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An Organized Compilation of Summaries of Selected Decisions Addressing Negligence Released by our New York State Appellate Courts in January 2021 and Posted on the New York Appellate Digest Website in January 2021. 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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ASSUMPTION OF THE RISK.

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The Third Department, over two separate dissents, determined plaintiff high school baseball player assumed the risk of injury from being struck with a ball during a so-called "Warrior Drill" where multiple balls are in play:

Having more than one ball in play may not be an inherent risk in a traditional baseball game, but the record indicates that it is a risk inherent in baseball team practices … . Although plaintiff asserts that the presence of a screen between certain players may have provided a false sense of security that they would be protected, thereby creating a dangerous condition beyond the normal dangers inherent in the sport, this argument is belied by his testimony unequivocally establishing that he did not rely upon the screen for safety but, rather, thought that the drill was unsafe even in the presence of the screen. Thus, the conditions were "as safe as they appear[ed] to be" … . As the evidence showed that plaintiff was an experienced baseball player who "knew of the risks, appreciated their nature and voluntarily assumed them," defendants demonstrated their prima facie entitlement to summary judgment under the primary assumption of risk doctrine … . 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.

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).

The Second Department, reversing Supreme Court, determined defendant's motion for summary judgment in this dental malpractice and lack of informed consent should not have been granted. Plaintiff's expert's affidavits raised questions of fact:

"In order not to be considered speculative or conclusory, expert opinions in opposition should address specific assertions made by the movant's experts, setting forth an explanation of the reasoning and relying on specifically cited evidence in the record" … . In determining a motion for summary judgment, the court must view the evidence in the light most favorable to the nonmoving party … , and "all reasonable inferences must be resolved in favor of the nonmoving party" … . * * *

Summary judgment is not appropriate in a dental malpractice action where, as here, the parties adduce conflicting medical expert opinions, since conflicting expert opinions raise credibility issues which are to be resolved by the factfinder … . …

"[L]ack of informed consent is a distinct cause of action requiring proof of facts not contemplated by an action based merely on allegations of negligence" … . "To establish a cause of action to recover damages 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" … . 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).

The Second Department, reversing Supreme Court, determined the defendants' motion to strike the note of issue and certificate of readiness and compel a medical examination of plaintiff should have been granted. Although the defendants missed the agreed deadline for the exam, they had an adequate excuse and there was no prejudice:

Although a defendant waives the right to medical examinations of the plaintiff by failing to conduct them within the time period set forth in compliance conference orders … , "under certain circumstances and absent a showing of prejudice to the opposing party, the court may exercise its discretion to relieve a party of a waiver of the right to conduct a physical examination" … . Here, a scheduled medical examination of the plaintiff failed to happen due to a clerical error by the vendor that scheduled the examination. Consequently, the defendants did not have the opportunity to conduct an independent medical examination of the plaintiff. Further, no prejudice was shown by the plaintiff. 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.

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).

The Second Department, reversing Supreme Court, determined the medical malpractice, lack of informed consent and battery causes of action should not have been dismissed. Plaintiff alleged defendant doctor operated on the wrong site. Defendant testified she removed a cyst from plaintiff's left leg and plaintiff alleged defendant should have removed an abscess. The court noted that plaintiff's signing a consent form did not require dismissal of the lack of informed consent cause of action:

As to the lack of informed consent cause of action, the deposition testimony of the plaintiff and the defendant and the generic consent form signed by the plaintiff presented triable issues of fact as to whether the defendant informed the plaintiff about the procedure, the alternatives thereto, and the reasonably foreseeable risks and benefits of the proposed treatment and the alternatives … . "[T]he fact that the plaintiff signed a consent form does not establish [the defendant's] entitlement to judgment as a matter of law" where, as here, the form was generic, and beyond a barebones handwritten notation of the areas of the body, "Left Bartholin/Left Inguinal Abscess," "did not contain any details about the operation" … . The consent form does not even indicate the procedure to be performed, but merely lists an area of the body, "Left Bartholin," and a condition, "Left Inguinal Abscess." 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).

The Second Department held that evidence of a routine procedure for keeping the parking lot free of ice and snow, together with the plaintiff's testimony she did not see any ice on the parking lot when she arrived at work on the day of the fall, supported summary judgment in defendants' favor in this slip and fall case:

The plaintiff testified that she worked at the premises five days a week, typically from 9:00 a.m. to 5:00 p.m., and that she either came to the premises by car pool or driving herself. The plaintiff indicated that she had not seen any runoff of melting snow or ice from snow piles in the parking lot to the area where she allegedly fell prior to or on the date of the accident. The plaintiff further testified that during the morning of January 20, 2011, she parked her car at the premises and did not notice any ice on the parking lot surface at that time. The plaintiff indicated that when she left work shortly after 6:00 p.m., she "look[ed] down at the ground" while walking to her car, and she did not see the ice on which she slipped, which she described as being clear, until after she fell. Further, Mauricio Pacheco, a maintenance worker for [defendant] RXR, testified that he checked the parking lot every morning, and if any ice was present, he would have salted the area. Pacheco indicated that if the temperature dropped below freezing or there was any precipitation later in the day, he would have again checked the parking lot for ice. Pacheco also testified that lighting for the parking lot turned on automatically at 6:00 p.m., and that he checked to make sure the lighting was working every morning. 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.

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).

The Second Department, reversing Supreme Court, determined the abutting property owner (Khadu) was not liable in this sidewalk slip and fall case. Although the village code made the abutting property owner responsible for maintenance of the sidewalk, it did not impose tort liability on the property owner:

"Generally, liability for injuries sustained as a result of negligent maintenance of or the existence of dangerous [or] defective conditions to public sidewalks is placed on the municipality and not the abutting landowner" … . "An abutting landowner will be liable to a pedestrian injured by a defect in a public sidewalk only when the owner either created the condition or caused the defect to occur because of a special use, or when a statute or ordinance places an obligation to maintain the sidewalk on the owner and expressly makes the owner liable for injuries caused by a breach of that duty" … .

Here, the evidentiary material submitted by Khadu in support of his motion established as a matter of law that the plaintiffs had no cause of action against him. Khadu demonstrated that he did not create the alleged condition or cause the condition through a special use of the sidewalk. Additionally, although section 180-2 of the Code of the Village of Freeport requires an abutting landowner to keep a sidewalk in good and safe repair, it does not specifically impose tort liability for a breach of that duty … . 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 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).

The Second Department, reversing Supreme Court, determined the defendant property owner's motion for summary judgment in this slip and fall case should not have been granted. Plaintiff alleged she tripped on a twig on the sidewalk in an area which was not adequately illuminated. The defendant, in her motion papers, did not demonstrate she lacked constructive notice of the conditions or that the conditions were not a proximate cause of the fall:

A property owner, or a party in possession or control of real property, has a duty to maintain the property in a reasonably safe condition … . "In a premises liability case, a defendant [real] property owner, or a party in possession or control of real property, who moves for summary judgment has the initial burden of making a prima facie showing that it neither created the alleged defective condition nor had actual or constructive notice of its existence" … . A defendant has constructive notice of a hazardous condition on property when the condition is visible and apparent, and has existed for a sufficient length of time to afford the defendant a reasonable opportunity to discover and remedy it … .

Here, the defendant failed to establish, prima facie, that she lacked constructive notice of the alleged dangerous conditions—to wit, the twig on the sidewalk and

inadequate lighting on the premises, or that these conditions were not a proximate cause of the plaintiff's fall … . Since the defendant failed to meet her initial burden as the movant, the Supreme Court should have denied the defendant's motion for summary judgment dismissing the complaint, regardless of the sufficiency of the plaintiff's opposition papers … . 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.

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).

The Second Department, reversing Supreme Court, determined defendant lessee (E & Z) failed to demonstrate it did not have actual or constructive notice of the alleged ice and snow on the sidewalk in this slip and fall action. Once again, it was not enough to offer proof of routine snow removal procedures as opposed to specific evidence inspection or cleaning close in time to the fall:

… [T]here was no statute or ordinance which imposed tort liability on E & Z for the failure to maintain the sidewalk abutting the subject property. However, E & Z's principal, Hikmatullah Rasul, testified at his deposition that E & Z was required to remove snow and ice from the sidewalk outside the subject property to the curb on both the Jamaica Avenue side and the 104th Street side. Rasul explained that when it snowed either he, his brother, or a restaurant employee would shovel snow, break

up any ice, and apply salt. E & Z did not clean at the bottom of the train staircase as that was not its property.

In support of its motion for summary judgment, E & Z failed to establish its prima facie entitlement to judgment as a matter of law dismissing the complaint and all cross claims insofar as asserted against it by demonstrating that it was free from negligence … . Specifically, E & Z failed to eliminate triable issues of fact as to whether it undertook snow and ice removal efforts to clear the sidewalk on the night of the plaintiff's fall, or whether any snow and ice removal efforts undertaken by it created or exacerbated the icy condition which allegedly caused the plaintiff's fall … . Since E & Z failed to establish its prima facie entitlement to judgment as a matter of law, the Supreme Court should have denied E & Z's motion for summary judgment dismissing the complaint and all cross claims insofar as asserted against it. 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).

The First Department, reversing Supreme Court, determined there were questions of fact about whether defendant had constructive notice of a raised sidewalk flag and whether the defect was trivial in this slip and fall case:

Although the property manager states that the premises were regularly inspected, and any condition observed would have been reported to him, reference to a generalized inspection practice "is insufficient to satisfy defendant['s] burden of establishing that [he] lacked notice of the alleged condition of the sidewalk prior to the accident" … .

As a general rule, whether a defect is trivial depends on "the facts presented, including the width, depth, elevation, irregularity and appearance of the defect along with the time, place and circumstance of the injury" … . The relevant inquiry is whether the defect was "difficult for a pedestrian to see or to identify as a hazard or difficult to pass over safely on foot in light of the surrounding circumstances" … . Although defendant relies on photographs to prove his defense that the defect is trivial, summary judgment should not be granted where, as here, "the dimensions of the alleged defect are unknown and the photographs and descriptions inconclusive" … . 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.

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).

The First Department, reversing Supreme Court, determined defendant's motion for summary judgment in this sidewalk slip and fall case should not have been granted. There was evidence the sidewalk flag was three inches high and the NYC Administrative Code requires the abutting property owner to repair any flags over 1/2 inch:

The Administrative Code of the City of New York requires owners of real property abutting any sidewalk to maintain that sidewalk in a reasonably safe condition, which includes repaving, repairing and replacing defective sidewalk flags (Administrative Code § 7-210[3]). Furthermore, property owners are specifically required to, at their own cost and expense, repave or repair any portion of the

sidewalk that constitutes a tripping hazard where "the vertical grade differential between adjacent sidewalk flags is greater than or equal to one half inch" ,,, ,

Plaintiff testified at the 50-h hearing that he tripped on a raised sidewalk flag that was approximately three inches higher than the adjacent flag, There is also photographic evidence that shows a visibly raised sidewalk flag in the area he identified as where his accident occurred. 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).

The First Department, reversing Supreme Court, determined the city's motion for summary judgment in this slip and fall case should not have been granted. Plaintiff alleged he fell into a hole between a tree well and the sidewalk. The city is responsible for maintaining tree wells:

The City's motion for summary judgment was improperly granted in this action where plaintiff was injured when he tripped and fell in a hole between a tree well and the sidewalk. According to plaintiff, the dirt in the tree well was lower than the sidewalk. The City had the obligation to maintain the tree well located in the sidewalk in a safe condition … . The size, shape, configuration and location of the Big Apple Map's line markings in the same area of the sunken tree well, which indicate a raised or uneven portion of the sidewalk, "raise an issue of fact as to whether the City had prior written notice of the particular defect" … . Although plaintiff's testimony and averments in regard to the precise precipitating cause of his fall are somewhat inconsistent, his consistent statements that a hole in an area between the sidewalk and tree well was a factor in causing him to fall raise triable

issues as to whether a tree well defect contributed to his fall. 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.

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).

The Second Department, reversing the defendant's judgment after trial in this slip and fall case, determined the jury should not have been instructed to consider a building code provision because there was not proof when the stairway was constructed:

We agree with the defendant that the Supreme Court should not have charged the jury with regard to certain provisions of the 1925 Administrative Code of the City of New York (hereinafter the Building Code). The plaintiffs failed to submit sufficient proof to establish when the subject stairway was constructed. Thus, the plaintiffs failed to establish which version of the Building Code was applicable … .

Since a general verdict sheet was submitted to the jury, we cannot ascertain whether the jury's verdict was predicated on a finding that the defendant violated the 1925 Building Code. Accordingly, the judgment must be reversed, and the matter remitted to the Supreme Court, Kings County, for a new trial on the issue of liability. 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. The jury should not have been instructed to consider the building code provisions.

SLIP AND FALL (STAIRWAY).

PLAINTIFF'S INCONSISTENT DEPOSITION TESTIMONY IN THIS STAIRWAY SLIP AND FALL CASE RAISED A CREDIBILITY QUESTION BUT DID NOT REQUIRE SUMMARY JUDGMENT IN DEFENDANT'S FAVOR; PLAINTIFF'S TESTIMONY SHE DID NOT USE THE HANDRAILS REQUIRED DISMISSAL OF THE CLAIM ALLEGING THE HANDRAILS WERE DEFECTIVE (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court in this stairway slip and fall case, determined the plaintiff's inconsistent deposition testimony raised an issue of credibility but did not warrant summary judgment dismissing the action. However the claim relating to the handrails of the should have been dismissed because plaintiff testified she did not use the handrails:

While plaintiff's initial deposition testimony was later contradicted by the affidavit she submitted in opposition to defendant's motion, after a break in the deposition, she testified that she had misspoken, and changed her testimony significantly as to how her fall on defendant's staircase occurred. Plaintiff's latter version of the accident is, in the main, consistent with her affidavit. Thus, while the change of testimony mid-deposition presents an issue of credibility for the jury, the affidavit does not present the kind of feigned issue of fact that requires the court to disregard the affidavit … . Since plaintiff's expert relied upon the version of the accident described in plaintiff's affidavit, his affidavit was properly considered … . Plaintiff's inability to identify uneven riser heights as the cause of her fall is not fatal to her claim, as her post-break deposition testimony permits the inference that her fall was caused by uneven riser heights … .

However, plaintiff's affidavit presents a feigned issue of fact as to whether her fall was caused by any defect of the staircase handrails and must be disregarded with respect thereto … . Plaintiff testified consistently through the entirety of her deposition that she was not holding the handrail, that it was her custom and practice

not to use handrails on short flights of steps, and that at no time during her fall did she attempt, or even think of attempting, to put her hand on the handrail. Dixon v Sum Realty, Co., 2021 NY Slip Op 00367, First Dept 1-21-21

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).

The Second Department, reversing Supreme Court, determined the defendants' motion to set aside the jury verdict in this slip and fall case should not have been granted. Plaintiff had double-parked. Her granddaughter ran toward traffic after getting out of the car. Plaintiff ran to stop her granddaughter and tripped over a piece of wood used as shoring by defendants who were installing a gas line. The jury found plaintiff negligent, but found her negligence was not a proximate cause of her injuries:

"A jury's finding that a party was at fault but that such fault was not a proximate cause of the accident is inconsistent and against the weight of the evidence only when the issues are so inextricably interwoven as to make it logically impossible to find negligence without also finding proximate cause" … . "[W]here there is a reasonable view of the evidence under which it is not logically impossible to reconcile a finding of negligence but no proximate cause, it will be presumed that, in returning such a verdict, the jury adopted that view" … . Here, the jury reasonably could have concluded that the plaintiff was negligent, but that such negligence was not a proximate cause of her falling over the piece of wood bracing that was supporting the stack of wood planking. The jury could have adopted the view that the defendants' failure to maintain the wood they were storing in the roadway in a safe condition was the sole proximate cause of the accident … . 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.

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).

The Second Department, in a full-fledged opinion by Justice Dillon, disagreeing with a line of First Department decisions, determined a targeted, premeditated attack on a building resident is not necessarily an intervening cause which insulates the landlord from liability. Here plaintiff's decedent was targeted by her former fiance (Boney) who set her, himself and one of her children on fire in the hallway outside plaintiff's decedent's apartment. There was evidence the exterior door to the building did not have a functioning lock. The Second Department held that the defendant landlord (the New York City Housing Authority [NYCHA]) did not eliminate questions of fact about whether the broken lock was a proximate cause of the attack and whether the attack was foreseeable:

The test in determining summary judgment motions involving negligent door security should … not focus on whether the crime committed within the building was "targeted" or "random," but whether or not, and to what extent, an alleged negligently maintained building entrance was a concurrent contributory factor in the happening of the criminal occurrence. In examining whether there is a triable issue of fact as to foreseeability and proximate cause requiring trial, a jury could conceivably conclude that the chronically broken lock at the building's front door provided Boney with an opportunity to attack the decedent, in a manner that might not otherwise have been possible, and that NYCHA could have foreseeably

anticipated that its broken front door lock would result in the entry of intruders into the building for the commission of criminal activities against known or unknown specific tenants … . All of these actions should be examined sui generis, recognizing the unique facts of individualized matters, rather than simplistically or arbitrarily channeling them into either "targeted" or "random" criminal boxes that do not accommodate the factual nuances that may vary from case to case. 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).

The First Department, ordering a new trial on damages if the plaintiffs do not stipulate to a reduction from $14.5 to $10 million, determined the defendant property owners and the security company (PSS) were properly found liable for the injuries caused by two twelve-year-old boys who threw a shopping cart over a fourth floor railing onto plaintiff on the ground below. There had been prior incidents where items were thrown over the railing and down an escalator:

… [T]he jury heard evidence that the Owner Defendants had notice of a recurring hazardous condition at the premises, namely, that youngsters frequented the location and threw various items off the elevated structure. According to witnesses and security log entries, young people threw such items as candy, food, rocks, glass bottles and garbage. Additionally, there was documentary evidence that 20 days before plaintiff's accident, several youths had thrown a shopping cart down the

escalator. Yet, according to testimony by one of defendant's managers, the Owner Defendants did not put into place any remedial measures, such as raising the height of the rails, increasing the number of security guards or putting up warning signs, despite having notice of the recurring dangerous condition. Thus, we decline to disturb the jury's findings apportioning liability 65% against Owner Defendants and 25% against defendant PSS. 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.

TRAFFIC ACCIDENTS.

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

The Second Department, reversing Supreme Court, determined the reckless disregard standard applied in this traffic accident case involving a municipal snowplow:

"A snowplow operator 'actually engaged in work on a highway' is exempt from the rules of the road and may be held liable only for damages caused by an act done in 'reckless disregard for the safety of others'" … . Reckless disregard requires more than a momentary lapse in judgment … . "This 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" … .

Oviedo-Mejia [the snowplow driver] testified that he was traveling in reverse at a speed of five to seven miles per hour with the lights and beeping alert of the snowplow vehicle activated. Oviedo-Mejia testified that he kept looking in the mirrors as the snowplow vehicle was moving in reverse, but he did not see the

plaintiff prior to the alleged impact. Under the circumstances, the defendants demonstrated, prima facie, that Oviedo-Mejia did not act with reckless disregard for the safety of others … . 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.