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"Negligence" Decision-Summaries Posted on the Website www.NewYorkAppellteDigest.com in March 2019.

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Negligence
March 2019

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The First Department determined defendant architect's (Cannon's) motion for summary judgment in this personal injury case was properly denied. Plaintiff was injured when an angle iron used to support part of a boiler system struck him on the head. Cannon argued it did not have any responsibility for the use of the angle iron as a support, which was placed there by a third party. However Cannon approved the boiler system and therefore may have been responsible for the defect which resulted in the need for the angle-iron support. Therefore the placement of the angle iron may not have been a superseding cause of the injury:

… [A]ccording to Cannon, even if it was negligent in its review of the component list or in its inspections of the ongoing work, any such negligence was not a proximate cause of the accident, because the installation of angle irons, which it never approved, and the failure of DASNY [building owner] and Martin [HVAC contractor} to heed its remediation recommendation for eight months before the accident occurred were intervening superseding causes.

"When a question of proximate cause involves an intervening act, liability turns upon whether the intervening act is a normal or foreseeable consequence of the situation created by the defendant's negligence'" … . "The mere fact that other persons share some responsibility for plaintiff's harm does not absolve defendant from liability because there may be more than one proximate cause of an injury'" … . Here, a jury could reasonably conclude that the effort to reinforce the cleanout port covers with angle irons was a normal and foreseeable consequence of the alleged inadequacy of the covers, which Cannon either approved or failed to detect, and which Cannon's principal acknowledged were not the proper covers. Thus, under the circumstances presented in this case, there remain triable issues of fact as to whether, inter alia, the use of the angle iron bracing, as well as DASNY and Martin's failure to replace the covers, despite notice from Cannon, constituted superseding causes of plaintiff's injuries … . Demetro v Dormitory Auth. of the State of N.Y., 2019 NY Slip Op 01642, First Dept 3-7-19

DAMAGES.

DAMAGES AWARDED 69-YEAR-OLD PLAINTIFF FOR PAST AND FUTURE PAIN AND SUFFERING DEEMED EXCESSIVE (FIRST DEPT).

The First Department determined the damages awarded the 69-year-old plaintiff for past and future pain and suffering were too high:

Judgment … upon a jury verdict, which … awarded plaintiff $1.2 million for past pain and suffering, $1 million for future pain and suffering over 10 years, $255,582 for future medical expenses, and $250,000 for future loss of earnings … unanimously modified … to remand the matter for a new trial on damages for past pain and suffering and future pain and suffering, unless plaintiff stipulates … to reduce the awards for past pain and suffering to $1,000,000 and for future pain and suffering to $675,000 … . Dacaj v New York City Tr. Auth., 2019 NY Slip Op 02171, First Dept 3-21-19

EDUCATION-SCHOOL LAW, SUPERVISION.

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The Second Department determined the school district's motion for summary judgment in this school recess injury case was properly granted. Plaintiff, who was in eighth grade, was injured when her shin struck a knee-high fence as she attempted to jump over it, causing her to fall on a concrete walkway. She had been taking turns with her friends jumping the fence for 10 or 15 minutes:

The plaintiff testified at a General Municipal Law § 50-h hearing and her deposition that she did not see any school personnel outside the school building either before or at the time of the incident. …

"Schools are under a duty to adequately supervise the students in their charge and they will be held liable for foreseeable injuries proximately related to the absence of adequate supervision" … . However, "[s]chools are not insurers of safety, . . . for they cannot reasonably be expected to continuously supervise and control all movements and activities of students" … . Here, the defendant established … that the plaintiff was engaged in an age-appropriate activity that did not constitute dangerous play, and that the alleged lack of supervision was not a proximate cause of the accident … . Chiauzzi v Sewanhaka Cent. High Sch. Dist., 2019 NY Slip Op 02310, Second Dept 3-27-19

EDUCATION-SCHOOL LAW, THIRD-PARTY ASSAULT.

QUESTION OF FACT WHETHER SCHOOL BUS DRIVER AND MONITOR TOOK APPROPRIATE STEPS AFTER THE FIGHT IN WHICH PLAINTIFF STUDENT WAS INJURED BROKE OUT ON THE BUS (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined the negligent supervision action against the school bus company and the school district should not have been dismissed. Plaintiff (J.W.) was injured by another student on the bus:

… [T]he bus company defendants and the school district established, prima facie, that they did not have sufficiently specific knowledge or notice of the dangerous conduct which caused injury … . However, in opposition, the plaintiff raised triable issues of fact as to whether J. W.'s injuries were a foreseeable consequence of the bus driver and bus monitor's alleged failure to respond appropriately as the events unfolded … , and whether the bus driver and bus monitor took "energetic steps to intervene" in the fight … . Accordingly, the Supreme Court should have denied the motion of the bus company defendants and the school district for summary judgment dismissing the complaint insofar as asserted against them. Williams v Student Bus Co., Inc., 2019 NY Slip Op 02146, Second Dept 3-20-19

EDUCATION-SCHOOL LAW, THIRD-PARTY ASSAULT.

STUDENT ON STUDENT ASSAULT WAS NOT FORESEEABLE, THEORIES IN THE PLEADINGS WHICH WERE NOT MENTIONED IN THE NOTICE OF CLAIM PROPERLY DISMISSED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant school district's motion for summary judgment should have been granted in this student-on-student assault case. The assault arose abruptly and and lasted 20 to 30 seconds and was not foreseeable. In addition, the theories of liability not mentioned in the notice of claim, but asserted in the pleadings, should have been dismissed:

… [T]he School District established, prima facie, that the alleged assault by the fellow student was an unforeseeable act and that the School District had no actual or constructive notice of prior conduct of the students involved here which was similar to the subject incident … . Moreover, the School District established, prima facie, that "the incident occurred in so short a period of time that any negligent supervision on its part was not a proximate cause of the infant plaintiff's injuries" … . …

"[T]he prima facie showing which a defendant must make on a motion for summary judgment is governed by the allegations of liability made by the plaintiff in the pleadings" … . However, if the defendant is a municipality, the plaintiff may not raise in the complaint causes of action or legal theories that were not directly or indirectly mentioned in the notice of claim and that "substantially alter" the nature of the claim or add a new theory of liability … . … By submitting evidence that the notice of claim did not mention … causes of action and legal theories, the School District established its … entitlement to judgment as a matter of law dismissing all of the causes of action, other than negligent supervision, that were asserted in the complaint and bill of particulars against the School District … . Meyer v Magalios, 2019 NY Slip Op 02336, Second Dept 3-27-19

GROSS NEGLIGENCE, CONTRACT, LOW BID FOR HIGHWAY PROJECT.

QUESTION OF FACT WHETHER GROSS NEGLIGENCE MIGHT OVERCOME A CONTRACTUAL LIMITATION ON LIABILITY (FIRST DEPT).

The First Department, reversing Supreme Court, determined there was a question of fact whether gross negligence might overcome a contractual limitation on liability. Here a bid on a highway project turned out to be more than $80 million short, which resulted in the withdrawal of the bid. The project was for a toll road, the toll to be paid to the builder of the road. The bid was low because the date of the beginning of construction, rather than the end of construction, was used to calculate the income from the toll. Gross negligence factors included, the firing of key personnel overseeing the creation of the bid, failure to follow company policy in reviewing the bid, and departure from industry standards:

It is well-settled that contractual limitations on liability are generally enforceable … . However, "public policy forbids a party from attempting to avoid liability for damages caused by grossly negligent conduct" … . Thus, a gross negligence claim will be sustained where a party's conduct "evinces a reckless disregard for the rights of others or smacks' of intentional wrongdoing" … . S.A. De Obras y Servicios, COPASA v Bank of Nova Scotia, 2019 NY Slip Op 01706, First Dept 5-12-19

HIGHWAYS, DANGEROUS CONDITION.

QUESTIONS OF FACT WHETHER STATE HAD CONSTRUCTIVE NOTICE OF THE CONDITION OF THE ROAD WHICH ALLEGEDLY CAUSED PLAINTIFF'S BICYCLE ACCIDENT (THIRD DEPT).

The Third Department determined claimant's motion for summary judgment in this bicycling accident case was properly denied. There were questions of fact whether the state had constructive notice of the road conditions which allegedly caused the accident:

There was no evidence that defendant had actual notice of this hazard and only conflicting evidence regarding constructive notice. Savoury testified that there had been no prior complaints or accidents and that the road was regularly inspected . However, defendant may be charged with constructive notice of the hazard if it "existed for

a sufficient period of time to allow defendant[] to discover and rectify the problem" … . Although most of the witnesses attributed the bumps to the effects of cars driving over cold patch and the delamination to the effects of the freeze/thaw cycle, evidence regarding the length of time that the bumps and delaminated section were present was equivocal, and there was no evidence regarding how long the debris had been on the shoulder … . Even if defendant had actual or constructive notice of the hazardous condition, claimant's submissions evince that temporary repair work had been done in the months leading up to the accident, and the submissions fail to demonstrate what "reasonable [corrective] measures" should have been taken given the circumstances … . Given the myriad factual questions presented, including whether defendant had notice of the hazardous condition in the highway but failed to respond with appropriate maintenance measures, the Court of Claims properly denied claimant's motion. Schleede v State of New York, 2019 NY Slip Op 02188, Third Dept 3-21-19

INDEPENDENT MEDICAL EXAMINATION, PRIVILEGE.

NOTES TAKEN BY AN OBSERVER HIRED BY PLAINTIFF'S ATTORNEY TO WITNESS AN INDEPENDENT MEDICAL EXAMINATION OF PLAINTIFF BY DEFENDANTS' DOCTOR ARE PRIVILEGED AS MATERIAL PREPARED FOR TRIAL, THE OBSERVER WAS ACTING AS AN AGENT OF PLAINTIFF'S ATTORNEY (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Gische, in a matter of first impression, determined that the notes taken by an observer at an independent medical exam (IME) of plaintiff by defendants' doctor are protected by the privilege afforded materials prepared for litigation. The observer was hired by plaintiff's attorney and was deemed to be acting as an agent of the attorney:

The IME observer, however, is an agent of the plaintiff's attorney. Consequently, the requested notes and materials constitute materials prepared for trial, bringing them within the conditional or qualified privilege protections of CPLR 3101(d)(2). Materials prepared in anticipation of litigation and preparation for trial may be obtained only upon a showing that the requesting party has a "substantial need" for them in the preparation of the case and that without "undue hardship" the requesting party is unable to obtain the substantial equivalent by other means (CPLR 3101[d][2] …).

The IME observer was hired to assist plaintiff's attorney in advancing the litigation and preparing for trial … . Although present, she was not involved in the doctor's examination of the plaintiff. Her function was to serve as

the attorney's "eyes and ears," observing what occurred during the IME, and then reporting that information back to plaintiff's attorney.

Defendants have not shown, in response, any "substantial need" for the IME observer's notes, etc., or why they are unable, without undue hardship, to obtain the "substantial equivalent" of the materials by other means … . Key to this analysis is that the defendants' doctor conducted plaintiff's examination and can provide defendants with any information concerning what generally occurred and what he did at the IME. Markel v Pure Power Boot Camp, Inc., 2019 NY Slip Op 02049, First Dept 3-19-19

MEDICAL MALPRACTICE, DEAD MAN'S STATUTE.

DECEDENT'S CONSENT TO SURGERY SUBMITTED IN SUPPORT OF SUMMARY JUDGMENT IN THIS MEDICAL MALPRACTICE ACTION DID NOT VIOLATE THE DEAD MAN'S STATUTE, THE CONSENT WAS AUTHENTICATED BY THE MEDICAL RECORDS (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the medical malpractice and wrongful death actions should have been dismissed. With respect to the "lack of informed consent" cause of action, the court held that the submission of the informed consent form by the defendant did not violate the Dead Man's Statute:

The plaintiff contends that Meyerson [defendant surgeon] cannot rely upon the portion of his expert's affidavit which states that the decedent was aware of the risks of the procedure because he signed a consent form for a similar procedure in 2012, because this evidence would be inadmissible pursuant to CPLR 4519, the so-called Dead Man's Statute. CPLR 4519 "precludes a party or person interested in the underlying event from offering testimony concerning a personal transaction or communication with the decedent" … .

While evidence excludable at trial under CPLR 4519 may be considered in opposition to a motion for summary judgment so long as it is not the sole evidence proffered … , such evidence "should not be used to support summary judgment" … . However, the statute does not bar "the introduction of documentary evidence against a deceased's estate. . . . [A]n adverse party's introduction of a document authored by a deceased does not violate the Dead Man's Statute, as long as the document is authenticated by a source other than an interested witness's testimony concerning a transaction or communication with the deceased" … . Inasmuch as the expert's affidavit as to the decedent's execution of the form was predicated upon the medical records, which contained the decedent's consent form for the prior surgery and on which the expert relied, and the records were properly

authenticated and submitted on the motion, Meyerson properly relied upon the expert opinion to support his motion … . Wright v Morning Star Ambulette Servs., Inc., 2019 NY Slip Op 02381, Second Dept 3-27-19

MEDICAL MALPRACTICE, EXPORT OPINION.

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED IN THIS MEDICAL MALPRACTICE ACTION, PLAINTIFF'S EXPERT'S AFFIDAVIT WAS CONCLUSORY AND SPECULATIVE AND IMPROPERLY RAISED AN ISSUE NOT DISCERNABLE FROM THE PLAINTIFF'S BILL OF PARTICULARS (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant's motion for summary judgment in this medical malpractice action should have been granted because the plaintiff's expert affidavit was conclusory and speculative. The court noted that plaintiff's expert raised an issue that was not discernable from the plaintiff's bill of particulars and therefore should not have been considered:

…[T]he defendant established his prima facie entitlement to judgment as a matter of law by submitting an expert affirmation indicating that the treatment and care given to the plaintiff by the defendant on May 13, 2013, did not deviate from accepted community standards of practice, that the plaintiff's infection, which occurred more than four months after that visit, was too remote in time to have been proximately caused by the defendant's treatment, and that the defendant had the plaintiff's informed consent for the procedure.

In opposition, the plaintiff submitted, inter alia, an affirmation of her expert, who opined that the defendant did not follow the good and accepted podiatric standard of care because although the defendant tested the plaintiff's foot pulse and found it to be low, the defendant did not refer the plaintiff to a vascular surgeon. We agree with the defendant that this assertion was not readily discernable from the allegations in the plaintiff's bill of particulars, and, thus, was a new theory of liability that should not have been considered by the Supreme Court … . Iodice v Giordano, 2019 NY Slip Op 02072, Second Dept 3-20-19

MEDICAL MALPRACTICE, MUNICIPAL LAW.

LATE NOTICE OF CLAIM IN THIS MEDICAL MALPRACTICE ACTION, SERVED THREE YEARS AFTER THE DEVELOPMENTALLY DELAYED CHILD'S BIRTH, SHOULD HAVE BEEN DEEMED TIMELY SERVED (SECOND DEPT).

The Second Department, reversing Supreme Court, determent the late notice of claim in this medical malpractice action should have been deemed timely served. The notice of claim was served in 2012 and the plaintiff-child was born in 2009. It became apparent in 2010 that the child was unable to bear weight on her legs and her development was delayed:

The record here indicates that the defendant was aware that the child's condition was related to glucose levels, which were not measured at birth. Thus, the defendant acquired actual knowledge of the essential facts constituting the claim immediately after the incident, and well within the 90 day period after the claim arose … .

The delay in serving a notice of claim was also directly attributable to the child's infancy, since it was not apparent that the child had suffered a permanent injury until after the 90-day period expired. When the child's injuries became apparent, the plaintiff served a late notice of claim without leave of court. Although this Court has ruled that actual knowledge of the essential facts constituting the claim cannot be inferred from a late notice of claim served without leave of the court … , in this case the late notice of claim generated a hearing pursuant to General Municipal Law § 50-h, where the defendant conducted an examination of the plaintiff and the essential facts constituting the claim were explore … . Feduniak v New York City Health & Hosps. Corp. (Queens Hosp. Center), 2019 NY Slip Op 01564, Second Dept 3-6-19

MEDICAL MALPRACTICE, SUPERVISION.

ACTION BASED UPON FAILURE TO SUPERVISE PLAINTIFF'S USE OF A HOSPITAL REST ROOM SOUNDED IN MEDICAL MALPRACTICE, NOT NEGLIGENCE, THE ACTION WAS THEREFORE TIME-BARRED (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff's action, which alleged inadequate supervision when plaintiff used a hospital rest room, sounded in medical malpractice, not negligence. Therefore the action was time-barred:

Plaintiff alleges that defendants failed to properly assess her condition and the degree of her supervisory needs in the restroom, a claim sounding in medical malpractice, and her action, brought three years after her injuries, is therefore untimely … . Because the loss of consortium claim is derivative of the injured plaintiff's claim, that cause of action must also be dismissed as untimely … . Kim v New York Presbyt., 2019 NY Slip Op 02425, First Dept 3-28-19

MEDICAL MALPRACTICE.

AUDIT TRAIL, I.E., METADATA SHOWING WHO ACCESSED PLAINTIFF'S MEDICAL RECORDS, WHERE AND WHEN THEY WERE ACCESSED, AND ANY CHANGES TO THE RECORDS, WAS DISCOVERABLE IN THIS MEDICAL MALPRACTICE ACTION ALLEGING IMPROPER TREATMENT AFTER SURGERY (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that the so-called "audit trail," which indicates who accessed plaintiff's medical records, where and when they were accessed and any changes made to the records (metadata), was discoverable in this medical malpractice action. The complaint alleged failure to properly treat plaintiff after surgery which led to infection and amputation:

The plaintiffs demonstrated, and Wyckoff [medical center] does not dispute, that an audit trail generally shows the sequence of events related to the use of a patient's electronic medical records; i.e., who accessed the records,

when and where the records were accessed, and changes made to the records … . Hospitals are required to maintain audit trails under federal and state law (see 45 CFR 164.312[b]; 10 NYCRR 405.10[c][4][v]). As argued by the plaintiffs, the requested audit trail was relevant to the allegations of negligence that underlie this medical malpractice action in that the audit trail would provide, or was reasonably likely to lead to, information bearing directly on the post-operative care that was provided to the injured plaintiff. Moreover, the plaintiffs' request was limited to the period immediately following the injured plaintiff's surgery. The plaintiffs further demonstrated that such disclosure was also needed to assist preparation for trial by enabling their counsel to ascertain whether the patient records that were eventually provided to them were complete and unaltered … .

In response to the plaintiffs' threshold showing, Wyckoff failed to demonstrate that the requested disclosure was improper or otherwise unwarranted. Although Wyckoff argued that the audit trail may contain information that would not be useful to the plaintiffs, it did not dispute that the audit trail would nevertheless contain information pertaining to the medical care that it provided to the injured plaintiff in the wake of his foot surgery. Vargas v Lee, 2019 NY Slip Op 02142, Second Dept 3-20-19

MEDICAL MALPRACTICE.

DEFENDANTS' MOTION TO SET ASIDE THE VERDICT FINDING LIABILITY IN THIS MEDICAL MALPRACTICE ACTION SHOULD NOT HAVE BEEN GRANTED, PLAINTIFF'S MOTION TO SET ASIDE THE VERDICT AWARDING NO DAMAGES FOR PAST AND FUTURE PAIN AND SUFFERING OR FUTURE LOST WAGES SHOULD HAVE BEEN GRANTED, PLAINTIFF ALLEGED HER CHILD WAS INJURED IN UTERO (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that defendants' motion to set aside the verdict finding liability in this medical malpractice action should not have been granted, and the plaintiff's motion to set aside so much of the verdict as awarded no damages for past or future pain and suffering or future lost earnings should have been granted. The action alleged damage to plaintiff's child in utero:

Here, the plaintiff adduced legally sufficient proof to establish a departure from the standard of care and as to causation. In particular, the plaintiff's expert obstetrician-gynecologist, Barry Schifrin, opined that the child suffered a placental "abruption plus or minus fetomaternal transfusion," which caused "a problem of oxygen availability in the baby's brain." Schifrin opined that continuous EFM testing should have been undertaken beginning on the date of the mother's fall, November 4, 2008. Schifrin testified that the EFM performed on

November 12, 2008, showed that the child had been in distress for "quite some time." The plaintiff's expert pediatric hematologist, Jill DeJong, opined that the child's anemia was related to a fetomaternal transfusion. Based on that evidence, the jury could have reasonably found that had the respondents undertaken or begun continuous EFM on November 10, 2008, the harm to the child would have been avoided or mitigated. Further, although the respondents' experts opined that the respondents did not depart from accepted practice, the jury was entitled to resolve the conflicting expert testimony in the plaintiff's favor … . Accordingly, the Supreme Court should not have granted that branch of the respondents' motion which was to set aside the jury verdict on the issue of liability and for judgment as a matter of law … .

The jury's failure to award any damages for past pain and suffering and future pain and suffering deviates materially from reasonable compensation, in light of the evidence of the severe deficits suffered by the child, her ongoing need for medical treatment, ongoing medical events such as intractable seizures, and evidence of her consciousness and ability to interact with others (see CPLR 5501[c] …). The jury's failure to award any damages for future lost earnings also deviates materially from reasonable compensation … . Larkin v Wagner, 2019 NY Slip Op 02327, Second Dept 3-27-19

MUNCIPAL LAW.

ALTHOUGH PLAINTIFFS APPEARED FOR THE 50-h HEARING, PLAINTIFFS' ATTORNEY REFUSED TO LET THE PLAINTIFFS TESTIFY UNLESS EACH PLAINTIFF COULD HEAR THE OTHER'S TESTIMONY, BECAUSE THE 50-h HEARING IS A CONDITION PRECEDENT TO BRINGING SUIT, PLAINTIFFS' LAWSUIT WAS PROPERLY PRECLUDED (SECOND DEPT).

The Second Department, over a two-justice dissent, determined that plaintiffs were precluded from proceeding with the lawsuit because, although plaintiffs appeared for the 50-h hearing, plaintiffs attorney refused to participate in the 50-h hearing unless each plaintiff was present when the other testified. The majority held that the 50-h hearing is a condition precedent to any lawsuit and the statute does not create a right for plaintiff's to be present for each other's testimony at the hearing:

The purpose of General Municipal Law § 50-h is to enable a municipality to make a prompt investigation of the circumstances of a claim by examining the claimant about the facts of the claim … . The oral examination of a claimant pursuant to General Municipal Law § 50-h serves to supplement the notice of claim and provides an investigatory tool to the municipality, with a view toward settlement … . "Compliance with a demand for a

General Municipal Law § 50-h examination is a condition precedent to the commencement of an action against a municipal defendant, and the failure to so comply warrants dismissal of the action" … . "A party who has failed to comply with a demand for examination pursuant to General Municipal Law § 50-h is precluded from commencing an action against a municipality" … . …

" [A] court cannot amend a statute by inserting words that are not there, nor will a court read into a statute a provision which the Legislature did not see fit to enact'" … . Moreover, "[i]n the construction of statutes, each word or phrase in the enactment must be given its appropriate meaning" … , which is in derogation of the common law, is to be strictly construed … . In strictly construing a statute, courts "will not go beyond the clearly expressed provisions of the act" … . Colon v Martin, 2019 NY Slip Op 02312, Second Dept 3-27-19

MUNICIPAL LAW.

ELDERLY PLAINTIFF'S HEALTH PROBLEMS EXCUSED HER FAILURE TO APPEAR FOR A 50-h HEARING, COMPLAINT SHOULD NOT HAVE BEEN DISMISSED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the elderly plaintiff's complaint, based upon a fall at defendant's city hospital, should not have been dismissed because plaintiff failed to appear at an oral examination pursuant to General Municipal Law 50-h. Her failure to appear was due to medical problems and should have been excused:

"Compliance with a demand for a General Municipal Law § 50-h examination is a condition precedent to the commencement of an action against a municipal defendant, and the failure to so comply warrants dismissal of the action" … . The failure to submit to such an examination, however, may be excused in exceptional circumstances, such as extreme physical or psychological incapacity … .

Under the circumstances of this case, the plaintiff's failure to appear for the examination pursuant to General Municipal Law § 50-h should have been excused in light of the nature and extent of the plaintiff's medical and mental conditions, as documented by her doctors' letters … . Riabaia v New York City Health & Hosps. Corp., 2019 NY Slip Op 02136, Second Dept 3-20-19

MUNICIPAL LAW.

UNEXCUSED FAILURE TO APPEAR AT A SCHEDULED 50-h HEARING REQUIRED DISMISSAL OF THE COMPLAINT (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined plaintiffs' failure to comply with defendants' demand for a 50-h hearing required dismissal of the complaint. Defendants were sued in their capacities as municipal employees acting within the scope of their employment:

We agree with defendants that Supreme Court erred in denying the motion. "It is well settled that a plaintiff who has not complied with General Municipal Law § 50-h (1) is precluded from maintaining an action against a municipality" … . Here, plaintiffs failed to appear at the scheduled examination due to an apparent disagreement with their attorney. Under the circumstances, plaintiffs had the burden of rescheduling the examination and, because they failed to do so, they were barred by statute from commencing an action … . "Although compliance with General Municipal Law § 50-h (1) may be excused in exceptional circumstances' "… , there were no such circumstances here. Kluczynski v Zwack, 2019 NY Slip Op 02236, Fourth Dept 3-22-19

PLAYGROUND, DANGEROUS CONDITION.

PLAYGROUND EQUIPMENT ON WHICH PLAINTIFF'S SON WAS INJURED, ACCORDING TO EXPERT EVIDENCE, WAS IN COMPLIANCE WITH APPLICABLE GUIDELINES AND STANDARDS, WAS PROPERLY MAINTAINED AND WAS NONHAZARDOUS, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendants' motion for summary judgment in this playground equipment injury case should have been granted. Plaintiff's son was injured when his leg was caught in a gap between two platforms:

… [T]he defendants submitted, inter alia, an expert affidavit, which established, prima facie, that the playground apparatus was not in violation of any relevant statutes or safety guidelines, that it was maintained in a reasonably safe condition, that the platforms were nonhazardous, and that the gaps between the platforms did not violate

any applicable guidelines or standards … . In opposition, the plaintiff failed to raise a triable issue of fact. Valenzuela v Metro Motel, LLC, 2019 NY Slip Op 01639, Second Dept 3-6-19

PRODUCTS LIABILITY.

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT IN THIS FARM EQUIPMENT PRODUCTS LIABILITY ACTION SHOULD HAVE BEEN GRANTED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined that defendants' motion for summary judgment in this products liability action should have been granted. Plaintiff "was working inside of a piece of farm equipment known as a grain cart, she lost her footing and her right leg became caught in a rotating auger." A steel safety guard covering the auger had apparently been removed:

… [T]he Killbros defendants submitted the affidavit of an expert, which was incorporated by reference into Bentley's moving papers, who opined that plaintiff's injuries would not have occurred if the steel safety guard had not been removed. …

Defendants established their entitlement to summary judgment dismissing the strict products liability causes of action insofar as they are predicated on a design defect theory by submitting evidence that the product was reasonably safe … . The Killbros defendants' expert averred that the steel safety guard was manufactured in accordance with industry standards, was designed to last the life of the product, and was "state of the art" inasmuch as it was permanently welded to the interior of the grain cart and could not be removed except by using an acetylene torch or other such heavy-duty tool … . …

… [T]he Killbros defendants are entitled to summary judgment dismissing the cause of action against them alleging negligent design and manufacture. "[I]nasmuch as there is almost no difference between a prima facie case in negligence and one in strict liability," we conclude that plaintiffs similarly failed to raise an issue of fact with respect to their cause of action for negligent design and manufacture … . Beechler v Kill Bros. Co., 2019 NY Slip Op 01993, Fourth Dept 3-15-19

RES IPSA LOQUITUR.

PLAINTIFF WAS STRUCK BY A FACE PLATE WHICH FELL OFF AN AIR CONDITIONER, ALTHOUGH PLAINTIFF MADE OUT A PRIMA FACIE CASE UNDER THE DOCTRINE OF RES IPSA LOQUITUR, DEFENDANTS RAISED QUESTIONS OF FACT ABOUT THE CAUSE AND EXCLUSIVE CONTROL, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SEOND DEPT).

The Second Department, reversing Supreme Court, determined that, although a prima facie case was made out under the doctrine of res ipsa loquitur, the defendant raised questions of fact. Plaintiff was injured when a face plate fell off an air conditioner:

… [A]lthough the plaintiff demonstrated, prima facie, that a face plate falling off an air conditioner is an event of a kind that ordinarily does not occur absent negligence… , the defendants raised a triable issue of fact as to whether the face plate could have fallen off the air conditioner because of the slamming of the door and not as a result of negligence … .

Furthermore, while the plaintiff demonstrated, prima facie, that the elevated air-conditioning unit was in the defendants' exclusive control … , the defendants raised a triable issue of fact through their submissions, which demonstrated that outside contractors were responsible for the repairs and installations of air conditioning units in the school. Exclusive control is not established when third-party contractors have access to an instrumentality causing injuries … . Dilligard v City of New York, 2019 NY Slip Op 02064, Second Dept 3-20-19

SLIP AND FALL, ESCALATOR.

DEFENDANT DID NOT ELIMINATE QUESTIONS OF FACT CONCERNING WHETHER IT HAD ACTUAL OR CONSTRUCTIVE KNOWLEDGE OF THE ALLEGEDLY DANGEROUS CONDITION IN THIS ESCALATOR SLIP AND FALL CASE, ANY CONFLICT IN PLAINTIFF'S TESTIMONY DID NOT RENDER IT INCREDIBLE AS A MATTER OF LAW, DEFENDANT'S SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant's motion for summary judgment in the escalator slip and fall case should not have been granted:

The defendant's submissions, which included a transcript of the plaintiff's deposition testimony, failed to eliminate all triable issues of fact as to whether the defendant had actual or constructive notice of the allegedly dangerous condition of the escalator steps … . Furthermore, the plaintiff testified at his deposition that he slipped and fell on a wet step while he was riding an escalator. In light of this testimony, it cannot be said that the plaintiff was unable to identify the cause of his accident … . Contrary to the defendant's contention, the plaintiff's deposition testimony was not incredible as a matter of law, and any conflict in the testimony or evidence presented merely raised an issue of fact for the factfinder to resolve … . Kerzhner v New York City Tr. Auth., 2019 NY Slip Op 02077, Second Dept 3-20-19

SLIP AND FALL, OPEN AND OBVIOUS.

PLAINTIFF FELL INTO A THREE-FEET-DEEP HOLE, QUESTION OF FACT WHETHER THE HOLE WAS AN OPEN AND OBVIOUS CONDITION, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT

The Second Department, reversing Supreme Court, determined that defendant's motion for summary judgment should not have been granted in this slip and fall case. Plaintiff fell into a three-feet-deep hole near where a fence was being installed:

"A landowner has a duty to exercise reasonable care in maintaining [its] property in a safe condition under all of the circumstances, including the likelihood of injury to others, the seriousness of the potential injuries, the burden of avoiding the risk, and the foreseeability of a potential plaintiff's presence on the property" … . A property owner has no duty to protect or warn against an open and obvious condition provided that, as a matter of law, the condition is not inherently dangerous … . "The issue of whether a hazard is latent or open and obvious is generally fact-specific and thus usually a jury question," but "a court may determine that a risk was open and obvious as a matter of law when the established facts compel that conclusion . . . on the basis of clear [and undisputed evidence" … . Further, the law is clear that "[e]vidence that the dangerous condition was open and obvious cannot relieve the landowner" of the burden to exercise reasonable care in maintaining the property in a safe condition … .

In this case, the defendant failed to establish its prima facie entitlement to judgment as a matter of law. The defendant's submissions did not demonstrate, prima facie, that the hole was not inherently dangerous. No evidence was submitted that the hole was too small to create an inherently dangerous condition … . Even if the condition were open and obvious—and it is by no means clear that it was—that would relate to the issue of comparative fault, and not absolve the landowner of all fault … . Kastin v Ohr Moshe Torah Inst., Inc., 2019 NY Slip Op 01582, Second Dept 3-6-19

SLIP AND FALL, STORM IN PROGRESS.

DEFENDANTS' PROOF DEMONSTRATED THE SNOW STORM WAS OVER 12 HOURS BEFORE PLAINTIFF'S SLIP AND FALL, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT UNDER THE STORM IN PROGRESS RULE SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendants did not demonstrate the applicability of the storm in progress rule in this ice and snow slip and fall case. Therefore defendants motion for summary judgment should not have been granted:

The climatological data submitted by the defendants showed that there was an accumulation of approximately seven inches of snow, which had ceased to fall by 8:00 p.m. on February 3, 2014, more than 12 hours prior to the accident, and that the temperature was 32 degrees when the storm stopped and dropped below freezing during the time prior to the happening of the accident. Further, the defendants submitted a transcript of the deposition testimony of the injured plaintiff, who testified that the walkway from the hotel to the parking lot was clear while

the parking lot was icy and had not been cleared by 9:00 a.m. on February 4, 2014, when the accident occurred. Casey-Bernstein v Leach & Powers, LLC, 2019 NY Slip Op 01557, Second Dept 3-6-19

Similar issues and result in Yeung v Selfhelp (KIV) Assoc., L.P., 2019 NY Slip Op 01558, Second Dept 3-6-19

SLIP AND FALL.

CAUSE OF THE SLIP AND FALL WAS NOT BASED UPON PURE SPECULATION, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (FOURTH DEPT).

The Fourth Department, reversing (modifying) Supreme Court, determined that defendants' motion for summary judgment in this slip and fall case should not have been granted. The cause of the fall was not based upon pure speculation. Plaintiff fell stepping out of a bath tub at a hotel:

… [D]efendants submitted plaintiff's deposition testimony, which, when viewed in the light most favorable to plaintiff and giving her the benefit of every reasonable inference … , establishes that plaintiff believed that the alleged dangerous or defective configuration or installation of the tub caused her to fall and sustain injuries. In addition, defendants failed to establish in support of their motion the absence of a dangerous or defective condition, and thus they were not entitled to summary judgment dismissing the complaint on that ground either … . We agree with defendants, however, that the court properly granted their motion to the extent that plaintiff alleged that they were negligent in failing to warn of dangerous and defective conditions. Defendants met their initial burden of establishing that any dangerous or defective condition was open and obvious, and plaintiff failed to raise a triable issue of fact … . DelRosario v Liverpool Lodging, LLC, 2019 NY Slip Op 01986, Fourth Dept 3-15-19

SLIP AND FALL.

DEFENDANT DID NOT SHOW A LACK OF CONSTRUCTIVE NOTICE IN THIS SLIP AND FALL CASE, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant's motion for summary judgment in this slip and fall case should not have been granted. Defendant did not demonstrate the absence of constructive notice:

A defendant who moves for summary judgment in a slip-and-fall case has the initial burden of making a prima facie showing that it did not create the hazardous condition which allegedly caused the fall, and did not have actual or constructive notice of that condition for a sufficient length of time to discover and remedy it … . A defendant moving for summary judgment dismissing a complaint cannot satisfy its initial burden merely by pointing to gaps in the plaintiff's case … .

Here, the defendant failed to meet its initial burden as the movant … . The defendant failed to affirmatively demonstrate that it did not have constructive notice of the condition that allegedly caused the plaintiff to fall … . Seedat v Capital One Bank, 2019 NY Slip Op 01632, Second Dept 3-6-19

SLIP AND FALL.

DEFENDANTS DEMONSTRATED THEY DID NOT HAVE CONSTRUCTIVE NOTICE OF THE WET CONDITION ON THE STAIRS IN THIS SLIP AND FALL CASE, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (FIRST DEPT).

The First Department, reversing Supreme Court, determined defendants' motion for summary judgment in this stairway slip and fall case should have been granted. Defendants demonstrated they did not have constructive notice of a wet condition:

Defendants … relied on plaintiff's testimony that, in the 15 minutes before his accident, he had gone up and down the stairs without incident and did not notice any liquid or water on the steps, demonstrating that the

alleged dangerous condition was not visible and apparent for a sufficient time before the accident to provide constructive notice … . Although plaintiff did testify that he saw a woman with a mop coming down the stairs as he was going upstairs the first time, implying that she could have caused the wet condition, he acknowledged that the surveillance video did not show any woman with a mop. Furthermore, defendants' witnesses stated that the daytime worker for defendant United Building Maintenance Associates, Inc. was only responsible for cleaning the area near the ATM machines on the first floor and never mopped, and that the staircase was cleaned by night personnel. Fernandez v JPMorgan Chase Bank, NA, 2019 NY Slip Op 01645, First Dept 5-7-19

SLIP AND FALL.

DEFENDANTS DID NOT DEMONSTRATE THRESHOLD STRIP WHICH ALLEGEDLY CAUSE PLAINTIFF TO SLIP AND FALL WAS NOT INHERENTLY DANGEROUS AND TRIVIAL AS A MATTER OF LAW, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined defendants did not demonstrate the threshold strip which allegedly caused plaintiff to slip and fall was not inherently dangerous and was trivial:

"[W]hether a dangerous or defective condition exists on the property of another so as to create liability depends on the peculiar facts and circumstances of each case" … , and the existence or nonexistence of a defect or dangerous condition "is generally a question of fact for the jury" … . Defendants' submissions in support of their motion included excerpts of plaintiffs' deposition testimony and defendants' affidavits, which raised a question of fact whether the threshold strip on the step created an unreasonably dangerous or defective condition. We further conclude that summary judgment dismissing the complaint was not warranted on the ground that the alleged defect was, as a matter of law, too trivial to be actionable. It is well settled that "a small difference in height or other physically insignificant defect is actionable if its intrinsic characteristics or the surrounding circumstances magnify the dangers it poses, so that it unreasonably imperil[s] the safety of' a pedestrian" . Here, it is impossible to ascertain from the black and white photographs submitted by defendants in support of the motion the width, depth, elevation, height differential or actual appearance of the threshold, and thus defendants failed to establish that the defect was, in fact, trivial. In addition, the threshold and step were located in a doorway, "where a person's attention would be drawn to the door, not to the [step]" … . Wiedenbeck v Lawrence, 2019 NY Slip Op 02246, Fourth Dept 3-22-19

SLIP AND FALL.

DEFENDANTS DID NOT SUBMIT EVIDENCE SHOWING WHEN THE SIDEWALK WAS LAST INSPECTED IN THIS SLIP AND FALL CASE, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendants' motion for summary judgment in this sidewalk slip and fall case should not have been granted. Defendants offered no evidence of when the sidewalk was last inspected:

In a trip and fall case, a defendant moving for summary judgment has the initial burden of making a prima facie showing that it neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it …. A movant cannot satisfy its initial burden by merely pointing to gaps in the plaintiff's case … .

Here, the defendants failed to establish, prima facie, that they did not have constructive notice of the alleged hazardous condition. In support of their motion, the defendants submitted no evidence as to when the subject sidewalk was last inspected prior to the accident … . Ariza v Number One Star Mgt. Corp., 2019 NY Slip Op 01551, Second Dept 3-6-19

SLIP AND FALL.

EVEN WHERE A CAUSE OF ACTION HAS NOT BEEN PROPERLY PLED THE COURT WILL SEARCH THE RECORD TO DETERMINE WHETHER THERE IS AN ACTIONABLE CLAIM IN RESPONSE TO A DEFENDANT'S MOTION FOR SUMMARY JUDGMENT, HERE IN THIS SLIP AND FALL CASE THERE WAS NO EVIDENTIARY SUPPORT FOR CERTAIN CAUSES OF ACTION AGAINST THE BUILDING OWNER (FIRST DEPT).

The First Department noted that, even where a cause of action is not properly pled, on a motion for summary judgment it must search the record to determine whether there is an actionable claim. In this slip and fall case, the building owner was defendant 90 Merrick and the employer of the janitor who allegedly mopped the floor

where plaintiff fell was defendant ABM. The First Department held that the 90 Merrick's motion for summary judgment should have been granted:

The complaint's allegations that defendants were negligent in their ownership, operation, control and maintenance of the premises by causing or allowing a dangerous condition on the floor gave no indication that plaintiff's theories of liability would include 90 Merrick's negligent retention of ABM or its vicarious liability for ABM's independent contractor's negligence in performing its duties under the contract … . Notwithstanding, a motion for summary judgment must be denied if there are issues of fact as to an actionable claim, even if the claim was not properly pleaded … , and we find that there are no factual issues as to whether ABM was an independent contractor — it was — when the accident happened. The deposition testimony elicited from nonparty CLK Commercial Management, LLC's employee, John S. Burke, the property manager for the building at the time of the accident, and ABM's manager, Victor Orellana, whose duties at the time of the accident included making sure the building was kept clean, shows that 90 Merrick did not direct, supervise or control ABM's work and that an ABM employee had responsibility for supervising and inspecting the work performed by ABM's employees, which comports with the duties and obligations as set forth in defendants' contract … . Burgdoerfer v CLK/HP 90 Merrick LLC, 2019 NY Slip Op 01532, First Dept 3-5-19

SLIP AND FALL.

MERELY QUESTIONING THE CREDIBILITY OF PLAINTIFF'S EXPLANATION OF THE CAUSE OF HER STAIRWAY SLIP AND FALL DID NOT RAISE A QUESTION OF FACT, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (FIRST DEPT).

The First Department, reversing Supreme Court, determined that defendant's motion for summary judgment in this slip and fall case should not have been granted. Defendant did not submit evidence refuting plaintiff's explanation of the cause of her fall (a hole in the stairs). Merely questioning the credibility of the plaintiff did not raise a question of fact:

Plaintiff was injured when, while walking down a staircase in defendant's building, her foot struck a hole in the stairs, causing her to fall from the third floor to the second floor. Defendant failed to establish entitlement to judgment as a matter of law by submitting evidence refuting plaintiff's testimony identifying the cause of her fall … . Defendant's challenge to the credibility of plaintiff's evidence is a matter for resolution by a trier of fact … . Morales v 320 E. 176th St., LLC, 2019 NY Slip Op 01711, First Dept 3-12-19

SLIP AND FALL.

QUESTION OF FACT WHETHER DEFENDANT IN THIS SLIP AND FALL CASE HAD CONSTRUCTIVE KNOWLEDGE OF MELTED ICE CREAM ON THE STAIRS, THERE WAS EVIDENCE THE ICE CREAM HAD BEEN THERE FOR AT LEAST THREE HOURS, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (FIRST DEPT).

The First Department, reversing Supreme Court, determined there was a question of fact whether defendant had constructive notice of melted ice cream which had spilled onto interior stairs in this slip and fall case. There was evidence the ice cream was on the step for at least three hours:

Although defendants' superintendent testified that he complied with his regular maintenance routine on the day of the accident and never observed the cup of ice cream on the stairs, plaintiff testified that she observed the cup of ice cream in an upright position approximately three hours before her fall when she had returned home from work. Such conflicting testimony, along with a photograph showing a tipped over cup of melted ice cream taken moments after plaintiff's fall, creates a triable issue as to whether defendants had constructive notice of the condition … . Cruz v Perspolis Realty LLC, 2019 NY Slip Op 01531, First Dept 3-5-19

SLIP AND FALL.

QUESTION OF FACT WHETHER DEFENDANTS HAD ACTUAL OR CONSTRUCTIVE NOTICE OF ELEVATED WHEEL STOP IN THIS SLIP AND FALL CASE (SECOND DEPT).

The Second Department determined defendants' motion for summary judgment in this parking lot slip and fall case was properly denied. There was a question of fact whether defendants had actual or constructive notice of an elevated plastic wheel stop:

The appellants failed to demonstrate, prima facie, that they lacked constructive notice of the elevated and broken wheel stop over which the plaintiff alleged she fell. They failed to present evidence of when the specific area

where the plaintiff fell was last cleaned or inspected relative to when the subject accident occurred … . Baviello v Patterson Auto Convenience Store, Inc., 2019 NY Slip Op 02052, Second Dept 3-20-19

SLIP AND FALL.

THE CAUSE OF PLAINTIFF'S DECEDENT'S SLIP AND FALL CALL COULD NOT BE IDENTIFIED, THE LIGHTER BURDEN OF PROOF PURSUANT TO THE NOSEWORTHY DOCTRINE DID NOT APPLY (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant's motion for summary judgment should have been granted because the cause of plaintiff's decedent's fall could not be identified. The Noseworthy lighter burden of proof did not apply. Although plaintiff's expert identified defects in the area where plaintiff's decedent fell, none of the defects were demonstrated to have caused the fall:

Contrary to the plaintiff's contention, the Noseworthy doctrine does not apply to the circumstances of this case, since the defendants' knowledge concerning the cause of the decedent's accident is no greater than that of the plaintiff … . Even accepting the defects identified in the plaintiff's expert's affidavit, the plaintiff failed to raise a triable issue of fact as to whether the decedent's fall was proximately caused by those allegedly unsafe conditions … . " Since it is just as likely that the accident could have been caused by some other factor, such as a misstep or loss of balance, any determination by the trier of fact as to the cause of the accident would be based upon sheer speculation'" … . Perrelli v Evangelista, 2019 NY Slip Op 01807, Second Dept 3-13-19

SLIP ANF FALL.

SUPREME COURT SHOULD NOT HAVE SEARCHED THE RECORD AND AWARDED SUMMARY JUDGMENT TO THE CITY IN THIS SIDEWALK SLIP AND FALL CASE, NO SUCH MOTION WAS BEFORE THE COURT (SECOND DEPT).

The Second Department determined that Supreme Court should not have searched the record and awarded summary judgment to the city in this sidewalk slip and fall case. No such motion was before the court:

… [T]he Supreme Court should not have, in effect, searched the record and awarded summary judgment to the City, which did not move for such relief. "A court may search the record and grant summary judgment in favor of a nonmoving party only with respect to a cause of action or issue that is the subject of the motions before the court" … . Since no party made any motion with respect to the plaintiff's direct cause of action against the City contained in the amended complaint, the court should not have granted relief with respect to that cause of action … . Cerbone v Lauriano, 2019 NY Slip Op 02056, Second Dept 3-20-29

THIRD-PARTY ASSAULT, LANDLORD-TENANT.

PLAINTIFF, WHO WAS ASSAULTED IN DEFENDANT'S BUILDING, DID NOT RAISE A QUESTION OF FACT ON WHETHER THE ASSAILANT WAS AN INTRUDER OR A TENANT, DEFENDANT'S SUMMARY JUDGMENT MOTION SHOULD HAVE BEEN GRANTED (FIRST DEPT).

The First Department, over a two-justice dissent, reversing Supreme Court, determined that the NYC Housing Authority's (NYCHA's) motion for summary judgment in this third party assault case should have been granted. Plaintiff, who was assaulted in defendant's building, did not raise a question of fact on whether the assailant was an intruder or a tenant. The defendant would only be liable if, due to negligence, an intruder entered the building and committed the assault:

NYCHA met its prima facie burden by demonstrating that plaintiff failed to raise an issue of fact as to whether the assailant was an intruder, as opposed to a tenant or invitee lawfully on the premises … . In support of its motion, NYCHA submitted plaintiff's deposition testimony that she was not a resident and did not know any other tenants in the building aside from her two patients. Plaintiff also testified that she did not see her assailant's face because he kept his face covered with the hood of his sweatshirt and that she did not know if her assailant was a tenant or guest.

We previously have held that the victim's familiarity with building residents, a history of ongoing criminal activity, and the assailant's failure to conceal his or her identity tend to demonstrate that the assailant was more likely than not an intruder … . Here, plaintiff's testimony demonstrates that these important factors were not present. Thus, plaintiff "provided no evidence from which a jury could conclude, without pure speculation, that it was more likely than not that the assailant was an intruder" … . Laniox v City of New York, 2019 NY Slip Op 02026, First Dept 3-19-19

TOXIC TORTS.

IN THIS ASBESTOS EXPOSURE CASE, A WITNESS'S VIDEOTAPED DEPOSITION TESTIMONY FROM PROCEEDINGS IN OTHER STATES SHOULD NOT HAVE BEEN ADMITTED IN THE PLAINTIFF'S DIRECT CASE OR IN THE DEFENSE CASE, NEW TRIAL ORDERED (THIRD DEPT).

The Third Department, ordering a new trial, determined that videotaped deposition testimony from proceedings in other states was not admissible in the New York action. It was alleged that plaintiff's decedent died from exposure to asbestos in a joint compound made by Georgia-Pacific. An employee of Georgia-Pacific, Charles Lehnert, who was familiar with the formula for the joint compound, gave the videotaped deposition testimony:

CPLR 3117 (a) (3) provides, in relevant part, that "any part or all of a deposition, so far as admissible under the rules of evidence, may be used . . . by any party for any purpose against any other party who was present or represented at the taking of the deposition or who had the notice required under these rules." Here, defendant was permitted to introduce deposition testimony given by Lehnert in the 2007 Texas state court action for the purpose of demonstrating that it contradicted the 2001 and 2003 testimony that plaintiff had been permitted to introduce as part of its case-in-chief. However, although defendant was a party to the 2007 Texas action, plaintiff was not, and he had no opportunity to be present and cross-examine Lehnert. Thus, this testimony was not admissible under CPLR 3117 (a) (3) … . …

Although defendant did not cross-appeal, our holding reversing Supreme Court's ruling regarding Lehnert's 2007 testimony necessarily brings up for review Supreme Court's denial of defendant's motion to preclude Lehnert's 2001 and 2003 testimony (seeCPLR 5501 [a] [1] …). Upon review, we find that none of Lehnert's deposition testimony should have been admitted into evidence at this trial. Although a live witness may be impeached with prior inconsistent testimony, Lehnert never testified for any party in this action, either at the trial itself or at any pretrial deposition. He was merely a witness who had testified years ago in multiple other states on the subject of the content of Georgia-Pacific joint compound. Rather than calling him (or any other witness) to testify on this topic, both parties resorted to retrieving video of Lehnert's testimony in those earlier actions and selectively playing those portions they believed supported their respective contentions. The jury was essentially asked to determine whether Lehnert, an empty chair in New York, testified more credibly in Illinois or Texas. In this scenario, CPLR 3117 (a) (2) did not permit plaintiff to introduce the 2001 and 2003 depositions on his case-in-chief, and CPLR 3117 (c) did not permit defendant to impeach those depositions with another deposition. Billok v Union Carbide Corp., 2019 NY Slip Op 02185, Third Dept 3-21-19

TRAFFIC ACCIDENTS, MEDICAL RECORDS.

DEFENDANTS' DECEDENT'S PHARMACY RECORDS IN THIS BICYCLE-VEHICLE COLLISION CASE ARE NOT PROTECTED BY PHYSICIAN-PATIENT PRIVILEGE AND MUST BE DISCLOSED SUBJECT TO TIME LIMITATIONS AND IN CAMERA REVIEW (FOURTH DEPT).

The Fourth Department, reversing (modifying) Supreme Court, determined that defendants' decedent's pharmacy records were not protected by physician-patient privilege and must be disclosed to plaintiff, subject to certain limitations and an in camera review. Plaintiff was injured when her bicycle collided with a vehicle driven by decedent:

We agree with plaintiffs, however, that decedent's pharmacy records are not protected by the physician-patient privilege (see CPLR 4504 [a] …) and are "material and necessary" to the prosecution of the action (CPLR 3101 [a] …). Nevertheless, we conclude that plaintiffs' request for records "before and after" the collision was overly broad, and we therefore limit disclosure of the pharmacy records to the six-month period immediately preceding the collision. Furthermore, those records "should not be released to [plaintiffs] until the court has conducted an in camera review thereof, so that irrelevant information is redacted"… . … [D]efendants are directed to submit to the court, for the six-month period immediately preceding the accident, pharmacy records identifying the medications prescribed to decedent and the prescribed dosages of those medications, and we remit the matter to Supreme Court for an in camera review of those records. Carr-Hoagland v Patterson, 2019 NY Slip Op 02000, Fourth Dept 3-15-19

TRAFFIC ACCIDENTS.

DEFENDANT DRIVER HAD ONLY TWO SECONDS TO REACT TO FORKLIFT WHICH ENTERED THE ROADWAY BLOCKING THE RIGHT-OF-WAY, DRIVER'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED, NO COMPARATIVE NEGLIGENCE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant driver was entitled to summary judgment in this traffic accident case. Defendant driver (Kim) had only two seconds to react when a forklift entered the roadway blocking the right-of-way:

"A defendant moving for summary judgment in a negligence action has the burden of establishing, prima facie, that he or she was not at fault in the happening of the subject accident" … . A driver who has the right-of-way is entitled to anticipate that other drivers will obey the traffic laws requiring them to yield to the driver with the right-of-way … . A driver traveling with the right-of-way may nevertheless be found partially responsible for an accident if he or she did not use reasonable care to avoid the accident. "Although a driver with a right-of-way . . . has a duty to … use reasonable care to avoid a collision, . . . a driver with the right-of-way who has only seconds to react to a vehicle which has failed to yield is not comparatively negligent for failing to avoid the collision" … .

Here, Kim established his prima facie entitlement to judgment as a matter of law by demonstrating that the driver of the forklift negligently entered the roadway mid-block from in front of a parked truck without yielding the right-of-way to Kim, and that such negligence was the sole proximate cause of the accident. The evidence submitted in support of the motion … demonstrated that Kim had, at most, two seconds to react before the forklift struck the passenger side of his vehicle. Thus, Kim demonstrated that he was not negligent for failing to avoid colliding with the forklift … . Jeong Sook Lee-Son v Doe, 2019 NY Slip Op 02073, Second Dept 3-20-19

TRAFFIC ACCIDENTS.

FAILURE TO PROVIDE SEATBELTS IN A TAXICAB VIOLATES THE VEHICLE AND TRAFFIC LAW AND IS NEGLIGENCE AS A MATTER OF LAW (FIRST DEPT).

The First Department noted that the failure to provide seatbelts in taxicab violates the Vehicle and Traffic Law and constitutes negligence:

The failure to provide seatbelts in a taxicab is a violation of Vehicle and Traffic Law § 383, and constitutes negligence as a matter of law … . Where an injured party fails to wear an available seatbelt, such failure would go to damages, not liability … . That is not the case when the vehicle owner fails to provide seatbelts in the first instance … . Grant v AAIJ African Mkt. Corp., 2019 NY Slip Op 01823, First Dept 3-14-19

TRAFFIC ACCIDENTS.

PLAINTIFF MADE A LEFT TURN IN FRONT OF DEFENDANT'S ONCOMING CAR WHEN DEFENDANT WAS FOUR CAR LENGTHS AWAY, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED, PLAINTIFF'S ALLEGATION THE TRAFFIC LIGHT WAS YELLOW DID NOT RAISE A QUESTION OF FACT (FOURTH DEPT)

The Fourth Department, reversing Supreme Court, determined defendant's motion for summary judgment in this intersection traffic accident case should have been granted. Plaintiff made a left turn in front of defendant. Plaintiff's claim that defendant was proceeding through a yellow light did not raise a question of fact:

… [W]e conclude that the record establishes that plaintiff made a left turn in front of defendant's oncoming vehicle, which was only four car lengths away from the intersection and traveling at the speed limit of 40 miles per hour. At that speed and distance, defendant entered the intersection with insufficient time to take evasive action to avoid the collision … . Thus, defendant's vehicle was so close to the intersection as to constitute an immediate hazard to the left-turning plaintiff, and plaintiff was therefore required to yield the right-of-way to defendant (see Vehicle and Traffic Law § 1141).

In addition, plaintiff's assertion that the traffic light facing her vehicle had changed from green to yellow just before she started to make her left turn does not raise a question of fact inasmuch as a yellow light would not deprive defendant of the right-of-way and confer it upon plaintiff … . Godwin v Mancuso, 2019 NY Slip Op 02248, Fourth Dept 3-22-19

TRAFFIC ACCIDENTS.

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IN THIS INTERSECTION TRAFFIC ACCIDENT CASE SHOULD HAVE BEEN GRANTED, PLAINTIFFS NO LONGER NEED TO DEMONSTRATE FREEDOM FROM COMPARATIVE FAULT (FIRST DEPT).

The First Department, reversing Supreme Court, noted the plaintiff in a traffic accident case no longer has to demonstrate freedom from comparative fault to warrant summary judgment:

Plaintiff made a prima facie showing of negligence on the part of defendants by submitting an affidavit stating that as she was driving through the intersection she noticed that defendant driver failed to stop at the stop sign when plaintiff had the right of way (see Vehicle and Traffic Law § 1142[a]). Plaintiff was not required to demonstrate her own freedom from comparative negligence to be entitled to summary judgment as to defendants' liability … . Garcia v McCrea, 2019 NY Slip Op 01842, First Dept 3-14-19

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