NYSBA SPRING 2009 | NO. 58

Trial Lawyers Section Digest

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

Message from the Chair

It is an honor and privilege to assume the position of Chair of the Trial Lawyers Section of the NYSBA, which has a long and rich history of being the Section containing some of the very best trial lawyers in the state and nation.

Initially, on behalf of the Trial Lawyers Section, I want to thank again Evan Goldberg for an outstanding past year as Chair and for his dynamic leadership. Second, I want to describe our Section and what it does. Third, I want to give some of my own brief reflections on what it means to be a trial lawyer.

Our Section got off this year to a great start with our annual dinner at Cipriani Wall Street, with the Honorable Robert S. Smith, Associate Judge of the Court of Appeals as our speaker, an event attended by a multitude of lawyers, Trial Judges and Appellate Judges from across the state. The following day there was a joint CLE program presented by the Trial Lawyers Section and Torts, Insurance and Compensation Law Section. These events characterize two of the Trial Lawyers Section's fundamental purposes, offering CLE programs to our membership and fostering a sense of collegiality and respect between Bench and Bar. Judges and lawyers each have different roles to play in the administration of justice, but we share a common interest in the effective administration of justice. Opportunities to interact professionally outside the courtroom benefit both Bench and Bar in accomplishing this goal. Continuing Legal Education programs allow us to not only earn CLE credits but also to interact with our colleagues in a more relaxed setting. This year our Summer meeting and CLE program will be at the Hyatt Regency at Newport, Rhode Island on July 19–22, 2009. For more information on the Summer meeting please visit our website at www.nysba.org/TrialSummerMtg2009.

One of the Trial Lawyers Section's most important and continuing goals is to review and comment upon pending legislation that affects our court system and how trials take place, and to do so in a manner that benefits neither plaintiffs nor defendants nor insurance companies but rather the effective administration of justice for lawyers who represent clients in court. Our membership is one of the largest and perhaps the most diverse in the Bar and covers all areas of practice that require court appearances, including lawyers who represent both plaintiffs and defendants in Tort, Product Liability, Commercial Litigation, Construction Litigation, Family Law, Employment Law, Real Property Litigation, Criminal, and Trust and Estates cases. As such, our voice within the New York State Bar carries the input of many years of experience with all facets of our court system.

We also continue to broaden our reach and diversify our appeal to all segments of trial lawyers who practice in the above multitude of trial practice areas in the state. One way we intend to do this is to continue to revitalize our committee system, which reports on and analyzes significant cases and events that affect every specialty, as

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well as to offer their insight and input on pending legislation. Our committee meetings and programs present a good opportunity to network, learn, teach and compare notes with other lawyers across the state who share a similar interest and draw upon many years of experience. I encourage you to contact the Committee Chairs listed at the end of this publication in your particular area of practice to join one or more committees. If you are interested in chairing a committee or starting a new one, please contact me directly. Another goal is to expand upon our Web site (www.nysba.org/trial) to act as a touchstone and recording vehicle for these reports and to serve as a central location where members of the Section can access articles of various aspects of practice and go to a central location to provide links to various legal Web sites. Brian Butler from the Bond, Schoeneck firm has agreed to head up this important project. (Volunteers for this committee are sought.)

Another continuing goal is to foster the introduction of new lawyers into the trial practice arena. One of the annual events that the Trial Lawyers Section is very proud of is its sponsorship, since 1979, of the Trial Lawyers Cup and Scholarship Awards Program, which arises out of a statewide law school moot court competition. The centerpiece has been the award of an Annual Silver Cup (also known as the Tiffany Cup) to the law school moot court team that wins the statewide competition. Cash awards are also given to the schools for first and second prize, for the teaching of trial advocacy. The winning team goes on to a national competition (New York State has produced four national championships, three runners-up and numerous sectional finalists). A Best Advocate Award and grant is given in memory of Tony DeMarco, who nurtured the program for many years, for the single best individual performance.

We also hope that young trial lawyers will attend our CLE programs and join individual committees referenced in the back of this publication to network with and learn from more experienced lawyers.

Trial law is a wonderful area of practice. I know that I personally have wanted to be a trial lawyer for as long as I have wanted to be a lawyer. It was always plain to me that trial lawyers are to the practice of law what surgeons are to the practice of medicine. It is, in my opinion, the most challenging, exciting, dynamic, and demanding part of the practice of law. To do it well, one must have the ability to decipher and interpret the thread of more than 200 years of common law; to advocate at an intellectual level to a Judge the nuances of a point of law; to master an unrelated subject matter, at least for as long as it takes to cross examine a doctor or other expert, so that one can question that expert on "equal footing" in his or her own subject matter; and yet to maintain the common touch, humility and ultimately humanity to reach, empathize with, and convince a jury. In doing these things, we bring a lifetime of learning, and living, and absorbing the human condition as well as three years of law school, law firm and Bar Association training and what the school of hard knocks teaches us. Finally, because we interact with our colleagues and Judges on a repeat basis, we learn to bring a sense of integrity and credibility to what we do. It is not only the right and ethical thing to do, but it also makes us more effective advocates for our clients.

We look forward to the coming year!

Mark J. Moretti

The *Trial Lawyers Section Digest* is also available online

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2008 Appellate Decisions

AFFIDAVIT/AFFIRMATION—SERVICE OF LEGAL PAPERS—MAIL

Plaintiff's attorney failed to raise the presumption of receipt following the mailing of a motion to reargue:

> We reject plaintiff's argument because the January 11, 2007 "Affirmation of Service" on which she relies as proof of the alleged January 10, 2007 service of the January 10, 2007 motion to reargue is defective. That affirmation states that "I caused a copy of plaintiff's motion for leave to reargue to be sent by first class mail to [defendant's attorney] at the following address . . ." Such affirmation is defective because it does not specifically state that the affiant, who is plaintiff's attorney, himself mailed the motion.

Peter MacIntyre v. Lynch International, Inc., 52 A.D.3d 424, 862 N.Y.S.2d 351 (1st Dep't 2008).

[EDITOR'S NOTE: Service by mail is deemed to be complete under CPLR 2103(b)(2) upon the deposit of a properly stamped and addressed letter in a depository under the exclusive care and custody of the U.S. Post Office. A duly executed and notarized Affidavit of Service by mail usually is sufficient to create a presumption that a proper mailing occurred. See *Kihl v. Pfeffer*, 94 N.Y.2d 118, 700 N.Y.S.2d 87 (1999). The presumption will not be invoked if, however, the Affidavit / Affirmation does not specifically state that the affiant herself or himself mailed the legal documents.

In *Metzger v. Esseks*, 168 A.D.2d 287, 562 N.Y.S.2d 625 (1st Dep't 1990), the court rejected the Affidavit of Service by defendant's attorney's employee because it did not

> specifically state that the affiant herself mailed the letter enclosing the motion papers, nor does it cite that the letter was mailed to plaintiff's attorneys at the designated address in the manner specified by CPLR 2103(b)(2).

Generally, an Affidavit of Service states that John Doe served the within legal papers on plaintiff's counsel

> by depositing a true copy of same securely enclosed in a post paid wrapper in an official depository under the exclusive care and custody of the United States Post Office Department within the State of New York.

In *Coonradt v. Averill Park Cent. School Dist.*, 73 A.D.2d 747, 422 N.Y.S.2d 544 (3d Dep't 1979), the Affidavit of Service was held insufficient because it "does not state that the affiant himself mailed the letter enclosing the order."

Unless the affiant herself or himself mails the letter at the Post Office or a Post Office Box, the mailing is subject to being invalidated. It is therefore recommended that if a document is time sensitive, that the person signing the Affidavit actually mail the legal document.]

APPEAL AND ERROR—FAILURE TO PERFECT/ DISMISSAL—ADJUDICATION/MERITS

The court refused to hear plaintiff's appeal because the court earlier dismissed the appeal for failure to prosecute:

> The plaintiff appealed from an order dated July 19, 2005, which . . . awarded the defendant summary judgment dismissing the complaint. That appeal was dismissed by decision and order on motion of this Court dated April 4, 2006, for failure to perfect in accordance with the rules of this Court, and that dismissal constituted an adjudication on the merits with respect to all issues which could have been reviewed on that appeal. We decline to exercise our discretion to determine the merits of the instant appeal from the judgment, which raises the same issues as could have been raised on the prior appeal.

Blue Chip Mortgage Corp. v. Strumpf, 50 A.D.3d 936, 857 N.Y.S.2d 607 (2d Dep't 2008).

DAMAGES—BELOW-KNEE AMPUTATION—$5,000,000 (PAST AND FUTURE PAIN AND SUFFERING)

Award to plaintiff of $2,200,000 for past pain and suffering and $5,200,000 for future pain and suffering deviated materially from what would be reasonable compensation to the extent that it exceeded $1,500,000 and $3,500,000 respectively:

> We find that the sum of $1,500,000 represents reasonable compensation for Firmes' past pain and suffering [approximately two years] and the sum of $3,500,000 represents reasonable compensation for future pain and suffering over 50.1 years of future life expectancy.

Firmes v. Chase Manhattan Automotive Finance Corp., 50 A.D.3d 18, 852 N.Y.S.2d 148 (2d Dep't 2008), *lv. denied*, 11 N.Y.3d 705, 866 N.Y.S.2d 608 (2008).

[EDITOR'S NOTE: Evidence of past pain and suffering included

> a total of 11 surgeries including the amputation of the left leg below the knee, debridements to remove dead tissue, and the grafting of skin from his right leg, and experienced phantom pain. All five prosthetic devices fabricated for Firmes failed because of his weight, the existence of a bone spike at the stump, and the nondurability of the extensive skin grafting. Evidence of future pain and suffering included, beyond the amputated limb itself, stump pain, the inability to use a prosthesis, the inability to perform certain chores and work, and the need for continuing psychotherapy.

Plaintiff's award is considerably less than the $9,750,000 award that was upheld by the First Department in *Bondi v. Bambrick*, 308 A.D.2d 330, 764 N.Y.S.2d 674 (1st Dep't 2003), for traumatic amputation of the lower left leg of a 35 year-old who was a passenger on a motorcycle. It is, however, higher than the $4,500,000 award in *Patterson v. Nassau Community College*, 308 A.D.2d 519, 764 N.Y.S.2d 841 (2d Dep't 2003): $2,000,000 for 7½ years of past pain and suffering and $2,500,000 for 54 years of future pain and suffering of a 19 year-old who sustained two separate above-the-knee amputations of her right leg. (See 2002 WL 3239189).]

DAMAGES—BI-OR-TRI MALLEOLAR ANKLE FRACTURE—THREE-PART SHOULDER FRACTURE—$850,000

Plaintiff's award of $1,500,000 for future pain and suffering for a bi-or-tri malleolar ankle fracture treated with open reduction and internal fixation, and a three-part shoulder fracture treated with immobilization, deviated from what was reasonable compensation to the extent that it exceeded $850,000:

> Plaintiff was in the hospital for 12 days, received in-patient care at a rehabilitation facility for four weeks, had to reside with a relative for approximately three months before returning home, and was unable to return to work for 18 months. Plaintiff continues to suffer constant sharp ankle pain, reduced range of motion, inability to return to recreational activities, and has an increased risk of arthritis, but no future surgery is indicated. The award for past pain and suffering [$300,000] does not deviate from what would be reasonable compensation. The award for future pain and suffering over 28 years deviates from what would be reasonable compensation to the extent indicated.

Lowenstein v. the Normandy Group, LLC, 51 A.D.3d 517, 859 N.Y.S.2d 29 (1st Dep't 2008).

DAMAGES—CONSCIOUS PAIN AND SUFFERING—LIMITED AMOUNT OF TIME—$750,000

The trial court erred in reducing plaintiff's award of $750,000 to $350,000 where, as a result of being struck in the head by the side mirror of defendants' van, plaintiff's decedent sustained fractures of the left orbit and right temporal bone, subdural hematoma and subarachnoid hemorrhaging:

> The trial evidence established that within an hour of the accident, plaintiff's decedent was heavily medicated and/or sedated, justifying the trial court's reasoning that the decedent endured pain and suffering for a limited amount of time. However, contrary to the court's determination, the award [$750,000] for conscious pain and suffering did not deviate materially from what is reasonable compensation.

Filipinas v. Action Auto Leasing, 48 A.D.3d 333, 851 N.Y.S.2d 550 (1st Dep't 2008).

DAMAGES—FRACTURES/25-YEAR-OLD—FUTURE PAIN AND SUFFERING –$1,000,000—NOT EXCESSIVE

Jury's award of $1,000,000 did not deviate materially from what would be reasonable compensation since the jury found that her pain and suffering would continue for 53 years:

> The then 25-year-old plaintiff, while working as a stagehand, was injured when a "Genie lift" tipped over and fell on her, causing her to sustain a crush fracture to her pelvis and fibula, a fractured sacrum, and rib fractures. The evidence demonstrated that she still suffered from pain, for which she took painkillers up to five times a week, that she had an increased risk of degenerative disease in her spine, as well as an increased risk of arthritis, and that she suffered and would continue to suffer from post traumatic stress disorder.

DeVirgilio v. Feller Precision Stage Lifts, Inc., 47 A.D.3d 522, 851 N.Y.S.2d 33 (1st Dep't 2008).

DAMAGES—FUTURE PAIN AND SUFFERING—THIRD-, FOURTH- AND FIFTH-DEGREE BURNS—24-YEAR-OLD—$3,000,000

Award of $3,000,000 to plaintiff, who was shocked and severely burned when searching for fault in owner's high voltage equipment, did not deviate from what

would be reasonable compensation for his future pain and suffering:

> Plaintiff, who was 24 years old at the time of the accident, sustained third, fourth and fifth degree burns to portions of his arms, torso and right hand. Although only approximately 7% of plaintiff's external skin was damaged, he sustained significant muscle loss, which cannot be regained. Similarly, plaintiff lacks normal strength, feeling and sensation in his arms due to the muscle and nerve damage, and because plaintiff has no oil or sweat glands in the areas where skin grafts were performed, the skin cracks, dries and is unable to regulate heat. Additionally, plaintiff's treating psychologist testified at length regarding the psychological symptoms suffered by him, including post traumatic stress disorder, flashbacks, nightmares, social isolation and panic attacks. In light of such testimony, we cannot say that the jury's award in this regard "deviates materially from what would be reasonable compensation" (CPLR 5501[c]).

Neissel v. Rensselaer Polytechnic Institute, 54 A.D.3d 446, 863 N.Y.S.2d 128 (3d Dep't 2008).

DAMAGES—HIP FRACTURE AND HEAD TRAUMA—$12,250,000—EXCESSIVE

Plaintiff's award of $12,250,000 for future pain and suffering was conditionally reduced to $5,000,000:

> We find the damage awards for plaintiff's catastrophic injuries excessive only to the extent indicated.

Huang v. New York City Transit Authority, 49 A.D.3d 308, 853 N.Y.S.2d 60 (1st Dep't 2008).

[EDITOR'S NOTE: Plaintiff was awarded $28,600,000 which included $3,042,287 for future medical expenses, $8,066,444 for future home health aide expenses, $2,000,000 for past pain and suffering and $3,065,900 for future lost earnings. In addition to the future pain and suffering award conditionally reduced to $5,000,000, the awards for (a) future lost earnings was reduced to $850,000, (b) future home health aide expenses to $2,100,750 and (c) future medical expenses to $1,388,000.

Plaintiff, 18 years old, was struck in the head and dragged by a moving subway train. The train's side struck her head, causing her to spin three or four times, then stumble toward the train. Her left leg became caught and she was dragged through the station. She suffered a hip fracture with resulting surgeries, permanent pain, impairment and scarring, four months of hospitalization and emotional distress. Her head injury resulted in amnesia and she claims she will never be able to work as a graphic designer, her intended career. See 2004 WL 4000017.]

DAMAGES—LEGS, ANKLE AND SHOULDER INJURIES—$7,600,000 FOR PAST AND FUTURE (24 YEARS) PAIN AND SUFFERING—EXCESSIVE

Awards to plaintiff of $3,000,000 for past pain and suffering and $4,600,000 for future pain and suffering over 24 years deviated materially from reasonable compensation to the extent they exceeded $2,500,000 and $3,000,000 respectively:

> The highest supportable amount [for past pain and suffering], taking into account that plaintiff did not suffer an amputation but did suffer injuries to both legs, an ankle, and a shoulder, is $2.5 million.
>
> Similarly, the future pain and suffering award of $4.6 million over 24 years likewise deviates materially from what would be reasonable compensation, with case law from this Court demonstrating that $3 million over 24 years would constitute reasonable compensation for comparable injuries.

Hernandez v. New York City Transit Authority, 52 A.D.3d 367, 860 N.Y.S.2d 75 (1st Dep't 2008).

[EDITOR'S NOTE: Plaintiff suffered severe injuries to her legs, which were pinned under defendant New York City Transit Authority's bus; her right arm, shoulder, and ankle were also injured. She was in the hospital for almost three months, underwent five operations, and will need at least one future operation; she needs a four-prong cane in order to walk, and still experiences pain.

The court also reduced the award of $3,042,949 for home health aide for the next 24 years to $633,947.70 because it was speculative and unproven with reasonable certainty. The jury anticipated that plaintiff will have her right knee replaced within five years, as shown by its award for future surgery expenses. In fact, plaintiff's physician stated that if the surgery went well plaintiff will be able to perform independent activities.

The court also reduced the award for handicapped-adapted housing from $850,000 to $490,000 because the uncontradicted evidence established that a more cost-effective solution would be the purchase of a handicapped-adapted carpeted apartment in addition to payments for 24 years of common charges and any necessary renovations.

In addition, the court set aside the jury's award of $30,000 for future ankle surgery because the witness who testified concerning plaintiff's need for future ankle surgery did not say that plaintiff will need that operation

within the next five years and therefore the award was speculative.

Finally, the court vacated the award of $126,000 for future psychotherapy because at the time of trial plaintiff was not undergoing psychotherapy even though that had been recommended to her.]

DAMAGES—SPINAL COMPRESSION FRACTURES/ COMMINUTED FRACTURE/DISC HERNIATION— 34-YEAR- OLD—$1,700,000

Awards of $250,000 for past pain and suffering and $410,000 for future pain and suffering to 34-year- old construction worker who, while performing demolition work, fell more than 15 feet from a scaffold to a cement floor, was inadequate and was conditionally increased by the trial court to $900,000 for past pain and suffering and $800,000 for future pain and suffering:

> Having reviewed the evidence regarding the injuries, as well as prior decisions from this Court involving comparable injuries, we conclude that the trial court did not improvidently grant plaintiffs' motion for additur of the damages for past and future pain and suffering.

Szpakowski v. Shelby Realty, LLC, 48 A.D.3d 268, 851 N.Y.S.2d 487 (1st Dep't 2005).

[EDITOR'S NOTE: After conditionally increasing plaintiff's award, the trial court noted the following injuries:

> Plaintiff submitted evidence showing spinal compression fractures at L1 & L2, a compression fracture at T12, a comminuted fracture at L4, compromise of the spinal canal, lumbosacral radiculopathy at L3 and a fracture at C7. There was also a disk herniation at L4-L5. Evidence was also introduced regarding traumatic arthritis. There was also evidence of diminished muscle bulk in the right thigh with diminished sensation, lower back pain, sensory deficit and an abnormal walk.
>
> Plaintiff was hospitalized at Bellevue for about a month. The first surgery, from which he awoke in much pain, took 12 hours. The next day he was told and eventually had a second surgery.]

See 9 Misc.3d 885, 804 N.Y.S.2d 629 (S. Ct. N.Y. Co. 2005).

DAMAGES—UNDOCUMENTED ALIEN— FRAUDULENT SOCIAL SECURITY CARD— LOST WAGES

An undocumented alien who submits false documents when he or she is hired does not forfeit his or her right to recover lost earnings in a personal injury action where the employer failed to verify the worker's eligibility for employment as required by federal legislation:

> If the employer hires the employee with knowledge of the employee's undocumented status, or without verifying the employee's eligibility for employment, the employer has not been induced by a false document to hire the employee and, thus, the employee has not "obtained employment by" submitting the false document.
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> * * *
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> Although, pursuant to our holding, an employee may be entitled to recover damages for lost wages despite his or her participation in an illegal hire, such a recovery is not a reward for wrongdoing, but merely constitutes the relief to which an injured worker is normally entitled, and thus represents the status quo.

Coque v. Wildflower Estates Developers, Inc., 31 A.D.3d 484, 867 N.Y.S.2d 158 (2d Dep't 2008).

DAMAGES—WRONGFUL DEATH—CONSCIOUS PAIN AND SUFFERING—$3,000,000—EXCESSIVE

Award of $3,000,000 to plaintiff for conscious pain and suffering was excessive to the extent that it exceeded $1,000,000:

> The award of damages for conscious pain and suffering in the sum of $3,000,000 deviates materially from what would be reasonable compensation and is excessive to the extent indicated.

Alston v. Sunharbor Manor, LLC, 48 A.D.3d 600, 854 N.Y.S.2d 402 (2d Dep't 2008).

[EDITOR'S NOTE: Plaintiff's decedent, 62 years old, was injured when defendant nursing home allowed him to remain outside for about two hours in 95-degree heat. See 2007 WL 5036856. Plaintiff's decedent suffered second-degree burns to the legs which covered approximately 10 percent of his total body surface area. He was hospitalized for approximately one month. For two weeks of the hospitalization, plaintiff's decedent was sedated due to the presence of an endotracheal tube. See 2007 WL 5036855.]

INDEMNITY—CONTRACTUAL—INDEMNITEE NON-NEGLIGENT

General contractor, Structure Tone, is entitled to contractual indemnity from plaintiff's employer, Hudson-Shatz, after plaintiff was awarded summary judgment on his Labor Law § 240(1) claim for injuries sustained when a

piece of plywood on which he was standing broke in half while he was working at an elevated work site:

> The indemnification agreement between Hudson-Shatz and Structure Tone provided for Hudson-Shatz to indemnify Structure Tone for liability, including statutory liability, "arising in whole or in part and in any manner from injury and/or death of any person or damage to or loss of any property resulting from the acts, omissions, breach or default" of Hudson-Shatz in the performance of any work by or for Hudson-Shatz. The indemnification clause does not, by its terms, limit indemnification only to claims arising out of the negligence of Hudson-Shatz in the performance of the work. Thus, the Supreme Court improperly denied full indemnification to Structure Tone on its motion for summary judgment solely on the ground that issues of fact existed as to whether Hudson-Shatz was negligent and, if so, whether its negligence proximately caused the injured plaintiff's injuries. In the absence of any proof that Structure Tone was itself negligent, the court should have awarded it summary judgment on the third-party cause of action for full contractual indemnification against Hudson-Shatz.

Tobio v. Boston Properties, Inc., 54 A.D.3d 1022, 864 N.Y.S.2d 172 (2d Dep't 2008).

INDEMNITY—CONTRACTUAL INDEMNITY—PARTIALLY NEGLIGENT GENERAL CONTRACTOR

General contractor's negligence does not preclude it from enforcing an indemnity provision against the subcontractor for that portion of the damages attributable to the subcontractor under General Law § 5-322.1:

> The statute does permit a partially negligent general contractor to seek contractual indemnification from its subcontractor so long as the indemnification provision does not purport to indemnify the general contractor for its own negligence. As such, the provision is enforceable and does not violate General Obligations Law § 5-322.1.

Brooks v. Judlau Contracting, Inc., 11 N.Y.3d 204, 869 N.Y.S.2d 366 (2008), *rvs'g* 39 A.D.3d 447, 833 N.Y.S.2d 223 (2d Dept. 2007).

[EDITOR'S NOTE: The indemnity agreement stated:

> The Contractor shall not be liable for any loss or casualty incurred or caused by or to the Subcontractor . . . The Subcontractor shall, to the fullest extent permitted by law, hold the Contractor and the Owner, their agents, employees and representatives harmless from any and all liability, costs, damages, attorneys' fee, and expense from any claims or causes of action of whatever nature arising from the Subcontractor's work, including all claims relating to its subcontractors, suppliers or employees, or by reason of any claim or dispute of any person or entity for damages from any cause directly or indirectly relating to any action or failure to act by the Subcontractor, its representatives, employees, subcontractors, or suppliers. The Subcontractor acknowledges that specific consideration has been received by it for this indemnification. . . .]

INSURANCE—DUTY TO DEFEND—"ARISING OUT OF"

Farm Family Casualty Insurance Company does not owe a duty to defend the general contractor, Worth, an additional insured, under a Farm Family policy purchased by the subcontractor Pacific, where Worth is an insured "but only with respect to liability arising out of" your [Pacific's] operations and where it is undisputed that Pacific was not negligent and was not working on the job site at the time of the accident:

> Here, the additional insured endorsement states that Worth is an additional insured "only with respect to liability arising out of [Pacific's] operations." The phrase "arising out of" has been interpreted by this Court to "mean originating from, incident to, or having connection with," and requires "only that there be some causal relationship between the injury and the risk for which coverage is provided."
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> At the time of the accident, Pacific was not on the jobsite, having completed construction of the stairs, and was awaiting word from Worth before returning to affix the handrails. The allegation in the complaint that the stairway was negligently constructed was the only basis for asserting any significant connection between Pacific's work and the accident. Once Worth admitted that its claims of negligence against Pacific were without factual merit, it conceded that the staircase was merely the situs of the accident.

> Therefore, it could no longer be argued that there was any connection between [plaintiff's] accident and the risk for which coverage was intended.

Worth Constr. Co., Inc. v. Admiral Ins. Co., 10 N.Y.3d 411, 859 N.Y.S.2d 101 (2008), *rvs'g* 40 A.D.3d 423, 836 N.Y.S.2d 155 (1st Dep't 2007).

INSURANCE—EMPLOYERS' LIABILITY—OUT-OF-STATE CARRIER—$100,000 COVERAGE

A New Jersey employer's liability policy issued by Preserver Insurance Company, which limited coverage to $100,000, and was delivered in New Jersey to a New Jersey corporation, does not provide unlimited employer's liability coverage to an employee injured in New York:

> Including New York as "a 3.C. state" [in the Information Page] means what the policy says it means: that if an accident occurs in such a state, all provisions of the policy will apply. This includes the stated limitation of coverage for employers' liability insurance to $100,000 per accident.
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> Nothing in the policy suggests that this cap evaporates when an accident occurs in a 3.C. state. Nor, significantly, does Part Two provide—as Part One does—that employers' liability insurance will conform to the workers' compensation laws of the state where the injury occurs. This conclusion is fortified by Part Two's "Exclusions," stating that this portion of the policy does not cover "any obligation imposed by a workers compensation . . . or any similar law."

Preserver Insurance Company v. Ryba, 10 N.Y.3d 635, 862 N.Y.S.2d 820 (2008), *rvs'g* 37 A.D.3d 574, 829 N.Y.S.2d 664 (2d Dept. 2007).

[EDITOR'S NOTE: The Appellate Division held that Insurance Law § 3420(d) applied to the policy and Preserver's disclaimer, based on the contractual indemnification exclusion, was untimely as a matter of law. The Court of Appeals held that the policy exclusion for any liability assumed under a contract is not covered by Insurance Law § 3420(d) because this section "requires timely disclaimer only for denials of coverage 'for death or bodily injury.'" No cases were cited to support this principle.]

INSURANCE—TIMELY DISCLAIMER—FAILURE TO COOPERATE

Where insured, who was being sued for dental malpractice, did not fully cooperate with his carrier and the carrier's letters warning him that further non-cooperation "may imperil" his coverage and were returned "unclaimed," it is a question of fact whether the carrier, in disclaiming approximately two months later, acted reasonably:

> Even if an insurer possesses a valid basis to disclaim for non-cooperation, it must still issue its disclaimer within a reasonable time. When construing Insurance Law § 3420(d), which requires an insurer to issue a written disclaimer of coverage for death or bodily injuries arising out of accidents "as soon as is reasonably possibly," we have made clear that timeliness almost always presents a factual question, requiring an assessment of all relevant circumstances surrounding a particular disclaimer.
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> Unlike cases involving late notice of claims or other clearly applicable coverage exclusions, an insured's non-cooperative attitude is often not readily apparent. Indeed, as here, such a position can be obscured by repeated pledges to cooperate and actual cooperation.
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> The challenge of setting an appropriate date is only heightened by the heavy burden that an insurer seeking to establish a non-cooperation defense must carry.
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> In this case, the reasonableness of an approximately two-month delay to analyze the pattern of obstructive conduct that permeated the insurer's relationship with its insured for almost six years presents a question of fact that precludes entry of summary judgment for either plaintiff or for defendants.

Continental Casualty Company v. Stradford, 11 N.Y.3d 334, 871 N.Y.S.2d 607 (2008), *modifying* 46 A.D.3d 598, 847 N.Y.S.2d 631 (2d Dep't 2007).

JUDGMENT—DISMISSAL WITHOUT PREJUDICE/LACK OF CAPACITY—*RES JUDICATA*

The judgment dismissing plaintiff's complaint "without prejudice" because of the corporation's lack of capacity does not have *res judicata* effect on a subsequent action commenced by the corporation's successor:

> A dismissal "without prejudice" lacks a necessary element of *res judicata*—by its terms such a judgment is not a final determination on the merits. When defendants moved to amend Supreme Court's judgment dated June 25, 2001 to provide

> that the dismissal of Eisen and Eisen, PC's complaint be changed from "with prejudice" to "without prejudice," this was a clear acknowledgement by the parties and the motion court that the merits of this case have yet to be determined.
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> * * *
>
> We agree that "[i]t would be inequitable to preclude a party from asserting a claim under the principle of *res judicata*, where, as in this case, '[t]he court in the first action has expressly reserved the plaintiff's right to maintain the second action.'" We remain mindful that if applied too rigidly, *res judicata* has the potential to work considerable injustice. "In properly seeking to deny a litigant 'two days in court,' courts must be careful not to deprive him of one." Landau, EC, has yet to have its day in court to litigate the merits of its legal malpractice claim against defendants and therefore we find that *res judicata* is not applicable to plaintiff in this case.

Landau v. LaRossa, Mitchell & Ross, 11 N.Y.3d 8, 862 N.Y.S.2d 316 (2008), *rvs'g* 41 A.D.3d 371, 838 N.Y.S.2d 773 (2007).

MASTER SERVANT—INDEPENDENT CONTRACTOR

Food products salesman (Girgis), who sold Jersey Lynne products to supermarkets for Jersey Lynne, a wholesale distributor, and MTM, an independent broker, is an independent contractor whose negligence cannot be imputed to Jersey Lynne and MTM:

> Girgis did not receive a salary, insurance, bonuses or any fringe benefits from either Jersey Lynne or MTM. MTM paid him a commission based upon a percentage of the commission which MTM received from Jersey Lynne. MTM provided Girgis with a Form 1099 at the end of the year as no taxes were withheld from his commission checks. In conducting his sales, Girgis established his own accounts, used his own car, was not reimbursed for any business expenses, was not required to work any specific days or hours, did not wear a uniform, and did not have to meet any sales quotas.

Belt v. Girgis, 55 A.D.3d 645, 865 N.Y.S.2d 658 (2d Dep't 2008).

MOTIONS—SUMMARY JUDGMENT—SLIP AND FALL—INITIAL BURDEN

A premises owner must demonstrate that its maintenance and inspection routines were adequate to detect and remedy dangerous conditions such as spills, dirt, debris and the like to meet its initial burden of making a *prima facie* showing that it neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it:

> To meet its initial burden on the issue of lack of constructive notice, the defendant must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell. The defendant failed to satisfy its initial burden. The deposition testimony of the defendant's assistant cleaning manager merely referred to the subject racetrack's general daily cleaning practices. The assistant cleaning manager tendered no evidence regarding any particularized or specific inspection or stair-cleaning procedure in the area of the plaintiff's fall on the date of the accident.

Birnbaum v. New York Racing Association, Inc., 57 A.D.3d 598, 869 N.Y.S.2d 222 (2d Dep't 2008).

NEGLIGENCE—AUTOMOBILES—DOUBLE-PARKED VEHICLE

A vehicle double-parked in the first lane of moving traffic that is struck in the rear by a driver who fell asleep behind the wheel is not entitled to summary judgment because there is a triable issue of fact whether the double-parked vehicle caused the accident. The court rejected defendant's argument that the presence of the double-parked vehicle "merely furnished the condition or occasion" for the accident, rather than constituting one of its causes:

> We conclude that a reasonable jury could find that a rear-end collision is a reasonably foreseeable consequence of double parking for five minutes on a busy Manhattan street. As in *Derdiarian [v. Felix Contr. Corp.*, 51 N.Y.2d 308, 434 N.Y.S.2d 166 (1980)], the precise manner of the accident need not be foreseeable. Accordingly, it is not necessary that we find it foreseeable that a driver asleep at the wheel would hit the van; it is enough that it is foreseeable that the flow of traffic, being impeded by the double-parked van, an inattentive, careless or distracted driver might not stop in time to avoid the van.

White v. Diaz, 49 A.D.3d 134, 854 N.Y.S.2d 106 (1st Dep't 2008).

NEGLIGENCE—AUTOMOBILES—DUMPSTER/ UNSAFE LOCATION

Summary judgment should have been denied owner of 20-cubic yard refuse container since it did not make out a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact:

> In order to make out a *prima facie* case on its motion, AJI [dumpster owner] was required to show that the dumpster was located neither in a driving lane on Zerega Avenue nor in the zebra-striped safety zone where parking was not permitted. The testimony of the police officer relied upon by AJI, however, was equivocal. Although the officer testified that the dumpster was positioned just four or five inches from the curb, he twice acknowledged that he could not recall whether the dumpster was parked in the safety zone.

Smalls v. AJI Industries, Inc., 10 N.Y.3d 733, 853 N.Y.S.2d 526 (2008), *rvs'g* 37 A.D.3d 324, 831 N.Y.S.2d 42 (1st Dep't 2007).

NEGLIGENCE—CONSTRUCTION MANAGER—LABOR LAW §§ 240(1), 241(6) AND 200

Construction manager, PCI, which was not delegated the authority and duties of a general contractor and which did not function as the owner's agent, cannot be held liable under Labor Law §§ 240(1), 241(6) and 200:

> The contracts between PCI and the Village and between Carlin and the Village specifically prohibited PCI from supervising the manner or means of the contractors' work or the contractors' safety procedures, and assigned that responsibility solely to the contractors. Thus, PCI established that it was not delegated the authority and duties of a general contractor, and that it did not function as an agent of the owner of the premises or a general contractor with the authority to control or supervise the work being performed.

Domino v. Professional Consulting, Inc., 57 A.D.3d 713, 869 N.Y.S.2d 224 (2d Dep't 2008).

NEGLIGENCE—DOG BITE—VIOLATION OF LEASH LAW—COMMON LAW NEGLIGENCE

Owner of unleashed Rottweiler dog, Kai, who chased mail carrier resulting in her injuring herself while eluding Kai, is not entitled to summary judgment having violated § 161.05(a) of the New York City Health Code requiring a dog in a public place to be restrained by a leash:

> The violation of a leash ordinance, standing alone, has been recognized by the Second Department as insufficient to support a finding of liability against a dog owner. However, in contrast to mere "loose dog" cases, this Department has recognized the potential liability of dog owners where a leash-law violation is coupled with affirmative canine behavior such as a dog bite or an attack upon the plaintiff or where there is a history of prior violations.

Petrone v. Fernandez, 53 A.D.3d 221, 862 N.Y.S.2d 522 (2d Dep't 2008).

NEGLIGENCE—DUTY—CONTRACTUAL OBLIGATION—THIRD PARTY

Plaintiff, who was injured when the vehicle in which he was a passenger left the roadway where there was a height differential or "drop-off" of approximately 4½ inches between the paved portion of the roadway and the gravel shoulder of the roadway, has a viable complaint against the paving contractor, Amherst Paving, if he establishes that the paving contractor exacerbated a dangerous condition:

> A triable issue of fact exists as to whether Amherst Paving created or exacerbated a dangerous condition.

Schosek v. Amherst Paving, Inc., 11 N.Y.3d 882, 873 N.Y.S.2d 256 (2008), *rvs'g* 53 A.D.3d 1037, 862 N.Y.S.2d 227 (4th Dep't 2008).

[EDITOR'S NOTE: Amherst Paving stopped its work before applying a top layer of pavement to the roadway because Erie County had halted the work. The majority found there was no evidence establishing how much of the 4½-inch drop-off was attributable to the work of Amherst Paving especially since the contract specified that it was to apply only a two-inch binder layer of pavement to the roadway.

Two dissenting judges, however, concluded that there was an issue of fact

> whether Amherst Paving was negligent in creating a dangerous condition by performing some of its contractual duties and by leaving the roadway in a less safe condition, fully aware of the problem it was leaving behind.]

NEGLIGENCE—EMOTIONAL DISTRESS—AIDS PHOBIA

Plaintiff, who claims she is suffering from post traumatic stress disorder, is not precluded from seeking damages for negligent infliction of emotional distress caused by fear of contracting AIDS even if more than six months have passed since exposure and plaintiff continues to test negative for HIV antibodies:

> Where plaintiff pursuing a negligent infliction of emotional distress claim arising from HIV exposure has been tested at regular intervals with negative results, the *Brown [v. New York City Health and Hospitals Corp*, 225 A.D.2d 36, 648 N.Y.S.2d 880 (2d Dep't 1996)] restriction of damages approach is inapposite.
>
> * * *
>
> It is undisputed that plaintiff came forward with evidence that her emotional distress and other direct damages did not cease six months after the exposure incident. Because this proof was sufficient to withstand defendants' motion to restrict damages, the Appellate Division erred in directing that plaintiff's damages be limited to that time period at trial.

Ornstein v. New York City Health and Hospitals Corporation, 10 N.Y.3d 1, 852 N.Y.S.2d 1 (2008), *rvs'g* 27 A.D.3d. 180, 806 N.Y.S.2d 566 (1st Dep't 2006).

[EDITOR'S NOTE: In allowing damages to extend beyond six months following the exposure, the court abrogated *Sims v. Comprehensive Community Dev. Corp.*, 40 A.D.3d 256, 835 N.Y.S.2d 163 (1st Dep't 2007) and *Taormino v. State of New York*, 286 A.D.2d 490, 729 N.Y.S.2d 757 (2d Dep't 2001). Both of these cases relied on *Brown v. New York City Health and Hospitals Corp.*, which held that damages should be restricted to six months following the HIV exposure incident because it would be unreasonable as a matter of law.]

NEGLIGENCE—LABOR LAW § 240(1) COLLAPSE/ PERMANENT STRUCTURE

Plaintiff, who fell approximately 10 to 12 feet when the permanent wooden floor he was working across collapsed, is not entitled to summary judgment under Labor Law § 240(1) unless plaintiff establishes that the collapse of the floor was a foreseeable risk of a task he was performing:

> The issue of foreseeability in this context is relevant only with respect to whether the plaintiff was exposed to an elevation-related risk, and only where the elevation-related risk was not apparent from the nature of the work such that the defendant would not normally be expected to provide the worker with a safety device to prevent the worker from falling.

Jones v. 414 Equities LLC, 57 A.D.3d 65, 866 N.Y.S.2d 165 (1st Dep't 2008).

[EDITOR'S NOTE: In *Espinosa v. Azure Holdings II, L.P.*, 58 A.D.3d 287, 869 N.Y.S.2d 395 (1st Dep't 2008), the court reversed the Supreme Court's granting defendant summary judgment when the sidewalk on which plaintiff was standing collapsed due to the failure of the cellar vault below it. The court followed the reasoning of the *Jones* decision:

> Where an injury results from the failure of a completed and permanent structure within a building—even a building undergoing demolition or one in a dilapidated condition—a necessary element of a cause of action under Labor Law § 240(1) is a showing that there was a foreseeable need for a protective device of the kind enumerated by the statute … Here, the evidence of the building no. 2's advanced state of disrepair raises a triable issue of whether the structural failure that caused the sidewalk to collapse was foreseeable but does not establish the foreseeability of the collapse as a matter of law.]

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

Falling object liability under Labor Law § 240(1) is not limited to cases where the falling object is in the process of being hoisted or secured:

> Plaintiff alleges that he was struck by falling planks that had been placed over open doors as a makeshift shelf to facilitate the installation of an air conditioner above a doorway. We agree with the Appellate Division majority that triable questions of fact preclude summary judgment on plaintiff's Labor Law § 240(1) claim, including whether the planks were adequately secured in light of the purposes of the plank assembly and whether plaintiff caused the accident by jostling the doors after disregarding a warning not to enter the doorway area.

Quattrocchi v. F.J. Sciame Construction Co., Inc., 11 N.Y.3d 757, 866 N.Y.S.2d 592 (2008), *aff'g* 44 A.D.3d 377, 843 N.Y.S.2d 564 (1st Dep't 2007).

[EDITOR'S NOTE: In previous decisions such *Boyle v. 42nd Street Development Project, Inc.*, 38 A.D.3d 404, 835 N.Y.S.2d 7 (1st Dep't 2007), and *Quattrocchi*, two justices dissented based upon *Narducci v. Manhasset Bay Associates*,

96 N.Y.2d 259, 727 N.Y.S.2d 37 (2001). The dissenting justices quoted *Narducci* as follows:

> [A] plaintiff must show that the object fell, while being hoisted or secured, because of the absence or inadequacy of a safety device of the kind enumerated in the statute.

The dissenters pointed out that neither the plank in *Quattrocchi* nor the rod in *Boyle* were being hoisted or not secured or inadequately secured by an enumerated safety device. Thus under *Quattrocchi*, a plaintiff is entitled to invoke Labor Law § 240(1) when he or she is struck by a falling object.]

NEGLIGENCE—LABOR LAW § 240(1)—OUT-OF-POSSESSION LANDLORD

Net lessor of building, Commet, whose tenant was obligated to make all repairs, both structural and nonstructural, and to undertake full maintenance of the premises, is liable under Labor Law § 240(1) to plaintiff who fell from wet affixed metal hatch ladder that led to the roof of the building:

> Commet was liable under § 240(1) notwithstanding its out-of-possession status and asserted lack of active negligence in connection with plaintiff's injury,

Mennis v. Commet 380, Inc., 54 A.D.3d 641, 864 N.Y.S.2d 414 (1st Dep't 2008).

[EDITOR'S NOTE: The court, however, granted Commet summary judgment upon its indemnity claim against the net lessee because the parties intended to allocate risk of liability between them through the procurement of insurance.]

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

A property owner is liable under Labor Law § 240(1) for an injury proximately caused to a worker even though a tenant in the building contracted for the work without the owner's knowledge:

> Here, like the defendants in *Celestine [v. City of New York*, 59 N.Y.2d 938, 466 N.Y.S.2d 319 (1983)], *Gordon [v. Eastern Ry. Supply*, 82 N.Y.2d 555, 606 N.Y.S.2d 127 (1993)], and *Coleman [v. City of New York*, 91 N.Y.2d 821, 666 N.Y.S.2d 553 (1997)], Consolidated seeks to avoid liability under Labor Law § 240(1) by contending that it is not an "owner" for the purposes underlying the statute. Relying on its lack of knowledge of plaintiff's work, undertaken at the behest of the tenant, Consolidated asks us to import a notice requirement into the Labor Law or, conversely, create a lack-of-notice exception to owner liability. But our precedents make clear that so long as a violation of the statute proximately results in injury, the owner's lack of notice or control over the work is not conclusive—this is precisely what is meant by absolute or strict liability in this context. We have made perfectly plain that even the lack of "any ability" on the owner's part to ensure compliance with the statute is legally irrelevant. Hence, Consolidated may not escape strict liability as an owner based on its lack of notice or control over the work ordered by its tenant.

Sanatass v. Consolidated Investing Company, Inc., 10 N.Y.3d 333, 857 N.Y.S.2d 67, *rvs'g* 38 A.D.3d 332, 833 N.Y.S.2d 12 (1st Dep't 2007).

[EDITOR'S NOTE: Although the Court of Appeals did not mention *Morales v. D. & A. Food Service*, 41 A.D.2d 352, 839 N.Y.S.2d 464 (1st Dep't 2007), it too is no longer good law, having been reversed by the Court of Appeals, 10 N.Y.3d 911, 862 N.Y.S.2d 449 (2008).

The Court of Appeals rejected defendant's reliance on its recent decision in *Abbatiello v. Lancaster Studio Assoc.*, 3 N.Y.3d 46, 781 N.Y.S.2d 477 (2004). The court noted that the fact that landlord was unaware of and did not consent to the plaintiff's presence on the property was not determinative of its affirming the dismissal of plaintiff's complaint. The court pointed out that in *Abbatiello*, the injured cable technician was on the property solely "by reason of provisions of the Public Service Law [§ 228]," which mandates access for cable repair workers, and that "but for this statute, the plaintiff 'would be a trespasser' on the owner's property." Here, the plaintiff was an "employee" for purposes of § 240(1) and cannot conceivably be viewed as a "trespasser." In *Abbatiello*, the court also held that the owner was "powerless to determine which cable company is entitled to operate, repair or maintain the cable facilities on its property, since such decision lies with the municipality—the franchisor."

Judges Smith and Read dissented, maintaining that the court should have followed *Abbatiello*.]

NEGLIGENCE—LABOR LAW § 240(1)—SAFETY DEVICE—HAZARD UNRELATED TO RISK

Plaintiff who used a six-foot A-frame ladder to install pipe racks on the new floor's unfinished ceiling is not covered under Labor Law § 240(1) when he fell while attempting to step with his right foot from the second rung directly to the floor, approximately two feet below, to avoid protruding rods that blocked the first rung:

> No Labor Law § 240(1) liability exists where an injury results from a separate hazard wholly unrelated to the risk

> which brought about the need for the safety device in the first place. Here, the presence of two unconnected pipes protruding from a wall was not "the risk which brought about the need for the [ladder] in the first instance," but was one of "the usual and ordinary dangers at a construction site" to which the "extraordinary protection of Labor Law § 240(1) [do not] extend."

Cohen v. Memorial Sloan-Kettering Cancer Center, 11 N.Y.3d 823, 868 N.Y.S.2d 578 (2008), *rvs'g* 50 A.D.3d 227, 850 N.Y.S.2d 435 (1st Dep't 2008).

[EDITOR'S NOTE: Justice Saxe, writing for the majority in the Appellate Division, reasoned:

> There is nothing here to contradict plaintiff's showing that his fall was proximately caused by his inability to step down one rung at a time because of the absence of a safety device which would allow his safe descent to the floor.
>
> Defendants, and our dissenting colleague, emphasize that there was no defect in the ladder. However, that is not the nature of the claimed violation of Labor Law § 240(1). Defendants had the statutory obligation to provide a safety device *appropriate to the task*. Just as it would be a violation of section 240(1) to provide a worker with a *non-defective* six-foot ladder was necessary to perform the assigned task, plaintiff here established that the device he was provided, though not itself defective, and sufficient for the task at other portions of the worksite, was *insufficient to permit him to safely perform the elevated task* at that particular part of the worksite. (Emphasis in original).]

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

Plaintiff was entitled to summary judgment under Labor Law §240(1) since he was injured after falling off a ladder that "shook and wobbled." While plaintiff was attempting to install insulation on a duct positioned over his head with insulation in his left hand and a nail gun in his right hand, he leaned to the left causing the two right legs of the ladder to come off the ground and for plaintiff to fall. As plaintiff fell down the ladder, the nail gun hit one of the steps and a nail from the gun entered his right eye:

> Plaintiff satisfied his *prima facie* burden by establishing that he was using the ladder to install fireproofing in the course of his employment, that the ladder was shaking and wobbling, that the feet of the ladder came off the ground and that defendant failed to provide plaintiff with adequate safety devices or to properly secure the ladder. Under these circumstances, plaintiff cannot be deemed the sole proximate cause of his injuries.
>
> * * *
>
> The dissent states that plaintiff had "two options"—either to reposition the ladder or to direct another worker to hold his ladder while he worked. However, the Labor Law does not require a plaintiff to have acted in a manner that is completely free from negligence. It is absolutely clear that "if a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it" (*Blake v. Neighborhood Hous. Servs. of N.Y. City*, 1 N.Y.3d 280, 290, 771 N.Y.S.2d 484 (2003).]

Hernandez v. Bethel United Methodist Church of New York, 49 A.D.3d 251, 853 N.Y.S.2d 305 (1st Dep't 2008).

[EDITOR'S NOTE: Two justices dissented, maintaining that there is a plausible view of the evidence, sufficient to raise an issue of fact, that no statutory violation occurred, and that plaintiff's own acts or omissions were the sole cause of the accident:

> The ladder did not slide or change position, and plaintiff admittedly chose not to reposition the ladder where it was needed because that would have taken a few minutes, although "it could have been a difference."
>
> * * *
>
> Plaintiff also could have directed another member of his crew to stabilize the ladder while he worked and, in my view, a jury could conclude that plaintiff's failure to exercise either of those safety options, which were readily available, was the sole proximate cause of his injury.]

NEGLIGENCE—PREMISES—CRIMINAL ASSAULT—FORESEEABILITY

Tenant who was sexually assaulted in her apartment by assailant who gained entry to the building via a non-working lock on the door to the tenant's entrance cannot sue premises owner because it took minimal security precautions to protect tenants from foreseeable criminal acts of third parties. The court rejected plaintiff's claim that there were sufficient criminal activities in or near the building before the assault that rendered the assault on plaintiff foreseeable:

> Without trivializing the criminal activity in and around plaintiff's building, it must be acknowledged that, with the exception of the shooting that took place on a street somewhere in the vicinity nearly three years earlier, the criminal activity plaintiff relies upon consists of low-level crimes. When one considers that plaintiff includes all the criminal activity in and around the building over a period of more than four and a half years, it also must be acknowledged that the extent of criminal activity plaintiff relies upon is hardly unusual.
>
> * * *
>
> That a woman entering her apartment in New York City might be subject to a sexual assault is conceivable, but conceivability is not the equivalent of foreseeability.

Maria T. v. New York Holding Company Associates, 52 A.D.3d 356, 862 N.Y.S.2d 16 (1st Dep't 2008).

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:

> Here, [Administrative Code] sections 19-152 and 16-123, the provisions whose language section 7-210 tracks, contemplate the installation, maintenance, repair and clearing of sidewalks or sidewalk flags. Significantly, tree wells are not mentioned in sections 19-152 and 16-123 or 7-210. And while 7-210 employs the phrase "shall include, but not limited to," this clause applies to the types of maintenance work to be performed, not the specific features of what constitutes a sidewalk. Given the statutory silence and the absence of any discussion of tree wells in the legislative history, it seems evident that the City Council did not consider the issue of tree well liability when it drafted section 7-210. If the City Council desired to shift liability for accidents involving tree wells exclusively to abutting landowners in derogation of the common law, it needed to use specific and clear language to accomplish this goal.

Vucetovic v. Epsom Downs, Inc., 10 N.Y.3d 517, 860 N.Y.S.2d 429 (2008), *aff'g* 45 A.D.3d 28, 841 N.Y.S.2d 301 (1st Dep't 2007).

NEGLIGENCE—PREMISES—TRIP—SPEED BUMP

A premises owner is not liable to plaintiff who tripped and fell over a speed bump on its premises:

> Defendant established its *prima facie* entitlement to summary judgment by showing that the speed bump was plainly observable and did not pose any danger to someone making reasonable use of his or her senses. A photograph of the scene depicts a speed bump spanning the width of the way plainly visible in the illumination cast by two nearby street lights.

Rivera v. City of New York, 57 A.D.3d 281, 870 N.Y.S.2d 241 (1st Dep't 2008).

PLEADINGS—AMENDMENT—CPLR 1602(10) EXCEPTION—PRODUCTS LIABILITY—JURISDICTION

Plaintiff, in her product liability action involving Chinese manufacturers of a luggage cart and bungee cord attached to it, was entitled to amend her complaint to assert CPLR 1602(10) as an exception to apportionment since the application gave defendants adequate notice and had merit:

> The standard on a motion to amend to allege a CPLR 1602 exception is no different than on any motion to amend pursuant to CPLR 3025. The proposed amendment should be sustained unless its "alleged insufficiency or lack of merit is clear and free from doubt." Here, plaintiff's proposed amendment satisfied that standard. At the time plaintiff made her motion, even defendants were not certain of the true identity of the cart's manufacturer. Moreover, plaintiff knew that the manufacturer was located in China, and that service of process would not be routine. Indeed, plaintiff knew that defendants themselves had not been able to serve a third-party summons on the manufacturer of the bungee cord. Under such circumstances, an allegation that jurisdiction could not be obtained over the manufacturers could hardly be said to have been lacking in merit as a matter of law. To the contrary, it served the purpose of placing defendants on notice of plaintiff's intention to prove at trial that CPLR 1602(10) applied to this action, and that she would seek to hold defendants jointly and severally liable for her injuries.

Miller v. Staples the Office Superstore East, Inc., 52 A.D.3d 309. 860 N.Y.S.2d 51 (1st Dep't 2008).

PLEADINGS—AMEND/COMPLAINT—GRAVES AMENDMENT—UNITED IN INTEREST

Plaintiff, who filed a verified complaint against the wrong vehicle owner, U-Haul, Inc., (UHI) before Congress passed the "Graves Amendment" is entitled to amend his complaint to name the correct owner, U-Haul Arizona (UHA2), and is not barred by the new law:

> Nothing in the language of the Graves Amendment suggests that it bars vicarious claims asserted in an amended pleading in an action commenced prior to its effective date.

Tirado v. Elrac Inc., 54 A.D.3d 261, 862 N.Y.S.2d 44 (1st Dep't 2008).

[EDITOR'S NOTE: The court relied on the recent Court of Appeals case, *Jones v. Bill*, 10 N.Y.3d 550, 860 N.Y.S.2d 767 (2008), discussed on page 16.]

PRE-TRIAL PROCEDURE—CPLR 3404—20-MONTH DELAY

Plaintiff, whose case was struck from the calendar on May 6, 2005 for failing to appear at four pre-trial conferences, is not entitled to restore it to the calendar because he did not move to restore it until January 2007:

> Plaintiff's conclusory and unsubstantiated claim of law office failure does not constitute a reasonable excuse for the 20-month delay in pursuing the action. Further, plaintiff's inactivity between the time the action was marked off the calendar and defendant's motion to dismiss fails to rebut the presumption of abandonment that arose pursuant to CPLR 3404.

Okun v. Tanners, 11 N.Y.3d 762, 867 N.Y.S.2d 25 (2008), *rvs'g* 47 A.D.3d 475, 849 N.Y.S.2d 537 (1st Dept. 2008).

[EDITOR'S NOTE: The Appellate Division, First Department, by a 3-2 vote, affirmed the trial court's order excusing plaintiff's failure to attend four pre-trial conferences based on his attorney's representation that he did not receive notice of any of the conferences and on condition that plaintiff pay defendant's attorney $1,000. The court also excused plaintiff's subsequent delay in restoring the action to the calendar on plaintiff's showing that there was no intent to abandon the case, the defendant was not prejudiced by the delay and the action is meritorious.

Two dissenting judges rejected plaintiff's claim of law office failure and that the case "just fell through the cracks."]

PRODUCTS LIABILITY—SUMMARY JUDGMENT—*PRIMA FACIE* SHOWING

Defendant's motion for summary judgment dismissing plaintiff's complaint that defendant's transformer, which exploded, was defectively designed and manufactured should have been granted since defendant made a *prima facie* showing of its entitlement to judgment as a matter of law:

> Defendant presented competent evidence demonstrating that its transformers were designed and manufactured under state of the art conditions according to Niagara Mohawk's specifications and that its manufacturing process complied with applicable industry standards. The evidence further demonstrated that each transformer was individually tested before leaving defendant's plant and that in light of such testing and inspection, its expert concluded that it was "virtually impossible for a transformer with an internal fault to leave [defendant's] plant." Defendant's expert affidavit also posited other possible causes of an explosion that may have been introduced while the transformer was rewired or rebuilt by Niagara Mohawk employees after it left defendant's possession.

Ramos v. Howard Industries, Inc., 10 N.Y.3d 218, 855 N.Y.S.2d 412 (2008), *rvs'g* 38 A.D.3d 1163, 831 N.Y.S.2d 615 (2d Dep't 2007).

[EDITOR'S NOTE: Judge Jones dissented, concluding that defendant's showing was insufficient to entitle it to judgment as a matter of law:

> The available inference from defendant's bare assertions—that this transformer could not have left its plant with a defect—is purely speculative. Defendant's own expert conceded as much: "without the transformer to test and examine, there is simply no evidence or proof that [defendant] sold a transformer containing a defect."]

STATUTES—COMMENCEMENT OF ACTION

Plaintiff's filing a summons and complaint before the effective date of the Graves Amendment prohibiting imposing vicarious liability on vehicle lessors, precluded the lessor from invoking the statute even though the lessor was only named a defendant in an amended complaint after the statute was effective:

> The Graves Amendment provides that it "shall apply with respect to any action commenced on or after the date of enactment of this section without

> regard to whether the harm that is the subject of the action, or the conduct that caused the harm, occurred before such date of enactment" (49 USC § 30106[c]). Defendants urge that we read "commenced"—with regard to a party later joined—to refer to the date the claim is "interposed" against such party. Under New York law, however, an action is "commenced" "by filing a summons and complaint or summons with notice" (CPLR § 304[a]) . . . Thus, under the statute's plain language, any action filed prior to August 10, 2005 has been "commenced" and therefore removed from the federal statute's pre-emptive reach. Here, plaintiff "commenced" his action as of August 8, 2005, when he filed his summons and complaint.

Jones v. Bill, 10 N.Y.3d 550, 860 N.Y.S.2d 769 (2008), *rvs'g* 34 A.D.3d 741, 825 N.Y.S.2d 501 (2d Dep't 2006).

TRIAL—EVIDENCE—DEPOSITIONS/50-H HEARING—SETTLED PARTIES—CPLR 3117(A)(2)

The trial court committed reversible error in permitting defense counsel to read into evidence portions of the pre-trial testimony given at depositions or 50-h hearings by six plaintiffs who had settled before trial, because none of the remaining plaintiffs received notice of, or was represented at, the depositions and 50-h hearings:

> Deposition testimony otherwise satisfying the requirements of CPLR 3117(a)(2) still is not admissible unless it is shown that, as to each party against whom the deposition is to be used, it falls within an exception to the rule against hearsay. No such showing was made here.
>
> While the deposition testimony of each plaintiff was admissible against that plaintiff as an admission, the status of such testimony as an admission of the plaintiff who testified did not render it admissible against the other plaintiffs. Neither were the depositions admissible under the hearsay exception for declarations against the declarant's interest, since none of the deponents was shown to have been unavailable to testify at trial. Further, since none of the deponents testified at trial before his or her deposition was read into evidence, the deposition testimony was not admissible as a trial witness's prior inconsistent statement.

Rivera v. New York City Transit Authority, 54 A.D.3d 545, 863 N.Y.S.2d 201 (1st Dep't 2008).

TRIAL—EXPERT TESTIMONY—HUMAN FACTORS—PROPER FOUNDATION

Plaintiff's expert's testimony that the design of a swinging door deviated from "human factors" design standards was insufficient to make out a *prima facie* case of negligent design requiring reversal of the verdict in favor of plaintiff and dismissal of his complaint:

> Before a claimed industry standard is accepted by a court as applicable to the facts of a case, the expert must do more than merely assert a personal belief that the claimed industry-wide standard existed at the time the design was put in place. Nor are mere non-mandatory guidelines and recommendations sufficient. The expert must offer concrete proof of the existence of the relied-upon standard as of the relevant time, such as "a published industry or professional standard or . . . evidence that such a practice had been generally accepted in the relevant industry" at the relevant time.
>
> * * *
>
> Lustbader [plaintiff's expert] primarily relied upon the Human Factors Design Handbook, by Woodson and Tillman, for the industry standards he applied. However, he failed to establish that these purported standards were published, generally accepted, or even in existence in 1970. His testimony on that point was limited to his asserted "belief" that the first edition of the handbook "goes back some 30, 40 years," and that "the early versions predate 1970." However, not only did he fail to establish the existence of any such pre-1970 version, but also he did not verify that any such purported pre-1970 version contained the same standards as the later edition upon which he relied. Indeed, defendants established in their post-trial motion that the first edition of the Woodson handbook was published in 1981, rendering Lustbader's reliance on the standards set forth in the handbook inapplicable as a matter of law.

Hotaling v. City of New York, 55 A.D.3d 396, 866 N.Y.S.2d 117 (1st Dep't 2008).

TRIAL—INADEQUATE NOTICE—BIG APPLE POTHOLE AND SIDEWALK PROTECTION CORPORATION

The Supreme Court correctly set aside the verdict in favor of plaintiff against the city because the city did not

receive prior notice of an alleged defective subway grating causing plaintiff to fall:

> He [plaintiff] attributed his fall to "the movement of the grating, plus the broken cement, the combination of the two." It is not completely clear how the accident happened, but there is no evidence that Mr. D'Onofrio walked across a raised or uneven portion of a sidewalk, even on the assumption that the grating is part of the sidewalk. A photograph of the area where he fell does not show any surface irregularity or elevation. Since the defect shown on the Big Apple map was not the one on which the claim in *D'Onofrio* was based, the lower courts in that case correctly set aside the verdict and entered judgment in the City's favor.

D'Onofrio v. City of New York, 11 N.Y.3d 581, 873 N.Y.S.2d 253 (2008).

[EDITOR'S NOTE: In *D'Onofrio,* the Big Apple map submitted to the city contained the coded symbol for raised or uneven portion of a sidewalk. This was inadequate to support an action premised on a defective subway grating.

The Court of Appeals reversed a companion case, *Shaperonovitch v. City of New York*, 49 A.D.3d 709, 854 N.Y.S.2d 450 (2d Dep't 2008), where the Appellate Division affirmed a jury verdict in favor of the plaintiff against the city because the symbol on the Big Apple map was not ambiguous.

The Court of Appeals held otherwise:

> Plaintiffs in *Shaperonovitch* argue that the symbol on the map is "ambiguous" and that its interpretation is for the jury. We disagree; we do not see how a rational jury could find that this mark conveyed any information at all. Because the map did not give the City notice of the defect, the City was entitled to judgment as a matter of law.

In both cases the notice issue was submitted to the jury, which found the notice adequate.]

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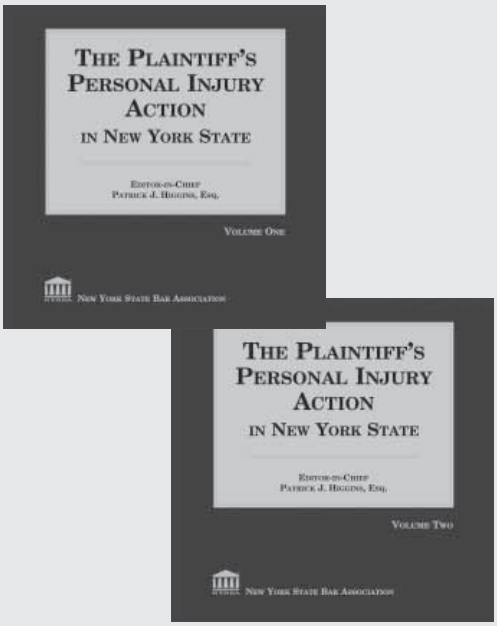

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February 16, 2009

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It is my goal to make our committees active, productive and meaningful to members of the Trial Section. I envision committee meetings two to three times a year, more likely by telephone conferences, but in person where possible, to discuss developments, proposed or recently passed legislation, and decisions of interest in their practice areas. I think this will be beneficial to more experienced practitioners such as yourselves but also to young lawyers who are entering into your particular area of practice. Finally, it should lead to a couple of short articles each year (on recent cases, legislation or other topics of interest in your practice area) which would be published in our Trial Digest and sent to all 3,000 lawyers in the section.

Your names and contact information will be published in the February 2009 Trial Digest with an invitation to our members to contact you to join your committee.

We will once again give an award to our Outstanding Committee Chair for 2009 at our annual meeting in January 2010.

Please contact me if you have any questions. I look forward to working with you this year.

Very truly yours,

Mark J. Moretti
Chair Trial Law Section

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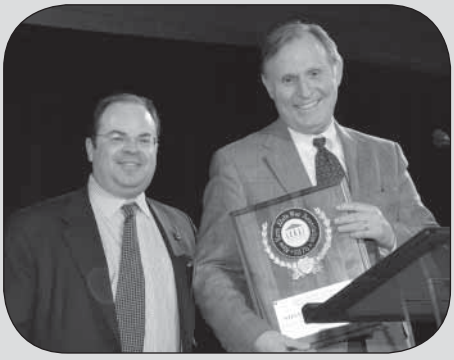

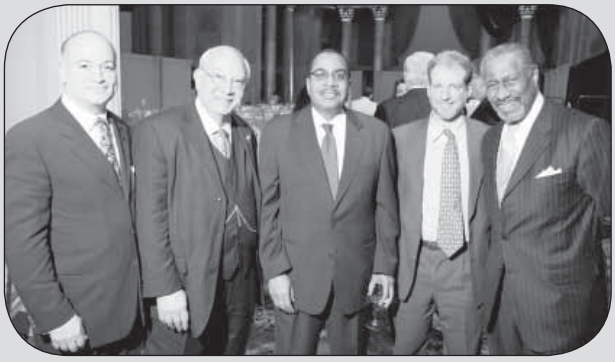

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The *Digest* is published for members of the Trial Lawyers Section of the New York State Bar Association. Members of the Section receive a subscription free of charge.

ISSN 1530-3985 (print) ISSN 1933-8457 (online)

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