# NEW YORK APPELLATE DIGEST, LLC

Negligence
Practice Newsletter
January 2021

A Succinct Collection of the Salient Issues Addressed in the Negligence Decisions Released by our New York State Appellate Courts in January 2021. The Citations Link to the Decisions on the Official New York Courts Website. The Full Decision-Summaries Are Available in the January 2021 Ne3gligence Update Pamphlet.

**ASSUMPTION OF THE RISK.**

**PLAINTIFF HIGH SCHOOL BASEBALL PLAYER ASSUMED THE RISK OF BEING STRUCK WITH A BALL DURING A PRACTICE DRILL WHERE MULTIPLE BALLS WERE IN PLAY; TWO DISSENTING MEMORANDA (THIRD DEPT).**

Grady v Chenango Val. Cent. Sch. Dist., 2021 NY Slip Op 00468, Third Dept 1-28-21

Practice Point: Even though only one ball is in play during a game, plaintiff assumed the risk of being struck by a ball in a common practice routine with multiple balls in play at the same time.

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**DENTAL MALPRACTICE.**

**PLAINTIFFS' EXPERT'S AFFIDAVIT WAS NOT SPECULATIVE OR CONCLUSORY; DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IN THIS DENTAL MALPRACTICE AND LACK OF INFORMED CONSENT ACTION SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).**

Many v Lossef, 2021 NY Slip Op 00165, Second Dept 1-13-21

Practice Point: Conflicting expert opinions preclude summary judgment in a medical malpractice action. Lack of informed consent is a distinct cause of action with these three proof requirements: (1) 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) a reasonably prudent patient in the same position would not have undergone the treatment if he or she had been fully informed, and (3) the lack of informed consent is a proximate cause of the injury.

**MEDICAL EXAMINATIONS.**

**ALTHOUGH DEFENDANTS MISSED THE DEADLINE AND THEREBY WAIVED THE RIGHT TO MEDICAL EXAMINATIONS OF PLAINTIFF, THE MOTION TO STRIKE THE NOTE OF ISSUE AND COMPEL AN EXAM SHOUD HAVE BEEN GRANTED (SECOND DEPT).**

Andujar v Boyle, 2021 NY Slip Op 00400, Second Dept 1-27-21

Practice Point: The defense's right to medical examinations of the plaintiff can be waived by missing a court-imposed deadline. A court may still compel a medical exam if there is a reasonable excuse for the delay and no prejudice.

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**MEDICAL MALPRACTICE.**

**PLAINTIFF'S SIGNING A CONSENT FORM PRIOR TO SURGERY DID NOT REQUIRE DISMISSAL OF THE LACK OF INFORMED CONSENT CAUSE OF ACTION (SECOND DEPT).**

Preciado v Ravins, 2021 NY Slip Op 00441, Second Dept 1-27-21

Practice Point: Plaintiff's signing a generic, barebones consent to surgery will not necessarily preclude a cause of action for lack of informed consent.

**SLIP AND FALL (PARKING LOT).**

**RARE CASE WHERE EVIDENCE OF A ROUTINE PROCEDURE FOR KEEPING A PARKING LOT FREE OF ICE AND SNOW, COMBINED WITH PLAINTIFF'S TESTIMONY, SUPPORTED SUMMARY JUDGMENT IN DEFENDANTS' FAVOR IN THIS SLIP AND FALL CASE (SECOND DEPT).**

Zimmer v County of Suffolk, 2021 NY Slip Op 00331, Second Dept 1-20-21

Practice Point: As a general rule, proof of a cleaning or inspection routine will not be enough to demonstrate the lack of constructive notice of a dangerous condition in a slip and fall case. The courts generally require proof of an inspection close in time to the slip and fall. This is a rare case in which proof of an inspection routine coupled with the plaintiff's testimony was enough for summary judgment in favor of defendant.

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**SLIP AND FALL (SIDEWALK).**

**ALTHOUGH THE VILLAGE CODE MADE THE ABUTTING PROPERTY OWNER RESPONSIBLE FOR MAINTAINING THE SIDEWALK, THE CODE DID NOT IMPOSE TORT LIABILITY ON THE ABUTTING PROPERTY OWNER; THE PROPERTY OWNER'S MOTION TO DISMISS THIS SIDEWALK SLIP AND FALL ACTION SHOULD HAVE BEEN GRANTED (SECOND DEPT).**

Daniel v Khadu, 2021 NY Slip Op 00291, Second Dept 1-20-21

Practice Point: Even where the municipal code makes abutting property owners responsible for maintaining the sidewalk, the property owner will not be liable for a slip and fall if the code does not explicitly impose tort liability on the abutting property owner.

**SLIP AND FALL (SIDEWALK).**

**PLAINTIFF ALLEGED SHE TRIPPED ON A TWIG ON THE SIDEWALK WHICH WAS NOT ADEQUATELY ILLUMINATED; DEFENDANT, IN HER MOTION FOR SUMMARY JUDGMENT, DID NOT DEMONSTRATE A LACK OF CONSTRUCTIVE NOTICE OF THE CONDITIONS OR THAT THE CONDITIONS WERE NOT A PROXIMATE CAUSE OF THE FALL; DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN DENIED WITHOUT CONSIDERING THE OPPOSING PAPERS (SECOND DEPT).**

Wittman v Nespola, 2021 NY Slip Op 00454, Second Dept 1-27-21

Practice Point: This case demonstrates how appellate courts analyze summary judgment motions. If you are a defendant in a slip and fall case you must present prima facie proof of "negatives," i.e., you must demonstrate you did not have actual or constructive notice of the condition and, if necessary, you must demonstrate the condition was not the proximate cause of the fall. Failure to present prima facie proof of required "negatives" will result in denial of your motion without any need to consider the plaintiff's opposing papers.

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**SLIP AND FALL (SIDEWALK).**

**PROOF OF A REGULAR SNOW REMOVAL ROUTINE IS NOT ENOUGH TO DEMONSTRATE A LACK OF ACTUAL OR CONSTRUCTIVE NOTICE OF THE CONDITION OF THE SIDEWALK AT THE TIME OF THE SLIP AND FALL (SECOND DEPT).**

Zamora v David Caccavo, LLC, 2021 NY Slip Op 00329, Second Dept 1-20-21

Practice Point: This case illustrates the usual "slip and fall case" rule that proof of an inspection or snow removal routine is not enough to demonstrate a lack of actual or constructive notice of the dangerous condition. The inspection or snow removal must take place close in time to the fall.

**SLIP AND FALL (SIDEWALK).**

**QUESTIONS OF FACT WHETHER DEFENDANT HAD CONSTRUCTIVE NOTICE OF THE RAISED SIDEWALK FLAG AND WHETHER THE DEFECT WAS TRIVIAL IN THIS SLIP AND FALL CASE (FIRST DEPT).**

Trinidad v Catsimatidis, 2021 NY Slip Op 00047, First Dept 1-5-21

Practice Point: Here the defendant submitted "inconclusive" photographs and descriptions of the sidewalk defect which was not enough to demonstrate the defect was trivial as a matter of law at the summary judgment stage.

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**SLIP AND FALL (SIDEWALK).**

**THE NYC ADMINSTRATIVE CODE REQUIRES ABUTTING PROPERTY OWNERS TO REPAIR SIDEWALK FLAGS OVER 1/2 INCH; PLAINTIFF PRESENTED EVIDENCE THE FLAG WAS THREE INCHES; DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IN THIS SIDEWALK SLIP AND FALL CASE SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).**

Tropper v Henry St. Settlement, 2021 NY Slip Op 00397, First Dept 1-26-21

Practice Point: In this case the abutting property owner was, under the NYC Administrative Code, responsible for repair of sidewalk flags over ½ inch and the code imposed liability for any related injury.

**SLIP AND FALL (SIDEWALK).**

**THE TREE WELL COULD HAVE CONTRIBUTED TO PLAINTIFF'S SLIP AND FALL; THE CITY'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (FIRST DEPT).**

Castro v 243 E. 138th St., LLC, 2021 NY Slip Op 00107, First Dept 1-12-21

Practice Point: Under the NYC Administrative Code, the city, not the abutting property owner, is responsible for the maintenance of tree wells. Here a tree well may have contributed to plaintiff's fall so the city's motion for summary judgment should not have been granted.

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**SLIP AND FALL (STAIRWAY).**

**BECAUSE THERE WAS NO PROOF WHEN THE STAIRWAY IN THIS SLIP AND FALL CASE WAS CONSTRUCTED, THE JURY SHOULD NOT HAVE BEEN INSTRUCTED ON THE BUILDING CODE PROVISION; DEFENSE VERDICT REVERSED AND NEW TRIAL ORDERED (SECOND DEPT).**

Coreano v 983 Tenants Corp., 2021 NY Slip Op 00290, Second Dept 1-20-21

Practice Point: Proof of a violation of the building code can be considered by the jury on the question of negligence. But here in this stairway slip and fall case there was no proof when the stairway was constructed; so the applicable building code could not be determined. Therefore, the jury should not have been instructed to consider the building code provisions.

**SLIP AND FALL.**

**THE JURY VERDICT FINDING THAT PLAINTIFF'S NEGLIGENCE WAS NOT THE PROXIMATE CAUSE OF HER INJURIES WAS NOT INCONSISTENT AND SHOULD NOT HAVE BEEN SET ASIDE (SECOND DEPT).**

Cruz-Rivera v National Grid Energy Mgt., LLC, 2021 NY Slip Op 00149, Second Dept 1-13-21

Practice Point: Even where the plaintiff is negligent, the jury can properly find the plaintiff's negligence was not the proximate cause of her injuries. Here plaintiff's granddaughter ran toward traffic after getting out of the car and plaintiff tripped and fell when chasing after her. The jury determined plaintiff's negligence was not the proximate cause of her injury.

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**THIRD-PARTY ASSAULT.**

**IN THIS THIRD-PARTY ASSAULT CASE, THE FACT THAT THE INTRUDER KILLED PLAINTIFF'S DECEDENT, A RESIDENT OF DEFENDANT'S APARTMENT BUILDING, IN A PRE-MEDITATED, TARGETED ATTACK DID NOT, AS A MATTER OF LAW, INSULATE THE LANDLORD FROM LIABILITY BASED UPON AN ALLEGEDLY BROKEN LOCK ON THE BUILDING'S EXTERIOR DOOR; THE 2ND DEPARTMENT DISAGREED WITH A LINE OF 1ST DEPARTMENT CASES (SECOND DEPT).**

Scurry v New York City Hous. Auth., 2021 NY Slip Op 00447, Second Dept 1-27-21

Practice Point: An intentional assault on a tenant by an intruder is not necessarily a superseding cause which will insulate the landlord from liability. Here a tenant was deliberately targeted and murdered by her former fiancé. There was evidence the exterior door lock for the apartment building was broken and the attack was foreseeable. So the landlord's motion for summary judgment was denied.

**THIRD-PARTY ASSAULT.**

**THE PROPERTY OWNERS AND THE SECURITY COMPANY WERE PROPERLY FOUND LIABLE FOR PLAINTIFF'S SEVERE INJURIES CAUSED BY TWELVE-YEAR-OLD BOYS WHO THREW A SHOPPING CART OVER A FOURTH FLOOR RAILING STRIKING PLAINTIFF ON THE GROUND BELOW (FIRST DEPT).**

Hedges v Planned Sec. Serv. Inc., 2021 NY Slip Op 00117, First Dept 1-12-21

Practice Point: There was evidence young people had in the past thrown objects over a railing from the fourth floor of defendants' building, as well as down an escalator. Plaintiff was severely injured when two twelve-year-old boys threw a shopping cart over the railing, directly striking the plaintiff. The building owners were properly found liable after trial.

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**TRAFFIC ACCIDENTS.**

**THE SNOWPLOW DRIVER DID NOT VIOLATE THE "RECKLESS DISREGARD" STANDARD IN THIS TRAFFIC ACCIDENT CASE (SECOND DEPT).**

Kaffash v Village of Great Neck Estates, 2021 NY Slip Op 00159, Second Dept 1-13-21

Practice Point: Municipal snowplow drivers are held to a reckless disregard standard in traffic accident cases. Reckless disregard requires a showing that the operator acted in conscious disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow.