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Negligence
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An Organized Compilation of Summaries of Selected Decisions Addressing Negligence Issues Released by Our New York State Appellate Courts in November, 2019 and Posted Weekly (in November) on the New York Appellate Digest Website. The Entries in the Table of Contents Link to the Decision-Summaries Which Link to the Decisions on the Official New York Courts' Website. Click on "Table of Contents" in the Header to Return There.

Contents

Table of Contents

Table of Contents

Table of Contents

Table of Contents

BANKRUPTCY.

BANKRUPTCY TRUSTEE PROPERLY SUBSTITUTED FOR PLAINTIFF IN A PERSONAL INJURY ACTION, DESPITE PLAINTIFF'S FAILURE TO LIST THE ACTION AS AN ASSET IN HIS VOLUNTARY PETITION FOR CHAPTER 7 BANKRUPTCY (SECOND DEPT).

The Second Department determined the bankruptcy trustee was properly substituted, by the Bankruptcy Court, for plaintiff in a personal injury action, despite the fact that the action had not been listed as an asset when plaintiff filed a voluntary petition for chapter 7 bankruptcy:

The rule that a substitution cannot be made is grounded in Reynolds v Blue Cross of Northeastern N.Y., Inc. (210 AD2d 619). In that case, the plaintiffs commenced an action against the defendants to recover damages for personal injuries. Thereafter, the plaintiffs filed a voluntary petition for chapter 7 bankruptcy, and failed to list the action on the schedule of assets. After the plaintiffs were discharged from bankruptcy, the defendants moved to dismiss the complaint, alleging that the plaintiff lacked the capacity to sue. During the pendency of the motion, the plaintiffs moved in the Bankruptcy Court to reopen the bankruptcy proceeding and to have a successor trustee appointed. A successor trustee was appointed, and both the plaintiffs and the interim trustee opposed the defendants' motion to dismiss. The Appellate Division, Third Department, determined that substitution was not available to cure the deficiency, on the ground that a party with no capacity to sue could not be replaced with one who had the capacity to sue, citing Matter of C & M Plastics (Collins) (168 AD2d 160, 161-162). However, in Matter of C & M Plastics (Collins), the proceeding in the Supreme Court was commenced after a bankruptcy petition was filed; therefore, in that case, the plaintiff did not have capacity to sue at the time of the commencement of the action.

Although subsequent cases have held that a substitution of the bankruptcy trustee for the plaintiff cannot be made, even if the plaintiff had the capacity to sue at the time the action or proceedings was commenced (see Rivera v Markowitz, 71 AD3d 449, 450; Pinto v Ancona, 262 AD2d 472), other cases have held that where a motion for substitution was made at the direction of a bankruptcy court, the motion should be granted, as a matter of comity (see Berry v Rampersad, 21 Misc 3d 851 [Sup Ct, Kings County]). … As a matter of comity, and in deference to the determination of the Bankruptcy Court, we agree with the Supreme Court's determination to grant the plaintiff's cross motion, inter alia, to substitute the bankruptcy trustee as the plaintiff, and to deny the defendants' motion for leave to amend their answer to assert the affirmative defense of lack of capacity to sue, and thereupon, to dismiss the complaint. Fausset v Turner Constr. Co., 2019 NY Slip Op 08173, Second Dept 11-13-19

COURT OF CLAIMS, NOTICE OF INTENT TO FILE CLAIM, MEDICAL MALPRACTICE.

NOTICE OF INTENT WAS TIMELY AND THE CLAIM WAS NOT JURISDICTIONALLY DEFECTIVE, INMATE'S MEDICAL MALPRACTICE ACTION AGAINST THE STATE REINSTATED (FOURTH DEPT).

The Fourth Department, reversing the Court of Claims, determined that the notice of intent was timely and the notice of intent and the claim are not jurisdictionally defective in this medical malpractice action against the state. The claimant was an inmate when he underwent hip replacement surgery. The claim alleged inadequate treatment led to infection, requiring further surgeries. The date of the accrual of the action was tolled by continuous treatment, and some mistakes concerning the nature of the injuries (i.e., left hip versus right hip) did not prejudice the defendant:

Generally, a medical malpractice claim accrues on the date of the alleged malpractice, but the statute of limitations is tolled "until the end of the course of continuous treatment" … . That toll likewise applies to the time periods contained in Court of Claims Act § 10 (3) … . Here, the record establishes that claimant was receiving ongoing treatment for his left hip replacement during postoperative follow-up visits through June 12, 2014, when he was transported to a hospital for treatment of the infection that developed at the incision site, which had not been diagnosed during those follow-up visits. We thus conclude that the notice of intent, filed and served on August 22, 2012, was timely inasmuch as it was filed and served within ninety days of the accrual of the claim. The fact that the claim listed a different date of the alleged injury than the notice of intent is a matter related to the contents of the documents, not their timeliness.

We recognize that, generally, the failure to treat a condition is not considered continuous treatment so as to toll the statute of limitations … . In such cases, however, there is a lack of awareness of a need for further treatment and thus no concern relating to the interruption of corrective medical treatment … . Here, claimant was already being treated for the surgical incision that eventually became infected and, therefore, "further treatment [was] explicitly anticipated by both [defendant's medical staff] and [claimant,] as manifested in form of . . . regularly scheduled appointment[s]" to monitor the incision and remove staples … . Moreover, this is not truly a failure-to-treat case inasmuch as defendant's employees did, in fact, attempt to treat the incision area by applying ointment and dressing the area. Gang v State of New York, 2019 NY Slip Op 08041, Fourth Dept 11-8-19

COURT OF CLAIMS, NOTICE OF INTENTION TO FILE CLAIM, CLAIM.

DEFENDANTS' AFFIDAVITS SUBMITTED IN REPLY TO CLAIMANT'S OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT RAISED A QUESTION OF FACT; DEFENDANTS' MOTION TO DISMISS THE CLAIM SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing the Court of Claims, determined that the defendants' motion to dismiss the claim should not have been granted. Claimant alleged she was injured when she collided with a glass exit door at Brooklyn College. The notice of intention to file a claim and the claim indicated photographs of the door were attached. Defendants apparently assumed the door in question was the front door to the building, but discovery indicated it was the back door. Defendants moved for summary judgment arguing that claimant failed to give proper notice of the location of the door as required by Court of Claims Act 11 (b). Defendants submitted affidavits stating that the computer files were searched and no photographs of the door were found. The Second Department held there was a question of fact whether the photographs of the door were attached to the notice of intention and the claim:

Pursuant to Court of Claims Act § 11(b), a notice of intention to file a claim and a claim must set forth, inter alia, the "place where such claim arose"… . "On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party'" … . Summary judgment is to be granted only where the moving party has "tender[ed] sufficient evidence to demonstrate the absence of any material issues of fact" … . "[O]n such a motion, the court's role is limited to issue finding, not issue resolution" … . Here, the affidavits submitted by the defendants in reply created a triable issue of fact as to whether the claimant had included, with the notice of intention, photographs, which would have directed the defendants to the precise set of doors at issue. Accordingly, the Court of Claims should have denied the defendants' motion. Shabat v State of New York, 2019 NY Slip Op 08589, Second Dept 11-27-19

DANGER INVITES RESCUE.

QUESTION OF FACT WHETHER THE "DANGER INVITES RESCUE" DOCTRINE APPLIED; PLAINTIFF ALLEGEDLY HURT HER BACK TRYING TO PREVENT A PATIENT FROM FALLING WHEN DEFENDANT'S EMPLOYEE IMPROPERLY USED A HOYER LIFT TO TRANSFER THE PATIENT FROM A WHEEL CHAIR TO A BED (FOURTH DEPT).

The Fourth Department, reversing (modifying) Supreme Court, determined there was a question of fact whether the "danger invites rescue" doctrine applied. One of defendant's employees tried to use a Hoyer lift to transfer the patient plaintiff was accompanying from a wheel chair to a bed. The lift began to tip over and plaintiff allegedly hurt her back trying to prevent the patient from falling:

… [T]he court erred in granting the motion with respect to the claim for negligence based on the "danger invites rescue" doctrine (rescue doctrine) … , and we therefore modify the order accordingly. That "doctrine imposes liability upon a party who, by his [or her] culpable act has placed another person in a position of imminent peril which invites a third person, the rescuing plaintiff, to come to his [or her] aid' " … , on the ground that "[t]he wrong that [*2]imperils life is a wrong to the imperilled victim . . . [and] also to his [or her] rescuer" … . For the rescue doctrine to apply, "it is sufficient that [the] plaintiff held a reasonable belief of imminent peril of serious injury to another, and it matters not that the peril feared did not materialize" … .

Here, in support of its motion, defendant submitted, inter alia, plaintiff's deposition testimony wherein she testified that she informed defendant's employee that two people were needed to move the patient onto the bed using the Hoyer lift, but the employee insisted on using the lift alone and did so in a manner that caused the lift to tilt which, in turn, caused the patient to begin to fall off of it. We conclude that the evidence submitted by defendant in support of its motion failed to establish that "plaintiff's rescue efforts were unreasonable as a matter of law or that plaintiff's actions were so rash under the circumstances as to constitute an intervening and superseding cause' of [her] alleged injuries" … . Payne v Rome Mem. Hosp., 2019 NY Slip Op 08024, Fourth Dept 11-8-19

EDUCATION-SCHOOL LAW, NOTICE OF CLAIM.

PLAINTIFF COULD NOT PROCEED ON A THEORY NOT RAISED IN THE NOTICE OF CLAIM; ALTHOUGH THE ISSUE WAS RAISED FOR THE FIRST TIME ON APPEAL, IT COULD BE CONSIDERED (SECOND DEPT).

The Second Department, reversing Supreme Court, held that plaintiff-student could not proceed based upon a theory not included in the notice of claim. Plaintiff, who alleged she was sexually assaulted at a BOCES facility, did not allege in her notice of claim that the school district (North Shore), which did not have custody of her when she was assaulted, was also liable because it had formulated an Individualized Education Program for her. The court noted that the issue, although raised for the first time on appeal, could be considered because it was a question of law that could not have been avoided by the lower court:

"A plaintiff seeking to recover in tort against a municipality must serve a notice of claim to enable authorities to investigate, collect evidence and evaluate the merits of the claim" … . "A notice of claim must set forth, inter alia, the nature of the claim, and the time, place, and manner in which the claim arose" … . "[A] mistake, omission, irregularity or defect made in good faith in the notice of claim required to be served by [General Municipal Law § 50-e], not pertaining to the manner or time of service thereof, may be corrected, supplied or disregarded, as the case may be, in the discretion of the court, provided it shall appear that the other party was not prejudiced thereby" (General Municipal Law § 50-e[6]). Under General Municipal Law § 50-e(6), "[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" … .

We agree with North Shore that the plaintiff may not proceed under the theory that North Shore negligently failed to formulate an appropriate IEP for her, as the plaintiff did not include this theory in her notice of claim. Although North Shore did not raise this argument before the Supreme Court, we may consider it because "it presents an issue of law that appears on the face of the record, and could not have been avoided had it been raised at the proper juncture" … . In her notice of claim, the only theory of liability that the plaintiff asserted was negligent supervision. In opposition to North Shore's motion for summary judgment, the plaintiff contended for the first time that North Shore had negligently failed to formulate an appropriate IEP for her. This was not a technical change, but was an impermissible substantive change to the theory of liability … . I. T. K. v Nassau Boces Educ. Found., Inc., 2019 NY Slip Op 08557, Second Dept 11-27-19

EDUCATION-SCHOOL LAW.

14-YEAR-OLD PLAYING CATCH ON A SCHOOL ATHLETIC FIELD ASSUMED THE RISK OF INJURY FROM A TWO TO FIVE INCH DEPRESSION IN THE FIELD (SECOND DEPT).

The Second Department, over an extensive dissent, determined that the primary assumption of risk doctrine applied to a 14-year-old experienced football player who was injured by stepping into a 2 to 5 inch depression in a school athletic field. The majority distinguished the condition here, part of the natural features of a grass field, and a condition resulting from disrepair:

The plaintiffs described the grass field on which the accident occurred as "choppy," "wavy," and "bumpy," with several depressions. In other words, the topography of the grass field on which the infant plaintiff was playing was irregular. The risks posed by playing on that irregular surface were inherent in the activity of playing football on a grass field … . Moreover, the infant plaintiff's testimony demonstrated that he was aware of and appreciated the inherent risks, and that the irregular condition of the field was not concealed … .

Like our dissenting colleague, we acknowledge the Court of Appeals' admonition that the doctrine of primary assumption of risk "does not exculpate a landowner from liability for ordinary negligence in maintaining a premises" … . Thus, the doctrine does not necessarily absolve landowners of liability where they have allowed certain defects, such as a hole in a net in an indoor tennis court, to persist … . In this case, we do not determine the doctrine's applicability to similar to that of a hole in an indoor tennis net, as there is a distinction between accidents resulting from premises having fallen into disrepair and those resulting from natural features of a grass field … . Ninivaggi v County of Nassau, 2019 NY Slip Op 08568, Second Dept 11-27-19

EDUCATION-SCHOOL LAW.

PLAINTIFF COLLEGE SOCCER PLAYER ASSUMED THE RISK OF INJURY FROM BEING STRUCK IN THE HEAD BY A SOCCER BALL, SUFFERING A CONCUSSION, AND THEREAFTER BEING LEFT IN THE GAME, ALLEGEDLY EXACERBATING THE INJURY (SECOND DEPT).

The Second Department determined that plaintiff, a college soccer player, assumed the risk of injury caused by being struck in the head by a soccer ball:

As to the Molloy College defendants and the referee defendants, the plaintiff alleged that they were negligent in, among other things, not removing him from the match after he was struck in the head with the soccer ball in the 10th minute of the match. The plaintiff contended that, because he was left in the match after he sustained a concussion on the initial blow to the head, he was exposed to an increased risk of injury, which exacerbated or worsened his injuries or symptoms beyond the initial concussion. * * *

Under the circumstances of this case, the doctrine of primary assumption of risk is applicable and bars the plaintiff's recovery against both the Molloy College defendants and the referee defendants. The evidence relied upon in support of the respective motions of the Molloy College defendants and the referee defendants demonstrated, prima facie, that they had no reason to believe that the plaintiff had sustained a concussion and that the plaintiff assumed the risks of any injuries to his head or brain stemming from being hit in the head by a soccer ball during the course of play by voluntarily participating in the soccer match … . In opposition, the plaintiff failed to raise a triable issue of fact as to whether any actions or inactions on the part of the Molloy College defendants or the referee defendants unreasonably increased the risk of injury normally associated with playing soccer … . Calderone v College, 2019 NY Slip Op 08169, Second Dept 11-13-19

EDUCATION-SCHOOL LAW.

WHETHER PLAINTIFFS WILL BE ABLE TO ESTABLISH THE CLAIMS IN A COMPLAINT IS NOT CONSIDERED ON A MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM; HERE THE DEFENDANTS' ARGUMENT THAT PLAINTIFFS WILL NOT BE ABLE TO LEARN AN ESSENTIAL ASPECT OF THEIR CASE IN DISCOVERY BECAUSE OF STATUTORY IMMUNITY WAS NOT RELEVANT TO WHETHER THE COMPLAINT STATED CAUSES OF ACTION (FIRST DEPT).

The First Department determined defendant school's motion to dismiss the complaint was properly denied. Plaintiffs alleged the school retaliated against them after they complained about race-related issues by making a false child neglect report to Child Protective Services (CPS). The school argued the plaintiffs will not be able to learn the identity of the person who reported the alleged neglect because of the immunity provided by the Social Services Law. The Second Department explained that the immunity question is not relevant to whether the complaint states causes of action:

… [P]laintiffs assert causes of action for intentional infliction of emotional distress, defamation, violations of the New York State and City Human Rights Laws, and negligent hiring, training and supervision … .

Defendants moved to dismiss all of these causes of action on the basis that plaintiffs would be unable to prove any of these claims because they did not know the identity of the CPS reporter and would be unable to learn it in discovery. …

… [I]n the context of this motion to dismiss, the Court does not assess the relative merits of the complaint's allegations against defendant's contrary assertions or to determine whether or not plaintiffs can produce evidence to support their claims … . Whether plaintiffs "can ultimately establish [their] allegations is not a part of the calculus in determining a motion to dismiss" … . Thus, regardless of whether plaintiffs will be able to obtain disclosure concerning the identity of the CPS reporter (Social Services Law § 422[4][A] …), defendants have not demonstrated entitlement to dismissal of the well-pleaded complaint for failure to state a cause of action … . M.H.B. v E.C.F.S., 2019 NY Slip Op 08276, First Dept 11-14-19

ELEVATORS.

PLAINTIFF'S JUMPING FROM A STALLED ELEVATOR WAS AN UNFORESEEABLE CONSEQUENCE OF THE ELEVATOR MALFUNCTION; DEFENDANT'S SUMMARY JUDGMENT MOTION SHOULD HAVE BEEN GRANTED (FIRST DEPT).

The First Department, reversing Supreme Court, determined the plaintiff's jumping out of a stalled elevator was an unforeseeable consequence of the elevator malfunction:

Plaintiff was injured when she attempted to exit a service elevator in the building where she worked after the elevator stalled near the top floor of the building. A coworker testified that the elevator shook and the lights went out for a few seconds. Plaintiff testified that she used the intercom in the elevator to contact the building's doorman, who said he would call the elevator mechanic. A few minutes later, another coworker, who was also in the stalled elevator, pried the door open. Plaintiff saw that the elevator was about 2½ feet above the floor level, and decided to jump out, believing she could do so safely. Under these circumstances, plaintiff's act of jumping from the stalled elevator was an unforeseeable, superseding cause of her accident, which terminates any potential liability of defendant elevator maintenance company for negligent maintenance or repair of the elevator … . Given the evidence that the elevator had been stalled for only a few minutes and that the doorman had been contacted, there was no emergency situation necessitating plaintiff's jump from the elevator … . Estrella v Fujitec Am., Inc., 2019 NY Slip Op 08501, First Dept 11-21-19

LANDLORD-TENANT, THIRD-PARTY ASSAULT.

THE LANDLORD DEMONSTRATED THE ASSAILANT IN THIS THIRD-PARTY ASSAULT CASE WAS NOT AN INTRUDER AND PLAINTIFF WAS NOT ABLE TO RAISE A QUESTION OF FACT ON THAT ISSUE, THE LANDLORD'S MOTION FOR SUMMARY JUDGMENT PROPERLY GRANTED, ONE JUDGE DISSENTED (CT APP).

The Court of Appeals, in a brief memorandum with no discussion of the facts, over a dissent, determined the landlord's (NYC Housing Authority's) motion for summary judgment in this third-party assault case was properly granted. The dissenter argued the Housing Authority did not demonstrate the assailant was not an intruder:

… [T]he New York City Housing Authority met its initial burden of demonstrating that no material triable issues of fact exist through its showing that plaintiff's assailant was likely not an intruder. In response, plaintiff failed to adduce any admissible evidence from which a jury could conclude, without engaging in speculation, that her assailant was an intruder and, concomitantly, whether defendant's alleged negligence was a proximate cause of her injuries … . Laniox v City of New York, 2019 NY Slip Op 08448, CtApp 11-21-19

MEDICAL MALPRACTICE.

COURT SHOULD NOT HAVE CONSIDERED A NEW THEORY OF MEDICAL MALPRACTICE RAISED FOR THE FIRST TIME IN RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT (FIRST DEPT).

The First Department, reversing Supreme Court, determined the court should not have considered a new theory of medical malpractice raised for the first time in response to defendant's motion for summary judgment:

… [T]he complaint and bill of particulars were only sufficient to put defendant on notice of an allegation that, in January 2013, he failed to properly compare the 2013 EC [echocardiagram] with the 2011 EC contained in decedent's medical record, and determine that a dilation in decedent's aorta had increased. Plaintiffs' papers were insufficient to put defendant on notice of plaintiffs' new theory of liability – raised for the first time in her expert's opinion – that he deviated from the standard of care in August 2011, when interpreting the 2011 EC … . Here, where negligence is specifically alleged to have occurred only between December 2012 and January 2013, we conclude that the vague, ambiguous, nonspecific and open-ended assertion "prior or subsequent thereto" contained in plaintiffs' bill of particulars failed to put defendant on notice of a claim that he acted negligently in August 2011. Carroll v New York City Health & Hosps. Corp., 2019 NY Slip Op 08524, First Dept 11-26-19

MEDICAL MALPRACTICE.

SHIFTING BURDENS OF PROOF AT THE SUMMARY JUDGMENT STAGE IN MEDICAL MALPRACTICE ACTIONS CLARIFIED; PRECEDENT TO THE CONTRARY SHOULD NO LONGER BE FOLLOWED (FOURTH DEPT).

The Fourth Department, reversing and modifying Supreme Court in three related appeals, clarified the respective burdens to be met at the summary judgment stage in a medical malpractice action. Applying those burdens, the Fourth Department found that summary judgment should have been awarded to the defendants in two of the three appeals. The facts are too complex to fairly summarize here. With respect to the burdens of proof, the court explained:

We note at the outset that the facts of this case provide the opportunity for this Court to review the appropriate standard for burden-shifting in medical malpractice cases. It is well settled that a defendant moving for summary judgment in a medical malpractice action " has the burden of establishing the absence of any departure from good and accepted medical practice or that the plaintiff was not injured thereby' " (O'Shea v Buffalo Med. Group, P.C., 64 AD3d 1140, 1140 [4th Dept 2009] …). As stated in O'Shea, once a defendant meets that prima facie burden, "[t]he burden then shift[s] to [the] plaintiff[] to raise triable issues of fact by submitting a physician's affidavit both attesting to a departure from accepted practice and containing the attesting [physician's] opinion that the defendant's omissions or departures were a competent producing cause of the injury" … .

Upon review, we conclude that the burden that O'Shea places on a plaintiff opposing a summary judgment motion with respect to a medical malpractice claim is inconsistent with the law applicable to summary judgment motions in general … . We therefore conclude that, when a defendant moves for summary judgment dismissing a medical malpractice claim, "[t]he burden shifts to the plaintiff to demonstrate the existence of a triable issue of fact only after the defendant physician meets the initial burden . . . , and only as to the elements on which the defendant met the prima facie burden" … . To the extent that O'Shea and its progeny state otherwise, those cases should no longer be followed. Bubar v Brodman, 2019 NY Slip Op 08294, Fourth Dept 11-15-19

SLIP AND FALL, EDUCATION-SCHOOL LAW.

SCHOOL DID NOT DEMONSTRATE IT DID NOT HAVE CONSTRUCTIVE KNOWLEDGE OF WATER ON THE FLOOR IN THIS SLIP AND FALL CASE; SCHOOL'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant school did not demonstrate it did not have constructive knowledge of water on the floor of the cafeteria where plaintiff slipped and fell:

… [T]he School District failed to demonstrate, prima facie, that it did not have constructive notice of the alleged water condition that caused the plaintiff to fall. The deposition testimony of the School District's head custodian merely referred to the general cleaning and inspection practices of the custodial staff in relation to the south cafeteria of the school, but provided no evidence regarding any specific cleaning or inspection of the area in question relative to the time when the plaintiff's accident occurred … . Williams v Island Trees Union Free Sch. Dist., 2019 NY Slip Op 08443, Second Dept 11-20-19

SLIP AND FALL, EXPERT OPINION.

DEFENSE MOTION TO PRECLUDE PLAINTIFF FROM PRESENTING EXPERT EVIDENCE BECAUSE OF LATE DISCLOSURE AND DEMANDING THE MATERIAL RELIED UPON BY THE EXPERT PROPERLY DENIED IN THIS STAIRWAY SLIP AND FALL CASE (FIRST DEPT).

The First Department determined defendant's motion to preclude plaintiff from offering his expert's report and to turn over the materials relied upon by the expert was properly denied in this stairway slip and fall case:

"Preclusion of expert evidence on the ground of failure to give timely disclosure, as called for in CPLR 3101(d)(1)(i), is generally unwarranted without a showing that the noncompliance was willful or prejudicial to the party seeking preclusion" … . "Prejudice can be shown where the expert is testifying as to new theories, or where the opposing side has no time to prepare a rebuttal" … . * * *

Here plaintiff withheld information about an expert he retained and who performed a comprehensive inspection and report before the demand for expert disclosure was served, failed to disclose this in response to such demand, and continued to withhold such information over the course of many court conferences and the years that the case was pending. He offers no excuse for his delay or for having served a response to defendant's expert disclosure demand that was arguably misleading.

However, when plaintiff eventually did disclose the expert, it was not on the eve of trial … . His disclosure was made on or about March 9, 2018, about six weeks before the originally-scheduled trial date of April 30, 2018, a lead time further expanded with the court's 60-day adjournment … . Moreover, notwithstanding defendant's claims to the contrary, plaintiff's expert did not advance a different theory of liability from that which plaintiff had previously advanced. * * *

Defendant also fails to show grounds to disturb the court's denial of its motion to direct plaintiff to turn over materials relied on by his expert. Defendant claims it is entitled to these materials because, given the passage of time, any expert it would retain now would not be inspecting premises that resemble the premises at the time of the accident. However, defendant does not adequately explain its failure to timely retain an expert of its own. Rivera v New York City Hous. Auth., 2019 NY Slip Op 08366, First Dept 11-19-19

SLIP AND FALL, MUNICIPAL LAW.

ALTHOUGH THE TOWN DEMONSTRATED THE DEPARTMENT OF PUBLIC WORKS DID NOT HAVE NOTICE OF THE ALLEGED SIDEWALK DEFECT IN THIS SLIP AND FALL CASE, IT DID NOT DEMONSTRATE THE TOWN CLERK'S RECORDS WERE SEARCHED; TOWN'S MOTION FOR SUMMARY JUDGMENT PROPERLY DENIED (SECOND DEPT).

The Second Department determined the town did not demonstrate that it did not receive written notice of the alleged sidewalk defect in this slip and fall case. The town's motion for summary judgment was therefore properly denied:

In support of its motion for summary judgment, the Town submitted the deposition testimony of a project supervisor for the Town's Department of Public Works, who testified that he directed an administrative aide to perform a record search of "the Town's complaint database." The Town also submitted an affidavit from the administrative aide for the Department of Public Works who conducted the search. The administrative aide stated

that her duties included "searching the official records of the Department of Public Works" to determine "whether the Department of Public Works ha[d] been provided with any prior written notice" of any defects in the area where the incident occurred. The administrative aide stated that her search revealed that "the Town was not in receipt of any written notice or written complaints."

While this evidence established, prima facie, that the Town's Department of Public Works did not have prior written notice of the alleged defect in the sidewalk, neither the deposition testimony nor the affidavit state specifically that the Town Clerk's records were searched for prior written notice of the alleged defect … . The Town's failure to provide specific evidence that the records of both the Department of Public Works and the Town Clerk were searched for prior written notice constitutes a failure to demonstrate its prima facie entitlement to judgment as a matter of law. Otto v Miller, 2019 NY Slip Op 08417, Second Dept 11-20-19

SLIP AND FALL.

A PARTY NEED NOT MAKE A MOTION TO SET ASIDE THE VERDICT TO BE ENTITLED TO A WEIGHT OF THE EVIDENCE REVIEW BY AN APPELLATE COURT; THE VERDICT FINDING DEFENDANT BUS DRIVER NEGLIGENT, BUT FINDING THE NEGLIGENCE WAS NOT THE PROXIMATE CAUSE OF PLAINTIFF'S SLIP AND FALL, WAS AGAINST THE WEIGHT OF THE EVIDENCE (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Connolly, overruling precedent and disagreeing with the Third and Fourth Departments, determined (1) a party need not make a motion to set aside the verdict to be entitled to an "against the weight of the evidence" review by the appellate court, and (2) the verdict finding defendant bus driver negligent but also finding the negligence was not the proximate cause of plaintiff's slip and fall was against the weight of the evidence. Plaintiff stepped into a pothole when getting off the bus which had stopped to let her off after she had missed her stop:

A … source of this Court's authority to review the weight of the evidence absent a motion to set aside the verdict comes from CPLR 4404(a), the provision authorizing postverdict motions for a new trial. CPLR 4404(a) provides, in pertinent part: "After a trial of a cause of action or issue triable of right by a jury, upon the motion of any party or on its own initiative, the court may . . . order a new trial of a cause of action or separable issue where the verdict is contrary to the weight of the evidence" … . Insofar as the trial court is permitted to order a new trial "on its own initiative" (CPLR 4404[a]), and "the power of the Appellate Division . . . is as broad as

that of the trial court" … , this Court also possesses the power to order a new trial where the appellant made no motion for that relief in the trial court. …

… [I]t was logically impossible for the jury to conclude that [the bus driver] was negligent in failing to provide the plaintiff with a safe location to alight from the bus but that such negligence was not a proximate cause of the accident. It was uncontradicted that the plaintiff stepped directly from the bus into the pothole, and immediately fell to the ground. The unbroken chain of events was witnessed by … a neutral witness with no relationship or prior affiliation with the parties, and corroborated by photographs of the scene taken immediately after the accident occurred. Assuming, as the jury found, that [the driver] was negligent, it is logically impossible under the circumstances to find that such negligence was not a substantial factor in causing the accident. Under these circumstances, the issues of reasonable care and proximate cause were so inextricably interwoven that the jury's verdict could not have been reached upon any fair interpretation of the evidence … . Evans v New York City Tr. Auth., 2019 NY Slip Op 07872, Second Dept 11-6-19

SLIP AND FALL.

EXPERT'S OPINION THAT DEFENDANT'S IMPROPER INSTALLATION OF A SIDEWALK/MANHOLE CAUSED THE SIDEWALK HEIGHT DIFFERENTIAL IN THIS SLIP AND FALL CASE WAS NOT SUPPORTED BY EVIDENCE IN THE RECORD; THE DEFENSE MOTION TO SET ASIDE THE VERDICT SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court. determined the motion to set aside the verdict in this slip and fall case should have been granted. Although plaintiff's expert was properly qualified, his opinion that defendant's improper installation of the sidewalk/manhole caused the sidewalk height-differential over which plaintiff tripped and fell was not supported by evidence in the record:

… [T]he expert reached his conclusion as to the defendant's negligence by assuming material facts not supported by the evidence and by guessing and speculating in drawing that conclusion … . For example, the expert testified to having no knowledge of when the sidewalk was constructed, when the manhole had been installed, or the weight and inside dimensions of the manhole structure. Yet, he opined that the defendant was responsible for the settling of the sidewalk flag and manhole due to improper backfilling, simply because the manhole belonged to the defendant at the time of the plaintiff's fall.

Contrary to the plaintiff's contention, absent the expert's assumptive and speculative testimony, there was no evidence of the defendant's negligence. " Ippolito v Consolidated Edison of N.Y., Inc., 2019 NY Slip Op 08179, Second Dept 11-13-19

SLIP AND FALL.

PLAINTIFF WAS KNOCKED TO THE FLOOR BY A SHOPPING CART PUSHED BY ANOTHER STORE CUSTOMER; THE DEFENDANT STORE DID NOT HAVE A DUTY TO MONITOR CUSTOMERS' USE OF SHOPPING CARTS; ISSUE COULD BE CONSIDERED FOR THE FIRST TIME ON APPEAL (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant's motion for summary judgment in this slip and fall case should have been granted. Plaintiff was knocked to the floor by a shopping cart pushed by another customer in the defendant's store. Apparently the customer had piled items high in the cart and couldn't see ahead of it. The court noted that, although defendant raised the "no duty to monitor customers" issue for the first time on appeal, it could be considered because it raises an issue of law than could not have been avoided by the court below:

The defendant contends that it was entitled to summary judgment dismissing the complaint insofar as asserted against it because it did not have a duty to control the conduct of the customer who struck Novak with the shopping cart. Although the defendant has raised this contention for the first time on appeal, "we may consider it . . . because the existence of a duty presents a question of law which could not have been avoided if brought to the Supreme Court's attention at the proper juncture"… .

"Store owners are charged with the duty of keeping their premises in a reasonably safe condition for the benefit of their customers" … . "[T]his duty may extend to controlling the conduct of third persons who frequent or use the property, at least under some circumstances" … . "This duty is, however, not limitless" … . "[A]n owner's duty to control the conduct of persons on its premises arises only when it has the opportunity to control such persons and is reasonably aware of the need for such control" … .

Here, the plaintiff contends that the defendant was negligent in failing to monitor its customers' use of the U-boat shopping carts and, more specifically, in failing to require customers to refrain from loading the carts over a certain height. However, the defendant did not owe the plaintiff a duty to protect her from the other customer's

negligent use of the U-boat shopping cart because it did not have control over that customer's actions … . Aupperlee v Restaurant Depot, LLC, 2019 NY Slip Op 08548, Second Dept 11-27-19

SLIP AND FALL.

QUESTION OF FACT WHETHER CONTRACTORS WHICH DID SIDEWALK/GRATE WORK LAUNCHED AN INSTRUMENT OF HARM IN THIS SLIP AND FALL CASE; THE CONTRACTORS' MOTIONS FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that the actions against two contractors (MPM and VRD) which did sidewalk/grate work should not have been dismissed in this slip and fall case. The two contractor defendants did not demonstrate, as a matter of law, that they did not launch an instrument of harm:

In general, a contractual obligation, standing alone, will not give rise to tort liability in favor of a third party (see Espinal v Melville Snow Contrs., 98 NY2d 136, 138). Nonetheless, the Court of Appeals has recognized three exceptions to this general rule: "(1) where the contracting party, in failing to exercise reasonable care in the performance of his [or her] duties, launches a force or instrument of harm . . . (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties . . . and (3) where the contracting party has entirely displaced the other's party's duty to maintain the premises safely" … .

Here, the owner, MPM, and VRD failed to establish their prima facie entitlement to judgment as a matter of law by demonstrating that the work performed on the grate and vault did not create the allegedly dangerous condition that caused the plaintiff to trip and fall and, thus, launched a force or instrument of harm … . Randazzo v Consolidated Edison Co. of N.Y., Inc., 2019 NY Slip Op 08236, Second Dept 11-13-19

SLIP AND FALL.

QUESTIONS OF FACT ABOUT THE EXISTENCE OF A DANGEROUS CONDITION, WHETHER THE ALLEGED DEFECT WAS TRIVIAL, AND PROXIMATE CAUSE PRECLUDED SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined there were questions of fact about the existence of a dangerous condition. whether the defect was trivial, and proximate cause in this slip and fall case. Plaintiff allegedly fell after stepping on a loose piece of asphalt from the driveway outside her apartment:

Plaintiff testified at her deposition that she "stepped on a piece of the driveway" that was "maybe the size of a tennis ball if you were to cut it in half and it was flat." Plaintiff did not photograph or preserve the piece of asphalt that allegedly caused her to fall, however, and we conclude that her testimony created an issue of fact whether the alleged defect on the property was "trivial and nonactionable as a matter of law" … . Inasmuch as plaintiff failed to establish that defendant was negligent in permitting a dangerous or defective condition to exist on the premises, she also "failed to establish as a matter of law that [defendant's negligence] was the sole proximate cause of the accident" … . …

… [Plaintiff 's own] deposition testimony that she "didn't really pay attention" to the driveway or the surrounding area prior to the accident raised an issue of fact whether plaintiff's conduct was a proximate cause of the accident inasmuch as she walked down the porch stairway onto uneven ground in the middle of the night without using due care … . Jackson v Rumpf, 2019 NY Slip Op 08291, Fourth Dept 11-15-19

SLIP AND FALL.

SIDEWALK DEFECT WAS NOT TRIVIAL AS A MATTER OF LAW, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE SHOULD NOT HAVE BEEN GRANTED (FIRST DEPT).

The First Department, reversing Supreme Court, determined there was a question of fact whether the condition of the sidewalk was a trivial defect in this slip and fall case. The edge of the sidewalk was raised less than an inch. But there was evidence the defendants themselves considered the condition of the sidewalk dangerous:

Defendants moved for summary judgment, arguing that the condition was trivial, open and obvious, and not inherently dangerous. Defendants submitted an expert affidavit, photographs, and deposition testimony. The expert concluded that the height differential in the sidewalk caused by the raised flag ranged between 7/16 of an inch and 13/16 of an inch.

In opposition, plaintiff pointed to a map of the property, a budget report, her photographs, and deposition testimony. … Plaintiff noted that defendants' maintenance manager had marked blue dots on a map during his inspection of the property months before her accident. The map appears to depict two blue dots in the vicinity of her fall. Plaintiff stressed that the maintenance manager testified that he marked the map with blue dots to indicate the areas where he expected that concrete repairs would be made. Plaintiff also pointed to the property's budget report, which referred to, months before her fall, the "High" priority need to repair large deteriorated sections of "Concrete Walks and Curbs." She further noted that some of her photographs depict a circle of white paint on the raised portion of the sidewalk, which she noticed immediately after her fall … . …

A finding that a condition is a trivial defect must "be based on all the specific facts and circumstances of the case, not size alone" … . The issue is generally a jury question because it is a fact-intensive inquiry … . McCabe v Avalon Bay Communities, Inc., 2019 NY Slip Op 08350, First Dept 11-19-19

SLIP AND FALL.

STACKED BOXES NOT AN OPEN AND OBVIOUS CONDITION AS A MATTER OF LAW IN THIS SLIP AND FALL CASE; TENANT'S MOTION FOR SUMMARY JUDGMENT PROPERLY DENIED; LANDLORD DID NOT DEMONSTRATE IT WAS AN OUT-OF-POSSESSION LANDLORD; HOWEVER, LANDLORD ESTABLISHED IT DID NOT CREATE OR HAVE NOTICE OF THE CONDITION (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court determined the landlord did not demonstrate it was an out-of-possession landlord in this slip and fall case. But the landlord did demonstrate it did not create of have notice of the stacked boxes which allegedly caused plaintiff's slip and fall. The stacked boxes did not constitute an open and obvious condition as a matter of law:

The evidence submitted by the tenant in support of its motion, including, inter alia, the plaintiff's deposition testimony regarding the accident, failed to eliminate all triable issues of fact as to whether the stacked boxes

constituted an open and obvious condition, and whether the stacked boxes constituted an inherently dangerous condition. The evidence likewise failed to establish, prima facie, that the tenant did not create or have notice of the condition. …

… [T]he landlord defendants' submissions failed to establish, prima facie, that they were out-of-possession landlords. The copy of the lease the landlord defendants submitted was illegible, and the deposition testimony … failed to establish, prima facie, that the landlord defendants had relinquished control over the premises to such a degree as to extinguish their duty to maintain the premise … .

… [T]he landlord defendants established their prima facie entitlement to judgment as a matter of law by demonstrating that they did not create the alleged hazardous condition or have actual or constructive notice of the condition … . Robbins v 237 Ave. X, LLC, 2019 NY Slip Op 08237, Second Dept 11-13-19

SLIP AND FALL.

THE CITY HAD CLEARED A PATH FREE OF ICE AND SNOW ON THE SIDEWALK; PLAINTIFF SLIPPED AND FELL WHEN SHE STEPPED BACKWARDS INTO AN AREA OF THE SIDEWALK WHICH HAD NOT BEEN CLEARED TO AVOID AN UNLEASHED DOG; THE CITY'S MOTION FOR SUMMARY JUDGMENT WAS PROPERLY GRANTED (SECOND DEPT).

The Second Department determined the city's motion for summary judgment in this sidewalk slip and fall case was properly granted. There was a clear path on the sidewalk. Plaintiff slipped and fell when she stepped backward into an area of the sidewalk which had not been cleared to avoid an unleashed dog:

" To render a municipality liable for an injury caused by the presence of snow and ice on the streets,'" it must be established that " the condition constitutes an unusual or dangerous obstruction to travel and that either the municipality caused the condition or a sufficient time had elapsed to afford a presumption of the existence of the condition and an opportunity to effect its removal'" … . This rule applies to sidewalks … . "Generally, whether a municipality was negligent in permitting extraordinary accumulations of snow to exist for an unreasonable period of time or whether it had a reasonable opportunity to remedy the condition are questions for the jury" … .

Here, in opposition to the City's prima facie showing of entitlement to judgment as a matter of law, the plaintiff failed to raise a triable issue of fact as to whether the City had constructive notice of the ice condition that

allegedly caused the plaintiff to fall and whether the ice condition was unusual or dangerous. The evidence indicated that a clear path had been shoveled on the sidewalk, but that, due to repeated snow storms, snow and ice remained in the area of the sidewalk close to the street. When the plaintiff stepped backward to avoid the unleashed dog, she stepped in the area of the sidewalk closer to the street, upon which there was a two-inch thick patch of ice of unspecified size. There is no evidence that the patch of ice was unusual or dangerous. Cespedes v City of New York, 2019 NY Slip Op 07943, Second Dept 11-6-19

SLIP AND FALL.

THE ONE-HALF INCH DEFECT IN A STEP WAS NOT TRIVIAL AS A MATTER OF LAW AND DEFENDANT DID NOT DEMONSTRATE A LACK OF NOTICE OF THE DEFECT; DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court in this slip and fall case, determined that the 1/2 inch defect in a step was not trivial as a matter of law and the defendant did not demonstrate a lack of notice:

"A defendant seeking dismissal of a complaint on the basis that the alleged defect is trivial must make a prima facie showing that the defect is, under the circumstances, physically insignificant and that the characteristics of the defect or the surrounding circumstances do not increase the risks it poses. Only then does the burden shift to the plaintiff to establish an issue of fact" … . Here, the evidence attached to the defendants' moving papers indicated that there was a defect on the nosing of the step that was created by wear to the step and was approximately ½-inch long and extended down ½-inch on the riser. This alleged defective condition was located on a portion of the step where the plaintiff had to stand while twisting her body to close an exterior door. …

… [T]he defendants' moving papers failed to eliminate triable issue of facts as to whether the condition had existed for a sufficient period of time for it to have been discovered and remedied by the defendants in the exercise of reasonable care … . Coker v McMillan, 2019 NY Slip Op 07948, Second Dept 11-6-19

TOXIC TORTS.

FOUR CLASSES PROPERLY CERTIFIED TO BRING CLASS ACTION SUITS BASED UPON THE CONTAMINATION OF AIR, WATER, REAL PROPERTY AND PEOPLE WITH TOXIC CHEMICALS (THIRD DEPT).

The Third Department, in a full-fledged opinion by Justice Lynch, determined that Supreme Court properly certified four classes bring class action suits against a manufacturer alleging the contamination of water, air, real property and people with toxic chemicals, PFOA and PFOS:

Plaintiffs, residents of the Town, commenced this action as a proposed class action, alleging that defendant's use and improper disposal of PFOA and PFOS caused personal injury and property damage. In their complaint, plaintiffs proposed four classes: (1) a public water property damage class; (2) a private well water property damage class; (3) a private well nuisance class; and (4) a PFOA invasion injury class. Generally, the putative class members were individuals who owned or leased property in the Town or who ingested contaminated municipal or well water or inhaled PFOA or PFOS particulates in the Town and had demonstrable evidence of elevated levels of the chemical in their blood system. * * *

We agree with Supreme Court's determination that, in addition to those questions common to the property classes, the answers to certain additional common questions will be applicable to all members of the invasion injury class, for example: (1) whether medical monitoring is an available remedy; (2) the extent of the health hazard presented by exposure to PFOA; and (3) whether the members of the class are at significant increased risk for disease based on the excess accumulation of PFOA in their bodies. Although defendant contends that there are myriad factual questions that are not common to the class, we do not agree that those predominate. Importantly, this is not a case where there is an issue of fact regarding exposure — rather, each class member must establish exposure and accumulation through blood work … . Burdick v Tonoga, Inc., 2019 NY Slip Op 08461, Third Dept 11-21-19

TRAFFIC ACCIDENTS.

$13,000,000 VERDICT IS AGAINST WEIGHT OF THE EVIDENCE IN THIS TRAFFIC ACCIDENT BACK-INJURY CASE, NEW TRIAL ORDERED UNLESS PLAINTIFFS STIPULATE TO A SUBSTANTIALLY REDUCED VERDICT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the over $13,000,000 verdict was against the weight of the evidence and ordered a new trial unless the defendants (the Tarpleys) stipulated to substantially reduced damages in this traffic accident back-injury case:

” The amount of damages to be awarded to a plaintiff for personal injuries is a question for the jury, and its determination will not be disturbed unless the award deviates materially from what would be reasonable compensation’” (… see CPLR 5501[c]). ” The reasonableness of compensation must be measured against relevant precedent of comparable cases’” … . …

Considering the nature and extent of the injuries sustained by Tarpley, the awards for past and future pain and suffering and past and future loss of services deviate materially from what would be reasonable compensation … (see CPLR 5501[c] …). …

“A party claiming lost earnings has the burden of proving the amount of actual past earnings with reasonable certainty, by means of tax returns or other documentation” … . “Unsubstantiated testimony, without documentation, is insufficient to establish lost earnings” … . Here, the award for lost earnings was speculative to the extent that it exceeded the income Tarpley could have expected to earn based on his 2008 and 2009 W2 forms submitted into evidence, since no documentation or expert testimony was presented to establish that Tarpley’s income was likely to increase in future years … . …

Tarpley’s treating physician provided an uncontroverted opinion that Tarpley would require a future lumbar fusion surgery, with an estimated cost of $100,000, due to his ongoing symptoms following the prior laminectomy. However, the verdict awarding damages for future medical expenses in excess of $100,000 was speculative, and we reduce it accordingly … . Tarpley v New York City Tr. Auth., 2019 NY Slip Op 08440, Second Dept 11-20-19

TRAFFIC ACCIDENTS.

DEFENDANT DID NOT COME FORWARD WITH A NON-NEGLIGENT EXPLANATION FOR STRIKING THE REAR OF PLAINTFF'S STOPPED CAR; PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff was entitled to summary judgment in this rear-end collision case:

… [T]he plaintiff's vehicle struck the rear of the vehicle traveling directly in front of it when that vehicle made a sudden stop in response to the traffic conditions ahead. A few seconds later, the plaintiff's vehicle was struck in the rear by a vehicle operated by the defendant John F. Meehan (hereinafter the defendant driver) … .

A plaintiff in a negligence action moving for summary judgment on the issue of liability must establish, prima facie, that the defendants breached a duty owed to the plaintiff, and that the defendants' negligence was a proximate cause of the alleged injuries … . "A driver of a vehicle approaching another vehicle from the rear is required to maintain a reasonably safe distance and rate of speed under the prevailing conditions to avoid colliding with the other vehicle" (,,,see Vehicle and Traffic Law § 1129[a]). Thus, 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 … .

Here, in support of her motion, the plaintiff submitted, inter alia, transcripts of the deposition testimony of the parties, which demonstrated that the defendants' vehicle struck the rear of the plaintiff's vehicle. Thus, the plaintiff established, prima facie, that the defendant driver's negligence was a proximate cause of the accident … . Gelo v Meehan, 2019 NY Slip Op 08175, Second Dept 11-13-19

TRAFFIC ACCIDENTS.

DEFENDANT DRIVER STRUCK A DISABLED CAR WHICH WAS SIDEWAYS IN THE LEFT LANE OF A HIGHWAY; THE CAR WAS BLACK AND THE ACCIDENT HAPPENED AT NIGHT IN A STEADY RAIN; DEFENDANT DRIVER CLAIMED TO BE GOING THE SPEED LIMIT, 65 MPH; DEFENDANTS' MOTION FOR SUMMARY JUDGMENT BASED UPON THE EMERGENCY DOCTRINE WAS PROPERLY DENIED (FOURTH DEPT).

The Fourth Department determined defendants' (Grice defendants') motion for summary judgment in this traffic accident case was properly denied. Defendant driver, who allegedly was travelling at the speed limit, 65 mph, struck a disabled car which was sideways in the left lane of a highway. The car was black and the accident happened at night when it was raining. Defendants argued the emergency doctrine applied:

Contrary to the Grice defendants' contention, their submissions failed to establish as a matter of law that defendant was confronted with a sudden and unexpected emergency situation to which he did not contribute. Although the accident occurred at night and the disabled vehicle was black and did not have its headlights on, the subject area of the highway was not curved and instead was straight and level with no permanent view obstructions or roadway defects to prevent defendant from perceiving the disabled vehicle. In addition, defendant testified at his deposition that he could see the "standard distance" with his headlights illuminating the roadway, yet he was unable to provide a reason why he did not observe the disabled vehicle prior to impact … . The fact that the disabled vehicle was positioned directly ahead of defendant on such an area of the highway with the headlights of defendant's vehicle illuminating the roadway, "considered in light of [defendant's] conceded failure to see anything prior to the impact, and his failure to take any steps to avoid the collision . . . , calls into question [his] testimony concerning the speed of his vehicle and his attentiveness as he drove" … . Moreover, inasmuch as the Grice defendants' submissions established that the subject area of the highway was not well lit, that it was raining steadily rather than merely precipitating lightly, and that the highway was wet, we conclude that there is an issue of fact whether defendant, who testified that he was driving at the posted speed limit of 65 miles per hour, was nonetheless operating the vehicle at a speed greater than was reasonable and prudent under the conditions … . "If [a trier of fact] determines that [defendant's] speed was unreasonable under the existing weather and road conditions, [the trier of fact] could also conclude that [defendant's] own unreasonable speed was what deprived him of sufficient time to avoid the collision, thereby preventing him from escaping liability under the emergency doctrine" … . White v Connors, 2019 NY Slip Op 08017, Fourth Dept 11-8-19

TRAFFIC ACCIDENTS.

PASSENGER'S MOTION FOR SUMMARY JUDGMENT IN THIS TRAFFIC-ACCIDENT, REAR-END COLLISION CASE SHOULD HAVE BEEN GRANTED DESPITE QUESTIONS OF FACT ABOUT THE TWO DRIVERS' NEGLIGENCE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff-passenger's motion for summary judgment in this rear-end collision case should have been granted, despite questions of fact about whether either driver was negligent:

The right of an innocent passenger to summary judgment on the issue of whether he or she was at fault in the happening of an accident is not restricted by potential issues of comparative negligence as between two defendant drivers (see CPLR 3212[g] …). Here, the plaintiffs made a prima facie showing of entitlement to summary judgment on their motion, and in opposition, the defendants failed to raise a triable issue of fact … . It is uncontested that the injured plaintiff was a passenger seated in the rear passenger seat of the Freed vehicle. While both drivers involved in the accident submitted affidavits in which each maintained that they were free from fault, neither driver suggested that the injured plaintiff bore any fault in the happening of the accident … . Romain v City of New York, 2019 NY Slip Op 07885, Second Dept 11-6-19

TRAFFIC ACCIDENTS.

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IN THIS REAR-END TRAFFIC ACCIDENT CASE SHOULD HAVE BEEN GRANTED; THE ABSENCE OF COMPARATIVE FAULT NO LONGER NEED BE SHOWN (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff's motion for summary judgment in this rear-end collision case should have been granted, noting that a plaintiff need not demonstrate the absence of comparative fault:

A plaintiff is no longer required to show freedom from comparative fault to establish her or his prima facie entitlement to judgment as a matter of law on the issue of liability … . " A driver of a vehicle approaching another vehicle from the rear is required to maintain a reasonably safe distance and rate of speed under the prevailing conditions to avoid colliding with the other vehicle'" (… see Vehicle and Traffic Law § 1129[a]). 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, thereby requiring that operator to rebut the inference of negligence by providing a nonnegligent explanation for the collision … . Although a sudden stop of the lead vehicle may constitute a nonnegligent explanation for a rear-end collision, " vehicle stops which are foreseeable under the prevailing traffic conditions, even if sudden and frequent, must be anticipated by the driver who follows'" … .

Here, the plaintiff testified at his deposition that he was reducing the speed of his vehicle, with his foot on the brake pedal, when his vehicle was struck in the rear by the defendant's vehicle. Likewise, the defendant's testimony at her deposition, a transcript of which was submitted by the plaintiff in support of his cross motion, was to the effect that her vehicle hit the plaintiff's vehicle in the rear while in "stop and go" traffic. Thus, the plaintiff established, prima facie, that the defendant's negligence was a proximate cause of the accident … . Xin Fang Xia v Saft, 2019 NY Slip Op 08248, Second Dept 11-13-19

TRAFFIC ACCIDENTS.

PLAINTIFFS, PASSENGERS IN A CAR WITH THE RIGHT OF WAY, WERE ENTITLED TO SUMMARY JUDGMENT IN THIS INTERSECTION TRAFFIC ACCIDENT CASE; COMPARATIVE NEGLIGENCE CAN BE CONSIDERED WHERE, AS HERE, PLAINTIFFS MOVED TO DISMISS DEFENDANT'S COMPARATIVE-NEGLIGENCE AFFIRMATIVE DEFENSE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiffs were entitled to summary judgment in this intersection traffic accident case. Plaintiffs were passengers in a car which had the right of way. Defendant may or may not have stopped at a stop before proceeding into the intersection. The Second Department noted that whether the defendant stopped or not was irrelevant. Although comparative negligence is generally not an issue at the summary judgment stage, it can be considered where, as here, the plaintiffs moved to dismiss defendant's comparative-negligence affirmative defense. The defense obviously does not apply to innocent passengers:

"To be entitled to partial summary judgment a plaintiff does not bear the . . . burden of establishing . . . the absence of his or her own comparative fault" … . Even though a plaintiff is no longer required to establish his or her freedom from comparative negligence, the issue of a plaintiff's comparative negligence may be decided

in the context of a summary judgment motion where, as here, the plaintiff moved for summary judgment dismissing a defendant's affirmative defense of comparative negligence … .

Here, in support of their motion, the plaintiffs submitted evidence sufficient to establish, prima facie, that the defendant driver was negligent in failing to see what was there to be seen and in entering the intersection without yielding the right-of-way, even if he did initially stop at the stop sign (see Vehicle and Traffic Law §§ 1142[a]; 1172[a] …). With respect to the issue of comparative negligence, the plaintiffs demonstrated, prima facie, that they were innocent passengers who did not contribute to the happening of the accident. The right of the plaintiffs, as innocent passengers, to summary judgment is not "restricted by potential issues of comparative negligence" which may exist as between the defendant driver and the driver of the host vehicle … . Balladares v City of New York, 2019 NY Slip Op 08549, Second Dept 11-27-19

TRAFFIC ACCIDENTS.

THE ALLEGATION THAT PLAINTIFF STOPPED FOR A YELLOW LIGHT WAS NOT A NON-NEGLIGENT EXPLANATION FOR A REAR-END COLLISION; DEFENSE VERDICT SHOULD HAVE BEEN SET ASIDE (FIRST DEPT).

The First Department, reversing Supreme Court, determined that plaintiff's motion to set aside the defense verdict in this rear-end traffic accident case should have been granted. Plaintiff was stopped when the collision occurred:

There is no valid line of reasoning and permissible inferences that could possibly support the jury's verdict based on the evidence presented at trial … . Defendant Tracy Murphy acknowledged that plaintiff's vehicle was stopped when she struck plaintiff's vehicle in the rear. Murphy's claim that plaintiff had stopped at a yellow light does not constitute a nonnegligent explanation for the accident … . Smyth v Murphy, 2019 NY Slip Op 08353, First Dept 11-19-19

TRAFFIC ACCIDENTS.

THE FAILURE TO AWARD DAMAGES FOR FUTURE PAIN AND SUFFERING AND FUTURE ECONOMIC LOSS WAS AGAINST THE WEIGHT OF THE EVIDENCE; THE MOTION TO SET ASIDE THOSE ASPECTS OF THE VERDICT SHOULD HAVE BEEN GRANTED; THE FUTURE ECONOMIC LOSS ISSUE WAS NOT ABANDONED ON APPEAL (FOURTH DEPT).

The Fourth Department, over a two-justice dissent, determined that the failure to award damages for future pain and suffering and future economic loss in this back-injury case was against the weight of the evidence. The motion to set aside those aspects of the verdict should have been granted. A new trial was ordered on those elements of damages. The dissenters argued the future economic law issue was abandoned on appeal:

… [T]he jury's failure to award any damages for future pain and suffering is " contrary to a fair interpretation of the evidence and deviates materially from what would be reasonable compensation' " … . Although the evidence at trial established that plaintiff was permitted to return to work with no restrictions, the evidence also established that the injuries she sustained in the accident severely affected her ability to perform the same sorts of tasks that she had performed with ease prior to the accident. Moreover, as noted, the parties' experts agreed that the injury to plaintiff's lumbar spine was caused by the accident, and plaintiff presented uncontroverted medical testimony at trial establishing that she continues to experience pain as a result of that injury … .

We also agree with plaintiff that the jury's failure to award damages for future economic loss is against the weight of the evidence. Initially, we disagree with our dissenting colleagues that the contention was abandoned on appeal … and conclude that plaintiff adequately raised that specific contention in her brief … . Mast v DeSimone, 2019 NY Slip Op 08288, Fourth Dept 11-15-19

WORKERS' COMPENSATION.

ALTHOUGH THE ISSUE WAS NOT RAISED BY THE PARTIES, SUPREME COURT SHOULD NOT HAVE DISMISSED PLAINTIFF'S NEGLIGENCE ACTION BEFORE THE WORKERS' COMPENSATION BOARD RULED ON WHETHER PLAINTIFF WAS INJURED WITHIN THE SCOPE OF HIS EMPLOYMENT (FOURTH DEPT).

The Fourth Department, reversing Supreme Court and reinstating the negligence action, determined Supreme Court did not have jurisdiction over the matter because the Workers' Compensation Board had not yet ruled whether plaintiff was injured when acting in the scope of his employment. The parties did not raise this issue:

Although not raised by the parties, we conclude that Supreme Court erred in entertaining defendant's motion. "It is well settled that primary jurisdiction with respect to determinations as to the applicability of the Workers' Compensation Law has been vested in the Workers' Compensation Board [(Board)] . . . [I]t is therefore inappropriate for the courts to express views with respect thereto pending determination by' the Board" … . Whether plaintiff was injured within the scope of his employment "must in the first instance be determined by the [B]oard" … , and the court thus should not have entertained defendant's motion at this juncture. Rather, the case should have been referred to the Board for a determination of plaintiffs' eligibility for workers' compensation benefits … . Warren v E.J. Militello Concrete, Inc., 2019 NY Slip Op 08300, Fourth Dept 11-15-19