NEW YORK APPELLATE DIGEST, LLC

Negligence
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An Organized Compilation of Summaries of Selected Decisions Addressing Negligence Released by the New York State Appellate Courts in February 2020. The Issues Are Described in the Table of Contents. The Entries in the Table of Contents Link to the Summaries Which Link 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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ASSUMPTION OF RISK.

THE JURY SHOULD HAVE BEEN INSTRUCTED ON THE IMPLIED ASSUMPTION OF RISK DOCTRINE IN THIS SKIING ACCIDENT CASE, DEFENDANTS' MOTION TO SET ASIDE THE $3,000,000/$15,000,000 VERDICT SHOULD HAVE BEEN GRANTED; THE DAMAGES AMOUNT IS NOT SUPPORTED BY THE RECORD (SECOND DEPT).

The Second Department, ordering a new trial, determined defendants' motion to set aside the verdict should have been granted. The jury should have been instructed on implied assumption of risk in this skiing accident case involving a nine-year-old novice skier. Plaintiff struck a pole and fractured her femur. The jury awarded $3,000,000 in past damages and $15,000,000 in future damages. If defendants are found liable in the second trial, there will be a trial on damages unless the plaintiff stipulates to $950,000 past damages and $1,250,000 future damages:

… [O]n their motion for summary judgment dismissing the complaint, the movants failed to establish their entitlement to judgment as a matter of law on the ground that the action was barred by the doctrine of assumption of the risk … . The evidence submitted in support of the motion demonstrated that the injured plaintiff was a nine-year-old novice skier on a bunny slope, which is a part of the ski area specifically designed for beginners who are learning how to ski. The evidence submitted also included the injured plaintiff's deposition testimony that she believed it was safer to continue beyond the devices than to be struck by a passing skier if she fell. The devices warned skiers to slow down but did not warn them to stop. These facts presented a triable issue of fact as to whether the injured plaintiff was aware of and fully appreciated the risk involved in downhill skiing and the terrain of the bunny slope such that she assumed the risk of injury … .

At the close of the trial on the issue of liability, the Supreme Court denied the defendants' request to instruct the jury on express assumption of the risk and implied assumption of the risk. While there was no evidence elicited at trial that the injured plaintiff expressly assumed the risk of injury, the evidence did support an instruction on implied assumption of risk. Specifically, a factual issue was presented regarding whether the injured plaintiff assumed the risk of skiing in the area where the PVC pipe was located. Although the injured plaintiff testified that the PVC pipe "blended with the snow," the pipe had a brightly colored guide-rope attached to it on the day of the accident and was behind warning devices past which the injured plaintiff skiied … . Therefore, the court should have granted the defendants' request to instruct the jury on implied assumption of the risk. Under the facts of this case, the failure to instruct the jury on implied assumption of the risk is an error warranting a new trial … . Zhou v Tuxedo Ridge, LLC, 2020 NY Slip Op 01206, Second Dept 2-19-20

CONTRACT LAW.

ALTHOUGH PLAINTIFF WAS A THIRD-PARTY BENEFICIARY OF A CONTRACT BETWEEN THE DEFENDANT AND THE COUNTY, PLAINTIFF SUED ON A NEGLIGENCE THEORY ONLY; THE NEGLIGENCE COMPLAINT PROPERLY SURVIVED SUMMARY JUDGMENT, CRITERIA EXPLAINED (THIRD DEPT).

The Third Department determined plaintiff's negligence claim arising from a contract properly survived summary judgment. Plaintiff qualified for the Home Energy Assistance Program. Pursuant to that program, defendant installed a chimney liner pursuant to a contract with the county. Although plaintiff was a third-party beneficiary of the that contract and could have sued on that ground, plaintiff's complaint sounded only in negligence:

Plaintiff could have … asserted a claim for breach of contract, but limited herself to a claim for negligence that will not lie "unless a legal duty independent of the contract itself has been violated" … . It must, as a result, be shown that defendants owed a duty of care to plaintiff "spring[ing] from circumstances extraneous to, and not constituting elements of, the contract, although it may be connected with and dependent upon the contract" … .

In assessing whether such a duty existed, we note that defendants were engaged to install a stainless steel liner in plaintiff's chimney "in a professional manner." Plaintiff alleges that the contracted-for work was done improperly and prevented the adequate venting of furnace exhaust. She also alleges deficiencies beyond that work, however, contending that defendants negligently failed to address visible deterioration of the chimney and surrounding roof that allowed water to infiltrate the home and caused mold growth that damaged both the home and the personalty within it. In response to defendants' motion for summary judgment, plaintiff provided the affidavit of an engineer who opined that the obvious problems with the roof and chimney should have been addressed by defendants while they were repairing adjacent parts of the chimney. … It is further notable that the work was paid for by public funds and aimed at helping plaintiff meet her "immediate home energy needs" (42 USC § 8621 [a]), both of which show a "public interest in seeing it performed with reasonable care" … . Jones v County of Chenango, 2020 NY Slip Op 01229, Third Dept 2-20-20

DAMAGES.

VERDICT AWARDING $0 DAMAGES FOR FUTURE AND PAIN SUFFERING SHOULD HAVE BEEN SET ASIDE, $100,000 WOULD BE REASONABLE COMPENSATION (FIRST DEPT).

The First Department, reversing Supreme Court, determined the damages verdict awarding $0 for future pain and suffering should have been set aside:

The jury's award of damages for past pain and suffering deviates materially from what would be reasonable compensation (see CPLR 5501[c]). Plaintiff sustained a bimalleolar ankle fracture and underwent two surgeries, the first involving implantation of hardware in the ankle and the second involving arthroscopy and removal of the hardware and some scar tissue. Comparing this matter to similar cases … , we find that $275,000 is reasonable compensation … .

The award for future damages also deviates materially from what would be reasonable compensation (CPLR 5501[c]). Defendant's expert agreed that plaintiff's injury is permanent and that he has developed arthritis in his left ankle, which may require treatment in the future, including the possibility of an ankle replacement. In light of the foregoing, we find that $100,000 for future pain and suffering is reasonable compensation … . Thomas v New York City Hous. Auth., 2020 NY Slip Op 01001, First Dept 2-13-20

INQUESTS.

DEFENDANT DEFAULTED; SUPREME COURT SHOULD NOT HAVE CONSIDERED LIABILITY ISSUES AT THE INQUEST TO DETERMINE DAMAGES (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the court should not have considered issues of liability because defendant had defaulted and thereby admitted liability:

In this action, inter alia, to recover damages for personal injuries, the defendant failed to appear or answer the complaint. In an order … , the Supreme Court granted the plaintiff's unopposed motion for leave to enter a default judgment against the defendant and directed an inquest on the issue of damages. After conducting the inquest, the court … determined that the plaintiff had failed to establish, prima facie, that the defendant was

negligent and that her negligence was a substantial factor in causing the plaintiff's injuries, and thereupon, sua sponte, directed the dismissal of the complaint.

By defaulting, the defendant admitted "all traversable allegations in the complaint, including the basic allegation of liability" … . As such, the sole issue to be determined at the inquest was the extent of the damages sustained by the plaintiff, and the Supreme Court should not have considered issues of liability … . Arluck v Brezinska, 2020 NY Slip Op 00839, Second Dept 2-5-20

LEGAL MALPRACTICE.

PLAINTIFF ALLEGED THE FAILURE OF DEFENDANT ATTORNEYS TO PROPERLY PREPARE THE EYEWITNESS TO THE ACCIDENT RESULTED IN THE WITNESS'S INCONSISTENT TESTIMONY AT TRIAL AND A DEFENSE VERDICT; ARGUING THAT THERE WOULD HAVE BEEN A PLAINTIFF'S VERDICT ABSENT THE ATTORNEYS' MALPRACTICE IS TOO SPECULATIVE TO SUPPORT A LEGAL MALPRACTICE ACTION (FIRST DEPT).

The First Department, reversing Supreme Court, determent defendant attorneys' motion for summary judgment in this legal malpractice action should have been granted. Plaintiff was allegedly struck by a garbage truck and seriously injured. Plaintiff could not describe the truck and plaintiff's case depended upon the testimony of an eyewitness, Arenas. Arenas's descriptions of the truck were not consistent and there was a defense verdict. Plaintiff alleged defendant attorneys failed to properly prepare Arenas for his deposition, which resulted in Arenas's inconsistent testimony at trial:

"[M]ere speculation of a loss resulting from an attorney's alleged omissions . . . is insufficient to sustain a claim" for legal malpractice" … . Plaintiff's assertion that, had Arenas been better prepared, the jury would have returned a favorable verdict is pure speculation … . Defendants met their burden of showing that plaintiff cannot establish causation, in that plaintiff cannot prove that it would have prevailed in the underlying action "but for" defendant's alleged negligence in preparing Arenas for his deposition … .

Although there are issues of fact regarding whether defendants may have departed from the applicable standard of care, any claim that the jury would have reached a different result in the personal injury action is wholly speculative. First, it is wholly speculative that Arenas would have testified to a different description of the truck

either at his deposition or at trial had he been shown the investigative reports. Although the investigative reports were read to him line by line at his deposition, his description of the truck did not change and he adhered to his belief, that the front of the truck he saw strike and run over plaintiff was bullnosed. Even if Arenas's statement in support of plaintiff's motion in this case is accurate, that he would have testified differently had he been differently prepared, this, at best, creates an issue of fact about what he would have said at trial. It does not eliminate speculation about what the jury's verdict would have been, given that Arenas's description of the truck otherwise lacked detail, and the absence of any additional proof identifying defendants' truck and driver as being involved in underlying accident. Caso v Miranda Sambursky Slone Sklarin Verveniotis LLP, 2020 NY Slip Op 01384, First Dept 2-27-20

MEDICAL MALPRACTICE, EMPLOYMENT LAW.

HOSPITAL DID NOT DEMONSTRATE THE TREATING EMERGENCY PHYSICIAN WAS NOT AN EMPLOYEE AND DID NOT DEMONSTRATE THE EMERGENCY PHYSICIAN DID NOT DEPART FROM ACCEPTED STANDARDS OF MEDICAL CARE; THE HOSPITAL'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined the medical malpractice action against the hospital (Mercy) should not have been dismissed. The hospital failed to demonstrate the emergency physician (Hughes) was not an employee and failed to demonstrate the emergency physician did not depart from the accepted standards of care:

… [T]he Mercy defendants failed to establish, prima facie, that they could not be held vicariously liable for the alleged malpractice of Hughes on the ground that he was not an employee. The medical records submitted by the Mercy defendants in support of the subject branches of the motion established that the plaintiff arrived at the hospital for treatment of her abdominal pain through the emergency department, and not as a patient of any particular physician … . In addition, the affidavit of a registered nurse employed by the defendant Mercy Medical Center as a Director Risk Management/Privacy Officer contained no evidentiary basis to support her conclusory assertion that Hughes was not an employee of the hospital … .

The Mercy defendants also failed to establish, prima facie, that Hughes did not depart from accepted community standards of medical care in the treatment of the plaintiff, or that any departure by Hughes was not a proximate cause of the plaintiff's injuries … . Pinnock v Mercy Med. Ctr., 2020 NY Slip Op 01374, Second Dept 2-26-20

MEDICAL MALPRACTICE, EMPLOYMENT LAW.

PLAINTIFF PROPERLY ALLOWED TO AMEND THE MEDICAL MALPRACTICE COMPLAINT AFTER THE STATUTE OF LIMITATIONS HAD RUN TO ADD A TREATING DOCTOR EMPLOYED BY A NAMED DEFENDANT PURSUANT TO THE RELATION-BACK DOCTRINE (SECOND DEPT).

The Second Department determined the relation-back doctrine allowed the amendment of the complaint (CPLR 1003) in this medical malpractice, wrongful death action to add a doctor, Abergel, who treated plaintiff's decedent and was employed by the defendant professional corporation (P.C.):

The causes of action arose out of the same conduct, to wit, the alleged negligence by [defendant] Purow and Abergel in the course of treating the decedent for her ulcerative colitis at the P.C.'s office, which they each did within the scope of their employment with the P.C. …

The vicarious liability of the P.C. allows for a finding of unity of interest with Abergel, "regardless of whether the actual wrongdoer or the person or entity sought to be charged vicariously was served first'" … . …

… [T]he plaintiff satisfied the third prong of the test, which focuses, inter alia, on "whether the defendant could have reasonably concluded that the failure to sue within the limitations period meant that there was no intent to sue that person at all and that the matter has been laid to rest as far as he [or she] is concerned'" … . The decedent's medical records from the P.C. included several notes signed by Abergel, and clearly and repeatedly referenced Abergel as a physician who treated the decedent as part of the care rendered to the decedent by the P.C. * * * In addition, the plaintiff demonstrated that the failure to originally name Abergel as a defendant was the result of a mistake, and there was no need to show that such mistake was excusable … . Petruzzi v Purow, 2020 NY Slip Op 01372, Second Dept 2-26-20

MEDICAL MALPRACTICE.

CONTINUOUS TREATMENT DOCTRINE NOT AFFECTED BY A YEAR AND THREE MONTH GAP IN TREATMENT, DEFENDANTS' SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED IN THIS MEDICAL MALPRACTICE ACTION (FIRST DEPT).

The First Department, reversing Supreme Court, determined defendants' motion for summary judgment in this medical malpractice action should not have been granted. Although the alleged malpractice (the failure to follow up on a detection of a mass) occurred in 2006, the continuous treatment doctrine tolled the statute of limitations. A year and three month gap in treatment did not preclude application of the continuous treatment doctrine:

Plaintiff raised an issue of fact as to whether Dr. Woo continuously treated the decedent for conditions related to renal cell carcinoma. Plaintiff's expert, Dr. Feit, opined that Dr. Woo treated the decedent for symptoms of back pain, hypertension, and insomnia, all of which were symptoms of and related to renal cell carcinoma, a diagnosis that should have been considered given the findings in the 2006 MRI of a renal mass.

Plaintiff sufficiently established that such treatment continued through the decedent's hospitalization in July 2012. * * *

The one-year-and-three month gap between the April 2011 visit and the July 2012 note does not preclude application of the continuous treatment doctrine … . Dookhie v Woo, 2020 NY Slip Op 00975, First Dept 2-11-20

MEDICAL MALPRACTICE.

QUESTION OF FACT WHETHER THE DOCTRINE OF RES IPSA LOQUITUR APPLIES IN THIS MEDICAL MALPRACTICE CASE; QUESTION OF FACT WHETHER THE MEDICAL CENTER IS LIABLE UNDER THE OSTENSIBLE AGENCY DOCTRINE (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined: (1) there is a question of fact whether the doctrine of res ipsa loquitur applied in this medical malpractice action; (2) the lack of informed consent cause

of action should be reinstated; (3) there is a question of fact whether the medical center (NYU Langone) is liable for the anesthesiologist (Coopersmith) who performed the pre-surgery nerve block pursuant to the doctrine of ostensible agency; and (4) the action against the doctor who assisted Dr. Coopersmith was properly dismissed because she didn't exercise any independent judgment in the procedure:

… [W]e agree with plaintiff that she sufficiently established that the doctrine of res ipsa loquitur applies to her cause of action for medical malpractice. The parties' experts disagreed as to whether plaintiff's injury ordinarily occurs in the absence of negligence, raising an issue of fact on that point … . Plaintiff also established that defendants were in control of all instruments used in the nerve block, and plaintiff's actions did not contribute to her injuries … . To the extent that defendants' expert opined that post-operative symptoms and image studies were not consistent with needle trauma to a nerve, that opinion did not refute plaintiff's assertion of res ipsa loquitur because it failed to identify any other possible cause of plaintiff's plexopathy, let alone a more probable cause … . Moreover, defendants' expert did not dispute that plaintiff sus tained nerve damage and did not opine that the nerve damage pre-existed the surgery. …

We agree with defendants that they were entitled to a determination that no actual agency existed between NYU Langone and Dr. Coopersmith because NYU Langone did not employ or otherwise control Dr. Coopersmith. However, we find that an issue of fact exists as to whether NYU Langone could be held liable for Dr. Coopersmith's actions in his treatment of plaintiff through ostensible agency. It is undisputed that plaintiff was treated by Dr. Feldman [the surgeon] because she sought out his care. However, Dr. Feldman testified that he did not choose which anesthesiologist at NYU Langone would perform the nerve block on plaintiff, instead an anesthesiologist was assigned by the Department of Anesthesia. A jury could reasonably infer from this testimony that Dr. Coopersmith was provided by NYU Langone and that plaintiff reasonably believed that Dr. Coopersmith was acting on NYU Langone's behalf … . Sklarova v Coopersmith, 2020 NY Slip Op 01033, First Dept 2-13-20

MUNICIPAL LAW, NOTICE OF CLAIM.

ALTHOUGH THE EXCUSE WAS NOT ADEQUATE PETITIONER'S APPLICATION FOR LEAVE TO FILE A LATE NOTICE OF CLAIM SHOULD HAVE BEEN GRANTED; RESPONDENTS HAD TIMELY NOTICE OF THE INCIDENT AND DEMONSTRATED NO PREJUDICE FROM THE DELAY (FIRST DEPT).

The First Department, reversing Supreme Court, determined petitioner's application for leave to file a late notice of claim should have been granted. Although the excuse was inadequate, the respondents had timely notice of the incident and were not prejudiced by the delay:

In determining whether to grant an extension, the key factors to consider are: (1) "whether the movant demonstrated a reasonable excuse for the failure to serve the notice of claim within the statutory time frame"; (2) "whether the municipality acquired actual notice of the essential facts of the claim within 90 days after the claim arose or a reasonable time thereafter"; and (3) "whether the delay would substantially prejudice the municipality in its defense" … .

Here, although petitioners failed to offer any reasonable excuse for their failure to timely serve a notice of claim, this failure is not, standing alone, fatal … . Indeed, petitioners sufficiently demonstrated that respondents acquired actual notice of the event within a reasonable time thereafter, and that respondents would not be substantially prejudiced in their defense by the delay. Specifically, there is a surveillance video of the accident [which] … the claims administrator … acknowledged having in its possession approximately six months after the accident. Moreover, the operator of the lift that injured petitioner was employed by respondents.

In addition, the correspondence … suggests that … only one month after plaintiff's accident, respondents' insurers were aware that the claims administrator anticipated that petitioner would be asserting a claim based on the … . … Our conclusion is further supported by the relatively short delay in petitioners' moving for leave to file a late notice of claim. Matter of Sproule v New York Convention Ctr. Operating Corp., 2020 NY Slip Op 01015, First Dept 2-13-20

PRODUCTS LIABILITY.

DEFENDANTS' MOTION TO DISMISS ON FORUM NON CONVENIENS GROUNDS SHOULD NOT HAVE BEEN GRANTED IN THIS PRODUCTS LIABILITY ACTION, DESPITE THE FACT THAT ONLY TWO OF THE 19 PLAINTIFFS RESIDED IN NEW YORK (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendants' motion to dismiss on forum non conveniens grounds should not have been granted. Nineteen plaintiffs brought this production liability action alleging damage caused by defendants' "Just For Men" dyes and products. Only two plaintiffs resided in New York and defendants' motion to dismiss was granted on that ground, without any further proof:

"The doctrine of forum non conveniens permits a court to dismiss an action when, although it may have jurisdiction over a claim, the court determines that in the interest of substantial justice the action should be heard in another forum'" (… CPLR 327[a]). The burden was on the defendants to show that "considerations relevant to private or public interest militate against accepting or retaining the litigation" … . Factors to consider are the residency of the parties, potential inconvenience to proposed witnesses, especially nonparty witnesses, availability of an alternative forum, the situs of the actionable events, the location of the evidence, and the burden that retaining the case would have on New York courts … .

Here, the defendants asserted no facts other than that the nonresident plaintiffs were out-of-state residents. The defendants did not meet their burden of proof on the issue of convenience of the witnesses, since, among other things, there was no statement as to whom the witnesses are and where they reside. Moreover, Just For Men's design, manufacturing, labeling, advertising, and executive decision-making all allegedly occurred in White Plains, where Combe Incorporated has a principal place of business. Further, there is no per se rule stating that out-of-state plaintiffs cannot, on the ground of forum non conveniens, sue in New York based upon products liability … , despite the fact that evidence of damages would most often be found where the plaintiff resides. Albright v Combe Inc., 2020 NY Slip Op 00837, Second Dept 2-5-20

SLIP AND FALL, LANDLORD-TENANT, MUNICIPAL LAW.

ALTHOUGH THE LEASE DID NOT IMPOSE A DUTY ON THE TENANT TO MAINTAIN THE SIDEWALK, THE VILLAGE CODE DID; THE TENANT'S MOTION FOR SUMMARY JUDGMENT IN THIS SIDEWALK SLIP AND FALL CASE SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant tenant's (Invite Health's) motion for summary judgment in this sidewalk slip and fall case should not have been granted. Although, under the lease, the tenant had no duty to maintain the sidewalk, the village code imposed that duty on owners and tenants:

Here, Code of the Village of New Hyde Park § 165-40.1 requires "owners, tenants or other persons occupying or entitled to the possession and control of any lands, whether vacant or improved" to, among other things, maintain the abutting public sidewalk "in a good state of repair and free and clear of any physical defects or other unsafe, hazardous or dangerous obstructions, encumbrances or conditions" and imposes joint and several liability upon them for injuries caused by their breach of that duty (see Code of the Village of New Hyde Park §§ 1-18, 165-40.1). Given the Code's imposition of an obligation on a tenant or occupant to maintain an abutting public sidewalk, Invite Health, as a tenant and occupant of the abutting property, had a statutory duty to maintain the public sidewalk where the accident occurred (see Code of the Village of New Hyde Park §§ 1-18, 165-40.1 …) . As such, the mere fact that Invite Health had no duty under the lease agreement to maintain the abutting sidewalk was not dispositive of the issue of whether it owed the injured plaintiff a duty of care. Mule v Invite Health at New Hyde Park, Inc., 2020 NY Slip Op 00869, Second Dept 2-5-20

SLIP AND FALL, MUNICIPAL LAW.

SIDEWALK DAMAGE CAUSED BY TREE ROOTS DOES NOT CONSTITUTE AFFIRMATIVE NEGLIGENCE BY THE CITY; THEREFORE THE CITY'S MOTION FOR SUMMARY JUDGMENT IN THIS SIDEWALK SLIP AND FALL CASE SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the city's alleged failure address sidewalk defects caused by tree roots was not affirmative negligence and therefore was not actionable in this slip and fall case:

"Administrative Code of the City of New York § 7-210, which became effective September 14, 2003, shifted tort liability for injuries arising from a defective sidewalk from the City to the abutting property owner, except for sidewalks abutting one-, two-, or three-family residential properties that are owner occupied and used exclusively for residential purposes" … . Administrative Code § 7-210, however, "does not shift tort liability for injuries proximately caused by the City's affirmative acts of negligence" … . Here, the defendants established, prima facie, that the abutting building at issue was not a one-, two-, or three-family residence, and that they did not affirmatively cause or create the alleged defect in the sidewalk … . Moreover, even assuming that the defendants were responsible for the maintenance of the tree and that the tree's roots caused the alleged sidewalk defect, the defendants' alleged failure to maintain the roots would, at most, constitute nonfeasance, not affirmative negligence … . Dragonetti v 301 Mar. Ave. Corp., 2020 NY Slip Op 01144, Second Dept 1-19-20

SLIP AND FALL, MUNICIPAL LAW.

TOWN DID NOT DEMONSTRATE IT DID NOT RECEIVE WRITTEN NOTICE OF THE ALLEGED SIDEWALK DEFECT IN THIS SLIP AND FALL CASE; THE TOWN'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined that the town's motion for summary judgment in this sidewalk slip and fall case should not have been granted because the town did not demonstrate it had not received written notice of the defect. The Second Department noted that Supreme Court properly rejected plaintiff's theory that inadequate lighting was a factor because that theory was not in the notice of claim and permission to amend the notice of claim was not sought by the plaintiff:

To prevail on its motion, it was the Town's burden to establish, prima facie, that no prior written notice of the alleged condition was given to either the Town Clerk or Town Commissioner of Highways (see Code of the Town of Hempstead § 6-3; Town Law § 65-a[2]). In support of its motion for summary judgment, the Town submitted, inter alia, the affidavit of a records access officer for the Town's Highway Department, wherein she specifically averred that she searched the Highway Department records, but did not state that she searched the Town Clerk's records. Thus, the Town failed to establish, prima facie, that neither the Town Clerk nor the Commissioner of Highways received prior written notice of the alleged condition … . Weinstein v County of Nassau, 2020 NY Slip Op 00890, Second Dept 2-5-20

SLIP AND FALL.

PLAINTIFF COULD NOT IDENTIFY THE CAUSE OF HER STAIRWAY SLIP AND FALL; DEFENDANT'S SUMMARY JUDGMENT MOTION IN THIS NEGLIGENT MAINTENANCE CASE SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant's motion for summary judgment should have been granted in this stairway slip and fall case. Plaintiff could not identify the cause of her fall and handrails were not required:

In a premises liability case, a defendant moving for summary judgment can establish its prima facie entitlement to judgment as a matter of law on the issue of negligent maintenance by showing that the plaintiff cannot identify the cause of his or her accident … . "Although proximate cause can be established in the absence of direct evidence of causation [and] . . . may be inferred from the facts and circumstances underlying the injury, [m]ere speculation as to the cause of a fall, where there can be many causes, is fatal to a cause of action" … . Where it is just as likely that some factor other than a dangerous or defective condition, such as a misstep or a loss of balance, could have caused an accident, any determination by the trier of fact as to causation would be based upon sheer speculation … . Here, in support of its motion for summary judgment, the defendant submitted, inter alia, the transcript of the plaintiff's deposition testimony. Based upon the plaintiff's testimony that she did not know what caused her to lose her footing, the defendant established its prima facie entitlement to judgment as a matter of law dismissing the complaint on the issue of negligent maintenance … . Gaither-Angus v Adelphi Univ., 2020 NY Slip Op 01147, Second Dept 2-19-20

SLIP AND FALL.

PROOF DID NOT DEMONSTRATE THE PLACEMENT OF A RUG CONSTITUTED A DANGEROUS CONDITION IN THIS SLIP AND FALL CASE, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the proof did not establish the placement of a rug was a dangerous condition in this slip and fall case:

Plaintiff commenced this action seeking damages for injuries she sustained when she allegedly tripped and fell on a rug while walking through a restaurant owned and operated by defendant. We agree with defendant that Supreme Court erred in denying its motion seeking summary judgment dismissing the complaint. We therefore reverse the order, grant the motion, and dismiss the complaint. "Although the issue whether a certain condition qualifies as dangerous or defective is usually a question of fact for the jury to decide . . . , summary judgment in favor of a defendant is appropriate where a plaintiff fails to submit any evidence that a particular condition is actually defective or dangerous' " … . Here, defendant established its entitlement to judgment as a matter of law by submitting evidence that the placement of the rug in the restaurant did not constitute a dangerous condition, and in opposition plaintiff failed to raise a triable issue of fact … . Glosek v Bella Pizza, 2020 NY Slip Op 00933, Fourth Dept 2-7-20

SLIP AND FALL.

THERE WAS EVIDENCE THE WATER ON THE FLOOR WAS A RECURRENT DANGEROUS CONDITION; PLAINTIFF SHOULD HAVE BEEN ALLOWED TO PRESENT AS A WITNESS DEFENDANT'S EMPLOYEE, THE BUILDING SUPERINTENDENT AT THE TIME OF THE SLIP AND FALL, DESPITE LATE NOTIFICATION; THE DIRECTED VERDICT WAS REVERSED (FIRST DEPT).

The First Department, reversing the directed verdict, determined the proof demonstrated water leaking from the ceiling onto the floor was a recurrent dangerous condition which was not addressed by the landlord. The First Department also held that a witness for the plaintiff, who was defendant's employee at the time of the accident, should have been allowed to testify:

Plaintiff's trial evidence established prima facie that defendant had constructive notice of the water on the floor of the lobby of its building on which plaintiff allegedly slipped and fell … . Plaintiff testified that at least four times before his accident, every few months, he observed water leaking from the ceiling onto the floor below in the area where he fell. His former girlfriend, with whom he lived in the building, testified that before the date of the accident "there were leaks and then afterward it was leaking again." This testimony established that "an ongoing and recurrent dangerous condition existed in the area of the accident that was routinely left unaddressed by the landlord" … . Issues of credibility were for the jury.

The trial court improvidently exercised its discretion in precluding the testimony of Henry Soto, defendant's building superintendent at the time of the accident, on the ground that it was prejudicial to defendant. Defendant could not have been prejudiced or surprised by plaintiff's disclosure of Soto as a witness on the eve of trial, since Soto was defendant's employee at the time of the accident … . Monzac v 1141 Elder Towers LLC, 2020 NY Slip Op 01243, First Dept 2-20-20

SLIP AND FALL.

WIFE'S MOTION TO BE SUBSTITUTED FOR HER DECEASED HUSBAND TO ENFORCE THE PAYMENT OF THE SETTLEMENT IN HER HUSBAND'S SLIP AND FALL CASE SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that plaintiff's wife's (Jesenia's) motion pursuant to CPLR 1015 for leave to substitute herself for her deceased husband in this slip and fall case should have been granted. Defendant had settled the case and Jesenia was seeking payment:

Contrary to the Supreme Court's determination, the settlement of the action did not preclude the granting of a motion for substitution (see CPLR 1015[a]; 1021 …). "The death of a party divests the court of jurisdiction and stays the proceedings until a proper substitution has been made pursuant to CPLR 1015(a)" … . Without substitution as a party plaintiff, Jesenia may not seek relief pursuant to CPLR 5003-a. CPLR 5003-a provides that if a settling defendant fails to pay the sum due under a settlement agreement within 21 days of tender of a duly executed release and a stipulation discontinuing the action, the settling plaintiff may, without further notice, pursue the entry of a judgment in the amount of the settlement, plus interest, costs, and disbursements … . Rivera v Skeen, 2020 NY Slip Op 01100, Second Dept 2-13-20

TRAFFIC ACCIDENTS, BICYCLES.

PLAINTIFF WAS RIDING HER BICYCLE ON A SIDEWALK WHEN SHE COLLIDED WITH DEFENDANT'S VEHICLE AS DEFENDANT WAS ATTEMPTING TO PULL OUT OF A PARKING LOT; 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 bicycle-vehicle collision case should not have been granted. Apparently plaintiff was riding on the sidewalk and collided with defendant's vehicle as it was attempting to pull out of a parking lot:

The plaintiff Jamie Heaney (hereinafter the plaintiff) alleges she was operating a bicycle on a sidewalk when she collided with the defendant's vehicle, which was attempting to exit from a parking lot … .

"A defendant moving for summary judgment in a negligence action has the burden of establishing, prima facie, that he or she was not at fault in the happening of the subject accident" … . "There can be more than one proximate cause of an accident" … , and the issue of proximate cause is generally one for the jury … . Here, the defendant's vehicle had pulled out from a parking lot and came to a stop immediately prior to the impact. The defendant failed to establish, prima facie, that the presence of his vehicle on the sidewalk merely furnished the condition or occasion for the occurrence of the event but was not one of its causes … . Heaney v Kahn, 2020 NY Slip Op 01333, Second Dept 2-26-20

TRAFFIC ACCIDENTS, GRAVES AMENDMENT.

ALTHOUGH DEFENDANT PROVED IT IS ENGAGED IN THE BUSINESS OF LEASING VEHICLES AND THE VEHICLE INVOLVED IN THE TRAFFIC ACCIDENT WAS LEASED AT THE TIME, DEFENDANT DID NOT PROVE THE CONDITION OF THE VEHICLE; THEREFORE DEFENDANT WAS NOT ENTITLED TO SUMMARY JUDGMENT UNDER THE GRAVES AMENDMENT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that the truck rental company's (MTLR's) motion for summary judgment in this traffic accident case should not have been granted. Although MTLR proved that the truck was rented out at the time of the accident, it failed to offer any proof of the condition of the truck:

… [T]he Graves Amendment provides "that the owner of a leased or rented motor vehicle cannot be held liable for personal injuries resulting from the use of such vehicle by reason of being the owner of the vehicle for harm to persons or property that results or arises out of the use, operation, or possession of the vehicle during the period of the rental or lease if: (1) the owner is engaged in the trade or business of renting or leasing motor vehicles, and (2) there is no negligence or criminal wrongdoing on the part of the owner (or an affiliate of the owner)'" … . However, where "a plaintiff seeks to hold a vehicle owner liable for the alleged failure to maintain a rented vehicle" … , the vehicle owner is not afforded protection under the Graves Amendment if it fails to demonstrate that it did not negligently maintain its vehicle … .

Here, MTLR failed to meet its prima facie burden demonstrating its entitlement to judgment as a matter of law dismissing the amended complaint insofar as asserted against it. Although MTLR submitted evidence showing that it owned the subject vehicle, that it was engaged in the business of leasing vehicles, and that the subject accident occurred during the period of the rental … , MTLR failed to submit any admissible evidence demonstrating the condition of the vehicle at the time of delivery or at any time up to the happening of the accident … . Couchman v Nunez, 2020 NY Slip Op 00844, Second Dept 2-5-20

TRAFFIC ACCIDENTS, PEDESTRIANS, INSURANCE LAW.

PLAINTIFF'S CLAIM IN THIS PEDESTRIAN HIT-AND-RUN ACTION WAS NOT AUTOMATICALLY ASSIGNED TO THE MOTOR VEHICLE ACCIDENT INDEMNIFICATION CORPORATION WHEN PLAINTIFF ACCEPTED A SETTLEMENT; PLAINTIFF'S ACTION AGAINST THE DEFENDANT TAXICAB COMPANY AND THE DRIVERS WHO WERE ON DUTY WHEN PLAINTIFF WAS STRUCK SHOULD NOT HAVE BEEN DISMISSED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the plaintiff's acceptance of a settlement from the Motor Vehicle Accident Indemnification Corporation (MVAIC) did not automatically assign plaintiff's claim to the MVAIC. Therefore plaintiff's action against a taxi company and eight drivers who were on duty when plaintiff, a pedestrian, was struck by a taxicab, should not have been dismissed. It was a hit-and-run accident and plaintiff had not yet identified the driver:

Insurance Law § 5213(b) provides: "As a condition to the payment of the amount of the settlement the qualified person . . . shall assign his claim to the corporation which shall then be subrogated to all of the rights of the qualified person against the financially irresponsible motorist." Thus, the statute provides that, upon payment of the settlement amount by MVAIC, the "qualified person," i.e., the plaintiff, shall assign his personal injury claim to MVAIC. …"[T]he text does not say that acceptance of payment operates as an assignment by operation of law; neither does it make execution of an assignment a condition precedent to the receipt of payment. Rather, the statute obligates an individual who receives payment to assign her claim to MVAIC, giving MVAIC the enforceable right to obtain such assignment." Thus, although the plain language of Insurance Law § 5213(b) requires the plaintiff to assign his claim to MVAIC as a condition of receiving a settlement from MVAIC, such language does not make the assignment automatic. * * *

… MVAIC … chose not to take an assignment from the plaintiff, but rather rely upon the plaintiff's reimbursement from any damages award he receives as a result of the instant action. MVAIC's determination as to how best to proceed to recoup the amount it paid to the plaintiff in settlement, while also being assured that the plaintiff was pursuing an action against a potential financially irresponsible driver, was within the broad powers granted to MVAIC, and was consistent with the purpose of the Motor Vehicle Accident Indemnification Corporation Act. Archer v Beach Car Serv., Inc., 2020 NY Slip Op 01138, Second Dept 2-19-20

TRAFFIC ACCIDENTS, REAR-END COLLISIONS.

DESPITE THE BRAKE-FAILURE ALLEGATION IN THIS REAR-END COLLISION CASE, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED; DEFENDANT DID NOT PRESENT SUFFICIENT EVIDENCE TO RAISE A QUESTION OF FACT ABOUT BRAKE FAILURE (FIRST DEPT).

The First Department, reversing Supreme Court, determined the plaintiff's motion for summary judgment in this rear-end traffic accident case should have been granted. Defendant did not raise a question of fact about the brake-failure allegation:

" … [D]efendants' contention that their vehicle's brake failure was the cause of the accident was insufficient to raise a triable issue of fact as to liability. Defendants failed to satisfy the two-pronged showing that the accident was caused by an unanticipated problem with the vehicle's brakes, and that they exercised reasonable care to keep the brakes in good working order … .

Summary judgment in plaintiff's favor is not premature. Both plaintiff and defendant driver had firsthand knowledge of the accident, and submitted affidavits. However, defendants did not submit any evidence concerning maintenance of their vehicle. Defendants only speculate that there may be facts supporting their opposition to plaintiff's motion which exist but cannot yet be stated … . Quiros v Hawkins, 2020 NY Slip Op 01020, First Dept 2-13-20

TRAFFIC ACCIDENTS.

PLAINTIFF WAS LEANING INSIDE THE OPEN DOOR OF A VAN WHEN THE VAN SUDDENLY MOVED FORWARD; THE RELATED VIOLATION OF THE VEHICLE AND TRAFFIC LAW CONSTITUTED NEGLIGENCE PER SE; PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff's summary judgment motion in this vehicle-injury case should have been granted. Plaintiff was leaning into the open sliding door of a van when the

van suddenly moved forward. Plaintiff sued the owner of the van (J & D) and the driver. The related violation of the Vehicle and Traffic Law constituted negligence per se:

A violation of the Vehicle and Traffic Law constitutes negligence as a matter of law … . Here, the plaintiff established her prima facie entitlement to judgment as a matter of law by presenting uncontroverted evidence that the driver stepped on the gas pedal while she was leaning into the vehicle, causing the vehicle to move forward and her to be injured by the sliding of the minivan's door into her back (see Vehicle and Traffic Law § 1162 …). This negligence can be imputed to J & D, which was the owner of the vehicle, through the presumption that the operator was driving the vehicle with the owner's express or implied consent (see Vehicle and Traffic Law § 388[1]). Edwards v J&D Express Serv. Corp., 2020 NY Slip Op 01145, Second Dept 2-19-20

TRAFFIC ACCIDENTS.

QUESTION OF FACT WHETHER DRIVER OF THE MOTORCYCLE, WHO HAD THE RIGHT OF WAY IN THIS INTERSECTION TRAFFIC ACCIDENT CASE, COULD HAVE AVOIDED THE COLLISION (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined there was a question of fact whether defendant driver of the motorcycle (Baker) could have avoided this intersection traffic accident case. The motorcycle had the right-of-way and collided with defendants' (Willow Bend's) truck. Plaintiff was a passenger on the motorcycle. Willow Bend's cross motion against the driver of the motorcycle (Baker Estate) should not have been dismissed:

We agree with the Willow Bend defendants that the court erred in granting that part of the motion seeking summary judgment dismissing the Willow Bend defendants' cross claim. In moving for summary judgment, the Baker Estate had the initial burden of establishing, as a matter of law, that Baker "was operating [the motorcycle] in a lawful and prudent manner and that there was nothing that [Baker] could have done to avoid the collision" … . "[I]t is well settled that drivers have a duty to see what should be seen and to exercise reasonable care under the circumstances to avoid an accident" … . "[U]nder the doctrine of comparative negligence, a driver who lawfully enters an intersection may still be found partially at fault for an accident if he or she fails to use reasonable care to avoid a collision with another vehicle in the intersection" … . We conclude that the Baker Estate failed to meet that burden, inasmuch as its own submissions in support of the motion raised a triable issue of fact … .

Although the Baker Estate established that Baker had the right-of-way as he approached the intersection, the Baker Estate submitted the deposition testimony of Baker and plaintiff, who each testified that, before the collision, Baker applied his brakes but did not attempt to steer around the dump truck. Baker further testified that he did not use his horn. Viewed in the light most favorable to the Willow Bend defendants, that testimony raises an issue of fact whether Baker exercised reasonable care under the circumstances to avoid an accident … . Carroll v Willow Bend Farm LLC, 2020 NY Slip Op 00954, Fourth Dept 2-7-20