NEW YORK APPELLATE DIGEST, LLC

Negligence
March 2020

An Organized Compilation of Summaries of Selected Decisions Addressing Negligence Released in March 2020 and Posted on the New York Appellate Digest Website. 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.

Contents

Table of Contents

Table of Contents

MEDICAL MALPRACTICE.

CONFLICTING EXPERT OPINIONS PRECLUDED SUMMARY JUDGMENT IN THIS MEDICAL MALPRACTICE ACTION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined conflicting expert opinions in this medical malpractice action created a question of fact:

… [T]he plaintiff's submissions were sufficient to raise a triable issue of fact. The expert affirmations of two board-certified urologists submitted by the plaintiff contradicted the conclusion of the NYCHH defendants' experts that the RUMC defendants and other defendants caused the plaintiff's injuries. The plaintiff's experts concluded, with a reasonable degree of medical certainty, that the plaintiff's injuries occurred intra-operatively during the prostatectomy performed by Surasi at Woodhull Medical Center. Summary judgment is not appropriate in a medical malpractice action where, as here, the parties adduce conflicting medical expert opinions. "Such credibility issues can only be resolved by a jury" … . Castillo v Surasi, 2020 NY Slip Op 01903, Second Dept 3-18-20

PRODUCTS LIABILITY.

IN THIS DESIGN DEFECT PRODUCTS LIABILITY CASE, THE LOSS OF THE SPECIFIC PRODUCT WHICH CAUSED THE INJURY DID NOT PREVENT DEFENDANT-MANUFACTURER FROM PRESENTING A DEFENSE; THE COMPLAINT SHOULD NOT HAVE BEEN DISMISSED ON SPOLIATION GROUNDS (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined defendant-manufacturer (Doka) of an allegedly defective ratchet was not entitled to dismissal of the complaint on the ground that plaintiff could not produce the ratchet (spoliation). The ratchet was used to move heavy concrete forms into place along a track. Allegedly the ratchets broke when extra pressure was placed on them when the forms became "bound" on the track. Plaintiff alleged he was injured when he used his foot to increase the pressure on the ratchet when the form became bound. Because this was a design-defect case, and because the ratchets allegedly had broken before under similar circumstance, the defendant-manufacturer could present a defense and, therefore, the loss of the ratchet did not warrant dismissal of the complaint:

In cases like this, where the claim is based on a design defect (as opposed to a manufacturing defect), the absence of the product is not necessarily fatal to the defendant. As this Court has observed, a product's design "possibly might be evaluated and the defect proved circumstantially" … . Circumstantial evidence could, one would imagine, be the testimony of someone involved in the design process, and plans or photographs of the product before it entered the stream of commerce. It could also, assuming that the missing product was one of multiple units manufactured using the same design, be another one of those units. * * *

Doka does not, in any meaningful way, argue why its inability to inspect the exact ratchet that plaintiff was using would prevent it from defending against the products liability claim. Rossi v Doka USA, Ltd., 2020 NY Slip Op 02098, First Dept 3-26-20

PRODUCTS LIABILITY.

PLAINTIFF'S EXPERT DID NOT PRESENT ANY EVIDENCE DEMONSTRATING THE REMOTELY OPERATED CRANE COULD FEASIBLY BE MADE SAFER; THEREFORE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT IN THIS PRODUCTS LIABILITY CASE WAS PROPERLY GRANTED (THIRD DEPT).

The Third Department determined plaintiff's expert did not raise a question of fact in this products liability case. Plaintiff's decedent was killed by a crane operated remotely by plaintiff's decedent. Defendants' experts attributed the accident to plaintiff's decedent's acts of leaning into the path of the crane and bending over with the remote attached to his hip, causing the crane to be activated inadvertently. Both leaning into the path of the crane and bending over with the remote attached were known to be dangerous and plaintiff's decedent had trained others accordingly. Although plaintiff's expert averred that a dead man's switch would have prevented the accident, he did not present any supporting evidence:

"An expert's [Darby's] affidavit — offered as the only evidence to defeat summary judgment — must contain sufficient allegations to demonstrate that the conclusions it contains are more than mere speculation, and would, if offered alone at trial, support a verdict in the proponent's favor" … . Initially, although Derby alleged that he inspected the remote, his affidavit was not supported by facts of his own independent testing of the device; rather, he relied on deposition testimony of other witnesses to explain the functions of the remote … . Furthermore, although Derby averred that the remote could be made safer by adding a dead man's switch or by implementing joysticks, he offered no proposed designs that could feasibly be installed … , and, moreover, he pointed to no industry standards or data to support his conclusion that the absence of a dead man's switch rendered the remote

unsafe … . After all, "[a] factual issue regarding design defect is not established merely by pointing to efforts within the industry to make a safer product, without providing some detail as to how the current product is not reasonably safe and how a feasible alternative would be safer" … . Given Derby's failure to elaborate, and mindful of the testimony of multiple witnesses for defendants who averred that they were not aware of any remote controls in the industry that use a dead man's switch for crane operations, plaintiff's proof was insufficient to raise a triable issue regarding design defect … . Darrow v Hetronic Deutschland GMBH, 2020 NY Slip Op 01543, Third Dept 3-5-20

SLIP AND FALL, LANDLORD-TENANT.

DEFENDANT PROPERTY OWNER DID NOT DEMONSTRATE IT WAS AN OUT-OF-POSSESSION LANDLORD AND DEFENDANTS FAILED TO ELIMINATE QUESTIONS OF FACT ON THE DUTY OF CARE AND KNOWLEDGE ELEMENTS OF A SLIP AND FALL CASE; DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendants' motion for summary judgment in this slip and fall case should not have been granted. Defendant property owner did not demonstrate it was an out-of-possession landlord. And defendants failed to eliminate questions of fact re: several elements of a slip and fall action:

… [T]he defendants failed to eliminate triable issues of fact as to whether they had a duty to maintain in a reasonably safe condition the area of the parking lot where the plaintiff allegedly slipped … . They further failed to eliminate triable issues of fact as to whether they, or anyone on their behalf, caused, created, or exacerbated the ice condition upon which the plaintiff allegedly slipped and fell … , and whether they lacked constructive notice of the alleged ice condition … . Pinck-Jafri v Marsh Realty, LLC, 2020 NY Slip Op 02082, Second Dept 3-25-30

SLIP AND FALL.

A WORN MARBLE STEP IS NOT AN ACTIONABLE DEFECT; DEFENDANTS' MOTION FOR SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE SHOULD HAVE BEEN GRANTED (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff's slip and fall action should have been dismissed. The cause of the fall was alleged to be a worn marble step, which is not actionable:

Defendants established their entitlement to judgment as a matter of law in this action where plaintiff was injured when, while descending interior stairs in defendants' building, she slipped and fell on a marble step that had a worn tread. A worn marble tread, without more, is not an actionable defect …

In opposition, plaintiff failed to raise a triable issue of fact. Having abandoned her claim that defendants were negligent in keeping the stairs free of moisture, plaintiff cannot now argue that the existence of moisture on the stairs would be an actionable condition. Nor did plaintiff's experts establish that in addition to the worn marble stair treads, they lacked adequate slip resistance, as the coefficient of friction value that the experts used as a standard value was not shown to be an accepted industry standard … . Nor did the experts' affidavits raise a triable issue of fact, since the opinions concerning the cause of plaintiff's slip were speculative … . DeCarbo v Omonia Realty Corp., 2020 NY Slip Op 01555, First Dept 3-5-20

SLIP AND FALL.

ABUTTING PROPERTY OWNER IS NOT RESPONSIBLE FOR TREE WELLS IN CITY SIDEWALKS; DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant was not liable for plaintiff's slip and fall because abutting property owners are not responsible for the condition of tree wells in a sidewalk:

Administrative Code of the City of New York § 7-210 places the duty to maintain a sidewalk in a reasonably safe condition on the owner of the property abutting the sidewalk, and provides for civil liability for injuries proximately caused by the failure to so maintain the sidewalk. However, the statute does not extend that duty of

maintenance to City-owned tree wells or provide for civil liability for injuries occurring in City-owned tree wells … . Thus, liability may be imposed on the abutting landowner for injuries caused by a dangerous condition in a tree well only where the landowner has "affirmatively created the dangerous condition, negligently made repairs to the area, [or] caused the dangerous condition to occur through a special use of that area" … .

Here, [defendant] established its prima facie entitlement to judgment as a matter of law by demonstrating that it had no duty to maintain the City-owned tree well, did not create the allegedly dangerous condition, did not negligently repair the sidewalk abutting the tree well, and did not cause the condition to occur through any special use of the tree well. Powroznik v City of New York, 2020 NY Slip Op 01655, Second Dept 3-11-20

SLIP AND FALL.

DEFENDANT DID NOT DEMONSTRATE WHEN THE AREA WHERE PLAINTIFF ALLEGEDLY SLIPPED AND FELL WAS LAST INSPECTED OR CLEANED; DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined there was a question of fact whether defendant had constructive notice of the condition which allegedly caused plaintiff's slip and fall:

"A defendant has constructive notice of a hazardous condition on property when the condition is visible and apparent, and has existed for a sufficient length to afford the defendant a reasonable opportunity to discover and remedy it" … . To meet its burden on the issue of lack of constructive notice, a defendant is required to offer evidence as to when the accident site was last cleaned or inspected before the accident … . "Mere reference to general cleaning practices, with no evidence regarding any specific cleaning or inspection of the area in question, is insufficient to establish a lack of constructive notice"… . Here, the defendant failed to establish, prima facie, that it did not have constructive notice of the alleged hazardous condition. While the affidavit of the building superintendent referenced general inspection and cleaning practices, the defendant failed to submit evidence regarding specific cleaning or inspection of the area in question relative to the time when the plaintiff's accident occurred … . Griffin v PMV Realty, LLC, 2020 NY Slip Op 02068, Second Dept 3-25-20

SLIP AND FALL.

ICE ON SIDEWALK MAY HAVE PRE-EXISTED RECENT SNOW; DEFENDANT'S MOTION FOR SUMMARY JUDGMENT PURSUANT TO THE STORM IN PROGRESS RULE SHOULD NOT HAVE BEEN GRANTED (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined there was a question of fact whether the ice on which plaintiff slipped and fell pre-existed the recent snow fall. Plaintiff slipped and fell at around 7:30 am and, pursuant to the New York City Administrative Code, defendant had until 11 am to clear the recent snow (storm in progress rule):

Because it snowed overnight, defendant had until 11 a.m. to clear any fresh snow and ice … . However, an issue of fact exists regarding whether the ice on which plaintiff slipped was preexisting. Plaintiff testified and submitted witness affidavits to the effect that the ice was dirty and trod upon, and had been present for days … .

Moreover, while defendant submitted certified climatological records from Central Park in reply and in opposition to plaintiff's cross motion, defendant cannot remedy a fundamental deficiency in its moving papers with evidence submitted in reply … , although they may be considered in opposition to plaintiff's cross motion. In any event, the records show that the temperatures remained below or only slightly above freezing during much of the six days after defendant asserts that the last snow fall occurred, and defendant offers only speculation that such temperatures would have melted previous accumulations of snow and ice. Ruland v 130 FG, LLC, 2020 NY Slip Op 01558, First Dept 3-5-20

SLIP AND FALL.

NON-MANDATORY STANDARDS FOR THE GAP BETWEEN A SUBWAY TRAIN AND THE PLATFORM PROPERLY ADMITTED IN THIS SLIP AND FALL CASE; HOWEVER THE EVIDENCE OF PRIOR GAP-RELATED ACCIDENTS SHOULD NOT HAVE BEEN ADMITTED; NEW TRIAL ORDERED (CT APP).

The Court of Appeals, ordering a new trial, in a brief memorandum with no description of the facts, determined evidence of prior accidents involving the gap between the subway train and the platform should not have been

admitted because there was no showing the conditions were the same. However the evidence of the non-mandatory gap standards were properly admitted:

In these circumstances, the trial court properly admitted plaintiff's expert testimony regarding non-mandatory gap standards promulgated by the American Public Transit Association and the Public Transportation Safety Board … . However, Supreme Court abused its discretion as a matter of law by admitting evidence of prior accidents at New York City subway stations involving the gap between the train car and platform in the absence of a showing that the relevant conditions of those accidents were substantially the same as plaintiff's accident … . Daniels v New York City Tr. Auth., 2020 NY Slip Op 02027, CtApp 3-24-20

SLIP AND FALL.

PLAINTIFF ALLEGED THE LANDLORD'S FAILURE TO REPAIR SHOWER-CURTAIN BRACKETS CREATED THE DANGEROUS WATER-ON-THE-FLOOR CONDITION WHICH CAUSED THE SLIP AND FALL; AN OPEN AND OBVIOUS CONDITION CAN STILL BE A DANGEROUS CONDITION; LANDLORD'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (FIRST DEPT).

The First Department, reversing Supreme Court, determined defendant landlord's motion for summary judgment in this wet-bathroom-floor slip and fall case should not have been granted. Plaintiff alleged the landlord failed to repair brackets for the shower curtain. The fact that the water on the floor was an open and obvious condition relieved landlord of the duty to warn, but not the duty to keep the property safe:

Supreme Court erred in granting summary judgment to defendants on the basis that plaintiff failed to identify the condition of water on the floor before he slipped and fell. Supreme Court incorrectly found that any conclusion that plaintiff slipped and fell because of water accumulation would be based on speculation. Plaintiff argues correctly that, even if in his deposition testimony he did not explicitly state that he noticed water on the floor before he stepped out of the shower, a jury could reasonably infer that he slipped and fell on water on the floor due to the absence of a shower curtain … . Defendants' proof failed to negate this reasonable inference … .

"[E]ven if a hazard qualifies as open and obvious' as a matter of law, that characteristic merely eliminates the property owner's duty to warn of the hazard, but does not eliminate the broader duty to maintain the premises in a reasonably safe condition" … .

… Defendants argue that the broken brackets were not an inherently dangerous condition but rather a benign condition. However, as plaintiff correctly observes, the purpose of the shower brackets was to hold up the shower curtain, and the purpose of a shower curtain is to prevent the accumulation of water when the shower is in use. Matos v Azure Holdings II, L.P., 2020 NY Slip Op 01441, First Dept 3-3-20

SLIP AND FALL.

PLAINTIFF APPARENTLY SLIPPED AND FELL BECAUSE OF LEAVES ON THE STAIRWAY; THE CONDITION WAS NOT BOTH "OPEN AND OBVIOUS" AND "NOT INHERENTLY DANGEROUS" AS A MATTER OF LAW; PLAINTIFF'S NEGLIGENCE IN DESCENDING THE STAIRWAY FURNISHED THE OCCASION FOR THE ACCIDENT, BUT WAS NOT THE PROXIMATE CAUSE OF THE ACCIDENT (SECOND DEPT).

The Second Department determined the verdict in this slip and fall case was not contrary to the weight of the evidence. Plaintiff descended a stairway which had leaves on it:

The plaintiff's testimony sufficiently identified the condition that caused her to fall … . The evidence at trial failed to establish, as a matter of law, that the condition at issue was both open and obvious and not inherently dangerous … . …

A jury's finding that a party was at fault but that such fault was not a proximate cause of the accident 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" … . Here, the jury could have reasonably concluded that the plaintiff was negligent in choosing to descend the stairway despite the presence of leaves, but that her negligence merely furnished the occasion for the accident … . Accordingly, the jury's determination that the plaintiff's conduct was not a substantial factor in causing the accident was not contrary to the weight of the evidence. Brennan v Gormley, 2020 NY Slip Op 01473, Second Dept 3-4-20

SLIP AND FALL.

WATER CAP IN A SIDEWALK WAS A TRIVIAL DEFECT, SLIP AND FALL ACTION PROPERLY DISMISSED (FIRST DEPT).

The First Department determined that a quarter to half inch depression where a water cap was located in a sidewalk was a trivial defect and therefore could not be the basis of a slip and fall action:

… [T]he alleged defect on which plaintiff tripped was trivial and nonactionable as a matter of law based on the characteristics and surrounding circumstances … . The water cap was a quarter to half of an inch below the surface of the sidewalk and the photographic evidence shows no defects in the water cap and surrounding sidewalk. Furthermore, plaintiff never attributed the cause of the accident to any broken or cracked cement or inadequate lighting … . Rivera v City of New York, 2020 NY Slip Op 01698, First Dept 3-12-20

SPOLIATION.

CITY DEFENDANTS SHOULD HAVE BEEN SANCTIONED FOR FAILURE TO PRESERVE PRE-ACCIDENT POLICE COMMUNICATIONS IN THIS POLICE-VEHICLE TRAFFIC ACCIDENT CASE BECAUSE THE CITY DEFENDANTS WERE AWARE THEY WOULD PROBABLY ASSERT AN EMERGENCY DEFENSE (FIRST DEPT).

The First Department, reversing Supreme Court, determined the City defendants should have been sanctioned for spoliation of evidence. The action stemmed from a traffic accident involving a police vehicle and the city defendants were put on notice they would assert an emergency defense by the notice of claim. But the pre-accident police communications were not preserved:

Defendants had an obligation to preserve the pre-accident audio recordings at the time they were destroyed because the Police Department (NYPD) internal report and plaintiff's notice of claim, which attached the public police accident report, put defendants on notice that they would likely assert an emergency operation defense. Therefore, pre-accident audio communication between the dispatcher and the NYPD vehicle or officers involved in the accident should have been preserved in case it was needed for future litigation … . Under the circumstances presented, the imposition of an adverse inference charge would be an appropriate sanction … . Sanchez v City of New York, 2020 NY Slip Op 01970, First Dept 3-19-20

TOXIC TORTS, LEAD PAINT.

DEFENDANT, WHO CO-OWNED THE PROPERTY FOR A TWO-YEAR PERIOD, DEMONSTRATED HE DID NOT HAVE ACTUAL OR CONSTRUCTIVE NOTICE OF THE HAZARDOUS LEAD PAINT CONDITION (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined defendant's motion for summary judgment in this lead-paint exposure case should have been granted. Defendant was a co-owner of the subject property but he was able to demonstrate his connection to the property was such that he did not have actual or constructive notice of the hazardous lead paint condition:

… [D]efendant owned the subject property, as a tenant in common, with his father during the period of plaintiffs' tenancy from 1992 to 1994. In support of his motions, defendant submitted his affidavit, wherein he averred, among other things, that he was a co-owner of the property "on paper only," that his father handled all day-to-day maintenance of the property, and that defendant never entered plaintiffs' apartments or hired anyone to make repairs thereto during plaintiffs' tenancy. Defendant further averred that he did not have a key to the apartments and that he never spoke to or received complaints from plaintiffs or plaintiffs' mother. Defendant's submissions also established that he had no knowledge of inspections for or the existence of lead paint at the property during plaintiffs' tenancy and that he was unaware that the property was constructed at a time before lead paint was banned, that paint was peeling at the property, that lead paint posed a danger to young children, and that young children lived on the property.

Regardless of whether defendant's father had actual or constructive notice through his own involvement with the property, that notice cannot be imputed to defendant absent evidence of defendant's own actual or constructive notice … . McDowell v Maldovan, 2020 NY Slip Op 01748, Fourth Dept 3-13-20

TRAFFIC ACCIDENTS.

$10.5 MILLION VERDICT FOR CONSCIOUS PAIN AND SUFFERING DEEMED EXCESSIVE IN THIS PEDESTRIAN TRAFFIC ACCIDENT CASE; PLAINTIFF ASKED TO STIPULATE TO $3 MILLION (FIRST DEPT).

The First Department, in a decision which does not discuss the relevant facts, determined the $10.5 million verdict for conscious pain and suffering was excessive and ordered a new trial unless plaintiff stipulates to $3 million. Plaintiff's decedent was crossing the street when she was struck by defendant's van:

The jury's finding that defendant was solely at fault for the decedent's death is supported by legally sufficient evidence and is not against the weight of the evidence … . Plaintiff's evidence established that the decedent was crossing the street with the right-of-way when she was struck by a van operated by defendant's employee making a left turn. Defendant presented no evidence to rebut plaintiff's evidence. Its argument that the decedent may have been crossing the street outside of the crosswalk is speculative, given that its employee did not see the decedent until after the accident … . "[T]he position of [the decedent's] body after impact is not probative as to whether she was walking in the cross-walk prior to being struck" … . In light of this determination, we do not reach defendant's arguments about the propriety of testimony elicited, and statements made by plaintiff's counsel, about its hiring practices generally and its hiring of the driver involved in the accident specifically.

We find the award for the decedent's conscious pain and suffering excessive to the extent indicated … . Martinez v Premium Laundry Corp., 2020 NY Slip Op 01557, First Dept 3-5-20

TRAFFIC ACCIDENTS.

DRIVER/OWNER OF THE MIDDLE VEHICLE IN THIS CHAIN-REACTION REAR-END TRAFFIC ACCIDENT CASE IS NOT LIABLE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the summary judgment motion by the driver/owner of the middle vehicle in this chain-reaction accident should have been granted. The rear-most driver pushed the stopped middle vehicle into the plaintiff's vehicle:

"A rear-end collision with a stopped or stopping vehicle establishes a prima facie case of negligence on the part of the operator of the rear vehicle, requiring that operator to come forward with evidence of a nonnegligent explanation for the collision to rebut the inference of negligence" … . " Evidence that a vehicle was struck in the rear and propelled into the vehicle in front of it may provide a sufficient non-negligent explanation'" … . Thus, "[i]n a chain collision accident, the operator of the middle vehicle may establish prima facie entitlement to judgment as a matter of law by demonstrating that the middle vehicle was properly stopped behind the lead vehicle when it was struck from behind by the rear vehicle and propelled into the lead vehicle" … . Bardizbanian v Bhuiyan, 2020 NY Slip Op 01897, Second Dept 3-18-20

TRAFFIC ACCIDENTS.

SCHOOL BUS DRIVER ALLEGEDLY GESTURED TO PLAINTIFF TO MAKE A TURN AND PLAINTIFF'S VEHICLE WAS THEN STRUCK BY ANOTHER VEHICLE; THE SCHOOL DISTRICT'S MOTION FOR SUMMARY JUDGMENT WAS PROPERLY DENIED (SECOND DEPT).

The Second Department determined the school district's motion for summary judgment in this intersection traffic accident case was properly denied. Plaintiff alleged the school bus driver gestured to plaintiff to make a turn and plaintiff's car was then struck by another car (driven by defendant Mallon) going through the intersection:

"When one driver chooses to gratuitously signal to another person, indicating that it is safe to proceed or that the signaling driver will yield the right-of-way, the signaling driver assumes a duty to do so reasonably under the circumstances" … . Here, the School District failed to establish, prima facie, that the plaintiff did not rely on the bus driver's gesture that it was safe for the plaintiff to make his left turn … . The School District also failed to establish, prima facie, that the defendant driver's alleged negligent conduct in operating Mallon's vehicle constituted an intervening and superseding act which broke the causal nexus between the bus driver's alleged negligence and the plaintiff's injuries … . Pittman v Ball, 2020 NY Slip Op 01944, Second Dept 3-18-20

VEHICLE AND TRAFFIC LAW, NEGLIGENCE PER SE.

THE BUS DRIVER VIOLATED THE VEHICLE AND TRAFFIC LAW AND WAS NEGLIGENT AS A MATTER OF LAW; DEFENSE VERDICT SET ASIDE (THIRD DEPT).

The Second Department, setting aside the defense verdict in this traffic accident case, determined the bus driver was negligent as a matter of law. To avoid a stopped vehicle the driver (Barreto) crossed a double yellow line and lost control of the bus which crashed into a store. The plaintiffs were bus passengers:

This Court has held that "a driver who crosses over a double yellow line into opposing traffic, unless justified by an emergency not of the driver's own making, violated the Vehicle and Traffic Law and is guilty of negligence as a matter of law" (… see Vehicle and Traffic Law § 1126[a] …). Here, although the evidence demonstrated that there was snow or slush on the surface of the subject road, the adverse weather conditions, as well as the fact that the road sloped downhill, were foreseeable and known to Barreto and did not provide a nonnegligent explanation for Barreto's violation of the Vehicle and Traffic Law … . Although the evidence demonstrated that there was a vehicle stopped in the bus's lane of travel, thereby obstructing its path, the evidence also demonstrated that the stopped vehicle was observable from a far distance, that the bus did not slow down after the stopped vehicle came into Barreto's view, and that Barreto crossed over the double-yellow line without slowing down. Under the circumstances, Barreto's loss of control over the bus was the result of his own negligent driving in adverse weather conditions, rather than the result of an emergency not of his own making. The absence of an emergency was recognized by the Supreme Court in its refusal to grant the defendant's request that the jury be given an instruction on the emergency doctrine.

Barreto's operation of the bus under the circumstances here violated Vehicle and Traffic Law § 1120(a). Such violation constitutes negligence as a matter of law and could not properly be disregarded by the jury … . Hodnett v Westchester County Dept. of Pub. Works & Transp., 2020 NY Slip Op 01603, Second Dept 3-11-20

WORKERS' COMPENSATION.

PLAINTIFF'S SOLE REMEDY FOR HIS ON THE JOB INJURY IS WORKERS' COMPENSATION; PLAINTIFF WAS NOT GRAVELY INJURED AND THERE WAS NO AGREEMENT WITH HIS EMPLOYER TO CONTRIBUTE, INDEMNIFY OR INSURE; THE EMPLOYER'S SUMMARY JUDGMENT MOTION SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant-employer's motion for summary judgment should have been granted. Plaintiff was injured while acting within the scope of his employment. Workers' Compensation, therefore, was his exclusive remedy unless he was gravely injured or there was agreement with the employer:

Workers' Compensation Law § 11 prohibits third-party claims for contribution or indemnification against an employer unless the employee has sustained a "grave injury" or there is a written contract entered into prior to the accident or occurrence by which the employer had expressly agreed to contribution to or indemnification of the third-party claimant … .

Here, in support of its motion, A.B.C. Tank established, prima facie, that there was no written agreement between the parties that required it to contribute, indemnify, or procure insurance … . Further, A.B.C. Tank established, prima facie, that the plaintiff was injured in the course of his employment and that the plaintiff's injuries did not constitute a "grave injury" within the meaning of Workers' Compensation Law § 11 … . McIntosh v Ronit Realty, LLC, 2020 NY Slip Op 01485, Second Dept 3-4-20