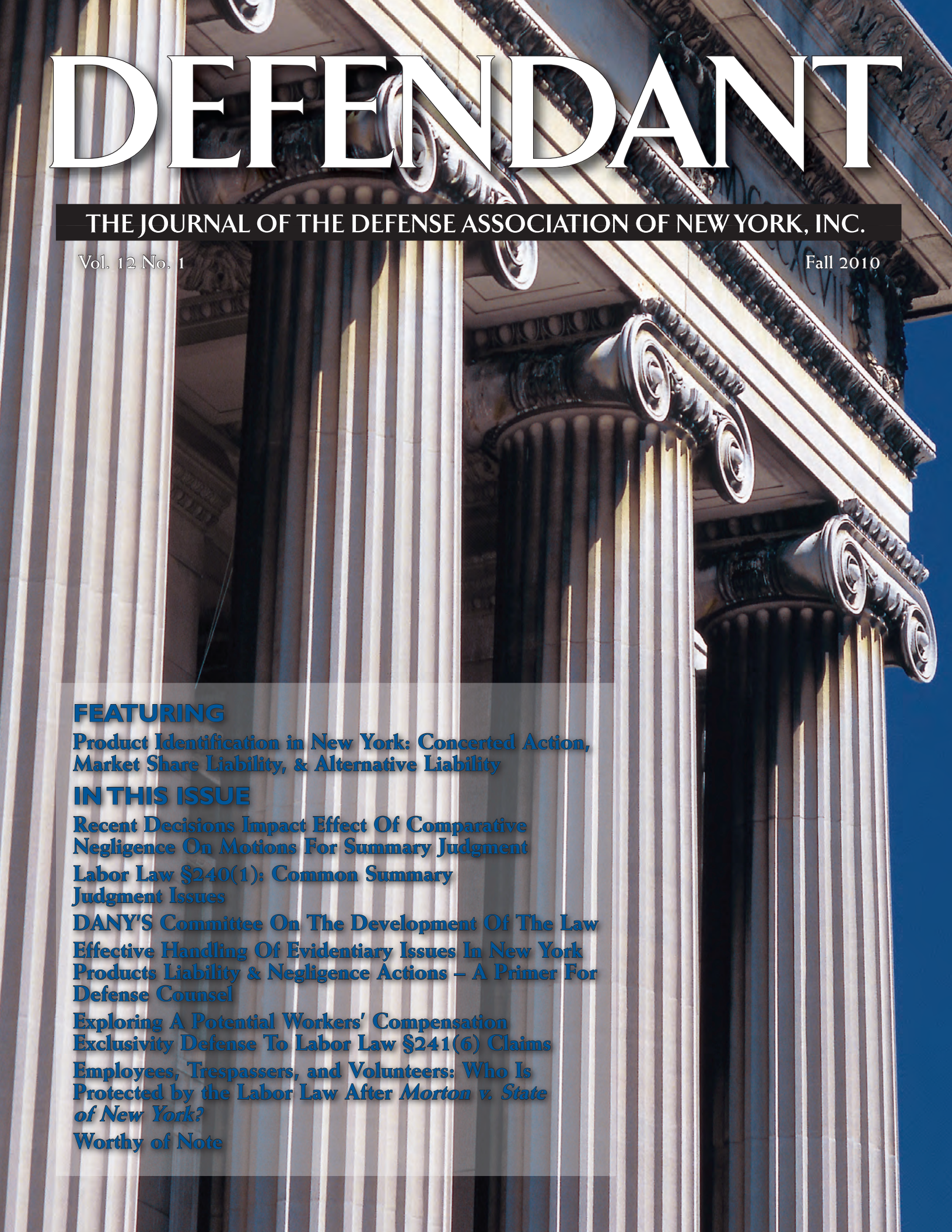

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President's Column

JULIAN D. EHLRICH.*

The past twelve months have been an exciting, even historic, time for DANY marked by an energizing spirit of collaboration between the membership, the bench, and the larger legal community and within DANY itself. This spirit has driven DANY events, publications and programming to successes on a truly impressive scale and grown membership.

The coming year promises to build on that excitement with the Past President's Dinner on October 14, 2010, a forthcoming CLE on November 9, 2010 with speakers Hon. Martin Schoenfeld, Justice of the Appellate Term, First Department, Hon. Peter Sweeney, Supervising Judge, Civil Court of the City of New York, Kings County, and Hon. George Silver, Supreme Court, Civil Branch sponsored by DANY's Young Lawyers and Women in the Law Committees and the strong issue of the Defendant you are reading now.

There really has never been a more compelling time to be part of DANY and the energized membership reflects the organizations vibrancy.

In these challenging economic times, the reality is that employers may limit the number of bar associations which they will are willing reimburse dues. However, DANY membership offers compelling, unique and real benefits and advantages to New York civil defense attorneys. These benefits derive from the cornerstones of DANY which are **passion, networking, programming, visibility and leadership opportunities**.

PASSION

- Members bring their passion about defense work to DANY. If you do defense work and like what you do or want to like it more, DANY is all about zealously defending and protecting clients in litigious New York venues. If you are not sure about defense work, you will find DANY members' enthusiasm is contagious. Working with motivated colleagues can make what we do

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* *Julian D. Ehrlich is Senior Vice President Claims at Aon Construction Services Group.*

Product Identification in New York: Concerted Action, Market Share Liability, & Alternative Liability

JOHN J. MCDONOUGH, ESQ.*

The general rule in a products liability action in New York is that identification of the exact defendant whose product injured the plaintiff is required. Hymowitz v. Eli Lilly and Company, 73 N.Y.2d 487, 504 (1989); Smith v. Johnson Products Co., 95 A.D.2d 675 463 N.Y.S.2d 464 (lst Dep't 1983); Shanks v. Oneita Knitting Mills, 58 A.D.2d 741, 395 N.Y.S. 2d 856 (4th Dep't 1977). And of course, such a showing must be by a fair preponderance of the evidence. Rinaldi & Sons v. Wells Fargo Alarm Services, Inc., 39 N.Y.2d 191, 383 N.Y.S.2d 256 (1976):

> Plaintiff has the burden of proving his case by a fair preponderance of the credible evidence. If, at the close of the proofs, the evidence as a matter of logical necessity is equally balanced, plaintiff has failed to meet his burden and the cause of action is not made out.

Id. at 196. See also the New York Pattern Jury Instructions, 3rd Edition, 1:60:

> "in order for a party to prevail on an issue which he or she has the burden of proof, the evidence that supports his or her claim on that issue must appeal to you as more nearly representing what happened than the evidence opposed to it. If it does not or if it weighs so evenly that you are unable to say that there is a preponderance on either side, you must decide the question against the party who has the burden of proof and in favor of the opposing party."

The above is, of course, consistent with principles of fundamental fairness. It is usually the plaintiff that has possession and control of the allegedly offending product and is in the best position to provide the details of same. However, what happens to the burden of proof if, as in the case of Healey v. Firestone Tire and Rubber Co., et al., 87 N.Y.2d 596, 640 N.Y.S.2d 860, (1996) the product at issue is disposed of through no fault of either the plaintiff or the alleged manufacturer?

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Product Identification in New York: Concerted Action, Market Share Liability, & Alternative Liability

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In Healey, the plaintiff sought and obtained pre-suit discovery orders which, *inter alia*, required plaintiff's employer to preserve all of its truck tire rims at its premises. Pursuant to these same orders, plaintiff's experts examined and evaluated all of the truck tire rims on the premises and identified three rims allegedly manufactured by the defendant as being the only rims that could have been involved in plaintiff's accident. A year later, the plaintiff's employer indicated that it had lost the subject truck tire rims. Based on these facts, the defendant truck tire rim manufacturer moved for summary judgment for lack of product identification. In confirming a dismissal of claims against the defendant, based on a lack of admissible facts supporting product identification, the Court of Appeals stated:

> The identity of the manufacturer of a defective product may be established by circumstantial evidence. Moreover, circumstantial evidence may sufficiently demonstrate the maker's identity notwithstanding the destruction of the allegedly defective product after use (citation omitted).

Id. at 601 (citation omitted). However, while the Court of Appeals will allow circumstantial evidence to prove product identification, the Court stated that "the circumstantial evidence of identity of the manufacturer of a defective product causing personal injury must establish that it is reasonably probable, not merely possible or evenly balanced, that the defendant was the source of the offending product." Id. (citations omitted).

What is the appropriate theory of liability and burden of proof when precise identification of the offending product is impossible? New York has adopted the theory of alterative liability. The paradigm of alternative eligibility is found in the case of Summers v. Tice, 33 Cal. 2d 80, 199 P2d 1 (1948). In Summers, the plaintiff and two of his friends went hunting. The former friends, later defendants, each carried identical shotguns and ammunition. During the hunt, the defendants shot simultaneously at the same bird, and plaintiff was struck by bird shot from one of the defendants' guns. The Court held that when two defendants breach a duty to the plaintiff, but there is uncertainty regarding which one caused the injury, "it should rest with them [defendants] each to absolve himself if he can." Id at 84. See also Restatement

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Recent Decisions Impact Effect Of Comparative Negligence On Motions For Summary Judgment

JONATHAN JUDD, HAVKINS, ROSENFELD, RITZERT & VARRIALE, LLP *

A recent series of Appellate Division decisions has spotlighted the role of comparative negligence in motions by plaintiffs for summary judgment.

Over the years, there have been thousands of cases addressing the proof required on motions for summary judgment. Therefore, it is somewhat surprising that, until now, the importance of a plaintiff's comparative negligence in connection with summary judgment motions has not been an area often addressed by the courts. However, the role of comparative negligence in the summary judgment context has been addressed in some very important recent decisions and has spawned a rather profound difference of opinion between the First and Second Departments of the Appellate Division.

In the recently decided Roman v. A1 Limousine, ___A.D.3d ___ (2d Dept August 10, 2010), the Second Department held that the plaintiff could not prevail on his motion for summary judgment because he "failed to establish, as a matter of law, that he was free from comparative negligence." The Court added that the failure to make this showing required the denial of the motion, regardless of the sufficiency of the defendant's opposition papers. Now, even if certain liability issues can be resolved as a matter of law, a court in the Second Department cannot grant summary judgment if a liability issue, such as comparative negligence, remains unresolved.

In its decision, the Second Department explicitly acknowledged that its holding in Roman conflicted with that of the First Department in Tsebelis v. Ryder Truck Rental, Inc., 72 A.D.3d 198, 895 N.Y.S.2d 389 (1st Dept 2010), and specifically declined to follow that decision.

In Tsebelis, the plaintiff was unable to recall the details of the alleged accident. However, the defendant testified that he "entered the intersection against a red light and he did not see [the] plaintiff prior to the impact." The First Department held that the plaintiff was entitled to summary judgment on the issue of liability despite the fact that his own negligence might raise an issue of fact. It reasoned that:

> A plaintiff's culpable conduct no longer stands as a bar to recovery in an action for personal injury, injury to property or wrongful death. Under CPLR 1411, such conduct merely acts to diminish the plaintiff's recovery in proportion to the culpable conduct of the defendants. This statute * * * substituted the notion of comparative fault for the common-law rule that barred a plaintiff from recovering anything if he or she was responsible to any degree for the injury.

The First Department further held that "it is not [the] plaintiff's burden to establish [the] defendants' negligence as the sole proximate cause of his injuries in order to make out a prima facie case of negligence."

The Second Department adamantly rejected the reasoning of the First Department, holding that:

> contrary to the Appellate Division, First Department's statements in Tsebelis, CPLR 1411 was not relevant to the issues presented herein. CPLR 1411 codifies that rule that any culpable conduct attributable to the plaintiff, including his or her negligence or assumption of risk, does not bar the plaintiff's recovery of damages, but shall diminish that recovery in proportion to the culpable conduct of the defendant. CPLR 1411 pertains to the damages ultimately recoverable by a plaintiff. It has no bearing, procedurally or substantively, upon a plaintiff's burden of proof as the proponent of a motion for summary judgment on the issue of liability.

In deciding Roman, the Second Department relied on Thoma v. Ronai, 82 N.Y.2d 736, 602 N.Y.S.2d 323 (1983), which it stated was directly on point.[1] In Thoma, the Court of Appeals, affirming an order of the Appellate Division, First Department, held

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Labor Law §240(1): Common Summary Judgment Issues

ANDREW ZAJAC * AND JAMES K. O'SULLIVAN **

SECTION A.
Introduction: General Principles Governing Summary Judgment Motions In Labor Law §240 Cases

The summary judgment motion, codified in New York Law under CPLR §3212, serves the worthy purpose of culling from the court system cases where there is no true issue of fact for a jury to hear, and provides the court with a means of an immediate disposition of those cases – either a dismissal in favor of a defendant, or an adjudication of liability in plaintiff's favor, permitting a trial limited solely to the issue of damages. See, generally, Zuckerman v. The City of New York, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980).

This procedure is probably less prevalent in the field of personal injury law than in other areas of law. Generally, personal injury actions requiring a finding of negligence on the part of a defendant, or someone for whom that defendant is responsible. Courts have often observed that negligence cases by their very nature do not lend themselves to summary judgment since, even if all parties are in agreement as to the underlying facts, the very question of negligence itself may present an issue for a jury because the determination of whether a party's conduct was reasonable is inherently a fact-based determination. See, e.g., Huff v. Rodriguez, 45 A.D.3d 1430, 846 N.Y.S.2d 841 (4th Dep't 2007); Rivers v. Atomic Exterminating Corp., 210 A.D.2d 134, 671 N.Y.S.2d 282 (1st Dep't 1994).

Be that as it may, there is one area where this general principle does not apply, because a showing of negligence is not required. Labor Law §240(1) is a provision that protects workers at the site of construction or other activities at buildings and other structures from hazards related to the effects of gravity; it covers those claims by a worker who falls, or who suffers injury because of the fall of an inadequately hoisted or secured object. The statute permits such an injured worker to sue owners and contractors for tort damages in the event that they suffer an injury because of the inadequacy of a scaffold, ladder, hoist or other elevation-related device. As a matter of public policy, New York deems this protection so important that the liability imposed by it is "absolute," and a worker's mere comparative negligence is not even a partial defense to an appropriate Labor Law §240 defendant. Koenig v. Patrick Constr. Corp., 298 N.Y. 313 (1948). As we will discuss further below, the negligence of an injured plaintiff is a defense only if that negligence was the sole proximate cause of the accident, and it can be determined that no inadequacy whatsoever of any elevation-related device contributed to it.

From the defendant's point of view, therefore, the negligent-free nature of the Labor Law §240(1) action has both positive and negative consequences for the disposal of such cases via summary judgment. Where the undisputed facts demonstrate that the plaintiff suffered an elevation-related accident, and the inadequacy of a safety device played at least some role in the occurrence of the accident, generally plaintiff will be entitled to summary judgment on liability. Whether the owner, general contractor, or a contractor charged with supervising the work was negligent or not will not be a consideration. Of course, the reverse is also true. Where it can be established that the accident occurred despite the adequacy of the safety device, or where the accident occurred outside the realm of the type of work covered by the accident, a defendant may obtain summary judgment on at least that claim, relegating plaintiff to negligence-based causes of action against the owner and contractors.

This article will explore some of the most common themes encountered in summary judgment actions concerning this unique statute.

The Recalcitrant Worker Defense: Did Plaintiff Inexcusably Refuse To Use A Safety Device?

Perhaps the most frequently-wielded weapon on the Labor Law §240 litigation battlefield is the

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Labor Law §240(1): Common Summary Judgment Issues

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"recalcitrant worker" defense. It is often used as a sword by defense counsel to dismiss this statutory claim on summary judgment grounds, or, at least, as a shield to defend summary judgment motions by plaintiff. Pursuant to this doctrine, a worker who fails to use an adequate elevation-related safety device, although instructed to do so, and although aware that the device is reasonably available for his or her use, may not obtain a judgment pursuant to the statute where the failure to use the device constitutes the sole proximate cause of the accident.

The New York State Court of Appeals, New York's highest Court, in its affirmance of an appellate court dismissal of a worker's statutory claim in Jastrzebski v. North Shore School Dist., 223 A.D.2d 677, 637 N.Y.S.2d 439, aff'd 88 N.Y.2d 946, 647 N.Y.S.2d 708 (1996) acknowledged the viability of this defense for the first time. In a brief memorandum in that case, the Court of Appeals affirmed, for reasons stated in the Appellate Division memorandum, the dismissal of an action where plaintiff was injured when he fell from a ladder. The evidence in that case established that when he first mounted it, his immediate supervisor ran over to plaintiff and told him to "get off of it." After the plaintiff climbed down from the ladder, the supervisor told him that the ladder was "no good" and then, pointing to a nearby scaffold, directed him to use it. Although the plaintiff indicated his assent to the directive, he re-climbed the ladder as soon as the supervisor turned his back. He then fell from the ladder and was injured. The majority at the Appellate Division in that case (affirmed explicitly by the Court of Appeals), cited prior Appellate Division cases for the proposition that the statutory protection provided by Labor Law §240 does not extend to workers who have adequate and safe equipment available to them but refuse to use it. The Jastrzebski decision distinguished a prior Court of Appeals decision in Gordon v. Eastern Ry. Supply, 82 N.Y.2d 555, 606 N.Y.S.2d 127 (1993), where the Court of Appeals denied summary judgment on the recalcitrant worker defense in a case where a plaintiff fell from a ladder that was apparently known to be defective, despite instructions not to use it. Gordon was distinguished on the grounds that instructions alone concerning the avoidance of inadequate safety devices are insufficient to support the defense. In Jastrzebski, however, there was both an immediate instruction, and the immediate availability of an adequate safety device.

1. The Explicitness and Recency of the Instructions

The first major issue raised by the recalcitrant worker defense in any particular case is the adequacy of the instructions to use safety devices, or the warnings to avoid unsafe ones. New York's intermediate courts, the Appellate Divisions, particularly the First Department (which covers cases emanating from New York County and Bronx County) once adhered to a rule that the instruction to avoid an unsafe device must be immediate. See, Olszewski v. Park Terrace Gardens Inc., 306 A.D.2d 128, 763 N.Y.S.2d 246 (1st Dep't 2003). In Vacca v. Landau Industries Ltd., 5 A.D.3d 119, 773 N.Y.S.2d 21 (1st Dep't 2004), the First Department held that statements contained in the affidavit of plaintiff's supervisor were insufficient to ward off summary judgment for plaintiff because the opposing affidavit did not state the exact date plaintiff was given the instruction to wear a safety harness, other than that it was "at some time" prior to the accident. Only if the instruction was given "shortly before the accident" would a defendant be entitled to a trial on the issue. See, also, Stewart v. Playland Center Inc., 8 A.D.3d 74, 778 N.Y.S.2d 159 (3d Dep't 2004).

However, in Cahill v. Triboro Bridge & Tunnel Auth., 4 N.Y.3d 35, 790 N.Y.S.2d 74 (2004), plaintiff suffered a fall from a form that would have been prevented by safety harnesses equipped with lanyards that were readily available at the site. Plaintiff conceded he had heard the warnings not to use them, although the facts described in the decision indicate that those warnings may not have been issued specifically for the last three to six weeks before his accident. The Court of Appeals, reversing the lower courts, denied summary judgment to plaintiff.

Accordingly, we believe that Appellate Division cases requiring an "immediate" instruction are no longer good law. However, the Court of Appeals has recently reaffirmed that it must be undisputed that a "standing order" had been communicated specifically to plaintiff; otherwise, plaintiff may overcome the recalcitrant worker defense to obtain summary judgment. Gallagher v. New York Post, 14 N.Y.3d 83, 896 N.Y.S.2d 732 (2010). See also, Quattrocchi v. F.J. Sciame Const. Corp., 11 N.Y.3d 757, 866 N.Y.S.2d 592 (2008) [question of fact concerning whether plaintiff ignored instruction to avoid doorway under which planks were stacked was sufficient to deny summary judgment to plaintiff].

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DANY'S Committee On The Development Of The Law

ANDREW ZAJAC *

The Committee on the Development of the Law of the Defense Association of New York Inc. (DANY) was founded in 1997 by John J. McDonough, who was President of DANY at the time. Since then, the Committee has been submitting *amicus curiae* briefs to the New York Court of Appeals on issues of vital concern to the defense community in this State.

Among the cases in which the Committee has filed amicus curiae briefs with the Court are the following:

Trincere v. County of Suffolk, 90 N.Y.2d 976, 665 N.Y.S.2d 615 (1997) – In this case, the Court of Appeals held that landowners are not responsible for trivial defects in walkways. The Court affirmed the Appellate Division, Second Department which held that differences in elevation of approximately one inch, without more, are not actionable.

Capparelli v. Zausmer Frisch Associates, Inc, 96 N.Y.2d 259, 727 N.Y.S.2d 37 (2001) – This case resulted in a landmark opinion on the scope of the absolute liability provisions of Labor Law §240 as it applies to falling objects. The Court's decision contains language that is highly beneficial for defendants in cases of this nature.

Tyrrell v. Walmart Stores, Inc., 97 N.Y.2d 650, 737 N.Y.S.2d 43 (2001) – Here, the Court of Appeals refused to abolish the "speaking agent" rule. Under that rule, the statement of an employee may be received as an admission against the employer only if the proponent of the statement can establish that the employee has the authority to speak on the behalf of the principal. This rule makes it much more difficult for plaintiffs to prevail, especially in slip and fall cases.

Peralta v. Henriquez, 100 N.Y.2d 139, 760 N.Y.S.2d 741 (2003) – In this case, the Court issued a favorable ruling for defendants on the issue of a landowner's duty concerning exterior lighting. The Court rejected the plaintiff's assertion that an unlit parking lot is per se dangerous.

Desiderio v. Ochs, 100 N.Y.2d 159, 761 N.Y.S.2d 576 (2003) – At issue here were the structured judgment statutes pertaining to medical malpractice cases. In this case, the jury awarded the plaintiff $40,000,000 for future nursing care. Application of the statutes resulted in a total payout to the plaintiff of $120,000,000. The Court was constrained to affirm this result by the statutory language and its prior precedents. Significantly, however, the Court's opinion contained strident calls for an amendment to the statutes to avoid absurd results such as ensued in this case. Shortly thereafter, the Legislature amended the statutes, intending to ameliorate results such as in Desiderio.

Blake v. Neighborhood Housing Services of New York City, Inc., 1 N.Y.3d 280, 771 N.Y.S.2d 484 (2003). This case resulted in a landmark opinion concerning the strict liability provisions of Labor Law §240, which is extremely favorable to defendants. The decision expands the scope of the defense concerning the plaintiff's actions as being the sole proximate cause of the accident.

Toefer v. Long Island Railroad, 4 N.Y.3d 399, 795 N.Y.S.2d 511 (2005). This was another significant victory for defendants on the issue of Labor Law §240. Resolving a split between the Appellate Divisions, the Court of Appeals held that a fall from a flatbed truck does not implicate the absolute liability provisions of Labor Law §240.

Morejon v. Rais Const., 7 N.Y.3d 203, 818 N.Y.S.2d 792 (2006). In a favorable result for defendants, the Court held that "only in the rarest of *res ipsa loquitur* cases may a plaintiff win summary judgment or a directed verdict."

Stiver v. Good & Fair Carting & Moving, Inc., 9 N.Y.3d 253, 848 N.Y.S.2d 585 (2007). This was a significant case concerning the duty of a defendant to a non-contracting third party. The court held that a New York State certified inspection station did not owe a duty to a motorist who was injured in a subsequent collision with the inspected vehicle. The decision in this case was the subject of an article on the front page of the New York Law Journal, and the

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Effective Handling Of Evidentiary Issues In New York Products Liability & Negligence Actions – A Primer For Defense Counsel

MICHAEL B. GALLUB *

Navigating through evidentiary issues that arise in products liability and general negligence trials can present significant challenges for defense counsel. Certain evidentiary issues frequently arise which can materially affect the outcome of a trial. The need to anticipate and devise appropriate strategies to address these issues is essential to an effective defense. This article will discuss important State Court evidentiary rules and practice tips which can help defense counsel deal effectively with difficult issues such as the existence of other accidents or claims, subsequent remedial measures, post-manufacture design or warning changes, and the admissibility of experiments, testing and in-court demonstrations.

I. EVIDENCE OF OTHER ACCIDENTS/CLAIMS

A. Existence of Other Accidents or Claims

Evidence of other accidents or claims can be harmful both in products liability and general negligence actions. Plaintiffs introduce such evidence to help establish claims of a defect or dangerous condition in a product, a hazardous condition on land or other premises, a defendant's prior notice or knowledge of a dangerous condition, a failure to adequately warn of alleged dangers, a post-manufacture continuing duty to warn, and other allegations of liability. In products liability actions, the existence of other accidents or claims involving the same product or product design can be particularly problematic, as some Courts have relied upon such evidence to support a punitive damages claim.[1]

"Other accident" evidence does not always involve prior accidents. It can also include subsequent accidents. Courts have held that knowledge of subsequent accidents can be admissible, even though it does not impact upon the issue of notice, "to establish the existence of a dangerous condition, instrumentality, or place."[2]

Evidence of other accidents or claims can have a substantial impact on a jury. It is subject to misuse and over-use, sometimes eclipsing the lack of other evidence in favor of verdicts based upon a misimpression that "where there's smoke, there's fire." Mass publicity concerning alleged incidents of concealment of product defects, ignoring of accidents/claims and failure to issue timely recalls has created a climate in which the existence of other accidents and claims can be particularly difficult to overcome. Needless to say, excluding evidence of other accidents and claims can be a pivotal factor in defense of products liability and premises actions. Understanding the basic rules for admission and exclusion of this type of evidence is essential.

The general rule is that evidence of other accidents or claims is not admissible unless the proponent demonstrates that their circumstances are substantially the same as those of the accident in issue.[3] This rule applies in products liability actions. For example, the Court of Appeals in Sawyer v. Dreis & Krump Mfg. Co.[4] held that it was error for the Trial Court to have allowed cross-examination of defendant's officers on prior accidents involving the press brake without having established the requisite similarity of the other accidents to the subject accident. In Rodriguez v. Ford Motor Co.,[5] an automotive "sudden acceleration" case, the Appellate Division, First Department held that evidence of alleged similar incidents of sudden acceleration involving the subject model vehicle was properly excluded "in the absence of a showing that 'the relevant conditions of the subject accident and the previous one were substantially the same'."[6] In Ramirez v. Sears, Roebuck & Co,[7] the Appellate Division, Second Department held that the Trial Court "erred when it permitted testimony of prior accidents involving the table saw, since there was no proof that the accidents were, in their relevant details and circumstances, substantially similar to the subject accident."[8]

Admission of "other accident" evidence in products liability actions also requires a showing that the other accidents involved the identical product or product design, at the very least, the identical component at issue in a product of the same or similar design.[9] Thus, in addition to dissimilarities between accident

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Effective Handling Of Evidentiary Issues In New York Products Liability & Negligence Actions – A Primer For Defense Counsel

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circumstances, differences between the products involved in the respective accidents can provide a strong basis for exclusion of the other accidents.

The same general showing applies where "other accidents and claims" is sought in discovery.[10] If pre-trial disclosure of other accidents or claims is permitted, such evidence can nevertheless be excluded at trial, under the more stringent rules of admissibility, if defendant sufficiently demonstrates that (1) the other accidents did not involve the same or similar product, or that the same "component when utilized in conjunction with another similar product, "is sufficiently distinct with respect to the design, function and capacity" from the product at issue,"[11] or (2) the accidents sought to be admitted were not substantially the same as the subject accident.

When plaintiffs seek to introduce other accidents or claims, defense counsel should be prepared to present all available evidence negating the required elements. Motions in limine to exclude "other accident" evidence should be made prior to trial. In appropriate circumstances, a hearing prior to or during trial should be requested. Defense counsel should submit evidence demonstrating the differences involving each accident's circumstance or condition, each product, component or instrumentality involved, and/or the condition and use of each product or instrumentality at the time of each other accident. In products liability cases, it is helpful to show all differences between the design, age, condition, use and environment of the subject product and the product involved in each other accident.

If available, expert evidence should be offered to support the exclusion of other accidents or claims. Photographs or videos showing differences in product conditions and accident conditions should be introduced. Written submissions before and/or during trial should include affidavits or testimony from persons with knowledge of the other accident details and from experts, if needed. Accident reports and other documents showing the dissimilarities should be submitted. If other lawsuits were commenced, admissions contained in pleadings, bills of particulars, responses to interrogatories, notices to admit and deposition testimony can be instrumental in establishing the dissimilarities between the other accidents and the subject accident. Consider making a chart or board listing each proffered accident and its differences from the subject accident. This can be extremely helpful in demonstrating to the Court why the other accidents should be excluded.

In addition to the exclusionary factors discussed above, other appropriate objections to the admission of other accidents or claims should be made. These include hearsay, foundation, prejudice exceeding probative value, and that inquiry as to whether other accidents are substantially the same would require mini-trials of collateral matters which would unduly prolong the trial and/or mislead and confuse the jury.

It is important to keep in mind that rulings on motions in limine are considered advisory in nature and are generally not appealable. If the Court denies a motion in limine to exclude other accidents or claims, defense counsel must make the appropriate objections and/or motion to exclude such evidence during the trial. Failure to make timely objections at trial will likely waive the issue for appeal. If the Court declines to hold a hearing during trial, defense counsel should ensure that a detailed offer of proof is placed on the record, with all available evidence submitted or recited, in order to preserve the issue for appellate review.

B. Lack of Other Accidents or Claims

While admission of other accidents or claims can be harmful, evidence concerning the absence of other accidents and claims can help the defense of products liability[12] and premises[13] actions. The absence of other accidents and claims can make a difference on summary judgment motions when presented as part of the overall showing. At trial, evidence concerning the absence of other accidents or claims can help persuade a jury that the product in issue was reasonably safe, that defendant acted reasonably, that defendant had no notice of an alleged hazardous condition, and/or that plaintiff's misuse or culpable conduct caused the accident.

II. SUBSEQUENT REMEDIAL MEASURES

Public policy promotes the remediation of problems in products and on premises. In the real world, post-accident remedial measures promote public safety and responsible behavior among members of society. However, in the world of litigation, sometimes "no good deed goes unpunished." A defendant's subsequent remedial measures can be used to its detriment in products liability and premises actions. Plaintiffs seek to admit evidence of a post-manufacture design or

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Exploring A Potential Workers' Compensation Exclusivity Defense To Labor Law §241(6) Claims

BRADLEY J. CORSAIR *

In construction site personal injury cases, Labor Law § 241(6)[1] is routinely alleged to impose vicarious liability of owners, general contractors, and their agents, for negligence by others at a project. Elements of the claim, and potential defenses, have been extensively treated in this publication and elsewhere. In concluding a 2004 review of those subjects, present DANY President Julian D. Ehrlich noted the "ample room for creative argument" for and against § 241(6) application.[2]

Against that backdrop, this discussion will examine potentially a potent defense to § 241(6) claims that arise solely from negligence of a plaintiff's employer or co-employee based on the exclusivity of the Workers' Compensation Law.

In essence, the proposed defense is based on the notion that because the exclusivity of the workers' compensation remedy prevents an injured employee from maintaining an action against a negligent co-employee, the Workers' Compensation Law should also bar a derivative § 241(6) claim which necessarily is dependent upon the same claim of negligence for which the exclusive remedy has been provided.

This defense, if honored, could have widespread application to the common accident scenarios where Labor Law § 241(6) is pled, including trips and falls due to debris created or left by coworkers, trench collapses due to coworkers' negligence in sheeting or shoring, losses involving negligence of coworker heavy equipment or crane operators and signalmen, and failures of foremen to provide proper personal protective equipment.

However, the defense would not apply to other common § 241(6) scenarios involving losses due to the fault of parties other than the employer, such as improper lighting or debris created by a trade other than plaintiff's employer, or improper coordination of trades by construction managers or general contractors. In these scenarios, owners and general contractors would have vicarious liability for trades that did not employ the claimant.

A brief review of the nature of liability under § 241(6) is useful to form a foundation for the discussion.

The Court of Appeals has described the duty imposed by § 241(6) on owners, general contractors and their agents as establishing "in a sense, a hybrid since it reiterates the common-law standard of care and then contemplates the establishment of specific detailed rules…"[3] in the Industrial Code. The elements of a § 241(6) cause of action include "negligence" by "someone within the chain of the construction project."[4]

Upstream entities thus face liability for negligent acts and omissions of downstream contractors, including a plaintiff's employer or co-employee. The plaintiff must demonstrate a violation of an applicable Industrial Code section that is a "specific, positive command."[5] That does not establish negligence, but rather is "some evidence of negligence which the jury may consider on the question of defendant's negligence."[6]

Critical for viability of the proposed defense is characterization of § 241(6) liability for another's negligence as "vicarious." It could not be effective if the Court of Appeals eventually held that predicate negligence gives rise to absolute liability, which some practitioners believe and would advocate. However, in referring to § 241(6) liability in Rizzuto, the Court of Appeals used the phrases "vicarious liability" or "vicariously liable" five times. What's more, the Rizzuto Court observed that "[a]n owner or general contractor may, of course, raise any valid defense to the imposition of vicarious liability under section 241(6)."[7]

The proposal here is that § 241(6) vicarious liability should not derive from negligence of a plaintiff's employer or co-employee, for which a Workers' Compensation Law exclusive remedy has been provided to the plaintiff. This exclusivity argument is grounded in case law from the Court of Appeals, and long-standing conceptual roots in the historical enforcement of workers' compensation exclusivity regarding an

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Exploring A Potential Workers' Compensation Exclusivity Defense To Labor Law §241(6) Claims

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analogous vicarious liability statute, VTL § 388.[8]

These historical roots, founded chiefly in Workers' Compensation Law (WCL) § 29(6),[9] can be traced to a 1958 Court of Appeals opinion that remains good and cited authority, Rauch v. Jones, 4 N.Y.2d 592, 152 N.E.2d 63, 176 N.Y.S.2d 628.[10]

Rauch addressed a claim of vicarious liability of a vehicle owner who was not an employer or co-employee of the plaintiff, for negligence of a co-employee driver in the course of employment. There was a prospect for such vicarious liability in view of then-existing VTL §§ 59 and 59-a, now present as VTL § 388.[11] The Court of Appeals had to decide whether a direct action against such owner has been barred by the enactment of WCL § 29(6). It concluded that such action is indeed prohibited.

The Rauch Court observed how the VTL created a remedy to address a scenario where no right to relief had previously existed. However, the Court stated that "where there is a specific remedy for a wrong, a derivative liability imposed by a statute does not attach inasmuch as provision for full redress for the losses suffered as a consequence of the wrong had been made."[12] Moreover, the § 29(6) exclusive remedy provision applies "where the negligence of a fellow employee was the sole proximate cause of the injury or death."[13] In that scenario, "[t]he statute, having deprived the injured employee of a right to maintain an action against a negligent coemployee, bars a derivative action which necessarily is dependent upon the same claim of negligence for which the exclusive remedy has been provided."[14]

In so holding, the Court of Appeals cited to a case it was deciding contemporaneously, Naso v. Lafata, 4 N.Y.2d 585, 152 N.E.2d 59, 176 N.Y.S.2d 622. In Naso, the Court expressed concern that granting VTL vicarious liability would "create recovery over against plaintiff's fellow employee."[15] The Court thus determined that vicarious liability would be improper, since "the fellow employee would be afforded less than complete protection, and the legislative purpose in adopting subdivision 6 of section 29 of the Workmen's Compensation Law would, thereby, be thwarted."[16]

These pronouncements of half century past have not faded with time. In 1983, the Court of Appeals addressed a contribution claim against a vehicle owner/lessor, allegedly vicariously liable for negligence of a driver who was the plaintiff's co-employee.[17] Citing Rauch and Naso, the Court held "there can be no liability imputed" since such person is "statutorily immune" from suit.[18]

The Court of Appeals revisited Naso and Rauch again just a few years ago, in Tikhonova v. Ford Motor Co., 4 N.Y.3d 621, 830 N.E.2d 1127, 797 N.Y.S.2d 799 (2005). In Tikhonova, a vehicle owner sought to avoid § 388 exposure for negligence of an immune diplomat driver. Relying upon Naso, the Court recounted its explanation "that a worker injured in a car driven negligently by a co-employee (and in the course of their employment) may not resort to the Vehicle and Traffic Law for a cause of action against the car's owner. The Workers' Compensation Law, we held, offers the only remedy for injuries caused by the co-employee's negligence. This conclusion flowed directly from the statutory language in what was then Workmen's Compensation Law § 29(6), which stated that '[t]he right to compensation or benefits under this chapter, shall be the exclusive remedy to an employee ... when such employee is injured or killed by the negligence or wrong of another in the same employ."[19]

Referring also to Rauch, the Court in Tikhonova added that "both decisions rest on the statutory language making plain that in the special context of workers' compensation, the system of remedies provided by the Workers' Compensation Law supplants all other statutory or common-law causes of action."[20]

Accordingly, the principle set forth in Rauch and Naso of refusing § 388 liability where workers' compensation exclusivity applies, remains prominent in recent jurisprudence.[21]

Now returning to the Labor Law context, significantly, Rauch and Naso have served as the seminal basis for applying the Workers' Compensation exclusivity to § 241(6) claims. Of particular note is the Court of Appeals case of Heritage v. Van Patten, 59 N.Y.2d 1017, 453 N.E.2d 1247, 466 N.Y.S.2d 958 (1983).

In Heritage, the Court of Appeals affirmed dismissal of a § 241(6) claim against a loss location owner who was the plaintiff's co-employee. Significantly, allegations of negligence and a nondelegable duty[22] did not result in a § 241(6) recovery.

It should be emphasized that even though the owner was the plaintiff's employer in that case, the Court of Appeals, in holding the dismissal of § 241(6)

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Employees, Trespassers, & Volunteers: Who Is Protected by the Labor Law After *Morton v. State of New York*?

MATTHEW J. LARKIN *

Labor Law § 240(1) protects only those "employed" in the "erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure." More broadly, Labor Law § 241(6) provides heightened protections to "persons employed" at or "lawfully frequenting" places of "construction, excavation, or demolition work." In interpreting both statutes, courts have relied upon Labor Law § 2 to supply the meaning of "employed."

The Court of Appeals has interpreted this language to limit those covered to persons "both permitted and suffered to work on a building or structure that was hired by someone …." Mordofsky v.V.C.V. Development Corp.[1] In Mordofsky, the court explained the reasoning for the restrictive purview of the statute as follows:

> The primary purpose of the Labor Law was the protection of workers .... Because [plaintiff] was not an "employee" or "employed" at this site, was not a "mechanic, workingman or laborer working for another for hire" (Labor Law § 2[5]) nor one "permitted or suffered to work" (Labor Law § 2[7]) at the place of occurrence he cannot be considered to have been within the class of persons "employed therein or lawfully frequenting" the premises entitled to the protection afforded by the "flat and unvarying duty" imposed by the Labor Law.[2]

Three categories have been identified by the courts as unprotected by the Labor Law: passersby, volunteers, and trespassers. For instance, a pedestrian who slipped on gravel from a road construction project was not protected by Labor Law § 241(6).[3] Similarly, a nursing home resident who died after falling through a floor opening during a renovation of the facility was not protected by Labor Law § 241(6).[4] Sections 240(1) and 241(6) have also been held "inapplicable to persons such as friends and neighbors who voluntarily render casual assistance to a homeowner in performing a home repair or construction job."[5] Even cases in which the plaintiff and property owner have agreed to a barter arrangement or exchange of services have been found to be beyond the reach of the Labor Law.[6]

THE MORTON MAJORITY

The Court of Appeals has recently examined again, in Morton v. State of New York, what it means to be "employed" pursuant to the Labor Law.[7] The divided court affirmed the Appellate Division, Second Department's dismissal of the plaintiff's Labor Law § 241(6) cause of action, finding that the requisite nexus between the owner and the injured worker was lacking. In Morton, the plaintiff was a water company employee who was injured during an excavation cave-in while in the process of repairing a ruptured water main. The accident occurred on property owned by the State of New York as part of the highway system. The plaintiff's employer had failed to obtain a work permit from the New York State Department of Transportation, pursuant to Highway Law § 52, which was required for any repair work performed within the State's right-of-way.

The Appellate Division, Second Department, determined that the lack of a work permit by the plaintiff's employer meant that the plaintiff was not "permitted or suffered to work" on the property as required by Labor Law § 2(7). Judge Read, writing for the majority of the Court of Appeals, embraced the Second Department's reasoning, finding that "[w]ithout the permit . . . claimant was a trespasser to whom the State owed no duty under Labor Law § 241(6)."[8] The majority opinion explained that ownership alone is not the dispositive factor: "ownership is a necessary condition, but it is not a sufficient one. Rather, we have insisted on 'some nexus between the owner and the worker, whether by lease agreement or grant of an easement, or other property interest.'"[9]

The majority opinion traced the recent history of the nexus requirement, citing to the 2004 unanimous opinion in Abbatiello v. Lancaster Studio Assoc.,[10] which held that a building owner was not liable under Labor Law § 240(1) to an injured cable technician working on its property without the owner's knowledge or consent because he was present at the property in

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Employees, Trespassers, & Volunteers: Who Is Protected by the Labor Law After *Morton v. State of New York*?

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response to a tenant request, and the owner, pursuant to Public Service Law § 219, had no authority to exclude him from the premises. The Abbatiello court noted that no nexus existed between the owner and the injured plaintiff because he "was on the owner's premises not by reason of any action of the owner but by reason of the provisions of the Public Service Law."[11]

Judge Read's majority opinion also differentiated the facts in Morton from those presented in the 2008 case, Sanatass v. Consolidated Inv. Co.,[12] where Judge Read had been one of two dissenters. In Sanatass, the Court of Appeals held that a property owner may be liable under Labor Law § 240(1) "even though a tenant of the building contracted for the work without the owner's knowledge"[13] and had breached the terms of lease by failing to obtain written permission from the owner before performing alterations to the property. The majority found that, because the injured worker was hired by the tenant who held a lease with the owner, there was a sufficient nexus between the worker and the owner. The tenant's breach of the lease did not sever that nexus.

The Sanatass dissenters lamented that the owner "did not try to delegate responsibility for worker safety to its tenant, but retained in the lease the power to provide protection for workers – only to have the tenant ignore the lease provision . . . . What could anyone expect the landlord to do to prevent the accident, other than what he did?"[14] In Morton, the majority distinguished Sanatass, noting that there was "no lease agreement or grant of an easement or other property interest creating a nexus between claimant and the State . . . . [W]hether a property owner benefits in any sense from the injury-related work is 'legally irrelevant' to determining whether the Labor Law imposes a nondelegable duty."[15]

THE DISSENT

The Morton dissent by Chief Judge Lippman, which was joined by Judge Ciparick, argued that Morton could not be reconciled with Abbatiello, Sanatass, and other precedent. The dissenters insisted that the nexus requirement had only been applied in cases where the owner had been out-of-possession or where the owner had been legally prohibited from denying access to the property, such as Abbatiello. According to the dissent, Sanatass reaffirmed the long-standing rule that an owner's lack of notice and permission are irrelevant to statutory liability.

The dissent equated the Highway Law work permit requirement with the lease provision in Sanatass, noting that "there is no reason why this defendant any more than the defendant in Sanatass, should therefore avoid the responsibilities of ownership under the Labor Law."[16] Turning to the majority's finding that the lack of a work permit made the injured worker a trespasser at the site, the dissent remarked that "no worker will know as he or she sets off to a work site at the direction of his or her employer whether he or she will be covered under the Labor Law's umbrella."[17] Chief Judge Lippman continued, "[t]here has never, until today, been a case in which an in-possession fee owner in no way legally disabled from the assertion of its ownership rights has been held to have an insufficient connection to those working upon the property to support statutory liability under the Labor Law."[18]

THE EFFECT

When viewed cumulatively, the effect of the Morton, Sanatass, and Abbatiello cases will most likely leave lower courts and practitioners even more uncertain as to the applicability of the Labor Law. Until Morton, it appeared that an owner had a defense to a Labor Law claim on the theory that the injured worker was not employed or lawfully frequenting the premises, only where he: (1) was not involved in an enumerated activity; (2) was a volunteer or passerby; or (3) where the owner was out-of-possession, had not contracted for the work, and had no legal authority to exclude the injured worker. It also appeared to be equally true that the lack of knowledge or permission of the owner, even where contractually required, was not sufficient to insulate the owner from liability.

Morton cast new light on the requisite link between an owner and an injured worker. Now an owner may be able to effectively argue that even though it was in-possession and had the legal authority to exclude access, there was no nexus between the owner and the work because the worker had no legal right to be there, making him a trespasser entitled to no statutory protection. Morton should not be read, however, to overturn or limit the holding in Sanatass, but instead, the court has carefully drawn a distinction based on the specific facts of the cases. Indeed, in writing for the Morton majority, Judge Read, a dissenter in Sanatass, defended the court's reasoning there, noting

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Worthy Of Note

VINCENT P. POZZUTO *

1. LABOR LAW

Labor Law § 200 Cause of Action Reinstated. Labor Law § 240 and 241(6) Causes of Action Dismissed

Navarro v. City of New York.
75 A.D.3d 590, 905 N.Y.S.2d 258 (2nd Dept. 2010)

Plaintiff was caulking windows on the exterior of a public school when he dropped his spatula and it fell through a metal grate in the ground outside of the school. A school custodian took him inside the school to the basement and told him he could access the tool by opening a window in the basement. The basement window was above plaintiff's head, and the custodian told plaintiff to climb a ladder that was owned by the Board of Education and which was propped up against the wall. As plaintiff climbed the ladder, it slipped and plaintiff fell. After his fall, plaintiff noticed grease on the ground and noticed that the ladder lacked proper footing. Plaintiff brought suit against the City of New York, the Board of Education and the New York City School Construction Authority. The lower Court granted summary judgment and dismissed plaintiff's causes of action under Labor Law §§ 200, 240 and 241(6). The Appellate Division held that the lower Court erred in granting summary judgment and dismissing the Labor Law § 200 and common law negligence causes of action as against the City and the Board of Education. The Court held that when the accident arises not from the manner and method of the work, but from a dangerous condition on the premises, the property owner is liable under Labor Law § 200 when the owner created the dangerous condition causing an injury or when the owner failed to remedy a dangerous condition of which it had actual or constructive notice. The Court further held that when a defendant property owner lends allegedly dangerous or defective equipment to a worker which causes injury during its use, the defendant movant for summary judgment must establish that it did not have actual or constructive notice of the defect. The Court held that the City and Board failed to do so. The Court affirmed the grant of summary judgment to the SCA on the Labor Law § 200 cause of action, as the SCA demonstrated that it did not own the premises and lacked sufficient control over it. The Court affirmed the dismissal of the Labor Law §§ 240 and 241(6) causes of action finding that the basement was not under construction, was not routinely accessed by workers and that the accident in the basement was too far removed from the construction related activity at the site.

2. RESPONDEAT SUPERIOR

Doctrine of Respondeat Superior was not Applicable

Burlarley v. Wal-Mart Stores,
75 A.D. 3d 955, 904 N.Y.S.2d 826 (3rd Dept. 2010)

Plaintiff was shopping in defendant Wal-Mart store. The cashier, in an effort to make her work shift "go faster", pretended to ring up items for more than their worth, and threw various items at plaintiff. She ultimately threw a bag containing a pair of shoes and shampoo at plaintiff striking him in the face. Plaintiff brought suit against the cashier's employer, Wal-Mart, alleging respondeat superior. The Court held that the doctrine applied only where the employee's acts were committed in furtherance of the employer's business and within the scope of employment. Factors relevant to a determination of whether an employee's acts fall within the scope of employment include whether the act is one commonly done by such an employee and whether the act was one that the employer could reasonable have anticipated. The Court held that while this inquiry generally creates an issue of fact, summary judgment is appropriate if the undisputed facts demonstrate that the doctrine is inapplicable. The Court held that the lower Court properly found that the employee's acts were not commonly done by a cashier and substantially departed from a cashier's normal method of performance. The Court further held that the employer did not have any reason to anticipate that the cashier would engage in the complained-of behavior.

3. RES IPSA LOQUITUR

Issue of Fact as to Whether Doctine Applies

Montalvo v. Mumpus Restorations, Inc.
905 N.Y.S.2d 659, 2010 N.Y. Slip. Op. (2nd Dept. 2010).

Plaintiff was struck and injured by a bucket of roofing adhesive that fell from a roof. The Court affirmed the

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lower Court's denial of defendant's motion for summary judgment. On the res ipsa loquitur claim, the Court held that the evidence established that access to the roof was limited, and there was an issue of fact as to whether access to the roof was sufficiently exclusive to defendant's employees between the time the bucket of adhesive was left on the roof and the time of the accident.

4. PRODUCTS LIABILITY

Expert Affidavit Created an Issue of Fact on Design Defect Claim; Actions of Product User Could be Forseeable; Failure to Warn Claim Dismissed

Reis v. Volvo Cars of North America, Inc.
73 A.D.3d 420, 901 N.Y.S.2d 10 (1st Dept. 2010)

Plaintiff was standing in front of car owner's 1987 Volvo Station Wagon. The owner of the vehicle asked plaintiff if he wanted to see the engine running and plaintiff said "yes". The owner reached into the car from the driver's side window and turned the key. The car, which had a manual transmission, lurched forward and crushed plaintiff's leg. The vehicle was not equipped with a "starter interlock", a device which prevents a manual transmission automobile from starting if it is in gear and the clutch is not depressed. On Defendant Volvo's motion for summary judgment, and with respect to the design defect claim, the Court held that plaintiff's expert's affidavit created an issue of fact in that he stated that starter interlocks were widely used in 1987, are easily and inexpensively installed and that that the subject vehicle without a starter interlock was unreasonably dangerous. As to defendant's argument that the products liability action could not stand as the car was not being used for its intended purpose, the Court held that a jury could reasonably conclude that it is foreseeable that a car owner might turn on the ignition while standing outside the car, especially if someone else was examining the engine. The Court dismissed the failure to warn claim on the grounds that the car owner did not read the manual, thus breaking any causal connection between the failure to warn and the accident.

5. PREMISES LIABILITY

Defendant's Evidence Made a Prima Facie Showing of Entitlement to Summary Judgment

Harbour v. Oceanside Institutional Industries, Inc.
74 A.D.3d 1023, 904 N.Y.S.2d 104 (2nd Dept. 2010)

Plaintiff claimed to have injured herself when her left foot went under a rectangular mat at her place of employment. On its motion for summary judgment, the Defendant submitted plaintiff's deposition testimony. Among other things, she testified that she was looking straight ahead and she could see the mat, she didn't see anything other than her foot getting caught, she did not know if the mat was flat on the floor, she did not see any problem with the mat, and she never made any complaints about the mat. The Court held that this was sufficient evidence to make a prima facie showing of entitlement to summary judgment, and plaintiff failed to raise an issue of fact in opposition.

6. DISCOVERY

Discovery Motion Denied as Plaintiff did not Establish that She Made a Good Faith Effort to Resolve Dispute

Yargequ v. Lasertron
74 A.D.3d 1805, 904 N.Y.S.2d 840 (2nd Dept. 2010)

Plaintiff took issue with the alleged inadequacy of Defendant's discovery responses. The Court held that affirmations of good faith must indicate the time, place and nature of the consultation regarding the discovery dispute, the issues discussed and any resolutions. The Court held that the failure to file the affirmation or a deficiency in the affirmation may justify denial of the motion. It may be excused where attempt to resolve the dispute would have been futile. The Court held that plaintiff in the instant case established a good faith effort to obtain initial responses, but did not establish a good faith effort to resolve the present dispute, which was the adequacy of the responses.

7. PRODUCTS LIABILITY

Plaintiff's Expert Affidavits Insufficient Where Experts Did Not Demonstrate Personal Experience With Product Design

Rinaldi v. EvenFlo Company, Inc.
75 A.D.3d 500, 906 N.Y.S.2d 52 (2nd Dept. 2010)

Plaintiff brought a products liability action against the manufacturer of the Snugli Soft Baby Carrier. The device snaps on to the front of the carrier's body and the child is then placed into the carrier and locked in with buckles. The infant-plaintiff fell out of the carrier after being buckled in by her mother. The Court held that the defendant manufacturer made a prima facie showing of entitlement to summary judgment by submitting the affidavit of its director of technical services, who inspected the carrier after the accident and found it to be working properly. He also testified that the carrier met or exceeded all applicable laws and industry standards. Defendant also submitted plaintiff's testimony wherein she testified that she had read the instruction manual which directed users to ensure that buckles were

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Effective Handling Of Evidentiary Issues In New York Products Liability & Negligence Actions – A Primer For Defense Counsel

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warning change in a product, or a post-accident repair of premises, to show that the product or premises was defective at the time of the accident and/or that defendant had notice of a dangerous condition. Such evidence is prone to being misused or over-emphasized by jurors. Because evidence of subsequent remedial measures can be so prejudicial, it is essential for defense counsel to understand and be able to apply the rules for its exclusion.

A. Products Liability – Post-Manufacture Design or Warning Changes

The general rule is that evidence of post-manufacture design or warning changes is not admissible to establish fault in design defect or failure to warn actions, or to show that the original design or warning was defective.[14] There are two exceptions under which such evidence may be admissible:

1. Where the post-manufacture design or warning change is needed to establish feasibility of an alternative design; or
2. Where the post-manufacture design or warning change is relevant to establish a continuing duty to warn of a known risk.[15]

A leading case, Haran v. Union Carbide Corp.,[16] provides a good illustration of how this rule is applied. Haran was a products liability action involving claims of design defect and failure to warn with respect to insect repellent. At trial, evidence was admitted, over defendant's objection, that defendant changed the label on these products after the subject product was manufactured and before plaintiff's accident. The Court of Appeals held the admission of this evidence to constitute reversible error.[17] The Court adhered to the general rule that evidence of the post-manufacture, pre-accident modification of the label was "not admissible to establish fault in a strict products liability case based upon a defect in design or failure to warn."[18] The Court further found that neither of the exceptions to the rule applied. Rejecting the first exception, the Court stated that "feasibility was never in issue, and, indeed, it is obvious that the modification of a warning label presents none of the difficulties typically involved in feasibility questions."[19] As to the second exception, the Court found that evidence of the modified warning label did not bear upon a continuing duty to warn because there was no evidence that defendant was on notice of the alleged danger prior to the accident, and "clearly, the modification itself cannot be received as an admission that defendant knew that the original warning label was inadequate."[20]

McCarthy v. Handel[21] provides another example. There, the Appellate Division, Third Department, in a products liability action claiming defective design, excluded evidence of post-manufacture, pre-accident design changes where plaintiff's offer of proof "failed to establish either their feasibility" at the time of manufacture "or the relevance of the modifications to their failure to warn claim…"[22]

The importance of this issue necessitates that defense counsel ascertain the existence of post-manufacture design or warning changes as early as possible. The issue should be addressed with the client at the inception of the case or as soon as plaintiffs' defect/warnings claim has been articulated. If appropriate, serious consideration should be made not to dispute feasibility of an alternative design if disputing it could result in discovery or admissibility of the evidence.

While not admissible on the issue of design defect or failure to adequately warn, evidence of post-manufacture design changes can be admissible with respect to a manufacturing defect claim.[23] This can lend itself to abuse, as a post-manufacture change in design would not likely be relevant to a manufacturing defect claim which does not impugn the product's design but merely alleges that the particular product involved in the accident deviated from its design. Plaintiffs often include manufacturing defect allegations as a "throw in" where their real claim is premised upon design defect or failure to adequately warn. The existence of a manufacturing defect claim could potentially result in the jury hearing evidence of a post-manufacture design or warning change that otherwise would have been excluded with respect to the design defect or failure to warn claim.

To remedy this potential for abuse, another leading case, Perazone v. Sears, Roebuck & Co.,[24] held that "a plaintiff cannot be permitted to make a perfunctory allegation of manufacturing defect, in a case where he is proceeding primarily on theories of…design defect or failure to adequately warn, and thereby circumvent the general rule that evidence of post-manufacture design changes is not admissible in these latter causes of action."[25] The Third Department in Perazone stated that "[s]ince evidence of post-manufacture design

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change is extremely prejudicial to a defendant, the action must be scrutinized to ascertain which theory or theories of strict products liability the plaintiff is relying on."[26] If careful scrutiny reveals that a plaintiff is legitimately offering proof of "a manufacturing defect and also offers proof of design defect and/or failure to warn or instruct, evidence of post-manufacture design change would be admissible on the issue of manufacturing defect and the defendant could request a jury charge limiting the consideration of such evidence to that issue."[27] However, if plaintiff is really asserting design or warnings claims, and cannot legitimately offer proof of a manufacturing defect, evidence of a post-manufacture design or warning change is to be excluded.

Most products liability actions include claims of manufacturing defect notwithstanding that the real claim is based upon design defect or failure to adequately warn. Whenever possible, perfunctory manufacturing defect claims should be disposed of prior to trial, so as to eliminate a basis for admission of post-manufacture design or warning changes. Plaintiffs should be pressed in discovery to articulate the specific basis for a manufacturing defect claim and the evidence alleged to support it. Motions to dismiss the claim or preclude the offering of evidence should be made where plaintiffs have not adequately articulated the claim. Summary judgment motions should be made to dismiss perfunctory or unsupported manufacturing defect claims. If the manufacturing defect claim is not dismissed before trial, defense counsel should move, in limine and at trial, to exclude evidence of post-manufacture design or warning changes.

B. General Negligence/Premises Cases – Evidence of Subsequent Repairs

In general, evidence of subsequent remedial measures is not discoverable or admissible unless there is an issue of maintenance or control that necessitates such evidence.[28]

When a defendant admits that it maintained and controlled the subject premises or instrumentality at the time of the accident, discovery concerning subsequent repairs is not permitted.[29] On the other hand, discovery of subsequent repairs has been permitted where maintenance or control are in dispute, such as in cases where defendant's answer denied allegations of maintenance or control.[30] Discovery of subsequent repairs has also been permitted if needed to establish the condition of the subject premises or instrumentality at the time of the accident,[31] or to show that a particular condition was dangerous.[32]

The defense of a general negligence or premises case must deal effectively with the issue of subsequent repairs. If maintenance and control are not real issues, they should not be contested so as to remove a basis for unnecessary disclosure or introduction of evidence of subsequent repairs. Evidence establishing the condition of the subject premises or instrumentality at the time of the accident should be obtained through other means, if appropriate, to eliminate a claim that evidence concerning subsequent repairs is needed to establish that condition.

III. EXPERIMENTS, TESTING AND IN-COURT DEMONSTRATIONS

Experiments, tests and demonstrations can constitute powerful evidence at trial. Since they purport to be grounded in science, they are accorded significant weight by juries. They can be used to prove or disprove a claim or defense, validate or invalidate the opinions of experts, support or undermine fact witness testimony, and demonstrate or negate the existence of important facts. Admission of such evidence can pose dangers, because not all tests, experiments and demonstrations are created equal. Many are not grounded in science or based upon reliable and generally accepted methodology. Many are the product of incorrect or unsupported data, assumptions and scientific principles. Admission of invalid or unreliable tests, experiments and in-court demonstrations can subvert trials, mislead juries and thwart the administration of justice. For these reasons, Courts have developed stringent criteria to safeguard against the admission of invalid, unreliable or misleading tests and experiments.

The general rule is that an experiment or test can be admitted if:

1. The proponent establishes that it satisfies the "Frye" test – i.e., that the data, procedures, methodology and use of the test "have been sufficiently established to have gained general acceptance in the particular [scientific] field to which it belongs,"[33] and
2. The proponent establishes a "substantial similarity between the conditions under which the [tests and] experiments were conducted and the conditions at the time

> of the event in question…particularly where the opponent has an unrestricted opportunity to cross-examine."[34]

Failure to satisfy both requirements warrants exclusion. Experiments or testing can also be excluded if they are based upon purported facts or assumptions not supported by the evidence, or if their probative value is outweighed by prejudicial factors such as being "deceptive, sensational, disruptive of the trial, or purely conjectural."[35] Courts have recognized that "[a]lthough tests and demonstrations in the courtroom are not lightly to be rejected when they would play a positive and helpful role in the ascertainment of the truth, courts must be alert to the danger that, when ill-designed or not properly relevant to the point at issue, instead of being helpful they may serve but to mislead, confuse, divert or otherwise prejudice the purposes of the trial."[36]

If the test or demonstration does not present intractable Frye problems, and its circumstances are substantially the same as those which existed at the time of the accident, then variations in the circumstances will usually go to the weight of the evidence, rather than admissibility, so long as the opponent is afforded adequate opportunity to cross-examine and/or introduce expert evidence regarding the dissimilarities.[37] Thus, in cases where a test, experiment or demonstration has been introduced, the opponent must be afforded the opportunity to effectively contest, by cross-examination and/or introduction of expert evidence, its validity, methodology and similarity. For example, in Vinci v. Ford Motor Co.,[38] the Appellate Division, First Department ordered a new trial because the Trial Court, after admitting defense crash tests, denied plaintiff's request to have his expert contest the propriety of the tests in rebuttal, thereby eliminating the right to "effective exploitation of the dissimilarities between the [crash test video] and the [accident]."[39]

The Trial Court has broad discretion to admit or exclude tests, experiments and in-court demonstrations. Absent an abuse of discretion or other demonstrable prejudice, the rulings of the Trial Court may be difficult to reverse on appeal. An example is found in Uss v. Town of Oyster Bay,[40] an action involving an allegedly defective street sign that fell on plaintiff's head. At trial, the accident street sign was admitted into evidence. Defendant offered a model sign pole which was four feet shorter than accident sign's pole, and was imbedded in a movable concrete block rather than the stationary blacktop in which the accident sign's pole was imbedded. "After inviting the jury's attention to the differences between the model and the original, the court received the model pole as an exhibit and the [accident] street sign was placed on the pole."[41] During his direct examination of the Superintendent of the Town's Sign Bureau, the Town's counsel struck the model pole sharply with his hand to demonstrate that the sign did not dislodge from the pole.[42] Over objection, the demonstration was not stricken and the Court allowed the accident sign and model pole to be taken into the jury room during deliberations.[43]

The Court of Appeals acknowledged that the Trial Court "might have been justified" in forbidding the demonstration based upon the dissimilarities of the model and conditions. Yet, the Court declined to find an abuse of discretion in admitting the model and demonstration. The Court held "it was not error as a matter of law for the [trial] court, after the demonstration had taken place, to determine that plaintiff's interests could be sufficiently protected by affording plaintiff's counsel unrestricted opportunity for cross-examination" and "effective exploitation of the dissimilarities…."[44] Since "[t]he physical features of the sign assembly as well as the principles of mechanics involved in this demonstration were well within the experience and comprehension of an average juror," the Court held that the jurors were able to independently weigh their probative worth, and there was no demonstrable prejudice of the nature and extent that would warrant exclusion as a matter of law.[45]

A different result occurred where plaintiff did not introduce evidence of substantial similarity of a test. In Cramer v. Kuhns,[46] plaintiff brought a products liability action alleging that defendant's motorcycle was defectively designed and manufactured because its side stand failed to retract upon impact with the pavement. At trial, plaintiff introduced, through her expert, a videotaped test depicting another expert riding the same type of motorcycle designed by defendant, with the side stand extended. In the videotape, the expert leaned the motorcycle to the left so that the stand contacted the pavement. The videotape showed that the stand did not retract upon contacting the pavement. Over objection, the Trial Court admitted the videotaped test into evidence notwithstanding plaintiff's failure to show the particular conditions under which the test was conducted and that those conditions were substantially similar to the subject accident conditions. The Appellate Division held that it was error to admit the videotape test because plaintiff made no showing that it was conducted under conditions sufficiently similar to the conditions existing at the time of the accident.[47]

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Effective Handling Of Evidentiary Issues In New York Products Liability & Negligence Actions – A Primer For Defense Counsel

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A. Scrutinizing Tests and Experiments - The Whole Does Not Always Equal the Sum of its Parts

Tests or experiments sought to be admitted in evidence must be scrutinized carefully to ensure that they satisfy all of the required criteria for admission. The fact that any individual part of a test may pass muster does not mean that the test as a whole is sufficiently valid or reliable. An interesting example is found in Styles v. General Motors Corp.,[48] a products liability case alleging that the roof of a vehicle failed to provide adequate protection in a rollover accident. In an effort to show that the roof was insufficiently crashworthy, plaintiffs' experts conducted a purported roof crush test on a single exemplar vehicle in two phases. In the first phase, the windshield was removed and the vehicle was gradually lowered, upside down, at what was supposed to be a pitch angle of 16 degrees and a roll angle of 36 degrees onto the junction of the A-pillar and the roof. The vehicle was held there with all its weight concentrated on that small spot until the roof started to deform, which took about two minutes. There was no evidence reflecting any measurement of the actual angles at which the vehicle was suspended during this part of the test. Thereafter, plaintiffs' experts conducted a second phase of the test by lifting that same vehicle and dropping it on its roof at what was supposed to be a pitch angle of 0 degrees, a roll angle of 36 degrees, and from a height of 6 inches.[49]

Defendant contested the validity of each phase of the test and of the combined test as a whole. The Trial Court denied defendants' request for a Frye hearing on the validity and reliability of the test methodology, and admitted the test over objection.[50] The Appellate Division, First Department found that each phase of the test, standing alone, satisfied the legal criteria for admission into evidence. Relying upon plaintiffs' expert, the Court found the first part of the test substantially similar to the generally accepted Federal Motor Vehicle Safety Standard (FMVSS) 216 test promulgated by the National Highway Traffic Safety Administration. While the FMVSS 216 test involved a plate pushed down on the junction of the A-pillar and roof at different pitch and roll angles than plaintiffs' test, the Court stated that the differences did not negate "substantial similarity" and did not render the first part of the test "novel" within the meaning of Frye.[51] The Court also found that the type of "drop testing" utilized in the second phase of the test was widely used to determine roof crashworthiness. The differences, said the Court, affected the weight of the evidence, not its admissibility, and defendant conducted thorough cross-examination and presented its own experts to contradict plaintiffs' experts.[52]

The Court, however, could not find that the combined test as a whole passed muster because "plaintiffs failed to demonstrate that the use of both tests, in combination, on the same vehicle, has gained general acceptance within the pertinent scientific community."[53] The Court reasoned:

> It is self-evident that an automobile subjected to two roof-stress tests is more likely to suffer a collapsed roof than a vehicle that undergoes only one such test. Moreover, plaintiffs' experts did not use the two parts of their test because they did not believe either of the tests alone would exert enough force on the roof; if those experts had, they presumably could have simply increased the pressure or the height of the drop. Rather, plaintiffs' experts indicated that the two components of their experiment were necessary to reflect different forces and factors of the accident. Translating a roll-over accident into angles of pitch and roll, and dropping and pressurizing, entails scientific matters not within the knowledge of the ordinary juror, and therefore must be demonstrated to be sufficiently established to have gained general acceptance within the scientific community.[54]

Despite the Trial Court's refusal to hold a Frye hearing, the Appellate Division declined to order a new trial. Instead, the Court held the appeal in abeyance and remanded the matter for a post-trial Frye hearing. At that hearing, said the Court, "plaintiffs' experts would need to establish, inter alia, the general acceptance of their combination of the tests…and substantiate how the precise measurements of angle, weight, height, time, and other components were taken."[55]

Interestingly, two of the Justices, in a concurring opinion, found that a new trial was warranted because (1) the test conditions were not "sufficiently similar" to those of the accident, (2) "[p]laintiffs' experts conceded that the test…has never been used to assess the structural strength of a vehicle," and (3) "[t]here

was no recognized protocol for the test and no body of scientific or engineering data to verify the results of the test and the conclusions drawn therefrom."[56] However, because the Trial Court had refused to hold a Frye hearing, the concurring Justices joined in holding the appeal in abeyance and remanding the matter for a post-trial Frye hearing in order to fully adjudicate the challenges to the test in the context of the overall appeal of the jury verdict.[57]

B. Underpinnings and Dangers of Post-Trial "Frye" Hearings to Validate Testing

As precedent for ordering a post-trial Frye hearing, the Styles Court relied upon People v. Roraback,[58] a criminal case in which the Trial Court, without holding a Frye hearing, improperly admitted a Police Forensic Scientist's testimony about a Fourier Transform Infrared Spectrophotometer (FTIR) test which allegedly tied defendant to materials at the crime scene. The Appellate Division, Third Department held that although, absent the FTIR test, the circumstantial evidence was legally sufficient to sustain all charges, it was not "so overwhelming that there was no significant probability that the jury would have acquitted defendant of [two of the] charges had it not been for the admission of…[that] testimony."[59] The appeal was held in abeyance with respect to those two charges and the matter remitted to the Trial Court "for a post-trial Frye hearing to consider the reliability of FTIR analysis…"[60]

Post-trial hearings are primarily a creature of criminal jurisprudence, where due process and other constitutional concerns are implicated. In criminal cases, Courts have held appeals in abeyance pending the conduct of other types of post-trial hearings, such as Batson hearings to assess claims of racially based voir dire challenges,[61] hearings on issues of photographic witness identification,[62] spectrograph voice identification hearings,[63] and hearings relating to jury notes during deliberations.[64] However, Styles appears to be the only reported civil case in which an appeal from a jury verdict was held in abeyance pending the conduct of a post-trial Frye hearing on the validity of scientific testing.

The decision to hold a civil appeal in abeyance in order to conduct a post-trial Frye hearing contains significant pitfalls for defendants. While seemingly rooted in judicial economy, such a procedure can afford plaintiffs an array of unfair advantages that would not have been available at trial. A post-trial Frye hearing can afford a plaintiff, who may not have been able or prepared to validate their testing during trial, the benefit of conducting a Frye hearing with twenty/twenty hindsight after reviewing defendants' appellate challenges as well as the Appellate Court's discussion of factual and legal issues relating to the tests. It could afford plaintiffs a "play book" of possible mistakes made at trial, the manner in which the mistakes can be corrected, the legal standards that must be satisfied, and the evidence and supporting data that needs to be supplied or supplemented in order to validate the tests. A post-trial Frye hearing also affords plaintiffs the benefit of significantly more time to gather research and line up witnesses that may not have been available, or even pursued, during the trial. Post-trial Frye hearings deprive defendants of the ability to contest the validity of plaintiffs' tests in the context of the evidence and other dynamics which existed during the trial, and to introduce other evidence or witnesses which may be deemed helpful based upon plaintiffs' Frye presentation during the trial.

CONCLUSION

The ability to anticipate and effectively address these difficult evidentiary issues can be essential to the successful defense of products liability and general negligence actions. Defense counsel should be well versed in the rules for admissibility of such evidence and devise appropriate means of dealing with them, both in discovery and at trial, as part of the overall defense strategy.

(Endnotes)

1 See, e.g., Blumenthal v. Zacklift International, Inc., 2008 N.Y. Misc. LEXIS 9618 at **27-30 (Sup. Ct., Kings Co. 2008) (granting amendment of complaint to add punitive damage claim where plaintiff showed that tow lift manufacturer "was aware of two previous accidents and other complaints arising out of the use of its lifts, and…made no effort to advise the owners of its equipment of any danger involved in using the lifts").

2 Niemann v. Luca, 214 A.D.2d 658 (2d Dept. 1995).

3 See Hyde v. County of Rensselaer, 51 N.Y.2d 927, 928 (1980); Hyatt v. Metro-North Commuter Railroad, 16 A.D.3d 218, 219 (1st Dept. 2005); Goode v. City of New York, 15 A.D.3d 440, 441 (2d Dept. 2005); Kane v. Triborough Bridge & Tunnel Auth., 8 A.D.3d 239 (2d Dept. 2004); Cramer v. Kuhns, 213 A.D.2d 131, 137 (3d Dept. 1995); Siegel v. New York Hosp., 2008 N.Y. Misc. LEXIS 7962 (Sup. Ct., Nassau Co. 2008). See also Vasquez v. State, 68 A.D.3d 1275 (3d Dept. 2009) ("in the absence of sufficient details about the prior assault, claimant failed to establish that the circumstances of that attack should have led defendant to reasonably foresee future incidents").

4 67 N.Y.2d 328, 336 (1986).

5 17 A.D.3d 159, 160 (1st Dept. 2005).

6 Id., quoting Sawyer, supra,

7 236 A.D.2d 530 (2d Dept. 1997).

8 Id.

9 Johantgen v. Hobart Mfg. Co., 64 A.D.2d 858, 859 (4th Dept. 1978); See also Mestman v. Ariens Co., 135 A.D.2d 516, 517 (2d Dept. 1987) (denying disclosure of claims involving a defendant's other product not identical or substantially similar to the product in issue).

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10 See Herbert v. Sivaco Wire Corp., 289 A.D.2d 71 (1st Dept. 2001) (in products liability action involving alleged injury from unspooling of a manufacturer's wire, discovery of other accidents was permitted because "[i]nasmuch as the prior incidents involve unspooling difficulties apparently substantially similar to the problem alleged by plaintiff, they are material and relevant to establishing whether Sivaco's product was hazardous and, if so, whether Sivaco had notice of such hazard").

11 Johantgen v. Hobart Mfg. Co., 64 A.D.2d 858 (4th Dept. 1978).

12 See, e.g., Cavolo v. Atlas Health & Fitness, 2010 N.Y. Misc. LEXIS 4078 (Sup. Ct., Richmond Co. 8/26/10) (exercise machine manufacturer and gym owner granted summary judgment where, inter alia, machine had a good safety record with no other similar claims).

13 Walsh v. Super Value, Inc., 904 N.Y.S.2d 121 (2d Dept. 2010); Truncellito v. Carroll's Florist Corp., 28 Misc. 3d 250 (Sup. Ct., Richmond Co. 2010) (in action involving a fall on a stairway, defendant's lack of prior accidents or claims helped to negate actual or constructive notice).

14 Haran v. Union Carbide Corp., 68 N.Y.2d 710, 711-12 (1986); Cover v. Cohen, 61 N.Y.2d 261, 270-71 (1984); Yates v. City of New York, 37 A.D.3d 458 (2d Dept. 2007); Liquori v. Hollymatic Corp., 230 A.D.2d 893 (2d Dept. 1996); Perazone v. Sears, Roebuck & Co., 128 A.D.2d 15 (3d Dept. 1987).

15 Haran, supra; Cover, supra; Perazone, supra.

16 68 N.Y.2d 710, 711-12 (1986).

17 Id. at 711.

18 Id.

19 Id. at 712 (citations omitted).

20 Id.

21 297 A.D.2d 444 (3d Dept. 2002).

22 Id.

23 Id.

24 128 A.D.2d 15 (3d Dept. 1987).

25 Id.

26 Id. at 18.

27 Id., citing Richardson, Evidence §168 at p.137 (Prince 10th ed.).

28 Hughes v. Cold Spring Constr. Co., 26 A.D.3d 858 (4th Dept. 2006); Niemann v. Luca, 214 A.D.2d 658 (2d Dept. 1995); Klatz v. Armor Elev. Co., 93 A.D.2d 633, 637 (2d Dept. 1983).

29 See Angerome v. City of New York, 237 A.D.2d 551 (2d Dept. 1997); Klatz, supra (in disallowing discovery of subsequent repairs, court found that no legitimate issue of maintenance existed because defendant was admittedly obligated to maintain and repair the elevator under its service contract with the building owner).

30 See Henry v. Thyssenkrupp Elev. Corp., 899 N.Y.S.2d 59 (Sup. Ct., Kings Co. 2009) (where defendant's answer denied allegations of control and maintenance, submission of an affidavit acknowledging a contract for maintenance and repair was held insufficient to eliminate the question of control to the extent needed to resist plaintiff's request for disclosure of subsequent repair records).

31 See Giannelli v. Montgomery Kone, Inc., 175 Misc.2d 32 (Sup. Ct, Westchester Co. 1997) ("while evidence of subsequent repairs are not admissible at trial, discovery of these records should not be precluded since they might shed light on the conditions complained of at the time of the accident").

32 Albino v. New York City Housing Auth., 52 A.D.3d 321 (1st Dept. 2008) (discovery of subsequent repairs permitted to show that a particular condition was dangerous); Francklin v. New York Elev. Co., 38 A.D.3d 329 (1st Dept. 2007) (in elevator case, Court permitted discovery of "records of post accident repairs…subject to the proviso that they are not to be introduced at trial except upon a showing of relevance to the condition of the elevator at the time of the accident").

33 People v. Wernick, 89 N.Y.2d 111, 115-16 (1996); People v. Wesley, 83 N.Y.2d 417, 423 (1994).

34 Uss v. Town of Oyster Bay, 37 N.Y.2d 639, 641 (1975); Styles v. General Motors Corp., 20 A.D.3d 338 (1st Dept. 2005); Lascano v. Lee Trucking, 2007 N.Y. Misc. LEXIS 6872 (Sup. Ct., N.Y. Co. 2007).

35 Uss, supra, 37 N.Y.2d at 641, citing 21 NY Jur, Evidence §377, p. 504; People v. Caballero, 34 A.D.3d 690, 691 (2d Dept. 2006).

36 Uss, 37 N.Y.2d at 641.

37 See Blanchard v. Joseph Whitlark, M.D., 286 A.D.2d 925, 926-27 (4th Dept. 2001) (not an abuse of discretion, in medical malpractice case, to allow two defense demonstrations where substantial similarity was established and plaintiff was able to contest them through cross-examination and rebuttal expert testimony).

38 846 N.Y.S.2d 9 (1st Dept. 2007).

39 Id.

40 37 N.Y.2d 639 (1975).

41 Id. at 640.

42 Id. at 640-41.

43 Id.

44 Id. at 641.

45 Id.

46 213 A.D.2d 131 (3d Dept. 1995).

47 Id. at 138. See also People v. Aranbayev, 35 A.D.3d 873 (2d Dept. 2006), which held that the Trial Court did not abuse its discretion in precluding a videotape, taken two years after defendant's arrest, which was offered to demonstrate the level of traffic and noise at the scene of the alleged offense. The jury had heard testimony that the area was noisy with heavy traffic, and the video was not shown to be substantially similar to the conditions existing at the time of arrest and could have misled the jury.

48 20 A.D.3d 338 (1st Dept. 2005).

49 Id. at 339.

50 Id. at 339-40.

51 Id. at 339.

52 Id.

53 Id. at 340 (emphasis in original).

54 Id. at 340.

55 Styles, 20 A.D.3d at 340.

56 Id. at 340-42.

57 Id.

58 242 A.D.2d 400, 406 (3d Dept.), lv denied, 91 N.Y.2d 878, 879 (1997).

59 242 A.D.2d at 406.

60 Id.

61 People v. Hameed, 88 N.Y.2d 232 (1996).

62 People v. Coleman, 73 A.D.3d 1200 (2d Dept. 2010).

63 People v. Tyson, 227 A.D.2d 322 (1st Dept. 1996).

64 People v. Cruz, 57 A.D.3d 1453 (4th Dept. 2008), rev'd on other grounds, 14 N.Y.3d 814 (2010).

Labor Law §240(1): Common Summary Judgment Issues

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2. AVAILABILITY OF DEVICES

As they had been with the issue of the explicitness of instructions, the Appellate Divisions have been reluctant to impose the recalcitrant worker defense because of a potential issue of the *readiness* with which an employee at a construction site could obtain an adequate safety device. For example, in Priestly v. Montefiore Medical Center, 10 A.D.3d 493, 781 N.Y.S.2d 506 (1st Dep't 2004), the First Department found that safety devices that were available in a gang box twenty feet from the point where plaintiff was to perform his work were not "ready for immediate use," and, therefore, plaintiff could not be deemed recalcitrant for failing to use them.

Several months later, however, the Court of Appeals took a more generous view towards this aspect of the defense in its brief memorandum decision in Montgomery v. Federal Express Corp., 4 N.Y.3d 805, 795 N.Y.S.2d 490 (2005). In that case, the Appellate Division had awarded summary judgment to defendant on the grounds that plaintiff's decision to voluntarily jump from a four foot height, causing injury, was an intervening act constituting a supervening cause for injury. Montgomery v. Federal Express Corp., 307 A.D.2d 865, 763 N.Y.S.2d 600 (1st Dep't 2003). The Court of Appeal's affirmance noted that although there was no ladder in the immediate vicinity, ladders were "available at the jobsite." 4 N.Y.3d at 806, 795 N.Y.S.2d at 490.

Then, in Robinson v. East Medical Center, LP, 6 N.Y.3d 550, 814 N.Y.S.2d 589 (2006), plaintiff was performing a job that he knew required an eight-foot ladder, but the only ladder in his immediate vicinity was six feet in height. Plaintiff testified at his deposition that his foreman offered to try to find an eight foot ladder for him, and the plaintiff acknowledged that the usual practice at this jobsite was for workers to simply go to a place where he knew ladders were located and simply "grab" a ladder oneself. Under those circumstances, the Court held, defendant could not be found liable for failing to make available an adequate safety device.

The following year, the Court of Appeals reversed so much of a decision of the First Department which granted summary judgment to defendant in a case where plaintiff was injured when he climbed down a ladder that was partially covered with a slippery substance. Miro v. Plaza Construction Corp., 38 A.D.3d 454, 834 N.Y.S.2d 36 (1st Dep't 2007), modified, 9 N.Y.3d 948, 846 N.Y.S.2d 76 (2007). The Court of Appeals so ruled despite the fact that plaintiff acknowledged that it was the normal practice at this worksite to obtain one's own ladder, as in Robinson. The Court of Appeals noted in its brief memorandum that it was unclear from the Record how easily a replacement ladder could have been procured. The lesson of Miro, therefore, is that it is not sufficient simply to establish that it is the practice at the worksite for plaintiff to obtain their own safety devices; it must be established that the workers knew exactly where they were.

The Appellate Division, First Department, has since indicated that the Robinson decision will be strictly construed in cases that come before it. See, Cherry v. Time Warner, 66 A.D.3d 233, 885 N.Y.S.2d 28 (1st Dep't 2009). It reads Robinson to limit the defense "to those situations when workers know the exact location of the safety device or devices and where there was a practice of obtaining such devices because it is a simple matter for them to do so." 66 A.D.3d at 237, 885 N.Y.S.2d at 32-33. In that case, the court denied summary judgment to defendant because the scaffolding needed to perform plaintiff's job was located on a different floor at the construction site.

The Appellate Divisions are in agreement that a scaffold is not reasonably available to a worker who is expected to construct it himself. Collins v. West 13th Street Owner's Corp., 63 A.D.3d 621, 882 N.Y.S.2d 85 (1st Dep't 2009); Prenty v. Kava Construction Co., 289 A.D.2d 120, 735 N.Y.S.2d 43 (1st Dep't 2001). A worker may successfully fight off a summary judgment motion on the recalcitrant worker doctrine if the worker establishes a question of fact as to whether or not the safety device that was available to him would have prevented the accident, had he used it. Rich v. State of New York, 231 A.D.2d 942, 648 N.Y.S.2d 195 (1996).

PROXIMATE CAUSE: WAS THE INADEQUACY OF A SAFETY DEVICE A LEGAL CAUSE OF AN ACCIDENT?

Another frequently encountered issue is concerns the concept of proximate cause. Many summary judgment cases concern the issue of whether or not an accident may be attributed to a supposed defect in the elevation-related device, or solely plaintiff's own conduct. On these issues, it is important to recall that mere comparative negligence is no defense whatsoever to the statute; not even for purposes of apportionment against plaintiff. However, where it may be shown that plaintiff's own action was the sole cause of the accident, a defendant may be eligible for summary judgment.

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The leading case on this issue is Blake v. Neighborhood Housing Services of New York, Inc., 1 N.Y.3d 280, 771 N.Y.S.2d 484 (2003). In that case, plaintiff, an independent contractor, was working by himself with his own materials, on the rehabilitation of a building. He set up an extension ladder, which he owned and used frequently. He acknowledged that the ladder was in perfect condition. However, while he stood on the ladder, its upper portion retracted, causing him to suffer an ankle injury. At his deposition he acknowledged that the ladder was securely placed and not defective. Nevertheless, he claimed that because it proved inadequate to protect him from injury, the building owner was absolutely liable as a matter of law. Defendant's motion for summary judgment was denied. At trial, plaintiff revealed that he was unsure whether he had locked the extension clips in place before ascending the rungs. The jury found, in effect, that the statute was not violated, and plaintiff appealed the resulting judgment in defendant's favor. Both the Appellate Division and the Court of Appeals affirmed. The Court of Appeals made clear that a fall from a ladder or scaffold, in and of itself, does not automatically give rise to a cause of action pursuant to the statute. Rather, the Court agreed that the facts demonstrated that plaintiff's own actions constituted the sole proximate cause of the accident.

In Holly v. County of Chautauqua, 13 N.Y.3d 931, 895 N.Y.S.2d 308 (2010), the Court of Appeals reversed a decision of the Appellate Division and denied summary judgment to plaintiff. In that case, plaintiff either jumped or fell after losing his balance as he attempted to lift a forty pound block over his head to place it on a wall under construction. Although the Court of Appeals brief memorandum purportedly agreed with the Appellate Division that there were no questions of fact regarding proximate cause, "triable issues of fact existed as to whether the defendants supplied a scaffold that provided proper protection." That sounds to us like this was indeed a proximate cause issue, since plaintiff's contention was that the scaffold did not contain any rail or other restraining device.

Holly, therefore, would appear to give tacit approval to many Appellate Division decisions that deny summary judgment to plaintiff on the grounds that an issue of fact exists as to whether plaintiff simply fell from a perfectly good ladder or other safety device. Such was the case in Guzman v. L.M. P. Realty Corp., 262 A.D.2d 99, 691 N.Y.S.2d 483 (1st Dep't 1999). There, plaintiff testified at his deposition that after his fall, he noticed that one of the legs of the ladder he had chosen was bent. Defendants presented photographic evidence that the legs were straight immediately after the accident. Thus, plaintiff was not entitled to summary judgment. Similarly, in Buckley v. J.A. Jones/GMO, 38 A.D.3d 461, 832 N.Y.S.2d 560 (1st Dep't 2007) defendant successfully fought off plaintiff's summary judgment motion in a case where plaintiff fell from a ladder which, he alleged, was defective because it was not tied off, either at the top or the bottom. Summary judgment was defeated with an affidavit and an incident report stated that plaintiff "just slipped" as a result of "losing his footing."

A defendant can successfully fight off a summary judgment motion with evidence that plaintiff deliberately left a place of safety. For example, in Latchuk v. Port Authority of New York and New Jersey, 71 A.D.3d 560, 896 N.Y.S.2d 356 (1st Dep't 2010), plaintiff, working on the repair of a bridge, was standing in a spider basket to access higher levels of a tower. He claimed that he needed to exit the basket to perform sand blasting. An explosion occurred after which, he contended, he could not use the basket to descend to a safe level and was forced to remove his safety harness and climb to a lower platform before he fell and sustained further injuries. His summary judgment motion was denied in light of defendant's contention that plaintiff should have remained in the basket and that, had he not decided to climb down from the work area without utilizing the basket or safety harness, he would not have been injured.

In Vasquez v. GMD Shipyard Corp., 582 F.3d 293 (2d Cir. 2009), the federal court covering the State of New York agreed that defendant was entitled to judgment as a matter of law where the evidence indicated that plaintiff stepped off a ladder along the hull of a ship onto angle irons, in order to allow a descending co-worker to pass him.

If a worker is intoxicated with alcohol or drugs at he time of the accident, that will not absolve a defendant of liability unless it was truly the *sole* cause. For example, in a case where plaintiff's decedent fell from a scaffold that was missing guard rails on three of its sides, the trial court rejected the contention that an issue of fact existed because of evidence that plaintiff was intoxicated when he fell. The Appellate Division affirmed the trial court's award of summary judgment in favor of plaintiff on the grounds that even if he were intoxicated, his condition was not the sole proximate cause of his death. Podbielski v. KMO-361 Realty Associates, 294 A.D.2d 552, 742

N.Y.S.2d 664 (3d Dep't 2002).

No discussion of common summary judgment issues in Labor Law §240 cases would be complete without a mention of cases concerning A-frame ladders. New York's law reports are rich with decisions in personal injury actions by plaintiffs who use A-frame ladders, not in their intended manner, i.e. open, but leaning against a wall. Suffice it to say that where there is a question of fact as to whether or not plaintiff could have properly opened the ladder in order to perform the work, plaintiff's summary judgment motion will be denied. See, Meade v. Rock-McGraw Inc., 307 A.D.2d 156, 760 N.Y.S.2d 39 (1st Dep't 2003), a case decided in defendant's favor over a vigorous dissent by Justice Mazzarelli. Where plaintiff can establish, however, that to perform the task assigned, he or she was required to use the A-frame in a closed position, plaintiff will be entitled to summary judgment. That is what occurred in Chlebowski v. Esper, 58 A.D.3d 662, 871 N.Y.S.2d 652 (2d Dep't 2009). The court found that plaintiff established a prima facie entitlement to judgment as a matter of law for injuries sustained for an accident which began while he was standing on a closed ladder on top of a scaffold which moved suddenly, causing him to fall. According to the Record on Appeal in that case, plaintiff's employer had only two types of scaffolds; one was too short for the job, the other was too tall. The only means for reaching his work site was to place an A-frame ladder on the short scaffold, and lean it against he wall. While that may have been negligent on plaintiff's part, it was not the sole proximate cause of his accident, the court held. See also, Preneta v. North Castle Inc., 65 A.D.3d 1027, 885 N.Y.S.2d 322 (2d Dep't 2009); Rico-Castro v. DO & CO New York Catering, Inc., 60 A.D.3d 749, 874 N.Y.S.2d 576 (2d Dep't 2009).

LUNCH BREAKS AND OTHER CESSATIONS OF WORK: ARE WORKERS STILL PROTECTED WHILE ON SITE?

The question of whether a construction worker is protected by the Labor Law while he is on the site, but not working, reveals a split of authority between the First Department (Manhattan and the Bronx) and the Second Department (the rest of the New York City metropolitan area). Morales v. Spring Scaffolding, Inc., 24 A.D.3d 42, 802 N.Y.S.2d 41 (1st Dep't 2005) is an illustrative case. There, plaintiff, a construction worker, was having lunch on a sidewalk bridge, sitting on an empty bucket. Plaintiff, a foreman, claims that he was told that a delivery arrived, and as he walked to the end of the bridge to see what was being delivered, the wall collapsed, causing him to fall eight feet. According to defendant, the 300 pound plaintiff was still eating lunch, sitting still, when the wall collapsed. The First Department held that, regardless of which version of the accident was true, plaintiff was protected by the Labor Law at the time it occurred. The Record demonstrated that the area where the accident occurred was used for lunch breaks, as well as several job tasks. The court found there was simply no reason to deny the benefit of the statute to the plaintiff under these circumstances.

In the Second Department's view, a plaintiff must show that he was injured during, as the statute says, "the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure." Thus, in Keenan v. Just Kids Learning Center, 297 A.D.2d 708, 747 N.Y.S.2d 393 (2d Dep't 2002), the court held that because plaintiff was injured while on a lunch break, and was not engaged in any of those activities, the statute did not apply. The Second Department granted summary judgment to defendant, despite plaintiff's affidavit in opposition which apparently indicated that his accident occurred while working. The court found that this was merely an attempt to avoid the consequences of an earlier admission at his deposition by raising feigned issues of fact that are insufficient to avoid summary judgment.

The Third Department grants coverage to workers while on a lunch break. Kouros v. State of New York, 288 A.D.3d 566, 732 N.Y.S.2d 277 (3d Dep't 2001).

The Court of Appeals injected some confusion into the issue of whether a worker was covered while walking from one section of the worksite to another in Melber v. 6333 Main Street Inc., 91 N.Y.2d 759, 676 N.Y.S.2d 104 (1998). In that case, a plaintiff, in order to work on ceiling, stood on 42 inch stilts. Although they supported him well without incident while he was working, when he walked on those stilts to another area of the worksite, he tripped over an electrical conduit protruding from an unfinished floor. The Court denied summary judgment to plaintiff and granted it to defendant, on the grounds that the stilts performed the function that the statute required of them: allowing plaintiff to safely complete his work at a height. However, the Court added:

> Had they failed while plaintiff was installing the metal studs . . . a different case would be presented. But here . . . the injury resulted from a separate hazard-electrical conduit protruding from the floor. Even if the stilts failed to avoid that pitfall, plaintiff's injuries allegedly flowed from a deficiency in the device that was wholly unrelated to the hazard which brought about its need in the first instance and did not interfere with

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> or increase the danger of injury in the performance of this elevation related task.

91 N.Y.2d at 764, 676 N.Y.S.2d at 106.

DELIVERIES: REMOVING CONSTRUCTION MATERIALS FROM TRUCKS, ETC. WHAT CIRCUMSTANCES ARE COVERED BY THE STATUTE?

Another frequent source of summary judgment motions concern cases where workers fall while unloading construction materials being delivered to the worksite. As a general rule, workers will be protected while engaged in that activity if and only if they are deemed to have suffered a truly elevation-related risk. In Toefer v. Long Island Railroad, 4 N.Y.3d 399, 795 N.Y.S.2d 511 (2005), the Court held that workers who fall when working on or alighting from the surface of a flatbed truck between four or five feet off the ground may not recover under the statute because their injuries do not result from the sort of elevation-related risk that is essential to that cause of action. The rationale for that case cannot be truly explained by the distance involved because in a falling object case, the Court of Appeals held that a four to five foot drop invoked the statute. Outar v. City of New York, 5 N.Y.3d 731, 799 N.Y.S.2d 770 (2005). Nevertheless, the Court of Appeals has adhered to the "flatbed truck rule" in a post Outar case, Berg v. Albany Ladder Company, Inc., 10 N.Y.3d 902, 861 N.Y.S.2d 607 (2008), even though in that case, plaintiff was standing on materials on the truck that raised the elevation of which he was standing to about 10 feet.

This calls into question a Second Department decision handed down one month earlier in Farrington v. Bovis Lend Lease LMB Inc., 51 A.D.3d 624, 857 N.Y.S.2d 236 (2d Dep't 2008). There, wooden planks were located on top of stacks of plywood on the flatbed of a truck. The planks were longer than the plywood and extended over the base of the plywood. Plaintiff's co-worker, who stood on the back of the truck, angled the planks down and slid them off the truck to the plaintiff as he worked on the ground stacking them into a pile. As the plaintiff was bent over, some of the planks fell off the truck and struck him. There, the Second Department denied summary judgment to defendant, despite defendant's citation to cases holding that flatbed trucks did not present elevation-related risks, holding that a question of fact was posed by the position of the planks, and the absence of safety devices to secure them.

Summary judgment was also denied to defendant in another falling object case, Kobetitisch v. P.M. Maintenance, 308 A.D.2d 510, 764 N.Y.S.2d 856 (2d Dep't 2003). In that case, plaintiff sustained injuries when he was struck by a large object that was being hoisted from the ground onto the back of the flatbed truck. The Second Department noted that although the statute generally does to apply when construction workers are injured by material which falls as it is being loaded or unloaded from a truck, the record here contained conflicting version with respect to how high the object was when it fell. If it were, as plaintiff contended, seven to twelve feet off the ground, the statute would be triggered, the court held.

EVIDENTIARY ISSUES - WHAT CONSTITUTES "EVIDENCE IN ADMISSIBLE FORM" TO ESTABLISH OR DEFEND A SUMMARY JUDGMENT MOTION UNDER THE STATUTE

Well-settled New York case law requires any summary judgment movant to present evidentiary proof in admissible form. Zuckerman v. City of New York, supra. Assuming the movant has established a prima facie case, an opponent will also need evidence in admissible form to successfully oppose the motion. Hearsay may be considered in opposition to a motion only if admissible evidence is also presented. Balsam v. Delma Engineering Corp., 203 A.D.2d 203, 611 N.Y.S.2d 164 (1st Dep't 1994). As we hope the foregoing discussion demonstrates, it is important to get that admissible proof into your file well in advance of a summary judgment motion, whether you are making it or opposing it. In this section we present cases that illustrate evidentiary issues that continually appear in summary judgment motions concerning the statute.

It is well-established that a plaintiff may obtain summary judgment even though the accident is unwitnessed. Plaintiff's uncontradicted testimony that the device on which he was standing collapsed, in the absence of some evidence that plaintiff's testimony or affidavit is incredible, will suffice for plaintiff, as it did in Inga v. EBS North Hills, LLC, 69 A.D.3d 568, 893 N.Y.S.2d 562 (2d Dep't 2010); see also, Weber v. Baccarat Inc., 70 A.D.3d 487, 896 N.Y.S.2d 12 (1st Dep't 2010); Klein v. City of New York, 89 N.Y.2d 833, 652 N.Y.S.2d 723 (1996).

Plaintiff may prevail on an unwitnessed accident even if he or she does not recall it. That was the case in Angamarca v. New York City Partnership Housing Development Fund Co., 56 A.D.3d 264, 866 N.Y.S.2d

659 (1st Dep't 2008). Circumstantial evidence that plaintiff most likely fell through an improperly covered skylight, in the absence of opposing proof other than mere speculation, was sufficient for plaintiff to prevail.

The consequences of defendant's failure to oppose plaintiff's prima facie showing with admissible proof is exemplified by Hernandez v. 42/43 Realty LLC, 74 A.D.3d 558, 903 N.Y.S.2d 367 (1st Dep't 2010). Plaintiff, whose job it was to ascend a ladder situated in a sub-basement while a co-worker on an upper floor was to feed her fiberoptic cable through a conduit, fell when, according to her testimony, it started to shake and topple over, despite the fact that she had previously attempted to ensure that it was firmly placed. Defendants contended for the first time on appeal that questions of fact existed as the proximate cause due to the allegedly conflicting accounts of the incident that plaintiff offered at two deposition sessions. However, the court found that a review of her testimony does not reveal any significant conflict. Moreover, notably, defendants did not produce testimony from a foreman or anyone else on the scene to dispute plaintiff's version of what took place, nor did they present any opinion, expert or otherwise, that there was anything inherently dangerous or hazardous about the manner in which plaintiff was doing her job. 74 A.D.3d at 558.

The failure to oppose a plaintiff's motion with admissible evidence must be excusable to prevent a plaintiff from prevailing. In Maldonado v. Townsends Avenue Enterprises, 294 A.D.2d 207, 741 N.Y.S.2d 696 (1st Dep't 2002), although plaintiff made a prima facie showing of entitlement to summary judgment, defendant successfully opposed a motion despite the fact that its only evidence was an unsworn statement contradicting plaintiff's testimony. According to the Record on Appeal on that case, defendant's attorney stated that he attempted to obtain an affidavit from the author of the unsworn statement, but was unable to find him in time to oppose the motion.

Admissible evidence, such as the deposition testimony of a witness that contradicts plaintiff's version of the accident, is the best form of proof. See, e.g., Chan v. Bed Bath & Beyond, Inc., 284 A.D.2d 290, 726 N.Y.S.2d N.Y.S.2d 127 (2d Dep't 2001). If the evidence is in the form of an affidavit, rather than the deposition testimony of an independent witness, that witness should be disclosed during the course of discovery, or the witness' affidavit may not be considered on the summary judgment motion. See, Yax v. Development Team, Inc., 67 A.D.3d 1003, 893 N.Y.S.2d 554 (2d Dep't 2009). This brings us to an important point: Of course, exculpatory statements should be obtained, if available, from witnesses to an accident or an allegedly dangerous condition as soon as notice of the accident is received. However, wherever possible, those statements should be in affidavit form, i.e. sworn to under penalty of perjury before a notary public. Since summary judgment motions in 240 cases, by both plaintiffs and defendants, are so common, the documentation you need to make or oppose them, in admissible form, should be made a part of your file as soon as possible.

Even if the witness statement is not in affidavit form, it may still be used as admissible evidence in opposition to a summary judgment motion as long as the statement qualifies as a business record under CPLR §4518. Such a statement was successfully used by the defense to defeat a plaintiff's summary judgment motion in Buckley v. J.A. Jones/GMO, supra. In that case, the Appellate Division held that plaintiff made out a prima facie showing of entitlement to summary judgment through his deposition testimony, and the affidavit of his foreman, that plaintiff fell from a ladder because it was not "tied off" at the top or bottom. However, a "Job Site Incident Report" prepared by the general contractor's safety inspector stated that the foreman had told him that the ladder in question was an A-frame type, and was being used properly when plaintiff simply lost his footing. The key point in Buckley was that the statement qualified as a business record because both the foreman and the safety supervisor were acting under a business duty to report the accident, even though they did not work for the same employer.

Finally, plaintiff's statements in his or her hospital records that contradict plaintiff's version of the accident may constitute party admissions sufficient to oppose a plaintiff's summary judgment motion. See, Eitner v. 119 West 71st Street Owner's Corp., 253 A.D.2d 641, 677 N.Y.S.2d 555 (1st Dep't 1998); Wilson v. Yemen Realty Corp., 74 A.D.3d 544, 903 N.Y.S.2d 42 (1st Dep't 2010). The statements in the hospital record, however, must be relevant to plaintiff's diagnosis and treatments. A gratuitous statement about the accident unrelated to treatment, even one concerning plaintiff's blood alcohol level, is not admissible if irrelevant to plaintiff's treatment. Haulotte v. The Prudential Insurance Company of America, 266 A.D.2d 38, 698 N.Y.S.2d 24 (1st Dep't 1999).

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proper, referred to the same operative principle that precluded recovery in the VTL setting. Simply put, a derivative action, dependent upon negligence for which Workers' Compensation remedies have been provided, is prohibited.

The Court in Heritage stated:

> That the purpose of section 241 of the Labor Law was to impose a non-delegable duty upon a property owner regardless of the absence of control, supervision or direction of the work by him (Allen v. Cloutier Constr. Corp., 44 N.Y.2d 290, 405 N.Y.S.2d 630, 376 N.E.2d 1276) provides no greater reason for denying exclusivity to the compensation remedy than did the derivative liability imposed upon a vehicle owner by section 388 of the Vehicle and Traffic Law, the purpose of which was, like section 241 of the Labor Law, to create a remedy which was previously nonexistent. Yet there is no question that a vehicle owner, not himself a co-employee of plaintiff, is protected by subdivision 6 of section 29 of the Workers' Compensation Law from liability for injury to plaintiff resulting from operation of the owner's vehicle by a co-employee of plaintiff (Naso v. Lafata, 4 N.Y.2d 585, 176 N.Y.S.2d 622, 152 N.E.2d 59; Rauch v. Jones, 4 N.Y.2d 592, 176 N.Y.S.2d 628, 152 N.E.2d 63; Malone v. Jacobs, 88 A.D.2d 927, 450 N.Y.S.2d 885; see Sikora v. Keillor, 13 N.Y.2d 610, 240 N.Y.S.2d 601, 191 N.E.2d 88). "The statute, having deprived the injured employee of a right to maintain an action against a negligent co-employee, bars a derivative action which necessarily is dependent upon the same claim of negligence for which the exclusive remedy has been provided" (Rauch v. Jones, supra, 4 N.Y.2d at p.596, 176 N.Y.S.2d 628, 152 N.E.2d 63).[23]

Thus, Heritage provides support for contention that the public policy behind workers' compensation exclusivity trumps the policy behind § 241(6) vicarious liability; or in the words of Tikhonova, that the Workers' Compensation scheme "supplants all other statutory or common-law causes of action."

The Appellate Division, Third Department decided a similar case two years later.[24] Citing Heritage, that Court stressed that "Labor Law § 241 was not intended to overrule or supersede Workers' Compensation Law § 29(6)."[25]

In Naso v. Lafata, the Court of Appeals reasoned that the basis for denying plaintiffs rights to statutory vicarious liability actions was to prevent the specter of third party claims passing exposure to employers and co-employees who are otherwise protected by the WCL. Notably, third party practice of that kind was altered by 1996 WCL legislation. However, the rationale behind Naso, Rauch and Heritage remains of interest.

The 1996 WCL revisions effectively precluded third party claims against employers for common law contribution or indemnification absent a "grave injury."[26] Employers still bear that "grave injury" risk, as well as exposure to contractual indemnification claims involving any injury. Moreover, the 1996 legislation is further affirmation of the policy of minimizing exposure of employers who provide the workers' compensation remedy. It is thus arguably as important as ever to apply WCL § 29(6) whenever indicated.

The ongoing prohibition of § 388 liability where workers' compensation exclusivity applies, even as to parties who did not employ or work with the plaintiff, accords with this notion. Moreover, preclusion of § 241(6) liability against an owner, general contractor, or agent who was a plaintiff's employer or co-employee, also remains settled.[27]

Concerning both of these trends, and policy considerations underlying WCL exclusivity, the 1998 case of Reich v. Manhattan Boiler & Equipment Corp., 91 N.Y.2d 772, 698 N.E.2d 939, 676 N.Y.S.2d 110, is quite noteworthy as well. Referring to Heritage and Rauch, the Court of Appeals in Reich emphasized its "tight rein"[28] on its one recognized "indirect exception"[29] to the WCL exclusivity provisions, i.e. third party contribution and indemnification claims against a plaintiff's employer under Dole v. Dow Chem. Co.[30] Apart from that indirect exception, the Court has "resisted many attempts to breach the wall of exclusivity of the workers' compensation remedy."[31]

The pronouncement in Heritage that § 241(6) "provides no greater reason for denying exclusivity to the compensation remedy" than does the § 388 derivative liability provision, is further strong language for advocating the proposed WCL exclusivity defense. It is also significant that § 388 derivative liability for negligence of a plaintiff's employer or co-employee has now been precluded for decades. Expansion of

judicial preclusion of § 241(6) derivative liability for negligence of a plaintiff's employer or co-employee seems plausible, but this remains to be determined.

Almost a quarter century ago, the proposed WCL exclusivity defense was advanced by motion to dismiss and declined at the Supreme Court level, in Chasnoff v. Port Authority of New York, 131 Misc.2d 233, 499 N.Y.S.2d 338 (Sup. Ct., N.Y. Cty. 1986). Emphasizing Allen v. Cloutier Constr. Corp., 44 N.Y.2d 290, 405 N.Y.S.2d 630, 376 N.E.2d 1276 (1978), the Chasnoff Judge presumed "[i]t certainly could not have been the intention of the Court of Appeals in deciding the Heritage case, to dismantle sections 240 and 241 of the Labor Law."[32]

However, in deciding Heritage, the Court of Appeals had expressly considered its earlier Allen decision, and yet refused to permit a § 241(6) recovery that would contravene WCL § 29(6). Moreover, refusing Labor Law § 241(6) liability for negligence of a plaintiff's employer or co-employee, would not dismantle any statutory scheme. A § 241(6) workers' compensation defense would not affect potential for § 241(6) recovery for negligence of another member of the chain of construction. Nor would it impact liability under § 240, as discussed below.

Chasnoff is also distinguishable, since the issue of the moving defendants' negligence was not resolved in that case. The potential defense under discussion would only exonerate non-negligent defendants, claimed vicariously liable for negligence of a plaintiff's co-employee or employer. Such result could be pursued under other authority discussed in this article, especially WCL § 29(6), Rauch, Naso, Heritage, and their progeny.

Counsel for owners, general contractors or agents advancing this WCL exclusivity argument[33] should anticipate opposition stressing that § 241(6), unlike § 388, imposes a non-delegable duty.[34] A possible reply is that duty aside, those defendants should not have derivative liability where primary liability of a plaintiff's co-employee or employer is precluded on WCL exclusive remedy grounds.

Argument emphasizing implications of non-delegable duty was made in dissent in Heritage. It was therefore rejected in the Heritage majority holding. Accordingly, prevailing defendants in the Heritage line of cases were adjudged not liable upon a § 241(6) non-delegable duty, since workers' compensation benefits were the plaintiffs' exclusive remedy under WCL § 29(6).

The Heritage application of WCL exclusivity in § 241(6) as well as § 388 settings is not surprising, given parallels of those statutes. The Legislature's goal with § 388 was to ensure owners "act responsibly" with regard to their vehicles;[35] or in other words, "to discourage owners from permitting people who are irresponsible or who might engage in unreasonably dangerous activities to use their vehicles."[36] Similarly, § 241(6) "serves the salutary purpose of inducing owners and contractors to assure that only financially responsible and safety-conscious subcontractors are engaged."[37]

Given these close parallels, it is arguable that construction site owners and general contractors, like vehicle owners, should not have vicarious liability for negligence of a plaintiff's employer or co-employee.

It is also telling that non-employers of plaintiffs have successfully invoked a WCL exclusivity defense beyond § 388 contexts. In Pereira v. St. Joseph's Cemetery, 54 A.D.3d 835, 864 N.Y.S.2d 491 (2d Dept 2008), the plaintiff alleged he was deliberately tripped by co-employees during their employment by a cemetery defendant. Different defendants who purportedly owned and operated the cemetery, were claimed vicariously responsible for the cemetery defendant's alleged liability. However, since the cemetery defendant / employer was immune under WCL § 29(6), the other defendants were held to lack liability as well: "[a] claim of vicarious liability cannot stand when there is no primary liability upon which such a claim of vicarious liability might rest."[38]

This is an interesting result, considering at least some of the prevailing defendants were alleged to have owned and operated a cemetery. An owner of property onto which the public is invited has a nondelegable duty to provide a reasonably safe premises.[39] The Pereira opinion does not indicate whether the possible presence of nondelegable duty was taken into account.

In Raptis v. Juda Construction, Ltd., 26 A.D.3d 153, 810 N.Y.S.2d 22 (1st Dept 2006), the plaintiff was injured while operating a defective dump trailer in the course of employment. The plaintiff sued the lessor of the trailer, which did not maintain it. However, the plaintiff claimed the lessor had vicarious liability, as principal of an agent who had negligently failed to maintain the equipment. Citing Heritage, the Appellate Division considered this claim barred by the Workers' Compensation Law. Thus, in Raptis, alleged liability of a non-employer owner of defective equipment was precluded by WCL exclusivity.

The Raptis court also relied on Dittert v. Oak Tree Farm Dairy, 249 A.D.2d 355, 671 N.Y.S.2d 492 (2d Dept 1998). The plaintiff became an armed robbery victim while working at a Dairy Barn store. He contended a co-employee assumed and breached a

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duty to have closed the store before the robbery. He alleged vicarious liability of a second employer of the co-employee, which defendant did not employ the plaintiff.[40] The Second Department concluded that because the negligent person was a co-employee of the plaintiff, the lawsuit "based upon acts performed by him in the scope of employment is barred by the Workers' Compensation Law."

It is thus apparent that existence of duty, non-delegable or otherwise, does not categorically implicate liability for negligence of another. This thought is consistent with the aforementioned Rizzuto observation that "[a]n owner or general contractor may, of course, raise any valid defense to the imposition of vicarious liability under section 241(6)."[41] Workers' compensation exclusivity is proposed as such a defense.

The WCL exclusivity argument discussed here would not apply to Labor Law § 240. § 388 and § 241(6) base vicarious liability of owners upon the negligence of others. In contrast, recovery under § 240 is obtained under a strict liability rather than negligence standard.

Lack of negligence of owners, general contractors, and their agents generally does not afford them a complete § 241(6) defense.[42] Thus, a typical focus of their defense is whether employer or co-employee acts and omissions did not violate a specific Industrial Code provision.

There has been scarce debate about whether negligence of a plaintiff's employer or co-employee can validly support § 241(6) vicarious liability, against an owner, general contractor, or agent who did not employ or work with the plaintiff. It seems the Bench and Bar have taken for granted that liability arises in that circumstance. Indeed, this state of law has existed for years, and should not be expected to change.

However, as this discussion has highlighted, there is a good faith basis in law for a proposed defense to § 241(6) claims of this kind, based on the exclusivity of the Workers' Compensation Law.

(Endnotes)

1 Labor Law §241(6) requires that "[a]ll areas in which construction, excavation or demolition work are being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places."

2 *The Slippery Matter of Defenses to Labor Law §241(6)*, The Journal of the Defense Association of New York, Inc.

3 Ross v. Curtis-Palmer Hydro-Electric Co., 81 N.Y.2d 494, 503, 618 N.E.2d 82, 601 N.Y.S.2d 49 (1993).

4 Rizzuto v. L.A. Wenger Contracting Co., Inc. 91 N.Y.2d 343, 351, 693 N.E.2d 1068, 670 N.Y.S.2d 816 (1998); Temes v. Columbus Centre LLC, 48 A.D.3d 281, 851 N.Y.S.2d 188 (1st Dept 2008).

5 Ross, 81 N.Y.2d at 504.

6 Rizzuto, 91 N.Y.2d at 349. In contrast, a violation of an explicit provision of the statute proper, i.e. any of the first five subdivisions of §241, gives rise to absolute liability. Id.

7 Rizzuto, 91 N.Y.2d at 350.

8 Vehicle and Traffic Law §388.

9 WCL §29(6) states, in part: "The right to compensation or benefits under this chapter, shall be the exclusive remedy to an employee, or in case of death his or her dependents, when such employee is injured or killed by the negligence or wrong of another in the same employ, the employer's insurer or any collective bargaining agent of the employer's employees or any employee, of such insurer or such collective bargaining agent (while acting within the scope of his or her employment)."

10 Rauch was decided concurrently with another case of interest, Naso v. Lafata, 4 N.Y.2d 585, 152 N.E.2d 59, 176 N.Y.S.2d 622.

11 VTL §388 states, among other things, that "[e]very owner of a vehicle used or operated in this state shall be liable and responsible for death or injuries to person or property resulting from negligence in the use or operation of such vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owner."

12 Rauch, 4 N.Y.2d at 596.

13 Id.

14 Id.

15 Naso, 4 N.Y.2d at 591.

16 Id.

17 Kenny v. Bacolo, 61 N.Y.2d 642, 460 N.E.2d 219, 472 N.Y.S.2d 78.

18 Kenny, 61 N.Y.2d at 645. See also Allen v. Blum, 232 A.D.2d 591, 649 N.Y.S.2d 162 (2d Dept 1996).

19 Tikhonova, 4 N.Y.3d at 624.

20 Tikhonova, 4 N.Y.3d at 625.

21 See also Musso v. Hsing Wei Chien, 73 A.D.3d 466, 905 N.Y.S.2d 129 (1st Dept 2010); Franco v. Carriel, 60 A.D.3d 626, 874 N.Y.S.2d 559 (2d Dept 2009).

22 I.e. that owners, general contractors, and their agents provide reasonable and adequate protection and safety.

23 Heritage, 59 N.Y.2d at 1019.

24 St. Andrews v. Lucarelli, 115 A.D.2d 155, 495 N.Y.S.2d 506 (3d Dept 1985).

25 Id.

26 Workers' Compensation Law §11.

27 See Durkee v. Renaud, 63 A.D.3d 1328, 880 N.Y.S.2d 403 (3d Dept 2009); DeJesus v. Todaro, 48 A.D.3d 341, 852

N.Y.S.2d 96 (1st Dept 2008); Melson v. Sebastiano, 32 A.D.3d 1259, 822 N.Y.S.2d 203 (4th Dept 2006).

28 Reich, 91 N.Y.2d at 779.

29 Id.

30 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972)

31 Reich, 91 N.Y.2d at 779.

32 Chasnoff, 131 Misc.2d at 236.

33 Again, a court might consider the proposed defense more compelling where 241(6) liability would result in exposure to the plaintiff's employer by way of contractual indemnification, or common law indemnification vis-à-vis a "grave injury."

34 Recent Court of Appeals pronouncements reflect distaste for the "nondelegable duty" phrase, and instead frame an issue of whether a "duty" existed: "[i]n tort law, the term 'nondelegable duty,' although widely used, is somewhat misleading. The question is not so much whether a defendant can or has delegated to another party a duty owed by that defendant to a particular plaintiff, but whether the defendant owes the plaintiff a duty in the first place." Morton v. State, 15 N.Y.3d 50, 55 n. 2, 930 N.E.2d 271, 904 N.Y.S.2d 350, quoting from Brothers v. New York State Elec. & Gas Corp., 11 N.Y.3d 251, 256 n. 1, 869 N.Y.S.2d 356, 898 N.E.2d 539 (2008).

35 Fried v. Seippel, 80 N.Y.2d 32, 41, 599 N.E.2d 651, 587 N.Y.S.2d 247 (1992).

36 Argentina v. Emery World Wide Delivery Corp., 93 N.Y.2d 554, 562, 715 N.E.2d 495, 693 N.Y.S.2d 493 (1999).

37 Allen v. Cloutier Constr. Corp., 44 N.Y.2d 290, 301, 405 N.Y.S.2d 630, 376 N.E.2d 1276 (1978).

38 Pereira, 54 A.D.3d at 837.

39 See Podlaski v. Long Island Paneling Center of Centereach, 58 A.D.3d 825, 826, 873 N.Y.S.2d 109 (2d Dept 2009).

40 However, it was alleged that this second employer was related to the business that employed the plaintiff.

41 Rizzuto, 91 N.Y.2d at 350.

42 Traditional common law negligence defenses like absence of control over work, or lack of notice of injury-causing danger, are often not effective in a §241(6) context; see Rizzuto, 91 N.Y.2d at 350. This is because of potential for vicarious liability for negligence of someone else within the chain of the construction project.

Employees, Trespassers, & Volunteers: Who Is Protected by the Labor Law After *Morton v. State of New York*?

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that the lease – even though breached by the tenant in allowing the work without the owner's permission – created a "clear nexus" between the owner and the injured worker.[19]

Collectively, reduced to their simplest meaning, these cases hold that where access to the property is compulsory by statute or other right, or is gained without the permission of either the owner or another party who has obtained property rights from the owner, there is not a sufficient nexus to impose the requirements of the Labor Law upon the owner. On the other hand, if a worker has entered by any means other than a compulsory right and is present with the authority of any party with an interest in the property, regardless of whether that party has obtained the right to allow access from the owner, the court should find that a sufficient nexus exists between the worker and the owner to apply the Labor Law.

What appears to be lost in this judicial framework is whether these rules advance the stated legislative goal to reduce workplace accidents by imposing the duty for statutory compliance upon owners, who are ostensibly best positioned to enforce safety requirements. Several years ago, the Court of Appeals noted that due to amendments to the Labor Law imposing strict liability, "the statute now serves the salutary purpose of inducing owners and contractors to assure that only financially responsible and safety-conscious subcontractors are engaged so that a high standard of care might be maintained throughout the entire construction site."[20] The Morton opinion appears to correspond with the intended statutory purpose to the extent it reasoned that applying Labor Law § 241(6) to the owner under the circumstances of that case would not advance the goal of safer construction sites. Yet, that practical and logical position is vastly undermined by the majority's defense of the court's contrary reasoning in Sanatass, in which it applied a literal interpretation of the statute, holding that the owner's inability to enforce safety precautions due to its lack of knowledge of the work, even though required by the lease, was irrelevant to the determination of liability.

What is left, unfortunately, is an unsettling disparity in which property owners equally without knowledge or means to comply with the Labor Law may or may not be subject to its remorseless enforcement. This confusing rubric, with little attachment to the legislative objective or facts on the ground, could be viewed as part of the Court of Appeals' recent, gradual shift on the Labor Law – or it could merely be seen as part of the patchwork of seemingly disconnected and contradictory holdings that appear from time to time in the advance sheets. In either scenario, the application of the Labor Law will certainly remain at the vortex of construction accident litigation.

(Endnotes)

1 76 N.Y.2d 573, 576-77, 561 N.Y.S.2d 892, 894 (1990); see also Stringer v. Musacchia, 11 N.Y.3d 212, 869 N.Y.S.2d 362 (2008); Whelen v. Warwick Valley Civic and Soc. Club, 47 N.Y.2d 970, 419 N.Y.S.2d 959 (1979).

2 76 N.Y.2d at 577, 561 N.Y.S.2d at 894-95.

3 Neely v. City of Buffalo, 171 A.D.2d 1078, 569 N.Y.S.2d 252 (4th Dep't 1991).

4 Hale v. Odd Fellow & Rebekah Health Care Facility, 302 A.D.2d 948, 755 N.Y.S.2d 164 (4th Dep't 2003); see also Spadola v. 260/261 Madison Equities Corp., 19 A.D.3d 321, 798 N.Y.S.2d 38 (1st Dep't 2005).

5 Howerter v. Dugan, 232 A.D.2d 524, 524, 649 N.Y.S.2d 32, 33 (2d Dep't 1996); see also Whelen, 47 N.Y.2d 970, 419 N.Y.S.2d 959.

6 Luthringer v. Luthringer, 59 A.D.3d 1028, 872 N.Y.S.2d 779 (4th Dep't 2009); see also Fuller v. Spiesz, 53 A.D.3d 1093, 861 N.Y.S.2d 896 (4th Dep't 2008).

7 15 N.Y.3d 50, ___ N.Y.S.3d ___ (2010).

8 Id. at 60.

9 Id. at 56.

10 3 N.Y.3d 46, 781 N.Y.S.2d 477 (2004).

11 Id. at 51, 781 N.Y.S.2d at 480.

12 10 N.Y.3d 333, 858 N.Y.S.2d 67 (2008).

13 Id. at 335.

14 Id. at 343 (Smith dissenting).

15 15 N.Y.3d at 58 (citing Gordon v. Eastern Ry. Supply, 82 N.Y.2d 555, 606 N.Y.S.2d 553 (1997)).

16 Id. at 64 (Lippman dissenting).

17 Id. at 65 (Lippman dissenting).

18 Id. at 66 (Lippman dissenting).

19 Id. at 60.

20 Allen v. Cloutier Constr. Corp., 44 N.Y.2d 290, 301, 405 N.Y.S.2d 630, 634 (1978).

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secure. In opposition to the motion, plaintiff submitted an affidavit from an engineer in the field of accident reconstruction and a human factors psychologist. The Court held that neither expert established that he had any practical experience or personal knowledge of baby carriers, and thus found their affidavits insufficient to create an issue of fact.

8. PRODUCTS LIABILITY

Product Modification Results in Dismissal of Strict Products Liability and Negligence Claims

Bauerlein v. Salvation Army et al.
77.A.D. 3d 851, 905 N.Y.S.2d 215 (2nd Dept. 2010)

Plaintiff was allegedly injured when a personal residential elevator he was riding in dropped one floor. The elevator manufacturer established that modifications to the elevator were done after its installation in 1977 and that those modifications were the proximate cause of plaintiff's injuries. Specifically, the elevator manufacturer established that in May, 2001, the elevators cables were replaced by an elevator maintenance company and attached with prohibited U-Bolts, which eventually crushed and severed the cables thereby causing the subject accident. The Court held that those modifications necessitated the dismissal of the negligence and strict liability causes of action. However, the Court held that a co-defendant raised an issue of fact on the failure to warn claim by submitting an expert affidavit establishing that the prohibition against the use of the subject U-Bolts is far from universally known among elevator service technicians.

9. PRODUCTS LIABILITY

Plaintiff's Expert's Affidavit Lacked Sufficient Probative Value to Raise a Triable Issue of Fact.

Rabon-Williamack v. Robet Mondovi, et al.
73 A.D. 3d 1007, 905 N.Y.S.2d 190 (2nd Dept. 2010)

Plaintiff brought suit against the Robert Mondavi Winery, the manufacturer and bottler of wine, for injuries sustained when a bottle of wine broke in her hand as she was attempting to open it with a corkscrew while working as a bartender in a restaurant. Upon defendant's motion for summary judgment to dismiss the claims of manufacturing defect, design defect, failure to warn, breach of warranty, and negligence, the plaintiff submitted an affidavit of an expert, Carl J. Abraham. The Court held that Mr. Abraham's affidavit consisted primarily of conclusory and speculative allegations that the accident was caused by the inherent weakness of the neck of the bottle, that Mondavi was aware that wine bottles were fracturing in the opening process, and that there were safer alternative designs. The Court held that the expert's opinion was not supported by foundational fact such as the results of actual testing of the bottle, a deviation from industry standards or statistics showing the frequency of consumer complaints or injuries resulting from the alleged product defect. The Court further held that there was no duty to warn of the danger of applying pressure to a glass bottle with a metal object while holding the bottle in one's hands. The Court affirmed the grant of summary judgment to defendants.

10. EVIDENCE/ASBESTOS/DAMAGES

Verdict Reinstated, Damages Reduced

Penn v. AMchem Products
73 A.D.3d 493, 903 N.Y.S.201 (1st Dept. 2010)

After a jury verdict in favor of plaintiff in an asbestos matter, the trial Court granted defendant's motion to set aside the verdict as against the weight of the credible evidence. On appeal, the First Department held that the evidence was sufficient to permit the jury to rationally conclude that the asbestos-containing dental liners were distributed by Defendant Kerr. The Court held that such a conclusion could be drawn from the evidence that Plaintiff's dental technical school gave him boxes containing dental liners used to make prosthetic teeth that had Kerr's name on them; that plaintiff followed a chart specifically made for Kerr's "casting ring" product when given a box with Kerr's name on it; that Kerr supplied asbestos-containing liners to dental technician schools at the time Plaintiff was a student and that Kerr often packaged its casting ring product with its dental liners. On causation, the Court held that sufficient evidence was provided by plaintiff's testimony that visible dust emanated while working with dental liners and by his expert's testimony that such dust must have contained enough asbestos to cause mesothelioma. The Court held that the damages awards deviated from what would be reasonable compensation and reduced the past pain and suffering award from $3,650,000 to $1,500,000, the future pain and suffering award from $10,900,000 to $2,000,000 and the loss of consortium award from $1,670,000 to $260,000.

11. INSURANCE COVERAGE

The "Exclusion – Cross Liability "Endorsement Held to Bar Coverage for All Insureds Under Policy

DRK, LLC v. The Burlington Insurance Company
74 A.D.3d 693, 905 N.Y.S.2d 58 (1st Dept. 2010)

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In a declaratory judgment action involving defendant insurer's obligation to defend and indemnify plaintiffs-insureds in an underlying personal injury action, the Supreme Court granted defendant's motion for summary judgment only with respect to the plaintiff that was the underlying plaintiff's employer. On appeal, the Court held that the "Exclusion-Cross Liability" endorsement states that the subject insurance "does not apply to bodily injury to an employee of any insured", and that precedent established that such language unambiguously excludes coverage even when the injured party was an employee of another insured under the policy. The Court held that the "Separation of Insureds" provision did not render this cross-liability exclusion ambiguous as the Separation of Insureds provision primarily highlights the named insured's separate rights and duties. It does not negate bargained for exclusions. The Court held that the Separation of Insureds provision is a general provision, while the "cross-liability" exclusion is specific and this controls if there is a conflict.

12. BROKER MALPRACTICE

Court Holds that Broker Routine Created "Special Relationship"

Abetta Boiler & Welding Service, Inc., v. American Specialty Lines Insurance Company 2010 N.Y. Slip. Op. 6349 (1st Dept. 2010)

The Court held that as a matter of routine plaintiff Abetta referred all questions regarding its insurance claims to defendant Amerisc and Amerisc handled all of Abetta's insurance needs including referring claims to its insurers. The Court held that this established a "special relationship" between Abetta and Amerisc that imposed upon Amerisc a duty to Abetta to exercise a degree of reasonable care in notifying the appropriate primary or excess insurer of any claim reported to it by Abetta. The Court held that the evidence further established that although Amerisc forwarded to the wholesale broker, Program, the information in its possession concerning the underlying personal injury claim, it failed to follow up with either Program or AISLIC, Abetta's excess insurer, to ascertain that AISLIC actually received notice of the claim. The Court held that as a matter of law Amerisc thereby breached its duty to Abetta and was thus liable for any amount above the limits of Abetta's primary policy. As to a separate wrongful death action, the Court held that there was not enough evidence to grant summary judgment in favor of Abetta against Amerisc, as Amerisc never received notice of the action from Abetta, only the claim. The Court held that an issue of fact existed as to whether Amerisc had a duty to monitor Abetta's pending claims to ascertain whether they had given rise to lawsuits to be reported to the insurer.

13. LABOR LAW

Labor Law 240 Applied Where Activity was Necessary and Incidental to Work Occurring at Work Site.

D'Alto v. 22-24 129th Street, LLC 2010 NY Slip Op 6291, 906 N.Y.S.2d 79 (2nd Dept. 2010)

Plaintiff was delivering concrete to a construction site. He alleges that he was injured when he fell while climbing down from the top of the cement truck, while it was parked 100 feet from the work site. Plaintiff alleges that his entrance to the site was delayed as he had to wait in line behind other cement trucks. While waiting, he prepared the cement for use at the work site. The Court held that plaintiff's activity was necessary and incidental to the alteration work occurring at the site, and fell within the purview of Labor Law Section 240. The Court then affirmed the denial of defendant's motion for summary judgment. The Court further held that the site owner's claim for contractual indemnification against the site lessee should be granted, as the contractual indemnification provision in the lease only applied to any injury to any person on the demised promises, and plaintiff was not on the demised premises when the accident occurred.

Recent Decisions Impact Effect Of Comparative Negligence On Motions For Summary Judgment

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that the plaintiff's motion for summary judgment on the issue of liability was properly denied where the plaintiff's submissions failed to eliminate a triable issue of fact regarding her comparative negligence.

Roman is clearly beneficial to defendants in the Second Department insofar as it raises the quantum of proof to be introduced by plaintiffs in establishing summary judgment. Not only must a plaintiff now prove that the defendant was negligent but, according to Roman, must also prove that he or she was free from any comparative negligence.

Additionally, since interest runs from the date of judgment, the denial of summary judgment motions will result in significant financial savings to many defendants.

Continued on next page

The holding in Roman is logical given that it is the role of a court to be an issue finder on a summary judgment motion. See generally, Powell v. HIS Constr., Inc., 75 A.D.3d 463, 905 N.Y.S.2d 161 (1st Dept 2010). Absent a plaintiff's showing that he is free from negligence, a plaintiff's negligence raises an issue of fact and the jury might ultimately apportion the plaintiff's culpability to be 100%. Thus, the First Department's holding in Tsebelis could potentially lead to the inconsistent result of summary judgment in favor of a plaintiff who is entirely responsible for his own loss.

Such a scenario could not occur under the Second Department standard, which will render a comparatively negligent plaintiff completely out of luck on a motion for summary judgment. Nor does the Second Department change the parties' burden of proof on summary judgment. A defendant opposing a plaintiff's summary judgment motion can still defeat the motion by raising an issue of fact regarding the plaintiff's comparative negligence.

For example, while comparative negligence is a defense to Labor Law 241 (6), plaintiffs have been granted summary judgment where defendants failed to submit proof of such culpable conduct in opposing papers. See, Rodriguez v. City of New York, 232 A.D.2d 621, 648 N.Y.S.2d 989 (2d Dept 1996). Thus, defendants must do more than just assert comparative negligence as a defense but, to defeat summary judgment, must also be able to articulate what that comparative negligence was.

Plaintiff's will all but certainly argue that Roman puts them in the unfair position of proving a negative, i.e., an absence of negligence. While this may be true, it will not necessarily be so difficult. For example, plaintiffs will be able to argue that they properly observed what there was to be seen and acted reasonably under the circumstances.

Given that the conflict between the First and Second Departments goes directly to the heart of what evidence is sufficient to prevail on summary judgment motions, it will likely need to be resolved by the Court of Appeals.

(Endnotes)

1. On the day Roman was decided, the Second Department also decided Singh v. Lee, ___ A.D.3d___ (2d Dept, August 10, 2010). In Singh, the Second Department held that the plaintiff failed to establish his prima facie entitlement to summary judgment as a matter of law on the issue of liability. The Court reasoned that, although the plaintiff introduced evidence that the defendant failed to use a directional signal, the plaintiff failed to submit any evidence that the defendant's conduct was the sole proximate cause of the accident or that he was free from comparative negligence. The Singh decision also relied on Thoma.

President's Column

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article discussed DANY's brief and the contentions that it raised on behalf of the defendant's position.

Ferluckaj v. Goldman Sachs & Co., 12 N.Y.3d 316, 880 N.Y.S.2d 879 (2009). Here, the New York Court of Appeals held that a lessee, who does not hire a contractor and thus does not have the right to control the injury-producing work being done, is not an "owner" within the meaning of Labor Law §240(1).

In Re Arbitration between Central Mutual Ins. Co. (Bemiss), 12 N.Y.3d 648, 884 N.Y.S.2d 222 (2009). In the context of this proceeding involving a claim for supplementary uninsured/underinsured motorist benefits, the Court reaffirmed that an insurer's subrogation rights must be preserved.

In addition to the above Court of Appeals cases, DANY successfully submitted an amicus curiae brief to the Appellate Division, Second Department in Graham v. Dunkley, 50 A.D.3d 55, 852 N.Y.S.2d 169 (2d Dep't 2008). At issue was the constitutionality of the Graves Amendment, which is the federal statute that prohibits vicarious liability actions against professional lessors and renters of motor vehicles. This case involved review of a decision of the Supreme Court, Queens County which declared the statute to be unconstitutional. The Appellate Division, Second Department reversed that determination, and held that the Graves Amendment was a valid exercise of Congress' power under the Commerce Clause of the United States Constitution. This is an extremely beneficial decision for professional renters and lessors of motor vehicles.

Recently, the Committee has drafted amicus curiae briefs in two cases pending in the New York Court of Appeals which are awaiting decision. Both cases emanate from the Appellate Division, Second Department. In San Marco v. Village/Town of Mount Kisco, 57 A.D.3d 874, 871 N.Y.S.2d 236 (2d Dep't 2008), the Appellate Division held that the defendant's creation of snow piles when it plowed its municipal parking lot did not constitute affirmative negligence and thus, the defendant did not lose the protection of its prior written notice ordinance. The second case is Ortiz v. Varsity Holdings LLC, 75 A.D.3d 538, ___ N.Y.S.2d ___, 2010 N.Y. Slip Op. 06080 (2d Dep't 2010), and it involves Labor Law §240(1). There, the Appellate Division held that the statute did not apply to a construction worker who fell from the top of a six-foot high dumpster.

The Committee is currently comprised of Andrew Zajac and Dawn DeSimone of Fiedelman & McGaw, Rona L. Platt, Corporate Counsel-WRM America, Brendan T. Fitzpatrick of Ahmuty, Demers & McManus and David B. Hamm, Esq. of Herzfeld & Rubin, P.C. The members of the Committee provide their services on a voluntary basis, free of charge. Printing costs have generally been borne by DANY.

Any inquiries regarding the Committee should be directed to its Chair, Andrew Zajac, Fiedelman & McGaw, Two Jericho Plaza, Jericho, New York 11753-1681, (516) 822-8900.

Any suggestions for an amicus brief to the Court of Appeals are welcome, as is assistance in defraying the cost of printing expenses.

Please direct your suggestions and offers of assistance to Mr. Zajac for consideration by the Committee.

DEFENDANT

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Product Identification in New York: Concerted Action, Market Share Liability, & Alternative Liability

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[second] of Torts §433B[3] ("the burden is upon each such actor to prove that he has not caused the harm"); Bichler v. Lilly & Co., 79 A.D.2d 317, 436 N.Y.S.2d 625 (1st Dep't 1981). The rationale for shifting the burden of proof in such a situation is that without this device each defendant will be silent as to culpability, and plaintiff's action will fail. Alternative liability, which presupposes all possible tortfeasors are before the court, and its shifting burden of proof, will force the defendants to speak regarding responsibility, or else be held jointly and severally liable. The use of alternative liability also assumes that the defendants have better access to information than does the plaintiff regarding the product or activity giving rise to plaintiff's injury. Restatement [Second] of Torts §433B, comment h.

Finally, a plaintiff who cannot precisely identify who among a group of manufacturers produced the product involved in plaintiff's injury may rely on enterprise liability if the following elements are present:

1. The industry comprises a small number of manufacturers;
2. Defendants engaged in similar or parallel conduct regarding the manufacture of the product;
3. The manufacturer of the product that injured plaintiff is unknown; and;
4. It is more probable than not that the product involved was made by one of the defendant manufacturers.

New York courts have recognized two types of enterprise liability: concerted action and market share liability. Concerted action provides for joint and several liability on the part of all defendants acting pursuant to an agreement, express or tacit, to participate in "a common plan or design to commit a tortuous act." Prosser and Keeton, Torts §46, at 323 [5th ed.]; DeCarvalho v. Brunner, 223 N.Y. 284 (1918). Thus if a manufacturer acted on its own to develop and test the design of a given product, liability under concerted action should fail as parallel activity and, without more, is insufficient to establish the agreement element necessary to establish a concerted action.

In 1989, the Court of Appeals adopted market share liability as a means for plaintiffs to satisfy the product identification requirement against some, but not all, of the manufacturers of diethylstilbestrol (DES) in Hymowitz v. Eli Lilly & Co, 73 N.Y.2d 487, 541 N.Y.S.2d 941 (1989). Briefly, DES is a synthetic substance that mimics the effects of estrogen. It was invented in 1937 by British researchers, but never patented. Approximately 300 manufacturers produced the drug during the 24 years that DES was sold for pregnancy use. In 1971, the FDA banned the drug for use during pregnancy when studies established the harmful latent effects of DES upon the offspring of mothers who had ingested the drug. All DES was of identical chemical composition. Thus, the pregnant woman who took DES generally never knew who produced the drug she took.

Thus, with DES, the Court of Appeals was faced with a great number of potential tortfeasors, who had entered and left the market at different times over a 24–year period, while some of whom no longer existed. None of the defendants were in any better position than the plaintiffs to identify the manufacturer of the DES ingested in any given case. On these facts, the Court applied a market share liability theory that did away with a plaintiff's need to prove product identification. The Court took pains to limit the application of market share liability to the facts presented in Hymowitz by stating: "We stress, however, that the DES situation is a singular case, with manufacturers acting in a parallel manner to produce an identical, generically marketed product, which causes injury many years later and which has evoked a legislative response reviving previously based actions." Id. at 508.

Given the sharp increase in mass tort filings, particularly those involving pharmaceuticals, it remains to be seen whether the general requirement for a plaintiff to identify the exact manufacturer whose product injured the plaintiff will be further modified or diluted.

President's Column

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