# LitigationManagement

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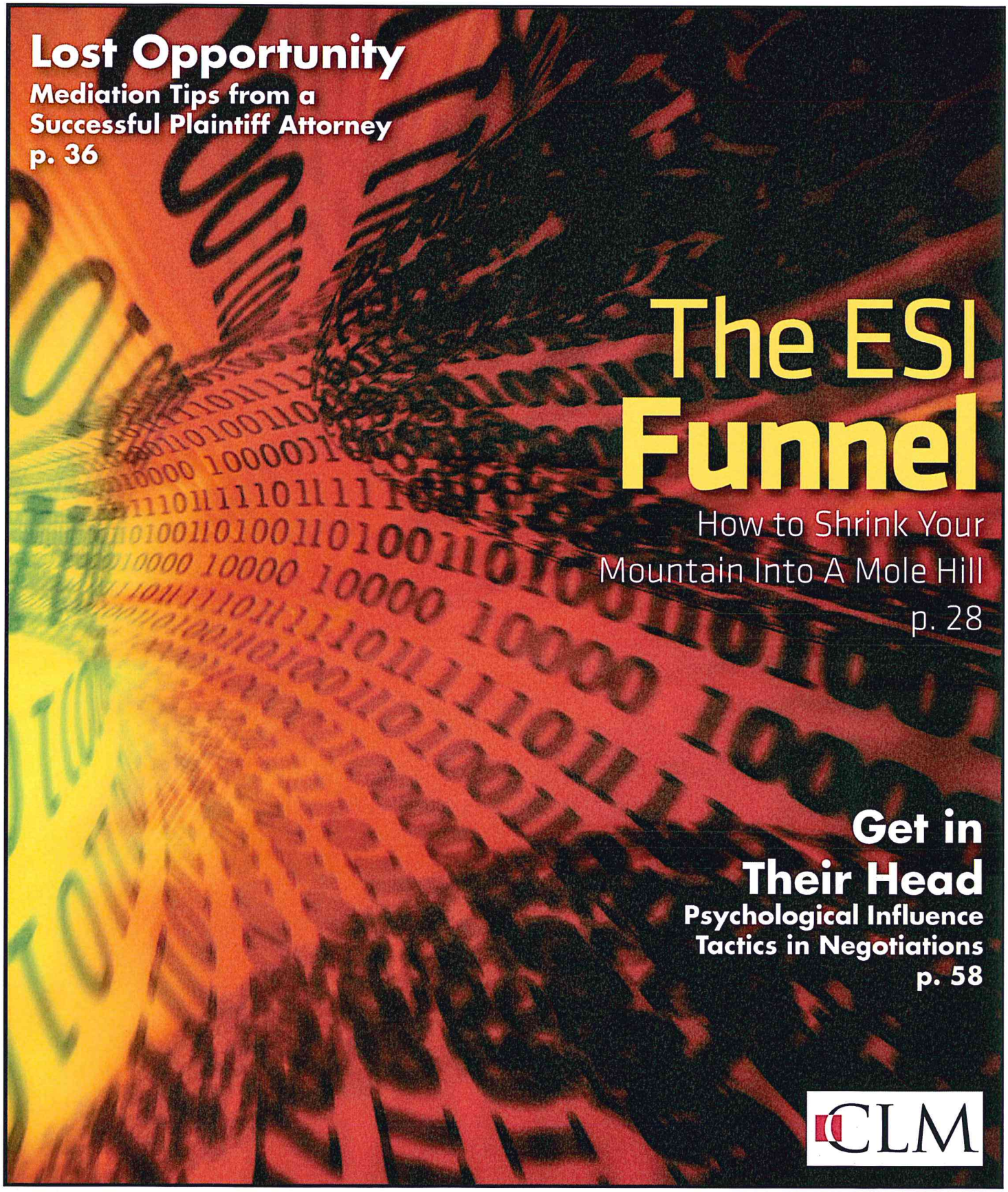

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CLM

# Leveling The Playing Field

## The Case For Repealing New York Labor Law §240

By Kenneth A. Bloom and J. Lee Wright

Consider a roofer laying decking on a three-story building. As he walks backwards across the roof, carrying a sheet of decking, he is chatting with a co-worker. Distracted, the worker falls off of the roof. He was not wearing a safety harness that was available at the site because it was not comfortable. Or consider an asbestos abatement worker working on a pipe running along an interior ceiling. He is standing on the third rung of a six-foot ladder. Rather than dismount the ladder and move it down

the wall as his work progresses, he leans his body to the side and he falls to the ground.

Both of these individuals may file suit against the owners of the buildings at which they were working seeking unlimited money damages for the accidents caused by their own failure to use available safety equipment, follow instructions and/or use common sense. Both of these workers will seek recovery under the semi strict liability provision of New York Labor Law §240, which prohibits a defendant/owner from arguing that the worker's own negligence led to his/her accident. Isn't it time to level the playing field and repeal New York Labor Law §240?

New York Labor Law §240 imposes liability upon an owner, general contractor and their agents for failing to provide "proper protection" against elevation-related hazards and "the application of the force of gravity to an object or person," regardless of whether or not the owner or contractor actually exercised supervision or control over the work. A violation of Labor Law Section §240 imposes absolute liability. In order to prevail, the plaintiff need only prove that the statute was violated and that the violation was a proximate cause of the injury.

At the moment, the only way to successfully defend against a §240 claim is to prove that the plaintiff was a recalcitrant worker or that the plaintiff's actions were the sole proximate cause of his injuries. A recalcitrant worker is one who was injured as a result of his absolute refusal to use available safety devices provided by the owner or employer. A worker is the sole proximate cause of his injuries where there is no statutory violation and the worker's actions are the sole cause of the accident, such as using a six-foot ladder knowing that a seven-foot ladder was necessary to do the work, and in fact a seven-foot ladder was readily available at the job site.

Complaints filed on behalf of workers injured as a result of a fall or the force of gravity at a construction site will typically include three statutorily based causes of action: violation of New York Labor Law §200, which is generally described as the codification of a common law negligence action; violation of Labor Law §241(6), which imposes liability on owners and general contractors for failure to comply with provisions of the New York Industrial Code, regardless of whether the owner or contractor controlled or supervised the worksite; and the §240 strict liability claim. Defendants may plead comparative negligence as a defense to the §200 and §241(6) claims. Comparative negligence, however, is not a defense to the §240 claim.

Although the New York Court of Appeals has opined that it was not the intent of the Legislature to make owners and contractors insurers of workers' safety, in practical effect that is precisely what has happened. Owners and contractors as insurers of worker safety is completely unnecessary when any alleged unsafe work-site conditions can be adequately addressed in a negligence action against any potentially culpable party, and any loss of income and medical expenses is reimbursed through the no-fault workers' compensation system.

More often than not, the individual hurt is employed by a subcontractor. Virtually every contract between owners or contractors and a subcontractor includes indemnity language that, "to the fullest extent permitted by law," passes through responsibility for the defense and indemnity of the owner and contractor to the subcontractor/employer. The contractual pass through effectively circumvents the protection otherwise afforded the employer by the workers' compensation law.

In those rare instances where there is no written contract or the indemnity provision of the contract is too broad, the workers' compensation law bars common law indemnity or contribution by the employer, except in instances of a "grave injury" such as death, permanent loss of use or amputation of an arm, leg, hand or foot, paraplegia, quadriplegia or a brain injury "caused by an external physical force resulting in permanent total disability."

The exposure and costs associated with the New York Labor Law have directly resulted in many carriers limiting the types and availability of coverage. Those carriers that will insure subcontractors will limit coverage, for example, to claims "arising solely out of the negligence of the named insured" or completely except coverage for an injury to any insured's employees. Thus procuring insurance has become more difficult and more expensive for subcontractors.

Currently pending in the New York State Assembly is a bill that would allow defendants to plead comparative negligence of the plaintiff who has brought an action under §240 as a defense in instances where the plaintiff has engaged in a criminal act; has used drugs or alcohol; failed to use safety devices furnished at the job site; failed to comply with employer instructions regarding the use of safety devices at the job site; or failed to comply with safe work practices in accordance with safety training programs provided by the employer. While being allowed to raise comparative negligence to a §240 claim would be a welcome addition, and would be consistent with how §200 and §241(6) claims are defended, why should the defense of comparative negligence be limited to the enumerated instances?

New York is the only state in the United States to have such a strict liability statute. What began in the late 19th century as necessary protection of innocent employees performing extraordinarily dangerous work has morphed into punishment for responsible owners and contractors. How is working on a six-foot scaffold or A-frame ladder at the modern construction site an ultra-hazardous activity such that liability for an accident should be on a par with strict products liability? Statistically, more workers are injured in manufacturing sector-based accidents than in construction-related accidents. Yet manufacturing workers do not have the benefit of an absolute liability statute.

As presently constituted, §240 is an invitation for fraud that enriches unscrupulous plaintiff's attorneys and rewards reckless or careless plaintiffs. It also encourages plaintiffs to submit to expensive and unnecessary surgical procedures and treatment.

It is time to level the playing field and repeal Labor Law §240. LM

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