

LABOR LAW §§ 200, 240(1) & 241(6) – UPDATE

The *sole proximate cause defense* was raised in numerous cases in all the Appellate Departments during this reporting period. A review of these cases clearly indicates that the application of the defense is extremely fact-specific. In analyzing, investigating and litigating cases where this defense is available, it is extremely important to focus on the following issues:

1. Were the appropriate safety devices “readily available” for the worker’s use;
2. Was there a specific instruction given to the worker to use the appropriate safety devices; and/or
3. Was there evidence of a “standing order” to use the safety device;
4. Did the worker, for no good reason, choose not to use the appropriate safety device?

In developing factors, it is important to note that the evidence must be in admissible form and not speculative hearsay.

The various appellate courts continue to cite to *Runner v. New York Stock Exchange*, 13 N.Y.3d 599 (2009) when considering whether an object that strikes and injures the plaintiff constitutes a “falling object” that requires protection under Labor Law §240(1). The weight of the object and nature and height of the fall are determining factors in this assessment.

Goldberg Segalla Labor Law Litigation Group

EDITOR

Thomas F. Segalla

If you have any questions about any cases reported in this *Update* or questions concerning Labor Law §§200, 240(1) and 241(6) in general, please contact Tom Segalla. (716) 566-5480; or tsegalla@goldbergsegalla.com

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COURT OF APPEALS

1. *Ryan P. St. Louis v. Town of North Elba*, 16 N.Y.3d 411, (2011) (Mar. 31, 2011). In a 4-3 decision, the court affirmed the holding below which held that 12 NYCRR §23-9.4(e) is a predicate for a violation of Labor Law §241(6). The plaintiff was injured when he was struck by a pipe that fell from the jaws of a clamshell bucket of a front-end loader. Even though this device was not listed in §23-9.4(e), the court held that it extended to a front-end loader.

Practice Note: The three dissenting judges noted that the majority was rewriting the regulation to give whatever protection a court thinks should be given and forgot the application of the general/specific analysis.

2. *John McCarthy v. Turner Construction, Inc.*, 2011 N.Y. LEXIS 1754 (June 28, 2011). At issue on this appeal was whether the property owners were entitled to common law indemnification from the general contractor. The court held, based on the facts of this case, that the property owner was not entitled to common law indemnification. In reaching its decision, the court settled an existing conflict among the various appellate departments and noted that "... a party cannot obtain common law indemnification unless it has been held to be vicariously liable without proof of any negligence or actual supervision on their own part." The court further noted that a general contractor's "authority to supervise the work and implement safety procedure is not alone a sufficient basis for requiring common law" There has to be an exercise of "actual supervision."

Practice Note: The mere contractual authority to direct and supervise the work and/or direction over the work is insufficient.

FIRST DEPARTMENT

1. *Cesar Rodriguez v. 3251 Third Avenue LLC*, 80 A.D.3d 434, 914 N.Y.S.2d 142 (1st Dept. 2011) (Jan. 4, 2011). Plaintiff fell off an unsecured ladder while painting office space. Defendant attempted to raise an issue of fact as to whether the plaintiff was employed and whether his presence was authorized on the job site. Neither the plaintiff's credibility nor version of the event was challenged.

Practice Note: The defendant submitted an unsworn statement of plaintiff's employer, which the court held was hearsay.

2. *Balla Tounkara v. Anthony Fernicola*, 80 A.D.3d 470, 914 N.Y.S.2d 161 (1st Dept. 2011) (Jan. 13, 2011). In granting the plaintiff's motion for summary judgment §240(1), the court made the following findings:

- (1) Defendant failed to raise a triable issue of fact on the sole proximate cause defense.
- (2) Even if plaintiff knew that appropriate safety devices were "readily available" (albeit not in the immediate vicinity of the accident), there is no evidence the plaintiff knew he was expected to use the safety devices.

- (3) There were no instructions to use any specified safety devices nor evidence of a “standing order” to use safety devices in performing the task.

Practice Note: As to the §241(6) there was no proof of comparative negligence.

3. *Luis Alvarez v. 1407 Broadway Real Estate LLC*, 80 A.D.3d 524, 915 N.Y.S.2d 263 (1st Dept. 2004) (Jan. 25, 2011). The plaintiff was injured when a scaffold tipped over as he was climbing onto it. The court rejected the sole proximate cause defense. The plaintiff’s expert opined that the plaintiff failed to lock the scaffold wheels; however, that did not cause the scaffold to tip over. In addition, the defendant failed to submit any evidence that plaintiff knew or should have known that he was expected to use a ladder to climb onto the scaffold and “chose for no good reason not to do so.”

Practice Note: The application of the sole proximate cause defense is fact specific and the defendant has burden of proof.

4. *Raymond Smith v. Broadway 110 Developers, LLC*, 80 A.D.3d 490, 914 N.Y.S.2d 167 (1st Dept. 2011) (Jan. 18, 2011). Plaintiff was injured when the suspended scaffold that he was straddling swung toward a building and crushed his chest. The court held that the defendant was entitled to indemnification from the plaintiff’s employer and noted that the defendant was not negligent. With respect to the plaintiff’s §240(1) claim, the court held that there were issues of fact whether the scaffold was inadequate to shield the worker. The §200 and common law negligence causes of action were dismissed and there was no evidence that any of the defendants’ acts or omissions contributed to the accident.

Practice Note: The court noted that the contractual indemnification provision did not violate the §5.322.1(1) since it limited indemnification “to the fullest extent permitted by law.”

5. *Jimmy Auriemma v. Biltmore Theatre, LLC*, 82 A.D.3d 1, 917 N.Y.S.2d 130 (1st Dept. 2011) (Jan. 27, 2011). The court granted the plaintiff’s motion for summary judgment under §240(1). Plaintiff was climbing into a pit utilizing a 10-foot wooden plank that shifted and the plaintiff fell into a pit. Defendant failed to raise an issue of fact as to whether the statute had been violated or whether the plaintiff was the sole proximate cause.

Practice Note: There was also a coverage dispute between two carriers as to who had the defense and indemnification of the defendants.

6. *Curtis Rhodes v. East 81st LLC*, 81 A.D.3d 453, 916 N.Y.S.2d 85 (1st Dept. 2011) (Feb. 8, 2011). Plaintiff was injured when he jumped from a stalled elevator at the direction of an employee of a subcontractor. The court dismissed the plaintiff’s §200 cause of action because the plaintiff was not faced with any immediate danger in the stalled elevator.

Practice Note: The court also found that there were issues of the intent of the parties in drafting the contractual language.

7. *Alberto Torres v. 1148 Bryant Ave., Inc.*, 81 A.D.3d 467, 916 N.Y.S.2d 107 (1st Dept. 2011) (Feb. 10,

2011). At issue on this appeal is whether a default judgment against the defendant should be vacated. The court vacated the default and noted:

- (1) There was excusable neglect.
- (2) There was a meritorious defense to the action.

Practice Note: The court noted that there was an affidavit of merit pointing out the existence of the potentially viable defenses of recalcitrant worker.

8. *Ratha Mak v. Silverstein Properties, Inc.*, 81 A.D.3d 520, 916 N.Y.S.2d 592 (1st Dept. 2011) (Feb. 17, 2011). At issue on this appeal was whether the defendant's motion to dismiss the plaintiff's §200 and common law negligence cause of action was proper. The court affirmed the denial. The court also held that the indemnification provision in the agreement between the defendants was void under General Obligations Law §5-322.1.

Practice Note: Also, the court held that another indemnification provision was not triggered by application of the terms of the agreement.

9. *Antonio A. Simoes v. City of New York*, 81 A.D.3d 514, 917 N.Y.S.2d 163 (1st Dept. 2011) (Feb. 17, 2011). Plaintiff, at the time of the accident, was a flagman directing a manlift into position under the bridge that was being renovated. In an attempt to move the manlift, the plaintiff got into the aerial basket. While another manlift attempted to assist the movement of the first manlift, the first manlift tipped over with the plaintiff in the bucket. The court dismissed the §240(1) claim because the plaintiff was not performing a protected activity (i.e. duties of a flagman did not entail an elevation-related risk). The §241(6) claim was not dismissed because the plaintiff was in a construction area and the Industrial Code regulations were applicable.

Practice Note: Not all activities on a construction site are protected by §240(1).

10. *Edward Heim v. The Trustees of Columbia University*, 81 A.D.3d 507, 917 N.Y.S.2d 159 (1st Dept. 2011) (Feb. 17, 2011). At issue on this appeal was whether an out-of-possession landlord with a right of reentry can be held liable under the Labor Law. In this case the defendant had a right of reentry, but did it have constructive notice of the structural defect that allegedly caused plaintiff's injury?

Practice Note: Not all out of possession landlords are liable under the Labor Law. The lease and activities of the landlord are critical to the analysis.

11. *Joe Mendoza v. Highpoint Associates, IX, LLC*, 83 A.D.3d 1, 919 N.Y.S.2d 129 (1st Dept. 2011) (Mar. 8, 2011). Prior to the plaintiff sustaining injury from a fall on a roof, he was doing a "walk-through" on the roof assessing what repairs were necessary and what materials would be necessary. The court noted that the defendant commended the plaintiff to inspect the roof despite its apparent knowledge that the roof was flimsy and plaintiff was not adequately protected against the dangers of the job. The factors supported a Labor Law §240(1) claim and the court found there were issues of fact to preclude defendant's summary judgment motion. Specifically, the majority of the court, in a divided decision,

held that plaintiff raised triable issues of fact as to whether the condition of the roof exposed the plaintiff to a foreseeable risk of injury from an elevation related hazard. The majority dismissed the plaintiff's §241(6) cause of action.

Practice Note: The dissent held that the defendant had not established that the plaintiff cannot maintain a §240(1) claim.

12. *Orlando Toro v. Plaza Construction Corp.*, 82 A.D.3d 505, 919 N.Y.S.2d 146 (1st Dept. 2011) (Mar. 10, 2011). Plaintiff's face and right eye were injured when a piece of debris shattered as it was being compacted in the garbage truck. At the time of his injury, the plaintiff was employed as a truck driver. The §241(6) claim was dismissed because the plaintiff was not a worker protected under the Labor Law. Section 241(6) is limited to accidents where the work being performed involves "construction excavation or demolition." Plaintiff was not performing one of those activities (i.e. not one of the members of the demolition team).

Practice Note: The plaintiff was performing a separate activity not intended for protection (*Martinez*, 93 N.Y.2d 332 (1999)).

13. *Robert Booth v. Seven World Trade Company*, 82 A.D.3d 499, 918 N.Y.S.2d 428 (1st Dept. 2011) (Mar. 10, 2011). Plaintiff, a construction site superintendent, was employed by a general contractor and was injured when he was completing a bi-weekly walk-through of a building. As he walked on the highest floor of the building, he tripped over an object covered by snow and ice and twisted his back. The court dismissed that part of the plaintiff's §241(6) cause of action that relied on 12 N.Y.C.R.R. 23-1.7(e) (tripping and other hazards) because the proof did not show that the object was debris, tools or even a tripping hazard. With respect to 12 NYCRR 23-1.7(d) (slipping hazards), the court held there was an issue of fact (i.e., whether someone knew of the presence of ice and snow and failed to remove it). Plaintiff's culpability is a defense.

Practice Note: The court held that the storm in progress rule did not apply to 12 NYCRR 23-1.7(d).

14. *Vilson Demaj v. Pelham Realty, LLC*, 82 A.D.3d 531, 918 N.Y.S.2d 459 (1st Dept. 2011) (Mar. 15, 2011). At the time of his injury, the plaintiff was painting and plastering a building and was protected under §240(1). The court rejected the recalcitrant worker and sole proximate cause defenses. Further, the court refused to hold that plaintiff was a special employee of one of the defendants for the purposes of the workers' compensation defense.

Practice Note: Defendant denied that it was the employer before the Workers' Compensation Board.

15. *Eric Berrios v. 735 Avenue of the Americas, LLC*, 82 A.D.3d 552, 919 N.Y.S.2d 16 (1st Dept. 2011) (Mar. 17, 2011). The court held that the I-beams, ribs and plywood, together with concrete, "served conceptually and functionally" as an elevated platform for the purposes of §240(1). The court rejected the sole proximate cause defense because there was no location where a safety harness could be tied off even if it was available. Also, the court noted that even if the plaintiff could be considered a recalcitrant worker, the failure of the defendant to provide proper safety equipment was a more proximate cause.

Practice Note: The attorney's affirmation submitted by the defendant carried no evidentiary weight.

16. *Israel Montalvo v. The New York and Presbyterian Hospital*, 82 A.D.3d 580, 919 N.Y.S.2d 18 (1st Dept. 2011) (Mar. 22, 2011). Plaintiff, at the time of his injury, was replacing a float and rod component in a condensate pump. As he was retrieving the broken-off component, the plaintiff slipped on a grate and fell into a pit of scalding water. At issue on this appeal was whether the plaintiff was performing routine maintenance. The court held that based on the proof, it could not be determined, as a matter of law, whether the plaintiff was engaged in routine maintenance.

Practice Note: The issue focused on whether the part broke from wear and tear.

17. *Edward Ruane v. The Allen-Stevenson School*, 82 A.D.3d 615, 919 N.Y.S.2d 160 (1st Dept. 2011) (Mar. 24, 2011). Plaintiff, a sheet metal worker, injured his knee when he slipped and fell on some construction debris in a stairwell. The accident involved a condition of the premises and the court held that there were questions of fact as to whether the defendants had constructive notice of the condition. Therefore, the §200 and common law negligence claims were not dismissed.

Practice Note: The court also considered the impact of an indemnification provision in an unsigned document and held that there were issues of fact as to whether or when the indemnification provision came into being.

18. *Marcos Castellon v. John Reinsberg*, 82 A.D.3d 635, 920 N.Y.S.2d 62 (1st Dept. 2011) (Mar. 29, 2011). At issue on this appeal was whether the construction manager was liable under §240(1). In reaching its decision that there were issues of fact as to whether the construction manager was liable in this case, the court noted:

“A construction manager is generally not considered a contractor or owner within the meaning of Section 240(1) or Section 241(6) However, ‘a construction manager ... may be vicariously liable as an agent of the property owner ... where the manager had the ability to control the activity which brought about the injury’”

Practice Note: The leading case on the liability of construction managers is *Walls v. Turner Const. Co.*, 4 N.Y.2d 861 (2005).

19. *Kendall Harris v. City of New York*, 83 A.D.3d 104 (1st Dept. 2011) (Apr. 5, 2011). Plaintiff, an ironworker, was injured while he and other workers were attempting to lift a slab of road deck (10 feet by 12 feet and weighing 1 ton) from the bridge. As a crane lifted the slab 3 or 4 feet in the air, the plaintiff wedged a four-by-four under the slab. Next the plaintiff, while standing on the four-by-four, instructed the crane operator to lower the slab and the slab descended, quickly causing the four-by-four to shatter. Plaintiff was thrown to the ground. The court, citing to *Runner*, 13 N.Y.3d 599, held that, where there was no safety device provided to guard against the risk or give proper protection, there is a violation of §240(1). The court also granted summary judgment under §241(6).

Practice Note: In reaching its decision, the court recognized the “de minimis” height doctrine, but held that it was not applicable because the rapid descent of a 1-ton object just 3 feet was capable of generating a significant amount of force.

20. *Carby Bruce v. 182 Main St. Realty Corp.*, 921 N.Y.S.2d 42 (1st Dept. 2011) (Apr. 7, 2011). Plaintiff was injured when he fell from a fiberglass A-frame ladder while engaged in a construction or renovation work at a warehouse. The court held there were issues of fact to preclude summary judgment. The owner contended that it neither arranged for nor knew about the plaintiff being hired to work on the premises; however, this did not entitle it to summary judgment. There were issues of fact as to who hired the plaintiff.

Practice Note: The court also held the “failure to properly secure” a ladder to ensure that it remains steady and erect while being used constitutes a violation of Labor Law §240(1).

21. *Jose Arnaud v. 140 Edgecomb LLC*, 922 N.Y.S.2d 292 (1st Dept. 2011) (Apr. 14, 2011). Plaintiff and a co-worker were moving wood planks from the fourth floor to the second floor by use of pulley and ropes. Plaintiff was on the second floor and was reaching through a window to grab the work as it was lowered. A plank struck the plaintiff, injuring him. The court made these statements with respect to “falling objects”:

- (1) The risk to guard against is the unchecked or insufficient checked decent of the object.
- (2) Injured plaintiff does not have to point to any particular defect in the pulley.
- (3) The safety device must be placed and operated to give proper protection.

Practice Note: The court cited to *Runner*, 13 N.Y.3d 599 in reaching its decision.

22. *Joshua Reyes v. Magnetic Construction, Inc.*, 922 N.Y.S. 291 (1st Dept. 2011) (Apr. 14, 2011). Plaintiff, a bricklayer foreman, was injured when he tripped and fell as he was ascending a temporary staircase from the first to the second floor. The plaintiff was pulling himself up and he fell forward onto the floor. The court held that the injuries sustained by the plaintiff did not fall within §240(1) and noted that the injuries were a result of the usual and ordinary dangers of a construction site.

Practice Note: The mere fact that the plaintiff fell while he was at an elevated level does not render the injury as a result of an elevated risk.

23. *Joseph Rendino v. The City of New York*, 922 N.Y.S.2d 300 (1st Dept. 2011) (Apr. 19, 2011). Plaintiff, at the time of this injury, was standing in a basket attached to the boom of a crane. While the basket

was being lowered it suddenly dropped, causing the plaintiff to fall within the basket. The court held that under §240(1) the defendants failed to show that the accident and injuries were not related to the application of the force of gravity.

Practice Note: Even though there was a mechanical defect that caused the basket to descend faster, this was not sufficient to defeat the plaintiff's claim.

24. *Francisco DaSilva v. C&E Ventures, Inc.*, 922 N.Y.S.2d 32 (1st Dept. 2011) (Apr. 21, 2011). This action involves a claim by plaintiffs that they were exposed to lead during lead paint abatements on the George Washington Bridge. The initial issue considered by the court was whether New York New Jersey law applied. Under New Jersey law an owner is not responsible for harm which occurs to a contractor's employee as a result of the very work the contractor was hired to perform; whereas, under §241(6) of the New York Labor Law owners can be liable. The court held that plaintiffs' uncontroverted evidence established that they were injured in both New York and New Jersey. Consequently, the court conducted a conflicts of law analysis and included:

"Given the uncontroverted evidence of injuries suffered in New York, the fact the plaintiffs were employed by a New York company while performing work for the PA, a domiciliary of NY (as well as NJ) the motion court properly concluded that New York law applies."

Practice Note: A choice of law analysis can be important to the assessment of the liability of a defendant.

25. *Felicitto Ramirez v. Willow Ridge Country Club, Inc.*, 922 N.Y.S.2d 343 (1st Dept. 2011) (May 5, 2011). There was a dispute as to how the incident happened. The jury found that the defendants had violated §240(1), but that the statutory violation was not a substantial factor in causing the accident. Specifically, the jury found that a statutory violation existed with respect to the guardrail of the deck, but accepted the foreman's version of the accident and found that the violation was not the proximate cause of the accident.

Practice Note: Not only must the plaintiff prove there was a violation, but the violation must be the proximate cause of the injury.

26. *4996-Patrick Noel Foley v. Consolidated Edison Company of New York*, 923 N.Y.S.2d 57 (1st Dept. 2011) (May 5, 2011). Plaintiff was injured when he was burned by a handheld saw which caught on fire while he was attempting to cut through a pipe. He was excavating a trench. The court dismissed the §200 and common law negligence claim against Con Edison because it did not control or supervise the plaintiff's work. The §241(6) claim was dismissed because the plaintiff failed to plead any specific Industrial Code violation.

Practice Note: General supervisory authority does not establish the requisite direction and control.

27. *Victoriano Ventura v. Ozone Park Holding Corp.*, 923 N.Y.S.2d 67 (1st Dept. 2011) (May 10, 2011). The plaintiff's complaint was dismissed against one defendant because the Workers' Compensation

Board had found that the defendant was the plaintiff's employer and any claim was barred by §11 of the Workers' Compensation Law. Also, the court dismissed the plaintiff's §240(1) claim because the work being performed by plaintiff was not alteration or repair under the statute. The plaintiff was performing routine maintenance. One of the defendants had given the plaintiff a ladder and was a gratuitous bailor. Of interest, the court in dismissing the §200 and common law negligence claim noted:

Plaintiff alleges that the subject ladder had not slip-resistant feet. We find that such a defect is readily discernible, and thus 3 Kings did not have a duty to warn (*see generally, Sofia*, 122 A.D.2d at 263).

Practice Note: There was no evidence of direction and control or notice of the condition.

28. *Rudy Ortega v. Everest Realty LLC*, 923 N.Y.S.2d 74 (1st Dept. 2011) (May 12, 2011). Plaintiff was injured when a 12-foot wall of a shed fell on him. Plaintiff alleges that he told his supervisor that he was afraid of cutting any further because the wall was shaking and going to slide. The court dismissed the §200 and common law negligence claims because the accident arose out of the manner and method of the plaintiff's work and the defendants exhibited no supervision or control. The court in this 3-2 decision did not dismiss the §241(6) claim because one of the Industrial Code regulations relied on by the plaintiff was sufficiently specific to support such a claim (12 NYCRR) 23-1.12(c)(1).

Practice Note: The two dissenting judges disputed that other Industrial Code regulations supported plaintiff's §241(6) claim.

29. *Raimundo Nascimento v. Bridgehampton Construction Corp.*, 2011 N.Y. App. Div. LEXIS 4473 (June 2, 2011). Plaintiff, a laborer, was injured when he fell into the basement while descending a ladder from a 14-foot-high platform (first floor of the house). Plaintiff contended that a portion of the extension ladder, which was unsecured, slid down. An observer indicated that he saw a worker fall from the rafters and there was no ladder in the area. Under either fact scenario, the court held that plaintiff was entitled to summary judgment. The court also refused to grant summary judgment under §241(6). One entity raised a question as to whether its status as a subcontractor precluded liability. The court held that once a subcontractor qualifies as a statutory agent, it may not escape liability by simply delegating that work to another entity. The court held there was an issue of fact.

Practice Note: The determination of when an entity constitutes a statutory agent for liability purposes under §§240(1) and 241(6) is fact specific.

30. *Thomas Burke v. Hilton Resorts Corporation*, 2011 N.Y. App. Div. LEXIS 4465 (June 2, 2011). Plaintiff was injured when he fell 15 feet through an unprotected hole in the floor of a construction site. The court rejected the sole proximate cause defense and held that the plaintiff was entitled to judgment on §240(1).

Practice Note: The court searched the record on its own and granted summary judgment to the plaintiff under §240(1) because it was the statutory agent of the general contractor.

31. *Sofio Garcia Paz v. City of New York*, 2011 N.Y. App. Div. LEXIS 5025 (June 14, 2011). The court applied the sole proximate cause defense and noted that the record established that the plaintiff knew that he was expected to use a ladder to climb onto the elevated scaffold and lower it to the ground. He chose for no good reason not to do it. The court dismissed the §240(1) claim. The court also dismissed the §200 and common law negligence claim because no supervisory control was established.

Practice Note: General instructions on what needed to be done, not how to do it, and monitoring and oversight of timing and quality of the work is not enough to impose §200 liability.

32. *Jorge Angamarca v. New York City Partnership Housing Development Fund, Inc.*, 2011 N.Y. App. Div. LEXIS 5251 (June 21, 2011). Plaintiff, an undocumented alien, was working on a construction site and was injured when he fell two stories through an improperly covered opening in the roof. Jury found that plaintiff sustained damages in the sum of \$20.0 million. The issue on this appeal was how the plaintiff's alien status affected the damages awarded. The court in this divided decision (3-2) analyzed each item of damage and modified the jury verdict and vacated the award for past and future pain and suffering unless the defendants agreed to pay a higher sum.

Practice Note: It is recommended that the decision be read because it provides an up-to-date analysis of undocumented alien issues.

SECOND DEPARTMENT

1. *John Mancuso v. MTA New York City Transit*, 80 A.D.3d 577, 914 N.Y.S.2d 283 (2d Dept. 2011) (Jan. 11, 2011). At the time of his injuries, the plaintiff was providing electrical work at a construction site. The plaintiff was operating an aerial lift that accelerated and collided with a chain link fence. Plaintiff did not fall from the aerial lift. The court dismissed the §240(1) claim because the accident did not involve an elevation-related risk. The court refused to dismiss the common law negligence claim against the general contractor because there was a triable issue of fact as to whether the general contractor had the authority to supervise or control the performance of the plaintiff's work (i.e., manner and method). Also, the court noted under §200 that there was an issue of fact as to whether the general contractor had the authority directly to evaluate the condition and supervise the use of the equipment causing the plaintiff's injuries.

Practice Note: General authority to supervise all work at a construction site, stop the subcontractor's work if a safety violation exists, or ensure compliance is sufficient.

2. *Jose Miguel Moran v. 200 Varick Street Associates*, 80 A.D.3d 581, 914 N.Y.S.2d 307 (2d Dept. 2011) (Jan. 11, 2011). Plaintiff established a *prima facie* case under §240(1) because he proved that he was engaged in a statutorily protected activity when he fell off a scaffold that failed to provide proper protection because it lacked safety railings. The court further noted that since the scaffold lacked railings, the defendant's alleged intoxication was not the sole proximate cause.

Practice Note: The plaintiff also established a violation of §241(6) because

it was predicated on 12 NYCRR 23-5.18(b).

3. *Rosendo Herrera v. Union Mechanical of NY Corp.*, 80 A.D.3d 564, 914 N.Y.S.2d 295 (2d Dept. 2011) (Jan. 11, 2011). The court granted the plaintiff's summary judgment motion and held that §240(1) liability was established because plaintiff fell from an unsecured ladder that moved. Plaintiff was performing repair work and not routine maintenance.

Practice Note: The difference between repair and routine maintenance is very fact specific.

4. *Zenon Zawadzki v. 903 E. 51st Street, LLC*, 80 A.D.3d 609, 914 N.Y.S.2d 272 (2d Dept. 2010) (Jan. 11, 2011). At issue on this appeal was the impact of a stipulation pursuant to which the general contractor admitted liability with respect to plaintiff's §240(1) claim. The plaintiff's employer was not part of the stipulation. The employer contended that it was entitled to a dismissal of the fourth-party complaint because it was not a party to the stipulation and was prejudiced. The court refused to dismiss the fourth-party complaint because the employer could still defeat contractual indemnification (i.e., general contractor was negligent).

Practice Note: The court also refused to sever the fourth-party action (CPLR 603).

5. *Fritz Leconte v. 80 East End Owners Corp.*, 80 A.D.3d 669, 915 N.Y.S.2d 140 (2d Dept. 2011) (Jan. 18, 2011). Plaintiff was injured while installing a security system and tying cable wire into conduit piping. At the time of his injury, the plaintiff was working from an unopened A-frame ladder. The ladder was provided by an employee of the building owner. Plaintiff felt the ladder tilt, which caused part of the ladder to go into a stairwell gap, causing plaintiff to fall with the ladder. There were disputed facts as to how the incident occurred; however, the court held that under either set of facts, the plaintiff established a *prima facie* case (i.e., defendant failed to provide protection, which was the proximate cause of the injuries). The court rejected the sole proximate cause defense.

Practice Note: Plaintiff's negligence is not a defense where there are other causes, including defendants' failure to provide a safety device.

6. *Maria Martinez v. Ashley Apts. Co.*, 80 A.D.3d 734, 915 N.Y.S.2d 620 (2d Dept. 2011) (Jan. 25, 2011). Plaintiff fell from a scaffold and was injured. The court reversed the trial court's finding that the plaintiff-decedent's failure to wear an available safety harness was the sole proximate cause of the accident. The court held that there were issues of fact as to whether the scaffold provided proper protection and whether the plaintiff-decedent's conduct was the sole proximate cause.

Practice Note: A fall from a scaffold does not establish, in and of itself, that proper protection was not provided.

7. *Laurie Campbell v. 111 Chelsea Commerce L.P.*, 80 A.D.3d 721, 915 N.Y.S.2d 619 (2d Dept. 2011) (Jan. 25, 2011). The walkboard on the scaffold collapsed, causing the plaintiff to fall. The court held that the plaintiff established a *prima facie* case and the defendants only raised mere speculation, which is insufficient.

Practice Note: The fact that the plaintiff was the sole witness did not preclude summary judgment.

8. *Tomasz Grochowski v. Ben Rubins, LLC*, 81 A.D.3d 589, 916 N.Y.S.2d 171 (2d Dept 2011) (Feb. 1, 2011). Initially at issue on this appeal was whether the court should allow one of the defendants to file a late motion for summary judgment. The court allowed the late filing because there was a good cause for the delay, since the note of issue was filed while there was significant discovery outstanding. The court dismissed the §240(1) claim against that defendant because, as a subcontractor or agent of the owner or general contractor, there must be a showing that the subcontractor had authority to supervise or control the work. The court dismissed the §200 and common law negligence on such facts.

Practice Note: The determinative factor on the issue of control is not whether the subcontractor furnishes equipment but whether it has control of the work being done and the authority to insist that proper safety practices be followed.

9. *Dursun Guclu v. 900 Eighth Avenue Condominium, LLC*, 81 A.D.3d 592, 916 N.Y.S.2d 147 (2d Dept. 2011) (Feb. 1, 2011). Previous to this appeal, the jury had awarded a verdict in favor of the defendants on liability under §§240(1), 241(6) and 200. Plaintiff made a motion to set aside the verdict and the court refused to set aside the verdict, noting:

For a reviewing court to determine that a jury verdict is not supported by legally sufficient evidence, it must conclude that there is ‘simply no valid line of reasoning on permissible inferences’ by which the jury could have rationally reached its verdict on the basis of the evidence presented at trial.

The defendants were not agents of the owner or general contractor or owners themselves.

Practice Note: The defendant lessees of the premises did not hire the plaintiff’s employer to undertake the work that plaintiff was performing at the time of the accident and did not have the authority to supervise or control the work that caused plaintiff’s injuries.

10. *Joseph V. Welsch v. Maimonides Medical Center*, 80 A.D.3d 755, 915 N.Y.S.2d 163 (2d Dept. 2011) (Jan. 25, 2011). The court refused to grant summary judgment in favor of either plaintiff or defendants, holding that “... neither party made a *prima facie* showing as to whether the plaintiff had access to properly placed and adequate safety devices” There were issues of fact as to whether the plaintiff’s conduct was the sole proximate cause of the accident.

Practice Note: The decision did not recite the applicable facts but did cite to relevant case law on the issues presented.

11. *Diane Going v. John W. Toomey III*, 81 A.D.3d 688, 916 N.Y.S.2d 224 (2d Dept. 2011) (Feb. 8, 2011). Plaintiff died after falling from the roof of the premises owned by defendant. The premises were used as a residence by the defendant and for commercial storage. The court held that the defendant failed

to establish the statutory exemption from liability for owners of one- or two-family residences or that defendant/owner did not direct or control the method and manner of the work being performed by the decedent.

Practice Note: The application of the one- and two-family exemption is extremely fact specific.

12. *Matthew D'Elia v. City of New York*, 81 A.D.3d 682, 916 N.Y.S.2d 196 (2d Dept. 2011) (Feb. 8, 2011). Plaintiff, a surveyor, was injured when he fell while carrying equipment out of a deep excavation pit made of loosely compacted dirt and rocks. The court dismissed the §200 (common law duty of an owner or general contractor to provide workers with a safe place to work) and common law negligence claim because the defendant/owner did not have the authority to supervise the plaintiff's work. With respect to the §241(6) claim, the court held that plaintiff was entitled to summary judgment on the Industrial Code regulation (12 NYCRR 23-1.23) was specific and applicable.

Practice Note: The court also noted that it was proper to allow the plaintiff to amend his bill of particulars to identify the relevant Industrial Code.

13. *Menachem Lipsker v. 650 Crown Equities, LLC*, 81 A.D.3d 789, 917 N.Y.S.2d 249 (2d Dept. 2011) (Feb. 15, 2011). Plaintiff was injured when he fell from a ladder while helping the part-owner of the premises put up a sign on the premises. The court dismisses all causes of action under §§200, 240(1) and 241(6), but did not dismiss the common law cause of action. In reaching its decision, the court noted:

“Contrary to the plaintiff’s contention, the evidence showed that he was a real estate agent for the owner, was paid a commission, and was acting as a volunteer when he helped ... put up the sign”

Practice Note: Because the common law negligence cause of action was not the subject of the motion and cross-motion before the Supreme Court, the court refused to address it.

14. *Adam Kowalik v. Hadassah Lipschutz*, 81 A.D.3d 782, 917 N.Y.S.2d 251 (2d Dept. 2011) (Feb. 15, 2011). At the time of his accident, the plaintiff was using a blade saw and injured his hand on the saw when he slipped in sawdust and other construction debris. Plaintiff sued under §241(6). The court dismissed the §241(6) cause of action because the Industrial Code regulation relied on by plaintiff (12 NYCRR 23-1.7(d)) required that a “foreign substance” be involved. In this case, the court noted that the substance was not foreign because it was a natural result of the work being performed.

Practice Note: In reaching its decision, that court noted: “... the failure to identify the specific [Industrial] Code provision ... either in the complaint or in the bill or supplemental bills of particulars is not necessarily fatal A plaintiff may make an allegation of an Industrial Code ... for the first time in opposition to a motion”

15. *Robert E. McGuire v. Michael A. Fuller*, 81 A.D.3d 794, 916 N.Y.S.2d 835 (2d Dept. 2011) (Feb 15,

2011). Without reciting the facts of the happening of the accident, the court held that the plaintiff failed to establish his *prima facie* entitlement to summary judgment under §240(1). Specifically, there were issues of fact as to whether the statute was violated and whether the plaintiff's conduct was the sole proximate cause.

Practice Note: The record and briefs on appeal should be reviewed to determine the impact of this decision.

16. *Elsayed Eldoh v. Astoria Generating Company L.P.*, 81 A.D.3d 871, 917 N.Y.S.2d 289 (2d Dept. 2011) (Feb 22, 2011). At the time of his injury, the plaintiff was performing work in connection with the overhaul of an electricity-generating turbine on a barge in the water offshore. The court held that the Longshore and Harbor Workers' Compensation Act did not pre-empt the §§200, 241(6) or 240(1) cause of action because the defendant was neither an owner of a vessel nor the plaintiff's employer. The court held, however, that the defendant did not establish entitlement to a dismissal of the §200 and common law negligence cause of action.

Practice Note: The court again defined what it means to "control" plaintiff's work.

17. *Bin Gu v. Palm Beach Tan, Inc.*, 81 A.D.3d 869, 917 N.Y.S.2d 878 (2d Dept. 2011) (Feb. 22, 2011). The court denied the motion for summary judgment of the "second third-party defendant/fourth party plaintiff" under §240(1). The court found issues of fact as to whether the plaintiff's conduct was the sole proximate cause of the accident.

Practice Note: The record and briefs on appeal should be reviewed in order to determine the impact of the case. See No. 18 below.

18. *Bin Gu v. Palm Beach Tan, Inc.*, 81 A.D.3d 867, 917 N.Y.S.2d 661 (2d Dept. 2011) (Feb. 22, 2011). In another appeal in the same case, the court considered the plaintiff's motion for summary judgment under §240(1). Plaintiff was injured when he fell from an open and locked A-frame ladder, which was positioned on top of a scaffold. While the court held that the plaintiff established a *prima facie* case under §240(1), the defendants raised a triable issue of fact as to whether the plaintiff's conduct was the sole proximate cause of the accident.

Practice Note: This decision cites the relevant case law on the sole proximate cause defense.

19. *Stephen Pritchard v. Tully Construction Co.*, 82 A.D.3d 730, 918 N.Y.S.2d 154 (2d Dept. 2011) (Mar. 1, 2011). Plaintiff was injured when his co-workers were, with their hands, attempting to attach a motor (300 to 350 pounds) to the end of a 20-foot-high pipe. The motor was not secured by a hoist or other device. Plaintiff, at the time of his injury, was positioned two feet to three feet beneath the motor and was instructed to bolt the motor onto the pipe. The court granted plaintiff's motion under §240(1) and noted that the nature of the work being performed posed a significant risk that the motor weighing 300 to 350 pounds could fall. The court held that the defendant failed to provide an appropriate safety device.

Practice Note: Because the defendant failed to meet its burden, the sole proximate cause defense was not applicable.

20. *Kevin Quinteros v. P. Deblasio, Inc.*, 82 A.D.3d 861, 918 N.Y.S.2d 526 (2d Dept. 2011) (Mar. 8, 2011). There were two versions of how the accident happened. The plaintiff's version involved a collapse of a scaffold; whereas, the defendant's version involved the plaintiff being struck by material that "required securing for the purposes of the undertaking." Under either version, the plaintiff established a *prima facie* entitlement to a violation of §240(1). The court also concluded that the plaintiff established a violation of §241(6) under 12 NYCRR 23-1.8(c)(1) (hard hat).

Practice Note: The court rejected the unforeseeable intervening act and sole proximate cause defenses.

21. *Robert A. Hall v. Smithtown Central School District*, 82 A.D.3d 703, 917 N.Y.S.2d 690 (2d Dept. 2011) (Mar. 1, 2011). Plaintiff was injured when he fell from a ladder while installing ceiling tiles in a classroom being added to a school. The court denied the motion of the defendant school district because it failed to establish its *prima facie* entitlement under §240(1). There was a triable issue of fact on sole proximate cause. The plaintiff's complaint was dismissed against another defendant because it was a prime contractor and not responsible for the plaintiff's work.

Practice Note: Not all contractors on construction sites are liable under §240(1).

22. *Julio Rodriguez v. Hope Margulies Gany*, 82 A.D.3d 863, 918 N.Y.S.2d 187 (2d Dept. 2011) (Mar. 8, 2011). At issue on this appeal was the application of the one- and two-family dwelling exemption. Plaintiff was injured when a ladder he was descending collapsed. The court held that there were issues of fact regarding whether the homeowner directed or controlled the plaintiff's work.

Practice Note: "The exception was enacted to protect those who, lacking business sophistication, would not know or anticipate the need to obtain insurance to cover them against absolute liability."

23. *Lincoln Hernandez Florez v. Michael Conlon*, 82 A.D.3d 831, 918 N.Y.S.2d 369 (2d Dept. 2011) (Mar. 8, 2011). Plaintiff fell from a ladder while removing asbestos from a single-family dwelling. The court granted defendant's motion for summary judgment and held that the homeowner did not have the requested supervision and control over the work to make the homeowner a statutory agent.

Practice Note: Without saying it, the court applied the one- and two-family dwelling exception.

24. *German Reyes v. Arco Wentworth Management Corp.*, 83 A.D.3d 47, 919 N.Y.S.2d 44 (2d Dept. 2011) (Mar. 15, 2011). On the appeal, the court considered liability under §200 and common law negligence and noted the distinction between liability resulting from the condition of the premises and situations where liability results from the method and manner of the work being performed. The plaintiff was injured when the wheel on a lawnmower he was operating went into a hole and the mower tipped over. The blade on the mover severed plaintiff's leg. The court noted that there were overlapping allegations

of a dangerous premises condition and defective equipment, and in such a case proof applicable to both liability standards must be presented. The court held that the defendant established its *prima facie* entitlement under §200 and common law negligence as it relates to the manner and methods standard (*i.e.*, there was no supervision or control). However, the court held that the defendant did not establish a *prima facie* case as to the condition of the premises (*i.e.*, creation of the dangerous condition or lack of actual or constructive notice). With respect to the §241(6) claim, there was an issue of fact as to whether the plaintiff was performing routine maintenance versus part of the construction, demolition or excavation project.

Practice Note: On the issue of notice, there was not any proof that the area had been inspected prior to the incident.

25. *Thomas Cody v. State of New York*, 82 A.D.3d 925, 919 N.Y.S.2d 55 (2d Dept. 2011) (Mar. 15, 2011). Plaintiff, a carpenter, was injured while stepping from the bottom rung of a ladder when he slipped on a wooden two-by-four and twisted his leg. The court recognized the two broad categories which establish liability under §200 and not that plaintiff's claim arose from the manner and method of the work and not from a dangerous or defective condition of the premises. The basis of the distinction was that the piece of wood was one of the materials being used by the claimant's co-worker in the course of ongoing work. Because the defendant had no supervisory activity or control over the plaintiff's work, the §200 and common law negligence claim was dismissed. The court also dismissed the §241(6) cause of action because the Industrial Codes were either not specific or inapplicable.

Practice Note: It is important to distinguish between the two broad categories of liability under §200, as there are two different legal and factual standards.

26. *Noe Rodriguez v. JMB Architecture, LLC*, 82 A.D.3d 949, 919 N.Y.S.2d 40 (2d Dept. 2011) (Mar. 15, 2011). Plaintiff was injured when something hit his eye while working on a private residence. The court dismissed the plaintiff's complaint against the defendant construction manager and noted:

Although a construction manager is generally not considered a contractor responsible for the safety of workers at a construction site pursuant to Labor Law §§200 and 241(6), it may nonetheless become responsible if it has been delegated the authority and duties of a general contractor, or if it functions as an agent of the owner of the premises.

The court held in this case the only role of the construction manager was general supervision; therefore, the complaint was dismissed.

Practice Note: When assessing the liability of a construction manager, the contract documents and actual onsite activities are important.

27. *Symeon Monioudis v. City of New York*, 82 A.D.3d 945, 918 N.Y.S.2d 580 (2d Dept. 2011) (Mar. 15, 2011). Plaintiff, at the time of his injury, was using a ladder to prepare walls and ceilings for painting and a ladder collapsed, which caused him to fall. The plaintiff established a *prima facie* case under §240(1) and relied on his deposition transcript. The defendant, in opposition, offered only mere speculation, and the court granted plaintiff's motion for summary judgment.

Practice Note: Defendant can challenge the credibility of the plaintiff by submitting proof in admissible form.

28. *Edward Herrel v. Daniel West*, 82 A.D.3d 933, 919 N.Y.S.2d 83 (2d Dept. 2011) (Mar. 15, 2011). Plaintiff, a roofer, was working on a roof at a single-family dwelling when he fell off the roof. The court dismissed the §§240(1), 241(6), and 200 causes of action against one of the defendants because that defendant did not have authority to supervise or control plaintiff's work.

Practice Note: The determinative factor is whether the party had the right to exercise control over the work, not whether it actually exercised the right.

29. *Witold J. Poracki v. St. Mary's Roman Catholic Church*, 82 A.D.3d 1192, 920 N.Y.S.2d 233 (2d Dept. 2011) (Mar. 29, 2011). The plaintiff's employer was hired by the owner to erect scaffolding on the premises. Plaintiff had been instructed by his foreman to replace wooden planking on the scaffold that had created a two-foot wide gap. As the plaintiff was performing that work, he fell through the gap onto the roof below. The court held that the plaintiff made a *prima facie* showing under §240(1) because he was not provided a safety device to protect him from the two-foot wide gap. The defendant failed to raise an issue of fact on the sole proximate cause defense. With respect to another defendant, the court dismissed the §200 cause of action because it did not supervise or control the plaintiff's work; however, the court found an issue of fact on the common law negligence claim. Specifically, the court noted that deposition testimony created an issue of fact as to whether that defendant created the opening on the scaffold. The fact that the defendant may have been negligent prevented the dismissal of a common law indemnification claim.

Practice Note: While §200 is a codification of the common law duty to provide a safe place to work, there is a clear distinction between that claim and a common law negligence claim.

30. *Mark Martins v. Board of Education of City of New York*, 82 A.D.3d 1062, 919 N.Y.S.2d 196 (2d Dept. 2011) (Mar. 22, 2011). Plaintiff was injured when he fell 10 to 12 feet to the second floor when the third floor on which he was working collapsed. The collapse was caused by a wall falling. Even though a collapse of a permanent floor may give rise to liability under §240(1), under the circumstances of this case, the need for safety devices was not foreseeable. The court also dismissed the §241(6) claim, as plaintiff did not prove that the regulation was factually applicable (12 NYCRR 23-3.3(c)).

Practice Note: Not all falls from elevated heights are protected under §240(1).

31. *Richard Moisa v. Atlantic Collaborative Construction Company, Inc.*, 922 N.Y.S.2d 405 (2d Dept. 2011) (Apr. 5, 2011). The plaintiff, a heating, ventilation and air conditioning mechanic, was digging a trench at a construction site and was working under a scaffold. The plaintiff wanted to move the scaffold, but defendant was not available to do so. While digging in a narrow area, the plaintiff's back went out. The court dismissed the §241(6) claim because the Industrial Code regulation (12 NYCRR 23-2.1(a)) was not applicable.

Practice Note: The court did not address the §200 or common law negligence claims because it was not properly before the court. The notice of appeal was limited.

32. *Estaban Ponce-Francisco v. Plainview-Old Bethpage Central School District*, 920 N.Y.S.2d 406 (2d Dept. 2011) (Apr. 5, 2011). Plaintiff was injured when he fell through a skylight located on a part of the roof that was not part of the project he was working on. The court held that the proof submitted by the plaintiff created a triable issue of fact as to whether §240(1) was violated or whether the plaintiff's actions were the sole proximate cause.

Practice Note: The decision does not provide detailed facts; therefore, the record and briefs on appeal should be reviewed.

33. *Konstantinos Georgakopoulos v. Gregory Shifrin*, 920 N.Y.S.2d 383 (2d Dept. 2011) (Apr. 5, 2011). The court held that the defendant met its burden of proof and dismissed the §200, common law negligence and §241(6) causes of action.

Practice Note: The defendant did not have “authority to supervise or control” the performance of the plaintiff's work.

34. *Leroy Chin-Sue v. City of New York*, 919 N.Y.S.2d 870 (2d Dept. 2011) (Apr. 5, 2011). The court dismissed the §240(1) claim, holding that the ladder from which the plaintiff fell was not defective or inadequate and that the plaintiff fell because he lost his balance.

Practice Note: Even though the plaintiff contended he needed additional discovery, the court held that such discovery must lead to relevant evidence. Plaintiff failed to make the proper showing.

35. *Fernando Canosa v. Holy Name of Mary Roman Catholic Church*, 920 N.Y.S.2d 390 (2d Dept. 2011) (Apr. 5, 2011). Plaintiff was injured while dismantling a scaffold. At the time of his injury, the plaintiff unhooked a plank and was handing it to a co-worker when he lost his balance and fell. The court held that the affidavits of competing experts raised issues of fact as to whether the plaintiff was provided with adequate safety devices and, if not, whether the absence was a proximate cause. The court dismissed the §241(6) cause of action because the Industrial Codes were not applicable. With respect to the §200 and common law negligence claim, the court dismissed those claims which arose from the manner and method of the work because the defendants did not have authority to supervise and control the plaintiff's work.

Practice Note: If it was determined that a safety device was not needed or was not defective and the plaintiff lost his balance, the court should dismiss the §240(1) claim.

36. *Joseph J. Delanoy v. City of White Plains*, 2011 N.Y. App. Div. LEXIS 2945 (Apr. 12, 2011). The court refused to dismiss the first and fifth causes of action because the defendant is liable for “ministerial actions” and/or not liable for “discretionary actions.” The court dismissed the §200 cause of action because the defendant/city was not charged with the responsibility to provide the plaintiff with a safe

place to work. The §241(6) cause of action was dismissed because the city was not owners, general contractors or statutory agents.

Practice Note: Plaintiff meet its burden of proof on the “governmental” liability issues.

37. *Rory Fox v. H&M Hennes & Mauritz, L.P.*, 922 N.Y.S.2d 139 (2d Dept. 2011) (Apr. 19, 2011). The plaintiff’s employer was hired to replace light bulbs and ballasts/transformers in 78 overhead lighting fixtures which were 12 feet above the retail floor. Plaintiff was injured when he fell from a ladder while performing this work. The court held that the work being performed by the plaintiff was repair and not routine maintenance when viewed in light of the scope of the entire job. The ladder which the plaintiff was using was “old and wobbly”; therefore, the court held that there was a violation of §240(1) that was the proximate cause of the plaintiff’s injuries.

Practice Note: The third-party complaint for indemnification was dismissed because the third-party defendant was a facilitator, was not negligent, and did not have authority to supervise or control plaintiff’s work.

38. *Joseph S. LaRosa, Jr. v. Internap Network Services Corp.*, 921 N.Y.S.2d 294 (2d Dept. 2011) (Apr. 19, 2011). The court dismissed the §240(1) cause of action because the plaintiff was not engaged in an activity protected under §240(1). Plaintiff was injured when he lifted a box one foot off the ground. The court also dismissed the §241(6) cause of action because the Industrial Code relied upon did not “mandate compliance with concrete specifications.”

Practice Note: The court outlines the two broad standards applicable to §200 causes of action.

39. *Jorge Ordonez v. C.G. Plumbing Supply Corp.*, 922 N.Y.S.2d 156 (2d Dept. 2011) (Apr. 26, 2011). The plaintiff was injured when an unsecured ladder he was descending slipped, which caused him to fall. The court held that the plaintiff established a *prima facie* case and rejected the sole proximate cause defense.

Practice Note: The failure to secure the ladder proximately caused plaintiff’s injuries.

40. *Eugene Van Dyke v. Skanska USA Civil Northeast, Inc.*, 921 N.Y.S.2d 544 (2d Dept. 2011) (Apr. 26, 2011). The court held that the defendant’s motion for summary judgment was untimely where the defendant failed to demonstrate good cause for delay. Similarly, the plaintiff’s cross-motion was untimely and the discovery sought by plaintiff was not relevant.

Practice Note: The failure to follow scheduling orders and the CPLR can result in additional legal fees and costs.

41. *John Raynor v. Quality Plaza Realty, LLC*, 922 N.Y.S.2d 791 (2d Dept. 2011) (May 3, 2011). Plaintiff fell 17 to 20 feet from an unsecured ladder while he was installing light fixtures in a warehouse. Plaintiff’s supervisor instructed and helped set up the ladder and left the plaintiff by himself to

complete the work. The supervisor initially held the unsecured ladder. The ladder slipped, causing it and the plaintiff to fall. The court held that the plaintiff established a *prima facie* case and rejected the application of the sole proximate cause defense.

Practice Note: The fact that the supervisor left the plaintiff was telling on liability under §240(1).

42. *Donald Haines v. Dick's Concrete Co., Inc.*, 922 N.Y.S.2d 514 (2d Dept. 2011) (May 3, 2011). Plaintiff, a truck driver, was injured when he fell from the top of a load on his truck. The tarps were allegedly wet due to drizzly conditions. The court dismissed the §§240(1) and 241(6) causes of action because the plaintiff was not delivering masonry to a construction site but was delivering to a vendor. Plaintiff was not engaged in a protected activity. The §200 and common law negligence causes of action were dismissed because the defendants did not have the authority to supervise or control the performance of the plaintiff's work.

Practice Note: The purpose and place of delivery of materials can determine whether the plaintiff is performing a protected activity.

43. *John Posa v. Copiague Public School District*, 922 N.Y.S.2d 499 (2d Dept. 2011) (May 3, 2011). The plaintiff was injured when two tabletops that were to be installed in defendant's science laboratories fell on his foot. One of the defendants that was a subcontractor did not control the plaintiff's work; therefore, the §200 cause of action was dismissed. Also, because the owner and general contractor failed to establish the absence of a triable issue of fact on whose negligence, if any, caused the accident, the motion for summary judgment based on contractual indemnification was dismissed. A common law indemnification claim between two entities should have been dismissed because there was not proof that indemnitor was responsible for negligence that contributed to the accident or had authority to direct, supervise, or control the work.

Practice Note: Negligence or the authority to direct, supervise, or control are critical to the assessment of an indemnification claim.

44. *Jimmy Merriman v. Integrated Building Controls, Inc.*, 922 N.Y.S.2d 562 (2d Dept. 2011) (May 10, 2011). The plaintiff testified that as he was descending a ladder, he missed a step. A hospital record had the same statement. The court held that this created an issue of fact as to whether the accident was caused by the sole proximate cause of the plaintiff, and therefore, plaintiff was not entitled to summary judgment.

Practice Note: In reaching its decision, the court reviewed the admissibility of hearsay evidence on motions as opposed to trial.

45. *Garry M. White v. Village of Port Chester*, 922 N.Y.S.2d 534 (2d Dept. 2011) (May 10, 2011). The defendant, Village of Port Chester, leased certain property to another entity. The plaintiff, who was an employee of a non-party, was injured when he was delivering steel to the site. Plaintiff tripped on some plastic outside his truck and was injured. The plaintiff's injuries arose from a dangerous condition. The court noted that liability will be imposed if the property owner created the condition or had actual or constructive notice and failed to remedy within a reasonable time. As to some of the defendants, the

court held that they failed to establish they did not have actual or constructive notice or request control; therefore, the §200 and common law negligence claims were not dismissed. The §241(6) claim was not dismissed and the court noted that because the injured plaintiff was on the course of delivering materials to a construction site, §241(6) applies.

Practice Note: The Labor Law applies to all those lawfully frequenting the construction site.

46. *Robert Robinson v. County of Nassau*, 923 N.Y.S.2d 135 (2d Dept. 2011) (May 10, 2011). The court dismissed the §200 cause of action because, on the manner and method case, the defendants demonstrated that plaintiff's work was directed and controlled exclusively by his employer and that they had no authority to exercise supervisory control over plaintiff's work. The §241(6) cause of action was also dismissed because the Industrial Codes were either not specific or inapplicable.

Practice Note: The retention of the right to generally supervise the work, to stop the contractor's work if a safety violation is noted, or to ensure compliance with safety regulations, does not amount to the authority to supervise and control.

47. *Manuel Perez v. 347 Lorimer, LLC*, 923 N.Y.S.2d 138 (2d Dept. 2011) (May 10, 2011). At issue on this appeal was whether one of the defendants was a statutory agent of an owner or general contractor. The court held that there was an issue of fact as to whether that entity was a statutory agent.

Practice Note: It is not the title that is determinative but the amount of control or supervision exercised that determines the status of a statutory agent.

48. *Rudolf Tomlins v. John DiLuna*, 2011 N.Y. App. Div. LEXIS 4154 (May 17, 2011). The plaintiff was hired to do siding, roofing and frame work on a two-family building which was being built as an investment. Plaintiff was injured when he fell off a porch roof. The court held that there was a triable issue of fact as to whether a scaffold should have been used, whether it was available, and whether the plaintiff's decision not to use the scaffolding was the sole proximate cause of the accident.

Practice Note: The court recognizes that the sole proximate cause defense is fact-specific.

49. *Sung Kyu-To v. Triangle Equities, LLC*, 923 N.Y.S.2d 628 (2d Dept. 2011) (May 17, 2011). Plaintiff was working on the first floor of a demolition project collecting his tools when he was hit on the head. At the end of the trial, the court granted the defendant a judgment dismissing the complaint. The court held that the evidence adduced at trial provided a rational basis upon which the defendants were liable under §240(1). The court noted that the material that hit the plaintiff was a "falling object" that presented a significant risk of injury, such that defendants were obligated under §240(1) to provide safety devices to secure materials. The §241(6) cause of action was dismissed because plaintiff failed to establish that specific Industrial Code violations were violated.

Practice Note: Not all falling objects create liability under the Labor Law.

50. *Frank Fusca v. A&S Construction, LLC*, 2011 N.Y. App. Div. LEXIS 4326 (May 24, 2011). Plaintiff was injured when he fell from the ground floor to the basement through an unguarded, unfinished stairwell. The trial court erred in granting the defendant's motion under §241(6) because neither plaintiff or defendant established their positions. The §240(1) claim was dismissed because the plaintiff failed to allege a violation of that statute in the complaint, even though it was asserted on the bill of particulars. The trial court should have granted plaintiff's motion to amend the complaint as to the §240(1) violation. With respect to the §200 claim, which involved a condition of the premises, the defendant failed to establish that it did not create the condition nor did it not have actual or constructive notice.

Practice Note: The court did not allow the plaintiff to amend its complaint to assert a §241(6) claim, as the Industrial Code relied upon was inapplicable.

51. *Joseph Ulrich v. Motor Parkway Properties, LLC*, 2011 N.Y. App. Div. LEXIS 4281 (May 24, 2011). Plaintiff, a laborer, was delivering mortar to bricklayers and, in order to reach them, he had to walk down a slope of dirt, debris, and rock. When he took his first step, the ground gave way, causing him to fall forward. The court dismissed the §200 claim because no defective or dangerous condition existed on the site. The slope conformed to OSHA regulations and guidelines. The court dismissed the §241(6) claim because the defendants had not violated the Industrial Code.

Practice Note: The indemnification provision contained in the contract did not violate GOL §5-322.1. The provision provides for indemnification when the claim arises out of the indemnitor's work, even though the indemnitor was not negligent.

52. *Jerzy Zamajtyś v. Marian Cholewa*, 926 N.Y.S.2d 163 (2d Dept. 2011) (May 31, 2011). While working on a renovation to add a second floor to a business premises, the plaintiff was injured when an unfinished wall frame fell and struck the plaintiff's eye. The court dismissed the §241(6) cause of action because the Industrial Codes relied on by the plaintiff were inapplicable.

Practice Note: The Industrial Code regulations must be specific/ concrete and applicable to the facts.

53. *Roy Losito v. Manlyn Development Group, Inc.*, 2011 N.Y. App. Div. LEXIS 5335 (June 21, 2011). The plaintiff established that the A-frame ladder on which he was standing was defective and collapsed, causing his injuries. The court noted that defendants failed to establish a superseding cause to relieve it of liability.

Practice Note: It appears that the plaintiff's foreman stepped on the back of the plaintiff's ladder just before it broke.

54. *Thomas Reilly-Geiger v. Susan Dougherty*, 2011 N.Y. App. Div. LEXIS 5392 (June 21, 2011). The plaintiff was injured when he fell from an extension ladder he was using to install a skylight in the home of the defendants. When the plaintiff arrived at the home, the ladder was placed underneath the skylight on top of a tarp, which was covering the defendants' dining room floor. Plaintiff contends the

ladder slipped on the tarp, causing him to fall and sustain injuries. The court denied the defendants' motion to dismiss the §200 cause of action, holding there were issues of fact as to whether they created or had actual or constructive notice of the dangerous condition on the premises.

Practice Note: Owner or general contractor must maintain a safe construction site.

55. *Roy Losito v. Manlyn Development Group, Inc.*, 2011 N.Y. App. Div. LEXIS 5356 (June 21, 2011). This is a second appeal on the same case. (See No. 53 above.) The court dismissed this appeal because it was brought for review on a prior appeal.

Practice Note: Procedural cases should be joined or dismissed where duplicative.

56. *Simon Durmiaki v. International Business Machines Corp.*, 2011 N.Y. App. Div. LEXIS 5318 (June 21, 2011). Plaintiff, a laborer working on a demolition project, was injured when a pipe that he was cutting began bowing. Before he could descend the ladder, the pipe struck the ladder, causing the plaintiff to fall. The court held that the plaintiff established a *prima facie* case under §240(1). The court held that defendants failed to establish the sole proximate cause defense. Specifically, there was no evidence that the plaintiff had been instructed to use other safety devices.

Practice Note: Even though the proper safety devices may have been available for use, there was no instruction given to the plaintiff to use.

57. *Manuel Jimenez v. RC Church of Epiphany*, 2011 N.Y. App. Div. LEXIS 5325. Plaintiff was painting from a closed A-frame ladder that he placed upon a scaffold and leaned it against the wall. Plaintiff was instructed by his supervisor to use this method. The scaffold moved away from the wall, even though one of the plaintiffs had locked the wheels. One plaintiff was on the ladder and the other was standing on the scaffold, bracing the ladder. The court granted the plaintiff's summary judgment motion under §240(1).

Practice Note: The critical fact in this decision was that the plaintiff followed his employer's instruction on the manner and method.

THIRD DEPARTMENT

1. *Joseph Lynch v. 99 Washington, LLC*, 80 A.D.3d 977, 915 N.Y.S.2d 353 (3d Dept. 2011) (Jan. 13, 2011). Plaintiff was injured when he stepped from a job site trailer onto a free-standing aluminum stairwell that was allegedly misaligned with the door of the trailer. At the time of his injury the plaintiff had placed his tools and safety harness in the trailer and was leaving the worksite. The court dismissed the §241(6) claim noting that at the time of his injury the plaintiff was not performing any work. Specifically, the court held that the trailer was not at "working level" within the meaning of 12 NYCRR 23-1.7(f).

Practice Note: The trailer was a "temporary job site trailer" in which,

although located on a job site, no construction work was performed.

2. *Ted P. Cullin II v. Alton D. Makely*, 80 A.D.3d 1042, 914 N.Y.S.2d 788 (3d Dept. 2011) (Jan. 20, 2011). Plaintiff injured his leg when the scaffold on which he was working collapsed. Subsequent to the accident, the plaintiff's leg was amputated. At issue on this appeal was whether the defendants were entitled to indemnification or contribution from the third-party defendant/plaintiff's employer. The issue considered by the court was whether the plaintiff sustained a "grave injury" (i.e. amputation of an arm, leg, hand or foot). Employer contended that the amputation was not related to the accident, but attributable to a prior accident. The court held based upon the evidence presented that the plaintiff sustained a "grave injury" related to the accident.

Practice Note: The proof submitted by the employer was an attorney's affidavit that lacked competent medical allegations and contained unsupported allegations.

3. *Larry Randall v. Time Warner Cable*, 81 A.D.3d 1149, 916 N.Y.S.2d 656 (3d Dept. 2011) (Feb. 11, 2011). At the time of plaintiff's injury, he was replacing a filter on cable lines on a structure outside a cable subscriber's home. Before performing this function, the plaintiff had installed a new cable service in the subscriber's home. While replacing the filter, the ladder on which the plaintiff was working began sliding and the plaintiff was injured when he jumped to the ground. The court held that the plaintiff was entitled to summary judgment under §240(1) and rejected the defendant's argument that the function being performed was not connected to altering the structure and was routine maintenance.

Practice Note: Labor Law §240 protects workers engaged in enumerated acts even while performing duties ancillary to those acts.

4. *Ralph H. Williams, Sr. v. Charlew Construction Company, Inc.*, 82 A.D.3d 1491, 918 N.Y.S.2d 764 (3d Dept. 2011) (Mar. 24, 2011). The court held that a letter bearing the caption of the action and file number corresponding to the third-party action and which contained a general denial and requested a dismissal of the action constituted both a notice of appearance and *pro se* answer.

Practice Note: The procedural posture of the case comes up in the context of a Labor Law claim and a third-party action for indemnification.

5. *Paul Mueller v. PSEG Power New York, Inc.*, 922 N.Y.S.2d 588 (3 Dept. 2011) (Apr. 14, 2011). Just prior to his injury, the plaintiff and a co-worker were holding two forms (1035 lbs), which had been placed on the ground by a crane. As the crane began moving the cable away from the forms, the cable snagged the forms, which caused them to rise up 6 to 8 inches off the ground. The forms fell against the plaintiff's leg, injuring him. The court dismissed the §240(1) and noted that it would be illogical to hold defendant liable for failing to utilize or properly attach a protective hoisting device when no further hoisting of the forms was contemplated. The §241(6) claim was also dismissed because the Industrial Code regulations were either not applicable or not violated.

Practice Note: The retention of an expert that provides an explanation as to why a particular Industrial Code is inapplicable or not can be important on motions of this nature.

6. *Thomas R. Georgia v. Joseph Urbanski*, 923 N.Y.S.2d 274 (3d Dept. 2011) (May 12, 2011). The plaintiff was injured when he fell from a ladder that he placed on ice and the ladder kicked up. The plaintiff was working outside the foundation and there was proof that he should have worked inside the foundation. The court found that there were issues of fact on whether §240(1) had been violated. Specifically, the court noted: “... a finder of fact could determine from this evidence that plaintiff had adequate safety devices available; that he knew both that they were available and that he was expected to use them; that he chose for no good reason not to do so; and that had he not made that choice he would not have been injured.”

Practice Note: Plaintiff readily admitted that the decision to use the ladder on an icy service was his alone. This went to the sole proximate cause argument.

7. *James Michael Maloney v. J.W. Pfeil & Company, Inc.*, 2011 N.Y. App. Div. 4091 (May 19, 2011). At the time of his injury, the plaintiff fell from the top cap of a six-foot ladder while installing sheetrock on an overhead soffit as part of a renovation project. The court dismissed the §240(1) claim because the defendants made a *prima facie* case that §240(1) was not violated. The plaintiff knew there were other devices available, the step ladder he was using was not defective and that the ladder had a written warning never to stand on the top cap. These factors established the sole proximate cause defense.

Practice Note: The plaintiff had the initial burden of proof; however, once the defendant establishes a *prima facie* case the burden shifts back to plaintiff.

8. *George H. Frisbee v. 156 Railroad Avenue Corp.*, 2011 N.Y. App. Div. LEXIS 4488 (June 2, 2011). Plaintiff was injured when he slipped and fell on carpet glue recently applied by a subcontractor to the cement floor of a renovation project. The plaintiff, at the time of his injury, was installing a security system. The court dismissed the §200 claim because there was not any proof that the defendant had any authority or control over the plaintiff’s work. The court, however, found that there were issues of fact on the common negligence cause of action. Here the plaintiff’s proof showed that the room where the accident occurred was dimly lit and the floor surface was slippery.

Practice Note: While a Labor Law §200 is a codification of common law negligence, it is clearly different and separate from a common law claim.

FOURTH DEPARTMENT

1. *Brian Rauls v. Directv, Inc.*, 81 A.D.3d 1257, 917 N.Y.S.2d 456 (4th Dept. 2011) (Feb. 10, 2011). In a Labor Law §240 case, the court reversed the trial court’s *sua sponte* granting the plaintiff summary judgment by converting a motion to renew a motion for a default judgment to a motion for summary judgment. The court, citing CPLR 3215(a), also outlined the parameters as to when a default is allowed — “when a defendant has failed to appear, plead or proceed to trial, or when the court orders a dismissal for any other neglect to proceed.”

Practice Note: The plaintiff sought a tactical advantage that he was not entitled to in light of a prior appeal in the case. See, 60 A.D.3d 1337, 875 N.Y.S.2d 377.

2. *Jeffrey J. Pitts v. Bell Constructors, Inc.*, 81 A.D.3d 1475, 916 N.Y.S.2d 731 (4th Dept. 2011) (Feb. 18, 2011). Plaintiff was injured when he fell from a column form in a trench. He was standing on one column form straightening out bolts on another form in the trench. Plaintiff fell when the tool he was using slipped and he lost his balance. The court reversed the dismissal of the §240(1) claim and noted that plaintiff was not furnished with the requisite safety devices and the absence of such devices caused his injuries. The dismissal of the §241(6) cause of action was similarly reversed because plaintiff alleged a sufficiently specific regulation to support the cause of action (12 NYCRR 23-1.7(b)). The §200 claim was dismissed because defendant did not supervise or control the manner or method of work.

Practice Note: Different legal and factual bases support the various Labor Law causes of action and each should be analyzed separately.

3. *Stephen Murdoch v. Niagara Falls Bridge Commission*, 81 A.D.3d 1456, 917 N.Y.S.2d 501 (4th Dept. 2011) (Feb. 18, 2011). In this Labor Law case, the court made the following rulings:
- (1) Plaintiff failed to make a timely motion to set aside the verdict.
 - (2) Plaintiff failed to object during trial to evidence that was presented that had previously been excluded by a motion in limine.
 - (3) A curative instruction cured another evidentiary issue and therefore, plaintiff was not prejudice.
 - (4) Even though the trial court refused to instruct the jury that an OSHA violation can constitute negligence, the jury's verdict would not have been altered.

Practice Note: The §200 cause of action was dismissed because the defendant did not have the authority to control the activity that caused plaintiff's injuries.

4. *Steven Kostyo v. Schmitt and Behling, LLC*, 82 A.D.3d 1575, 919 N.Y.S.2d 606 (4th Dept. 2011) (Mar. 25, 2011). The plaintiff, Steven Kostyo, was injured when he fell from the front porch roof of a rental property owned by the defendant and leased by Karen Kostyo (plaintiff's wife). At the time of his injury, the plaintiff was fixing and winterizing a window over the porch. The trial court had dismissed the §240(1) claim on "routine maintenance" grounds. This court held that there was an issue of fact as to whether the plaintiff was performing a repair (i.e. the object being worked on was inoperable or not functioning properly).

Practice Note: "Delineating between routine maintenance and repair is frequently a close, fact-driven issue."

5. *James C. Kuhn v. Camelot Association, Inc.*, 82 A.D.3d 1704, 919 N.Y.S.2d 684 (4th Dept. 2011) (Mar. 25, 2011). At the time of his injury, the plaintiff was working on the roof of a building owned by defendant when he stepped from the roof onto an elevated platform attached to a forklift and the forklift tipped over which caused the plaintiff to fall to the ground. The plaintiff made a prima facie case that he was furnished with the requisite safety devices and the absence of appropriate safety devices was a proximate cause of the injuries. The defendant failed to establish that the plaintiff's own conduct, rather than any violation of §240(1), was the sole proximate cause of the accident.

Practice Note: The court conducted a detailed factual analysis of what employees knew and what instructions were given.

6. *James E. McManus v. County of Onondaga*, 82 A.D.3d 1641, 919 N.Y.S.2d 425 (4th Dept. 2011) (Mar. 25, 2011). Without reciting the facts of the case, the court affirmed the trial court's granting of summary judgment to plaintiff in his Labor Law §240(1) claim.

Practice Note: The impact of this opinion is hard to access without referencing the record and briefs on appeal.

7. *David J. Olin v. State of New York*, 82 A.D.3d 1682, 919 N.Y.S.2d 457 (4th Dept. 2011) (Mar. 25, 2011). Without reciting the facts of the case, the court affirmed the trial court's granting of summary judgment to plaintiff in his Labor Law §240(1) claim.

Practice Note: The impact of this opinion is hard to access without referencing the record and briefs on appeal.

8. *Daniel E. Ozimek v. Holiday Valley, Inc.*, 920 N.Y.S.2d 528 (4th Dept. 2011) (Apr. 1, 2011). Plaintiff was injured when he fell from a ladder while working on a commercial freezer at a resort. The court concluded that there were issues of fact under §240(1) as to whether the plaintiff's activities were the sole proximate cause of his injuries. In reaching its decision, the court noted:

- (1) It is well settled that §240(1) does not apply to routine maintenance in a non-construction, non-renovation context.
- (2) Where a person is investigating a malfunction, however, efforts in furtherance of that investigation are protected activities.

Plaintiff was injured while “troubleshooting” an uncommon malfunction, which is a protected activity. The court, with respect to one of the defendants, dismissed the §200 claim and common law negligence claim because that defendant did not control the premises. With respect to another defendant, the court refused to dismiss the §200 claim because there was an issue of fact as to whether that defendant had actual or constructive notice of the dangerous condition.

Practice Note: Defendants are required to establish as a matter of law that they did not exercise any supervisory control over the general conditions of the premise or that they neither created nor had actual or constructive notice

of the dangerous conditions on the premises. There is a different standard between a manner and methods case and a dangerous conditions case.

9. *Joseph Timmons v. Barrett Paving Materials, Inc.*, 920 N.Y.S.2d 545 (4th Dept. 2011) (Apr. 1, 2011). In a very complicated set of facts, the plaintiff was injured when he was struck by a catwalk that fell as a result of a tack-weld breaking while workers were attempting to level the catwalk. The court dismissed the plaintiff's §240(1) claim because the object (i.e. catwalk) was not being "hoisted or secured." Further, the court noted that the plaintiff was exposed to the usual and ordinary dangers of a construction site. The court dismissed the §241(6) claim because the Industrial Code regulations relied on by the plaintiff were insufficiently specific or inapplicable. With respect to the §200 and common law negligence claims, they noted that where the claims arose out of the manner and method of the work, the defendant is only liable where there was supervisory control over the operation.

Practice Note: The court in reaching its decision on §240 referenced the *Runner* case (12 N.Y.3d 599).

10. *Timothy M. Kobel v. Niagara Mohawk Power Corporation*, 920 N.Y.S.2d 557 (4th Dept. 2011) (Apr. 1, 2011). The plaintiff, at the time of his injury, was working at the bottom of a manhole and was injured when he slipped and fell backwards. The court dismissed the §200 and common law negligence claim because the defendant did not have actual or constructive notice of the dangerous condition of the floor. With respect to the §241(6) claim the court held that at least one Industrial Code Regulation (12 NYCRR 23-1.7(d)) was applicable and, therefore, did not dismiss the cause of action. Another regulation (12 NYCRR 23-1.7(b)(1)) was not applicable as a hazardous opening was not involved.

Practice Note: The court makes it clear that a different standard applies to a claim caused by a dangerous condition and one involving the manner and method of the work.

11. *Barry Harris v. Eastman Kodak Company*, 921 N.Y.S.2d 766 (4th Dept., 2011) (Apr. 29, 2011). Plaintiff fell from a scaffold after a pipe on which he was working fell. In considering the denial of the plaintiff's §240(1) motion for summary judgment, the court noted that plaintiff failed to meet his "initial burden of establishing as a matter of law that the injury was caused by the lack of enumerated safety devices, the proper placement and operation of which would have prevented the pipe from falling on plaintiff and plaintiff falling off the scaffold."

Practice Note: There was a difference between the plaintiff's deposition testimony, where he testified that he was unsure whether the scaffold moved or shifted, with his bill of particulars, which asserted that the scaffold shifted and moved.

12. *Michael Shrek v. Clover Management, Inc.*, 922 N.Y.S.2d 891 (4th Dept. 2011) (Apr. 29, 2011). Plaintiff was on the premises replacing the filter in an HVAC system. He was injured when he fell from a ladder that was secured to the wall. The court held that the plaintiff was engaged in routine maintenance and not engaged in an enumerated activity protected by §240(1). The filters were required to be replaced as a result of normal wear and tear. The court did not dismiss the §200 and common law negligence claim and noted that there were issues of fact as to whether the defendant had constructive notice of

the dangerous condition (i.e. location of the guard railing).

Practice Note: In reaching its decision, the court clearly established the different legal standards applicable to a claim arising from a dangerous condition and a claim involving the manner and method of the work being performed.

13. *Anthony Quarcini v. National Fuel Gas Company*, 2011 N.Y. App. Div. LEXIS 3737 (May 6, 2011). The court dismissed the defendant's appeal and noted that "[n]o appeal lies from a mere decision," even though the defendant purported to appeal from an order.

Practice Note: The procedural posture of the case can impact appeal rights.

14. *John W. Karcz v. Klewin Building Company, Inc.*, 2011 N.Y. App. Div. LEXIS 4880 (June 10, 2011). Plaintiff was injured when a truss he had lifted overhead onto the aerial platform of a scissor lift fell on him. In holding that the plaintiff was entitled to summary judgment, the court noted that the Labor Law §240(1) applies to property located on the Seneca Nation reservation and held that the truss fell and struck the plaintiff because of the absence or inadequacy of an enumerated safety device. The court dismissed the §241(6) claim because the Industrial Code regulation relied on by the plaintiff was inapplicable. The §200 and common law negligence claim was dismissed because the defendants did not have the authority to exercise supervisory control of plaintiff's work nor did they actual or constructive notice.

Practice Note: The court applied the anti-subrogation rule to the claim by the primary defendant against the plaintiff's employer (i.e. both insured by the same primary and excess policies).

15. *Shawn Stenglein v. John Reigel*, 2011 N.Y. App. Div. LEXIS 4861 (June 10, 2011). In this Labor Law §240(1) case, the court, without reciting the facts and law, upheld the plaintiff's motion for summary judgment.

Practice Note: The record and briefs on appeal should be referenced to determine the procedural impact of this case.

16. *John T. Gowans v. Otis Marshall Farms, Inc.*, 2011 N.Y. App. Div. LEXIS 5202 (June 17, 2011). The plaintiff was injured when he fell through a hay hole in a barn. At the time of his injuries, the plaintiff's brother had been measuring the barn, which was incidental to the replacement of rotting carrier beams. The brother forgot to cover the hay hole through which the plaintiff fell. The court held that the plaintiff was performing a protected activity under §240(1); however, there were issues of fact as to the cause of the plaintiff's injuries.

Practice Note: There were conflicting expert affidavits on the issue of causation, which precluded summary judgment.

FEDERAL COURTS:

Second Circuit

1. *Frank Homola v. Praxair, Inc.*, 2011 U.S. App. LEXIS 4556 (Mar. 8, 2011). Plaintiff was injured while on the property owned by defendant when he tripped and fell. He sued the defendant under Labor Law §200 and 241(6). The court held that the fact that the workers, including the plaintiff, had to pass through an area between the safety fence and a building did not by itself render the area a “passageway” or “walkway” under Industrial Code §23-1.7(e)(1). The court noted that an open yard between buildings is not a passageway or walkway. Further, the court held that the fence over which the plaintiff fell was an integral part of the work being performed and was not the accumulation of dirt and debris or scattered tools or materials under 12 NYCRR §23-1.7(e)(2).

Practice Note: Not all slips and trips on job sites will constitute a violation of the Labor Law.

Eastern District

1. *Alfredo Perez v. Duane Reade*, 2011 U.S. Dist. LEXIS 2810 (Jan. 11, 2011). Plaintiff was injured when he was struck by a battery that fell 12 to 15 feet from a building’s control box that his co-worker was working on. The court held that there was an issue of fact as to whether the object was dropped by hand or whether it fell from the control box (i.e. improperly secured). Therefore, the court did not grant summary judgment under §240(1). With respect to the §241(6) claim, the court found an issue of fact whether there was a foreseeable danger of falling objects to require the use of a hard hat under the applicable Industrial Code (12 NYCRR 23-1.8(c)(1)). The court also held that Duane Reade, as a tenant, was an owner under the Labor Law. As for the claims for common law and contractual indemnification, the court found issues of fact and refused to grant the relevant motions.

Practice Note: The court held that a tenant can be considered an “owner” under the Labor Law where it has an “interest in the property and who fulfilled the role of the owner by contracting to have the work done.”

SOUTHERN DISTRICT

1. *United States Underwriters Insurance Company v. Skyline Development Corporation*, 2011 U.S. Dist. LEXIS 28852 (Mar. 17, 2011). The underlying Labor Law action settled, and at issue in this decision was the applicable insurance coverage between the parties. The issues raised were:
 - (1) Was liability established by statute as a matter of law? The court answered yes.
 - (2) Was there any evidence of actual negligence? The court answered no.
 - (3) Was there evidence of supervision, direction or control over the plaintiff’s work? The court answered no.

In light of these findings, the court found common law indemnification in favor of the defendants against the plaintiff's employer.

Practice Note: The court in reaching its decision rejected the anti-subrogation rule.



OFFICES

PHILADELPHIA

1700 Market Street, Suite 1418, Philadelphia, Pennsylvania 19103-3907
Telephone: 267.519.6800 Fax: 267.519.6801

NEW YORK

1200 Avenue of the Americas, 3rd Floor, New York, New York 10036-1615
Telephone: 646.253.5400 Fax: 646.253.5500

PRINCETON

902 Carnegie Center / Suite 100, Princeton, New Jersey 08540-6530
Telephone: 609.986.1300 Fax: 609.986.1301

HARTFORD

100 Pearl Street, 7th Floor, Hartford, Connecticut 06103-4506
Telephone: 860.760.3300 Fax: 860.760.3301

BUFFALO

665 Main Street, Suite 400, Buffalo, New York 14203-1425
Telephone: 716.566.5400 Fax: 716.566.5401

ROCHESTER

2 State Street, Suite 805, Rochester, New York 14614-1342
Telephone: 585.295.5400 Fax: 585.295.8300

SYRACUSE

5786 Widewaters Parkway, Syracuse, New York 13214-1840
Telephone: 315.413.5400 Fax: 315.413.5401

ALBANY

8 Southwoods Boulevard, Suite 300, Albany, New York 12211-2364
Telephone: 518.463.5400 Fax: 518.463.5420

WHITE PLAINS

11 Martine Avenue, Suite 750, White Plains, New York 10606-1934
Telephone: 914.798.5400 Fax: 914.798.5401

LONG ISLAND

200 Old Country Road, Suite 210, Mineola, New York 11501-9801
Telephone: 516.281.9800 Fax: 516.281.9801

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