TORTS

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INTRODUCTION

This Article discusses developments in New York's common law of torts for the *Survey* period.[1] Part I discusses major developments, focusing on landmark Court of Appeals (and appellate division) precedent decided during the *Survey* period, which cover the following: trip-and-fall cases, duty in negligence actions, Insurance Law § 3420 and stare decisis, accrual in wrongful birth cases, and the duty owed to diagnostic test-takers by laboratories. Part II discusses other case law developments decided during the *Survey* period, focusing on five substantive areas: Labor Law §§ 240(1) and 241(6), defamation, negligence, trip-and-fall, and assumption of the risk.

I. SPOTLIGHT: DEVELOPMENTS IN THE LAW OF TORTS

The New York Court of Appeals has had a busy year in the law of torts. As discussed below, it has helped clarify the trivial defect doctrine in trip-and-fall actions, and has once again clarified its duty analysis in negligence actions. It reaffirmed its prior position that Insurance Law § 3420 is inapplicable to police vehicles, and in the course of the decision, the Court also discussed stare decisis at length. In contrast, the Second Department reviewed the historical duty of care owed by pharmacists, and in the process acknowledged the changing role of pharmacists over the past hundred years by expanding pharmacists' duties in dispensing medications. Finally, the Court of Appeals declined to find a testing laboratory's failure to follow federal regulations as the basis for a duty of care.

A. Hutchinson v. Sheridan Hill House Corp.: *Court of Appeals Revisits Trivial Defect Doctrine in Trip-and-Fall Cases*

Trip-and-fall cases "teach [us] that it is usually more difficult to define what is trivial than what is significant."[2] The Court attempted to provide some clarity in *Hutchinson v. Sheridan Hill House Corp.*[3]: "The common factual and procedural thread among the three appeals [in *Hutchinson*] is that an individual tripped on a defect in a sidewalk or

1. The *Survey* period encompasses July 1, 2015 to June 30, 2016. This Article does not aim to encyclopedically report every case decided during the *Survey* period; instead, this Article focuses on major developments of note to practitioners.

2. Hutchison v. Sheridan Hill House Corp., 26 N.Y.3d 66, 72, 41 N.E.3d 766, 769, 19 N.Y.S.3d 802, 805 (2015).

3. 26 N.Y.3d 66, 41 N.E.3d 766, 19 N.Y.S.3d 802 (2015).

stairway, and was injured, but was foreclosed from going to trial on the ground that the defect was characterized as too trivial to be actionable."[4]

The Court began by recounting the doctrine's general principles, enunciated in *Trincere v. County of Suffolk*,[5] including the lack of a "minimum dimension" test and the totality of the circumstances inquiry, and then surveyed the appellate division decisions construing *Trincere*[6]: "Our survey of [the lower court] cases indicates that the lower courts, appropriately, find physically small defects to be actionable when their surrounding circumstances or intrinsic characteristics make them difficult for a pedestrian to see or to identify as hazards or difficult to traverse safely on foot."[7]

Noting the fact-specific nature of the trivial defect doctrine, the Court clarified, "A defendant seeking dismissal of a complaint on the basis that the alleged defect is trivial must make a prima facie showing that the defect is, under the circumstances, physically insignificant and that the characteristics of the defect or the surrounding circumstances do not increase the risks it poses."[8] The Court provided a new gloss on *Trincere*'s import for summary judgment:

> *Trincere* stands for the proposition that a defendant cannot use the trivial defect doctrine to prevail on a summary judgment motion solely on the basis of the dimensions of an alleged defect, and that the reviewing court is obliged to consider all the facts and circumstances presented when it decides the motion. Summary judgment should not be granted to a defendant on the basis of "a mechanistic disposition of a case based exclusively on the dimension[s] of the . . . defect," and neither should summary judgment be granted in a case in which the dimensions of the alleged defect are unknown and the photographs and descriptions inconclusive. Moreover, in deciding whether a defendant has met its burden of showing prima facie triviality, a court must—except in unusual circumstances not present here—avoid interjecting the question whether the plaintiff might have avoided the accident simply by placing his feet elsewhere. In sum, there are no shortcuts to summary judgment in a slip-and-fall case.[9]

4. *Id.* at 72, 41 N.E.3d at 769, 19 N.Y.S.3d at 802.

5. 90 N.Y.2d 976, 688 N.E.2d 489, 665 N.Y.S.2d 615 (1997).

6. *Hutchinson*, 26 N.Y.3d at 77–78, 41 N.E.3d at 773, 19 N.Y.S.3d at 809.

7. *Id.* at 79, 41 N.E.3d at 774, 19 N.Y.S.3d at 810.

8. *Id.*; *see also id.* ("Only then does the burden shift to the plaintiff to establish an issue of fact.").

9. *Id.* at 84, 41 N.E.3d at 777–78, 19 N.Y.S.3d at 813 (alteration in original) (omission in original) (quoting *Trincere*, 90 N.Y.2d at 977–78, 688 N.E.2d at 490, 665 N.Y.S.2d at 616).

1. Quarter-Inch Metal Protrusion in Sidewalk Trivial as a Matter of Law

The first appeal involved a five-eighths inch wide metal object that stood between one eighth and one quarter of an inch out of a sidewalk.[10] The defendant "met its burden of making a prima facie showing that the [defect] was trivial as a matter of law by producing measurements . . . together with evidence of the surrounding circumstances."[11] The plaintiff then failed "to show a triable issue of fact concerning features of the defect that would magnify the hazard it presents."[12] Specifically, the Court found "the abruptness of the projecting edge, the alleged irregularity of its shape, and its rigidity and firm insertion into the sidewalk" as "not dispositive" because those characteristics were "true of many contours in a sidewalk."[13]

The Court noted the error in the plaintiff's formulation of the trivial defect test: "[T]he test . . . is not whether a defect is *capable* of catching a pedestrian's shoe. Instead, the relevant questions are whether the defect was difficult for a pedestrian to see or to identify as a hazard or difficult to pass over safely on foot in light of the surrounding circumstances."[14] Applying the test to the first appeal's facts, the Court noted that the defect "protrud[ed] only about a quarter of an inch above the sidewalk, [which] was in a well-illuminated location approximately in the middle of the sidewalk," and was not in an area where pedestrians formed a crowd.[15] Additionally, "[t]he object stood alone and was not hidden or covered in any way so as to make it difficult to see or to identify as a hazard."[16] As a result, the Court held "the defect . . . trivial as a matter of law."[17]

2. Chip in Stair Tread Not Trivial as a Matter of Law

The second appeal involved a "chip" in a stair tread that was about three inches wide and a half-inch deep.[18] Initially, the Court rejected the plaintiff's argument that the trivial defect doctrine only applied to municipalities: "[The] principle is equally applicable to private landlords and municipalities."[19] The core issue was whether the defect was trivial

10. *Hutchinson*, 26 N.Y.3d at 72–73, 41 N.E.3d at 769, 19 N.Y.S. at 805.
11. *Id.* at 79, 41 N.E.3d at 774, 19 N.Y.S. at 810.
12. *Id.*
13. *Id.* at 79–80, 41 N.E.3d at 774, 19 N.Y.S.3d at 810.
14. *Id.* at 80, 41 N.E.3d at 775, 19 N.Y.S.3d at 811.
15. *Hutchinson*, 26 N.Y.3d at 80, 41 N.E.3d at 775, 19 N.Y.S.3d at 811.
16. *Id.*
17. *Id.*
18. *Id.* at 74, 41 N.E.3d at 771, 19 N.Y.S.3d at 807.
19. *Id.* at 81, 41 N.E.3d at 775, 19 N.Y.S.3d at 811.

because it was not on the "walking surface of a step tread" as a matter of law.[20]

The Court announced a test regarding defects in stairwells: "What counts here is not whether a person could avoid the defect, but whether a person would invariably avoid the defect while walking in a manner typical of human beings descending stairs."[21] The Court found that the "missing piece, of irregular shape, 3.25 inches in width and at least one-half inch in depth, on the nosing of the step, where a person might step" raised a "triable issue of fact . . . regarding whether the defect was trivial."[22]

3. Defendant Fails to Make Prima Facie Case Where Clump's Size Is Unclear in the Record

The third appeal involved a "clump" in a stair tread.[23] The Court declined to make a determination on the triviality issue, noting that the record was altogether "inconclusive."[24] "[D]eposition testimony" was unclear, the photographs were "indistinct," and the defendant did not provide "measurements of the alleged defect."[25] As a result, the Court noted, "[I]t is not possible to determine whether [the clump] is the kind of physically small defect to which the trivial defect doctrine applies."[26]

But practitioners should not read this language as a major restriction: "[The Court] does not imply that there are no cases in which a fact-finding court could examine photographs and justifiably infer from them as a matter of law that an elevation or depression or other defect is so slight as to be trivial as a matter of law."[27]

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20. *Hutchinson*, 26 N.Y.3d at 81, 41 N.E.3d at 775–76, 19 N.Y.S.3d at 811–12. The Court, while not deciding the factual issue, noted that "the photograph in the record of a foot positioned next to the 'chip,' the toe of the shoe extends across and over the nosing in a way that does not appear forced or unnatural." *Id.* at 82, 41 N.E.3d at 776, 19 N.Y.S.3d at 812. The Court declined to hold that "if there were room on the step for a person to place his or her foot behind the defect, it would not follow as a matter of law that the defect is 'not on the walking surface.'" *Id.*

21. *Id.*

22. *Id.*

23. *Hutchinson*, 26 N.Y.3d at 76, 41 N.E.3d at 772, 19 N.Y.S.3d at 808. The clump appears to have been painted over some time before the plaintiff fell. *Id.*

24. *Id.* at 82, 41 N.E.3d at 777, 19 N.Y.S.3d at 813.

25. *Id.*

26. *Id.* at 82–83, 41 N.E.3d at 777, 19 N.Y.S.3d at 813. The Court went on to "hold that [the] defendants failed to meet their initial burden of making a prima facie showing of entitlement to judgment as a matter of law." *Hutchinson*, 26 N.Y.3d at 83, 41 N.E.3d at 777, 19 N.Y.S.3d at 813. Therefore, the Court held, "The burden did not shift to [the plaintiff] to establish the existence of a material issue of fact." *Id.*

27. *Id.* (first citing Outlaw v. Citibank, 35 A.D.3d 564, 565, 826 N.Y.S.2d 642, 644 (2d Dep't 2006); and then citing Julian v. Sementelli, 234 A.D.2d 866, 867, 651 N.Y.S.2d 678,

B. Davis v. South Nassau Communities Hospital: *Court of Appeals Defines Scope of Duty*

Students of the law—academics, practitioners, and even law students—all remember the famous formulation of duty from *Palsgraf v. Long Island Railroad*: "The 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."[28] While we all learn—and often discuss—duty in *Palsgraf*'s balancing terms,[29] the law of duty has been subtly reformulated over the years, culminating in the five-to-two decision in *Davis v. South Nassau Communities Hospital*.[30]

Davis arose out of an automobile accident.[31] The plaintiff was driving a bus, travelling on the highway.[32] A doctor and nurse, both defendants in the action, had recently treated another driver at a hospital.[33] The medical professionals gave the driver painkillers, including opioid medications, during her treatment.[34] Without warning the driver about the medications' effect on her ability to drive, the medical professionals discharged the driver.[35] While driving home from the hospital, she crossed the center line and hit the plaintiff's bus, causing him injuries.[36] The plaintiff then sued the hospital and the medical professionals, alleging that a breach of the duty to warn a patient would extend to third parties who were injured as a result of the failure to warn.[37]

The Court of Appeals framed the issue as "whether [the] defendants owed a duty to [the] plaintiff and his wife [third parties] . . . to warn [a patient] that the medication [the] defendants gave to [the patient] either impaired or could have impaired her ability to safely operate a motor vehicle following her departure from the hospital."[38]

The Court began by noting that "[c]ourts resolve legal duty

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679 (3d Dep't 1996)).

28. Palsgraf v. Long Island R.R., 248 N.Y. 339, 344, 162 N.E. 99, 100 (1928) (first citing Warren A. Seavey, *Negligence: Subjective or Objective?*, 41 HARV. L. REV. 1, 6 (1927); and then citing Boronkay v. Robinson & Carpenter, 247 N.Y. 365, 368, 160 N.E. 400, 400–01 (1928)).

29. *Id.*

30. 26 N.Y.3d 563, 569, 46 N.E.3d 614, 616, 26 N.Y.S.3d 231, 233 (2015); *see also id.* at 581, 46 N.E.3d at 625, 26 N.Y.S.3d at 242 (Stein, J., dissenting).

31. *Id.* at 569, 46 N.E.3d at 616, 26 N.Y.S.3d at 233 (majority opinion).

32. *Id.*

33. *Id.*

34. *Davis*, 26 N.Y.3d at 569, 46 N.E.3d at 616, 26 N.Y.S.3d at 233.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

questions by resort to common concepts of morality, logic and consideration of social consequences of imposing the duty."[39] Unlike the foreseeability inquiry embraced by *Palsgraf*, however, the *Davis* court stated that "[a] critical consideration in determining whether a duty exists is whether 'the defendant's relationship with either the tortfeasor or the plaintiff places the defendant in the best position to protect against the risk of harm.'"[40] Or, "[s]aid another way, [the Court's] calculus is such that [it] assign[s] the responsibility of care to the person or entity that can most effectively fulfill that obligation at the lowest cost."[41]

Applying that analysis to *Davis*, the Court expanded the duty of care: "[P]ut simply, to take the affirmative step of administering the medication at issue without warning [the patient] about the disorienting effect of those drugs was to create a peril affecting every motorist in [the patient's] vicinity."[42] The Court was careful to note that the "[d]efendants [were] the only ones who could have provided a proper warning of the effects of the medication."[43]

The Court went on to clarify how to fulfill the duty of care, stating that the "defendants and those similarly situated may comply with the duty recognized herein merely by advising one to whom medication is administered of the dangers of that medication."[44] In order to dispel any ambiguity, the Court stated that the duty was "not about *preventing Walsh from leaving the Hospital*, but about ensuring that *when Walsh left the Hospital*, she was *properly warned about the effects of the medication*

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39. *Davis*, 26 N.Y.3d at 572, 46 N.E.3d at 618, 26 N.Y.S.3d at 235 (quoting Tenuto v. Lederle Labs., Div. of Am. Cyanamid Co., 90 N.Y.2d 606, 612, 687 N.E.2d 1300, 1302, 665 N.Y.S.2d 17, 19 (1997)) (citing Palka v. Servicemaster Mgmt. Servs. Corp., 90 N.Y.2d 579, 586, 634 N.E.2d 189, 193, 611 N.Y.S.2d 817, 821 (1994)).

40. *Id.* (quoting Hamilton v. Beretta U.S.A. Corp., 96 N.Y.2d 222, 233, 750 N.E.2d 1055, 1061, 727 N.Y.S.2d 7, 13 (2001)).

41. *Id.*

42. *Id.* at 577, 46 N.E.3d at 622, 26 N.Y.S.3d at 239. *Davis* is no rallying cry for expanded duties. *See id.* at 579, 46 N.E.3d at 624, 26 N.Y.S.3d at 241 ("Our decision herein imposes no additional obligation on a physician who administers prescribed medication. Rather we merely extend the scope of persons to whom the physician may be responsible for failing to fulfill that responsibility." (footnote omitted)). Indeed, the Court concluded its legal discussion by stating, "[O]ur decision . . . should not be construed as an erosion of the prevailing principle that courts should proceed cautiously and carefully in recognizing a duty of care. . . . This decision does not reflect a retreat from those principles." *Davis*, 26 N.Y.3d at 580, 46 N.E.3d at 624, 26 N.Y.S.3d at 241.

43. *Id.* at 577, 46 N.E.3d at 622, 26 N.Y.S.3d at 239. The Court defended its decision to expand the duty of care first in terms of cost: "[T]he 'cost' of the duty imposed . . . should be a small one: where a medical provider administers to a patient medication that impairs or could impair the patient's ability to safely operate an automobile, the medical provider need do no more than simply warn the patient of those dangers." *Id.* at 579, 46 N.E.3d at 623–24, 26 N.Y.S.3d at 240–41.

44. *Id.* at 580, 46 N.E.3d at 624, 26 N.Y.S.3d at 241.

administered to her."[45] Under the *Davis* decision, it would seem prudent for treating physicians to provide the Food and Drug Administration prescription drug warning sheets, which are given when pharmacists dispense medications, which would likely fulfill the duty of care.[46]

C. State Farm Mutual Automobile Insurance Co. v. Fitzgerald: *Police Vehicles Not Subject to SUM Coverage Requirement in Automobile Policies*

1. Insurance Law § 3420 Remains Inapplicable to Police Vehicles

In *State Farm v. Fitzgerald*,[47] the Court of Appeals revisited its holding in *State Farm v. Amato*[48]: police vehicles are not subject to Insurance Law § 3420's requirement that automobile insurance policies include supplementary uninsured/underinsured motorist ("SUM") coverage.[49] In a four-to-three decision,[50] the Court reaffirmed its prior holding.[51]

Officer Fitzgerald was a passenger in a police cruiser when an "allegedly intoxicated driver of an underinsured vehicle struck the police car."[52] Officer Knauss, who was driving the police car, had insurance through State Farm, which provided coverage for anyone travelling in any "motor vehicle" he was driving.[53] But "[t]he policy did not define the term 'motor vehicle.'"[54] After the other driver's insurance company paid its policy limits, Officer Fitzgerald requested coverage from Officer Knauss's insurance company, State Farm.[55] State Farm denied coverage, and "filed a petition to permanently stay arbitration."[56] Relying on *Amato*, the supreme court granted the petition.[57] The Second Department

45. *Id.*
46. *See Davis*, 26 N.Y.3d at 579 n.5, 46 N.E.3d at 624 n.5, 26 N.Y.S.3d at 241 n.5.
47. 25 N.Y.3d 799, 38 N.E.3d 325, 16 N.Y.S.3d 796 (2015).
48. 72 N.Y.2d 288, 528 N.E.2d 162, 532 N.Y.S.2d 239 (1988).
49. *Id.* at 295, 528 N.E.2d at 165, 532 N.Y.S.2d at 242.
50. *Compare Fitzgerald*, 25 N.Y.3d at 820–21, 38 N.E.3d at 340, 16 N.Y.S.3d at 811 (citing N.Y. INS. LAW § 3420(f)(2)(A) (McKinney 2015)) (holding that police vehicles are not subject to the insurance law), *with id.* at 822, 38 N.E.3d at 341, 16 N.Y.S.3d at 812 (Pigott, J., dissenting) (arguing that the plaintiff should be eligible for insurance through the officer's SUM endorsement).
51. *Fitzgerald*, 25 N.Y.3d at 822, 38 N.E.3d at 341, 16 N.Y.S.3d at 812.
52. *Id.* at 801, 38 N.E.3d at 326, 16 N.Y.S.3d at 797.
53. *Id.* (emphasis omitted).
54. *Id.* at 802, 38 N.E.3d at 326, 16 N.Y.S.3d at 797.
55. *Id.*
56. *Fitzgerald*, 25 N.Y.3d at 802, 38 N.E.3d at 326, 16 N.Y.S.3d at 797.
57. *Id.* at 802, 38 N.E.3d at 326–27, 16 N.Y.S.3d at 797–98.

reversed, focusing on the statutory language and distinguishing *Amato*.[58] The Court of Appeals reversed the appellate division's decision, reaffirming *Amato*.[59]

The Court's policy interpretation began with the principle that "a policy provision mandated by statute must be interpreted in a neutral manner consistently with the intent of the legislative and administrative sources of the legislation" because the insurance company "did not choose the terms of the SUM endorsement . . . of its own accord, but, rather, was required to offer SUM coverage" by law.[60] Insurance Law § 3420(e), which requires SUM coverage, defines "motor vehicle" by reference to Vehicle and Traffic Law § 388.[61] Insurance Law § 388, in turn, excludes police vehicles from its definition of motor vehicles.[62] In *Amato*, the Court held § 3420's obligations, defined by § 388, were inapplicable to police vehicles.[63] After reviewing the parties' contentions, the Court reaffirmed *Amato* and granted "a permanent stay of arbitration."[64]

2. The Court of Appeals Discusses Stare Decisis

In reaching its decision, the Court also provided a detailed discussion of stare decisis,[65] which practitioners may find helpful in constructing future arguments.

The Court began its discussion of stare decisis by stating, "Even if we were to disagree with our holding in *Amato*, we would nonetheless be

58. *Id.* at 802–03, 38 N.E.3d at 327, 16 N.Y.S.3d at 798 (citing State Farm Mut. Auto Ins. Co. v. Fitzgerald, 112 A.D.3d 166, 170, 973 N.Y.S.2d 801, 804 (2d Dep't 2013)).

59. *Id.* at 804, 38 N.E.3d at 328, 16 N.Y.S.3d at 799.

60. *Id.* (citing Country-Wide Ins. Co. v. Wagoner, 45 N.Y.2d 581, 586, 384 N.E.2d 653, 655, N.Y.S.2d 106, 108 (1978)); *see also* N.Y. INS. LAW § 3420(f)(2)(A) (McKinney 2015) (requiring SUM coverage); 11 N.Y.C.R.R. § 60-2.3(f) (2016) (implementing § 3420(f)(2)(A)'s requirements).

61. INS. § 3420(e); *see also* N.Y. VEH. & TRAF. LAW § 388 (McKinney 2005).

62. VEH. & TRAF. § 388; *see also Fitzgerald*, 25 N.Y.3d at 805–06, 38 N.E.3d at 329, 16 N.Y.S.3d at 800.

63. State Farm Mut. Auto. Ins. Co. v. Amato, 72 N.Y.2d 288, 295, 528 N.E.2d 162, 165, 532 N.Y.S.2d 239, 242 (1988). The *Fitzgerald* dissent, in contrast, focused on the SUM coverage scheme's purpose "to make compensation available in cases in which insured persons suffer automobile accident injuries at the hands of financially irresponsible motorists," yet "[u]nder the majority's holding, [the] plaintiff is left without uninsured motorist coverage altogether. Clearly, neither the Legislature nor this Court would ever intend such a result." *Fitzgerald*, 25 N.Y.3d at 821, 38 N.E.3d at 341, 16 N.Y.S.3d at 812 (Pigott, J., dissenting).

64. *Fitzgerald*, 25 N.Y.3d at 821, 38 N.E.3d at 340, 16 N.Y.S.3d at 811 (Pigott, J., dissenting).

65. *Id.* at 819–20, 38 N.E.3d at 339, 16 N.Y.S.3d at 810 (majority opinion).

bound to follow it under the doctrine of stare decisis."[66] The Court described departing from precedent as a "drastic step" requiring a "compelling justification."[67] In statutory interpretation cases, however, the Court went further: "[A]n even more extraordinary and compelling justification is needed to overturn precedents involving statutory interpretation . . . because . . . if the precedent or precedents have misinterpreted the legislative intention [embodied in a statute], the Legislature's competency to correct the misinterpretation is readily at hand."[68] The Court cautioned attorneys that it upholds a statutory interpretation even where it is "riddled with shortcomings."[69] And the Court cautioned attorneys to do more than blindly rely on any amendment to a statute;[70] instead, the decision implies that attorneys making arguments to depart from precedent must focus on the relationship between the statutory amendment and the precedent an attorney is attempting to overturn.[71]

D. Abrams v. Bute: *Second Department Examines Pharmacist's Duty of Care*

The Second Department's *Abrams v. Bute* decision, which dealt with a pharmacist's duty of care when fulfilling prescriptions, provides a common law contrast to *Fitzgerald*'s application of stare decisis in the statutory context.[72]

Mr. Abrams, the decedent, was given "six milligrams of hydromorphone," a strong painkiller, after his "hemorrhoid surgery."[73] "After the surgery, Dr. Bute wrote the decedent a prescription for hydromorphone. The decedent was instructed to ingest up to eight milligrams of hydromorphone every three to four hours as needed for pain."[74] The decedent's wife filled the prescription promptly.[75] After

66. *Id.* at 819, 38 N.E.3d at 339, 16 N.Y.S.3d at 810.

67. *Id.* (quoting People v. Lopez, 16 N.Y.3d 375, 384 n.5, 947 N.E.2d 1155, 1163 n.5, 923 N.Y.S.2d 377, 384 n.5 (2011)) (citing People v. Silva, 24 N.Y.3d 294, 300, 22 N.E.3d 1022, 1026, 998 N.Y.S.2d 154, 158 (2014)).

68. *Id.* at 819–20, 38 N.E.3d at 339, 16 N.Y.S.3d at 810 (quoting Palladino v. CNY Centro, Inc., 23 N.Y.3d 140, 151, 12 N.E.3d 436, 442, 989 N.Y.S.2d 438, 444 (2014)).

69. *Fitzgerald*, 25 N.Y.3d at 820, 38 N.E.3d at 339, 16 N.Y.S.3d at 810.

70. *Id.*

71. *Id.* at 820, 38 N.E.3d at 340, 16 N.Y.S.3d at 811.

72. *Compare* Abrams v. Bute, 138 A.D.3d 179, 191, 27 N.Y.S.3d 58, 68 (2d Dep't 2016) (discussing application of case law), *with Fitzgerald*, 25 N.Y.3d at 819–20, 38 N.E.3d at 339, 16 N.Y.S.3d at 810 (discussing statutory interpretation).

73. *Abrams*, 138 A.D.3d at 181, 27 N.Y.S.3d at 61.

74. *Id.*

75. *Id.*

giving another dose of the painkiller, the decedent's wife "found the decedent 'gasping for air'";[76] the decedent died before the ambulance arrived.[77] "An autopsy report prepared at the request of the plaintiff indicated that the decedent died as a result of acute hydromorphone intoxication."[78]

In addition to asserting a medical malpractice claim against the prescribing doctor, the complaint named the pharmacy, CVS, as a defendant, alleging "that the dosage of hydromorphone prescribed by Dr. Bute was so high that the CVS defendants had a duty to take steps to confirm that the prescription was appropriate for the decedent under the circumstances."[79] The pharmacist argued "that the scope of this duty, as a matter of law, did not include any obligation to warn the decedent of the dangers of taking the [prescription] . . . or to take any steps to confirm that the prescription was not issued in error."[80] The Second Department rejected the argument, finding that pharmacists "ha[d] special training [and] experience in a trade or profession and [was] engaged in that capacity."[81]

The Second Department held pharmacists to a level of professional competence.[82] In its decision, the court traced pharmacists' historical role in the treatment process[83]:

> In modern times, the means of distributing prescription medication to the public generally involves three principal actors: the manufacturer, the prescribing physician, and the pharmacist. The interlocking system of liability that has been developed to govern the conduct of these actors reflects the specialized role that each actor plays in the distribution of prescription medication."[84]

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76. *Id.*

77. *Id.*

78. *Abrams*, 138 A.D.3d at 181, 27 N.Y.S.3d at 61.

79. *Id.* at 182, 27 N.Y.S.3d at 61.

80. *Id.* at 183, 27 N.Y.S.3d at 62; *see also id.* ("The CVS defendants contend that the prescribing physician is solely responsible for determining whether the prescription is appropriate for any particular patient and that requiring a pharmacist to verify the appropriateness of a prescription would undermine the physician-patient relationship and intrude into the exclusive professional sphere of the treating physician.").

81. *Id.* at 184, 27 N.Y.S.3d at 63 (citing Reis v. Volvo Cars of N. Am., 24 N.Y.3d 35, 42, 18 N.E.3d 383, 387, 993 N.Y.S.2d 672, 676 (2014)).

82. *Abrams*, 138 A.D.3d at 184, 27 N.Y.S.3d at 63 (first citing *Reis*, 24 N.Y.3d at 42, 18 N.E.3d at 387, 993 N.Y.S.2d at 676; then citing Milau Assoc. v. N. Ave. Dev. Corp., 42 N.Y.2d 482, 486, 368 N.E.2d 1247, 1250, 398 N.Y.S.2d 882, 885 (1977); and then citing Landon v. Kroll Lab. Specialists, Inc., 91 A.D.3d 79, 84, 934 N.Y.S.2d 183, 189 (2d Dep't 2011)).

83. *Id.* at 185, 27 N.Y.S.3d at 64.

84. *Id.* at 185–86, 27 N.Y.S.3d at 64 (citing McKee v. Am. Home Prods. Corp., 782 P.2d

The pharmacist in *Abrams* did not question the dosage of the hydromorphone, which was allegedly dangerous.[85] The court dismissed the case because the prescription was for a high, but not clearly erroneous, dosage, but left open whether, under different circumstances, a pharmacist might be required to inquire as to whether the prescription's dosage was incorrect.[86]

Thus, in contrast to *Fitzgerald*'s discussion of stare decisis above, the Second Department found itself more willing to change the common law. The *Abrams* court found itself faced with the common law: a flexible set of legal rules that takes into account the changing nature of relationships as society's structure changes.[87] In contrast to statutory interpretation—where the courts assume that they have correctly decided the case unless the legislature overrides them[88]—when considering the common law, courts can look at societal changes: advocates should not shy away from arguing that changing roles in society dictate changing duties in the law of torts, especially the law of negligence as specialization and professionalization become the norm, and not the exception, to societal structuring.

E. Pasternack v. Laboratory Corp. of American Holdings: *Laboratories Had No Duty to Properly Abide by Federal Regulations when Conducting Tests Since the Regulations Did Not Affect the Validity of the Underlying Testing and Rejects Third-Party Reliance in Fraud Actions*

1. Court of Appeals Holds No Negligent Misrepresentation Cause of Action Where Failure to Follow Regulations Is Irrelevant to Underlying Test's Validity

In *Pasternack v. Laboratory Corp. of American Holdings*,[89] the Court of Appeals analyzed the scope of its recent decision in *Landon v.*

1045, 1049–51 (Wash. 1989)).

85. *Id.* at 195, 27 N.Y.S.3d at 71–72.

86. *Id.* at 196, 27 N.Y.S.3d at 72 (first citing Cassano v. Hagstrom, 5 N.Y.2d 643, 646, 159 N.E.2d 348, 349, 187 N.Y.S.2d 1, 3 (1959); then citing Lagman v. Overhead Door Corp., 128 A.D.3d 778, 779, 9 N.Y.S.3d 147, 148 (2d Dep't 2015); then citing Lopez v. Retail Prop. Tr., 118 A.D.3d 676, 676, 986 N.Y.S.2d 857, 858 (2d Dep't 2014); and then citing Fenty v. Seven Meadows Farms, Inc., 108 A.D.3d 588, 589, 969 N.Y.S.2d 506, 508 (2d Dep't 2013)).

87. AHARON BARAK, THE JUDGE IN A DEMOCRACY 10 (2006).

88. *See, e.g.*, State Farm v. Fitzgerald, 25 N.Y.3d 799, 819–20, 38 N.E.3d 325, 339, 16 N.Y.S.3d 796, 810 (2015) (quoting Palladino v. CNY Centro, Inc., 23 N.Y.3d 140, 151, 12 N.E.3d 436, 444, 989 N.Y.S.2d 438, 442 (2014)).

89. 27 N.Y.3d 817, 59 N.E.3d 485, 37 N.Y.S.3d 750 (2016).

Kroll Laboratory Specialists, Inc.,[90] which held that laboratories have a common law duty to conduct diagnostic testing with reasonable care.[91] The plaintiff, a part-time airline pilot, went to the defendant laboratory as a part of Department of Transportation (DOT)-mandated random drug testing program.[92] When the plaintiff went for his random drug test, he first was unable to produce a sufficient amount of urine for drug testing.[93]

DOT regulations provided specific procedures for the situation, which included a requirement that the test administrator to inform the test-taker that leaving the laboratory would be considered refusing testing.[94]

Despite the regulations, the test administrator did not provide any warning and implied that he could return without consequence;[95] the plaintiff left the facility.[96] The plaintiff returned to the facility later that day and produced a sufficient sample.[97] The plaintiff was subsequently deemed to have refused to test, and his license to fly was revoked.[98]

The issue in *Pasternack* became whether a laboratory had a common law duty to properly follow regulatory procedures intended to inform the test-taker about the consequences of aborting a test process where the regulations' requirements did not affect the test's validity.[99] The Court declined to extend *Landon* beyond its "limited ruling" that a laboratory owed a duty of care "to ensure accurate testing procedures."[100] Instead, the Court rejected an argument that a laboratory's duty of care "encompass[ed] every step of the testing process, whether that process is governed by federal regulations and guidelines or otherwise."[101] The

90. *Id.* at 825, 59 N.E.3d at 490, 37 N.Y.S.3d at 755 (citing Landon v. Kroll Lab. Specialists, Inc., 22 N.Y.3d 1, 6–7, 999 N.E.2d 1121, 1124–25, 977 N.Y.S.2d 676, 679–80 (2013)).

91. *Landon*, 22 N.Y.2d at 6–7, 999 N.E.2d at 1124–25, 977 N.Y.S.2d at 679–80.

92. The defendant was under contract to perform the tests for the plaintiff's part-time employer. *Pasternack*, 27 N.Y.3d at 820–21, 59 N.E.3d at 487, 37 N.Y.S.3d at 752.

93. *Id.* at 821, 59 N.E.3d at 487, 37 N.Y.S.3d at 752.

94. *Id.*

95. *Id.* at 822, 59 N.E.3d at 488, 37 N.Y.S.3d at 753.

96. *Id.*

97. *Pasternack*, 27 N.Y.3d at 822, 59 N.E.3d at 488, 37 N.Y.S.3d at 753.

98. The plaintiff was ultimately vindicated and his license was reinstated in administrative proceedings. *Id.* at 823, 59 N.E.3d at 489, 37 N.Y.S.3d at 754. The plaintiff's filed suit during the administrative proceeding, but sued for money damages. *Id.*

99. *Id.* at 824–25, 59 N.E.3d at 489–90, 37 N.Y.S.3d at 754–55.

100. *Id.* at 826, 59 N.E.3d at 491, 37 N.Y.S.3d at 756.

101. *Pasternack*, 27 N.Y.3d at 826, 59 N.E.3d at 491, 37 N.Y.S.3d at 756 (first citing *In re* N.Y.C. Asbestos Litig., 5 N.Y.3d 486, 493, 840 N.E.2d 115, 119, 806 N.Y.S.2d 146, 150 (2005); and then citing Braverman v. Bendiner & Schlesinger, Inc., 121 A.D.3d 353, 355, 990 N.Y.S.2d 605, 607 (2d Dep't 2014)).

Court's reasoning leads to the conclusion that a test-taker's damage, incurred while fighting an improperly administered test, has no common law remedy.

The Court distinguished *Pasternack* from *Landon*, noting that "federal regulations and guidelines unrelated to the actual performance of scientific testing" was fundamentally different than a duty to perform the underlying test competently.[102] Thus, because the "regulations and guidelines . . . are ministerial in nature and do not implicate the scientific integrity of the testing process," there was no common law duty of care.[103]

2. Court of Appeals Rejects Third-Party Reliance Doctrine in Fraudulent Misrepresentation Claims

Pasternack v. Laboratory Corp. of America Holdings also is of interest because the Court of Appeals determined that a diagnostic laboratory could not be held liable to a plaintiff test-taker where it allegedly misrepresented the plaintiff's demeanor and failed to mention the employee's failure to warn the plaintiff of the consequences of leaving the facility to the organization, there the DOT, required the tests.[104] The plaintiff claimed that he was damaged by the defendant's failure to disclose the defendant's employee's improper advice as a reason that the plaintiff left the facility to a third-party, the DOT, which led to his license's revocation, could support a cause of action for fraud.[105]

While noting a split of authority in lower New York State courts and federal courts applying New York law,[106] the Court held "that under New York law, such third-party reliance does not satisfy the reliance element of a fraud claim."[107] Judge Fahey, joined by Judge Rivera, would have

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102. *Id.*

103. *Id.* at 826–27, 59 N.E.3d at 491, 37 N.Y.S.3d at 756. Judge Fahey, joined by Judge Rivera and Stein, would have found *Landon* indistinguishable because *Pasternack*, like *Landon*, created an unreasonable risk of a false failure of the test. *Id.* at 833, 59 N.E.3d at 496, 37 N.Y.S.3d at 761 (Fahey, J., dissenting). The dissenters would have found the regulations created a professional standard and were not ministerial, and thus would have found that *Pasternack* did not extend *Landon* but reaffirmed it. *Id.* at 834, 59 N.E.3d at 497, 37 N.Y.S.3d at 763 ("To that end, true 'ministerial' regulations are unlikely to be sufficient to sustain a successful cause of action for negligence.").

104. *Pasternack*, 27 N.Y.3d at 827, 59 N.E.3d at 491, 37 N.Y.S.3d at 756.

105. *Id.*

106. *Id.* at 827, 59 N.E.3d at 492, 37 N.Y.S.3d at 757.

107. *Id.* at 827, 59 N.E.3d at 491, 37 N.Y.S.3d at 756. The Court's rationale was that requiring reliance by a plaintiff is logical "as the tort of fraud is intended to protect a party from being induced to act or refrain from acting based on false representations—a situation which does not occur where, as here, the misrepresentations were not communicated to, or

allowed the claim: "In practice, to reject the third-party reliance doctrine is to facilitate the commission of fraud by straw man and to ease the practice of deceit."[108]

One questions whether, given a duty to perform diagnostic tests, a laboratory might be held liable for a negligent, as opposed to fraudulent, misrepresentation. The essence of the diagnostic testing is not just to report, but to report accurate results.[109] Without accurate results, the testing does not serve the underlying goal: creating safety by detecting drug users.[110]

II. UPDATE: LAW OF TORTS

The New York State courts have issued many more decisions affecting New York's law of torts. It is beyond the scope of this Article to recite every decision affecting the law of torts in New York State. Instead, Part II highlights important decisions rendered in five substantive areas of tort law: Labor Law §§ 240(1) and 241(6), defamation, negligence, slip and fall, and assumption of the risk.

A. Labor Law §§ 240(1) and 241(6)

1. Assevero v. Hamilton Church Properties, LLC: *Homeowners' Exemption Held Inapplicable to Building with Two Apartments and Retail Space on Ground Level*

In *Assevero v. Hamilton Church Properties, LLC*, the Second Department dealt with the one and two family home exemption to Labor Law §§ 240 and 241(6).[111] The plaintiff fell while renovating a building owned by a limited liability corporation,[112] which had three apartments

relied on, by [a] plaintiff." *Id.* at 829, 59 N.E.3d at 493, 37 N.Y.S.3d at 758.

108. *Pasternack*, 27 N.Y.3d at 838, 59 N.E.3d at 500, 37 N.Y.S.3d at 765.

109. *Cf.* Patrick M.M. Bossuyt et al., *Beyond Diagnostic Accuracy: The Clinical Utility of Diagnostic Tests*, 58 CLINICAL CHEMISTRY 1636, 1636 (2012) ("In the clinical evaluation of diagnostic tests . . . , diagnostic accuracy plays a pivotal role.").

110. *Pasternack*, 27 N.Y.3d at 820, 59 N.E.3d at 486, 37 N.Y.S.3d at 751 (first citing 49 U.S.C. § 44701(a)(5); and then citing 49 C.F.R. pt. 40 (2016)).

111. 131 A.D.3d 553, 553–54, 15 N.Y.S.3d 399, 400–01 (2d Dep't 2015).

112. *Id.* at 554, 15 N.Y.S.3d at 401. "The fact that title to an otherwise qualifying one- or two-family dwelling is held by a corporation rather than an individual home owner does not, in and of itself, preclude application of the exemption." *Id.* at 556, 15 N.Y.S.3d at 402 (first citing Parise v. Green Chimneys Children's Servs., Inc., 106 A.D.3d 970, 971, 965 N.Y.S.2d 608, 609 (2d Dep't 2013); then citing Castellanos v. United Cerebral Palsy Ass'n of Greater Suffolk, 77 A.D.3d 879, 880, 909 N.Y.S.2d 757, 758 (2d Dep't 2010); then citing Uddin v. Three Bros. Constr. Corp., 33 A.D.3d 691, 692, 823 N.Y.S.2d 178, 179–80 (2d Dep't 2006); and then citing Baez v. Cow Bay Constr., 303 A.D.2d 528, 529, 756 N.Y.S.2d 281, 282 (2d Dep't 2003)).

above a ground floor retail space.[113] The renovations were designed to include an apartment for the limited liability corporation's owner and his family.[114] The building's certificate of occupancy provided a zoning classification "that includ[ed] one- and two- family residential dwellings," which the court noted was not dispositive.[115] The court held that the building was not subject to the exception because "[t]he ground floor of the building contain[ed] a commercial unit intended for use as a retail store" and "two of the three separate units [one residential, one commercial] [were] used to generate rental income."[116] Thus, owners of mixed residential and commercial property will not gain the one and two family home exception; one question left open by the court was whether renting commercial space itself defeats the exemption.

2. Moreira v. Ponzo: *Labor Law §§ 240(1) and 241(6) Held Applicable to Tree Cutting and Removal Where It Was Required Prerequisite Work for Roof Repair*

In *Moreira v. Ponzo*, the Second Department revisited Labor Law §§ 240 and 241(6), but this time dealt with whether tree maintenance was subject to the Labor Law provisions.[117] While removing a tree limb from a house's roof, a worker fell.[118] "The defendant had hired the plaintiff . . . to remove the tree, which had caused structural damage" to the house's roof.[119] After the tree was removed, "the structural damage was . . . repaired by a different company."[120]

While the court acknowledged that "tree cutting and removal, in and of themselves, [were] not activities subject to Labor Law § 240(1)," which impose absolute liability for gravity-related construction accidents,[121] the court found the statute applicable because "the tree

113. *Id.* at 554, 15 N.Y.S.3d at 401.

114. *Id.*

115. *Assevero*, 131 A.D.3d at 556, 15 N.Y.S.3d at 402 ("[T]his classification is not dispositive because it is primarily intended to govern what building code safety standards are applicable to the building." (first citing N.Y.C., N.Y., ADMIN. CODE § 27-266 (2008); and then citing Greystone Hotel Co. v. City of N.Y. Bd. of Standards & Appeals, 214 A.D.2d 467, 468, 625 N.Y.S.2d 534, 535 (1st Dep't 1995))).

116. *Id.* at 557, 15 N.Y.S.3d at 403 (finding that the building "does not further" the exemption's aim).

117. 131 A.D.3d 1025, 1026, 16 N.Y.S.3d 813, 814 (2d Dep't 2015).

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* (first citing Lombardi v. Stout, 80 N.Y.2d 290, 296, 604 N.E.2d 117, 120, 590 N.Y.S.2d 55, 58 (1992); then citing Enos v. Werlatone, Inc., 68 A.D.3d 713, 714, 890 N.Y.S.2d 109, 110 (2d Dep't 2009); and then citing Morales v. Westchester Stone Co., Inc., 63 A.D.3d 805, 805–06, 881 N.Y.S.2d 456, 457 (2d Dep't 2009)).

removal was the first step in the process of undertaking structural repairs to the building, and . . . the repairs could only be commenced by removing the tree from the roof."[122]

With regard to Labor Law § 241(6), which was pled in the alternative and which imposes liability if a contractor or owner does not adequately protect workers on construction sites,[123] the court noted that "the plaintiff was engaged in activities ancillary to the repair of the building," which made "the provisions of Labor Law § 241 . . . applicable," even despite the general understanding that § 241(6) generally applies to construction, not work precedent to construction.[124]

B. Defamation

1. Colantonio v. Mercy Medical Center: *Statements Made During Credential Committee Meeting Subject to Federal and State Qualified Privileges*

In *Colantonio v. Mercy Medical Center*, the Second Department dealt with allegedly defamatory statements made during a medical credential committee meeting,[125] and held that absolute privilege for quasi-judicial proceedings did not apply to the committee's meeting because the meeting was "preliminary in nature" and no "form of relief" was available or sought.[126] However, the Second Department found that a qualified privilege granted under the federal Health Care Quality Improvement Act applied, and granted summary judgment.[127]

122. *Moreira*, 131 A.D.3d at 1026, 16 N.Y.S.3d at 814.

123. N.Y. LAB. LAW § 241(6) (McKinney 2015).

124. *Moreira*, 131 A.D.3d at 1027, 16 N.Y.S.3d at 815 (citing LAB. § 241(6)).

125. 135 A.D.3d 686, 690, 24 N.Y.S.3d 653, 657 (2d Dep't 2016).

126. *Id.* at 690, 24 N.Y.S.3d at 657–58 (first citing Toker v. Pollak, 44 N.Y.2d 211, 219, 376 N.E.2d 163, 167, 405 N.Y.S.2d 1, 5 (1978); and then citing Rosenberg v. Metlife, Inc., 8 N.Y.3d 359, 368, 866 N.E.2d 439, 444–45, 834 N.Y.S.2d 494, 499–500 (2007)).

127. *Id.* at 690, 24 N.Y.S.3d at 658. The court also found that the state law common interest qualified privilege applied. *Id.* at 691, 24 N.Y.S.3d at 658. The court affirmed the lower court's order, finding no triable issue of fact regarding malice, and therefore that the qualified privilege protected the statements. *Id.* at 691, 24 N.Y.S.3d at 659 (first citing 42 U.S.C. § 11111(a)(2) (2012); then citing Jenkins v. Methodist Hosp. of Dallas, Inc., No. 3:02-CV-1823, 2004 U.S. Dist. LEXIS 28094, at *47 (N.D. Tex. Aug. 14, 2004); then citing Hurwitz v. AHS Hosp. Corp., 103 A.3d 285, 297 (N.J. Super. Ct. App. Div. 2014); and then citing Sithian v. Staten Island Univ. Hosp., 189 Misc. 2d 410, 414, 734 N.Y.S.2d 812, 815 (Sup. Ct. Richmond Cty. 2001)).

2. Three Amigos SJL Restaurant, Inc. v. CBS News, Inc.: *Statement that Business "Run by the Mafia" Does Not Support Defamation Claim by Suppliers of Business*

In a three-to-two decision, the First Department held that a news entity did not defame a restaurant operator or its managerial employees when, in multiple newscasts, the news entity stated that a strip club where the restaurant operated was "run by the mafia" and "'at the center' of a human trafficking ring."[128] Since the restaurant was not explicitly branded with the strip club, but merely a supplier of services to the strip club, the court found the "plaintiffs' relationship to [the business] [was] peripheral, and the public at large would have no reason to think that they were implicated" absent CBS specifically identifying the restaurant.[129]

Thus, citing Second Circuit precedent, the First Department noted, "[W]here an allegedly defamatory statement is directed at a company, it does not implicate the company's suppliers, partners, vendors or affiliated enterprises even if they sustain [an] injury as a result."[130] As to the restaurant's managerial employees, the court rejected an argument that "individual plaintiffs [were] necessarily identified as members of organized crime because they [were] employees of entities that provide management services to [a business]—reported to be 'run' by the Mafia" and were also not specifically identified.[131]

3. Gaccione v. Scarpinato: *Making Statement to Spouse Held Not Publication*

In *Gaccione v. Scarpinato*, the Second Department held that making defamatory statements to a spouse did not constitute publication citing Southern District of New York precedent.[132]

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128. Three Amigos SJL Rest., Inc. v. CBS News, Inc., 132 A.D.3d 82, 86, 90, 15 N.Y.S.3d 36, 40, 43–44 (1st Dep't 2015).

129. *Id.* at 86, 15 N.Y.S.3d at 40.

130. *Id.* at 88, 15 N.Y.S.3d at 41 (citing Kirch v. Liberty Media Corp., 449 F.3d 388, 398 (2d Cir. 2006)).

131. *Id.* at 89–90, 15 N.Y.S.3d at 42. The dissent would have found that the individual plaintiffs were sufficiently visible to be identified as members of a small group who were connected to running the business that was allegedly operated by organized crime. *Id.* at 94, 15 N.Y.S.3d at 46 (Kapnick, J., dissenting).

132. 137 A.D.3d 857, 858–59, 26 N.Y.S.3d 603, 605 (2d Dep't 2016) (citing Medcalf v. Walsh, 938 F. Supp. 2d 478, 286 (S.D.N.Y. 2013)).

C. Negligence

1. Murray v. Golley: *Automobile Inspector Has No Duty to Third-Party to Properly Inspect Car Unless Inspection Causes or Exacerbates Dangerous Condition*

In *Murray v. Golley*, the Fourth Department confronted an issue of duty relating to an automobile inspection.[133] The plaintiff alleged that a mechanic, made a defendant to the action, was liable for "negligently allow[ing] Golley's vehicle to pass inspection prior to the [automobile] accident."[134] The court, citing the Court of Appeals' decision in *Stiver v. Good & Fair Carting & Moving, Inc.*,[135] declined to find a legally cognizable duty, but did note that the case might have turned out differently if there was an allegation that the mechanic "created or exacerbated any dangerous condition relating to Golley's vehicle by inspecting it."[136]

Stiver declared that vehicle inspectors only owed a contractual duty to the inspected car's owner, and, consequently, did not owe a duty of care to the motoring public.[137] In this author's view, *Stiver* improperly applied contractual maintenance cases to inspectors.[138] Inspectors, unlike contractual maintenance companies, have legally mandated duties aimed at ensuring a minimal level of safety for motor vehicle equipment.[139] As a result, when an inspector fails to properly perform the mandated safety inspection, a mechanic's failure to fail the automobile should be considered a breach of the duty to inspect an automobile for safety standards, which, in turn, launches a dangerous instrumentality into the public roadways.[140] The *Stiver* holding seems counterintuitive, since

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133. 132 A.D.3d 1391, 1392, 17 N.Y.S.3d 570, 571 (4th Dep't 2015).

134. *Id.*

135. *Id.* (citing Stiver v. Good & Fair Carting & Moving, Inc., 9 N.Y.3d 253, 257, 878 N.E.2d. 1001, 1003, 848 N.Y.S.2d 585, 587–88 (2007)).

136. *Id.*

137. *Stiver*, 9 N.Y.3d at 256, 878 N.E.2d at 1003, 848 N.Y.S.2d at 587 (quoting Stiver v. Good & Fair Carting & Moving, Inc., 32 A.D.3d 1209, 1210, 822 N.Y.S.2d 178, 180 (4th Dep't. 2006)) (citing Hartsock v. Scaccia, 84 A.D.3d 1697, 1698, 922 N.Y.S.2d 699, 700 (4th Dep't. 2011)).

138. *Compare id.* at 257, 878 N.E.2d at 1003, 848 N.Y.S.2d at 587 (quoting Espinal v. Melville Snow Contractors, Inc., 98 N.Y.2d 136, 138, 773 N.E.2d 485, 487, 746 N.Y.S.2d 120, 122 (2002)) (citing Church v. Callanan Indus., 99 N.Y.2d 104, 111, 782 N.E.2d 50, 52, 752 N.Y.S.2d 254, 256 (2002)), *with* Elliott v. City of New York, 95 N.Y.2d 730, 733, 747 N.E.2d 760, 761, 724 N.Y.S.2d 397, 398 (2001) (discussing negligence per se for failures to follow law), *and* 15 N.Y.C.R.R. § 79.20–.21 (2016) (discussing inspection requirements).

139. 15 N.Y.C.R.R. § 79.20–.21.

140. *But see Murray*, 132 A.D.3d at 1392, 17 N.Y.S.3d at 571 (first citing *Stiver*, 9 N.Y.3d at 257, 878 N.E.2d at 1003, 848 N.Y.S.2d at 587–88; and then citing *Hartsock*, 84 A.D.3d at

vehicle inspections are designed to ensure safety standards, and may be an area ripe for future litigation.

2. Daily v. Tops Markets, LLC: *Store Has No Duty to Obtain Assistance for Person in Parking Lot Where Person Was Dropped Off in Parking Lot*

In *Daily v. Tops Markets, LLC*, the Third Department confronted an issue of duty relating to landowners and parking lots.[141] The decedent and his friends were "consuming alcohol and drugs [off premises] . . . when he passed out and appeared to have trouble breathing."[142] Alarmed, the decedent's companions "placed the then unconscious decedent in his own car and drove the car to the parking lot of defendant Tops," informing employees "that there was someone in the parking lot who was unconscious and in need of emergency medical care."[143] After "the Tops' employees took no action" the "decedent died . . . allegedly of the combined effects of intoxication and hypothermia."[144] The court declined to find a legally cognizable duty, noting that the store was open to the public, but "this did not necessarily create an affirmative duty to come to the aid of anyone who was anywhere on its property no matter how unrelated such person's presence was to Tops' function as a grocery store."[145]

D. Slip and Fall

1. Sherman v. New York State Thruway Authority: *Storm-in-Progress Doctrine Applied to Ice Storm that May Have Turned to Rain Before Slip-and-Fall*

In *Sherman v. New York State Thruway Authority*, the Court of Appeals held that the storm in progress doctrine precluded a state trooper's slip-and-fall claim where an ice storm continued as a rainstorm,

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1698, 922 N.Y.S.2d at 700).

141. 134 A.D.3d 1332, 1332, 20 N.Y.S.3d 487, 488 (3d Dep't 2015).

142. *Id.* at 1332, 20 N.Y.S.3d at 488.

143. The decedent's friends "made no effort themselves to contact police of emergency medical personnel." *Id.*

144. *Id.*

145. *Id.* at 1333, 20 N.Y.S.3d at 488–89. The court emphasized that the "[d]ecedent was not a customer of Tops, neither he nor his companions were on the premises for any activity related in any manner to Tops' business, Tops' employees did not participate in any fashion in the conduct of decedent's companions." *Daily*, 134 A.D.3d at 1333, 20 N.Y.S.3d at 489. Turning to the Tops employees, the court noted that "it is not alleged that Tops' employees saw or had any contact with decedent on the premises, and Tops' employees did not take any actions that put decedent in a worse position than the one in which his companions left him." *Id.*

despite the fact that the ice turned to rain hours before the trooper slipped and fell.[146] The trooper sued the Thruway Authority, which had the duty to maintain the barracks' sidewalks,[147] avoiding the exclusive remedy provisions of the Workers' Compensation Law.[148]

For practitioners, *Sherman* presents an interesting extension of the storm-in-progress doctrine: generally, when an ice or snowstorm ceases, even if a rainstorm persists, the storm-in-progress doctrine becomes inapplicable.[149] Three judges dissented and would have reversed the appellate division's decision.[150] In the dissent's view, "where a storm has turned to rainy conditions that neither imperil workers [who would remedy the dangerous condition] nor frustrate clean up efforts, the temporary suspension of a property owner's duty of care is no longer justified."[151]

2. Cruz v. Bronx Lebanon Hospital Center: *Plaintiff's Testimony Alone Sufficient to Support Trip-and-Fall Liability Determination Absent Photograph of Defect*

In a three-to-two decision, the First Department held a jury verdict was supported by evidence where the plaintiff provided the sole testimony regarding a hole "caused by 'worn out' rubber" at a playground, despite an apparent lack of specific proof regarding any actual or constructive notice to the defendant.[152] In response to the plaintiff's testimony, the defendant's "vice-president of support services . . . testified that the maintenance staff inspect[ed] and clean[ed] the accident area at least once per day" and that "records did not contain a

146. 27 N.Y.3d 1019, 1021, 52 N.E.3d 231, 232, 32 N.Y.S.3d 568, 569 (2016).

147. *Id.* at 1020, 52 N.E.3d at 232, 32 N.Y.S.3d at 569.

148. N.Y. WORKERS' COMP. LAW § 29(6) (McKinney 2016).

149. *Sherman*, 27 N.Y.3d at 1020–21, 52 N.E.3d at 232, 32 N.Y.S.3d at 569 (citing Solazzo v. N.Y.C. Transit Auth., 6 N.Y.3d 734, 735, 843 N.E.2d 748, 749, 810 N.Y.S.2d 121, 122 (2005)).

150. *Id.* at 1022–23, 1025, 52 N.E.3d at 233, 235, 32 N.Y.S.3d at 570, 572 (Rivera, J., dissenting).

151. *Id.* at 1022–23, 52 N.E.3d at 233, 32 N.Y.S.3d at 570; *see also id.* at 1024, 52 N.E.3d at 234, 32 N.Y.S.3d at 571 ("We have never held that above-freezing rain alone constitutes a type of storm-in-progress that would relieve a property owner from taking any action to clear or maintain the property."). The dissent also noted that the Thruway Authority's own submission seemed to indicate that rain, not snow or ice, was falling for hours prior to the accident. *Id.* at 1023, 52 N.E.3d at 234, 32 N.Y.S.3d at 571. As a result, in the dissent's view, the Thruway Authority failed to establish their prima facie entitlement to judgment as a matter of law. *Sherman*, 27 N.Y.3d at 1025, 52 N.E.3d at 235, 32 N.Y.S.3d at 572 (Rivera, J., dissenting).

152. Cruz v. Bronx Lebanon Hosp. Ctr., 129 A.D.3d 631, 632, 13 N.Y.S.3d 27, 28 (1st Dep't 2015).

work order for the claimed defect in the rubber mat."[153] The First Department concluded, "Plaintiff's testimony that she was caused to fall when her foot became ensnared in a 'worn out' section of the rubber mat was sufficient to support a finding of liability."[154]

Justice Saxe, dissenting, noted that the plaintiff did not produce any evidence that the defendant had actual or constructive notice of the defect, and that the plaintiff did not produce any photographic evidence depicting the defect; Justice Saxe would have held the evidence insufficient, as the plaintiff never addressed notice specifically in its case in chief.[155]

E. Assumption of the Risk

1. Georgiades v. Nassau Equestrian Center: *Exception to Horseback Riding as Inherently Dangerous Activity Where Instructor Demands Rider Perform Maneuver*

While it is generally true that courts find falling and being thrown from a horse inherent risks in horseback riding,[156] the Second Department noted an exception to the general rule in *Georgiades v. Nassau Equestrian Center*.[157] The plaintiff, a minor, "was injured while taking horseback riding lessons" at the defendant farm.[158] "At the direction of her instructor, Chloe attempted to perform a maneuver with her feet out of the stirrups . . . . [Despite her testimony that] she felt uncomfortable

153. *Id.*

154. *Id.* at 633, 13 N.Y.S.3d at 29 (citing Taylor v. N.Y.C. Transit Auth., 48 N.Y.2d 903, 904, 400 N.E.2d 1340, 1341, 424 N.Y.S.2d 888, 889 (1979)).

155. *Id.* at 634, 13 N.Y.S.3d at 30 (Saxe, J., dissenting) (citing Gordon v. Am. Museum of Nat. History, 67 N.Y.2d 836, 837, 492 N.E.2d 774, 775, 501 N.Y.S.2d 646, 647 (1986)).

156. Kirkland v. Hall, 38 A.D.3d 497, 498, 832 N.Y.S.2d 232, 234 (2d Dep't 2007) (first citing Kinara v. Jamaica Bay Riding Acad., Inc., 11 A.D.3d 588, 588, 783 N.Y.S.2d 636, 636 (2d Dep't 2004); then citing Becker v. Pleasant Valley Farms, Ltd., 261 A.D.2d 427, 427, 690 N.Y.S.2d 76, 77 (2d Dep't 1999); and then citing Freskos v. City of New York, 243 A.D.2d 364, 364, 663 N.Y.S.2d 174, 175 (1st Dep't 1997)) (stating that falling from a horse is an inherent risk of horseback riding); Eslin v. County of Suffolk, 18 A.D.3d 698, 699, 795 N.Y.S.2d 349, 350–51 (2d Dep't 2005) (first citing *Kinara*, 11 A.D.3d at 588, 783 N.Y.S.2d at 636; then citing *Becker*, 261 A.D.2d at 427, 690 N.Y.S.2d at 77; then citing *Freskos*, 243 A.D.2d at 364, 663 N.Y.S.2d at 175; then citing Morrelli v. Giordano, 206 A.D.2d 464, 464, 614 N.Y.S.2d 565, 565 (2d Dep't 1994), then citing Rubenstein v. Woodstock Riding Club, 208 A.D.2d 1160, 1161, 617 N.Y.S.2d 603, 605 (3d Dep't 1994); and then citing Irish v. Deep Hollow, Ltd., 251 A.D.2d 293, 293, 671 N.Y.S.2d 1024, 1024 (2d Dep't 1998)) (stating that being thrown by a horse is an inherent risk of horseback riding).

157. 134 A.D.3d 887, 889, 22 N.Y.S.3d 467, 469–70 (2d Dep't 2015) (first citing Custodi v. Town of Amherst, 20 N.Y.3d 83, 89, 980 N.E.2d 933, 936, 957 N.Y.S2d 268, 271 (2012); then citing Benitez v. N.Y.C. Bd. of Educ., 73 N.Y.2d 650, 658, 541 N.E.2d 29, 33, 543 N.Y.S.2d 29, 33 (1989); and then citing Weinberger v. Solomon Schechter Sch. of Westchester, 102 A.D.3d 675, 678, 961 N.Y.S.2d 178, 182 (2d Dep't 2013)).

158. *Id.* at 888, 22 N.Y.S.3d at 469.

performing the maneuver and told the instructor she was not able to do so."[159] The Second Department found that the defendants did not meet its initial burden of showing entitlement to summary judgment because "[t]he defendants failed to establish, prima facie, that the [instructor's] conduct . . . did not unreasonably increase Chloe's exposure to the risk of falling."[160]

CONCLUSION

New York's law of torts continues to be an ever-evolving field. Stay tuned.

159. *Id.*
160. *Id.* at 889, 22 N.Y.S.3d at 470.