

THE SLIPPERY MATTER OF DEFENSES TO LABOR LAW §241(6)

By Julian D. Ehrlich

With amendments in the Workers' Compensation Law¹ and the increasing use of wrap-up insurance drastically reducing the ability to implead actively negligent employers², the evolving and elusive defenses to the commonly pled Labor Law §§241(6)³ and 240(1)⁴ are becoming increasingly important to both plaintiffs and defendants in construction site personal injury suits.

Both statutes imposed vicarious liability on owners, general contractors and their agents who are free from negligence for prescribed acts of subcontractors "instead on workers, who 'are scarcely in a position to protect themselves from accident.'"⁵

The legislative purpose of vicarious liability under Labor Law §241(6) is to "give [workers] in the hazardous employment of construction, demolition and excavation added protection, other than workman's compensation, in the form of nondelegable duties upon the owner and general contractor."⁶ and to encourage "owners and contractors to assure that only financially responsible and safety-conscious subcontractors are engaged so that a high standard of care might be maintained throughout the entire construction site."⁷

While Labor Law §240 provides the "exceptional protection" of absolute liability to workers performing enumerated activities whose injuries are proximately caused by the special hazards of gravity-related accidents that arise from elevation-involved risks,⁸ under Labor Law §241(6), the owner or general contractor is "allowed to raise any defense to the imposition of liability."⁹

The following discussion examines trends in interpreting and applying Labor Law §241(6), and highlights defenses that may be available to owners, general contractors, and their agents free of fault - defenses that become especially important where there is no viable impleader for apportionment or indemnity against the party actually responsible for the accident, the actively negligent subcontractor. Particular attention is paid to the conceptual challenge of applying the statute's hybrid duty between the common law standard of care and the specific standard of care in the N.Y. COMP. CODES R. & REGS. tit. 12, §23 (1972) commonly known as the Industrial Code, as well as the question of whether there is any place for the traditional notice requirement.

As is well known, plaintiff's failure to establish the violation of a rule of the Industrial Code (12 NYCRR 23) containing a specific, positive command, requirement, or standard of conduct instead of a routine incorporation of the ordinary tort duty of care or general safety standards is a defense to Labor Law §241(6).¹⁰ Allegations of OSHA violations will not support a §241(6) claim.¹¹ Since

this requirement was set forth by the Court of Appeals in *Ross v. Curtis-Palmer Hydro-Electric Co.*,¹² there has been a steady emergence of case law interpreting the various sections of the Industrial Code for the specificity required in Labor Law §241(6). An excellent guide can be found in the commentaries to PJI 2:216A.¹³

Another defense that may be available on a case-by-case basis is that the Industrial Code section pled by the plaintiff does not apply to the particular facts of plaintiff's accident.¹⁴

Since defendant's violation of the Industrial Code is not conclusive of defendant's breach of duty but "is merely some evidence of negligence,"¹⁵ in theory a defense exists that despite a code violation, the subcontractor's behavior nonetheless constituted reasonable care. Indeed, parties may and do battle experts over both the applicability of the Code and "circumstantial reasonableness"¹⁶ within the context of custom and practice in the industry. However, the distinction between some evidence of negligence and conclusive evidence of negligence may be too subtle to impress a jury.

Another defense is lack of proximate cause between the defendant's violation of the code and failure to use reasonable care, and the plaintiff's injuries. Since "legal causation turns on foreseeability of the injury attributed to the defendant's conduct and 'questions concerning what is foreseeable and what is normal may be subject to varying inferences as is the question of negligence itself, these issues generally are for the fact finder to resolve.'"¹⁷ Nonetheless, there is no shortage of cases where the court has found no causation as a matter of law in the §241(6) context.¹⁸

Another defense is that plaintiff is not a protected person within the meaning of §241(6). The statute provides that it applies to persons employed in construction, excavation, or demolition "or lawfully frequenting such places."¹⁹ Case law reveals that critical to this defense are the following factors: (1) plaintiff's job responsibilities; (2) the type of activity that causes plaintiff's injuries; and the (3) time; and (4) place of plaintiff's injury with respect to the prescribed activity. There appears to be a trend toward narrowing the definition of "protected person" in recent case law.

For example, in the area of plaintiff's own job responsibilities, in 1993, the First Department held in *Williamson v. Borg Florman Development Corporation*²⁰ that Labor Law §241(6) applied to protect a dietary aide employed by a hospital undergoing renovation where the injury was caused by construction related condition. However, in 1998, the same court noted in *Agli v. Turner Construction Corporation, Inc.*,²¹ that it had not followed *Williamson*. In addition, the court in *Agli* ruled that a 241(6) claim was properly dismissed for a building operating engineer responsible for reading water meters among other maintenance duties even though his injury was caused by construction-related activity.²²

In fact, Labor Law §241(6) has also been held not to apply to many other plaintiffs who seem to be lawfully frequenting construction sites. Examples include a passenger stepping off a city bus onto gravel in a roadway replacement project,²³ and a corrections officer stepping into a hole created for a security fence installation at the prison where he worked.²⁴ More recent examples include an employee of a tenant tripping on a substance left by contractors working at another office on the same floor,²⁵ a UPS worker who tripped on construction related to an overhaul of UPS conveyor belts at his workplace,²⁶ and a salvager dismantling a tractor trailer that he had purchased still located on the owner's premises.²⁷

Accordingly, it now appears that plaintiffs who are lawfully frequenting construction sites must actually have construction related duties.

Similarly, with regard to the type of activity causing plaintiff's injury, there may also be a trend toward limiting the scope of §241(6). While highway repair²⁸ and tree removal²⁹ have been held covered activities, more recent cases hold that tree removal under similar facts,³⁰ repairing a loader at a landfill,³¹ repairing an overland conveyor,³² constructing a septic tank at a factory,³³ and tightening and tying loose wire and changing light bulbs,³⁴ are not covered activities.

Also, if the plaintiff's accident occurs just before or just after prescribed activity, no §241(6) action will lie (although a common law negligence claim may still be appropriate.) For example, injury while inspecting a roof to submit a repair bid³⁵ and injury while inspecting a construction area for feasibility of a hoist for a mason subcontractor³⁶ have been held not protected. Similarly, §241(6) did not create vicarious liability against the owner where an excavation subcontractor which left two or three days before an inner foundation wall it had braced collapsed on the plaintiff,³⁷ or where a roofing contractor employed plaintiff's co-worker whose cigarette ignited gasoline on the plaintiff's hands and pants where the plaintiff had used the gas to clean off tar after materials and tools were put back into their van.³⁸

On the issue of the place of plaintiff's injury with respect to the construction activity, there may again be a trend towards narrowing the scope of §241(6). In *Brogan v. International Business Machines*,³⁹ the plaintiff was afforded §241(6) protection where he was injured by a shifting load on a truck driving within the campus-like property of the owner but some distance from the building construction site. Several other decisions in the 1980's had extended §241(6) protection beyond the area where the contractor was performing prescribed activity.⁴⁰

More recently, however, in *Baurer v. Niagra Mohawk Power Corp.*,⁴¹ §241(6) protection was denied to a contractor's employee who tripped and fell in a common area off a perimeter road at the defendant's power plant. Also, in *Scarps v. Lockport Energy Associates*,⁴² §241(6) was held not to apply where a subcontractor's employee slipped in an open yard between buildings at defendant's cogeneration plant.

Several cases have dealt with accidents involving trips or slips on truck beds. In *Kemp v. Lakelands Precast, Inc.*,⁴³ §241(6) protection was afforded to a plaintiff injured while standing on a vault supplier's truck. Also, in *Carafella v. Harrison Radiator Division of General Motors*,⁴⁴ §241(6) protected a laborer who slipped on oil and mud on a damp truck bed. However, protection was denied to an iron worker who slipped while stepping on the rear bumper of his employer's van in *Greenburg v. MTA*.⁴⁵

A related defense is that §241(6) does not apply to the particular type of defendant. The statute excepts owners of one and two family dwellings who contract for but do not direct or control the work. Also the defendant must be within the construction (contractual) chain.⁴⁶ In addition, Labor Law §241(6) does not expressly apply to subcontractors⁴⁷ since its purpose is to create vicarious liability. Given vicarious liability language in PJI 2:216A, the statute appears to be exclusively vicarious and thus would not serve as the basis for a separate theory of liability against a general contractor alleged to be negligent.

The "integral part" defense has been increasingly successful in defeating allegations of the commonly pled Industrial Code §23-1.7(d) and (e). As its name implies, this defense applies where the causality of the injury is an integral part of the work being performed. These code sections pertain to slippery footing from ice, snow, water, grease and "any other foreign substances" and tripping hazards.⁴⁸ Both have been held sufficiently specific to support a claim under §241(6).⁴⁹

Case law has firmly cemented the integral part defense in recent years to defeat claims typically by plaintiffs who fall on slippery materials they have applied themselves such as paint remover,⁵⁰ carpet paste,⁵¹ floor cleaner,⁵² and roof sealant,⁵³ which under such circumstances are not considered "foreign substances." However, this defense has also been applied to defeat §241(6) claims in other contexts such as a fall from a stack of lubricated pipes,⁵⁴ a fall in a weed covered hole in the ground,⁵⁵ a trip on a Genie hoist plaintiff was lifting,⁵⁶ a trip on a wire mesh placed where concrete was to be provided,⁵⁷ and injury from a falling permanent brace of a building.⁵⁸

Remarkably the integral part defense has defeated a §241(6) claim for a slip on muddy ground,⁵⁹ but in one reported case did not defeat the same claim for a slip on plywood used to cover muddy ground, since rainwater on earth was not considered a foreign substance but plywood was.⁶⁰

Also of note is *Lenard v. 1251 Americas Associates*,⁶¹ where the court found that the integral part defense did not apply to a plaintiff who tripped on a half moon shaped, one and a half inch high door stop that had been left in the floor during prior dismantling. In reinstating the §241(6) claim, the court held "because the floor itself was not under construction, the door stop did not constitute an integral part of the work being performed."⁶²

Despite the Court of Appeals holding that workers are “scarcely in a position to help themselves,”⁶³ plaintiff’s comparative negligence is a defense to Labor Law §241(6).⁶⁴ This will generally defeat a plaintiff’s motion for summary judgment,⁶⁵ unless the defendant fails to plead this affirmative defense⁶⁶ or fails to submit proof in opposition papers.⁶⁷ Although the amount of plaintiff’s comparative negligence is usually a jury question, in at least one reported decision the court found the plaintiff 15% negligent as a matter of law after a jury found no comparative negligence.⁶⁸

Finally, there is the issue of whether the traditional requirement of notice has any place in the application of Labor Law §241(6). Clearly, the owner or general contractor’s lack of supervision, control, or direction of the work site is not a defense.⁶⁹ As the Court of Appeals recently held in *Rizzuto v. L.A. Wenger Contracting Co., Inc.*,⁷⁰ lack of notice *to the owner or general contractor* is similarly not a defense.

But does the *Rizzuto* case leave open or even support the requirement of notice when considering the subcontractor’s negligence?

In *Rizzuto*, the plaintiff, an employee of a subcontractor, slipped on diesel fuel that suddenly sprayed from a tank being tested by the owner’s workers.⁷¹ Plaintiff sued the general contractor claiming vicarious liability for the owner’s workers under §241(6) and Industrial Code §23-1.7(d).⁷² The lower court dismissed §241(6) finding the general contractor lacked control or notice.⁷³

In reversing, the Court of Appeals appeared to use traditional notice language with regard to the actively negligent subcontractor. The court reinstated the plaintiff’s §241(6) claim, holding that “the jury could, thus, have rationally concluded that *someone* within the chain of the construction project was negligent in not exercising reasonable care, or *acting within a reasonable time*, to prevent or remediate the hazard ... Once the negligence of some party was established at trial, defendant would be vicariously liable (emphasis added).”⁷⁴

If notice to the subcontractor is a requirement, how is it to be applied?

In *Ross v. Curtis-Palmer Hydro-Electric Co.*, the court defined the duty under Labor Law §241(6) as “in a sense, a hybrid, since it reiterates the common-law standard of care and then contemplates the establishment of specific detailed rules....”⁷⁵ Violation of the rule alone does not rise to the level of negligence as a matter of law but rather is merely some evidence of negligence.⁷⁶

PJI 2:216A addresses the code violation first and makes it a *sine qua non* in the hybrid. This charge requires a jury first to consider only evidence of the subcontractor’s alleged rule violation in considering the subcontractor’s alleged failure to use reasonable care. Next the jury is instructed that the rule violation is

some evidence of negligence. Then the jury must consider, if the rule was violated, whether the violation constituted a failure to use reasonable care. Finally, the breach must be the cause of the injury.

Since §241(6) holds an owner or general contractor liable for the subcontractor's code violation if there is also negligence, notice might naturally be a factor in considering the subcontractor's alleged failings after considering the code violation and before determining causation.

To consider notice while applying the second part of the hybrid i.e., the common law standard of care after determining the code violation, would also be consistent with the legislative purpose of the statute. As defined in *Ross*, the purpose of §241(6) is to provide special protection for construction, demolition, and excavation hazards. But some accidents at construction sites arise out of ordinary risks no different than risks in garden-variety premises or other tort cases such as slips and falls on food, snow, ice, garbage, or paper or due to a burnt-out light bulb, or even motor vehicle accidents. While there are specific Industrial Code Sections that would apply to such falls, (12 NYCRR 23-1.7(d)) or the light-out scenario (12 NYCRR 23-1.30), these risks can hardly be considered hazards special to construction.

Do office workers who track snow, rain, or mud into an office building lobby pose any different risk than construction workers who track the same substances into an unfinished lobby? Does a supermarket shopper who drops a piece of lettuce in an aisle moments before another shopper slips pose any different risk than a worker who drops lettuce from his lunch moments before a co-worker slips? Violation of the Code notwithstanding, isn't it reasonable for the contractor with a primary responsibility in those situations to have a sufficient opportunity to discover and cure such conditions? Shouldn't ordinary notice requirements apply to ordinary risks?

In an analogous context, a plethora of cases hold that motor vehicle accidents at construction sites do not trigger liability under §241(6) (or Industrial Code).⁷⁷ Arguably, the risk of serious injury from heavy construction vehicle accidents is among the more dangerous hazards at a construction site.

Support for including the notice requirement while considering the subcontractor's conduct beyond the Code violation can be found in two cases decided before *Rizzuto*.

In *McCague v. Walsh Construction*,⁷⁸ an ironworker slipped and fell on sand on a ramp. According to the plaintiff, he had not noticed sand on the ramp fifteen minutes earlier.⁷⁹ Citing the seminal case of *Gordon v. American Museum of Natural History*,⁸⁰ the court dismissed the §241(6) claim concluding that "there must be some evidence that the slippery condition existed for a sufficient length of

time for it to be discovered and remedied, as is the rule in any negligence action based on a slip and fall.”⁸¹

In *McLoud v. State*,⁸² an apprentice carpenter hammering nails removed his safety goggles in order to clean them but continued working. Within minutes thereafter, a masonry nail shattered his eye.⁸³ The court held the plaintiff’s \$241(6) claim properly dismissed against the owner on the ground that there was no notice to the employer subcontractor that the claimant’s goggles became dirty “and, therefore, they never had the opportunity to instruct claimant to stop working until he could replace his goggles.”⁸⁴ In addition, the court based its decision on a lack of evidence that the employer subcontractor directed or even encouraged the claimant to continue work without first cleaning off his safety goggles.⁸⁵

However in *Rothchild v. Faber Homes, Inc.*,⁸⁶ the court noted that there was no common law duty to remove snow during a snowstorm but refused to apply that standard. The court also referred to the hybrid duty between common law and the Industrial Code rules but held “[i]n effect the rules set forth in the Industrial Code establish concrete rules that, in some instances, supersede common-law principles.”⁸⁷ Without defining what those instances would be, the court held that there were factual issues as to whether the owner had constructive notice of the snow and a reasonable opportunity to address it.⁸⁸ The latter part of this decision clearly does not survive *Rizzuto*.

If notice to someone in the chain of construction is a requirement, can the plaintiff rely on a *res ipsa loquitur* type argument in the typical construction site accident scenario where it is unknown exactly who left the food, mud, wood, grease, etc., at the place of the accident? Can a plaintiff argue that a construction area is accessed only by workers directly or indirectly employed by the owner of the site, thus 1) the instrumentality causing the injuries is in the exclusive custody and control of the owner 2) the accident would not have occurred without negligence and 3) the facts are sufficient to justify an inference of negligence?⁸⁹

The plaintiff made such an argument in one reported case that pre-dates *Ross* and *Rizzuto*. In *Monroe v. City of New York*,⁹⁰ the court rejected plaintiff’s *res ipsa* argument noting it only gives rise to inference of defendant’s culpability anyway but since the plaintiff presented specific and overwhelming proof establishing the cause of the accident, *res ipsa* disappeared.

Of course in many construction accidents, notice is a moot issue. Where the danger that caused the plaintiff’s accident was created by the negligent act of a particular subcontractor, the created condition is actual notice. In other situations, the general contractor may have general site safety responsibilities that give rise to independent common law duties.

After *Rizzuto* the First Department held in *Crystal v. Japan Airlines*⁹¹ that

summary judgment motion dismissing plaintiff's §241(6) claim was not warranted where "it is unclear how or when the piece of metal that caused plaintiff's fall appeared on the stairwell in his work area." Would directed verdict also be unwarranted if the mystery remained at the close of evidence?

Another scenario where notice might remain an issue is the product liability claim arising out of a construction site accident. Is a product manufacturer considered in the chain of construction within the meaning of *Rizzuto*? Will notice play a part is where the actively negligent entity is a product manufacturer who can not be identified or is uninsured or is for some other reason not a viable party? Can an owner be liable under Labor Law §241(6) if there is a latent defect in the construction tool or machine that results in a code violation? Who, if anyone, is liable where a perfectly well designed, manufactured and maintained machine or tool wears out and spills oil on the ground the moment before the plaintiff steps there?

No doubt these questions and others will test §241(6) defenses in future decisions. In the meantime, while not intended to be exhaustive, this review supports the notion that there is ample room for creative argument by aggressive practitioners on both sides of construction injury suits.

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1. See Workers' Compensation Law Section 11 (McKinney 1992 & Supp 1998) as amended by the Omnibus Workers' Compensation Reform Act of 1996 (L. 1996, ch. 635, § 2).

2. *Allen v. Cloutier Construction Corp.*, 44 N.Y.2d 290, 405 N.Y.S.2d 630 (1978). See also *Russin v. Louis Picciano & Son*, 54 N.Y.2d 311, 319, 445 N.Y.S.2d 127, 130 (1981) which held that the owner and general contractor may implead the actively negligent subcontractor and stated "although Sections 240 and 241 now make nondelegable the duty of an owner or general contractor to conform the requirements of those sections, the duties themselves may in fact be delegated."

3. Labor Law §241(6) states: **Construction, excavation, demolition work** All contractors and owners and their agents, except the owners of one and two family dwellings who contract for but do not direct or control the work, when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements: 6. All areas in which construction, excavation or demolition work are being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The board may make rules to carry into effect provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two family dwellings who contract for but do not direct or control work, shall comply therewith.

4. Labor Law §240 states: **Scaffolding and other devices for use of employees** 1. All

contractors and owners and their agents, except owners of one and two family dwellings who contract for but do not direct or control the work, in erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.

No liability pursuant to this subdivision for the failure to provide protection to a person so employed shall be imposed on professional engineers as provided for in article one hundred forty-five of the education law, architects as provided for in article one hundred forty-seven of such law or landscape architects as provided for in article one hundred forty-eight of such law who do not direct or control the work for activities other than planning and design. This exception shall not diminish or extinguish any liability of professional engineers or architects or landscape architects arising under the common law or any other provisional law.

5. *Zimmer v. Chemung County Performing Arts, Inc.*, 65 N.Y.2d 513, 520, 493 N.Y.S.2d 102, 105 (1985) (citation omitted).
6. *Allen*, 44 N.Y.2d at 299, 405 N.Y.S.2d at 633.
7. *Id.* at 301, 405 N.Y.S.2d at 634.
8. *Rocovich v. Consolidated Edison Co.*, 78 N.Y.2d 509, 514, 577 N.Y.S.2d 219, 222 (1991).
9. *Long v. Forest-Fehlhaber*, 55 N.Y.2d 154, 159-160, 448 N.Y.S.2d 132, 134 (1982), *Zimmer*, at 521-522, 493 N.Y.S.2d at 105.
10. *Ross v. Curtis-Palmer Hydro-Electric Co.*, 81 N.Y.2d 494, 504-5, 601 N.Y.S.2d 49, 55 (1993).
11. *Pellescki v. City of Rochester*, 198 A.D.2d 762, 605 N.Y.S.2d 692 (4th Dept. 1993).
12. 81 N.Y.2d 494, 601 N.Y.S.2d 49 (1993).
13. 1A N.Y. PJI 3d, page 839.
14. *Francis v. Aluminum Co. of America*, 240 A.D.2d 985, 659 N.Y.S.2d 903, 905 (3rd Dept. 1997).
15. *Ross*, 81 N.Y.2d at 502, 601 N.Y.S.2d at 53, ftnt 4, *Zimmer*, 65 N.Y.2d at 522, 493 N.Y.S.2d at 106.
16. *Zimmer* at 523, 493 N.Y.S.2d at 107.
17. *Leon v. J&M Pepe Realty Corp.*, 190 A.D.2d, 400, 413, 596 N.Y.S.2d 380, 387 (1st Dept. 1993) (citation omitted).
18. *Ares v. State*, 80 N.Y.2d 959, 590 N.Y.S.2d 874 (1992); *Haghighi v. Bailer*, 240 A.D.2d 368, 657 N.Y.S.2d 774 (2nd Dept. 1997); *Carrion v. Lewmara Realty Corporation*, 22 A.D.2d 205, 635 N.Y.S.2d 4 (1st Dept. 1995); *McCullum v. Barrington Company*, 192 A.D.2d 489, 597 N.Y.S.2d 295 (1st Dept. 1993); *Calomino v. Lincoln Plaza Tenants Corp.*, 173 A.D.2d 368, 569, N.Y.S.2d 738 (1st Dept. 1991); *McGovern v. Fordham Hill Owners Corp.*, 173 A.D.2d 162, 569 N.Y.S.2d 71 (1st Dept. 1991);

Amedure v. Standard Furniture, 125 A.D.2d 170, 512 N.Y.S.2d 912 (3rd Dept. 1987).

19. *Cf.* Labor Law §240 which applies to erection, demolition, repairing, altering, painting, cleaning or pointing.

20. 191 A.D.2d 335, 594 N.Y.S.2d 778 (1st Dept. 1993).

21. 246 A.D.2d 16, 676 N.Y.S.2d 54, 59 (1st Dept. 1998).

22. Id.

23. *Neely v. City of Buffalo*, 171 A.D.2d 1078, 569 N.Y.S.2d 252 (4th Dept. 1991).

24. *Farrell v. Dick Enterprises*, 227 A.D.2d 956, 643 N.Y.S.2d 852 (4th Dept. 1996).

25. *Plung v. Cohen*, 250 A.D.2d 430, 673 N.Y.S.2d 114 (1st Dept. 1998).

26. *Valinoti v. Sandvik Seamco, Inc.*, ___ A.D.2d ___, 677 N.Y.S.2d 311 (1st Dept. 1998).

27. *Strunk v. Buckley*, ___A.D.2d___, 674 N.Y.S.2d 420 (2nd Dept. 1998).

28. *Mosher v. State*, 80 N.Y.2d 286, 590 N.Y.S.2d 53 (1992); *Ares v. State*, 80 N.Y.2d 959, 590 N.Y.S.2d 874 (1992).

29. *Seaman v. A.B. Chance Co.*, 197 A.D.2d 612, 602 N.Y.S.2d 693 (2nd Dept. 1993) *appeal dismissed, lv. dismissed* 83 N.Y.2d 847, 612 N.Y.S.2d 110; *Nagel v. Metzger*, 103 A.D.2d 1, 478 N.Y.S.2d 737 (4th Dept. 1984).

30. *Walton v. Devi Corporation*, 215 A.D.2d 60, 632 N.Y.S.2d 898 (3rd Dept. 1995). *See also Dumoulin v. Oval Wood Dish Corp.*, 211 A.D.2d 883, 621 N.Y.S.2d 705 (3rd Dept. 1995).

31. *Phillips v. City of New York*, 228 A.D.2d 570, 644 N.Y.S.2d 764 (2nd Dept. 1996).

32. *Houde v. Barton*, 202 A.D.2d 890, 609 N.Y.S.2d 411, *lv. dismissed* 84 N.Y.2d 977, 609 N.Y.S.2d 411 (3rd Dept. 1994).

33. *Jock v. Fein*, 176 A.D.2d 6, 579 N.Y.S.2d 293 (4th Dept. 1992).

34. *Highighi v. Bailer*, 240 A.D.2d 368, 657 N.Y.S.2d 774 (2d Dept. 1997).

35. *Gibson v. Worthington Division-of McGraw-Edison Company*, 78 N.Y.2d 1108, 578 N.Y.S.2d 127 (1991).

36. *Harrison v. City of New York*, 248 A.D.2d 592, 670 N.Y.S.2d 527 (2nd Dept. 1998).

37. *Hooper v. Anderson*, 157 A.D.2d 939, 550 N.Y.S.2d 196 (3rd Dept. 1990).

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38. *Esposito v. D'Orsagna*, 240 A.D.2d 195, 658 N.Y.S.2d 277 (1st Dept. 1997).
39. 157 A.D.2d 76, 555 N.Y.S.2d 895 (3rd Dept. 1990).
40. *DaBolt v. Bethlahem Steel Corp.*, 459 N.Y.S.2d 503 (4th Dept. 1983); *Reinitz v. Arc Electric Co., Inc.*, 104 A.D.2d 247, 483 N.Y.S.2d 821 (3rd Dept. 1984); *Rosenbaum v. Lefrak Corp.*, 80 A.D.2d 337, 438 N.Y.S.2d 794 (1st Dept. 1981).
41. 249 A.D.2d 948, 672 N.Y.S.2d 567 (4th Dept. 1998).
42. 245 A.D.2d 1038, 667 N.Y.S.2d 561 (4th Dept. 1997).
43. 84 A.D.2d 630, 444 N.Y.S.2d 274 (3rd Dept. 1981), *modified on other grounds*, 55 N.Y.2d 1032, 449 N.Y.S.2d 710 (1981).
44. 237 A.D.2d 936, 654 N.Y.S.2d 910 (4th Dept. 1997).
45. NYLJ 5/2/95, page 28 col 5 (Goldstein J., Queens County).
46. *Russin* at 318, 445 N.Y.S.2d at 130.
47. *Leon v. J&M Peppe Realty*, 190 A.D.2d 400, 408, 596 N.Y.S.2d 380, 384 (1st Dept. 1993).
48. Industrial Code §23-1.7(d) entitled *Shipping Hazards* provides: Employers shall not suffer or permit any employee to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition. Ice, snow, water, grease and any other foreign substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing.
- Industrial Code §23-1.7(e) entitled *Tripping and Other Hazards* provides: (1) Passageways. All passageways shall be kept free from accumulation of dirt and debris and from any other obstruction or conditions which could cause tripping. Shop projections which could cut or puncture any person shall be removed and covered. (2) Working Areas. The parts of floors, platforms or similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials from shop projections as may be consistent with the work being performed.
49. *Akins v. Baker*, 247 A.D.2d 562, 669 N.Y.S.2d 63 (2nd Dept. 1998); *Farina v. Plaza Construction*, 238 A.D.2d 158, 655 N.Y.S.2d 952 (1st Dept. 1996) and *Fox v. Westchester Resco*, 229 A.D.2d 466, 644 N.Y.S.2d 998 (2nd Dept. 1996) for §23-1.7(d) and *Colucci v. Equitable Life Assurance Company of United States*, 218 A.D.2d 513, 630 N.Y.S.2d 515 (1st Dept. 1995) for §23-1.7(e).
50. *Dugandzic v. NYC School Construction Authority*, NYLJ 11/14/97, page 28 column 6 (Goldberg J., Kings County).
51. *Walsh v. Kidder Peabody*, NYLJ 8/15/97, page 21, column 3 (Miller J, New York County).
52. *Soukup v. Herbert Construction Co.*, NYLJ 12/5/95, page 25 column 4 (Miller J, New York

County).

53. *Gist v. Central School District No. 1*, 234 A.D.2d 976, 651 N.Y.S.2d 818 (4th Dept. 1996).
54. *Basile v. ICF Kaiser Engineer Corp. LTV*, 227 A.D.2d 959, 643 N.Y.S.2d 854 (4th Dept. 1996).
55. *Finch v. Conrail*, 241 A.D.2d 952, 661 N.Y.S.2d 327 (4th Dept. 1997).
56. *Sharrow v. Dick Corporation*, 233 A.D.2d 858, 649 N.Y.S.2d 281 (4th Dept. 1996).
57. *Adams v. Glass Fab, Inc.*, 212 A.D.2d 972, 624 N.Y.S.2d 583 (1st Dept. 1998).
58. *Amato v. State*, 241 A.D.2d 400, 660 N.Y.S.2d 576 (1st Dept. 1997).
59. *Gielow v. Rosa Coplion Home*, 245 A.D.2d 1038, 674 N.Y.S.2d 551 (4th Dept. 1998); *Scarpa v. Lockport Energy Associates*, 245 A.D.2d 1038, 667 N.Y.S.2d 561 (4th Dept. 1997).
60. *Cottone v. Dormitory Authority of State of New York*, 225 A.D.2d 1032, 639 N.Y.S.2d 631 (4th Dept. 1996).
61. 241 A.D.2d 391, 660 N.Y.S.2d 416 (1st Dept. 1997).
62. *Id.* at 392, 660 N.Y.S.2d at 417-418.
63. *Zimmer* at 520, 493 N.Y.S.2d at 105.
64. *Id.* at 522, 493 N.Y.S.2d at 105.
65. *Irwin v. St. Joseph's Inter Community Hospital*, 236 A.D.2d 123, 665 N.Y.S.2d 773, 779-780 (4th Dept. 1997).
66. *Keleher v. First Presbyterian Church of Lockport*, 158 A.D.2d 946, 551 N.Y.S.2d 708 (4th Dept. 1990).
67. *Rodriguez v. City of New York*, 232 A.D.2d 621, 648 N.Y.S.2d 989 (2nd Dept. 1996).
68. *Leon* at 412, 596 N.Y.S.2d at 387.
69. *Ross* at 502, 601 N.Y.S.2d at 53.
70. 91 N.Y.2d 343, 351-352, 670 N.Y.S.2d 816, 820-821 (1998).
71. *Id.* at 347, 670 N.Y.S.2d at 817.
72. *Id.*, 670 N.Y.S.2d at 818.
73. *Id.* at 350, 670 N.Y.S.2d at 819.

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74. Id. at 351, 670 N.Y.S.2d at 820.
75. *Ross* at 503, 601 N.Y.S.2d at 54.
76. *Zimmer* at 522, 493 N.Y.S.2d at 105-106.
77. *McGurran v. DiLanio Planned Development Corp.*, ___A.D.2d___, 674 N.Y.S.2d 706 (2nd Dept. 1998); see also *Strunk*, ___A.D.2d___, 674 N.Y.S.2d 420 (2nd Dept. 1998); *Finch*, 241 A.D.2d 952, 661 N.Y.S.2d 327 (4th Dept. 1997); *Vincent v. Dresser Industries*, 172 A.D.2d 1033, 569 N.Y.S.2d 296 (4th Dept. 1991); *Brooks v. Ogden Projects, Inc.*, NYLJ 7/14/94, page 29, column 5 (Oshrin, J., Suffolk County).
78. 225 A.D.2d 530, 638 N.Y.S.2d 752, 753 (2nd Dept. 1996).
79. Id.
80. 61 N.Y.2d 836, 501 N.Y.S.2d 646 (1986).
81. Id. 638 N.Y.S.2d at 754.
82. 237 A.D.2d 783, 654 N.Y.S.2d 860 (3rd Dept. 1997).
83. Id. at 785, 654 N.Y.S.2d at 862.
84. Id.
85. Id.
86. 247 A.D.2d 889, 668 N.Y.S.2d 793, 795 (4th Dept. 1998).
87. Id.
88. Id.
89. JEROME PRINCE, RICHARDSON ON EVIDENCE, 10th Edition §93 at 60 (10th Ed. 1973).
90. 67 A.D.2d 89, 97-98, 414 N.Y.S.2d 718, 723 (2nd Dept. 1979).
91. ___ A.D.2d ___, 679 N.Y.S.2d 583 (1st Dept. 1998).