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Negligence
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An Organized Compilation of Selected Decisions Addressing Negligence Released in January 2020 and Posted Weekly on the New York Appellate Digest Website. The Issues Are Described in the Tables of Contents. The Table of Contents Entries Are Linked to the Summaries which Are Linked to the Decisions on the Official New York Courts Website. Click on "Table of Contents" in the Header to Return There.

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ATTORNEYS, STIPULATIONS.

DEFENDANTS' ATTORNEYS HAD APPARENT AUTHORITY TO BIND DEFENDANTS TO THE OPEN-COURT STIPULATED SETTLEMENT OF $8,875,000; IN ADDITION, DEFENDANTS RATIFIED THE STIPULATION BY FAILING TO TIMELY OBJECT TO IT (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Acosta, determined that defendants (the Infiniti defendants) were bound by an open-court stipulated settlement of $8,875,000 in this personal injury case. The attorneys had apparent authority to bind the defendants. And the defendants ratified the stipulation by failing to timely object to it:

I write to highlight the fundamental principle that parties are bound by stipulations signed in open court by their attorneys. The issue arose in the context of a negligence case, where plaintiff was seriously injured when she was struck by a motor vehicle while standing on a sidewalk median in Brooklyn. The vehicle was owned by defendant Infiniti of Manhattan, Inc. and driven by defendant Massamba Seck (the Infiniti defendants). Plaintiff suffered serious injuries and required extensive hospitalization and multiple surgeries. At issue in this case is whether the Infiniti defendants are bound by a settlement agreement entered into by their attorneys. We find that the Infiniti defendants are bound, because their attorneys had apparent authority to bind them to the $8,875,000 judgment. Significantly, there is no affidavit or testimony by Infiniti stating that Infiniti, or any of its employees, was unaware of the settlement or that Infiniti did not authorize the settlement. The only ones making this claim are the lawyers from the firm that was hired by the insurance companies to defend the Infiniti defendants. The fact that one of the insurers is now unable to pay its intended $5 million portion does not inure to the Infiniti defendants' benefit. Rather, the Infiniti defendants are responsible for the portion of the agreed-upon amounts that the insurers do not pay. To accept their position would alter the way litigation is conducted in New York State. Courts would have to conduct colloquies in every case to make sure that the parties, notwithstanding their attorneys' actions in appearing for them on numerous occasions and signing stipulations, acquiesced in the terms of the stipulations. That is unacceptable, especially here, where the Infiniti defendants never objected to the stipulation until the filing of the instant order to show cause more than a year and six months after the stipulation was signed in open court. Pruss v Infiniti of Manhattan, Inc., 2020 NY Slip Op 00229, First Dept 1-9-20

ATTORNEYS.

PLAINTIFF'S COUNSEL'S REMARKS DURING SUMMATION DEPRIVED DEFENDANT RESIDENTIAL HEALTH CARE FACILITY OF A FAIR TRIAL; OVER $1 MILLION JUDGMENT IN THIS NEGLIGENCE/PUBLIC-HEALTH-LAW ACTION REVERSED (SECOND DEPT).

The Second Department, reversing the over $1 million judgment in this negligence and Public-Health-Law-2801-d violation case, determined plaintiff's counsel's remarks in summation required a new trial. Plaintiff's decedent, who was at risk for falling, fell after getting up from a wheelchair at defendant residential health care facility and ultimately died:

"[L]itigants are entitled, as a matter of law, to a fair trial free from improper comments by counsel or the trial court" … . "The interest of justice thus requires a court to order a new trial where comments by an attorney for a party's adversary deprived that party of a fair trial or unduly influenced a jury" … .

Here, during summation, the plaintiff's counsel improperly appealed to the passion of the jurors by characterizing the defendant as a "corporation" that has "two lawyers," a "tech person," "general counsel," and "video people." Counsel also improperly accused the defendant of willfully depriving the plaintiff of evidence that would have been harmful to the defendant's case, accused the defendant's witnesses of having "changed" their testimony after their depositions or pretrial affirmations, which were not in evidence, "because they saw that they couldn't win," and improperly argued that the defendant failed to call certain witnesses, who were not under the defendant's control. Thus, "the comments of the plaintiff['s] counsel . . . were not isolated, were inflammatory, and were unduly prejudicial. These prejudicial comments so tainted the proceedings as to have deprived the defendant . . . of a fair trial" … . Nieves v Clove Lakes Health Care & Rehabilitation, Inc., 2020 NY Slip Op 00422, Second Dept 1-22-20

ESPINAL.

DEFENDANT CLEANING SERVICE CONTRACTOR SUBMITTED EVIDENCE WHICH CREATED A QUESTION OF FACT WHETHER, PURSUANT TO THE ESPINAL CRITERIA, IT LAUNCHED AN INSTRUMENT OF HARM WHICH CAUSED PLAINTIFF'S SLIP AND FALL; DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant cleaning service contractor's motion for summary judgment in this slip and fall case should not have been granted. Plaintiff alleged defendant was liable under Espinal for launching or creating an instrument of harm by mopping the floor without placing warning signs in the are where she fell:

Generally, 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, 140). However, there are three exceptions to the general rule … . …

Here, the plaintiff alleged only one of the Espinal exceptions: that the defendant created or launched an instrument of harm. Thus, in support of its motion for summary judgment dismissing the complaint, the defendant was required to establish, prima facie, that it did not create or launch an instrument of harm … . … [T]he defendant's submissions demonstrated the existence of triable issues of fact regarding the location of "wet floor" signs and whether the wet floor or the signs were readily observable by a reasonable use of the plaintiff's senses as she entered the area through a closed door … . Thus, the defendant failed to establish, prima facie, that it did not create the condition that caused the plaintiff to fall or that it provided adequate notice of the alleged hazardous condition … . Ramsey v Temco Serv. Indus., Inc., 2020 NY Slip Op 00166, Second Dept 1-8-20

HEALTH CLUBS.

NO ONE AT THE DEFENDANT HEALTH CLUB WHEN PLAINTIFF'S DECEDENT SUFFERED A HEART ATTACK WAS CERTIFIED TO PROVIDE EMERGENCY AID AND THE EMPLOYEE DELAYED CALLING 911; PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that plaintiff's motion for summary judgment against defendant health club for failing to aid plaintiff's decedent when she had a heart attack at the club. The only club employee on duty, Higgins, was not certified to provide emergency aid and delayed calling 911:

The Supreme Court should have granted that branch of the plaintiff's motion which was for summary judgment on the issue of liability on the common-law negligence cause of action to the extent of granting partial summary judgment on the issue of the defendants' breach of their limited duty of care to render aid to patrons struck down by heart attack or cardiac arrest. In Miglino v Bally Total Fitness of Greater N.Y., Inc. (20 NY3d 342), the Court of Appeals recognized that "New York courts have viewed health clubs as owing a limited duty of care to patrons struck down by a heart attack or cardiac arrest while engaged in athletic activities on premises" (id. at 350). The Court of Appeals has referred to this limited duty as the health club's "common-law duty to render aid" (id. at 351 …). A health club fulfills this duty by, for example, calling 911 immediately, responding to the patron and performing CPR or other measures, or responding to the patron and then deferring to someone else with superior medical training … . Hamlin v PFNY, LLC, 2020 NY Slip Op 00574. Second Dept 1-29-20

INSURANCE LAW.

IT WAS ALLEGED ONE MAN INTENDED TO DOUSE ANOTHER WITH LIQUID IN A CUP BUT UNINTENTIONALLY THREW THE CUP ITSELF CAUSING INJURY; THERE WAS A QUESTION OF FACT WHETHER THE INJURY WAS CAUSED BY INTENTIONAL CONDUCT OR AN ACCIDENT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff insurer's (Unitrin's) motion for summary judgment in this insurance-coverage dispute should not have been granted. Apparently Sullivan was in one car and the injured party, Ciminello, was in another car when Sullivan allegedly attempted to throw liquid

that was in a cup into Ciminello's car. It was alleged that Sullivan unintentionally threw the entire cup, not just its contents, which injured Ciminello. So there was a question of fact whether Ciminello was injured by intentional conduct (not covered by insurance) or an accident (which would be covered):

Ciminello raised a triable issue of fact as to whether the harm was inherent in the intentional act committed … . Ciminello submitted evidence that, although Sullivan and his passenger intended to douse Ciminello with the liquid contained in the cup, there was no intent to throw the cup and strike Ciminello with it. As the instant case does not fall within the narrow class of cases in which the intentional act exclusion applies regardless of the insured's subjective intent … , there is a triable issue of fact as to whether the event qualified as an "accident," as defined by the policy … . Unitrin Auto & Home Ins. Co. v Sullivan, 2020 NY Slip Op 00452, Second Dept 1-22-20

INSURANCE LAW.

THE CARRIER WHICH HAD ISSUED A BUSINESS AUTOMOBILE INSURANCE POLICY COVERING THE INSURED'S FLATBED TRUCK WAS OBLIGATED TO DEFEND THIS ACTION STEMMING FROM AN INJURY INCURRED WHILE UNLOADING A TRACTOR FROM THE FLATBED TRUCK; UNLOADING A TRUCK IS CONSIDERED OPERATION OF THE TRUCK UNDER VEHICLE AND TRAFFIC LAW 388 (THIRD DEPT).

The Third Department determined plaintiff-insurer was obligated to defend and the insured in this personal injury case stemming from the unloading of a tractor from a flatbed truck owned by the insured. The tractor rolled over the insured's son as it was being unloaded. The son and his wife sued the insured and the insured's farm. Plaintiff carrier brought this action for a declaratory judgment that it was not obligated to defend or indemnify, apparently claiming the (insured's) truck was not being operated when the accident occurred:

If anything within the "four corners of the complaint suggest[s] . . . a reasonable possibility of coverage," the insurer must defend, even though it may not ultimately be bound to pay because the insured may not be liable … . …

Pursuant to the Vehicle and Traffic Law, "[e]very owner of a vehicle used or operated in this state shall be liable and responsible for . . . injuries to person or property resulting from negligence in the use or operation of such vehicle, in the business of such owner or otherwise, by any person using or operating the same with the

permission, express or implied, of such owner" (Vehicle and Traffic Law § 388 [1]) … . * * * "The policy of insurance issued must be as broad as the insured owner's liability for use of the vehicle by the owner or anyone using the vehicle with his [or her] permission" … .

Loading and unloading of a covered vehicle constitute "use or operation" pursuant to Vehicle and Traffic Law § 388 (1) … , and a vehicle does not have to be in motion to be in "use or operation" … . * * *

George Henderson [the insured] loaded and secured the tractor on the flatbed truck, drove the flatbed truck to the farm, rolled the bed back and tilted it, and operated the winch that was supposed to be holding the tractor in place. He also regularly requested or allowed Charles Henderson [his son} and the other individual to unload machinery from the flatbed truck. Charles Henderson asserted that, due to George Henderson not paying attention, the winch cable went slack, causing it to release from the tractor and allow the tractor to roll. George Henderson is potentially both directly and vicariously liable for negligence in the personal injury action … , and there is prima facie "reasonable possibility of coverage" … . Thus, plaintiff is obliged to defend George Henderson and the farm in the underlying action. Farm Family Cas. Ins. Co. v Henderson, 2020 NY Slip Op 00021, Third Dept 1-2-20

MEDICAL MALPRACTICE, OUT-OF-STATE EXPERT.

STATEMENT FROM PLAINTIFF'S OUT-OF-STATE EXPERT IN THIS DENTAL MALPRACTICE ACTION NOT IN ADMISSIBLE FORM; CPLR 2106 REQUIRES A SWORN AFFIDAVIT FROM A DENTIST LICENSED IN ANOTHER STATE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the statement by a New Jersey dentist offered by the plaintiff in this dental malpractice action was not admissible because it was not in the form of a sworn affidavit. Therefore plaintiff did not raise a question of fact in opposition to defendants' motions for summary judgment:

In opposition, the plaintiff submitted, among other things, the unsworn affirmation of Martin, who was licensed to practice dentistry in the State of New Jersey. Consequently, the out-of-state dentist's statement did not constitute admissible evidence in that CPLR 2106 only authorizes attorneys, physicians, osteopaths, or dentists licensed in this state to utilize an affirmation in lieu of a sworn affidavit … . …

While an otherwise qualified expert physician, osteopath, or dentist, who is not licensed in this state, may submit a statement in support of or in opposition to a party's position in a case at bar, that statement must be in the form of a sworn affidavit. CPLR 2106(a), which permits such a statement to be in the form of an affirmation, only applies to attorneys, physicians, osteopaths, and dentists licensed to practice in the State of New York. Nelson v Lighter, 2020 NY Slip Op 00420, Second Dept 1-22-20

MEDICAL MALPRACTICE.

AFTER JURISDICTIONAL DISCOVERY, PLAINTIFF DID NOT DEMONSTRATE NEW YORK HAD JURISDICTION OVER THREE OF FOUR NEW JERSEY DEFENDANTS IN THIS MEDICAL MALPRACTICE CASE; WITH RESPECT TO ONE NEW JERSEY DEFENDANT, THE JURISDICTION ISSUE MUST BE DECIDED BY THE JURY (FIRST DEPT).

The First Department, reversing Supreme Court, determined that New Jersey defendant Princeton Radiology Associates (PRO) and the associated defendant doctors (Tsai and Chon) had demonstrated New York did not have jurisdiction over them in this medical malpractice action. With regard to another related New Jersey defendant, Princeton Procure Management, LLC (PPM), the First Department held its lack-of-jurisdiction affirmative defense should not have been dismissed and a jury must decide the issue:

After defendants PPM, PRO, Tsai and Chon moved to dismiss for lack of personal jurisdiction, the motion court found that plaintiff had made a "substantial start" in demonstrating a basis for personal jurisdiction over those defendants. PPM appealed and this Court affirmed, noting the evidence that PPM had identified a principal place of business in New York, and that it "marketed its Somerset, New Jersey, location to target New York residents, touting its proximity to New York in advertising," and "entered into an agreement with a consortium of New York City hospitals for the referral of cancer patients for treatment at its facility" … . …

Plaintiff did not meet her ultimate burden of establishing that Drs. Tsai and Chon, New Jersey doctors who treated her in New Jersey, projected themselves, on their own initiative, into New York to engage in a sustained and substantial transaction of business related to her claims, such that specific long-arm jurisdiction existed over them under CPLR 302(a)(1) … . …

… [Re: PPM] we conclude that the evidence submitted by plaintiff … does not warrant dismissal of PPM's affirmative defense of lack of jurisdiction. As to general jurisdiction under CPLR 301, plaintiff presented

documents in which PPM listed a New York place of business, but PPM submitted an affidavit of its president, who identified PPM's principal place of business as in New Jersey and denied having a New York principal office. …

Plaintiff also failed to establish that specific long-arm jurisdiction exists over PPM under CPLR 302(a)(1). The evidence presented by plaintiff, including various contracts and the radio interviews and billing documents discussed above, provides a "sufficient start" in demonstrating a basis for asserting personal jurisdiction … , but does not warrant dismissal of PPM's affirmative defense … . Robins v Procure Treatment Ctrs., Inc., 2020 NY Slip Op 00047, First Dept 1-2-20

MEDICAL MALPRACTICE.

DEFENDANT PHYSICIAN MAY BE LIABLE FOR FAILURE TO ADVISE DECEDENT AND THE NURSE MIDWIFE AGAINST HOME BIRTH; SUCH FAILURE COULD CONSTITUTE A PROXIMATE CAUSE OF DEATH; JUDGE SHOULD NOT HAVE GRANTED SUMMARY JUDGMENT BASED IN PART ON A GROUND NOT RAISED BY THE PARTIES (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant's motion for summary judgment in this medical malpractice action should not have been granted. Defendant, Lascale, is a board-certified obstetrician and gynecologist specializing in maternal-fetal medicine. Plaintiff's decedent died in childbirth when she was assisted at home by a certified nurse midwife (Moss Jones). Plaintiffs alleged Lascale negligently failed to advise decedent and Moss Jones of the dangers of a home birth given the baby's size and the fact decedent had previously given birth by caesarian section. Lascale argued his limited role, analyzing periodic sonograms, did not include advice on delivery. The Second Department noted that the motion court, sua sponte, should not have granted defendant's motion based in part on an issue not raised by the parties:

Although Lescale, a board-certified obstetrician and gynecologist, purported to limit the scope of his duty to the field of maternal-fetal medicine, and the performance and interpretation of ultrasounds, it was within such limited scope of duty to consult with the decedent and Moss Jones … , concerning his diagnosis of suspected fetal macrosomia [the baby was very large], and how such diagnosis would increase the risks of a VBAC [vaginal birth after caesarian section] home birth, given all of the other risk factors that were present. Given such risks, it was also within the scope of Lescale's duty to advise the decedent and Moss Jones against proceeding with the planned VBAC home birth. * * *

"When a question of proximate cause involves an intervening act, liability turns upon whether the intervening act is a normal or foreseeable consequence of the situation created by the defendant's negligence" . "It is only where the intervening act is extraordinary under the circumstances, not foreseeable in the norm… al course of events, or independent of or far removed from the defendant's conduct, that it may possibly break the causal nexus" … .

* * * Whether the decedent would have heeded appropriate warnings and advice by Lescale in light of, inter alia, the purported warnings she was given by Moss Jones, or her own views, is for the jury to decide … . Romanelli v Jones, 2020 NY Slip Op 00316, Second Dept 1-15-20

MEDICAL MALPRACTICE.

DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT IN THIS MEDICAL MALPRACTICE ACTION SHOULD HAVE BEEN GRANTED; PLAINTIFF'S EXPERT DID NOT DEMONSTRATE THE NECESSARY EXPERTISE AND THE EXPERT'S AFFIDAVIT WAS CONCLUSORY AND SPECULATIVE; THE COURT NOTED THAT A THEORY RAISED FOR THE FIRST TIME IN OPPOSITION TO SUMMARY JUDGMENT SHOULD NOT BE CONSIDERED (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined summary judgment should have been granted to several of the defendants in this medical malpractice action because the plaintiff's expert did not raise a triable issue of fact. The expert did not demonstrate expertise in relevant areas and the expert's opinions were conclusory and speculative with respect to three of the defendants. The Second Department noted that a court should not consider a theory of liability raised for the first time in opposition to a summary judgment motion:

"While it is true that a medical expert need not be a specialist in a particular field in order to testify regarding accepted practices in that field, the witness nonetheless should be possessed of the requisite skill, training, education, knowledge or experience from which it can be assumed that the opinion rendered is reliable" … . "Thus, where a physician provides an opinion beyond his or her area of specialization, a foundation must be laid tending to support the reliability of the opinion rendered" … . Here, the plaintiff's expert, who specialized in general and vascular surgery, did not indicate that he or she had any special training or expertise in orthopaedics or family medicine, and failed to set forth how he or she was, or became, familiar with the

applicable standards of care in these specialized areas of practice … . Further, the conclusions of the plaintiff's expert as to Desai, Anand, and Sveilich were conclusory and speculative … , improperly based on hindsight reasoning … , and self-contradictory … . Samer v Desai, 2020 NY Slip Op 00318, Second Dept 1-15-20

MEDICAL MALPRACTICE.

MEDICAL MALPRACTICE ACTIONS REINSTATED AGAINST SEVERAL DEFENDANTS; TWO JUSTICE DISSENT ARGUED THE ACTIONS WERE REINSTATED BASED UPON A NEW THEORY WHICH SHOULD NOT HAVE BEEN CONSIDERED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, over a two-justice dissent, reinstated the medical malpractice action against several defendants. The dissent argued that evidence submitted in opposition to defendants' motion for summary judgment presented a new theory and should have been rejected on that ground. The dissent argued that the new theory was raised for the first time in a "supplemental" bill of particulars which, the majority concluded, had been properly struck by Supreme Court:

… [W]e conclude that the court properly granted the motions to strike plaintiff's "supplemental" bills of particulars inasmuch as they were actually amended bills of particulars. We further conclude that the amended bills of particulars are "a nullity" inasmuch as the note of issue had been filed and plaintiff failed to seek leave to serve amended bills of particulars before serving them upon defendants … .

From the dissent:

… [P]laintiff's expert's opinions on malpractice and causation cannot create a question of fact because they are based on a new condition and new injury. Plaintiff's expert opined that: plaintiff's son developed Henoch-Schonlein Purpura (HSP) in the days before presenting to the emergency room and was suffering from HSP when he presented to the emergency room; plaintiff's son was misdiagnosed and the correct diagnosis was HSP; as a result of the mistriage, plaintiff's son went into hypovolemic shock; and, if properly triaged, plaintiff's son's condition, i.e., HSP, never would have progressed to hypovolemic shock.

Plaintiff's expert's opinion regarding failure to triage and diagnose relates to a new condition, HSP, and his opinion on proximate cause relates to a new injury, hypovolemic shock, neither of which were included in plaintiff's original bill of particulars and both of which were included in the "supplemental" bills of particulars, which this Court unanimously agrees were properly struck. Inasmuch as plaintiff's expert's opinions regarding

the defendants' negligence and proximate cause involve a new condition and new injury not included in plaintiff's original bill of particulars, they constituted a new theory of recovery and thus could not be used to defeat the defendants' motions … . Jeannette S. v Williot, 2020 NY Slip Op 00743, Fourth Dept 1-31-20

MEDICAL MALPRACTICE.

PLAINTIFFS CAN NOT RAISE A NEW THEORY OF LIABILITY IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, SUPREME COURT REVERSED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the defendant hospital's motion for summary judgment in this medical malpractice action should have been granted. The plaintiffs attempted to raise an evidentiary issue and theory of liability for the first time in opposition to the motion:

… [T]he plaintiffs improperly alleged, for the first time, a new theory claiming that other employees of the hospital were negligent in failing to properly administer Decadron and Heparin in accordance with the prescription of the plaintiff's attending physician. " A plaintiff cannot, for the first time in opposition to a motion for summary judgment, raise a new or materially different theory of recovery against a party from those pleaded in the complaint and the bill of particulars'" … . Bacalan v St. Vincents Catholic Med. Ctrs. of N.Y., 2020 NY Slip Op 00561, Second Dept 1-29-20

MEDICAL MALPRACTICE.

QUESTION OF FACT WHETHER HOSPITAL MAY BE VICARIOUSLY LIABLE FOR TREATMENT PROVIDED BY A NON-EMPLOYEE IN THE HOSPITAL EMERGENCY ROOM (SECOND DEPT).

The Second Department determined there was a question of fact whether the hospital, Good Samaritan, was vicariously liable for the alleged malpractice of a physician, Chin, who, although not a hospital employee, treated plaintiff in the hospital emergency room:

"In general, under the doctrine of respondeat superior, a hospital may be held vicariously liable for the negligence or malpractice of its employees acting within the scope of employment, but not for negligent treatment provided by an independent physician, as when the physician is retained by the patient himself" … . However, "[a]n exception to this general rule exists where a plaintiff seeks to hold a hospital vicariously liable for the alleged malpractice of an attending physician who is not its employee where a patient comes to the emergency room seeking treatment from the hospital and not from a particular physician of the patient's choosing" … . …

Here, although Good Samaritan established that Chin was not its employee, the evidence submitted in support of its motion for summary judgment was insufficient to demonstrate, prima facie, that the plaintiff entered Good Samaritan's emergency room seeking treatment from a privately selected physician rather than from the hospital itself … . Fuessel v Chin, 2020 NY Slip Op 00404, Second Dept 1-22-20

MEDICAL MALPRACTICE.

THE COURT OF CLAIMS IN THIS MEDICAL MALPRACTICE ACTION CREDITED BOTH EXPERTS, ONE OF WHOM OPINED DEFENDANT WAS AT RISK FOR FUTURE HEART PROBLEMS; THEREFORE THE AWARD OF ZERO DAMAGES FOR FUTURE PAIN AND SUFFERING WAS ERROR; AWARD INCREASED BY $10,000 (THIRD DEPT).

The Third Department, reversing the Court of Claims, determined the conflicting expert evidence credited by the Court of Claims forced the conclusion claimant suffered some permanent damage to his heart. Therefore awarding nothing for future pain and suffering was error. The Third Department awarded an additional $10,000:

… [T]he court accepted aspects of both experts' opinions, crediting both the opinion of defendant's expert cardiologist that claimant had suffered no significant permanent damage and simultaneously crediting the opinion of claimant's expert cardiologist that claimant could develop a future arrhythmia because of his injury. As claimant argues, and based upon our review of the record, we find these opinions to be inconsistent with one another. Claimant's cardiologist based his opinion that claimant was at risk of developing a future arrhythmia upon his opinion that claimant had suffered permanent damage to his heart muscle, consisting of weakness that would not resolve with time and that required the rest of his heart to work harder to maintain normal function. As the court noted, claimant's cardiologist did not quantify the degree of potential risk to which he believed claimant was exposed. Nevertheless, in order to accept the opinion that claimant's risk of suffering a future

arrhythmia was increased, the court must necessarily also have credited the cardiologist's opinion that claimant had suffered some, albeit limited, degree of permanent injury.

We thus find that the award of no damages for future pain and suffering deviates from reasonable compensation. Serrano v State of New York, 2020 NY Slip Op 00458, Third Dept 1-23-20

NOTICE, LANDLORD-TENANT.

DEFENDANT PROPERTY OWNER/MANAGER'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED; DEFENDANTS DEMONSTRATED THEY DID NOT HAVE NOTICE OF ANY PROBLEMS WITH A DOOR WHICH ALLEGEDLY MALFUNCTIONED CAUSING PLAINTIFF'S DECEDENT TO FALL OUT OF A WHEELCHAIR LIFT (FIRST DEPT).

The First Department, reversing Supreme Court, determined defendants' [property owner/manager's ?] motion for summary judgment should have been granted. Plaintiff alleged the door to a wheelchair lift on the exterior of the building where plaintiffs lived malfunctioned causing plaintiff's decedent to fall out of the lift. The defendants presented evidence they did not have notice of any problems with the door:

Defendants established prima facie entitlement to judgment as a matter of law in this action where plaintiff's decedent was injured when the door to the wheelchair lift on the exterior of the building in which they lived malfunctioned causing him to fall out of the lift. Defendants submitted evidence demonstrating that they did not have notice of any malfunction in the subject door through service records showing no issues related to the door opening prematurely … .

In opposition, plaintiff failed to raise a triable issue of fact. Plaintiff did not submit any evidence that complaints about the lift were similar in nature or caused by similar contributing factors … . Nor is the doctrine of res ipsa loquitur applicable under the circumstances presented … . Pui Kum Ng Lee v Chatham Green, Inc., 2020 NY Slip Op 00069, First Dept 1-7-20

NOTICE.

DEFENDANT SCHOOL DID NOT DEMONSTRATE IT DID NOT HAVE CONSTRUCTIVE NOTICE OF THE PROTRUDING SCREW WHICH LACERATED PLAINTIFF-STUDENT'S LEG; THE SCHOOL'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department determined defendant school did not demonstrate it lacked constructive notice of the protruding screw which allegedly lacerated plaintiff-student's leg as she walked by bleachers. Therefore the school's motion for summary judgment should not have been granted:

A property owner, or a party in possession or control of real property, has a duty to maintain the property in a reasonably safe condition … . In a premises liability case, a defendant property owner, or a party in possession or control of real property, who moves for summary judgment has the initial burden of making a prima facie showing that it neither created the alleged dangerous condition nor had actual or constructive notice of its existence for a sufficient length of time to have discovered and remedied it … . To meet its initial burden on the issue of lack of constructive notice, the moving party is required to offer some evidence as to when the accident site was last inspected or maintained prior to the plaintiff's accident … .

Here, in support of their motion, the defendants submitted, inter alia, the affidavit of the School District's Director of Facilities, Roald Broas, who averred, in relevant part, that the School District did not maintain the subject bleachers, but instead "hire[d] subcontractors to perform inspections and maintenance of the bleachers." Broas's conclusory affidavit—which failed to identify the subcontractor who performed the last inspection or maintenance on the bleachers, as well as when and how such inspection or maintenance was performed—was insufficient to establish, prima facie, the School District's lack of constructive notice of the alleged dangerous condition … . Kelly v Roy C. Ketcham High Sch., 2020 NY Slip Op 00111, Second Dept 1-8-20

NOTICE.

THE TIP OF PLAINTIFF THIRD-GRADER'S FINGER WAS SEVERED WHEN A DOOR IN THE SCHOOL BUILDING SLAMMED SHUT; THE DEFENDANT-SCHOOL'S (DEPARTMENT OF EDUCATION'S [DOE'S]) MOTION FOR SUMMARY JUDGMENT WAS PROPERLY GRANTED; THE DOOR WAS NOT DEFECTIVE, THE SCHOOL HAD NO NOTICE OF A PROBLEM WITH THE DOOR, SUPERVISION COULD NOT HAVE PREVENTED THE ACCIDENT, AND NYC IS NOT LIABLE FOR AN ACCIDENT ON SCHOOL (DOE) PROPERTY (SECOND DEPT).

The Second Department determined defendant school (NYC Department of Education [DOE]) was entitled to summary judgment in this premises liability and negligent supervision action. Plaintiff third-grader alleged a door closed on his finger, severing the tip. The school demonstrated it had no notice of any problems with the door and that supervision could not have prevented the accident. The Second Department noted that the unsigned depositions were properly considered because they were submitted by the DOE and therefore were adopted as accurate, and further noted that, because the accident occurred on school property, the city (NYC) was not liable:

The unsigned deposition transcripts of the school's custodial engineer and the injured plaintiff's teacher, who testified on behalf of their employer, the DOE, were admissible under CPLR 3116(a) because the transcripts were submitted by the DOE and, therefore, were adopted as accurate … . …

The deposition testimony of the building's custodial engineer established that he inspected the door at least twice per week before the accident. Moreover, the school principal provided evidence that a search of the school's records revealed no "indication of any maintenance, repairs, work orders, or other issues reported" with respect to the door during the two-year time period prior to the accident. This evidence, together with evidence that the subject door was in regular use, including regular use by the infant plaintiff, was sufficient to establish, prima facie, that the door was not defective … . …

When an accident occurs in so short a span of time that even the most intense supervision could not have prevented it, lack of supervision is not the proximate cause of the injury … . E.W. v City of New York, 2020 NY Slip Op 00175, Second Dept 1-8-20

OPEN AND OBVIOUS.

WOOD WHICH HAD FALLEN TO THE GROUND FROM A SPLIT RAIL FENCE IS AN OPEN AND OBVIOUS CONDITION WHICH IS NOT ACTIONABLE IN THIS SLIP AND FALL CASE (SECOND DEPT).

The Second Department determined wood from a split rail fence which had fallen to the ground was open and obvious and therefore not actionable in this slip and fall case:

A landowner has a duty to maintain its premises in a reasonably safe condition . There is, however, no duty to protect or warn against conditions that are open… and obvious and not inherently dangerous … . Here, the defendants established their entitlement to judgment as a matter of law by demonstrating, prima facie, that the wood on the ground was open and obvious and not inherently dangerous … . Swinney v Nassau County, 2020 NY Slip Op 00169, Second Dept 1-8-20

PROXIMATE CAUSE.

PLAINTIFF ALLEGEDLY INJURED HIS HAND WHEN HE SAW HIS DAUGHTER START TO SLIP OUT OF A SWING ON A SCHOOL PLAYGROUND AND STOPPED THE SWING; THE ALLEGEDLY DEFECTIVE SWING WAS NOT THE PROXIMATE CAUSE OF PLAINTIFF'S INJURY; THE COURT NOTED THAT THE ASSUMPTION OF THE RISK DOCTRINE DID NOT APPLY TO THIS SCENARIO (SECOND DEPT).

The Second Department determined plaintiff failed to demonstrate the allegedly defective swing was the proximate cause of his injury. Plaintiff alleged the swing was crooked causing his daughter to begin to slip off the seat and he fractured his hand trying to stop the swing. The Second Department noted that the assumption of the risk doctrine did not apply to this scenario:

The concept of assumption of the risk has been "generally restricted . . . to particular athletic and recreative activities in recognition that such pursuits have enormous social value' even while they may involve significantly heightened risks'" … . "As a general rule application of assumption of the risk should be limited to cases . . . such as personal injury claims arising from sporting events, sponsored athletic and recreative activities, or

athletic and recreational pursuits that take place at designated venues" … . Here, the plaintiff was pushing his young daughter in a plastic molded bucket seat swing at a playground on the School District defendants' property when, while attempting to stop the swing, he "jammed" his hand on the back of it and fractured his hand. Pushing a swing is not the type of activity to which the doctrine of assumption of the risk is applicable … . Moreover, jamming one's hand in the back of a swing "is not a risk inherent in the activity and flowing from it" … . * * *

… [T]he plaintiff's deposition testimony describing the accident leads to the conclusion, as a matter of law, that under the circumstances of this case the risk of the plaintiff's injury was not forseeable … . It is not reasonably foreseeable that the allegedly negligent installation of the swing, which caused it to swing crookedly, would have resulted in the plaintiff "jamm[ing]" his hand on the back of the swing and fracturing his hand. The alleged negligent installation of the swing merely furnished the occasion for the unrelated act of the plaintiff reaching out to grab the swing and jamming his hand … . Raldiris v Enlarged City Sch. Dist. of Middletown, 2020 NY Slip Op 00630, Second Dept 1-29-20

PROXIMATE CAUSE.

VERDICT FINDING THE SCHOOL DISTRICT WAS NEGLIGENT BUT FURTHER FINDING THE NEGLIGENCE WAS NOT THE PROXIMATE CAUSE OF THE STUDENT'S SUICIDE WAS NOT AGAINST THE WEIGHT OF EVIDENCE; PLAINTIFFS ALLEGED BULLYING AT SCHOOL CAUSED THEIR SON'S SUICIDE (THIRD DEPT).

The Third Department determined the verdict finding the school district was negligent but further finding the negligence was not the proximate cause of plaintiff-student's suicide was not against the weight of the evidence. Plaintiffs alleged bullying at school was the reason for their son's suicide and claimed the school was liable under a negligent-supervision theory:

"… [A] jury's finding that a party was at fault but that [such] fault was not a proximate cause of [decedent's] injuries is inconsistent and against the weight of the evidence only when the issues are so inextricably interwoven as to make it logically impossible to find negligence without also finding proximate cause" … . …

The conduct of defendant's employees was not blameless … — indeed, it appears that several minor incidents involving decedent provided missed opportunities for them to uncover what was going on — but the fact remains that the trial proof neither established the degree of the bullying that decedent received at school nor showed that

defendant could have anticipated its impact upon him. Therefore, the jury could logically find that defendant was negligent by failing "to adequately supervise" decedent in some respects … , but that the pain, suffering and suicide of decedent were not foreseeable consequences of that negligence … . The issues of negligence and proximate cause were not inextricably interwoven as a result and, after viewing the evidence in the light most favorable to the nonmoving party, "we find that the evidence did not so preponderate in plaintiff[s'] favor that the jury's verdict could not have been reached on any fair interpretation of the evidence" … . C.T. v Board of Educ. of S. Glens Falls Cent. Sch. Dist., 2020 NY Slip Op 00023, Third Dept 1-2-20

RES IPSA LOQUITUR.

THE JURY WAS PROPERLY INSTRUCTED ON THE DOCTRINE OF RES IPSA LOQUITUR; PLAINTIFF WAS INJURED WHEN AN AUDITORIUM RISER COLLAPSED WHEN SHE WAS WALKING ON IT (THIRD DEPT).

The Third Department determined the jury in this personal injury action was properly instructed on the doctrine of res ipsa loquitur. A riser used for a choral rehearsal collapsed as plaintiff was walking on it:

To be entitled to a res ipsa loquitur jury charge, a plaintiff must establish (1) that the injurious event is "of a kind that ordinarily does not occur in the absence of someone's negligence," (2) that the event was "caused by an agency or instrumentality within the exclusive control of the defendant" and (3) that the event was not "due to any voluntary action or contribution on the part of the plaintiff" … . …

… [A] jury could reasonably conclude that the collapse of a stage riser being put to its intended use qualifies as an event that would not ordinarily occur in the absence of negligence „„ , … [Plaintiff} … proffered expert testimony demonstrating that the collapse was most likely caused by a flaring of the riser's locking mechanism, a condition caused by "wear and tear" and which allegedly could have been discovered with proper inspection and maintenance. [P]laintiff's … expert evidence of negligence did not preclude her from also relying on the doctrine of res ipsa loquitur … .

The evidence established that the auditorium was locked whenever it was not in use and that defendant's agents exclusively assembled, disassembled, maintained and repaired the risers. * * * [P]laintiff was not required to "conclusively eliminate the possibility" that someone intentionally disengaged the locking mechanism … . Rather, all that was required was that the likelihood of an intentional act "be so reduced that the greater

probability lies at defendant's door" … . Elsawi v Saratoga Springs City Sch. Dist., 2020 NY Slip Op 00019, Third Dept 1-2-20

RESPONDEAT SUPERIOR.

DEFENDANT'S EMPLOYEE WAS NOT ACTING WITHIN THE SCOPE OF HIS EMPLOYMENT WHEN HE ARM-WRESTLED WITH PLAINTIFF; THEREFORE THE EMPLOYER WAS NOT LIABLE FOR THE ALLEGED INJURY TO PLAINTIFF UNDER A RESPONDEAT SUPERIOR THEORY (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined plaintiff's action against the owner of a defendant strip club for injuries incurred when plaintiff was arm-wrestling with defendant's employee should have been dismissed. Defendant's employee was not acting within the scope of his employment and defendant therefore could not be liable under a respondeat superior theory:

… [W]e conclude that defendants met their initial burden on the motion by establishing that the employee's act of arm wrestling plaintiff was not within the scope of his employment and that plaintiff failed to raise a triable issue of fact in response … . The uncontroverted evidence submitted by defendants demonstrated that, although the employee had various responsibilities at the club, he was not required to entertain the club's patrons, and he arm wrestled plaintiff out of personal motives unrelated to any of his job responsibilities … . Gehrke v Mustang Sally's Spirits & Grill, Inc., 2020 NY Slip Op 00741, Fourth Dept 1-31-20

RESPONDEAT SUPERIOR.

PLAINTIFF ALLEGED DEFENDANT'S EMPLOYEE, A SECURITY GUARD, ATTACKED HER; DEFENDANT'S EMPLOYEE ALLEGED PLAINTIFF ATTACKED HIM AND HE ACTED IN SELF DEFENSE; THE EMPLOYER WOULD NOT BE LIABLE UNDER EITHER SCENARIO; THE EMPLOYER'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (FIRST DEPT).

The First Department, reversing Supreme Court, determined the security guard's employer's (SEB's) motion for summary judgment in this third-party assault case should have been granted. Plaintiff alleged the security guard attacked her without provocation. The security guard alleged he acted in self defense after plaintiff and others attacked him. The employer would not be liable in either scenario:

Plaintiff Gregory testified that SEB's employee, a security guard who was then working at a movie theater, attacked her with a box cutter and slashed her face and body with it after she tapped him on the shoulder and told him she had enjoyed the movie she had just seen. The security guard gave a different version of events and claimed that he was acting in self defense after plaintiffs and others attacked him with box cutters. However, neither version of events would give rise to liability on the part of SEB. Under plaintiff's version of events, SEB could not be held liable because SEB's employee's unprovoked assault on Gregory with a box cutter was not within the scope of any duties he may have had as a security guard and was not done in furtherance of SEB's business interests … . Under the security guard's version of events, even assuming for purposes of this appeal that his actions were within the scope of his duties as a security guard and were done in furtherance of SEB's business interests, SEB would not be held liable because the security guard's actions were taken in self-defense after being attacked by patrons of the movie theater. Gregory v National Amusements, Inc., 2020 NY Slip Op 00223, First Dept 1-9-20

SLIP AND FALL, LANDLORD-TENANT, MUNICIPAL LAW.

TENANT IN THE BUILDING ABUTTING A DEFECTIVE SIDEWALK WAS NOT LIABLE FOR A SLIP AND FALL; RELEVANT LAW CONCISELY AND COMPLETELY EXPLAINED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant, a tenant in the building abutting the sidewalk, could not be held liable for a sidewalk defect which allegedly caused plaintiff's slip and fall. The Second Department concisely but completely laid out the law on the issues:

Pursuant to Administrative Code of the City of New York § 7-210(a), "the owner of real property abutting any sidewalk" has a duty "to maintain such sidewalk in a reasonably safe condition." "Notwithstanding any other provision of law, the owner of real property abutting any sidewalk . . . shall be liable for any injury to property or personal injury, including death, proximately caused by the failure of such owner to maintain such sidewalk in a reasonably safe condition" … . "As a general rule, the provisions of a lease obligating a tenant to repair the sidewalk do not impose on the tenant a duty to a third party" … . "However, where a lease agreement is so comprehensive and exclusive as to sidewalk maintenance as to entirely displace the landowner's duty to maintain the sidewalk, the tenant may be liable to a third party" … .

Here, the defendant established its prima facie entitlement to judgment as a matter of law by demonstrating that it did not create the alleged defect, make special use of the sidewalk, violate any applicable statute, or have a contractual duty to maintain the sidewalk where the accident occurred … . Leitch-Henry v Doe Fund, Inc., 2020 NY Slip Op 00112, Second Dept 1-8-20

SLIP AND FALL, MUNICIPAL LAW.

ALTHOUGH THE CITY GAVE A PERMIT TO A BUS COMPANY TO USE A PARKING LOT, THE CITY DID NOT DEMONSTRATE IT RELINQUISHED ALL CONTROL OVER THE MAINTENANCE OF THE PARKING LOT SUCH THAT IT COULD NOT BE HELD LIABLE IN THIS SLIP AND FALL CASE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that the City did not demonstrate it relinquished maintenance responsibilities for a parking lot licensed to a bus company in this slip and fall case:

… [T]he City failed to meet its prima facie burden of demonstrating that it relinquished control of the premises such that it had no duty to the plaintiff to remedy the allegedly defective condition. In support of its motion, the City submitted a copy of the permit agreement, as well as the deposition testimony of several City employees. The permit agreement provided that the bus company had some responsibility for maintenance of the premises, but that the permit also was revocable at will by the City, and the City reserved "the right at all times to free and interrupted access" to any portion of the premises. Moreover, the deposition testimony submitted by the City established, prima facie, that City employees made regular visual inspections of the premises.

Viewing the evidence in the light most favorable to the plaintiff … , it cannot be said as a matter of law that the City relinquished control of the premises to the bus company such that it owed no duty to the plaintiff to remedy the allegedly defective condition… . D'Angelo v City of New York, 2020 NY Slip Op 00569, Second Dept 1-29-20

SMOKE DETECTORS, LANDLORD-TENANT.

BUILDING OWNER NOT LIABLE FOR ALLEGED FAILURE TO ENSURE A SMOKE DETECTOR WAS FUNCTIONAL, DESPITE THE ALLEGATION THE OWNER REGULARLY INSPECTED THE SMOKE DETECTORS (FIRST DEPT).

The First Department determined the defendant landlord could not be held liable for the failure to ensure a smoke detector was functional:

In this action where plaintiff alleges that he was injured as a result of a fire in his apartment due to defendant building owner's negligent failure to provide an operable smoke detector, defendant demonstrated prima facie that he satisfied his statutory duty to provide a functional smoke detector in the apartment, and accordingly, the obligation to maintain the smoke detector was assumed by plaintiff (see Administrative Code of City of NY § 27-2045[a][1], [b][1], [2]).

Plaintiff's argument that defendant voluntarily assumed a duty to ensure his smoke detector was in good working condition by regularly inspecting tenants' smoke detectors, is unavailing. "Liability under this theory may be imposed only if defendant's conduct placed plaintiff in a more vulnerable position than he would have been in had defendant done nothing" … . Here, however, plaintiff provided no evidence that he relied on defendant's inspection of his smoke detector to ensure its functionality, and instead testified that he never saw the building superintendent inspect his smoke detector. Figueroa v Parkash, 2020 NY Slip Op 00525, First Dept 1-28-20

THIRD-PARTY ASSAULT, LANDLORD-TENANT.

QUESTIONS OF FACT WHETHER THE ASSAILANT WAS AN INTRUDER AND WHETHER THE LANDLORD HAD NOTICE OF THE DEFECTIVE DOOR LOCK IN THIS THIRD-PARTY ASSAULT CASE; LANDLORD'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (FIRST DEPT).

The First Department, reversing Supreme Court, determined defendant NYC Housing Authority's (NYCHA's) motion for summary judgment in this third-party assault case should not have been granted. Plaintiff raised questions of fact whether the assailant was an intruder and whether the NYCHA had notice of the defective entrance door to the apartment building:

NYCHA failed to eliminate an issue of fact as to whether it was " more likely or more reasonable than not'" that the man who shot plaintiff in the leg in front of his apartment door was an intruder " who gained access to the premises through a negligently maintained entrance'" … . Plaintiff testified that a man spoke to him on the sidewalk just outside the building, asking where he could find drugs, and that, after plaintiff entered through the unlocked front entrance and walked up the stairs to his floor and along the hall 10 feet to his apartment, he saw the man again when he heard the door to the stairwell open, and the man held him up at gunpoint.

From plaintiff's familiarity with building residents, the history of ongoing criminal activity, and the assailant's failure to conceal his or her identity a jury could reasonably infer "that the assailant was more likely than not an intruder" … . Plaintiff informed the police that he could identify the assailant if shown a photograph … . NYCHA's evidence also showed that there was a robbery inside the building about 18 months before plaintiff's incident, requiring repairs to the front door lock, and various shootings on the grounds … .

Contrary to NYCHA's contention, there is enough evidence as to how the assailant gained entry to the building to require consideration of whether NYCHA had actual or constructive notice of the nonfunctioning door lock … . A jury could infer from plaintiff's testimony that the assailant entered the building himself and did not need to wait for anyone in the lobby to open the door for him.

Nor does its evidence demonstrate that NYCHA did not have constructive notice of the nonfunctioning door lock, since plaintiff testified that the lock was not functioning the day before and the day of the incident, but the last daily maintenance checklist produced by NYCHA, which included the front door lock, was dated two days before the incident … . Clotter v New York City Hous. Auth., 2020 NY Slip Op 00554, First Dept 1-28-20

TRAFFIC ACCIDENTS.

DEFENDANT DRIVER HAD THE BURDEN TO PROVE FREEDOM FROM COMPARATIVE NEGLIGENCE IN THIS TRAFFIC ACCIDENT CASE; DEFENDANT FAILED TO ELIMINATE QUESTIONS OF FACT ABOUT WHETHER HE WAS TRAVELLING TOO FAST AND WHETHER HE KEPT A PROPER LOOKOUT FOR PLAINTIFF BICYCLIST; DEFENDANT'S SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant driver, Perrone, did not eliminate questions of fact concerning whether he was negligent in travelling too fast for conditions or in keeping a proper lookout. Plaintiff bicyclist was struck while trying to see around a construction wall separating the bicyclist from the traffic:

Since there can be more than one proximate cause of an accident, a defendant moving for summary judgment has the burden of establishing freedom from comparative negligence as a matter of law … . "In order for a defendant driver to establish entitlement to summary judgment on the issue of liability in a motor vehicle collision case, the driver must demonstrate, prima facie, inter alia, that he or she kept the proper lookout, or that his or her alleged negligence, if any, did not contribute to the accident" … . The issue of comparative fault is generally a question for the trier of fact … .

Here, the defendants failed to establish, prima facie, that Perrone was free from comparative fault in the happening of the accident. In particular, the defendants failed to eliminate triable issues of fact as to whether Perrone kept a proper lookout or was traveling at a reasonable and prudent speed as he approached the intersection in light of the conditions then present … . Ballentine v Perrone, 2020 NY Slip Op 00562, Second Dept 1-29-20

TRAFFIC ACCIDENTS.

DEFENSE VERDICT SHOULD HAVE BEEN SET ASIDE; DEFENDANT MADE A LEFT TURN IN FRONT OF PLAINTIFF'S MOTORCYCLE (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined plaintiff's motion to set aside the defense verdict in this traffic accident case should have been granted. Defendant made a left turn in front of plaintiff's motorcycle:

A court should be guided by the rule that, "if the verdict is one that reasonable persons could have rendered after receiving conflicting evidence, the court should not substitute its judgment for that of the jury" … . Here, as the court charged the jury, "defendant had a common-law duty to see that which [he] should have seen through the proper use of [his] senses" … . The evidence undisputedly established that the area of the accident did not have any obstructions and that defendant had a clear line of sight of oncoming traffic. Inasmuch as defendant admitted at trial that he never saw plaintiff or his motorcycle prior to the accident, we conclude that the finding that defendant was not negligent could not have been reached on any fair interpretation of the evidence … . Cramer v Schruefer, 2020 NY Slip Op 00728, Fourth Dept 1-31-20

TRUSTS AND ESTATES, TRUSTEES.

THE TRUST-ASSET-SUBSTITUTION AGREEMENT, SUBSTITUTING LIFE INSURANCE FOR CERTAIN ASSETS, WAS SUBJECT TO EPTL 11-1.7(a)(1); THEREFORE THE PROVISION OF THE AGREEMENT RELEASING THE TRUSTEE FROM LIABILITY WAS AGAINST PUBLIC POLICY AND THE TRUSTEE IS LIABLE FOR FAILING TO ENSURE THE LIFE INSURANCE PREMIUMS WERE PAID (SECOND DEPT).

The Second Department, reversing Surrogate's Court, determined the 1992 agreement substituting life insurance for trust assets was covered by Estates, Powers and Trusts Law (EPTL) 11-1.7(a)(1) and the trustee, which owned the policies, was liable in negligence for failing to ensure the premiums were paid (the policies had

lapsed). The provision of the trust-asset-substitution agreement exonerating the trustee from liability was invalid as against public policy. The matter was remitted for a determination of damages:

The Surrogate's Court found that the 1992 agreement created a "new trust agreement" funded in part by the life insurance policies, which was not part of the testamentary trust, and therefore not governed by EPTL 11-1.7(a). The court further found that the agreement released the trustee from any promises relating to "the substitution of property," which relieved the trustee of any "liability to monitor the investment owed to the trust," released the trustee and any successor trustee "from any future lawsuit," and released the trustee of any fiduciary duty to act upon Robert's default in paying insurance premiums.

Contrary to the conclusion of the Surrogate's Court, the agreement did not create a new trust. Rather, the agreement provided for the substitution of testamentary trust property with life insurance policies. The petitioner included the life insurance policies in its final account of the testamentary trusts as worthless assets. There is no reference to any separate accounting for the life insurance policies as part of a separate trust. Thus, the duty of the trustee was governed by EPTL 11-1.7(a)(1), which states that the exoneration of a testamentary trustee from liability for failure to exercise reasonable care, diligence, and prudence is contrary to public policy. Matter of Wilkinson, 2020 NY Slip Op 00286, Second Dept 1-15-20