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Negligence
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An Organized Compilation Selected Summaries of New York State Appellate Decisions Released in December 2019 Which Address Issues Related to Negligence. The Summaries Were Posted Weekly on the New York Appellate Digest Website in December. Click on the Table of Contents Entries to Go to the Summaries. Click on "Table of Contents" in the Header on Each Page to Return There. Click on the Case Citations to Go to the Decisions on the Official New York Courts Website.

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CONTINUOUS REPRESENTATION DOCTRINE APPLIED TO AN ENGINEERING FIRM HIRED TO OVERSEE AN HVAC INSTALLATION PROJECT; THE THREE-YEAR NEGLIGENCE STATUTE OF LIMITATIONS WAS TOLLED BY THE CONTINUOUS REPRESENTATION DOCTRINE AND THE ACTION WAS TIMELY (FIRST DEPT).

The First Department determined the negligence action against Skyline, an engineering firm hired to inspect an on-going HVAC (heating, ventilation, air conditioning) installation, was not time-barred because the continuous representation doctrine applied to toll the accrual of the limitations period:

Plaintiff commenced this action in 2016 alleging that it retained Skyline, an engineering firm, to perform "special inspection" services for "Phase I" of an HVAC installation project, and that Skyline negligently performed those services and breached the contract. In support of its motion for summary judgment, Skyline demonstrated prima facie that it completed Phase I work under the contract in 2012 and that it was serving in a professional capacity as an engineering firm when it performed those services, so that the three-year limitations period applied (CPLR 214[6] …). …

… [P]plaintiff demonstrated that the action is not time-barred because the continuous representation doctrine is applicable and tolled the accrual of the limitations period until 2014 … . Plaintiff submitted evidence showing Skyline provided special and progress inspection and testing services for "Remediation of Phase I" of the project, pursuant to a 2014 agreement. Although this work was completed under a separate agreement, Skyline rendered these services to correct the engineering and construction defects that it failed to identify during its Phase 1 inspection in 2012. Since Skyline continued to provide services in connection with Phase I in 2014, the action commenced in 2016 is timely under CPLR 214(6) … . Mutual Redevelopment Houses, Inc. v Skyline Eng'g, L.L.C, 2019 NY Slip Op 09112, First Dept 12-19-19

DAMAGES.

DAMAGES IN THIS TRAFFIC ACCIDENT CASE FOR A TORN MENISCUS AND IRREPARABLE DAMAGE TO PLAINTIFF'S DOMINANT HAND ($25,000 FOR PAST PAIN AND SUFFERING AND $0 FOR FUTURE PAIN AND SUFFERING) WERE INADEQUATE; PLAINTIFF'S MOTION TO SET ASIDE THE VERDICT PURSUANT TO CPLR 4404(a) SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff's motion to set aside the verdict as inadequate in this traffic accident case should have been granted. Plaintiff sustained a torn meniscus in his right knee and irreparable damage to his thumb on his dominant hand. The jury awarded $25,000 for pat pain and suffering and $0 for future pain and suffering. The Second Department held that the past pain and suffering amount should be $100,000 and the future pain and suffering amount should be $50,000:

"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" … . Prior damage awards in cases involving similar injuries are not binding upon the courts, but serve to guide and enlighten them in determining whether a verdict in a given case constitutes reasonable compensation … . However, consideration should also be given to other factors, including the nature and extent of the injuries … .

Under the circumstances of this case, the jury's award for past pain and suffering was inadequate to the extent indicated herein (see CPLR 5501[c] …). Furthermore, 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 herein … . Cullen v Thumser, 2019 NY Slip Op 08988, Second Dept 12-18-19

DAMAGES.

THERE WAS A QUESTION OF FACT WHETHER PLAINTIFF'S DECEDENT, WHO WAS IN A VEGETATIVE STATE, EXPERIENCED PAIN; THE DEFENDANT HOSPITALS' MOTION TO DISMISS THE CONSCIOUS PAIN AND SUFFERING CLAIM SHOULD NOT HAVE BEEN GRANTED (FIRST DEPT).

The First Department, reversing Supreme Court, determined the hospital's motion to dismiss the conscious pain and suffering claim should not have been granted. Plaintiff's decedent was in a vegetative state, but there was evidence she was aware of pain:

… [A]lthough she was in a vegetative state, the decedent was generally responsive to pain, and sometimes followed commands or responded to verbal stimuli … . Although defendants' experts opined that reflex responses to pain, such as grimacing or withdrawing, are not signs of conscious awareness, at least some of the behaviors recorded in the medical records transcend such reflex responses.

The medical records also reflect that the decedent was administered pain medication in at least one of defendant facilities. Although not dispositive, this fact suggests that the decedent's doctors believed that she might be able to experience pain.

In addition, plaintiff testified that, while at defendants' facilities, the decedent made expressions of pain or emotion, such as moaning, crying, or smiling, and communicated with her by blinking … . Plaintiff's belief that the decedent blinked in response to questions was reflected in the medical records, although the phenomenon was not itself observed by others. …

Plaintiff's expert also opined that the decedent "had a sufficient level of awareness to enable her to feel pain," as evidenced by the fact that she "made facial expressions, smiled, … grimaced, moaned, blinked, responded to simple questions, responded to verbal and tactile stimuli, and retracted to pain," all of which were "indicators of some level of awareness and conscious pain. Estreich v Jewish Home Lifecare, 2019 NY Slip Op 08970, First Dept 12-17-19

DISCOVERY.

IT WAS AN ABUSE OF DISCRETION TO STRIKE PLAINTIFF'S COMPLAINT BASED UPON AN ALLEGED FAILURE TO COMPLY WITH COURT-ORDERED DISCOVERY (THIRD DEPT).

The Third Department, reversing Supreme Court, determined it was an abuse of discretion to grant defendants' motion to strike the complaint for plaintiff's alleged failure to comply with discovery orders. Discovery had been ongoing for years with several conferences with the judge and several orders to comply with new discovery demands:

… [I]t is undisputed that defendants' motion to strike the complaint failed to include an affirmation of good faith as required by 22 NYCRR 202.7 … . Moreover, this error is compounded by the lack of other record evidence demonstrating that defendants engaged in good faith efforts to resolve the ongoing discovery issues without the need for judicial intervention. Despite plaintiff having at least partially complied with defendants' discovery demands, the record is devoid of any correspondence or other documentation indicating that defendants ever specifically informed plaintiff's counsel, other than in a generalized conclusory manner, in what manner the subject discovery responses were deficient or inadequate. Further, following the filing of defendants' April 2018 motion to strike, defendants' counsel failed to respond to four separate letters sent by plaintiff's counsel in May 2018 wherein he provided certain additional discovery and otherwise attempted to ascertain from defendants what, if any, paper discovery remained outstanding. Notably, defendants have provided no explanation as to why they failed to provide any such response prior to the filing of defendants' second motion to strike plaintiff's complaint … .

Although we appreciate Supreme Court's concern regarding the length of time that this action has been pending and the fact that the various discovery responses that plaintiff's counsel did provide were unquestionably untimely, we do not find that defendants have established a "deliberately evasive, misleading and uncooperative course of conduct or a determined strategy of delay [by plaintiff] that would be deserving of the most vehement condemnation" … . Mesiti v Weiss. 2019 NY Slip Op 09343. Third Dept 12-26-19

ELEVATORS, ESPINAL.

ELEVATOR MAINTENANCE COMPANY DID NOT DISPLACE THE BUILDING OWNER'S AND MANAGER'S DUTY TO KEEP THE ELEVATORS SAFE AND DID NOT LAUNCH AN INSTRUMENT OF HARM; IT'S MOTION FOR SUMMARY JUDGMENT IN THIS ELEVATOR ACCIDENT CASE SHOULD HAVE BEEN GRANTED; A VIOLATION OF THE NYC BUILDING CODE IS NOT NEGLIGENCE PER SE (FIRST DEPT).

The First Department, modifying Supreme Court in this elevator accident case, noted that violation of the NYC Building Code is some evidence of negligence but not negligence per se, and held that Dunwell's (the elevator maintenance company's) motion for summary judgment should have been granted. Dunwell had demonstrated two Espinal factors did not apply (it did not displace the building defendants' obligation to keep the elevators safe and it did not launch an instrument of harm, i.e., it did not exacerbate or create the defects in the elevator):

Dunwell's motion for summary judgment dismissing all claims against it should be granted. Dunwell cannot be held liable to plaintiff, because it did not owe the decedent any duty. There is no evidence in the record that Dunwell created or exacerbated any of the alleged elevator defects, including the missing door rollers and link arms, even if it were found to have wrongfully failed to diagnose or correct them (see Espinal v Melville Snow Contrs., 98 NY2d 136, 140, 142-143 [2002] …). Moreover, Dunwell in fact did recommend that these parts be replaced, but its proposal was not accepted by the Building Defendants, and the governing maintenance agreement did not allow Dunwell to replace them without authorization … . The maintenance agreement was not comprehensive and exclusive and therefore did not displace the Building Defendants' obligations to maintain the elevators in a safe condition … . Plaintiff does not argue that the decedent detrimentally relied on Dunwell's continued performance of its duties … . Baez v 1749 Grand Concourse LLC, 2019 NY Slip Op 08948, First Dept 12-12-19

ELEVATORS, ESPINAL.

IN THIS ELEVATOR ACCIDENT CASE, ONE DEFENDANT FAILED TO DEMONSTRATE IT HAD NOT DISPLACED THE BUILDING OWNER'S DUTY TO KEEP THE PREMISES SAFE, AND ANOTHER DEFENDANT DEMONSTRATED IT DID NOT LAUNCH AN INSTRUMENT OF HARM; FAILING TO MAKE DANGEROUS CONDITION SAFER DOES NOT EQUATE WITH LAUNCHING AN INSTRUMENT OF HARM (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined that one defendant in this elevator accident case, Cooper Square, did not demonstrate that it did not displace the building owner's duty to keep the premises safe, and another defendant, PS Marcato [elevator company] , sufficiently demonstrated it did not launch an instrument of harm. The court noted that PS Marcato's failure to make the elevator safer did not equate to launching and instrument of harm:

Cooper Square failed to establish prima facie that it did not displace [the building owner's] duty to maintain the premises in a reasonably safe condition. Its management agreement with [the owner] authorized Cooper Square to make repairs or alterations to the premises and to purchase supplies and materials for the building. Cooper Square also agreed to "directly supervise the work of, hire and discharge all maintenance and security personnel," and was "clothed with such general authority and powers as may be necessary or advisable to carry out the spirit and intent of th[e] Agreement." An amendment to the management agreement recognized that Cooper Square "ha[d] been delegated significant authority and discretion in the operation of the Building under th[e] Agreement." * * *

PS Marcato, which inspected and made repairs to the elevator before plaintiff was injured by it, established prima facie that it did not create or exacerbate the dilapidated condition of the elevator, and therefore did not launch a force or instrument of harm (see Espinal, 98 NY2d at 142-143 …). While the record suggests that PS Marcato knew that the elevator was in disrepair and being tampered with, it "did nothing more than neglect to make the [elevator] safer — as opposed to less safe — than it was before" the inspection and repairs were made … . Ileiwat v PS Marcato El. Co., Inc., 2019 NY Slip Op 08946, First Dept 12-12-19

LANDLORD-TENANT.

OUT-OF-POSSESSION LANDLORD ONLY RESPONSIBLE FOR STRUCTURAL REPAIRS; THE ONE-STEP RISER WHICH CAUSED PLAINTIFF'S SLIP AND FALL WAS NOT A STRUCTURAL ELEMENT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the out-of-possession landlord (Steph-Leigh) was not responsible for the repair of a one-step riser inside a warehouse, which allegedly caused plaintiff's slip and fall:

"An out-of-possession landlord is not liable for injuries that occur on its premises unless the landlord has retained control over the premises and has a duty imposed by statute or assumed by contract or a course of conduct'" … . Here, where the complaint sounds in common-law negligence and the pleadings do not allege the violation of a statute, Steph-Leigh demonstrated its prima facie entitlement to judgment as a matter of law by establishing that it was an out-of-possession landlord that was not bound by contract or course of conduct to repair the allegedly damaged step … . Although the lease obligated Steph-Leigh to make necessary structural repairs to the interior of the premises, contrary to the plaintiff's contentions, the allegedly cracked and eroded single-step riser was not a structural element of the warehouse for which Steph-Leigh was contractually responsible … . Michaele v Steph-Leigh Assoc., LLC, 2019 NY Slip Op 08844, Second Dept 12-11-19

LONG-TERM CARE FACILITIES, CONTRIBUTION.

THE NURSING HOME SUED BY DECEDENT'S DAUGHTER AS EXECUTOR OF HER MOTHER'S ESTATE BROUGHT A THIRD-PARTY ACTION AGAINST THE DAUGHTER ALLEGING HER MOTHER'S INJURIES DID NOT RESULT FROM A FALL AT THE NURSING HOME BUT RATHER FROM THE DAUGHTER'S NEGLIGENT FAILURE TO FOLLOW THE NURSING HOME'S INSTRUCTIONS FOR THE HOME CARE AND SUPERVISION OF HER MOTHER; UNDER THE FACTS OF THIS CASE THERE EXISTED NO DUTY OF CARE UNDER WHICH THE DAUGHTER COULD BE HELD LIABLE FOR CONTRIBUTION BY THE NURSING HOME (SECOND DEPT).

The Second Department, in a comprehensive opinion by Justice Hinds-Radix, reversing Supreme Court, determined plaintiff (Santoro), the daughter of the decedent and the executor of her mother's estate, did not owe a duty of care to her infirm mother such that Santoro could be sued for contribution by the nursing home her mother's estate was suing. The decedent was released from the nursing home to reside with Santoro. Subsequently Santoro, as executor, sued the nursing home based upon her mother's fall at the facility. The nursing home then brought a third-party action against Santoro alleging that the decedent's injuries stemmed from a fall at Santoro's home resulting from Santoro's negligent care and supervision of her mother. The opinion discusses contribution versus indemnification and all possible theories which might impose a duty upon Santoro, but ultimately held no extant duty was applicable to these facts:

There is no common-law duty of a child to care for a parent … . While a statutory duty may be imposed in derogation of common law, the defendant here does not rely on any such statute. However, a duty may also be imposed by contract … . "The general rule is that, where the relationship between the parties is that of parent and child, the law presumes that where there is no proof of a contract under which the services were performed . . . they were rendered gratuitously" … . …

… [A] party also may assume a duty to a third party based upon gratuitous conduct. … [T]he question is whether [the] defendant's conduct placed [the] plaintiff in a more vulnerable position than [the] plaintiff would have been in had [the] defendant done nothing'" … . When determining whether a cause of action exists, the question is whether the alleged wrongdoer has "launched a force or instrument of harm," not whether the alleged wrongdoer "stopped where inaction is at most a refusal to become an instrument of good" … . In this case, the defendant

alleged that Santoro failed to act in accordance with its instructions—which, in its view, would make her an instrument of good—not that she placed the decedent in a more vulnerable position than if she had done nothing.

Further, a duty may arise " where one has voluntarily assumed the care of another and so secluded the helpless person as to prevent others from rendering aid'" … . However, the defendant cites no duty imposed in derogation of common law. Further, it is not alleged that Santoro secluded the decedent while she was in a helpless state, preventing others from rendering aid. …

The defendant would impose a new duty on those who live with infirm individuals "to use reasonable care" and "be liable for harm caused by the failure to use reasonable care by affirmative act or omission" … . The imposition of such an obligation carries with it public policy considerations of possible negative consequences, since such a general obligation could discourage persons from residing with the infirm, discourage children and infirm parents from living together, and discourage the infirm from attempting to resume independent living … . The circumstances alleged here "provide no justification for creating" such a duty … . Santoro v Poughkeepsie Crossings, LLC, 2019 NY Slip Op 08883, Second Dept 12-11-19

LONG-TERM CARE FACILITIES, THIRD-PARTY ASSAULT.

THIRD-PARTY ASSAULT. PLAINTIFF WAS ASSAULTED BY ANOTHER PATIENT IN DEFENDANT LONG-TERM CARE FACILITY; THE MEDICAL RECORDS OF THE ASSAILANT, WHO WAS NOT A PARTY, WERE PRIVILEGED AND NOT DISCOVERABLE; THE INCIDENT REPORTS PERTAINING TO THE ASSAULT WERE NOT SHOWN BY THE DEFENDANT TO BE PRIVILEGED PURSUANT TO THE PUBLIC HEALTH LAW AND WERE THEREFORE DISCOVERABLE (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined that the assailant's medical records were privileged, but any incident reports pertaining to the assault were not. Plaintiff alleged she was attacked while a long-term resident of defendant long-term health care facility. The assailant in this third-party assault action was not made a party:

We agree with the Supreme Court's determination denying that branch of the plaintiffs' motion which sought disclosure of the assailant's admission chart. The assailant is not a party to the action, his medical records were subject to the physician-patient privilege, and he has not waived that privilege … .

However, the Supreme Court should have granted that branch of the plaintiffs' motion which sought disclosure of all incident reports related to the assault. Pursuant to Education Law § 6527(3), certain documents generated in connection with the "performance of a medical or a quality assurance review function," or which are "required by the Department of Health pursuant to Public Health Law § 2805-l," are generally not discoverable … . The defendant, as the party seeking to invoke the privilege, has the burden of demonstrating that the documents sought were prepared in accordance with the relevant statutes … . Here, the defendant merely asserted that a privilege applied to the requested documents without making any showing as to why the privilege attached. Accordingly, the incident reports related to the assault were subject to disclosure. DeLeon v Nassau Health Care Corp., 2019 NY Slip Op 08989, Second Dept 12-18-19

MEDICAL MALPRACTICE.

ALTHOUGH A REFERRING PHYSICIAN CAN NOT BE VICARIOUSLY LIABLE FOR THE NEGLIGENCE OF THE PHYSICIAN TO WHOM THE PATIENT WAS REFERRED, THE REFERRING PHYSICIAN MAY BE LIABLE FOR HER OWN NEGLIGENCE WITH RESPECT TO CONFERRING WITH THE OTHER PHYSICIAN ABOUT THEIR DIFFERENT FINDINGS (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the motion for summary judgment by one of the two doctors who examined plaintiff (Dr. Andreyko) should not have been granted:

Although a medical provider cannot be held vicariously liable for the malpractice of a physician to whom a patient is referred, the referring medical provider may be held liable for his or her own independent negligent conduct that proximately causes the patient injury … …

Here, Andreyko examined the plaintiff on May 30, 2012, and noted the existence of palpable masses, "tender to palpation," in the plaintiff's right breast. Later that day, the plaintiff was examined by Wertkin who, though detecting thickening of the right breast, did not detect any palpable masses. Wertkin reported his findings to Andreyko who, upon reviewing them, reviewed her notes from her examination of the plaintiff but did not contact Wertkin to discuss the differences in their respective examinations. We conclude that the plaintiff raised a triable issue of fact as to whether Andreyko, upon learning that Wertkin was unable to palpate any masses in the plaintiff's right breast, departed from the accepted standard of care by failing to advise Wertkin that Andreyko had been able to palpate distinct masses in the plaintiff's breast, and whether Andreyko's failure to

do so was a substantial factor in contributing to the delay in diagnosis that the plaintiff had breast cancer. Notably, Wertkin testified at his deposition that, given the plaintiff's medical history, had he been able to locate any distinct palpable masses in the plaintiff's breast, the standard of care would have called for a biopsy of the breast. Yanchynska v Wertkin, 2019 NY Slip Op 09320, Second Dept 12-24-19

MEDICAL MALPRACTICE.

ALTHOUGH DEFENDANT PSYCHIATRIST ALLEGED HE CALLED PLAINTIFF'S DECEDENT TO TELL HER SHE SHOULD SEE ANOTHER PSYCHIATRIST, THE NEXT SCHEDULED APPOINTMENT WITH DEFENDANT WAS NOT CANCELLED; THERE IS A QUESTION OF FACT WHETHER THE CONTINUOUS TREATMENT DOCTRINE APPLIED AND RENDERED THE ACTION TIMELY; DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, over a dissent, determined that the medical malpractice causes of action should not have been dismissed as time-barred. Plaintiff's decedent had seen the defendant psychiatrist for the first time on November 20, 2014 and the next appointment was set up for December 11, 2014. Defendant alleged he called decedent on November 21, 2014 to tell her she should be treated by someone else, but the December 11, 2014 appointment was not cancelled. Decedent committed suicide on November 24, 2014. The action was commenced on May 24, 2017:

Under the continuous treatment doctrine, the period of limitations does not begin to run until the end of the course of treatment if three conditions are met: (1) the patient "continued to seek, and in fact obtained, an actual course of treatment from the defendant physician during the relevant period"; (2) the course of treatment was "for the same conditions or complaints underlying the plaintiff's medical malpractice claim"; and (3) the treatment is "continuous" … . To satisfy the requirement that treatment is continuous, further treatment must be explicitly anticipated by both the physician and the patient, as demonstrated by a regularly scheduled appointment for the near future … . * * *

The question here is whether the statute of limitations began to run on November 20, 2014, when the decedent met with the defendant for a medical appointment, or November 24, 2014, when she died. The Supreme Court concluded that the limited interactions between the defendant and the decedent failed to give rise to a continuing

trust and confidence between them upon which the court could conclude that the decedent anticipated further treatment. However, since a further appointment was scheduled and was not cancelled—further treatment of some sort was anticipated, or there is at least a triable issue of fact on that issue … . Hillary v Gerstein, 2019 NY Slip Op 08658, Second Dept 12-4-19

MEDICAL MALPRACTICE.

DEFENDANT DOCTOR WAS PROPERLY ALLOWED TO TESTIFY ABOUT HIS USUAL PRACTICE OR HABIT IN PERFORMING KNEE REPLACEMENT SURGERY (SECOND DEPT).

The Second Department, affirming the defense verdict in this medical malpractice action, determined that defendant doctor (Baez) was properly allowed to testify about his usual practice or "habit" in performing a knee replacement:

Baez's habit testimony as to how he performs knee replacement surgeries, including that the methodology for measuring and dissecting 10 millimeters of the patient's patella did not vary from patient to patient, that the manner in which he performed knee replacement surgeries was done in a deliberate, identical, and repetitive manner on every patient, and that he was in complete control of the circumstances concerning the measuring and dissection of the patient's patella, was properly admitted by the Supreme Court … . The evidence supported a finding that Baez's surgical techniques a deliberate and repetitive practice by a person in complete control of the circumstances … . Heubish v Baez, 2019 NY Slip Op 08826, Second Dept 12-11-19

MEDICAL MALPRACTICE.

DEFENDANT, A PODIATRIST, USING ALTERNATIVE MEDICINE (OZONE THERAPY), TREATED PLAINTIFF FOR LYME DISEASE; DEFENDANT DID NOT SUBMIT PROOF OF THE APPLICABLE STANDARD OF CARE; DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IN THIS MEDICAL MALPRACTICE ACTION SHOULD NOT HAVE BEEN GRANTED (FIRST DEPT).

The First Department, reversing Supreme Court, determined defendant's motion for summary judgment in this medical malpractice action should not have been granted because defendant did not submit proof of the appropriate standard of care. The defendant, a podiatrist, treated plaintiff for Lyme disease with "ozone therapy:"

In this medical malpractice action, plaintiff testified that after he saw an advertisement by defendant in a magazine about alternative medicine he sought treatment from defendant for Lyme disease. Defendant is a licensed podiatrist who the record shows told plaintiff that he could treat a host of incurable non-podiatric conditions. * * *

Defendant has a history of being accused of using his putative study of ozone therapy's ostensible benefits in treating podiatric conditions as a cover for his treatment of non-podiatric conditions … . In the present case, the record reflects that the putative treatment was not for a podiatric condition, and thus that defendant was practicing medicine outside of the medical confines of podiatry … , which raises an issue of professional misconduct … .

Defendant failed to make the necessary prima facie showing of entitlement to judgment as a matter of law, requiring reversal and denial of his motion for summary judgment regardless of the sufficiency of the opposing papers … . Defendant failed to establish the standard of care with which he should have complied for the treatment of Lyme disease, as to which he submitted no expert evidence … . Thus, on this record, it cannot be determined whether defendant deviated from accepted standards of practice. A trial is required on the issue whether defendant's treatment proximately caused the physical and neurological manifestations of injury alleged by plaintiff. Georgievski v Robins, 2019 NY Slip Op 08619, First Dept 12-3-19

MEDICAL MALPRACTICE.

MALPRACTICE ACTION AGAINST A DOCTOR PROPERLY SEVERED FROM A NEGLIGENT HIRING AND RETENTION ACTION AGAINST THE DOCTOR'S EMPLOYER (SECOND DEPT).

The Second Department determined the action against a doctor (Wishner) for medical malpractice was properly severed from an action against the doctor's employer (HMG) for negligent training, supervision, hiring and retention. Evidence the doctor had negligently treated another patient would not be admissible in the malpractice action but would be admissible in the action against the employer:

"In furtherance of convenience or to avoid prejudice the court may order a severance of claims, or may order a separate trial of any claim, or of any separate issue" (CPLR 603). Here, the Supreme Court providently exercised its discretion in granting that branch of Wishner's motion which was to sever the causes of action asserted against HMG alleging negligent training, supervision, hiring, and retention from the causes of action premised on medical malpractice. In general, "it is improper to prove that a person did an act on a particular occasion by showing that he or she did a similar act on a different, unrelated occasion" … . Thus, generally, evidence of prior unrelated bad acts of negligent treatment of other patients, even if relevant, constitutes impermissible propensity evidence that lacks probative value and "has the potential to induce the jury to decide the case based on evidence of [a] defendant's character" … . Mullen v Wishner, 2019 NY Slip Op 08850, Second Dept 12-11-19

MEDICAL MALPRACTICE.

QUESTION OF FACT WHETHER DEFENDANT NEUROLOGIST AND DEFENDANT CARDIOLOGIST WERE JOINTLY DIAGNOSING AND TREATING PLAINTIFF FOR HER STROKE; QUESTION OF FACT WHETHER THE NEUROLOGIST SHOULD HAVE ENSURED THAT A TEST ORDERED BY THE NEUROLOGIST, BUT TO BE PERFORMED BY THE CARDIOLOGIST, WAS DONE WITHIN 48 HOURS (FIRST DEPT),

The First Department, reversing Supreme Court, determined the defendant doctors' motions for summary judgment in this medical malpractice case should not have been granted. There was a question of fact whether defendants were jointly diagnosing and treating the plaintiff. Defendant neurologist ordered a trans-esophageal electrocardiogram (TEE), to be done by a cardiologist, to determine the origin of plaintiff's stroke. Plaintiff

alleged defendant neurologist should have made sure the TEE was performed immediately. The TEE was performed more than two week's after plaintiff's initial stroke:

Plaintiffs allege that defendants were negligent for scheduling a TEE, the definitive diagnostic tool to detect the presence of atrial clots, more than two weeks after the patient's initial stroke was confirmed and she was referred to the cardiology defendants. Plaintiffs allege that defendants should have scheduled the TEE to take place within 48 hours, or, alternatively, placed the patient on anticoagulants as a prophylactic measure.

The expert affidavit submitted by plaintiff raises an issue of fact whether the neurology defendants retained a duty to ensure that the patient received a timely TEE insofar as Dr. Xie referred her to the cardiology defendants as part of his overall neurological assessment, and he continued to manage her condition throughout. Under these circumstances, questions exist whether defendants were engaged in "joint action in diagnosis or treatment" so as to make it appropriate to impose liability on one for the negligence of the other … . Lin v Yi Xie, 2019 NY Slip Op 08943, First Dept 12-12-19

MEDICAL MALPRACTICE.

THE ALLEGED NEGLIGENCE IN THE PROCEDURE USED WHEN PLAINTIFF DONATED BLOOD SOUNDED IN MEDICAL MALPRACTICE, DESPITE THE FACT THAT NO DOCTOR WAS INVOLVED IN THE PROCEDURE; PLAINTIFF'S FAILURE TO PROVIDE A CERTIFICATE OF MERIT AS REQUIRED BY CPLR 3012-a WAS DUE TO THE GOOD FAITH BELIEF THE ACTION SOUNDED IN COMMON LAW NEGLIGENCE; THE ACTION SHOULD NOT HAVE BEEN DISMISSED WITHOUT AFFORDING PLAINTIFF THE OPPORTUNITY TO PROVIDE A CERTIFICATE OF MERIT (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Dillon, reversing Supreme Court, determined: (1) the action stemming from alleged negligence in drawing blood donated by plaintiff sounded in medical malpractice, not common law negligence; (2) therefore a certificate of merit was required (CPLR 3012-a); and (3) the failure to provide a certificate of merit does not warrant dismissal of the action, rather the plaintiff should be allowed 60 days to provide the certificate:

… [M]any of the plaintiff's allegations bear a substantial relationship to the rendition of medical treatment to a particular patient …. The complaint alleges, inter alia, that the defendant failed to properly screen the plaintiff for health problems, obtain her medical history, monitor her physical condition, measure her hemoglobin levels, and keep her at the donation site for a specific period of time to observe any signs of an adverse reaction. The issues of whether the plaintiff needed additional screening, monitoring, or supervision, and whether she was at risk of falling due to a medical condition, involve the exercise of medical judgments beyond the common knowledge of ordinary persons. Only a medical professional would know what factors make a person ineligible to donate blood, how much blood should be drawn, what constitutes the signs and symptoms of an adverse reaction, and how to immediately treat an adverse reaction. Thus, the interaction between the plaintiff and the defendant implicates issues of medical judgment that sound in medical malpractice. * * *

… [A]lthough the complaint was not accompanied by a certificate of merit as required by CPLR 3012-a, dismissal of the complaint is not warranted as the plaintiff's attorney should be provided with an opportunity to comply with the statute now that it is determined that the statute applies to this particular action … . There is no reason to believe from this record that the plaintiff's attorney's failure to file a certificate of merit was motivated by anything other than a good faith assessment that CPLR 3012-a did not apply to the action. The proper remedy at this stage, since the defendant had also sought in its underlying motion "such other and further relief as this court may deem just, proper and reasonable" … , is for this Court to extend the plaintiff's time to serve a certificate of merit upon the defendant until 60 days after service of this opinion and order. Only if the plaintiff is recalcitrant in complying with both the statute and this Court's order may the Supreme Court, in its discretion, then dismiss the complaint … . Rabinovich v Maimonides Med. Ctr., 2019 NY Slip Op 08724, Second Dept 12-4-19

MEDICAL MALPRACTICE.

THERE IS A QUESTION OF FACT WHETHER A DRUG, WHICH CAN DISSOLVE BLOOD CLOTS IN MINUTES, SHOULD HAVE BEEN ADMINISTERED TO PLAINTIFF WHO WAS SUFFERING FROM A PULMONARY EMBOLISM UPON ADMISSION; SUPREME COURT REVERSED; TWO-JUSTICE DISSENT (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Manzanet-Daniels, over a two-justice dissent, determined that the defendants' motion for summary judgment in this medical malpractice case should not have been granted. The opinion is fact-specific and too detailed to fairly summarize here. The majority concluded there was a question of fact whether the administration of a drug, which defendants averred was contraindicated,

would have saved decedent's life. Decedent was suffering from a pulmonary embolism upon admission. The staff waited hours for blood tests and an angiogram to confirm the diagnosis. A drug which can dissolve blood clots in minutes was not administered. Barry v Lee, 2019 NY Slip Op 09397, First Dept 12-26-19

NEGLIGENT CONCEALMENT.

NEGLIGENT CONCEALMENT CAUSE OF ACTION AGAINST HOSPITAL ALLEGING THE FAILURE TO DISCLOSE BILLING PRACTICES SHOULD HAVE BEEN DISMISSED; GENERAL BUSINESS LAW 349 CAUSE OF ACTION PROPERLY SURVIVED (SECOND DEPT).

The Second Department determined the complaint did not state a cause of action for negligent concealment/misrepresentation, but did state a cause of action for violation of General Business Law 349. The plaintiff alleged defendant hospital failed to to disclose material facts about the hospital's billing practices for emergency treatment:

As a threshold matter, while the parties appear to dispute whether the first cause of action should be characterized as one sounding in "negligent concealment" or "negligent misrepresentation," this is a distinction without a difference. The gravamen of the plaintiff's allegations are that the hospital negligently failed to disclose material facts to him concerning the hospital's billing practices. This is a species of negligent misrepresentation based on the omission to disclose material facts … . As a general proposition, "a duty to speak with care exists when the relationship of the parties, arising out of contract or otherwise, [is] such that in morals and good conscience the one has the right to rely upon the other for information" … . Thus, "liability for negligent misrepresentation has been imposed only on those persons who possess unique or specialized expertise, or who are in a special position of confidence and trust with the injured party such that reliance on the negligent misrepresentation is justified" … . Contrary to the plaintiff's contention, the fact that the parties are in a contractual relationship, without more, is insufficient to support the imposition of a duty to speak with care … .

While it cannot be doubted that the relationship between a physician and a patient is one of confidence and trust regarding matters of medical treatment … , we decline to hold that such relationship, and any duty to speak with care that may come with it, also extends to matters of billing having nothing to do with the rendition of medical treatment. …

… [W]e agree with the Supreme Court's determination that the hospital was not entitled to summary judgment dismissing the General Business Law § 349 cause of action insofar as asserted against it. First, contrary to the hospital's contention, it was engaged in consumer-oriented activity … . Second, it is possible to engage in deceptive trade practices through omissions as well as affirmative representations … , particularly where, as here, it is alleged that "the business alone possesses material information that is relevant to the consumer and fails to provide this information" … . Third, contrary to the hospital's contention, there is a triable issue of fact as to whether the plaintiff suffered an injury under General Business Law § 349 … . Krobath v South Nassau Communities Hosp., 2019 NY Slip Op 08838, Second Dept 12-11-19

SLIP AND FALL.

DEFENDANT DID NOT DEMONSTRATE IT DID NOT HAVE CONSTRUCTIVE NOTICE OF THE LIQUID ON THE FLOOR WHICH ALLEGEDLY CAUSED PLAINTIFF TO SLIP AND FALL; 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. Defendant did not demonstrate a lack of constructive notice of the liquid on the floor:

… [T]he evidence submitted by the defendant in support of its motion failed to demonstrate, prima facie, that it lacked constructive notice of the alleged dangerous condition that caused the plaintiff to fall. The deposition testimony of the assistant manager of the supermarket, who did not recall if he was working on the date of the accident, and the affidavit of the defendant's vice president of loss prevention, merely referred to the defendant's general cleaning and inspection practices. The defendant did not proffer any evidence demonstrating when the specific area where the plaintiff fell was last cleaned or inspected before the accident … . Furthermore, the defendant failed to demonstrate, prima facie, that the condition on which the plaintiff fell was not visible and apparent, and would not have been discoverable upon a reasonable inspection of the area where the plaintiff was injured … . Fortune v Western Beef, Inc., 2019 NY Slip Op 08656, Second Dept 12-4-19

SLIP AND FALL.

DEFENDANTS PRESENTED NO EVIDENCE OF SNOW REMOVAL EFFORTS OR LACK OF CONSTRUCTIVE NOTICE IN THIS ICE-ON-SIDEWALK SLIP AND FALL CASE; DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined defendants' motion for summary judgment in the ice-on-sidewalk slip and fall case should not have been granted:

[Defendants] failed to sustain their initial burden of demonstrating that they neither created nor had actual or constructive knowledge of the icy condition of the sidewalk … . Neither presented evidence concerning snow removal immediately prior to plaintiff's accident and/or their lack of notice of the condition … . Burton v Khedouri Ezair Corp., 2019 NY Slip Op 09379, First Dept 12-26-19

SLIP AND FALL.

PORTIONS OF CITY SIDEWALK ELEVATED BY TREE ROOTS AND "REPAIRED" WITH COLD PATCH; QUESTIONS OF FACT WHETHER THE ABUTTING PROPERTY OWNERS AND CITY ARE LIABLE IN THIS SLIP AND FALL CASE (FOURTH DEPT).

The Fourth Department, reversing (modifying) Supreme Court determined: (1) there are questions of fact concerning whether the abutting property owners are liable for this sidewalk slip and fall; (2) there are questions of fact whether the city created the dangerous condition by patching the sidewalk. Plaintiff tripped and fell in an area where the sidewalk had been elevated by tree roots:

… [T]he Charter of the City of Buffalo (Charter) § 413-50 (A) specifically imposes on "owner[s] or occupant[s] of any lands fronting or abutting on any street," i.e., the property defendants, a duty to maintain and repair the sidewalk and provides that their failure to do so will result in liability for injuries to users of the sidewalk. Contrary to the property defendants' contention, that duty to maintain and repair extends to damage caused by the roots of a tree owned by the City where, as here, "the local ordinance contains no exceptions to the duty imposed on abutting landowners to maintain the sidewalk, even if the allegedly dangerous condition was created by a root extending from [City] property" … . …

… [T]he evidence submitted by the property defendants in support of their motion, which was then incorporated into the City's cross motion, raised triable issues of fact whether the City performed the "cold patch" repair to the area sometime before plaintiff's accident and whether the condition of the sidewalk on the day of plaintiff's accident was the same as when the "cold patch" was first applied. We thus conclude that the City failed to establish as a matter of law that it did not affirmatively create a dangerous condition or that the dangerous condition was due solely to conditions that developed over time … . Beagle v City of Buffalo, 2019 NY Slip Op 09126, Fourth Dept 12-20-19

SLIP AND FALL.

PROOF OF GENERAL INSPECTION PRACTICES DOES NOT DEMONSTRATE THE ABSENCE OF CONSTRUCTIVE NOTICE; DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IN THIS ICE-ON-SIDEWALK SLIP AND FALL CASE SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant property-owner's (Colonial's) motion for summary judgment should not have been granted in this ice-on-sidewalk slip and fall case:

"To meet its initial burden on the issue of lack of constructive notice, [a] defendant must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell" … . Here, Colonial failed to establish, prima facie, that it did not have constructive notice of the alleged patch of ice. The deposition testimony of the president of its board of managers merely referred to general inspection practices, and provided no evidence regarding any specific inspection of the subject area prior to the plaintiff's fall … . Carro v Colonial Woods Condominiums, 2019 NY Slip Op 08986, Second Dept 12-18-19

SLIP AND FALL.

THE BUILDING OWNER AND MANAGER WERE ADDITIONAL INSUREDS UNDER A POLICY ISSUED TO THE CONTRACTOR HIRED TO RENOVATE CONCRETE WALKWAYS; THE OWNER AND MANAGER ARE ENTITLED TO COVERAGE FOR A SLIP AND FALL ALLEGED TO HAVE BEEN CAUSED BY PAINTING THE WALKWAYS ALL THE SAME COLOR AND THEREBY DISGUISING A CHANGE IN ELEVATION (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Kapnick, determined plaintiffs are additional insureds under an insurance policy issued by defendant to nonparty Upgrade, the contractor hired to restore concrete catwalks. Plaintiffs, Windsor Apartments and Argo Real Estate, are entitled to coverage for a slip and fall in plaintiffs' building allegedly caused by painting the floor all the same color, thereby disguising a change in elevation:

Defendant State National issued a commercial general liability (CGL) policy to Upgrade during the relevant time period. The policy contained a "Blanket Additional Insured" Endorsement that limited coverage to operations performed by or on behalf of Upgrade:

"It is agreed that this Policy shall include as additional Insureds any person or organization to whom the Named Insured [Upgrade] has agreed by written contract to provide coverage, but only with respect to operations performed by or on behalf of the Named Insured and only with respect to occurrences subsequent to the making of such written contract."

The State National policy also stated that its coverage was primary, with exceptions not applicable here, for damages arising out of the premises or operations for which an entity is added as an additional insured.

The policy issued by plaintiff Fireman's Fund Insurance Company (Fireman's) to Windsor and Argo provided that coverage was excess when its insureds, Windsor and Argo, have other primary insurance available to them covering liability for damages arising out of the premises or operations for which they have been added as an additional insured. * * *

… [S]ince the injury to the plaintiff in the underlying action here "arose out of" Upgrade's operation of painting the walkways, plaintiffs are additional insureds under the State National policy and the policy is primary in connection with the underlying action. Fireman's Fund Ins. Co. v State Natl. Ins. Co., 2019 NY Slip Op 09399, First Dept 12-26-19

TRAFFIC ACCIDENTS.

ALTHOUGH DEFENDANT MAY HAVE STOPPED AT A STOP SIGN, HE NEVERTHELESS FAILED TO YIELD; PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IN THIS INTERSECTION TRAFFIC ACCIDENT CASE SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff was entitled to summary judgment in this intersection traffic accident case. The fact that defendant (Maicol) allegedly stopped at a stop sign before pulling out into plaintiff's path did not raise a question of fact:

… [T]he plaintiff established her prima facie entitlement to judgment as a matter of law on the issue of liability by demonstrating that Maicol's negligence in failing to yield the right-of-way was a proximate cause of the accident (see Vehicle and Traffic Law §§ 1142[a]; 1172[a] …). Moreover, the plaintiff's case was buttressed by Maicol's admission in the police report to the effect that he failed to see the plaintiff's vehicle prior to the collision … . …

That Maicol stopped at the stop sign was not dispositive, as he nevertheless failed to yield … . The assertions in the defendants' counsel's affirmation that the plaintiff may have been speeding or negligent in failing to take evasive action were speculative … . In any event, to be entitled to summary judgment on the issue of liability, a plaintiff is no longer required to show freedom from comparative fault in establishing his or her prima facie case … . Ashby v Estate of Encarnacion, 2019 NY Slip Op 08815, Second Dept 12-12-19

TRAFFIC ACCIDENTS.

DEFENDANT DRIVER WAS ENTITLED TO SUMMARY JUDGMENT IN THIS BICYCLE-CAR TRAFFIC ACCIDENT CASE; PLAINTIFF BICYCLIST WAS TRAVELING THE WRONG WAY ON A ONE-WAY STREET AND DID NOT SLOW DOWN APPROACHING THE INTERSECTION WHERE HE COLLIDED WITH THE SIDE OF DEFENDANT'S CAR (FIRST DEPT).

The First Department, reversing Supreme Court, determined defendant driver was entitled to summary judgment in this bicycle-car collision case. Plaintiff was bicycling in the wrong direction on a one-way street. Defendant

pulled out into the intersection after checking the traffic in the appropriate direction and plaintiff ran into the side of defendant's car:

Pursuant to Vehicle and Traffic Law § 1231, a person riding a bicycle on a roadway has the same rights and responsibilities as a driver of a motor vehicle. Therefore, 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 into a dangerous position … .

Vehicle and Traffic Law § 1142(b) states that a "driver of a vehicle approaching a yield sign shall . . . slow down to a speed reasonable for existing conditions, or shall stop if necessary," and "yield the right of way . . . to any vehicle in the intersection or approaching on another highway so closely as to constitute an immediate hazard during the time such driver is moving across or within the intersection." In addition, Vehicle and Traffic Law § 1146(a) requires motorists to "exercise due care to avoid colliding with any bicyclist, pedestrian, or domestic animal" on the roadway and to "give warning by sounding the horn when necessary."

The undisputed testimony was that plaintiff was traveling in the opposite direction of traffic, in clear violation of Vehicle and Traffic Law § 1231, and traveled into the intersection without stopping or yielding to defendant's vehicle which was clearly already in the intersection. Admittedly, plaintiff made no attempt to stop, or to alert defendant of his presence. Although a driver of a motor vehicle has a duty to see what is there to be seen, defendant was not required to look in the opposite direction of the intersecting one-way street to see if someone was traveling in the wrong direction and at a speed indicating no intent to stop. Felix v Polakoff, 2019 NY Slip Op 09100, First Dept 12-19-19

TRAFFIC ACCIDENTS.

DEFENDANT DRIVER WAVED TO PLAINTIFF'S DECEDENT, A PEDESTRIAN, INDICATING SHE WAS ALLOWING PLAINTIFF'S DECEDENT TO CROSS THE STREET; ONE SECOND LATER PLAINTIFF'S DECEDENT WAS STRUCK BY ANOTHER CAR; THE ACCIDENT WAS THE RESULT OF A SUPERSEDING, INTERVENING ACT AND DEFENDANT WAS NOT LIABLE AS A MATTER OF LAW (SECOND DEPT).

The Second Department determined defendant driver, Biesty, was entitled to summary judgment in this pedestrian accident case because the act of another driver was the supervening cause of the accident. Biesty had

stopped at a stop sign and waved to plaintiff-pedestrian (Nanfro) indicating Biesty would allow Nanfro to cross the street. One second later Nanfro was struck by a car driven by Agostinelli:

A driver of a motor vehicle may, under certain circumstances, be liable to a pedestrian where the driver "undertakes to direct a pedestrian safely across the road in front of his [or her] vehicle, and negligently carries out that duty" … . "However, even if a pedestrian is injured because he or she relied on a driver's gesture directing him or her to cross a roadway, the acts of another driver may constitute a superseding, intervening act that breaks the causal nexus" … . "Whether an intervening act is a superseding cause is generally a question of fact, but there are circumstances where it may be determined as a matter of law" … .

Here, assuming without deciding that Biesty negligently motioned Nanfro to continue walking across the street and that Nanfro relied upon the gesture, Agostinelli's unforeseeable failure to see what was there to be seen and failure to yield the right-of-way to Nanfro, who was crossing the street within an unmarked crosswalk, constituted an intervening and superseding cause that established Biesty's prima facie entitlement to judgment as a matter of law … . Levi v Nardone, 2019 NY Slip Op 08665, Second Dept 12-4-19

TRAFFIC ACCIDENTS.

PLAINTIFF POLICE OFFICER'S MOTION FOR SUMMARY JUDGMENT AGAINST THE DRIVER OF THE TRACTOR TRAILER WHICH STRUCK HIM WHEN HE WAS STANDING IN THE ROADWAY SHOULD HAVE BEEN GRANTED, FREEDOM FROM COMPARATIVE FAULT NO LONGER NEED BE SHOWN; OTHER ISSUES ADDRESSED IN THE DECISION INCLUDE THE EMPLOYER'S LIABILITY, THE TRUCK RENTAL COMPANIES' LIABILITY, THE EMERGENCY DOCTRINE, WORKERS' COMPENSATION AND GENERAL MUNICIPAL LAW 205-e (SECOND DEPARTMENT).

The Second Department, reversing (modifying) Supreme Court determined plaintiff police officer was entitled to summary judgment against the driver of the tractor trailer which struck the officer who was standing in the roadway both under a common law negligence theory and under General Municipal Law 205-e. The court dealt with several other issues including: (1) whether a second police officer was engaged in an emergency operation, giving rise to the reckless disregard standard, when he stopped to assist the plaintiff who had made a traffic stop (the answer is no); (2) whether the second officer was liable based upon the position of his car (the answer is no,

the car furnished a condition for the accident but was not the cause); (3) whether the injured officer's recovery was confined to Workers' Compensation (there is a question of fact whether the injury was "grave"); (4) whether the Graves Amendment protected the truck rental companies (the answer is yes); (5) whether vicarious liability applies to the truck driver's employer (there is a question of fact on that issue). With respect to the common law negligence and the General Municipal Law 205-e causes of action, the court wrote:

… [T]he plaintiffs were not required to demonstrate that the injured plaintiff was free from comparative negligence in order to obtain summary judgment on the issue of Burke's [the truck driver's] liability on the first cause of action [negligence]. * * *

When the light changed, Burke began his left turn onto northbound Midland Avenue. Prior to beginning his turn, Burke was aware that there was a police officer conducting a traffic stop on foot and a police car parked on the northbound side of Midland Avenue. Although Burke believed he could make the turn safely, the rear of the trailer hit the injured plaintiff. * * *

The plaintiffs also established … Burke's liability as to … a violation of General Municipal Law § 205-e. … [T]hat statute permits a police officer to bring a tort claim for injuries sustained "while in the discharge or performance at any time or place of any duty imposed by . . . superior officer[s]" where such injuries occur "directly or indirectly as a result of any neglect, omission, willful or culpable negligence of any person or persons in failing to comply with the requirements of any of the statutes, ordinances, rules, orders and requirements of the federal, state, county, village, town or city governments" … . In order to recover under the statute, "a police officer must demonstrate injury resulting from negligent noncompliance with a requirement found in a well-developed body of law and regulation that imposes clear duties" … .

Vehicle and Traffic Law § 1146(a) requires a driver to "exercise due care to avoid colliding with any . . . pedestrian." Here, the unrebutted evidence established a prima facie violation of § 1146(a), as it demonstrated that Burke failed to exercise due care to avoid hitting the injured plaintiff. Cioffi v S.M. Foods, Inc., 2019 NY Slip Op 09251, Second Dept 12-24-19

TRAFFIC ACCIDENTS.

PLAINTIFFS (CUPID AND ROBINSON) DEMONSTRATED DEFENDANT DRIVER WAS NEGLIGENT AND HIS NEGLIGENCE CAUSED THE TRAFFIC ACCIDENT; DEFENDANTS' ALLEGATION THAT PLAINTIFF CUPID, NOT PLAINTIFF ROBINSON, WAS DRIVING THE CAR DID NOT CREATE A RELEVANT QUESTION OF FACT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiffs' motion for summary judgment in this traffic accident case should have been granted. The evidence demonstrated defendant driver (Paul) went through a red light and failed to see what he should have seen. The defendants' argument that the plaintiffs claimed that Cupid was driving when in fact the other plaintiff, Robinson, was driving was irrelevant:

The evidence submitted in support of Robinson's motion demonstrated, prima facie, that Paul entered the subject intersection against a red light, in violation of Vehicle and Traffic Law § 1111(d) … . That evidence further showed that Paul failed to see the plaintiffs' vehicle before colliding with it in the middle of the intersection, thus demonstrating that Paul failed to see that which he should have seen through the proper use of his senses. Contrary to the defendants' contention in the Supreme Court, Robinson was not required to demonstrate her freedom from comparative fault in order to establish her prima facie entitlement to summary judgment on the issue of liability … .

Thus, Robinson made a prima facie showing of entitlement to judgment as a matter of law on the issue of the defendants' liability by demonstrating that Paul was negligent and that his negligence was a proximate cause of the subject accident and her resulting injuries … . In opposition, the defendants failed to raise a triable issue of fact. On the facts presented here, whether Robinson or Cupid was driving their vehicle is not germane to the issue of the defendants' liability. Robinson v City of New York, 2019 NY Slip Op 08881, Second Dept 12-11-19

TRAFFIC ACCIDENTS.

THE CAR IN WHICH PLAINTIFFS WERE PASSENGERS HAD THE RIGHT OF WAY ON A THROUGH ROAD; WHETHER DEFENDANT'S CAR STOPPED AT THE STOP SIGN BEFORE PULLING OUT INTO THE PATH OF PLAINTIFFS' CAR WAS NOT DISPOSITIVE; PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff-passengers' motion for summary judgment in this intersection traffic accident case should have been granted. The Hernandez/Transit car, in which plaintiffs were passengers, had the right of way on a through road. The defendant Desriviere's car was on an intersecting street with a stop sign. The Second Department held that the fact the Desriviere car may have stopped at the stop sign before entering the intersection did not raise a relevant question of fact:

As a general matter, a driver who fails to yield the right-of-way after stopping at a stop sign in violation of Vehicle and Traffic Law § 1142(a) is negligent as a matter of law … . The driver with the right-of-way is entitled to anticipate that the other motorist will obey traffic laws that require him or her to yield … . Yet, "a driver traveling with the right-of-way may nevertheless be found to have contributed to the happening of the accident if he or she did not use reasonable care to avoid the accident" … . Here, Hernandez and Julie P. Transit established their entitlement to judgment as a matter of law by submitting evidence demonstrating that (1) Hernandez had the right-of-way, (2) that because Desriviere failed to yield the right-of-way upon entering the intersection in violation of Vehicle and Traffic Law § 1142(a), he was negligent as a matter of law, and (3) that Desriviere's negligence was the sole proximate cause of the accident … . The question of whether Desriviere stopped at the stop sign is not dispositive, since the evidence established that he failed to yield even if he did stop … . Belle-Fleur v Desriviere, 2019 NY Slip Op 09244, Second Dept 12-24-19