



## Liberal Interpretation of Labor Law § 240(1) in Fernandez And The Need For Thorough Deposition Questioning

By Jon P. Pisiewski



On occasion, when conducting a deposition, attorneys find themselves confronted with an opposing counsel improperly objecting to “irrelevant” or follow-up questions about something the witness denied. However, thorough questioning anticipating potential pitfalls may often lead to asking the crucial question that can turn a case.

A recent example of this was set forth by the Appellate Division, First Department, in Fernandez v 213 E. 63rd St. LLC, 2014 N.Y. Slip Op. 01676, 2014 WL 958734 (App. Div., 1<sup>st</sup> Dept. 2014). In that case, plaintiff was installing black iron into a concrete ceiling using an A-frame ladder. Defendants contended the ladder was improperly folded and leaned against a wall but plaintiff denied this at his deposition. The ladder subsequently “kicked out,” causing plaintiff to fall to the ground. Plaintiff moved for summary judgment under NY Labor Law § 240(1). Defendant opposed, arguing that plaintiff was the sole proximate cause of his injuries, presumably pursuant to Blake v Neighborhood Hous. Servs. of N.Y. City, 1 N.Y.3d 280, 771 N.Y.S.2d 4848 (2003). The Supreme Court granted plaintiff’s motion and awarded summary judgment on his Labor Law § 240(1) claims against defendants and the Appellate Division affirmed.

The Appellate Division specifically noted that, even assuming defendants had raised an issue of fact as to whether plaintiff had used the A-frame ladder in a folded position leaned against the wall, they “**offered no evidence that plaintiff was ever instructed not to use the ladder in this manner,**” reflecting a trend of the First Department interpreting Labor Law § 240(1) liberally. Fernandez, supra (emphasis added).

Defendants’ counsel may have believed that further deposition questioning would risk “muddying the waters” or lead to damaging testimony; however, questioning the plaintiff whether he was ever instructed not to fold the ladder and lean it against the wall—even after he had denied doing so and even if his counsel objected to the questioning on that basis—may have resulted in a different decision in this case. Further questioning asking whether plaintiff knew how to properly operate an A-frame ladder, whether he had ever folded and leaned such a ladder against a wall before, whether he had seen anyone else doing so and what he believed would happen if he used the ladder in that way may also be necessary or appropriate given the Court’s decision in Fernandez and its ongoing trend of liberal interpretation of Labor Law § 240(1).

Continued on Page 2

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The First Department in Fernandez requires defendants to affirmatively verify that instructions were given against potential misuses of the ladder in question. Specifically, questions such as, “what were you told/given about how to use” the device and “what were you told/given about how not to use” the device should be asked in order to satisfy this expanding standard under Fernandez. The decision reinforces the need to prepare thoroughly before depositions, think outside the box during depositions, and ask the follow-up questions that might not be needed in order to cover all bases and elicit the information necessary for success down the road.

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