GOLDBERG SEGALLA

SPRING 2025

Labor Law Update

Keeping clients informed about significant cases and changes in New York's Labor Law

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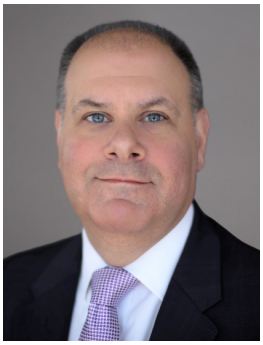

THEODORE W. UCINSKI III
516.281.9860
tucinski@goldbergsegalla.com

KELLY A. McGEE
646.292.8794
kmcgee@goldbergsegalla.com

EDITOR'S NOTE

The spring edition reveals an emerging pattern in addressing the Sole Proximate Cause defense and compliance with the Labor Law. It has been well established that the Sole Proximate Cause Defense will not apply if there was a failure of a safety device. A plaintiff cannot be deemed to have solely caused his or her own accident if the safety device in use at the time contributed to the accident in some way. The only way the Sole Proximate Cause Defense will be viable is if the defendant was in compliance with the statute in providing an adequate safety device so as to provide proper protection to the worker. We have observed a pattern among the cases where the defendants have argued what is clearly comparative negligence by the plaintiff as sole proximate cause. This is either a misunderstanding of the defense, or wishful thinking by defense counsel attempting to create an issue of fact. Whatever the basis, the courts are consistently denying these attempts by the defense to argue comparative negligence as sole proximate cause.

For example, in *Jara-Salazar v. 250 Park LLC* [i], the plaintiff was working from an unsecured A-frame ladder. His task was to remove a main sprinkler pipe that hung from the ceiling. His accident occurred when the unsecured pipe fell and struck the A-frame ladder, causing it and the plaintiff to fall. The defendants argued that the plaintiff's conduct was the sole proximate cause of his accident and that he was a recalcitrant worker because his foreman gave him safety instructions concerning how to cut the pipe and where to place his ladder so it would not be hit by the falling pipe. The court addressed the defendants' non-compliance with the statute, the failure to provide an adequate safety device so as to provide proper protection for the subject work. The plaintiff's conduct or omissions were not the sole proximate cause of the accident. As such, the defense failed.

In *Dolcimascolo v. 701 7th Prop. Owner, LLC* [ii], the plaintiff was injured when he was struck by a steel beam that was inadvertently caught on a crane hook during hoisting, causing it to slide off the truck where it had been placed. The plaintiff was working at ground level and was struck when the beam fell. The defendants claimed the plaintiff was not authorized to work in the area where a load was being hoisted. The First Department found that the defendants' claim that the plaintiff's conduct was the sole proximate cause of his accident was meritless. There was no evidence that the plaintiff was ever directed not to be in the area where he was injured and, even if there was, the defendants failed to show that they were free of any statutory violations. The court specifically noted if the plaintiff had been in an unauthorized area it would have amounted only to comparative negligence, which is not a defense in a Labor Law § 240 case.

The Second Department case of *Amaro v. New York City Sch. Constr. Auth.* [iii] provides an analysis of the elements of the sole proximate cause defense. The plaintiff was allegedly injured when a scaffold plank broke, causing him to fall. The plaintiff had disconnected his lanyard prior to the accident because he was carrying material and was unable to unhook and re-hook as he walked along the scaffolding towards a co-worker. The court noted that the plaintiff may be the sole proximate cause of the accident if the defense can establish that he "(1) had adequate safety devices available, (2) knew both that the safety devices were available and that [he or she was] expected to use them, (3) chose for no good reason not to do so, and (4) would not have been injured had [he or she] not made that choice." The plaintiff established his entitlement to summary judgment by establishing that Labor Law § 240(1) was violated and that the violation was a proximate cause of his injuries. As such, his comparative negligence could not be a defense.

In *Lopez v. Kamco Servs., LLC* [iv], the defendant raised the defense of sole proximate cause to defend against a Labor Law § 241(6) claim. The plaintiff, a mechanic, was engaged in the installation and furnishing of electrical cables. He was injured when he was struck in the left eye by an electrical cable while attempting to connect the cable to a disconnector while he was not wearing any eye protection. He claimed that no goggles or other eye protection had been provided to him. The defendant failed to establish that Labor Law § 241(6) was inapplicable to the plaintiff's activities as well as eliminating triable issues of fact as to whether the plaintiff was engaged in work that may endanger his eyes, whether approved eye protection was provided, and whether the defendant's failure to require the plaintiff to wear safety goggles was a proximate cause of the alleged injuries. As such, the Appellate Division reversed the Supreme Court's decision granting the defendant's motion for summary judgment dismissing the case.

In sum, the primary defense in any Labor Law case is compliance with the statute. When evaluating a Sole Proximate Cause defense, a defendant's compliance with the statute is the first element to be considered. In a case where a safety device failed causing the plaintiff's injuries, defendants should expect an adverse outcome regardless of the plaintiff's negligent conduct or omissions prior to the accident.

Please note that Goldberg Segalla has a number of construction related publications, blogs, and rapid response teams. For more information, please refer to the back page of our update or contact us directly.

As always, we hope you find this edition of the *Labor Law Update* to be a helpful and practical resource. If you have any questions about the cases or topics discussed or have any feedback on how we can make the *Labor Law Update* more useful, please do not hesitate to contact us.

Theodore W. Ucinski III

Kelly A. McGee

i. 231 A.D.3d 674 (1st Dep't. 2024)
ii. 232 A.D.3d 538 (1st Dep't. 2024)
iii. 229 A.D.3d 746 (2nd Dep't. 2024)
iv. 231 A.D.3d 1142 (2nd Dep't. 2024)

Goldberg Segalla *Labor Law Update*

SPRING 2025

Goldberg Segalla's *Labor Law Update* keeps clients informed about significant changes and cases involving New York's Labor Law. Cases are organized by court and date. If you have any questions about cases reported in this *Labor Law Update* or questions concerning Labor Law §§ 200, 240(1) and 241(6) in general, please contact Theodore W. Ucinski III or Kelly A. McGee.

IN THIS ISSUE

LABOR LAW UPDATE ASSISTANT EDITORS

Jamie K. McAleavey
Partner | Garden City
jmcaleavey@goldbergsegalla.com
516.281.9865

Jeffrey S. Matty
Partner | Manhattan, Raleigh
jmatty@goldbergsegalla.com
646.292.8748

SPRING 2025 CONTRIBUTORS

Brian L. Battisti
Partner | Manhattan
bbattisti@goldbergsegalla.com
646.292.8765

Ryan C. Mahoney
Special Counsel | Buffalo, Manhattan
rmahoney@goldbergsegalla.com
646.292.8776

Jack L. Cohen
Partner | Manhattan, Princeton
jlcohen@goldbergsegalla.com
609.986.1365

Endell J. Osuna
Partner | Buffalo
eosuna@goldbergsegalla.com
716.710.5808

Daniel R. Flynn
Special Counsel | Garden City
dflynn@goldbergsegalla.com
516.281.9890

Emily S. Schierhorst
Associate | Garden City
eschierhorst@goldbergsegalla.com
516.281.9853

Ian B. Forman
Partner | Garden City
iforman@goldbergsegalla.com
516.267.5915

Shannon Q. Sullivan
Associate | Garden City
ssullivan@goldbergsegalla.com
516.281.9835

TOPICS: *Labor Law § 241(6), Slipping hazard, Foreign substance, Labor Law § 200, Out of possession*

RUISECH V. STRUCTURE TONE INC.

2024 NY Slip Op 05866
November 25, 2024

The plaintiff, a construction worker, was attempting to install a 500-pound glass panel when he slipped on concrete pebbles that were installed by a separate contractor. The defendants failed to meet their burden for dismissal of Labor Law § 241(6) claims predicated on Industrial Code § 23-1.7 because they were not able to demonstrate that the concrete pebbles were integral to the work rather than a foreign substance because, at the time of the alleged injury, the pebbles were "not a component of the floor and were not necessary to the floor's functionality." Regarding Industrial Code § 23-1.7(e)(2), the defendants failed to establish that the pebbles did not create a slippery condition. The code provision is not limited to tripping hazards, but also encompasses other hazards that may arise from the described conditions. Regarding Labor Law § 200, the Appellate Division properly granted the defendants' summary judgment dismissing the plaintiff's § 200 and common law negligence claims. The defendants were an out-of-possession landlord, a building manager, and a tenant not occupying the space during construction, who demonstrated that they exercised no supervisory control over the operation and thus were not liable for any defect or dangerous condition arising from the contractor's methods.

PRACTICE NOTE: A Labor Law § 241(6) action predicated on Industrial Code § 23-1.7 may not necessarily include a foreign substance but rather may include a substance that is not a component to the floor and not necessary for the floor's functionality.

TOPICS: *Labor Law § 240(1), Safety devices*

RIVERA V. 712 FIFTH AVE. OWNER LP

229 A.D.3d 401
July 2, 2024

The plaintiff was injured while removing metal ductwork from a building owned by the defendant. He was provided with an A-frame ladder but no other safety devices. He was working alone and standing on the fourth rung of the ladder while cutting a portion of the ductwork when the ductwork fell, causing the ladder to tip and the plaintiff to fall. He was rendered unconscious. There were no witnesses to the accident. The First Department found that the defendant, the building owner, failed to provide adequate safety devices as required by Labor Law § 240(1). The plaintiff's testimony established a prima facie case. The defendant's evidence, consisting of two uncorroborated accident reports where the authors stated they were told by unidentified individuals that the plaintiff lost his balance, was deemed insufficient to raise a triable issue of fact. Likewise, the defendant's expert's affidavit was insufficient to raise an issue of fact. The expert's opinion was based solely on speculation as he failed to examine the ladder, the ductwork, or the room where the ductwork was located. The court concluded that the plaintiff was entitled to summary judgment as a matter of law.

PRACTICE NOTE: A building owner has a duty to provide proper protection to a worker pursuant to Labor Law § 240(1). A plaintiff is not required to prove that a ladder was defective. It is sufficient to establish liability that adequate safety devices to prevent the ladder from slipping or prevent the plaintiff from falling were absent.

TOPICS: *Labor Law § 240(1), Ladder, Gravity-related risk, Indemnification*

DIBRINO V. ROCKEFELLER CTR. N. INC.

230 A.D.3d 127
July 2, 2024

The Appellate Division upheld the Supreme Court's award of summary judgment to the plaintiff on Labor Law § 240(1). To confirm the measurements of a soffit, the plaintiff was working from an A-frame ladder that he found on the site. He worked from the ladder for about 15 minutes before it wobbled. The plaintiff attempted to jump from the ladder when this occurred, became entangled, and fell, sustaining injuries. The ladder's owner, who was a subcontractor and not a Labor Law defendant, introduced evidence in opposition to the plaintiff's motion in the form of accident reports prepared by non-eye witnesses which stated that the plaintiff fell because he was over-reaching and did not maintain three points of contact on the ladder. In addition, the ladder owner was not obligated to provide contractual indemnification to the owner or general contractor because the plaintiff's act of unilaterally taking the ladder was not sufficient to trigger the arising out provision within their contract.

PRACTICE NOTE: When opposing a summary judgment motion on Labor Law § 240(1), a defendant must come forth with evidence in admissible form that actually controverts the facts and takes the accident outside the ambit of the Labor Law.

TOPICS: *Labor Law § 241(6), Industrial Code, Elevators*

SMITH V. EXTELL W. 45TH LLC

230 A.D.3d 1044
September 24, 2024

The plaintiff was a carpenter working on the construction of a hotel. He was injured when an elevator he was riding in suddenly stopped, shook, and then abruptly descended approximately 15 floors. When the elevator car stopped suddenly, the plaintiff claimed it caused his right foot to move and land on debris causing him to twist to the right and sustain injury. The First Department upheld the lower court's dismissal of the plaintiff's Labor Law § 241(6) claim based on Industrial Code § 23-7.3(a). It reversed the lower court's denial of the motion as to the plaintiff's Labor Law § 241(6) claim based on § 23-1.7(e)(1) but upheld the denial of summary judgment as to the plaintiff's Labor Law § 241(6) claim based on § 23-1.7(e)(2). The First Department held that § 23-7.3(a) was not specific enough to support the claim as it only set general safety standards. Industrial Code § 23-1.7(e)(1) did not apply because the elevator where the accident occurred was not considered a passageway. However, § 23-1.7(e)(2) was deemed specific enough to support the claim, as it requires floors and similar areas to be kept free from debris and obstructions. The court also noted that disputes over the plaintiff's credibility should be resolved at trial, not on summary judgment.

PRACTICE NOTE: Industrial Code sections are not sufficiently specific to support a Labor Law § 241(6) claim where they simply set general safety standards and do not mandate compliance with concrete specifications.

TOPICS: *Labor Law § 241(6), Hearsay, Comparative negligence*

OLIVEIRA V. TOP SHELF ELEC. CORP.

230 A.D.3d 1035
September 24, 2024

The plaintiff was injured when he slipped on debris in a dark interior stairway where the temporary lights were off. The First Department affirmed partial summary judgment as to the plaintiff's Labor Law § 241(6) claim predicated on Industrial Code §§ 23-1.7(d) and 23-1.30. The defendant's witness testimony about the lighting did not raise a triable issue of fact. The defendant's reliance on hearsay, such as an unsworn foreman's statement and inadmissible statements in an incident report that the plaintiff was moving a washing machine at the time of the accident, was insufficient to defeat the motion for summary judgment.

PRACTICE NOTE: Comparative negligence on the plaintiff's part does not preclude partial summary judgment in his favor under Labor Law § 241(6).

TOPICS: *Labor Law § 240(1), Sole proximate cause, Language translation*

MOSQUERA V. TF CORNERSTONE INC.

230 A.D.3d 1065
September 26, 2024

The plaintiff was injured when he fell off the edge of a bathtub he was standing on to paint the upper corners of a room. He alleged the ladders provided did not fit in the tub when open. The First Department held that the plaintiff established a prima facie case for summary judgment on his Labor Law § 240(1) claim. The defendants failed to

raise any issues of fact that would preclude summary judgment. The defendants' expert examined the scene four years after the accident and could not confirm that the ladder he examined was the one the plaintiff fell from. The expert's conclusion that the plaintiff was solely responsible for the accident was unsupported by the record. The description of the accident in the plaintiff's Workers' Compensation Questionnaire and medical reports lacked certification of accurate translation from Spanish.

PRACTICE NOTE: The proponents of evidence that has been translated from another language to English are obligated to show that a plaintiff was the source of the information recorded and that the translation was provided by a competent, objective interpreter whose translation was accurate.

TOPICS: *Labor Law § 240(1), Labor Law § 241(6), Contractual indemnification*

PITANG V. BEACON BROADWAY CO., LLC

220 N.Y.S.3d 242
October 1, 2024

The plaintiff in this matter stood on unsecured two-by-four pieces of lumber near the edge of a truck's flatbed in order to reach up and hand a soda to a co-worker on a sidewalk bridge. The piece of lumber flipped, causing the plaintiff to fall four feet and sustain an injury. The First Department held that this was not considered an elevation-related risk under Labor Law § 240(1), and the plaintiff failed to specify a concrete Industrial Code violation for their Labor Law § 241(6) claim. The defendant-lessee of the property was entitled to conditional indemnification against the plaintiff's employer subject to the determination of whether the plaintiff's accident arose from his own negligence.

PRACTICE NOTE: Falling from a height alone is not sufficient to invoke Labor Law § 240(1). A plaintiff must establish that they were exposed to the type of elevation-related risk in which safety devices of the kind enumerated in Labor Law § 240(1) are deemed warranted.

TOPICS: *Labor Law § 240(1), General contractors, Safety devices*

TEJADA-RODRIGUEZ V. 76 ELEVENTH AVE. PROP. OWNER LLC.

217 N.Y.S.3d 548
October 1, 2024

The plaintiff was injured by a heavy wooden panel that fell from a cured concrete poured ceiling. The First Department held that the plaintiff's failure to explain how the panel fell did not preclude him from summary judgment. The court rejected the defendants' contention that the plaintiff's account of the accident was impossible and held that the defendants failed to raise an issue of fact as the type of work the plaintiff was performing involved a load that required securing. Further, the defendants failed to establish that using safety devices would have hindered the task of stripping the forms from concrete beams. The First Department also held that the defendant who hired the plaintiff's employer was a general contractor or statutory agent as it had the authority to exercise control over the work that brought about the plaintiff's injury.

PRACTICE NOTE: A party may qualify as a general contractor or statutory agent for purposes of Labor Law § 240(1) if it has the authority to exercise control over the work that brought about a plaintiff's injury, regardless of whether the party exercised that authority with respect to a plaintiff's task.

TOPICS: *Approved safety devices, Superseding causes, Contractual indemnification*

SANDOVAL V. 201 WEST 16 OWNERS CORP.

231 A.D.3d 500
October 8, 2024

The plaintiff was injured due to a masonry stone falling from the exterior of a building. The First Department affirmed the trial court's finding that the plaintiff established his entitlement to summary judgment on his Labor Law § 240(1) claim because the ropes used by his co-worker proved inadequate to prevent the stone from falling. The First Department further rejected the defendants' claims that the co-worker's negligence caused the injury, finding that people are not safety devices within the meaning of the Labor Law. The First Department reversed the denial of the defendants' motion relating to contractual indemnity and failure to procure insurance, finding that the property owner established its freedom from negligence and that the accident occurred within the scope of the plaintiff's employment, thereby triggering both the indemnity and insurance provisions.

PRACTICE NOTE: Particularly where liability is difficult to contest, it is important to pursue all avenues of risk transfer, including contractual claims for failure to procure appropriate insurance, in order to fully protect your client's financial exposure.

TOPICS: *Brill time, Supervisory control and authority, Approved safety devices*

SANDOVAL-MORALES V. 164-20 N. BLVD., LLC

231 A.D.3d 501
October 8, 2024

The plaintiff was injured while washing paint buckets in a slop sink in a closet when an object fell through missing ceiling tiles and struck her in the head. Just prior to the injury, a plumbing contractor was called away from his post by the general contractor, and was given instructions to close the closet and place caution tape over its doors. The First Department affirmed the trial court's denial of the general contractor's motion for summary judgment finding that questions of fact existed concerning the general contractor's supervisory control over the work given its alleged instructions concerning sealing off the area in question, and further found that Industrial Code § 23-1.8(c)(1) requiring hard hats was a sufficiently specific predicate for liability. Finally, the First Department affirmed the denial of the property owner's cross-motion for summary judgment as untimely, noting it was filed more than 60 days after the Note of Issue, and was improperly styled as a cross-motion where the relief sought was entirely against parties that did not file the original motion.

PRACTICE NOTE: It is critical to timely file dispositive motions in accordance with court orders or risk having the same denied irrespective of the merits.

TOPICS: *Permanent parts of structures, Credibility, Falling object, Sufficient evidence*

MOLINA V. 114 FIFTH AVE. ASSOC., LLC

231 A.D.3d 543
October 15, 2024

The plaintiff, a steam fitter, was injured when a rod and shield affixing a segment of fire suppression piping to the ceiling broke free and fell on his neck and shoulder. The court affirmed the trial court's granting of the plaintiff's motion for summary judgment, noting that the plaintiff met his evidentiary burden by demonstrating that his claims involved both a falling object and his fall from an elevation caused by inadequate safety devices. The court rejected the defendants' claims that the newly installed pipe was a "permanent" part of the building, or that to succeed on his claims, the falling object must have fallen while in the course of being hoisted or secured.

PRACTICE NOTE: Careful attention must be paid to the substance of the defendants' opposition papers, as the court's function in deciding motions for summary judgment is not to assess the credibility of the parties or witnesses, but rather to identify questions of material fact.

TOPICS: *Labor Law § 240(1), Anti-subrogation rule, Failure to procure insurance*

URQUIA V. DEEGAN 135 REALTY LLC

231 A.D.3d 567
October 15, 2024

The plaintiff was standing on an unsecured ladder when he was struck by a 20- to 30-pound beam falling from the ceiling, causing him to fall off the ladder and sustain injuries. The First Department reversed the trial court's decision finding that the plaintiff had met his prima facie burden and that the defendants had failed to raise an issue of fact in opposition. The court further found that the anti-subrogation rule precluded the owner and general contractor's contractual indemnity claims against the concrete subcontractor because they were each named as additional insureds on the subcontractor's CGL policy. Finally, the court dismissed the plaintiff's Labor Law § 241(6) claim predicated upon Industrial Code § 23-1.7(a)(1) because the overhead planking required by that section of the code would have interfered with the plaintiff's ability to execute his work, and the plaintiff failed to offer sufficient proof to show that overhead protection was needed as there were no individuals required to pass through the area in question.

PRACTICE NOTE: The anti-subrogation rule is an important defense that should be asserted against contractual indemnity claims falling within the same risk as that provided by the insurance requirements of a construction contract.

TOPICS: *Protected activities, Labor Law § 240(1)*

RODRIGUEZ V. RIVERSIDE CTR. SITE 5 OWNER LLC

231 A.D.3d 603
October 22, 2024

The plaintiff had delivered cement to a construction site and was cleaning the cement truck afterward when a rail on the truck broke, causing him to fall and sustain injury. The court affirmed the granting of summary judgment to the plaintiff on his Labor Law § 240(1) claim noting that his washing of the truck was a continuation of his enumerated activity within the meaning of construction work under § 240(1), and that his work at the time of the incident was necessary and incidental to the alteration work occurring at the site. The court reiterated that the purpose of the Labor Law was to protect workers even while performing duties ancillary to the acts enumerated by the statute.

PRACTICE NOTE: A defense premised upon a plaintiff being engaged in an unprotected act must be certain to establish a clear delineation of work that is necessary and incidental to a protected activity, and that which is not sufficiently related to statutorily protected construction work.

TOPICS: *Inadmissible hearsay, Insufficient safety devices, Sole proximate cause*

DE SOUZA V. HUDSON YARDS CONSTR. II LLC

231 A.D.3d 614
October 24, 2024

The plaintiff was injured when he fell from an unsecured plank he was standing on while stripping concrete forms from a wall inside an elevator shaft. The court affirmed the granting of the plaintiff's motion for summary judgment, finding that the plaintiff established the lack of an overhead attachment point for his self-retracting lifeline, and that the plank upon which he was standing was not secured. The court further rejected the defendants' attempt to introduce an accident report and medical forms in opposition to the plaintiff's motion, finding that the content thereof was unreliable hearsay because the translation of the statements attributed to the plaintiff could not be shown to be provided by a competent, objective interpreter.

PRACTICE NOTE: It is critical to appropriately establish the admissibility of accident reports and medical records by obtaining admissible testimony concerning the process of entering notes, comments and statements into such forms, and ensuring that the translation of statements into English is accompanied by an authorized translator.

TOPICS: *Labor Law § 240(1), Falling object, Gravity-related risk*

MACAULEY V. NEW LINE STRUCTURES & DEV. LLC

2024 NY Slip Op 05284
October 24, 2024

The Appellate Division reversed the lower court and found the plaintiff was entitled to summary judgment on his Labor Law § 240(1) cause of action. The plaintiff was injured when a metal louver panel about four feet by eight feet struck him on the head as he was attempting to remove it. The panel was estimated to weigh 150 to 200 lbs. In support of his position, the plaintiff utilized an expert who opined the panel required securing for purposes of the undertaking and that statutory safety devices could have prevented the accident. The court found this unsecured panel exposed the plaintiff to a gravity-related risk and the fact that he and his co-worker were trying to pry it free does not render § 240(1) inapplicable.

PRACTICE NOTE: The court relied upon the *Wilinski* Analysis to reach its conclusion. An unsecured object that can injure a worker because of its size or weight, even if it falls a de minimis distance, will be found to have violated the Labor Law if not properly secured.

TOPICS: *Labor Law § 240(1), Safety devices*

DEOLEO V. 90 FIFTH OWNER LLC

2024 NY Slip Op 05306
October 29, 2024

The Appellate Division affirmed the lower court's granting of summary judgement to the plaintiff on Labor Law § 240(1). The plaintiff, an employee of a painting subcontractor, was assigned to caulk windows as part of building renovations. The plaintiff claimed there were no ladders available in the supply room and that his supervisor directed him to complete the task however he could. The plaintiff used a bucket placed on top of a convector to reach the top of the window. He was injured when he stepped in a hole while dismounting from the bucket. The plaintiff's supervisor's equivocal statement that he believed that his employer's ladders were in the plaintiff's vicinity was insufficient to raise an issue of fact.

PRACTICE NOTE: To create an issue of fact in opposition to a motion for summary judgment, a defendant must come forward with unequivocal evidence.

TOPICS: *Permanent fixture, Labor Law § 240(1), Falling object*

DELCID V. PARK AVE. CHRISTIAN CHURCH

231 A.D.3d 666
October 31, 2024

The defendant's motion for summary judgment seeking to dismiss the plaintiff's Labor Law §§ 240(1) and 241(6) claims was denied at the trial level and the denial was upheld by the Appellate Division. The plaintiff's counsel was one of the Tradesman Insurance defendants and it is notable that the Appellate Division declined to search the record to award them summary judgment. The plaintiff was injured when a piece of construction material known as WonderBoard, which had been screwed into the lobby wall the day before the accident, fell upon him. The defendant's argument that the WonderBoard was a permanent fixture was unavailing because the case law requires fixtures to be part of the pre-existing structure before work began.

PRACTICE NOTE: An object that is affixed to a wall and falls will be sufficient to establish a violation of the Labor Law.

TOPICS: *Recalcitrant worker defense, Scaffold, Labor Law § 240(1)*

RUIZ V. BOP 245 PARK LLC

2024 NY Slip Op 05419
October 31, 2024

The Appellate Division reversed the lower court and granted the plaintiff's motion for summary judgment on Labor Law § 240(1). The plaintiff submitted undisputed evidence that he fell off a scaffold which lacked guardrails that would have prevented his fall after the scaffold moved while he was standing atop it. The defendants' attempt at establishing that the plaintiff was a recalcitrant worker was unavailing, even though the defendants submitted an affidavit from the plaintiff's employer that there was a standing order for its employees to use only baker scaffolds with safety railings, that there were safety railings available at the worksite, and that they would be provided upon request. The affidavit also acknowledged that the supervisor for the employer was not present on the project on the day of the accident and he offered no basis to find that he personally knew sufficient guardrails were present at the site.

PRACTICE NOTE: This case demonstrates how difficult it is for the defendant to establish the recalcitrant worker defense and how the court continues to narrow the availability of this defense.

TOPICS: *Recalcitrant worker defense, Falling object, Ladder, Gravity-related risk*

JARA-SALAZAR V. 250 PARK LLC

231 A.D.3d 674
October 31, 2024

The Appellate Division reversed the Supreme Court's denial of the plaintiff's motion for summary judgment on Labor Law § 240(1). The plaintiff was working from an unsecured A-frame ladder at the time of the accident. The plaintiff's task was to remove a main sprinkler pipe that hung from the ceiling. His accident occurred when the unsecured pipe fell and struck the A-frame ladder, causing it and the plaintiff to fall. The defendants argued that the plaintiff was a recalcitrant worker because the plaintiff's foreman gave him safety instructions concerning how to cut the pipe and where to place his ladder so it would not be hit by the falling pipe. The court found that the plaintiff could not be a recalcitrant worker or the sole proximate cause of his accident because a safety device failed. Here, the pipe was not properly secured and neither was the ladder.

PRACTICE NOTE: This case is a further example of the weakness of the recalcitrant worker defense. The defendant must first establish compliance with the Labor Law and that it provided adequate safety devices to provide proper protection before the court will consider worker recalcitrance.

TOPICS: *Issue of fact, Labor Law § 240(1), Premature motion*

GUZMAN-SASQUISILI V. HARLEM URBAN DEV. CORP.

231 A.D.3d 685
October 31, 2024

The Appellate Division reversed the Supreme Court's denial of the plaintiff's motion for summary judgment on Labor Law § 240(1). The plaintiff, a carpenter, was injured when he was retrieving wooden planks. To do so, he had to cross over an uncovered beam pocket measuring three feet wide and three feet deep. His accident occurred when he tripped over metal debris and fell into the beam pocket. Notably, at the time of the accident the plaintiff was wearing a harness with Yo-Yo but there was no place for him to tie off. In granting the plaintiff's motion, the court noted it was not premature because the defendants failed to establish that the plaintiff was in possession of any evidence that was within his exclusive knowledge. The court also found the defendants failed to create an issue of fact utilizing the notice to admit they served with photos of the accident scene because the notice failed to establish that the photos fairly and accurately depict how the accident scene looked on the day of the accident.

PRACTICE NOTE: Defendants have the burden to establish that they provided adequate safety devices so as to provide proper protection to the plaintiff-worker in order for the court to consider dismissal of Labor Law claims.

TOPICS: *Tripping hazard, Scattered debris*

CIOPPA V. ESRT 112 W. 34THST., L.P.

219 N.Y.S.3d 667
November 7, 2024

In this matter, the plaintiff fell after stepping into an opening in a piece of plywood that was covering a hole in an unfinished and uneven concrete floor. The Appellate Court affirmed the lower court's decision to deny the plaintiff's motion for partial summary judgment and grant the defendants' motion, as the plaintiff himself admitted in his deposition testimony that the plywood board had been placed, in response to his own complaints, on the uneven concrete floor as a deliberate protective measure and had not been discarded from a previous stage of work. Therefore, the plywood board did not constitute "dirt," "debris," "scattered tools and materials," or a "sharp projection" as required by Industrial Code § 1.7(e)(2) and, therefore as a matter of law, did not not fall within the scope of the Labor Law.

PRACTICE NOTE: Not every tripping hazard on a construction site may fall within the scope of Labor Law § 241(6).

TOPICS: *Labor Law § 241(6), Failure to oppose Industrial Code violation, Burden of proof*

ANTONIO V. VS 125, LLC

219 N.Y.S.3d 678
November 12, 2024

The plaintiff was using a chipping gun on concrete when it became stuck in the wall. After being directed to continue using it, she wiggled the chipping gun in an attempt to pull it loose. At that point, it spun around and allegedly caused her injury. The defendants moved for summary judgment to dismiss the plaintiff's Labor Law § 241(6) claim, with testimony that the chipping gun had worked fine immediately prior and subsequent to the plaintiff's accident, as well as an expert opinion that the chipping gun was in good condition and working order. The plaintiff cross-moved for summary judgment on violations of Industrial Code §§ 23-1.5(c) and 23-9.2(a) and submitted an affidavit. In affirming its denial of the defendants' motion for summary judgment, the Appellate Court stated that even if the defendants had met their burden for summary judgment, the plaintiff's testimony regarding the condition of the chipping gun was sufficient to raise a triable issue of fact. The Appellate Court modified the lower court's order to dismiss the plaintiff's Labor Law § 241(6) claim as premised on any other section of the Industrial Code than §§ 1.5(c) and 23-9.2(a) as the plaintiff did not submit arguments in support of additional ones pled.

PRACTICE NOTE: Conflicting testimony can create a triable issue of fact which is ultimately up to the jury to decide.

TOPICS: *Covered worker, Labor Law § 241, Integral to construction work*

KALAF V. PSEG LONG IS. LLC

220 N.Y.S.3d 26
November 14, 2024

The plaintiff was injured when he was clearing ice from a machine used to backfill holes previously left from the removal of wooden utility poles. In affirming the lower court's denial of the defendants' motion for summary judgment to dismiss the plaintiff's claims of common law negligence, the Appellate Court upheld that there was a triable issue of fact as to whether the plaintiff unintentionally stuck his hand in the machine when he slipped on ice. Additionally, the plaintiff argued in opposition that backfilling of the holes was excavation under Labor Law § 241 as per 12 NYCRR § 23-1.4(19) and was an integral part of the overall project, and took place at a location where he was readying a machine for such work. The Appellate Court held that by failing to establish the plaintiff's work and the location were not covered by the Labor Law, the defendants failed to establish that the plaintiff was not a covered worker and, therefore, their motion to dismiss the plaintiff's Labor Law § 241(6) claim was properly denied.

PRACTICE NOTE: Covered work under Labor Law § 241(6) includes construction, demolition and excavation.

TOPICS: *Labor Law § 200, Actual notice, Conditional contractual indemnification*

TRAVALJA V. 135 W. 52ND ST. OWNER, LLC

232 A.D.3d 503
November 19, 2024

While inspecting a drainage issue near the edge of a roof, the decedent fell 46 floors to his death. The plaintiff was granted summary judgment on Labor Law § 240(1) as an employee of the decedent who witnessed the accident testified that although he had been wearing a safety harness, there were no proper tie offs, lifelines, or rope grabs on that part of the roof. In opposition, the defendants argued that there were signs posted to tie off when on the roof. The employee further testified that the signs were not posted until after the accident. Additionally, an employee of the project manager testified that they were aware of the dangerous condition regarding the potential falling hazard on the roof. As the project manager-defendants failed to establish that they lacked notice of the lack of appropriate tie offs, their motion for summary judgment dismissing the plaintiff's Labor Law § 200 and common law negligence claims, as well as for contractual indemnification from the decedent's employer, were denied. The Appellate Division affirmed the lower court's finding of negligence. However, the court modified the decision to grant the project manager-defendants conditional

contractual indemnification to the extent that the accident was not caused by their own negligence.

PRACTICE NOTE: Without a determination of negligence, a finding for indemnity is premature. However, contractual indemnification can be conditioned to the extent that the indemnitee is not found negligent.

TOPICS: *Labor Law § 240(1), Falling object*

FROMEL V. W2005/HINES W. FIFTY-THIRD REALTY, LLC

221 N.Y.S.3d 508
November 21, 2024

The plaintiff was injured when a four inch by four inch formwork support beam hit him, causing him to fall. The plaintiff moved for summary judgment on his Labor Law § 240(1) claim which the lower court denied on the basis that there was no evidence that the formwork support beam was an object that required securing or that the support beam had fallen from the inadequacy of a safety device. The Appellate Court granted the plaintiff's appeal reversing the lower court, finding that a plaintiff does not have to observe whether the object in question was dropped or fell or show the exact circumstances in which a lack of protective device proximately caused his injuries in order to be entitled to summary judgment on Labor Law § 240(1).

PRACTICE NOTE: In a falling object case, the court will not require a plaintiff to establish the exact circumstances giving rise to the accident.

TOPICS: *Labor Law § 240(1), Elevation-related risk, Door frame, Window, Top*

CICALE V. HINES 1045 AVE. OF THE AMS. INVS. LLC

220 N.Y.S.3d 302
November 21, 2024

The plaintiff was injured while trying to level a door buck when a two- to-six-inch metal top track of a door frame fell approximately two- to four-inches onto his hand. According to the plaintiff, the door frame shifted downwards, causing his hand to be immobilized. The First Department found the defendants failed to show that the accident did not arise from an elevation-related risk contemplated by the statute.

PRACTICE NOTE: The court here continues to liberally apply the *Runner* standard in that the object which struck the plaintiff only moved two to four inches.

TOPICS: *Labor Law § 240(1), Proximate cause*

CAMINITI V. EXTELL W. 57TH ST. LLC

2024 NY Slip Op 05825
November 21, 2024

In this matter, an electrician was on a ladder installing wires and cabling when he suffered chest pains. When a co-worker went over to help, the electrician collapsed onto him. The co-worker noticed at the time that the ladder was upright. The electrician was taken to the hospital where he was diagnosed with an aortic tear and underwent surgery. He passed away approximately 15 days later due to complications from the surgery. The lower court found that the plaintiff had made a rebuttable prima facie showing of judgment on the Labor Law § 240(1) claim by presenting a statement the decedent had made to his spouse that while he was working on the ladder, it started to move. While trying to stabilize the ladder, it tipped and struck him in the chest. However, there was no reference to the ladder tipping or striking him in the decedent's medical records. The First Department found that the violation of Labor Law § 240(1) did not proximately cause the plaintiff's aortic dissection.

PRACTICE NOTE: Labor Law § 240 will be found when the plaintiff establishes a violation of the statute and that such violation was the proximate cause of the plaintiff's specific injuries.

TOPICS: *Labor Law § 240(1), Unauthorized areas, Comparative negligence*

DOLCIMASCOLO V. 701 7TH PROP. OWNER, LLC

232 A.D.3d 538
November 26, 2024

The plaintiff was injured when struck by a steel beam that was inadvertently caught on a crane hook during hoisting, causing it to slide off the truck where it had been placed. The First Department found that the defendants' claim that the plaintiff was the sole proximate cause of his accident was meritless. There was no evidence that the plaintiff was ever directed not to be in the area where he was injured and, even if there was, the defendants failed to show that they were free of any statutory violations. If the plaintiff had been in an unauthorized area it would have amounted only to comparative negligence, which is not a defense to a Labor Law § 240(1) claim.

PRACTICE NOTE: In asserting the sole proximate cause defense, the defendant must establish compliance with the Labor Law in providing adequate safety devices so as to provide proper protection, and establish that the plaintiff knew he was to use such devices and for no good reason failed to use them, thereby causing his injuries.

TOPICS: *Labor Law § 240(1), Ladder, Sole proximate cause*

LLACH V. L.I.C.C. REALTY CO.

221 N.Y.S.3d 73
November 26, 2024

In this matter, a construction worker stood on an A-frame ladder while installing a damper into a ceiling hole. When the ladder shifted, he fell. It was undisputed that the ladder did not provide proper protection due to the height differential between the ladder and ceiling. The First Department found that the plaintiff had established his entitlement to partial summary judgment on Labor Law § 240(1) as the record presented no issues of fact as to whether his conduct was the sole proximate cause of his injuries. The plaintiff testified that his supervisor had instructed him to quickly complete the project because of a looming building inspection. Against this imposed deadline, the plaintiff looked in various places for a ladder more suitable to the task, but could not find a taller ladder that was typically stored in the building's workshop. Because the taller ladder was not readily available, the plaintiff was compelled to use the shorter ladder. As such, the defendants failed to provide an adequate safety device so as to provide proper protection as per Labor Law § 240(1).

PRACTICE NOTE: This case is an example of a classic Labor Law scenario. Where an A-frame ladder wobbles, courts typically will impose liability upon the defendants.

TOPICS: *Labor Law § 200, Common law negligence, Contractual indemnification, Triggering language, Definition of terms, Plaintiff's actions imputed to employer, Signage, Foreseeable risk*

VARGAS V. 622 THIRD AVE. CO. LLC

2024 NY Slip Op 06285
December 12, 2024

The plaintiff, a floor installer, slipped on a puddle of water on a stairway during a renovation project. The lower court properly denied the general contractor's summary judgment motion based upon issues of fact as to whether it exercised control over the means and methods of the plaintiff's work. The plaintiff presented evidence that he was required to report to an employee of the general contractor, that such employee was aware of the wet condition on that stairway, and that the plaintiff had complained about the condition prior to the accident. The issues of fact regarding the negligence of the general contractor prevented the trigger of indemnification obligations in the subcontractor agreement. The general contractor was not entitled to summary judgment on contractual indemnification.

PRACTICE NOTE: If a general contractor supervises, directs or controls the means and methods of a plaintiff's work, it will likely be exposed to Labor Law § 200 liability.

TOPICS: *Labor Law § 240(1), Prima facie case, Gravity-related risk*

HARJO-CODD V. TISHMAN CONSTR. CORP.

2024 NY Slip Op 06302
December 17, 2024

The plaintiff was injured when the bucket lift she rode in to affix plastic sheets to façade scaffolding at the fourth floor level of a building snagged on the scaffolding then popped free from the scaffolding, ejecting the plaintiff. The building was leased by the defendants, a museum. The plaintiff wore a harness and lanyard that had a retractable protective device that did not operate as designed to keep her inside the bucket. The plaintiff fell approximately 20 feet from the bucket before the lanyard arrested her fall, and allegedly sustained gravity-related injuries. The court found that the evidence established prima facie that the plaintiff's accident arose from a gravity-related risk which the defendants failed to adequately protect her from.

PRACTICE NOTE: If a defendant owner or general contractor fails to provide adequate safety devices so as to provide the plaintiff with proper protection for his or her work, there will be Labor Law exposure.

TOPICS: *Labor Law § 240(1), Establishing entitlement to summary judgment*

GKOUMAS V. LEWIS CONSTR. & ARCHITECTURAL MILL WORK

222 N.Y.S.3d 443
December 31, 2024

The First Department reversed the granting of the plaintiff's summary judgment motion on his Labor Law § 240(1) claim. The plaintiff claimed he was injured in an unwitnessed accident when the ladder he was on shifted, causing him to fall to the ground. In support of his motion for summary judgment, the plaintiff submitted the transcript of his supervisor, who testified that the plaintiff called right after his accident and did not say he was injured from a fall from a ladder. Rather, the plaintiff told his supervisor that he cut his hand because his tool slipped. The court held that the differing accounts called the plaintiff's credibility into question regarding how the accident occurred.

PRACTICE NOTE: A question of fact can be raised if the plaintiff has provided a contradictory account of the accident that calls his/her credibility into question.

TOPICS: *Labor Law § 240(1), Sole proximate cause*

AMARO V. NEW YORK CITY SCH. CNSTR. AUTH.

229 A.D.3d 746
July 31, 2024

The Second Department reversed and granted the plaintiff's motion for summary judgment pursuant to Labor Law § 240(1) where the plaintiff was allegedly injured when a scaffold plank broke, causing him to fall. The plaintiff had disconnected his lanyard prior to the accident because he was carrying material and was unable to unhook and re-hook as he walked along the scaffolding towards a co-worker. The court noted that the plaintiff may be the sole proximate cause of the accident if the defense can establish that he "(1) had adequate safety devices available, (2) knew both that the safety devices were available and that [he or she was] expected to use them, (3) chose for no good reason not to do so, and (4) would not have been injured had [he or she] not made that choice." The plaintiff established his entitlement to summary judgment by establishing that Labor Law § 240(1) was violated and that the violation was a proximate cause of his injuries. As such, his comparative negligence could not be a defense. The court found that the defense had failed to raise a triable issue of fact and failed to present evidence that the "plaintiff was recalcitrant in the sense that he was instructed to tie and untie his lanyard to traverse the scaffold and refused to do so."

PRACTICE NOTE: To support a sole proximate cause defense it is critical to provide evidence of an instruction to the plaintiff advising against the action taken.

TOPICS: *Labor Law §§ 240(1) and 241(6), Sole proximate cause*

CHIARELLA V. NEW YORK STATE THRUWAY AUTH.

230 A.D.3d 463
August 7, 2024

The plaintiff allegedly sustained personal injuries when he fell while descending from an upper walkway to a lower walkway via a wooden pallet installed by a co-worker. As the plaintiff stepped onto the wooden pallet, the handrail swung and the wooden pallet fell, causing him to fall. The Second Department reversed the Court of Claims and granted the plaintiff summary judgment on both the Labor Law § 240 (1) and § 241 (6) causes of action. The Labor Law § 241(6) claim was predicated on violations of Industrial Code 12 NYCRR § 23-1.7(f) (failing to provide ladders or other access from walkway levels) and § 23-1.15(a) (failing to provide securely supported safety railings). The court held that the defense failed to raise a triable issue of fact, despite asserting the sole proximate cause defense, because it failed to submit sufficient evidence "as to whether a proper ladder was readily available to the claimant or whether the claimant had been instructed to use a ladder rather than the wooden pallet installed between the walkway levels."

PRACTICE NOTE: To support a sole proximate cause defense, it is critical to provide evidence of an instruction to the plaintiff advising against the action taken.

TOPICS: *Labor Law § 240(1), Establishing entitlement to summary judgment*

INJAI V. CIRCLE F 2243 JACKSON (DE), LLC

230 A.D.3d 1122
September 11, 2024

The Second Department affirmed the denial of the plaintiff's motion for summary judgment as to both the Labor Law §§ 240(1) and 241(6) claims, for which he was the sole witness to an alleged fall from a ladder. The Labor Law § 241(6) cause of action was predicated upon a violation of Industrial Code 12 NYCRR § 23-1.21(b)(4)(ii), which provides that all ladder footings shall be firm, and slippery or insecure surfaces or objects shall not be used as ladder footings. The plaintiff testified that a wooden ladder he was using wobbled, causing him to fall. The plaintiff admitted he had used the ladder 20 to 25 times before the accident without any prior issues. In opposition, the defendant submitted an expert affidavit that opined the ladder was constructed and secured within OSHA safety standards. The court noted that "[w]here a plaintiff is the sole witness to the accident and his or her credibility has been placed in issue, the granting of summary judgment on the issue of liability in favor of the plaintiff on a Labor Law § 240 (1) cause of action is inappropriate." The court further found that the plaintiff's evidentiary submissions and the evidence submitted in opposition "raised triable issues of fact regarding how the accident occurred, whether the accident could have occurred in the manner the plaintiff described, and whether the ladder was secured."

PRACTICE NOTE: Where the plaintiff is the sole witness to an accident, a motion for summary judgment can be overcome by placing the plaintiff's credibility at issue and disputing the allegations.

TOPICS: *Labor Law § 240(1), De minimis height*

DAVILA V. CITY OF NEW YORK

232 A.D.3d 580
November 6, 2024

The Second Department reversed the dismissal of the plaintiff's Labor Law § 240(1) claim and granted summary judgment to the plaintiff as against the general contractor defendant. The plaintiff alleged a violation of Labor Law § 240(1) as the result of being struck by a duct lift that fell from an unsteady ramp. The court noted that, although the alleged elevation differential was only 10 to 12 inches, it was not de minimis because of the weight and amount of force the 400-pound duct lift could generate. The court stated that the "single decisive question is whether the plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential." The court found that the plaintiff had established his entitlement to summary judgment by establishing the defendants failed to provide an appropriate safety device (a secured ramp) to protect against the elevation-related hazard while maneuvering the duct lift over the ramp. The court also affirmed the dismissal of the cause of action alleging a violation of Labor Law § 241(6) because the defendant sufficiently demonstrated "that no specific safety standard under 12 NYCRR § 23-1.22 (b) was violated."

PRACTICE NOTE: Even a minimal height differential can provide the basis for a Labor Law § 240(1) claim.

TOPICS: *Contractual indemnification, Additional insured coverage*

S. DONADIC, INC. V. UTICA MUT. INS. CO.

230 A.D.3d 606
August 14, 2024

The underlying action involved a claim by an employee of subcontractor Apollo Electric who alleged that he was injured while walking on a plank that had been laid over newly poured concrete. Utica Mutual Ins. provided a defense to the project's general contractor, S. Donadic, Inc. in the underlying action, but disclaimed coverage after the court in the underlying action dismissed a third-party cause of action for contractual indemnification asserted by S. Donadic against Apollo upon a determination that there was no evidence that the alleged accident was caused by any negligent act or omission of Apollo. In its contract with S. Donadic, Apollo agreed to obtain additional insured coverage for the general contractor. However, the additional insured endorsement in Apollo's policy provided that an entity qualified as an additional insured only "[t]o the extent that such additional insured is held liable for your acts or omissions arising out of and in the course of ongoing operations performed by you or your subcontractors for such additional insured." S. Donadic commended an action seeking a declaratory judgment that Utica Mutual Ins. was obligated to defend and indemnify it, and Utica Mutual cross-moved for summary judgment declaring that it had no obligation to defend, indemnify or provide additional insured coverage to S. Donadic in connection with the underlying action. The lower court denied the plaintiff's motion for summary judgment on the complaint and granted the defendant's cross-motion for summary judgment, declaring that the defendant has no obligation to defend, indemnify or provide additional insured coverage to the plaintiff in connection with the underlying action. The Second Department affirmed and held that, contrary to the plaintiff's contention, the language of the additional insured endorsement covered only S. Donadic's vicarious liability for the acts of Apollo and, because the court in the underlying action determined that the worker's alleged accident was not caused by any negligent act or omission of Apollo, Apollo's summary judgment motion was properly granted. The Second Department also affirmed that the lower court properly declared that the defendant had no obligation to defend, indemnify or provide additional insured coverage to the general contractor.

PRACTICE NOTE: The key here was the specific language in the additional insured endorsement that required any additional insured to be held liable for the policy holder's acts or omissions arising out of and in the course of ongoing operations for the additional insured coverage to be triggered.

TOPICS: *Labor Law § 241(6), Industrial Code, Vertical passageways, General Obligations Law § 5-322.1*

TITOV V. V&M CHELSEA PROP., LLC

230 A.D.3d 614
August 14, 2024

The court properly granted the defendant's motion for summary judgment as to the plaintiff's Labor Law § 241 (6) cause of action, predicated upon violations of Industrial Code 12 NYCRR §§ 23-1.7(e) and 23-1.7(f). The defendant established that § 23-1.7(e)(1), which protects workers from tripping hazards, was inapplicable as the plaintiff's accident resulted from a slipping hazard, and § 23-1.7(e)(2), which applies to "working areas," was inapplicable because the staircase where the accident happened was a "passageway" and not a working area at the time the accident occurred. Additionally, the defendant established that § 23-1.7(f), which provides that "[s]tairways, ramps or runways shall be provided as the means of access to working levels above or below ground," was not violated. The plaintiff's Labor Law § 200 and common law negligence claims were not dismissed since the defendant did not present evidence as to when the stairs were last cleaned or inspected and failed to establish that they lacked constructive notice of the alleged condition. The Second Department also upheld the dismissal of the contractual indemnification claims asserted in the third-party complaint because the indemnification clause in the subcontractor agreement at issue contained no language limiting the subcontractor's obligation to "the fullest extent permitted by law" or to the subcontractor's negligence, which violated General Obligations Law § 5-322.1. An indemnification provision which authorizes indemnification for the general contractor's own negligence is void as against public policy and unenforceable.

PRACTICE NOTE: In a Labor Law § 241(6) claim, a plaintiff must plead and prove a violation of a sufficiently specific Industrial Code provision.

TOPICS: *Labor Law § 200, Labor Law § 241(6), Labor Law § 240(1), Homeowners exemption, Direct and control, Architect*

PUNINA V. CANADAY

230 A.D.3d 706
August 21, 2024

The plaintiff was working at an owner-occupied single-family dwelling and fell from a 16-foot ladder positioned on top of a scaffold, both of which were provided by his employer and had been set up at his employer's direction. The court upheld the lower court's dismissal of the plaintiff's common law negligence and Labor Law §§ 200, 241(6) and 240(1) causes of action asserted against the defendant-owners and defendants' architect. None of the defendants supervised or controlled the methods or the manner of the plaintiff's work, and the plaintiff testified that his employer provided all materials and equipment for the job and that he received no instructions from the defendants regarding the work to be performed. The defendant-architect also established that it was not a general contractor or an agent of the owners or general contractor regarding the plaintiff's work. Additionally, all defendants established entitlement to summary judgment on the common law and Labor Law § 200 claims because the plaintiff's employer was solely responsible for supervising the plaintiff's work and provided the plaintiff with the equipment in use when the accident occurred.

PRACTICE NOTE: To fall within the homeowners exemption, the homeowner must show they did not direct or control the work being performed. Further, general supervisory authority is insufficient to hold a homeowner or contractor liable under Labor Law § 200 or common law negligence. Liability may only be imposed if the homeowner or contractor had authority to supervise and control the work being performed.

TOPICS: *Labor Law § 240(1), Labor Law § 241(6), Alteration, Enumerated activity*

MIRANDA V. 1320 ENTERTAINMENT, INC.

230 A.D.3d 755
August 28, 2024

The plaintiff was using a woodworking machine called an edge bender when she was struck by a piece of lumber that flew from a table saw being operated by a co-worker. The plaintiff alleged that Labor Law §§ 240(1) and 241(6) were violated. The Second Department overturned the trial court's order and dismissed these causes of action. The record demonstrated that the plaintiff's work at the time of her injury, which involved applying edges on the sides of cabinets, did not involve "construction, excavation or demolition work" within the meaning of Labor Law § 241(6) or "erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure" within the meaning of Labor Law § 240(1).

PRACTICE NOTE: Labor Law § 240(1) only applies to activities considered as erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure. Labor Law § 241(6) only applies when a worker is performing construction, excavation or demolition work.

TOPICS: *Labor Law § 240(1), Enumerated activity, Covered worker, Statutory agent*

RAMIREZ V. PACE UNIV.

230 A.D.3d 811
August 28, 2024

The plaintiff fell from a scaffold platform during a construction project and was injured. The property was owned by Pace University, which contracted with NYCAN Builders to manage the project. The plaintiff established he was exposed to an elevation-related hazard within the ambit of Labor Law § 240(1) and that the unsecured scaffold platform was the proximate cause of his injuries, which entitled him to summary judgment on his Labor Law § 240(1) claim. Additionally, NYCAN was liable under § 240(1) as a statutory agent, as it had the ability to control the activity that brought about the injury.

PRACTICE NOTE: The court also held that the plaintiff's motion was not premature because the defendants' contentions that depositions of more witnesses might lead to relevant information was speculative and the defendants also failed to show that they were diligent in pursuing the additional discovery.

TOPICS: *Labor Law § 240(1), Lack of nexus between defendant owner and cable technician's work*

ACEVEDO-ESPINOSA V. RH 250 SHERMAN AVE., LLC

230 A.D.3d 1088
September 11, 2024

The plaintiff was injured when he fell from a ladder while installing cable services for a tenant within property owned and managed by the defendants. The Second Department upheld the lower court's decision that granted the defendants summary judgment on the plaintiff's Labor Law § 240(1) claim, agreeing that the defendants established there was an insufficient nexus between them and the work being performed by the plaintiff when he was injured.

PRACTICE NOTE: In its decision, the court relied on the case of *Abbatiello v. Lancaster Studio Assoc.*, 3 N.Y.3d 46 (2004), which set precedent on this issue in the First Department.

TOPICS: *Construction manager, Homeowners exemption, Labor Law §§ 240(1) and 241(6)*

ARGUETA V. HALL & WRIGHT, LLC.

219 N.Y.S.3d 110
September 18, 2024

The plaintiff, a carpenter, fell from the roof of a single-family residence. He sued the owner, the general contractor, and the construction manager. The Appellate Division affirmed an order granting summary judgment in favor of the construction manager based on evidence that the construction manager did not exercise supervisory control or authority over the work done by the plaintiff. The defendant established that, while it coordinated and monitored the progress of the work, it was the general contractor, which hired the subcontractors and controlled the means and methods of the work. The construction manager did not supervise the means and methods of the subcontractors' work. The court also dismissed claims against the property owner based on similar arguments, plus the fact that the home was a single-family residence.

PRACTICE NOTE: A construction manager is a project administrator that acts as an owners' agent similar to an architect. They do not enter into contracts with subcontractors, or control the means and methods of the work. Aware of this standard, many general contractors call themselves construction managers, but the misnomer typically falls by the wayside during discovery.

SECOND DEPARTMENT

TOPICS: *Architect, Labor Law §§ 240(1) and 241(6)*

CHAVARRIA V. BRUCE NAGEL & PARTNERS ARCHITECTS, P.C.

220 N.Y.S.3d 57
September 15, 2024

The plaintiff was injured when he fell off a mechanical lift. The plaintiff's employer was the general contractor hired by the homeowners. The homeowners hired the architecture firm and had an option under the contract with the architect to provide construction administration services on a regular or ad hoc basis, as requested by the homeowners. Reversing a lower court order denying summary judgment under the Labor Law in favor of the architects, the Appellate Court found that the architects did not have the authority, during the time period at issue, to direct or control the plaintiff's injury-producing work, a fact recognized in the homeowners' contract with the architect.

PRACTICE NOTE: An architect which did not control or supervise a laborer's means and methods of work is not a proper Labor Law defendant. Mere observations of the project site do not give rise to a claim of control or supervision.

TOPIC: *Falling object, Labor Law § 241(6), 12 NYCRR § 23-1.7(e)(2), 12 NYCRR § 23-2.1(a)(1)*

SHEWPRASAD V. KSSK CONSTRUCTION GROUP, LLC.

219 N.Y.S.3d 395
October 2, 2024

The plaintiff was injured when a cluster of steel railings that had been stacked vertically against one another fell on him at a construction site. The Appellate Division upheld a lower court order dismissing the plaintiff's claims under Labor Law § 241(6). No violation of 12 NYCRR § 23-1.7 (e)(2), pertaining to tripping hazards, was applicable to the circumstances of the plaintiff's injuries. 12 NYCRR § 23-2.1 (a) (1) does not apply to material piles not located in a passageway, walkway, stairway or other thoroughfare.

PRACTICE NOTE: When reviewing a bill of particulars with myriad claims of violation of the New York Industrial Code, analyze each section of the Industrial Code against deposition testimony and discovery materials to ensure that the allegations support the distinct claims made under each subsection identified by the plaintiff.

TOPICS: *Labor Law § 240(1), Gravity-related risk, Insurance procurement*

ROGERS V. PETER SCALAMANDRE & SONS, INC.

231 A.D.3d 1174
October 30, 2024

While installing louvers near the roof line at a construction site, the plaintiff was injured when the arm of a boom lift holding the construction basket in which he stood suddenly "telescoped in." The lower court granted the plaintiff's motion for summary judgment under Labor Law § 240(1) and denied the general contractor's motion for summary judgment under Labor Law § 241(6). The Appellate Division affirmed the plaintiff's motion under Labor Law § 240(1), finding that although the plaintiff remained in the basket, poor maintenance of the boom caused the plaintiff's elevation-related injuries. The court denied the general contractor's motion to dismiss the plaintiff's claims under Labor Law § 241(6), holding that 12 NYCRR § 23-9.2(a) requires that power-operated equipment be maintained in good repair, and that the general contractor did not establish that it lacked actual notice of a structural defect or unsafe conditions of the boom lift.

PRACTICE NOTE: Proof of a fall is not required to establish a case of liability under Labor Law § 240(1) if the device in question

does not provide proper protection from an elevation-related risk. The party seeking summary judgment dismissing a claim under Labor Law § 241(6) based on actual notice has the affirmative duty to disprove it had such notice of the defect in question.

TOPICS: *Labor Law § 241(6), Safety equipment, Goggles, Proximate cause*

LOPEZ V. KAMCO SERVS., LLC

231 A.D.3d 1142
October 30, 2024

The plaintiff, a mechanic, was engaged in the installation and furnishing of electrical cables. He was allegedly injured when he was struck in the left eye by an electrical cable while attempting to connect the cable to a disconnector while he was not wearing any eye protection. He claimed that no goggles or other eye protection had been provided to him. The defendant failed to establish that Labor Law § 241(6) was inapplicable to the plaintiff's activities as well as eliminating triable issues of fact as to whether the plaintiff was engaged in work that may endanger his eyes, whether approved eye protection was provided, and whether the defendant's failure to require the plaintiff to wear safety goggles was a proximate cause of the alleged injuries. As such, the Appellate Division reversed the Supreme Court's decision granting the defendant's motion for summary judgment dismissing the case.

PRACTICE NOTE: Labor Law § 241(6) imposes a nondelegable duty of reasonable care upon owners and contractors to provide reasonable and adequate protection and safety to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed. As such, to establish liability under this provision of the Labor Law, a plaintiff must establish the violation of an Industrial Code provision which sets forth specific safety standards, and which is applicable under the circumstances of the case. An owner or contractor may be held liable under § 241(6) even if it did not have control of the site or notice of the alleged dangerous condition.

TOPICS: *Labor Law § 241(6), Trip and fall, 12 NYCRR § 23-1.5(c)(3), 12 NYCRR § 23-1.7(e)(2)*

VELASQUEZ V. RS JZ DRIGGS, LLC

221 N.Y.S.3d 210, 232 A.D.3d 700
November 13, 2024

The plaintiff was an ironworker employed by a subcontractor on a construction project. He was injured when a piece of temporary plywood flooring "came up," causing him to fall onto a vertical column of rebar. At the time of the incident, the plaintiff was using a handheld power saw/grinder to remove plywood flooring. The Supreme Court found that the defendants' submissions on summary judgment failed to eliminate triable issues of fact as to whether the alleged defect in the temporary plywood flooring and the presence of an uncapped vertical column of rebar constituted violations of 12 NYCRR § 23-1.5(c)(3) and 12 NYCRR § 23-1.7(e)(2).

PRACTICE NOTE: The Industrial Code requires that the parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris, from scattered tools and materials, and from sharp projections insofar as consistent with the work being performed.

TOPICS: *Labor Law § 240(1), Labor Law § 241(6), Summary judgment*

KHARYSHYN V. WEST END 82, LLC

232 A.D.3d 723
November 13, 2024

The plaintiff was employed by D.R. Prut Corporation, a contractor hired to perform construction work at a property located in Manhattan. The plaintiff allegedly fell from a ladder while performing work at the subject property, ultimately suing the defendant for negligence and violations of the Labor Law. The defendant, the owner of the premises, moved for summary judgment, contending that it was exempt from the provisions of Labor Law §§ 240(1) and 241(6) as the owner of a one-family dwelling and that it did not have actual or constructive notice of any defect. The Supreme Court denied the motion as premature, without prejudice, upon which the defendant appealed. The Appellate Division found that the denial of the motion was proper, as the motion was filed within two months of joinder and before any depositions were conducted.

PRACTICE NOTE: A party opposing summary judgment is entitled to obtain further discovery (i.e. depositions) when it appears that facts supporting the opposing party's position may exist but cannot then be stated.

TOPICS: *Labor Law § 240(1), Ladder, Spoliation of evidence*

YI JIANG PAI V. NELSON SENIOR HOUS. DEV. FUND CORP.

232 A.D.3d 822
November 20, 2024

The plaintiff, an employee of a subcontractor, fell from a ladder while installing a fire sprinkler system at a property owned by one of the defendants. Per the plaintiff, the ladder unexpectedly collapsed. However, the subcontractor testified that the ladder was upright after the fall, but an elbow joint pipe connected to the sprinkler system had become dislodged and that is what may have caused the incident. The elbow pipe, however, was discarded, prompting the plaintiff to seek spoliation sanctions. With respect to Labor Law § 240(1), the Supreme Court found a triable issue of fact regarding whether the ladder was defective or unsecured, precluding summary judgment for the plaintiff. With respect to the spoliation issue, while it was not central and, therefore, did not warrant pleadings being stricken, the Supreme Court found an adverse inference to be an appropriate sanction. The Appellate Division upheld the Supreme Court's rulings.

PRACTICE NOTE: For a plaintiff to establish liability under Labor Law § 240(1), the evidence must show that the ladder or scaffold failed to provide proper protection, as when it collapses, moves, falls, or otherwise fails to support the plaintiff and their materials.

TOPICS: *Labor Law § 240(1), Statutory agent, Fall from height*

MEJIA V. 69 MAMARONECK RD. CORP.

232 A.D.3d 886
November 27, 2024

The plaintiff, a roofer, fell through a chimney opening on a flat roof, sustaining injuries. He sued the property owner, general contractor, and framing contractor for

violations of the Labor Law and common law negligence. The framing contractor, WR Home Builders, LLC, had covered the chimney opening with plywood before the roofers began their work. The Appellate Division determined that WR Home Builders did not create the dangerous condition or have notice of it, and did not have authority to supervise or control the plaintiff's work, so it cannot be found liable under Labor Law § 200 or common law negligence, affirming the Supreme Court's dismissal of all claims against the party. However, the Appellate Division reinstated a prior order that had granted summary judgment as against the owner and general contractor pursuant to Labor Law § 241(6), as it was determined that the Supreme Court improperly vacated the order.

PRACTICE NOTE: An agent must have the authority to control the activity that brings about the injury for them to be liable under Labor Law §§ 240(1) and 241(6).

TOPICS: *Labor Law §§ 240(1) and 241(6), Ladder, Stairs*

JAIMES-GUTIERREZ V. 37 RAYWOOD DR., LLC.

221 N.Y.S.3d 233
December 11, 2024

The plaintiff was standing on pulldown attic stairs, attempting to connect a cable for the security cameras he was installing. While he worked, the stair unit came off its hinges, causing the plaintiff to fall to the floor below. The plaintiff testified that the attic stairs were permanently affixed to the ceiling above and were his only means of access to the attic. This testimony established, prima facie, that the pulldown attic stairs were a safety device within the meaning of Labor Law § 240(1), since they served as the functional equivalent of a ladder at the time of the accident. Accordingly, the court found that when the stair detached from the hinges and caused plaintiff to fall, this was a prima facie violation of Labor Law § 240(1). Further, this evidence established a violation of NYCRR § 23-1.21(b)(1), since the attic stairs could not bear the plaintiff's weight without breaking. Such violation established liability under Labor Law § 241(6). The Second Department reversed the trial court's order denying the plaintiff's motion for summary judgment on liability under Labor Law §§ 240(1) and 241(6).

PRACTICE NOTE: Contractors must be careful to ensure all ladders and/or stairs that provide laborers with the sole means of access to a work area are properly maintained and can bear weight without breakage. As any such means of access will be considered a safety device within the meaning of Labor Law § 240(1), they may subject a contractor to absolute liability under § 240(1) if they fail.

TOPICS: *Labor Law §§ 240(1) and 241(6), Ladder, Gravity-related risk*

WRIGHT V. PENNINGS

2024 NY Slip Op 06233
December 11, 2024

The plaintiff was injured when he was struck by an unsecured 20-foot extension ladder that a co-worker was using to install wiring on the defendant's barn. The plaintiff's co-worker placed the footing of the ladder on a rubber mat that was covered in cow manure and hay, causing it to slide and ultimately fall. The plaintiff demonstrated, prima facie, he was entitled to summary judgment under Labor Law § 240(1) by providing evidence that the ladder was unsecured and allowed to slip and fall forward onto his head. The court reasoned that the protections provided by Labor Law § 240(1) are not limited solely to instances of falling objects being hoisted above, nor was the co-worker's placement of the ladder on the mat of such an extraordinary nature as to sever the causal nexus under Labor Law § 240(1). Further, the evidence presented by the plaintiff established a prima facie violation of NYCRR § 23-1.21(b)(4)(ii), which provides that all ladder footing shall be firm and not placed on slippery surfaces. The cow manure and hay covered mat was a slippery surface under the Industrial Code, such that liability for Labor Law § 241(6) could attach. The Second Department reversed the trial court's order denying the plaintiff's motion for summary judgment on liability under Labor Law § 240(1) and granting the defendant's motion for summary judgment under § 241(6). The plaintiff failed to move for summary judgment on the § 241(6) claim at the trial court level. Accordingly, the Appellate Court declined the plaintiff's invitation to search the record and grant the plaintiff summary judgment on the § 241(6) claim.

PRACTICE NOTE: This decision continues an evolving line of cases that apply Labor Law § 240(1) not just to situations where a plaintiff falls from a ladder, but also where an unsecured ladder which is set up on the same level where a plaintiff is working falls over and strikes the plaintiff. As the scope of gravity-related accidents continues to expand, contractors must be diligent to ensure that ladders are properly secured to avoid situations where they can fall over and strike a worker.

TOPICS: *Labor Law § 240(1), Ladder, Comparative negligence*

KEEN V. TISHMAN CONSTR. CORP OF N.Y.

2024 NY Slip Op 06594
December 24, 2024

The plaintiff alleged she was injured when a "job built" ladder she was using slid away from the concrete wall she was working on, causing her to fall to the ground below. In opposition to the plaintiff's motion for summary judgment, the defendants contended that the plaintiff waived any objection to the admissibility of certain incident reports that they asserted proved a differing version of events that precluded liability under Labor Law § 240(1). The Appellate Division, in affirming the trial court's granting of summary judgment, found that those incident reports only presented evidence of comparative negligence by the plaintiff, which is not a defense to a Labor Law § 240(1) claim. The Second Department affirmed the trial court's order granting the plaintiff's motion for summary judgment on liability under Labor Law § 240(1).

PRACTICE NOTE: This decision upholds the long-standing rule that comparative negligence is not a defense to a Labor Law § 240(1) claim.

TOPICS: *Labor Law §§ 240(1) and 241(6), Homeowners exemption, Supervision and control*

DENNIS V. CERRONE

229 A.D.3d 1116
July 3, 2024

The plaintiff was injured while working as a framing subcontractor on a residential construction project where the defendant-homeowner served as his own general contractor. In addition to owning the property, the defendant co-owned a contracting business. The plaintiff fell through an unguarded hole in the first-floor decking that was cut prior to a basement stairwell being installed. The matter proceeded with a non-jury trial against both the defendant-homeowner and his contracting business. The main issue at trial was whether the defendant served as general contractor in his capacity as the property owner, or if the contracting business he owned served as the general contractor. The evidence at trial showed that that no witnesses testified that the defendant's business had the authority to enforce safety standards or direct or control the work. At the close of proof, the trial judge rendered a verdict in favor of the defendants. On appeal, the Fourth Department upheld the trial court judge's verdict, finding that ample evidence existed to find that the court's decision was reached under fair interpretation of the evidence.

PRACTICE NOTE: In any unique scenario where a homeowner acting as their own general contractor is also a professional contractor, evidence must be introduced to clearly establish that it is the defendant as a private homeowner who holds the authority to enforce safety standards or direct or control the work, and not the professional contracting business.

TOPICS: *Labor Law §§ 240(1) and 241(6)*

ROSS V. NORTHEAST DIVERSIFICATION, INC.

229 A.D.3d 1282
July 26, 2024

The plaintiff was injured while working as a concrete finisher installing sidewalks and pavement at an elementary school owned by the defendant-school district. During the course of performing his job, the plaintiff was caused to slip or trip into an 8- to 12-inch-deep trench cut in the blacktop for the installation of a curb. While an appeal on the summary judgment motion was pending, the court conducted a damages-only trial where a verdict in favor of the plaintiff was rendered. The defendants filed post-trial motions to set aside the verdict. The Fourth Department decided the appeal and found that the plaintiff's Labor Law § 240(1) claim must be dismissed, as his work only involved the demolition and restoration of a sidewalk and therefore Labor Law § 240(1) did not apply. Conversely, the court found that the plaintiff's Labor Law § 241(6) claim should not be dismissed. Upon this finding, the defendants contended they needed a new trial on damages to ensure the jury's verdict was not based on the absolute liability standard imposed pursuant to Labor Law § 240(1). The court denied this request, finding that liability and damages are typically distinct and severable and should be tried separately. Because the plaintiff's liability claims under Labor Law § 241(6) survived summary judgment, there was no need for a new trial on damages. The court further found that the defendants failed to timely object at trial to the plaintiff's use of the strict liability standard of Labor Law § 240(1) in their closing statement. Failure to object at the time of trial meant this issue was not preserved for appeal and the defendants must suffer the consequences of their failure to properly preserve this issue for appeal.

PRACTICE NOTE: Defendants must be diligent at the time of trial to preserve their record for appeal. This is particularly important in the Labor Law context where each cause of action can have a different standard of proof. Accordingly, defendants must be acutely aware of which standard does and does not apply to the facts of their case and be sure to timely object to any misstatement of the legal standard by a plaintiff.

TOPICS: *Contractual indemnification*

LAMARR V. BUFFALO STATE ALUMNI ASSN., INC.

229 A.D.3d 1241
July 26, 2024

The plaintiff was injured while handling wall panels used in an exterior wall system that was being installed. Fourth-party defendant, the manufacturer of the prefabricated wall panels that were being installed by the plaintiff, sued the subcontractor who was installing the exterior wall system seeking a conditional order for contractual indemnification. The subcontractor contended that the manufacturer could not produce a valid, signed indemnification agreement between the parties. The court found that the evidence established that the parties intended to be bound by the terms of the unsigned contract. Specifically, the manufacturer submitted a written quotation that included terms and conditions for indemnification and the subcontractor responded by sending a signed purchase order for the exact amount in the quotation. Additionally, deposition testimony from both parties showed an intent to be bound by the terms and conditions in the quotation. The Fourth Department upheld the trial court order awarding contractual indemnification to the manufacturer.

PRACTICE NOTE: Parties must carefully study the terms and conditions found in unsigned work proposals. Failure to do so and negotiate different terms may unexpectedly bind a party to indemnity provisions that they were otherwise unaware of.

TOPICS: *Sole proximate cause, Safety harness*

BALLARD V. 300 E. BLVD. CANANDAIGUA LLC

230 A.D.3d 1557
September 27, 2024

While working on the roof of a building, the plaintiff stepped on an unsecured plywood sheet and fell to the ground. The plaintiff was not wearing a harness or any type of safety device. The plaintiff moved for summary judgment on his Labor Law §§ 240 (1) and 241 (6) causes of action. The court held that there were triable issues of fact warranting a denial of the plaintiff's motion for summary judgment. The court reasoned that although the plaintiff met his initial burden, the defendants raised a triable issue of fact as to whether the plaintiff's own negligence was the sole proximate cause of his injuries due to his choice not to use available, safe, and appropriate equipment at the time of the accident, which was present at the job site.

PRACTICE NOTE: When defending against § 240(1) claims and asserting a sole proximate cause defense, it is critical to provide evidentiary support for direct instructions being given to the plaintiff and to establish the plaintiff's knowledge of proper safety procedures contrary to his own actions.

TOPICS: *Labor Law § 241(6), 12 NYCRR § 23-1.7(a)(2), 12 NYCRR § 23-2.1(b), Enumerated activity*

ELLS V. CITY OF NIAGARA FALLS

219 N.Y.S.3d 842
October 4, 2024

The plaintiff was injured when a tree that was being cut down by a co-worker fell and struck him. The plaintiff's employer was the general contractor on the defendant's roadway rehabilitation project. The project included the erection of a pedestrian bridge. At the time of the accident, the plaintiff and his co-workers were removing trees to prepare the site for construction of the pedestrian bridge, with the plaintiff assisting in the operation of a woodchipper. The plaintiff moved for summary judgment on the issue of liability with respect to his Labor Law §§ 240(1) and 241(6) causes of action. The court granted the plaintiff's motion. The court reasoned that although trees are not structures and tree removal in and of itself is not an enumerated activity, tree removal performed to facilitate an enumerated activity does come within the ambit of Labor Law § 240(1). Further, the court also held that 12 NYCRR § 23-1.7 (a) (2) was violated because the plaintiff submitted an uncontroverted expert opinion that he was not required to be in the area where the trees were being felled as well as uncontradicted evidence that the area was not sectioned off.

PRACTICE NOTE: Although an activity may not fall in the ambit of an enumerated activity under Labor Law § 240(1), if the activity being performed was ancillary to an enumerated activity, the court can find that the statute is applicable.

TOPICS: *Homeowners exemption, One-family dwelling, Commercial purpose*

DINIERI V. SCHIMMELPENNICK

232 A.D.3d 1211
November 15, 2024

The plaintiff was injured when the scaffolding on which he was standing collapsed while he was working on the construction of an addition to a single-family home owned and occupied by the defendants. The defendants moved for summary judgment on the grounds that the homeowners exemption applied to them. The court agreed, reasoning that it was established that the defendants were the owners of a one-family dwelling where the plaintiff was working, the defendants neither directed nor controlled the plaintiff's work, and that the home had no commercial purpose.

PRACTICE NOTE: The homeowners exemption will not apply if the plaintiff can establish that the dwelling was being used solely for commercial purposes.

TOPICS: *Routine maintenance repairs, Enumerated activity*

VERHOEF V. DEAN

222 N.Y.S.3d 861
December 20, 2024

The plaintiff and his co-worker were replacing rubber flashing around plumbing ventilation pipes on the roof of a concession stand at the defendant's commercial property when the plaintiff fell from the roof and landed on a concrete pad. It was undisputed that the defendant did not supply the plaintiff with any safety devices for the work on the roof. Therefore, the court granted the plaintiff's motion for summary judgment, holding that the proper placement and operation of safety devices would have prevented the incident. The court also held that the plaintiff was engaged in repair work on the roof, which was a protected activity under Labor Law § 240(1).

PRACTICE NOTE: Delineating between routine maintenance and repairs is frequently a close, fact-driven issue and that distinction depends upon whether the item being worked on was inoperable or malfunctioning prior to the commencement of work and whether the work involved the replacement of components damaged by normal wear and tear.

TOPICS: *Spoliation of evidence, Subcontractor liability, Indemnification*

JR. V. SHULTS MGT. GROUP, INC.

2024 NY Slip Op 06460
December 20, 2024

The plaintiff's accident occurred when he tripped on an electrician's pull string that had one end tied to a door handle at a construction site, with the other end left lying on the ground. The pull string had previously been used to hold the door open by having one end tied to the door handle and the other end tied to a post, but the door was closed at the time of the plaintiff's accident. When the plaintiff opened the door, the pull sting clinched around one of his feet, causing him to fall. The plaintiff moved for summary judgment against the subcontractor on the common law negligence cause of action, which the court granted, holding that a subcontractor may be held liable for negligence where the work it performed created a dangerous condition that caused the incident even if it did not possess any authority to supervise and control the plaintiff's work. The court also granted the subcontractor's cross-motion for summary judgment seeking a dismissal of the Labor Law §§ 200 and 241(6) causes of action against it because it did not have authority to supervise the plaintiff's work. Since there was a question of fact regarding the subcontractor's negligence, the court denied its motion seeking a dismissal of the cross-claims for indemnification brought against it by the general contractor. Lastly, the court denied the subcontractor's motions for sanctions against the plaintiff because he did not destroy the evidence. The plaintiff was on the way to the hospital after the subject incident. With respect to the subcontractor's request for sanctions against the general contractor, the court held that it did not destroy the pull string with a culpable state of mind or with the intention of frustrating discovery, and thus the imposition of a sanction was not warranted.

PRACTICE NOTE: Preserve all issues for appeal. In the aforementioned case, the plaintiff abandoned his Labor Law § 241 (6) cause of action against the subcontractors by not opposing those causes of action in the lower court and not addressing same on appeal.

TOPICS: *12 NYCRR § 23-9.2(a), Proximate cause*

BRONGO V. TOWN OF GREECE

2024 NY Slip Op 06439
December 20, 2024

The defendant contracted with the employer of the plaintiff to perform milling and asphalt work on a town road. As part of the project, the plaintiff operated a water truck

used to cool the mill's blades. The plaintiff attempted to fill his water tank, but his hose was torn and the force of the water through the hose caused it to whip around, knocking the plaintiff off a ladder. The defendant moved to dismiss the plaintiff's Labor Law §§ 200 and 241 (6) causes of action. The court granted the defendant's request to dismiss the § 241 (6) cause of action, holding that 12 NYCRR § 23-9.2 (a) was not applicable in the circumstances of the case. The court denied the defendant's request for a dismissal of the § 200 cause of action, finding that triable issues of fact existed with regard to the proximate cause of the accident. Specifically, there were issues of fact regarding whether the equipment that the defendant alleges the plaintiff should have used – an undamaged hose with the appropriate coupling to permit attachment to the rear of the water truck – was readily available at the worksite.

PRACTICE NOTE: Liability under Labor Law § 241(6) will only apply where there is a violation of an Industrial Code provision which is applicable to the facts of that particular matter.

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Theodore W. Ucinski and Kelly A. McGee

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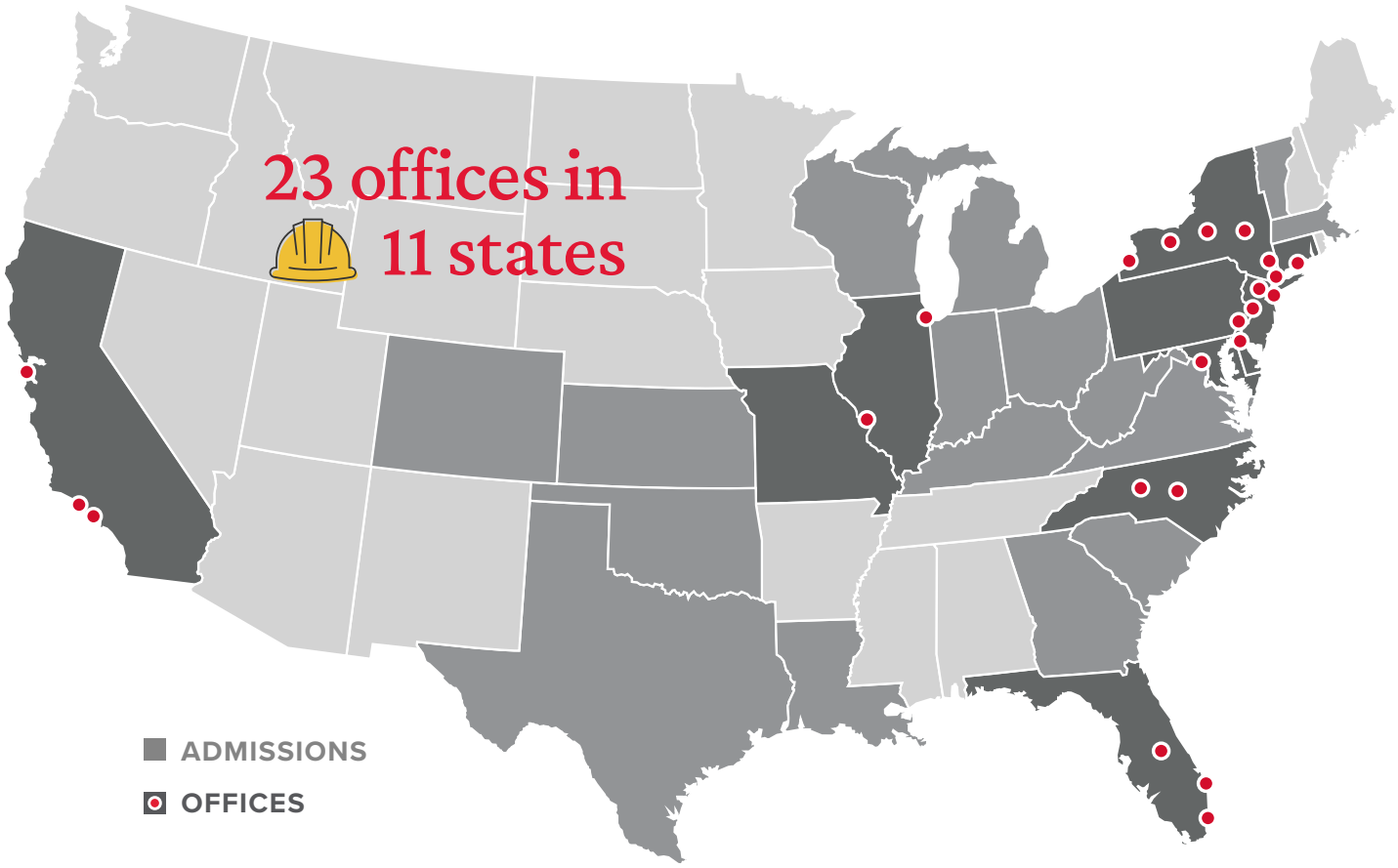

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