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Trial Lawyers Section Digest

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

Message from the Chair

It is with great pleasure that I begin my term as Chair of the Trial Lawyers Section. The job requirements have been lessened based upon the great work and leadership of our immediate past Chair, **T. Andrew Brown**. I had the great pleasure to work with Andrew, and serve as Vice-Chair during his term as Chair. Thank you, Andrew, for your leadership, guidance and friendship over the past year.

I look forward to sharing in the challenge of leading the Trial Lawyers Section with **Noreen DeWire Grimmick**, our Vice Chair, **Violet E. Samuels**, our Secretary, and **Kevin J. Sullivan**, our Treasurer, and the rest of our Executive Committee. We look forward to hearing from our members during the year regarding any questions, concerns or suggestions in making our Section the best it can be.

In keeping with our mission, the Trial Lawyers Section has been a staunch supporter of legal education programs and seminars for furtherance of trial practice and litigation. For example, this year our Section supported financially as well as with our time and talent, the New York Regional Round of The National Trial Competition. Our Section has had the privilege of hosting this competition for the past forty years. This year's competition was held January 29-31 at the Queens County Courthouse. Twenty teams from ten different law schools from across the state participated. Over a hundred members of the Bar and Judiciary volunteered their time to serve as judges and evaluators during the rounds of competition. Many thanks to our volunteers and a special thanks again goes to **Tom Valet**, our past section chair, for all his time and effort in coordinating and running this worthwhile program. Thank you, Tom.

Another worthwhile program our Section gets actively involved in every year is the Trial Academy held at Cornell Law School. This five-day program was created by the Young Lawyers Section and is held during the spring for newly admitted attorneys and those attorneys with limited trial skills. Our Section has supported this worthwhile endeavor financially as well as with our time and talent. Over the years, some of our Section members have been instructors as well as facilitators. Thanks to **Manny Romero**, **Mark Moretti**, **Andrew Brown**, **Sherry Levin Wallach** and others who over the past years have contributed their time and talents for this great program.

Inside

I note that the NYSBA Annual Meeting in New York City this past January was a great success. It was great to see so many friends and colleagues from across the state. Our joint annual dinner, held this year at Cipriani Wall Street with our TICL Section compatriots, was well attended. Our dinner speaker this year was Jenny Rivera, Associate Judge of the New York Court of Appeals. Many thanks to our annual dinner chair, **Evan Goldberg**, for a job well done. Not to be outdone, our joint CLE with TICL was outstanding. Topics included an Update on the CPLR, Legal Liability in the Age of the Drone and Electronic Evidence, Spoliation and Discovery Issues, to name a few of the topics. A great job was done by our TLS program co-chairs, **Violet E. Samuels** and **Peter C. Kopff.** Thank you both for another successful program.

While we are on the topic of an outstanding CLE, please **SAVE THE DATE** for our joint fall meeting with the TICL Section to be held **Friday, October 7th through Monday, October 10th in New Orleans**. This Columbus Day weekend event will be one of our best ever. We have put together an informative CLE program, with a great seminar on appellate practice ("Appellate Primer: What Every Trial Lawyer Needs to Know but was Afraid to Ask"). We have Judge Eugene Pigott, Jr. and Judge Michael J. Garcia from the Court of Appeals lecturing on "How to Protect the Record." We have Associate Justice Thomas A. Dickerson, Appellate Division, Second Department, speaking on "Maritime Law: The Cruise Passenger's Rights and Remedies 2016." We have a panel of experts and judges presenting a seminar on "Emails/ Social Media/Texts & Videos: What to Look For, Where to Find It and What to Do with It," just to name a few of our outstanding CLE seminars for our meeting. Our joint fall meeting will be a family and friends affair, with CLE programs in the morning thereby leaving the rest of the day to play golf, visit the attractions or enjoy the great restaurants that New Orleans has to offer. Additional information may be found at www.nysba.org/TICLTrialFall2016. Please join us.

Speaking of joining us, our Executive Committee is always looking for new and energetic members to assist and make our Section one of the best. We would ask that if you have an interest in speaking, publishing, or joining the Executive Committee, we can help. Please feel free to call me at 212.440.2345 or email me at charles.siegel@cna.com.

Charles J. Siegel

Request for Articles

If you have written an article you would like considered for publication, or have an idea for one, please contact one of the *Trial Lawyers Section Digest* Editors:

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Articles should be submitted in electronic document format (pdfs are not acceptable), along with biographical information.

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2015 Appellate Decisions

By Steven B. Prystowsky

ACTIONS—ARTICLE 16—SUPREME COURT/COURT OF CLAIMS—LAWSUITS

Plaintiff, who was injured on a state highway when a tree branch fell and struck her vehicle causing her injuries and sued in Supreme Court and Court of Claims, is entitled to an Article 16 charge apportioning liability between the defendant and the state in the Supreme Court action:

> The prevailing view is that apportionment against the State is an appropriate consideration in determining the fault of a joint tortfeasor in Supreme Court. Legislative history supports this view, as consideration of the State's fault would prevent a jury from imposing full liability on a defendant in the absence of the option to apportion culpability between the two entities. Moreover, as a policy matter, prohibiting a jury from apportioning fault would seem to penalize a defendant for failing to implead a party that, as a matter of law, it cannot implead.
>
> Although we recognize the possibility of inconsistent verdicts as to the apportionment of fault in Supreme Court and in the Court of Claims, we note that this risk arises regardless of whether or not the jury is entitled to apportion liability between defendant and the State. Given the statutory purpose of CPLR 1601(1) to "limit[ ] a joint tortfeasor's liability for noneconomic losses to its proportionate share, provided that it is 50% or less at fault," we find that juries in this scenario should be given the option to, if appropriate, apportion fault between defendant and the State.

Artibee v. Home Place Corporation, 132 A.D.3d 96, 14 N.Y.S.3d 817 (3d Dept. 2015).

[EDITOR'S NOTE: Justice Egan dissented. He would affirm the Supreme Court's ruling that evidence with regard to the State's liability for plaintiff's alleged damages would be admissible at trial, but defendant's request for an apportionment charge is not.]

ACTION—SUBJECT JURISDICTION—FILING

The Supreme Court did not have jurisdiction even though plaintiff purchased an index number and moved by order to show cause to modify terms of an agreement, because he never filed or served a summons and complaint

> Under CPLR 304, an action in Supreme Court is ordinarily commenced "by filing a summons and complaint or summons with notice" (CPLR 304[a]). The failure to file the initial papers necessary to institute an action constitutes a nonwaivable, jurisdictional defect, rendering the action a nullity.
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> * * *
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> Although CPLR 2001, as amended in 2007, gives the court broad discretion to correct or disregard mistakes, omissions, defects, or irregularities at any stage of an action, including mistakes in the filing process, appellate courts, guided by the legislative history, have made it clear that the complete failure to file the initial papers necessary to institute an action is not the type of error that falls within the court's discretion to correct under CPLR 2001.

O'Brien v. Contreras, 126 A.D.3d 958, 6 N.Y.S.3d 273 (2d Dept. 2015).

ACTIONS—FORUM NON CONVENIENS—SUBSTANTIAL NEXUS

Plaintiff, who was sexually assaulted during a supervised tour in Israel, is entitled to have her action tried in New York because defendants failed to meet their "heavy burden" to show that the relevant factors militate against the litigation being heard in New York:

> Plaintiff, as well as both of her parents and at least four medical providers who treated her after the alleged assault, all of whom are expected to testify at trial, are New York residents; defendant Friends of Mayanot Institute, Inc. is incorporated in New York; defendant Mayanot Institute of Jewish Studies, which was the designated operator of the tour, marketed itself as being at least partially based in New York, as its website provided a New York telephone number and physical address; and the tour was scheduled to begin and end in New York. Under these circumstances, notwithstanding that the alleged assault occurred in Israel, this case has a substantial nexus with New York.

Lerner v. Friends of Mayanot Institute, Inc., 126 A.D.3d 431, 4 N.Y.S.3d 202 (1st Dept. 2015).

[EDITOR'S NOTE: Defendants, in Supreme Court, New York County, argued that plaintiff's action should be heard in Israel because:

> the sexual assault took place in Israel, (2) the Mayanot staff that witnessed the events is located in Israel, (3) the King Solomon Hotel staff that witnessed the events is in Israel, (4) the hospital and doctors from which plaintiff sought initial treatment are in Israel, (5) the police investigators are located in Israel, and (6) if defendants wanted to assert any claims against the King Solomon Hotel, they would have to assert claims in Israel. (See 2014 WL 1628572 (S. Ct., N.Y. Cty.)

The Appellate Division, as did the Supreme Court, rejected this argument because defendants "did not identify any foreign witness, nor did they specify the nature or materiality of the testimony of any foreign witness."]

APPEAL AND ERROR—MOTION IN LIMINE

Denial of defendant's motion in limine to have the jury apportion liability between defendant and State in Supreme Court action was appealable as of right:

> Although generally "an order which merely limits the admissibility of evidence constitutes an advisory opinion which is neither appealable as of right nor by permission," we find defendant's motion to be "the functional equivalent of a motion for partial summary judgment" as to the issue of the State's liability in this action. The motion is therefore appealable because the resolution thereof limited the scope of the issues to be tried.

Artibee v. Home Place Corporation, 132 A.D.3d 96, 14 N.Y.S.3d 817 (3d Dept. 2015).

ATTORNEY-CLIENT—PROSPECTIVE LITIGATION—QUALIFIED PRIVILEGE

The third-party action against law firm and attorney for libel *per se* after law firm attorney sent defendants a cease and desist letter from using client confidential and proprietary information and accusing them of unlawfully diverting business opportunities from their client was correctly dismissed because the prospective litigation letter was protected by a qualified privilege:

> When litigation is anticipated, attorneys and parties should be free to communicate in order to reduce or avoid the need to actually commence litigation. Attorneys often send cease and desist letters to avoid litigation. Applying privilege to such preliminary communication encourages potential defendants to negotiate with potential plaintiffs in order to prevent costly and time-consuming judicial intervention. Communication during this pre-litigation phase should be encouraged and not chilled by the possibility of being the basis for a defamation suit.
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> * * *
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> Rather than applying the general malice standard to this pre-litigation stage, the privilege should only be applied to statements pertinent to a good-faith anticipated litigation. This requirement ensures that privilege does not protect attorneys who are seeking to bully, harass, or intimidate their client's adversaries by threatening baseless litigation or by asserting wholly unmeritorious claims, unsupported in law and fact, in violation of counsel's ethical obligations. Therefore, we hold that statements made prior to the commencement of an anticipated litigation are privileged, and that the privilege is lost where a defendant proves that the statements were not pertinent to a good-faith anticipated litigation.

Front, Inc. v. Khalil, 24 N.Y.3d 713, 4 N.Y.S.3d 581 (2015).

AUTOMOBILE—"NO-FAULT"—SERIOUS INJURY

Plaintiff failed to rebut defendant's showing that her shoulder, knee and spine conditions were caused by degeneration and not by the accident:

> [Plaintiff's] surgeon failed to address or contest the detailed findings of preexisting degenerative conditions by defendants' experts, which were acknowledged in the reports of plaintiff's own radiologists. Moreover, the surgeon's failure to address plaintiff's history of arthritis, or the earlier, conflicting findings by plaintiff's other physician of normal knee range of motion and the same range of motion in both shoulders, warrants summary judgment dismissing those serious injury claims.

Alvarez v. NYLL Management Ltd., 120 A.D.3d 1043, 993 N.Y.S.2d 1 (1st Dept. 2014), *affd*, 24 N.Y.3d 1191, 3 N.Y.S.3d 757 (2015).

DAMAGES—COMMINUTED ANKLE FRACTURE—$350,000 PAST PAIN AND SUFFERING—NOT EXCESSIVE

Plaintiff's award of $350,000 for a broken ankle did not deviate materially from what would be reasonable compensation to plaintiff who fell into a foot-wide gap between the subway and the platform:

> As a result of the accident, plaintiff sustained a broken ankle, and underwent two surgeries, an open reduction with internal fixation to repair the comminuted ankle fracture, and later, the removal of the hardware.

Blechman v. New York City Transit Authority, 134 A.D.3d 487, 21 N.Y.S.3d 233 (1st Dept. 2015).

[EDITOR'S NOTE: The jury award of $350,000 was for plaintiff's pain and suffering and the loss of her ability to enjoy life up to the date of the verdict. The jury did not award any amount for future pain and suffering. See 2013 WL 6911500.

Defendant, in moving to set aside the verdict as excessive, argued that plaintiff's injury was fully healed a few months after the accident and she had no ongoing debilitating condition as a result. The trial court denied the motion, reasoning:

> Plaintiff allegedly sustained a fracture of the distal fibula, a/k/a the lateral malleolus. She underwent open reduction/internal fixation of the fracture two weeks after the accident. Plaintiff lost two weeks from work. Subsequently, she was able to work from home at the job that she was starting. She went on vacation four months after the accident, at which time she was able to climb to the top of a volcano. She subsequently had to undergo a second surgical procedure to remove the hardware, which was causing her pain. See 2014 WL 1254656.]

DAMAGES—COMMINUTED FRACTURES OF THE FIBULA, TIBIA AND TALUS—$1,900,000

Award of $500,000 for past pain and suffering and $1,400,000 for future pain and suffering to 19 year-old plaintiff, who was caused to lose control of his motorized dirt bike on a roadway, did not deviate materially from what would be reasonable compensation:

> Plaintiff sustained, *inter alia*, a serious injury to his right ankle, including open, comminuted fractures of the fibula, tibia and talus, requiring three surgeries. A fourth surgery is likely required to eliminate pain by either fusing the ankle bones or replacing the ankle, which healed with malunion, and has caused significant, permanent, and arthritic changes, which are of a progressive nature. In addition, one of the screws that was placed in plaintiff's ankle broke, destroying the talus bone, causing plaintiff to suffer from daily pain, restricting the ankle's range of motion, and limiting his physical activities.

Bonano v. City of New York, 125 A.D.3d 502, 4 N.Y.S.3d 174 (1st Dept. 2015).

DAMAGES—FRACTURED FIBULAR, TIBIA, PELVIS AND TEARS OF LIGAMENTS—$6,000,000

Awards of $2,200,000 and $3,800,000 for past and future pain and suffering, respectively, did not deviate from what is considered reasonable compensation of 41-year-old plaintiff:

> Plaintiff suffered severe and debilitating injuries to his legs, knees, pelvis, shoulder, and ribs, including fractures of the tibia, fibula, and pelvis, and numerous tears of the ligaments supporting both knees, requiring that he spend three weeks in the trauma unit at St. Vincent's Hospital.

Gregware v. City of New York, 132 A.D.3d 51, 15 N.Y.S.3d 21 (1st Dept. 2015).

[EDITOR'S NOTE: The court discussed plaintiff's injuries:

> Plaintiff underwent the first of five surgeries to stabilize his knees on May 30, 2006. Following removal of the casts, his legs were swollen and severely atrophied. Plaintiff was fitted with braces and had to relearn how to walk. Two physical therapists worked on his knees on a daily basis to break up scar tissue formation. After discharge from the nursing home, on August 12, 2006, plaintiff commenced outpatient physical therapy for three hour sessions three times per week.
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> Plaintiff underwent further surgery on his left knee on January 22, 2007, and on his right knee on February 5, 2009. He underwent a further surgery on the left knee. Following each surgery, he was required to resume use of braces and to re-start physical therapy.
>
> Plaintiff's knees remain unstable and he will eventually develop osteoarthritis.

> Over the course of his life, he will require four total knee replacement surgeries, two on each leg. Plaintiff, 41 years of age at the time of the accident, will suffer pain in his knees for the rest of his life due to the extent of the injuries.]

DAMAGES—LAMINECTOMY—27-YEAR-OLD—$5,500,000 EXCESSIVE

Awards of $2,000,000 for past pain and suffering and $3,500,000 for future pain and suffering conditionally reduced to $1,000,000 and $2,000,000 respectively to 27 year-old who tripped over a subway grate embedded in a concrete median, suffering injuries to her wrist and spine that required surgery:

> Although plaintiff testified that she still experiences pain after arthroscopic surgery to her wrist and a laminectomy with fusion surgery to her lower back, she sustained no fractures. In addition, although she had to hire additional staff to help her after she was injured, she is able to perform her full time job of owning and operating a daycare center in her home. Accordingly, we find that plaintiff was not so debilitated as to warrant the jury's awards for past and future pain and suffering, which deviate materially from what constitutes reasonable compensation under the circumstances.

Mata v. City of New York, 124 A.D.3d 466, 1 N.Y.S.3d 83 (1st Dept. 2015).

DAMAGES—LOSS OF CONSORTIUM

The jury's decision not to award damages to plaintiff, decedent's wife, for loss of consortium was against the weight of the evidence and a new trial was ordered unless defendants stipulated to increase the verdict to $50,000 for loss of consortium:

> Plaintiff described significant changes to Pyle's behavior after his accident and explained the impact this had on their relationship. On this record, the jury's decision to award damages for pain and suffering, but none for loss of consortium, is inconsistent. Accordingly, we reverse and remand unless the parties stipulate to the increased awards, as indicated above.

Kutza v. Bovis Lend Lease LMB, Inc., 131 A.D.3d 838, 16 N.Y.S.3d 58 (1st Dept. 2015).

DAMAGES—LOSS OF INHERITANCE—PERIODIC PAYMENTS

An award for loss of inheritance in a wrongful death action is to be paid in periodic payments under CPLR 5041:

> We reject defendant's contention that the court erred in directing the award of damages for loss of inheritance to be paid in periodic payments pursuant to CPLR 5041(e). Defendant relies on CPLR 5041(b) in arguing that the award should have been paid in a lump sum, but we reject that argument. CPLR 5041(b) provides, in relevant part, that "[t]he court shall enter judgment in lump sum for past damages, for future damages not in excess of [$250,000], and for any damages, fees or costs payable in lump sum or otherwise under subdivisions (c) and (d) of this section." CPLR 5041(b) is not applicable because the loss of inheritance award does not constitute past damages or future damages less than $250,000, and CPLR 5041(c) and (d) are not applicable.

Gardner v. State, 134 A.D.3d 1563, 24 N.Y.S.3d 805 (4th Dept. 2015).

[EDITOR'S NOTE: At trial there was a dispute between the experts concerning personal consumption. Claimants' expert used a personal consumption rate of 28.5%, while defendant's used a rate of 95-99%. The court properly concluded that the figure used by defendant's expert was too high in light of the evidence that decedent was frugal, but claimants' expert failed to consider decedent's spending habits a few years prior to his death and his limited assets at the time of his death. The court used a personal consumption rate of 45%.]

DAMAGES—REFLEX SYMPATHETIC DYSTROPHY—$100,000

Award of $100,000 to plaintiff who suffered left hand injury/nerve damage deviated materially from what would be reasonable compensation and a new trial ordered unless defendants stipulated to increase the verdict to $400,000:

> The evidence established that, as a result of his hand injury, Pyle developed, inter alia, nerve damage, painful symptoms consistent with *reflex sympathetic dystrophy*, anxiety, and significant limitation of the use of his left hand due to permanent contracture of the fingers. Upon a review of other relevant cases, we find that the award of $100,000 for pain and suffering materially deviates from reasonable compensation.

Kutza v. Bovis Lend Lease LMB, Inc., 131 A.D.3d 838, 16 N.Y.S.3d 58 (1st Dept. 2015).

DAMAGES—TEAR/MEDIAL MENISCUS—BULGING DISCS—$750,000

Award of $750,000 for future pain and suffering to plaintiff street vendor did not deviate materially from what would be reasonable compensation:

> Plaintiff suffered damage to her left knee, including a laceration requiring 15 staples, a tear of the medial meniscus, and three bulging discs, and that she developed post-traumatic arthritis in the left knee. Plaintiff underwent two years of physical therapy before resorting to arthroscopic surgery and, while her knee improved, she continued to experience pain, walked with a limp, and used a cane. Plaintiff's treating orthopedic surgeon testified that plaintiff would eventually need a total knee replacement, since the cartilage damage was severe and permanent. Moreover, plaintiff has difficulty standing and therefore, since the accident, has been unable to return to her work as a street vendor.

Reyes v. New York City Transit Authority, 126 A.D.3d 612, 3 N.Y.S.3d 600 (1st Dept. 2015).

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 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—ADMISSIBILITY—HOSPITAL RECORDS

The trial court did not err in admitting into evidence a statement in plaintiff's hospital records that he was not wearing a safety belt at the time of the accident because he testified that he was using his seat belt:

> A hearsay entry in a hospital record is admissible under the business records exception to the hearsay rule only if the entry is germane to the diagnosis or treatment of the patient. However, if the entry is inconsistent with a position taken by a party at trial, it is admissible as an admission by that party, even if it is not germane to diagnosis or treatment, as long as there is "evidence connecting the party to the entry." At trial, the plaintiff testified that he was using a seat belt at the time of the accident. The hospital records containing the challenged entries clearly indicated that the plaintiff was the source of the information contained therein.

Robles v. Polytemp, Inc., 127 A.D.3d 1052, 7 N.Y.S.3d 441 (2d Dept. 2015).

INDEMNITY—CONTRACTUAL—LANDLORD/TENANT

Because tenant (Pretty Girl) was obligated to make repairs and replacements to the sidewalks, landlord (PI Associates) was entitled to contractual indemnity from the tenant for damages plaintiff sustained when she tripped over a chipped portion of the sidewalk and fell:

> The subject lease provides that the "Tenant, shall, at Tenant's own expense, make all repairs and replacements to the sidewalks and curbs adjacent thereto." The lease also provides that Pretty Girl will indemnify PI from all claims for damages incurred as a result of Pretty Girl's breach of the lease, which contrary to Pretty Girl's contention, does not conflict with General Obligations Law § 5-322.1.
>
> Contrary to Pretty Girl's contention, certain provisions in the rider to the lease, which require the tenant to keep the sidewalk clean and free from debris and snow, and to make all nonstructural

repairs to the demised premises, not including the public sidewalk, did not conflict with the lease's provision that obligated the tenant to make all sidewalk repairs. Thus, the Supreme Court should have granted PI's motion for a directed verdict on its cross claim against Pretty Girl for contractual indemnification, and denied that branch of Pretty Girl's motion which was for a directed verdict dismissing all cross claims asserted against it.

Bhanmattie Rajkumar Kumar v. PI Associates, LLC, 125 A.D.3d 609, 3 N.Y.S.3d 372 (2d Dept. 2015).

[EDITOR'S NOTE: The lease agreement between the landlord and tenant provided provisions that reoccur in many cases where the tenant is obligated to make all sidewalk repairs:

> "Repairs: 4. …Tenant shall, throughout the term of this lease, take good care of the demised premises and the fixtures and appurtenances therein, and the sidewalks adjacent thereto, and at its sole cost and expense, make all non-structural repairs thereto as and when needed to preserve them in good working order and condition, reasonable wear and tear, obsolescence and damage from the elements, fire or other casualty excepted."
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> Paragraph 30 of the Lease provides that "Tenant shall at Tenant's expense, keep demised premises clean and in order, to the satisfaction to Owner, and if the demises premises are situated on the street floor, Tenant shall at its own expense, make all repairs and replacements to the sidewalks and curbs adjacent thereto.…"
>
> Paragraph 70 of the Rider to said lease, dated April 18, 2000, provides as follows: "*Sidewalks*: The Tenant is aware that the Landlord is renting the Demised Premises to the Tenant conditioned on the fact that the Tenant will continuously keep the sidewalk in front of the Demised Premises clean and free from garbage and debris. The Tenant agrees to arrange to sweep the sidewalk when reasonably necessary. The Tenant further agrees, at its sole cost and expense, to be responsible for the clearance and removal of snow which may accumulate on the sidewalk in front of the Demised Premises."
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> Paragraph 77 of said Rider, in part, provides as follow: The Tenant…shall and will indemnify and save harmless the Landlord from and against all claims for damages of whatever nature arising from any accident, injury or damage, occurring outside of the Demised Premises but within the Building, or on the sidewalks and area adjacent to the Building where such accident, damage or injury results from or is claimed to have resulted from any action or omission on the part of the Tenant or the Tenant's contractors, licensees, agents, invitees, visitors, servants or employees. See 41 Misc.3d 1232(A), 981 N.Y.S.2d 636 (S.Ct. Queens Cty. 2013).]

INDEMNIFICATION—CONTRACTUAL—TENANT/ LEASE EXPIRED

The court correctly denied third-party defendant tenant's motion to dismiss third-party plaintiff landlord's claim for contractual indemnity even though the lease had expired and the tenant was a holdover:

> Upon the expiration of the lease, the third-party defendant continued to occupy the leased premises. Generally, when a tenant remains in possession after the expiration of a lease, "pursuant to common law, there is implied a continuance of the tenancy on the same terms and subject to the same covenants as those contained in the original instrument." The third-party defendant failed to establish that the holdover tenancy was not subject to the terms of the written lease, including the indemnification provision.

Henderson v. Gyrodyne Company of America, Inc., 123 A.D.3d 1091, 1 N.Y.S.3d 199 (2d Dept. 2014).

[EDITOR'S NOTE: The indemnity clause required the tenant to indemnify the landlord for liability or damages incurred based on "any act or acts, omission or omissions of the tenant, or of the employees—of the tenant."]

INSURANCE—ADDITIONAL INSURED—LATE NOTICE

Utica First Insurance Company's disclaimer notice to its insured, CFC, that it would not defend any legal action against it or any other party because of the employee exclusion, was not notice to the additional insured, Adelphi, and its disclaimer 14 months later was untimely:

> If Adelphi was not entitled to coverage because of the employee exclusion, it did

not matter one way or the other whether it was an additional insured under the CFC/Utica policy, and Utica therefore did not need to investigate Adelphi's status in order to disclaim coverage under the exclusion. Indeed, given its statement that it would not indemnify "our insured *or any other party* for any judgment awarded," Utica must have known that the employee exclusion was effective not only as to CFC but also as to Adelphi, and therefore, Utica should have immediately disclaimed to Adelphi on that basis. Thus, Utica's investigation as to whether Adelphi was an additional insured was insufficient as a matter of law as the basis for a disclaimer.

Endurance American Specialty Insurance Company, et al. v. Utica First Insurance Company, 132 A.D.3d 434, 17 N.Y.S.3d 401 (1st Dept. 2015).

[EDITOR'S NOTE: The First Department recalled and vacated its early order on March 31, 2015, holding the disclaimer notice to Adelphi was not unreasonably late because it disclaimed immediately after receiving the CFC/Adelphi contract.

> However, Adelphi's additional insured status was conferred by a blanket additional insured endorsement, i.e., for any entity that CFC was required by a written contract to name as an additional insured; Adelphi was not named in the policy, and was required to prove its status by providing a copy of its written contract with CFC. Plaintiffs acknowledge that Utica "conducted an investigation as to Adelphi's status as an additional insured on its policy, and only when it confirmed that Adelphi was an additional insured did it issue its coverage position for Adelphi's tender." Indeed Utica issued its disclaimer the day after it received the CFC/Adelphi contract. See 126 A.D.2d 651, 7 N.Y.S.3d 58 (2015)]

INSURANCE—EXCLUSION—ENSUING LOSS PROVISION—WATER MAIN RUPTURE

Plaintiff, whose house was damaged by water after a water main abutting the property exploded, is not covered under Allstate's homeowners' policy based on its "ensuing loss provision":

> Plaintiffs' loss occurred when water from a burst water main flowed onto their property, flooding the basement of their home. Accordingly, their loss clearly falls within item 4 of the water loss exclusion, which bars coverage for "loss to the property…consisting of or caused by… 4. Water…on or below the surface of the ground, regardless of its source… [, including] water…which exerts pressure on, or flows, seeps or leaks through any part of the residence premises."
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> Turning next to the sudden and accidental exception, this clause is properly characterized as an ensuing loss provision, which "provide[s] coverage when, as a result of an excluded peril, a covered peril arises and causes damage."
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> * * *
>
> Stated another way, an ensuing loss "at least requires a new loss to property that is of a kind not excluded by the policy"; it "[does not] resurrect coverage for an excluded peril."

Platek v. Town of Hamberg, 24 N.Y.3d 688, 3 N.Y.S.2d 312 (2015) ***rvg.*** 97 A.D.3d 1118, 948 N.Y.S.2d 797 (4th Dept. 2012).

[EDITOR'S NOTE: The Allstate policy excluded property damage caused by water, with an exception for certain sudden and accidental direct physical losses:

> [Allstate does] not cover loss to the property…*consisting of or caused by*:
>
> 4. Water…*on or below the surface of the ground, regardless of its source[, including] water…which exerts pressure on, or flows, seeps or leaks through any part of the residence premises*.
>
> We do cover sudden and accidental direct physical loss *caused by fire, explosion or theft resulting from items 1 through 4 listed above* (emphases added).]

JUDGMENT—MEDICARE STATUS

The Supreme Court correctly directed plaintiff to submit an affidavit that he is not and was not a Medicare recipient at the time of the accident:

> Contrary to plaintiff's contention, the court properly found that plaintiff did not satisfy his obligations under CPLR 5003-a, since he failed to provide defendant with the information relating to his Medicare status that defendant requires to comply with its reporting obligations under 42 USC § 1395y.

Torres v. Visto Realty Corp., 127 A.D.3d 545, 8 N.Y.S.3d 59 (1st Dept. 2015).

MALPRACTICE—LEGAL—STATUTE OF LIMITATIONS

Plaintiff's action for legal malpractice against his former attorneys was time-barred because the action was commenced three years after consents to change attorneys were signed notwithstanding signing a later revised consent:

> The defendant took no acts on behalf of the plaintiff in the actions after the consents were signed on April 20, 2010. The parties' execution of the consents on that date in all of the actions, including Action Nos. 1 and 2, demonstrated the end of the defendant's representation of the plaintiff and the parties' mutual understanding that any future legal representation in the actions would be undertaken by the plaintiff's new counsel. Therefore, the defendant met its prima facie burden of establishing that the three-year statute of limitations period for commencing a cause of action alleging legal malpractice had expired at the time the plaintiff commenced this action on May 10, 2013.
>
> * * *
>
> The May 2010 revised consent, which was prepared and distributed by new counsel, not the defendant, and related only to Action No. 1, constituted "a mere memorialization of what had already occurred" in April 2010.

Alizio v. Ruskin Moscou Faltischek, P.C., 126 A.D.3d 733, 5 N.Y.S.3d 252 (2d Dept. 2015).

MASTER SERVANT—SPECIAL EMPLOYEE RELATIONSHIP

Question of fact whether plaintiff, a truck driver assigned to work for defendant Business Relocation Services, Inc. for two days by a temporary employment agency, was Business Relocation Services's special employee:

> Although plaintiff used defendant's trucks and was told where and when to deliver and pick up voting machines, this does not establish as a matter of law that United surrendered complete control and direction over plaintiff's work or that defendant assumed such control and direction. Nor did United's relinquishment of contact with and direct supervision of plaintiff after assigning him to defendant establish that defendant had in fact assumed "complete and exclusive control" over plaintiff's work. Notably, although plaintiff was accompanied by one of defendant's supervisors during his deliveries and pickups of the voting machines, the supervisor testified that he did not supervise drivers.

Holmes v. Business Relocation Services, Inc., 117 A.D.3d 468, 984 N.Y.S.2d 868 (2d Dept. 2014), *affd,* 25 N.Y.3d 955, 8 N.Y.S.3d 896 (2015).

[EDITOR'S NOTE: In affirming, the Court of Appeals reasoned:

> As a matter of law, it cannot be said that Business Relocation Services, Inc., the alleged special employer, overcame the presumption of continuing general employment by "clear[ly] demonstrati[ng]… surrender of control by the general employer and assumption of control by the special employer." The Appellate Division correctly determined that issues of fact remained as to the alleged special employment relationship.]

MOTION—AMENDED ANSWER—SETOFF

The Supreme Court erred in limiting defendant distributor Coast's motion to plead the affirmative defense of setoff (G-O-L § 15-108) only with respect to the sum of $84,448.41 that plaintiffs received from the manufacturer in a bankruptcy settlement:

> In light of the policy that leave to amend pleadings should be liberally given where no prejudice would result thereby to another party, the Supreme Court erred in limiting Coast's assertion of the affirmative defense. It is premature, at this stage, to make any determination as to the amount of any potential setoff to which Coast may be entitled

Silver v. Sportsstuff, 130 A.D.3d 911, 12 N.Y.S.3d 892 (2d Dept. 2015).

MOTIONS—SUMMARY JUDGMENT—ISSUES OF FACT/INCONSISTENCIES

Plaintiff was not entitled to summary judgment on liability where eyewitness stated to police that defendant driver caused the accident by turning into oncoming traffic, but also stated that plaintiff was driving at a rate of 40 to 50 miles per hour:

> Since plaintiff submitted and relied on the certified police accident report containing the eyewitness's statement, he cannot

> now complain that defendants' reliance on favorable aspects of the statement to defeat summary judgment is improper. The inconsistencies between the statements made to the police after the accident and the affidavits submitted in support of plaintiff's motion raise issues of fact as to whether defendant driver violated Vehicle and Traffic Law § 1141, and whether plaintiff's excessive speed or other negligence contributed to the accident precluding an award of summary judgment.

Espinal v. Volunteers of America-Greater New York, Inc., 121 A.D.3d 558, 995 N.Y.S.2d 22 (1st Dept. 2014).

MUNICIPAL CORPORATIONS—ROADWAY REPAIR—PROPRIETARY FUNCTION—FAILURE TO WARN

New York City is liable to plaintiff because a NYC Department of Transportation supervisor, Donald Bowles, closed entry of a roadway in preparation of a repair but told plaintiff that it was "okay to go through" the roadway resulting in plaintiff bicyclist hitting a pothole and falling:

> A municipality has a duty to maintain its roads and highways in a reasonably safe condition and liability will flow for injuries resulting from a breach of that duty. Thus, it is well established that a municipality has a proprietary duty to keep its roads and highways in a reasonably safe condition. Although liability for failing to maintain roads and highways can and has been limited by prior written notice laws, the nature of that function remains proprietary when performed by highway maintenance personnel.
>
> * * *
>
> At the time he failed to warn plaintiff, he [Bowles] was blocking the transverse to vehicular traffic in preparation for that road repair. Although the maintenance work had not yet begun, Bowles and his crew could not have repaired the roadway without having closed the road to traffic. In other words, his act of closing the entry to vehicular travel was integral to the repair job a proprietary function.

Wittorf v. City of New York, 23 N.Y.3d 473, 991 N.Y.S.2d 578 (2014).

NEGLIGENCE—DUTY—CONTROL OF THIRD PARTIES

Defendant, Queens Village drug treatment center, did not demonstrate, as a matter of law, that it did not owe plaintiff, who was stabbed by a recently expelled patient, Sean Velentzas, who was sent to the facility as an alternative to incarceration for charges stemming from allegations that he had robbed a cab driver at gunpoint:

> The key factor in determining whether a defendant will be liable for the negligent acts of third persons is whether the defendant has sufficient authority to control the actions of such third persons. Such authority, at a minimum, requires "an existing relationship between the defendant and the third person over whom 'charge' is asserted."
>
> There is no question that Queens Village had "an existing relationship" and sufficient authority to control Velentzas's actions.
>
> * * *
>
> Based on the evidence submitted, there is no proof, documentary or otherwise, from anyone present at the time of the incident that the police ever took Velentzas into "custody," thereby extinguishing any further duty on defendant's part. At this stage of the proceedings, the record presents a material question of fact on this issue.

Oddo v. Queens Village Committee, 135 A.D.3d 211, 21 N.Y.S.3d 53 (1st Dept. 2015).

[EDITOR'S NOTE: Justice Saxe, who would have granted defendant summary judgment, dissented:

> These facilities (residential drug treatment) cannot be properly be saddled with a duty to protect the general public from a discharged resident on the theory that he may possibly become violent toward some unknown third party after leaving the facility. Moreover, even if any such duty existed in law, it would be fulfilled when that resident was turned over to police custody; the facility has neither the right nor the obligation to ensure that the police thereafter prevent the resident's release.
>
> * * *

> Velentzas was escorted off the premises by the police. The police released Velentzas shortly after escorting him out of defendant's facility, and he made his way to his grandmother's residence, where his attack on plaintiff took place.
>
> * * *
>
> The majority goes even further than imposing on the defendant facility an obligation to instruct the police as to how to handle a resident whose conduct prompted a 911 call; the obligation it imposes logically survives past the removal of that resident by the police, so that no matter how the police handle that resident initially, if the police later decide to release him, the facility will still be liable for any harm he does. The unreasonableness of such an obligation should be apparent, since the responding officers have a number of options, from deciding not to arrest the individual at all, to arresting him but releasing him, to arresting him, booking him, and leaving it to the arraignment court to decide how to handle him. The observation that the police did not take Velentzas into custody does not justify holding the defendant facility liable; once the police took Velentzas, he was under their control and authority, and the facility had no further duty or ability to control him.]

NEGLIGENCE—DUTY—PHYSICIAN—PRESCRIBING NARCOTICS TO DRUG ADDICT

Daughter of a woman killed in a pharmacy by a drug addict committing a robbery in an attempt to procure narcotics cannot sue physician who (a) operated pain management clinic functioning as a "pill mill" and (b) prescribed narcotics to the drug addict:

> [Dr.] Li did not owe a duty to the decedent or to the general public because no special circumstances existed. The decedent was a stranger to Laffer [drug addict] and a member of the general public, not a member of "a determinate and identified class." Additionally, Li did not have the authority or the ability to control Laffer and to protect against the risk of harm. In essence, the plaintiffs are arguing that Li was in the best position to prevent the harm by not prescribing narcotics to Laffer. However, this contention represents a departure from the established precedent requiring the existence of "sufficient authority and ability to control the conduct of third persons" to impose a duty.

Malone v. County of Suffolk, 128 A.D.3d 651, 8 N.Y.S.3d 408 (2d Dept. 2015).

NEGLIGENCE—LABOR LAW § 240(1)—BILLBOARD—ALTERING

Plaintiff, who was assisting his co-workers while they were installing and removing a billboard advertisement and fell 10 feet below onto the lower rear catwalk when a strong wind gust caused vinyl advertisement to strike his chest, was engaged in altering a structure, within the meaning of Labor Law § 240(1):

> Here, plaintiff's job was to install a new advertisement. In order to do so he and the other members of the construction crew had to attach extensions that changed the dimensions of the billboard's frame and transformed the shape of the billboard to accommodate the advertisement's artwork. Plaintiff was injured when in furtherance of this task he fell while assisting the other crew members with the removal of the old vinyl advertisement from the billboard's side panels. The vinyl removal was a prerequisite to the attachment of the extensions and therefore an integral part of the installation of the extensions. We have little difficulty concluding that the plaintiff's work entails a significant change to the billboard structure because once the vinyl is removed, the billboard is enlarged by the attachment of the extensions, work accomplished by the use of the angle iron on the back of each extension, and application of nuts, bolts and nails.
>
> * * *
>
> The fact that the advertisement extensions stay up as long as the sign does, makes the work no less an alteration within the meaning of Section 240(1). The change to the physical attributes of the structure is what matters.
>
> A requirement that the alteration be permanent would also undermine the worker protection purpose of the statute. Regardless of the duration of the completed work, the worker's task remains the same, and the permanency of the alteration in no way diminishes the risk attendant to that task.

Joseph Saint v. Syracuse Supply Company, 25 N.Y.3d 117, 8 N.Y.S.3d 229 (2015), *rvg* 110 A.D.3d 1470, 973 N.Y.S.2d 896 (4th Dept. 2013).

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

Plaintiff, who fell in floor opening when plywood cover collapsed, is not entitled to summary judgment, there being issues of fact whether his own conduct was the proximate cause of his injuries:

> Although the plaintiff met his prima facie burden of establishing a violation of Labor Law § 240(1), the defendants produced evidence that a safety harness and line were available to the plaintiff, that he was aware that he was required to anchor the line on the floor where he was working, and that the anchors, harness, and line would have prevented him from falling to the 14th floor, but that the plaintiff had consciously decided not to anchor his line on the 15th floor as instructed

Bascombe v. West 44th Street Hotel, LLC, 124 A.D.3d 812, 2 N.Y.S.3d 569 (2d Dept. 2015).

NEGLIGENCE—LABOR LAW § 240(1)—STILTS

Plaintiff, who slipped on a thin patch of ice while wearing stilts that elevated him to reach a 9- to 10-foot-high ceiling to install insulation in a ceiling, is not protected under Labor Law § 240(1):

> Here, plaintiff's accident was plainly caused by a separate hazard—ice—unrelated to any elevation risk. Plaintiff testified that stilts were the appropriate device for the type of work that he was undertaking, given the height of this particular ceiling. Plaintiff's testimony further established that it was the ice—not a deficiency or inadequacy of the stilts—that caused his fall. The ice that caused plaintiff to slip is indistinguishable from electrical conduit, a portable light, or protruding pipes, none of which are hazards that call for elevation-related protective devices.
>
> * * *
>
> Unlike ladders, stilts are not "placed" in a stationary position and expected to remain still to ensure their proper and safe use. Rather, stilts are intended to function as extensions of, and move with, the worker during performance of the designated task. Thus, the imposition of liability under section 240(1) where a ladder slips due to an unsafe condition on the floor in the area where it is placed is distinguishable from the circumstances of plaintiff's accident here.

Nicometi v. Vineyards of Fredonia, LLC, 25 N.Y.3d 90, 7 N.Y.S.3d 263 (2015).

[EDITOR'S NOTE: Chief Judge Lippman dissented, stating that stilts placed on ice create the same elevation-related risk as do ladders. Chief Judge Lippman criticized the majority for expanding ***Melber v. 6333 Main St.***, 91 N.Y.2d 759, 676 N.Y.S.2d 104 (1998) which held Labor Law § 240(1) inapplicable, where the plaintiff was standing on 42 inch stilts while installing metal studs in the top of a drywall and while walking away from the drywall, without removing his stilts, to retrieve a tool, he tripped over electrical conduit protruding from the unfinished floor:

> The majority finds that ice "is indistinguishable from electrical conduit, a portable light, or protruding pipes." However, when stilts or ladders are placed on top of ice, the combination of the two presents and exacerbates elevation-related risks.
>
> Ladders, like stilts, must be moved as the worker moves, and thus placement is equally important for stilts. To the extent the majority indicates that the stilts themselves have to break in order for a plaintiff to make out a Labor Law § 240(1) claim, that view is contradicted by the language of the statute and by our case law.]

NEGLIGENCE—NON-DELEGABLE DUTY—PARKING LOT SECURITY

The Buffalo Bills failed to establish as a matter of law that it maintained a safe parking lot where plaintiff was struck by a vehicle while being pursued by a driver employed by Apex, the security firm the Buffalo Bills hired to provide security in the parking lot on days when football games were played in the stadium:

> Although the Bills contracted with Apex to provide security in the parking lot, we conclude that the Bills defendants are "vicariously liable for [Apex's] negligence based on [their] nondelegable duty to keep the premises safe."
>
> We further conclude that the Bills defendants failed to establish as a matter of law that Apex had entirely displaced

> their duty to maintain the premises safely…Although the Bills defendants submitted the deposition testimony of the vice president of Apex in which he stated that Apex was responsible for security in the parking lot, the Bills defendants also submitted the Bills' contract with Apex, which provided that Apex would follow guidelines and procedures promulgated by the Bills and that the Bills "reserve[d] the right to utilize its own employees to provide security services." The Bills defendants further submitted evidence that an employee of the Bills drafted a Stadium Guide that was distributed to all Apex employees as a handbook; the Bills held briefings for Apex employees before every football game; the Bills determined Apex's staffing levels; and the Bills determined where Apex employees would be stationed in the parking lot.

Giacometti v. Farrell, 133 A.D.3d 1387, 20 N.Y.S.3d 826 (4th Dept. 2015).

[EDITOR'S NOTE: In ruling that the Buffalo Bills had a non-delegable duty keep the premises safe, the court cited ***Thomassen v. J&K Diner, Inc.***, 152 A.D.2d 421, 549 N.Y.S.2d 416 (2d Dept. 1989), which states that where a member of the general public is invited into a place of public assembly, the premises owner is vicariously liable for the negligence of an independent contractor because certain duties such as where the public is invited into stores, office buildings and other places of public assembly, are duties imposed upon an owner that cannot be delegated to another so as to relieve the owner from liability:

> Where such a duty exists, the owner of property or other employer may not be relieved of liability for injury even though the injury is occasioned by the neglect of an independent contractor.]

NEGLIGENCE—PREMISES—ASSAULT—PRIOR INCIDENTS

Plaintiff's assault by patrons at defendant's multiplex theater is actionable because the owner failed to demonstrate its ***prima facie*** entitlement to judgment as a matter of law:

> The defendants' submissions included the deposition testimony of a security guard who indicated that in the year preceding the subject incident, there had been four or five other incidents in which disputes between patrons escalated into physical altercations. The defendants also submitted the deposition testimony of the plaintiffs, wherein they alleged that the physical assault upon them inside the theater lasted for approximately 15 to 20 minutes, during which time the plaintiff Yelena Solomon was screaming for help. Under these circumstances, the defendants failed to eliminate triable issues of fact as to whether the assault on the plaintiffs could have been reasonably anticipated and prevented.

Solomon v. National Amusements Inc., et al., 128 A.D.3d 947, 9 N.Y.S.3d 398 (2d Dept. 2015).

NEGLIGENCE—PREMISES—DOORMAT

Premises owner is not entitled to summary judgment where plaintiff was injured when she tripped over her neighbor's doormat that was in front of her apartment door, there being an issue whether the doormat was an open and obvious condition:

> Although plaintiff testified she had previously observed the doormat in the hallway prior to her accident, she also stated that the doormat had never been placed in front of her apartment door. Under these circumstances, there is an issue as to whether the doormat's location was likely to be overlooked.
>
> Furthermore, defendant was aware of the tripping hazards of having doormats in the common hallways, and informed the tenants that they were prohibited, and that defendant retained the authority to remove them. Plaintiff testified that she complained about the doormat in the hallway, and that defendant failed to act. Thus, the evidence also raises issues of fact as to whether defendants breached their common-law duty to maintain the area in a reasonably safe condition.

Ward v. Ruppert Housing Co., Inc., 130 A.D.3d 467, 13 N.Y.S.3d 76 (1st Dept. 2015).

NEGLIGENCE—NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS—ELEMENTS

Plaintiffs' failure to adequately allege extreme and outrageous conduct is not fatal to their cause of action alleging negligent infliction of emotional distress:

> To the extent that certain of this Court's past decisions have indicated that extreme and outrageous conduct is an element of negligent infliction of emotional distress, those cases should no longer be followed.

> [Negligent infliction of emotional distress] is a breach of a duty of care "resulting directly in emotional harm [and] is compensable even though no physical injury occurred." However, the mental injury must be "a direct, rather than a consequential, result of the breach."

Taggart v. Costabile, 131 A.D.3d 243, 14 N.Y.S.3d 388 (2d Dept. 2015).

NEGLIGENCE—PREMISES—SLIP AND FALL

Plaintiff, who lost her balance while shopping at Filene's Basement hitting her head against the display case and fell, failed to raise a triable issue of fact in opposing defendants' summary judgment motion:

> In a trip and fall case, [a] plaintiff's inability to identify the cause of his or her fall is fatal to his or her cause of action, since, in that instance, the trier of fact would be required to base a finding of proximate cause upon nothing more than speculation. Here…defendants established their prima facie entitlement to judgment as a matter of law by submitting evidence that demonstrated that the plaintiff could not identify the cause of her fall without resorting to speculation.
>
> * * *
>
> In any event, the conditions that the plaintiff suggests may have been the proximate causes of her fall were open and obvious, and not inherently dangerous as a matter of law.

Blocker v. Filene's Basement #51-00540, et al., 126 A.D.3d 744, 5 N.Y.S.3d 265 (2d Dept. 2015).

NOTICE OF CLAIM—INSUFFICIENT ALLEGATIONS

The Appellate Division erred in denying the Housing Authority's motion to strike allegations in plaintiff's bill of particulars concerning the condition of the handrail:

> The allegations in the notice of claim were not sufficient to put defendant on notice of the allegations in the bill of particulars concerning the handrail.

Thomas v. New York City Housing Authority, 25 N.Y.3d 1087, 12 N.Y.S.3d 617 (2015), *rvg* 120 A.D.3d 401, 990 N.Y.S.2d 517 (1st Dept. 2014).

[EDITOR'S NOTE: In a 3-2 decision, the Appellate Division majority held:

> 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.

The dissenters, on the other hand, disagreed, stating that the majority's conclusion cannot "fairly be inferred from the allegations in the notice of claim":

> Nowhere in the amended notice of claim is there even an indication of a defective handrail being a substantial factor in the accident.

In the amended notice of claim, the plaintiff alleges that his accident was

> due to the dangerous, defective, broken, hazardous, dimly lit, wet, feces-filled and unsafe condition of said landing… [Defendants were also] negligent in its ownership, design, construction, operation, maintenance, management, repair and control of the premises mentioned, and more specifically the aforementioned 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 permitted the landing to be carelessly, negligently and dangerously maintained, creating a trap, nuisance and hazard upon the said premises and more particularly upon the landing and in failing to post any notice or warning of the said dangerous and defective condition at said premises and landing.

See 2013 WL 9817107]

NOTICE OF CLAIM—LATE NOTICE

Plaintiff, who was injured while on a City boardwalk, is not entitled to have her late notice of claim deemed timely served ***nunc pro tunc*** because she did not (a) demonstrate a reasonable excuse for failing to serve a timely notice of claim; (b) demonstrate that the City obtained timely actual knowledge of the essential facts constituting the claim, and (c) no prejudice to the City's ability to conduct an investigation of the claim:

> The incident report prepared by the City's Department of Parks and Recreation on the day of the accident did not provide the City with actual notice of the essential facts constituting the peti-

> tioner's claim that the City was negligent in allowing the boardwalk upon which the petitioner allegedly fell and sustained injuries to be operated, managed, controlled, and maintained in a dangerous and hazardous condition.

Bhargava v. City of New York, 130 A.D.3d 819, 13 N.Y.S.3d 552 (2d Dept. 2015).

[EDITOR'S NOTE: Actual knowledge of the essential facts underlying the claim means "'knowledge of the facts that underlie the legal theory or theories on which liability is predicated in the [proposed] notice of claim; the [municipality] need not have specific notice of the theory or theories themselves."]

PARTIES—CLASS ACTION—PERSONAL INJURY PLAINTIFFS

Personal injury plaintiffs who sued for damages caused by defendants' negligent release of chemicals into the atmosphere are entitled to two classes: One seeking damages for alleged loss in property values, and the other seeking damages for alleged loss of quality of life:

> Contrary to defendants' contention, plaintiff established that there are common questions of law or fact whether defendants negligently discharged chemicals into the atmosphere and whether such negligent conduct caused decreases in property values or quality of life in the affected area. Although the individual class members may have sustained differing amounts of damages, it is well settled that "'the amount of damages suffered by each class member typically varies from individual to individual, but that fact will not prevent the suit from going forward as a class action if the important legal or factual issues involving liability are common to the class.'"
>
> * * *
>
> We also reject defendants' contention that plaintiff failed to meet the typicality requirement of CPLR 901 (a) (3). Plaintiff established that the claims of the class representative arose "'out of the same course of conduct and are based on the same theories as the other class members.'" Contrary to defendants' contention, because "the typicality requirement relates to the nature of the claims and the underlying transaction, not the amount or measure of damages, [the fact that the class representative's] damages may differ from those of other members of the class is not a proper basis to deny class certification."

Deluca v. Tonawanda Coke Corp., 134 A.D.3d 1534, 22 N.Y.S.3d 768 (4th Dept. 2015).

PLEADINGS—AFFIRMATIVE DEFENSE—STATUTE OF LIMITATIONS

Defendant's statute of limitations defense was inadequately pleaded where an affirmative defense of statute of limitations is "concealed" within a boilerplate, catchall paragraph containing 15 other affirmative defenses and an attempt to plead and reserve every other conceivable affirmative defense:

> Defendant failed to properly plead the statute of limitations, because its inclusion of the defense within a laundry list of predominantly inapplicable defenses did not provide plaintiff with the requisite notice (see CPLR 3013; CPLR 3014).
>
> * * *
>
> Nevertheless, dismissing the statute of limitations defense, or treating the defense as waived, as we might otherwise do, would be an excessively severe result. Instead, the prejudice can be cured by allowing defendant to amend its pleading and then allowing plaintiff to conduct discovery on the statute of limitations issue, particularly to determine when Pace (plumbing subcontractor) completed its work on the Victaulic plumbing system… Therefore, in order to ensure the rights of both parties, we remand for an adequate determination of the date on which Pace completed its work.

Scholastic Inc. v. Pace Plumbing Corp., 129 A.D.3d 75, 8 N.Y.S.3d 143 (1st Dept. 2015).

[EDITOR'S NOTE: The court urged parties in asserting a statute of limitations affirmative defense to comply with Official Form 17 which states:

> The cause of action set forth in the complaint did not accrue within six years next before the commencement of this accident.

The court recommended defendants plead the statute of limitations with as much particularity as illustrated by Official Form 17, at least in cases where, as here, the plaintiff states multiple causes of action and the accrual date is absent from the face of the complaint (or the body of the answer).]

PLEADINGS—FORMAL JUDICIAL ADMISSION

Plaintiff was entitled to a new trial because the trial court erred when responding to the jury's inquiry whether defendant Khan was driving the cab in which plaintiff was a passenger. Instead of stating to the jury there was no evidence on that issue, the court should have informed the jury of defendants' admission in the answer conceding their operation and ownership of the vehicle involved in the accident and the jury could draw its own inferences on the issue of operation and ownership:

> In their answer, Ali and Khan admitted that they were the owner and operator, respectively, of a vehicle bearing a certain New York registration number and that their vehicle came into contact with the vehicle operated by Chowdhury on the date and at the place specified in the complaint. They denied knowledge or information sufficient to form a belief as to whether the plaintiff was a passenger in their vehicle, as she alleged in the complaint.
>
> * * *
>
> The failure to deny an allegation in a complaint constitutes an admission to the truth of that allegation. "Facts admitted in a party's pleadings constitute formal judicial admissions, and are conclusive of the facts admitted in the action in which they are made." Moreover, "admissions…in pleadings are always in evidence for all the purposes of the trial of [an] action." In response to the jury's inquiry about whether Khan was the driver, the court should have informed the jury of Khan's and Ali's admissions in their answer concerning their operation and ownership of a certain vehicle.

DeSouza v. Ahammad Reja Khan, 128 A.D.3d 756, 11 N.Y.S.3d 168 (2d Dept. 2015).

PRE-TRIAL DISCLOSURE—PRIOR LITIGATION

Con Edison is entitled to discovery of co-defendant Team's records concerning earlier litigation against it, among others, arising from a 2001 fire at a refinery in Texas (the Diamond Shamrock litigation) where Team had performed design and repair work:

> The weight to be given evidence of other [lawsuits or claims] on the issues of notice and causation, and indeed the very admissibility of such evidence…are not of concern in the context of disclosure.
>
> * * *
>
> We are not concerned with the ultimate admissibility of the evidence at trial, but with the discovery of information concerning the prior incident, as to which a more liberal standard applies.
>
> * * *
>
> [Team's] excess application of leak sealant was a contributing factor in both the steam pipe explosion at Lexington Avenue and 41st Street and the incident at the Diamond Shamrock refinery in Texas. Diamond Shamrock's expert opined that injection of sealant caused a stress overload fracture of the outlet nozzle; and the team's senior technical specialist admitted that they had pumped far more sealant into the enclosure box at the refinery than it was capable of holding. The expert opined that the stress applied by third-party defendant's technicians during injection of sealant into the closure caused the rupture of the valve and the resulting explosion. Con Edison, in this case, alleges that excess application of sealant caused blockages of steam traps, preventing the removal of condensed steam from inside the steam main, and leading to a "water hammer" which caused the main to rupture. The precipitating causes and the circumstances surrounding both incidents are sufficiently similar so as to warrant discovery concerning the prior incident.

In re Steam Pipe Explosion at 41st Street, 127 A.D.3d 554, 8 N.Y.S.3d 88 (1st Dept. 2015).

PRE-TRIAL DISCOVERY—NON-PARTY PHYSCIAN

Defendant's subpoena to depose plaintiff's treating physician was upheld because his deposition was relevant to the defense of the action:

> The party or nonparty moving to vacate the subpoena has the initial burden of establishing either that the requested deposition testimony "is 'utterly irrelevant'" to the action or that "'the futility of the process to uncover anything legitimate is inevitable or obvious.'"
>
> Here, contrary to the plaintiff's contention, the Galster defendants satisfied the notice requirement. In a copy of the document entitled "Authorization to Permit the Interview of Treating Physician by Defense Counsel," which was attached to the nonparty witness subpoena, "the cir-

> cumstances or reasons" requiring the deposition of the nonparty were properly provided. Since the Galster defendants met this minimal obligation, the burden shifted to the plaintiff to establish that the deposition testimony sought was irrelevant to this action, which she failed to do. Further, the Galster defendants demonstrated that it was relevant to the defense of the action.

Bianchi v. Galster Management, 131 A.D.3d 558, 15 N.Y.S.3d 189 (2d Dept. 2015).

[EDITOR'S NOTE: Plaintiff alleged that she was showering in her apartment when the cold water suddenly turned off causing the remaining hot water to burn her. Plaintiff's medical records were filled with notes that, given the nature of her injuries, the burns could not have occurred in the manner or at the time plaintiff claimed. See 2013 WL 10903120.]

PRE-TRIAL DISCOVERY—NOTICE TO ADMIT

Defendant Islip Pizza should have been permitted leave to withdraw its admission in its notice to admit response where it admitted that the owner and operator of a motor vehicle involved in a collision with plaintiff was (a) "in the course his employment" with Islip Pizza and (b) "acting in furtherance of the business activities of" Islip Pizza:

> Here, Islip Pizza's liability depends entirely on whether it is liable for (operator) Kelly's acts under the doctrine of respondeat superior. The plaintiff's requests to admit thus were addressed to the core legal and factual issues pertaining to Islip Pizza. Moreover, the facts underlying the determination of whether Islip Pizza is liable for Kelly's alleged negligence may be obtained through discovery, including depositions of the defendants.

Altman v. Kelly, 128 A.D.3d 741, 9 N.Y.S.3d 359 (2d Dept. 2015).

[EDITOR'S NOTE:

> Under CPLR 3123(a), a party may serve upon another party a written request that it admit, among other things, "the truth of any matters of fact set forth in the request, as to which the party requesting the admission reasonably believes there can be no substantial dispute at the trial and which are within the knowledge of such other party or can be ascertained by him upon reasonable inquiry" (CPLR 3123[a]). The legislative policy underlying CPLR 3123(a) is to promote efficiency in the litigation process by "eliminat[ing] from the issues in litigation matters which will not be in dispute at trial. It is not intended to cover ultimate conclusions, which can only be made after a full and complete trial. A notice to admit which goes to the heart of the matters at issue is improper." Furthermore, under CPLR 3123(b), a court may at any time permit a party to amend or withdraw any admission "on such terms as may be just."]

PRE-TRIAL DISCOVERY—SECOND IME

Defendant is not entitled to a second IME where the physician, after examining plaintiff, was suspended for three years:

> Defendants have failed to demonstrate the existence of "unusual and unanticipated circumstances," since the bill of particulars was served before the IME, and there were no allegations of new or additional injuries.

Rebollo v. Nicholas Cab Corp., 125 A.D.3d 452, 2 N.Y.S.3d 471 (1st Dept. 2015).

PRE-TRIAL DISCOVERY—VIDEO/IME

Defendants were entitled to have plaintiff examined by an orthopedist of their own choosing after a mistrial was granted because plaintiff's counsel surreptitiously videotaped an IME by defendants' orthopedist, Dr. Michael Katz, who stated he was not willing to testify at a new trial:

> There is no restriction in CPLR 3121 limiting the number of examinations to which a party may be subjected, and a subsequent examination is permissible provided the party seeking the examination demonstrates the necessity for it.
>
> * * *
>
> In the present case, unusual and unanticipated circumstances warranting a new IME abound. Foremost among them is Dr. Katz's unavailability to the appellants as a witness at a retrial, due to his refusal to appear voluntarily, which, in turn, resulted from the Supreme Court's repeated accusation that Dr. Katz "lied" or committed "perjury" at the first damages trial. These extraordinary circumstances were set in motion when the plaintiff's attorney chose to surreptitiously videotape

> Dr. Katz's second IME of the plaintiff, and chose to withhold that recording from defense counsel despite the requirements of CPLR 3101(i).

Bermejo v. New York City Health and Hospitals Corp., 135 A.D.3d 116, 21 N.Y.S.3d 78 (2d Dept. 2015).

[EDITOR'S NOTE: The court criticized plaintiff's counsel's conduct and awarded defendants costs incurred to be determined at a hearing:

> The failure of the plaintiff's attorneys to disclose to defense counsel the videotape depicting the plaintiff being examined by Dr. Katz violated CPLR 3101. It also violated the spirit of New York's open disclosure policy, which, to a large extent, "was intended to mark an end to the presentation of totally unexpected evidence and to substitute honesty and forthrightness for gamesmanship."]

PRODUCTS LIABILITY—ALTERNATIVE LIABILITY

Defendants Coast Distribution and Land 'N' Sea Midwest, Inc., distributors of a Wego Kite Tube which injured plaintiff, are not entitled to summary judgment even though it "was impossible to identify which one of them distributed to Cargo [the seller], the Wego Kite Tube plaintiff purchased:

> The doctrine of alternative liability is "available in some personal injury cases to permit recovery where the precise identification of a wrongdoer is impossible."
>
> Under that doctrine, where the conduct of two or more defendants is tortious, and "'it is proved that harm has been caused to the plaintiff by only one of them, but there is uncertainty as to which one,' ' the burden is placed on those defendants to prove that they did not cause the harm. If the defendants cannot meet that burden, they are jointly and severally liable.
>
> * * *
>
> It is undisputed that Coast and Land placed into the stream of commerce a product that is alleged to be defective. If it is established at trial that the Wego Kite Tube was defective, then Coast and Land, as distributors of that product, will have acted tortiously "regardless of privity, foreseeability, or the exercise of due care."

Silver v. Sportsstuff, 130 A.D.3d 907, 14 N.Y.S.3d 421 (2d Dept. 2015).

PRODUCTS LIABILITY—REASONABLY FORESEEABLE USE

Plaintiff, who developed peritoneal mesothelioma when exposed to asbestos while dismantling and salvaging scrap metal, cannot recover against the manufacturer [Powell] even if the products were defectively designed because plaintiff's injuries did not result from their intended or unintended but reasonably foreseeable use:

> To recover for injuries caused by a defective product, the defect must have been a substantial factor in causing the injury, and "the product must have been used for the purpose and in the manner normally intended or in a manner reasonably foreseeable." As plaintiff did not use Powell's manufactured product in a reasonably foreseeable manner and his salvage work was not an intended use of the product, the complaint should have been dismissed.

Hockler v. William Powell Co., 129 A.D.3d 463, 11 N.Y.S.3d 45 (1st Dept. 2015).

RES IPSA LOQUITOR—TRAIN CEILING PANEL SWUNG OPEN

Plaintiff, a passenger on defendant's train, who was injured when the ceiling panel in the train car swung open and struck her on the head, is not entitled to partial summary judgment based on ***res ipsa loquitor***:

> This is not the type of rare case in which the circumstantial proof presented by plaintiff "is so convincing and the defendant's response so weak that the inference of defendant's negligence is inescapable."

Barney Yeboah v. Metro-North Commuter R.R., 25 N.Y.3d 945, 6 N.Y.S.3d 549 (2015), ***rvg*** 120 A.D.2d 1023, 992 N.Y.S.2d 215 (1st Dept. 2014).

[EDITOR'S NOTE:

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 (see *Dermatossian v. New York City Tr. Auth.*, 67 N.Y.2d 219, 226, 501 N.Y.S.2d 784 [1986]).]

TRIAL—BATSON VIOLATION

Prosecutor's failure to offer a race-neutral reason for striking a Hispanic male prospective juror warrants reversal of the judgment of conviction:

> The facially race-neutral reason proffered by the prosecutor for exercising a peremptory challenge with respect to the Hispanic male prospective juror was pretextual. Although the prosecutor argued that this prospective juror had a difficult time understanding the trial court's questions during voir dire, this claim is not borne out by the record. Rather, the record shows that the prospective juror was repeatedly asked the same question regarding his willingness to follow the law and assured the trial court more than once that he would follow the law as it was provided.

People v. Fabregas, 130 A.D.3d 939, 15 N.Y.S.3d 794 (2d Dept. 2015).

[EDITOR'S NOTE:

> Under both state and federal law, the use of peremptory challenges in a racially discriminatory manner is prohibited (see *Batson v Kentucky*, 476 US 79, 106 S. Ct. 1712 [1986]. Trial courts must follow a three-step protocol to determine whether a party has used its peremptory challenges in a racially discriminatory manner. First, the moving party contesting the peremptory challenges must allege sufficient facts to make a prima facie showing that the prospective jurors were challenged because of race. Where the moving party makes such a prima facie showing, the burden shifts to the nonmoving party to offer a race-neutral reason for each of the disputed peremptory challenges. If such reasons are offered, the burden shifts back to the moving party to demonstrate that the reasons, although facially neutral, are pretextual. The third step requires the trial court to make an ultimate determination as to whether the proffered reasons are pretextual.

The ***Batson v. Kentucky*** rule is also applicable in civil cases. See ***Torres v. Educational Alliance, Inc.***, 300 A.D.2d 469, 752 N.Y.S.2d 80 (2d Dept. 2002).]

TRIAL—CROSS-EXAMINATION—SCIENTIFIC TESTS—AUTHORITATIVE

The trial court did not err in permitting the use of a publication from the American College of Obstetricians and Gynecologists to be used during cross-examination even though the witness did not recognize it as "authoritative":

> It is well settled that the use of scientific works and publications may be used for impeachment purposes during cross-examination if it has been demonstrated that the work is the type of material commonly relied upon in the profession and has been deemed authoritative by such expert. Here, defendant recognized the publication as a "standard of care" to which he attempted to "adhere" in his own practice. Although he did not use the word "authoritative" in describing the publication, we note that the modern trend, with which we agree, is to eschew a narrow and rigid reliance upon semantic choices when other words, and the testimony viewed as a whole, convey an equivalent meaning as that in the traditional verbal formulation. Thus, a physician may "not foreclose full cross-examination by the semantic trick of announcing that he did not find the work authoritative" where he has testified that it is reliable, especially where, as here, he agreed that it constituted a "standard of care" to which he attempted to "adhere."

Wolf v. Persaud, 130 A.D.3d 1523, 14 N.Y.S.3d 601 (4th Dept. 2015).

VERDICT—INCONSISTENT FINDINGS

The trial court correctly granted defendant's cross-motion to enter a complete defense verdict where the jury found defendant's negligence not a substantial factor in causing plaintiff's injuries and, instead of stopping deliberations, determined defendant was 5% at fault and awarded plaintiff $200,000:

> Once the jurors determined that defendant's negligence was not a substantial factor or proximate cause of plaintiff's injuries, they should not have attempted to assess plaintiff's own negligence and to fix damages. That they did so was a superfluous act that does not require a new trial.

Alcantara v. Knight, 123 A.D.3d 622, 1 N.Y.S.3d 24 (1st Dept. 2014).

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NOTICE OF CLAIM—INSUFFICIENT ALLEGATIONS [*Thomas v. New York City Housing Authority*, 25 N.Y.3d 1087, 12 N.Y.S.3d 617 (2015), *rvg* 120 A.D.3d 401, 990 N.Y.S.2d 517 (1st Dept. 2014)]

NOTICE OF CLAIM—LATE NOTICE [*Bhargava v. City of New York*, 130 A.D.3d 819, 13 N.Y.S.3d 552 (2d Dept. 2015)]

PARTIES—CLASS ACTION—PERSONAL INJURY PLAINTIFFS [*Deluca v. Tonawanda Coke Corp.*, 134 A.D.3d 1534, 22 N.Y.S.3d 768 (4th Dept. 2015)]

PLEADINGS—AFFIRMATIVE DEFENSE—STATUTE OF LIMITATIONS [*Scholastic Inc. v. Pace Plumbing Corp.*, 129 A.D.3d 75, 8 N.Y.S.3d 143 (1st Dept. 2015)]

PLEADINGS—FORMAL JUDICIAL ADMISSION [*DeSouza v. Ahammad Reja Khan*, 128 A.D.3d 756, 11 N.Y.S.3d 168 (2d Dept. 2015)]

PRE-TRIAL DISCLOSURE—PRIOR LITIGATION [*In re Steam Pipe Explosion at 41st Street*, 128 A.D.3d 493, 9 N.Y.S.3d 238 (1st Dept. 2015)]

PRE-TRIAL DISCOVERY—NON-PARTY PHYSCIAN [*Bianchi v. Galster Management*, 131 A.D.3d 558, 15 N.Y.S.3d 189 (2d Dept. 2015)]

PRE-TRIAL DISCOVERY—NOTICE TO ADMIT [*Altman v. Kelly*, 128 A.D.3d 741, 9 N.Y.S.3d 359 (2d Dept. 2015)]

PRE-TRIAL DISCOVERY—SECOND IME [*Rebollo v. Nicholas Cab Corp.*, 125 A.D.3d 452, 2 N.Y.S.3d 471 (1st Dept. 2015)]

PRE-TRIAL DISCOVERY—VIDEO/IME [*Bermejo v. New York City Health and Hospitals Corp.*, 135 A.D.3d 116, 21 N.Y.S.3d 78 (2d Dept. 2015)]

PRODUCTS LIABILITY—ALTERNATIVE LIABILITY [*Silver v. Sportsstuff*, 130 A.D.3d 907, 14 N.Y.S.3d 421 (2d Dept. 2015)]

PRODUCTS LIABILITY—REASONABLY FORESEEABLE USE [*Hockler v. William Powell Co.*, 129 A.D.3d 463, 11 N.Y.S.3d 45 (1st Dept. 2015)]

RES IPSA LOQUITOR—TRAIN CEILING PANEL SWUNG OPEN [*Barney Yeboah v. Metro-North Commuter R.R.*, 25 N.Y.3d 943, 6 N.Y.S.3d 549 (2015), *rvg* 120 A.D. 1023, 992 N.Y.S.2d 215 (1st Dept. 2014)]

TRIAL—BATSON VIOLATION [*People v. Fabregas*, 130 A.D.3d 939, 15 N.Y.S.3d 794 (2d Dept. 2015)]

TRIAL—CROSS-EXAMINATION—SCIENTIFIC TESTS—AUTHORITATIVE [*Wolf v. Persaud*, 130 A.D.3d 1523, 14 N.Y.S.3d 601 (4th Dept. 2015)]

VERDICT—INCONSISTENT FINDINGS [*Alcantara v. Knight*, 123 A.D.3d 622, 1 N.Y.S.3d 24 (1st Dept. 2014)]

2016 National Trial Competition

By Thomas P. Valet

For the past 40 years, the Trial Lawyers Section of the New York State Bar Association has had the privilege of hosting the New York Regional Round of the National Trial Competition, the country's oldest and most prestigious mock trial competition for law students. The mission of the NTC is to "encourage and strengthen students' advocacy skills through quality competition and valuable interaction with members of the bench and bar. The program is designed to expose law students to the nature of trial practice and to serve as a supplement to their education."

This year's competition was held in the courtrooms of the Queens County Supreme Court from January 29-31, 2016. Twenty teams from ten different New York law schools entered to compete: Brooklyn Law, SUNY Buffalo Law, Cornell Law, Cardozo Law, Fordham Law, Hofstra Law, NYU Law, Pace Law, St. John's Law and Syracuse Law all entered teams. St. John's Law, the defending 2015 Regional Champion, served as the host school. More than 100 members of the Bench and Bar volunteered their time to serve as Judges and Evaluators during the competition.

The NTC requires teams of law students to try an entire case before a presiding judge and a panel of lawyers. The students must argue motions in limine, make an opening statement, offer evidence in support of their case, perform direct and cross examination of witnesses, and present a closing argument.

The students are scored by the lawyers in each of the various disciplines during the trial based on the trial advocacy skills they demonstrate. After three rounds of trials, eight teams advanced to the Semi-Final Round held on Sunday morning: Brooklyn Law School Teams A and B, Hofstra Law Teams K and L and teams from St. John's, Syracuse, NYU and Fordham Law faced off in the Semi-Finals, with Hofstra K, Hofstra L, Syracuse and NYU advancing to the Finals on Sunday afternoon.

In the Finals, Hofstra Team K defeated NYU Law and Syracuse defeated Hofstra Team L. Hofstra and Syracuse were crowned Co-Champions of the New York Region. The members of the Co-Champion Teams were:

Syracuse University School of Law:
Carly Halpin
Joe Gattuso
Cory Schoonmaker

Hofstra School of Law:
Lauren Reilly
Helene Weiss
Sean Brucher

The teams from Hofstra and Syracuse went on to represent the New York State Bar Association in the National Finals held in Dallas, Texas in March. Based on its performance at the Texas Finals, the team from Hofstra Law was awarded the Trial Lawyers Cup for 2016, a sterling silver cup given by the Trial Lawyers Section to the team from New York that advanced farthest in the National Finals.

The Trial Lawyers Section also presents several individual awards during the competition, based on the scores each student receives during the trials in which he or she competes. These awards were presented to the law students during a reception held at St. John's Law School on Saturday night January 30. The following students were recognized:

Best Opening Statement:
1. Rahul Hari, NYU Law
2. Samantha Oakes, Brooklyn Law
3. Helene Weiss, Hofstra Law

Best Direct Examination:
1. Evan Jaffe, St. John's Law
2. Carly Halpin, Syracuse Law
3. Samantha Oakes, Brooklyn Law

Best Cross-Examination
1. Justin St. Louis, Syracuse Law
2. Andrew Mark, Buffalo Law
3. Wyatt Smith, Cornell Law
   Brianne Richards, Hofstra Law

Best Closing Argument:

1. Lauren Reilly, Hofstra Law
2. Phil Schultze, Brooklyn Law
3. Austin Minogue, Brooklyn Law
   Dan Rosenbaum, Fordham Law
   Justin St. Louis, Syracuse Law

The Best Advocate through the Preliminary Rounds Award was presented to Justin St. Louis from Syracuse Law.

The Trial Lawyers Section also presents two special awards in honor of individuals who have been instrumental in the organization and administration of the Trial Competition over the years: the late Tony DeMarco, and Prof. Travis Lewin from Syracuse Law School. Both Mr. DeMarco and Prof. Lewin dedicated years of service to the NTC because they believed that the competition afforded young lawyers and law students an invaluable opportunity to learn the skills needed to be a trial lawyer.

The 2016 winner of the Anthony J. DeMarco Best Advocate Award was Lauren Reilly from Hofstra Law School. Lauren had the highest overall score of all students in all disciplines during the competition. She is a member of the Co-Champion team from Hofstra and went on to compete in the NTC National Finals in Dallas, Texas. This is the fourth time in the past five years that a female competitor has won the DeMarco Award as the Best Advocate in the competition.

The 2016 winners of the Travis H.D. Lewin Best Coaches Award are the coaches from Hofstra Law School, Jared Rosenblatt, Gerard McCloskey and Courtney Charles. Jared and Courtney practice with the Queens County District Attorney's Office and Gerard also worked at the Queens D.A. before recently going into private practice on Long Island. Both of the Hofstra teams they coached advanced to the Semi-Finals and one of the Hofstra teams was named Co-Champion for 2016.

The Trial Lawyers Section applauds all of the schools and laws students who competed in the NTC this year.

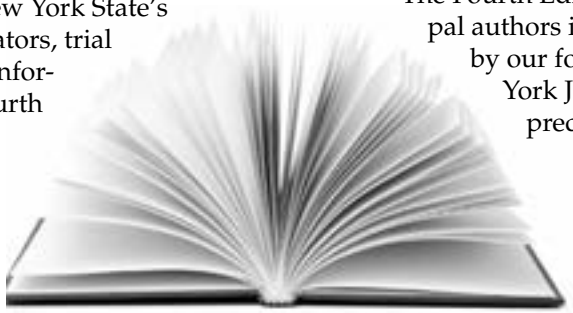
Congratulations to all of the law students who participated in the 2016 competition.

Book Review

Commercial Litigation in New York State Courts, Fourth Edition

Reviewed by Seymour Boyers

The Fourth Edition of the Treatise *Commercial Litigation in New York State Courts* is both inspirational and eminently pragmatic. Editor-in-Chief Robert L. Haig has called upon the expertise of New York State's most experienced commercial litigators, trial lawyers, and judges to author the informative articles contained in the Fourth Edition.



The contributing lawyers and judges hold enviable positions as leaders of the New York State Commercial and Trial Bar, and their articles illustrate their own precepts and experiences.

The Fourth Edition is packed with wisdom and knowledge beneficial not only to the neophyte commercial law attorney, but also to the most experienced tactician and strategist. Every lawyer familiar with the litigation process has seen commercial law cases won by thorough preparation, or lost by inadequate preparation, of trial counsel. It is true that only experience can develop the skills of a successful advocate, but to say that only practice can breed perfection is not to deny the substantive value of precept and example.

The First, Second and Third Editions of this Treatise, which were published in 1995, 2005, and 2010, respectively, have been widely recognized as informative and invaluable resources.

Pocket Parts for all chapters in the Third Edition have been published each year since 2010. Due to the many changes over the past five years in New York procedural and substantive law relating to commercial litigation, it became clear that a new Fourth Edition of the Treatise was required.

Accordingly, Editor-in-Chief Haig organized the authors to begin work on the Fourth Edition during the fall of 2014. The Herculean efforts of the authors resulted in the completion of 22 new chapters added to the Fourth Edition. In addition, the chapters carried forward from the Third Edition have been substantially expanded. As a result, the Fourth Edition consists of eight volumes (there were three volumes in the First Edition, five in the Second Edition, and six in the Third Edition).

The Fourth Edition also features a separate Appendix that contains an index as well as tables of all laws, rules and cases discussed in the Fourth Edition. The Appendix will be replaced annually. This Appendix is a most valuable assistance for the readers.

The Fourth Edition contains the work of 182 principal authors including 29 distinguished Judges led by our former Chief Judge of the State of New York Jonathan Lippman and his immediate predecessor, Chief Judge Judith Kaye.

The Fourth Edition also contains 53 substantive law chapters that cover the subjects most commonly encountered in commercial cases including contracts, insurance, sale of goods, banking, securities, antitrust, intellectual property, professional liability, business torts and franchising.

One other major change to be highlighted for the Commercial Bar lawyers in the Fourth Edition is the following list of new chapter titles that includes Internal Investigations; Preliminary and Compliance Conferences and Orders; Negotiations; Mediation and Other Non-Binding ADR; Arbitration; International Arbitration; Pro Bono; Reinsurance; Workers' Compensation; Trade Associations; Securitization and Structural Finances; Derivatives; Medical Malpractice; Licensing; Social Media; Tax; Land Use Regulation; Commercial Leasing; Project Finance and Infrastructure; Entertainment; Sports; and Energy.

Covered as well are the nine trial chapters with comprehensive analyses of every aspect of the trial, with emphasis on critical insights of experienced and outstanding trial practitioners concerning their perspective on the art of advocacy, as well as their insights leading to effective trial strategy.

Chief Judge Lippman, the author of Chapter One in the Fourth Edition, always sought to enhance the Commercial Division. In January 2012, he created the Task Force on Commercial Litigation to take a fresh look at how the Commercial Division can continue to serve as an efficient and effective forum for resolving business disputes in the 21st Century.

Thereafter, Chief Judge Lippman created a permanent Commercial Division Advisory Council to advise the Chief Judge on an ongoing basis about all matters involving the Commercial Division. He appointed Robert L. Haig as Chair of the Advisory Council, which consists of lawyers, current and former members of the Judiciary, and in-house counsel representing statewide areas.

Chief Judge Lippman reports that during the past two years, under Bob Haig's leadership, the Advisory Council has recommended numerous changes to the rules, procedures and operations of the Commercial Division. These changes have been approved by the Administrative Board of the Courts. The result of all these changes is a Commercial Division that is even more cost effective and otherwise responsive to the needs of the business community.

Chief Judge Lippman wrote, "We must never retreat from our commitment to provide a venue for business litigation that is commensurate with New York's role as a world business capital."

To the authors and contributors to this very substantive Fourth Edition, we owe a debt of gratitude for their exemplary performance and dedication to the law.

Editor-in-Chief Robert L. Haig is a noted expert, author and lecturer in the area of Commercial Litigation. He is the Editor-in-Chief of an eleven-volume, 12,000-page treatise titled *Business and Commercial Litigation in Federal Courts* (West published the First Edition of this treatise in 1998, the Second Edition in 2006, and the Third Edition in 2011). He is also the Editor-in-Chief of a five-volume, 7,000-page treatise published by West in 2000 titled *Successful Partnering Between Inside and Outside Counsel*.

Seymour Boyers is a member of Gair, Gair, Conason, Rubinowitz, Bloom, Hershenhorn and a former Associate Justice of the Appellate Division, Second Department.

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NYSBA

Torts, Insurance & Compensation Law and Trial Lawyers Sections

Joint Fall Meeting

The New Orleans Marriott
555 Canal Street, New Orleans, LA
October 7 – 10, 2016

SCHEDULE OF EVENTS

Friday, October 7

2:30 – 6:00 p.m. **Registration**

3:00 – 5:00 p.m. **Torts, Insurance & Compensation Law Section Executive Committee Meeting**

3:30 – 5:00 p.m. **Trial Lawyers Section Executive Committee Meeting**

5:30 – 6:30 p.m. **Welcome Reception**
Co-Sponsored by **DIETZ COURT REPORTING & VANSON INVESTIGATIONS, INC.**

Dinner on your own

8:30 – 10:30 p.m. **Join us for a taste of New Orleans!**
Local specialties include assorted Beignets with dipping sauces, Swamp Pop sodas, Ice Cream and Italian Ices from Angelo Brocato's, Louisianca craft beers and cocktails.

Sponsored by **ABI DOCUMENT SUPPORT SERVICES**

Saturday, October 8

7:30 – 8:20 a.m. **Torts, Insurance & Compensation Law Section Executive Committee Breakfast Meeting**

7:30 – 8:20 a.m. **Trial Lawyers Section Executive Committee Breakfast Meeting**

7:30 a.m. **Registration & Continental Breakfast**

8:30 a.m. – 12:15 p.m. **GENERAL SESSION**

8:30 – 8:45 a.m. **New York State Bar Association Welcome**
CLAIRE P. GUTEKUNST, ESQ., PRESIDENT

Trial Lawyers Section Welcome
CHARLES J. SIEGEL, ESQ.
Law Offices of Charles J. Siegel
New York City

Torts, Insurance & Compensation Law Section Welcome
KENNETH A. KRAJEWSKI, ESQ.
Brown & Kelly, LLP
Buffalo

8:45 – 9:35 a.m. **Appellate Practice: What Every Trial Attorney Needs to Know but Was Afraid to Ask**
Whether you are a seasoned trial attorney or just starting out, the who, what, where and how in perfecting and responding to an appeal. *(1.0 credit in Professional Practice)*

Panelists:

MICHAEL KESTAN, ESQ.
AppealTech
New York City

TINA FISHER, ESQ.
AppealTech
New York City

9:35 – 10:50 a.m. **How to Protect the Record: A View From the Bench**
A practical guide for attorneys of all levels of practice on protecting the record for appellate review *(1.5 credit in Professional Practice)*

Panelists:

HONORABLE EUGENE F. PIGOTT, JR.
New York State Court of Appeals
Albany

HONORABLE MICHAEL J. GARCIA
New York State Court of Appeals
Albany

10:50 – 11:00 a.m. **Refreshment Break** – ***Sponsored by*** **BROWN & KELLY LLP**

11:00 a.m. – 12:15 p.m. **Emails/Social Media/Texts & Videos: What to Look For, Where to Find It and What to Do with It**

A view from the bench and trial practitioners as to the means and methods in obtaining and collecting electronic source information, getting it into or keeping it out of evidence. *(1.5 credits in Professional Practice)*

Panelists:

HON. ARTHUR M. DIAMOND
NYS Supreme Court, Nassau County
Mineola

EILEEN E. BUHOLTZ, ESQ.
Connors, Corcoran & Buholtz
Rochester

GARY A. CUSANO, ESQ.
Law Office of Gary A. Cusano
Yorktown Heights

OPTIONAL AFTERNOON EVENTS

12:30 p.m. **GOLF: LAKEWOOD GOLF CLUB,** 4801 General De Gaulle Dr., New Orleans.
Recently updated by Award-winning golf course architect Ron Garl who has preserved the character of the original course, while upgrading the 18-hole, 7,002 yards, par 72 course with modernized fair ways, tee boxes and greens—new improvements to an old favorite. Garl has added strategy and fun with new fairway contouring and unique bunkering. **Soft-spikes ONLY. Directions to course will be provided. Allow 30 minutes travel time. Meet in lobby at 12:30 to car pool or UBER to course. First tee time is 1:15 p.m. Pre-registration required. $105.00 per person** includes box lunch, greens fee & golf cart (transportation to course not included; club rentals extra.)

Golf Chairs: Daniel G. Ecker, Esq. & James O'Connor, Esq.

1:00 – 4:30 p.m. **RACONTOURS' HISTORY OF NEW ORLEANS THROUGH FOOD & DRINK**
Among majestic live Oaks and grand, Greek Revival homes lies New Orleans' Garden District, inspiration to such literary greats as Mark Twain, George Washington Cable and Ann Rice. In the heart of the District stands **Commander's Palace Restaurant**, winner of five James Beard Awards and the Grand Award from ***Wine Spectator Magazine***; home of haute Creole cooking. Its renowned chefs have included Emeril Lagasse, Paul Prudhomme, Jamie Shannon, and now Tory McPhail. Enjoy a lavish four course brunch, complete with beverages and live music. Discover the rich history of New Orleans through a taste tour of its cuisine at this lauded landmark open since1893! After brunch, we venture out for a short tour of the surrounding Garden District or guests may explore the area on their own. Magazine St., with fabulous boutique shopping, is only 3 blocks away. **Very Limited Availability. Preregistration Required: $125 per person** includes live jazz brunch with choice of entrees and drinks. **Restaurant Dress Code:** Jacket preferred, collared shirts, closed-toe shoes required for gentlemen. No jeans, shorts, flip-flops, t-shirts, sweat shirts or sweat pants. **Meet at Commander's Palace Restaurant, 1403 Washington Avenue, at 12:50 pm. Directions provided.**

1:00 – 3:30 p.m. **LE MONDE CREOLE: THE INSIDER'S FRENCH QUARTER, COURTYARDS & CEMETERY TOUR**
Step into the mysterious, remarkable lives of generations of Creoles in New Orleans; meet the specters of those long dead and the European and African branches of this community through the memoirs of Laura Locoul Gore of Laura Plantation. Learn how their world tragically dissolves through changing soci ety, civil war, the birth of Jazz and the Americanization of the city. Stops on the tour include Locoul family residences, private courtyards, original French Quarter homes and the marvelous New Orleans Pharmacy Museum to explore the townhouse and the garden where herbs were grown for use in apothecary solutions and voodoo potions. The tour also stops at the Locoul family tomb in the stunning St. Louis Cemetery #1, where you can also view the tomb of Voodoo priestess Marie Laveau! **Preregistration required. $25 per person. Tour departs from 622 Royal St. at 1:15 p.m. 10 minute walk from Hotel. Directions provided.**

1:10 – 5:45 p.m.

PEARL RIVER ECO-TOUR, HONEY ISLAND SWAMP, SLIDDELL, LA Journey deep into the wetland's to enjoy the flora and fauna of Louisiana's crown jewel Honey Island Swamp and learn about its eco-system. See alligators, exotic waterfowl, snakes, turtles, bears, feral pigs and more!

Meet in hotel lobby at 1:10 p.m. for bus. Preregistration required. $52 per person; children under 12: $32.50. Price includes transportation.

7:00 – 10:00 p.m.

COCKTAILS AND DINNER: K-PAUL'S LOUISANA KITCHEN, 416 Chartres St.

Opened in 1979 by celebrated Chef Paul Prudhomme. Current Chef Paul Miller joined him soon thereafter, taking over the reins in the 80s. Miller furthered the restaurant's use of fresh, local ingredients in the creation of flavorful, authentic Louisiana cooking**. Preregistration required.**

Meet in hotel lobby at 6:45 to walk to K-Paul's.

Sunday, October 9

8:15 a.m. **Registration & Continental Breakfast**

8:45 – 11:55 a.m. **GENERAL SESSION**

8:45 – 8:50 a.m. **Concluding Remarks: KENNETH A. KRAJEWSKI, ESQ.,** Brown & Kelly LLP, Buffalo

8:50 – 9:40 a.m. **Louisiana v. New York: The Napoleonic Code and English Common Law**
A General Overview of Each State's Civil Procedure & Practice from the simple to the sophisticated.
(1.0 credit in Professional Practice)

Moderator: **TERRENCE LEE TARVER, ESQ.,** Tarver Law Firm, P.C., Garden City

Panelists:

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Law Offices of Sheryl D. Story
Metairie, LA

MICHAEL C. TROMELLO, ESQ.
Tromello, McDonald & Kehoe
Melville

ELIA DIAZ-YAEGER, ESQ.
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New Orleans, Louisiana

RICHARD W. DAWSON, ESQ.
Conway, Farrell, Curtin & Kelly, P.C.
New York City

HON. TIFFANY GAUTIER CHASE
Orleans Civil District Court
New Orleans, Louisiana

9:40 – 9:50 am. **Refreshment Break**

9:50 – 11:05 a.m. **Traumatic Brain Injuries: The Medicine Every Attorney Needs to Know**
A discussion of the latest medicine and science and its admissibility under the law.
(1.5 credits in Professional Practice)

DR. KISHORE RANADE
UMC Medical Consultants
Purchase

ROBERT D. BARONE, ESQ.
The Tarantino Law Firm, LLC.
Buffalo

11:05 – 11:55 a.m. **Admiralty Law: The Cruise Passengers' Rights & Remedies 2016**
The law & remedies for passengers whether at sea or on the shore. *(1.0 credit in Professional Practice)*

Speaker: **Hon. THOMAS A. DICKERSON**
Appellate Division, Second Department
Brooklyn

OPTIONAL AFTERNOON ACTIVITIES

12:15 p.m. **GOLF: TPC LOUISIANA,** 11001 Lapalco Blvd, Avondale. Named "the #4 Best Upscale Public Golf Course" by ***Golf Digest*** when it debuted in 2004. Consistently included in ***GolfWeek's*** "Best Courses You Can Play." (*Golf Digest* Top 100 Public Golf Course). **Soft-spikes ONLY. Directions to course will be provided. Allow 45 minutes travel time. Meet in lobby at 12:15 to car pool or UBER to course. First tee time is 1:15 p.m. Pre-registration required. $185.00 per person** includes box lunch, greens fee & golf cart (transportation not included; club rentals extra.)

1:00 - 4: 30 p.m. **RACONTOURS' HISTORY OF NEW ORLEANS THROUGH FOOD & DRINK** See description on page 4. $125 per person includes live jazz brunch with choice of entrees and cocktails. **Meet at Commander's Palace**, 1403 Washington Avenue, no later than 12:50 p.m. **Very Limited Availability. Preregistration required. $125 per person.**

1:00 – 3:00 p.m. **LE MONDE CREOLE: THE INSIDER'S FRENCH QUARTER COURTYARDS & CEMETERY TOUR** See description on page 4. **Preregistration Required: $25 per person. Tour departs from 622 Royal Street at 1:15 pm. Directions to Royal Street will be provided.**

2:00 – 4:30 p.m. **STEAMBOAT NATCHEZ JAZZ CRUISE & BRUNCH** Jump aboard for a two hour cruise from the heart of the French Quarter back to a time when life was as slow and graceful as the current on the Mississippi. Brunch buffet and traditional jazz by the Steamboat Stompers. **Boat Boards at 2 p.m. Directions to Launch Provided. Preregistration Required. $40.00 per person; children ages 6 to 12: $23.00; children under 6: $11.00.**

7:00 – 8:00 p.m. **Cocktail Reception at the Hotel**

Monday, October 10

11:00 a.m. **Check Out/Departure**

Important Information

The New York State Bar Association's Meetings Department has been certified by the NYS Continuing Legal Education Board as an accredited provider of continuing legal education in the State of New York. Under New York's MCLE rule, this program has been approved for a total of **6.0 credit hours; 1.0 hours in ethics and 5.0 hours in professional practice for experienced attorneys only.**

ACCOMMODATIONS FOR PERSONS WITH DISABILITIES: NYSBA welcomes participation by individuals with disabilities. NYSBA is committed to complying with all applicable laws that prohibit discrimination against individuals on the basis of disability in the full and equal enjoyment of its goods, services, programs, activities, facilities, privileges, advantages, or accommodations. To request auxiliary aids or services or if you have any questions regarding accessibility, please contact Catheryn Teeter at New York State Bar Association, One Elk Street, Albany, New York 12207 or cteeter@nysba.org ***at least 21 days prior to the start of the meeting.***

DISCOUNTS AND SCHOLARSHIPS: New York State Bar Association members and non-members may receive financial aid to attend this program. Under this policy, anyone who requires financial aid may apply in writing, not later than seven working days prior to the program, explaining the basis of his/her hardship, and if approved, may receive a discount or scholarship. Scholarships apply to the educational portion of the program only. For more details, please contact: cteeter@nysba.org or Catheryn Teeter, New York State Bar Association, One Elk Street, Albany, New York 12207. 518-487-5573

THE TORTS, INSURANCE & COMPENSTATION LAW AND TRIAL LAWYERS SECTIONS THANK THE FOLLOWING MEETING SPONSORS:

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Preparing For and Trying the Civil Lawsuit, 2d Ed, 2016 Rev

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More than 30 of New York State's leading trial practitioners and other experts reveal the techniques and tactics they have found most effective when trying a civil lawsuit. Expert commentary and numerous practice tips guide you through all aspects of a civil lawsuit, from discovery to appeals. A thorough discussion of pretrial preparation and investigation will aid the attorney in obtaining an advantageous settlement even if the case never goes to trial.

Especially helpful are the excerpts from actual trial transcripts, which illustrate the effectiveness of certain lines of questioning. Trial attorneys will benefit by using the book to supplement and reinforce their own methods of practice. The 2016 Revision includes updates to the previous edition, as well as a new chapter on Attorney-Client Privilege.

EDITORS-IN-CHIEF
Neil A. Goldberg, Esq.; John P. Freedenberg, Esq.

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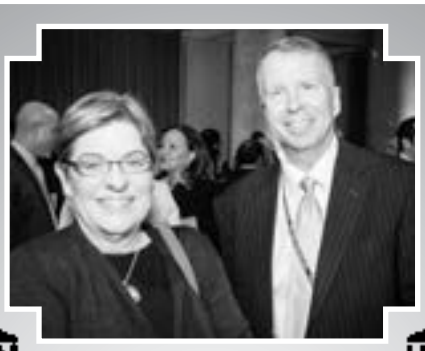







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