TORTS

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INTRODUCTION

Between July 1, 2018, and June 30, 2019,[1] the Courts of the State of New York issued thousands of pages of decisions. The Courts also issued hundreds of decisions dealing with tort law. It would be impractical to

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1. The "*Survey* Year."

discuss each and every case here, and the article would be unbearably long. The Author, after reading each case, tried to sift through the *Survey* year's developments to provide practitioners with the most interesting doctrinal cases decided in the area of torts. As a result, this Article highlights twenty cases decided during the *Survey* Year. This year, this Article focuses on fewer cases than in some previous years, but aimed to provide a more comprehensive digest of each case with more depth.

I. LEGISLATIVE SPOTLIGHT: THE CHILD VICTIMS ACT

On February 14, 2019, Governor Cuomo signed the Child Victim's Act (the "Act") into law, which contains powerful provisions allowing for suits resulting from sexual abuse of children.[2] At its core, the Act amended N.Y. C.P.L.R. section 208 to add subsection (b), which now allows victims who were under eighteen years old at the time of the abuse to sue until they reach the age of fifty-five.[3] The Act also revived time-barred claims for a one-year period, which began on August 14, 2019.[4] Additionally, the Act abrogated notice of claim provisions in the General Municipal Law,[5] the Education Law,[6] and the Court of Claims Act.[7] Revived suits will receive trial preference.[8] On the first day of the revival period, approximately 350 claims were filed by noon.[9]

2. *See Governor Cuomo Signs The Child Victims Act*, NEW YORK STATE (Feb. 14, 2019), governor.ny.gov/news/governor-cuomo-signs-child-victims-act. Two earlier versions of the bill failed. The first, in the 2015-2016 legislative session, died in an Assembly committee. N.Y. Assembly Bill No. A10600, 239th Sess., Legislative Memorandum of Committee on Rules (2016). The second, in the 2017-2018 legislative session, died in a Senate committee after passing in the Assembly. N.Y. Assembly Bill No. A5885A, 240th Sess., Legislative Memorandum of Assemb. Rosenthal (2017).

3. N.Y. C.P.L.R. § 208(b) (McKinney 2019).

4. N.Y. C.P.L.R. § 214-g (McKinney 2019).

5. N.Y. GEN. MUN. LAW §§ 50-e(b), 50-i(5) (McKinney 2016 & Supp. 2019).

6. N.Y. EDUC. LAW § 3813(2) (McKinney 2015).

7. N.Y. JUD. CT. ACTS § 10(10) (McKinney 2019).

8. N.Y. C.P.L.R. § 3403(a)(7) (McKinney 2007 & Supp. 2019). *See also* N.Y. JUD. LAW § 219-d (McKinney 2018 & Supp. 2019) ("The chief administrator of the courts shall promulgate rules for the timely adjudication of revived actions . . . .").

9. Steve Orr, *Hundreds of child sex abuse claims filed on first day of New York's Child Victims Act*, USA TODAY (Aug. 14, 2019, 3:28 PM), https://www.usatoday.com/story/news/nation/2019/08/14/new-york-child-victims-act-lawsuits/2007257001/.

II. LABOR LAW

A. Spotlight: Doskotch v. Pisocki

The Third Department's decision in *Doskotch v. Pisocki*, is worth special attention because it covers a significant amount of ground on Labor Law issues.[10] Factually, the case arises out of a fall "from a ladder" that occurred "while [Plaintiff was] climbing to the roof of defendant's rental property to inspect a chimney that needed repairs."[11] Adding to the peculiarity of the case, the plaintiff is the defendant's son.[12] The plaintiff moved for summary judgment on liability pursuant to Labor Law section 240.[13] The defendant cross-moved to dismiss the plaintiff's Labor Law claims, arguing his son was a volunteer not covered by the Labor Law.[14]

The Third Department began its analysis by noting, "[t]he Labor Law defines an employee as a 'mechanic, work[er] or laborer working for another for hire.'"[15] The court went on to explain,

> [t]hree characteristics typically indicate that a person is working for hire: [1] the person has agreed to perform a service in exchange for compensation; [2] the employer may, but need not always, direct and supervise the manner and method of the work; and [3] "the employer usually decides whether the task undertaken by the employee has been completed satisfactorily.[16]

The Third Department held the supreme court properly denied summary judgment on this ground, reasoning,

> [a]t the time of the accident, plaintiff resided in the home of defendant and her husband, who was plaintiff's stepfather. The residence is adjacent to the separate rental property where the accident occurred. The tenant discovered that the chimney of the rental property was damaged following a storm, when he found broken pieces of the chimney cap on the ground. Defendant testified that upon plaintiff's return from work on the day of the accident, she asked him to inspect the chimney to see if the repair could be carried out by purchasing replacement parts, or whether it would be necessary to hire a contractor to perform a more complex repair. She had already put an extension

10. *See generally* 168 A.D.3d 1174, 90 N.Y.S.3d 667, 2019 N.Y. Slip Op. 00017, at 1 (3d Dep't 2019) (discussing numerous Labor Law issues).

11. *Id.* at 1174, 90 N.Y.S.3d at 670, 2019 N.Y. Slip Op. 00017, at 1.

12. *Id.*

13. *Id.* (citing N.Y. LAB. LAW §§ 200, 240(1) (McKinney 2015)).

14. *Id.* at 1174–75, 90 N.Y.S.3d at 670–71, 2019 N.Y. Slip Op. 00017, at 1.

15. *Doskotch*, 168 A.D.3d at 1174, 90 N.Y.S.3d at 670, 2019 N.Y. Slip Op. 00017, at 1 (quoting N.Y. LAB. LAW § 2 (5) (McKinney 2015)).

16. *Id.* (quoting Stringer v. Musacchia, 11 N.Y.3d 212, 216, 898 N.E.2d 545, 548, 898 N.Y.S.2d 362, 365 (2008)).

> ladder in place for plaintiff to use to reach the roof. This ladder belonged to defendant. It had been stored on the rental property for years, but defendant had never used it or seen anyone use it. Defendant testified that she instructed plaintiff on what to look for before he began to climb. She stated that she was standing nearby, but was not watching when plaintiff and the ladder fell to the ground.
>
> Defendant testified that she had paid plaintiff to perform previous repairs on the rental property because "[she] might as well pay [her] own child," rather than hire an outside contractor. Defendant was not planning to pay plaintiff for the task of determining what repairs were needed on the chimney, but stated that she would have paid him if he had carried out the ultimate repair. Plaintiff averred that he had not told defendant that he would charge a fee for inspecting the chimney, but that he and defendant had a longstanding agreement by which she paid him $100 each time he performed a repair. He stated that he thus expected to be paid when the chimney project was complete, whether or not he needed assistance in carrying it out.[17]

Ultimately, after noting the many unresolved issues of fact, the Third Department found the testimony "presents a triable issue of fact as to whether plaintiff was a volunteer or an employee within the meaning of the Labor Law."[18]

But the court's analysis did not end there. The court then turned to "whether the chimney inspection that plaintiff was attempting to perform when he fell was within the scope of activities protected by the Labor Law."[19] Whether an inspection constitutes a Labor Law activity is a perennial issue that requires a case-specific inquiry: on the one hand, "[a] worker who carries out an inspection for solely investigatory purposes, when no covered activities have yet been undertaken and when those activities will be carried out by a separate contractor, does not fall within the Labor Law's protections;"[20] on the other hand, "an inspection may be within the statutory coverage when it is 'on-going and contemporaneous with repairs, construction or other covered activities being carried on

17. *Id.* at 1175, 90 N.Y.S.3d at 671, 2019 N.Y. Slip Op. 00017, at 2.

18. *Id.* at 1176, 90 N.Y.S.3d at 671, 2019 N.Y. Slip Op. 00017, at 2 (first citing Curatolo v. Postiglione, 2 A.D.3d 480, 481, 767 N.Y.S.2d 894, 895 (2d Dep't 2003); then citing 12 N.Y.C.R.R. § 23–1.3 (2016), then citing Lysiak v. Murray Realty Co., 227 A.D.2d 746, 747–48, 642 N.Y.S.2d 350, 352–53 (3d Dep't 1996); then citing Marks v. Morehouse, 222 A.D.2d 785, 787, 634 N.Y.S.2d 835, 836 (3d Dep't 1995); and then citing Benamati v. McSkimming, 8 A.D.3d 815, 816, 777 N.Y.S.2d 822, 823–24 (3d Dep't 2004)).

19. *Id.*

20. *Doskotch*, 168 A.D.3d at 1176, 90 N.Y.S.3d at 671–72, 2019 N.Y. Slip Op. 00071, at 2 (first citing Martinez v. City of New York, 93 N.Y.2d 322, 326, 712 N.E.2d 689, 691–92, 690 N.Y.S.2d 524, 527 (1999); and then citing Beehner v. Eckerd Corp., 3 N.Y.3d 751, 752, 821 N.E.2d 941, 941, 788 N.Y.S.2d 637, 637 (2004)).

under the same contract . . . , or when it is part of an employee's work for an employer who has been hired to perform a covered activity."[21] In this case, the Third Department found "a triable issue of fact" on the inspection issue because "Plaintiff testified that he planned to inspect the chimney to see what repairs were needed and to take measurements for replacement parts" but "defendant had not yet decided whether plaintiff or an outside contractor would perform the repairs," which Defendant testified "hinged upon the results of plaintiff's inspection, which was never completed due to his fall."[22]

B. Who is an Owner for Labor Law Purposes?

Labor Law section 240 (1) and Labor Law section 241 (6) apply to "owners, contractors" and "agents."[23] In *Gordon v. City of New York*, the First Department explored who could be considered an "owner" for Labor Law purposes.[24] There, on appeal from cross-motions for summary judgment, the First Department affirmed the supreme court's Order determining that the City of New York and Long Island Railroad (LIRR) were not Labor Law "owners" of a construction project at grand central terminal.[25] "Plaintiff Gary Gordon was injured when he fell from a ladder while working on a construction project designed to bring LIRR service to Grand Central Terminal."[26] The Metropolitan Transportation Authority entered into a contract with the plaintiff's employer to excavate rock under the terminal.[27] "On the day of the accident, plaintiff was instructed to re-position a stadium light that was approximately fifteen–to–twenty feet above the tunnel floor."[28] The City (apparently the record owner of the property) and LIRR moved for summary judgment with

21. *Id.* at 1176, 90 N.Y.S.3d at 672, 2019 N.Y. Slip Op. 00071, at 2 (first quoting Nelson v. Sweet Assocs., 15 A.D.3d 714, 715, 788 N.Y.S.2d 705, 707 (3d Dep't 2005)) (first citing Prats v. Port Auth., 100 N.Y.2d 878, 881, 800 N.E.2d 351, 353, 768 N.Y.S.2d 178, 180 (2003); then citing Fedrich v. Granite Bldg. 2, LLC, 165 A.D.3d 754, 758, 86 N.Y.S.3d 566, 571, 2018 N.Y. Slip Op. 06717, at 1, 3 (2018); then citing Pakenham v. Westmere Realty, LLC, 58 A.D.3d 986, 988, 871 N.Y.S.2d 456, 459, 2009 N.Y. Slip Op. 167, at 1 (3d Dep't 2009); then citing England v. Vacri Constr. Corp., 24 A.D.3d 1122, 1123, 807 N.Y.S.2d 669, 670, 2005 N.Y. Slip Op. 10167, at 1 (3d Dep't 2005); and then citing Bagshaw v. Network Serv. Mgmt., 4 A.D.3d 831, 833, 772 N.Y.S.2d 161, 163 (4th Dep't 2004)).

22. *Id.* at 1177–78, 90 N.Y.S.3d at 672–73, 2019 N.Y. Slip Op. 00071, at 2.

23. N.Y. LAB. LAW § 240(1) (McKinney 2015); N.Y. LAB. LAW § 241(6) (McKinney 2015).

24. 164 A.D.3d 1110, 84 N.Y.S.3d 64, 2018 N.Y. Slip Op. 05972, at 1 (1st Dep't 2018).

25. *Id.* at 1110, 84 N.Y.S.3d at 65, 2018 N.Y. Slip Op. 05972, at 1 (citing Lab. Law § 240(1)).

26. *Id.*

27. *Id.*

28. *Gordon*, 164 A.D.3d at 1110, 84 N.Y.S.3d at 65, 2018 N.Y. Slip Op. 05972, at 1.

affidavits establishing, (1) "that neither was the owner, lessee, licensee or occupant of the tunnel where the accident occurred," (2) "that neither was a party to any contract for plaintiff's work," and (3) that "neither performed, supervised or controlled any construction work at the subject premises."[29] In response, the "plaintiffs failed to proffer any competent evidence that disputed the allegations in defendants' affidavits, and thus, did not raise a triable issue of fact."[30] Notably, the plaintiffs failed to raise the City's status as record owner of the property in supreme court,[31] which likely would have raised at least a question of fact as to its status as a Labor Law owner.

C. The Homeowner Exemption to "Owner" Status

In *Bautista v. Archdiocese of New York*, the First Department explored a statutory exception to "owner" status for one and two family dwellings.[32] "The determination" as to whether the exception applies "turns on the site and purpose of the work."[33] The property at issue in *Bautista* "was . . . a detached garage associated with a church rectory *used for both residential and church purposes*."[34] But its certificate of occupancy did not list a church purpose.[35] Instead, it "indicate[d] that the rectory constituted a dwelling and a private garage."[36] Based on these facts, the First Department held the homeowner exception applied.[37]

29. *Id.* at 1111, 84 N.Y.S.3d at 65–66, 2018 N.Y. Slip Op. 05972, at 1.

30. *Id.* at 1111, 84 N.Y.S.3d at 66, 2018 N.Y. Slip Op. 05972, at 1.

31. *Id.* (citing Diarrassouba v. Consolidated Edison Co. of N.Y. Inc., 123 A.D.3d 525, 525, 999 N.Y.S.2d 33, 33, 2014 N.Y. Slip Op. 08749, at 1 (1st Dep't 2014)).

32. 164 A.D.3d 450, 451, 84 N.Y.S.3d 47, 49, 2018 N.Y. Slip Op. 05959, at 1 (1st Dep't 2018) (citing N.Y. LAB. LAW § 240(1) (McKinney 2015); then citing N.Y. LAB. LAW § 241(6) (McKinney 2015)). Both Labor Law § 240(1) and Labor Law § 241(6) specifically exempt "owners of one and two-family dwellings who contract for but do not direct or control the work" from liability. Khela v. Neiger, 85 N.Y.2d 333, 337, 648 N.E.2d 1329, 1330–31, 624 N.Y.S.2d 566, 567–68 (1995). "The exemption was added by amendment to section 241 in 1980 because it is unrealistic to expect the owner of a one or two family dwelling to realize, understand and insure against the responsibility that section imposes." *Id.* at 337, 648 N.E.2d at 1330–31, 624 N.Y.S.2d at 567–68 (internal citation omitted).

33. *Khela*, 85 N.Y.2d at 337, 648 N.E.2d at 1331, 624 N.Y.S.2d at 568 (citing Cannon v. Putnam, 76 N.Y.2d 644, 650, 564 N.E.2d 626, 629, 563 N.Y.S.2d 16, 19 (1990)).

34. *Bautista*, 164 A.D.3d at 451, 84 N.Y.S.3d at 49, 2018 N.Y. Slip Op. 05959, at 1 (first citing Bartoo v. Buell, 87 N.Y.2d 362, 366, 662 N.E.2d 1068, 1069, 639 N.Y.S.2d 778, 779 (1996); and then citing Muniz v. Church of Our Lady, 238 A.D.2d 101, 101, 655 N.Y.S.2d 38, 39 (1st Dep't 1997)) (emphasis added).

35. *Id.* (citing Thompson v. Geniesse, 62 A.D.3d 541, 541–42, 880 N.Y.S.2d 19, 21, 2009 N.Y. Slip Op. 3952, at 1 (1st Dep't 2009)).

36. *Id.* (citing *Thompson*, 62 A.D.3d at 541–42, 880 N.Y.S.2d at 21, 2009 N.Y. Slip Op. 3952, at 1).

37. *See id.* (first quoting N.Y. LAB. LAW § 240(1) (McKinney 2015); and then quoting N.Y. LAB. LAW § 241 (McKinney 2015)) (holding the defendant established a prima facie

In passing, the *Bautista* court noted failure to plead the homeowner exception as an affirmative defense did not preclude summary judgment because the "plaintiff was not surprised by the defense, and fully opposed the motion."[38] However, the better practice is always to plead the affirmative defense, especially since the defense flows from a statute.[39] Similarly, cases like *Bautista* remind counsel to perform an early investigation as to the use of the structure to determine if a mixed-use building might nevertheless qualify for the affirmative defense.[40]

D. The Architect Exemption to Labor Law Liability

Valdez v. Turner Construction Company dealt with a different exception to liability under Labor Law section 240 (1) and Labor Law section 241 (6) that allows architects to avoid contractor or agent liability.[41] There, the Dormitory Authority of the State of New York hired Skidmore Owings and Merrill, LLP (Skidmore) "to provide architectural, engineering, and construction management services for a construction

case that the plaintiff's injury fell within the exemption and that "Plaintiff failed to raise issues of fact as to the applicability of the homeowner exception.").

38. *Id.* (first citing N.Y. C.P.L.R. 3018(b) (McKinney 2010); then citing Joan Hansen & Co. v. Everlast World's Boxing Headquarters Corp., 2 A.D.3d 266, 266 768 N.Y.S.2d 329, 329 (1st Dep't 2003), *appeal denied*, 2 N.Y.3d 702,702, 810 N.E.2d 914, 914, 778 N.Y.S.2d 461, 461 (2004); and then citing Florio v. Fisher Dev., Inc., 309 A.D.2d 694, 698, 765 N.Y.S.2d 879, 881 (1st Dep't 2003), *reargument denied*, 2003 N.Y. App. Div. LEXIS 13627 (1st Dep't 2003)).

39. *See* N.Y. C.P.L.R. 3018(b) (McKinney 2019); *see* 1 Matthew Bender & Co., Civil Practice Annual: Desk Edition § 3018 (2019).

40. *See generally Bautista*, 164 A.D.3d at 451, 84 N.Y.S.3d at 49, 2018 N.Y. Slip Op. 05959, at 1 ("Plaintiff failed to raise issues of fact as to the applicability of the homeowner exemption. His assertion that the garage was exclusively restricted to use by teachers at an elementary school owned by the church is unsupported by the record.").

41. 171 A.D.3d 836, 840, 98 N.Y.S.3d 79, 83–84, 2019 N.Y. Slip Op. 02582, at 1 (2d Dep't 2019) (first citing Fernandez v. Abalene Oil Co., 91 A.D.3d 906, 909–10, 938 N.Y.S.2d 119, 123, 2012 N.Y. Slip Op. 750, at 1 (2d Dep't 2012); and then citing Reisman v. Bay Shore Union Free Sch. Dist., 74 A.D.3d 772, 773, 902 N.Y.S.2d 167, 169, 2010 N.Y. Slip Op. 4762, at 1 (2d Dep't 2010)). LAB. LAW § 240(1) ("No liability pursuant to this subdivision for the failure to provide protection to a person so employed shall be imposed on professional engineers as provided for in article one hundred forty-five of the education law, architects as provided for in article one hundred forty-seven of such law or landscape architects as provided for in article one hundred forty-eight of such law who do not direct or control the work for activities other than planning and design."); N.Y. LAB. LAW § 241(9) (McKinney 2015) ("No liability for the non-compliance with any of the provisions of this section shall be imposed on professional engineers as provided for in article one hundred forty-five of the education law, architects as provided for in article one hundred forty-seven of such law or landscape architects as provided for in article one hundred forty-eight of such law who do not direct or control the work for activities other than planning and design. This exception shall not diminish or extinguish any liability of professional engineers, architects or landscape architects arising under the common law or any other provision of law.").

project."[42] Skidmore then subcontracted the "construction management services for the project" to Turner Construction Company ("Turner").[43] The Second Department held Skidmore could have liability under Labor Law sections 240 (1) and 241 (6) despite its status as an architect because its contract provided for construction management services,[44] which contrasts with the limited, off-site design authority architects generally have.[45] The court likewise found Turner could be potentially liable on an agency theory in its role as construction manager because "it 'functioned as the eyes, ears, and voice of the owner' with respect to site safety, it had broad responsibility for ensuring site safety, and it oversaw the planning of the craning operation, specifically with regard to safety, which was subject to Turner's approval."[46]

Turning to the merits of the plaintiff's Labor Law section 240 (1) claim, the Second Department found the defendants failed to meet their initial burden:[47]

> According to the plaintiff, on November 15, 2010, he was in the process of detaching a bag of soil that weighed at least 2,500 pounds from a crane that had hoisted the bag up to the fifth-floor roof" when he fell because the "bag of soil was still attached [to the crane when] the crane lifted, causing the straps connecting the bag to the crane to catch the plaintiff's hand and lift him off the roof.[48]

42. *Valdez*, 171 A.D.3d at 837, 98 N.Y.S.3d at 82, 2019 N.Y. Slip Op. 02582, at 1.

43. *Id.*

44. *Id.* at 839, 98 N.Y.S.3d at 83, 2019 N.Y. Slip Op. 02582, at 1 (quoting Kulaszewski v. Clinton Disposal Servs., 272 A.D.2d 855, 856, 707 N.Y.S.2d 558, 559 (4th Dep't 2000)) (first citing Aversano v. JWH Contracting LLC, 37 A.D.3d 745, 746, 831 N.Y.S.2d 222, 223 (2d Dep't 2007); and then citing Russin v. Louis N. Picciano & Son, 54 N.Y.2d 311, 317–18, 429 N.E.2d 805, 807–08, 445 N.Y.S.2d 127, 129–30 (1981)) ("Skidmore was subject to liability under Labor Law §§ 240(1) and 241(6) as a contractor since it remained 'responsible for coordinating and supervising the entire construction project and was invested with a concomitant power to enforce safety standards and to hire responsible contractors.'").

45. *See, e.g.*, Walls v. Turner Constr. Co., 4 N.Y.3d 861, 863–64, 831 N.E.2d 408, 410, 798 N.Y.S.2d 351, 353 (2005) (first citing *Russin*, 54 N.Y.2d at 317, 429 N.E.2d at 807, 445 N.Y.S.2d at 129; and then citing Comes v. N.Y. State Elec. & Gas Corp., 82 N.Y.2d 876, 877, 631 N.E.2d 110, 111, 609 N.Y.S.2d 168, 169 (1993)) ("Although a construction manager . . . is generally not responsible for injuries under Labor Law § 240(1), one may be vicariously liable as an agent of the property owner for injuries sustained . . . where the manager had the ability to control the activity which brought about the injury[.]").

46. *Valdez*, 171 A.D.3d at 839, 98 N.Y.S.3d at 83, 2019 N.Y. Slip Op. 02582, at 1 (quoting *Walls*, 4 N.Y.3d at 864, 831 N.E.2d at 410, 798 N.Y.S.2d at 353).

47. *See id.* at 839, 98 N.Y.S.3d at 83, 2019 N.Y. Slip Op. 02582, at 1 (quoting Runner v. N.Y. Stock Exch., Inc., 13 N.Y.3d 599, 604, 922 N.E.2d 865, 867–68, 895 N.Y.S.2d 279, 281–82 (2009)) ("Turner and Skidmore failed to demonstrate that Labor Law § 240(1) was inapplicable. . . .").

48. *Id.* at 838, 98 N.Y.S.3d at 82, 2019 N.Y. Slip Op. 02582, at 1.

Interestingly, the Second Department denied summary judgment in this falling worker case by citing *Runner v. New York Stock Exchange, Inc.*, which is a falling object case.[49] The apples-and-oranges mixture in *Valdez* should be viewed as an oddity: *Runner*'s focus on the weight of the object does not fit into the analytical framework of a falling worker case, where the weight of the object does not affect whether, and to what extent, the worker fell.[50]

E. Labor Law Section 240 (1) Covers Repair Work and, Therefore, is More Expansive than Labor Law Section 241 (6)

Generally, Labor Law section 240 (1) and section 241 (6) have almost identical applicability, but one oft-overlooked distinction between Labor Law section 240 (1) and Labor Law section 241 (6) is when a plaintiff is performing "repair" work.[51] *Barrios v. 19-19 24th Avenue Co.* illustrates the distinction in practice.[52] There, "[t]he plaintiff allege[d] that he was injured in the course of his employment when a differential block and chain fell onto his head as he and his coworkers were preparing a hoisting apparatus to remove and replace a broken roll-up gate on the defendants' premises."[53] Analyzing Labor Law section 240 (1), the Second Department held, "[t]he activity of the removal of the old roll-up gate and the installation of a new roll-up gate is a repair within the purview of Labor Law [section] 240 (1)."[54] But not for Labor Law section

49. *See id.* at 839, 98 N.Y.S.3d at 83, N.Y. Slip Op. 05959, at 1 (quoting Runner v. N.Y. Stock Exch., Inc., 13 N.Y.3d 599, 604, 922 N.E.2d 865, 867–68, 895 N.Y.S.2d 279, 281–82 (2009)).

50. *See* Narducci v. Manhasset Bay Assocs., 96 N.Y.2d 259, 268, 750 N.E.2d 1085, 1089–90, 727 N.Y.S.2d 37, 41–42 (2001) (citing Ross v. Curtis-Palmer Hydro-Elec. Co., 81 N.Y.2d 494, 500–01, 618 N.E.2d 82, 85–86, 601 N.Y.S.2d 49, 54–53 (1993)).

51. *Compare* N.Y. LAB. LAW § 240(1) (McKinney 2015) (noting "erection, demolition, repairing, altering, painting, cleaning or pointing" are covered activities), *with* N.Y. LAB. LAW § 241(6) (McKinney 2015) (noting "construction, excavation or demolition" are covered activities); *see* Barrios v. 19-19 24th Ave. Co., 169 A.D.3d 747, 749, 93 N.Y.S.3d 428, 430, 2019 N.Y. Slip Op. 01046, at 1 (2d Dep't 2019) (first citing LAB. LAW § 240(1); and then citing LAB. LAW § 241(9)) ("[U]nlike Labor Law § 240, which includes repair work, Labor Law § 241(6) is limited to those areas in which construction, excavation, or demolition work is being performed.")).

52. *See Barrios*, 169 A.D.3d at 749, 93 N.Y.S.3d at 430, 2019 N.Y. Slip Op. 01046, at 1 (citing Mata v. Park Here Garage Corp., 71 A.D.3d 423, 424, 869 N.Y.S.2d 57, 58, 2010 N.Y. Slip Op. 1731, at 1 (1st Dep't 2010)) ("In this case, Labor Law § 241(6) is inapplicable because the plaintiff was not performing work in the context of construction, demolition, or excavation.").

53. *Id.* at 748, 93 N.Y.S.3d at 429, 2019 N.Y. Slip Op. 01046, at 1.

54. *Id.* at 748, 93 N.Y.S.3d at 430, 2019 N.Y. Slip Op. 01046, at 1 (first citing Zhu Wei Shi v. Jun Lan Zhang, 76 A.D.3d 558, 559, 907 N.Y.S.2d 32, 33, 2010 N.Y. Slip Op. 6371, at 1 (2d Dep't 2010); and then citing Lofaso v. J.P. Murphy Assocs., 37 A.D.3d 769, 771, 831 N.Y.S.2d 230, 232, 2007 N.Y. Slip Op. 1690, at 1 (2d Dep't 2007)). *Barrios* is also interesting

241 (6): "unlike Labor Law [section] 240, which includes repair work, Labor Law § 241(6) is limited to those areas in which construction, excavation, or demolition work is being performed."[55]

F. Summary Judgment and Labor Law Section 240 (1)

Labor Law section 240 (1) has been described as imposing "absolute" liability.[56] As a result, courts frequently grant summary judgment on liability in the section 240 (1) context. But, as the Second Department reminded practitioners in *Giannas v. 100 3rd Avenue Corporation*, summary judgment is not always warranted.[57] "Summary judgment is not appropriate on a cause of action alleging a violation of Labor Law § 240 (1) *where there is a triable issue of fact as to the manner in which the accident occurred*."[58] In *Giannas*, the parties disputed "whether the accident was caused by the shifting of the scaffold," which would implicate Labor Law section 240 (1), or "by the plaintiff tripping while entering the building from the scaffold and through the window," which is an ordinary workplace hazard outside the scope of section 240

on the merits. It appears there was some dispute between the parties as to whether the object that hit the plaintiff was dropped by a worker on accident or whether it fell spontaneously due to being inadequately secured. *Id.* at 748, 93 N.Y.S.3d at 429–30, 2019 N.Y. Slip Op. 01046, at 1. The Second Department found the dispute immaterial because "the defendants are liable whether the plaintiff's coworker accidently dropped the differential while preparing to use the hoisting apparatus to remove the old roll-up gate, or the differential fell because it was inadequately secured." *Id.* at 748–49, 93 N.Y.S.3d at 430, 2019 N.Y. Slip Op. 01046, at 1 (first citing Pritchard v. Tully Constr. Co., 82 A.D.3d 730, 731, 918 N.Y.S.2d 154, 155, 2011 N.Y. Slip Op. 1634, at 1 (2d Dep't 2011); and then citing Tkach v. City of New York, 278 A.D.2d 227, 229, 717 N.Y.S.2d 290, 291 (2d Dep't 2000)).

55. *Barrios*, 169 A.D.3d at 749, 93 N.Y.S.3d at 430, 2019 N.Y. Slip Op. 01046, at 1 (first citing LAB. LAW § 240(1); and then citing LAB. LAW § 241(6)). "In this case, Labor Law § 241(6) is inapplicable because the plaintiff was not performing work in the context of construction, demolition, or excavation. Therefore, the defendants were entitled to summary judgment dismissing the Labor Law § 241(6) cause of action." *Id.* (citing *Mata*, 71 A.D.3d at 424, 896 N.Y.S.2d at 58, 2010 N.Y. Slip Op. 1731, at 1).

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

57. 166 A.D.3d 853, 855, 88 N.Y.S.3d 442, 445–46, 2018 N.Y. Slip Op. 08009, at 1 (2d Dep't 2018).

58. *Id.* at 855, 88 N.Y.S.3d at 445, 2018 N.Y. Slip Op. 08009, at 1 (emphasis added) (first citing Corchado v. 5030 Broadway Props., LLC, 103 A.D.3d 768, 769, 962 N.Y.S.2d 185, 187, 2013 N.Y. Slip Op. 1058, at 1 (2d Dep't 2013); and then citing Kamolov v. BIA Group, LLC, 79 A.D.3d 1101, 1101, 915 N.Y.S.2d 588, 589, 2010 N.Y. Slip Op. 9890, at 1 (2d Dep't 2010)).

(1).[59] As a result, the Second Department held the supreme court appropriately denied summary judgment.[60]

III. NEGLIGENCE

A. General Negligence

The Second Department addressed the res ipsa loquitur doctrine in *Dilligard v. City of New York*.[61] The plaintiff, a school teacher, "allegedly was injured when the face plate of an air-conditioning unit in her classroom fell on her head and right hand."[62] After a "disruptive" special education student "'stormed out'" of the room and slammed the door, the face plate fell from above the plaintiff while she was trying to call the school office.[63] "According to the deposition testimony of Edward Perez, the custodian engineer at the school, the air conditioning unit was not regularly inspected by the DOE [Department of Education], or by outside contractors."[64] Based on this testimony, the "plaintiff moved for summary judgment on the issue of liability based on the doctrine of res ipsa loquitur," which caused the defendants to cross-move for summary judgment seeking dismissal of the complaint.[65]

Turning to the res ipsa loquitur doctrine, the Second Department began by noting a plaintiff seeking summary judgment based on res ipsa loquitur faces a high bar: "[s]ummary judgment is appropriate in res ipsa cases only where 'the plaintiff's circumstantial proof is so convincing and the defendant's response so weak that the inference of defendant's

59. *Id.; see also* Nicometi v. Vineyards of Fredonia, LLC, 25 N.Y.3d 90, 98–99, 30 N.E.3d 154, 159, 7 N.Y.S.3d 263, 268 (2015) (first citing Runner v. N.Y. Stock Exch., Inc., 13 N.Y.3d 599, 603, 922 N.E.2d 865, 866–67, 895 N.Y.S.2d 279, 280–81 (2009); and then citing Fabrizi v. 1095 Ave. of the Ams., LLC, 22 N.Y.3d 658, 662–63, 8 N.E.3d 791, 794, 985 N.Y.S.2d 416, 419 (2014)) (holding that tripping falls outside the scope of Section 240(1)).

60. *Id.* at 855, 88 N.Y.S.3d at 445–46, 2018 N.Y. Slip Op. 08009, at 1. The court went on to dismiss the plaintiff's claims against the construction manager because it did not have the requisite level of authority as an agent under *Walls v. Turner Constr. Co.*, despite an employee's testimony he had the right to stop the job if he walked onto the site and saw someone in danger. 4 N.Y.3d 861, 864, 831 N.E.2d 408, 410–11, 798 N.Y.S.2d 351, 353–54 (2005); *Giannas*, 166 A.D.3d.at 856, 88 N.Y.S.3d at 446, 2018 N.Y. Slip Op. 08009, at 1 ("[T]his is insufficient to raise a triable issue of fact regarding whether JF had control over the work of the plaintiff.") (citing Lamar v. Hill Int'l., Inc., 153 A.D.3d 685, 686–87, 59 N.Y.S.3d 756, 759, 2017 N.Y. Slip Op. 06167, at 1 (2d Dep't 2017)).

61. 170 A.D.3d 955, 956, 96 N.Y.S.3d 306, 308, 2019 N.Y. Slip Op. 02064, at 1 (2d Dep't 2019).

62. *Id.* at 955, 96 N.Y.S.3d at 308, 2019 N.Y. Slip Op. 02064, at 1.

63. *Id.*

64. *Id.*

65. *Id.* at 956, 96 N.Y.S.3d at 308, 2019 N.Y. Slip Op. 02064, at 1.

negligence is inescapable.'"[66] Indeed, the court explained, "[r]es ipsa does not ordinarily or automatically entitle the plaintiff to summary judgment . . . even if the plaintiff's circumstantial evidence is unrefuted.'"[67] Focusing on the facts of this case, the Second Department held the plaintiff had not met her initial burden.[68] The court conceded the "plaintiff demonstrated, prima facie, that a face plate falling off an air conditioner is an event of a kind that ordinarily does not occur absent negligence," but also found the "defendants raised a triable issue of fact as to whether the face plate could have fallen off the air conditioner because of the slamming of the door and not as a result of negligence."[69] Additionally, the court noted the defendants raised a question of fact on the exclusive control element of res ipsa loquitur because "outside contractors were responsible for the repairs and installations of air conditioning units in the school."[70]

On the other end of the spectrum, the First Department considered whether a missing seat constituted an open and obvious condition, precluding liability, in *Vasquez v. Yonkers Racing Corporation*.[71] On summary judgment, the supreme court found the chair was an open and obvious condition and granted the defendants summary judgment.[72] The First Department affirmed, reasoning, "Defendants showed that the missing chair was an open and obvious condition that was not inherently dangerous by submitting videotape footage showing the subject slot machine without a chair."[73] Also, notably, the court was persuaded that the condition was open and obvious based on the plaintiff's own testimony: "Plaintiff also testified that she had previously noticed chairs

66. *Dilligard*, 170 A.D.3d at 956, 96 N.Y.S.3d at 309, 2019 N.Y. Slip Op. 02064, at 1 (quoting Morejon v. Rais Constr. Co., 7 N.Y.3d 203, 209, 851 N.E.2d 1143, 1147, 818 N.Y.S.2d 792, 796 (2006)).

67. *Id.* (quoting *Morejon*, 7 N.Y.3d at 209, 851 N.E.2d at 1146, 818 N.Y.S.2d at 795).

68. *Id.* at 957, 96 N.Y.S.3d at 309, 2019 N.Y. Slip Op. 02064, at 1.

69. *Id.* at 956, 96 N.Y.S.3d at 309, 2019 N.Y. Slip Op. 02064, at 1 (first citing Matsur v. N.Y.C. Transit Auth., 66 A.D.3d 848, 849, 888 N.Y.S.2d 531, 533, 2009 N.Y. Slip Op. 7599, at 1 (2d Dep't 2009); then citing Bonventre v. August Max, 229 A.D.2d 557, 557, 645 N.Y.S.2d 867, 868 (2d Dep't 1996); and then citing Imhotep v. State, 298 A.D.2d 558, 559, 750 N.Y.S.2d 87, 88 (2d Dep't 2002)).

70. *Id.* at 956–57, 96 N.Y.S.3d at 309, 2019 N.Y. Slip Op. 02064, at 1; (first citing Brennan v. Wappingers Cent. Sch. Dist., 164 A.D.3d 640, 641–42, 83 N.Y.S.3d 260, 262, 2018 N.Y. Slip Op. 05745, at 1 (2d Dep't 2018); and then citing Lococo v. Mater Cristi Catholic High Sch., 142 A.D.3d 590, 591, 37 N.Y.S.3d 134, 136, 2016 N.Y. Slip Op. 05796, at 1 (2d Dep't 2016)) ("Exclusive control is not established when third-party contractors have access to an instrumentality causing injuries.").

71. 171 A.D.3d 418, 418, 97 N.Y.S.3d 100, 101, 2019 Slip Op. 02461, at 1 (1st Dep't 2019).

72. *Id.*

73. *Id.*

missing from slot machines at the casino, and that she had been seated next to the subject machine that was without a chair for 20 to 25 minutes before her fall."[74]

The court ended its decision by rejecting the plaintiff's "argument that slot machines are distracting to the point of being all-encompassing," because "she did not provide any probative evidence as to how distracted a person becomes when she or he uses slot machines."[75] In support of her argument, the plaintiff only offered her own testimony "that she was distracted by the slot machines," which, the court found, "does not lead to a conclusion that they are so distracting that their mere existence makes an open and obvious condition such as a missing chair any less open and obvious."[76] Notably, the court's decision does not foreclose a properly supported argument in the future. However, in order to support such a claim, a plaintiff would likely have to come forth with expert evidence establishing how distracting slot machines are.[77]

In *Deng v. Young*, the Fourth Department dealt with a school district's duty when it instructs a child to walk home from school.[78] "On September 16, 2010, the child, who was then eight years old, missed his after-school bus and was allegedly told by school personnel to walk home, even though his home was located over two miles away from the school."[79] On his way home, "the child was struck by a car and suffered a fractured skull."[80] On appeal, the appellate division reversed the supreme court's order granting summary judgment to the defendants.[81] The court reasoned, the "plaintiff raised a triable issue of fact concerning whether defendants, in violation of their own policies and procedures, released the child into a 'foreseeably hazardous setting' partly of their

74. *Id.* (first citing Philips v. Paco Lafayette LLC, 106 A.D.3d 631, 632, 966 N.Y.S.2d 400, 401, 2013 N.Y. Slip Op. 3781, at 1 (1st Dep't 2013); then citing Schulman v. Old Navy/Gap, Inc., 45 A.D.3d 475, 476, 845 N.Y.S.2d 341, 342, 2007 N.Y. Slip Op. 5333, at 1 (1st Dep't 2007)).

75. *Id.*

76. *Vasquez*, 171 A.D.3d at 418, 97 N.Y.S.3d at 101, 2019 Slip Op. 02461, at 1 (citing Mauriello v. Port Auth., 8 A.D.3d 200, 200, 779 N.Y.S.2d 199, 200 (1st Dep't 2004)).

77. *See, e.g.*, Mark Gruetze, *Psychiatrist explains why people are attracted to slot machines*, TRIBLIVE (Jan. 20, 2012, 12:00 AM), https://archive.triblive.com/news/psychiatrist-explains-why-people-are-attracted-to-slot-machines-2/.

78. 163 A.D.3d 1469, 1470, 81 N.Y.S.3d 699, 701, 2018 N.Y. Slip Op. 05414, at 1 (4th Dep't 2018).

79. *Id.* at 1469, 81 N.Y.S.3d at 700, 2018 N.Y. Slip Op. 05414, at 1.

80. *Id.*

81. *Id.*

own making."[82] At his deposition, "the child testified . . . that, after he missed the bus, he approached a school employee, who told him to walk home" instead of "accompany[ing] the child to the main office to attempt to call the bus back or to arrange other transportation."[83] The child further testified that, "the employee simply left him alone with no further instructions" and, that "[t]he child . . . attempted to reenter the school, as defendants had previously instructed him to do in such a situation, but that no one answered the buzzer."[84] Under these circumstances, the court found a question of fact precluded summary judgment in the defendants' favor.[85]

The court concluded by discussing what the plaintiff had not testified to: "the child did not have parental permission or direction to walk home, and he did not typically walk to or from school."[86] In dicta, the court noted, "our holding herein should not be construed to apply in circumstances where a student is injured while walking to or from school with parental consent or as part of his or her normal routine."[87]

Finally, in *McDermott v. Santos*, the Second Department passed on the circumstances under which a diver into a residential pool can sue in negligence.[88] "Although the pool had a deep end, it did not have a diving board."[89] As a result, "[t]he walls in the deep end below the water line were not vertical; rather, the walls slanted inward toward the center of the bottom of the pool."[90] The pool did not bear any "marking . . . to show that the walls slanted or signs warning that diving was not permitted."[91] The plaintiff suffered injuries when "he dove into the water from the side of the pool and was injured when he struck his head on the slanted portion of the deep end wall."[92]

82. *Id.* at 1470, 81 N.Y.S.3d at 700–01, 2018 N.Y. Slip Op. 05414, at 1 (citing Ernest v. Red Creek Cent. Sch. Distr., 93 N.Y.2d 664, 672, 7171 N.E.2d 690, 693, 695 N.Y.2d 531, 535 (1999)).

83. *Deng*, 163 A.D.3d at 1470, 81 N.Y.S.3d at 701, 2018 N.Y. Slip Op. 05414, at 1.

84. *Id.*

85. *Id.* (citing Vega v. Restani Constr. Corp., 18 N.Y.3d 499, 505, 965 N.E.2d 240, 243, 942 N.Y.S.2d 13, 16 (2012)).

86. *Id.*

87. *Id.* (citing Donofrio v. Rockville Ctr. Union Free Sch. Dist., 149 A.D.3d 805, 805–06, 52 N.Y.S.3d 378, 379, 2017 N.Y. Slip Op. 02774, at 1 (2017)).

88. 171 A.D.3d 1158, 1161, 98 N.Y.S.3d 646, 650, 2019 N.Y Slip Op. 03039, at 1 (2d Dep't 2019).

89. *Id.* at 1158–59, 98 N.Y.S.3d at 648, 2019 N.Y Slip Op. 03039, at 1.

90. *Id.* at 1159, 98 N.Y.S.3d at 648, 2019 N.Y Slip Op. 03039, at 1.

91. *Id.*

92. *Id.*

The defendants who were sued based on the design of the pool moved for summary judgment arguing the plaintiff's conduct solely proximately caused his injuries.[93] The court affirmed supreme court's order denying their motion, holding "[t]here are triable issues of fact as to whether the plaintiff's conduct was the sole proximate cause of his injuries . . . , whether the design of the pool was defective . . . , and whether the pool was negligently constructed."[94]

The out-of-possession landlord also sought summary judgment alleging it did not have notice of the condition.[95] The appellate division reversed the supreme court's order granting summary judgment on this ground.[96] The court began by explaining, "the owners failed to establish, prima facie, that the slanted wall in the deep end of their pool was not dangerous or that they lacked constructive notice of the condition."[97] The court reasoned expert evidence (which the defendant did not submit) would have been needed to meet the defendant's initial burden.[98]

B. Malpractice

1. Legal Malpractice

This *Survey* Year was not terribly interesting doctrinally for legal malpractice practitioners.

Defined more broadly, however, practitioners should find *Sammy v. Haupel*,[99] an interesting read. The case arose out of a real estate transaction that resulted in the client making a claim against a title

93. *McDermott*, 171 A.D.3d at 1159, 98 N.Y.S.3d at 648–49, 2019 N.Y Slip Op. 03039, at 1 (first citing Amatulli v. Delhi Constr. Corp., 77 N.Y.2d 525, 534–35, 571 N.E.2d 645, 650, 569 N.Y.S.2d 337, 342 (1991); then citing Denkensohn v. Davenport, 144 A.D.2d 58, 62, 536 N.Y.S.2d 587, 590 (3d Dep't 1989), *aff'd*. Kriz v. Schum, 75 N.Y.2d 25, 25, 549 N.E.2d 1155, 1155, 550 N.Y.S.2d 584, 584 (1989); then citing Pierre-Louis v. DeLonghi Am., Inc., 66 A.D.3d 859, 861–62, 887 N.Y.S.2d 628, 631, 2009 Slip Op. 7609, at 1 (2d Dep't 2009); then citing Jackson v. Conrad, 127 A.D.3d 816, 818, 7 N.Y.S.3d 355, 358, 2015 N.Y. Slip Op. 02936, at 1 (2d Dep't 2015); and then citing Pesca v. City of New York, 298 A.D.2d 292, 293, 749 N.Y.S.2d 26, 27 (1st Dep't 2002)).

94. *Id.*

95. *Id.* at 1160, 98 N.Y.S.3d at 649, 2019 N.Y Slip Op. 03039, at 1.

96. *Id.* at 1161, 98 N.Y.S.3d at 650, 2019 N.Y Slip Op. 03039, at 1.

97. *Id.* at 1160, 98 N.Y.S.3d at 649, 2019 N.Y Slip Op. 03039, at 1 (first citing Grosse v. Olsen, 164 A.D.3d 763, 765, 83 N.Y.S.3d 256, 259, 2018 N.Y. Slip Op. 05829, at 1 (2d Dep't 2018); and then citing Price v. Kowalski, 258 A.D.2d 637, 637, 685 N.Y.S.2d 800, 801 (2d Dep't 1999)).

98. *McDermott*, 171 A.D.3d at 1160, 98 N.Y.S.3d at 649, 2019 N.Y Slip Op. 03039, at 1 ("[T]hey failed to submit an expert affidavit and relied instead upon deposition testimony, including their own deposition testimony as well as the plaintiff's deposition testimony, and documentary evidence.").

99. 170 A.D.3d 1224, 97 N.Y.S.3d 269, 2019 N.Y. Slip Op. 02372, at 1 (2d Dep't 2019).

insurance company, which the company denied.[100] The plaintiff asserted a law firm "(1) violated Judiciary Law § 487, (2) committed fraud, (3) filed a fraudulent instrument, (4) committed tortious interference with a contract, and (5) offered a false instrument for filing in the first degree," in representing a title insurance company and its agent.[101] The supreme court dismissed the first, second, and fourth causes of action.[102] The Second Department affirmed.[103]

The Second Department found the "plaintiff did not state a cause of action alleging violations of Judiciary Law [section] 487" because the "plaintiff failed to set forth 'with specificity,' . . . how the defendants knew or should have known that she did not sign the release upon which they relied in asserting affirmative defenses on behalf of their clients in the claim denial action."[104] And, in any event, the court found the plaintiff failed to allege any intended deception arising out of the affirmative defenses.[105]

The plaintiff's fraud cause of action and her tortious interference with contract claim failed for similar reasons.[106] The court did note, in passing, that the plaintiff could not establish reliance on any alleged representations because "the alleged statements—the assertion of an affirmative defense—'were undertaken in the course of adversarial proceedings and were fully controverted,' further undermining any claim of reliance by the plaintiff."[107]

2. Medical Malpractice

In *Wright v. Morning Star Ambulette Services, Inc.*, the Second Department touched on the Dead Man's Statute in the context of a

100. *Id.* at 1224–25, 97 N.Y.S.3d at 271, 2019 N.Y. Slip Op. 02372, at 1.

101. *Id.* at 1225, 97 N.Y.S.3d at 271, 2019 N.Y. Slip Op. 02372, at 1.

102. *Id.* at 1224, 97 N.Y.S.3d at 270–71, 2019 N.Y. Slip Op. 02372, at 1.

103. *Id.* at 1224, 97 N.Y.S.3d at 271, 2019 N.Y. Slip Op. 02372, at 1.

104. *Sammy*, 170 A.D.3d 1224, 1225, 97 N.Y.S.3d 269, 271, 2019 N.Y. Slip Op. 02372, at 1 (citing Betz v. Blatt, 160 A.D.3d 696, 698, 74 N.Y.S.3d 75, 79, 2018 N.Y. Slip Op. 02445, at 1 (2d Dep't 2018)).

105. *Id.* at 1225, 97 N.Y.S.3d at 271–72, 2019 N.Y. Slip Op. 02372, at 1 (first citing *Betz*, 160 A.D.3d at 698, 74 N.Y.S.3d at 79, 2018 N.Y. Slip Op. 02445, at 1; and then citing Kupersmith v. Winged Foot Golf Club, Inc., 38 A.D.3d 847, 848, 832 N.Y.S.2d 675, 676. 2007 N.Y. Slip Op. 2713, at 1 (2d Dep't 2007)).

106. *Id.* at 1226–27, 97 N.Y.S.3d at 272–73, 2019 N.Y. Slip Op. 02372, at 1 (first citing Ginsburg Dev. Co., LLC v. Carbone, 134 A.D.3d 890, 892, 22 N.Y.S.3d 485, 488, 2015 N.Y. Slip Op. 09250, at 1 (2d Dep't 2015); and then citing Hersh v. Cohen, 131 A.D.3d 1117, 1119, 16 N.Y.S.3d 606, 609, 2015 N.Y. Slip Op. 06888, at 1 (2d Dep't 2015)).

107. *Id.* at 1226–27, 97 N.Y.S.3d at 272, 2019 N.Y. Slip Op. 02372, at 1 (quoting Lazich v. Vittoria & Parker, 189 A.D.2d 753, 754, 592 N.Y.S.2d 418, 419 (2d Dep't 1993)).

decedent's informed consent form.[108] The decedent "underwent arthroscopic surgery on his knee," which "went without incident."[109] But then the decedent "became unresponsive and apneic, and went into cardiac arrest" when he "was being transferred from the operating table to a stretcher."[110] Decedent died in the operating room.[111] Decedent had several co-morbidities, including "morbid obesity, obstructive sleep apnea, and anxiety."[112] The alleged malpractice consisted of "negligent medical care and treatment, including, among other things, performing arthroscopic surgery and administering anesthesia and/or an endotrachial tube, which were contraindicated in light of the decedent's underlying conditions."[113]

The surgeon moved for summary judgment.[114] The supreme court denied the motion.[115] On appeal, the Second Department reversed.[116] The court began by finding the surgeon met his initial burden "by submitting a detailed expert affidavit that was based on the decedent's medical records, demonstrating that the surgery Meyerson performed was in accordance with good and accepted standards of medical practice and was not a proximate cause of the decedent's death."[117] Turning to the informed consent cause of action, the court found he met his burden "by submitting the affidavit of his expert, portions of his deposition testimony and the deposition testimony of [other physicians], and documentary evidence, including the written consent forms signed by the decedent."[118]

But did considering the informed consent form violate New York's Dead Man's Statute?[119] The Second Department held it did not.[120]

108. 170 A.D.3d 1249, 1251 96 N.Y.S.3d 678, 682, 2019 N.Y. Slip Op. 02381, at 1 (2d Dep't 2019).

109. *Id.* at 1249, 96 N.Y.S.3d at 680, 2019 N.Y. Slip Op. 02381, at 1.

110. *Id.*

111. *Id.*

112. *Wright*, 170 A.D.3d at 1249, 96 N.Y.S.3d at 680, 2019 N.Y. Slip Op. 02381, at 1.

113. *Id.*

114. *Id.* at 1249–50, 96 N.Y.S.3d at 680, 2019 N.Y. Slip Op. 02381, at 1.

115. *Id.* at 1250, 96 N.Y.S.3d at 681, 2019 N.Y. Slip Op. 02381, at 1.

116. *Id.* at 1249, 96 N.Y.S.3d at 680, 2019 N.Y. Slip Op. 02381, at 1.

117. *Wright*, 170 A.D.3d at 1250–51, 96 N.Y.S.3d at 681, 2019 N.Y. Slip Op. 02381, at 1 (first citing Mitchell v. Lograno, 108 A.D.3d 689, 692–93, 970 N.Y.S.2d 58, 61 (2d Dep't 2013); then citing Poter v. Adams, 104 A.D.3d 925, 926, 961 N.Y.S.2d 556, 558 (2d Dep't 2013); and then citing DiGeronimo v. Fuchs, 101 A.D.3d 933, 936, 957 N.Y.S.2d 167, 170 (2d Dep't 2012)).

118. *Id.* at 1251, 96 N.Y.S.3d at 681, 2019 N.Y. Slip Op. 02381, at 1.

119. N.Y. C.P.L.R. § 4519 (McKinney 2007).

120. *Wright*, 170 A.D.3d at 1251, 96 N.Y.S.3d at 682, 2019 N.Y. Slip Op. 02381, at 1 (first citing Acevedo v. Audubon Mgmt., Inc., 280 A.D.2d 91, 95, 721 N.Y.S.2d 332, 335 (1st Dep't 2001); then citing Miller v. Lu-Whitney, 61 A.D.3d 1043, 1045, 876 N.Y.S.2d 211, 213

Reviewing the Dead Man's Statute as it relates to summary judgment, the court explained that testimony should not be used by the movant under the Dead Man's Statute, but that "evidence excludable at trial under CPLR 4519 may be considered in opposition to a motion for summary judgment so long as it is not the sole evidence proffered."[121] Nevertheless, the court found, the surgeon could rely on the consent form in support of his motion for summary judgment because it was not testimony: "The expert's affidavit as to the decedent's execution of the form was predicated upon the medical records, which contained the . . . consent form for the prior surgery . . . , and the records were properly authenticated and submitted on the motion, Meyerson properly relied upon the expert opinion to support his motion."[122] The Second Department went on to hold the plaintiff did not raise a question of fact in response to the motion and entered summary judgment.[123]

In *Clifford v. Kates*, the Fourth Department analyzed the continuous treatment doctrine at some length.[124] The plaintiff underwent a surgical hip replacement on July 9, 2008.[125] The defendants moved for summary judgment arguing the "plaintiff's treatment with Kates ended prior to June 16, 2011."[126] Because the plaintiff did not file suit until December 16, 2013, the defendants contended the plaintiff failed to timely commence the action.[127] More specifically, "Defendants argued that the continuous treatment doctrine did not toll the statute of limitations because the requisite trust and confidence between Kates and plaintiff

(3d Dep't 2009); and then citing Yager Pontiac Inc., v. Danker & Sons Inc., 41 A.D.2d 366, 368, 343 N.Y.S.2d 209, 211 (3d Dep't 1973), *aff"d*, 34 N.Y.2d 707, 313 N.E.2d 340, 356 N.Y.S.2d 860 (1974)).

121. *Id.* (citing Phillips v. Joseph Kantor & Co., 31 N.Y.2d 307, 314, 291 N.E.2d 129, 132, 338 N.Y.S.2d 882, 887 (1972)).

122. *Id.* at 1251–52, 96 N.Y.S.3d at 683, 2019 N.Y. Slip Op. 02381, at 1 (citing People v. Ortega, 15 N.Y.3d 610, 617, 942 N.E.2d 210, 214, 917 N.Y.S.2d 1, 6 (2010); then citing Butler v. Cayuga Med. Ctr., 158 A.D.3d 868, 873, 71 N.Y.S.3d 642, 647 (3d Dep't 2018)). "However, the statute does not bar the introduction of documentary evidence against a deceased's estate . . . . [A]n adverse party's introduction of a document authored by a deceased does not violate the Dead Man's Statute, as long as the document is authenticated by a source other than an interested witness's testimony concerning a transaction or communication with the deceased" *Id.* at 1251, 96 N.Y.S.3d at 683, 2019 N.Y. Slip Op. 02381, at 1 (first quoting *Acevedo*, 280 A.D.2d at 95, 721 N.Y.S.2d at 335; then quoting *Miller*, 61 A.D.3d at 1045, 876 N.Y.S.2d at 213; and then quoting *Yager Pontiac*, 41 A.D.2d at 368, 343 N.Y.S.2d at 211, *aff"d*, 34 N.Y.2d at 707, 313 N.E.2d at 340, 356 N.Y.S.2d at 860).

123. *Id.* at 1252, 96 N.Y.S.3d at 683, 2019 N.Y. Slip Op. 02381, at 1.

124. *See generally* 169 A.D.3d 1375, 93 N.Y.S.3d 477, 2019 N.Y. Slip Op. 00744, at 1 (4th Dep't 2019) (discussing the continuous treatment doctrine).

125. *Id.* at 1375, 93 N.Y.S.3d at 478, 2019 N.Y. Slip Op. 00744, at 1.

126. *Id.* at 1375–76, 93 N.Y.S.3d at 479, 2019 N.Y. Slip Op. 00744, at 1.

127. *Id.* at 1376, 93 N.Y.S.3d at 479, 2019 N.Y. Slip Op. 00744, at 1.

was severed as of January 26, 2011, when Kates last treated plaintiff at a free clinic operated by the hospital defendants."[128] In response, "Plaintiff . . . argu[ed] that the action was timely because her treatment with Kates and the clinic continued until November 26, 2011—less than 2½ years before the action was commenced."[129]

After the supreme court granted the defendants' motion, the plaintiff appealed; the Fourth Department reversed.[130] After discussing the background principles of the continuous treatment toll, the court found, the "plaintiff raised triable issues of fact in opposition as to whether she intended to end her relationship with Kates on January 14, 2009."[131] Notably, the "plaintiff submitted the deposition testimony of Kates in which Kates admitted that he continued to treat plaintiff until at least January 26, 2011."[132] Further, while the plaintiff admitted to shopping for a new physician and asked for her medical records so that she could consult a medical malpractice attorney, the court did not find these fact dispositive because "the clinic's free services were her only viable and stable avenue for treatment."[133] Finally, the court found it persuasive that "as late as July 2011, the plaintiff still had enough confidence in Kates to ask if he would perform corrective hip surgery."[134] As a result, the court held, "even though plaintiff was somewhat disaffected with Kates, the record does not conclusively establish that either plaintiff or Kates regarded the gap in treatment or plaintiff's consultation with counsel as the end of their treatment relationship."[135] Therefore, the court found questions of fact precluded dismissal based on the continuous treatment doctrine.[136]

128. *Id.*

129. *Clifford*, 169 A.D.3d at 1376, 93 N.Y.S.3d at 479, 2019 N.Y. Slip Op. 00744, at 1.

130. *Id.*

131. *Id.* at 1378, 93 N.Y.S.3d at 480, 2019 N.Y. Slip Op. 00744, at 1.

132. *Id.*

133. *Id.* (citing Lohnas v. Luzi,140 A.D.3d 1717, 33 N.Y.S.3d 637, 2016 N.Y. Slip Op. 04819, at 1 (4d Dep't 2016) (discussing the continuous treatment doctrine).

134. *Clifford*, 169 A.D.3d at 1378, 93 N.Y.S.3d at 480, 2019 N.Y. Slip Op. 00744, at 1.

135. *Id*. at 1378, 93 N.Y.S.3d at 481, 2019 N.Y. Slip Op. 00744, at 1 (first citing *Lohnas*, 140 A.D.3d at 1719, 33 N.Y.S.3d at 639, 2016 N.Y. Slip Op. 04819, at 1; then citing Edmonds v. Getchonis, 150 A.D.2d 879, 880–81, 541 N.Y.S.2d 250, 251 (3d Dep't 1989)).

136. *Id.* ("[W]e therefore cannot conclude that the continuous treatment doctrine no longer applied as a matter of law after January 14, 2009.")

IV. PRODUCTS LIABILITY

Two cases form this year's *Survey* of doctrinal developments in products liability.[137] Both cases present a similar theme: a plaintiff's deposition testimony is often the most fruitful basis for summary judgment motions in products cases. In both cases discussed below, the plaintiffs' depositions played central roles in establishing the defendants' defenses as a matter of law.[138]

First, *Beechler v. Kill Brothers Co.* from the Fourth Department provides a useful example of the appropriate use of summary judgment in products liability cases.[139] There, while the plaintiff "was working inside of a piece of farm equipment known as a grain cart, she lost her footing and her right leg became caught in a rotating auger."[140] The plaintiff raised "causes of action against the Killbros defendants based upon strict products liability and negligent design and manufacture, and a cause of action against Bentley based upon strict products liability."[141] The defendants all moved for summary judgment dismissing the complaint in its entirety.[142] The supreme court denied the motions.[143] The Fourth Department reversed.[144]

Turning first to the plaintiff's manufacturing defect theory, the "defendants submitted the testimony of the Killbros defendants' production manager and foreman, who described the process of assembling a grain cart, during which a steel safety guard was welded over the exposed portion of auger on every grain cart."[145] The defendants paired this testimony with more testimony explaining "that the guard was present on this particular unit at the time it left the manufacturer's control" and an expert affidavit explaining "that plaintiff's injuries would

137. *See generally* Palmatier v. Mr. Heater Corp., 163 A.D.3d 1192, 82 N.Y.S.3d 186, 2018 N.Y. Slip Op. 05238, at 1 (3d Dep't 2018) (discussing new developments in products liability). *Palmatier* is worth mentioning in passing. There, the Third Department affirmed a decision denying summary judgment based largely on the defendants' failure to establish their product's compliance with ANSI standards. *Id.* From a doctrinal perspective, *Palmatier* is not noteworthy, but it is instructive procedurally for practitioners who prosecute and defend products liability cases. *See also* Beechler v. Kill Bros Co., 170 A.D.3d 1606, 95 N.Y.S.3d 704, 2019 N.Y. Slip Op. 01993, at 1 (4th Dep't 2019).

138. *See Beechler*, 170 A.D.3d at 1607, 95 N.Y.S.3d at 706, 2019 N.Y. Slip Op. 01993, at 1; *Palmatier*, 163 A.D.3d at 1196, 82 N.Y.S.3d at 191, 2018 N.Y. Slip Op. 05238.

139. *Beechler*, 170 A.D.3d at 1607, 95 N.Y.S.3d at 706, 2019 N.Y. Slip Op. 01993, at 1.

140. *Id.* at 1606, 95 N.Y.S.3d at 705, 2019 N.Y. Slip Op. 01993, at 1.

141. *Id.*

142. *Id.* at 1606–07, 95 N.Y.S.3d at 705, 2019 N.Y. Slip Op. 01993, at 1.

143. *Id.* at 1607, 95 N.Y.S.3d at 705–06, 2019 N.Y. Slip Op. 01993, at 1.

144. *Beechler*, 170 A.D.3d at 1607, 95 N.Y.S.3d at 706, 2019 N.Y. Slip Op. 01993, at 1.

145. *Id.*

not have occurred if the steel safety guard had not been removed."[146] Based on this evidence, the Fourth Department found the defendants met their initial burden and that the plaintiff could not raise a question of fact.[147]

The plaintiff's design defect theory did not fare any better. The Fourth Department found the defendants met their burden by submitting expert evidence opining "that the steel safety guard was manufactured in accordance with industry standards, was designed to last the life of the product, and was 'state of the art' inasmuch as it was permanently welded to the interior of the grain cart and could not be removed except by using an acetylene torch or other such heavy-duty tool."[148] In response, the plaintiff provided expert evidence that "averred that certain features of the grain cart violated industry standards," which the Fourth Department found unavailing because it "conclude[d] that none of the standards upon which he relied are applicable here."[149] Finally, the court dismissed the plaintiff's negligence theories because "there is almost no difference between a prima facie case in negligence and one in strict liability."[150]

Second, *Moscatiello v. Wyde True Value Lumber & Supply Corporation*, dealt with a sole proximate cause defense in a products liability suit.[151] There, the plaintiff's accident occurred while he "participated in the swimming portion of an annual camp counselor relay race."[152] More specifically, "[a]fter being 'tagged,' the plaintiff sprinted into the lake and attempted to perform a shallow dive into a swimming area that the YMCA defendants had created using a plastic, modular dock system."[153] The plaintiff dove headfirst from "ankle-deep water" into a "red [i.e. shallow] swimming zone."[154] The Second Department held the defendants established the plaintiff's dive solely proximately caused his

146. *Id.*

147. *Id.* (citing Rutherford v. Signode Corp., 11 A.D.3d 922, 922, 783 N.Y.S.2d 735, 736 (4th Dep't 2004)).

148. *Id.* at 1607–08, 95 N.Y.S.3d at 706, 2019 N.Y. Slip Op. 01993, at 1 (first citing Reeps v. BMW of N. Am., LLC, 94 A.D.3d 475, 475–76, 941 N.Y.S.2d 597, 598 (1st Dep't 2012); then citing Guzzi v. City of New York, 84 A.D.3d 871, 873, 923 N.Y.S.2d 170, 173 (2d Dep't 2011); and then citing Wesp v. Carl Zeiss, Inc., 11 A.D.3d 965, 967, 783 N.Y.S.2d 439, 441 (4th Dep't 2004)).

149. *Beechler*, 170 A.D.3d at 1608, 95 N.Y.S.3d at 706, 2019 N.Y. Slip Op. 01993, at 1.

150. *Id.* at 1608, 95 N.Y.S.3d at 707, 2019 N.Y. Slip Op. 01993, at 1 (quoting Preston v. Peter Luger Enters., Inc., 51 A.D.3d 1322, 1325, 858 N.Y.S.2d 828, 832 (3d Dep't 2008)).

151. 168 A.D.3d 833, 835, 92 N.Y.S.3d 88,91, 2019 N.Y. Slip Op. 00269, at 1 (2d Dep't 2019).

152. *Id.* at 833, 92 N.Y.S.3d at 90, 2019 N.Y. Slip Op. 00269, at 1.

153. *Id.*

154. *Id.* at 834, 92 N.Y.S.3d at 90, 2019 N.Y. Slip Op. 00269, at 1. He hit the bottom of the lake, which caused him "serious injuries" that "rendered [him] a quadriplegic." *Id.*

injuries because the plaintiff's deposition testimony "established that the plaintiff, a swimming instructor, was familiar with the various color-coded swimming areas at the lake, and the danger of diving into shallow water" and, more specifically, that "he was aware of the shallow condition of the water in the red swimming zone [at most twenty inches] where he commenced his dive."[155]

V. INTENTIONAL TORTS

A. Fraud

William Doyle Galleries, Inc. v. Stettner arose out of the ever-interesting realm of antique jewelry auctions.[156] Because the appeal came from a motion to dismiss the Complaint, the Court "assume[s] the facts stated in plaintiff's verified complaint to be true," and "g[a]ve the pleadings the benefit of every possible favorable inference."[157]

"At an auction held by plaintiff on April 16, 2012, defendant Brett Stettner successfully bid on multiple antique watches and items of jewelry."[158] He paid by "a check dated May 16, 2012 for $425,750.00 as payment."[159] Rightfully suspicious of the post-dated check, "plaintiff declined to honor [it] without a credit reference."[160] Enter HSBC and one of its vice presidents, William Caban, who "contacted plaintiff and advised plaintiff that Stettner had a long-standing banking relationship with HSBC in the United States and Hong Kong, and that Stettner's account contained funds sufficient to cover the check."[161] Caban then sent

155. *Moscatiello*, 168 A.D.3d at 835, 92 N.Y.S.3d at 91, 2019 N.Y. Slip Op. 00269, at 1 (first citing Tkeshelashvili v. State of New York, 18 N.Y.3d 199, 207, 960 N.E.2d 414, 419, 936 N.Y.S.2d 645, 650 (2011); then citing Howard v. Poseidon Pools, Inc., 72 N.Y.2d 972, 974–75, 530 N.E.2d 1280, 1281, 534 N.Y.S.2d 360, 361 (1988); then citing Smith v. Stark, 67 N.Y.2d 693, 694, 490 N.E.2d 841, 842, 499 N.Y.S.2d 922, 923 (1986); then citing Boltax v. Joy Day Camp, 67 N.Y.2d 617, 619–20, 490 N.E.2d 527, 528, 499 N.Y.S.2d 660, 661 (1986); and then citing Rudat v. Mark Colf Excavating Contracting Inc., 66 A.D.3d 1425, 1425–26, 885 N.Y.S.2d 692, 692 (4th Dep't 2009)).

156. 167 A.D.3d 501, 502, 91 N.Y.S.3d 13, 16, 2018 N.Y. Slip Op. 08743, at 1 (1st Dep't 2018).

157. *Id.* (first citing Simkin v. Blank, 19 N.Y.3d 46, 52, 968 N.E.2d 459, 462, 945 N.Y.S.2d 222, 225 (2012); and then citing Rivietz v. Wolohojian, 38 A.D.3d 301, 301, 832 N.Y.S.2d 505, 506 (1st Dep't 2007)). For the same reasons, this Article presents those facts as true only for the purpose of presenting the case as the court saw it. It remains to be seen whether the plaintiff will be able to prove its claims.

158. *Id.*

159. *Id.*

160. *Stettner*, 167 A.D.3d at 502; 91 N.Y.S.3d at 16, 2018 N.Y. Slip Op. 08743, at 1.

161. *Id.*

a letter to the plaintiff on HSBC stationary confirming the plaintiff's financial viability.[162]

"In reliance upon HSBC's verbal and written representations, plaintiff released the jewelry and watches to Stettner."[163] As the reader may have assumed by now, "Stettner's HSBC check was rejected for insufficient funds, and plaintiff did not receive payment."[164] Stettner ultimately pled guilty to theft in a criminal proceeding, and provided the following admission during his allocution: "I presented a letter to [plaintiff] which I knew contained false information about my bank balances for the purposes of inducing [plaintiff] to give me [the watches and jewelry]."[165]

The plaintiff then sued Stettner for fraud for obvious reasons.[166] On appeal, the First Department quickly found "Plaintiff sufficiently pleaded that there was an underlying fraud" based on the admissions in Stettner's plea allocution.[167] More interestingly, the plaintiff sued HSBC for its role in aiding and abetting the fraud.[168] "A plaintiff alleging an aiding-and-abetting fraud claim must allege the existence of the underlying fraud, actual knowledge, and substantial assistance."[169]

First, HSBC unsuccessfully argued the plaintiff did not plead fraud "because it failed to plead the misrepresentation of a present or existing fact."[170] Rejecting the argument, the First Department noted, "the HSBC letter made representations about Stettner's bank balances as they existed at the time the letter was written."[171] HSBC's equivocal disclaimer that balances "can fluctuate" did not change the analysis because the minimum $1,000,000 balance cited in the letter "was specific, and that was sufficient to cover Stettner's $425,750.00 check.[172]

Second, HSBC unsuccessfully argued the plaintiff did not plead actual knowledge sufficiently.[173] The court began by reminding

162. *Id.*

163. *Id.* at 503, 91 N.Y.S.3d at 17, 2018 N.Y. Slip Op. 08743, at 1.

164. *Id.*

165. *Stettner*, 167 A.D.3d at 503, 91 N.Y.S.3d at 17, 2018 N.Y. Slip Op. 08743, at 1.

166. *Id.*

167. *Id.*

168. *Id.* at 502, 91 N.Y.S.3d at 16, 2018 N.Y. Slip Op. 08743, at 1.

169. *Id.* at 503, 91 N.Y.S.3d at 17, 2018 N.Y. Slip Op. 08743, at 1 (quoting Oster v. Kirschner, 77 A.D.3d 51, 55, 905 N.Y.S.2d 69, 72 (1st Dep't 2010)).

170. *Stettner*, 167 A.D.3d at 502; 91 N.Y.S.3d at 17, 2018 N.Y. Slip Op. 08743, at 1 (citing Roney v. Janis, 77 A.D.2d 555, 556–57, 430 N.Y.S.2d 333, 335 (1st Dep't 1980), *aff'd*, 53 N.Y.2d 1025, 425 N.E.2d, 872, 442 N.Y.S.2d 484 (1981)).

171. *Id.*

172. *Id.* at 504, 91 N.Y.S.3d at 17, 2018 N.Y. Slip Op. 08743, at 1.

173. *Id.*

practitioners that plaintiffs bear a relatively small burden in pleading actual knowledge in a pre-discovery posture.[174] Turning to the specific case presented, the court returned to Stettner's plea allocution, noting, "Stettner admitted that he knew that the letter that he provided plaintiff contained false information about his bank balances," which was sufficient to plead a cause of action against HSBC because "HSBC was the source of that letter, and had the means to verify if it was accurate."[175] The court also noted the letter followed verbal representations to the same effect.[176]

Finally, the Court rejected HSBC's argument that the plaintiff did not adequately plead HSBC substantially assisted Stettner's fraud in short order: "since plaintiff pleaded that '[b]ut for the verbal assurances by HSBC Vice President Caban and the HSBC Letter vouching for Stettner's financial and personal integrity, Stettner's scheme would have failed [and] Doyle released the Valuables only after HSBC's repeated representations . . . ."[177]

For substantially the same reasons, the court rejected HSBC's virtually identical arguments that it did not aid and abet Stettner's conversion of the antique jewelry.[178]

One Justice dissented in a detailed opinion that raises some fair points.[179] The dissent began by noting this incident took place in the context of a three-year "scheme" orchestrated by Stettner "against several auction houses in Manhattan, through which he obtained possession of hundreds of thousands of dollars worth of watches and jewelry, and attempted to take possession of additional items worth millions of dollars."[180] Only the plaintiff released jewelry to Stettner before the check cleared.[181]

The dissent would have dismissed the case based on documentary evidence pursuant to C.P.L.R. § 3211 (a) (1).[182] On the dissent's theory, "[w]hile it is reasonable to infer that HSBC knew Stettner's balance on

174. *Id.* at 504, 91 N.Y.S.3d at 17–18, 2018 N.Y. Slip Op. 08743, at 1.

175. *Stettner*, 167 A.D.3d at 504; 91 N.Y.S.3d at 18, 2018 N.Y. Slip Op. 08743, at 1.

176. *Id.*

177. *Id.* at 504–05; 91 N.Y.S.3d at 18, 2018 N.Y. Slip Op. 08743, at 1 (quoting Oster v. Kirschner, 77 A.D.3d 51, 56, 905 N.Y.S.2d 69, 73 (1st Dep't 2010)).

178. *Id.* at 505, 91 N.Y.S.3d at 19, 2018 N.Y. Slip Op. 08743, at 1.

179. *Id.* at 507, 91 N.Y.S.3d at 20 (Tom. J.P., dissenting).

180. *Stettner*, 167 A.D.3d at 507, 91 N.Y.S.3d at 20, 2018 N.Y. Slip Op. 08743, at 1 (Tom. J.P., dissenting).

181. *Id.* at 508, 91 N.Y.S.3d at 21, 2018 N.Y. Slip Op. 08743, at 1 (Tom. J.P., dissenting).

182. *Id.* (first citing Goshen v. Mut. Life Ins. Co., 98 N.Y.2d 314, 326, 774 N.E.2d 1190, 1197, 746 N.Y.S.2d 858, 865 (2002); and then citing Mill Fin., LLC v. Gillett, 122 A.D.3d 98, 103, 922 N.Y.S.2d 20, 24 (1st Dep't 2014)).

the account the check was drawn upon, the letter did not mention the specific balance or its sufficiency in any particular account" and, therefore, could not constitute an affirmative misrepresentation of a present fact (i.e. the account balance for the checking account from which the check was drawn).[183] "Indeed, stating a customer's average balances across multiple accounts and throughout the world is no guarantee or representation regarding the balance in one account at that time or, as relevant here, on a future date."[184]

The dissent also noted the plaintiff accepted a post-dated check but released the jewelry based on a letter dated weeks before the check could be presented.[185] As a result, the dissent reasoned, "it was impossible for the letter to state whether the balance would be adequate in the future because of possible withdrawal activity in the account during the interim," precluding any justifiable reliance argument.[186] On the dissent's theory, because the checking account was freely usable by Stettner to draw against, "[i]t would be improper and unreasonable to hold the banking institution responsible for an account holder withdrawing funds to bring the account below the amount of a postdated check when the bank clearly did not guarantee any such result."[187]

Turning to the other central piece of the majority's analysis, the dissent found the plea allocution general and vague.[188] Even assuming the allocution could establish Stettner's intent to commit a fraud, the dissent aptly noted the letter itself did not provide any proof that the bank knew Stettner's intent.[189] Again, turning to the post-dated nature of the check, the dissent found it impossible for the bank to know its earlier letter would support "a fraud that was yet to occur for some weeks."[190]

The dissent concluded with a public policy statement: "Critically, the majority's holding would subject banking institutions to potential

183. *Id.* at 509, 91 N.Y.S.3d at 21–22, 2018 N.Y. Slip Op. 08743, at 1 (Tom. J.P., dissenting) (citing Auchincloss v. Allen, 211 A.D.2d 417, 417, 621 N.Y.S.2d 305, 306 (1st Dep't 1995) ("Instead, it referred only generally to Stettner's 'average balances' in the plural on a "worldwide" basis. Thus, it failed to provide specific existing facts upon which a fraud could be perpetrated and it did not contain any false representation of an existing fact.")).

184. *Id.* at 509, 91 N.Y.S.3d at 22, 2018 N.Y. Slip Op. 08743, at 1 (Tom. J.P., dissenting).

185. *Stettner*, 167 A.D.3d at 509, 91 N.Y.S.3d at 22, 2018 N.Y. Slip Op. 08743, at 1 (Tom. J.P., dissenting).

186. *Id.*

187. *Id.* at 510, 91 N.Y.S.3d at 22, 2018 N.Y. Slip Op. 08743, at 1 (Tom. J.P., dissenting).

188. *Id.* ("Stettner's allocution was unspecific concerning the letter and ultimately inaccurate as the letter clearly made no representations about his specific bank balances on particular dates.").

189. *Id.*

190. *Stettner*, 167 A.D.3d at 510, 91 N.Y.S.3d at 22, 2018 N.Y. Slip Op. 08743, at 1 (Tom. J.P., dissenting).

liability any time they issue an accurate reference letter and the account holder later decides to withdraw funds to prevent the collection of an issued check," which, the dissent felt, "would lead to an unreasonable and unjustifiable result."[191]

B. False Arrest and Malicious Prosecution

Two false arrest and malicious prosecution cases from this *Survey* year are noteworthy: *Michaels v. MVP Healthcare, Inc.*[192] and *Roberts v. City of New York.*[193]

In *Michaels v. MVP Healthcare, Inc.* the Third Department dealt with a malicious prosecution claim arising out of insurance fraud, ultimately holding that the plaintiff adequately alleged the cause of action.[194] "Plaintiff ran an insurance brokerage firm for many years," including a three-year stint "as an insurance broker for defendant MVP Health Care, Inc. [(MVP)] under a written independent broker's agreement.[195] During the same time, under a separate agreement, MVP established a group insurance plan with a county chamber of commerce that allowed the chamber's members to obtain health insurance for their employees.[196] "Plaintiff agreed with the Chamber to act as its insurance broker, in exchange for a 5% commission on all premiums that MVP collected for policies purchased under this plan."[197]

The problem arose when the chamber expanded its membership to allow groups who "had no connection to Otsego County" to participate in the plan.[198] MVP noticed a spike in membership, which triggered an internal investigation.[199] MVP then reported its findings to the

191. *Id.* at 511, 91 N.Y.S.3d at 23, 2018 N.Y. Slip Op. 08743, at 1 (Tom. J.P., dissenting). For similar reasons, the dissent would have dismissed the plaintiff's aiding-and-abetting conversion claim. *Id.*

192. Michaels v. MVP Health Care, Inc., 167 A.D.3d 1368, 1368, 91 N.Y.S.3d 567, 567, 2018 N.Y. Slip Op. 08986, at 1 (3d Dep't 2018).

193. Roberts v. City of New York, 171 A.D.3d 139, 139, 97 N.Y.S.3d 3, 3, 2019 N.Y. Slip Op. 02177, at 1 (1st Dep't 2019).

194. *Id.* at 1374, 91 N.Y.S.3d at 575, 2018 N.Y. Slip Op. 08986, at 1 (first citing Bd. of Educ. v. Farmingdale Classroom Teachers Ass'n, 38 N.Y.2d 397, 405, 343 N.E.2d 278, 284, 380 N.Y.S.2d 635, 644 (1975); and then citing Light v. Light, 64 A.D.3d 633, 634, 883 N.Y.S.2d 553, 555 (2d Dep't 2009)).

195. *Id.* at 1369, 91 N.Y.S.3d at 570, 2018 N.Y. Slip Op. 08986, at 1.

196. *Id.*

197. *Id.*

198. *Michaels*, 167 A.D.3d at 1369, 91 N.Y.S.3d at 570, 2018 N.Y. Slip Op. 08986, at 1.

199. *Id.* at 1369, 91 N.Y.S.3d at 571, 2018 N.Y. Slip Op. 08986, at 1. At the same time, "MVP also terminated its broker agreement with plaintiff, for cause, and canceled all insurance policies under the Chamber's group plan." *Id.*

Department of Financial Services, which started its own investigation.[200] "In April 2013, DFS investigators arrested plaintiff for grand larceny and conspiring to create the associate membership category of insured persons so as to enable non-Chamber affiliates to wrongfully enroll in the Chamber's health insurance plan."[201] After the grand jury indicted the plaintiff, a petit jury convicted him of multiple charges.[202] Later, the Third Department vacated the convictions based on legally insufficient evidence.[203] The plaintiff then sued MVP and various employees involved in its investigation for malicious prosecution and several other causes of action.[204] The defendants moved to dismiss pursuant to C.P.L.R. § 3211.[205]

The Third Department began by rejecting the defendants' argument that the Insurance Law provided them immunity.[206] While the defendants correctly noted the Insurance Law imposed an obligation to report suspected fraud coupled with an immunity for reporting suspected fraud, the Third Department found it did not provide immunity because the provision only applied "in the absence of fraud or bad faith."[207] Because the plaintiff "specifically alleged fraud and bad faith in his complaint and, in response to defendants' motion to dismiss, presented evidence of fraud and bad faith through his own affidavit and supporting documents," the court found the plaintiff sufficiently pled fraud and bad faith reporting, rendering the statutory immunity inapplicable.[208]

The defendants' common-law immunity argument did not fare any better.[209] The common law provides for immunity "for reporting fraud if doing so serves the 'best interests of the public' through 'the exposure of those guilty of offenses against the public'" even where "the one who sets the agencies in motion is actuated by an evil motive."[210] Ultimately, determining whether common-law immunity applies "involves a balancing test that weighs the conflicting interests of the public and the

200. *Id.*

201. *Id.*

202. *Michaels*. 167 A.D.3d at 1369–70, 91 N.Y.S.3d at 571, 2018 N.Y. Slip Op. 08986, at 1 (citing People v. Michaels, 132 A.D.3d 1073, 1078, 18 N.Y.S.3d 723, 728 (3d Dep't 2015)).

203. *Id.* (citing People v. Michaels, 132 A.D.3d at 1078, 18 N.Y.S.3d at 728).

204. *Id.* at 1370, 91 N.Y.S.3d at 571, 2018 N.Y. Slip Op. 08986, at 1.

205. *Id.*

206. *Id*. at 1371, 91 N.Y.S.3d at 572, 2018 N.Y. Slip Op. 08986, at 1.

207. *Michaels*, 167 A.D.3d at 1370, 91 N.Y.S.3d at 571, 2018 N.Y. Slip Op. 08986, at 1.

208. *Id.* at 1370–71, 91 N.Y.S.3d at 572, 2018 N.Y. Slip Op. 08986, at 1.

209. *Id.* at 1371, 91 N.Y.S.3d at 572, 2018 N.Y. Slip Op. 08986, at 1.

210. *Id*. (quoting Brandt v. Winchell, 3 N.Y.2d 628, 635, 148 N.E.2d 160, 164, 170 N.Y.S.2d 828, 834 (1958); and citing Posner v. Lewis, 18 N.Y.3d 566, 570, 965 N.E.2d 949, 952, 942 N.Y.S.2d 447, 450 (2012)).

person who reported that activity," making its applicability difficult to determine in a motion-to-dismiss posture.[211] In the *MVP* case, the Third Department found, "Plaintiff has adequately alleged that defendants, to cover their own mistakes, knowingly submitted false reports asserting that plaintiff committed insurance fraud.[212] As there would be no public benefit from false reports of fraud, defendants will not be entitled to immunity if the facts as plaintiff alleged are borne out."[213]

Turning to the merits of the plaintiff's pleading, the Third Department found the plaintiff stated a prima facie case for malicious prosecution.[214] The defendants challenged two elements of the plaintiff's prima facie case: (1) whether the plaintiff pled the defendants actually commenced the criminal action (as opposed to DFS and the District Attorney); and (2) whether the defendants' investigation revealed probable cause sufficient to report the suspected fraud.[215]

First, the Court found MVP and its employees actively guided the investigation toward the plaintiff.[216] Reviewing the general principles governing its inquiry, the court noted, "[g]enerally, "[a] civilian complainant, by merely seeking police assistance or furnishing information to law enforcement authorities who are then free to exercise their own judgment as to whether an arrest should be made and criminal charges filed, will not be held liable for false arrest or malicious prosecution."[217] The general rule holds true even where the civilian "giv[ing] false information to the authorit[y]" absent an allegation that the civilian knew the information was false.[218] But where (as there), "the [civilian] played an active role in the prosecution, such as giving advice and encouragement or importuning the authorities to act," the civilian can

211. *Id.*

212. *Michaels*, 167 A.D.3d at 1371, 91 N.Y.S.3d at 572, 2018 N.Y. Slip Op. 08986, at 1 (citing *Posner*, 18 N.Y.3d at 570, 965 N.E.2d at 952, 942 N.Y.S.2d at 450).

213. *Id.*

214. *Id.* ("As relevant here, malicious prosecution requires (1) the commencement or continuation of a criminal proceeding by the defendant against the plaintiff, (2) the termination of the proceeding in favor of the accused, (3) the absence of probable cause for the criminal proceeding and (4) actual malice." (internal citations omitted)).

215. *Id.*

216. *Id.* at 1372, 91 N.Y.S.3d at 573, 2018 N.Y. Slip Op. 08986, at 1.

217. *Michaels*, 167 A.D.3d at 1372, 91 N.Y.S.3d at 572–73, 2018 N.Y. Slip Op. 08986, at 1 (quoting Mesiti v. Wegman, 307 A.D.2d 339, 340, 763 N.Y.S.2d 67, 69 (2d Dep't 2003)) (first citing Barrett v. Watkins, 82 A.D.3d 1569, 1572, 919 N.Y.S.2d 569, 572 (3d Dep't 2011); and then citing Lupski v. County of Nassau, 32 A.D.3d 997, 997, 822 N.Y.S.2d 112, 114 (2d Dep't 2006)).

218. *Id.* at 1372, 91 N.Y.S.3d at 573, 2018 N.Y. Slip Op. 08986, at 1 (citing *Lupski*, 32 A.D.3d at 997, 822 N.Y.S.2d at 114 (2d Dep't 2006)).

be considered a proper defendant.[219] The plaintiff adequately pled this element by submitting the allegedly false testimony given to the grand jury and by "explain[ing] how they knew it to be false."[220]

Second, the court found the criminal proceeding lacked probable cause despite the grand jury's contrary finding.[221] While a grand jury indictment is generally fatal to a malicious prosecution action because it constitutes an independent, quasi-judicial determination of probable cause,

> a plaintiff can show a lack of probable cause for the criminal proceeding through 'proof that [the] defendant has not made a full and complete statement of the facts either to the [g]rand [j]ury or the District Attorney, has misrepresented or falsified the evidence or else kept back evidence which would affect the result,' which 'requires pleading intentional or knowing conduct on the part of a defendant.'[222]

The court noted, "Plaintiff pleaded such allegations," presumably based on the same evidence discussed above, and further held, "[n]one of the affidavits or documentary evidence submitted by defendants definitively disposes of the claims."[223] As a result, the court found "the determination of probable cause here depends on an evaluation of the facts or inferences to be drawn from such facts."[224] Thus, the Third Department concluded, "Supreme Court properly declined to dismiss the malicious prosecution cause of action against defendants."[225]

In the second malicious prosecution case highlighted this year, *Roberts v. City of New York*, the First Department affirmed summary judgment on a malicious prosecution claim over a spirited dissent.[226] *Roberts* arose out of the plaintiff's arrest, grand jury indictment, and trial "for the murder of Jamie Richetti, who was shot and killed at a social

219. *Id.* (first citing *Mesiti*, 307 A.D.2d at 340, 763 N.Y.S.2d at 69; and then citing Place v. Ciccotelli, 121 A.D.3d 1378, 1379, 995 N.Y.S.2d 348, 351 (3d Dep't 2014)).

220. *Id.*

221. *Id.* at 1373, 91 N.Y.S.3d at 573, 2018 N.Y. Slip Op. 08986, at 1 (citing Parkin v. Cornell Univ., Inc., 78 N.Y.2d 523, 529, 583 N.E.2d 939, 942, 577 N.Y.S.2d 227, 229 (1991)).

222. *Michaels*, 167 A.D.3d at 1372, 91 N.Y.S.3d at 573, 2018 N.Y. Slip Op. 08986, at 1 (first citing *Lupski*, 32 A.D.3d at 998–99, 822 N.Y.S.2d at 114; and then citing Colon v. New York, 60 N.Y.2d 78, 82–83, 455 N.E.2d 1248, 1250–51, 468 N.Y.S.2d 453, 455–56 (1983)).

223. *Id.* at 1373, 91 N.Y.S.3d at 573 (first citing Turtle Island Trust v. Cty. of Clinton, 125 A.D.3d 1245, 1248, 5 N.Y.S.3d 536, 540 (3d Dep't 2015); and then citing Greenwood Packing Corp. v. Associated Tel. Design, Inc., 140 A.D.2d 303, 305, 527 N.Y.S.2d 811, 813 (2d Dep't 1988)).

224. *Id.* (citing *Parkin*, 78 N.Y.2d at 529, 583 N.E.2d at 942, 577 N.Y.S.2d at 229).

225. *Id.*

226. 171 A.D.3d 141, 152, 97 N.Y.S.3d 5, 13, 2019 N.Y. Slip Op. 02177, at 1 (1st Dep't 2019).

gathering."[227] "Ultimately, the plaintiff was acquitted on February 2, 2006."[228]

The plaintiff's malicious prosecution claim "focused on disputing the identification of him as the shooter."[229] The plaintiff claimed the police did not ever adequately identify him as a result of the "significant confusion" surrounding the shooting.[230] As a result, the plaintiff claimed the police did not have probable cause to commence the criminal matters against him.[231] The court foreshadowed its conclusions by explaining at the outset that the "plaintiff's various attempts to dispute his identification as well as disparage the credibility of police and identification witnesses do not withstand a close analysis with respect to establishing the requisite elements of the civil claims."[232] Continuing, the court summarized the decision to come, "[w]hen the speculative challenges to probable cause and the propriety of the prosecution are cleared away, we are left with a record of the criminal investigation and prosecution that is factually compelling, warranting dismissal of the civil claims relevant to this appeal."[233]

After disposing of the plaintiff's false arrest claim,[234] the court analyzed the plaintiff's malicious prosecution claim.[235] The court began by remarking, "plaintiff's indictment created a presumption of probable cause for the criminal proceeding."[236] The court quickly rejected any claim that the grand jury indictment resulted from misrepresentations, false evidence, or bad faith.[237] In lengthy dicta, the First Department went on to explain that the plaintiff did not raise a question of fact as to any malice as required to recover, distinguishing two prior cases.[238]

The dissent offered a probing retort, ultimately concluding no probable cause existed to arrest the plaintiff or commence a criminal action against him.[239] "The investigation did not recover a weapon,

227. *Id.* at 141, 97 N.Y.S.3d at 5, 2019 N.Y. Slip Op. 02177, at 1.

228. *Id.*

229. *Id.*

230. *Roberts*, 171 A.D.3d 141, 97 N.Y.S.3d 5, 2019 N.Y. Slip Op. 02177, at 1.

231. *Id.* at 147, 97 N.Y.S.3d at 9, 2019 N.Y. Slip Op. 02177, at 1.

232. *Id.* at 141, 97 N.Y.S.3d at 5, 2019 N.Y. Slip Op. 02177, at 1.

233. *Id.*

234. *Id.* at 146, 97 N.Y.S.3d at 9, 2019 N.Y. Slip Op. 02177, at 1.

235. *Roberts*, 171 A.D.3d at 149, 97 N.Y.S.3d at 11, 2019 N.Y. Slip Op. 02177, at 1.

236. *Id.* (first citing *Colon*, 60 N.Y.2d 78, 82, 455 N.E.2d 1248, 1250, 468 N.Y.S.2d 453, 455; and then citing De Lourdes Torres v. Jones, 26 N.Y.3d 742, 761, 47 N.E.3d 747, 761, 27 N.Y.S.3d 468, 482 (2016)).

237. *Id.* ("This record does not evince any such improprieties.").

238. *Id.* ("Malice, too, is not evident in this record.").

239. *Id.* at 155, 97 N.Y.S3d at 15, 2019 N.Y. Slip Op. 02177, at 1 (Gesner, J., dissenting).

fingerprints, or DNA."[240] Further, "[w]itnesses interviewed by the police gave descriptions of the shooter that varied as to his height, age, and skin tone."[241] Most problematically, the dissent noted, "[w]hen Milan [a friend of the victim] was deposed in this action, he testified that, at the precinct, he explicitly informed the police that plaintiff was not the shooter," which did not appear in police records.[242] While two witnesses identified the plaintiff as the shooter, the first witness coached the other witness to lie so that the first witness could cut a deal on an unrelated charge.[243] These inconsistencies raised a question of fact in the dissent's view, which should have precluded summary judgment.[244]

C. Obscure Case of the Year: Interference with the Right of Sepulcher

The last case in this year's *Survey* relates to an obscure area of law that has a surprising number of recently reported decisions: the right of sepulcher.[245] The right of sepulcher is a quasi-property "right of next of kin to immediate possession of a decedent's body for disposition."[246] In New York, "[t]he common-law right of sepulcher seeks to assure the absolute right of the decedent's next of kin to have immediate possession of the body for preservation and burial, and it affords damages only when there has been interference with that right."[247]

With that background, this Article turns to *Lee v. City of New York*, which arose out of Hurricane Sandy, an "unprecedented hurricane" that resulted in "unprecedented flooding in the Bellevue Hospital morgue" which led to the desecration of the decedent's body.[248] On appeal, the First Department dealt with the intersection between the right of sepulcher and the governmental immunity defense.[249] The court began by noting, "the right of sepulcher does not, by definition, trump

240. *Roberts*, 171 A.D.3d at 153, 97 N.Y.S.3d at 13, 2019 N.Y. Slip Op. 02177, at 1 (Gesmer, J., dissenting).

241. *Id.*

242. *Id.*

243. *Id.* at 153–54, 97 N.Y.S.3d at 14, 2019 N.Y. Slip Op. 02177, at 1 (Gesmer, J., dissenting).

244. *Id.* at 158, 97 N.Y.S.3d at 17, 2019 N.Y. Slip Op. 02177, at 1 (Gesmer, J., dissenting).

245. Lee v. City of New York, 164 A.D.3d 415, 415, 80 N.Y.S.3d 51, 51, 2018 N.Y Slip Op. 05626, at 1 (1st Dep't 2018).

246. *Right*, BLACK'S LAW DICTIONARY (11th ed. 2019).

247. 18 N.Y. JUR. 2D CEMETERIES AND DEAD BODIES § 88 (2011); *see also id.* (collecting cases).

248. *Id.* ("The specific act from which plaintiffs' claims arise is the City's treatment of the decedent's body in the context of Hurricane Sandy, i.e., as the hurricane approached, once it had struck, and in its aftermath.").

249. *Id.* at 415, 80 N.Y.S.3d at 51, 2018 N.Y Slip Op. 05626, at 1.

governmental immunity."[250] And, in fact, the governmental immunity defense disposed of the plaintiffs' claims.[251] The court noted "the City's emergency preparations and the decisions it made during and immediately after the unprecedented hurricane, which caused, among other things, unprecedented flooding in the Bellevue Hospital morgue" constituted "quintessential governmental functions."[252] As a result of these discretionary acts, decedent's body was damaged.[253] But, because the acts were discretionary, the plaintiffs had no recourse.[254]

CONCLUSION

The law of torts is ever-changing. As with other areas of law, decisions abound with greater and greater frequency. But the principles underlying tort law remain fairly static. This Article has presented doctrinal developments from the last twelve-month *Survey* period. By the time it is published, hundreds more cases will have been decided. While it is increasingly impractical (now nearly impossible) to read every case that is handed down from the Courts of the State of New York, practitioners should continue to read cases and discuss them regularly. And, even more importantly, practitioners should stay tuned for next year's *Survey*.

250. *Id.* at 415, 80 N.Y.S.3d at 51, 2018 N.Y Slip Op. 05626, at 1 (citing Drever v. State of New York, 134 A.D.3d 19, 25, 18 N.Y.S.3d 207, 212, 2015 N.Y. Slip Op. 07726, at 1 (3d Dep't 2015)).

251. *Id.* at 415, 80 N.Y.S.3d at 52, 2018 N.Y Slip Op. 05626, at 1 (citing Valdez v. City of New York, 18 N.Y.3d 69, 75–76, 960 N.E.2d 356, 361, 936 N.Y.S.2d 587, 591 (2011)).

252. *Lee*, 164 A.D.3d at 415, 80 N.Y.S. at 52, 2018 N.Y Slip Op. 05626, at 1.

253. *Id.*

254. *Id.* ("Plaintiffs seek to ignore or minimize the significance of that context. However, their claims directly implicate the City's emergency preparations and the decisions it made during and immediately after the unprecedented hurricane, which caused, among other things, unprecedented flooding in the Bellevue Hospital morgue—all quintessential governmental functions.").