NYSBA SPRING 2015 | NO. 66

Trial Lawyers Section Digest

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

Message from the Chair

As the newly elected Chair of the Trial Lawyers Section, I want to thank my TLS colleagues for trusting me with this wonderful and challenging opportunity. I look forward to serving our Section members over the next year.

I also want to recognize and thank our outgoing Chair, Michael Furman, for his past year of dedicated service to our Section. I'm grateful for having had the opportunity to serve as Vice-Chair during Mike's term. Mike has long been regarded as one of New York's outstanding trial attorneys, but he is also a deeply committed member of NYSBA and the TLS, always ready to do his part to protect and advance the good of our profession. I know I speak for all of our members when I say to our outgoing Chair—job well done!

It was great seeing so many TLS members in New York City at the NYSBA Annual Meeting in January. Despite the wintry challenges of Mother Nature, having brought about cancellations of an entire day's programs of the Annual Meeting, the Meeting proved highly successful and worthwhile for all who attended. Special thanks TLS Vice-Chair Charlie Siegel and others who worked so hard orchestrating, along with the TICL Section, an excellent joint CLE program on trial evidence and damages and an update on product liability.

Also jointly held with TICL was another great Annual Dinner, traditionally held during the Annual Meeting. As usual, the Dinner was well-attended by leading members of the trial bar, along with many judges from around the State. Numerous awards were given during the evening, including an award to the Hon. Leslie E. Stein, Associate Judge of the New York Court of Appeals, for her years of accomplishment and contributions to the profession. I commend past TLS Chair Evan Goldberg and others who worked with him to plan this successful event.

As a practicing trial lawyer for more than 30 years, I look forward to leading the Trial Lawyers Section. I will have the benefit of working with an outstanding team of officers: Vice-Chair Charlie Siegel; Secretary Noreen Grimmick and Treasurer Violet Samuels. We have had the good fortune of knowing each other for many years which will enable us to accomplish much over the next year.

As I stated during my comments at the Annual Dinner, my mission as Chair is to find ways to make an already great Section even better. Essential to this effort, I hope to grow our membership and strengthen our diversity. I look forward to also reaching out to new law school graduates and younger members of the profession to encourage them to join the TLS.

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NYSBA

I also hope to strengthen our committees and committee structure. This will enable us to accomplish much more as a Section, and to better advance those programs, issues and interests so important to us as trial lawyers. Joining a committee is one of the best ways to become active in the Section. There are many committees to choose from. Being active in this way will no doubt prove rewarding.

Looking ahead to warmer weather, we are well into the planning of our annual Summer Meeting, which is always a great success. This year the Summer Meeting will take place in Newport, Rhode Island during July 25-29. We are planning for strong attendance and an excellent lineup of programs and CLEs. And, of course, being Newport, we're also planning an outstanding offering of entertainment, social and fun activities. If you have not been to Newport, this is a great opportunity. I strongly encourage all TLS members as well as nonmembers to reserve the days on your calendar and plan to join us.

While I look forward to working hard, along with my fellow officers, to make our great Section even better, I call upon each of you as TLS members to take pride in our Section and look for ways that you can get involved to promote and advance the interests and mission of the TLS. Together we can, and will, accomplish great things!

T. Andrew Brown

Opening and Closing Statements

By Neil S. Kornfeld and Tracy S. Katz

Opening and closing statements are key aspects of any trial and the importance of the effectiveness of a lawyer's presentation cannot be overstated. However, it is important for any lawyer to be well-versed in what conduct and statements are permissible, because improper conduct or statements can result in a mistrial or adverse verdict. This article will discuss various tips and pointers for opening and closing statements as well as some common pitfalls to avoid.

Opening Statement Tips

It is important to make a favorable first impression and present a theme that a jury can relate to and understand. The theme should allow for the jury to become emotionally invested in your case. The attorney should make the story interesting and engage the jury by using imagery or analogies.

The opening statement is made before the introduction of any evidence, but must state fairly the facts the attorney expects to prove. Attorneys should state the facts that will be proven during trial so that the jury's first understanding of the facts is in the context of the light most favorable to their case. The attorney should present a clear chronology of the case, including the important events, key characters/witnesses involved, what is being disputed and what your contentions are. Nevertheless, an attorney must be careful not to overstate the facts. An opening is a promise and you should not promise what you cannot deliver. If you are unable to prove a fact that you state in your opening, your adversary will attack the credibility of your case.

During openings, the attorney should also seek to personalize his/her client. This can be done by providing background information regarding your client that is relevant to the case and that tends to make a jury more sympathetic to your client.

Arguing is not permitted during openings. Argument includes urging, comparing, and voicing opinions, characterizations, and inferences. It is important to be careful that the attorney's tone does not sound like argument. However, the attorney should confront significant weaknesses at the outset to minimize the impact of the other side's presentation.

During opening statements, an attorney should avoid telling the jury that the opening is not evidence as this will lessen the impact of the opening statement. Lastly, the opening should empower the jury. It should conclude with a call to action. For example, explain to jurors that their role is to do justice or to investigate the truth or to hold those responsible for their actions.

Closing Statement Tips

The closing argument occurs after the evidence is in and is intended explicitly as argument. In closing, the attorney should refer back to the theme introduced in opening and reiterate it. You should reiterate your theory of the case and why it most sufficiently and reasonably incorporates the evidence. For example, remind the jury of the witness testimony that was helpful to your case and explain how this testimony makes the most sense in the context of the facts presented.

Once again, similar to opening statements, you want to engage the jury. However, an attorney is permitted more leeway to use passionate language and tone in his/her closing. You should consider using analogies and anecdotes to keep the jury engaged.

Furthermore, in closing, an attorney should force his/her adversary to argue their weaknesses. You should point out the various inconsistencies in his/her witnesses' testimony and/or other deficiencies in the case. You should also know the elements of the cause of action (what you have to prove), comment on testimony of key witnesses, confront damaging evidence/testimony, highlight the other side's inconsistencies, hold the other side accountable for their promises, and argue why your theory is "better," or "makes more sense."

In closing, you should confront your adversary's position and refute it. For example: "The defendant told you that my client did not suffer any additional harm by the delay in diagnosis of her fractured ankle and that she would have needed to undergo surgery for it regardless of when it was diagnosed. However, my client's treating physician, Dr. Bones, testified that over the course of a year, my client was forced to endure excruciating pain, and that the surgery she ultimately did need was far more extensive and complicated than what would have been needed had the defendant diagnosed her at the first visit."

Does the Plaintiff Have to State a Prima Facie Case During Opening?

The CPLR does not specifically provide for the dismissal of a complaint based upon the plaintiff's opening statement. However, if after the opening statement, "it becomes obvious that the suit cannot be maintained because it lacks a legal basis or, when taken in its strongest light, cannot succeed, the court has the power to dismiss…." *De Vito v. Katsch*, 157 A.D.2d 413, 556 N.Y.S.2d 649 (2d Dept. 1990); *see also Warme v. City of New York*, 89 A.D.3d 548, 932 N.Y.S.2d 690 (1st Dept. 2011) (proper to dismiss complaint where plaintiff's opening statement and offer

of proof thereafter failed to set forth prima facie case of negligence against defendant).

When making its determination as to whether to dismiss a cause of action after the opening statement, a court must take all the allegations made in the complaint and the statements of plaintiff's counsel to be true.

The complaint is only to be dismissed if it can be demonstrated that (1) the complaint did not state cause of action, (2) the cause of action is conclusively defeated by admitted defense, or (3) admissions or statements of fact made by plaintiff's counsel in opening statement absolutely precludes recovery. See *Hoffman House v. Foote*, 172 N.Y. 348 (1902).

Such motions are strongly disfavored and "should not be granted 'unless it is obvious that under no circumstances, and under no view of the testimony to be adduced, can plaintiff prevail.'" *Benz v. Burrows*, 191 A.D.2d 1021, 594 N.Y.S.2d 929 (4th Dept. 1993).

When an opening statement has been challenged as inadequate, counsel should be offered the opportunity to correct or enhance the opening statement by making an offer of proof. *De Vito v. Katsch, supra.*

Case Law Concerning What Is Permitted During Opening and Closing Statements

What can a lawyer do in opening and closing? Can a lawyer argue the case or just state the facts? The Rules of Professional Conduct (Rule 3.4) state as follows: A lawyer shall not…in appearing before a tribunal on behalf of a client:

(1) state or allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence;

(2) assert personal knowledge of facts in issue except when testifying as a witness;

(3) assert a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused but the lawyer may argue, upon analysis of the evidence, for any position or conclusion with respect to the matters stated herein.

It is improper to allude to evidence unless a good faith and reasonable basis exists for believing the evidence will be tendered and admitted in evidence. Common questions regarding permissible conduct and statements during openings and closings are discussed below:

- Should a lawyer utilize props? In certain situations a lawyer can and should utilize props.

  However, a lawyer may not use props or visual aids that have nothing to do with the issues in the case. *See Raney v. Suffolk Obstetrical & Gynecological Assocs.*, P.C., 200 A.D.2d 612, 606 N.Y.S.2d 729 (2d Dept. 1994) (it is within the trial court's discretion to refuse to allow the plaintiff's attorney to display a chart to the jury during summation).

- Should a lawyer suggest an amount to the jury? During summation in a personal injury action, plaintiff's counsel may ask for a specific amount for pain and suffering. S*ee Tate v. Colabello*, 58 N.Y.2d 84, 459 N.Y.S.2d 422 (1983); *Braun v. Ahmed*, 127 A.D.2d 418, 515 N.Y.S.2d 473 (2d Dept. 1987).

  However, it is improper for a counsel to raise a per diem argument, otherwise known as a "unit of time" measure of damages, by referring to plaintiff's life in terms of days, months, or years in asking the jury to determine past and future pain and suffering awards in reaching a verdict (*De Cicco v. Methodist Hospital of Brooklyn*, 74 A.D.2d 593, 424 N.Y.S.2d 524 (2d Dept. 1980). In *De Cicco,* the appellate court noted: "In view of the fact that there is no mechanical method by which pain and suffering may be translated into dollars and cents, the time-unit technique injects an element of false simplicity into the determination by holding out a mathematical formula by which damages may be neatly calculated. To that extent the technique tends to deflect the jury from the essential task of exercising its own sound discretion in determining the appropriate award." Furthermore, a lawyer cannot ask the jury to imagine themselves in the position of the plaintiff and to award the damages accordingly. *Young v. Tops Mkts., Inc.*, 283 A.D.2d 923, 725 N.Y.S.2d 489 (4th Dept. 2001) (court erred by allowing plaintiffs' counsel to argue that plaintiffs' damage claim "may seem like a lot of money, but I don't know of anybody [who] would take that money and say give me what * * * [plaintiff] has gone through and will go through"); *cf. Wilson v. City of New York*, 65 A.D.3d 906 (1st Dept. 2009) (plaintiff's counsel's suggestion that jury put itself in plaintiff's shoes to determine appropriate damages, although improper, was not egregious as to warrant setting aside the verdict).

- Can a lawyer mention witnesses that were not called to testify? The rule is well established that counsel may comment on the failure of the adverse party to call a witness who is under his control and whose testimony he could be expected to produce if it were favorable to him. This rule is applied, for example, where a plaintiff fails to call his own physician as a witness. *See Brotherton v. Barber Asphalt Paving Co.*, 117 A.D. 791, 102 N.Y.S.2d 1089 (2d Dept. 1907); *Seligson, Morris & Neuburger v. Fairbanks Whitney Corp.*, 22 A.D.2d 625, 257 N.Y.S.2d 706 (1st Dept. 1965). *But see Huff v. Rodriguez*, 64 A.D.3d 1221, 882 N.Y.S.2d 628 (4th Dept. 2009) (comments

by defendant's attorney that plaintiff had failed to call expert at trial because his testimony would not support plaintiff's claim that defendant had caused accident, despite having received expert's report stating actions of defendant to be sole proximate cause of accident, warranted reversal).

Conduct/Statements That Are Impermissible

It is impermissible to mislead the jury or misstate the evidence. In *Cohn v. Meyers*, 125 A.D.2d 524, 509 N.Y.S.2d 603 (2d Dept. 1986), the plaintiff filed an action for assault and battery; the defendant counterclaimed for assault and battery, false arrest and malicious prosecution. Defense counsel stated, in his opening statement to the jury, that the altercation that resulted in the lawsuit had also resulted in the defendant's being wrongfully arrested and held in jail for three days. However, the arrest actually stemmed from another incident. The trial court denied the plaintiff's motion for mistrial based on the prejudicial opening remarks. The Appellate Division reversed, finding that the defense counsel made the inaccurate remarks with utter disregard for the truth and that the trial court's curative instructions to the jury were insufficient to eliminate the prejudice.

In *McAlister v. Schwartz*, 105 A.D.2d 731, 481 N.Y.S.2d 167 (2d Dept. 1984), a case involving an automobile accident where the plaintiff alleged to have suffered amnesia as a result, the Appellate Division found a new trial was warranted due, in part, to defense counsel's remarks during summation. In summation, the defendant's attorney made this statement regarding the claim of amnesia: "Well, I submit to you, ladies and gentlemen, that you cannot find fault with what you don't remember, and this is a convenient way to avoid being cross-examined on the issues, to be cross-examined on negligence by saying I don't remember, but I submit to you that if there is any credence to that claim that man would have told the doctor in the hospital the day after this occurred that he didn't remember." *Id.*

It is also improper and prejudicial to address a juror by name. *See People v. Creasy*, 236 N.Y. 205 (1923).

It is improper for an attorney to accuse a witness, without evidence, of being willing to testify falsely for a fee or accuse them of being a liar. S*ee Smolinski v. Smolinski*, 78 A.D.3d 1642, 912 N.Y.S.2d 820 (4th Dept. 2010); *O'Neil v. Klass*, 36 A.D.3d 677, 829 N.Y.S.2d 144 (2d Dept. 2007). However, it is "within the broad bounds of rhetorical comment to point out insufficiency and contradictory nature of plaintiff's proof" and refer to alternative ways evidence could be interpreted. *See Selzer v. New York City Tr. Auth.*, 100 A.D.3d 157, 952 N.Y.S.2d 26 (1st Dept. 2012); *and see Karsdon v. Barringer*, 20 A.D.3d 551, 799 N.Y.S.2d 548 (2d Dept. 2005) (court erred in refusing to allow defense counsel to comment on personal injury plaintiff's consumption of wine at dinner prior to accident; while testimony did not establish that plaintiff was intoxicated, it was relevant to issue of whether she was fully attentive to surroundings at time of accident).

An attorney should avoid making disparaging comments during his/her opening or closing statements. *See Avila v. Robani Energy Inc.*, 12 A.D.3d 223, 784 N.Y.S.2d 526 (1st Dept. 2004) (comment accusing plaintiffs of fraud in unrelated matter was inappropriate); *Also see Maraviglia v. Lokshina*, 92 A.D.3d 924, 890 N.Y.S.2d 349 (2d Dept. 2012) (new trial warranted due to inappropriate cross-examination and inflammatory and improper summation comments by counsel for defendants, including comment that plaintiff and treating physician were "working the system"); *and see McArdle v. Hurley*, 51 A.D.3d 741, 858 N.Y.S.2d 690 (2d Dept. 2008) (cross-examination of plaintiff and expert with respect to plaintiff's husband's disability pension and summation remarks arguing that her family was trying to "max out in the civil justice system" were so inflammatory as to deny plaintiff a fair trial and require reversal).

An attorney may discuss the applicable law by reading from the instructions in certain limited circumstances. For example, in *Williams v. Brooklyn E. R. Co.*, 126 N.Y. 96 (1891), the plaintiff's counsel read case law to the jury during his summation. The Court of Appeals held that a *correct* statement of law by counsel would not be grounds for reversal: "It may be observed, however, that it is the function of the judge to instruct the jury upon the law, and, where counsel undertakes to read the law to the jury, the judge may properly interpose to prevent it. But if the judge sees fit to permit this to be done, and the law is correctly laid down in the decision or book used by counsel, it would not, we think, constitute legal error or be ground of exception by the other party, although such a practice is not to be encouraged." However, an attorney may not misstate the law. See *Kelly v. Metropolitan Ins. & Annuity Co.*, 82 A.D.3d 16, 918 N.Y.S.2d 50 (1st Dept. 2011).

A lawyer may not suggest from personal knowledge that certain facts exist, inject personal beliefs or vouch for the credibility of a witness. *See Valenzuela v. City of New York*, 59 A.D.3d 40, 869 N.Y.S.2d 49 (1st Dept. 2008) (reversal required where plaintiff's counsel injected personal knowledge and vouched for the credibility of himself and his client); *Smolinski v. Smolinski*, 78 A.D.3d 1642, 912 N.Y.S.2d 820 (4th Dept. 2010) (reversal required where plaintiff's counsel introduced extensive irrelevant evidence and, during summation, implied defendant's expert witnesses testified falsely for a fee and made references to resources defendant had as large corporation).

Nor may an attorney make prejudicial or inflammatory remarks. *See Berkowitz v. Marriott Corp.*, 163 A.D.2d 52, 558 N.Y.S.2d 511 (1st Dept. 1990) (reversal mandated where plaintiff's counsel made numerous prejudicial comments during his summation, including attacking the credibility of the defendant's experts and attorneys

and referring to the experts as "hired guns" who were brought into litigation to "fluff up the case" and stating that defense counsel was merely carrying out "instructions from his principals, and possibly he doesn't even believe himself some of the things he has said"); *Tehozol v. Anand Realty Corp*., 41 A.D.3d 151, 838 N.Y.S.2d 32 (1st Dept. 2007) (prejudicial remarks including appealing to jurors' class, prejudice, or passion were sufficiently prejudicial as to create likelihood that counsel's misconduct improperly influenced verdict); *and see Johnson v. Lazarowitz*, 4 A.D.3d 334, 771 N.Y.S.2d 534 (2d Dept. 2004) (reversal mandated where the record was "replete with vituperative remarks made by plaintiff's attorney for the sole purpose of inducing the jury to decide this case on passion rather than on the basis of the evidence").

Other improper remarks include mentioning settlement discussions, *See Bigelow-Sanford, Inc. v. Specialized Commercial Floors, Inc*., 77 A.D.2d 464, 433 N.Y.S.2d 931 (4th Dept. 1980); mentioning the wealth or poverty of a party or any insurance coverage (see *Estes v. Town of Big Flats*, 41 A.D.2d 681, 340 N.Y.S.2d 950 (3d Dept. 1973); and mentioning excluded evidence (*See Zegarelli v. Hughes*, 3 N.Y.3d 64, 781 N.Y.S.2d 488 (2004).

Preserving Objections

Lastly, it is important to preserve objections to any improper remarks made by opposing counsel during opening or closing statements. Failure to object to the improper remark may waive the point on appeal *see* CPLR 4017, 5501; *Coma v. City of New York*, 97 A.D.3d 715, 949 N.Y.S.2d 98 (2d Dept. 2012). On the other hand, continuous objections can inflame the jury or cause them to sympathize with the other side. *See Kennedy v. Children's Hosp*., 288 A.D.2d 918, 732 N.Y.S.2d 326 (4th Dept. 2001) (although plaintiff did object to the defense counsel's summation remarks, in the interests of justice, the Court reversed the judgment where defense counsel interrupted summation of plaintiff's attorney more than thirty times with groundless objections and referred to counsel's arguments as "preposterous" and "absolutely objectionable").

Usually, when an attorney engages in improper conduct during an opening or closing statement, the remedy is for the Judge to admonish counsel and provide a curative instruction. However, if the statements are so prejudicial that they cannot be cured by an instruction to the jury, an immediate motion for mistrial must be made. Failure to move for mistrial in a timely fashion will waive the issue on appeal.

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2014 Appellate Decisions

AUTOMOBILE—THIRD-PARTY ACTION/ CONTRIBUTION—PRECLUDED/WORKERS' COMPENSATION EXCLUSIVITY

In a two-car collision, defendant automobile owner (Hallock), whose driver/wife was found ten percent liable, cannot implead owner of the other car (Koubek), whose driver/wife (Oldenborg) was found ninety percent liable, for contribution because Oldenborg and her passenger/plaintiff were co-employees and the exclusivity provision of the Workers' Compensation Law trumps Vehicle and Traffic Law § 388 under these circumstances:

> Read together, these statutes (Workers' Compensation Law § 29 and Vehicle and Traffic Law § 388) render workers' compensation benefits the exclusive remedy of an injured employee, thereby barring the employee from recovering against a negligent coemployee or employer. These statutes further preclude third parties from seeking contribution or indemnification from the coemployee or employer unless the employee sustained a qualifying grave injury as defined by the statute.

Isabella v. Koubek, 22 N.Y.3d 788, 987 N.Y.S.2d 293 (2014).

DAMAGES—ANKLE INJURY—$2,250,000—PAST AND FUTURE PAIN AND SUFFERING—EXCESSIVE

Plaintiff's award of $750,000 for past pain and suffering and $1,500,000 for future pain and suffering for injuries sustained after a fall on ice was conditionally reduced to $350,000 and $900,000 respectively:

> Damages awarded to the plaintiff for past and future pain and suffering deviated materially from what would be reasonable compensation to the extent indicated here.

Telsaint v. City of New York, 120 A.D.3d 794, 992 N.Y.S.2d 80 (2d Dept. 2014).

[EDITOR'S NOTE: The Second Department did not mention plaintiff's injuries or age. The Supreme Court, Kings County, however, referred to an ankle injury when it noted in the final disposition order that the jury did not award plaintiff future medical costs she will incur "in connection with having the hardware from her left ankle removed" (2012 WL 4865067).

Two of the cases the court cited in reducing the award were ankle fracture injuries:

(a) *Williams v. New York City Transit Authority*, 95 A.D.3d 1003, 945 N.Y.S.2d 564 (2d Dept. 2012) [Award of $600,000 for past pain and suffering and $1,000,000 for future pain and suffering to 50-year-old woman was conditionally reduced to $200,000 for past pain and suffering and $400,000 for future pain and suffering];

(b) *Rivera v. Lincoln Center for the Performing Arts, Inc.*, 16 A.D.3d 274, 792 N.Y.S.2d 39 (1st Dept. 2005) [Award for future pain and suffering which the trial court reduced from $362,500 to $40,000 was inadequate and was conditionally increased to $200,000 where an ankle injury did not satisfactorily respond to treatment, and the 25-year-old plaintiff was expected to require further major surgery and to experience lasting pain];

(c) *Fishbane v. Chelsea Hall, LLC*, 65 A.D.3d 1079, 885 N.Y.S.2d 718 (2d Dept. 2009) [Awards of $500,000 for past pain and suffering and $300,000 for future pain and suffering were conditionally reduced to $350,000 and $200,000 respectively for plaintiff who sustained a trimalleolar ankle fracture];

See also:

(d) *Harrison v. New York City Transit Authority*, 113 A.D.3d 472, 978 N.Y.S.2d 194 (1st Dept. 2014) [Award to 22-year-old plaintiff of $200,000 for past pain and suffering and $300,000 for future pain and suffering for a comminuted bimalleolar fracture to her left ankle, resulting in two orthopedic surgeries, did not deviate materially from what would be reasonable compensation];

(e) *Burnett v. City of New York*, 104 A.D.3d 437, 961 N.Y.S.2d 81 (1st Dept. 2013) [Trial court's increasing plaintiff's past ($175,000) and future pain and suffering ($75,000) to $500,000 did not deviate from what would be reasonable compensation for a plaintiff who suffered a comminuted four-part proximal humerus fracture, dislocation of right shoulder and open reduction surgery on his right ankle, using plate and screws to stabilize a lateral malleolus fracture];

(f) *Alicea v. City of New York*, 85 A.D.3d 585, 927 N.Y.S.2d 321 (1st Dept. 2011) [Award to 33-year-old of $782,800 for future pain and suffering for a period of 38 years due to bimalleolar ankle fracture sustained when he fell on ice was not excessive, but award of $158,960 for past pain and suffering was inadequate and would be conditionally increased to $400,000. The passenger had three surgeries, including one open insertion to repair his broken bones, and second to develop the hardware, and also developed post-traumatic arthritis that could require additional surgery in the future];

(g) *Grinberg v. C&L Contracting Corp.*, 107 A.D.3d 491, 967 N.Y.S.2d 58 (1st Dept. 2013) [Jury awards of $75,000 and $35,000 for past and future pain and suffering respectively for a pylon fracture and a comminuted fracture to the tibia were inadequate and were conditionally increased to $500,000 and $450,000 respectively];

(h) *Bermudez v. New York City Board of Education*, 83 A.D.3d 878, 922 N.Y.S.2d 428 (2d Dept. 2011) [An award of $840,000 for future pain and suffering of 11-year-old for ankle fracture who had open reduction and internal fixation and subsequent removal of the fixation hardware did not deviate from what would be reasonable compensation].

DAMAGES—DISC INJURIES—$620,000 FOR FUTURE PAIN AND SUFFERING

Plaintiff's award of $620,000 for future pain and suffering was conditionally reduced to $465,000:

> Under the circumstances presented herein, the jury award of $620,000 for future pain and suffering ($20,000 per year for 31 years) deviated materially from what would be reasonable compensation. An award of $465,000 ($15,000 per year for 31 years), would constitute reasonable compensation.

Sweet v. Rios, 113 A.D.3d 750, 979 N.Y.S.2d 130 (2d Dept. 2014).

[EDITOR'S NOTE: The court discussed plaintiff's injuries in awarding $465,000 for future pain and suffering:

> At trial, the plaintiff presented evidence that she sustained, as a result of the accident, protrusions of the discs at C4-5 and C5-6, and disc bulges at L4 and L5-S1 with right-sided radiculopathy, causing her chronic pain in her lower back, and pain radiating from her right hip down to the bottom of her foot where she has a "needles and pins" sensation requiring her to use a cane. She also suffered a left shoulder superior labrum anterior-posterior lesion which required arthroscopic surgery and resulted in restricted mobility, and a right knee meniscus tear which required arthroscopic surgery which was "largely successful."]

DAMAGES—FRACTURED RIGHT ANKLE/ HERNIATED DISC—$1.2 MILLION

Award of $791,000 for past pain and suffering and $1,428,571.43 for future pain and suffering over 28 years to construction worker who fell eight to ten feet from a ladder did not deviate materially from what would be reasonable compensation:

> [Plaintiff's] injuries included an ankle fracture, which required him to undergo two surgeries, a herniated disc at the L4-L5 or L5-S1 level, which also required surgery, and a rotator cuff injury.

Guallpa v. Key Fat Corp., 98 A.D.3d 650, 950 N.Y.S.2d 165 (2d Dept. 2012).

[EDITOR'S NOTE: Plaintiff, an undocumented immigrant from Ecuador, was also awarded $86,360 for past lost earnings, $198,000 for future lost earnings over 28 years and $535,714 for future medical expenses over 35 years.

Defendant had retained an orthopedic surgeon before trial whose report concluded that plaintiff incurred a moderate disability. The expert was not called to the stand and the court instructed the jury that it was allowed to draw an adverse inference from the fact that defendant's orthopedic surgery expert did not testify at trial.

Defendant also retained a private investigator to perform surveillance on plaintiff. The video captured, over the course of two days, plaintiff walking about seemingly without pain, and unloading groceries from the back of a vehicle.

Plaintiff was permitted to pursue damages for lost potential income because, although an undocumented immigrant, he had not submitted any false identification to his employer before being hired. Plaintiff was paid off-the-books and in cash. See 2010 WL 4926835.]

DAMAGES—HERNIATED DISCS L2-L3, L3-L4 AND L5-L6—$1,197,000

Awards to 56-year-old male mechanic were conditionally reduced from $450,000 for past pain and suffering to $350,000, $1,000,000 for future pain and suffering to $450,000, $72,000 for future physical therapy to $0 and future medical expenses of $125,000 to $0 because they deviated materially from what would be reasonable compensation:

> Under the circumstances of this case, the jury's awards of damages for past pain and suffering and future pain and suffering deviated materially from what would be reasonable compensation to the extent indicated herein.
>
> Furthermore, the award of damages for future physical therapy and future medical expenses is not supported by the record and was based upon speculation.

Weathers v. Rios, 120 A.D.3d 663, 990 N.Y.S.2d 853 (2d Dept. 2012).

[EDITOR'S NOTE: The court did not discuss plaintiff's injuries, but they were described in 2012 WL 4959536.

Ronald Weathers, a 56-year-old male auto mechanic, reportedly suffered cervical spine myofascial derangement with multiple cervical spine disc bulges and herniations and lumbar spine derangement with disc bulges requiring a *discectomy* at L3-4 and L4-5 and *lumbar radiculopathy* as a result of a motor vehicle collision in which defendant Alex Rios turned left in front of him and collided with his vehicles. The jury awarded future damages to compensate the plaintiff for 20 years.

See also 2012 WL 8262695—"Plaintiff sustained herniated discs at L2-L3, L3-L4 and L5-L6."]

DAMAGES—LAMINECTOMY/FUSION—27-YEAR-OLD—$3,000,000 FUTURE PAIN/SUFFERING

Award of $3,000,000 for future pain and suffering to 27-year-old plaintiff who was injured on a bus when it struck a utility pole did not deviate materially from what would be reasonable compensation:

> The plaintiff sustained injuries including, *inter alia*, a protruding disc in the lumbar spine, radiculopathy, torn rotator cuff with impingement in her right shoulder, and a torn triceps tendon in her right elbow. As a result, the plaintiff underwent a laminectomy and fusion on her lumbar spine, as well as surgeries to repair her right shoulder and elbow.

Halsey v. New York City Transit Authority, 114 A.D.3d 726, 980 N.Y.S.2d 487 (2d Dept. 2014).

[EDITOR'S NOTE: The court discussed plaintiff's injuries in sustaining the $3,000,000 award for future pain and suffering:

> Here, the plaintiff, 27 years old at the time of trial, suffered from severe lower back pain that radiated into her legs and restricted her range of motion. She suffered from disc protrusion, foraminal stenosis, and radiculopathy. After physical therapy, pain medications, and epidural injections failed to alleviate her pain, the plaintiff underwent a laminectomy and fusion surgery, in which a piece of the disc was removed and a bone graft was fused to replace the removed disc. Following the surgery, the pain in the plaintiff's lower back did not improve and she had significant restrictions in her range of motion. She continued physical therapy, pain medications, and epidural injections. The plaintiff's expert concluded that the injuries to her lower back were permanent. He continued to observe restrictions in her range of motion and lumbar atrophy. He concluded that the plaintiff's back pain will worsen, and that she will need to continue to take pain, anti-inflammatory, and muscle relaxer medications. Further, the injuries hindered the previously active plaintiff's ability to participate in athletic activities and activities with her children, and made daily tasks, such as cooking and cleaning, very difficult. As a result of the fusion, other parts of the plaintiff's spine were subject to degeneration.]

DAMAGES—PAST AND FUTURE ECONOMIC LOSS SUSTAINED/DISTRIBUTEES

The jury's awarding the sum of $250,000, reduced from $336,000 for past economic loss and $2,243,560 for future economic loss sustained by the distributees of decedent's estate, did not deviate from what was reasonable compensation even though plaintiffs failed to establish the decedent's lost earnings, past or future.

Plaintiffs sought damages sufficient to replace the services provided by the decedent in taking care of his daughter, who was 32 years old at the time of the trial and had been diagnosed with schizophrenia and seizure disorder, and had a mental disability resulting in her having the IQ of an eight-year-old child:

> However, "[i]n the case of a decedent who was not a wage earner, pecuniary injuries may be calculated, in part, from the increased expenditures required to continue the services [he or she] provided, as well as the compensable losses of a personal nature, such as loss of guidance."
>
> "[T]he standard by which to measure the value of past and future loss of household services is the cost of replacing the decedent's services." While the decedent's wife testified that the decedent spent a minimum of 20 hours per week performing household chores such as laundry, cooking, and cleaning, there was no evidence presented of any actual expenditures incurred in replacing these kinds of household services in the past, or of expected future expenditures with regard to these chores. Nor does the record show any evidence of past expenditures to be compensated based on the loss of the decedent's services in caring for his daughter, also a category of household services. However, with regard to the future loss of the decedent's care of

his daughter, in light of the extensive evidence "regarding the special, lifetime needs of the disabled [daughter], which were projected to continue throughout [her life], the damages award[ ] for… future loss of the decedent's household services were reasonably certain to be incurred and necessitated."

* * *

Since there were no past lost earnings or housekeeping expenses, the award of $336,000 for past economic loss could only be based on the decedent's daughter's loss of parental care and guidance….While there is ample evidence in the record of the parental guidance and care that the decedent provided to his daughter, we find that the award here deviated materially, to the extent indicated, from what would be reasonable compensation for the loss of parental guidance for the period between the death of the decedent and the date of the verdict.

Lee v. New York Hospital Queens, 118 A.D.3d 750, 987 N.Y.S.2d 436 (2d Dept. 2014).

DAMAGES—WRONGFUL DEATH—CONSCIOUS PAIN AND SUFFERING—$3,750,000

The award of $3,750,000, conditionally reduced by the trial court from $5,000,000, for decedent's conscious pain and suffering, did not did not deviate materially from what would be reasonable compensation:

The jury reasonably could have concluded that the decedent suffered, for 3½ days, from intermittent, but ongoing, sharp gallbladder pain, increasing anxiety as each day passed with no surgery and no explanation for the delay, and growing discomfort due to the regimen of no food or drink by mouth. These witnesses also testified—and their testimony is confirmed by notes in the hospital record—that from approximately 6:00 a.m. on Sunday June 22, 2008, until 2:48 or 2:50 p.m. on that date, the decedent experienced intermittent bouts of agitation, sense of impending death, pain, respiratory distress, shivering, shaking, and chills. Finally, during the last 10 to 12 minutes before the decedent lost consciousness and died, the testimony established that he experienced conscious pain and suffering.

Lee v. New York Hospital Queens, 118 A.D.3d 750, 987 N.Y.S.2d 436 (2d 2014).

EVIDENCE—MOLD/CAUSATION—*FRYE* TEST

Plaintiff did not rebut defendant premises owner's *prima facie* showing because she failed to establish that her personal injuries were caused by indoor exposure to dampness and mold:

Studies that show an *association* between a damp and moldy indoor environment and the medical conditions that [plaintiff's expert] Dr. Johanning attributes to Cornell's exposure to mold (bronchial-asthma, rhino-sinusitis, hypersensitivity reactions and irritation reactions of the skin and mucous membranes) do not establish that the relevant scientific community generally accepts that molds *cause* these adverse health effects. But such studies necessarily furnish "some support" for causation since there can be no causation without an association (although, as explained, there can be an association without causation). For these reasons, the Appellate Division was incorrect when it ruled that the *Frye* standard was satisfied in this case because Dr. Johanning's opinions as to general causation find "some support" in the record…

Additionally, even *assuming* that Cornell demonstrated general causation, she did not show the necessary specific causation. As *Parker* [v. Mobil Oil Corp., 7 N.Y.3d 434, 824 N.Y.S.2d 584 (2006)] explains, "an opinion on causation should set forth a plaintiff's exposure to a toxin, that the toxin is capable of causing the particular illness (general causation) and that plaintiff was *exposed to sufficient levels* of the toxin to cause the illness (specific causation). *Parker* explains that "precise quantification" or a "dose-response relationship" or "an exact numerical value" is not required to make a showing of specific causation. *Parker* by no means, though, dispensed with a plaintiff's burden to establish sufficient exposure to a substance to cause the claimed adverse health effect.

* * *

Here, Dr. Johanning did not identify the specific disease-causing agent to which Cornell was allegedly exposed other than to vaguely describe it as "an unusual mixture of atypical microbial contaminants." He made no effort to quantify her level

> of exposure to this "unusual mixture"; he simply asserted that "[c]ertain 'quantifications'…may be misleading," and that she was "unquestionably exposed to unsanitary conditions." He did not respond to, much less refute, [defendant's expert] Dr. Phillips's statement that the measurement of molds in Cornell's former apartment were "of expected level and distribution for any average home," when compared to sampling studies.
>
> * * *
>
> The Appellate Division is incorrect to the extent that it suggests that performance of a differential diagnosis establishes that a plaintiff has been exposed to enough of an agent to prove specific causation. This is not what we meant when we stated that "precise quantifications" of exposure was not necessary, and there exist alternative "potentially acceptable ways to demonstrate [specific] causation." In any event, this record does not supply a proper foundation for Dr. Johanning's differential diagnosis.

Cornell v. 360 West 51st Street Realty, LLC, et al., 22 N.Y.3d 762, 986 N.Y.S.2d 839 (2014) *rvg* 95 A.D.3d 50, 939 N.Y.S.2d 434 (1st Dept. 2012).

[EDITOR'S NOTE: The Court of Appeals issued a caveat that the *Frye* ruling on lack of general causation hinges on the scientific literature in the record before the trial court—six years ago. The scientific consensus prevailing at the time of the *Frye* hearing in *Cornell* may or may not endure, however:

> As a result, this case does not (and indeed cannot) stand for the proposition that a cause-and-effect relationship does not exist between exposure to indoor dampness and mold and the kinds of injuries that Cornell alleged. Rather, Cornell simply did not demonstrate such a relationship on this record.]

FORUM NON-CONVENIENS—CPLR 327(a)—NY BANK ACCOUNTS

The Supreme Court correctly dismissed the New York action of a Dubai bank (Mashreqbank PSC) against a Saudi Arabian partnership (AHAB) because of forum non-conveniens even though (a) the parties used a New York bank to facilitate dollar transfers and (b) no party moved for such relief:

> We see nothing in this case to justify resort to a New York forum. No party is a New York resident; no relevant conduct apart from the execution of fund transfers occurred in New York; no party has identified any important New York witnesses or New York documents; New York law does not apply; no property related to the dispute is located in New York; no related litigation is pending in New York; and no other circumstance supports an argument that New York is an appropriate forum. Alternatives to a New York forum are available; indeed, the parties' briefs refer to a number of related investigations or litigations pending in several foreign countries. This is a classic case for the application of the forum non conveniens doctrine.

Mashreqbank v. Ahmed Hamad A1 Gosaibi & Brothers Company, 23 N.Y.3d 129, 989 N.Y.S.2d 458 (2014).

[EDITOR'S NOTE: Although the Court of Appeals had ruled in *VSL Corp. v. Dunes Hotels & Casinos, Inc.*, 70 N.Y.2d 948, 524 N.Y.S.2d 671 (1988) that it was error for the Appellate Division to dismiss a complaint *sua sponte* on forum non conveniens grounds, adding that such a dismissal may occur "only upon the motion of a party," the court pointed out that this principle did not apply in this case because the issue was briefed and argued at Supreme Court.]

INDEMNITY—COMMON LAW—OWNER/MAINTENANCE COMPANY

Building owner (Acadia) sued for failing to place mats to protect individuals from the slipperiness of the wet terrazzo floor was entitled to common law indemnification from its maintenance company, Gateway:

> The testimony of both Acadia and Gateway is clear and consistent; Gateway was solely responsible for putting out the mats in the lobby and vestibule when it rained. To the extent plaintiff has alleged her injury is because of Gateway's failure to do so, Gateway is required to provide common-law indemnification to Acadia, which would only be vicariously liable for Gateway's negligence.

Joynes v. Acadia-P/A 161st Street, LLC, 117 A.D.3d 651, 986 N.Y.S.2d 477 (1st Dept. 2014).

INSURANCE—NONCUMULATION CLAUSE—POLICY LIMITS

The children of two families injured after being exposed to lead paint in the same apartment at different times cannot recover more than the $500,000 limit for "each occurrence" because the annual renewal of the

landlord's policy did not increase the limits of available coverage under the policy's noncumulation clause:

> The injury to Young's children and Nesmith's grandchildren resulted "from continuous or repeated exposure to the same general conditions," so that the injuries were only one "accidental loss" within the meaning of the policy.

Nesmith v. Allstate Insurance Company, 24 N.Y.3d 520 (2014).

[EDITOR'S NOTE: Allstate's noncumulation clause reads:

> Regardless of the number of insured persons, injured persons, claims, claimants or policies involved, our total liability under the Family Liability Protection coverage for damages resulting from one accidental loss will not exceed the limit shown on the declarations page [$500,000]. All bodily injury and property damage resulting from one accidental loss or from continuous or repeated exposure to the same general conditions is considered the result of one accidental loss.]

JUDGMENT—VACATE DEFAULT—ESTOPPEL

Defendant, who was served at the same address that was listed on the Police Accident Report and not updated with the Department of Motor Vehicles, is estopped from raising defective service of process as a ground for vacating his default:

> The respondent was not entitled to relief pursuant to CPLR 5015(a)(1), based upon excusable default; the respondent's purported change of residence is not a reasonable excuse, because he failed to comply with Vehicle and Traffic Law § 505(5).
>
> * * *
>
> The respondent was not entitled to relief pursuant to CPLR 317, since his failure to receive notice of the summons was a deliberate attempt to avoid such notice. The respondent's direct involvement in the subject accident and his failure to notify the DMV of his change of address in compliance with Vehicle and Traffic Law § 505(5) raised an inference that the respondent deliberately attempted to avoid notice of the action.

Canelas v. Flores, 112 A.D.3d 871, 977 N.Y.S.2d 362 (2d Dept. 2013).

JURISDICTION—PERSONAL—SOLICITATION—CPLR 301, CPLR 302

Plaintiff, who was injured at a ski resort in Vermont, cannot sue the ski resort in New York because it was not subject to personal jurisdiction in New York:

> Even assuming that Killington (ski resort) engaged in substantial advertising in New York, as the plaintiffs claim, the plaintiffs have not demonstrated that Killington also engaged in substantial activity within this State sufficient to satisfy the solicitation-plus standard.
>
> * * *
>
> There is no substantial relationship between Killington's maintenance of a website through which a person in New York could purchase services and the alleged tort that occurred [improper instruction]. Such allegations are "too remote from [Killington's] alleged sales and promotional activities to support long-arm jurisdiction under CPLR 302(a)(1)."

Mejia-Haffner v. Killington, Ltd., 119 A.D.3d 912, 998 N.Y.S.2d 561 (2d Dept. 2014).

MASTER SERVANT—SPECIAL EMPLOYEE—WORKERS' COMPENSATION DEFENSE

Plaintiff, an employee of non-party TemPositions, who was injured while working as a coat checker at Columbia University, was barred from suing the university because she was its special employee:

> Determination of special employment status may be made as a matter of law where the particular, undisputed critical facts compel that conclusion and present no triable issue of fact.
>
> * * *
>
> The defendant further demonstrated, through the deposition testimony and affidavit of the general manager of the Faculty House and the affidavit of TemPositions' chief executive officer, that the defendant controlled and directed the manner, details, and ultimate result of the plaintiff's work. The defendant also had the authority to discharge the plaintiff, and the work she performed was in furtherance of the defendant's business. In addition, the plaintiff, at her own deposition, the transcript of which was submitted by the defendant in support of its motion, stated, *inter alia*, that TemPositions told her where and to

whom to report, but that the defendant's supervisors instructed her on her work duties. Thus, the defendant established, *prima facie*, that it was the plaintiff's special employer.

Munion v. Trustees of Columbia University in City of New York, 120 A.D.3d 779, 991 N.Y.S.2d 460 (2d Dept. 2014).

MOTIONS—OUT-OF-STATE AFFIDAVIT—CERTIFICATE OF CONFORMITY—CPLR 2309(C)

The Supreme Court correctly granted defendant's motion to reargue since they attached a certificate of conformity that was not earlier attached to the affidavit in support of defendant's motion which was signed and notarized in Virginia:

> The absence of a certificate of conformity in violation of CPLR 2309 is not a fatal defect and, in the event that relief is denied on that ground, the denial should, as here, generally be without prejudice to renewal upon proper papers.

Fuller v. Nesbitt, 116 A.D.3d 999, 983 N.Y.S.2d 896 (2d Dept. 2014).

[EDITOR'S NOTE: CPLR 2309 (states):

> (c) Oaths and affirmations taken without the state. An oath or affirmation taken without the state shall be treated as if taken within the state if it is accompanied by such certificate or certificates as would be required to entitle a deed acknowledged without the state to be recorded within the state if such deed had been acknowledged before the officer who administered the oath or affirmation.]

MOTIONS—SUMMARY JUDGMENT—EXPERT QUALIFIED

The motion court erred in granting defendant summary judgment where plaintiff was injured when she fell descending a curb after exiting defendant's facility because the Supreme Court should not have relied on defendant's expert's affidavit as it failed to establish that the affiant was qualified to render an expert opinion on the maintenance and construction of curbs and walkways:

> Defendant's proffered expert affidavit does not include the information necessary to permit a court to reach such a determination [expert is "possessed of the requisite skill, training, education, knowledge or experience"]. In his affidavit, defendant's proffered expert listed the initials "P.E." after his name, stated that he is a principal in a specific engineering firm, and stated his opinion based on his inspection, review of codes and his "experience as an engineer." While the "P.E." would indicate that he is licensed as a professional engineer, the expert did not explicitly state whether he licensed in any particular state. He also did not mention anything about his education, what type of engineer he is (e.g., mechanical, chemical, electrical), or any experience he may have that would be relevant to the design and maintenance of curbs and sidewalks. Nor did he attach a curriculum vitae that presumably would have included some or all of that information.

Flanger v. 2461 Elm Realty Corporation and Afrim Sports, Inc., 123 A.D.3d 1196, 998 N.Y.S.2d 502 (3d Dept. 2014).

MOTIONS—UNCERTIFIED TRANSCRIPT—CPLR 3116(a)

The Supreme Court erred in denying [defendant] Eastern Athletic's motion for summary judgment by deciding that plaintiff's deposition transcript was uncertified and, therefore, inadmissible, where that ground of admissibility was not raised by the plaintiff herself:

> The Supreme Court denied the subject motion for summary judgment on a ground that the parties did not litigate. The parties did not have an opportunity to address the issue relating to the certification of the plaintiff's deposition transcript, relied upon by the Supreme Court in denying that dispositive motion. The lack of notice and opportunity to be heard implicates the fundamental issue of fairness that is the cornerstone of due process. It is significant that, in *Misicki v. Caradonna* (12 N.Y.3d 511, 519, 882 N.Y.S.2d 375), the Court of Appeals cautioned the judiciary that "[w]e are not in the business of blindsiding litigants, who expect us to decide their appeals on rationales advanced by the parties, not arguments their adversaries never made."
>
> * * *
>
> Had the plaintiff argued in opposition to Eastern Athletic's motion that her deposition transcript was inadmissible because it was uncertified, Eastern Athletic could have submitted a certification in its reply papers and, if the plaintiff were not

> prejudiced, the Supreme Court may have considered Eastern Athletic's failure to submit to the Supreme Court a certified copy of the plaintiff's deposition was an irregularity and, as no substantial right of a party was prejudiced, the court should have ignored the defect.

Rosenblatt v. St. George Health and Racquetball Associates, LLC, 119 A.D.3d 45, 984 N.Y.S.2d 40 (2d Dept. 2014).

[EDITOR'S NOTE: The Supreme Court held that plaintiff's deposition transcript was not in admissible form because it was not certified even though defendant argued that a copy of plaintiff's unsigned deposition transcript was forwarded to plaintiff's attorney for signature under CPLR 3116(a) and never returned.]

MUNICIPAL CORPORATION—GML § 205-e—STATUTORY PREDICATE—LABOR LAW § 27-a(3)(a)(1)

Plaintiff, a police officer, injured when she fell from a police flatbed truck while loading wooden police barriers, has a valid GML § 205-e claim because the back of the truck was left open and unprotected, thereby violating Labor Law § 27-a(3)(a)(1), the Public Employee Safety and Health Act (PESHA):

> The question then is whether section 27-a contains a clear legal duty, expressed in a well-developed body of law and regulation. We find that it does.
>
> The Legislature enacted PESHA "to provide individuals working in the public sector with the same or greater workplace protections provided to employees in the private sector under" the federal Occupational Safety and Health Act ("OSHA"). The provisions contained in PESHA are modeled on OSHA, and are intended to ensure the common goal of these federal and state statutes, i.e. a safe workplace.
>
> * * *
>
> Within this statutory framework, section 27-a(3)(a)(1) imposes on employers a duty to provide a safe workplace "free from recognized hazards,…[and] reasonable and adequate protection to the lives, safety or health of its employees." This duty, albeit general, is sufficiently clear to provide a basis to determine liability. Notably, as in *Gonzalez* [*v. Iocovello*, 93 N.Y.2d 539, 693 N.Y.S.2d 486 (1999)], the standard is set forth in a statute, here in PESHA, in G*onzalez*, in VTL § 1104. Also, the mandate that employers provide a workplace "free from recognized hazards" sets a standard at least as sufficient to define the duty of care as the "reckless disregard" duty of care incorporated into VTL § 1104, which we referenced approvingly in *Gonzalez*.

Gammons v. City of New York, 24 N.Y.3d 562, N.Y.S.3d 45 (2014), *aff'g* 109 A.D.3d 189, 972 N.Y.S.2d 559 (2d Dept. 2013).

[EDITOR'S NOTE: Two judges dissented, finding that:

> A plaintiff must do more than just cite to a common law duty of care in order to recover under GML § 205-e while utilizing the general duty clause as a predicate; the plaintiff should also be required to cite to at least one of the hundreds of thousands of regulations either adopted or promulgated by the Commissioner of Labor.]

NEGLIGENCE—BEVERAGE—EXCESSIVELY HOT

Plaintiff, who slipped and fell at a McDonald's sustaining burns from hot coffee he had just been served, has a cause of action against McDonald's for serving coffee at an unreasonably or excessive hot temperature:

> Under New York law, a defendant may properly be held liable for the personal injuries caused by the service of a beverage that, because of its excessive temperature, was unreasonably dangerous for its intended use, and the drinking or other use of which presented a danger that was not reasonably contemplated by the consumer. In support of its motion, 82 Court produced no competent evidence to establish that the coffee served to the plaintiff on the day of the accident was within the range that would normally be expected by a typical consumer of coffee. There was no competent proof submitted by 82 Court in support of its motion that the machine from which the coffee was dispensed was in good working order or operating within the temperature parameters provided by the franchisor.

Khanimov v. McDonald's Corporation, 121 A.D.3d 1052, 995 N.Y.S.2d 191 (2d Dept. 2014).

[EDITOR'S NOTE: In a companion case, 121 A.D.3d 1050, 995 N.Y.S.2d 202 (2d Dept. 2014), the court granted the motion of the franchisor, McDonald's Corporation, to dismiss the complaint because it owed no duty to the plaintiff:

> In determining whether a defendant, as a franchisor, may be held vicariously liable for the acts of its franchisee, the most significant factor is the degree of control that the franchisor maintains over the daily operations of the franchisee or, more specifically, the manner of performing the very work in the course of which the accident occurred. Here, the McDonald's defendants tendered sufficient evidence in support of their motion to establish, *prima facie*, that McDonald's Corporation lacked the requisite control over the alleged causes of the plaintiff's injuries. The plaintiff failed to raise a triable issue of fact in opposition.]

NEGLIGENCE—CONSTRUCTIVE NOTICE—SIMILAR HAZARDOUS CONDITIONS

Defendant premises owner is not entitled to summary judgment where plaintiff-tenant was injured when a window in her apartment suddenly fell while her hands were on the window sill:

> The owners and managers of the building had constructive notice of the defective condition of the window. Defendants were aware of problems with the building's windows staying in an upright position, based on the replacement of balances on a number of plaintiff's own windows, including the subject window, and on many of those elsewhere in the building prior to the accident.
>
> * * *
>
> Once defendants knew that an appreciable number of the windows in the building required attention, they had an obligation to inspect all of them.

Hermina v. 2050 Valentine Avenue LLC, 120 A.D.3d 1131, 992 N.Y.S.2d 424 (1st Dept. 2014).

NEGLIGENCE—EASEMENT/OWNER (GRANTOR)

Even though easement holder was obligated to maintain and repair the property subject to the easement, the owner may be held liable to plaintiff for a broken sidewalk curb resulting in her injury:

> The Supreme Court correctly determined that the appellants [owners of property encumbered by the easement] failed to establish their *prima facie* entitlement to judgment as a matter of law, since their submissions revealed the existence of a triable issue of fact as to whether they have used the portion of the property that is subject to the easements for their own purposes by creating and maintaining a private, for-profit parking lot upon that portion of the property.

Kleyner v. City of New York, 981 A.D.3d 710 N.Y.S.2d 608 (2d Dept. 2014).

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

Plaintiff, who was suddenly struck by a falling brick while he was performing his assigned work of cleaning debris from the ground level, has a viable Labor Law § 240(1) action:

> Defendants' witnesses further established their liability by confirming that the brick fell out of the hands of a masonry worker several stories above plaintiff, and that safety netting which had been installed on other sides of the building was absent from the north exterior. The lack of overhead protective devices was a proximate cause of plaintiff's injuries under any of the conflicting accounts, and plaintiff's comparative negligence is not a defense to a Labor Law § 240(1) claim.

Hill v. Acies Group, LLC, 122 A.D.3d 428, 990 N.Y.S.2d 235 (1st Dept. 2014).

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

Plaintiff, who was injured when a galvanized steel conduit weighing 60-80 pounds that was connected to another section of pipe near the ceiling by a compression coupling came loose from its coupling and plummeted to the floor crushing his right thumb, does not have a cause of action under Labor Law § 240(1):

> The plaintiff must demonstrate that at the time the object fell, it either was being "hoisted or secured," or "required securing for the purposes of the undertaking."
>
> * * *
>
> Contrary to the dissent's contention, section 240(1) does not automatically apply simply because an object fell and injured a worker; "[a] plaintiff must show that the object fell…*because of the* absence or inadequacy of a *safety device* of the kind enumerated in the statute."
>
> * * *
>
> The compression coupling, which plaintiff claims was inadequate, is not a safety

> device "constructed, placed and operated as to give proper protection" from the falling conduit together as part of the conduit/pencil box assembly…Plaintiff's argument that the coupling itself is a safety device, albeit an inadequate one, extends the reach of section 240(1) beyond its intended purpose to any component that may lend support to a structure. It cannot be said that the coupling was meant to function as a safety device in the same manner as those devices enumerated in section 240(1).
>
> * * *
>
> It follows that defendants' failure to use a set screw coupling is not a violation of section 240(1)'s proper protection directive. A set screw coupling, utilized in the manner proposed by plaintiff, is not a safety device within the meaning of the statute.

Fabrizi v. 1095 Avenue of the Americas, L.L.C., 22 N.Y.3d 658, 985 N.Y.S.2d 416 (2014).

[EDITOR'S NOTE: Two justices dissented:

> The crucial legal questions arising from the face of this record are whether the task of repositioning the pencil box entailed an elevation-related risk that triggered defendants' duty to supply adequate safety devices, and whether the failure to do so caused the accident.
>
> Clearly, plaintiff was exposed to a gravity-related hazard within the meaning of the statute. Kneeling on the floor to drill, he was situated several feet below a 60-to-80-pound segment of conduit pipe made of galvanized steel. The conduit was attached to the pipe above by only a compression coupling whose grip was inadequate to withstand the vibrations of drilling. "The elevation differential here involved cannot be viewed as *de minimis*, particularly given the weight of the object and the amount of force it was capable of generating, even over the course of a relatively short descent."
>
> By focusing myopically on whether couplings fall under the statute, the majority loses sight of defendants' burden on summary judgment. To prevail, it is not enough for defendants to argue that a particular alternative device can be sensibly distinguished from those enumerated in the statute. Instead, they must demonstrate either the absence of a gravity-related risk or, where the risk posed by the elevation differential is readily apparent, a deficient causal nexus between the failure to provide a safety device and plaintiff's injury.]

NEGLIGENCE—FIREFIGHTER'S RULE—GENERAL MUNICIPAL LAW § 205-a

A firefighter who was injured while fighting a fire in the Ebbets Field complex, started after a child allegedly lit paper material on the kitchen stove where two burners were lit to heat the apartment, has a cause of action under General Municipal Law § 205-a, predicated on violations of Multiple Dwelling Law § 79 and Administrative Code of City of New York § 27-2029:

> Plaintiff made the requisite showing that Multiple Dwelling Law § 79 and Administrative Code of City of N.Y. § 27-2029 are part of well-developed bodies of law and regulation that impose clear legal duties, or mandate the performance or nonperformance of specific acts. Both provisions mandate the performance of specific acts. Moreover, failure to comply with the provisions can result in criminal sanctions. "Where criminal liability may be imposed, we would be hard put to find a more well-developed body of law and regulation that imposes clear duties." Thus, Multiple Dwelling Law § 79 and Administrative Code § 27-2029 can properly serve as predicates for liability under General Municipal Law § 205-a.
>
> * * *
>
> The plaintiff set forth facts sufficient to support a cause of action based on the defendant's alleged failure to provide sufficient heat, and set forth facts sufficient to allege that this failure was a factor that played a part in the tenant's decision to utilize the stove top burners to heat the apartment. Contrary to the defendant's contention, the act of the tenant's child in lighting paper material on a burner while the tenant was occupied elsewhere in the apartment, resulting in the fire which led to the plaintiff's injuries, was not, under the circumstances presented here, an intervening act that defeats, at the pleading stage, the causes of action alleging liability.

Paolicelli v. Fieldbridge, 120 A.D.3d 643, 992 N.Y.S.2d 60 (2d Dept. 2014).

NEGLIGENCE—MEDICAL MONITORING—NO PHYSICAL INJURY

Plaintiffs, smokers with histories of 20 pack-years who have not been diagnosed with lung cancer and are not currently "under investigation by a physician for suspected lung cancer," are not entitled to the creation of a court-supervised program, at Philip Morris's expense, that would provide them with Low Dose CT Scanning of the chest (LDCT), which plaintiffs claim is a type of medical monitoring that assists in the early detection of lung cancer:

> A threat of future harm is insufficient to impose liability against a defendant in a tort context. The requirement that a plaintiff sustain physical harm before being able to recover in tort is a fundamental principle of our state's tort system. The physical harm requirement serves a number of important purposes: it defines the class of persons who actually possess a cause of action, provides a basis for the fact-finder to determine whether a litigant actually possesses a claim, and protects court dockets from being clogged with frivolous and unfounded claims.
>
> * * *
>
> The Appellate Divisions have consistently found that medical monitoring is an element of damages that may be recovered only after a physical injury has been proven, i.e., that it is a form of remedy for an *existing* tort.
>
> * * *
>
> We conclude that the policy reasons set forth above militate against a judicially-created independent cause of action for medical monitoring. Allowance of such a claim, absent any evidence of present physical injury or damage to property, would constitute a significant deviation from our tort jurisprudence. That does not prevent plaintiffs who have in fact sustained physical injury from obtaining the remedy of medical monitoring. Such a remedy has been permitted in this State's courts as consequential damages, so long as the remedy is premised on the plaintiff establishing entitlement to damages on an already existing tort cause of action.

Caronia v. Philip Morris, 22 N.Y.3d 439, 982 N.Y.S.2d 40 (2013).

[EDITOR'S NOTE: Chief Judge Lippman dissented:

> We are thus presented with a defendant who has allegedly engaged in long-term and continuing misconduct and plaintiffs who, as a proximate result of that wrongdoing, have allegedly reached a risk level threshold for lung cancer at which medical experts believe LDCT screening is "reasonable and necessary" to facilitate early detection so as to avert terrible suffering and near-certain death. Legal recovery eludes these plaintiffs, however, because they do not manifest the kind of physical, symptomatic injury traditionally required for a valid tort claim. Furthermore, plaintiffs are unlikely to manifest symptoms of lung cancer unless and until the disease is at an advanced stage, at which point mortality rates are high and the only treatments available would be aimed at extending their lives, not saving them.
>
> It is difficult to envision a scenario more worthy of the exercise of this Court's equitable powers. Indeed, it is contrary to the spirit of New York law to deny these plaintiffs an opportunity to seek relief in equity where the policy justifications for the proposed medical monitoring cause of action are so compelling.]

NEGLIGENCE—PREMISES—BATH MAT—EXPERT

Plaintiff, who slipped and fell on the bathroom floor on a bath mat made of terry material without any non-skid surface, does not have a cause of action against the hotel operator:

> In cases involving inherently smooth, and thus potentially slippery tiled or stone floors, absent competent evidence of a defect in the surface or some deviation from an applicable industry standard, no liability is imposed. The same standard applies to allegedly defective bath mats.

The court rejected the undated affidavit of plaintiff's expert, Russell J. Kendzior, who examined an exemplar provided during discovery since the actual bath mat in question had not been preserved. Kendzior cited § 5.4.5. of the American Society of Testing and Materials F-1637-09 Standard which requires that "mats, runners and area rugs shall be provided with safe transition from adjacent surfaces and shall be fixed in place or provided with slip resistant backing."

In rejecting the expert's opinion, the court stated:

> Kendzior never examined the actual floor involved in this incident. He viewed only

> a photograph, from which it would be impossible to conclude how slippery the floor was, if at all. Moreover, he did not test the mat exemplar against the floor, or against any floor, before opining that it would have been in the "low traction category." He made no reference to any methodology used to arrive at this determination. Finally, the standards cited by Kendzior in his affidavit specifically identify bath tubs and showers as beyond the scope of the practices contained therein. Simply put, his conclusions about the cause of the accident are purely speculative.

Kalish v. Hei Hospitality, LLC, 114 A.D.2d 444, 980 N.Y.S.2d 80 (1st Dept. 2014).

NEGLIGENCE—PREMISES—COMMON LAW NEGLIGENCE

While plaintiff, who was injured when she fell over a railing on a stairway landing outside her apartment building, has no cause of action for NYC Administrative Code violations, she nonetheless has a cause of action for common law negligence:

> An owner of property has a duty to maintain the property in a reasonably safe condition. In order for a landowner to be liable in tort to a plaintiff who is injured as a result of an allegedly defective condition upon property, "it must be established that a defective condition existed and that the landowner affirmatively created the condition or had actual or constructive notice of its existence." Thus, in a premises liability case, a defendant property owner who moves for summary judgment has the initial burden of making a *prima facie* showing that it neither created the defective condition nor had actual or constructive notice of its existence. Here, the defendant failed to establish, *prima facie*, that it neither created the allegedly defective condition nor had actual or constructive notice of it. Thus, the defendant failed to establish its *prima facie* entitlement to judgment as a matter of law as to the plaintiff's common-law negligence cause of action, and we need not review the sufficiency of the plaintiff's opposition concerning that cause of action.

Friedman v. 1753 Realty Co., 117 A.D.3d 781, 986 N.Y.S.2d 175 (2nd Dept. 2014).

[EDITOR'S NOTE: The court relied on *Kellman v. 45 Tiemann Associates, Inc.*, 87 N.Y.2d 871, 638 N.Y.S.2d 937 (1995) where the court held:

> Contrary to defendant landlord's contentions, its alleged compliance with the applicable statutes and regulations is not dispositive of the question whether it satisfied its duties under the common law.]

NEGLIGENCE—PREMISES—SLIP AND FALL—*ESPINAL*

Plaintiff, who slipped and fell on ice while walking on an outdoor setback of a building under construction, has a viable cause of action under *Espinal v. Melville Snow Contrs.*, 98 N.Y.2d 136, 746 N.Y.S.2d 120 (2002), against Waldorf, the general clean-up contractor who had contracted to provide additional "blizzard storm snow removal services":

> The record presents a triable issue of fact as to whether Waldorf owed plaintiff a duty of care by having launched a force or instrument of harm in failing to exercise reasonable care in the performance of its snow and ice removal duties. The evidence, including photographs and videos taken at the scene of the accident showing the icy condition and deposition testimony that there was no sand or salt in the area where plaintiff fell, raises questions as to whether Waldorf had adequately salted the pathway, and therefore, whether it created or exacerbated the hazardous ice condition.

Jenkins v. Related Companies, Inc., 114 A.D.3d 435, 979 N.Y.S.2d 581 (1st Dept. 2014).

NEGLIGENCE—PREMISES—SLIP AND FALL—LAST INSPECTION

Defendant Housing Authority's failure to submit evidence concerning when it last cleaned and inspected the area in question relative to the time when plaintiff fell warrants reversal of order granting it summary judgment:

> Although the defendant submitted an affidavit from the supervisor of the caretaker assigned to clean the subject building on the day immediately preceding the plaintiff's nighttime accident, that affidavit was insufficient to establish when the stairway was last inspected and cleaned relative to the plaintiff's fall. The affidavit was conclusory and only referred, in a general manner, to the janitorial schedule followed on normal weekdays. Moreover, another caretaker testified at his deposi-

> tion, and the defendant concedes, that the normal weekday janitorial schedule was not in effect on the day preceding the plaintiff's accident, which was the Thanksgiving holiday. Since the defendant did not provide evidence regarding any specific cleaning or inspection of the area in question on that day, the defendant failed to make a *prima facie* showing of entitlement to judgment as a matter of law.

Williams v. Housing Authority, 119 A.D.3d 857, 990 N.Y.S.2d 549 (2d Dept. 2014).

[EDITOR'S NOTE: Unless the affidavit meets the requirements set above, courts will deny the motion "regardless of the sufficiency of the plaintiff's papers in opposition."

Both the First and Second Departments are very demanding regarding the last cleaning and inspection requirements.]

NEGLIGENCE—PREMISES—SNOW AND ICE—ADMINISTRATIVE CODE § 16-123(a)

Plaintiff, who slipped and fell on a thin layer of ice covering the sidewalk in front of defendant's commercial premises, does not have a viable cause of action since the storm had taken place the night before:

> Pursuant to Administrative Code section 16-123(a), owners of abutting properties have four hours from the time the precipitation ceases, excluding the hours between 9:00 p.m. and 7:00 a.m., to clear ice and snow from the sidewalk. Here, the owners had until 11:00 a.m. on the day of the accident to comply with the ordinance. Since that period had not yet expired at the time of the injured plaintiff's fall, the owners demonstrated, *prima facie*, that they could not be liable for any failure to clear the sidewalk at the time of the accident.

Schron v. Jean's Fine Wine & Spirits, Inc., 114 A.D.3d 659, 979 N.Y.S.2d 684 (2d Dept. 2014).

NEGLIGENCE—*RES IPSA LOQUITOR*

Plaintiff, a passenger seated on a Metro-North train, who was injured when a ceiling panel in the train car swung open and struck her in the head, is entitled to summary judgment on liability because the inference of defendant's negligence is inescapable under *res ipsa loquitor*:

> To demonstrate a claim under the doctrine, a plaintiff must establish three elements: (1) the accident is of a kind that ordinarily does not occur in the absence of defendant's negligence; (2) the instrumentality causing the accident was within defendant's exclusive control; and (3) the accident was not due to any voluntary action or contribution by plaintiff.
>
> Plaintiff met all three elements with her submission of witness testimony and the testimony of defendant's foreman. The foreman testified that the train's HVAC and ventilation system was accessible through the ceiling panel that hit plaintiff. He also testified that to his knowledge, no one but defendant's personnel accessed the ceiling panels and that he had no explanation for how the accident occurred. The foreman described the panel as being fastened to the ceiling with four screws outside and two safety latches and a safety chain inside.

Barney-Yeboah v. Metro-North Commuter Railroad, 120 A.D.3d 1023, 992 N.Y.S.2d 215 (1st Dept. 2014).

[EDITOR'S NOTE: Justice DeGrasse dissented:

> I dissent because there is a triable issue of fact as to whether, under the second element, the accident was caused "by an agency or instrumentality within the exclusive control of the defendant."
>
> * * *
>
> Given the exposure of the panel to daily public contact, the majority misplaces its reliance on the foreman's testimony that "to his knowledge," no one other than defendant's employees accessed the ceiling panels. Contrary to the majority's view, this testimony is insufficient to establish defendant's exclusive control of the publicly accessible ceiling panel as a matter of law.
>
> * * *
>
> Given the fact that the ceiling panel was within the reach of any passenger on the commuter train, the majority misplaces its reliance on the absence of evidence that passengers "generally handled the overhead panel."]

NOTICE OF CLAIM—LEAVE/LATE NOTICE—ACTUAL KNOWLEDGE

Claimant, who contracted herpes from an infected wrestler during a tournament, was not entitled to serve a late notice of claim under GOL § 50-e(5) because the

schools did not have actual knowledge of the essential facts:

> Where a claimant does not offer a reasonable excuse for failing to serve a timely notice of claim, a court may grant leave to serve a late notice of claim only if the respondent has actual knowledge of the essential facts underlying the claim [and] there is no compelling showing of prejudice to the respondent. Here, respondents asserted that, until claimant made the instant application, they had no knowledge that he had contracted herpes or otherwise had been injured at the tournament. Although claimant offered no evidence to the contrary, he essentially contended that respondents *should have known* of his injury because another wrestler had filed a timely notice of claim regarding an identical injury and because respondents had received Health Advisory #279a.

Candino v. Starpoint Central School District, 115 A.D.3d 1170, 982 N.Y.S.2d 210 (4th Dept. 2014), *aff'd*, 24 N.Y.3d 925, 993 N.Y.S.2d 538 (2014).

[EDITOR'S NOTE: Actual knowledge of the essential facts of a claim requires, according to the court,

> knowledge of the injuries or damages claimed by a [claimant], rather than mere notice of the underlying occurrence. Here, claimant's proof in support of his application establishes, at most, that respondents had constructive notice knowledge of his claim. In other words, there is nothing in the notice of claim filed by the other wrestler who was infected at the tournament or in Health Advisory # 279a that gave respondents actual knowledge that claimant was similarly injured.]

NOTICE OF CLAIM—LIABILITY THEORY INFERRED

The court erred in granting defendant's motion to strike the allegations in plaintiff's bill of particulars, alleging that defendant was negligent in failing to maintain, repair and clean the handrail on the second floor landing (Stairway "A") in defendant's building and allowing the handrail to remain obstructed so as to prevent its use by people traversing the stairway:

> Plaintiff's claim that defendant failed to maintain the handrail along the stairway at or near the second floor may be fairly inferred from the notice of claim, which alleged that defendant was negligent in maintaining the second floor landing area. The notice of claim alleged generally that defendant failed to maintain stairway "A" in the vicinity of the second floor landing, causing plaintiff's injury. The bill of particulars merely amplified the allegations of negligence concerning the landing area by further specifying that defendant had failed to maintain the handrail at the landing area.

Thomas v. New York City Housing Authority, 120 A.D.3d 401, 990 N.Y.S.2d 517 (1st Dept. 2014).

[EDITOR'S NOTE: The amended notice of claim alleged in part:

> Due to the dangerous, defective, broken, hazardous, dimly lit, wet, feces-filled and unsafe condition of said landing…
>
> Defendant was further negligent in allowing, causing, creating and permitting the landing to be, become and remain in a broken, dangerous, defective, unstable, dimly lit, wet, feces-filled and unsafe condition; in causing, allowing and permitting the landing to be carelessly, negligently and dangerously maintained, creating a trap, nuisance and hazard upon the said premises.

Based on the amended notice of claim, two judges dissented:

> Nowhere in the amended notice of claim is there even an indication of a defective handrail being a substantial factor in the accident.
>
> Therefore, the allegations contained in the bill of particulars regarding defective conditions of the handrail were not set forth in, and, despite the majority's conclusion, cannot fairly be inferred from, the allegations in the notice of claim.]

PRE-TRIAL DISCOVERY—MEDICAL RECORDS/ PLAINTIFF

The Supreme Court abused its discretion in requiring plaintiffs to provide medical evidence of each alleged injury resulting from exposure to lead paint or otherwise be precluded from offering evidence of that injury at trial:

> Supreme Court's motivation for granting that relief is understandable. Plaintiffs' counsel filed boilerplate bills of particulars and then did not disclose medical records substantiating the alleged injuries. To that end, plaintiffs should amend

> their respective bills of particulars to reflect those injuries actually sustained. Nonetheless, although Supreme Court had wide, inherent discretion to manage discovery, foster orderly proceedings, and limit counsel's gamesmanship, the ordered relief exceeded the court's power.
>
> Supreme Court also granted relief beyond that contemplated by rule 22 NYCRR 202.17(b)(1) requiring plaintiffs to produce, prior to the defense examination, a medical report causally relating plaintiffs' injuries to lead paint exposure or be precluded from offering proof of such injuries at trial. The rule requires that the medical reports "include a recital of the injuries and the conditions as to which testimony will be offered at the trial,…including a description of the injuries, a diagnosis, and a prognosis." There is no requirement that medical providers causally relate the injury to the defendant's negligence or, in this case, the lead paint exposure.

Hamilton v. Miller, 23 N.Y.3d 592, 992 N.Y.S.2d 190 (2014).

[EDITOR'S NOTE: In the two actions the Court of Appeals reviewed, plaintiff's medical records in Action #1 [*Giles v. Yi*] did not substantiate the 35 alleged injuries nor did they causally relate the documented problems to lead poisoning. In Action #2 [*Hamilton v. Miller*], plaintiffs alleged in the bill of particulars that the infant suffered 58 injuries resulting from his exposure to lead poisoning including neurological damage, diminished cognitive function and intelligence, emotional and psychological harm, lowered I.Q., impaired educational and occupational functioning, behavioral problems, damage to his DNA, and other cognitive and developmental disabilities.

The Court of Appeals, however, rejected plaintiffs' claim that they only have to turn over medical reports that currently exist. According to the court:

> The rule obligates plaintiffs to provide comprehensive reports from their treating and examining medical providers the reports "*shall* include a recital of the injuries and conditions as to which testimony will be offered at the trial" (22 NYCRR 202.17 [b] [1]) [emphasis added]). Plaintiffs therefore cannot avoid disclosure simply because their treating or examining medical providers have not drafted any reports within the meaning of rule 202.17. If plaintiffs' medical reports do not contain the information required by the rule, then plaintiffs must have the medical providers draft reports setting forth that information. If that is not possible, plaintiffs must seek relief from disclosure and explain why they cannot comply with the rule (see 22 NYCRR 202.17 [j]).]

PRE-TRIAL DISCOVERY—PRIVILEGED/ATTORNEY—CLIENT/WORK PRODUCT DOCTRINE

Documents prepared by insurance company's counsel, retained to provide coverage opinion, are not privileged since counsel was primarily engaged in claims handling—an ordinary business activity for an insurance company:

> Documents prepared in the ordinary course of an insurer's investigation of whether to pay or deny a claim are not privileged, and do not become so "merely because [the] investigation was conducted by an attorney."

National Union Fire Insurance Company of Pennsylvania v. Transcanada, Williams v. Housing Authority, 119 A.D.3d 492, 990 N.Y.S.2d 510 (1st Dept. 2014).

PRE-TRIAL DISCOVERY—SOCIAL MEDIA—IN CAMERA INSPECTION

Defendants' motion to compel plaintiff to comply with their demand for discovery and inspection with respect to a certain videotape compilation and their demand for an authorization for a nonparty's YouTube account should not have been denied before the court conducted an in camera review:

> The videotape compilation purportedly contained several video clips depicting the decedent's lifestyle prior to the subject hospitalization. The appellants also sought to compel the plaintiff to obtain and furnish an authorization for the nonparty's YouTube account. The appellants demonstrated that the requested discovery may be relevant to issues of pecuniary loss and life expectancy. However, the papers submitted in support of, and in opposition to, those branches of the appellants' motion were insufficient to make a determination as to whether the requested discovery was in fact relevant to those issues. Under these circumstances, the Supreme Court should have examined the subject videotape compilation, in camera, prior to making its determination.

Reid v. Soults, 114 A.D.3d 921, 980 N.Y.S.2d 579 (2d Dept. 2014).

PRODUCTS LIABILITY—POST-SALE MODIFICATION/SAFETY DEVICE—DESIGN DEFECT—FACTUAL ISSUE

Plaintiff, who was injured when she was caught and dragged into the rotating driveline of a tractor-driven post hole digger because the owner of the post hole digger had removed a plastic safety shield from the machine after years of use resulted in the shield damaged beyond repair, is not barred by the substantial modification defense in *Robinson v. Reed-Prentice Division of Package Machinery Company*, 49 N.Y.2d 471, 426 N.Y.S.2d 717 (1980). Plaintiff raised triable issues of fact concerning the defective design of the safety shield that was sufficient to defeat summary judgment based on substantial modification:

> The substantial modification defense is intended to insulate manufacturers and others in the distribution chain from liability for injuries that would never have arisen *but for* the post-sale modification of a safety feature on an otherwise safe product. *Robinson* does not, however, mandate summary disposal of cases where the plaintiff raises a colorable claim that the product was dangerous because of a defectively designed safety feature and *notwithstanding* the modification by the third party.
>
> * * *
>
> While we do not necessarily agree, as plaintiff contends, that no safety device is reasonably safe unless it is designed to last the lifetime of the product on which it is installed, defendants did not adequately refute plaintiff's assertions that the plastic shield failed prematurely under the circumstances presented here.
>
> Defendants urge that the owner of a machine is responsible for replacing all parts that become damaged or worn, including safety devices, and that a contrary rule would place an onerous burden on manufacturers to design accident-proof products that are incapable of wearing out. A manufacturer is not obligated to design a machine that will never deteriorate or wear out, and the owner does bear the responsibility of maintaining the machine by, among other things, "having it inspected periodically so that worn parts may be replaced." However, where the plaintiff raises questions of fact whether the machine incorporated a defective safety device, the manufacturer or others in the distribution chain cannot automatically avoid liability on the basis that the safety device was removed post sale and not replaced. Such a broad rule would lessen the manufacturer's duty to design effective safety devices that make products safe for their intended purpose and "unintended yet reasonably foreseeable use."
>
> * * *
>
> Smith [owner] testified that he did not replace the shield before the accident because it was "only going to get bent up, broke up, and tore off again." This testimony was sufficient to raise a question whether, because of its allegedly defective design, the shield would have repeatedly broken and required replacement by Smith, and defendants failed to adequately refute this material issue. Although owners are obligated to keep their products in good repair, they should not be required to continually replace defective safety components even if, as here, the components could be replaced easily and cheaply. Thus, defendants could not succeed on summary judgment merely because Smith testified that a new shield cost $40 and took no more than 30 minutes to install, or because Smith had previously replaced other worn-out components on the digger.
>
> * * *
>
> Plaintiff defeated summary judgment here not because defendants failed to foresee that Smith would "abuse" the shield, but because plaintiff's evidence in opposition raised questions of fact whether, because the shield was defectively designed, Smith's conduct could even qualify as an "abuse" of that safety device under *Robinson*.

Hoover v. New Holland North America, Inc., 23 N.Y.3d 41, 988 N.Y.S.2d 543 (2014).

[EDITOR'S NOTE: Judge Smith dissented:

> The majority relies on our statement in *Robinson* "that a manufacturer is under a duty to use reasonable care in designing his product when used in a manner for which the product was intended…as well as an unintended yet reasonably foreseeable use." But, as the majority acknowl-

> edges, we qualified this statement by saying: "The manufacturer's duty…does not extend…to designing a product that is impossible to abuse or one whose safety features may not be circumvented." The point of our statements in *Robinson* is clear in context: a manufacturer's duty is to use reasonable care to design a product that is safe at the time it leaves the manufacturer's hands. A manufacturer is not liable for dangers created by substantial alterations to the product thereafter. That principle should control this case.

Judge Smith also pointed out that the machine came with safety decals warnings in large letters against operating it without a safety shield.

> DANGER: GUARD MISSING DO NOT OPERATE; DANGER: CONTACT CAN CAUSE DEATH…DO NOT OPERATE WITHOUT…ALL DRIVELINE, TRACTOR AND EQUIPMENT SHIELDS IN PLACE.]

SETTLEMENT—GENERAL RELEASE—NO DELIVERY

Plaintiff's signed general release, which was held by her attorney pending receipt of defendant's affidavit of no excess insurance, is not an enforceable contract:

> [A] general release is governed by principles of contract law. Citing *White v. Corlies*, 46 N.Y. 467, 469-470 (1871), this Court has held that "it is essential in any bilateral contract that the fact of acceptance be communicated to the offeror." Therefore, this action was not settled because the executed release was never forwarded to defendant nor was acceptance of the offer otherwise communicated to defendant or its carrier.

Gyabaah v. Rivlab Transportation Corp., 102 A.D.3d 451, 958 N.Y.S.2d 109 (1st Dept. 2013), *aff'd*, 22 N.Y.3d 1018, 981 N.Y.S.2d 349 (2013).

[EDITOR'S NOTE: One judge dissented, finding that the "agreement to settle is evidence by the carrier's letter confirming the conversation" with plaintiff's counsel in which it agreed to tender the policy. The carrier's letter stated:

> This firm has been retained by National Casualty Company to represent the interests of its insured with regard to the above matter. We have been advised that National Casualty Company, on behalf of its insured, has offered the limits of its liability policy ($1 million) for the settlement of this action. We have been advised that plaintiff has accepted the offer.
>
> We request that you provide the undersigned with a Stipulation of Discontinuance with prejudice, General Release and copy of your law firm's W-9 Statement. Additionally, we have drafted a Hold Harmless Agreement for signature of the plaintiff. Please review the document and contact the undersigned if you feel changes are required.
>
> In conclusion, kindly advise the undersigned of instructions regarding payees on the settlement draft. We are in the process of obtaining the affidavit of no excess coverage form the insured. We will forward this to you as soon as possible.]

SUBPOENA—NON-PARTY—"CIRCUMSTANCES OR REASONS"—QUASH

A party subpoenaing a non-party must first sufficiently state the "circumstances or reasons" underlying the subpoena (either on the face of the subpoena itself or in a notice accompanying it) under CPLR 3101(a)(4). In moving to quash, the witness must establish either that the discovery sought is "utterly irrelevant" to the action or that the "futility of the process to uncover anything legitimate is inevitable or obvious."

If the witness meets this burden, the subpoenaing party must then establish that the discovery sought is "material and necessary" to the prosecution or defense of an action:

> The words "material and necessary" as used in section 3101 must "be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. Section 3101 (a)(4) imposes no requirement that the subpoenaing party demonstrate that it cannot obtain the requested disclosure from any other source. Thus, so long as the disclosure sought is relevant to the prosecution or defense of an action, it must be provided by the nonparty.
>
> "An application to quash a subpoena should be granted [o]nly where the futility of the process to uncover anything legitimate is inevitable or obvious or where the information sought is 'utterly irrelevant to any proper inquiry'." It is the one moving to vacate the subpoena

> who has the burden of establishing that the subpoena should be vacated under such circumstances.

Kapon v. Koch, 23 N.Y.3d 32, 988 N.Y.S.2d 559 (2014).

SUBPOENA—QUASH—*SUBPOENA AD TESTIFICUM*

The court erred in denying plaintiff's motion to depose defendant's former chief operating officer served with a subpoena duces tecum even if the non-party stated she did not treat any patients at defendant's hospital, had no recollection of plaintiff's decedent or of the hospital's rules, policies and procedures during the relevant period:

> Defendants' contention that the deposition would be a futile exercise in light of the passage of time and the witness's sworn denial of any relevant knowledge, is not sufficient to establish "that the discovery sought is 'utterly irrelevant' to the action or that the 'futility of the process to uncover anything legitimate is inevitable or obvious'." Therefore, the deposition of nonparty Zuckerman should go forward.

Menkes v. Beth Abraham Health Services, 120 A.D.3d 408, 990 N.Y.S.2d 414 (1st Dept. 2014).

TRIAL—CROSS-EXAMINATION—CREDIBILITY—GOOD FAITH

The trial court erred in precluding defense counsel from cross-examining plaintiff about her tax returns he believed were inaccurate:

> Defendant's attorney had a good faith basis to ask plaintiff about the propriety of her filing status. Moreover, if plaintiff had improperly filed federal tax returns as head of household in order to receive a tax credit to which she was not entitled, it raises the possibility that she may have committed tax fraud. We conclude that evidence that plaintiff may have committed tax fraud has "some tendency to show moral turpitude to be relevant on the credibility issue." Although it is true, as plaintiff points out, that, because of the collateral evidence rule, defendant's attorney would have been bound by plaintiff's answers concerning her federal tax returns without "refuting [those] answers by calling other witnesses or by producing extrinsic evidence." We nevertheless conclude that defendant's attorney should have been allowed to ask the questions.
>
> * * *
>
> Finally, because plaintiff's credibility was central to several close issues at trial—including proximate cause, serious injury, and damages—it cannot be said that the error is harmless.

Young v. Lacy, 120 A.D.3d 1561, 993 N.Y.S.2d 222 (4th Dept. 2014).

[EDITOR'S NOTE: The trial court precluded defendant's attorney from asking plaintiff any questions about information in her tax returns because plaintiff had not been asked about such issues at her deposition and, therefore, defendant's attorney was improperly attempting to "ambush her" at trial.]

TRIAL—IMPEACHING JURY VERDICT—*VOIR DIRE* DISHONESTY—FRE 606(b)

Plaintiff, who failed to prevail on his personal injury cause of action, is not entitled to a new trial where the jury foreperson first lied during *voir dire* about her impartiality and ability to award damages:

> Warger, it seems, would restrict Rule 606(b)'s application to those claims of error for which a court must examine the manner in which the jury reached its verdict—claims, one might say, involving an inquiry into the jury's verdict. But the "inquiry" to which the Rule refers is one into the "*validity* of the verdict," not into the verdict itself. The Rule does not focus on the means by which deliberations evidence might be used to invalidate a verdict…. It simply applies "[d]uring an inquiry into the validity of the verdict"—that is, during a *proceeding* in which the verdict may be rendered invalid. Whether or not a juror's alleged misconduct during *voir dire* had a direct effect on the jury's verdict, the motion for a new trial requires a court to determine whether the verdict can stand.

Warger v. Shauers, ___ U.S. ___, 135 S.Ct. 521, ___ L.Ed.2d ___ (2014).

[EDITOR'S NOTE: During *voir dire* plaintiff's counsel asked whether any jurors would be unable to award damages for pain and suffering or for future medical expenses, or whether there was any juror who thought, "I don't think I could be a fair and impartial juror on this case."

During deliberations, according to the affidavit of one of the jurors, the jury foreperson revealed that her daugh-

ter had been at fault in a fatal motor vehicle accident and that a lawsuit would have ruined her daughter's life.

Federal Rules of Evidence 606(b)(1) states in pertinent part that

> "[d]uring an inquiry into the validity of a verdict," evidence "about any statement made or incident that occurred during the jury's deliberations" is inadmissible. The Rule contains three specific exceptions—allowing testimony "about whether (A) extraneous prejudicial information was improperly brought to the jury's attention; (B) an outside influence was improperly brought to bear on any juror; or (C) a mistake was made in entering the verdict on the verdict form."

New York does not have a similar Rule 606(b). Generally, New York adopts the three exceptions of Rule 606(b). See, for example, *People v. Brown*, 48 N.Y.2d 388, 423 N.Y.S.2d 641 (1979) [Juror performed an experiment on her own and reported the results to the jury]; *People v. Crimmins*, 26 N.Y.2d 319, 310 N.Y.S.2d 300 (1970) [Jurors made an authorized visit to the crime scene]; see, however, *People v. Pauley*, 281 App Div 223, 119 N.Y.S.2d 152 (4th Dept. 1953) where a new trial was ordered because the answers given by a juror upon *voir dire* examination were "misleading, evasive and false."

Before the *Warger* decision, Circuit Courts of Appeals split whether statements which tend to show deceit during *voir dire* are barred by Rule 606(b).]

TRIAL—IMPROPER CHARGE—NEW TRIAL

An automobile manufacturer, Volvo, is entitled to a new trial because the trial judge charged the jury PJI 2:15 ("Common Law Standard of Care—Defendant Having Special Knowledge") designed for malpractice cases:

> The verdict was, as we have said, inconsistent: The jury found for plaintiff on the negligent design claim and for Volvo on the design defect claim, though the claims were in substance identical. And it did so after hearing extensive evidence about the practices of other manufacturers, and after hearing a charge that said, erroneously, "If you decide that Volvo did not use the same degree of skill and care [as other manufacturers selling automobiles in the United States], then you must find that Volvo was negligent" (emphasis added). Thus while Volvo may not complain of the inconsistency in the verdict, because it failed to object to it before the jury was discharged, that inconsistency leads us to believe that the error in the charge —to which Volvo did make a timely objection —may have confused the jury.

Reis v. Volvo Cars of North America, 24 N.Y.3d 35, 993 N.Y.S.2d 672 (2014).

[EDITOR'S NOTE: The court gave PJI 2:15 to the jury in the following language:

> A manufacturer like Volvo that has special training and experience in designing and manufacturing automobiles, when acting in that capacity, has a duty to use the same degree of skill and care that others in the business of manufacturing and selling automobiles in the United States would reasonably use in the same situation.
>
> Volvo has special skills in designing and manufacturing automobiles. If you decide that Volvo did use the same degree of skill and care that other manufacturers selling automobiles in the United States would reasonably use in the same situation, then you must find that Volvo was not negligent, no matter what resulted from defendant's conduct.
>
> On the other hand, if you decide that Volvo did not use the same degree of skill and care, then you must find that Volvo was negligent.]

VENUE—ADDITIONAL RESIDENCE

Although plaintiff and defendant resided in Rockland County, the trial court erred in transferring the action, initially commenced in Queens County, to Rockland County, because plaintiff demonstrated he had an "additional residence" in Queens County at the time the action was commenced:

> In support of his contention, the plaintiff submitted a copy of a three-year lease for a cooperative apartment in Queens. The lease recited that the apartment was to be occupied by the plaintiff, and was dated two years prior to the commencement of the action. The plaintiff also submitted a copy of a New York State tax bill, which listed the apartment in Queens as his address, and which was dated prior to the commencement of the action, and a maintenance invoice for the apartment in Queens, a bank account statement, and a union membership card, all of which listed the apartment in Queens as his address, and all of which were dated after the commencement of the action. These

> documents were sufficient to establish that, at the time of the commencement of the action, the plaintiff had a bona fide intent to retain an additional residence in Queens with some degree of permanency.

Kelly v. Karsenty, 117 A.D.3d 912, 986 N.Y.S.2d 227 (2d Dept. 2014).

VENUE—MALPRACTICE—PRINCIPAL OFFICE

Plaintiff correctly placed venue in this malpractice action in Kings County because the alleged location was the principal office of the defendant—physician Lee—even though Richmond County was also proper because it was the county of his residence:

> "In the context of determining the proper venue of an action, a party may have more than one residence." Under CPLR 503(d), the county of an individual's principal office is a proper venue for claims arising out of that business. Here, the plaintiff seeks to recover damages for medical malpractice allegedly committed by, among others, the defendant Jung Lack Lee in his capacity as a medical doctor. Accordingly, the county in which that defendant maintains his principal office is a proper venue in this case.
>
> To prevail on a CPLR 510(1) motion to transfer venue, a defendant bears the burden of demonstrating that the plaintiff's choice of venue was improper on the day the action was commenced, and that the defendant's choice of venue is proper. Only if a defendant meets this burden is the plaintiff required to establish, in opposition, that the venue selected was proper.

Chung v. Kwah, 122 A.D.3d 729, 996 N.Y.S.2d 153 (2d Dept. 2014).

VENUE—VENUE-SELECTION CLAUSE

Attorney-in-fact for nursing home patient is bound by the venue-selection clause in the admission agreement that did not violate public policy:

> Since this action arises out of or relates to the duties and obligations under the agreement, the venue-selection clause applies… Moreover, since defendant moved to change venue based on the written agreement (see CPLR 501), it was not required to serve a written demand for a change of venue with or prior to its answer before making the motion, and the motion needed only to be made "within a reasonable time after commencement of the action," as it was here (CPLR 511[a]… Further, there is no evidence of fraud in the execution of the agreement, particularly since plaintiff, as attorney-in-fact for her grandmother, could have, and by signing the agreement indicated that she had, read the agreement, understood it, and agreed to be legally bound by it, none of which she expressly denies.

Medina v. Gold Crest Care Center, Inc., 117 A.D.3d 633, 988 N.Y.S.2d 578 (1st Dept. 2014).

WORKERS' COMPENSATION—INTENTIONAL WRONG EXCEPTION—NEW JERSEY

Employer's removal of safety screen from hot leather stamping machine was insufficient by itself to trigger intentional wrong exception to exclusive remedy rule of New Jersey Workers' Compensation Act:

> Applying New Jersey law and viewing the evidence in a light most favorable to plaintiff, defendant SML Veteran Leather, LLC demonstrated its entitlement to summary judgment dismissing the complaint against it. Plaintiff failed to raise a triable issue of fact whether defendant's conduct constituted an intentional wrong under the New Jersey Workers' Compensation Act.

Lebron v. SML Veteran Leather, LLC, 22 N.Y.3d 1119, 982 N.Y.S.2d 836, *aff'g* 109 A.D.3d 431, 971 N.Y.S.2d 82 (1st Dept. 2013).

[EDITOR'S NOTE: The New Jersey Workers' Compensation Act provides the exclusive remedy for recovery of damages as a result of an accidental injury which is sustained during the course of employment unless there was conduct on the part of the employer that amounts to an "intentional wrong," (N.J. Stat. Ann. § 34-14-A).

In finding for the employer, the First Department noted:

> There is an insufficient basis for finding that defendant knew that its conduct in not replacing the safety screens was "substantially certain" to result in plaintiff's injury or that there was a "virtual certainty" of injury. The probability or knowledge that such injury "could" result, or even that an employer's action was reckless or grossly negligent, is not enough to invoke the statutory exception for intentional wrongdoing.]

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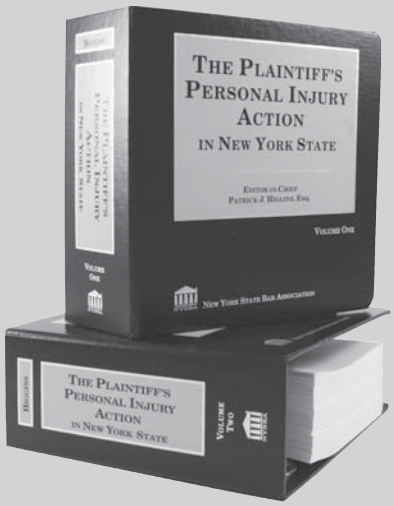

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ISSN 1530-3985 (print) ISSN 1933-8457 (online)