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A Succinct Collection of the Salient Issues Addressed in the Negligence Decisions Released by our New York State Appellate Courts in March 2021.The Entries in the Table of Contents Link to the Summaries Which Link to the Decisions on the Official New York Courts Website.

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Negligence Practice Newsletter
March 2021

CHEMICAL CONTAMINATION, REAL PROPERTY.

PLAINTIFF, WHO PURCHASED THE PROPERTY, SUED THE PRIOR OWNER IN NEGLIGENCE FOR DAMAGES STEMMING FROM PLAINTIFF'S EXPOSURE TO CHEMICAL CONTAMINATION ON THE PROPERTY; LIABILITY FOR A DANGEROUS CONDITION ON PROPERTY GENERALLY CEASES UPON TRANSFER OF THE PROPERTY; THE NEGLIGENCE CAUSE OF ACTION SHOULD HAVE BEEN DISMISSED (FOURTH DEPT).

Powers v City of Geneva, 2021 NY Slip Op 01684, Fourth Dept 3-19-21

Practice Point: A "negligence" personal injury action based upon chemical contamination of real property essentially alleges injury caused by a dangerous condition on land. The general rule is the sale of the property cuts off any liability on the seller's part for injury caused by a dangerous condition on the property, unless there was insufficient time for the new owner to discover and remedy the condition.

EDUCATION-SCHOOL LAW, THIRD-PARTY ASSAULT.

THE SCHOOL TOOK REASONABLE STEPS TO PREVENT A STUDENT, J. P., FROM ASSAULTING AN UNIDENTIFIED STUDENT AFTER THE SCHOOL LEARNED OF A RUMOR THAT J.P. INTENDED TO FIGHT SOMEONE; WHEN CONFRONTED AND WARNED J.P. DENIED THAT HE INTENDED TO ASSAULT ANYONE; TWO DAYS LATER J.P. ASSAULTED PLAINTIFF'S CHILD; THE SCHOOL'S MOTION FOR SUMMARY JUDGMENT DISMISSING THE NEGLIGENT SUPERVISION ACTION SHOULD HAVE BEEN GRANTED (SECOND DEPT).

Wienclaw v East Islip Union Free Sch. Dist., 2021 NY Slip Op 08277, Second Dept 3-17-21

Practice Point: When the school administration was warned that a student, JP, intended to assault another unidentified student, the assistant principal spoke to JP and JP denied he intended to assault anyone. The assault on plaintiff's child two days

later occurred in so short a time that supervision could not have prevented it. Under those circumstances the school was not liable for the assault as a matter of law.

ELEVATOR MALFUNCTION, ESPINAL.

THE ELEVATOR COMPANY, BY CONTRACT, HAD COMPLETE RESPONSIBILITY FOR ELEVATOR MAINTENANCE; THEREFORE THE BUILDING OWNER AND MANAGER WERE ENTITLED TO SUMMARY JUDGMENT DISMISSING THE COMPLAINT AGAINST THEM IN THIS RES IPSA LOQUITUR ELEVATOR-MALFUNCTION-ACCIDENT CASE (FIRST DEPT).

Sanchez v 1067 Fifth Ave. Corp., 2021 NY Slip Op 01522, First Dept 3-16-21

Practice Point: Plaintiff alleged the elevator door closed on her shoulder, pinning her as the elevator descended. The building owner and manager had, by contract, relinquished all control over maintenance of the elevator to an elevator company. The contract was comprehensive and detailed enough to entirely displace the building owner's and manager's responsibility for the safety of the elevator. Therefore the owner and manager were entitled to summary judgment on the strength of the contract alone.

LANDLORD-TENANT, OUT-OF-POSSESSION.

PLAINTIFF SHOULD NOT HAVE BEEN ALLOWED TO AMEND THE BILL OF PARTICULARS AFTER DISCOVERY WAS CLOSED TO RAISE A NEW THEORY OF LIABILITY STEMMING FROM FACTS NOT PREVIOUSLY ALLEGED; DEFENDANT OUT-OF-POSSESSION LANDLORD DEMONSTRATED THE LEASE DID NOT REQUIRE THE LANDLORD TO MAINTAIN THE DOOR WHICH PLAINTIFF ALLEGED CLOSED ON HER HAND (SECOND DEPT).

King v Marwest, LLC, 2021 NY Slip Op 08225, Second Dept 3-17-20

Practice Point: By the terms of the lease, the tenant exercised complete and exclusive control of the retail store premises. Therefore the out-of-possession landlord, based upon the terms of the lease, could not be held liable for the plaintiff's injury, allegedly caused by a malfunctioning door on the store premises which closed on plaintiff's hand.

MEDICAL MALPRACTICE.

GALLBLADDER SURGERY WAS PERFORMED ON PLAINTIFF, BUT HER GALLBLADDER HAD BEEN REMOVED YEARS BEFORE; THE DOCTORS APPARENTLY DID NOT REVIEW THE AVAIABLE MEDICAL RECORDS; THE RADIOLOGIST DID NOT DISCOVER THAT THE GALLBLADDER WAS ABSENT; THE DOCTORS' MOTIONS FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

Ruiz v Opsha, 2021 NY Slip Op 01796, Second Dept 3-24-21

Practice Point: Failure to review the patient's medical records which resulted in surgery to remove an organ which had already been surgically removed was a ground for medical malpractice, as was the radiologist's failure to notice the organ was missing when the ultrasound was reviewed.

MEDICAL MALPRACTICE.

MENTAL HEALTH TREATMENT PROVIDERS, WHO WERE TREATING MOTHER, DID NOT OWE A DUTY OF CARE TO HER SON, WHO WAS STABBED AND KILLED BY MOTHER (FOURTH DEPT).

Cardenas v Rochester Regional Health, 2021 NY Slip Op 01641, Fourth Dept 3-19-21

Practice Point: The Fourth Department did not rule out the possibility that mental health providers could owe a duty to a patient's family to protect them from a patient's violence. Rather, the court noted the complaint did not allege that the patient sought treatment to prevent injury to her family or that the defendants were aware of threats of violence by the patient in the past, or that the defendants in some way contributed to the danger posed by the patient.

MEDICAL MALPRACTICE.

PLAINTIFF'S EXPERT AFFIDAVIT IN THIS MEDICAL MALPRACTICE ACTION DID NOT LAY A FOUNDATION FOR AN OPINION OUTSIDE THE EXPERT'S FIELD AND DID NOT REBUT THE OPINIONS OF DEFENDANT'S EXPERT; DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (SECOND DEPT).

Laughtman v Long Is. Jewish Val. Stream, 2021 NY Slip Op 01251, Second Dept 3-3-21

Practice Point: Medical malpractice actions stand or fall on expert affidavits at the summary judgment stage. Here plaintiff's expert's affidavit did not lay a foundation for an opinion outside the expert's field, did not specifically rebut the opinions of defendant's expert and did not specify how the defendant deviated from the standard of care.

MEDICAL MALPRACTICE.

PLAINTIFFS' MEDICAL MALPRACTICE ACTION SEEKING RECOVERY OF THE COSTS OF CARING FOR A SEVERELY DISABLED CHILD SHOULD NOT HAVE BEEN DISMISSED; PROOF REQUIREMENTS EXPLAINED (SECOND DEPT).

Vasiu v Berg, 2021 NY Slip Op 01798, Second Dept 3-24-21

Practice Point: A medical malpractice action can be brought to recover the costs of care for a severely disabled child if the parents can demonstrate the defendant deprived them of the opportunity to timely terminate the pregnancy, or the child would not have been conceived but for the defendant's malpractice.

MUNICIPAL LAW, GENDER-MOTIVATED VIOLENCE.

THE SEVEN-YEAR STATUTE OF LIMITATIONS IN NYC'S VICTIMS OF GENDER-MOTIVATED VIOLENCE PROTECTION LAW (VGM) IS NOT PREEMPTED BY THE ONE-YEAR OR THREE-YEAR CPLR STATUTES OF LIMITATIONS; ALTHOUGH DEFENDANT AND DEFENDANT S CORPORATION MAY BE ONE AND THE SAME, THERE WAS ENOUGH EVIDENTIARY SUPPORT FOR THE NEGLIGENT HIRING AND SUPERVISION CAUSE OF ACTION TO SURVIVE THE MOTION TO DISMISS (FIRST DEPT).

Engelman v Rofe, 2021 NY Slip Op 01321, First Dept 3-2-21

Practice Point: Here, even though the defendant and the defendant S corporation may be one and the same, the complaint stated a cause of action for negligent hiring and supervision. Apparently the theory is: the defendant was an agent and an employee of the S corporation such that defendant's knowledge of his own sexual assaults could be imputed to the S corporation (??).

MUNICIPAL LAW, NOTICE OF CLAIM.

THE COURT LACKED AUTHORITY TO DEEM A NOTICE OF CLAIM TIMELY FILED MORE THAN ONE YEAR AND 90 DAYS AFTER THE CAUSE OF ACTION (SLIP AND FALL) ACCRUED, EVEN THOUGH THE SUMMONS AND COMPLAINT WAS SERVED WITHIN THAT TIME PERIOD; A NOTICE OF CLAIM FILED MORE THAN 90 DAYS AFTER THE CAUSE OF ACTION ACCRUES WITHOUT LEAVE OF COURT IS A NULLITY (FOURTH DEPT).

Bennett v City of Buffalo Parks & Recreation, 2021 NY Slip Op 01920, Fourth Dept 3-26-21

Practice Point: Service of a notice of claim more than 90 days after the cause of action against a municipality accrues, without court approval, is a nullity. A court does not have the authority to grant leave to file a late notice of claim more than 1 year and 90 days after the cause of action accrues.

MUNICIPAL LAW, SUICIDE PREVENTION.

THE COMPLAINT STATED A CAUSE OF ACTION AGAINST PORT AUTHORITY FOR FAILING TO INSTALL FENCING TO PREVENT PLAINTIFFS' DECEDENTS FROM COMMITTING SUICIDE BY JUMPING FROM THE GEORGE WASHINGTON BRIDGE (FIRST DEPT).

Feldman v Port Auth. of N.Y. & N.J., 2021 NY Slip Op 01719, First Dept 3-23-21

Practice Point: Maintenance of a bridge is a proprietary, not a governmental, function. Therefore normal principles of negligence apply to the municipality which owns and maintains the bridge and there is no requirement that there be a special relationship between the municipality and the plaintiff to hold the municipality liable. Here the complaint alleging the city was negligent for failing to install fencing on the George Washington bridge (to make it impossible to commit suicide by jumping off the bridge) stated a cause of action.

MUNICIPAL LAW, THIRD-PARTY ASSAULT.

THE COUNTY POLICE OFFICER'S STATEMENT TO PLAINTIFF'S DECEDENT TO THE EFFECT SHE HAD NO REASON TO FEEL UNSAFE DID NOT CREATE A SPECIAL RELATIONSHIP; THEREFORE THE COUNTY WAS NOT LIABLE FOR THE SHOOTING DEATH OF PLAINTIFF'S DECEDENT AT THE HANDS OF THE FATHER OF HER YOUNG CHILD (SECOND DEPT).

Coleman v County of Suffolk, 2021 NY Slip Op 08219, Second Dept 3-17-21

Practice Point: A police officer's statement to plaintiff's decedent that he didn't see any reason why the father of her child, Jenkins, would hurt her did not create a special relationship between the police and plaintiff's decedent such that the city could be held liable for her shooting death at the hands of Jenkins. The statement was not a promise to protect upon which she could reasonably have relied.

PANIC.

PLAINTIFF WAS KNOCKED DOWN WHEN MALL SHOPPERS PANICKED AND FLED BECAUSE A FALLING DISPLAY SOUNDED LIKE GUNSHOTS; QUESTIONS OF FACT CONCERNING THE FORESEEABILITY OF THE PANIC AND THE OPPORTUNITY TO CONTROL THE PANIC PRECLUDED SUMMARY JUDGMENT RE THE OWNERS AND SECURITY COMPANY (SECOND DEPT).

Grogan v Simon Prop. Group, Inc., 2021 NY Slip Op 01396, Second Dept 3-10-21

Practice Point: The owners of a shopping mall and mall security may owe a duty to protect against injury caused by a panicking crowd. Here a falling retail display sounded like gunshots and plaintiff was knocked down in the ensuing panic.

PRODUCTS LIABILITY.

THE DEFENSE EXPERT SHOULD NOT HAVE BEEN ALLOWED TO OFFER A SPECULATIVE CONCLUSION ABOUT HOW PLAINTIFF WAS INJURED WHICH WAS NOT SUPPORTED BY ANY EVIDENCE IN THE RECORD; PLANTIFF ALLEGED THE STEP STOOL SHE WAS STANDING ON COLLAPSED; THE DEFENSE EXPERT TESTIFIED SHE COULD HAVE FALLEN ONTO THE STOOL; THE DEFENSE VERDICT SHOULD HAVE BEEN SET ASIDE (SECOND DEPT).

Montesione v Newell Rubbermaid, Inc., 2021 NY Slip Op 01253, Second Dept 3-3-21

Practice Point: In this products liability case, defendant's expert should not have been allowed to offer an opinion about the cause of plaintiff's injuries which had no basis in the record. Plaintiff alleged the step stool she was standing on collapsed. The expert testified she could have simply fallen onto the stool.

SLIP AND FALL, MUNICIPAL LAW.

DESPITE A SMALL HOME OFFICE, DEFENDANT WAS ENTITLED TO THE LIABILITY EXEMPTION FOR OWNER-OCCUPIED RESIDENCES IN THIS SIDEWALK SLIP AND FALL CASE (SECOND DEPT).

Zak v City of New York, 2021 NY Slip Op 01287, Second Dept 3-3-21

Practice Point: Owner-occupied one-, two-, and three-family residences in New York City are exempt from the code provision shifting tort liability for defective sidewalks from the city to abutting property owners. The fact that the defendant property owner, a retired photographer, had a small home office and did some photography work did not take his single-family residence out of the exempt category.

SLIP AND FALL, MUNICIPAL LAW.

THE CITY DID NOT HAVE WRITTEN NOTICE OF THE SIDEWALK/CURB DEFECT IN THIS SLIP AND FALL CASE BECAUSE THE DEFECT DID NOT APPEAR ON THE BIG APPLE MAP WHICH HAD BEEN SERVED ON THE CITY, DESPITE THE APPARENT EXISTENCE OF ANOTHER BIG APPLE MAP WHICH SHOWED THE DEFECT BUT WAS NOT SHOWN TO HAVE BEEN SERVED ON THE CITY (SECOND DEPT).

Abdullah v City of New York, 2021 NY Slip Op 01377, Second Dept 3-10-21

Practice Point: In New York City, where there is more than one Big Apple map and one map shows the sidewalk defect where plaintiff fell and the other doesn't, only the map which had been served on the City is considered. Here the map which had been served on the City did not show the defect, so the City did not have written notice of it.

SLIP AND FALL.

IN A SLIP AND FALL CASE, PROOF OF A GENERAL CLEANING AND INSPECTION POLICY DOES NOT DEMONSTRATE A LACK OF CONSTRUCTIVE NOTICE OF THE DANGEROUS CONDITION (SECOND DEPT).

Piotrowski v Texas Roadhouse, Inc., 2021 NY Slip Op 02000, Second Dept 3-31-21

Practice Point: In order to demonstrate a defendant in a slip and fall case did not have constructive notice of the condition alleged to have caused the fall, the defendant cannot rely on proof of a general cleaning and inspection policy. The defendant must show the area was inspected or cleaned close in time to the slip and fall.

SLIP AND FALL.

PLAINTIFF ALLEGED HE STUMBLED WHEN HIS FOOT HIT ROLLED UP CARPETS AND THEN HE TRIPPED ON A RAISED SIDEWALK FLAG IN THIS SLIP AND FALL CASE; DEFENDANT DEMONSTRATED IT DID NOT HAVE NOTICE OF THE CARPETS, BUT THERE WERE QUESTIONS OF FACT ABOUT DEFENDANT'S NOTICE OF THE RAISED FLAG AND WHETHER THE FLAG WAS TRIVIAL; THE COURT NOTED THERE CAN BE MORE THAN ONE PROXIMATE CAUSE (FIRST DEPT).

Abraham v Dutch Broadway Assoc. L.L.C., 2021 NY Slip Op 01711, First Dept 3-23-21

Practice Point: This case illustrates that there may be more than one proximate cause for a slip and fall. The defendant was able to show it did not have notice of one of the causes (rolled up carpets on the sidewalk). But it did not show that it did not have notice of the other proximate cause, a raised sidewalk flag.

SLIP AND FALL.

PLAINTIFF'S EXPERT SHOULD HAVE BEEN ALLOWED TO TESTIFY IN THIS SLIP AND FALL CASE; NEW TRIAL ORDERED (SECOND DEPT).

Robins v City of Long Beach, 2021 NY Slip Op 01277, Second Dept 3-3-21

Practice Point: Here the preclusion of expert testimony about whether the unfinished driveway area where plaintiff allegedly fell should have been barricaded required reversal. The fact that there was no violation of a code or ordinance did not prohibit expert testimony relevant to common-law negligence principles, as long as the testimony was based upon professional or technical knowledge beyond the ken of the average juror.

TRAFFIC ACCIDENTS.

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IN THIS PEDESTRIAN-VEHICLE ACCIDENT CASE WAS PREMATURE; PLAINTIFF HAD NOT YET BEEN DEPOSED (FIRST DEPT).

Bey v Rosado, 2021 NY Slip Op 01840, First Dept 3-25-21

Practice Point: Even though the plaintiff in a traffic accident case no longer needs to demonstrate the absence of comparative negligence to be awarded summary judgment, this summary judgment motion made before plaintiff was deposed should have been denied as premature.

WRONGFUL DEATH, TRUSTS AND ESTATES, STATUTE OF LIMITATIONS, INFANCY TOLL.

THE INFANCY TOLL OF THE STATUTE OF LIMITATIONS IN CPLR 208 APPLIES TO A WRONGFUL DEATH ACTION WHERE THE SOLE DISTUBUTEES ARE INFANTS; THE TOLL, HOWEVER, DOES NOT APPLY TO A RELATED ASSAULT AND BATTERY ACTION WHICH IS PERSONAL TO THE DECEDENT (FRIST DEPT).

Machado v Gulf Oil, L.P., 2021 NY Slip Op 01849, First Dept 3-25-21

Practice Point: Here father was killed in an altercation and the only distributes of his estate were two children. With respect to the statute of limitations for a wrongful death lawsuit, the infancy toll applies until a guardian of the property of the child distributee is appointed or until the child reaches the age of majority, whichever occurs first.

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