STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

LARRY W. MONDORE and KRISTEN MONDORE,

Plaintiffs,

vs.

Index No. 05-3522
RJI No. 33-06-1146

KARL H. STINSON; TOWN OF DEWITT, NEW YORK; TOWN OF MANLIUS, NEW YORK; O'BRIEN & GERE ENGINEERS, INC.; COUNTY OF ONONDAGA, NEW YORK; ONONDAGA COUNTY INDUSTRIAL DEVELOPMENT AGENCY; and COR COLLAMER ROAD COMPANY, LLC,

Defendants.

DECISION

In this action, plaintiff, Larry Mondore, seeks judgment against the defendants, and each of them, for personal injuries he received as a result of a work-related/motor vehicle accident that occurred with him as a pedestrian on June 30, 2004 at approximately 2:00 p.m. At the time of the accident, the plaintiff was working as an equipment operator, [front-end bucket loader for Leitz Enterprises ("Leitz")], and was standing near the roadway of Route 298 in the Town of Dewitt.

At the time, Leitz had entered into a contract with the Town of Dewitt to clear trees and install water lines for Collamer Business Park over a certain strip of land next to State Route 298, which is an east-west roadway, with one lane of travel going in each direction. This roadway is a flat, straight and level piece of roadway.

Mondore's co-employees were chainsawing trees and using the bucket from an excavator to saw and clear trees along the path they had contracted to clear. The bucket was braced up against a tree that they were cutting, and another worker was

chainsawing at the tree at its base. The workers relied on the bucket to push the tree over in the desired direction once the tree was ready to be felled.

The tree was not otherwise hoisted, braced, wired, roped, winched or controlled in any other way. The workers relied strictly upon the fact that the bucket from the excavator could push the tree in the appropriate direction when the tree was chainsawed to what was the desired cut.

The series of events which lead to the plaintiff's injuries began when the tree began to fall. Instead of falling in the direction away from nearby power lines, as initiated by the workers, the tree fell in a direction over the power lines which ran adjacent to State Route 298. The tree struck the power lines, making the power lines begin to violently shake and spark, making it look, to many that were there, like the lines were going to fall. A shower of sparks ensued from the lines from the impact from the tree, causing the plaintiff Mondore to run. He ran away from the apparent falling lines and/or sparks, and into the roadway where he was struck by a motorcycle operated and owned by defendant Karl H. Stinson.

PROCEDURAL HISTORY OF THE CASE

The plaintiff then commenced this action by virtue of summons and complaint, dated June 25, 2005. Plaintiff's complaint included, in his Fist Cause of Action, a claim of negligence versus the driver of the motorcycle, Karl H. Stinson.

The Second and Third Causes of Action dealt with claims of general negligence as to all other defendants other than Stinson, and the Third Cause of Action specifically claimed liability under §200 of the Labor Law of the State of New York with regard to each of those other defendants. The Fourth Cause of Action included a claim pursuant

to Labor Law §202(h) as against all defendants, other than defendant Stinson. Plaintiff's Fifth Cause of Action dealt with a claim against all other such defendants pursuant to §240(1) of the Labor Law of the State of New York, claiming that said defendants were liable to the plaintiff absolutely as a result of the failure to use adequate and appropriate safety devices as required under that statute. Causes of Action Six and Seven are claims made against the defendants (other than Stinson) pursuant to §241(6) of the Labor Law of the State of New York, and violations of several sections of the Industrial Code of the State of New York, and violations of those code rules. The Eighth Cause of Action is a cause of action dealing with loss of consortium on behalf of the plaintiff's wife, a claim derivative in nature. The Eighth Cause of Action will rise and/or fall as plaintiff's primary cause of action will either survive or be dismissed by virtue of the motions made before this Court.

Discovery rapidly proceeded in this matter, and bills of particulars, supplemental bills of particulars and other pleadings including other discovery matters were, for the most part, readily exchanged among the various parties.

Previously, many of the defendants, including Stinson, moved for summary judgment dismissing the plaintiff's complaint, and that motions were decided by Honorable Justice Edward D. Carni, at which time Judge Carni issued an Order denying, without prejudice to renew, the motions.

THE MOTIONS PRESENTLY BEFORE THE COURT

In this matter, each of the defendants bring a motion for summary judgment dismissing the allegations contained in plaintiff's complaint. For example, Karl H. Stinson renews his motion for summary judgment to dismiss the plaintiff's complaint in

its entirety, upon the grounds that there simply are no facts that will support a claim against the defendant Stinson. The other defendants (Cor, OCIDA, Town of Dewitt and O'Brien & Gere) vigorously move to defend the claims made against them on the basis of all other actions and proceedings brought against them, enumerating the host of reasons in support of each motion why they should not be parties to this action, and why the claims against them must fail as a matter of law.

The plaintiff, on the other hand, takes issue with the defendants' motions, and vigorously defends the claims made including negligence, and claims made under the Labor Law, specifically §200, Labor Law §240(1) and Labor Law §241(6). All of the motions came to be heard before this Court in March of 2008, and the parties were allowed additional time for subsequent submissions following that.

At the time of oral argument, the Court listened to arguments of the parties with regard to the subject motions, and the Court reserved decision. The following is the decision of the Court:

I - PLAINTIFF'S CLAIM VERSUS KARL H. STINSON - THE FIRST CAUSE OF ACTION

The defendant, Karl H. Stinson, moves to renew the motion for summary judgment previously made before Honorable Edward D. Carni, and brings this motion to the Court seeking to have the Court dismiss all actions and proceedings of Karl H. Stinson based on the deposition transcripts and all other actions and proceedings in this matter pursuant to CPLR §3212. Defendant Stinson argues, through counsel, that there is absolutely no proof that anyone saw the defendant driver operating the motorcycle that he was driving at the time, except Dennis Brooker, who was standing across the

street. Defendant further argues that there is no proof that his client was doing anything improper, and that his client was going (by his testimony and that of Karen Trush) approximately 30 miles per hour at the time of the impact with the plaintiff. The defendant further argues that there is no dispute about the fact that the plaintiff ran into the roadway without looking, and relies primarily upon the defendant's statement that he had no time to react at all to the plaintiff's movements. A review of the record with regard to the deposition testimony of both the defendant, the plaintiff, Dennis Brooker, and Karen Trush, is necessary to determine the subject motion.

Looking at the testimony in a light most favorable to the plaintiff in this matter, as one must do in a motion for summary judgment, there are certain facts that are undisputed with regard to the operation of the motorcycle, and others of which are acutely at issue.

At the time of the incident, the defendant Stinson lived with Karen Trush, who was a passenger on his motorcycle at the time that the incident occurred. The defendant Stinson was operating a 1984 Harley motorcycle, and had been licensed for twenty-four years, since age nineteen. The license had been revoked in 1985 because of a DWI, but since then had been reinstated.

There was a conflict in the testimony from both Karen Trush and the defendant as to where they started their journey. Defendant Stinson says that he started from his house on Lorraine Avenue in the City of Syracuse, but Trush recalls them coming from their house at 100 Hadden Lane, Syracuse, New York. That notwithstanding, it is clear that they traveled on Route 81 North, to 690 East, to 481 North, at which point they got off at the Bridgeport Exit onto State Route 298. The defendant and Ms. Trush were

simply out for a ride that day, traveling on a roadway that the defendant was very much familiar with. The road is described as flat, level and straight, there was not a lot of traffic in either direction, and it was a clear and sunny day. The defendant describes his travel as just coming onto State Route 298, approximately 200 feet before the area of impact. At the time, it is alleged that the speed limit on State Route 298 was 50 miles per hour - that has since changed to 35 miles per hour. The defendant Stinson states that at no time was he going more than 30 miles per hour, and that he was simply accelerating to about that speed when the incident occurred. Witness Karen Trush, who was on the back of his motorcycle, describes his speed similarly, indicating that they were not going above 30 miles per hour at the time that impact occurred.

This Court notes an immediate discrepancy with regard to where the accident occurred, and the exit ramp from State Route 481. The police report indicates that it was approximately one-half mile from the 481 exit where the accident occurred. However, neither Trush nor Stinson agree with that, each indicating that it was about 200 feet from the intersection where the incident occurred.

The defendant was traveling east on a two-lane road, with one lane going in each direction.

Witness Karen Trush recalls, from the back of the motorcycle, seeing the tree hit the power lines prior to the accident, and that it was “a minute or less” before the accident actually occurred. She also testified that from that point she saw the man running away, trying to get out from the shower of sparks that had occurred, and that he was looking over his right shoulder and looking up at the sky towards the power lines and the tree. Both she, like Stinson, were concerned that the power lines would come

down. She, like Stinson, noted that there were significant sparks coming from the power lines, and that she had occasion to see these sparks as well as the tree hit the lines before seeing the plaintiff running towards the roadway. The accident occurred in the middle of the eastbound lane of State Route 298, and apparently the defendant Stinson took no evasive action to avoid the collision. Defendant Stinson recalls that he saw the tree come down on the power lines, and then saw the sparks coming from the power lines. He indicates that, as he was traveling, he was almost "directly under the tree when it came down". The defendant testified that he saw the plaintiff run into the side of the motorcycle, and saw him hit the crash bar with his leg, flipping him over and he ended up in the middle of the road, behind the motorcycle. He observed damage to the right front crash bar of his motorcycle, and observed the plaintiff in the eastbound lane following the impact.

Noteworthy, at the scene of the accident, defendant Stinson alleges to have talked to the workers who were at the scene, who apologized to him because it was their fault, and allegedly discussed with him the fact that there were no warnings, road signs, barricades or anything else that would warn of a potential danger. They allegedly told the defendant that they thought they could get away with not putting up any warning signs or other items to warn travelers, as they needed to move quickly along to get the trees taken down.

Dennis Brooker, a co-employee of the plaintiff, in his deposition, testified that he was talking to a surveyor at the time of the incident, and saw the tree go into the wires, and then roll down off the branches. Brooker further testified that he saw sparks flying everywhere, as the tree pushed the wires together, and that he was afraid the wires were

going to break, but somehow they did not. Witness Brooker knew that they were high-voltage wires, and he was very much concerned of that because of the number of co-employees that were in the area. Brooker testified that it was like somebody "welding the sky" with a lot of sparks flying everywhere. Brooker further identified the location as being directly above Larry Mondore, where he was working, waiting for the tree to be cut down so that it could be cleared away.

Brooker went on to say that then he saw the plaintiff turning to run - or as he said - "run for his life". Brooker testified that he then saw Larry Mondore run into the road before he was struck on the roadway by the motorcycle.

This Court has reviewed the facts of this matter in great detail with regard to the plaintiff's First Cause of Action. Defendant Stinson's contention is that he did not have enough time to avoid the accident. It is clear that defendant Stinson took no evasive action, and it is equally clear that he was driving on a straight, flat, level stretch of road. There is a significant deviation of facts based on the police report versus the testimony of the defendant Stinson and witness Trush. While the exact location of the incident from the 481 entrance is not specifically described in any of the materials submitted to the Court, it is clear that there are multiple questions of fact that need to be resolved before the defendant could or would be entitled to summary judgment.

In any motion for summary judgment, the burden on the Court is not to resolve issues of fact, or determine matters of credibility, but merely to determine whether such issues exist. Barr v. County of Albany, 50 NY2d 247. The court may not weigh the credibility of the affiant on a motion for summary judgment, unless it clearly appears that the issues are not genuine but feigned. Glick v. Dolleck, 22 NY2d 439. For the most

part, summary judgment will be inappropriate when competing inference when reasonably drawn as to whether the defendant's conduct constituted negligence. Myers v. Fir Cab Corp., 64 NY2d 806. Generally, the very question of negligence is a question for the jury to determine. Ugarriza v. Schmeieder, 46 NY2d 471; Rubin v. Realty Fashions, Ltd., 229 AD2d 1026.

In evaluating whether a defendant's conduct contributed to, or was a proximate cause of the injury, it is important to note that there can be more than one potential proximate cause of an injury. Doctor v. Juliana, 277 AD2d 1013; Heal v. Liszewski, 294 AD2d 911; Deshaies v. Prudential Rochester Realty Corp., 302 AD2d 999; Bush v. Lambs-Grays Harbor Co., 246 AD2d 768. With comparative negligence, the possibility that competing parties may each bear some responsibility in an accident or injuries to a plaintiff is readily apparent. Pedersen v. Balzan, 117 AD2d 933. Indeed, a driver who lawfully enters into a intersection, or comes upon a potential accident may be found partially at fault for the failure to use reasonable care to avoid the accident even if the plaintiff himself might be at fault or partially at fault. Romano v. 202 Corp., 305 AD2d 576. Indeed, the determination of comparative negligence is almost always a question of fact, and it is for a jury to determine in all but the clearest of cases. Duffy v. County of Chautaugua, 225 AD2d 261; MacDowall v. Koehring Basic Construction Equipment, 49 NY2d 824.

Summary judgment is a drastic remedy which deprives a party his day in court and should be applied only when there is no doubt whatsoever as to the absence of any triable issues of fact. Andre v. Pomeroy, 35 NY2d 361. For this reason, summary judgment should be used sparingly and is seldom appropriate in negligence cases.

Christie's v. Gugliardi, 65 AD2d 714; Berk v. 111 Atlantic Realty Corp., 206 AD2d 211. Indeed, for the most part, issues of negligence do not even lend themselves to such a drastic remedy as summary judgment. Gokey v. Castine, 163 AD2d 709. As issue finding is the key to deciding a summary judgment motion, the court should carefully scrutinize the papers presented in a light most favorable to the party opposing the motion. Wamey v. Haddad, 237 AD2d 123.

The facts at hand in this case demand that the Court find that there are questions of fact for a jury to resolve. Such questions of fact include the actual speed of the defendant's motorcycle at the time of the incident, whether he was going at a reasonable speed given the circumstances, whether he was keeping a proper lookout for things as they then and there presented, and whether or not he had his vehicle under proper control at or about the time that the plaintiff ran into the roadway. Such questions of fact as to the extent of period of time upon which the defendant left the 481 exit and got onto State Route 298, the distance that he had traveled at the time, and when it was that he first saw or was able to see the circumstances of the tree falling on the wires, the sparks, and the whole action that led to the plaintiff darting into the highway, and whether or not evasive action could be taken. Indeed, just because somebody crosses over into the roadway or runs into the roadway, and an accident ensues, does not mean that the defendant driver automatically has the right-of-way. Quite the contrary, and the rule now appears to be clear in New York that in order to prevail, the defendant must show that the plaintiff suddenly entered his lane, that the defendant was operating his vehicle in a prudent and careful manner, and that there was nothing that the defendant could do to prevent the accident and that he took all evasive action to do so. *See*

Fratangelo v. Benson, 294 AD2d 880; Seymour v. Obreza Trucking, Inc., 288 AD2d 831; Quiles v. Greene, 291 AD2d 345; Tossas v. Ponce, 18 Misc.3d 1132(A); Gardner v. Continued Developmental Services, 98 NY2d 612; Jessica A.H. v. Robert C.H., 98 NY2d 607; Montes v. New York City Transit Authority, 46 AD3d 121; Gonzalez v. City of New York, 295 AD2d 122; Carozza v. Daranyi, 2002 W.L. 33943108; Boston v. Dunham, 274 AD2d 708; Duffy v. County of Chautaugua, 255 AD2d 261; MacDowall v. Koehring Basic Construction Equipment, Inc., 49 NY2d 824; Greco v. Boyce, 262 AD2d 734; Lake v. Suchan, 285 AD2d 722; Beechey v. DeSorbo, 53 AD2d 727; Lints v. Fiore, 302 AD2d 1010. At the time of trial, the jury will have to evaluate the operator's response in the framework or of the continuum of time from when he first was able to observe the events leading to the incident, and evaluate what evasive action, if any, was undertaken by the defendant. *See* Ward v. Fra Operating Corp., 265 NY 303; Lewis v. Long Island Railroad Company, 162 NY 52; Polley v. Polley, 11 AD2d 121, affirmed 9 NY2d 1006; Ferrer v. Harris, 55 NY2d 285; Andre v. Pomeroy, 35 NY2d 361; Berk v. 111 Atlantic Realty Corp., 206 AD2d 921; Caristo v. Sanzone, 96 NY2d 172; Christie's v. Gugliardi, 65 AD2d 714; Cross v. Cross, 112 AD2d 62.

For all the above stated reasons, the defendant's motion for summary judgment dismissing plaintiffs' First Cause of Action is DENIED. Gokey v. Castine, 163 AD2d 709; Cross v. Cross, 112 AD2d 62; Seymour v. Obreza Trucking, Inc., 288 AD2d 831; Caristo v. Sanzone, 96 NY2d 172; Rappold v. Snorac, Inc., 289 AD2d 1044.

II - III - PLAINTIFF'S SECOND AND THIRD CAUSES OF ACTION - CLAIMS OF GENERAL NEGLIGENCE AND LABOR LAW §200 - LIABILITY AGAINST COR, OCIDA, TOWN OF DEWITT AND O'BRIEN & GERE

Plaintiff in this case alleges that the Town of Dewitt, O'Brien & Gere Engineers, Inc. ("O'Brien & Gere"), Onondaga County Industrial Development Agency ("OCIDA") and Cor Collamer Road Company, LLC ("Cor"), all are equally, individually, jointly, and severally responsible to the plaintiff pursuant to Labor Law §200. Plaintiff thus brings its Second Cause of Action seeking compensation for the negligence of said defendants, and then seeks compensation alternatively in the Third Cause of Action, which makes a claim under §200 of New York State Labor Law.

New York State Labor Law §200(1) states as follows:

> **Section 200. General duty to protect health and safety of employees; enforcement:**
>
> 1. All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein who are lawfully frequenting such places. All machinery, equipment, and devices, in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons. The Board may make such rules to carry into effect the provisions of this section.

In reality, Labor Law §200(1) is the codification of the common law duty imposed upon an owner or general contractor to maintain a safe construction site. *See* Ross v. Curtis Palmer Hydroelectric Co., 81 NY2d 494; Rizzuto v. LA Wenger Contracting Co., 91 NY2d 343; Allen v. Clutier Construction Co., 44 NY2d 290; Lombardi v. Stout, 80 NY2d 290. However, as a condition precedent to establishing liability under Labor Law §200(1), the party or parties to be charged with the obligation to provide a safe place to work, must have the authority to control the activities bringing about the injury to enable it to avoid or correct an unsafe condition. In other words, the duty requires the

owner (or other party) to prevent injuries to workers arising in defects in common ways or areas of the work, which owner (or other party) has notice. He is not obligated to supervise the contractor for the benefit of the employees, nor does his obligation extend protecting employees from defects in the contractor's plant, tools or methods. *See* Ortiz v. Uhl, 39 AD2d 143, affirmed 33 NY2d 989; Gasper v. Ford, 13 NY2d 104; Zuchelli v. City Construction Co., 4 NY2d 52. Thus, in order to establish liability under Labor Law §200(1), there must be a showing that the owner, general contractor, or their agents exercised some supervisory control over the operation and had actual or constructive notice of the alleged unsafe condition or conditions that caused the accident and/or injury. Hutchins v. Finch, Pruyn and Co., Inc., 267 AD2d 809.

In so requiring, the statute merely is a declaration of currently existing common law, and requires the exercise of reasonable care with regard to owners, contractors and their agents, a duty which is general in character and not absolute. Tilkins v. City of Niagara Falls, 52 AD2d 304 (4th Dept.). The duty to provide a safe place to work includes the detection of dangers discoverable by reasonable diligence and the supervisory authority with which to deal with them. Lunde v. Nichols Yacht Sales, Inc., 143 AD2d 816.

The facts as entertained by this Court in the various motions for summary judgment in this matter show, conclusively in this Court's opinion, the facts of ownership and control.

The defendant, Cor, is a commercial real estate developer that acquired 210 acres of land for a project owned by defendant, Cor, known as "Collamer Crossings Business Park". Eight to ten acres of the business park is located in the Town of Manlius, and the

balance of the acreage is in the Town of Dewitt. The land in Manlius is not involved in this accident, which comes before this Court, and as a result, the Town of Manlius and the County of Onondaga were both dismissed from this lawsuit by earlier motions for summary judgment.

In order to obtain funding and economic incentives available through OCIDA in conjunction with the development, Cor entered into an agreement with OCIDA whereby the initially conveyed their property - or a significant portion thereof - to OCIDA and then leased back the property from OCIDA via a lease agreement. Subsequently, financing was undertaken by OCIDA. Prior to the first building being constructed, Cor approached the Town of Dewitt regarding the installation of public utilities. The Town of Dewitt, working with O'Brien & Gere, its engineers, agreed to put in a public infrastructure, design the plans and specifications and have them bid and constructed. Cor was not involved with any of the design or bidding process. Cor then began its construction of building the first office building within the business park, which was designed for Sensis Corporation ("The Sensis Building"), and this building was under construction at the time that the plaintiff was injured. Under the terms of the agreement with the Town of Dewitt, the Town was to go ahead, with O'Brien & Gere to serve as its engineer/construction manager for the project, and develop the project known as Collamer Business Park - Water District #1. The contract drawings and specifications were prepared by O'Brien & Gere. A bid system was set up whereby those interested in bidding would contact O'Brien & Gere, obtain the necessary bidding booklets, and return them to O'Brien & Gere. O'Brien & Gere would then, as part of its duties and responsibilities, choose the appropriate contractors for the job, and make

those recommendations to the Town of Dewitt. The Town of Dewitt then would enter into a contract with the appropriate bidder, as recommended by O'Brien & Gere, unless they felt otherwise.

There are two entrances into the business park known as Road A and Road B, both of which enter and exit from Route 298 - also known as Collamer Road. Roads A and B create a horseshoe. Road A is known as Collamer Crossings Parkway and Road B is Aspen Park Boulevard. All of the lands in between Roads A and B are owned by Cor. Route 298 is owned by the State of New York, and the State has a right-of-way, which extends into the Cor property. Power lines are located about 10 to 15 feet off the shoulder of Route 298, near the Cor property.

Pursuant to the terms of his contract with the Town of Dewitt, O'Brien & Gere prepared the plans, specifications, and plan contract documents for public utilities, reviewed the bids and made recommendations to the Town of Dewitt, and Town awarded the bid for tree clearing to Leitz Enterprises, the plaintiff's employee in this matter. Even though the Town of Dewitt can reject O'Brien & Gere's recommendation, they accepted the recommendation in this case, and awarded the contract to Leitz Enterprises.

Both the Town of Dewitt and O'Brien & Gere - through their employees - met with Leitz Enterprises and authorized the work. The contract between the Town of Dewitt and Leitz Enterprises required that Leitz install new sewer and water lines within the business park and also install water lines along Route 298. Prior to the installation of the water lines along Route 298, Leitz had to clear trees between Roads A and B.

OCIDA and Cor were not parties to the contract between the Town of Dewitt and Leitz Enterprises. They were not involved in the discussions related thereto, nor to the bidding process. OCIDA and Cor did not - at least with regard to the proof before this Court - in any way direct, supervise, or control Leitz Enterprises' work or their employees on the date of the accident, or at any other time during the course of the contract that Leitz was in the process of carrying out. OCIDA and Cor were not aware of any of the manner and/or means or methods used by Leitz Enterprises to perform its work, and were not aware of any of the alleged conditions which the plaintiff alleges in this case.

It is within this context that the parties now come before this Court as defendants in an action whereby the plaintiff is claiming negligence, and a breach of §200 of the Labor Law.

Given that background, the Court will first look to those claims made by the plaintiff against OCIDA and Cor. As previously indicated in the facts above, this Court has not seen a scintilla of evidence in any fashion that would indicate that either OCIDA or Cor had any knowledge of any alleged defect or any defective work manners or methods or that they were in any way charged with the responsibility to control the activity bringing about the plaintiff's alleged injury. Where a defendant establishes that they had no authority to supervise the work being done, and a dangerous condition arises from the contractor's methods, manners and otherwise the work being done by the contractor, and the owner exercises no control over the operation, and the defendant did not have actual notice or constructive notice of the alleged hazardous condition, no liability attaches to that owner either under common law or Labor Law §200. *See* Bald,

III v. Westfield Academy and Central School, 298 AD2d 881 (4th Dept.); In the Matter of Fischer v. State of New York, 291 AD2d 815 (4th Dept.); Comes v. New York State Electric and Gas Corp., 82 NY2d 876.

In this case, the contract was between the Town of Dewitt and Leitz Enterprises. Neither OCIDA nor Cor had anything to do with the contract, the bid process, or anything concerning the work being done. The work being done was the responsibility of the Town of Dewitt under an agreement with Cor to provide the needed utilities to the construction site. Indeed, summary judgment under common law negligence and Labor Law §200 is warranted where the accident and/or injuries were not caused by a dangerous condition on a owner's premises and the owner did not have authority, contractual or otherwise, to supervise or control the work. Estate of Medbury v. Sonwil Distribution Center, Inc., 19 AD3d 1111 (4th Dept.); Comes v. New York State Electric and Gas Corp., *supra*; Bald, III v. Westfield Academy and Central School, *supra*; In the Matter of Fischer v. State of New York, *supra*; Ortiz v. Uhl, 39 AD2d 143, affirmed 33 NY2d 989; Gasper v. Ford, 13 NY2d 104; Zukelly v. City Construction Co., 4 NY2d 52. As a result, and based on all the factual information provided to this Court, the Second and Third Causes of Action, at least as those causes of action are directed to OCIDA and Cor, are dismissed, and defendants' motions for summary judgment are GRANTED accordingly with regard to those two causes of action.

IV - PLAINTIFF'S SECOND AND THIRD CAUSES OF ACTION AS THEY RELATE TO O'BRIEN & GERE AND THE TOWN OF DEWITT

Plaintiff takes the position in this matter that the defendant Town of Dewitt and O'Brien & Gere are those types of owners/contractors/agents that are distinctly liable under §200 of the Labor Law. In support of this claim, they rely upon the agreement of contract that was made between O'Brien & Gere and Town of Dewitt, as well as the contract between the Town of Dewitt and the plaintiff's employer, Leitz Enterprises. The Town of Dewitt[1] takes the position that pursuant to the contract between the Town and Leitz Enterprises that clause 7.05 of the contract provides clearly that the contractor will be solely responsible for all the means, methods and construction activities, and if there are any injuries that the contractor will be responsible for them. The defendant Town of Dewitt further takes the position that the Town did not direct or control the work on the job site, and that general supervisory authority which the Town had under its contract is not enough. The Town of Dewitt asserts that no instruction came from the Town of Dewitt, and that there is no way that the plaintiff's injury, caused by a collision with Stinson can be the result of anything done or not done by the Town of Dewitt. They further allege that the choice of how to do the work was that solely of Leitz Enterprises, and not the Town of Dewitt. The Town also alleges that there is no actual or constructive notice of any potential danger, and that there has been no proof that a

[1] It should be noted that the Town of Dewitt's Notice of Motion indicates that said defendnat is moving to dismiss pursuant to CPLR §3211. This Court converts that motion to one seeking summary judgment pursuant to §3212.

barrier of the type and kind that plaintiff asserts in the roadway would have protected the plaintiff in any event.

Plaintiff contends that the defendants Town of Dewitt and O'Brien & Gere did have authority to supervise or control the activity which brought about plaintiff's injury. In particular, the plaintiff alleges that there is adequate testimony from Jason Bassett (OB&G inspector) and other OB&G employees that would show that the crew regularly checked the job site, and would, with regularity, make sure the work was being performed in accordance with good and safe practices and in accord with the contract documents. O'Brien & Gere personnel would meet with Leitz's foreman, Dennis Brooker, regularly, to get an idea of the days activities, know when and where they were going to be clearing trees, know what equipment was on site, and would be fully aware of the activities of the plaintiff's employer.

In Mr. Bassett's testimony from his examination before trial, he testified that he represented the Town of Dewitt out on the job site, and if there were any problems or issues, he would address what he could on the job site, and that he did have authority to address or question a problem with Leitz if something was found to be unsafe.

In looking to see whether or not O'Brien & Gere and/or the Town of Dewitt had adequate supervisory authority over the job site, this Court has relied significantly upon the contracts that exist by and between the parties in this matter, including the contract between the Town of Dewitt and Leitz Enterprises, as well as the terms and conditions dealing with owner's representative, access to work, and covering to work, all terms of which are included under the terms of the contract. The contract itself, which is a short form document, includes the contract documents prepared by O'Brien & Gere by

reference. Those terms, including the addenda, special provisions, general provisions, advertisement, information for bidders, bid, payment terms, technical specifications for materials and performance, and contract drawings, to the extent provided to this Court, have been reviewed. It is noted that the contract itself provides, in pertinent part, ...

> Article 5. If the contractor shall fail to comply with any of the terms, conditions, provisions or stipulations of this contract, according to the true intent and meaning thereof, then the owner may make use of any or all remedies provided in his behalf in the contract and shall have the right and power to proceed in accordance with the provisions thereof.

The defendant, O'Brien & Gere, takes the position that OB&G owed no duty of care to the plaintiff, Larry Mondore, and that it did not have the authority to supervise or control the work which gave rise to plaintiff's injury. Defendant OB&G argues that at the time of the plaintiff's alleged incident, OB&G was operating as the representative at the construction site for the Town of Dewitt pursuant to the terms of the contract by and between the parties.

To a large extent, defendant, O'Brien & Gere relies upon Section 6 of the contract between O'Brien & Gere and the Town of Dewitt, which reads, in pertinent part, as follows:

> *...no matter how extensive or intensive (OB&G's) inspection, OB&G will not have any duty or obligation with reference to and will not be responsible for construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the Work, and will not be responsible for the Contractor's failure to carry out the Work in substantial compliance with the Contract Documents. (OB&G's) duties, services, and work shall in no way supercede or dilute the contractor's obligation to perform the Work in conformance with all contract documents. OB&G is empowered, when directed by the Town, by (the Town) to act on its behalf with respect*

> *to the proper execution of the Work and give instructions when necessary to require such corrective measures as may be necessary in (OB&G's) professional opinion to endeavor to protect (the Town's) interest.*

The defense claims that this section shows that OB&G assumed no duty to maintain the construction site in a safe manner or to otherwise supervise or control Mr. Mondore's work or that of Leitz Enterprises, including the tree clearing. Defendant OB&G further argues that OB&G's duty was so far removed from Mr. Mondore's work that liability cannot be imposed upon OB&G. Again, alleging its duties at the construction site consisted of simply insuring the work was completed in accord with the contract documents, OB&G again relies upon Section 6 of the contract, and in particular, Paragraph GP-6.01, which allegedly limits OB&G's representatives to observe the progress and quality of the work, and determine, in general, if the work is proceeding in substantial compliance with the contract documents. Section 6.01 goes on to read, in pertinent part, as follows:

> *(OB&G) will not be required to make exhaustive or continuous on-site inspections to check the quality or quantity of the Work. On the basis of the on-site observations, (OB&G) will keep (the Town) informed of the progress of the work and will endeavor to guard (the Town) against defects and deficiencies in the Work of Contractors. (OB&G) may disapprove Work as failing to conform to the contract documents. Whenever (OB&G) considers it necessary or advisable for the proper carrying out of the intent of the Contract Documents, (OB&G) shall have authority to require the Contractor to make such special examination or testing of the work (whether or not fabricated, installed or completed).*

Looking at the contract closer, and specifically 6.01 in dealing with "owner's representative" this Court notes that O'Brien & Gere agreed to be the owner's

representative during the construction period. Part of 6.01, which this Court finds convincing, is the part that reads as follows:

> *...on the basis of the on-site observations, the Engineer will keep the Owner informed of the progress of the Work and will endeavor to guard the Owner against defects and deficiencies in the Work of contractors. The engineer may disapprove Work as failing to conform to the contract documents. Whenever the engineer considers it necessary or advisable for the proper carrying out of the intent of the Contract Documents, the engineer shall have the authority to require the Contractor to make special examination or testing of the Work...the engineer is empowered, when directed by the owner to act on its behalf with respect to the proper execution of the Work, and to give instructions when necessary to require such corrective measures as may be necessary by the Engineer's professional opinion to endeavor to protect the owner's interest...the engineer is empowered to determine the amount, quality, acceptability, and fitness for all parts of the work, to interpret the Contract Documents, to waive provisions of the Specifications, to meet unforeseen conditions or circumstances revealed or arising during the course of the Work and to decide all other questions in connection with the Work, but this authority shall not give rise to any duty or responsibility of the engineer to the contractor, the sub-contractor, or any other agents or employees to do so.*

This Court further relies upon GP 6.02 of the contract documents, which, in pertinent part, reads as follows:

> *...the Owner, its Engineers, Inspectors, Agents, other employees, and any other parties who may enter into contracts with the Owner for doing work within the territory covered by this contract shall, for all purposes which may be required by their contracts, and representatives of the State and Federal regulatory agencies shall, for any purpose, have access to the Work and the premises used by the Contractor, and the Contractor shall provide safe and proper facilities thereof. The Contractor shall, whenever so requested, provide to the Engineer access to the proper invoices, bills of lading, etc.,*

and shall provide scales and assistance for measuring and testing any of the materials.

Clearly, under the terms of the contract, the Town of Dewitt had with O'Brien & Gere, and under the terms of the contract that the Town of Dewitt had with Leitz Enterprises, the powers of O'Brien & Gere, as representatives of the owner were broad and expansive. In fact, it is clear that O'Brien & Gere acted for the most part, as the general contractor on this job. O'Brien & Gere prepared the necessary documents, the contract documents, the plans, the specifications, the scope of work, and otherwise acted as the Town of Dewitt's agent for purposes of bidding. In fact, the contract documents themselves, and the bidding booklets were kept at O'Brien & Gere's offices, and disbursed only upon request to O'Brien & Gere. O'Brien & Gere then undertook to review the relative bids, made the choices from those bids, and went ahead, pursuant to the terms and conditions of the contract, to make sure that the contract work was done in a fashion acceptable to the owner, acting as representative of the owner the whole time. Clearly, it was the intent of the Town of Dewitt not to give up authority over the job site. Clearly, the Town of Dewitt, both itself and through its agent, O'Brien & Gere - representative on the job - chose to keep supervisory authority over any aspect of the job. Such power was extensive. Such power was unlimited in nature. Such power was both of a supervisory nature and otherwise so as to compel the contractor to comply with all the contract documents and to be sure the work got done in accord with the contract documents, including safety requirements as may be necessary under the contract terms and conditions.

The above proof notwithstanding, this Court, upon reviewing all of the contract documents, looked very carefully to the examinations before trial in this matter. Such examinations before trial included the deposition of Michael S. Kolceski of August 23, 2007, the deposition of Ralph Whedon of May 15, 2007, the deposition of Jason Bassett on May 16, 2007, as well as the depositions of all Leitz employees that were deposed during the discovery stage.

In reviewing the text of the Kolceski deposition, this Court finds it to be, at best, creative of multiple questions of fact with regard to the O'Brien & Gere authority. Indeed, Kolceski admitted that O'Brien & Gere had the authority to call Leitz's attention as to whether something they thought was unsafe, but did not have authority to direct Leitz to do anything. However, Kolceski also admitted that Section 5-5.01 of the contract states, at least in part, that the owner has the right to suspend work if the contractor fails to supply sufficient skilled workers or suitable materials or equipment or if the contractor fails to pay promptly for labor and materials or equipment. This testimony is consistent with all the documents and other testimony in depositions before this Court. The "admissible" evidence is clear. Indeed, O'Brien & Gere were the owner's representatives. Indeed, as appointed representatives, they had complete and full authority to halt the job whenever necessary and to assure the owner, the Town of Dewitt, that appropriate safety measures were being undertaken.

This Court finds, as a matter of law, that O'Brien & Gere and the Town of Dewitt did not give up supervisory authority or control over the project. As a matter of law, each of them had authority to control the work of Leitz Enterprises. Each of them must respond pursuant to §200 of the Labor Law. *See* Tilkins v. City of Niagara Falls, 52

AD2d 306 (4th Dept.); Lunde v. Nichols Yacht Sales, Inc., 143 AD2d 816; Roosa v. Cornell Real Property Servicing, Inc., 38 AD3d 1352 (4th Dept.); Ross v. Curtis Palmer Hydroelectric Co., 81 NY2d 494; Rizzuto v. LA Wenger Contracting Co., 91 NY2d 343; Waszak v. State of New York, 275 AD2d 916 (4th Dept.); Russin v. Picciano & Son, 54 NY2d 311; Finch Pruyn & Co., Inc. v. M. Wilson Control Services, Inc., 239 AD2d 814; Adams v. Glass Fab, Inc., 212 AD2d 972 (4th Dept.); Cowan v. ADF Construction Corp., 26 AD2d 802 (4th Dept.).

Plaintiffs in this matter have proven that the defendant OB&G, as representative for the Town of Dewitt, was at the job site daily, observed the equipment being used by Leitz's workers to clear the trees, had been there on previous days when the trees were being cut and cleared, and otherwise were well-familiar with the work and methods of the plaintiff's employer. The danger, which presumably was open, obvious, and clear, was such that they were removing trees close to overhead lines. They had the power to inspect, and to otherwise deal with issues of safety as they chose to. Clearly, the trees readily could have been involved with the high-tension power lines, should they have been misdirected in the way that they were felled.

Based on all of the above, there exists in this case sufficient evidence for a jury to determine whether or not the Town of Dewitt and its representative, O'Brien & Gere, were negligent in violating Labor Law §200. *See* Seaman v. Town of Babylon, 231 AD2d 704; Cowan v. ADF Construction Corp., 236 AD3d 802; Finch Pruyn & Co., Inc. v. M. Wilson Control Services, Inc., 239 AD2d 814. As a result, the defendant, O'Brien & Gere Engineers, Inc., and the defendant, Town of Dewitt's motions for summary judgment, as

they regard the Second and Third Cause of Action, based on general negligence and Labor Law §200, are DENIED.

V - PLAINTIFF'S CLAIM PURSUANT TO §202(h) OF THE LABOR LAW OF THE STATE OF NEW YORK - PLAINTIFF'S FOURTH CAUSE OF ACTION

The plaintiff's Fourth Cause of Action in this matter alleges a breach of Labor Law §202(h) by the defendants, Town of Dewitt, O'Brien & Gere Engineers, Inc., OCIDA, and Cor.

Section 202(h) of the New York State Labor Law is known as the "High-Voltage Proximity Act". This Act goes into great detail in trying to protect untrained persons working or moving materials or equipment in proximity to high-voltage power lines. The purpose of the Act was to establish standards and provide for the promulgation of rules governing work and the transportation of materials or equipment in the proximity of high-voltage power lines. Pursuant to the very terms of the statute, the statute allows for enforcement of all of the provisions of the statute and provides a civil penalty [see §202(h)(6)(7)(b)].

Plaintiffs claim that the defendants failed to comply with §202(h) and that they allowed the plaintiff to work in the area of high-tension power lines when they knew or reasonably should have known that those lines might become disrupted and cause injury to the plaintiff.

The defendants, and each of them, take the position that Labor Law §202(h) does not afford plaintiffs a private cause of action and, therefore, their Fourth Cause of Action must be dismissed as against the defendants, *citing* Gain v. Eastern Reenforcing Service,

Inc., 193 AD2d 255. The Court has reviewed all of the materials before this Court and, based upon the law as submitted, and the current law in the State of New York, the Court does not feel that there is a private right of action that can be pursued pursuant to Labor Law §202(h). Indeed, the plaintiffs' papers are silent with regard to this issue. At oral argument, very little was said about this issue by any party.

Reviewing the statute in a light most favorable to the plaintiffs, it is clear that there is no private right of action expressly authorized pursuant to the statute. Indeed, a plaintiff must satisfy three conditions before such a private right of action may be commenced under any such statute. The plaintiff first must demonstrate that he or she is a member of the class for whose benefit the statute was enacted. Negrin v. Northwest Mortgage, Inc., 263 AD2d 39. Here, there is no question but that the plaintiff, Mondore, is a person who should be deemed to be a member of the class for whose benefit the statute was enacted.

But secondly, in order for the plaintiff to bring a private right of action under the statute, the private right of action must promote the purpose of the legislation at issue. Third, in order for the plaintiff to recover, the private right of action must conform with the statutory scheme as taken from the legislative history and the statute itself. *See* Negrin v. Northwest Mortgage, Inc., 263 AD2d 39; Carrier v. Salvation Army, 88 NY2d 298; Sheehy v. Big Flats Community Day, Inc., 73 NY2d 629.

The question of whether or not an implied private right of action is consistent with the legislative scheme for Labor Law §202(h), has been, previously reviewed by the courts of the State of New York. In Gain v. Eastern Reinforcing Service, Inc., 193 AD2d

255, the Third Department reviewed in detail whether or not §202(h) allowed for an implied private right of action.

Noting that Labor Law §202(h)(7) allows only for a civil penalty recoverable in a civil action only by the Commissioner of Labor, and noting that the legislative history is stated in the statute is to provide more stringent and specific safety standards in this area, and to empower the Commission of Labor to enforce compliance with the provisions of Labor Law §202(h), the Third Department in Gain held that the "inescapable conclusion" was that the legislature's goal for §202(h) was

> *...not to establish a vehicle for the compensation of persons injured by high-voltage electricity, but rather to achieve the prevention of such injuries through the imposition of generally applicable safety standards and the creation of a mechanism by which the Commissioner of Labor would have broad, regulatory and remedial powers to intervene in an effort to insure compliance.*
>
> Gain v. Eastern Reenforcing Service, Inc., *Id.*

This Court holds that the plaintiffs here cannot sustain a private right of action against the defendants for damages pursuant to Labor Law §202(h). For this reason, plaintiffs' Fourth Cause of Action is dismissed against all defendants. The motions of the defendants, Cor, OCIDA, Town of Dewitt and O'Brien & Gere, and each of them, with regard to the motions to dismiss the plaintiff's Fourth Cause of Action dealing with Labor Law §202(h), are hereby GRANTED.

VI - PLAINTIFFS' FIFTH CAUSE OF ACTION - PURSUANT TO LABOR LAW §240(1)

Plaintiffs' Fifth Cause of Action against the defendants O'Brien & Gere Engineers, Inc., OCIDA, Cor and Town of Dewitt, is based upon a violation of §240(1) of the Labor

Law of the State of New York.

New York Labor Law §240(1) provides, in pertinent part, as follows:

> *...All contractors and owners and their agents...in the erection...of a structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers...and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.*

§240 of the Labor Law is designed to protect workers employed in the erection of a building or structure from the risk of falling from an elevated work-site or from being struck by falling objects from above. Zimmer v. Chemung County Performing Arts, 65 NY2d 513. It has been often stated that the statute is one for the protection of workmen from injury and is to be construed as liberally as may be for the accomplishment of the purpose for which is was thus framed. *See* Zimmer v. Chemung County Performing Arts, 65 NY2d 513 @ 521; Quigley v. Thatcher, 207 NY 66; Joblon v. Solow, 91 NY2d 457.

The purpose of the statute is to protect workers by placing the ultimate responsibility for work-site safety on the owner, general contractor, and their agents, including the employees/workers themselves. Gordon v. Eastern Railway Supply, Inc., 82 NY2d 555; Ross v. Curtis Palmer Hydroelectric Co., 81 NY2d 494. Thus, Labor Law §240(1) imposes absolute liability on owners, contractors and their agents for any breach of their statutory duty that has proximately caused an injury. Liability against the land owner, contractor and/or agent is absolute and does not require notice of defect or the existence of supervisory control. Lombardi v. Stout, 80 NY2d 290; Zimmer v. Chemung County Performing Arts, 65 NY2d 513.

Plaintiff in this matter contends that §240(1) of the Labor Law has been violated by the defendants, and each of them, in that the plaintiff was not given adequate safety devices that prevented his injuries at the time and date of the incident alleged in the complaint and that deficient safety devices or other pulleys, slings, ropes, wires or other appropriate methods of directing cut trees were not used or employed on the job site. Plaintiff urges that Labor Law §240(1) should be liberally construed so as to accomplish the purpose for which it was framed - to protect those workers exposed to dangerous conditions created by elevated differential at the work site. The contemplated hazards under Labor Law §240(1) are those related to the effects of gravity where protective devices are called for either because of a difference between the elevation level of the required work and the lower level or difference between the elevation level where the worker is positioned and the higher level of materials or load being hoisted or secured. *Citing* Rocovich v. Consolidated Edison, 78 NY2d 509; Lombardi v. Stout, 80 NY2d 290; Zimmer v. Chemung Performing Arts, 65 NY2d 513.

The duty imposed by an owner, contractor or agent by Labor Law §240(1) is non-delegable, regardless of whether or not such owner and/or contractor exercised supervision and/or control over the work. Ross v. Curtis Palmer Hydroelectric Co., *supra*; Rocovich v. Consolidated Edison, *supra*.

It has been held that tree trimming in and of itself, performed as a routine maintenance, is considered non-construction, non-renovation, and an activity to which the statute does not apply. However, tree trimming as part of site preparation is considered a protective activity under Labor Law §240(1). *See* Palmer v. Butts, 256 AD2d 1178 (4th Dept.); Mosher v. St. Joseph's Villa, 184 AD2d 1000 (4th Dept.). It is well

established that it is sufficient that the work that the employee is performing be work that is necessary and incidental or an integral part of the erection of a building or structure. *See* Mosher v. St. Joseph's Villa, *supra*.

Plaintiff in this matter urges that the tree clearing involved in this case was necessary and incidental, or was an integral part of preparing the site for water lines to be installed and thus a protected activity under Labor Law §240(1). The plaintiff further urges that the clearing of trees being performed by the plaintiff Mondore and his co-workers from Leitz Enterprises constituted site preparation for the installation of water lines along Route 298 in the Town of Dewitt, which was to benefit Collamer Crossings Business Park, which was already in the process of being developed, with buildings already under construction.

Defendants, Cor, OCIDA, Town of Dewitt and O'Brien & Gere, and each of them, urge that first a tree is not a structure upon which a §240(1) liability claim can rest. *Citing* Lysiak v. Murray Realty Company, et al, 227 AD2d 746; Burr v. Short, 285 AD2d 576; Callea v. Niagara Mohawk Power Corp., 254 AD2d 696; Lombardi v. Stout, 80 NY2d 290. Further, urging the Court that Labor Law §240(1) was designed to protect laborers from injuries related to construction work at elevated heights, including falling objects, defendants urge that the plaintiff Mondore is not a person who is deserving of protection under the statute, as he was not injured by a falling object that was otherwise "hoisted, secured, or because the absence of inadequacy of a safety device of the kind enumerated in the statute". *Citing* Narducci v. Manhassett Bay Association, 96 NY2d 259; Ross v. Curtis Palmer Hydroelectric Co., 81 NY2d 494; Rocovich v. Consolidated Edison Co., 78 NY2d 509; Young v. Barden and Robson Corp., 247 AD2d 755.

Defendants finally argue that all the plaintiff's injuries were as a result of his own activities, and as a result, he cannot recover as against the defendants in this matter. *Citing* Blake v. Neighborhood Housing Services of New York City, Inc., 1 NY3d 280.

Defendant, O'Brien & Gere urges upon the Court that the defendant never assumed the duty to inspect and/or provide adequate safety devices, and again pursuant to the terms and conditions of the contract, they have no liability accordingly.

The facts of this case are unique to a Labor Law §240(1) case. Indeed, Labor Law §240(1) does provide absolute liability to persons protected under the statute, by owners, agents, contractors and their employees. Here, OCIDA was the owner of the property in question. Cor had a leasehold interest in the property. The defendant, Town of Dewitt acted as contractor, and contracted with Leitz Enterprises. In their role as contractor, they entered into an agreement with O'Brien & Gere to put together the design documents, devise the design plans and specifications, take bids, and otherwise, for all practicable purposes as already determined by this Court, exercised control over the project. As a result, each and all are those that had an obligation pursuant to §240(1) of the Labor Law.

The next question is whether the work being performed is related to the development and construction of buildings upon the site. Here, it is clear from the proof introduced at the time of the motions, that the work being performed to put in the water lines, was clearly incidental to the construction of the buildings being built at the Collamer Business Park. The Sensis building was already under construction at the time, and in order to feed that building and others with water, the water lines were indeed necessary, incidental and a pertinent part of the overall construction activities. Indeed,

tree trimming - as part of site preparation, and as part of the construction - is considered a protected activity under Labor Law §240(1). Palmer v. Butts, 256 AD2d 1178 (4th Dept.); Mosher v. St. Joseph's Villa, 184 AD2d 1000; Covey v. Iroquois Gas Transmission System, LP, 218 AD2d 197; Fuller v. Niagara Mohawk Power Corp., 213 AD2d 986. Defendants argue that the plaintiff in this matter was simply standing there and watching at the time of the incident, and as a result is not protected person under §240(1). However, the proof adduced at the time of the motions makes it clear that the plaintiff's capacity was to remove the trees once they were felled, and as such, clearly was someone involved in the employment, as he was waiting for the trees to be felled so he could move them away with his loader as he so testified.

The protection afforded by Labor Law §240(1) is not limited to those workers who are directly engaged in the actual construction work itself, and the courts have routinely rejected a narrow construction of the statute. *See* Covey v. Iroquois Gas Transmission System, LP, 218 AD2d 197; Lombardi v. Stout, 80 NY2d 290.

Labor Law §240(1) protects workers, not only where the work is being performed at heights, but where the works involves risks related to differences in elevation. Groves v. Lands and Housing, 80 NY2d 978. Before the tree in question fell striking the power lines in this matter, a bucket of the excavator was lifted up against the tree while another worker was cutting the tree at its base with a chainsaw. Thus, the plaintiff urges that the tree was secured by the excavator bucket, with the goal of controlling it and pushing it down into a safe direction. This bucket was above ground level, and pressed up so as to "secure" or "brace" the tree so that it would fall in the desired manner. Plaintiff urges that such bracing is insufficient, and that there should have been ropes, pulleys, wires,

pull cords or other devices that would effectively direct the tree. Because of inadequate bracing and/or guarding, the tree fell upon the high-tension wires, which were again at an elevated height. This produced a "shower of sparks" over the area directly above where the plaintiff stood at the time - thereby creating a situation where the plaintiff feared he was going to be struck by the falling tree, falling power lines, falling sparks, electrocuted, or otherwise.

The defendants rely on Lysiak v. Murray Realty Company, 227 AD2d 746 and Young v. Barden and Robeson Corporation, 247 AD2d 755. Both of these cases miss the mark, and do not control the current factual situation presented in this matter. In Lysiak, a tree was being dragged, and as a result of being dragged, sprung up and struck the plaintiff. In this case, the tree was standing, and the deposition testimony from all who observed and were there is such that the tree was being secured by a bucket up against the tree, while another worker was cutting at the base of the tree with a chainsaw. The tree then struck the power lines above, creating a shower of sparks, and giving the clear impression to anyone that was there that the power lines may imminently fall and/or that the plaintiff may be in direct danger of being injured. Here, the removal of the tree in the instant case was an integral part of the site preparation for the proposed water lines along Route 298. This Court finds that the plaintiff Mondore is entitled to the protections afforded by Labor Law §240(1). The danger is one that dealt with the forces of gravity, and a falling tree upon high-tension wires above where the plaintiff was standing. This all occurred as a result of inadequate securing, hoisting, staying, slinging, hanging, or such other safety devices to be otherwise constructed,

placed and operated to give proper protection to the plaintiff. This Court finds that the plaintiff is entitled to the protections of Labor Law §240.

With regard to the defendants' unanimous position that the plaintiff's injuries were caused as a result of his own activities and as a result of his own negligence, this Court cannot endorse that defense. Unlike Blake v. Neighborhood Housing Services of New York City, Inc., 1 NY3d 280, it is clear that the plaintiff was in a position of danger that was not self-created. He clearly had to react one way or the other to get out of the way of the danger that he was in. He could either stand there and wait for the tree and/or the power lines and/or the sparks to hit him, or he could take evasive action. His actions, spurred by the dangers from overhead cannot be used as a battering ram to beat down the absolute liability under §240 of the Labor Law.

The legislative history behind Labor Law **§**240(1) makes it clear that the protection under the statute is to be applied liberally. There is no possible reading of the statute, or the case law defining the statute, that would be consistent with defendants' position here. Here, the plaintiff made a split-second decision to avoid the dangers, which are the dangers contemplated by the statute. These actions to avoid the dangers were foreseeable, and ultimately led to injury.

As a result, the defendants', Cor, OCIDA, Town of Dewitt and O'Brien & Gere, motions for summary judgment dismissing plaintiffs' Fifth Cause of Action based upon §240(1) of the Labor Law, and each of them are DENIED in their entirety.

Defendants OCIDA and Cor take the position that §240 does not allow recovery from injuries resulting from other types of hazards, even if proximately caused by the absence of some required safety device. This Court has reviewed the cases submitted by

the defendants, including Santos v. Terrace Place Realty, Inc., 433 F.Supp.2d 236; Dority v. Zurn Industries, 226 AD2d 983; Young v. Barden and Robson Corp., 247 AD2d 755; Scarver v. County of Erie, 2 AD3d 1384; Desjardins v. Auburn Steel Co., Inc., 185 AD2d 627. The defendants' argument is flawed.

This Court finds the defendants' argument, insofar as plaintiff's direct injury was not caused by the forces of gravity, is flawed. It cannot be said that a plaintiff should simply stand and wait for something to strike him on the head, or for a tree to hit him, or for electrical lines to fall upon him to get the protection under §240(1) of the Labor Law. That clearly was never the legislative intent of the statute, and the absolute liability which is derived from the statute is to be generously applied.

Certainly, the plaintiff's injuries in this case are not the usual injuries sustained in this type of incident. In fact, neither the tree nor the sparks nor the power lines themselves actually hit and caused injury to the plaintiff. Rather, in an attempt to avoid injury, the plaintiff ran as fast as he could, unfortunately into the oncoming traffic on Route 298. Plaintiff in this case was trying to avoid the very type of danger anticipated under the statute. Such action as taken by plaintiff is clearly foreseeable under the circumstances. The statute, must be applied liberally. The fact existed - a danger was imminently present from falling tree live high-voltage lines, wires and sparks. It is only natural plaintiff would try to get out of the way. Plaintiff's actions were foreseeable, and the statute should be applicable to him.

Defendants argue that because of the evasive action taken by the plaintiff that he should be barred from recovery on a proximate cause issue. Arguing that no liability can attach under §240(1) when there is no violation of the statute and the worker's actions

are the "sole proximate cause" of the accident, plaintiff relies upon Blake v. Neighborhood Housing Services of New York City, Inc., 1 NY3d 280 in support of the proposition that it was the plaintiff's own actions that caused his injuries. They argue that the plaintiff should have stayed in his vehicle, should not have been in the place he was at the time, and otherwise, should not be entitled to the benefits of §240(1) because his actions caused the injury that he received.

This argument misses the point. Plaintiff had a legal right to be where he was. He at no time disobeyed orders. He was in the course of his employment, carring out his duties. What set the whole process in action, was the failure to have appropriate hoisting, bracing, guarding, or other techniques involved to be sure that the tree was felled in the appropriate direction. This was caused by a violation of §240(1) and this Court has already held that the actions of the plaintiff and the employees Leitz Enterprises were incidental to and part of the overall construction of the business park and the buildings within the business park.

Collectively, the motions for summary judgment of OB&G, the Town of Dewitt, OCIDA and Cor are all DENIED. Plaintiffs' Fifth Cause of Action must stand.

VII - VIII - PLAINTIFFS' SIXTH AND SEVENTH CAUSES OF ACTION PLAINTIFFS CLAIM UNDER §241(6) OF THE LABOR LAW OF THE STATE OF NEW YORK AND INDUSTRIAL CODE RULE 23 CLAIMS

The plaintiffs, in the Sixth and Seventh Causes of Action bring claims as against the defendants, Town of Dewitt, O'Brien & Gere, OCIDA and Cor, alleging that they failed to provide reasonable and adequate protection to the plaintiff in violation of Labor Law §241(6).

New York Labor Law §241(6) provides, in pertinent part, as follows:

> *All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein...*

It has often been said that the purpose of Labor Law §241 is to impose a non-delegable duty upon the owners and general contractors and their agents to provide reasonable and adequate protection and safety to persons employed in the construction, excavation and demolition of work, regardless of the absence of control, supervision or direction of the work. *See* Allen v. Cloutier Construction Corp., 44 NY2d 290. The owner is liable for an injury due to the failure of a general contractor, sub-contractor, agent or other to use reasonable care even though the owner did not control or supervise the area or the work being performed, and did not and could not know of any danger to the plaintiff. Labor Law §241(6) has been designed to protect laborers against unsafe equipment and the lack of safety devices as well as unsafe procedures used during construction. *See* Mascellino v. Buffalo General Hospital, 123 AD2d 507 (4th Dept.). Indeed, it has been held that persons employed in or lawfully frequenting all areas in which construction, excavation or demolition work is being performed are entitled to the protection under Labor Law §241(6). *See* Rizzuto v. L.A. Wenger Contracting Co., 91 NY2d 343. An owner of a construction project cannot escape the liability imposed under Labor Law §241(6) by simply delegating its responsibilities. The duty is one that is non-delegable, and cannot be assigned or otherwise assumed by anyone else. Crawford v. Williams, 198 AD2d 48; Giacomazzo v. Exxon Corp., 185 AD2d 145.

However, the Court of Appeals in Ross v. Curtis Palmer Hydroelectric Co., 81 NY2d 494, made it clear that §241(6) unlike §240(1), is not self-executing. Liability under this section is predicated only upon a showing that the owner, general contractor or agent violated a particular regulatory requirement of the Industrial Code of the State of New York. The New York State Industrial Code, Rule 23, provides specific commands and standards to owners, contractors and/or agents. Indeed, the plaintiff must show a specific violation of one or more of the provisions of Rule 23 in order to recover in a §241(6) case. *See* Ross v. Curtis Palmer Hydroelectric Co., 81 NY2d 494 @ 503-505. Supervision, control of the work site, or actual or constructive notice of a violation of Rule 23 of the Industrial Code is not necessary to impose vicarious liability against owners, general contractors or their agents. *See* Rizzuto v. L.A. Wenger Contracting Co., 91 NY2d 343.

In this case, plaintiffs argue that defendants violated multiple regulations of Rule 23 of the Industrial Code relating to the protection and construction, demolition and excavation, and specifically argue that the following sections were violated: 12 NYCRR 23-1.2(a)-(e); 12 NYCRR 23-1.5(a)-(c); 12 NYCRR 23-1.7(a); 12 NYCRR 23-1.8(c); 12 NYCRR 23-1.13(b)(1)-(6),(c) and (d); 12 NYCRR 23-1.29(a)-(b), and Industrial Code Rules 57.3(a); 57.5(l); 57.6(a)-(c); 57.7(a)(1)-(4) and 57.8(a)-(d). The Court will review the claims of the parties with regard to each of the above claims of violations.

(a) & (b) 12 NYCRR 23-1.2 and 12 NYCRR 23-1.5

The plaintiff relies on various sections of these two Rule 23 mandates. Rule 23-1.2 is entitled “Finding of Fact”. Rule 23-1.5 deals with “General Responsibility of Employers”. Each of these are general requirements for employers who deal in the areas

of construction, demolition, etc., and these two Industrial Code Rule 23 rules have been found to be too general to support a claim under §241(6) of the Labor Law of the State of New York. *See* McGrath v. Lake Tree Village, 216 AD2d 877 (4th Dept.) and Basile v. Keiser Engineers Corp., 277 AD2d 959 (4th Dept.). As a result, the defendants' motion to dismiss the §241(6) cause of action based on 12 NYCRR 23-1.2 and 12 NYCRR 23-1.5 is GRANTED, and the plaintiffs' claims with regard to those sections and such sub-sections of those that the plaintiffs have claimed, are dismissed.

(c) 12 NYCRR 23-1.7(a)

Industrial Code Rule 23-1.7(a) is entitled "Protection from General Hazards". Rule 23-1.7 reads, in pertinent part, as follows:

> Section 23-1.7 - Protection from General Hazards.
>
> (a) Overhead hazards.
>
> (1) every place where persons are required to work or to pass that is normally exposed to falling material or objects shall be provided with suitable overhead protection...

The plaintiffs' contend that the defendants violated 12 NYCRR 23-1.7, and specifically 23-1.7(a) by failing to provide suitable overhead protection for the safety of the workers. This regulation applies to areas where workers would normally be exposed to falling objects. At the time of plaintiff Mondore's accident, the overhead work of cutting the trees was the primary focus of the daily activities being performed by Leitz Enterprises at the work site. On the particular date in question, the tree cutting was at or near a place where overhead high-tension wires were located, which plaintiff suggests even heightens the need for overhead protection equipment provided under 1.7(a) of Rule 23.

The defendants argue that this section is not applicable to tree clearing. *Citing* Knudson v. Pentizien, 209 AD2d 909 and Lysiak v. Murray Realty Co., 227 AD2d 746, defendants argue that this section does not apply to tree clearing.

12 NYCRR 23-1.7(a) is sufficiently specific to support a Labor Law §241(6) claim. *See* Terry v. Mutual Life Insurance Company of New York, 265 AD2d 929; Ross v. Curtis Palmer Hydroelectric Co., 81 NY2d 494. In this case, plaintiff relies upon Roosa v. Cornell Real Property Servicing, Inc., 38 AD3d 1352 (4th Dept.). This Court finds that there are enough facts before the Court in this record, that when reviewed in a light most favorable to the plaintiff, to create a question of fact as to the violation of 12 NYCRR 23-1.7(a), and whether or not such protection as may be claimed by the plaintiff is needed under the statute would have prevented plaintiff's injuries. As a result, the defendants' motions to dismiss plaintiff's claim with regard to 12 NYCRR 23-1.7(a) are DENIED in their entirety.

(d) 12 NYCRR 23-1.8(c)

Industrial Code Rule 23-1.8(c) deals with "Protective Apparel". This rule requires head protection for falling objects, foot protection in wet and muddy areas, and protection from corrosive substances. Clearly, those parts of 1.8(c) dealing with foot protection and corrosive substance protection are irrelevant to any of the issues in this case. Defendants again rely upon Lysiak v. Murray Realty Co., 227 AD2d 746 in taking the position that 1.8(c) should not be applied in a tree removal case. Defendant O'Brien & Gere urges that that defendant had no duty to provide these types of protective devices, and even if any of the defendants did have such a duty, none would have prevented the injuries that he subsequently received, as the injuries were caused by the

collision with the Stinson vehicle. The defendant notes that the plaintiff was not struck by a tree or any parts of a tree, and the protective headgear of the type and kind provided under 1.8(c)(1) would not have any impact on plaintiff's injuries. This Court finds that, like Industrial Code Rule 23-1.7(a) that the plaintiffs have made a question of fact with regard to Industrial Code Rule 23-1.8(c) as it relates to 1.8(c)(1) and the issue of protective headgear. Following the Roosa v. Cornell Real Property Servicing, Inc. rationale (38 AD3d 1352), this Court, indeed, does find that a question of fact exists as to whether or not protective headgear and/or other protective equipment were required under the circumstances, and whether or not they would have prevented some or all of the injuries that the plaintiff ultimately received in this case. As a result, the defendants' motion for summary judgment as it relates to Industrial Code Rule 23-1.8(c), being a predicate for the §241(6) theory of the plaintiff, is DENIED.

(e) 12 NYCRR 23-1.13(b)(1)-(6)

Plaintiff next relies on Industrial Code Rule 23-1.13, and specifically sections 23-1.13(b)(1)-(4), and (6), and (d)(1), (3) and (4).

The relevant parts of Industrial Code Rule 23-1.13 that plaintiff contends to be relevant here are, in pertinent part, set forth as follows:

> Section 23-1.13 - Electrical Hazards
>
> (b) General.
>
> (1) Precautions.
> All power lines and power facilities around or near construction, demolition and excavation sites shall be considered as energize until assurance has been given that they are otherwise by qualified representatives of the owners of such power lines or power facilities.

> (2) Determination of voltages.
> Before work is begun at any construction, demolition or excavation site, the employer shall determine the voltage levels of all energized power lines and power facilities around or near such site. Where two or more voltages are available at a job site, all electrical equipment and circuits shall be appropriately identified. Such identification shall include voltage level and phase.
>
> (3) Investigation and warning.
> Before work is begun, the employer shall ascertain by inquiry or direct observation, or by instruments, whether any part of an electric power circuit, exposed or concealed, is so located that the performance of the work may bring any person, tool or machine into physical or electrical contact therewith. The employer shall post and maintain proper warning signs where such a circuit exits. He shall advise his employees of the locations of such lines, the hazards involved and the protective measures to be taken.
>
> (4) Protection of employees.
> No employer shall suffer or permit an employee to work in such proximity to any part of an electric power circuit that he may contact such circuit in the course of his work unless the employee is protected against electric shock by de-energizing the circuit and grounding it or by guarding such circuit by effective insulation or other means...
>
> (6) Notifying utility company.
> At least five normal working days before work is begun withing ten feet of any live overhead power line...the employer shall notify in writing the utility whose power line may be affected.

The courts have held that the provisions of Industrial Code Rule 23-1.13 are sufficiently specific to be a predicate for liability under §241(6) of the Labor Law. *See* Rice v. City of Cortland, 262 AD2d 770.

In this case, the defense argues that the sole purpose of 23 NYCRR 23-1.13 is to prevent electrical shock to a worker by the inadvertent closing of an open switch or circuit interrupting device. *Citing* Zak v. United Parcel Service, 262 AD2d 252. The

defense takes the position that the plaintiff's injuries in Zak were not caused by electrical shock, and thus the court in that case found that Labor Law §241(6) cause of action could not be supported by Industrial Code Rule 23-1.13. *Also citing* Badzmierowski v. Pbak, LLC, 5 Misc.3d 1005. As a result, defendants take the position that inasmuch as the plaintiff did not sustain any injuries which were caused by electrical shock, he cannot recover pursuant to §241(6) of the Labor Law.

Defendants further take the position that Industrial Code Rule 23-1.3(b)(1)-(6), (c) and (d) are inapplicable to the case at bar because the section is subject only to the jurisdiction of a public service commission. Moreover, defendants take the position that the workers were working more than ten feet away from the power lines, and that there was no need to be concerned about their safety in that regard. As a result, *citing* Greenough v. Niagara Mohawk Power Corp., 13 AD3d 1160, defendants argue that this section cannot be a predicate for Labor Law §241(6) liability.

Defendants further argue that no one, including the plaintiff, was working on electrical lines and/or circuits or in an dangerous proximity thereto.

In evaluating all of the facts and circumstances in a light most favorable to the plaintiff with regard to this motion, it is clear that, given the testimony of the Leitz employees present at the job, that there were no general precautions taken, no determination of voltages, no investigation of warnings of any type or kind that preceded or were concurrent with the work in question.

Plaintiff and his co-workers quite apparently were permitted to work in close proximity to, if not directly under, the power lines. There obviously was a risk of contact with the power lines, given the trees that were being cut and cleared, especially the one

in question that was being cut prior to plaintiff's injury. The top branches were only a few feet from the power lines, according to the testimony of Leitz employee Eric Gravelding, and there were no attempts by any of the defendants or Leitz Enterprises to protect the plaintiff and/or his co-workers against electrical shock by de-energizing the circuit or grounding it or by guarding the circuit by effective insulation or other means as might be required by Industrial Code Rule 23-1.13.

The plaintiffs also contend, based on all of the same reasons set forth above, that there is a violation of 12 NYCRR 23-1.13(d)(1), (3) and (4), which state, in pertinent part, as follows:

> (d) High-voltage power circuits (over 300 volts to ground) at construction, demolition and excavation sites.
>
> (1) At any construction, demolition or excavation site, where any person or equipment is required to approach nearer than ten feet to any overhead energized, high-voltage power line or power facility, such approach shall not be made unless or until the following procedure has been complied with:
>
> > (i) The owner of such power line or power facility shall be notified in writing by the employer that such an approach is to be made.
> >
> > (ii) In not more than one normal working day following the receipt of such written notice, the owner of the high-voltage power line or power facility shall advise and make recommendations for the procedure to be followed in performing any work nearer than ten feet to such power line or power facility...
> >
> > (iii) The employer shall follow the procedure recommended by the owner of the high-voltage power line or power facility in performing any work within ten feet of such power line or power facility...
>
> (3) Any equipment used on construction, demolition or excavation site, which could approach nearer than ten feet of

> an energized electric power line or power facility, located overhead or underground, shall be effectively grounded as follows:
>
> > (i) Any equipment shall be provided with a permanent clamp or other means for convenient and effective attachment to a grounding conductor.
> >
> > (ii) The cable connecting the clamp to the ground shall be equivalent to a number one AWG or larger single conductor, extra flexible, rope-stranded cooper, with 600 volt covering for abrasive protection, and with terminal parts that insure a proper connection with hand-type screw clamps.
> >
> > (iii) An effective ground for such equipment shall be one having a measured resistence of 25 ohms or less, or a connection to a continuous underground metallic water piping system.
>
> (4) Any machinery or equipment used on a construction, demolition or excavation site which has a boom or similar moving extension shall be provided with a durable warning sign posted and maintained in such a location as to be clearly visible to the operator of such machinery or equipment from his operating position. Every such warning sign shall bear the following legend in black letters on a yellow background: WARNING (letters to be at least one-half inch in height). IT IS UNLAWFUL TO OPERATE THIS EQUIPMENT CLOSER THAN TEN FEET OF ANY ENERGIZED, HIGH-VOLTAGE ELECTRIC POWER CIRCUIT (letters to be at least one-quarter inch in height).

Indeed, these sections provide sufficient specificity to support a cause of action under Labor Law §241(6). *See* Rice v. City of Cortland, 262 AD2d 770; Hernandez v. Ten Ten Company, 31 AD3d 333. Here, the question of direct causation becomes an issue for the jury to review. The fact that the plaintiff was not electrocuted bears not so much to the direct finding an applicability of §1.1.3 of Rule 23 of the Industrial Code, but deals specifically with the facts at bar, whether the plaintiff can recover should their be a

violation. Here, there was an obvious and foreseeable risk of performing tree clearing operations in close proximity to overhead power lines. As a result, this Court finds that the Town of Dewitt, O'Brien and Gere, OCIDA and Cor had a non-delegable duty to comply with 12 NYCRR 23-1.3. It will be a question of fact as to whether or not such a violation caused plaintiff's injuries, given all the facts and circumstances that a jury might take into consideration in their evaluation. Snowdon v. New York City Transit Authority, 248 AD2d 235; Bardouille v. Structure Tone, Inc., 282 AD2d 635; Adams v. Owens-Corning Fiberglass Corporation, 260 AD2d 877; Lorefice v. Reckson Operating Partnership, LP, 269 AD2d 572; Nankervis v. Casko Development Corporation, 2002 Slip.Op. 50228U; 2002 NY Misc. LEXIS 748. For all the above reasons, the defendants' motions, and each of them, to the effect that they move to dismiss the plaintiffs' §241(6) case, based on a failure Industrial Code Rule - 1.13 are DENIED.

(f) 12 NYCRR 23-1.29(a)(b)

Plaintiff also alleges a violation of Industrial Code Rule 23-1.29, which reads, in pertinent part, as follows:

> (a) Whenever any construction, demolition or excavation work is being performed over, on or in close proximity to a street, road, highway or any other location where public vehicular traffic may be hazardous to the persons performing such work, such work areas shall be so fenced and barricaded as to direct such public vehicular traffic away from such area, or such traffic shall be controlled by designated persons.
>
> (b) Every designated person authorized to control public vehicular traffic shall be provided with a flag or paddle measuring not less than 18 inches in length and width. Such flag or paddle shall be colored fluorescent red or orange and shall be mounted on a suitable hand staff. Such designated person shall be stationed at a proper and reasonable distance from the work area and shall face approaching traffic. Such

> person shall be instructed to stop traffic, whenever necessary, by extending the traffic flag or paddle horizontally and facing the traffic. When traffic is to resume, such designated person shall lower the flag or paddle and signal with his free hand.

The plaintiff in this case argues that the work being done by Leitz Enterprises was "in close proximity" to a street or highway, and thus was within the purview of the statute and Industrial Code Rule 23-1.29. *Citing* McGuiness v. Hertz Corporation, 15 AD3d 160.

Defendants argue that none of the employees were working within ten feet of the roadway, and rely upon the deposition testimony of Messrs. Brooker and Donnelly, where both testified that the tree they were cutting down was over 50 feet from the road. Defendants also argue that there was no reason to place any barricades or have a flag man because the work being done was not in the right-of-way, and thus not "in close proximity to the roadway".

The defendants' contention that the work was not being done "in close proximity" to the roadway belies the facts in this matter. There is ample testimony before this Court to justify that a jury conclusion that might be reached that in fact the work was very close to the roadway, inasmuch as the tree itself, the power lines, and especially the sparks from the power lines were close and/or even into the roadway and the proof developed from the deposition testimony of the defendant Stinson and witness Trush.

In this case, the work that the plaintiff was involved in at the time of his injury constituted an integral part of the construction project and occurred at the work site. This Court finds that there are material issues of fact as to whether the actions of the defendants rendered the work site unsafe and proximately caused the plaintiff

Mondore's injury. There are various descriptions of how close the work was being done to the roadway, and whether or not it was foreseeable to be that close to the roadway at the time that the tree fell. Testimony from Eric Gravelding indicates that the work was, in fact, being done within the State right-of-way, while others may have differed. Defendant Stinson testified that the work was being done 12 - 15 feet from the roadway. It is a jury question of fact whether or not that is "in close proximity" to the roadway.

What is clear is that there were no fences, barricades, flag men, or other safety measures taken to direct or slow vehicular traffic who might be in the area of the work being done at the time. Clearly, a jury may reach a determination that the absence of barricades and/or flag men rendered the work place unsafe, and as a result was a proximate cause of the plaintiff's accident and injuries. Indeed, it is not necessary to be the sole proximate cause, but there can be other proximate causes which cause or contribute to an injury. As a result, this Court finds that the defendants' motion to dismiss the plaintiff's §241(6) claim based upon Industrial Code Rule 23-1.29(a)(b), is DENIED. There exists triable issues of fact which require jury determination. McGuiness v. Hertz Corporation, 15 AD3d 160; Lamuraglia v. New York City Transit Authority, 299 AD2d 321; Derdiarian v. Felix Contracting Corp., 51 NY2d 308.

Defendants' summary judgment seeking dismissal of plaintiff's Labor Law §241(6) claim - to the extent that it is predicated on Industrial Code Rule 23-1.29 is DENIED.

(g) 12 NYCRR 23-1.30

Plaintiff contends that defendants violated Industrial Code Rule 23-1.30, and that that violation was a proximate cause of the plaintiff's injuries.

Industrial Code Rule 23-1.30 requires workers to be provided with sufficient illumination to create a safe work place. The record in this action is clear that the subject incident occurred during a summer afternoon, approximately 2:00 p.m. The proof further is adduced that the weather was clear and dry, and that it was a sunny day. There was no need for additional illumination in order to provide plaintiff with a safe place of work under the circumstances presented in this case. *See* Cahill v. Tri-Borough Bridge and Tunnel Authority, 31 AD3d 347; Lawyer v. Hoffman, 275 AD2d 541. As a result, the defendants' motion for summary judgment dismissing the plaintiff's Sixth and Seventh Causes of Action dealing with Labor Law §241(6) to the extent that it is predicated upon a violation of Industrial Code Rule 23-1.30 is GRANTED, and plaintiff's action, as against all defendants, is dismissed to the extent that it is support by a violation of Industrial Code Rule 23-1.30.

(h) 12 NYCRR 23-1.33(c)

Plaintiffs also rely upon an alleged violation of Industrial Code Rule 23-1.33(c). The defense urges that this regulation applies to protect persons passing by a construction site, not construction workers such as the plaintiff in this matter. *Citing* Lawyer v. Hoffman, 275 AD2d 541, the defendants take the position that this section states that barricades and other necessary guards are required "to protect vehicular traffic passing at or near a construction, demolition, or excavation site".

This Court finds that the defendants miss the mark with regard to their claim that Industrial Code Rule 23-1.33(c) has no bearing in this case. Quite the contrary. Here, the defendant Stinson raises as a defense the fact that if he knew or had reason to know that the stated activities were being performed in the area of the roadway, and they may

intrude upon the roadway, and that if barriers and/or other warning devices were in place, he may have slowed his vehicle, and perhaps may not have been involved in the incident at all. This Court finds that in this case, the application of Industrial Code Rule 23-1.33(c) does, in fact, have significant relevance to the issues in this case, and as a result, that the section can, and should, stand as a predicate for the plaintiff's §241(6) claim as a jury may see fit at the time of trial. As a result, the defendants' motions for summary judgment to dismiss the plaintiff's §241(6) Labor Law claim based on a violation of Industrial Code Rule 23-1.33 is DENIED.

(I) Industrial Code Rules 57.3, 57.5, 57.6, 57.7, and 57.8

Plaintiffs further argue that violations of various sections of Industrial Code Rule 57 form a predicate for liability pursuant to §241(6). These sections laid out in support of the plaintiffs' claim, contain certain safety measures which are required when workers are in the proximity of high-voltage power lines, so that said workers are not electrocuted during the course of that work. Defendants argue that there is no precedent for plaintiffs' reliance on any section of Rule 57 in support of their cause of action under Labor Law §241(6). The plaintiffs, in their papers and argument submitted to this Court, take no position with regard to the alleged violations of Industrial Code Rule 57 in this matter, and make no complaint, at least at oral argument and/or through any of the papers or documents submitted, that these violations were, in fact, violated and should form a predicate for liability under Labor Law §241(6). Clearly, this Court has already determined, based upon Rice v. City of Cortland, 262 AD2d 770, that Industrial Code Rule 23-1.13 forms a predicate basis for liability under Labor Law §241(6). Inasmuch as the plaintiff has apparently abandoned their claims dealing with

Industrial Code Rule 57 and the various claims made in accordance with that provision, this Court GRANTS the defendants' motions for summary judgment in that regard. To the extent that the plaintiffs claims under Labor Law §241(6) are predicated upon any violation of Industrial Code Rule 57, plaintiffs' claims are dismissed.

Based on all of the foregoing, it is clear that plaintiffs' Sixth Cause of Action, as against each of the defendants, must stand, at least to the extent set forth above, where there is a predicate Industrial Code Rule 23 violation. As a result, the defendants' motions for summary judgment, and each of them, are GRANTED in part and DENIED in part, as set forth above, but plaintiffs' Sixth Cause of Action will stand.

With regard to plaintiffs' Seventh Cause of Action, this Court is not aware of any independent cause of action that can be based upon violations of Industrial Code Rule 23 or otherwise, and as a result, the Seventh Cause of Action must be dismissed. All such matters dealing with the violations of the Industrial Code will be heard with regard to the plaintiffs' Sixth Cause of Action, and with regard to the Second and/or Third Causes of Action, dealing with negligence and violation of §200 of the Labor Law and/or plaintiffs' Fifth Cause of Action dealing with the alleged Labor Law §240(1) violations. Such ultimate decision on admissibility will be made at the time of trial.

IX - PLAINTIFFS' EIGHTH CAUSE OF ACTION
ACTION FOR LOSS OF CONSORTIUM AND SERVICES
ON BEHALF OF CHRISTINE MONDORE

To the extent that the Court has made decisions above affecting various causes of action, the Court has already determined which of the above underlying causes of action will serve as the predicate for plaintiff, Christine Mondore's dirrivitive claim. As a

result, the loss of consortium of Christine Mondore's claim, will stand with regard to the First, Second, Third, Fifth and Sixth Causes of Action, limited only to the extent of the Court's decision above. To that extent, the motion for summary judgment of the defendants, in their entirety, are GRANTED in part and DENIED in part, as set forth above in this decision. Plaintiff's Eighth Cause of Action then will continue accordingly with regard to the remaining causes of action that will be tried by a jury in this case.

X - OCIDA AND COR MOTIONS FOR INDEMNIFICATION

OCIDA and Cor move for common law indemnification against the other defendants in this matter. To the extent that such motion is made pursuant to the Labor Law §200 claims, this Court has already dismissed OCIDA and Cor from those claims on the basis that they had no supervisory control, and as a result, there can be no verdict against them. As a result, any claim for indemnification or contribution, or otherwise is moot, and such motion is DENIED as moot accordingly.

With regard to the claims of indemnification pursuant to Labor Law §240 and §241(6) as against O'Brien & Gere and the Town of Dewitt, this Court, at this time, DENIES said motions subject to reconsideration at the end of the proof at the time of trial. As a result, the defendants Cor and OCIDA's motions for judgment via indemnification are DENIED, with the motion subject to the extent that it deals with the Town of Dewitt, O'Brien & Gere, and Stinson, without prejudice to be renewed after all the proof at trial. *See* State v. Syracuse Rigging Co., 249 AD2d 758; Barraco v. First Lennox Terrace Assoc., 25 AD3d 427; Scally v. Regional Industrial Partnership, 9 AD3d 865; Raquet v. Braun, 90 NY2d 177; Frank v. Meadowlakes Development Corp., 20 AD3d 874.

XI - ANCILLARY MOTIONS/REQUESTS FROM MOTIONS PAPERS FOR THE TOWN OF DEWITT

While the Court has previously dealt with all of the substantive issues of the case, there appears, at least from the papers, to be several ancillary issues which came before the Court during the motion process with regard to this matter. Nothing was said at oral argument concerning any of the issues that the Court now takes up, which apparently were ancillary to the motions made before the Court by the Town of Dewitt.

The Town of Dewitt, at the time of motion practice, delivered to the Court two Notices of Motion. The first Notice of Motion included a request of relief pursuant to §3211 dismissing plaintiffs' complaint, together with such other and further relief as to the Court may seem just and proper. However, the affidavit of Lisa Robinson, the attorney for defendant, submitted an affidavit attached to that Notice of Motion "in support of the Town of Dewitt's Motion for Protective Order Pursuant to §3103 of the CPLR". The affidavit goes on to ask the Court to compel the plaintiff Mondore to attend an independent neuropsychological evaluation with neuropsychologist Anthony Blumetti, and take the standardized tests alone, and without anyone from the plaintiff being present at that examination. The defendant, Town of Dewitt cites both Ward v. County of Oneida, and Benson v. County of Albany, for the proposition that such action is necessary to assure proper test results to be gleaned from the standardized testing. (Supreme Court decisions, citations omitted).

The Court's notes in the file for this matter indicate that a similar motion was made before this Court together with a Motion to Strike the Plaintiff's Note of Issue, and that the motion was heard on December 5, 2007. Attorney for the plaintiff was to

prepare the appropriate Order, but none was prepared regarding that motion, and the decision of the Court at the time. No written decision was given by the Court, but it is clear that the motion to strike the Note of Issue was denied, and it was believed at the time that the attorneys would work out the issues dealing with the neuropsychologist's testing. It is noteworthy that the neuropsychologist had agreed to give the raw test data to plaintiffs' designated neuropsychologist for his review following the neuropsychological testing. Attorney Stephanie Palmer was present for the initial interview with the plaintiff, but refused to allow the neuropsychologist - Anthony Blumetti - to do testing without her being present, in accord with his long-standing protocol, and in accord with general clinical neuropsychology practice.

Inasmuch as nothing was addressed at oral argument, and it is the Court's belief that this matter has been fully argued and decided previously, no decision will be made at this time. If, for any reason, this issue remains pending, the parties are directed to contact the Court immediately so that this matter can be taken up in Chambers, and appropriate decisions made concerning the neuropsychological testing, reporting, and data gathering in this matter. As a result, the defendant's motion, at least as it appears to this Court, is DENIED for several reasons.

The first is that it is accompanied by a Notice of Motion that does not state the true purpose and nature of the relief demanded. Pursuant to CPLR §2214 and 22 NYCRR §202.7, a Notice of Motion, in practice in New York State pursuant to the CPLR, must contain the following: (1) the time and the place of the hearing on the motion; (2) the supporting papers on which the motion is based; (3) the relief demanded (i.e., dismissal of the action, or dismissal of numbered causes of action, or dismissal of

numbered affirmative defenses, or such other relief as to the party seeks to have the court provide), and (4) the grounds for the relief demanded. A Notice of Motion must read substantially as provided in 22 NYCRR §202.7.

Clearly, with regard to the instant motion made before this Court concerning Dr. Blumetti, the Court can only reason that there either was an error on behalf of attorney Robinson when the papers were put together and/or attorney Robinson misstated the relief. In any event, because of the defective nature of the Notice of Motion and the relief requested, this Court declines to consider the motion upon that ground.

Additionally, the Court's notes reflect that this is a matter that has already been decided along with the Motion to Strike the Plaintiff's Note of Issue in this matter, and as a result of that, this Court does not feel that further intervention is necessary at this time.

As a result, the defendant Town of Dewitt's motion - to the extent there is one - or the ancillary request as such it may be - is DENIED in its entirety, with leave to renew if, in fact, there are any issues remaining with regard to the neuropsychology review and/or exchange of raw data.

The second issue before this Court is another motion made by the defendant Town of Dewitt, in that Notice of Motion the Town seeks an Order pursuant to CPLR §3211 for an Order dismissing plaintiffs' complaint as against the Town of Dewitt, together with such other and further relief as to the Court may seem just and proper.

With regard to that motion, Lisa Robinson against submitted an affidavit in support of the motion, dated March 11, 2008. In that affidavit she takes particular offence with the service of the plaintiffs' second supplemental bills of particulars, and

seeks to have the bills of particulars stricken under CPLR §3043(b). Attorney for the Town of Dewitt takes the position that the second supplemental bills of particulars are untimely, and that an order to preclude is warranted under the circumstances.

The defendant's motion (and/or request) deals with the second supplemental bill of particulars of the plaintiffs that was dated March 3, 2008 and served upon the defendant Town of Dewitt on March 4, 2008.

A review of the bills of particulars shows that the plaintiffs, for the first time, allege in support of their negligence, and §240(1) claims, seek to include negligent violation of ANSI standard, Z113.1-2006.

The defendant claims to have made a demand for bill of particulars seeking any violations of rules, statutes, or regulations, and the position taken by the defense that the violation of the ANSI standards were never described in any prior bills of particulars filed prior to the Note of Issue and Certificate of Readiness in this matter. The Note of Issue in this matter was filed on November 1, 2007. At that time, the plaintiff did, in fact, indicate that all discovery had been complete, and that the case was ready to be placed on the trial calendar.

Pursuant to CPLR §3101(a) the Court may, in its discretion, grant a protective order to prevent prejudice to the defendant. Also, pursuant to §3043(b), a party may only submit a supplemental bill of particulars with regard to claims of continuing special damages, and may not allege a new cause of action or a new claim.

With regard to the issue of prejudice, and despite the fact that the defendant Town of Dewitt alleges prejudice, the Town of does not, in any way, outline to the Court what the nature of the prejudice is, or how it is affected by prejudice. A review of the

plaintiffs' prior bills of particulars, including the plaintiffs' original bill of particulars to the defendant, Town of Dewitt, makes it clear, in fact, that there is no prejudice by virtue of the service of the Second Supplemental Bill of Particulars and the submission of the expert affidavit of Arborist Jeffrey Phelps. A review of the affidavit of Mr. Phelps, together with the supporting papers, shows that he clearly relies upon the facts and circumstances of the case, and forms multiple opinions with regard to the case, including the following: (1) that no one on the job was trained in proper methods of tree removal; (2) that there was improper personal protective equipment worn; (3) that there was no job briefing prior to working on the tree removal; (4) that there were inaccurate calculations of the tree's distance to the power lines; (5) that Leitz Enterprises was not a qualified tree removal company; (6) that there was improper notching; (7) that there was improper pushing as opposed to pull lines, wedges, block and tackle, rope and/or wire cable; (8) that all limbs were not removed as they should have been to assure that the tree does not fall on the high-tension wires; (9) that the employer failed to certify employees to be trained in tree removal; (10) that an inspection of the trees to be removed should have been made by a certified arborist; and (11) that the employees failed to maintain a minimum approach distance from the energized electrical wires.

In short, Mr. Phelps alleges improper equipment, improper trained personnel, and improper knowledge of tree removal.

He equates these to violation of the ANSI standards, which no doubt will form the basis of negligence and breach of §200 in the First and Second Causes of Action, and breach of §240(1) of the Labor Law with regard to the plaintiffs' Fifth Cause of Action.

Reviewing the initial bill of particulars that the plaintiffs served in this matter, the plaintiffs have claims for almost each and every one Mr. Phelps alleged violations of the ANSI standards. The bills of particulars, in pertinent part, reads as follows:

> *....were negligent, wanton, reckless and careless in failing to provide good, safe and proper equipment for use by workers; failed to inspect the work site; failed to provide a safe working place for persons performing work, labor and services at their work site under their control; failed to prevent accident and injuries to the plaintiff; failed to properly superintend and supervise the work, labor and services then and there performed; failed to provide the proper or, in fact, any equipment required for the performance of the work; failed to keep the work site safe and free from hazards; in creating a hazard at the work site; in failing to correct or eliminate the hazard from the work site; in failing to warn the plaintiff of the hazard which existed at the work site; in failing to erect barriers around the hazard at the work site; in failing to have proper policies and procedures in place for the removal of trees at the work site; in failing to have proper policies and procedures in place for the safeguarding of workers at the work site; in failing to take any precaution to insure the safety of the plaintiff; in failing to initiate, maintain and supervise all necessary safety precautions and programs in connection with the performance of the work contracted for; in failing to provide adequate protection to the workers at the job site, and in particular the plaintiff herein, during the cutting down of trees at the work site; in failing to take precautions for the safety of workers at the work site; in violating the provisions of the following sections of the Labor Law to wit .....*

The plaintiffs' first supplemental verified bill of particulars to the Town of Dewitt contains similar claims, but added the following:

> *...in failing to make sure the workers at the job site had the proper and necessary training, skills, equipment and safety devices to remove and clear trees from the premises in a safe and professional manner; in failing to erect or post warning signs, barrels, cones or other devices to notify motorists that construction work was being performed in*

the area where the accident happened over and along Route 298 in the Town of Dewitt; in failing to adequately and properly fulfill their duties and responsibilities in connection with the inspection of the job site; in failing to suspend the work that was being performed on the job site due to unsafe work practices and methods in removal of trees from the premises; in failing to make sure that the contractor...provided sufficiently skilled workers and suitable materials and equipment for performance of their job duties under the contract documents; in failing to make proper and adequate visits to the job site to observe the progress of the quality of the work being performed and to determine if the work was proceeding in accordance with and in substantial compliance with the contract documents and the applicable safety rules, practice and procedures; in failing to make sure that the contractor...had a competent superintendent or foreman at the job site at all times; in failing to make sure that the contractor...had an employee at the job site at times whose duty it was to assure compliance with all safety rules, practices and/or regulations; in failing to direct the contractor...and its employees and agents regarding safety precautions in connection with the work that was being performed at the job site; in failing to direct the contractor...to refrain from removing trees on the job site in the manner that was being performed; in failing to make sure that the contractor... complied with all laws and regulations in connection with performing construction work in close proximity to vehicle traffic along Route 298 in the Town of Dewitt in the area where the accident happened; in failing to protect the workers, and in particular, the plaintiff herein, from the hazards of working in close proximity to vehicle traffic along Route 298 in the Town of Dewitt in the area where the accident happened; in failing to make sure that the contractor...complied with all laws and regulations in connection with performing construction work in close proximity to high-voltage power lines along Route 298 in the Town of Dewitt in the area where the accident occurred; in failing to protect the workers, and in particular the plaintiff herein, from the hazards of working in close proximity to high-voltage power lines along Route 298 in the Town of Dewitt in the area where the accident happened; in failing to make sure that the contractor.... notified the power company prior to clearing trees in close proximity to power lines; in failing to advise the

> *contractor…of the dangers inherent in performing work in close proximity to power lines; in failing to perform and adequate due diligence in background investigation prior to recommending and/or awarding the public bid for the project to the contractor…; in recommending and/or awarding the public bid to the contractor, Leitz Enterprises, as the lowest, most responsive, responsible bidder who was qualified to perform the work required and was responsible and reliable; in failing, and further, in creating and/or removing a hazard from the work site, all of which negligent, wanton, reckless, and careless acts caused and contributed to the plaintiff' Larry W. Mondore's injuries.*

This first supplemental verified bill of particulars to the Town of Dewitt was dated on August 30, 2007, and served immediately thereafter.

Comparing the claims made in the initial and first supplement verified bill of particulars, it is clear that identical claims are being made by the expert, Jeffrey Phelps, and that these claims are now reduced to a violation of a standard of care with regard to tree cutting professionals who should be familiar with the ANSI standard, Z-133.1-2006.

The fact that the ANSI standards are included in the plaintiffs' second supplemental verified bill of particulars to the Town of Dewitt makes no matter in this case. That is not a new theory of law, but rather additional information which the plaintiff has included to support the negligence claims and the Labor Law violations. Indeed, the well-settled rule is that a supplemental bill of particulars cannot include a new cause of action or a new injury. This supplemental bill of particulars, together the report of Jeffrey Phelps, does not create a new cause of action. It simply expands on the proof that the plaintiff intends to prove at the time of trial, as initially was given notice to the defendant Town of Dewitt, from the initial bill of particulars and the first

supplemental bill of particulars. Cordova v. New York City Housing Authority, New York Law Journal, January 25, 2001, Supreme Court, New York County.

This Court finds that there is no prejudice to the defendant with regard to the supplementation of the bills of particulars by the plaintiff, and the service of the expert affidavit in this matter. While this Court has not considered the expert affidavit, in any respect, with regard to the nature of the motions before this Court for purposes of this motion, the admissibility of the substance of the affidavit's opinions will be dealt with at the time of trial. In that regard, the defendant, Town of Dewitt's motion and/or request to strike and/or reject and/or otherwise vacate the plaintiffs' second supplemental bill of particulars is, in its entirety, DENIED.

CONCLUSION

To the extent that there are any other motions that have been made and/or any other requests for relief that have been made to this Court with regard to the subject motions, all such other requests are generally DENIED. Defendants' motions are GRANTED in part and DENIED in part, consistent with the respective rulings of this Decision.

Plaintiff's attorney is to draft the appropriate Order, consistent with the provisions of this Decision, and deliver it to the Court upon notice to all of the other parties in this matter, with a copy of this Decision attached thereto.

DATED: June 1, 2009.

/s/ John C. Cherundolo
Hon. John C. Cherundolo