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ARCHITECTURAL MALPRACTICE, CONTINUOUS REPRESENTATION.

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The Second Department, reversing Supreme Court, determined the complaint alleging architectural malpractice should not have been dismissed pursuant to CPLR 3211. Plaintiff leased the first floor of a building to operate a pizza restaurant. Plaintiff hired a contractor which in turn hired an architect for the heating, ventilation and air conditioning (HVAC) design. The gas line hookup was completed in 2014. Subsequently, in 2016, National Grid shut off the gas, alleging plaintiff was stealing gas. In 2017 the defendant architect allegedly attempted to remedy the problem with the gas line. The complaint adequately pled the statute of limitations was tolled by the continuous representation doctrine and a privity-like relationship between the plaintiff and the architect:

"The law recognizes that the supposed completion of the contemplated work does not preclude application of the continuous representation toll if inadequacies or other problems with the contemplated work timely manifest themselves after that date and the parties continue the professional relationship to remedy those problems" … . In support of its motion, the architect submitted documentary evidence which included a final invoice issued by it dated August 14, 2014, and a letter of completion issued by the New York City Department of Buildings to the architect stating that its work was completed on December 20, 2014. In opposition, the plaintiffs' submissions, which included evidence of continuing communications between [plaintiff] and the architect, and evidence of the architect's efforts to remedy the alleged error uncovered by National Grid regarding the gas line connection for the premises, raised a question of fact as to the application of the continuous representation doctrine and supported the denial of those branches of the architect's motion which were pursuant to CPLR 3211(a)(1) and (5) to dismiss the amended complaint insofar as asserted against it … . Contrary to the architect's contention, the fact that two years had elapsed between the completion of its services and its subsequent efforts to remedy the problem does not render the continuous representation doctrine inapplicable as a matter of law … .

We also reject the architect's contention, as an alternative ground for affirmance, that dismissal of the amended complaint insofar as asserted against it was warranted pursuant to CPLR 3211(a)(1) and (7), on the ground that it was not in privity with the plaintiffs. The evidence submitted by the architect, which included a copy of the

contract entered into between it and the contractor, failed to utterly refute the factual allegations supporting the plaintiffs' contention that a relationship existed between them and the architect that was the "functional equivalent of privity" … . Creative Rest., Inc. v Dyckman Plumbing & Heating, Inc., 2020 NY Slip Op 03499, Second Dept 6-24-20

MEDICAL MALPRACTICE, EXPERTS.

ALTHOUGH PLAINTIFF'S EXPERT, A GENERAL SURGEON, PROVIDED AN OPINION IN THE AREA OF INTERNAL MEDICINE, THE EXPERT'S AFFIRMATION DEMONSTRATED THE EXPERT WAS QUALIFIED TO OFFER THE OPINION; DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff's expert's affirmation raised a question of fact in this failure-to-diagnose medical malpractice case, even though the affirmation dealt with an area of medicine outside of the expert's area of practice (general surgery):

… [T]he plaintiffs' expert's affirmation was not lacking in probative value because the plaintiffs' expert was board certified in general surgery rather than internal medicine. A medical expert need not be a specialist in a particular field in order to testify regarding accepted practices in that field; however, the expert must 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 opines outside his or her area of specialization, a foundation must be laid tending to support the reliability of the opinion rendered" … . "Where no such foundation is laid, the expert's opinion is of no probative value'" … .

Here, the plaintiffs' expert's affirmation sufficiently established that the plaintiffs' expert was possessed of the requisite skill, training, education, knowledge and experience from which it can be assumed that the opinion rendered was reliable … . In particular, the expert demonstrated that he was qualified to render an opinion regarding the symptomology of temporal arteritis, which he characterized as a relatively common disease of the arteries, and as to whether a proper examination and investigation of [the] symptoms was conducted in accordance with accepted medical practices. Kiernan v Arevalo-Valencia, 2020 NY Slip Op 03388, Second Dept 6-17-20

MEDICAL MALPRACTICE, MUNICIPAL LAW.

THE MEDICAL RECORDS DID NOT PROVIDE NOTICE TO THE HOSPITAL OF A POTENTIAL MEDICAL MALPRACTICE ACTION AND PETITIONER FAILED TO SHOW THE HOSPITAL WOULD NOT BE PREJUDICED BY THE DELAY IN SERVING A NOTICE OF CLAIM; LEAVE TO SERVE A LATE NOTICE OF CLAIM SHOULD NOT HAVE BEEN GRANTED (FIRST DEPT).

The First Department, reversing Supreme Court, determined leave to file a late notice of claim should not have been granted in this action against NYC Health & Hospitals Corp (HHP) alleging a failure to timely diagnose breast cancer. The medical records did not alert HHP to injury from malpractice and petitioner failed to show the HHP was not prejudiced by the delay in serving a notice of claim:

Petitioner failed to show that HHC had actual notice of her claim within 90 days of accrual of the claim, or a reasonable time thereafter. HHC's "mere possession or creation of medical records does not ipso facto establish that it had actual knowledge of a potential injury where the records do not evince that the medical staff, by its acts or omissions, inflicted any injury on plaintiff'" … . Here, HHC records of petitioner's treatment do not on their face show any negligence, malpractice or injury to plaintiff, and plaintiff did not submit a physician's affirmation to make such a showing … .

Likewise, petitioner failed to demonstrate the lack of any prejudice to HHC from the delay, as HHC's "possession of medical records that could not alert it to a claim of malpractice obviously cannot, ipso facto, establish a lack of prejudice" … . Because petitioner offered no other basis for the lack of prejudice to HHC, the burden never shifted to HHC to show prejudice from the delay … . Matter of Atkinson v New York City Health & Hosps. Corp., 2020 NY Slip Op 03609, First Dept 6-25-20

MEDICAL MALPRACTICE, MUNICIPAL LAW.

THE MEDICAL RECORDS SUBMITTED FOR THE FIRST TIME IN REPLY CAN BE CONSIDERED BECAUSE RESPONDENTS ADDRESSED THE RELEVANT ISSUES AT ORAL ARGUMENT; THE MEDICAL RECORDS DEMONSTRATED RESPONDENTS HAD TIMELY NOTICE OF THE NATURE OF THE CLAIM; ALTHOUGH THE EXCUSE FOR DELAY WAS NOT ADEQUATE, THE DEFECT DID NOT REQUIRE DENIAL OF THE APPLICATION FOR LEAVE TO FILE A LATE NOTICE OF CLAIM; THE APPLICATION SHOULD NOT HAVE BEEN DENIED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, over a two-justice dissent, determined claimant's application for leave to file a late notice of claim in this medical malpractice action should have been granted. The court noted that the medical records submitted for the first time in a reply were properly considered because the respondents addressed the relevant issues at oral argument. Both the majority and the dissent noted that the excuse for failure to timely file the notice of claim was inadequate but that defect did not require denial of the application. The majority found claimant demonstrated respondents were not prejudiced by the delay. The dissent disagreed with the majority's finding that the medical records demonstrated respondents had timely notice of the nature of the claim:

… [W]e reject the contention of respondents and the dissent that it is inappropriate under the circumstances of this case to consider the medical records submitted by claimant for the first time in his reply papers. In general, " [t]he function of reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds [or evidence] for the motion [or application]' " … . "This rule, however, is not inflexible, and a court, in the exercise of its discretion, may consider a claim or evidence offered for the first time in reply where the offering party's adversaries responded to the newly presented claim or evidence" … . …

… "[T]he medical records . . . evince that [respondents'] medical staff, by its acts or omissions, inflicted an[ ] injury on [claimant]' " … . The medical records indicate that, following the surgical skin graft procedure, claimant developed swelling beneath the dressings that became constrictive of blood flow to the leg and ultimately caused necrosis, and that respondents' medical staff, for various reasons, had failed to recognize the ischemic nature of the leg and claimant's development of compartment syndrome, thereby eventually necessitating partial amputation of the leg … . We thus conclude that respondents timely acquired actual

knowledge of the essential facts constituting the claim … . Matter of Dusch v Erie County Med. Ctr., 2020 NY Slip Op 03351, Fourth Dept 7-12-20

RES IPSA LOQUITUR, MUNICIPAL LAW.

JURY SHOULD HAVE BEEN CHARGED ON THE RES IPSA LOQUITUR DOCTRINE AND INSTRUCTED THAT THE VIOLATION OF THE NYC ADMINISTRATIVE CODE IS SOME EVIDENCE OF NEGLIGENCE IN THIS FALLING OBJECT CASE, NEW TRIAL ORDERED (FIRST DEPT).

The First Department, reversing Supreme Court and ordering a new trial, determined the jury should have been instructed on the res ipsa loquitur doctrine and the violation of the NYC Administrative Code was some evidence of negligence. Plaintiff was allegedly injured when a towel dispenser/trash receptacle (TD/TR) fell out of the wall:

… [W]e find that the trial court improvidently exercised its discretion in declining to charge the jury on res ipsa loquitur. A res ipsa charge "merely permits the jury to infer negligence from the circumstances of the occurrence" … . The doctrine does not require "sole physical access to the instrumentality causing the injury" … . The trial court should also have charged that a violation of Administrative Code of the City of New York § 28-301.1, which requires property owners to maintain their buildings in a safe condition, constitutes "some evidence of negligence" … . To the extent that the TD/TR unit allegedly fell out of the wall eight months after installation by defendant John Spaccarelli, the court erred by failing to allow plaintiff to fully question the credentials of Mr. Spaccarelli and his qualifications as an expert … . Galue v Independence 270 Madison LLC, 2020 NY Slip Op 03463, First Dept 6-18-20

RES IPSA LOQUITUR, SPOLIATION.

SUMMARY JUDGMENT PURSUANT TO THE DOCTRINE OF RES IPSA LOQUITUR WAS NOT WARRANTED BECAUSE EXCLUSIVE CONTROL WAS NOT DEMONSTRATED; SANCTIONS FOR THE LOSS OF THE LIGHT FIXTURE WHICH FELL ON PLAINTIFF WERE NOT WARRANTED BECAUSE THE BENT PIPE TO WHICH THE FIXTURE WAS ATTACHED WAS PRESERVED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined summary judgment should not have been granted pursuant to the doctrine of res ipsa loquitur. Plaintiff was injured when a light fixture fell on him. The pipe to which the fixture was attached was bent and was preserved by the defendant. The light fixture, which was same as several others at the site, was not preserved. Because contractors were working at the site, and the pipe securing the light fixture was bent. it could not be said defendant exercised exclusive control over the fixture. The Second Department went on to find that sanctions for the loss of the light fixture were not warranted because the bent pipe was saved and the light fixture itself was not crucial evidence:

Res ipsa loquitur is a doctrine which is submitted to the finder of fact when the accident arises out of an event which ordinarily does not occur in the absence of negligence, the accident was caused by an agency or instrumentality within the exclusive control of the defendant, and it was not due to a voluntary action or contribution on the part of the plaintiff … . The Court of Appeals has held that "only in the rarest of res ipsa loquitur cases may a plaintiff win summary judgment or a directed verdict. That would happen only when the plaintiff's circumstantial proof is so convincing and the defendant's response so weak that the inference of defendant's negligence is inescapable" … . Cantey v City of New York, 2020 NY Slip Op 03213, Second dept 6-10-20

SLIP AND FALL, LANDLORD-TENANT.

DEFENDANT OUT-OF-POSSESSION LANDLORD'S MOTION FOR SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE SHOULD HAVE BEEN GRANTED; THE LEASE DID NOT OBLIGATE THE LANDLORD TO MAINTAIN THE AREA AND NO STATUTORY VIOLATION WAS ALLEGED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant out-of-possession landlord's motion for summary judgment in this slip and fall case should have been granted. Plaintiff allegedly slipped on ice which formed from a leak in a pipe in a walk-in freezer. The lease did not require the landlord to maintain the freezer. No statutory violation was alleged:

"An out-of-possession landlord is not liable for injuries that occur on its premises unless the landlord has retained control over the premises and has a duty imposed by statute or assumed by contract or a course of conduct'" … . Here, where the complaint sounds in common-law negligence and the plaintiff does not allege the violation of a statute, the defendants demonstrated their prima facie entitlement to judgment as a matter of law by establishing that they were an out-of-possession landlord that was not bound by contract or course of conduct to repair the allegedly dangerous condition … . The lease in this case specified that the "Landlord's Obligations do not include the performance nor the payment of the costs for . . . the maintenance, repair and/or replacement of Freezer System or the replacement of the Refrigeration System at any time." Mallet v City of New York, 2020 NY Slip Op 03220, Second Dept 6-10-20

SLIP AND FALL, MUNICIPAL LAW.

VILLAGE DID NOT DEMONSTRATE IT DID NOT CREATE THE DEFECT IN THIS SIDEWALK/TREE-WELL SLIP AND FALL CASE; THEREFORE THE VILLAGE'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the village's motion for summary judgment in this sidewalk/tree-well slip and fall case should not have been granted. The Village demonstrated it did not have the required written notice of the defect, but did not demonstrate it did not create the defect:

" A municipality that has adopted a prior written notice law cannot be held liable for a defect within the scope of the law absent the requisite written notice, unless an exception to the requirement applies'" … . "Two exceptions to the prior written notice requirement have been recognized, namely, where the locality created the defect or hazard through an affirmative act of negligence and where a special use confers a special benefit upon the locality" … .

"[T]he prima facie showing which a defendant must make on a motion for summary judgment is governed by the allegations of liability made by the plaintiff in the pleadings" … . Here, the plaintiff alleged in her complaint and bill of particulars that the Village affirmatively created the defect that caused the accident. Therefore, in order to establish its prima facie entitlement to judgment as a matter of law, the Village had to demonstrate both that it did not have prior written notice of the defect and that it did not create the defect … . The Village established, prima facie, that it did not have prior written notice of the defect, but it failed to establish, prima facie, that it did not affirmatively create the alleged defect … . Nigro v Village of Mamaroneck, 2020 NY Slip Op 03518, Second Dept 6-24-20

SLIP AND FALL, MUNICIPAL LAW.

WHETHER THE SIDEWALK DEFECT WHICH ALLEGEDLY CAUSED PLAINTIFF'S SLIP AND FALL IS SHOWN ON A BIG APPLE MAP MUST BE RESOLVED BY A JURY (SECOND DEPT).

The Second Department, reversing Supreme Court, determined there was a question of fact whether the sidewalk defect which allegedly caused plaintiff to fall was depicted on the Big Apple map. Therefore the question whether the city had written notice of the defect was for the jury:

Administrative Code of the City of New York § 7-201(c)(2) "limits the City's duty of care over municipal streets and sidewalks by imposing liability only for those defects or hazardous conditions which its officials have been actually notified exist at a specified location" … . Accordingly, "prior written notice of a defect is a condition precedent which plaintiff is required to plead and prove to maintain an action against the City" … . …

"Big Apple is a corporation established by the New York State Trial Lawyers Association for the purpose of giving notices in compliance with [Administrative Code of City of New York § 7-201(c)(2)]. It does so through maps on which coded symbols are entered to represent defects" … . "A Big Apple map submitted to the Department of Transportation may serve as prior written notice of a defective condition" … . …

” Where [, as here,] there are factual disputes regarding the precise location of the defect that allegedly caused a plaintiff’s fall, and whether the alleged defect is designated on the [Big Apple] map, the question should be resolved by a jury’” … . Harrison v City of New York, 2020 NY Slip Op 03401, Second Dept 6-17-20

SLIP AND FALL.

LABOR LAW 200 CAUSE OF ACTION BASED UPON A DANGEROUS CONDITION PROPERLY SURVIVED SUMMARY JUDGMENT, APPELLANTS DID NOT DEMONSTRATE A LACK OF ACTUAL OR CONSTRUCTIVE NOTICE OF THE CONDITION; JUDGE SHOULD NOT HAVE, SUA SPONTE, DENIED A MOTION ON A GROUND NOT RAISED BY A PARTY (SECOND DEPT).

The Second Department determined the Labor Law 200 and common-law negligence causes of action properly survived summary judgment. The Second Department noted the court should not have, sua sponte, denied appellants’ motion on the ground the deposition transcripts were inadmissible because that issue was not raised. Plaintiff was working in the bottom of a hole which was muddy from heavy rain and littered with boulders and rocks. Plaintiff was injured when he allegedly slipped and fell because of the mud. The Second Department held that the causes of action were based upon a dangerous condition, not the method and manner of work, and the appellants did not demonstrate they lacked actual or constructive notice of the condition:

Labor Law § 200 is a codification of the common-law duty imposed on owners, contractors, and their agents to provide workers with a safe place to work … . There are “two broad categories of actions that implicate the provisions of Labor Law § 200” … . The first category involves worker injuries arising out of alleged dangerous or defective conditions on the premises where the work is performed … . In those circumstances, “[f]or liability to be imposed on the property owner, there must be evidence showing that the property owner either created a dangerous or defective condition, or had actual or constructive notice of it without remedying it within a reasonable time” … . The second category of actions under Labor Law § 200 involves injuries arising from the method and manner of the work … . A property owner will be held liable under this category only if it possessed the authority to supervise or control the means and methods of the work … .

Contrary to the appellants’ contention, the plaintiff’s accident arose from a dangerous premises condition, not from the method and manner of the work. Where a plaintiff alleges that he or she was injured at a work site as a result of a dangerous premises condition, a property owner’s liability under Labor Law § 200 and for common-law negligence rests upon whether the property owner created the condition, or had actual or constructive notice

of it and a reasonable amount of time within which to correct the condition … . Modugno v Bovis Lend Lease Interiors, Inc., 2020 NY Slip Op 03508, Second Dept 6-24-20

SUMMARY JUDGMENT RE: NEGLIGENCE.

RARE CASE WHERE PLAINTIFF'S SUMMARY JUDGMENT MOTION ON LABOR LAW 200 AND COMMON-LAW NEGLIGENCE CAUSES OF ACTION WAS APPROPRIATELY GRANTED (FIRST DEPT).

The First Department determined this was a rare case where summary judgment was appropriate on a Labor Law 200, common-law negligence cause of action:

Here, PSJV, the entities responsible for site cleanliness and trade coordination, at a time when the project was open to the elements, covered a recessed area of the third floor, where rainwater regularly collected, with non-waterproof planking, and never inspected it for water accumulation. Further, PSJV did not warn plaintiff or his employer that he was working under the recessed area, and when he drilled into the second floor ceiling to affix electrical equipment, the sludgy, oily water poured down onto him, causing him to lose his balance and injure himself. Thus, plaintiffs made a prima showing that the accident occurred due to a defective condition on the premises of which PSJV had actual notice, having caused and created it … . In response, PSJV failed to adduce credible evidence that anyone else, including plaintiff electrician, negligently caused the accident … . Langer v MTA Capital Constr. Co., 2020 NY Slip Op 03171, First Dept 6-3-20

TOXIC TORTS, ASBESTOS.

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IN THIS ASBESTOS-INJURY CASE SHOULD NOT HAVE BEEN GRANTED, PROPER BURDEN OF PROOF EXPLAINED (FIRST DEPT).

The First Department, reversing Supreme Court, determined the defendant's motion for summary judgment in this asbestos -injury case should not have been granted and, alternatively, even if the motion were properly granted, leave to renew should have been granted based on additional evidence:

In connection with a motion for summary judgment in an action based on exposure to asbestos, defendant has the initial burden of showing "unequivocally" that its product could not have contributed to the causation of decedent's asbestos-related injury … .

Defendant Burnham failed to sustain its initial burden of demonstrating that its products could not have contributed to decedent's mesothelioma. Decedent's testimony identified defendant as the manufacturer of greenhouses in which he worked and cited three possible sources of asbestos: transite benches in the greenhouses, window glazing and the greenhouse boiler. Burnham provided no evidence demonstrating that its products could not have been the source of the asbestos that caused decedent's illness. It only pointed to gaps in plaintiffs' proof, which was insufficient to meet its burden … . Even if the burden had shifted, plaintiffs' evidence in opposition raised an issue of fact as to whether Burnham had sold, distributed, and recommended asbestos-containing products such as those used in plaintiffs' family's gardening business. While hearsay, that evidence could be considered by the court since it was not the sole basis of the opposition … .

Alternatively, even if the summary judgment motion had been properly granted, the court should have granted leave to renew in the interests of fairness and justice since plaintiffs presented an affidavit of decedent's estranged brother, which supplied crucial evidence linking decedent's illness to Burnham's products. Fischer v American Biltrite, Inc., 2020 NY Slip Op 03277, First Dept 6-11-20

TOXIC TORTS, MUNICIPAL LAW, LEAD PAINT.

PLAINTIFFS WERE ENTITLED TO SUMMARY JUDGMENT FINDING DEFENDANT-LANDLORD VIOLATED NYC LOCAL LAW NO. 1 BY FAILING TO TAKE REASONABLE MEASURES TO ADDRESS THE HAZARDOUS LEAD-PAINT CONDITION IN PLAINTIFFS' APARTMENT; HOWEVER DEFENDANTS RAISED A QUESTION OF FACT WHETHER DEFENDANTS' NEGLIGENCE WAS THE PROXIMATE CAUSE OF THE CHILD'S INJURIES (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, in a full-fledged opinion by Justice Moulton, determined plaintiffs demonstrated defendants violated Local Law No. 1 of the City of New York in failing to take reasonable measures to address the hazardous lead-based paint condition in plaintiffs' apartment. However defendants' medical expert raised a question of fact whether defendants' negligence was the proximate cause of the plaintiff's child' (S.T.'s) injuries:

Under Local Law 1 defendants' liability is not predicated on their observations of peeling paint or whether they are informed of it. Defendants' liability does not depend on the mother demonstrating that she credibly complained about each and every instance or location of peeling paint. Even assuming that the mother never complained about the paint condition, defendants are charged with notice of the hazardous lead-based paint condition under Local Law 1 from the time that defendants were aware that S.T. moved into apartment. Moreover, Local Law 1 imposes on landlords "a specific duty to ameliorate hazardous levels of lead-based paint" … . Defendants cannot avoid liability by attempting to shift their statutory obligation to the mother by questioning her memory or her credibility, or for failing to inform them when the paint began to peel. Shifting the burden to the mother is inconsistent with the purpose of Local Law 1 which "is unquestionably intended to protect a definite class of persons [plaintiffs] from a particular hazard they are incapable of avoiding themselves" … . S.T. v 1727-29 LLC, 2020 NY Slip Op 03630, First Deptp 6-25-20

TRAFFIC ACCIDENTS, MUNICIPAL LAW, INTERSECTIONS.

DESPITE EVIDENCE THAT BOTH DRIVERS WERE FAMILIAR WITH THE INTERSECTION WHERE THE TRAFFIC ACCIDENT OCCURRED, PLAINTIFFS' EXPERT RAISED A QUESTION OF FACT WHETHER PROPER SIGNAGE COULD HAVE PREVENTED THE ACCIDENT; THE TOWN'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (THIRD DEPT).

The Third Department, reversing Supreme Court, determined plaintiffs' expert raised a question of fact whether proper signage at the intersection where the traffic accident occurred could have prevented the collision. The fact that both drivers were familiar with the intersection did not require that the town's motion for summary judgment be granted (as Supreme Court had found):

"As a general rule, the question of proximate cause is to be decided by the finder of fact," but it may be decided as a matter of law "where only one conclusion may be drawn from the established facts" … . Here, in support of its motion for summary judgment, the Town submitted evidence revealing that the drivers had some familiarity with the intersection, together with expert proof that the existing markings and traffic control devices were appropriate and consistent with applicable design standards. However, plaintiffs countered the Town's showing with evidence that additional devices, such as a stop sign and painted stop bar, as well as pavement markings indicating the proper turning radius, were required for the subject intersection by applicable design standards; plaintiffs' expert opined that the absence of such markings and devices was a substantial contributing factor to this collision. Notably, "a disagreement . . . between experts merely creates a question of credibility to

be resolved by the finder of fact" … . Upon review, we do not find the opinions expressed by plaintiffs' expert in this matter to be lacking in either substance or foundation … . O'Keefe v Wohl, 2020 NY Slip Op 03579, Third Dept 6-25-20

UTILITIES, ELECTROCUTION.

PLAINTIFF WAS WORKING ON A ROOF WHEN HE ALLEGEDLY CONTACTED AN ELECTRIC WIRE LEADING TO THE HOME AND WAS KILLED; THE UTILITIES' (CON EDISON'S) MOTION TO DISMISS FOR FAILURE TO STATE A CAUSE OF ACTION ON THE GROUND IT OWED NO DUTY TO PLAINTIFF'S DECEDENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the complaint against the Con Edison defendants in this electrocution case should not have been dismissed for failure to state a cause of action. Plaintiff was working on a roof when he alleged came into contact with an electric wire attached to the home and was killed. Con Edison argued it did not owe a duty to plaintiff's decedent:

"[T]he existence and scope of a duty is a question of law requiring courts to balance sometimes competing public policy considerations" …. Contrary to Con Edison's contention, it failed to establish that it owed no duty to the decedent … . Viewing the allegations in the light most favorable to the plaintiff, since the plaintiff alleged that Con Edison authorized the installation of an improper and non code-compliant connection between its electrical lines and the homeowner's electrical system, such actions gave rise to Con Edison's duty to the decedent who reasonably could be expected to come into contact with the property's electrical wires … . Thus, Con Edison did not establish that the plaintiff failed to state a cause of action to recover damages for negligence. Sucre v Consolidated Edison Co. of N.Y., Inc., 2020 NY Slip Op 03377, Second Dept 6-17-20