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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: What Have You Done for Me Lately?

If you are reading this, you are most likely a dues-paying member of the Trial Lawyers Section, and for that we are indeed grateful. Lately, however, you may have asked yourself: what exactly is it that I am getting from the Trial Lawyers Section in return for my dues? The honest answer: not much of late, at least not much that you as an individual would appreciate.

There is, of course, much that the leaders of the Trial Lawyers Section do on your behalf, things of which you may not be aware but which nevertheless are of enormous benefit to all trial lawyers: lobbying for and against bills that are proposed in Albany and which affect our profession; developing and hosting CLE programs that are of interest to trial lawyers; and making sure that the interests of trial lawyers are not forgotten by the leadership of the Bar Association when they set their agenda each year.

Truth be told, however, on a more practical, day to day basis, the members of this Section have not gotten much of a return on their membership. The incoming Officers of the Executive Committee of the Trial Lawyers Section aim to change that.

Over the course of the next few months we will be taking steps to create and improve services that, we hope, will be of enormous interest and benefit to the members of our Section. The Trial Lawyers Section website will be revamped. We will be starting work on a database that will be accessible to Section members in which one will find documents that can be downloaded and used to help prepare and try your cases. The database will include forms for pleadings and demands; deposition and trial transcripts; legal briefs; and articles by experts in various fields of trial law.

The Section's journal will be enhanced, with articles by each of the various Section Sub-Committees appearing on a regular basis. In the same vein, we expect our Sub-Committees to become more active, with regular meetings that will be open to all Section members.

We will also make a better effort to keep the Section's membership apprised of developments that are of interest and concern to trial lawyers, with regular reports in the journal about the meetings of the Section's Executive Committee and the work that we are doing on your behalf.

Finally, we as your appointed Officers will make a better effort to connect with you, our Section members. The greatest benefit of being a member of the Trial Lawyers Section is the close association and friendships that develop among trial lawyers from across our state. If you have not previously attended a Trial Lawyers Section event, we would encourage you to do so. Later this year, our Section will hold its annual summer meeting at the Equinox Resort in Vermont. In addition to a fantastic CLE program, the summer meeting offers an opportunity for our members to meet and get to know one another in a social setting away from the formality of the courtroom. We sincerely hope to see you there.

Thomas P. Valet

Inside

2009 APPELLATE DECISIONS

APPEAL AND ERROR—SERVICE—NOTICE OF APPEAL—WITHOUT STATE

Appellant's violation of CPLR 2103(b)(2) and (f)(1) by not serving the notice of appeal within the state is not a "fatal jurisdictional defect" requiring the dismissal of the appeal since CPLR 5520(a) permits the Appellate Division to exercise its discretion in granting an extension of time for curing the omission:

> Plaintiffs here timely filed their notice of appeal with the New York County Clerk's office, thus authorizing the Appellate Division to determine whether to exercise its discretion pursuant to CPLR 5520(a). By contrast, the movants in *Cipriani v. Greene*, 96 N.Y.2d 821, 729 N.Y.S.2d 431 (2001), *rearg. denied*, 97 N.Y.2d 639, 735 N.Y.S.2d 495 (2001) and *National Org. for Women v. Metropolitan Life Ins. Co.*, 70 N.Y.2d 939, 524 N.Y.S.2d 772 (1988), *rearg. denied*, 71 N.Y.2d 890, 527 N.Y.S.2d 771 (1988), not only failed to timely serve their notices of motions for leave to appeal, but they also failed to timely file those papers with this Court. Thus, in those cases, the Court could not invoke its discretionary authority under CPLR 5520(a).

M Entertainment, Inc. v. Leydier, 13 N.Y.3d 827, 891 N.Y.S.2d 6 (2009), *rvg.* 62 A.D.3d 627, 880 N.Y.S.2d 40 (1st Dept. 2009).

CONTRACTS—SETTLEMENT—E-MAIL CORRESPONDENCE

Plaintiffs' acceptance of defendant's offer of settlement and defendant's agreeing to notify the NASD arbitration panel that the matter was settled was sufficient to bind defendant even though defendant withdrew the offer before plaintiff signed the proposed agreement:

> To establish the existence of an enforceable agreement, a plaintiff must establish an offer, acceptance of the offer, consideration, mutual assent, and an intent to be bound (22 N.Y. Jur. 2d, Contracts § 9). That meeting of the minds must include agreement on all essential terms.
>
> The February 6 e-mail sent by plaintiffs' counsel establishes that defendant made an offer, including all the essential material terms of that offer, and that plaintiffs accepted the offer. If any confirmation were needed that plaintiffs' counsel had accurately framed and characterized defendant's offer, the subsequent e-mails satisfy any such concerns.

Kowalchuk v. Stroup, 61 A.D.3d 118, 873 N.Y.S.2d 43 (1st Dept. 2009).

[EDITOR'S NOTE: The court found that plaintiffs' February 6 e-mail responding to defendant's offer constituted an effective acceptance. The court distinguished between a "preliminary agreement contingent on and not intended to be binding absent formal documentation," which is not enforceable, and a "binding agreement that is nevertheless to be further documented" which is enforceable with or without the formal documentation. The court held that "the mere fact that the parties intended to draft formal settlement papers is *not alone* enough to imply an intent not to be bound except by a fully executed document." (Emphasis in original).

The critical e-mail:

> As discussed, my clients have agreed to accept Mr. Stroup's settlement offer. The terms of the offer are as follows:
>
> Total settlement amount of $285,000 with $125,000 payable upon execution of the settlement paperwork but no later than 20 days. The remainder to be paid in nine equal monthly installments on the 15th of each month beginning on March 15, 2007. Confession of judgment and security interest sufficient to cover the outstanding amounts].

DAMAGES—DISTAL TIBIA FRACTURE WITH SHORTENING/10-YEAR-OLD—$3,000,000 PAST AND FUTURE PAIN AND SUFFERING—NOT EXCESSIVE

Award of $3,000,000 for past and future pain and suffering to 10-year-old plaintiff who sustained a distal tibia fracture and second degree burns on 10 percent of her body was not excessive:

> Infant plaintiff was injured when, while attempting to exit defendant's train, the door closed on her right foot and she was dragged along the length of the platform as the train departed from the station. As a result of the accident, infant plaintiff, who was 10 years old at the time, sustained, *inter alia*, a distal tibia fracture which resulted in one leg being 20mm shorter than the other, repeated knee dis-

> location with concomitant pain, second degree burns on ten percent of her body from scraping on the cement platform, as well as scarring and severe psychological injuries. Under the circumstances, the awards of $1.5 million for past pain and suffering and $1.5 million for future pain and suffering did not deviate materially from what would be reasonable compensation.

Jones v. New York City Transit Authority, 66 A.D.3d 532, 887 N.Y.S.2d 74 (1st Dept. 2009).

DAMAGES—FALSE ARREST—$2,700,000 AWARD REDUCED TO $500,000 – EXCESSIVE

Award to plaintiff for false arrest of $2.7 Million Dollars, which the trial court reduced to $500,000, was excessive to the extent it exceeded $150,000:

> We modify to the extent indicated because the award of damages on the false arrest claim, even as reduced by the trial court from $2,700,000 to $500,000, deviates materially from what would be reasonable compensation for the 20 hours plaintiff spent in custody between the arrest and arraignment.

Sital v. City of New York, 60 A.D.3d 465, 875 N.Y.S.2d 22 (1st Dept. 2009)

[EDITOR'S NOTE: Plaintiff was also awarded $7,100,000 for malicious prosecution which the trial court reduced to $1,600,000. Plaintiff was incarcerated for 333 days and the criminal charges remained pending for nearly eight months after he was released from custody before all charges were dismissed by the Bronx County District Attorney. The trial court noted the following in reducing the malicious prosecution award:

> At the time of his arrest, plaintiff was a senior in high school, a "B" student and was among the twelve players who made All City in basketball. Plaintiff voluntarily went to the police precinct to cooperate in the investigation of a crime he knew he did not commit, and which he thought, at the time, was an assault. Plaintiff was arrested and arraigned for murder within approximately 20 hours and incarcerated at Rikers Island for approximately 11 months. He was released from custody on bail while the charges remained pending for 8 more months until ultimately all of the charges were dismissed on the motion of the Bronx District Attorney on June 4, 2003. In addition to the indignity, deprivation and trauma of being in jail, plaintiff suffered physical injuries from other inmates. Plaintiff's mother testified at trial that when he returned home he was a "changed person" and "a little shell shocked." At trial, plaintiff testified that even to the present day he does not feel readjusted.] See 2/8/2008 *NYLJ* 30 (col. 3).

DAMAGES—FRACTURE DISLOCATION/ METACARPAL-CARPAL BONES—$1,200,000—EXCESSIVE

Award of $1,200,000 to plaintiff who sustained non-dominant wrist injuries including surgery and placement of four stainless steel pins in his hand was conditionally reduced to $755,000:

> Upon consideration of the nature and extent of the injuries sustained by the plaintiff, the jury's finding that the plaintiff sustained damages in the sum of $1,200,000 for past pain and suffering deviated materially from what would be reasonable compensation to the extent indicated herein.

Cusumano v. City of New York, 63 A.D.3d 5, 877 N.Y.S.2d 153 (2d Dept. 2009).

[EDITOR'S NOTE: The court set forth the following multiple injuries plaintiff sustained:

> These included a fracture dislocation of the metacarpal-carpal bones in his left, nondominant, wrist with permanent restriction of motion, requiring surgery involving the placement of four stainless steel pins in his hand; degenerative joint disease at the AC joint in his left shoulder with impingement, requiring two surgeries involving the removal of bone and scar tissue; and re-injury to his right knee resulting in a torn medial meniscus, requiring arthroscopic surgery].

DAMAGES—FRACTURED SKULL—$2,000,000 PAST PAIN AND SUFFERING—EXCESSIVE

Plaintiff's award of $2 million for past pain and suffering for injuries sustained after a tree fell on his van requiring him to be removed from his vehicle with the "jaws of life" was excessive to the extent it exceeds $750,000:

> The damages awarded to the plaintiff for past pain and suffering are excessive to the extent indicated herein, as they deviate materially from what would be

reasonable compensation (see CPLR 5501[c]).

Ferrigno v. County of Suffolk, 60 A.D.3d 726, 875 N.Y.S.2d 202 (2d Dept. 2009).

[EDITOR'S NOTE: Plaintiff testified at trial that a tree fell on his van. He was transported by helicopter to Stony Brook Hospital where he remained for three days. According to plaintiff's brief, he suffered: a fractured skull; a laceration to his head which required 60 stitches; a brain injury; a compression fracture of his cervical spine, permanent carpal tunnel syndrome with permanent nocturnal numbness of his arms and hands; permanent and severe migraine headaches; a post accident fear of impending death; severe pain and suffering; mental anguish; the loss of enjoyment of life and depression. See 2008 WL 5600103.

Plaintiff's award of $300,000 for past lost earning was vacated: "A claim for lost earnings must be established with reasonable certainty."

> At trial, plaintiff only offered his own unsubstantiated testimony regarding his purported lost earning and he did not submit any documentary evidence to substantiate his claim. Accordingly the plaintiff was not entitled to an award of lost earnings.]

DAMAGES—TIBIA/FIBULA FRACTURES—$12,000,000—45 YEAR-OLD—EXCESSIVE

Trial court's reduction of awards of $5,000,000 for past pain and suffering to $500,000 and $7,000,000 for future pain and suffering (over 31 years) to $600,000 did not deviate materially from what would be reasonable compensation to 45 year-old who suffered an open fracture of the tibia and fracture of the fibula:

> The awards for past and future pain and suffering do not deviate materially from what would be reasonable compensation, where plaintiff, 45 years old at the time of the July 2003 accident, suffered an open fracture of the tibia and a fracture of the fibula requiring six surgical procedures performed over the course of almost three years, including external fixation and internal fixation, as well as skin, muscle and nerve grafts; the fracture has not achieved union, will likely require additional surgery, and continues to cause plaintiff significant pain; and plaintiff has severe scarring, has undergone extensive physical therapy, and does not have full mobility of her right ankle.

Keating v. SS & R Management Co., 59 A.D.3d 176, 872 N.Y.S.2d 459 (1st Dept. 2009).

[EDITOR'S NOTE: Plaintiff's award of future medical expenses for $800,000 (over 10 years) was conditionally reduced by the Appellate Division to $150,000:

> The award for future medical expenses, however, is excessive to the extent above indicated, given that the only evidence of such costs was the testimony of plaintiff's treating orthopedic surgeon that plaintiff will likely require future surgery at a cost of $40,000 to $50,000, exclusive of hospital costs, and future physical therapy at a cost of "tens of thousands of dollars"].

DAMAGES—TRAUMATIC BRAIN INJURY—$2,750,000—NOT EXCESSIVE

Plaintiff's award for $2.75 million for traumatic brain injury was not excessive:

> The impact caused plaintiff to sustain, *inter alia*, a traumatic brain injury termed a subarachnoid hemorrhage. The evidence further supported plaintiff's contention that the subarachnoid hemorrhage resulted in plaintiff suffering a cerebral infarct about one week after the accident. The award of $1 million for past pain and suffering and $1.75 million for future pain and suffering over 15 years did not materially deviate from what would be reasonable compensation under the circumstances.

Hernandez v. Vavra, 62 A.D.3d 616, 880 N.Y.S.2d 50 (1st Dept. 2009).

[EDITOR'S NOTE: The court also upheld the award for future home health care attendant expenses of $390,000 which was supported by the plaintiff's neurologist's testimony that plaintiff would require 12 hours of home health care services a day for the rest of his life].

DAMAGES—TRIMALLEOLAR ANKLE FRACTURE—$850,000—PAST AND FUTURE PAIN AND SUFFERING—EXCESSIVE

Award to plaintiff, who sustained a trimalleolar ankle fracture when he slipped, of $500,000 for past pain and suffering and $350,000 for future pain and suffering was conditionally reduced to $350,000 and $200,000, respectively:

> The jury verdict awarding damages to the plaintiff Myron Fishbane in the sum of $500,000 for pat pain and suffering and $300,000 for future pain and

> suffering was excessive to the extent indicated herein, as it deviated materially from what would be reasonable compensation.

Fishbane v. Chelsea Hall, LLC, 65 A.D.3d 1079, 885 N.Y.S.2d 718 (2d Dept. 2009).

DAMAGES—WRIST FRACTURE—HERNIATED DISC—REFLEX SYMPATHETIC DYSTROPHY AND POST TRAUMATIC STRESS DISORDER—$4,240,000 FUTURE PAIN AND SUFFERING—EXCESSIVE

Plaintiff's award of $4,240,000 for future pain and suffering was excessive to the extent that it exceeded $2,500,000:

> In addition to the wrist fracture… plaintiff suffered a herniated disc, for which he underwent an operation, and developed reflex sympathetic dystrophy and posttraumatic stress disorder associated with major depressive disorder. However, the award for future pain and suffering is excessive.

Serrano v. 432 Park South Realty Co., LLC, 59 A.D.3d 242, 873 N.Y.S.2d 567 (1st Dept. 2009).

[EDITOR'S NOTE: The jury also awarded plaintiff $2,302,425 for future medical expenses including $710,556 for care, $443,405 for rehabilitation and $150,011 for household services. The court, however, reduced the award for future medical expenses by $150,111:

> The rehabilitation (physical therapy) award is supported by plaintiff's testimony that, as of the time of trial, he was going to physical therapy twice a month and that he would go more frequently if he had the money and the testimony of a physician specializing in pain management that plaintiff will need physical therapy twice a week for the rest of his life, at a cost of approximately $120 per visit.
>
> The award for care is supported by a psychiatrist's testimony that plaintiff will probably need someone to care for him for the rest of his life and a life care planner and medical case manager's testimony that plaintiff will need two hours of assistance per day until age 55 and four hours per day thereafter and that he cannot rely forever on his family. The testimony of an economist establishes that "care" means the assistance provided by the home attendant mentioned by the life care planner. However, it cannot be determined from the evidence what the category of "household services" is meant to cover. We therefore vacate the $150,111 award for household services].

EVIDENCE—JUDICIAL ADMISSION

HVT's admission in its answer to the amended complaint that it had leased the vehicle to the operator and was listed as the owner on the certificate of title was a formal judicial admission and was conclusive of the facts admitted in the action in which they were made:

> Facts admitted by a party's pleading constitute formal judicial admissions.
>
> * * *
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> Here, HVT made a formal judicial admission that it was listed as owner on the certificate of title. A certificate of title is prima facie evidence of ownership. Although this presumption of ownership is not conclusive, and may be rebutted by evidence which demonstrates that another individual owned the vehicle in question, there was no evidence in the record to rebut that presumption.

Zegarowicz v. Ripatti, 67 A.D.3d 672, 888 N.Y.S.2d 554 (2d Dept. 2009)

EVIDENCE—LABORATORY REPORT—PROFESSIONAL RELIABILITY EXCEPTION

The Supreme Court properly sustained defendant's objection to the admission of the laboratory report as well as the expert report and opinion testimony based upon the laboratory report:

> The plaintiff's expert sent samples of certain materials to the independent laboratory for testing. He did not conduct, supervise, or observe the testing, testify about the testing procedures used by the laboratory, or otherwise indicate that he had personal knowledge of the specific tests conducted. Under these circumstances, the expert's testimony that reports such as the laboratory report are generally relied upon by professionals in his field did not sufficiently establish the reliability of the laboratory report for the purposes of the professional reliability exception.

A-Tech Concrete Co., Inc. v. Tilcon New York, Inc., 60 A.D.3d 603, 874 N.Y.S.2d 565 (2d Dept. 2009).

EVIDENCE—SIGNED STATEMENTS/NOT SWORN OR NOTARIZED—INADMISSIBLE

Statement in a deposition prepared by a police officer and purportedly signed by convenient store employee (Bonney Edwards) but not sworn or notarized that purchaser of a 12-pack of beer less than seven minutes before deadly collision had odor on his breath was not admissible:

> Since Edwards' out-of-court statements were offered by plaintiffs for the truth of their content, they constitute hearsay. As such, they are not admissible unless they satisfy one of the exceptions to the hearsay rule…the statements are not admissions attributable to a party, as there is no evidence that Edwards was authorized to speak on defendants' behalf. Nor does the supporting deposition fall within the exception for a prior inconsistent written statement where the declarant is available to testify and there is no reason to believe that the declarant's works were incorrectly reported.
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> * * *
>
> As inadmissible hearsay, Edwards' statements could be considered in opposition to defendants' motion for summary judgment only if there were an acceptable excuse for plaintiffs' failure to present the evidence in admissible form or other competent evidence in the record supporting their claim. Here, plaintiffs could not present the relevant statements in admissible form because Edwards repudiated them. Repudiation is not an acceptable excuse, however, because plaintiffs had the opportunity to, and did, obtain Edwards' sworn testimony describing the sale at her examination before trial. Thus, this is not a case where the witness was unavailable or unwilling to give a sworn statement as to the relevant facts.

Kaufman v. Quickway, Inc., 64 A.D.3d 978, 882 N.Y.S.2d 554 (3d Dept. 2009).

INDEMNITY—BROAD AGREEMENT—ACTION DISMISSED

Valet parking operator (Laz) who agreed to indemnify Manhattan Ford against claims and expenses including reasonable attorney's fees arising out of any act or omission of Laz's employees is obligated to pay Manhattan Ford's costs, including counsel fees, incurred in defense of primary action even though the action was dismissed:

> The indemnification provision is enforceable inasmuch as it does not require that the triggering act or omission constitute negligence. Moreover, even if the agreement purported to indemnify Manhattan Ford against its own negligence, it would still be enforceable under General Obligations Law § 5-325, in any event, as Manhattan Ford was in fact not negligent …The indemnification provision would apply with respect to litigation costs and counsel fees incurred, even in the event of a dismissal of plaintiff's claims against Manhattan Ford.

Quinonez v. Manhattan Ford, Lincoln Mercury, Inc., 62 A.D.3d 495, 879 N.Y.S.2d 110 (1st Dept. 2009).

INDEMNITY—COMMON-LAW INDEMNITY/ VICARIOUS LIABILITY

The City of New York, which was held vicariously liable for violating Labor Law § 241(6), is entitled to full common-law indemnity against Haks Engineers notwithstanding that the jury only found Haks 40% at fault for the happening of the accident:

> This Court has recognized that an owner held strictly liable under the Labor Law is entitled to "full indemnification from the party wholly at fault." While the duty imposed by § 241 may not be delegated, the burden may be shifted to the party actually responsible for the accident, either by way of a claim for apportionment of damages, or by contractual language requiring indemnification.
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> * * *
>
> The fact that the City voluntarily elected to concede liability on the Labor Law § 241(6) claim should not preclude an indemnification claim…Further, it is well settled that a party may settle and then seek indemnification from the party responsible for the wrongdoing as long as the settling party shows that it may not be held liable in any degree.

Cunha v. City of New York, 12 N.Y.3d 504, 882 N.Y.S.2d 674 (2009).

INDEMNITY—CONTRACTUAL—GOL § 5-321

Hold harmless agreement tenant signed with landlord when it received an elevator key from the landlord is void under GOL § 5-321 because it did not include any requirement to procure insurance and did not refer to the tenant's lease:

> In *Hogeland v. Sibley, Lindsay & Curr Co.*, 42 N.Y.2d 153, 397 N.Y.S.2d 602 (1977), the Court of Appeals distinguished between exculpatory clauses "whereby lessor are excused from direct liability for otherwise valid claims which might be brought against them by others" which would be unenforceable under General Obligations Law § 5-321, and clauses whereby "the parties are allocating the risk of liability to third parties between themselves, essentially through the employment of insurance." The Court found that the latter type of provisions were enforceable because they required the parties to maintain insurance for the benefit of the public.
>
> * * *
>
> However, if the purpose of the indemnity clause is to exempt the landlord from liability to the victim—in this case the tenants and / or their employees—for its own negligence, it violates General Obligations Law § 5-321.

Mendieta v. 333 Fifth Avenue Associates, 65 A.D.3d 1097, 885 N.Y.S.2d 350 (2d Dept. 2009).

INSURANCE—DISCLAIMER—NOTICE/CARRIER—INSURANCE LAW 3420(d)

Tender letter by Travelers Insurance Company on behalf of its insureds covered by a commercial liability policy to Hartford Fire Insurance Company, whose policy covered the Travelers insureds as additional insureds, is sufficient to require, under Insurance Law 3420(d), Hartford to issue a prompt disclaimer since a notice of claim from another insurance carrier on behalf of a mutual insured asking that the insured be provided a defense and indemnity is notice:

> We hold that the tender letter insurer Travelers wrote on behalf of plaintiff and others to insurance carrier Hartford—asking that their mutual insureds be provided with a defense and indemnity, as additional insureds under the policy issued to Erath—fulfills the policy's notice-of-claim requirements so as to trigger the insurer's obligation to issue a timely disclaimer pursuant to Insurance Law § 3420(d).

JT Magen v. Hartford Fire Insurance Company, 64 A.D.3d 266, 879 N.Y.S.2d 100 (1st Dept. 2009).

[EDITOR'S NOTE: Justice Tom dissented, stating:

> This Court's decisions have made clear that notice received from a third party does not fulfill the insurance policy's notice requirement and thus does not implicate the insurer's obligation to issue a timely disclaimer.
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> * * *
>
> The effectiveness of Travelers' notice notwithstanding, it remains that Hartford was not notified of the underlying accident for more than 11 months. Accepting, for the sake of argument, that majority's proposition that notice was given on behalf of the insured, it was untimely because the delay was unreasonable as a matter of law].

MOTIONS—RENEWAL—CHANGE IN LAW

The Supreme Court erred in denying plaintiff's motion to renew since the renewal motion, made while the action was still pending, was based on the Court of Appeals changing the current state of the law, which the Fourth Department had relied on in dismissing plaintiff's action for consequential damages in an insurance claim:

> Supreme Court erred in denying that part of plaintiff's motion for leave to renew with respect to consequential damages based upon the doctrine of law of the case and instead should have granted leave to renew and, upon renewal, denied Charter Oak's motion. "[A] court of original jurisdiction may entertain a motion to renew or [to] vacate a prior order or judgment even after an appellate court has rendered a decision on that order or judgment. Furthermore, we conclude that, because "the analysis employed by this [C]ourt in the prior appeal no longer reflects the current state of the law, the doctrine of law of the case should not be invoked to preclude reconsideration of" Charter Oak's motion to dismiss plaintiff's claim for compensatory damages.

Stern v. The Charter Oak Fire Ins. Co., 59 A.D.3d 930, 872 N.Y.S.2d 618 (4th Dept. 2009).

MOTIONS—SUMMARY JUDGMENT—NOTE OF ISSUE—MAIL/CPLR 2103(b)(2)

CPLR 2103(b)(2), which adds five days to the prescribed period if the papers are mailed, does not apply to summary judgment motions:

> Both the order of the Supreme Court and CPLR 3212(a) measure the period within

> which motions for summary judgment must be made as commencing upon the filing of the note of issue. Accordingly, CPLR 2103(b)(2) does not extend the time within which such motions may be made. Thus, the defendant's motion was untimely.

Mohen v. Stepanov, 59 A.D.3d 502, 873 N.Y.S.2d 687 (2d Dept. 2009).

[EDITOR'S NOTE: There is a conflict, however, with the First Department. In *Luciano v. Apple Maintenance & Servs.*, 289 A.D.2d 90, 734 N.Y.S.2d 153 (1st Dept. 2001) and *Szabo v. XYZ, Two Way Radio Taxi Assn., Inc.*, 267 A.D.2d 135, 700 N.Y.S.2d 179 (1st Dept. 1999), the court held that CPLR 2103(b)(2) extended the time a summary judgment motion could be made if the Note of Issue was mailed. However, in *Coty v. County of Clinton*, 42 A.D.3d 612, 839 N.Y.S.2d 825 (3d Dept. 2007), the court held that the period during which a summary judgment motion must be made begins to run upon the filing of the Note of Issue].

NEGLIGENCE—ASSUMPTION OF RISK—CHEERLEADING STUNT

Plaintiff, a high school senior, is barred from suing school for injuries sustained while performing a stunt during cheerleading practice at school:

> Although defendant was "under a duty to exercise ordinary reasonable care to protect student athletes involved in extracurricular sports from unreasonably increased risks, the risks that are known and fully comprehended, open and obvious, inherent in the activity, and reasonably foreseeable are assumed by the student athlete. Here, defendant established that "[t]he risk posed [to] plaintiff by performing her cheerleading routine on a bare wood gym floor as opposed to a matted surface, was obvious," and thus that "plaintiff assumed the risks of the sport in which she voluntarily engaged."

Williams v. Clinton Central School Dist., 59 A.D.3d 938, 872 N.Y.S.2d 262 (4th Dept. 2009).

NEGLIGENCE—DANGER INVITES RESCUE

Plaintiff, who was injured when struck by an approaching vehicle while she and other motorists attempted to aid an injured defendant in his immobilized vehicle, does not have a cause of action against the injured defendant under the "danger invites rescue" doctrine:

> Contrary to the plaintiffs' contention, the doctrine of "danger invites rescue" is inapplicable to the facts of this case. This doctrine "was intended to relieve a rescuer from a charge of negligence when rushing into danger to save another from imminent, life-threatening peril." It also applies against a party who "by his [or her] culpable act has placed another person in a position of imminent peril which invites a third person, the rescuing plaintiff, to come to his aid."
>
> Here, there is nothing in the record to suggest that the defendant was a culpable party who voluntarily placed himself in "imminent, life-threatening peril" which invited rescue.

Flederbach v. Lennett, 65 A.D.3d 1011. 885 N.Y.S.2d 325 (2d Dept. 2009).

NEGLIGENCE—DOG CHASE—STRICT LIABILITY

Owner of unleashed Rottweiler is not liable to plaintiff, a mail carrier, who was injured attempting to jump through the open window of her vehicle when the Rottweiler ran after her but did not bite her, based on a violation of the leash law:

> [W]hen harm is caused by a domestic animal, its owner's liability is determined *solely* by application of the rule in *Collier*, i.e., the rule of strict liability for harm caused by a domestic animal whose owner knows or should have known of the dog's vicious propensities … Here, defendant's violation of the local leash law is "irrelevant because such a violation is only some evidence of negligence, and negligence is no longer a basis for imposing liability" after *Collier [v. Zambito*, 1 N.Y.3d 444, 446, 775 N.Y.S.2d 205 (2004)] and *Bard [v. Jahnke*, 6 N.Y.3d. 592, 815 N.Y.S.2d 16 (2006)].

Petrone v. Fernandez, 12 N.Y.3d 546, 883 N.Y.S.2d 164 (2009), *rvg*, 53 A.D.3d 221, 862 N.Y.S.2d 522 (2d Dept. 2008).

NEGLIGENCE—LABOR LAW § 240(1)—ALTERATIONS/BUILDING

Plaintiff, injured while dismantling and removing storage cages approximately 20 feet tall bolted to the support beams of the building's wall, floor and ceiling, was engaged in alteration of a building under Labor Law § 240(1) and was entitled to partial summary judgment:

> Contrary to the appellant's contention, the plaintiffs were engaged in an activity enumerated in the statute. They were not,

> as the appellant contends, engaged in mere "decorative modification" and the Supreme Court properly determined that the subject work constituted "altering" with the meaning of Labor Law § 240(1).
>
> Furthermore, contrary to the appellant's assertion, "falling object" liability under the statute is not limited to objects that are in the process of being hoisted or secured, but extends also to objects that "require [] securing for the purposes of the undertaking." Here, in light of the nature and purpose of the work being performed at the time of the accident, there was a significant risk that the unsecured sheet metal would fall, and cause injuries to workers such as the plaintiffs. Accordingly, the appellant was obligated under Labor Law § 240(1) to use appropriate safety devices to secure the load.

Lucas v. Fulton Realty Partners, LLC, 60 A.D.3d 1004, 876 N.Y.S.2d 480 (2d Dept. 2009).

NEGLIGENCE—LABOR LAW 240(1)—FALLING OBJECT

Plaintiff, struck by steel decking crane was hoisting that abruptly came down in a free fall directly towards plaintiff, is entitled to partial summary judgment under Labor Law 240(1):

> Liability under Labor Law 240(1), which applies to falling objects as well as falling workers, requires a showing that safety devices like those enumerated in the statute were absent, inadequate or defective, and that this was a proximate cause of the object's fall, i.e., for the gravity-related injury. While not all injuries caused by falling objects come within the ambit of Labor Law 240(1), it does afford protection where the falling of an object is related to "a significant risk inherent in…the relative elevation…at which materials or loads must be positioned or secured."

Jock v. Landmark Healthcare Facilities, LLC, 62 A.D.3d 1070, 879 N.Y.S.2d 227 (3d Dept. 2009).

NEGLIGENCE—LABOR LAW § 240(1)—LESSEE

Lessee, who did not hire or control the building's cleaning service company, cannot be held liable under Labor Law § 240(1) when a cleaning lady fell off a desk on which she was standing while cleaning the inside of an office building window in the area it leased:

> This statute places a duty on "contractors and owners and their agents." It says nothing about lessees. That does not necessarily mean lessees can never be liable. Appellate Division cases have said that lessees who hire a contractor, and thus have the right to control the work being done, are "owners" within the meaning of the statute. We assume, without deciding, that these cases are right, but they do not apply here. ABM [cleaning service] was hired by the landlord, Paramount, not by Goldman, so there is no basis for holding Goldman to be an owner or owner's agent.

Ferluckaj v. Goldman Sachs & Co., 12 N.Y.3d 316, 880 N.Y.S.2d 879 (2009), *rvg*, 53 A.D.3d 422, 862 N.Y.S.2d 473 (1st Dept. 2008).

[EDITOR'S NOTE: Three judges dissented finding that the lessee failed to sustain its initial burden of making a *prima facie* showing of entitlement to summary judgment].

NEGLIGENCE—LABOR LAW § 240(1)—ROUTINE MAINTENANCE

Plaintiff, who was injured, when he sustained an electric shock that caused him to fall off a ladder, was protected under Labor Law § 240(1) and entitled to summary judgment since the work he was performing was not routine maintenance outside the protective scope of the statute:

> The work, viewed in its totality, involved much more than simply changing a light bulb; it required replacement of a photocell, dismantlement of lamp housings and their ultimate rebuilding, replacement of ballasts and bulbs, and the disconnection and reconnection of termination wiring to power sources.

Caban v. Maria Estela Houses I Associates, 63 A.D.3d 639, 882 N.Y.S.2d 97 (1st Dept. 2009).

NEGLIGENCE—LABOR LAW § 240(1)—SECOND-FLOOR BALCONY/ELEVATION DIFFERENTIAL

Plaintiff, who fell from a second floor balcony while attempting to secure a tarp covering the roof he was repairing at the motel, is covered by Labor Law § 240(1) even though the balcony, a permanent appurtenance to a building, does not constitute the functional equivalent of a scaffold or other safety device within Labor Law § 240(1):

> We conclude that plaintiff demonstrated that he was exposed to "the exceptionally dangerous conditions posed by elevation

> differentials at work sites which Labor Law § 240(1) was designed to address." That is, plaintiff established that "the required work itself [was] performed at an elevation, i.e., at the upper elevation differential, such that one of the devices enumerated in the statute: would have allowed plaintiff to safely secure the tarp. Specifically, the record reveals that plaintiff was required to lean against and over the balcony railing to reach the tarp, with nothing but that railing to protect him from falling into the open space beyond and to the parking lot below. Thus, while the balcony itself cannot be deemed a de facto safety device, it did, in fact, constitute an elevated work site. Given that no safety device was provided to protect plaintiff from the risk of falling over or through the balcony railing, we agree with Supreme Court that plaintiff was entitled to summary judgment on his Labor Law § 240(1) claim.

Yost v. Quartararo, 64 A.D.3d 1073, 883 N.Y.S.2d 630 (3d Dept. 2009).

NEGLIGENCE—LABOR LAW § 241(6)—OWNER

Plaintiff, a Village of Frankfort employee who was injured while installing a sewer lateral from the newly constructed cemetery chapel owned by defendant Church, does not have a cause of action against the owner of the property where he was injured, Herkimer County Industrial Development Agency (HCIDA), since it did not contract for the work and did not grant the Village an easement or other property interest. Plaintiff was on HCIDA's premises by reason of the arrangement between the Church and the Village to install the sewer lateral. In addition, the Church was not considered an owner under the statute even though it paid for the cost of materials and contracted and benefited from the installation of the sewer lateral because the Church did not have an interest in HCIDA's property:

> In cases imposing liability on a property owner who did not contract for the work performed on the property, this Court has required "some nexus between the owner and the worker, whether by a lease agreement or grant of an easement, or other property interest." Here, although the accident occurred on HCIDA's property, HCIDA did not contract with the Village of Frankfort to have sewer lateral installed, it had no choice but to allow the Village to enter its property pursuant to a right-of-way, and it did not grant the Village an easement or other property interest creating the right-of-way.
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> Here, although the Church agreed to pay for the cost of materials, the Church had no interest in the property over which the sewer lateral was placed. Notably, municipal employees working at the site testified that no representative from the Church was present at, or gave directions during the excavation work. Moreover, the testimony adduced indicated that the Village assumed full responsibility for installing the lateral sewer line and acknowledged that the lateral would be available for use by future property owners in the area who wished to connect to the Village sewer system.

Scaparo v. Village of Ilion, 13 N.Y.3d 864, 893 N.Y.S.2d 823 (2009).

NEGLIGENCE—NOTICE—ACTUAL/CONSTRUCTIVE NOTICE

Plaintiff, who sustained burns resulting from a burst of scalding water flowing from the shower head, cannot sue the landlord since her prior complaints had concerned only hot water dripping from the shower head:

> Plaintiff failed to raise a triable issue of fact regarding defendants' actual or constructive notice of the particular dangerous condition that allegedly caused her injuries.

Flores v. Langsam Property Services Corp., 13 N.Y.3d 811, 890 N.Y.S.2d 432 (2009), *aff'g*, 63 A.D.3d 502, 881 N.Y.S.2d 405 (1st Dept. 2009).

[EDITOR'S NOTE: Two dissenting judges in the Appellate Division found that plaintiff had made a number of complaints to the super and the handyman about hot water dripping constantly from the shower, which they concluded was sufficient to constitute notice:

> The sudden burst of hot water after the shower was turned off was close enough to the ongoing complaint of hot water constantly dripping or streaming from the shower head to raise a triable issue as to notice].

NEGLIGENCE—PEDESTRIAN RAMP—ADMINISTRATIVE CODE § 7-210

Administrative Code § 7-210 transferred tort liability to the adjacent property owner but not for defects on a

corner pedestrian ramp leading down a sidewalk onto the street:

> § 7-210 of the Code is nonetheless in derogation of the common law and must thus be strictly construed. Therefore, if the City desired, with the enactment of the new sidewalk law, to shift liability for accidents on pedestrian ramps, "it needed to use specific and clear language to accomplish this goal."
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> There is simply no indication anywhere in the amendments, or for that matter in the legislative history of § 7-210, that the City Council intended to include pedestrian ramps as part of the sidewalk that the abutting property owner would be responsible for maintaining.

Ortiz v. City of New York, 67 A.D.3d 21. 884 N.Y.S.2d 417 (1st Dept. 2009).

NEGLIGENCE—PREMISES—EXCESSIVE HOT WATER

Infant plaintiff, who fell into bathtub containing scalding hot water, does not have a cause of action against premises owner for failing to properly maintain the building's hot water system notwithstanding two earlier incidents involving children burned by hot water:

> It is undisputed that this incident occurred when the unattended, 17-month-old child was scalded after getting or falling into a bathtub after her brother had turned on hot water only, and while her mother was in another room. As this Court has previously stated: "A landlord cannot be required to adjust the hot water temperature in order to protect children from adults who fail to do so" (*Williams v. Jeffmar Mgt. Corp.*, 31 A.D.3d 344, 347, 820 N.Y.S.2d 212 [2006], *lv. denied*, 7 N.Y.3d 718, 827 N.Y.S.2d 689 [2006]). "People using hot water…must be expected to monitor the mixture of hot and cold water to ensure a temperature that is safe for bathing" (*id.*).
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> There is no prescribed maximum temperature under the Administrative Code for the water that is supplied to an individual apartment. For that reason, we decline to follow that analysis of the dissent, even if New York City Building Code Reference Standard 16, P107.26(b) is applicable.

Simmons v. Sacchetti, 65 A.D.3d 495, 885 N.Y.S.2d 257 (1st Dept. 2009).

[EDITOR'S NOTE: Justice Acosta dissented finding that there is a question of fact whether defendants violated their duty to ensure that the water temperature was at a level where it would not cause burns:

> Such issues are raised by evidence that, *inter alia*, 20 days after the accident, the water temperature in the apartment was measured at between 151 and 186 degrees; water temperature of 150 degrees will instantly scald an infant's skin, the building's hot water system did not have a temperature relief valve, in violation of New York City Building Code Reference Standard 16, P107.26(b), which would have prevented excessively hot water from flowing to the infant's apartment; the boiler contractor had previously issued a violation notice to the building defendants based on the absence of a temperature relief valve in a boiler that serviced other buildings in the complex, indicating that the building defendants were on notice that such a valve was required; and other tenants had complained to building management about excessively hot water].

NEGLIGENCE—PREMISES—TRACKED-IN RAIN WATER/SPILLED COFFEE—REASONABLE PRECAUTIONS

Defendants demonstrated that they took reasonable precautions to remedy the wet condition—tracked-in water / spilled coffee—on the lobby floor:

> The undisputed evidence demonstrates that two mats were placed in the entranceway of the building, one in the vestibule and one on the lobby floor immediately past the threshold of the interior door; at least one yellow "caution" sign was placed in the lobby; and an ABM employee had mopped the floor several times before the accident occurred and was mopping it at the time of the accident. Thus, if the source of the moisture was tracked-in rain water, defendants took reasonable measures to remedy it. Similarly, if the source of the moisture was spilled coffee, defendants acted reasonably. According to the security guard who was stationed in the lobby, the coffee was spilled moments before the accident

> in the area where plaintiff fell. Almost immediately after the coffee was spilled, an employee of ABM placed a yellow "caution" sign in the area of the spill and began mopping the area.

Pomahac v. Trizechahn 1065 Avenue of the Americas, LLC, 65 A.D.3d 462, 884 N.Y.S.2d 402 (1st Dept. 2009).

[EDITOR'S NOTE: Justice Moskowitz dissented, finding plaintiff raised an issue of fact whether defendants failed to use reasonable care to remedy the slippery, wet floor, of which they had notice, by not placing a sufficient number of mats on the floor on the day of the accident.

Although Justice Moskowitz agreed with the majority that defendants were not required to cover the entire floor with mats, or continuously mop, she nonetheless held that there were issues of fact whether under the weather conditions that morning, defendants placed enough mats on the terrazzo floor].

NEGLIGENCE—SPORTS—ASSUMPTION OF RISK

Defendants were not entitled to summary judgment based upon assumption of risk where the plaintiff was hit in the eye with a tossed bat during a softball game at defendants' summer camp:

> An issue of fact exists as to whether plaintiff assumed the risk of playing catcher without any catcher protective gear. Such issue is raised by evidence that plaintiff was nine years old at the time of the accident and had never played the position of catcher before, and that camp counselors organized and supervised the game, instructed plaintiff to play catcher, did not instruct game participants on the risks of playing softball without appropriate protective gear, and were in charge of supplying protective gear but did not do so.

Merino v. Board of Educ. of the City of New York, 59 A.D.3d 248, 873 N.Y.S.2d 65 (1st Dept. 2009).

PREMISES—LEAD POISONING—*PRIMA FACIE* CASE

Infant plaintiff's initial blood level (5/13/97) of 4 micrograms of lead per deciliter of blood (g/dl) three months after moving into defendant's premises and subsequent blood levels of 10.4g/dl (9/19/98), 12.6 g/dl (11/30/98), 9 g/dl (1/27/99), 8 g/dl (5/1/`99), under 3 g/dl (11/3/99), 7 g/dl (1/22/01), under 3 g/dl (12/12/01), 6 g/dl (6/29/02) and 3 g/dl (2/13/05) were sufficient to raise a triable issue of fact notwithstanding defendant's pediatric neurologist's opinion that under publications by the United States Centers for Disease Control ("CDC"), blood levels of less than 10 g/dl are "not considered to be indicative of lead poisoning" and levels of 10-14 g/dl are "in a border zone" in which the adverse effects are "subtle and unlikely to be recognizable or measureable in the individual child":

> To bar plaintiff's claim on that basis (CDC's statements) would be to effectively declare that a child with blood levels in that range can never sue for damages and we decline to make such a far-reaching determination. First, such an approach would ignore the fact that the CDC statement expressly recognizes that there is a deleterious effect on the human body attributable to blood lead levels over 10 g/dl. Second, the CDC statement did not state that a child can *never* exhibit ill effects as a result of blood lead levels between 10-14 g/dl, only that it is "unlikely" that he or she would. It is worth noting that the CDC statement predates plaintiff's allegation of lead poisoning by 13 years. During this time, the ability of the medical community to recognize "the adverse effects of blood lead levels of 10-14 g/dl" has presumably advanced. Finally, the New York City Health Code provides that "lead *poisoning* [is] to be defined as a blood lead level of 10 micrograms per deciliter or higher." The term "poisoning" is generally defined not merely as a person's exposure to a dangerous substance itself, but rather to an exposure that is likely to result in injury…Thus, the City of New York has determined that lead paint exposure which causes a child's blood level to rise above 10 g/dl usually "injures" or "impairs" the child. To not recognize the possibility that plaintiff's injuries in this case were caused by lead paint exposure would be at odds with that determination. (Emphasis in original).
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> This is not to say that blood lead levels of 10-14 g/dl will *always* give rise to a suit for damages. A plaintiff must still prove that he or she developed physical symptoms as a result of having been exposed to lead paint … There is nothing novel in the theory that lead paint exposure causes cognitive deficits. Accordingly, defendant was required to establish by other than conclusory statements that those deficits were not caused by the lead paint exposure.

* * *

> Plaintiff's three medical experts collectively presented numerous scientific articles concluding that exposure to lead paint which results in blood lead levels of even less than 10 g / dl can cause demonstrable injuries. This directly contradicted Dr. Maytal's [defendant's expert] opinion. Additionally, all three experts opined that, to a reasonable degree of medical certainty, the symptoms they observed in plaintiff were causally related to his lead poisoning, and were separate injuries from his autism and mental retardation.

Bygrave v. New York City Housing Authority, 65 A.D.3d 842, 884 N.Y.S.2d 724 (1st Dept. 2009).

PRE-TRIAL PROCEDURE—SPOLIATION—NOTICE—SANCTIONS

Plaintiff, injured after motorcycle manufacturer, Harley-Davidson, recalled his motorcycle for possible defective main circuit breaker, was not entitled to an order dismissing defendants' answers because the manufacturer, who received the circuit breaker from the distributor, discarded it notwithstanding his counsel requested the dealer, Lighthouse, to preserve the circuit breaker:

> The Supreme Court providently exercised its discretion in denying that branch of the plaintiffs' motion which was pursuant to CPLR 3126(3) to strike the defendants' answers and affirmative defenses for failure to comply with discovery demands. The drastic remedy of striking an answer is inappropriate absent a clear showing that the failure to comply with discovery demands is willful, contumacious, or in bad faith. Here, the plaintiffs failed to demonstrate that the failure to produce the circuit breaker was the product of willful, contumacious, or bad faith conduct by either defendant.
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> The loss of the circuit breaker did not leave the plaintiff "prejudicially bereft" of the means of prosecuting this action against the defendants.

Weber v. Harley-Davidson Motor Company, 58 A.D.3d 719, 871 N.Y.S.2d 698 (2d Dept. 2009).

[EDITOR'S NOTE: The Appellate Division, however, imposed lesser sanctions because the destruction of the circuit breaker deprived the plaintiffs of an opportunity to conduct their own testing and examination of the breaker. Therefore, the court ordered the following:

> (1) Plaintiffs are entitled to disclosure by Harley-Davidson of all of the information it has regarding the circuit breakers, including, *inter alia*, any data, tests, and analysis it performed, whether in response to inquiries by the National Highway Traffic Safety Administration or otherwise;
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> (2) At trial both defendants must be precluded from arguing or presenting evidence that the circuit breaker at issue was adequate for the purpose for which it was designed, or from arguing or presenting evidence as to any alternative source of the alleged total loss of electrical power that might have been rebutted by evidence obtained from the inspection and testing of the circuit breaker; and
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> (3) The jury must be instructed that, should it credit the testimony of the plaintiff that he suffered a total loss of electrical power to the motorcycle just prior to the crash, it may infer that the loss resulted from the failure of the circuit breaker to perform as intended].

PRODUCTS LIABILITY—CASUAL SELLER—USED MACHINE—KNOWN DEFECTS

Weyerhaeuser, a casual seller of a defective industrial Flexo Folder Gluer machine ("FFG") used in its plant, cannot be held strictly liable under New York law by plaintiff, injured 16 years after the sale, even though Weyerhaeuser knew that the FFG lacked a safety device when sold:

> This case is controlled by *Sukljian [v. Charles Ross & Son Co.*, 69 N.Y.2d 89, 511 N.Y.S.2d 821 (1986)] and the policy considerations underlying our holding in that case. The "onerous" burden of strict liability is only imposed on "certain sellers" because of "continuing relationships with manufacturers" and a "special responsibility to the public, which has come to expect [these sellers] to stand behind their goods." The second of these policy goals is clearly absent here: buyers of Weyerhaeuser's used (third-hand, in fact) equipment at irregularly-scheduled "as is, where is" surplus sales cannot reasonably "expect [Weyerhaeuser] to stand behind [someone else's] goods." As to the first policy goal, while Weyerhaeuser

> may have had a closer relationship with FFG manufacturers than a customer would have with a supplier of run-of-the-mine equipment not unique to its particular industry, this relationship was still general in nature and even more attenuated with respect to the FFGs that Weyerhaeuser sold as surplus…Simply put, there is no reason to believe that imposing strict liability on Weyerhaeuser's sales of its scrap, used FFGs would create any measurable "pressure for the improved safety of products" on FFG manufacturers. Indeed, the most likely effect would be exactly what the District Court predicted: Weyerhaeuser would stop selling its used machinery, thus depriving small businesses of the ability to purchase otherwise unaffordable equipment.

Jaramillo v. Weyerhaeuser Company, 12 N.Y.3d 181, 878 N.Y.S.2d 659 (2009).

SETTLEMENT—DISCLOSURE—NON-SETTLING PARTY

Settlement agreement between plaintiff and general contractor, which was not disclosed to the non-settling party, must be submitted to Supreme Court for an in-camera inspection notwithstanding its confidentiality provision:

> The touchstone for determining whether information is discoverable in an action is whether the information is "material and necessary" (CPLR § 3101[a])…Thus, disclosure of the terms of a settlement agreement by a settling party to a nonsettling party may be appropriate, despite the presence of a confidentiality clause in the agreement, where the terms of the agreement are "material and necessary" to the nonsettling party's case … Conversely, where the terms of a settlement agreement have no bearing on the issues in the case, the terms are not discoverable by a nonsettling party.

Mahoney v. Turner Construction Co., 61 A.D.3d 101, 872 N.Y.S.2d 433 (1st Dept. 2009).

SETTLEMENT—HEALTH INSURER/EQUITABLE SUBROGATION

Where plaintiff settled her personal injury action for less than her actual damages and insurance proceeds available, the right of the health insurer carrier (IHA) to equitable subrogation was not extinguished:

> When an insurer pays for losses sustained by its insured that were occasioned by a wrongdoer, the insurer is entitled to seek recovery of the monies it expended under the doctrine of equitable subrogation…Therefore, if an injured party received monies from the tortfeasor attributable to expenses that were paid by its insurer, the insurer may recoup its disbursements from its insured; but when the wrongdoer does not pay damages for an insured's medical expenses, generally the insurer, as subrogee, has been allowed to seek recovery directly from the tortfeasor.
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> If "the sources of recovery ultimately available are inadequate to fully compensate the insured for its losses, then the insurer—who has been paid by the insured to assume the risk of loss—has no right to share in the proceeds of the insured's recovery from the tortfeasor." In other words, the insurer may seek subrogation against only those funds and assets that remain after the insured has been compensated. This designation of priority interests—referred to as the "made whole" rule—assures that the injured party's claim against the tortfeasor takes precedence over the subrogation rights of the insurer.
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> In this case, the made whole doctrine does not present an obstacle to the insurer's right to seek recoupment from the tortfeasor because the settlement between the Fassos and Dr. Doerr left a potential source of recovery—$1.1 million in remaining insurance coverage. Consequently, the made whole rule did not mandate dismissal of IHA's equitable subrogation claim merely because the Fassos decided to accept a settlement figure that did not completely compensate them for the full extent of their damages.
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> Hence, the provision of the settlement between the Fassos and Dr. Doerr that purported to bar IHA's equitable subrogation claim cannot be enforced and does not prevent IHA from proceeding to obtain reimbursement from Dr. Doerr for the payments it made for Mrs. Fasso's medi-

cal expenses as a result of the doctor's alleged negligence. We therefore reverse and remit to Supreme Court for further proceedings.

Fasso v. Doerr, 12 N.Y.3d 80, 875 N.Y.S.2d 846 (2009), *rvg*., 46 A.D.3d 1358, 848 N.Y.S.2d 799 (4th Dept. 2007).

TRIAL—HIGH/LOW AGREEMENT

Plaintiff, who consented to a high-low agreement at trial, was not permitted, under the agreement, to enter a judgment which included interest and costs:

> We agree with the defendants that pursuant to the terms of the high-low stipulation at issue, the plaintiff's counsel was obligated to furnish a stipulation of discontinuance and general release—*not* to submit a judgment containing a substantial amount of interest and costs—"regardless of what the verdict is" and for "whatever [the] number was"]. (Emphasis in original).

Vargas v. Marquis, 65 A.D.3d 1332, 885 N.Y.S.2d 747 (2d Dept. 2009).

[EDITOR'S NOTE:

> The stipulation read into the record by defense counsel, to which the plaintiff's counsel "agreed," was as follows: "At the conclusion of the case, regardless of what the verdict is, plaintiff's counsel will give a stipulation of discontinuance and general release. If the number were zero, we'll still pay you 25 thousand dollars pursuant to that agreement. If the number is over 275 thousand, well, the release would be for 275 thousand dollars. And obviously, if the number is somewhere in between, it will be for whatever that number was"].

TRIAL—JURY VERDICT—FAILURE TO POLL

The trial court erred, which error was not harmless, in failing to poll the jury at plaintiff's request when the jury announced its verdict that it found the defendant physicians not negligent but awarded plaintiff $1.5 million in damages against non-party physicians:

> That a verdict may not be deemed "finished or perfected" until it is recorded, and that it may not be validly recorded without a jury poll where one has been sought, have been uncontroversial propositions. Although we have not had the opportunity recently to reconsider them, they have been applied over the years with axiomatic force by New York's intermediate appellate courts…No cogent, principled argument is made for their revision here.
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> Here, it is important to understand that the relevant question is not whether the trial evidence was sufficiently persuasive to impel a hypothetical reasonable juror to vote in favor of the announced verdict, but rather whether each juror chosen by the parties to hear the case would, upon reflection, publicly affirm that the verdict agreed to in the jury room was the one he or she actually intended. The exercise of individual conscience involved is one whose outcome defies prediction.
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> Only timely inquiry of jurors will disclose whether their announced verdict truly expresses their will, and it is for this reason, and not out of unreasoned devotion to antique forms, that the common-law insistence upon jury polling has persisted. Harmless error analysis in this context would amount to no more than a speculative exercise, impermissibly substituting the judgments of judges for those that would have been made and disclosed by jurors had their verdict been properly pronounced in open court.

Duffy v. Vogel, 12 N.Y.3d 169, 878 N.Y.S.2d 246 (2009), *rvg*., 50 A.D.3d 319, 855 N.Y.S.2d 440 (1st Dept. 2008).

[EDITOR'S NOTE: Judge Smith dissented, rejecting the court's ruling that a failure to poll a civil jury on request can never be harmless error. According to Judge Smith, the majority's result is "compelled by no statute and supported by no binding precedent"].

TRIAL—JURY FINDING/SUFFICIENT EVIDENCE

Evidence supported jury's verdict finding that physician deviated from reasonable medical care in discharging emergency room patient who had stroke-like symptoms without admission to hospital for further observation:

> Evidence is legally insufficient to support a verdict if "there is simply no valid line of reasoning and permissible inferences which could possibly lead rational men to the conclusion reached by the jury on the basis of the evidence presented at trial." Plaintiff's expert testified that if

> [Dr.] Firman had admitted plaintiff to the hospital rather than discharging her, the stroke would have been diagnosed, she would have been given an anticoagulant, and the failure to administer that medicine resulted in "a little larger stroke than she should have had if she was properly treated." Despite the fact that the expert also stated that it was "very hard to quantify" precisely how much additional damage plaintiff suffered as a result of Firman's negligence, we cannot say that the jury's finding of liability on this theory was "utterly irrational" or that no basis of proof existed to support the verdict. Consequently, the verdict was based on legally sufficient evidence.

Lang v. Newman, 12 N.Y.3d 868, 883 N.Y.S.2d 153 (2009).

TRIAL—JURY SELECTION—TIME LIMITATION

Plaintiff is entitled to a new trial because the court "placed unduly restrictive time constraints"—questioning of prospective jurors in each round limited to 15 minutes:

> While the trial court is accorded discretion in setting time limits for voir dire, the 15 minutes allowed for each round under the circumstances of this case was unreasonably short (*see* "implementing New York's Civil Voir Dire Law and Rules," http://www.nycourts.gov/publications/pdgs/Implementing Voir Dire 2009.pdf [New York State Unified Court System], [stating that "(i)n a routine case a reasonable time period to report on the progress of voir dire is after two or three hours of actual voir dire"]). This case involved close factual and medical issues, and evidence from several experts was presented at trial. Issues implicated involved, among others, proof regarding four distinct injuries and four surgeries, challenges to causation regarding each injury, the relevance and impact of plaintiff's preexisting conditions, the weight to be given evidence from several experts with markedly varying opinions, and consideration of appropriate compensation for a variety of asserted injuries. Notwithstanding that liability was not an issue, the case was not simple and straightforward. We cannot conclude from this record that plaintiffs were not prejudiced by the extremely short time permitted for voir dire.

Zgrodek v. McInerney, 61 A.D.3d 106, 876 N.Y.S.2d 277 (3d Dept. 2009).

TRIAL—SET ASIDE VERDICT—CPLR 4404

Jury finding driver who entered intersection, controlled by stop sign, without a clear view of approaching traffic was not negligent was set aside as not being based "on any fair interpretation of the evidence":

> Cortese [defendant driver] testified that she stopped at the stop sign, but her view was obstructed by vehicles parked along North 7th Street and Wythe Avenue, so she moved forward two to four feet and stopped again. However, her view was still somehow obstructed. Not seeing any approaching traffic, she proceeded through the intersection. Cortese testified that she did not see the plaintiff prior to impact.
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> Under the facts of this case, as a matter of law, Cortese violated Vehicle and Traffic Law § 1172(a) and § 1142(a) by proceeding into the intersection without a clear view of approaching traffic and without yielding the right-of-way to the plaintiff. Such violations constituted negligence as a matter of law and could not be disregarded by the jury. Moreover, Cortese was obligated to see that which by the proper use of her senses she should have seen, and the plaintiff, as the driver with the right-of-way, was entitled to anticipate that Cortese would obey traffic laws which required her to yield.

O'Connell v. DL Peterson Trust/Abbott Labs, 67 A.D.3d 874, 889 N.Y.S.2d 96 (2d Dept. 2009).

[EDITOR'S NOTE: Although plaintiff was awarded judgment as a matter of law, the court found that there was an issue of fact whether she was also at fault in causing the accident].

TRIAL—SETTLEMENT—OPEN COURT—UNENFORCEABLE

The trial court's directing plaintiff's counsel to place settlement ($150,000) on the record after the jury verdict ($1,450,000) was taken rendered the settlement unenforceable under CPLR 2104:

> A settlement agreement is valid only if both parties stipulate to the settlement in a written agreement or it is made in open court and placed on the record.

* * *

> None of the requirements of the open-court exception to CPLR 2104 were met. "'Open court,' as used in CPLR 2104, is a technical term that refers to the formalities attendant upon documenting the fact of the stipulation and its terms." Thus, some form of written documentation is required if a settlement is made in open court. In this case, the settlement was never reduced to writing or entered onto the stenographic record. In fact, the court explicitly refused to place the settlement on the record, saying, "once I have a verdict, I take the verdict, and then the parties are free to do what they agreed to."

Diarassouba v. Urban, 71 A.D.3d 51, 892 N.Y.S.2d 410 (2d Dept. 2009).

TRIAL—SUMMATION—IMPROPER COMMENTS

Plaintiffs' counsel's calling defendants' expert medical witness a "hired gun" and asking the jury to put itself in plaintiffs' shoes to determine the appropriate damages during summation were improper but not so egregious as to warrant setting aside the verdict in favor of the plaintiffs:

> Although several of counsel's comments about the defendants' expert medical witness, including calling him a "hired gun," were improper and would have been better off left unsaid, they did not "create a climate of hostility that so obscured the issues as to have made the trial unfair." … In light of this [defendants' physician's] testimony, which the jury reasonable found implausible, there was no danger that the jury was so influenced by counsel's remarks that they reached a verdict unsupported by the evidence.
>
> Likewise, the suggestion by plaintiffs' counsel that the jury put itself in plaintiffs' shoes to determine the appropriate damages, although improper, was not so egregious as to warrant setting aside the verdict and [the cases], relied upon by defendants, do not stand for the proposition that making such a comment during summation automatically warrants setting aside a verdict. In these two cases, it was the court, in its charge, that improperly directed the jury to use this incorrect standard for determining how to compensate the plaintiffs for their injuries. Here, defendants raise no objection to the court's charge. Furthermore, the court instructed the jury that the summation remarks were not evidence and that the jury was bound to accept the law as charged and reach a verdict based on the evidence presented.

Wilson v. City of New York, 65 A.D.3d 906, 885 N.Y.S.2d 279 (1st Dept. 2009).

[EDITOR'S NOTE: The court noted that since defense counsel did not object to many of the summation remarks challenged on appeal and did not ask for any curative instructions or seek a mistrial with regard to them, they were not preserved for review. In addition, the defendants did not show that there was error so fundamental that it caused a gross injustice].

TRIAL—SUMMATION—PREJUDICE

Defense counsel's comments during summation were inflammatory and unduly prejudicial warranting a new trial on damages:

> During the course of summarizing the testimony of an economic analyst retained by the plaintiffs, defense counsel exclaimed, "[w]hat a liar," when describing the analyst and the analyst's statement that he did not have a calculator with him at trial. In addition, defense counsel rhetorically asked "[w]hy do they lie to you?" when telling the jury that the case was about fair and adequate compensation for the injuries Rodriguez sustained in the accident. Defense counsel went on to state: "It's not a lottery. It's not a game. It's not 'here's the American dream, come over here, fall off a scaffold, get a million dollars.'" Finally, defense counsel also told the jury that, from the beginning of his testimony, Rodriguez's treating chiropractor was "not being honest, is not being truthful."

Rodriguez v. City of New York, 67 A.D.3d 884, 889 N.Y.S.2d 220 (2d Dept. 2009).

[EDITOR'S NOTE: The court also found that numerous comments made by the trial court evinced "a course of conduct by which the trial court unduly injected itself into the cross-examination, thus further serving to deprive the plaintiffs of a fair trial, a fundamental right to which all litigants, regardless of the merits of their case, are entitled"].

TRIAL—UNDISCLOSED WITNESS—NEW TRIAL

Plaintiff was entitled to a new trial since the court committed reversible error in permitting, over plaintiff's

objections, an undisclosed witness to testify concerning prior incidents at defendant's store and the store's structure and outdoor lighting conditions:

> The plaintiff previously had demanded disclosure of, inter alia, witnesses to "[t]he nature and duration of any alleged condition which allegedly caused" the plaintiff's accident, and an April 4, 2007, preliminary conference order required a response to her discovery demands within 30 days.
>
> * * *
>
> The trial court erred in allowing an undisclosed witness to testify for the defendant and a new trial is warranted under the circumstances.

Wolodkowicz v. Seewell Corp., 61 A.D.3d 676, 876 N.Y.S.2d 487 (2d Dept. 2009).

[EDITOR'S NOTE: The court also held that the trial court's admitting into evidence photographs taken by defense counsel during lunch recess immediately after plaintiff's direct trial testimony and not providing copies to the plaintiff was also grounds for a new trial].

VENUE—REQUISITE SHOWING

Supreme Court correctly denied defendant Specta / Allied's motion to change venue to Westchester County even though Westchester County was the county where the alleged assault took place because defendant failed to demonstrate how the convenience of witnesses would be served:

> Specta / Allied did not submit proof in admissible form concerning the location of the officers' residences for the motion court to determine whether the distance from their homes to the Bronx County courthouse is greater than the distance to the Westchester County courthouse. Moreover, assuming arguendo that all four officers indeed reside in Westchester County, plaintiff submitted evidence showing that the differences in distance and time between the Bronx courthouse and the Westchester courthouse were not significant, and any inconvenience to the witnesses would be minimal. Furthermore, Specta / Allied failed to set forth the facts as to which the subject police officers would testify and how such testimony would be material and necessary to its defense.

Walton v. Mercy College, 63 A.D.3d 425, 879 N.Y.S.2d 330 (1st Dept. 2009).

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