NEW YORK APPELLATE DIGEST. LLC

Negligence
March 2021

An Organized Compilation of Summaries of Selected Decisions Addressing Negligence Released in March 2021 by the First, Second, Third and Fourth Departments, as Well as the Court of Appeals, 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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ACCOUNTANT MALPRACTICE.

PLAINTIFF DID NOT DEMONSTRATE DEFENDANT ACCOUNTANT DEPARTED FROM THE PROFESSIONAL STANDARD FOR TAX PREPARATION SERVICES (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff did not demonstrate defendant accountant departed from the professional standard for tax preparation:

"A party alleging a claim of accountant malpractice must show that there was a departure from the accepted standards of practice" … . Plaintiff does not identify any applicable professional standard which would have required defendants to inquire whether the transactions at issue were approved in accordance with the procedures contained in the operating agreement. To the contrary, the standards proffered by plaintiff's expert permit an accountant engaged for tax preparation services to rely on information furnished by the taxpayer unless it appears to be incorrect, incomplete or inconsistent. There is no allegation here that the information provided to defendants was incorrect, incomplete or inconsistent. Deane v Brodman, 2021 NY Slip Op 01842, First Dept 3-25-21

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).

The Fourth Department, reversing (modifying) Supeme Court, determined plaintiff's negligence cause of action seeking damages for exposure to contaminants on the land plaintiff purchased from defendant city should have been dismissed. A

property owner's liability for a dangerous condition ceases upon the transfer of the property:

We … agree with defendant that the court erred in denying the motion with respect to the negligence cause of action, and we therefore further modify the order accordingly. That cause of action is based on allegations that plaintiff was injured due to a dangerous condition on the parcel of property that defendant sold to plaintiffs, i.e., chemical contamination, to which plaintiff was exposed after the sale. It is well settled that "[o]ne's liability in negligence for the condition of land ceases when the premises pass out of one's control before injury results. Such is the general rule" … . Thus, under that general rule, defendant's liability for negligence based on a dangerous condition on the property ended when it sold the parcel to plaintiffs … , and "liability may be imposed upon defendant only if the allegedly dangerous condition . . . existed at the time [it] relinquished possession and control of the premises 'and the new owner has not had a reasonable time to discover the condition, if it was unknown, and to remedy the condition once it is known' " … .

Here, defendant met its burden on the motion of establishing that any injury allegedly sustained by plaintiff was caused by exposure after defendant sold the property. In response, "plaintiff[s have] offered nothing to show that [they, as] the new owner[s,] did not have adequate time to discover and remedy such defects" … . 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).

The Second Department, reversing Supreme Court, determined the defendant school district's motion for summary judgment in this negligent supervision case should have been granted. Plaintiff's child was assaulted at school by another child, J.P. The assistant principal had been warned that J.P. was going to fight with someone. The assistant principal warned J.P. of the consequences and alerted school security. When the assistant principal warned J.P. he denied that he intended to fight someone:

A necessary element of a cause of action alleging negligent supervision is that the district knew or should have known of J.P.'s propensity for violence … . The defendant established that the complaint and bill of particulars did not allege that J.P. had a propensity to engage in violence or that the district knew or should have known that J.P. had a propensity for violence … .

The defendant established, prima facie, that it was not made aware of any particularized threat against the child. Furthermore, the evidence presented by the defendant established that the assistant principal took reasonable steps to prevent J.P. from fighting by warning J.P. about the consequences of fighting, informing his mother of the alleged threat and the consequences of fighting, and informing the head of school security that there was an alleged threat that J.P. intended to fight someone, notwithstanding that the assistant principal was not aware of J.P.'s intended target. Under these circumstances, the defendant reasonably responded to a rumor of a threat and could not have anticipated that J.P. would have attacked the child two days later … . Further, the defendant established that "the incident occurred in so short a period of time that any negligent supervision on its part was not a proximate cause of the infant plaintiff's injuries" … . 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).

The First Department, recalling and vacating a decision in this case released on December 8, 2020, determined the building owner (1067 Fifth) and manager (Elliman) did not have constructive or action notice of the defect in the elevator door which allegedly caused it to close on plaintiff's shoulder, pinning her while the elevator descended. However liability may be demonstrated under the res ipsa loquitur theory. But because the building owner and manager had, by contract, relinquished all control over the maintenance of the elevator to defendant elevator company, American, their motions for summary judgment were granted:

… [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 American (see Espinal v Melville Snow Contrs., 98 NY2d 136, 140 [2002]). 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).

he Second Department, reversing Supreme Court, determined plaintiff's motion to amend the bill of particulars after discovery was complete should not have been granted and defendant out-of-possession landlord's motion for summary judgment should have been granted. Plaintiff alleged the door of a retail store closed on her hand as she was pushing a cart with merchandise through the doorway. She alleged the door was not properly maintained. After discovery she sought to amend her bill of particulars to allege there was a crack in the floor which caused the cart to get stuck as she was attempting to pass through the doorway:

"While leave to amend a bill of particulars is ordinarily to be freely given in the absence of prejudice or surprise" … , "once discovery has been completed and the case has been certified as ready for trial, [a] party will not be permitted to amend the bill of particulars except upon a showing of special and extraordinary circumstances" … . In such a case, leave may properly be granted "where the plaintiff makes a showing of merit, and the amendment involves no new factual allegations, raises no new theories of liability, and causes no prejudice to the defendant" … . However "where a motion for leave to amend a bill of particulars alleging new theories of liability not raised in the complaint or the original bill is made on the eve of trial, leave of court is required, and judicial discretion should be exercised sparingly, and should be discreet, circumspect, prudent, and cautious" … . "In exercising its discretion, the court should consider how long the party seeking the amendment was aware of the facts upon which the motion was predicated, whether a reasonable excuse for the delay was offered, and whether prejudice resulted therefrom" … .

… [T]he proposed amendment to the bill of particulars raised an entirely new theory of liability well after discovery had been completed, and was advanced only in response to the defendant's motion for summary judgment. Moreover, the plaintiff failed to proffer a reasonable excuse for her delay in seeking the amendment … , and the proposed amendment was prejudicial to the defendant … . * * *

… [T]he defendant [out-of-possession landlord] demonstrated its … entitlement to summary judgment dismissing the complaint by submitting, inter alia, the lease, which established that the tenant enjoyed complete and exclusive possession of the demised premises at the time of the plaintiff's injury and that the defendant was not responsible for maintenance of the door. 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).

The Second Department, reversing Supreme Court, determined questions of fact precluded summary judgment which had been awarded to an internist (Patil), a surgeon (Jung), and a radiologist (Opsha). Plaintiff underwent gallbladder surgery, but her gallbladder had already been removed. The medical record reflected the prior removal:

The plaintiff's expert opined that Patil departed from the accepted standard of care and contributed to the plaintiff's injuries by failing to review the plaintiff's medical records maintained by SIPP, which indicated that the plaintiff previously had her gallbladder removed. …

At his deposition, Jung testified that, before the surgery, he was not aware that the plaintiff had a previous cholecystectomy and became aware that "[t]here was no gallbladder" … surgery. He admitted that he "looked at" Patil's notes and reviewed the ultrasound report. Further, although he had access to [the] medical records, he did not recall if he reviewed the plaintiff's medical chart prior to the surgery, but "might have looked at something." Jung admitted that, other than the primary care physician's report and the radiological report, it was "not routine" for him to "look into other documents and charts for a patient." …

Opsha's expert failed to explain the basis for his conclusion as to how Opsha detected a gallbladder in his review of the ultrasound and made findings in his report regarding the plaintiff's gallbladder when that organ had been removed years earlier … . 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).

The Fourth Department, reversing Supreme Court, determined defendant medical/mental health facilities and psychiatrist, who were treating plaintiff's wife, did not owe a duty to plaintiff's son, who was killed by plaintiff's wife. Plaintiff had called defendant Unity Mental Health (UMH) several times seeking additional care because his wife's condition was worsening. Plaintiff was told his wife should keep her psychiatric appointment which was two weeks away. Two days later plaintiff's wife stabbed their son (decedent):

Generally, medical providers owe a duty of care only to their patients, and courts have been reluctant to expand that duty to encompass nonpatients because doing so would render such providers liable "to a prohibitive number of possible plaintiffs" … .The scope of that duty of care has, on occasion, been expanded to include nonpatients where the defendants' relationship to the tortfeasor " 'place[d] [them] in the best position to protect against the risk of harm,' " and "the balancing of factors such as the expectations of the parties and society in general, the proliferation of claims, and public policies affecting the duty proposed herein . . . tilt[ed] in favor of establishing a duty running from defendants to plaintiffs under the facts alleged" … . Under the circumstances of this case, however, we conclude that those factors do not favor establishing a duty running from defendants to decedent. The complaint herein does not allege that plaintiff's wife sought treatment specifically in order to prevent physical injury to decedent or her family, that defendants were aware whether she had threatened or displayed violence towards her family in the past, or that defendants directly put in motion the danger posed by the patient … . 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).

The Second Department, reversing Supreme Court, determined defendant's motion for summary judgment in this medical malpractice case should have been granted. Plaintiff's expert's affidavit did not raise a question of fact because there was no foundation for the expert's opining outside the expert's field of emergency medicine:

The affirmation of the plaintiff's expert, a physician with training in emergency medicine, lacked probative value as it failed to specify that the expert had any specific training or expertise in neurology or in the diagnosis and treatment of strokes, or how she became familiar with the applicable standards of care … . Moreover, the plaintiff's expert failed to rebut the opinions of the defendant's expert or articulate how the defendant's alleged deviations from the accepted standard of care were a proximate cause of the plaintiff's injuries … . 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).

The Second Department determined plaintiffs' medical malpractice action seeking recovery of the expenses of caring for their severely disable child should not have been dismissed. The plaintiffs alleged defendants failed to properly diagnose the child's conditions in utero and failed to advise plaintiffs of their options:

Parents may maintain a cause of action on their own behalf for the extraordinary costs incurred in raising a child with a disability … . "To succeed on such a cause of action, which 'sound[s] essentially in negligence or medical malpractice,' [a plaintiff] 'must demonstrate the existence of a duty, the breach of which may be considered the proximate cause of the damages suffered by' [the injured party]" … . "Specifically, the parents must establish that malpractice by a defendant physician deprived them of the opportunity to terminate the pregnancy within the legally permissible time period, or that the child would not have been conceived but for the defendant's malpractice" … . "[T]he claimed damages cannot be based on mere speculation, conjecture, or surmise, and, when sought in the form of extraordinary expenses related to caring for a disabled child, must be necessitated by and causally connected to the child's condition" … . "Since the plaintiffs' recovery is limited to their personal pecuniary loss, expenses covered by other sources such as private insurance or public programs are not recoverable" … . 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, EXCESSIVE FORCE BY POLICE.

EXCESSIVE FORCE. THE NYPD IS A DEPARTMENT OF THE CITY AND CANNOT BE SEPARATELY SUED; THE 42 USC 1983 CIVIL RIGHTS VIOLATION CAUSE OF ACTION WAS NOT SUPPORTED BY SUFFICIENT ALLEGATIONS OF AN UNCONSTITUTIONAL CITY CUSTOM OR POLICY; THE OTHER CAUSES OF ACTION AGAINST THE CITY FALL BECAUSE THERE WAS PROBABLE CAUSE FOR PLAINTIFF'S ARREST AND THE FORCE USED BY THE POLICE WAS NOT EXCESSIVE UNDER THE CIRCUMSTANCES (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the 42 USC 1983 violation-of-civil rights, negligence, assault and battery, excessive force, false arrest and false imprisonment causes of action against the New York Police Department (NYPD) and New York City (City) should have been dismissed. Plaintiff was shot when, in the midst of a psychotic episode, she approached the police with a knife. She was indicted, tried and found not responsible by reason of mental disease or defect. The court noted that the NYPD is a department of the City and cannot be sued separately. The court also noted the 1983 action against the City failed to state a cause action because no city policy or custom was identified as violating plaintiff's constitutional rights:

To hold a municipality liable under 42 USC § 1983 for the conduct of employees below the policymaking level, a plaintiff must show that the violation of his or her constitutional rights resulted from a municipal custom or policy … . Here, "[a]lthough the complaint alleged as a legal conclusion that the defendants engaged in conduct pursuant to a policy or custom which deprived the plaintiff of certain constitutional rights, it was wholly unsupported by any allegations of fact identifying the nature of that conduct or the policy or custom which the conduct purportedly advanced" … . * * *

The Supreme Court also should have granted that branch of the defendants' motion which was for summary judgment dismissing the false arrest and false imprisonment causes of action insofar as asserted against the City. The existence of probable cause constitutes a complete defense to a cause of action alleging false arrest and false imprisonment … , including causes of action asserted pursuant to 42 USC § 1983 to

recover damages for the deprivation of Fourth Amendment rights under color of state law … . Brown v City of New York, 2021 NY Slip Op 01743, Second Dept 3-24-21

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).

The First Department, in a full-fledged opinion by Justice Acosta, reversing Supreme Court, determined the seven-year statute of limitations in NYC's Victims of Gender-Motivated Violence Protection Law (VGM) was not preempted by the one-year statute of limitations for assault in the CPLR and the negligent hiring and supervision cause of action should have survived the motion to dismiss even though the S corporation (PDR) and the defendant (Rofe) may be one and the same. The complaint alleged plaintiffs were subjected to unwanted sexual touching by defendant Rofe during voice-over coaching sessions offered by defendant S corporation (PDR):

… [W]e find that the legislative intent of the VGM was to create a civil rights remedy or cause of action such as in VAWA, rather than to extend the statute of limitations for a particular class of assaults. Since the nature of the claim is for a civil rights violation (providing a remedy for those subjected to violence because of their gender), the seven-year limitations period provided in the Administrative Code is not preempted by the CPLR statute of limitations for assault claims. * * *

To be sure, defendants may be correct that PDR essentially has no corporate structure separate from Rofe. Plaintiffs themselves do not appear to distinguish between Rofe and PDR in their brief. Nevertheless, plaintiffs have sufficiently alleged that Rofe was an employee of PDR and, through the submission of additional

evidence in opposition to the motion to dismiss, have also sufficiently alleged that there may have been other employees of PDR who either hired, or supervised Rofe or whom Rofe hired or supervised. The acts of a corporation's agent and the knowledge acquired by the agent are presumptively imputed to the corporation … . Thus, Rofe's knowledge (as an alleged agent of PDR) that an employee was potentially violent or prone to sexual assaults would normally be imputed to PDR, potentially requiring PDR to supervise that employee, and the cause of action for negligent hiring and supervision should be reinstated as against PDR … . 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).

The Fourth Department, reversing Supreme Court, determined the notice of claim served more than 90 after the slip and fall without leave of court was a nullity. The court further determined that the request for an order deeming the notice of claim timely served made more than one year and 90 days after the slip and fall could not be authorized by the court, even where the summons and complaint was served within that time period:

It is well settled that an "application for the extension [of time within which to serve a notice of claim] may be made before or after the commencement of the action but

not more than one year and 90 days after the cause of action accrued, unless the statute has been tolled" .. . Where that time expires before the application for an extension is made, "the court lack[s] the power to authorize late filing of the notice [of claim]" … .

Here, we conclude that "[p]laintiff's service of the summons and complaint within the limitations period does not excuse the failure to serve a notice of claim within that period," and we further conclude that "plaintiff's earlier service of a notice of claim is a nullity inasmuch as the notice of claim was served more than 90 days after the accident but before leave to serve a late notice of claim was granted" … . Thus, because plaintiff's cross motion seeking an order deeming her notice of claim to be timely filed "was made after the expiration of the maximum period permitted" for seeking such relief, i.e., one year and 90 days, Supreme Court should have denied plaintiff's cross motion, granted defendant's motion, and dismissed the complaint … . 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).

The First Department, reversing Supreme Court, in a full-fledged opinion by Justice Webber, determined the complaint alleging defendant Port Authority was negligent in failing to install fencing to prevent plaintiffs' decedents from jumping from the George Washington Bridge (GWB) to commit suicide should not have been dismissed:

… [P]laintiffs allege that the GWB was unreasonably dangerous because the low four-foot railing on the south walkway facilitated suicides and that the Port Authority had long been aware that the bridge had become a "suicide magnet" based upon hundreds of deaths that had occurred at the bridge over the decades preceding these cases. The complaints allege that suicide attempts at the GWB have occurred at the rate of approximately 1 every 3 1/2 days, and that about 93 deaths occurred from 2009 up to 2016. The complaints assert that the Port Authority, as the owner of the GWB, "owed a duty to the public," including to "protect the public from foreseeable harm," "take reasonable steps to protect public safety," "take reasonable steps to prevent suicide," "not increase the risk of suicide by inaction," and "protect human life." Additionally, plaintiffs allege that the Port Authority "failed to exercise reasonable care in constructing, operating, and maintaining the [GWB]" and were negligent "in falling to provide for the safety and protection for vulnerable or impulsive individuals." …

Viewing the allegations of the complaint in the light most favorable to plaintiff, we find that plaintiffs have set forth sufficient facts which, if true, show that the Port Authority, as owner of the GWB, was acting in a proprietary capacity in the design and maintenance of the bridge, and, therefore was subject to suit under the ordinary rules of negligence applicable to nongovernmental parties. …

We find that the complaints sufficiently allege that the low railing of the bridge, and Port Authority's awareness of the frequent suicide attempts on the bridge over previous decades, give rise to a duty to install fencing to protect against foreseeable harm to withstand a motion to dismiss … . 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).

The Second Department determined the complaint failed to state a cause of action against the county stemming from the shooting death of plaintiff's decedent at the hands of the father of her child (Jenkins). Plaintiff's decedent had repeatedly requested of the county police that Jenkins be arrested and allegedly was told there was no reason for her to feel unsafe. The officer's statement did not create a special relationship with the county such that the county could be held liable:

"Generally, a municipality may not be held liable for the failure to provide police protection because the duty to provide such protection is owed to the public at large, rather than to any particular individual" … . "A narrow exception to the rule exists where a special relationship exists between the municipality and the injured parties" … . The elements of a special relationship are (1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured, (2) knowledge on the part of the municipality's agents that inaction could lead to harm, (3) some form of direct contact between the municipality's agents and the injured party, and (4) the injured party's justifiable reliance on the municipality's affirmative undertaking … .

Contrary to the plaintiff's contentions, the complaint fails to allege facts that could establish an affirmative undertaking or justifiable reliance on any such undertaking by the defendants … . The complaint alleged that the decedent was told by an officer, weeks before the killing, that the officer "did not see any reason why Mr. Jenkins would hurt [the decedent or her sister] and that there was no reason for them to feel unsafe." This statement, or statements to that effect, which could not be construed as conveying any promise or intention to protect the decedent, are not a basis on which a special duty may be premised … . 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).

The Second Department determined the owners of a shopping mall and the mall security company did not eliminate questions of fact about whether they owed a duty to prevent harm to plaintiff, who was knocked down when shoppers panicked. Apparently security personnel were struggling with a shoplifter when a display of perfume bottles was knocked over causing a crash which apparently sounded like gunshots:

"'Landowners, as a general rule, have a duty to exercise reasonable care to prevent harm to patrons on their property'" … . An owner's duty to control the conduct of persons on its premises arises when it has the opportunity to control such conduct, and is reasonably aware of the need for such control … . The record demonstrates that the mall defendants and AlliedBarton [the security company] had trained employees to handle mall evacuations and active shooters, including a live drill with other employees assuming the role of panicked shoppers. Thus, the mall defendants did not eliminate all triable issues of fact as to whether it was foreseeable that a disturbance in the mall, like the one caused by the incident with Darby [the alleged shoplifter], could cause a dangerous panic. Furthermore, contrary to the mall defendants' contention, they failed to establish that they had no notice or opportunity to control the panic or the crowd before it reached [the] store [where plaintiff was

shopping] and allegedly ultimately caused the plaintiff's injuries. 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).

The Second Department, reversing Supreme Court, determined the verdict in this products liability case should have been set aside. Plaintiff alleged she was injured when a step stool collapsed as she stood on it. The defendant's expert testified she could have fallen onto the stool. There was no evidence in the record to support the expert's opinion, which was objected to by plaintiff. The defense verdict, therefore, should have been set aside:

Following the accident, one of the injured plaintiff's coworkers discarded the step stool in the trash. At the trial on the issue of liability, the defendant's expert testified, over the plaintiffs' objection, that the injured plaintiff's accident may have occurred because she slipped and fell onto the step stool. Over the plaintiffs' objection, the jury was asked the question: "Did the subject step stool collapse under the [injured] plaintiff while she was standing on it on October 22, 2013, causing the [injured] plaintiff's accident?" The jury answered "No," thereby finding in favor of the defendant on the ground that the accident did not occur as the injured plaintiff said it did. * * *

We agree with the plaintiffs that the evidence so preponderates in favor of the plaintiffs on the issue of whether the subject step stool collapsed as the injured

plaintiff stood on it causing her accident, that the jury could not have reached the verdict it did by any fair interpretation of the evidence … . Moreover, the testimony of the defendant's expert that the accident may have happened because the injured plaintiff fell onto the step stool was speculative, lacked support in the record, and should not have been admitted in evidence … . 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).

The Second Department, reversing Supreme Court, determined defendant property owner's motion for summary judgment in this sidewalk slip and fall case should have been granted. The NYC Administrative Code exempts abutting owner-occupied residential properties from liability. The fact that defendant had a small office where he edited photos did not change the purely residential nature of the property:

In 2003, the New York City Council enacted section 7-210 of the Administrative Code of the City of New York to shift tort liability for injuries resulting from defective sidewalks from the City to abutting property owners … . This liability shifting provision does not, however, apply to "one-, two- or three-family residential real property that is (i) in whole or in part, owner occupied, and (ii) used exclusively for residential purposes" … . "The purpose of the exception in the Code is to recognize the inappropriateness of exposing small-property owners in residence, who have limited resources, to exclusive liability with respect to sidewalk maintenance and repair" … .

Here, the appellant established, prima facie, that he was exempt from liability pursuant to the subject Code exception, and no triable issue of fact was raised in opposition. The appellant's partial use of a room in his single-family home as an office to edit some photos in relation to his infrequent paid photography ventures was merely incidental to his residential use of the property … . The appellant was a retired photographer, and on occasion he would edit photos on his home computer in relation to two or three paid party photography jobs he did per year. The appellant did not claim a "home office" tax deduction, nor did he use this space in his home to edit these photos with any regularity. 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).

The Second Department, reversing Supreme Court, determined the Big Apple map demonstrated the city did not have prior written notice of the sidewalk/curb defect where plaintiff allegedly slipped and fell, despite the apparent existence of another Big Apple map which showed the defect but was not shown to have been served on the city (NYC):

Maps prepared by Big Apple Pothole and Sidewalk Protection Committee, Inc. (hereinafter Big Apple), and filed with the Department of Transportation serve as prior written notice of defective conditions depicted thereon … . Where a plaintiff relies on a Big Apple map, the map served on the City closest in time prior to the subject accident is controlling … .

Here, the City met its prima facie burden by proffering evidence that the most recent Big Apple map served on it did not show the defect and that it had not received any other prior written notice of the allegedly defective condition … . Although the plaintiff produced a competing Big Apple map which purportedly showed the defect, that map was not accompanied by any evidence showing when it had been served on the City. 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).

The Second Department determined defendant's motion for summary judgment in this slip and fall case should not have been granted. Evidence of a general cleaning and inspection policy does not demonstrate the lack of constructive notice of the dangerous condition:

The defendant also failed to show, prima facie, that it did not have constructive notice of the condition that the plaintiff alleged caused her to fall. "To meet its initial burden on the issue of lack of constructive notice, the defendant must offer some evidence as to when the area in question was last cleaned or inspected relative to the

time when the plaintiff fell" … . Although the defendant submitted the transcript of the deposition testimony of the individual who was the managing partner of the restaurant at the time of the accident, the manager testified only as to the restaurant's general cleaning and inspection policy and not about any inspections that may have occurred prior to the plaintiff's fall. 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 cause 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.

ON A COLD DAY DEFENDANTS HOSED DOWN THE SIDEWALK WHERE PLAINTIFF SLIPPED AND FELL ON ICE; ANY COMPARATIVE NEGLIGENCE ON PLAINTIFF'S PART IS NOT A BAR TO SUMMARY JUDGMENT (FIRST DEPT).

The First Department, reversing Supreme Court and recalling and vacating a decision in the same matter dated December 17, 2020, determined defendants' motion for summary judgment in this slip and fall case should not have been granted. Defendant restaurants hosed down the sidewalk where plaintiff, an EMT responding to a call, slipped and fell on ice. Any comparative negligence on plaintiff's part is not a bar to summary judgment:

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 Concord Partners 46th Street LLC (Concord) and Elo Equity, LLC, had a non delegable duty to maintain the sidewalk. Elo had notice that the restaurant employees had created a dangerous condition, because Elo's superintendent had observed the

restaurants' employees hosing the sidewalk. The property manager for Concord did not personally observe the restaurant employees hosing down the sidewalk on the date in question; however, he testified that it was the general practice to hose down the sidewalk at approximately 7:30 a.m.

In opposition, defendants did not raise a question of fact with respect to the issue of their liability. Defendant restaurants admit that the evidence shows that their employees hosed the sidewalk with water before the incident occurred. Furthermore, defendants' argument that there are triable issues of fact on the basis that plaintiff should have sought an alternative route to safely care for the patient relates to the issue of comparative negligence and, therefore, does not preclude summary resolution of the issue of their liability … . Benny v Concord Partners 46th St. LLC, 2021 NY Slip Op 01550, First Dept 3-18-21

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).

The First Department, reversing Supreme Court, determined defendant in this slip and fall case did not eliminate issues of fact re: notice and nature of the raised sidewalk flag. There were rolled up carpets on the sidewalk, of which defendant had no notice. Plaintiff alleged he stumbled when his foot hit the carpet and then he tripped on the raised flag. The court noted there can be more than one proximate cause of an accident:

… [T]here are issues of fact as to whether defendant had constructive notice of the sidewalk defect, whether the defect was trivial, and whether it proximately caused plaintiff's fall. Defendant failed to offer specific evidence as to when the sidewalk was last inspected, relying only on vague testimony concerning the manager's

occasional visits to the shopping center … . Plaintiff's submission of photographs depicting the height differential in the raised sidewalk flag to be about one inch also raised an issue of fact as to whether the defect was nontrivial … . While plaintiff testified that he first tripped on the rolled-up carpets before coming into contact with the sidewalk defect, "there can be more than one proximate cause of an accident" … . 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, AN EXTERMINATOR, WAS IN THE ATTIC OF DEFENDANT'S HOUSE; THE ATTIC HAD NO FLOOR AND THE PLAINTIFF WALKED ON THE BEAMS OR JOISTS; THE PLAINTIFF TESTIFIED HE STEPPED ON A SMALLER PIECE OF WOOD LYING ACROSS THE BEAMS, IT GAVE WAY AND HIS LEG WENT THROUGH THE CEILING; THE 2ND DEPARTMENT, OVER A TWO-JUSTICE DISSENT, DETERMINED THERE WAS NO EVIDENCE THE SMALLER BOARD WAS A LATENT DEFECT OR THAT DEFENDANT HAD NOTICE OF ANY DEFECT, SET ASIDE THE PLAINTIFF'S VERDICT AND DISMISSED THE COMPLAINT (SECOND DEPT).

The Second Department, reversing Supreme Court, over a two-justice dissent, determined defendant's motion to set aside the plaintiff's verdict and dismiss the complaint should have been granted. Plaintiff, an exterminator, went into defendant's attic which apparent had no floor, only the beams or joists. Plaintiff testified that there were some smaller boards lying across the joints. According to the plaintiff, when he stepped on one of the smaller boards it gave way and his leg went through the ceiling:

"[T]he issue of whether a hazard is latent or open and obvious is generally fact-specific and thus usually a jury question" … . However, in order to meet his prima

facie burden of proof at trial, the plaintiff was required to submit sufficient evidence to enable the jury to decide this critical issue in a logical manner, based on the inferences to be drawn from the evidence, rather than through sheer speculation or guesswork … . Here, the evidence showed that the main beams were part of the structure of the house, but the function of the smaller pieces of wood was never really made clear, except that the plaintiff offered that they may have been intended to hold the insulation in place. In fact, the jury heard next to nothing about the smaller piece of wood that allegedly caused the plaintiff to fall. There were no pictures of it, no testimony regarding its dimensions, no evidence as to whether such a smaller piece of wood would ordinarily be safe to walk on, no evidence as to whether the smaller piece of wood even appeared reasonably safe to walk on, and no evidence that the smaller piece of wood was in a rotted, deteriorated, or otherwise unsafe condition, other than the plaintiff's testimony that it looked "discolored" and "pretty damp."

Viewing the evidence in the light most favorable to the plaintiff, and affording him every favorable inference which may properly be drawn from the facts presented, there was simply no rational basis upon which the jury could determine, without speculating, that the smaller piece of wood that allegedly caused the plaintiff to fall constituted a latent hazard due to its alleged rotted condition … . Saintume v Lamattina, 2021 NY Slip Op 02004, Second Dept 3-31-21

SLIP AND FALL.

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

The Second Department, reversing the defendants' verdict in this slip and fall case, determined plaintiff's expert should have been allowed to testify:

The plaintiff Wendy Robins (hereinafter the injured plaintiff) fell after stepping onto a curb adjacent to an unfinished driveway apron leading to an underground parking garage in a condominium building that was under construction … . …

"[E]xpert opinion is proper when it would help to clarify an issue calling for professional or technical knowledge, possessed by the expert and beyond the ken of the typical juror" … . The admissibility and scope of expert testimony is a determination within the discretion of the trial court … .

Here, the Supreme Court improvidently exercised its discretion in precluding the testimony of the plaintiffs' proposed expert witness as to industry safety standards relating to the construction of sidewalks … . Contrary to the defendants' contention, the record shows no appreciable difference between the unfinished driveway apron where the injured plaintiff fell, which was left open to pedestrians, and the adjoining unfinished sidewalks, which were barricaded by a fence and barrels. Moreover, the absence of a violation of a specific code or ordinance is not dispositive of the plaintiffs' allegations based on common-law negligence principles … . Had the plaintiffs' expert been permitted to testify, he could have addressed whether, under the circumstances presented, the defendants' failure to barricade the driveway apron or otherwise warn pedestrians of its unfinished condition was a departure from generally accepted customs and practices and whether the defendants were negligent in failing to do so … . 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).

The First Department, reversing Supreme Court, determined plaintiff's motion for summary judgment in this pedestrian-vehicle accident case was premature because plaintiff had not been deposed:

Plaintiff alleges that after crossing Pearl Street at the intersection with Whitehall Street he was struck from behind by defendants' box truck, while he was on the curb/lip of the sidewalk. According to the affidavit of the driver, defendant Rosado, plaintiff was distracted by talking on a cell phone, and walked into the side of the truck while it was already making a right turn.

While plaintiff was not required to demonstrate the absence of comparative negligence on his part, his motion was premature in that defendants did not have the opportunity to depose him … . 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).

The First Department, in a full-fledged opinion by Justice Kapnick, determined the infancy toll of the statute of limitations in CPLR 208 applies where the unmarried father of two children dies intestate. The statute of limitations for the ensuing wrongful death action is tolled until the appointment of a guardian of the children's property. Father was involved in an altercation with a defendant, suffered fatal injuries and died later that day, September 6, 2012. Plaintiffs, the mothers of the two children, were each appointed guardians of the property of their children in 2015. That is when the statute began running on the wrongful death action, rendering the 2016 complaint timely. A wrongful death action directly compensates the distributees, here the children. The assault and battery action, by contrast, is personal to the decedent. Therefore the infancy toll does not apply to the assault and battery cause of action. The First Department explicitly overruled a decision relied upon by the defendants, Ortiz v Hertz Corp., 212 AD2d 374 (1st Dept 1995). (The opinion is comprehensive and can not be fairly summarized here.):

Today we clarify that Ortiz is not good law, because it was based on an incorrect application and interpretation of Hernandez. Therefore, pursuant to the precedent established in Hernandez [78 NY2d 687] … we hold that when the sole distributees of a decedent's estate are infants, the toll of CPLR 208 applies to a wrongful death claim "until the earliest moment there is a personal representative or potential personal representative who can bring the action whether by appointment of a guardian [of the property of the infant distributee] or majority of [a] distributee, whichever occurs first" … . 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.