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Negligence
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An Organized Compilation of the Decision-Summaries Addressing "Negligence" Issues Posted on the New York Appellate Digest Website in July 2019.

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"The failure of a party to disclose a cause of action as an asset in a prior bankruptcy proceeding, which the party knew or should have known existed at the time of that proceeding, deprives him or her of the legal capacity to sue subsequently on that cause of action'" … .

Here, it is undisputed that the plaintiff did not disclose, in the bankruptcy petition that she filed in October 2015, the existence of the cause of action to recover damages for personal injuries that she had previously asserted against the defendant. The defendant established, prima facie, that when the petition was filed, the plaintiff knew or should have known of the existence of her cause of action, and the plaintiff failed to raise a triable issue of fact in opposition to that prima facie showing … . Jean-Paul v 67-30 Dartmouth St. Owners Corp., 2019 NY Slip Op 05965, Second Dept 7-31-19

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The Third Department determined claimant in this slip and fall case did not meet the pleading requirements of Court of Claims Act 11 and her claim was therefore properly dismissed. Although claimant submitted an aerial map in opposition to the motion to dismiss, only the information in the claim need be considered:

Court of Claims Act § 11 (b) provides that "[t]he claim shall state the . . . place where such claim arose." Although "absolute exactness" is not required, "a claimant must provide a sufficiently detailed description of the particulars of the claim to enable defendant to investigate and promptly ascertain the existence and extent of its

liability" … . "[D]efendant is not required to ferret out or assemble information that [Court of Claims Act §] 11 (b) obligates the claimant to allege," and "[f]ailure to abide by [the statute's] pleading requirements constitutes a jurisdictional defect mandating dismissal of the claim, even though this may be a harsh result" … . …

Claimant alleged that she fell "on the exterior stairs/landing located proximate to Moffit Hall and Clinton Dining Hall." The record establishes, however, that there are three staircases proximate to Moffit Hall and Clinton Dining Hall. Claimant's contention that the location stated in her claim necessarily referred to the sole staircase/landing between the two buildings is without merit because the claim did not allege that the situs of the accident occurred between the two buildings … . In opposition to the motion to dismiss, claimant submitted an aerial map of where she allegedly fell. However, the aerial map does not cure the pleading defect in her claim because the aerial map was not included in her claim, and defendant is not required to go beyond the claim to ascertain the situs of the injury … . Katan v State of New York, 2019 NY Slip Op 05746, Third Dept 7-18-19

EDUCATION-SCHOOL LAW.

DAY CARE CENTER'S MOTION FOR SUMMARY JUDGMENT IN THIS NEGLIGENT SUPERVISION CASE PROPERLY DENIED (SECOND DEPT).

The Second Department determined defendant day care center's motion for summary judgment in this negligent supervision case was properly denied. The infant plaintiff allegedly was injured while in the care of the day care center. The facts were not described:

The defendant, as a provider of day care services, was under a duty to adequately supervise the children in its charge and may be held liable for foreseeable injuries proximately related to the absence of adequate supervision … . "A plaintiff is not required to exclude every other possible cause, but need only offer evidence from which proximate cause may be reasonably inferred. [The p]laintiff's burden of proof on this issue is satisfied if the possibility of another explanation for the event is sufficiently remote or technical to enable the jury to reach its verdict based not upon speculation, but upon the logical inferences to be drawn from the evidence" … .

Here, the defendant failed to establish, prima facie, that the infant plaintiff's injuries were not proximately caused by its negligence. The defendant's submissions failed to negate a reasonable inference that the injury occurred at the defendant's day care center and that the defendant failed to provide adequate supervision … . A.D.G. v Children's Ark Daycare Ctr., Inc., 2019 NY Slip Op 05959, Second Dept 7-31-19

EDUCATION-SCHOOL LAW.

NEGLIGENT SUPERVISION WAS NOT THE PROXIMATE CAUSE OF PLAINTIFF'S INJURIES IN THIS STUDENT-PUSHES-STUDENT CASE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the school district's motion for summary judgment in this negligent supervision, student-pushed-by-student, case should have been granted. Negligent supervision was not the proximate cause of the injury:

… [T]he infant plaintiff, a kindergarten student at a school in the defendant … School District … , allegedly was injured when she was pushed into a wall by a fellow kindergarten student while they were lining up outside their classroom before the afternoon session. …

"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, where an accident occurs in so short a span of time that even the most intense supervision could not have prevented it, lack of supervision is not the proximate cause of the injury and summary judgment in favor of a defendant charged with the duty of reasonable supervision is warranted … .

Here, 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 alleged injuries … . M.P. v Central Islip Union Free Sch. Dist., 2019 NY Slip Op 05553, Second Dept 7-10-19

LEGAL MALPRACTICE, CIVIL PROCEDURE.

CONTINUOUS REPRESENTATION DOCTRINE DID NOT APPLY TO TWO DISTINCT AND SEPARATE ACTIONS, LEGAL MALPRACTICE ACTION TIME-BARRED (FIRST DEPT).

The First Department determined the continuous representation doctrine did not apply and the legal malpractice action was time-barred. Plaintiff was represented by defendant law firm in a 2005 divorce. Plaintiff's ex-wife then sued plaintiff alleging he fraudulently concealed an asset in the divorce proceedings. Defendant law firm

successfully defended the fraud action. 12 years after the divorce action ended, plaintiff sued the law firm for malpractice, asking to be relieved of the obligation to pay the law firm's legal fees in the fraud action:

The motion court correctly found that this action, which was commenced 12 years after the divorce action ended, is barred by the applicable three-year statute of limitations … . Contrary to plaintiff's contentions, the continuous representation doctrine is inapplicable, because defendants were retained under two separately executed retainer agreements in the divorce action and the fraud action … . The first retainer agreement expressly stated that it did not cover any services following the entry of a final judgment of divorce. Thus, there was no mutual understanding that further representation was necessary on the specific subject matter of the malpractice claim … . Moreover, the divorce action and the fraud action, although related, were two distinct and separate actions … . Etzion v Blank Rome, LLP2019 NY Slip Op 05468, First Dept 7-9-19

LEGAL MALPRACTICE, CIVIL PROCEDURE.

QUESTION OF FACT WHETHER THE CONTINUOUS REPRESENTATION DOCTRINE TOLLED THE STATUTE OF LIMITATIONS IN THIS LEGAL MALPRACTICE ACTION; THE ATTORNEY HAD ATTEMPTED TO REMEDY THE FAILURE TO FILE OBJECTIONS IN AN ESTATE MATTER AFTER THE STATUTE HAD RUN; ABSENCE OF AN EXPERT'S REPORT FROM THE RECORD ON APPEAL PRECLUDED A RULING ON THE RELATED ISSUE (FOURTH DEPT).

The Fourth Department, reversing (modifying) Supreme Court, determined plaintiff had raised a question of fact whether the continuous representation doctrine tolled the statute of limitations in this legal malpractice action. The attorney had attempted to remedy the failure to file objections in an estate matter after the statute had run. The Fourth Department noted that plaintiff's expert's report was missing from the record on appeal and therefore plaintiff was unable to argue on appeal that he had raised a related question of fact (concerning damages) before Supreme Court. Defendant had argued the damages were speculative (requiring dismissal) and Supreme Court did not rule on the issue (because the case was dismissed as untimely). The matter was remitted for a ruling on the damages issue:

We are unable to review plaintiff's contention that he raised a triable issue of fact with respect to … damages by submitting an expert report inasmuch as plaintiff failed to include that document in the record on appeal. Thus

plaintiff, as the party raising this issue on his appeal, "submitted this appeal on an incomplete record and must suffer the consequences" … . …

Defendant met his burden … by establishing that the statute of limitations for legal malpractice is three years (see CPLR 214 [6]), that the estate cause of action accrued on November 1, 2010, the last date on which to file objections to the accounting …, and that the estate cause of action was therefore untimely when this malpractice action was commenced on November 15, 2013. "The burden then shifted to plaintiff[] to raise a triable issue of fact whether the statute of limitations was tolled by the continuous representation doctrine" … .

We agree with plaintiff that the court erred in determining that plaintiff failed to do so. It is well settled that, in order for the continuous representation doctrine to apply, "there must be clear indicia of an ongoing, continuous, developing, and dependant relationship between the client and the attorney which often includes an attempt by the attorney to rectify an alleged act of malpractice" … . Here, plaintiff submitted evidence that defendant made several unsuccessful attempts to file the objections within the weeks after the deadline and that he made preparations to appear at a scheduled conference on the objections on November 23, 2010. Those efforts could be viewed as "attempt[s] by the attorney to rectify an alleged act of malpractice" … , and thus plaintiff raised a triable issue of fact whether the statute of limitations was tolled by the continuous representation doctrine. Leeder v Antonucci, 2019 NY Slip Op 05898, Fourth Dept 7-31-19

MEDICAL MALPRACTICE, ATTORNEYS, EVIDENCE.

ALTHOUGH THE ATTORNEY REPRESENTING HIS MOTHER'S ESTATE IN A MEDICAL MALPRACTICE/WRONGFUL DEATH ACTION MAY BE A WITNESS, UNDER THE PARTICULAR FACTS OF THE CASE, DISQUALIFICATION PURSUANT TO THE ADVOCATE-WITNESS RULE WAS NOT REQUIRED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that, although the attorney representing his mother's estate in the medical malpractice/wrongful death action may be a witness, the advocate-witness rule, under the particular facts of this case, did not require disqualification:

… [T]he advocate-witness rules contained in the Rules of Professional Conduct (22 NYCRR 1200.0) provide guidance, but are not binding authority, for the courts in determining whether a party's attorney should be disqualified during litigation … . Rule 3.7(a) of the Rules of Professional Conduct … provides that, in general,

"[a] lawyer shall not act as advocate before a tribunal in a matter in which the lawyer is likely to be a witness on a significant issue of fact." There is an exception to this rule when "disqualification of the lawyer would work substantial hardship on the client"… . Further, the advocate-witness rule generally does not control where the attorney is also a litigant … . However, estate representatives represent the interests of the estate's beneficiaries, rather than their own. Therefore, generally, the advocate-witness rule will prevail over a fiduciary-attorney's right to self-representation … . …

Here, the other distributee affirmed that his interests in the lawsuit are identical to those of the plaintiff, whom he wished would remain as attorney for the estate. Accordingly, while the plaintiff is not a party in his individual capacity, his personal property interests as one of two distributees of the estate are at stake (see EPTL 5-4.4[a] …), and his interests appear to be identical to those of the estate … . Furthermore, the plaintiff affirmed that his attempt to retain different counsel for the estate was unsuccessful, such that his disqualification as counsel would essentially foreclose the claim, working substantial hardship on the estate and its distributees … . Greenberg v Grace Plaza Nursing & Rehabilitation Ctr., 2019 NY Slip Op 05390, Second Dept 7-3-19

MEDICAL MALPRACTICE, CIVIL PROCEDURE.

ALTHOUGH THE TWO THYROID SURGERIES WERE PERFORMED BY THE SAME DOCTOR, THE 2005 SURGERY AND THE 2010 SURGERY WERE DISCRETE EVENTS; THE STATUTE OF LIMITATIONS WAS NOT TOLLED BY THE CONTINUOUS TREATMENT DOCTRINE (FOURTH DEPT).

The Fourth Department, reversing (modifying) Supreme Court, determined the medical malpractice action based upon a 2005 thyroid surgery by the same doctor who performed the 2010 thyroid surgery was time-barred. The two surgeries were discrete events and the statute of limitations was not tolled by the continuous treatment doctrine:

Defendants established that [the 2005] claims are time-barred inasmuch as more than 2½ years elapsed between the date of the alleged conduct and the commencement of the action … , and plaintiff failed to raise an issue of fact in opposition. Contrary to plaintiff's contention, the continuous treatment doctrine does not apply. It is undisputed that plaintiff did not treat with Dr. Chahfe in relation to the 2005 surgery after her final follow-up appointment in 2005, and that she did not return to Dr. Chahfe until 2010. The surgical procedures in 2005 and 2010 were " discrete and complete' events that cannot be linked by way of the continuous treatment doctrine"

… , and there was no evidence of anticipated further treatment related to the 2005 procedure at the time plaintiff left Dr. Chahfe's care in 2005 … . Angelhow v Chahfe, 2019 NY Slip Op 05437, Fourth Dept 7-5-19

MEDICAL MALPRACTICE, EVIDENCE, APPEALS.

THE DENIAL OF DEFENDANT'S MOTION TO LIMIT THE EXPERT TESTIMONY PLAINTIFF COULD OFFER AT TRIAL DID NOT LIMIT THE ISSUES TO BE TRIED; THEREFORE ANY APPEAL MUST AWAIT THE CONCLUSION OF THE TRIAL; APPEAL DISMISSED (THIRD DEPT).

The Third Department determined defendant doctor could not appeal the denial of defendant's motion to limit the expert testimony which plaintiff could offer at trial in this medical malpractice action. The motion court's ruling did not limit the issues to be tried. Therefore an appeal must be brought after trial:

It is well settled that "an order which merely determines the admissibility of evidence, even when made in advance of trial on motion papers, constitutes, at best, an advisory opinion which is neither appealable as of right nor by permission" … . Here, Supreme Court's decision merely permits the infant to offer various testimony of his expert witnesses and does not limit the scope of issues to be tried … . Therefore, appellate review of the court's ruling "must await the conclusion of a trial so that the relevance of the proffered evidence, and the effect of [the court's] ruling with respect thereto, can be assessed in the context of the record as a whole" … . Accordingly, this appeal must be dismissed … . C.H. v Dolkart, 2019 NY Slip Op 05614, Third Dept 7-11-19

MEDICAL MALPRACTICE, PRIVILEGE, EVIDENCE.

STATEMENTS MADE IN CONNECTION WITH A HOSPITAL'S QUALITY ASSURANCE INVESTIGATION ARE PRIVILEGED PURSUANT TO THE EDUCATION LAW AND PUBLIC HEALTH LAW; THE STATEMENTS ARE NOT DISCOVERABLE IN THE MEDICAL MALPRACTICE ACTION (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, over a concurrence, and refusing to follow the Second Department, determined certain statements made in connection with a hospital's (SUNY Upstate's) quality

assurance investigation were privileged pursuant to the Education Law and Public Health Law and therefore were not subject to discovery in this medical malpractice action:

"The New York State Education Law shields from disclosure the proceedings [and] the records relating to performance of a medical or a quality assurance review function or participation in a medical and dental malpractice prevention program' " (… see Public Health Law § 2805-m [2]). Although there is an exception to that privilege, "the exception is narrow" … and is limited to "statements made by any person in attendance at such a [quality assurance] meeting who is a party to an action or proceeding the subject matter of which was reviewed at such meeting" (Education Law § 6527 [3]; see Public Health Law § 2805-m [2] …).

Here, the "statements" at issue were provided shortly after the incident and were obtained as part of SUNY Upstate's quality assurance investigation. The statements, however, were not made at a quality assurance committee meeting; nor were they made in response to any inquiries initiated by the committee … . None of the defendants appeared at any committee meeting. Thus, we agree with SUNY Upstate and defendants that plaintiff's proposed construction of the statutory exception would not give any practical effect to the phrase "in attendance," but rather would render that phrase meaningless … . Further, the Court of Appeals specifically instructed that the exception is "narrow and limited to statements given at an otherwise privileged peer review meeting" … . Following plaintiff's proposed construction "would extend the [statutory] exception to a point where it would swallow the general rule that materials used by a hospital in quality review and malpractice prevention programs are strictly confidential" … . Nowelle B. v Hamilton Med., Inc., 2019 NY Slip Op 05464, Fourth Dept 7-5-19

MEDICAL MALPRACTICE.

THE SURGICAL PROCEDURE FOR WHICH THERE ALLEGEDLY WAS NO CONSENT WAS NOT DEMONSTRATED TO BE THE PROXIMATE CAUSE OF THE CLAIMED INJURIES, THEREFORE THE LACK OF INFORMED CONSENT CAUSE OF ACTION SHOULD HAVE BEEN DISMISSED PURSUANT TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the defendants' motion for summary judgment in this medical malpractice action should have been granted. Plaintiff's expert's affirmation concerning the alleged malpractice was deemed conclusory and therefore did not raise a question of fact. The informed consent cause of action was dismissed because the medical procedure was not the proximate cause of the claimed injuries:

To establish a cause of action to recover damages based on lack of informed consent, a plaintiff " must prove (1) that the person providing the professional treatment failed to disclose alternatives thereto and failed to inform the patient of reasonably foreseeable risks associated with the treatment, and the alternatives, that a reasonable medical practitioner would have disclosed in the same circumstances, (2) that a reasonably prudent patient in the same position would not have undergone the treatment if he or she had been fully informed, and (3) that the lack of informed consent is a proximate cause of the injury'" … . " The third element is construed to mean that the actual procedure performed for which there was no informed consent must have been a proximate cause of the injury'" … . Here, the defendants established through their expert affirmation that the surgery performed … did not proximately cause the injured plaintiff's claimed injuries … . Gilmore v Mihail, 2019 NY Slip Op 05647, Second Dept 7-17-19

MUNICIPAL LAW, SLIP AND FALL, JUDGES, APPEALS. JUDGE SHOULD NOT HAVE, SUA SPONTE, GRANTED RELIEF NOT REQUESTED BY A PARTY, HERE THE ABILITY FOR UNLIMITED AMENDMENT OF A NOTICE OF CLAIM WHICH HAD NOT YET BEEN FILED; SUA SPONTE ORDERS ARE NOT APPEALABLE; LEAVE TO APPEAL GRANTED AS AN EXERCISE OF DISCRETION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that Supreme Court should not, sua sponte, have granted relief which was not requested by a party. Petitioner allegedly was injured trying to board a subway train. Before filing a notice of claim petitioner commenced a CPLR 3102 (c) proceeding to obtain discovery before starting the action. The court granted the petition and, sua sponte, gave the petitioner permission to amend the notice of claim, which had not yet been filed, within 30 days of filing the note of issue. The Second Department noted that a sua sponte order is not appealable and exercised its discretion to grant leave to appeal (CPLR 5701[a][2]; [c]):

Turning to the merits, "[p]ursuant to CPLR 2214(a), an order to show cause must state the relief demanded and the grounds therefor'" . "However, the court may grant relief that is warranted by the… facts plainly appearing on the papers on both sides, if the relief granted is not too dramatically unlike the relief sought, the proof offered supports it, and there is no prejudice to any party'" … .

Here, the Supreme Court strayed from this principle when, in addition to granting, in effect, that branch of the petition which was for an order preserving material related to the accident, it also sua sponte granted a nearly

unlimited prospective right to the petitioner to amend a notice of claim that had not yet been served. This sua sponte relief was dramatically different from the pre-action discovery that was the subject of the petition … . Furthermore, the papers before the court did not support the award of such additional relief, since the absence of a notice of claim rendered it impossible to determine whether the future notice of claim or any amendments thereto would be in compliance with General Municipal Law § 50-e. We also agree with the appellants that they were prejudiced insofar as the court set a permissive timeline for amending the notice of claim that potentially could be, inter alia, beyond the statute of limitations and after the completion of discovery. Matter of Velez v City of New York, 2019 NY Slip Op 05781, Second Dept 7-24-19

MUNICIPAL LAW, SLIP AND FALL.

MOTION TO AMEND THE NOTICE OF CLAIM IN THIS SLIP AND FALL CASE SHOULD NOT HAVE BEEN GRANTED, THE NOTICE ADDED A NEW THEORY OF CAUSATION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff's motion to amend her notice of claim in this slip and fall case should not have been granted. The motion was made two years after the complaint was filed and included a new theory of causation:

A timely served notice of claim dated June 1, 2015, alleged, in relevant part, that the steps and/or stairs were "defective," "uneven, misleveled, smooth" with a "slick surface," and that the New York City Transit Authority and the Metropolitan Transportation Authority (hereinafter together the defendants), were negligent "in the ownership, operation, control, and maintenance" of the stairs. The plaintiff subsequently filed a complaint dated April 12, 2016, alleging, in relevant part, that her injuries were caused by the defendants' negligence in the ownership, operation, management, maintenance, care, custody, and control of the premises.

More than two years later, in April 2018, the plaintiff moved pursuant to General Municipal Law § 50-e(6) for leave to amend her notice of claim to remove any mention of the stairs being "uneven, misleveled, smooth" with a "slick surface," and to add new allegations that the stairs were "defectively installed . . . and/or designed . . . with a hole/gap upon which [the plaintiff's] foot was caused to trip and fall." …

"A notice of claim may be amended only to correct good faith and nonprejudicial technical mistakes, omissions, or defects, not to substantively change the nature of the claim or the theory of liability" … . Amendments of a substantive nature are not within the purview of General Municipal Law § 50-e(6) … .

Here, the plaintiff's notice of claim made no allegations of any "hole/gap" in which the plaintiff's foot got caught, or that the stairs were defectively installed or designed … . Therefore, the proposed amendments were not technical in nature; rather, they were of a substantive nature beyond the purview of General Municipal Law § 50-e(6) … . Ryabchenko v New York City Tr. Auth., 2019 NY Slip Op 05430, Second Dept 7-3-19

MUNICIPAL LAW.

NEGLIGENCE, BREACH OF CONTRACT AND DISCRIMINATION CLAIMS BROUGHT BY A DISABLED FORMER POLICE OFFICER CONCERNING GENERAL MUNICIPAL LAW 207-c BENEFITS PROPERLY DISMISSED (FOURTH DEPT).

The Fourth Department affirmed the grant of summary judgment to all defendants in this action by a disabled former police officer concerning claims for General Municipal Law 207-c benefits:

With respect to the City defendants, … we conclude that the court properly dismissed the negligence and gross negligence causes of action against them inasmuch as they were entitled to governmental function immunity based on the discretion they are afforded in administering payments of General Municipal Law § 207-c benefits … . Although plaintiff's negligence and gross negligence causes of action involved the health care services that he was receiving, the City defendants were engaged in a governmental function because they were merely administering the payment of General Municipal Law § 207-c benefits, i.e., they did not actually provide plaintiff with health care services ;;; . Moreover, the City defendants were entitled to immunity inasmuch as the administration of section 207-c benefits involved the exercise of their discretion and the record establishes that the City defendants denied payment of the disputed claims for benefits after actually exercising this discretion … .

… Plaintiff was not a party to the contracts between [the remaining] defendants and City defendants, and therefore liability may be established where, inter alia, "the contracting party, in failing to exercise reasonable care in the performance of [its] duties, launches a force or instrument of harm" (Espinal v Melville Snow Contrs., 98 NY2d 136, 140 [2002]). Here, the undisputed evidence established that the [defendants] did not have authority to deny payment of plaintiff's claims for General Municipal Law § 207-c benefits. That authority rested, at all relevant times, with the City defendants. Thus, it cannot be said that these defendants launched any "instrument of harm" because they never made the decision to deny any of plaintiff's claims for payment of medical care and treatment. …

… [W]e note that plaintiff, as a public employee, may not sue his employer under Title II of the ADA and the Rehabilitation Act, as plaintiff has done here … . Where, as here, plaintiff's causes of action are "related to the terms, conditions and privileges of his employment[, i.e., his entitlement to benefits under General Municipal Law § 207-c, they] are covered by Title I" and not Title II of the ADA or the Rehabilitation Act … . Vassenelli v City of Syracuse, 2019 NY Slip Op 05878, Fourth Dept 7-31-19

MUNICIPAL LAW.

THE NOTICES OF CLAIM NOTIFIED THE MUNICIPAL DEFENDANTS ONLY OF THE DAMAGES RELATING TO PLAINTIFF'S DECEDENT, PLAINTIFF'S MOTHER'S MOTION TO AMEND THE COMPLAINT TO ADD HER DERIVATIVE CAUSES OF ACTION SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that the complaint against the municipal defendants could not be amended to assert a derivative cause of action by plaintiff's decedent's mother:

In September 2015, the decedent commenced this action against the City, the Port Authority, and another defendant, alleging common-law negligence and violations of the Labor Law. The decedent died on August 7, 2016. Subsequently, the decedent's mother, Marilyn Conn (hereinafter Marilyn), as administrator of the decedent's estate and individually, moved for leave to substitute herself as the plaintiff in place of the decedent. She also moved for leave to amend the complaint to add a cause of action to recover damages for wrongful death on behalf of the decedent's estate and, in effect, a derivative cause of action to recover damages for loss of services on her own behalf, in her individual capacity. …

… [T]he notices of claim filed against the City and the Port Authority were limited to allegations that, as a result of the accident, the decedent was caused to sustain damages related to his "personal injuries, loss of earnings, pain and suffering and medical expenses." Marilyn was not identified as a claimant in the caption of the notices of claim, she was not mentioned in the text of the notices of claim, and there were no allegations that she, individually, sustained any damages for which compensation was sought from the City or the Port Authority … .

Accordingly, the Supreme Court should have denied that branch of Marilyn's motion which was, in effect, for leave to amend the complaint to assert a derivative cause of action to recover damages for loss of services on her own behalf, in her individual capacity, against the City and the Port Authority. Since the City and the Port

Authority were not given timely notice of Marilyn's derivative claim, the court should not have allowed it to be asserted against them. Conn v Tutor Perini Corp., 2019 NY Slip Op 05643, Second Dept 7-17-19

NEGLIGENT ENTRUSTMENT.

PLAINTIFF'S ACTION AGAINST DEFENDANT FOR LETTING PLAINTIFF USE A SCISSORS LIFT SURVIVED SUMMARY JUDGMENT; PLAINTIFF ALLEGED DEFENDANT NEGLIGENTLY ENTRUSTED THE LIFT TO HIM, KNOWING HE DID NOT KNOW HOW TO OPERATE IT; PLAINTIFF WAS INJURED WHEN THE LIFT TIPPED OVER AND PLAINTIFF FELL 25 FEET (THIRD DEPT).

The Third Department determined there was a question of fact whether defendant building contractor negligently entrusted a scissors lift to plaintiff, who was injured when the lift tipped over:

Given the testimony regarding plaintiff's alleged lack of experience operating the subject scissor lift, the alleged observations by defendant's employees of plaintiff's operation thereof, Reagles' [defendant's project superintendent's] assumption as to plaintiff's level of training and his subsequent knowledge that an employee of defendant was allegedly made aware, prior to the accident, that plaintiff was not familiar with and/or trained in the use and operation of the scissor lift, we find that defendant failed to meet its prima facie burden of establishing the absence of a triable issue of fact, specifically as to whether defendant knew or should have known that plaintiff lacked the requisite training and experience necessary to safely operate the subject scissor lift at the time it was entrusted to him, rendering his subsequent use thereof unreasonably dangerous … . Moreover, the issue of proximate cause is generally more appropriately resolved by the trier of fact … . Further, although it is undisputed that plaintiff was the sole operator of the scissor lift, we find a question of fact also exists as to whether plaintiff's injuries were a foreseeable result of defendant's negligent entrustment of the lift to plaintiff … . Hull v The Pike Co., 2019 NY Slip Op 05611, Third Dept 7-11-19

PRODUCTS LIABILITY.

PLAINTIFF BUS DRIVER WAS SPRAYED WITH DIESEL FUEL AS SHE ATTEMPTED TO FILL THE TANK OF THE BUS SHE WAS DRIVING; THE MANUFACTURER OF THE GAS PUMP NOZZLE AND THE GAS STATION DEMONSTRATED THE NOZZLE AND THE GAS PUMP WERE WORKING PROPERLY; THERE WAS EVIDENCE OF A RELEVANT DESIGN FLAW IN THE FUEL SYSTEM OF THE BUS; THE NOZZLE MANUFACTURER'S AND THE GAS STATION'S MOTIONS FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, over a dissent, determined that the products liability cause of action against the manufacturer of a gas pump fuel nozzle (Husky), and the premises liability cause of action against the gas station (Kwik Fill) should have been dismissed. The plaintiff was sprayed with diesel fuel as she attempted to fill the tank in the bus (manufactured by Coach) she was driving. There was evidence that the design of the fuel system of the bus may have been the cause:

In opposition to Husky's motion, the Coach defendants submitted the affidavit of an expert and the deposition testimony of the vice president of engineering of defendant Motor Coach Industries, Ltd. The expert opined that the accident was caused by a nozzle malfunction. He did not, however, identify any particular defect in the nozzle, which he did not inspect. We thus conclude that the expert's opinion is based on mere speculation and is insufficient to raise an issue of fact … . …

It is undisputed that the Kwik Fill defendants hired an outside vendor that regularly inspected and serviced their fuel pumps, and, in support of their motion, the Kwik Fill defendants submitted evidence establishing that the vendor determined that the fuel pumps were working properly before and after the accident, thus establishing that the Kwik Fill defendants maintained their property in a reasonably safe condition … . Menear v Kwik Fill, 2019 NY Slip Op 05845, Fourth Dept 7-31-19

SLIP AND FALL.

DEFENDANT GYM DID NOT DEMONSTRATE AN ACCUMULATION OF DUST ON THE BASKETBALL COURT FLOOR WAS INHERENT IN THE SPORT OR OPEN AND OBVIOUS, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT BASED ON THE ASSUMPTION OF THE RISK DOCTRINE SHOULD NOT HAVE BEEN GRANTED (FIRST DEPT).

The First Department, reversing Supreme Court, determined that the assumption of the risk doctrine did not entitle defendant gym to summary judgment. Plaintiff was playing basketball when he allegedly slipped and fell on an accumulation of dust on the indoor court:

An owner may not be held liable if the injury results from certain conditions inherent in a participant's outdoor game of basketball … . The same is true if a condition on an indoor basketball court is otherwise open and obvious … .

Here, defendant failed to establish that accumulated dust on an indoor basketball court is inherent in the sport of basketball. Nor did defendant establish that the alleged condition was an open and obvious one … . Samuels v Town Sports Intl., LLC, 2019 NY Slip Op 05477, First Dept 7-9-19

SLIP AND FALL.

ONE INCH DEEP DEPRESSION IN THE ROADWAY WHICH WAS SURROUNDED BY ORANGE MARKINGS WAS NOT DEMONSTRATED TO BE TRIVIAL OR BOTH 'OPEN AND OBVIOUS' AND 'NOT INHERENTLY DANGEROUS' AS A MATTER OF LAW, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendants' motion for summary judgment in this slip and fall case should not have been granted. Plaintiff was jogging when she tripped over a raised edge of a depression in the roadway. The defect was surrounded by orange markings:

The evidence demonstrated that [defendant] was in the process of restoring the excavated area in the location of the plaintiff's accident and that the alleged defective condition measured approximately four-feet wide, eight-feet long, and at least one-inch deep. …

… A "condition that is ordinarily apparent to a person making reasonable use of his or her senses may be rendered a trap for the unwary where the condition is obscured or the plaintiff is distracted'" … . Furthermore, "proof that a dangerous condition is open and obvious does not preclude a finding of liability . . . but is relevant to the issue of the plaintiff's comparative negligence" … . "Thus, to obtain summary judgment, a defendant must establish that a condition was both open and obvious and, as a matter of law, was not inherently dangerous" … . Here, the defendants failed to establish, prima facie, that the alleged defect was open and obvious and not inherently dangerous given the surrounding circumstances at the time of the accident … . Finally … , the doctrine of primary assumption of risk is inapplicable to this action … . Karpel v National Grid Generation, LLC, 2019 NY Slip Op 05651, Second Dept 7-17-19

SLIP AND FALL.

PLAINTIFF ALLEGED SHE FELL OVER A WORKER WHEN SHE ATTEMPTED TO STEP OFF AN ELLIPTICAL MACHINE, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (FIRST DEPT).

The First Department, reversing Supreme Court, determined defendant's motion for summary judgment should not have been granted. Plaintiff was on an elliptical machine and allegedly fell over a worker who was working near the machine:

Summary judgment was not warranted in this action, because plaintiff's deposition testimony that she felt "stuck" as she attempted to step off the elliptical machine, coupled with defendant's maintenance worker's testimony that his right leg was stretched out next to the elliptical machine on which plaintiff was exercising, cleaning the outlets in the area, and that plaintiff's foot hit his foot, causing her to lose balance and fall, were together sufficient to raise a triable issue as to whether plaintiff's injuries were caused by defendant's negligence … . An incident report prepared by the manager consistently recounts that plaintiff fell over a worker. Ausch-Alteras v Equinox – 85th St., Inc., 2019 NY Slip Op 05478, First Dept 7-9-19

SLIP AND FALL.

PLAINTIFF FELL IN A POTHOLE IN THE PATH FROM THE BUS TO THE CURB, TRANSIT AUTHORITY'S MOTION FOR SUMMARY JUDGMENT PROPERLY DENIED (FIRST DEPT).

The First Department determined the defendant New York City Transit Authority's (NYCTA's) motion for summary judgment in this slip and fall case was properly denied. Plaintiff was let off at a bus stop about seven or eight feet from the curb and stepped into a pothole:

NYCTA's motion was properly denied since the record presents triable issues of fact as to whether NYCTA breached its duty as a common carrier to provide plaintiff with a safe place to board the bus … . The record shows that the bus stopped seven or eight feet from the curb adjacent to the bus stop, with a pothole, into which plaintiff fell, in the path that passengers would take walking from the sidewalk to board the bus. The fact that approximately 10 other passengers safely boarded the bus at the same time that plaintiff fell in the hole while attempting to board does not entitle NYCTA to summary judgment … . Defay v City of New York, 2019 NY Slip Op 05325, First Dept 7-2-19

THIRD-PARTY ASSAULT.

HOTEL WAS NEGLIGENT AS A MATTER OF LAW IN THIS THIRD-PARTY ASSAULT CASE, PLAINTIFF'S DECEDENT WAS STABBED TO DEATH AT A PARTY AT THE HOTEL, THERE WAS AN EXTENSIVE HISTORY OF CRIMINAL ACTIVITY AT THE HOTEL AND THERE WAS NO SECURITY ON THE NIGHT OF THE STABBING (SECOND DEPT).

The Second Department determined that the facts of this case supported a finding that the hotel (Howard Johnson) where plaintiff's decedent was stabbed to death was negligent as a matter of law. There was an extensive history of criminal acts, including assaults, at the hotel and there was no security on the night of the stabbing:

… [I]n certain "rare" cases ,,, , a plaintiff may be awarded summary judgment on the issue of a defendant's negligence where "there is no conflict at all in the evidence" and "the defendant's conduct fell far below any permissible standard of due care" … . The case at bar presents such an instance where there is no triable issue of fact as to the defendant's negligence, entitling the plaintiff to summary judgment on the issue of liability on the first and third causes of action insofar as asserted against Howard Johnson.

"A possessor of real property is under a duty to maintain reasonable security measures to protect those lawfully on the premises from reasonably foreseeable criminal acts of third parties" … . This includes the common-law duty to take "minimal precautions" to protect tenants and visitors from foreseeable harm, including foreseeable criminal conduct by a third person … . "To establish foreseeability, there is no requirement that the past experience of criminal activity be of the same type as that to which the plaintiff was subjected, but the criminal conduct at issue must be shown to be reasonably predictable based on prior occurrences of the same or similar criminal activity at a location sufficiently proximate to the subject location" … . "[T]he duty to employ protective measures arises when it is shown that the possessor of the property either knows or has reason to know from past experience that there is a likelihood of conduct on the part of third persons . . . which is likely to endanger the safety of the visitor'" … . Davis v Commack Hotel, LLC, 2019 NY Slip Op 05385, Second Dept 7-3-19

TRAFFIC ACCIDENTS, COMMON CARRIER.

QUESTION OF FACT WHETHER THE BUS STOPPED IN AN UNUSUAL AND VIOLENT WAY IN THIS COMMON CARRIER INJURY CASE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined there was a question of fact about whether the bus on which plaintiff was a passenger stopped in an unusual and violent way, injuring her:

To prevail on a cause of action alleging that a common carrier was negligent in stopping a bus, a plaintiff must prove that the stop was unusual and violent, rather than merely one of the sort of "jerks and jolts commonly experienced in city bus travel" … . Moreover, a plaintiff may not satisfy that burden of proof merely by characterizing the stop as unusual and violent … . "However, in seeking summary judgment dismissing such a cause of action, common carriers have the burden of establishing, prima facie, that the stop was not unusual and violent" … .

… According to the plaintiff's testimony, shortly after she paid her fare, the bus "took off" and then came to a quick stop, causing her to fall. According to the testimony of the bus driver, he was operating the bus at about

15 miles per hour when a vehicle cut in front of him, causing him to apply the brakes and stop the bus. Under the circumstances, a triable issue of fact exists as to whether the stop of the bus was unusual and violent … . Brown v New York City Tr. Auth., 2019 NY Slip Op 05759, Second Dept 7-24-19

TRAFFIC ACCIDENTS, EVIDENCE.

EYEWITNESS TESTIMONY THAT DEFENDANT IN THIS TRAFFIC ACCIDENT CASE APPEARED TO BE INTOXICATED SHOULD NOT HAVE BEEN EXCLUDED, THE EVIDENCE WAS RELEVANT TO DEFENDANT'S RELIABILITY AS A WITNESS AND COULD PROPERLY HAVE BEEN PRESENTED IN REBUTTAL TO DEFENDANT'S TESTIMONY, PLAINTIFFS' MOTION TO SET ASIDE THE DEFENSE VERDICT SHOULD HAVE BEEN GRANTED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined plaintiffs' motion to set aside the defense verdict in this traffic accident case should have been granted. There was sharply conflicting testimony about how the accident happened and whether defendant fled the scene. A witness, Stephen, who allegedly chased defendant down after the accident was not allowed to testify that defendant appeared to be intoxicated:

We agree with plaintiffs that the court erred in excluding Stephen's testimony that defendant exhibited indicia of intoxication during their interaction immediately after the accident and that, in his opinion, she was intoxicated. Although defendant's failure to remain at the scene meant that Stephen was the only witness who had an opportunity to observe defendant and interact with her after the accident, the court prohibited Stephen from testifying about his observations of defendant on the ground that he was not an "expert" in signs of intoxication. Contrary to the court's ruling, it is well settled that a lay witness may testify regarding his or her observation that another individual exhibited signs of intoxication … , and also regarding his or her opinion that another individual was intoxicated … . …

… [P]laintiffs should have been permitted to present Stephen's testimony with respect to whether defendant appeared to be intoxicated, which would allow the jury to consider whether and to what degree alcohol impaired defendant's senses and her ability to accurately perceive and recall the events about which she testified at trial. …

… Stephen's proposed testimony regarding his observations of defendant, i.e., that she fumbled with her license, slurred her speech, and smelled of alcohol, was not cumulative of other evidence already before the jury … . …

Defendant testified that she did not fumble with her license, her speech was not slurred, she did not recall her eyes being "glassy," and there was no alcohol on her breath. Thus, the excluded testimony from Stephen would have provided " evidence in denial of some affirmative fact which [defendant] has endeavored to prove' " … and therefore fell within the scope of permissible rebuttal evidence. Brooks v Blanchard, 2019 NY Slip Op 05847, Fourth Dept 7-31-19

TRAFFIC ACCIDENTS, EVIDENCE.

PLAINTIFF'S TESTIMONY ABOUT HOW THE TRAFFIC ACCIENT HAPPENED FOUND INCREDIBLE AS A MATTER OF LAW AT THE SUMMARY JUDGMENT STAGE, DISSENT ARGUED THE TESTIMONY RAISED CLASSIC QUESTIONS OF FACT FOR THE JURY TO DETERMINE (FIRST DEPT).

The First Department, over an extensive dissent, determined the defendants' motion for summary judgment in this traffic accident case was properly granted. The majority argued plaintiff's testimony was incredible and therefore was properly disregarded. The dissent argued plaintiff's testimony raised classic questions of fact about how the accident happened. The collision occurred when plaintiff was attempting to change lanes. The majority interpreted plaintiff's testimony to mean that she was straddling two lanes and was not moving when the truck struck her SUV, which, based on photographic evidence, the majority found incredible as a matter of law:

The photographic evidence shows that plaintiff's SUV struck the rear of defendants' tractor-trailer as plaintiff was attempting to merge into defendants' truck's lane of traffic. Thus, plaintiff violated her "duty not to enter a lane of moving traffic until it was safe to do so" (… see Vehicle and Traffic Law § 1128[a] …), "and [her] failure to heed this duty constitutes negligence per se". * * ^

… [I]n summary judgment analysis, we must discount the plaintiff's testimony where the plaintiff has "relied solely on [her] own testimony, uncorroborated by any other witnesses or evidence," and her testimony belied "common sense" … . As these circumstances are presented in this case, plaintiff's testimony was properly "disregarded as being without evidentiary value" … . Thus, plaintiff's testimony raised no triable issues of fact. Castro v Hatim, 2019 NY Slip Op 05639, First Dept 7-16-19

TRAFFIC ACCIDENTS, SPOLIATION.

RECORD WAS INSUFFICIENT TO DETERMINE THE LEVEL OF PREJUDICE CAUSED BY PLAINTIFF'S FAILURE TO PRESERVE THE PHONE WHICH ALLEGEDLY CAPTURED IMAGES OF THE INCIDENT AT THE HEART OF THE LAWSUIT, DISMISSAL OF THE COMPLAINT REVERSED AND MATTER REMITTED FOR FURTHER DISCOVERY (THIRD DEPT).

The Third Department, in a full-fledged opinion by Justice Garry, determined that the record was not sufficient to conclude whether dismissal of the complaint was a proper sanction for spoliation of evidence. Plaintiff alleged defendant negligently or intentionally struck defendant with an all-terrain vehicle (ATV). Defendant asked plaintiff to preserve a phone which allegedly contained images of the incident. Plaintiff did not preserve the phone but provided one image and one video which were alleged to have been on the phone. Supreme Court dismissed the complaint as a sanction for spoliation. The Third Department noted there was evidence that all the metadata on the phone had been preserved and remitted the matter for discovery and, if necessary, an appropriate sanction:

… [T]he factors to be considered in determining the appropriate sanctions for such failures are "the extent that the spoliation of evidence may prejudice a party and whether a dismissal will be necessary as a matter of elementary fairness" … . …

… [W]e remit to Supreme Court with direction for plaintiff to promptly obtain and provide to defendant all photos, videos and metadata pertinent to the incident that have been preserved in any source, or to provide defendant with full access to any such stored photos, videos and metadata. The retrieval and examination of this information — or the continued failure to do so — will permit Supreme Court to reexamine, upon a full record, whether pertinent electronic information has been lost as a result of plaintiff's failure to preserve the phone, to what extent defendant has been prejudiced by that loss and, thus, whether dismissal, an adverse inference charge or some other sanction may be appropriate … . LaBuda v LaBuda, 2019 NY Slip Op 05372, Third Dept 7-3-19

TRAFFIC ACCIDENTS, SPOLIATION.

SPOLIATION WARRANTED STRIKING THE COMPLAINT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that the destruction of plaintiff's truck, which was allegedly struck by defendant's truck, warranted striking the complaint:

… [O]n their motion pursuant to CPLR 3126 to strike the complaint, the defendants sustained their burden of establishing that the plaintiff was obligated to preserve the truck at the time it was purportedly "seized and disposed" of, that the truck had been seized and disposed of before the defendants had an opportunity to inspect it, and that the truck was relevant to the litigation … . Furthermore, the defendants demonstrated that their ability to prove their defense had been significantly, if not fatally, compromised by the loss of the truck. Under the circumstances presented, the sanction of striking the complaint was appropriate … . Delmur, Inc. v School Constr. Auth., 2019 NY Slip Op 05764, Second Dept 7-24-19\

TRAFFIC ACCIDENTS.

QUESTION OF FACT WHETHER THE EMERGENCY DOCTRINE APPLIED IN THIS TRAFFIC ACCIDENT CASE; DEFENDANT SAW THE VEHICLE WHICH SUBSEQUENTLY RAN THE STOP SIGN AND THOUGHT IT WAS GOING TOO FAST TO STOP; QUESTION OF FACT WHETHER DEFENDANT SHOULD HAVE TAKEN EVASIVE ACTION (FOURTH DEPT).

The Fourth Department determined defendant did not eliminate questions of fact in this traffic accident case about whether the emergency doctrine applied. Defendant was behind plaintiffs' motorcycle when a vehicle (operated by Buck) ran a stop sign, broadsided a truck (operated by Matthew) which then collided with the motorcycle. There was evidence defendant's vehicle then struck the motorcycle. Defendant testified she saw the Buck vehicle approaching the stop sign and thought it was going too fast to stop, The Fourth Department determined there was a question of fact whether defendant should have slowed down at that point:

In determining whether the actions of a driver are reasonable in light of an emergency situation, both the driver's awareness of the situation and his or her actions prior to the occurrence of the emergency must be considered … . Here, defendant's deposition testimony established that she saw Buck's car on the access road approaching the

stop sign "very, very fast," "like he was still on the Thruway," and that she also observed Matthew's pick-up truck approaching the intersection. Defendant was "very conscious . . . because [she knew] there [were] a lot of accidents that happen on this road because people do not pay attention to the stop sign at that [a]ccess [r]oad," and she "start[ed] to get nervous" that Buck's vehicle was moving too fast to stop for the stop sign. Despite defendant's awareness that the intersection presented a particular danger and her observations of Buck's vehicle, however, defendant did not slow down, move over, or apply her brakes until after she saw Buck's vehicle "smash into the truck." At that point, defendant did not know where the motorcycle was in relation to her minivan. We thus conclude that issues of fact exist whether defendant, in taking no evasive action and in making no effort to slow down, or move over, or otherwise attempt to avert the impending collision, responded reasonably under the circumstances … . Gilkerson v Buck, 2019 NY Slip Op 05435, Fourth Dept 7-5-19