New York Court of Appeals Floors "Same Level" Rule

By Christopher Renzulli and James Brown

Vague guidance from the court may not be enough to stem expansion of the law toward the more liberal inquiry used in previous decisions.

The New York Court of Appeals recently continued to broaden New York's stringent statutory protection for construction workers. New York's Labor Law, passed in the early twentieth century, imposed "absolute" liability on an owner or contractor when a worker was injured in a "height-related" accident, in section 240(1), commonly referred to as "the scaffold law." As a result of this strict standard, plaintiffs' attorneys attempt to characterize construction site accidents as violating the scaffold law no matter how tenuous the connection to an elevation-related danger. The resulting constant influx of cases alleging violations of the scaffold law has left New York courts with an ever-growing responsibility to weed through vastly differing scenarios to discern those plaintiffs with injuries that legislators originally intended the law to address from those simply seeking to cash in on the strict liability imposed on owners and general contractors by the law.

In defining the scaffold law's boundaries on a case-by-case basis, the New York Court of Appeals gradually has expanded the law's initial protections and doesn't show signs of stopping. In December 2009 in a landmark decision, *Runner v. New York Stock Exchange*, 13 N.Y.3d 599 (N.Y. 2009), the court expanded the scaffold law's scope to injuries resulting from "gravity" and seemed to bring under the law's protection numerous common-place worksite incidents that legislators never intended to protect when they enacted the legislation. While subsequent decisions seemed to signify a step back from *Runner*'s expansive interpretation of the scaffold law, the court of appeals' recent decision in *Wilinski v. 334 East 92nd Housing Development Fund Corp.*, 18 N.Y.3d 1 (N.Y. 2011), indicates that it has not finished expanding the protections of the scaffold law, and the next victim within its sights is New York's "same level" rule.

Scaffold Law

The New York scaffold law requires that all contractors and owners and their agents furnish or erect equipment such as scaffold-

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ing, hoists, ladders, and ropes to protect a person employed in erecting, demolishing, or repairing a building properly. New York Labor Law §240(1). The purpose of the law is to protect workers engaged in construction activities involving heights by mandating that employers provide and make sure workers use protective equipment, and it assigns responsibility for providing the equipment to owners and general contractors. What makes the New York scaffold law unique, however, is that contractors and owners cannot delegate this duty, and it applies to all of the contractors and owners involved in demolishing, constructing, or repairing buildings regardless of the degree of control that an owner or a contractor exercises. Moreover, contributory negligence cannot defeat a plaintiff's claim under this law.

Historically courts construed the scaffold law to apply only to those "special hazards" that arose from elevation-related risks such as falling from a height, known as the "falling man hazard," or suffering a strike by an improperly hoisted or inadequately secured object, known as the "falling object hazard." *Ross v. Curtis-Palmer Hydro-Electric Co.*, 81 N.Y.2d 494, 501 (N.Y. 1993).

As a result, courts traditionally interpreted the scaffold law as not covering "any and all perils that may be connected in some tangential way with the effects of gravity." *Id.*; *Rodriguez v. Tietz Center for Nursing Care*, 84 N.Y.2d 841 (N.Y. 1994).

Influenced by the elevation-related inquiry, over time New York courts have developed the "same level" rule, which precludes the scaffold law's application when someone suffers an injury from an object that did not fall from a height but merely tipped over and fell on that party claiming injury.

"Same Level" Rule

In 1995, the courts began to deal with a series of cases presenting the unique issue of whether or not the scaffold law protected those workers who were struck by objects that fell from the same level as the plaintiffs rather than from levels above them. In *Misseritti v. Mark IV Constr. Co.*, a mason was severely injured when a recently completed concrete-block fire wall collapsed. When the wall collapsed, the plaintiff was sweeping the floor at the base of the wall. In ruling on the matter, the New York Court of Appeals reaffirmed that legislators intended the scaffold law to protect those working on elevated worksites "either because of a difference between the elevation level of the required work and a lower level, or a difference between the elevation level where the worker is positioned and the higher level of the materials or load being hoisted or secured." *Misseritti v. Mark IV Constr. Co.*, 86 N.Y.2d 487, 491 (N.Y. 1995) (quoting *Rocovich v. Consol. Edison Co.*, 78 N.Y.2d 509, 514 (N.Y. 1991). It further reiterated that "injuries resulting from other types of hazards are not compensable under [the scaffold law] even if proximately caused by the absence of a required safety device." *Id.* As the injured mason was working at the same level as the wall, the court declined to extend the protections of the scaffold law because the collapse of the wall did not qualify as a "falling object" elevation-related accident that legislators intended the scaffold law to guard against. *Id.* Rather, the court ruled that the accident "is the type of peril a construction worker usually encounters on the job site." *Id.*

Following the New York Court of Appeals' ruling in *Misseritti*, intermediate appellate courts began citing the decision to support the so-called "same level" rule, which proposed that a plaintiff injured by a falling object could not state a claim under the scaffold law when the plaintiff and the base of the object that fell were on the same level when the incident happened. *See, e.g., Brink v. Yeshiva Univ.*, 259 A.D.2d 265 (N.Y. App. Div. 1999); *Matter of Savovic v. State of New York*, 229 A.D.2d 586, 587 (N.Y. App. Div. 1996); *Corsaro v. Mt. Calvary Cemetery*, 214 A.D.2d 950, 950 (N.Y. App. Div. 1995). For example, in *Brink v. Yeshiva University*, the plaintiff was struck by a collapsing chimney during its demolition. A New York Appellate Division court granted a summary judgment to the defendant owner because the plaintiff and the base of the chimney were located on the same level when the incident occurred, and, therefore, an elevation-related differential did not contribute to the incident. *Brink*, 259 A.D.2d at 265. In *Matter of Savovic v. State of New York*, an Appellate Division court denied a request of a plaintiff for leave to serve a late notice of intention to file a claim because the claim lacked merit. The plaintiff in *Sabovic* was injured when a wall collapsed during the razing of a building. The court reasoned that, among other things, because the "wall which collapsed was at the same level as the work site," it was "not considered a falling object for purposes of Labor Law §240(1) pertaining to risks created by differences in elevation." *Matter of Savovic*, 229 A.D.2d at 587. And in *Mikcova v. Alps Mechanical, Inc.*, the plaintiff was injured when metal barriers that were part of a 10-foot-high to 12-foot-high scaffold standing on the ground next to her tipped over and fell on her. Without referencing the "same level rule," the Appellate Division court determined that the scaffold law did not apply to this incident because the barriers did not fall from an elevation higher than plaintiff. *Mikcova v. Alps Mechanical, Inc.*, 34 A.D.3d 769, 770 (N.Y. App. Div. 2006).

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Runner

In 2009, labor law jurisprudence in New York drastically changed when the New York Court of Appeals issued a ruling in *Runner v. New York Stock Exchange* and replaced the "height-related" inquiry with a "gravitational force" inquiry. In *Runner*, an electrician sought damages for injuries sustained when a large, heavy cable reel fell down a flight of four stairs as he and his coworkers attempted to move it without a hoisting device. The plaintiff's supervisor directed his crew to use a rope to restrain the reel as they rolled the reel down the

steps. The rope was affixed to the reel and wound several times around a pipe that was placed behind a door jamb to serve as a brake. The plaintiff and two coworkers stood behind the pipe holding the free end of the rope. As they attempted to move the reel down the stairs with the rope, the reel began to descend rapidly down the stairs, dragging the plaintiff forward and crushing his hand between the pipe and the rope.

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The case progressed to a trial during which the defendants argued that because the plaintiff neither fell nor was struck by a falling object the scaffold law did not apply. Though the jury agreed, the trial court set the verdict aside and found a violation of the scaffold law because the movement of the reel down the stairs presented a gravity-related risk and the defendants' failure to provide an adequate safety device had been a substantial factor in the plaintiff's injury.

The New York Court of Appeals reviewed this decision and determined that the previously espoused dichotomy between a falling man and a falling object did not "exhaustively" define the statute's protective reach. Rather than base its determination on whether or not a worker fell or a falling object struck a worker, the court determined that the "relevant inquiry" was whether or not the protective devices provided "proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person." This decision marked a noticeable departure from the "elevation-related" inquiry to the "gravitational" inquiry.

In the wake of *Runner*, the New York courts initially expansively interpreted the scaffold law as applying to injuries caused by the application of the force of gravity. *See Potter v. Jay E. Potter Lumbar, Co.*, 71 A.D.3d 1565, 1566–67 (N.Y. App. Div. 2010); *Quarcini*, 27 Misc. 3d 478 (N.Y. Supp. Ct. Niagara Co. 2010). New York courts declined to grant summary judgment to defendants in a number of cases that didn't involve apparent elevation-related risks, and at times, they even failed to consider whether or not protective devices could have prevented these incidents. In subsequent decisions, however, the lower courts began to move away from *Runner* and back toward the "elevation-related" inquiry. *Strangio v. Sevenson Environmental Services, Inc.*, 74 A.D.3d 1892, 1893–95 (N.Y. App. Div. 2010); *Lombardo v. Park Tower Management, Ltd.*, 76 A.D.3d 497 (N.Y. App. Div. 2010); *Makarius v. Port Auth. of New York*, 76 A.D.3d 805 (N.Y. App. Div. 2010). In a number of closely decided rulings Appellate Division courts once again began focusing on whether or not elevation-related differentials created the extraordinary risks from which legislators originally intended to protect workers through the scaffold law, as opposed to whether or not the application of gravity caused incidents.

While the lower courts struggled with how to apply *Runner* and shifted focus to whether or not the force of gravity caused a plaintiff's injuries, the New York courts continued to apply the "same level" rule when a worker and the falling object were standing on the same level before an incident. For example, in March 2011, the Supreme Court of Nassau County decided *Gatto v. Plaza Construction Corp.*, in which a plaintiff standing on a man lift was struck by a number of eight-foot by 10-foot boards of sheetrock that were located on the lift bed with the plaintiff after the man lift was driven over a ditch. The plaintiff argued that the accident involved a "falling object" because the top edge of the sheetrock fell four to five feet when it tipped over. *Gatto v. Plaza Constr. Corp.*, 31 Misc. 3d 1228(A) (N.Y. Sup. Ct. Nassau County 2011). The court ruled that "while the force of gravity may have caused the sheetrock to fall, the sheetrock itself was not elevated above the work site." *Id.* Because the sheetrock was resting on the same level where the plaintiff was performing his work when it fell, the Court ruled that the scaffold law did not apply to the incident.

Wilinski Demolishes the "Same Level" Rule

In October of 2011, however, the New York Court of Appeals radically shifted away from the "same level rule" in *Wilinski v. 334 East 92nd Housing Development Fund Corp.* In *Wilinski*, the plaintiff and other workers were demolishing brick walls at a vacant warehouse on a site where previous demolition had left two, 10-foot-tall, vertical pipes unsecured. The plans called for removing these metal pipes eventually but left them standing on the day of the incident for the time being. When the workers demolished the brick wall, debris fell and struck the pipes, which then fell, striking the plaintiff.

The Appellate Division court, relying on *Misseritti*, granted a partial summary judgment to the defendant, the owner of the premises, on the grounds that "the pipes and [the] plaintiff were at the same level at the time of the collapse," meaning that the "incident was not sufficiently attributable to elevation differentials." *Wilinski v. 334 East 92nd Housing Development Fund Corp.*, 71 A.D.3d 538 (N.Y. App. Div. 2010). Rather, the accident was deemed "the type of peril a construction worker usually encounters at the job site." *Id.*

The New York Court of Appeals, despite a vigorous defense of the "same level" rule by dissenting Justice Pigott, reversed course, ruling that *Misseritti* did not call "for the categorical exclusion of injuries caused by falling objects that, at the time of the accident, were on the same level as the plaintiff." *Wilinski v. 334 East 92nd Housing Development Fund Corp.*, 18 N.Y.3d 1 (N.Y. 2011). Rather, the court ruled that *Misseritti* turned on the absence of a causal nexus between the worker's injury and the failure to provide a safety device. *Id.* In one swift blow the court had undone 14 years of "same level" jurisprudence.

Although courts had continued to apply the "same level" rule after the *Runner* decision, the New York Court of Appeals in *Wilinski* further ruled that the "same level" rule was inconsistent with *Runner*. *Id.* The New York Court of Appeals found that because the pipes were 10-feet tall, and the plaintiff was only 5'8", the pipes must have fallen at least four feet, and this height differential could not qualify as de minimis given the amount of force the pipes gen-

erated as they fell. *Id.* (quoting *Runner*, 13 N.Y.3d 599 (N.Y. 2009)). In an apparent attempt to avoid controversy over the debate between the "elevation-related" inquiry and the "gravitational" inquiry that emerged after the *Runner* decision, the court concluded that the plaintiff's injuries flowed from both the application of the force of gravity to the pipes as well as from a physically significant elevation differential. *Id.*

The *Wilinski* court further distinguished previous decisions that had applied the "same level" rule on the grounds that the pipes were not slated for demolition at the time of the incident. In *Brink*, workers intended to demolish the chimney that collapsed on the plaintiff when it fell, whereas, in *Wilinski*, workers hadn't planned to destroy the injury-causing pipes on the date of the incident, which meant that temporarily protecting them from falling would not have interfered with the work plan. *Id.*; *Brink*, 259 A.D.2d at 265. Rather than grant a summary judgment to the plaintiff in *Wilinski* on the alleged violation of section 240(1), however, the court merely overturned the order granting a summary judgment to the defendant on this issue, ruling that whether the defendant could have provided a safety device to prevent this type of incident was a question of fact.

Post-*Wilinski*

Wilinski had almost immediate effects. In *Howell v. Bethune West Associates, LLC*, decided by the Supreme Court of New York County just three days after *Wilinski*, a bundle of plumbing brackets that was leaning against a fence behind a seated worker fell on the worker and injured his neck. The plaintiff argued that the brackets, which were 10-feet long, were improperly "hoisted" and "secured" against the fence. Relying on *Wilinski*, the *Howell* court determined that the brackets "generated enough force during their descent to implicate a risk arising from a significant height differential." *Howell*, 33 Misc. 3d 1215(A) at *3 (N.Y. Sup. Ct. New York Co. 2011). Because the defendants failed to show that something other than an absent, enumerated safety device cause the plaintiff's injuries, the *Howell* court declined to grant the defendants' motion for a summary judgment.

Less than a month after *Wilinski* was decided, the *Wilinski* dissenting jurists signaled that they intended to rein in *Wilinski*'s expansive nature. In *Salazar v. Novalex Contracting Corp.*, 18 N.Y.3d 134 (N.Y. 2011), as the plaintiff raked concrete across a floor that had a trench system for piping, he stepped backwards into a three-foot to four-foot trench and was injured. The concrete was, in part, designed to fill in these trenches. The plaintiff argued that a barricade should have been erected or something should have covered the trench. Calling for a "common sense approach to the realities of the workplace at issue," Justice Pigott, this time ruling with the majority, stated that the defendants hadn't needed to barricade or to cover the trench since that would have hindered the very work that the plaintiff needed to perform: filling the trench with concrete. *Id.* at 140. Justice Pigott, applying the "common sense approach," further sought to limit the holding of *Wilinski* to matters in which providing security devices would not hinder the objective of the work. *Id.* at 139; *Id.* at 142 (Lippman, J., dissenting).

Any signal that *Wilinski* might be reined in, however, dissipated with the decision of an appellate division court in *McCallister v. 200 Park, LLP*, 92 A.D.3d 927 (2d Dept. 2012). In *McCallister*, a worker and his foremen were moving a baker's scaffold with a load of approximately 450–550 lbs. *Id.* at 927–28. When two wheels broke on the scaffold, the foreman instructed the plaintiff that they needed to pick up the scaffold and carry it. *Id.* As the plaintiff picked up the scaffold to approximately chest height, the foreman unexpectedly pushed the scaffold toward the plaintiff and pinned him against the wall. *Id.* The court granted summary judgment to the plaintiff, stating that "although the base of the scaffold was at the same level as the plaintiff and the scaffold only fell a short distance, given the combined weight of the device and its load, and the force it was able to generate over its descent, this difference was not de minimis." *Id.* at 928–29. By focusing on the application of the force of gravity, the court further distorted the labor law into protecting a worker in a scenario where neither he nor any object fell. *Id.*

Impact of *Wilinski*

Wilinski's elimination of the "same level" rule represents a shift back toward the more liberal "gravitational" inquiry used by the court in *Runner*. While the New York Court of Appeals paid lip service to the four-foot-difference between the 10' pipes and the 5'8" plaintiff, labeling it a "significant elevation differential," its determination centered on the fact that the harm "flowed directly from the application of the force of gravity on the pipes." *Wilinski*, 18 N.Y.3d at 10. The de-emphasis of the importance of a significant elevation differential was further exhibited in the *McCallister* case where the court applied the scaffold law to an incident in which the worker and the object were admittedly positioned on the same level. 939 N.Y.S.2d at 928–29. As evidenced by *McCallister*, the lower courts have struggled to incorporate the gravitational analysis announced in *Runner* without deviating from the statute's intended purpose to protect construction workers from pronounced risks arising from construction work-site elevation differentials, as opposed to all routine workplace risks. *Wilinski* and *McCallister* represent a clear rebuke to the lower courts' attempts following *Runner* to return to a more restrictive scope in applying the scaffold law.

In attempting to distinguish previous "same level" rule cases such as *Misseritti* and *Brink*, the New York Court of Appeals ignored a fundamental reality of the *Wilinski* facts. As discussed above, the court distinguished the previous "same level" rule cases on the grounds that the workers intended to demolish the falling objects that struck the plaintiffs in those cases, and, therefore, securing them would have thwarted the objectives of the work. In *Wilinski*, however, the court reasoned that the construction crew did not intend to take down the pipes on the date of the incident, and, therefore, the defendants could have secured the pipes until they were scheduled to be demolished. In applying this reasoning, however, the court ignored the fact that the pipes hit the plaintiff in *Wilinski* because debris from a wall which the construction workers intended to demolish struck the pipes. The New York Court of Appeals, therefore, has drawn a fine line between plaintiffs who can and cannot recover: a plaintiff directly struck by debris from a demolished wall cannot recover under the scaffold law, while a plaintiff struck by an object that debris

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from a demolished wall has hit can recover. Although debris from a demolished wall would cause the plaintiffs' injuries in both circumstances, currently the scaffold law will only protect a plaintiff if the debris indirectly injures him or her.

This fine distinction cannot stand long. Based on the current trend, it seems likely that the case law will hold owners and general contractors responsible for securing every object on a work site, even if the owner or contractor temporarily stores an object on level ground so that it cannot become a "falling object" threat in the traditional sense of the term. Given recent jurisprudence, it has become evident that any time a worker leans an object against a wall it could lead to a potential scaffold law violation.

While the New York Court of Appeals in *Salazar* called for courts to construe the scaffold law with "a commonsense approach to the realities of the workplace at issue," this vague guidance may not stem expansion of the more liberal "gravitational" inquiry presented in *Runner.* FD