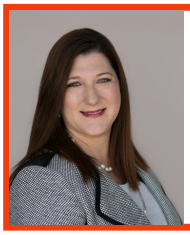

FRANKEL-Y APPEALING

By Tracy L. Frankel, Esq.

Although Labor Law §240(1) is a strict liability statute, not every worker who falls at a construction site, and not every object that falls on a worker, gives rise to the statute's protections (Blake v. Neighborhood Hous. Servs. of N.Y.C., Inc., 1 N.Y.3d 280, 288 [2003]). Over time, the Courts have addressed various defenses to Labor Law §240(1) claims, including, among others, that a plaintiff's activity was not of the kind protected under the statute (Stockton v. H&E Biffer Enters. No. 2, 2021 NY Slip Op 04568, ¶ 2 (2nd Dept. 2021); and that the injury was not caused by an object that required hoisting or securing (Kammerer v. Mercado, 145 N.Y.S.3d 888, 889 [4th Dept. 2021]). However, there is one defense to the Labor Law §240(1) claim that remains elusive- the sole proximate cause defense.

What is clear from a review of the appellate decisions since January 2020, is that defense litigators must be particularly detailed and intentional in working up a potential sole proximate cause defense and plaintiffs' counsel must be equally detailed in their initial client intakes, to adequately prepare for an anticipated sole proximate cause argument. As this case review underscores, the Courts are not simply focusing on a plaintiff's conduct, but how the conduct of co-workers and supervisors may have impacted plaintiff's choices. These cases highlight division in the Appellate Departments in connection with the kinds of evidence necessary to support a sole proximate cause defense and it is only through a fulsome work-up that the elusive sole proximate cause decision can be achieved.

Labor Law practitioners have said that it is more difficult to establish that a plaintiff's conduct was the sole proximate cause of an accident in some appellate departments than in other appellate departments. Perhaps a review of recent appellate decisions will help you form your own opinion.

In order to obtain summary judgment on the issue of liability on a Labor Law §240(1) cause of action, a plaintiff is required to demonstrate, prima facie, that there was a violation of the statute, and that the violation was a proximate cause of his or her injuries (Cain v. Ameresco, Inc., 2021 NY Slip Op 03572, ¶ 2 [2nd Dept. 2021]; Jones v City of New York, 166 A.D.3d at 740 [2nd Dept. 2018]). Comparative negligence is not a defense to a Labor Law §240(1) claim (Hernandez v. 767 Fifth Partners, 194 A.D.3d 649 [1st Dept. 2021]). However, where a defendant demonstrates

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that: 1) the plaintiff had adequate safety devices available; 2) the plaintiff knew that they were available and that he or she was expected to use them; 3) the plaintiff chose for no good reason not to do so; and 4) had the plaintiff not made that choice, he or she would not have been injured, the defendant can achieve a dismissal of the Labor Law §240(1) claim on sole proximate cause grounds (Cahill v. Triborough Bridge & Tunnel Auth., 4 N.Y.3d 35, 40 [2004]).

Convincing the Courts that conduct rises to the level needed to find that an accident occurred solely as a result a plaintiff's conduct, as opposed to only partially a result of that conduct, is difficult and uncommon. In the last year, the appellate decisions analyzing the sole proximate cause defense have been varied and, as any attorney practicing in the Labor Law arena can sympathize, not always consistent.

First Department Decisions

The First Department was busy with sole proximate cause arguments and in the majority of those cases, the Court rejected the sole proximate cause defense. Several of the decisions rejected the application of sole proximate cause where the plaintiffs were either following the directions, or the example, of their foremen at the time of injury (Hayek v. Metro. Transp. Auth., 195 A.D.3d 568 [1st Dept. 2021] [plaintiff was following the directions of his foreman at the time of injury when he was struck by an improperly hoisted or inadequately secured load of steel rebar weighing between 2000 to 3000 pounds]; Portillo v. DRMBRE-85 Fee LLC, 191 A.D.3d 613 [1st Dept. 2021] [rejecting sole proximate cause, in part, on fact that even plaintiff's supervisor stood on a bucket to perform work]).

In three cases this year, the First Department rejected the sole proximate cause defense on the grounds that the defendants did not provide evidence that they provided adequate safety devices for the work at hand (Hernandez v. 767 Fifth Partners, 194 A.D.3d 649 [1st Dept. 2021]; Hogan v. 590 Madison Ave., 194 A.D.3d 570, 571 [1st Dept. 2021]; Singh v. City of N.Y., 191 A.D.3d 547 [1st Dept. 2021]). In Hernandez, 194 A.D.3d 649, although the defendant presented evidence that the plaintiff failed to heed safety instructions and attempted to move the scaffold to a different location while standing on top of it, the Court held that the defendant failed to raise a question regarding sole proximate cause without providing proof establishing that the scaffold was an adequate safety device for the work plaintiff was performing at the time of his accident (Id., citing Auriemma v. Biltmore Theatre, LLC, 82 A.D.3d 1, 10 [1st Dept. 2011]). The Court further held that plaintiff's conduct was, at most, comparative negligence, which is not a defense to a Labor Law §240(1) claim (Hernandez, 194 A.D.3d 649).

Likewise, in Hogan v. 590 Madison Ave., 194 A.D.3d 570, 571 (1st Dept. 2021), although the defendants contended that plaintiff fell from a ladder that gave way solely as a result of plaintiff

stepping between a desk and the ladder, the Court found that there was no evidence that either defendant provided an appropriate safety device that plaintiff either chose not to use, or misused.

In Singh, 191 A.D.3d 547, the Court found that defendants failed to raise an issue of fact as to whether plaintiff was the sole proximate cause of his injuries even though the plaintiff was not wearing his safety harness on the scaffold. The plaintiff testified that the lifeline could not be used while working on the sidewalk bridge and the defendants neither submitted evidence, nor identified discovery, that would lead to evidence that the lifeline was still available, and that it was possible to wear it on the sidewalk bridge while engaged in the work that plaintiff was performing.

Several of the decisions addressed what the First Department deemed to be insufficient evidence to establish whether plaintiff knew, or should have known, to use certain equipment, even where safety devices were available (Goundan v. Pav-Lak Contracting Inc., 188 A.D.3d 596 [1st Dept. 2020]; Herrero v. 2146 Nostrand Ave. Assocs., LLC, 193 A.D.3d 421 [1st Dept. 2021]; Mayorga v. 75 Plaza LLC, 191 A.D.3d 606 [1st Dept. 2021]). These decisions also raise questions for practitioners in terms of what evidence the Court would deem satisfactory to satisfy this prong of the sole proximate cause analysis and whether the evidentiary burden implied by some of these decisions is reasonable.

For example, in Goundan v. Pav-Lak Contracting Inc., 188 A.D.3d 596 (1st Dept.2020), the plaintiff was injured when he was electrocuted and fell off of the scaffold upon which he was standing, without a safety harness or safety lines. The Court found plaintiff's foreman's testimony that weekly toolbox meetings addressed safety topics including wearing harnesses, to be too vague to constitute sufficient support that plaintiff knew, or should have known, to use the safety harness or safety lines. The Court indicated that defendants needed to show: 1) whether a meeting on harnesses was conducted before the accident; 2) what was said about harnesses at any meeting; and 3) whether plaintiff attended the meeting wherein harnesses were discussed.

In Herrero, 193 A.D.3d 421, the First Department upheld the lower court's granting of plaintiff's motion for partial summary judgment on his Labor Law §240(1) claim, finding that although plaintiff decided to use the scaffold of an unknown contractor, instead of one that was provided by his employer, *that he knew was readily available,* defendants did not present evidence that the plaintiff "knew he was expected to use" only his employer's scaffolds.

Likewise, in Mayorga v. 75 Plaza LLC, 191 A.D.3d 606 (1st Dept. 2021), the First Department rejected the defendants' contention that plaintiff was the sole proximate cause of the

accident for failing to use the ladder, scissor lift, or scaffolds that were provided. The Court reasoned that there was no evidence that plaintiff could have, and should have, known to use one of those devices (Id., citing DeFreitas v. Penta Painting & Decorating Corp., 146 A.D.3d 573, 574 [1st Dept. 2017]).

The decision in Ping Lin v. 100 Wall St. Prop. L.L.C., 193 A.D.3d 650, 652-53 (1st Dept. 2021), is significant for the two principles it espoused. In Ping Lin, the defendant contended that the plaintiff lost his balance and fell from a ladder when he dropped a piece of sheetrock and threw his drill to the ground. The First Department held that since plaintiff's loss of balance was directly attributable to the work that he was performing, the accident could not have been solely caused by plaintiff's conduct. The Court also held that even if the ladder shook prior to plaintiff's fall, the sole proximate cause defense would not have applied, because the ladder was an inadequate safety device for the work in question (Id., citing Nieto v CLDN NY LLC, 170 A.D.3d 431, 432 [1st Dept. 2019]).

As expected, where questions of fact exist as to how an accident occurred, the Court will not grant summary judgment to either party in connection with a Labor Law §240(1) claim and this was the basis for the decision in Crawford v. 14 E. 11th St., LLC, 191 A.D.3d 461 [1st Dept.2021]). In Crawford, 191 A.D.3d 461, the Court found that the Record was unclear as to whether the plaintiff was injured due to the breaking of a cross-brace, the breaking of a walking plank, or plaintiff's climbing onto the scaffold's cross bracing instead of using the scaffold's stairs when moving between platform levels. This lack of clarity as to the happening of the accident precluded summary judgment on proximate cause grounds.

Likewise expected, the Court rejected the sole proximate cause defense where the defendants did not provide safety devices to the plaintiff. Specifically, in Ordonez v. One City Block, LLC, 191 A.D.3d 412 (1st Dept. 2021), the Court held that plaintiff's alleged failure to lock the wheels of the scaffold could not be the sole proximate cause of his accident, where uncontroverted evidence established that that the defendants supplied the plaintiff with a scaffold that had no guardrails to protect his fall and failed to provide any other safety devices (*see also,* Padilla v. Absolute Realty, Inc., 188 A.D.3d 608 [1st Dept. 2020] [holding, plaintiff could not have been the sole proximate cause of the accident, given the admitted lack of any safety devices provided to him]).

Two of the First Department's decisions this year were interesting given the Court of Appeals' holding in Montgomery v. Federal Express Corp., 4 N.Y.3d 805, 806 (2005). In Montgomery, the Court of Appeals was presented with a plaintiff who was assigned to work in a motor room located 4-feet above roof level. When plaintiff arrived at the roof, he noticed that the

stairs leading from the roof to the motor room had been removed. Instead of using one of the ladders that were located at the job site, albeit not in the immediate vicinity of the motor room, plaintiff chose to use an inverted bucket to climb to the motor room and then jump down when his work was completed. The Court of Appeals held that, the plaintiff's choice to use an inverted bucket to get up, and then to jump down, was the sole cause of his injury, and he is therefore not entitled to recover under Labor Law §240(1) (Id.).

This year, in the First Department, plaintiffs who stood on inverted buckets or crates were victorious (Portillo v. DRMBRE-85 Fee LLC, 191 A.D.3d 613 [1st Dept. 2021]; Valdez v. City of N.Y., 189 A.D.3d 425 [1st Dept. 2020]). In Portillo v. DRMBRE-85 Fee LLC, 191 A.D.3d 613 (1st Dept. 2021), the Court held that the defendants failed to raise a triable issue of fact as to whether plaintiff was the sole proximate cause of his accident even though plaintiff fell when the bucket upon which he was standing to perform work in the ceiling, tipped. The Court found compelling, that: 1) plaintiff testified that even his supervisor would climb onto a 5-gallon bucket for an overhead task; 2) plaintiff searched for a ladder for five minutes and only found one, which his coworker was using at that moment; and 3) there was no standing order not to use the bucket to complete the project, especially after he witnessed his supervisor doing so.

One might argue, that the decision to require a standing order *not* to stand on a bucket or crate, before a defendant can attain a dismissal based on sole proximate cause, is difficult to reconcile with the principal that Labor Law §240(1) "should be construed with a commonsense approach to the realities of the workplace at issue" (Montgomery, 4 N.Y.3d 805; Salazar v. Novalex Contr. Corp., 18 N.Y.3d 134 [2011]). Questions also arise as to whether the Portillo decision will be relied upon in cases wherein the focus hinges on an analysis of whether alternative equipment was "readily available". While the Court in Portillo did not specifically undertake an availability analysis, implicit in its holding, is that searching unsuccessfully for an adequate safety device for five minutes is sufficient to determine whether the equipment is readily available for the purposes of both a proximate cause determination and/or a determination on performance of a duty to provide an adequate safety device.

Furthermore, the Court's focus on the fact that another co-worker was using another device in the five minutes plaintiff was searching for the same, may indicate that the Court is not accepting of the "failure to wait" grounds used by other Courts to grant summary judgment in favor of defendants (*see,* Urias v. Orange County Agric. Soc'y, Inc., 7 A.D.3d 515 [2nd Dept. 2004], *app. den*. 3 N.Y.3d 605 [2004] [Second Department dismissed Complaint when plaintiff chose to scale the beams on the wall to ascend rather than wait for the other person to finish using the ladder plaintiff needed]; Vasquez v. FCE Indus., Ltd, 2008 U.S. Dist. LEXIS 91767 [E.D.N.Y.

2008][plaintiff's choice to climb angle irons instead of waiting for co-worker to finish climbing a ladder was the sole proximate cause of the accident], Robinson v. East Med. Ctr., 6 N.Y.3d 550 [2006] [affirming dismissal of Complaint of plaintiff who lost his balance when he used a six-foot ladder instead of an eight foot ladder, since plaintiff failed to wait for workers to stop using the available, taller ladders despite that he had the time to wait]). It is unclear from the Portillo decision, whether the failure to wait argument was presented to the Court for its review.

Valdez v. City of N.Y., 189 A.D.3d 425 (1st Dept. 2020) involved a plaintiff who fell backward and struck his head on a bar of a scaffold while pointing bricks. The plaintiff had been standing on a crate placed on top of the planks of the scaffold when the crate shifted unexpectedly. The First Department held that plaintiff's pointing work exposed him to an elevation-related risk against which defendants failed to provide him with proper protection. The Court further held that although the plaintiff failed to use a ladder or the scaffold's bicycle to raise the scaffold to an appropriate height, the defendants submitted no evidence that the plaintiff was ever specifically instructed to use either of those devices and refused to do so, instead of standing on an inverted milk crate.

The First Department's view of the failure to wait argument appears to be consistent in this year's decisions. In Melaku v. AGA 15th St., LLC, 191 A.D.3d 410 (1st Dept. 2021), the Court held that the plaintiff was not the sole proximate cause of his fall when, having been asked to retrieve a tool from the edge of the lower of two levels of the scaffold, plaintiff chose to use a step ladder rather than the vertical rungs built onto the scaffold, which, according to a coworker, would have required the use of one of two harnesses already in use. Although the decision did not indicate that the Court was presented with a "failure to wait" argument, its inclusion of the fact that plaintiff would have had to wait for a harness, supports that the Court is not inclined to consider working equipment in-use to be "readily available" as the Court of Appeals, and others, have.

The First Department did invoke the common-sense rule in Morales v. 2400 Ryer Ave. Realty, LLC, 190 A.D.3d 647 (1st Dept. 2021), when it declined to find a question of fact as to whether plaintiff's decision to use an A-frame ladder in the closed position was the sole proximate cause of the accident, and plaintiff gave a specific reason why he used the ladder in the closed position. The Court held that the defendants did not elicit any evidence that it would have been plaintiff's "'normal and logical response'" to use the taller ladder that they alleged was available at the time of his accident. The Court also stated that the defendants failed to establish that plaintiff knew that the taller ladder was available for his use; that he was expected to use the taller ladder for his work; and that he chose not to use it for no good reason.

Neither party was entitled to summary judgment in connection with plaintiff's Labor Law §240(1) claim in Kolakowski v. 10839 Assocs., 185 A.D.3d 427 (1st Dept. 2020), where issues of fact existed as to whether, and to what extent, plaintiff's employer directed the plaintiff to use a safety harness, and whether the plaintiff's failure to abide by any such direction rendered him a recalcitrant worker and sole proximate cause of his accident.

Although the First Department's decisions this year mainly declined to find questions of fact in connection with the sole proximate cause defense, in Batlle v. NY Devs. & Mgmt., 193 A.D.3d 562 (1st Dept. 2021), the First Department denied plaintiff's motion for partial summary judgment on his Labor Law §240(1) claim, holding that issues of fact exist as to whether plaintiff's conduct was the sole proximate cause of his injuries. In Batlle, 193 A.D.3d 562, one witness testified that a foreman had ordered plaintiff to perform his work without railings because the railings were being used by another company. Another witness, however, testified that about 20 to 60 minutes before the accident occurred, he instructed plaintiff to stop performing the work, get off of the scaffold, and obtain the railings which allegedly were available. These conflicting accounts raised issues of fact as to whether the defendant bore any liability because plaintiff had adequate safety devices available, knew both that the safety devices were available and that he was expected to use them, chose for no good reason not to do so, and would not have been injured had he not made that choice (Id., citing Biaca-Neto v. Boston Rd. II Hous. Dev. Fund Corp., 34 N.Y.3d 1166, 1167-1168 [2020]).

Likewise, in Valle v. Port Auth. of N.Y. & N.J., 189 A.D.3d 594 (1st Dept. 2020), the Court held that questions of fact precluded summary judgment in connection with plaintiff's Labor Law §240(1) claim, holding that it is for the jury to consider whether any of the numerous disputed events giving rise to plaintiff's accident was a proximate cause of the plaintiff's accident, or whether those events merely furnished the occasion for the accident-a principle mainly seen in the negligence context. Based upon the stated evidence in the Record, although it appeared that the plaintiff made all the decisions as to how to unload and stack the materials, he may have made those choices based on certain restrictions imposed on him, thereby supporting the Court's reluctance to grant summary judgment to the plaintiff.

Second Department Decisions

In 2021, the Second Department has faced fewer sole proximate cause arguments in connection with Labor Law §240(1) claims and those decisions were evenly favorable to the plaintiffs and defendants. In Debennedetto v. Chetrit, 190 A.D.3d 933 (2nd Dept. 2021), the Court held that contrary to the defendant's contention, the plaintiff's participation in the assembly of the scaffold did not raise a triable issue of fact as to whether he was the sole proximate cause of the accident.

Similar to the reasoning given by the First Department in Portillo, 191 A.D.3d 613, in Luan Zholanji v. 52 Wooster Holdings, LLC, 188 A.D.3d 1300 (2nd Dept. 2020), the Second Department held that the plaintiff could not have been the sole proximate cause of his fall off of a ladder that he used in the closed position, where there was evidence that the plaintiff was "following the example of his coworkers and acting with the tacit approval of his superior" (Id.).

In a post-trial appeal, the Second Department, in Cioffi v. Target Corp., 188 A.D.3d 788 (2nd Dept. 2020), determined that there was a valid line of reasoning and permissible inferences which could have led a rational jury to conclude that the plaintiff was neither a recalcitrant worker nor the sole proximate cause of his injuries. The Court referred to the existence of conflicting evidence as to whether adequate safety devices—namely, his employer's ladders and/or the scissor lift—were available, whether the plaintiff knew that he was expected to use those devices, and, if so, whether he had a good reason for choosing to using ladders not owned by his employer.

The defendants successfully established prima facie entitlement to summary judgment dismissal of plaintiff's Labor Law §240(1) claim based upon a sole proximate cause argument, in Reyes v. Astoria 31st St. Developers, LLC, 190 A.D.3d 872 (2nd Dept. 2021). The Court reasoned that plaintiff was injured when he voluntarily engaged in an activity that he was neither authorized, nor instructed, to engage in, after he had ceased performing his assigned task. Specifically, plaintiff ran up a 9-foot hill to assist coworkers having difficulty attempting to pass a 30-foot-long piece of rebar manually across the excavation site at ground-level. As the plaintiff grabbed the 30-foot-long piece of rebar, the rebar shook, allegedly causing the plaintiff to lose his footing and to roll down to the bottom of the excavation site.

In Tomlinson v. Demco Props. NY, LLC, 189 A.D.3d 1294 (2nd Dept. 2020), the Court dismissed plaintiff's Labor Law §240(1) claim on sole proximate cause grounds, finding determinative, evidence that the plaintiff knowingly stepped off the ladder and onto a sloped, snowy roof.

The defendants also establishing entitlement to a dismissal of plaintiff's Labor Law §240(1) claim in Tukshaitov v. Young Men's & Women's Hebrew Ass'n, 180 A.D.3d 1101 (2nd Dept. 2020). The Court reasoned that the sole proximate cause of the accident was plaintiff's decision to climb into the elevator shaft and stand on the access panel to close the doors, despite knowing that his employer's procedure was to stand on the floor of the machine room with another coworker and close the doors from above. The plaintiff also knew that his supervisor would not have approved of him standing on the access panel.

Likewise, in Ahmed v. F & G Grp., LLC, 187 A.D.3d 972 (2nd Dept. 2020), the Court dismissed plaintiff's Labor Law §240(1) claim based upon evidence that the plaintiff unilaterally decided to climb on top of a sidewalk shed scaffold by using its horizontal piping and cross-brace, rather than using the readily available ladder. Plaintiff attempted to jump from the pipes and grab a metal beam, but lost his grip and fell. Plaintiff's supervisor testified that he gave explicit instructions to use the nearby ladder to reach the sidewalk shed and that supervisor had used that very ladder to reach the shed seconds before the plaintiff's accident. The plaintiff testified that the ladder was the appropriate way to get onto the sidewalk shed and testified that he was supposed to use the ladder. Testimony also established that plaintiff had used that ladder to get to the sidewalk bridge hours earlier (Ahmed, 187 A.D.3d 972). A review of the briefs in Ahmed made clear that the sole proximate cause facts were quite developed during the course of litigation, which made all of the difference in the appeal.

Third Department Decision

In Smith v. State of N.Y., 180 A.D.3d 1270 (3rd Dept. 2020), the Court upheld the Court of Claims' rejection of the defendant's sole proximate cause argument, on the grounds that the precipitating event was the failure of the platform itself and not the decedent's failure to wear a life jacket or tie off to an anchorage point.

Fourth Department Decisions

The Fourth Department also faced several sole proximate cause arguments in the last year. Particularly informative is Ward v. Corning Painted Post Area Sch. Dist 192 A.D.3d 1563 (4th Dept.2021), wherein the Court held that the plaintiff failed to meet his initial burden to establish entitlement to summary judgment since his own submissions raised an issue of fact as to whether his conduct in "refusing to use available, safe and appropriate equipment", and carrying a pour stop up a ladder to the second floor of the building, was the sole proximate cause of the accident. The Court stated that the existence of safer means for moving the pour stop included a forklift and ropes, to lift or hoist it to the second floor. The Court also suggested that the plaintiff could even have handed the pour stop to a coworker who was located on the second level. The Court was presented with the testimony of plaintiff's foreman, who stated that he specifically told the plaintiff not to transport materials to the second floor by carrying items up the ladder. Plaintiff testified that he knew he should climb a ladder only when he was able to maintain three points of contact with the ladder and admitted that he was not able to maintain these points of contact while carrying the pour stop.

The decision in Ward provides insight into the level of information the defendants were able to amass during discovery to build a sole proximate cause defense. In addition to the aforementioned testimony regarding the availability of other equipment or methods to transport the pour stop, the Court considered plaintiff's training, prior practice in transporting materials, and what the Court considered to be common-sense issue as to whether the plaintiff knew, or should have known, not to carry the pour stop by hand up the ladder and to use other means available to him.

The Fourth Department's reliance on a common-sense approach to determining whether plaintiffs knew or should have known to use, or not use, certain devices to perform their work, in Ward, stands in contrast to the First Department's apparent view that proof of a standing order to use, or not use, certain equipment should be presented to attain summary judgment on sole proximate cause grounds (Portillo, 191 A.D.3d 613; Valdez, 189 A.D.3d 425).

The Fourth Department's decision in Schutt v. Bookhagen, 186 A.D.3d 1027 (4th Dept.2020), is also interesting for its drawing of a distinction between a plaintiff's failure to follow instructions and an outright refusal to use available safe and appropriate equipment. In Schutt, 186 A.D.3d 1027, the plaintiff, a ground laborer, was injured when the toe board that he used to stabilize himself failed, causing him to slide off of the roof. He was not wearing a harness at the time of the accident. The defendants submitted deposition testimony from plaintiff's employer, establishing that the plaintiff may have been aware that harnesses were somewhere on the work site, was told to wear a harness while on the roof, and was instructed on how to wear a harness.

Nevertheless, the Court held that the defendants failed to raise a triable issue of fact as to whether safety harnesses were readily available at the work site, albeit not in the immediate vicinity of the accident. The Court stated that the presence of other safety devices somewhere at the worksite' does not alone satisfy the defendants' duty to provide appropriate safety devices. Moreover, similar to the First Department in Hayek v. Metro. Transp. Auth., 195 A.D.3d 568 and Portillo, 191 A.D.3d 613, the Court highlighted that neither of the plaintiff's supervisors wore a harness on the day of the accident.

In addressing the plaintiff's failure to follow the instructions he was given, the Court stated that, "[t]he mere failure by plaintiff to follow safety instructions" does not render plaintiff the sole proximate cause of his injuries and that the evidence presented by the defendants established only that the plaintiff possibly failed to follow safety instructions, not that he outright refused to "use available, safe and appropriate equipment". The Court distinguished the facts in Schutt to those in Fazekas v. Time Warner Cable, Inc., 132 A.D.3d 1401 (4th Dept. 2015), where the plaintiff

rejected the owner's offers to retrieve safety equipment from his own truck that would help to remove ice from underneath the ladder and thereby stabilize the ladder and rejected the owner's offer to hold the ladder for plaintiff.

The Court's distinction between failing to follow instructions and an outright refusal to use available safe and appropriate equipment, raises a question of what kind of discovery a party might need to satisfy the Court's view of the refusal to use available equipment. Would parties need an admission to establish that a plaintiff's non-use of equipment was meant to be a refusal to use? Is there a difference between a contractor offering to retrieve new equipment for a plaintiff versus a contractor advising the plaintiff where certain equipment was located at the jobsite? Must an actual offer to retrieve be made, and a rejection given, for "the refusal to use" factor of a sole proximate cause analysis to be satisfied?

While the appellate decisions analyzing the sufficiency of the evidence submitted to support a sole proximate cause defense continues to confound the Labor Law litigator, it is clear that the Courts are broadening their analysis beyond plaintiffs' own conduct. How deep counsel digs to obtain information that can be used to support the sole proximate cause defense is within the litigator's control. Since the Courts have not set a bright line rule as to what constitutes "readily available" equipment within the context of the Scaffold Law, it is wise for litigation counsel to explore the location of equipment within *and outside* of the worksite, as well as how easily one could obtain the equipment. Probing the adequacy of available equipment to the specific tasks plaintiffs were performing at the time of their accidents, is critical, although it remains unclear whether witness testimony will be considered by some courts to be sufficient in this regard, without providing expert opinions. Although the Courts are inconsistent in their application of the "failure to wait" grounds for granting sole proximate cause, the cases reviewed herein indicate that a sole proximate cause work-up should include questions regarding plaintiffs' ability to wait. In other words, the success of an appeal involving the sole proximate cause defense is only as good as the details litigation counsel has amassed during the course of the litigation and has submitted to the court below.