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Trial Lawyers Section Digest

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A Message from the Chair

Time is our most important commodity. We all strive to organize and efficiently manage our practices to assure we are fully prepared for the next challenge and, yet, the myriad demands and issues of each day test the best of our organizational skills.

We are now well into the era of continuing legal education which demands more than experience and client development. Each of us is challenged to hone our academic, ethical and professional skills while setting aside precious time to do so.

To this end, I encourage everyone to review the enclosed package of "Recent Decisions" summarizing a variety of trial issues in a concise, readable fashion. We often learn best from the experience of our colleagues, and may find the case situations described sitting in a file on our own desks. Hopefully, you will uncover, in a few minutes time, a case note that directly resolves a difficult matter at hand.

For those of you in need of CLE credit, but in search of a way to earn it in a fun, relaxed and most enjoyable environment, I encourage you to join the Trial Lawyers Section this August 8-12 for our meeting in Florence, Italy. We have a fabulous program planned in conjunction with the Elder Law Section. Our guest speakers include Honorable Howard Levine, Associate Judge of the New York State Court of Appeals; Honorable Anthony V. Cardona, Presiding Justice of the Third Judicial Department; Honorable Francis Nicolai, Administrative Judge of the Ninth Judicial District, and several other wonderful speakers. We have an array of leisure time activities planned including trips to Pisa, Siena and San Gimignano, and guided tours of the museums and cathedrals of the beautiful city of Florence, the center of the Renaissance. You can spend your mornings with Levine, Cardona and Nicolai, and your afternoons with Botticelli, Donatello and Michelangelo. What could be better? We hope you will be able to join us for what promises to be a most memorable adventure!

Margaret Comard Lynch

Inside

Recent Decisions

By Steven B. Prystowsky

APPEAL AND ERROR—DISMISSAL—FIRST APPEAL—SECOND APPEAL

The Appellate Division correctly dismissed plaintiff's second appeal from an order granting reargument and adhering to the court's earlier decision since plaintiff (a) appealed from the initial order, (b) failed to timely perfect the appeal, and (c) the Appellate Division dismissed the appeal for failure to prosecute:

> The message is clear and consistent: the filing of an appeal is not inconsequential. An appeal left untended may be dismissed as abandoned, and appellant may be precluded from later appealing the same issue.

The court suggested the following to avoid a similar predicament:

> Notably, plaintiff could have avoided his present predicament in several ways. He could have timely perfected his original appeal. He could have moved the Appellate Division for an extension of time to perfect that appeal. If plaintiff knew that he could not perfect the first appeal in a timely manner, he could have withdrawn it, sparing the Appellate Division the burden of carrying, monitoring and ultimately dismissing it. After withdrawing the first appeal, plaintiff could have continued to pursue the second appeal, if he so desired, where defendant withdrew his interlocutory appeal. Plaintiff, however, simply chose to abandon his first appeal, showing complete indifference toward the court system. We cannot say that, in these circumstances, dismissal of plaintiff's second appeal was erroneous as a matter of law.

Rubeo v. Grange Mutual Insurance Co., 93 N.Y.2d 750, 697 N.Y.S.2d 866 (1999).

[EDITOR'S NOTE: The Court of Appeals will not interfere with the Appellate Division's exercise of discretion. Thus, an Appellate Division order declining to dismiss defendant's appeal even though the court had earlier dismissed defendant's appeal of a summary judgment order for want of prosecution will not be reversed:

> An appellate court has the authority to entertain a second appeal in the exercise of its discretion, even where a prior appeal on the same issue has been dismissed for failure to prosecute. Thus, in the case at hand, the Appellate Division had the authority to hear defendant's second appeal in the exercise of its discretion, even if it could have dismissed the appeal under *Bray*. (*Faricelli v. TSS Seedman's, Inc*., 94 N.Y.2d 772, 698 N.Y.S.2d 588 [1999]).]

APPEAL AND ERROR—MOTION *IN LIMINE*—ADMISSIBILITY OF EVIDENCE

Denial of a motion *in limine* concerning the admissibility of evidence at trial is not an appealable interlocutory order as of right or by permission:

> While it is axiomatic that a pretrial order which limits the legal theories of liability to be tried will constitute an appealable order, an order which merely limits the admissibility of evidence, "even when made in advance of trial on motion papers, constitutes, at best, an advisory opinion which is neither appealable as of right nor by permission." As the issues raised herein, including those seeking to limit the proof to be admitted on the issue of damages, solely address the admissibility of evidence in advance of trial, we must dismiss these appeals as premature. Appropriate review may only be attained after trial and "when the propriety of the challenged ruling can be assessed, not speculatively, but in the context of its application to a concrete factual controversy."

Strait v. Arnot Ogden Medical Center, 246 A.D.2d 12, 675 N.Y.S.2d 457 (3d Dep't 1998).

CONFLICT OF LAWS—CONNECTICUT STATUTE OF REPOSE—SUBSTANTIVE

Plaintiff, a New York resident injured in Danbury, Connecticut, while operating a printing press, is barred from suing manufacturer by Connecticut General Statute § 52-577a, which precludes products liability actions more than ten years from the date the injury-

inflicting product left the manufacturer's possession and control. The court held that Connecticut Statute of Repose is substantive under New York choice of law principles:

> Unlike the usual limitation provision, which does not begin to run until a cause of action accrues (see, e.g., CPLR 203[a]; CPLR 214), a statute of repose begins to run when the specified event or events take place, regardless of whether a potential claim has accrued or, indeed, whether any injury has occurred.
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> * * *
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> The extra theoretical consequence of statutes of repose practically blocks causes of action before they even accrue. Thus, they exhibit a substantive texture, nature and consequence that distinguishes them from ordinary limitation provisions. In the vernacular of conflict of laws analysis, statutes of repose envelop both the right and the remedy. The weight of authority thus accords with the conclusion that this important theoretical and practical quality pushes statutes of repose over into the substantive law class.

Tanges v. Heidelberg North America, Inc., 93 N.Y.2d 48, 687 N.Y.S.2d 48 (1999).

CONTRIBUTION—CRIMINAL/INTENTIONAL ACT—ARTICLE 16

Defendant County of Nassau (Police Department) which failed to honor plaintiff-wife's order of protection resulting in her being viciously assaulted with a machete by her husband, is entitled to contribution from non-party tortfeasor husband under Article 16. The Appellate Division rejected the lower court's ruling that *Siler v. 146 Montague Associates*, 228 A.D.2d 33, 652 N.Y.S.2d 315 (2d Dep't 1997), is not controlling:

> In *Siler v. Montague Assocs.*, supra, this court held that a merely negligent tortfeasor, such as the landlord in the Siler case, may seek apportionment of liability under CPLR Article 16 from the non-party intentional tortfeasor who actually inflicted the injuries suffered by plaintiff. We do not agree with the Supreme Court that the facts of the present case remove it from the ambit of our holding in Siler. The social importance which inheres in the strict enforcement of orders of protection relating to domestic violence does not change the essentially secondary nature of the negligence which might be attributed to the defendant in this case, negligence which stands in stark contrast to the act of intentional and criminal violence committed by Teodoro Morales [husband]. Also, in our opinion, the law does not impose on police officers a "non-delegable duty" to arrest, within the meaning of CPLR 1602(2)(iv), in every case where the police officers might have the authority to arrest. We find that the "non-delegable duty" exception set forth in CPLR 1602(2)(iv) does not apply to the facts of this case, and we therefore conclude that the Supreme Court erred in refusing to issue an apportionment charge.

Morales v. County of Nassau, 256 A.D.2d 608, 683 N.Y.S.2d 127 (2d Dep't 1999).

[EDITOR'S NOTE: The order was affirmed by the Court of Appeals at 94 N.Y.2d 218, 703 N.Y.S.2d 61 (1999), but on other grounds, since plaintiff did not plead the intentional tort or non-delegable duty exemption set forth in CPLR 1602(2)(iv) or 1602(5). Under CPLR 1603, plaintiff was required to affirmatively plead any exception under Article 16. *See Pleadings, Infra.*]

DAMAGES—BRAIN DAMAGED—VEGETATIVE STATE—PAST AND FUTURE CONSCIOUS PAIN AND SUFFERING—$5,000,000

The Appellate Division, Second Department, affirmed a substantial reduction of a multi-million dollar award to plaintiff, who is permanently brain-damaged and in a vegetative state from $3,000,000 for past pain and suffering to $2,000,000 and $10,050,000 for future pain and suffering to $3,000,000:

> Contrary to the contention of the defendant Long Island College Hospital (hereinafter LICH), the plaintiff adduced sufficient evidence from which a jury could rationally conclude that the sole proximate cause of Carol Weldon's permanent brain damage was the deviation by LICH from good and accepted standard medical practice. Moreover, the plaintiff adduced sufficient evidence to demonstrate that Weldon, although in a vegetative state, has the requisite level of awareness nec-

essary for an award of damages for conscious pain and suffering.

Weldon v. Beal, 272 A.D.2d 321, 707 N.Y.S.2d 875 (2d Dep't 2000).

DAMAGES—DOUBLE AMPUTEE—$7,000,000—EXCESSIVE

Plaintiff's legs were amputated as a result of defendants' failure to timely diagnose her as suffering from peripheral vascular disease. Her award of $11,500,000 ($5,000,000 for past pain and suffering; $4,000,000 for future pain and suffering; and $2,500,000 for future medical expenses) was reduced by the trial judge to $7,000,000 ($3,500,000 for past pain and suffering; $1,500,000 for future pain and suffering; and $2,000,000 for future medical expenses), which the Appellate Division reduced further: $2,500,000 for past pain and suffering and $1,300,000 for future medical expenses:

> We find the damages awarded for past pain and suffering and future medical expenses, even as reduced by the trial court, deviated materially from what would be reasonable compensation to the extent indicated.

Walker v. Zdanowitz, 265 A.D.2d 404, 696 N.Y.S.2d 509 (2d Dep't 1999).

DAMAGES—FRACTURED ANKLE/MULTIPLE SURGERIES—DEGENERATIVE ARTHRITIS—$500,000 DAMAGE AWARD NOT EXCESSIVE

Plaintiff's award of $200,000 for past pain and suffering and $300,000 for future pain and suffering was reasonable compensation to plaintiff:

> Given the evidence demonstrating that plaintiff suffered a severely fractured ankle, which has thus far required surgery for open reduction and fixation and for removal of surgical hardware and may yet require additional surgery, and continues to experience the debilitating effects of the injury, among them symptoms of the onset of degenerative arthritis.

Rydell v. Pan Am Equities, Inc., 262 A.D.2d 213, 692 N.Y.S.2d 333 (1st Dep't 1999).

DAMAGES—HERNIATED DISC—C5-C6

Award of $450,000 for past pain and suffering and $300,000 for future pain and suffering was reasonable compensation for a 49-year-old male who sustained a herniated disc at C5-C6 when the bus came to a sudden stop:

> Plaintiff sustained a herniated disc at C5-C6, with cervical pain and right shoulder radiculopathy, numbness and tingling in the right hand. He was disabled for several months and lost his ability to perform his former job. Despite surgery and extensive physical therapy, he had permanent pain and loss of mobility. The damages awarded did not deviate materially from what is reasonable compensation under the circumstances. For example, in *Gonzalez v. Rosenberg*, [247 A.D.2d 337, 669 N.Y.S.2d 216 (1st Dep't 1998)], we sustained an award of $750,000 for past pain and suffering and $750,000 for future pain and suffering, where the plaintiff's herniated disc required several operations and left him with permanent pain and "limitations on [his] once active life" (compare *Adams v. Romero*, [227 A.D.2d 292, 293, 642 N.Y.S.2d 673 (1st Dep't 1996)] [reducing award totaling $750,000 for past and future pain and suffering to $450,000, where plaintiff had herniated discs and limited range of neck movement, but no mention of surgery].

Rountree v. MABSTOA, 261 A.D.2d 324, 692 N.Y.S.2d 13 (1st Dep't 1999), *lv. to appeal dnd.*, 94 N.Y.2d 754, 701 N.Y.S.2d 340 (1999).

[EDITOR'S NOTE: The court was not influenced by defendant's experts' opinion that plaintiff's injuries were not related to the accident. The court took special note of the short period of time that defendant's physician devoted to the examination and forming his opinion:

> Defendant's experts disputed whether the accident had caused the hernia. After a 15-minute examination, defendant's neurologist concluded that plaintiff could have continued to perform his job.]

DAMAGES—INFANT—LOSS OF EARNINGS—LEAD POISONING

The jury's loss of earnings award to infant plaintiff who sustained lead poisoning from paint was reduced to zero because there was no proof that his employment opportunities would be limited:

> We agree with the defendant that the plaintiffs failed to present evidence, other than speculation, that the infant plaintiff's academic and future employment opportunities would be limited as a result of his rather mild disorder. It is axiomatic that loss of future earnings or earning capacity must be established with reasonable certainty. The plaintiffs produced no quantitative evidence as to what the infant plaintiff might have earned over the course of his lifetime in a vocational setting and presented no testimony by an economist qualified to assess work-life expectancy or employment opportunities and how such factors would be diminished due to the infant plaintiff's condition. Therefore, there was no reasonable basis for the jury to award damages for the infant plaintiff's loss of earning capacity.

Davis v. City of New York, 264 A.D.2d 230, 379 N.Y.S.2d 693 (2d Dep't 1999).

DAMAGES—LOST EARNINGS

Plaintiff failed to establish lost earnings with reasonable certainty when he did not submit proof of loss of earnings, such as a W-2 form or tax returns:

> The award for past and future lost wages, however, was based only on plaintiff's testimony regarding prior employment, unsubstantiated by any tax returns or W-2 forms, and his current employment of less than two weeks. Thus, plaintiff's past and future earnings were not established with reasonable certainty and the award therefor cannot be permitted to stand.

DelVALLE v. White Castle System, Inc., 277 A.D.2d 13, 715 N.Y.S.2d 57 (1st Dep't 2000).

DAMAGES—"MASSIVE CRUSH" INJURIES—FRACTURES OF LUMBAR VERTEBRAE—FRACTURED RIBS—$12,500,000 EXCESSIVE

Plaintiff, who suffered "massive crush" injuries, including a bilateral public bone pelvic fracture, laceration and avulsion of the peritoneum, fractures of the lumbar vertebrae, and fractured ribs, was not entitled to award of $7,500,000 for past pain and suffering and $5,000,000 for future pain and suffering, which the court conditionally reduced to $1,500,000 and $1,250,000, respectively:

> The award of damages for past and future pain and suffering deviates materially from what would be reasonable compensation.

Lind v. City of New York, 270 A.D.2d 315, 705 N.Y.S.2d 61 (2d Dep't 2000).

DAMAGES—DUAL RECOVERY—PAIN AND SUFFERING/EMOTIONAL DISTRESS—SEPARATE RECOVERIES NOT ALLOWED

Plaintiff, who sustained several herniated discs with nerve root involvement which caused certain psychological symptoms including a significant change in plaintiff's personality and mood, is not entitled to recover damages for (a) pain and suffering and (b) emotional distress. The court accepted defendant's argument that damages for mental suffering and emotional distress is subsumed under the pain and suffering award and reversed the Magistrate Judge:

> By defining pain and suffering as a broad category that includes loss of enjoyment of life, the *McDougald [v. Garber*, 73 N.Y.2d 246, 538 N.Y.S.2d 937 (1989)] court foreclosed as duplicative separate awards for these non-pecuniary harms. Rounds urges us to interpret *McDougald* narrowly, distinguishing her claims for emotional distress from *McDougald*'s loss of enjoyment of life. The question is whether, under New York tort law, pain and suffering subsumes emotional distress making their separate compensation duplicative.
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> To be sure, distinctions can be drawn between loss of enjoyment of life and emotional distress. The former is specifically concerned with "the inability to participate in activities that once brought pleasure." Rounds argues that the latter describes the pain she lives with on a daily basis and the emotional distress that she suffers as a result of the physical pain she endures. However, the ability to articulate differences between the damages at issue in *McDougald* and those challenged here does not alter the Court of Appeals's reasoning which applies equally to emotional distress. As the Court of Appeals stated:
>
> The advocates of separate awards contend that because pain and suffering

> and loss of enjoyment of life can be distinguished, they must be treated separately if the plaintiff is to be compensated fully for each distinct injury suffered. We disagree. Such an analytical approach may have its place when the subject is pecuniary damages, which can be calculated with some precision. But the estimation of nonpecuniary damages is not amenable to such analytical precision and may, in fact, suffer from its application.
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> Despite our ability to distinguish between loss of enjoyment of life and the emotional distress at issue in this case, we follow the reasoning of the New York Court of Appeals and find that emotional distress is no more amenable to analytical precision than loss of enjoyment of life. There is no plausible basis for limiting *McDougald* to its facts and holding, as Rounds urges, that pain and suffering does not also encompass emotional distress, which is just as difficult to measure.

Rounds v. Rush Trucking Corp., 211 F.3d 185 (2d Cir. 2000).

DAMAGES—QUADRIPLEGIC—PENTAPLEGIC—$18+ MILLION—NOT EXCESSIVE

The jury award to plaintiff Virgil Brown, a quadriplegic, of $3,000,000 for past pain and suffering was excessive and reduced to $1,000,000 and the $7,000,000 awarded for future pain and suffering was excessive and reduced to $3,000,000.

Brown v. City of New York, 275 A.D.2d 726, 713 N.Y.S.2d 223 (2d Dep't 2000).

[EDITOR'S NOTE: While plaintiff's past pain and suffering of $1,000,000 and future pain and suffering of $3,000,000 is in the ballpark for awards for pain and suffering, past and present, the total amount awarded, $18,188,553, sets a record.

Initially, the jury awarded plaintiff $15,711,665 for past damages ($15,000,000 of which was for past pain and suffering) and $34,188,553 for future damages including $20,000,000 for a total of $49,900,218. The $15,000,000 for past pain and suffering was reduced by the trial court to $3,000,000 and the $20,000,000 for future pain and suffering was reduced to $7,000,000. The appellate court did not discuss what constituted future damages of $14,188,553.

Plaintiff John Brown, who was with his brother at the time, sustained injuries which rendered him a pentaplegic. Initially, he was awarded $20,607,815 for past damages (including $20,000,000 for past pain and suffering) and $34,286,998 for future damages (including $20,000,000 for future pain and suffering) for a total of $54,894,813. $20,000,000 for past and pain and suffering was reduced by the trial court to $3,000,000. $20,000,000 for future pain and suffering was reduced to $7,000,000. The Appellate Division reduced the $3,000,000 to $1,000,000 for past pain and suffering and the $7,000,000 for future pain and suffering to $3,000,000.]

DAMAGES—RAPE—$2 MILLION PAST PAIN AND SUFFERING; $1 MILLION FUTURE PAIN AND SUFFERING—NOT EXCESSIVE

Award to tenant, raped at gunpoint in apartment building stairwell, of $2 million for past pain and suffering and $1 million for future pain and suffering did not materially deviate from reasonable compensation. Plaintiff, according to her psychiatrist, was diagnosed with a chronic post-traumatic stress disorder which had not abated in the four years of treatment. Plaintiff has nightmares about the attack, decreased appetite, depression, memory loss and anxiety. Plaintiff did not respond well to drugs or psychotherapy and was still suffering, at the time of trial, of depression and extreme anxiety. The court sustained the verdict, observing:

> There was thus evidence before the jury that the rape had dramatically changed the quality of Ortiz's life. Following the attack, she suffered from persistent anxiety, depression and sleeplessness, which conditions continued to the time of trial. She is unable to leave her apartment by herself; indeed, the prospect of staying in her apartment alone often compels her to work seven days a week. When at home Ortiz barricades herself into her apartment, with a knife ready in the event that an intruder is able somehow to make his way through the furniture she places against the door. She has lost all interest in social activity, including sexual activity, and as a result, her romantic relationship of approximately 14 years ended. Moreover, both her therapist and her psychiatrist testified that she had shown no sustained improvement as of the time of trial, and that the potential for improvement was unlikely in the near future and uncertain over the long term.

> Under these circumstances, the Court concludes that the jury's compensatory damage award does not materially deviate from reasonable compensation.

Ortiz v. New York City Housing Authority, 22 F. Supp. 2d 15 (E.D.N.Y. 1998), *aff'd*, 198 F.3d 234 (2d Cir. 1990).

[EDITOR'S NOTE: The $3 million award appears to be the largest award sustained by a court in a rape case. In *Haddock v. City of New York*, 140 A.D.2d 91, 532 N.Y.S.2d 379 (1st Dep't 1988), *aff'd*, 75 N.Y.2d 478, 554 N.Y.S.2d 439 (1990), the Appellate Division, First Department, upheld a verdict of $2.5 million where a child was raped in a New York City playground. In *Splawn v. Lextag Corp.*, 97 A.D.2d 479, 603 N.Y.S.2d 41 (1st Dep't 1992), a $2 million award for rape in a hotel was not found excessive. In *Kukla v. Syfus Leasing Corp.*, 928 F. Supp. 1328 (S.D.N.Y. 1996), a $1.35 million for rape in a hotel was sustained.]

EVIDENCE—EXPERT—STATUTORY INTERPRETATION

Trial court's permitting expert witness, a former long-time Department of Buildings employee, to testify that the building codes permitted the cellar to be occupied as dwellings, was reversible error:

> The trial court erred in deferring to the opinion of the cooperative corporation's expert as to the legality of the apartment. Expert testimony as to a legal conclusion is impermissible. The apartment's legality presented a pure question of law involving statutory interpretation, which, in the first instance, is the responsibility of the court. In our view, as the controlling provisions of the Multiple Dwelling Law make clear, the trial court erred in finding that the cellar apartment was legal at the time of plaintiffs' purchase.

Measom v. Greenwich & Perry Street Housing, 268 A.D.2d 156, 712 N.Y.S.2d 1 (1st Dep't 2000).

EVIDENCE—HOSPITAL RECORD

The trial court did not err in refusing to admit into evidence a hospital triage report that contain conflicting information whether plaintiff fell from a fire escape or jumped out of a window to escape the fire:

> Plaintiff spoke only Spanish, and the nurse who prepared the triage report testified that the information he recorded was based on what he learned form an EMS worker and a hospital translator, both of whom were unidentified and never called as witnesses. The hospital triage report was potentially admissible in evidence, either under business entry exception to the hearsay rule or as an admission against interest, but only upon a showing by defendants, as proponents of the evidence, that plaintiff was the source of the information recorded, and that the translation was provided by a competent, objective interpreter whose translation was accurate, a fact generally established by calling the translator as a witness. Here, the nurse, who never spoke to plaintiff regarding the cause of her injuries, left it unclear whether he obtained his information pertaining thereto from the EMS person, the translator, or a combination of the two, and it is also unclear whether the translator obtained such information from plaintiff, the EMS person or a combination of the two. Moreover, since the disputed cause of plaintiff's injury, i.e., whether she fell from a height of eight feet or jumped from that height, is not germane to plaintiff's diagnosis or treatment, the history portion of the hospital record is not admissible under the business records exception to the hearsay rule. Defendants' argument that the hospital record is admissible because the translator was plaintiff's agent was aptly characterized by the trial court as a "quantum leap" utterly without factual support.

Quispe v. Lemle & Wolff, Inc., 266 A.D.2d 95, 698 N.Y.S.2d 652 (1st Dep't 1999).

EVIDENCE—JUDICIAL NOTICE—COURT FILE

It was an error for the court to permit the jury to see an affidavit even if the affidavit is part of the Supreme Court file:

> Judicial notice of law is covered under CPLR 4511. Judicial notice of adjudicative-type facts, however, has long been a matter of decisional law. The test is whether the fact rests upon knowledge or sources so widely accepted and unimpeachable that it need not be evidentiarily proven. The most obvious illustrations are matters such as calendar dates, and such unassailably established facts as, for example, geographical locations or sunrise times.

> In some instances, and under certain circumstances, undisputed portions of court files or official records, such as prior orders or kindred documents, may be judicially noticed. No authoritative case has ever been held, however, that an item may be considered and weighed by the finder of fact merely because the item, however unauthenticated and unreliable it may be, happened to repose in the court's file. Polygraph test results, for example, that are otherwise inadmissible are not rendered admissible merely because they happen to be part of the paperwork filed with the court.
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> Several opinions in other jurisdictions have aptly and repeatedly commented on the seemingly widespread but mistaken notice that an item is judicially noticeable merely because it is part of the "court file." Court files are often replete with letters, affidavits, legal briefs, privileged or confidential data, in camera materials, fingerprint records, probation reports, as well as depositions that may contain unredacted gossip and all manner of hearsay and opinion. Accordingly, we reject the plaintiff's argument that the affidavit in question was admissible as a judicially noticeable court record.

Ptasznik v. Schultz, 247 A.D.2d 197, 679 N.Y.S.2d 665 (2d Dep't 1998).

EVIDENCE—POLICE REPORT—EYEWITNESS STATEMENT—BUSINESS RECORD EXCEPTION

The IAS court correctly excluded the eyewitness statement contained in the police report as hearsay:

> We disagree with the defendants' contention that the trial court erred in excluding, as hearsay, a written statement given by an eyewitness to the police concerning the accident. The statement did not fall under the excited utterance exception to the hearsay rule since the eyewitness did not make the statement under the stress and excitement of the accident, which occurred at least 30 minutes before the statement was given. Moreover, the statement did not qualify as a business record exception to the hearsay rule, since the eyewitness was under no duty to impart information to the police.

Pector v. County of Suffolk, 259 A.D.2d 605, 686 N.Y.S.2d 789 (2d Dep't 1999).

EVIDENCE—WITHDRAWN GUILTY PLEA TO FAILURE TO OBEY A TRAFFIC-CONTROL DEVICE/TRAFFIC COURT—IMPEACHMENT

Defendant's withdrawal of a plea of guilty to a traffic offense after he was sued for negligence is admissible. *People v. Spitaleri*, 9 N.Y.2d 168, 203 N.Y.S.2d 53 (1961), which held that a withdrawn plea of guilty could not be used against a defendant in a criminal case as an admission of the crime for which defendant was being tried, was not applicable:

> It is undisputed that the basis for City Court's decision to allow defendant to withdraw his plea was that, at the time of the plea, defendant was without the benefit of legal counsel. Since, however, defendant was charged only with a traffic infraction, he was not as a matter of right entitled to the assignment of counsel. Thus, City Court's "affirmative action" allowing defendant to withdraw his plea was not constitutionally or statutorily compelled, but was instead an exercise of discretion. Nothing in the record suggests that there was any finding that the plea itself was a product of coercion, misrepresentation or any other constitutionally based denial. . . . The withdrawal of defendant's plea, however, suggests only that he was made aware, in the light of the civil suit which followed, that his decision to enter the plea was unwise.
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> Plaintiff in this case seeks to use the vacated plea as a sword. With it, plaintiff intends to impeach the credibility of defendant and to demonstrate his negligence in the action. In our view, since the vacatur of defendant's plea was not based upon any violation of due process grounds, in the circumstances presented, plaintiff's intended use of the plea is proper, while defendant's attempted use of *Spitaleri* is misplaced. The fundamental differences in the considerations at work in criminal and civil

> trials compel the conclusion that *Spitaleri* is inapplicable here. Notwithstanding, consistent with *Ando [v. Woodberry*, 8 N.Y.2d 165, 203 N.Y.S.2d 74 (1960)], defendant must be permitted a full and fair opportunity to offer the jury his reasons for the withdrawn plea.

Cohens v. Hess, 92 N.Y.2d 511, 683 N.Y.S.2d 161 (1998).

INDEMNITY—IMPLIED—OWNER/RETAINS CONTROL OVER SNOW OPERATION

Owner of a retail store is not entitled to implied indemnity against snow removal contractor because it retained sufficient responsibility or control over the snow removal operation:

> Here, the contact between Wal-Mart [owner] and Subik [snow contractor] expressly provided for Wal-Mart's retention of the right to direct Subik to salt and sand the parking lot "as deemed necessary" and to remove snow "as requested." In our view . . . this reservation of authority provides an adequate basis for the imposition of primary tort liability against Wal-Mart for the condition of the property and defeats its implied indemnity claim as a matter of law.
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> As a final matter, we note that Wal-Mart could easily have shifted its liability to Subik by requiring the inclusion of any express indemnity provision in the snow removal contract.

Salisbury v. Wal-Mart Stores, Inc., 225 A.D.2d 95, 690 N.Y.S.2d 156 (3d Dep't 1999).

INSURANCE—ANTI-SUBROGATION—PERMISSIVE USER

The insurers [Jefferson and Reliance] of the owner [A-Drive] of a leased vehicle involved in an accident cannot sue the lessee [Continental Copy] as subrogee since the lessee, as a permissive user, is also an additional insured even though not specifically named in the policy:

> Just as Liberty Mutual [in *Pennsylvania General Ins. v. Austin Powder Co.*, 68 N.Y.2d 465, 510 N.Y.S.2d 67 (1986)] as subrogee was prohibited from seeking indemnity against its additional insured Austin Powder, Jefferson and Reliance as subrogees should be prohibited form recovering from Travelers in its capacity as insurer of Continental Copy. Jefferson and Reliance insured not only A-Drive, but Continental Copy as well. It is clear that as a lessee Continental Copy was a permissive user of the van, and as such was an insured by virtue of that portion of Reliance's "WHO IS INSURED" clause which stated that "[a]nyone else is an insured while using with your permission a covered auto you [Reliance] own, hire, or borrow. . . ."
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> The Appellate Division seemingly relied on the fact that Continental Copy was not a specifically named insured in the Reliance and Jefferson policies. For the purposes of the anti-subrogation rule, there is simply no reason for treating a "permissive user" insured differently than a named insured. An insurer covering a permissive user under its policy would still be subject to the same potential conflict of interest, and an insurer in explicitly providing for such coverage should not be surprised to pay claims that it covered. Indeed, by statute, New York requires each automobile policy to cover the named insured for any loss or damage occasioned by "any person operating or using [the vehicle] with the permission, express or implied, of the named insured" (Insurance Law § 3420[e]).
>
> This Court has not differentiated between the permissive user insureds and named insureds, except to the extent that the specific policy terms required a difference in treatment. Thus, the fact that Reliance insured Continental Copy because it was a permissive user of the van instead of a named insured is immaterial for purposes of application of the antisubrogation rule, and a claim against Travelers grounded on an indemnity theory of recovery must fail.

Jefferson Insurance Co. of New York v. Travelers Indemnity Company, 92 N.Y.2d 363, 681 N.Y.S.2d 208 (1998).

INSURANCE—BAD FAITH—CONFLICT OF INTEREST—FAILURE TO SETTLE WHERE INSURED EXPOSED TO SUBSTANTIAL PUNITIVE DAMAGES

Insurance company who refused to compromise a claim within available coverage because its insured was exposed to substantial punitive damages can be subject to a bad faith claim if the award exceeds the policy amount even if no punitive damages are awarded.

The court rejected the insurer's argument that since the amount representing an award of punitive damages cannot be recovered from the insurer on public policy grounds, it cannot be guilty of bad faith by exposing the insured to punitive damages. In finding that plaintiff made a *prima facie* case of bad faith, the court reasoned:

> Whether or not an insurer's cavalier indifference to its insured's exposure to potentially ruinous punitive damages, without more, constitutes bad faith, forcing the insured to sacrifice the very coverage it paid for in order to avoid a possible award of exemplary damages involves the carrier in a clear conflict of interest.
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> * * *
>
> The record contains evidence from which a jury might readily conclude that, prior to trial, defendant insurer was presented with a settlement offer, well within the limits of the policy, under which plaintiff's proposed contribution was $375,000. Its own counsel urged it to accept the offer, stating: "It is my recommendation that at this juncture active efforts on our part to resolve this matter be undertaken to minimize the exposure to runaway verdicts, punitive damages, or a disproportionate liability split in which Public Service Mutual's contribution towards the settlement would be greater than [this amount]." The insurer did not act upon the recommendation. Subsequently, on October 11, 1996, the ten co-defendants settled for the total sum of $152,702. Counsel again urged settlement, stating his "opinion that resolutions [sic] of these actions, and the extinguishment of any liability of the insured including the possible effect of punitive damages is preferred to the prospect [of] subjecting the insured to a trial on the issue of liability and damages where the exposure appears greater than the benefits of resolution." The insurer again ignored the suggestion. A trial was then conducted on the issue of liability. The jury returned a verdict that apportioned fault among all of the original defendants, finding plaintiff herein to be 80 percent liable for the injury and to be answerable in punitive damages for "gross negligence and/or willful misconduct." . . . On June 26, 1997, the case was ultimately settled for $1.5 million, the entire amount being provided by plaintiff herein upon defendants' refusal to make any contribution towards the settlement. Under these circumstances, a trier of fact could certainly conclude that the intransigence of the insurer deprived plaintiff of a legitimate opportunity to compromise the action within the limits of the available coverage at a point when there remained no doubt as to liability.
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> * * *
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> Having succeeded in maneuvering its insured into unilaterally entering into a settlement to avoid the *potential* of an award of punitive damages, the insurer has exhibited bad faith by using economic duress to deprive the insured of the very insurance coverage for which plaintiff contracted. The insurer cannot justify its misconduct by speculating that, had the parties proceeded to trial, an award of exemplary damages would have been rendered that would necessarily have been upheld by this Court. In the absence of any award representing exemplary damages, this Court is not concerned with "preserving the condemnatory and retributive character" of such awards avoiding a result that "would allow the insured wrongdoer to divert the economic punishment to an insurer."

Ansonia v. Public Service Mutual Insurance Co., 257 A.D.2d 84, 692 N.Y.S.2d 5 (1st Dep't 1999).

INSURANCE—BAD FAITH—FAILURE TO KEEP INSURED INFORMED OF NEGOTIATIONS

An insurance carrier may be guilty of bad faith for failing to inform its insured of negotiations with plain-

tiffs where plaintiffs' demand exceeds the insurance carrier's policy:

> The Solomons [insured] also base their bad faith cross claim against Aetna on its failure to fully inform them of the settlement negotiations. Miriam Solomon affirmed that trial counsel's office had no direct contact with them until just prior to trial and did not inform them as to what was happening with regard to the settlement discussions. She asserted that trial counsel never informed them or their independent counsel that, prior to trial, plaintiffs and Burkart had offered to accept $275,000 and might have been willing to go as low as $265,000, at a time when Aetna had authorized a settlement of $250,000, or that, during the trial, Aetna had offered $250,000. She further stated that if she and her husband had known that the difference between the parties was so nominal, they would have considered contributing the difference to avoid a potentially far greater jury verdict.
>
> * * *
>
> Upon our review, we are reminded that Aetna's alleged failure to inform the Solomons of settlement negotiations is a factor to be considered in determining bad faith. On this record . . . Aetna's alleged failure to keep them informed presents a question of fact for a jury.

Redcross v. Aetna Casualty & Surety Company, 260 A.D.2d 908, 688 N.Y.S.2d 817 (3d Dep't 1999).

INSURANCE—BAD FAITH—HIGH/LOW PROPOSAL

Insurance (Amica) company's high/low proposal on the eve of trial, which offered the full policy limit of $300,000, did not constitute a "gross disregard" of its insured's interest and the lower court properly set aside the jury verdict finding Amica guilty of bad faith. Plaintiffs in the underlying action had rejected Amica's high/low proposal and obtained a verdict of $1,500,000:

> Amica's offer of the "high/low" agreement in response to the Neary's [plaintiff] demand letter clearly negates a finding that its refusal to tender the policy limits amounted to a deliberate or reckless failure to place the policyholder's interests on an equal footing with its own. Rather, the evidence demonstrates that Amica made the proposal for the purpose of protecting the policyholder from a potential excess judgment. That Amica may have greatly overestimated the likelihood that its policyholder would not be found liable for the accident is indicative of an error in judgment, not bad faith. The gross disregard standard, like gross negligence and reckless disregard, requires a higher level of culpability than ordinary negligence.

Vecchione v. Amica Mutual Ins. Co., 274 A.D.2d 576, 711 N.Y.S.2d 186 (2d Dep't 2000).

INSURANCE—*KINNEY v. LISK* CLAIM—THIRD-PARTY DEFENDANT/EMPLOYER—OMNIBUS WORKERS' COMPENSATION ACT OF 1996

The third-party complaint stated a cause of action against the third-party defendant, plaintiff's employer, since it was based upon the employer's failure to obtain liability insurance:

> The Omnibus Workers' Compensation Act of 1996 does not bar a third-party action against an employer premised upon the employer's alleged breach of an agreement to procure liability insurance.

Santos v. Floral Park Lodge of Free and Accepted Masons, No. 1016, 261 A.D.2d 526, 690 N.Y.S.2d 634 (2d Dep't 1999).

JURISDICTION—AFFIRMATIVE DEFENSE/IMPROPER JURISDICTION—WAIVER—CPLR 3211(e)

Defense of improper jurisdiction was waived if defendant's motion to dismiss was not made within 60 days after January 1, 1997, the effective date of the amendment of CPLR 3211(e) even if the defense was asserted before the Legislature amended the statute:

> It is clear that this amendment to CPLR 3211(e) is procedural in nature. However, to hold this amendment to CPLR 3211(e) applicable to all pending actions without any limitation would be "unfair" since it would trigger the "waiver on objections put into place long ago in conformity with all existing procedural requirements." Accordingly, to avoid injustice, we hold that the sub-

> ject amendment to CPLR 3211(e) is retroactive but the starting time of the requisite 60-day period in pending actions is deemed to be January 1, 1997, the amendment's effective date.

Wade v. Byung Yang Kim, 250 A.D.2d 323, 681 N.Y.S. 355 (2d Dep't 1998).

JUDGMENT—DEFAULT—SETTLEMENT NEGOTIATIONS

Since plaintiff was actively negotiating with defendant's insurance carrier, plaintiff was not entitled to a default judgment:

> While defendant Schlegel, apparently through some oversight of his insurer, failed to timely answer the complaint, his insurer had entered into settlement negotiations with plaintiff, who was thus aware that Schlegel, far from being willfully unresponsive to the complaint, was attempting to resolve the matter and was prepared to mount a defense in the event that a settlement could not be reached. Because plaintiff, under these circumstances, sustained no prejudice by reason of Schlegel's delay in answering, and Schlegel has shown that he has a meritorious defense, plaintiff's motion for a default judgment against Schlegel was properly denied.

Parker v. I.E.S.I. N.Y. Corporation, 276 A.D.2d 449, 715 N.Y.S.2d 50 (1st Dep't 2000).

JURISDICTION—FAILURE TO NOTIFY COMMISSIONER OF MOTOR VEHICLES—VTL § 505(5)

New York courts do not have jurisdiction in an action arising out of a Vermont automobile accident where defendants no longer were domiciled in New York when plaintiff attempted service even if the defendants violated VTL § 505(5) by failing to notify the Commissioner of Motor Vehicles of change in address:

> We conclude that New York's courts lacked a jurisdictional basis to entertain this lawsuit. Defendants were not domiciled in New York at the time plaintiff commenced her action. Moreover, the relevant provision of New York's long-arm statute is inapplicable because the alleged tortious act occurred in Vermont (CPLR 302[a][2]).

Keane v. Kamin, 94 N.Y.2d 263, 701 N.Y.S.2d 698 (1999).

JURISDICTION—NON-DOMICILIARY MANUFACTURER/N.Y. DISTRIBUTOR—N.Y. ACCIDENT—SUBSTANTIAL REVENUE—CPLR 302(A)(3)(ii)

Texas corporation with a manufacturing facility in Virginia who has no property, offices, telephone numbers or employees in New York but maintains a New York distributor and derives $514,490 revenue in New York out of a total $18,245,292 is subject to New York jurisdiction for an accident occurring in New York even though the defective rear-loading device which caused plaintiff's injuries was installed in Virginia. CPLR 302(a)(3)(11) authorizes jurisdiction over the defendant and there is no violation of federal due process:

> Pak-Mor's business can hardly be characterized as "local." A Texas corporation with a manufacturing facility in Virginia is inherently engaged in interstate commerce. Moreover, the company had a New York distributor and a district representative. Its national advertising and New York sales figures alone show that the company derives substantial revenue from interstate commerce.
>
> In short, we have no difficulty in concluding that CPLR 302(a)(3)(ii) was satisfied in this case. Pak-Mor derived substantial revenue from interstate commerce and the circumstances surrounding its sale of the subject rear-loader gave it reason to expect that its acts in connection with the manufacture of the rear-loader would have consequences in this State.

The court rejected Pak-Mor's argument that it did not have any contacts with New York because it did not direct activities at New York residents and that it performed manufacturing in Virginia for customers who paid, received title and accepted delivery in Virginia. Instead, the court found that Pak-Mor itself forged the ties with New York and took purposeful action, motivated by the entirely understandable wish to sell its products here:

> Fair play involves a set of corresponding rights and obligations. When a company of Pak-Mor's size and scope

> profits from sales to New Yorkers, it is not at all unfair to render it judicially answerable for its actions in this State. Considering that Pak-Mor's long business arm extended to New York, it seems only fair to extend correspondingly the reach of New York's jurisdictional long-arm. In all, we conclude that asserting jurisdiction over Pak-Mor in New York would not offend traditional notions of fair play and substantial justice.

LaMarca v. Pak-Mor Mfg. Co., 95 N.Y.2d 210, 713 N.Y.S.2d 304 (2000).

LIMITATIONS OF ACTIONS—INSTALLATION OF ASBESTOS-CONTAINING MATERIAL

Plaintiff, the owner of a building, is barred by the statute of limitations from suing in 1990 for costs for performing abatement work when the installation of the asbestos-containing material took place in 1971 during the building's construction. The court held that time of injury rule was applicable under *Schmidt v. Merchants Desp. Transp. Co.*, 270 N.Y. 287 (1936). The court refused to apply CPLR 214(c) because the statute has an arbitrary cutoff in CPLR 214(c)(6)(b), which provides that it shall not apply to "any act, omission or failure . . . which caused or contributed to an injury that either was discovered or through the exercise of reasonable diligence should have been discovered prior to" July 1, 1986. The court concluded:

> In this case, the primary condition on which the claim is based is the presence of asbestos in the building. It cannot be contested that plaintiff was or should have been aware of this condition prior to July 1, 1986, and that there was widespread public awareness of the dangers of asbestos well before that date. Thus, plaintiff's claim does not fall within the savings provision of the discovery statute.

MRI Broadway Rental, Inc. v. United States Mineral Products Co., 92 N.Y.2d 421, 681 N.Y.S.2d 783 (1998).

MOTIONS—EXPERT AFFIDAVIT—*CURRICULUM VITAE*—ABSENCE TO OUTSIDE MATERIAL

Affidavit of expert, a professor of engineering technology at a local community college and a consulting engineer regarding highway design, construction, accident reconstruction and other safety matters, lacked foundation required to support plaintiff's claim that the county was negligent in failing to erect guard rails on curve:

> Although the affidavit references a curriculum vitae which purportedly sets forth his qualifications, no such document was included. While the affidavit specifically describes the accident scene, [Professor] Bryski's conclusory statements abound with indications that the physical configurations detailed therein "meet long-standing criteria for guardrails." Further speckled with opinions, based upon "a reasonable degree of engineering certainty," that the failure to erect guardrails in this instance "constitutes an ultrahazardous condition which in good engineering practice mandates the placements of guide rails in order to protect the traveling public," all a "substantial factor in causing the injuries," we note the absence of any reference to outside material to support the statements made.
>
> Although courts have, at times, relied upon the expertise of a witness "to support the inference that the opinion is based on knowledge acquired through personal professional experience," courts have, at other times, required that the expert's affidavit "make[] reference to outside material 'of a kind accepted in the profession as reliable in forming a professional opinion.'" Here, we have neither an outside reference nor a litany of Bryski's professional licenses, degrees or other affiliations. Having previously analyzed one of Bryski's affidavits as "purely speculative and . . . lack[ing] sufficient probative force to constitute prima facie evidence of negligence" since there was no foundation or indication of applicable industry standards or practices to support the conclusions reached, we must similarly conclude here.

Bova v. County of Saratoga, 258 A.D.2d 748, 685 N.Y.S.2d 834 (3d Dep't 1999).

MOTIONS—EXPERT'S AFFIDAVIT—INSUFFICIENT

Plaintiff, who was injured when his car skidded off the road and collided with a tree, cannot defeat contrac-

tor's summary judgment motion with a conclusory expert's affidavit:

> Here, the appellant's project coordinator testified at his deposition that the appellant's work was done in accordance with the specifications of the County of Nassau, using 1A asphalt. Such testimony established prima facie that the work was properly done. The affidavits of the plaintiff's expert did not identify any impropriety as to how the work was performed. He merely stated that the appellant's resurfacing of the roadway in 1987 "did not maintain a proper coefficient of friction for at least 10 years" without identifying the reason, or citing any standard requiring that pavement retain the proper coefficient of friction for at least 10 years. In addition, he did not state that use of 1A asphalt was in any way deficient. In view of the foregoing, the appellant was entitled to summary judgment.

Michael Sipourene v. County of Nassau, 266 A.D.2d 450, 698 N.Y.S.2d 705 (2d Dep't 1999).

NEGLIGENCE—ASSUMPTION OF RISK—ATHLETE—BASKETBALL

Plaintiff, who injured his knee when he stepped into a recessed drain near the free throw line while playing basketball on an outdoor court, assumed the risk and has no cause of action:

> Although the doctrine of assumption of risk does not exculpate a landowner from liability for ordinary negligence in maintaining a premises, there is no evidence that the drain was defective or improperly maintained. In dismissing the complaint, the Appellate Division majority correctly held that the risks of playing upon an irregular surface are inherent in out-door basketball activities (such as occurred here) and that the condition of the court was open and obvious. Thus, the complaint was properly dismissed on the ground that plaintiff had assumed the risk of the injury.

Sykes v. County of Erie, 94 N.Y.2d 912, 707 N.Y.S.2d 374 (2000), *aff'g* 263 A.D.2d 947, 695 N.Y.S.2d 454 (4th Dep't 1999).

NEGLIGENCE—ASSUMPTION OF RISK—SIX-YEAR OLD

The doctrine of assumption of risk does not apply to a six-year old, who climbed over an easily breached fence closing off a lawn and was burned by a firehose discharging steam from a hot water system of a New York City Housing Authority building:

> As a matter of law, the doctrine of assumption of risk, which contemplates the voluntary assumption of fully appreciated, "perfectly obviousness" risks, can have no application to a six-year old under these circumstances.

Roberts v. New York City Housing Authority, 257 A.D.2d 550, 685 N.Y.S.2d 23 (1st Dep't 1999).

[EDITOR'S NOTE: The court applied the doctrine of assumption of risk to an 11-year-old in *Auwarter v. Malverne Union Free School Dist.*, 274 A.D.2d 528, 715 N.Y.S.2d 852 (2d Dep't 2000), where an 11-year-old infant was injured when he fell while playing on and around "jungle gym" type playground equipment and where there was inadequate protective surfacing].

NEGLIGENCE—ASSUMPTION OF RISK—AIRPLANE RACE—MIDAIR COLLISION

Widow of pilot killed in midair collision immediately following an airplane race is precluded from recovery for wrongful death because decedent's electing to participate in such an activity operates to relieve other participants in the activity of a duty to use reasonable care under the doctrine of assumption of risk:

> According to the New York Court of Appeals, the inquiry into whether an individual has assumed the risks inherent in a sport or recreational activity "includes consideration of the participant's knowledge and experience in the activity generally."
>
> * * *
>
> With these principles and examples of New York law in mind, we are confident that the New York Court of Appeals would hold that the present action is barred by the doctrine of primary assumption of the risk. The sport of Formula V air racing involves flying small home-built airplanes using converted car engines in tight formation, as speeds of 100 to 200 miles per hour, and at altitudes of 30 to 150 feet. The risk of a fatal crash, whether as a result of a midair collision or some other

cause, plainly inheres in one's participation in this sport, as is evidenced by the fact that there had been several accidents in previous air races that resulted in death or serious injury to pilots and the fact that the sponsoring Association explicitly warns pilots that there is a risk of midair collisions (and that such collisions "usually" result in the deaths of both pilots).

* * *

Further, Goodlett was obviously aware of the risks involved. He had been flying airplanes for over 23 years, and had worked as both a commercial pilot and a flight instructor; he had participated in a number of previous Formula V air races (and, on several occasions, was forced to make emergency landings due to engine failure); and, at the time of his death, he served as President of the Association, the organization that sponsors the air races and cautions pilots about the "potential for injury or death." In short "[t]he accident in this case was solely the result of dangers and calculations inherent in a highly dangerous sport," and these dangers were both "fully comprehended" by Goodlett and "perfectly obvious." Accordingly, the doctrine of primary assumption of risk applies, and Kalishek may not be held liable for Goodlett's death.

Goodlett v. Kalishek, 223 F.3d 32 (2d Cir. 2000).

NEGLIGENCE—DOG BITE—PIT BULL

Absent evidence that a pit bull owned by another tenant had attacked any other individual or previously displayed any vicious tendencies, the landlord may not be cast in damages. The court cannot take judicial notice that pit bulls are generally vicious and have vicious propensities:

> Before a pet owner, or the landlord of the building in which the pet lives, may be held strictly liable for an injury inflicted by the animal, the plaintiff must establish both (1) that the animal had vicious propensities and (2) that the defendant knew or should have known of the animal's propensities.
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> * * *
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> Furthermore, scientific evidence more definitive than articles discussing the dogs' breeding history is necessary before it is established that pit bulls, merely by virtue of their genetic inheritance, are inherently vicious or unsuited for domestic living, such as, for instance, wolves and leopards would be. No statistical analysis is offered to demonstrate that a high percentage of the total number of pit bulls has engaged in violent incidents.
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> * * *
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> The defendants' failure to enforce the "No Pets" provision of the lease cannot be characterized as a proximate cause of plaintiff's injuries. There is no causal connection between the lease violation and plaintiff's injuries, particularly in the absence of any demonstrated reliance on the lease clause by the plaintiff.

Carter v. Metro North Associates, 225 A.D.2d 251, 680 N.Y.S.2d 239 (1st Dep't 1998).

NEGLIGENCE—DUTY—INSTALLER/ TEMPORARY TRAFFIC LIGHT

Installer of a temporary traffic light at intersection owed duty to pedestrian and is liable when the traffic light malfunctioned. The court rejected installer's argument that the only duty it owed was to the state who contracted with it and not to the general public:

> The duties imposed upon Yonkers [installer] under its contract with the DOT were comprehensive and included all responsibility for the temporary traffic signals installed at the site as well as the responsibility to "[p]rovide adequate protection for pedestrian traffic during all phases of construction." Thus, it is reasonable to conclude that Yonkers's responsibilities were not only for compliance with the contractual undertakings, but also for the broader purpose of ensuring the safety of the public. The reasonable expectation of pedestrians that the temporary traffic signal would be maintained so as to permit safe passage is consonant with the expectation of Yonkers regarding its duty under the contract.

Uvaydova v. J.W.P. Welsbach Electric Corp., 275 A.D.2d 776, 713 N.Y.S.2d 751 (2d Dep't 2000).

NEGLIGENCE—DUTY TO WARN—OPEN AND OBVIOUS

Department store cannot be cast in damages for plaintiff's injuries when her foot became caught on the bottom of a clothes bin located at the top of two steps in defendant's department store:

> The record establishes that the bin did not present an inherently dangerous condition. Furthermore, since the bin was readily observable by the reasonable use of one's senses, the appellant had no duty to warn the injured plaintiff of the allegedly dangerous condition.

Thomas v. Price-Mart, Inc., 267 A.D.2d 374, 699 N.Y.S.2d 729 (2d Dep't 1999).

[EDITOR'S NOTE: Not all cases involving the principle that when a dangerous condition is in plain view and observable by a plaintiff by the reasonable use of his or her senses, that there may be no duty to warn of the condition, and defendant is absolved of liability. Where the defendant is under a duty not to create a dangerous condition that is likely to pose a foreseeable risk of injury, the principle will not apply. In *Vliet v. Crowley Foods, Inc.*, 263 A.D.2d 941, 693 N.Y.S.2d 338 (3d Dep't 1999), a wholesale milk vendor's delivery person violated a duty owed when he stacked milk in the store's walk-in cooler in column seven to nine crates high and failed to insure that the crates' interlocking mechanisms were engaged. In addition, the court held that the extent to which the positioning of the top crate was readily observable, it was also relevant to the issue of comparative negligence and not to defendant's duty to stack the crates in a safe manner. The court affirmed the denial of summary judgment to the wholesale milk vendor.]

NEGLIGENCE—ECONOMIC DAMAGES/NO PERSONAL PROPERTY INJURY

Business stores, who could not open because the City closed streets to vehicular and pedestrian traffic after a section of a high-rise office building collapsed and fell, have a cause of action for negligence and public nuisance:

> A deviation from the "economic loss rule" is appropriate on the facts of this case because of defendants' alleged knowledge and reckless disregard of the risk of creating approximately 90 new windows throughout the south wall of a skyscraper, and conducting other renovation to the base of this building, which already had major pre-existing structural defects. Under such alleged scenario, defendants should have anticipated that those pre-existing problems would negatively affect the planned renovation, and could foreseeably result in injury to others. That the injuries were not catastrophic to the thousands of people who generally frequent this area was fortuitous, because the collapse took place on a Sunday, shortly after noon.
>
> Allowing the negligence cause of action here to proceed properly allocates the risk of loss and the costs of engaging in dangerous activities such as defendants are alleged to have done. Holding defendants liable for their tortious acts creates an incentive for others not to follow suit but to act reasonably with regard for the safety of others.

532 Madison Avenue Gourmet Foods, Inc. v. Finlandia Center, Inc., 271 A.D.2d 49, 711 N.Y.S.2d 391 (1st Dep't 2000)**.**

[EDITOR'S NOTE: Two justices dissented, noting that without a legally cognizable relationship and without physical injury or property damage, mere economic loss is not recoverable in tort.

See also 5th Avenue Chocolatiere, Ltd. v. 540 Acquisition Co., L.L.C., 272 A.D.2d 23, 712 N.Y.S.2d. 8 (1st Dep't 2000). The court also in the same incident allowed two businesses to sue for lost profits during the period the street was closed despite absence of property damage to the businesses. But, the court refused to extend the doctrine to a law firm in the same vicinity to sue for damages absent any alleged physical property damage because the connection between the defendant's activities and plaintiff's economic losses alleged to have resulted from the closing of the street is "too tenuous and remote to promote recovery on any tort theory." *See Goldberg Weprin & Ustin, LLP v. Tishman Const. Corp.*, 275 A.D.2d 614, 713 N.Y.S.2d 57 (1st Dep't 2000).]

NEGLIGENCE—FALLING STACKED BOXES

The court properly invoked the doctrine of *res ipsa loquitur* to hold store owner liable to plaintiff who was injured when 19 boxes fell off an overhead riser, striking her:

> The boxes were stacked four feet high on the riser, which was six feet off the floor. Although the shelves below the riser were intended for direct customer access, merchandise on the riser was for

> restocking only. Signs were posted directing customers to "please ask for help" rather than trying to reach that merchandise themselves, and a special ladder was used by defendant's employees to access the riser. The requirement of exclusivity "does not mean that "the possibility of other causes must be altogether eliminated, but only that their likelihood must be so reduced that the greater probability lies at defendant's door." Here, "it is unlikely that the accident was caused by the negligence of a third party and . . . it is more probable that it was caused by defendant's negligence."

Durso v. Wal-Mart Stores, Inc., 270 A.D.2d 877, 705 N.Y.S.2d 137 (4th Dep't 2000).

NEGLIGENCE—FIREFIGHTER'S RULE—SANITATION WORKER

Sanitation worker who was injured when he fell on a defective sidewalk is not barred by the common law firefighter's rule from recovering against negligent property owner:

> The "determinative factor" in applying the firefighter's rule is "whether the injury sustained is related to the particular dangers which police [municipal] officers are expected to assume as part of their duties."
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> * * *
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> Applying the determinative factor articulated in *Cooper* [*v. City of New York*, 81 N.Y.2d 584, 601 N.Y.S.2d 432 (1993)], we conclude that the rule does not include sanitation workers. Contrary to the city's contentions, city sanitation workers are not expected or trained to assume the hazards routinely encountered by police officers and firefighters. In fact, plaintiff notes that sanitation workers are required to pick up garbage in situations where doing so will compromise their safety.
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> * * *
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> Extending this rule to New York City sanitation workers—whose employment does not entail securing public interests at an increased risk of injury to themselves—would abrogate the rule's underlying policy rationale.

Ciervo v. City of New York, 93 N.Y. 2d 465, 693 N.Y.S.2d 63 (1999).

NEGLIGENCE—FORESEEABILITY—BUS

Plaintiff has no cause of action against a bus company because its driver failed to warn her to keep windows closed on Halloween and she was struck in the eye by a hard-boiled egg thrown by a masked Halloween miscreant:

> Completely absent from this case, however, is the element of foreseeability. There is not a shred of evidence in the record that there had been any prior egg-throwing incidents directed at MABSTOA buses on Halloween, or any similar incidents involving objects being hurled at vehicles in general. Likewise, there is no evidence that the defendant's driver knew or should have known that such an occurrence was imminent. Since MABSTOA was unaware of any foreseeable risk of dangers to its passengers, a duty to warn them or to take other preventative measures never arose. Plaintiff's assumption that an egg-throwing attack directed at a MABSTOA bus on Halloween is so common as to always be foreseeable is without merit.

Daniels v. MABSTOA, 261 A.D.2d 115, 689 N.Y.S.2d 463 (1st Dep't 1999).

NEGLIGENCE—HIT IN THE REAR—STOP AND GO TRAFFIC

Police Officer who struck stopped vehicle in the rear is negligent notwithstanding her claim that plaintiff came to a sudden and unexpected stop. Officer admitted in her deposition that she looked to the right while traffic was moving and when she turned her attention back to the road, she struck plaintiff's stopped vehicle:

> As a matter of law, a rear-end collision with a stopped car establishes a prima facie case of negligence on the part of the driver of the rear vehicle. Evidence that plaintiff's lead vehicle was forced to stop suddenly in heavy traffic does not amount to proof that plaintiff was in any way at fault for the accident. As it can easily be anticipated that cars up ahead will make frequent stops in rush hour traffic, "defendant driver's failure to anticipate and react to the slow and cautious movement of plaintiff's vehi-

> cle" is not an adequate, non-negligent explanation for the accident. Rather, [Police Officer] Sullivan clearly fell below the appropriate standard of care when she looked away from the road while traffic was moving, which then rendered her unable to react quickly enough when Diller's car came to a stop.

Diller v. City of New York Police Department, 269 A.D.2d 143, 701 N.Y.S.2d 432 (1st Dep't 2000).

[EDITOR'S NOTE: In limited circumstances, a jury question is presented whether the driver of the rear-ended vehicle shares a portion of liability. In *Niemiec v. Jones*, 237 A.D.2d 267, 654 N.Y.S.2d 163 (2d. Dep't 1997), the court held that a driver of a motor vehicle has a duty to keep proper control of the vehicle and not to stop suddenly or slow down without proper signaling so as to avoid a collision. *See also Maschka v. Newman*, 262 A.D.2d 615, 692 N.Y.S.2d 472 (2d. Dep't 1999) (question of fact whether preceding driver contributed to rear-end collision by making sudden stop and failing to signal left turn.)]

NEGLIGENCE—INDEPENDENT CONTRACTOR/CLEANING SERVICE

The act of mopping a floor is not work of an inherently dangerous nature as to render a building owner liable for the negligence of an independent contractor:

> The plaintiff Sara Spitzer slipped and fell in a shopping center owned or operated by the respondents, allegedly as the result of a condition created by a maintenance worker, who was seen in the vicinity with a mop. In support of their motion for summary judgment, the respondents produced competent evidence which showed that such cleaning services were not performed by their employees, but rather by the employees of an independent contractor. Since the cleaning activity in question was not intrinsically dangerous, and since there was no proof that the respondents controlled the contractor's work, the respondents, as owners of the premises, cannot be held liable for the negligent performance of such services by an independent contractor.

Spitzer v. Kings Plaza Shopping Center of Flatbush Avenue, Inc., 275 A.D.2d 450, 713 N.Y.S.2d 68 (2d Dep't 2000).

NEGLIGENCE—INTERVENING CAUSE/ FACTUAL QUESTION—EMERGENCY SITUATION/ESCAPING ELEVATOR STUCK BETWEEN FLOORS

Plaintiff's lowering himself from a stuck elevator resulting in his falling to the bottom of the elevator shaft was not a superseding cause, relieving defendant of liability as a matter of law:

> It cannot be said, as a matter of law, that the plaintiff's conduct was a superseding intervening act which broke the causal connection between their alleged negligence and his injuries. It is well established that an intervening act constitutes a superseding cause and relieves the defendant of liability when "the act is of such extraordinary nature or so attenuates defendant's negligence from the ultimate injury that responsibility for the injury may not be reasonably attributed to the defendant." Here, there is a question of fact as to whether the plaintiff's conduct was a foreseeable consequence of an emergency situation created by the defendants' alleged negligence.

Humbach v. Goldstein, 225 A.D.2d 420, 686 N.Y.S.2d 54 (2d Dep't 1998).

[EDITOR'S NOTE: A year later, the Court of Appeals in *Egan v. A.J. Constr. Corp.*, 94 N.Y.2d 839, 702 N.Y.S.2d 574 (1999), held that a worker who jumped six feet from a stalled freight elevator to the lobby floor of the building in which he was working, was not foreseeable and was a superseding cause:

> Plaintiff's jump superseded defendants' conduct and terminated defendants' liability for his injuries.

The court distinguished this case from *Humbach*:

> In that case, plaintiff sustained serious injuries when he fell while attempting to lower himself from a stalled elevator to the nearest floor. Unlike the instant case, however, plaintiff and his fellow passengers in *Humbach*, who were on an elevator at about midnight when it stalled, "pressed the buttons for other floors, pushed the alarm button, pounded on the walls and screamed for help but no one responded" for an uncertain period of time. Thus, in contrast to the case before us, *Humbach* presented an issue of fact as to whether

> plaintiff's conduct was a foreseeable consequence of an emergency situation created by the defendants' alleged negligence.]

NEGLIGENCE—INTERVENING AND SUPERSEDING CAUSE

Plaintiff's failure to look through the peephole before opening the door after the doorbell rang is not an intervening act as a matter of law severing the causal relationship from the landlord's alleged negligence in providing security against intruders and the ability of the intruder who attacked plaintiff to gain access to her apartment. It is a question of fact for the jury:

> Given the circumstances of this case, it cannot be said, as a matter of law, that plaintiff's opening of her apartment door, without looking through the peephole or inquiring who was at the door, was an independent intervening act which did not flow from defendants' alleged negligence in permitting a known troublemaker to enter the premises and gain access to plaintiff's apartment, thus relieving defendants of any liability.

Mason v. U.E.S.S. Leasing Corp., 274 A.D.2d 79, 712 N.Y.S.2d 465 (1st Dep't 2000).

[EDITOR'S NOTE: Two judges dissented:

> The basic point remains the same—we have exclusively reposed responsibility for assaults within the apartment on tenants who provided access to perpetrators, albeit inadvertently, by failing to ascertain, despite the availability of means to do so, who was at the door.]

NEGLIGENCE—LABOR LAW § 200—CONSTRUCTION MANAGER

Plaintiff, who was injured on a construction site, cannot sue the construction manager absent establishing that the construction manager directed or controlled the manner in which he carried out his task:

> The record contains no evidence that Lehrer McGovern directed or controlled the manner in which Loiacono carried out his task. Although Lehrer McGovern coordinated the contractors at the site, told contractors where to work on a given day, and had the authority to review safety on the site, this conduct does not rise to the level of supervision or control necessary to hold Lehrer McGovern liable for Loiacono's injuries. As Loiacono testified at his examination before trial, his employer supplied him with his equipment for the job, and he determined how to go about installing the stone on his own.

Loiacono v. Lehrer McGovern Bovis, Inc., 270 A.D.2d 464, 704 N.Y.S.2d 658 (2d Dep't 2000).

NEGLIGENCE—LABOR LAW § 240(1)—ALIGHTING FROM CONSTRUCTION VEHICLE—ELEVATION-RELATED RISK

Plaintiff is not protected under Labor Law § 240(1) when using a construction vehicle track system as a step down, he slipped on a spot of grease on the track and fell off the track:

> As a matter of law, the risk of alighting from the construction vehicle was not an elevation-related risk which calls for any of the protective devices of the types listed in Labor Law § 240(1).

Bond v. York Hunter Construction, Inc., 95 N.Y.2d 883, 715 N.Y.S.2d 209 (2000), *aff'g*, 270 A.D.2d 112, 705 N.Y.S.2d 40 (1st Dep't 2000).

NEGLIGENCE—LABOR LAW § 240(1)—COVERED PARTY

Plaintiff, an "environmental inspector" whose company was hired to provide asbestos inspection services during phase one of "Operation Clean House," a two-phase project to identify and remove asbestos from New York City public schools, is not a covered party under Labor Law § 240(1) for injuries sustained when he fell from a desk:

> While the reach of section 240(1) is not limited to work performed on actual construction sites, the task in which an injured employee was engaged must have been performed during "the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure." Here, plaintiff's work as an environmental inspector during phase one was merely investigatory, and was to terminate prior to the actual commencement of any subsequent asbestos removal work. In fact, none of the activities enumerated in the statute was underway, and any future repair work would not even be con-

> ducted by Kaselaan, plaintiff's supervisor, but by some other entity. Thus, plaintiff was "not a person 'employed' to carry out the repairs as that term is used" in section 240(1).

Martinez v. City of New York, 93 N.Y.2d 332, 690 N.Y.S.2d 524 (1999).

NEGLIGENCE—LABOR LAW § 240(1)—COVERED PERSONS

Plaintiff, who owned the building where he was injured as well as being the sole shareholder, officer and director of the defendant corporation, is not a covered person under Labor Law § 240(1) when he fell off the roof of defendant's place of business while attempting to secure a metal sheet over an air-conditioning unit:

> Defendant submitted proof establishing that plaintiff is both the owner of the building where the accident occurred and the sole shareholder, officer and director of defendant corporation. Plaintiff therefore was not "working for another for hire" (Labor Law § 2[5]) and did not come within the class of persons projected by the Labor Law.

Scott v. Scott's Landing, Inc., 277 A.D.2d 918, 715 N.Y.S.2d 135 (4th Dep't 2000).

NEGLIGENCE—LABOR LAW § 240(1)—ELEVATION-RELATED RISK

Plaintiff cannot invoke Labor Law § 240(1) because his injury did not result from an elevated-related risk. Plaintiff was injured as he stepped from the bottom rung of a ladder onto a drop cloth covering the carpeted floor, tripping over a concealed portable light located underneath the cloth. His right foot remained on the ladder as his left foot hit the concealed object on the floor, causing him to twist his ankle, fall and incur injuries:

> The core objective of the statute in requiring protective devices for those working at heights is to allow them to complete their work safely and prevent them from falling. Where an injury results from a separate hazard and wholly unrelated to the risk which brought about the need for the safety device in the first instance, no section 240(1) liability exists.
>
> Here, the ladder was effective in preventing plaintiff from falling during performance of the ceiling sprinkler installation. Thus, the core objective of section 240(1) was met. As in *Ross* [*v. Curtis Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494, 601 N.Y.S.2d 49 (1993)] and *Melber* [*v. 6333 Main Street*, 91 N.Y.2d 759, 676 N.Y.S.2d 104 (1998)], plaintiff's injury resulted from a separate hazard wholly unrelated to the danger that brought about the need for the ladder in the first instance—an unnoticed or concealed object on the floor. There was no evidence of any defective condition of the ladder or instability in its placement. Hence, the risk to plaintiff was not the type of extraordinary peril section 240(1) was designed to prevent. Rather, his injuries were the result of the usual and ordinary danger at a construction site. Therefore plaintiff is not entitled to Labor Law §240(1) protection because no true elevation risk was involved here.

Nieves v. Five Boro Air Conditioning & Refrigeration Corp., 93 N.Y.2d 914, 690 N.Y.S.2d 852 (1999).

NEGLIGENCE—LABOR LAW § 240(1)—FALL/18 TO 36 INCHES

Plaintiff who fell a distance between 18 and 36 inches from lumber (whaler)—used to shore up hole around cement form—to the bottom of the hole, is not protected by Labor Law § 240(1):

> The record makes plain that the whaler upon which Gile [plaintiff] stood in order to more conveniently reach the cement chute with his shovel was not intended for such use. Furthermore, the whaler was a mere four to six inches above ground level, which hardly constituted an elevated work site exposing Gile to the types of hazards contemplated by Labor Law § 240(1). Simply stated, this case presents nothing more than a laborer who slipped and fell into a ditch or trench that was considerably less than three feet deep—an occurrence that repeatedly has been found not to be protected by Labor Law § 240(1).

Gile v. General Electric Company, 272 A.D.2d 833, 708 N.Y.S.2d 188 (3d Dep't 2000).

NEGLIGENCE—LABOR LAW § 240(1)—FLATBED TRUCK—FOUR AND A HALF FEET

Plaintiff who fell four and a half feet from a flatbed truck is not entitled to invoke Labor Law § 240(1):

> The narrow question to resolve in this case is whether the surface of a flatbed truck constitutes an elevated work surface for purposes of Labor Law § 240(1). We conclude that it does not. . . . Labor Law § 240(1) does not cover plaintiff's accident because there was no exceptionally dangerous condition posed by the elevation differential between the flatbed portion of the truck and the ground, and there was no significant risk inherent in the particular task plaintiff was performing because of the relative elevation at which he was performing that task.

Tillman v. Triou's Homes, 253 A.D.2d 254, 687 N.Y.S.2d 506 (4th Dep't 1999).

NEGLIGENCE—LABOR LAW § 240(1)/FOUR-FOOT ELEVATION—BLOOD ALCOHOL LEVEL

Plaintiff, who was alleged to have been drinking before falling off a four-foot mobile scaffold without guard rails and wheels in a locked-in position is entitled to recover under Labor Law § 240(1) since the scaffold did not give him proper protection: "The four-foot elevation of the scaffold cannot be said to have posed a gravity-related risk that was 'minuscule.' Nor can it be said that plaintiff's alleged intoxication was the sole proximate cause of the accident."

Haulotte v. Prudential Insurance Co. of America, 266 A.D.2d 38, 698 N.Y.S.2d 24 (1st Dep't 1999).

NEGLIGENCE—LABOR LAW § 240(1)—INSTALLING/REPLACING WINDOW SCREENS

Handyman, who fell from a ladder while installing and/or replacing window screens at a motel, is not covered under Labor Law §§ 240(1) and 241(6):

> Contrary to the plaintiffs' contention, Mr. Rogala was not "making a *significant* physical change to the configuration or composition of the building" at the time of his accident and, therefore, was not engaged in "altering" the motel within the meaning of Labor Law § 240(1). Nor was Mr. Rogala engaged in repair work. Rather, he was performing routine maintenance.
>
> Dismissal of the Labor Law § 241(6) claim was also proper where, as here, the accident at issue "did not arise in a 'construction' context."

Rogala v. Caspar Van Bourgondien, 263 A.D.2d 535, 693 N.Y.S.2d 204 (2d Dep't 1999), *lv. to appeal dnd.*, 94 N.Y.2d 758, 705 N.Y.S.2d 5 (2000).

NEGLIGENCE—LABOR LAW § 240(1)—OWNER/OCCUPANCY PERMITEE/OWNER'S AGENT

Semaphore, a wholly-owned subsidiary of Universal City Studios, Inc., who was granted the use of the Park Slope Armory by the fee owner, City of New York, is liable under Labor Law § 240(1) as the owner's agent for injuries sustained by a scene painter even though Universal Studios was the entity responsible for the day-to-day production of the movie:

> The key criterion is "the right to insist that proper safety practices were followed and it is the right to control the work that is significant, not the actual exercise or nonexercise of control."
>
> Notwithstanding the distribution of responsibilities as between the two sister corporations, it was Semaphore, as permitee, that was contractually charged with the right and the obligation to control the work site, and the responsibility of ensuring that the work contemplated by the permit was performed in a safe and proper manner. The Occupancy Permit granted to Semaphore was broad in scope. Among other things, it provided (paragraph 17) that Semaphore had the authority to construct and install temporary structures on the set, and the obligation to keep all such structures in good repair (paragraph 13). Further, the Permit required Semaphore to comply with all applicable law to be a financially responsible party by obtaining insurance.
>
> The foregoing authority vested in Semaphore by means of the permit requires the conclusion that Semaphore must be deemed an agent of the fee owner (City of New York) for purposes of liability under the applicable Labor Law sections.

Bart v. Universal Pictures, et al., 277 A.D.2d 4, 715 N.Y.S.2d 240 (1st Dep't 2000).

NEGLIGENCE—LABOR LAW § 240(1)—WALLPAPERING

Plaintiff who fell off a ladder while engaged in removing and replacing wallpaper in a vacant apartment is not protected under Labor Law § 240(1) since she was not engaged in one of the statute's enumerated activities or engaged in work sufficiently necessary and incidental to one of the enumerated activities:

> Notably, wallpapering is not, and never has been explicitly among the enumerated protected activities, although plaintiffs argue that it should be subsumed under either "painting" or "alteration." It is uncontroverted that, at the time of plaintiff's injury, there was no construction or other activity enumerated in Labor Law §240(1) underway at the apartment building, and that the wallpapering was not performed incidental to any other enumerated activity. Importantly, in construing this statute, we endeavor—as we should—to ascertain its "fair and reasonable meaning" and to avoid "a construction which either extends or limits its provisions beyond that which was evidently intended."
>
> * * *
>
> We are unable to conclude that removing and replacing wallpaper constitutes a significant physical change to the apartment's or to the apartment building's configuration or composition so as to fall within the statutory term altering.
>
> * * *
>
> It cannot be said that the existing wallpaper or walls behind it were broken, inoperable or not functioning properly, therefore, plaintiff was not engaged in repairing under Labor Law §240(1). . . . Were we to conclude that every such modification to, or improvement of, a wall surface constitutes a repair we would "render superfluous such statutory terms as "painting" and "pointing," and our holding would be "tantamount to a ruling that all work related falls of ladders fall within . . . Section 240." Thus, plaintiff was not engaged in repairing work within the meaning of Labor Law §240(1).

La Fontaine v. Albany Management, Inc., 257 A.D.2d 319, 691 N.Y.S.2d 640 (3d. Dep't 1999), *lv. to appeal dnd.*, 94 N.Y.2d 751, 699 N.Y.S.2d 6 (1999).

NEGLIGENCE—LABOR LAW §§ 202 AND 240(1)—WINDOW CLEANER

Labor Law § 202, which establishes safety standards for window cleaners, is the exclusive remedy for a window cleaner who fell while cleaning a third-story window:

> In short, with the enactment of Labor Law § 202, window cleaners were afforded absolute liability against owners of all buildings except dwellings while working at elevated heights, the precise protection afforded other enumerated workers under Labor Law § 240. Thus, we agree with defendant that to conclude that the Legislature at the time of the enactment of Labor Law § 202 intended that the protections of Labor Law § 240 also would encompass window cleaners "would have the effect of making Labor Law [§ 202] . . . virtually useless." Such an interpretation clearly would be contrary to accepted rules of statutory construction.

Bauer v. Female Academy of the Sacred Heart, 250 A.D.2d 298, 682 N.Y.S.2d 708 (3d Dep't 1999).

[EDITOR'S NOTE: Two judges dissented, pointing out that Labor Law § 240(1) applies because the activity engaged in by the plaintiff may not constitute "cleaning" within the meaning of Labor Law § 202.

The First, Second and Fourth Departments hold that Labor Law § 202 does not preclude a window cleaner's cause of action under Labor Law § 240(1). *See Cruz v. Bridge Harbor Hgts. Assocs.*, 249 A.D.2d 44, 671 N.Y.S.2d 72 (1st Dep't 1998); *Williamson v. 16 West 57th Street Co.*, 256 A.D.2d 507, 683 N.Y.S.2d 548 (2d Dep't 1998) 1998 WL909890 and *Ferrari v. Niasher Realty*, 175 A.D.2d 591, 573 N.Y.S.2d 794 (4th Dep't 1991).

The Court of Appeals has yet to rule on this issue.

Plaintiff tried the case under Labor Law § 202 and was awarded $3,351,933 only to have the verdict set aside because the trial judge instructing the jury on Labor Law § 202 that as a matter of law defendants were liable to plaintiff because they breached their statutory duty under Labor Law § 202, having failed to comply with the rules and regulations established by the Industrial Board of Appeals. The Third Department held that Labor Law § 202, as amended in 1970, is no longer self executing because it defers to the safety stan-

dards set forth in the implementing regulations adopted by the Industrial Board and, as such, any violation of those regulations is merely some evidence of negligence to which comparative negligence applies.]

NEGLIGENCE—LABOR LAW § 241(6)—OSHA VIOLATIONS

Plaintiff, injured when a bulldozer backed over him, cannot invoke violation of OSHA regulations to sustain a Labor Law § 241(6) cause of action:

> We reject the contention of plaintiffs that they may rely upon a violation of a regulation promulgated under the Occupational Safety and Health Act (OSHA) to support the Labor Law § 241(6) cause of action. It is well settled that an OSHA regulation generally cannot provide a basis for liability under Labor Law § 241(6). The OSHA regulation cited by plaintiff imposes a nondelegable duty upon the employer, rather than the owner, to enforce that regulation, and thus it cannot be relief upon by plaintiffs as a basis for liability under Labor Law § 241(6).

Millard v. City of Ogdensburg, 274 A.D.2d 953, 710 N.Y.S.2d 507 (4th Dep't 2000).

NEGLIGENCE—LABOR LAW—PRIME CONTRACTOR—GENERAL CONTRACTOR

Prime contractor who exercised no supervisory control over plaintiff's work or plaintiff's employer was not liable to plaintiff for common law negligence and Labor Law § 200:

> The court erred in denying that part of the motion of McMorris [who held the contract for constructing the steel building] for summary judgment dismissing the Labor Law § 200 and common-law negligence claims against him. McMorris exercised no supervisory control over plaintiff or Edison's work.

The court rejected plaintiff's argument that McMorris was a general contractor and thus liable under Labor Law §§ 240(1) and 241(6):

> A general contractor will be held liable under those sections if it was responsible for coordinating and supervising the entire construction project and was invested with a concomitant power to enforce safety standards and to hire responsible contractors. The mere status or designation of general contractor, however, does not establish liability. There is a distinction between a general contractor and a prime contractor for general construction.
>
> * * *
>
> Here, as in *Walsh* [*v. Sweet Assocs.*, 172 A.D.2d 111, 577 N.Y.S.2d 224 (4th Dep't 1991), *lv. denied*, 79 N.Y.2d 755, 581 N.Y.S.2d 666 (1992)], there was a prime contractor for general construction (McMorris) and a prime contractor (Edison) for the erection of the I-beams and plate wall. McMorris had no control over plaintiff's work and did not have the authority to control the activities of plaintiff or Edison.

Kulaszewski v. Clinton Disposal Services, et al., 272 A.D.2d 855, 707 N.Y.S.2d 558 (4th Dep't 2000).

NEGLIGENCE—LABOR LAW § 240(1)—REPLACEMENT OF PARTS

Plaintiff, who was replacing a broken belt and adjusting a worn pulley on an air conditioner at defendant's building, cannot invoke Labor Law § 240(1) when he fell in a hole:

> Case law indicates that replacement of parts that wear out routinely should be considered maintenance, outside the purview of Labor Law § 240(1), as opposed to replacement of the nonfunctioning components of a building or structure. As in *Rowlett* [*v. Great S. Bay Assoc.*, 237 A.D.2d 183, 655 N.Y.S.2d 16 (1st Dep't 1997)], Jehle's tasks on the day of the accident merely involved replacing or repairing relatively small components that suffered from normal wear and tear, not major structural work. Thus, Honeywell has no liability under Labor Law § 240(1).

Jehle v. Adams Hotel Associates, 264 A.D.2d 354, 695 N.Y.S.2d 22 (1st Dep't 1999).

NEGLIGENCE—LEGAL MALPRACTICE—CONTRIBUTION/INITIAL TORTFEASOR

Defendant law firm, sued for legal malpractice in failing to timely commence an action against a municipality, cannot implead plaintiff's employer, DDI Enterprises, for contribution based on its negligence in the initial action. DDI argued that the personal injuries

suffered by the plaintiff was not the same injury suffered as a result of legal malpractice:

> Pursuant to CPLR 1401, "two or more persons who are subject to liability for damages for the same personal injury, injury to property or wrongful death, may claim contribution among them." Thus, contribution may be obtained if the breach of duty by a third-party defendant "had a part in causing" the same injury for which contribution is sought. Here, however, the injury allegedly caused by Jacoby & Meyers, i.e., the loss of certain legal rights, is not the same injury as the one allegedly caused by DDI's alleged negligence in the automobile accident. While the third-party plaintiff Jacoby & Meyers and DDI allegedly violated duties to the plaintiffs, they did not share in responsibility for the same injury.

Gonzalez v. Jacoby & Meyers, 258 A.D.2d 560, 685 N.Y.S.2d 461(2d Dep't 1999).

NEGLIGENCE—PREMISES—NEGLIGENTLY SECURED PREMISES—CRIMINAL CONDUCT—UNIDENTIFIED ASSAILANTS—PROXIMATE CAUSE

The appellate court erred in dismissing actions of tenants who were assaulted in their building even though tenants could not identify assailants as "uninvited strangers to the building." The Appellate Division had improperly ruled in favor of premises owners because plaintiffs could not prove assailant was intruder:

> Because victims of criminal assault often cannot identify their attackers, a blanket rule precluding recovery whenever the attacker remains unidentified would place an impossible burden on tenants. Moreover, such a rule would undermine the deterrent effect of tort law on negligent landlords, diminishing their incentive to provide and maintain the minimally required security for their tenants.

In discussing proximate cause, the court observed that plaintiff must establish by a preponderance of the evidence that the defendant's negligence was a proximate cause of plaintiff's injuries. However, the court noted:

> A plaintiff is not required to exclude every other possible cause, but need only offer evidence from which proximate cause may be reasonably inferred. Plaintiff's burden of proof on this issue is satisfied if the possibility of another explanation for the event is sufficiently remote or technical "to enable the jury to reach its verdict based not upon speculation, but upon the logical inferences to be drawn from the evidence." When faced with a motion for summary judgment on proximate cause grounds, plaintiff need not prove proximate cause by a preponderance of the evidence, which is plaintiff's proof at trial. Instead, in order to withstand summary judgment, a plaintiff need only raise a triable issue of fact regarding whether defendant's conduct proximately caused plaintiff's injuries.
>
> * * *
>
> A plaintiff who sues a landlord for negligent failure to take minimal precautions to protect tenants from harm can satisfy the proximate cause burden at trial even where the assailant remains unidentified, if the evidence renders it more likely or more reasonable than not that the assailant was an intruder who gained access to the premises through a negligently maintained entrance.

Burgos v. Aqueduct Realty Corp. & Gomez v. New York City Housing Auth., 92 N.Y.2d 544, 684 N.Y.S.2d 139 (1998).

NEGLIGENCE—PREMISES LIABILITY—SLIP AND FALL—PUDDLE—CONSTRUCTIVE NOTICE

Plaintiff, who slipped and fell as a result of a puddle in front of the lobby elevator, did not establish constructive notice that defendant's employees had sufficient time to correct the dangerous condition:

> There is nothing in the record which indicates that the puddle in front of the lobby elevator upon which plaintiff slipped as she was leaving the building was one of the puddles she observed 20 to 25 minutes prior to her fall when she first returned home from work. As such, plaintiff has failed to establish that the particular puddle of water she slipped on existed for an appreciable length of time so as to permit defendant's employees to rectify the dangerous condition. Moreover, it cannot be

> concluded that defendant was affirmatively negligent in causing plaintiff's injuries.

Puryear v. New York City Housing Authority, 255 A.D.2d 138, 680 N.Y.S.2d 9 (1st Dep't 1998).

[EDITOR'S NOTE: In dismissing plaintiff's complaint, the Appellate Division, First Department, recalled its earlier decision affirming the denial of summary judgment. In the earlier decision, 674 N.Y.S.2d 294, the court found constructive notice of a dangerous condition:

> Plaintiff testified at her deposition that it had been raining all day and that the puddle in front of the lobby elevator on which she slipped upon exiting the building was present at least 20 minutes earlier when she entered the building. This allows a reasonable inference that the puddle accumulated gradually as a result of rainwater dripping from persons entering the building and that the process took a sufficient time so that defendant could be charged with constructive notice of the condition.]

NEGLIGENCE—PREMISES OWNER

Restaurant owner is not liable to patron who was suddenly assaulted in the restaurant:

> Only injuries that are foreseeable raise a duty to take reasonable preventive measures. The assault upon the plaintiffs at the appellant's restaurant was sudden and was not an act that the appellants could reasonably be expected to anticipate or prevent. After the appellants made out a prima facie case for summary judgment, the plaintiffs failed to present any evidence raising a triable issue of fact as to whether the risk of assault to the appellants' patrons by third parties was foreseeable, and whether the appellants violated a duty to take precautions to protect their patrons from that risk.

DeCruz v. McDonald's Guttierez Food Corp., 272 A.D.2d 366, 707 N.Y.S.2d 486 (2d Dep't 2000).

[EDITOR'S NOTE: *See also Martinez v. Santoro*, 273 A.D.2d 448, 710 N.Y.S.2d 374 (2d Dep't 2000) [Restaurant owner not liable to plaintiff who was injured when she was knocked down by a panhandler who was opening door to the restaurant.]

NEGLIGENCE—PROXIMATE CAUSE/ INTERVENING CAUSE

Plaintiff, who fell while ascending the basement stairs and lacerated her hand on the serrated edge of the Handi-Wrap box she was holding, cannot sue the manufacturer for negligence and products liability. Plaintiff was unable to establish that any allege defect was a proximate cause of her injury:

> We conclude that the sole proximate cause of plaintiff's injury was her fall, and this independent and intervening act was "so attenuated from the defendants' conduct that responsibility for the injury should not reasonably be attributed to them" thereby severing any alleged negligence or strict products liability. Therefore, any alleged negligence or defect in the product was not a proximate cause of plaintiff's injury, especially in light of the fact that plaintiff acknowledged that had she not slipped and fallen on the step, she would not have cut her hand.

Dickinson v. Dowbrands Inc., 261 A.D.2d 703, 689 N.Y.S.2d 548 (3d Dep't 1999).

NEGLIGENCE—PROXIMATE CAUSE— PROTRUDING DUMPSTER

Defendant is not entitled to summary judgment because questions of fact exist whether dumpster—which plaintiff struck when it was located on the shoulder of the road—was negligently placed and whether it was a proximate cause of plaintiff's injuries:

> The Supreme Court properly denied the appellant's motion for summary judgment. It is well settled that a defendant's negligence does not have to be the sole cause of the injury, but merely a substantial factor in bringing about the injury. Here, Coccia testified at his examination before trial that the dumpster protruded into his driving lane approximately six to seven inches and that the lighting was poor. Accordingly, there are questions of fact as to whether the dumpster was negligently placed in the driving lane and, if so, whether such negligence was a proximate cause of the accident.

DeBartolo v. Coccia, 276 A.D.2d 663, 714 N.Y.S.2d 742 (2d Dep't 2000).

NEGLIGENCE—RECKLESS ACT—FORESEEABILITY

Construction worker, who jumped out of an elevator stalled for 10 to 15 minutes and six feet off the ground sustaining a back injury, has no claim under the Labor Law or common-law negligence:

> As a matter of law, plaintiff's act of jumping out of a stalled elevator six feet above the lobby floor after the elevator's doors had been opened manually was not foreseeable in the normal course of events resulting from defendants' alleged negligence. Plaintiff, an experienced worker, was not threatened by injury while in the stalled elevator, which had come to a smooth stop and remained motionless, quiet and lit. Furthermore, he was aware that the elevator operator had telephoned for assistance. Although plaintiff was inconvenienced, he had only been on the elevator for 10 to 15 minutes when he decided to put his safety at risk by jumping, and there was no indication that the subsequent delay would be inordinately long. Thus, plaintiff's jump superseded defendants' conduct and terminated defendants' liability for his injuries.

Egan v. A.J. Construction Corp., 94 N.Y.2d 839, 702 N.Y.S.2d 574 (1999).

NEGLIGENCE—*RES IPSA LOQUITUR*—SUMMARY JUDGMENT—CLOTHING BAR

Plaintiff, who was struck when a bar on which clothing hung became dislodged from the wall, is entitled to summary judgment under the doctrine of *res ipsa loquitur*:

> Plaintiff met her initial burden by establishing that the event would not ordinarily occur in the absence of someone's negligence; that the bar was within the exclusive control of defendant; and that the event was not due to any voluntary action or contribution by plaintiff. . . . Defendant contends that the element of exclusive control was not established because customer had access to the bar. That conclusory contention is insufficient to raise a material issue of act because defendant submitted no proof that third parties tampered with the bar. Moreover, "'the cause of the [incident] was probably "such that the defendant would be responsible for any negligence connected with it.'" Nor did defendant submit any evidence that plaintiff contributed in any way to causing the incident.

The court denied defendant's cross-motion for summary judgment based upon plaintiff's failure to establish actual or constructive notice of any defect in the bar:

> Such notice is not required in *res ipsa loquitur* cases.

Harmon v. United States Shoe Corp., 262 A.D.2d 1010, 692 N.Y.S.2d 566 (4th Dep't 1999).

NEGLIGENCE—*RESPONDEAT SUPERIOR*—ASSAULT

Supermarket is liable to plaintiff, who was struck by its store manager after the two brushed against each other and the manager threw a punch at plaintiff.

Immediately before the incident, the store manager was unloading a shopping cart of groceries for the cashier to ring up a phone order he was filling. He had an argument with a customer who was waiting in line and objected to having to wait while the manager filled out a telephone order since this was the only check out that was open.

The Appellate Division reinstated plaintiff's verdict which was dismissed after the trial court granted defendant's post trial motion for a directed verdict:

> Indubitably, the store manager was acting within the scope of his employment when he was filling the phone order. The ensuing argument with the woman and the manager's concomitant tension testified to by plaintiff were not clearly unforeseeable by his employer and, unlike *Dykes v. McRoberts Protective Agency*, 256 A.D.2d 2 [680 N.Y.S.2d 513 (1st Dep't 1998)], it cannot be said, as a matter of law, that the manager's apparently unprovoked attack against plaintiff was not carried out within the scope of his employment.
>
> Mere disregard of instructions or deviation from the line of his duty does not relieve his employer of responsibility. "Wrongful acts are usually in violation of orders or in deviation from the strict line of duty. The test is whether the act was done while the servant was doing his master's work, no matter how irregularly, or with what disregard of instructions." Only where the servant

> for his own purposes departs from the line of his duty and abandons his service is his employer not liable. However, to constitute an abandonment of his service, the servant must be serving his own or some other person's purposes wholly independent of his master's business.
>
> Given the facts of this case, it cannot be said, as a matter of law, that the jury had no rational basis for its finding that the store manager was acting within the scope of his employment at the time of his attack on plaintiff and, accordingly, defendant's motion for a directed verdict should have been denied.

Stewartson v. Gristede's Supermarket, Inc., 271 A.D.2d 324, 705 N.Y.S.2d 583 (1st Dep't 2000).

[EDITOR'S NOTE: Justice Wallach dissented. He would have affirmed the order for a directed verdict dismissing the complaint:

> Even under the expansive interpretation of that concept in *Riviello v. Waldron*, 47 N.Y.2d 297 [419 N.Y.S.2d 300 (1979)], plaintiff's evidence, given every possible favorable inference, fell short of the requisite standard as a matter of law. Following the slight "brushing" contact between plaintiff and the manager, each succeeding move by the latter was an act of wild and entirely unforeseeable violence that operated against every conceivable interest of his employer: it quashed the imminent sale to plaintiff, and if plaintiff is to be believed, further damaged and/or put at risk the employer's own merchandise by converting these goods into missiles.]

NEGLIGENCE—*RESPONDEAT SUPERIOR*—SEXUAL ABUSE

Plaintiff who was sexually abused while she was an inpatient at a hospital cannot sue the hospital absent a showing of negligent hiring, retention or supervision:

> The doctrine of *respondeat superior* renders an employer vicariously liable for torts committed by an employee acting within the scope of the employment. Pursuant to this doctrine, the employer may be liable when the employee acts negligently or intentionally, so long as the tortious conduct is generally foreseeable and a natural incident of the employment. If, however, an employee "for purposes of his own departs from the line of his duty so that for the time being his acts constitute an abandonment of his service, the master is not liable." Assuming plaintiff's allegations of sexual abuse are true, it is clear that the employee here departed from his duties for solely personal motives unrelated to the furtherance of the Hospital's business. Accordingly, the courts below properly dismissed plaintiff's *respondeat superior* cause of action.

Judith M. v. Sisters of Charity Hospital, 93 N.Y.2d 932, 693 N.Y.S.2d 67 (1999).

[EDITOR'S NOTE: Not every sexual act, however, will exempt an employer from liability. In *Melbourne v. New York Life Ins. Co.*, 271 A.D.2d 296, 707 N.Y.S.2d 64 (1st Dep't 2000), a paramedical, whose company (Hudson) was hired by IMR, a company conducting paramedical examinations for life insurance companies of insurance applicants, was denied summary judgment when a Hudson employee performed an unauthorized prostrate examination on plaintiff in connection with his application for insurance with New York Life, an examination which was conceded was not part of a paramedical examination:

> With regard to IMR, issues of fact exist regarding the nature of the relationship between IMR and Hudson as well as the circumstances under which Hudson was engaged. We note in particular the possibility that Hudson is nothing more than a shell corporation.
>
> * * *
>
> We, therefore, conclude that issues of fact exist as to whether IMR was negligent in hiring Hudson, whether such negligence was a proximate cause of plaintiff's injuries, and whether IMR could, as a result, be held liable for Hudson's negligence, even if Hudson were found to be an independent contractor.]

NEGLIGENCE—STORE OWNER—STACKING BOXES—DANGEROUS CONDITION

Store owner is not liable to plaintiff who was injured when she was struck by a box of diapers which she tried to remove from the top shelf of a diaper feed rack. The court rejected plaintiff's argument that the store owner created a dangerous condition by placing

the boxes of diapers on the top shelf instead of on the floor and by failing to warn customers that they should not remove items from the top shelf or should request assistance to do so.

The court also rejected the report submitted by plaintiff's engineer:

> To establish the reliability of an expert's opinion, the party offering that opinion must demonstrate that the expert possesses the requisite skill, training, education, knowledge, or experience to render the opinion. In the case at bar, the report of the plaintiff's expert recited that he is a licensed engineer, but no further information was offered to establish any specialized knowledge, experience, training, or education with regard to consumer shelving, package retrieval, or customer safety so as to qualify him as an expert. Moreover, the engineer's report failed to identify any violation of industry-wide standards or accepted practices by the defendant. Therefore, the engineer's conclusions regarding the safety of the shelving and shelf-stocking practices of the defendant were insufficient to raise a genuine issue of material fact.

Hofmann v. Toys "R" US-NY Ltd. Partnership, 272 A.D.2d 296, 707 N.Y.S.2d 641 (2d Dep't 2000).

[EDITOR'S NOTE: Note however, *Sammis v. Nassau/Suffolk Football League*, 95 N.Y.2d 809, 710 N.Y.S.2d 834 (2000), decided after *Hofmann*. In *Sammis*, plaintiff [assistant football coach] was injured when he was assisting defendant Alex Caruano in removing a box from an elevated shelf in an equipment shed at defendant North Babylon Athletic Club. The Appellate Division, Second Department, affirmed the granting of summary judgment to the defendants, stating:

> He had been in the shed approximately 30 times, and was aware that football equipment was stored there. The plaintiff admitted that he volunteered to help move the box and had positioned himself into a very small space. There existed no duty to warn of danger which was obvious and which the plaintiff either did or should have appreciated to the same extent as a warning would have provided (264 A.D.2d 413, 693 N.Y.S.2d 237 [2d Dep't 1999]).

The Court of Appeals modified and reinstated plaintiff's claim:

> Although the Appellate Division did not expressly invoke the doctrine of assumption of risk—a doctrine that does not apply to this case—it erred in concluding that plaintiff's act of helping Caruano remove a box from an elevated shelf relieved defendants of any duty to plaintiff or otherwise established defendants' entitlement to summary judgment. At the same time, the proof also fails to provide a basis for granting plaintiffs partial summary judgment on the question of defendants' liability. On this record, there exist issues of fact as to comparative fault for a fact-finder to consider pursuant to CPLR 1411.]

NEW TRIAL—POST TRIAL HEARING/JURY DISCHARGED—JURY CONFUSION/ "SUBSTANTIAL FACTOR"

Plaintiff is not entitled to a new trial after the court held an unauthorized hearing of jurors following their verdict and discharge even where the hearing disclosed that at least three jurors had been confused by the term "substantial factor." The trial court found that "there is no confusion in the record":

> Jurors may not impeach their own verdict unless they have been subjected to outside influence. There are two exceptions to that rule.
>
> First, juror testimony may be used in certain rare instances to correct ministerial error in reporting the verdict, such as when the foreperson, through an honest mistake, enters the percentages of fault on the wrong lines. However, "this exception to the general rule is not intended to encompass jury error in reaching a verdict."
>
> Second, where there are "inherent defects, confusion or ambiguity in the verdict" the trial court may order a new trial. The confusion must be apparent from the trial record.
>
> * * *
>
> The trial court here questioned the jurors as to confusion they purportedly had in reaching the verdict, after the verdict was accepted and the jury had been discharged. Therefore, the inquiry was not part of the trial record. Indeed,

> as previously noted, that procedure was totally unauthorized.
>
> The problems with permitting such a procedure are apparent here. After the jurors were discharged, they received extrajudicial communications from counsel for the parties, and therefore were exposed to outside influences of the most prejudicial sort. They then had the entire weekend to rehash the deliberations and formulate second thoughts.

Moisakis v. Allied Bldg. Products Corp., 265 A.D.2d 457, 697 N.Y.S.2d 100 (2d Dep't 1999).

PLEADINGS—AMENDED BILL OF PARTICULARS—NOTE OF ISSUE FILED

Plaintiff is not entitled to amend his Bill of Particulars to allege "aggravation-exacerbation of a prior injury and/or condition" after filing Note of Issue since he raised a new theory not in the complaint or in the original Bill of Particulars and failed to offer a reasonable excuse for the delay:

> The Supreme Court improvidently exercised its discretion in granting leave to amend. The plaintiff failed to offer a reasonable excuse for his delay in seeking to amend the bill of particulars until over three years after the accident and after the note of issue was filed. The amendment, if permitted, would require the Housing defendants to reorient the defense strategy, as the plaintiff initially maintained that the 1992 injuries were irrelevant to the instant action. In addition, the plaintiff failed to provide a medical affidavit to establish the merits of his new theory that the 1995 accident aggravated the injuries he sustained in 1992.

Barrera v. City of New York, 265 A.D.2d 516, 697 N.Y.S.2d 132 (2d Dep't 1999).

PLEADINGS—AMENDED BILL OF PARTICULARS—UNTIMELY

It was error for the IAS Court to deny striking plaintiff's Supplemental Verified Bill of Particulars which was in fact an Amended Bill of Particulars because it was untimely, failed to establish a nexus between the new injury—amputation of right leg above the knee—and the alleged malpractice:

> The alleged medical malpractice giving rise to this action occurred in 1991, and the action was commenced in 1993. The original bills of particulars were served in 1993, and the so-called "supplemental verified bill of particulars" was served in 1998. The supplemental verified bill of particulars alleged as additional injuries, *inter alia*, that the injured plaintiff's right leg had been amputated above the knee. Although the amputation occurred in 1994, the injured plaintiff failed to offer a reasonable excuse for his delay in seeking to add it as a new injury until 1998. Moreover, the injured plaintiff failed to submit a medical affidavit establishing a nexus between the new injury and the alleged malpractice. Under these circumstances, the Supreme Court improvidently exercised its discretion in denying that branch of appellants' motion which was to strike the supplemental verified bill of particulars.

DeNicola v. Mary Immaculate Hospital, 505 A.D.2d 272, 708 N.Y.S.2d 152 (2d Dep't 2000).

PLEADINGS—EXCEPTION TO CPLR 1602

Plaintiff may not raise a CPLR 1602 exception against a defendant, whose liability is less than 50 percent, for the first time on appeal. Plaintiff, who failed to plead the exception or seek leave to amend the pleadings to include the allegation at any stage of the action, cannot recover his non-economic loss:

> The limitation of liability prescribed in CPLR 1601(1) is inapplicable when any of 11 exceptions delineated in CPLR 1602 applies. Pursuant to CPLR 1603, a party asserting an exception to article 16 has the affirmative obligation of pleading and proving that exception by a preponderance of the evidence (CPLR 1603). The party asserting the limitation of liability has the burden of proving by a preponderance of the evidence that its share of the liability is 50 percent or less.
>
> * * *
>
> When the language of a statute is clear and unambiguous, courts are obligated to construe the statute so as to give effect to the plain meaning of the words. The plain words of CPLR 1603

> require a plaintiff seeking to recover noneconomic loss from a joint tortfeasor 50 percent or less liable in a personal injury action to "allege and prove by a preponderance of the evidence" that the limitation of liability delineated in CPLR 1601(1) does not apply (CPLR 1603). Implicit in this requirement is that a defendant potentially subject to the weight of a full judgment must have appropriate notice provided by the pleadings.
>
> * * *
>
> Absent such a notice, a defendant is prejudiced by its inability to prepare a defense to the plaintiff's allegations.

Cole v. Mandell Food Stores, Inc., 93 N.Y.2d 34, 687 N.Y.S.2d 598 (1999).

PLEADINGS—FAILURE TO PLEAD ARTICLE 16

Plaintiff, who did not plead the intentional tort or non-delegable duty exemption in Article 16, is precluded from raising it for the first time on appeal:

> Under CPLR 1603, plaintiff was required to affirmatively plead any exemption under Article 16 she wished to have considered. As we noted in *Cole* [*v. Mandell Food Stores*, 93 N.Y.2d 34, 687 N.Y.S.2d 598 (1998)], "in keeping with the liberal rules of CPLR 3205, courts have generally permitted plaintiffs to amend the pleadings at various points throughout an action in order to comply with CPLR 1603." Having failed to plead the exemptions in her original complaint, once the County requested an apportionment charge, plaintiff should have moved to amend her pleading to include any possible Article 16 exemptions. Plaintiff did not do so then or at any time prior to the presentation of the appeal to this Court. We therefore cannot review plaintiff's claims that the intentional tort and non-delegable duty exemptions to Article 16 apply.

Morales v. County of Nassau, 94 N.Y.2d 218, 703 N.Y.S.2d 61 (1999).

PLEADING—LEAVE TO AMEND—FAILURE TO PROCURE INSURANCE

Trial judge properly granted contractor's motion to amend the third-party complaint to assert a claim for breach of contract to procure insurance against subcontractor:

> Leave to amend pleadings should be freely granted absent prejudice or surprise. In the absence of prejudice, mere delay is insufficient to defeat the amendment. Northberry [third-party defendant] has not demonstrated prejudice resulting from Turner's [third-party plaintiff] delay in seeking the amendment. Notably, Northberry had notice of the breach of contract claim since it was asserted in the bill of particulars of the other third-party plaintiffs, which contained a claim identical to the one asserted by Turner. Moreover, Northberry was provided with a copy of the contract between Northberry and Turner together with the bill of particulars.

Sheppard v. Blitman/Atlas Building Corp., 278 A.D.2d 116, 722 N.Y.S.2d 1 (1st Dep't 2000).

PLEADINGS—*RESPONDEAT SUPERIOR*/ NEGLIGENT HIRING—LOW RETENTION CLAIMS

Plaintiff cannot maintain a negligent hiring/retention claim if he is also suing for damages caused by an employee's negligence under a theory of *respondeat superior*:

> Plaintiff's claims against the Guttman Institute alleging that it negligently supervised and retained its employees should have been dismissed since where, as here, an employee is acting within the scope of his or her employment, thereby rendering the employer liable for any damages caused by the employee's negligence under a theory of respondeat superior; no claim may proceed against the employer for negligent hiring or retention.

Weinberg v. Guttman Breast & Diag. Inst., 254 A.D.2d 213, 679 N.Y.S.2d 127 (1st Dep't 1998).

PRE-TRIAL DISCLOSURE—SUPERVISING DISCLOSURE—PRIVATE ATTORNEY—CPLR 3104(b)

An IAS judge cannot appoint a private attorney to serve as a discovery referee unless the parties stipulate. The court erred in *sua sponte* appointing a private attorney to act as a referee to supervise disclosure:

> A review of the legislative history leading up to the passage of the current version of CPLR 3104 leads to the conclusion that it is intended to restrict a court's right to appoint private Referees to supervise disclosure without a stipulation of the parties, in preference for Judicial Hearing Officers who are compensated by the State. We reach this conclusion even though, as a practical consideration, the limited pool of Judicial Hearing Officers makes it difficult to effectively supervise all disclosure, especially in cases presenting special problems.

Ploski v. Riverwood Owners Corporation, 255 A.D.2d 24, 688 N.Y.S.2d 627 (2d Dep't 1999).

PRE-TRIAL DISCOVERY—CONDITIONAL ORDER—ABSOLUTE

Where a party fails to serve a document under a conditional order of preclusion, the conditional order becomes absolute:

> As a result of the plaintiff's failure to comply with a conditional order of preclusion dated February 20, 1998, that conditional order became absolute. In order to avoid the adverse impact of the conditional order of preclusion, the plaintiff was required to either comply with the order or to demonstrate an excusable default and the existence of a meritorious claim. In the instant case, the plaintiff did neither.

Askenazi v. Hymil Mfg. Co., Inc., 263 A.D.2d 443, 692 N.Y.S.2d 705 (2d Dep't 1999).

PRE-TRIAL DISCOVERY—DEFENDANT'S MEDICAL RECORDS

Where defendant driver involved in a two-car collision admits at her deposition that she took Navane and Cogentin for her nerves within 24 hours before the accident, plaintiff is entitled to discover (a) the name and address of defendant's treating psychiatrist and the condition for which she was being treated and (b) pharmaceutical records within a six-month period immediately before the accident:

> Because the plaintiff sought DeStefano's [defendant] medical records, he was required to demonstrate that her physical or mental condition was in controversy. If this burden is satisfied, discovery may still be precluded if the requested information is subject to the physician-patient privilege. If the information sought falls within the privilege, discovery can only be compelled if the privilege has been waived.
>
> The plaintiff sufficiently demonstrated that DeStefano's psychiatric condition is in controversy through her own testimony that she had taken prescription medication for "nerves" before the subject accident, and that one of the medications warns that it may impair one's ability to drive a motor vehicle.
>
> * * *
>
> The name of DeStefano's treating psychiatrist is not privileged information. However, the plaintiff's request for the name of the specific nerve condition from which DeStefano suffers is privileged. Therefore, the plaintiff is entitled to this information only if DeStefano waived the privilege.
>
> This court has stated that waiver "results from failure to object to disclosure of privileged information." By stating that she takes the medication for "nerves," DeStefano waived the physician-patient privilege with respect to the specific name of the condition from which she suffers.
>
> DeStefano's pharmacy records are not subject to the physician-patient privilege. In the exercise of our discretion, however, we limit the plaintiff's discovery of DeStefano's pharmacy records to information regarding the quantities of Navane and Cogentin that were prescribed for her during the six-month period immediately preceding the accident.

Neferis v. DeStefano, 265 A.D.2d 464, 697 N.Y.S.2d 108 (2d Dep't 1999).

PRE-TRIAL DISCOVERY—DEFENDANT'S MEDICAL AND HOSPITAL RECORDS—MEMORY LOSS

Plaintiff is entitled to an *in-camera* inspection of defendant's medical and hospital records because he claimed that another party is responsible for the accident while at the same time asserting a memory loss. The court distinguished *Dillenbeck v. Hess*, 73 N.Y.2d

278, 539 N.Y.S.2d 707 (1989), which held that defendant did not waive her physician-patient privilege by claiming that she did not have any memory of the incident because she did not use her memory loss to excuse her conduct:

> Although defendant claimed to have blacked out after the incident, he also claimed he swerved as a result of being cut off by an unknown vehicle causing him to crash his car into a wall severely injuring the two plaintiffs. Thus defendant Oquendo did not assert the blanket failure of memory as in *Dillenbeck*, but claimed the negligence of another party as the cause of the accident while at the same time asserting his absence of any other memories.
>
> Accordingly, we find that since defendant asserted at a deposition that he had memory of events sufficient to excuse his actions (swerving to avoid another automobile), but that his memory failed upon being held to account for the operation of his own automobile, we find that defendant has asserted his physical condition, i.e., a lack of memory, in defense of his actions unlike the defendant in *Dillenbeck*.

Lopez v. Oquendo, 262 A.D.2d 24, 690 N.Y.S.2d 584 (1st Dep't 1999).

PRE-TRIAL DISCOVERY—DEPOSITION—EYEWITNESS SUFFERING TRAUMA—PROTECTIVE ORDER

Notwithstanding an eyewitness's submission of affidavits from a psychologist and physician that an examination before trial of an accident in which she was an eyewitness would cause her trauma, the court affirmed an order directing her deposition with the proviso that she could have her physician and psychologist present at the deposition:

> Defendants invoke CPLR 3103(a), which provides that a protective order may be issued to prevent "unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice." The proponent of such a motion must make an appropriate factual showing to be entitled to such relief. Significantly, "[t]he scope and supervision of discovery is generally within the sound discretion of the court where the action is pending." Furthermore, "[I]f the disclosure sought is of relevant material and does not come under any of the immunities . . . of CPLR 3101, it will be the rare case in which CPLR 3103 is applied to deny disclosure altogether."
>
> Here, upon review of the materials submitted by defendants in support of their motion, we find that Supreme Court appropriately weighed the parties' competing interests in denying their request for a protective order. Although it is not disputed that Cassia suffered trauma as a result of the accident, it cannot be ignored that Cassia, now an adult, is a party and eyewitness to the accident and her testimony is obviously material and relevant. Notably, there is no proof in the record that Cassia has been declared incompetent to proceed, is psychologically *incapable* of being deposed or that testifying would cause her permanent damage or be "life impairing." . . . Under these circumstances, we cannot conclude that the court abused its discretion, particularly since any resulting strain would not be greater than what Cassia would face if called as a witness at trial.

Willis v. Cassia, 255 A.D.2d 800, 680 N.Y.S.2d 313 (3d Dep't 1998).

PRE-TRIAL DISCOVERY—INADVERTENT DISCLOSURE/PRIVILEGED DOCUMENT—RETURN OF DOCUMENTS

The trial court acted within its discretion in denying employer's motion for return of an allegedly privileged document that was inadvertently disclosed:

> Disclosure of a privileged document generally waives that privilege unless the client intended to retain the confidentiality of the printed document and took reasonable steps to prevent its disclosure. The other factors to be considered in assessing whether an inadvertent disclosure waives the privilege are whether there was a prompt objection to the disclosure after discovering it and whether the party claiming waiver will suffer prejudice if a protective order is granted. . . . Because there is support in the record for the court's resolution of those issues, we decline to disturb the court's discretionary determination.

Baliva v. State Farm Mutual Auto. Ins. Co., 275 A.D.2d 1030, 713 N.Y.S.2d 376 (4th Dep't 2000).

PRE-TRIAL DISCOVERY—INDEPENDENT MEDICAL EXAMINATION/SECOND THIRD-PARTY DEFENDANT

Third-party defendant's rights concerning pre-trial discovery of plaintiff is not dependent on the earlier discovery procedures of defendant/third-party plaintiff:

> Since a third-party defendant is not required to rely on the defense mounted by a defendant/third-party plaintiff, we find that there was no basis here to deny second third-party defendant Suchocki permission to conduct an independent medical examination of the plaintiff.

Sledz v. 333 East 68th Street Corp., 254 A.D.2d 196, 679 N.Y.S.2d 119 (1st Dep't 1998).

[EDITOR'S NOTE: The court cited with approval *Williams v. 55 Wall Street*, 239 A.D.2d 411, 658 N.Y.S.2d 638 (2d Dep't 1997), which stated:

> A third-party defendant has a right to examine the plaintiff before trial and to compel the plaintiff to submit to a physical examination by a doctor designated by the third-party defendant. This is the case irrespective of whether there exists any issue created by the pleadings between a plaintiff and a third-party defendant. A third-party defendant should not be at the mercy of a mere formal or inept defense to the plaintiff's claims by the defendant third-party plaintiff.]

PRE-TRIAL DISCOVERY—I.Q. EXAMINATION/MOTHER—LEAD POISONING/INFANT

In a personal injury action where an infant plaintiff is claiming lead poisoning, the infant's mother cannot be compelled to submit to an I.Q. examination to determine if the infant's injuries are due in whole or in part to risk factors other than exposure to lead such as deficits genetic in origin. The court held that the mother's mental and physical condition are not "in controversy" merely because another party has placed such condition in issue. In addition, the I.Q. test results would raise more questions than they will answer and will not aid in the resolution of the question of causality:

> Even if maternal I.Q. may be a factor in determining a child's intelligence, extending the inquiry into this area would "dramatically broaden the scope of litigation," turning the fact-finding process into a series of mini-trials regarding, at a minimum, the factors contributing to the mother's I.Q. and, possibly, that of other family members. "There is no logical end to the litigation inquiry once individual boundaries are crossed."

Andon v. 302-304 Mott Street Associates, 257 A.D.2d 37, 690 N.Y.S.2d 241 (1st Dep't 1999).

[EDITOR'S NOTE: In affirming the Appellate Division at 94 N.Y.2d 740, 709 N.Y.S.2d 873 (2000), the Court of Appeals observed:

> Far from creating a blanket rule prohibiting discovery of maternal IQ, the Appellate Division evaluated defendants' request in the context of this case and in light of the evidence presented to it. The Appellate Division concluded that the burden of subjecting plaintiff-mother to an IQ test outweighed any relevance her IQ would bear on the issue of causation. The Court noted that the mother's mental condition is not in dispute and that IQ results, while not confidential, are private. Under these circumstances, we are satisfied that the Appellate Division did not abuse its discretion as a matter of law in denying defendants' discovery motion].

PRE-TRIAL DISCOVERY—SPOLIATION OF EVIDENCE—DISMISSAL

Defendant, in a legal malpractice action, is entitled to a dismissal of plaintiff's action after plaintiff destroyed relevant tape recordings because (1) evidence supported inference that tape recordings were relevant to underlying action, (2) plaintiff's destruction of tape recordings was done in bad faith, and (3) plaintiff failed to establish a satisfactory excuse for its conduct:

> CPLR 3126 provides that if a party "wilfully fails to disclose information which the court finds ought to have been disclosed . . . the court may take such orders with regard to the failure or refusal as are just . . ." As such, courts have "broad discretion" that must not be disturbed absent "clear abuse" to impose sanctions under CPLR 3126 when a party intentionally,

> contumaciously or in bad faith fails to comply with a discovery order or destroys evidence prior to an adversary's inspection. We have recognized that under such circumstances, dismissal may be appropriate as a matter of "elemental fairness," especially when the destruction of the evidence is "reprehensible." Although we also have recognized that dismissal may be an excessive remedy where the destroyed evidence is not crucial, with prejudice diminished accordingly, and other courts have not dismissed when evidence was discarded in good faith, pursuant to normal business practices and in the absence of pending litigation or notice of a specific claim, those factors are inapplicable in this case. Rather, dismissal is justified by the deliberate nature of the conduct that effectively impede the ability of the deprived party to assert a claim or a defense.

Sage Realty Corporation v. Proskauer Rose LLP, 275 A.D.2d 11, 713 N.Y.S. 155 (1st Dep't 2000).

PRE-TRIAL DISCOVERY—STUDENT ASSAULT—SCHOOL RECORDS

Plaintiff, who was sexually assaulted in a school dormitory by another student, is entitled to discover the school records involving prior written or oral complaints against the student alleged to have attacked plaintiff:

> In her notice of discovery and inspection, dated March 25, 1997, the plaintiff requested from Maplebrook, *inter alia*, "(b) All prior written or oral complaints involving * * * Kroiz, regarding his behavior towards fellow students at * * * Maplebrook" and "(e) All records regarding prior incidents involving * * * Kroiz, wherein [he] exhibited violent and/or sexual overtures toward fellow students at * * * Maplebrook." These specifically delineated records are clearly relevant and material to the plaintiff's action and are discoverable. The claim of privilege asserted by Maplebrook is without merit.

Egle v. Maplebrook School, 254 A.D.2d 388, 679 N.Y.S.2d 85 (2d Dep't 1998).

PRE-TRIAL DISCOVERY—SURVEILLANCE TAPE—PLAINTIFF'S DEMAND—DEPOSITION

Defendant, who took surveillance tapes of plaintiff, must turn them over to the plaintiff when requested under CPLR 3101(i) even if depositions have not been completed:

> It is apparent that the Legislature was well aware of the holding in *DiMichel* [*v. South Buffalo Ry. Co.*, 80 N.Y.2d 184]. We conclude that, had the Legislature wanted to limit the disclosure of surveillance tapes until after depositions, as did the Court in *DiMichel*, it would have included language to that effect. As written, CPLR 3101(i) requires disclosure of surveillance tapes upon demand. Being mindful of the fact that "we are judges and not legislators, and must not assume to make exceptions or to insert qualifications [into the wording of a statute], however justice may seem to require it," we decline to insert into the statute a qualification concerning the timing of disclosure.
>
> * * *
>
> The Legislature, in furthering the liberal disclosure policy, did not include the new discovery provision under CPLR 3101(d)(2), but rather created a new subdivision, CPLR 3101(i). The result is that defendants no longer enjoy a qualified exemption for disclosure of surveillance tapes. We conclude that the liberal disclosure policy of CPLR article 31 is best served by interpreting CPLR 3101(i) to require full disclosure of surveillance tapes upon demand.

Dinardo v. Koronowski, 252 A.D.2d 69, 684 N.Y.S.2d 736 (1998).

PRE-TRIAL PROCEDURE—CPLR 3126—DEFENDANT—FAILURE TO COMPLY WITH DISCOVERY REQUESTS

The lower court improperly struck the answer of defendant, a company out of business, after it failed to fully respond to plaintiff's discovery requests, which it had earlier agreed to supply:

> The drastic sanction of striking pleadings is only justified when the moving party shows conclusively that the failure to disclose was willful, contumacious or in bad faith, a burden borne by

> the movant. Generally, the sanction should be commensurate with the nature and extent of the disobedience. Plaintiff herein neither alleged nor conclusively demonstrated that On-Site acted willfully, contumaciously or in bad faith, the court made no such finding, nor is such readily inferable from the record. The present record does not indicate whether the requested documents were even in existence at the time the action was commenced against On-Site, nor is it clear why On-Site's failure to maintain and preserve these records was more egregious than that of HRH. In view of the absence of any demonstration of willful and contumacious conduct by On-Site, this imposition of the harshest penalty available to the court was an improvident exercise of discretion. Rather a more appropriate remedy under these circumstances would have been to preclude On-Site from offering into evidence any of the undisclosed documents or from calling as witnesses any employees whose identities or addresses were not provided upon which we condition our own order vacating the default.

Christian v. City of New York, 269 A.D.2d 135, 703 N.Y.S.2d 5 (1st Dep't 2000).

PRE-TRIAL PROCEDURE—DISMISSAL—FAILURE TO TIMELY OBEY COURT-ORDERED DISCLOSURE

The trial court did not abuse its discretion in dismissing plaintiff's complaint for failing to respond to defendant's interrogatories within court-ordered time frames:

> When a party fails to comply with a court order and frustrates the disclosure scheme set forth in the CPLR, it is well within the Trial Judge's discretion to dismiss the complaint.
>
> Regrettably, it is not only the law but also the scenario that is all too familiar. If the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity. Indeed, the Legislature, recognizing the need for courts to be able to command compliance with their disclosure directives, has specifically provided that a "court may make such orders . . . are just," including dismissal of an action (CPLR 3126). Finally, we underscore that compliance with a disclosure order requires both a timely response and one that evinces a good-faith effort to address the requests meaningfully.

Kihl v. Pfeffer, 94 N.Y.2d 118, 700 N.Y.S.2d 87 (1999).

PRODUCTS LIABILITY—CASUAL MANUFACTURER—STRICT LIABILITY IN TORT

A "casual manufacturer" of a machine cannot be held liable under strict products liability or negligent design theories. Its only duty is to provide adequate warnings when the dangers are not obvious or readily discernible:

> Central to our decision today is the affirmed finding, supported by the record, that Filtration Sciences built the protective guarding system for its own use, not to sell or transfer to another.
>
> * * *
>
> Plaintiff claims that because defendant designed, assembled, installed and sold the modified embossing unit, defendant must be held to the same standard as a product manufacturer. We disagree. Filtration Sciences' single act of design and assembly does not without more make it equivalent to a product manufacturer.
>
> * * *
>
> It cannot be said that the policy considerations which serve to justify the imposition of ordinary negligence liability upon the manufacturer and the seller in the normal course of business apply with equal weight and force to defendant. As a casual manufacturer, Filtration Sciences cannot be said to have derived significant commercial or economic benefit from the one-time bulk sale of its paper mill and embossing unit. Furthermore, as the purchaser of a product from a casual manufacturer, Knowlton Specialty Papers cannot be said to have held the same type of consumer expectations that Filtration Sciences would continue to stand behind its goods.

Gebo v. Black Clawson Company, 92 N.Y.2d 387, 681 N.Y.S.2d 221 (1998).

PRODUCTS LIABILITY—FAILURE TO WARN—ADEQUATE WARNING/OPEN AND OBVIOUS

Wire stripping machine manufacturer cannot be held liable under failure to warn theory by plaintiff, who was injured when his hand was drawn into the wire stripping machine, because the machine displayed a warning label stating "[d]o not operate this machine without a guard in place." In addition, plaintiff's deposition testimony established that he was aware of the danger of using the machine without the safety guards and that the danger was obvious:

> Liability herein may not be grounded on a duty to warn. Inasmuch as a warning would not have given plaintiff any better knowledge of the machine's danger than he already had from prior use or than was readily discernible from observation, the absence of a warning could not have proximately caused his injuries. Indeed, given plaintiff's awareness of the danger which was, in any case, obvious, the duty to warn was not triggered.

Barnes v. Pine Tree Machinery, 261 A.D.2d 295, 691 N.Y.S.2d 398 (1st Dep't 1999).

PRODUCTS LIABILITY—MARKET-SHARE THEORY

Market-share theory for determining liability and apportioning damages does not apply in a lead poisoning case where the identification of the lead pigment manufacturer, whose product allegedly caused the lead poisoning, cannot be ascertained:

> The only factor present in both this case and *Hymowitz* [*v. Lilly & Co.*, 73 N.Y.2d 487, 541 N.Y.S.2d 941] is the inability of the plaintiffs to identify which defendant manufactured the injury-causing product, and thus we conclude that the exceptional remedy of market share liability should not apply here.
>
> * * *
>
> In sum, we conclude that the application of the market share theory is inappropriate here because lead pigments other than white lead carbonate are used in lead-based paint; white lead carbonate is used for products other than interior residential paint; plaintiffs assert that they cannot determine when the lead-based paint was applied to their apartment; lead pigments are found in products other than lead-based paint; lead-based paint is not fungible; the manufacturers of white lead carbonate were not in exclusive control of the risk posed by lead-based paint; there is no signature injury associated with lead poisoning; and there is no indication by the Legislature that there should be a remedy for lead poisoning plaintiffs.

Brenner v. Cyanamid Company, 263 A.D.2d 165, 699 N.Y.S.2d 849 (4th Dep't 1999).

SANCTIONS—FRIVOLOUS AFFIRMATIVE DEFENSE

Defendant's counsel engaged in "frivolous conduct" under 22 N.Y.C.R.R. § 130-1.1(a) when he asserted an affirmative defense that plaintiff creditor had failed to comply with federal Truth in Lending Act (TILA) because this defense had little bearing on the central issues presented in the consumer debt collection case and the attorney and attorney of record were properly sanctioned $500 each.

> A court is empowered under 22 NYCRR part 130 to impose sanctions for frivolous conduct on the part of a litigant or attorney in a civil action and such a determination will not be disturbed absent a clear abuse of discretion. Conduct may be deemed frivolous if it is without legal merit or is unsupported by a reasonable argument, undertaken to unduly prolong litigation or to harass or injure another, or involves material false statements. The party sanctioned must be provided a reasonable opportunity to be heard on the issue and a sanction order must be supported by "a written decision setting forth the conduct on which the award is based and the reasons why the court found the conduct to be frivolous and the amount of the award to appropriate."
>
> * * *
>
> We find no abuse of discretion in Supreme Court's determination that Capoccia [defendant's counsel] engaged in frivolous conduct. Supreme Court based its decision to impose

> sanctions on Capoccia's failure to "raise any meaningful issues in connection with [the] defense," observing that Capoccia asserted arguments which had little bearing on the central issues presented in this consumer debt collection case, i.e., whether the debtor "obtain[ed] credit through use of the credit card" or "was genuinely deceived or misled in some fashion by the credit card issuer."
>
> * * *
>
> We cannot say Supreme Court erred in finding that its conduct "was undertaken and continued primarily to delay or prolong the resolution of the litigation," and we therefore decline to disturb the order of sanctions.

Household Bank Region I v. Stickles, 276 A.D.2d 940, 714 N.Y.S.2d 564 (2d Dep't 2000).

SERVICE OF PROCESS—ESTOPPEL—FAILURE/ CHANGE OF ADDRESS—VEHICLE AND TRAFFIC LAW § 505(5)

The trial court improperly vacated defendants' default because they failed to demonstrate a reasonable excuse for their default in appearing. Defendants' claim that they no longer lived at the address served when service was made was rejected:

> Vehicle and Traffic Law § 505(5) requires that every motor vehicle licensee notify the Commissioner of Motor Vehicles of any change of residence within 10 days of the occurrence of the change. A party who fails to comply with this provision is estopped from challenging the propriety of service made to the former address. After the instant motor vehicle accident took place in Rockland County, but before the commencement of this action, the defendants moved from New York to the State of Washington, without giving notice of their change of address as required by the Vehicle and Traffic Law. The defendants are therefore estopped from contesting the validity of service to their former address.

McCleaver v. Mickey VanFossen, et al., 276 A.D.2d 603, 714 N.Y.S.2d 138 (2d Dep't 2000).

SERVICE OF PROCESS—NOTICE OF ENTRY—AFFIDAVIT OF SERVICE—DENIAL

Denials by law office personnel who reviewed incoming mail that no order with notice of entry was received is insufficient to rebut an affidavit of service that the notice of entry was mailed:

> *First*, service of papers on an attorney is complete upon mailing (CPLR 2103[b][2]). *Second*, a properly executed affidavit of service raises a presumption that a proper mailing occurred, and a mere denial of receipt is not enough to rebut this presumption. Here, the denials of receipt by persons who reviewed plaintiff's lawyer's June mail were insufficient to create an issue of fact requiring a hearing.

Kihl v. Pfeffer, 94 N.Y.2d 118, 770 N.Y.S.2d 87 (1999).

TRIAL—ADJOURNMENT

The lower court abused its discretion in failing to grant counsel an adjournment when defendant's examining doctor was unable to testify because the trial had rapidly progressed:

> Although an application for a adjournment is addressed to the sound discretion of the trial court, it is an improvident exercise of discretion to deny a adjournment where the application is properly made, is not made for purposes of delay, the evidence is material, and the "need for a [adjournment] does not result from the failure to exercise due diligence." Here, the trial progressed at an unusually rapid pace, and there was an offer of proof regarding the unavailability of the witness and that the witness would be available within a day or two. The proffered testimony went to the heart of the damages issue and was therefore material. Under such circumstances, failure to grant the defendants a brief adjournment was an improvident exercise of discretion.
>
> This error was compounded and the defendants were further prejudiced when the plaintiff's counsel, in his summation, made reference to the failure of the defendants' examining doctor to testify notwithstanding the court's directive that such references should not be made.

Romero v. City of New York, 260 A.D.2d 461, 688 N.Y.S.2d 226 (2d Dep't 1999).

TRIAL—APPORTIONMENT AGREEMENT/ CO-DEFENDANTS "MARY CARTER" AGREEMENT

Defendants' agreement to apportion liability between themselves notwithstanding the jury's apportionment of their liability is not improper:

> The agreement between the defendants to apportion liability on a 25%/75% basis, if they were found liable, was not an improper "Mary Carter" agreement. The trial court, therefore, properly exercised its discretion in declining to reveal the agreement to the jury.

Herbst v. 40 Worth Associates, 276 A.D.2d 320, 714 N.Y.S.2d 211 (1st Dep't 2000).

TRIAL—IMPEACHMENT JURY VERDICT— JUROR AFFIDAVIT

The court properly denied plaintiffs' post-trial motion to set aside the verdict because the jury was affected by improper outside influences:

> Plaintiffs presented the affidavit of a juror stating that the jury had speculated that plaintiff would receive worker's compensation benefits and Social Security disability benefits, thereby causing the jury to award lesser damages than it otherwise would have awarded. The juror further stated that another juror had expressed concern that her school taxes would be affected by the verdict. In the absence of exceptional circumstances in this case, the juror's affidavit submitted by plaintiffs may not be used to attack the jury verdict.

Lopez v. Kenmore-Tonawanda School Dist., 275 A.D.2d 894, 713 N.Y.S.2d 607 (4th Dep't 2000).

TRIAL—JUDGE'S ABSENCE AT READBACK

Trial judge's absence during the readbacks of trial testimony does not mandate reversal of defendant's conviction:

> An integral component of a defendant's right to trial by jury is the supervision of a judge. In any case where the Judge's absence from trial proceedings prevents performance of an essential, nondelegable judicial function, judge's reversal is required. Here, defendant's claim does not require reversal of his conviction.
>
> * * *
>
> The absence of Trial Judges from readbacks is disfavored. In this case, however, the Trial Judge's absence did not rise to the level of a "mode of proceedings" error requiring reversal despite defendant's consent.

People v. Hernandez, 94 N.Y.2d 552, 908 N.Y.S.2d 34 (2000).

TRIAL—JURY DELIBERATIONS— BLACKBOARD NOTES

It was error for the trial judge to transcribe blackboard notes and give them to the jury during deliberations, even if the jurors requested it:

> The court improperly had the damages figures requested by the plaintiff's counsel during summation, which were written on a blackboard, transcribed onto a piece of paper and submitted to the jury, at its request, during deliberations. Arguments made by counsel during summation are not evidence.

Merenda v. Consolidated Rail Corp., 248 A.D.2d 684, 670 N.Y.S.2d 869 (2d Dep't 1998).

TRIAL—JURY NOTE-TAKING

It is within the sound discretion of the trial court to allow note-taking by jurors:

> Judges, lawyers and court clerks typically take notes during the trial. In light of the pervasive use of note-taking by others at trial to manage information, we are of a view that allowing jurors to take notes is long overdue. In fact, in a recent survey, 98% of jurors polled nationally and State-wide indicated that they would welcome the opportunity to take notes during trial.
>
> Based upon the foregoing, we hold that a trial court—while not obligated to do so—has the discretion to permit note-taking by jurors during a trial. If a trial court determines that a particular case warrants note-taking, the court can, sua sponte, instruct jurors that they are permitted to take notes during the trial.

> This discretion, however, must be tempered, in light of the potential perils that note-taking can present during trial. Preliminary cautionary instructions should be given with respect to note-taking and the use of notes. The instructions should also be repeated at the conclusion of the case as part of the court's charge prior to the commencement of jury deliberations.

People v. Hues, 92 N.Y.2d 413, 681 N.Y.S.2d 779 (1998).

[EDITOR'S NOTE: The Court of Appeals suggested special instructions be given which are found in PJI 1:103:

> The question has been asked whether the jurors may take notes. The answer is yes, you may take notes if you want to. Whether you take notes or not, you should be aware that the court reporter records everything stated in the courtroom, and any portion of the transcript, at your request, will be read back to you during your deliberations. If you do take notes during the trial, you should not allow your note-taking to become a distraction from the proceedings.
>
> If any of you do take notes during the trial, those notes are only for your personal use and are simply an aid to your memory. Because the notes may be inaccurate or incomplete, they may not be given any greater weight than your independent recollection. Because the notes may be inaccurate or incomplete, they may not be given any greater weight or influence than the recollection of other jurors about the facts or the conclusions to be drawn from the facts in determining the outcome of this case. Those of you who do not take notes should rely on your independent recollection of the evidence and not be influenced by the fact that another juror has taken notes. Any difference between a juror's recollection and a juror's notes should always be settled by asking to have the court reporter's transcript on that point read back to you. The court transcript should govern your determination rather than a juror's notes. A juror's notes are not a substitute for the official record or for the governing principles of law that I will give to you.]

TRIAL—NEW THEORY—BILL OF PARTICULARS

Where plaintiff alleges in her Bill of Particulars that defendant performed surgery without first securing her informed consent, she cannot, at trial, amend her informed consent cause of action to include defendant's failure to advise plaintiff of available alternative procedures:

> It is axiomatic that when a party attempts to introduce evidence at trial which does not conform to the bill of particulars, the appropriate remedy is the preclusion of that evidence. Plaintiff, through her complaint and bill of particulars, limited her informed consent cause of action to defendant's failure to advise her of the risks associated with the Caldwell-Luc procedure. As the pleadings are devoid of allegations that defendant failed to advise her of the availability of alternative procedures, Supreme Court properly restricted plaintiff's proof to defendant's failure to warn plaintiff of the risk involved while prohibiting evidence of defendant's failure to advise plaintiff of alternative procedures. Parenthetically, defendant argues quite convincingly that he would have been sorely prejudiced if, at this stage of the trial, plaintiff had been permitted to amend her bill of particulars and thereby inject an entirely new theory into the case.

Larkin v. Diaz, 257 A.D.2d 843, 685 N.Y.S.2d 300 (3d Dep't 1999).

TRIAL—PLAINTIFF'S BURDEN—SEVERAL POSSIBLE CAUSES—CIRCUMSTANTIAL EVIDENCE—*PRIMA FACIE* CASE

Plaintiff, who was injured when his car skidded on a wet roadway and collided with a parked trailer, was not required to rule out other plausible factors for the accident such as mechanical defect or failure, low treads on the car's tires, plaintiff's negligence or that a pedestrian jumped in front of the injured plaintiff before he reached the water. The Court of Appeals, in reversing the Appellate Division, held that plaintiff's circumstantial evidence of establishing that a large puddle formed on the roadway due to defendant's negligence in maintaining a proper drainage system was a proximate

cause of the accident and was sufficient to uphold the jury verdict in his favor:

> The Appellate Division erred in determining that plaintiffs were required to rule out all plausible variables and factors that could have caused or contributed to the accident. Plaintiffs need not positively exclude every other possible cause of the accident. Rather, the proof must render those other causes sufficiently "remote" or "technical" to enable the jury to reach its verdict based not upon speculation, but upon the logical inferences to be drawn from the evidence. A plaintiff need only prove that it was "more likely" or "more reasonable" that the alleged injury was caused by the defendant's negligence than by some other agency. The expert testimony, physical evidence and Gayle's testimony provided a basis in the record from which the jury could conclude that defendant's negligence was a proximate cause of the automobile accident. Plaintiffs met their burden of proving a prima facie case as a matter of law.

Gayle v. City of New York, 92 N.Y.2d 936, 680 N.Y.S.2d 900 (1998), *reversing* 247 A.D.2d 431, 668 N.Y.S.2d 693 (2d Dep't 1998).

TRIAL—PLAINTIFF'S OPENING—DISMISSAL—ERROR

The court erred in dismissing plaintiff's complaint after her counsel's opening statement where the Bill of Particulars stated a cause of action for negligence and plaintiff's opening statement did not preclude the possibility of recovery:

> Motions to dismiss made after a plaintiff's opening statement are disfavored and should be granted only where the defendant establishes either that (1) the complaint does not state a cause of action, (2) the cause of action is conclusively defeated by an admitted defense, or (3) admissions or statements of fact made by plaintiff's counsel in the opening absolutely preclude recovery. Generally, "the prospect of a dismissal on opening exists only when, from all available indications, the case is doomed to defeat."

Gleyzer v. Steinberg, 254 A.D.2d 455, 679 N.Y.S.2d 154 (2d Dep't 1998).

TRIAL—WITNESS—SURPRISE

Plaintiff's expert was properly permitted to testify about statute violations not alleged in the complaint since he established that defendant was not prejudiced:

> The Supreme Court properly allowed the expert to testify about violations of a section of the building code which was not specified in the complaint, and properly allowed the plaintiffs to amend the pleadings to conform to the proof, since that testimony did not surprise the defendants.

Marshall v. 130 North Bedford Road Mount Kisco Corp., 277 A.D.2d 432, 717 N.Y.S.2d 227 (2d Dep't 2000).

TRIAL—WRONGFUL DEATH—STANDARD OF PROOF

Relaxed standard of proof generally applicable in a wrongful death action under *Noseworthy v. City of New York*, 298 N.Y. 76 (1948), is not applicable in an unwitnessed wrongful death action:

> Inasmuch as the accident was unwitnessed and both participants were killed, the parties have equal access to the underlying facts and the essential predicate for the *Noseworthy* doctrine is therefore lacking.

Rockhill v. Pickering, 276 A.D.2d 1002, 714 N.Y.S.2d 598 (3d Dep't 2000).

WORKERS' COMPENSATION—GRAVE INJURY—TOTAL AND PERMANENT BLINDNESS—LOSS OF ONE EYE

Plaintiff, who claimed "loss of use and function of the right eye" did not sustain a grave injury as required under Workers' Compensation Law § 11:

> The plaintiff's bill of particulars states the plaintiff's injuries to be "loss of use and function of the right eye", "loss of vision in the right eye", and "[c]hronic and continual pain, dryness, and loss of vision in the right eye." These injuries are not listed in the amended statute. While Workers' Compensation Law § 11, as amended, does list "total and permanent blindness," the plaintiff's loss of vision in only one eye, even if total, does not constitute "total and permanent blindness." In short, the phrase must be construed to mean blindness in both eyes. This conclusion is supported by the fact that the statute also lists

> "total loss of use or amputation of an arm, leg, hand or foot." Therefore, had the Legislature intended to include loss of vision in only one eye, it would have so stated.

Ibarra v. Equipment Control, Inc., 268 A.D.2d 13, 707 N.Y.S.2d 208 (2d Dep't 2000).

WRONGFUL DEATH—CONSCIOUS PAIN AND SUFFERING—$4,000,000 AWARD EXCESSIVE

Four million dollars awarded for the conscious pain and suffering of 15-year-old who died as a result of medical malpractice was excessive to the extent that it exceeded $1,200,000:

> In evaluating whether an assessment of damages is excessive, this court must determine whether it deviates materially from what would be reasonable compensation. The damages awarded for the pain and suffering awarded by the plaintiffs' decedent are excessive to the extent indicated.

Johnson v. Queens-Long Island Medical Group, P.C., 272 A.D.2d 524, 708 N.Y.S.2d 134 (2d Dep't 2000).

[EDITOR'S NOTE: The court upheld the awards of $50,000 to the mother and $20,000 to the father for pecuniary loss since the decedent was a 15-year-old student who did not contribute monetarily to the household of either parent.]

WRONGFUL DEATH—LOSS OF FUTURE SUPPORT—GOL § 11-101(1)

Defendant, Upper East Side Pub, cannot be sued for loss of future support in a wrongful death action where the decedent, a 20-year-old student, had no legal duty to support his parents and did not contribute to their support:

> Absent a showing that a child had a legal duty to support his parents or had undertaken an obligation to do so, a parent cannot recover actual damages for loss of "means of support" under General Obligations Law § 11-101(1). Here, it is undisputed that the plaintiffs' deceased son had neither a legal duty to support them, nor had he undertaken an obligation to contribute to their support. Accordingly, the defendants were entitled to dismissal of so much of the first cause of action as sought to recover damages for loss of future support.

McNeill v. Rugby Joe's Inc., 272 A.D.2d 384, 707 N.Y.S.2d 483 (2d Dep't 2000).

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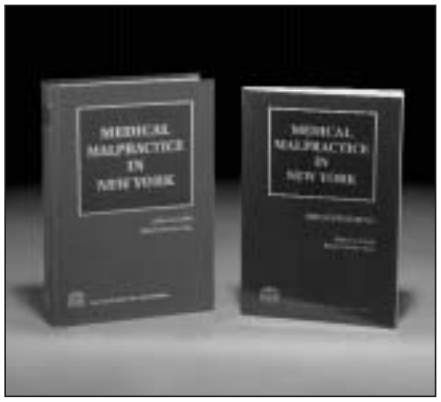

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