# NEW YORK APPELLATE DIGEST,LLC

Negligence
June 2019

Negligence-Related Decision-Summaries Posted on the Website www.NewYorkAppellateDigest.com in June, 2019, Organized by Topic.

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## ASSUMPTION OF THE RISK.

## PLAINTIFF ASSUMED THE RISK OF PARTICIPATING IN AN OBSTACLE COURSE RACE; PLAINTIFF FELL ATTEMPTING A 'MONSTER CLIMB' WHICH HAD BEEN ERECTED ON A ROADWAY WITH NO MATS BENEATH (SECOND DEPT).

The Second Department determined plaintiff assumed the risk of injury by participating in a "Monster Climb" knowing she could fall and knowing there were no protective mats. The event was an obstacle course race sponsored by defendants and held at a public park:

… [T]he plaintiffs argued that the assumption of risk doctrine cannot apply unless the sport or recreational activity takes place at a permanent, designated facility. They also argued that there were triable issues of fact as to whether the defendants unreasonably increased the risk of the Monster Climb obstacle by erecting it on a roadway without protective mats underneath it, by allowing an unlimited number of participants on the obstacle's cargo nets at the same time, and by having staffers shout at the injured plaintiff to turn her body and hurry up. …

The "assumption of risk doctrine applies where a consenting participant in sporting and amusement activities is aware of the risks; has an appreciation of the nature of the risks; and voluntarily assumes the risks'"… . "If the risks of the activity are fully comprehended or perfectly obvious, plaintiff has consented to them and defendant has performed its duty" … . Risks which are "commonly encountered" or "inherent" in a sport, as well as risks "involving less than optimal conditions," are risks which participants have accepted and are encompassed by the assumption of risk doctrine … "It is not necessary . . . that the injured plaintiff have foreseen the exact manner in which his or her injury occurred, so long as he or she is aware of the potential for injury of the mechanism from which the injury results" … . A participant's awareness of risk is "to be assessed against the background of the skill and experience of the particular plaintiff" … . Ramos v Michael Epstein Sports Prods., Inc., 2019 NY Slip Op 04973, Second Dept 6-19-19

## COMMON CARRIERS.

## THE MOVEMENT OF THE COMMON CARRIER'S VAN WAS NOT UNUSUAL OR VIOLENT, THE PERSONAL INJURY ACTION BROUGHT BY A PASSENGER SHOULD HAVE BEEN DISMISSED (SECOND DEPT).

The Second Department determined that the common carrier's motion for summary judgment in this personal injury case should have been granted. Plaintiff alleged injury caused when defendant's van hit an expansion joint in the highway:

"To establish a prima facie case of negligence against a common carrier for injuries sustained by a passenger as a result of the movement of the vehicle, the plaintiff must establish that the movement consisted of a jerk or lurch that was unusual [and] violent" … . There must be evidence that the movement of the vehicle was "of a different class than the jerks and jolts commonly experienced in city bus travel,'" and, therefore, attributable to the negligence of defendant … .

Here, the defendant established its prima facie entitlement to judgment as a matter of law through its submission of the deposition testimony of the plaintiff, who testified that the van in which he was a passenger was constantly jostled up and down, and that when the van hit one of the expansion joints in the highway, he heard something in his neck snap. The plaintiff admitted that his body was not physically moving up and down, and that the bumps and jolts of the van were only putting pressure on his lower back. Thus, the evidence established that the movement of the van at issue was not unusual and violent … . Petrie v Golden Touch Transp. of NY, Inc., 2019 NY Slip Op 04431, Second Dept 6-5-19

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## EDUCATION-SCHOOL LAW, NEGLIGENT SUPERVISION, THIRD-PARTY ASSAULT.

## DISCOVERY OF PRIOR ASSAULTS IN THIS STUDENT ON STUDENT THIRD-PARTY ASSAULT CASE SHOULD NOT HAVE BEEN LIMITED TO PRIOR SEXUAL ASSAULTS AND PRIOR ASSAULTS BETWEEN THE TWO STUDENTS, ASSAULTS OF ANY KIND MAY HAVE PUT THE SCHOOL ON NOTICE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that discovery in this third-party assault (negligent supervision) case should not have been restricted to prior sexual assaults in the school and prior assaults between the alleged (student) perpetrator and the (student) plaintiff:

We disagree with the Supreme Court's determination that the defendants were only required to provide records pertaining to "assaults of a sexual nature" and "all assaults of any nature between" the infant plaintiff and the student alleged to have sexually assaulted the infant plaintiff. Evidence of prior assaults at the school, particularly any assaults in the stairwell where the subject incident occurred, may be sufficient to establish that the defendants had actual or constructive notice of conduct similar to the subject incident … . Moreover, evidence of any prior assaults perpetuated by the offending student against students other than the infant plaintiff may be sufficient to establish that the defendants had actual or constructive notice of the offending student's dangerous propensities … . M.C. v City of New York, 2019 NY Slip Op 04372, Second Dept 6-5-19

## EDUCATION-SCHOOL LAW, NEGLIGENT SUPERVISION.

## THE GYM TEACHER TOLD THE STUDENTS TO RUN AROUND THE PERIMETER OF THE BUILDING; STUDENT PLAINTIFF TRIPPED AND FELL OVER A CHAIN WHICH, SHE ALLEGED, OTHER STUDENTS WERE JUMPING OVER AS THEY RAN; THE SCHOOL DISTRICT'S MOTION FOR SUMMARY JUDGMENT IN THIS NEGLIGENT SUPERVISION SLIP AND FALL CASE WAS PROPERLY DENIED (SECOND DEPT).

The Second Department determined that the school district's motion for summary judgment in this negligent supervision action was properly denied. The gym teacher told the students to run around the perimeter of the building and, according to the student-plaintiff, some students were jumping over a chain. The student-plaintiff attempted to jump over the chain when she tripped and fell:

The infant plaintiff testified at her deposition that the gym teacher did not instruct her not to jump over anything, and that approximately 20 students jumped over the chain before she attempted to do so. She initially did not know what the other students were jumping over, and she realized that they were jumping over the chain when she was approximately five feet away from it. The infant plaintiff was still jogging at that point. She did not see the chain until she was very close to it because the chain "blend[ed] in." The gym teacher testified at his deposition that the students usually ran on a grassy area around the perimeter of a field. On the day of the accident, however, he instructed the infant plaintiff and her classmates to run around the perimeter of the school building because the grassy area was too wet and muddy. He had never before instructed that class to run around the perimeter of the building. The gym teacher also testified that he instructed the students to avoid the chain, that he ran behind the students, and that, when he reached the chain, he observed students running around it. …

… [T]the school district failed to demonstrate, prima facie, that it provided adequate supervision, or that a lack of adequate supervision was not a proximate cause of the infant plaintiff's injuries … . B.T. v Bethpage Union Free Sch. Dist., 2019 NY Slip Op 04442, Second Dept 6-5-19

## EDUCATION-SCHOOL LAW, DANGEROUS CONDITION.

## PLAINTIFF-STUDENT WAS INJURED BY AN OUTWARD-SWINGING BATHROOM DOOR WHICH OPENED INTO THE HALLWAY, THE SCHOOL DISTRICT'S MOTION TO SET ASIDE THE PLAINTIFF'S NEGLIGENCE VERDICT PROPERLY DENIED (FOURTH DEPT).

The Fourth Department determined the motion to set aside the negligence verdict against the school district was properly denied. Plaintiff student was injured by a bathroom door which opened outward into the hallway on the side of the hallway the students were instructed to use:

[The] evidence, which we have evaluated in light of the unchallenged jury instructions given by the court … , included testimony from the school's principal that it would have been safer for students walking in the hallway to have the door open inward and that the likelihood of the door opening into someone's path was increased because the students were instructed to walk on the right side of the hallway next to the door. In addition, the director of facilities for defendant Williamsville Central School District at the time of the incident testified that it was very possible that the outward-swinging door could strike someone walking down the hallway, that he did not know of any reason why the door opened outward, and that the door could have been modified by his staff in a short time at minimal expense. The jury was also able to consider trial exhibits including oversized photographs and architectural schemata to help it determine whether, in light of all the circumstances … , the bathroom door was, as charged by the court, "reasonably safe." Thus, even apart from the testimony of the expert, there is legally sufficient evidence from which the jury could conclude, based on common sense and the ordinary experience and knowledge possessed by laypersons … , that the outward-opening door was not reasonably safe. Douglas F. v Williamsville Cent. Sch. Dist., 2019 NY Slip Op 04536, Fourth Dept 6-7-19

## EMPLOYMENT LAW, FEDERAL EMPLOYERS' LIABILITY ACT.

## DEFENDANT RAILROAD'S MOTION FOR SUMMARY JUDGMENT IN THIS FEDERAL EMPLOYERS' LIABILITY ACT (FELA) ACTION BY A RAILROAD EMPLOYEE WHO WAS ASSAULTED BY A PASSENGER PROPERLY DENIED (FIRST DEPT).

The First Department determined the defendant railroad's motion for summary judgment in this Federal Employers' Liability Act (FELA) by a railroad employee assaulted by a passenger was properly denied. The court explained the evidentiary criteria under the FELA:

The Federal Employers' Liability Act (FELA) (45 USC § 51 et seq.) provides that operators of interstate railroads shall be liable to their employees for on-the-job injuries resulting from the railroad's negligence. In an action under FELA, "the plaintiff must prove the traditional common-law elements of negligence: duty, breach, damages, causation and foreseeability" … . However, these elements are "substantially relaxed" and "negligence

is liberally construed to effectuate the statute's broadly remedial intended function" … . A claim under FELA "must be determined by the jury if there is any question as to whether employer negligence played a part, however small, in producing plaintiff's injury" … . "A case is deemed unworthy of submission to a jury only if evidence of negligence is so thin that on a judicial appraisal, the only conclusion that could be drawn is that negligence by the employer could have played no part in an employee's injury" … .

To establish the element of foreseeability, a plaintiff must show that the defendant had either actual or constructive notice of the defective condition (id.). However, notice generally presents an issue of fact for the jury … . "As with all issues under FELA, the right of the jury to pass on this issue must be liberally construed, with the jury's power to draw inferences greater than in a common-law action" … .

Under the foregoing relaxed standard, there is sufficient evidence to raise an issue of fact concerning defendant's actual or constructive notice of a risk of assault to conductors on the New Haven Line. Plaintiff testified that she was previously assaulted by a passenger, and that there was an ongoing problem of physical intimidation by large groups of adolescents refusing to pay their fares, which caused her to fear for her safety. Plaintiff also testified that she has called the MTA's rail traffic controllers for police assistance at least 250 times to deal with abusive passengers; another conductor was punched in the face and knocked out on the New Haven Line; a passenger attempted to stab and rob another conductor on the Harlem Line. Stephney v MTA Metro-N. R.R., 2019 NY Slip Op 05004, First Dept 6-20-19

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## EMPLOYMENT LAW, DANGEROUS CONDITION.

## SCHOOL EMPLOYEE'S NEGLIGENCE ACTION AGAINST THE DEPARTMENT OF EDUCATION IS NOT GOVERNED BY THE COLLECTIVE BARGAINING AGREEMENT (CBA), NO NEED TO EXHAUST ADMINISTRATIVE REMEDIES; DENIAL OF MEDICAL LEAVE DID NOT HAVE RES JUDICATA OR COLLATERAL ESTOPPEL EFFECT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined an employee's personal injury complaint against the NYC Department of Education (DOE), stemming from an elevator accident, should not have been dismissed. The plaintiff-employee first applied to the DOE for line of duty injury paid medical leave pursuant to the collective bargaining agreement (CBA) and was denied. Plaintiff then commenced the personal injury action. The DOE argued that plaintiff had failed to exhaust the administrative remedies required by the CBA and, in the alternative, the denial of the line of duty pay should be given res judicata or collateral estoppel effect. Supreme Court decided plaintiff had failed to exhaust the administrative remedies. The Second Department held that her injury and the resulting negligence action were not covered by the CBA:

An employee covered by a collective bargaining agreement which provides for a grievance procedure must exhaust administrative remedies prior to seeking judicial remedies … or face dismissal of the action …. Here, however, the plaintiff seeks to recover damages against the defendants for pain and suffering based upon a negligence theory of liability which is outside the scope of, and is not governed by, the CBA's "line of duty injury" paid leave grievance provisions… . There is no need to exhaust administrative remedies when the cause of action by the plaintiff is not governed by the CBA … .

The defendants' contention that dismissal is also warranted on the basis of collateral estoppel and res judicata is without merit … . Collateral estoppel is inapplicable, as the defendants failed to demonstrate that the issue that the plaintiff seeks to pursue here was necessarily decided by the DOE when it denied the plaintiff's "line of duty injury" paid leave application … . Likewise, the doctrine of res judicata, or claim preclusion, also is inapplicable to the plaintiff's complaint because the relief she seeks could not have been awarded within the context of the prior administrative proceeding … . Shortt v City of New York, 2019 NY Slip Op 04745, Second Dept 6-12-19

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## EMPLOYMENT LAW, PRIMA FACIE TORT.

## NEGLIGENT HIRING AND SUPERVISION AND PRIMA FACIE TORT CAUSES OF ACTION SHOULD HAVE BEEN DISMISSED, NO ALLEGATION EMPLOYEES WERE ACTING OUTSIDE THE SCOPE OF EMPLOYMENT, NO ALLEGATION MALICE WAS DEFENDANT'S SOLE MOTIVATION (FOURTH DEPT).

The Fourth Department determined plaintiff's negligent hiring and supervision and prima facie tort causes of action should have been dismissed. The lawsuit alleged defendant insurer failed to pay claims for medical care submitted by plaintiff:

"An employer may be liable for a claim of negligent hiring or supervision if an employee commits an independent act of negligence outside the scope of employment and the employer was aware of, or reasonably should have foreseen, the employee's propensity to commit such an act" … . Here, plaintiff's cause of action for negligent hiring, supervision or retention is based on the factual allegations that defendant's employees denied or delayed the payment of claims to plaintiff and sent repetitive verification demands, and that defendant was aware of what its employees were doing and continued to employ them. Plaintiff, however, failed to allege that those acts were committed outside the scope of the employees' employment. Plaintiff also failed to allege how the employees' alleged acts of denying claims and sending verification demands constituted acts of negligence. …

"There can be no recovery [for prima facie tort] unless a disinterested malevolence' to injure [the] plaintiff constitutes the sole motivation for defendant['s] otherwise lawful act" … . Here, plaintiff alleged that defendant acted in "bad faith" and intended harm by repeatedly sending plaintiff duplicitous requests for verification forms to be completed. Those conclusory statements in the amended complaint, however, fail to allege "a malicious [act] unmixed with any other and exclusively directed to [the] injury and damage of another" … . Furthermore, it is "[a] critical element of the cause of action . . . that plaintiff suffered specific and measurable loss" … , which "must be alleged with sufficient particularity to identify actual losses and be related causally to the alleged tortious acts" … , but the injuries alleged by plaintiff are "couched in broad and conclusory terms" … , and do not constitute "specific and measurable loss" stated with particularity … . Walden Bailey Chiropractic, P.C. v Geico Cas. Co., 2019 NY Slip Op 05267, Fourth Dept 6-28-19

## LEGAL MALPRACTICE, DISGORGE LEGAL FEES.

## THE COMPLAINT STATED A CAUSE OF ACTION TO DISGORGE LEGAL FEES PAID TO LAWFIRM WHICH IS ALLEGED TO HAVE REPRESENTED ADVERSE PARTIES IN THE SAME MATTER; THE ACTION TO DISGORGE FEES IS INDEPENDENT FROM ANY ACTION ALLEGING LEGAL MALPRACTICE OR BREACH OF A FIDUCIARY DUTY (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the complaint stated a cause of action for forfeiture of legal fees on conflict of interest grounds:

The complaint alleged that the plaintiff's decedent retained the defendant in 2005 to, among other things, analyze her ownership interest in Wilson [Corporation], including her right to certain retained earnings in the sum of $20 million. The complaint further alleged that, in January 2007, the defendant began acting as Wilson's corporate counsel, and, beginning in 2008, performed legal services for Wilson regarding the decedent's right to those retained earnings. * * *

"An attorney who violates a disciplinary rule may be discharged for cause and is not entitled to fees for any services rendered" … . A cause of action for forfeiture of legal fees based on an attorney's discharge for cause due to ethical violations may be maintained independent of a cause of action alleging legal malpractice or breach of fiduciary duty, and does not require proof or allegations of damages … .

… [T]he complaint seeks forfeiture of legal fees paid to the defendant between January 2007 and August 2009 in connection with the plaintiff's decedent's claim against Wilson for retained earnings. The complaint alleges that the decedent retained the defendant in January 2007 to recoup the retained earnings from Wilson, that the defendant also represented and performed legal work for Wilson on that issue between 2008 and 2009, that the interests of the decedent and Wilson on that issue were adverse, and that the dual representation violated rule 1.7 of the Rules of Professional Conduct (22 NYCRR 1200.0). The complaint further alleged that, as a result of its previous dual representation, the defendant was disqualified from representing the decedent's estate in a 2009 turnover proceeding against Wilson to collect the retained earnings. Contrary to the determination of the Supreme Court, these allegations are sufficient to state a viable cause of action to disgorge legal fees … . Baugher v Cullen & Dykman, LLP, 2019 NY Slip Op 04904, Second Dept 6-19-19

## MEDICAL MALPRACTICE, DEFENSE VERDICT SET ASIDE.

## PLAINTIFF'S MOTION TO SET ASIDE THE DEFENSE VERDICT IN THIS MEDICAL MALPRACTICE CASE SHOULD HAVE BEEN GRANTED, THE VERDICT WAS AGAINST THE WEIGHT OF THE EVIDENCE; THE VERDICT SHEET DID NOT REFLECT THE TRIAL EVIDENCE ON THE APPLICABLE STANDARD OF CARE (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, over a two-justice dissent, determined plaintiff's motion to set aside the defense verdict in this medical malpractice case should have been granted. Plaintiff alleged her bowel was perforated during surgery. The defense expert testified the bowel must be fully inspected as it is replaced, section by section. However, defendant surgeon testified he did not fully inspect the bowel. In addition the jury was asked to determine whether the bowel was subjected to a "focused inspection." However there was no trial evidence equating a "focused inspection" with the standard of care. A new trial was necessary:

The weight of the evidence greatly preponderates in favor of plaintiff due, in no small part, to defendant's testimony that he not only failed to perform a "focused inspection" of the bowel, but that "[he could not] not observe it" as he returned it into plaintiff's abdomen. In not "observing" the bowel, defendant plainly could not have conducted a careful visualization of the body part as it was returned to plaintiff's body; therefore he was plainly not performing a "focused inspection." Defendant also admitted that "[he] didn't specifically look for [bruising]" of the bowel, which his own expert testified is required when inspecting the bowel during an aortobifemoral bypass surgery.

Defendant also testified that he only looked at the bowel's top side. Although his expert did not testify that defendant was personally required to view the other side, she did explain that the other surgeon in the operating room must view that side so that both surgeons, collectively, can view the entire bowel. Defendant did not testify that he ensured that the assisting surgeon carefully viewed the back side of the bowel, segment by segment. Moreover, the assisting surgeon did not testify that defendant instructed her to do so. Inasmuch as defendant's conduct does not meet the standard articulated by the expert witnesses, we conclude that the evidence so preponderates in plaintiff's favor that the court erred in denying her motion to set aside the verdict … Monzon v Porter, 2019 NY Slip Op 04855, Fourth Dept 6-14-19

## MEDICAL MALPRACTICE, OPIOIDS PRESCRIBED FOR ADDICT.

## PAIN MANAGEMENT DOCTOR'S MOTION FOR SUMMARY JUDGMENT IN THIS MEDICAL MALPRACTICE/WRONGFUL DEATH CASE PROPERLY DENIED, THE DOCTOR PRESCRIBED OPIOIDS FOR PLAINTIFF'S DECEDENT, A DRUG ADDICT (SECOND DEPT).

The First Department determined defendant pain-management doctor's (Kiri's) motion for summary judgment in this medical malpractice case was properly denied. Kiri allegedly continued to prescribe high-dosage opioids to plaintiff's decedent knowing that she was an addict. Plaintiff's decedent died of a drug overdose. Although plaintiff's decedent used illicit drugs as well, there was a question of fact about the proximate cause of death and whether the death was a foreseeable consequence of prescribing opioids:

Plaintiff's theory of liability is that Dr. Kiri's prescription of high-dose opioid pain killers for more than a year, despite the fact that her medical records showed drug use and drug seeking behavior, escalated, enhanced, or encouraged that behavior. An accidental overdose is not an unforeseeable result of prescribing, or over-prescribing, opioid painkillers to a patient who displays signs of addiction … . More specifically, here, decedent's procurement and use of illicit drugs were not unforeseeable in light of the indicia of addiction or misuse noted in her medical records. Because decedent's use of illicit drugs was not unforeseeable, her drug use was not an intervening cause and did not amount to a separate act of negligence that independently caused her death. Halloran v Kiri, 2019 NY Slip Op 04769, First Dept 6-13-19

## MEDICAL MALPRACTICE, CAUSAL RELATIONSHIP.

## PLAINTIFF'S EXPERT'S AFFIDAVIT DID NOT DEMONSTRATE A CAUSAL RELATIONSHIP BETWEEN THE ALLEGED DEVIATION FROM THE STANDARD OF CARE AND PLAINTIFF'S INJURY WITH RESPECT TO ONE OF THE DEFENDANT DOCTORS, THE DOCTOR'S SUMMARY JUDGMENT MOTION SHOULD HAVE BEEN GRANTED (FOURTH DEPT).

The Fourth Department, reversing (modifying) Supreme Court, over a two-justice dissent, determined that the medical malpractice action against defendant Dr. Dietz and his employer should have been granted because plaintiff's expert did not raise a question of fact about whether the alleged departure from the standard of care had a causal relationship with the plaintiff's injury. The majority concluded the expert's affidavit was sufficient to raise a question of fact with respect a second defendant, Dr. Pedersen, but the dissent argued the affidavit with respect to Dr. Pedersen was conclusory and did not demonstrate a causal relationship:

… [P]laintiff's expert did not opine that Dr. Dietz caused the iliac vein injury and instead opined that Dr. Dietz deviated from the standard of care by insufficiently examining or testing the iliac vein following Dr. Pedersen's repair. Inasmuch as plaintiff's expert did not indicate the possible results of any such examination or testing, whether those results should have prompted a different course of treatment, or how Dr. Dietz's alleged departure from the standard of care otherwise caused plaintiff's injury, plaintiff failed to raise an issue of fact as to causation regarding Dr. Dietz … . Dickinson v Bassett Healthcare, 2019 NY Slip Op 04610, Fourth Dept 6-7-19

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## MUNICIPAL LAW, TRAFFIC ACCIDENTS, EMERGENCY VEHICLES.

## THE RECKLESS DISREGARD STANDARD APPLIED TO DEFENDANT POLICE OFFICER WHO WAS RESPONDING TO AN EMERGENCY WHEN THE TRAFFIC ACCIDENT OCCURRED, THE OFFICER TOOK PRECAUTIONARY MEASURES AND THEREFORE HIS CONDUCT DID NOT RISE TO THE LEVEL OF RECKLESS DISREGARD OF THE SAFETY OF OTHERS (FOURTH DEPT).

The Fourth Department, reversing (modifying) Supreme Court, determined "reckless disregard" standard for the operation of a police car in an emergency situation applied to the facts, and further found that the officer's conduct did not rise to the level of "reckless disregard:"

We agree with defendants that the court erred in determining that the defendant officer's conduct was not measured by the "reckless disregard" standard of care under Vehicle and Traffic Law § 1104 (e) … . That standard of care "applies when a driver of an authorized emergency vehicle involved in an emergency operation engages in the specific conduct exempted from the rules of the road by Vehicle and Traffic Law § 1104 (b)" … and, if applicable, the driver is "shielded from liability unless [he or she] is shown to have acted with reckless disregard' of the safety of others" … . Here, there is no dispute that the defendant officer was operating an "authorized emergency vehicle" and was "involved in an emergency operation" at the time of the accident (§ 1104 [a]). Furthermore, defendants' submissions in support of their motion established as a matter of law that the defendant officer was performing exempted conduct when he "proceed[ed] past a steady red signal . . . , but only after slowing down as may be necessary for safe operation" … . …

Here, the defendant officer's uncontroverted testimony established that he was responding to a disturbance call that was "[p]riority 1," i.e., the highest priority level, and that he took several precautions before proceeding into the intersection against the red light. Specifically, he slowed his vehicle to an almost complete stop, looked to his right and left, and then slowly proceeded into the intersection at a speed of about five miles per hour. When plaintiffs' vehicle came into the defendant officer's peripheral vision, he "slammed" his brake and attempted to avoid colliding with plaintiffs' vehicle. Where, as here, a defendant officer takes precautionary measures before engaging in exempted conduct under Vehicle and Traffic Law § 1104 (b), the police officer does not act with reckless disregard for the safety of others … . Levere v City of Syracuse, 2019 NY Slip Op 04613, Fourth Dept 6-7-19

## MUNICIPAL LAW, LABOR LAW.

## PLAINTIFF WAS ENGAGED IN ROUTINE MAINTENANCE SO HIS FALL FROM A LADDER WAS NOT ACTIONABLE PURSUANT TO LABOR LAW 240 (1), A MUNICIPALITY'S MAINTENANCE OF LIGHT POLES IS A PROPRIETARY FUNCTION TO WHICH THE DOCTRINE OF IMMUNITY DOES NOT APPLY, THE MUNICIPALITY'S 'LACK OF WRITTEN NOTICE' DEFENSE COULD NOT BE RAISED FOR THE FIRST TIME ON APPEAL (THIRD DEPT).

The Third Department, reversing Supreme Court, determined that plaintiff was engaged in routine maintenance when he was injured, which is not actionable pursuant to Labor Law 240 (1). The Third Department further determined that a municipality's maintenance of light poles is a proprietary function subject to ordinary standards of negligence which is not protected by the doctrine of governmental immunity. The court further held that the "lack of written notice" defense was not a question of law which the municipality could raise for the first time on appeal. The plaintiff was repairing burned out lights which were on strands of decorative lights attached to a light pole. The strands of decorative lights were not fixtures within the meaning of the Labor Law:

… Merchants [a non-profit which had wrapped decorative lights around city light poles] hired plaintiff, as an independent contractor, to replace light strands located on 36 light poles because many of the light bulbs had become inoperable. Plaintiff was injured when he fell from a 16-foot aluminum-rung extension ladder when the pole that it was leaning on suddenly fell over. …

… [R]replacement of the light strands, which was necessary because numerous bulbs had burned out, constituted routine maintenance that is outside the protection of Labor Law § 240 (1) … . …

… [A]lthough replacement of a light fixture on a lighting pole is a repair within the protection of Labor Law § 240 (1) … , under the facts herein, the light strands cannot be considered a fixture. …

Although a municipality may enjoy qualified immunity from liability arising from highway planning and design decisions … , that doctrine does not shield a municipality from liability arising from negligent maintenance. Gutkaiss v Delaware Ave. Merchants Group, Inc., 2019 NY Slip Op 04527, Third Dept 6-6-19

## MUNICIPAL LAW, EMPLOYMENT LAW, SHERIFF.

## THE COUNTY IS DISTINCT FROM THE SHERIFF, AND THE SHERIFF IS DISTINCT FROM THE SHERIFF'S DEPARTMENT, ONLY THE SHERIFF IS RESPONSIBLE FOR THE HIRING AND TRAINING OF SHERIFF'S DEPUTIES, THEREFORE THE INJURED INMATE'S ACTION AGAINST THE COUNTY FOR NEGLIGENT HIRING, TRAINING, SUPERVISION AND RETENTION OF SHERIFF'S DEPUTIES WAS PROPERLY DISMISSED (FOURTH DEPT).

The Fourth Department determined the action against the county stemming from the injuries and death suffered by plaintiff's decedent in the Erie County Holding Center was properly dismissed. The court held that the county is separate from the sheriff's department, which in turn is separate from the sheriff. The county is not responsible for the hiring and training of sheriff's deputies, which is only the sheriff's responsibility. Therefore the negligent hiring, training, supervision and retention cause of action against the county was not viable:

The duty to supervise and train Sheriff's deputies rests with the Sheriff (… County Law § 652). … [T]he County has no similar duty … . Defendants in this case therefore met their initial burden on the motion by establishing that the County was not liable under the theory stated in plaintiff's fourth cause of action. …

We reject plaintiff's … contention that the County's representation that the Erie County Sheriff's Department lacked a separate legal identity from the County estops the County from contending that it is not the employer of the Sheriff's deputies. The County correctly stated that "the Sheriff's Department does not have a legal identity separate from the County . . . and thus an action against the Sheriff's Department is, in effect, an action against the County itself"… . The Sheriff, however, is distinct from both the County and the Sheriff's Department … and thus the County's representation has no bearing on whether the Sheriff, as opposed to the County, bears the responsibility of hiring, training, and supervising the Sheriff's deputies. Metcalf v County of Erie, 2019 NY Slip Op 05265, Fourth Dept 6-28-19

## MUNICIPAL LAW, EMPLOYMENT LAW, VICARIOUS LIABILITY.

## THE COMPLAINT ALLEGING THE COUNTY WAS VICARIOUSLY LIABLE (RESPONDEAT SUPERIOR) FOR THE NEGLIGENT ACTIONS OF A CORONER SHOULD NOT HAVE BEEN DISMISSED, THE CORONER ALLEGEDLY TRANSFERRED A PORTION OF THE REMAINS OF PLAINTIFF'S SON TO A VOLUNTEER FIRE DEPARTMENT FOR THE TRAINING OF CADAVER DOGS (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the complaint against the county, based upon the alleged negligence of a county employee, should not have been dismissed. It was alleged that a coroner (Jackman) employed by the county transferred human remains (plaintiff's son) to a volunteer fire company for the purpose of train cadaver dogs:

Although it is generally a question for the jury whether an employee is acting within the scope of employment … , an employer is not liable as a matter of law "if the employee was acting solely for personal motives unrelated to the furtherance of the employer's business' "… .

Here, there is evidence that Jackman's decision to transfer a portion of the remains of plaintiffs' son (decedent) to defendant Vincent Salerno, the Fire Chief of Cambria, was driven by a work-related purpose, rather than Jackman's own personal interests … . Furthermore, there are issues of fact whether it was foreseeable that Jackman, in performing his obligations as a county coroner, might negligently remove, transport, or even transfer decedent's remains. "[F]or an employee to be regarded as acting within the scope of his [or her] employment, the employer need not have foreseen the precise act or the exact manner of the injury as long as the general type of conduct may have been reasonably expected" … . An employee's "[m]ere . . . deviation from the line of . . . duty does not relieve [the] employer of responsibility" … . …

… [W]e reject plaintiffs' contention that the court erred in granting Cambria's motion. The unrefuted evidence showed that Cambria's employee, Salerno, had only personal motives for requesting decedent's remains from Jackman, i.e., to further his own interest in training dogs to locate cadavers … . Salerno had no official duties that required him to train cadaver dogs or obtain human remains to train such dogs. Dunn v County of Niagara, 2019 NY Slip Op 04530, Fourth Dept 6-7-19

## NEGLIGENCE PER SE.

## VIOLATIONS OF ORDINANCES, ADMINISTRATIVE RULES OR REGULATIONS DO NOT CONSTITUTE NEGLIGENCE PER SE, ONLY VIOLATIONS OF STATUTES CONSTITUTE NEGLIGENCE PER SE (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined that defendant Delco's motion for summary judgment dismissing the negligence per se cause of action should have been granted. Negligence per se is shown by the violation of a statute, not, as here, by the violation of local ordinances, administrative rules or regulations. Plaintiffs alleged Delco, a painting contractor, caused a fire at plaintiffs' residence. The Second Department held there was sufficient circumstantial evidence to support the causation element of the negligence cause of action:

Delco failed to eliminate triable issues of fact as to whether it performed electrical work in the area in which the fire started. Although representatives of Delco and Chestnut asserted in their deposition testimony that Delco was not hired to, and did not, perform any electrical work on the subject premises, those averments were contradicted by the deposition testimony of some of the tenant plaintiffs, who asserted that they had observed Delco performing electrical work in the apartment where the fire occurred, and that Delco was the only entity that performed repairs and other work at the premises generally, including electrical work. The foregoing circumstantial evidence set forth sufficient facts upon which Delco's liability could be reasonably and logically inferred … . …

However, that branch of Delco's motion which was for summary judgment dismissing the negligence per se causes of action asserted against it by the tenant plaintiffs should have been granted. "[V]iolation of a State statute that imposes a specific duty constitutes negligence per se, or may even create absolute liability"… . In contrast, violation of local ordinances or administrative rules and regulations constitutes only evidence of negligence … . Here, the tenant plaintiffs did not allege that Delco violated any particular State statute. Rather, they only alleged violations of local laws … . Rivera v 203 Chestnut Realty Corp., 2019 NY Slip Op 04976, Second Dept 6-19-19

## OPEN AND OBVIOUS, DANGEROUS CONDITIONS.

## GAP IN BATHROOM STALL DOOR AT MCDONALD'S RESTAURANT, IN WHICH INFANT PLAINTIFF'S FINGER WAS PINCHED AND PARTIALLY SEVERED WHEN THE DOOR SLAMMED SHUT, WAS NOT UNREASONABLY DANGEROUS AND WAS OPEN AND OBVIOUS, TWO-JUSTICE DISSENT (FOURTH DEPT).

The Fourth Department, over a two-justice dissent, determined that the gap in a bathroom stall door at a McDonald's restaurant, in which infant plaintiff's finger was pinched and partially severed when her brother slammed the door, was not an unreasonably dangerous condition. In addition, the court found the condition was open and obvious and there was no duty to warn. The dissent noted the testimony that McDonald's now installs finger guards which raised questions of fact whether defendants were on notice the door presented an unreasonably dangerous condition:

Defendants met their initial burden by establishing that the stall door did not constitute an unreasonably dangerous condition … , and plaintiffs failed to raise a triable issue of fact in response … . The affidavit of plaintiffs' expert was " speculative and not sufficiently probative to defeat defendant[s'] motion for summary judgment' " … . Contrary to plaintiffs' further contention, we conclude that the alleged hazard posed by the bathroom stall door was also open and obvious, and therefore defendants had no duty to warn that the door presented a finger-pinching hazard … . Christopher J.G. v Derico of E. Amherst Corp., 2019 NY Slip Op 04857, Fourth Dept 6-14-19

## PRODUCTS LIABILITY, DEFINITION OF 'PRODUCT.'

## DEFENDANT DID NOT DEMONSTRATE AS A MATTER OF LAW THAT COKE OVENS USED IN THE MANUFACTURE OF STEEL WERE NOT PRODUCTS TRIGGERING THE DUTY TO WARN OF THE HAZARDS OF BREATHING EMISSIONS FROM THE OVENS, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Stein, over a two-judge dissent, reversing the Appellate Division, determined the defendant (Wilputte), which sold coke ovens for steel production, did not demonstrate, as a matter of law, the ovens were not "products" triggering the duty to warn. Therefore defendant's motion for summary judgment should not have been granted (by the Appellate Division). Plaintiff's decedent worked on top of the coke ovens and alleged breathing the toxic substances caused lung cancer. Plaintiffs alleged defendant had a duty to warn plaintiff's decedent to use a respirator when working on the ovens. The Appellate Division

had determined the coke ovens, housed in so-called "batteries," were akin to buildings and construction of the buildings was a service, not a product:

… [D]efendant has not met its burden in showing that the coke ovens at issue are not products as a matter of law. Regardless of the alterations Bethlehem [the steel manufacturer] may have made to the scale and specifications of the battery at large, the ovens themselves served one function: the production of coke. This process was standard across all variations of coke ovens that Wilputte sold, ultimately placing the hazardous thing at issue squarely within the category of products to which liability has attached in the failure-to-warn context. …

… Wilputte was responsible for placing the ovens into the stream of commerce and that it derived financial benefit from its role in the production process. Indeed, by the time decedent began working for Bethlehem, Wilputte had sold hundreds of coke ovens to plants … . Wilputte also marketed its ovens with informational brochures showing the completed ovens and their functionality, indicating that Wilputte, not Bethlehem, was the commercial source of the product. … Although the ovens were largely assembled and completed on-site, that merely speaks to the logistical realties of the market of which Wilputte had a considerable share. …

… [T]he record supports Supreme Court's conclusion that Wilputte was in the best position to assess the safety of the coke ovens because of its superior knowledge regarding the ovens' intended functionality … . "A major determinant of the existence of a duty to warn" is an assessment of "whether the manufacturer is in a superior position to know of and warn against those hazards" inherent to its product … . Matter of Eighth Jud. Dist. Asbestos Litig., 2019 NY Slip Op 04640, CtApp 6-11-19

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## SLIP AND FALL, ICE.

## THE DEFENDANTS' PAPERS, WHICH INCLUDED PLAINTIFF'S AND DEFENDANT SANTIAGO'S DEPOSITION TESTIMONY, DEMONSTRATED THERE WERE QUESTIONS OF FACT ABOUT THE EXISTENCE OF ICE ON THE DRIVEWAY AND SANTIAGO'S NOTICE OF IT, 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, the property owners, were not entitled to summary judgment in this slip and fall case. The defendants submitted plaintiff's deposition testimony that the ice formed sometime between the middle of the day on the 16th and 7 a.m. on the 17th when he fell. The property owner, Santiago, testified he saw no ice on the afternoon of the 16th and saw no ice when he returned to the property at 11 a.m. on the 17th. The defendants' papers, therefore, demonstrated there were questions of fact:

In support of their motion, the defendants submitted the transcript of the deposition testimony of the plaintiff, who testified that on February 16, 2016, precipitation had fallen, that it stopped sometime after he picked up his children at their school at noon, that when he returned to the subject property, the driveway was not icy, and that the neighbor whom the defendants had retained to plow the driveway had done so after the precipitation stopped

but did not apply any salt. The plaintiff also testified that, on February 17, 2016, at approximately 7:00 a.m., he slipped and fell on thick ice that was cloudy and dirty in appearance and which covered the entire driveway. He further testified that the ice started forming on February 16, 2016, either sometime in the middle of the day, or sometime between 9:00 p.m. and 7:00 a.m. the next day.

The defendants also submitted the transcript of the deposition testimony of the defendant Christian Santiago, who testified that the tenants did not have any responsibilities with respect to snow or ice removal from the driveway. He also testified that he visited the subject property to inspect ongoing renovation work in one of the apartments in the morning or early afternoon of February 16, 2016, that it was not snowing or raining at that time, and that he did not observe any ice on the driveway. Santiago further testified that, when he returned to the property the following day, at approximately 11:00 a.m. or noon, he observed a snowbank measuring anywhere from four-to-five feet or six-to-seven feet high at the end of the driveway created by the plow the day before, that he did not see any ice on the driveway, and that he noticed that there was salt on the concrete landing but not on the driveway. …

The defendants failed to submit any meterological data for either February 16 or 17, 2016, or evidence of the condition of the driveway subsequent to it being plowed by the neighbor or within a reasonable time prior to the incident … .

… [T]he evidence submitted by the defendants showed the existence of triable issues of fact and did not suffice to establish a prima facie case for summary judgment … . Ghent v Santiago, 2019 NY Slip Op 04362, Second Dept 6-5-19

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## SLIP AND FALL, REGULATORY COMPLIANCE.

## DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE SHOULD NOT HAVE BEEN GRANTED, ISSUE THAT WAS ADDRESSED BY THE DEFENDANT IN ITS REPLY PAPERS AND THE JUDGE IS PRESERVED FOR APPEAL, COMPLIANCE WITH REGULATIONS IS NOT DISPOSITIVE ON THE ISSUE OF NEGLIGENCE (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined defendant's motion for summary judgment in this slip and fall case should not have been granted. Plaintiff tripped over a wheelchair scale in a hallway of defendant's nursing home. The Fourth Department noted that the issue was preserved for appeal despite the absence from the record of the memorandum which raised the issue. The issue was addressed in defendant's reply papers and noted in the court's written decision. The Fourth Department held that the scale was not an open and obvious hazard as a matter of law and the fact that the scale was alleged to have been in compliance with the National Fire Prevention Associations's Life Safety Code would not be dispositive on the issue of negligence:

… [P]laintiff's contention that defendant failed to meet its initial burden on its motion for summary judgment is properly before us inasmuch as it involves a "question of law appearing on the face of the record . . . [that] could not have been avoided by the opposing party if brought to that party's attention in a timely manner" … . …

… [T]he facts here simply do not warrant concluding as a matter of law that the [wheelchair scale] was so obvious that it would necessarily be noticed by any careful observer, so as to make any warning superfluous' " and to support a conclusion that it was not a hazard as a matter of law … . …

Defendant also did not meet its initial burden on the motion by submitting the deposition testimony of one of its employees, who opined that the wheelchair scale was in compliance with the National Fire Prevention Association's Life Safety Code, 2000 Edition (Code). Even assuming, arguendo, that defendant's employee was qualified to render an opinion concerning defendant's compliance with the Code … , we conclude that defendant is not entitled to summary judgment because it is well settled that "compliance with regulations or a building code is not dispositive on the issue of negligence" … . Rivera v Rochester Gen. Health Sys., 2019 NY Slip Op 04835, Fourth Dept 6-14-19

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## SLIP AND FALL, STORM IN PROGRESS, ICE.

## ALTHOUGH PLAINTIFF FELL DURING A STORM, THERE WAS EVIDENCE THE AREA WAS ICY BEFORE THE STORM, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT PROPERLY DENIED (FIRST DEPT).

The First Department determined defendants' motion for summary judgment in this slip and fall case was properly denied. Although a storm was in progress when plaintiff fell, there was evidence there was ice in that area before the storm:

Although the meteorological records and the expert meteorological affidavits demonstrate that there was a storm in progress when the accident happened, a warehouse associate employed by [defendant] testified at his deposition that he saw ice on the ground the loading dock about a week before plaintiff's fall and defendants submitted no evidence as to when the area was last inspected or cleaned before the accident. In these circumstances, there are triable issues of fact as to whether plaintiff's fall was caused by pre-existing ice on the ground or the storm in progress and whether [defendants] had a reasonable time to remedy any alleged icy condition before the date of plaintiff's fall … . Perez v Raymours Furniture Co., Inc., 2019 NY Slip Op 05083, First Dept 6-25-19

## SLIP AND FALL, DISCOVERY OF HEALTH INFORMATION.

## DEFENDANTS DID NOT SHOW THERE WAS A COMPELLING NEED FOR DISCOVERY OF 'ALCOHOL/DRUG TREATMENT/MENTAL HEALTH INFORMATION/HIV-RELATED INFORMATION' IN THIS SLIP AND FALL CASE, DISCOVERY REQUEST SHOULD HAVE BEEN DENIED (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined that the defendants request for discovery of "Alcohol/Drug Treatment/Mental Health Information/HIV-Related Information" in this slip and fall case was not supported by evidence of a compelling need:

"[A] party must provide duly executed and acknowledged written authorizations for the release of pertinent medical records under the liberal discovery provisions of the CPLR when that party has waived the physician-patient privilege by affirmatively putting his or her physical or mental condition in issue" … However, Public Health Law § 2785(1) provides that, "[n]otwithstanding any other provision of law, no court shall issue an order for the disclosure of confidential HIV related information," and the only exception to that prohibition that is pertinent in this case requires an application showing "a compelling need for disclosure of the information for the adjudication of a criminal or civil proceeding" (Public Health Law § 2785[2][a]).

Here, the defendants failed to proffer any showing of a compelling need for disclosure related to "HIV-Related Information." Further, the defendants failed to submit an expert affidavit or any other evidence that would establish a connection between "Alcohol/Drug Treatment/Mental Health Information/HIV-Related Information," and the cause of the accident, and failed to make any effort to link any such information to the plaintiff's ability to recover from his injuries or his prognosis for future enjoyment of life … . Nesbitt v Advanced Serv. Solutions, 2019 NY Slip Op 04961, Second Dept 6-19-19

## SLIP AND FALL, LANDLORD-TENANT, ASSUMPTION OF RISK.

## OUT-OF-POSSESSION LANDLORD COULD NOT HAVE FORESEEN THAT INFANT PLAINTIFF WOULD MOVE LOGS STACKED AT THE SIDE OF THE PROPERTY AND THEN FALL WHEN JUMPING FROM LOG TO LOG, INFANT PLAINTIFF CREATED THE DANGEROUS CONDITION AND ASSUMED THE RISK (FIRST DEPT).

The First Department determined the out-of-possession landlord's motion for summary judgment in this slip and fall case was properly granted. Infant plaintiff (Deandre) had moved some logs from the side of the property and was jumping from log to log when he fell:

Defendant testified that he had had the tree cut down and the logs stacked along a property fence line several years earlier and had never seen the logs anywhere else on the property. Deandre testified that he and his friends had arranged the logs in a line and were jumping from log to log when he fell. The record shows that no one had complained to defendant, an out-of-possession landlord, about the logs before the accident, and Deandre testified that he had been playing on them for about 10 minutes when he fell.

Plaintiffs contend that it was foreseeable that children would move the logs. However, absent evidence of earlier incidents involving the logs or any complaint made to defendant about the logs, the possibility of children playing with them does not render the presence of the logs in the backyard foreseeably dangerous … .

Plaintiffs also failed to raise an issue of fact as to whether Deandre could fully appreciate the risks of jumping onto logs. As Deandre himself created the danger by setting up and jumping on the logs while playing with his friends, plaintiffs cannot show that he was faced with a risk that was unassumed, S.-B. v Radincic, 2019 NY Slip Op 04324, First Dept 6-4-19

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## SLIP AND FALL, MUNICIPAL LAW, SIDEWALKS.

## ABUTTING PROPERTY OWNER HAS A NON-DELEGABLE DUTY TO MAINTAIN THE SIDEWALK WHICH IS NOT DIMINISHED BY HIRING AN INDEPENDENT CONTRACTOR TO WORK ON THE SIDEWALK, PROPERTY OWNER'S MOTION FOR SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE PROPERLY DENIED (FIRST DEPT).

The First Department determined defendant abutting property owner's (Hillman's) motion for summary judgment in this sidewalk slip and fall case was properly denied. Hillman had hired an independent contractor to do concrete work on the sidewalk, but that did not relieve Hillman of his nondelegable duty to keep the sidewalk in good repair (NYC Administrative Code):

Although the "general rule is that a party who retains an independent contractor . . . is not liable for the independent contractor's negligent acts," an exception arises when the hiring party "is under a specific nondelegable duty" … . Here, Hillman, as the property owner, had a nondelegable duty to maintain the sidewalk, including the sidewalk around the subject sign post stump …

Contrary to Hillman's contention, the motion court did not conclude that Hillman is, in fact, liable for any alleged wrongs committed by the independent contractor in performing cement sidewalk resurfacing work. Rather, the motion court correctly found that under these circumstances the record raises issues of fact as to whether the cement work ordered by this defendant, the property owner, caused or exacerbated a hazardous tripping condition, and whether Hillman had actual or constructive knowledge of the metal protrusion on the sidewalk outside its building. Factual issues are also presented as to whether the condition was open and obvious, or, alternatively the defect trivial … . Vullo v Hillman Hous. Corp., 2019 NY Slip Op 05087, First Dept 6-25-19

## SLIP AND FALL, OPEN AND OBVIOUS, DANGEROUS CONDITION.

## THE POND INTO WHICH THE 96-YEAR-OLD PLAINTIFF'S DECEDENT APPARENTLY SLID WAS OPEN AND OBVIOUS AND THE FACT THAT THE BANK OF THE POND IS SLIPPERY IS INCIDENTAL TO ITS NATURE AND LOCATION, PLAINTIFF'S EXPERT DID NOT SUPPORT THE ASSERTION THAT THE POND WAS DEFECTIVE AND UNSAFE, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT PROPERLY GRANTED (FOURTH DEPT).

The Fourth Department determined defendant property owners' motion for summary judgment in this wrongful death case was properly granted. Plaintiff's decedent was 96 years old and resided in defendants' senior citizen facility. Plaintiff's decedent was found dead in a pond on the property. The medical examiner concluded plaintiff's decedent may has slipped on the sloping bank of the pond and slid into the water where he died of drowning:

… [A] landowner has no duty to protect or warn against an open and obvious condition that is inherent or incidental to the nature of the property, and that could be reasonably anticipated by those using it" … .

Here, defendants met their initial burden on the motion by establishing that the pond, including its sloping bank, was an open and obvious condition inherent or incidental to the nature of the property and that it was known to decedent prior to the accident …. "A slippery condition on a [pond's bank] is necessarily incidental to its nature and location near a body of water" … . …

… [T]he engineering expert's affidavit that plaintiff submitted fails to indicate that it was based on any studies, regulations, codes, or statutes, "nor is the expert's conclusion that the [retention pond] was defective and unsafe . . . supported by foundational facts, such as a deviation from industry standards or statistics showing the frequency of injuries caused by" the lack of safety measures proposed by the expert … . Preston v Castle Pointe, LLC, 2019 NY Slip Op 04617, Fourth Dept 6-7-19

## TOXIC TORTS, CONTAMINATON.

## CLAIMANTS DID NOT ALLEGE WHEN THE ALLEGED INJURIES RELATED TO TOXIC CONTAMINATION WERE INCURRED, CLAIMS PROPERLY DISMISSED AS JURISDICTIONALLY DEFECTIVE (FOURTH DEPT).

The Fourth Department determined the action alleging negligence and inverse condemnation stemming from toxic contamination of the vicinity of a defunct factory was properly dismissed because the allegations did not specify when the alleged injuries occurred:

The State of New York is sovereign and has consented to be sued only in strict accordance with the requirements of the Court of Claims Act (see Court of Claims Act § 8 …). Among those requirements is the claimant's duty to allege "the time when [the] claim arose" … . The requirements of section 11 (b) are jurisdictional in nature … , and the failure to satisfy them mandates dismissal of the claim without regard to whether the State was prejudiced … or had access to the requisite information from its own records … . As the Court of Appeals has explained, the State is not required "to ferret out or assemble information that section 11 (b) obligates the claimant to allege" … . …

Here, although claimants adequately specified when defendant's negligent acts allegedly occurred, they failed to supply any dates or ranges of dates regarding their alleged injuries, such as when they were exposed to toxins, when they developed symptoms, when they sought treatment, or when they were diagnosed with an illness. Instead, claimants alleged only the dates of their residence in Geneva and the dates when news of the contamination became public. Claimants' allegations are insufficient to enable defendant to adequately investigate the claims in order to ascertain its liability, if any. Given claimants' failure to provide any dates regarding their alleged injuries, defendant could not realistically differentiate between those injuries attributable to toxic exposure and those injuries attributable to other causes. We therefore conclude that claimants failed to adequately plead when the claims arose for purposes of Court of Claims Act § 11 (b). Consequently, the court properly dismissed the claims as jurisdictionally defective … . Matter of Geneva Foundry Litig., 2019 NY Slip Op 05271, Fourth Dept 6-28-19

## TOXIC TORTS, LEAD PAINT.

## DEFENDANTS DID NOT DEMONSTRATE WHEN THE CAUSE OF ACTION FOR LEAD-PAINT EXPOSURE ACCRUED, THEREFORE THE SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED ON THE GROUND THAT THE STATUTE OF LIMITATIONS HAD EXPIRED (FOURTH DEPT).

The Fourth Department, reversing (modifying) Supreme Court, determined that defendant's failed to demonstrate when the lead-paint-exposure cause of action accrued. Therefore the motion for summary judgment on the ground that the statute of limitations had passed should not have been granted:

In moving to dismiss the complaint on statute of limitations grounds, each defendant had "the initial burden of establishing prima facie that the time in which to sue ha[d] expired . . . and thus was required to establish, inter alia, when the plaintiff[s'] cause of action accrued" … Here, neither defendant established the relevant accrual date of plaintiffs' claims for injury caused by the latent effects of lead paint exposure and, in the absence of such evidence, neither defendant made a prima facie showing that the applicable limitations period had expired on those claims … . Supreme Court thus erred in granting defendants' respective motions to that extent. We note that, at oral argument in these appeals, plaintiffs conceded that their claims for patent injuries arising from such exposure were properly dismissed as time-barred. Chaplin v Tompkins, 2019 NY Slip Op 04562, Fourth Dept 6-7-19

## TRAFFIC ACCIDENTS, EVIDENCE, INADEQUATE DAMAGES.

## DEFENDANT IN THIS TRAFFIC ACCIDENT CASE SHOULD NOT HAVE BEEN ALLOWED TO TESTIFY SHE WAS NOT TICKETED; DAMAGES FOR PAIN AND SUFFERING SHOULD NOT HAVE BEEN INCREASED UNCONDITIONALLY BY THE TRIAL JUDGE, THE PROPER PROCEDURE IS TO ORDER A NEW TRIAL UNLESS DEFENDANT STIPULATES TO THE INCREASED DAMAGES (FOURTH DEPT).

The Fourth Department noted that defendant, in this traffic accident case, should not have been allowed to testify that she did not receive a traffic ticket. The court also noted that the trial judge properly determined the damages for past pain and suffering should be increased, but that the proper procedure is to order a new trial unless the defendant stipulates to the increased amount. The trial judge had unconditionally increased the damages amount:

It is well established that "[e]vidence of nonprosecution is inadmissible in a civil action" … . In our view, however, that was the only error during trial … . We conclude that, "standing alone" … , the error was harmless,

and therefore the court properly denied the motion insofar as it sought to set aside the jury verdict and a new trial on all issues (see CPLR 2002).

Plaintiff further contends that the jury's damages award for pain and suffering materially deviated from what would be reasonable compensation for plaintiff's injuries and that the deviation was not cured by the court's increase of the award for past pain and suffering. We reject that contention. We conclude that the court properly determined that the jury's verdict for past pain and suffering should be increased to $125,000 and that the award for future pain and suffering did not materially deviate from what would be reasonable compensation for plaintiff's injuries (see CPLR 5501 [c]). The court, however, erred in unconditionally increasing the past pain and suffering award. " [T]he proper procedure when a damages award is inadequate is to order a new trial on damages unless [a] defendant stipulates to the increased amount' " … . Queen v Kogut, 2019 NY Slip Op 04863, Fourth Dept 6-14-19

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## TRAFFIC ACCIDENTS, INSURANCE CARRIER, PARTIES.

## PLAINTIFF SUED YANKEE TRAILS FIVE DAYS BEFORE THE STATUTE OF LIMITATIONS RAN IN THIS BUS TRAFFIC ACCIDENT CASE; THE OWNER OF THE BUS WAS ACTUALLY YANKEE TRAILS WORLD TOURS, A COMPANY WITH A DIFFERENT ADDRESS AND CEO; BOTH COMPANIES HAD THE SAME INSURANCE CARRIER; PLAINTIFF'S MOTIONS TO EXTEND THE TIME TO SERVE THE SUMMONS AND COMPLAINT AND TO AMEND THE COMPLAINT TO SUBSTITUTE THE CORRECT DEFENDANT, MADE AFTER THE STATUTE HAD RUN, SHOULD NOT HAVE BEEN GRANTED (THIRD DEPT).

The Third Department, reversing Supreme Court, over a dissent, determined plaintiff should not have been allowed to have more time to serve defendant and amend the complaint to substitute the correct defendant. The action stemmed from a traffic accident involving a bus owned by Yankee Trails. Five days before the statute of limitations ran, plaintiff commenced an action against Yankee Trails World Tours, a different corporation with different addresses and different chief executive officers:

… [W]hether relief pursuant to CPLR 306-b and 305 (c) is available is not merely a matter of discretion. Significantly, "CPLR 306-b cannot be used to extend the time for service against a defendant as to which the action was never validly commenced" … . Similarly, although a court may allow amendment of a summons to correct the name of a defendant pursuant to CPLR 305 (c), such remedy is not available where a plaintiff seeks to substitute a defendant who has not been properly served … .

The fact that defendant and Yankee Trails use the same insurance carrier is of no significance in the circumstances presented; notably, the record reflects that the insurance carrier did not contact Yankee Trails until after the statute of limitations had expired. Nor may we consider plaintiff's error a mere misnomer that would allow relief to be granted pursuant to CPLR 305 (c) and CPLR 306-b … . Upon this record, plaintiff's attempt to "proceed against [Yankee Trails as] an unserved and entirely new defendant" after the statute of

limitations had run should have been denied, as he failed to obtain jurisdiction over Yankee Trails for relief pursuant CPLR 306-b and, thus, to later amend the complaint pursuant to CPLR 305 … . Fadlalla v Yankee Trails World Tours, Inc., 2019 NY Slip Op 05044, Third Dept 6-20-19

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## TRAFFIC ACCIDENTS, MUNICIPAL LAW, EMERGENCY VEHICLES.

## NO SHOWING THAT THE AMBULANCE SIREN OR EMERGENCY LIGHTS WERE IN USE WHEN THE INTERSECTION COLLISION OCCURRED, THEREFORE THERE WAS NO SHOWING THE RECKLESS DISREGARD STANDARD FOR EMERGENCY VEHICLES APPLIED, THE MUNICIPAL DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the municipal defendants' motion for summary judgment in this ambulance traffic accident case should have been denied. The municipal defendants did not demonstrate that the reckless disregard standard for emergency vehicles applied because they did not present evidence the ambulance siren or emergency lights were in use:

… [W]hile the reckless disregard standard of care in Vehicle and Traffic Law § 1104(e) applies to a driver of an authorized emergency vehicle involved in an emergency operation, who engages in specific conduct exempted from the rules of the road by Vehicle and Traffic Law § 1104(b), the exemptions apply only when the authorized emergency vehicle sounded audible signals such as a siren and displayed at least one red light (see Vehicle and Traffic Law § 1104[c]). Here, the municipal defendants failed to establish, prima facie, their entitlement to judgment as a matter of law under the reckless disregard standard of care, as they did not demonstrate that the siren and lights on the ambulance were activated as required for the exemptions set forth in Vehicle and Traffic Law § 1104(b) to apply … . Wynter v City of New York, 2019 NY Slip Op 04993, Second Dept 6-19-19

## TRAFFIC ACCIDENTS, MUNCIPAL LAW, LATE NOTICE OF CLAIM.

## THE PLAINTIFF WAS PROPERLY ALLOWED TO FILE A LATE NOTICE OF CLAIM ASSERTING A NEW CAUSE OF ACTION, ALTHOUGH THE ORIGINAL NOTICE OF CLAIM DID NOT MENTION AN ALLEGEDLY MISSING STOP SIGN AS A BASIS FOR LIABILITY, THE MISSING STOP SIGN WAS MENTIONED IN THE POLICE REPORT WHICH WAS ATTACHED TO THE ORIGINAL NOTICE OF CLAIM (SECOND DEPT).

The Second Department determined plaintiff student was properly allowed file a late notice of claim, which added a cause of action. The infant plaintiff was injured when his school bus was involved in a traffic accident. The initial notice of claim alleged negligence on the of the city and the Department of Education (DOE) in connection with the ownership of the school bus. The late notice of claim alleged a cause of action against the city and the NYC Department of Transportation based upon an alleged missing stop sign. A police report was attached to the original notice of claim and the missing stop sign was mentioned in the report:

… [T]he Supreme Court providently exercised its discretion in granting that branch of the plaintiff's motion which was for leave to serve a late notice of claim (see General Municipal Law § 50-e[5]). Although the plaintiff failed to demonstrate a reasonable excuse for the failure to serve a timely notice of claim containing the allegation regarding the missing stop sign, the absence of a reasonable excuse is not determinative, as the City defendants acquired actual knowledge of the essential facts constituting the claim within 90 days after the claim arose and were not substantially prejudiced by the late notice … . M.L. v City of New York, 2019 NY Slip Op 04686, Second Dept 6-12-19

## TRAFFIC ACCIDENTS, MUNICIPAL LAW, DANGEROUS INTERSECTION, PEDESTRIANS.

## THE CITY'S STUDIES OF THE INTERSECTION WHERE INFANT PLAINTIFF WAS STRUCK BY A CAR WERE DONE IN THE SUMMER WHEN NO SCHOOL CHILDREN USED THE INTERSECTION, THEREFORE THE CITY WAS NOT ENTITLED TO SUMMARY JUDGMENT BASED ON THE DOCTRINE OF QUALIFIED IMMUNITY, THE STUDIES HAD CONCLUDED NO TRAFFIC CONTROL DEVICE WAS NECESSARY, SUPREME COURT REVERSED (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined the city's motion for summary judgment in this intersection pedestrian traffic accident case should not have been granted. Infant plaintiff, the eight years old, attempted to cross the street, Avenue J, to get on his school bus when he was struck by a vehicle. The city submitted evidence that a studies of the intersection had been done which found that no traffic control device was required. Therefore, the city argued, and Supreme Court agreed, it was entitled to qualified immunity precluding suit:

… [I]n the field of traffic design engineering, the [governmental body] is accorded a qualified immunity from liability arising out of a highway planning decision" … . Under the doctrine of qualified immunity, a governmental body may not be held liable for a highway safety planning decision unless its study of the traffic condition is plainly inadequate or there is no reasonable basis for its traffic plan . Immunity will apply only "where a duly authorized public planning body has entertained and passed on the very same question of risk as would ordinarily go to the jury" … .

Here, the City failed to sustain its prima facie burden on the issue of qualified immunity. The City established that, in response to citizen complaints, it had conducted studies of the subject intersection in 2005 and 2007 and concluded that no traffic control device on Avenue J was warranted. However, the City did not establish that those studies, which took place in the summertime, were conducted at times when the subject schools were in session. The City also failed to establish that the studies addressed the specific concern of schoolchildren crossing Avenue J to reach awaiting buses and, thus, did not establish that it had entertained and passed on the very same question of risk that is at issue in this case … . Tyberg v City of New York, 2019 NY Slip Op 05177, Second Dept 6-26-19

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## TRAFFIC ACCIDENTS, REAR-END COLLISION.

## DEFENDANT DRIVER'S CLAIM HE COULDN'T STOP BECAUSE HIS CAR SKIDDED ON WET METAL GRATING DID NOT ESTABLISH THE REAR-END COLLISION WAS UNAVOIDABLE, PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that plaintiffs were entitled to summary judgment in this rear-end collision case. The defendants' claim that the defendant driver, Flippen, couldn't stop because the skidded on wet metal grating did not raise a question of fact:

"[A] rear-end collision with a stopped or stopping vehicle establishes a prima facie case of negligence on the part of the operator of the rear vehicle, requiring that operator to come forward with evidence of a nonnegligent explanation for the collision in order to rebut the inference of negligence" … . Here, the plaintiffs established their prima facie entitlement to judgment as a matter of law on the issue of liability, as the evidence submitted in support of their motion demonstrated that the injured plaintiff's vehicle was stopped when it was struck in the rear by the defendants' vehicle … . In opposition, the defendants failed to raise a triable issue of fact. The defendants' contention that Flippen applied his brakes but was unable to stop because his vehicle skidded on a wet metal grating on the roadway was insufficient to rebut the inference of negligence arising from the rear-end collision because they failed to demonstrate that Flippen's skid on known road conditions was unavoidable … . Morgan v Flippen, 2019 NY Slip Op 04377, Second Dept 6-5-19

## TRAFFIC ACCIDENTS, OUT-OF-STATE.

## THE NEW JERSEY TRAFFIC ACCIDENT INVOLVED NEW YORK RESIDENTS (PLAINTIFFS), A TRUCK LEASED BY DEFENDANT NEW JERSEY CORPORATION AND THE DEFENDANT TRUCK DRIVER FROM PENNSYLVANIA; NO GENERAL PERSONAL JURISDICTION OVER THE CORPORATION OR THE DRIVER; POSSIBLE LONG-ARM JURISDICTION OVER THE CORPORATION, BUT NOT THE DRIVER, BASED UPON BUSINESS CONDUCTED IN NEW YORK (SECOND DEPT).

The Second Department determined Supreme Court properly denied all but one of the defendants' motions to dismiss premised on lack of personal jurisdiction, pending further discovery. The traffic accident happened in New Jersey. The plaintiffs' van was struck from behind by a freight truck leased by Finkle (a New Jersey corporation) from Ryder Truck Rental and driven by defendant Larios, a resident of Pennsylvania. All the plaintiffs were residents of New York. The Second Department found that there was no general jurisdiction under CPLR 301, and no long-arm jurisdiction under CPLR 302 (a])(3) (tortious act outside the state causing injury within the state). However there may jurisdiction against Finkle pursuant to CPLR 302 (a) (1) (conducting business within the state):

… [Plaintiffs] have not alleged facts in opposition which would support the exercise of personal jurisdiction under New York's general jurisdiction statute, CPLR 301, over Larios, who was not domiciled in New York, or over Finkle, which was not incorporated in New York and did not have its principal place of business in New York … . …

Under CPLR 302(a)(3), "[t]he situs of the injury is the location of the original event which caused the injury, not the location where the resultant damages are subsequently felt by the plaintiff" … . Here, since the accident which caused the injuries occurred in New Jersey, CPLR 302(a)(3) does not provide a basis for personal jurisdiction over these defendants in New York … .

… .Finkle asserted that it is a New Jersey corporation with its business address in New Jersey, and Larios stated that, at the time of the accident, he was transporting a load for the United States Postal Service within the State of New Jersey. However, Finkle admitted that it had terminals at four New York locations at which it parked its vehicles. Based upon these facts, and given Finkle's failure to submit trip logs, manifests, or other documentary evidence to support its assertion that the load Larios was transporting was being shipped within the State of New Jersey and had no relationship to Finkle's New York business, we agree with the Supreme Court's determination to deny as premature that branch of the appellants' motion which was pursuant to CPLR 3211(a)(8) to dismiss the complaint insofar as asserted against Finkle, with leave to renew upon completion of discovery. Qudsi v Larios, 2019 NY Slip Op 04742, Second Dept 6-12-19