



# GOLDBERG SEGALLA <sup>LLP</sup>

## LABOR LAW UPDATE

Summer 2010

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

Prepared by: **Thomas F. Segalla**  
**Brian T. Stapleton**

During this reporting period, it is obvious that the Court of Appeals decision in *Runner v. New York Stock Exchange, Inc.*, 12 N.Y. 599 (2009) has had a significant impact on how various courts are addressing the traditional “falling worker” and “falling object” cases. When faced with injuries sustained by a worker and there is an alleged Labor Law §240(1) claim, the claims representative and practitioner must have a detailed understanding of *Runner*. In addition, the Court of Appeals has visited the definition of what type of entity consistent an “owner” within the purview of the Labor Law. See *Alan Motor v. State of New York*, 2010 N.Y. LEXIS 1148 (June 8, 2010) where the Court held that there must be some “nexus” between the owner and worker whether by a lease agreement or grant of easement or other property interest to establish “ownership.” This determination requires a detail analysis of all relevant agreements between the entities involved in the construction site process. Further during this reporting period, we have seen an increase in claims based upon Labor Law §200 and common law negligence where the injured worker is seeking relief based upon the manner and method of the work being performed or where there is a defective or dangerous condition on the work site. These types of inquiries again require a detailed investigation of the onsite activities and the contractual arrangement between owners, general contractors, subcontractors and/or the injured worker’s employer. A close reading of the decisions of the various Appellate Courts is necessary and will help frame the claim professional’s investigative approach and the strategy of defense counsel.

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 at the above address; by phone at (716) 566-5480; or email at [tsegalla@goldbergsegalla.com](mailto:tsegalla@goldbergsegalla.com). You can also contact Brian Stapleton at 11 Martine Avenue, Suite 750, White Plains, New York 10606; by phone at (914) 798-5470; or by email at [bstapleton@goldbergsegalla.com](mailto:bstapleton@goldbergsegalla.com).

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### COURT OF APPEALS

1. *Larry C. Holly v. County of Chautauqua*, 13 N.Y.3d 932, 895 N.Y.S.2d 308 (2010)(Jan. 19, 2010). Plaintiff was injured when he lost his balance and fell off the scaffolding on which he was working. At the time of his fall, he was installing the last cinderblock on a 12' wall. The Court held that there was a triable issue of fact as to whether the scaffolding provided by the defendants provided the proper protection under §240(1).

**Practice Note:** Not every fall from a height including a fall from a scaffold, are afforded protection under §240(1). The pronouncement is key to future falling worker/gravity related accidents.

2. *Hugh Gallagher v. The New York Post*, 14 N.Y.3d 83, 896 N.Y.S.2d 732 (2010)(Feb. 11, 2010). At the time of his injury, the plaintiff was using a saw which jammed causing him to fall through an uncovered opening. The Court granted the plaintiff's motion for summary judgment holding that the evidence presented by the defendant did not raise a question of fact as to whether the plaintiff knew of the availability of a safety device (i.e. safety harness with lanyard) and unreasonably chose not to use. The fact that plaintiff may have prematurely returned to work from a prior injury constituted contributory negligence which was insufficient to establish the sole proximate cause defense.

**Practice Note:** It is important for employers to document where safety devices are stored and the employees knowledge concerning location and need to use.

3. *David Belding v. Verizon New York, Inc.*, 898 N.Y.S.2d 539 (2010)(Feb. 18, 2010). Plaintiff was injured while applying bomb blast film to the lobby windows. The Court held that this was a significant alteration (i.e. significantly altered the configuration or composition of the structure) and therefore, a protected activity under §240(1).

**Practice Note:** The Court focused on the fact that this activity was a one time activity versus a more frequent change.

4. *Alan Morton v. State of New York*, 2010 N.Y. LEXIS 1148 (June 8, 2010). At issue on this appeal was whether the owner of the premise was liable under §241(6). The plaintiff's employer had failed, prior to performing the work being conducted, to obtain a statutorily required permit. The majority of the Court, in this 5-2 decision, held that even though ownership was established that there was not any nexus between the owner and worker, whether by a lease agreement or grant of easement or other property interest to establish "ownership" for the purposes of the Labor Law.



**Practice Note:** Both the majority and dissent review historical precedent, but arrive at a different decision.

## **FIRST DEPARTMENT**

1. *Gene Collins v. Switzer Construction Group, Inc.*, 69 A.D.3d 407, 892 N.Y.S.2d 94 (1<sup>st</sup> Dept. 2010)(Jan. 5, 2010). Plaintiff was injured when he stepped off the ladder and slipped on debris that was scattered around the ladder. The court held that there was an issue of fact as to whether the plaintiff tripped over debris he created (i.e. “integral part” of his work) or whether created by other trades. Therefore, the court refused to dismiss the §241(6) claim (12 NYCRR §23-1.7(e)(2)).

**Practice Note:** The court also held that the indemnification clause was not unenforceable and void under GOL §5-322.1.

2. *Arthur Weber v. Baccarat, Inc.*, 70 A.D.3d 487, 896 N.Y.S.2d 12 (1<sup>st</sup> Dept. 2001)(Feb. 16, 2010). Plaintiff heard a “pop” and the right rear legs of the A-frame ladder shifted forward and separated from the top plate. The plaintiff was injured when the ladder fell. The court held that even though the accident was unwitnessed that the plaintiff established a *prima facie* violation of §240(1). With respect to the liability of a subcontractor for violations of §240(1), the court noted that a subcontractor is considered a statutory agent where it has the authority to supervise and control the plaintiff’s work even though the authority is shared with another entity.

**Practice Note:** Whether the subcontractor actually supervised the plaintiff is irrelevant provided it has the contract obligation to do so.

3. *Jose L. Garzon v. Metropolitan Transportation Authority*, 70 A.D.3d 568, 895 N.Y.S.2d 83 (1<sup>st</sup> Dept. 2010)(Feb. 23, 2010). Plaintiff was injured when he was struck by a caulking gun that he left temporarily on a ladder and forgot to remove the gun when he moved the ladder. The court dismissed the §240(1) claim holding that it was not a “falling object” and no evidence was presented that established that the absence of a scaffold caused the accident.

**Practice Note:** Not all falling objects create liability under §240(1) and the mere fact that the employee may have been working at an elevation is not controlling.

4. *Lukasz Kaminski v. 53<sup>rd</sup> Street and Madison Tower Development, LLC*, 70 A.D.3d 530, 895 N.Y.S.2d 76 (1<sup>st</sup> Dept. 2010)(Feb. 23, 2010). Plaintiff was injured at a demolition site when a portion of an exterior wall collapsed onto him. At the time, the plaintiff was clearing debris on the landing of a staircase. The court dismissed the §240(1) claim noting that the plaintiff was not working at an elevation so as to require a protective device and the collapse of a wall is not “the type of elevation-related accident that section 240(1) is intended to guard against.”



The court found an issue of fact as to the §241(6) claim and specifically 12 NYCRR §23-3.3(b)(2) which deals with falling masonry.

**Practice Note:** The court also noted that objects being loosened by vibrations is merely a “hazard incidental” to the work site.

5. *Shpetim Hajderlli v. Wiljohn, 59 LLC, 71 A.D.3d 416, 897 N.Y.S.2d 37* (1<sup>st</sup> Dept. 2010)(Mar. 2, 2010). The plaintiff was injured when his supervisor pulled the unfolded A-ladder away while the plaintiff was using it as a ramp. The court dismissed the §240(1) and noted that the supervisor’s action constituted a superseding act that broke any casual connection between the violation of the statute and the plaintiff’s injuries.

**Practice Note:** The act was not foreseeable in the ordinary course of events to establish §240(1) liability.

6. *David Harris v. 170 East End Avenue, LLC, 71 A.D.3d 408, 896 N.Y.S.2d 51* (1<sup>st</sup> Dept. 2010)(Mar. 2, 2010). Plaintiff was assisting in landing steel reinforcing rods and was injured when the crane he used struck wooden beams that fell on the plaintiff. The court refused to dismiss the §240(1) cause of action and granted plaintiff’s motion for summary judgment. In reaching its decision, the court held that the bundle of beams fell as a result of a foreseeable construction-related accident, not an act of god or other calamity which defendant’s could not have anticipated. In this case, it was foreseeable that the crane would strike the bundle of beams and cause them to fall.

**Practice Note:** The courts also noted, that even the beams were secured according to procedure, the plaintiff was entitled to summary judgment.

7. *Manuel Mata v. The Park Here Garage Corp., 71 A.D.3d 423, 896 N.Y.S.2d 57* (Mar. 4, 2010). At the time of his injury, the plaintiff, an independent contractor was engaged in the repair of an inoperative rolling garage gate that was permanently affixed to a structure used as a commercial parking facility. The 300 lb. assembly struck the ladder on which the plaintiff was standing and the plaintiff lost his balance and fell to the sidewalk. Citing to *Runner*, 13 N.Y.3d 599, the court, in this 5-1 decision, held that the plaintiff’s injury was the direct consequence of a failure to provide statutorily required protection (i.e. scaffold, hoist, hanger or pulley). Further, the court noted that the risk arose from a workplace elevation differential and directly from the application of the force of gravity on the object.

**Practice Note:** The dissent would not have granted the plaintiff summary judgment because there were issues of fact as to whether the plaintiff’s actions were the sole proximate cause.

8. *Gerard Fenty v. The City of New York, 71 A.D.3d 459, 897 N.Y.S.2d 53* (1<sup>st</sup> Dept. 2010)(Mar. 9, 2010). The plaintiff was injured when he jumped from a bucket lift because of hot steam emanating from a ruptured pipe. The court dismissed the §240(1) claim because



the accident was the result of a separate and unforeseeable hazard not a result of an elevation differential at the work site.

**Practice Note:** Not all injuries that result from a fall or jump from an elevation related work site are protected by §240(1).

9. *James v. Sinkaus v. Regional Scaffolding & Hoisting Co.*, 71 A.D.3d 478, 898 N.Y.S.2d 107 (1<sup>st</sup> Dept. 2010)(Mar. 11, 2010). Plaintiff's foot was injured when a cart being pushed up a ramp by a co-worker rolled over his foot. The court dismissed the §240(1) claim because the accident was not caused by the effects of gravity. The court dismissed the §200 and common law negligence claims because there was no evidence that the defendants supervised or controlled the injured plaintiff's work or created the dangerous condition.

**Practice Note:** What if the cart was being moved down the ramp, instead of up the ramp, would there have been a different result?

10. *John Francescon v. Gucci America, Inc.*, 71 A.D.3d 528, 897 N.Y.S.2d 73 (1<sup>st</sup> Dept. 2010)(Mar. 18, 2010). Plaintiff was injured when he stepped on a piece of loose carpeting described as debris. Plaintiff was an employee of a stone and marble subcontractor. The court allowed the plaintiff to amend its bill of particulars to add expert disclosure, even though 8 ½ years had elapsed, because the defendant had not shown it would be prejudiced. Further, the court held that the defendants' motion on common law and contractual indemnification was not yet ripe for adjudication.

**Practice Note:** From a procedural standpoint, it is often best to wait until discovery has been completed before making dispositive motions.

11. *Antoni Wilinski v. 334 East 92<sup>nd</sup> Housing Development Fund Corp.*, 71 A.D.3d 538, 898 N.Y.S.2d 15 (1<sup>st</sup> Dept. 2010)(Mar. 23, 2010). Plaintiff, at the time of his injury, was engaged in the demolition of a wall. Two large pipes that had been standing unsecured following their removal struck the plaintiff. The court held that the collapse of the pipes like the collapse of a wall is not the type of elevation related action that §240(1) is intended to guard against. The accident that resulted in the plaintiff's injuries is the type of peril a construction worker usually encounters on the job site. The court allowed the §241(6) claim.

**Practice Note:** The court also noted that the plaintiff and the pipes were at the same level.

12. *Patrick Keane v. Chelsea Piers, L.P.*, 71 A.D.3d 593, 899 N.Y.S.2d 158 (1<sup>st</sup> Dept. 2010)(Mar. 30, 2010). Plaintiff was injured while working under a pier when wave action caused a board to fall on top of him. The court held that the "swing in elevation" due to tides was understood as a risk and plainly contemplated by §240(1). The common law negligence claim was dismissed because the condition was known by plaintiff and his employer.



**Practice Note:** This was neither a pure falling object or falling workers case and the court cited to *Runner*, 13 N.Y.3d 599.

13. *David Latchuk v. The Port Authority of New York and New Jersey*, 71 A.D.3d 560, 896 N.Y.S.2d 356 (1<sup>st</sup> Dept. 2010)(Mar. 23, 2010). Plaintiff fell from one of the bridge towers when he exited a spider basket and did not use his safety harness in attempting to descend the bridge. The court denied plaintiff's motion for summary judgment finding there were issues of fact as to whether the plaintiff's decision to climb down without utilizing the basket or safety harness was the sole proximate cause.

**Practice Note:** The plaintiff testified he was forced to act in a particular manner which was disputed by the defendant.

14. *Guillermo Parraguirre v. 27<sup>th</sup> St. Holding, LLC*, 71 A.D.3d 594, 898 N.Y.S.2d 114 (1<sup>st</sup> Dept. 2010)(Mar. 30, 2010). Plaintiff fell to a lower level roof and was injured. At the time of the accident, plaintiff was transporting dust filters from a roof top to a ground level garage. The court held that plaintiff should be entitled to summary judgment and noted that this was not "routine maintenance." The court concluded that the activity being performed encompassed an ever present evaluation-related risk that safety devices in §240(1) were designed to protect against.

**Practice Note:** The court discussed the selection of the manner used to transport the filters and is perhaps the reason for its holding.

15. *Raul Salazar v. Novalex Contracting Corp.*, 72 A.D.3d 418, 897 N.Y.S.2d 423 (1<sup>st</sup> Dept. 2010)(Apr. 1, 2010). Plaintiff was injured while he was spreading freshly poured concrete in the basement of a building that was being renovated. He fell into an open trench. His torso was still at ground level, his right leg went into the trench (4' deep, 2' wide and 10' to 15' long). In a lengthy 5-1 decision, the majority of the court held that the risk of injury was gravity related because it was created by the difference between the elevation level of the required work and a lower level. Therefore, the majority concluded that the plaintiff had a viable §240(1) claim. The majority relied on *Carpio v. Tishman*, 240 A.D.2d 234 and stated it was good law until revised by the Court of Appeals. Also, the majority concluded that §241(6) was violated because the plaintiff fell into a "hazardous opening" with 12 NYCRR 23-1.7(b)(1)(i).

**Practice Note:** The dissent indicated that all other departments of the Appellate Division have held, as a matter of law, that a fall into a trench, ditch or hole does not fall within §240(1).

16. *Joseph Gallagher v. Levien & Company*, 72 A.D.3d 407, 898 N.Y.S.2d 35 (1<sup>st</sup> Dept. 2010)(Apr. 1, 2010). Plaintiff was injured when one of his legs became wedged in a hole in an alleyway that ran alongside a building wall. Just before the accident, he picked up the board that was covering the hole. The court found a triable issue of fact because there was



conflicting testimony as to the height of the drop exposed by the hole, the size of the hole and whether the board covering the hole had been secured and marked. With respect to the plaintiff's §241(6) claim, the court held that there was an issue of fact on the sole proximate cause defense.

**Practice Note:** The court, in reaching its decision, does not cite any case law and appears to be contrary to other Appellate Departments.

17. *Ramades Seda, Jr. v. Nina Epstein*, 72 A.D.3d 455, 900 N.Y.S.2d 6 (1<sup>st</sup> Dept. 2010)(Apr. 6, 2010). The plaintiff was washing windows on a second floor when the window frame broke and became dislodged causing him to fall to the concrete below. Plaintiff stepped outside of the ledge to clean the window. The court found issues of fact as to whether the defendants created or had notice of the defective window frame and therefore, refused to dismiss the §200 claim.

**Practice Note:** The court rejected the sole proximate cause defense.

18. *Australia Collado v. City of New York*, 72 A.D.3d 458, 900 N.Y.S.2d 10 (1<sup>st</sup> Dept. 2010)(Apr. 6, 2010). Plaintiff fell to his death from a fender system at the base of a bridge while handling an air hose. He lost his footing and fell into the river. The court held that the failure of the defendant to provide adequate safety devices against an elevation hazard contributed to the cause of the accident; therefore, the sole proximate cause defense was not available under §240(1). Further, the court held that the place where the plaintiff was standing was a "work location" under the industrial codes (12 NYCRR 23-1.7(c)).

**Practice Note:** The defendant failed to prove that the life vest was an adequate safety device and that plaintiff's refusal to wear it was the sole proximate cause.

19. *Indemnity Insurance Company of North America v. St. Paul Mercury Insurance Company*, 900 N.Y.S.2d 24 (1<sup>st</sup> Dept. 2010)(Apr. 22, 2010). In a coverage action arising out of an underlying §240 claim, the excess insurer settled the claim and then sought reimbursement from the primary insurer. The court held that the excess insurer was not entitled to reimbursement from the contractor's insurer because the contractor's insurer neither participated in the settlement negotiations nor agreed to the amount of settlement. The court also applied the anti-subrogation rule and barred recovery.

**Practice Note:** This is an interesting case that explores the relationships of various insurers that are involved in construction site litigation.

20. *Monica Harrison v. V.R.H. Construction Corp.*, 72 A.D.3d 547 (1<sup>st</sup> Dept. 2010)(Apr. 22, 2010). The court held that the plaintiff established a *prima facie* case because the ladder on



which she was working “tilted” causing her to fall. The defendants in an attempt to raise an issue of fact relied on two-post accident reports which the court held was heresy and did not create an issue of fact.

**Practice Note:** In order to create an issue of fact, the opposing part must submit evidence in admissible form.

21. *Andrzej Romanczuk v. Metropolitan Insurance and Annuity Company*, 72 A.D.3d 592, 899 N.Y.S.2d 228 (1<sup>st</sup> Dept. 2010)(Apr. 27, 2010). There was undisputed testimony that plaintiff was using the device he had been provided and that there were insufficient planks on the scaffold and no other devices were provided. The court rejected the sole proximate cause defense concluding that the plaintiff’s conduct was comparative negligence which is not a defense.

**Practice Note:** Where there is more than one cause, the sole proximate cause defense is unavailable.

22. *Brian Luongo v. The City of New York*, 72 A.D.3d 609, 899 N.Y.S.2d 235 (1<sup>st</sup> Dept. 2010)(Apr. 29, 2010). At the time the plaintiff injured his hand he was bracing a hydraulic jack. He was using his body to brace the jack. The unlevelled surface combined with the spacers and twisted C channel made the jack get off contact. The court held that the activity fell within the ambit of §240(1) because of the enormous weight the jack and plates fell or shifted while being hoisted. Relying on *Runner*, 12 N.Y.3d 599, the court found a violation of §240(1) because the plaintiff’s injuries here were a direct result of the gravitational force of the improperly secured girder jack and spacers and the absence of a securing device.

**Practice Note:** The court held this was a “falling object,” but not in the traditional sense.

23. *Laurence Apel v. The City of New York*, 901 N.Y.S.2d 183 (1<sup>st</sup> Dept. 2010)(May 4, 2010). Plaintiff was injured when a pin on a barge came up “like a seesaw.” The pins weighed 125 pounds. The court, relying on *Runner*, 13 N.Y.3d 599, 604 concluded “the risk to be guarded against arose from the force of the very heavy object’s unchecked or insufficiently checked, descent” and that the adequate safety device had not been provided.

**Practice Note:** It is obvious that *Runner* has changed the playing field.

24. *Jesus Pacheco v. Kew Garden Hills Apartment Owners, Inc.*, 2010 N.Y. App. Div. LEXIS 4219 (May 20, 2010). The defendant contractor entered into a contract with the general contractor that authorized the contractor to supervise and control the work delegated. Therefore, there were issues of fact as to whether the contractor was the general contractor’s agent.



**Practice Note:** The courts will focus on the terms of the contract and the activities on site when assessing whether one entity is an agent of another.

25. *Yacomo Coyago v. Mapa Properties, Inc.*, 2010 N.Y.App. Div. LEXIS 4437 (May 27, 2010). Plaintiff was injured when a flame torch he was using to demolish a boat exploded. The court held that the activity being performed was not “demolition” as defined by 12 NYCRR §23-1.4(b)(16) because the “mere act of dismantling” a vehicle, whether a boat, a car or otherwise, unrelated to any other project is not the sort of demolition covered by the Labor Law §241(6). The §200 claim was dismissed because there was not any proof that defendant had the authority to direct, control or manage the plaintiff’s work.

**Practice Note:** Is a boat or car a structure within the meaning of §240(1)? If it is, could you have a violation of §240(1) and not §241(6)?

26. *James A. McCary v. J.A. Jones-GMO, LLC*, 2010 N.Y. App. Div. LEXIS 5203 (June 17, 2010). Plaintiff was injured when falling bricks from above caused him to step off the plywood platform and into a hole (6’ deep and 4’ to 5’ wide). The court held that the plaintiff’s injuries were caused by an elevation-related risk.

**Practice Note:** Note the discussion of the court concerning the type of evidence and motions to reargue.

27. *Eugeniusz Minorczyk v. Dormitory Authority of the State of New York*, 2010 N.Y. App. Div. LEXIS 5539 (June 24, 2010). The court held that because a contractor was “the eyes, ears and voice of the owner” with complete supervisory authority over the project and specific duties with regard to safety, it was a statutory agent of the owner for the purposes of the labor law. The §200 claim was based on a dangerous condition on site and not the manner, method or materials. Therefore, the only issue to prove was whether the owner or agent had notice of the injury causing condition.

**Practice Note:** The court also addressed the enforceability of an indemnification contract where the owner had actual notice. The contract specifically barred indemnification of the owner for its own negligence. See *Brooks*, 11 N.Y.3d 204.

28. *2165 & Milton Moracho v. Open Door Family Medical Center, Inc.*, 2010 N.Y. App. Div. LEXIS 5501 (June 24, 2010). Plaintiff was injured when he fell through an open skylight on a roof which was under renovation. The court found that there is conflicting testimony as to whether a safety vest was available to plaintiff, whether he was aware of the expectation that he would “tie off” the vest, and if so, whether he chose for no good reason not to do so.

**Practice Note:** The court also considered the liability of the general contractor under the facts of the case.



## SECOND DEPARTMENT

1. *Thomas Mitthauer v. T. Moriarty & Son, Inc.*, 69 A.D.3d 588, 893 N.Y.S.2d 152 (2d Dept. 2010)(Jan. 5, 2010). Plaintiff was injured when he fell to the ground after taking his first step exiting a portable toilet located at the construction site. The court dismissed the common law negligence §§200 and 241(6) cause of action because the plaintiff was unable to identify a dangerous or defective condition that actually caused his fall.

**Practice Note:** All the plaintiff was able to offer was contradictory evidence that raised “feigned” issues of fact.

2. *Thomas Quinn v. Whitehall Properties, II, LLC*, 69 A.D.3d 599, 891 N.Y.S.2d 482 (2d Dept. 2010)(Jan. 5, 2010). Plaintiff was injured as he alighted from a ladder and stepped onto debris causing him to fall. He had cleared debris away from the area prior to climbing the ladder. The court refused to grant the defendant summary judgment under §241(6) because there were issues of fact as to whether the debris was an integral part of the work being performed or mere debris. The court also rejected the sole proximate cause defense.

**Practice Note:** The industrial code (12 NYCRR 23-1.7(e)(2)) requires contractors to maintain working area free from tripping hazards.

3. *Robert E. Walsh v. Richard F. Kresge*, 69 A.D.3d 612, 893 N.Y.S.2d 137 (2d Dept. 2010)(Jan. 5, 2010). The court granted the plaintiff’s motion for summary judgment under §240(1) and refused to apply the one and two-family dwelling exemption. The plaintiff submitted proof that the owner directed or controlled the work being performed (i.e. “method and manner of the work”).

**Practice Note:** The mere fact that one owns a one or two-family dwelling does not mean he or she is entitled to the exemption.

4. *Gabino Inga v. EBS North Hills, LLC*, 69 A.D.3d 568, 893 N.Y.S.2d 562 (2d Dept. 2010)(Jan. 5, 2010). The plaintiff’s injuries occurred while he was standing on an open A-frame ladder and the scaffold on which the ladder was placed fell. Court held that the plaintiff made a *prima facie* showing under §240(1)(i.e. the ladder and scaffold failed to give him proper protection). Defendant failed to create an issue of fact. Mere speculation about how the accident happened or challenged to the plaintiff’s credibility that is not bonafide is insufficient.

**Practice Note:** The court also ruled that the defendant was the statutory agent of the owner and general contractor (i.e. authority to supervise and control the work being performed by the plaintiff at the time of the injury).



5. *Joseph Barillaro v. Beechwood RB Shorehaven, LLC*, 69 A.D.3d 543, 894 N.Y.S.2d 434 (2d Dept. 2010)(Jan. 5, 2010). Plaintiff was injured when the ground beneath his feet collapsed causing him to injure his eye on an exposed rebar. At the time of his injury he was shoveling fill to cover pipes running through a 1 ½' to 2' deep trench. The court granted the defendant summary judgment and, citing to *Runner*, 895 N.Y.S.2d 279, noted that defendant made a *prima facie* showing that the plaintiff was not exposed to any risk that the §240(1) safety devices would have prevented. With respect to the §241(6) claim, the court held that a 1 ½' to 2' feet dept trench is not a hazardous opening (12 NYCRR 231-7(b)(1) .

**Practice Note:** It is important when assessing a common law negligence and §200 claims to determine whether the issue involves the manner and method of the work being performed or whether it involves a defective or dangerous condition. Different standards apply.

6. *Lawrence Schultz v. Hi-Tech Construction & Management Services, Inc.*, 69 A.D.3d 701, 893 N.Y.S.2d 225 (2d Dept. 2010)(Jan. 12, 2010). The court, in this case, again considered the “two disjunctive categories” that fall under §200 and common law negligent claims (i.e. dangerous or defective conditions at the work site and those involving the manner in which the work was performed.) This case involved a situation where the plaintiff was injured as a result of a dangerous condition on the premises. The issue was whether a dangerous condition caused the ladder to slip and the plaintiff to fall. There were issues of fact as to whether the defendant had control over the work site and actual or constructive notice of the condition.

**Practice Note:** It is important to determine which category the case falls into because there are different standards.

7. *VincentMugavero v. Windows By Hart, Inc.*, 69 A.D.3d 694, 894 N.Y.S.2d 448 (2d Dept. 2010)(Jan. 12, 2010). As to the general contractor, the court dismissed the §200 and common law claims because it did not have control of the subject work or have actual or constructive notice of the dangerous condition. Further, the court refused to dismiss the §241(6) claim against the general contractor because the industrial codes relied upon were sufficient specific and applicable. As to another defendant contractor, the court refused to dismiss the common law and §200 claim because the contractor failed to establish that it did not have control of the work site or that it did not have actual or constructive notice of the dangerous condition. With respect to the §241(6), the court held that the contractor failed to establish it was not an agent of the general contractor or homeowner.

**Practice Note:** This case provides an interesting analysis on how different contractors can be treated differently under the various sections of the Labor Law.

8. *George Nunez v. City of New York*, 69 A.D.3d 696, 891 N.Y.S.2d 668 (2d Dept. 2010)(Jan. 12, 2010). Without reviewing the facts of the case, the court granted the plaintiff’s motion



for summary judgment under §240(1). The court, however, cited to the key cases with respect to the plaintiff's burden to establish a *prima facie* case and the defendant's burden in proving the sole proximate cause.

**Practice Note:** The Record and Briefs on appeal should be reviewed to determine the factual and legal impact of the case.

9. *Angelo DeLiso v. State of New York*, 69 A.D.3d 786, 892 N.Y.S.2d 533 (1<sup>st</sup> Dept. 2010)(Jan. 19, 2010). The court held there were issues of fact that precluded the dismissal of the common law negligence and §200 claims. Specifically, there were issues whether the defendant controlled the work site, created the dangerous conditions or had actual or constructive notice of the hazardous conditions. The court dismissed the §241(6) claim because the industrial codes that the plaintiff relied upon were inapplicable.

**Practice Note:** While one party has the burden of proof on the *prima facie* case, the other can refute that with evidence in admissible form.

10. *Magid Beshay v. Eberhart L.P. #1*, 69 A.D.3d 779, 893 N.Y.S.2d 242 (2d Dept. 2010)(Jan. 19, 2010). The plaintiff was injured when a piece of a circular saw blade struck him in the eye. The §240(1) claim was dismissed previously. At issue here was the dismissal of the §241(6), §200 and common law negligence causes of action after opening statements. Based on various admissions, the court dismissed the §241(6) claim. The §200 and common law negligence claims was not dismissed.

**Practice Note:** The standard for a motion to dismiss the complaint after opening statements under CPLR 4401(a) is: (1) that the complaint does not state a cause of action; (2) that a cause of action that is otherwise stated is conclusively defeated by something interposed by way of a defense and clearly admitted as a fact, or (3) that the counsel for the plaintiff, in his or her opening statement by some admission or statement of fact, so completely compromised his or her case that the court was justified in awarding judgment as a matter of law.

11. *Andrzej Zimnoch v. Bridge View Palace, LLC*, 69 A.D.3d 928, 893 N.Y.S.2d 213 (2d Dept. 2010)(Jan. 26, 2010). The plaintiff was injured when he fell from a height of about 2' onto a concrete floor. The jury found that the defendant's violation of §240(1) was a substantial factor causing the accident. At issue on the appeal was the amount and nature of the damages awarded by the jury. The court held that the award for past and future medical expenses did not deviate from what would be reasonable compensation; however, the award for past and future pain and suffering did deviate (CPLR §5501(1)).

**Practice Note:** While liability was not challenged, is a 2' fall "diminimus"?



12. *Michael Parnell v. Babureddy Mareddy*, 69 A.D.3d 915, 897 N.Y.S.2d 108 (2d Dept. 2010)(Jan. 26, 2010). The plaintiff, a carpenter, working on the second floor of a single family dwelling, was injured when he stepped, lost his balance and fell into an open stairwell. The court applied the one and two-family dwelling exemption and held that the homeowner did not direct or control the work.

**Practice Note:** The exemption also applies to claims based on Labor Law §241-a.

13. *Michael Harkin v. City of New York*, 69 A.D.3d 901, 893 N.Y.S.2d 273 (2d Dept. 2010)(Jan. 26, 2010). The plaintiff was injured when his foot caught a pallet while he was entering a construction shanty. The pallet, according to the plaintiff had been in the same place with other debris. As the plaintiff was trying to avoid stepping on a piece of paper and bottle he fell. The court refused to dismiss the §200 and common law negligence claim because defendant failed to establish, *prima facie* that it neither had actual non-constructive notice of the dangerous condition. The court also denied defendant's motion under §241(6) as there was an issue of fact as to whether under 12 NYCRR 23-1.7(e)(2) plaintiff's injury was in a working area.

**Practice Note:** Not all slips and trips on a construction site are protected by the Labor Law.

14. *Carlos Alberto Chacha v. Glickenhau Doynow Sutton Farm Development, LLC*, 69 A.D.3d 896, 894 N.Y.S.2d 480 (2d Dept. 2010)(Jan. 2, 2010). A strong gust of wind blew a piece of plywood from a pile near the plaintiff which struck the plaintiff causing him to fall from the first floor 10' to 15' down to a dirt floor below. While the plaintiff established that the defendants violated §240(1) by failing to provide him with a safety device, the plaintiff failed to establish that his accident was a foreseeable consequence of the defendants' failure to provide an adequate safety device.

**Practice Note:** The result was an unforeseeable, independent, intervening act that attenuated the defendants' failure to provide an adequate safety device.

15. *Paul Astarita v. Flintlock Construction Services, LLC*, 69 A.D.3d 888, 893 N.Y.S.2d 615 (2d Dept. 2010)(Jan. 26, 2010). The plaintiff sued the defendants for common law negligence and a violation of §200. The court noted that the plaintiff's injuries stem not from the manner in which the work was being performed, but rather, from an alleged dangerous condition on the premises. The court held that liability in such a case exists where the defendant had control over the work and actual or constructive notice of the dangerous condition. In this case the court held that defendants were not entitled to summary judgment because they did not establish *prima facie* that they did not have control or notice.



**Practice Note:** It is important to initially determine the factual genesis of the plaintiff's claim before determining the applicable standard.

16. *William Scheidt v. Toll Bros., Inc.*, 70 A.D.3d 669, 892 N.Y.S.2d 869 (2d Dept. 2010)(Feb. 2, 2010). Without discussing the facts of the case, the court noted that the plaintiff sustained an injury as a result of the defendants' failure to guard against a gravity-related risk and the defendant failed to raise a triable issue of fact. Therefore, the court granted the plaintiff's motion for summary judgment.

**Practice Note:** The defendants' proof in opposition to the plaintiff's motion challenged the credibility of the evidence as it related to the damages aspect of the claim not liability.

17. *Henry Fiallos v. Vin's Crown Realty Associates*, 70 A.D.3d 630, 892 N.Y.S.2d 899 (2d Dept. 2010)(Feb. 2, 2010). The court dismissed the plaintiff's §200 and common law negligence causes of action. The plaintiff was injured not by a dangerous condition, but by the methods or means of the work. The defendant established that it did not have the authority to supervise or control the performance of the plaintiff's work.

**Practice Note:** It is important to distinguish between cases involving methods and manners from dangerous condition cases.

18. *Richard Brownrigg v. New York City Housing Authority*, At issue on this appeal is the application of Labor Law §241-a and whether the court properly directed a verdict in plaintiff's favor. Labor Law §241-a provides that persons working in an elevator shaftway must be protected by planking in various instances; however where the work could not be performed or not performed efficiently if the shaftway had been planked over a defendant does not violate §241-a. In light of this, the court held that the trial court improperly granted the verdict and remitted the case for a new trial.

**Practice Note:** On motions for a directed verdict, the court cannot engage in weighing the evidence or it cannot direct a verdict where facts are in dispute, different inferences drawn on the credibility of witness is called into question.

19. *John Armentano v. Broadway Mall Properties, Inc.*, 70 A.D.3d 614, 897 N.Y.S.2d 113 (2d Dept. 2010)(Feb. 2, 2010). The plaintiff was injured when he fell through an opening in the floor that had been secured only by an unsecured piece of plywood. The plaintiff was awarded summary judgment against the owner, managing agent and general contractor and the case went to trial on various cross claims. Specifically, at issue was the enforceability of the contractual indemnification provision. The court held that since there was sufficient evidence to support that the accident was caused solely by the general contractor's negligence that voided the agreement. The court also held that the anti-subrogation rule was not implicated because the contractor's insurer was merely defending the cross claims



asserted by the general contractor and not seeking to recover damages from the general contractor.

**Practice Note:** Also the subject insurance policy did not require the contractor's insurer to indemnify the general contractor for liability arising out of the general contractor's performance of the work.

20. *Michael Passaro v. 163-15 Northern Flushing Corp.*, 70 A.D.3d 795, 892 N.Y.S.2d 912 (2d Dept. 2010)(Feb. 9, 2010). Without discussing the facts of the case, the court held that the defendant met its *prima facie* case by proving that 12 NYCRR 23-1.7(e)(2) was inapplicable because the plaintiff was not injured by a "sharp projection."

**Practice Note:** Not only must an industrial code relied on by the plaintiff be sufficiently specific, it must be applicable to the facts of the case.

21. *Andrew Rivera v. 800 Alabama Ave., LLC*, 70 A.D.3d 798, 892 N.Y.S.2d 915 (2d Dept. 2010)(Feb. 9, 2010). The ladder on which the plaintiff was working slipped which caused the plaintiff to climb higher on the ladder. He grabbed a vertical metal stud and cut his hand. The court held that the plaintiff established a *prima facie* entitlement to a §240(1) claim and granted summary judgment. The defendant failed to raise a triable issue of fact on the sole proximate cause defense.

**Practice Note:** The issue of whether the failure to properly secure the ladder was not a substantial factor leading to plaintiff's injuries.

22. *Arra Ashjian v. Orion Power Holdings, Inc.*, 70 A.D.3d 738, 895 N.Y.S.2d 459 (2d Dept. 2010)(Feb. 9, 2010). Plaintiff was injured when he stepped into an unguarded, open hatch on the deck of the owner's barge while overhauling a turbine engine. Relying on various Court of Appeals decisions, the court held that under the Longshore and Harbor Workers' Compensation Act (LHWCA), an injured workers' employer "shall not be liable to the vessel for . . . damages directly or indirectly and any agreement or warranties to the contrary shall be void." The court held that the barge was a vessel within the meaning of the LHWCA and the action against the employer must be dismissed. The court also held that the LHWCA preempts causes of action under §240(1) and 241(6). However, a claim for common law negligence (dangerous condition) can be viable, but only attaches if the owner controls the work site and has actual or constructive notice of the dangerous condition. The plaintiff failed to state a cause of action for common law negligence and for §200.

**Practice Note:** The first question to ask and answer is whether a "vessel" is involved within the meaning of the LHWCA.



23. *Richard McCaffery v. Wright & Co. Construction, Inc.*, 71 A.D.3d 842, 895 N.Y.S.2d 835 (2d Dept. 2010)(Mar. 16, 2010). Plaintiff was injured when an unsecured ladder kicked out causing him to fall to the ground. The court held that the plaintiff established a *prima facie* case and that defendant failed to raise a triable issue of fact on the sole proximate cause defense. The fact that the plaintiff was the sole witness did not preclude summary judgment.

**Practice Note:** Mere speculation and the failure to challenge the plaintiff's credibility was insufficient to defeat plaintiff's motion.

24. *Frederick Jenkins v. Walter Realty, Inc.*, 71 A.D.3d 954, 898 N.Y.S.2d 56 (2d Dept. 2010)(Mar. 23, 2010). Plaintiff injured his finger on a plastic shaper machine which he was operating without a properly placed safety guard. At issue on this appeal was whether the plaintiff had a viable common-law negligence and §200 claim. The common law negligence and §200 claims were dismissed because the defendant made a *prima facie* showing that the plaintiff was injured, not by a dangerous condition, but by the methods or materials of his work and that defendant did not have the authority to supervise or control the performance of the work.

**Practice Note:** The owner is only liable in a manner or methods case where it has the authority to supervise or control.

25. *Willie Smith v. New York City Housing Authority*, 71 A.D.3d 985, 897 N.Y.S.2d 232 (2d Dept. 2010)(Mar. 23, 2010). At the time of his injury, the plaintiff was using a jackhammer to perform demolition work and he was standing on a scaffold. He was chipping mortar away from a cinder block when a cinder block started to fall. While attempting to move out of the way of the cinder block, he tripped on some broken brick on the scaffold. The cinder block on which he was working fell on his foot. The trial court dismissed the §§200, 240(1) and common law negligence claims, but denied the defendant's motion for summary judgment under §241(6). The court reversed the trial court and dismissed the §241(6) claim holding that the defendant demonstrated *prima facie* that 12 NYCRR 23-1.7(e)(2) was inapplicable and the plaintiff failed to raise triable issues of fact.

**Practice Note:** Because the only issue treated on appeal was the §241(6) claim; therefore, it appears that the plaintiff conceded that §240(1) was inapplicable.

26. *Patrick G. Tren v. Richard R. Capelletti, Jr.*, 71 A.D.3d 994, 897 N.Y.S.2d 199 (2d Dept. 2010)(Mar. 23, 2010). The plaintiff had erected a scaffold and when he stepped onto a section of the scaffold the plank tipped and he fell to the ground. The court in holding that the plaintiff established a *prima facie* case noted that where there is no statutory violation, or where the plaintiff is the sole proximate cause there can be no recovery under §240(1). Here the court noted that the defendant failed to provide safe ladders or scaffolding for the elevation related work performed by the plaintiff. The defendant failed to raise a triable issue of fact. With respect to the §241(6) claim, the court noted that while any comparative



negligence on the part of the plaintiff may require an apportionment of liability, such comparative negligence does not absolve the defendant of his own negligence.

**Practice Note:** Defendant/contractor has the burden to prove the sole proximate cause defense.

27. *Adan Pereira v. Quoque Field Club of Quogue, Long Island*, 71 A.D.3d 1104, 898 N.Y.S.2d 220 (2d Dept. 2010)(Mar. 30, 2010). The plaintiff was injured while attempting to start a steamroller that he had been using to pave a tennis court. Plaintiff's hand got caught in a pulley and his fingers were amputated. There was no pulley cover. At issue on this appeal was whether the plaintiff had a viable §241(6) claim. The court dismissed the §241(6) claim because the industrial code (12 NYCRR 23-1.5(a) relied upon by the plaintiff provided a general standard case which is an insufficient predicate for liability and that statute.

**Practice Note:** The plaintiff must plead and provide a violation of a concrete specification not a general safety standard.

28. *Thomas Cooper v. State of New York*, 72 A.D.3d 633, 899 N.Y.S.2d 275 (2d Dept. 2010)(Apr. 6, 2010). Plaintiff, while working on a "scissor lift," slipped on various substances including a substance from his own operations. As a result, plaintiff sued his defendant under §241(6), common law negligence and §200. The court held there was an issue of fact as to whether 1 NYCRR 23-1.7(d)(slipping hazards) was violated; however, the court held that 12 NYCRR 23-7.1(e)(2)(tripping hazards) was not applicable. The court dismissed the §200 and common law negligent claims which were based on a methods and materials claim because the defendant did not have authority to supervise or control the work.

**Practice Note:** The court distinguishes slipping and tripping hazards.

29. *Carlos Tapia v. Mario Genovesi & Sons, Inc.*, 72 A.D.3d 800, 899 N.Y.S.2d 303 (2d Dept. 2010)(Apr. 13, 2010). Prior to his injury, the plaintiff had erected the makeshift scaffold which was approved by his employer. The scaffold collapsed and the plaintiff was injured. The plaintiff made a *prima facie* case under §240(1); however, the subcontractor which was the statutory agent of the general contractor failed to raise a triable issue of fact. The fact that the plaintiff was unwitnessed did not prevent summary judgment. Also, the court rejected the sole proximate cause defense. The court held that the general contractor was entitled to contractual indemnification against the subcontractor based on a finding that the subcontractor was statutorily liable even though the subcontractor was not negligent.

**Practice Note:** The court also noted that there was not any proof that the general contractor was actively negligent.

30. *Carmelo Ciccone v. Kendal On Hudson*, 72 AD.3d 723, 898 N.Y.S.2d 645 (2d Dept. 2010)(Apr. 13, 2010). Plaintiff claimed that he was injured while unloading panels of



wallboard from a boom when the boom dropped causing the bundle to fall on his arm. The court held that there was a triable issue of fact as to how this accident occurred and therefore, denied plaintiff's motion and §§240(1) and 241(6).

**Practice Note:** The court also applied the doctrine of res ispa loquitur as to the negligent claim against one of the defendants.

31. *William A. Owens v. City of New York*, 72 A.D.3d 775, 898 N.Y.S.2d 493 (2d Dept. 2010)(Apr. 13, 2010). Plaintiff was injured when he fell from a ladder while performing work on a door's "slide bolt" locking mechanism. The court dismissed the §240(1) claim because the plaintiff was performing "routine maintenance" which is not a protected activity.

**Practice Note:** Not all falls off ladders are protected under §240(1). The activity being performed must be one of the statutorily enumerated activities.

32. *Milton Walker v. City of New York*, 72 A.D.3d 936, 899 N.Y.S.2d 322 (2d Dept. 2010)(Apr. 20, 2010). The plaintiff was injured when he fell from a permanently affixed ladder while attempting to exit a manhole. A balloon he placed in the sewer exploded causing him to fall. The court dismissed the §240(1) claim noting that the permanently affixed ladder was not defective and that the ladder was an adequate safety device. The court also dismissed the §241(6) cause of action because industrial provision relied on by the plaintiff were not applicable.

**Practice Note:** The court rejected the plaintiff's argument that a safety harness should have been provided.

33. *Jerzy Grabowski v. Consolidated Edison Company of New York*, 72 A.D.3d 888, 898 N.Y.S.2d 261 (2d Dept. 2010)(Apr. 20, 2010). The court dismissed the plaintiff's §240(1) on its own motion. Plaintiff was injured when he fell from a bench that he stepped on while entering the jobsite trailer. The door to the trailer was 2' to 3' off the ground and the bench seal was mid way. The court held that the bench from which the plaintiff fell was used as a passageway or stairway and did not come within the purview of §240(1).

**Practice Note:** The facts are not clear from a reading of this case; therefore, the Records and Briefs should be reviewed.

34. *Salvatore Ficano v. Franklin Stucco Supply, Inc.*, 72 A.D.3d 1018, 898 N.Y.S.2d 882 (2d Dept. 2010)(Apr. 27, 2010). The court, in dismissing the plaintiff's §240(1) claim, noted that §240(1) imposes liability only on contractors, owner, or their agents. The defendant was not one of these entities. Specifically, the court noted that the defendant was not hired to perform the work nor had authority to control the work; therefore all claims were dismissed.



**Practice Note:** An agent is defined as a third-party who obtains the authority to supervise and control the work being performed for an owner or general contractor.

35. *Vikram Harinarain v. Elizabeth Walker*, 900 N.Y.S.2d 364 (2d Dept. 2010)(May 4, 2010). Plaintiff was hit by a piece of plywood that was either thrown through or fell from a hole in the room. The court dismissed the §240(1) claim holding that the plaintiff failed to make a *prima facie* showing that the plywood was a material that required securing. Further, the court found there was a triable issue of fact under §241(6) as to whether the plaintiff was comparatively negligent.

**Practice Note:** Not all falling object injuries are protected by §240(1).

36. *Everardo Avila v. Plaza Construction Plaza*, 900 N.Y.S.2d 378 (2d Dept. 2010)(May 4, 2010). Plaintiff at the time of his injury was standing on a rebar grid holding a hose when the hose shifted and hit plaintiff in the head which caused him to fall on a rebar. The court held that the plaintiff was not presented with an elevation-related hazard to which the protective devices enumerated to the statute were designed to apply.

**Practice Note:** The mere fact that the plaintiff was standing on the rebar grid was not sufficient to establish that the activity was protected. He could not have fallen to the ground.

37. *Anthony McKee v. Great Atlantic & Pacific Tea Company*, 2010 N.Y. App. Div. LEXIS 4068 (May 11, 2010). Plaintiff was using a saw to cut a metal stud when the stud kicked out and the plaintiff fell injuring his back. The court dismissed the §200 and common law negligent claims against one of the defendants because that defendant only had general supervisory authority which is insufficient to establish liability. As to another defendant the court held, the plaintiff's employer is the only entity that had the authority to supervise or control plaintiff's work; therefore, the §200 and common law negligent claims were dismissed. The industrial codes relied on by the plaintiff were inapplicable and the §241(6) claim was dismissed.

**Practice Note:** Not all contractors on a job site are liable for injuries sustained by workers. The contracts and activities on site must be reviewed.

38. *Fernando Ramos v. Patchogue-Medford School District*, 210 N.Y. App. Div. LEXIS 4260 (May 18, 2010). The plaintiff's injuries stemmed from the means and method of the work being performed by the plaintiff. In order to establish liability against the defendants the plaintiff must prove that the defendant had the authority to supervise and control the activity which produced the injury. No such authority was present. The §241(6) claim was dismissed because the industrial code relied upon was inapplicable.



**Practice Note:** Under the code relied upon, notice of the structural defect or unsafe condition was required (12 NYCRR 23-9.2(a)). Here it is lacking.

39. *Jose Martinez v. City of New York*, 901 N.Y.2d 339 (2d Dept. 2010)(May 18, 2010). The plaintiff was injured when he fell after climbing 18 feet to shut off a valve. The valve broke as he was turning it and this caused his fall. The court dismissed the §240(1) because the plaintiff in the past had closed the valve as part of his regular maintenance duties. The court noted that the plaintiff was not performing a protected activity even though the valve needed to be shut off before the renovation project started. (i.e. no protection to a plaintiff injured before any activity listed in the statute was under way). Further, the plaintiff's employer had not been hired to perform the renovation work. The §241(6) claim was dismissed because the accident did not arise out of "construction, excavation or demolition. Construction work is defined as "all work of the types performed in the construction, erection, alteration, repair, maintenance, painting or moving of buildings or structures.

**Practice Note:** The court provides a detailed analysis of the categories of §200 liability and the relevant standards.

40. *Chester Lenda v. Breeze Concrete Corp.*, 2010 N.Y. App. Div. LEXIS 4250 (May 18, 2010). The defendant/owner hired a general contractor to construct a single family dwelling for the owner's use and a second residence for a caretaker. The plaintiff was injured while working on the second residence. The court refused to apply the "homeowners" exemption under §§240(1) and 241(6) because the second residence was not for residential purposes. In making this determination, the court focused on the site and purpose of the work and concluded that the use of the second residence was "commercial."

**Practice Note:** Even though the owner did not direct or control the work, the exemption was unavailable because it did not fit within the purpose of the exemption.

41. *Victor T. Jimenez v. Francisco Pacheco*, 900 N.Y.S.2d 903 (2d Dept. 2010)(May 25, 2010). The plaintiff was working on a detached garage of a single family dwelling when he was injured. He shot himself with a nail gun. The court applied the one and two-family dwelling exemption because the renovation work on the detached garage was not performed exclusively for commercial purposes or that it was unrelated to the residential use.

**Practice Note:** The owner did not direct or control the work and therefore, the exemption applied.

42. *David Reisman v. Bay Shore Union Free School District*, 2010 N.Y. App. Div. LEXIS 4690 (June 1, 2010). The plaintiff was injured when he was hit by a falling brick. At issue on this appeal was the indemnification claims between the owner, general contractor and subcontractor. In reaching its decision, the court noted that "[t]he right to contractual indemnification depends upon the specific language of the contract." The court held that the



indemnification provisions were enforceable because it contained the language “only to the extent permitted by law.

**Practice Note:** This is an excellent case because it outlines the current standards of how to assess the enforceability of a contractual indemnification provision.

43. *Zong Mou Zou v. Hai Ming Construction Corp.*, 2010 N.Y. App. Div. LEXIS 4670 (June 1, 2010). The plaintiff was injured when a sheet metal decking collapsed underneath him and he fell 10’ to 13’ into the basement. The court held that the plaintiff met his *prima facie* burden under §240(1); however, held that the defendants failed to raise a triable issue of fact on the sole proximate cause defense and failed to prove that the plaintiff was a recalcitrant worker.

**Practice Note:** The standard to prove a recalcitrant worker is that the plaintiff was provided with certain safety devices, that such devices were readily available for his use, he was instructed to use such devices and chose for no good reason to disregard the instructions.

44. *Ryan Gittins v. Barbara Construction Corp.*, 2010 N.Y. App. Div. LEXIS 4696 (June 1, 2010). The plaintiff, a carpenter, was injured when he attempted to pull an extension cord on a saw he was using and he lost his balance and fell three stories. At issue on this appeal was the application of the one and two-family dwelling exemption. The court held that the homeowner established the application of the exemption and noted that the mere fact that he homeowner spoke to the plaintiff’s supervisor was insufficient to defeat the exemption.

**Practice Note:** An owner can lose the exemption if he or she supervises or controls the plaintiff’s work.

45. *Eugene Travers v. RCPI Landmark Properties, LLC*, 2010 N.Y. App. Div. LEXIS 4887 (June 8, 2010). The plaintiff, at the time of his injury, was moving speakers that had been lowered on a stage by a forklift. The speaker fell from the forklift injuring the plaintiff. The court dismissed the §240(1) holding that the activity was moving speakers was not covered by the statute. The common law negligence claim was dismissed because the plaintiff was an out-of-possession landlord.

**Practice Note:** An out-of-possession landlord’s right to enter the premises was not sufficient to establish liability.

46. *Samuel Florestal v. City of New York*, 2010 N.Y. App. Div. LEXIS 4838 (June 8, 2010). Plaintiff was injured when an unsecured ladder suddenly twisted which caused him to fall and sustain injuries. The court held that the plaintiff established a *prima facie* case and the defendant failed to raise a triable issue of fact.



**Practice Note:** Mere speculation as to the possible causes of the accident are insufficient in defeating a §240(1) claim.

47. *Edwin Pope v. Safety and Quality Plus, Inc.*, 2010 N.Y. App. Div. LEXIS 5303 (June 15, 2010). The plaintiff was injured when he stepped off the unguarded edge of an elevated concrete portion of the basement and stepped onto a pile of cardboard. At the time of the incident, plaintiff was walking and talking to his foreman. The court dismissed the §240(1) claim because the concrete floor was not a safety device to protect an injured plaintiff, but was a normal appurtenance of the building. The §241(6) claim was dismissed because the industrial codes relied on by the plaintiff were not applicable. Further, there was not any tripping over or slipping over debris.

**Practice Note:** Not all falls on a construction site are protected by §240(1) or §241(6).

48. *Carmelo Rojas v. Jacob Schwartz*, 2010 N.Y. App. Div. LEXIS 5245 (June 15, 2010). The court in dismissing the plaintiff's common law negligence and §200 causes of action considered both categories involved in these types of claims (i.e. manner or method of claims and dangerous or defective claims). In manner or method claims, liability is established when the defendant has "authority to exercise supervision and control over the work: whereas in dangerous condition cases liability attaches when the landlord either created the dangerous condition that, caused the accident or had actual or constructive notice of the dangerous condition.

**Practice Note:** This case provides all relevant existing cases on Labor Law §200 and common law negligence claims.

49. *Dennis Bruno v. Board of Education of Central School District*, 2010 N.Y. App. Div. LEXIS 5547 (June 22, 2010). Plaintiff, a carpenter, was injured when he fell in a shallow trench on a renovation project. The plaintiff alleged a §200 and common law negligence claim based upon an alleged dangerous condition on the worksite. A defendant is liable for such a claim where it had control over the work site and either created or had actual or constructive notice of the dangerous condition. The defendant failed to produce competent evidence that it lacked control over the work site or lacked actual or constructive notice.

**Practice Note:** This appears to be a motion by the defendant who had the burden of proof.

### **THIRD DEPARTMENT**

1. *Raymond Baker v. Town of Niskayuna*, 69 A.D.3d 1016, 891 N.Y.S.2d 749 (3d Dept. 2010)(Jan. 7, 2010). Plaintiff was injured when a trench collapsed while he was working outside of a trench box. The trench was 6' to 7' wide and 10' to 12' deep. The court dismissed the §§240(1) and 241(6) claims against one of the defendants because that defendant did not constitute an agent of the defendant. Liability only attaches to an agent



where the alleged agent has the authority to supervise and control the work being performed. Here neither the contractor nor the activities on the job site indicate that the defendant had exercised the necessary level of control. The common law negligence and §200 claims were also dismissed because of lack of control.

**Practice Note:** The court also considered the issue of whether the plaintiff's Notice of Claim was sufficient. (i.e. whether it includes information sufficient to enable the municipality to investigate..

2. *William P. Bush v. Mechanicville Warehouse Corp.*, 69 A.D.3d 1207, 895 N.Y.S.2d 212 (3d Dept. 2010)(Jan. 21, 2010). Plaintiff was injured when he fell from a ladder while attempting to free a box of merchandise that was stuck to the surface of a pallet as a result of water leakage from a roof. Plaintiff instituted a §200 and common law negligence claim against the out-of-possession owner/landlord. The rule with respect to out of possession owner/landlords was stated as follows:

While an out-of-possession landlord is generally not responsible for dangerous conditions existing upon the leased premises, one who is contractually responsible for repair and maintenance or assumes responsibility for repairs through a course of conduct may be liable for unsafe conditions on the premises.

In this case, the court held that under the lease the owner was obligated to maintain and repair and did so on prior occasions. The court noted that in order to prevail on a §200 and common law negligence claim, the defendant owner either had to create the dangerous condition or had actual or constructive notice. The defendant had the burden of proof on these issues. The evidence demonstrated the defendant had constructive notice of the dangerous condition.

**Practice Note:** The court also rejected the defendant's sole proximate cause defense because there were more than one cause.

3. *Jose Deshields v. Deborah Carey*, 69 A.D.3d 1191, 897 N.Y.S.2d 254 (3d Dept. 2010). The plaintiff, while installing siding was injured when he fell from a ladder that "kicked out." The court refused to dismiss the plaintiff's §240(1) cause of action because there were issues of fact as to whether the accident was caused by the plaintiff's misuse of the ladder rather than by improper placement on slippery ground or other violation of §240(1). There were also issues of fact as to plaintiff's §241(6) claim.

**Practice Note:** The court also reviewed the admissibility of the report of a medical expert on causation issues.

4. *Scott A. Clemens v. Timothy G. Brown*, 69 A.D.3d 1197, 894 N.Y.S.2d 197 (3d Dept. 2010)(Jan. 21, 2010). At issue on this appeal was whether the plaintiff was an employee of the defendant and if so whether his claim under the Labor Law was barred by the exclusivity of the Workers' Compensation Law or whether the plaintiff was an independent contractor.



The court found that there was an issue of fact. The court noted that “the critical inquiry in determining whether an employment relationship exists pertains to the degree of control exercised by the purported employer over the results produced or the means used to achieve the results.”

**Practice Note:** The court also held that this is not a “special employee” situation. Further, the court refused to decide as a matter of law whether there was coverage under the workers’ compensation insurance policy.

5. *Ryan P. St. Louis v. Town of North Elba*, 7 A.D.3d 1250, 894 N.Y.S.2d 587 (3d Dept. 2010)(Feb. 18, 2010). Plaintiff was injured when a pipe dropped from a front-end loader bucket and struck plaintiff’s leg. Plaintiff had struck the pipe with a hammer just before it fell. The court held that the plaintiff had a viable §241(6) claim and noted that the applicability of an industrial code turns upon the manner a piece of equipment is being used not the name or label (i.e. whether a “front-end” loader was being used as a shovel or backhoe under 12 NYCRR 23-9.4).

**Practice Note:** The court notes that to the extent that the 2d Dept. decision in *Phillips v. City of New York*, 228 A.D.2d 570 reaches a contrary conclusion, the court declines to follow.

6. *Wheeler v. Citizens Telecommunications Company of New York*, 71 A.D.3d 1218, 897 N.Y.S.2d 277 (3d Dept. 2010)(Mar. 4, 2010). Plaintiff was injured when the utility pole he had climbed and was working on toppled. Two of the defendants had leased the pole from the third party defendant who was the pole’s owner. The owner had identified the pole as defective. The court noted that it may be reasonably inferred from the evidence that the owner had specific information regarding the structural integrity of the pole that it should have communicated, but failed to do so. The court found that there were issues of fact on proximate cause and contribution.

**Practice Note:** Apportionment of fault is generally a question of fact that is resolved by the jury.

7. *Sean Fallon v. Flach Development & Realty, Inc.*, 71 A.D.3d 1258, 896 N.Y.S.2d 510 (3d Dept. 2010)(Mar. 11, 2010). Plaintiff, a volunteer firefighter, was injured while working on a warehouse owned by the defendant where the fire company temporarily housed its vehicles. The plaintiff had responded to a notice from the fire company for volunteers to install plastic sheeting and heaters in the warehouse. The plaintiff fell while ascending a ladder that collapsed. The primary issue on this appeal was whether the plaintiff was an employee or worker for hire by either an owner, contractor or agent to perform work on a structure or building. In reaching its decision that the plaintiff was not an employee or worker for hire the court noted that absent the necessary “mutual duties or obligations” between the parties the situation bears none of the traditional hallmarks of an employment relationship. The



court also held that mere ownership was insufficient to establish liability under §240(1). There must be some nexus between the owner and the worker by lease agreement or grant of easement or other property interest.

**Practice Note:** Not all workers on a construction site that are performing construction work are protected workers under the Labor Law.

8. *Kenneth C. Beardslee v. Cornell University*, 72 A.D.3d 1371, 899 N.Y.S.2d 444 (3d Dept. 2010)(Apr. 22, 2010). Plaintiff was injured when he fell from the top of a ladder that shifted while he was working on the erection of form walls for the pouring of a foundation. The court noted that the simple fact that the plaintiff fell from a ladder does not automatically establish liability under §240(1). The defendants raised issues of fact regarding the type and adequacy of the safety devices provided and the proximate cause of the plaintiff's injuries.

**Practice Note:** Not all falls from a ladder are protected. Plaintiff must prove the safety device was inadequate or defective.

9. *Charles J. Bowles v. Clean Harbors Environmental Services, Inc.*, 72 A.D.3d 1307, 899 N.Y.S.2d 398 (3d Dept. 2010)(Apr. 15, 2010). Plaintiff was injured when a ladder "kicked out" and he fell. At issue on this appeal was whether the defendant was an agent of the general contractor or owner. The court held that the defendant was not liable under §240(1) and §241(6) because the defendant had not been granted the power to enforce safety standards and hire subcontractors or the authority to supervise and control the activity that brought about the injury. Here the defendant had only supervisory control over its employees and not the plaintiff nor could it enforce safety standards.

**Practice Note:** The §200 and common law negligence cause of action were dismissed because there was no supervisory control.

10. *Michael Larosae v. American Pumping, Inc.*, 2010 N.Y. App. Div. LEXIS 3749. Plaintiff was injured when he fell 30' into a ravine during the repair and reconstruction of a retaining wall. The fall occurred when the flow of the concrete in a pipe being held by plaintiff abruptly resumed which caused the pipe to lurch knocking the plaintiff into the ravine. Defendant moved to dismiss plaintiff's complaint contending that the accident did not occur on his property and therefore, he is not an owner within the meaning of the Labor Law. The court disagreed with the defendant and noted:

"The term 'owner' is not limited to the titleholder of the property where the accident occurred and encompasses a person 'who has an interest in the property' and who fulfilled the role of owner by contracting to have work performed for his [or her] benefit."



In this case, the defendant did not dispute the wall was being repaired for his benefit and also he owned part of the wall. (contrast – *Scaparo v. Village of Ilion*, 13 N.Y.3d at 866-897).

**Practice Note:** In order to find a violation of §200 and common law negligence, the plaintiff must prove a defendant both exercised supervisory control and had actual and constructive knowledge of the unsafe manner in which the work was being performed.

11. *Eric M. Rolewicz v. State of New York*, 2010 N.Y. App. Div. LEXIS 3849 (May 6, 2010). Plaintiff was injured when he received a severe electrical shock while using a jackhammer. He alleged violations of §200 and §241(6). The §200 was dismissed because plaintiff did not prove that the defendant “exercised supervisory control over the plaintiff’s work and had actual or constructive knowledge of the unsafe manner in which the work was being performed.” The §241(6) cause of action was dismissed because the industrial code relied on was not violated.

**Practice Note:** In this jurisdiction both supervisory and knowledge are required to establish liability under §200 and common law negligence.

12. *Christopher Cook v. Orchard Park Estates, Inc.*, 2010 N.Y. App. Div. LEXIS 3855 (May 6, 2010). Plaintiff was injured as a result of a slip and fall accident at the construction site. The court refused to dismiss the §200 claim because there were issues of fact as to whether the plaintiff’s injuries were caused by a dangerous or defective condition on the property or a danger created by the manner of the work being performed. The court dismissed the §241(6) claim because the tripping and slipping industrial codes were inapplicable (12 NYCRR 23-1.7(d) & (e)).

**Practice Note:** The court provides an excellent discussion of the standards applicable to §200 claims involving injuries caused by the manner of the work versus injuries sustained because of an unsafe or dangerous condition at a work site.

13. *Walter Rought v. Price Chopper Operating Company, Inc.*, 901 N.Y.S.2d 418 (3d Dept. 2010)(May 27, 2010). In a complicated set of facts, the plaintiff was injured when a bundle of wires fell onto him. The trial court dismissed the §240(1) claim, but not the §200 and §241(6) causes of action. The court refused to dismiss the §241(6) cause of action because the industrial code relied upon was sufficiently specific and applicable. The court dismissed the §200 and common law negligent claims against the owner noting there was no evidence of any supervision or control over the activity that brought about plaintiff’s injuries and to another defendant there was a question of fact.



**Practice Note:** One of the factors looked at in determining supervision and control is whether the contractor has the authority to stop work, if in its opinion, the work was not being performed in a safe manner.

14. *Paul Wheeler v. Citizens Telecommunications Company of New York, Inc.*, 2010 N.Y. App. Div. LEXIS 5202 (June 17, 2010)(See also #6 case above). At issue on this appeal was whether the allegations of the common law negligence, §§200, 240 and 241 should be dismissed against one of the defendants. The common law negligence claim and §200 claim were dismissed because the defendant did not create a condition that was the proximate cause of the plaintiff's accident nor did the defendant exercise supervisory control of plaintiff's work or create or have actual or constructive notice. The §§240 and 241(6) causes of action were dismissed because the defendant was not an owner of the pole from which the plaintiff fell because there was not a sufficient nexus.

**Practice Note:** In reaching its decision that court noted: "Although the term 'owner' may encompass a non-titleholder 'who has an interest' in the property and who fulfilled the role of the owner by contracting to have work performed for his or her benefit. . ." the defendant neither contracted for nor benefited by, plaintiff's work.

15. *Michael Truppi v. Leonardo Busciglio*, 2010 N.Y. App. Div. LEXIS 5231 (June 17, 2010). Plaintiff was injured when he fell because his ladder slipped out from under him. The court found that there were issues of fact as to whether the one and two-family dwelling exemption applied. There was conflicting evidence as to whether the work was being done to maintain the dwelling's use as defendant's home or for rental to others.

**Practice Note:** There was an issue surrounding whether the defendant owner intended to live there or not or whether he was going to rent the premises. Intention is important.

16. *Edward J. Len v. State of New York*, 2010 N.Y. App. Div. LEXIS 5187 (June 17, 2010). The plaintiff, at the time of his death, was performing a seasonal task to allow for winter ice flow. At issue on appeal was whether one of the defendants was the employer of the plaintiff. Specifically, the court considered whether the plaintiff was an employee of the parent and/or subsidiary corporation. The court held for the purposes of the operations being performed by the plaintiff that the plaintiff was an employee of both entities and the workers' compensation was his exclusive remedy.

**Practice Note:** In determining the relationship of a parent and subsidiary for the purposes of the application of the workers' compensation law, the courts utilize a building block approach. See decision for key factors.



## **FOURTH DEPARTMENT**

1. *Kenneth Davis v. Wind-Sun Construction, Inc.*, 70 A.D.3d 1383, 894 N.Y.S.2d 621 (4<sup>th</sup> Dept. 2010)(Feb. 11, 2010). Plaintiff was injured while engaged in the fabrication of steel bridge components at his employer's place of business and not at the construction site where the components were to be installed. The court dismissed the plaintiff's complaint under §§240(1) and 241(6) because plaintiff was not engaged in a protected activity.

**Practice Note:** An injured plaintiff must be performing a protected activity in order to prevail under either §240(1) (enumerated statutory activities) or 241(6)(i.e. construction, excavation or demolition).

2. *Roger Carrow v. Stephen Bogard*, 2010 N.Y. App. Div. LEXIS 1256 (Feb. 11, 2010). At the time the plaintiff was injured, the owner of the one-family dwelling was out of town. Plaintiff was injured when he cut the main supports for trusses. The court dismissed the plaintiff's §§240(1) and 241(6) causes of action by applying the one and two-family dwelling exemption and noted that the owner did not direct or control the method and manner in which the work was performed. The court also dismissed the common law negligence cause of action because the owner did not have authority to control the injury-producing work.

**Practice Note:** The application of the one and two-family dwelling exemption is fact specific. This case cites to the leading cases on this issue.

3. *John K. Martinez v. Tambe Electric, Inc.*, 70 A.D.3d 1376, 894 N.Y.S.2d 666 (4<sup>th</sup> Dept. 2010)(Feb. 11, 2010). Plaintiff was injured when he received an electrical shock and fell from a ladder at a construction site. The plaintiff's theory of liability against the electrical subcontractor was that as an agent of the general contractor the subcontractor it was liable for plaintiff's injuries. Pursuant to its contract with the general contractor, the subcontractor was responsible for the temporary wiring and for the safety of its work and the work area. Therefore, the court held that the subcontractor was liable, as an agent, because it had the authority to control the activity bringing about the injury and could avoid or correct an unsafe condition.

**Practice Note:** The courts in assessing the liability of an agent will review the contract documents and the activities performed on the site.

4. *Syracuse University v. Games 2002*, 71 A.D.3d 1531, 897 N.Y.S.2d 343 (4<sup>th</sup> Dept. 2010)(Mar. 19, 2010). At issue on this appeal was whether the plaintiff was entitled to contractual and common law indemnification against the defendant for the amount that the plaintiff paid in settling the underlying action. The defendant had entered into a contract



with plaintiff which allowed the defendant to utilize the premises for opening ceremonies. The contract had an indemnification provision. The court, in this 5-1 decision, denied the plaintiff's motion seeking contractual and common law indemnification because the plaintiff failed to establish as a matter of law that it was not itself negligent and plaintiff failed to establish that it exercised no supervision or control over the work being performed by the injured employee. The court also held that the plaintiff's motion was premature.

**Practice Note:** The one dissenting judge provided a detailed analysis of his view of the relevant cases and how the plaintiff met its burden in demonstrating that it did not control or supervise the injuring producing work.

5. *Sarah Corsivo v. M&S Hotels, LLC*, 71 A.D.3d 1503, 895 N.Y.S.2d 915 (4<sup>th</sup> Dept. 2010)(Mar. 19, 2010). Without discussing the facts of the case, the court unanimously affirms that holding of the trial court that granted the plaintiff's motion for summary judgment under §240(1).

**Practice Note:** The Record and Briefs on Appeal should be reviewed to determine the legal impact of this case.

6. *Caesar Tronolone v. New York State Department of Transportation*, 71 A.D.3d 1488, 897 N.Y.S.2d 356 (4<sup>th</sup> Dept. 2010)(Mar. 19, 2010). Plaintiff was injured when he slipped on a piece of scrap plywood that had been placed underneath a temporary road sign. The court dismissed the plaintiff's §241(6) claim which was predicated on 12 NYCRR 23-1.7(d) because the piece of plywood on which the plaintiff slipped was not “. . . the sort of [floor] passageway, walkway, [scaffold, platform or other elevated] working area” within the purview of that industrial code.

**Practice Note:** Not only must the industrial code be sufficiently specific, but it must be applicable to the facts of the case.

7. *Glen Potter v. Jay E. Potter Lumber Co., Inc.*, 71 A.D.3d 1565, 900 N.Y.S.2d 207 (4<sup>th</sup> Dept. 2010)(Mar. 26, 2010). At the time of plaintiff's injury, the plaintiff and several co-employees had positioned themselves on the back of a forklift to act as a counterweight. The forklift was being used to lift sheeting off the back of a flatbed truck. The load became unstable and plaintiff was catapulted 10' into the air. The court, relying on *Runner v. New York Stock Exch. Inc.*, 13 N.Y.3d 599, rejected defendant's contention that liability was not established because the plaintiff neither fell from an elevated work surface or struck by a falling object. The court held that the harm to plaintiff flowed directly from the application of the force of gravity to the sheeting load being hoisted by the forklift. Also the court noted, citing to *Narducci v. Manhasset Bay*, 96 N.Y.2d 259, that the load fell while being hoisted because of the absence or inadequacy of a safety device of the kind enumerated in §240(1).



**Practice Note:** The court in its decision also reviewed the standard applicable to a determination as to whether a jury verdict is inconsistent and against the weight of the evidence.

8. *John Calderon v. Walgreen Co.*, 72 A.D.3d 1532, 900 N.Y.S.2d 533 (4<sup>th</sup> Dept. 2010)(Apr. 30, 2010). The plaintiff was injured when the scaffolding tipped backwards and he fell to the ground. The court, in this 3-2 decision, refused to dismiss the plaintiff's §240(1) claim because the plaintiff met his initial burden in establishing that §240(1) was violated. Even though the plaintiff moved materials to the back of the scaffold that caused the scaffold to tip, the court held that constitutes contributory negligence which is a defense that is unavailable.

**Practice Note:** The statutory violation was the proximate cause of the accident and the plaintiff's actions were not the sole blame.

9. *Chang Han Kim v. Clymer Central School*, 72 A.D.3d 1547, 900 N.Y.S.2d 227 (4<sup>th</sup> Dept. 2010)(Apr. 30, 2010). Plaintiff was injured when he fell from a ladder while removing asbestos from defendant's premises. While the plaintiff met his initial burden of proof that there was a violation of §240(1), the court held there was a triable issue of fact of whether the activities of the plaintiff were the sole proximate cause of his injuries. Therefore, the court refused to grant summary judgment.

**Practice Note:** In reaching its decision, the court relies on the Court of Appeals case *Robinson v. East Med. Ctr.*, 6 N.Y.3d 550.

10. *Harry Chacon-Chavez v. City of Rochester*, 72 A.D.3d 1636, 900 N.Y.S.2d 799 (4<sup>th</sup> Dept. 2010)(Apr. 30, 2010). Plaintiff fell when the ladder on which he was standing slipped because it was not secured to the roof at the time of the accident. Because the ladder was inadequately secured, the court found a violation of §240(1). The court also refused to apply the sole proximate cause defense.

**Practice Note:** Once the plaintiff meets his or her initial burden that a safety device was not "so constructed, placed or operated to give proper protection," the defendant must present evidence to the contrary and the plaintiff's actions or inactions were the sole cause.

11. *John Gronski v. County of Monroe*, 901 N.Y.S.2d 448 (4<sup>th</sup> Dept. 2010)(May 7, 2010). The defendant was the owner of a recycling facility which was operated by the plaintiff's employer. Plaintiff was injured when he was struck by a bale (1 ton) of recycling material. The court, in dismissing the plaintiff's labor law and common law negligence action, relied on the out-of-possession landlord cases and noted:

. . . an out-of-possession landlord who relinquishes control of the premises and is not contractually obligated to repair unsafe



conditions is not liable to employees of a leasee for personal injuries caused by an unsafe condition existing on the premises.

**Practice Note:** The ownership issue can be extremely fact specific and the “title” is not necessarily determinative.

12. *Clyde Coleman v. ISG Lackawanna Services, LLC*, 2010 N.Y. App. Div. LEXIS 5003 (June 11, 2010). The court affirmed the trial court’s dismissal of plaintiff’s Labor Law §241(6) cause of action. The plaintiff was injured while operating a diesel-powered water blasting unit. In reviewing the application of various industrial codes under 12 NYCRR Part 23, the court held the codes were not sufficiently specific or were inapplicable to the facts of the case.

**Practice Note:** In order to establish a *prima facie* claim under §241(6), the industrial code must be sufficiently specific and applicable to the facts.

13. *Richard Benevento v. City of Buffalo*, 2010 N.Y. App. Div. LEXIS 5136 (June 11, 2010). In this 3-2 decision, the majority held that there was an issue of fact as to whether the plaintiff had met his initial burden of proof with respect to his §241(6) claim. Plaintiff was injured when the backhoe near where he was standing swiveled and struck him. At issue was the application of 12 NYCRR 23-1.4(b)(19) which deals with the use of backhoe during excavation work.

**Practice Note:** The majority and dissent differ on their analysis of the facts as they relate to the relevant code.

14. *John Dennis Ferris, Sr. v. Benbow Chemical Packaging, Inc.*, 2010 N.Y. App. Div. LEXIS 4986 (June 11, 2010). Plaintiff was injured while installing a pipe system for cleaning the defendant’s cylindrical storage tanks. At the time of his injury, plaintiff was working on an A-frame ladder that he had leaned against one of the tanks. The ladder partially slid from underneath plaintiff and when the ladder struck a seam in the floor, a rung of the ladder broke causing plaintiff to fall. The court rejected the defendant’s contention that plaintiff was negligent in using the A-frame ladder in a closed position. This, according to the court, constituted contributory negligence in light of the testimony of the plaintiff that there were no “operable safety devices” available on site.

**Practice Note:** The court held that the plaintiff was performing a “repair” which is protected activity under §240(1) (i.e. significant physical change beyond routine maintenance).

15. *David A. Barto v. NS Partners, LLC*, 2010 N.Y. App. Div. LEXIS 4941 (June 11, 2010). Plaintiff was injured when he grabbed a live wire while working on a hotel construction project. The plaintiff was installing acoustic ceiling tiles at the time of the accident. The court dismissed the §200 and common law negligence claim against one of the defendants



because that defendant did not have the right or authority to control the activity that brought about the plaintiff's injuries. Further, the plaintiff only offered inadmissible hearsay statements as to whether the defendant had actual or constructive notice of the dangerous condition. The court also considered the common law contribution and indemnification and contractual indemnification claims between the defendants and dismissed all claims. With respect to the common law contribution claim because the plaintiff did not have a claim against the defendant, that claim was dismissed. The common law indemnification claim was dismissed because the defendant did not direct or supervise the injury producing work. The contractual indemnification claim was dismissed because the plaintiff's injury did not arise or result from the defendant's work.

**Practice Note:** The court also considered a failure to procure insurance claim which it dismissed based upon the defendant producing a certificate of liability insurance which the other defendant did not refute.

16. *Duane Pieri, Sr. v. B&B Welch Associates*, 2010 N.Y. App. Div. LEXIS 4954 (June 11, 2010). Plaintiff was injured when he fell into a tank on the defendant's premises that he was working on. The plaintiff was "on-call" to handle problems that the premise owners part-time maintenance worker could not handle. At issue on this appeal was whether the plaintiff was performing only routine maintenance. The court noted that "delineating between routine maintenance and repair is frequently a close, fact-driven issue." The distinction depends on "whether the item being worked on was inoperable or malfunction prior to the commencement of the work." and "whether the work involved the replacement of components damaged by normal wear and tear." The court held that the plaintiff was injured while "troubleshooting" an uncommon lift station malfunction which is a protected activity under the Labor Law §240(1). Further, the inspection of an integral part of the structure in furtherance of repairing an apparent malfunction is protected. The court also rejected the defendant's sole proximate cause argument because the defendant failed to present evidence that plaintiff had been instructed to use the safety device or that based on plaintiff's training, prior experience and common sense, knew or should have known to use the safety device.

**Practice Note:** Citing Cahill, 4 NY3d at 41 the court noted that defendant failed to present evidence that would have permitted the jury to find that the plaintiff knew that he was expected to use they safety device that he chose for no good reason not to use and had he not made that choice he would not have been injured.

17. *Francesco Strangio v. Severson Environmental Services, Inc.*, 2010 N.Y. App. Div. LEXIS 5335 (June 18, 2010). Plaintiff was injured when he was struck in the face by the handle of a hand-operated hoisting mechanism while he was raising a scaffold. The court, in this 3-2 decision, dismissed the §240(1) cause of action holding that the fact that the accident is "connected in some tangential way with the effects of gravity" is insufficient to bring the matter within §240(1).



**Practice Note:** The dissent was of the view that there can be no question that the harm to the plaintiff was a direct consequence of the force of gravity citing to *Runner*, 13 N.Y.3d 599.

## **FEDERAL COURTS:**

### **SECOND CIRCUIT**

1. *Victor J. Runner v. New York Stock Exchange, Inc.*, 590 F.3d 904 (2d Cir. 2010)(Jan. 5, 2010). This Court had previously certified a question to the New York Court of Appeals. The Court of Appeals decided the issue and this Court affirmed the District Court Judgment and remanded this case to the District Court to enter judgment in conformity with the parties' settlement agreement.

**Practice Note:** This decision reviews the complete procedural and substantive process involved in the *Runner* case.

### **SOUTHERN DISTRICT OF NEW YORK**

1. *Jorge Lopez v. Carlos Echebia*, 693 F. Supp.2d 381 (S.D.N.Y. 2010)(Mar. 11, 2010). The plaintiff was injured while he was cutting down a tree and he fell. The court considered the one and two-family dwelling exemption. The plaintiff did not provide any evidence that the property is anything other than a one-family dwelling. Further, there was not any proof the owner directed or controlled the working being performed by the plaintiff.

**Practice Note:** The court also discussed whether the tree removal was part of the construction project and concluded there were issues of fact. This did not alter the court's application of the exemption.

### **WESTERN DISTRICT OF NEW YORK**

1. *Frank Homola v. Praxair, Inc.*, 2010 U.S. Dist. LEXIS 53147 (May 26, 2010). The plaintiff, while working on the defendant's property was caused to slip and trip and fall to the ground based on a hazardous and surrounding icy condition. The court dismissed the plaintiff's §200 claim because the defendant did not exercise control over the remediation work being performed. The §241(6) claim was dismissed because the industrial codes relied upon were not applicable to the facts of the case.

**Practice Note:** The case reviews the alleged industrial codes and concludes that even though the plaintiff was involved in excavation which is a protected activity – none of the codes applied.



**GOLDBERG SEGALLA LABOR LAW LITIGATION GROUP**

**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 / 3<sup>rd</sup> Floor  
New York, New York 10036-1615  
Telephone: 646.235.5400  
Fax: 646.235.5500

**HARTFORD**

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

**PRINCETON**

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

**BUFFALO**

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

**LONG ISLAND**

200 Old Country Road / Suite 210  
Mineola, New York 11501-4293  
Telephone: 516.281.9800  
Fax: 516.281.9801

**ALBANY**

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

**SYRACUSE**

5789 Widewaters Parkway  
Syracuse, New York 13214-1855  
Telephone: 315.413.5400  
Fax: 315.413.5401

**WHITE PLAINS**

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

**ROCHESTER**

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