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Summary Jury Trials: Coming Soon to a Courthouse Near You

By Lucindo Suarez

A summary jury trial is a voluntary, innovative and streamlined form of alternative dispute resolution that combines the flexibility and cost-effectiveness of arbitration with the structure of a conventional trial. The primary mission of New York's Summary Jury Trial Program is to give cost-conscious litigants a reliable, trial-tested option guaranteed to resolve civil cases fairly, quickly and economically by one-day jury trials. A summary jury trial is similar to arbitration, except that jurors are utilized. The parties are allowed to shape a format that will allow them to fully explore all the issues or to focus on a particular issue without spending the time and money to bring in myriad witnesses, doctors and other experts.

Participation in summary jury trials is voluntary, and can be either binding or non-binding on the parties, depending on their agreement, order of the court or the local summary jury trial program rules and procedures. Thus, in non-binding cases, parties have successfully used the verdict as a settlement guide to predict how an actual jury would determine damages or resolve a contested issue and then determine an appropriate settlement value for their case. All large-damage and small-damage cases in which a jury's advisory verdict has the potential of helping the parties reach settlement—even complex cases with potentially large damages—are suitable. In complex cases, parties may submit one or more key factual issues to the jury for resolution, which often leads the parties to settlement. Also, the judge and attorneys may question the jurors on their impressions and rationales, which often helps lead to a settlement. They can also decide whether the advisory verdict will be publicized or remain confidential. This can be an important consideration for cases where the outcome is likely to impact the broader community. In most instances, however, the summary jury trial verdict is binding, and cannot be appealed, affording the courts and the parties the same degree of finality offered by arbitration. In binding summary jury trials, damages can be floored and capped on a high/low basis and the right to appeal or move against the verdict can be limited or waived. In addition, because the summary jury trial format allows scheduling a trial within weeks of filing a note of issue, subject to local rule, it results in early resolution by settlement or trial without congesting a court's trial calendar. At the same time, the summary jury trial process preserves the precious right of litigants to have their cases decided by a jury of their peers, a right that is given up when the parties proceed through conventional alternative forms of dispute resolution such as arbitration or mediation.

The summary jury trial allows citizens who are summoned for jury duty to serve as fact finders during what is usually a one-day mini-trial. Jury selection is abbreviated, each litigant may offer documentary, demonstrative, and limited testimonial evidence without calling expert witnesses, and the attorneys are permitted to deliver abbreviated opening and closing statements.

In general, any case that can be presented to and understood by a jury in a day is suitable for a summary jury trial: Slip-and-fall, no-fault automobile accident cases and property damage claims are appropriate for a summary jury trial. Also, those cases where the damages sought are less than $200,000 are particularly amenable for a summary jury trial because the costs of pursuing traditional litigation likely outweigh the potential benefits to the plaintiff and his or her attorney.

The cases that are most likely to settle following a summary jury trial are those in which the defense either admits liability or concedes that a finder of fact is likely to find the defendant liable. In these cases, the only issue on which the parties significantly disagree is the amount of damages. The summary jury trial is also likely to be effective for cases in which damages clearly exceed insurance coverage and the only outstanding issue is liability. The summary jury trial is also well suited to liability or damages only cases, as well as cases where the parties are firm on demands and offers, and willingly submit the case on a high/low basis. Cases that lack complex credibility questions and cases that are factually straightforward are also likely to benefit from summary jury trials. In addition, cases where the primary issue in contention is whether the no-fault threshold has been met (e.g., soft-tissue injuries) are conducive to summary jury trials and in the non-binding case, tend to settle following the jury's verdict.

Prior to the summary jury trial, attorneys can negotiate whether the panel's determination will be binding or non-binding, subject to the judicial district's summary jury trial rules and procedures. In addition, prior to the trial, the attorneys exchange all the evidence in the form they wish to introduce it at trial, as well as proposed pattern jury instruction charges and proposed verdict sheets. Matters that cannot be agreed upon are resolved at an evidentiary hearing, by a ruling if necessary. Therefore, the pre-charge conference at the end of the submission of evidence is eliminated.

Duke Law Professor Thomas B. Metzloff, in his work *Improving the Summary Jury Trial*, wrote:

> The theory of the binding SJT rejects the common assumption that the process is intended for cases in which conventional negotiations have failed. Instead, it seeks a broader role by providing an ADR option for litigants . . . who would prefer a binding adjudication if the process could be made less expensive and more predictable. The process allows litigants to obtain a binding adjudication of their dispute [usually on a high/low basis] at a reasonable cost without the risk inherent in the current jury system. [It is] a procedure of choice for cost-conscious or risk averse litigants. 77 Judicature 9-12 (1993)

One of the advantages of the summary jury trial is that it offers both sides the opportunity for significant savings in time and costs before and during the actual trial. Early in the litigation, even before suit is filed, the parties could stipulate to a summary jury trial providing for: the extent, dates and period for discovery; the mode and method of the trial; a waiver of the right of appeal and motions directed to the verdict; and high/low parameters. With the permission of the court, the parties could even stipulate a date for the trial. This approach could reduce the number of motions and applications, especially motions for summary judgment, particularly in no-fault automobile threshold cases. In the absence of agreement of counsel and approval by the trial court, the process provided in the rules of the judicial district applies.

Most summary jury trials are structured like traditional trials, though attorneys and judges may fashion the process to fit the needs of a given case. The typical summary jury trial begins with judicially supervised abbreviated jury selection, followed by an introduction from the court that explains what will occur and how it differs from a conventional trial. Each side's attorney has 10 minutes to deliver an opening statement, followed by plaintiff's, then defendant's presentation of their evidence.

The summary jury trial achieves its great economy of time by limiting the presentation by each side to one hour, absent a court rule or an agreement to the contrary. During the one hour, each side may call one or two witnesses, who are subject to cross-examination. These should be witnesses whose credibility is key to the case. Other testimony may be presented through deposition transcripts or sworn affidavits. The rules of evidence are relaxed but not abrogated. The key to the saving of time and especially expense is the submission of medical evidence through the affidavits or reports of providers, rather than through live testimony. Police, hospital, and accident reports, as well as other documentary or demonstrative evidence are allowed to be introduced without certification or authentication, subject to all items having been exchanged and objections and rulings before trial at an evidentiary hearing. Portions of video depositions may be played for the jury in lieu of actual appearances. Attorneys may display reports, contracts, photos or diagrams, and therefore, attorneys know the extent and form of the adversary's submission. The form of the evidence presentation may be by traditional or electronic presentation. In presenting the case, each lawyer explains the evidence to the jury, emphasizing relevant testimony and exhibits which may be contained in a trial notebook or other packet and provided to each juror. The one-hour time limit forces the attorney to go directly to the core of the case. Time spent in cross-examination of witnesses generally is deducted from the cross-examining party's time, again encouraging attorneys to confine themselves to key points. After all the evidence has been introduced, each attorney gives a 10- to 15-minute closing argument, the judge provides a modified closing charge and sends the jurors to deliberate. The majority of juries deliberate less than 90 minutes before rendering their verdicts.

Summary jury trials provide a win-win situation: Attorneys benefit because they need not invest the time and expense required to conduct a traditional trial and in the non-binding scenario, the advisory verdict can serve as a "reality check" to a client who is reluctant to settle;

clients benefit because it gives them their day in court, and in a binding scenario, it affords finality; courts benefit because it reduces court calendars and allows reallocation of limited judicial resources; and jurors benefit by fulfilling their civic duty with a minimum of inconvenience. Unlike conventional trials, the jurors in a summary jury trial can provide the attorneys with immediate specific feedback.

Parties that are reluctant to arbitrate or mediate their disputes but are anxious for an early, yet cost-effective resolution are often more accepting of the summary jury trial. Some defense counsel and insurance carriers have expressed reservations about arbitration, because it relies upon attorneys serving as arbitrators to decide the case. Many plaintiffs, on the other hand, do not feel that they have had their "day in court" unless a jury makes a decision. Both objections are met by the summary jury trial.

Across the country, the summary jury trial is increasingly becoming a part of the legal landscape. Texas, Florida and Virginia have incorporated this time- and money-saving alternative dispute resolution technique into their civil practice acts, and it is being used in several other states. Federal courts also make use of this tool, even in high-exposure personal injury cases. Indeed, it was in 1980 that federal district court judge Thomas Lambros formulated the summary jury trial.

Through the successful pioneering efforts of New York State Supreme Court Justice Joseph Gerace, summary jury trials, which were first used in the Eighth Judicial District in 1998, are spreading to other areas of the state. Justice Gerace recently updated the *Summary Jury Trial Bench* and *Program* manuals, which provide background and guidance to the bench and bar on approaches to summary jury trials. Both of these manuals and a summary jury trial DVD video can be accessed from the Eighth Judicial District website: http://nycourts.gov/8jd/internet/html/sjt.html.

The judiciary's experience with summary jury trials has been positive and continues to grow. Since 2000, New York's Eighth Judicial District has resolved over 320 cases through binding and non-binding summary jury trials without the necessity of a traditional trial. The lawsuits involved automobile collisions, slip-and-fall injuries, medical and dental malpractice claims, contract disputes, wrongful timber cutting allegations, and injuries from dog bites.

The Office of Court Administration has noted the success of the summary jury trial program in the Eighth Judicial District and has directed the expansion of the program to all of the state's 12 judicial districts. I was appointed Statewide Coordinator of Summary Jury Trials in April 2006. While it is anticipated that statewide rules will be implemented, the Office of Court Administration is aware that the particular characteristics of the populace, and of the Bench and Bar in each judicial district, may warrant variations of the rules. The 12th Judicial District (Bronx County), for example, has implemented a rule that all summary jury trials will be binding, while in the Eighth Judicial District, the attorneys are free to stipulate either for a binding or non-binding verdict. The Administrative Judges in each judicial district, with the input and participation of the local bar associations, will be able to tailor the rules to suit their district's needs.

Bronx County was chosen as the first major downstate metropolitan judicial district to implement a summary jury trial program. Administrative Judge Barry Salman, working together with the Bronx Bar Association, adopted summary jury trial rules and procedures, participated with Justice Gerace in conducting a summary jury trial Continuing Legal Education seminar, and recruited Justice Gerace to preside over the Bronx Summary Jury Trial Pilot Project in the summer of 2006. Ten cases were consecutively scheduled over ten court days which resulted in nine jury verdicts in nine days—one case settled before trial. The Bronx Summary Jury Trial Program from September 2006 to June 2007 resulted in 69 verdicts in 73 court days, and is expecting to double the number of verdicts in 2007–2008. The summary jury trial program has expanded to the other New York City boroughs and surrounding counties. It is expected that the continuing success in disposing of suitable cases will lead the program to expand to every county throughout the state.

The summary jury trial program relieves calendar congestion and provides a vehicle for the disposition of the less enticing cases in a lawyer's inventory and older, stagnant cases. The oldest case had an index number purchased in 1997: an automobile accident case with a limited insurance policy of $10,000.

The number and interest of insurance carriers has increased and continues to grow. Currently, the following carriers are participating in the Bronx program: AIG, Allstate, American Transit, Geico, Greater New York, Hartford, Metropolitan Life, New York Central Mutual, Progressive, State Farm, Travelers, and XL Insurance Company. Efforts have not been successful in having the City of New York or the New York City Transit Authority participate in the summary jury trial program—yet.

Jury selection in a summary jury trial is streamlined. The Bronx Summary Jury Trial Rules and Procedures provide for judicial participation, with 10 minutes for each attorney to *voir dire* the jury. The jury clerk provides a prospective panel of jurors who are informed by the presiding judge of the summary jury trial program. Each attorney has two peremptory challenges. The selected jurors are provided with a lunch menu and lunch orders are taken in the jury room located off the courtroom. The jurors are in effect sequestered to eliminate down time. The average time taken in jury selection in the summer 2006 Pilot Project was: judge–24 minutes; plaintiff's attorney–15 minutes; defendant's attorney–9 minutes. The average time taken in jury selection in the September 2006–June

2007 Program was: judge–34 minutes; plaintiff's attorney–7 minutes; defendant's attorney–10 minutes.

After the judge provides the modified opening charge, each attorney has 10 minutes for opening statements. The average for the summer 2006 Pilot Project openings was: judge–10 minutes; plaintiff's attorney–8 minutes; defendant's attorney–5 minutes. The average for the September 2006–June 2007 Program was: judge–14 minutes; plaintiff's attorney–7 minutes; defendant's attorney–5 minutes.

The number of witnesses called in the Summer 2006 Pilot Project and the Bronx Program from September 2006 to June 2007 was less than allowed, especially by defendants, contributing to and assuring that a verdict was reached within one day. The average for the summer 2006 Pilot Project:

Plaintiff	Defendant
8 cases–1 witness	4 cases–0 witnesses
1 case–2 witnesses	4 cases–1 witness
	1 case–3 witnesses

Both counsel agreed to, and the judge approved, the calling of the third witness in the last case above, whose testimony took 8 minutes.

The average for the September 2006–June 2007 Program was:

Plaintiff	Defendant	
	One Defendant	Two Defendants
48 cases–1 witness		
11 cases–2 witnesses	37 cases–no witnesses	1 case Δ1 No W; Δ2 No W
4 cases–3 witnesses	21 cases–1 witness	3 cases Δ1 1W; Δ2 No W
1 case–4 witnesses		1 case Δ1 1W; Δ2 1W

The cases where three and four witnesses were called were consolidated cases, and cases where it was agreed to by both counsel and approved by the judge.

Both plaintiffs and defendants presented their cases well within the one-hour limitation. In the summer 2006 Pilot Project the average was: plaintiff–43 minutes; defendant–42 minutes. The average for the September 2006–June 2007 Program was: plaintiff–49 minutes; defendant–37 minutes. Objections and rulings were almost non-existent because the all the evidence was agreed to and or ruled upon at an evidentiary hearing before trial.

The average times for closings for the summer 2006 Pilot Project were: defendant–12 minutes; plaintiff–14 minutes; judge–28 minutes. The jury averaged 57 minutes in their deliberations. The averages for the September 2006–June 2007 Program were: defendant–7 minutes; plaintiff–9 minutes; judge–29 minutes. The jury averaged 1 hour and 10 minutes in their deliberations.

The insurance policy limits ranged from $10,000 to $1,000,000. The parties were free to enter into high/low agreements. The distributions were:

Pilot Project Summer 2006

8 cases	$ 25K
1 case	100K
1 case	1M

SJT Program September 2006–June 2007

1 case	$10K
32 cases	25K
1 case	30K
3 cases	50K
2 cases	60K
16 cases	100K
1 case	250K
2 cases	500K
3 cases	1M
4 cases	Δ1–25K; Δ2–25K
3 cases	Δ1–25K; Δ2–50K
1 case	Δ1–25K; Δ2–100K

The verdicts, taking into account defendant verdicts where the plaintiff received an award because of a high/low agreement, were practically even.

In the summer 2006 Pilot Project four verdicts favored plaintiffs and five verdicts favored defendants. Nine judges presided over the 69 trials in the September 2006–June 2007 Program, where 28 verdicts favored plaintiffs and 41 verdicts favored defendants, of which six favored plaintiff due to high/low agreements. These six verdicts, when

added to plaintiffs' 28 verdicts, and subtracted from defendants' 41 verdicts, results in 34 verdicts where plaintiff received an award and 35 verdicts where defendant did not have to pay an award:

Term	Judge	# Trials/Verdicts	π verdict	Δ verdict	High/Low
Sept. 2006	Guzman	6	4	2	
October	Renwick	11	1	10	3
November	Friedlander	6	1	5	1
December	Guzman	3	0	3	
Jan. 2007	Barone	8	3	5	
February	Thompson	7	4	3	1
March	Salerno	7	7	0	
April	Ruiz	6	1	5	1
May	Walker	10	4	6	6
June	Gonzalez	5	3	2	
		69	28	41	
			+6	-6 6 Δ verdicts favored π due to high/low	
			34	**35**	

The judicial districts and judges currently conducting summary jury trials are:

1st Judicial District Hon. Jacqueline W. Silbermann, Administrative Judge, New York Co.

No Summary Jury Trials reported
Summary Jury Trial Program will begin January 2008

2d Judicial District Hon. Ariel E. Belen, Administrative Judge, Kings Co.

Hon. Lawrence S. Knipel
Hon. Larry D. Martin
Hon. Mark I. Partnow
Hon. Karen B. Rothenberg
Hon. Wayne Saitta
Hon. Arthur Schack
Kings County

Hon. Philip Minardo, Administrative Judge, Richmond Co.

Hon. Judith N. McMahon
Richmond County

3d Judicial District Hon. George Ceresia, Administrative Judge

Hon. Michael C. Lynch
Hon. William E. McCarthy
Hon. Joseph Teresi
Albany County

Hon. Robert C. Williams
Greene County

Hon. Robert C. Williams
Sullivan County

Hon. E. Michael Kavanaugh
(appointed to Appellate Division 1st Dep't)
Hon. Joseph Torraca
Hon. Robert C. Williams
Ulster County

4th Judicial District Hon. Vito Caruso, Administrative Judge

Hon. Patrick R. McGill
Clinton County

Hon. Richard T. Aulisi
Fulton County

Hon. Joseph M. Sise
Montgomery County

Hon. Courtenay W. Hall
Saratoga County

Hon. Vincent J. Reilly, Jr.
Schenectady County

5th Judicial District Hon. James Tormey, Administrative Judge

Hon. Robert Julian
Oneida County

6th Judicial District Hon. Judith O'Shea, Administrative Judge

Hon. Robert C. Mulvey
Tompkins County

7th Judicial District Hon. Thomas Vanstrydonck, Administrative Judge

Hon. Matthew A. Rosenbaum
Hon. William Polito
Hon. Evelyn Frazee
Monroe County

Hon. Craig Doran
Ontario County

8th Judicial District Hon. Sharon S. Townsend, Administrative Judge

Hon. Larry Himelein
Hon. Michael Nenno
Cattaraugus County

Hon. Joseph Gerace, JHO
Hon. Paula Feroleto
Hon. John Ward
Chautauqua County

Hon. John Curran
Hon. Diane Devlin
Hon. Joseph Glownia
Hon. Joseph Makowski
Hon. Frederick Marshall
Hon. Patrick NeMoyer
Hon. John O'Donnel
Hon. Erin Peradotto
Hon. Frank Sedita
Hon. Donna Siwek
Erie County

Hon. Robert Noonan
Genesee County

Hon. Ralph Boniello
Hon. Richard Klock
Hon. Gerald Whalen
Niagara County

Hon. James P. Punch
Orleans County

9th Judicial District Hon. Francis Nicolai, Administrative Judge

Hon. Andrew O'Rourke
Putnam County

Hon. Gerald Loehr
Westchester County

10th Judicial District Hon. Anthony Marano, Administrative Judge, Nassau Co.

Hon. Karen V. Murphy
Hon. Joseph Spinola
Nassau County

Hon. H. Patrick Leis, Administrative Judge, Suffolk Co.

Hon. Paul J. Baisley, Jr.
Hon. Edward D. Burke
Hon. Lucindo Suarez
Suffolk County

11th Judicial District Hon. Jeremy S. Weinstein, Administrative Judge, Queens Co.

No Summary Jury Trials reported
Summary Jury Trial Program will begin Fall 2007

12th Judicial District Hon. Barry Salman, Administrative Judge, Bronx Co.

Hon. John Barone
Hon. Mark Friedlander
Hon. Joseph Gerace
Hon. Yvonne Gonzalez
Hon. Wilma Guzman
Hon. Diane Renwick
Hon. Norma Ruiz
Hon. George Salerno
Hon. Lucindo Suarez
Hon. Kenneth Thompson
Hon. Edgar G. Walker
Bronx County

Beginning in the fall of 2007, I will communicate with every Bar Association President, President Elect, and Executive Director in the 3d, 4th, 5th, 6th, 7th and 8th Judicial Districts regarding a summary jury trial presentation. This was done in the 1st, 2d, 9th, 10th, 11th and 12th Judicial Districts, where I included a PowerPoint presentation at almost all of the following summary jury trial seminars:

- NYS Trial Lawyers Association—7 Cr CLE
- OCA Court Attorneys Seminar at Rochester, NY
- OCA Court Attorneys Seminar at Saratoga Springs, NY
- Council on Judicial Administrators at City Bar
- Supreme and County Court Clerks Association at The Judicial Institute
- New Rochelle Bar Association—2 Cr CLE
- Defense Association of New York—1 Cr CLE
- Tort Advisory Committee—New York County
- Black Bar Association of Bronx County & The Dominican Bar Association—2 Cr CLE
- Brooklyn Bar Association—2 Cr CLE

- Suffolk County Bar Association—2 Cr CLE
- Marino Institute CLE—2 Cr CLE
- Litigation Committee—City Bar
- Putnam County Bar Association—2 Cr CLE
- Columbian Lawyers of Nassau County
- New York County Bench & Bar—22 Cr CLE
- Nassau County Bar Association—2 Cr CLE
- Queens County Bar Association—2 Cr CLE
- Richmond County Bar Association—2 Cr CLE
- New Rochelle Bar Association—Part I & II–2 Cr CLE
- Niagara County Bar Association—3 Cr CLE
- Columbian Lawyers Association of Brooklyn—1 Cr CLE
- Insurance Carriers & Representatives at the Judicial Institute—2 Cr CLE
- NYS Supreme Court Justices Association Conference
- Travelers Insurance Company

I will continue to meet and work with the bench and bar to coordinate and expand the summary jury trial program, and I will approach the Administrators and Supervisors of the lower civil courts to begin a summary jury trial program in their jurisdictions.

The Summary Jury Trial Program in New York State is anchored in the Eighth Judicial District, has gained outposts in upstate New York, and is flourishing in New York City and its surrounding counties. The success of the program has been substantial and significant. The experience in the Bronx, Chautauqua, and other counties proves the summary jury trial can be adapted for use in both rural and metropolitan counties and that the process will move cases through the courthouse. Parties can obtain a fair trial at a significant savings of time, money and stress. More importantly, justice is served in summary jury trials.

Lucindo Suarez is the Statewide Coordinator for Summary Jury Trials.

Understanding Your Jury's Point of View

By Harry Plotkin

Perhaps the most important and simplest principle of juror decision-making is the reality that every juror enters the courtroom with a unique point of view. At the very least, this point of view will color how that juror views a case and will influence how likely he or she is to believe certain types of cases. At the worst, a juror's point of view will limit the types of case elements he or she is able to believe and may make it nearly impossible for even the best attorney to sway that juror to accept a world that conflicts with the juror's point of view. Though some jurors are more open-minded and pliable than others, every juror's point of view creates predispositions that strongly influence how he or she will view your trial in a way that your evidence and best efforts at persuasion cannot.

Although rarely simple, understanding juror predispositions and becoming adept at selecting a jury are skills that trials are won and lost upon. In this article, I will discuss some ways to understand juror predispositions and decision-making and will offer some insights on understanding how jurors might react to your case.

The first, and most important, lesson to understand about jurors is that their predispositions and biases will always outweigh your best evidence. One of the most common (and fatal) miscalculations made in trial strategy is relying heavily on the persuasive power of evidence and underestimating the power of juror bias and cognitive decision-making in the first moments of trial, when jurors are the most open to persuasion.

Never assume that jurors make informed decisions on the basis of the evidence. In reality, juror attitudes and verdicts are shaped much more by the biases they bring into the courtroom that predispose them to choose one side's case over the other.

The trial is ultimately about jurors making choices between the versions of reality offered by the plaintiff and the defense. Although the justice system demands that jurors make these choices based solely on an objective view of the evidence presented, cognitive psychology understands that this is impossible; in interpreting information and making judgments and decisions, jurors are forced to rely on their cognitive framing of the case to make these choices, and the jurors' framework of the case colors their interpretation of the evidence to fit their preconceived ideas.

For example, if a juror goes into trial believing that doctors are honest, benevolent, highly trained and competent, this juror will almost certainly justify plaintiff's evidence of malpractice in a manner favorable for the doctor. To this juror, it is more likely that the evidence was manufactured, taken out of context, has a reasonable explanation, or is the result of an honest mistake than convincing evidence of malpractice.

Because the presentation of evidence comes long after the jurors have heard what the case is about and who is involved, the jurors build the framework that determines how they view the evidence based largely on biases and predispositions. As illogical as it may seem, jurors determine what happened on the basis of what they believe is more likely to have happened in a given situation rather than waiting for the evidence to speak for itself.

Take the example of an insurance bad-faith case. Logically speaking, everyone would agree that there are some situations in which insurance companies mistreat policy holders and some situations in which policy holders mistreat their insurer. Anyone would agree that the best way to determine who is at fault in any given case would be to examine the evidence: the insurance policy, the claims, and evidence of damage and how both parties interacted. In practice, jurors never evaluate the evidence objectively; having formed impressions of credibility and what is more likely to have happened before they view the evidence, jurors use their predispositions to make the evidence fit their framework.

In insurance bad-faith cases, some jurors are predisposed to trust insurance companies and mistrust plaintiffs. These jurors may have positive experiences with insurance companies, may work for an insurance company, may have negative attitudes toward plaintiffs, view lawsuits as "frivolous," or may belong to a personality type known as "authoritarian" that blindly trusts institutions. If asked prior to trial, these jurors would tell you that it is far more likely for a claims holder to exaggerate claims and defraud an insurance company than for an insurance company to refuse to pay claims they are entitled to pay. Another group of jurors will be predisposed to distrust the insurance company; they likely have had negative experiences with insurance companies and negative attitudes toward large corporations in general. These jurors likely view corporations as greedy, unethical, and profit-driven, and will find it much more likely for an insurance company to defraud its policy holders than vice versa. These pre-trial attitudes will be far more influential in shaping the verdict than the evidence itself. These prior experiences and deep-seated beliefs determine what a juror will readily believe. Once predisposed, a juror is very difficult—if not impossible—to rehabilitate and to persuade to believe something that does not fit his or her view of the world.

In your next trial, think about your case not in terms of the evidence, but instead in terms of the arguments

involved, and think about the type of experiences and attitudes that would predispose a person to find your account of what happened a more likely scenario than that of opposing counsel.

A second important lesson to understand about jurors is that in order to understand their point of view, you need to ask probing questions in *voir dire* and avoid making assumptions.

Never assume that all jurors are logical. Many are anything but. No matter how strong your case may be and how airtight your evidence in supporting or disputing liability, there will be jurors out there who are strongly predisposed to be against you. Never assume that all jurors will agree with your strongest points, even if your evidence is compelling and the opposition has nothing to dispute it. All it takes for a juror to disagree with you is for your case to clash with their version of reality, skewed by a single fluke experience. As illogical as it may be, your strong evidence itself can destroy your credibility, in that juror's mind, by conflicting with their skewed vision of how the world works.

How can your credibility be breached, even in a slam-dunk case with strong, undisputed evidence? If a juror has had any experience that tells him or her reality is different from the one your evidence suggests—perhaps they survived a car crash at 50 mph without a scratch, while your client is paralyzed from a low-speed fender bender—your logical evidence seems illogical to them. If your juror has any reason to mistrust your honest client—perhaps you represent one of Fortune 500's top companies to work for, yet the juror has had a string of bitter employment experiences—your honest company will be assumed to be dishonest (along with their evidence and testimony) by the juror.

Notice, however, that the key to understanding juror bias and predisposition is not the experiences themselves, but rather how jurors interpret those experiences, how they feel about them, and how they react to and deal with them. Not all jurors who survive violent car crashes are pro-defense; those who recognize that lesser crashes often cause serious injury, understand how lucky they are, and drive much more carefully now may very easily be pro-plaintiff. Not all jurors who have been fired and discriminated against are pro-plaintiff. Some may recognize that they had uncommonly bad managers and maintain an optimistic view of employers and the world. Some may be practical or optimistic by nature and shrug off any trauma or resentment. Some might take some personal blame for those negative experiences—perhaps they shouldn't have taken the job in the first place, or should have quit their job earlier—learned from them, and now expect others to do the same. All three of these jurors may be strongly pro-defense, despite their negative experiences, simply because of their outlook.

By the same token, never make assumptions about your jurors based on superficial traits. Although occupation, age, education, income, political and religious views, and even personality type may provide clues to how a juror might think, it is much more important to gain an understanding of your jurors' approach to the issues and situations that come up in trial. If your juror has a vastly different set of experiences, values, or approaches to the issues and situations at trial than you might expect from someone like him or her, that juror will have a vastly different set of biases and predispositions too.

Don't always expect your jurors to follow the "industry standard" within their fields. Most real estate developers are strongly protective of the principle of due diligence and are highly critical of plaintiffs with fraud claims who barely looked at a piece of property and refused to hire a professional inspector or appraiser, but some aren't. Make sure to ask them what their approach is to buying or selling property, because any whose approach matches the plaintiff's more so than the defendant's will, obviously, have pro-plaintiff dispositions.

How is a surgeon going to judge a pathologist's diagnosis in a medical malpractice trial? How is a personnel manager going to judge claims of employment discrimination or wrongful termination? How is a secretary, waitress, or flight attendant going to judge allegations of sexual harassment? As tempting as it may be to fall back on assumptions and stereotyping, the best way to make an informed decision about a juror is to ask about his or her unique approach to a given situation. Perhaps the stereotype might fit, or perhaps that juror has a wildly different philosophy.

In the latter example, there are a variety of approaches to sexual harassment by jurors who are exposed to high levels of it. Some have experienced it and are outraged; some brush it off and minimize the emotional impact. Some have been exposed to the worst kinds of harassment and yet never bring it to court, preferring to deal with it in other ways; these jurors may be outraged by the plaintiff's litigious approach. Some may believe that they can prevent harassment by changing their dress or tone and may blame victims for failing to be equally pro-active ("look at what she was wearing!"), while others may feel completely powerless and non-judgmental toward victims. In every type of case, the key is in finding out which jurors agree with your client's approach and which diverge.

The lesson to be learned here is to never judge your jurors based on a superficial examination of their experiences or traits. Experiences are just the jumping-off point in *voir dire* and in gaining an understanding of how your jurors think. Much more important is to dig deeper and probe how they feel about those experiences, how they dealt with them, and what they have learned from them. Not all car crash victims, accountants, jurors who have

been fired, homeowners, or even tort-reform jurors think alike.

A third and final lesson to understand about jurors is that some jurors are less open-minded than others, and it is important to identify these jurors during jury selection.

On any given panel of potential jurors, there will be a handful of jurors who may be so hyper-predisposed against the facts of your case that they might be impossible for you to win over. Beyond biased, there are jurors on every *venire* panel whose view of the world is so inflexible that they literally cannot accept the POSSIBILITY of situations that conflict with their worldviews. Identifying and removing these jurors from your panel is essential, but the identifying part is trickier than it may seem.

Jurors who have biases against certain types of people and situations—a juror who has a distaste for corporations or lawsuits, for example—are relatively easy to identify because people are usually consciously aware of things they DISLIKE. With these jurors, the identifying is easy but the removing part is challenging.

On the other hand, jurors whose worldviews are uncompromisingly rigid—we'll call them "inflexible jurors"—are rarely if ever aware that their view of the world is a constructive bias that will color how they view a trial. These jurors don't dislike the litigants or what they represent, but when one side presents a situation that conflicts with their view of the world, an inflexible juror will be completely unable to imagine and accept the possibility of that situation being a reality and will reject it as false, no matter how strong the evidence. My favorite example is the juror who can never imagine a doctor making a mistake in judgment; these jurors hold doctors in such high esteem that they are literally incapable of second-guessing doctors and rendering plaintiff verdicts in medical malpractice trials. And yet most (if not all) inflexible jurors are completely unaware that their worldview is a constructive bias and unaware of how uncompromising their worldview is. As such, inflexible jurors are challenging to identify during *voir dire*. You cannot simply ask them if they could find against a doctor, a corporation, or an injured plaintiff because they are completely unaware that they cannot, let alone why.

Instead, ask potential jurors questions about their view of the world. Are corporations honest? Do plaintiffs exaggerate or lie? Have you ever seen a co-worker fake an injury or disability to get out of work? Have you ever heard of a police officer arresting and charging someone with insufficient evidence? Ask jurors about their experiences and impressions of the world to get a sense of what they believe is likely and prevalent and what is rare or impossible. In criminal trials, you'll find that some inflexible jurors are incapable of believing that a police officer could make an error in judgment, intentionally or not, or that the justice system may be flawed. Such a juror may not be able to admit it directly, but they won't be able to cite a single example of police abuse, a false arrest, inappropriate charging of a defendant, or a single law that they would change, and you'll find that they cannot conceive that a good person could ever commit a crime.

An even more insightful way of identifying inflexible jurors on your panel is to ask questions about your jurors' approaches to case issues. Inflexible defense jurors in medical malpractice cases are those who have never sought a second opinion, double-checked or disagreed with a doctor's diagnosis or treatment plan, or asked a doctor for alternative options or to explain his or her reasoning. Instead, they tend to follow their doctors' instructions implicitly without questioning, and their approach reveals a blind trust in doctors that suggests a worldview that doctors don't make mistakes.

The blinders that handicap inflexible jurors go far beyond the standard predispositions that every juror has. Again, every juror is guilty of determining what happened in a given trial on the basis of what they believe is more likely to have happened in a given situation rather than waiting for the evidence to speak for itself. For most jurors, these predispositions can be overcome with overwhelming evidence or persuasive trial presentations (although with great difficulty, so it's much wiser to remove them in jury selection). Inflexible jurors cannot be rehabilitated. They believe that certain situations are not only less likely but are actually not realistically possible. For example, there are inflexible defense jurors in auto accident cases who truly believe that a cautious, defensive driver should be able to avoid or prevent accidents in any situation; these jurors will actually construct a theory that the plaintiff was somewhat responsible for the accident without any supporting evidence.

Keep in mind that inflexible jurors are not so much a demographic group as a view of the world on a particular topic. Every juror is capable of being an inflexible juror given the right set of facts and situations, and a juror who is inflexible in one type of case may not be on a different case. Some types of jurors—conventional personality types, especially—are more prone to inflexibility, but you should treat every juror as potentially inflexible in any given case.

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2006 Appellate Decisions

By Steven B. Prystowsky

ACTIONS—LEGAL CAPACITY—BANKRUPTCY PETITION

Plaintiff's failure to disclose a cause of action as an asset in an earlier bankruptcy proceeding, the existence of which the plaintiff knew or should have known existed at the time, deprived her of the legal capacity to sue subsequently on that cause of action:

> Plaintiff knew or should have known of the facts allegedly giving rise to the legal malpractice cause of action at the time she filed her February 2002 bankruptcy petition. Thus, plaintiff's failure to disclose that cause of action in her bankruptcy petition deprived her of the legal capacity to sue in this action.

Whelan v. Longo, 7 N.Y.3d 821, 822 N.Y.S.2d 751 (2006).

APPEAL AND ERROR—AGAINST WEIGHT OF CREDIBLE EVIDENCE—RIGHT TURN—PLAINTIFF'S VERDICT

The trial court erred in failing to set aside the jury verdict in favor of plaintiff who made a right turn when the Brooks vehicle that collided with her was approximately "three-quarters" through the intersection:

> Here, the plaintiff claimed that she did not see Brooks' vehicle before she began making a right turn onto Seaman's Neck Road, despite evidence that Brooks' vehicle was three-quarters of the way into the intersection when the collision occurred. The plaintiff also testified that she could not recall whether or not she looked to her left before beginning her turn. A driver is negligent where an accident has occurred because he or she has failed to see that which through the proper use of his or her senses should have been seen. Thus, even fully crediting the plaintiff's testimony that the stop sign was obscured, her failure to observe the Brooks vehicle in the intersection before proceeding to make her turn constituted negligence. Accordingly, the jury's failure to apportion any fault to the plaintiff is not supported by a fair interpretation of the evidence.

D'Onofrio-Ruden v. Town of Hempstead, 29 A.D.3d 512, 815 N.Y.S.2d 141 (2d Dep't 2006).

APPEAL AND ERROR—AGAINST WEIGHT OF CREDIBLE EVIDENCE

Jury verdict in favor of defendant against plaintiff who claimed he was injured when a 66-pound box slid off another box from a forklift, striking his neck was against the weight of the credible evidence:

> We find that the evidence that the defendant bore some liability in the happening of the accident so preponderated in favor of the plaintiffs that the jury verdict on the issue of liability in favor of the defendants, and against the plaintiffs, could not have been reached upon any fair interpretation of the evidence. Moreover, although the plaintiffs have not established that the doctrine of res ipsa loquitur must be applied as a matter of law with respect to the defendants' liability, the evidence in support of the applicability of that doctrine so preponderated in the plaintiffs' favor that a new trial is required.
>
> * * *
>
> Here, Cubeta established that he was struck by a box that fell off of a forklift loaded and operated solely by the defendant's warehouse manager.

Cubeta v. York International Corporation, 30 A.D.3d 557, 818 N.Y.S.2d 136 (2d Dep't 2006).

APPEAL AND ERROR—LAW OF THE CASE

The Supreme Court erred in granting plaintiff summary judgment after the opening statements since an earlier court order denied his motion for summary judgment based upon the same facts and law:

> The doctrine of the law of the case seeks to prevent relitigation of issues of law that have already been determined at an earlier stage of the proceeding. The doctrine applies only to legal determinations that were necessarily resolved on the merits in a prior decision. The doctrine may be ignored in extraordinary circumstances such as a change in law or a showing of new evidence.

Brownrigg v. New York City Housing Authority, 29 A.D.3d 721, 815 N.Y.S.2d 681 (2d Dep't 2006).

APPEALS—VTL § 388—PRESUMPTION/ REBUTTABLE

Uncontradicted statements by both the owner and driver of a vehicle involved in an accident—that the operator did not have the owner's permission—will not necessarily warrant a court in awarding summary judgment for the owner, although in most cases they will but "not as an absolute or invariable rule":

> Disavowals by both the owner and the driver, without more, should not automatically result in summary judgment for the owner. Where the disavowals are arguably suspect, as where there is evidence suggesting implausibility, collusion or implied permission, the issue of consent should go to a jury.
>
> * * *
>
> Whether summary judgment is warranted depends on the strength and plausibility of the disavowals, and whether they leave room for doubts that are best left for the jury.

Country Wide Insurance Company v. National Railroad Passenger Corp., 6 N.Y.3d 172, 811 N.Y.S.2d 302 (2006).

[EDITOR'S NOTE: In this case, an Amtrak employee without a valid license, after realizing he did not have his radio, took an Amtrak pickup truck before his shift began, and drove home for his radio. On his way back, he struck plaintiff's car. In moving for summary judgment, Amtrak submitted an affidavit from a supervisor that the operator was driving the vehicle without authorization and he was not within the scope of his employment. In addition, the driver was charged at an internal hearing with driving without authorization and accepted discipline which the court construed as an uncontradicted statement that he had no permission to operate the vehicle.]

ATTORNEY-CLIENT—DUTY—EXCESS INSURANCE—INVESTIGATE

A law firm retained by a carrier to defend its insured in a personal injury action may have a duty to ascertain whether the insured it was hired to represent has available excess coverage and to file a timely notice of excess claim on the insured's behalf:

> It seems self-evident that the question whether, in the ordinary case, an attorney could be found negligent for failing to investigate insurance coverage would turn primarily on the scope of the agreed representation—a question of fact—and on whether, in light of all relevant circumstances, the attorney "failed to exercise the reasonable skill and knowledge commonly possessed by a member of the legal profession." We cannot say, as a matter of law, that a legal malpractice action may never lie based upon a law firm's failure to investigate its client's insurance coverage or to notify its client's carrier of a potential claim.

Shaya B. Pacific, LLC v. Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, 38 A.D.3d 34, 827 N.Y.S.2d 231 (2d Dep't 2006).

[EDITOR'S NOTE: Justice Fisher, writing for the majority, denied defendant's pre-discovery CPLR 3211 motion to dismiss since the documentary evidence that forms the basis of the defense did not resolve all factual issues as a matter of law and conclusively dispose of plaintiff's claim. The court rejected defendant's argument that (1) plaintiff failed to establish its status as an insured under an excess policy and therefore could not establish causation, (2) any negligence on its part was not a proximate cause of the loss of excess coverage because the firm was retained more than three months after plaintiff first became aware of the need to notify an excess carrier and approximately two months after the plaintiff became aware of the legal action, and (3) the defense counsel provided by the plaintiff's primary carrier had no duty to advise the plaintiff concerning coverage issues.

Justice Fisher rejected defendant's argument that it had no duty because it would violate every principle of the tri-partite relationship that exists between an insurer, an insured, and appointed defense counsel. Since the primary carrier, Lloyds, had no interest in the existence or extent of excess coverage available to the plaintiff, the defendant therefore would not have breached any duty owed to Lloyds by advising the plaintiff on issues of excess coverage.

Justice Lifson dissented, finding that the majority is imposing a duty on lawyers that has not been recognized by any court in the state. There is no case law imposing a duty on an attorney assigned by a primary carrier to verify that excess coverage exists:

> Where the circumstances are such that the client has superior or equal knowledge of potential sources of additional coverage, unless requested to investigate by the client, the attorney has no duty to explore hypothetical theories of additional insurance coverage.
>
> * * *
>
> The record also indicates that the plaintiff had an obligation to notify the excess carrier of the happening of the incident (i.e., an obligation that preceded any designation of counsel on the primary policy of

> insurance after the commencement of the underlying action). The insured's contractual responsibility to notify its alleged excess insurance carrier cannot be avoided or diminished through the subterfuge of attempting to foist such obligation on an unsuspecting law firm selected by the primary carrier particularly where, as here, the law firm may have been assigned the case after the time to notify the excess carrier had expired.]

AUTOMOBILES—IMPLIED CONSENT—VTL § 388

Owner's entrustment of minivan to friend, who disputes owner's statement that he was instructed not to drive the vehicle, raises fact questions whether friend was given implied consent to drive the van and whether friend, who left keys to the van on a table in his house, gave implied consent to his son, an unlicensed driver:

> Where the owner of a vehicle entrusts it to another person without setting forth any express restrictions as to the vehicle's use, and the person entrusted with the vehicle permits an unlicensed third person to drive it, the financial burden of an accident caused by the unlicensed driver's negligence should fall on the owner, who put in motion the chain of events leading to the accident. The burden should not fall on an innocent stranger, such as plaintiff in this action, who happens to be injured in the accident.

Bernard v. Mumuni, 6 N.Y.3d 881, 817 N.Y.S.2d 210 (2006), *aff'g* 22 A.D.3d 186, 802 N.Y.S.2d 1 (1st Dep't 2005).

AUTOMOBILE—NO FAULT—SERIOUS INJURY

Plaintiff Samira Kasim's complaint should not have been dismissed since defendants' examining physician's medical report failed to establish that she did not sustain a serious injury:

> While the defendants' examining orthopedist set forth in his affirmed medical reports range of motion findings concerning the respective cervical and lumbar spines of the plaintiffs . . . he never compared those ranges of motion to the normal range of motion. Such proof alone is insufficient to establish a lack of serious injury. As the defendants failed to adduce any other proof demonstrating the absence of serious injury as to the plaintiff Samira Kasim, the defendants failed to meet their initial burden as to that plaintiff, and we need not consider whether the plaintiffs' papers were sufficient to raise a triable issue of fact as to that plaintiff.

Kasim v. Defretias, 28 A.D.3d 611, 813 N.Y.S.2d 521 (2d Dep't 2006).

[EDITOR'S NOTE: The court, however, sustained the dismissal of the complaints of plaintiffs Yousaf and Samir Kasim based on other proof. Yousaf Kasim resumed his duties in the military service without any impairments or limitations and Samir Kasim engaged in a rigorous weight-lifting regimen without any impairment or limitation of motion:

> Such proof, coupled with the medical proof submitted by the defendants, indicated that each of those plaintiffs had a full range of motion (without establishing the norms of such range) and was sufficient to establish, *prima facie*, that the plaintiffs Yousaf Kasim and Samir Kasim did not sustain any permanent injury or a "*significant* limitation of use of a body function or system."]

CARRIERS—SAFE DISEMBARKATION

Bus company's discharging passenger at an icy subway grating raises a question of fact:

> Defendants owed a duty to plaintiff to stop at a place from which plaintiff could safely disembark and leave the area. A triable issue of fact exists whether defendants breached that duty.

Malawer v. New York City Transit Authority, 6 N.Y.3d 800, 812 N.Y.S.2d 438 (2006), *aff'g* 18 A.D.3d 293, 795 N.Y.S.2d 201 (1st Dep't 2005).

CHOICE OF LAW—FOREIGN LAW—CONTRACTS—VIOLATION/NEW YORK PUBLIC POLICY

Plaintiff did not meet its "heavy burden" of proving that applying Florida law, under the contract's choice-of-law provision, allowing "pay-if-paid" clause, which violates New York's Lien Law § 34, would be offensive to a fundamental public policy of New York:

> Given the checkered history of pay-if-paid clauses in the construction industry, we cannot say they are "truly obnoxious" so as to void the parties' choice of law.

Welsbach Elec. Corp. v. MasTec North America, Inc., 7 N.Y.3d 624, 825 N.Y.S.2d 692 (2006).

[EDITOR'S NOTE: Judge Rosenblatt discusses New York's Public Policy and when it is and is not applicable to contracts with choice-of-law clauses].

DAMAGES—BRAIN INJURY—35-YEAR-OLD FEMALE—$3,000,000—FUTURE PAIN AND SUFFERING

Jury award to plaintiff for future pain and suffering for 40 years of $9,000,000, which the trial judge reduced to $5,000,000, was further conditionally reduced to $3,000,000:

> While plaintiff sustained a severe brain injury resulting in, *inter alia*, permanent cognitive impairment affecting her memory, concentration, organizational ability and emotional response, the award of $5 million for future pain and suffering deviates materially from what is reasonable compensation under the circumstances, and we accordingly reduce the award therefor as indicated.

Paek v. City of New York, 28 A.D.3d 207, 812 N.Y.S.2d 83 (1st Dep't 2006).

[EDITOR'S NOTE: Justice Saxe dissented, in part, finding the initial award of $9,000,000 appropriate to the particular circumstances and the award reduced to $5,000,000 as not deviating materially from what would be reasonable compensation under the circumstances. In upholding the $5,000,000 award, Justice Saxe pointed out:

> Plaintiff will never be able to return to work, or engage in any type of meaningful employment. Her treating neurologist made a diagnosis of dementia based upon the constellation of plaintiff's symptoms, which includes confusion, disorganization, inability to plan, inability to carry out activities of daily life, and memory difficulties with respect to verbal information. She has trouble completing simple tasks, and cannot balance a checkbook or cook. Her fundamental personality has changed: she is nervous, anxious, depressed, and, importantly, her dream of having a family is unrealizable.

The majority and the dissenter disagreed concerning the value of jury verdicts. According to the majority:

> An award is excessive if it deviates materially from what would be reasonable compensation. The standard for that determination is set by judicial precedent, not juries.

Justice Saxe viewed this holding as unnecessarily extreme:

> The voice of a jury is the voice of the community, and it should not be so cavalierly ignored when deciding whether an award deviates materially from what would be reasonable compensation. Indeed, not only are jury awards of relevance in deciding what is reasonable, but in some circumstances they may offer the only basis for comparison.]

DAMAGES—FOUR-YEAR-OLD INFANT—PERMANENT NERVE DAMAGE/ULNAR NERVE—$600,000 PAST AND FUTURE PAIN AND SUFFERING—NOT EXCESSIVE

The court's reduction of $500,000 for past pain and suffering to $250,000 and $750,000 for future pain and suffering to $350,000 for ulnar nerve damage did not deviate materially from what would be reasonable compensation for the four-year-old infant:

> The four-year old plaintiff, Irakly Biejanov, sustained injuries when a defective window in the building owned by defendant 8645 Realty, LLC, fell on his left hand. There was expert testimony that he fractured his thumb and his left index finger and suffered permanent nerve damage to the ulnar nerve. Shortly after the accident, he underwent surgery. Subsequent to the surgery, he could not fully straighten his left index finger and lost partial feeling in his third finger.

Biejanov v. Guttman, 34 A.D.3d 710, 826 N.Y.S.2d 111 (2d Dep't 2006).

DAMAGES—ILLEGAL ALIENS

Illegal aliens injured on construction work sites who have not tendered false work authorizations documents to obtain employment are not precluded by the Immigration Reform and Control Act ("IRCA") from seeking, in a personal injury action, lost wages he or she might have earned in the United States for the following reasons:

1. IRCA does not contain an express statement by Congress that it intends to preempt state laws regarding the permissible scope of recovery in personal injury actions predicated on state labor laws;

2. The doctrine of "field preemption" does not apply because there is nothing in IRCA's provisions indicating that Congress meant to affect state regulation of occupational health and safety, or the types of damages that may be recovered in a civil action arising from those laws;

3. New York's Labor Law applies to all workers in qualifying employment situations—regardless of immigration status—and nothing in the relevant

statutes or the Court of Appeals' decisions negate the universal applicability of this principle;

4. Limiting a lost wages claim by an injured undocumented alien would lessen an employer's incentive to comply with the Labor Law and supply all of its workers the safe workplace that the Legislature demands;

5. An absolute bar to recovery of lost wages by an undocumented worker would lessen the unscrupulous employer's potential liability to its alien workers and make it more financially attractive to hire undocumented aliens;

6. Plaintiffs here, unlike the alien in *Hoffman [Plastic Compounds, Inc. v. National Labor Relations Bd.*, 535 U.S. 137, 122 S. Ct. 1275, 152 L. Ed.2d 271 (2002)], did not commit a criminal act under IRCA. There were no false work documents in violation of IRCA that occurred here;

7. IRCA does not make it a crime to work without documentation;

8. Working in the United States without work authorization is impermissible under federal law. Standing alone, however, this transgression is insufficient to justify denying plaintiffs a portion of the damages to which they are otherwise entitled; and

9. The alien worker in *Hoffman* suffered no bodily injury whatsoever.

Balbuena v. IDR Realty LLC, 6 N.Y.3d 338, 812 N.Y.S.2d 416 (2006), *rev'g* 13 A.D.3d 285, 787 N.Y.S.2d 35 (1st Dep't 2004) and *aff'g Majlinger v. Cassino Constr. Corp.*, 25 A.D.3d 14, 802 N.Y.S.2d 56 (2d Dep't 2005).

[EDITOR'S NOTE: The majority noted that in determining damages, the jury is permitted to consider the plaintiff's immigration status as one factor:

> An undocumented alien plaintiff could, for example, introduce proof that he had subsequently received or was in the process of obtaining the authorization documents required by IRCA and, consequently, would likely be authorized to obtain future employment in the United States. Conversely, a defendant in a Labor Law action could, for example, allege that a future wage award is not appropriate because work authorization has not been sought or approval was sought but denied. In other words, a jury's analysis of a future wage claim proffered by an undocumented alien is similar to a claim asserted by any other injured person in that the determination must be based on all of the relevant facts and circumstances presented in the case.

Judges R.S. Smith and Reade dissented, concluding that New York law does not permit such a recovery and, if it does, New York's Labor Law is preempted by federal immigration law as interpreted in *Hoffman Plastic Compounds, Inc. v. National Labor Relations Bd.*, 535 U.S. 137, 122 S. Ct. 1275, 152 L. Ed.2d 271 (2002)]. *See also Madiera v. Affordable Housing Foundation, Inc.*, 469 F.3d 219 (2d Cir. 2006)].

DAMAGES—MILD BRAIN INJURY—$30,000,000—EXCESSIVE

Awards of $15,000,000 for past pain and suffering and $15,000,000 for future pain and suffering, which were reduced to $2,000,000 and $5,000,000 respectively, were excessive and further conditionally reduced to $1,000,000 and $2,250,000 to 23-year-old iron worker who suffered a mild brain injury, skull, pelvic, clavicle and rib fractures and headaches when he fell from a 28-foot ladder:

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

Benefield v. Halmar Corporation, 25 A.D.3d 633, 808 N.Y.S.2d 419 (2d Dep't 2006).

[EDITOR'S NOTE: *See also* 2001 WL 909472. The court also reduced plaintiff's award of future lost wages of $4,800,000 to the sum of $3,200,000 noting that it was excessive since

> it does not take into account the physical nature of the work, the likelihood of injury, and the cyclical fluctuations in the construction industry.]

DAMAGES—TEAR OF GLENOID LABRUM—$150,000—NOT EXCESSIVE

Trial court's reduction of plaintiff's award of $400,000 for past pain and suffering and $650,000 for future pain and suffering for over 20 years to $75,000 and $80,000 respectively for a permanent injury to the shoulder did not deviate materially from reasonable compensation and was warranted under the circumstances of this case:

> Although the [13 year-old] infant plaintiff experienced pain in her neck, back and right shoulder, she did not seek treatment until the day after the accident, when she went to a physical therapy center. About two weeks later, plaintiff consulted an orthopedist, who advised her to continue with physical therapy and ordered MRI

> studies, which revealed derangements of the cervical and lumbar spine, a tear of the glenoid labrum, and a disc bulge at L5-S1.
>
> The infant plaintiff was last seen by her orthopedist for treatment about four years before trial. Her last physical therapy session was about three and a half years before trial. She was never prescribed pain medication, and no surgery was recommended.

Leal v. Levy, 32 A.D.3d 797, 833 N.Y.S.2d 121 (1st Dep't 2006).

DAMAGES—$1,850,000—STROKE—NOT EXCESSIVE

Plaintiff's award of damages of $350,000 for past pain and suffering and $1,500,000 for future pain and suffering over 42 years did not deviate materially from what would be reasonable compensation:

> Plaintiff, then 34 years old, suffered a stroke that resulted in cognitive impairments, including deficits in attention, slow information processing speed and impaired visual perception skill; [she] experiences altered sensation and pain in her left arm, a reduced ability to discriminate objects in her left hand and diminished fine motor control in her left arm; and was unable to handle the stress of her job requiring computer skills and hospitalized for depression.

Coore v. Franklin Hospital Medical Center, 35 A.D.3d 195, 825 N.Y.S.2d 463 (1st Dep't 2006).

DAMAGES—WRONGFUL DEATH—LOSS OF PARENTAL GUIDANCE

The award of $1 million to plaintiff and her brother does not deviate materially from what would be reasonable compensation for past and future loss of parental guidance.

Snuszki v. Wright, 34 A.D.3d 1235, 824 N.Y.S.2d 519 (4th Dep't 2006).

DISMISSAL—SECOND ACTION—FIRST ACTION DISMISSED/NONAPPEARANCE—22 N.Y.C.R.R. § 202.27(B)

Plaintiff's second action, commenced after the first action was dismissed under 22 N.Y.C.R.R. § 202.27(b) for failing to appear at a compliance conference, was not barred by the doctrine of *res judicata* since the Statute of Limitations had not expired:

> Defendants' contention that this action is barred by the doctrine of res judicata is without merit. A prior order that does not indicate an intention to dismiss the action on the merits is not a basis for the application of the doctrine of res judicata. Here, the first action was dismissed as a result of plaintiff's counsel's failure to attend a compliance conference, not on the merits.

Espinoza v. Concordia International Forwarding Corp., 32 A.D.3d 326, 820 N.Y.S.2d 259 (1st Dep't 2006).

DISMISSAL—SELF-EXECUTING ORDER

Defendant's answer was properly stricken for failing to comply with a conditional, self-executing order of the Supreme Court:

> A self-executing order having been issued, requiring production of a witness on date certain, defendants were cognizant of the repercussions of their failure to produce. Rather than produce a witness, or contact the court for a protective order for their anticipated noncompliance, defendants simply took no action. Notwithstanding their claimed good faith belief that the deposition of their witness should await the outcome of their appeal of the January 13, 2005 order compelling document production, defendants took this position at their peril. Their conduct of flouting the court order, without good cause and without contacting the court for relief therefrom, was willful and contumacious conduct, warranting sanction.

Rampersad v. New York City Department of Education, 30 A.D.3d 218, 817 N.Y.S.2d 20 (1st Dep't 2006).

EVIDENCE—EXPERT TESTIMONY—MEDICAL CAUSATION—TOXIC TORTS

The Appellate Division correctly precluded plaintiff's experts from testifying that plaintiff Parker contracted acute myelogenous leukemia ("AML") resulting from his 17-year occupational exposure to gasoline containing benzene, a known carcinogen, because plaintiff's experts, Dr. Goldstein and Dr. Landrigan, failed to demonstrate that exposure to benzene as a component of gasoline caused plaintiff's AML:

> Dr. Goldstein's general, subjective and conclusory assertion—based on Parker's deposition testimony—that Parker had "far more exposure to benzene than did the refinery workers in the epidemiological studies" is plainly insufficient to

establish causation. It neither states the level of the refinery workers' exposure, nor specifies how Parker's exposure exceeded it, thus lacking in epidemiologic evidence to support the claim.

Dr. Landrigan's submissions were likewise insufficient. He reported that Parker was "frequently" exposed to "excessive" amounts of gasoline and had "extensive exposure . . . in both liquid and vapor form," which—even given that an expert is not required to pinpoint exposure with complete precision—cannot be characterized as a scientific expression of Parker's exposure level. Moreover, Landrigan concentrates on the relationship between exposure to benzene and the risk of developing AML—an association that is not in dispute. Key to this litigation is the relationship, if any, between exposure to *gasoline* containing benzene as a component and AML. Landrigan fails to make this connection perhaps because, as defendants claim, no significant association has been found between gasoline exposure and AML. Plaintiff's experts were unable to identify a single epidemiologic study finding an increased risk of AML as a result of exposure to gasoline.

Parker v. Mobil Oil Corporation, 7 N.Y.3d 434, 824 N.Y.S.2d 584 (2006).

[EDITOR'S NOTE: The Appellate Division at 16 A.D.3d 648, 793 N.Y.S.2d 434 (2d Dep't 2005), precluded plaintiff's experts because plaintiff presented no evidence of the concentration level of benzene and gasoline to which he was exposed and the failure to quantify the special level exposure rendered it impossible to determine whether he exceeded the threshold. The Court of Appeals, however, disagreed with this requirement:

We find it is not always necessary for a plaintiff to quantify exposure levels precisely or use the dose-response relationship, provided that whatever methods an expert uses to establish causation are generally accepted in the scientific community.

* * *

There could be several other ways an expert might demonstrate causation. For instance, amici note that the intensity of exposure to benzene may be more important than a cumulative dose for determining the risk of developing leukemia. Moreover, exposure can be estimated through the use of mathematical modeling by taking a plaintiff's work history into account to estimate the exposure to a toxin. It is also possible that more qualitative means could be used to express a plaintiff's exposure. Comparison to the exposure levels of subjects of other studies could be helpful provided that the expert made a specific comparison sufficient to show now the plaintiff's exposure level related to those of the other subjects. These, along with others, could be potentially acceptable ways to demonstrate causation if they were found to be generally accepted as reliable in the scientific community.]

EVIDENCE—RATE OF SPEED—TREADMILL EXPERIENCE

Eighteen-year-old plaintiff's estimation of his speed in running away from an oncoming subway train which his expert used to conclude that the train operator could have stopped in time to have avoided striking plaintiff was admissible:

Plaintiff established a sufficient foundation demonstrating the basis of his knowledge—two years experience running on a treadmill calibrated to measure miles per hour. In comparable situations, both police and civilian witnesses with an appropriate basis for knowledge have been permitted to give testimony estimating the speed of moving motor vehicles. The reliability of plaintiff's testimony and the weight it should have been accorded were issues for the finders of fact. The jury, which was best able to observe plaintiff's testimony and evaluate his credibility, resolved the question of reliability in plaintiff's favor. It cannot be said that the jury's conclusion was utterly irrational.

Soto v. New York City Transit Authority, 6 N.Y.3d 487, 813 N.Y.S.2d 701 (2006).

INDEMNIFICATION—COMMON LAW—LESS THAN 50 PERCENT LIABLE—ARTICLE 16

Owner or general contractor who was held strictly liable under Labor Law § 241(6) is not entitled to full indemnification for non-economic loss from the party actually responsible if the latter's liability is apportioned 50 percent or less:

A third-party defendant [Home] found to have only one-ninth of the tortfeasors'

total fault should be responsible for one-ninth of the economic loss.

* * *

CPLR 1602(2)(ii) is, likewise, a savings provision intended to ensure the courts do not read article 16 as altering or limiting the pre-existing right of indemnification. This does not, however, entitle a party to 100% recovery. Therefore, though Meadowlakes [owner] retained its right to indemnification, Home [plaintiff's employer], as a party found 10% liable, was limited to its proportionate share with respect to non-economic damages. To calculate Home's share, we divide indemnity among potential indemnitors and exclude Frank's 10% share of fault since he cannot be an indemnitor. Home's total indemnity to Meadowlakes will, therefore, be all economic loss and one ninth of non-economic loss encompassed within the settlement, with interest.

Frank v. Meadowlakes Development Corporation, 6 N.Y.3d 687, 816 N.Y.S.2d 715 (2006), *rev'g* 20 A.D.3d 874, 798 N.Y.S.2d 820 (4th Dep't 2005) and ***Salamone v. Wincaf Properties***, 9 A.D.3d 127, 777 N.Y.S.2d 37 (1st Dep't 2004).

[EDITOR'S NOTE: The jury, in the *Frank* trial, apportioned liability as follows: 10 percent to plaintiff; 80 percent to general contractor, D.J.H. Enterprises; and 10 percent to Home Insulation & Supply, Inc., plaintiff's employer.]

INDEMNITY—COMMERCIAL LEASE—OWN NEGLIGENCE—INSURANCE—GOL § 5-321

A commercial lease with an indemnification clause holding the landlord harmless for its own negligence except sole negligence and coupled with an insurance procurement provision does not violate GOL § 5-321. The landlord is entitled to indemnity notwithstanding that the parties stipulated that if the case had gone to trial the landlord's allocation would have been 90 percent:

> Here, subsection (c) of the indemnification clause in the lease required Depository [tenant] to indemnify New Water [landlord] for "any" accident occurring in Depository's premises "unless caused solely by [New Water's] negligence." This broadly drawn provision unambiguously evinced an intent that Depository indemnify New Water for the latter's own negligence, provided New Water was not 100% negligent. In this case, the parties stipulated that New Water was 90% at fault and Depository's contractor was 10% responsible for the water damage. Hence, New Water was not solely liable under the terms of the stipulation and the clear language of the lease unmistakably affords indemnification under the circumstances of this case.
>
> * * *
>
> As in *Hogeland [v. Sibley, Lindsay & Curr Co.*, 42 N.Y.2d 153, 397 N.Y.S.2d 602 (1997)], this case presents a commercial lease negotiated between two sophisticated parties who included a broad indemnification provision, coupled with an insurance procurement requirement. . . . Additionally, Depository's insurer—not Depository itself—will bear ultimate responsibility for the indemnification payment, which is precisely the result contemplated by the parties when they entered into the lease. Where, as here, a lessor and lessee freely enter into an indemnification agreement whereby they use insurance to allocate the risk of liability to third parties between themselves, General Obligations Law § 5-321 does not prohibit indemnity.

Great Northern Insurance Company v. Interior Construction Corp., 7 N.Y.3d 412, 823 N.Y.S.2d 765 (2006).

INSURANCE—ADDITIONAL INSURED—COVERAGE

Defendant insurance company, One Beacon, was obligated to defend general contractor, BP, who was named as an additional insured on the policy of subcontractor, Alfa Piping, with respect to liability "arising out of your ongoing operations performed for that insured." The court rejected that coverage for an additional insured is triggered only when a court has made findings of fact giving rise to such coverage under the terms of the endorsement:

> It follows from *Pecker [v. Iron Works of N.Y.*, 99 N.Y.2d 391, 756 N.Y.S.2d 882 (2003)] that BP's coverage as an additional insured under Alfa's policy is primary, a point apparently not disputed by Beacon. Moreover, since BP, as an additional insured under Alfa's policy, "enjoy[s] the same protection as the named insured," the same principles govern the activation of Beacon's duty to defend for both Alfa and BP. Accordingly, since it is undisputed that [plaintiff] Cosentino's amended complaint sets forth a potential basis for BP's liability

> within the scope of BP's coverage under Alfa's policy, it remains possible that Cosentino will prevail on that basis, Beacon is obligated to defend BP in the *Cosentino* Action, just as it would be obligated to defend Alfa if called upon to do so. That Alfa may ultimately be exonerated of responsibility for Cosentino's injuries—in which event Beacon would have no obligation to indemnify BP—is immaterial to the issue of Beacon's duty to defend BP while the issue of Alfa's responsibility remains unresolved.

***BP Air Conditioning v. One Beacon Insurance Group*,** 33 A.D.3d 116, 821 N.Y.S.2d 1 (1st Dep't 2006), *aff'd as modified*, 8 N.Y.3d 708, 840 N.Y.S.2d 302 (2007).

[EDITOR'S NOTE: Two judges vigorously dissented. Justice Sullivan maintained that the condition precedent to the triggering of the additional insured coverage was not met, namely that the putative additional insured's liability for the underlying claim arises out of Alfa's ongoing operations performed for BP. The testimony is that the oil that caused plaintiff to fall could have emanated from activities of other contractors:

> Since that issue [who is responsible for plaintiff's injury] cannot be summarily resolved, no coverage obligation, either to indemnify, as the motion court held, or to defend, is, as yet, triggered.]

INSURANCE—BROKER—DUTY—FAILURE TO OBTAIN COVERAGE

Absent proof of a specific request for coverage or a "special relationship," defendant broker (R & K) was not liable to policyholder (Hoffend) for failing to obtain coverage for property damage arising out of foreign projects:

> *Murphy v. Kuhn* (90 N.Y.2d 266, 660 N.Y.S.2d 371 [1997]) is on point. There, we held that a broker has a common-law duty either to obtain the coverage that a customer specifically requests or to inform the customer of an inability to do so. Although Hoffend contends it made a request sufficiently specific to trigger that duty, the record does not support its assertion. A general request for coverage will not satisfy the requirement of a specific request for a certain type of coverage.
>
> Moreover, the broker in *Murphy* handled the policyholder's personal insurance needs for 13 years and served as the company's insurance broker for over three decades. We held that there was no special relationship in that case and we decline to hold that one exists here. In this case, the services provided by Nickel in his capacity as an R & K employee did not rise to the level of a special relationship. Hoffend, a sophisticated commercial entity, did not compensate R & K for its insurance advice apart from its payment of premiums, nor did it delegate its insurance decision-making responsibility to R & K. In short, as in any ordinary broker-client relationship, Hoffend told R & K in general what insurance Hoffend had decided to purchase. It did not ask R & K what that insurance should be.

***Hoffend & Sons, Inc. v. Rose & Kiernan, Inc.*,** 7 N.Y.3d 152, 818 N.Y.S.2d 798 (2006).

INSURANCE—COVERAGE—SELF-DEFENSE SHOOTING

Insured (Cook) who shot intruder (Barber) after he broke into his home is entitled to be defended by his homeowner's carrier even though insured knew that the shot would injure the intruder:

> Among other things, the complaint alleges that Cook negligently caused Barber's death. If such allegations can be proven, they would fall within the scope of the policy as a covered occurrence. The policy defines an "occurrence" as an accident, and we have previously defined the term "accident" albeit in a life insurance policy "to pertain not only to an unintentional or unexpected event which, if it occurs, will foreseeably bring on death, but equally to an intentional or expected event which unintentionally or unexpectedly has that result." Thus, if Cook accidentally or negligently caused Barber's death, such event may be considered an "occurrence" within the meaning of the policy and coverage would apply. The fact-finder in the underlying action may indeed ultimately reject the notion that Cook negligently caused Barber's death given the evidence of intentional behavior, but that uncertain outcome is immaterial to the issue raised here—the insurer's duty to defend in an action where it is alleged that the injury was caused by the negligent conduct of the insured.

***Automobile Insurance Company of Hartford v. Cook*,** 7 N.Y.3d 131, 818 N.Y.S.2d 176 (2006).

INSURANCE—SUBROGATION—NO FAULT—RELEASE

Defendant who settled claim on behalf of its driver (Weinreb), and received release from plaintiff Bradley, cannot be sued by plaintiff's insurer, State Farm, for A-PIP payments it made to Bradley since there is no proof that Weinreb had notice of any A-PIP payments before settling:

> The plaintiff's right of subrogation only arose upon payment of the claim for A-PIP benefits. The plaintiff, via the extrinsic evidence submitted on the motion, established that the general release, executed in connection with the underlying personal injury action, was intended to cover the subject matter of the action. There is no evidence that, at the time the plaintiff's insured reached settlement with Weinreb and signed the general release, Weinreb was aware of the plaintiff's payment of A-PIP benefits, or of any claim against Weinreb for such payment such that the release would not have barred the subrogation claim. Under the circumstances, Weinreb did not know or have reason to know of the plaintiff's subrogation rights at the time he entered into the settlement. At best, the defendants third-party plaintiffs' claim of notice to Weinreb is speculative. Therefore, the Supreme Court should have granted Weinreb's motion to dismiss the third-party complaint. Insofar as Weinreb is concerned, Bradley impaired the plaintiff's right of subrogation against him.

State Farm Mutual Automobile Insurance Company v. Hertz Corporation, 28 A.D.3d 643, 813 N.Y.S.2d 513 (2d Dep't 2006).

JUDGMENT—SUMMARY JUDGMENT—EXPERT'S AFFIDAVIT

Defendant who denied it had notice of or created the condition allowing ice to form due to water accumulating in a depression on a warped step was entitled to summary judgment notwithstanding plaintiff's expert's affidavit stating that the ice accumulated on the step due to a recurrent dangerous condition:

> Contrary to the plaintiff's contentions, her expert's affidavit was conclusory and speculative. There is no proof in the record supporting the expert's claim that the rain that fell prior to the plaintiff's fall accumulated and froze on the allegedly warped portion of the step. Furthermore, there is no meteorological proof as to what the outdoor temperature was prior to the plaintiff's fall nor how long, if at all, it was at or below the freezing point. Finally, the plaintiff's expert's affidavit was internally contradictory as to how the water could accumulate on that step, even assuming that it was warped in the manner in which the expert claimed it was. Thus, the affidavit was insufficient to raise a triable issue of fact.

Reilly v. Carrollwood Homeowners Association, Inc., 31 A.D.3d 417, 818 N.Y.S.2d 157 (2d Dep't 2006).

JUDGMENT—SUMMARY JUDGMENT—120 DAYS—UNTIMELY

Plaintiff's cross motion for summary judgment, made after defendants timely moved for summary judgment but not within the 120-day period for making summary judgment motions, was untimely:

> A cross-motion for summary judgment made after the expiration of the statutory 120-day period may be considered by the court, even in the absence of good cause, where a timely motion for summary judgment was made seeking relief "nearly identical" to that sought by the cross-motion. An otherwise untimely cross motion may be made and adjudicated because a court, in the course of deciding the timely motion, may search the record and grant summary judgment to any party without the necessity of a cross motion. The court's search of the record, however, is limited to those causes of action or issues that are the subject of the timely motion. Here, defendants' motion was addressed to the causes of action under Labor Law § 200 and § 241(6), while plaintiff's cross-motion concerned a different cause of action.

Filannino v. Triborough Bridge and Tunnel Authority, 34 A.D.3d 280, 824 N.Y.S.2d 244 (1st Dep't 2006).

[EDITOR'S NOTE: Justices Tom and Saxe dissented, finding that plaintiff established good cause for the delay.

The First Department appears to be allowing a co-defendant to cross move for summary judgment even after the time period for making summary judgment motions has expired if the relief sought is "nearly identical" to the first movant's motion. The court cited *Fahrenholtz v. Security Mutual Ins. Co.*, 32 A.D.3d 1326, 822 N.Y.S.2d

346 (4th Dep't 2006) and *Bressingham v. Jamaica Hospital Medical Center*, 17 A.D.3d 496, 793 N.Y.S.2d 176 (2d Dep't 2005). The Second Department, however, in recent cases has retreated from this position and has denied untimely cross-motions by co-defendants for summary judgment. In *Gaines v. Shell-Mar Food, Inc.*, 21 A.D.3d 986, 801 N.Y.S.2d 376 (2d Dep't 2005), the court reinstated the complaint against co-defendant Shell-Mar Foods whose cross-motion for summary judgment was granted by the Supreme Court even though it was made 142 days after the Note of Issue was filed. In reversing, the court reasoned:

> Although Shell-Mar denominated its motion a cross motion, its effort to "piggyback" on its codefendant's timely motion for summary judgment is unavailing since a cross motion can only be made for relief against a "moving party," and the plaintiff was not a "moving party."

See also Fuller v. Westchester County Health Care Corp., 32 A.D.3d 896, 821 N.Y.S.2d 241 (2d Dep't 2006) [defendant's motion for summary judgment untimely even though co-defendants filed a timely motion for summary judgment]].

JURISDICTION—LONG-ARM—TRANSACTS BUSINESS WITHIN STATE (CPLR 302[a][1])

Montana Board of Investments ("MBOI"), a Montana state agency charged with managing an investment program for the state, that sold securities to a New York plaintiff, Deutsche Bank Securities, Inc. ("DBSI") via "instant messaging" but never entered the state is nonetheless subject to long-arm jurisdiction for breach of contract under CPLR 302(a)(1):

> MBOI should reasonably have expected to defend its actions in New York. As distinct from an out-of-state individual investor making a telephone call to a stockbroker in New York, MBOI is a sophisticated institutional trader that entered New York to transact business here by knowingly initiating and pursuing a negotiation with a DBSI employee in New York that culminated in the sale of $15 million in bonds. Negotiating substantial transactions such as this one was a major aspect of MBOI's mission—"part of its principal reason for being."
>
> * * *
>
> In short, when the requirements of due process are met, as they are here, a sophisticated institutional trader knowingly entering our state—whether electronically or otherwise—to negotiate and conclude a substantial transaction is within the embrace of the New York long-arm statute.

Deutsche Bank Securities, Inc. v. Montana Board of Investments, 7 N.Y.3d 65, 818 N.Y.S.2d 164 (2006).

MOTIONS—SUMMARY JUDGMENT—NON-PARTY AFFIDAVIT—DISREGARDED—CONTRADICTORY

Affidavit of non-party friend of plaintiff, Ms. Mulzac, submitted in opposition to defendant's motion for summary judgment that it had no constructive notice of boy sitting in aisle, should have been rejected by the Supreme Court because it contradicted plaintiff's deposition testimony concerning basic facts:

> Far from raising a triable issue of fact as to the duration of the boy's presence, Mulzac's affidavit gives rise to entirely different questions which cast grave doubt on her credibility. While issues of fact and credibility ordinarily may not be determined on a motion for summary judgment, courts have occasionally disregarded affidavits or other evidence submitted in opposition to such a motion where they directly contradict the plaintiff's own version of the accident and are plainly tailored to avoid dismissal of the action. In this case, Mulzac's affidavit is completely at odds with plaintiff's deposition testimony and so clearly designed to lengthen the time period of the boy's presence in the aisle in order to raise a triable issue as to constructive notice, that this is one of those rare occasions where such evidence must be disregarded by this Court.

Branham v. Loews Orpheum Cinemas, Inc., 31 A.D.3d 319, 819 N.Y.S.2d 250 (1st Dep't 2006), *aff'd*, 8 N.Y.3d 931, 834 N.Y.S.2d 503 (2007).

[EDITOR'S NOTE: Justice McGuire vigorously dissented on many issues, including the majority's rejecting Ms. Mulzac's affidavit:

> The majority's disregard of Ms. Mulzac's affidavit is not defensible. As the majority recognizes, the occasions on which an affidavit or other testimonial evidence can be disregarded on a motion for summary judgment are "rare." The majority correctly describes those occasions as ones in which the "affidavits or other evidence submitted in opposition to such a motion [for summary judgment] . . . directly con-

tradict the plaintiff's own version of the accident and are plainly tailored to avoid dismissal of the action." Although Ms. Mulzac's affidavit differs from plaintiff's deposition testimony, it does not "directly contradict" the key testimony of plaintiff, and it can be seen as "plainly tailored" only with unrelenting and unreasonable cynicism.]

MOTIONS—SUMMARY JUDGMENT—*RES IPSA LOQUITUR*

Plaintiff's decedent, who it is alleged was injured while delivering materials to a private house when roofing materials fell from the roof, is not entitled to summary judgment based solely on the *res ipsa loquitur* doctrine:

> Only in the rarest of res ipsa loquitur cases may a plaintiff win summary judgment or a directed verdict. That would happen only when the plaintiff's circumstantial proof is so convincing and the defendant's response so weak that the inference of defendant's negligence is inescapable.

Morejon v. Rais Construction Company, 7 N.Y.3d 203, 818 N.Y.S.2d 792 (2006).

[EDITOR'S NOTE: There was a serious question whether plaintiff's decedent was even injured at the house-construction area.]

MUNICIPALITIES—PRIOR NOTICE—NEGLIGENT REPAIR—POTHOLE

The City's negligent repair of a pothole, which did not exacerbate it, did not preclude the City from relying on prior written notice law to dismiss plaintiff's complaint.

Kushner v. City of Albany, 7 N.Y.3d 726, 818 N.Y.S.2d 182 (2006), *aff'g* 27 A.D.3d 851, 811 N.Y.S.2d 796 (3d Dep't 2006).

[EDITOR'S NOTE: The Appellate Division, in affirming the granting of a directed verdict, reasoned:

> The gist of plaintiffs' proof at trial was that defendant's use of a cold patch (an admittedly temporary cold weather remedy) to fill the subject pothole without first excavating it resulted in the patch being dissipated prior to the date of the accident. In other words, what was once a pothole gradually became a pothole again. Countenancing plaintiff's logic, defendant would have no liability if he had done nothing, but is now liable because it made an imperfect repair that clearly did not make the matter any worse. Such an illogical result compels the conclusion that an attempted repair which does not exacerbate the defective condition cannot constitute an affirmative act of negligence such that defendant is precluded from relying on its prior notice law.]

NEGLIGENCE—ASSUMPTION OF RISK—ICE SKATER

Plaintiff, an experienced speedskater who fell on the ice striking the fiberglass boards surrounding the rink and injured herself when her feet lifted the safety pads placed over the boards causing her hip to strike the boards directly, has no negligence cause of action since she assumed the risk:

> Because plaintiff was aware of the exact manner in which the safety pads had been set up on the day of her accident, the Appellate Division correctly held that plaintiff had assumed the risk of her injuries, and properly affirmed the Supreme Court order granting summary judgment dismissing the complaint.

Ziegelmeyer v. United States Olympic Committee, 7 N.Y.3d 893, 826 N.Y.S.2d 598 (2006), *aff'g* 28 A.D.3d 1019, 813 N.Y.S.2d 817 (3d Dep't 2006).

[EDITOR'S NOTE: Two Appellate Division justices dissented, concluding that the record contains arguable questions of fact whether the protective pads placed over the boards on the day of the accident were properly installed according to the applicable standards set forth by the International Skating Union and in the Special Regulations for Speed Skating and Short Track Speed Skating].

NEGLIGENCE—EXCESSIVELY HOT WATER—DISABLED PLAINTIFF

Supreme Court correctly denied defendants' summary judgment motion where a paraplegic burned both of his legs after the cafeteria in the vocational training school he was attending served him with excessively hot water to make tea. Defendants did not make a *prima facie* showing that the water served had not been "heated beyond reasonably expected limits":

> The appellants produced no competent evidence to establish that the water given to the plaintiff on the day of the accident was within the range that would normally be expected by a typical consumer of tea. There was no competent proof that

> the machine from which the hot water was dispensed was "in good working order [or] operating within the temperature parameters provided by the manufacturer." In seeking summary judgment, the appellants instead relied on the plaintiff's own deposition testimony, the substance of which supported the opposite inference, that is, the inference that the water that had been given to the plaintiff on the day of the accident was, in fact, "heated beyond reasonably expected limits." The plaintiff's deposition testimony would also support the inference that one or more of the defendants had actual notice that the brewing apparatus used in the cafeteria was producing overly hot coffee, and that a cafeteria worker had in fact been burned on a prior occasion.

McClean v. National Center for Disability Services, 30 A.D.3d 383, 816 N.Y.S.2d 551 (2d Dep't 2006).

NEGLIGENCE—INTERVENING CAUSE

Plaintiff, who sustained skin necrosis and abscess after he replaced his customized wheelchair with a temporary wheelchair not customized for his body, does not have a cause of action for the injuries sustained:

> Although the issue of proximate cause is ordinarily for the fact finder to resolve, defendant established that the ill-fitting replacement wheelchair provided by a third party constituted an independent intervening occurrence which operated upon, but did not flow from, the original negligence.

Campbell v. Central New York Regional Transportation Authority, 7 N.Y.3d 819, 822 N.Y.S.2d 751 (2006), *rev'g* 28 A.D.3d 1083, 814 N.Y.S.2d 456 (4th Dep't 2006).

[EDITOR'S NOTE: The majority found that defendant was not entitled to summary judgment because there was a triable issue of fact whether the accident was a proximate cause of plaintiff's injuries or whether an intervening act broke the causal nexus.]

NEGLIGENCE—LABOR LAW § 200—GENERAL CONTRACTOR

Plaintiff, who tripped over an electrical pipe protruding two or three inches from a newly laid floor, does not have a Labor Law § 200 claim against the general contractor notwithstanding that the general contractor had an on-site safety manager who may have had overall responsibility for the safety of the work done by the subcontractors:

> Plaintiff cannot recover in negligence or pursuant to Labor Law § 200 because no triable issue of fact exists that defendant [general contractor] IDI Construction Company, Inc.'s on-site safety manager "control[led] the activity bringing about the injury to enable it to avoid or correct an unsafe condition" or that IDI maintained an unreasonably dangerous work environment.

O'Sullivan v. IDI Construction Company, Inc., 7 N.Y.3d 805, 822 N.Y.S.2d 745 (2006), *aff'g* 28 A.D.3d 225, 813 N.Y.S.2d 373 (1st Dep't 2006).

[EDITOR'S NOTE: Justices Saxe and Malone dissented in the Appellate Division, finding that the Labor Law § 200 claim against the general contractor was improperly dismissed:

> Inasmuch as the general contractor assigned to the site an employee called the "site safety manager" whose job it was to supervise the subcontractors in regard to safety, and report safety problems to the appropriate foreman, it makes little sense to hold that, as a matter of law, this general contractor lacked the authority to "control the activity bringing about the injury to enable it to avoid or correct an unsafe condition."]

NEGLIGENCE—LABOR LAW § 240(1)—DOMESTIC CLEANING—THREE-FEET FALL

Plaintiff, who was part of a cleaning crew employed to clean interior parts of the dormitory and fell from a height of three feet while using a rag and Windex to clean the inside portion of a window in the defendants' dormitory building, does not have a Labor Law § 240(1) cause of action because she was engaged in routine maintenance:

> Liability under Labor Law § 240(1) is contingent on "the existence of a hazard contemplated in [that section] and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein." One of the activities enumerated in the statute is the cleaning of a building or a structure. Although this Court has held that Labor Law § 240(1) applies to window cleaners who are subjected to elevation-related risks inherent in their work, the statute does not apply to truly domestic cleaning or routine maintenance.
>
> The plaintiff was cleaning windows from a height of three feet with a rag and glass

> cleaner. This is routine maintenance which Labor Law § 240(1) does not protect.

Swiderska v. New York University, 34 A.D.3d 445, 824 N.Y.S.2d 133 (2d Dep't 2006).

NEGLIGENCE—LABOR LAW § 240(1)—ENUMERATED AND NON-ENUMERATED WORK

Plaintiff, who was employed in repairing or altering a sewer line but was injured when he fell from a backhoe bucket while attempting to reconnect an electrical wire that fell off a metal hook two days earlier that was not part of the sewer project, states a cause of action under Labor Law § 240(1):

> The plaintiff was employed in the repair or alteration of the sewer line at the time of his accident and the work he was performing was ancillary to those acts. "[I]t is neither pragmatic nor consistent with the spirit of the statute to isolate the moment of injury and ignore the general context of the work. The intent of the statute was to protect workers employed in the enumerated acts, even while performing duties ancillary to those acts." Here, at the time of the accident, the plaintiff and his coworkers were still in the process of finishing the restoration phase of the sewer repair project. The street evacuation was still being backfilled with asphalt and there is a triable issue of fact as to whether reattaching the wire to the hook was required as part of the plaintiff's employer's contract with the City. Certainly, there is no "bright line separating enumerated and nonenumerated work."

Lijo v. City of New York, 31 A.D.3d 503, 818 N.Y.S.2d 569 (2d Dep't 2006).

NEGLIGENCE—LABOR LAW § 240(1)—FIVE-to-SIX-INCH GAP SLIP

Building owner cannot be held liable under Labor Law § 240(1) for injuries sustained by plaintiff as he was walking backward on top of a stack of insulation boards piled eight feet high and slipped into a gap between them while pulling the tarp to cover them. Plaintiff fell into the gap up to his knee, injuring his right ankle and foot:

> The act of falling into a five to six-inch gap between insulation boards, which were stacked eight-feet tall, is not a gravity related accident encompassed by Labor Law § 240(1).

Keavey v. New York State Dormitory Authority, 8 N.Y.3d 859, 816 N.Y.S.2d 722 (2006), *aff'g* 24 A.D.3d 1193, 807 N.Y.S.2d 769 (4th Dep't 2005).

[EDITOR'S NOTE: Two judges dissented, concluding that the stacks of insulation boards constituted an elevated worksite and plaintiff was exposed to one of the extraordinary elevation risks contemplated by Labor Law § 240(1). Moreover, plaintiff need not have fallen to the ground to qualify for the protection of Labor Law § 240(1). But the dissenting judges found an issue of fact whether plaintiff's actions were the sole proximate cause of the accident because it was alleged that the task was for two workers to perform and that he was instructed not to climb on to stacks of insulation boards that were more than a single bundle—more than four feet high.]

NEGLIGENCE—LABOR LAW § 240(1)—WALLPAPERING

Plaintiff, an independent contractor, who fell from a stepladder while wallpapering, is not covered under Labor Law § 240(1) since his work was not part of a larger project that included activities covered under Labor Law § 240(1):

> Plaintiff fails to allege sufficient facts to establish that her work was part of a larger renovation project subject to coverage under the statute.

Schroeder v. Kalenak Painting & Paperhanging, Inc., 7 N.Y.3d 797, 82 N.Y.S.2d 804 (2006), *aff'g* 27 A.D.3d 1097, 811 N.Y.S.2d 240 (4th Dep't 2006).

[EDITOR'S NOTE: Two dissenting judges maintained that plaintiff's wallpaper activity was part of a larger repair project because plaintiff testified at her deposition that extensive work was being performed in the kitchen, which was bare of appliances, and that certain parts of the apartment were in the process of being painted.

The dissenters relied on *Loreto v. 376 St. John's St. Condominium*, 15 A.D.3d 454, 790 N.Y.S.2d 190 (2d Dep't 2005), where the court held that plaintiff, who fell from a ladder while applying a wallpaper border to the upper portions of the walls in the lobby and interior stairway, was covered because his duties included preparing the walls for application of the wallpaper border by scraping and spackling the uneven surfaces and painting areas that were discolored or flaking.]

NEGLIGENCE—PREMISES—CRIMINAL ATTACK—NEGLIGENTLY MAINTAINED ENTRANCE

Premises owner is entitled to summary judgment since it met its duty to take minimal precautions to protect decedent tenant from foreseeable harm from criminal conduct of a third party:

> Defendants established that the doors into the building were secured by automatic locks accessible by a computerized key fob issued only to tenants, that there was an intercom system by which tenants admitted visitors, that the apartment doors were secured by a lock with a dead bolt that locked automatically unless left unlocked by tenant, and that each apartment door contained a peep hole, and we conclude that plaintiffs failed to raise an issue of fact whether the "assailant gained access to the premises through a negligently maintained entrance."

Browning v. James Properties, Inc., 32 A.D.3d 1160, 821 N.Y.S.2d 696 (4th Dep't 2006).

NEGLIGENCE—PREMISES—DOG BITE/OFF DEFENDANT'S PROPERTY

Landlord is not liable for a dog bite by tenant's dog occurring outside the premises:

> Defendant, who did not own the dog but was merely the landlord of the premises where the dog was kept, had no responsibility to prevent a dog bite incident that allegedly occurred off defendant's property.

Sedeno v. Luciano, 34 A.D.3d 365, 824 N.Y.S.2d 294 (1st Dep't 2006).

[EDITOR'S NOTE: The First Department joins the other three departments in holding that a premises owner does not owe any duty of care to a person injured outside the premises even if the injury was caused by a dog owned by a tenant. *See Braithwaite v. Presidential Prop. Servs., Inc.*, 24 A.D.3d 487, 806 N.Y.S.2d 681 (2d Dep't 2005); *Terrio v. Daggett*, 208 A.D.2d 1163, 617 N.Y.S.2d 585 (3d Dep't 1994); and *Weipert v. Oldfield*, 298 A.D.2d 974, 748 N.Y.S.2d 123 (4th Dep't 2002)].

NEGLIGENCE—PREMISES—DUTY—RADIATOR COVERS

A residential landlord does not have a duty to provide radiator covers in apartments where children reside and cannot be held liable for failing to provide radiator covers even where the tenants requested them:

> Plaintiffs do not claim that the radiator that injured Aaron needed repair, or was defective in any way. Plaintiffs' claim is that an uncovered radiator in good working order, though not a hazard in a home occupied only by adults, is dangerous to children. No duty to remedy this alleged hazard is imposed by the Multiple Dwelling Law or arises under common law by virtue of the lease. Accordingly, any duty to protect children from uncovered radiators remains that of the tenant, unless some other statute or regulation imposes it on the landlord.

Rivera v. Nelson Realty, LLC, 7 N.Y.3d 530, 825 N.Y.S.2d 422 (2006).

NEGLIGENCE—PROXIMATE CAUSE—ILLEGAL PARKING

Plaintiff, who was struck in the rear by a vehicle whose driver ran a red light, causing his bus to strike an illegally parked bus owned by defendant, does not have a cause of action against the illegally parked bus:

> Even assuming the location of the bus owned by defendant Leprechaun Lines, Inc. in the traffic lane at the time of the accident resulted, in some respect, from negligence on the part of Leprechaun, the City of Buffalo or the County of Erie/Erie Community College as plaintiffs allege, these defendants were nonetheless entitled to summary judgment because they established, as a matter of law, that the alleged negligence was not a proximate cause of plaintiff's injuries.

Gerrity v. Muthana, 7 N.Y.3d 834, 824 N.Y.S.2d 206 (2006), *aff'g* 28 A.D.3d 1063, 814 N.Y.S.2d 440 (4th Dep't 2006).

[EDITOR'S NOTE: Two dissenting judges in the Appellate Division held that there were issues of fact whether the illegally parked bus's negligence was a proximate cause of the collision between this bus and the bus operated by the plaintiff:

> We view this incident as a "chain reaction" accident consisting of two separate collisions. The first collision was unrelated to defendant's bus. The second collision with defendant's illegally-parked bus caused the injuries. We thus conclude that there are issues of fact whether defendant was negligent in parking the bus illegally and whether that negligence was a proximate cause of the collision between plaintiff's bus and defendant's bus.]

NEGLIGENCE—RECKLESS CONDUCT—SOLE LEGAL CAUSE

Eighteen-year-old plaintiff's negligence (75 percent) in walking along the catwalk on the subway track was not the sole proximate cause of his being struck by an oncoming train:

> Contrary to NYCTA's argument and the dissent, plaintiff's conduct, although a substantial factor in causing the accident, was not so egregious or unforeseeable that it must be deemed a superseding cause of the accident absolving defendant of liability.
>
> * * *
>
> Here, plaintiff surely and very substantially contributed to his injury, but did not engage in the type of dangerous criminal conduct that prohibited recovery in *Barker v. Kallash*, 63 N.Y.2d 19, 479 N.Y.S.2d 201 (1984). Nor can it be said that his conduct was such as to vitiate the duty of reasonable care owed to him by the train operator to see what there was to be seen through the proper use of his senses and to bring the train to a safe stop.
>
> We have held that a train operator may be found negligent if he or she sees a person on the tracks "from such a distance and under such other circumstances as to permit him [or her], in the exercise of reasonable care to stop before striking the person." The train operator's duty certainly is not vitiated because plaintiff was voluntarily walking or running along the tracks or because of any reckless conduct on plaintiff's part.
>
> Thus, it was not irrational for the jury to find NYCTA negligent. There is a reasonable view of the evidence that the train operator failed to see the teenagers from a distance from which he should have seen them, and that he failed to employ emergency braking measures. The jury's determination that the operator could have avoided this accident is an affirmed finding of fact with support in the record and is beyond our further review.

Soto v. New York City Transit Authority, 6 N.Y.3d 487, 813 N.Y.S.2d 701 (2006).

[EDITOR'S NOTE: Three judges dissented in an opinion by Judge R.S. Smith, who concluded that plaintiff's injuries were entirely his own fault even if a non-negligent motorman might have been able to stop the train in time to avoid the accident:

> The principle we have applied in previous cases, and should apply here, is that people whose failure to take care of themselves is extreme may not shift any of the consequences to others. Anyone of normal human compassion will sympathize with plaintiff; he is not the only eighteen-year-old who ever acted recklessly, and he has paid a much higher price for it than most. But I do not think it consistent with law or wise policy to hold, as the majority does, that the New York City Transit Authority must compensate him in part for his loss. The Transit Authority moved, before the case was submitted to the jury, for a directed verdict, asserting that plaintiff's reckless conduct was the sole legal cause of the accident. I think that motion should have been granted.]

NO-FAULT—SERIOUS INJURY—OBJECTIVE MEDICAL TESTS

Defendants failed to establish their *prima facie* burden of demonstrating that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) because the physician's affirmed medical report did not set forth objective medical testing performed to support the conclusion:

> The defendants' examining orthopedist merely stated in his affirmed medical report that upon physical examination, the plaintiff "had full range of motion of all segments of the spine extending from the cervical to [the] lumbosacral region," without setting forth the objective medical testing performed to support his conclusion.

Vazquez v. Basso, 27 A.D.3d 728, 815 N.Y.S.2d 626 (2d Dep't 2006).

[EDITOR'S NOTE: In *Sullivan v. Dawes*, 28 A.D.3d 472, 811 N.Y.S.2d 596 (2d Dep't 2006), the court also denied defendants' motion for summary judgment based upon § 5102(d) where an orthopedist assigned a numerical value to the range of motion but failed to compare his findings against the normal range of motion].

PREMISES—NEGLIGENCE—SLIPPERY CONDITION—FACTUAL QUESTION

Plaintiff's theory of liability that premises owner created a slippery condition when it removed mats from the lobby floor of her building and dirt, dust and debris that collected in the grooves of the mats fell onto the floor, which is not cleaned until the evening, is sufficient to raise questions of fact

> whether a slippery substance on the floor caused plaintiff's injuries and, if so, whether defendants' negligence created the condition.

Lempert v. Steinberg & Pokoik Management Corp., 7 N.Y.3d 917, 827 N.Y.S.2d 684 (2006), *rev'g* 32 A.D.3d 215, 820 N.Y.S.2d 215 (1st Dep't 2006).

[EDITOR'S NOTE: Three judges dissented and voted to affirm for the reasons stated by majority in the Appellate Division. The Court of Appeals' majority apparently adopted the Appellate Division dissenting judges' reasoning. They rejected the majority's conclusion that plaintiff's theory is nothing more than speculation and therefore did not raise a triable issue of fact. The Appellate Division dissenters concluded:

> From the evidence submitted it is possible to logically conclude that some time before plaintiff fell, defendants had rolled up the mats that had been on the lobby floor over the weekend, but had not properly cleaned up the floor thereafter. Such a finding would be neither guesswork nor speculation, but a reasonably drawn logical inference.
>
> Defendants' assertions as to the schedule for putting away the floor mats, or for cleaning the floor after the mats are rolled up, do not establish those assertions as incontrovertible facts or otherwise disprove plaintiff's theory of liability. They merely contribute to the questions of fact that ought to be left for trial.]

PRE-TRIAL DISCOVERY—INTERVIEWS—PLAINTIFF'S TREATING PHYSICIAN—HIPAA

Defense counsel are not entitled to conduct post note of issue *ex parte* interviews of plaintiff's non-party treating physicians under the Health Insurance Portability and Accountability Act of 1996:

> After the filing of a note of issue, a court's authority to allow additional pretrial disclosure is limited to a party's demonstration of "unusual or unanticipated circumstances" (22 N.Y.C.R.R. § 202.21[d]). In the absence of additional statutory authority, the "courts should not become involved in post-note of issue trial preparation matters and should not dictate to plaintiffs or defense counsel the terms under which interviews with non-party witnesses may be conducted."
>
> * * *
>
> Simply stated, Fulop moved, with the support of the other defendants, to compel the plaintiffs to consent to a form of disclosure which is beyond the scope of article 31 and the Uniform Rules. The relief requested by defense counsel is simply not authorized by statute.

Arons v. Jutkowitz, 37 A.D.3d 94, 825 N.Y.S.2d 738 (2d Dep't 2006).

PRODUCTS LIABILITY—SUCCESSOR CORPORATION—PRODUCT LINE EXCEPTION

Sawmills and Edgers, who purchased assets of sawmill manufacturer S & W Edger Works, Inc., is not subject to liability caused by the seller's sawmill before the purchase even though it advertised itself as formerly S & W Edger Works, Inc. and stated that it "opened [its] doors for business in 1990," the date Edger Works first sold its products in the marketplace:

> Adoption of the "product line" exception would mark "a radical change from existing law implicating complex economic considerations better left to be addressed by the Legislature."
>
> We therefore join the majority of courts declining to adopt the "product line" exception. Sawmills does not fit within any of the four *Schumacher* exceptions, and therefore cannot be liable for Edger Works' allegedly tortious conduct.

Semenetz v. Sherling & Walden, Inc., 6 N.Y.3d 702, 810 N.Y.S.2d 416 (2006).

[EDITOR'S NOTE: The court abrogated *Hart v. Bruno Mach. Corp.*, 250 A.D.2d 58, 679 N.Y.S.2d 740 (3d Dep't 1998), which expanded *Schumacher v. Richards Shear Co., Inc.*, 59 N.Y.2d 239, 464 N.Y.S.2d 437 (1983), to encompass two additional exceptions in cases alleging strict products liability: "product line" and "continuing enterprise."]

SPOLIATION—PRODUCT LIABILITY ACTION—MISSING HANDLE AND AFFIXING SCREWS—ADVERSE INFERENCE CHARGE

The Supreme Court abused its discretion in granting plaintiff a directed verdict on liability against the hotel that was unable to produce for discovery the plastic handle and affixing screws on its whirlpool tub which plaintiff claims were responsible for his falling when he attempted to lift himself up from the tub:

> Striking a pleading for negligent spoliation is a drastic sanction that is appropriate only where the missing evidence "deprive[s] the moving party of the ability to establish his or her defense or case."
>
> * * *

Although plaintiffs' engineering expert did not have the actual handle and affixing screws available for testing, he was provided with exemplars by the manufacturers. According to his affidavit submitted by the Hotel in opposition to plaintiffs' motion, in testing those exemplars he found "ample evidence that the [handle] was defective in its design" and opined that "there are more structurally sound and better alternative designs for the [handle] that would be more effective and safer for the consumer."

* * *

Because plaintiffs are not required to prove the specific defect in order to present a *prima facie* case of defective design, and because their expert's opinion "exclude[s] all causes of the accident not attributable" to product defect, we conclude that plaintiffs are able to present a *prima facie* case based on defective design despite the spoliation of evidence.

Enstrom v. Garden Place Hotel, 27 A.D.3d 1084, 811 N.Y.S.2d 263 (4th Dep't 2006).

[EDITOR'S NOTE: The Appellate Division, however, granted plaintiff relief to the extent that he is entitled to an adverse inference charge against the hotel.]

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