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Negligence
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Contents

Table of Contents

Table of Contents

Table of Contents

Table of Contents

ASSUMPTION OF THE RISK, OPEN AND OBVIOUS.

PLAINTIFF ASSUMED THE RISK OF INJURY CAUSED BY AN OPEN AND OBVIOUS CRACK IN A BASKETBALL COURT (FIRST DEPT).

The First Department determined plaintiff assumed the risk of injury from a crack in an outdoor basketball court:

Defendant made a prima facie showing of its entitlement to judgment as a matter of law, by submitting evidence that plaintiff frequently played basketball on the subject outdoor basketball court, which has an open and obvious crack which runs the length of the court and has a marked tar surface … . The court correctly rejected plaintiff's contention that grass growing out of the crack concealed its depth, finding instead that the grass served to highlight the defect, which was also one of the risks assumed by plaintiff when he chose to play basketball at this location … . Alvarado v City of New York, 2019 NY Slip Op 00962, First Dept 2-7-19

BOATING ACCIDENT, MUNICIPAL LAW.

IN THESE MARITIME LAW ACTIONS STEMMING FROM A FATAL BOATING ACCIDENT, THE TOWN DID NOT DEMONSTRATE ITS ENTITLEMENT TO SUMMARY JUDGMENT, THE COMPLAINTS ALLEGED NEGLIGENT PLACEMENT OF BUOYS (SECOND DEPT).

The Second Department, reversing Supreme Court in this boat-accident case, determined that the town was not entitled to summary judgment. Four boat passengers were killed and others were injured. The complaints alleged the town was negligent in the placement of buoys:

Maritime law, which is applicable in this case, recognizes a general theory of liability for negligence… . "[N]egligent conduct on the navigable waters that causes loss to another constitutes a maritime tort"… . Once the Town set a channel through the use of navigational aids, it had a duty to maintain those navigational aids in a reasonable and prudent manner … .

Upon applying maritime law, we conclude that the Town failed to establish its prima facie entitlement to judgment as a matter of law. Although the Town submitted evidence suggesting that the accident may have been at least partly caused by negligence on the part of the boat's operator, the Town failed to meet its prima facie burden of demonstrating the lack of any triable issues of fact regarding the Town's comparative fault based on

its placement and maintenance of the buoys … . Sugamele v Town of Hempstead, 2019 NY Slip Op 01118, Second Dept 2-13-19

EDUCATION-SCHOOL LAW, COLLEGE STUDENTS.

COLLEGE DID NOT OWE A DUTY OF CARE TO TWO STUDENTS WHO DIED IN A FIRE IN THE OFF-CAMPUS HOUSE THEY WERE RENTING (SECOND DEPT).

The Second Department determined the college (Marist College) did not owe a duty of care to two students (Kerry and Eva) who died in a fire in an off-campus house (Brennan house). The house was on a private-off-campus-housing list made available to students by the college:

"The threshold question in any negligence action is: does defendant owe a legally recognized duty of care to plaintiff?" … . In the context of this action, a critical consideration in determining whether such a duty exists is whether Marist College's relationship with either the Brennans or Kerry and Eva placed the college in the best position to protect against the risk of harm … . Also relevant is the principle that "one who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully" … . …

… .Marist College did not owe a duty of care to Kerry and Eva. Contrary to the plaintiffs' argument, Marist College demonstrated … that it did not owe a duty to ensure that the off-campus housing listed on its website, which included the Brennan house, complied with all relevant fire safety standards. Even if, in theory, Marist College could have refused to list landlords on its website unless each landlord's off-campus housing met all relevant fire safety laws and regulations, imposing such a requirement on the college is simply not warranted because the college is not "in the best position to protect against the risk of harm"… . In this regard, it bears recalling that the doctrine of in loco parentis has no application at the college level … . Adult students who chose to live off campus, as well as the private landlords with whom they enter into a contractual relationship, are in the best position to ensure that off-campus apartments and houses have the required number of smoke detectors and other fire safety features. While the risk of fire is all too foreseeable—often with tragic consequences, as this case demonstrates—"[f]oreseeability, alone, does not define duty—it merely determines the scope of the duty once it is determined to exist" … .

… .Marist College also demonstrated … that it did not assume a duty to ensure that the Brennan house was safe for Kerry and Eva to live in, as the college did not engage in any conduct that may have induced Kerry and Eva to forgo some opportunity to avoid risk, thereby placing them "in a more vulnerable position than [they] would

have been in had [Marist College] done nothing" … . In fact, the evidence shows, among other things, that Kerry and Eva found the Brennan house because they knew some of the students who had been renting it. Fitzsimons v Brennan, 2019 NY Slip Op 01200, Second Dept 2-20-19

EDUCATION-SCHOOL LAW, MUNICIPAL LAW.

ALTHOUGH THE CITY OWED A SPECIAL DUTY TO A STUDENT WHO WAS STRUCK BY A CAR ATTEMPTING TO CROSS THE ROAD, THAT DUTY WAS FULFILLED WHEN THE CROSSING GUARD TOLD THE STUDENT TO WALK TO THE NEXT AVAILABLE CROSSWALK, THE STUDENT, HOWEVER, THEN ATTEMPTED TO CROSS WHERE THERE WAS NO CROSSWALK (SECOND DEPT).

The Second Department determined the city's motion for summary judgment in this traffic accident case involving a student who had just left school was properly granted. The city owed a special duty to the student-plaintiff. A school crossing guard had stopped the plaintiff from crossing the street where there was no crosswalk and told her to walk to the next crosswalk. The plaintiff, however, attempted to cross where there was no crosswalk and was hit by a car. Any alleged negligent supervision was not the proximate cause of the student's injury:

… [A] special duty existed between the City defendants' crossing guard and the infant plaintiff … . Nevertheless, given that the crossing guard, inter alia, told the infant plaintiff to not cross 7th Avenue at an unsafe location and pointed the infant plaintiff to the crosswalk at 19th Street, the City defendants established, prima facie, that its employees did not breach their duty to the infant plaintiff. Moreover, the City defendants, while under a duty to adequately supervise the students in their charge, are not insurers of their safety … . The evidence submitted by the City defendants established, prima facie, that the infant plaintiff crossed 7th Avenue in the middle of the block where there was no intersection or crosswalk, and no traffic device affording her a right-of-way. Additionally, the infant plaintiff admitted that she attempted to cross the road "fast," and that she did not look for oncoming traffic. Where an accident occurs so quickly that even the most intense supervision could not have prevented it, any lack of supervision is not a proximate cause of the injury … . K.A. v City of New York, 2019 NY Slip Op 00861, Second Dept 2-6-19

EDUCATION-SCHOOL LAW, PLAYGROUNDS.

EVIDENCE SUBMITTED WITH REPLY PAPERS SHOULD HAVE BEEN CONSIDERED, NEGLIGENT MAINTENANCE CAUSE OF ACTION PROPERLY SURVIVED SUMMARY JUDGMENT IN THIS PLAYGROUND INJURY CASE (SECOND DEPT).

The Second Department determined Supreme Court should have considered evidence submitted by the defendant in its reply papers and further determined that the negligent maintenance cause of action properly survived summary judgment in this playground injury case. Infant plaintiff was injured when she fell from playground equipment during recess. The negligent supervision cause of action was dismissed. But there was evidence the area beneath the playground equipment was dangerous:

… [W]e disagree with the Supreme Court's decision to not consider the evidence submitted by the defendant in its reply papers. "The function of reply papers is to address arguments made in opposition to the position taken by the movant, not to introduce new arguments or new grounds for the requested relief" … . The evidence submitted by the defendant in its reply papers addressed arguments made by the plaintiff and the plaintiff's expert in opposition to its motion. Thus, the court should have considered the evidence. …

The defendant also established its prima facie entitlement to judgment as a matter of law dismissing so much of the complaint as alleged negligent maintenance of its premises by submitting evidence which demonstrated that it adequately maintained the playground, and that it did not create an unsafe or defective condition … . In opposition, however, the plaintiff raised a triable issue of fact by the submission of her expert's affidavit which opined, in part, that the ground cover beneath the apparatus from which the plaintiff fell was inherently dangerous as installed and/or maintained, because it did not meet standards established by the Consumer Product Safety Commission (see General Business Law § 399-dd). Boland v North Bellmore Union Free Sch. Dist., 2019 NY Slip Op 00849, Second Dept 2-6-19

EDUCATION-SCHOOL LAW, SUPERVSION.

QUESTIONS OF FACT ABOUT THE TYPE OF STICKS AND BALLS USED IN THE LACROSSE GAME AND WHETHER THE FAILURE TO PROVIDE GOGGLES WAS THE PROXIMATE CAUSE OF PLAINTIFF-STUDENT'S EYE INJURY (THIRD DEPT).

The Third Department, reversing Supreme Court, determined the school district's motion for summary judgment should not have been granted in this lacrosse injury case. There were questions of fact about the type of sticks and balls used such that protective goggles were required:

… [W]e find that a triable issue of fact exists as to the nature of the lacrosse game played by the students and whether protective goggles should have been used by the students based upon the game they were playing. Furthermore, under the circumstances of this case, a jury must determine whether defendants' breach of their duty to provide protective goggles was a proximate cause of the infant's eye injury … . Powers v Greenville Cent. Sch. Dist., 2019 NY Slip Op 01477, Third Dept 2-28-19

MEDICAL MALPRACTICE, CONTINUOUS TREATMENT DOCTRINE.

QUESTIONS OF FACT WHETHER THE CONTINUOUS TREATMENT DOCTRINE TOLLED THE STATUTE OF LIMITATIONS IN THIS MEDICAL MALPRACTICE ACTION, REQUESTING MEDICAL RECORDS AND MEETING WITH AN ATTORNEY TO EXPLORE A MALPRACTICE ACTION DID NOT NECESSARILY INDICATE THE TERMINATION OF TREATMENT (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the medical malpractice action should not have been dismissed as untimely. Plaintiff raised questions of fact supporting the application of the continuous-treatment toll of the statute of limitations. The court noted the fact plaintiff may have considered bringing a malpractice action did not signal the termination of treatment. Although the lawsuit named the surgeon, Kates, who did the hip replacement, the suit encompassed treatment by others at the clinic, treatment that was well-within the statute of limitations:

… [A]lthough plaintiff requested her medical records and consulted with attorneys in 2010, the mere consultation with an attorney to explore a potential malpractice claim does not, by itself, terminate a course of treatment … . Furthermore, on January 26, 2011, Kates ordered an ultrasound for plaintiff and, on July 27, 2011, plaintiff was seen in the clinic by another physician to evaluate the results of the ultrasound. That physician recommended to plaintiff that she see Kates to discuss those results, and plaintiff testified in her deposition that she was expecting to see Kates after the ultrasound to discuss whether corrective hip revision surgery was necessary. That testimony further indicates that plaintiff expected her doctor-patient relationship with Kates to continue … . Thus, even though plaintiff was somewhat disaffected with Kates, the record does not conclusively establish that either plaintiff or Kates regarded the gap in treatment or plaintiff's consultation with counsel as the end of their treatment relationship, and we therefore cannot conclude that the continuous treatment doctrine no longer applied as a matter of law after January 14, 2009 … . …

[A]lthough the court did not reach this issue, we … conclude that questions of fact exist regarding whether, for purposes of the continuous treatment doctrine, plaintiff's treatment by various other physicians in the clinic should be imputed to Kates … . Clifford v Kates, 2019 NY Slip Op 00744, Fourth Dept 2-1-19

MEDICAL MALPRACTICE, EXPERT OPINION.

PLAINTIFF'S EXPERT DID NOT LAY A FOUNDATION FOR AN OPINION ABOUT THE PROXIMATE CAUSE OF PLAINTIFF'S INJURY, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT IN THIS MEDICAL MALPRACTICE ACTION SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendants' motion for summary judgment in this medical malpractice action should have been granted. Plaintiff was treated by an ophthalmologist for eye pain. The doctor suspected glaucoma. Six months later plaintiff was diagnosed with meningioma, a noncancerous tumor of the membranes surrounding the brain. Plaintiff's expert did not lay a foundation for an opinion that the meningioma could have been treated with radiation, rather than surgery, had it been discovered earlier:

" While it is true that a medical expert need not be a specialist in a particular field in order to testify regarding accepted practices in that field . . . the witness nonetheless should be possessed of the requisite skill, training, education, knowledge or experience from which it can be assumed that the opinion rendered is reliable'" … . "Thus, where a physician opines outside his or her area of specialization, a foundation must be laid tending to

support the reliability of the opinion rendered" … . Here, the plaintiff's expert, who was board certified in ophthalmology, was qualified to, and did, raise a triable issue of fact as to whether [defendants] deviated from the accepted standard of care in failing to refer the plaintiff to a neurologist to further evaluate his symptoms. However, the affidavit was insufficient to establish that the plaintiff's meningioma could have been treated by radiation instead of surgery if it had been detected in November 2014. The plaintiff's expert failed to articulate that he had any training in the treatment of meningiomas or what, if anything, he did to familiarize himself with the applicable standard of care. The affidavit, therefore, lacked probative value and failed to raise a triable issue of fact as to whether any departure from the accepted standard of care proximately caused the plaintiff's injuries … . Simpson v Edghill, 2019 NY Slip Op 00923, Second Dept 2-6-19

MEDICAL MALPRACTICE, MUNICIPAL LAW.

LATE NOTICE OF CLAIM SHOULD HAVE BEEN DEEMED TIMELY SERVED, MEDICAL RECORDS PROVIDED TIMELY NOTICE OF THE NATURE OF THE MEDICAL MALPRACTICE CLAIM (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that plaintiff's motion to deem a late notice of claim timely served should have been granted. The attempt to serve the notice of claim was three years late. Plaintiff, who was born in 2010, brought a medical malpractice action alleging the city hospital was negligent by sending plaintiff's mother home when she presented at the emergency room complaining of contractions. The Second Department held that the medical records provided the defendant with timely knowledge of the nature of the claim:

The medical records demonstrated that the hospital failed to admit the plaintiff's mother to the hospital when she presented to the emergency room on November 23, 2010, notwithstanding an order in the emergency room record from a physician that the mother "was to be admitted secondary to non-reassuring fetal heart tracing." Inasmuch as the medical records, upon independent review, showed that the mother was not admitted to the hospital on November 23, 2010, despite a physician's order, and that two days later, the plaintiff was delivered one hour after the mother arrived at the hospital and only after a fetal heart monitor alarm sounded four times, they provided the hospital with actual knowledge of the essential facts constituting the claim … . …

… [T]the plaintiff made an initial showing that the hospital would not suffer any prejudice by the delay in serving a notice of claim, and the hospital failed to rebut the showing with particularized indicia of prejudice… . Further, the absence of prejudice was demonstrated by virtue of the fact that the hospital had possessed timely actual

knowledge of the essential facts constituting the claim … . J.H. v New York City Health & Hosps. Corp., 2019 NY Slip Op 01203, Second Dept 2-20-19

MUNICIPAL LAW, POLICE DOGS, DOG-BITE.

POLICE DOG RELEASED TO TRACK SUSPECTS WENT OUT OF THE HANDLER'S SIGHT AND BIT PLAINTIFF, 42 USC 1983, NEGLIGENCE AND BATTERY ACTIONS SURVIVED SUMMARY JUDGMENT, QUESTION OF FACT WHETHER POLICE OFFICER ENTITLED TO QUALIFIED IMMUNITY, CITY ENTITLED TO SUMMARY JUDGMENT PURSUANT TO THE PROFESSIONAL JUDGMENT RULE (THIRD DEPT).

The Third Department determined several causes of action property survived summary judgment in this case where a police officer (Ashe) released his K-9 partner (a trained police dog named Elza) which bit plaintiff as he was walking to his car. After Elza was released she ran out of Ashe's sight. Ashe was attempting to use Elza to track suspects who had just robbed a gas station. The Third Department held, inter aliia, that the 42 USC 1983 action properly survived summary judgment, Ashe was not entitled to qualified immunity as a matter of law, the battery action properly survived summary judgment, and the city was entitled to summary judgment on the common-law negligence action based on the professional judgment rule:

There is at least a question of fact as to whether a reasonable police officer, aware that the dog could not differentiate a suspect from an innocent bystander, would allow the dog to search off leash and out of sight of the handler. Moreover, the record contains evidence from which a jury could find that the City "fail[ed] to train its employees in a relevant respect [that] evidences a deliberate indifference to the rights of its inhabitants[, which] can . . . be properly thought of as a city policy or custom that is actionable under [42 USC] § 1983" … . …

… [P]laintiffs' expert … opined in his affidavit that Ashe failed to comply with standard police practice, including keeping the K-9 within visual range and providing audible warnings. Based on the foregoing, there are triable issues of fact that preclude summary judgment on the issue of Ashe's entitlement to qualified immunity … . …

… [T]he City was entitled to dismissal of the common-law negligence claims based on the professional judgment rule. " That rule 'insulates a municipality from liability for its employees' performance of their duties where the

. . . conduct involves the exercise of professional judgment such as electing one among many acceptable methods of carrying out tasks, or making tactical decisions' … . Relf v City of Troy, 2019 NY Slip Op 01287, Third Dept 2-21-19

MUNCIPAL LAW, WEIGHT-LIFTING EQUIPMENT.

APPLICATION FOR LEAVE TO FILE A LATE NOTICE OF CLAIM SHOULD HAVE BEEN GRANTED DESPITE ABSENCE OF A REASONABLE EXCUSE (FIRST DEPT).

The First Department, reversing Supreme Court, determined petitioner's application for leave to file a late notice of claim should have been granted. Petitioner alleged he was injured by the malfunction of weightlifting equipment at a city recreation center:

Assuming that the law firm's clerical error was not a reasonable excuse, " [t]he absence of a reasonable excuse is not, standing alone, fatal to the application,'" where the municipal respondent had actual notice of the essential facts constituting the claim and was not prejudiced by the delay … . Here, petitioner's affidavit stating that he signed an incident report prepared by respondent's employee shortly after the accident, and that the weightlifting equipment was repaired a few months later, demonstrate prima facie that respondent received actual notice of the pertinent facts underlying his claim, if not the negligence claim itself, which supports a "plausible argument" that the City will not be substantially prejudiced in investigating and defending the claim … . Matter of Mercedes v City of New York, 2019 NY Slip Op 01487, First Dept 2-28-19

NEGLIGENT PLACEMENT, FOSTER CARE.

COMPLAINT AGAINST A FOSTER CARE AGENCY STATED CAUSES OF ACTION FOR NEGLIGENT PLACEMENT, LOSS OF THE CHILDREN'S SERVICES AND EXPENSES FOR THE CHILDREN'S CARE AND TREATMENT (SECOND DEPT).

The Second Department, modifying Supreme Court, determined that plaintiff, the children's guardian, stated causes of action against the foster care agency, Graham Windham, for negligent placement of the children and for loss of services of the children and expenses for care and treatment of the children:

"Counties and foster care agencies cannot be vicariously liable for the negligent acts of foster parents, who are essentially contract service providers" … . "However, counties and foster care agencies may be sued to recover damages for negligence in the selection of foster parents and in supervision of the foster home"… . Ultimately, to sustain a cause of action for negligent supervision, the plaintiff must establish that the defendant "had sufficiently specific knowledge or notice of the dangerous conduct which caused injury; that is, that the third-party acts could reasonably have been anticipated" … . …

… [A] parent may recover damages measured by the pecuniary loss sustained by the injuries to the child, including the value of the child's services, if any, of which the parent was deprived and reasonable expenses necessarily incurred in an effort to restore the child to health … . Thus, the court should not have directed dismissal, pursuant to CPLR 3211(a)(7), of so much of the third cause of action insofar as asserted against Graham Windham as sought to recover damages for the loss of the children's services and the expense for their care and treatment. George v Windham, 2019 NY Slip Op 01201, Second Dept 2-20-19

OPEN AND OBVIOUS, DANGEROUS CONDITION.

LOCK BOX ON THE OUTSIDE OF A BUILDING ON WHICH PLAINTIFF STRUCK HIS HEAD WAS OPEN AND OBVIOUS AND NOT INHERENTLY DANGEROUS (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that the key lock box on the outside of building, on which plaintiff struck his head, was open and obvious and not inherently dangerous:

The plaintiff alleges that …, as he was walking out of the defendants' Wendy's restaurant, he turned right and struck his head on a black Fire Department key lock box that was affixed to the exterior of the red brick wall of the building. The plaintiff commenced this action against the defendants, alleging negligence in, among other things, the maintenance of their premises. In his pleadings, the plaintiff alleged that the presence and positioning of the lock box on the exterior wall constituted a dangerous condition. …

On their motion for summary judgment, the defendants made a prima facie showing of their entitlement to judgment as a matter of law by demonstrating that the subject condition was both open and obvious, and not inherently dangerous … . In opposition, the plaintiff failed to raise a triable issue of fact … . Erario v Wen Shirley, LLC, 2019 NY Slip Op 01059, Second Dept 2-13-19

SLIP AND FALL, MUNICIPAL LAW, WRITTEN NOTICE.

VILLAGE CODE PROVISION WHICH REQUIRES WRITTEN NOTICE OF A SIDEWALK DEFECT BEFORE MUNICIPAL LIABILITY CAN BE IMPOSED APPLIES TO A STAIRWAY FROM A PUBLIC ROAD TO A MUNICIPAL PARKING LOT, STAIRWAY SLIP AND FALL ACTION PROPERLY DISMISSED (CT APP).

The Court of Appeals, over an extensive two-judge dissent, determined that the village code provision which requires written notice of a sidewalk defect before the village can be held liable applies to a stairway connecting a public road to a municipal parking lot. Because plaintiff did not plead or prove written notice of a stairway defect, plaintiff's slip and fall action was properly dismissed:

In Woodson v City of New York, this Court determined that a stairway may be classified as a sidewalk for purposes of a prior written notice statute if it "functionally fulfills the same purpose that a standard sidewalk would serve" (93 NY2d 936, 937-938 [1999] …). * * *

The courts below correctly applied Woodson in holding that the stairway at issue "functionally fulfills the same purpose" as a standard sidewalk, and therefore plaintiff was required to show that the Village received prior written notice of the allegedly defective condition … . Hinton v Village of Pulaski, 2019 NY Slip Op 01261, CtApp 2-21-19

SLIP AND FALL, SPOLIATION.

SANCTIONS FOR SPOLIATION OF VIDEOTAPE IN THIS SLIP AND FALL CASE SHOULD NOT HAVE BEEN IMPOSED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant store (Fairway) should not have been sanctioned (adverse inference jury instruction) for spoliation of evidence, i.e., videotape depicting areas outside the store. Plaintiff slipped and fell on ice in an area near the entrance to the store. The videotape from the camera which captured the fall was provided to plaintiff. The videotape from the other cameras depicting other areas outside the store was not preserved:

The plaintiff's January 3, 2013, letter specifically requested that Fairway preserve "any and all video footage depicting the location of my client's accident." Ten hours of video footage depicting the exact location of the accident before the fall occurred, including footage of the accident itself, were preserved by Fairway and subsequently disclosed to the plaintiff. The plaintiff did not initially request that video footage of other locations also be preserved, so Fairway was not on notice that such footage might be needed for future litigation … . In addition, the plaintiff has not established that the absence of such footage deprived her of the ability to prove her case … . Under these circumstances, the plaintiff did not establish that sanctions against Fairway were warranted … . Sarris v Fairway Group Plainview, LLC, 2019 NY Slip Op 00922, Second Dept 2-5-19

SLIP AND FALL.

DEFENDANT DID NOT DEMONSTRATE THE ABSENCE OF CONSTRUCTIVE KNOWLEDGE OF THE CONDITION OF THE STAIRWAY WHERE PLAINTIFF ALLEGEDLY SLIPPED AND FELL, HOWEVER DEFENDANT WAS ENTITLED TO SUMMARY JUDGMENT BECAUSE PLAINTIFF COULD NOT IDENTIFY THE CAUSE OF THE FALL (SECOND DEPT).

The Second Department determined the defendant did not demonstrate the absence of constructive notice of the condition of the stairway where plaintiff allegedly slipped and fell. Therefore defendant's motion for summary judgment should not have granted on that ground. However, although Supreme Court didn't rule on the issue, the Second Department held that defendant's motion for summary judgment should have been granted because plaintiff could not identify the cause of the fall:

… [T]he defendant failed to establish, prima facie, that it did not have constructive notice of the alleged hazardous condition. While the deposition testimony of the premises' caretaker demonstrated that the caretaker inspected and cleaned the subject stairwell on a regular basis, the defendant failed to present evidence regarding specific cleaning or inspection of the area in question relative to the time when the subject accident occurred … . Thus, the defendant was not entitled to summary judgment dismissing the complaint on the ground that it established that it did not have notice of the alleged hazardous condition.

A defendant in a slip-and-fall case may also establish its prima facie entitlement to judgment as a matter of law by submitting evidence that the plaintiff cannot identify the cause of his or her fall without engaging in speculation … . Here, the defendant demonstrated its prima facie entitlement to judgment as a matter of law by submitting the plaintiff's General Municipal Law § 50-h hearing and deposition transcripts, which demonstrated that he was unable to identify the cause of his fall without resorting to speculation … . In opposition, the plaintiff failed to raise a triable issue of fact in this regard … . Rodriguez v New York City Hous. Auth., 2019 NY Slip Op 01246, Second Dept 2-20-19

SLIP AND FALL.

DEFENDANTS DID NOT DEMONSTRATE THEY LACKED CONSTRUCTIVE NOTICE OF CRUMBLING ASPHALT, 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 defendants did not demonstrate they lacked constructive notice of the crumbling asphalt around a sewer grate in this slip and fall case. Defendants' motion for summary judgment should not have been granted:

A property owner, or a party in possession or control of real property, has a duty to maintain the property in a reasonably safe condition … . In a premises liability case, a defendant who moves for summary judgment has the initial burden of making a prima facie showing that it neither created the condition that allegedly caused the accident nor had actual or constructive notice of its existence… . "To provide constructive notice, a dangerous condition must be visible and apparent and must exist for a sufficient length of time before the accident to permit the defendant to discover and remedy it'" … .

Here, the evidence submitted in support of the defendants' motion demonstrated, prima facie, that they did not have actual notice of the alleged dangerous condition, but failed to eliminate triable issues of fact as to whether they created the condition or had constructive notice of it … .Stepkowski v Holy Trinity Diocesan High Sch., 2019 NY Slip Op 00924, Second Dept 2-6-19

SLIP AND FALL.

JUDGE SHOULD NOT HAVE GRANTED RELIEF WHICH WAS NOT REQUESTED IN THE MOTION PAPERS, QUESTIONS OF FACT PRECLUDED SUMMARY JUDGMENT ON SOME ISSUES IN THIS SLIP AND FALL CASE (FOURTH DEPT).

The Fourth Department, reversing (modifying) Supreme Court, determined questions of fact precluded summary judgment on some issues in this slip and fall case. The decision addresses too many issues to fairly summarize here. The court noted that Supreme Court should not have granted relief (dismissal of cross-claims) not requested in the motion papers. Plaintiff slipped and fell on ice in a delivery area behind defendant Cafe in a plaza owned by defendant Pixley. There was some evidence the Cafe exercised control over at least part of the delivery area (snow removal):

… [W]e conclude that the court erred in granting that part of the Café's motion for summary judgment dismissing the complaint against it insofar as the complaint alleges that the Café had constructive notice of the icy condition; the court also erred in denying that part of Pixley's motion for summary judgment dismissing the complaint against it insofar as the complaint alleges that Pixley had actual notice of the icy condition. Johnson v Pixley Dev. Corp., 2019 NY Slip Op 01040, Fourth Dept 2-8-19

SLIP AND FALL.

ONE INCH GAP AT THE TOP OF EXTERIOR STEPS ALLEGEDLY CAUSED PLAINTIFF'S SLIP AND FALL, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT PROPERLY DENIED (SECOND DEPT).

The Second Department determined this slip and fall case properly survived summary judgment. Plaintiff alleged her foot was caught in a one-inch gap at the top of exterior steps:

While testifying at her deposition, the plaintiff identified photographs that demonstrated that the gap was at least one inch wide and at least one inch deep and three feet long, and ran the entire length of the steps. The defendants' witness, Monsignor Jamie Gigantiello, testified that he had been assigned and came to the defendant St. Bernard Church in January 2013. Gigantiello testified that upon his arrival, he found that the church building and rectory needed work, and his focus was on renovating those buildings. He further testified that, despite being on the site daily and making regular observations and inspections as he traversed the area, he did not notice thegap before the plaintiff's accident, but noticed it every time he traversed the area thereafter. He also identified the same photographs of the gap that were identified by the plaintiff, and agreed that they accurately depicted the condition that he observed following the accident. Thus, we agree with the Supreme Court's determination that the defendants failed to establish, prima facie, that the subject steps were not in a defective condition and that the defendants did not have constructive notice, as a reasonable inspection would have revealed the defective condition … . Fasano v St. Bernard Church, 2019 NY Slip Op 00856, Second Dept 2-6-19

SLIP AND FALL.

PLAINTIFF WAS INJURED WHEN HE FELL THROUGH A FLOOR OPENING IN A HOUSE UNDER CONSTRUCTION, DEFENDANT HAD PLACED CARDBOARD OVER THE OPENING, THE MOTION TO SET ASIDE THE DEFENSE VERDICT SHOULD HAVE BEEN GRANTED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined plaintiff's motion to set aside the defense verdict in this personal injury case should have been granted. Defendant Keleher had placed cardboard over the floor opening to the basement in this house under construction. Plaintiff, whose presence was foreseeable, and who (allegedly) was aware of the opening in the floor, fell through and landed on his back on the basement floor:

Timothy Keleher admitted at trial that he covered the hole, which measured several feet in width and length, with a sheet of cardboard in an effort to preserve the heat in the basement, where he was working. It was undisputed at trial that covering such a hole with cardboard created an unsafe condition. The evidence at trial further established that plaintiff's presence at the property was foreseeable inasmuch as both Timothy Keleher and plaintiff testified that plaintiff stated that he would return to the property later that day. The fact that plaintiff may have returned later than was expected does not, in our view, render it unforeseeable that he would come back to the residence. Moreover, contrary to the Kelehers' contention, the fact that plaintiff was allegedly "aware of the condition did not relieve [them] of [their] duty to maintain the [premises] in a reasonably safe condition" … . Rather, such awareness " bears only on the injured person's comparative fault' " … .

Inasmuch as plaintiff's presence was foreseeable, the risk of serious injury was great and the burden of avoiding the risk minimal, we conclude that a finding that the Kelehers were not negligent could not have been reached on any fair interpretation of the evidence. Pasceri v Keleher, 2019 NY Slip Op 00758, Fourth Dept 2-1-19

THIRD-PARTY ASSAULT.

MANAGER OF COOPERATIVE DID NOT HAVE A DUTY TO PROVIDE SECURITY IN EXTERIOR PUBLIC AREAS IN THIS THIRD PARTY ASSAULT CASE (FIRST DEPT).

The First Department, reversing Supreme Court, determined that the manager of a cooperative complex could not be liable for a third party assault occurring in exterior public areas:

Plaintiff Sander Palaj, and his wife suing derivatively, commenced this action to recover for personal injuries he allegedly sustained when he was shot outdoors in the co-operative complex known as Co-op City, which was managed by defendant Marion Scott Real Estate, Inc. at the time. However, a landowner's duty to take minimal security precautions does not extend to exterior public areas, such as walkways and vestibules … . Palaj v Marion Scott Real Estate, Inc., 2019 NY Slip Op 00958, First Dept 2-7-19

THIRD-PARTY ASSAULT.

MOTION TO DISMISS THE NEGLIGENCE ACTION AGAINST DEFENDANT SECURITY COMPANY IN THIS THIRD PARTY ASSAULT CASE SHOULD NOT HAVE BEEN GRANTED, THE EVIDENCE SUBMITTED BY THE DEFENDANT DID NOT RULE OUT LIABILITY BASED UPON THE RELATIONSHIP BETWEEN THE DEFENDANT SECURITY COMPANY AND THE COMPANY PROVIDING SECURITY AT THE TIME OF THE ASSAULT (SECOND DEPT).

The Second Department determined defendant security company's motion to dismiss the complaint should not have been granted in this third party assault case. The complaint alleged the security company's negligence resulted in the murder of plaintiff's decedent at an assisted living facility. The defendant alleged it did not provide security there at the time of the murder. However, the documentary evidence submitted by defendant did not rule out the possibility the defendant company could be liable based upon its relationship with the company which was providing security at the time of the murder:

Generally, "a corporation which acquires the assets of another is not liable for the torts of its predecessor"… . However, such liability may arise if the successor corporation expressly or impliedly assumed the predecessor's tort liability, there was a consolidation or merger of seller and purchaser, the purchaser corporation was a mere continuation of the seller corporation, or the transaction was entered into fraudulently to escape such obligations… .

Moreover, "[w]here, as here, evidentiary material is submitted and considered on a motion pursuant to CPLR 3211(a)(7) . . . the motion should not be granted unless the movant can show that a material fact as claimed by the plaintiff is not a fact at all and unless it can be said that no significant dispute exists regarding it"… . " Accordingly, consideration of such evidentiary materials will almost never warrant dismissal under CPLR 3211(a)(7) unless the materials establish conclusively that [the plaintiff] has no [claim or] cause of action'"… .

Contrary to the Supreme Court's determination, the documentary and affidavit evidence submitted by USSA in support of its motion failed to conclusively establish that the plaintiff had no cause of action against it. More particularly, that evidence failed to demonstrate that the exceptions to the general rule of a successor corporation's nonliability where there was a de facto merger between the purchaser and the seller, or where the purchaser is a mere continuation of the seller, do not apply to this case … . Shea v Salvation Army, 2019 NY Slip Op 01441, Second Dept 2-27-19

THIRD-PARTY ASSAULT.

OWNERS OF A RESTAURANT-BAR NOT LIABLE FOR AN ATTACK ON PLAINTIFF IN THE ADJACENT PARKING LOT IN THIS THIRD-PARTY ASSAULT CASE, THE ATTACK WAS NOT FORESEEABLE (SECOND DEPT).

The Second Department determined the owners of a restaurant/bar were not liable for an attack on plaintiff int the adjacent parking lot:

"Landowners, as a general rule, have a duty to exercise reasonable care to prevent harm to patrons on their property" … . "However, an owner's duty to control the conduct of persons on its premises arises only when it has the opportunity to control such conduct, and is reasonably aware of the need for such control" … . "Thus, the owner of a public establishment has no duty to protect patrons against unforeseeable and unexpected assaults" … .

Here, the defendants established their prima facie entitlement to judgment as a matter of law by submitting evidence demonstrating that the attack on the plaintiff was unforeseeable and unexpected … . Oblatore v 67 W. Main St., LLC, 2019 NY Slip Op 00892, Second Dept 2-6-19

TOXIC TORTS.

RELEASE SIGNED BY PLAINTIFF'S DECEDENT IN 1997 DID NOT ENTITLE CHEVRON TO SUMMARY JUDGMENT IN THIS ASBESTOS-MESOTHELIOMA CASE (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Wilson, over a three-judge dissent, determined that defendant Chevron was not entitled to summary judgment in this asbestos-mesothelioma action. Plaintiff's decedent [Mr. South] signed a release in 1997 and Chevron argued the release precluded the subsequent lawsuit:

Like Supreme Court, the Appellate Division concluded that the record did not demonstrate Chevron's entitlement to summary judgment, because the release did not specifically mention mesothelioma, which then required the court to determine whether extrinsic evidence entitled Chevron to summary judgment. Pointing to the "meager consideration" [$1,750] and the lack of any diagnosis of mesothelioma as to Mr. South at the time he settled, the Appellate Division concluded that the record left open the question of whether the release

pertained to an existing pulmonary condition and the fear of some future asbestos-related disease, or if it was intended to release all future asbestos-related diseases arising from Mr. South's employment by Texaco. The parties agree that, at the time he executed the release, Mr. South suffered from a nonmalignant pulmonary disease but not from mesothelioma or cancer. …

The sole question presented to us on this appeal is whether Chevron has established that the release, coupled with the 1997 complaint, eliminates all material questions of fact and proves that the release bars the claims here as a matter of law. Answering that question requires us to consider the protections afforded to Mr. South by admiralty law and Section 5 of FELA [Federal Employers' Liability Act] (45 USC § 55), which is incorporated into the Jones Act by 46 USC § 30104. …

… [W]e conclude that Chevron has not met its burden to demonstrate the absence of any material question of fact. The 1997 release does not unambiguously extinguish a future claim for mesothelioma … . The release itself does not mention mesothelioma. It does say that Mr. South "is giving up the right to bring an action against the Released Parties, or any of them, in the future for any new or different diagnosis that may be made about Claimant's condition as a result of exposure to any product[.]" But "claimant's condition" may cabin the "new or different diagnosis" to ones that related to his nonmalignant asbestos-related pulmonary disease—the "condition" both parties agree was the only one he suffered at the time. Matter of New York City Asbestos Litig., 2019 NY Slip Op 01259, CtApp 2-19-19

TRAFFIC ACCIDENTS, GRAVES AMENDMENT.

NISSAN, AS THE LESSOR OF THE VEHICLE, WAS ENTITLED TO DISMISSAL OF THE COMPLAINT IN THIS TRAFFIC ACCIDENT CASE PURSUANT TO THE GRAVES AMENDMENT, THE COMPLAINT ALLEGED NEGLIGENT MAINTENANCE OR MECHANICAL MALFUNCTION, NISSAN DEFENDANTS DEMONSTRATED THEY DO NOT INSPECT, REPAIR, MAINTAIN OR SERVICE THE VEHICLES THEY LEASE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined Nissan's motion to dismiss the complaint in this traffic accident case should have been granted pursuant to the Graves Amendment:

Under the Graves Amendment, in order for recovery to be barred, the owner, or an affiliate of the owner, must be engaged in the trade or business of renting or leasing motor vehicles, and the owner, or its affiliate, must not be negligent … .

Here, the Nissan defendants demonstrated that they were the owners of the subject vehicle and were engaged in the business of renting or leasing motor vehicles… . Additionally, to the extent that the plaintiff's theory of negligent maintenance or mechanical malfunction was supported by factual allegations, the Nissan defendants established that the allegations were not facts at all through its submissions showing that the Nissan defendants never possess, inspect, repair, maintain, or service the vehicles they lease and that it was the sole responsibility of the lessee of the subject vehicle … to maintain that vehicle … . Cukoviq v Iftikhar, 2019 NY Slip Op 01057, Second Dept 2-13-19

TRAFFIC ACCIDENTS, INCREDIBLE AS A MATTER OF LAW.

PLAINTIFF'S DEPOSITION TESTIMONY DEEMED INCREDIBLE AS A MATTER OF LAW IN THIS TRAFFIC ACCIDENT CASE, DEFENDANT'S SUMMARY JUDGMENT MOTION SHOULD HAVE BEEN GRANTED (FIRST DEPT).

The First Department, reversing Supreme Court, over a two-justice dissent, made the unusual finding that certain testimony did not raise a question of fact in this traffic accident case because it was incredible as a matter of law. Defendant's motion for summary judgment should have been granted:

Although we agree with the dissent that as a general premise "the contradictions in the testimony of the respective parties raise issues of credibility for the trier of fact to resolve," there are rare instances where credibility is properly determined as a matter of law … . This Court is not "required to shut its eyes to the patent falsity of a claim]" … . Here … we conclude that plaintiff's deposition testimony was demonstrably false and should be rejected as incredible as a matter of law, permitting summary judgment in favor of defendant. Carthen v Sherman, 2019 NY Slip Op 00954, First Dept 2-7-19

TRAFFIC ACCIDENTS, MOTORCYCLE, GRAVES AMENDMENT.

PLAINTIFF, A PASSENGER ON A MOTORCYCLE, WAS ENTITLED TO SUMMARY JUDGMENT AGAINST THE VAN DRIVER AND THE EMPLOYER OF THE VAN DRIVER WHO MADE A LEFT TURN INTO THE MOTORCYCLE'S PATH, THE GRAVES AMENDMENT MAY APPLY TO THE LESSOR OF THE VAN, PLAINTIFF DID NOT HAVE TO DEMONSTRATE SERIOUS INJURY AS SHE WAS NOT A COVERED PERSON UNDER THE NO-FAULT INSURANCE LAW (SECOND DEPT).

The Second Department addressed several issues in this motorcycle-vehicle accident case. Plaintiff was a passenger on a motorcycle that collided with a van which attempted to make a left turn across the motorcycle's path. The court held: (1) plaintiff was entitled to summary judgment against the van driver who violated Vehicle and Traffic Law 1146 and 1126 in making the turn; (2) the van driver's employer was vicariously liable because the driver was operating the van during the course of his employment, the employer leased the van for more than 30 days and therefore was the owner of the van under Vehicle and Traffic Law 388; (3) the Graves Amendment may insulate the lessor of the van from liability; (4) plaintiff was not a covered person under the no fault provisions of the Insurance Law and therefore did not have to demonstrate serious injury before bringing suit. Jung v Glover, 2019 NY Slip Op 01066, Second Dept 2-13-19

TRAFFIC ACCIDENTS, MUNICIPAL LAW, EMERGENCY VEHICLES.

QUESTION OF FACT WHETHER THE RECKLESS STANDARD APPLIED IN THIS PEDESTRIAN-POLICE CAR ACCIDENT CASE (FIRST DEPT).

The First Department, reversing Supreme Court, determined there was a question of fact whether the reckless standard applied in this pedestrian-police car traffic accident case. The court noted that the governmental function immunity doctrine does not apply to this scenario:

The governmental function immunity doctrine does not apply in this case where plaintiff pedestrian was injured when she was struck by a police vehicle that was allegedly pursuing a vehicle that had committed a traffic infraction … . Instead, where a plaintiff alleges that a municipality and/or its employees were negligent in the

ownership or operation of an authorized emergency vehicle while engaged in one of the activities protected by Vehicle and Traffic Law § 1104(b), the "reckless disregard" standard set forth in Vehicle and Traffic Law § 1104(e) applies … .

Here, a factual issue exists as to whether defendants were engaged in a protected activity under Vehicle and Traffic Law § 1104(b), namely, proceeding past a steady red signal (see Vehicle and Traffic Law § 1104[b][2]), while pursuing a vehicle for a traffic violation so as to apply the reckless standard of care as opposed to ordinary negligence principles … . Santana v City of New York, 2019 NY Slip Op 01348, First Dept 2-26-19

TRAFFIC ACCIDENTS, MUNICIPAL LAW, EMERGENCY VEHICLES.

SNOWPLOW DRIVER WAS EXEMPT FROM STANDARD NEGLIGENCE AND DID NOT ACT RECKLESSLY IN THIS TRAFFIC ACCIDENT CASE, COURT OF CLAIMS REVERSED (THIRD DEPT).

The Third Department, reversing the Court of Claims, determined the snowplow driver was not liable in this traffic accident case. The highway-work exemption from standard negligence applied and the driver was not reckless:

There is little dispute that the Court of Claims erred in applying Vehicle and Traffic Law § 1104, which affords certain privileges to "[t]he driver of an authorized emergency vehicle, when involved in an emergency operation" … and has no applicability to a vehicle such as a snowplow put to its intended use . The pertinent statute is instead Vehicle and Traffic Law § 1103 (b), which "exempts from the rules of the road all vehicles . . . which are 'actually engaged … in work on a highway,' and imposes on such vehicles a recklessness standard of care" … . Inasmuch as "the snowplow [here] was clearing the road during a snowstorm" when the accident occurred, both the snowplow and its driver are exempted "from the rules of the road" … . As such, liability will only attach if defendant and its employees behaved in a reckless manner, meaning a "conscious disregard of 'a known or obvious risk that was so great as to make it highly probable that harm would follow'" … . Howell v State of New York, 2019 NY Slip Op 01281, Third Dept 2-21-19

TRAFFIC ACCIDENTS, REAR-END COLLISIONS.

PLAINTIFF ENTITLED TO SUMMARY JUDGMENT IN THIS REAR-END COLLISION CASE, ALTHOUGH SUPREME COURT DIDN'T REACH THE LIABILITY ISSUE, THE MERITS WERE LITIGATED AND BRIEFED ALLOWING APPELLATE REVIEW (SECOND DEPT).

The Second Department determined plaintiff was entitled to summary judgment in this rear-end collision traffic accident case, noting that the plaintiff no longer has to demonstrate freedom from comparative fault to warrant a judgment on liability. Supreme Court had not reached the liability issue and the Second Department did so because the merits were litigated and briefed:

… [T]he plaintiff testified at her deposition that her vehicle was stopped at a red light when it was struck in the rear by the defendants' vehicle. This testimony established, prima facie, that the defendant driver's negligence was a proximate cause of the accident … . Moreover, although the plaintiff also submitted a transcript of the defendant driver's deposition testimony, that testimony does not present a triable issue of fact. The defendant driver testified that before the accident occurred, the light turned green, and the plaintiff began to slowly move forward. The defendant driver began to accelerate, then he saw the plaintiff's brake lights go on. He testified that he "hit the brakes and hit her." In essence, his testimony amounted to a claim that the plaintiff's vehicle came to a sudden stop which, standing alone, was insufficient to rebut the presumption of negligence on the part of the defendants' vehicle … . Buchanan v Keller, 2019 NY Slip Op 01385, Second Dept 2-27-19