NEW YORK APPELLATE DIGEST, LLC

Negligence
August 2019

An Organized Compilation of the Decision-Summaries Addressing Negligence Issues Posted on the New York Appellate Digest Website in August 2019, The Issues Are Described in the Table of Contents, The Entries in the Table of Contents Link to the Summaries. The Summaries Link to the Decisions. Click on "Table of Contents" in the Header to Return There.

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CAUSES OF ACTION, FAILURE TO STATE.

COMPLAINT DID NOT STATE CAUSES OF ACTION FOR BREACH OF CONTRACT, NEGLIGENT HIRING AND SUPERVISION OR PRIMA FACIE TORT (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined plaintiff, the assignee of no-fault benefits, did not state valid causes of action against the insurer for breach of contract, negligent hiring and supervision, and prima facie tort. The claims were paid by the defendant and plaintiff alleged flaws and delays in the processing of the claims:

The amended complaint, however, failed to identify the specific insurance contracts that plaintiff had performed services under or the contract provisions that defendant allegedly breached. Inasmuch as bare legal conclusions without factual support are insufficient to withstand a motion to dismiss, we conclude that the amended complaint fails to state a cause of action for breach of contract. …

Although "[a]n employer may be liable for a claim of negligent hiring or supervision if an employee commits an independent act of negligence outside the scope of employment and the employer was aware of, or reasonably should have foreseen, the employee's propensity to commit such an act"… , the amended complaint failed to allege that the acts of defendant's employees were committed independent of defendant's instruction or outside the scope of employment … . …

"There can be no recovery [for prima facie tort] unless a disinterested malevolence to injure [a] plaintiff constitutes the sole motivation for [the] defendant['s] otherwise lawful act" … . Here, the amended complaint alleged that defendant acted in "bad faith" and intentionally caused harm to plaintiff by requesting verifications and examinations under oath. Those conclusory allegations, however, failed to state that defendant had " a malicious [motive] unmixed with any other and exclusively directed to [the] injury and damage of [plaintiff]' " … . Furthermore, it is "[a] critical element of [a prima facie tort] cause of action . . . that plaintiff suffered specific and measurable loss" … . Medical Care of W. N.Y. v Allstate Ins. Co., 2019 NY Slip Op 06243, Fourth Dept 8-22-19

ESPINAL; ASSUMPTION OF RISK.

THE SOIL CONSERVATION AND WATERSHED BOARD'S MOTION FOR SUMMARY JUDGMENT IN THIS DROWNING CASE WAS PROPERLY DENIED, PLAINTIFF'S DECEDENT DIED AFTER GOING OVER A SUBMERGED DAM; ALTHOUGH THE BOARD WAS NOT LIABLE PURSUANT TO A CONTRACT TO MAINTAIN AND OPERATE THE DAM UNDER AN ESPINAL EXCEPTION, THERE WAS A QUESTION OF FACT WHETHER THE BOARD OWNED THE DAM (A DANGEROUS CONDITION); THE BOARD IS SEPARATE AND DISTINCT FROM THE CONSERVATION DISTRICTS; THE ASSUMPTION OF THE RISK DOCTRINE IS NOT APPLICABLE (FOURTH DEPT).

The Fourth Department determined soil the soil conservation and watershed board's motion for summary judgment in this wrongful death case was properly denied. The board operated and maintained a dam pursuant to a contract with a federal agency, the Natural Resources Conservation Service (NRCS). The dam was submerged and plaintiff's decedent sustained drowning injuries which led to his death after he waded into the water and went over the dam. Supreme Court should not have held that the board had entirely displaced the NRCS responsibilities for operation and maintenance of the dam (and therefore was liable under contract pursuant the third Espinal exception). However the board did not demonstrate it did not own the dam and summary judgment was properly denied on that ground. In addition the board was separate and distinct from the conservation districts. So granting summary judgment to the districts did not require the same relief for the board. Finally the court noted that the assumption of risk doctrine applies only to sporting events and had no applicability to these facts:

… "[A] contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party" (Espinal, 98 NY2d at 138) although, as relevant here, the third exception to that rule applies where the contracting party has "entirely displaced the other party's duty to maintain the premises safely" … . * * * We … conclude that "the contract between [the Board] and the [NRCS] was not so comprehensive and exclusive that it entirely displaced the [NRCS's] duty to maintain the premises safely, such that [the Board] owed a duty to [decedent]" … . …

While the Board established that it did not own the creek or the banks adjacent thereto … , its submissions are insufficient to establish as a matter of law that it did not own the subject dam, which allegedly constituted and created the dangerous condition … .

The Court of Appeals has made clear that, "[a]s a general rule, application of assumption of the risk should be limited to cases appropriate for absolution of duty, such as personal injury claims arising from sporting events, sponsored athletic and recreative activities, or athletic and recreational pursuits that take place at designated venues" … . Here, decedent was not engaging in a sporting event or recreative activity that was sponsored or otherwise supported by the Board, nor was he wading and swimming at a designated venue … . Suzanne P. v Joint Bd. of Directors of Erie-Wyoming County Soil Conservation Dist., 2019 NY Slip Op 06343, 8-22-19

ESPINAL; FORESEEABILITY OF RESCUE ATTEMPT.

TWO YOUNG MEN DID NOT REALIZE THE CONCRETE THEY WERE MOVING WAS A CESSPOOL COVER; ONE FELL IN AND THE OTHER JUMPED IN TO RESCUE HIM; BOTH DIED FROM CHEMICAL ASPHYXIATION; QUESTIONS OF FACT WHETHER THE COVER WAS A DANGEROUS CONDITION, WHETHER THE CESSPOOL CONTRACTOR LAUNCHED AN INSTRUMENT OF HARM AND WHETHER THE RESCUE ATTEMPT WAS FORESEEABLE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined there were questions of fact whether the property owner (Cruzate) was negligent and whether the cesspool contractor (Port Jefferson) launched an instrument of harm. Two young men were planning to build a campfire in the backyard of a rental property owned by Cruzate. The men did not realize the pieces of concrete they decided to move were cesspool covers. One of the men (Fuentes) fell in, the other (Castro) jumped in to rescue him. Both were asphyxiated by chemicals that had been added when the cesspool was serviced:

… [T]he plaintiff raised a triable issue of fact as to whether the cesspool cover was in a defective condition because Port Jefferson Cesspool had improperly replaced it after servicing the cesspool, enabling Suarez to get his fingers underneath the cover and lift it … . The plaintiff submitted the affidavit of his expert, who opined that, on the date of the accident, the cover was not secure to the ground. According to the expert, there was soil between the cover and the cesspool, so that the cover did not rest firmly on the cesspool, which was a substantial factor in the deaths of Castro and Fuentes. Moreover, Cruzate testified that he hired Port Jefferson Cesspool to service the cesspool, supervised the work, observed Port Jefferson Cesspool lift the cesspool cover, and was present when the work was completed. Therefore, there are triable issues of fact as to whether Cruzate had actual or constructive notice of the allegedly defective condition of the cesspool cover … . …

… [T]he plaintiff raised a triable issue of fact as to whether Port Jefferson Cesspool launched a force of harm and created a dangerous condition by improperly replacing the cement cover after servicing the cesspool (see generally Espinal v Melville Snow Contrs., 98 NY2d 136). The plaintiff's expert opined, as discussed above, that there was soil between the cover and the cesspool, so that the cover did not rest firmly on the cesspool, and that this was a substantial factor in the deaths of Castro and Fuentes. …

… [T]he fact that Castro decided to jump into the cesspool in an attempt to save his friend does not necessarily act as a bar to recovery. In 1921, the Court of Appeals, in an opinion by Judge Benjamin Cardozo, established that, with regard to the principle of foreseeability, "[d]anger invites rescue. . . . The wrong that imperils life is a wrong to the imperiled victim; it is also a wrong to his rescuer" (Wagner v International Ry. Co., 232 NY at 180 …) this principle applies where "the actions of the injured person were reasonable in view of the emergency situation," that is, where the rescuer "acted as a reasonably prudent person would act in the same situation, even if it later appears that the rescuer did not make the safest choice or exercise the best judgment" … . Calderon v Cruzate, 2019 NY Slip Op 06377, Second Detp 8-28-19

GUESTS, DUTY TO CONTROL.

AN ADULT GUEST'S ACT OF POURING KEROSENE ONTO AN ACTIVE FIRE IN A FIRE PIT AT DEFENDANTS' HOME WAS THE SOLE PROXIMATE CAUSE OF PLAINTIFF'S BURN INJURIES; THE DISSENTER ARGUED THERE WAS A QUESTION OF FACT WHETHER A DUTY TO CONTROL THE GUEST'S BEHAVIOR WAS BREACHED (FOURTH DEPT).

The Fourth Department, over a dissent, determined the sole proximate cause of plaintiff's burn injuries was a guest's (Gray's) pouring kerosene onto an active fire in a fire pit at defendants' home. All parties were adults. The mere presence of kerosene at the home did not constitute a dangerous condition. The dissenter argued defendant-parent did not demonstrate his daughter did not breach a duty to control the conduct of Gray:

Although plaintiff correctly contends that defendants owed him a duty of care as a guest on their property … , defendants' submissions establish that they did not breach their duty to "act as . . . reasonable [persons] in maintaining [the] property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk" … . All attendees of the gathering at defendants' property on the night of the incident were adults, and it was not unreasonable for

defendants to allow the small group of adults to use the premises for an unsupervised gathering around a fire pit. Bavisotto v Doldan, 2019 NY Slip Op 06247, Fourth Dept 8-22-19

LEGAL MALPRACTICE.

THE TRANSCRIPT OF THE SETTLEMENT PROCEEDING UTTERLY REFUTED PLAINTIFF'S CLAIM TO HAVE BEEN COERCED INTO SETTLING, THE LEGAL MALPRACTICE COMPLAINT SHOULD HAVE BEEN DISMISSED (SECOND DEPT),

The Second Department, reversing Supreme Court, determined that defendants-attorneys' motion to dismiss the complaint in this legal malpractice action should have been granted because the transcript of the settlement proceeding utterly refuted the allegations in the complaint. Plaintiff alleged it was coerced into settling the action:

A motion to dismiss a complaint pursuant to CPLR 3211(a)(1) "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" … . …

A legal malpractice cause of action "is viable, despite settlement of the underlying action, if it is alleged that settlement of the action was effectively compelled by the mistakes of counsel" … .

In support of their motion, the defendants submitted the transcript of the court proceeding setting forth the terms of the settlement of the underlying action, which conclusively established that the plaintiff was not coerced into settling … . The plaintiff's allegations that it was coerced into settling the underlying action were utterly refuted by the admissions of its principals during the settlement proceeding that they had discussed the terms of the settlement with their attorneys, understood the settlement terms, and had no questions about them; that they were entering into the settlement freely, of their own volition, and without undue influence or coercion; and that they were satisfied with their legal representation … . Glenwayne Dev. Corp v James J. Corbett, P.C., 2019 NY Slip Op 06069, Second Dept 8-7-19

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MEDICAL MALPRACTICE.

COURT DID NOT HAVE AUTHORITY TO DISMISS THE ACTION PURSUANT TO CPLR 3216 BECAUSE NO 90-DAY NOTICE HAD BEEN SERVED; DISMISSAL FOR FAILURE TO COMPLY WITH DISCOVERY DEMANDS WAS NOT WARRANTED, BUT PRECLUSION OF FURTHER DISCOVERY WAS APPROPRIATE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that the court did not have authority to dismiss the medical malpractice action pursuant to CPLR 3216 for failure to prosecute in the absence of a 90-notice. The court further noted that, although dismissal for failure to comply with discovery demands was not warranted, the preclusion of further discovery was appropriate:

With regard to CPLR 3216, "the courts have no authority to dismiss an action for failure to prosecute, whether on the ground of general delay, or for failure to serve and file a note of issue, unless there has first been served a [90 day notice]" … . Here, it is undisputed that neither the Supreme Court nor the defendant served the requisite 90-day notice upon the plaintiff. …

… . [D]smissal of the complaint pursuant to CPLR 3126(3) was unwarranted as a sanction for the plaintiff's failure to limit his disclosure demands. The remedy of dismissal is "only warranted where there has been a clear showing that the failure to comply with discovery demands was willful and contumacious" … . The sanction of dismissal is available for the willful and contumacious failure to disclose … , which did not occur here. The plaintiff submitted to a deposition by the defendants. However, the lengthy pendency of this action, the dispute over the plaintiff's overbroad demands for disclosure, and his refusal to tailor those demands in accordance with prior orders of the court, compels the conclusion that further disclosure has been forfeited. Rezk v New York Presbyt. Hospital/N.Y. Weill Cornell Ctr., 2019 NY Slip Op 06426, Second Dept 8-28-19

MEDICAL MALPRACTICE.

MEDICAL MALPRACTICE ACTION SHOULD NOT HAVE BEEN DISMISSED ON THE GROUND THAT PLAINTIFF HAD NOT YET MOVED TO BE APPOINTED GUARDIAN AD LITEM FOR HER COMATOSE HUSBAND (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that the motion to dismiss the medical malpractice action should not have been granted on the ground plaintiff had not moved pursuant to CPLR 1202 to be appointed guardian ad litem for her comatose husband (Zheng) prior to commencing the action:

… [T]he mere fact that this action was commenced before the plaintiff moved pursuant to CPLR 1202 to be appointed guardian ad litem of her husband does not provide grounds for dismissal of the complaint pursuant to CPLR 3211(a)(3). An incapacitated individual who has not been judicially declared incompetent may sue or be sued in the same manner as any other person … , and CPLR 1202(a) expressly contemplates that a motion for the appointment of a guardian ad litem may be made "at any stage in the action." Thus, there is no strict legal requirement that the plaintiff should have been appointed guardian before the commencement of this action. While it would have been better for the action to have been commenced in Zheng's name, rather than by the plaintiff "as Proposed Guardian Ad Litem of [Zheng]," the defect is not fatal, particularly given the relatively short delay between the commencement of the action and the filing of the plaintiff's guardianship motion (see CPLR 2001). Linghua Li v Xiao, 2019 NY Slip Op 06388, Second Dept 8-28-19

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MEDICAL MALPRACTICE.

PLAINTIFF ALLEGED A NEW THEORY OF LIABILITY FOR THE FIRST TIME IN ANSWER TO DEFENDANT DOCTOR'S MOTION FOR SUMMARY JUDGMENT IN THIS MEDICAL MALPRACTICE ACTION; SUPREME COURT SHOULD HAVE GRANTED DEFENDANT'S SUMMARY JUDGMENT MOTION AND SHOULD NOT HAVE ALLOWED PLAINTIFF TO AMEND THE COMPLAINT AND BILL OF PARTICULARS TO REFLECT THE NEW THEORY (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant doctor's motion for summary judgment in this medical malpractice action should have been granted. Instead of answering the defendant's expert opinion that the doctor's actions were not the cause of the amniotic fluid embolism (AFE) which plaintiff alleged caused the death of plaintiff's decedent, the plaintiff for the first time alleged the cause of death was septic shock, not AFE. Supreme Court erroneously denied defendant's motion for summary judgment and allowed plaintiff to amend the complaint to allege the new theory:

… [T]he defendant met his prima facie burden as to proximate cause by submitting the affidavit of an expert in maternal fetal medicine, who opined that any delay in the decedent undergoing an abortion procedure from the second trimester to the third trimester did not cause her to develop AFE. In opposition, the plaintiff did not raise a triable issue of fact as to the defendant's prima facie showing, but rather alleged, for the first time, a new theory of causation, claiming that the decedent died of septic shock, not AFE. "A plaintiff cannot, for the first time in opposition to a motion for summary judgment, raise a new or materially different theory of recovery against a party from those pleaded in the complaint and the bill of particulars" … . …

"[O]nce discovery has been completed and the case has been certified as ready for trial, [a] party will not be permitted to amend the bill of particulars except upon a showing of special and extraordinary circumstances" … . Here, the plaintiff failed to show special and extraordinary circumstances in seeking leave to amend the complaint and the bill of particulars in response to the defendant's motion for summary judgment, three years after the commencement of the action and almost six months after the filing of the note of issue. The plaintiff offered no reasonable excuse for relying solely on the medical examiner's report and for failing to explore his new theory of causation earlier in the proceedings … . Moreover, permitting the amendment at this late stage of the proceedings would prejudice the defendant. Anonymous v Gleason, 2019 NY Slip Op 06207, Second Dept 8-21-19

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MEDICAL MALPRACTICE.

PROTRACTED DELAY IN PLAINTIFFS' SEEKING SUBSTITUTION OF PARTIES IN THIS MEDICAL MALPRACTICE ACTION AFTER INFANT PLAINTIFF'S DEATH DID NOT REQUIRE DISMISSAL OF THE COMPLAINT, DEFENDANTS WERE IN POSSESSION OF THE MEDICAL RECORDS AND OTHER RELEVANT INFORMATION AND THEREFORE WERE NOT PREJUDICED BY THE DELAY; IN ADDITION, THE MOTION TO AMEND THE COMPLAINT TO ADD WRONGFUL DEATH SHOULD HAVE BEEN GRANTED UNDER THE RELATION-BACK DOCTRINE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiffs' protracted delay in substituting father for the deceased infant in this medical malpractice action did not require dismissal of the complaint because the defendants were in possession of all the relevant medical records and therefore were not prejudiced by the delay. The court also noted that motion to amend the complaint to assert wrongful death should have been granted under the relation-back doctrine:

CPLR 1021 requires a motion for substitution to be made within a reasonable time … , and the determination of whether the timing is reasonable requires consideration of several factors, including the diligence of the party seeking substitution, the prejudice to the other parties, and whether the party to be substituted has shown that the action or the defense has potential merit … . Here, the plaintiffs moved, inter alia, for leave to substitute Jean Petion, who is the father of the plaintiff Jeremiah Prince Petion (hereinafter the deceased infant) and administrator of the deceased infant's estate (hereinafter the administrator), in place of the deceased infant as a party plaintiff and to amend the caption accordingly. Although the plaintiffs admit that the delay in seeking the substitution of the administrator was protracted … , the plaintiffs showed that there was no prejudice to the defendants because the defendants were on notice of the claims against them as early as February 2, 2009, when the plaintiffs filed a notice of claim against the defendant New York City Health and Hospitals Corporation, and the defendants possessed all of the relevant medical records … . In opposition, the defendants asserted only conclusory allegations of prejudice based solely on the passage of time … . The plaintiffs also demonstrated that they have potentially meritorious causes of action through their expert's affidavit of merit, the pleadings, and the testimony of Marie Petion at the General Municipal Law § 50-h hearing … . Petion v New York City Health & Hosps. Corp., 2019 NY Slip Op 06107, Second Dept 8-7-19

NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS.

EMERGENCY PHYSICIAN ERRONEOUSLY PRONOUNCED PLAINTIFF'S DECEDENT DEAD AND ALLEGEDLY REFUSED TO REEXAMINE HIM FOR NEARLY THREE HOURS, DESPITE THE PLEAS OF HIS FAMILY MEMBERS WHO ALLEGEDLY SAW HIM BREATHING, MAKING EYE CONTACT AND MOVING; SUPREME COURT SHOULD NOT HAVE PROHIBITED THE PARTIES FROM MAKING STATEMENTS ABOUT THE FACTS OF THE CASE; THE NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS CAUSE OF ACTION SHOULD HAVE BEEN DISMISSED (FOURTH DEPT).

The Fourth Department, reversing (modifying) Supreme Court, determined Supreme Court should not have prohibited the parties and their attorneys from making statements about the underlying facts in this medical malpractice action, and the negligent infliction of emotional distress (NIED) cause of action should have been dismissed. Plaintiff's decedent suffered cardiac arrest and was pronounced dead by an emergency physician (Perry). However plaintiff's decedent was not in fact dead and the emergency physician allegedly refused to examine plaintiff's decedent for nearly three hours. Plaintiff's decedent subsequently died after surgery at another hospital:

Perry notified plaintiff that decedent had died, and plaintiff, along with decedent's son and several other family members, was brought into the code room. Plaintiff alleges that, for the next two hours and 40 minutes, decedent was breathing, making eye contact, and moving around, which prompted her and the coroner to urge Perry and the nursing staff to examine decedent, but they refused to do so. When Perry examined decedent at 11:10 p.m. at plaintiff's insistence, he observed that decedent was, in fact, alive. Decedent was transferred to another hospital, where he underwent heart surgery and subsequently died. * * *

Supreme Court erred in granting defendants' motions for an order enjoining and prohibiting the parties and their attorneys from making extrajudicial statements about the action or the underlying facts in a public forum or in front of the media. Although defendants met their burden of "demonstrat[ing] that such statements present a reasonable likelihood' of a serious threat to [defendants'] right to a fair trial" … , there is no evidence in the record "that less restrictive alternatives would not be just as effective in assuring the defendant[s] a fair trial" … . Absent "the requisite showing of a necessity for such restraints," a court may not impose prior restraints on First Amendment rights … . * * *

We agree with defendants … that the court erred in denying their motions insofar as they sought summary judgment dismissing the … causes of action … for NIED … . . "A breach of the duty of care resulting directly

in emotional harm is compensable even though no physical injury occurred' … when the mental injury is a direct, rather than a consequential, result of the breach' … and when the claim possesses some guarantee of genuineness' … . Here, defendants met their respective burdens of establishing as a matter of law that plaintiff and decedent's son did not suffer mental and emotional injuries causally related to Perry's erroneous pronouncement of decedent's death, and plaintiff failed to raise a triable issue of fact by demonstrating the requisite " guarantee of genuineness' " with respect to her claims of mental or emotional injuries … . Cleveland v Gregory C. Perry, M.D., FDR Med. Servs., P.C., 2019 NY Slip Op 06306, Fourth Dept 8-22-19

PROXIMATE CAUSE.

DEFENDANT TRANSIT AUTHORITY'S NEGLIGENCE FURNISHED THE CONDITION FOR PLAINTIFF'S DECEDENT'S DEATH BUT WAS NOT THE CAUSE OF HIS DEATH, DEFENDANT'S MOTION TO SET ASIDE THE SUBSTANTIAL VERDICT SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the substantial plaintiff's verdict in this wrongful death case should have been set aside. It was alleged that the NYS Transit Authority was negligent in failing to make sure all passengers were off the subway train when the train reached the end of the line, requiring that it be repositioned in the relay tunnel. Plaintiff's decedent, who was intoxicated, remained on the train. At some point he fell from the train in the relay tunnel and was killed:

… [V]iewing the evidence in the light most favorable to the plaintiffs, there is no valid line of reasoning and permissible inferences which could possibly lead rational people to conclude that the defendants' alleged negligence was a proximate cause of the decedent's injuries and death … . Even assuming that the defendants' employees were negligent in failing to remove the decedent from the train before it was taken into the subject relay tunnel, the defendants' negligence merely furnished the condition or occasion for the occurrence of the decedent's fall from the train … rather than being one of its proximate causes. While the record evidence supports the plaintiffs' theory that the decedent was in the area between the two northernmost subway cars when he fell to the tracks below, the circumstances that led the decedent to be in that area, and the cause of the fall itself, remain unknown and, therefore, speculative … . Williams v New York City Tr. Auth., 2019 NY Slip Op 06187, Second Dept 8-21-19

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SLIP AND FALL.

DEFENDANT DID NOT DEMONSTRATE WHEN THE STAIRWELL WAS LAST INSPECTED OR CLEANED IN THIS SLIP AND FALL CASE, 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 in this slip and fall case. Plaintiff alleged a discarded metrocard was the cause of her slip and fall on a train station stairwell. The defendant did not demonstrate when the stairwell was last inspected or cleaned:

Defendant failed to establish its prima facie entitlement to judgment as a matter of law, in this action where plaintiff … alleges that he was injured when, while descending stairs in a subway station, he slipped and fell on a discarded Metrocard. Although the cleaner on duty in the station testified he was given a Cleaners Manual and a written cleaning schedule, evidencing that defendant had a "rational means for dealing with the problem" of strewn MetroCards on the stairwell of train stations, the cleaner conceded that he could not recall whether he had deviated from his usual work schedule on the date of plaintiff's accident and he did not have an independent recollection of when the staircase was last cleaned or inspected prior to the accident … .

Because defendant did not establish its prima facie entitlement to summary judgment, the burden never shifted to plaintiff to establish how long the condition existed … . Carela v New York City Tr. Auth., 2019 NY Slip Op 06140, First Dept 8-13-19

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SLIP AND FALL.

FACT THAT DEFENDANT CONTRACTOR HAD BEEN ISSUED A PERMIT FOR DRILLING IN THE STREET DID NOT RAISE A QUESTION OF FACT ABOUT WHETHER THE CONTRACTOR CREATED A DEFECT IN THE SIDEWALK IN THIS SLIP AND FALL CASE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the contractor's motion for summary judgment in this sidewalk slip and fall case should have been granted. The contractor presented evidence it did no work on the sidewalk. The fact that a permit for drilling on the street had been issued to the contractor did not raise a question of fact:

The plaintiff allegedly was injured when he tripped on a raised sidewalk flag. He commenced this personal injury action against, among others, the defendant Craig Geotechnical Drilling Co., Inc. (hereinafter Craig Drilling), a contractor, alleging that it was negligent in, among other things, creating the allegedly dangerous condition that caused the accident. …

A contractor may be liable for an affirmative act of negligence which results in the creation of a dangerous condition upon a public street or sidewalk … . Here, Craig Drilling demonstrated its prima facie entitlement to judgment as a matter of law by presenting evidence that it performed no work in the area of the raised sidewalk flag prior to the subject accident … . In opposition, the plaintiff failed to raise a triable issue of fact as to whether Craig Drilling created or exacerbated the raised sidewalk flag. Under the circumstances of this case, the mere fact that a permit had been issued to Craig Drilling to perform work on the street was insufficient to raise a triable issue of fact as to whether Craig Drilling created or exacerbated the raised sidewalk flag … . Sindoni v City of New York, 2019 NY Slip Op 06110, Second Dept 8-7-19

SLIP AND FALL.

STORM IN PROGRESS. NO QUESTION OF FACT WHETHER ICY CONDITION EXISTED BEFORE THE STORM, STORM IN PROGRESS RULE WARRANTED SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE, TWO-JUSTICE DISSENT (FOURTH DEPT).

The Fourth Department, reversing (modifying) Supreme Court, over a two-justice dissent, determined defendants demonstrated they were entitled to summary judgment under the storm in progress rule. The dissenters argued there was a question of fact whether the icy condition was there before the storm:

… [W]e conclude that defendants established as a matter of law "that a storm was in progress at the time of the accident and, thus, that [they] had no duty to remove the snow [or] ice until a reasonable time ha[d] elapsed after cessation of the storm' " … .

Where, as here, a defendant's own submissions do not raise an issue of fact whether the icy condition existed before the storm, the burden shifts to the plaintiff "to raise a triable issue of fact whether the accident was caused by a slippery condition at the location where the plaintiff fell that existed prior to the storm, as opposed to precipitation from the storm in progress, and that the defendant had actual or constructive notice of the preexisting condition' " …

Contrary to plaintiff's contentions, nothing in her deposition testimony, which was submitted by defendants in support of their respective motions, raised a triable issue of fact whether the ice she allegedly observed existed before the storm … , and the evidence that plaintiff submitted in opposition to the motions also did not raise a triable issue of fact. Battaglia v MDC Concourse Ctr., LLC, 2019 NY Slip Op 06310, Fourth Dept 8-22-19

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SLIP AND FALL; ESPINAL.

QUESTIONS OF FACT WHETHER THE "LAUNCH AN INSTRUMENT OF HARM" ESPINAL EXCEPTION APPLIED TO A CONTRACTOR AND WHETHER DEFENDANTS HAD CONSTRUCTIVE NOTICE OF THE CONDITION ALLEGED TO HAVE CAUSED PLAINTIFF'S SLIP AND FALL (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined there was a question of fact whether defendant contractor launched an instrument of harm in this slip and fall case. Plaintiff alleged she tripped on a piece of masonite that had been placed over concrete that had just been poured. There was also a question of fact whether the property owner had constructive notice of the condition:

The … defendants' submissions failed to eliminate all triable issues of fact as to whether Howell launched a force or instrument of harm through the failure to exercise reasonable care when its employee laid the subject masonite over the area of the floor where the self-leveling concrete had been poured … . …

The evidence proffered by the … defendants failed to demonstrate, prima facie, that the [defendants] lacked constructive notice of a hazardous condition on the premises. During an examination before trial, [defendant's] operations director was asked about his inspection tour of the mall on the morning of the plaintiff's fall. His repeated descriptions of what he "normally would" do and "probably would have" done are ambiguous as to whether he is describing a specific inspection, or merely describing general inspection policies and practices … . Pinto v Walt Whitman Mall, LLC, 2019 NY Slip Op 06157, Second Dept 8-21-19

TRAFFIC ACCIDENTS.

DRIVER OF MIDDLE VEHICLE IN THIS THREE-CAR REAR-END TRAFFIC ACCIDENT CASE ENTITLED TO SUMMARY JUDGMENT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the middle driver, Budziak, in this three-car rear-end collision case was entitled to summary judgment:

"A rear-end collision with a stopped or stopping vehicle establishes a prima facie case of negligence on the part of the operator of the rear vehicle, requiring that operator to come forward with evidence of a nonnegligent

explanation for the collision to rebut the inference of negligence" … . " Evidence that a vehicle was struck in the rear and propelled into the vehicle in front of it may provide a sufficient non-negligent explanation'" … . Thus, "[i]n a chain collision accident, the operator of the middle vehicle may establish prima facie entitlement to judgment as a matter of law by demonstrating that the middle vehicle was properly stopped behind the lead vehicle when it was struck from behind by the rear vehicle and propelled into the lead vehicle" … .

Here, Budziak established her prima facie entitlement to judgment as a matter of law by demonstrating that she was stopped in traffic behind Hakimi's vehicle when her vehicle was struck in the rear by Barnett's vehicle and propelled into Hakimi's vehicle … . Mihalatos v Barnett, 2019 NY Slip Op 06082, Second Dept 8-7-19

TRAFFIC ACCIDENTS.

PLAINTIFF WAS WALKING IN THE CROSSWALK WHEN SHE WAS STRUCK BY DEFENDANT'S BUS MAKING A RIGHT TURN; PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT WAS NOT PREMATURE AND SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff's motion for summary judgment in this pedestrian traffic accident case should have been granted. Plaintiff was in the crosswalk when she was struck by defendant's bus making a right turn:

The plaintiff established her prima facie entitlement to judgment as a matter of law on the issue of liability by submitting her own affidavit and a certified copy of the police accident report, which demonstrated that she was walking within a crosswalk, with the pedestrian signal in her favor, when the defendants' vehicle failed to yield the right-of-way and struck her … . In opposition, the defendants failed to raise a triable issue of fact as to as to whether there was a non-negligent explanation for striking the plaintiff.

Furthermore, the plaintiff's motion was not premature, as the defendants failed to offer an evidentiary basis to suggest that additional discovery may lead to relevant evidence, or that facts essential to opposing the motion were exclusively within the knowledge and control of the plaintiff … . Rodriguez-Garcia v Bobby's Bus Co., Inc., 2019 NY Slip Op 06221, Second Dept 8-21-19

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TRAFFIC ACCIDENTS.

QUESTION OF FACT WHETHER THE BUS DRIVER RESPONDED REASONABLY UPON HEARING THE SIREN OF A FIRE TRUCK APPROACHING AN INTERSECTION; PLAINTIFF, A PASSENGER, WAS INJURED WHEN THE BUS DRIVER SLAMMED ON THE BRAKES (SECOND DEPT).

The Second Department, reversing Supreme Court, determined there was a question of fact whether the bus driver reacted properly to an emergency. Plaintiff, a passenger, was injured when the bus suddenly braked to avoid a fire truck entering an intersection. There was a question whether the driver slowed down upon hearing the siren:

The evidence proffered in support of the defendants' motion demonstrated, prima facie, that the operator of the bus was presented with an emergency situation, to wit, a fire truck that was entering the intersection against the traffic light, and that the operator acted as a reasonable person would under the circumstances … . However, in opposition, the plaintiff noted that the operator testified at her deposition that, as she approached the intersection, she heard a fire truck siren. Although the operator claimed she slowed down prior to reaching the intersection, the plaintiff testified at her deposition that the operator was driving "pretty fast" prior to the accident and that there was no change in speed. The operator's alleged entry into the intersection without slowing down, after hearing sirens approaching the intersection, raised a triable issue of fact as to whether the operator was faced with an emergency situation not of her own making and whether her actions in relation thereto were reasonable … . Liang-Ying Ren v Doe, 2019 NY Slip Op 06074, Second Dept 8-7-19

TRAFFIC ACCIDENTS. VERDICT SHEET.

IN A TRIAL SUBJECT TO INSURANCE LAW 5102 THE TERM "SERIOUS INJURY" NOT "INJURY" SHOULD BE USED ON THE VERDICT SHEET (FOURTH DEPT).

The Fourth Department noted that the term "serious injury" not "injury" should be used on a verdict sheet in a case involving Insurance Law 5102:

… [W]e … note that the first question on the verdict sheet — i.e., "[w]as the accident . . . a substantial factor in causing an injury to [plaintiff]?" — invites the very problem we addressed in Brown v Ng (163 AD3d 1464,

1465 [4th Dept 2018]), where we noted that an interrogatory asking whether the plaintiff sustained an "injury" fails to address the appropriate legal issue, which is whether the plaintiff sustained a serious injury within the meaning of Insurance Law § 5102 (d). The first question on the verdict sheet was unnecessary here inasmuch as the second and third questions asked the jury to determine whether plaintiff sustained a serious injury under the relevant categories that was causally related to the accident. McCulloch v New York Cent. Mut. Ins. Co., 2019 NY Slip Op 06254, Fourth Dept 8-22-19