NEW YORK APPELLATE DIGEST, LLC

Negligence
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An Organized Compilation of Summaries of Selected Decisions Addressing Negligence Released by Our New York State Appellate Courts in September 2020. 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 on Any Page to Return There.

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The Second Department, reversing Supreme Court, determined the village did not demonstrate infant plaintiff assumed the risk of injury from a tire swing in a village playground. Apparently the swing struck a railing causing infant plaintiff's leg to slip out from under him and his leg struck a support post:

… [T]he Village failed to demonstrate its entitlement to judgment as a matter of law based on the doctrine of primary assumption of risk. Although the locations of the railing and support post were open and obvious, the submissions of the Village failed to establish, prima facie, that the structure was not negligently designed so as to permit the tire to come into contact with the railing and support post, thereby unreasonably increasing the risks over and above the usual dangers that are inherent in playing on a tire swing … . In addition, in light of the infant plaintiff's age and limited experience with this tire swing, it cannot presently be determined as a matter of law that he was aware of and fully appreciated the risks involved with the tire being able to come into contact with the railing and support post … .

Further, the Village failed to establish, prima facie, that it neither created the allegedly dangerous condition nor had actual or constructive notice of the condition … , or that the infant plaintiff's accident was not foreseeable … . Berrin v Incorporated Vil. of Babylon, 2020 NY Slip Op 05177, Second Dept 9-30-20

BUS-PASSENGER INJURY, RESPONSE TO EMERGENCY.

TRANSIT AUTHORITY'S MOTION FOR SUMMARY JUDGMENT IN THIS BUS-PASSENGER INJURY CASE SHOULD HAVE BEEN GRANTED; THE BUS DRIVER REACTED APPROPRIATELY TO A CAR SUDDENLY PULLING OUT IN FRONT OF THE BUS TO MAKE A U-TURN (FIRST DEPT).

The First Department, reversing Supreme Court, determined defendant transit authority's motion for summary judgment in this bus-passenger injury case should have been granted. The driver of a double-parked car pulled out in front of the bus to make a u-turn and the driver properly slammed on the brakes:

… [D]efendants established their prima facie entitlement to judgment as a matter of law by showing that their bus driver was presented with an emergency situation that was not of his own making when a vehicle that was double-parked on the right side of the roadway suddenly made a U-turn in front of him, and that he took reasonable and prudent action to avoid a collision … . They also met their initial burden of showing that their bus driver's actions before the accident did not cause or contribute to the emergency, because the bus driver testified at his deposition that he was traveling no more than 15 miles per hour, warned the double-parked car before he attempted to pass by sounding his horn, and had his foot hovering over the brakes when the sedan suddenly made a U-turn in front of his bus when it was approximately five feet away. What is more, the driver had no duty to anticipate that another driver would make a sudden, illegal maneuver … .

… [T]he record shows that the driver was obliged to take immediate action when the car suddenly cut in front of the bus to make a U-turn, and stepping on the brakes to avoid a collision was a reasonable response to a situation not of defendants' own making … . Santana-Lizardo v New York City Tr. Auth., 2020 NY Slip Op 05164, First Dept 9-29-20

DENTAL MALPRACTICE, EXPERT EVIDENCE.

SUPREME COURT SHOULD NOT HAVE DISMISSED THIS DENTAL MALPRACTICE ACTION ON THE GROUND THE PLAINTIFFS' EXPERT WAS NOT QUALIFIED TO RENDER AN OPINION; ANY WEAKNESSES IN THE EXPERT'S AFFIDAVIT WENT TO ITS WEIGHT NOT ITS ADMISSIBILITY (SECOND DEPT).

The Second Department, reversing Supreme Court, determined this dental malpractice action should not have been dismissed. The weaknesses in plaintiffs' expert's affidavit went to the weight of her opinion as evidence, not its admissibility:

The Supreme Court granted that branch of the motion, determining that the defendant demonstrated his prima facie entitlement to judgment as a matter of law dismissing the dental malpractice cause of action insofar as asserted against him, and that the expert affirmation submitted by the plaintiffs in opposition lacked probative value because the plaintiffs' expert was not qualified to render an opinion as to the applicable standard of care. …

… [T]he affirmation of the plaintiffs' expert was sufficient to demonstrate his qualifications to render opinions as to the applicable standard of care and, under these circumstances, raised triable issues of fact as to whether the defendant deviated from that standard and whether any such deviation was a proximate cause of [plaintiff's] injuries … . "Any lack of skill or expertise that the plaintiff's expert may have had goes to the weight of his or her opinion as evidence, not its admissibility" … . The parties' conflicting expert opinions raised questions of credibility for the trier of fact … . Lesniak v Huang, 2020 NY Slip Op 05044, Second Dept 9-23-20

EDUCATION-SCHOOL LAW, MUNICIPAL LAW.

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The Second Department determined defendants' motion to dismiss claims that were not in the notice of claim was properly granted, and plaintiffs' motions to amend the notice of claim and for leave to file a late notice of claim were properly denied. The Second Department noted that the loss of services claim should not have been dismissed (sua sponte) because that relief was not requested. The action alleged negligent supervision by the school. Plaintiff student was allegedly pushed into a wall during gym class by another student who had been bullying her for some time:

The plaintiffs' new claims of other purported bullying incidents and Dupper's [plaintiff-student's father's] claim that he suffered stress, anxiety, and depression as a result of the … incident constitute new theories of liability which were not included in the notice of claim and should be dismissed … . …

The plaintiffs' proposed amendments to the notice of claim add substantive new facts and new theories of liability not set forth in the original notice of claim and which are not permitted as late filed amendments to a notice of claim under General Municipal Law § 50-e(6) … . …

… [T]he plaintiffs' failure to include a proposed notice of claim with their cross motion alone was a sufficient basis for denying that branch of the cross motion … . C.D. v Goshen Cent. Sch. Dist., 2020 NY Slip Op 04916, Second Dept 9-16-20

ELEVATOR MALFUNCTION, ACTUAL OR CONSGTRUCTIVE NOTICE.

QUESTION OF FACT WHETHER DEFENDANT PROPERTY OWNER HAD NOTICE OF THE ALLEGED ELEVATOR MISALIGNMENT PROBLEM WHICH ALLEGEDLY CAUSED PLAINTIFF'S SLIP AND FALL; SUPREME COURT REVERSED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined there was a question of fact whether the elevator was functioning properly and whether defendant had actual or constructive knowledge of the misalignment which alleged caused plaintiff's slip and fall:

… [T]he property defendants demonstrated their prima facie entitlement to judgment as a matter of law by establishing, through the deposition testimony of their witnesses and an expert affidavit, that no complaints were ever made about misalignment of the elevator, that routine inspections of the building by employees did not reveal the presence of such a condition, and that an inspection conducted of the elevator three days before the accident did not reveal any defects that would cause misalignment.

… [T]he plaintiff submitted, among other things, an affidavit from her mother, who then resided in the building, asserting that during the month preceding the accident, she observed misalignment of the elevator "almost every day," and that, in response to a complaint about misalignment by another resident, a member of the condominium's Board of Managers had acknowledged the problem in her presence … . The plaintiff also submitted evidence demonstrating the documented occurrence of prior similar incidents of misalignment, and an unsatisfactory inspection report for the elevator, completed three days before the accident, which, according to the plaintiff's expert, and contrary to the averment of the property defendants' expert and other witnesses, evinced defects which would cause misalignment. The plaintiff's evidence was sufficient to raise a triable issue of fact as to whether the property defendants had notice of the allegedly defective condition that caused the plaintiff's accident … . Napolitano v Jackson "78" Condominium, 2020 NY Slip Op 04955, Second Dept 9-16-20

INQUEST ON DAMAGES.

PLAINTIFF'S TREATING PHYSICIAN SHOULD HAVE BEEN MADE AVAILABLE FOR CROSS-EXAMINATION BY THE DEFENDANT IN THIS INQUEST ON DAMAGES; ALTHOUGH DEFENDANT DEFAULTED ON LIABILITY IN THIS PERSONAL INJURY ACTION, DEFENDANT APPEARED FOR THE INQUEST (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the injured plaintiff's (Castaldini's) treating physician should have been made available for cross-examination by defendant at the inquest on damages. Defendant had defaulted on liability but appeared at the inquest. Supreme Court accepted an affidavit from the doctor to prove damages. The court noted that causation of the damages is not considered in an inquest:

… [W]e disagree with the Supreme Court's determination to admit into evidence the written sworn statement of Castaldini's treating physician without making the physician available for cross-examination. At an inquest to ascertain damages upon a defendant's default, the plaintiff may submit proof by written sworn statements of the witnesses (see CPLR 3215[b]; 22 NYCRR 202.46[b]). However, where, as here, the defaulting defendant gives notice that he or she will appear at the inquest, the plaintiff must make the witnesses available for cross-examination (see CPLR 3215[b] …). Since Walsh did not make the physician available for cross-examination, the court should not have admitted into evidence the physician's written sworn statement over Walsh's objection. Further, since the court relied on the physician's statement in making its findings of fact on damages, we remit the matter to the Supreme Court, Suffolk County, for a new inquest on the issue of damages … . Castaldini v Walsh, 2020 NY Slip Op 04822, First Dept 9-2-20

JURY INSTRUCTIONS, BURDEN OF PROOF.

INSTRUCTING THE JURY ON THE BURDEN OF PROOF IN THIS DAMAGES-ONLY PERSONAL INJURY TRIAL SHIFTED THE BURDEN OF PROOF; $5,500,000 VERDICT SET ASIDE AND NEW TRIAL ORDERED (SECOND DEPT).

The Second Department, ordering a new trial in this personal injury action which had resulted in a $5,500,000 verdict, determined the "burden of proof" jury instruction should not have been given in this damages-only trial:

… [T]he defendants contend … that the verdict and judgment must be set aside on the ground that they were deprived of a fair trial by the Supreme Court's improper jury instruction on the law. Specifically, the defendants contend that the court erroneously charged the jury with respect to the burden of proof.

"A trial court is required to state the law relevant to the particular facts in issue, and a set of instructions that confuses or incompletely conveys the germane legal principles to be applied in a case requires a new trial"… .

Here, we agree with the defendants that under the facts of this case, the Supreme Court's determination to charge Pattern Jury Instructions 1:60 was improper in the context of a trial limited to the issue of damages only and was prejudicial to the defendants in that it shifted the burden of proof. In light of the court's error in the charge, substantial justice was not done since the jury was not instructed with the germane legal principles to be applied … . Gorokhova v Consolidated Edison of N.Y., Inc., 2020 NY Slip Op 04828, Second Dept 9-2-20

LANDLORD LIABILITY.

DEFENDANT LANDLORD NOT LIABLE FOR PLAINTIFF'S FALL OUT OF A WINDOW; NO ALLEGATION OF THE VIOLATION OF ANY RULE, REGULATION, CODE OR STANDARD (FIRST DEPT).

The First Department, reversing Supreme Court, determined defendant property owner was not liable for plaintiff's fall out of a window to the sidewalk below:

The record demonstrates that defendants may not be held liable for the injuries sustained by plaintiff when, upon tripping over speaker wires, he fell out of his bedroom window and onto the sidewalk below. Defendants met their burden for summary judgment by submitting evidence that the window, neither by its configuration or condition, presented a hazard in and of itself, and that defendants had no statutory or common-law duty to install window guards or stops for the benefit of adult plaintiff …

Plaintiff's expert's affidavit was insufficient to defeat the motion for summary judgment as it was not based on any rules, regulations, codes, standards or on the factual record … . Fraser v Reclaim Hous. Dev. Fund Corp., 2020 NY Slip Op 05135, First Dept 9-29-20

MEDICAL MALPRACTICE, COURT OF CLAIMS.

CLAIMANTS' MOTION FOR LEAVE TO FILE A LATE NOTICE OF CLAIM IN THIS MEDICAL MALPRACTICE ACTION SHOULD HAVE BEEN GRANTED PRIMARILY BECAUSE THE MEDICAL RECORDS PROVIDED THE STATE WITH TIMELY KNOWLEDGE OF THE NATURE OF THE CLAIM (SECOND DEPT).

The Second Department, reversing the Court of Claims, determined claimants' motion for leave to file a late notice of claim pursuant to Court of Claims Act 10(6) in this medical malpractice action should have been granted, primarily because the state had timely knowledge of the nature of the claim and was not prejudiced by the 14 week delay:

… [T]he claimants demonstrated that the State had timely notice of the essential facts constituting the claim, inter alia, to recover damages for personal injuries arising from the alleged malpractice, by virtue of the medical records from Southampton Hospital as well as the medical records from Stony Brook University Hospital (hereinafter University Hospital), also owned by the State, to which the claimants' infant son was transferred and where he later died … . The medical records evidence the medical care received by the claimant and the infant. The records show that during the claimant's labor, no sonogram of the fetus was taken to determine the fetus' head size. The records also show that, after approximately nine hours of unsuccessful labor at Southampton Hospital, which included the administration of pitocin, a birth-facilitating drug, and an epidural, the claimant was counseled about using forceps to deliver the fetus. After the claimant agreed to try a forceps-assisted delivery and declined to consent to an episiotomy, the infant was delivered via forceps-assistance and was diagnosed immediately with a hemorrhage below his scalp as a result of "birth trauma." Thereafter, the infant was transferred to University Hospital, where he died a week later. The autopsy report in University Hospital's medical records indicates that the infant suffered, inter alia, an injury during the forceps-assisted delivery which separated the infant's brain stem from his upper cervical spinal cord region, and the infant's overly large head was noted to be a factor in this injury. Although the treating physician noted in his report—which was created after the delivery—that the claimant did not want a cesarean section, the claimant's medical record contains a form signed by the claimant on admission consenting to a cesarean section. There is no documentation in the record to show that the claimant was advised that a cesarean section should be performed. In addition, the claimant's medical records, postdelivery, demonstrate that she experienced perineal lacerations and vaginal tears, which were deep and penetrated the perirectal tissue, as a result of the delivery. Stirnweiss v State of New York, 2020 NY Slip Op 04986, Second Dept 9-16-20

MEDICAL MALPRACTICE, DEPOSITIONS.

SUPREME COURT PROPERLY LIMITED THE DEPOSITION QUESTIONING OF A DOCTOR IN THIS MEDICAL MALPRACTICE ACTION AND PROPERLY ORDERED THAT THE DEPOSITION BE SUPERVISED BECAUSE OF MISCONDUCT ON BOTH SIDES DURING A PRIOR DEPOSITION (SECOND DEPT).

The Second Department, over an extensive dissent, determined Supreme Court properly issued a protective order limiting the deposition questioning of a doctor (Brem) in this medical malpractice action and properly ordered that the deposition be supervised. Both sides had engaged in misconduct at the prior deposition:

… [T]he Supreme Court providently exercised its discretion in granting those branches of Winthrop's [the hospital's] motion which were for a protective order to the extent of limiting further questioning of Brem solely to his observations and treatment of decubitis ulcers sustained by Slapo [plaintiff's decedent] and to direct that Brem's continued deposition be supervised by a special referee. While we agree with the court's characterization of the improper conduct of Slapo's attorney at Brem's deposition, we observe that the defense attorneys violated 22 NYCRR 221.1 by making numerous objections and making speaking objections. We further note that Brem violated 22 NYCRR 221.2 by refusing to answer questions. Given the obstructive conduct by the defense attorneys and Brem in violation of 22 NYCRR part 221, and the improper conduct of Slapo's attorney during the deposition, we agree with the court that appropriate supervision of the balance of Brem's deposition is necessary. Because both sides have engaged in arguably sanctionable conduct during the course of Brem's deposition … , it was inappropriate to compel the plaintiff to solely bear the cost of supervision thereof. Further, without the consent of all the parties, the court may not compel a party to pay for or contribute to the cost of an outside referee (see CPLR 3104[b] …). Accordingly, we modify the order so as to direct that Brem's continued deposition be supervised by a court-employed special referee … , a judicial hearing officer, or a court attorney referee. Slapo v Winthrop Univ. Hosp., 2020 NY Slip Op 04887, Second Dept 9-2-20

POLICE REPORTS, ADMISSIONS.

A PARTY'S ADMISSION IN AN UNCERTIFIED POLICE REPORT IS NO LONGER ADMISSIBLE IN THE 2ND DEPARTMENT AND DECISIONS TO THE CONTRARY SHOULD NO LONGER BE FOLLOWED (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Connolly, reversing Supreme Court, noting prior decisions to the contrary should no longer be followed, determined a party's hearsay admission in an uncertified police report is not admissible. Therefore, plaintiff's motion for summary judgment in this rear-end collision case should not have been granted:

At the first level of hearsay, the report itself must be admissible. A properly certified police accident report is admissible where "the report is made based upon the officer's personal observations and while carrying out police duties" … . CPLR 4518(c) provides that the foundation for the admissibility of, inter alia, the records of a department or bureau of a municipal corporation or of the state may be laid through a proper certification … . CPLR 4518(c) "is governed by the same standards as the general business record exception" … . Thus, the certification must "set forth" … that the record "was made in the regular course of any business and that it was the regular course of such business to make it, at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter" (CPLR 4518[a]). * * *

Although a line of cases from our Court held that an uncertified police report constitutes inadmissible hearsay … , a separate line of cases anomalously espoused a carve-out to that rule, holding that a party's admission in an uncertified police report is admissible against that party. Although a party's admission is an exception to the hearsay rule … , it is not logically consistent to hold that such admission may be received into evidence where the business record containing the purported admission is not itself in admissible form. Stated differently, a party's admission contained within a police accident report may not be bootstrapped into evidence if a proper foundation for the admissibility of the report itself has not been laid. Yassin v Blackman, 2020 NY Slip Op 05090, Second Dept 9-23-20

SLIP AND FALL, MUNICIPAL LAW.

OWNER OF OWNER-OCCUPIED TWO-FAMILY RESIDENCE IS EXEMPT FROM LIABILITY FOR A SIDEWALK SLIP AND FALL PURSUANT TO THE NYC ADMINISTRATIVE CODE AND WAS NOT LIABLE UNDER THE COMMON LAW; DEFENDANT'S SUMMARY JUDGMENT MOTION SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court in this sidewalk slip and fall case, determined defendant property owner was exempt from liability under the administrative code and common law:

"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" (… see Administrative Code of City of NY § 7-210[b]). Here, the defendants established, prima facie, that the subject property abutting the public sidewalk was a two-family, owner-occupied residence, and thus, that they are entitled to the exemption from liability for owner-occupied residential property … .

The defendants also established that they could not be held liable for the plaintiff's alleged injuries under common-law principles. "Absent the liability imposed by statute or ordinance, an abutting landowner is not liable to a passerby on a public sidewalk for injuries resulting from defects in the sidewalk unless the landowner either created the defect or caused it to occur by special use" … . The defendants established, prima facie, that they did not create the defective condition that allegedly caused the plaintiff's fall or make a special use of that area of the sidewalk … . Osipova v London, 2020 NY Slip Op 05053, Second Dept 9-23-30

TOXIC TORTS, MUNICIPAL LAW.

PETITION FOR LEAVE TO FILE A LATE NOTICE OF CLAIM AGAINST THE CITY OF NEW YORK SHOULD NOT HAVE BEEN GRANTED IN THIS LEAD-PAINT EXPOSURE CASE; THE PLAINTIFF WAS EXPOSED TO LEAD IN AN APARTMENT OWNED BY THE NEW YORK CITY HOUSING AUTHORITY (NYCHA), AN ENTITY SEPARATE FROM THE CITY; THEREFORE THE UNDERLYING CLAIM WAS PATENTLY MERITLESS (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the motion for leave to file a late notice of claim in this lead-paint exposure case should not have been granted with respect to the defendant City of New York. Plaintiff alleged exposure to lead in an apartment owned by the New York City Housing Authority (NYCHA) which is a entity separate from the city:

" Ordinarily, the courts will not delve into the merits of an action on an application for leave to serve and file a late notice of claim' … . However, permission to file a late notice of claim is properly denied where the underlying claim is patently meritless' …".

Here, the Supreme Court should have denied the petition on the ground that the claim, insofar as asserted against the City, is patently meritless. "Liability for a dangerous condition on real property must be predicated upon ownership, occupancy, control, or special use of the property" … . It is undisputed that the apartment building in which the infant petitioner resided at the time of his injury was owned and operated by NYCHA, an entity which is separate from the City … . Furthermore, there is no basis for finding that the City owed the infant petitioner a duty based upon a special relationship between them … . Matter of K.G. v City of New York, 2020 NY Slip Op 04943, Second Dept 9-16-20

TRAFFIC ACCIDENTS, EXPERT EVIDENCE.

THE AFFIDAVIT FROM PLAINTIFF'S ACCIDENT RECONSTRUCTION EXPERT WAS ESSENTIALLY THE SOLE BASIS FOR PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IN THIS BICYCLE-CAR ACCIDENT CASE; THE AFFIDAVIT, FOR SEVERAL REASONS, DID NOT RISE TO THE LEVEL OF PROOF REQUIRED TO WARRANT SUMMARY JUDGMENT (THIRD DEPT).

The Third Department determined plaintiff's motion for summary judgment in this bicycle-car accident case, based entirely on the affidavit from plaintiff's accident reconstruction expert (Witte), was properly denied. The bicyclist died in the accident. The driver, Amyot, and her husband, a passenger, died later:

… [W]e note that Witte does not aver that his opinion is within a reasonable degree of scientific certainty. Although the failure to do so does not de facto render his affidavit invalid … , the affidavit must contain an evidentiary foundation that would support plaintiff's verdict if offered at trial … . This it failed to do. Witte's conclusions — which were based on the timing of the accident, i.e., where Amyot should have seen decedent and the precise distances and times averred to by Witte — are not based on facts evident in the record, but rather on the statement that Amyot's husband made to police that "[a] couple houses past [the] speed zone on the right, I saw [decedent] on his bike coming out of . . . the driveway." It is unclear from this statement whether Amyot's husband was located "a couple" of houses past the speed zone when he saw decedent or whether decedent and the driveway from which he was exiting were located "a couple" of houses past the speed zone. Further, one cannot discern what constitutes "a couple." For these reasons, the factual foundation lacks the probative force adequate to support summary judgment … . …

… [A]part from the supporting depositions, all of the documents that Witte utilized in forming his opinion are unsworn, uncertified and/or unauthenticated. Although the professional reliability exception to the hearsay rule allows "an expert witness to provide opinion evidence based on otherwise inadmissible hearsay," it must be shown "to be the type of material commonly relied on in the profession" … . Furthermore, even if such reliability is shown, "it may not be the sole basis for the expert's opinion" … . Delosh v Amyot, 2020 NY Slip Op 05003, Third Dept 9-17-20

TRAFFIC ACCIDENTS, MUNICIPAL LAW.

A COUNTY SHERIFF WAS INVOLVED IN THE TRAFFIC ACCIDENT FOR WHICH PETITIONER SOUGHT LEAVE TO FILE A LATE NOTICE OF CLAIM; BECAUSE THE COUNTY WAS AWARE OF THE POTENTIAL ACTION FROM THE OUTSET, LEAVE WAS PROPERLY GRANTED (SECOND DEPT).

Petitioner state trooper was involved in a traffic accident with a county sheriff and sought to file a late notice of claim against the county. The county was aware of the potential claim from the outset, because a county employee was involved. Therefore leave to file a late notice of claim was properly granted:

Although a police report regarding an automobile accident does not, in and of itself, constitute notice of a claim to a municipality, where the municipality's employee was involved in the accident and the report or investigation reflects that the municipality had knowledge that its employee committed a potentially actionable wrong, the municipality can be found to have actual notice … . In this case, the subject motor vehicle accident involved an Orange County Sheriff's vehicle and employee. Numerous officers from the Orange County Sheriff's office responded to the scene of the accident. Further, the police accident report prepared by a state police officer who responded to the scene contained the injured petitioner's account of how the accident occurred. Specifically, the police report indicated that the County committed a potentially actionable wrong when its employee allegedly failed to yield the right of way to the injured petitioner's vehicle even though the injured petitioner's vehicle's lights and sirens were activated. The police accident report also indicated that the injured petitioner was allegedly injured in the accident. Moreover, upon submitting a request to the County pursuant to the Freedom of Information Law for documents related to this accident, the County produced the police accident report, photographs taken of the vehicles and the accident scene, unit activity logs for the vehicles, and the Orange County Sheriff's report regarding the accident. Thus, the County acquired timely actual knowledge of the essential facts constituting the petitioners' claim … .

Moreover, as the County acquired timely knowledge of the essential facts constituting the petitioners' claim, the petitioners met their initial burden of showing that the County would not be prejudiced by the late notice of claim … . Matter of McVea v County of Orange, 2020 NY Slip Op 04840, Second Dept 9-2-20

TRAFFIC ACCIDENTS, VICARIOUS LIABILITY.

DESPITE THE ALLEGATION THAT THE DRIVER HAD LOGGED OFF THE UBER APP PRIOR TO THE PEDESTRIAN-VEHICLE ACCIDENT, QUESTIONS OF FACT PRECLUDED SUMMARY JUDGMENT ON THE VICARIOUS LIABILITY THEORY; THE UNEMPLOYMENT INSURANCE APPEAL BOARD'S FINDING THAT THE DRIVER WAS EMPLOYED BY UBER WAS NOT ENTITLED TO PRECLUSIVE EFFECT; ISSUE NOT RAISED BELOW PROPERLY CONSIDERED ON APPEAL (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court in this pedestrian-vehicle accident case, determined: (1) a ruling by the Unemployment Insurance Appeal Board finding that defendant driver was an employee of defendant Uber was not entitled collateral-estoppel effect pursuant to Labor Law 623(2); (2) although the Labor Law 623(2) argument was not raised below, it raised a question of law which could not have been avoided below and therefore was considered on appeal; (3) the claim that defendant driver had logged off the Uber app at the time of the accident did not warrant summary judgment in favor of Uber on the vicarious liability theory:

An action may be considered to be within the scope of employment, thus rendering an employer vicariously liable for the conduct, when "the employee is engaged generally in the business of the employer, or if the act may be reasonably said to be necessary or incidental to such employment" … . Whether an employee was acting within the scope of his or her employment is generally a question of fact for the jury … .

Here, contrary to Uber's contention, the averments [that the driver] had logged off of the Uber app 40 minutes before the accident were simply insufficient, without more, to eliminate all questions of fact as to whether Hussein was acting within the scope of his alleged employment with Uber at the time of the incident … . Uy v Hussein, 2020 NY Slip Op 05080, Second Dept 9-23-30