



Significant New York Court of Appeals Victory Limits Scope of State's Labor Law § 240(1)



For the past two years, Hodgson Russ attorneys Ryan K. Cummings and Hugh M. Russ, III have pursued an appeal that sought to narrow the application of New York Labor Law § 240(1) across the state. On January 19, 2010, the New York State Court of Appeals issued its decision in *Holly v. County of Chautauqua and E.E. Austin & Son, Inc.* In its decision, the court returned to the true intent of New York Labor Law § 240(1) and, by doing so, began to limit the statute's far-ranging impact on owners of construction projects and their contractors throughout New York State.

THE ACCIDENT

The County of Chautauqua began renovating its jail in the spring of 2006. The county hired E.E. Austin & Son, Inc. to be the general contractor on the project. In turn, E.E. Austin hired J. William Pustelak, Inc. as the masonry subcontractor. The plaintiff was employed as a bricklayer for J. William Pustelak.

On March 23, 2006, the plaintiff was working on scaffolding provided by his employer. The tube-scaffolding was six feet off the ground. The plaintiff was installing the last cinderblock on the top row of a twelve-foot high wall. As he reached up to install the cinderblock, the plaintiff lost his balance and fell off the scaffolding, landing on both feet on the concrete below. As a result of the fall, the plaintiff suffered a fractured left heel that required surgery.

THE TRIAL COURT DECISION

The plaintiff and his wife then sued the county and E.E. Austin, alleging they violated New York Labor Law §§ 200, 240(1), 241(6) and were negligent. In particular, the plaintiffs claimed the scaffolding should have had guardrails to prevent the fall. Hodgson Russ was retained to represent the county and E.E. Austin.

After completing discovery, the plaintiffs moved for summary judgment on their Labor Law § 240(1) claim. The county and E.E. Austin opposed the motion and cross-moved for summary judgment seeking dismissal of the plaintiffs' claims. On April 2, 2008, the New York State Supreme Court for Chautauqua County issued a decision granting the plaintiffs' motion and denying the cross-motion.

THE APPELLATE DIVISION DECISION

The county and E.E. Austin immediately appealed to the Appellate Division for the Fourth Department. The argument on appeal was that the common law negligence and Labor Law § 200 claims should have been dismissed as a matter of law because the undisputed evidence showed that neither the county nor E.E. Austin directed or controlled the plaintiff's work on the day of his accident. We also argued that the New York Labor Law § 241(6) claim should have been dismissed because the New York State Industrial Code Regulations relied upon by the plaintiffs to support that claim were inapplicable; the regulations only required guardrails on scaffolding that is more than seven feet off the ground. And finally, we argued that the plaintiffs' Labor Law § 240(1) claim should have been dismissed, or at the very least their motion should have been denied, because the plaintiff was provided with scaffolding that complied with all applicable rules and regulations, and it did not collapse, slip, or otherwise fail to support the plaintiff's weight.

On June 5, 2009, the Fourth Department unanimously modified the trial court's decision by dismissing the common law negligence, Labor Law § 200, and Labor Law § 241(6) claims, but affirmed that portion of the trial court's decision finding strict liability pursuant to Labor Law § 240(1). See *Holly v. County of Chautauqua*, 63 A.D.3d 1558 (4th Dep't 2009).

THE COURT OF APPEALS DECISION

The county and E.E. Austin then applied to the Appellate Division for permission to take their case to the highest court in New York. We pointed out that the Fourth Department's decision was in conflict with decisions from the First, Second, and Third Departments and, in fact, was inconsistent with a prior decision from the Fourth Department. The same panel of judges who issued the Appellate Division decision against Hodgson Russ's clients granted them leave to appeal to the Court of Appeals.

On appeal to the Court of Appeals, the county and E.E. Austin again argued that they could not be held liable under New York Labor Law § 240(1) because the plaintiff was provided with scaffolding that complied with all of the applicable federal and state regulations, and it did not collapse, slip, or otherwise fail to support the plaintiff's weight, so he was provided "proper protection" as required by the statute. The plaintiff argued that he fell off the scaffolding, so strict liability was appropriate under § 240(1).

On January 19, 2010, the Court of Appeals issued its decision. The court held, consistent with the prior decisions from the First, Second, and Third Departments, that “triable issues of fact do exist as to whether the scaffolding defendants supplied provided proper protection under Labor Law § 240(1).” See *Holly v. County of Chautauqua*, _ N.E.2d _, 2010 WL 153338 (Jan. 19, 2010 N.Y. Ct. App. 2010).

THE IMPACT OF HOLLY

The Court of Appeals has now made it clear that not every fall off scaffolding gives rise to New York Labor Law § 240(1) strict liability. If the injured worker has been provided with the safety device mandated by the state and federal regulations and that device does not break but the plaintiff still gets injured, there is a question of fact whether the plaintiff was provided with “proper protection” as required by the statute. In most instances, this will be a difficult burden for the plaintiff to overcome. Owners and contractors should be prepared to retain an expert to evaluate the plaintiff’s testimony, the testimony of any witnesses to the accident, and any other evidence regarding the safety device provided so they can state with a reasonable degree of certainty that the safety device provided to the plaintiff complied with all applicable state and federal regulations.

For more information, please contact:

Ryan K. Cummings
716.848.1665
ryan_cummings@hodgsonruss.com

Hugh M. Russ, III
716.848.1388
hruss@hodgsonruss.com

677 Broadway, Suite 301, **ALBANY**, NY 12207 518.465.2333

The Guaranty Building, 140 Pearl Street, Suite 100, **BUFFALO**, NY 14202 716.856.4000

55 East Main Street, Suite 100, **JOHNSTOWN**, NY 12095 518.736.2900

1540 Broadway, 24th Floor, **NEW YORK**, NY 10036 212.751.4300

One Grand Central Place, 60 East 42nd Street, 37th Floor, **NEW YORK**, NY 10165 212.661.3535

450 Royal Palm Way, 6th Floor, **PALM BEACH**, FL 33480 561.656.8608

150 King Street West, Suite 2309, P.O. Box 30, **TORONTO**, ON M5H 1J9 Canada 416.595.5100

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