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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

Greetings to all the trial lawyers:

I want to urge all of you to attend our Summer Meeting at the Woodstock Inn in Vermont, Sunday, July 29 through Wednesday morning, August 1, 2012. We plan to have excellent speakers. I am hopeful Professor Patrick Connors of Albany Law School will again join us to present CPLR updates and ethic discussions. Professor Paul Finkelman, also at Albany Law School, will provide a fun and insightful lecture. We will provide more specific information regarding our speakers and activities in the months ahead. There is an excellent golf course near the Woodstock Inn. I have stayed at the Woodstock Inn several times in the past. I understand that the Inn has significantly renovated its facility since my last visit several years ago. It should be an outstanding meeting for our Section. Please attend.

In terms of issues that concern me on the trial bar level, one is problems facing both the plaintiff and defense bar with E-Discovery. Preservation by your client of e-mails and electronic data is absolutely imperative.[1] There are duties imposed on trial attorneys to notify their clients at the outset of litigation or even at the first hint of a lawsuit. Please abide by the admonition to clearly instruct your clients to preserve their electronic data. This can have dire consequences for your client and for yourself.

In the 1980s, the interest rate of 9% on judgments[2] was enacted when the actual interest rate was 12%. Circumstances have changed and the legal interest rate of 9%, in my opinion, is way too high and punitive. I hope the legislature will take a look at this and enact a more fair interest rate.

The recent *Toledo* case,[3] decided by the New York Court of Appeals, imposes the extraordinary burden of awarding interest to the plaintiff on future damages that will not be earned, in some cases, for decades. This particular decision seems unfair and hopefully the legislature will reconsider this issue as well.

I look forward to working with my fellow officers, Vice-Chair Elizabeth Hecht, Secretary, the Honorable Robert Julian, and Treasurer A. Michael Furman, as well as with members of our Executive Committee and our past chairs to provide an outstanding 2012 for our membership.

Peter C. Kopff
Trial Lawyers Section Chair

Endnotes

1. Electronic discovery – *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422 (S.D.N.Y. 2004).
2. CPLR 5004.
3. *Toledo v. Christo*, 18 N.Y.3d 363. The *Toledo* decision is dated January 10, 2012.

Inside

Recent Important Appellate Decisions

APPEAL AND ERROR—AGGRIEVED PARTY—ADDITUR/REMITTITUR

Defendant, who stipulated to increase the amounts awarded to plaintiff for past and future pain and suffering set forth in the Appellate Division's conditional order, is not precluded from appealing the liability issue:

> We now reexamine the *Batavia [Turf Farms v. County of Genesee,* 91 N.Y.2d 906, 668 N.Y.S.2d 1001 (1998)] / *Whitfield [v. City of New York*, 90 N.Y.2d 777, 666 N.Y.S.2d 545 (1997)] rule, and conclude that it is not justified. It is unfair to bar a party from raising legitimate appellate issues simply because that party has made an unrelated agreement on the amount of damages. Indeed, the *Batavia* rule may operate as a trap; parties stipulating to additur and remittitur are likely not to foresee the counterintuitive result that *all* their appellate claims will be forfeited.
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> * * *
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> [Defendant] Genie is a party aggrieved, and we proceed to consider the merits of the appeal.

Adams v. Genie Industries, Inc., 14 N.Y.3d 535, 903 N.Y.S.2d 318 (2010).

[EDITOR'S NOTE: In *Batavia Turf Farms*, the Court of Appeals denied leave to appeal stating:

> A party who, as a result of a conditional order, has stipulated at the trial or appellate court to a reduction in damages in lieu of a new trial on a cause of action, foregoes all further review of other issues raised by that order, including those pertaining to any other cause of action and is therefore not a party aggrieved].

CONTEMPT—CIVIL—SUBPOENAED NON-PARTY WITNESS

The court correctly held that the non-party witness was in contempt pursuant to Judiciary Law § 756 based upon his disobedience of a subpoena duces tecum:

> The finding of contempt based upon Orozco's refusal to appear for a subpoenaed deposition was appropriate.

Ravnikar v. Skyline Credit-Ride, Inc., 79 A.D.3d 1118, 913 N.Y.S.2d 339 (2d Dept. 2010).

DAMAGES—$35,000—BURN INJURIES—INADEQUATE

Award of $15,000 for past pain and suffering (three years) and $20,000 for future pain and suffering (35.4 years) to plaintiff who sustained first and second degree burns to three to four percent of his neck, back and chest, was inadequate and conditionally increased to $30,000 (past) and $60,000 (future):

> Plaintiff testified that, immediately after the incident, he was in "unbearable" pain, but he was treated at a local hospital where he was given pain medication and his burns were dressed. Plaintiff was released within hours, but he returned several days later for removal of the dead skin. In removing the skin, a nurse scrubbed plaintiff's neck with a steel-bristled brush for "approximately 15 to 20 minutes." Plaintiff again testified that the pain was "unbearable." It is undisputed that plaintiff developed several keloids in the area of the burns, although photographs taken shortly before trial and admitted in evidence at trial establish that cortisone shots had reduced the size of the keloids. At trial, plaintiff testified that the burn areas were still painful, that they were sensitive to touch and cold weather, and that there was a general tightness in the burn area. He also testified that the scars caused him embarrassment when his neck was exposed.

Beck v. Spinner's Recreational Center, Inc., 78 A.D.3d 1695, 912 N.Y.S.2d 364 (4th Dept. 2010).

DAMAGES—CONSCIOUS PAIN AND SUFFERING—INSTANTANEOUS DEATH

The trial court properly set aside the award of $3,000,000 for conscious pain and suffering because plaintiff failed to show decedent's consciousness for at least some period of time following the accident:

> Specifically, plaintiff failed to present any evidence that the decedent was conscious or had any cognitive awareness after he was shot in the head, which caused his nearly instantaneous death. A record that shows practically instantaneous death will not support an award for conscious pain and suffering.… In *Merzon v. County of Suffolk*, 767 F. Supp. 432. 444 (E.D.N.Y.

1991), the court found that the death of a suspect shot and killed by police was almost instantaneous; he never regained consciousness. Under such circumstances, the plaintiff "failed to establish any conscious pain and suffering." Plaintiff's conjecture, surmise and speculation that the decedent was consciously suffering is not enough to sustain the claim. Moreover, plaintiff is wrong to assert that the award can be sustained on the theory that the decedent experienced fear of impending death when Officer Rivera first grabbed him. Indeed, there was no evidence that the decedent was aware that Rivera had drawn his weapon, or that the gun was only inches from his head before he was shot.

Ferguson v. City of New York, 73 A.D.3d 649, 901 N.Y.S.2d 609 (1st Dept. 2010).

DAMAGES—FUTURE LOST WAGES

Plaintiff's testimony that he earned $5.00 per hour less as a construction manager than other managers after his accident was insufficient to support the amount of damages he was awarded by the jury:

> Plaintiff's own testimony, without more, was insufficient to establish by a reasonable certainty his loss of future wages as a result of the accident. In this case, the W-2 forms and tax returns that plaintiff introduced demonstrated his yearly income post-accident but they were not probative of a reduction in future wages as a result of the accident because they did not compare his pre-and post-accident income nor compare his post-accident income with the income of similarly situated employees in plaintiff's company.

Shubbuck v. Conners, 15 N.Y.3d 871, 913 N.Y.S.2d 120 (2010).

DAMAGES—LOST EARNINGS ERRONEOUS—EARNINGS PROJECTION—ILLEGAL ALIEN

Award of $1,892,300 to plaintiff, who claimed total disability after fracturing a vertebra in his spine, was conditionally reduced to $1,324,610 because his economist's earnings projection was erroneous:

> The plaintiff's economist erroneously projected the plaintiff's lost earnings based on an annualization of his earnings for the year 2005. The record establishes that the plaintiff earned $25 per hour for the first half of 2005 and only $15 per hour subsequently, until the date of the accident. Since no evidence was adduced that the plaintiff would again have earned $25 per hour, the economist's earnings projection was incorrect to the extent it was based on that assumption.

Janda v. Michael Rienzi Trust, 78 A.D.3d 899, 912 N.Y.S.2d 237 (2d Dept. 2010).

[EDITOR'S NOTE: The court rejected defendants' argument that plaintiff's past and future lost earnings were barred because he was an illegal alien:

> Contrary to the defendants' contention, the plaintiff's claims for past and future lost earnings were not barred by the federal Immigration Reform and Control Act of 1986 because the evidence did not establish that the plaintiff's employer was induced to hire him based on his submission of false documentation].

DAMAGES—MESOTHELIOMA—PAST AND FUTURE PAIN AND SUFFERING AND LOSS OF CONSORTIUM—EXCESSIVE

Awards to plaintiff who suffered mesothelioma deviated from what would be reasonable compensation and were conditionally reduced as follows:

> $3,650,000 for past pain and suffering reduced to $1,500,000;
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> $10,900,000 for future pain and suffering reduced to $2,000,000; and
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> $1,670,000 for loss of consortium reduced to $260,000.

Penn v. Amchem Products, 73 A.D.3d 493, 903 N.Y.S.2d 1 (1st Dept. 2010).

DAMAGES—PAIN AND SUFFERING—FOUR-YEAR COMA/$5,000,000 EXCESSIVE

Award of $5,000,000 to plaintiff for his wife's four years of conscious pain and suffering—she lapsed into a coma after errors were made during her medical treatment—was excessive to the extent it exceeded $2,500,000:

> Under the circumstances, since Mrs. Schaffer was only sporadically aware of her condition while she remained in a nursing home for slightly more than four years…we find that an award of $2,500,000 for Mrs. Schaffer's past pain and suffering…would not deviate materially from what would be reasonable compensation.

Schaffer v. Batheja, 76 A.D.3d 970, 908 N.Y.S.2d 82 (2d Dept. 2010).

[EDITOR'S NOTE: Plaintiff was also awarded $3,000,000 for loss of his wife's services. This was conditionally reduced to $500,000 since there was only limited proof as to the value of the services actually rendered by the decedent to the plaintiff during their 40-year marriage].

DAMAGES—PAST PAIN AND SUFFERING—POST TRAUMATIC STRESS DISORDER—$1,250,000

Award to infant plaintiff of $2,500,000 for 14 years of past pain and suffering for post traumatic stress disorder was excessive to the extent that it exceeded $1,250,000:

> When plaintiff was 13 years old, a police officer pointed a gun at him, "smacked" him with the gun, stomped on him, and arrested him during an investigatory stop. Plaintiff sustained a fractured right hand and developed posttraumatic stress disorder (PTSD), which manifested in the form of nightmares, flashbacks, anxiety, social withdrawal, fear of police officers, and anger, among other things. During the 14 years between the incident and trial, plaintiff had diminished utility of his right hand and experienced problems stemming from his PTSD.

Figueroa v. City of New York, 78 A.D.3d 463, 910 N.Y.S.2d 76 (1st Dept. 2010).

DAMAGES—PUNITIVE DAMAGES—$2,700,000 NOT EXCESSIVE

Punitive damage award of $7,000,000 against police officer who shot suspect in head was excessive to the extent it exceeded $2,700,000:

> When reviewing a punitive damage award for excessiveness, we must examine whether it deviated materially from what is considered reasonable compensation (CPLR 5501[c]). However, "[w]hether to award punitive damages in a particular case, as well as the amount of such damages, if any, are primarily questions which reside in the sound discretion of…the jury, and such an award is not lightly to be disturbed."
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> * * *
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> On this record, an award of $2.7 million would be "reasonably related to the harm done and the flagrancy of the conduct," and consistent with the purpose of punishing a defendant for wanton and reckless acts, thereby discouraging similar conduct in the future.

Ferguson v. City of New York, 73 A.D.3d 649, 901 N.Y.S.2d 609 (1st Dept. 2010).

DAMAGES—TRAUMATIC BRAIN INJURY—PAST AND FUTURE PAIN AND SUFFERING—$5,000,000

Plaintiff's award of $2,418,000 for past pain and suffering and $8,060,000 for future pain and suffering conditionally reduced to $1,500,000 and $3,500,000 respectively.

Ashkinazy v. Consolidated Edison Company of New York, Inc., 78 A.D.3d 434, 909 N.Y.S.2d 632 (1st Dept. 2010).

[EDITOR'S NOTE: Plaintiff claimed he was "dentist to the stars" who treated celebrities who wished to undergo cosmetic dentistry. His injuries were a traumatic brain injury, herniation of his CS-4 intervertebral disc and a permanent residual tremor of one hand. Plaintiff was awarded almost $3,000,000 for past and future lost earnings. See 11/3/2008 *NYLJ*, p. 5, col. 1)].

EVIDENCE—911 CALL—ADMISSIBILITY

Recording of 911 emergency call was admissible at trial:

> The recording was properly admitted as a present sense impression, as the call contained spontaneous descriptions of events made substantially contemporaneously with the witness's observations, and her descriptions were independently corroborated by other evidence. Therefore, the admission of the recording did not constitute improper bolstering.

People v. Bradley, 73 A.D.3d 1198, 902 N.Y.S.2d 142 (2d Dept. 2010).

EVIDENCE—HOSPITAL RECORDS—ADMISSIBILITY

The trial courts did not err in admitting hospital records containing: (a) description of case as involving "domestic violence" and reference to "safety plan" for victim; and (b) that victim was "forced to" smoke white, powdery substance, as relevant to diagnosis and treatment:

> It [domestic violence] is relevant for purposes of diagnosis and treatment that complainant's assault was at the hands of a former boyfriend.
>
> The references [in *People v. Ortega*] to "domestic violence" and to the existence of a safety plan were admissible under the business records exception. Not only were these statements relevant to

> complainant's diagnosis and treatment, domestic violence was part of the attending physician's diagnosis in this case… Therefore, it is was not error to admit references to domestic violence and a safety plan in complainant's medical records.
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> In *[People v.] Ortega*, the statement that complainant was "forced to" smoke a white, powdery substance was relevant to complainant's diagnosis and treatment. As the trial judge reasoned, under such a scenario, complainant would not have been in control over either the amount or the nature of the substance he ingested. In addition, treatment of a patient who is the victim of coercion may differ from a patient who has intentionally taken drugs. The references to complainant being "forced to" consume crack were admissible under the business records exception to the hearsay rule.

People v. Ortega; People v. Benston, 15 N.Y.3d 610, 917 N.Y.S.2d 1 (2010).

[EDITOR'S NOTE: Two judges concurred agreeing with the result reached by the majority but not with the court's rationale].

INSURANCE—COMMERCIAL AUTOMOBILE POLICY—OPERATING VEHICLE/TAXI

Insurance carrier does not have to defend and indemnify taxicab passenger who was sued after he opened the rear door causing collision with bicyclist:

> The Appellate Division correctly held that Kohl [bicyclist] was not insured under the taxi owner's policy of automobile liability insurance. The policy says that it "shall inure to the benefit of any person legally operating" the insured vehicle in the business of the insured. The word "operating" cannot be stretched to include a passenger's riding in the car or opening the door.

Kohl v. American Transit Insurance Company, 15 N.Y.3d 763, 906 N.Y.S.2d 809 (2010).

INTEREST—PERSONAL INJURY—ARBITRATION

Plaintiff is entitled to interest from the date liability is determined by a jury verdict, not from the date of the arbitration award even if the matter is submitted to arbitration on the issue of damages:

> Damages and prejudgment interest are not the same thing. Damages compensate plaintiffs in money for their losses, while prejudgment interest "is simply the cost of having the use of another person's money for a specified period." Further, as plaintiff observes, there was "no necessity to negotiate whether plaintiff was entitled to interest" as a part of the arbitration agreement because "she already possessed that right as a matter of law as of the date of her liability verdict." Finally, there are no circumstances in this case indicating that plaintiff gave up that right when she agreed to arbitrate damages.

Grobman v. Chernoff, 15 N.Y.3d 525, 914 N.Y.S.2d 731 (2010).

JUDGMENT—LAW OF THE CASE—FULL AND FAIR OPPORTUNITY

The Appellate Division erred in dismissing plaintiff's personal injury action because it had granted, in an earlier appeal, defendants summary judgment on the third-party contractual indemnification claim against plaintiff's employer finding they were not negligent:

> Plaintiff thus had neither incentive to litigate the motion for summary judgment nor adequate notice that the issue of defendants' negligence could be conclusively decided against him. Under these circumstances, the law of the case doctrine does not preclude plaintiff from litigating the issue of defendants' negligence.

Roddy v. Nederlander Producing Company of America, Inc., 15 N.Y.3d 944, 916 N.Y.S.2d 578 (2010), *rvg* 73 A.D.3d 583, 904 N.Y.S.2d 5 (1st Dept. 2010).

[EDITOR'S NOTE: The Appellate Division, First Department, concluded that plaintiff had a full and fair opportunity to address the issues decided adversely to his interest since he was served with the indemnification motion and the issue of defendants' lack of negligence was demonstrated in the papers. The court noted that plaintiff never sought "to participate in the indemnification motion, electing instead to sit on his hands despite his material interest in the determination as to whether [defendants] were negligent or not." In addition, when defendants appealed from the denial of indemnification, plaintiff elected not to participate, even though the issue of defendants' negligence was apparent from the record and plaintiff had a material interest in the determination of that issue].

JURISDICTION—IRREGULARITY OF SERVICE/ PROCESS SERVER UNAUTHORIZED

Plaintiff was entitled to a default judgment notwithstanding that the defendant, a Pennsylvania company, was served by an unauthorized process server because the defect was not jurisdictional and a court may disregard it under CPLR 2001:

> The purpose of the 2007 amendment to CPLR 2001 was to allow courts to correct or disregard technical defects, occurring at the commencement of an action, that do not prejudice the opposing party… The Legislature considered the amendment to be necessary "to fully foreclose dismissal of actions for technical, nonprejudicial defects."
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> * * *
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> CPLR 2001 may be used to cure only a "technical infirmity." In deciding whether a defect in service is merely technical, courts must be guided by the principle of notice to the defendant—notice that must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."
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> We therefore conclude that a defect related to the residence of a process server has no effect on the likelihood of defendant's receipt of actual notice, and the court may choose to correct or disregard it as a technical infirmity under CPLR 2001.

Ruffin v. Lion Corp., 15 N.Y.3d 578, 915 N.Y.S.2d 204 (2010), *rvg* 63 A.D.3d 814, 880 N.Y.S.2d 702 (2d Dept. 2009).

[EDITOR'S NOTE: The court, however, noted that the fact that a defendant actually received the summons is not dispositive. If the summons and complaint were mailed or e-mailed, the service would, according to the court, present more than a technical infirmity…inasmuch as these matters in general introduce greater possibility of failed delivery. Likewise, delivery of the summons and complaint to the wrong person is a substantial defect].

LABOR LAW § 240(1)—FAILURE TO PROVIDE SAFETY DEVICES

Plaintiff, who was propelled 14 feet into an opening when the blade of the saw he was using to cut metal jammed, has a viable Labor Law § 240(1) action:

> [Two] men asserted that the ironworkers were not provided with necessary safety devices, corroborating Gallagher's own similar testimony. The burden then shifted to NYP to raise a question of fact as to whether there was a violation of Labor Law § 240(1). NYP argues that it met this burden through evidence that adequate safety devices were provided to Gallagher or, in the alternative, evidence that the sole proximate cause of Gallagher's fall was that he prematurely returned to work.
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> * * *
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> There is no evidence in the record that Gallagher knew where to find the safety devices that NYP argues were readily available or that he was expected to use them. Although Schreck [assistant project manager] testified that appropriate safety devices were available at the project site on the date of the accident, nowhere in his testimony did Schreck state that Gallagher had been told to use such safety devices. Schreck referred to a "standing order" issued to the project foreman, directing workers to "have a harness on and be tied off," but could not say whether the order had been conveyed to the workers. Moreover, the affidavit of Gallagher's foreman, Nover, who was not deposed, does not support NYP's claim that Gallagher was told about safety devices. Nover stated that Gallagher had not been provided with the requisite safety devices, a proposition that is consistent either with Gallagher's own ignorance of the availability of safety devices or with his knowledge thereof. Even viewed in the light most favorable to NYP (as it must be when we consider plaintiffs' motion for summary judgment), the evidence does not raise a question of fact that Gallagher knew of the availability of the safety devices and unreasonably chose not to use them.

Gallagher v. The New York Post, 14 N.Y.3d 83, 896 N.Y.S.2d 732 (2010), *rvg* 55 A.D.3d 488, 866 N.Y.S.2d 178 (1st Dept. 2008).

[EDITOR'S NOTE: The Appellate Division majority found that Schreck's testimony contradicted plaintiff's testimony and was sufficient to raise a factual question whether plaintiff was provided with adequate safety devices, was instructed to use them and declined to do so rendering his conduct the sole proximate cause of his injuries.

Two dissenting judges concluded that there is no evidence in the record that plaintiff chose not to use an available safety device:

> Mere generic statements of the availability of safety devices are insufficient to create an issue of fact that the plaintiff was the sole proximate cause of his injury].

LEGAL MALPRACTICE—ESTATE TAX PLANNING—PERSONAL REPRESENTATIVE

The lack of strict privity does not bar the personal representative of an estate from suing the attorney for the estate for causing enhanced estate tax liability:

> We now hold that privity, or a relationship sufficiently approaching privity, exists between the personal representative of an estate and the estate planning attorney. We agree with the Texas Supreme Court that the estate essentially "stands in the shoes of a decedent" and, therefore, "has the capacity to maintain the malpractice claim on the estate's behalf." The personal representative of an estate should not be prevented from raising a negligent estate planning claim against the attorney who caused harm to the estate. The attorney estate planner surely knows that minimizing the tax burden of the estate is one of the central tasks entrusted to the professional.

Estate of Saul Schneider v. Finmann, 15 N.Y.3d 306, 907 N.Y.S.2d 119 (2010).

[EDITOR'S NOTE: The court's ruling applied only to the personal representative of an estate:

> Strict privity remains a bar against beneficiaries' and other third-party individuals' estate planning malpractice claims absent fraud or other circumstances. Relaxing privity to permit third parties to commence professional negligence actions against estate planning attorneys would produce undesirable results—uncertainty and limitless liability].

LIENS—MEDICAL INSURER—REIMBURSEMENT

Medical insurer, who paid plaintiff's medical expenses, was entitled to reimbursement from the personal injury settlement proceeds which was "inclusive of disbursements [and] liens":

> Oxford was entitled to seek reimbursement from the settlement proceeds the defendant paid to the injured plaintiff for medical expenses Oxford paid on his behalf relating to injuries he sustained in a slip-and-fall accident. The hold harmless agreement, made in accordance with the settlement, and the representation of the plaintiffs' counsel that the settlement was inclusive of all liens and disbursements, which was made with the knowledge that Oxford was seeking recovery from the injured plaintiff, established that health care services were part of the settlement. In fact, the plaintiffs' verified complaint and bill of particulars specifically stated that the injured plaintiff was seeking damages for medical expenses he incurred, even though Oxford paid these expenses on his behalf.

Gualano v. Abington Square Condominium Association, 69 A.D.3d 793, 894 N.Y.S.2d 453 (2d Dept. 2010).

LIMITATIONS OF ACTIONS—INFANCY TOLL—DISTRIBUTEES

An administrator's cause of action for conscious pain and suffering as part of a wrongful death action is not tolled for infancy on behalf of decedent's infant distributees even though it is tolled for the wrongful death action:

> As we explained in *Hernandez [v. New York City Health and Hosps. Corp.*, 78 N.Y.2d 687, 578 N.Y.S.2d 510 (1991)] itself, a wrongful death action belongs to the decedent's distributees and is designed to compensate the distributees themselves for their pecuniary losses as a result of the wrongful act. The proceeds are paid directly to the distributees in the proportions directed by the court, determined by their respective monetary injuries. In comparison, a personal injury action on behalf of the deceased under EPTL 11-3.2(b) seeks recovery for the conscious pain and suffering of the deceased and any damages awarded accrue to the estate. Such a claim is personal to the deceased and belongs to the estate, not the distributees. The types of damages that are recoverable are different and the calculations of damages for the two claims are based on separate factors.

Heslin v. County of Greene, 14 N.Y.3d 67, 896 N.Y.S.2d 723 (2010).

[EDITOR'S NOTE: Three judges dissented:

> Here, contrary to the majority's assertions, the only real parties in interest to both the personal injury claim and the wrongful death claim are [decedent's]

> Egypt's infant sisters—the only persons who can inherit from her estate and who will benefit from the outcome of both the personal injury and wrongful death claims.
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> * * *
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> The infant distributees are no differently situated with respect to the personal injury claim than they are with respect to the wrongful death claim. For both causes of action, they will be the sole beneficiaries of any damages. The majority would deny the infant plaintiffs the benefit of the CPLR 208 toll, as we applied in *Hernandez*, merely because any damages must first pass through the estate].

MALPRACTICE—ATTORNEY—*PRIMA FACIE* SHOWING

Defendant law firm's failure to establish that plaintiff would not have been successful in an action against premises for her slip and fall injuries precludes dismissal of plaintiff's legal malpractice action:

> In order to succeed in a legal malpractice action, the plaintiff must prove that the attorney failed to exercise the degree of care, skill, and diligence commonly possessed and exercised by a number of the legal community, which proximately caused the plaintiff to sustain damages. This requires a showing that "'but for' the [attorney's] negligence…[the plaintiff] would have prevailed in the underlying action." In order for a defendant in a legal malpractice claim to prevail on a motion for summary judgment, evidence must be presented in admissible form establishing that the plaintiff is unable to prove at least one of the three essential elements of a malpractice cause of action.
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> * * *
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> Under the circumstances of this case, the defendants failed to establish, as a matter of law, that the plaintiff would not have been able to prove that the premises owner, by its own snow and ice removal efforts, created or exacerbated the allegedly dangerous condition which caused the plaintiff's injuries.

Walker v. Glotzer, 79 A.D.3d 737, 913 N.Y.S.2d 290 (2d Dept. 2010).

MOTION—SUMMARY JUDGMENT—PLAINTIFF'S CULPABLE CONDUCT

Plaintiff's failure to establish, as a matter of law, that he was free from comparative negligence, precludes granting his motion for summary judgment:

> The failure to make such a showing [freedom from comparative negligence] requires the denial of the motion, regardless of the sufficiency of the defendants' opposition papers.
>
> To the extent that the Appellate Division, First Department, holds differently (*see Tselebis v. Ryder Truck Rental, Inc.*, 72 A.D.3d 198, 602 N.Y.S.2d 389), we disagree and decline to follow that holding. In *Thoma v. Ronai* (82 N.Y.2d 836), a case directly on point, the Court of Appeals, in affirming an order issued by the Appellate Division, First Department, expressly concluded that the plaintiff's motion for summary judgment on the issue of liability was properly denied where the plaintiff's submissions failed to eliminate a triable issue of fact regarding her comparative negligence.

Roman v. A1 Limousine, Inc., 76 A.D.3d 552, 907 N.Y.S.2d 251 (2d Dept. 2010).

MOTIONS—LABOR LAW § 241(6)—INDUSTRIAL CODE—RAISED FIRST TIME

Plaintiff cannot defeat defendant's summary judgment motion to dismiss his Labor Law § 241(6) claim for failing to allege specific Industrial Code violations by citing a provision for the first time in his opposition:

> In opposition, the plaintiffs failed to raise a triable issue of fact. The plaintiffs' excuse of law office failure for the omission from its opposition papers of a specific Industrial Code provision is improperly raised for the first time on appeal. Therefore, the Supreme Court properly granted that branch of Vitanza's motion which was for summary judgment dismissing the Labor Law § 241(6) cause of action insofar as asserted against it.

Wnetrzak v. V.C. Vitanza Sons, Inc., 7 A.D.3d 939, 913 N.Y.S.2d 736 (2d Dept. 2010).

[EDITOR'S NOTE: There is contrary authority, however. In *Latino v. Nolan and Taylor-Howe Funeral Home, Inc.*, 300 A.D.2d 631, 754 N.Y.S.2d 289 (2d Dept. 2002), plaintiffs alleged violation of the Industrial Code for the

first time in their opposition to defendant's cross-motion for summary judgment. The Supreme Court granted, *sua sponte*, plaintiffs' leave to amend their bill of particulars. In affirming, the court noted:

> The plaintiffs' allegation of specific Industrial Code provisions for the first time in their opposition to the Nolans' cross motion for summary judgment was not fatal to their claim, and was sufficient to raise a triable issue of fact regarding the Nolans' liability pursuant to Labor Law § 241(6)].

MOTION—SUMMARY JUDGMENT—PLAINTIFF'S CULPABLE CONDUCT/NO BAR

Plaintiff is entitled to summary judgment on the issue of liability even though his own negligence is still an open question:

> A plaintiff's culpable conduct no longer stands as a bar to recovery in an action for personal injury, injury to property or wrongful death. Under CPLR 1411, such conduct merely acts to diminish the plaintiff's recovery in proportion to the culpable conduct of the defendants… Here, plaintiff's own negligence, if any, would have no bearing on defendant's liability. Stated differently, it is not plaintiff's burden to establish defendants' negligence as the sole proximate cause of his injuries in order to make out a *prima facie* case of negligence. To establish a *prima facie* case, a plaintiff "must generally show that the defendant's negligence was *a substantial cause* of the events which produced the injury."

Tselebis v. Ryder Truck Rental, Inc., 72 A.D.3d 198, 895 N.Y.S.2d 389 (1st Dept. 2010).

[EDITOR'S NOTE: A different panel in the First Department declined to follow *Tselebis* in *Calcano v. Rodriguez*, 91 A.D.3d 478, 936 N.Y.S.2d 185 (1st Dept. 2012):

> Although this Court departed from the *Thoma [v. Ronai*, 82 N.Y.2d 736, 602 N.Y.S.2d 323 (1993)] holding in *Tselebis v. Ryder Truck Rental, Inc.*, the Second Department has expressly noted that it "disagree[s] [with] and decline[s] to follow th[e] holding" of *Tselebis* as inconsistent with *Thoma*. Needless to say, it is not this Court's prerogative to overrule or disregard a precedent of the Court of Appeals. Accordingly, like the Second Department, we respectfully decline to follow *Tselebis*. (*See Roman v. A1 Limousine, Inc.*, p.8)].

NEGLIGENCE—ASSUMPTION OF RISK

The doctrine of assumption of risk is not a defense to a 12-year-old plaintiff's personal injury action for damages he sustained while engaged in horseplay—sliding down a banister:

> No suitably compelling policy justification has been advanced to permit an assertion of assumption of risk in the present circumstances. The injury-producing activity here at issue, referred to by the parties as "horseplay," is not one that recommends itself as worthy of protection, particularly not in its "free and vigorous" incarnation, and there is, moreover, no nexus between the activity and defendants' auspices, except perhaps negligence.
>
> * * *
>
> If the infant plaintiff's harm is attributable in some measure to his own conduct, and not to negligence on defendant's part, that would be appropriately taken account of within a comparative fault allocation; it is not a predicate upon which an assumption of risk should be permitted to be applied.

Trupia v. Lake George Central School Dist., 14 N.Y.3d 392, 901 N.Y.S.2d 127 (2010).

NEGLIGENCE—DOUBLE-PARKED VEHICLE

The trial court erred in granting summary judgment to owner of box truck double-parked in the right hand lane in front of a department store when plaintiff's vehicle shifted lanes to the left and collided with a tractor trailer:

> An issue of fact exists as to whether the Marvarino's truck was illegally double-parked, which would constitute some evidence of negligence. But for the position of that truck, plaintiff's vehicle would not have had to make the lane change that purportedly precipitated the accident. Furthermore, even if the Marvarino defendants were not the sole cause of the accident, they could still be found liable if they were a contributing cause.

Borbon v. Pescoran, 73 A.D.3d 502, 900 N.Y.S.2d 296 (1st Dept. 2010).

NEGLIGENCE—DUTY—SECURITY GUARD COMPANY

Security guard company, Mandel, may owe a duty to plaintiff-tenant, who was assaulted in the lobby by an unknown intruder, since the guard company was expected to enforce the no loitering policy:

> It is undisputed that under the contract, Mandel provided the building with around-the-clock security. Given the magnitude of this deployment and the security guard's statutory function of preventing unlawful activity on designated property and protecting individuals from harm, there is at least an issue of fact as to whether Mandel "entirely displaced" or "comprehensively absorbed" Twin Parks' duty to secure the building against crime.

Romero v. Twin Parks Southeast Houses, Inc., 70 A.D.3d 484, 895 N.Y.S.2d 387 (1st Dept. 2010).

NEGLIGENCE—LABOR LAW § 200—DEFENDANTS' NOTICE OF UNSAFE MANNER

Although the defendants (owner, managing agent and tenant) had notice of the allegedly unsafe manner in which plaintiff was performing his work—changing a ballast without turning off the electricity—they cannot be held liable under Labor Law § 200 because they demonstrated that they did not have the authority to supervise or control the performance of plaintiff's work:

> A cause of action sounding in violation of Labor Law § 200 or common-law negligence may arise from either dangerous or defective premises conditions at a work site or the manner in which the work is performed. Contrary to the conclusion of the Supreme Court, the plaintiff's injury "did not arise from a defective condition inherent on the… property, but rather, arose as a result of the allegedly defective 'means' utilized by him to perform his work." The fact that electricity was flowing into the light fixture was not a defective condition, nor was it dangerous until the plaintiff decided to change the ballast without turning off the current.

Pilato v. 866 U.N. Plaza Associates, LLC, 77 A.D.3d 644, 909 N.Y.S.2d 180 (2d Dept. 2010).

NEGLIGENCE—LABOR LAW § 240(1)—AGENT

Electrician, who fell from a ladder after receiving an electrical shock, has a Labor Law § 240(1) claim against the electrical subcontractor at the site:

> Tambe [electrical subcontractor] failed to establish as a matter of law that it was not an agent of the general contractor with respect to the work that resulted in plaintiff's injuries. "A subcontractor such as [Tambe] will be liable as an agent of the general contractor for injuries sustained in those areas and activities within the scope of the work delegated to it… Plaintiff['s] theory of liability in this case is based on a defective condition of the premises rather than the manner of work…[and Tambe] failed to meet its initial burden of establishing that it did not have supervision or control of the safety of the area involved in the incident… Pursuant to its [sub]contract with [the general contractor, Tambe] was responsible for the [temporary wiring] and for the safety of its work and the work area."

Martinez v. Tambe Electric, Inc., 70 A.D.3d 1376, 894 N.Y.S.2d 666 (4th Dept. 2010).

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

Court correctly rejected claims by plaintiff, who was struck by a caulking gun that he left temporarily on a ladder rung while he was working in defendants' facility, that defendants failed to provide (1) a scaffold or manlift from which to work and (2) a safety device to secure the caulking gun:

> Labor Law § 240(1) applies to falling object cases where the falling of an object is related to a significant risk inherent in the relative elevation at which materials and/or loads must be positioned or secured. The fact that an injured plaintiff may have been working at an elevation when an object fell is of no moment in a falling object case because a different type of hazard is involved.
>
> Here, the caulking gun did not fall because of the absence or inadequacy of the ladder, scaffold or manlift. Plaintiff left it on the ladder temporarily and forgot to remove it before adjusting the ladder. No evidence was presented by plaintiffs that the absence of a scaffold or lift proximately caused the accident. Thus, defendants demonstrated that plaintiff's conduct was the sole proximate cause of the accident.

Garzon v. Metropolitan Transportation Authority, 70 A.D.3d 568, 895 N.Y.S.2d 83 (1st Dept. 2010).

NEGLIGENCE—LABOR LAW § 240(1)—FAMILY DWELLING EXCEPTION—DIRECT/CONTROL WORK

Plaintiff, hired to install appliances for owner of family dwelling who made aesthetic decisions and exercised general supervision concerning the project, is not protected under Labor Law § 240(1):

> Defendants' participation was limited to discussion of the results the homeowner wished to see, not the method or manner in which the work was then to be performed. Defendants' direction to plaintiff to place a vent through the roof was simply an aesthetic decision. Defendants did nothing more than what any ordinary homeowner would do in deciding how they wanted the home to look upon completion. Further, defendants did not provide the plaintiff with any equipment or work materials, nor were they even present at the time plaintiff undertook the venting work. Rather, both the method and the manner of plaintiff's work were left to his judgment and experience.

Affri v. Basch, 13 N.Y.3d 592, 894 N.Y.S.2d 370 (2009), *aff'g* 45 A.D.3d 615, 846 N.Y.S.2d 270 (2d Dept. 2007).

[EDITOR'S NOTE: Two judges joined in the dissenting opinion of Chief Judge Lippman:

> Defendants' conduct could be found to be more extensive than expected of the typical homeowners renovating their home inasmuch as their activity involved changing the fundamental or structural nature of the work. For example, plaintiff asserts that when he told Mr. Basch that in order to move a sink to Basch's preferred location he would need to cut a beam that supported the house, defendant instructed him to cut the beam. Basch told plaintiff to place the washer-dryer vent through the roof, rather than through the window, after plaintiff expressed reservations about the safety of that procedure—a significant alteration changing the fundamental nature of the work. That Basch may have been able to induce plaintiff to perform the work on the roof, even though plaintiff was afraid for his safety, would also support a finding that Basch directed or controlled plaintiff's work].

NEGLIGENCE—LABOR LAW § 240(1)—HOISTING MECHANISM—STRUCK IN FACE

Plaintiff, who was injured when he was struck in the face by the handle of a hand-operated hoisting mechanism while he was raising a scaffold, raised triable issues of fact whether the defendants provided proper protection under Labor Law § 240(1).

Strangio v. Sevenson Environmental Services, Inc., 15 N.Y.3d 914, 913 N.Y.S.2d 639 (2010), *mod*. 74 A.D.3d 1892, 902 N.Y.S.2d 729 (4th Dept. 2010).

[EDITOR'S NOTE: The Appellate Division majority would have dismissed plaintiff's action:

> The fact that an accident is "connected in some tangential way with the effects of gravity" is insufficient to bring the injured worker within the protection of Labor Law § 240(1). Here, the protective device, i.e., the scaffold, adequately shielded plaintiff and his coworkers on the platform from falling to the ground or sustaining other injuries as a result of the unchecked descent of the scaffold. "The mere fact that the force of gravity acted upon the hoisting mechanism is insufficient to establish a valid Labor Law § 240(1) claim inasmuch as plaintiff's injury did not result from an elevation-related risk as contemplated by the statute."

Two justices dissented pointing out that it is irrelevant whether plaintiff's coworkers were prevented from "falling to the ground." The case, according to the dissenters, falls within a now well recognized variant of a "falling object" case under § 240(1) and does not depend upon whether the plaintiff has fallen or been hit by the falling object. The court was influenced by plaintiff's expert who stated that plaintiff's injury was caused by a "malfunction" of the device, which resulted in an unexpected fall of the scaffold platform in an uncontrolled backward movement of the crank handle due to a defect in the cranking mechanism. The dissenters concluded that

> the injury to plaintiff was every bit as direct a consequence of the descent of the [scaffold] as would have been an injury to a worker positioned in the descending (scaffold's) path].

NEGLIGENCE—LABOR LAW § 240(1)—INTERVENING CAUSE—STRONG WIND

Labor Law § 240(1) is not triggered where a gust of wind blew off the top board of a stack of plywood, striking plaintiff and knocking him over the edge of the floor to the dirt floor 10 to 15 feet below:

> The plaintiff failed to establish, as a matter of law, that his accident was a foreseeable consequence of the defendants' failure to provide him with an adequate safety device, rather than the result of an unforeseeable, independent, interven-

> ing act that attenuated the defendants' failure to provide him with an adequate safety device. Accordingly, the plaintiff failed to establish that the defendants' violation of Labor Law § 240(1) proximately caused his injuries.

Chacha v. Glickenhaus DoyNow Sutton Farm Development, LLC, 69 A.D.3d 896, 894 N.Y.S.2d 480 (2d Dept. 2010).

NEGLIGENCE—LABOR LAW § 240(1)—RETAINING WALL/OWNER

Although plaintiff fell off a part of a retaining wall that was both part of the property owned by Windsor and Charles Norman, the latter is liable as an "owner" under Labor Law § 240(1):

> At the time of the accident plaintiff was engaged in pouring concrete into an upper section of the retaining wall; in that area, the survey reveals that the wall is located on Norman's property. "[T]he term 'owner' is not limited to the titleholder of the property where the accident occurred and encompasses a person 'who has an interest in the property and who fulfilled the role of owner by contracting to have work performed for his [or her] benefit.'" We conclude that for this purpose, the pertinent ownership interest is that of the property being improved and is not, as Norman suggests, limited to the precise site from which plaintiff fell, i.e., the immediately adjoining property.

Larosae v. American Pumping, Inc., 73 A.D.3d 1270, 902 N.Y.S.2d 202 (3d Dept. 2010).

NEGLIGENCE—LABOR LAW § 240(1)—STAIRCASE

Labor Law § 240(1) did not apply to plaintiff who was performing repair work when the middle step (18 inches above the floor) of a three-step staircase broke:

> We grant summary judgment to defendant on the ground that the three-foot stairway, which had been in place since the late 1990's until plaintiff's accident on October 22, 2003, was neither a safety device nor a temporary stairway to protect a worker from an elevation-related risk within the meaning of the statute. The middle step was not of sufficient height to trigger the protection of § 240(1), nor was plaintiff exposed to the type of extraordinary risk for which the statute was designed.

Lombardo v. Park Tower Management Ltd., 76 A.D.3d 497, 907 N.Y.S.2d 196 (1st Dept. 2010).

[EDITOR'S NOTE: Two justices dissented. Justice Moskowitz, in her dissent, pointed out:

> Here it is undisputed that the harm to plaintiff was the direct consequence of the application of gravity to his body stepping on a weakened stair. Worn out stairs were certainly a risk against which defendant, being in control of the property, should have guarded. That the steps may have been part of the permanent structure rather than a temporary apparatus is irrelevant because it is beyond dispute that the steps provided the most efficient means of access to the pit].

NEGLIGENCE—LABOR LAW § 241(6)—COVERED PERSONS

Claimant, injured while performing excavation work on a State highway, is not a covered person under Labor Law § 241(6) because his employer was working without the State's permission or knowledge:

> We have consistently held that ownership of the premises where the accident occurred—standing alone—is not enough to impose liability under Labor Law § 241(6) where the property owner did not contract for the work resulting in the plaintiff's injuries, that is, ownership is a necessary condition, but not a sufficient one. Rather, we have insisted on "some nexus between the owner and the worker, whether by a lease agreement or grant of an easement or other property interest."
>
> * * *
>
> The outcome of this case would be different—as the State concedes—if the water company had secured a highway work permit before excavating in the state highway right-of-way. In that event, the work permit would have created the nexus between the claimant, the injured worker, and the State, the property owner.

Morton v. State of New York, 15 N.Y.3d 50, 904 N.Y.S.2d 350 (2010).

[EDITOR'S NOTE: Two judges dissented including Chief Judge Lippmann. The dissenters held that Labor Law § 241(6), as a strict liability statute, nowhere conditions an owner's liability upon consent to the injury-producing work:

> An owner may not avoid responsibility under the strict liability provisions of the Labor Law by interpolating such a requirement as a condition of recovery.]

NEGLIGENCE—LABOR LAW § 241(6)—DEMOLITION

Plaintiff, who was injured while using a flame torch to demolish a boat when an explosion occurred, is not protected under Labor Law § 241(6) because plaintiff was not, at the time of his injury, engaged in construction, excavation or demolition:

> Regarding demolition, which is defined by 12 NYCRR § 23-1.4(b)(16) as "[t]he work incidental to or associated with the total or partial dismantling or razing of a building or other structure including the removing or dismantling of machinery or other equipment," the mere act of dismantling a vehicle, whether a boat, a car or otherwise, unrelated to any other project, is not the sort of demolition intended to be covered by Labor Law § 241(6).

Coyago v. Mapa Properties, Inc., 73 A.D.3d 664, 901 N.Y.S.2d 616 (1st Dept. 2010).

NEGLIGENCE—PREMISES—CRIMINAL ATTACK/FORESEEABILITY

Defendant, premises owner, was entitled to judgment notwithstanding the verdict since the jury finding in favor of the plaintiff-tenant, who was attacked in the lobby of the building, was not supported by legally sufficient evidence:

> Plaintiff's testimony that he previously complained of loitering and suspected drug sales in the lobby of the subject apartment building was insufficient to establish the foreseeability of the assault that led to his injuries.

Beato v. Cosmopolitan Associates, LLC, 69 A.D.3d 774, 893 N.Y.S.2d 578 (2d Dept. 2010).

NEGLIGENCE—PREMISES—HIDDEN TRAP

Building owner is not liable to plaintiff for injuries sustained when she took a step backward and fell down two steps from the lobby into a smaller room where the tenants' mail boxes were located even though there was no handrail installed by the stairs:

> The court incorrectly concluded that the stairs at issue were "interior stairs" such that Owner and Architect were required to install handrails, as the subject stairs do not serve as an exit to the building.
>
> * * *
>
> In light of the photographs, which show an obvious drop in elevation and trimmings against the wall outlining the steps, and the deposition testimony that no prior similar incidents had occurred and that bright lights illuminated the stairway area, Owner made a *prima facie* showing that the stairway area did not constitute a hazardous condition or hidden trap proximately causing plaintiff's injuries.

Remes v. 513 West 26th Realty, LLC, 73 A.D.3d 665, 903 N.Y.S.2d 8 (1st Dept. 2010).

NEGLIGENCE—PREMISES—OPEN AND OBVIOUS

Plaintiff's claim for injuries she sustained after tripping and falling over a garden hose that had been placed across the sidewalk in front of a building managed by the defendant was viable even though the garden hose was open and obvious:

> Even assuming that the deposition testimony and photographs suggesting the hose was clearly visible from all directions compels the conclusion as a matter of law that the hazard was open and obvious, the question remains whether defendant breached its duty to maintain the premises in a reasonably safe condition.
>
> We find that the hose stretching across the sidewalk constituted a tripping hazard.

Sweeney v. Riverbay Corporation, 76 A.D.3d 847, 907 N.Y.S.2d 214 (1st Dept. 2010).

[EDITOR'S NOTE: Justice Catterson dissented, agreeing with the trial judge that the garden hose was not inherently dangerous. He also concluded that plaintiff failed to raise any issues of fact to rebut the defendant's showing that it neither created the condition nor had actual or constructive notice of it].

NEGLIGENCE—PREMISES—OUT-OF-POSSESSION LANDLORD

Owner of single-family home which was leased for approximately seven years is not entitled to summary judgment as an out-of-possession landlord for a slip and fall in the rear of the house:

> "Generally, [an out-of-possession] landlord may be held liable for injur[ies] caused by a defective or dangerous condition upon the leased premises if the landlord is under a statutory or contractual duty to maintain the premises

in repair." Here, there was no lease or other written agreement between the defendants and the tenant to establish that the defendants were out-of-possession landlords who were absolved of their statutory duty to maintain the premises in good repair.

Section 27-2005 of the New York City Administrative Code requires the owner of a one or two-family dwelling to keep the premises in good repair except as otherwise agreed to between the tenant and the owner of a dwelling, "by lease or other contract in writing."

* * *

Here, the defendants failed to establish, *prima facie*, that they did not have notice of the defective step which proximately caused the plaintiff to fall.

Ramirez v. Saka, 76 A.D.3d 673, 906 N.Y.S.2d 609 (2d Dept. 2010).

NEGLIGENCE—PREMISES—UNRETRACTED SPRINKLER HEAD—INHERENTLY DANGEROUS

Defendant is not entitled to summary judgment as a matter of law where plaintiff tripped and fell over a sprinkler head, approximately four inches high and two inches wide, which failed to retract after watering the lawn:

> Here, the defendants failed to meet their burden of establishing that, as a matter of law, they maintained the premises in a reasonably safe condition. Although the defendants argued, *inter alia*, that the unretracted sprinkler head was an open and obvious condition which was not inherently dangerous, under these circumstances, it cannot be determined, as a matter of law, that the defendants were entitled to summary judgment dismissing the complaint.
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> * * *
>
> Here, given the dimensions of the sprinkler head and its location on the lawn in an area close to where pedestrians would be traversing, a triable issue of fact exists as to whether the unretracted sprinkler head was an open and obvious condition.
>
> * * *
>
> Here, even though the plaintiff was aware of the location of the sprinkler head, it failed to retract into the ground as it should have, since the sprinkler system was not in operation at the time of the accident. Thus, the defendants failed to establish, as a matter of law, that the sprinkler head was not inherently dangerous as a matter of law.

Villano v. Strathmore Terrace Homeowners Association, Inc., 76 A.D.3d 1061, 908 N.Y.S.2d 124 (2d Dept. 2010).

NEGLIGENCE—PREMISES OWNER—SIDEWALK METAL GRATE

In an action where plaintiff claims she fell because of an allegedly slippery condition of a sidewalk metal grate, Consolidated Edison, as the owner, is responsible for maintaining and repairing it, not the building owner:

> New York City Department of Transportation Highway Rule 34 (RCNY § 2-07), which governs the maintenance and repair of sidewalk grates, places maintenance and repair responsibilities on the owners of covers or gratings. Indeed, 34 RCNY § 2-07(b)(1) states that "[t]he owners of the covers or gratings on a street are responsible for monitoring the condition of the covers and gratings and the area extending twelve inches outward from the perimeter of the hardware." Further, 34 RCNY § 2-07 (b)(2) requires that "[t]he owners of the covers or gratings shall replace or repair any cover or grating found to be defective and shall repair any defective street condition found within an area extending twelve inches outward from the perimeter of the cover or grating."

Hurley v. Related Management Company, 74 A.D.3d 648, 904 N.Y.S.2d 41 (1st Dept. 2010).

NEGLIGENCE –SEXUAL ASSAULT/SCHOOL—NOTICE

School district not liable for injuries sustained when plaintiff was sexually assaulted by another child on a school bus because it had no prior knowledge of the assailant's sexual tendencies:

> It is well-settled that schools have a duty to adequately supervise their students, and "will be held liable for foreseeable injuries proximately related to the absence of adequate supervision." However, unanticipated third-party acts causing injury upon a fellow student will generally not give rise to a school's liability in negligence absent actual or constructive notice of prior similar conduct. "[I]t must be established that school authorities had

> sufficiently specific knowledge or notice of the dangerous conduct which caused injury; that is, that the third-party acts could reasonably have been anticipated."
>
> * * *
>
> Here, the alleged sexual assault against Brenna was an unforeseeable act that, without sufficiently specific knowledge or notice, could not have been reasonably anticipated by the school district. Robert's history demonstrates that he had severe behavioral issues that had not manifested themselves for more than two years. Since his initial hospitalization in 2000, each program noted that he had not displayed any aggression towards anyone, and, because of his behavioral improvements, he was approved for less restrictive programs. More significantly, his prior history did not include *any* sexually aggressive behavior. Thus, without evidence of any prior conduct similar to the unanticipated injury-causing act this claim for negligent supervision must fail (emphasis in original).

Brandy B. v. Eden Central School District, 15 N.Y.3d 297, 907 N.Y.S.2d 735 (2010).

PRETRIAL PROCEDURE—CPLR 3126—CONDITIONAL ORDER

The trial court erred as a matter of law in excusing plaintiff's default in failing to serve a Supplemental Bill of Particulars before the deadline set by a conditional order of preclusion without requiring plaintiff to establish both a reasonable excuse for his noncompliance and a meritorious cause of action:

> We have made clear that to obtain relief from the dictates of a conditional order that will preclude a party from submitting evidence in support of a claim or defense, the defaulting party must demonstrate (1) a reasonable excuse for the failure to produce the requested items and (2) the existence of a meritorious claim or defense.
>
> * * *
>
> We reiterate that "[l]itigation cannot be conducted efficiently if deadlines are not taken seriously, and we make clear again, as we have several times before, that disregard of deadlines should not and will not be tolerated."

Gibbs v. St. Barnabas Hospital, 16 N.Y.3d 74, 917 N.Y.S.2d 68 (2010).

[EDITOR'S NOTE: Three judges dissented pointing out that both the Supreme Court and the Appellate Division found no evidence that plaintiff's inaction was willful, contumacious or the result of bad faith. Since there was no willfulness, which is a prerequisite for preclusion, the majority is imposing the sanction where there is an affirmed finding that plaintiff's behavior was not willful.

The majority rejected this argument because plaintiff not only failed to respond to or comply fully with the demand of the Bill of Particulars but also disregarded court orders. Since plaintiff did not comply with the conditional order, the order became absolute when plaintiff failed to timely provide the Bill of Particulars].

PRE-TRIAL DISCOVERY—INTERROGATORIES—TREADMILL—OTHER INCIDENTS

Manufacturer of treadmill, sued by plaintiff who claims she was injured when the treadmill she was exercising on suddenly accelerated, is only entitled to a protective order with regard to interrogatories requesting information about other treadmills it manufactured during the period:

> [Defendant's motion] for a protective order to the extent of directing them to answer interrogatories regarding prior incidents with regard to other treadmills that Icon manufactured and marketed during the period in which it manufactured the subject treadmill [is limited] to those interrogatories…regarding prior incidents involving sudden acceleration.

Salter v. Sears, Roebuck and Co., 77 A.D.3d 449, 908 N.Y.S.2d 573 (1st Dept. 2010).

PRE-TRIAL DISCOVERY—NON-PARTY DEPOSITION—OBJECTIONS

Counsel for non-party physicians cannot participate in the deposition of a witness including objecting to questions asked of the witness:

> A non-party witness does not have a right to object during or otherwise to participate in a pre-trial deposition. CPLR 3113(c) provides that the examination and cross-examination of deposition witnesses "shall proceed as permitted in the trial of actions in open court"…We discern no distinction between trial testimony and pre-trial videoptaped deposition testimony presented at trial. We note in addition that 22 NYCRR 202.15, which concerns

> videotaped recordings of civil depositions, refers only to objections by the parties during the course of the deposition in the subdivision entitled "Filing and objections" (*see* 22 NYCRR 202.15[g][1][2]). We thus conclude that plaintiff is entitled to take the videotaped depositions of the physicians and that counsel for those physicians is precluded from objecting during or otherwise participating in the videotaped depositions.

Thompson v. Mather, 70 A.D.3d 1436, 894 N.Y.S.2d 671 (4th Dept. 2010).

PRODUCT LIABILITY—CPSC GUIDELINES

The trial court erred in failing to grant the City's CPLR 4404 motion because the City cannot be held liable for failing to comply with the 1981 CPSC guidelines requiring slip resistant steps and rungs in a playground under both wet and dry conditions when the playground was designed in 1996 and constructed in 1998 and the 1994 and 1997 CPSC guidelines superseded the 1981 guidelines relied on by the plaintiff:

> An injured plaintiff cannot demonstrate negligence on the part of the municipality merely by showing that a playground does not meet CPSC guidelines, as those guidelines are aspirational in nature.
>
> * * *
>
> The plaintiffs' theory of negligence was based on a recommendation found in the 1981 edition of the CPSC guidelines. While those 1981 guidelines did call for certain components to be finished with a surface that was slip resistant under wet and dry conditions the subject playground was designed in 1996 and constructed in 1998, and the plaintiffs' own expert acknowledged, on cross-examination, that the 1981 guidelines had been superseded by editions published in 1994 and 1997.

Carrasquillo v. City of New York, 78 A.D.3d 635, 910 N.Y.S.2d 526 (2d Dept. 2010).

PRODUCT LIABILITY—DESIGN DEFECT

Defendant, who manufactured personnel lift with outriggers that were detachable but not interlocked, is liable to plaintiff because the product was not reasonably safe:

> The evidence clearly showed that the use of outriggers would have made the product safer. Expert testimony explained that outriggers would have expanded the product's "footprint," making it more stable by distributing its weight over a wider area. Indeed, Genie's own label warned against using the product without outriggers. It is thus reasonable to conclude that an interlock, making use without outriggers impossible, would have increased the safety of the product.
>
> Plaintiff also offered evidence from which a jury could find that, in 1986 when the product was sold, it was technologically possible, at minimal cost, to design the product with interlocked outriggers. A qualified expert so testified, and illustrated his point with a model that he had created of Genie's machine, to which he added a half dozen switches, of a kind available in the late 1980s for $20 to $25 each.

Adams v. Genie Industries, Inc., 14 N.Y.3d 535, 903 N.Y.S.2d 318 (2010).

[EDITOR'S NOTE: The court rejected defendant's argument that finding its product was "not reasonably safe" may not rest merely on a showing that a safer product was theoretically possible at the time the machine was made. Plaintiff's evidence, however, showed not only that the better way was "thought possible" but that it had actually been implemented. A former employee of the manufacturer testified that in 1985, before the accident which occurred in 1997, the manufacturer purchased a competitor's personnel lift with interlocked outriggers].

PRODUCTS LIABILITY—STRICT LIABILITY IN TORT—FAILURE TO WARN/NEGLIGENT DESIGN

Defendant drill manufacturer met its initial burden of establishing *prima facie* entitlement to judgment as a matter of law dismissing plaintiff's failure to warn and negligent design claims:

> The strict products liability cause of action based on failure to warn should have been dismissed because the injured plaintiff admitted that he never read the instruction manual.
>
> The cause of action for negligent design fails because there is no evidence that the alleged design defects were the result of negligence or lack of care on Hougen's part.

Boyle v. City of New York, 79 A.D.3d 664, 914 N.Y.S.2d 126 (1st Dept. 2010).

[EDITOR'S NOTE: The manufacturer, however, failed to meet its burden that the drill was manufactured reasonably safe:

> Its expert failed to set forth any information demonstrating that the subject drill was "designed and manufactured under state of the art conditions," "that its manufacturing process complied with applicable industry standards " or that proper testing and inspection was performed on the products before they left defendant's possession. The expert's affirmation was replete with speculation and did little more than attempt to disprove plaintiff's version of the facts. It failed to establish that the drill, as designed and manufactured, was reasonably safe].

SETTLEMENT—CPLR 5005-a—TAXPAYER IDENTIFICATION NUMBER

Defendant, who received a general release and stipulation of discontinuance, must comply with CPLR 5003-a and cannot delay payment until plaintiff's counsel provides a taxpayer identification number:

> Plaintiff fulfilled his obligations under CPLR 5003-a by tendering a duly executed release and stipulation of discontinuance to the defendants' attorney. Neither CPLR 5003-a, nor the parties' stipulation of settlement, imposed any additional requirement on the plaintiff or his attorney. Regardless of whether the defendants' request that the plaintiff's attorney complete Form W-9 certifying his tax identification number was reasonable, as they contend, there is no statutory authority for elevating the completion of this form to a condition precedent for payment of the sum due in settlement of a personal injury claim.
>
> * * *
>
> Granting settling defendants the unilateral right to withhold payment in these circumstances would significantly undercut the statutory goal of CPLR 5003-a to ensure the prompt payment of settlement proceeds upon tender of the statutorily prescribed documents.

Klee v. Americas Best Bottling Co., Inc., 76 A.D.3d 544, 907 N.Y.S.2d 260 (2d Dept. 2010).

[EDITOR'S NOTE: The court disagreed with the First Department holding in *Cely v. O'Brien & Kreitzberg*, 45 A.D.3d 368, 845 N.Y.S.2d 292 (1st Dept. 2007). The First Department denied plaintiff's request for interest under CPLR 5003-a(e) because he failed to timely provide defendant with a hold harmless stipulation and a W-9 form. The First Department recognized that defendant's request is not a condition of payment of the settlement amount but since the request for the W-9 is supported by statute and case law it agreed with defendant].

STIPULATION—SO-ORDERED—BINDING

The court erred in vacating a so-ordered stipulation signed by counsel during a court appearance because it was binding:

> While a court may relieve a party of the consequences of a stipulation made during litigation where there is cause sufficient to invalidate a contract, such as fraud, collusion, mistake, or accident, here, the plaintiff failed to demonstrate good cause sufficient to invalidate the subject provision of the stipulation.

Kirkland v. Fayne, 78 A.D.3d 660, 915 N.Y.S.2d 270 (2d Dept. 2010).

[EDITOR'S NOTE: The plaintiff's and defendant's counsel agreed that if defendant Emmorrison Griffiths did not appear for a deposition by a date certain he would be precluded from testifying.

Attorneys who sign stipulations at pretrial conferences, especially those that have specific dates, should diary the dates and if it appears that the deadline cannot be met, a motion should be made before the due date to modify the stipulation].

TRIAL—EMERGENCY CHARGE—SUN GLARE

Trial court committed reversible error in instructing the jury on the emergency doctrine when defendant driver, Klink, struck plaintiff while crossing the intersection after he was blinded by the sun "all of a sudden":

> Klink was about to turn to the west at a time of day that the sun would be setting. It is well known, and therefore cannot be considered a sudden and unexpected circumstance, that the sun can interfere with one's vision as it nears the horizon at sunset, particularly when one is heading west. This is not to say that sun glare can never generate an emergency situation but, under the circumstances presented, there is no reasonable view of the evidence under which sun glare constitutes a qualifying emergency.

Lifson v. City of Syracuse, 17 N.Y.3d 492, 934 N.Y.S.2d 38 (2011), *rvg*, 72 A.D.3d 1523, 900 N.Y.S.2d 568 (4th Dept. 2010).

[EDITOR'S NOTE: Two judges dissented maintaining that the emergency instruction was properly given because a jury could have found that the driver did not calculate the direction of his travel, the time of day and the time of year so precisely that he expected to find the sun in his eyes when he turned].

TRIAL—JURY CHARGE

The trial court erred in repeating the phrase "launched a force or instrument of harm" several times for defendant repairer, DAC, to be held liable for a part of the mechanism door which broke off and hit plaintiff in the head:

> The court is required to clearly define for the jury what it must find in order to determine whether there was negligence. A charge must be precise, specifically related to the claim of liability, and it must state and outline separately the disputed issues of fact as the nature of the case and the evidence require. Here the court's instructions did not concisely explain, in fact—specific terms, what the jury needed to find in order to determine DAC's liability for alleged negligent repair work. Instead, it was both misleading and confusing, because the charge included instructions regarding third party contractor's tort liability. Because the error precluded the jury's fair interpretation of the evidence, we remand for a new trial.

Altamirano v. Door Automation Corp., 76 A.D.3d 401, 907 N.Y.S.2d 164 (1st Dept. 2010).

[EDITOR'S NOTE: The court instructed the jury that plaintiff had the burden of proving:

> One, that the defendant [DAC] was negligent in performing repair service under its contract with Lincoln Center and that such negligence launched a force or instrument of harm; and two, that the force or instrument of harm that was launched was a substantial factor in causing plaintiff's injury.

Two judges dissented finding that the charge was not confusing and that it did not include extraneous information about tort liability of third-party contractors].

VENUE—CPLR 511(b)—TIMELY MOTION

Defendant's motion to change venue was timely because the five-day extension under CPLR 2103(b)(2) applies to the 15-day time period described by CPLR 511(b) to move for change of venue after a defendant serves a demand for change of venue by mail:

> Pursuant to CPLR 511(a), a defendant shall serve with the answer, or prior to service of the answer, a demand "for change of place of trial on the ground that the county designated for that purpose is not a proper county." Subsection (b) permits defendant to "move to change the place of trial within fifteen days after service of the demand, unless within five days after such service plaintiff serves a written consent to change the place of trial to that specified by the defendant." CPLR 2103(b)(2) provides "where a period of time prescribed by law is measured from the service of a paper and service is by mail, five days shall be added to the prescribed period." The extension provided in CPLR 2103(b)(2) constitutes legislative recognition of and compensation for delays inherent in mail delivery."
>
> * * *
>
> Although the motion papers are not directly responding to papers served by plaintiffs, defendants are effectively responding to plaintiffs' lack of consent to the change of venue. Simply put, defendants' motion papers are not initiatory and, because the demand was served by mail, defendants were entitled to the benefit of section 2103(b)(2)'s five-day extension.

Simon v. Usher, 17 N.Y.3d 625, 934 N.Y.S.2d 362 (2011), *rvg* 73 A.D.3d 415, 899 N.Y.S.2d 601 (1st Dept. 2010).

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Villano v. Strathmore Terrace Homeowners Association, Inc., 76 A.D.3d 1061, 908 N.Y.S.2d 124 (2d Dept. 2010) **[NEGLIGENCE—PREMISES—UNRETRACTED SPRINKLER HEAD—INHERENTLY DANGEROUS]**

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Brandy B. v. Eden Central School District, 15 N.Y.3d 297, 907 N.Y.S.2d 735 **[SCHOOL'S SEXUAL ASSAULT—NOTICE]**

Klee v. Americas Best Bottling Co., Inc., 76 A.D.3d 544, 907 N.Y.S.2d 260) **[SETTLEMENT—CPLR 5005-a—TAXPAYER IDENTIFICATION NUMBER]**

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The State of Social Media in Civil Litigation—Where Do the Courts Stand Now?

By Emina Poricanin

The law is slowly but surely catching up to the latest Internet fad—social networking websites, also known collectively as social media. Facebook, undoubtedly the largest and most popular of them all, currently has 500 million users and one study has found that Americans spend 22.7 percent of their free time on social networking sites.[1] In the legal realm, social media have most often been utilized to investigate claims of pain and suffering or loss of enjoyment of life in civil suits. For example, a plaintiff who claims catastrophic injuries from a motor vehicle accident posts a video to her Facebook page showing her doing cartwheels after the accident occurred. The state of mind of the social media user can also be examined by viewing the user's "wall posts," messages, and "status updates." The foregoing information may be used to impeach testimony, dismiss the complaint, or negotiate lower damages. These are some of the most basic ways that information discovered on social media may be utilized and some recent cases show the "unconventional" roles that social media may play in litigation. For example, information on social media may be utilized to establish the domicile of a decedent at the time of her death in a wrongful death suit arising from an airplane crash.[2] In a divorce case, statements by the wife on her blog were found to be relevant with respect to her demand for non-durational maintenance.[3] Social media may also reveal the work and hours spent by a plaintiff's attorney on a case in an attorneys' fee dispute.[4] Given the prevalence of social media and their ever-expanding role in litigation, familiarity with cases that have addressed this issue is necessary for any practitioner.

In New York, the courts that have addressed discoverability of social networking sites have applied traditional principles of discovery: All non-privileged matter which is material and necessary to the defense or prosecution of an action is discoverable.[5] Since the content on social networking sites is, in some cases, practically per se relevant, or by its very nature likely to lead to discovery of relevant information, discovering social media content should be easier than discovering some other materials. Perhaps because of the potential for abuse, some of the higher courts in New York State have denied liberal disclosure of content on social networking sites and have demanded a strong evidentiary showing before granting orders to compel discovery. Conversely, the lower courts appear to be more inclined to find relevance based on the motion papers and grant discovery.

The first New York case on this topic was *Romano v. Steelcase*,[6] a personal injury action, in which plaintiff sought damages for loss of enjoyment of life. Defendant moved the court for an order granting access to the plaintiff's current and historical Facebook and MySpace pages and accounts, including all deleted pages. Defendant asserted that plaintiff's claims of permanent injuries were belied by the public portions of her Facebook and MySpace profiles, which revealed that she had an active lifestyle and participated in many activities. A picture portrayed plaintiff smiling happily outside her home, despite the plaintiff's claim that she was largely confined to her house and bed as a result of her injuries. Plaintiff objected to the motion of defendant on the ground that its assertions were speculation and conjecture and that ordering the release of all private messages would permit defendant to obtain wholly irrelevant content and private information. After laying out the relevant discovery rules, namely those codified in CPLR 3101, the court held that defendant would be at a distinct disadvantage in defending the action without the requested information and granted defendant's motion.

Patterson v. Turner Construction Company,[7] yet another personal injury action, was an appeal from an order granting defendants' motion to compel an authorization for "all of plaintiff's Facebook records compiled after the incident alleged in the complaint, including any records previously deleted or archived." The motion court had determined that "at least some of the discovery sought" would disclose relevant evidence or lead to the same. The Second Department, however, held that it was "possible" that not all plaintiff's Facebook communications would be related to the events that gave rise to the plaintiff's claim. Consequently, the Second Department remanded the case for a "more specific identification of plaintiff's Facebook information" that was "relevant, contradicted or conflicted with plaintiff's alleged restrictions, disabilities, and losses, and other claims." Most importantly, however, the Second Department noted that plaintiff's utilization of privacy settings on Facebook did not shield his posts from discovery—private posts on Facebook are discoverable, just like relevant matter from a personal diary is discoverable.

In *McCann v. Harleysville Ins. Co. of New York*,[8] defendant sought disclosure of "an authorization for plaintiff's Facebook account," which allegedly contained information about the plaintiff's motor vehicle injury. The Appellate Division, Fourth Department, affirmed the trial court's denial of defendant's motion, noting that defendant had failed to establish a factual predicate to justify its discovery demand and was on a fishing expedition. The Appellate Division, however, lifted the protective order that was granted to the plaintiff by the trial court and held that defendant should be permitted to seek disclosure of plaintiff's Facebook account at a future date, presumably after defendant establishes the necessary factual predicate.

In *Caraballo v. City of New York*,[9] defendant general contractor sought to compel plaintiff to provide it with authorizations to access the plaintiff's "current and historical Facebook, MySpace and Twitter pages and accounts, including all deleted pages and related information." Defendant asserted that the websites contained photographs, status reports, and videos that belied the plaintiff's claims of injury. Plaintiff refused defendant's demand on the ground that it was overboard, intrusive, and that the information sought was irrelevant. Citing *McCann*, the court held that defendant's discovery demand was overly broad and that defendant had failed to establish a factual predicate for the relevancy of the information that the websites might contain. Notably, in its decision, the court referred to another Richmond County Supreme Court decision, *Fernandez v. Metropolitan Tr. Auth*, Index No. 102662/09, where the movant's request for plaintiff's MySpace account information was granted. In *Fernandez*, however, the plaintiff had testified at a deposition about the type of information she posted on her social networking website, thus enabling defendant to establish the relevancy of the information sought in its discovery demand.

Abrams v. Pecile[10] is the most recent New York decision on discoverability of information from social media sites. In *Abrams*, the plaintiff's complaint alleged intentional infliction of emotional distress. In reversing the order of the trial court and denying defendant's demand for access to plaintiff's social networking accounts, the First Department held that defendant had failed to make a showing that "the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims." The court cited *McCann*.

The federal courts have granted parties access to their opponents' social networking sites more liberally than New York State courts. For example, in *Ledbetter v. Wal-Mart Stores, Inc*.,[11] the court denied the plaintiff's motion for a protective order and granted defendant's motion to compel production of content on plaintiff's social media site, finding that it was reasonably calculated to lead to discovery of relevant and admissible evidence. Similarly, in *Beye v. Horizon Blue Cross Blue Shield of New Jersey*,[12] the court ordered plaintiffs to produce their beneficiaries' Facebook and MySpace writings and entries that the beneficiaries shared with others. The court also ordered plaintiffs to preserve writings that were not shared with others, in case defendants' experts needed such writings at a later time.

In *Bass v. Miss Porter's School*,[13] the plaintiff filed an action against her school, alleging, among other things, intentional and negligent infliction of emotional distress. Defendants sought production of "all documents representing or relating to communications between plaintiff and anyone else" regarding the plaintiff's allegations. Pursuant to plaintiff's request, Facebook provided plaintiff with over 750 pages of wall postings, messages, and pictures that had been made on her Facebook site. Plaintiff gave only 100 of those pages to defendant. The court reviewed all of the pages in camera and found that "production should not be limited to Plaintiff's own determination of what may be 'reasonably calculated to lead to the discovery of admissible evidence,'" noting that some of the unproduced documents contained information that was "clearly relevant" to the action. The court ordered plaintiff to provide defendant with all of the pages it had received from Facebook.

In *E.E.O.C. v. Simply Storage Mgmt., LLC*,[14] a sexual harassment case, defendant employer sought the claimants' social networking website "profiles." The court interpreted "profile" to mean any postings, pictures, blogs, messages, personal information, and lists of friends that the user had placed or created. The EEOC objected to the demand on the grounds that the requests were overbroad, not relevant, unduly burdensome because they infringed on the claimants' privacy, and were meant to harass and embarrass the claimants. The court rejected the notion that all content on the claimants' social media sites was relevant with respect to the claimants' emotional distress claims. Instead, the court determined that any postings within a certain period of time, which related to any emotion, feeling or mental state, or which related to "events that could reasonably be expected to produce a significant emotion, feeling, or mental state," would be relevant.

Conversely, in another sexual harassment case,[15] the court denied defendant's motion to compel production of plaintiff's private messages sent via MySpace. While the court recognized that defendants were entitled to discover information relevant to plaintiff's alleged emotional distress, which she had placed at issue in the case, it nevertheless found that defendants had merely speculated that the plaintiff's MySpace account contained relevant information. The court, however, indicated that it would grant defendants' request if they demanded "relevant email communications" from plaintiff.

Some federal courts have even gone as far as injecting themselves into social media in order to resolve discovery disputes. In *Barnes v. CUS Nashville, LLC*,[16] a magistrate judge offered to create a Facebook account and "friend" witnesses for the sole purpose of reviewing, *in camera*, potentially relevant comments and photographs that were posted on those witnesses' Facebook sites.

Several conclusions may be distilled from the foregoing cases. First and foremost, content on social networking sites is indeed discoverable. Presently, the courts are applying traditional rules of discovery to evaluate orders to produce or compel discovery. It remains to be seen whether the Legislature, or courts at the local levels, will craft rules specifically designed for discovery of social media.

Secondly, and more practically speaking, in order to obtain content from social media websites, the movant can either seek discovery of specific content or account access information, such as username and passwords. Another option is for the account holder to execute a release, which the other litigants may submit to the social media company to obtain the necessary content. The first option is the safest for the social media account holder because it allows the account holder to be the gatekeeper of the information on the site. The other options expose the account holder to having another party obtain more information than is necessary. As such, discovery demands for username and passwords should be opposed on the basis of being overly broad. The account holder should demand that the party seeking the information specifically tailor the discovery request, perhaps even limiting it to a specific time period.

Third, the party seeking disclosure will have to establish a factual predicate for the discovery demand. A request for "all information" from the litigants' social media site will most likely be denied as vague and overly broad. The most prudent practice would be to submit to the court, with the motion papers, some evidence that the social networking sites contain relevant information. Conclusory assertions will not suffice and will be interpreted as a request for a fishing expedition into the social media user's account. A movant may submit, for example, evidence that the movant has already obtained from the claimant's social networking site, such as the claimant's profile picture or postings containing relevant information. The logical inference is that if the public portions of the claimant's account show relevant information, then the private portions of those sites may contain relevant information as well. Alternatively, if the claimant subscribes to several social networking sites, such as Twitter, Facebook, MySpace, or LinkedIn, and some of the settings on those sites are set to private, while others are viewable to anyone, information obtained from the public portions of one site may be used to seek disclosure of the private contents on another site. For example, one may try to use public information obtained from Twitter to obtain discovery of private content on Facebook.

Another way to establish relevancy is to elicit testimony at depositions regarding the type of information the claimant posts on the websites, focusing specifically on status updates, pictures, videos, and communications. Questions about the frequency of usage of these sites would also be useful, since habitual users are more likely to post detailed information about their lives than occasional users. Also, while potentially futile, litigants should seek the identity of the claimants' "friends," who also may have discoverable information.

In sum, social media have the potential to break or make a case. As such, litigants should arm themselves with strong motions to compel or preclude discovery because that battle is one that they cannot afford to lose.

Endnotes

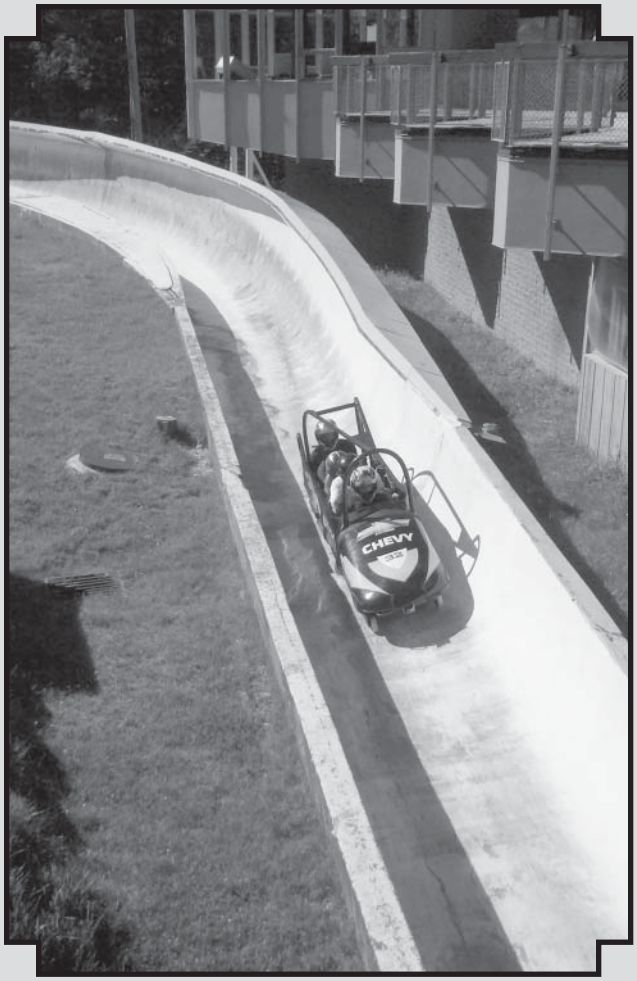
1. http://blog.nielsen.com/nielsenwire/online_mobile/what-americans-do-online-social-media-and-games-dominate-activity/.
2. See memorandum and affidavit filed of defendants in support of their motion to compel production of documents and answer interrogatories, Matter of Aircrash Near Clarence Center, New York, on February 12, 2009, 2011 WL 1555615 (W.D.N.Y. 2011).
3. *B.M. v. D.M.*, 31 Misc. 3d 1211, 2011 WL 1420917 (Sup. Ct., Richmond Co. 2011).
4. *Muniz v. United Parcel Service, Inc*., 2011 WL 311374 (N.D. Cal. 2011).
5. See CPLR 3101.
6. 30 Misc. 3d 426, 907 N.Y.S.2d 650 (Sup. Ct., Suffolk Co. 2010).
7. 88 A.D.3d 716, 931 N.Y.S.2d 311 (1st Dep't 2011).
8. 78 A.D.3d 1524, 910 N.Y.S.2d 614 (4th Dep't 2010).
9. 2011 NY Slip Op. 30606 (U), 2011 WL 972547 (Sup. Ct., Richmond Co. 2011).
10. 83 A.D.3d, 927, 922 N.Y.S.2d 16 (1st Dep't 2011).
11. 2009 WL 1067018 (D. Colo. 2009).
12. 2007 WL 7393489 (D. N.J. 2007).
13. 2009 WL 3724968 (D. Conn. 2009).
14. 2010 WL 3446105 (S.D. Ind. 2010).
15. *Mackelprang v. Fidelity Nat'l Title Agency*, 2007 WL 119149 (D. Nev. 2007).
16. 2010 WL 2265668 (M.D. Tenn. 2010).

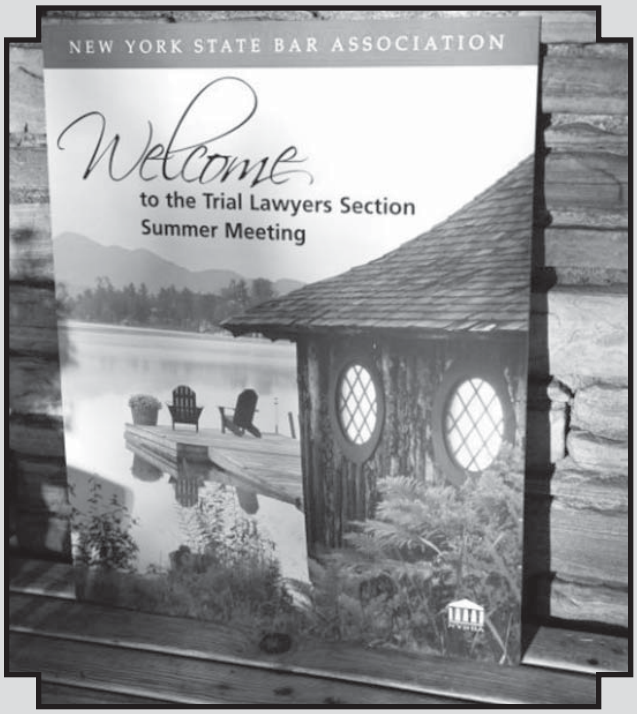
Emina Poricanin worked as a Court attorney at the Fourth Department and is now at Hodgson Russ LLP.

Scenes from the Trial Lawyers Section

SUMMER MEETING

Lake Placid, NY • July 31 - August 3, 2011





Save the Dates

Trial Lawyers Section

SUMMER MEETING

July 29 - August 1, 2012

Woodstock Inn

Woodstock, Vermont

NYSBA

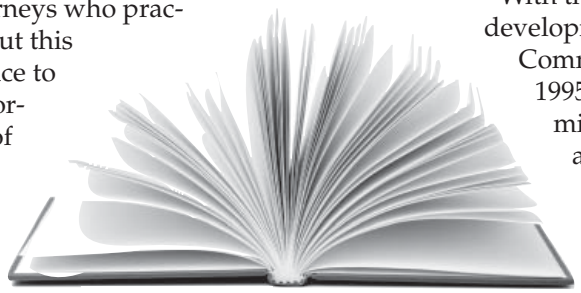
Book Review

Commercial Litigation in New York State Courts, Third Edition

Robert L. Haig, Esq., Editor-in-Chief

Reviewed by Seymour Boyers, Esq.

The Third Edition of the treatise "Commercial Litigation in New York State Courts" is a must read for both new lawyers and seasoned trial attorneys. This treatise is not only vitally beneficial for attorneys who practice in the field of commercial law, but this treatise will be of enormous assistance to all trial lawyers, including those attorneys who specialize in the practice of tort law, such as Products Liability, Professional Liability Litigation, and Environmental and Toxic Tort Litigation. Many of the treatise's chapters provide insightful information concerning all elements of a trial.



The Third Edition has managed to distill the lessons of decades in court. Both beginners and veteran trial lawyers can learn much from those chapters that are written by highly experienced advocates and Jurists who provide invaluable information and common sense tips in a highly readable style. This treatise is a veritable panoply of prescriptions for winning strategies for the modern day trial lawyer.

Chapter one of the treatise, entitled "Commercial Litigation in New York State Courts," is written by our distinguished Chief Judge of the State of New York, the Honorable Jonathan Lippman. Prior to Judge Lippman's appointment as Chief Judge, he was appointed in 1996, by Chief Judge Judith Kaye, as the Chief Administrative Judge of All New York State Courts, and he served in that capacity until 2007 when he was appointed by Governor Spitzer as Presiding Justice of the Appellate Division of the Supreme Court, First Department. As Chief Administrative Judge, he played a central role in many far-reaching reforms of New York's Judiciary and legal profession, including the creation of Specialized Commercial Parts.

Historically, New York was the center of commerce but early in the 1990s the business community and commercial bar more often turned to Federal Courts.

In 1993, four Commercial Parts were established in New York County with the expectation to promote efficiency of court operations as well as to develop the desirable expertise in commercial law.

In January 1995, the New York State Bar Association's Commercial and Federal Litigation Section issued a comprehensive report evaluating the Commercial Parts initiative. The Section found the Commercial Parts highly effective and recommended that they be made permanent and replicated around the State.

With the momentum generated by these developments, Chief Judge Kaye created the Commercial Courts Task Force in March 1995, co-chaired by the then Chief Administrative Judge E. Leo Milonas and a brilliant commercial lawyer Robert L. Haig, to develop a blueprint for the creation of a statewide Commercial Division of the New York State Supreme Court. Judge Lippman, as Chief Administrative Judge, worked with Judge Kaye and the task force members to put their recommendations into action.

On November 6, 1995, the Commercial Division officially opened its doors with five parts in New York County and one in Rochester, Monroe County.

As of the year 2010, the Commercial Division has grown from its original six Court parts to a total of 25 parts statewide with four additional parts in New York County.

The Chief Judge reports that throughout the Commercial Division's history there has been an ongoing commitment to innovation and fine-tuning of practice and procedure. In 2006, the Administrative Board of the Courts adopted statewide uniform rules governing the Division's jurisdiction and procedures as promulgated at 22 NYCRR §202.70.

The rules promote operational uniformity around the state and greater predictability of practice for the commercial bar in many important areas, including motion practice, electronic discovery, pre-trial conferences, temporary restraining orders, and trial scheduling. The rules also set forth definitive criteria governing the cases that may be heard in the Commercial Division including what qualifies as a commercial case and the monetary thresholds for the different Commercial Division Courts around the State.

The Third Edition consists of seven volumes and masterly covers the entire procedural scope of commercial litigation. The First Edition, published in 1995, consisted of 68 chapters and the Second Edition, published in 2005, consisted of 88 chapters. The substantive topics in the Third Edition, stated succinctly, are Investigation of the Case (extremely well written by Brad S. Karp and Roberta

A. Kaplan); Case Evaluation; Specific Performance and Rescissions; Removal to Federal Court; Comparison with Commercial Litigation in Federal Courts; Suing or Representing Foreign Corporations in New York State Courts; Class Actions; Sealing of Court Records in the Commercial Courts; Document Discovery; Selection of Experts, Expert Disclosure and the Pre-trial Exclusion of Expert Testimony; Referees and Special Masters; Practice Before the Commercial Division (chapter 33); Settlements; Jury Selection (chapter 35); Trials; Trial Preliminaries and the Opening Statements; Presentation of the Case in Chief; Cross Examination; Expert Witnesses; Graphics and Other Demonstrative Evidence; Admissibility Issues in Commercial Cases; Final Arguments in Jury and Bench Trial; Jury Conduct, Instructions and Verdicts; Compensatory Damages; Punitive Damages; Alternative Dispute Resolution; Trial and Post-Trial Motions; Judgments; Effect of Bankruptcy Proceedings on Pending Litigation and Judgments; Court Awarded Attorneys Fees; Fees, costs and disbursements; Sanctions; Appeals to the Appellate Division; Appeals to the Court of Appeals; Enforcement of Judgments; Litigation Avoidance and Prevention; Crisis Management; Techniques for Expediting and Streamlining Litigation; Litigation Management by Corporations; Litigation Management by Law Firms; Litigation Technology; Contracts; Insurance; Bank Litigation; Letters of Credit; Contracts for Services; Employment Restrictive Covenants and other Post-Employment Restrictions; Warranties; Bills and Notes; Secured Transactions; Agency; Partnerships; Products Liability; Mergers and Acquisitions; Securities Litigation; Shareholder Derivative Actions; Director and Officer Liability; Not for Profit Institution Litigation; Health Care Institution Litigation; Franchising; Antitrust Litigation; White Collar Crime; The Interplay Between Commercial Litigation and Criminal Proceedings; Theft or Loss of Business Opportunities; Misappropriation of Trade Secrets; Intellectual Property (chapter 94); Right of Publicity Claims; Privacy and Security; Commercial Defamation; E-Commerce; Information Technology Litigation; CPLR Article 78 Challenge to Administrative Determinations; Commercial Real Estate Litigation; Construction Litigation; Environmental and Toxic Tort Litigation (chapter 105); An Overview of Surrogate's Court Practice for the Commercial Litigator (chapter 106).

It is time to express some words about the superb Editor-in-Chief of the Third Edition, Robert L. Haig, Esq., and the very distinguished and scholarly 144 Jurists and learned and experienced attorneys assembled by Mr. Haig as authors and contributors to this most scholarly Third Edition.

Editor-in-Chief Robert Haig is a noted expert, author and lecturer in the area of Commercial Litigation. He is the Editor-in-Chief of an eight volume, 9000-page treatise entitled "Business And Commercial Litigation In Federal Courts" (West published the First Edition of this treatise in 1998 and the Second Edition in 2006). He is also the Editor-in-Chief of a four volume, 7000-page treatise published by West in 2000 entitled "Successful Partnering Between Inside and Outside Counsel."

To the authors and contributors to this very substantive Third Edition, I wish to express, as a reader, how grateful I am for your exemplary performance and dedication to the law.

The Third Edition unerringly produces for its commercial practitioners the revelations, reflections, insights and practical advice on areas ranging from the Commercial Division's individual rules of practice through the many substantive trial sections that provide the foundation for the skillful and expeditious disposition of complex commercial cases.

For the new attorney a caveat. When deciding whether to bring a case before the Commercial Division, you must, at the outset, analyze whether your case is eligible for assignment there. Even if your case may have a commercial dimension, it still may not qualify for Commercial Division Assignment. I suggest you read the section "Practice Before the Commercial Division," and carefully consult the standards for assignment of cases to the Commercial Division.

The Third Edition covers seven volumes. The final volume provides a comprehensive table of law and rules both for the Federal Courts and the New York State Courts, including The Federal Rules of Bankruptcy Procedure; The Federal Rules of Civil Procedure, et al; The New York Uniform Commercial Code; The New York General Business Law, et al; together with a complete table of cases.

When you read the chapters of this treatise, you know at once that you are in the presence of a writer of singular brightness. Best of all, in each chapter the language, the wit, the forward momentum of valuable information for the commercial lawyer—all conspire to produce a vitality that will linger throughout the course of the Third Edition.

Seymour Boyers is a retired Justice of the Appellate Division, Second Judicial Department, and presently a partner at the law firm of Gair, Gair, Conason, Steigman, Mackauf, Bloom & Rubinowitz.

Scenes from the
Trial Lawyers Section and Torts, Insurance
and Compensation Law Section

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January 25, 2012









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