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# Trial Lawyers Section Digest

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

## Message from the Chair:
### Trial Lawyers—Where the Rubber Meets the Road

If you want to see real democracy in action, come down to the courthouse. Most New Yorkers will never see the inside of the Governor's mansion, or interact with the New York State Senate or Assembly. But at some stage in their lives, almost all New Yorkers will be involved in the judicial process in one form or another, whether it is through jury service, as a witness or as a party litigant. It is in these moments that our citizens will form their opinions about the Courts, and the lawyers that ply their trade in those hallowed halls. Were they treated with dignity and respect by the lawyers, the courthouse personnel, the Judges? Was the administration of justice in our Courts fair, efficient and transparent?

As trial lawyers, we have a tremendous stake in the maintaining and enhancing the public's perception of the credibility and professionalism of the New York State Court System. In the face of budget cuts, burgeoning caseloads and overstretched judicial resources, our challenge is to maintain the faith of our clients, jurors and the public at large that our system of justice works, and that civil disputes, criminal proceedings, and domestic matters are handled fairly and efficiently.

Our agenda for this upcoming year is to ensure that the Trial Lawyers Section remains a relevant, integral part of the judicial process in the State of New York. This year the Trial Lawyers Section will look to reinvigorate the various Section Committees, and we will seek opportunities for the various District Representatives to meet with the local Administrative Judges to explore ways that our Section can assist and help maintain professionalism, credibility and efficiency in the trial courts. We are hopeful that these meetings can take place over the next several months, and that we can open and maintain a dialogue with the judiciary, and report back to our Section membership on the feedback we receive.

I also encourage all our members to view the Trial Lawyers Section's revamped website at www.nysba.org/trial, so that you can see our Section's efforts and programs. I strongly urge our members to consider joining a Section Committee, and become more involved in our Section's activities.

At the grassroots level, the Trial Lawyers Section proudly sponsors the New York Trial Lawyers Cup and Scholarship Awards Program, which is a statewide law school moot court competition in which the winner moves on to the National Trial Competition. This year, under the stewardship of Executive Committee members Thomas Valet (past Chair) and Kevin Kuehner, fifteen law

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schools participated in the competition, which was held at Pace Law School (we thank Justice Alan Scheinkman, Administrative Judge for the 9th District, who graciously permitted the after-hours / weekend use of several courtrooms in the Westchester County Supreme Court for the mock trials). Two schools (Syracuse and St. John's) advanced to the National Finals in Texas, and the team that advances the farthest will receive the Annual Silver Cup (also known as the "Tiffany Cup"). Several individual awards were given as well, including the Anthony J. DiMarco Award for best overall advocate (named after the late Tony DiMarco, the legendary Kings County trial lawyer).

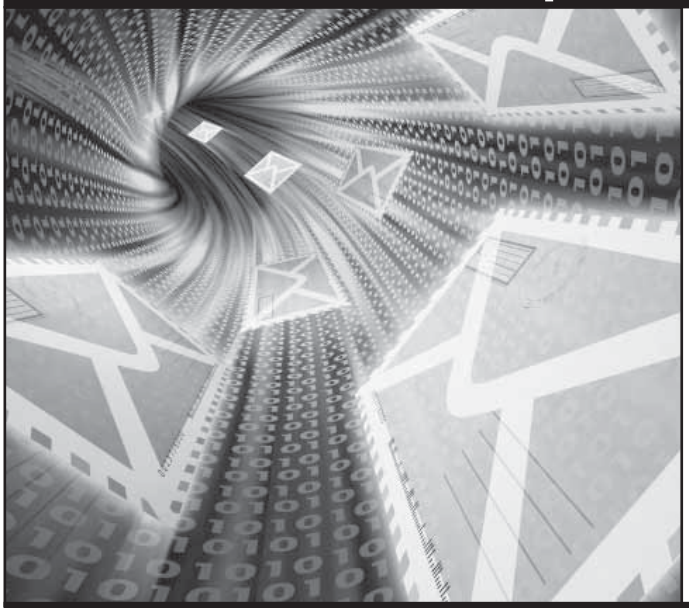
Members of the Trial Lawyers Section also participate in the annual Trial Academy, an intensive five day trial advocacy course held at Cornell University that is sponsored by the Young Lawyers Section. The Trial Academy is a comprehensive introduction to trial techniques and tactics for newly admitted attorneys, and the instructors include some of the most respected jurists and trial lawyers in New York State.

Looking forward, the Trial Lawyers Section Annual Meeting will take place in the heart of beautiful Sonoma Valley, California on July 27-30, 2014. The Trial Lawyers Section Summer Meeting is a wonderful opportunity to meet and network with Section members, obtain CLE credits, and enjoy the various recreational activities that we have planned.

On a personal note, I am humbled and honored to serve as your Chair of the Trial Lawyers Section of the New York State Bar Association in 2014. The Executive Committee of the Trial Lawyers Section is interested in increasing our membership, learning of new ways to improve and advance our Section's goals. Please feel free to contact me at mfurman@fkblaw.com to get more involved in our Section. I look forward to working with you this year.

**All the best,**
**A. Michael ("Mike") Furman**

## Request for Articles



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

**www.nysba.org/TrialLawyersDigest**

# Handling a Defendant's Late Filed and Served Jury Demand

By Robert I. Gruber

While some plaintiffs' attorneys demand a jury in every civil trial, a significant number of plaintiffs' attorneys, for a variety of valid reasons, file their note of issue without demanding a jury. These include:

(1) a conservative plaintiffs' county may persuade plaintiff's counsel to seek a non-jury trial in the belief that any judge in that county may award more than any jury deciding the case;

(2) the facts and complexities of the case may be more conducive to a non-jury trial; or,

(3) some attorneys may assess that the value of the case (that should have, but has not yet settled) may not be worth the expert witness fees required for live medical or other expert testimony.

Some trial judges, in non-jury trials, have been known to suggest that counsel may dispense with live experts and submit only medical or other experts' reports and records to expedite the trial. Regardless of the reason, your non-jury choice seems justified when opposing counsel timely files a jury demand in response.

But what if defense counsel fails to timely demand a jury trial in response to your non-jury demand? It is advisable for plaintiffs' attorneys to do nothing, say nothing, and never mention the defense's failure to file a jury demand. The more time that passes from the time a jury demand was required to be served and filed, until it eventually is, or is sought to be served and filed, the greater the likelihood that the late jury demand will not be permitted.

This article aims to give you the best chance of preserving your non-jury choice when defense counsel seeks to file and serve a late jury demand.

The late filed and served jury demand will arise in one of two ways: either defense counsel will (improperly) file and serve a late jury demand without moving for permission to do so, or the defense will (properly) move to do so as CPLR 4102(e) contemplates. If defense counsel initiates this motion, as part of your affirmation in opposition, you may, but *do not have to*, cross move to strike that demand. This is for two reasons: (1) your opposition to the defense motion is enough for a court to deny the defense request and preserve your non-jury choice; and, (2) since the defense is not filing and serving anything, but is seeking permission to do so, there, technically, is nothing to strike.

If defense counsel simply files and serves the late jury demand (and, presumably, pays the fee), without moving for permission to do so, plaintiff's counsel's proper response is a motion to strike the late filed demand together with an affirmation in support. While CPLR 4102 does not specify a time period from the filing and serving of a late jury demand when the motion to strike must be made, do not delay in moving to strike, lest you weaken your argument about the defense's lateness, since decisions in this area are based on judicial discretion.

A party served with a note of issue which does not contain a demand for a jury trial or that contains a demand for a nonjury trial may obtain a jury trial by serving a demand upon the plaintiff and filing it within 15 days after service of the note of issue (CPLR 4102(a)). If a party fails to serve and file the demand within the applicable time period, the right to a jury trial is waived (id.). While the court has discretion to permit the late filing in certain circumstances, structure your argument that all circumstances in your case signal a clear intent by the defendant to have waived a jury.

In the Second Department, it is an improvident exercise of discretion to grant a motion to file a jury demand where the application was not made until four and one half (4½) months after plaintiff's nonjury note of issue was served and filed. See *Zelvin v. Pagliocca*[1] In *Zelvin*, it was claimed the "former attorney" inadvertently failed to timely demand a jury. The court in *Fils v. Diener*[2] held it was an abuse of discretion to grant leave to file a jury demand where the application was not made until five (5) months after plaintiff's nonjury note of issue was served and filed. In *Lackowitz v. City of Yonkers*,[3] the court denied a motion for leave to serve and file a late jury demand seven (7) months after the note of issue was served, and held counsel's inadvertent failure to notice that the note of issue did not request a jury demand was inadequate.

The framework to analyze and decide late jury demand cases has been set forth by the Appellate Division, Second Department in *Fils v. Diener*, *Zelvin v. Pagliocca*, and *Lackowitz v. City of Yonkers* where the court focused on whether the failure to timely file the jury demand was "inadvertent" or whether the late filer, by actions or inactions, demonstrated an intent to waive the jury. In those cases, the court found that the would-be late filer made no adequate factual showing that either the failure to timely demand a jury trial was inadvertent or that defendants had no intent to waive a jury trial. The Second Department has reiterated that a "motion for such relief must be based upon a factual showing that the earlier waiver of that right was the result of either inadvertence or other excusable conduct indicating a lack of intention to waive such a right" (*Caruso, Caruso & Branda, P.C. v. Hirsch*).[4] As

this claimed inadvertence is a form of law office failure, the factual showing requires a "detailed and credible" explanation (*Campbell-Jarvis v. Alves*).[5]

From these cases, relevant factors that bear on whether the failure to timely file and serve the jury demand was "inadvertent" are (1) the length of the delay, (2) the reason for the delay, and (3) the actions the late filer took or failed to take when he or she became aware of the failure to timely file the jury demand.

It would seem rational that the longer the delay, the more "adequate" the factual showing would have to be before mere "inadvertence" would be found.

Also, bearing on the validity of the reason for the delay is whether the defendant knew or reasonably should have known of the nonjury demand when it was served and filed. If the defendant had or should have had timely notice of the nonjury demand but did nothing to promptly file and serve a jury demand, that failure to act would negate inadvertence and suggest an intent to waive a jury. For example, in an e-filed case where a properly completed note of issue with a clearly marked non-jury request appears, it is very hard for the defense to claim it was not received or even inadvertently overlooked, especially today when more and more attorneys rely on electronic mechanisms for the status of their cases. Even in a non-e-filed case, service of a note of issue with a clearly marked nonjury demand dilutes the defense claim of inadvertence.

Finally, the actions defense counsel took or did not take when he or she claims to have become aware a jury demand was several months late in not being filed is highly relevant on the issue of inadvertence. If the counsel promptly applied for leave to serve a late demand after obtaining that knowledge, that might support inadvertence, although not negating the delay which still must be adequately explained. But if counsel delayed several more months to apply for leave knowing the jury demand was already several months late and not served and filed, that delay would negate inadvertence and confirm a jury waiver.

Defendant must first make an adequate factual showing of inadvertence and a lack of intent to waive a jury before the court considers the question of prejudice to the party opposing the late jury demand. That is because the burden is initially on the late filer who has disregarded CPLR 4102(a) (*Paternoster v. Drehmer*).[6] If the late filing defendants do not make this showing, the court, as did the courts in *Fils v. Diener*, *Zelvin v. Pagliocca*, *Lackowitz v. City of Yonkers*, and *Caruso, Caruso & Branda, P.C. v. Hirsch*, *supra*, will deny the late jury demand without considering the issue of prejudice. If the court finds such an adequate showing, it still can deny the late demand if there is prejudice to the plaintiff.

## Some Do's and Don'ts of an "Adequate Factual Showing" and Moving for Permission to File and Serve a Late Jury Demand

### Arguments Against an "Adequate Factual Showing"

1. The defense claims general or standard office procedures in how a note of issue is handled in their office, but fails to address this particular note of issue with the non-jury demand: when it was received, who received or was supposed to receive it, what specific instructions this person was given in how to handle this note of issue, and by when those instructions were to be completed. Affidavits are required from everyone in the "handling chain." Their absence supports your argument that there was no adequate "factual" showing;

2. Defense counsel blames someone else in his or her office for failing to follow office procedure or specific instructions. Again, affidavits from the defense attorney, and especially the "blamee," are required to substantiate these claims.

3. The high volume, high pressure law office is no excuse for attorneys or their staffs abdicating their responsibility to comply with statutory or other requirements, else that argument could be used for every failure of that office to comply with any kind of deadline imposed by statute, court order, or other authority.

4. Where the claim of inadvertence is based on the absence of the assigned attorney, an office relocation, or some other reason for an interruption in the vigilance required, an affirmation or affidavit from those with personal knowledge is required that covers the dates of the interruption of defense services, the number of other missed "nonjury requests" during this time, citing specific case names, index numbers, dates of notes of issue service and dates when the defense realized its mistake and what it did in response, and when it acted to correct it. If the defense claims multiple interruptions, be they office moves, attorney absences or a combination, the counter argument is that since the defense had previously encountered an interruption, it should be especially careful to avoid missing deadlines and other statutory mandates or court orders, and should have taken special precautions to avoid non-compliance. It's failure to do that vitiates mere inadvertence and becomes its opposite, neglect.

5. The motion for permission to file and serve a late jury demand was denied when it was made or returnable on or shortly before the eve or day of trial, even though relatively shortly after the deadline after the note of issue with the non-jury demand was served (*Paternoster v. Drehmer*), *supra* (more

than 30 days past the deadline and the motion to excuse the delay was returnable on the day of trial); *Roosa v. Roosa*[7] (motion made less than one month before the trial date); *Fidler v. Sullivan*[8] (motion made less than one month before the trial date and granting the late jury demand would have delayed the trial). Likewise, a motion to file and serve a late jury demand will be denied if it is made one year or more after the note of issue was filed, despite also being made on the eve of trial (*Amitrano v. Notaro*[9] (one year delay and on eve of trial); *Fertik v. Fertik*[10] (15 months after service of note of issue); *Eastern Air Lines, Inc. v. Town of Islip*[11] (one year delay and on eve of trial)).

### Arguments in Support of an "Adequate Factual Showing"

1. Defense claims it was late in demanding a jury because it awaited a decision on a pending motion for a preference and its cross-motion to strike the note of issue. These were the facts of *Lane v. Marshall*,[12] where a delay of two months, the absence of prejudice to the plaintiff, and the prompt motion for permission to file and serve a late jury demand after the decision, combined to show a lack of intent to waive a jury trial.

2. A short delay past the statutory deadline before moving for permission to file and serve a late jury demand and absence of prejudice indicated inadvertence and no intent to waive a jury trial (*Leone v. Greek Peak, Inc.*)[13] (less than three months after discovery of mistake); *Chemical Bank v. 1364 Dean Street Corp.*[14] (several days past statutory period and on eve of trial); (*Brooks v. Brooks*)[15] (14 days); *Schwartz v. Sunlight Apartments, Inc.*[16] (prompt motion after discovery of mistake).

The scale seems to be the longer the delay, the more "adequate" the factual showing must be to overcome inadvertence and an intent to waive a jury, and the less any prejudice to plaintiff will be a significant factor; but the shorter the delay, the less adequate the factual showing must be to show inadvertence and no intent to waive, and the more significant the prejudice to plaintiff must be to deny the defense motion to file the late jury demand.

### Prejudice

Defendants usually argue that the plaintiff "will not be prejudiced." That is insufficient. They must show why. In *Paternoster v. Dehmer*,[17] the court held that "it must be demonstrated that plaintiff will suffer no prejudice" under CPLR 4102(e). The burden of proof is thus on the party seeking permission to file and serve the late jury demand to show the plaintiff will suffer no prejudice. In addition to the flexibility of medical witness scheduling and potentially lower expert witness fees because medical witness testimony in non-jury trials takes less time, here are some considerations that may apply to your facts and constitute a showing of prejudice.

1. A judge, as trier of the facts, is better able to assess the credibility of defense experts who frequently testify than a jury who has never heard of the witness before. The counter argument is that a jury may be more objective in such a case.

2. The medical or other issues in the case are sufficiently complex that a judge, as trier of the facts, is better able to render a fair and intelligent verdict.

3. Some plaintiffs, after being advised by their counsel that the defendant has failed to timely demand a jury, are unable to continue to segregate the funds they have put aside for expert witnesses in a jury trial because the plaintiff needs to expend them for continued medical care, or everyday living expenses for themselves or their family. The plaintiff, in reliance on CPLR 4102, knows the defendant has waived a jury when it has not timely filed and served a jury demand.

4. Where liability has already been determined in plaintiff's favor before the note of issue has been filed (e.g., summary judgment or stipulation), 22 NYCRR 202.46(b) [UCR 202.46(b)] provides:

> In any action where it is necessary to take an inquest before the court, the party seeking damages may submit the proof required by oral testimony of witnesses in open court or by written statements of the witnesses, in narrative or question and answer form, signed and sworn to.

Unlike subsection (a) of this rule which is applicable to defaults, subsection (b) is not similarly restricted, and applies to "any action" where there is an inquest for damages. Though denominated an inquest in the rule, all parties may submit evidence; and while plaintiff, as the party seeking damages, is permitted to submit written evidence instead of live testimony, the rule does not expressly proscribe a defendant from submitting live testimony, in the court's discretion. It would be prejudicial to plaintiff to permit the defendant's late filed jury demand in a damages only trial because the plaintiff relied on the waiver of CPLR 4102 and has spent the funds saved for live expert testimony that is permitted to be substituted by affidavit or affirmation. Granting the late jury demand would effectively deprive plaintiff of the live medical testimony that plaintiff, in justifiable reliance on the waiver provisions of CPLR 4102, can no longer afford.

The Court of Appeals has long recognized that "prejudice" exists when a party has been hindered in the preparation of his case or has been prevented from taking some measure in support of his position in a case because

of the actions or inaction of another party. See (*Loomis v. Civetta Corinno Const. Corp.*).[18] Significantly, the *Loomis* court favorably cites Appellate Division Justice Cooke's dissent in *Wyman v. Morone*,[19] where he said: "Delay should not be confused with laches, the latter being not mere delay, but delay accompanied by prejudice."

In *Keller v. Keller*,[20] a party relied on his opponent's failure to timely demand a jury trial when his counsel made other trial commitments based on the upcoming non-jury trial. If the court granted the late jury demand, the resolution of custody of two young children would have been delayed. While this is a graphic example of prejudice, and your facts may not possess the "tug-at-your-heartstrings appeal" of *Keller*, if you similarly made other trial commitments relying on the defendant's jury waiver, you would be well-advised to share with the court, in your affirmation, the effects that granting a late jury demand would have on the current trial or one or more of those other trial commitments you made.

## Some Special Cases

A party cannot assume a motion to strike a note of issue as prematurely filed will be granted, so that party could have and should have timely demanded a jury trial by the deadline after being served with that note of issue. Demanding a jury in response to a served note of issue is not inconsistent with moving to strike that same note of issue (*Jacobs, Inc., v. Manning Mfg Corp.*).[21]

**Caveat**: These rules apply equally to plaintiffs. Where plaintiff's counsel checked the "trial without jury" box on the note of issue, did not pay a jury fee, and waited more than three months thereafter before moving, on the eve of trial, to file and serve a late jury demand, the motion was denied (*Joseph v. Exxon Corporation*).[22]

## Endnotes

1. 32 A.D.2d 561, 300 N.Y.S.2d 361 (2d Dept 1969).
2. 59 A.D.2d 522, 397 N.Y.S.2d 14 (2d Dept 1972).
3. 29 A.D.3d 744, 813 N.Y.S.2d 912 (2d Dept 2006).
4. 60 A.D.3d 886, 887, 874 N.Y.S.2d 918 (2d Dept 2009).
5. 68 A.D.3d 701, 702, 889 N.Y.S.2d 257 (2d Dept 2009).
6. 260 A.D.2d 867, 688 N.Y.S.2d 778 (3d Dept 1999).
7. 248 A.D.2d 858, 669 N.Y.S.2d 740 (3d Dept 1998).
8. 81 A.D.2d 733, 439 N.Y.S.2d 478 (3d Dept 1981).
9. 10 A.D.3d 667, 781 N.Y.S.2d 746 (2d Dept 2004).
10. 264 A.D.2d 463, 694 N.Y.S.2d 456 (2d Dept 1999).
11. 14 A.D.2d 792, 220 N.Y.S.2d 461 (2d Dept 1961).
12. 89 A.D.2d 579, 452 N.Y.S.2d 238 (2d Dept 1982*), appeal dismissed*, 57 N.Y.2d 955, 457 N.Y.S.2d 1028 (1982).
13. 81 A.D.2d 751, 438 N.Y.S.2d 406 (4th Dept 1981).
14. 53 A.D.2d 882, 385 N.Y.S.2d 382 (2d Dept 1976).
15. 37 A.D.2d 835, 326 N.Y.S.2d 99 (2d Dept 1971).
16. 274 A.D. 901, 83 N.Y.S.2d 80 (2d Dept 1948).
17. 260 A.D.2d 867, 688 N.Y.S.2d at 781 (3d Dept 1999).
18. 54 N.Y.2d 18, 444 N.Y.S.2d 571 (1981).
19. 33 A.D.2d 168, 173, 306 N.Y.S.2d 115, 120 (3d Dept 1969).
20. 66 A.D.2d 960, 411 N.Y.S.2d 701 (3d Dept 1978).
21. 23 Misc.2d 507, 197 N.Y.S.2d 794 (S. Ct., N.Y. Cty., 1960).
22. 83 A.D.2d 549, 441 N.Y.S.2d 29 (2d Dept 1981).

**Robert I. Gruber practices in New York City.**

# 2013 Appellate Decisions

By Steven B. Prystowsky

**AUTOMOBILE—VTL 1142(a)—SUMMARY JUDGMENT**

Defendant was entitled to summary judgment when she approached the intersection and plaintiff's vehicle suddenly and without warning sped into the intersection:

> The defendant established her *prima facie* entitlement to judgment as a matter of law by demonstrating that the injured plaintiff proceeded into the intersection without yielding the right of way, in violation of Vehicle and Traffic Law § 1142(a). The evidence submitted by the defendant in support of her motion demonstrated, *prima facie*, that the sole proximate cause of the accident was the injured plaintiff's failure to properly observe and yield to cross traffic before proceeding into the intersection.

***Galvis v. Sudhaker S. Ravilla***, 111 A.D.3d 600, 974 N.Y.2d 288 (2d Dept. 2013)**.**

**CONTRACTS—FORUM SELECTION CLAUSE—ADHESION CONTRACT**

Plaintiff, who slipped and fell at defendant's resort, must sue in Warren County because "Rental Agreement" contained a forum selection clause requiring suit there:

> The Supreme Court erred in determining that the Rental Agreement was an unenforceable contract of adhesion and that enforcement of the forum selection clause contained therein would be unreasonable and unjust: "A contract of adhesion contains terms that are unfair and nonnegotiable and arises from a disparity of bargaining power or oppressive tactics."…"A contractual forum selection clause is *prima fa*cie valid and enforceable unless it is shown by the challenging party to be unreasonable, unjust, in contravention of public policy, invalid due to fraud or overreaching, or it is shown that a trial in the selected forum would be so gravely difficult that the challenging party would, for all practical purposes, be deprived of its day in court."
>
> Here, the fact that the Rental Agreement containing the forum selection clause was presented to the plaintiffs at registration and was not the product of negotiation does not render it unenforceable.

***Molino v. Sagamore***, 105 A.D.3d 922, 963 N.Y.S.2d 355 (2d Dept. 2013).

**DAMAGES—BRAIN INJURY—$5,500,000—PAST AND FUTURE PAIN AND SUFFERING—EXCESSIVE**

Plaintiff's award in a bench trial, of $1,500,000 for past pain and suffering and $4,000,000 for future pain and suffering, deviated materially from what would be reasonable compensation and the awards reduced to $500,000 for past pain and $750,000 for future pain and suffering:

> Although plaintiff Bruce Lindenman demonstrated that he suffered a brain injury, he did not undergo surgery and was able to continue to engage in activities such as driving and playing tennis… Given that this was a bench trial, we need not remand for a new trial on the issue of damages.

***Lindenman v. Kreitzer***, 105 A.D.3d 477, 964 N.Y.S.2d 87 (1st Dept. 2013).

**DAMAGES—FRACTURED RIGHT ANKLE—$500,000**

The trial court's increasing plaintiff's past and future pain and suffering from $250,000 ($175,000 past and $75,000 future) to $500,000 did not deviate from what would be reasonable compensation:

> An orthopedic specialist, Dr. John Sharkey, determined that he had suffered a severe, comminuted, four-part proximal humerus fracture and dislocation of his right shoulder. Sharkey surgically repaired plaintiff's shoulder, using a prosthetic device to replace the head of the humerus, and suturing a posterior labral tear and a split tear in the rotator cuff.
>
> * * *
>
> Sharkey also performed open reduction surgery on plaintiff's right ankle, using plates and screws to stabilize a lateral malleolous fracture. Plaintiff then underwent two years of extensive physical therapy. He was able to return to employment with defendant in a sedentary timekeeping position. Sharkey's range-of-motion tests on plaintiff's right shoulder showed appreciable permanent restrictions and a 50% overall loss of shoulder function. Sharkey opined that plaintiff's right shoulder would likely become arthritic, weaker and more painful over time, and that his right ankle, which had fractured, would remain stiff and that he would occasionally experience difficulty in walking.

***Burnett v. City of New York***, 104 A.D.3d 437, 961 N.Y.S.2d 81 (1st Dept. 2013).

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

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

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

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

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

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

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

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

### DAMAGES—FRACTURED RIGHT WRIST/CERVICAL HERNIATED DISC—$1,200,000

Award of $400,000 for past pain and suffering and $800,000 for future pain and suffering to 52-year-old office worker who fractured her right wrist and injured her neck and right shoulder after she was struck by a truck did not deviate materially from reasonable compensation:

> Plaintiff sustained a comminuted intra-articular fracture of the distal radial metaphysis of her right wrist, and a cervical herniated disc. A closed reduction was performed in efforts to repair the wrist. When that failed, an open reduction surgery was performed with internal fixation (a plate and screws), which will remain in the wrist permanently. She underwent physical therapy for three months for her wrist, and an additional six months for her shoulder. Plaintiff was left with reduced ranges of motion, continued pain, and progressive arthritis in her wrist.

***Alfonso v. Metropolitan Transit Authority***, 103 A.D.3d 563, 962 N.Y.S.2d 69 (1st Dept. 2013).

### DAMAGES—BULGING DISC—$400,000

Award of $400,000 for future pain and suffering over 20 years did not deviate materially from what was reasonably compensation for injuries plaintiff sustained when, while attempting to board defendant's bus, the doors closed on her and the bus started to drive away before coming to an abrupt stop:

> Plaintiff suffered a herniation to her lumbar spine and two bulging discs to her cervical spine, resulting in radiculopathy, for which surgery was recommended.

***Rutledge v. New York City Transit Authority***, 103 A.D.3d 423, 959 N.Y.S.2d 182 (1st Dept. 2013).

### DAMAGES—FRACTURED HIP

Award of $400,000 for past pain and suffering and $450,000 for future pain and suffering over six years did not deviate materially from what would constitute reasonable compensation under the circumstances:

> Decedent suffered a fractured hip requiring surgery, and she testified that it changed her lifestyle, as she was no longer able to regularly travel into Manhattan to visit museums and attend cultural events and lectures.

***Victor v. New York City Transit Authority***, 112 A.D.3d 523 (1st Dept. 2013).

### DAMAGES—FRACTURES—TIBIA/FIBULA—$3,166,000

Awards of $1,000,000 for past pain and suffering over eight years and $2,166,666.67 for future pain and suffering over 25.8 years did not deviate materially from what would be considered reasonable compensation for plaintiff, an electrician:

> The evidence showed that plaintiff had sustained fractures to his tibia and fibula, underwent leg surgery entailing installation of a metal rod and screws in his leg, sustained back injuries, and suffered from reflex sympathetic dystrophy, complex regional pain syndrome, depression, sleep disorder, and sexual dysfunction.

***Hernandez v. Ten Ten Company***, 102 A.D.3d 431, 959 N.Y.S.2d 128 (1st Dept. 2013).

[EDITOR'S NOTE: The award for plaintiff's wife for $341,666.60 for past loss of services for eight years, and $0 for future loss of services was not excessive because the evidence established that plaintiff can no longer help care for the children, perform household chores, take his wife out or engage in intimate relations.]

**DAMAGES—FRACTURES—$105,000/PAST AND FUTURE PAIN AND SUFFERING—INADEQUACY**

Jury awards of $75,000 and $35,000 for past and future pain and suffering for fractures plaintiff sustained were inadequate and were conditionally increased to $500,000 and $450,000 respectively:

> Given the severity of plaintiff's injuries and the ongoing problems and expected future limitations, the amounts awarded for past and future pain and suffering are inadequate, deviating materially from what would be reasonable compensation.

***Grinberg v. C & L Contracting Corporation***, 107 A.D.3d 491, 967 N.Y.S.2d 58 (1st Dept. 2013).

[EDITOR'S NOTE: Plaintiff suffered the following injuries to his left leg as a result of a fall:

> A pilon fracture, which is a "limb threatening injury," crushing the ankle, as well as a multi-fragmented, comminuted fracture to the tibia. Such a fracture injures not only the bone but also the surrounding tissues, including nearby ligaments, tendons, veins, arteries, and nerves. Plaintiff also sustained a spiral fracture to the fibula, near the knee. He underwent a surgery involving open reduction and internal fixation, and a second surgery to remove the hardware. Plaintiff's injuries required rehabilitation and have resulted in permanent arthritis, tendonitis, and the potential need for future procedures].

**DAMAGES—HERNIATED DISC—$2,000,000—PAST/ FUTURE PAIN AND SUFFERING**

Awards of $500,000 and $1,500,000 for past and future pain and suffering respectively were not excessive since plaintiff suffered a herniated disc, underwent surgery and his experts testified that for the rest of his life he will continue to experience significant pain and require additional surgery and medical treatment:

> Considering the nature and extent of the injuries sustained by Mohammed Kayes and comparable precedent, the jury's awards for past and future pain and suffering did not deviate materially from what would be reasonable compensation.

***Kayes v. Liberati***, 104 A.D.3d 739, 960 N.Y.S.2d 499 (2d Dept. 2013).

[EDITOR'S NOTE: According to 2009 WL 6043100 plaintiff sustained the following injuries:

> A herniation of his C5-6 intervertebral disc;
>
> He initially underwent conservative treatment that included bi- and triweekly sessions of physical therapy, the administration of epidural injections of steroid-based painkillers, and the administration of painkilling trigger-point injections. He claimed that the treatment did not alleviate his symptoms. In July 2007, he underwent fusion of his spine's C5 and C6 levels;
>
> In 2009, a doctor determined that plaintiff suffers a total, permanent residual disability, and he has not worked since that determination.

Defense counsel did not present two of the medical experts that had been retained; jury was given adverse inference instruction].

**DAMAGES—PUNITIVE—INTENTIONAL TORTUOUS ACTS**

Evidence that defendant Kieffer Enterprises, Inc. ("KEI") intentionally discharged storm water without justification or permission onto plaintiff's land causing extensive damage and constituting the torts of trespass and nuisance is insufficient to support plaintiff's $250,000 award for punitive damages:

> Although it is undisputed that the Town did not obtain plaintiff's permission to allow water to flow onto his property, it does not follow that the acts resulting in overflow onto plaintiff's property were undertaken with the requisite malice or gross indifference. KEI failed to ensure that the Town followed through with its plan to obtain an easement, so that they were liable in nuisance and trespass, but "[s]omething more than the mere commission of a tort is always required for punitive damages." Punitive damages are permitted only when a defendant purposefully causes, or is grossly indifferent to causing, injury and defendant's behavior cannot be said to be merely volitional; an unmotivated, unintentional or even accidental result of a legally inten-

> tional act cannot, alone qualify. Punitive damages are awarded to punish and deter behavior involving moral turpitude. Here, KEI's behavior does not rise to that level.

***Marinaccio v. Town of Clarence***, 20 N.Y.3d 506, 964 N.Y.S.2d 69, 2013, *rev'g* 90 A.D.3d 1599, 936 N.Y.S.2d 412 (4th Dept. 2011).

**DAMAGES—TORN MENISCUS—$350,000—INADEQUATE**

The First Department conditionally reinstated jury's award of $500,000 for past pain and suffering and $500,000 for future pain and suffering, which the trial court had reduced to $100,000 and $250,000, respectively, to 34-year-old who sustained a torn meniscus:

> The record shows that the time between the date of the incident and the date of verdict is seven years and seven months, and plaintiff's life expectancy is 34.5 years. The evidence at trial established that as a result of the fall on defendants' bus, the 47-year-old plaintiff suffered a torn meniscus in her right knee, underwent arthroscopic surgery, was unable to work for three months, used a cane for more than one month, underwent twelve extremely painful sessions of physical therapy, continues to experience significant pain requiring her to take medication and limit her activities, and has permanently aggravated and activated arthritis in her knee that is progressive. In addition, her doctor explained that she sustained a permanent partial disability and that it is "most probable" that she will require a future knee replacement.

***Luna v. New York City Transit Authority***, 111 A.D.3d 551, 975 N.Y.S.2d 55 (1st Dept. 2013).

**EVIDENCE—EMPLOYEE ADMISSION**

The trial court erred in admitting defendant's ticket booth clerk's statement to plaintiff that she had reported the defective conditions six times before plaintiff's trip and fall:

> The evidence does not show that the statement was made within the clerk's authority as a speaking agent on behalf of defendant.

***Gordzica v. New York City Transit Authority***, 103 A.D.2d 598, 960 N.Y.S.2d 103 (1st Dept. 2013).

**INDEMNITY—GOL 5-323—NO INSURANCE**

Port Parties, a cleaning service who was to be included as an additional insured in its contract with Merchandise Mart Properties, a trade show operator, cannot enforce its hold harmless agreement because (a) Merchandise Mart did not obtain insurance coverage and (b) the agreement purports to indemnify Port Parties for its sole negligence:

> An indemnification provision is only exempt from the prohibition of the General Obligations Law where "the parties are allocating the risk of liability to third parties between themselves, essentially through the employment of insurance."
>
> * * *
>
> In the absence of the insurance policy Merchandise Mart was supposed to obtain, the subject indemnification provision does not have the favorable effect of allocating loss for the purpose of placing the risk on the party with insurance coverage. Relief from the bar against exemption from liability for a party's own negligent acts is granted only where recovery against the negligent party is obviated by the availability of adequate insurance. Since the effect of enforcing the indemnification provision in the instant matter would be to exempt Port Parties from liability for an injury that was concededly caused by its own negligence without the commensurate protection afforded by insurance coverage, the indemnification provision is void and unenforceable.

***Port Parties, Ltd. v. Merchandise Mart Properties, Inc.,*** 102 A.D.3d 539, 959 N.Y.S.2d 37 (1st Dept. 2013).

**INSURANCE—DISCLAIMER—UNTIMELY**

Insurer failed to adequately explain its delay in disclaiming coverage until three years after the accident involving the insured. Even if, as the insurer claims, its duty to disclaim was not triggered until it received the complaint, it was nonetheless untimely since the insurer had a pre-claim report at the time of the accident but failed to disclaim until one year after receiving the complaint:

> It is the responsibility of the insurer to explain its delay. Hartford undisputedly had a pre-claim report of the 200 accident in 2006. Hartford had every opportunity to investigate and disclaim, yet it failed to do so until at least 2009, fully one year after GPI was added to the underlying action as a defendant.

***Hartford Underwriting Insurance Company v. Greenman-Pederson, Inc.***, 111 A.D.3d 562, 975 N.Y.S.2d 736 (1st Dept. 2013).

### INSURANCE—LATE NOTICE—GOOD FAITH/ NONLIABILITY

Plaintiffs' (building owners) seven-month delay in notifying insurer of the accident on their premises was unreasonable as a matter of law and was not excused because they did not establish a reasonable, good faith belief in their nonliability:

> The need to investigate the matter was particularly apparent since the accident involved a construction worker falling off a ladder while working on plaintiffs' property, thereby subjecting them to potential liability pursuant to the Labor Law. Moreover, when an investigator showed up to take photographs of the premises, and the superintendent understood that he was there on the worker's behalf, plaintiffs were effectively on notice of the likelihood of the underlying personal injury claims. Plaintiffs' professed ignorance of the scope of landowners' liability for accidents suffered by construction workers pursuant to the Labor Law does not establish a reasonable belief in nonliability.

***310 East 74 LLC v. Fireman's Fund Insurance Company***, 106 A.D.3d 469, 964 N.Y.S.2d 512 (1st Dept. 2013).

[EDITOR'S NOTE: The superintendent's knowledge was imputed to plaintiffs.]

### INSURANCE—MULTIPLE OCCURRENCES—CGL POLICY—SELF-INSURED RETENTION

Acts of sexual abuse alleged in underlying action against insureds constituted multiple occurrences, for which insureds were required to exhaust a $250,000 self-insured retention for each of the two commercial general liability (CGL) insurance policies implicated:

> Generally, the issue of what constitutes an occurrence has been a legal question for courts to resolve ... We adopted the "unfortunate event" test, specifically rejecting other approaches that would equate the number of occurrences with either "the sole proximate cause" or by the "number of persons damaged."
>
> * * *
>
> Here, nothing in the language of the policies, nor the definition of "occurrence," evinces an intent to aggregate the incidents of sexual abuse into a single occurrence…Applying the unfortunate event test we conclude that the incidents of sexual abuse within the underlying action constituted multiple occurrences. Clearly, incidents of sexual abuse that spanned a six-year period and transpired in multiple locations lack the requisite temporal and spatial closeness to join the incidents…While the incidents share an identity of actors, it cannot be said that an instance of sexual abuse that took place in the rectory of the church in 1995 shares the same temporal and spatial characteristics as one that occurred in 2002 in, for example, the priest's automobile.
>
> Moreover, the incidents are not part of a singular causal continuum…Thus, contrary to the Diocese's and dissent's view that the negligent supervision was the sole causal factor, and thus requires a finding of a single occurrence, the unfortunate event test requires us to focus on "the nature of the incident[s] giving rise to damages"…Accordingly, where, as here, each incident involved a distinct act of sexual abuse perpetrated in unique locations and interspersed over an extended period of time, it cannot be said, like the uninterrupted, instantaneous collisions in [*Hartford Acc. & Indem. Co. v.] Wesolowsk*i, [33 N.Y.2d 169, 350 N.Y.S.2d 895 (1973)] that these incidents were precipitated by a single causal continuum and should be grouped into one occurrence.

***Roman Catholic Diocese of Brooklyn v. National Union Fire Ins. Co. of Pittsburgh PA***, 21 N.Y.3d 139, 969 N.Y.S.2d 808 (2013).

### JUDGMENT—COLLATERAL ESTOPPEL—WORKER'S COMPENSATION BOARD FINDING

The Workers' Compensation Board finding that plaintiff had no further disability and no further need for treatment is not entitled to collateral estoppel effect in plaintiff's personal injury action:

> Defendants have failed to meet their burden of establishing that the issue decided in the workers' compensation proceeding was identical to that presented in this negligence action.
>
> * * *

> We have observed that the term "disability," as used in the Workers' Compensation Law, "generally refers to inability to work." In addition, the Board uses the term "disability" in order to make classifications according to degree (total or partial) and duration (temporary or permanent) of an employee's injury. The focus of the act, plainly, is on a claimant's ability to perform the duties of his or her employment.
>
> By contrast, a negligence action is much broader in scope. It is intended to make an injured party whole for the enduring consequences of his or her injury—including, as relevant here, lost income and future medical expenses. Necessarily, then, the negligence action is focused on the larger question of the impact of the injury over the course of plaintiff's lifetime. Although there is some degree of overlap between the issues being determined in the two proceedings, based on the scope and focus of each type of action, it cannot be said that the issues are identical.
>
> * * *
>
> Moreover, based on the expedited nature of workers' compensation proceedings, parties may not have the means to litigate the matter beyond the issue presented to the Board. Notably here, plaintiff did not obtain neuropsychiatric testing for the workers' compensation hearing, which his physicians had deemed necessary to diagnose his particular type of injury and which he will seek to submit to a jury in the personal injury action.
>
> We stress that this holding should not be read to impair the general rule that the determinations of administrative agencies are entitled to collateral estoppel effect. That rule is well-settled and should continue to be applied where, unlike here, there is identity of issue between the prior administrative proceeding and the subsequent litigation.

***Auqui v. Seven Thirty One Limited Partnership***, 22 N.Y.3d 246, 980 N.Y.S.2d 345 (2013).

[EDITOR'S NOTE: The Court of Appeals' decision is unique, for it is one of the first times in recent history that the Court of Appeals has granted reargument and recalled an earlier decision. In its earlier opinion, 20 N.Y.3d 1035, 962 N.Y.S.2d 579 (2013), the Court of Appeals held that the Workers' Compensation Board finding here *precluded* the plaintiffs from litigating the issue of plaintiff Jose Verdugo's accident-related disability beyond January 24, 2006, the date the Administrative Law Judge found that he no longer suffered any disability and terminated his benefits:

> The determination of the WCB should be given preclusive effect as to the duration of plaintiff's disability, relevant to lost earnings and compensation for medical expense. The issue of continuing benefits before the administrative agency necessarily turned upon whether Jose Verdugo had an ongoing disability after a certain date, which is a question of fact, as distinguished from a legal conclusion and a conclusion of mixed law and fact.
>
> We also find that plaintiffs had a full and fair opportunity to litigate the issue of ongoing disability in the 2006 WC proceedings. Plaintiff was represented by counsel, submitted medical reports, presented expert testimony, and cross-examined the defendants' experts regarding the issue of whether or not there was an ongoing disability.]

**JUDGMENT—DEFAULT—CPLR 3215(f)—JURISDICTIONAL DEFECT**

Plaintiff's failure to file "proof of the facts constituting the claim" pursuant to CPLR 3215(f) does not render its default judgment a nullity because the defect is not jurisdictional:

> The defect in the default judgment before us is not jurisdictional in this sense. A failure to submit the proof required by CPLR 3215(f) should lead a court to deny an application for a default judgment, but a court that does not comply with this rule has merely committed an error—it has not usurped a power it does not have. The error can be corrected by the means provided by law—i.e., by an application for relief from the judgment pursuant to CPLR 5015. It does not justify treating the judgment as a nullity.

***Manhattan Telecommunications Corporation v. H & A Locksmith, Inc.,*** 21 N.Y.3d 200, 969 N.Y.S.2d 424 (2013).

[EDITOR'S NOTE: Previously, there was a division between the Appellate Division's First and Second Departments interpreting CPLR 3215(f). The First Department held failure to comply with 3215(f) is a nullity; the Second Department did not and required both an affidavit of merit and excusable neglect in order to vacate a default

judgment. This decision also abrogated cases in the Third and Fourth Departments that also held failure to comply with 3215(f) is a nullity.]

**JUDGMENT—VACATE DEFAULT—ESTOPPEL**

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

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

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

**MOTIONS—BURDEN—DEFENDANT/*PRIMA FACIE* ENTITLEMENT**

Defendants failed to establish their entitlement to judgment as a matter of law in an action where plaintiff alleged that she fell over a produce box that was placed next to her in a supermarket aisle while she was bending over to retrieve a product:

> As the movants, defendants bore the burden of disproving an essential element of plaintiff's claims and cannot affirmatively establish the absence of negligence as a matter of law merely by pointing out the gaps they perceive in plaintiff's case.]

***Furment v. Ziad Food Corp.***, 104 A.D.3d 562, 960 N.Y.S.2d 648 (1st Dept. 2013).

[EDITOR'S NOTE: The First Department has joined the Second Department in denying defendants summary judgment where they fail to affirmatively demonstrate their entitlement to it but rather point to gaps in plaintiffs' account of the accident. See *Salgado v. Port Auth. of N.Y. & N.J.*, 105 A.D.3d 417, 962 N.Y.S.2d 129 (1st Dept. 2013).]

**MOTION—*PRIMA FACIE* CASE—SLIP AND FALL**

Premises owner met its burden of making a *prima facie* demonstration that it neither created the hazardous condition nor had actual or constructive notice of its existence:

> [Defendant submitted] the testimony of plaintiff, the testimony of the area and maintenance supervisors for the subject building, and the log book entry for the date of the accident, which failed to indicate a hazardous condition in the area of the accident.

***Boachie v. 57-115 Associates, L.P.***, 105 A.D.3d 603, 963 N.Y.S.2d 629 (1st Dept. 2013).

[EDITOR'S NOTE: Defendant was also granted summary judgment in *Pfeuffer v. New York City Housing Authority*, 93 A.D.3d 470, 940 N.Y.S.2d 566 (1st Dept. 2012):

> Both the NYCHA superintendent, who was responsible for overseeing the maintenance and janitorial staff, and the caretaker who was responsible for cleaning the common areas on the day of plaintiff's accident testified to the cleaning schedule of the buildings.

The Second Department, however, demands more. In *Alexander v. New York City Housing Authority*, 89 A.D.3d 969, 933 N.Y.S.2d 357 (2d Dept. 2011), the court affirmed the denial of defendant's motion for summary judgment. Plaintiff was injured when an exposed tip of a screw, which had become loose in a metal door, pricked him:

> According to the affidavit of the defendant's building caretaker, she conducted a daily inspection of the rear exit door, and indicated what she would do if she detected any problem with regard to the door. This failed to demonstrate what the caretaker observed regarding the condition of the door prior to the plaintiff's accident. Thus, the defendant failed to meet its *prima facie* burden of showing that it lacked constructive notice of the condition which allegedly caused the plaintiff's injuries].

*See infra*, ***Gautier v. 941 Interval Realty LLC*** *and* ***Armijos v. Vrettos Realty Corp.***

**NEGLIGENCE—LABOR LAW § 240(1)—ALTERING—WINDOW SHADE**

Plaintiff, who sustained injuries when he fell from a ladder while installing window shades in a building, is not covered under Labor Law § 240(1):

> [Plaintiff's] work of hanging window shades at the time of the accident does

> not constitute "altering" within the meaning of Labor Law § 240(1). The evidence shows that the shade installation work essentially entailed securing brackets with screws to the ceiling or pan protruding from the wall, and inserting the shades into the bracket. This work does not amount to a "significant physical change to the configuration or composition of the building or structure." Plaintiff's contention that the work constitutes "repairing" under the statute is unsupported by the record. Indeed, plaintiff and the witnesses all testified that new shades were being installed at the time of the accident.

***Amendola v. Rheedlen 125th Street, LLC***, 963 A.D.3d 426, 963 N.Y.S.2d 30, 105 (1st Dept. 2013).

[EDITOR'S NOTE: The court also found that the shade work performed was not in the "context of the larger construction project" because it was not "ongoing and contemporaneous with other work that formed part of the single contract"; rather it fell "into a separate phase easily distinguishable from other parts of the larger construction project," citing *Prats v. Port Auth. of N.Y. & N.J.*, 100 N.Y.2d 878, 768 N.Y.S.2d 178 (2003)].

**NEGLIGENCE—LABOR LAW § 240(1)—GUARD RAIL BROKEN**

Plaintiff was injured when the guardrail on the trailing platform on which he was working broke, causing him to fall 14 feet, which violated Labor Law § 240(1):

> This evidence [broken guardrail] establishes *prima facie* a violation of Labor Law § 240(1), since the protective device, i.e., the guardrail, "proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person." Plaintiff was not required to prove that the guardrail was defective.

***Verdon v. Port Auth. of New York and New Jersey***, 111 A.D.3d 580, 977 N.Y.S.2d 4 (1st Dept. 2013).

[EDITOR'S NOTE: The court rejected defendant's argument that the independent intervening act of the contact between the skip box and the mid-rail was a superseding cause that relieved them of liability:

> It was foreseeable that the skip box would strike the wooden mid-rail as it was hoisted by a crane and moved on and off the trailing platform.]

**NEGLIGENCE—LABOR LAW § 240(1)—CLEANING/ DUSTING STORE FLOOR SHELF**

Plaintiff, who injured himself after falling off an A-frame ladder while dusting the top of a J. Crew shelf, is not covered under Labor Law § 240(1):

> Applying these factors here, the activity undertaken by Soto was not "cleaning" within the meaning of Labor Law § 240(1). The dusting of a six-foot-high display shelf is the type of routine maintenance that occurs frequently in a retail store. It did not require specialized equipment or knowledge and could be accomplished by a single custodial worker using tools commonly found in a domestic setting. Further, the elevation-related risks involved were comparable to those encountered by homeowners during ordinary household cleaning and the task was unrelated to a construction, renovation, painting alteration or repair project.

***Soto v. J. Crew Inc.***, 21 N.Y.3d 562, 976 N.Y.S.2d 421 (2013).

[EDITOR'S NOTE: The court set forth the following guidelines in determining whether cleaning is a covered activity under Labor Law § 240(1):

> Outside the sphere of commercial window washing (which we have already determined to be covered), an activity cannot be characterized as "cleaning" under the statute, if the task: 1) is routine, in the sense that it is the type of job that occurs on a daily, weekly or other relatively-frequent and recurring basis as part of the ordinary maintenance and care of commercial premises; 2) requires neither specialized equipment or expertise, nor the unusual deployment of labor; 3) generally involves insignificant elevation risks comparable to those inherent in typical domestic or household cleaning; and 4) in light of the core purpose of Labor Law § 240(1) to protect construction workers, is unrelated to any ongoing construction, renovation, painting, alteration or repair project. Whether the activity is "cleaning" is an issue for the court to decide after reviewing all of the factors. The presence or absence of any one is not necessarily dispositive if, viewed in totality, the remaining considerations militate in favor of placing the task in one category or the other.

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

Roofer, who fell after being struck by co-worker's water jug when it rolled down the roof, is not protected by Labor Law § 240(1):

> Not every object that falls on a worker gives rise to the extraordinary protections of Labor Law § 240(1): a plaintiff must show that, at the time the object fell, it was being hoisted or secured, or that the falling object required securing for the purposes of the undertaking.
>
> Here, the defendants established, *prima facie*, that the water jug "was not a material being hoisted or a load that required securing for the purposes of the undertaking at the time it fell."

***Banscher v. Actus Lend Lease, LLC***, 103 A.D.3d 823, 960 N.Y.S.2d 183 (2d Dept. 2013).

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

Plaintiff, who fell to the ground after climbing out of his scissor lift basket and onto an exhaust duct when his lift could not be raised high enough for him to reinstall a fluorescent light, is covered under Labor Law § 240(1):

> We reject defendant's assertion that Vasquez's decision to leave the lift was the sole proximate cause of his death. Although the building manager, Joseph Tesoriero, stated in his affidavit that months prior to the accident he told Vasquez not to stand on the guardrails of the lift or leave the lift basket while it was elevated, an instruction to avoid an unsafe practice is not a sufficient substitute for providing a worker with a safety device to allow him to complete his work safely.

***Vasquez v. Cohen Brothers Realty Corporation***, 105 A.D.3d 595, 963 N.Y.S.2d 626 (1st Dept. 2013).

**NEGLIGENCE—LABOR LAW § 241(6)—SAFETY CONSULTANT**

Safety consultant who had sufficient supervision and control over the activity that resulted in the injury plaintiff sustained is liable to plaintiff under the Labor Law:

> The contract between defendant and Osterhoudt [general contractor] set forth that a representative of defendant would be at the work site daily, make inspections, conduct safety meetings and have authority to require "immediate corrective action for imminent danger situations." Defendant's representative was continuously at the site throughout the project, and he exercised his power on several occasions prior to the accident by stopping work and requiring defendant to take specific precautions or actions. He was present when the accident occurred. Osterhoudt's employees were aware that defendant's representative had the authority to stop work and that his directions regarding safety were to be followed. While the jury could have reasonably come to a different conclusion, there was sufficient evidence for its finding that defendants acted as an agent of Osterhoudt.

***Leszczynski v. Town of Neversink***, 107 A.D.3d 1183, 968 N.Y.S.2d 204 (3d Dept. 2013).

**NEGLIGENCE—MEDICAL MONITORING—NO PHYSICAL INJURY**

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

> A threat of future harm is insufficient to impose liability against a defendant in a tort context. The requirement that a plaintiff sustain physical harm before being able to recover in tort is a fundamental principle of our state's tort system. The physical harm requirement serves a number of important purposes: it defines the class of persons who actually possess a cause of action, provides a basis for the fact-finder to determine whether a litigant actually possesses a claim, and protects court dockets from being clogged with frivolous and unfounded claims.
>
> * * *
>
> The Appellate Divisions have consistently found that medical monitoring is an element of damages that may be recovered only after a physical injury has been proven, i.e., that it is a form of remedy for an existing tort.
>
> * * *

We conclude that the policy reasons set forth above militate against a judicially created independent cause

of action for medical monitoring. Allowance of such a claim, absent any evidence of present physical injury or damage to property, would constitute a significant deviation from our tort jurisprudence. That does not prevent plaintiffs who have in fact sustained physical injury from obtaining the remedy of medical monitoring. Such a remedy has been permitted in this State's courts as consequential damages, so long as the remedy is premised on the plaintiff establishing entitlement to damages on an already existing tort cause of action.

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

[EDITOR'S NOTE: Chief Judge Lippman dissented:

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

**NEGLIGENCE—PREMISES—CONSTRUCTIVE NOTICE/ JANITORIAL SCHEDULE**

Superintendent's deposition testimony that a janitorial scheduled existed does not establish that the schedule was followed and is insufficient to establish that premises owner did not have constructive notice of a dangerous condition:

> Standing alone, proof that "stairs were routinely cleaned on a daily basis" is not germane to the dispositive issue of lack of notice of an alleged defective condition…It is no coincidence that in *Rodriguez v. New York City Housing Authority* (102 A.D.3d 407, 959 N.Y.S.2d 127 [1st Dept. 2013]), we based a finding of a lack of constructive notice of a dangerous condition on the testimony of a "caretaker who cleaned the building on the day before the early-morning accident." Accordingly, in *Rodriguez* the Housing Authority made a prima facie showing that a janitorial schedule not only existed but was followed at around the time of the accident.

***Gautier v. 941 Intervale Realty LLC***, 108 A.D.3d 481, 970 N.Y.S.2d 191 (1st Dept. 2013).

[EDITOR'S NOTE: Justice Andrias dissented finding that defendant made a *prima facie* showing of its entitlement to judgment as a matter of law:

> The building superintendent's deposition testimony, corroborated by a member of defendant LLC, established that the stairs were swept every morning and mopped three times a week, at about 7:00 a.m., in accordance with a regular maintenance schedule, and that there were never any prior accidents on the steps caused by any foreign substance. The accident occurred at 3:00 a.m. and a landlord cannot be required to work around the clock on the chance that a dangerous condition might be created at any given moment.]

**NEGLIGENCE—PREMISES—GENERAL CLEANING PRACTICES**

Plaintiff, who slipped and fell on a greasy substance in a stairway in defendant's building, did not raise a question of fact in opposing defendant's prima facie showing:

> The defendant submitted an affidavit from its superintendent indicating that each and every Monday, he would mop the entire building, including the stairwell where the plaintiff allegedly fell, and that this mopping would always occur between the hours of 3:00 p.m. and 4:00 p.m. This affidavit was specific enough to satisfy the defendant's initial burden.

***Armijos v. Vrettos Realty Corp.***, 106 A.D.3d 847, 965 N.Y.S.2d 536 (2d Dept. 2013).

**NEGLIGENCE—PREMISES—OPEN AND OBVIOUS—CHRISTMAS TREE**

Defendant premises owner was not entitled to dismissal of plaintiff's action for injuries sustained when she tripped and fell over a Christmas tree:

> Summary judgment was properly denied. Triable issues of fact exist as to whether the large, spreading Christmas tree on which plaintiff tripped was an open and obvious and not inherently dangerous condition.

***Nunez v. Wah Kok Realty Corp.***, 110 A.D.3d 500, 973 N.Y.S.2d 558 (1st Dept. 2013).

[EDITOR'S NOTE: Earlier, the First Department, in *Bisogno v. 333 Tenants Corp. Co-Op*, 72 A.D.3d 555, 898 N.Y.S.2d 459 (2010), with three of the same members on the *Nunez* panel, reached a different result, affirming an order dismissing plaintiff's complaint stating she fell over a Christmas tree:

> In opposition to defendants' prima facie showing that they did not create an unreasonably dangerous condition by placing a pile of Christmas trees near the curb on the sidewalk in front of their building, plaintiff failed to raise an issue of fact whether defendants had notice of a tripping hazard that allegedly resulted when the trees were moved by an unknown person or persons some time between their placement on the sidewalk and plaintiff's fall later that morning.]

**NEGLIGENCE—PREMISES—OUT-OF-POSSESSION LANDLORD—DUTY**

Defendants Kansas/Bullard, who leased the premises to defendant Hong, are not liable to plaintiff, who slipped and fell on an icy condition located on a shoveled pathway in front of their premises:

> In the absence of any evidence of a duty to remove snow and ice or that Kansas and Bullard, the out-of-possession landlords, were involved in creating the subject pathway in the snow, summary judgment should have been granted in their favor. While plaintiffs have come forward with evidence that an unidentified male created the pathway the night before the accident and shoveled the pathway again that morning, there is no indication in the record that the man is affiliated with the landlords. Moreover, it is undisputed that, by lease, the landlords delegated the responsibility to remove snow and ice to Hong.

***Adley v. Kansas Fried Chicken, Inc., et al.***, 106 A.D.3d 565, 966 N.Y.S.2d 28 (1st Dept. 2013).

**NEGLIGENCE—PREMISES—UNLOCKED GATE**

Plaintiff, who was injured while leaning against what he thought was a sturdy three-foot-high black fence surrounding an area of greenery, does not have a cause of action against the premises owner when the fence was actually an unlocked gate, which swung inward, causing him to fall and suffer injuries:

> The color photographs in the record show that the gate was "plainly observable and did not pose any danger to someone making reasonable use of his or her senses."
>
> The gate was not obscured by other people or objects, or by its location, and nothing about it or the fence created any optical confusion. Plaintiff had lived in the building since 2007, and the gate had been unlocked and in the same condition since 2006, if not longer. Plaintiff testified that he looked at the fence before he leaned against it and "assumed it was sturdy," and there is no evidence that he did not notice the gate because he was distracted.
>
> * * *
>
> The color photographs in the record show that the gate is not flush with the rest of the fence and that three hinges on the right side and a hasp on the left side of the gate, attached to posts that are thicker than the vertical bars in the fence, are clearly visible. Thus, the opinion of plaintiff's expert and the eyewitness are belied by the photographs the expert took, which demonstrate that the condition was open and obvious and not inherently dangerous.

***Boyd v. City of New York***, 105 A.D.2d 542, 964 N.Y.S.2d 10 (1st Dept. 2013).

**NEGLIGENCE—TEXTER—AUTOMOBILE DRIVER RECIPIENT**

Remote texter to motor vehicle driver less than a minute before driver crossed double center line of roadway, striking motorcycle driver and passenger, was entitled to summary judgment because plaintiff failed to develop evidence tending to prove that texter not only knew that driver was operating the vehicle when she texted him, but that she also knew he would violate the law and immediately view and respond to her text:

> Sender of a text message can potentially be liable if an accident is caused by texting, but only if the sender knew or had

special reason to know that the recipient would view the text while driving and thus be distracted:

* * *

When the sender texts a person who is then driving, knowing that the driver will immediately view the text, the sender has disregarded the attendant and foreseeable risk of harm to the public. The risk is substantial, as evidenced by the dire consequences in this and similar cases where texting drivers have caused severe injuries or death.

***Kubert v. Best,*** 432 N.J. Super. 495, 75 A.3d 1214 (App. Div. 2013).

[EDITOR'S NOTE: The court further pointed out:

Liability is not established by showing only that the sender directed the message to a specific identified recipient, even if the sender knew the recipient was then driving. We conclude that additional proofs are necessary to establish the sender's liability, namely, that the sender also knew or had special reason to know that the driver would read the message while driving and would thus be distracted from attending to the road and the operation of the vehicle.]

## NEGLIGENCE—UNLEASHED DOG

Defendant, who permitted his dog to run across a Central Park loop road to his girlfriend, resulting in plaintiff colliding with the dog, is not entitled to summary judgment even though there was no proof the dog had vicious propensities:

Here, the dog was in the control of defendants at all times in the split second before the accident occurred. Had Smith [girlfriend] not called the dog, and Goldsmith [boyfriend] not let it go, plaintiff would have ridden past them without incident.

Defendants' actions can be likened to those of two people who decide to toss a ball back and forth over a trafficked road without regard to a bicyclist who is about to ride into the ball's path. If the cyclist collided with the ball and was injured, certainly the people tossing the ball would be liable in negligence. Simply put, this case is different from the cases addressing the issue of injury claims arising out of animal behavior, because it was defendants' actions, and not the dog's own instinctive, volitional behavior, that most proximately caused the accident.

***Doerr v. Goldsmith***, 110 A.D.3d 453, 978 N.Y.S.2d 1 (1st Dept. 2013), *vacating* 105 A.D.3d 534, 964 N.Y.S.2d 13 (1st Dept. 2013).

[EDITOR'S NOTE: Two justices dissented. They disagreed with the majority's reliance on the recent Court of Appeals decision, *Hastings v. Suave*, 21 N.Y.3d 122, 967 N.Y.S.2d 658 (2013), which held that triable issues existed whether the owner of property which allowed a cow to enter the public roadway, causing plaintiff to hit the cow, was negligent.

The dissenters noted that the *Hastings* case was limited to farm animals (cows) and that until the Court of Appeals addresses the issue, the court should adhere to the established rule that New York does not recognize the common law negligence cause of action to recover damages for injuries caused by a pet dog.

The dissenters would have granted leave for the plaintiff to appeal to the Court of Appeals because it is not appropriate for the Appellate Division to presume how the Court of Appeals will rule.]

## NEW TRIAL—FAIR INTERPRETATION/EVIDENCE

Jury verdict in favor of defendant oil company mechanic who left basement trap door open at approximately 5:00 p.m. on December 21, 2006, resulting in plaintiff's decedent falling into the basement through the open trap door, could not have been reached by any fair interpretation of the evidence and plaintiff was entitled to a new trial:

In exercising our authority to review the weight of the evidence we find that the jury's verdict was contrary to the weight of the evidence. "Negligence involves the failure to exercise the degree of care that a reasonable prudent person would exercise in the same circumstances." Applying this standard, we conclude that the jury's determination that the defendant was not negligent was not based on a fair interpretation of the evidence, since a reasonable person should have been aware that leaving the trapdoor open created an unsafe condition. Accordingly, we reverse the amended judgment, reinstate the complaint, and remit the matter to the Supreme Court, Suffolk County, for a new trial.

***Cooper v. Burt's Reliable, Inc.***, 105 A.D.3d 886, 964 N.Y.S.2d 195 (2d Dept. 2013).

**NO-FAULT—GAP/MEDICAL TREATMENT—REASONABLE EXPLANATION**

Plaintiff's claim that he stopped ongoing therapy when his no-fault benefits for the service ceased was sufficient to raise a triable issue of fact whether he offered "some reasonable explanation" for the cessation of physical therapy for his injury under *Pommells v. Perez*, 4 N.Y.3d 566, 797 N.Y.S.2d 380 (2005):

> The Appellate Division's requirement that plaintiff either offer documentary evidence to support his sworn statement that his no-fault benefits were cut off, or indicate that he could not afford to pay for his own treatment, is an unwarranted expansion of *Pommells*. Plaintiff testified at his deposition that "they" (which a reasonable juror could take to mean his no-fault insurer) cut him off, and that he did not have medical insurance at the time of the accident. While it would have been preferable for plaintiff to submit an affidavit in opposition to summary judgment explaining why the no-fault insurer terminated his benefits and that he did not have medical insurance to pay for further treatment, plaintiff has come forward with the bare minimum required to raise an issue regarding "some reasonable explanation" for the cessation of physial therapy.

***Ramkumar v. Grand Style Transportation Enterprise, Inc.***, 22 N.Y.3d 905, 976 N.Y.S.2d 1 (2013), *rv'g* 94 A.D.3d 484, 941 N.Y.S.2d 610 (1st Dept. 2012).

[EDITOR'S NOTE: Two judges dissented, finding that the majority diluted the rule in *Pommells* by finding that plaintiff's "ambiguous and self-serving statement at his deposition—'they cut me off at like five months'—is a sufficient 'reasonable explanation.' We should demand more than this."]

**PLEADING—WORKERS' COMPENSATION DEFENSE**

Plaintiff, whose work as a building handyman was directed and controlled by Wavecrest Management, Inc., was precluded from suing the owners of the building, Plaza Residences, because of the Workers' Compensation defense:

> The evidence establishes that an actual employment relationship existed between plaintiff and Plaza Residences. Such evidence includes Plaza Residences' payroll records, state withholding tax and unemployment returns, plaintiff's own W-2 form, and copies of canceled paychecks. Each of these documents identified Plaza Residences as plaintiff's employer, and the fact that Plaza Residences relinquished all authority to nonparty Wavecrest Management, Inc., which directed and controlled plaintiff's work, did not preclude Plaza Residences from asserting the Workers' Compensation defense.

***Clifford v. Plaza Housing Development Fund***, 105 A.D.3d 609, 965 N.Y.S.2d 87 (1st Dept. 2013).

**PRE-TRIAL DISCOVERY—DEPOSITION—NON-PARTY WITNESS—REPRESENTATION**

CPLR 3113(c) prohibits the participation of the attorney for a non-party witness during the deposition of his or her client:

> CPLR 3113(c) provides that the examination and cross-examination of deposition witnesses "shall proceed *as permitted* in the trial of actions in open court," and it is axiomatic that counsel for a nonparty witness is not permitted to object or otherwise participate in a trial. We recognize that 22 NYCRR 221.2 and 221.3 may be viewed as being in conflict with CPLR 3113(c) inasmuch as sections 221.1 and 221.3 provide that an "attorney" may not interrupt a deposition except in specified circumstances. Nevertheless, it is well established that, in the event of a conflict between a statute and a regulation, the statute controls.

***Sciara v. Surgical Associates of Western New York, P.C.,*** 104 A.D.3d 1256, 961 N.Y.S.2d 640 (4th Dept. 2013).

[EDITOR'S NOTE: Two justices dissented:

> The long-standing practice of counsel for a nonparty witness objecting at a deposition is exemplified by the Second Department's decision in *Horowitz [v. Up-John Co.*, 149 A.D.2d 467, 539 N.Y.S.2d 961(2d Dept. 1989)]. There, the Second Department stated that the nonparty witness, a partner of the defendant physicians at the time the infant plaintiff's mother was their patient, was entitled to refuse to answer questions that sought testimony in the nature of opinion evidence. There was no discussion of CPLR 3113(c) or the rules. The relief fashioned by the Second Department "was favorable *to the objections raised by counsel for the non[]party at the deposition*. The Second Department evinced no problem with the participation of counsel for the nonparty at the

deposition, thereby, at the very least impliedly countenancing the practice."]

### PRE-TRIAL DISCOVERY—SPOLIATION—AUDIO RECORDING—LIMITED PRECLUSION

Plaintiffs-pedestrians, injured when a NYC emergency vehicle collided with another vehicle, are not entitled to strike the City's answer or preclude the City from offering any evidence in support of its emergency operation affirmative defense even though the City spoliated evidence by destroying an audiotape recording between patrol unit and commanding officer directing the unit to respond to a specified location:

> Nothing in the record supports an inference that the erasure of the audio recording sought here was willful or in bad faith such as would justify the striking of a pleading.
>
> * * *
>
> Here, the radio run audio recording is not key to the proof of plaintiff's case in chief, although, depending on its contents, it could have been relevant either to prove or help disprove defendants' emergency operation defense.
>
> * * *
>
> The City's emergency operation defense can still be challenged through examination of the officers involved and their commanding officer. We therefore conclude that the preclusion of any evidence that establishes the defense would be excessive. The limited preclusion that the motion court ordered initially, preventing the City from introducing testimony as to the contents of the audio recording, is appropriate. If warranted, an adverse inference charge at trial may be an appropriate additional sanction.

***Strong v. City of New York***, 112 A.D.3d 15, 973 N.Y.S.2d 152 (1st Dept. 2013).

### SETTLEMENT—CPLR 2104—EMAIL MESSAGE

Email message sent by claims adjuster to plaintiff's attorney confirming settlement is binding because it complies with CPLR 2104 even though it was not signed:

> Here, [adjuster] Greene's email message set forth the material terms of the agreement, to wit, the acceptance by the plaintiffs' counsel of an offer of $230,000 to settle the case in exchange for a release in favor of the defendants, and contained an expression of mutual assent. Significantly, the settlement was not conditioned on any further occurrence, such as the outcome of the motion for summary judgment or the formal execution of the release and stipulation of dismissal by these defendants and related entities.
>
> * * *
>
> Moreover, given the now widespread use of email as a form of written communication in both personal and business affairs, it would be unreasonable to conclude that email messages are incapable of conforming to the criteria of CPLR 2104 simply because they cannot be physically signed in a traditional fashion.
>
> * * *
>
> Email message contained her [adjuster's] printed name at the end thereof, as opposed to an "electronic signature" as defined by the Electronic Signatures and Records Act. Nevertheless, the record supports the conclusion that Greene, in effect, signed the email message.

***Forcelli v. Gelco Corporation***, 109 A.D.3d 244, 972 N.Y.S.2d 570 (2d Dept. 2013).

[EDITOR'S NOTE: The adjuster sent the following email to plaintiff's counsel:

> Per our phone conversation today, May 3, 2011, you accepted my offer of $230,000 to settle this case. Please have your client executed [sic] the attached Medicare form as no settlement check can be issued without this form.
>
> You also agreed to prepare the release, please included [sic] the following names: Xerox Corporation, Gelco Corporation, Mitchell G. Maller and Sedgwick CMS. Please forward the release and dismissal for my review. Thanks Brenda Greene.]

### SETTLEMENT—GENERAL RELEASE—NO DELIVERY

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

> [A] general release is governed by principles of contract law. Citing *White v. Corlies*, 46 N.Y. 467, 469-470 (1871), this Court has held that "it is essential in any bilateral contract that the fact of acceptance be communicated to the offeror." Therefore, this action was not settled because the executed release was never forwarded

> to defendant nor was acceptance of the offer otherwise communicated to defendant or its carrier.

***Gyabaah v. Rivlab Transportation Corp.***, 102 A.D.3d 451, 958 N.Y.S.2d 109 (1st Dept. 2013), *affd*, 322 N.Y.3d 1018, 981 N.Y.S.2d 349.

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

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

### SPOLIATION—MISSING EMPLOYEE FILE—ADVERSE INFERENCE IN JURY INSTRUCTION

UPS's unexplained failure to provide plaintiff with its file on employee which may disclose previous disciplinary issues amounted to spoliation, even though plaintiff was unable to establish that the file contained critical evidence such as the employer having notice of the employee's propensity for violence:

> UPS's unexplained failure to provide plaintiff with its "center file" on Callwood, which, *inter alia*, would document any previous disciplinary issues, and which UPS's counsel asserted, without elaboration, "no longer exist[s]," constitutes spoliation. The file would be critical in determining whether UPS had notice of Callwood's propensity for violence, an issue central to plaintiff's claims. Plaintiff cannot be faulted for his inability to establish that the missing records contained critical evidence. However, the extreme sanction of striking UPS's answer—the only relief plaintiff sound—is not warranted, since the center file does not constitute the sole source of the information and the sole means by which plaintiff can establish his case. A lesser sanction, such as an adverse inference charge, if sought, at trial, would be more appropriate.

***Alleva v. United Parcel Service, Inc.***, 112 A.D.3d 543, 978 N.Y.S.2d 32 (1st Dept. 2013).

### SPOLIATION—VIDEOTAPE REDACTION—SANCTIONS

Defendant is entitled, as a spoliation sanction, to preclude plaintiff's videotape of the accident scene that was edited by its employee to delete camera views he considered unnecessary, but is not entitled to a dismissal of plaintiff's complaint:

> Although NYCHA should be sanctioned for the destruction of portions of the surveillance video, the dismissal of the complaint was too harsh a remedy.
>
> * * *
>
> Defendants should not have to rely on NYCHA's statement that the deleted views are irrelevant, but should have been given an opportunity to view those images for themselves. Because NYCHA deprived defendants of this opportunity, NYCHA should be precluded from entering the redacted video into evidence or having a witness testify to its contents.

***New York City Housing Authority v. Pro Quest Security, Inc.***, 108 A.D.3d 471, 970 N.Y.S.2d 21 (1st Dept. 2013).

### TRIAL—JUROR MISCONDUCT—EXTERNAL INFLUENCE—REVERSIBLE ERROR

The trial judge did not err in declaring a mistrial after the jury rendered a verdict in favor of the defendant when she learned that the jury consulted a dictionary for the meaning of the word substantial:

> The court properly determined that the jury's act of consulting an outside dictionary on a term critical to its decision constitutes misconduct warranting a mistrial, especially since the foreperson indicated that the jury was "confused" about the term "substantial" and the court was unable to give curative instructions.

***Olshantesky v. New York City Transit Authority***, 105 A.D.3d 600, 964 N.Y.S.2d 101 (1st Dept. 2013).

[EDITOR'S NOTE: Since the jury's misconduct related only to the issue of liability and there was no evidence that it affected the jury's determination on damages, the court reinstated the verdict on damages and ordered a new trial as to liability only.]

**WITNESSES—DISPROPORTIONATE WITNESS FEE—BIAS JURY INSTRUCTION**

Testimony of subpoenaed orthopedist, who examined plaintiff in the emergency room and was paid by defendant CSI $10,000 to testify concerning plaintiff's description of the accident recorded in his consulting note, is admissible but the court should have issued a bias charge tailored to address the payment:

> Supreme Court generally instructed the jury that bias or prejudice was a consideration that it should consider in weighing the testimony of *any* of the witnesses, but this was insufficient as it pertained to CSI's payment to the doctor. To be sure, Supreme Court properly acted within its discretion in concluding that the fee payment was fertile ground for cross-examination and comment during summation. But because CSI did not even attempt to justify the $10,000 payment for one hour of testimony, Supreme Court should have also crafted a charge that went beyond the CPLR 8001 requirements. Supreme Court should have instructed the jury that fact witnesses may be compensated for their lost time but that the jury should assess whether the compensation was disproportionately more than what was reasonable for the loss of the witness's time from work or business. Should the jury find that the compensation is disproportionate, it should then consider whether it had the effect of influencing the witness's testimony (see PJI 1:90.4)… Additionally, it is within the trial court's discretion to determine whether the charge is warranted in the context of a particular payment to a witness, and to oversee how much testimony should be permitted relative to the fact witness's lost time and other expenses for which he is being compensated.

***Caldwell v. Cablevision***, 20 N.Y.3d 365, 960 N.Y.S.2d 711 (2013).

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***New York City Housing Authority v. Pro Quest Security, Inc.***, 108 A.D.3d 471, 970 N.Y.S.2d 21 (1st Dept. 2013) **[SPOLIATION—VIDEOTAPE REDACTION—SANCTIONS]**

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***Caldwell v. Cablevision***, 20 N.Y.3d 365, 960 N.Y.S.2d 711 (2013) **[WITNESSES—DISPROPORTIONATE WITNESS FEE—BIAS JURY INSTRUCTION]**

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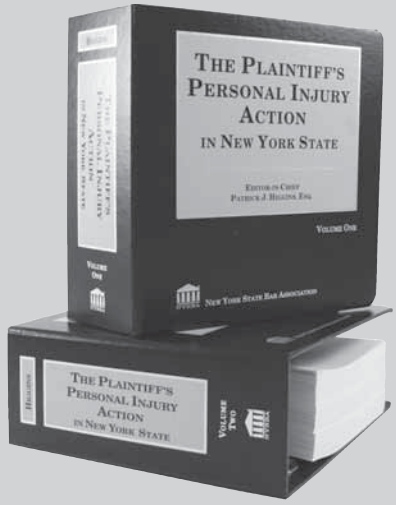


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# Scenes from the Trial Lawyers Section

## ANNUAL MEETING
New York Hilton Midtown
January 30, 2014

## ANNUAL DINNER
Harvard Club
January 29, 2014

Andrew Kowlowitz, Florence Lishansky and Allison McCabe

Jeffrey Lichtman, Tina Wells, Justice Louis Gonzalez, Presiding Justice, Appellate Division, 1st Department

Andrew Furman, Neil Kornfeld and Kathleen Furman

T. Andrew Brown and A. Michael Furman

Associate Justices John Leventhal and Sandra L. Sgroi, Appellate Division, Second Department

Former Judge of Court of Appeals Carmen Beauchamp Ciparick and Associate Justice Helen Friedman, Appellate Division, First Department

Harold Lee Schwab

Justice George Silver, Supreme Court, New York County

Former Chief Judge Judith Kaye, Andrew Jones, and Zachary Schurkman

Former Justice Arial Belen, Associate Justice John Leventhal, Associate Justice Robert J. Miller, Justice Patricia DiMango, David Hernandez, Former Associate Judge of Court of Appeals Carmen Beauchamp Ciparick

At left:
Robert McCarthy, Sherry Levin Wallach and incoming NYSBA President-Elect David Miranda

Violet Samuels and Noreen Grimmick

Charles Siegel and Manny Romero

Trial Lawyers Section Dinner Chair Evan Goldberg

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**Associate Judge Victoria Graffeo of the Court of Appeals and Evan Goldberg**


**Associate Judge Victoria Graffeo**

**A. Michael Furman**

**T. Andrew Brown, A. Michael Furman, Elizabeth McDonald Hecht and Evan Goldberg**

**Robert McCarthy, Robert R. Coughlin, Jr., and Michael O'Brien**

**Former New York State Bar Association President Vincent Doyle, III and Justice Larry Martin of Supreme Court, Kings County**

**A. Michael Furman, Elizabeth McDonald Hecht incoming and outgoing chairs of Trial Lawyers Section**

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**Attendees participating in a question and answer period.**

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## MacArthur Place

## Sonoma, California

## Sunday, July 27 – Wednesday, July 30, 2014

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