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ASSUMPTION OF THE RISK.

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The Fourth Department determined defendant golfer's motion for summary judgment was properly denied. There was evidence defendant teed off when plaintiff was within the range of defendant's normal drives. Plaintiff was struck in the head by the ball. This was not a case of a mishit ball which would trigger the assumption of the risk doctrine:

… "[A]lthough the object of the game of golf is to drive the ball as cleanly and directly as possible toward its ultimate intended goal (the hole), the possibility that the ball will fly off in another direction is a risk inherent in the game" … . Thus, while a golfer owes a duty to use due care in striking a golf ball … , "the mere fact that a golf ball did not travel in the intended direction does not establish a viable negligence claim" … . "To provide an actionable theory of liability, a person injured by a mishit golf ball must affirmatively show that the golfer failed to exercise due care by adducing proof, for example, that the golfer aimed so inaccurately as to unreasonably increase the risk of harm' " … . …

… [D]efendant's submissions raise an issue of fact whether he unreasonably increased the risk of striking plaintiff with his golf ball by teeing off when plaintiff, who was visible in the fairway on the same hole, was still positioned well within the typical range of defendant's drive … . Krych v Bredenberg, 2019 NY Slip Op 03479, Fourth Dept 5-3-19

DOG-BITE, LANDLORD-TENANT.

LANDLORD'S MOTION FOR SUMMARY JUDGMENT IN THIS DOG-BITE CASE SHOULD HAVE BEEN GRANTED, PLAINTIFF BITTEN BY TENANT'S DOG (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the landlord's motion for summary judgment in this dog-bite case should have been granted. The landlord was aware the tenant had a dog, and could have required the removal of the dog, but was not aware whether the dog had vicious propensities. The court noted that theories of common-law negligence are not applicable:

It is well established that " [t]o recover against a landlord for injuries caused by a tenant's dog on a theory of strict liability, the plaintiff must demonstrate that the landlord: (1) had notice that a dog was being harbored on the premises[,] (2) knew or should have known that the dog had vicious propensities, and (3) had sufficient control of the premises to allow the landlord to remove or confine the dog' " … . Here, it is undisputed that defendant was aware that a dog was kept on the premises by his tenants and that he could have required them to remove or confine the dog. Nevertheless, defendant met his initial burden on the motion by establishing as a matter of law that he lacked actual or constructive knowledge that his tenants' dog had any vicious propensities … .

Furthermore, to the extent that plaintiff's complaint includes a negligence cause of action, we conclude that the court erred in failing to dismiss that cause of action inasmuch as "[c]ases involving injuries inflicted by domestic animals may only proceed under strict liability based on the owner's knowledge of the animal's vicious propensities, not on theories of common-law negligence" … . Toher v Duchnycz, 2019 NY Slip Op 03487, Fourth Dept 5-3-19

EDUCATION-SCHOOL LAW, ASSUMPTION OF THE RISK.

PLAINTIFF-STUDENT WAS WATCHING FOOTBALL PRACTICE FROM THE SIDELINES WHEN A BLOCKING SLED, PUSHED BY SEVERAL PLAYERS, VEERED OFF TO THE SIDE AND RAN OVER PLAINTIFF'S FOOT, THE ASSUMPTION OF THE RISK DOCTRINE APPLIES TO SPECTATORS, THE SCHOOL DISTRICT'S MOTION FOR SUMMARY JUDGMENT IN THIS NEGLIGENT SUPERVISION ACTION SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court in this negligent supervision action, determined plaintiff-student assumed the risk of injury from a blocking sled during football practice. Plaintiff was not feeling well and was on the sidelines watching practice. He was not paying attention when a blocking sled, pushed by several players, veered toward him and ran over his foot. The court noted that the assumption of risk doctrine applies to bystanders and spectators:

The doctrine of primary assumption of the risk applies not only to participants in a qualified activity, but also to bystanders or spectators who have placed themselves in close proximity to it, "particularly where the record shows that the plaintiff had viable alternatives to [his or] her own location" … . "[T]he spectator at a sporting event, no less than the participant, accepts the dangers that inhere in it so far as they are obvious and necessary'"… .

Here, the defendant established its prima facie entitlement to judgment as a matter of law. The defendant submitted evidence that the plaintiff fully comprehended the risks inherent in the sport of football, specifically, that a blocking sled could veer to the left or the right while it was being used in a drill … . M.F. v Jericho Union Free Sch. Dist., 2019 NY Slip Op 03781, Second Dept 5-15-19

EDUCATION-SCHOOL LAW, BULLYING.

NEW TRIAL ORDERED BECAUSE THE INCONSISTENCY IN THE VERDICT SHEET COULD NOT BE REMEDIED AFTER THE JURY WAS DISCHARGED, THE JURY HAD AWARDED PLAINTIFF-STUDENT $1 MILLION IN A SUIT AGAINST A SCHOOL DISTRICT STEMMING FROM BULLYING BY OTHER STUDENTS (THIRD DEPT).

The Third Department determined a new trial was necessary because of an inconsistency in the jury's answers on the verdict sheet. The trial court attempted to cure the inconsistency after the jury was discharged by speaking with the jury foreman, who was still in the courthouse when the problem was noticed. The jury had awarded plaintiff-student $1 million in a negligent supervision suit against a school district stemming from bullying by other students:

The taking of this verdict was fatally flawed. Pursuant to CPLR 4111 (c), when the answers on a verdict sheet "are inconsistent with each other and one or more is inconsistent with the general verdict, the court shall require the jury to further consider its answers and verdict or it shall order a new trial" … . The jury's consideration of question No. 5 was inconsistent with its answer to question No. 4 and should have been brought to the jury's attention with a curative charge, followed by a return to deliberations to resolve the inconsistency … . However, because the jury had already been discharged, this was not possible and Supreme Court's consultation with the jury foreperson alone, although done in open court, could not take the place of full jury reconsideration … . In essence, the window of opportunity for Supreme Court to fix the problem closed when the other jurors left the courthouse. Supreme Court's subsequent efforts, while well intentioned, were futile and, given this timeline, our only course of action is to order a new trial … . Motta v Eldred Cent. Sch. Dist., 2019 NY Slip Op 03714, Third Dept 5-9-19

EDUCATION-SCHOOL LAW.

NEGLIGENT SUPERVISION WAS NOT THE PROXIMATE CAUSE OF THE PLAINTIFF-STUDENT'S INJURIES, ANOTHER STUDENT, WHO WAS BEING CHASED BY A DOG WHICH HAD BROKEN LOOSE, RAN INTO PLAINTIFF DURING LACROSSE PRACTICE (SECOND DEPT).

The Second Department determined the plaintiff-student's negligent supervision action against the board of education was properly dismissed. The plaintiff was injured during lacrosse practice when a dog brought into the field area by a nonstudent broke loose and chased a student who ran into plaintiff:

… [T]he defendants established …that they had no specific knowledge of any prior instances of dogs being brought into the field area during sports practices. Furthermore, the act of a student running into the infant plaintiff was a spontaneous, impulsive, and intervening act that could not have been anticipated. Therefore, the defendants established … that any alleged lack of supervision was not a proximate cause of the infant plaintiff's injuries … . B.J. v Board of Educ. of the City of N.Y., 2019 NY Slip Op 03325, Second Dept 5-1-19

EMPLOYMENT LAW, ESPINAL, AGENCY.

DEFENDANT RESTAURANT CAN BE LIABLE FOR THE NEGLIGENCE OF THE VALET PARKING SERVICE WITH WHICH IT CONTRACTED IF THE RESTAURANT HAD THE ABILITY AND OPPORTUNITY TO CONTROL THE CONDUCT OF THE CONTRACTOR, IF ESPINAL EXCEPTIONS APPLY, AND UNDER AN AGENCY THEORY, THE RESTAURANT'S MOTION FOR SUMMARY JUDGMENT WAS PROPERLY DENIED (FIRST DEPT).

The First Department determined the restaurant's (Dolphin's) motion for summary judgment in this action alleging negligence on the part of a valet parking service (APV) with which the restaurant had contracted was properly denied:

A restaurant providing valet parking services can be held liable for the negligence of the service whose attendants are alleged to have caused an accident to a third party. This is the case even where the service is an independent contractor with which the restaurant has contracted … .

This duty arises [under Espinal] when there is an ability and opportunity to control the conduct of the restaurant's contractors and an awareness of the need to do so. Thus, Dolphin cannot assert that it signed a contract with the valet parking service and then "covered its eyes with a blindfold"; rather, Dolphin was required to select a company "with, at the minimum, both appropriate insurance and competent drivers". Defendant restaurant w … as able to decline to enter into any contract for valet services it felt insufficient, and therefore in the best position to protect against the risk of harm.

Dolphin similarly failed to demonstrate that it did not create an unreasonable risk of harm to others or that APV entirely displaced its duty to maintain the valet parking area safely … . Indeed, the evidence showed, inter alia, that the restaurant and the valet service communicated on a daily basis to determine proper staffing. The restaurant, further, obtained parking spots for the valet service to utilize on its behalf. The restaurant informed the valet service in advance of functions so that staffing could be arranged. The parties' agreement similarly provided that service was provided "as requested" by the restaurant, and that it was the restaurant's obligation to provide the schedule for each week.

Dolphin may also be liable under the doctrine of ostensible agency or apparent authority and thus estopped from denying liability for an entity it held out as its agent … . Evans v Norecaj, 2019 NY Slip Op 04029, First Dept 5-23-19

EMPLOYMENT LAW, NEGLIGENT SUPERVISION AND RETENTION.

IN THIS NEGLIGENT SUPERVISION, HIRING AND RETENTION CASE, THE MEDICAL RECORDS OF A NON-PARTY WITNESS WHO ALLEGED IMPROPER CONDUCT BY DEFENDANT DOCTOR ARE DISCOVERABLE ONLY TO THE EXTENT THEY INCLUDE NON-PRIVILEGED INFORMATION INDICATING DEFENDANT DOCTOR'S EMPLOYER WAS AWARE OF THE ALLEGATIONS, THE NON-PARTY WITNESS DID NOT WAIVE THE PHYSICIAN-PATIENT PRIVILEGE BY DISCUSSING HER MEDICAL HISTORY IN A DEPOSITION (SECOND DEPT).

The Second Department, modifying Supreme Court, determined the medical records of a non-party witness were discoverable only to the extent that they included non-privileged information demonstrating defendant Huntington Medical Group (HMG) was on notice that defendant doctor (Wishner) had acted improperly with

patients. Plaintiff sued HMG alleging negligent hiring, supervision and retention of Wishner. Plaintiff had deposed a non-party witness who apparently had alleged improper conduct by Wishner. Defendants sought to discover the non-party witness's medical records. The Second Department noted that the defendants (1) had not shown the medical records were relevant to the improper conduct allegations and (2) the non-party witness had not waived the physician-patient privilege. The matter was remitted for an in camera review of the records by Supreme Court:

The physician-patient privilege seeks to protect confidential communications relating to the nature of the treatment rendered and the diagnosis made … . The physician-patient privilege applies to information communicated by the patient while the physician attends the patient in a professional capacity, as well as information obtained from observation of the patient's appearance and symptoms … . "The privilege applies at examinations before trial, and it covers both oral testimony and documents, such as hospital records, which presumably are drawn up in large part based on communications imparted by the patient to the treating physician" … .

Here, the nonparty witness expressly declined to waive the physician-patient privilege as to her medical records, and her deposition testimony with respect to the facts of Wishner's alleged improper conduct during the subject physical examination and the facts and incidents of her medical history does not constitute privileged information … . Thus, the nonparty witness did not waive the physician-patient privilege as to her medical records … . …

… [P]rivileged medical records may contain nonprivileged information that could be discoverable if relevant … . Thus, we remit this matter to the Supreme Court, … for an in camera inspection of the nonparty witness' medical records stored by HMG for a determination of whether such records, or any parts thereof, contain any nonprivileged information relevant to the issue of whether HMG was on notice of Wishner's alleged improper conduct toward patients during his examination of them and, if so, for the entry of an order directing that such nonprivileged information, if any, shall be produced to the defendants. Mullen v Steven G. Wishner, 2019 NY Slip Op 04180, Second Dept 5-29-19

EMPLOYMENT LAW, SCOPE OF EMPLOYMENT.

QUESTIONS OF FACT WHETHER THE EMPLOYEE WAS DRIVING THE EMPLOYER'S TRUCK WITH THE EMPLOYER'S PERMISSION AND WHETHER THE EMPLOYEE WAS ACTING WITHIN THE SCOPE OF HIS EMPLOYMENT WHEN THE TRAFFIC ACCIDENT OCCURRED (THIRD DEPT).

The Third Department determined plaintiff's vicarious liability causes of action against the employer of the driver of a company truck which struck plaintiff's car head-on properly survived summary judgment. The driver, Price, was intoxicated and was convicted of vehicular assault. The employer argued that, because of the company policy prohibiting employees from using drugs and alcohol, Price did not have permission to operate the truck within the meaning of Vehicle and Traffic Law 388. The employer further argued Price was not acting within the scope of his employment when the accident occurred. The court found there were questions of fact on both issues:

… [T]he requirement to drive sober relates more closely to the manner of operation, or how to drive, rather than a restriction on who may operate the vehicle and when and where they may do so … . As defendants did not establish, as a matter of law, that Price was driving without permission at the time of the accident, they were not entitled to summary judgment on the Vehicle and Traffic Law § 388 claim … . …

Price testified that [his employer] gave him a vehicle to use for business purposes, including traveling from home to work, and at the time of the accident he was driving to a job site to begin work for the day. [The employer] arguably derived a benefit from Price's ability to take the vehicle home because the truck contained a tool box for work tools, he used the truck to transport supplies to job sites from home improvement stores, the truck advertised the business by displaying the company name and logo, and he worked at construction job sites rather than a main office, so permitting him to take the vehicle home saved him from having to use work time to pick the company truck up and drop it off at a central location each day … . Based on this evidence, defendants failed to establish their entitlement to summary judgment, as there was a factual question regarding whether Price was acting within the scope of his employment at the time of the accident … . Williams v J. Luke Constr. Co., LLC, 2019 NY Slip Op 03431, Third Dept 5-2-19

LABOR LAW-CONSTRUCTION LAW.

PLAINTIFF, WHO FELL THROUGH A HOLE IN A HOUSE UNDER CONSTRUCTION, WAS NOT ENGAGED IN CONSTRUCTION WORK COVERED BY LABOR 240 (1) OR 241 (6), PLAINTIFF WAS MEASURING WINDOWS FOR FUTURE INSTALLATION OF WINDOW TREATMENTS (FOURTH DEPT).

The Fourth Department, reversing (modifying) Supreme Court, determined that plaintiff, who fell through a hole in a house under construction, was not engaged in an activity covered by Labor Law 240 (1) or 241 (6) when he fell. Plaintiff was measuring windows for future installation of window treatments, which is not construction work. There were questions of fact on the negligence and wrongful death causes of action however:

… [T]he work of measuring windows for the future installation of window treatments is not a protected activity under Labor Law § 240 (1). The work did not involve a "significant physical change to the configuration or composition of the building or structure" … , was not "performed in the context of the larger construction project" … , and was not "necessary and incidental to the construction of the home" … . …

The work being performed by decedent was not protected work under Labor Law § 241 (6) inasmuch as decedent " was not involved with [any] construction' "… , and the window treatment work was separate and "distinct from the construction work" … . Acox v Jeff Petroski & Sons, Inc., 2019 NY Slip Op 03480, Fourth Dept 5-3-19

LANDLORD-TENANT, DANGEROUS CONDITION.

LESSEE RESPONSIBLE FOR MAINTAINING THE LAUNDRY ROOM COULD BE LIABLE FOR INJURY CAUSED BY A DEFECTIVE WASHING MACHINE, LESSEE DID NOT ELIMINATE QUESTION OF FACT WHETHER IT HAD CONSTRUCTIVE NOTICE OF THE DEFECT, DISSENT (SECOND DEPT).

The Second Department, reversing Supreme Court, over a dissent, determined that defendant Coinmach, which leased the laundry room, was not entitled to summary judgment in this personal injury case. Plaintiff alleged the soap tray on the washing machine she was using came all the way out of the machine when she pulled it open, causing her to fall backward from an elevated step in front of the machine. The Second Department determined

Coinmach, the lessee of the laundry room, could be held liable because it was responsible for maintaining the laundry room. The court further held that Coinmach did not eliminate questions of fact concerning its constructive notice of the defect which caused the tray to pull out of the machine, because there was no evidence when the machine was last inspected:

Coinmach was the lessee of the laundry room with "the sole and exclusive occupancy, possession and control" for a term of seven years. In return, Coinmach agreed to make monthly rent payments. A tenant has a common-law duty to keep the premises it occupies in a reasonably safe condition, even when the landlord has explicitly agreed in the lease to maintain the premises … . …

Coinmach failed to make a prima facie showing that it did not have constructive notice that the soap tray was broken. Coinmach's area vice president testified at his deposition that Coinmach did not perform any routine maintenance on the machines, which were serviced whenever Coinmach received a service call requesting repairs. The area vice president testified that at each such service call, the technician would perform a "touch and feel test" on each machine, which would include opening the soap tray to make sure it was secure. However, there is no evidence in the record as to the date of the last service call, and therefore no evidence as to when Coinmach last inspected the subject soap tray before the injured plaintiff's accident … . Gatto v Coinmach Corp., 2019 NY Slip Op 03956, Second Dept 5-22-19

LEGAL MALPRACTICE, BANKRUPTCY.

PLAINTIFF SUED DEFENDANT ATTORNEYS ALLEGING INACCURATE ADVICE CAUSED HER TO FILE FOR BANKRUPTCY, BECAUSE THE LEGAL MALPRACTICE ACTION ACCRUED WHEN PLAINTIFF FILED FOR BANKRUPTCY, THE LAWSUIT BECAME PART OF THE BANKRUPTCY ESTATE AND PLAINTIFF WAS THEREBY STRIPPED OF THE CAPACITY TO SUE (SECOND DEPT).

The Second Department determined plaintiff did not have the capacity to sue the defendant attorneys for legal malpractice. The lawsuit alleged the attorneys gave inaccurate advice which caused plaintiff to file for bankruptcy on March 20, 2012. Because plaintiff's legal malpractice action accrued on the day she filed for bankruptcy, and the lawsuit was not listed as an asset, the lawsuit became part of the bankruptcy estate:

The commencement of a bankruptcy proceeding creates an "estate" that is comprised of "all legal or equitable interests of the debtor in property as of the commencement of the case" (11 USC § 541[a][1]…). "Upon the filing of a voluntary bankruptcy petition, all property which a debtor owns, including a cause of action, vests in the bankruptcy estate" … . "Although federal law determines when a debtor's interest in property is property of the bankruptcy estate, property interests are created and defined by state law"… . Causes of action that accrue under state law prior to the filing of a bankruptcy petition, as well as those that accrue as a result of the filing, are property of the estate … . "[A] debtor's failure to list a legal claim as an asset in his or her bankruptcy proceeding causes the claim to remain the property of the bankruptcy estate and precludes the debtor from pursuing the claim on his or her own behalf" … . Burbacki v Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara & Wolf, LLP, 2019 NY Slip Op 04128, Second Dept 5-29-19

MEDICAL MALPRACTICE, CIVIL PROCEDURE.

THE HOSPITAL DEFENDANT WAS PROPERLY PRECLUDED FROM PRESENTING THE CPLR ARTICLE 16 DEFENSE AFTER THE OTHER POTENTIALLY LIABLE DEFENDANTS HAD BEEN SEVERED FROM THE ACTION AT THE HOSPITAL DEFENDANT'S REQUEST, AND AFTER THE HOSPITAL DEFENDANT HAD REPRESENTED TO THE COURT THE OTHER POTENTIALLY LIABLE DEFENDANTS WOULD NOT BE PART OF THE TRIAL, TWO JUSTICE DISSENT, THE HOSPITAL DEFENDANT'S REQUEST FOR THE ERROR IN JUDGMENT JURY INSTRUCTION WAS PROPERLY DENIED (FOURTH DEPT).

The Fourth Department, over a two-justice dissent, determined defendant hospital was properly precluded from presenting a CPLR article 16 defense (pursuant to the defense, a party deemed 50% liable or less pays only that portion of the damages) in this medical malpractice action. Plaintiff's decedent was first treated at defendant hospital and then at defendant rehabilitation facilities (the Elderwoods). When plaintiff's decedent was treated at the hospital she was given a high dosage of medication, Simvastatin, and that high dosage was continued at the Elderwoods. The dosage was four times higher than plaintiff's decedent's usual dosage. The high dosage caused plaintiff's decedent's extreme suffering and death. Earlier in the litigation, the Elderwoods moved for severance, the defendant opposed and the motion was denied. As the trial approached defendant moved to sever the Elderwoods, and represented to the court that the Elderwoods involvment would not be "a topic in the main action." Then, at the trial, after plaintiff rested, defendant gave notice that it would present evidence of the

Elderwoods' negligence and asked to have them included on the verdict sheet pursuant to CPLR article 16. Noting that the plaintiff was not able to address the article 16 defense during the jury selection and trial, the Fourth Department held that the defendant was properly precluded from presenting the defense. The court also held that defendant's request for an error in judgment jury instruction was properly denied:

We agree with defendant that the fact that the third-party action was severed does not extinguish a defendant's article 16 defense. But, in this case, defendant represented before the trial started that the topic of care at the Elderwoods would not be discussed. If defendant had not made this representation, then plaintiff could have preempted or otherwise addressed this anticipated defense through opening statements and plaintiff's own lay and expert witnesses in plaintiff's case in chief, and thus could have suggested that the Elderwoods were not negligent before resting. As plaintiff's counsel asserts, he could have examined his witnesses at trial differently had he known that the topic of the Elderwoods' care, and thus the CPLR article 16 defense, was still on the table. …

It is well settled that "a doctor may be liable only if the doctor's treatment decisions do not reflect his or her own best judgment, or fall short of the generally accepted standard of care" . An "error in judgment" charge "is appropriate only in a narrow category of medical malpractice cases in which there is evidence that defendant physician considered and chose among several medically acceptable treatment alternatives" … .

This case does not fall within that narrow category … . There was simply no evidence that there was any judgment made by hospital personnel to administer 80 mg/daily of Simvastatin to decedent. Mancuso v Health, 2019 NY Slip Op 03520, Fourth Dept 5-3-19

MEDICAL MALPRACTICE, EXPERT OPINION.

SUMMARY JUDGMENT IS NOT APPROPRIATE IN A MEDICAL MALPRACTICE ACTION WHERE THERE ARE CONFLICTING MEDICAL EXPERT OPINIONS ABOUT A DEPARTURE FROM ACCEPTED STANDARDS OF CARE, SUPREME COURT REVERSED (SECOND DEPT).

The Second Department, reversing Supreme Court in this medical malpractice action, determined plaintiff's expert affidavit raised questions of fact about whether defendant's treatment of plaintiff's decedent departed from accepted standards of practice. Granting summary judgment to defendants is not appropriate where there are conflicting medical expert opinions:

… [V]ascular surgeon Jon Kirwin from Kings County Hospital surgically created an arteriovenous fistula (hereinafter AVF) in the decedent's upper left arm as an access site for dialysis treatments. … [D]uring one of the decedent's scheduled dialysis visits … , a nurse examined the decedent and, believing that the AVF was infected, conferred with … [the] attending nephrologist, who directed that the decedent be transferred to Kings County Hospital's emergency room for evaluation. The decedent presented to Kings County Hospital where he was evaluated by Kirwin, who cleared him for dialysis. The decedent underwent dialysis at Kings County Hospital without incident that day, and two days later reported to Utica for his scheduled dialysis treatment. The decedent underwent dialysis at Utica on August 27, 2010, and August 30, 2010, without incident. On August 31, 2010, the decedent was found unconscious at home and died on the way to the hospital. The cause of death was a rupture of the AVF. * * *

… [I]n support of their separate motions for summary judgment dismissing the complaint insofar as asserted against each of them, the moving defendants submitted expert affirmations that established, prima facie, that none of them departed from good and accepted standards of medical practice in their treatment of the decedent and that no alleged departure was the proximate cause of the plaintiff's injuries … . However, in opposition, the plaintiff raised triable issues of fact through her expert affirmations as to whether the defendants departed from accepted standards of practice by continuing with dialysis on an AVF that presented with infection and aneurysmal dilatation and whether the continued dialysis caused the AVF to rupture. "Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions. Such credibility issues can only be resolved by a jury" … . Hutchinson v New York City Health & Hosps. Corp., 2019 NY Slip Op 03775, Second Dept 5-15-19

MEDICAL MALPRACTICE VS NEGLIGENCE.

ADEQUATE SUPERVISION OF PLAINTIFF AFTER SURGERY RESULTING IN MEMORY LOSS WAS PART OF PLAINTIFF'S TREATMENT, THEREFORE A CAUSE OF ACTION RESULTING FROM PLAINTIFF'S LEAVING THE HOSPITAL SOUNDED IN MEDICAL MALPRACTICE, NOT NEGLIGENCE, PLAINTIFF'S MOTION TO AMEND THE COMPLAINT, ALTHOUGH PARTIALLY GRANTED, SHOULD HAVE BEEN GRANTED IN ITS ENTIRETY (SECOND DEPT).

The Second Department determined plaintiff's action against defendant hospital sounded in medical malpractice, not negligence, and plaintiff's motion to amend the complaint to add a medical-malpractice cause of action

(which was granted by Supreme Court) and other allegations should have been granted in its entirety. Plaintiff suffered memory loss after surgery and repeatedly threatened to leave the hospital. She did in fact leave and was not found for five days. The Second Department determined the failure to supervise plaintiff was an element of her treatment and therefore the actions sounded in medical malpractice:

… [W]hen the complaint challenges the medical facility's performance of functions that are "an integral part of the process of rendering medical treatment" and diagnosis to a patient, such as taking a medical history and determining the need for restraints, it sounds in medical malpractice … .

… [T]he allegations at issue essentially challenged the hospital's assessment of the plaintiff's supervisory and treatment needs … . Thus, the conduct at issue derived from the duty owed to the plaintiff as a result of a physician-patient relationship and was substantially related to her medical treatment … . …

… "Applications for leave to amend pleadings under CPLR 3025(b) should be freely granted unless the proposed amendment (1) would unfairly prejudice or surprise the opposing party, or (2) is palpably insufficient or patently devoid of merit" … . Here, there was no showing of prejudice, and the plaintiff's proposed amended complaint was not papably insufficient or patently devoid of merit. Therefore, the court should not have limited the allegations that the plaintiff could include in her amended complaint. Jeter v New York Presbyt. Hosp., 2019 NY Slip Op 04148, Second Dept 5-29-19

MUNICIPAL LAW, THIRD-PARTY ASSAULT.

PETITIONER'S MOTION TO FILE A LATE NOTICE OF CLAIM SHOULD HAVE BEEN GRANTED, THE CITY HAD TIMELY NOTICE OF THE FACTS UNDERLYING PETITIONER'S INJURIES, THE FACTS SUPPORTING THE CITY'S NEGLIGENCE COULD HAVE BEEN DISCOVERED DURING THE INVESTIGATION WITH A MODICUM OF EFFORT, CITY DID NOT DEMONSTRATE PREJUDICE RELATING TO THE DELAY, PETITIONER'S FAILURE TO OFFER A REASONABLE EXCUSE FOR THE DELAY WAS NOT FATAL (FIRST DEPT).

The First Department, reversing Supreme Court, determined that petitioner's motion to serve a late notice of claim should have been granted. Petitioner, a medical technician, alleged she was struck by an inmate in the custody of the Department of Correction (DOC) while the inmate was being treated at Bellevue Hospital. The

petitioner reported and discussed the incident with a DOC captain (Obigumeda) on the day it happened and sought to file the notice of claim seven months late:

Supreme Court presumably agreed with respondent's argument that it lacked notice because petitioner never specified that she had told Obigumeda the manner in which DOC was negligent (namely, by failing to ensure that a correction officer was present when she spoke with the inmate). We disagree.

To the extent that petitioner did not establish actual notice because she did not specify that her description of the assault included a recitation of who was in the room, "municipal authorities have an obligation to obtain the missing information if that can be done with a modicum of effort" … . Here, negligence is the only theory of liability that could be implied by petitioner's conversations with Obigumeda and, in any event, he could have determined who was in the room during the course of his investigation with "a modicum of effort." To hold otherwise would turn the statute into a sword, contrary to its remedial purpose … . …

… [R]espondent never provided Supreme Court with any evidence to substantiate that it was prejudiced by the mere passage of time. Instead, respondent made "[g]eneric arguments and inferences" which cannot establish substantial prejudice "in the absence of facts in the record to support such a finding" … .

While petitioner did not demonstrate a reasonable excuse for service of her late notice of claim, the lack of excuse is not fatal here … . Matter of Rodriguez v City of New York, 2019 NY Slip Op 03921, First Dept 5-21-19

NEGLIGENT ENTRUSTMENT.

PLAINTIFF'S SON WAS INJURED WHEN A UTILITY VEHICLE DRIVEN ON PRIVATE PROPERTY BY DEFENDANTS' 14-YEAR-OLD SON OVERTURNED, THE VEHICLE AND TRAFFIC LAW CAUSE OF ACTION SHOULD HAVE BEEN DISMISSED BECAUSE THE VEHICLE WAS NOT BEING DRIVEN ON A PUBLIC ROAD, HOWEVER THE NEGLIGENT ENTRUSTMENT CAUSE OF ACTION PROPERLY SURVIVED SUMMARY JUDGMENT (THIRD DEPT).

The Third Department, reversing (modifying) Supreme Court, determined the Vehicle and Traffic Law cause of action should have been dismissed, but the negligent entrustment cause of action properly survived summary judgment. Plaintiffs' 16-year-old son was injured when defendants' utility vehicle, driven on private property by defendants' 14-year-old son, overturned:

We find merit in defendants' claim that Supreme Court erroneously concluded that the utility vehicle is not excluded under Vehicle and Traffic Law § 125. Pursuant to Vehicle and Traffic Law § 388 (1), "[e]very owner of a vehicle used or operated in this state shall be liable and responsible for death or injuries to person or property resulting from negligence in the use or operation of such vehicle . . . by any person using or operating the same with the permission, express or implied, of such owner." For purposes of section 388, vehicle means a motor vehicle, which is defined as "[e]very vehicle operated or driven upon a public highway which is propelled by any power other than muscular power" … . A public highway is "[a]ny highway, road, street, avenue, alley, public place, public driveway or any other public way" (Vehicle and Traffic Law § 134).

At the time of the incident, the utility vehicle was being operated on defendants' private property — not a public highway … . Accordingly, we find that the utility vehicle was not a motor vehicle within the meaning of Vehicle and Traffic Law § 125 …, and it was error for Supreme Court to conclude otherwise. …

Supreme Court did not err in denying summary judgment on the negligent entrustment cause of action. "[A] parent owes a duty to protect third parties from harm that is clearly foreseeable from the child's improvident use or operation of a dangerous instrument, where such use is found to be subject to the parent's control" … . …

[The] submissions reveal that [defendant] O'Leary's son was not always required to ask for permission to operate the utility vehicle and fail to show that O'Leary had knowledge of how his son, when out of his presence, operated the vehicle. This proof, together with the clear warnings in the operator's manual, fails to support a determination as a matter of law that defendants could not have "clearly foreseen" that their 14-year-old son's recreational use of the utility could have exposed others to injury … . Wright v O'Leary, 2019 NY Slip Op 03424, Third Dept 5-2-19

OPEN AND OBVIOUS, DANGEROUS CONDITION.

ALLEGEDLY OPERATING A TREE-TRIMMING BUSINESS WITHOUT A LICENSE AND ENTRUSTING THE TREE-TRIMMING TRUCK TO PLAINTIFF'S CO-WORKER, IF NEGLIGENT, WERE NOT PROXIMATE CAUSES OF PLAINTIFF'S INJURY, THE DANGEROUS CONDITION ON THE TRUCK WHICH CAUSED PLAINTIFF'S INJURY WAS OPEN AND OBVIOUS, AND THE ACCIDENT WAS AN 'EXTRAORDINARY OCCURRENCE,' SO THERE WAS NO DUTY TO WARN (SECOND DEPT).

The Second Department determined the allegations that defendants were operating a tree-trimming business without a license and negligently entrusted the tree-trimming to one Perez (with whom plaintiff worked) were not proximate causes of the injury. Plaintiff caught a ring on his finger on a spike on a metal step on the truck and his finger was severed. The court noted that the danger was open and obvious and the accident was an 'extraordinary occurrence' so there was no duty to warn:

"Evidence of negligence is not enough by itself to establish liability. It must also be proved that the negligence was [a proximate] cause of the event which produced the harm"… . Thus, " liability may not be imposed upon a party who merely furnishes the condition or occasion for the occurrence of the event but is not one of its causes'" … . Further, "proximate cause is no less essential an element of liability because the negligence charged is premised in part or in whole on a claim that a statute or ordinance . . . has been violated" … .

… [E]ven if the defendants were negligent in operating a tree-trimming business without a license or in lending or renting or entrusting the truck to Perez, such negligent acts only furnished the occasion for the plaintiff's accident … , but were not a proximate cause of the accident. The defendants additionally demonstrated, prima facie, that they did not have any "special knowledge concerning a characteristic or condition peculiar to [Perez] which render[ed] [his] use of the [truck] unreasonably dangerous," as is required to establish a negligent entrustment cause of action … . In opposition, the plaintiff failed to raise a triable issue of fact as to either negligence or negligent entrustment.

With respect to the cause of action alleging a violation of the defendants' duty to warn, the defendants demonstrated … that any danger posed by the stairs was open and obvious and known to the plaintiff from his prior use of the truck … . Moreover, the plaintiff's accident was an "extraordinary occurrence" … . "[T]here is no duty to warn against an extraordinary occurrence, which would not suggest itself to a reasonably careful and prudent person as one which should be guarded against"… . Deschamps v Timberwolf Tree & Tile Serv., 2019 NY Slip Op 04133, Second Dept 5-29-19

SLIP AND FALL, ESPINAL.

ALTHOUGH NO ESPINAL FACTORS WERE ALLEGED BY PLAINTIFF IN THIS SLIP AND FALL CASE, QUESTIONS OF FACT WHETHER DEFENDANT'S ORAL CONTRACT WITH THE PROPERTY OWNER TO REMOVE ICE AND SNOW ENTIRELY REPLACED THE PROPERTY OWNER'S DUTY, AND WHETHER DEFENDANT HAD CONSTRUCTIVE NOTICE OF A RECURRENT ICY CONDITION, PRECLUDED SUMMARY JUDGMENT (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. The plaintiff leased the ground floor apartment and defendant, the plaintiff's mother, leased the second floor apartment. Plaintiff slipped and fell on ice on the exterior front steps of the two-family house. Defendant demonstrated she had a contractual arrangement with the property owner to remove ice and snow and, because plaintiff was not a party to the agreement, no duty of care was owed plaintiff (no Espinal factors were alleged by the plaintiff). But defendant raised questions of fact in opposition:

"[A] contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party" … . However, the Court of Appeals has recognized three exceptions to the general rule: "(1) where the contracting party, in failing to exercise reasonable care in the performance of his [or her] duties, launche[s] a force or instrument of harm; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely" … .

Here, the defendant established … entitlement to judgment as a matter of law by demonstrating that she did not owe a duty of care to the plaintiff, since the plaintiff was not a party to the oral agreement between the defendant and the property owner … . Since the plaintiff did not allege facts in her pleadings that would establish the possible applicability of any of the Espinal exceptions, the defendant … was not required to affirmatively establish that these exceptions did not apply

However, in opposition … , the plaintiff raised a triable issue of fact as to whether … . defendant's oral agreement with the property owner regarding maintenance was comprehensive and exclusive so as to entirely displace the property owner's duty to maintain … the exterior front steps and the gutter … . Additionally, the plaintiff raised a triable issue of fact as to whether the defendant had actual notice of an alleged recurrent dangerous condition regarding ice formation on the steps due to the leaky gutter, and was thus chargeable with

constructive notice of each specific occurrence of the condition … . Sampaiolopes v Lopes, 2019 NY Slip Op 03835, Second Dept 6-15-19

SLIP AND FALL, ESPINAL.

THE ALLEGED FAILURE TO ELIMINATE A TRIPPING HAZARD WAS NOT ACTIONABLE BECAUSE PLAINTIFF WAS NOT A PARTY TO THE CONTRACT BETWEEN DEFENDANT AND PLAINTIFF'S EMPLOYER, DEFENDANT'S ACTS OR OMISSIONS DID NOT FIT WITHIN ANY OF THE ESPINAL EXCEPTIONS IN THIS SLIP AND FALL CASE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the defendant, which had contracted with plaintiff's employer to offer a work-training program, did not owe a duty of care to the plaintiff who tripped and fell over extension cord wires during the training session. The only Espinal exception alleged was that the defendant launched an instrument of harm, which was deemed inapplicable by the Second Department. The alleged failure to eliminate the tripping hazard was not actionable:

"[A] contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party" … . However, there are three exceptions to that general rule: "(1) where the contracting party, in failing to exercise reasonable care in the performance of [its] duties, launche[s] a force or instrument of harm'; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely" … .

… The Supreme Court's determination that a triable issue of fact existed as to whether the defendant negligently failed to correct the alleged tripping hazard amounts to a finding that the defendant may have merely failed to become "an instrument for good," which is insufficient to impose a duty of care upon a party not in privity of contract with the injured party … . Espeleta v Synergy Resources, Inc., 2019 NY Slip Op 04138, Second Dept 5-29-19

SLIP AND FALL, MUNICIPAL LAW.

ABUTTING LANDOWNER HAS NO DUTY TO MAINTAIN A TREE WELL IN THE SIDEWALK, LANDOWNER'S MOTION FOR SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the abutting landowner (Glynton) in this slip and fall case did not have a duty to maintain the sidewalk tree well where plaintiff fell:

Administrative Code of the City of New York § 7-210, which became effective September 14, 2003, shifted tort liability for injuries arising from a defective sidewalk from the City to the abutting property owner … . However, a tree well does not fall within the applicable Administrative Code definition of "sidewalk" and, thus, "section 7-210 does not impose civil liability on property owners for injuries that occur in city-owned tree wells" … . Here, Glynton established its prima facie entitlement to judgment as a matter of law by demonstrating that the plaintiff fell due to a condition related to the tree well, not due to any condition concerning the sidewalk, and that it had no duty to maintain the tree well … . Barrios v City of New York, 2019 NY Slip Op 03311, Second Dept 5-1-19

SLIP AND FALL, MUNICIPAL LAW.

ALTHOUGH THE TOWN DEMONSTRATED IT DID NOT HAVE WRITTEN NOTICE OF THE DANGEROUS CONDITION IN THIS SIDEWALK SLIP AND FALL CASE, IT DID NOT DEMONSTRATE ITS SNOW REMOVAL EFFORTS DID NOT CREATE THE DANGEROUS CONDITION, THE TOWN'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the town's motion for summary judgment in this sidewalk slip and fall case should not have been granted. Although the town did not have written notice of the dangerous condition, the town did not demonstrate it did not create the dangerous condition by piling snow that melted and re-froze:

… Since the plaintiff alleged that the defendant affirmatively created the allegedly dangerous ice condition through its snow removal operations, the defendant, in addition to establishing that it did not receive prior written notice, was also required, on its motion for summary judgment, to make a prima facie showing that it did not create the condition complained of … . …

A municipality's act in piling snow as part of its snow removal efforts, which snow pile then melts and refreezes to create a dangerous ice condition, constitutes an affirmative act excepting the dangerous condition from the prior written notice requirement … . The defendant's evidence provided information about its general snow removal operations, but failed to show what the sidewalk abutting the accident site looked like immediately after it completed its snow removal operations. The defendant failed to establish, prima facie, that the 6 to 12 inches of snow that the plaintiff observed on the sidewalk, making it impassable, was not the product of its snow removal operations. The defendant also failed to submit any evidence as to what the temperature was from the time that it last performed its snow removal operations on January 24, 2016, and the time of the accident. Given that the defendant's submissions failed to eliminate all triable issues of fact as to whether its snow removal efforts created the ice condition, the defendant's motion for summary judgment dismissing the complaint should have been denied … . Eisenberg v Town of Clarkstown, 2019 NY Slip Op 03319, Second Dept 5-1-19

SLIP AND FALL, MUNICIPAL LAW.

CITY DID NOT HAVE NOTICE OF THE PROTRUDING SIGN ANCHOR IN THE SIDEWALK AND PLAINTIFF WAS UNABLE TO SHOW THE CONDITION WAS THE IMMEDIATE EFFECT OF ACTION TAKEN BY THE CITY, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE SHOULD NOT HAVE BEEN GRANTED (THIRD DEPT).

The Third Department, reversing Supreme Court, determined defendant-city's motion for summary judgment in this sidewalk slip and fall case should have been granted. Plaintiff alleged a sign which had been installed in the sidewalk was missing and she tripped over the protruding sign anchor. The city demonstrated it did not have written notice of the condition. And plaintiff was unable to show the condition was the immediate effect of action taken by the city:

… [P]laintiff claimed that defendant affirmatively created the defect by improperly installing the sign in 2006 and failing to routinely monitor its condition thereafter. "However, the affirmative negligence exception to prior written notice statutes applies only where the action of the municipality immediately results in the existence of

a dangerous condition" … . Plaintiff failed to present any proof establishing that defendant engaged in an activity that immediately resulted in the detachment of the sign and sign pole from its anchor … . Harvish v City of Saratoga Springs, 2019 NY Slip Op 03428, Third Dept 5-2-19

SLIP AND FALL, STORM IN PROGRESS.

NO EVIDENCE ICE ON WHICH PLAINTIFF SLIPPED AND FELL WAS FORMED BEFORE THE STORM, DEFENDANT ENTITLED TO SUMMARY JUDGMENT PURSUANT TO THE STORM IN PROGRESS RULE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the NYC Transit Authority (NYCTA) was entitled to summary judgment in this slip and fall case pursuant to the storm in progress rule. The evidence did not support plaintiff's allegation that the ice had formed before the storm:

"Under the so-called storm in progress' rule, a property owner will not be held responsible for accidents occurring as a result of the accumulation of snow and ice on its premises until an adequate period of time has passed following the cessation of the storm to allow the owner an opportunity to ameliorate the hazards caused by the storm" … . A defendant property owner may establish a prima facie case for summary judgment by presenting evidence that there was a storm in progress when the plaintiff allegedly slipped and fell … .

Here, the evidence that NYCTA submitted in support of its motion, including a transcript of the plaintiff's testimony at her General Municipal Law § 50-h hearing, a transcript of the plaintiff's deposition testimony, and certified climatological data, demonstrated, prima facie, that the subject accident occurred while a storm was in progress … . In this regard, the plaintiff testified that it was snowing at the time of the accident, and the certified climatological data confirms that testimony.

In opposition, the plaintiff failed to raise a triable issue of fact. Her contention that she slipped and fell on ice that existed prior to the storm that was in progress on the date of the accident was based on speculation and conjecture … . Indeed, the plaintiff presented no evidence, expert or otherwise, that the ice on which she fell was not produced by the storm in progress on the date of the accident … . Allen v New York City Tr. Auth., 2019 NY Slip Op 04121, Second Dept 5-29-19

SLIP AND FALL.

DEFENDANT DID NOT DEMONSTRATE THE AREA WHERE PLAINTIFF SLIPPED AND FELL ON ICE WAS CLEANED OR INSPECTED DURING THE THREE DAYS PRIOR TO THE FALL, THEREFORE DEFENDANT DID NOT DEMONSTRATE IT LACKED CONSTRUCTIVE NOTICE OF THE ICY CONDITION, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant school district did not demonstrate that it did not have constructive notice of the icy condition in this slip and fall case. Although the district demonstrated that it removed snow and slush from the area as late as January 6, it did not demonstrate that it inspected or cleaned the area between January 6 and January 9 when plaintiff fell:

Here, the School District failed to meet its initial burden as the movant. The evidence submitted by the School District demonstrated that snow fell on January 2 and 3, 2014. On January 2, 3, and 4, 2014, the School District removed snow and ice from all of its property, including the subject elementary school. On January 6, 2014, between 5:00 a.m. and 7:00 a.m., the School District removed slush from all of its property. However, no evidence was submitted as to what the accident site looked like after the School District performed work on the premises on January 6, 2014, and what, if any, cleaning procedures or inspection procedures were performed from 7:00 a.m. on January 6, 2014, until the time of the plaintiff's accident on January 9, 2014. Accordingly, the School District failed to establish, prima facie, that it did not have constructive notice of the alleged ice condition that caused the plaintiff to fall … . Muzio v Levittown Union Free Sch. Dist., 2019 NY Slip Op 03974, Second Dept 5-22-19

SLIP AND FALL.

DEFENDANT DID NOT DEMONSTRATE WHEN THE AREA WAS LAST INSPECTED AND THEREFORE DID NOT DEMONSTRATE IT LACKED CONSTRUCTIVE NOTICE OF THE ICE 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 that the defendant condominium's motion for summary judgment in this ice slip and fall case should not have been granted. Defendant did not demonstrate when the area had last been inspected:

"A property owner will be held liable for a slip-and-fall accident involving snow and ice on its property only when it created the dangerous condition which caused the accident or had actual or constructive notice of its existence" … . "Thus, 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 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" … . "To meet its initial burden on the issue of lack of constructive notice, [a] defendant must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell" … .

Here, Vista II failed to establish, prima facie, that it did not have constructive notice of the alleged patches of ice. In support of its motion, Vista II submitted, inter alia, the deposition testimony of the managing agent of the property, who merely testified about his general inspection practices and provided no evidence regarding any specific inspection of the areas in question prior to the plaintiff's falls …". Lauture v Board of Mgrs. at Vista at Kingsgate, Section II, 2019 NY Slip Op 04154, Second Dept 5-29-19

SLIP AND FALL.

DEFENDANT HOUSING AUTHORITY DEMONSTRATED THE AREA WHERE PLAINTIFF SLIPPED AND FELL HAD BEEN INSPECTED ON THE MORNING OF THE ACCIDENT AND THERE HAD BEEN NO PRIOR COMPLAINTS ABOUT A WET CONDITION, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT PROPERLY GRANTED (SECOND DEPT).

The Second Department determined that defendant New York City Housing Authority's (NYCHA's) motion for summary judgment in this stairway slip and fall case was properly granted. Plaintiff alleged she slipped on a wet condition that was recurrent. The NYCHA presented evidence the stairway had been inspected the morning of the accident and there had been no prior complaints about a wet condition:

NYCHA established, prima facie, that it did not create or have actual or constructive notice of the condition alleged by the plaintiff to have caused the accident … . The deposition testimony of the building caretaker who was on duty the morning of the accident was sufficient to establish that the area where the plaintiff fell was inspected that morning before the plaintiff's accident occurred, and would have been cleaned if there were any hazardous conditions present during the inspection. Furthermore, in regard to the claim that it had constructive notice of a recurrent dangerous condition, NYCHA submitted evidence that no complaints about the condition of the stairwell had been received for one year prior to and including the morning of the plaintiff's accident. Pagan v New York City Hous. Auth., 2019 NY Slip Op 03608, Second Dept 5-8-19

SLIP AND FALL.

DEFENDANT RESTAURANT DEMONSTRATED IT DID NOT HAVE ACTUAL OR CONSTRUCTIVE NOTICE OF THE GREASY OR SLIPPERY CONDITION IN THIS SLIP AND FALL CASE, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT PROPERLY GRANTED (FIRST DEPT).

The First Department determined defendant restaurant's summary judgment motion in this slip and fall case was properly granted. The restaurant demonstrated the floor had been inspected ten minutes before plaintiff fell and the floor had been cleaned the night before:

Defendants established prima facie that they neither created the dangerous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it … . Among other things, defendants' manager received no complaints concerning the floor and saw nothing on the floor when he inspected in the morning or later, around ten minutes before plaintiff fell … . The evidence that neither plaintiff nor defendants' employees saw the slippery substance on the floor until after plaintiff fell demonstrates that it was not sufficiently visible and apparent to charge defendants with constructive notice … .

Furthermore, testimony by defendant's manager that the porter cleaned the restaurant floor every night with a solution of water and vinegar is sufficient to establish a lack of constructive notice … .

In opposition, plaintiff failed to raise a triable issue of fact. Plaintiff's speculation that her fall could have been caused by the porter's use of a vinegar and water mixture to clean the floors is insufficient to sustain a cause of action … . The wet or greasy substance on the floor of a busy restaurant was a transient condition that could have appeared at any point after the porter finished cleaning the floors in the morning … . Valenta v Spring St. Natural, 2019 NY Slip Op 04118, First Dept 5-28-19

SLIP AND FALL.

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE SHOULD NOT HAVE BEEN GRANTED, HEARSAY IS ADMISSIBLE IN OPPOSITION TO A MOTION FOR SUMMARY JUDGMENT, THERE WAS CIRCUMSTANTIAL EVIDENCE OF THE CAUSE OF PLAINTIFF'S DECEDENT'S FALL (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the defendant's motion for summary judgment in this slip and fall case should not have been granted. The complaint alleged plaintiff's decedent tripped over a raised portion of a sidewalk. The evidence included plaintiff's decedent's explanation of the cause of the fall as described by plaintiff-wife. Defendants argued plaintiffs could not prove the cause of the fall because decedent's statements were inadmissible hearsay. The Second Department noted that hearsay is admissible in opposition to a summary judgment motion as long as it is not the only evidence. Here there was circumstantial evidence of the cause of the fall:

The defendants failed to establish their prima facie entitlement to judgment as a matter of law by eliminating all triable issues of fact. They failed to demonstrate that the cause of the decedent's fall could not be established by

admissible evidence, either direct or circumstantial … . While the defendants contend that the plaintiff's deposition testimony as to what the decedent told her as to how the accident occurred constituted inadmissible hearsay, hearsay may be considered on a motion for summary judgment so long as the hearsay evidence is not the only evidence of a triable issue of fact … . The defendants' submissions included the plaintiff's own deposition testimony concerning her personal observations of the location of the accident shortly after the event and photographs of the claimed defect. Thus, the defendants failed to carry their burden of demonstrating that the plaintiff could not establish, through direct or circumstantial evidence, that the decedent tripped and fell as the result of a defect in the sidewalk.

Further, since the defendants failed to submit evidence as to when they last inspected the sidewalk, they failed to establish lack of constructive notice of the allegedly defective condition of the sidewalk … . Kontorinakis v 27-10 30th Realty, LLC, 2019 NY Slip Op 03579, Second Dept 5-8-19

SUMMARY JUDGMENT.

VASTLY DIFFERENT ACCOUNTS OF THE INCIDENT PRECLUDED SUMMARY JUDGMENT, SUPREME COURT REVERSED, EXTENSIVE DISSENT (FIRST DEPT).

The First Department, reversing Supreme Court, over a dissent, determined questions of fact precluded summary judgment. The plaintiff's and defendants' versions of events, which are vastly different, are explained in detail in the decision. Plaintiff, who was in the back of an ambulette with a patient in a wheelchair, alleged that the driver pulled out fast causing plaintiff to fall and causing the wheelchair to tip over onto plaintiff. The driver alleged he had fastened the wheelchair to the floor of the ambulette and made sure plaintiff was strapped into his seat. He further alleged he drove safely. The driver acknowledged that the wheelchair had tipped over backwards:

We disagree with the dissent's statement that "defendants have failed to offer any explanation of the proximate cause of the accident." It is plaintiff's burden as the moving party for summary judgment to establish defendants' negligence as a proximate cause of plaintiff's injuries. Here, defendants adequately rebutted plaintiff's claim of negligence on their part, and thus plaintiff has failed to establish defendants' negligence and proximate cause. If a trier of fact finds defendants' version of events to be credible, then no liability should be imposed on them. Bajaha v Mercy Care Transp., Inc., 2019 NY Slip Op 03457, First Dept 5-2-19

THIRD-PARTY ASSAULT.

DEFENDANT DID NOT STRIKE PLAINTIFF AND WAS UNDER NO DUTY TO PROTECT PLAINTIFF FROM AN ASSAULT BY OTHERS, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IN THIS BAR-FIGHT CASE SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that defendant's motion for summary judgment in this third-party assault bar-fight case should have been granted. Defendant did not strike the plaintiff and was not under a duty to protect plaintiff from the conduct of others:

The plaintiff commenced this action, inter alia, to recover damages for personal injuries he sustained on January 7, 2013, at premises owned by the defendant Bulldog Grille, when he allegedly was physically assaulted by the defendants John Heinbuch, John Doe #1, and/or John Doe #2, who were patrons of the Bulldog Grille. …

"Generally, there is no duty to control the conduct of third persons to prevent them from causing injury to others'" … . Here, Heinbuch established his prima facie entitlement to judgment as a matter of law by demonstrating that he did not strike the plaintiff and that he had no duty to control the conduct of the persons who assaulted the plaintiff … . In opposition, the plaintiff failed to raise a triable issue of fact as to whether Heinbuch created the situation which led to the assault, or acted tortiously pursuant to a tacit agreement to assault or batter the plaintiff … . Lanfranchi v Grille, 2019 NY Slip Op 03780, Second Dept 5-15-19

TOXIC TORTS, REAL ESTATE, CONTRACTS.

DEFENDANT-SELLERS NOT LIABLE FOR MOLD AND MICE IN HOUSE SOLD TO PLAINTIFFS, UNDER THE MERGER DOCTRINE NO PROVISION OF THE CONTRACT SURVIVED THE DELIVERY OF THE DEED, THE DOCTRINE OF CAVEAT EMPTOR APPLIED, NO DUTY OF CARE OWED TO THE PLAINTIFFS OVER AND ABOVE THE CONTRACT PROVISIONS, THE PRIVITY ELEMENT OF NEGLIGENT MISREPRESENTATION WAS ABSENT (SECOND DEPT).

The Second Department determined the defendant-sellers were not liable under breach of contract or negligence theories for the presence of mold and mice in a house sold to plaintiffs:

The contract of sale contained language providing that, unless expressly stated, no covenant, warranty, or representation in the contract survived closing. A rider to the contract stated that the defendants were not aware of any mold or vermin infestation in the house. Prior to the closing, the plaintiffs conducted a home inspection which revealed, among other things, the presence of water staining and evidence of water infiltration on the interior of the house. The home inspection report stated that a mold evaluation was beyond the scope of the inspection and recommended that if the plaintiffs were concerned about potential mold issues, they should call a professional mold abatement company to perform an inspection. The report also stated that the need for some periodic general pest control should be anticipated. The plaintiffs did not undertake a mold inspection. * * *

… [O]nce title to the property closed and the deed was delivered, "any claims the plaintiff[s] might have had arising from the contract of sale were extinguished by the doctrine of merger" since there was no "clear intent evidenced by the parties that [the relevant] provision of the contract of sale [would] survive the delivery of the deed". … Furthermore, "New York adheres to the doctrine of caveat emptor and imposes no duty on the seller or the seller's agent to disclose any information concerning the premises when the parties deal at arm's length, unless there is some conduct on the part of the seller or the seller's agent which constitutes active concealment" … . …

A simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated … . …

"A claim for negligent misrepresentation requires the plaintiff[s] to demonstrate (1) the existence of a special or privity-like relationship imposing a duty on the defendant[s] to impart correct information to the plaintiff[s]; (2) that the information was incorrect; and (3) reasonable reliance on the information" … . Here, the defendants demonstrated that there was no special or privity-like relationship between themselves and the plaintiffs in this arm's length transaction … . Rosner v Bankers Std. Ins. Co., 2019 NY Slip Op 04015, Second Dept 5-22-19

TOXIC TORTS.

DEFENDANT'S SUBCONTRACTOR USED A PAINT STRIPPING PRODUCT DURING AN OFFICE BUILDING RENOVATION, PLAINTIFF, AN EVENING OFFICE CLEANER, ALLEGED INJURY FROM BREATHING TOXIC FUMES, THERE IS EVIDENCE DEFENDANT HAD A DUTY TO WARN, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT PROPERLY DENIED (FIRST DEPT).

The First Department determined defendant's motion for summary judgment in this toxic tort case was properly denied. Plaintiff, an evening cleaner in an office building, allege she was injured by inhaling toxic fumes from a paint stripping product used by a defendant's subcontractor (Island Painting):

Defendant failed to establish prima facie that it did not have actual or constructive notice of the alleged dangerous condition of the premises in time to take corrective measures … . Defendant submitted no evidence with respect to notice. However, there is evidence in the record that defendant had superintendents on site who oversaw the subcontractors' work and that defendant had a duty to notify and warn the building owner and its occupants of hazardous work undertaken on the project site so as to safeguard the building's occupants against exposure to such hazards. Thus, issues of fact exist as to whether defendant knew of the scheduled use of the paint stripper and of the product's toxicity and yet failed to warn the building owner and occupants to prevent harm to them. These issues of fact as to negligence also preclude summary judgment in defendant's favor on its claim for contractual indemnification by Island Painting … . Arias v Recife Realty Co., N.V., 2019 NY Slip Op 04269, First Dept 5-30-19

TRAFFIC ACCIDENTS, ATTORNEYS, SUMMATION.

PLAINTIFF'S MOTION TO SET ASIDE THE JURY VERDICT IN THE INTEREST OF JUSTICE SHOULD NOT HAVE BEEN GRANTED, THE COURT GRANTED THE MOTION BASED UPON REMARKS MADE BY DEFENSE COUNSEL DURING SUMMATION, REMARKS TO WHICH NO OBJECTION HAD BEEN MADE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff's motion pursuant to CPLR 4404 (a) to set aside the jury verdict in this personal injury case should not have been granted. The jury found that plaintiff did not suffer a serious injury within the meaning of the no-fault law (Insurance Law § 5102(d)), and awarded plaintiff $50,000 for lost wages, reduced by $25,000 for failure to wear a seatbelt. The trial judge granted the motion in the interest of justice primarily based upon comments made by defense counsel during summation, comments to which no objection was made:

… [T]he Supreme Court identified eight specific statements made by defense counsel in his closing that the court characterized as improper, in addition to the remarks quoted above. However, none of these statements were objected to. We recognize that common courtesy requires that an attorney allow opposing counsel the opportunity to argue his or her case to the jury without undue or repetitive interruptions. Nevertheless, where counsel, in summing up, exceeds the bounds of legal propriety, it is the duty of the opposing counsel to make a specific objection and for the court to rule on the objection, to direct the jury to disregard any improper remarks, and to admonish counsel from repetition of improper remarks … . Where objection is not, or cannot appropriately be, interposed during summation, counsel should, upon the conclusion of the summation, make appropriate objections, seek curative instructions, or request a mistrial … . Where no objection is interposed, a new trial may be directed only where the remarks are so prejudicial as to have caused a gross injustice, and where the comments are so pervasive, prejudicial, or inflammatory as to deprive a party of a fair trial … . This standard was not met in this case. We stress that the plaintiff's counsel made no complaint regarding the allegedly prejudicial nature of the defendant's closing statement until after an adverse verdict was rendered. The verdict that the plaintiff did not sustain a serious injury was supported by the evidence, and the jury had ample reason to reject the plaintiff's claims and accept the arguments of the defendants.

Accordingly, we reverse the order insofar as appealed from, deny the branch of the plaintiff's motion which was pursuant to CPLR 4404(a) to set aside the jury verdict on the issue of damages in the interest of justice and for a new trial on the issue of damages, and reinstate the jury verdict. Kleiber v Fichtel, 2019 NY Slip Op 03778, Second Dept 5-15-19

TRAFFIC ACCIDENTS, NOSEWORTHY.

PLAINTIFF HAD NO MEMORY OF THE ACCIDENT AND THE JURY WAS GIVEN THE NOSEWORTHY CHARGE, DEFENDANT'S MOTION TO SET ASIDE THE VERDICT IN THIS TRAFFIC ACCIDENT CASE PROPERLY DENIED (SECOND DEPT).

The Second Department determined the motion to set aside the verdict in this traffic accident case was properly denied. Plaintiff had no memory of the accident and testified about his habit or routine practice of riding his bicycle home from work. The court had given the Noseworthy jury instruction:

The plaintiff testified that, while he did not recall the accident, he did recall leaving work and getting on his bicycle with the intent of taking the route he usually took home, which route he detailed, explaining that he took the same route every day, except for when he took the bus. While that route would have had the plaintiff traveling with traffic at the time of the accident, the defendant testified, inter alia, that the plaintiff was traveling against traffic … . …

The jury could have credited the plaintiff's testimony as to his habit or routine practice, as to which the plaintiff submitted sufficient evidence "to allow the inference of its persistence" at the time of this accident … , while also making reasonable inferences based on the defendant's own testimony that, inter alia, the defendant failed to see that which through proper use of the driver's senses she should have seen, for which the defendant could be found liable even if the plaintiff, as the defendant here argues, could not establish that he obeyed all the rules of the road … . Ortega v Ting, 2019 NY Slip Op 03977, Second Dept 5-22-19

TRAFFIC ACCIDENTS, POLICE REPORT.

DEFENDANT DRIVER ATTEMPTED TO RAISE A FEIGNED FACTUAL ISSUE IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT BY CONTRADICTING A STATEMENT ATTRIBUTED TO DEFENDANT IN THE POLICE REPORT, PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT IN THIS INTERSECTION TRAFFIC ACCIDENT CASE SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiffs' motion for summary judgment in this intersection traffic accident case should have been granted. Defendant driver (Karen) made a statement included in the police report indicating she did not see plaintiffs' motorcycle before the accident. In response to plaintiffs' motion for summary judgment defendant driver (Karen) averred that she came to a stop at the stop sign, pulled out into the intersection and then saw the motorcycle moving "extremely fast." The Second Department held that defendant had raised a feigned factual issue. The court also noted that, although the motion for summary judgment was made before discovery was complete, defendants did not show that additional discovery would lead to relevant evidence:

In support of their motion, the plaintiffs submitted, among other things, affidavits from the injured plaintiff and a witness, Shahiem Smith, who observed the collision. According to those affidavits, Karen drove … into the intersection without yielding the right-of-way to the injured plaintiff's motorcycle in violation of Vehicle and Traffic Law § 1142(a) and struck the motorcycle as it was lawfully proceeding through the intersection … . "A violation of the Vehicle and Traffic Law constitutes negligence as a matter of law" … . Moreover, the plaintiffs also submitted a copy of a police accident report which contained Karen's statement that she did not see the injured plaintiff. Therefore, the plaintiffs established their prima facie entitlement to judgment as a matter of law on the issue of liability … . Kerolle v Nicholson, 2019 NY Slip Op 03959, Second Dept 5-22-19

TRAFFIC ACCIDENTS, REAR-END COLLISIONS.

DEFENDANT ASSERTED SHE THOUGHT PLAINTIFF'S CAR WOULD GO THROUGH THE YELLOW LIGHT AT AN INTERSECTION AND DEFENDANT RAN INTO THE REAR OF PLAINTIFF'S CAR WHEN IT CAME TO A SUDDEN STOP, DEFENDANT'S ASSERTION DID NOT CONSTITUTE A NON-NEGLIGENT EXPLANATION FOR THE REAR-END COLLISION, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT PROPERLY GRANTED (SECOND DEPT).

The Second Department determined defendant, in this traffic accident case, failed to raise a question of fact about a non-negligent explanation for the rear-end collision. Defendant asserted that it "appeared" the lead vehicle and plaintiff's vehicle (behind the lead vehicle) were going to go through the yellow light at the intersection. Defendant further asserted that the lead vehicle came to a sudden stop, plaintiff's vehicle struck the lead vehicle, and then defendant's vehicle struck the plaintiff's. The court held that defendant should have anticipated the sudden stop because of the yellow light:

The defendant driver's assertion that the plaintiff's vehicle came to a sudden stop, standing alone, was insufficient to raise a triable issue of fact as to whether there was a nonnegligent explanation for the collision between the plaintiff's vehicle and the defendants' vehicle … . Even if, as the defendant driver asserted, the plaintiff had come to a sudden stop at the traffic light, the defendant driver should have anticipated that the plaintiff's vehicle might come to a stop at the intersection, especially where, according to the defendant driver's own affidavit, the traffic light already turned yellow … . The defendant driver was under a duty to maintain a safe distance between her vehicle and the plaintiff's vehicle, notwithstanding that it "appeared" to her that the lead vehicle and the plaintiff's vehicle were "going to attempt to beat the light'" … . Therefore, in opposition to the plaintiff's prima facie showing, the defendants failed to raise a triable issue of fact. Catanzaro v Edery, 2019 NY Slip Op 03762, Second Dept 5-15-19

TRAFFIC ACCIDENTS.

QUESTION OF FACT WHETHER DEFENDANT VIOLATED VEHICLE AND TRAFFIC LAW 1141 BY MAKING A LEFT TURN IN FRONT OF PLAINTIFF'S VEHICLE, DEFENDANT AVERRED PLAINTIFF WAS DRIVING TOO FAST, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the plaintiff's motion for summary judgment in this intersection traffic accident case should not have been granted. Although plaintiff made out a prima facie case, alleging the defendant, without warning, made a left turn in front of him in violation of Vehicle and Traffic law 1141, defendant raised a question of fact about whether she violated the statute by averring plaintiff was driving too fast:

Pursuant to Vehicle and Traffic Law § 1141, "[t]he driver of a vehicle intending to turn to the left within an intersection . . . shall yield the right of way to any vehicle approaching from the opposite direction which is within the intersection or so close as to constitute an immediate hazard" … . A violation of this statute constitutes negligence per se … . …

The defendant driver averred that, as she approached the intersection, she slowed her vehicle, activated her left hand turn signal, and "looked to ensure that the roadway was clear." As she was in the process of turning, she noticed the plaintiff's vehicle for the first time and observed it traveling toward her at such an excessive rate of speed that she was unable to avoid the impact. The foregoing was sufficient to raise a triable issue of fact as to whether, at the time the defendant driver initiated her turn, the plaintiff's vehicle was "so close as to constitute an immediate hazard" … . Brodney v Picinic, 2019 NY Slip Op 03314, Second Dept 5-1-19

ZONE OF DANGER, IMMEDIATE FAMILY.

GRANDMOTHER WAS IN THE ZONE OF DANGER WHEN PIECES OF THE FACADE OF A BUILDING FELL AND KILLED HER TWO-YEAR-OLD GRANDCHILD, BECAUSE GRANDMOTHER IS NOT 'IMMEDIATE FAMILY' SHE CANNOT RECOVER UNDER A NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS THEORY, THE MOTION TO AMEND THE COMPLAINT TO ADD THAT THEORY SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, over an extensive two-justice dissent, determined the grandmother of a two-year-old child who witnessed the child's death was not a member of the child's "immediate family" and therefore could not recover for negligent infliction of emotional distress, despite the grandmother's being in the zone of danger when the child was struck by falling pieces of a building-facade. The motion to amend the complaint to add the negligent infliction of emotional distress cause of action should not have been granted:

… [I]n Trombetta v Conkling (82 NY2d 549, 551), the Court of Appeals held that a niece could not recover damages for negligent infliction of emotional distress for witnessing the death of her aunt, despite the fact that the niece's mother had died when the niece was 11 years old, and the aunt had allegedly been the maternal figure in the niece's life. At the time of the accident, the plaintiff was 37 years old and her aunt was 59 years old (see id. at 551). In rendering its determination, the Court of Appeals stated: "On firm public policy grounds, we are persuaded that we should not expand the cause of action for emotional injuries to all bystanders who may be able to demonstrate a blood relationship coupled with significant emotional attachment or the equivalent of an intimate, immediate familial bond" (id. at 553).

In Jun Chi Guan v Tuscan Dairy Farms (24 AD3d 725), this Court held that the relationship of grandparent and grandchild does not constitute "immediate family" so as to permit recovery for negligent infliction of emotional distress. In Jun Chi Guan, the plaintiff grandmother was pushing her infant grandson in a stroller, when a truck owned and operated by the defendants struck the stroller, killing the infant (see id. at 725). This Court rejected the grandmother's argument that she should be considered immediate family because she was the family member who spent the most time with the infant during his waking hours (see id. at 726). Further, this Court held that "it is not appropriate for this Court to expand the class [of persons constituting immediate family] absent further direction from the Court of Appeals or the New York State Legislature" (id.). Greene v Esplanade Venture Partnership, 2019 NY Slip Op 03771, Second Dept 5-15-19