

FOURTH DEPARTMENT SIGNALS MOVE TO LIMIT SCOPE  
OF SOLE PROXIMATE CAUSE DOCTRINE

*Lorenti v. Stickl Construction Co., Inc.*

(4TH DEPT, NOVEMBER 12, 2010)

*Handville v. MJP Contractors, Inc.*

(4TH DEPT, OCTOBER 8, 2010)

With its 2003 decision in *Blake v. Neighborhood Housing Services of New York City* – the decision which birthed the sole proximate cause defense – the Court of Appeals signaled what many thought would be a significant change in New York’s Labor Law jurisprudence. For several years after it was handed down, it appeared that the *Blake* decision and its progeny marked the start of a departure from the strict liability imposed on owners and general contractors by § 240 of New York’s antiquated Labor Law. Indeed, following the *Blake* decision many courts in this State continued to hold that the Labor Law should not be utilized to treat defendants as insurers and that where a plaintiff’s own choice of what manner in which to complete his task was the sole cause of his injury, he is not entitled to recover under Labor Law. With two recent decisions, however, the Fourth Department has suggested that a tightening of the sole proximate cause defense is on the horizon.

In *Lorenti*, plaintiff injured himself while he was installing siding on a home under construction. At the close of discovery, plaintiff moved the trial court for an order granting him summary judgment under § 240(1) of the Labor Law. The defendant cross-moved and argued that plaintiff’s failure to use a ladder made available to him was the sole proximate cause of his injuries. The trial court granted plaintiff’s motion and denied the defendant’s cross-motion. On appeal, the Fourth Department affirmed the lower court’s decision and held that plaintiff met his initial burden by establishing that the absence of a ladder was a proximate cause of his injuries. The Court went further, however, and opined that defendant failed to even raise a question of fact to defeat plaintiff’s motion. According to the Court, it was not enough for defendant to simply argue that a sufficient safety device was provided and

plaintiff **should** have used that device. Rather, defendant was obligated to provide proof that plaintiff had been instructed to use the ladder provided and that he failed to do so.

A similar result was reached by the Fourth Department in *Handville* where plaintiff injured himself when he fell from a scaffold at a construction site. After depositions in *Handville*, plaintiff moved for summary judgment before the trial court relative to his cause of action interposed under § 240(1) of the Labor Law. In support of his motion, plaintiff contended that the absence of OSHA-approved scaffolding was a proximate cause of his injuries. In opposition, defendant tendered evidence that a sufficient safety device was available to plaintiff and argued that plaintiff’s failure to use that device raised a question of fact sufficient to defeat plaintiff’s motion. The trial court agreed and denied plaintiff’s motion. On appeal, the Fourth Department reversed the trial court’s ruling and granted plaintiff summary judgment on his § 240 cause of action. In so holding, the Court opined that although defendant submitted evidence to establish that a proper safety device was made available to plaintiff, it failed to present any evidence establishing that plaintiff had been instructed to use that equipment in completing his task. With its decisions in *Lorenti* and *Handville*, the Fourth Department seems to be signaling a departure from that view of the sole proximate cause defense which provides that a plaintiff is precluded from recovering when an adequate safety device is made available and their normal and logical response should be to use that device. The Court therefore appears to be moving in a direction in which the sole proximate cause is available to a defendant only when it both provides an adequate safety device and **instructs** plaintiff to use it.

INJURY ON A SCAFFOLD IS NOT ENOUGH

*Wanderlei Gasques v. State of New York*

(COURT OF APPEALS, OCTOBER 21, 2010)

New York’s Court of Appeals has once again found that just because an accident involves a scaffold, it does not necessarily implicate the absolute liability imposed by Labor Law § 240(1). In *Gasques*, the claimant was injured while repainting the leg of a bridge using a “spider scaffold.” While ascending in the scaffold, the claimant’s hand became caught between the scaffold and the bridge, sustaining injuries. The Court found that the claimant’s hand was crushed when the scaffold motor continued to operate causing his hand to be trapped between the external motor control and the steel bridge. Affirming dismissal of the claimant’s Labor Law § 240(1) claim, the Court held that his injury was not the direct consequence of the application of the force of gravity to an object or person.

**Practice Pointer:** In analyzing a Labor Law § 240(1) claim, the mechanism of the injury is crucial to determining the applicability of that section.

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#### FOURTH DEPARTMENT GETS "ENTRENCHED" IN THE LABOR LAW

*Pitts v. Bell Constructors, Inc.*  
(4TH DEP'T, FEBRUARY 18, 2011)

Although courts generally have agreed that a fall into a trench from the ground on either side does not trigger the extraordinary protections of § 240 of the Labor Law, recently the Fourth Department noted an exception to this general rule. In *Pitts*, plaintiff injured himself when he fell while working from a column form in a trench. At the time of his accident, plaintiff was standing on a column form *in* a trench and was attempting to straighten bolts located on other column forms in the trench. Plaintiff fell when the bar he was standing on slipped off of a bolt.

At the close of discovery, defendant moved for summary judgment to dismiss plaintiff's cause of action asserted under § 240 of the Labor Law. In support of its motion,

defendant argued that a fall into a trench is a usual and ordinary danger associated with construction and not the type of elevation-related risk envisioned by § 240. The trial court agreed and dismissed plaintiff's claim.

On appeal the Fourth Department determined that the trial court erred in its decision. In so holding, the Court opined that although a fall into a trench from the ground on either side is not covered by Labor Law § 240, it is a different story altogether when a worker is in some way working over or suspended within a trench. In reversing the lower court's decision, the Fourth Department determined that where, as here, a plaintiff is working or walking over a plank or similar support suspended over a trench and falls into it, the statute applies.



#### FOURTH DEPARTMENT REJECTS PLAINTIFF'S OFF-SITE CLAIM

*Dahar v. Holland Ladder & Manufacturing Co., et al.*  
(4TH DEP'T, DECEMBER 30, 2010)

Although it often seems as if the courts continually are expanding plaintiffs' rights under the Labor Law, recently the Fourth Department signaled that its willingness to generously interpret the Labor Law extends only so far.

In *Dahar*, plaintiff sustained injury when he fell from a ladder at his employer's shop while readying a component for shipment to an off-site construction project. At the time of his accident, plaintiff was employed by West Metal Works, Inc. and was working at its

fabrication shop in Cheektowaga, New York. Plaintiff was not performing any work on any part of the shop building when he was injured but rather was engaged in the final phase of the fabrication of a component part of a nuclear waste treatment plant that was being constructed by the United States Department of Energy in Richmond, Virginia. Specifically, plaintiff was cleaning grease and welding residue off of the fabricated wall module prior to its shipment. Plaintiff was injured when he was descending a ladder and a rung broke. After discovery, plaintiff moved for partial

summary judgment with respect to his cause of action under § 240(1). The trial court denied plaintiff's motion and plaintiff appealed.

On appeal, the Fourth Department affirmed the lower court's ruling and held that § 240 of the Labor Law does not apply to workers engaged in the fabrication of component parts that are to be shipped from the fabrication facility to an off-site construction location.

#### BUT I FELLI

*Simoes v. City of New York*  
(1ST DEP'T, FEBRUARY 27, 2011)

In a recent decision, the Appellate Division, First Department affirmed dismissal of a plaintiff's Labor Law § 240(1) claim despite the fact that he fell from the raised bucket of a manlift, an accident clearly involving the effect of gravity on a person.

In *Simoes*, plaintiff was working as a flag man during a bridge renovation project. His job was to direct traffic so that manlifts could be maneuvered into position under the bridge. During the course of the work, one of the

manlifts malfunctioned and the workers decided to drive it to a nearby vacant lot. When the manlift was unable to make it over the curb, the plaintiff got into the aerial bucket and attempted to use the controls there to get the manlift over the curb. A few moments later, a foreman drove another vehicle over and attempted to push the manlift into the lot. When that vehicle made contact with the manlift, however, it fell over, with plaintiff still in the aerial bucket.

In affirming dismissal, the Court held that plaintiff was not protected by section 240(1) because his duties as a flagman did not entail any elevation-related risks.

**Practice Pointer:** It is not enough that a plaintiff fall from a height. Before Labor Law § 240(1) liability can be imposed, it must be determined that the plaintiff's work at the time of the incident is the type of work that would subject him to any elevation-related risk.

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