TORT LAW

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CONTENTS

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INTRODUCTION

There were many memorable decisions in this *Survey* year in the area of tort law. Many of these were Court of Appeals decisions decided by four-to-three decisions. These decisions, if nothing else, show the importance of one Court of Appeals judge's vote. Beyond that, the lack of clarity given by the Court of Appeals in such fractioned decisions leaves many practitioners guessing as to what black-letter law is in the area of tort litigation.

That notwithstanding, many significant policies of tort law were decided by the Court of Appeals in the past year. As usual, many of these were in the field of labor law in cases addressing section 240(1) and section 241(6) of the Labor Law of the State of New York. Many cases dealt with municipal liability and the application of governmental immunity, where the Court made a number of significant policy moves concerning the ability of citizens to sue state and local governments, as well as governmental agencies.

There was also a number of cases coming out of the appellate division showing a split in authority between the departments, which no doubt will lend towards Court of Appeals scrutiny sometime in the near future. Significant cases reached the Court of Appeals in the area of motor vehicle liability, and others, no doubt, will get there given the split in policy between the various departments.

Perhaps the most notorious case of the year being reported is that of the World Trade Center Bombing of 1993 and that Court of Appeals decision (four-to-three) to dismiss tort lawsuits against Port Authority that had been brought out of that bombing on the basis of governmental immunity.

In short, decisions have been made during the past year that will affect tort law litigation for years, if only seeking clarity of the positions raised by the courts' judges to our systemic New York legal framework.

I. LABOR LAW

A. Objects Falling or Collapsing When the Base of the Object is at the Same Level as Work Being Performed and Labor Law Section 240(1)

The Court of Appeals case *Runner v. New York Stock Exchange, Inc.* significantly changed the landscape for the application of Labor

Law section 240(1) absolute liability in New York State courts.[1] The aftershocks from *Runner* were felt throughout New York State during the course of this *Survey* year.

In *Wilinski v. 334 East 92nd Housing Development Fund Corp.* the New York State Court of Appeals took up issue of whether section 240(1) of the Labor Law of the State of New York applies to objects that fall or collapse and cause injury when the base of the object is at the same level as the work being performed.[2] The plaintiff in the *Wilinski* case was seriously injured when two pipes fell and struck the plaintiff when they were left standing after the walls that supported them had been demolished.[3] The pipes ran from the floor upon which the plaintiff was standing upwards to a height of approximately ten feet.[4] The plaintiff alerted his supervisor that the pipes could be dangerous, but no action was taken by his employer or the owner of the property to provide any safety devises to hold the pipes in position.[5] Plaintiff alleged that he suffered serious and permanent injuries to his back, arm, and shoulder, and that he sustained brain damages with residual neuropsychological injuries.[6]

Plaintiff brought suit pursuant to Labor Law section 240(1) and Labor Law section 241(6).[7] Plaintiff moved for summary judgment relying upon the liability of Labor Law section 240(1) and the defendants cross-moved for summary judgment dismissing the plaintiff's complaint.[8] Supreme Court Justice Deborah A. James found that plaintiff was entitled to judgment, as the plaintiff had sustained a gravity-related injury and proved that there was no statutory required safety device.[9] The court denied the defendants' motion, and also found that the defendants were subject to liability under Labor Law section 241(6).[10]

Defendants then appealed the case to the Appellate Division, First Department, and that court unanimously modified the decision of Judge

1. 13 N.Y.3d 599, 605, 922 N.E.2d 865, 868, 895 N.Y.S.2d 279, 282 (2009); *see also* Hon. John C. Cherundolo, *Tort Law, 2009-10 Survey of New York Law*, 61 SYRACUSE L. REV. 935, 938-43 (2011).

2. 18 N.Y.3d 1, 5, 959 N.E.2d 488, 490, 935 N.Y.S.2d 551, 553 (2011).

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*, 959 N.E.2d at 490-91, 935 N.Y.S.2d at 553-54.

7. *Wilinski*, 18 N.Y.3d at 5, 959 N.E.2d at 491, 935 N.Y.S.2d at 554.

8. *Id*. at 6, 959 N.E.2d at 491, 935 N.Y.S.2d at 554.

9. *Id.*

10. *Id.*; *see also* Wilinski v. 334 E. 92nd Hous. Dev. Fund Corp., No. 117632/05, 2009 NY Slip. Op. 30605(U), at 2 (Sup. Ct. N.Y. Cnty. 2009).

Smith by denying the plaintiff's motion for summary judgment, and granting the defendants' motion to dismiss the section 240(1) claim.[11] The appellate division relied on the Court of Appeals landmark decision of *Misseritti v. Mark IV Construction Co.*, and found that—given the fact that the pipes' base were at the same level as the worker that was injured—the plaintiff cannot recover.[12]

The parties then moved and cross-moved at the appellate division for leave to appeal to the New York State Court of Appeals.[13] In granting the motions, the appellate division certified the following question: "[w]as the order of this Court, which modified the order of the Supreme Court, properly made?"[14] The Court of Appeals in a four-to-three decision declined to accept the "same level" rule.[15] Inasmuch as that rule, and reversed, finding that the rule was inconsistent with the recent New York State Court of Appeals decisions.[16] The Court then applied the *Runner* rationale and held that the plaintiff was not precluded from seeking to recover pursuant to section 240(1) simply because the pipes had their base at the same level which the plaintiff was working.[17] The Court also found that the plaintiff suffered harm that flowed directly from the application of the force of gravity to the pipes.[18] The Court determined that plaintiff must prove at the time of trial that plaintiff's injury was a direct consequence of the defendants' failure to provide adequate protection to hold the pipes upright or to otherwise protect the plaintiff.[19] That issue, the Court held, is an issue for the trier of fact to determine.[20] The Court went on to hold that plaintiff's Labor Law section 241(6) claim can also be pursued by the plaintiff, finding that plaintiff's claim had basis in Industrial Code Rule 23-3.3 (12 N.Y.C.R.R. 23-3.3(b)(3)), which provides in pertinent part: "[w]alls, chimneys and other parts of any building or structure shall not be left unguarded in such condition that such parts may fall, collapse or

11. Wilinski v. 334 E. 92nd Hous. Dev. Fund Corp., 71 A.D.3d 538, 539, 898 N.Y.S.2d 15, 17 (1st Dep't 2010).

12. *Id.* (citing Misseritti v. Mark IV Constr. Co., 86 N.Y.2d 487, 491, 657 N.E.2d 1318, 1321, 634 N.Y.S.2d 35, 38 (1995)).

13. *Wilinski*, 18 N.Y.3d at 6, 959 N.E.2d at 491, 935 N.Y.S.2d at 554.

14. *Id.*

15. *Id.* at 9, 959 N.E.2d at 493, 935 N.Y.S.2d at 556.

16. *Id.* (citing Quattrocchi v. F.J. Sciame Constr. Corp., 11 N.Y.3d 757, 896 N.E.2d 75, 866 N.Y.S.2d 592, (2008); Runner v. N.Y. Stock Exch., Inc., 13 N.Y.3d 599, 922 N.E.2d 865, 895 N.Y.S.2d 279 (2009)).

17. *Id.* at 10, 959 N.E.2d at 494, 935 N.Y.S.2d at 557.

18. *Wilinski*, 18 N.Y.3d at 10, 959 N.E.2d at 494, 935 N.Y.S.2d at 557.

19. *Id.* at 11, 959 N.E.2d at 494, 935 N.Y.S.2d at 557.

20. *Id.*, 959 N.E.2d at 495, 935 N.Y.S.2d at 558.

be weakened by wind pressure or vibration."[21]

Making that finding, the Court found that the plaintiff is not required to show that the pipes fell or collapsed due to wind pressure or vibration in order to state a claim under 12 N.Y.C.R.R. 23-3.3(b)(3).[22] In doing so, the Court chose not to accept several lower court rulings which had previously adopted the defendants' interpretation of the application of that regulation, and specifically adopted the appellate division's interpretation of a more expansive view of the Industrial Code regulation involved.[23]

With regard to plaintiff's second section 241(6) Labor Law claim, supported by Industrial Code Rule 23-3.3(c), the Court of Appeals again agreed with the appellate division and found that the defendants failed to meet their burden to show that they either performed regular inspections as required under the Industrial Code Rule or that the failure to do so did not cause plaintiff's injury.[24]

Judge Pigott, along with Judges Graffeo and Read concurring, wrote an opinion for the dissent, set forth the view that plaintiff's injuries were not the result of a hazard contemplated by section 240(1).[25] Judge Pigott recited the long history in the State of New York following the *Misseritti* decision, taking the position that the majority only adds more uncertainty and confusion to the previous decisional case law.[26] In conclusion, Judge Pigott wrote that he saw no reason to

21. *Id.* at 12, 959 N.E.2d at 495, 935 N.Y.S.2d at 558 (quoting N.Y. COMP. CODES R. & REGS. tit. 12, § 23-3.3(c) (1981)).

22. *Id.*, 959 N.E.2d at 495-96, 935 N.Y.S.2d at 558-59.

23. *Wilinksi*, 18 N.Y.3d at 12, 959 N.E.2d at 495, 935 N.Y.S.2d at 558. *See also* German v. City of N.Y., No. 118177/04, 2006 NY Slip Op. 52406(U) (Sup. Ct. N.Y. Cnty. 2006); Maternik v. Edgemere By-The-Sea-Corp., No. 18148/05, 2008 NY Slip Op. 50763(U) (Sup. Ct. Kings Cnty. 2008); Gonzalez v. Fortway, LLC, No. 38814/05, 2009 NY Slip Op. 50132(U) (Sup. Ct. Kings Cnty. 2009).

24. *Wilinski*, 18 N.Y.3d at 12-13, 959 N.E.2d at 496, 935 N.Y.S.2d at 559; 12 N.Y.C.R.R. 23-3.3(c) ("During hand demolition operations, continuing inspections shall be made by designated persons as the work progresses to detect any hazards to any person resulting from weakened or deteriorated floors or walls or from loosened material. Persons shall not be suffered or permitted to work where such hazards exist until protection has been provided by shoring, bracing or other effective means.").

25. *Wilsinki*, 18 N.Y.3d at 15, 959 N.E.2d at 497, 935 N.Y.S.2d at 560 (Pigott, J., dissenting).

26. *Id.* at 14-15, 959 N.E.2d at 497, 935 N.Y.S.2d at 560 (citing Narducci v. Manhasset Bay Assocs., 96 N.Y.2d 259, 750 N.E.2d 1085, 727 N.Y.S.2d 37 (2001); Melo v. Consol. Edison Co. of N.Y., Inc., 92 N.Y.2d 909, 702 N.E.2d 832, 680 N.Y.S.2d 47 (1998); Capparelli v. Zausmer Frisch Assocs., Inc., 93 N.Y.2d 888, 711 N.E.2d 644, 689 N.Y.S.2d 430 (1999); Misseritti v. Mark IV Constr. Co., 86 N.Y.2d 487, 657 N.E.2d 1318, 634 N.Y.S.2d 35; Brink v. Yeshiva Univ., 259 A.D.2d 265, 686 N.Y.S.2d 15, (1st Dep't 1999); Sabovic v. State, 229 A.D.2d 586, 645 N.Y.S.2d 860 (2d Dep't 1996); Corsaro v. Mount Calvary Cemetery, Inc., 214 A.D.2d 950, 626 N.Y.S.2d 634 (4th Dep't 1995)).

stray from the overwhelming and settled body of case law that had previously established that section 240(1) liability does not apply when the base of the falling object is at the same level as the worker and the work being performed.[27]

Even though the majority decision specifically recites that, the case does not mean that every time there is an injury at a construction site, section 240(1) would apply.[28] Quite the contrary, the majority decision suggests very clearly that there may be other "same level" cases which might be subject to dismissal as not falling with the section 240(1) rationale. Given the split decision of the Court of Appeals, and the prior case law leading up to that decision, it remains to be seen how expansive liability will be in the "same level" cases. For now, it would appear as though the practitioner must recognize that over the past several years, liability under section 240(1) has indeed expanded and that *Runner* will still have significant future effect on cases within the state.

A clear example of the effect that the *Runner* case had in New York State is again shown in the New York State Court of Appeals case of *Strangio v. Sevenson Environmental Services*.[29] In this case, plaintiff was struck in the face by a handle and/or arm of a crank that was connected to a pulley system that was used to raise and lower the scaffold upon which the plaintiff was working.[30] Plaintiff was raising the scaffold by turning the crank in a counterclockwise rotation when the crank arm spun unexpectedly in a clockwise rotation striking the plaintiff in the face and causing him serious injuries.[31] A safety mechanism that was designed to prevent the crank from moving more than one foot did not engage as it was designed.[32] The plaintiff brought an action based on, among other things, section 240(1) of the Labor Law.[33] Defendants and third-party defendant moved for summary judgment dismissing the plaintiff's complaint and Supreme Court Justice Ralph Boniello granted summary judgment to the defendants and third-party defendant.[34] Noting that the plaintiff was not injured while falling from or attempting to prevent himself from falling from a

27. *Wilinski*, 18 N.Y.3d at 15, 959 N.E.2d at 497, 935 N.Y.S.2d at 560.

28. *Id.* at 7, 959 N.E.2d at 492, 935 N.Y.S.2d at 555.

29. 15 N.Y.3d 914, 939 N.E.2d 805, 913 N.Y.S.2d 639 (2010).

30. Strangio v. Sevenson Envtl. Serv., No. 120903, 2009 NY Slip Op. 52794(U), at 2 (Sup. Ct. Niagara Cnty. 2009).

31. *Id.*

32. *Id.* at 2-3.

33. *Id.* at 1.

34. *Id.*

scaffold, or anything falling on him, the court determined that the accident resulted from the usual and ordinary dangers of a construction site.[35] The Appellate Division, Fourth Department, affirmed the lower court decision in a three-to-two decision, with Justice Carni and Justice Lindley dissenting, in part, upon the basis that there was no question that the harm that the plaintiff suffered was a direct consequence of the application of the force of gravity to the cranking mechanism.[36]

The Court of Appeals found unanimously that the order of the appellate division must be modified by denying the motion of the defendants and third-party defendant for summary judgment insofar as each sought the dismissal of plaintiff's Labor Law section 240(1) claim.[37] The Court found that there were triable issues of fact as to whether defendants provided proper protection pursuant to Labor Law section 240(1).[38]

In *Gasques v. State*, the plaintiff had his hand crushed between the motor control of a scaffold and a steel bridge when he stopped the suspension scaffold while painting a tower of the bridge.[39] He brought an action against the State making claims, among others, of a violation of section 240(1) of the Labor Law of the State of New York.[40] The State made a motion for summary judgment, and the Court of Claims Judge Waldon granted summary judgment in favor of the State.[41] Plaintiff appealed to the Appellate Division, Second Department, and that court affirmed the decision of the Court of Claims.[42] The appellate division found that the plaintiff's injuries were not caused by the type of elevation-related hazards that would impose absolute liability pursuant to Labor Law section 240(1).[43] The decision was a three-to-one decision, with Justices Fisher, Dillon, and McCarthy concurring in the affirmance, and Justice Belen concurring in part and dissenting in part.[44] Justice Belen's dissent was based upon his view of the proof that the plaintiff's injury was caused by the effects of gravity and that based on the proof before the court, there was a question of fact as to whether the

35. *Strangio*, No. 120903, 2009 N.Y. Slip. Op. 52794(U), at 5.

36. Strangio v. Sevenson Envtl. Serv., 74 A.D.3d 1892, 1894, 905 N.Y.S.2d 729, 731 (4th Dep't 2010) (Carni & Lindley, JJ., dissenting).

37. Strangio v. Sevenson Envtl. Serv., 15 N.Y.3d 914, 915, 939 N.E.2d 805, 805, 913 N.Y.S.2d 639, 639.

38. *Id.*

39. 15 N.Y.3d 869, 870, 937 N.E.2d 79, 80, 910 N.Y.S.2d 415, 416 (2010).

40. Gasques v. State, 59 A.D.3d 666, 667, 873 N.Y.S.2d 717, 719 (2d Dep't 2009).

41. *Id.* at 666, 873 N.Y.S.2d at 719.

42. *Id.* at 667, 873 N.Y.S.2d at 719.

43. *Id.*

44. *Id.* at 668, 873 N.Y.S.2d at 720.

scaffold provided the plaintiff the type of safety device that would prevent the plaintiff from crushing his hand.[45] Plaintiff then appealed to the Court of Appeals by permission of the Appellate Division, Fourth Department. In a memorandum decision, the Court affirmed the majority decision of the Fourth Department.[46] The Court found that the injury was not caused as a direct consequence of the force of gravity to an object or a person, but that the scaffold continued to elevate because of the force of one of the scaffold's motors, trapping claimant's hand, and, thus, the Court of Appeals found that the rationale set forth in *Runner* did not apply.[47]

The Appellate Division, First Department was confronted with the case of *Smith v. Broadway 110 Developers, LLC*, where the plaintiff received severe crushing injuries to his chest when the scaffold that he was working upon suddenly was caused to swing toward a building.[48] A coworker was on a building across the street and was holding a rope pulling the scaffold away from the building that plaintiff was working on until it could be lowered into proper position.[49] The coworker then suddenly vomited, and let go of the rope, causing the scaffold to swing towards the building injuring the plaintiff.[50] The Appellate Division, First Department affirmed the lower court decision finding that the facts presented raised an inference that the scaffold provided inadequate safety to the user from harm that would be directly flowing from the forces of gravity.[51] The court affirmed Supreme Court Judge Carol R. Edmead's decision that there was a question of fact as to whether the scaffold provided adequate protection to shield him from harm directly flowing from the application of the force of gravity.[52]

All-in-all, over the course of the *Survey* year, there were a myriad of cases presented to the appellate courts in the State of New York that were decided favorably to the plaintiffs on the basis of an application of *Runner*. All four departments have now recognized the expansive effects of *Runner* and the trend of liberalizing the application of Labor

45. *Gasques*, 59 A.D.3d at 669-70, 873 N.Y.S.2d at 721-22 (Belen, J., dissenting).

46. Gasques v. State, 15 N.Y.3d 869, 870, 937 N.E.2d 79, 80, 910 N.Y.S.2d 415, 416.

47. *Id.*; *see also* Runner v. N.Y. Stock Exch., Inc., 13 N.Y. 599, 604, 922 N.E.2d 865, 867, 895 N.Y.S.2d 279, 282 (2009); Ross v. Curtis Palmer Hydro-Elec. Co., 81 N.Y.2d 494, 499-500, 618 N.E.2d 82, 85, 601 N.Y.S.2d 49, 52 (1993) (holding that the injury must be caused by the application of the force of gravity).

48. 80 A.D.3d 490, 491, 914 N.Y.S.2d 167, 168 (1st Dep't 2011).

49. Smith v. Broadway 110 Developers, LLC, No. 107091-2006, 2009 N.Y. Slip Op. 30756(U) (Sup. Ct. N.Y. Cnty. 2009).

50. *Id.*

51. *Smith*, 80 A.D.3d at 491, 914 N.Y.S.2d at 169.

52. *Id.*

Law section 240(1) is clearly seen throughout New York State.[53]

B. Foreseeability in Section 240(1) Cases

Ever since the Industrial Revolution, the legal concept of foreseeability has been part of the basic framework in establishing liability in tort claims.[54] Foreseeability, as a legal requirement, had its origins in negligence actions.[55] In order to be successful, the plaintiff had the burden of showing that the defendant knew or reasonably should have known of a risk, and the risk determined the extent of the duty of care owed by a defendant.[56] In other words, as so aptly stated by Judge Cardozo in *Palsgraf*, "[t]he risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension."[57]

There is nothing in Labor Law section 240(1) that relates in any way with the requirement of foreseeability. The statute itself is clear and unequivocal in that it provides that:

> [a]ll contractors and owners and their agents . . . in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.[58]

The statute has been held to warrant absolute protection to workers given the nature of the occupational hazards which the legislature intended by the statute.[59] New York law is clear that the statute is designed to prevent the types of accidents in which protective devices prove to provide inadequate protection to shield the injured worker from harm directly flowing from the application of the force of gravity to an

53. *Cf.* Rendino v. City of N.Y., 83 A.D.3d 540, 922 N.Y.S.2d 300 (1st Dep't 2011); Jara v. N.Y. Racing Assoc., 85 A.D.3d 1121, 927 N.Y.S.2d 87 (2d Dep't 2011); Miranda v. Norstar Bldg. Corp., 79 A.D.3d 42, 909 N.Y.S.2d 802 (3d Dep't 2010); Tafelski v. Buffalo City Cemetery, Inc., 68 A.D.3d 1802, 891 N.Y.S.2d 779 (4th Dep't 2009).

54. *See generally* MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916); Palsgraf v. Long Island R.R. Co., 248 N.Y. 339, 162 N.E. 99 (1928); Nussbaum v. Lacopo, 27 N.Y.2d 311, 265 N.E.2d 762, 317 N.Y.S.2d 347 (1970).

55. *See Palsgraf*, 248 N.Y. at 344, 162 N.E. at 100.

56. *See id.*

57. *Id.*

58. N.Y. LAB. LAW § 240(1) (McKinney 2011).

59. Rocovich v. Consol. Edison Co., 78 N.Y.2d 509, 513, 583 N.E.2d 932, 934, 577 N.Y.S.2d 219, 221 (1991).

object or person.[60] Based on the established New York State Court of Appeals case law, an injured worker making a claim pursuant to section 240(1) must establish that: (1) the task required the plaintiff to work at an elevation; (2) the plaintiff was exposed to the effects of gravity at that elevation and fell as a direct result of the force of gravity or something fell upon the plaintiff; and (3) the protective devices envisioned by the statute would have prevented the injuries.[61] These principals have recently been expanded by virtue of the most recent cases from the New York Court of Appeals, including *Runner*, *Quattrocchi v. F.J. Sciame Construction Corp.*, and *Wilinski*.[62]

In practically all of the cases dealing with section 240(1) mentioned above, there is no requirement of foreseeability being shown as a predicate to recovery on behalf of the plaintiff. As the law currently stands with regard to section 240(1) cases, if a worker is involved in any of the protected categories and is injured by the force of gravity or an object in flight by the force of gravity, then the plaintiff has a right to recover without regard to comparative negligence.[63]

The application of section 240(1) to falls or injuries sustained while working on a permanent surface, whether it be a roof or a floor, has created much more difficulty in the application of foreseeability as a requirement for recovery. The First Department, after having cases that were split on the subject as to whether or not recovery could be had, finally adopted a rule whereby section 240(1) would be applicable, assuming the plaintiff satisfies all other requirements of the statute and shows the injury was foreseeable.[64] The Second Department also has imposed liability pursuant to section 240(1) when a worker has fallen through a roof that collapsed where the collapse was foreseeable.[65] The

60. Ross v. Curtis-Palmer Hydro-Electric Co., 81 N.Y.2d 494, 501, 618 N.E.2d 82, 86, 601 N.Y.S.2d 49, 53 (1993).

61. *See generally id.*; *Rocovich*, 78 N.Y.2d 509, 583 N.E.2d 932, 577 N.Y.S.2d 219; Nieves v. Five Boro AC & Refrig. Corp., 93 N.Y.2d 914, 712 N.E.2d 1219, 690 N.Y.S.2d 852 (1999); Bond v. York Hunter Const., Co., 95 N.Y.2d 883, 738 N.E.2d 356, 715 N.Y.S.2d 209 (2000).

62. *See generally* Runner v. N.Y. Stock Exch., Inc., 13 N.Y.3d 599, 922 N.E.2d 865, 895 N.Y.S.2d 279 (2009); Quattrocchi v. F.J. Sciame Constr., Co., 11 N.Y.3d 757, 896 N.E.2d 75, 866 N.Y.S.2d 592 (2008); Wilinski v. 334 E. 92nd Hous. Dev. Fund Corp., 18 N.Y.3d 1, 959 N.E.2d 488, 935 N.Y.S.2d 551 (2011).

63. *Runner*, 13 N.Y.3d at 603, 922 N.E. 2d at 867, 895 N.Y.S.2d at 281.

64. Jones v. 414 Equities, LLC, 57 A.D.3d 65, 79-80, 866 N.Y.S.2d 165, 176 (1st Dep't 2008).

65. *See* Taylor v. V.A.W. of Am., Inc., 276 A.D.2d 621, 622, 714 N.Y.S.2d 321, 322 (2d Dep't 2000); Charles v. Eisenberg, 250 A.D.2d 801, 800, 673 N.Y.S.2d 461, 463 (2d Dep't 1998); Dyrmyshi v. Clifton Place Dev. Grp., Inc., 7 A.D.3d 565, 565, 775 N.Y.S.2d 908, 908 (2d Dep't 2004).

Third Department has held that a permanent structure or passageway is not a device that is employed for the express purpose of gaining access to an elevated work site, and as a result, no cause of action lies under section 240(1) when a permanent structure collapses.[66]

The Fourth Department has issued differing decisions on the subject, in one case finding the collapse of a permanent work site constitutes a prima facie violation of section 240(1) in *Bradford v. State*,[67] but then followed the Third Department's rule that the collapse of a permanent structure cannot serve as a basis for a section 240(1) claim in *Sponholz v. Benderson Property Development*.[68]

Clearly the matter is ripe for the Court of Appeals to weigh in on the subject, and there were three cases during the *Survey* year, either one, or all of which, may end up being decided by the Court of Appeals. The First Department adopted the view that the plaintiff may recover if foreseeability is shown as a preliminary requirement to the recovery in *Mendoza v. Highpoint Associates, IX, LLC*.[69] The plaintiff in *Mendoza* was told to go up to the roof of a vacant one-story commercial building to assess the damage on the roof, which apparently had been leaking.[70] Plaintiff was also told to fix the roof once he assessed the damage.[71] Plaintiff, while assessing the roof and taking notes of the damage, was near the middle of the roof when it "started to buckle," at which point he fell on his right side and landed on his knee.[72] He described the roof as sinking approximately an inch and a half to two inches, causing the plaintiff to fall.[73] Plaintiff then brought suit against the defendant, owner of the premises seeking recovery for negligence, and statutory Labor Law violations of section 200, section 240(1), and section 241(6).[74] Defendant then failed to produce for deposition in a timely

66. *See* Milanese v. Kellerman, 41 A.D.3d 1058, 1061, 838 N.Y.S.2d 256, 259 (3d Dep't 2007); D'Egidio v. Frontier Ins. Co., 270 A.D.2d 763, 765, 704 N.Y.S.2d 750, 753 (3d Dep't 2000); Avelino v. 26 R.R. Ave., Inc., 252 A.D.2d 912, 913, 676 N.Y.S.2d 342, 343 (3d Dep't 1998).

67. 17 A.D.3d 995, 997, 794 N.Y.S.2d 522, 524 (4th Dep't 2005).

68. 266 A.D.2d 815, 815, 697 N.Y.S.2d 432, 433 (4th Dep't 1999), *appeal dismissed*, 94 N.Y.2d 899, 728 N.E.2d 340, 707 N.Y.S.2d 144 (2000); *see also* Dombrowski v. Schwartz, 217 A.D.2d 914, 914, 629 N.Y.S.2d 924, 925 (4th Dep't 1995).

69. 83 A.D.3d 1, 10, 919 N.Y.S.2d 129, 136 (1st Dep't 2011) (citing Buckley v. Columbia Grammar & Prep., 44 A.D.3d 263, 841 N.Y.S.2d 249 (2007)).

70. *Id.* at 4, 919 N.Y.S.2d at 132.

71. *Id.*

72. *Id.* at 5, 919 N.Y.S.2d at 132.

73. *Id.*

74. *Mendoza*, 83 A.D.3d at 3-4, 919 N.Y.S.2d at 131.

fashion an employee subject to notice.[75] As a result, the court issued an order precluding the defendant from presenting any evidence at the time of trial with regard to liability.[76] Defendant then moved for summary judgment based on plaintiff's claims under section 240(1) and section 241(6).[77] The supreme court refused to listen to defendant's motion on the ground that the preclusion order prevented the defendant from presenting any evidence at the time of trial on liability.[78] The supreme court also denied plaintiff's cross-motion as untimely.[79]

The matter was then appealed to the Appellate Division, First Department, and in a three-to-two decision that court found that even though the defendant was precluded from giving any evidence at the time of trial by the preclusion order, the defendant could still move for summary judgment and put the plaintiff to their proof with regard to those issues surrounding section 240(1) and section 241(6) of the Labor Law.[80] In addressing the plaintiff's claim under section 240(1), the court specifically adopted the Second Department rule that: "the plaintiff must show that the failure of the structure in question 'was a foreseeable risk of the task he was performing.'"[81]

The court then went on to the lengthy analysis of the history of the "foreseeability" requirement in previous Second Department section 240(1) claims leading to the court finding that there was an issue of fact as to whether it was foreseeable that the roof would buckle, under the circumstances.[82]

Judge Acosta and Judge Tom dissented, in part, and issued separate opinions. Judge Tom issued his dissent based on the issue that once defendant was barred from offering evidence as to the issue of liability, that defendant was thereby rendered unable to demonstrate its prima facie entitlement to summary judgment under the law.[83] Judge Acosta, on the other hand, was very forceful in his disagreement with the majority as to the requirement that the plaintiff must show foreseeability, making clear his view that there was no statutory

75. *Id.* at 5, 919 N.Y.S.2d at 133.

76. *Id.*

77. *Id.* at 5-6, 919 N.Y.S.2d at 133.

78. *Id.* at 6, 919 N.Y.S.2d at 133.

79. *Mendoza*, 83 A.D.3d at 6, 919 N.Y.S.2d at 133.

80. *Id.*

81. *Id.* at 10, 919 N.Y.S.2d at 136 (quoting Espinosa v. Azure Holdings II, LP, 58 A.D.3d 287, 291, 869 N.Y.S.2d 395, 398-99 (1st Dep't 2008)).

82. *Id.* at 12, 919 N.Y.S.2d at 137; *see generally Espinosa*, 58 A.D.3d 287, 869 N.Y.S.2d 395; Shipkoski v. Watch Case Factory Assoc., 292 A.D.2d 587, 588, 741 N.Y.S.2d 55, 56 (2d Dep't 2002).

83. *Mendoza*, 83 A.D.3d at 16-17, 919 N.Y.S.2d at 141.

requirement that a plaintiff must establish that an injury was foreseeable to prevail under Labor Law section 240(1).[84] Judge Acosta relied heavily upon his reading of *Gordon v. Eastern Railway Supply, Inc*.[85] for the proposition that the New York State Court of Appeals has not read section 240(1) requiring the plaintiff to show that the injuries were foreseeable.[86]

It is clear that Labor Law section 240(1) fails to include any foreseeability requirement as a predicate to recovery for a plaintiff. The majority in *Mendoza* imputes that requirement, and would seem by the language of the decision to impliedly impute the requirement to every claim under Labor Law section 240(1).[87] That is especially so where the claim is premised on a collapsing permanent structure, such as a roof or staircase. Given the two dissents in this case, it is likely the case will find its way to the Court of Appeals, who will, for the first time, make a determination under New York State law whether foreseeability should play any role in a Labor Law section 240(1) claim and, if so, whether it should be limited to collapses and/or injuries that occur on permanent structures. It is noteworthy that in the *Gordon* case the plaintiff's section 240(1) claim was not dismissed by the Court notwithstanding that the injury was a result of an unforeseeable accident—a malfunctioning trigger on a sandblaster that the plaintiff was using at the time.[88]

The First Department had also taken on the same issue in *Vasquez v. Urbahn Associates, Inc*.[89] The plaintiff in *Vasquez* was injured when a staircase collapsed in a building that had a hole in the roof for possibly decades, thus exposing the floors to the elements.[90] Plaintiff was injured when one of the floors partially collapsed.[91] The building had been abandoned by the city since 1974 and was purchased from the city in 2003 in as is condition for one dollar.[92] The defendant moved for summary judgment, and plaintiff cross-moved with regard to claims under Labor Law section 240(1) and section 241(6).[93] At motion term,

84. *Id*. at 15, 919 N.Y.S.2d at 140.

85. 82 N.Y.2d 555, 626 N.E.2d 912, 606 N.Y.S.2d 127 (1993).

86. *Mendoza*, 83 A.D.3d at 15, 919 N.Y.S.2d at 140 (citing *Gordon*, 82 N.Y.2d 555 at 562, 626 N.E.2d at 916, 606 N.Y.S.2d at 131).

87. *See id.* at 10, 919 N.Y.S.2d at 136.

88. *Gordon*, 82 N.Y.2d at 562, 626 N.E.2d at 916, 606 N.Y.S.2d at 131.

89. 79 A.D.3d 493, 918 N.Y.S.2d 1 (1st Dep't 2010).

90. *Id.* at 495, 918 N.Y.S.2d at 4.

91. *Id.*

92. *Id.* at 500-01, 918 N.Y.S.2d at 8.

93. *Id.* at 493, 918 N.Y.S.2d at 3.

Supreme Court Justice Edward H. Lehner granted the defendant's motion for summary judgment pursuant to Labor Law section 241(6) claim and granted plaintiff's cross-motion for summary judgment on the issue of liability on the Labor Law section 240(1) claim.[94] The Appellate Division, First Department reversed on the section 241(6) cause of action finding that based on a search of the record, insofar as the claim was based on a violation of Industrial Code Rule 12 NYCRR section 23-3.3(c), the plaintiff's motion for summary judgment should be granted.[95] With regard to the Labor Law §240(1) claim, the majority found as follows: "[w]hile it is true that Labor Law [section] 240(1) fails to mention any foreseeability requirement as a predicate to its violation, a foreseeability requirement must necessarily be imputed as to every claim pursuant thereto, when as here, the claim is premised on a collapsing permanent structure."[96]

In the dissent written by Judge Acosta, Judge Freedman concurs, taking the position that the majority has read an element into section 240(1) that is misplaced, and in doing so, feels the majority has misread the Court of Appeals holding in *Gordon*.[97] The dissent went on to say that the statute imposes no such requirement and reaffirmed that even in *Gordon*, the injury was unforeseeable.[98] The dissent argued that Labor Law section 240(1) mandates that where there is a demolition of a "structure" that the appropriate safety devices are to be supplied to workers.[99] Judge Acosta went on to explain that in *Jones*, even though he joined in concurring with the majority opinion in that case, upon a closer examination and in the absence of any Court of Appeals case that decides the issue that it is best that judges do not read a foreseeability requirement into the statutes.[100] To do so, would encourage the contractors and owners to take a "head-in-the-sand" approach to their obligations.[101] Judge Acosta continued that such a requirement went directly against legislative intent, and that the Court of Appeals had recognized this by placing the ultimate responsibility for safety on the

94. *Vasquez*, 79 A.D.3d at 493, 918 N.Y.S.2d at 3.

95. *Id.*

96. *Id.* at 495-96, 918 N.Y.S.2d at 4-5.

97. *Id.* at 497, 918 N.Y.S.2d at 6.

98. *Id.*

99. *Vasquez*, 79 A.D.3d at 498, 918 N.Y.S.2d at 6.

100. *Id.*, 918 N.Y.S.2d at 7 (citing Jones v. 414 Equities, LLC, 57 A.D.3d 65, 866 N.Y.S.2d 165 (1st Dep't 2008)).

101. *Id*.

owners and general contractors rather than the workers.[102] Judge Acosta noted in his dissent that permanent structures, much like temporary ones, at times will collapse, particularly during times of demolition and construction, particularly if one has been abandoned for three decades and exposed to the elements.[103]

In all, *Vasquez* and *Mendoza* have clearly placed, with three-to-two decisions, the issue in a way that the New York State Court of Appeals will soon be called upon to provide guidance accordingly.

The Appellate Division, Second Department was likewise faced with a similar case in *Martins v. Board of Education of New York*.[104] The plaintiff in *Martins* was a laborer who fell from the third floor of a building undergoing demolition to the second floor when a coworker ran a piece of equipment into a wall, knocked the wall over, thus causing the floor to collapse.[105] Plaintiff then brought claims against the defendants alleging violations of Labor Law section 240(1) and section 241(6).[106] Plaintiff then moved for summary judgment on the issue of liability, and that motion was denied in Supreme Court, Kings County.[107] However, plaintiff's motion for summary judgment on the issue of liability with regard to alleged violations of Labor Law section 241(6) was granted.[108]

The Appellate Division, Second Department found that the plaintiff failed to demonstrate that the impending collapse of the floor, and thus the need for safety devices, was foreseeable.[109] As a result, the court affirmed the lower court's denial of that branch of the plaintiff's motion.[110] The court also found that the plaintiff failed to show that the defendants failed to perform inspection as required by Industrial Code Rule 12 N.Y.C.R.R. 23-3.3(c) or that the floor was structurally unstable and thus required shoring.[111] The decision was a unanimous one.[112]

We will await to hear further from the Court of Appeals, which

102. *Id.* at 499, 918 N.Y.S.2d at 7 (citing Zimmer v. Chemung Cnty. Performing Arts, 65 N.Y.2d 513, 520, 482 N.E.2d 989, 901, 493 N.Y.S.2d 102, 105 (1985)).

103. *Id.* at 502, 918 N.Y.S.2d at 9-10.

104. 82 A.D.3d 1062, 919 N.Y.S.2d 196 (2d Dep't 2011).

105. *Id.*, 919 N.Y.S.2d at 197.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Martins*, 82 A.D.3d at 1063, 919 N.Y.S.2d at 197-98.

110. *Id.*, 919 N.Y.S.2d at 198 (citing Jones v. 414 Equities, LLC, 57 A.D.3d 65, 80, 866 N.Y.S.2d 165, 177 (1st Dep't 2008); Shipkoski v. Watch Case Factory Assoc., 292 A.D.2d 587, 590, 741 N.Y.S.2d 55, 59 (2d Dep't 2002)).

111. *Id.*

112. *Id.* at 1064, 919 N.Y.S.2d at 198.

hopefully will give some direction to the issue of whether foreseeability is a component predicate to liability under section 240(1), and if so, does the requirement apply only to permanent building structures and/or all cases brought under section 240(1).

C. Falling Objects Being Secured, Raised, or Lowered, and the Current Application of Section 240(1)

There were a number of cases dealing with falling objects over the course of the survey, but three have been chosen for their representative value here. In *Harris v. City of New York*, the First Department wrestled with a case dealing with a worker who fell from a four-by-four plank and was injured.[113] Plaintiff subsequently brought an action pursuant to Labor Law section 240(1) and section 241(6).[114] The defendant moved for summary judgment dismissing the complaint with regard to section 240(1) and section 241(6) and denied plaintiff's cross-motions for leave to amend the bill of particulars to include additional claims of violations of the Industrial Code as a predicate to the section 241(6) claim.[115] The First Department, in a unanimous decision written by Judge Catterson, reversed the Supreme Court Justice Manzanet-Daniels' order and reinstated the plaintiff's section 240(1) and 241(6) claims.[116] In so doing, the court was persuaded that the plaintiff's injuries resulted from the force of gravity.[117] It was clear that the four-by-four plank that the plaintiff was standing on had been wedged between a large piece of concrete which was being removed from a demolition work site, and had caught in one corner.[118] The plaintiff was told to place the four-by-four plank underneath a portion of the concrete piece, while it was hoisted into the air.[119] Plaintiff did as he was told, wedged the plank between the raised piece and the ground, in hopes that when the concrete piece was dropped that the part that was stuck would become dislodged.[120] As the concrete slab was lowered, it fell quickly, causing the four-by-four upon which the plaintiff was standing to shatter.[121] Plaintiff fell the approximate three-foot distance to the

113. 83 A.D.3d 104, 106, 923 N.Y.S.2d 2, 4 (1st Dep't 2011).
114. *Id.* at 107, 923 N.Y.S.2d at 4.
115. *Id.*, 923 N.Y.S.2d at 4-5.
116. *Id.* at 111-12, 923 N.Y.S.2d at 8.
117. *Id.* at 110, 923 N.Y.S.2d at 6.
118. *Harris*, 83 A.D.3d at 106, 923 N.Y.S.2d at 4.
119. *Id.*
120. *Id.*
121. *Id.* at 106-07, 923 N.Y.S.2d at 4.

ground and struck an object causing the injuries.[122] Reviewing the case in accord with *Runner*, the court adopted the test that was espoused in *Runner* as the relevant inquiry, that being "whether the harm flows directly from the application of the force of gravity to the object."[123]

The court then recognizing the similarity between the instant case and *Runner* that it was uncontroverted that the slab descended too quickly causing the wedge upon which the plaintiff stood to shatter, thus causing plaintiff to fall and sustain injury. The court thus found: "that the injuries suffered by the plaintiff 'was every bit as direct a consequence of the descent of the [slab] as would have been an injury to a worker positioned in the descending [slab's] path.'"[124]

With regard to the plaintiff's section 241(6) claim, and plaintiff's motion to amend the bill of particular to include Industrial Code Rule section 23-8.1(f)(1)(iv) and section 23-8.1(2)(I), the court found that there was no prejudice to the defendant by the amendment and that defendant would suffer no prejudice assuming the bill of particulars was to be amended.[125] As a result, the court found that the request for leave to amend the bill of particulars should have been granted by Judge Brigantti-Hughes and reversed that decision accordingly.[126]

In *Gutman v. City of New York*,[127] plaintiff moved for summary judgment on the issue of liability under section 240(1) and defendant cross-moved seeking summary judgment dismissing the complaint.[128] Supreme Court, Kings County Justice Kerrigan denied the plaintiff's motion for summary judgment, but granted the defendant's motion dismissing plaintiff's complaint based upon section 240(1).[129] On appeal, the Second Department modified the supreme court decision by denying the branch of the defendant's cross-motion that sought dismissal of plaintiff's complaint.[130] The plaintiff was an employee of the New York City Transit Authority who was injured when he and his co-workers were moving a thirty-nine-foot, thirteen-hundred-pound rail at the Steinway subway station in Queens, New York.[131] The

122. *Id.* at 107, 923 N.Y.S.2d at 4.

123. *Harris*, 83 A.D.3d at 108, 923 N.Y.S.2d at 5-6.

124. *Id.* at 110, 923 N.Y.S.2d at 6 (quoting Runner v. N.Y. Stock Exch., Inc., 13 N.Y.3d 599, 604, 922 N.E.2d 865, 868, 895 N.Y.S.2d 279, 282 (2009)).

125. *Id.* at 111, 923 N.Y.S.2d at 5.

126. *Id.* at 111-12, 923 N.Y.S.2d at 8.

127. 78 A.D.3d 886, 911 N.Y.S.2d 458 (2d Dep't 2010).

128. *Id.* at 886, 911 N.Y.S.2d at 459.

129. *Id.*

130. *Id.*

131. *Id.*

coworkers began lifting the rail, but the plaintiff had not yet securely attached his hook, and as a result, the co-workers lost control of the rail causing the rail to fall approximately twelve to sixteen inches, injuring plaintiff's leg.[132] The court found that the defendant failed to submit a prima facie case that the height differential was not enough to activate the liability protections under section 240(1).[133] Applying *Runner*,[134] the court held, as the court in *Runner* had previously held in that case: "the elevation differential here involved cannot be viewed as de minimis, particularly given the weight of the object and the amount of force it was capable of generating, even over the course of a relatively short descent."[135]

As a result, the court denied the defendant's motion, but also decided that the plaintiff was not entitled to summary judgment on his motion as there were remaining issues of fact as to "whether the rail 'fell, while being hoisted . . . because of the absence or inadequacy of a safety device of the kind enumerated in the statute.'"[136]

The Appellate Division, Fourth Department reviewed the case of *Timmons v. Barrett Paving Materials, Inc*.,[137] which was another falling object case that dealt with a metal catwalk being secured or lowered, thus falling on the plaintiff and causing injury. Defendant Barrett moved for summary judgment dismissing the Labor Law claims, and Supreme Court, Oswego County Justice Norman Seiter granted the defendant's motion.[138] The plaintiff was tack-welding the catwalk to a building with a coworker when it was noticed that the catwalk was not straight.[139] As a result, they were attempting to lower one end of the catwalk by pushing down on the catwalk with a man-lift while Timmons—standing below on a second catwalk—would tack-weld the upper structure into position.[140] The court, in a unanimous memorandum decision, decided that "[s]ince the (catwalk) was not an object being hoisted or secured, Labor Law section 240(1) does not

132. *Gutman*, 78 A.D.3d at 886, 911 N.Y.S.2d at 459.

133. *Id.* at 887, 911 N.Y.S.2d. at 460.

134. *See* Runner v. N.Y. Stock Exch., Inc., 13 N.Y.3d 599, 605, 922 N.E.2d 865, 865, 895 N.Y.S.2d 279, 282 (2009).

135. *Gutman*, 78 A.D.3d at 887, 911 N.Y.S.2d at 459 (quoting *Runner*, 13 N.Y.3d at 605, 922 N.E.2d at 865, 895 N.Y.S.2d at 282).

136. *Id.*, 911 N.Y.S.2d at 460 (quoting Narducci v. Manhassett Bay Assoc., 96 N.Y.2d 259, 268, 750 N.E.2d 1085, 1089, 727 N.Y.S.2d 37, 41 (2001)).

137. 83 A.D.3d 1473, 920 N.Y.S.2d 545 (4th Dep't 2011).

138. *Id.* at 1473, 920 N.Y.S.2d at 546.

139. *Id.* at 1474-75, 920 N.Y.S.2d at 547.

140. *Id.* at 1475, 920 N.Y.S.2d at 547.

apply."[141] "We thus conclude that Timmons was 'exposed to the usual and extraordinary dangers of a construction site, and not the extraordinary elevation risks envisioned by Labor Law section 240(1).'"[142]

This decision would appear to be a very conservative application of Labor Law section 240(1), especially when considered in light of the clear trend presented by most of the cases decided in the State at the appellate level or Court of Appeals level since *Runner*.[143]

D. Routine Maintenance Versus Covered Work as Defined by Labor Law Section 240(1)

The protections afforded to workers pursuant to section 240(1) of New York State Labor Law are very distinctly stated in the statute. For a worker to be afforded such protections, that worker must be injured during the "erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure."[144] The issue of whether a plaintiff is involved in routine maintenance as opposed to any of the statute enumerated activities is often a subject of litigation in section 240(1) cases as so adeptly stated by the New York State Court of Appeals in *Smith v. Shell Oil Co.*:[145]

> [c]hanging a lightbulb is not "erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure." An illuminated sign with a burnt-out lightbulb is not broken, and does not need repair. Rather it needs maintenance of a sort different from "painting, cleaning or pointing," the only types of maintenance provided for in the statute.[146]

There were several cases dealing with the distinction of what type of work the injured plaintiff was doing at the time of the incident that caused the injury, and whether that was as a result of routine maintenance or other work that was not associated with or an integral part of a covered activity.

For example, in *Randall v. Time Warner Cable, Inc.*,[147] the

141. *Id*. (quoting *Narducci*, 96 N.Y.2d at 268, 750 N.E.2d at 1091, 727 N.Y.S.2d at 43).

142. *Timmons*, 83 A.D.3d at 1475, 920 N.Y.S.2d at 547 (citing Rodriquez v. Margaret Tietz Ctr. for Nursing Care, 84 N.Y.2d 841, 640 N.E.2d 1134, 616 N.Y.S.2d 900 (1994)).

143. Runner v. N.Y. Stock Exch., Inc., 13 N.Y.3d. 599, 922 N.E.2d 865, 895 N.Y.S.2d 279 (2009).

144. N.Y. LAB. LAW § 240(1) (McKinney 2011).

145. 85 N.Y.2d 1000, 654 N.E.2d 1210, 630 N.Y.S.2d 962 (1995).

146. *Id*. at 1002, 654 N.E.2d at 1211, 630 N.Y.S.2d at 963.

147. 81 A.D.3d 1149, 916 N.Y.S.2d 656 (3d Dep't 2011).

Appellate Division, Third Department decided a case that was dismissed at the supreme court level in St. Lawrence County by Judge Demarest, who granted the defendant's cross-motion for summary judgment on a section 240(1) Labor Law claim.[148] In that action, plaintiff who worked for Wells Communications Company, LLC had contracted with the defendant Time Warner to perform multiple services for Time Warner, including installations, repairs, and other services dealing with cable television.[149] Plaintiff went to a subscriber's home in the Town of Messina, and installed new equipment, wiring and fittings inside the home, as well as a ground cable outside the home, and did a significant amount of modification of other wires outside the home to complete the job.[150] Most of the work was complete when it was found that the equipment was not working, and he was directed by his supervisor to replace a filter on the outside cable wires.[151] Plaintiff then hooked a twenty-eight-foot extension ladder over the cable wires, and while climbing the ladder, the ladder slid, causing the plaintiff to fall to the ground and be injured.[152] At the supreme court level, Judge Demarest granted the defendant's cross-motion for summary judgment based on the fact that, at the time that the plaintiff was climbing the ladder, he was no longer engaged in activities which "altered" the subscriber's home.[153] The defendant had argued that the plaintiff was working on an entirely different structure consisting of the outside poles and wires, and this was more of a routine task, akin to placing a light bulb rather than alteration, which is a covered activity.[154] The court found that the supreme court justice improperly "isolate[d] the moment of injury and ignore[d] the general context of the work" that the plaintiff was performing at the time.[155] The court found that the activity that the plaintiff was engaged in was one that was directly ancillary to the acts of alteration, and all part of a series of interconnected steps, with the work not being complete until the final step was completed.[156] As a result, the court found that activity was a covered activity and the plaintiff was entitled to summary judgment on his Labor Law section

148. *Id*. at 1149-50, 916 N.Y.S.2d at 657.
149. *Id.* at 1150, 916 N.Y.S.2d at 657.
150. *Id.*
151. *Id.*
152. *Randall*, 81 A.D.3d at 1150, 916 N.Y.S.2d at 657-58.
153. *Id.*, 916 N.Y.S.2d at 658.
154. *Id.* at 1151, 916 N.Y.S.2d at 658.
155. *Id.*, 916 N.Y.S.2d at 659.
156. *Id.*

240(1) claim.[157]

In *Gowans v. Otis Marshall Farms, Inc.*, the Appellate Division, Fourth Department unanimously reversed a lower court decision dismissing plaintiff's section 240(1) claim, but found questions of fact with regard to the cause of plaintiff's injuries.[158] In *Gowans*, the plaintiff and his brother had agreed to perform work regarding the replacement of rotting carrier beams in a barn owned by the defendant.[159] At the time he was injured, the plaintiff was allegedly climbing a ladder to the upper level of the barn when he fell through a "hay hole" that his brother had failed to cover, even though he had been requested to do so.[160] Plaintiff allegedly sustained injuries, including neurological injuries, which were disputed by the defendant.[161] The court found that Supreme Court Justice Hester erred in granting the defendant judgment dismissing the complaint, as at the time plaintiff fell, it was not necessary for the plaintiff to be at the location where his brother was working.[162] Not only was his brother a coworker, but his brother was also taking measurements that were critical to the restoration project.[163] As a result, plaintiff was entitled to the protections of Labor Law section 240(1).[164] Plaintiff's claim under Labor Law section 241(6) was also reinstated by the Fourth Department.[165]

In a case that dealt with whether the plaintiff was engaged in one of the covered activities or otherwise was engaged in routine maintenance or manufacturing, the First Department in *Montalvo v. New York and Presbyterian Hospital* reversed a lower court decision granting the plaintiff summary judgment pursuant to Labor Law section 240(1).[166] In *Montalvo*, plaintiff was working to replace a float and rod component to a pump that was installed in the basement of defendant's building.[167] The system which plaintiff was working on was located in a six-foot deep pit that was covered with metal grating.[168] Plaintiff

157. *Randall*, 81 A.D.3d at 1152, 916 N.Y.S2d at 659.

158. 85 A.D.3d 1704, 1704, 925 N.Y.S.2d 783, 783 (4th Dep't 2011).

159. *Id.*, 925 N.Y.S.2d at 784.

160. *Id.*

161. *Id.* at 1705-06, 925 N.Y.S.2d at 785.

162. *Id.* at 1705, 925 N.Y.S.2d at 784.

163. *Gowans*, 85 A.D.3d at 1705, 925 N.Y.S.2d at 784.

164. *Id.* at 1704, 925 NYS2d at 783.

165. *Id.*

166. *See* Montalvo v. N.Y. & Presbyterian Hosp., 82 A.D.3d 580, 919 N.Y.S.2d 18 (1st Dep't 2011).

167. *Id.*, 919 N.Y.S.2d at 19.

168. *Id.*

released the water in the pit so it would drain, and then took part of the grate off.[169] While he was standing on the other grate, he slipped on the wet grating, causing him to fall into the pit and into the boiling water.[170] The defendants argued that the components needed replacing only because it was part of the normal wear and tear experienced by the components and, as a result, that the plaintiff was not in a protected activity as defined by Labor Law section 240(1).[171] Plaintiff testified that this particular component had only been replaced four or five times in the twenty-five years that he worked as a mechanic.[172] The appellate division found it important that there was nothing on the record that established the cause of the component's failure nor was there anything on the record that described the type or amount of work involved in replacing the part.[173] As a result, the court found that, as a matter of law, it could not grant plaintiff summary judgment, but found that there was an issue of fact on the question of whether it was routine maintenance and/or repair.[174] As a result, the court modified New York County Supreme Court Justice Rakower's grant of summary judgment to the plaintiff and, as modified, denied the plaintiff's cross-motion.[175] The court did grant the defendant's motion pursuant to Labor Law section 241(6) and section 200, as at the time the plaintiff was not engaged in "construction, demolition or excavation" when he was injured, as required by those statutes.[176]

In *Selak v. Clover Management, Inc.*, the Fourth Department affirmed the dismissal of a plaintiff's section 240(1) case based on the fact that the plaintiff was performing routine maintenance rather than engaged in one of the protected activities under the statute.[177] The defendant had contracted with plaintiff's employer to change the HVAC system from heating to cooling, and the plaintiff was physically on the premises owned by the defendant replacing filters in the system when he was injured when he fell from an eleven-foot ladder and into a concrete stairwell one story below.[178] The court found that the plaintiff

169. *Id.*

170. *Id.*

171. *Montalvo*, 82 A.D.3d at 580-81, 919 N.Y.S.2d at 19.

172. *Id.* at 581, 919 N.Y.S.2d at 19.

173. *Id.*

174. *Id.*

175. *Id.* at 580, 919 N.Y.S.2d at 19.

176. *Montalvo*, 82 A.D.3d at 581, 919 N.Y.S.2d at 19; *see also* N.Y. LAB. LAW §§ 200, 241(6) (McKinney 2009).

177. 83 A.D.3d 1585, 1586, 922 N.Y.S.2d 891, 893 (4th Dep't 2011).

178. *Id.*, 922 N.Y.S.2d at 892.

was engaged in routine maintenance at the time of his activity, given the undisputed testimony of the plaintiff's employer that the filters were regularly changed two to four times per year, as a result of normal wear and tear.[179] The appellate division, however, found that Niagara County Supreme Court Justice Boniello, III erred by granting the defendants' judgment by dismissing plaintiff's Labor Law section 200 and common law negligence claims.[180] The court thus modified the order denying defendants' motion, finding that defendants may be liable for common-law negligence or the violation of Labor Law section 200, if the plaintiff can prove, at the time of trial, that the defendants had actual or constructive notice of an alleged defective condition at the work site.[181] Based on the facts submitted to the court, the court determined that there was a question of fact as to whether the placement of the ladder so close to a railing and stairway constituted a hazardous condition.[182]

E. Requirement of Industrial Code Rule Violation and Liability Under Section 241(6)

It has long been established in the State of New York that in order to pursue a claim under section 241(6) of the Labor Law, that the plaintiff must prove a violation of one of the specific Industrial Code Rules and Regulations promulgated by the Commission of the Department of Labor.[183] Section 241(6), like section 240(1) imposes a non-delegable duty on all contractors and owners and their agents, and requires that:

> [a]ll areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work . . . .[184]

The plaintiff cannot rest his claim under Labor Law §241(6) on common-law safety principals, but must rather show a violation of a

179. *Id.* at 1586-87, 922 N.Y.S.2d 893.

180. *Id.* at 1587, 922 N.Y.S.2d at 893.

181. *Id.*

182. *Selak*, 83 A.D.3d at 1587, 922 N.Y.S.2d at 893-94 (citing Kobel v. Niagara Mohawk Power Corp., 83 A.D.3d 1435, 920 N.Y.S.2d 557 (4th Dep't 2011)).

183. *See* Ross v. Curtis Palmer Hydro-Elec. Co., 81 N.Y.2d 494, 501-02, 618 N.E.2d 82, 86, 601 N.Y.S.2d 49, 53 (1993).

184. N.Y. LAB. LAW § 241(6) (McKinney 2009).

specific Industrial Code rule.[185]

The New York State Court of Appeals was called upon to decide whether the plaintiff adequately could prove a Industrial rule violation of 12 N.Y.C.R.R. 23-9.4(e) and thus established the predicate for Labor Law section 241(6) liability in the case of *St. Louis v. Town of North Elba*.[186] The plaintiff was injured while helping in the construction of a drainage pipeline when a section of pipe fell from the jaws of a hydraulic-operated clamshell bucket which was attached to the bucket arm of a font-end loader.[187] Plaintiff sought to prove, as a predicate, that Industrial Code Rule 23-9.4(e) was violated, and that as a result of that violation, the plaintiff was entitled to protection afforded under section 241(6).[188] The Industrial Code rule relied upon by the plaintiff requires loads to be fastened with sturdy wire, proportionate to the weight of the load, so that the equipment will not fall, such as it did in the case that injured the plaintiff.[189] The concern that the defendant had in this case was that the Industrial Code rule relied upon, 23-9.4(e) only relates or mentions "power shovels and backhoes."[190]

In a decision written by Chief Judge Jonathan Lippman, the Court of Appeals, in a four-to-three decision, affirmed the appellate division decision that denied defendant's motion for summary judgment based on the fact that plaintiff could not show a violation of the particular Industrial Code rule because section 23-9.4(e) does not apply to front-end loaders.[191] The majority in the Court of Appeals noted that although the Industrial Code did not mention each and every piece of heavy equipment that can or might be operated to suspend materials from its bucket or bucket arm, that the intent was clearly to reduce the type of injuries that would occur in the workplace such as happened to the plaintiff in the instant case.[192] In other words: "the same danger that exists for a worker using a power shovel or backhoe with an unsecured load exists for a worker using a front-end loader with an unsecured load."[193]

The court went on to say that "[t]he Industrial Code should be

185. *Ross*, 81 N.Y.2d at 501-02, 628 N.E.2d at 86, 601 N.Y.S.2d at 53.

186. *See* 16 N.Y.3d 413, 947 N.E.2d 1169, 923 N.Y.S.2d 391 (2011).

187. *Id.* at 411, 947 N.E.2d at 1170, 923 N.Y.S.2d at 392.

188. *Id.* at 415, 947 N.E.2d at 1170, 923 N.Y.S.2d at 392-93; *see also* N.Y. COMP. CODES R. & REGS. tit. 12, § 23-9.4(e) (2008).

189. 12 N.Y.C.R.R. 23-9.4(e).

190. *St. Louis*, 16 N.Y.3d at 414, 947 N.E.2d at 1171, 923 N.Y.S.2d at 393.

191. *Id.* at 415, 947 N.E.2d at 1172-73, 923 N.Y.S.2d at 393-94.

192. *Id.*, 947 N.E.2d at 1172-73, 923 N.Y.S.2d at 394.

193. *Id.* at 415-16, 947 N.E.2d at 1172, 923 N.Y.S.2d at 394.

sensibly interpreted and applied to effectuate its purpose of protecting construction laborers against hazards in the workplace."[194] The Court affirmed the appellate division and the supreme court, and found that supreme court properly denied defendant's motion for summary judgment.[195]

Thus, in two cases before the New York State Court of Appeals this year, *St. Louis v. Town of North Elba*[196] and *Wilinski v. 334 East 92nd Housing Development Fund Corp.*,[197] liberal interpretations were made on Industrial Code rules that would form predicates for liability against defendants under Labor Law section 241(6). Noteworthy, both decisions were four to three decisions to the extent that that lends some uncertainty to future cases, it remains to be seen as more cases percolate through the Court of Appeals.[198] One thing from this year's decisions, however, is clear: the court is unwilling, at least at this time, to deviate from the long-held standard held in New York State that the plaintiff must plead and prove a violation of a "specific, positive command."[199]

In a related case, the Appellate Division, First Department in *Booth v. Seven World Trade Co., L.P.*, determined that even though defendants in a common-law negligence action can rely on the so-called "storm in progress doctrine," that that doctrine is not applicable to an alleged violation of Labor Law section 241(6).[200] Plaintiff was injured while doing a biweekly walk-through on the forty-second floor of a construction site when he slid and injured his back, while struggling to keep himself upright.[201] Plaintiff then commenced an action against the defendants alleging violations of Labor Law section 240(1) and section 241(6) and particularly based the section 241(6) claim on the violation

194. *Id.* at 416, 947 N.E.2d at 1172, 923 N.Y.S.2d at 394.

195. *St. Louis*, 16 N.Y.3d at 416, 947 N.E.2d at 1172, 923 N.Y.S.2d at 394.

196. *See generally id.*

197. 18 N.Y.3d 1, 959 N.E.2d 488; 935 N.Y.S.2d 551 (2011).

198. *St. Louis*, 16 N.Y.3d at 418, 947 N.E.2d at 1174, 923 N.Y.S.2d at 396; *Wilinski*, 18 N.Y.3d at 15, 959 N.E.2d at 497; 935 N.Y.S.2d at 560.

199. Gasques v. State, 15 N.Y.3d 869, 870, 937 N.E.2d 79, 80, 910 N.Y.S.2d 415, 416 (2010) (affirming a dismissal of a section 241(6) claim based on the general and non-specific nature of the alleged predicate Industrial Code rule violation). That Rule, 23 N.Y.C.R.R. 23-1.5(c)(1) requires that machinery or equipment used by employees must be in good repair and in safe working condition. N.Y. COMP. CODES R. & REGS. tit. 23, § 23-1.5(c)(1) (2008). The Court of Appeals agreed with the Appellate Division, Second Department and Court of Claims Judge Alton R. Waldon, Jr., in granting defendant's motion for summary judgment dismissing the claimant's Labor Law Section 241(6) claim. *Gasques*, 15 N.Y.3d at 870, 937 N.E.2d at 80, 910 N.Y.S.2d at 416.

200. 82 A.D.3d 499, 501-02, 918 N.Y.S.2d 428, 430 (1st Dep't 2011).

201. *Id.* at 500, 918 N.Y.S.2d at 429.

of Industrial Code Rule 23-1.7(d) and (e).[202] The defendants moved for summary judgment and New York County Supreme Court Justice Milton A. Tingling denied the motion in its entirety.[203] The appellate division found that Justice Tingling properly declined to dismiss the Labor Law section 241(6) claim that was based on Industrial Code Rule 23-1.7(d), which dealt with slipping hazards.[204] The court specifically determined that the defendants' "storm in progress" defense did not apply to an Industrial Code Rule 23-1.7(d) claim, as there is no exception in that rule which would allow for a storm in progress defense.[205]

II. MUNICIPAL LIABILITY

A. Emergency Vehicle Doctrine

Last year, we reported, at length, the Appellate Division, Fourth Department decision in *Kabir v. County of Monroe*, where the appellate division, in a three to two decision, determined that the "reckless disregard" standard of defense was not available to a Monroe County Deputy Sheriff during a burglary call.[206] As predicted, the Court of Appeals listened to arguments in this case on January 13, 2011 and issued a decision on February 17, 2011 after the Appellate Division, Fourth Department granted leave to appeal to the Court of Appeals, and certified the question "was the order of this court entered December 30, 2009 properly made?"[207]

In *Kabir*, the plaintiff had brought action against the defendant, County of Monroe, alleging negligence of Deputy County Sheriff DiDomenico who was dispatched to a burglary alarm.[208] The deputy sheriff, who did not activate the emergency lights or siren on his vehicle, looked down at his vehicle terminal to view the names of the cross-streets where the burglary was reported.[209] When he looked up, he saw the plaintiff's vehicle, but was unable to stop before rear-ending

202. *Id*.

203. *Id.*

204. *Id.* at 501, 918 N.Y.S.2d at 430.

205. *Booth*, 82 A.D.3d at 502, 918 N.Y.S.2d at 430 (citing Rothschild v. Faber Homes, 247 A.D.2d 889, 890-91, 688 N.Y.S.2d 793, 795 (4th Dep't 1998)).

206. Kabir v. Cnty. of Monroe, 68 A.D.3d 1628, 1629, 892 N.Y.S.2d 714, 716 (4th Dep't 2009).

207. Kabir v. Cnty of Monroe, 16 N.Y.3d 217, 222, 945 N.E.2d 461, 463, 920 N.Y.S.2d 268, 270 (2011).

208. *Id.* at 220-21, 945 N.E.2d at 462, 920 N.Y.S.2d at 269.

209. *Id.*

the vehicle in front of him, driven by the plaintiff.[210] Plaintiff then brought action as against the defendant, County of Monroe, and Supreme Court Justice Thomas A. Stander denied partial summary judgment to the plaintiff on the issue of liability, and granted summary judgment seeking dismissal of the complaint as against the County of Monroe.[211] The Appellate Division, Fourth Department reversed, finding at the time the defendant deputy, in looking at his terminal, was not engaged in one of the four protected activities enumerated in the statute.[212]

In a four-to-three decision written by Judge Read, the Court of Appeals affirmed the appellate division decision, and in so doing held:

> that the reckless disregard standard of care in *Vehicle and Traffic Law* [*section*] *1104(e)* only applies where a driver of an authorized vehicle involved in an emergency operation engages in the specific conduct exempted from the rules of the road by *Vehicle and Traffic Law* [*section*] *1104(b)*. Any other injury-causing conduct of such a driver is governed by the principals of ordinary negligence.[213]

In setting forth the majority opinion, Judge Read looked at the legislative history with regard to the statute, and the preciseness with which the legislature granted the statute's list of activities that are subject to the limited liability of the statute.[214] The court went on to specifically hold:

> we hold that the reckless disregard standard of care in *Vehicle and Traffic Law* [*section*] *1104(e)* only applies when a driver of a authorized emergency vehicle involved in an emergency operation engages in the specific conduct exempted from the rules of the road by *Vehicle and Traffic Law* [*section*] *1104(b)*. Any other injury relating conduct such a driver is governed by the rules of ordinary negligence.[215]

In the dissent written by Judge Graffeo, she concludes that "the majority reads a limitation into *section 1104(e)* that I believe is unworkable, incompatible with our precedent and unwarranted given the language in the statute."[216] The dissent relies heavily on *Saarinen v. Kerr*,[217] for

210. *Id.* at 221, 945 N.E.2d at 462, 920 N.Y.S.2d at 270.

211. Kabir v. Cnty. of Monroe, 2008 NY Slip Op. 52000(U), at 1, 7-8 (Sup. Ct. Monroe Cnty. 2008).

212. Kabir v. Cnty. of Monroe, 68 A.D.3d 1628, 1628-29, 892 N.Y.S.2d 714, 715-16 (4th Dep't 2009).

213. *Kabir*, 16 N.Y.3d at 220, 945 N.E.2d at 461-62, 920 N.Y.S.2d at 268-69.

214. *Id.* at 222-27, 945 N.E.2d at 463-67, 920 N.Y.S.2d at 270-74.

215. *Id.* at 220, 945 N.E.2d at 461-62, 920 N.Y.S.2d at 268-69.

216. *Id.* at 231, 945 N.E.2d at 469, 920 N.Y.S.2d at 276.

what appeared to be an accepted rule of law with regard to section 1104, that "'momentary judgment lapse' does not alone rise to the level of recklessness required of the driver of an emergency vehicle in order for liability to attach."[218] As its final point, the dissent highlights what the term the "unworkable nature of the new rule" to the extent of where does one look during the emergency route to determine liability.[219] Is it based on what the officer does at a particular moment or is it triggered with respect to the entire emergency operation once the officer initiates that?[220]

Clearly, the new rule established by the Court of Appeals is that the "reckless disregard standard" of section 1104(b) will be applied only when the proof shows that the public servant has complied with one of the four activities specified in the law.[221] If, at any time during the travel within the emergency response, the public servant varies from the four rules, liability will be imposed under ordinary rules of negligence pursuant to Vehicle and Traffic Law section 1104(e).[222]

The Appellate Division, First Department in *Tatishev v. City of New York*, had an opportunity to review the application of section 1104(b) and (e) soon after the Court of Appeals decided the *Kabir* decision.[223] In that case, the plaintiff was walking across the street in a crosswalk when the defendant police officer made a left-hand turn with a green light within the applicable speed limit.[224] The Appellate Division, First Department, in a unanimous decision upheld the decision of New York County Justice Saliann Scarpulla in determining that the reckless disregard standard of care of Vehicle and Traffic Law section 1104 did not apply.[225] The court specifically found that:

> the injury causing conduct of the police driver—making a left turn at a green light, within the speed limit, and not contrary to any restriction on movement or turning—does not fall within any of the categories of privileged conduct set forth in Vehicle and Traffic Law section 1104(b) . . . plaintiff's claim is governed by principals of ordinary negligence, whether or not the police driver was responding to an

217. *See* 84 N.Y.2d 494, 644 N.E.2d 988, 620 N.Y.S.2d 297 (1994); *see also* Szczerbiak v. Pilat, 90 N.Y.2d 553, 686 N.E.2d 1346, 664 N.Y.S.2d 252 (1997).

218. *Kabir*, 16 N.Y.3d at 236, 945 N.E.2d at 473, 920 N.Y.S.2d at 280 (quoting *Szczerbiak*, 90 N.Y.2d at 557, 686 N.E.2d at 1349, 664 N.Y.S.2d at 255).

219. *Id.* at 241, 945 N.E.2d at 476, 920 N.Y.S.2d at 283.

220. *Id.*

221. *Id.* at 223-24, 945 N.E.2d at 464, 920 N.Y.S.2d at 271.

222. *Id.* at 220, 945 N.E.2d at 461-62, 920 N.Y.S.2d at 268-69.

223. 84 A.D.3d 656, 656-57, 923 N.Y.S.2d 523, 523 (1st Dep't 2011).

224. *Id.* at 657, 923 N.Y.S.2d at 523-24.

225. *Id.* at 656, 923 N.Y.S.2d at 523.

emergency.[226]

In *Rusho v. State*, the Appellate Division, Fourth Department took up the question of what constitutes emergency operation for purposes of the application of Vehicle and Traffic Law section 1104.[227] In *Rusho*, the claimant was injured when the vehicle she was riding in was struck by a parole officer that was driving a state-owned vehicle.[228] Plaintiff moved for partial summary judgment on the issue of liability, and defendant's cross-moved for summary judgment dismissing the claim.[229] Court of Claims Judge Norman I. Siegel denied the plaintiff's motion for summary judgment and granted the defendant's cross-motion for summary judgment based on the fact that defendant was protected from liability by the qualified privilege afforded by Vehicle and Traffic Law section 1104.[230] The appellate division reversed in a four-to-one decision upon the basis that the parole officers were not engaged in an emergency operation as required by the statute, but were merely turning around to try to determine whether the person they saw was a parole violator.[231] As a result, the parole officers were deemed to have been engaged in an investigatory role and not in actual pursuit.[232] The court was persuaded in part by the fact that the testimony was that, had the parole officers found the alleged parole violator, they would not have arrested the individual, but would have called police to assist in such arrest.[233] Judge Carni, in dissent, noted that Vehicle and Traffic Law section 114-b includes "pursuing an actual or suspected violator of the law" in defining the term "emergency operation."[234] Judge Carni's view was that the majority performed an incorrect analysis of the facts and their decision did not comply with the legislative intent with regard to the application of the statute.[235] Judge Carni also would agree with that part of the Court of Claims' decision that made the determination that failure to use the turn signal and failing to see those things that are there do not rise to the level of reckless disregard or conscious indifference was nothing more than a "momentary judgment lapse" and

226. *Id*. at 657, 923 N.Y.S.2d at 523-24.
227. *See* 76 A.D.3d 783, 906 N.Y.S.2d 836 (4th Dep't 2010).
228. *Id*. at 783-84, 906 N.Y.S.2d at 837.
229. *Id*. at 783, 906 N.Y.S.2d at 836.
230. *Id.* at 783-84, 906 N.Y.S.2d at 836-37.
231. *Id.* at 784, 906 N.Y.S.2d at 837.
232. *Rusho*, 76 A.D.3d at 784, 906 N.Y.S.2d at 837.
233. *Id.*
234. *Id.* at 785, 906 N.Y.S.2d at 838.
235. *Id.* at 786, 906 N.Y.S.2d at 838.

does not constitute "reckless disregard for the safety of others."[236]

B. Governmental Immunity

The 1996 case of *Brown v. State*, characterized a distinction between sovereign immunity and immunity based defenses available to governmental agencies.[237] Sovereign immunity, as defined by the Court of Appeals, is: "the historic immunity derived from the State's status as a sovereign and protects the State from suit."[238]

Governmental immunities, in accord with the New York State Court of Appeals *Brown* decision: "are based on the special status of the defendant as a governmental entity. The State is amenable to suit but may nevertheless assert these grounds to avoid paying damages for some tortious conduct because, as a matter of policy, the courts have foreclosed liability."[239]

Thus, a state may relinquish its sovereign status, but may still assert defenses of governmental immunity.[240]

1. Governmental Action Versus Proprietary Action

The questions dealing with governmental immunity many times will turn on whether the governmental agency was involved in an action typically provided by government as a governmental function, or whether the governmental agency assumed a role not considered part of a governmental function such as owning, managing, or being a landlord of property.[241]

On some occasions, a governmental agency may be undertaking to perform both a proprietary action as well as a governmental action at the same time. When that is the case, it is necessary for the courts to look to see whether the act or omission claimed to have caused the injury was one more closely aligned to the proprietary function or the governmental function being assumed by the agency.[242]

236. *Id.*, 906 N.Y.S.2d at 838-39 (quoting N.Y. VEH. & TRAF. LAW § 1104 (McKinney 2011)); *see also* Rusho v. State, 24 Misc. 3d 752, 758, 878 N.Y.S.2d 855, 860 (N.Y. Ct. Cl. 2009).

237. 89 N.Y.2d 172, 192, 674 N.E.2d 1129, 1141, 652 N.Y.S.2d 223, 235 (1996).

238. *Id.*

239. *Id.*

240. Weiss v. Fote, 7 N.Y.2d 579, 586-87, 167 N.E.2d 63, 66, 200 N.Y.S.2d 409, 414 (1960).

241. Miller v. State, 62 N.Y.2d 506, 512, 467 N.E.2d 493, 496-97, 478 N.Y.S.2d 829, 832-33 (1984); Weiner v. Metro. Transp. Auth., 55 N.Y.2d 175, 182, 433 N.E.2d 124, 127, 448 N.Y.S.2d 141, 144 (1982). These types of functions are referred to as "proprietary" functions in the cases.

242. *See Weiner*, 55 N.Y.2d at 182, 433 N.E.2d at 127, 448 N.Y.S.2d at 144.

The New York State Court of Appeals had the opportunity to review just such a case this past year in the case of *In re World Trade Center Bombing Litigation Steering Committee*.[243]

This case involved the terrorist bombing of the World Trade Center that took place on February 26, 1993, when two terrorists drove a fertilizer bomb-laden van into the World Trade Center parking garage.[244] The resulting explosion killed six people, including four Port Authority employees, and as a result 648 plaintiffs commenced 174 actions against The Port Authority for injuries sustained as a result of the bombing.[245] The plaintiffs claimed that The Port Authority was negligent in failing to provide adequate security and otherwise:

> the failure to adopt the recommendations in the security reports; to restrict the public access to the subgrade parking levels; to have an adequate security plan; to establish a manned checkpoint at the garage; to inspect vehicles; to have adequate security personnel; to employ recording devices concerning vehicles, operators, occupants and pedestrians; and to investigate the possible consequences of a bombing within the WTC.[246]

After discovery was complete, The Port Authority made a motion for summary judgment claiming that it was entitled to the protection of governmental immunity and that the terrorist attack was not foreseeable.[247] This motion was denied by Supreme Court Justice Stanley L. Sklar who held that the Port Authority, because of the proprietary nature of its ownership and management of the World Trade Center, was not entitled to sovereign or governmental immunity and that there were questions of fact that existed as to whether the bombing was foreseeable.[248] The appellate division then affirmed this decision without opinion.[249]

The case then went to trial on the issue of liability, and the jury found that the Port Authority was liable for failing to maintain the World Trade Center parking garages in a reasonably safe condition.[250] In doing so, the jury apportioned sixty-eight percent of fault to the Port

243. 17 N.Y.3d 428, 432, 957 N.E.2d 733, 735, 933 N.Y.S.2d 164, 166 (2011).

244. *Id.* at 438, 957 N.E.2d at 739, 933 N.Y.S.2d at 170.

245. *Id.* at 438-39, 957 N.E.2d at 739, 933 N.Y.S.2d at 170.

246. *Id.* at 439, 957 N.E.2d at 739, 933 N.Y.S.2d at 170.

247. *Id.* at 440, 957 N.E.2d at 740, 933 N.Y.S.2d at 171.

248. *In re* World Trade Ctr. Bombing Litig., 3 Misc. 3d 440, 474, 776 N.Y.S.2d 713, 739 (Sup. Ct . N.Y. Cnty. 2004).

249. *In re* World Trade Ctr. Bombing Litig.,13 A.D.3d 66, 784 N.Y.S.2d 869 (1st Dep't 2004).

250. *World Trade Ctr.*, 17 N.Y.3d at 440, 957 N.E.2d at 740, 933 N.Y.S.2d at 171.

Authority and thirty-two percent of fault to the terrorists.[251] The appellate division then unanimously affirmed.[252] In its decision, the First Department held "the gravamen of this action is . . . that the defendant . . . failed in its capacity as a commercial landlord to meet its basic proprietary obligation to its commercial tenants and invitees reasonably to secure its premises . . . ."[253]

The parties then began to litigate damages separately, and the case that was brought to the Court of Appeals was the case of Antonio Ruiz.[254] Mr. Ruiz obtained a jury verdict in the amount of $824,100.06.[255] The Port Authority then moved for leave to appeal, and the Court of Appeals granted that motion.[256]

The plaintiffs contended in the action that the Port Authority was precluded from raising any claim of governmental immunity because of a statutory waiver set forth in the unconsolidated laws of New York section 7101, and section 7106.[257] The Court of Appeals, in a four-to-three decision authored by Judge Jones, found that the plaintiffs' allegations dealing with breach of security and the jury's findings support the fact that the Port Authority was acting in its capacity as a governmental agency in providing security inasmuch as:

> they allude to lapses in adequately examining the risk and nature of terrorist attack in adopting specifically recommended security protocols to deter terrorist intrusion. These actions are not separable from the Port Authority's provision of security at the World Trade Center . . . they were a consequence of the Port Authority's mobilization of police resources for the exhaustive study of the risk of terrorist attack, the policy-based planning of effective counter-terrorist strategy, and the consequent allocation of such resources.[258]

The Court then went into significant detail about the number of studies and the care taken by the Port Authority to develop a security plan, given the resources that it had available, all of which confirmed for the majority that the Port Authority was operating as a governmental function in taking the security measures.[259] The Court quoted from

251. *Id*.

252. *Id.*

253. Nash v. Port. Auth. of N.Y. & N.J., 51 A.D.3d 337, 344, 856 N.Y.S.2d 583, 587 (1st Dep't. 2008).

254. *World Trade Ctr.*, 17 N.Y.3d at 441, 957 N.E.2d at 741, 933 N.Y.S.2d at 172.

255. *Id*.

256. *Id.*

257. *Id.*; N.Y. UNCONSOL. LAW §§ 7101, 7106 (McKinney 2000).

258. *World Trade Ctr.*, 17 N.Y.3d at 448, 957 N.E.2d at 746, 933 N.Y.S.2d at 177.

259. *Id*. at 449-50, 957 N.E.2d at 747, 933 N.Y.S.2d at 178.

Haddock v. City of New York, in confirming:

> [w]hether absolute or qualified (governmental) immunity reflects a value judgment that—despite injury to a member of the public—the broader interest in having government officers and employees free to exercise judgment and discretion in their official functions, unhampered by fear of second-guessing and retaliatory lawsuits, outweighs the benefits to be had from imposing liability for that injury.[260]

The majority held that from the facts before the Court, the Port Authority exercised their judgment in undertaking the studies as best they could, and made a reasoned judgment on how to provide security.[261] It found that in doing so, the Port Authority must be given the latitude to make those decisions without the threat of legal repercussion.[262] The Court thus reversed the appellate division decision and dismissed the complaint of Antonio Ruiz.[263] Judge Ciparick wrote the dissent on behalf of the minority in which Judges Graffeo and Prundenti concurred.[264] Judge Ciparick wrote very forcefully that just because the Port Authority is a government agency does not mean it should be shielded from liability for negligence alleged to have occurred in its capacity as a landlord.[265] Judge Ciparick forcefully conveyed the message that by finding the Port Authority negligent, the jury found that the Port Authority failed to meet the obligations that it owed to the tenants and invitees as landlord of a commercial office complex.[266] Recognizing that the World Trade Center contained twelve million square feet of rentable office space, totally occupied by private tenants, together with over fifty shops, restaurants, and other services, and that parking was available in the garage for the purpose of accommodating those tenants and visitors and potential customers, Judge Ciparick noted that the Port Authority security decisions regarding the garage were made by civilian managers, not law enforcement or security authorities, and stemmed from concerns of their tenants—all engaged in decision-making as a proprietary landlord.[267]

260. *Id*. at 454-55, 957 N.E.2d at 750-51, 933 N.Y.S.2d at 181-82 (quoting Haddock v. City of N.Y., 75 N.Y.2d 478, 484, 553 N.E.2d 987, 991, 554 N.Y.S.2d 439, 443 (1990)).

261. *Id.* at 455, 957 N.E.2d at 751, 933 N.Y.S.2d at 182.

262. *Id.*

263. *World Trade Ctr*., 17 N.Y.3d at 455, 957 N.E.2d at 751, 933 N.Y.S.2d at 182.

264. *Id.* at 468, 957 N.E.2d at 761, 933 N.Y.S.2d at 192. Chief Judge Lippman and Judge Smith took no part in the decision.

265. *Id*. at 456, 957 N.E.2d at 751, 933 N.Y.S.2d at 182.

266. *Id.* at 461, 957 N.E.2d at 765, 933 N.Y.S.2d at 186.

267. *Id.* at 464, 957 N.E.2d at 757-58, 933 N.Y.S.2d at 188-89.

Judge Ciparick would have the jury verdict stand and otherwise affirmed the appellate division decision.[268]

2. Discretionary Actions Versus Ministerial Actions

As the *World Trade Center* case above clearly shows, the first step in analysis as to whether a governmental action is one that allows an injured party redress is the determination initially as to whether or not the entity is or is not a governmental entity.[269] Once that test has been confirmed, the next question is whether or not the entity was acting in a governmental capacity or in a proprietary capacity.[270] If, as the *World Trade Center* case shows the response is that the agency was acting in a governmental capacity, then the next question that must be asked is whether the action was one that was discretionary or ministerial.[271] As was discussed at length in last year's *Survey* of New York Law article, if governmental action is discretionary, then what must be determined is whether discretion was used by the agency.[272] If so, as pronounced in *McLean*, discretionary governmental acts may never be the basis for tort liability.[273] If the government actions were ministerial, then if there is a special duty that is owed to the plaintiff apart from any duty to the public in general, an injured party may have a basis for liability.[274]

The Court of Appeals again wrestled this issue in *Johnson v. City of New York*.[275] In that case, the plaintiff and her young daughter were playing on a sidewalk in New York City, when two men ran by, apparently with guns.[276] The mother and daughter jumped to the ground, and a gunfight ensued whereby the New York City Police Department had a gunfight with two apparent robbers.[277] When the gunfight had stopped, it became apparent that the plaintiff parent had been shot in the elbow, and her daughter apparently had been grazed by a bullet.[278] Plaintiffs brought action against the City claiming that the

268. *World Trade Center*, 17 N.Y.3d at 468, 957 N.E.2d at 760-61, 933 N.Y.S.2d at 191-92.

269. *Id.* at 446, 957 N.E.2d at 744-45, 933 N.Y.S.2d at 175-76.

270. *Id*. at 447, 957 N.E.2d at 745, 933 N.Y.S.2d at 176.

271. McLean v. City of New York, 12 N.Y.3d 194, 202, 905 N.E.2d 1167, 1173, 878 N.Y.S.2d 238, 244 (2009).

272. Hon. John C. Cherundolo, *Tort Law, 2009-10 Survey of New York Law*, 61 SYRACUSE L. REV. 935, 950 (2011).

273. *McLean*, 12 N.Y.3d at 203, 905 N.E.2d at 1173, 878 N.Y.S.2d at 244.

274. *Id.* at 202, 905 N.E.2d at 1173, 878 N.Y.S.2d at 244.

275. *See* 15 N.Y.3d 676, 942 N.E.2d 219, 917 N.Y.S.2d 10 (2010).

276. *Id.* at 679, 942 N.E.2d at 221, 917 N.Y.S.2d at 12.

277. *Id.*

278. *Id.*

police officers at the scene violated New York City Police Department Procedure No. 203-12, entitled "Deadly Physical Force," which sets out guidelines for the use of firearms by police officers within the city.[279] The plaintiffs made the claim that the police officers did not comply with that part of the department procedure, and as a result, complained that the actions of the police were ministerial in nature, and as a result, the plaintiffs should be allowed to recover.[280] The supreme court denied the City's motion for summary judgment, finding there was a question of fact as to whether the officers violated police guidelines by just discharging their weapons with the Johnsons in harm's way.[281] On appeal, the appellate division, in a three to two decision, reversed and dismissed the complaint, holding that the plaintiffs failed to show that the officers violated any of the guidelines.[282] The appellate division pointed to the uncontradicted testimony of the officers that they saw no pedestrians in sight, and that they only sought to protect themselves and their fellow officers by returning fire.[283] The dissent in the appellate division concluded that the testimonies of two of the officers that they did not look for bystanders while shooting at the suspects raised a question of fact.[284]

The New York State Court of Appeals, in a four-to-three decision, affirmed the decision of the appellate division and dismissed the plaintiffs' complaint on the basis that: "[t]he professional judgment rule insulates a municipality from liability for its employees' performance of their duties where the . . . conduct involves the exercise of professional judgment such as electing one among many acceptable methods of carrying out tasks, or making tactical decisions."[285]

The grant of such a immunity, however, presupposes that judgment and discretion are exercised in compliance with the municipality's procedures.[286]

The Court, in the decision written by Judge Pigott, then noted in detail about how the police officers at the scene exercised their

279. *Id.*

280. *Johnson*, 15 N.Y.3d at 679-80, 942 N.E.2d at 221-22, 917 N.Y.S.2d at 12-13.

281. *Id.* at 680, 942 N.E.2d at 222, 917 N.Y.S.2d at 13.

282. Johnson v. City of N.Y., 65 A.D.3d 476, 477, 884 N.Y.S.2d 44, 46 (1st Dep't 2009).

283. *Id.*

284. *Id.* at 480, 884 N.Y.S.2d at 47.

285. *Johnson*, 15 N.Y.3d at 680, 942 N.E.2d at 222, 917 N.Y.S.2d at 13 (quoting McCormack v. City of N.Y., 80 N.Y.2d 808, 811, 600 N.E.2d 211, 213, 587 N.Y.S.2d 580, 582 (1992)).

286. *Id.* at 681, 942 N.E.2d at 222, 917 N.Y.S.2d at 13.

discretion and, in so doing, did not see any bystanders; thus raising no issue as to whether they unnecessarily endangered innocent persons.[287] Judge Jones, writing for the three-judge dissent, espoused the view that the facts showed a question of fact as to whether the police officers violated police department procedure 203-12 and, as a result, summary judgment was not appropriate.[288]

In *Metz v. State*, the Appellate Division, Third Department, wrestled with the issue of whether discretion was in fact used in a governmental action.[289] In that case, claimants moved to dismiss the State's affirmative defense of sovereign immunity, and the Court of Claims denied the motion, and also denied the State's cross-motion for summary judgment.[290] The action involved the Ethan Allen, a tour boat in Lake George that collapsed while carrying forty-seven tourists and one crew member.[291] Twenty passengers died and a number of others suffered severe personal injuries.[292] Annually, the Ethan Allen had been inspected by employees of the Commissioner of the New York State Office of Parks, Recreation, and Historic Preservation, and the Ethan Allen was, on the date of the event, certified to carry forty-eight people.[293] However, during the ensuing year, a significant change to the body of the ship had been made,[294] and the ship was not seaworthy for more than fourteen people.[295] Following the accident, the National Transportation Safety Board (NTSB) concluded that the cause of the accident was poor stability as a result of having too many passengers, rather than fourteen which the NTSB determined would be the maximum permitted safely.[296] The appellate division reversed the Court of Claims and granted claimant's motion to strike the affirmative defense.[297] Indeed, although the court found that in inspecting the Ethan Allen, the inspector was acting in a governmental rather than proprietary manner,[298] the court found that there was no exercise of

287. *Id.* at 681-82, 942 N.E.2d at 223, 917 N.Y.S.2d at 14.

288. *Id.* at 682, 942 N.E.2d at 223, 917 N.Y.S.2d at 14 (Jones, J., dissenting, with Lippman, C.J., and Ciparick, J., concurring).

289. *See* Metz v. State, 86 A.D.3d 748, 927 N.Y.S.2d 201 (3d Dep't 2011).

290. *Id*. at 749, 927 N.Y.S.2d at 203.

291. *Id.* at 748, 927 N.Y.S.2d at 202.

292. *Id*.

293. *Id.*

294. *See Metz*, 86 A.D.3d at 751-52, 927 N.Y.S.2d at 205.

295. *Id.* at 748, 927 N.Y.S.2d at 203.

296. *Id.*

297. *Id.* at 752, 927 N.Y.S.2d at 206.

298. *Id.* at 749, 927 N.Y.S.2d at 203.

discretion in certifying the ship as seaworthy.[299] In reviewing the facts before, the court held that from the deposition testimony of the inspectors, it was clear that there was no discretion or judgment used in re-certifying the Ethan Allen and, as a result, the State was not entitled to the governmental immunity from liability.[300]

C. Written Notice Provisions

Many local municipalities have opted to enact written notice provisions similar to, and sometimes broader than, those set out in New York Civil Practice Law and Rules (CPLR) section 9804 and Village Law section 6-628.[301] These provisions provide a written notice requirement before any local municipality can be sued in damages where the plaintiff alleges the damages were as a result of an icy condition.[302] These written notice requirements are reiterated in the General Municipal Law section 50-e(4) and are self-delineating to include only locations such as sidewalks, crosswalks, streets, highways, bridges, or culverts.[303] For the most part, the written notice provisions have been limited to the six categories contained in the statutes but, on occasion, a municipality will seek to expand the list and add additional locations not originally anticipated by the statute.[304] The exception and have declined to expand the availability of the written notice requirement beyond the enumerated six locations in the statutes.[305] On multiple occasions, the issue has arisen of whether municipally owned parking lots can be included in a statute requiring written notice that includes sidewalks, crosswalks, streets, highways, bridge, or culverts. The appellate courts over the years have, for the most part, found that publicly owned parking lots fall within the definition of "highway" and may be included in such a statute.[306]

299. *Metz*, 86 A.D.3d at 751, 927 N.Y.S.2d at 205.

300. *Id.* at 750-52, 927 N.Y.S.2d at 204-05 (citing Mon v. City of N.Y., 78 N.Y.2d 309, 579 N.E.2d 689, 574 N.Y.S.2d 529 (1991); Haddock v. City of N.Y., 75 N.Y.2d 478, 553 N.E.2d 987, 554 N.Y.S.2d 439 (1990)).

301. N.Y. C.P.L.R. 9804 (McKinney 1981); N.Y. VILLAGE LAW § 6-628 (McKinney 2011).

302. *See, e.g.*, N.Y. C.P.L.R. 9804; N.Y. VILLAGE LAW § 6-628.

303. *Compare* N.Y. GEN. MUN. § 50-e(4) (McKinney 2007 & Supp. 2012) *with* N.Y. C.P.L.R. § 9804; N.Y. VILLAGE LAW § 6-628.

304. *See generally* Walker v. Town of Hempstead, 84 N.Y.2d 360, 643 N.E.2d 77, 618 N.Y.S.2d 758, (1994).

305. *Id.* at 367-68, 643 N.E.2d at 79, 618 N.Y.S.2d at 760.

306. *See, e.g.*, Peters v. City of White Plains, 58 A.D.3d 824, 825, 872 N.Y.S.2d 502, 503 (2d Dep't 2009); Walker v. Inc. Vill. of Freeport, 52 A.D.3d 697, 697, 860 N.Y.S.2d 188, 189 (2d Dep't 2008); Healy v. City of Tonawanda, 234 A.D.2d 982, 982, 651 N.Y.S.2d 819, 819 (4th Dep't 1996); Lauria v. City of New Rochelle, 225 A.D.2d 1013, 1013-14, 639

In *Groninger v. Village of Mamaroneck*, the plaintiff slipped and fell on ice in a parking lot owned and maintained by the Village.[307] The Village moved for summary judgment dismissing the complaint pursuant to CPLR section 9804 and Village Law section 6-628, on the basis that it had not received written notice, nor did it create the icy condition.[308] The supreme court granted the defendant's motion for summary judgment, and the appellate division affirmed.[309] The appellate division then granted leave to appeal to the Court of Appeals certifying the question: was their decision and order properly made?[310] In a four-to-three decision, with Judge Pigott writing on behalf of the majority, the Court found that the plaintiff was required to submit written notice in accord with the statutes and that a publicly owned parking lot falls within the definition of a highway.[311] The Court concluded that Vehicle and Traffic Law section 118 so broadly defined highways so as to include the definition of a parking lot, and that a parking lot was the functional equivalent of a highway.[312] The Court of Appeals affirmed the appellate division decision, dismissing the plaintiff's claim accordingly.[313]

Writing for the dissent, Chief Judge Lippman relied heavily on the stare decisis of *Walker v. Town of Hempstead*,[314] where the Court

> after extensive briefing and careful consideration . . . decided . . . the Town['s] . . . powers did not permit its enactment of a Town Code provision imposing a ["written notice"] requirement . . . by reason of "any defective parking field, beach area, swimming or wading pool or pool equipment, playground or playground equipment, skating rink or park property."[315]

Judge Lippman viewed *Walker* as definitively holding that the Town

N.Y.S.2d 867, 868-69 (3d Dep't 1996); Stratton v. City of Beacon, 91 A.D.2d 1018, 1019, 457 N.Y.S.2d 893, 894 (2d Dep't 1983).

307. Groninger v. Vill. of Mamaroneck, 17 N.Y.3d 125, 127, 950 N.E.2d 908, 909, 927 N.Y.S.2d 304, 305 (2011).

308. *Id.*

309. *Id.*

310. *Id.*

311. *Id.* at 128, 950 N.E.2d at 910, 927 N.Y.S.2d at 306 (citing *Peters*, 58 A.D.3d at 825, 872 N.Y.S.2d at 503; *Walker*, 52 A.D.3d at 697, 860 N.Y.2d at 189; *Healy*, 234 A.D.2d at 982, 651 N.Y.S.2d at 819; *Lauria*, 225 A.D.2d at 1014, 639 N.Y.S.2d at 868-69; *Stratton*, 91 A.D.2d at 1018, 457 N.Y.S.2d at 894).

312. *Groninger*, 17 N.Y.3d at 129, 950 N.E.2d at 910, 927 N.Y.S.2d at 306.

313. *Id.* at 130, 950 N.E.2d at 911, 927 N.Y.S.2d at 307.

314. 84 N.Y.2d 360, 643 N.E.2d 77, 618 N.Y.S.2d 785 (1994).

315. *Groninger*, 17 N.Y.3d at 130, 950 N.E.2d at 911, 927 N.Y.S.2d at 307 (quoting TOWN OF HEMPSTEAD, N.Y., CODE § 6-2 (2011)).

had no authority to impose any notice requirement regarding any defect at any location beyond the six specifically enumerated in the General Municipal Law section 50-e(4).[316] Upset that the majority would adopt appellate cases in lieu of the law set out in *Walker*, Judge Lippman made it clear that the purpose of the Court of Appeals is to establish policy, and not rely upon the appellate divisions to do so, particularly where "we held with great clarity in Walker that a 'parking field' is not a location within the statutes dispensational enumeration, from which it follows ineluctably that a parking lot cannot be a 'highway' within the meaning of [section] 50-e(4)."[317]

Judge Lippman also took issue with the majority's reliance on *Woodson v. City of New York*,[318] that allowed a staircase in a municipal park connecting two lengths of sidewalk to be understood as a "sidewalk" within the meaning of General Municipal Law section 50-e(4).[319] The dissent made it clear that *Woodson* was not decided to sanction what it termed a "promiscuous doctrine of functional 'equivalence' . . . under which a parking lot is deemed to be a 'highway.'"[320] Finally, the dissent criticized the majority's opinion, noting that the legislature was the one who picked the six categories to be included in the statute and that legislative intent very likely was that "quite sensibly" parking lots within their borders should be maintained by municipalities and they should be responsible for defects once they have notice, either actual or constructive.[321] In closing, Judge Lippman wrote, "[w]hat is at issue is a legislative policy judgment that we have previously recognized and enforced in a controlling decision. A mere judicial aversion to municipal liability is not a ground upon which either should now be disturbed."[322] Judges Ciparick and Jones concurred with Judge Lippman.[323]

The Court of Appeals, in yet another four-to-three decision, decided the case of *San Marco v. Village/Town of Mount Kisco*.[324] In that case, the plaintiff allegedly slipped and fell on black ice that had

316. *Id.* at 132, 950 N.E.2d at 913, 927 N.Y.S.2d at 309.

317. *Id.* at 133, 950 N.E.2d at 913, 927 N.Y.S.2d at 309.

318. Woodson v. City of N.Y., 93 N.Y.2d 936, 715 N.E.2d 96, 693 N.Y.S.2d 69 (1999).

319. *Id.* at 938, 715 N.E.2d at 97, 693 N.Y.S.2d at 70.

320. *Groninger*, 17 N.Y.3d at 133-34, 950 N.E.2d at 914, 927 N.Y.S.2d at 310.

321. *Id*. at 135, 950 N.E.2d at 915, 927 N.Y.S.2d at 311.

322. *Id.*

323. *Id.*

324. San Marco v. Vill./Town of Mount Kisco, 16 N.Y.3d 111, 944 N.E.2d 1098, 919 N.Y.S.2d 459 (2010).

accumulated in a parking lot that was owned and maintained by the defendant, and suffered severe injuries.[325] Plaintiff claimed that the black ice accumulated as a result of the plowing of a snow-mound created by the defendant.[326] The question that came before the Court was whether the prior written notice statute acts as an absolute bar to recovery against a municipality where plaintiff claims that she slipped and fell on black ice.[327] In a majority decision written by Judge Lippman, the Court of Appeals reversed a decision of the appellate division which granted summary judgment, and voted to deny summary judgment, finding that the written notice requirement does not attach under the circumstances of the case.[328] The court reasoned:

> we find these statutes were never intended to and ought not exempt a municipality from liability as a matter of law where a municipality's negligence in the maintenance of a municipality owned parking facility triggers the foreseeable development of black ice as soon as the temperature shifts. Unlike a pothole, which ordinarily is a product of wear and tear of traffic or long-term melting and freezing on pavement that at one time was safe and served an important purpose, a pile of plowed snow in a parking lot is a cost-saving, pragmatic solution to the problem of an accumulation of snow that presents the foreseeable, indeed known, risk of melting and freezing . . . . [I]n the case of black ice that forms from plowing snow in a municipally owned parking facility, a municipality should require no additional notice of the possible danger arising from its method of snow clearance apart from widely available local temperature data.[329]

The minority opinion, written by Judge Smith, with Judges Graffeo and Read concurring, argued that the majority decision frustrates the whole purpose and legislative intent in dealing with written notice requirements as expressed in the Court's prior holdings.[330] In concluding the dissent, Judge Smith urged:

> [t]he state, which has created municipalities and has, by abrogating the old rule of sovereign immunity, permitted citizens to bring actions against them, has chosen to limit those lawsuits to cases in which a municipality has received written notice of the hazard complained of.

325. *See id.* at 114-15, 944 N.E.2d at 1098-99, 919 N.Y.S.2d at 459-60.

326. *Id.* at 114, 944 N.E.2d at 1099, 919 N.Y.S.2d at 460.

327. *Id.*, 944 N.E.2d at 1098, 919 N.Y.S.2d at 459.

328. *Id.* at 116, 944 N.E.2d at 1100, 919 N.Y.S.2d at 461.

329. *San Marco*, 16 N.Y.3d at 117, 944 N.E.2d at 1100-01, 919 N.Y.S.2d at 461-62.

330. *Id.* at 119, 944 N.E.2d at 1102, 919 N.Y.S.2d at 463 (citing Oboler v. City of N.Y., 8 N.Y.3d 888, 889-90, 864 N.E.2d 1270, 1271-272, 832 N.Y.S.2d 871, 872-73 (2007); Yarborough v. City of N.Y., 10 N.Y.3d 726, 727-28, 882 N.E.2d 873, 873-74, 853 N.Y.S.2d 261, 262 (2008)).

> Because the Village here received no such notice, this case should be dismissed.[331]

III. MOTOR VEHICLE

A. Emergency Doctrine

With regard to automobile liability, if a driver confronts a sudden and unforeseeable occurrence, not of the party's own making, which creates an emergency and the need to act without the opportunity to consider alternatives available, that party may be entitled to an emergency charge when the case is presented to the jury.[332] The decision whether to give the charge is a threshold determination to be made by the trial court, if a reasonable view of the evidence shows that the party's conduct was as a result of the emergency situation.[333] However, the party is not entitled to the emergency charge where that party's own action caused or contributed to the emergency.[334]

The emergency doctrine was the subject of the New York State Court of Appeals case of *Lifson v. City of Syracuse*, during the survey year.[335] In that case, the plaintiff was struck and killed by the defendant as he was suddenly and temporarily blinded by the sun while attempting to make a left-hand turn from a stop sign onto a one-way road facing west at approximately 4:05 P.M.[336] The defendant looked away from the road momentarily to recover from the blinding sun, and when he turned his attention back to the road, the first thing that he saw was the decedent plaintiff in front of his vehicle.[337] He was unable to avoid hitting her, and did so, even though applying the brakes.[338] There was no indication that the decedent had darted out in front of the vehicle and there was no indication that the defendant driver was speeding.[339] Plaintiff brought an action against the defendant driver and the City of

331. *Id.* at 122, 944 N.E.2d at 1104, 919 N.Y.S.2d at 465.

332. *See generally* Caristo v. Sanzone, 96 N.Y.2d 172, 750 N.E.2d 36, 726 N.Y.S.2d 334 (2001).

333. *See id.* at 175, 750 N.E.2d 38, 726 N.Y.S.2d at 336 (citing Kuci v. Manhattan & Bronx Surface Transit Operating Auth., 88 N.Y.2d 923, 924, 669 N.E.2d 1110, 1110-111, 646 N.Y.S.2d 788, 788-89 (1996)).

334. *See, e.g.*, Ford v. N.Y.C. Interborough Ry. Co., 236 N.Y. 346, 140 N.E. 720 (1923).

335. Lifson v. City of Syracuse, 17 N.Y.3d 492, 958 N.E.2d 72, 934 N.Y.S.2d 38 (2011).

336. *Id.* at 495, 958 N.E.2d at 73, 934 N.Y.S.2d at 39.

337. *Id.* at 496, 958 N.E.2d at 73, 934 N.Y.S.2d at 39.

338. *Id.*

339. *Id.*

Syracuse, and the case was tried on the issue of liability.[340] The trial court gave the jury the emergency charge in the defendant driver's favor—over objection of the plaintiff.[341] The jury returned a verdict apportioning fifteen percent liability to the City of Syracuse and eighty-five percent liability to the decedent, and the driver was found not negligent.[342]

On appeal, the appellate division affirmed, finding that the sun glare was a sudden and unforeseen occurrence as required by the emergency doctrine.[343] Judge Peradotto dissented on the basis that the sun glare at 4:00 P.M. is something that should be reasonably expected under the circumstances, and certainly was not a sudden occurrence.[344] The Court of Appeals then granted plaintiff leave to appeal.[345] The Court of Appeals, in a five-to-two decision, reversed the appellate division, finding that the emergency doctrine charge should not have been given.[346] The Court took into consideration the fact that the defendant driver worked in the MONY Towers, which was directly adjacent to the area where the accident occurred, and should have been aware that the sun set at approximately 4:00 P.M. in February.[347] The Court subsequently found that in giving the emergency charge, error was present which was more than harmless error and required a new trial.[348] Accordingly, the order of the appellate division was reversed, the complaint was reinstated against the defendant driver, and the case was remitted for retrial.[349] Judge Smith, writing for the dissent, felt that the record supported the court giving the charge to the jury, and would have affirmed in the minority view, in which Judge Read concurred, the jury surely could have found that the defendant driver was not so attuned to his direction of travel nor the time of day at that time of year that he'd have expected to find the sun in his eyes when he turned.[350]

340. *Lifson*, 17 N.Y.3d at 496, 958 N.E.2d at 74, 934 N.Y.S.2d at 40.

341. *Id.* For an example of the jury charge *see* N.Y. PATTERN JURY INSTRUCTIONS *Civil* § 2:14 (3d ed. 2011).

342. *Lifson*, 17 N.Y.3d at 496, 958 N.E.2d at 74, 934 N.Y.S.2d at 40.

343. Lifson v. City of Syracuse, 72 A.D.3d 1523, 1525, 900 N.Y.S.2d 568, 570 (4th Dep't 2010).

344. *Id*. at 1528, 900 N.Y.S.2d at 572.

345. *See Lifson*, 17 N.Y.3d at 496, 958 N.E.2d at 74, 934 N.Y.S.2d at 40.

346. *See id*. at 498, 958 N.E.2d at 75, 934 N.Y.S.2d at 41.

347. *Id*.

348. *Id*.

349. *Id*.

350. *Lifson*, 17 N.Y.3d at 500, 958 N.E.2d at 76, 934 N.Y.S.2d at 42.

B. Must an SUM Arbitrator Give Collateral Estoppel Effect to a Previous Arbitrator's Award on the Same Issue?

In *In re Arbitration between Carmen Falzone & New York Central Mutual Fire Insurance Co.*, the petitioner commenced an Article 75 proceeding arising from the insurance carrier's determination that denied the petitioner's claim for supplementary uninsured/underinsured motorists (SUM) benefits.[351] In this case, the petitioner was allegedly injured when she was involved in a motor vehicle accident on May 15, 2004.[352] She filed a no-fault claim with the vehicle insurer, New York Central Mutual Fire Insurance Company ("New York Mutual"), making allegations that she had injured her shoulder and, as a result, sustained medical bills.[353] A no-fault carrier denied the request for medicals expenses, and the petitioner then filed for arbitration.[354] The no-fault arbiter ruled that the denial was inappropriate, and awarded the petitioner $4354.56 in no-fault benefits.[355] Petitioner then settled the lawsuit she had against the other driver for the full extent of that driver's insurance liability policy ($25,000.00), and sought $75,000.00 from New York Mutual in SUM benefits.[356] New York Mutual again denied the claim for SUM benefits on the basis that the injuries were unrelated to the accident, much as they had originally denied the no-fault benefits.[357] An SUM arbitration took place approximately two months after the decision on the no-fault arbitration, and New York Mutual again argued that the injury was unrelated despite the fact that the prior arbitrator had found otherwise.[358] The petitioner contended that the SUM arbitrator was bound to accept the prior determination of the no-fault arbitrator based on the doctrine of collateral estoppel.[359] However, after the SUM arbitration was completed, the SUM arbitrator found in favor of New York Mutual, denying the SUM benefits to the petitioner, concluding that the petitioner's injury was not caused by the accident, and also finding that her recovery from the other driver's liability policy was more than adequate compensation for any injuries

351. *In re* Falzone and N.Y. Cent. Mut. Fire Ins. Co., 15 N.Y.3d 530, 532, 939 N.E.2d 1197, 1197, 914 N.Y.S.2d 67, 67 (2010).

352. *Id.*, 939 N.E.2d at 1198, 914 N.Y.S.2d at 68.

353. *Id.*

354. *Id.*

355. *Id.* at 532-33, 939 N.E.2d at 1198, 914 N.Y.S.2d at 68.

356. *Falzone*, 15 N.Y.3d at 533, 939 N.E.2d at 1198, 914 N.Y.S.2d at 68.

357. *Id.*

358. *See id.*

359. *Id.*

sustained in the accident.[360] The petitioner then commenced the CPLR Article 75 proceeding for the purpose of setting aside the SUM arbitration finding in New York Mutual's favor, arguing that collateral estoppel denied the respondent from re-litigating the causation issues.[361] Respondent sought confirmation of the award, and the supreme court vacated the SUM arbitration award and ordered that at new arbitration be scheduled before a different arbiter.[362]

The Appellate Division, Fourth Department, in a three-to-two decision confirmed the SUM arbitration award.[363] The majority specifically found that the fact:

> (1) "[T]he fact a prior arbitration award is inconsistent with a subsequent award" is not a ground pursuant to CPLR [section] 7511, for vacating an arbitration award, (2) it is within the arbitrator's sole discretion to determine the preclusive effect of a prior award, and (3) "the SUM arbitrator was not required to state that he had considered" the collateral estoppel argument raised before him.[364]

Appellate Division Judges Peradotto and Gorski felt that the "SUM arbitrator exceeded his power by disregarding the . . . [collateral estoppel] effect of the prior no-fault arbitration award, which involved the same parties and was based on the same facts."[365] Petitioner then appealed to the Court of Appeals as of right pursuant to CPLR section 5601(a).[366] In a six-to-one decision, the New York State Court of Appeals affirmed the appellate division and confirmed the SUM arbitration award that denied the petitioners relief requested.[367] The Court noted that the law is well-settled that, even when an arbitrator has made an error of law or fact, the courts generally may not disturb the arbitrator's decision even if the arbitrator misapplied the substantive law in the area, as such questions are within the exclusive province of the arbitrator.[368] The Court determined that it was not for the courts to decide whether the SUM arbitrator erred in not applying collateral estoppel, but only to determine whether the arbitration award was not

360. *Id*.

361. *Falzone*, 15 N.Y.3d at 533, 939 N.E.2d at 1198, 914 N.Y.S.2d at 68.

362. *Id.*

363. *Id.*

364. *Id.* at 533-34, 939 N.E.2d at 1198, 914 N.Y.S.2d at 68 (quoting *In re* Arbitration between Falzone & N.Y. Cent. Mut. Fire Ins. Co., 64 A.D.3d 1149, 1150, 881 N.Y.S.2d 769, 769 (4th Dep't 2009)).

365. *Id.* at 534, 939 N.E.2d at 1198, 914 N.Y.S.2d at 68.

366. *Falzone*, 15 N.Y.3d at 534, 939 N.E.2d at 1198, 914 N.Y.S.2d at 68.

367. *Id.* at 535, 939 N.E.2d at 1200, 914 N.Y.S.2d at 70.

368. *See id.* at 534, 939 N.E.2d at 1189-99, 914 N.Y.S.2d at 68-69.

patently irrational or so egregious to violate public policy.[369] Judge Pigott in dissent, showed the inequity of the decision by writing:

> [h]ad the arbitrator during the original no-fault arbitration found against the petitioner, any direct action against the tortfeasor would have been met with the defense of issue preclusion, with the tortfeasor relying on the no-fault arbitrator's finding of no causation. That, in turn would have precluded petitioner from even bringing a SUM claim against her carrier, as it would have been impossible for her to succeed on such a claim without first exhausting the tortfeasor's policy limits.[370]

In conclusion, Judge Pigott felt that the arbitrator exceeded his powers, and in so doing, contradicted the legislative purpose behind the no-fault law "that every auto accident victim will be compensated for substantially all of his economic loss promptly and without regard to fault."[371]

C. No-Fault: Serious Injury and the Need for "Contemporaneous" Quantitative Assessments Under Toure

In the 2002 New York Court of Appeals decision of *Toure v. Avis Rent-A-Car Systems*, the New York State Court of Appeals set out, in a trilogy of cases, basic parameters to determine whether or not someone has sustained a serious injury pursuant to section 5102(d) of the Insurance Law of the State of New York.[372] In the *Toure* decision, the Court of Appeals found that, in order to qualify as a "serious injury" under the classifications of permanent consequential limitation of use of a body organ or member; significant limitation of use of body function or system; or permanent loss of use of a body organ, member, function or system, it is incumbent on the plaintiff, in order to satisfy the serious injury requirement to suit, to show how the injury has affected the individual in both quantitative assessments and qualitative restrictions.[373] These restrictions which the plaintiff will prove will be typically numerically quantified by physicians, thus showing objective

369. *Id.* at 535, 939 N.E.2d at 1200, 914 N.Y.S.2d at 70.

370. *Id.* at 536, 939 N.E.2d at 1200, 914 N.Y.S.2d at 70 (citing Clemons v. Apple, 65 N.Y.2d 746, 481 N.E.2d 560, 492 N.Y.S.2d 20 (1985)) (internal citations omitted).

371. *Falzone*, 15 N.Y.3d at 537, 939 N.E.2d at 1201, 914 N.Y.S.2d at 71 (quoting Norman H. Dachs & Jonathan A. Dachs, *Time to Reconsider 'Clemens v. Apple'?*, N.Y. L.J., Nov. 14, 1995, at 3).

372. Toure v. Avis Rent-A-Car Sys., 98 N.Y.2d 345, 350, 774 N.E.2d 1197, 1199, 746 N.Y.S.2d 865, 867 (2002).

373. *Id.*, 774 N.E.2d at 1200, 746 N.Y.S.2d at 868.

evidence of an injury that would be classified as a serious injury.[374] Physicians would thus compare the measurements that they find on the alleged injured individual, and then compare them to the norms based on generally accepted objective tests.[375]

Since *Toure*, the appellate decisions throughout the state have added a requirement that the person alleging serious injury under any of the three categories must demonstrate quantitatively the effect of the injury on the plaintiff both contemporaneous to the accident, and later recent findings before trial.[376]

During the 2010-2011 *Survey* year, the Court of Appeals again accepted another trilogy of cases dealing with the issue as to how extensive quantitative assessments must be when they are done contemporaneous to the accident, and to what extent should that requirement stand. The cases involved are two cases out of the Second Department, and one out of the First Department.[377]

Adler v. Bayer[378] and *Perl v. Meher*[379] are cases that both dealt with claims made under the three serious injury categories that were at issue in *Toure*—permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system.[380] The third case, *Travis v. Batchi*,[381] came out of the First Department and dealt strictly with the issue of whether the plaintiff had sustained a serious injury based upon that classification of:

> a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment.[382]

374. *See id.*; *see also* Friscia v. Mak Auto, Inc., 59 A.D.3d 492, 493, 873 N.Y.S.2d 197, 197 (2d Dep't 2009).

375. *See Toure*, 98 N.Y.2d at 350-51, 774 N.E.2d at 1200, 746 N.Y.S.2d at 868.

376. *See, e.g.*, Stevens v. Sampson, 72 A.D.3d 793, 898 N.Y.S.2d 657 (2d Dep't 2010); Little v. Locoh, 71 A.D.3d 837, 897 N.Y.S.2d 183 (2d Dep't 2010); Sierra v. Gonzalez First Limo, 71 A.D.3d 864, 895 N.Y.S.2d 863 (2d Dep't 2010).

377. Perl v. Meher, 18 N.Y.3d 208, 960 N.E.2d 424, 936 N.Y.S.2d 655 (2011).

378. 77 A.D.3d 692, 909 N.Y.S.2d 526 (2d Dep't 2010).

379. 74 A.D.3d 930, 902 N.Y.S.2d 632 (2d Dep't 2010).

380. *See id.* at 930-31, 902 N.Y.S.2d at 633; *Adler*, 77 A.D.3d at 693, 909 N.Y.S.2d at 527 (2d Dep't 2010); N.Y. INS. LAW § 5102(d) (McKinney 2009).

381. 75 A.D.3d 411, 905 N.Y.S.2d 66 (1st Dep't 2010).

382. *See Perl*, 18 N.Y.3d at 215, 960 N.E.2d at 426, 936 N.Y.S.2d at 657 (quoting N.Y. INS. LAW § 5102(d)).

In all three cases, the appellate divisions dismissed the cases upon the basis that the plaintiff's proof was not legally sufficient to sustain a cause of action.

The Second Department, in *Perl v. Meher*, split three-to-two on that issue, and as a result, appealed to the Court of Appeals as a matter of right.[383] The *Perl* case was decided on the basis of a motion for summary judgment, which supreme court denied, but the appellate division reversed and dismissed the complaint.[384] In a similar case, the *Adler* case was actually tried to a jury verdict, which resulted in a verdict for the plaintiff, and the appellate division reversed and dismissed the complaint.[385] In *Travis*, the defendant moved for summary judgment at the supreme court level, and that was granted and affirmed at the appellate division level.[386] The New York State Court of Appeals granted leave to both *Adler* and *Travis*, and as of the end of the *Survey* year, the case was on the calendar for argument during the October term.

With regard to *Perl* and *Adler*, the main question that was presented to the appellate division was whether or not the quantitative assessments made by physicians had to be done early in the injury phase, or "contemporaneous" with the injury.[387] The appellate division in both cases, following the appellate case law to date, felt that because the examining physician in both *Perl* and *Adler* did not do extensive quantitative evaluations early on, that that fact alone was enough to defeat the plaintiffs' claims for serious injury under the classifications of section 5102(d).[388] In both cases, Dr. Leonard Bleicher did both initial examinations and then did more detailed quantitative examinations several years later, before trial.[389] In the early examinations, he made no quantitative measurements so as to specifically prove the quantitative nature of the limitations, which the courts thought was required under *Toure* to show objective evidence of injury.[390] In both cases, the argument was raised by the plaintiff that, early on in an injury, the injured parties are not necessarily thinking of a lawsuit that would entail them to have specific measurements taken at

383. *See Perl*, 74 A.D.3d 930, 932, 902 N.Y.S.2d 632, 634.

384. *Id.* at 930, 902 N.Y.S.2d at 633.

385. *Adler*, 77 A.D.3d at 693, 909 N.Y.S.2d at 527.

386. *Travis*, 75 A.D.3d at 411, 905 N.Y.S.2d at 67.

387. *See Perl*, 18 N.Y.3d at 217, 960 N.E.2d at 428, 936 N.Y.S.2d at 659.

388. *Adler*, 77 A.D.2d at 693-94, 909 N.Y.S.2d at 527-28; *see also Perl*, 74 A.D.3d at 932, 902 N.Y.S.2d at 634.

389. *Perl*, 18 N.Y.3d at 216, 960 N.E.2d at 427, 936 N.Y.S.2d at 658.

390. *Perl*, 74 A.D.3d at 931, 902 N.Y.S.2d at 634.

an early date. The Appellate Division, Second Department's feelings are best described in the *Perl v. Meher* case when the majority opinion, in which Judges Dillon, Miller and Baulkin concurred, exclaimed:

> [w]e disagree with the suggestion of our dissenting colleagues that Dr. Bleicher's arguably adequate findings from the examination of the injured plaintiff on June 25, 2007, some two years after the accident, quantifying restrictions compared to norms and based upon objective tests, can, in effect, be stretched to remedy the multiple deficiencies of the 2005 findings which were made only days after the accident. While a physician's description of "norms" may be capable of transfer from one examination to another by that physician, the same cannot be said for the quantification of an examinee's restricted motion and of the objective test utilized to measure restrictions, since such information may differ from one examination to the next.[391]

At the time of this writing, the matter has been argued in the Court of Appeals, and a decision, no doubt, will be coming forthwith.

In *Travis*, the Appellate Division, First Department found no evidence of an impairment based on the medical records that the plaintiff submitted, and the proof was that she was able to perform the essential functions of her job in ninety out of the first 180 days.[392] The court found that there was no evidence to sustain her allegations that she sustained a "permanent consequential limitation" or a "significant limitation" as those categories are defined under the statute.[393] The plaintiff in *Travis* primarily relied upon the ninety out of 180 days, which the proof showed—according to the appellate division—that she did not qualify under that criteria or any other.[394] That case also is part of the trilogy that was argued in the Court of Appeals in October of 2011.

IV. PREMISES LIABILITY

A. Liability of Owner for Recurring Condition Versus General Awareness of a Condition

In *Mauge v. Barrow St. Ale House*, the plaintiff slipped and fell down stairs in the defendant's bar/restaurant, which were slippery from accumulated grease.[395] Plaintiff alleged that the defendant was

391. *Id.*

392. *See Perl*, 18 N.Y.3d at 220, 960 N.E.2d at 430, 936 N.Y.S.2d at 661.

393. *See id.*

394. *Id.*

395. Mauge v. Barrow St. Ale House, 70 A.D.3d 1016, 1016, 895 N.Y.S.2d 499, 500 (2d Dep't 2010).

negligent because the defendant had created a dangerous condition or had constructive notice of the existence of that condition on the stairway.[396] The defendant moved for summary judgment, and that was granted by Supreme Court, Queens County Justice Agate.[397] The plaintiff appealed, and the Appellate Division, Second Department affirmed, holding that where defendant has actual knowledge of a potentially dangerous and recurring condition, that defendant may be charged with constructive knowledge of that condition.[398] Where the recurring condition exists in an area that is routinely left uninspected, a question of fact may arise regarding the dangerous condition.[399] However, "a 'general awareness' of a condition is insufficient to constitute notice of the particular condition that caused the injury."[400]

The court found that in this case the defendant established that the stairwell was de-greased by bar personnel twice daily, that the employees were tasked with constantly monitoring the stairwell for spills and debris throughout their shifts, and that there had not been any prior complaints about grease on the steps leading up to the accident.[401] Therefore, the court held that the grease on the steps was a condition of which the defendant had a "general awareness," but not one of constructive notice.[402]

B. Readily Observable Conditions (Open and Obvious)

There were a number of cases during the *Survey* year from the appellate division level that show a burgeoning split of opinion with regard to whether or not a plaintiff can recover in a trip and fall case when the condition complained about is readily observable, or open and obvious.

Cases from the First and Fourth Department decided during the survey year would tend to suggest that such cases are entitled to jury evaluation rather than being dismissed at the summary judgment stage.[403] However, the Second and Third Department have taken a different attitude with regard to open and obvious conditions, and have

396. See *id.*

397. *See id.*

398. *See id.* at 1017, 895 N.Y.S.2d at 501.

399. *Id.*, 895 N.Y.S.2d at 500.

400. *Mauge*, 70 A.D.3d at 1017, 895 N.Y.S.2d at 500.

401. *Id.*

402. *Id.*, 895 N.Y.S.2d at 501.

403. *See, e.g.*, Saretsky v. Kenmore Realty Corp., 85 A.D.3d 89, 92-94, 924 N.Y.S.2d 32, 34 (1st Dep't 2011); Custodi v. Town of Amherst, 81 A.D.3d 1344, 1347, 916 N.Y.S.2d 685, 687-88 (4th Dep't 2011).

dismissed cases coming before them on summary judgment.[404] It is important to look at just a couple of these cases to see the thought process of the appellate divisions in their evaluations of these cases. Whether a showdown is likely in the Court of Appeals, at this time, it appears remote, as most appellate division decisions were unanimous.

In *Saretsky v. Kenmore Realty Corp.*, the plaintiff was exiting the defendant's storefront when she fell on a portion of the walkway that created an "optical confusion."[405] There was a raised sidewalk at this location that was approximately five inches above the sidewalk.[406] There were no visual warnings, barriers, handrails, or other devices that might highlight the raised sidewalk, and while plaintiff was walking, she tripped over the elevated sidewalk.[407] The question that was presented to the Appellate Division, First Department was whether the open and obvious nature of the condition was sufficient for summary judgment in favor of the defendant.[408] The supreme court had granted such judgment for the defendant.[409] The appellate division reversed on the basis that categorizing a condition as "open and obvious" is not fatal to a plaintiff's negligence claim.[410] Instead, it is relevant to the issue of comparative negligence.[411] The court decided that the plaintiff raised a triable issue of fact in the case when she presented evidence as to whether or not the raised sidewalk itself was an open and obvious condition by submitting an affidavit of an engineer supporting her case.[412]

Thus, the thinking of the Fourth Department was similar in the case of *Custodi v. Town of Amherst*.[413] Plaintiff in that case claimed that she tripped over a two-inch differential between a driveway and curb while rollerblading onto a sidewalk to avoid an ice cream truck.[414] Plaintiff said that she did not see the difference in height between the apron and the curb.[415] The supreme court granted the defendant's

404. *See* Grossman v. Target Corp., 84 A.D.3d 1164, 1165-66, 924 N.Y.S.2d 141,144 (2d Dep't 2011); Anton v. Corr. Med. Servs, Inc., 74 A.D.3d 1682, 1683-84, 904 N.Y.S.2d 535, 536-37 (3d Dep't 2010).

405. 85 A.D.3d at 92, 924 N.Y.S.2d at 34.

406. *Id.*

407. *Id.* at 91, 924 N.Y.S.2d at 33.

408. *See id.* at 90, 924 N.Y.S.2d at 33.

409. *Id.* at 93-94, 924 N.Y.S.2d at 35.

410. *Saretsky*, 85 A.D.3d at 90, 93, 924 N.Y.S.2d at 33, 35.

411. *Id.* at 90, 924 N.Y.S.2d at 33.

412. *Id.* at 92, 924 N.Y.S2d at 34.

413. 81 A.D.3d 1344, 916 N.Y.S.2d 685 (4th Dep't 2011).

414. *Id.* at 1345, 916 N.Y.S.2d at 686.

415. *See id.* at 1346, 916 N.Y.S.2d at 687.

motion for summary judgment based on the affirmative defense of assumption of the risk.[416] The appellate division found that the doctrine of the assumption of the risk does not apply to defeat the plaintiff's claim, and reinstated the plaintiff's complaint.[417] In so doing, the Court stated:

> [w]e cannot agree with [the] defendants that the height differential between their driveway apron and the curb was an open and obvious condition and that they are absolved of liability. It is well-settled that "the open and obvious nature of the allegedly dangerous condition . . . does not negate the duty to maintain [the] premises in a reasonably safe condition, but, [instead], bears only on the injured person's comparative fault."[418]

However, results in the Second and Third Departments were not as accommodating to plaintiffs during the past year as the First and Fourth Departments. In *Anton v. Correctional Medical Services, Inc.*, the plaintiff was a corrections officer who, while conducting an inmate headcount in his assigned unit, turned the corner and walked into a metal bedframe positioned along the wall of a subsequent corridor.[419] The defendant moved for summary judgment, and that was granted at the supreme court level.[420] The case then went to the Appellate Division, Third Department, which decided that the defendant was entitled to summary judgment as a matter of law based upon the fact that the defendant established a prima facie case in establishing that it maintained the property in a reasonably safe condition and that it neither created nor had actual notice of the allegedly dangerous condition.[421] The court reasoned that the bed was in plain view, that it did not violate any safety regulations, and that there was adequate room to move around the bedframe.[422] Thus, the court felt that summary judgment was appropriate.[423]

Similarly, in *Grossman v. Target Corp.*, the plaintiff was injured when she fell down a moving escalator when boarding it with her personal pushcart filled with groceries.[424] The Appellate Division,

416. *Id.* at 1345, 916 N.Y.S.2d at 686.

417. *Id.* at 1346, 1347, 916 N.Y.S.2d at 687, 688.

418. *Custodi*, 81 A.D.3d at 1346-47, 916 N.Y.S.2d at 687 (citing Konopczynski v. ADF Constr. Corp., 60 A.D.3d 1313, 1315, 875 N.Y.S.2d 697, 698 (4th Dep't 2009)).

419. 74 A.D.3d 1682, 1682, 904 N.Y.S.2d 535, 536 (3d Dep't 2010).

420. *Id.* at 1682-83, 904 N.Y.S.2d at 536.

421. *Id.* at 1683, 904 N.Y.S.2d at 536.

422. *Id*., 904 N.Y.S.2d at 537.

423. *See id.* at 1684, 904 N.Y.S.2d at 537.

424. 84 A.D.3d 1164, 1165, 924 N.Y.S.2d 141, 142 (2d Dep't 2011).

Second Department, determined that "the danger arising from the act of boarding a moving escalator with a pushcart was open and obvious and readily perceptible by the plaintiff."[425]

The Second Department also decided the case of *Thomas v. Pleasantville Union Free School District*, where a twelve-year-old student running from the cafeteria toward a field ran into a rope that was strung between two stanchions across the path where he was running that was about four feet high.[426] In that case, the Appellate Division, Second Department, affirmed the lower court's ruling dismissing the plaintiff's complaint inasmuch as the defendant showed that the presence of the rope was open and obvious and was readily observable and otherwise was not inherently dangerous.[427] Noteworthy, the young lad had testified that he had turned and looked away before running into the rope.[428]

C. Trivial Defects: How Trivial Must a Defect be for Defendant to be Entitled to Summary Judgment?

A number of cases decided during the course of the survey year dealt with the question of how trivial must a defect be in a sidewalk or walkway for a defendant to be entitled to summary judgment on the issue of negligence. The cases again showed a developing disparity between those cases decided in the First and Fourth Departments with those decided in the Second Department. Again, the First and Fourth Departments appeared to be much more lenient towards injured plaintiffs, while the Second Department appears to be more willing to dismiss cases at the summary judgment stage.

For example, in *Gafter v. Buffalo Medical Group, P.C.*, the plaintiff tripped and fell on the sidewalk in front of the property owned by the defendant, alleging that her toe struck the divider between the cement slabs.[429] The issue presented to the Fourth Department was whether the dimensions of the divider between the cement slabs constituted a dangerous or defective condition.[430] The court held that there was a question of fact that had to be answered, and reasoned: "[w]hether a particular height difference between sidewalk slabs constitutes a dangerous condition depends on the peculiar facts and

425. *Id.*
426. 79 A.D.3d 853, 853, 913 N.Y.S.2d 702, 703 (2d Dep't 2010).
427. *Id.* at 854, 913 N.Y.S.2d at 703.
428. *Id.* at 853-54, 913 N.Y.S.2d at 703.
429. 85 A.D.3d 1605, 1605, 925 N.Y.S.2d 297, 298 (4th Dep't 2011).
430. See *id.*

circumstances of each case, including the width, depth, elevation, irregularity, and appearance of the defect as well as the time, place, and circumstances of the injury."[431] The court then ruled that there was no minimal dimension test or rule per se that a defect must meet in order to be actionable, but it must be considered in light of all the other evidence as a question of fact for the jury.[432]

In *Fazio v. Costco Wholesale Group*, the plaintiff fell and was allegedly injured in the defendant's parking lot when she allegedly fell over a cracked and eroded area that was one-sixteenth inch deep.[433] The Appellate Division, First Department, was confronted with the issue of whether the defect that allegedly caused the injury was trivial in nature.[434] The court determined that there was an issue of fact as to that question that a jury had to decide.[435] The court reasoned that: "a mechanistic disposition of a case based exclusively on the dimension of the . . . defect is unacceptable. Plaintiff's testimony that the concrete in the depressed area was eroded, broken up and uneven, with exposed, protruding stone creates an issue of fact whether the defect was trivial."[436]

Cases involving alleged trivial defects in the Second Department got quite a different response. In *Koznesoff v. First House Co., Inc.*, the plaintiff claimed that there was a chip in a step which caused the plaintiff to fall and cause injuries.[437] The supreme court denied the defendant's motion for summary judgment, but the Appellate Division, Second Department, reversed finding that the alleged chip in the subject step, based on photographs submitted to it, showed: "the alleged defect, which did not have any of the characteristics of a trap or nuisance, was trivial and, therefore, not actionable."[438]

The Second Department used the same standard (i.e., did the defect have any characteristics of a trap or nuisance) in *Richardson v. J.A.L. Diversified Management*.[439] In that case, plaintiff allegedly tripped and fell over a metal strip separating the brick surface from the dirt surface

431. *Id.* at 1605-06, 925 N.Y.S.2d at 298 (quoting Cuebas v. Buffalo Motor Lodge/Best Value Inn, 55 A.D.3d 1361, 1362, 865 N.Y.S.2d 184, 185 (4th Dep't 2008)).

432. *Id.* at 1606, 925 N.Y.S.2d at 298.

433. 85 A.D.3d 443, 443, 924 N.Y.S.2d 381, 382 (1st Dep't 2011).

434. *See id.*, 924 N.Y.S.2d at 383.

435. *Id.*

436. *Id.* (quoting Trincere v. Cnty. of Suffolk, 90 N.Y.2d 976, 977-78, 688 N.E.2d 489, 490, 665 N.Y.S.2d 615, 616 (1997)).

437. 74 A.D.3d 1027, 1027, 904 N.Y.S.2d 101, 102 (2d Dep't 2010).

438. *Id*. at 1028, 904 N.Y.S.2d at 102.

439. 73 A.D.3d 1012, 1013, 901 N.Y.S.2d 676, 677 (2d Dep't 2010).

of a tree-wall.[440] The Second Department applied the "trap or nuisance" standard to reverse the Supreme Court, Kings County, denial of summary judgment to the defendant, and dismissed the plaintiff's complaint accordingly.[441] The Second Department decided a number of cases based on the same standard, in all cases dismissing the plaintiffs' complaints against the defendants.[442]

D. Can a Defendant be Held Accountable for Latent Defects in Property?

In *McMahon v. Gold*, the plaintiff was injured when a deck attached to defendant's house collapsed.[443] Plaintiff then brought action against the defendant based on the fact that the deck collapsed.[444] The defendant presented expert evidence in support of a motion for summary judgment from a professional engineer that presented the opinion that the deck was poorly constructed in that it was attached to the house with nails instead of bolts, and that a careful inspection of the deck would not have revealed this problem, as the nails were hidden from view.[445] Defendant was unsuccessful on motion for summary judgment, and the Appellate Division, Second Department reversed, granting the defendant judgment and dismissing the complaint.[446] In doing so, the court held, in pertinent part:

> [h]ere the defendants demonstrated their prima facie entitlement to judgment as a matter of law by submitting the affidavit of their professional engineer, who stated that the defect in the subject deck was latent and not readily observable, and could not have been discovered by the homeowners upon a reasonable inspection. Thus, the defendants, who purchased the house after the deck had already been installed, could not have had constructive notice of the defect.[447]

440. *Id.* at 1012, 901 N.Y.S.2d at 677.

441. *Id.* at 1013, 901 N.Y.S.2d at 678.

442. *See, e.g.*, Losito v. JP Morgan Chase & Co., 72 A.D.3d 1033, 1034, 899 N.Y.S.2d 374, 375-76 (2d Dep't 2010); Sabino v. 745 64th Realty Ass'n, LLC, 77 A.D.3d 722, 723, 909 N.Y.S.2d 482, 483 (2d Dep't 2010).

443. 78 A.D.3d 908, 909, 910 N.Y.S.2d 561, 562 (2d Dep't 2010), *leave denied*, 16 N.Y.3d 706, 944 N.E.2d 1152, 919 N.Y.S.2d 512 (2011).

444. *Id.*

445. *Id.*, 910 N.Y.S.2d at 562-63.

446. *See id.*, 910 N.Y.S.2d at 563.

447. *Id.* at 910, 910 N.Y.S.2d at 563.