NEW YORK APPELLATE DIGEST, LLC

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Negligence
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ASSUMPTION OF THE RISK.

SNOWBOARDER ASSUMED THE RISK OF INJURY CAUSED BY A CREVICE THAT HAD FORMED IN THE AREA WHERE SNOWBOARDERS USED A MOUND OF SNOW TO "CATCH AIR," THE DEFENDANT DEMONSTRATED THE CREVICE FORMED NATURALLY (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that the defendant ski area was entitled to summary judgment in this snowboarding injury case. A mound of snow was used by snowboarders to "catch air." Plaintiff was injured when he used the mound to "catch air" and landed in a five and a half foot crevice:

"[B]y engaging in a sport or recreational activity, a participant consents to those commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation" (… see General Obligations Law §§ 18-101, 18-106) . … A skier or snowboarder generally "assumes the inherent risk of personal injury caused by ruts, bumps or variations in the conditions of the . . . terrain" … . …

The defendant demonstrated, through the deposition testimony of its employees and the affidavit of its expert, that the crevice was likely caused by a combination of changing temperatures, natural wet springs in the area, and water draining from the snow whale. Underground springs and surface run-off are common on mountains and can undermine the integrity of the snowpack, resulting in voids, holes, crevices, and sinkholes. The defendant demonstrated that it did not create the crevice and that the crevice was the natural consequence of variations in surface and subsurface snow conditions (see General Obligations Law § 18-101). We conclude that the defendant made a prima facie showing of entitlement to judgment as a matter of law by demonstrating that the infant plaintiff assumed the risk of injury that could be caused by the crevice, and that the defendant did not do anything that unreasonably increased the risk … . Festa v Apex Capital, LLC, 2019 NY Slip Op 02853, Second Dept 4-17-19

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The Second Department, reversing Supreme Court, determined that defendant NYC Transit Authority's motion for summary judgment in this bus-passenger injury case should not have been granted:

According to the plaintiff, the bus stopped in a manner that caused her to fall and sustain injuries. …

In seeking summary judgment dismissing a complaint which alleges injuries to a plaintiff arising out of a fall on a bus, a common carrier has the burden of establishing, prima facie, that the stop that caused the fall was not unusual and violent … .

We disagree with the Supreme Court's determination granting the defendant's motion. The evidence submitted by the defendant, which included, inter alia, the deposition testimony of the plaintiff regarding her fall and the bus camera video footage of her fall, failed to eliminate triable issues of fact as to whether the movement of the bus at issue was unusual and violent … . Giordano v New York City Tr. Auth., 2019 NY Slip Op 02684, Second Dept 4-10-19

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The First Department, reversing Supreme Court, determined plaintiff could not defeat a summary judgment motion by raising a new theory of liability in the opposing papers:

The report established that the fire marshal conducted an investigation at the subject premises and concluded that the fire in defendants' building was caused by combustible clothing left in a dryer for too long, rather than any defect in the premises or dryer … . Although the fire marshal did not have an independent recollection of his investigation, his report was admissible under the business record exception to the hearsay rule, and was sufficient to satisfy defendants' prima facie burden, since it noted that he independently inspected the premises and concluded that the accident was not due to defendants' negligence … .

In opposition, plaintiff failed to raise a triable issue of fact. Her expert failed to address the theories of liability raised in the complaint and bill of particulars and failed to rebut defendants' showing. Instead, plaintiff's expert raised a new theory, namely that plaintiff's injuries from smoke inhalation were caused by the absence of a self-closing door in the laundry room where the fire occurred, which caused smoke to permeate into plaintiff's apartment. A plaintiff cannot defeat a summary judgment motion by asserting a new theory of liability for the first time in opposition papers … . Mirdita v Musovic Realty Corp., 2019 NY Slip Op 03284, First Dept 4-30-19

LANDLORD-TENANT, DANGEROUS CONDITION.

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The Second Department determined the products liability cause of action against the builder of an in-ground swimming pool (Swim Tech) properly survived summary judgment and further determined the out-of-possession landlords' motion for summary judgment should not have been granted. Plaintiff dove into the pool and struck his head on a slant portion of the pool wall/floor. With respect to the property owners' liability, the court wrote:

An out-of-possession landowner who has assumed the obligation to make repairs to its property can be held liable for injuries caused by a dangerous condition if it is established that the landowner created or had actual or constructive notice of the condition … . Whether a dangerous condition exists on property so as to create liability on the part of a landowner depends on the particular circumstances of each case and is generally a question of fact for the jury … . " [T]he owner of a private residential swimming pool has a duty to maintain the pool in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury and the burden of avoiding the risk'" … . A landowner also has the duty to warn of potentially dangerous conditions that are not readily observable … . " To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit [the defendants] to discover and remedy it'" … .

Here, the owners failed to establish, prima facie, that the slanted wall in the deep end of their pool was not dangerous or that they lacked constructive notice of the condition … . McDermott v Santos, 2019 NY Slip Op 03039, Second Dept 4-24-19

LEGAL MALPRACTICE.

LEGAL MALPRACTICE COUNTERCLAIM SHOULD HAVE BEEN DISMISSED, SPECULATION ABOUT THE RESULT OF A HEARING HAD THE LAW FIRM APPEARED IS NOT ENOUGH TO SUSTAIN A CLAIM FOR LEGAL MALPRACTICE (FIRST DEPT).

The First Department, reversing Supreme Court, determined that plaintiff law firm's motion for summary judgment dismissing the legal malpractice counterclaim should have been granted. Apparently plaintiff failed to appear at a hearing on a temporary restraining order (TRO):

… [P]laintiff demonstrated prima facie entitlement to judgment in the legal malpractice counterclaim by showing that defendants could not prove that but for plaintiff's failure to appear at the TRO hearing the hearing court would have denied the TRO or set a shorter return date … . Defendants speculate that had plaintiff appeared at the TRO hearing, injunctive relief may have been denied or the hearing court may have adjourned the case to an earlier date. Such speculation is insufficient to sustain a claim for legal malpractice … . Salans LLP v VBH Props. S.R.L., 2019 NY Slip Op 02611, First Dept 4-4-19

MEDICAL MALPRACTICE, EXPERT OPINION.

WHERE THERE IS CONFLICTING EXPERT OPINION EVIDENCE IN A MEDICAL MALPRACTICE ACTION, SUMMARY JUDGMENT IS NOT APPROPRIATE, DEFENDANT'S SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that the defendant hospital's motion for summary judgment in this medical malpractice action should not have been granted. Although the hospital made out a prima facie case with expert evidence, the plaintiff produced conflicting expert evidence:

On a motion for summary judgment dismissing a cause of action alleging medical malpractice, the defendant bears the initial burden of establishing that there was no departure from good and accepted medical practice or that any alleged departure did not proximately cause the plaintiff's injuries … . In order to sustain this prima facie burden, the defendant must address and rebut any specific allegations of malpractice set forth in the plaintiff's complaint and bill of particulars … . If the defendant makes such a showing, the burden then shifts to

the plaintiff to raise a triable issue of fact, but only as to those elements on which the defendant met its prima facie burden of proof … .

Here, [defendant] Brookhaven met its initial burden of demonstrating its entitlement to judgment as a matter of law dismissing the first cause of action by submitting an expert's affirmation establishing that the diagnostic testing and consultations performed by its personnel were, within a reasonable medical certainty, appropriate and within prevailing standards of practice. In opposition, however, the plaintiff's expert opined that the delay in performing and reviewing the second CT scan …, constituted a departure from prevailing standards of care. Where, as here, the parties submit conflicting medical expert opinions, summary judgment is not appropriate … . Sheppard v Brookhaven Mem. Hosp. Med. Ctr., 2019 NY Slip Op 03097, Second Dept 4-24-18

MEDICAL MALPRACTICE, SPOLIATION.

MOTION FOR A JUDGMENT AS A MATTER OF LAW MADE DURING JURY SELECTION WAS PREMATURE, GRANTING THE MOTION ON SPOLIATION GROUNDS VIOLATED THE LAW OF THE CASE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff's motion to strike defendant's answer on spoliation grounds in this medical malpractice and wrongful death action, made during jury selection, should not have been granted. It was not a proper motion for a judgment as a matter of law pursuant to CPLR 4401 and the ruling violated the law of the case:

During jury selection, the plaintiff made an oral application, in effect, to strike the defendant's answer and for judgment as a matter of law on the issue of liability based on the defendant's alleged spoliation of evidence relating to certain telemetry strips and the defendant's failure to perform an autopsy on the decedent. In opposition, the defendant argued, among other things, that the Supreme Court had previously denied that branch of a prior motion by the plaintiff which was to strike the defendant's answer based on the defendant's alleged spoliation of evidence. …

"A motion for judgment as a matter of law is to be made at the close of an opposing party's case or at any time on the basis of admissions (see CPLR 4401), and the grant of such a motion prior to the close of the opposing party's case generally will be reversed as premature even if the ultimate success of the opposing party in the action is improbable" … . Here, the plaintiff's oral application, which was made during jury selection, was not

based on any admissions by the defendant, and the Supreme Court should not have considered the merits of the plaintiff's application at that juncture … .

"The doctrine of the law of the case' is a rule of practice, an articulation of sound policy that, when an issue is once judicially determined, that should be the end of the matter as far as Judges and courts of co-ordinate jurisdiction are concerned" … . The doctrine forecloses reexamination of an issue previously determined by a court of coordinate jurisdiction "absent a showing of newly discovered evidence or a change in the law" … .

Here, the Supreme Court violated the doctrine of law of the case by disregarding the prior order denying that branch of the plaintiff's earlier motion which was to strike the defendant's answer based upon the same evidentiary issues … . Fishon v Richmond Univ. Med. Ctr., 2019 NY Slip Op 02682. Second Dept 4-10-19

PRODUCTS LIABILITY.

DISTRIBUTOR'S AND SELLER'S MOTIONS FOR SUMMARY JUDGMENT IN THIS PRODUCTS LIABILITY AND NEGLIGENT DESIGN ACTION SHOULD HAVE BEEN GRANTED, PLAINTIFF'S OWN ACTIONS CONSTITUTED THE SOLE PROXIMATE CAUSE OF PLAINTIFF'S INJURY AND THE DANGER WAS OPEN AND OBVIOUS (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined the distributor's (Skyfood's) and seller's (E & A's) motions for summary judgment in this products liability and negligent design action should have been granted. Plaintiff lost several fingers when he tried to remove a piece of cheese from a meat grinder being used to grate cheese by reaching into the hopper without turning the machine off. The court held that the plaintiff's own actions constituted to sole proximate cause of the injury and the danger was open and obvious (no duty to warn):

The Supreme Court should have granted that branch of Skyfood's motion which was for summary judgment dismissing the causes of action alleging strict products liability and negligent design insofar as asserted against it. Skyfood established its prima facie entitlement to judgment as a matter of law dismissing those causes of action by submitting, inter alia, the deposition transcripts of the plaintiff and the affidavit of an expert, which showed that the plaintiff's own conduct of knowingly placing his hand into the hopper of the operating cheese grater without turning it off was the sole proximate cause of his injuries … . In opposition, the plaintiff failed to raise a triable issue of fact … .

We agree with the Supreme Court's determination granting those branches of the separate motions of Skyfood and E & A which were for summary judgment dismissing the causes of action alleging failure to warn insofar as asserted against each of them. Skyfood and E & A made a prima facie showing of entitlement to judgment as a matter of law dismissing those causes of action insofar as asserted against them by establishing, as a matter of law, that they had no duty to warn the plaintiff of the open and obvious danger of knowingly placing his hand into a cheese grater in close proximity to its spinning blade … . Hernandez v Asoli, 2019 NY Slip Op 02688, Second Dept 4-10-19

SLIP AND FALL, MUNICIPAL LAW.

ABUTTING PROPERTY OWNER NOT RESPONSIBLE FOR TRIP AND FALL IN TREE WELL NEAR THE SIDEWALK, THE TREE WELL IS NOT UNDER THE PROPERTY OWNER'S CONTROL (FIRST DEPT).

The First Department determined defendant property owner's (Val-Mac's) motion for summary judgment in this sidewalk slip and fall case was properly granted. Plaintiff fell in a tree well near the sidewalk abutting defendant's property:

Plaintiff tripped and fell in a tree well as he walked on the sidewalk in front of Val-Mac's property, which was undergoing repairs to a sewer line running to the street. Absent evidence that Val-Mac controlled the construction or made special use of the sidewalk, there is no issue of fact as to whether it proximately caused the accident, rather than "merely furnish[ing] the condition or occasion for the occurrence of the event" … . As the tree well is not part of the sidewalk under Val-Mac's control, the court properly granted summary judgment … . Schwartz v City of New York, 2019 NY Slip Op 02465, First Dept 4-2-19

SLIP AND FALL, MUNICIPAL LAW.

CAUSE OF ACTION BASED UPON A THEORY NOT ALLEGED IN THE NOTICE OF CLAIM PROPERLY DISMISSED (SECOND DEPT).

The Second Department determined plaintiff's first cause of action was properly dismissed because it alleged a theory of liability in this slip and fall case that was not alleged in the notice of claim. Apparently the plaintiff fell after getting off defendants' bus:

[In the notice of claim] the plaintiff alleged … that the accident was caused by "the carelessness, recklessness and negligence of . . . New York City Transit Authority in the ownership, operation, maintenance, repair, construction, renovation, supervision and control of the aforesaid location." …

… [T]he … defendants established their prima facie entitlement to judgment as a matter of law dismissing the first cause of action … by submitting proof that the amended notice of claim contained no allegation that the bus operator was negligent in failing to provide the plaintiff with a safe place to alight … . Rojas v Hazzard, 2019 NY Slip Op 02573, Second Dept 4-3-19

SLIP AND FALL, OPEN AND OBVIOUS, DANGEROUS CONDITION.

MISSING CHAIR IN FRONT OF A SLOT MACHINE IS OPEN AND OBVIOUS AND NONACTIONABLE, PLAINTIFF WAS INJURED WHEN SHE ATTEMPTED TO SIT IN FRONT OF A MACHINE WHERE THERE WAS NO CHAIR (FIRST DEPT).

The First Department determined the absence of a chair in front of a slot machine was open and obvious and nonactionable:

… [P]laintiff was injured when she fell while attempting to sit down at a slot machine that did not have a chair. Defendants showed that the missing chair was an open and obvious condition that was not inherently dangerous by submitting videotape footage showing the subject slot machine without a chair. Plaintiff also testified that she had previously noticed chairs missing from slot machines at the casino, and that she had been seated next to the subject machine that was without a chair for 20 to 25 minutes before her fall … .

Plaintiff's opposition failed to raise a triable issue of fact. Her argument that slot machines are distracting to the point of being all-encompassing, is unavailing, as she did not provide any probative evidence as to how distracted a person becomes when she or he uses slot machines. Plaintiff's testimony that she was distracted by the slot machines does not lead to a conclusion that they are so distracting that their mere existence makes an open and obvious condition such as a missing chair any less open and obvious … . Furthermore, that a similar accident apparently occurred at defendant casino does not lead to the conclusion that a missing chair is a latent or inherently dangerous condition. Vasquez v Yonkers Racing Corp., 2019 NY Slip Op 02461, First Dept 4-2-19

SLIP AND FALL, SPOLIATION.

PLAINTIFF WAS NOT ENTITLED TO THE PRESUMPTION DEFENDANT RECEIVED A LETTER ALLEGEDLY REQUESTING THAT SURVEILLANCE VIDEO BEFORE AND AFTER PLAINTIFF'S SLIP AND FALL BE PRESERVED AS THERE WAS NO PROOF OF MAILING, DEFENDANT SHOULD NOT HAVE BEEN SANCTIONED FOR SPOLIATION PURSUANT TO CPLR 3126 (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that the plaintiff was not entitled to the "presumption of receipt" with respect to a letter alleged to have been sent to the defendant requesting that surveillance video from 6 hours before to 2 hours after plaintiff's slip and fall be preserved. Only a two-minute clip showing plaintiff's fall had been preserved and Supreme Court had precluded the defendant from presenting video evidence as a sanction for spoliation pursuant to CPLR 3126:

… [T]he plaintiff did not establish that the defendant failed to preserve all of the surveillance video footage taken on the date of the accident after the defendant was placed on notice that the evidence might be needed for future litigation … . The letter dated February 23, 2016, which was submitted for the first time with the plaintiff's reply papers, may be considered, since the defendant had an opportunity to respond and submit papers in surreply … . However, the defendant denied receiving this letter and we reject the plaintiff's argument that he is entitled to the presumption of receipt. The mere assertion in the reply affirmation of the plaintiff's attorney that the letter dated February 23, 2016, was "sent" to the defendant, unsupported by someone with personal knowledge of the mailing of the letter or proof of standard office practice or procedure designed to ensure that the letter was properly addressed and mailed, was insufficient to give rise to the presumption of receipt that attaches to letters duly addressed and mailed … . Sanders v 210 N. 12th St., LLC, 2019 NY Slip Op 02737, Second Dept 4-10-19

SLIP AND FALL, STORM IN PROGRESS.

ALTHOUGH THERE WAS A STORM IN PROGRESS WHEN PLAINTIFF SLIPPED AND FELL, THERE WAS A QUESTION OF FACT WHETHER THE ICY CONDITION EXISTED PRIOR TO THE STORM, DEFENDANT'S SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that, although defendant demonstrated there was a storm in progress in this slip and fall case, there was a question of fact whether the icy condition existed before the storm:

Under the storm in progress rule, a property owner will not be held liable in negligence for accidents occurring as a result of a slippery snow or ice condition "occurring during an ongoing storm or for a reasonable time thereafter" … . Here, in support of its motion, the defendant submitted, inter alia, the affidavit and report of a meteorologist with attached certified climatological data, which demonstrated that, at the time of the plaintiff's accident, a wintery mix of freezing rain, sleet, and rain was falling and the temperature may have been at or below freezing. Accordingly, the defendant established, prima facie, that a storm was ongoing at the time of the plaintiff's fall … .

In opposition, however, the plaintiff raised a triable issue of fact, via her General Municipal Law § 50-h hearing testimony, her deposition testimony, and the affidavit of her brother, as to whether the icy condition that caused her fall existed prior to the storm in progress and whether the defendant had constructive notice of the hazard … . Isabel v New York City Hous. Auth., 2019 NY Slip Op 02506, Second Dept 4-3-19

SLIP AND FALL, STORM IN PROGRESS.

THE COMPLAINT ALLEGED THE ICY CONDITION EXISTED BEFORE 10 INCHES OF SNOW FELL, DEFENDANTS DID NOT DEMONSTRATE THEY DID NOT HAVE NOTICE OF THE ICE, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE SHOULD NOT HAVE BEEN GRANTED (FIRST DEPT).

The First Department, reversing Supreme Court, determined defendants' motion for summary judgment in this slip and fall case should not have been granted. Plaintiff alleged the icy condition existed before the snow fell and defendants didn't demonstrate a lack of notice of the icy condition:

Although it is undisputed that about 10 inches of snow fell about two hours before the … accident, Supreme Court should have denied [defendants'] summary judgment because their submissions failed to address the complaint's allegations that the ice was on the sidewalk before that storm and that they received notice that it was there. Specifically, they failed to present evidence from someone with knowledge as to whether either entity received a complaint about the location before the storm commenced and the area's condition before the new precipitation fell. Wolf v St. Vincent's Catholic Med. Ctrs. of N.Y., 2019 NY Slip Op 03293, First Dept 4-30-19

SLIP AND FALL.

DEFENDANT DID NOT DEMONSTRATE WHEN THE AREA WHERE PLAINTIFF SLIPPED AND FELL WAS LAST INSPECTED OR CLEANED, MOTION FOR SUMMARY JUDGMENT PROPERLY DENIED (SECOND DEPT).

The Second Department determined defendant did not demonstrate a lack of constructive notice of the sand and debris in a walkway in this slip and fall case. Therefore their motions for summary judgment were properly denied:

"Mere reference to general cleaning practices, with no evidence regarding any specific cleaning or inspection of the area in question, is insufficient to establish a lack of constructive notice" … . [Defendant's] submissions in support of its motion failed to demonstrate, prima facie, a lack of constructive notice. The affidavit of its

association president merely referenced his general inspection practices and failed to indicate when the area of the walkway where the alleged slip and fall occurred was last inspected or cleaned relative to the accident … . Butts v SJF, LLC, 2019 NY Slip Op 02491, Second Dept 4-3-19

SLIP AND FALL.

DEFENDANT DID NOT PRESENT EVIDENCE THAT THE AREA WHERE PLAINTIFF SLIPPED AND FELL ON ICE WAS INSPECTED OR TREATED ON THE DAY OF THE FALL, THEREFORE DEFENDANT DID NOT DEMONSTRATE A LACK OF CONSTRUCTIVE NOTICE OF THE CONDITION, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (FIRST DEPT).

The Second Department, reversing Supreme Court, determined defendant did not demonstrate it did not have constructive notice of the icy condition in this slip and fall case. The defendant presented evidence of the manager's and superintendent's general practices but did not present evidence was inspected or treated on the day of the fall:

"To meet its initial burden on the issue of lack of constructive notice, [a] defendant must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell" … .

Here, the defendant failed to demonstrate, prima facie, that it did not have constructive notice of the alleged ice condition that caused the plaintiff to fall. The deposition testimony of the defendant's site manager merely referred to her general practice of traversing the breezeway where the accident allegedly occurred, one to two times per week, but provided no evidence regarding any specific inspection of the area prior to the plaintiff's fall … . … The superintendent's testimony failed to provide specific details of his snow removal efforts and salting near the time of the incident, and, thus, was too general to establish lack of constructive notice … . Ahmetaj v Mountainview Condominium, 2019 NY Slip Op 02489, Second Dept 4-3-19

SLIP AND FALL.

DEFENDANT STORE DEMONSTRATED IT TOOK ADEQUATE MEASURES TO MOP UP RAIN WATER IN THIS SLIP AND FALL CASE, THE STORE'S MOTION FOR SUMMARY JUDGMENT WAS PROPERLY GRANTED (SECOND DEPT).

The Second Department determined defendant store (7-Eleven) demonstrated it took adequate steps to mop up rain water in this slip and fall case. The store's motion for summary judgment was properly granted:

It is undisputed that it was raining heavily on the day of the accident, and that there was a mat just inside the front entrance to the store. Said testified at her deposition that store employees were instructed to dry-mop water from the floor every 15 minutes on days it rained. At his deposition, one of Said's employees testified that he mopped water as soon as he observed it. Moreover, the evidence submitted in support of the defendants' motion demonstrated that the employee dry-mopped the area of the floor where the injured plaintiff allegedly fell approximately 15 to 25 minutes before the accident occurred. Said and her employees were not obligated to provide a constant remedy to the problem of water being tracked into the store in rainy weather … . Further, the defendants demonstrated that the condition was not present for a sufficient period of time for the defendants to have discovered and remedied it, and therefore, there is no basis for an inference that they had constructive notice … . Radosta v Schechter, 2019 NY Slip Op 02916, Second Dept 4-17-19

SLIP AND FALL.

FRESHLY PAINTED AND SEALED FLOOR WILL NOT SUPPORT A SLIP AND FALL CASE IN THE ABSENCE OF PROOF THE DEFENDANTS HAD ACTUAL, CONSTRUCTIVE OR IMPUTED KNOWLEDGE THE PAINT AND SEALANT COULD RENDER THE FLOOR DANGEROUSLY SLIPPERY (SECOND DEPT).

The Second Department determined that the allegation that a freshly painted floor was slippery was not enough to support a slip and fall case. The defendants' motion for summary judgment was properly granted:

The plaintiff Stephanie Faiella (hereinafter the injured plaintiff) slipped and fell on a recently painted walkway at her place of employment. The walkway was painted several days prior to her accident. … The walkway was first painted with an epoxy-based paint and then covered with a clear sealant. …

A defendant may not be held liable for the application of "wax, polish, or paint to a floor . . . unless the defendant had actual, constructive, or imputed knowledge" that the product could render the floor dangerously slippery … . Faiella v Oradell Constr. Co., Inc., 2019 NY Slip Op 02851, Second Dept 4-17-19

SLIP AND FALL.

INSPECTION WOULD NOT HAVE DISCOVERED THE LATENT DEFECT, A SNOW COVERED HOLE IN AN AREA NOT USED AS A WALKWAY, THE LANDOWNER WAS ENTITLED TO SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE (SECOND DEPT).

The Second Department determined the defendant landowner, JWB, did not have constructive notice of a snow covered hole in a grassy area which was not intended to be a public walkway. Because the area was not a public walkway, the landowner did not have a duty to keep the area clear of snow. Plaintiff, in this slip and fall case, was injured when he stepped into the hole:

" [A] defendant has constructive notice of a defect when it is visible and apparent, and has existed for a sufficient length of time before the accident that it could have been discovered and corrected'" … . When a defect is latent and would not be discoverable upon a reasonable inspection, constructive notice may not be imputed … . To meet its initial burden on the issue of lack of constructive notice, a defendant is required to offer some evidence as to when the accident site was last cleaned or inspected prior to the plaintiff's accident … . However, "it is well established that the failure to make a diligent inspection constitutes negligence only if such inspection would have disclosed the defect" … .

JWB showed that it lacked constructive notice of the snow-covered hole in the ground. Even though no evidence of prior inspections of the subject area was offered, JWB demonstrated that the snow-covered hole was a latent defect that could not have been discovered upon a diligent inspection. The plaintiff's own deposition testimony indicated that he first noticed the hole after the accident, and that he had traversed the subject area prior to the accident on a number of occasions during the course of his work and did not see a hole in the grassy median … . JWB further demonstrated, prima facie, that as a matter of law it owed no duty of care to keep the grassy median

clear of snow, as the unpaved median was not intended to be a public walkway … . Reed v 64 JWB, LLC, 2019 NY Slip Op 03094, Second Dept 4-24-19

SLIP AND FALL.

NON-MANDATORY STANDARDS WHICH ARE GENERALLY ACCEPTED CONSTITUTE SOME EVIDENCE OF NEGLIGENCE, EVIDENCE OF SIMILAR ACCIDENTS AT OTHER SUBWAY STATIONS PROPERLY ADMITTED IN THIS SUBWAY-PLATFORM GAP SLIP AND FALL CASE (FIRST DEPT).

The First Department affirmed the plaintiff's verdict in this subway "gap" slip and fall accident case. Plaintiff's leg slipped through the gap between the subway car and the platform. The fact that the defendant New York City Transit Authority (NYCTA) was in compliance with its own six-inch-gap rule was not conclusive on liability. Plaintiff's expert's testimony that non-mandatory gap standards promulgated by the American Public Transit Association and the Public Transportation Safety Board were generally accepted was admissible. Evidence of similar gap accidents at other stations was also admissible:

… [P]laintiff's expert's testimony regarding gap standards promulgated by the American Public Transit Association (APTA) and the Public Transportation Safety Board (PTSB) did not misleadingly establish industry standards that were non-mandatory guidelines. While mere non-mandatory guidelines and recommendations are insufficient to establish a standard of care, an expert's testimony regarding "generally accepted" standards, which are promulgated by an association such as APTA and the PTSB, and generally accepted in the relevant community at the relevant time, constitutes some evidence of negligence and may establish a standard of care … . Moreover, the expert noted in his testimony that the standards were voluntary and did not suit all transit systems. His testimony merely served to help the jury determine whether NYCTA's own policy of a six-inch gap was reasonable, in light of the evidence … .

The trial court did not err in admitting evidence of gap accidents at other stations or precluding NYCTA's witnesses from testifying. Plaintiff demonstrated that the relevant conditions of the subject accident and the previous ones were substantially the same, though they occurred at other stations … , and the probative value of the gap accident statistics outweighed any prejudice to NYCTA … . Daniels v New York City Tr. Auth., 2019 NY Slip Op 03000, First Dept 4-23-19

SLIP AND FALL.

PLAINTIFF PRESENTED ONLY SPECULATION ABOUT THE CAUSE OF HER SLIP AND FALL, LANDLORD'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that the landlord's motion for summary judgment in this slip and fall case should have been granted because plaintiff could not identify the cause of her fall:

… [T]he landlord met her prima facie burden on her motion for summary judgment dismissing the complaint by submitting the plaintiff's deposition transcript which demonstrated, prima facie, that she was unable to identify the cause of her fall without resorting to speculation … . The plaintiff's theory that she slipped on water dripping from the ceiling was speculative in light of, inter alia, her deposition testimony that she "personally didn't see any water dripping, but there must have been a drip from the ceiling because the ground was wet." Moreover, [third-party defendant] testified at his deposition that, although there had been a prior water leak coming from the ceiling into the kitchen, that leak was not near the location of the plaintiff's accident. Bilska v Truszkowski, 2019 NY Slip Op 02490, Second Dept 4-3-19

SLIP AND FALL.

TENANT DID NOT DEMONSTRATE IT DID NOT EXACERBATE THE CONDITION OF THE SIDEWALK BY ITS EFFORTS TO REMOVE SNOW AND THE PROPERTY OWNER AND MANAGER DID NOT DEMONSTRATE THEY DID NOT HAVE CONSTRUCTIVE NOTICE OF THE CONDITION, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the tenant, the landowner and the property manager did not submit sufficient evidence to warrant summary judgment in their favor in this sidewalk slip and fall case. The tenant (PCM) did not demonstrate that it did not exacerbate the danger by its snow removal and the property owner (2248) and the property manager (Solil) did not demonstrate they did not have constructive notice of the condition. [Defendants moving for summary judgment must address every theory of liability in their papers or the motion will be denied without the need to consider the opposing papers]:

PCM failed to eliminate triable issues of fact as to whether it undertook snow and ice removal efforts on the date of the accident to clear the area of the sidewalk where Pilar allegedly slipped and fell, or whether any snow and ice removal efforts undertaken by it created or exacerbated the icy condition that allegedly caused Pilar to fall … . …

2248, as owner of the premises abutting the sidewalk where Pilar allegedly slipped and fell, and Solil, its managing agent, failed to establish, prima facie, that they lacked constructive notice of the alleged icy condition. Section 7-210 of the Administrative Code imposes a nondelegable duty on 2248 to maintain the sidewalk abutting the premises, where Pilar allegedly fell … . In a premises liability case, a defendant real property owner or a party in possession or control of real property who moves for summary judgment has the initial burden of making a prima facie showing that it neither created the allegedly dangerous or defective condition nor had actual or constructive notice of its existence … . Here, neither 2248 nor Solil established when the subject portion of the sidewalk was last inspected relative to when Pilar slipped and fell … . Accordingly, 2248 and Solil failed to establish, prima facie, that they did not have constructive notice of the condition that allegedly caused the plaintiff decedent's fall … . Branciforte v 2248 Thirty First St., LLC, 2019 NY Slip Op 02845, Second Dept 4-17-19

SLIP AND FALL.

UNSIGNED DEPOSITIONS WERE ADMISSIBLE AND EVIDENCE SUBMITTED IN REPLY SHOULD HAVE BEEN CONSIDERED (SECOND DEPT).

The Second Department, although affirming the denial of defendants' motion for summary judgment in this slip and fall case on other grounds, noted that the depositions were admissible and evidence submitted in reply should have been considered:

Although the plaintiff's deposition transcript, which the defendants submitted in support of their motion, was unsigned, it was nonetheless admissible as the plaintiff raised no objection to its submission or accuracy and, in fact, requested that the Supreme Court "incorporate" his transcript into his opposition … . Regarding the deposition transcript of the decedent's niece, which the defendants also submitted in support of their motion, the defendants demonstrated that they had submitted the unsigned transcript to the decedent's niece for review, but that she failed to sign and return it within 60 days. Thus, the niece's deposition transcript could have been used by the defendants as fully as though signed (see CPLR 3116[a] …). Furthermore, even though the evidence demonstrating the defendants' compliance with CPLR 3116(a) was submitted by the defendants in reply, the

court should have considered it, because it was in direct response to allegations raised for the first time in the plaintiff's opposition papers … . The unsigned deposition transcript of the defendants' property manager was admissible under CPLR 3116(a) since it was submitted by the defendants themselves and thus adopted as accurate … . Baptiste v Ditmas Park, LLC, 2019 NY Slip Op 02844, Second Dept 4-17-19

THIRD-PARTY ASSAULT, LANDLORD-TENANT.

PLAINTIFF WAS SHOT INSIDE DEFENDANT'S BUILDING, DEFENDANT LANDLORD DEMONSTRATED IT DID NOT HAVE NOTICE OF AN ALLEGED BROKEN LOCK, THE EVIDENCE DID NOT DEMONSTRATE THE ASSAILANT WAS AN INTRUDER AS OPPOSED TO AN INVITED GUEST, AND THERE WAS EVIDENCE PLAINTIFF WAS THE VICTIM OF A TARGETED ATTACK, DEFENDANT LANDLORD'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (FIRST DEPT).

The First Department, reversing Supreme Court, determined the NYC Housing Authority's (NYCHA's) motion for summary judgment should have been granted in this third-party assault case. Plaintiff was shot inside the building. Defendant demonstrated it did not have notice of an alleged broken lock which would have allowed an intruder to enter the building. And the evidence did not demonstrate the assailant was an intruder as opposed to an invited guest. In addition, plaintiff admitted he was the victim of a targeted attack, which severed any causal relationship with defendant's alleged negligence:

… [P]laintiff alleges that he was injured when, while visiting his wife in NYCHA's building, he was shot by defendant Lawrence, who was able to enter the building because of a broken lock on the building's front door. The record establishes that NYCHA lacked notice of a broken lock inasmuch as NYCHA submitted evidence showing that although the front door lock had been repaired a number of times in the months leading up to the incident, NYCHA's supervisor of caretakers testified that the lock was working on the morning of the incident, and for almost a full week beforehand … .

The evidence also fails to show that the alleged assailant was an unauthorized intruder, rather than an invited guest … . The alleged assailant testified that he lived across from the subject building, that he had numerous family members and friends who lived in the building, and that he was a frequent visitor of the building. Furthermore, plaintiff admitted that he was the victim of a targeted attack by the alleged assailant, which severed

the causal nexus between NYCHA's alleged negligence and plaintiff's injuries … . Roldan v New York City Hous. Auth., 2019 NY Slip Op 02462, First Dept 4-2-19

THIRD-PARTY ASSAULT, MUNICIPAL LAW.

COUNTY NOT LIABLE IN THIS INMATE-ON-INMATE THIRD PARTY ASSAULT CASE (SECOND DEPT).

The Second Department determined the county's motion for summary judgment in this inmate-on-inmate third party assault case was properly granted. Plaintiff, an inmate in county jail, was assaulted with a pool cue by another inmate (named Batts). The complaint against the county alleged negligent supervision:

… [T]he County defendants demonstrated that prior to the incident, the plaintiff and Batts had a friendly relationship and joked around with each other. They had no prior physical altercations with one another, and Batts had not been involved in any prior violent incidents with other inmates. The County defendants also demonstrated that prior to August 11, 2013, there had been no incident at the facility where an inmate had used a pool cue as a weapon to attack another inmate.

The County defendants established their prima facie entitlement to judgment as a matter of law dismissing the cause of action sounding in negligent supervision by demonstrating that the assault by Batts upon the plaintiff was not reasonably foreseeable … . As for the cause of action sounding in negligent entrustment, the County defendants established, prima facie, that they did not possess special knowledge concerning a characteristic or condition peculiar to Batts that rendered his access to the pool cue unreasonably dangerous … . Dickson v Putnam, 2019 NY Slip Op 03025, Second Dept 4-24-19

TRAFFIC ACCIDENTS, MEDICAL RECORDS.

DEFENDANT'S HEALTH AT THE TIME OF THE TRAFFIC ACCIDENT WAS NEVER PLACED IN CONTROVERSY AND THE PHYSICIAN-PATIENT PRIVILEGE WAS NOT WAIVED BY A LETTER TO PLAINTIFF'S ATTORNEY INDICATING DEFENDANT SUFFERED FROM DEMENTIA, ANXIETY AND DEPRESSION (SECOND DEPT).

The Second Department, over a two-justice dissent, determined that defendant driver's (Rozansky's) medical condition at the time of this 2004 traffic accident was not "in controversy" and therefore the driver's medical records were not discoverable. Rozansky, who subsequently died, had, in 2006, submitted a letter from his social worker to plaintiff's attorney claiming he suffered from dementia, anxiety and depression, allegedly to be excused from a deposition, but otherwise the issue of the Rozansky's health was not raised:

… [T]he plaintiffs failed to sustain their initial burden of demonstrating that Rozansky's condition at the time of the accident was "in controversy" within the meaning of CPLR 3121(a) … . Furthermore, even if the plaintiffs had met that burden, neither Rozansky nor his estate waived the privilege attached to the medical records, as the defendant has not asserted a counterclaim or sought to excuse Rozansky's conduct at the time of the accident on the basis of some condition … . Contrary to the conclusion of our dissenting colleagues, Rozansky did not place his mental condition at the time of the accident "in controversy" or waive the privilege attached to his medical records by allegedly declining to be deposed … . Neither Rozansky nor his estate have sought to excuse his conduct at the time of the accident … , due to any condition. At best, Rozansky placed his mental condition in September 2006 at issue by allegedly refusing to appear for a deposition … . The plaintiffs could have moved at that time to compel the deposition and challenged the social worker's diagnosis. Instead, nine years after the social worker's letter, and six years after Rozansky's death, and after filing three notes of issue over the course of some seven years, indicating that discovery was complete and the case was ready for trial, the plaintiffs purported to use the mechanism of a trial subpoena to compel production of Rozansky's medical records from October 22, 1999, to the present. We disagree with our dissenting colleagues that Rozansky's alleged invocation of dementia in September 2006, by submission of a letter from his social worker, established a waiver of the privilege attached to his medical records from October 22, 1999. Peterson v Estate of John Rozansky, 2019 NY Slip Op 02568, Second Department, 4-3-19

TRAFFIC ACCIDENTS, REAR-END COLLISIONS.

DEFENDANT'S SLOW MOVING TRUCK FURNISHED THE CONDITION FOR THE REAR-END COLLISION BUT WAS NOT THE CAUSE OF THE COLLISION, DIFFICULTY SEEING BECAUSE OF SUNLIGHT DID NOT CONSTITUTE A NON-NEGLIGENT EXCUSE (FIRST DEPT).

The First Department, reversing Supreme Court, determined that defendant's motion for summary judgment should have been granted in this traffic-accident case:

In this rear-end collision case, the fact that the truck owned and operated by defendants had entered onto the parkway one exit earlier than authorized by a permit issued by the Department of Transportation, standing alone, does not establish that the early entry onto the parkway was a proximate cause of the accident … . The record reflects that the accident occurred on a dry and sunny day with light traffic, that defendant Paolino was driving the truck slowly, and that Paolino had turned on the truck's hazard lights. The truck's presence on the parkway merely furnished the condition or occasion for the occurrence of the accident, but not its cause … .

Plaintiffs' proffered excuse for the accident, that the bright sunlight may have made it difficult for the decedent to see defendants' truck driving through the tunnel, does not constitute a nonnegligent explanation for the rear-end collusion … . The affidavit by plaintiffs' accident reconstruction expert is not based on any evidence and therefore fails to raise an issue of fact … . Battocchio v Paolino, 2019 NY Slip Op 02477, First Dept 4-2-19

TRAFFIC ACCIDENTS.

BUS COMPANY'S MOTION FOR SUMMARY JUDGMENT IN THIS TRAFFIC ACCIDENT CASE SHOULD NOT HAVE BEEN GRANTED, THE BUS DRIVER SIGNALED TO DEFENDANT DRIVER TO PASS THE BUS AND THE DRIVER EITHER STRUCK THE WHEEL CHAIR LIFT OR THE PLAINTIFF WHO WAS STANDING ON THE LIFT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that the bus company's (Happy Child's) motion for summary judgment in this traffic accident case should not have been granted. Plaintiff (Jaber) was standing on the bus's wheel chair lift when the bus driver signaled to defendant driver (Todd) to drive past the bus. Todd stuck either the defendant or the lift:

The Happy Child defendants failed to establish, prima facie, that the bus driver's alleged action in signaling Todd to maneuver his car through the narrow space between the extended lift—on which Jaber was still standing—and parked cars on the other side of the street did not set into motion an eminently foreseeable chain of events that resulted in Jaber's injuries … . Accordingly, the Happy Child defendants' motion for summary judgment dismissing the complaint and all cross claims insofar as asserted against them should have been denied, regardless of the sufficiency of the plaintiffs' or Todd's opposing papers … . Jaber v Todd, 2019 NY Slip Op 02690, Second Dept 4-10-19