NEW YORK APPELLATE DIGEST, LLC

Summaries of Selected Decisions Addressing Negligence Released by the New York State Appellate Courts in September 2019, Organized Alphabetically by Topic. Click on the Table of Contents Entries to Go to the Summaries, which Link to the Decisions on the Official New York Courts Website.

Negligence
September 2019

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The Second Department determined, because plaintiff in this bicycle-vehicle traffic accident case affirmatively argued he was not comparatively negligent, the issue of comparative negligence was properly considered on plaintiff's summary judgment motion. Plaintiff ran into the door of defendant's car as it was being opened. The plaintiff did not eliminate all triable issue of fact concerning his comparative negligence:

"Although a plaintiff need not demonstrate the absence of his or her own comparative negligence to be entitled to partial summary judgment as to a defendant's liability"… , the issue of a plaintiff's comparative negligence may be decided where, as here, "the plaintiff specifically argued the absence of comparative fault in support of his [or her] motion" … .

Here, the plaintiff failed to establish, prima facie, that he was not comparatively at fault in the happening of the accident … . "A bicyclist is required to use reasonable care for his or her own safety, to keep a reasonably vigilant lookout for vehicles, and to avoid placing himself or herself in a dangerous position" … . In support of his motion, the plaintiff submitted, inter alia, the deposition testimony of the parties, which failed to eliminate all triable issues of fact as to whether the plaintiff exercised reasonable care while riding his bicycle. Further, although the plaintiff was not required to demonstrate his freedom from comparative fault to establish his entitlement to summary judgment on the issue of liability … , the plaintiff failed to eliminate triable issues of fact as to whether the defendant was negligent and, if so, whether any such negligence caused or contributed to the accident … . Flores v Rubenstein, 2019 NY Slip Op 06747, Second Dept 9-25-19

EDUCATION-SCHOOL LAW.

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The Third Department determined there were questions of fact whether the school was negligent in supervision plaintiff kindergarten student in gym class. Infant plaintiff was instructed to jump but her feet did not leave the ground and she fell forward on her arm. Infant plaintiff had an individualized accommodation plan (504 plan) of which the gym teacher was aware:

Defendant submitted evidence demonstrating that the gym teacher was aware of the infant's 504 plan and that there were no specific accommodations therein for physical education. The physical therapist who worked with the infant testified that she did not have any safety concerns for the infant regarding physical education. Defendant's expert stated in an affidavit that defendant provided a safe environment for the students, and the gym teacher explained the safety rules and taught proper techniques to the students. The expert thus opined that the infant's alleged injuries were not proximately caused by any inadequate supervision by defendant.

Meanwhile, the infant gave conflicting accounts as to whether a mat was located on the floor where she landed after jumping. The infant also testified in her hearing pursuant to General Municipal Law § 50-h that she explained to the gym teacher how she jumped at the time of the accident and, when the teacher told her that her explanation was incorrect, the infant responded that she jumped how she was instructed to do so by him. Plaintiff's expert stated in an affidavit that the infant's physical limitations impaired her ability to function in class and engage in physical education activities. The expert opined that, when taking into account the class size and the activities performed, defendant negligently supervised the infant by allowing her to jump without having a teacher in close proximity to her. Jaquin v Canastota Cent. Sch. Dist., 2019 NY Slip Op 06555, Third Dept 9-12-19

ELEVATORS.

THERE ARE QUESTIONS OF FACT WHETHER DEFENDANTS WERE NOTIFIED THAT THE ELEVATOR DOORS CLOSED TOO FAST AND WHETHER REPAIRS TO THE DOOR COULD BE RELATED TO THE CLOSING VELOCITY; PLAINTIFF ALLEGED HIS THUMB WAS CAUGHT IN THE CLOSING DOOR; DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (FIRST DEPT).

The First Department, reversing Supreme Court, determined summary judgment should not have been granted to the defendant's in this elevator accident case. Plaintiff alleged the elevator door closed too fast and his thumb was caught in the closing door. Plaintiff alleged he had complained to the building superintendent, a building maintenance employee and the management company about the door closing too fast. Both parties submitted affidavits from experts:

The superintendent-in-training on the date of the accident testified that he did not receive any complaints regarding problems with the elevator door. The field mechanic for [the elevator service company] testified that he did not complete any repair work with respect to the door opening and closing too quickly. He did, however, replace the elevator shoe which is a necessary component for the elevator door to be able to close … .

Plaintiff … testified that prior to his accident he had complained to the then superintendent, another building maintenance employee, and the management company numerous times regarding the velocity with which the elevator door closed. Plaintiff testified further that during one of his conversations with the management company regarding the elevator door, he was told that management would send a service company out to address the issue. Additionally, plaintiff testified that approximately two months before his accident, he witnessed a friend get hit in the shoulder by the fast closing elevator door, and that plaintiff and his mother reported this incident to the then superintendent and the management company.

The parties also presented conflicting expert affidavits regarding the potential causes of the alleged elevator door malfunction, including the purpose of the elevator shoe, and the relevance of the velocity with which the door closed as it pertained to the cause of plaintiff's injury, which only further precludes a grant of summary judgment … . Mable v 384 E. Assoc., LLC, 2019 NY Slip Op 06442, First Dept 9-3-19

EMPLOYMENT LAW, SLIP AND FALL.

PLAINTIFF WAS NOT INJURED BY THE CONDITION HE WAS HIRED TO FIX IN THIS SLIP AND FALL CASE; DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant's motion for summary judgment in this slip and fall case should not have been granted. Plaintiff, a cleaner employed by a nonparty to clean a NYC school, tripped and fell as he was walking across the auditorium stage to turn on the lights. The defendant argued it could not be liable because plaintiff was injured by the condition he was responsible to fix:

A plaintiff cannot recover against a defendant for common-law negligence if he or she was injured by the dangerous condition which he or she had been hired to remedy … . Here, the evidence submitted by the defendants established that the plaintiff was merely walking to the rear of the stage in order to turn on the lights in the auditorium. Thus, the plaintiff was not engaged in the type of cleaning activity aimed at eliminating the risk presented by the test board that had been left on the floor … . Additionally, the plaintiff's duty to clean visible debris off the floor had not yet arisen, because the plaintiff testified that due to the dim lighting condition in the auditorium, he had not observed the test board before his fall. Torres v Board of Educ. of the City of New York, 2019 NY Slip Op 06818, Second Dept 9-25-19

LANDLORD-TENANT, SLIP AND FALL.

LANDLORD DID NOT SUBMIT SUFFICIENT PROOF THAT THE LEASE REQUIRED THE TENANT TO REMOVE ICE AND SNOW, THEREFORE THE OUT-OF-POSSESSION LANDLORD'S MOTION FOR SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that the out-of-possession landlord's motion for summary judgment in this slip and fall case should not have been granted. The landlord did not submit a copy of the (expired) lease:

"Generally, when a tenant remains in possession [of the leased premises] after the expiration of a lease, pursuant to common law, there is implied a continua[tion] of the tenancy on the same terms and subject to the same covenants as those contained in the original instrument"'… . By failing to submit a copy of the expired lease in

support of their motion, the defendants failed to establish, prima facie, that they had no contractual obligation to remove snow and ice from the property … . Even assuming that neither the plaintiff nor the defendants have a copy of the expired lease in their possession, the defendants inexplicably failed to submit a copy of a lease entered into between them and other tenants of the property, notwithstanding the deposition testimony of the defendant … that he has rented the property since he purchased it in 1996, that he entered into a lease with each tenant, and that the leases specifically provided that it was the tenants' responsibility to remove snow and ice. Miske v Selvaggi, 2019 NY Slip Op 06765, Second Dept 9-25-19

LANDLORD-TENANT, SLIP AND FALL.

OUT-OF-POSSESSION LANDLORD NOT LIABLE FOR A SLIP AND FALL ON ICE ON THE RENTAL PROPERTY, SUPREME COURT REVERSED (THIRD DEPT).

The Third Department, reversing Supreme Court, determined defendant out-of-possession landlord did not have a contractual duty to remove ice and snow and did not have actual or constructive notice of the icy condition on the rental property in this slip and fall case:

"As a general rule, an out-of-possession landlord is not responsible for dangerous conditions existing upon leased premises after possession of the premises has been transferred to the tenant. Exceptions to this rule include situations where the landlord retains control of the premises, has specifically contracted to repair or maintain the property, has through a course of conduct assumed a responsibility to maintain or repair the property or has affirmatively created a dangerous condition thereon" … . "[W]hen a landowner and one in actual possession have committed their rights and obligations with regard to the property to a writing, [courts] look not only to the terms of the agreement but to the parties' course of conduct . . . to determine whether the landowner in fact surrendered control over the property such that the landowner's duty is extinguished as a matter of law" … . However, the fact that a landlord "retain[s] the right to visit the premises, or even to approve alterations, additions or improvements, is insufficient to establish the requisite degree of control necessary for the imposition of liability with respect to an out-of-possession landlord" … .

… "[W]ithout notice of a specific dangerous condition, an out-of-possession landlord cannot be faulted for failing to repair or otherwise rectify it" … . "Accordingly, the [ultimate] burden is on the plaintiff to prove actual or constructive notice and a reasonable opportunity to repair or remedy the dangerous condition" … . Rose v Kozak, 2019 NY Slip Op 06559, Third Dept 9-12-19

MEDICAL MALPRACTICE VS NEGLIGENCE.

THE DEFENDANT HOSPITAL DID NOT DEMONSTRATE THAT A DOCTOR ORDERED THE RESTRAINT OF PLAINTIFF'S DECEDENT AND THEREFORE DID NOT DEMONSTRATE THAT MEDICAL MALPRACTICE, AS OPPOSED TO NEGLIGENCE, WAS THE APPROPRIATE THEORY; THE ACTION SHOULD NOT HAVE BEEN DISMISSED BASED UPON THE EXPIRATION OF THE 2 1/2 YEAR STATUTE OF LIMITATIONS FOR MEDICAL MALPRACTICE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant's motion to dismiss the complaint on statute of limitations grounds should not have been granted. Plaintiff's decedent's injuries were alleged to relate to defendant-hospital's improper restraint of plaintiff's decedent (apparently to keep him from getting up from his hospital bed). Defendant argued the 2 1/2 year statute of limitations for medical malpractice actions had passed. The Second Department held that defendant did not demonstrate that a doctor had ordered the restraints; therefore the defendant had not made out a prima facie case that the action sounded in medical malpractice as opposed to negligence:

" The critical question in determining whether an action sounds in medical malpractice or simple negligence is the nature of the duty to the plaintiff which the defendant is alleged to have breached'" … . " When the duty arises from the physician-patient relationship or is substantially related to medical treatment, the breach gives rise to an action sounding in medical malpractice, not simple negligence'" … . " The distinction between ordinary negligence and malpractice turns on whether the acts or omissions complained of involve a matter of medical science or art requiring special skills not ordinarily possessed by lay persons or whether the conduct complained of can instead be assessed on the basis of the common everyday experience of the trier of the facts'" … .

Here, the defendant failed to establish, prima facie, that the plaintiff's claims were time-barred under the 2½-year statute of limitations applicable to medical malpractice actions (see CPLR 214-a). Since the defendant did not present any evidence that a doctor ordered the decedent to be restrained at any point prior to or during the subject incident, the defendant failed to establish that the plaintiff's claims related to medical treatment, as opposed to the failure of hospital staff to exercise ordinary and reasonable care to prevent harm to the decedent … . Wesolowski v St. Francis Hosp., 2019 NY Slip Op 06646, Second Dept 9-18-19

MEDICAL MALPRACTICE, MUNICIPAL LAW.

PLAINTIFF ALLEGED DEFENDANT WAS LIABLE FOR HER BABY'S BRAIN DAMAGE BECAUSE DEFENDANT'S AMBULANCE BROKE DOWN ON THE WAY TO THE HOSPITAL, CAUSING A DELAY IN DELIVERY; DEFENDANT MUNICIPALITY, WHICH PROVIDED THE AMBULANCE, WAS ENGAGED IN A GOVERNMENTAL FUNCTION AND THERE WAS NO SPECIAL RELATIONSHIP WITH PLAINTIFF; THE MUNICIPALITY CAN NOT BE HELD LIABLE (SECOND DEPT).

The Second Department determined the complaint against the airport emergency medical service alleging liability for a delay in getting plaintiff to the hospital was properly dismissed. Plaintiff suffered complications giving birth which were alleged to have resulted in the baby suffering brain damage. The ambulance provided by defendant broke down and plaintiff was transferred to another ambulance. The defendant was deemed to have been engaged in a governmental function and there was no special relationship between the plaintiff and the municipal defendant. Therefore the defendant could not be held liable:

"Protecting health and safety is one of municipal government's most important duties" … , and emergency medical services "have widely been considered one of government's critical duties" … . …

… [D]efendant could not be held liable to the plaintiffs unless it owed them a special duty … . One way to prove the existence of a special duty is by showing that the defendant assumed a "special relationship" with the plaintiff beyond the duty that is owed to the public generally … . "The plaintiff has the heavy burden of establishing the existence of a special relationship by proving all of the following elements: (1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) the party's justifiable reliance on the municipality's affirmative undertaking" … . Of the four factors, the "justifiable reliance" element is particularly "critical" because it "provides the essential causative link between the special duty assumed by the municipality and the alleged injury" … . Halberstam v Port Auth. of N.Y. & N.J., 2019 NY Slip Op 06479, Second Dept 9-11-19

MEDICAL MALPRACTICE.

HEARSAY STATEMENTS ATTRIBUTED TO PLAINTIFF'S DECEDENT IN THIS MEDICAL MALPRACTICE ACTION NOT ADMISSIBLE AS ADMISSIONS OR BUSINESS RECORDS; THE DEAD MAN'S STATUTE PROHIBITED TESTIMONY ABOUT THE HEARSAY STATEMENTS; DEFENSE VERDICT REVERSED, NEW TRIAL ORDERED (SECOND DEPT).

The Second Department, reversing the defense verdict in this medical malpractice case and ordering a new trial, determined that hearsay statements to the effect that plaintiff's decedent had signed an "against medical advice [AMA]" form when he allegedly refused treatment at defendant hospital were not admissible under the Dead Man's Statute or as statements against interest or admissions, or as business records:

"A hearsay entry in a hospital record is admissible under the business records exception to the hearsay rule if the entry is germane to the diagnosis or treatment of the patient" (… see CPLR 4518[a]). Here, although the entries were germane to the decedent's diagnosis and treatment, the defendants failed to offer foundational testimony under CPLR 4518(a) or certification under CPLR 4518(c) … . …

If an entry in the medical records "is inconsistent with a position taken by a party at trial, it is admissible as an admission by that party, even if it is not germane to the diagnosis or treatment, as long as there is evidence connecting the party to the entry'" … . Here … the entry clearly states that the decedent's primary care physician, not the decedent himself, was the source of the information … . …

Pursuant to CPLR 4519, otherwise known as the Dead Man's Statute, "[u]pon the trial of an action . . . a party or a person interested in the event . . . shall not be examined as a witness in his [or her] own behalf or interest . . . against the executor, administrator or survivor of a deceased person or the committee of a mentally ill person . . . concerning a personal transaction or communication between the witness and the deceased person or mentally ill person, except where the executor, administrator, survivor, committee or person so deriving title or interest is examined in his [or her] own behalf, of the testimony of the mentally ill person or deceased person is given in evidence, concerning the same transaction or communication." Here, both [witnesses] were defendants at the time they gave deposition testimony, making them interested parties under the statute … [and] they both testified to transactions or communications with the decedent and sought to offer that testimony against the decedent's estate. …

The defendants argue that the plaintiff waived the protections of the Dead Man's Statute by eliciting the communications at issue. However, "[t]he executor does not waive rights under the statute by taking the opponent's deposition" … . … Contrary to the defendants' contention, the declaration of the decedent did not fall within the declaration against interest exception to the hearsay rule because the defendants failed to establish that the subject statement was against the decedent's interest when made … . Moreover, where the Dead Man's Statute renders a witness's testimony inadmissible, "the fact that the testimony would fall within an exception to the hearsay rule is simply irrelevant" … . Grechko v Maimonides Med. Ctr., 2019 NY Slip Op 06478, Second Dept 9-11-19

MUNICIPAL LAW, MEDICAL MALPRACTICE.

PLAINTIFF ALLEGED DEFENDANT WAS LIABLE FOR HER BABY'S BRAIN DAMAGE BECAUSE DEFENDANT'S AMBULANCE BROKE DOWN ON THE WAY TO THE HOSPITAL, CAUSING A DELAY IN DELIVERY; DEFENDANT MUNICIPALITY, WHICH PROVIDED THE AMBULANCE, WAS ENGAGED IN A GOVERNMENTAL FUNCTION AND THERE WAS NO SPECIAL RELATIONSHIP WITH PLAINTIFF; THE MUNICIPALITY CAN NOT BE HELD LIABLE (SECOND DEPT).

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"Protecting health and safety is one of municipal government's most important duties" … , and emergency medical services "have widely been considered one of government's critical duties" … . …

… [D]efendant could not be held liable to the plaintiffs unless it owed them a special duty … . One way to prove the existence of a special duty is by showing that the defendant assumed a "special relationship" with the plaintiff beyond the duty that is owed to the public generally … . "The plaintiff has the heavy burden of establishing the existence of a special relationship by proving all of the following elements: (1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured;

(2) knowledge on the part of the municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) the party's justifiable reliance on the municipality's affirmative undertaking" … . Of the four factors, the "justifiable reliance" element is particularly "critical" because it "provides the essential causative link between the special duty assumed by the municipality and the alleged injury" … . Halberstam v Port Auth. of N.Y. & N.J., 2019 NY Slip Op 06479, Second Dept 9-11-19

MUNICIPAL LAW, SLIP AND FALL.

THE PETITION FOR LEAVE TO FILE A LATE NOTICE OF CLAIM IN THIS SIDEWALK SLIP AND FALL CASE SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the petition for leave to file a late notice of claim in this sidewalk slip and fall case should not have been granted:

Although the photographs submitted in support of the petition may have demonstrated that the City had prior knowledge of the defect in the asphalt, "actual knowledge of the defect is not tantamount to actual knowledge of the facts constituting the claim, since the City was not aware of the petitioner's accident, her injuries, and the facts underlying her theory of liability" … .

A lack of due diligence in determining the identity of the owner of the property upon which the subject accident occurred is not a reasonable excuse for the failure to serve a timely notice of claim … . …

In addition, the petitioner failed to satisfy her initial burden of showing that the City would not be substantially prejudiced in maintaining a defense on the merits as a result of the delay … . Matter of Perez v City of New York, 2019 NY Slip Op 06774, Second Dept 9-25-19

PRIVILEGE.

PLAINTIFF WAIVED THE PHYSICIAN-PATIENT PRIVILEGE BY PLACING THE CONDITION OF HER KNEES INTO CONTROVERSY IN THIS ACCIDENT CASE, APPELLATE DIVISION REVERSED (CT APP).

The Court of Appeals, reversing the Appellate Division, determined plaintiff had placed the condition of her knees into controversy in this accident case and defendants were therefore entitled to discovery re: prior treatment of her knees. The facts were not discussed:

Plaintiff affirmatively placed the condition of her knees into controversy through allegations that the underlying accident caused difficulties in walking and standing that affect her ambulatory capacity and resultant damages … . Under the particular circumstances of this case, plaintiff therefore waived the physician-patient privilege with respect to the prior treatment of her knees and the discovery sought by authorizations pertaining to the treatment of plaintiff's knees is "material and necessary" to defendants' defense of the action (CPLR 3101 [a]). Accordingly, Supreme Court erred in denying defendants' motion to compel plaintiff to provide discovery related to the prior treatment of her knees. Brito v Gomez, 2019 NY Slip Op 06452, CtApp 9-10-19

PRODUCTS LIABILITY.

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED ON THE GROUND THAT PLAINTIFF'S DEPOSITION TESTIMONY CONTRADICTED THE CONCLUSIONS OF PLAINTIFF'S EXPERT (CT APP).

The Court of Appeals, reversing the Appellate Division, over two dissents, determined summary judgment should not have been granted to defendants in this personal injury case stemming from a potholder catching fire. The Appellate Division had reversed because plaintiff's deposition testimony conflicted with the conclusions of plaintiff's expert. The facts were not discussed:

The courts below erred in granting defendants' motions for summary judgment on the basis that plaintiff failed to raise a triable issue of fact sufficient to defeat the motions. Although the plaintiff's deposition testimony partially contradicted the factual conclusions reached by her expert witnesses, the expert opinions were based upon other record evidence and were neither speculative nor conclusory. Insofar as plaintiff raised genuine issues

of fact on the element of causation, summary judgment should not have been granted on that ground … . We remit for Supreme Court to consider the alternative grounds for summary judgment defendants raised in their motions and neither Supreme Court nor the Appellate Division reached.

… Judges]Rivera, Stein, Fahey and Wilson concur. Chief Judge DiFiore and Judges Garcia and Feinman dissent and vote to affirm for reasons stated in the Appellate Division memorandum decision (Salinas v World Houseware Producing Co., Ltd., 166 AD3d 493 [1st Dept 2018]). Salinas v World Houseware Producing Co., 2019 NY Slip Op 06537, CtApp 9-12-19

SLIP AND FALL, INQUEST.

THE DEFENDANT IN THIS SLIP AND FALL CASE, WHOSE ANSWER HAD BEEN STRUCK, SHOULD HAVE BEEN ALLOWED TO PRESENT EVIDENCE ON DAMAGES (FIRST DEPT).

The Second Department, reversing Supreme Court, determined that, although defendant's answer in this slip and fall case had been struck, the defendant should not have been precluded from presenting evidence on damages:

… Supreme Court … struck the answer and scheduled an inquest on the issue of damages. At the inquest, following direct testimony by the plaintiff, the court denied defense counsel's request to cross-examine the plaintiff, since the defendant's answer had been stricken. The court awarded the plaintiff damages in the principal sum of $267,221.77. …

"[A] defendant whose answer is stricken as a result of a default admits all traversable allegations in the complaint, including the basic allegation of liability, but does not admit the plaintiff's conclusion as to damages" … . "Accordingly, where a judgment against a defaulting defendant is sought by motion to the court, the defendant is entitled, at an inquest to determine damages, to cross-examine witnesses, give testimony, and offer proof in mitigation of damages" … . Here, since the Supreme Court did not provide such an opportunity to the defendant, we remit the matter to the Supreme Court, Queens County, for a new inquest on the issue of damages … . Dejesus v H.E. Broadway, Inc., 2019 NY Slip Op 06743, First Dept 9-25-19

SLIP AND FALL.

ALTHOUGH PLAINTIFF HERSELF MAY NOT HAVE BEEN ABLE TO IDENTIFY THE CAUSE OF HER SLIP AND FALL, HER DAUGHTER, WHO WITNESSED THE FALL, PROVIDED SUFFICIENT EVIDENCE TO WARRANT DENIAL OF DEFENDANT'S SUMMARY JUDGMENT MOTION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant's (New York City Housing Authority's, NYCHA's) motion for summary judgment in this slip and fall case should not have been granted. Plaintiff's daughter, who witnessed the fall, provided sufficient evidence of the sidewalk defect:

"If a plaintiff is unable to identify the cause of a fall, any finding of negligence would be based upon speculation" … . "That does not mean that a plaintiff must have personal knowledge of the cause of his or her fall" … . "It only means that a plaintiff's inability to establish the cause of his or her fall — whether by personal knowledge or by other admissible proof — is fatal to a cause of action based on negligence" … . …

In support of its motion, NYCHA submitted a transcript of the deposition testimony of the plaintiff's daughter, Galina Moiseyeva (hereinafter Galina), who testified that she saw the plaintiff fall because of a "crack" or "gap" in the sidewalk, which made the sidewalk a "different level." Further, Galina, who lived with the plaintiff in the premises abutting the sidewalk, testified that she walked along the sidewalk while traveling to and from work, and was previously aware of the alleged crack in the sidewalk. Contrary to NYCHA's contentions, the alleged failure of the plaintiff and Galina to identify the exact location of the plaintiff's alleged fall on a photograph shown at their depositions and hearings pursuant to General Municipal Law § 50-h, which photograph was taken the day after the alleged accident occurred and after NYCHA had allegedly covered the subject part of the sidewalk with plywood, did not establish, prima facie, that the plaintiff is unable to identify the cause of her fall. Under the circumstances, NYCHA failed to eliminate triable issues of fact as to whether the plaintiff fell due to the alleged defective condition of the sidewalk … . Moiseyeva v New York City Hous. Auth., 2019 NY Slip Op 06766, Second Dept 9-25-19

SLIP AND FALL.

LANDLORD DID NOT SUBMIT SUFFICIENT PROOF THAT THE LEASE REQUIRED THE TENANT TO REMOVE ICE AND SNOW, THEREFORE THE OUT-OF-POSSESSION LANDLORD'S MOTION FOR SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that the out-of-possession landlord's motion for summary judgment in this slip and fall case should not have been granted. The landlord did not submit a copy of the (expired) lease:

"Generally, when a tenant remains in possession [of the leased premises] after the expiration of a lease, pursuant to common law, there is implied a continua[tion] of the tenancy on the same terms and subject to the same covenants as those contained in the original instrument"'… . By failing to submit a copy of the expired lease in support of their motion, the defendants failed to establish, prima facie, that they had no contractual obligation to remove snow and ice from the property … . Even assuming that neither the plaintiff nor the defendants have a copy of the expired lease in their possession, the defendants inexplicably failed to submit a copy of a lease entered into between them and other tenants of the property, notwithstanding the deposition testimony of the defendant … that he has rented the property since he purchased it in 1996, that he entered into a lease with each tenant, and that the leases specifically provided that it was the tenants' responsibility to remove snow and ice. Miske v Selvaggi, 2019 NY Slip Op 06765, Second Dept 9-25-19

SLIP AND FALL.

NO ESPINAL EXCEPTIONS WERE PLED SO THE SNOW REMOVAL CONTRACTOR'S MOTION FOR SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE WAS PROPERLY GRANTED; QUESTIONS OF FACT WERE RAISED ABOUT WHETHER THE STORM IN PROGRESS RULE APPLIED AND WHETHER THE AREA WAS SLIPPERY BEFORE THE STORM, PRECLUDING SUMMARY JUDGMENT IN FAVOR OF THE OTHER DEFENDANTS (FOURTH DEPT).

The Fourth Department, modifying Supreme Court, in this slip and fall case, determined: (1) the snow removal contractor's (Fitzgerald's) motion for summary judgment was properly granted because no Espinal exception was pled; and (2) there were questions of fact whether there was a storm in progress at the time of the fall and whether there were slippery areas prior to the storm:

"[A] contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party" (Espinal v Melville Snow Contrs., 98 NY2d 136, 138 [2002]). Although there are three well-established exceptions to that rule (see id. at 140), plaintiff did not allege facts in his complaint or bill of particulars that would establish the applicability of any of those exceptions, and thus Fitzgerald was not required to affirmatively negate the possible application of any of them in order to meet her initial burden … . Instead, Fitzgerald had to demonstrate only that plaintiff was not a party to the snow removal contract and that she therefore owed no duty to him, which she accomplished by submitting a copy of the contract … . …

… [D]efendants submitted the deposition testimony of plaintiff, who testified that snow and rain had been predicted that day, but during the time leading up to his fall it was merely overcast. Thus, defendants' own submissions raise an issue of fact whether there was a storm in progress at the time of the fall …. Furthermore, defendants submitted the deposition testimony of an assistant store manager, who testified that there were "a few" "different" "slippery spots" in the parking lot when she arrived for her shift at 2:00 p.m. on the day of plaintiff's fall, thus raising issues of fact whether the slippery condition preexisted the alleged storm … , and whether defendants had actual or constructive notice of the slippery condition … . Govenettio v Dolgencorp of N.Y., Inc., 2019 NY Slip Op 06907, Fourth Dept 9-27-19

SLIP AND FALL.

OUT-OF-POSSESSION LANDLORD NOT LIABLE FOR A SLIP AND FALL ON ICE ON THE RENTAL PROPERTY, SUPREME COURT REVERSED (THIRD DEPT).

The Third Department, reversing Supreme Court, determined defendant out-of-possession landlord did not have a contractual duty to remove ice and snow and did not have actual or constructive notice of the icy condition on the rental property in this slip and fall case:

"As a general rule, an out-of-possession landlord is not responsible for dangerous conditions existing upon leased premises after possession of the premises has been transferred to the tenant. Exceptions to this rule include situations where the landlord retains control of the premises, has specifically contracted to repair or maintain the property, has through a course of conduct assumed a responsibility to maintain or repair the property or has affirmatively created a dangerous condition thereon" … . "[W]hen a landowner and one in actual possession have committed their rights and obligations with regard to the property to a writing, [courts] look not only to the terms of the agreement but to the parties' course of conduct . . . to determine whether the landowner in fact surrendered control over the property such that the landowner's duty is extinguished as a matter of law" … . However, the fact that a landlord "retain[s] the right to visit the premises, or even to approve alterations, additions or improvements, is insufficient to establish the requisite degree of control necessary for the imposition of liability with respect to an out-of-possession landlord" … .

… "[W]ithout notice of a specific dangerous condition, an out-of-possession landlord cannot be faulted for failing to repair or otherwise rectify it" … . "Accordingly, the [ultimate] burden is on the plaintiff to prove actual or constructive notice and a reasonable opportunity to repair or remedy the dangerous condition" … . Rose v Kozak, 2019 NY Slip Op 06559, Third Dept 9-12-19

SLIP AND FALL.

PLAINTIFF DID NOT DEMONSTRATE DEFENDANTS' JANITORIAL SCHEDULE WAS MANIFESTLY UNREASONABLE IN THIS SLIP AND FALL CASE, WHICH PRECLUDES DEFENDANTS' LIABILITY; PLAINTIFF'S TESTIMONY DEMONSTRATED DEFENDANTS DID NOT HAVE ACTUAL OR CONSTRUCTIVE KNOWLEDGE OF THE ALLEGED WET CONDITION; DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (FIRST DEPT).

The First Department, reversing Supreme Court, determined defendants' motion for summary judgment should have been granted in this slip and fall case. Defendants' presented evidence of the janitorial schedule for a particular day which was deemed sufficient to preclude liability because plaintiff did not demonstrate the schedule was manifestly unreasonable. And plaintiff's testimony the defendants did not have actual or constructive notice of the alleged wet condition on the stairs:

Defendants' superintendent offered testimony as to the janitorial schedule to be followed on a particular day. An established reasonable cleaning routine precludes the imposition of liability … . Where, as here, the incident occurs outside of the scheduled cleaning routine, plaintiff's failure to raise a factual issue that such routine was manifestly unreasonable so as to require altering it warrants dismissal of the complaint … .

Furthermore, plaintiff testified that there was no wet condition on the stairs when he left the building, that upon his return a short while later he observed an alleged wet condition on the stairs, that he did not notify anyone of such condition, and that as a result of this condition he slipped and fell on the stairs as he was leaving the building a second time. Plaintiff's testimony demonstrates that defendants did not have actual notice of the purported wet condition, or constructive notice given that the condition did not exist for a sufficient length of time prior to the accident to permit defendants' employees to discover and remedy it … . Thomas v Sere Hous. Dev. Fund Corp., 2019 NY Slip Op 06443, First Dept 9-3-19

SLIP AND FALL.

PLAINTIFF WAS NOT INJURED BY THE CONDITION HE WAS HIRED TO FIX IN THIS SLIP AND FALL CASE; DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant's motion for summary judgment in this slip and fall case should not have been granted. Plaintiff, a cleaner employed by a nonparty to clean a NYC school, tripped and fell as he was walking across the auditorium stage to turn on the lights. The defendant argued it could not be liable because plaintiff was injured by the condition he was responsible to fix:

A plaintiff cannot recover against a defendant for common-law negligence if he or she was injured by the dangerous condition which he or she had been hired to remedy … . Here, the evidence submitted by the defendants established that the plaintiff was merely walking to the rear of the stage in order to turn on the lights in the auditorium. Thus, the plaintiff was not engaged in the type of cleaning activity aimed at eliminating the risk presented by the test board that had been left on the floor … . Additionally, the plaintiff's duty to clean visible debris off the floor had not yet arisen, because the plaintiff testified that due to the dim lighting condition in the auditorium, he had not observed the test board before his fall. Torres v Board of Educ. of the City of New York, 2019 NY Slip Op 06818, Second Dept 9-25-19

SLIP AND FALL.

PROPERTY OWNER PROPERLY FOUND NEGLIGENT IN FAILING TO MOP UP TRACKED IN SNOW AND WATER IN THIS SLIP AND FALL CASE; DEFENDANT'S MOTION TO SET ASIDE THE VERDICT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department determined defendant property owner (a school) was properly found negligent in failing to mop up tracked in snow and water in this slip and fall case. Defendant's motion to set aside the verdict should not have been granted:

Although a defendant is not required to "provide a constant remedy to the problem of water being tracked into a building during inclement weather, and has no obligation to cover all of its floors with mats or to continuously mop up all moisture resulting from tracked-in precipitation" … , a defendant may be held liable for an injury

proximately caused by a dangerous condition created by water, snow, or ice tracked into a building if it either created the hazardous condition, or had actual or constructive notice of the condition and a reasonable time to undertake remedial action … . Here, evidence was presented at trial demonstrating that the defendant had actual notice of the wet condition in the area where the plaintiff fell approximately an hour before the accident, yet failed to remedy it. …

Accordingly, viewing the evidence in the light most favorable to the plaintiff, and affording her every favorable inference which may properly be drawn from the facts presented, there is a valid line of reasoning and permissible inferences could lead rational individuals to the jury's conclusion that the defendant was negligent in failing to maintain the premises in a reasonably safe condition and that its negligence was a substantial factor in causing the plaintiff's accident … . Allen v Federation of Jewish Philanthropies of N.Y., 2019 NY Slip Op 06462, Second Dept 9-11-19

SLIP AND FALL.

THE PETITION FOR LEAVE TO FILE A LATE NOTICE OF CLAIM IN THIS SIDEWALK SLIP AND FALL CASE SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the petition for leave to file a late notice of claim in this sidewalk slip and fall case should not have been granted:

Although the photographs submitted in support of the petition may have demonstrated that the City had prior knowledge of the defect in the asphalt, "actual knowledge of the defect is not tantamount to actual knowledge of the facts constituting the claim, since the City was not aware of the petitioner's accident, her injuries, and the facts underlying her theory of liability" … .

A lack of due diligence in determining the identity of the owner of the property upon which the subject accident occurred is not a reasonable excuse for the failure to serve a timely notice of claim … . …

In addition, the petitioner failed to satisfy her initial burden of showing that the City would not be substantially prejudiced in maintaining a defense on the merits as a result of the delay … . Matter of Perez v City of New York, 2019 NY Slip Op 06774, Second Dept 9-25-19

TRAFFIC ACCIDENTS, BICYCLES.

THE ISSUE OF PLAINTIFF'S COMPARATIVE NEGLIGENCE IN THIS BICYCLE-VEHICLE ACCIDENT CASE CAN BE CONSIDERED BECAUSE PLAINTIFF ARGUED HE WAS NOT COMPARATIVELY NEGLIGENT IN HIS MOTION FOR SUMMARY JUDGMENT; PLAINTIFF DID NOT ELIMINATE ALL QUESTIONS OF FACT ABOUT WHETHER HE WAS COMPARATIVELY NEGLIGENT; PLAINTIFF RAN INTO THE DOOR OF DEFENDANT'S CAR AS IT WAS BEING OPENED (SECOND DEPT).

The Second Department determined, because plaintiff in this bicycle-vehicle traffic accident case affirmatively argued he was not comparatively negligent, the issue of comparative negligence was properly considered on plaintiff's summary judgment motion. Plaintiff ran into the door of defendant's car as it was being opened. The plaintiff did not eliminate all triable issue of fact concerning his comparative negligence:

"Although a plaintiff need not demonstrate the absence of his or her own comparative negligence to be entitled to partial summary judgment as to a defendant's liability"… , the issue of a plaintiff's comparative negligence may be decided where, as here, "the plaintiff specifically argued the absence of comparative fault in support of his [or her] motion" … .

Here, the plaintiff failed to establish, prima facie, that he was not comparatively at fault in the happening of the accident … . "A bicyclist is required to use reasonable care for his or her own safety, to keep a reasonably vigilant lookout for vehicles, and to avoid placing himself or herself in a dangerous position" … . In support of his motion, the plaintiff submitted, inter alia, the deposition testimony of the parties, which failed to eliminate all triable issues of fact as to whether the plaintiff exercised reasonable care while riding his bicycle. Further, although the plaintiff was not required to demonstrate his freedom from comparative fault to establish his entitlement to summary judgment on the issue of liability … , the plaintiff failed to eliminate triable issues of fact as to whether the defendant was negligent and, if so, whether any such negligence caused or contributed to the accident … . Flores v Rubenstein, 2019 NY Slip Op 06747, Second Dept 9-25-19

TRAFFIC ACCIDENTS.

GOODYEAR DEMONSTRATED IT DID NOT HAVE SUFFICIENT AFFILIATIONS WITH NEW YORK TO CONFER JURISDICTION IN THIS TIRE-MALFUNCTION OUT-OF-STATE ACCIDENT CASE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that Goodyear's motion to dismiss the products liability complaint for lack of jurisdiction should have been granted. Plaintiff, a New York resident, was injured when a tire manufactured by Goodyear allegedly malfunctioned causing the car to overturn in Virginia. The Second Department held that plaintiff did not rebut Goodyear's argument that it did not have significant affiliations with New York and noted that a corporation's registration with the New York State Department of State does not confer jurisdiction on New York:

"While the ultimate burden of proof rests with the party asserting jurisdiction, the plaintiffs, in opposition to a motion to dismiss pursuant to CPLR 3211(a)(8), need only make a prima facie showing that the defendant was subject to the personal jurisdiction of the Supreme Court" … . "General jurisdiction in New York is provided for in CPLR 301, which allows a court to exercise such jurisdiction over persons, property, or status as might have been exercised heretofore'"… . A court may exercise general jurisdiction over foreign corporations "when their affiliations with the State are so continuous and systematic as to render them essentially at home in the forum State" … .

Here, in opposition to Goodyear's motion, the plaintiff failed to make a prima facie showing that personal jurisdiction over Goodyear existed under CPLR 301. The plaintiff did not rebut the evidence submitted by Goodyear showing that Goodyear's affiliations with New York are not so continuous and systematic as to render it essentially at home here … . Furthermore, contrary to the Supreme Court's determination, "a corporate defendant's registration to do business in New York and designation of the Secretary of State to accept service of process in New York does not constitute consent by the corporation to submit to the general jurisdiction of New York for causes of action that are unrelated to the corporation's affiliations with New York" … . Aybar v Goodyear Tire & Rubber Co., 2019 NY Slip Op 06584, Second Dept 9-18-19

TRAFFIC ACCIDENTS.

MOTION TO SET ASIDE THE DAMAGES VERDICT IN THIS TRAFFIC ACCIDENT CASE AS INADEQUATE SHOULD HAVE BEEN GRANTED; NEW TRIAL ORDERED UNLESS DEFENDANT STIPULATES TO INCREASED AWARDS FOR PAST AND FUTURE PAIN AND SUFFERING (SECOND DEPT).

The Second Department determined the motion to set aside the damages verdict as inadequate in this traffic accident case should have been granted. The Second Department ordered a new trial unless the defendant stipulates to an increased award of damages for past pain and suffering from $25,000 to $150,000 and for future pain and suffering from $0 to $100,000:

"While the amount of damages to be awarded for personal injuries is a question for the jury, and the jury's determination is entitled to great deference'" … , it may be set aside if the award deviates materially from what would be reasonable compensation (see CPLR 5501[c] …). "Although prior damage awards in cases involving similar injuries are not binding upon the courts, they guide and enlighten them with respect to determining whether a verdict in a given case constitutes reasonable compensation" … ,

Under the circumstances of this case, where the plaintiff was required to undergo an anterior cervical discectomy and fusion surgery as a result of the accident, the jury's award for past pain and suffering was inadequate to the extent indicated … .

Further, since it was undisputed that the cervical fusion, inter alia, permanently reduced the plaintiff's cervical range of motion, the jury's failure to award any damages for future pain and suffering was not based upon a fair interpretation of the evidence … , and was inadequate to the extent indicated … . Chung v Shaw, 2019 NY Slip Op 06468, Second Dept 9-11-19