

# NEW YORK APPELLATE DIGEST, LLC

A Succinct Collection of the Salient Issues Addressed in the Negligence Decisions Released by Our New York State Appellate Courts in December 2020. The Citations Link to the Decisions on the Official New York Courts Website. The Full Decision-Summaries Are Available in the December 2020 Negligence Update Pamphlet.  
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Negligence Practice  
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## **BANKRUPTCY, TRUSTS AND ESTATES, WRONGFUL DEATH.**

**THE ADMINISTRATOR OF THE ESTATE COULD SUE FOR DECEDENT'S CONSCIOUS PAIN AND SUFFERING BUT, BECAUSE THE WRONGFUL DEATH ACTION HAD NOT BEEN LISTED AS AN ASSET IN THE BANKRUPTCY PROCEEDING, THE ADMINISTRATOR DID NOT HAVE THE CAPACITY TO SUE ON BEHALF OF THE DISTRIBUTEE FOR WRONGFUL DEATH (SECOND DEPT).**

[Vinogradov v Bay Plaza Apts Co., LLC, 2020 NY Slip Op 08104, Second Dept 12-30-20](#)

Practice Point: In this wrongful death case, the plaintiff was the administrator of the estate and the sole distributee. Because this wrongful death action was not listed as an asset in the plaintiff's bankruptcy proceeding, to which the decedent was not a party, and because the cause of action vested in the plaintiff, as distributee, upon death, the plaintiff did not have the capacity to bring the action. But the plaintiff had the capacity to sue for conscious pain and suffering because that cause of action was personal to the decedent and therefore was part of the estate.

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## **DENTAL MALPRACTICE.**

**PLAINTIFF'S EXPERT'S AFFIDAVIT IN THIS DENTAL MALPRACTICE ACTION WAS CONCLUSORY AND SPECULATIVE AND THEREFORE DID NOT RAISE A QUESTION OF FACT; DEFENDANT DEMONSTRATED THE PERFORMED PROCEDURE WAS NOT THE PROXIMATE CAUSE OF PLAINTIFF'S INJURY, THEREBY NEGATING THE "LACK OF INFORMED CONSENT" CAUSE OF ACTION; DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (SECOND DEPT).**

[Kelapire v Kale, 2020 NY Slip Op 07553, Second Dept 12-16-20](#)

Practice Point: A lack of informed consent cause of action in a medical or dental malpractice case requires proof that the actual procedure for which there was no informed consent was the proximate cause of the injury.

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## **ELEVATORS.**

**THE BUILDING OWNER HAD, BY CONTRACT, RELINQUISHED ALL RESPONSIBILITY FOR ELEVATOR MAINTENANCE TO DEFENDANT AMERICAN ELEVATOR AND WAS THEREFORE NOT LIABLE FOR THE ALLEGED ELEVATOR MALFUNCTION; THE PLAINTIFF ALLEGED THE INNER GATE CLOSED ON HER SHOULDER, PINNING HER, AND THE ELEVATOR THEN DESCENDED; A QUESTION OF FACT PURSUANT TO THE RES IPSA LOQUITUR DOCTRINE WAS RAISED (FIRST DEPT).**

*Sanchez v 1067 Fifth Ave. Corp., 2020 NY Slip Op 07326, First Dept 12-8-20*

Practice Point: The building owner had, by contract, completely relinquished the responsibility to maintain the building's elevator to an elevator maintenance and repair company. Therefore the building owner was not liable for any injuries caused by the malfunction of the elevator.

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## **GROSS NEGLIGENCE PUBLIC POLICY RULE, CONTRACT LAW.**

**THE SOLE REMEDY PROVISION IN THE REPRESENTATIONS AND WARRANTIES AGREEMENT IN THIS RESIDENTIAL MORTGAGE-BACKED SECURITIES CASE WAS VALID AND ENFORCEABLE; THE GROSS NEGLIGENCE PUBLIC POLICY RULE DOES NOT APPLY WHERE THE SOLE REMEDY PROVISION IMPOSES REASONABLE LIMITATIONS ON LIABILITY OR REMEDIES (CT APP).**

*Matter of Part 60 Put-Back Litig., 2020 NY Slip Op 07687, CtApp 12-22-20*

Practice Point: The so-called gross negligence public policy rule may render a clause in a contract which wholly insulates a party from liability unenforceable.

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## **MEDICAL MALPRACTICE, EMPLOYMENT LAW.**

**THE NEGLIGENT SUPERVISION ACTION AGAINST PHYSICAL-THERAPY DEFENDANTS SOUNDED IN MEDICAL MALPRACTICE REQUIRING EXPERT OPINION EVIDENCE; THE DOCTRINE OF OSTENSIBLE OR APPARENT AGENCY RAISED A QUESTION OF FACT WHETHER THE PHYSICAL-THERAPY FACILITY WAS VICARIOUSLY LIABLE FOR THE ALLEGED NEGLIGENCE OF THE THERAPIST, WHO WAS AN INDEPENDENT CONTRACTOR (SECOND DEPT).**

[Weiszberger v KCM Therapy, 2020 NY Slip Op 07425, Second Dept 12-9-20](#)

Practice Point: A negligence action against a physical therapist, here stemming from the allegation a child receiving therapy fell off a scooter due to inadequate supervision, sounds in medical malpractice and therefore requires expert opinion evidence. Although the physical therapist in this action was an independent contractor, the employer could be held liable under an ostensible or apparent authority theory.

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## **MEDICAL MALPRACTICE.**

**PLAINTIFF'S EXPERT AFFIDAVIT DID NOT ADDRESS ONE CAUSE OF ACTION IN THIS MEDICAL MALPRACTICE CASE; THEREFORE THAT CAUSE OF ACTION SHOULD HAVE BEEN DISMISSED (FOURTH DEPT).**

[Bristol v Bunn, 2020 NY Slip Op 07773, Fourth Dept 12-23-20](#)

Practice Point: The appellate courts' approach to summary judgment motions generally and in medical malpractice actions specifically is illustrated by this case. Plaintiff's expert's affidavit submitted in response to defendant's motion for summary judgment did not address one of the causes of action alleging medical malpractice, specifically the negligent perforation of the bowel. Therefore that cause of action should have been dismissed. Medical malpractice actions survive or fall at the summary judgment stage on the strength and scope of the expert affidavits.

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**MEDICAL MALPRACTICE.**

**PLAINTIFF'S EXPERT'S AFFIDAVIT DID NOT ADDRESS DEFENDANT'S EXPERT'S OPINION THAT NERVE DAMAGE WAS NOT THE RESULT OF DEVIATION FROM THE STANDARD OF CARE; THEREFORE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (FOURTH DEPT).**

[Campbell v Bell-Thomson, 2020 NY Slip Op 07807, Fourth Dept 12-23-20](#)

Practice Point: In this medical malpractice action, the plaintiff's expert did not rebut the defendant's expert's opinion with specific allegations supported by competent evidence and therefore did not raise a question of fact. Conclusory or speculative allegations by an expert have no evidentiary force in medical malpractice actions.

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**MEDICAL MALPRACTICE.**

**THE JURY WAS PROPERLY INSTRUCTED ON THE RES IPSA LOQUITUR DOCTRINE IN THIS MEDICAL MALPRACTICE ACTION (SECOND DEPT).**

[Smith v Sommer, 2020 NY Slip Op 07235, Second Dept 12-2-20](#)

Practice Point: The jury in this medical malpractice action was properly instructed on the res ipsa loquitur doctrine. There was expert evidence a nerve would not have been damaged had the surgery been done properly.

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**MUNICIPAL LAW, THIRD-PARTY ASSAULT.**

**THERE IS NO CAUSE OF ACTION FOR NEGLIGENT INVESTIGATION IN NEW YORK; PLAINTIFF'S DECEDENT, A CHILD, WAS MURDERED BY MOTHER'S BOYFRIEND: THE SUIT ALLEGING THE COUNTY DID NOT ADEQUATELY INVESTIGATE PRIOR REPORTS OF CHILD ABUSE SHOULD HAVE BEEN DISMISSED (FOURTH DEPT).**

[Hart v County of Erie, 2020 NY Slip Op 07779, Fourth Dept 12-23-20](#)

Practice Point: The action alleged county child protective services was negligent in investigating prior reports of child abuse and therefore the county was liable for the death of the child. The action was dismissed because there is no cause of action for negligent investigation in New York.

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**MUNICIPAL LAW.**

**THE WRONGFUL DEATH COMPLAINT ALLEGED PORT AUTHORITY WAS NEGLIGENT IN FAILING TO INSTALL SUICIDE-PREVENTION BARRIERS ON THE GEORGE WASHINGTON BRIDGE; THE COMPLAINT STATED A CAUSE OF ACTION AND SHOULD NOT HAVE BEEN DISMISSED (SECOND DEPT).**

[Perlov v Port Auth. of N.Y. & N.J., 2020 NY Slip Op 08092, Second Dept 12-30-20](#)

Practice Point: The Port Authority may be liable for plaintiff's suicide because suicide-prevention barriers were not installed on the George Washington Bridge.

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**NEGLIGENT HIRING, SUPERVISION, RETENTION AND TRAINING.**

**NEGLIGENT HIRING, SUPERVISION, RETENTION AND TRAINING CAUSES OF ACTION PROPERLY SURVIVED SUMMARY JUDGMENT; THE VICARIOUS LIABILITY CAUSE OF ACTION, HOWEVER, SHOULD HAVE BEEN DISMISSED; IT WAS ALLEGED EMPLOYEES OF A RESIDENTIAL FACILITY BURNED A NONVERBAL, AUTISTIC RESIDENT (FIRST DEPT).**

[Sandoval v Leake & Watts Servs., Inc., 2020 NY Slip Op 08017, First Dept 12-29-20](#)

Practice Point: An employer may be liable for negligent hiring, training and supervision of employees, yet not vicariously liable because the employees were not acting within the scope of their employment.

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**SLIP AND FALL, LABOR LAW-CONSTRUCTION LAW.**

**A WALKWAY WET FROM RAIN WHICH WAS FALLING AT THE TIME OF THE SLIP AND FALL WAS NOT ACTIONABLE (SECOND DEPT).**

[Derosa v Zaliv, LLC, 2020 NY Slip Op 07862, Second Dept 12-23-20](#)

Practice Point: A walkway wet from falling rain, while rain is falling, is not actionable.

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**SLIP AND FALL, MUNICIPAL LAW.**

**CLAIMANT'S APPLICATION TO SERVE A LATE NOTICE OF CLAIM IN THIS SLIP AND FALL CASE SHOULD HAVE BEEN GRANTED, DESPITE THE ABSENCE OF A VALID EXCUSE FOR THE DELAY (THIRD DEPT).**

[Matter of Perkins v Albany Port Dist. Commn., 2020 NY Slip Op 07963, Third Dept 12-24-20](#)

Practice Point: In an application for permission to file a late notice of claim, the lack of a valid excuse for not filing on time may not result in the denial of the application where the defendant had notice of the potential lawsuit. Here an incident report was created by the defendant's security personnel at the time of the slip and fall.

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**SLIP AND FALL, MUNICIPAL LAW.**

**FAILURE TO FILE A NOTICE OF CLAIM AGAINST THE NEW YORK TRANSIT AUTHORITY (AS OPPOSED TO THE CITY OF NEW YORK) IN THIS SLIP AND FALL CASE, AND THE FAILURE TO APPLY FOR PERMISSION TO FILE A LATE NOTICE OF CLAIM, GAVE RISE TO THIS LEGAL MALPRACTICE AND JUDICIARY LAW 487 ACTION WHICH SHOULD NOT HAVE BEEN DISMISSED; THE DISTINCTION BETWEEN THE TWO CAUSES OF ACTION EXPLAINED (SECOND DEPT).**

[Bianco v Law Offs. of Yuri Prakhin, 2020 NY Slip Op 07849, Second Dept 12-23-20](#)

Practice Point: In this case the defendant lawyers were sued for failure to file a notice of claim. The complaint alleged legal malpractice and a violation of Judiciary Law 487. The two causes of action are distinct. Legal malpractice sounds in negligence and the Judiciary Law violation requires an intent to deceive.

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**SLIP AND FALL, MUNICIPAL LAW.**

**PLAINTIFF IN THIS SLIP AND FALL CASE ALLEGED HE WAS INJURED WHEN HE STEPPED ON A LOOSE MANHOLE COVER OWNED BY DEFENDANT-TOWN; THE TOWN DEMONSTRATED IT DID NOT HAVE NOTICE OF THE CONDITION BUT DID NOT DEMONSTRATE IT DID NOT CREATE THE CONDITION; THE TOWN'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).**

[Dejesus v Town of Mamaroneck, 2020 NY Slip Op 07542, Second Dept 12-16-20](#)

Practice Point: In this slip and fall case against a municipality, the plaintiff alleged the municipality created the dangerous condition. In its summary judgment motion, the municipality argued that it did not have written notice of the condition but did not address the allegation it created the condition. Therefore the municipality's motion for summary judgment should have been denied.



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**SLIP AND FALL.**

**DEFENDANTS FAILED TO DEMONSTRATE A LACK OF ACTUAL OR CONSTRUCTIVE NOTICE OF THE CONDITION WHICH CAUSED PLAINTIFF TO SLIP AND FALL; PLAINTIFF ADEQUATELY IDENTIFIED THE CAUSE OF HER FALL; DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (FIRST DEPT).**

[Mandel v 340 Owners Corp., 2020 NY Slip Op 07316, First Dept 12-8-20](#)

Practice Point: In a slip and fall case, to win on summary judgment the defendant must prove a lack of constructive knowledge of the condition, usually by demonstrating when the area was last inspected. Here no evidence of the inspection routine was presented. The defendants' summary judgment motion should have been denied.

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**SLIP AND FALL.**

**IN THIS SLIP AND FALL CASE, DEFENDANTS DID NOT DEMONSTRATE THE WHEEL STOP, WHICH HAD BEEN MOVED FROM ITS POSITION AT THE TOP OF THE PARKING SPACE, WAS OPEN AND OBVIOUS AND NOT INHERENTLY DANGEROUS; DEFENDANTS' MOTION FOR SUMMARY JUDGMENT PROPERLY DENIED (SECOND DEPT).**

[Brett v AJ 1086 Assoc., LLC, 2020 NY Slip Op 07532, Second Dept 12-16-20](#)

Practice Point: Although wheel stops in parking lots are usually not actionable in slip and fall cases, here the wheel stop had been moved from its usual position and may have constituted a dangerous condition.

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### **THIRD-PARTY ASSAULT.**

**DEFENDANT PROPERTY OWNER DEMONSTRATED THERE HAD BEEN NO CRIMINAL ACTIVITY ON THE PROPERTY IN THE PAST AND PLAINTIFF FAILED TO RAISE A QUESTION OF FACT WHETHER THE FAILURE TO SECURE THE ALLEYWAY WAS A PROXIMATE CAUSE OF THE THIRD-PARTY ASSAULT; DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (SECOND DEPT).**

[Calle v Elmhurst Woodside, LLC, 2020 NY Slip Op 08033, Second Dept 12-30-20](#)

Practice Point: A property owner will not be liable for a third party assault if there had not been any similar incidents on the property in the past.

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### **TRAFFIC ACCIDENTS, BICYCLES, MUNICIPAL LAW.**

**THE VILLAGE DEMONSTRATED IT DID NOT HAVE WRITTEN NOTICE OF THE ROAD DEFECT WHICH ALLEGEDLY CAUSED PLAINTIFF'S BICYCLE ACCIDENT, BUT IT FAILED TO DEMONSTRATE IT DID NOT CREATE THE DEFECT; THEREFORE THE VILLAGE'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).**

[Holleran v Incorporated Vil. of Floral Park, 2020 NY Slip Op 07871, Second Dept 12-23-20](#)

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### **TRAFFIC ACCIDENTS, BICYCLES.**

**QUESTION OF FACT WHETHER THE DEFENDANT'S DOUBLE-PARKED CAR WAS A PROXIMATE CAUSE OF THE ACCIDENT; PLAINTIFF'S DECEDENT, A BICYCLIST, WAS STRUCK BY A TRUCK WHEN HE ATTEMPTED TO GO AROUND DEFENDANT'S DOUBLE-PARKED CAR (FIRST DEPT).**

[Dong v Cruz-Martel, 2020 NY Slip Op 07699, First Dept 12-22-20](#)

Practice Point: In this case there was a question of whether defendant's double-parked car was a proximate cause of plaintiff bicyclist's death, or merely furnished a condition for

the accident. The plaintiff was struck by a truck when he attempted to go around defendant's double-parked car.

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**TRAFFIC ACCIDENTS, COURT OF CLAIMS.**

**CLAIMANT'S DECEDENT WAS KILLED IN A MULTIVEHICLE ACCIDENT IN WHITE OUT CONDITIONS ON A STATE HIGHWAY; QUESTIONS OF FACT ABOUT NOTICE OF THE RECURRING CONDITION AND PROXIMATE CAUSE (NO SNOW FENCE) WERE RAISED; THE STATE'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (FOURTH DEPT).**

[Klepanchuk v State of N.Y. Dept. of Transp., 2020 NY Slip Op 07766, Fourth Dept 12-23-20](#)

Practice Point: The state may be liable for a traffic accident in an area of a highway with recurring white-out conditions caused by blowing snow.

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