2003 APPELLATE DECISIONS

AUTOMOBILES – LEFT HAND TURN -- SPEEDING

Plaintiff, who was making a left hand turn directly onto the path of defendant's oncoming vehicle, cannot recover against defendant because plaintiff was negligent in failing to see that which under the circumstances she should have seen and in crossing in front of the defendant's vehicle when it was hazardous to do so. The court rejected plaintiff's argument that defendant should have looked for approaching vehicles that might encroach on her right of way even though defendant admitted that she saw plaintiff's vehicle in the distance with its left turn blinker activated:

> Defendant, however, was entitled to anticipate that plaintiff would obey the traffic laws that required her to yield the right-of-way to defendant.

The court also rejected plaintiff's argument that there was a triable issue concerning defendant violating the posted speed limit by traveling over 45 miles an hour in a 45 miles per hour speed zone:

> Even if defendant was traveling at a speed of four miles per hour over the posted speed limit, there was no evidence that defendant's speed was a proximate cause of the accident. The weather conditions were dry and sunny, and the road where the accident occurred was flat and straight. There was no evidence that defendant could have avoided the collision had she been traveling at a speed of 45 miles per hour as opposed to 49 miles per hour.

* * *

> We conclude that defendant established as a matter of law that plaintiff's failure to yield the right-of-way to her was the sole proximate cause of the accident.

Galvin v. Zacholl, 302 A.D.2d 965, 755 N.Y.S.2d 175 (4th Dept. 2003).

AUTOMOBILES – REAR END COLLISION – NON-NEGLIGENT EXPLANATION

Plaintiff was not entitled to summary judgment although her vehicle was struck in the rear since defendant offered a non-negligent explanation for the collision sufficient to overcome the inference of negligence and preclude an award of summary judgment:

> Here, plaintiff met her initial burden on the motion by establishing that her vehicle was rear-ended by the vehicle driven by defendant. Defendants, however, raised an issue of fact by submitting the deposition testimony of plaintiff in which she stated that, because she was looking at the street signs she did not see the vehicle move into the lane directly in front of her vehicle. Plaintiff admitted that she slammed on her brakes to avoid hitting that vehicle, and that is when the vehicle driven by defendant rear-ended her vehicle. We conclude that defendants thereby offered a non-negligent explanation for the collision, rendering partial summary judgment on liability and dismissal of the affirmative

defenses alleging plaintiff's culpable conduct inappropriate.

Danner v. Campbell, 302 A.D.2d 859, 754 N.Y.S.2d 484 (4th Dept. 2003).

AUTOMOBILES – VEHICLE AND TRAFFIC LAW § 388 – EMPLOYEE RESTRICTED USE

Brown and Williamson, who leased van for employee, Margaret Scicchitano, is not liable to plaintiff, who was injured when the van, operated by Scicchitano's boyfriend, struck him because B & W's employee manual restricted use of the leased vehicle to employees and spouses rebutting the presumption of permissive use under Vehicle and Traffic Law § 388:

> Here, by permitting an employee's use of its vehicle, B & W stands in a very different position than a car rental agency, which "rent[s] large number of vehicles to the general public for profit." While it is foreseeable that a rented vehicle would come into the hands of any number of operators by the very nature of the quasi-ownership relationship created by a lease, the bailment of a vehicle to an employee spawns a markedly different relationship with its own set of expectations. Indeed, an at-will employment relationship and the frequent contact between an employee and employer demand compliance with restrictions on vehicle operation placed on the employee. As a result of this relationship, it is reasonable for an employer to expect employees to comply with its use restrictions. Thus, allowing an employer explicitly to restrict those who may operate its vehicles while simultaneously restricting its liability as an owner under Vehicle and Traffic Law § 388, encourages careful selection of operators – the curative policy underpinning of the section. Even if Scicchitano had consented to Zimmerman's use of the van, B & W's employee handbook explicitly restricted those who may operate its vehicles and thereby rebutted the presumption of liability under Vehicle and Traffic Law § 388 (1).

Murdza v. Zimmerman, 99 N.Y.2d 375, 756 N.Y.S.2d 505 (2003).

[EDITOR'S NOTE: As a matter of public policy, the court refused to extend its holding in *Motor Vehicle Accid. Indem. Corp. v. Continental National American Group. Co.*, 35 N.Y.2d 260, 360 N.Y.S.2d 859 (1974), to non-car rental agencies. In *Motor Vehicle*, the court found constructive consent, reasoning that car rental agencies "rent large numbers of vehicles to the general public for profit." It therefore concluded that car rental agencies should be judged on a different standard from a "friendly individual [car] loan." However, the *Murdza* court rejected the argument of the van's lessors, D.L. Peterson Trust and PHH Fleet America Corporation, that they are entitled to benefit from B & W's employee handbook restriction:

> Unlike B & W's role as a bailor-employer, however, PHH and the Trust are lessors of the van and therefore fall squarely within the public policy considerations discussed in *Motor Vehicle*. As such, they may not benefit as a matter of law from restrictions adopted by their lessee that they themselves could not use to limit their ownership liability under section 388.]

AUTOMOBILE – VTL § 388 – PASSENGER/OWNER – SUIT AGAINST CO-OWNERS

Injured passenger, who was also statutory owner of vehicle under VTL § 128 [lessee over 30 days] is not barred from suing her co-owners, the lessors, Hendel and First Union Auto Finance, Inc.:

> Assuming without deciding that plaintiff is a statutory owner, we hold that she is not precluded from bringing a section 388 claim against other statutory owners. Focusing on the language of the statute, there is no limitation of the class of possible plaintiffs to non-owners. The statute simply says "every owner" shall be liable for injuries "to person or property" resulting from the negligence of any person using the vehicle with the

> permission of such owner. Defendants Hendel and First Union are owners who do not dispute that they permitted the person whose alleged negligence caused plaintiff's injury to drive their vehicle. Thus, regardless of whether plaintiff is also an "owner," the fact that her husband operated the vehicle with the consent of Hendel and First Union is sufficient to bring her within the protection of the statute.

Hassan v. Montuori, 99 N.Y.2d 348, 756 N.Y.S.2d 126 (2003), rvsg., 291 A.D.2d 375, 737 N.Y.S.2d 625 (2d Dept. 2002).

CONFLICT OF LAWS – CONN PLAINTIFF – NJ DEFENDANT – NY LOCUS – CHARITABLE IMMUNITY LAW

Connecticut resident attending college in New Jersey who was injured at a rugby match in New York was barred by New Jersey charitable immunity statute from suing New Jersey's Seton Hall University, who was charged with negligent supervision.

Gilbert v. Seton Hall University, 332 F.3d 105, (2d Cir. 2003)**.**

[EDITOR'S NOTE: The court applied the third Neumeier [v. Kuehner, 31 N.Y.2d 121, 335 N.Y.S.2d 64 (1972)] rule because the parties resided in different jurisdictions and the allegedly tortious conduct occurred in a third jurisdiction. Under the third Neumeier rule, the court applies the law of the jurisdiction where the injury occurred unless it can "be shown that displacing that normally applicable rule will advance the relevant substantive law purposes without impairing the smooth working of the multistate system or producing great uncertainty for litigants." Three factors influenced the court to reject the third Neumeier rule:

> One factor was that the plaintiffs had benefited from New Jersey's law of charitable immunity and the State therefore had a rightful interest in holding them to its burdens as well.
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> * * *
>
> A second factor … to favor application of New Jersey's charitable immunity law was that the state had an interest in encouraging the work of charities located within its borders.
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> * * *
>
> A third factor … was that while the injury had taken place in New York, most of the relevant contact between the parties in that case had occurred in New Jersey.]

CONFLICT OF LAWS – QUEBEC/NO FAULT

Quebec's no-fault law prohibiting actions to recover non-economic loss for injuries sustained in car accidents on its roadways cannot be invoked by a manufacturer of an allegedly defective tire where the allegedly defective tire was purchased in New York and the plaintiffs are New York residents:

> Significant contacts with New York are the purchase of the allegedly defective tire in New York; the car's registration in New York; the car's ownership by a New York domiciliary who was a passenger, the car's operation by a New York domiciliary who had a New York driver's license and was killed in the accident when the car rolled over, and the presence of two passengers in the car who are New York domiciliaries and were injured in the accident. Appellants manufacturer and distributor are Delaware corporations that have their principal places of business in Ohio and Tennessee and conduct business throughout the world; the tire was apparently manufactured in Georgia. Contacts with Quebec are the occurrence of the accident and the initial treatment of injuries there. The IAS court correctly held that New York's interest in having its products liability and negligence laws applied to compensate its domiciliaries for injuries sustained by a defective product sold in New York is greater than Quebec's interest in having its no-fault law uniformly applied so as to prohibit compensation to United States domiciliaries.

Mann v. The Cooper Tire Company, 306 A.D.2d 23, 761 N.Y.S.2d 635 (1st Dept. 2003)

COURTS – DOCTRINE OF LAW OF THE CASE

A defendant whose initial motion to dismiss plaintiff's complaint as barred by the Worker's Compensation Law -- an injured worker cannot recover damages from a property owner where the owner is also an officer or shareholder of the corporation which employed the worker -- was denied because the defendant was a separate and distinct corporate entity from the plaintiff's employer is not precluded from arguing that the plaintiff is a special employee under the law of the case doctrine:

> The doctrine of law of the case "applies only to legal determinations that were necessarily resolved on the merits in the prior decision." Here, the defendant's prior motion for summary judgment was not based upon the theory that a special employment relationship existed between the parties, and the Supreme Court's decision denying the defendant summary judgment on its worker's compensation defense did not consider or determine this issue. Accordingly, the trial court should not have limited the defendant's right to offer evidence of a special employment relationship.

D'Amato v. Access Manufacturing, Inc., 305 A.D.2d 447, 762 N.Y.S.2d 393 (2d Dept. 2003)

DAMAGES – BELOW KNEE AMPUTATION – $9,750,000

Plaintiff's award of $2.25 million for past pain and suffering and $7.5 million for future pain and suffering for traumatic amputation of the lower left leg of 35 year-old, who was a passenger on a motorcycle struck by a vehicle that crossed over to plaintiff's side of the road, is not excessive:

> The total pain and suffering award of $9,750,000 does not deviate from what is reasonable compensation in light of the evidence that plaintiff, an active 35 year-old woman, lost part of her left leg in the accident, underwent nine surgeries prior to trial, including some very painful skin grafts as well as two surgeries that required the removal and relocation of muscle tissue, and was left with pervasive scarring and a wound at the area of amputation that may never heal.

Bondi v. Bambrick, 308 A.D.2d 330, 764 N.Y.S.2d 674 (1st Dept. 2003).

EDITOR'S NOTE: $9,750,000 for traumatic amputation of the lower left leg (*NYLJ* 4/27/2001), appears to be the highest sustained appellate award for a leg amputation. Previous awards for leg amputations include John v. City of New York, 235 A.D.2d 210, 652 N.Y.S.2d 15 (1st Dept. 1997) [$2,500,000 for 4½ years of pain and suffering and $4,000,000 for 25 years of future pain and suffering for plaintiff who sustained amputation of both legs below the knee]; Hoenig v. Shyed, 284 A.D.2d 225, 727 N.Y.S.2d 80 (1st Dept. 2001) [$2,000,000 for past pain and suffering and $3,600,000 for future pain and suffering to plaintiff for an amputation above the knee of right leg]; Sladick v. Hudson General Corp., 226 A.D.2d 263, 641 N.Y.S.2d 270 (1st Dept. 1996) [$2,500,000 for past pain and suffering and $5,000,000 for future pain and suffering for amputation of plaintiff's leg eight inches above the knee and the deterioration of parts of the surviving leg]; Hersh v. New York City Transit Auth., 297 A.D.2d 556, 747 N.Y.S.2d 153 (1st Dept. 2002) [90 year-old female pedestrian suffered bilateral above knee leg amputations when her legs were crushed by defendant's public bus. Plaintiff was awarded $10,998,150 for damages including past and future pain and suffering. The trial judge's reduction of the total award to $3,629,390.00 was affirmed as reasonable compensation]. [See JRV No. 391327.]

DAMAGES – BURNS/SECOND AND THIRD DEGREE – 17% OF BODY – $8,000,000 – NOT EXCESSIVE

An award of $8,000,000 to 37 year-old plaintiff, a laboratory technician, who sustained second and third-degree burns to at least 17%

of her body, suffered permanent scarring to virtually all of her torso, was hospitalized for about one month for debridements and two skin grafts surgeries and required long-term treatment for post traumatic stress disorder, is not excessive:

> We find the damages awarded for past and future pain and suffering do not deviate materially from what is reasonable compensation under the circumstances.

Weigl v. Quincy Specialties Company, 1 A.D.3d 132, 766 N.Y.S.2d 428 (1st Dept. 2003), *aff'g*, 190 Misc.2d 1, 735 N.Y.S.2d 229 (S. Ct., NY Cty. 2001).

[EDITOR'S NOTE: Initially, plaintiff was awarded $20,000,000 as follows:

> $9,410,000 for past pain and suffering, $190,000 for past medical expenses, $400,000 for past loss of earnings, and $10,000,000 for future pain and suffering.

The IAS Court conditionally reduced the awards for past pain and suffering and future pain and suffering to $4,000,000 each, which plaintiff stipulated to accept. In reducing the amount, the IAS Court pointed out that the jury's verdict in the case was twice as high as the highest verdict awarded in a burn case in New York. The IAS Court rejected lower amounts suggested by defendant's cases:

> While the cases [cited by defendant] involved injuries with superficial factual similarities to plaintiff's injuries, it does not appear from the decisions that the injuries included severe permanent scarring or psychological injuries, and therefore that the injuries were as extensive as plaintiff's. The verdicts in the two to five million dollar range involved extensive injuries with similarities to plaintiff's. However, the injuries are not capable of precise comparison, and the jury in this case expressed its clear intent to award plaintiff substantial damages for injuries which it could, on the evidence, fairly regard as catastrophic. In deference to the jury and considering plaintiff's particular injuries, the court concludes that the verdict should not be limited to the two to five million dollar range, but should be reduced to $8,000,000, with damages for past and future pain and suffering in the amount of $4,000,000 each. Although a verdict in such amount has not previously been approved in a burn case by appellate courts, the amount is not higher than the highest level of previous burn verdicts. It is the court's opinion, based on the severity of plaintiff's injuries, that this amount constitutes reasonable compensation.]

DAMAGES – COLLATERAL SOURCE PAYMENTS – UNION PENSION BENEFITS

Trial judge erred in allowing collateral source offsets for union pension benefits:

> While the Social Security payments received by plaintiff and his family members were intended to compensate for lost earnings and thus properly treated as collateral source payments, the same cannot be said about plaintiff's pension benefits.

Hayes v. Normandie LLC, 306 A.D.2d 133, 761 N.Y.S.2d 645 (1st Dept. 2003)

DAMAGES – COMMINUTED FRACTURE OF RIGHT RADIUS – $750,000

Trial judge erred in reducing plaintiff's award for future pain and suffering from $750,000 to $350,000:

> Plaintiff sustained a comminuted fracture of the right radius extending into the right wrist that required the insertion of a metal plate and screws that will have to be removed in the future. The award for future pain and suffering is adequately supported by medical evidence that future fusion surgery or implantation of an artificial wrist joint might be necessary to alleviate pain.

Hayes v. Normandie LLC, 306 A.D.2d 133, 761 N.Y.S.2d 645 (1st Dept. 2003)

DAMAGES – FOREIGN OBJECT – FIVE YEARS – $500,000 – NOT EXCESSIVE

Surgeon who failed to remove a surgical wire from plaintiff's breast was liable to her for $500,000 for five years of pain and suffering and to her husband for $100,000 for loss of consortium:

> For almost five years after appellant performed surgery to remove an irregularity in plaintiff's left breast, she suffered a debilitating "sticking pain" in that breast because of his negligent failure to remove a surgical wire … The jury's awards do not deviate materially from what is reasonable compensation under the circumstances.

Chisolm v. New York Hospital, 304 A.D.2d 342, 757 N.Y.S.2d 34 (1st Dept. 2003).

DAMAGES – FRACTURES OF RIGHT CALCANEUS, DISTAL TIBIA AND FIBULA – SURGERIES – PLATE AND SCREWS – $750,000 PAST PAIN AND SUFFERING, $500,000 FUTURE PAIN AND SUFFERING – EXCESSIVENESS

Plaintiff's award of $750,000 for his past pain and suffering was excessive for the injures sustained when he fell 10 feet from a ladder and landed feet first on the ground. $500,000, according to the court, was the maximum amount the jury could have found as a matter of law. The court, however, sustained the award of $500,000 for future pain and suffering since it did not deviate materially from what would be reasonable compensation.

Patterson v. Kummer Development Corporation, 302 A.D.2d 873, 755 N.Y.S.2d 180 (4th Dept. 2003).

[EDITOR'S NOTE: The court described plaintiff's injuries as follows:

> Plaintiff sustained a fracture of his right calcaneus, which did not require surgery, and a fracture dislocation of his left ankle, including the distal tibia and fibula, which required two surgeries and the insertion of a plate and screws. Plaintiff testified that he was in extreme pain after the accident and after both surgeries. At the time of trial, plaintiff still experienced pain in both feet, which increased in intensity when standing or walking for prolonged periods of time. … Plaintiff has a permanent partial disability, including a 35% loss of use of his right foot and a 60% loss of use of his left foot and ankle. He cannot take long walks, and he has difficulty descending stairs. His physicians opined that he would develop posttraumatic arthritis that would worsen over time, along with the pain in his feet, and that he would eventually require surgery to alleviate the pain].

DAMAGES – HERNIATED CERVICAL AND LUMBAR DISCS – 2.5 INCH CHEEK SCAR – $1,118,000 PAIN AND SUFFERING – EXCESSIVE

Plaintiff's award of $958,000 for future pain and suffering deviated from what would be reasonable compensation -- $600,000 -- for plaintiff's injuries sustained when he fell from an A-frame ladder after it collapsed.

Sozzi v. Gramercy Realty Co. No. 2, L.P., 304 A.D.2d 555, 758 N.Y.S.2d 659 (2d Dept. 2003).

[EDITOR'S NOTE: The court also reduced plaintiff's future medical expenses from the sum of $150,000 to the sum of $80,000. However, the court affirmed plaintiff's damages of $160,000 awarded for past pain and suffering. Plaintiff's injuries were: herniated cervical and lumbar discs; laceration to the right cheek, resulting in a 2.5-inch scar. See *NYLJ*, 3/30/2001, p. 5, col. 1].

DAMAGES – KNEE INJURY – $348,000 FUTURE PAIN AND SUFFERING/$100,000 FUTURE MEDICAL EXPENSES

Plaintiff's award of $100,000 for future medical expenses and $348,000 for future pain and suffering is not excessive:

> The awards for future medical expenses and future pain and suffering do not deviate materially from what is reasonable compensation for a knee injury that has required three arthroscopic surgeries to treat torn ligaments and cartilage damage, will require pain killers, anti-inflammatory medication and a new unloader knee brace each year for the rest of plaintiff's 50-year life expectancy at a per-brace cost of $1200, and will likely require at least two knee replacements and associated physical therapy at cost of $20,000 each.

Kircher v. Motel 6 G.P., Inc., 305 A.D.2d 261, 761 N.Y.S.2d 19 (1st Dept. 2003).

DAMAGES – KNEE INJURY – $1.3 MILLION NOT EXCESSIVE

Award of $1,300,000 to 55 year-old electrician was not excessive:

> The jury's awards of $300,000 and $1 million for past pain and future pain and suffering, respectively, do not deviate materially from what is reasonable compensation under the circumstances.

Williams v. Turner Construction, Inc., 2 A.D.3d 217, 768 N.Y.S.2d 314 (1st Dept. 2003).

[EDITOR'S NOTE: According to the Jury Verdict Reporter, plaintiff suffered torn tendons and cartilage damage to his knee when he fell on fireproofing material].

DAMAGES – KNEE INJURY -- $800,000 – PAST AND FUTURE PAIN AND SUFFERING

Plaintiff's award of $100,000 for past and suffering and $700,000 for future pain and suffering was not excessive:

> The award of $100,000 for past pain and suffering over a two-year period for a torn anterior cruciate ligament and a torn medial meniscus does not deviate materially from reasonable compensation. Likewise, in view of testimony that plaintiff will ultimately develop arthritis and require knee replacement surgery, the $700,000 award for future pain and suffering over a projected 32-year period is not so disproportionate to what constitutes reasonable compensation as to warrant reduction.

Calzado v. New York City Transit Authority, 304 A.D.2d 385, 758 N.Y.S.2d 303 (1st Dept. 2003).

DAMAGES – LOSS OF CONSORTIUM – LOSS OF SERVICES AWARDS/NOT DUPLICATIVE

The award of $60,000 to plaintiff's wife for future loss of consortium is not duplicative of her award of $120,000 for loss of services:

> The award of damages to plaintiff's wife encompasses loss of society and companionship, not merely loss of services.

Patterson v. Kummer Development Corporation, 302 A.D.2d 873, 755 N.Y.S.2d 180 (4th Dept. 2003)**.**

DAMAGES – PUNITIVE DAMAGES – $7,000,000

Plaintiff's award of $7,000,000 for punitive damages when the motorcycle she was a passenger on was struck by an intoxicated driver who crossed lanes is excessive. The court held that $1,000,000 was "sufficient to punish appellant and to deter future misconduct":

> The trial evidence demonstrated that appellant, although previously convicted of driving while intoxicated, knowingly and willingly operated his car, which he understood to be a dangerous instrumentality, while intoxicated at the time of the subject accident, and, indeed that his blood alcohol level in the immediate aftermath of the accident was

.42, the highest such level ever recorded by the Suffolk County District Attorney's office.

Bondi v. Bambrick, 308 A.D.2d 330, 764 N.Y.S.2d 674 (1st Dept. 2003).

DAMAGES – WRONGFUL DEATH/CONSCIOUS PAIN AND SUFFERING – NEWBORN – 12 DAYS – $175,000 – INADEQUATE

Award of $175,000, reduced from $12,000,000 for conscious pain and suffering of a newborn, who died 12 days after a delayed Caesarian delivery, was inadequate and a new trial is ordered unless plaintiff stipulates to reduce the jury's award to $750,000.

The trial court erred in reasoning that, as a newborn, the decedent could not have had any cognitive awareness of her impending death:

> While "some level" of cognitive awareness is a prerequisite to recovery for loss of enjoyment of life, the fact finder is not required "to sort out varying degrees of cognition and determine at what level a particular deprivation can be fully appreciated." Thus, given the evidence of the decedent's consciousness for most of her short life, we find the trial court's reduction of the jury's verdict excessive.

The court was apparently influenced by decedent's condition during her short 12-day life:

> The decedent's compromised condition required constant invasive procedures during her 12-day life, including intubation and placement in a heart-lung machine for a therapy known as Extra Corporeal Membrane Oxygenation (EMCO), which required catheterization through the neck into the heart in order to bypass her damaged lungs. The EMCO incubated a secondary Candida infection that resulted in slow respiratory decomposition and death.

Cepeda v. New York City Health and Hospitals Corporation, 303 A.D.2d 173, 756 N.Y.S.2d 189 (1st Dept. 2003).

[EDITOR'S NOTE: In Cramer v. Benedictine Hospital, 301 A.D.2d 924, 754 N.Y.S.2d 414 (3d Dept. 2003), the court found that a $1,000,000 award for decedent's pain and suffering is excessive and conditionally reduced it to $350,000.

Plaintiff's decedent, William Cramer, 30 years old, was admitted to Benedictine Hospital for complaints of lethargy, vomiting and abdominal pain. The next day he lapsed into a coma for five days but resumed consciousness for five days before dying. The jury awarded plaintiff $1,000,000 for decedent's pain and suffering. The court reasoned:

> Decedent was in a profound coma from April 6, 1995 to April 11, 1995, and that, in such a state, it would have been difficult for him to have perceived pain. With respect, however, to the period between April 11, 1995 and April 16, 1995, the time during which decedent was alert, the jury could have found that decedent endured significant pain and suffering as a result of severe peritonitis, sepsis, the surgery, edema, skin ulcerations and subsequent organ failure and respiratory problems. On this record, where decedent's pain and suffering was limited to a period of approximately six days, we conclude that an award of $1 million deviates materially from what would be reasonable compensation and should be reduced to $350,000.]

EXPERT – QUALIFICATIONS – PODIATRIST

The trial court's refusal to permit a podiatrist who treated burns during his residency to testify concerning a burn injury to plaintiff's calf because he was not a medical doctor was reversible error:

> A witness may be qualified as an expert based upon "[l]ong observation, actual experience and/or study." "No precise

rule has been formulated and applied as to the exact manner in which such skill and experience must be acquired. Moreover, the lack of a medical license does not, in and of itself, disqualify a witness from testifying as an expert on a medical question.

In the instant case, the trial court abused its discretion in disqualifying the proffered expert because he did not have a medical degree. The court was required to assess his qualification as an expert based upon his professional background, training, study, and experience. The court did not attempt to make this kind of assessment and erroneously ruled that only a physician with a medical degree could testify with respect to causation.

The proffered expert, established, inter alia, that while New York State podiatrists are only licensed to treat below the ankle, he had experience in diagnosing and treating many burns both above and below the ankle. Thus, we find under the particular circumstances of this case, that he was sufficiently qualified to offer expert testimony as to the respondent's alleged malpractice in his treatment of the plaintiff's burn injury. Furthermore, the trial court erred in not affording the plaintiff an opportunity to lay a foundation for qualification of her witness.

Steinbuch v. Stern, 2 A.D.3d 709, 770 N.Y.S.2d 106 (2d Dept. 2003).

EVIDENCE – CROSS EXAMINATION – REFRESH RECOLLECTION/PRIOR COMPLAINT

Trial court erred in refusing defendant's counsel's application to refresh plaintiff's recollection with a copy of the witness' complaint against the manufacturer of the metal grinding machine which injured him when his hand became caught:

The trial court should have allowed defense counsel to show the plaintiff a copy of the complaint he had filed in another action to refresh his recollection as to whether he had commenced a lawsuit against the manufacturer of the grinding machine.

D'Amato v. Access Manufacturing, Inc., 305 A.D.2d 447, 762 N.Y.S.2d 393 (2d Dept. 2993)

INDEMNITY – CONTRACTUAL – DUTY TO DEFEND

Where there is a factual issue whether an indemnity clause in a contract is triggered, the indemnitor is not obligated to defend the indemnitee since the indemnitor is not an insurer whose duty to defend is greater than its duty to indemnify:

It was premature to grant that branch of the motion of the defendant third-party plaintiff which was for summary judgment on its cause of action for a defense in the main action, and to direct the third-party defendant to provide a defense to the defendant third-party plaintiff in the main action since the third-party defendant is not an insurer and its duty to defend is no broader than its duty to indemnify.

Moreover, since the third-party defendant is not an insurer, it was inappropriate to require the third-party defendant to provide a defense to the defendant third-party plaintiff in the main action since the obligation of the third-party defendant to indemnify the defendant third-party plaintiff has yet to be determined.

Brasch v. Yonkers Construction Company, 306 A.D.2d 508, 762 N.Y.S.2d 626 (2d Dept. 2003).

[EDITOR'S NOTE: This decision superseded an earlier decision at 298 A.D.2d 345, 751 N.Y.S.2d 200 (2d Dept. 2002), where the court had directed the third-party defendant to provide a defense to the third-party plaintiff because "the duty to defend is broader than the duty to indemnify, and allegations herein give rise to a reasonable possibility of coverage."

INDEMNITY – DEFENSE COSTS

Subcontractor who agreed to indemnify and hold harmless contractor is obligated to reimburse contractor's insurer [Home Insurance] for fees, costs and disbursements where the contractor was held to be free from negligence even though the contractor had no damages – their out-of-pocket expenses being paid by Home Insurance:

> Although Home Insurance paid the defense costs incurred by American and Resource in the underlying action, leaving them with no damages other than the out-of-pocket costs of obtaining and maintaining substitute insurance coverage, the subrogation doctrine permits Home Insurance to obtain reimbursement for these costs from Universal, whose negligence was responsible for the loss. Furthermore, the Supreme Court properly concluded that the rationale of the *Inchaustegui [v 666 5th Ave. Ltd. Partnership*, 96 N.Y.2d 111, 725 N.Y.S.2d 627 (2001)] decision is not controlling because in this case, Home Insurance seeks to recoup defense costs through enforcement of the indemnification rights of its insureds. In contrast, the issue presented in *Inchaustegui* was whether the damages caused by breach of an insurance procurement provision could be minimized where other insurance coverage was available. Accordingly, we do not find that the *Inchaustegui* decision bars Home Insurance from recovering its reasonable defense costs in its capacity as subrogee for its insureds, who established their right to indemnification from Universal in the underlying action.

American Ref-Fuel Company of Hempstead v. Resource Recycling, Inc., 307 A.D.2d 939, 763 N.Y.S.2d 657 (2d Dept. 2003).

INSURANCE – DUTY TO INDEMNIFY – ASSAULT – OCCURRENCE/EXCLUSION ("EXPECTED OR INTENDED")

Insurance company is obligated to satisfy plaintiff's judgment against its insured, a café, whose bartender assaulted plaintiff with a metal pipe kept in plain view behind the bar. The court rejected the carrier's argument that the policy excluded the claim because plaintiff's injuries were intentionally caused by an employee who wielded a pipe:

> In *Agoado Realty Corp. v. United International Insurance Company*, 95 N.Y.2d 141, 145, 711 N.Y.S.2d 141 (2000), the Court of Appeals reaffirmed its holding that a court, when deciding "whether a loss is the result of an accident … must … determine[] *from the point of view of the insured*, whether the loss was unexpected, unusual and unforeseen" (emphasis supplied in original). Since, in this matter, Salant-Jerome's employee was not acting within the scope of the employer's behalf when he committed the assault, it was not intended or expected by the insured and is, therefore, a covered occurrence under the policy.

Siagha v. National Fire Insurance Company of Pittsburgh, PA, 306 A.D.2d 60, 762 N.Y.S.2d 46 (1st Dept. 2003)**.**

[EDITOR'S NOTE: The policy applied to "bodily injury" caused by an "occurrence," which is defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." The policy did not explicitly contain an assault and battery exclusion, but contained a provision that coverage does not apply to "'bodily injury' or 'property damage' expected or intended from the standpoint of the insured."]

JUDGMENT – SUMMARY JUDGMENT – DEFENDANT'S BURDEN – ATTORNEY'S AFFIRMATION

Defendant supermarket failed to carry its burden to establish the absence of notice as a matter of law where plaintiff was alleging that the deli display case door, which caused her injury, was defective:

> As the movant in this case, the defendant was required to make a prima facie

showing, *inter alia*, "to establish the absence of notice as a matter of law." The defendant failed to carry its burden in this regard.

* * *

Beyond the issue of notice, the defendant's prima facie burden faltered on the issue of whether the condition of the display case was dangerous or defective. The defendant's sole support for its claim that the display case was not dangerous or defective consisted of a conclusory statement in its attorney's affirmation to the effect that the plaintiff had not demonstrated the existence of a defect in the door. However, a defendant moving for summary judgment does not carry its burden merely by citing gaps in the plaintiff's case.

Kucera v. Waldbaums Supermarkets, 304 A.D.2d 531, 758 N.Y.S.2d 133 (2d Dept. 2003)**.**

JUDGMENT – SUMMARY JUDGMENT – EXPERT'S AFFIDAVIT/SPECULATIVE AND CONCLUSORY

Plaintiff's expert's affidavit that defendant was speeding, traveling 55 miles per hour in a 40 mile per hour zone, was a contributing cause to her inability to avoid colliding with plaintiff's vehicle was not sufficient to raise a triable issue of fact:

We find this expert affidavit to be insufficient. The expert's affidavit failed to provide any data upon which the opinion is based and is, therefore, speculative and conclusory. Accordingly, the Supreme Court should have granted [defendant] Rubino's motion.

Youthkins v. Cascio, 298 A.D.2d 386, 751 N.Y.S.2d 216 (2d Dept. 2002), aff'd, 99 N.Y.2d 638, 760 N.Y.S.2d 91 (2003**).**

[EDITOR'S NOTE: Plaintiff's expert calculated defendant's rate of speed by examining: the vehicle crush damage patterns to the vehicle involved, the point of impact between the Honda and the motorcycle driven by Mr. Youthkins, the initial traveling path directions of the vehicles and their positions on the roadway and the final resting position of the motorcycle driven by Mr. Youthkins and the Honda driven by Lisa Rubino].

JUDGMENT – SUMMARY JUDGMENT – PRECLUSION ORDER/TESTIFY

Although the plaintiff was precluded from testifying at trial, defendant was not entitled to summary judgment since the preclusion order did not relate to all aspects of plaintiff's proof:

Plaintiff was precluded only from testifying at trial. Inasmuch as plaintiff seeks to recover not only for negligence but also for violation of absolute liability provisions of the Labor Law, it cannot be said that plaintiff necessarily will not be able to prove his case without testifying and that defendants are entitled to judgment as a matter of law. Since defendants failed to make a prima facie showing of entitlement to judgment as a matter of law, the sufficiency of plaintiff's opposition is immaterial.

Rosario v. Humphreys & Harding, Inc., 301 A.D.2d 406, 752 N.Y.S.2d 865 (1st Dept. 2003).

JURISDICTION – CPLR 302 – OUT-OF-STATE HOSPITAL – SOLICITATION

New Jersey hospital cannot be sued in New York by New York resident for medical malpractice occurring in New Jersey even if hospital solicited business in New York since the hospital did not have any "presence" in New York:

Solicitation limited to the defendant maintaining a telephone listing in New York is insufficient and, as noted, defendant herein does not have a New York telephone number or another New York point of contact in furtherance of the

solicitation. Nor would the New York residence of patients or the New York licensing of its physicians, factors likely resulting from the hospital's geographic proximity to New York, confer jurisdiction, the issue being the nature of the hospital's actual business transactions within the state.

* * *

The purported solicitation in the present case, even accompanied by what really amounts to treatment of New York residents in New Jersey, does not provide a stronger case for finding that defendant transacted business in New York. Finally, it is well established that the situs of the injury is the location where the event giving rise to the injury occurred, and not where the resultant damages occurred. In a medical malpractice case, the injury occurs where the malpractice took place.

O'Brien v. Hackensack University Medical Center, 305 A.D.2d 199, 760 N.Y.S.2d 425 (1st Dept. 2003).

LIEN – MEDICAID – REDUCTION

The IAS Court erred in reducing a $116,000 medical assistance lien to $11,600 on the proceeds of a medical malpractice settlement between plaintiff and defendant doctor:

The Court of Appeals has held that all settlement proceeds are available to satisfy a Medicaid lien. "Once a Medicaid lien is in effect, only the local public welfare official may release and discharge it, and 'no release, payment, discharge or satisfaction of any … claim, demand, right of action, suit or counterclaim shall be valid or effective against such lien.'" Consequently, we reverse the order and reinstate the original lien

Veno v. Saleh, 306 A.D.2d 876, 760 N.Y.S.2d 913 (4th Dept. 2003)**.**

LIMITATIONS OF ACTION – ESTOPPEL

Plaintiff is entitled to serve a supplemental summons and amended complaint naming the correct hotel franchisee even though the Statute of Limitations had expired where (a) plaintiff was injured at the Albany Marriott and the hotel referred plaintiff's counsel to its insurance carrier and claims agent Zurich American Insurance Company, (b) Zurich conducted settlement negotiations with plaintiff's counsel, (c) Zurich obtained a stipulation from plaintiff for an extension of time to answer on "behalf of Albany Marriott" and (d) franchisee's counsel asserted the affirmative defense of statute of limitations:

Plaintiff is essentially alleging that Interstate [Albany Marriott] should be estopped from asserting the affirmative defense of statute of limitations based upon, among other things, the actions of Zurich-American. Notably, "a defendant may be estopped to plead the Statute of Limitations where [the] plaintiff was induced by fraud, misrepresentation or deception to refrain from filing a timely action." Here, the record demonstrates that Zurich-American, while continually maintaining that it represented Albany Marriott and could act on its behalf, received a "courtesy" copy of a summons and complaint specifically directed solely to defendant, a purportedly separate entity from the Albany Marriott franchise. Zurich-American did not simply ignore the courtesy copy of the papers as it presumably could have done had it solely represented the interests of "Albany Marriott" as indicated in its correspondence. Instead, it affirmatively negotiated an extension of defendant's time to answer which was fully taken advantage by the defendant. By doing so, Zurich-American clearly misrepresented that the interests of the Albany Marriott and defendant were one and the same. Simply, Zurich-American consistently set forth that it was acting solely for the party liable for any negligent acts by Albany Marriott employees when it first engaged in settlement negotiations and then sought an extension of time for an answer to be served. In the latter communications, Zurich-American represented through its

conduct that *defendant* was "the Albany Marriott," i.e. the responsible party.

Hart v. Mariott International, Inc., 304 A.D.2d 105, 758 N.Y.S.2d 435 (3d Dept. 2003).

[EDITOR'S NOTE: Two judges dissented:

No insurance company has a duty to aid its insured's adversaries. Indeed, if Zurich-American or its attorneys had so advised plaintiff's attorneys, they would have violated the duty of undivided loyalty owed to their insured.

* * *

In addition, Zurich-American's conduct of generally identifying its insured as "the Albany Marriott" in correspondence is without significance. Plaintiff's attorneys surely knew any reference to "the Albany Marriott" was not intended to identify the corporate owner/operator of the hotel since they themselves sued Marriot International, Inc., *not* "the Albany Marriott."]

MOTIONS – RENEWAL

The IAS Court erred in granting plaintiff's motion to renew after it granted defendant's motion for summary judgment. The court should not have received plaintiff's expert's revised affidavit when earlier it rejected it as conclusory:

An application to renew must be based upon additional material facts which existed at the time that the prior motion was made but which were not then known to the party seeking leave to renew and a valid excuse must be offered for not supplying such facts. A request for renewal should be rejected when the moving party fails to offer a reasonable excuse for not submitting the new material on the previous motion. Plaintiff never explained why the expert engineer was not able, when providing an affidavit on defendant's motion, to make the same inspection he performed and incorporated into his revised affidavit for the renewal motion. There still had been no actual examination of the vault area which is assumed to lie beneath the sidewalk and near the curb in question. Plaintiff did not provide any construction plans, schematics or other evidence which would support the still-conclusory statements of the expert that the vault space is a special use and that any deterioration of the curb has a relationship to the vault space.

Cuccia v. City of New York, 306 A.D.2d 2, 761 N.Y.S.2d 31 (1st Dept. 2003)**.**

MOTIONS – RENEWAL – ABUSE OF DISCRETION

The court abused its discretion in failing to grant defendants' motion to renew even though they gave no excuse for failing to offer the newly submitted evidence in support of the initial motion:

We agree with the IAS court that defendant's second motion, denominated as one for reargument, was actually a motion for renewal, since it was based on evidence not presented on the prior motion, i.e., defendants' affidavits and the invoices addressed to their Westchester County address. Although renewal motions generally should be based on newly discovered facts that could not be offered on the prior motion (*see* CPLR 2221[e]), courts have discretion to relax this requirement and to grant such a motion in the interest of justice. On this record, in which the only competent evidence is that both defendants reside in Westchester County, we deem it appropriate to reverse and grant renewal of the motion to change venue in the exercise of our discretion, and thereupon direct a change of venue.

Mejia v. Nanni, 307 A.D.2d 870, 763 N.Y.S.2d 611 (1st Dept. 2003).

MOTION – SUMMARY JUDGMENT – LATE/ONE MONTH

Defendant's motion for summary judgment should have been granted notwithstanding that it was one month late:

> Initially, we find that the motion court, which is afforded wide latitude in exercising its discretion to entertain a later motion for summary judgment, improvidently exercised that discretion, where, as here, the delay of just over one month was minimal, plaintiff failed to demonstrate that he was prejudiced by the delay and, because the motion addressed a potentially determinative matter, its consideration was warranted in advance of trial in the interest of judicial economy.

Burns v. Gonzalez, 307 A.D.2d 863, 763 N.Y.S.2d 603 (1st Dept. 2003).

[EDITOR'S NOTE: A party whose summary judgment motion is late must establish "good cause." If no "good cause" is demonstrated, the motion must be denied even if the motion has merit and there is no prejudice. See Brill v. City of New York, __ N.Y.3d __, __ N.Y.S.2d __, 2004 WL 1263 754 (2004):

> We conclude that "good cause" in CPLR 3212(a) required a showing of good cause for the delay in making the motion – a satisfactory explanation for the untimeliness – rather than simply permitting meritorious, non-prejudicial filings, however tardy. That reading is supported by the language of the statute – only the movant can **show** good cause – as well as by the purpose of the amendment, to end the practice of eleventh-hour summary judgment motions. No excuse at all, or a perfunctory excuse, cannot be "good cause"].

NEGLIGENCE – FORESEEABILITY – SUPERSEDING CAUSE

Verdict in favor of plaintiff who was injured while attempting to exit stalled elevator through three-foot opening was not barred by the intervening and superseding cause doctrine:

> Under these circumstances [plaintiff stuck with young children in malodorous, dirty and poorly ventilated elevator with children complaining they could not breathe], we cannot accept defendant's contention that plaintiff's actions were so extraordinary as to interrupt the causal chain stemming from its negligence and constitute an intervening and superseding cause of her injury. Rather, the evidence warrants the conclusion that plaintiff's conduct in attempting to extricate herself from the fetid elevator in which she had been trapped without assistance for some 40 minutes was a foreseeable response to the hazardous situation that had developed by reason of defendant's negligence.

Wiggins v. City of New York, 1 A.D.3d 116, 766 N.Y.S.2d 202 (1st Dept. 2003).

[EDITOR'S NOTE: The holding in this case should be distinguished from the Court of Appeals finding in Egan v. A.J. Construction Corp., 94 N.Y.2d 839, 702 N.Y.S.2d 574 (1999), where the court held that a worker who, after 10 to 15 minutes in a stalled freight elevator, jumped six feet above the lobby floor had no cause of action since his jumping from a stalled elevator was not foreseeable in the normal course of events. The Court of Appeals ruled that plaintiff's jump superseded defendants' conduct and terminated defendants' liability for his injuries.]

NEGLIGENCE – FORESEEABILITY – STABBING OUTSIDE PREMISES

Foster care agency may be liable to plaintiff, foster mother, for a stabbing by biological mother [Alves] outside agency building since agency scheduled a visit between foster mother and the biological mother:

> This "confluence of factors" raises an issue of fact as to whether the attack was reasonably foreseeable, "triggering the need for protective action." That Alves

had only expressed anger in the past without acting on it did not make the attack unforeseeable as a matter of law.

Waldon v. Little Flower Children's Service, 308 A.D.2d 320, 764 N.Y.S.2d 49 (1st Dept. 2003).

[EDITOR'S NOTE: Justice Tom dissented stating that the agency cannot be responsible as a premises owner under common law negligence since the assault occurred on a public street over which the agency exercised no control. Justice Tom also found that there was no evidence of criminal history that would have alerted the agency to potential violence. Plaintiff's failure to demonstrate foreseeability required dismissal.

The Court of Appeals reversed the Appellate Division's order finding a question of fact. See 1 N.Y.3d 612, 776 N.Y.S.2d 532 (2004):

> Assuming the agency owed the foster parent a duty of care, no evidence was proffered raising a question of fact on the issues of breach or causation. Although the biological mother had a history of mental illness, she had no history of violence, nor had she threatened agency staff or the foster parent in the past. The agency therefore had no reason to anticipate a violent outburst or to take steps to prevent contact between the biological mother and the foster parent. In addition, due to the suddenness of the attack and its location, the agency's security staff had no opportunity to intervene to assist the foster parent. Under the circumstances of this case, defendants-appellants were entitled to summary judgment dismissing the complaint against them].

NEGLIGENCE – FRANCHISOR

Issues of fact exist whether franchisor is an out-of-possession landlord who relinquished supervisory control over franchisee/lessee's operation of a mini-mart where plaintiff fell allegedly because of a missing floor tile:

> Such issues are raised by evidence that appellants [franchisor] had the right to enter and inspect the mini-mart at all reasonable times to ensure compliance with franchise standards, and exercised that right regularly and vigorously. Indeed, one of appellants' inspectors testified that if she had seen a missing floor tile at the entrance of the mini-mart, as alleged, she would have made a note of it and required the franchisee/lessee to fix it. There is even evidence tending to show that the inspector did make such a note.

Gerber v. West Hempstead Convenience, Inc., 2 A.D.3d 260, 769 N.Y.S.2d 527 (1st Dept. 2003**).**

NEGLIGENCE – LABOR LAW § 240(1)

Plaintiff's fall from a roof while inspecting it as a potential site for a condenser unit relative to the work he was performing nearby was not covered under Labor Law § 240(1):

> Here, as in *Martinez [v. City of New York*, 93 N.Y.2d 322, 690 N.Y.S.2d 524 (1999)], the activity in which plaintiff was engaged at the time of his fall was merely investigatory, i.e., it entailed merely planning for future construction work, before defendants had the incentive to install safety devices. Plaintiff's work did not take place during the "erection, demolition, repairing, [or] altering … of a building or structure," nor did it involve any such activities. Thus, plaintiff was not "a person employed to carry out the [construction work] as that term is used in section 240(1).

McMahon v. H S M Packaging Corporation, 302 A.D.2d 1012, 755 N.Y.S.2d 186 (4th Dept. 2003), appeal withdrawn, 99 N.Y.2d 652, 760 N.Y.S.2d 105 (2003).

[EDITOR'S NOTE: There was a vigorous dissent by two judges because the plaintiff's inspection of a potential construction site

> was within the general scope of the project for which plaintiff's company was hired, and the inspection was essential to the project. Thus, we conclude that plaintiff was engaged in an activity within the protection of Labor Law § 240(1) when he was injured.

This case was decided before the Court of Appeals case of Panek v. County of Albany, 99 N.Y.2d. 452, 758 N.Y.S.2d 267 (2003), where the court held that plaintiff's injury sustained during his removal of air handlers weighing 200 pounds before demolition work was to start was covered under the statute even though the removal of the air handlers was not part of the separately contracted future demolition project.]

NEGLIGENCE – LABOR LAW § 240(1) – ALTERATION

Plaintiff's fall from a ladder while removing an air handler attached to the Albany International Airport's cooling system, which was scheduled for demolition two weeks later, is covered under Labor Law § 240(1) since plaintiff was engaged in altering, a protected activity.

The court rejected the Appellate Division's reasoning that altering, like any other enumerated protected activity other than demolition, logically contemplates the continued use of the building or structure whose composition or configuration is being substantially changed physically:

> Here, plaintiff was clearly engaged in a significant physical change to the building when he was injured, thus satisfying the *Joblon [v. Solow*, 91 N.Y.2d 457, 672 N.Y.S.2d 286 (1998)] standard for alteration. The removal of the two 200-pound air handlers required two days of preparatory labor, including the dismantling of electrical and plumbing components of the cooling system, and involved the use of a mechanical lift to support the weight of the air handlers. That plaintiff performed this substantial modification on a building ultimately scheduled for demolition does not change the nature of the work project at the time of his accident.

Panek v. County of Albany, 99 N.Y.2d 452, 758 N.Y.S.2d 267 (2003), *rvsg*., 286 A.D.2d 86, 731 N.Y.S.2d 803 (3rd Dept. 2001).

NEGLIGENCE – LABOR LAW § 240(1) – FALL FROM FIRE ESCAPE

Decedent, who was seriously injured when a fire escape railing that he was leaning over while painting the outside of the fire escape collapsed, was covered under Labor Law § 240:

> The evidence that the decedent's fall was caused by the collapse of the safety device upon which he was working established a prima facie case of liability under Labor Law § 240(1).
>
> * * *
>
> The fire escape was being used as the functional equivalent of a scaffold to protect the decedent from elevation-related risks and therefore constituted a safety device within the meaning of Labor Law § 240(1). The fact that the fire escape was a permanent rather than temporary structure does not preclude Labor Law § 240(1) liability.

De Jara v. 44-14 Newtown Road Apartment Corporation, 307 A.D.2d 948, 763 N.Y.S.2d 654 (2d Dept. 2003)**.**

NEGLIGENCE – LABOR LAW § 240(1) – INCOMPLETE FALL

Plaintiff's slide down the roof, rather than off the roof, is the type of hazard that Labor Law § 240(1) covers:

> The simple fact is that plaintiff was subject to an elevation-related risk. He fell from the top of the roof all the way down to the eaves, a distance of about 15 to 20 feet. Safety devices could have prevented him from falling as he did. Defendant does not dispute that under 22 NYCRR 23-1.24, plaintiff should have been provided with roofing brackets, crawling boards or safety belts. The

> application of section 240(1) does not hinge on whether the worker actually hit the ground. This argument, accepted by the dissent below, represents an overly strict interpretation of section 240(1). It would exclude from section 240(1) workers who succumb to elevation-related risks but, for whatever the reason, do not make it to the ground. For instance, a window washer who is injured when a scaffold drops 20 floors but stops before hitting the ground would not be covered.
>
> In short, plaintiff was subject to an elevated-related risk while working on this particular roof, and he was not provided with any safety devices. In addition, the failure to provide any safety devices was a proximate cause of plaintiff's injuries. He was within the protective ambit of Labor Law section 240(1).

Striegel v. Hillcrest Hgts. Dev. Corp., 100 N.Y.2d 974, 768 N.Y.S.2d 727 (2003).

NEGLIGENCE – LABOR LAW § 240(1) – INSPECTIONS – COVERED PERSONS

Plaintiff, injured when the ladder slid from under him under and bounced off the floor striking him in the face before he fell to the ground, is covered under Labor Law § 240(1) even though at the time he was only readying air handling units for inspection because (a) the inspections were ongoing and contemporaneous with other work that formed part of a single contract and (b) plaintiff's company was performing construction and alteration work pursuant to a contract.

The court distinguished this case from Martinez v. City of New York, 93 N.Y.2d 322, 690 N.Y.S.2d 524 (1999), because the work plaintiff's company was performing went beyond inspection; it covered Labor Law § 240(1) activities including construction and alteration:

> The Second Circuit questioned whether our holding in *Joblon v. Solow*, 91 N.Y.2d 457, 465, 672 N.Y.S.2d 286 (1998) bars plaintiff's recovery. There, we looked to the "time of injury" to determine whether plaintiff's work fell within § 240(1). Defendant would have us read that phrase in an overly literal manner. In our view, however, the words must be applied in context. At one extreme, a construction worker who, between hammer strokes, pauses to see where to hit the next nail is at that moment "inspecting." But this is very different from an inspection conducted by someone carrying a clipboard while surveying a possible construction site long before a contractor puts a spade in the ground. Here, AWL employed the plaintiff mechanic substantially to perform work that involved alteration of a building, and, under the facts of this case, he enjoyed the protection of § 240(1) even though he was inspecting, or more precisely, climbing a ladder, at the moment of the accident

Prats v. Port Authority of NY and NJ, 100 N.Y.2d 878, 768 N.Y.S.2d 178 (2003).

NEGLIGENCE – LABOR LAW § 240(1) – INTERVENING CAUSE

Plaintiff who (a) knew that the permanent stairs to the motor room above the roof were removed, (b) used a bucket to gain access to the motor room, and (c) was injured after jumping from the motor room to the roof has no Labor Law § 240(1) claim. The court rejected the IAS finding that the accident occurred as a result of defendant's failure to provide plaintiff with a ladder or other safety device to enable him to descend from the machine room, which failure was a proximate cause of his injuries:

> Plaintiff's jump from the motor room to the roof under the circumstances presented was not reasonably foreseeable and, thus, was an intervening act which constituted a superseding cause for the knee injury he sustained as he landed.

The court distinguished this case from Desousa v. City of New York, 267 A.D.2d 195, 699 N.Y.S.2d 475 (2d Dept. 1999):

However, this is not a situation similar to *Desousa*, where plaintiff was working on an elevated pier from which he could only descend by jumping onto a platform several feet below and where defendants only argued that ladders were unnecessary. Nor is it a situation where, after plaintiff and his supervisor ascended to the elevated work site, the stairs or ladder used to access the site were removed without notice, thus stranding the two men in a precarious or dangerous location.

Montgomery v. Federal Express Corporation, 307 A.D.2d 865, 763 N.Y.S.2d 600 (1st Dept. 2003).

NEGLIGENCE – LABOR LAW § 240(1) – LADDER TIPPED

Plaintiff, who fell from second rung of six-foot folding fiberglass step ladder that was "placed in an open and locked position" is covered under Labor Law 240(1). The court rejected defendants' argument that the ladder was safe:

Defendant[s'] contention that the ladder provided to plaintiff was an adequate safety device lacks merit; the fact that the ladder "tipped" establishes that it was not so "placed … as to give proper protection" to plaintiff.

Petit v. Board of Educ. of West Genesee School District, 307 A.D.2d 749, 762 N.Y.S.2d 557 (4th Dept. 2003)**.**

NEGLIGENCE – PREMISES – LABOR LAW § 240(1) – OWNER'S LIABILITY/CABLE TELEVISION TECHNICIAN INJURY

A cable television technician, called by a building tenant to the premises, cannot sue the building's owner under Labor Law § 240(1) for injuries sustained where the tenant (a) was not acting as the owner's agent and (b) the owner did not otherwise authorize the work:

We are not persuaded that defendants owners otherwise authorized the work requested by their unnamed tenant, and third-party defendants' unnamed subscriber, by virtue of Public Service Law § 228, which prohibits landlords from interfering with the installation of cable television facilities. The equipment that plaintiff was working on at the time of the accident was not being "installed" and was not owned by defendants but by third-party defendants. In addition, as the motion court stated, section 228 was enacted to assure that tenants have access to cable television (*see* Public Service Law § 211), not to impose liability on landlords for personal injuries where such liability would not otherwise exist.

Abbatiello v. Lancaster Studio Associates, 307 A.D.2d 788, 763 N.Y.S.2d 44 (1st Dept. 2003).

[EDITOR'S NOTE: Justice Mazzarelli dissented relying primarily on two Court of Appeals cases: Gordon v. Eastern Railway Supply, Inc., 82 N.Y.2d 555, 606 N.Y.S.2d 127 (1993) and Coleman v. City of New York, 91 N.Y.2d 821, 666 N.Y.S.2d 553 (1997), where the court held that liability rests upon the fact of ownership and it is legally irrelevant whether the owner had contracted for the work or benefited from it.

Justice Mazzarelli also relied on Otero v. Cablevision of New York, 297 A.D.2d 632, 747 N.Y.S.2d 46 (2d Dept. 2002), where the court, contrary to the Third Department in Marchese v. Grossarth, 232 A.D.2d 924, 648 N.Y.S.2d 810 (3d Dept. 1996), held an owner liable for a cable technician's injury:

This case is no different from *Otero*, *Coleman* and *Gordon*, in that Lancaster, like the owners in those cases, was not controlling or supervising the work being done on its property. These defendant-owners are nonetheless responsible for the safety of those workers. In fact, because of Public Service Law § 228, Lancaster knew that cable technicians like plaintiff would be working on its premises, for the benefit of the tenants in its building. In this situation, Lancaster should be held responsible, pursuant to the requirements of Labor Law § 240(1), for the safety of the workers exposed to

> the hazards of working at an elevation on its property.

Justice Mazzarelli also disagreed with the majority's holding that the work plaintiff was performing on the malfunctioning cable box was routine maintenance. According to Justice Mazzarelli, "it cannot be determined, as a matter of law, at this stage of the proceeding, whether the work the plaintiff was doing was repair or routine maintenance."

Leave was granted by the Court of Appeals, 1 N.Y.3d 502, 775 N.Y.S.2d 240 (2003)].

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

Plaintiff, who was injured in fall from ladder while performing monthly maintenance check on the air-conditioning units, is not covered under Labor Law § 240(1):

> Section 240(1) applies where an employee is engaged "in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure." Although repairing is among the enumerated activities, we have distinguished this from "routine maintenance." The work here involved replacing components that require replacement in the course of normal wear and tear. It therefore constituted routine maintenance and not "repairing" or any of the other enumerated activities.

Esposito v. New York City Industrial Development Agency, 1 N.Y.3d 526, 770 N.Y.S.2d 682 (2003)**.**

NEGLIGENCE – LABOR LAW § 240(1) – TWO DISTINCT JOBS

Plaintiff, who, after making repairs to an air conditioning unit, climbed ladder to obtain air conditioner's serial and model numbers and fell 10 feet from the ladder when a gust of wind moved his ladder while descending, is not covered under Labor Law 240(1):

> Although the repair of the malfunctioning air conditioning unit did not constitute mere routine maintenance, plaintiff was not engaged in that repair work at the time of his injury. Plaintiff had two distinct jobs to perform on the day that he was injured, i.e., repairing the air conditioning unit and obtaining the serial and model numbers of the unit, and it is undisputed that he was obtaining the serial and model numbers of the unit at the time of his injury. Because obtaining that information was not part of the repair work, plaintiff was not engaged in a protected activity under Labor Law § 240(1) when he fell from the ladder.

Beehner v. Eckerd Corporation, 307 A.D.2d 699, 762 N.Y.S.2d 756 (4th Dept. 2003), appeal withdrawn, 100 N.Y.2d 617, 767 N.Y.S.2d 399 (2003).

[EDITOR'S NOTE: Two justices dissented. They maintained that since the plaintiff was required to obtain the air conditioning serial and model numbers before the repair of the unit would be deemed completed, this was not a "separate and distinct" task assigned by plaintiff's employer but rather was "incidental to the repair work that plaintiff completed earlier and therefore is a protected activity under Labor Law § 240(1)."]

NEGLIGENCE – PARENT/SON – AGENCY

A parent who allegedly consented to his adult children hosting a party at his home in his absence is not liable based on alleged agency relationship between the parent and his children for the negligent failure of the children to control the conduct of others at the party causing injury to plaintiff because of horse play engaged in by two other guests:

> We conclude that no agency relationship existed between defendant and his sons as a matter of law. "The existence of a parent-child relationship is insufficient to establish an agency relationship; the proof must establish that the child is in fact an agent of the parent."

* * *

> Furthermore, unlike *Comeau [v. Lucas*, 90 A.D.2d 674, 455 N.Y.S.2d 871 (4th Dept. 1982)], which should be limited to its particular facts, defendant herein was not involved in the planning of the party and gave no direction concerning the manner in which it was to be conducted. Because there is no triable issue of fact whether Jonathan and Timothy Nagowski were acting as defendant's agents, defendant's motion for summary judgment should be granted.

Dynas v. Nagowski, 307 A.D.2d 144, 762 N.Y.S.2d 745 (4th Dept. 2003)**.**

NEGLIGENCE – PLAINTIFF'S VIOLATION/PENAL LAW – BB GUN

Eleven-year-old plaintiff, who violated Penal Law § 265.05 while playing with friends (defendants), is not precluded from suing them under Barker v. Kallash, 63 N.Y.2d 19, 479 N.Y.S.2d 201 (1984):

> Supreme Court properly denied defendant's motion seeking a directed verdict on the ground that plaintiff is precluded from recovery because the injuries sustained by Mark resulted from Mark's own violation of Penal Law § 265.05. Mark's possession of the BB gun does not constitute the type of serious criminal or illegal conduct that would bar plaintiff from bringing this lawsuit, nor is the illegal possession of the BB gun by Mark a direct cause of his injuries.

Rokitka v. Barrett, 303 A.D.2d 983, 757 N.Y.S.2d 184 (4th Dept. 2003).

NEGLIGENCE – PREMISES – SLIP AND FALL – OPEN AND OBVIOUS/DUTY TO MAINTAIN PROPERTY

Plaintiff, who tripped on a sidewalk crack, has a viable claim against the City of Schenectady even though the allegedly dangerous condition was readily observable and plaintiff was well aware of it:

> Policy considerations lead us to conclude that the open and obvious nature of an allegedly dangerous condition does not, standing alone, necessarily obviate a landowner's duty to maintain his or her property in a reasonably safe condition (citing Tagle v. Jakob, 97 N.Y.2d 165, 737 N.Y.S.2d 331 [2001]).
>
> * * *
>
> The societal benefit to imposing a duty to maintain one's premises in a reasonably safe condition remains even where the dangerous condition is obvious. Notably, this Court has repeatedly articulated the fact that a landowner's duty to maintain its premises is separate and distinct from the duty to warn of latent, hazardous conditions.
>
> A contrary rule of law would permit a landowner to persistently ignore an extremely hazardous condition – regardless of how foreseeable it might be that injuries will result from such condition – simply by virtue of the fact that it is obvious and apparent to onlookers. In our view, the extent that a danger is obvious is a factor which, like the status of the plaintiff on the property, will impact the foreseeability of an accident and the comparative negligence of the injured party, but will not, as a matter of law, relieve a landowner of all duty to maintain his or her premises.

MacDonald v. City of Schenectady, 308 A.D.2d 125, 761 N.Y.S.2d 752 (3d Dept. 2003).

[EDITOR'S NOTE: All four departments now agree that the open and obvious doctrine negates only a duty to warn. Plaintiff, however, is not precluded from establishing liability based on the premises owner's failure to maintain his or her property in a reasonably safe condition. See Westbrook v. W.R. Activities-Cabrera Markets, 5 A.D.3d 69, 773 N.Y.S.2d 38 (1st Dept. 2004); Cupo v. Karfunkel, 1 A.D.3d 418, 767 N.Y.S.2d 40 (2d Dept. 2003); and Pelow v. Tri-Main Development, 303 A.D.2d 940, 757 N.Y.S.2d 653 (4th Dept. 2003)].

NEGLIGENCE – RES IPSA LOQUITUR – ELEVATOR – MAINTENANCE COMPANY

Doctrine of res ipsa loquitur was not applicable to elevator passenger's negligence action against elevator repair company for injuries he sustained when elevator malfunctioned during its descent since the alleged cause of the accident, a malfunctioning "safe edge," was not in the exclusive control of the elevator maintenance company:

> The doctrine requires that a plaintiff establish the following conditions: "first, the event must be of a kind that ordinarily does not occur in the absence of someone's negligence; second, it must be caused by an agency or instrumentality within the exclusive control of the defendant; and third, it must not have been due to any voluntary action or contribution on the part of the plaintiff." The second prong of the test requires "that the evidence must afford a rational basis for concluding that the cause of the accident was probably such that the defendant would be responsible for any negligence connected with it." In other words, the likelihood of other causes "'must be so reduced that the greater probability lies at defendant's door.'"
>
> * * *
>
> We conclude that plaintiff did not establish sufficient exclusivity of control over the safe edge here. Unlike cases involving breakdown of operating mechanisms that are relatively inaccessible to the general public, the safe edge, which plaintiff asserts caused the accident, is designed to come into contact with the public and, thus, subject to potentially damaging misuse or vandalism. Accordingly, plaintiff is not entitled to have res ipsa loquitur charged to the jury.

De Sanctis v. Montgomery Elevator Company, Inc., 304 A.D.2d 936, 758 N.Y.S.2d 419 (3d Dept. 2003).

[EDITOR'S NOTE: Where, however, the control mechanism of the elevator is in the sole control of the elevator maintenance company, the doctrine of res ipsa loquitur is applicable. See Rodriguez v. Serge Elevators Co., 99 N.Y.2d 587, 757 N.Y.S.2d 809 (2003); Carrasco v. Millar Elevator Industries, Inc., 305 A.D.2d 353, 758 N.Y.S.2d 679 (2d Dept. 2003); Walden v. Otis Elevator Co., 178 A.D.2d 878, 577 N.Y.S.2d 732 (3d Dept. 1991) and Burgess v. Otis Elevator Co., 114 A.D.2d 784, 495 N.Y.S.2d 376 (1st Dept. 1985), *aff'd*. 69 N.Y.2d 623, 511 N.Y.S.2d 227 (1986).]

NEGLIGENCE – TRIP AND FALL – TRIVIAL DEFECT

Plaintiff's trip and fall on a concrete stairway landing with a height differential of less than one inch is trivial and, absent plaintiff establishing a significant hazard, it is not actionable:

> The defect to which plaintiff now attributes the accident – the height differential of less than one inch between the defective area and the rest of the landing – was trivial, and plaintiff has not presented any evidence to show that such defect presented a significant hazard, notwithstanding its minimal dimension, by reason of location, adverse weather or lighting conditions, or other circumstances giving it the characteristics of a trap or snare. We note that the trivial defect argument was properly raised in defendant's reply papers in further support of the motion for summary judgment, since plaintiff first asserted in her opposition papers that she lost her footing due to the height differential at the edge of the defective area.

Gaud v. Markham, 307 A.D.2d 845, 764 N.Y.S.2d 241 (1st Dept. 2003).

[EDITOR'S NOTE: Justice Tom dissented:

> While the height differential of the defect appeared minimal, a factual issue remains as to whether plaintiff lost her footing due to loose pieces of cement on a large part of a landing which one must

cross to gain entry or whether the defect was so minor as to warrant judgment for the premises owner. Further, the defective condition appeared to have existed for a substantial period of time, thus putting the owner on notice.]

NEGLIGENCE – STATUTORY VIOLATION – RETROACTIVITY

Plaintiff is not entitled to invoke the Administrative Code to establish out-of-possession landlord's negligence in failing to have a second means of egress from premises that caused decedent's fatal injuries when a fire was intentionally set by an unknown arsonist because the Code provisions were enacted after the construction of the premises:

> While a violation of the Code may be considered as some evidence of negligence, the appellant demonstrated that the provisions of the Code cited by the plaintiff were enacted after the construction of the subject premises. The plaintiff failed to demonstrate that these Code provisions were intended to be applied retroactively. Thus, there is no basis to find that the appellant was required to provide a second means of egress from the subject premises.

White v. Jeffco Western Properties, Inc., 304 A.D.2d 824, 759 N.Y.S.2d 138 (2003).

[EDITOR'S NOTE: The non-applicable Building Code defense did not save the premises owner in Swerdlow v W.S.K. Properties Corp., 5 A.D.3d. 587, 772 N.Y.S.2d 864 (2d Dept. 2004). In Swerdlow, the court held:

> W.S.K. and Beneficial correctly contend that their evidence established that the subject building was not under the purview of the New York State Fire Prevention and Building Code (hereinafter Code), since it was built more than 50 years before the enactment of the Code.
>
> * * *
>
> The fact that the subject building did not fall under the scope of the Code only absolved the defendants of the mandatory duty that the Code might otherwise impose. WSK and Beneficial, nevertheless, had continuing duties, as an owner and a possessor, respectively, to maintain the property in a reasonably safe manner. Under the circumstances of this case, questions of fact exist as to whether, among other things, the absence of handrails and the presence of steps of unequal height contributed to the plaintiff's accident and whether WSK and Beneficial were negligent in failing to correct those conditions.]

NEGLIGENCE – TENANT-IN-COMMON – POSSESSION AND CONTROL

Tenant-in-common [Brian Rafferty] of residential structure is not liable to plaintiff who injured herself when she fell off a bunk bed that was in the property exclusively used and controlled by the co-tenant-in-common because he had surrendered possession and control over the portion of the property where the injury occurred:

> For purposes of imposing personal liability for defective conditions on the premises, a co-tenant's right to use and enjoy the entire premises translates into a duty to maintain it safely. Indeed, because the common law doctrine of tenancy-in-common presumptively gives each co-tenant full possession of the entire premises, a defective condition causing injury to a third party results in joint and several liability as to each co-tenant.
>
> * * *
>
> This does not mean, however, that all co-tenants will inevitably be liable any time an injury occurs on the premises. Although co-tenants generally have the right to use and enjoy the entire property, they may contract otherwise.
>
> * * *

> When co-tenants enter into such an agreement and are faithful to its terms, liability for personal injuries will fall only on the tenant who exercises possession and control over the area in question. Predicating liability on a landowner's possession and control of the premises is firmly entrenched in our case law.

Butler v. Rafferty, 100 N.Y.2d 265, 762 N.Y.S.2d 56 (2003).

PLEADINGS – AFFIRMATIVE DEFENSES – CHOICE OF LAW

Defendant did not waive its right to invoke Connecticut law if it failed to assert choice of law as an affirmative defense:

> Contrary to plaintiff's contentions, it was not necessary for defendant to plead, as an affirmative defense, that Connecticut, rather than New York, law should be employed. This choice of law claim was not "likely to take [plaintiffs] by surprise" and did not "raise issues of fact not appearing on the face of a prior pleading" (CPLR 3018[b]). Plaintiff was presumably aware of the potential applicability of Connecticut law, as its complaint asserted the fact that the accident occurred in Westport, Connecticut.

Florio v. Fisher Development, Inc., 309 A.D.2d 694, 765 N.Y.S.2d 879 (1st Dept. 2003).

PRE-TRIAL DISCOVERY – SURVEILLANCE VIDEO TAPES – PLAINTIFF'S DEPOSITION

Under CPLR 3101(i), plaintiff is entitled to immediate production of all surveillance video tapes even before he is deposed:

> The plain language of section 3101(i) eliminates any qualified privilege that previously attached to surveillance tapes under DiMichel [v. South Buffalo Ry. Co., 80 N.Y.2d 184, 590 N.Y.S.2d 1 (1992)]. Under the new provision, surveillance tapes (and other specified materials) are subject to "full disclosure." Thus, parties seeking disclosure of any of the specified items under section 3101(i) need not make a showing of "substantial need" and "undue hardship." Moreover, section 3101(i)'s "full disclosure" requirement is not limited to those materials a party intends to use at trial. The provision compels disclosure of all the listed materials – including "out-takes" – whether or not they will be used at trial.
>
> * * *
>
> Even more revealing however, is the placement of subdivision (i) within the statutory scheme. After DiMichel, the Legislature chose to create an entirely new subdivision within section 3101 to deal exclusively with videotapes and similar materials. We must assume that the Legislature was fully aware that the timing rule we announced in DiMichel was premised on surveillance tapes falling within section 3101(d)(2). Indeed, it is evident that the Legislature enacted section 3101(i) in reaction to DiMichel. The Legislature's decision to create this separate subdivision, subject to no qualified privilege and imposing no express timing requirement, satisfies us that the lawmakers did not intend to adopt the DiMichel timing rule.

Tran v. New Rochelle Hosp. Medical Center, 99 N.Y.2d 383, 756 N.Y.S.2d 509 (2003), *rvg.*, 291 A.D.2d 121, 740 N.Y.S.2d 11 (1st Dept. 2002)].

PRODUCTS LIABILITY – METAL FABRICATOR – CASUAL MANUFACTURER – STRICT LIABILITY IN TORT

VF Conner, who was engaged in a one-time, custom fabrication of a retractable floor at a General Electric plant, is strictly liable because it is in the business of manufacturing specialty sheet metal products and the retractable floor was just such a product – specifically manufactured for market sale to General Electric:

> Like other manufacturers, custom fabricators engaged in the regular course of their business hold themselves out as having expertise in manufacturing their custom products, have the opportunity and incentive to ensure safety in the process of making those products, and are better able to shoulder the costs of injuries caused by defective products than injured consumers or users.
>
> * * *
>
> The fact that Conner had not previously built such a floor should not preclude the application of strict liability. So long as the product was built for market sale in the regular course of the manufacturer's business, as it was here, strict liability may apply.

Sprung v. MTR Ravensburg Inc., 99 N.Y.2d 468, 758 N.Y.S.2d 271 (2003), rvg., 294 A.D.2d 758, 742 N.Y.S.2d 438 (3d Dept. 2002).

SUMMARY JUDGMENT – EXPERT'S AFFIDAVIT – CIRCUMSTANTIAL EVIDENCE/EXCLUDING ALL OTHER CAUSES

Plaintiffs' three experts' sufficiently rebutted the Fire Marshal's conclusion that the house fire in which plaintiffs' decedent died was caused by a stovetop grease fire thereby raising a question of fact whether defendant's refrigerator was the cause of the fire. In reversing the Appellate Division's finding that plaintiffs' expert witnesses' testimony that the fire could have originated from the refrigerator was equivocal, the Court of Appeals held:

> In order to withstand summary judgment, plaintiffs were required to come forward with competent evidence excluding the stove as the origin of the fire. To meet that burden, plaintiffs offered three expert opinions: the depositions of an electrical engineer and a fire investigator, and the affidavit of a former Deputy Chief of the New York City Fire Department.
>
> * * *
>
> Plaintiffs' experts consistently asserted that the fire originated in the upper right quadrant of the refrigerator and each contended the stove was not the source of the blaze. Both parties supported their positions with detailed, non-conclusory expert depositions and other submissions which explained the bases for the opinions.

Speller v. Sears, Roebuck and Co., 100 N.Y.2d 38, 760 N.Y.S.2d 79 (2003).

[EDITOR'S NOTE: The court specifically noted that plaintiffs were not required to produce evidence of a specific defect to survive summary judgment even though defendants came forward with evidence suggesting an alternative cause of the fire. The court noted that where causation is disputed, summary judgment is not appropriate unless "only one conclusion may be drawn from the established facts" (Kriz v. Schum, 75 N.Y.2d 25, 550 N.Y.S.2d 584 [1989]). Since a reasonable jury could credit plaintiffs' proof and find that plaintiff excluded all other causes of the fire not attributed to the defendants, there were material issues of fact requiring a trial.

In its decision, the court also noted that New York law is consistent with Restatement [Third] of Torts: Products Liability § 3 [1998]:

> It may be inferred that the harm sustained by the plaintiff was caused by a product defect existing at the time of sale or distribution, without proof of a specific defect, when the incident that harmed the plaintiff: (a) was of a kind that ordinarily occurs as a result of product defect; and (b) was not , in the particular case, solely the result of causes other than product defect existing at the time of sale or distribution.]

TRIAL – JUROR MISCONDUCT – CONCEALMENT OF FRIENDSHIP/ADA

Trial judge correctly denied defendant's motion to set aside verdict because a juror, during voir dire, failed to reveal his friendship with an assistant district attorney. The court rejected defendant's argument that a juror's concealment deprived him of the opportunity to

question the juror more fully and possibly remove him from the jury:

> In addressing [juror conduct] motions, we have held that "[a]bsent a showing of prejudice to a substantial right, … proof of juror misconduct does not entitle a defendant to a new trial." We apply this standard because "not every misstep by a juror rises to the inherently prejudicial level at which reversal is required automatically." Indeed, the fact-intensive nature of these kinds of issues requires that "[e]ach case … be examined on its unique facts to determine the nature of the misconduct and the likelihood that prejudice was engendered." Accordingly, trial courts are vested with discretion in deciding CPL 330.30(2) motions, and this Court will uphold a trial court's undisturbed findings of fact if they are supported by evidence in the record.

People of the State of New York v. Rodriguez, 100 N.Y.2d 30, 760 N.Y.S.2d 74 (2003).

[EDITOR'S NOTE: The juror and the ADA were friends during high school but lost touch for about 10 years after graduation. Although the juror contacted the ADA a few weeks before the trial, there was no contact with him during the trial and the juror unequivocally stated that his relationship with the ADA did not influence his deliberations in the slightest. Based upon this testimony, the trial court determined that although the juror's failure to disclose the friendship constituted misconduct, it was "harmless" and did not result in substantial prejudice to defendant.]

TRIAL – JURY -- UNDERSTAND AND COMMUNICATE IN ENGLISH

Trial judge committed reversible error in failing to inquire from a juror what she meant when she stated to court officers that during deliberations "she did not understand what was going on." Limiting the inquiry to the juror's satisfying Judiciary Law § 510 -- that a person must "be able to understand and communicate in English language" – is insufficient:

> The court's inquiry, however, was both misdirected and incomplete, falling short of the "probing and tactful inquiry" that a court must undertake when it appears that a juror may be grossly unqualified. The court did not ask the juror what she meant by her extraordinary statements to the court officer but asked her questions as to her age, address, citizenship and whether she was ever charged with a crime, along with a single question as to whether she was able to understand and communicate in English. Invoking the Judiciary Law § 510 standard, the court then concluded that she was qualified to serve.
>
> The issue before the court was not whether the juror fulfilled the dictates of Judiciary Law § 510 with regard to general qualifications. Rather, the problem was whether this particular juror should have been entrusted with the responsibilities of fact finding, after she told the court officer that she "didn't understand what was going on" and did not understand the lawyers or the judge. The court thus failed to make any inquiry – let alone a tactful, probing inquiry – to elicit what the juror meant by her statement. We caution that it would have been unnecessary and indeed inappropriate to subject the juror to questions relating to her thought processes, the deliberations or other matters that lie within the confines of the jury room.

People of the State of New York v. Sanchez, 99 N.Y.2d 622, 760 N.Y.S.2d 391 (2003)**.**

TRIAL – MISSING WITNESS CHARGE

Missing witness instruction was warranted for failure to call defendant's friend as a witness where prosecution met its burden to qualify for such charge:

> First, the witness's knowledge must be material to the trial. Second, the witness must be expected to give noncumulative testimony favorable to the party against whom the charge is sought. This has

> been referred to as the "control" element, which requires the court to evaluate the relationship between the witness and the party to whom the witness is expected to be faithful. Third, the witness must be available to that party.

People v. Savinon, 100 N.Y.2d 192, 761 N.Y.S.2d 144 (2003).

[EDITOR'S NOTE: In addition, to qualify for a missing witness charge, the request for such charge must be timely. Where the request for such charge was made after the close of all the evidence, the court held the request was untimely. See Buttice v. Dyer, 1 A.D.3d 552, 767 N.Y.S.2d 784 (2d Dept. 2003)].

TRIAL – SURVEILLANCE FILMS—ORIGINAL – FAILURE TO DISCLOSE

The trial court did not abuse its discretion in granting plaintiff's motion to preclude defendant from presenting his surveillance of plaintiff allegedly shoveling snow after the accident:

> Prior to trial plaintiffs requested full disclosure of any and all existing videotapes pursuant to CPLR 3101(i), and the defendant provided plaintiffs with a copy of a surveillance videotape that contained two breaks in motion. Plaintiffs sought preclusion upon discovering during trial that the original eight-millimeter surveillance tape of plaintiff had not been disclosed, and the court properly granted plaintiff's motion.

Zegarelli v. Hughes, 303 A.D.2d 916, 756 N.Y.S.2d 674 (4th Dept. 2003).

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

> The investigator indicated that there had been no editing of or out-takes from the video from the time it was made until it was presented in court. He further testified that any breaks in the videotape reflected intervals during which he had stopped videotaping. That testimony established an adequate foundation for admission of the videotape in evidence.

The Court of Appeals has granted defendant's motion for leave to appeal. See 100 N.Y.2d 515, 769 N.Y.S.2d 201 (2003)].

VENUE – OPPOSITION -- HEARING

Where plaintiff controverts defendant's motion for change of venue based upon improper venue, the court should not have granted the motion but ordered a hearing to resolve disputed facts:

> This is not a case where the only evidence before the IAS Court consists of the residence listed on a driver's license or where such information is only controverted by a self-serving affidavit of a party. Plaintiff provided a detailed narrative of his address change, documented it with the types of communications one would typically receive at one's residence and offered the additional verification of the two individuals who lived, respectively, at the Manhattan and Bronx residences. Where resolution of such a factual issue ultimately depends on evaluating the credibility of the affiants, a hearing should be held to resolve any inconsistencies.

Rivera v. Jensen, 307 A.D.2d 229, 762 N.Y.S.2d 387 (1st Dept. 2003).

WRONGFUL DEATH – DAMAGES – LOSS OF PARENTAL GUIDANCE

The jury verdict rejecting the claim of plaintiff's decedent's two sons, ages five and eight, for damages for loss of parental (father) guidance, could not have been reached "on any fair interpretation of the evidence":

> [I]t has "long been recognized that pecuniary advantage results as well from parental nurture and care, from physical, moral and intellectual training, and that the loss of those benefits may be considered within the calculation of

'pecuniary injury.'" Here, although the plaintiff testified that the decedent's work schedule often kept him away from home, the decedent generally spent several hours during weekday evenings and entire weekends with his children. The plaintiff also testified that the decedent was a "wonderful dad" who always helped out whenever he could, and that during the years before his death, he taught his children to play baseball, read to them, and took them to the movies, bowling, ice skating, to the park, to the zoo, and to any place "a child would enjoy." Such testimony, which was unrefuted, established that the decedent played a role in providing the children with nurture and care, and physical, moral, and intellectual training.

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Tran v. New Rochelle Hosp. Medical Center, __ N.Y.2d __, __ N.Y.S.2d __, 2003 WL 367551 (2003), *rvg*., 291 A.D.2d 121, 740 N.Y.S.2d 11 (1st Dept. 2002)[**PRE-TRIAL DISCOVERY – SURVEILLANCE VIDEO TAPES – PLAINTIFF'S DEPOSITION]**

Sprung v. MTR Ravensburg Inc., __ N.Y.2d __, __ N.Y.S.2d __, 2003 WL 1754231 (2003), rvg., 294 A.D.2d 758, 742 N.Y.S.2d 438 (3d Dept. 2002) [**PRODUCTS LIABILITY – METAL FABRICATOR – CASUAL MANUFACTURER – STRICT LIABILITY IN TORT]**.

Speller v. Sears, Roebuck and Co., __ N.Y.2d __, N.Y.S.2d __, 2003 WL 21003710 (2003)[**SUMMARY JUDGMENT – EXPERT'S AFFIDAVIT – CIRCUMSTANTIAL EVIDENCE/EXCLUDING ALL OTHER CAUSES]**

People of the State of New York v. Sanchez, 99 N.Y.2d 622, 760 N.Y.S.2d 391 (2003) [**TRIAL – JURY -- UNDERSTAND AND COMMUNICATE IN ENGLISH]**.

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People v. Savinon, 100 N.Y.2d 192, 761 N.Y.S.2d 144 (2003) [**TRIAL – MISSING WITNESS CHARGE]**.

Zegarelli v. Hughes, 303 A.D.2d 916, 756 N.Y.S.2d 674 (4th Dept. 2003) [**TRIAL – SURVEILLANCE FILMS]**.

Rivera v. Jensen, __ A.D.2d __, 762 N.Y.S.2d 387 (1st Dept. 2003) [**VENUE – OPPOSITION – HEARING]**.

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