TORT LAW

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INTRODUCTION

Some might classify the 2012-2013 *Survey* year in the field of tort law in New York as a "slow" year. However, while there were not a lot of cases that were reviewed by the Court of Appeals, there were some interesting and long-lasting results.

For example, the Court of Appeals clarified the liability of a condominium association when a contractor was working for one of the condominium owners, and determined that only the condominium owner could be held liable under section 241(6) of the Labor Law. The Court also determined that routine cleaning on a daily basis does not allow an injured party to rely on the protections of section 240(1) of the Labor Law.

For the families of the twenty people who died while on the Ethan Allen, the end of the road came in a Court of Appeals decision that determined that the actions of state inspectors were governmental in nature and that there was no established "special relationship" between

their duties and the injured and dead travelers.

Liability for animal actions was again a focus of the Court of Appeals, and the Court determined that an animal that wandered off a defendant's property through negligence can establish liability on behalf of the owner of the animal and/or the land, even without a showing of prior episodes or propensities. However, a family dog that runs around the back yard barking was held not to show a dangerous propensity to run in the street if allowed outside.

By far the most interesting case before the Court during the *Survey* year was *Aqui v. Seven Thirty One Partnership*. There, the Court on its own motion re-reviewed a case it had decided only months earlier and came to a different conclusion. The issue was whether a worker's compensation determination was binding in a third-party liability negligence action. After realizing the effect of its decision in the first instance—that such a decision will significantly hamper a plaintiff's right to a trial by jury—and recognizing the differences in the meaning and scope of disability in workers compensation court versus negligence actions, the Court finally came to the conclusion that such findings are not binding in a subsequent negligence action.

The following are the cases decided in the State of New York during the 2012-2013 *Survey* year that seem to have the most legal impact in state tort law.

I. LABOR LAW

A. Piece of Glass in Household Garbage Constitutes Hazard Inherent in Duty of Sanitation Worker.

Last year, the *Survey* reported that the defendant in *Vega v. Restani Construction Corp.* failed to come forward with evidence showing, as a matter of law, that the alleged act of disposing construction debris in a public trash would not constitute negligence.[1] Recall in that case, the plaintiff was injured when she attempted to pull a trashcan to the front entrance of Loreto Park for pickup by the New York City Department of Sanitation.[2] A co-worker testified that she saw chunks of concrete in the trashcan that "could only have come from the other workers who were repairing/fixing the park."[3] On the issue posed by the defendants,

1. Hon. John C. Cherundolo, *Tort Law, 2011-12 Survey of New York Law*, 63 SYRACUSE L. REV. 923, 980 (2013) (citing Vega v. Restani Constr. Corp., 18 N.Y.3d 499, 504, 965 N.E.2d 240, 243, 942 N.Y.S.2d 13, 16 (2012)).

2. Vega, 18 N.Y.3d at 502-03, 965 N.E.2d at 242, 942 N.Y.S.2d at 15.

3. *Id.* at 503, 965 N.E.2d at 242, 942 N.Y.S.2d at 15.

that concrete and construction debris presented an "open and ordinary" hazard inherent in the plaintiff's job as a sanitation worker, Chief Judge Lippman rejected the argument as a matter of law because the record did not establish that the plaintiff "should have known that the [garbage] can was very heavy due to the presence of concrete" and sent the case back to the lower court for resolution of this issue of fact.[4]

In *Wagner v. Wody*, the Second Department discussed and distinguished the *Vega* case in a four-to-one decision, which also dealt with the issue of the inherent risks in sanitation work.[5] The plaintiff was injured while he was taking a garbage bag from the curb to a sanitation truck.[6] The plaintiff testified at his deposition that he lifted a thirty-to-forty pound black plastic garbage bag with his left hand and, "as he turned to throw it into the truck, the bag made contact with his leg" and a thin piece or shard of glass "punctured" his leg and caused injury.[7] The plaintiff commenced an action against the defendant-homeowners after the plaintiff found mail addressed to them in the subject garbage bag.[8]

The supreme court granted defendants' motion for summary judgment on the ground that "the hazard of being injured by the contents of a garbage bag was inherent to plaintiff's duties as a sanitation worker."[9] The Second Department affirmed the lower court; the majority distinguished the Court of Appeals' decision in *Vega* by recognizing that "a small piece of glass constitutes ordinary garbage or a common item of trash, the disposal of which is a hazard inherent in the duty of a sanitation worker."[10] The majority also acknowledged the way in which plaintiff chose to perform his work by lifting and "throw[ing]" the large plastic bag into the sanitation truck.[11] In particular, the court held that "[a] worker who 'confronts the ordinary and obvious hazards of his [or her] employment, and has at his [or her] disposal the time . . . to enable him [or her] to proceed safely . . . may not hold others responsible if he [or she] elects to perform his [or her] job so incautiously as to injure himself [or herself].'"[12]

4. *Id.* at 504, 506, 507, 965 N.E.2d at 241, 244, 245, 942 N.Y.S.2d at 14, 17, 18.

5. *See* Wagner v. Wody, 98 A.D.3d 965, 966 951 N.Y.S.2d 59, 60 (2d Dep't 2012).

6. *Id.* at 965, 951 N.Y.S.2d at 60.

7. *Id.*

8. *Id.*

9. *Id.* at 966, 951 N.Y.S.2d at 60.

10. *Wagner*, 98 A.D.3d at 966, 951 N.Y.S.2d at 60 (citing Marin v. San Martin Rest., Inc., 287 A.D.2d 441, 441, 731 N.Y.S.2d 70, 71 (2d Dep't 2001)

11. *Id.*

12. *Id.* (citations omitted).

In his lengthy dissenting opinion, Judge Skelos reasoned that this case was less like *Marin* and more akin to *Vega*.[13] Relying on the Court of Appeals' decision in *Vega*, which declined to find, as a matter of law, whether the offending material belonged in the garbage can or whether it constituted ordinary or common items to trash,[14] the dissent reasoned that in this case it was more properly a question of reasonableness for the jury to determine whether the shard of glass posed an inherent risk in the plaintiff's work.[15] Most compelling to this argument is the fact that the mere shard of glass, characterized as "small" by the majority, was apparently "large enough and sharp enough to cut through the plaintiff's heavy work pants, to lodge itself in the plaintiff's leg, and to require exploratory surgery."[16] Therefore, as in *Vega*, the plaintiff should have been entitled to present his claim to the trier of fact.[17]

B. Owner of Land Beneath Condominium Building Is Not "Owner" or "Agent of Owner" Under Labor Law Section 241(6).

The Court of Appeals case of *Guryev v. Tomchinsky*[18] arises from renovation work being done at the Tomchinsky's condominium unit and an alleged injury to the plaintiff's eye while operating a nail gun.[19] The plaintiff commenced a personal injury action against the Tomchinskys, as well as his employer, YZ Remodeling, Inc., and the condominium defendants, made up of Trump Corporation and the condominium's Board of Managers.[20]

The condominium defendants moved for summary judgment, which was denied on the ground that there were issues of fact.[21] The appellate division reversed the lower court's decision and granted the condominium defendants' motion for summary judgment and held that these defendants "'were not entities which ha[d] an interest in the property and who fulfilled the role of owner by contracting to have work performed for [their] benefit.'"[22]

The threshold issue before the Court of Appeals was whether the

13. *Id.* at 969, 951 N.Y.S.2d at 63 (Skelos, J.P., dissenting).
14. *Id.* (Skelos, J.P., dissenting).
15. *Wagner*, 98 A.D.3d at 970, 951 N.Y.S.2d at 63 (Skelos, J.P., dissenting).
16. *Id.* at 966, 970, 951 N.Y.S.2d at 60, 63 (Skelos, J.P., dissenting).
17. *Id.* at 971, 951 N.Y.S.2d at 64 (citations omitted).
18. Guryev v. Tomchinsky, 20 N.Y.3d 194, 981 N.E.2d 273, 957 N.Y.S.2d 677 (2012).
19. *Id.* at 197, 981 N.E.2d at 274-75, 957 N.Y.S.2d at 678-79.
20. *Id.* at 197, 981 N.E.2d at 274, 275, 957 N.Y.S.2d at 678, 679.
21. *Id.* at 198, 981 N.E.2d at 275, 957 N.Y.S.2d 679.
22. *Id.* (citations omitted).

condominium defendants were "owners" or "agents of owners" of the Tomchinskys' apartment so as to trigger liability for failing to "provide reasonable and adequate protection and safety" to workers under New York Labor Law section 241(6).[23]

The Court of Appeals affirmed the appellate division's decision, reasoning that these defendants "did not determine which contractors to hire, and were not in a position to control the renovation work or to insist that proper safety practices were followed," and they were therefore free from liability under Labor Law section 241(6).[24]

Relying in part on its earlier decision in *Gordon v. Eastern Railway Supply*, the *Guryev* Court distinguished its prior holding in that case on the ground that here, in the absence of a lessee-lessor relationship, and where the Tomchinskys owned their unit in fee simple absolute, the condominium defendants "[were] not the owner's agents within the meaning of the Labor Law."[25] Here, the Tomchinsky apartment, where the alleged injury occurred, was real property separate and apart from the land beneath the condominium building.[26] In addition, the mandatory Alteration Agreement, signed by Mr. Tomchinsky, did not give the condominium defendants "authority to 'determine which contractors to hire, . . . control the renovation work or . . . insist that proper safety practices [be] followed.'"[27]

In his dissent, Chief Judge Lippman focused more closely on the terms of the Alteration Agreement, which provided that proposed alterations be subject to condominium approval; that such "approval . . . could be withheld 'in the Board's sole and absolute discretion;'"[28] that "the condominium . . . retained . . . power to insist upon compliance with the Industrial Code worker safety provisions;"[29] and that the condominium reserved a "right to reentry 'for the purpose of inspecting [the work], to ensure [that the work] is being performed, and has been performed, in accordance with the [approved plans].'"[30] Judge Lippman also argued that the majority's decision significantly reduced

23. *See Guryev*, 20 N.Y.3d at 198-99, 981 N.E.2d at 275-76, 957 N.Y.S.2d at 679-80 (quoting N.Y. LAB. LAW § 241(6) (2014)).

24. *Id.* at 198, 981 N.E.2d at 275, 957 N.Y.S.2d 679.

25. *Id.* at 199-200, 981 N.E.2d at 276, 957 N.Y.S.2d at 680 (citing Gordon v. E. Ry. Supply, 82 N.Y.2d 555, 560, 626 N.E.2d 912, 914-15 606 N.Y.S.2d 127, 129-30 (1993)).

26. *See id.*

27. *Id.* at 200, 981 N.E.2d at 276-77, 957 N.Y.S.2d at 680-81 (citations omitted).

28. *Guryev*, 20 N.Y.3d at 202-03, 981 N.E.2d at 278, 957 N.Y.S.2d at 682 (Lippman, C.J., dissenting).

29. *Id.* at 203, 981 N.E.2d at 279, 957 N.Y.S.2d at 683.

30. *Id.*

the avenues of recovery for an injured construction laborer, who "now has no Labor Law cause of action against the unit owner by reason of the single dwelling exemption, no claim against his contractor employer by reason of the workers' compensation defense, and no statutory claim against the condominium because it is not the title owner of the unit."[31]

C. Court of Appeals Lays out Four Factors to Determine Whether Activity Falls Within the Definition of "Cleaning" Under Labor Law Section 240(1).

This *Survey* year, the Court of Appeals in *Soto v. J. Crew Inc.*,[32] revisited the issue of commercial "cleaning" as that term is used in Labor Law section 240(1) and was discussed in various other cases.[33]

In *Soto,* the "[p]laintiff, an employee of a commercial cleaning company hired to provide janitorial services for a [J. Crew] retail store, was injured when he fell from a four-foot-tall ladder while dusting a six-foot-high display shelf."[34] The plaintiff "positioned a four-foot-high A-frame ladder on the floor in front of the shelf" and both he, and the ladder fell over while the plaintiff dusted the shelf, "causing [him] to injure his back, knee and elbow."[35] The plaintiff "commenced [a] personal injury action against J. Crew and the building owner [sought] recovery under New York Labor Law section 240(1)."[36] The Supreme Court dismissed the plaintiff's Labor Law claim on the basis that "the statute does not apply to workers employed on a daily basis to conduct routine commercial cleaning, such as the dusting, sweeping, mopping and general tidying at issue [in this case]."[37]

The appellate division affirmed and "held that 'the dusting of the shelf constituted routine maintenance and was not the type of activity that is protected under the statute.'"[38]

The Court of Appeals affirmed the decision of the two lower courts, relying on its 2012 decision in *Dahar v. Holland Ladder &*

31. *See id.* at 204, 981 N.E.2d at 279-80, 957 N.Y.S.2d at 683-84.

32. 21 N.Y.3d 562, 998 N.E.2d 1045, 976 N.Y.S.2d 421 (2013).

33. *Id.* at 564, 998 N.E.2d at 1046, 976 N.Y.S.2d at 422 (citing N.Y. LAB. LAW §240(1) (2014)). *See also* Dahar v. Holland Ladder & Mfg. Co., 18 N.Y.3d 521, 525, 964 N.E.2d 402, 405, 941 N.Y.S.2d 31, 34 (2012); Swiderska v. N.Y. Univ., 10 N.Y.3d 792, 793, 886 N.E.2d 155, 156, 856 N.Y.S.2d 533, 534 (2008); and Brown v. Christopher St. Owners Corp., 87 N.Y.2d 938, 939, 663 N.E.2d 1251, 1251, 641 N.Y.S.2d 221, 221 (1996).

34. *Id.*

35. *Id.* at 564-65, 998 N.E.2d at 1046, 976 N.Y.S.2d at 422.

36. *Id.* 565, 998 N.E.2d at 1046, 976 N.Y.S.2d at 422 (citing LAB. §240(1)).

37. *Soto*, 21 N.Y.3d at 565, 998 N.E.2d at 1046-47, 976 N.Y.S.2d at 422-23.

38. *Id.* at 565, 998 N.E.2d at 1047, 976 N.Y.S.2d at 423 (quoting Soto v. J. Crew Inc., 95 A.D.3d 721, 721, 945 N.Y.S.2d 255, 255-56 (1st Dep't 2012)).

Manufacturing Co.,[39] "which denied recovery to a manufacturing-plant employee injured while cleaning a large wall module at the conclusion of the manufacturing process."[40] In *Soto*, the Court revisited the window-washing cases it discussed in dicta in *Dahar*,[41] and distinguished those cases from the instant matter on the ground that "routine commercial cleaning" was never intended by the Legislature to be covered under the Labor Law.[42] In reaching its decision, the Court recognized four factors that, when viewed in totality, suggest a task cannot be characterized as "cleaning" under the Labor Law if the task:

> 1) is routine, in the sense that it is the type of job that occurs on a daily, weekly or other relatively-frequent and recurring basis as part of the ordinary maintenance and care of commercial premises; 2) requires neither specialized equipment or expertise, nor the unusual deployment of labor; 3) generally involves insignificant elevation risks comparable to those inherent in typical domestic or household cleaning; and 4) in light of the core purpose of Labor Law § 240(1) to protect construction workers, is unrelated to any ongoing construction, renovation, painting, alteration or repair project.[43]

Applying these factors in this case, the Court concluded that "the activity undertaken by Soto was not 'cleaning' within the meaning of [the statute] . . . [because t]he dusting of a six-foot-high . . . shelf is the type of routine maintenance [conducted] in . . . retail store[s];"[44] the activity did not require "specialized equipment or knowledge and could be [completed] by a single custodial worker;"[45] and the elevation risks involved were those comparable to a person doing ordinary household cleaning.[46]

39. 18 N.Y.3d 521, 964 N.E.2d 402, 941 N.Y.S.2d 31 (2012).

40. *Soto*, 21 N.Y.3d at 565-66, 569, 998 N.E.2d at 1047, 1049, 976 N.Y.S.2d at 423, 425 (citing *Dahar*, 18 N.Y.3d at 523, 964 N.E.2d at 403, 941 N.Y.S.2d at 32. *See* Cherundolo, *Tort Law, 2011-12 Survey of New York Law*, 63 SYRACUSE L. REV. at 974-77 (discussing Dahar v. Holland Ladder & Mfg. Co., 18 N.Y.3d 521, 964 N.E.2d 402, 941 N.Y.S.2d 31 (2012))).

41. *Id.* at 567, 998 N.E.2d at 1048, 976 N.Y.S.2d at 424 (citations omitted).

42. *Id.*

43. *Id.* at 568-69, 998 N.E.2d at 1049, 976 N.Y.S.2d at 425.

44. *Id.* at 569, 998 N.E.2d at 1049, 976 N.Y.S.2d at 425.

45. *Soto*, 21 N.Y.3d at 569, 998 N.E.2d at 1049, 976 N.Y.S.2d at 425.

46. *Id.*

D. Mechanical Operation of Backhoe by an Allegedly Negligent Co-Worker Does Not Constitute "Falling Object" Under Labor Law Section 240(1) Absent the Application of Force of Gravity.

In *Mohamed v. City of Watervliet*,[47] the Appellate Division, Third Department, affirmed the lower court's grant of summary judgment to the defendants on the ground that the plaintiffs failed to demonstrate, as a matter of law, that a violation of Labor Law section 240(1) occurred when he was injured by the lowering bucket of a backhoe.[48]

At the time of the plaintiff's injury, the plaintiff and two co-workers were in a trench installing a T-connection to an existing water main.[49] The T-connection was lowered on a chain, which was secured to the bucket of a backhoe.[50] The operator of the backhoe left the cab to check on the placement of the T-connection.[51] While the plaintiff worked to secure the T-connection, the bucket of the backhoe was suspended approximately three-and-a-half feet above his head.[52] The operator returned to the cab of the backhoe, and the bucket descended into the trench and crushed the plaintiff.[53] The plaintiff and his wife, derivatively, brought a lawsuit against the city pursuant to Labor Law sections 240(1), 241(6), and 200 and common law negligence.[54]

The appellate division affirmed the dismissal of the plaintiffs' section 241(1) and §240(6) claims by the lower court, reasoning that:

> the statute's protection does "not encompass any and all perils that may be connected in some tangential way with the effects of gravity," but is "limited to . . . those types of accidents in which the scaffold, hoist, stay, ladder or other protective device [has] proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person."[55]

In *Mohamed*,[56] although the plaintiff considers this to be a "falling object" case, arguing that the backhoe acted as a hoist, the appellate division held that "liability does not extend to 'harm caused by an inadequate, malfunctioning or defectively designed scaffold, stay or hoist' unless the injury itself was caused by '*the application of the force*

47. 106 A.D.3d 1244, 965 N.Y.S.2d 637 (3d Dep't 2013).
48. *Id.* at 1245, 1246, 965 N.Y.S.2d at 639, 640.
49. *Id.* at 1244, 965 N.Y.S.2d at 639.
50. *Id.*
51. *Id.*
52. *Mohamed*, 106 A.D.3d at 1244, 965 N.Y.S.2d at 639.
53. *Id.*
54. *Id.* at 1245, 965 N.Y.S.2d at 639 (citations omitted).
55. *Id.* at 1245, 965 N.Y.S.2d at 639, 640 (citations omitted).
56. *See generally id*.

of gravity to an object or person.'"[57] Here, it was determined from "the evidence . . . that 'the backhoe bucket crushed [the] plaintiff . . . not because [of a force] of gravity, but because of its mechanical operation by an allegedly negligent co-worker.'"[58] There being no "'application of the force of gravity'" that led to the plaintiff's injury, the harm that befell the plaintiff was a consequence of "the usual and ordinary dangers [that exist at] a construction site."[59] The appellate division also affirmed the dismissal of the plaintiffs' section 241(6) claim on the grounds that it improperly alleged violations of 12 N.Y.C.R.R. 23-9.4(h)(5) because the load (i.e. the T-connection) was not suspended over the plaintiff's head at the time of his injury.[60]

E. Glass Pane Installed in Metal Frame Four Feet off the Ground Was Slated for Demolition, and Therefore Was Not an Object that Required "Securing" for Purposes of Labor Law Section 240(1).

In another "falling object" case, the Appellate Division, Second Department, upheld the lower court's dismissal of the plaintiff's Labor Law section 240(1) claim.[61]

"The plaintiff was employed to demolish [the] interior partition wall in a commercial building."[62] The plaintiff held a glass pane that was installed in a metal frame built into the wall, while a co-worker attempted to dislodge it from the frame.[63] The glass pane cracked and fell, injuring the plaintiff.[64]

The Court relied on settled law, which holds that the "plaintiff must [demonstrate] that, at the time the object fell, it was being hoisted or secured, or [that it] 'required securing,'" and "that the object fell 'because of the absence or inadequacy of a safety device.'"[65] In

57. *Mohamed*, 106 A.D.3d at 1245-46, 965 N.Y.S.2d at 640 (quoting Ross v. Curtis-Palmer Hydro-Elec. Co., 81 N.Y.2d 494, 501, 618 N.E.2d 82, 86, 601 N.Y.S.2d 49, 53 (1993)).

58. *Id.* at 1246, 965 N.Y.S.2d at 640 (quoting Elezaj v. Carlin Constr. Co., 225 A.D.2d 441, 442, 639 N.Y.S.2d 356, 358 (1st Dep't 1996), *aff'd*, 89 N.Y.2d 992, 679 N.E.2d 638, 657 N.Y.S.2d 399 (1997)).

59. *See id.* (citations omitted).

60. *Id.* at 1247, 965 N.Y.S.2d at 641 (citations omitted).

61. Maldonado v. AMMM Props. Co., 107 A.D.3d 954, 955, 968 N.Y.S.2d 163, 165 (2d Dep't 2013).

62. *Id.* at 954, 968 N.Y.S.2d at 165.

63. *Id.*

64. *Id.*

65. *Id.* at 955, 968 N.Y.S.2d at 165 (quoting Outar v. City of New York, 5 N.Y.3d 731, 732, 832 N.E.2d 1186, 1186, 799 N.Y.S.2d 770, 770 (2005); Quattrocchi v. F.J. Sciame Constr. Co., 11 N.Y.3d 757, 759, 896 N.E.2d 75, 76, 866 N.Y.S.2d 592, 593 (2008); Narducci v. Manhasset Bay Assocs., 96 N.Y.2d 259, 268, 750 N.E.2d 1085, 1089, 727

Maldonado,[66] "the glass pane . . . was slated for demolition at the time of the accident, and [therefore], was not an object that required securing for the purposes of the [statute]."[67]

II. MEDICAL MALPRACTICE

A. Plain Language of New York Municipal Law 50-e Does Not Require Plaintiff to Include Names of Individual Defendant-Doctors in Medical Malpractice Notice of Claim.

In this action arising out of alleged medical malpractice by a defendant public services medical center and its physician employees, the Appellate Division, Fourth Department, traced back the line of reasoning to the holding in *White v. Averill Park Central School District*,[68] and found no legal authority for that holding.[69]

In May 2009, decedent sought treatment at Erie County Medical Center Corporation, a public services corporation.[70] She was admitted on May 7, 2009, and discharged on May 12, 2009.[71] Five days later, decedent was transported back to the medical center by ambulance and she died the next day.[72] "In August 2009, plaintiff served a notice of claim on [the medical center], naming [the medical center] as the sole defendant."[73] Thereafter, plaintiff commenced this action against five individually named doctors (the "Employee Defendants"), as well as the medical center.[74] "Defendants thereafter moved to dismiss the complaint against the Employee Defendants on the grounds that [they] were neither served . . . nor named in the notice of claim."[75] The court denied the motion,[76] and for the reasons stated below, the Appellate Division, Fourth Department, affirmed.[77] Section 50-e of the General Municipal Law did not "require service of a notice of claim on the Employee Defendants as a condition precedent to the commencement of

N.Y.S.2d 37, 42 (2001)).

66. *Maldonado*, 107 A.D.3d at 955, 968 N.Y.S.2d at 165.

67. *Id.* at 955, 968 N.Y.S.2d at 165.

68. 195 Misc. 2d 409, 759 N.Y.S.2d 641 (Sup. Ct. Rensselaer Cnty. 2003).

69. Goodwin v. Pretorius, 105 A.D.3d 207, 211, 962 N.Y.S.2d 539, 542 (4th Dep't 2013).

70. *Id.* at 208-09, 962 N.Y.S.2d at 540-41.

71. *Id.* at 209, 962 N.Y.S.2d at 541.

72. *Id.*

73. *Id.*

74. *Goodwin*, 105 A.D.3d at 209, 962 N.Y.S.2d at 541.

75. *Id.* (citing N.Y. GEN. MUN. LAW § 50-e (2014)).

76. *Id.*

77. *Id.*

[that] action."[78]

> It is undisputed that [the] plaintiff served the notice of claim on [the medical center] in accordance with the provisions of section 50-e(1)(b).[79] Inasmuch as the statute unambiguously states that service upon . . . employees of [the medical center], i.e., the Employee Defendants, is not a condition precedent to the commencement of an action against the individual employees, there [was] no merit to [the] defendants' initial contention on their motion that the failure to serve the Employee Defendants with the notice of claim require[d] dismissal of the complaint against them.[80]

Thus, the Court noted, to the extent that the Court's prior decision in *Rew v. County of Niagara*[81] suggested that service of a notice of claim upon an employee of a public corporation is a condition precedent to commencement of the action against such employee, that decision is no longer to be followed.[82]

The defendants also contended that, although service of the notice of claim on the Employee Defendants was not required, plaintiff was required to name those individual defendants in the notice of claim as a condition precedent to the commencement of an action against them.[83] Despite precedent supporting that contention, the Court agreed with the motion court that there is no such requirement.[84]

The notice of claim filed by the plaintiff against the medical center contained all of the required information.[85] Defendants contended, however, that precedent from the Fourth Department and others requires that all of the Employee Defendants also be named in the notice of claim.[86] While recognizing the importance of stare decisis, the Court concluded that its prior cases were wrongly decided.[87]

In both *Rew*[88] and *Cropsey v. County of Orleans Industrial Development Agency*[89], the Court wrote that General Municipal Law section 50-e bars the commencement of an action against an individual

78. *Id.* (citations omitted).
79. *Goodwin*, 105 A.D.3d at 209, 962 N.Y.S.2d at 541.
80. *Id.* at 209, 209-10, 962 N.Y.S.2d at 541 (citations omitted).
81. 73 A.D.3d 1463; 901 N.Y.S.2d 442 (4th Dep't 2010).
82. *Goodwin*, 105 A.D.3d at 210, 692 N.Y.S.2d at 541.
83. *Id.* at 210, 692 N.Y.S.2d at 541-42.
84. *Id.* at 210, 692 N.Y.S.2d at 542.
85. *Id.*
86. *Id.*
87. *Goodwin*, 105 A.D.3d at 210, 692 N.Y.S.2d at 542.
88. 73 A.D.3d 1463, 901 N.Y.S.2d 641 (4th Dep't 2010).
89. 66 A.D.3d 1361, 886 N.Y.S.2d 290 (4th Dep't 2009).

who has not been named in the notice of claim where such notice is required by law.[90] The decision in *Rew* cited *Cropsey* for that proposition, and the decision in *Cropsey* cited only *Tannenbaum v. City of New York*[91], in support of its statement to the same effect.[92] In deciding *Tannenbaum*, the First Department cited *White v. Averill*[93] in support of its statement that section 50-e makes unauthorized an action against individuals who have not been named in a notice of claim.[94]

The Court can find no cases before *White* with such a holding.[95] The decision in *White* is devoid of legal authority supporting the justices' view that individual employees must be named in a notice of claim as a condition precedent to the commencement of an action against them.[96] The justice who authored the *White* decision concluded that, without naming the individual employees, the municipality does not have enough information to enable it to investigate the claim.[97] He thus concluded that permitting plaintiffs to prosecute causes of action against individuals who were not named in the notice of claim is contrary both to the law and the purpose of General Municipal Law section 50-e.[98]

While the First Department in its decision in *White* cited to *Ratner v. Planning Commission of Village of Pleasantville*,[99] that case does not stand for the proposition that individual employees must be named in a notice of claim.[100] The issue in *Ratner* was whether a notice of claim, to be served on the public corporation, was required at all, not whether the notice of claim needed to name the specific individual employees.[101]

There is no doubt that, despite the absence of any statutory provision so holding, numerous cases have held that, where a notice of claim is required by law, a plaintiff must, as a condition precedent to the commencement of an action against the individual employees of a public corporation, name those employees in the notice of claim.[102] In

90. *Goodwin*, 105 A.D.3d at 210-11, 692 N.Y.S.2d at 542.
91. 30 A.D.3d 357, 819 N.Y.S.2d 641 (1st Dep't 2006).
92. *Goodwin*, 105 A.D.3d at 211, 692 N.Y.S.2d at 542.
93. 195 Misc. 2d 409, 750 N.Y.S.2d 641 (Sup. Ct. Rensselaer Cnty. 2003).
94. *Goodwin*, 105 A.D.3d at 211, 692 N.Y.S.2d at 542.
95. *Id.*
96. *See generally Id.*
97. *Id.*
98. *Id.*
99. 156 A.D.2d 521, 548 N.Y.S.2d 943 (2d Dep't 1989).
100. *Goodwin*, 105 A.D.3d at 212, 692 N.Y.S.2d at 543.
101. *Id.*
102. *Id.* at 214, 692 N.Y.S.2d at 544.

support of her position that individual employees need not be named in a notice of claim, the plaintiff noted the absence of any such requirement within the statute and quoted *Schiavone v. County of Nassau*[103] for the proposition that, on a purely practical basis, it is obvious that, uniquely in medical malpractice actions, a potential claimant may not be able to ascertain the perpetrators to the alleged malpractice within the 90-day notice period.[104]

The question for the Court was whether it should follow its prior decisions, based on the doctrine of stare decisis.[105] The Court concluded that the courts have misapplied or misunderstood the law creating, by judicial fiat, a requirement for notice of claim that goes beyond those requirements set forth in the statute.[106] If the legislature had intended that there be a requirement that the individual employees be named in notices of claim, it could have easily created such a requirement.

B. Plaintiff's Settlement Before Any Entry of Judgment Triggered General Rule that a Tortfeasor Who Settles with an Injured Party May Not Seek Contribution from Any Other Tortfeasor or Potential Tortfeasor.

Plaintiff commenced a medical malpractice action, and defendant/third-party plaintiff Chohan asserted cross-claims for contribution against defendant/third-party defendants Patel and Sarwar that were converted into a third-party action after the main action was dismissed against Patel and Sarwar.[107] The parties to the third-party action agreed to sever that action from the main action and to conduct the trial therein at a later date.[108]

At the conclusion of the trial in the main action, the jury returned a verdict finding Chohan liable to the plaintiffs and awarding the plaintiffs a sum of $2.4 million in damages.[109] Following the verdict in the main action but before any entry of the judgment, Chohan settled with the plaintiffs.[110] Thereafter, Patel and Sarwar moved for summary judgment dismissing the third-party action on the ground that Chohan

103. 51 A.D.2d 980, 380 N.Y.S.2d (2d Dep't 1976).

104. *Id.* at 981, 380 N.Y.S.2d at 714.

105. *Id.* at 980, 380 N.Y.S.2d at 712.

106. *Id.* at 982, 380 N.Y.S.2d at 714.

107. Carlin v. Patel, 99 A.D.3d 1220, 1220, 951 N.Y.S.2d 807, 807 (N.Y. App. Div. 2012).

108. *Id.* at 1220, 951 N.Y.S.2d at 807-08.

109. *Id.* at 1220, 951 N.Y.S.2d at 808.

110. *Id.*

was barred by General Obligations Law section 15-108(c)[111] from seeking contribution from them.[112] The Appellate Division, Fourth Department, reversed the lower court's denial of third-party defendants' motion.[113]

General Obligations Law section 15-108(c) provides that "[a] tortfeasor who has obtained his own release from liability shall not be entitled to contribution from any other person."[114] Thus, as a general rule, a tortfeasor who settles with an injured party may not seek contribution from any other tortfeasor or potential tortfeasor. That rule, however, does not apply to post-judgment settlements.[115]

Here, it was undisputed that Chohan settled with the plaintiffs prior to the entry of the judgment against him,[116] and thus he forfeited his right to seek contribution from Patel and Sarwar according to the plain language of General Obligations Law section 15-108.[117]

C. Hospital Is Not Ordinarily Liable for the Acts of a Private Attending Physician Unless a Patient Relies upon the Fact that the Physician's Services Are Provided by the Physician as the Hospital's Apparent Agent.

A hospital is not ordinarily liable for the acts of a private attending physician[118] unless a patient, in accepting treatment by a private physician, relies upon the fact that the physician's services are provided by the physician as the hospital's apparent agent, such as where the patient comes to the emergency room seeking treatment from the hospital and not from a particular physician of the patient's choosing.[119]

Defendant hospital established its entitlement to judgment as a matter of law by demonstrating that independent vascular surgeons, employees of a non-party practice, were responsible for the supervision

111. N.Y. GEN. OBLIG. LAW § 15-108(c) (McKinney 2007).

112. *Carlin*, 99 A.D.3d at 1220, 951 N.Y.S.2d at 808.

113. *Id.*

114. *Id.* at 1221, 951 N.Y.S.2d at 808; *see also* N.Y. GEN. OBLIG. LAW § 15-108(c) (McKinney 2007).

115. *Id.*

116. *Id.*

117. *Id.*; *see also* N.Y. GEN. OBLIG. LAW § 15-108 (McKinney 2007).

118. Polgano v. Christakos, 104 A.D.3d 501, 502, 961 N.Y.S.2d 133, 134 (N.Y. App. Div. 2013); *see also* Hill v. St. Claire's Hosp., 67 N.Y.2d 72, 79, 490 N.E.2d 823, 827, 499 N.Y.S.2d 904, 908, (N.Y. 1986).

119. *Polgano*, 104 A.D.3d at 502, 961 N.Y.S.2d at 134; *see also* Shafran v. St. Vincent's Hosp. & Med. Ctr., 264 A.D.2d 553, 558, 694 N.Y.S.2d 642, 646 (N.Y. App. Div. 1999).

and management of plaintiff's care.[120] Since it was conceded that plaintiff arrived at defendant hospital in an unconscious state, liability on a theory of ostensible agency found no support,[121] nor was there evidence that hospital employees failed to carry out instructions given by the attending physicians.[122] Thus, the Appellate Division, First Department, held there was no basis upon which to subject the hospital to liability.[123]

D. Relation Back Doctrine Applied Where "Mere Mistake" in Failing to Identify Defendant Doctor in Original Complaint.

Plaintiffs commenced this medical malpractice action seeking damages for injuries sustained by infant during her delivery.[124] The complaint named as defendants the hospital where the infant was born, Robert Silverman, MD, the medical practice group for whom Silverman worked, and John Doe, MD and Jane Roe, MD.[125] The complaint alleged that the defendant physicians were employed by or associated with the practice and committed malpractice in their prenatal care and treatment of the infant plaintiff.[126] One year after the expiration of the statute of limitations, plaintiffs moved for leave to amend their complaint by substituting non-party John Folk, MD in place of John Doe, MD.[127] Plaintiffs contended that although Silverman was the primary obstetrician for plaintiff during the pregnancy, he was unavailable to deliver the infant.[128] Plaintiffs alleged that, after filing the complaint, they became aware that Dr. Folk, who was employed or associated with the medical practice group, was the attending physician who delivered the infant and thus was a proper party to the action.[129]

The Appellate Division, Fourth Department, affirmed the lower court's grant of plaintiff's motion for leave to amend their complaint,[130] relying on the relation back doctrine, as set forth in *Brock v. Bua*,[131]

120. *Polgano*, 104 A.D.3d at 502, 961 N.Y.S.2d at 135.

121. *Id.*; *see also* Brink v. Muller, 86 A.D.3d 894, 927 N.Y.S.2d 719 (N.Y. App. Div. 2011).

122. *Polgano*, 104 A.D.3d at 502, 961 N.Y.S.2d at 135.

123. *Id.*

124. Kirk v. Univ. OB-GYN Assoc., Inc., 104 A.D.3d 1192, 1193, 960 N.Y.S.2d 793, 794 (4th Dep't 2013).

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Kirk*, 104 A.D.3d at 1193, 960 N.Y.S.2d at 795.

130. *Id.*

131. 83 A.D.2d 61, 68–71, 443 N.Y.S.2d, 407 (2d Dep't 1981).

adopted by the Court of Appeals in *Mondello v. New York Blood Center – Greater N.Y. Blood Program*,[132] and refined in *Buran v. Coupal*[133134]

[Defendants] do not dispute that the first prong of the relation back doctrine is satisfied because the claims against Dr. Folk and the original defendants arise out of the same occurrence, i.e., the infant plaintiff's birth, and we conclude that the second prong is satisfied as well. With respect to the third prong, the Court of Appeals made it clear that "New York law requires merely mistake – not excusable mistake – on the part of the litigant seeking the benefit of the doctrine." [Defendants] contend that here there was no mistake and only neglect on the part of the plaintiffs. We agree with plaintiffs, however, that even if they were negligent, there was still a mistake by plaintiffs in failing to identify Dr. Folk as a defendant."[135]

E. Device Known as "Wisconsin Wire" for Spinal Fusion Surgery Was Not a "Foreign Object" Within the Meaning of CPLR 214-a.

Plaintiff commenced this medical malpractice action seeking damages for injuries allegedly sustained during spinal fusion surgery.[136] During the course of surgery, a device known as a "Wisconsin wire" was implanted in plaintiff's body in order to enhance the fixation and stabilization of his thoracic spine.[137] Thereafter, over the course of many years, plaintiff experienced pain and discomfort at the surgical site, and upon inquiry of a physician in February 2004, found that the Wisconsin wire was in fact protruding from the plaintiff's spinal column into his muscle and soft tissue at the surgical site.[138] The positioning of the wire was corrected in April, 2007.[139]

Plaintiff contends that because the wire was not properly bent, twisted or placed when it was implanted, it became a "foreign object" within the meaning of CPLR section 214-a,[140] thus contending that this action was timely commenced within one year of the discovery of the wire or "of facts which would reasonably lead to such discovery,

132. 80 N.Y.2d 219, 226, 604 N.E.2d 81(1992).

133. 87 N.Y.2d 173, 177–82, 661 N.E.2d 978(1995).

134. *Kirk*, 104 A.D.3d 1192, 1193, 960 N.Y.S.2d 793, 795.

135. *Id*. at 1194, 960 N.Y.S.2d at 795.

136. Jacobs v. Univ. of Rochester, 103 A.D.3d 1205, 1205, 959 N.Y.S.2d 345, 346 (4th Dep't 2013).

137. *Id.* at 1206, 959 N.Y.S.2d at 346.

138. *Id.*

139. *Id.*

140. *Id.*; *see also* N.Y. C.P.L.R. § 214-a (McKinney 2014).

whichever is earlier."[141]

Contrary to plaintiff's contention, however, it is well settled that an intentionally implanted device is not a "foreign object" within the meaning of CPLR 214-a.[142]

F. Theory that Guide Wire Was "Foreign Object" Unpersuasive in Res Ipsa Loquitur *Claim Where Plaintiff Argued Doctor Was Negligent for Intending to Leave Wire in Plaintiff After Surgery.*

In October 2004, a guide wire inserted into the plaintiff to assist with a biopsy of an area in plaintiff's lung dislodged.[143] Defendant Wormuth proceeded with the biopsy, but was unable to locate the dislodged wire.[144] After an unsuccessful twenty-minute search, the defendant determined that it was better for the plaintiff to leave the wire and end the surgery, rather than to extend the amount of time plaintiff was in surgery for him to continue looking for the wire.[145] Defendant informed plaintiff after the surgery that he could not find the wire and that he determined that it was better to leave it rather than to continue the search procedure.[146]

Approximately two months after the first procedure, defendant performed a second procedure during which he successfully located and removed the wire.

Plaintiff commenced this medical malpractice action.[147] At the close of plaintiff's case, defendants moved to dismiss for failure to establish a prima facie case of medical malpractice.[148] Defendants argued that plaintiff failed to show a deviation from accepted standards of medical practice and also that such deviation was a proximate cause of the plaintiff's injury.[149] Defendants pointed specifically to plaintiff's failure to present any expert proof on the standard of practice.[150] Anticipating plaintiff's response, defendants argued that res ipsa loquitor was inapplicable because there was no evidence of any error by

141. *Id.*

142. *Jacobs*, 103 A.D.3d at 1206, 959 N.Y.S.2d at 346; *see also* N.Y. C.P.L.R. § 214-a.

143. James v. Wormuth, 21 N.Y.3d 540, 543, 997 N.E.2d 133, 134, 974 N.Y.S.2d 308, 309 (2013).

144. *Id*. at 543, 997 N.E.2d at 134, 974 N.Y.S.2d at 309.

145. *Id*.

146. *Id*.

147. *Id*. at 544, 997 N.E.2d at 134-35, 974 N.Y.S.2d at 309–10.

148. *James*, 21 N.Y.3d at 544, 997 N.E.2d at 135, 974 N.Y.S.2d at 310.

149. *Id*.

150. *Id*.

defendant Wormuth that caused the wire to become dislodged.[151]

Plaintiff objected to the motion and argued that expert testimony was unnecessary because Wormuth admitted that he intentionally left the wire inside the plaintiff.[152] Therefore, a jury could infer negligence given that there was no medical reason to leave the wire lodged in plaintiff.[153] Plaintiff asserted that the doctrine of res ipsa loquitur necessarily applied because the wire was a foreign object that could only have been left in the plaintiff as a result of the doctor's negligence.[154]

It was clear from the record that the doctor explained his decision to leave the wire in terms of his medical assessment of what was best for the patient under the circumstances.[155] Defendant's testimony that it was his professional judgment to leave the wire could not be assessed by the jury based on the "common knowledge of lay persons."[156] Therefore, evidence clearly was needed in the form of expert opinion to assist a jury's understanding of whether this occurrence would have "taken place in the absence of negligence."[157] Plaintiff wholly failed to present any such evidence of the standards of practice and, therefore, her complaint was properly dismissed.[158]

To the extent that counsel argued that res ipsa loquitor applied because the wire could only have dislodged due to the doctor's negligence, plaintiff failed to establish the elements of res ipsa, specifically that Wormuth had exclusive control over the object.[159] Plaintiff's counsel appeared to have believed that the control element was satisfied because the doctor had control over the operation.[160] Whether the doctor had control over the operation did not address the question of whether he was in control of the instrumentality, because several other individuals participated to an extent in the procedure.[161] Given that plaintiff failed to produce any evidence that the doctor had exclusive control over the wire, or sufficient proof that eliminated

151. *Id*.

152. *Id*.

153. *James*, 21 N.Y.3d at 544, 997 N.E.2d at 135, 974 N.Y.S.2d at 310.

154. *Id*.

155. *Id*. at 547, 997 N.E.2d at 137, 974 N.Y.S.2d at 312.

156. *Id*. (quoting States v. Lourdes Hosp., 100 N.Y.2d 208, 792 N.E.2d 151, 762 N.Y.S.2d 1 (2003)).

157. *Id*. (quoting *States*, 100 N.Y.2d at 212, 792 N.E.2d at 154, 762 N.Y.S.2d at 4).

158. *James*, 21 N.Y.3d at 547, 997 N.E.2d at 137, 974 N.Y.S.2d at 312.

159. *Id*. (citing Dermatossian v. N.Y.C. Transit Auth., 67 N.Y.2d 219, 227–28, 492 N.E.2d 1200, 501 N.Y.S.2d 784 (1986)).

160. *Id*. at 547–48, 997 N.E.2d at 137, 974 N.Y.S.2d at 312.

161. *Id*. at 548, 997 N.E.2d at 137, 974 N.Y.S.2d at 312.

within reason all explanations for the injury other than defendant's negligence, the control element clearly had not been satisfied.[162]

Plaintiff's argument that the wire should have been treated as a foreign object in support of her res ipsa claim was unpersuasive because her theory of the case was that the doctor negligently chose to leave the wire.[163] Thus, this case is distinguishable from those involving objects left unintentionally, where, as plaintiff argued, no decision to leave the object has been made which must be measured against a standard of care.[164]

G. Failure to Establish a Course of Treatment Is Not a Course of Treatment; Instead, Course of Treatment Requires Ongoing Affirmative Conduct by a Physician.

Plaintiff was a patient of defendant Walders from the time of her birth until the time she was eleven years old.[165] At the time that plaintiff turned three years old, plaintiff grew concerned about the development of the infant's right foot.[166] "In particular, plaintiff's feet were not the same size and her right arch appeared to be higher than the left."[167] This worsened as plaintiff grew older.[168] Sometime after plaintiff's last checkup with Walders in September 1996, plaintiff changed to pediatrician Jolie.[169] During Jolie's first examination of plaintiff, she observed plaintiff's right foot and referred her to a podiatrist, who then referred her to a neurologist, who ultimately diagnosed plaintiff with tethered spine, a condition that caused, among other things, the deformity of plaintiff's foot, and required plaintiff to undergo multiple surgeries.[170]

On December 23, 2005, plaintiff initiated the instant action in medical malpractice,[171] and alleged, among other things, that Walders' failure to refer plaintiff to a specialist deviated from the accepted standard of care and that infant was injured as a result of the delayed

162. *Id*. at 548, 997 N.E.2d at 137–38, 974 N.Y.S.2d at 312–13.

163. *James*, 21 N.Y.3d at 548, 997 N.E.2d at 138, 974 N.Y.S.2d at 313.

164. *Id*.

165. Dugan v. Troy Pediatrics, LLP, 105 A.D.3d 1188, 1188, 963 N.Y.S.2d 443, 444 (3d Dep't 2013).

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Dugan*, 105 A.D.3d at 1188, 963 N.Y.S.2d at 444.

171. *Id.*

diagnosis and treatment of her condition.[172] "Following discovery, defendants moved for summary judgment dismissing the complaint on the ground that Walders did not deviate from the accepted standard of care and, alternatively, that the claims were time-barred."[173] The motion court partially granted defendants' motion by dismissing as time-barred all claims that accrued more than ten years prior to the commencement of the action.[174] As to the remaining claims, the court found that triable issues of fact existed regarding whether Walders departed from the accepted standard of care.[175] Both parties appealed.[176]

With regard to the issue of whether plaintiff's claims are time-barred, the court first determined whether the continuous treatment applies.[177] Significantly, a failure to establish a course of treatment was not a course of treatment.[178] The court was persuaded by plaintiff's claims that the concerns regarding the infant's foot were raised to Walders by the plaintiff during her annual visits and were evidence of treatment of her foot condition by Walders.[179] However, a course of treatment spoke to the affirmative and ongoing conduct by the physician which is recognized as such by both patient and physician.[180] Notably, a routine examination of a seemingly healthy patient, or visits concerning matters unrelated to the condition at issue giving rise to the claim, are insufficient to invoke the benefit of the continuous treatment doctrine.[181]

Here, the record was devoid of any evidence that would support a finding that Walders provided affirmative treatment to plaintiff's infant for a condition related to her foot and Walders' failure to treat the condition in response to the concerns of the plaintiff did not, by itself, establish an ongoing course of treatment.[182] The record did not reflect that Walders ever indicated that she would monitor the condition related to the infant's foot, nor did plaintiff assert that Walders assured her that

172. *Id.* at 1189, 963 N.Y.S.2d at 444.

173. *Id.*

174. *Dugan,* 105 A.D.3d at 1189, 963 N.Y.S.2d at 445.

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. *Dugan*, 105 A.D.2d at 1190, 963 N.Y.S.2d at 445.

180. Gomez v. Katz, 61 A.D.3d 108, 112, 874 N.Y.S.2d 161, 166 (2d Dep't 2009).

181. Plummer v. N.Y.C. Health & Hosp. Corp., 98 N.Y.2d 268, 268, 774 N.E.2d 712, 716, 746 N.Y.S.2d 647, 650 (2002).

182. Dugan v. Troy Pediatrics, LLP, 105 A.D.3d at 1190, 963 N.Y.S.2d at 446 (3d Dep't 2013).

she would do so.[183] Moreover, when plaintiff was nine years old, her parents took her to see an orthopedic surgeon who noted that he would follow plaintiff with interest, suggesting that he would monitor the condition.[184]

Regarding the defendant's appeal, the appellate court agreed with the motion court on the remainder of the claims.[185] Questions of fact existed regarding whether Walders deviated from the accepted standard of care during the time period of December 23, 1995 until she last treated the infant in 1996.[186] Plaintiff alleged that she departed from the standard of care when she failed to refer the infant to a specialist.[187] While defendants claimed that plaintiff's expert failed to specify any deviation from the last annual checkup—the only checkup that would have fallen with the timely claim—the Court did not agree.[188] In fact, plaintiff's expert specifically referred to a notation made by Walders correlating to the September 1996 examination in which she indicated that infant's extremities were within normal limits.[189] Plaintiff's expert opined that because her abnormality was significant and obvious, so much so that it had been noticed by other care providers, Walders should have referred the infant to a specialist at the time.[190]

H. Failure of Plaintiff to Disclose a Cause of Action as an Asset in a Prior Bankruptcy Proceeding, the Existence of Which the Plaintiff Knew or Should Have Known Had Existed at the Time, Deprives the Plaintiff of the Legal Capacity to Sue Subsequently on that Cause of Action.

Plaintiff commenced this action seeking damages arising out of alleged failure to timely diagnose plaintiff's prostate cancer.[191] In Appeal No. 1, defendant Kendrick contended that the motion court erred in denying his motion to dismiss the complaint against him as time-barred.[192] In Appeal No. 2, defendants contended that the court erred in denying what the order on appeal characterized as defendant's

183. *Id.*
184. *Id.*
185. *Id.* at 1191, 963 N.Y.S.2d at 446.
186. *Id.*
187. *Dugan*, 105 A.D.3d at 1191, 963 N.Y.S.2d at 446.
188. *Id.* at 1192, 963 N.Y.S.2d at 447.
189. *Id.*
190. *Id.*
191. Green v. Assoc. Prof'l of NY, PLLC, 111 A.D.3d 1430, 1430-31, 965 N.Y.S.2d 319, 320 (4th Dep't 2013).
192. *Id.* at 1431, 965 N.Y.S.2d at 320-21.

motion to dismiss the complaints against them pursuant to CPLR 3211(a)(3) based on plaintiff's lack of capacity to sue.[193]

With regard to Appeal No. 1, plaintiff met his burden.[194] Plaintiff raised an issue of fact concerning the applicability of the continuous treatment doctrine by submitting evidence that plaintiff was a patient of defendant Syracuse Urology Associates and defendant AMP Urology.[195] Specifically, plaintiff alleged that he underwent a continuous course of treatment that began in 2004, and that such treatment remained ongoing within two years and six months of the commencement of the action.[196]

With regard to Appeal No. 2, the Court agreed that the complaint should have been dismissed because plaintiff lacked the capacity to sue.[197] Plaintiff filed for Chapter 7 bankruptcy protection on April 22, 2009 without listing a potential medical malpractice claim as an asset, and he obtained a discharge from bankruptcy on August 3, 2009.[198] Plaintiff's failure to disclose a cause of action as an asset in a prior bankruptcy proceeding, the existence of which plaintiff knew or should have known had existed at the time, deprived the plaintiff of the legal capacity to sue subsequently on that cause of action.[199] Inasmuch as plaintiff acknowledged that he did not list the instant action on his 2009 bankruptcy petition, the court must determine when plaintiff's claim accrued, whether plaintiff knew or should have known of those claims at the time of the bankruptcy filing, and what effect, if any, the bankruptcy has on plaintiff's capacity to sue.[200] The Court noted that the bankruptcy proceeding was reopened by the U.S. Bankruptcy Court for the Northern District of New York during the pendency of this appeal.[201]

With regard to the issue of accrual, the court noted that an action in medical malpractice accrues at the date of the original negligent act or omission, and subsequent continuous treatment does not change or extend the accrual date but serves only to toll the running of the applicable statute of limitations.[202] Here, in this medical malpractice case based on the defendants' failure to timely diagnose plaintiff's

193. *Id.* at 1431, 965 N.Y.S.2d at 321.
194. *Id.*
195. *Id.*
196. *Green*, 111 A.D.3d at 1431, 965 N.Y.S.2d at 321.
197. *Id.* at 1432, 965 N.Y.S.2d at 322.
198. *Id.*
199. *Id.*
200. *Id.* at 1433, 965 N.Y.S.2d at 322.
201. *Green*, 111 A.D.3d at 1431, 965 N.Y.S.2d at 321.
202. *Id.* at 1433, 975 N.Y.S.2d at 322.

cancer, the accrual date could not be later than approximately April 2008, when plaintiff's cancer returned.[203] As plaintiff filed for bankruptcy protection in April 2009, the court concluded that plaintiff's claims accrued prior to the bankruptcy filing.[204]

Whether the plaintiff should have known of his instant claims at the time of the bankruptcy filing, the court noted that plaintiff's knowledge of the *facts* giving rise to the claims, rather than his knowledge of his *legal rights* was decisive, citing *Cafferty v. Thompson*.[205] "Neither ignorance of the law nor inadvertent mistake excuses a plaintiff's failure to list such a claim as a potential asset in the bankruptcy petition."[206] Here, although the plaintiff might not have known that defendants' alleged failure to render a proper diagnosis was actionable, on the record before the court, the court concluded that plaintiff knew of the circumstances of plaintiff's treatment with defendants and plaintiff's cancer, i.e., the facts giving rise to the malpractice claim, prior to the bankruptcy filing.[207]

In light of the fact that the bankruptcy proceeding was recently re-opened, the trustee in bankruptcy must commence a new action in a representative capacity on behalf of the plaintiff's bankruptcy estate[208] and, in doing so, the trustee will receive the benefit of the six-month extension embodied in CPLR 205.[209] The court further noted that although it granted the defendants' motion, the complaint was dismissed without prejudice to commence a new action asserting these claims pursuant to CPLR 205(a).[210]

I. Recovery for Lost Capacity Is not Limited to the Plaintiff's Actual Earnings Before the Injury, and the Assessment of Damages May Instead Be Based upon Future Probabilities.

The jury awards for past and future lost wages are supported by legally sufficient evidence and are not against the weight of the evidence.[211] While the plaintiff did not become a union electrician until

203. *Id.*

204. *Id.*

205. *Id.* at 1433, 975 N.Y.S.2d at 323 (citing Cafferty v. Thompson, 223 A.D.2d 99, 101, 644 N.Y.S.2d 584, 586 (3d Dep't 1996)).

206. *Green*, 111 A.D.3d at 1433, 975 N.Y.S.2d at 323 (quoting Hutchinson v. Weller, 93 A.D.3d 509, 510, 940 N.Y.S.2d 248, 249 (1st Dep't 2012)).

207. *Id.*

208. *Id.* at 1433-34, 975 N.Y.S.2d at 323.

209. *Id.* at 1434, 975 N.Y.S.2d at 323.

210. *Id.*

211. Sacchetti v. Giordano, 101 A.D.3d 1619, 1620, 956 N.Y.S.2d 361, 362 (4th

after he was treated by the defendant, the Appellate Division, Fourth Department relied on the cases of *Huff v. Rodriguez,*[212] and *Kirschhoffer v. Van Dyke*,[213] to hold that recovery for lost capacity is not limited to the plaintiff's actual earnings before the injury, and the assessment of damages may instead be based upon future probabilities.[214]

J. Defense Counsel Waived Right to Poll Jury.

In distinguishing this case from *Duffy v. Vogel*,[215] wherein the Court of Appeals held that a party has an absolute right to poll the jury and the court's denial of that right mandates reversal and a new trial,[216] the Appellate Division, Fourth Department, found that it was not unreasonable for the trial court to conclude that counsel's request to poll the jury had been withdrawn or waived[217] where the following colloquy took place between the judge and counsel: Judge, "Jury be polled? They have signed. They each have individually signed," and defense counsel stated, "Okay. All right. Thank you."[218]

K. Public Policy Concerns Disfavor the Use of Juror Affidavits for Post-Trial Impeachment of a Verdict.

Plaintiffs made a supplemental post-trial motion to correct the jury's verdict with respect to the award of damages for plaintiff's future pain and suffering.[219] Plaintiffs submitted affidavits from all six jurors, who averred that they understood and agreed that the plaintiff would receive $60,000 per year for a period of 30 years, not a total of $60,000 over the course of 30 years.[220]

The Appellate Division, Fourth Department, did not change its long-held position that public policy concerns disfavor the use of juror affidavits for post-trial impeachment of a verdict, where here the plaintiffs' use of juror affidavits was for the purpose of supporting the verdict really given by the jury, rather than to impeach the verdict

Dep't 2012).

212. 45 A.D.3d 1430, 846 N.Y.S.2d 841 (4th Dep't 2007).

213. Kirschhoffer v. Van Dyke, 173 A.D.2d 7, 577 N.Y.S.2d 512 (3d Dep't 1991).

214. *Sacchetti*, 101 A.D.3d at 1620, 956 N.Y.S.2d at 362.

215. 12 N.Y.3d 169, 905 N.E.2d 1175, 878 N.Y.S.2d 246 (2009).

216. *Id.* at 176, 905 N.E.2d at 1178, 878 N.Y.S.2d at 249.

217. Holstein v. Cmty. Gen. Hosp. of Greater Syracuse, 20 N.Y.3d 892, 892, 980 N.E.2d 523, 523, 956 N.Y.S.2d 475, 475 (2012).

218. *Id.*

219. Butterfield v. Caputo, 108 A.D.3d 1162, 1164, 970 N.Y.S.2d 144, 145 (4th Dep't 2013).

220. *Id.* at 1164, 970 N.Y.S.2d at 146.

given.[221]

L. Denial of Defendants' Motions for Summary Judgment on Liability and Damages Did Not Prevent the Court from Considering Defendants' Subsequent Motions in Limine to Preclude the Plaintiff's Expert from Offering Certain Evidence Relating to the Cause of Plaintiff's Injury.

In an obstetrical medical malpractice action, the denial of defendants' motions for summary judgment on liability and damages did not prevent the court from considering defendants' subsequent motions in limine to preclude the plaintiff's expert from offering certain evidence relating to the cause of the infant plaintiff's neurological impairments since the summary judgment motions focused on different issues from those in the evidentiary motion, and the posture of the case differed when each motion was presented.[222]

Although the Appellate Division, First Department, previously affirmed the denial of the defendants' summary judgment motions, at which time some of the same issues were raised,[223] defendants sought a specifically focused evidentiary ruling and furnished evidence that challenged the entire basis of Dr. Chen's, the plaintiff's expert, causation theories.[224] The very experts whose work Dr. Chen cited in support of his causation theories submitted affidavits that directly controverted those theories and explained how Dr. Chen had misinterpreted their works.[225] While the summary judgment motions concerned both liability and damages, further examination of the underlying basis of plaintiff's expert's theories as to the cause of the infant's impairments demonstrated that they were neither reliable nor generally accepted in the medical community.[226]

The court concluded that the denial of defendants' motions for summary judgment did not preclude consideration of the motions in limine,[227] noting that in a summary judgment motion, the defendant has the initial burden of proof that no trial issues of fact exist.[228] In a motion to preclude, such as here, which sought a specific evidentiary ruling concerning the reliability of specific proposed expert

221. *Id.*
222. Frye v. Montefiore Med. Ctr., 100 A.D.3d 28, 951 N.Y.S.2d 4 (1st Dep't 2012).
223. *Id.* at 31, 951 N.Y.S.2d at 7.
224. *Id.* at 31-2, 951 N.Y.S.2d at 7.
225. *Id.* at 32, 951 N.Y.S.2d at 7.
226. *Id.*
227. *Frye*, 100 A.D.3d at 38, 951 N.Y.S.2d at 11.
228. *Id.*

testimony,[229] the party offering expert testimony bears the burden of demonstrating its reliability where a credible challenge to the underpinning of the expert theory has been raised.[230]

Here, "plaintiff successfully opposed the summary judgment motions by submitting an expert affidavit stating that defendants' medical treatment departed from good and accepted practice and by citing various treatises that allegedly supported his theories."[231] Whether plaintiff's theories that the alleged departures "could cause injury had any generally accepted scientific basis was not squarely before the court on summary judgment, and it was not in a position to evaluate the reliability of those theories" at that time.[232]

M. Where a Jury Has Already Decided Issue of Liability, It May Not Consider Causation at Separate Damages Trial.

Plaintiff suffered a sudden, severe headache with vomiting and sensitivity to light.[233] This persisted for three weeks, during which time, plaintiff sought treatment from several doctors, including defendants, and underwent a CT scan.[234] Evidence at trial showed that it resulted from an aneurysm that burst near the brain and went undetected until it ruptured, causing plaintiff to suffer a severe stroke that left plaintiff permanently disabled.[235] Evidence was also adduced at trial that the CT scan was either misread or not read at all, and that if it had been read properly, the aneurysm could have been detected and the stroke prevented.[236]

After a trial, the jury returned a verdict for plaintiff in the amount of $5.1 million;[237] however, plaintiff moved to set aside the verdict as inadequate.[238] The judge granted additur, or, if the defendants did not agree to the increase in damages, the matter would be tried again on the issue of damages alone.[239] Defendants did not agree to the additur.[240]

229. *Id.*
230. *Id.*
231. *Id.*
232. *Frye*, 100 A.D.3d at 38, 951 N.Y.S.2d at 11.
233. Oakes v. Patel, 20 N.Y.3d 633, 640, 988 N.E.2d 488, 490, 965 N.Y.S.2d 752, 754 (2013).
234. *Id.*
235. *Id.*
236. *Id.* at 640-41, 988 N.E.2d at 490, 65 N.Y.S.2d at 754.
237. *Oakes*, 20 N.Y.3d at 641, 988 N.E.2d at 491, 965 N.Y.S.2d at 755.
238. *Id.*
239. *Id.*
240. *Id.*

Shortly before the trial on damages, plaintiffs moved to preclude any testimony or evidence contesting causation.[241] The trial court granted this motion, stating that the issue of causation had been decided by the first jury, and could not be re-litigated.[242] The second trial resulted in a jury award totaling approximately $17.8 million.[243]

On appeal, a majority of the appellate division affirmed,[244] but did not discuss the preclusion of defendants' causation testimony at the second trial.[245] Two justices dissented and leave to appeal to the Court of Appeals was granted.[246]

"Defendants were not required, in order to preserve their claim that the additur was excessive, to identify a specific amount that they considered reasonable."[247] Defendants made clear in opposing plaintiff's motion for a new trial their view that any amount above what the first jury awarded was excessive.[248] However, a party that wants to challenge the amount of an additur or remittitur on appeal must do so before a new trial takes place.[249]

The trial court erred in prohibiting defendants from litigating issues of causation at the second, damages-only trial, as it is often the case that causation issues are relevant both to liability and to damages.[250]

Here, plaintiff had a pre-existing condition, an aneurysm that burst near his brain.[251] Defendants demonstrated that they "should have been allowed to show that, even with appropriate medical care, some of the injuries that [plaintiff] suffered were inevitable."[252]

For example, plaintiff had proved in support of his pain and suffering claim that plaintiff's treatment for his stroke had resulted in a wound in his groin that became infected and caused serious difficulty.[253] The testimony with regard to this groin infested was graphic in detail.[254]

Counsel for defendants elicited testimony on cross-examination

241. *Id.*
242. *Oakes*, 20 N.Y.3d at 641, 988 N.E.2d at 491, 965 N.Y.S.2d at 755.
243. *Id.* at 641-42, 988 N.E.2d at 491, 965 N.Y.S.2d at 756.
244. *Id.* at 642, 988 N.E.2d at 491, N.Y.S.2d at 756.
245. *Id.*
246. *Id.*
247. *Oakes,* 20 N.Y.3d at 642, 988 N.E.2d at 491, N.Y.S.2d at 756.
248. *Id.* at 642, N.E.2d at 491-92, N.Y.S.2d at 756.
249. *Id.* at 643, N.E.2d at 492, N.Y.S.2d at 756.
250. *Id.* at 647, N.E.2d at 495, N.Y.S.2d at 759.
251. *Id.* at 647, N.E.2d at 495, N.Y.S.2d at 760.
252. *Oakes*, 20 N.Y.S.3d at 647, N.E.2d at 495, N.Y.S.2d at 760.
253. *Id.* at 648, N.E.2d at 496, N.Y.S.2d at 760.
254. *Id.*

that the groin wound was the result of an angiogram, and that such a procedure would have been necessary to deal with the aneurysm even if his stroke had not occurred.[255] The trial court ruled this and certain other testimony inadmissible, instructing the jury "the issues of responsibility and the tie to the injuries as causation have been determined and we're not revisiting that again."[256] The court thus told the jury that it could not consider the extent to which plaintiff's injuries resulted from the malpractice.[257] A new trial was ordered to determine damages.[258]

III. MUNICIPAL LAW

A. New York State Navigation Law Does Not Create a Special Duty Owed by State to Passengers Aboard Vessel Inspected by State Employees

In *Metz v. New York*,[259] the Court of Appeals examined New York State Navigation Law to hold that a statutory obligation requiring that public vessels be given a certificate of inspection does not create a special duty of care owed by the State to its passengers.[260]

The Ethan Allen ("Vessel") was a public vessel operating as a tour boat on Lake George.[261] In 2005, twenty passengers were killed and several others were injured when the boat capsized and sank.[262] As a public vessel, the Vessel had been subject to yearly state inspections by the United States Coast Guard, when the Vessel was constructed in 1964, and then by the New York State Office of Parks, Recreation and Historic Preservation (OPRHP) between 1979 and 2005.[263] At the time the Vessel sank, it had been carrying forty-seven passengers and one crew member, within the forty-eight-passenger maximum set forth in the certificate of inspection.[264]

The Court of Appeals discussed briefly the history of the Vessel's prior inspections by the U.S. Coast Guard and the OPRHP, recognizing

255. *Id.* at 649, N.E.2d at 496, N.Y.S.2d at 760.

256. *Id.* at 649, N.E.2d at 496, N.Y.S.2d at 760-61.

257. *Oakes*, 20 N.Y.S.3d at 649, N.E.2d at 496, N.Y.S.2d at 761.

258. *Id.* at 642, 988 N.E.2d at 491, 965 N.Y.S.2d at 756.

259. 20 N.Y.3d 175, 982 N.E.2d 76, 958 N.Y.S.2d 314 (2012).

260. *Metz*, 20 N.Y.3d at 180, 982 N.E.2d at 79, 958 N.Y.S.2d at 317; *see* N.Y. NAV. LAW §§ 13, 50, 63 (McKinney 2014).

261. *Metz*, 20 N.Y.3d at 177, 982 N.E.2d at 77, 958 N.Y.S.2d at 315.

262. *Id.*

263. *Id.* at 177-78, 982 N.E.2d at 77-78, 958 N.Y.S.2d at 315-16.

264. *Id.* at 177, 982 N.E.2d at 78, 958 N.Y.S.2d at 316.

that the forty-eight-passenger limit certified by state inspectors was much higher than the level which the Vessel could safely be operated.[265]

The Court of Claims found insufficient evidence to allow it to determine whether the inspections were proprietary or governmental in nature and denied the claimant's motion to dismiss the State's affirmative defense of sovereign immunity.[266] The appellate division reversed on the issue of sovereign immunity and dismissed that affirmative defense.[267] It also found that the inspections were a governmental function, and it granted the State's motion for leave to appeal its decision on the State's affirmative defense of sovereign immunity.[268]

In its decision, the Court of Appeals relied on last year's *Survey* case, *Valdez v. City of New York*,[269] which recognized that claimants must make a threshold showing of the existence of a special duty owed to them by the State before it becomes necessary to address whether the State can rely upon the defense of governmental immunity.[270] The Court looked at the statutory scheme at issue here, New York's Navigation Law,[271] to determine that the statutory obligations of inspecting the subject Vessel did not create a special duty of care.[272]

In reaching this decision, the Court looked at its decision in the 1983 case of *O'Connor v. City of New York*,[273] "where the City's inspector either failed to observe a defect in the gas piping system or failed to insist that such defect be corrected before certifying that the system satisfied the applicable building department rules and regulations."[274] This case, the Court held, was similar to the *Metz* case because while the statutory regulations were intended to benefit the specific plaintiffs in this case, the regulation was also intended, more broadly, to protect all members of the general public similarly situated and therefore did not create a duty to particular individuals.[275]

265. *Id.* at 178, 982 N.E.2d at 78, 958 N.Y.S.2d at 316.

266. *Metz*, 20 N.Y.3d at 179, 982 N.E.2d at 78, 958 N.Y.S.2d at 316.

267. *Id.* at 179, 982 N.E.2d at 79, 958 N.Y.S.2d at 317.

268. *Id.*

269. 18 N.Y.3d 69, 960 N.E.2d 356, 936 N.Y.S.2d 587 (2011).

270. *Metz*, 20 N.Y.3d at 179, 982 N.E.2d at 79, 958 N.Y.S.2d at 317 (citing *Valdez,* 18 N.Y.3d at 80, 960 N.E.2d at 365, 936 N.Y.S.2d at 596).

271. N.Y. NAV. LAW §§ 13, 63.

272. *Metz*, 20 N.Y.3d at 180, 982 N.E.2d at 79, 958 N.Y.S.2d at 317.

273. 58 N.Y.2d 184, 447 N.E.2d 33, 460 N.Y.S.2d 485 (1983).

274. *Metz*, 20 N.Y.3d at 180, 982 N.E.2d at 79-80, 958 N.Y.S.2d at 317-18 (citing *O'Connor*, 58 N.Y.2d at 189, 447 N.E.2d at 34, 460 N.Y.S.2d at 486).

275. *Id.* at 180, 982 N.E.2d at 80, 958 N.Y.S.2d at 318 (citing *O'Connor*, 58 N.Y.2d at 190, 447 N.E.2d at 35, 460 N.Y.S.2d at 487).

Moreover, the Court recognized that the Legislature never intended for New York's Navigation Law to provide for governmental immunity, but instead was meant to allow for fines and criminal penalties to be imposed upon vessel owners and operators.[276]

B. Ranger Was Engaged in Governmental Activity When Assisting Claimant in Backing out of Driveway and onto Highway.

Claimant commenced this negligence action against the State of New York alleging that the State's employee, a ranger for the Department of Environmental Conservation, was negligent in guiding the claimant's vehicle onto the highway and into the path of an oncoming vehicle.[277] The Court of Claims dismissed the claim, concluding that, at the time of the accident, the ranger was performing a governmental function within the exercise of his discretion and, as such, defendant was immune from liability. Claimant appealed.[278]

Crediting claimant's proof, it is apparent that the unidentified ranger was engaged in traffic control or regulation, "which 'is a classic example of a governmental function undertaken for the protection and safety of the public pursuant to the general police powers,' thus placing the ranger's asserted negligence 'well within the immunized 'governmental' realm of municipal responsibility.'"[279]

As to whether the ranger was engaged in a discretionary or ministerial act at the time of the collision,

> the case law makes it clear that 'a discretionary or quasi-judicial act involves the exercise of reasoned judgment which could typically produce different acceptable results whereas a ministerial act envisions direct adherence to a governing rule or standard with a compulsory result.'[280] 'Government action, if discretionary, may not be a basis for liability, while ministerial actions may be, but only if they violate a special duty owed to the plaintiff, apart from any duty to the public in general.'[281] Simply put, traffic control is an inherently

276. *Id.* at 180-81, 982 N.E.2d at 80, 958 N.Y.S.2d at 318; *see, e.g.*, N.Y. NAV. LAW § 62 (McKinney 2014).

277. Murchinson v. New York, 97 A.D.3d 1014, 1015, 949 N.Y.S.2d 789, 791 (3d Dep't 2012).

278. *Id.* at 1015, 949 N.Y.S.2d at 792.

279. *Id.* at 1016, 949 N.Y.S.2d at 792-93.

280. *Id.* at 1016-17, 949 N.Y.S.2d at 793 (quoting Haddock v. New York, 75 N.Y.2d 478, 484, 553 N.E.2d 987, 991, 554 N.Y.S.2d 439, 443 (1990)).

281. *Id.* at 1017, 949 N.Y.S.2d at 793 (quoting McLean v. New York, 12 N.Y.3d 194, 203, 905 N.E.2d 1167, 1173-74, 878 N.Y.S.2d 238, 244-45 (2009)).

discretionary act.[282]

"All that remains for the Court's consideration is whether the record as a whole contains sufficient proof that the ranger did in fact exercise discretion/reasoned judgment when assisting claimant in backing out of the driveway."[283]

> Claimant's own testimony reveals that the ranger exercised discretion in assisting him.[284] Specifically, claimant testified that when he first started backing out of the driveway, the ranger was standing on the south shoulder of the highway.[285] As claimant continued to back up, the ranger moved to the middle of the road and, by claimant's own admission, looked both east and west as he continued to motion claimant out of the driveway.[286] Notably, claimant acknowledged the ranger 'was being cautious about what was coming from the direction of Danamora.'[287] Such testimony . . . is more than sufficient to establish that the ranger was . . . engaged in a governmental function involving the actual exercise of discretionary authority and, as such, the [lower court] correctly concluded that defendant was immune from liability.[288]

C. Municipal Emergency Responders, Including Ambulance Assistance Rendered by First Responders, Fire, and Emergency Medical Technicians, Should Be Viewed as a Classic Governmental Function, Rather than a Proprietary Function.

Patient who suffered anaphylactic shock caused by an allergic reaction to prescribed medication brought action for personal injuries sustained as a result of allegedly negligent treatment rendered by the defendant City's emergency medical technicians (EMTs).[289] The lower court granted the City's motion for summary judgment and the plaintiff appealed.[290] The appellate court reversed.[291] The Court of Appeals affirmed the holding of the appellate division.[292]

Plaintiff's infant suffered an allergic reaction to medication she

282. *Murchinson*, 97 A.D.3d at 1017, 949 N.Y.S.2d at 793.
283. *Id.*
284. *Id.*
285. *Id.*
286. *Id.*
287. *Murchinson*, 97 A.D.3d at 1017, 949 N.Y.S.2d at 793.
288. *Id.*
289. Applewhite v. Accuhealth, Inc., 21 N.Y.3d 420, 995 N.E.2d 131, 972 N.Y.S.2d 169 (2013).
290. *Id.* at 424-25, 995 N.E.2d at 133, 972 N.Y.S.2d at 171.
291. *Id.* at 425, 995 N.E.2d at 133, 972 N.Y.S.2d at 171.
292. *Id.* at 432, 995 N.E.2d at 139, 972 N.Y.S.2d at 177.

was administered, sending her into anaphylactic shock.[293] Plaintiff called 911, and within minutes, two emergency medical technicians (EMTs) employed by the New York City Fire Department responded in a basic life support ambulance.[294] No advanced life support ambulance was available to respond at the time the call came in.[295] One EMT immediately began to perform cardiopulmonary resuscitation ("CPR") on the infant, while the other called for an advanced life support ambulance.[296] Plaintiff requested that the EMTs transport the infant to a nearby hospital; however, the EMT continued to conduct CPR until paramedics arrived from a private hospital with an advanced life support ambulance.[297] The paramedics injected the infant with epinephrine to counter the effects of the anaphylactic shock, intubated her, administered oxygen and transported her to the hospital.[298] The infant survived, but suffered serious brain damage.[299]

Plaintiff commenced this action against the City of New York and its EMT services (the "City"), as well as other defendant caregivers.[300] The City moved for summary judgment, contending that it was immune from suit because it did not owe a special duty to plaintiff or her infant.[301] In the alternative, the City maintained that the actions of its personnel were not the proximate cause of the infant's injuries.[302] The lower court granted the City's motion, holding that the plaintiff "could not prove that the City owed them a special duty or that the municipal defendants were the proximate cause of the harm."[303] The appellate division reversed, determining that the "City's emergency medical response was governmental in nature, but found that plaintiff raised triable issues of fact whether the City had assumed a special duty" to plaintiff or her infant and whether it proximately caused the injuries.[304]

"When a negligence claim is asserted against a municipality, the first issue for a court to decide is whether the municipal entity was engaged in a proprietary function or acted in a governmental capacity at

293. *Id.* at 424, 995 N.E.2d at 133, 972 N.Y.S.2d at 171.
294. *Applewhite*, 21 N.Y.3d at 424, 995 N.E.2d at 133, 972 N.Y.S.2d at 171.
295. *Id.*
296. *Id.*
297. *Id.*
298. *Id.*
299. *Applewhite*, 21 N.Y.3d at 424, 995 N.E.2d at 133, 972 N.Y.S.2d at 17.
300. *Id.*
301. *Id.*
302. *Id.* at 424-25, 995 N.E.2d at 133, 972 N.Y.S.2d at 171.
303. *Id.* at 425, 995 N.E.2d at 133, 972 N.Y.S.2d at 171.
304. *Applewhite*, 21 N.Y.3d at 425, 995 N.E.2d at 133, 972 N.Y.S.2d at 171.

the time the claim arose."[305] "A government entity performs a purely proprietary role when its activities essentially substitute for or supplement traditionally private enterprises."[306] "In contrast, a municipality will be deemed to have been engaged in a governmental function when its acts are 'undertaken for the protection and safety of the public pursuant to the general police powers.'"[307] "Police and fire protection are examples of long-recognized, quintessential governmental functions."[308] On the other hand, the Court has long recognized that "certain medical services delivered by the government in hospital-type settings are more akin to private, proprietary conduct."[309] "As a general rule, the distinction is that the government will be subject to ordinary tort liability if it negligently provides 'services that traditionally have been supplied by the private sector.'"[310]

"If it is determined that a municipality was exercising a governmental function, the next inquiry focuses on the extent to which the municipality owed a 'special duty' to the injured party."[311] "The core principle is that to 'sustain liability against a municipality, the duty breached must be more than that owed'" to the general public.[312] The Court has "recognized that a special duty can arise in three situations: (1) the plaintiff belonged to a class for whose benefit a statute was enacted; (2) the government entity voluntarily assumed a duty to the plaintiff beyond what was owed to the public generally; or (3) the municipality took positive control of a known and dangerous safety condition."[313]

In *Laratro v. City of New York*,[314] the Court viewed municipal emergency systems and responses to 911 calls to be within the sphere of governmental functions.[315]

In the instant case, the concurring members of the Court "contend that the EMTs acted in a proprietary capacity when they began to render aid, equating their conduct with medical services such as mental health

305. *Id.* at 425, 995 N.E.2d at 134, 972 N.Y.S.2d at 172.

306. *Id.* (citations omitted).

307. *Id.* (quoting Sebastian v. New York, 93 N.Y.2d 790, 793, 720 N.E.2d 878, 879, 698 N.Y.S.2d 601, 603 (1999)).

308. *Id.*

309. *Applewhite*, 21 N.Y.3d at 426, 995 N.E.2d at 134, 972 N.Y.S.2d at 172.

310. *Id.* (quoting *Sebastian*, 93 N.Y.2d at 795, 720 N.E.2d at 881, 698 N.Y.S.2d at 605).

311. *Id.* at 426, 995 N.E.2d at 135, 972 N.Y.S.2d at 173.

312. *Id.* (citations omitted).

313. *Id.*

314. 8 N.Y.3d 79, 861 N.E.2d 95, 828 N.Y.S.2d 280 (2006).

315. *Id.* at 81-82, 861 N.E.2d at 96, 828 N.Y.S.2d at 281.

care, obstetrics and surgery."[316] "In those situations, however, the governmental activities . . . displaced or supplemented traditionally private enterprises."[317] "Emergency medical services, in contrast, have widely been considered one of government's critical duties."[318]

Consistent with this view and the Court's reasoning in *Laratro*, the Court of Appeals held

> "that publicly-employed, front-line EMTs and other first responders, who routinely place their own safety and lives in peril in order to rescue others, surely fulfill a government function—certainly no less so than municipal garbage collectors and school playground supervisors—because they exist for the protection and safety of the public and not as a substitute for private enterprises."[319]

"And contrary to the belief expressed in the concurring opinions, the fact that private entities operate ambulance services in" the city "is not determinative because those companies provide supplemental support for a critical governmental duty rather than vice versa."[320]

Moreover, and unlike the types of medical providers identified by the concurring members of the court, the EMTs employed by the New York City Fire Department and deployed via the 911 system receive training in basic life support techniques and their range of approved emergency services is limited by law. Basic EMTs function in a pre-hospital setting and their activities are generally restricted to CPR, oxygen administration, bleeding control, foreign body airway obstruction removal, and spinal immobilization. EMTs cannot be realistically compared to the proprietary medical professionals whose licensure requires extensive educational and training credentials, and who typically provide services at hospital or medical facilities rather than in the unpredictable community-at-large.

It was for those reasons that the Court held "that a municipal emergency response system—including the ambulance assistance rendered by first responders such as" the fire department "EMTs in this case—should be viewed as a classic governmental, rather than proprietary, function."[321]

316. *Applewhite*, 21 N.Y.3d at 427-28, 995 N.E.2d at 136, 972 N.Y.S.2d at 174 (citations omitted).

317. *Id.* at 428, 995 N.E.2d at 136, 972 N.Y.S.2d at 174 (citations omitted).

318. *Id.*

319. *Id.* at 428, 995 N.E.2d at 136, 972 N.Y.S.2d at 174 (citations omitted) (internal quotation marks omitted).

320. *Id.* (citations omitted).

321. *Applewhite*, 21 N.Y.3d at 430, 995 N.E.2d at 138, 972 N.Y.S.2d at 176 (citations omitted) (internal quotation marks omitted).

This conclusion did not necessarily immunize the City from liability because the plaintiff may yet establish that a special duty was owed to her or her infant and whether the City voluntarily assumed a special relationship.[322] Relying on its prior decision in *Laratro*, the Court pointed out that the response to that question requires the presence of four elements:

> 1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; 2) knowledge on the part of the municipality's agents that inaction could lead to harm; 3) some form of direct contact between the municipality's agents and the injured party; and 4) that party's justifiable reliance on the municipality's affirmative undertaking.[323]

Here, the parties' dispute centered on the first and fourth elements. The Court agreed with the appellate division that plaintiff had adequately presented questions of fact on both of those factors.[324] When realizing that the EMTs' treatment would be limited to CPR, the plaintiff asked that the infant be taken to the hospital right away.[325] The EMT continued delivering CPR and waited for the advanced life support ambulance to arrive.[326] This poses a question of fact as to whether the EMTs, through their actions or promises, assumed an affirmative duty in deciding to have advanced life support paramedics undertake more sophisticated medical treatment rather than transporting the infant to the hospital.[327]

The Court also determined that a factual resolution by a jury was also necessary to resolve the justifiable reliance element, stating that it was possible for a fact finder to conclude that it was reasonable for the infant's mother to rely on the EMTs' alleged assurances rather than seek an alternative method for transporting the infant to the nearby hospital since the plaintiff claims that she was not informed that it would take nearly twenty minutes for the advanced life support ambulance to arrive.[328] The allegations raised the question of whether the EMTs lulled the plaintiff into a false sense of security.[329] Plaintiff would then be required to show how the EMTs' statements or conduct deprived the plaintiff of assistance that reasonably could have been expected from

322. *Id.*
323. *Id.* at 430-31, 995 N.E.2d at 138, 972 N.Y.S.2d at 176 (citations omitted).
324. *Id.* at 431, 995 N.E.2d at 138, 972 N.Y.S.2d at 176.
325. *Id.*
326. *Applewhite*, 21 N.Y.3d at 431, 995 N.E.2d at 138, 972 N.Y.S.2d at 176.
327. *Id.*
328. *Id.*
329. *Id.* at 431, 995 N.E.2d at 138-39, 972 N.Y.S.2d at 176-77.

another source.[330] In this regard, the plaintiff has the ultimate burden of establishing that some other reasonable alternative was available.[331]

In sum, because there were issues of fact associated with the eventual determination as to whether the City owed a special duty to plaintiff or her infant, the City was not entitled to summary judgment dismissing the complaint, and the order of the appellate court was affirmed.[332]

Based on this holding in *Applewhite,* the supreme court in *DiMeo* granted defendants' motion for summary judgment dismissing the complaint in this wrongful death action against the town and town provider of emergency medical services.[333] Plaintiff appealed.[334]

Plaintiff called 911 after her husband complained of chest pains and shortness of breath.[335] Dispatch sent a paramedic, employed by defendant Town of Rotterdam, and an ambulance, that was owned by defendant Rotterdam Emergency Medical Services, Inc. (REMS), and staffed by two EMTs trained to provide basis life support.[336] The decedent's family requested that the decedent go to a hospital in Albany, rather than the one that was closer in the Town of Rotterdam.[337] The paramedic determined that the decedent was stable enough to go to Albany and that advanced life support was not necessary during transport, so the paramedic turned the decedent over to the EMTs and left.[338] About half-way to Albany, decedent's condition worsened and the EMTs unsuccessfully tried to arrange for advanced life support assistance en route.[339] "Decedent was in cardiac arrest when they arrived at the hospital.[340] He died the following week."[341]

> The Court of Appeals recently held that when a municipality provides emergency first responder services in response to a 911 call for assistance, as the Town did here by dispatching its paramedic, it performs a governmental function, rather than a proprietary one, and

330. *Id.* at 431, 995 N.E.2d at 139, 972 N.Y.S.2d at 177 (citations omitted).

331. *Applewhite*, 21 N.Y.3d at 431, 995 N.E.2d at 139, 972 N.Y.S.2d at 177 (citations omitted).

332. *Id.* at 432, 995 N.E.2d at 139, 972 N.Y.S.2d at 177.

333. *See* DiMeo v. Rotterdam Emergency Med. Servs., Inc., 110 A.D.3d 1424, 1423-24, 974 N.Y.S.2d 178, 179 (3d Dep't 2013).

334. *Id.* at 1424, 974 N.Y.S.2d at 179.

335. *Id.* at 1423, 974 N.Y.S.2d at 179.

336. *Id.*

337. *Id.*

338. *DiMeo*, 110 A.D.3d at 1423-24, 974 N.Y.S.2d at 179.

339. *Id.* at 1425, 974 N.Y.S.2d at 179.

340. *Id.* at 1424, 974 N.Y.S.2d at 179.

341. *Id.*

> cannot be held liable unless it owed a 'special duty' to the injured party.[342]

The Appellate Division, Third Department, held that "although the record here at least arguably contain[ed] factual issues concerning whether the Town voluntarily assumed a duty to decedent or plaintiff, thereby creating a special duty", the court did not see the need to address that question because the Town's actions were discretionary.[343]

> The Town's paramedic exercised his discretion in making medical determinations concerning the decedent's condition, such as the type of examination and tests to perform, whether decedent was stable enough to be transported to a hospital that was farther away, and whether he could be transported with basic life support services or if the paramedic needed to ride in the ambulance to be available to provide advanced life support services en route to the hospital.[344]

"Thus, as its actions were discretionary, the Town established its entitlement to immunity pursuant to the governmental function immunity defense."[345]

The appellate court also affirmed the lower court's decision with regard to the defendant REMS.[346]

> While REMS' EMTs provided medical care at decedent's house, the paramedic—who was the person with the highest level of certification—had the ultimate authority over decisions concerning the care provided.[347] The paramedic, and not the EMTs, was responsible for deciding that decedent could be transported to the farther hospital and that the paramedic did not need to accompany the ambulance.[348] While the EMTs could have requested that the paramedic accompany them, they could not compel him to do so.[349]

REMS could not be held liable for the paramedic's determination not to accompany the ambulance, and the EMTs were required to defer to his medical judgment.[350]

342. *Id.*
343. *DiMeo*, 110 A.D.3d at 1424, 974 N.Y.S.2d at 180.
344. *Id.* at 1424-25, 974 N.Y.S.2d at 180.
345. *Id.*
346. *Id.*
347. *Id.* at 1425, 974 N.Y.S.2d at 181.
348. *DiMeo*, 110 A.D.3d at 1425, 974 N.Y.S.2d at 181.
349. *Id.*
350. *Id.*

D. City Department of Transportation Supervisor Was Performing Governmental Function When Controlling Traffic, Even When Such Activity Was Done in Preparation for Road Repairs About to Be Performed.

In *Wittorf*, the plaintiff appealed the lower court's decision to set aside the jury verdict in favor of the defendants following a trial for personal injuries allegedly sustained while plaintiff was riding her bicycle in Central Park.[351]

"On November 5, 2005, plaintiff and her boyfriend rode their bicycles to the entrance of Central Park transvers road at West 65th Street."[352] At the same time, a City Department of Transportation (DOT) supervisor was in the process of setting up warning cones to close off both lanes of the road to vehicular traffic before starting to repair a "special condition" in the transverse.[353] The "special condition" was "bigger than a pothole" but "less involved" than road resurfacing.[354] Plaintiff was injured when she struck a pothole.[355]

At the trial, the jury found that the roadway was not in a reasonably safe condition; however, it also held that the City could not be held liable because it did not receive timely written notice of the particular defect, and it did not cause or create the dangerous condition.[356] The trial court granted defendant's motion to set aside the verdict on the basis of that the City was immune from liability because the supervisor was engaged in the discretionary governmental function of traffic control, not the proprietary function of street repair, when he allowed the plaintiff to proceed.[357]

On appeal, the First Department held that the City is entitled to governmental immunity because the specific act or omission that caused plaintiff's injuries was the supervisor's discretionary decision to allow plaintiff to proceed onto the transverse; and therefore, the cause of plaintiff's injuries was not the City's proprietary function in maintaining the roadway.[358]

Relying on settled case law, the First Department recognized that

351. Wittorf v. City of New York, 104 A.D.3d 584, 585, 961 N.Y.S.2d 432, 433 (1st Dep't 2013).

352. *Id.* at 585, 961 N.Y.S.2d at 433.

353. *Id.*

354. *Id.*

355. *Id* at 585, 961 N.Y.S.2d at 433-34.

356. *Wittorf*, 104 A.D.3d at 585, 961 N.Y.S.2d at 434.

357. *Id.*

358. *Id.* at 586, 961 N.Y.S.2d at 435.

"government action, if discretionary, may not be a basis for liability."[359] On the other hand, ministerial actions may give rise to liability only in those cases where a special duty is owed to the plaintiff, and the defendant violated that special duty.[360]

Beyond this distinction, whether the subject act or omission was a governmental function or a proprietary function necessarily determines the review by the court in assessing liability.[361]

"A governmental function is generally defined as one undertaken for the protection and safety of the public pursuant to the general police powers."[362] In those cases where the defendant was engaged in a governmental function, the government can still avoid liability if it timely raises the defense of governmental immunity and proves that the alleged acts or omissions were an exercise of governmental authority.[363]

A proprietary function is one in which "governmental activities essentially substitute for or supplement traditionally private enterprises."[364] When performing a proprietary function, the governmental entity is generally subject to "the same duty of care as private individuals and institutions engaging in the same activity."[365]

In performing its analysis, the court acknowledges that the alleged activity falls along a "continuum of responsibility" and it examines the specific acts or omissions out of which the injury occurred; it does not examine, however, whether the agency involved is engaged generally in proprietary or is in control of the location in which the injury occurred.[366]

The majority in *Wittorf* focused exclusively on the that fact that, at the time of plaintiff's injury, repair work had not yet begun and the DOT supervisor was only engaged in traffic control when he waved plaintiff and her companion through, allowing them to enter the transverse but without warning them about road conditions ahead.[367] Traffic control, the appellate division held, is a "classic example of a

359. *Id.* at 585, 961 N.Y.S.2d at 434.

360. *Wittorf*, 104 A.D.3d at 585, 961 N.Y.S.2d at 434.

361. *Id.*

362. *Id.* at 585, 961 N.Y.S.2d at 434 (quoting Murchinson v. New York, 97 A.D.3d 1014, 1016, 949 N.Y.S.2d 789, 792 (3d Dep't 2012)).

363. *Id.*

364. *Id.* (quoting Sebastian v. New York, 93 N.Y.2d 790, 793, 720 N.E.2d 878, 880, 698 N.Y.S.2d 601, 603 (1999)).

365. *Wittorf*, 104 A.D.3d at 585, 961 N.Y.S.2d at 434.

366. *Id.* at 586, 961 N.Y.S.2d at 434-35 (*see* Miller v. New York, 62 N.Y.2d 506, 511-12, 467 N.E.2d 493, 496, 478 N.Y.S.2d 829, 832 (1984)).

367. *Id.* at 586, 961 N.Y.S.2d at 435.

governmental function undertaken for the protection and safety of the public pursuant to the general police powers."[368] Therefore, "the City was entitled to governmental function immunity because the specific act or omission that caused plaintiff's injuries was the supervisor's discretionary decision to allow plaintiff to proceed since his crew had not completed its preparations for the roadwork."[369] Plaintiff's injuries were not caused by the City's proprietary function in maintaining the roadway; when plaintiff encountered the DOT supervisor he was not at the entrance of the transverse to repair potholes and that repair work was to take place later.[370]

Judge Manzenet-Daniels wrote the dissenting opinion, arguing that the majority's view is too narrowly focused on the DOT supervisor's actions in waving plaintiff and her companion through the entrance to the transverse, rather than on the road-repair activity his crew had been dispatched to perform in the first place; activity "which clearly falls along the continuum of proprietary function."[371]

Relying on *Balsam* and *Miller*,[372] the dissent argues that it is "well settled that the City may be held liable for negligence of the exercise of its *proprietary duty to keep the roads and highways under its control in a reasonably safe condition*."[373] In this case, the decision to allow plaintiff to proceed along the transverse cannot be viewed separately from the City's proprietary function in maintaining the roadway.[374] The work by the DOT supervisor of barricading an entrance to the transverse was integral to the overall assignment of repairing hazardous roadway conditions.[375]

E. Police Department Policies Designed to Address Situations of Domestic Violence Involving an Officer Create Special Duty to Victims of Domestic Violence Perpetrated by Police Officers in the Department

The case of *Pearce v. Labella*,[376] in the Northern District of New

368. *Id.* (quoting Balsam v. Delma Eng'g Corp., 90 N.Y.2d 966, 968, 688 N.E.2d 487, 489, 665 N.Y.S.2d 613, 615 (1997)).

369. *Id.*

370. *Wittorf*, 104 A.D.3d at 586-87, 961 N.Y.S.2d at 435 (citations omitted).

371. *Id.* at 589, 961 N.Y.S.2d at 437 (Manzenet-Daniels, J., dissenting).

372. 90 N.Y.2d 966, 688 N.E.2d 487, 665 N.Y.S.2d 613 (1997); 62 N.Y.2d 506, 467 N.E.2d 493, 478 N.Y.S.2d 829 (1984).

373. *Wittorf*, 104 A.D.3d at 588, 961 N.Y.S.2d at 436 (Manzenet-Daniels, J., dissenting) (emphasis added); *see Balsam*, 90 N.Y.2d at 967, 688 N.E.2d at 488, 665 N.Y.S.2d at 614.

374. *Id.* at 589, 961 N.Y.S.2d at 437.

375. *Id.*

376. No. 6: 10-CV-1569, 2013 U.S. Dist. LEXIS 134689 (N.D.N.Y. Sept. 20, 2013).

York, addresses the issue of whether liability extends to a police department following a murder-suicide involving one of its officers and his estranged wife.[377]

On the evening of September 28, 2009, Joseph Longo ("Longo"), an officer with the Utica Police Department, stabbed and killed his estranged wife, Kristin Longo ("Kristin"), and then stabbed and killed himself.[378] The events leading up to this fateful evening give rise to a claim by Kristin's estate that alleges violations of Kristin's constitutional rights and common-law negligence against members of the Utica Police Department (UPD), the City of Utica, and the UPD.[379]

As brief background, Kristin and Longo were married in the early 1990s and had four children together.[380] Issues with the marriage pervaded, and then intensified in May and June of 2009, when it was discovered that Longo was having an extramarital affair with a fellow UPD officer.[381]

Between mid-July 2009 and late-September 2009, Longo became more violent, erratic, and threatening toward Kristin.[382] With each episode, either Kristin or a member of her family contacted the UPD to report the incident to Longo's supervisors and seek intervention to protect Kristin and her family.[383]

On July 19, 2009, Kristin contacted Longo's supervisors to report that Longo had become enraged and pushed Kristin and/or her eight-year-old son to the ground.[384] Kristin reportedly told her matrimonial attorney, handling her divorce from Longo, and her father that the UPD discouraged her from seeking an order of protection because it could affect Longo's employment; and therefore, the family finances.[385]

Also in July 2009, an investigation was opened by the UPD into multiple reports that Longo had displayed his service weapon in an aggressive manner and had pointed it at others while on duty as a part-time security guard at Proctor High School.[386] On August 13, 2009, Longo was suspended from working as security guard pending the

377. *Id.* at *1.
378. *Id.* at *13-14.
379. *Id.* at *1-14.
380. *Id.* at *4.
381. Pearce v. Labella, 2013 U.S. Dist. LEXIS 134689, at *4 (N.D.N.Y. 2013).
382. *Pearce*, 2013 U.S. Dist. LEXIS 134689, at *5, *7-12.
383. *Id.* at *5, *7-9.
384. *Id.* at *5.
385. *Id.*
386. *Id.* at *5-6.

results of the school investigation.[387]

On both August 14, and September 14, Longo reportedly appeared at the marital home, where Kristin had been living without Longo since he moved out in July 2009, becoming emotional, crying, and threatening to "go postal," and to kill himself.[388] On both occasions, Kristin reported the incidents to Longo's direct supervisor and other supervisors at the UPD.[389]

A few days after the September 14 incident, Longo appeared at the UPD station "yelling and screaming" about recently being put on desk duty and having his firearms revoked.[390]

On September 24, an Order to Show Cause was filed on Kristin's behalf in Supreme Court, Oneida County, directing Longo to appear in court on September 28.[391] Plaintiffs allege that Kristin notified the UPD on September 18 and 25, that papers regarding the divorce proceeding were being served on Longo and that this might prompt a violent reaction.[392]

On September 28, Kristin and Longo appeared in court to begin divorce proceedings.[393] At the proceeding, Kristin was awarded exclusive possession of the marital home and temporary physical custody of the children.[394] After the appearance, Longo's request to have the rest of the day off was granted.[395] At approximately 3:15 p.m. that afternoon, Longo went to the marital home, where he fatally stabbed Kristin and then himself.[396]

Plaintiffs bring this case alleging substantive due process violations by defendants, as well as theories of *Monell* liability and common-law negligence.[397]

Regarding the *Monell* claim, the court articulated that in order to hold the City of Utica liable under § 1983,[398] "plaintiffs must prove that the constitutional violation was caused by (1) a municipal policy; (2) a municipal custom or practice; or (3) the decision of a municipal

387. *Pearce*, 2013 U.S. Dist. LEXIS 134689, at *7.
388. *Id.* at *7-8, *11-12.
389. *Id.* at *7-8, *11-12.
390. *Id.* at *12.
391. *Id.* at *13.
392. *Pearce*, 2013 U.S. Dist. LEXIS 134689, at *13.
393. *Id.* at *13-14.
394. *Id.* at *14.
395. *Id.*
396. *Id.*
397. *Pearce*, 2013 U.S. Dist. LEXIS 134689, at *1-3, *18, *26, *33.
398. *Id.* at *27.

policymaker."[399] Courts find a municipality has a policy or custom that causes a constitutional violation when the municipality is "faced with a pattern of misconduct and does nothing, compelling the conclusion that [it] has acquiesced in or tacitly authorized its subordinates' unlawful actions."[400] The failure to adequately train city employees also can be a basis for municipal liability.[401]

In this case, the court held there was sufficient evidence in the record to create issues of material fact regarding the City's *Monell* liability. "Indeed, proper supervision and adherence to UPD policy would have at the very least triggered a full investigation into each domestic incident Kristin reported."[402] More startling is the fact that "Kristin reportedly told several people that a supervisor at the UPD actually discouraged her from making a formal complaint and seeking an order of protection."[403] Plaintiffs also "correctly point out that the UPD policies in place in 2009 did not require 'fitness for duty' evaluations, did not outline adequate preventative measures for identified trouble employees, and did not contain specific guidelines regarding whether an officer should be involuntarily committed to a mental health facility pursuant to New York Mental Hygiene Law section 9.41."[404]

Regarding Plaintiffs' negligence claim, Defendants argued that "they did not owe a 'special duty' to Kristin."[405] Relying on settled law, the Court recognized that a special duty arises when a municipality "(1) violates a statutory duty enacted for the benefit of a particular class of persons; (2) voluntarily assumes a duty that generates justifiable reliance by the person who benefits from the duty; or (3) assumes positive direction and control in the face of a known, blatant and dangerous safety violation."[406]

To satisfy the second factor, the following must exist:

> (1) an assumption by a municipality, through promises or actions, of an affirmative duty to act on behalf of the injured party; (2) knowledge on the part of a municipality's agents that inaction could lead to harm; (3) some form of direct contact between the

399. *Id.*

400. *Id.* at *27 (quoting Reynolds v. Giuliani, 506 F.3d 183, 192 (2d Cir. 2007)).

401. *Id.*

402. *Pearce*, 2013 U.S. Dist. LEXIS 134689, at *29.

403. *Id.*

404. *Id.* at *29.

405. *Id.* at *33.

406. *Id.* at *33-34 (quoting Pelaez v. Seide, 2 N.Y.3d 186, 199-200, 810 N.E.2d 393, 400, 778 N.Y.S.2d 111, 118 (2004)) (internal quotation marks omitted).

> municipality's agents and the injured party; and (4) that party's justifiable reliance on the municipality's affirmative undertaking.[407]

Plaintiffs argued that, based on representations Longo's supervisors made to Kristin, she was owed a special duty under the second and third factors.[408] "It is undisputed that high-ranking members of the UPD knew about the concerns Kristin voiced and the incidents involving Longo's part-time employment" at the local high school.[409] Additionally, the UPD policy regarding officer-involved domestic incidents specifically addressed how to properly respond to alleged incidents of domestic violence involving UPD officers.[410] "As the wife of a UPD officer, Kristin was clearly part of the class of persons this policy was designed to benefit—victims of domestic violence by UPD officers."[411] Based on these facts and circumstances, the Court held that "[a] reasonable juror could conclude that Kristin justifiably relied on [D]efendants' representations that they would address the matter with Longo and that they possessed the authority to do so."[412]

The negligence claim, therefore, survived to the next inquiry of whether the acts of the municipality were discretionary or ministerial.[413] On this issue, the Court concluded that "[a] reasonable jury could find that following the UPD's clear policy mandating an internal investigation into all reports of domestic incidents involving UPD officers is a ministerial function."[414] Nothing in the policy's language that suggested its enforcement was discretionary as to whether an investigation should begin.[415] The policy used phrases such as "shall" and "will," and "[D]efendants were required to initiate a full internal domestic violence investigation which . . . should have been routine procedure."[416]

Defendants failed to commence an investigation.[417] Viewing these facts in light most favorable to the plaintiffs, Defendants' motion for

407. *Pearce*, 2013 U.S. Dist. LEXIS 134689, at *34 (quoting *Pelaez,* 2 N.Y.3d at 202, 810 N.E.2d at 401, 778 N.Y.S.2d at 119).

408. *Id.*

409. *Id.* at *34-35.

410. *Id.* at *35.

411. *Id.* (footnote omitted).

412. *Pearce*, 2013 U.S. Dist. LEXIS 134689, at *37-38.

413. *See id.* at *38.

414. *Id.* at *39.

415. *Id.*

416. *Id.*

417. *Pearce*, 2013 U.S. Dist. LEXIS 134689, at *39.

summary judgment dismissing these claims was denied.[418]

F. New York's Civil Service Law Section 71 Mandates Reinstatement of Town Employee, Previously Terminated Due to Work-Related Injury, Once the County Civil Service Department, and Not the Town, Has Certified the Employee Fit for Work.

The *Matter of Lazzari v. Town of Eastchester* arose from an injury Lazzari sustained to his neck, back, and both arms in October 2006 while performing duties related to his employment with the Town of Eastchester ("the Town"), in Westchester County ("the County"), New York.[419]

Throughout Lazzari's absence from work, he was periodically examined by the Town's physician at the Town's request and repeatedly told that he was "not fit to perform the responsibilities of an assistant building inspector and it is unlikely that any dramatic change will allow him to return to this occupation in the near or distant future."[420] Effective November 16, 2007, Lazzari was informed by the Town Comptroller that, based on recent medical reports and pursuant to New York Civil Service Law section 71,[421] his employment with the Town would be terminated.[422]

Shortly after receiving the Town's letter, Lazzari sought to have his medical condition evaluated by the County's Department of Human Rights ("DHR"), which arranged for Lazzari to meet with a physician in order to obtain an independent determination as to whether he was medically able to perform his job duties.[423] On December 18, 2007, the DHR notified the Town that it had completed Lazzari's section 71 application, concluding with an independent medical determination that Lazzari was "able to perform is job duties" and that he should be immediately reinstated.[424]

In light of the conflicting medical opinions among the Town and County, the Town responded to the DHR by requesting a copy of the medical report;[425] but the County declined, indicating that it would not

418. *Id.* at *40

419. Lazzari v. Town of Eastchester, 20 N.Y.3d 214, 219, 981 N.E.2d 777, 778, 958 N.Y.S.2d 76, 78 (2012).

420. *Id.*

421. N.Y. CIV. SERV. LAW § 71 (McKinney 2014).

422. *Lazzari*, 20 N.Y.3d at 219, 981 N.E.2d at 778, 958 N.Y.S.2d at 77.

423. *Id.*

424. *Id.* at 220, 981 N.E.2d at 778, 958 N.Y.S.2d at 77.

425. *Id.* at 220, 981 N.E.2d at 778-779, 958 N.Y.S.2d at 77-78.

provide a copy of the requested report.[426]

The Town, again, wrote to the DHR asserting that the Town was entitled to the medical report.[427] The County Attorney responded that nothing in Civil Service Law section 71 required the County to disclose the medical report; but notably, the language of section 71 clearly mandated that the Town immediately reinstate Lazarri.[428]

Following this back-and-forth, the Town simply did nothing, declining to reinstate Lazzari, failing to bring a Freedom of Information[429] ("FOIL") request, and never commencing an Article 78 proceeding.[430] Instead, Lazzari commenced an Article 78 proceeding seeking to compel the Town to comply with section 71.[431] In August 2008, the supreme court granted Lazzari's petition and ordered the Town reinstate him to his position.[432]

The Town appealed and, through a procedural matter, the case was remitted back to the supreme court, where the Town sought discovery of the County's medical report on Lazzari.[433] The supreme court denied the Town's motion to compel discovery, explaining that the Civil Service Law section 71 "does not provide for a challenge to the determination of the medical officer selected by the civil service commission or department and the only available remedy was for the Town to institute its own [A]rticle 78 proceeding against the [County]. . . ."[434] The Town, again, appealed this decision.[435]

The appellate division affirmed the decision by the lower court,[436] and the Court of Appeals also affirmed, relying on the plain language of the statute.[437] Because the statute clearly states, "The employee '*shall be reinstated*' if 'such medical officer *shall certify* that such person is physically and mentally fit to perform the duties' of the job."[438]

At the Court of Appeals, the Town argued that the medical

426. *Id.* at 220, 981 N.E.2d at 779, 958 N.Y.S.2d at 78.

427. *Lazzari*, 20 N.Y.3d at 220, 981 N.E.2d at 779, 958 N.Y.S.2d at 78.

428. *Id.*

429. N.Y. PUB. OFF. LAW § 87 (McKinney 2013).

430. *Lazzari*, 20 N.Y.3d at 220, 981 N.E.2d at 779, 958 N.Y.S.2d at 78.

431. *Id.*

432. *Id.* at 220-221, 981 N.E.2d at 779, 958 N.Y.S.2d at 78.

433. *Id.* at 221, 981 N.E.2d at 779, 958 N.Y.S.2d at 78.

434. *Id.*

435. *Lazzari*, 20 N.Y.3d at 221, 981 N.E.2d at 779, 958 N.Y.S.2d at 78.

436. *Id.*

437. *Id.* at 221, 981 N.E.2d at 780, 958 N.Y.S.2d at 79; *see* N.Y. CIV. SERV. LAW § 71.

438. *Id.* at 221-22, 981 N.E.2d at 780, 958 N.Y.S.2d at 79 (emphasis added); *see* N.Y. CIV. SERV. LAW § 71.

certification of fitness can only come from the examining physician and a mere statement by a non-doctor advising the municipal employer that the disabled employee has been found medically fit does not satisfy Civil Service Law section 71.[439] Rejecting this, the Court determined that the letter from the County Civil Service Commission informing the town that a medical officer has "certified" Lazzari fit to return to work, was sufficient under section 71.[440]

Relying on the legislative purpose and intent of Civil Service Law section 71, the Court also noted that the statute's purpose was to "involve a neutral agency and a physician, independent of both employee and employer, with appropriate oversight."[441] In drafting section 71, the legislature never articulated that a written medical certification becomes "admissible evidence" at a hearing. Instead, the legislature clearly intended for the determination by the County to be final.[442] In addition to ordering the reinstatement of Mr. Lazzari, the Court ordered also awarded him back pay under Civil Service Law section 77.[443]

Judge Pigott drafted the dissenting opinion, arguing that he is uncomfortable with an interpretation of the statute that requires the employer to blindly reinstate the employee without first receiving a certification from a medical officer that the employee is fit for duty.[444] Such an interpretation, he felt, would lead to more litigation.[445] In Judge Pigott's view, "the only rational interpretation of section 71 requires submission of the certification to the Town by the County as a condition precedent to the Town's reinstatement of Mr. Lazzari."[446] Moreover, Judge Pigott felt the majority's interpretation placed the employee's interest in continued employment before that of the State's substantial interest in an efficient civil service by ordering the employee's reinstatement without submission of any proof of the employee's fitness to serve.[447]

439. *Id.* at 222, 981 N.E.2d at 780, 958 N.Y.S.2d at 79.
440. *Lazzari*, 20 N.Y.3d at 222, 981 N.E.2d at 780, 958 N.Y.S.2d at 79.
441. *Id.* at 222, 981 N.E.2d at 780, 958 N.Y.S.2d at 79.
442. *Id.* at 223, 981 N.E.2d at 781, 958 N.Y.S.2d at 80.
443. *Id.* at 222, 981 N.E.2d at 780, 958 N.Y.S.2d at 79.
444. *Id.* at 225, 981 N.E.2d at 782, 958 N.Y.S.2d at 81.
445. *Lazzari*, 20 N.Y.2d at *225,* 981 N.E.2d at 783, 958 N.Y.S.2d at 82.
446. *Id.* at 226, 981 N.E.2d at 783, 958 N.Y.S.2d at 82.
447. *Id.*

IV. PREMISES LIABILITY

A. Evidence that Dog Had History of Running Around Yard While Barking Was Not Sufficient to Establish Dog Had Propensity for Running in Road

In *Buicko v. Neto*,[448] the Third Department extended the Court of Appeals holding from last year's *Survey* case of *Smith v. Reilly*[449] which held that where the plaintiff "had no knowledge of the dog's alleged propensity to interfere with traffic, the fact that the dog, on three to five occasions, escaped defendant's control and ran toward the road is insufficient to establish a triable issue of material fact."[450]

In this case, the plaintiff rode her bicycle past defendant's residence and noticed the defendant's dog, Dudley, running back and forth along the boundary of defendant's property while barking.[451] The plaintiff then turned around and rode, again, past defendant's property at which time Dudley ran from the property and into the road in front of plaintiff's bicycle, causing plaintiff to inadvertently strike Dudley and fall off her bicycle.[452]

Plaintiff commenced a personal injury action against the defendant alleging both negligence and strict liability.[453] Plaintiff's negligence claim was dismissed as a matter of law because it is well settled that "the sole viable claim against the owner of a dog that causes injury is one for strict liability."[454] To establish strict liability "there must be evidence that the animal's owner had notice of its vicious propensities," which also include "the propensity to do any act the might endanger the safety of the persons and property of others in a given situation."[455] Indeed, "a dog's habit of chasing vehicles or otherwise interfering with traffic could be a vicious propensity," however "a history of barking and running around is insufficient, by itself, to establish a vicious propensity" because such actions are consistent with normal canine

448. Buicko v. Neto, 112 A.D.3d 1046, 976 N.Y.S.2d 610 (3d Dep't 2013).

449. *Id.* at 1046, 976 N.Y.S.2d at 611; Smith v. Reilly, 17 N.Y.3d 895, 957 N.E.2d 1149, 933 N.Y.S.2d 645 (2011).

450. *Smith,* 17 N.Y.3d at 897, 957 N.E.2d at 1149, 933 N.Y.S.2d at 646.

451. *Buicko*, 112 A.D.3d at 1046, 976 N.Y.S2d at 611.

452. *Id.*

453. *Id.*

454. *Id.*; *see also* Bard v. Jahnke, 6 N.Y.3d 592, 596-97, 848 N.E.2d 463, 466, 815 N.Y.S.2d 16, 19 (2006)).

455. *Buicko*, 112 A.D.3d at 1046, 976 N.Y.S2d at 611 (quoting Collier v. Zambito, 1 N.Y.3d 444, 446, 807 N.E.2d 254, 256, 775 N.Y.S.2d 205, 207 (2004)).

behavior.[456]

In this case, the appellate division held that plaintiff's evidence that Dudley barked at passing traffic and ran back and forth in the yard was insufficient to raise a question of fact as to whether he had a propensity to run into the road or interfere with traffic.[457]

B. Determination of Horse's Behavior as "No Vicious Propensity" vs. "Vicious Propensity" May Be Found as a Matter of Law or Reserved for the Trier of Fact

In *Bloomer v. Shauger,* the Court of Appeals revisited the issue of vicious propensities in domestic animals.[458] Here, plaintiff's hand was injured while holding the halter of defendant's horse.[459]

To recover under a theory of strict liability against the defendant, plaintiff has the burden to prove that the defendant had knowledge of the animal's "vicious propensity to do any act that might endanger the safety of the persons and property of others."[460] The Court of Appeals recognized that "behavior that is normal or typical for the particular type of animal in question" does not constitute a vicious propensity.[461]

In this case, the Court upheld the decision of the Third Department which found that a "tendency to shy away when a person reaches for a horse's throat or face" is a trait "typical of horses" and therefore, the plaintiff failed to meet his burden.[462]

In *Carey v. Schwab*,[463] the Third Department again addressed a vicious propensity case involving domestic animals.[464] In *Carey*, the plaintiff was injured when he tried to assist in corralling a horse named "Whiskey" who had escaped from the defendant's pen.[465] The Third Department again recognized that while the plaintiff has the burden of showing that an animal has a "vicious propensity" to "do any act that might endanger the safety of the persons and property of others in a given situation," strict liability will not extend to the defendant where

456. *Id.* (quoting *Collier*, 1 N.Y.3d at 447, 807 N.E.2d at 256, 775 N.Y.S.2d at 207).

457. *Id.*

458. 21 N.Y.3d 917, 989 N.E.2d 560, 967 N.Y.S.2d 322 (2013).

459. *Id.* at 918, 989 N.E.2d at 560, 967 N.Y.S.2d at 322.

460. *Id.* (quoting Bard v. Jahnke, 6 N.Y.3d 592, 597-598, 848 N.E.2d 463, 466-467, 815 N.Y.S.2d 16, 19-20 (2006)).

461. *Id.*

462. *Id.*

463. 108 A.D.3d 976, 969 N.Y.S.2d 619 (3d Dep't 2011).

464. *Carey*, 108 A.D.3d 976, 976, 969 N.Y.S.2d 619, 619 (3d Dep't 2011).

465. *Id.* at 976, 969 N.Y.S.2d at 620-21.

the animal's activity is "normal or typical equine behavior."[466]

Plaintiff's witness in *Carey* testified that he once saw one of defendant's horses "giving defendant a hard time getting on and off," that the horse "was often dancing and circling around," and that the horse was "always throwing his head in the air."[467] The Third Department viewed these facts in a light most favorable to the plaintiff, and declined to find as a matter of law that the horse was exhibiting normal equine behavior, and ultimately found that a triable issue of fact existed as to whether the horse observed by plaintiff's witness was, in fact, Whiskey, and whether the defendant had prior knowledge of Whiskey's propensities.[468]

C. Landowner or the Owner of an Animal May Be Liable Under Ordinary Tort-Law Principles When a Farm Animal Is Negligently Allowed to Stray from the Property on Which the Animal Is Kept.

In *Hastings v. Sauve*,[469] plaintiff was injured when the van she was driving hit a cow on a public road.[470] The cow had been kept on the property owned by defendant, Laurie Sauve, and was owned by either co-defendant[471], Albert Willams or William Delarm. Plaintiff's claim is based, in part, on evidence that the fence separating Sauve's property from the road was overgrown and in bad repair.[472]

The lower court granted the summary judgment motions of the defendants, dismissing plaintiff's claim.[473] The appellate division affirmed the dismissal, citing *Bard v. Jahnke*,[474] for the proposition that "injuries inflicted by domestic animals may *only* proceed under strict liability based on the owner's knowledge of the animal's vicious propensities, not on theories of common-law negligence."[475] The appellate division expressed its "discomfort" with this result, and

466. *Id.* at 977, 969 N.Y.S.2d at 621 (quoting Collier v. Zambito, 1 N.Y.3d 444, 446, 807 N.E.2d 254, 256, 775 N.Y.S.2d 205, 207 (2004)); *id.* at 977, 969 N.Y.S.2d at 621-22 (citing Bloomer v. Shauger, 94 A.D.3d 1273, 1275, 942 N.Y.S.2d 277, 279 (3d Dep't 2013); Bloom v. Van Lenten, 106 A.D.3d 1319, 1320, 965 N.Y.S.2d 660, 661 (3d Dep't 2013); Hamlin v. Sullivan, 93 A.D.3d 1013, 1014, 939 N.Y.S.2d 770, 771 (3d Dep't 2012)).

467. *Carey*, 108 A.D.3d at 978, 969 N.Y.S.2d at 622.

468. *Carey*, 108 A.D.3d at 978, 969 N.Y.S.2d at 622-23.

469. 21 N.Y.3d 122, 989 N.E.2d 940, 967 N.Y.S.2d 658 (2013).

470. *Id.* at 124, 989 N.E.2d at 941, 967 N.Y.S.2d at 659.

471. *Id.*

472. *Id.*

473. *Id.*

474. 6 N.Y.3d 592, 848 N.E.2d 463, 815 N.Y.S.2d 16 (2006).

475. Hastings v. Sauve, 94 A.D.3d 1171, 1172 , 941 N.Y.S.2d 774, 776 (3d Dep't 2012) (citing *Bard*, 6 N.Y.3d at 598, 848 N.E.2d at 467-468, 815 N.Y.S.2d at 21).

granted plaintiff leave to appeal.[476]

In its decision, the Court of Appeals recognized that in *Bard,* the plaintiff's claim was dismissed because she could not show that defendants had knowledge of a bull's "vicious propensities" before she was attacked.[477] Here, the claim is "fundamentally distinct" from *Bard* and its related line of vicious propensity cases because it involves a farm animal that was permitted to wander off the property where it was kept through the negligence of the owner of the property and the owner of the animal.[478] Therefore, to apply the rule in *Bard* would immunize defendants who take little or no care to keep their livestock out of the roadway or off of other people's property.[479]

To eliminate this injustice, the court held that a landowner or the owner of an animal may be liable under ordinary tort-law principles when a farm animal (as defined by section 108(7) of the Agricultural and Markets Law) is negligently allowed to stray from the property on which the animal is kept.[480] The court expressly stated that it was not considering whether the same rule would apply to dogs, cats, or other household pets.[481]

V. TORT DAMAGES

A. Scope, Burdens, Procedures, and Prescribed Benefits of Workers' Compensation Board Hearing and Negligence Action in Supreme Court Were Qualitatively and Quantitatively Distinct so as to Deny Collateral Estoppel's Preclusive Effect on Issue of Plaintiff's Ongoing Injury in Negligence Action

In the case of *Auqui v. Seven Thirty One Ltd. Partnership*,[482] the Court of Appeals dealt with the issue of "whether the determination of the Workers Compensation Board, finding that plaintiff had no further causally-related disability and no further need for treatment, was entitled to collateral estoppel effect in plaintiff's personal injury action" sounding in common-law negligence.[483]

476. *Id.* at 1173, 941 N.Y.S.2d at 776.

477. Hastings v. Suave, 21 N.Y.3d 122, 126, 989 N.E.2d 940, 941, 967 N.Y.S.2d 658, 659 (citing *Bard*, 6 N.Y.3d at 597-98, 848 N.E.2d at 467-68, 815 N.Y.S.2d at 19-20).

478. *Id.*

479. *Id.* (citing *Bard*, 6 N.Y.3d at 597-598, 848 N.E.2d at 467-468, 815 N.Y.S.2d at 19-20).

480. *Id.* at 125-26, 989 N.E.2d at 942, 967 N.Y.S.2d at 660.

481. *Id.* at 126, 989 N.E.2d at 942, 967 N.Y.S.2d at 660.

482. 22 N.Y.3d 246, 3 N.E.3d 682, 980 N.Y.S.2d 345 (2013).

483. *Id.* at 253-54, 3 N.E.3d at 684, 980 N.Y.S.2d at 347.

On December 24, 2003, plaintiff was injured during the course of his employment as a food delivery person when he was struck in the head by a sheet of plywood that fell to the sidewalk from a nearby building under construction.[484] "[P]laintiff began receiving workers' compensation benefits for the injuries to his head, neck and back, as well as for post-traumatic stress disorder and depression."[485]

In December 25, 2005, the workers' compensation carrier for plaintiff's employer moved to discontinue workers' compensation benefits at a hearing before the administrative law judge ("ALJ").[486] At the hearing, each side introduced expert medical testimony, subject to cross-examination, and the ALJ ultimately found that plaintiff had "no further causally-related disability since January 24, 2006."[487] An administrative review, sought by plaintiff, affirmed the finding that plaintiff had no causally-related disability and found he had no further need for treatment.[488]

In plaintiff's negligence action, defendants moved for an order estopping plaintiff from "relitigating" the issue of causally-related disability beyond January 24, 2006, arguing that the matter had finally determined by the Workers' Compensation Board.[489] The supreme court agreed, finding that the plaintiff had a "full and fair opportunity to address the issue before the Board and that he was precluded from further litigating that issue."[490]

Plaintiff appealed, and the appellate division reversed the lower court's finding on the grounds that the determination by the Workers' Compensation Board was one of "ultimate fact," and thus did not preclude plaintiff from litigating the issue of his ongoing disability.[491] Defendants appealed as of right.[492]

In affirming the appellate division's holding, the Court of Appeals acknowledged settled law that

> quasi-judicial determinations of administrative agencies are entitled to collateral estoppel effect where the issue a party seeks to preclude in a subsequent civil action is identical to a material issue that was necessarily decided by the administrative tribunal and where there was

484. *Id*. at 254, 3 N.E.3d at 684, 980 N.Y.S.2d at 347.
485. *Id*.
486. *Id*.
487. *Auqui*, 22 N.Y.3d at 254, 3 N.E.3d at 684, 980 N.Y.S.2d at 347.
488. *Id*.
489. *Id.*
490. *Id*.
491. *Id*. at 254-55, 3 N.E.3d at 684, 980 N.Y.S.2d at 347.
492. *Auqui*, 22 N.Y.3d at 255, 3 N.E.3d at 684, 980 N.Y.S.2d at 347.

a full and fair opportunity to litigate before that tribunal.[493]

At the same time, the court also recognized the fundamental differences in the proceedings of a workers' compensation claim before the Workers' Compensation Board and a negligence claim before the supreme court.[494] The court explained that the "Workers' Compensation Law 'is the State's most general and comprehensive social program, enacted to provide all injured employees with some scheduled compensation and medical expenses, regardless of fault for ordinary and unqualified employment duties.'"[495] Furthermore, the Board uses the term "disability" in order to make quantitative classifications according to degree (total or partial) and duration (temporary or permanent) of an employee's injury.[496]

In contrast, negligence actions are much broader in scope, intending to make an injured party whole for the enduring consequences of his or her injury; including, as relevant here, lost income and future medical expenses.[497] The negligence action necessarily focuses on the larger impact of the injury over the course of plaintiff's lifetime.[498]

Other distinctions appear out of the fact that Worker's Compensation Benefits are intended to be dispensed regardless of fault, and the burdens, procedures, and prescribed benefits are significantly distinct among both venues.[499]

Therefore, "[g]iven the realities of these distinct proceedings, the finder of fact in a third-party negligence action, in its attempt to ascertain the extent of plaintiff's total damages, should not be bound by the narrow findings of the [Workers' Compensation] Board regarding the duration of plaintiff's injury or his need for further medical care."[500]

VI. PRODUCT LIABILITY

A. Affidavit by Employee that Sale of Suspect Product Occurred Only Once Failed to Raise Triable Issue of Fact on Issue of Whether

493. *Id*. (citing Jeffreys v. Griffin, 1 N.Y.3d 34, 39, 801 N.E.2d 404, 407, 769 N.Y.S.2d 184, 187 (2003)).

494. *Id.* at 255, 3 N.E.3d at 685, 980 N.Y.S 2d at 348.

495. *Id*. at 256, 3 N.E.3d at 685, 980 N.Y.S 2d at 348 (quoting Balcerak v. Cnty. of Nassau, 94 N.Y.2d 253, 259, 723 N.E.2d 555, 558, 701 N.Y.S.2d 700, 703 (2009)).

496. *Id*. at 256, 3 N.E.3d at 685-86, 980 N.Y.S.2d at 348-49.

497. *Auqui*, 22 N.Y.3d at 256, 3 N.E.3d at 686, 980 N.Y.S.2d at 349.

498. *Id*.

499. *Id.*

500. *Id*. at 257, 3 N.E.3d at 686-87, 980 N.Y.S.2d at 349-50.

Defendant Was a Casual Seller

Plaintiff in this action was seriously injured while using a radial drill press she had purchased from defendant Tuthill Energy Systems, Inc.[501] Tuthill filed a motion for summary judgment, arguing that when it sold the drill press, it was acting as a casual seller.[502] As a result, defendant argued, it did not owe a duty to the plaintiff, and did not have a duty to warn and cannot be found liable under principles of strict liability.[503] The court dismissed the plaintiff's complaint as against Tuthill, based on the fact that Tuthill was at best a casual seller and not a company that regularly sells products of the type and kind that were sold to plaintiff.[504]

In support of its claims that it was just a casual seller, Tuthill submitted the affidavit of its employee which stated, to his knowledge, "the 2005 sale of the Fosdick radial drill to Dresser-Reed was the only time that Tuthill sold a Fosdick radial drill."[505] This affidavit was submitted originally in support of Tuthill's previous motion for summary judgment.[506] The court denied the motion without prejudice and the right to renew, finding that discovery was not advanced enough to determine whether there may have been more information that existed outside the employee's knowledge, and that raised a question as to what investigation was performed to determine the information contained in the employee's affidavit.[507]

After the close of discovery, Tuthill renewed its motion for summary judgment,[508] and the court held that the plaintiff failed to raise a triable issue of fact with regard to whether the defendant was a casual seller, and therefore, granted the defendant's motion.[509]

501. Benjamin v. Fosdick Machine Tool Co., No. 11-CV-571, 2013 U.S. Dist. LEXIS 100744, at *1 (W.D.N.Y. July 18, 2013).

502. *Id.*

503. *Id*. at *1-2.

504. *Id*. at *2-3.

505. Benjamin v. Fosdick Mach. Tool Co., No. 11-CV-00571, 2012 U.S. Dist. LEXIS 148829, at *4 (W.D.N.Y. Sept. 27, 2012).

506. *Id.*

507. *Id*. at *12-13.

508. Benjamin v. Fosdick Mach. Tool Co., No. 11-CV-00571, 2013 U.S. Dist. LEXIS 101417, at *2 (W.D.N.Y. May 10, 2013).

509. *Id.* at *8.

B. Plaintiff's Failure to Properly Identify Serial Number and Manufacture Date of Subject Product Lead to Suit Against Wrong Defendants and the Expiration of the Three-Year Statute of Limitations

Plaintiff brought actions against several defendants as a result of an incident where plaintiff had multiple fingers sliced by a saw.[510] Plaintiff thought that they knew the model number and approximate date of manufacture, but it turned out to be a different date, and eventually a different manufacturer.[511] As a result, the defendants that plaintiff brought into the action were the wrong defendants, not the proper parties, and the defendant was entitled to dismissal of the action.[512]

The manufacturer was Delta International Manufacturing Company (DIMC) an ongoing entity owned by Black & Decker Company.[513] Plaintiff, during the course of litigation, was very lax in going forward in completing discovery, and unfortunately learned this error about the parties only at the time of the motion, which was more than three years after the plaintiff's incident.[514] This case points to the need to be active and aggressive in discovery in a product liability case. It is important to identify the manufacturer early, and the history of the product so as not to miss out on suing the appropriate defendants. In this case, the plaintiff's actions were dismissed pursuant to defendant's Federal Rule of Civil Procedure ("FRCP") 56 motion.[515]

C. New Trial for Plaintiff on Issue of Damages for Pain and Suffering Following Defendant's Rule 50 and 59 Motions

In this products liability claim alleging a failure to warn against the American Tobacco Company and others, plaintiff received a jury verdict in the amount of $1,300,000 for the wrongful death of plaintiff's decedent, $25,000 for pain and suffering, and $20,000 for plaintiff's loss of consortium.[516] American Tobacco Company renewed its previously filed motions for judgment as a matter of law post-trial via a FRCP 50 motion and also sought a new trial pursuant to FRCP 59.[517]

After going through an extensive evaluation of the alleged errors of

510. Arneauld v. Pentair, Inc., No. CV-11-3891, 2012 U.S. Dist. LEXIS 168185, at *2, *4 (E.D.N.Y. Nov. 26, 2012).

511. *Id.* at *3.

512. *Id*. at *1-2.

513. *Id*. at *9.

514. *Id*. at *11-15.

515. *Arneauld*, No. CV-11-3891, 2012 U.S. Dist. LEXIS 168185, at *67-68.

516. Clinton v. Brown & Williamson Holdings, Inc., No. 05-CV-9907, 2013 U.S. Dist. LEXIS 87204, at * 2 (S.D.N.Y. June 20, 2013).

517. *Id.* at *2-3.

the court claimed by the defendant—the judge did not include an open and obvious instruction to the jury, an assumption of risk instruction to the jury, a knowledgeable user instruction to the jury, and other issues[518]—the court denied the motion and confirmed the verdict of $1,300,000 for wrongful death and $20,000 for loss of consortium, but set aside the plaintiff's verdict of $25,000 for pain and suffering and ordered a new trial to be held on the issue of pain and suffering.[519]

1. In the Event New York Recognizes an Independent Cause of Action for Medical Monitoring Then that Claim Will Be Viewed as Accruing When an Effective Monitoring Test, Such as Low Dose C-T Scanning, Becomes/Became Available

Smokers of Marlboro cigarettes for at least twenty years brought this class action against the manufacturer, asserting claims based on allegations that the cigarettes contained unnecessarily dangerous levels of carcinogens when smoked by humans.[520] The U.S. District Court for the Eastern District of New York dismissed the plaintiffs' claims for negligence, strict products liability, breach of warranty, and for medical monitoring with respect to increased risk for cancer, and plaintiffs appealed.[521]

Notably, none of the plaintiffs were diagnosed with lung cancer at the time of the motion before the court, and plaintiffs did not seek compensatory damages but brought an independent equitable claim seeking to require Philip Morris USA to fund a program of medical monitoring for longtime smokers of Marlboro cigarettes who have not been diagnosed with, but are at an increased risk for, lung cancer.[522] The district court dismissed this claim, ruling that the plaintiffs failed to state a claim upon which relief can be granted because they could not sufficiently plead that their injuries—i.e., their increased risk of developing lung cancer from smoking the defendant's product—were proximately caused by the defendant's conduct.[523]

The U.S. Court of Appeals for the Second Circuit held that the plaintiff's negligence and strict liability claims against the manufacturer for injury caused by harmful exposure to toxic substances accrued, for limitations purposes, when the exposure occurred, and did not

518. *Id*. at *7, *15-16.
519. *Id*. at *84.
520. Caronia v. Philip Morris USA, Inc., 715 F.3d 417, 419-21 (2d Cir. 2013).
521. *Id.* at 419-20.
522. *Id.* at 419.
523. *Id.* at 420.

repeatedly accrue with each new inhalation.[524] Further, the accrual of the plaintiffs' negligence and strict liability claims against the defendant for injuries in the form of increased risk for lung cancer occurred prior to the date when the relief they sought—low dose CT scanning of the chest ("LDCT") became available.[525] Additionally, the court found that "the implied warranty [of merchantability] was not breached if the cigarettes were minimally safe when used in the customary, usual, and reasonably foreseeable manner."[526] Finally, the court found that certifying questions to the New York State Court of Appeals was warranted as to availability of an independent equitable claim for medical monitoring of injuries caused by tortious exposure to toxic substances by a plaintiff who has not alleged a physical injury, and the applicable period of any such claim.[527]

Defendant moved to dismiss the independent cause of action for failure to state a claim.[528] Defendant argued that New York would not recognize such a claim.[529] It argued that even if New York would approve of ordering medical monitoring as a remedy, it would do so only as a remedy for an existing tort.[530] The district court rejected these contentions.[531]

However, the court concluded that the plaintiff's medical monitoring claim must be dismissed for failure to plead and prove that the defendant's alleged tortious conduct is the reason why they must now secure a monitoring program that included LDCT scans.[532]

The question whether a plaintiff may maintain an independent cause of action for medical monitoring has not been addressed by the Court of Appeals, and although the matter has been addressed by New York's intermediate appellate courts, the federal courts in New York, and the highest courts of several other states, the treatments have varied.[533]

"In cases such as this one, in which state law controls and the governing principles are uncertain or ambiguous, the courts attempt to predict how the highest court of the state would resolve the uncertainty

524. *Id.* at 431.
525. *Caronia*, 715 F.3d at 431.
526. *Id.* at 434.
527. *Id.* at 450.
528. *Id.* at 425
529. *Id.*
530. *Caronia*, 715 F.3d at 425.
531. *Id.*
532. *Id.* at 426.
533. *Id.* at 434.

or ambiguity."[534]

Where plaintiffs have alleged tortious exposure to toxic substances but have not alleged that they have suffered physical harm, the New York intermediate appellate courts have ruled that the cost of medical monitoring may be awarded as an item of consequential damages.[535] Most of the federal courts sitting in New York have opined that New York would recognize an independent cause of action of medical monitoring.[536] The highest courts of other states have divided as to whether or not the plaintiff may maintain an independent cause of action for medical monitoring.[537] "None of the New York courts has directly addressed the question of whether the State recognizes an independent cause of action for medical monitoring, and the answer to this question, which has the capacity to resolve this litigation, is unclear."[538] "The question is material in the present action because the statute of limitations bars plaintiffs' pursuit of their traditional negligence and strict products liability claims;[539] the principle evinced in cases such as *Askey*, *Allen*, and *Abusio*, that the cost of medical monitoring may be recovered as an element of consequential damages, would be immaterial to claims that are time-barred."[540]

"If, however, New York recognizes an independent cause of action for medical monitoring, and if, as recognized, that claim is viewed as accruing when an effective monitoring test becomes available—and if plaintiffs' allegations as to the availability and effectiveness of LDCT and as to the lack of effectiveness of prior tests are proven—the statute of limitations likely will not have run on that independent cause of action."[541] The court also noted its "uncertainty as to how New York courts would regard claim accrual in the event of further technological advances that may from time to time improve on the effectiveness of existing tests."[542] The court framed "the certified questions as [it has] in order to facilitate the weighing of competing policy considerations, including various gradations of health concerns and the potential for preventive or early-detection measures, in light of the scope of plaintiffs' claims on behalf of a putative class of persons who not only

534. *Id.* at 449
535. *Caronia*, 715 F.3d at 449.
536. *Id.*
537. *Id.*
538. *Id.*
539. *Id.*
540. *Caronia*, 715 F.3d at 449.
541. *Id.*
542. *Id*.

have not been diagnosed with a smoking-related disease but also are not under investigation by a physician for such a suspected disease."[543]

The court concluded that the New York Court of Appeals is better suited to determine whether New York recognizes such a cause of action.[544] Accordingly, the court certified the following questions of New York law:

> 1) Under New York law, may a current or former longtime heavy smoker who has not been diagnosed with a smoking-related disease, and who is not under investigation by a physician for such a suspected disease, pursue an independent equitable cause of action for medical monitoring for such a disease?
>
> 2) If New York recognizes such a cause of action for medical monitoring,
>
> a. What are the elements of the cause of action?
>
> b. What is the applicable statute of limitation and when does that cause of action accrue?[545]

2. Discovery, and Not Diagnosis, of a Physical Condition Controls Actual Time When Cause of Action Accrues in Products Liability Case Where Plaintiff Experienced Pain and Chondrolysis Following Surgery of Shoulder

Plaintiff in this products liability claim underwent surgery on his shoulder, during which the surgeon implanted a catheter pain pump manufactured by Stryker to continuously infuse anesthetic into the surgical site.[546] After the wound healed and the catheter was removed, a new and persistent kind of pain developed.[547] Over the next few years, plaintiff sought treatment for this new condition from a number of doctors.[548] Almost six years after his initial surgery, plaintiff brought suit against Stryker, alleging that he had found an advertisement from a lawyer's office suggesting that there was a link between the intra-articular use of the Stryker pain pump catheter and the development of chondrolysis.[549] He later saw an attorney and for the first time found out that he had a new condition related to the pain pump and not just a

543. *Id*.

544. *Id*. at 550.

545. *Caronia*, 715 F.3d at 550.

546. Braunscheidel v. Stryker Corp., No. 3:12-CV-1004, 2013 U.S. Dist. LEXIS 45376, at *3 (N.D.N.Y. Mar. 29, 2013).

547. *Id.*

548. *Id*. at *4.

549. *Id*. at *5.

continuation of the pre-existing shoulder injury.[550] He then went back to a doctor that had previously diagnosed him with arthritis, who then, after a new examination, changed his diagnosis to chondrolysis.[551]

In granting defendant's motion to dismiss, the court determined that the plaintiff's claims were time-barred, relying on *Wetherill v. Eli Lilly & Co.*,[552] to the extent that the term "discovery of the physical condition," not the diagnosis of said condition, controls the actual time when the statute begins to run.[553]

3. Plaintiff's Negligence and Strict Liability Claims Survive Defendants' Summary Judgment Motion Where Court Determined that, Based on the Record, Plaintiff's Claims Could Have Arisen During Three Different Time Frames Following Hip Replacement Surgery and, Therefore, a Question of Fact Existed on the Issue of Statute of Limitations

Plaintiff underwent a left hip replacement surgery on November 9, 2004, during which he received a hip replacement system manufactured by the defendant.[554] From 2004 to 2007, plaintiff experienced discomfort in the left thigh and hip area, only to be reassured by his physician.[555] Finally, he was referred to a knee surgeon who performed a total knee replacement in April, 2008.[556] The left thigh and hip pain persisted after the knee replacement.[557] The hip pain intensified "beyond belief" between April and June 2009.[558] A second physician recommended surgery, and found that the left acetabular cup had loosened and failed causing the intense hip pain.[559]

The plaintiff brought this products liability suit against Stryker.[560] Stryker moved for summary judgment based on the statute of limitations.[561] The court found that, with regard to plaintiff's claims of strict products liability and negligence, the general rule that a plaintiff

550. *Id*.

551. *Braunscheidel*, No. 3:12-CV-1004, 2013 U.S. Dist. LEXIS 45376, at *5.

552. *Id.* at *10 (citing Wetherhill v. Eli Lilly & Co., 89 N.Y.2d 506, 678 N.E.2d 474, 655 N.Y.S.2d 862 (1997)).

553. *Id*. at *10-12.

554. Cerqua v. Stryker Corp., No. 11-Civ.-9208, 2012 U.S. Dist. LEXIS 162833, at *2 (S.D.N.Y. Nov. 9, 2012).

555. *Id.* at *2, *3.

556. *Id*. at *3.

557. *Id*.

558. *Id*.

559. *Cerqua*, No. 11-Civ.-9208, 2012 U.S. Dist. LEXIS 162833, at *4.

560. *Id.* at *1.

561. *Id.* at *2.

has three years from the time of the injury in which to bring an action applied.[562] This three-year period will be tolled "until the earlier of [either] the date of a plaintiff's actual discovery of the 'primary [medical] condition' underlying the suit or the date upon which th[e] plaintiff should have discovered [the] primary condition 'through the exercise of reasonable diligence.'"[563] Citing the well-established principle outlined in *Wetherhill v. Eli Lilly & Co.*,[564] the court noted that the standard was that the plaintiff must be aware of the discovery of the injury, which means the "'discovery of the physical condition and not . . . the more complex concept of [the] discovery of both the condition and the . . . etiology of that condition.'"[565] The court also found that the three-year statute of "'limitations period runs from the date when [the] plaintiff first noticed symptoms, rather than when a physician first diagnosed those symptoms.'"[566]

The court reviewed the affidavits submitted by the parties and determined that "a reasonable jury could find that the 'primary condition' underlying the loose hip replacement device did not occur until 2009," when the plaintiff felt the intense pain.[567] The court also held that "even if the mild pain [the plaintiff] reported [before] 2009 was a symptom of [the] 'primary condition,' there [wa]s no evidence . . . that [the plaintiff] did or should have connected the discomfort to the implant."[568] In looking at the depositions of the parties, the court found that the physician's "assurances that the discomfort in the left hip was part of the normal healing process meant that [the plaintiff] should not have been aware of the 'primary condition' [prior to] the second left hip surgery in 2009."[569]

Thus, based on the record, the court held that a reasonable jury could find that plaintiff did or should have discovered the "primary condition" behind his claim either "after the 2004 surgery, during the period from 2004-2007 when he sought medical advice, after the 2008 knee replacement [surgery] failed to alleviate the hip pain, or in 2009

562. *Id.* at *7-8 (citing N.Y. C.P.L.R. § 214-c(2) (McKinney 2014)).

563. *Id.* at *8 (citing N.Y. C.P.L.R. § 214-c(2)).

564. *Cerqua*, No. 11-Civ.-9208, 2012 U.S. Dist. LEXIS 162833, at *8 (citing Wetherhill v. Eli Lilly & Co., 89 N.Y.2d 506, 678 N.E.2d 474, 655 N.Y.S.2d 862 (1997)).

565. *Id.* (quoting *Wetherhill*, 89 N.Y.2d at 514, 678 N.E.2d at 478, 655 N.Y.S.2d at 866).

566. *Id.* (quoting Galletta v. Stryker Corp., 283 F. Supp. 2d 914, 917 (S.D.N.Y. 2003)).

567. *Id.* at *10.

568. *Id.*

569. *Cerqua*, No. 11-Civ.-9208, 2012 U.S. Dist. LEXIS 162833, at *11-12.

when the pain intensified" and he underwent a second hip surgery.[570] Based on the fact that this was a motion for summary judgment, the court determined that it could not "choose among the competing alternatives" and accordingly held that the "defendants' statute of limitations argument failed with respect to" the negligence and strict products liability claims.[571]

With regard to the breach of warranty claim, the parties agreed that the statute of limitations for breach of warranty had expired inasmuch as the claim accrued at the date on which the product was "sold or placed into the stream of commerce."[572] With regard to the plaintiff's loss of consortium claim, the fact that it was derivative in nature meant that the denial of the defendant's motion for summary judgment on plaintiff's strict products liability and negligence claims precluded a dismissal of the loss of consortium claim.[573]

D. While Direct-to-Consumer Advertising Has Altered the Traditional Patient/Physician Relationship, New York's Learned Intermediary Doctrine Still Applies Because It Is the Physician Who Determines Whether a Drug's Risks Justify Its Use

The plaintiff brought suit against defendant Abbott Laboratories, claiming that the use of the manufacturer's drug Humira to treat psoriasis caused her to develop squamous cell carcinoma of the tongue, leading to multiple operations and ongoing trouble with the cancer.[574] Plaintiff used Humira for six months, after which she was diagnosed with the cancer.[575]

In a decision by District Court Judge Naomi Reice Buchwald, the court found that the scope of the defendant's duty to warn was governed by the New York State Learned Intermediary Doctrine.[576] The plaintiff argued, however, that the Learned Intermediary Doctrine should not govern because of defendant's direct-to-consumer "advertising, and because Dr. Cui[, plaintiff's prescriber,] may have had a direct financial relationship with [the defendant] Abbott."[577] In reviewing the law of New York, the court found that there was no direct-to-consumer

570. *Id.* at *12.

571. *Id.* at *13.

572. *Id.* (citing N.Y. U.C.C. § 2-725(1) (McKinney 2014); Schrader v. Sunnyside Corp., 297 A.D.2d 369, 371, 747 N.Y.S.2d 26, 28 (2d Dep't 2002)).

573. *Id.* at *13-14.

574. DiBartolo v. Abbott Labs., 914 F. Supp. 2d 601, 606 (S.D.N.Y. 2012).

575. *Id.* at 608-09.

576. *Id.* at 606, 611.

577. *Id.* at 613.

exception to the doctrine.[578] The court recognized that direct-to-consumer advertising has altered the traditional patient/physician relationship, but held that the physician is still the "informed intermediary" who decides whether the risks of the drug treatment justify its use.[579] Plaintiff alternately alleged a failure to warn, and the court found that there was a question of fact that existed as to whether the warning labels and package insert adequately set forth the real dangers of the drug.[580]

With regard to the plaintiff's design defect claim, the court noted that the analysis concerning design defect is identical to the failure to warn analysis, with the exception that the plaintiff must allege a feasible design alternative.[581] As a result, the defendant's motion for summary judgment was granted to the extent that the strict products liability design defect claim and the negligent design defect claim were both dismissed, together with the misrepresentation claim and the breach of express warranty claim.[582] The court, however, denied the defendant's motion with regard to the strict products liability failure to warn claim, the negligent failure to warn claim, and the breach of implied warranty.[583]

1. Law of the Case that Jury Could Conclude Motor Vehicle Accident Occurred as a Result of Defendant's Strict Product Liability Did Not Preclude Directed Verdict in Case Against Defendant, Ford Motor Company, Where Plaintiff Failed to Exclude All Other Causes Not Attributable to Ford, Including Evidence that Defendant May Have Been Intoxicated at Time of the Accident

Plaintiff sued the operator of a motor vehicle and Ford Motor Company when she was hit by a Ford vehicle that suddenly backed up, striking the plaintiff.[584] The Appellate Division, First Department, had previously reversed a lower court's grant of summary judgment to Ford Motor Company based on circumstantial evidence that the defendant driver was neither intoxicated nor negligent at the time that the vehicle supposedly lurched backward at a high rate of speed and would not

578. *Id.* at 613-15.
579. *DiBartolo*, 914 F. Supp. 2d at 615-16.
580. *Id.* at 616-20.
581. *Id.* at 621-622.
582. *Id.* at 628.
583. *Id.*
584. Rodriguez v. Ford Motor Co., 106 A.D.3d 525, 525, 965 N.Y.S.2d 451, 453 (1st Dep't 2013).

brake.[585] The court held that the defendant's deposition testimony could lead a jury to conclude that the vehicle did not work as intended and exclude all other causes.[586] At trial, the plaintiff presented additional evidence to the effect that the defendant driver was impaired and that his claim of having only one glass of wine would not account for a BAC of .08.[587] On appeal, the appellate division found that "the law of the case" does not preclude a directed verdict in Ford's case.[588] Plaintiff failed to exclude all other causes not attributable to Ford, and that alone compels the dismissal of the plaintiff's case against Ford.[589] The plaintiff simply failed to exclude all other causes by their own expert toxicologist who proved, in pertinent part, that the defendant driver had consumed more than one glass of wine and fit the legal definition of "impaired."[590]

2. Without a Showing that the Product in Question Was Unreasonably Dangerous as Designed, Plaintiff's Showing that There Were Economically Feasible Alternative Designs Available Is Irrelevant

Plaintiff alleges that she was injured during a flag football game when her finger became entrapped in the D-ring closure of the opposing player's flag belt.[591] "Plaintiff commenced this action in Supreme Court, Kings County, against the manufacturer and distributor of the flag belt, alleging, among other things, that the belt was defectively designed."[592] After trial, a jury returned a verdict in favor of the plaintiff on the theory of strict products liability design defect.[593] Defendants moved to set aside the verdict, arguing that the plaintiff failed to make out a prima facie showing that the flag belt was defectively designed.[594] The trial court granted defendant's motion; plaintiff appealed.[595]

Plaintiff's evidence regarding defective design consisted mainly of the testimony of her expert witness, who testified that the D-ring flag

585. *Id.*
586. *Id.*
587. *Id.* at 525-26, 965 N.Y.S.2d at 453.
588. *Id.* at 526, 965 N.Y.S.2d at 453.
589. *Rodriguez*, 106 A.D.3d at 526, 965 N.Y.S.2d at 453.
590. *Id.*
591. Delgado v. Markwort Sporting Goods Co., 2013 N.Y. Slip Op. 50899(U), at 1 (Sup. Ct. App. T. 2d Dep't 2014).
592. *Id.*
593. *Id.* at 2.
594. *Id.*
595. *Id.*

belt was not reasonably safe as designed.[596] However, there was no substantial factual basis for this opinion.[597] The only stated basis for plaintiff's expert's opinion was that the D-ring closure presented an opportunity for finger entrapment or entanglement and a potential to cause harm.[598] He acknowledged that most of the tens of thousands of games he observed were played with quick release belts and only a limited number were played with D-ring belts.[599] The expert never observed anyone's finger become entrapped in the D-rings, and he provided no other evidence that, except for one case, it had ever happened before.[600]

Plaintiff's expert had no experience in the design or manufacture of flag belts.[601] Similarly, he had conducted no testing of the D-ring belt.[602] "Without any such foundational facts, [plaintiff's expert's] opinion lacked probative value."[603] Further, plaintiff's expert's "own evidence showed that in almost [twenty] years of regular play, mostly or always using D-ring belts, this type of injury had never occurred, except for this [incident], which strongly [suggested] against a finding that the belt was substantially likely to cause injury."[604] "Without a[ ] showing that the product in question was unreasonably dangerous as designed, plaintiff's showing that there were economically feasible alternat[ive] designs available [wa]s, essentially, irrelevant."[605]

3. Jury Finding of a Design Defect in the Vehicle's Roof Was Not Inconsistent with Its Rejection of a Breach of Warranty Cause of Action Based upon Whether the Roof Was Fit for the Ordinary Purposes for Which the System Is Used.

In two separate related actions to recover damages for wrongful death and personal injuries incurred in a motor vehicle accident, the defendant, Ford, appealed from stated portions of an amended order of the Supreme Court, Richmond County, which denied its motion to set aside the jury verdict in favor of the plaintiffs and for judgment as a

596. *Delgado*, 2013 N.Y. Slip Op. 50899(U), at 3.
597. *Id.*
598. *Id.* at 4.
599. *Id.*
600. *Id.*
601. *Delgado,* 2013 N.Y. Slip Op. 50899(U), at 4.
602. *Id.*
603. *Id.*
604. *Id.* at 6.
605. *Id.*

matter of law, or, alternatively, for a new trial.[606]

The trial court concluded that plaintiffs' evidence "established liability for [decedent's] wrongful death based upon a design defect in the roof of the vehicle and based upon the 'second collision doctrine,' under which a plaintiff must prove that 'the injuries were more severe than they would have been had the product been properly designed.'"[607]

"The jury's finding that there was a design defect in the roof of the vehicle, which caused the roof to buckle during the crash and caused [decedent's] death, was supported by legally sufficient evidence and the weight of credible evidence," based on evidence of a safer design "which 'would have avoided' [decedent's] life-threatening injuries."[608]

"Contrary to the defendants' contention, the jury's verdict sustaining that cause of action was not inconsistent with its rejection of a breach of warranty cause of action based upon whether the roof was fit for the ordinary purposes for which such system is used."[609] "The verdict sheet and the jury instructions directed the jury to consider these causes of action separate and distinct, and authorized the jury to reach contrary conclusions on those two causes of action."[610] "Under the particular circumstances of this case, the jury could have concluded that the roof was fit for ordinary purposes but not crash-worthy due to a design defect."[611]

4. Defendant Failed to Show that Material Issues of Fact Do Not Remain in Dispute Regarding Whether the Open-Compartment Forklift Design Constitutes a Safer Alternative to the Closed-Compartment Design as a Standard Feature

Plaintiffs brought a product liability action against the defendant due to a stand-up forklift accident that allegedly caused the plaintiff severe injury.[612] Before the court was defendant's motion to exclude the testimony of plaintiffs' proposed expert witnesses and defendant's motion for summary judgment.[613]

One of the plaintiffs "allege[d] that, while he was operating a

606. Motelson v. Ford Motor Co., 101 A.D.3d 957, 957-58, 957 N.Y.S.2d 341, 343 (2d Dep't 2012).

607. *Id.* at 960, 957 N.Y.S.2d at 345.

608. *Id.* at 961, 957 N.Y.S.2d at 345-46.

609. *Id.* at 961, 957 N.Y.S.2d at 346.

610. *Id.*

611. *Motelson*, 101 A.D.3d at 961, 957 N.Y.S.2d at 346.

612. Congilaro v. Crown Equip. Corp., No. 5:09-Civ-1452, 2012 U.S. Dist. LEXIS 125123, at *1-2 (N.D.N.Y. 2012).

613. *Id.* at *1.

stand-up forklift that [d]efendant manufactured, . . . he slid through a puddle of liquid on a . . . warehouse floor and crashed into a firewall door, causing severe injury."[614] Plaintiffs contended "that the 'open-compartment design' of [d]efendant's stand-up forklift [wa]s unreasonably dangerous and defective because the compartment in which the [operator] stands . . . lacks a rear door enclosing the operator compartment."[615] Plaintiffs asserted "that the addition of a rear door to the operator compartment as the forklift's standard design [wa]s a safer alternative to the open-compartment design."[616]

"In its *Daubert* motion, [d]efendant s[ought] to preclude [p]laintiffs' proffered experts . . . from testifying at trial concerning their opinions regarding a proposed safer alternative to the open-compartment design of [the d]efendant's stand-up forklift on the ground that their opinions [we]re unreliable, untested, and speculative."[617]

> In the instant case, [d]efendant certainly has support for its position that the operator compartment . . . should remain unencumbered by a door . . . as [a] standard design. However, this d[id] not preclude [p]laintiffs from presenting [his] theory of liability to a jury, aided by qualified experts, that a door guarding the opening at the rear of the operator compartment is a safer alternative to no door. Applying the *Daubert* factors to this case, first, [p]laintiffs' experts' door theory has been tested.[618]

It also appeared that a study was conducted by plaintiffs' expert on the history of stand-up forklift operator safety and published in a peer-reviewed report.[619] Finally, "although it has not gained general acceptance, the closed-operator-compartment-door theory is subject to dispute within the engineering community."[620]

"Plaintiffs' experts' proposed alternative design is not, as defendant suggests, some untested and unreliable design."[621] "On the contrary: [d]efendant has designed, manufactured, and sold such doors to various customers for many years."[622]

Courts have also found defendant Crown Equipment "liable based

614. *Id.* at *1-2.
615. *Id.* at *2.
616. *Id.*
617. *Congilaro*, No. 5:09-Civ-1452, 2012 U.S. Dist. LEXIS 125123, at *2-3.
618. *Id.* at *5.
619. *Id.*
620. *Id.* at *6.
621. *Id.*
622. *Congilaro*, No. 5:09-Civ-1452, 2012 U.S. Dist. LEXIS 125123, at *6.

on alternative design theories substantially similar to those asserted here."[623]

With respect to expert Berry, the court denies defendant's *Daubert* motion to exclude because Berry is a qualified expert in mechanical engineering with significant experience in forklift design and forklift accidents of the type at issue here.[624]

With regard to the plaintiff's proposed expert testimony of Coniglio, however—plaintiff's so-called "industrial safety" expert—plaintiff, and even Coniglio himself, concede that Coniglio is not qualified to render an expert design opinion.[625] Thus, his testimony is precluded.[626]

With regard to the defendant's motion for summary judgment, "[d]efendant has utterly failed to show that material facts do not remain in dispute regarding whether the open-compartment forklift design constitutes a safer alternative to the closed-compartment design as a standard feature," and thus the motion is denied.[627]

5. Even Though Plaintiff Was Trained that High-Speed Winds on Runway Might Cause Hood of Tractor to Fly up, Jury Could Still Reasonably Conclude that Plaintiff Was Unaware that Engine from Airplanes on Runway Could Cause Danger

A baggage handler brought a products liability action against S&S, a baggage tractor manufacturer, and American Airline's for failure to warn following the handler's injury after a jet engine blew the hood of the tractor back on to its hinges and into the passenger compartment of the tractor, which was sometime after the tractor's cab had been removed.[628] As a result, Plaintiff was struck in the head by the tractor's hood, rendering him quadriplegic.[629] Following a jury award of over $48 million in U.S. District Court for the Eastern District of New York, manufacturer and airline appealed.[630]

> The evidence permitted the jury to find that the tractor had once been equipped with a cab that might have protected [Plaintiff] from the fly-away hood; that the tractor was sold by S&S without the cab, which was offered by S&S as an option and ordered by American [Airlines]

623. *Id.*
624. *Id.* at *8.
625. *Id.* at *9-10.
626. *Id.* at *10.
627. *Congilaro*, No. 5:09-Civ-1452, 2012 U.S. Dist. LEXIS, at *11-12.
628. Saladino v. Am. Airlines, Inc., 500 Fed. App'x 69, 72 (2d Cir. 2013).
629. *Id.* at 71.
630. *Id.*

> separately and installed after the tractor's delivery; that the cab had been removed by American [Airlines] after it was damaged . . . ; that the tractor's hood was equipped with a hinge that . . . permitted the hood to flip back 180 degrees and enter the passenger compartment; and that the rubber latches that secure the hood had deteriorated over time or been removed, thus permitting the unsecured hood . . . to fly away in the jet-wash.[631]

"Plaintiff's theory at trial was that S&S was liable for its failure to warn users that operating the vehicle without a cab and without adequate latches could lead to injury due to the design of the hood."[632] "Defendants argue[d] that this theory was defective, either on its face or as presented to the jury by plaintiff's evidence."[633]

"S&S argue[d] that plaintiffs failed to establish a prima facie case for liability on a failure to warn theory because their evidence did not establish that it was foreseeable to S&S that the tractor would be used in its 'modified' state."[634] The court found that "[a] jury could reasonably have found, based on the evidence at trial that it was foreseeable to S&S that the tractor would be used without a cab, given the evidence that the cab was only an option."[635]

American Airlines argued that "plaintiffs' case was legally insufficient because . . . plaintiffs were required to present 'expert proof regarding the feasibility, actual content, form and placement of a proposed warning.'"[636] The court was not persuaded that a jury would be so confused by lay testimony about the operation of the tractor's cab, hood hinge, or latches as to undermine the sufficiency of the evidence in support of the verdict.[637] "That expert testimony—or an exemplar warning—may have assisted the jury, or advanced plaintiff's case, does not mean that jurors could not understand, without such evidence, the basic mechanisms at issue in this case."[638]

"S&S argue[d] that any failure to warn did not proximately cause plaintiff's injuries because, as a matter of law, the product's danger was open and obvious, rendering a warning superfluous."[639] "The trial record, however, contains evidence from which the jury reasonably

631. *Id*. at 72.
632. Id.
633. Saladino, 500 Fed. App'x at 72.
634. Id.
635. Id.
636. Id. at 72-73.
637. Id. at 73.
638. *Saladino*, 500 Fed. App'x at 73.
639. *Id.*

could have found that the hinge's ability to open in a half circle, and the resulting possibility that the hood could rotate into the tractor's passenger compartment, was not obvious to any reasonably prudent person, since the mechanism was not reasonably apparent."[640]

"S&S and American Airlines both argue[d] that the evidence at trial required the jury to find that plaintiff was a 'knowledgeable user' of the tractor because he knew or reasonably should have known of the specific danger based on his training and experience operating tractors for many years."[641] The court concluded that "the jury could reasonably have found . . . that [plaintiff] was not aware of the danger that the hood could open into the passenger compartment, or that the hood presented a danger when the tractor was operated away from full-power runway jet engines."[642]

> The jury thus could reasonably have found that, although [plaintiff] had been trained and was aware that operating a tractor in the high-speed winds present on a runway was acutely dangerous, in part because of the risk that the hood might open, [plaintiff] was unaware of the danger that in fact materialized in this case.[643]

6. Plaintiff Established Legally Sufficient Evidence of Causation Where Plaintiff's Expert Demonstrated There Is No Threshold that Has Been Determined to Be Safe with Respect to Asbestos Exposure and Mesothelioma

Defendant Crane Co. moves to set aside the judgment in favor of the plaintiff and for judgment in its favor as a matter of law on the grounds that it is not liable for the mesothelioma plaintiff alleges he developed as a result of exposure to asbestos while serving in the United State Navy.[644]

Plaintiff asserts that asbestos containing products, including gaskets, packing and insulation at issue here, are dangerous, and therefore defective, and that Crane knew of the dangers and knew such products would be used with its valves.[645]

Plaintiff alleged and offered proof that as to some of the valves on the ships where plaintiff served, Crane supplied, although it did not

640. *Id.*
641. *Id.*
642. *Id.*
643. *Saladino*, 500 Fed. App'x at 73-74.
644. *In re* N.Y.C. Asbestos Litig., 2012 N.Y. Misc. LEXIS 4057, at *1 (Sup. Ct. N.Y. Cnty. 2012).
645. *Id.* at *5.

manufacture, the original asbestos-containing gaskets and packing.[646] Crane rebranded asbestos sheet gaskets as Cranite and supplied some of its valves to the Navy with such Cranite gaskets, and sold asbestos-containing gaskets and replacement parts for its valves.[647] While plaintiff conceded he could not prove that he was exposed to original or replacement asbestos-containing products supplied or sold by Crane, he offered this evidence to establish that Crane knew that asbestos-containing products would be used with its valves.[648]

Plaintiff produced evidence through Crane's corporate representative that Crane was aware routine maintenance of the valves required replacement of packing and gaskets, and that such maintenance would release asbestos which would be hazardous.[649] "Plaintiff also introduced evidence that Crane knew asbestos insulation would be used with its valves."[650]

The court found that

> sufficient evidence was adduced at trial that Crane meant for its valves to be used, or knew or should have known that its valves would be used in conjunction with asbestos-containing gaskets, packing and insulation to warrant a determination that Crane was potentially liable under a failure to warn theory in strict products liability and negligence.[651]

"[T]he duty is not based solely on foreseeability, or the possibility that manufacturer's sound product may be used with a defective product so as to militate against a finding of a duty to warn."[652] "Rather, these circumstances show a connection between Crane's product and the use of the defective products, and Crane's knowledge of this connection, such that, under *Berkowitz*, Crane could be potentially liable based on a duty to warn theory as a manufacturer who meant for its product to be used with a defective product of another manufacturer, or knew or should have known of such use."[653]

"Crane argue[d] that plaintiff failed to produce sufficient evidence to establish that exposure to asbestos from Crane's valves was a substantial factor in causing his mesothelioma such that it is entitled to judgment notwithstanding the verdict or in the alternative, the verdict

646. *Id.* at *5-6.
647. *Id.* at *6.
648. *Id.*
649. In re *N.Y.C. Asbestos Litig*., 2012 N.Y. Misc. LEXIS 4057, at *6.
650. *Id.*
651. *Id.* at *14.
652. *Id.*
653. *Id.* at *15.

should be set aside as against the weight of the evidence.[654] "Crane argue[d] its motion to strike the testimony of plaintiff's medical expert . . . should have been granted, as [the doctor] failed to establish specific causation as required."[655] "Crane further argues that plaintiff's expert industrial hygienist . . . similarly failed to show which exposures could have been substantial contributing factors, based on his response to a single hypothetical question that 'there could be some exposures there that could be substantial.'"[656]

The court concluded that plaintiff established legally sufficient evidence of specific causation.[657] "[Plaintiff's medical expert] testified that there 'is no threshold that has been determined to be safe with respect to asbestos exposure and mesothelioma'; even low doses of asbestos can cause mesothelioma; plaintiff's cumulative exposures to asbestos were substantial contributing factors which caused his mesothelioma; each of the occupational exposures described contributed to causing the disease; and 'there's no way of separating them (the individual exposures) out.'"[658]

Plaintiff's expert industrial hygienist "testified to the release of asbestos fibers into the air from the removal and replacement of gaskets, packing and insulation; the percentage of asbestos in gaskets and packing of, respectively, [sixty] to [eighty-five], and [fifteen] percent; the existence of quadrillions of asbestos fibers in a standard gasket; and tests he performed showing that the removal of a gasket released from 2.3 fibers per cubic centimeter (CC) to 4.4 asbestos fibers per CC, compared to the highest measured background level of .0005, and that the removal of packing released from .2 to .3 fibers per CC."[659]

The court concluded that "there is 'scientific expression' of the basis for the opinions."[660] "Moreover, when the testimony of [plaintiff's medical expert] and [industrial hygienist] is considered together with evidence that the ships on which plaintiff served contained hundreds of Crane's valves, there [wa]s legally sufficient evidence that plaintiff was exposed to asbestos while supervising routine maintenance work on Crane's valves so as to establish specific causation."[661]

654. In re *N.Y.C. Asbestos Litig*., 2012 N.Y. Misc. LEXIS 4057, at *25.
655. *Id.*
656. *Id.* at *26.
657. *Id.* at *27.
658. *Id.*
659. In re *N.Y.C. Asbestos Litig*., 2012 N.Y. Misc. LEXIS 4057, at *27-28.
660. *Id.* at *28.
661. *Id.*

"Crane argue[d] that the state of the art evidence with respect to the dangers of exposure to asbestos from gaskets, packing and lagging pads was insufficient to establish that it had a duty to warn and, thus, its valves were not defective nor was it negligent."[662]

"[P]laintiff's state of the art expert . . . testified that while articles with measurements and data on exposure from gaskets were published in the early 1990's, he pointed to prior publications, a book written in 1942 and an article in 1961, . . . which list packing and gaskets as potential sources of asbestos exposure."[663] "[V]arious studies and reports showed the dangers of asbestos exposure to workers where there was occupational exposure with similarities to the exposure plaintiff alleged."[664] Moreover, Crane's corporate representative "testified that Crane knew of the dangers of exposure to asbestos in the early 1970's."[665]

"[W]hile the republished table and 1992 articles were some evidence to be considered by the jury, the totality of the state of the art evidence and specific references to gaskets and packing were sufficient such that Crane's motion for judgment as a matter of law and to set aside the verdict on these grounds [was] denied."[666]

"Crane also appear[ed] to assert that it was not negligent because the state of the art evidence shows it did not violate custom and practice."[667] "Crane point[ed] to *Lancaster Silo & Block Co. v. Northern Propane Gas Co.*, for the proposition that 'if a given design is within the state of the art, plaintiff can argue that a deviation from that standard is negligence.'"[668] "While *Lancaster* involve[d] both design defect and failure to warn claims, plaintiff [was] correct that the foregoing proposition [was] applicable to the design defect claim."[669] "In any event, even if this proposition [was] applicable to failure to warn claims, Crane's argument [was] unpersuasive for the same reasons [the court] rejected its argument that its valves were not defective based on the state of the art evidence."[670]

662. *Id.* at *28-29.

663. *Id.* at *30.

664. In re *N.Y.C. Asbestos Litig*., 2012 N.Y. Misc. LEXIS 4057, at *30.

665. *Id.*

666. *Id.* at *33.

667. *Id.*

668. *Id.* (quoting Lancaster Silo & Block Co. v. Northern Propane Gas Co., 75 A.D.2d 55, 66, 427 N.Y.S.2d 1009, 1016 (4th Dep't 1980)).

669. In re *N.Y.C. Asbestos Litig.*, 2012 N.Y. Misc. LEXIS 4057, at *33-34 (emphasis in original).

670. *Id.* at *34.

Crane also argued that the Navy was fully aware of "the potential harm of asbestos and its failure to warn was a superseding and intervening cause of the plaintiff's injuries sufficient to break the causal chain so that Crane [was] not liable as a matter of law."[671]

"Here, the Navy's failure to warn was not an intervening act, as the risk of the Navy's conduct, that is, its failure to warn of the dangers of asbestos, is the same risk which render[ed] Crane negligent."[672] "Moreover, the Navy's failure to warn was neither extraordinary nor unforeseeable so as to break the causal nexus."[673] "Other courts have held that it was foreseeable in the absence of warnings by Crane, that the Navy as the employer would not warn plaintiff of the dangers of asbestos."[674]

"Crane's argument that the Navy was aware of the dangers of asbestos, even if true, [did] not relieve Crane of liability."[675] The cases upon which Crane relied, *McLaughlin v. Mine Safety Appliances, Co.*[676] and *Billsborrow v. Dow Chemical USA*,[677] were both distinguishable on their facts.[678] "In those cases, defendants actually provided warnings, and the issue was whether the nature of the intervener's conduct was so extraordinary that it was unforeseeable."[679]

"Crane's argument that the knowledgeable user doctrine shields it from liability [was] also without merit."[680] "Crane argue[d] that since the Navy knew of the dangers of asbestos, Crane [wa]s not liable for failure to warn."[681]

Crane also argued that "the Navy exercised its discretion and approved certain warnings based on Navy custom, practice and policies."[682] "Here, the issue is whether the evidence Crane presented as to its valves demonstrated that Navy specifications contained warnings or labeling requirements limiting information such that Crane established the Navy exercised its discretion and the specifications

671. *Id.* at *35.
672. *Id.* at *36-37.
673. *Id.* at *37.
674. In re *N.Y.C. Asbestos Litig*., 2012 N.Y. Misc. LEXIS 4057, at *37.
675. *Id.*
676. 11 N.Y.2d 62, 181 N.E.2d 430, 226 N.Y.S.2d 407 (1962).
677. 177 A.D.2d 7, 579 N.Y.S.2d 728 (2d Dep't 1992).
678. In re *N.Y.C. Asbestos Litig.*, 2012 N.Y. Misc. LEXIS 4057, at *37.
679. *Id.*
680. *Id.* at *38.
681. *Id.*
682. *Id.* at *39.

conflicted with state law."[683]

"Crane did not introduce relevant contracts nor, with one exception, specifications applicable to Crane's valves."[684]

The court concluded that "Crane [did] not establish[ ] it was entitled to this defense as it failed to establish that the Navy prescribed or proscribed any specific warnings with respect to its valves."[685] "Thus, Crane . . . failed to establish that the Navy exercised its discretion as to warnings or that there was a conflict with state warning requirements."[686] "Nor [did] Crane show[ ] entitlement under the law as articulated in *Getz v. Boeing Co.*"[687] "Crane [did] not assert nor d[id] the evidence support a finding that the Navy exercised its discretion and selected a complete set of warnings as did the Army in *Getz*."[688] "Crane [did] not establish[ ] that the Navy exercised its discretion as to warnings; at best, Crane established that the Navy was involved in labeling of the valves."[689]

"Crane also argue[d] that this [c]ourt's evidentiary ruling precluding its Navy witness from testifying that if Crane had attempted to place warnings on its valves, such warnings would have been rejected, prevented Crane from establishing that the Navy exercised its discretion."[690] This evidence was properly excluded as it was undisputed that Crane never attempted to warn the Navy, and the opinion of the Navy witness was based on pure speculation as Crane offered no specific Navy regulation or protocol to support this conclusion other than the witness's generalized opinions of what the Navy would have done had Crane warned the Navy about the dangers of asbestos of which it knew but the Navy did not."[691]

"Crane argue[d] that plaintiff failed to establish proximate cause, as the Navy could not have permitted a warning on its valves."[692] Crane also argue[d] that there was no evidence that a warning would have made its way to the plaintiff since . . . the Navy would not have permitted the warnings, was aware of the dangers of asbestos, and in certain instances used warning signs and distributed respiratory

683. In re *N.Y.C. Asbestos Litig.*, 2012 N.Y. Misc. LEXIS 4057, at *42.
684. *Id.* at *43.
685. *Id.* at *45.
686. *Id.* at *45-46.
687. *Id.* at *46.
688. In re *N.Y.C. Asbestos Litig.*, 2012 N.Y. Misc. LEXIS 4057, at *46.
689. *Id.* at *48.
690. *Id.* at *48-49.
691. *Id.* at *49.
692. *Id.*

protection to shipyard workers, but did not provide the same protections to plaintiff."[693]

"Significantly, plaintiff explicitly and clearly testified that had he seen the warnings, he would have acted differently to protect himself."[694] When plaintiff's testimony is considered together with this evidence that went in before the jury, "there is a valid line of reasoning, as well as permissible inferences for the jury to have concluded that Crane's failure to warn was a proximate cause of the plaintiff's developing mesothelioma.[695]

"To the extent Crane asserts that the Navy would not have permitted warnings,

. . . Crane's assertion is based on speculation and is insufficient to grant judgment notwithstanding the verdict or to set aside the verdict."[696] "Finally, as to Crane's argument that if it had provided warnings, plaintiff would have developed mesothelioma from the other 'intense exposures,' such argument is without foundation in law and is an attempt to exempt Crane from liability based on the actions of others."[697]

7. Despite Removal of Blade Guard by Plaintiff, Defendant's Claim that It Is Not Liable Because of Substantial Modification Fails Where Issue of Fact Exists as to Whether Saw Was Purposefully Designed to Permit Use Without Guard

Carpenter sued project owner and table saw manufacturer, seeking damages for injuries sustained when his hand came into contact with a table saw blade.[698] Plaintiff brought causes of action alleging common law negligence and a violation of New York Labor Law section 200 against the project owner, and negligence and strict products liability based on design defect against the manufacturer.[699] Plaintiff alleged that the table saw was not equipped with a blade guard when he bought it from a co-worker, and that "[t]he failure to include a blade guard bolted to the table saw constitutes a design defect."[700] Defendant-manufacturer argued that the saw was distributed with a blade guard

693. In re *N.Y.C. Asbestos Litig.*, 2012 N.Y. Misc. LEXIS 4057, at *49.

694. *Id.* at *50.

695. *Id.*

696. *Id.* at *50-51.

697. *Id.* at *51.

698. Forssell v. Lerner, 101 A.D.3d 807, 807, 956 N.Y.S.2d 117, 118 (2d Dep't 2012).

699. *Id.* at 808, 956 N.Y.S.2d at 118.

700. *Id.*

attached, and it could not be held liable for injuries resulting from a substantial modification of the saw.[701]

The motion court denied defendants' motion for summary judgment and manufacturer's motion for leave to renew, and defendants appealed.[702]

The appellate court held that while the manufacturer's submissions established that the saw was distributed with a blade guard, there was also evidence that the blade guard was removable and that the table saw was operable without it.[703] There, the appellate court held that the motion court was correct in finding triable issues of fact whether the table saw was purposefully designed to permit use without the guard, and thereby denying the defendant's motion for summary judgment.[704]

8. Conflicting Opinions of the Parties' Experts Regarding the Reasonableness of the Swing's Design Presented Classic Credibility Issues that Are a Matter for the Trier of Fact to Resolve

Plaintiff's infant was ten years old and was playing on a swing set on Birchwood Lodge's property when he jumped off the swing and his fingers got caught between the links of the swing's chain, amputating the tips of two of his fingers.[705] Plaintiff commenced this action against defendants Birchwood Lodge, Miracle Recreation Equipment Co., and Pettinell & Associates, the manufacturer and installer of the playground equipment involved in the accident.[706] Miracle then initiated a third-party action against Peerless in its capacity as supplier of bulk chain used by Miracle in making the playground equipment.[707] Miracle moved for summary judgment dismissing the complaint, and Birchwood cross-moved to dismiss the complaint against it.[708]

The motion court held that the conflicting opinions of the parties' experts regarding the reasonableness of the swing's design presented classic credibility issues that were a matter for the trier of fact to resolve.[709] Further, the defendants also contended that, as a matter of law, the plaintiff assumed the risk of his injury, thus barring recovery;

701. *Id.*

702. *Id*. at 807, 956 N.Y.S.2d at 118.

703. *Forssell*, 101 AD3d at 809, 956 N.Y.S.2d at 119.

704. *Id*.

705. Faherty v. Birchwood Lodge, Inc., No. 32324/2009, 2012 N.Y. Slip Op. 52031(U), at *2 (Sup. Ct. Queens Cnty. 2012).

706. *Id*. at *1.

707. *Id*.

708. *Id*.

709. *Id*. at *5.

however, primary assumption of the risk cannot constitute a defense to a strict products liability claim.[710]

9. New York Law Is Clear that Failure of Exterior Building Products Bars Recovery of the Products and Consequential Damages to the Underlying Structure

Plaintiff brought this action against the defendant for breach of warranty, breach of New York's Deceptive Trade Practices Law, negligence, and unjust enrichment, alleging that the composite wood trim, manufactured by the defendant, installed in the plaintiff's facility was defective—that it was rotting, swelling, cracking and peeling.[711] Plaintiff also alleged that, as a result, there was water damage to the building.[712] The claim was brought nine years after the composite wood trim's installation.[713]

Defendant filed a motion to dismiss, and plaintiff filed an amended complaint.[714] The plaintiff argued that it was not the installer of the product, but a third-party beneficiary to the contract between the installer and the defendant manufacturer.[715]

The motion court found that the plaintiff was not a third-party.[716] Further, the court found that New York law was clear that failure of exterior building products bars recovery of the products and consequential damages to the underlying structure.[717] The court also dismissed plaintiff's unjust enrichment claim, as the existence of a valid enforceable contract precluded recovery in quasi-contract, and the parties' relationship was too attenuated.[718] The court denied defendant's motion to dismiss plaintiff's New York's Deceptive Trade Practices claim pursuant to General Business Law section 349(a)[719], finding a question of fact on the issue.[720] However, the court did dismiss the plaintiff's claim for punitive damages as the plaintiff failed

710. *Faherty*, No. 32324/2009, 2012 NY Slip Op. 52031(U), at *5-6 (citing Lamey v. Foley, 188 A.D.2d 157, 159, 594 N.Y.S.2d 490 (4th Dep't 1993)).

711. Bristol Vill., Inc. v. Louisiana-Pacific Corp., 916 F. Supp. 2d 357, 361 (W.D.N.Y. 2013).

712. *Id*.

713. *Id*. at 360-61.

714. *Id*. at 361.

715. *Id*. at 363.

716. *Bristol Vill., Inc.*, 916 F.Supp. 2d at 363.

717. *Id*. at 366 (citing Weiss v. Polymer Plastics Corp., 21 A.D.3d 1095, 1096, 802 N.Y.S.2d 174, 175 (2d Dep't 2005).

718. *Id*. at 366-67.

719. *Id*. at 368-69

720. *Id*.

to plead or prove egregious fraud aimed at the general public.[721]

721. *Bristol Vill., Inc.*, 916 F.Supp. 2d at 371.