NEW YORK APPELLATE DIGEST, LLC

Negligence
August 2020

An Organized Compilation of the Summaries of Selected Decisions Addressing Negligence Released by Our New York State Appellate Courts in August 2020. The Summaries Link to the Decisions. Click on "Table of Contents" in the Header of Any Page to Return There.

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MEDICAL MALPRACTICE.

BECAUSE PLAINTIFF'S EXPERT AFFIDAVIT IN RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IN THIS MEDICAL MALPRACTICE ACTION DID NOT ADDRESS SEVERAL OF THE MALPRACTICE CLAIMS RAISED IN THE PLEADINGS, THOSE CLAIMS WERE DEEMED ABANDONED (FOURTH DEPT).

The Fourth Department noted that the affidavit of plaintiff's expert in this medical malpractice action did not address several of the allegations of defendant's negligence. Therefore the unaddressed claims were deemed abandoned:

The affidavit of plaintiff's expert anesthesiologist addressed defendant's conduct only with respect to the claims arising from defendant's alleged failure to ensure that the transport of Pasek [plaintiff] to the operating room was performed safely and his alleged failure to document the disconnection event and resulting blood loss in Pasek's medical chart. Inasmuch as plaintiff's expert failed to address the claims against defendant regarding the diagnosis, consulting, testing, examination, and pre- and post-operative treatment and did not identify any deviation with respect to defendant's efforts to ventilate, monitor, or resuscitate Pasek, those claims are deemed abandoned. Supreme Court thus erred in denying defendant's motion with respect to those claims … , and we therefore modify the order accordingly. Pasek v Catholic Health Sys., Inc., 2020 NY Slip Op 04652, Fourth Dept 8-20-20

MUNICIPAL LAW.

THE APPLICATION FOR LEAVE TO FILE A LATE NOTICE OF CLAIM SHOULD NOT HAVE BEEN GRANTED; THERE WAS NO SHOWING THE CITY AND FIRE DEPARTMENT HAD TIMELY KNOWLEDGE OF A POTENTIAL NEGLIGENCE ACTION ARISING FROM A RESPONSE TO A 911 CALL (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the application for leave to file a late notice of claim should not have been granted. Plaintiff alleged the city and the fire department (the appellants) were negligent in the response to a 911 call made after petitioner's daughter was discovered drowning in a swimming pool. The petitioner did not demonstrate the appellants were timely made aware of a potential negligence action:

Contrary to the petitioner's contention, the appellants did not acquire actual knowledge of the essential facts constituting the claim within 90 days after the claim arose or a reasonable time thereafter by virtue of their possession of a portion of the relevant 911 call. The appellants demonstrated that 911 calls are initially answered by a representative of the New York Police Department (hereinafter NYPD) and are transferred to the FDNY's Emergency Medical Dispatch Center if, as here, the reported emergency is of a medical nature. The appellants showed that the NYPD portion of the call was deleted in the normal course of business after 180 days, while the FDNY portion was retained. The FDNY portion of the call and other communications maintained by the appellants revealed that the arrival on the scene of an Advanced Life Support ambulance was delayed because the ambulance was initially directed to an incorrect address, but did not reveal whether the appellants' employees or the 911 caller was the source of the error. Rather, it was the deleted NYPD portion of the call that would likely have contained that information. Furthermore, the petitioner's daughter's pulse and breathing were restored in the ambulance, and nothing in the records maintained by the appellants revealed the extensive injuries that the petitioner's daughter allegedly suffered. Thus, despite the appellants' knowledge of facts surrounding the response to the 911 call, there was little to suggest injury attributable to any negligence on their part … .

… [E]ven assuming that the petitioner demonstrated an absence of prejudice, in response, the appellants made a particularized evidentiary showing that they would be substantially prejudiced by the more than one year delay in serving the notice of claim by showing that the NYPD portion of the call, which would likely have revealed the source of the erroneous residential address, had been deleted … . The petitioner additionally failed to demonstrate a reasonable excuse for the failure to timely serve a notice of claim … . Matter of Adbelghany v City of New York, 2020 NY Slip Op 04391, Second Dept 8-5-20

PUBLIC HEALTH LAW.

CERTAIN DISCOVERY DEMANDS IN THIS NEGLIGENCE AND PUBLIC HEALTH LAW ACTION AGAINST A RESIDENTIAL CARE FACILITY ON BEHALF OF A FORMER RESIDENT SHOULD NOT HAVE BEEN DENIED (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined certain discovery demands by plaintiff should have been granted. Plaintiff's decedent was a resident at defendant's residential care facility and plaintiff brought an action against the facility alleging negligent care and violations of Public Health law 2801-d:

Supreme Court should have granted those branches of the plaintiff's motion which were to compel the defendants to comply with (1) his discovery demand number 30, (2) his discovery demand number 32 to the extent that it demands "[a]ll documents relating to meals provided to" the decedent, (3) his discovery demand number 33 to the extent that it demands "[a]ll documents relating to bed changing records for" the decedent, (4) his discovery demand number 34 to the extent that it demands "[a]ll documents relating to [the] movement of" the decedent, (5) his discovery demand number 35 to the extent that it demands "[a]ll documents relating to [the] washing of" the decedent, (6) his discovery demand number 36 to the extent that it demands "[a]ll documents relating to the change of position of" the decedent, and (7) his discovery demand number 51. Those demands related to the decedent's care, the staffing of nurses and nursing assistants who provided care to the decedent, and complaints or investigations of alleged substandard care or abuse involving the decedent … . Olmann v Willoughby Rehabilitation & Health Care Ctr., LLC, 2020 NY Slip Op 04750, Second Dept 8-26-20

SLIP AND FALL.

THE STATE HIGHWAY LAW MAY HAVE IMPOSED A DUTY ON THE TOWN TO MAINTAIN THE SIDEWALK IN THIS SLIP AND FALL CASE; IN ADDITION, THE TOWN DID NOT DEMONSTRATE IT DID NOT HAVE WRITTEN NOTICE OF THE ALLEGED DEFECT AND DID NOT DEMONSTRATE THE DEFECT WAS TRIVIAL; THE TOWN'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined the that action against the abutting landowner (Long Island Rail Road [LIRR} and Metropolitan Transportation Authority [MTA] in this sidewalk slip and fall case was properly dismissed, but the action against the Town should not have been dismissed. Notwithstanding the Town Code, the state Highway Law may require maintenance of the sidewalk by the Town. In addition the Town did not demonstrate that it did not have written notice of the alleged sidewalk defect:

LIRR and MTA demonstrated their prima facie entitlement to judgment as a matter of law by demonstrating that they did not create the alleged defect, did not make special use of the sidewalk, and did not breach a statutory duty to maintain the abutting sidewalk … . Moreover, LIRR and MTA "demonstrated, prima facie, that the sidewalk was not an area serving primarily for ingress and egress to a [train] station that is served by a single carrier but, rather, the area at issue is akin to a common area in a multi-carrier facility, for which [they] did not owe any duty of care to maintain" … . …

… [T]he plaintiffs raised a triable issue of fact as to the applicability of Highway Law § 140(18), which imposes a duty on the Town to maintain certain sidewalks adjacent to state highways and county roads … .

The Town failed to submit evidence that its employees or agents had specifically searched the records maintained by the Town Clerk to determine whether it had prior written notice of the alleged sidewalk defect, as per the requirements of its Town Code. In addition, the Town failed to establish, prima facie, that the alleged sidewalk defect was too trivial to be actionable … . Hanus v Long Is. Rail Rd., 2020 NY Slip Op 04541, Second Dept 8-19-20

SLIP AND FALL.

WHERE THERE ARE TWO POSSIBLE CAUSES OF A DANGEROUS CONDITION AND THE TRIER OF FACT WOULD HAVE TO RESORT TO SPECULATION ABOUT WHETHER THE ALLEGED NEGLIGENCE OF THE DEFENDANT WAS THE PROXIMATE CAUSE, THE ACTION MUST BE DISMISSED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the defendant New York City Housing Authority's (NYCHA's) summary judgment motion in this playground injury case should have been granted. Plaintiff alleged a water sprinkler, in which children could play, was too close to the monkey bars and infant plaintiff was injured falling from the wet monkey bars. However the plaintiff presented evidence that children who were wet from playing in the sprinkler had climbed the monkey bars before infant plaintiff slipped and fell. The Second Department held that finding the NYCHA negligent would have to be based upon speculation:

The infant plaintiff testified at a General Municipal Law § 50-h hearing and his deposition that the wind was pushing water from the sprinkler to the monkey bars. However, the infant plaintiff also testified at his deposition that, immediately before he went on the ladder to the monkey bars, two children who were wet from playing in the sprinkler climbed on the ladder. "Where the facts proven show that there are several possible causes of an injury, for one or more of which the defendant was not responsible, and it is just as reasonable and probable that the injury was the result of one cause as the other, plaintiff cannot have a recovery, since he [or she] has failed to prove that the negligence of the defendant caused the injury" … . Given the wet children who preceded the infant plaintiff on the ladder, it would require impermissible speculation to conclude that the water on which the infant plaintiff slipped was caused by the proximity of the sprinkler to the monkey bars … .

The affidavit of the infant plaintiff to the effect that the ladder was wet before the wet children climbed on it "presented what appears to be a feigned issue of fact, designed to avoid the consequences of [his] earlier deposition testimony" that he did not see that the ladder was wet before he climbed on it … . Wilson v New York City Hous. Auth., 2020 NY Slip Op 04427, Second Dept 8-5-20

THIRD-PARTY ASSAULT.

CLAIMANT'S PETITION FOR LEAVE TO FILE A LATE NOTICE OF CLAIM IN THIS STUDENT-ON-STUDENT ASSAULT CASE SHOULD NOT HAVE BEEN GRANTED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined claimant's petition for leave to file a late notice of claim on the school district in this student-on-student third-party assault case should not have been granted:

" In determining whether to grant such leave, the court must consider, inter alia, whether the claimant has shown a reasonable excuse for the delay, whether the municipality had actual knowledge of the facts surrounding the claim within 90 days of its accrual, and whether the delay would cause substantial prejudice to the municipality' " … . …

… [C]laimant described the assault on her child as "unprovoked," and the accident report prepared contemporaneously by a school nurse, which claimant submitted with her reply affidavit, describes a single punch resulting only in a headache and swollen face. Inasmuch as "an injury caused by the impulsive, unanticipated act of a fellow student ordinarily will not give rise to a finding of negligence absent proof of prior conduct that would have put a reasonable person on notice to protect against the injury-causing act" …, we agree with respondent that the known facts failed to give "reasonable notice from which it could be inferred that a potentially actionable wrong had been committed by [respondent]". Matter of Mary Beth B. v West Genesee Cent. Sch. Dist., 2020 NY Slip Op 04630, Fourth Dept 8-20-20

THIRD-PARTY ASSAULT.

PLAINTIFFS SUED A FOSTER-CHILD PLACEMENT SERVICE FOR FRAUD AND NEGLIGENCE AFTER THE FOSTER CHILD SEXUALLY ASSAULTED PLAINTIFFS' BIOLOGICAL CHILD; THE FRAUD ACTION WAS NOT TIME-BARRED BECAUSE THE PLACEMENT SERVICE'S MERE KNOWLEDGE OF THE FOSTER CHILD'S SEXUAL BEHAVIOR IN 2008 DID NOT START THE SIX-YEAR STATUTE OF LIMITATIONS, AND THE NEGLIGENCE ACTION WAS SUPPORTED BY A DUTY OWED TO PLAINTIFFS' BIOLOGICAL CHILD (FOURTH DEPT).

The Fourth Department determined the fraud cause of action was not time-barred and the defendant's owed a duty which supported the negligence cause of action. The plaintiffs, who had a biological child, took in a foster child through Good Shepherd, a placement service. The plaintiffs were not aware that the foster child had a history of animal abuse and sexually inappropriate behavior. One day after plaintiffs' adoption of the foster child, the child sexually assaulted the biological child. Plaintiffs sued in fraud and negligence and Supreme Court denied Good Shepard's motion to dismiss:

A defendant's mere knowledge of something is not an element of a fraud cause of action; instead, a fraud cause of action requires a showing of, inter alia, the false representation of a material fact with the intent to deceive … . Thus, even assuming, arguendo, that Good Shepherd knew of the foster child's history of animal abuse and engaging in sexually inappropriate behavior as early as May 2008, we conclude that its knowledge thereof did not demonstrate that the alleged fraud occurred at that time. Good Shepherd submitted no evidence that, in May 2008, it falsely represented the foster child's relevant history with the intent to deceive plaintiffs. Thus, it did not establish as a matter of law that the fraud cause of action accrued in 2008 … . Moreover, Good Shepherd submitted the amended complaint, wherein plaintiffs alleged that, on numerous occasions in early 2012, they contacted Good Shepherd about the foster child's sexually inappropriate behavior and that, on each occasion, Good Shepherd assured them that the foster child had no history of that type of behavior. We therefore conclude that Good Shepherd failed to meet its initial burden of establishing that the fraud cause of action asserted in 2016 was barred by the applicable six-year statute of limitations (see CPLR 213 [8]). * * *

Although defendants contend that they did not owe the biological child a duty because they lacked control over the foster child during the four years that he lived with plaintiffs, control over a third-person tortfeasor is just one way to establish a duty. … [A]duty may also exist where "there is a relationship . . . between [the] defendant

and [the] plaintiff that requires [the] defendant to protect [the] plaintiff from the conduct of others," and "the key . . . is that the defendant's relationship with either the tortfeasor or the plaintiff places the defendant in the best position to protect against the risk of harm" … . Stephanie L. v House of The Good Shepherd, 2020 NY Slip Op 04643, Fourth Dept 8-20-20

TOXIC TORTS.

ALTHOUGH THE DAMAGES WERE DEEMED EXCESSIVE, PLAINTIFFS' MULTI-MILLION DOLLAR VERDICT IN THE ASBESTOS MESOTHELIOMA ACTION WAS SUPPORTED BY THE EXPERT EVIDENCE OF CAUSATION (FIRST DEPT).

The First Department, although finding some of the damage amounts excessive, determined, over a dissent, the plaintiffs' multi-million-dollar verdict in this asbestos exposure case was supported by the evidence. The case hinged on expert evidence that the extent of the exposure was sufficient to cause the resulting illness. The dissent argued the expert evidence did not meet the criteria imposed by the Court of Appeals:

In this asbestos case, Marlena Robaey [(]plaintiff), who died after the trial of this action, testified that, working with her husband and co-plaintiff, she had been regularly exposed to visible dust from scraping and grinding engine gaskets over a period of years, from cleaning the family garage after each gasket change, and from taking her and her husband's dusty clothes into their laundry room to clean. [Defendant] Federal-Mogul's corporate representatives, as well as the various experts called by defendants at trial, testified that the gaskets contained anywhere from 50% to 85% asbestos, and plaintiffs' experts testified that dust from these products, if visible, necessarily exceeded current permissible levels and contained sufficient levels of asbestos to cause plaintiff's peritoneal mesothelioma. * * *

… [T]he experts did not merely testify as to only an increased risk. Dr. Schwartz testified that the visible dust from the gaskets at issue, which were conceded by defendants' expert to contain between 50% and 85% asbestos, 80% being "standard," necessarily contained several thousand times the "safe" amount of asbestos, and thus was causative of plaintiff's disease … .

From the dissent:

It should be borne in mind that the decedent's relevant alleged exposure to asbestos from Fel-Pro products was restricted to helping her husband remove gaskets from his cars "once or twice . . . in a month" over a period of

12 year. It should also be remembered that only about half of the gaskets involved were [defendant's] products, that not all of the [defendant's] gaskets contained asbestos, and that any asbestos that the gaskets did contain was of the less hazardous chrysotile variety. Matter of New York City Asbestos Litig. v Air & Liquid Sys. Corp., 2020 NY Slip Op 04437, First Dept 8-5-20

TRAFFIC ACCIDENTS.

NOTWITHSTANDING ANY PRECEDENT TO THE CONTRARY, THE APPELLATE DIVISION CAN REVIEW THE RECORD OF A TRIAL AND FIND THE VERDICT UNSUPPORTED BY THE FACTS DESPITE THE ABSENCE OF A MOTION TO SET ASIDE THE VERDICT; HERE THE RECORD IN THIS TRAFFIC ACCIDENT CASE DID NOT SUPPORT THE FINDING THAT THE DRIVER OF A NEW YORK STATE THRUWAY DUMP TRUCK ACTED RECKLESSLY BY PARKING THE TRUCK ON THE SHOULDER OF THE THRUWAY (FOURTH DEPT).

The Fourth Department, refusing to follow any decisions to the contrary, determined, despite the defendant's failure to make a motion to set aside the verdict, the appellate court may review the record and render a judgment warranted by the facts. The Fourth Department, over a two-justice dissent, reversed the plaintiffs' verdict in this traffic accident case. Defendant, an employee of the New York State Thruway Authority, was the driver of a dump truck parked on the shoulder of the thruway while other employees picked up debris in the median. The truck was parked 18 inches to the left of the fog line. Plaintiffs' van drifted out of its lane and struck the back of the dump truck. The plaintiffs argued defendant was required by the relevant regulations to pull off "as far from traffic as feasible." The Fourth Department held that, although failure to pull off the highway further than 18 inches may demonstrate a lack of due care, it did not demonstrate recklessness as required by Vehicle and Traffic Law 1103:

… [A]t the time of the collision, defendant had parked the truck entirely outside of the travel lane approximately 18 inches to the left of the yellow fog line on or near the rumble strips located on the shoulder. Defendant had also activated multiple hazard lights on the truck, which consisted of regular flashers, two amber lights on the tailgate, beacon lights, and four flashing caution lights on the arrow board. Moreover, the undisputed evidence established that there were no weather, road, or lighting conditions creating visibility or control issues for motorists on the morning of the incident. Even if, as the court found, defendant knew or should have known that vehicles occasionally leave the roadway at a high rate of speed due to motorists being tired, distracted, or

inattentive, we conclude that, here, it cannot be said that defendant's actions were of an "unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow and . . . done . . . with conscious indifference to the outcome" … . Alexandra R. v Krone, 2020 NY Slip Op 04631, Fourth Dept 8-20-20

TRAFFIC ACCIDENTS.

PLAINTIFF BICYCLIST RAN INTO THE BACK OF DEFENDANT'S STOPPED OR STOPPING CAR; DEFENDANT DRIVER'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the action by plaintiff-bicyclist against defendant-driver should have been dismissed. Plaintiff ran into the back of defendant's car as defendant was stopped or was stopping to park:

Vehicle and Traffic Law section 1231 provides that every bicyclist is "subject to all of the duties applicable to the driver of a vehicle" … . A bicyclist "approaching another vehicle from the rear is required to maintain a reasonably safe distance and rate of speed under the prevailing conditions to avoid colliding with the other vehicle" (… see Vehicle and Traffic Law § 1129[a]). 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 … .

… The evidence … established that the plaintiff was negligent in failing to see what was there to be seen because he was not paying attention to the road conditions ahead, while he was riding his bicycle at a fast rate of speed, and that he failed to maintain a reasonably safe distance from the defendant's vehicle which, according to the plaintiff, was stopped at the time of the impact … .

The plaintiff's contention in opposition that the defendant made a sudden stop before attempting to park his vehicle was insufficient to raise a triable issue of fact as to whether the defendant was negligent in the operation of his vehicle … . Greene v Raskin, 2020 NY Slip Op 04463, Second Dept 8-12-20

TRAFFIC ACCIDENTS.

THE DEFENSE DID NOT NEED TO PROVIDE PLAINTIFF WITH "EXPERT-OPINION" NOTICE OF ITS INTENT TO CALL PLAINTIFF'S TREATING PHYSICIAN TO TESTIFY THAT PLAINTIFF'S COGNITIVE DEFICITS WERE THE RESULT OF A PRIOR STROKE, NOT THE TRAFFIC ACCIDENT; THE DOCTOR'S TESTIMONY SHOULD NOT HAVE BEEN PRECLUDED AND THE $2,000,000 VERDICT SHOULD HAVE BEEN SET ASIDE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined there was no need for the defendants to give prior notification to the plaintiff of the defendants' intent to call one of plaintiff's treating doctors to testify about the cause of plaintiff's cognitive deficits in this traffic accident case. The doctor would have testified the deficits were caused by a prior stroke. The testimony was precluded by Supreme Court because no "expert witness" notice had been provided to the plaintiff pursuant to CPLR 3101(d). The plaintiff was awarded $2,000,000 but the Second Department held the verdict should have been set aside:

A treating physician is permitted to testify at trial regarding causation, notwithstanding the failure to provide notice pursuant to CPLR 3101(d)(1) … ."Indeed, a plaintiff's treating physician could testify to the cause of the injuries even if he or she had expressed no opinion regarding causation in his or her previously exchanged medical report'"… . Here, the Supreme Court should not have precluded the plaintiff's treating physician from testifying regarding causation based on the defendants' failure to provide notice pursuant to CPLR 3101(d)(1), as that provision does not apply to treating physicians … . Moreover, under the circumstances of this case, the error in precluding this testimony cannot be deemed harmless.

Accordingly, the Supreme Court should have granted that branch of the defendants' motion which was pursuant to CPLR 4404(a) to set aside the verdict on the issue of damages in the interest of justice and for a new trial on that issue. Duman v Scharf, 2020 NY Slip Op 04537, Second Dept 8-19-20