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Negligence  
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## **EDUCATION-SCHOOL LAW, DISABILITIES.**

### **NEGLIGENCE AND NEGLIGENT SUPERVISION CAUSES OF ACTION AGAINST THE SCHOOL DISTRICT BROUGHT BY A STUDENT WITH SPECIAL NEEDS WHO LEFT SCHOOL AND ATTEMPTED SUICIDE ARE NOT SUBJECT TO THE EXHAUSTION OF REMEDIES REQUIREMENTS OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA) (SECOND DEPT).**

The Second Department, reversing Supreme Court, determined the negligence and negligent supervision, hiring, training and retention causes of action against the school district should not have been granted. Infant plaintiff is a special needs student who had an Individualized Education Program (IEP) pursuant to the Individuals with Disabilities Education Act (IDEA). The infant plaintiff left school, went home and attempted suicide. The school district argued plaintiffs did not exhaust their administrative remedies as required by the IDEA. The Second Department held that the negligence causes of action were not subject to the administrative requirements of the IDEA:

“An IEP is developed jointly by a school official, the child’s teacher and parents, and, where appropriate, the child. It details the special needs of a disabled child and the services which are to be provided to serve the individual needs of that child” . . . . Because parents and school officials sometimes cannot agree on such issues, the IDEA establishes formal administrative procedures for resolving disputes. . . . If a parent is dissatisfied with the outcome after having exhausted the IDEA’s administrative remedies, the parent may then seek judicial review by filing a civil action in state or federal court. . . . The IDEA’s exhaustion requirement is not limited to actions brought explicitly pursuant to the IDEA. 20 USC § 1415(l) states: “Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990, title V of the Rehabilitation Act of 1973, or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (f) and (g) shall be exhausted to the same extent as would be required had the action been brought under this subchapter.”

Here, the complaint alleges only common-law causes of action to recover damages for, inter alia, negligence, negligent supervision, hiring, training, and retention, and loss of consortium. Thus, the plaintiffs were not required to exhaust the IDEA’s administrative remedies before commencing the instant action . . . . [Matter of P.S. v Pleasantville Union Free Sch. Dist., 2019 NY Slip Op 00282, Second Dept 1-16-19](#)

## **ELEVATOR ACCIDENTS, DANGEROUS CONDITION.**

**ALTHOUGH THE FREIGHT ELEVATOR WAS IN COMPLIANCE WITH ALL RULES, REGULATIONS AND CODES, THERE WAS A QUESTION OF FACT WHETHER THE ABSENCE OF A GATE CREATED A DANGEROUS CONDITION OF WHICH THE BUILDING OWNERS WERE AWARE, THE OWNERS' MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).**

The Second Department, reversing Supreme Court, determined the building owners' motion for summary judgment in this elevator accident case should not have been granted. Although the freight elevator was in compliance with all applicable rules, regulations and codes, there was a question of fact whether the absence of a gate constituted a dangerous condition of which the defendants were aware:

... [T]he plaintiff raised a triable issue of fact as to whether the ... defendants were negligent. The plaintiff submitted evidence demonstrating that prior to the accident, the Waterfront defendants were on notice of the dangerous condition of the elevator when they were provided with proposals from their own elevator service company, which proposals stated that because there was no gate on the inside of the elevator platform, an extremely dangerous condition existed ... [Romero v Waterfront N.Y.](#), 2019 NY Slip Op 00486, Second Dept 1-23-19

## **LEGAL MALPRACTICE.**

**THE LETTER OF ENGAGEMENT SPELLED OUT WHAT THE ATTORNEYS AGREED TO DO, DEFENDANT-ATTORNEYS' MOTION TO DISMISS THE LEGAL MALPRACTICE COMPLAINT ON THE BASIS OF DOCUMENTARY EVIDENCE WAS PROPERLY GRANTED (SECOND DEPT).**

The Second Department found that the retainer agreement determined the scope of what the attorneys agreed to do and the motion to dismiss the legal malpractice complaint was properly granted. The plaintiff had retained the defendants after he was expelled from the New York College of Osteopathic Medicine:

The letter of engagement provided, in relevant part, that: "Our services will include all activities necessary and appropriate in our judgment to investigate and consider options that may be available to urge administrative reconsideration of your dismissal from the New York College of Osteopathic Medicine (the College'). This engagement does not, however, encompass any form of litigation or, to the extent ethically prohibited in this



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circumstance, the threat of litigation, to resolve this matter. This engagement will end upon your re-admittance to the College or upon a determination by the attorneys working on this matter that no non-litigation mechanisms are available to assist you. The scope of the engagement may not be expanded orally or by conduct; it may only be expanded by a writing signed by our Director of Public Service.” \* \* \*

An attorney may not be held liable for failing to act outside the scope of a retainer (see *AmBase Corp. v Davis Polk & Wardwell*, 8 NY3d 428). Therefore, since the defendant’s alleged failure to negotiate with the school, its alleged failure to commence litigation against the school, and its alleged failure to properly advise the plaintiff on the efficacy of a defamation action against nonschool parties fell outside the scope of the parties’ letter of engagement, dismissal of the cause of action alleging legal malpractice was warranted, pursuant to CPLR 3211(a)(1), on documentary evidence grounds. *Attallah v Milbank, Tweed, Hadley & McCloy, LLP*, 2019 NY Slip Op 00583, Second Dept 1-30-19

## **MEDICAL MALPRACTICE, EXPERT OPINION.**

### **FOUNDATION FOR OPINION EVIDENCE OUTSIDE PLAINTIFF’S EXPERT’S FIELD WAS NOT LAID, DEFENDANT SURGEON’S MOTION FOR SUMMARY JUDGMENT IN THIS MEDICAL MALPRACTICE ACTION SHOULD HAVE BEEN GRANTED (SECOND DEPT).**

The Second Department, reversing Supreme Court, determined defendant’s motion for summary judgment in this medical malpractice action should have been granted. Plaintiff’s decedent died from a pulmonary embolism five days after knee replacement surgery. Plaintiff contended decedent was not given the proper dosage of a medication designed to prevent deep vein thrombosis (DVT). The Second Department noted that the plaintiff’s expert was a forensic pathologist and a proper foundation for expert opinion outside the expert’s field was not laid:

“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 provides an opinion beyond 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 specialized in forensic pathology, did not indicate that he had any specific training or expertise in orthopaedic surgery, or prophylactic anticoagulation treatment to prevent DVT, and failed to “set forth how he was, or became, familiar

with the applicable standards of care in this specialized area of practice” ... . *Noble v Kingsbrook Jewish Med. Ctr.*, 2019 NY Slip Op 00608, Second Dept 1-30-19

## **MEDICAL MALPRACTICE, EXPERT OPINION.**

### **PLAINTIFF’S VERDICT IN THIS MEDICAL MALPRACTICE ACTION SET ASIDE IN THE INTEREST OF JUSTICE, DEFENDANTS WERE NOT ALLOWED TO CROSS EXAMINE PLAINTIFF’S EXPERTS ABOUT THE POSSIBLE NEGLIGENCE OF TWO NON-PARTY DOCTORS WHO ALSO TREATED PLAINTIFF, IN ADDITION, PLAINTIFF’S EXPERTS WERE NOT SHOWN TO BE QUALIFIED TO OFFER OPINION EVIDENCE CONCERNING EMERGENCY MEDICINE (SECOND DEPT).**

The Second Department, reversing Supreme Court, set aside the verdict in this medical malpractice case in the interest of justice. The defendants (Kirschen, Roberts and Winthrop) were involved in emergency treatment of the plaintiff for back pain. Subsequently surgery was performed by two additional (non-party) doctors (Obedian and Sonstein) to deal with an abscess on plaintiff’s spine. At trial the defendants were not allowed to cross-examine plaintiff’s experts about the possible negligence of the surgeons, which was deemed reversible error. The Second Department further held plaintiff’s experts should not have been allowed to testify as experts in emergency medicine because no specialized knowledge of emergency medicine was demonstrated:

” A motion pursuant to CPLR 4404(a) to set aside a verdict and for a new trial in the interest of justice encompasses errors in the trial court’s rulings on the admissibility of evidence, mistakes in the charge, misconduct, newly discovered evidence, and surprise”... . In considering such a motion, “[t]he Trial Judge must decide whether substantial justice has been done, whether it is likely that the verdict has been affected and must look to his [or her] own common sense, experience and sense of fairness rather than to precedents in arriving at a decision” ... . . . .

... [T]he evidence at trial failed to demonstrate that the plaintiff’s injuries were capable of any reasonable or practicable division of allocation among Kirschen, Roberts, and Winthrop, and Obedian and Sonstein ... . Thus, if, as Kirschen, Roberts, and Winthrop propose, a jury were to find that Obedian and Sonstein departed from accepted medical practice and that this departure was a substantial factor in depriving the plaintiff of a substantial chance for an improved outcome, Obedian and Sonstein could be found at fault together with Kirschen, Roberts, and Winthrop ... . As a result, any evidence as to the culpability of Obedian and Sonstein was relevant under CPLR 1601(1) ... . The court’s error in precluding Kirschen, Roberts, and Winthrop from cross-examining two

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... . *Daniele v Pain Mgt. Ctr. of Long Is.*, 2019 NY Slip Op 00093, Second Dept 1-9-19

## MUNICIPAL LAW.

### **PLAINTIFF SUED THE VOLUNTEER FIRE COMPANY, NOT THE FIRE DISTRICT WHICH WAS THE PROPER PARTY, PLAINTIFF NEVER SERVED A NOTICE OF CLAIM ON THE DISTRICT, THE ACTION WAS PROPERLY DISMISSED (THIRD DEPT).**

The Third Department determined the action against the Coeymans Hollow Volunteer Fire Company was properly dismissed and the proper party, the Coeymans Hollow Fire District #3, could not be sued because it was never served with a notice of claim. Plaintiff alleged she was injured when members of the Coeymans Hollow Volunteer Fire Company evacuated her from her house during a fire call:

A volunteer fire company, such as defendant, “shall be under the control of the . . . fire district . . . having, by law, control over the prevention or extinguishment of fires therein” (N-PCL 1402 [e] [1]). Indeed, the Fire District was responsible for preventing and extinguishing fires within its jurisdiction and trained and supervised defendant’s members. Furthermore, when defendant’s members responded to the fire at [plaintiff’s] house, they acted under the direction of the Chief of the Fire District. Because defendant and the Fire District are separate entities and defendant does not exert control over its members, defendant cannot be held liable for the alleged negligence of its members . . . . .

We reject plaintiff’s contention that defendant and the Fire District are so inextricably intertwined that timely service of the notice of claim upon defendant equates to timely service upon the Fire District. Furthermore, although defendant conducted an examination of [plaintiff] under General Municipal Law § 50-h, equitable estoppel does not preclude any claim that Roberts failed to serve the notice of claim upon the proper party . . . . We also note that, even though defendant was not obligated to inform Roberts that she failed to name the proper party . . . , defendant did so as an affirmative defense in its answer.

Plaintiff additionally contends that General Municipal Law § 50-e (3) (c) permits deeming the notice of claim served upon defendant as being timely served upon the Fire District. We disagree. This savings provision is “limited in scope to defects in the manner of serving the notice of claim on the correct public entity” . . . . That said, plaintiff fails to identify, nor does the record disclose, any infirmities in the service of the notice of claim. More critically, before any defects in service can be overlooked, service on the proper party must be

accomplished in the first instance . . . . [Roberts v Coeymans Hollow Volunteer Fire Co.](#), 2019 NY Slip Op 00006, Third Dept 1-3-19

## **PRODUCTS LIABILITY.**

### **PLAINTIFF’S PROOF THAT DEFENDANT SUPPLIED THE ALLEGEDLY DEFECTIVE WIRE MESH TO THE RETAILER IN THIS PRODUCTS LIABILITY ACTION WAS SPECULATIVE, DEFENDANT’S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (SECOND DEPT).**

The Second Department, reversing Supreme Court, determined defendant Prime Source’s motion for summary judgment in this products liability case should have been granted. Plaintiff alleged he was injured when a roll of wire mesh recoiled and struck him. Prime Source presented it was not in the manufacturing or distribution chain of the wire mesh and plaintiff’s proof too speculative to raise a question of fact:

In strict products liability, a manufacturer, wholesaler, distributor, or retailer who sells a product in a defective condition is liable for injury which results from the use of the product regardless of privity, foreseeability, or the exercise of due care . . . . Liability, however, may not be imposed upon a party that is outside the manufacturing, selling, or distribution chain . . . . The identity of the manufacturer or supplier of a defective product may be established by circumstantial evidence . . . . The circumstantial evidence of the identity of the manufacturer or supplier of a defective product causing personal injury must establish, however, “that it is reasonably probable, not merely possible or evenly balanced, that the defendant was the source of the offending product” . . . . “Speculative or conjectural evidence of the manufacturer’s identity is not enough” . . . .

Prime Source established its prima facie entitlement to judgment as a matter of law by demonstrating that it was outside the manufacturing, selling, or distribution chain of the mesh . . . . In opposition to the motion by Prime Source, the plaintiff’s attorney submitted an affirmation in which he stated that on the return date of the order to show cause which commenced the proceeding to obtain pre-action disclosure, a representative from Sand Man [the retailer] “produced a sheet of paper on which she had written the names of two suppliers she claims had supplied wire mesh to Sand Man” prior to the date of the subject accident. This affirmation was insufficient to raise a triable issue of fact, because it did not establish “that it is reasonably probable, not merely possible or evenly balanced” . . . that Prime Source, rather than Steel Services, was the source of the mesh . . . . The plaintiff failed to come forward with any evidence “that might permit a reasoned inference” that Prime Source, rather than Steel Services, supplied the mesh to Sand Man . . . . [Tyminskyy v Sand Man Bldg. Materials, Inc.](#), 2019 NY Slip Op 00632, Second Dept 1-30-19

## **SLIP AND FALL, EXPERT OPINION.**

### **THE TRIAL EVIDENCE DID NOT SUPPORT THE PLAINTIFF’S EXPERT’S TESTIMONY THAT DEFECTS IN THE HANDRAIL OR THE STAIR RISER HEIGHTS CONSTITUTED THE PROXIMATE CAUSE OF PLAINTIFF’S FALL IN THIS STAIRWAY SLIP AND FALL CASE, THE OVER \$500,000 PLAINTIFF’S VERDICT WAS VACATED AND A NEW TRIAL ORDERED (FIRST DEPT).**

The First Department vacated the plaintiff’s jury verdict (over \$500,000) in this stairway slip and fall case and ordered a new trial, finding that plaintiff’s expert should not have been allowed to testify about defects in the handrail because the trial evidence did not allege the handrail was a proximate cause of the fall. The First Department further held, without explanation, that the riser heights should not have been charged as an independent theory of liability:

... [D]efendants’ argument that there was insufficient evidence adduced at trial to charge the jury on theories that either riser heights or the handrail were a proximate cause of plaintiff’s fall, has merit... . Although plaintiff testified that it was her usual habit to hold a handrail while descending stairs, her testimony was equivocal on whether she held the handrail that day. Further, she testified that she did not attempt to reach for a handrail at the time of her fall, because the accident happened too fast. Nor did she provide any testimony connecting the handrail to her optical illusion theory. Thus, plaintiff’s expert should not have been allowed to testify that the handrail was a contributing cause of plaintiff’s fall, and the jury should not have been charged on the question whether the handrail was too short. Moreover, while the final step’s size may have helped contribute to plaintiff’s claim of optical illusion, the riser heights in the staircase should not have been charged as an independent theory of liability.

The trial court’s response to a jury note asking whether the building was “up to code” was incorrect in light of the prior summary judgment order. Rather than responding that there was no evidence that the code was either violated or complied with, the jury should have been informed that the building code was not applicable to the staircase. [Landau v Balbona Rest. Corp., 2019 NY Slip Op 00051, First Dept 1-3-19](#)

## **SLIP AND FALL, INCONSISTENT VERDICT.**

**DEFENSE VERDICT IN THIS SLIP AND FALL CASE SHOULD HAVE BEEN SET ASIDE, THE JURY FOUND DEFENDANT NEGLIGENT BUT FURTHER FOUND THE NEGLIGENCE WAS NOT THE PROXIMATE CAUSE OF THE FALL, HOWEVER, THE NEGLIGENCE AND PROXIMATE CAUSE WERE INEXTRICABLY INTERTWINED (SECOND DEPT).**

The Second Department, reversing Supreme Court, determined that plaintiff's motion to set aside the verdict in this slip and fall case should have been granted:

The plaintiff alleged that after entering the auditorium to attend the showing of a movie at the defendant's multiplex theater, she entered a row of seats, slipped on what she believed to be popcorn oil, and fell. After the movie ended, the plaintiff realized that she was injured when she had difficulty rising from her seat.

... [T]he jury rendered a verdict finding that the defendant was negligent, but that such negligence was not a substantial factor in causing the plaintiff's injuries.

Where, as here, the issues of negligence and proximate cause were inextricably interwoven, the jury's finding that the defendant was negligent, but that such negligence was not a substantial factor in causing the plaintiff's injuries, was not supported by a fair interpretation of the evidence ... . The plaintiff, and her friend who accompanied her on the day of the accident, both consistently testified that the plaintiff slipped and fell on an oily substance on the floor of the auditorium. The defendants failed to submit any evidence to refute this testimony. Thus, the plaintiff's motion pursuant to CPLR 4404(a) to set aside the jury verdict should have been granted. [Mitchell v Quincy Amusements, Inc., 2019 NY Slip Op 00430, Second Dept 1-23-19](#)

## **SLIP AND FALL, LANDLORD-TENANT.**

**ALTHOUGH DEFENDANT LANDLORD DID NOT DEMONSTRATE WHEN THE STAIRS WERE LAST CLEANED OR INSPECTED, PLAINTIFF'S DEPOSITION TESTIMONY ESTABLISHED THE WETNESS ON WHICH SHE SLIPPED AND FELL COULD NOT HAVE BEEN PRESENT FOR MORE THAN AN HOUR, THEREFORE THE LANDLORD HAD NEITHER ACTUAL NOR CONSTRUCTIVE NOTICE OF THE CONDITION (FIRST DEPT).**

The First Department, reversing Supreme Court, determined that the plaintiff's deposition testimony demonstrated that the wetness on the stairs could not have been present for more than an hour. Therefore the defendant landlord had neither actual nor constructive notice of the condition and the landlord's motion for summary judgment in this slip and fall case should have been granted:

The building superintendent testified that he had no knowledge of the condition and received no complaints about it on the day of the accident. On the issue of constructive notice, although he described a reasonable cleaning and inspection routine... , there was no evidence when the stairs were last inspected or cleaned before plaintiff's accident so as to satisfy defendant's burden ... .

Plaintiff's deposition testimony offered in support of defendant's motion, however, established that the water condition did not exist for a sufficient period of time to discover and remedy the problem ... . Thus, there was neither actual nor constructive notice of the wetness. Although plaintiff testified that she had complained about a wet condition on the stairs on three occasions between 2009 and 2013, she presented no evidence of a recurring condition unaddressed by defendants. Plaintiff also testified that she had no reason to believe that the stair was wet when she left her apartment at 5 p.m. and that she slipped on the stairs when she returned, less than an hour later. Thus, any wet condition was present for less than an hour, and might have been there only minutes or seconds before plaintiff slipped on it ... . Plaintiff failed to raise any issue of fact requiring a trial.

Plaintiff's argument that the absence of a handrail on both sides of the staircase raises an issue of fact as to defendants' negligence is speculative, as there is no evidence that the absence of a handrail played any role in her accident ... . [Perez v River Park Bronx Apts., Inc., 2019 NY Slip Op 00196, First Dept 1-10-19](#)

## **SLIP AND FALL, LANDLORD-TENANT.**

**THE LANDOWNER AND THE TENANT TAXI COMPANY HAD THE SAME PRINCIPAL, A HOSE WAS USED BY INDEPENDENT CONTRACTORS TO WASH THE TAXIS, PLAINTIFF ALLEGEDLY SLIPPED ON THE WATER FROM THE HOSE WHICH FROZE, THE LANDOWNER DID NOT ESTABLISH IT WAS AN OUT OF POSSESSION LANDLORD, THE LANDOWNER’S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (FIRST DEPT).**

The First Department, over a dissent, reversing Supreme Court, determined the landowner was not entitled to summary judgment in this slip and fall case. The principal of the property owner, 514 West, is also the principal of the tenant, Style, a taxi company. Independent contractors used a hose to wash the cars. Water from the hose froze and plaintiff allegedly slipped and fell on the ice. The First Department noted the close connection between 514 West and Style and found that 514 West did not establish it was an out-of-possession landlord:

514 West, which owns the building adjacent to the roadway in which plaintiff slipped and fell on ice, failed to make a prima facie showing of its entitlement to summary judgment, since the evidence it submitted raises genuine issues of fact about whether it created the dangerous condition . . . . For example, its principal, who is also the principal of codefendant Style Management Co., Inc. (Style), the taxi company housed at the building owned by 514 West, admitted that there is a hose attached to the building, which the independent contractors who work for the taxi company would use to wash the cars. It is water from this hose, which pooled in the street and then froze, that plaintiff allegedly slipped on. “It is . . . a general rule that an abutting owner is liable if, by artificial means . . . water from the property is permitted to flow onto the public sidewalk where it freezes” . . . . 514 West asserts that Style operated the hose, not it, thus absolving it of liability. However, 514 West fails to establish that it is an out-of-possession landlord; indeed, given the very close connection between 514 West and Style, which, again, have the same principal, it is not possible on this record to determine, as a matter of law, that the former is without liability as a landowner. [Malik v Style Mgt. Co. Inc., 2019 NY Slip Op 00372, First Dept 1-22-19](#)



## **SLIP AND FALL, MUNICIPAL LAW.**

**IN THIS SLIP AND FALL CASE, THE PARKING LOT WAS THE SUBJECT OF A LICENSE AGREEMENT BETWEEN THE CITY AND THE ATHLETIC CLUB, NOT A LEASE, THEREFORE THE OUT OF POSSESSION LANDLORD DOCTRINE WAS NOT APPLICABLE, ALTHOUGH THE LICENSE AGREEMENT REQUIRED THE ATHLETIC CLUB TO MAINTAIN THE PARKING LOT, THE LICENSE AGREEMENT IMPOSED CERTAIN MAINTENANCE DUTIES ON THE CITY AS WELL, THE CITY'S SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).**

The Second Department, reversing Supreme Court, determined the defendant city did not demonstrate that it had relinquished control over the parking lot where plaintiff allegedly fell into an access pit. The access pit was exposed because a snow removal contractor pushed the cover off when plowing snow. The city had a license agreement with an athletic club, Fitmar, which required Fitmar to maintain the parking lot. Fitmar had hired the snow removal contractor. The city argued it was an out of possession landlord and the parking lot was solely Fitmar's responsibility. The Second Department held that the parking lot was subject to a license agreement, not a lease, and therefore the out of possession landlord doctrine did not apply. The Second Department went on to find that the terms of the license agreement did not demonstrate as a matter of law that the city had relinquished control over the maintenance of the parking lot:

... [T]he license agreement granted Fitmar a license to use the premises, and not a leasehold interest ... . Thus, the standard applied to out-of-possession landlords is inapplicable here ... . Rather, the City, "as landowner, remains in presumptive control over its property and subject to the attendant obligations of ownership until it is found that control was relinquished" ... .

The City failed to meet its prima facie burden of demonstrating that it relinquished control of the premises such that it owed no duty to the plaintiff to remedy the allegedly defective condition. While the license agreement assigned responsibility for maintenance of the premises, and specifically of the parking lot, to Fitmar, it vested the City with ultimate approval authority over Fitmar's operating procedures. The City had unfettered access to the premises and could sponsor or promote its own special events at the premises. The agreement required a yearly inspection of the premises by the City to determine the extent of any repairs to be performed by Fitmar, and the City was permitted to inspect the premises at any time and direct Fitmar to undertake repairs. The City could maintain field personnel at the premises to observe the means and methods of anticipated construction work by Fitmar, and also reserved the right for the City to perform construction or maintenance work at the premises at any time. Fitmar's former general manager testified at his deposition that the City conducted regular

inspections of the premises, and that representatives of the Parks Department would often show up unannounced to conduct inspections. [Agbosasa v City of New York, 2019 NY Slip Op 00250, Second Dept 1-16-19](#)

## **SLIP AND FALL, MUNICIPAL LAW.**

### **QUESTION OF FACT WHETHER CITY HAD PRIOR WRITTEN NOTICE OF THE DEFECTS IN THE SIDEWALK AND RAILING WHERE PLAINTIFF’S DECEDENT FELL INTO A GORGE, CITY’S MOTION FOR SUMMARY JUDGMENT PROPERLY DENIED (THIRD DEPT).**

The Third Department determined the city's motion for summary judgment in this slip and fall case was properly denied. Plaintiff's decedent fell from a paved trail into a gorge. There were questions of fact about whether the city had prior written notice of the broken sidewalk and railing:

... [P]laintiff produced a police investigation report concluding that decedent had fallen along a part of the trail with multiple defects, including broken pavement, a “bent/unsecured hand railing . . . and huge gap spaces in sidewalk edge adjacent to [the] cliff side edge.” Plaintiff also demonstrated that, by the time of the fall, the Department of Public Works had received numerous written complaints about the condition of the trail. General complaints and the subsequent efforts of department personnel to evaluate the condition of the trail did not “obviate the need for prior written notice” of the particular defects implicated in decedent's fall . . . . That said, one of the written complaints was a January 2012 email forwarded to an Assistant Superintendent of Public Works that was, according to his testimony, “probably” shared with the Superintendent of Public Works, and attached to the email is a map with photographs that appear to reference the defects in the area where decedent fell. [Van Wageningen v City of Ithaca, 2019 NY Slip Op 00343, Third Dept 1-17-19](#)

## **SLIP AND FALL, TRIVIAL.**

### **THE DEFECT, A PROTRUDING BOLT UNDER THE HANDRAIL IN A STAIRWAY, WAS TRIVIAL AND NONACTIONABLE, THE \$650,000 VERDICT SHOULD HAVE BEEN SET ASIDE (SECOND DEPT).**

The Second Department determined defendant’s motion to set aside the verdict in this slip and fall case should have been granted. The defect, a protruding bolt, was deemed trivial and nonactionable:

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... [T]he plaintiff's evidence at trial included her own testimony, the testimony of her expert engineer, as well as photographs identified and marked by the plaintiff showing the alleged defect as it existed at the time of the subject accident. Accepting such evidence as true, and affording the plaintiff every favorable inference that may be properly drawn from the facts presented ... , the alleged defect was not actionable. Considering the appearance and dimensions of the protruding bolt, as well as its location on the sidewall of the staircase, directly underneath a handrail and away from the walking surface of the stairway... , the defect was trivial as a matter of law. Accordingly, the defendant's motion pursuant to CPLR 4401 for judgment as a matter of law dismissing the complaint should have been granted ... . [Rambarran v New York City Tr. Auth., 2019 NY Slip Op 00484, Second Dept 1-23-19](#)

### **THIRD-PARTY ASSAULT, LANDLORD-TENANT.**

#### **PLAINTIFF'S DECEDENT, WHO WAS DELIVERING MEALS ON WHEELS IN DEFENDANT'S BUILDING WHEN HE WAS ASSAULTED, ALLEGED THE ASSAILANT WAS AN INTRUDER WHO ENTERED THE BUILDING THROUGH A NEGLIGENTLY MAINTAINED ENTRANCE, THE LANDLORD'S DUTY TO PROTECT TENANTS EXTENDS TO GUESTS OF TENANTS, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).**

The Second Department, reversing Supreme Court in this third-party assault case, determined the personal injury and wrongful death action against the landlord should not have been dismissed. Plaintiff's decedent was delivering "meals on wheels" in the building when he was assaulted, allegedly by an intruder who allegedly entered the building through a negligently maintained entrance:

"Landlords have a common-law duty to take minimal precautions to protect tenants from foreseeable harm,' including a third party's foreseeable criminal conduct" ... . This duty extends to the guests of a tenant ... . A tenant or guest may recover damages, however, only on a showing that the landlord's negligent conduct was a proximate cause of the injury... . "In premises security cases particularly, the necessary causal link between a landlord's culpable failure to provide adequate security and a tenant's injuries resulting from a criminal attack in the building can be established only if the assailant gained access to the premises through a negligently maintained entrance. Since even a fully secured entrance would not keep out another tenant, or someone allowed into the building by another tenant, plaintiff can recover only if the assailant was an intruder" ... .

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Here, the defendant established its prima facie entitlement to judgment of a matter of law by presenting evidence that the lock on the only entrance to 341 Dumont Avenue was operable on the day of the incident ... . In opposition, however, the plaintiffs raised triable issues of fact as to whether the decedent's assailant was an intruder who entered the building through a negligently maintained entrance ... . [Aminova v New York City Hous. Auth.](#), 2019 NY Slip Op 00083, Second Dept 1-9-19

### **THIRD-PARTY ASSAULT.**

**DEFENDANT GRANDFATHER DID NOT HAVE A DUTY TO CONTROL HIS COLLEGE-AGE GRANDSON IN THIS ROAD RAGE INCIDENT, THEREFORE THE NEGLIGENCE ACTION WAS PROPERLY DISMISSED, HOWEVER THE AIDING-AND-ABETTING ASSAULT CAUSE OF ACTION AGAINST DEFENDANT GRANDFATHER SHOULD NOT HAVE BEEN DISMISSED (SECOND DEPT).**

The Second Department determined defendant Mancuso's motion for summary judgment on the negligence cause of action was properly granted, but the motion for summary judgment on the aiding-and-abetting-assault cause of action should not have been granted. The action stemmed from a road rage incident. Defendant Mancuso was driving and his college-age grandson, Vaccaro, was a passenger. The grandson got out of the car and hit plaintiff in the face:

Mancuso established, prima facie, that he did not owe a duty to the plaintiff by virtue of the relationship Mancuso had with Vaccaro. The fact that Mancuso could have exercised control over Vaccaro, his college-aged grandson, did not create a duty to do so ... . In addition, the mere fact that Vaccaro was a passenger in Mancuso's vehicle did not create a duty on the part of Mancuso to control Vaccaro's conduct ... .

To be liable for an assault under an aiding and abetting theory, a defendant must have committed some overt act, either by words or conduct, in furtherance of the assault ... . Here, Mancuso established, prima facie, that he did not commit an overt act in furtherance of Vaccaro's assault on the plaintiff ... . In opposition, however, the plaintiff raised a triable issue of fact as to whether Mancuso's actions preceding the assault constituted an overt act in furtherance of the assault ... . [McKiernan v Vaccaro](#), 2019 NY Slip Op 00267, Second Dept 1-16-19

**TOXIC TORTS, LEAD PAINT.**

**TOXIC TORTS, MUNICIPAL LAW. APPLICATION FOR LEAVE TO FILE LATE NOTICES OF CLAIM AGAINST THE VILLAGE STEMMING FROM A HAZARDOUS SUBSTANCE IN THE WATER SUPPLY PROPERLY GRANTED, ALTHOUGH THERE WAS NO ADEQUATE EXCUSE FOR THE DELAY, THE VILLAGE HAD TIMELY NOTICE OF THE FACTS UNDERLYING THE CLAIM AND WAS NOT PREJUDICED BY THE DELAY (THIRD DEPT).**

The Third Department determined Supreme Court properly granted petitioners' application to file late notices of claim against the village stemming from a hazardous substance, PFOA, in the municipal water supply. Although petitioners did not have an adequate excuse for the delay, respondents had timely knowledge of the facts underlying the claim and were not prejudiced by the the delay:

... [I]t is evident that respondent was well aware of the PFOA contamination in its municipal water system, the likelihood of increased PFOA levels in the blood of its residents as a result of exposure to PFOA and the potential negative health consequences as a result thereof. On the record before us, therefore, respondent cannot plausibly claim that it had only a “general awareness” of the presence of PFOA in its municipal water system. Accordingly, we conclude that Supreme Court properly found that respondent had actual notice of all the essential facts underlying petitioners' claims ... .

Further, there has been no demonstration of substantial prejudice to respondent as a result of petitioners' delay in seeking to file late notices of claim ... . Respondent has been aware of the subject PFOA contamination since at least October 2014, it was apprised of the potential negative health risks to its residents from PFOA exposure and, as a result of the blood testing program commenced by DOH, it learned of the elevated levels of PFOA in its residents — despite its efforts to downplay said results. Moreover, respondent alleges that it has located the source of the PFOA contamination and petitioners, as residents of respondent, remain available for any further investigation into whether respondent's conduct was the proximate cause of their alleged injuries. In turn, other than the passage of time, respondent has offered no particularized evidence in opposition to establish that it suffered substantial prejudice ... . [Matter of Holbrook v Village of Hoosick Falls, 2019 NY Slip Op 00342, Third Dept 1-17-19](#)

## **TOXIC TORTS, LEAD PAINT.**

### **STATUTORY PRESUMPTION THAT THE PAINT CONTAINED LEAD DID NOT APPLY BECAUSE THERE WAS NO EVIDENCE THE INTERIOR OF THE BUILDING WAS PAINTED PRIOR TO JANUARY 1, 1960; HOWEVER QUESTIONS OF FACT WERE RAISED ABOUT THE PRESENCE OF LEAD PAINT AND THE CONNECTION BETWEEN THE PAINT AND INFANT PLAINTIFF'S LEAD POISONING, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (FIRST DEPT).**

The First Department, in a full-fledged opinion by Justice Moulton, reversing Supreme Court, determined that questions of fact were raised about the landlord's (New York City Housing Authority's, NYCHA's) responsibility for the lead poisoning of infant plaintiff (A.L.). Successive blood tests revealed increasing lead levels as the child aged, and a decrease after the apartment was repainted. The first issue the court dealt with was whether Local Law 1, which creates a presumption that the paint in the apartment contains more than .5 percent lead for buildings "erected" prior to January 1, 1960, applied. The certificate of occupancy for the building was issued in March, 1961, but there was evidence the building was under construction in 1959. "Erected" was (apparently) interpreted to mean when the apartment was painted, so the statutory presumption did not apply:

Here, A.L.'s elevated blood lead level suggests ... a hazardous condition may have existed in the apartment during the relevant period. While there are other sources of lead poisoning, housing is a prime source ... The circumstantial evidence of a hazardous lead-based paint condition is also supported by an affirmation by Dr. Douglas B. Savino and an affidavit by lead paint expert William Savarese. Dr. Savino concluded that the apartment contained a hazardous level of lead-based paint, given the "chronology of the infant plaintiff's blood lead levels," which was "environmentally and temporally related to the infant plaintiff's residence." He noted that A.L.'s blood levels increased over time until he was diagnosed with 16 ug/dl on March 19, 2003, coinciding with the repainting of the apartment on March 5-6, 2003. Dr. Savino attributed the lead spike in A.L.'s blood to A.L. ingesting an excessive amount of lead dust. Dr. Savino further pointed out that A.L.'s blood lead levels declined gradually after the 2003 apartment repair and the 2004 removal of the chipped and peeling interior doors. William Savarese echoed Dr. Savino's statements and conclusions. *A.L. v New York City Hous. Auth.*, 2019 NY Slip Op 00702, First Dept 1-31-19

## **TRAFFIC ACCIDENTS, DAMAGES.**

### **MOTION TO SET ASIDE THE DAMAGES VERDICT IN THIS TRAFFIC ACCIDENT CASE AS AGAINST THE WEIGHT OF THE EVIDENCE SHOULD HAVE BEEN GRANTED, THE JURY FOUND THE INJURY TO BE PERMANENT BUT DID NOT AWARD DAMAGES FOR FUTURE PAIN AND SUFFERING, DAMAGES FOR PAST PAIN AND SUFFERING TOO LOW, MAY HAVE BEEN AN IMPERMISSIBLE COMPROMISE VERDICT (SECOND DEPT)**

The Second Department, reversing Supreme Court and granting a new trial, determined the jury's damages verdict in this rear-end collision, traffic accident case should have been granted. The jury found that plaintiff suffered a permanent injury but did not award plaintiff with damages for future pain and suffering. The Second Department further determined the \$12,500 verdict for past pain and suffering was too low:

A jury verdict should be set aside as contrary to the weight of the evidence only if the jury could not have reached the verdict by any fair interpretation of the evidence... . Here, the Supreme Court should have granted the plaintiff's motion pursuant to CPLR 4404(a) to set aside the verdict on the issue of damages for past pain and suffering and future pain and suffering, as the verdict with respect to those damages was contrary to the weight of the evidence. The jury's determination that the plaintiff was not entitled to damages for future pain and suffering was inconsistent with the jury's finding that his injuries were permanent in nature and were proximately caused by the accident ... . Furthermore, whereas the jury was presented with conflicting evidence and theories as to the cause of the plaintiff's injuries, and the jury's award for past pain and suffering was inexplicably low, it appears that the verdict with respect to damages for past pain and suffering may have been the result of an impermissible compromise ... . [Avisato v McDaniel, 2019 NY Slip Op 00084, Second Dept 1-9-19](#)

## **TRAFFIC ACCIDENTS.**

### **DEFENDANT'S UNATTENDED TOW TRUCK MOVED BACKWARDS INTO PLAINTIFF'S CAR, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (FIRST DEPT),**

The First Department, reversing Supreme Court, determined plaintiff's motion for summary judgment in this traffic accident case should have been granted. Defendant's tow truck was left running and unattended when it moved backwards into plaintiff's car:

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Plaintiff established entitlement to judgment as a matter of law in this action where he was injured when defendants' tow truck was left unattended by its driver, defendant Millar, and rolled backwards into plaintiff's car, which was stopped behind the tow truck. When a driver fails to secure an unattended vehicle sufficiently to prevent it from starting to move on its own, the driver is negligent ...

In opposition, defendants did not raise a triable issue of fact as they failed to offer a non-negligent explanation for the collision... . Defendants' speculation that, even though Millar left the gear in "park" before exiting the tow truck, the gear must have slipped into reverse on its own due to some mechanical failure is insufficient to raise an issue of fact ... . Defendants present no evidence of any type of mechanical failure or defect in the tow truck, which Millar was able to drive back to the depot after the accident without incident. [Franco v City of New York, 2019 NY Slip Op 00377, First Dept 1-22-19](#)

## **TRAFFIC ACCIDENTS, DISCOVERY, SOCIAL MEDIA.**

### **MOTION TO COMPEL ACCESS TO PLAINTIFF'S DEVICES, EMAIL ACCOUNTS AND SOCIAL MEDIA ACCOUNTS TO OBTAIN EVIDENCE OF PLAINTIFF'S PHYSICAL ACTIVITIES SINCE THE TRAFFIC ACCIDENT SHOULD HAVE BEEN GRANTED (FIRST DEPT).**

The First Department, reversing Supreme Court, determined that the motion to compel "access by a third-party data mining company to plaintiff's devices, email accounts, and social media accounts, so as to obtain photographs and other evidence of plaintiff engaging in physical activities" should have been granted:

Private social media information can be discoverable to the extent it "contradicts or conflicts with [a] plaintiff's alleged restrictions, disabilities, and losses, and other claims" ... . Here, plaintiff, who at one time was a semi-professional basketball player, claims that he has become disabled as the result of the automobile accident at issue, such that he can no longer play basketball. Although plaintiff testified that pictures depicting him playing basketball, which were posted on social media after the accident, were in games played before the accident, defendant is entitled to discovery to rebut such claims and defend against plaintiff's claims of injury. That plaintiff did not take the pictures himself is of no import. He was "tagged," thus allowing him access to them, and others were sent to his phone. Plaintiff's response to prior court orders, which consisted of a HIPAA authorization refused by Facebook, some obviously immaterial postings, and a vague affidavit claiming to no longer have the photographs, did not comply with his discovery obligations. The access to plaintiff's accounts and devices, however, is appropriately limited in time, i.e., only those items posted or sent after the accident,



and in subject matter, i.e., those items discussing or showing defendant engaging in basketball or other similar physical activities ... . *Vasquez-Santos v Mathew*, 2019 NY Slip Op 00541, First Dept 1-24-19

## **TRAFFIC ACCIDENTS, EMPLOYMENT LAW.**

### **TRAFFIC ACCIDENTS, EMPLOYMENT LAW. CITY’S POTENTIAL LIABILITY FOR THE ACTIONS OF A CITY BUS DRIVER WAS BASED ON RESPONDEAT SUPERIOR, THEREFORE A NEGLIGENT HIRING AND RETENTION ACTION WAS NOT VIABLE AND THE DRIVER’S PERSONNEL FILE WAS NOT DISCOVERABLE (SECOND DEPT).**

The Second Department, reversing Supreme Court, determined the city’s motion to vacate the order compelling disclosure of the city bus driver’s personnel file should have been granted. Plaintiff alleged she was injured when she fell on a city bus. The city acknowledged that the driver was acting within the scope of his employment when the accident occurred. Therefore the city’s potential liability was based upon respondeat superior, and a negligent hiring and retention action was not viable. Therefore the personnel records were not discoverable:

“Generally, where an employee is acting within the scope of his or her employment, the employer is liable for the employee’s negligence under a theory of respondeat superior, and a plaintiff may not proceed with a cause of action to recover damages for negligent hiring and retention”... . In light of the defendants’ formal concession that the bus driver was acting within the scope of his employment when the accident occurred, the personnel records of the bus driver are not discoverable... . Furthermore, the plaintiff failed to show any other basis to justify granting her request for the personnel records, as “any prior acts of carelessness or incompetence of the defendant’s employee would not be admissible at trial” ... . Therefore, the additional discovery sought by the plaintiff is not relevant or reasonably calculated to lead to evidence relevant to the issue of the driver’s alleged negligence ... . *Trotman v New York City Tr. Auth.*, 2019 NY Slip Op 00631, Second Dept 1-30-19

## **TRAFFIC ACCIDENTS, EMPLOYMENT LAW.**

### **THE RELATION BACK DOCTRINE ALLOWED PLAINTIFF TO SERVE A SUPPLEMENTAL SUMMONS AND COMPLAINT ON THE DRIVER'S EMPLOYER IN THIS TRAFFIC ACCIDENT CASE PURSUANT TO THE RESPONDEAT SUPERIOR THEORY OF LIABILITY, AFTER THE ACTION WAS STARTED PLAINTIFF LEARNED THAT THE DRIVER OF THE CAR IN WHICH PLAINTIFF'S DECEDENT WAS A PASSENGER WAS PAID BY THE EMPLOYER TO TRANSPORT THE OTHER EMPLOYEES IN THE CAR TO WORK (FIRST DEPT).**

The First Department, reversing Supreme Court, determined that the relation-back doctrine (CPLR 203(f)) allowed plaintiff, Polanco, to serve a supplemental summons and complaint against the employer of Elias-Tejada, the driver of the car in which plaintiff's decedent was a passenger. The Elias-Tejada car stalled on a bridge and was struck from behind. Plaintiff (Polanco) did not learn until after the action was started that Elias-Tejada was paid by his employer, Fairway, to transport the other occupants of his car, all Fairway employees, to work. Plaintiff (Polanco) sought to add Fairway as a defendant under a respondeat superior theory and the First Department held he could do so:

The claims that Polanco seeks to assert against Fairway arise out of the same occurrence as alleged in the complaint against Elias-Tejada [and the other two defendant drivers]. ... [W]e find that Polanco also satisfied the second condition, because under the doctrine of respondeat superior, an employer will be vicariously liable for the negligence of an employee committed while the employee is acting in the scope of his or her employment ... . Based on Elias-Tejada's employer/employee relationship with Fairway, they are united in interest because a judgment against one of them will similarly affect the other ... . [T]he Fairway defendants can, therefore, be charged as having notice of Polanco's potential claims against them, based upon the claims asserted against Elias-Tejada in the original summons and complaint ... .

... Only later, after depositions were held, including those of a key Fairway employee and Elias-Tejada, did [plaintiff] learn that Fairway compensated Elias-Tejada for hosting the car pool and that this travel arrangement was condoned, if not actually implemented and encouraged, by Fairway's human resources department because Fairway reimbursed him for tolls and mileage. [Ramirez v Elias-Tejada, 2019 NY Slip Op 00021, First Dept 1-3-19](#)

## **TRAFFIC ACCIDENTS, JURISDICTION, CORPORATION LAW.**

### **A CORPORATION’S REGISTRATION WITH THE DEPARTMENT OF STATE IS NO LONGER DEEMED CONSENT TO BE SUED IN NEW YORK, FORD’S AND GOODYEAR’S MOTIONS TO DISMISS FOR LACK OF PERSONAL JURISDICTION SHOULD HAVE BEEN GRANTED, THE SUIT STEMMED FROM A ROLLOVER ACCIDENT IN VIRGINIA (SECOND DEPT).**

The Second Department, in full-fledged opinion by Justice Brathwaite-Nelson, determined that a products liability case (stemming from a traffic accident in Virginia) against Ford, the manufacturer of the vehicle which rolled over, and Goodyear, the manufacturer of a tire which allegedly failed, could not be brought in New York. The plaintiffs alleged general jurisdiction over both companies based upon business done generally in New York and registration with the NY Department of State. The plaintiffs did not allege long-arm jurisdiction. Neither the vehicle nor the tire was manufactured or purchased from the defendants in New York. The plaintiff had purchased the vehicle from a New York nonparty and had used the vehicle in New York.

We consider on these appeals whether, following the United States Supreme Court decision in *Daimler AG v Bauman* (571 US 117), a foreign corporation may still be deemed to have consented to the general jurisdiction of New York courts by virtue of having registered to do business in New York and appointed a local agent for the service of process. We conclude that it may not. \* \* \*

We agree with those courts that asserting jurisdiction over a foreign corporation based on the mere registration and the accompanying appointment of an in-state agent by the foreign corporation, without the express consent of the foreign corporation to general jurisdiction, would be “unacceptably grasping” under *Daimler* (*Daimler AG v Bauman*, 571 US at 138).

The Court of Appeals does not appear to have ... relied upon its consent-by-registration theory since *International Shoe* was decided. We think that this is a strong indicator that its rationale is confined to that era ... and that it no longer holds in the post-*Daimler* landscape. We conclude that a corporate defendant’s registration to do business in New York and designation of the secretary of state to accept service of process in New York does not constitute consent by the corporation to submit to the general jurisdiction of New York for causes of action that are unrelated to the corporation’s affiliations with New York. [Aybar v Aybar, 2019 NY Slip Op 00412, Second Dept 1-23-19](#)