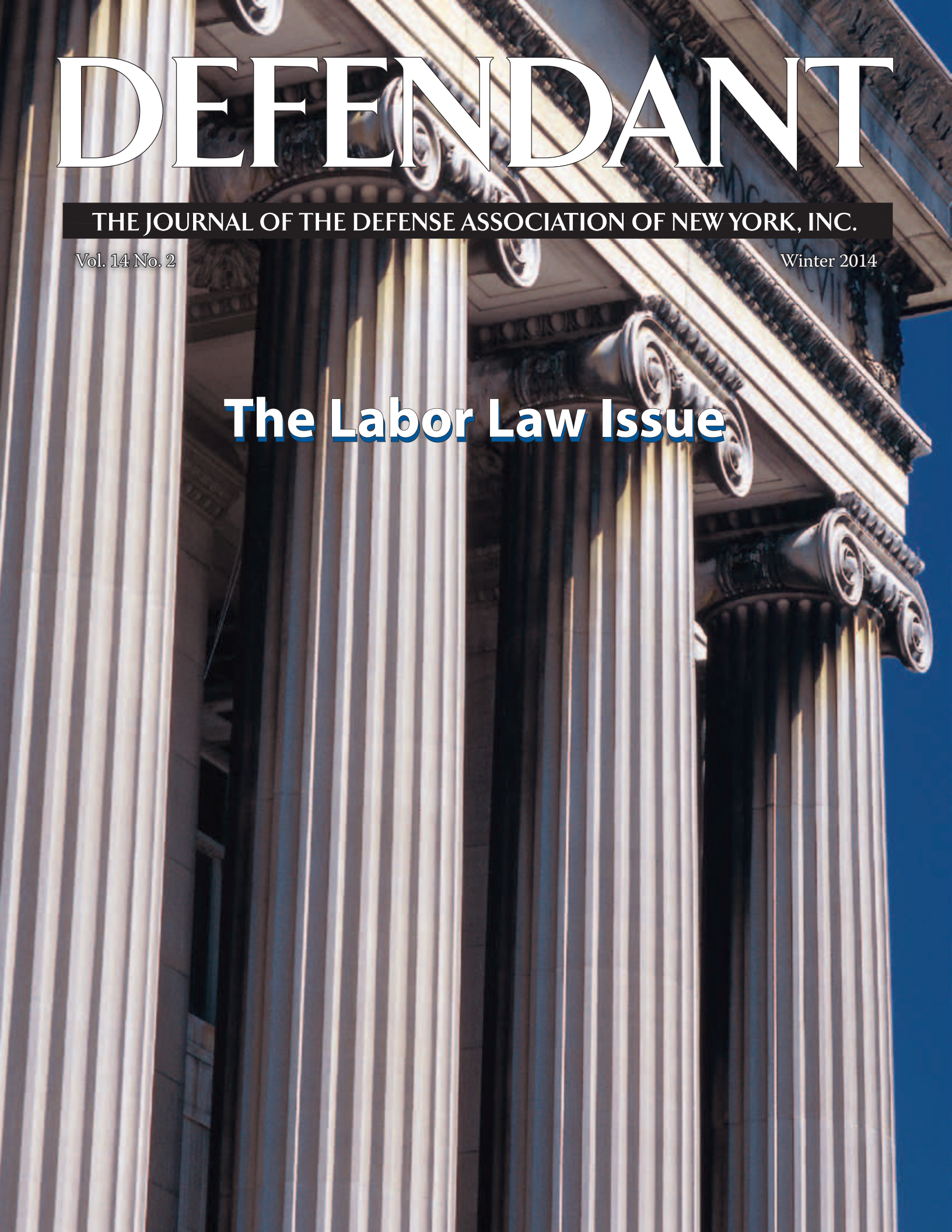

# DEFENDANT

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## The Labor Law Issue

# Understanding The Recalcitrant Worker Defense

CHRISTOPHER RENZULLI* & NICHOLAS WHIPPLE**

Labor Law § 240(1) requires all contractors, owners and their agents engaged in erecting, demolishing or repairing a building or structure to furnish or erect such scaffolding, ladders, and other safety devices "as to give proper protection to a person so employed."[1] The statute "is to be construed as liberally as may be for the accomplishment of the purpose for which it was thus framed."[2] The legislature intended that there would be "no burden upon a worker to guarantee his own safety."[3]

The statute imposes strict or absolute liability upon a contractor or owner who fails to provide safety devices to a worker at an elevated work site where the lack of such devices is a substantial factor in causing the worker's injuries.[4] The plaintiff's contributory negligence does not undermine a defendant's statutory liability.[5] Thus, a plaintiff who establishes a prima facie case of a statutory violation will typically succeed on his or her § 240(1) claim.

Labor Law § 240(1) defendants, however, may be able to relieve themselves of liability by asserting the recalcitrant worker defense. This affirmative defense is a complete bar to a plaintiff's recovery under the statute. Although defendants frequently invoke the defense, many find they are unable to overcome a plaintiff's § 240(1) claim due to stringent requirements that must be shown. As explained below, the respective departments in the Appellate Division have chosen to emphasize different aspects of the defense, making it more difficult for defendants to know which arguments to focus on. This article will explain the standard and history of the defense, while also providing insight into differences in its application among departments.

## Standard For Defense

The recalcitrant worker defense "requires a showing that the injured worker refused to use the safety devices that were provided by the owner."[6] At least one court has identified three elements which comprise the affirmative defense: (1) an available and ready to use safety device; (2) a supervisor's immediate and active instruction regarding the use of the safety device; and (3) the plaintiff's knowing refusal to use the safety device.[7] Although the general rule is easily stated, courts have struggled to apply it in the years since its recognition. As a result, defendants who have asserted the defense have often found courts willing to strike it from the pleadings.

As the defense has developed since it was first recognized, it has become clear that the mere presence of safety devices somewhere at the job site is insufficient to establish the recalcitrant worker defense.[8] Nor will a general instruction to avoid an unsafe device or practice be adequate in establishing the defense.[9] The plaintiff-worker must deliberately refuse to use an available safety device provided by the owner or contractor.[10]

## History Of Defense

The Court of Appeals has not addressed the recalcitrant worker defense directly in a number of years, but its early decisions on the defense have been instrumental in shaping the understanding of litigators and the lower courts. However, the decisions that the Court of Appeals has handed down illustrates that there is room for interpretation. For example, in Gordon v. Eastern Ry. Supply, Inc., the plaintiff was injured after he fell off a ladder while using a sandblaster to clean a railroad car.[11] Defendants established only that there was a scaffold available somewhere in the sand house and that plaintiff had attended several safety meetings that included specific warnings not to sandblast from a ladder. The defendant argued that the plaintiff was recalcitrant, because he had ignored repeated instructions to use a scaffold and not a ladder while performing the sandblasting work. In rejecting the recalcitrant worker defense, the Court of Appeals ruled that plaintiff's failure to comply with "an instruction by an employer or owner to avoid using unsafe equipment or engaging in unsafe practices" is

* *Christopher Renzulli is a partner with Renzulli Law Firm, LLP, located in White Plains, New York.*

** *Nicholas Whipple is an associate with Renzulli Law Firm, LLP*

not the "equivalent to refusing to use available safe, and appropriate equipment," and that evidence of the instruction, by itself, does not create a question of fact to support a recalcitrant worker defense.[12] In essence, defendants needed to do more than provide general instructions; they needed to ensure that the scaffold was provided to plaintiff and not merely located somewhere on the jobsite.

Conversely, in Jastrzebski v. N. Shore Sch. Dist., the Court of Appeals affirmed the Second Department's acceptance of the recalcitrant worker defense.[13] In Jastrzebski, the plaintiff's supervisor instructed him not to use a ladder to perform his work. Instead, the supervisor directed the plaintiff to use a scaffold next to the plaintiff's worksite. As soon as the supervisor left, the plaintiff resumed using the ladder and was injured when he fell from it. The court reasoned that, unlike in Gordon, this case involved "more than an instruction to avoid using unsafe equipment or to avoid engaging in unsafe practices; rather, the plaintiff here refused to use the available, safe, and appropriate equipment."[14]

The Court of Appeals' reasoning reflected in these cases offers little guidance to litigants. Few would dispute that a worker is not recalcitrant when the proper safety device is not made available to him. The situation in Jastrzebski, however, where the scaffold was readily available and the instruction to use it immediately preceded the accident, falls on the opposite end of the spectrum. Unfortunately, many cases fall somewhere between these extremes and the Court did not provide much guidance for such cases in either opinion.

## Appellate Division Approaches

In the wake of these two decisions, New York courts had a definition of the recalcitrant worker defense that was somewhat ambiguous. The courts of the Appellate Division have attempted to articulate more precise standards for the defense with mixed success. The First and Third Departments have issued opinions which emphasize standards which the Court of Appeals has not appeared to give much scrutiny in its opinions. The First Department requires the worker to disregard an "immediate instruction" in order to establish the defense.[15] In Balthazar v. Full Circle Const. Corp., the defendants argued the worker was recalcitrant because he allegedly ignored an instruction to only use ladders owned by defendant.[16] The First Department held that "the alleged instruction was neither immediate nor specifically targeted at the ladder from which he fell," and that the plaintiff did "not become recalcitrant merely by disobeying a general instruction not to use certain equipment, if safer alternatives are not supplied."[17]

The other Departments have not emphasized the need for an immediate instruction to the same degree as the First Department. The Third Department has emphasized the need for the safety device to be visible to the worker before he can be deemed recalcitrant.[18] In one case, the Third Department found a supervisor's assertion that step ladders were available at the worksite insufficient to raise a triable issue of fact.[19] The court noted that the supervisor had neither provided the plaintiff with the necessary equipment nor indicated "where it was located or that it was in place."

It is worth noting that in both the First and Third Departments, the defendant must still establish that the worker deliberately refused to use the safety device, and that his refusal caused his injury. The tests regarding the immediacy of the instruction or the visibility of the safety devices are used to help determine whether or not the devices were truly available, or the deliberateness of a plaintiff worker's refusal to use the device. It is not entirely clear why the First and Third Departments have focused on these aspects of the test, but in neither Department does that focus alter the basic requirements as stated by the Court of Appeals.

The Second and Fourth Departments do not appear to have emphasized any particular element of the recalcitrant worker defense. The Second Department states that the defendant "must establish that the injured worker deliberately refused to use available and adequate safety devices in place at the work station."[20] Similarly, the Fourth Department has said that the "defendant must establish that plaintiff deliberately or purposely refused an order to use safety devices actually put in place or made available by the owner or contractor."[21] In both Departments, this general language suggests that litigants need not tailor their arguments to specifically address concerns of visibility or immediate orders.

## An Alternative Defense To Keep In Mind

As discussed above, there are stringent requirements to be met before the recalcitrant worker defense is successfully raised. But litigants should be aware of an alternative defense that could potentially be raised which carries with it a lower burden in the context of

Labor Law § 240(1) claims. In order for liability to attach to a defendant under a § 240(1) claim, the plaintiff must show not only that the statute was violated, but also that the violation was a proximate cause of the injury.[22]

Most factual scenarios which invoke the recalcitrant worker defense involve a plaintiff who consciously chooses to disregard repeated instructions by their employer. But even in cases where the recalcitrant worker defense is not raised, the Court of Appeals has held "where a plaintiff's own actions are the sole proximate cause of the accident, there can be no liability."[23] Indeed, the controlling question is not whether plaintiff was recalcitrant, but whether a jury could have found that his own conduct, rather than any violation of Labor Law § 240(1), was the sole proximate cause of his accident.[24] Thus, litigants may be able to get a claim dismissed (or at least raise an issue of material fact) without raising the recalcitrant worker defense when the proximate cause prong of Section 240(1) has not been fulfilled.[25]

Unlike the recalcitrant worker defense, this sole proximate cause defense does not involve proving that plaintiff blatantly ignored repeated instructions or expressly disobeyed orders. Rather, the sole proximate cause defense focuses on the knowledge of the plaintiff that a device he is using is not proper for the work being performed, that there are other adequate safety devices available, and making an unreasonable choice to not use them.[26] This defense can also arise where the plaintiff was using a proper device, and then did something inappropriate that compromised his own safety.[27] Bear in mind, depending on the factual circumstances, the sole proximate cause defense may be more feasible than a recalcitrant worker position.[28]

## CONCLUSION

Labor Law § 240(1) imposes a heavy obligation on owners, contractors and agents, made even heavier by the fact that a worker's comparative negligence will not excuse their liability. Although the recalcitrant worker defense can protect this class of defendants, its high and at times confusing standards has meant that many defendants could not avail themselves of the defense. Hopefully, this article has helped to illuminate the standard for the recalcitrant worker defense. Owners and contractors are reminded that compliance with Section 240(1)'s requirements, including supervision of workers to ensure they use the proper safety equipment, is a far surer way to avoid accidents and exposure under the statute.

[1] N.Y. Lab. Law § 240 (McKinney)

[2] Rocovich v. Consol. Edison Co., 78 N.Y.2d 509, 513, (1991); see also Quigley v. Thatcher, 207 N. Y. 66, 68 (1912); Koenig v Patrick Constr. Corp., 298 NY 313, 319 (1948).

[3] Lickers v. State, 118 A.D.2d 331 (4th Dep't 1986)

[4] Wallace v. Stonehenge Grp., Ltd., 1 A.D.3d 589 (2d Dep't. 2003).

[5] See Kouros v. State, 288 A.D.2d 566, 567 (3d Dep't 2001) ("A worker's contributory negligence, however, is not a defense to a Labor Law § 240(1) claim.")

[6] Jastrzebski v. N. Shore Sch. Dist., 223 A.D.2d 677, 679 (2d Dep't 1996).

[7] Gomez v. Preferred Rentals, 1997 WL 749389 (S.D.N.Y. 1997).

[8] Kaffke v. New York State Elec. & Gas Corp., 257 A.D.2d 840 (3d Dep't. 1999)

[9] Tennant v. Curcio, 237 A.D.2d 733, 734 (3d Dep't. 1997).

[10] Kouros v. State, 288 A.D.2d 566, 567 (3d Dep't 2001).

[11] 82 N.Y.2d 555 (1993),

[12] Id., at 557.

[13] 223 A.D.2d 677,678 (2d Dep't 1996).

[14] Id. at 680.

[15] Vacca v. Landau Indus. Ltd., 5 A.D.3d 119,120 (1st Dep't 2004) ("It is well settled in this Department that an immediate instruction is a requirement of the 'recalcitrant worker' defense.")

[16] 268 A.D.2d 96, 98 (1st Dep't 2000).

[17] Id. at 99.

[18] See Williams v. Town of Pittsburgh, 100 A.D.3d 1250, 1252 (3d Dep't 2012) (holding the recalcitrant worker defense requires proof that a safety device was available and visible at the work site and the employee deliberately refused to use it).

[19] Powers v. Lino Del Zotto & Son Builders Inc., 266 A.D.2d 668, 670 (3d Dep't 1999).

[20] Fitzsimmons v. City of New York, 37 A.D.3d 655, 657 (2d Dep't 2007); see also Akins v Central N.Y. Regional Mkt. Auth., 275 A.D.2d 911 (2000).

[21] Salotti v. Wellco, Inc., 273 A.D.2d 862 (4th Dep't. 2000); see also Stolt v. General Foods Corp., 81 N.Y.2d 918 (1993).

[22] See Kuntz v. Wnyg Hous. Dev. Fund Co., Inc., 104 A.D.3d 1337 (2d Dep't 2013); Blake v. Neighborhood Hous. Services of New York City, Inc., 1 N.Y.3d 280, 289 (2003) (finding that "an accident alone does not establish a Labor Law § 240(1) violation or causation").

[23] Robinson v. E. Med. Ctr., LP, 6 N.Y.3d 550, 554 (2006) (holding that "[p]laintiff's own negligent actions— choosing to use a six-foot ladder that he knew was too short for the work to be accomplished and then standing on the ladder's top cap in order to reach the work—were, as a matter of law, the sole proximate cause of his injuries").

[24] Cahill v. Triborough Bridge & Tunnel Auth., 4 N.Y.3d 35, 40 (2004).

[25] See Navarro v. New York City Housing Auth., Index No. 2007/10 (Kings Co. Aug. 15, 2013) (unpublished) (plaintiff's motion for summary judgment on Labor Law § 240(1) denied where there was a question of fact regarding the availability of ladders).

[26] See Cahill v. Triborough Bridge & Tunnel Auth., 4 N.Y.3d 35, 40 (2004).

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[27] Editors' Note: For a few case studies illustrating how sole proximate cause positions have played out, see the article of David Persky and Bradley Corsair in this publication, regarding expert witnesses.

[28] Parenthetically, some view the recalcitrant worker defense as a category of the sole proximate cause principle, as so stated in the PJI 2:217 Comment.

# Use of Experts to Defend a Labor Law § 240(1) Claim

*Continued from page 41*

[21] 738 N.Y.S.2d at 432

[22] 291 A.D.2d at 708

[23] 91 A.D.3d 1087, 937 N.Y.S.2d 345 (3d Dept 2012)

[24] 13 N.Y.3d 599, 603, 895 N.Y.S.2d 279, 922 N.E.2d 865 (2009)

[25] *Id.* In *Runner*, the plaintiff was exposed to a gravity-related risk while moving a heavy reel of wire down a flight of stairs.

[26] 111 A.D.3d 1208, 976 N.Y.S.2d 283 (3d Dept 2013)

[27] 69 A.D.3d 1191, 897 N.Y.S.2d 254 (3d Dept 2010)

[28] 69 A.D.3d at 1193-1194

[29] Citing *Falah v. Stop & Shop Cos., Inc.,* 41 A.D.3d 638, 641, 838 N.Y.S.2d 639 (3d Dept 2007)

[30] Citing *Dillon v. Rockaway Beach Hosp.,* 284 N.Y. 176, 179, 30 N.E.2d 373 (1940)

Any views and opinions expressed in this article are solely those of the authors. Each case has different facts and issues, and any approach suggested here may not be appropriate in a given case.

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**EDITOR IN CHIEF**
**STAFF**
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