NEW YORK APPELLATE DIGEST, LLC

Negligence
December 2020

An Organized Compilation of Summaries of Selected Decisions Addressing Negligence Released by the New York Appellate Courts in December 2020. The Entries in the Table of Contents Link to the Summaries Which Link to the Decisions. Click on "Table of Contents" in the Header to Return There.

Contents

Table of Contents

Table of Contents

Table of Contents

Table of Contents

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).

The Second Department, reversing (modifying) Supreme Court in this wrongful death action, determined that the plaintiff, who was the administrator of the estate and the sole distributee, could bring an action for conscious pain and suffering because that claim was personal to the decedent and part of the estate. But, because the wrongful death action, which vested in the plaintiff/distributee upon death, was not listed as an asset in the plaintiff's bankruptcy proceedings, to which the decedent was not a party, the plaintiff did not have the capacity to bring that claim:

… [T]he plaintiff, as the administrator of the decedent's estate, had the capacity to prosecute the cause of action to recover damages for conscious pain and suffering. A cause of action brought on behalf of a deceased to recover damages for conscious pain and suffering is "personal to the deceased and belongs to the estate, not the distributees" … . The decedent was not a party to the bankruptcy proceeding. Accordingly, the bankruptcy did not affect the plaintiff's capacity to prosecute the cause of action to recover damages for conscious pain and suffering on behalf of the decedent's estate … .

The Supreme Court, however, should have granted those branches of the defendants' separate motions which were to dismiss the cause of action to recover damages for wrongful death insofar as asserted against each of them. "A cause of action to recover damages for wrongful death is a property right belonging solely to the distributees of the decedent and vests in them at the decedent's death" (… EPTL 5-4.4 [a]). It is undisputed that the cause of action to recover damages for wrongful death vested in the plaintiff as the sole distributee of the estate prior to the filing of the bankruptcy petition. Accordingly, as the plaintiff failed to schedule the wrongful death claim in the bankruptcy proceeding, it is subject to dismissal in this action on the ground that the plaintiff lacks the capacity to pursue the claim … . 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.

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).

The Second Department, reversing Supreme Court, determined defendant established he did not depart from good and accepted practice and the procedure he performed was not the proximate cause of plaintiff's injury. Plaintiff's expert's affidavit was speculative and conclusory. Plaintiff did not raise a question of fact in support of the "lack of informed consent" cause of action:

… [M]ere conclusory allegations of malpractice, unsupported by competent evidence tending to establish the elements of the cause of action at issue, are insufficient to defeat summary judgment … .

"[L]ack of informed consent is a distinct cause of action [which] requir[es] proof of facts not contemplated by an action based merely on allegations of negligence" … . "To establish a cause of action [to recover damages] for malpractice based on lack of informed consent, [a] plaintiff must prove (1) that the person providing the professional treatment failed to disclose alternatives thereto and failed to inform the patient of reasonably foreseeable risks associated with the treatment, and the alternatives, that a reasonable medical practitioner would have disclosed in the same circumstances, (2) that a reasonably prudent patient in the same position would not have undergone the treatment if he or she had been fully informed, and (3) that the lack of informed consent is a proximate cause of the injury" … . "The third element is construed to mean that the

actual procedure performed for which there was no informed consent must have been a proximate cause of the injury" … .

The defendant established, prima facie, that his care and treatment did not proximately cause the plaintiff's alleged injuries. In opposition, the plaintiff failed to raise a triable issue of fact as to whether a lack of informed consent proximately caused his injuries … . 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.

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).

The First Department determined that the building owner, 1067 Fifth Avenue Corp. had, by contract, relinquished the responsibility to maintain the elevator to defendant American Elevator. Plaintiff alleged the elevator inner gate closed on her shoulder and then the elevator descended. Plaintiff alleged she injured her shoulder, neck and back pulling her arm free. Although the defendants demonstrated they did not have actual or constructive notice of the defect, a question of fact was raised pursuant to the res ipsa loquitur doctrine. Based on its maintenance contract with American, the action against the building owner should have been dismissed:

… [U]nder the terms of its contract with 1067 Fifth, American was responsible for providing "full comprehensive maintenance and repair services" for the elevators, which included maintaining "[t]he entire vertical transportation system," including "all engineering, material, labor, testing, and inspections needed to achieve work specified by the contract." Further, under the terms of the contract, maintenance "include[s], but is not limited to, preventive services, emergency callback services, inspection and testing

services, repair and/or direct replacement component renewal procedures." The contract also provided for American to "schedule [ ] systematic examinations, adjustments, cleaning and lubrication of all machinery, machinery spaces, hoistways and pits," and to do all "repairs, renewals, and replacements . . . as soon as scheduled or other examinations reveal the necessity of the same." Further, American agreed to provide emergency call-back service 24 hours a day, 7 days a week. Given such broad contractual responsibilities, American's contract can be said to have "entirely displaced" the responsibility of 1067 Fifth and Elliman to maintain the safety of the building's elevators, which gave rise to a duty owed directly to plaintiff by America … . 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.

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).

The Court of Appeals, reversing the Appellate Division, in a full-fledged opinion by Judge Fahey, over a partial dissent, held that the sole remedy provision in the Representations and Warranties Agreement (RWA) in this residential mortgage-backed securities (RBMS) case was valid and enforceable. Plaintiff unsuccessfully tried to avoid the sole remedy provision by arguing the defendants breached the contract with gross negligence:

… [W]e … conclude that the parties' contract, as written, means what it says. In this RMBS put-back action, plaintiff seeks to avoid a provision in the contract … that sets out a sole remedy for a breach by alleging that defendants breached the contract with gross negligence. This sole remedy provision purports to limit, but not eliminate, the remedies available to the plaintiff in the event of a breach. We conclude that, in a breach of contract action, the public policy rule prohibiting parties from insulating themselves from damages

caused by grossly negligent conduct applies only to exculpatory clauses or provisions that limit liability to a nominal sum. The rule does not apply to contractual limitations on remedies that do not immunize the breaching party from liability for its conduct. The sole remedy provision is not an exculpatory or nominal damages clause. Plaintiff cannot render it unenforceable through allegations of gross negligence. * * *

We have previously considered the application of the gross negligence public policy rule only in cases where the contract provision at issue was an exculpatory clause, purporting to wholly immunize a party from liability, or a nominal damages clause limiting damages to, at most, $250 … . We have not yet determined whether grossly negligent conduct may render unenforceable contractual provisions that do not wholly insulate a party from liability for its breach, but instead impose reasonable limitations on either liability or the remedies available to the non-breaching party. We conclude that, in a breach of contract case, grossly negligent conduct will render unenforceable only exculpatory or nominal damages clauses, and the public policy rule does not extend to limitations on the remedies available to the non-breaching party. 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.

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).

The Second Department, reversing (modifying) Supreme Court, determined: (1) the negligent supervision cause of action against defendants' physical therapy services sounded in medical malpractice and therefore required expert opinion evidence; and (2) the defendant physical therapist (Gonikman) was an independent contractor but the doctrine of ostensible or apparent agency raised a question of fact about the facility's

(KCM's) vicarious liability for Gonikman's alleged negligence. Plaintiff's infant daughter, who was receiving physical therapy, fell off a scooter and was injured:

Though a medical facility can be held liable for the negligence or malpractice of its employees, it is not generally held liable when the treatment is provided by an independent contractor, even if the facility affiliates itself with that independent contractor … . However, the facility may be held vicariously liable under a theory of apparent or ostensible agency by estoppel … . "In order to create such apparent agency, there must be words or conduct of the principal, communicated to a third party, which give rise to the appearance and belief that the agent possesses the authority to act on behalf of the principal" … . "The third party must reasonably rely on the appearance of authority, based on some misleading words or conduct by the principal, not the agent" … . "Moreover, the third party must accept the services of the agent in reliance upon the perceived relationship between the agent and the principal, and not in reliance on the agent's skill" … . …

… [S]ince the conduct at issue in the complaint stems from Gonikman's generalized treatment plan and alleged negligent supervision of the infant daughter during her physical therapy session, the allegation sounds in medical malpractice, not ordinary negligence, because Gonikman's duty towards the infant daughter derived from the physical therapist-patient relationship … . In support of his cross motion, Gonikman merely submitted a conclusory statement that his therapy plan of activities was consistent with the accepted standard of care, and he failed to submit an expert's affidavit to establish that he did not deviate from the accepted standard of care for physical therapy … . 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.

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).

The Fourth Department, reversing (modifying) Supreme Court, determined the cause of action alleging defendant doctor caused the bowel perforation should have been dismissed because plaintiff's expert's affidavit did not address it:

The affidavit of plaintiff's expert addressed defendant's conduct only with respect to the claims that he failed to diagnose and treat the bowel perforation intraoperatively and failed to timely and properly treat the bowel perforation postoperatively. Plaintiff's expert acknowledged that bowel perforation is a known complication from this type of surgery. Thus, plaintiff failed to raise a triable issue of fact with respect to the claims that defendant negligently caused the bowel perforation … . We therefore conclude that the court erred in denying defendant's motion with respect to those claims, and we modify the order accordingly. 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.

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).

The Fourth Department, reversing Supreme Court, determined plaintiff's expert's affidavit did not raise a question of fact in this medical malpractice case:

Although plaintiff submitted a physician's affidavit in opposition to defendant's motion, "[g]eneral allegations of medical malpractice, merely conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice, are insufficient to defeat [a] defendant physician's summary judgment motion" … . Where "the expert's ultimate assertions are . . . unsupported by any evidentiary foundation, . . . [his or her] opinion should be given no probative force and is insufficient to withstand summary judgment" … . Here, plaintiff's expert did not rebut the opinion in defendant's affidavit that defendant's surgical technique was appropriate to the situation in light of the fact that decedent's lung was adherent to the heart, nor did plaintiff's expert rebut defendant's opinion that any possible phrenic nerve damage was the result of stretching caused by traction sutures and did not constitute a deviation from the standard of care. 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.

MEDICAL MALPRACTICE.

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

The Second Department determined the jury was properly instructed on the res ipsa loquitur doctrine in this medical malpractice case. Here plaintiffs presented evidence nerve damage would not have occurred absent negligence. The plaintiff's verdict was upheld:

We agree with the Supreme Court's determination to charge the jury with respect to res ipsa loquitur. "Under appropriate circumstances, the evidentiary doctrine of res ipsa loquitur may be invoked to allow the factfinder to infer negligence from the mere happening of an event" … . "'Where the actual or specific cause of an accident is unknown, under the doctrine of res ipsa loquitur a jury may in certain circumstances infer negligence merely from the happening of an event and the defendant's relation to it'" … . Res ipsa loquitur "'derives from the understanding that some events ordinarily do not

occur in the absence of negligence'" … . "'In addition to this first prerequisite, plaintiff must establish, second, that the injury was caused by an agent or instrumentality within the exclusive control of defendant and, third, that no act or negligence on the plaintiff's part contributed to the happening of the event. Once plaintiff satisfies the burden of proof on these three elements, the res ipsa loquitur doctrine permits the jury to infer negligence from the mere fact of the occurrence'" … . "Moreover, expert testimony may be properly used to help the jury 'bridge the gap' between its own common knowledge, which does not encompass the specialized knowledge and experience necessary to reach a conclusion that the occurrence would not normally take place in the absence of negligence, and the common knowledge of physicians, which does" … .

Here, the plaintiffs presented expert testimony that, in a first time fundoplication procedure like the plaintiff's, injury to the vagus nerves should not occur if the surgeon adheres to the accepted standard of care and follows the proper surgical sequence. While the defendants presented evidence that gastroparesis can be idiopathic, "a plaintiff need not conclusively eliminate the possibility of all other causes of the injury to rely on res ipsa loquitur" … . 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.

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).

The Fourth Department, reversing Supreme Court and dismissing the complaint, determined there is no cause of action for negligent investigation in New York:

At the age of five, plaintiff's decedent was brutally murdered by his mother's boyfriend … . Plaintiff thereafter commenced this wrongful death action, alleging that the County of Erie (defendant), through its Child Protective Services office, had inadequately

investigated multiple prior reports of child abuse and neglect concerning the decedent child. …

As defendant correctly contends, "New York does not recognize a cause of action sounding in negligent investigation" of child abuse and neglect … . "Moreover, 'a claim for negligent training in investigative procedures is akin to a claim for negligent investigation or prosecution, which is not actionable in New York' " … . 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.

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).

The Second Department, reversing Supreme Court, over a two-justice dissent, determined the complaint alleging the Port Authority was negligent for failure to install suicide-prevention barriers on the George Washington Bridge should not have been dismissed. Plaintiff's decedent had jumped off the bridge. Supreme Court held the maintenance of the bridge was a governmental function and there was no special relationship between Port Authority and plaintiff's decedent. The Second Department held the complaint alleged Port Authority was acting in a proprietary capacity and therefore was subject to ordinary principles of negligence:

… [T]he complaint did not need to allege that the Port Authority owed a special duty to the decedent, as opposed to the public generally, as the Port Authority did not establish that it was acting in a governmental capacity in maintaining the bridge … . Since the complaint has alleged facts that support a determination that the Port Authority was acting in a proprietary capacity, the Port Authority would be subject to the same principles of tort law as a private landowner, and as such, the complaint states a cause of action … . Here,

accepting all facts alleged in the complaint as true for the purposes of this motion, the Port Authority's remaining contentions likewise do not establish that the complaint fails to state a cause of action. 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.

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).

The First Department, in a full-fledged opinion by Justice Moulton, determined the vicarious liability cause of action against L & W, the employer of defendants Chavies and Edwards, should have been dismissed, but the negligent hiring, retention, supervision and training causes of action, as well as claims for punitive damages, properly survived summary judgment. The complaint alleged plaintiff, Sandoval, a nonverbal autistic adult who lived in a residential facility operated by defendant L & W, was deliberate burned by a heated utensil (potato masher) used by either Chavies or Edwards to control plaintiff. The vicarious liability cause of action dismissed because the alleged burning of plaintiff was outside the scope of Chavies' and Edwards' employment:

… L&W conditions all employment offers on at least one satisfactory professional reference.

Despite this policy, L&W did not check the professional references submitted by Chavies or Edwards. Most notably, Chavies indicated on his job application that he had been "let go" from his most recent job working with intellectually disabled children. It is for the jury to determine whether L&W's lapse in obtaining satisfactory references for both employees constitutes negligent hiring under the circumstances … .

L&W's claim that the incident was not foreseeable is belied by its own training materials. The SCIP training materials reflect that residential staff face difficult emotional challenges

in their positions, and that as a result, the potential for abuse is reasonably foreseeable. The training materials note the "Common Emotional Reactions" that staff may have including "Anger." The training materials reference the "incidents of abuse" and seek to decrease those incidents "through increasing awareness of the definition and the causative factors of abuse." The materials also reference the potential that staff might "lose control and strike or verbally abuse a person." … [A]s the movant, it is L&W's burden to establish the lack of proximate cause … . … L&W's causation arguments are undercut by its own hiring policy, which makes an offer of employment contingent on at least one satisfactory professional reference and by the … training materials, which highlight the critical importance of "ongoing staff training" in decreasing abuse. 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.

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).

The Second Department, reversing Supreme Court, determined the plaintiff did not demonstrate the slip and fall was caused by a dangerous condition. The walkway where plaintiff fell was wet from rain, which was falling at the time:

The mere fact that an outdoor walkway or stairway becomes wet from precipitation is insufficient to establish the existence of a dangerous condition … . Here, the defendants established their prima facie entitlement to judgment as a matter of law by showing that the plaintiff's slip and fall on the landing of a stairway leading to the entrance of the restaurant occurred solely because that area was wet due to precipitation. Among other things, in support of their motions, the defendants submitted the transcript of plaintiff's deposition testimony, which indicates that the location where the plaintiff slipped and fell was wet due to the rain that had fallen and was falling at the time of his accident … . Derosa v Zaliv, LLC, 2020 NY Slip Op 07862, Second Dept 12-23-20

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

SLIP AND FALL, MUNICIPAL LAW.

A CONTRACTOR ALLEGED TO HAVE WORKED ON THE AREA OF THE ROADWAY WHERE PLAINTIFF SLIPPED AND FELL AND THE MUNICIPALITY DID NOT ELIMINATE QUESTIONS OF FACT ABOUT THEIR LIABILITY; DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the municipality's (Port Washington North's) motion for summary judgment should not have been granted in this slip and fall case. The code provision requiring written notice of the dangerous condition applied to the village, not to Port Washington North, and Port Washington North did not demonstrate it did not create the condition. In addition, defendant contractor did not demonstrate it did not do any work on the roadway in the area of the slip and fall:

A contractor [J. Anthony] may be liable for an affirmative act of negligence which results in the creation of a dangerous condition upon a public street or sidewalk … . Thus, in moving for summary judgment, J. Anthony had the burden of establishing, prima facie, that it did not perform any work on the portion of the roadway where the accident occurred or that it did not create the allegedly defective condition that caused the plaintiff's injuries … . However, J. Anthony failed to satisfy its burden … .The failure to do so requires the denial of that branch of J. Anthony's motion which was for summary judgment dismissing the complaint insofar as asserted against it, regardless of the sufficiency of the opposing papers … .

Port Washington North moved for summary judgment on the ground, inter alia, that it had not received prior written notice of the alleged defect which caused the plaintiff's injuries. … Since the prior written notice provision specifically limits the notice requirement to "street[s]" located "within the Village" (Village Code §§ 143-23, 143-22), this provision is not applicable to the facts here, as the location of the accident was not within Port Washington North. Moreover, Port Washington North failed to meet its prima facie burden of eliminating all triable issues of fact regarding its role in creating the allegedly defective condition … . Downing v J. Anthony Enters., Inc., 2020 NY Slip Op 08038, Second Dept 12-30-20

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).

The Third Department, reversing Supreme Court, determined petitioner's application to serve a late notice of claim with respect to one of the two defendants (Albany Port District Commission) should have been granted. Although the excuse for failure to file was inadequate (ignorance of the requirement), the defendant had timely notice of the claim by virtue of surveillance cameras and an incident report, and defendant was not prejudiced by the delay:

… [M]embers of the Port Security Department came to the scene of the accident soon after petitioner's fall to check on his condition and were able to observe the area where petitioner fell. Petitioner also averred that the Port Security Department was located approximately one hundred feet from where he fell and that there are surveillance cameras on the Port Security Department office building that are pointed at the area where petitioner fell. Petitioner also proffered an incident report form completed by one of the members of the Port Security Department who came to the scene the day of the accident. This form reflects the location of petitioner's fall and that petitioner fell on ice, injured his back and was transported to the hospital by an ambulance. Thus, the Port had "more than merely generalized awareness of an accident and injuries" sufficient to establish actual notice … . …

… [T]he … standard requires a petitioner to initially "present some evidence or plausible argument that supports a finding of no substantial prejudice" … . Here, petitioner met this burden by showing … that the Port had actual notice of the incident sufficient to allow it to investigate the accident shortly after it occurred … . Additionally, petitioner submitted photographs and a video that suggest that the condition has not substantially changed from its appearance at the time of the accident. 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.

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).

The Second Department, reversing Supreme Court, determined the legal malpractice and Judiciary Law 487 causes of action against one of two groups of attorney-defendants should not have been dismissed. The first group of attorneys (the Schneider defendants) failed to file a timely notice of claim against the New York Transit Authority (NYTA) in this slip and fall case. Then plaintiff retained the second group of attorneys (the Kletzkin defendants) and the action was dismissed with prejudice. Then plaintiff sued both groups of attorneys for legal malpractice and for violations of Judiciary Law 487. Supreme Court granted the Kletzkin defendants motion to dismiss and denied the Schneider defendants' motion to dismiss. The facts were not discussed, but the court noted the difference between a legal malpractice and a Judiciary Law 487 cause of action:

… [T]he plaintiff adequately pleaded the cause of action alleging legal malpractice against the Kletzkin defendants and the Schneider defendants. Contrary to the contentions of those defendants, neither conclusively established that an application for leave to serve a late notice of claim or to deem the late notice of claim timely served upon the NYCTA nunc pro tunc would have been futile … .

Contrary to the Kletzkin defendants' contention, the complaint adequately states a cause of action to recover damages for violation of Judiciary Law § 487. Contrary to the Schneider defendants' contention, the cause of action alleging violation of Judiciary Law § 487 is not duplicative of the cause of action alleging legal malpractice. "A violation of Judiciary Law § 487 requires an intent to deceive (see Judiciary Law § 487), whereas a legal malpractice claim is based on negligent conduct" … . 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.

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).

The Second Department, reversing Supreme Court, determined defendant-town's motion for summary judgment in this slip and fall case should not have been granted. Plaintiff alleged he stepped on a loose manhole cover which swung out from under him crushing his leg. The town demonstrated it did not have written notice of the condition, but did not demonstrate it did not create the condition:

Where, as here, the plaintiff alleged that the affirmative negligence exception applies, the defendant must show, prima facie, that the exception does not apply … .

Here, the plaintiff alleged that the defendant created the alleged dangerous condition, inter alia, through its initial placement of the manhole and by the use of an ill-fitting manhole cover, and the defendant's submissions in support of its motion for summary judgment do not address these allegations. Accordingly, the defendant failed to establish, prima facie, that it did not create the alleged defect … . 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.

SLIP AND FALL, MUNICIPAL LAW.

PLAINTIFF RAISED A QUESTION OF FACT WHETHER THE CITY CREATED THE ROAD CONDITION WHICH CAUSED HIS SLIP AND FALL; THE CITY'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Renwick, reversing Supreme Court, determined plaintiff's slip and fall action should not have been dismissed. Although the city demonstrated it did not have written notice of the condition, plaintiff raised a question of fact whether the city created the dangerous condition when it attempted road repair:

… [P]laintiff Nicholas Martin testified consistently — both at a hearing held pursuant to General Municipal Law § 50-H and a deposition — that on January 17, 2017, he slipped and fell on Seward Avenue, between Pugster Avenue and Olmtead Avenue. At the time, plaintiff lived on the same block where his accident occurred. He specified that he fell on the roadway in front of 2007 Seward Avenue. When shown photographs where his accident occurred, he stated that he fell on a square blacktop that contained loose gravel and was raised about one and one-half inches. He had noticed the condition about a month before his accident, when pavement work had been done. Although he did not see who did the road work, his girlfriend told him that the City had performed the work. Martin v City of New York, 2020 NY Slip Op 07503, First Dept 12-15-20

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).

The First Department, reversing Supreme Court, determined defendants' motion for summary judgment in this slip and fall case should not have been granted because they failed to establish they lacked actual or constructive notice of the alleged hump in a runner

over which plaintiff tripped. The First Department noted that plaintiff had adequately identified the cause of her fall:

Defendants' failure to establish prima facie entitlement to judgment as a matter of law requires the denial of the motion regardless of the strength of plaintiff's opposition … . They failed to offer evidence of their inspection routines, including evidence regarding the last time the accident site was inspected … .

In any event, plaintiff raises factual issues. Although plaintiff did not actually observe what caused her to trip and fall over an inclement weather runner in the lobby of defendants' building, her evidence, together with reasonable inferences drawn therefrom, including that she felt the toebox of her right foot slide under what felt to be a hump in the runner, causing her foot to get caught, and her to lose her balance and fall, sufficiently identified the cause of her fall … . 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.

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).

The Second Department determined the defendants in this slip and fall case did not demonstrate the wheel stop which was an open and obvious condition that was not inherently dangerous. The wheel stop had been moved from its normal position at the top of a parking space. Plaintiff tripped over it after getting out of her car and taking a few steps while looking toward the store:

A landowner has a duty to maintain its premises in a reasonably safe condition … . There is, however, no duty to protect or warn against conditions that are open and obvious and

not inherently dangerous … . "Proof that a dangerous condition is open and obvious does not preclude a finding of liability against an owner for failure to maintain property in a safe condition" … . "The determination of whether an asserted hazard is open and obvious cannot be divorced from the surrounding circumstances, and whether a condition is not inherently dangerous, or constitutes a reasonably safe environment, depends on the totality of the specific facts of each case" … . 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.

SLIP AND FALL.

PROPERTY OWNERS WERE AWARE THE SIDEWALK IN FRONT OF THE RESTAURANT HAD BEEN HOSED DOWN BY RESTAURANT EMPLOYEES ON A COLD DAY; PLAINTIFF WAS ENTITLED TO SUMMARY JUDGMENT IN THIS ICY-SIDEWALK SLIP AND FALL CASE (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff was entitled to summary judgment in this icy-sidewalk slip and fall case. Defendants' employees hosed down the sidewalk in front of the restaurant on a cold day. The argument that plaintiff saw the ice and should have taken another route (comparative negligence) did not preclude summary judgment in plaintiff's favor:

To obtain partial summary judgment, a plaintiff does not have to demonstrate the absence of his own comparative fault … . Moreover, plaintiff is not required to show that "defendants' negligence was the sole proximate cause of the accident to be entitled to summary judgment" … . The evidence plaintiff submitted in support of his motion shows that defendants-tenants … created the dangerous condition when their employees hosed the sidewalk on a cold winter day … . Defendants-owners … had a non delegable duty to maintain the sidewalk and had notice that the restaurant employees had created a dangerous condition, because [the] property manager and … superintendent had observed the restaurants' employees hosing the sidewalk. Benny v Concord Partners 46th St. LLC, 2020 NY Slip Op 07665, First Dept 12-17-20

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).

The Second Department, reversing Supreme Court, determined defendant property owner's motion for summary judgment in this third-party assault case should have been granted. The defendant demonstrated there had been no prior criminal activity on the property and did not raise a question of fact whether the failure to secure the alleyway was a proximate cause of the attack:

… [T]he infant plaintiff testified that while he was in the building's vestibule, he was accosted by an unknown assailant and assaulted in the alleyway on the side of the building. The infant plaintiff, by his father and natural guardian, and his father suing derivatively, commenced this action against the defendant, alleging that the defendant failed to secure the alleyway.

To recover damages from an owner of real property for injuries caused by criminal acts on the premises, a plaintiff must produce evidence indicating that the owner knew or should have known of the probability of conduct on the part of third persons which was likely to endanger the safety of those lawfully on the premises … . Here, the defendant established, prima facie, its entitlement to summary judgment by showing that it had no notice of prior criminal activity so as to make the instant occurrence foreseeable. The plaintiffs submitted no evidence in response, and thus failed to raise a triable issue of fact … . Moreover, in opposition to the defendant's prima facie showing with respect to causation, the plaintiffs failed to raise a triable issue of fact as to whether the defendant's alleged failure to secure the alleyway was a proximate cause of the occurrence … . 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.

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).

The Second Department, reversing Supreme Court, determined the village's motion for summary judgment in this bicycle-related injury case should not have been granted. Plaintiff alleged a road defect caused his accident. The village demonstrated it did not have written notice of the defect but failed to demonstrate it did not create the defect:

"[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 plaintiffs alleged in their complaint 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, prima facie, 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 alleged defect, but it failed to establish, prima facie, that it did not affirmatively create the alleged defect … . Therefore, the burden never shifted to the plaintiffs to submit evidence sufficient to raise a triable issue of fact … . Holleran v Incorporated Vil. of Floral Park, 2020 NY Slip Op 07871, Second Dept 12-23-20

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).

The First Department determined there were questions of fact about defendant driver's (Sung's) negligence and whether the negligence proximately cause plaintiff bicyclist's injuries and death. Defendant was stopped in the right lane and when plaintiff attempted

to go around defendant's car he was struck by a truck (driven by Cruz-Marte). The First Department noted that hearsay was properly considered in opposition to the summary judgment motion:

Issues of fact exist with respect to whether Wenhua Sung negligently obstructed traffic with his vehicle based on his own testimony, in which he admitted that he was issued a ticket for obstructing a lane of traffic … , as well as that of Cruz-Marte, who testified that a vehicle was "double-parked," although he was not sure what that vehicle looked like.

This evidence was sufficient to raise issues of fact regarding Sung's negligence, even absent proof of Sung's purported contemporaneous admissions to police that he was double-parked. Those admissions may also, however, be properly considered. Even if they are hearsay, they were offered in opposition to a motion for summary judgment and were not the only evidence submitted … .

Issues of fact also exist with respect to whether the Sung defendants' negligence proximately caused the accident, as a jury could reasonably find that a bicyclist swerving and being hit by a passing vehicle was a reasonably foreseeable consequence of double-parking or obstructing a lane of traffic … . Dong v Cruz-Marte, 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.

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).

The Fourth Department, reversing the Court of Claims, determined the state's motion for summary judgment in this "white out" traffic accident case should not have been granted. Claimants argued the state had notice of a recurring white=out condition caused by

blowing snow on a portion of a state highway. Claimant's decedent died in a multivehicle accident in white out conditions:

… [T]he claimants raised a triable issue of fact with respect to whether defendant had actual knowledge of "an ongoing and recurring dangerous condition in the area of the accident" … . Notably, claimants submitted a Highway Safety Investigation Report that was prepared by an employee of defendant in December 2008. The report states that it was written in response to the subject accident with the purpose of "evaluat[ing] the frequency and potential for similar accidents and evaluate potential countermeasures." The report compared the number and severity of the accidents on that portion of highway to those occurring elsewhere on I-390, and noted that, "[a]lthough the number of accidents in the study area was lower, the severity of the accidents was [greater]." The report also noted that "[s]everal factors exist which increase the degree of risk of poor visibility and drifting due to blowing snow in this section." Such factors included the large, flat airport property next to the highway, the "abrupt, topographic change due to the proximity of the airport runway and former Pennsylvania railroad embankment," and the section's slight reverse curve. The data thus suggested that "snow on the road [was] an issue to be addressed in this area" and that, although the number of accidents was not extraordinarily high, "their occurrence was sufficiently sensational, disquieting to the public, and disruptive to the traveling public and [defendant] to justify making more than ordinary efforts to prevent them." Furthermore, the deposition testimony of employees of defendant established that, for years prior to the accident, blowing and drifting snow had been an issue on that section of I-390.

We also agree with claimants that the court erred in determining that defendant established that the lack of a snow fence was not a proximate cause of the accident. 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.

TRAFFIC ACCIDENTS.

DEFENDANT'S FEIGNED ISSUE OF FACT DID NOT RAISE A QUESTION OF FACT IN THE PEDESTRIAN TRAFFIC ACCIDENT CASE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant had raised a feigned issue which did not raise a question of fact in this pedestrian traffic accident case:

The plaintiff established her prima facie entitlement to judgment as a matter of law on the issue of liability through her own affidavit, which demonstrated that she was walking within a crosswalk, with the pedestrian signal in her favor, when the defendants' vehicle failed to yield the right-of-way and struck her … .

In opposition, the defendants failed to raise a triable issue of fact. Edelstein's affidavit contradicted his admission immediately following the accident, as reflected in a police accident report. This affidavit was a belated attempt to avoid the consequences of his earlier admission by raising a feigned issue and was insufficient to raise a triable issue of fact … . Gooden v EAN Holdings, LLC, 2020 NY Slip Op 08043, Second Dept 12-30-20

TRAFFIC ACCIDENTS.

QUESTION OF FACT WHETHER DEFENDANT DRIVER ATTEMPTED TO MAKE A LEFT TURN WHEN PLAINTIFF'S DECEDENT WAS TOO CLOSE IN THE ON-COMING LANE (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined there was a question of fact whether defendant driver executed a left turn when plaintiff's decedent, who apparently was being chased by police, was too close:

"Vehicle and Traffic Law § 1141 provides that the 'driver of a vehicle intending to turn to the left within an intersection . . . shall yield the right of way to any vehicle approaching from the opposite direction which is within the intersection or so close as to constitute an immediate hazard'" … . The operator of an oncoming vehicle with the right-of-way is entitled to assume that the opposing operator will yield in compliance with the Vehicle and Traffic Law … . A driver is negligent where he or she failed to see that which, through proper use of his or her senses, the driver should have seen … . "At the same time, a

driver traveling with the right-of-way may nevertheless be found to have contributed to the happening of the accident if he or she did not use reasonable care to avoid the accident" … .

Here, the evidence submitted by [defendants] in support of their motion … failed to eliminate triable issues of fact as to whether [defendant driver] was free from fault in the happening of the accident and, if not, whether [plaintiff's decedent's] negligence was the sole proximate cause of the accident … . Specifically, a triable issue of fact exists, inter alia, as to whether, at the time [defendant driver] initiated her turn, [plaintiff's decedent's] vehicle was "'so close as to constitute an immediate hazard'" … . Gaudio v City of New York, 2020 NY Slip Op 08041, Second Dept 12-30-20