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Individual Highlights:

New York Court of Appeals Takes a "Common Sense" Approach In Applying Labor Law 240(1)

by Lisa M. Rolle

In dismissing Labor Law claims, the highest court in the State of New York held that it will take a "common sense" approach when examining the application of Labor Law §240(1) to the facts. In *Salazar v. Novalex Contracting Corp.*, 18 NY3d (2011), the New York Court of Appeals interpreted its recent decision in *Wilinski v. 334 E. 92nd Housing Development Fund Corp.*, 2011 N.Y. LEXIS 3181 (Oct. 25, 2011) to affirm the Supreme Court's granting of summary judgment to defendants dismissing plaintiff's Labor Law §§ 240(1) and 241(6) claims. Plaintiff Raul Salazar was employed by a subcontractor hired to pour concrete at a project managed by the general contractor Novalex Contracting Corp. At the time of the accident, plaintiff and his co-

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Trip and Fall Claim Over a Half Inch Defect Dismissed as a Matter of Law

by Jerri A. DeCamp

In the recent dismissal of a personal injury claim arising from a trip and fall over an allegedly defective sidewalk condition, the New York State Appellate Division, First Department, concluded that a gap between two sidewalk flags measuring one-half-inch in depth and one-half-inch in width is trivial in nature and not actionable as a matter of law.

In *Schwartz v. Bleu Evolution Bar & Restaurant Corp.*, 2011 NY Slip. Op. 8980, 2011 N.Y.App.Div. LEXIS 8817 (December 13, 2011), plaintiff claimed that she was caused to trip and fall when her foot became caught in the gap between two sidewalk flags. The appellate court unanimously reversed, on the law, the lower court's denial of defendants' motion for summary judgment dismissing the

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NY Court of Appeals Takes "Common Sense" Approach (cont.)

workers were laying a concrete floor in the basement of the premises. Concrete was fed into the basement through a chute fed through a window into wheelbarrows. The workmen then poured the concrete onto the floor and spread it around with rakes to ensure the floor would be level. The floor contained a trench system which was to be filled with concrete as part of the laying of the floor. The trench system was about two feet wide and between three and four feet deep. While walking backward across the floor smoothing the concrete with his rake, plaintiff stepped into the trench that had been partially filled with concrete. There was no railing, barricade, or cover around or over the trench. Plaintiff filed a lawsuit citing violations of Labor Law §§ 240(1) and 241(6) claiming defendants failed to provide appropriate safety devices. The Supreme Court granted the defendants' motions for summary judgment and dismissed plaintiff's complaint in its entirety. The Appellate Division reversed the Supreme Court and reinstated plaintiff's Labor Law claims. Defendants subsequently were granted leave to appeal to the Court of Appeals challenging the decision of the Appellate Division.

The Court of Appeals held that "installation of a protective device of the kind that Salazar posits . . . would have been contrary to the objectives of the work plan in the basement." The Court stated further, "Put simply, it would be illogical to require an owner or general contractor to place a protective cover over, or otherwise barricade, a three-or four-foot-deep hole when the very goal of the work is to fill that hole with concrete," particularly when needed to be done with celerity. In arriving at its decision, the Court distinguished its holding in *Wilinski*. The Court stated that the plaintiff in *Wilinski* was injured when a wall that was being demolished caused pipes that were leaning against nearby walls to fall and hit plaintiff. The pipes themselves were not slated for demolition so "securing the pipes in place as workers demolished nearby walls would not have been contrary to the objectives of the work plan." Since the work plan in *Salazar* involved laying the concrete floor, which included filling the trenches, the Court of Appeals found that "it would [have been] impractical and contrary to the very work at hand to cover the area where the concrete was being spread." The Court held that this finding of impracticality pertained to the use of safety devices as required by both the 240(1) and 241(6) claims. In dismissing the Labor Law claim, the Court of Appeals held that Labor Law 240(1) should be construed with "a common sense approach to the realities of the workplace at issue."

Labor Law 240(1) Is Not Precluded Because the Object and the Plaintiff Are On The Same Level

by Jeffrey Briem

A divided Court of Appeals issued a decision in *Wilinski v. 334 E 62nd St Dev Fund Corp.*, 2011 N.Y. Slip Op. 747, holding that Labor Law 240(1) liability is not precluded merely because the object which injured plaintiff was located at the same level as his work area.

Plaintiff Wilinski and other co-workers were demolishing interior brick walls in a vacant apartment house. Two disconnected 4" plumbing pipes ran vertically from the floor of plaintiff's work area to the ceiling and into the floor above. The above floor had already been demolished, so the pipes were essentially "free standing" for about 10 feet above the plaintiff's work area at the time of the incident. Plaintiff (purportedly) complained to his supervisor about the condition of the pipes, but nothing was done to secure them. As demolition progressed, a neighboring wall (also at the work level) fell and struck the pipes, causing them to fall and strike plaintiff. Plaintiff alleged, *inter alia*, claims under Labor Law 240(1). The plaintiff moved for summary judgment, alleging that his injury was caused by a gravity related risk and resulted from the absence of an enumerated safety device as required by the statute. The Supreme Court granted the plaintiff's motion. The First Department reversed, relying upon *Miseritti v. Mark IV Constr. Co.*, 86 N.Y.2d 487 (1995), granting the defendants summary judgment and holding that the pipes did not pose the type of elevation risk contemplated by the statute, but granted both parties leave to appeal to the Court of Appeals.

The Court of Appeals modified the Appellate Division, finding an issue of fact regarding whether the accident occurred due to the absence of a statutorily prescribed safety device. In so modifying, the four-judge majority held:

Some New York courts have interpreted our decision in *Miseritti v. Mark IV Constr. Co.*, 86 N.Y.2d 487, 657 N.E.2d 1318, 634 N.Y.S.2d 35 to preclude recovery under Labor Law 240(1) where a worker sustains an injury caused by a falling object whose base stands at the same level as the worker. We reject that interpretation and hold that such a circumstance does not categorically bar the worker from recovery under section 240(1)

The majority retraced the evolution of the case law regarding Labor Law 240(1) over the last two decades. It stated that the central premise of Labor Law 240(1) jurisprudence was that "defendant's failure to provide workers with adequate protection from reasonably preventable, gravity-related accidents will result in liability." Citing *Rocovich v. Consolidated Edison*, 78 N.Y.2d 509 (1991)(dismissing claim due to fall into a 12-inch hole), the majority specified the "contemplated hazards" from the statute as:

> "those related to the effects of gravity where protective devices are called for either because of a difference between the elevation level of the required work and a lower level or a difference between the elevation level where the worker is positioned and the higher level of the materials or load being hoisted or secured."

Some New York courts have interpreted our decision in Miseritti to preclude recovery under Labor Law 240(1) where a worker sustains an injury caused by a falling object whose base stands at the same level as the worker.

In *Ross v. Curtis Palmer*, 81 N.Y.2d 494 (1991), the majority noted that Court refined the *Rocovich* standard to "such specific gravity-related accidents as [a worker] falling from a height or being

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Trip and Fall Dismissed (cont.)

The Court will examine the circumstances to determine whether the alleged defect is trivial or presents a significant hazard.

complaint in holding that the gap between the sidewalk flags and the height differential was trivial and plaintiff failed to come forward with any evidence to show that the defect presented a significant hazard despite being *de minimis*.

In its decision, the Appellate Division essentially dismissed plaintiff's claim after its examination of all the facts and circumstances presented, including the dimension of the defect at issue. Although in New York there is no "minimal dimension test" or *per se* rule that a defect must be of a certain minimum height or depth in order to be actionable, when making a determination as to whether a defect is trivial in nature, the courts consider "the width, depth, elevation, irregularity and appearance of the defect along with the time, place and circumstance of the injury." *Trincere v County of Suffolk,* 90 N.Y.2d 976, 665 N.Y.S.2d 615(1997).

The decision in *Schwartz* supports the proposition that a trivial defect on a walkway, not constituting a trap or nuisance, is not actionable in that not every injury allegedly caused by a defect in a sidewalk must be submitted to a jury.

In a Case of First Impression, Health Clubs Are Found to Have a Duty to Both Have and Use Defibrillators

By Jamie Kuebler

General Business Law §627-a requires that a automated external defibrillator (AED) be present in health clubs with at least 500 members along with a trained operator to use it. In reviewing General Business Law §627-a, the Court of Appeals left open the question of whether the statute imposes an affirmative duty upon a health club to *use* the defibrillator, rather than just requiring a health club to maintain one on its premises and employ a person certified in its use.

"[W]hy statutorily mandate a health club facility to provide the device if there is no concomitant requirement to use it?" Justice Sandra L. Sgroi asked rhetorically in *Miglino v. Bally Total Fitness of Greater New York, et al.,* 2011 NY Slip Op 09603, 2011 N.Y.App.Div. LEXIS 9478 (December 27, 2011).

Gregory C. Miglino Sr. collapsed while playing racquetball at a Bally Total Fitness health club. A Bally personal trainer found Mr. Miglino lying on his back, breathing heavily and with a faint pulse but with normal color. Another Bally worker brought over a defibrillator, but a doctor and medical student were attending to Mr. Miglino, and it was not used. Mr. Miglino was pronounced dead after being taken to the hospital.

Gregory Miglino Jr. filed a wrongful death action against Bally Total Fitness of Greater New York, the owner and operator of the club, and Bally Total Fitness Corporation. Miglino Jr. claimed that Bally was negligent in its failure to use the defibrillator.

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The Court of Appeals Rejects Contemporaneous Quantitative Measurements as a Prerequisite For Recovery As A "Serious Injury"

By Lisa M. Rolle

In a trilogy of cases that arose out of the First and Second Departments, The Court of Appeals addressed the application of the serious injury threshold under the New York State Insurance Law, a field of law fraught with abuse and frivolous claims. In each case, the Appellate Division rejected the allegations of serious injury as a matter of law. In *Perl v. Meher*, 2011 Lexis 3320, the Court of Appeals reversed two of the three Appellate Division decisions: *Perl v. Meher* and *Adler v. Bayer*, both out of the Second Department, and *Travis v. Batchi*, out of the First Department. The plaintiffs in all three cases relied on the two "limitation of use" categories, which require some significant, permanent limitation. Judge Robert S. Smith noted that in 2010, no fault accounted for 53% of all fraud reports received by the Insurance Department. While acknowledging that the lower courts often approach soft tissue cases with "well-deserved skepticism," Judge Smith instructs that a "case should not be lost because the doctor who cared for the patient initially was primarily, or only, concerned with treating the injuries."

In the *Perl* and *Adler* cases, the plaintiffs each coincidentally relied on the testimony of the same expert, Dr. Leonard Bleicher. Each plaintiff testified that that their ability to function had been significantly limited since their accidents. In each case, Dr. Bleicher testified that he examined the plaintiff shortly after the accident, performed a number of clinical tests that indicated some abnormality, observed that they had difficulty in moving and diminished strength and that their range of motion was impaired. However, at his initial examination, he did not quantify the range of motion he observed, except to say that Perl's was less than 60% of normal in the cervical and lumbar spine. Years later, Dr. Bleicher re-examined the plaintiffs and used medical instruments to make specific, numerical range of motion measurements. The defendants argued that Dr. Bleicher's quantitative findings were made too long after the accidents.

The Second Department held that Dr. Bleicher's testimony and affirmation were insufficient. The Court of Appeals specifically rejected the Second Department's purported rule that contemporaneous quantitative measurements are a prerequisite to recovery under the no-fault law. The Court held that "potential plaintiffs should not be penalized for failing to seek out, immediately after being injured, a doctor who knows how to create the right kind of record for litigation." Thus, the rule, as propounded by the Court of Appeals, is that a treating health care provider cannot doom a claim for serious injury if their findings during the initial examination are not recorded in a manner consistent with the evidentiary requirements of Insurance Law §5102(d).

It is important to note that subjective complaints alone are not sufficient to support a claim of serious injury; there must be objective proof. An expert's qualitative assessment of a plaintiff's condition may suffice, provided that the evaluation has an objective basis and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system. When supported by objective evidence, an expert's qualitative assessment of the seriousness of a plaintiff's injuries can be tested during cross-examination by another expert and weighed by the trier of fact. A defendant must also rely on an examining physician's report that compares the alleged deficient findings of range of motion of the spine with normal range of motion.

Labor Law 240(1) Is Not Precluded Because the Object and the Plaintiff Are On The Same Level (cont'd)

struck by a falling object that was improperly hoisted or inadequately secured." However, not every falling worker or falling object invokes the extraordinary protections of the Labor Law. To illustrate the point, the majority cites *Narducci v. Manhasset Bay Assoc.*, 96 N.Y.2d 259 (2003) (dismissing claim premised upon falling glass from a broken window), noting that the Court's reasoning focused upon whether the accident was either caused or could have been prevented by the type of devices enumerated in the statute. Similarly, in *Miseritti*, the Court held that a permanently installed wall was outside the scope of the statute, because the permanent structural braces identified by the plaintiff were not the types of devices identified in the statute. The majority indicated that, despite certain Appellate Divisions using the holding in *Miseritti* as a categorical rule, the reasoning was identical to that in *Narducci* – there is no categorical rule regarding the mechanism of accident; rather, the proper analysis focuses on whether there is a causal nexus between the injury and the absence or failure of an enumerated safety device.

To illustrate the point further, the Court cited its recent decisions in *Runner v. NYSE*, 13 N.Y.3d 599 (2009) (finding 240 applicable to spool being transported without a hoist) and *Quattrocci v. F.J. Sciame Constr. Corp.*, 11 N.Y.3d 757 (2008) which held that, "the single decisive question is whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential."

However, in dissent, Judges Piggot, Reade and Graffeo indicate that the majority decision simply adds more confusion to the already tortuous body of case law, and instead advocate for a rule that Labor Law 240(1) does not apply where the base level of the falling object is at the same level as the plaintiff and the work being performed. Notably, the dissent cites *Capparelli v Zausmer Frisch Assocs.* 2001 NY LEXIS 527, (decided with *Narducci*) (dismissing claim related to a falling ceiling light fixture which cut plaintiff's hand while on a ladder) and *Melo v. Con Ed*, 92 N.Y.2d 909 (1998) (dismissing claim where steel plate being placed over hole injured plaintiff on ground level). For example, in deciding *Capparelli*, the Court unequivocally relied upon the fact that:

> there was no height differential between plaintiff and the falling object. Plaintiff was working at ceiling level when his accident occurred. That being so, this is not a case that entails the hazards presented by "a difference between the elevation level where the worker is positioned and the higher level of the materials or load being hoisted or secured." The fact that gravity worked upon this object which caused plaintiff's injury is insufficient to support a Labor Law 240(1) claim.

Further, in *Melo*, the Court explicitly held that the statute was not implicated because "[t]he steel plate was not elevated above the work site." 92 N.Y.2d at 911.

The dissent is notable because *Narducci* and *Melo* are oft-relied upon by defendants in opposing or moving for dismissal of Labor Law 240(1) claims. Notably, it is difficult to fathom how this would not be a 240(1) case if the wall fell and struck plaintiff, but the wall striking something else, which in turn strikes the plaintiff is a 240(1) case. The fact that the majority now explicitly rejects dicta from those decisions requires defendants citing them to analogize their rationale more closely with *Runner*, arguing that there are no safety devices which could have prevented the accident, rather than there being no gravity related risk because the object was at the same level.

In a Case of First Impression, Gyms Are Found to Have a Duty to Both Have and Use Defibrillators (cont.)

Bally Total Fitness of Greater New York moved to dismiss for failure to state a cause of action, contending that there is no affirmative duty under General Business Law §627-a or common law for an AED certified operator employed by a health club to use the device in an emergency, and that they otherwise were entitled to immunity under New York's Good Samaritan Statute (Public Health Law §3000-a). Bally Total Fitness Corporation sought dismissal based on its lack of ownership or management interest in the club involved. The Supreme Court denied both dismissal motions.

On appeal, the Second Department modified the decision to dismiss Bally Total Fitness Corporation, but let the suit against Bally Total Fitness of Greater New York proceed, focusing upon General Business Law §627-a. Justice Sgrogi acknowledged that the statute does not articulate an affirmative duty to use the devices. However, she noted that the statute does not state that there is no duty to act either.

Noting the well-recognized risk of heart attacks following strenuous exercise and the documented beneficial effects of the use of AED devices in such situations, Justice Sgrogi found that "[t]he laudatory purpose of the statute was to increase the number of lives that could be saved through the use of available [automated external defibrillator] devices at health club facilities." Against this back drop, it would "anomalous to conclude that there is no duty to use the device should the need arise," she concluded.

Justice Sgrogi found that Bally is not entitled to immunity under the Good Samaritan Statute because such immunity is only offered in situations where medical treatment is rendered. Here, "the cause of action is based on the failure to employ the device," she said.

Furthermore, Justice Sgrogi held that it would be premature to dismiss the suit based on the theory that the plaintiffs had not stated a cause of action based solely on common-law negligence. Generally speaking, a person does not owe a duty to assist a person "in peril," but here, Justice Sgrogi stated, "[The Bally personal trainer] assumed a duty by coming to the decedent's assistance."

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The Court of Appeals Awards Pre-Judgment Interest in Wrongful Death Actions

By Lisa M. Rolle

In a 5-2 decision, the Court of Appeals ruled that the survivors of a man killed in a construction accident may collect interest on his award from the time he was killed to the time a court reached its verdict on liability, relying on Estates Powers and Trust Law (EPTL) §5-4.3 and prior precedent that damages in wrongful death actions are "due on the date of the death of the plaintiff's decedent."

In *Toledo v. Iglesia Ni Christo*, 2012 Lexis 58, the Court of Appeals affirmed the Appellate Division decision that the plaintiff's decedent is entitled to $1.2 million in interest on the Bronx Supreme Court award of just under $2.5 million for the accident on September 21, 2002. The Court noted that the EPTL states that "interest upon the principal sum recovered by the plaintiffs from the date of the decedent's death shall be added to and be a part of the total sum awarded." The Court further noted that "future damages should be discounted to the date of liability, which by statute is the date of death, before interest is calculated on them."

Judge Carmen Beauchamp Ciparick wrote: "We now conclude that the proper method for calculating pre-verdict interest in a wrongful death action is to discount the verdict to the date of liability, i.e., the date of death, and award interest on that amount from the date of death to the date of judgment."

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