NEW YORK APPELLATE DIGEST, LLC

A Succinct Collection of the Salient Issues in the Negligence Decisions Released by Out New York State Appellate Courts in July 2021. Right Click on the Citations to Keep Your Place in the Newsletter.

Negligence
Practice Newsletter
July 2021

ALL-TERRAIN-VEHICLE ACCIDENT, IMMUNITY.

DEFENDANT OWNS A VINEYARD IN WHICH PLAINTIFF WAS INJURED IN AN ALL-TERRAIN-VEHICLE ACCIDENT; DEFENDANT WAS ENTITLED TO IMMUNITY PURSUANT TO GENERAL OBLIGATIONS LAW 9-103 BECAUSE THE VINEYARD WAS "SUITABLE FOR RECREATIONAL USE" (FOURTH DEPT).

Wheeler v Gibbons, 2021 NY Slip Op 04323, Fourth Dept 7-9-21

Practice Point: The plaintiff was injured in an all-terrain-vehicle accident in a vineyard owned by defendant. The vineyard was deemed "suitable for recreational use" under the General Obligations Law. The property owner was therefore immune from suit.

EDUCATION-SCHOOL LAW, MUNICIPAL LAW.

PLAINTIFF'S CHILD ALLEGEDLY WAS INJURED DURING SCHOOL RECESS; PLAINTIFF'S FAILURE TO PRODUCE THE CHILD FOR THE GENERAL MUNICIPAL LAW 50-H HEARING REQUIRED DISMISSAL OF THE COMPLAINT (FOURTH DEPT).

Jeffrey T.C. v Grand Is. Cent. Sch. Dist., 2021 NY Slip Op 04427, Fourth Dept 7-16-21

Practice Point: Here plaintiffs refused to produce the child who was allegedly injured during school recess at the 50-h hearing. The complaint was dismissed.

EDUCATION-SCHOOL LAW, NEGLIGENT SUPERVISION.

IN THIS NEGLIGENT SUPERVISION ACTION AGAINST A SCHOOL DISTRICT, THE DISTRICT DEMONSTRATED A STUDENT'S SEXUAL ASSAULT OF PLANTIFF WAS NOT FORESEEABLE (FOURTH DEPT).

Knaszak v Hamburg Cent. Sch. Dist., 2021 NY Slip Op 04441, Fourth Dept 7-16-21

Practice Point: Although the student who allegedly sexually assaulted plaintiff had a history of drug and academic problems, there was nothing in the student's history about assaultive behavior. Therefore the assault was not foreseeable from the school's perspective.

MEDICAL MALPRACTICE.

ALTHOUGH DEFENDANTS DID NOT SEE THE PLAINTIFF, THERE IS A QUESTION OF FACT WHETHER A PATIENT-PHYSICIAN RELATIONSHIP WAS CREATED BASED UPON ANOTHER DOCTOR'S ORDER THAT PLAINTIFF BE SEEN BY THOSE DEFENDANTS WITHIN ONE OR TWO DAYS (THIRD DEPT).

Marshall v Rosenberg, 2021 NY Slip Op 04180, Third Dept 7-1-21

Practice Point: Even though the defendant doctor never saw the plaintiff, the defendant doctor could be liable for failing the see the plaintiff within the "one or two days" recommended by the referring doctor.

MEDICAL MALPRACTICE, CRIMINAL LAW.

PLAINTIFF WAS BROUGHT TO THE HOSPITAL PURSUANT TO THE MENTAL HYGIENE LAW AFTER THREATENING FAMILY MEMBERS AND KILLING A DOG; DEFENDANTS RELEASED PLAINTIFF THE SAME DAY AND PLAINTIFF KILLED THE FAMILY MEMBERS; PLAINTIFF ENTERED A PLEA OF NOT RESPONSIBLE BY REASON OF MENTAL ILLNESS; THE RULE PROHIBITING A PLAINTIFF FROM TAKING ADVANTAGE OF HIS OWN WRONG DID NOT APPLY AND DEFENDANTS' MOTION TO DISMISS THIS MEDICAL MALPRACTICE WAS PROPERLY DENIED (FOURTH DEPT).

Bumbolo v Faxton St. Luke's Healthcare, 2021 NY Slip Op 04429, Fourth Dept 7-16-21

Practice Point: Here plaintiff killed three family members after release from a hospital. Plaintiff's "not responsible by reason of mental illness or defect" plea did not preclude his medical malpractice action against the hospital.

NURSING HOMES.

PLAINTIFF RAISED A QUESTION OF FACT WHETHER PLAINTIFF'S DECEDENT'S FALL FROM HER BED IN A NURSING HOME WAS CAUSED BY DEFENDANTS' NEGLIGENCE (FOURTH DEPT).

Rosado v Rosa Coplon Jewish Home, 2021 NY Slip Op 04432, Fourth Dept 7-16-21

Practice Point: A nursing home may be liable in negligence for a resident's fall from her bed. The evidence here demonstrated plaintiff had fallen thirty times at the facility, raising a question of fact whether protective measures should have been taken.

PREMISES LIABILITY, LLC.

THE SOLE MEMBER OF THE LLC WHICH OWNED THE PROPERTY COULD NOT BE HELD LIABLE FOR THE DANGEROUS CONDITION SOLELY BY VIRTUE OF HIS MEMBER STATUS; HOWEVER THERE WAS A QUESTION OF FACT WHETHER THE LLC COULD BE LIABLE (SECOND DEPT).

Hayden v 334 Dune Rd., LLC, 2021 NY Slip Op 04481, Second Dept 7-21-21

Practice Point: Although the sole member of an LLC may not be liable for a dangerous condition on property owned by the LLC, the LLC may be liable.

RES IPSA LOQUITUR.

THE RES IPSA LOQUITUR DOCTRINE APPLIED TO A PLASTIC CHAIR IN THE RECREATIONAL ROOM OF DEFENDANT CORRECTIONAL FACILITY; THE CHAIR COLLAPSED WHILE CLAIMANT WAS SITTING IN IT; THE ISSUE WAS WHETHER DEFENDANT HAD EXCLUSIVE CONTROL OVER THE CHAIR; COURT OF CLAIMS REVERSED (THIRD DEPT).

Draper v State of New York, 2021 NY Slip Op 04163, Third Dept 7-1-21

Practice Point: A plastic chair at defendant correctional facility collapsed when plaintiff sat in it. The facility exercised complete control over chair thereby triggering liability under the res ipsa loquitur doctrine.

SEPARATE TRIALS (TORT AND BREACH OF CONTRACT), SAME EVIDENCE, DIFFERENT DAMAGE AWARDS, ONE APPEALABLE JUDGMENT.

SEPARATE TRIALS WERE HELD ON THE TORT AND BREACH OF CONTRACT ACTIONS STEMMING FROM DAMAGE TO PLAINTIFFS' BUILDING CAUSED BY RENOVATION OF DEFENDANT'S NEIGHBORING BUILDING; THE DAMAGES AWARDED IN EACH ACTION WERE BASED UPON THE SAME EVIDENCE OF THE COST OF REPAIR AND ALTERNATE LIVING EXPENSES BUT THE AMOUNTS OF THE AWARDS DIFFERED; SUPREME COURT PROPERLY ENTERED THE DAMAGES AWARDED IN THE BREACH OF CONTRACT ACTION, PLUS INTEREST AND ATTORNEY'S FEES, AS THE APPEALABLE FINAL JUDGMENT (FIRST DEPT).

Shah v 20 E. 64th St., LLC, 2021 NY Slip Op 04587, First Dept 7-29-21

Practice Point: Here damage to plaintiff's property by the renovation of neighboring property gave rise to a tort action and a breach of contract action tried separately, one a bench trial, one a jury trial. The evidence was the same but the damage awards were different. The judge properly chose the higher award as the appealable judgment.

SLIP AND FALL, CONSTRUCTIVE NOTICE.

IN THIS SLIP AND FALL CASE, PROOF OF GENERAL CLEANING AND INSPECTION PRACTICES WAS NOT ENOUGH TO DEMONSTRATE THE LACK OF CONSTRUCTIVE NOTICE OF LIQUID ON THE FLOOR (SECOND DEPT).

Roland v Jackson Terrace Apts., 2021 NY Slip Op 04247, Second Dept 7-7-21

Practice Point: In a slip and fall case, proof of general cleaning practices does not demonstrate a lack of constructive notice of the dangerous condition.

SLIP AND FALL, MUNICIPAL LAW.

DEFENDANT PROPERTY OWNERS DID NOT DEMONSTRATE, AS A MATTER OF LAW, THE DECORATIVE FENCE IN THE GRASSY AREA BETWEEN THE CURB AND THE SIDEWALK WAS OPEN AND OBVIOUS (SECOND DEPT).

Rosenman v Siwiec, 2021 NY Slip Op 04248, Second Dept 7-7-21

Practice Point: Abutting property owners may be liable for a dangerous condition in the grassy area between the sidewalk and the road.

SLIP AND FALL, STORM IN PROGRESS, CONSTRUCTIVE NOTICE.

THE CLIMATOLOGICAL RECORDS WERE NOT CERTIFIED AS BUSINESS RECORDS AND THEREFORE COULD NOT BE RELIED UPON TO SHOW A STORM IN PROGRESS AT THE TIME OF THE SLIP AND FALL; PROOF OF A GENERAL INSPECTION ROUTINE COULD NOT BE RELIED UPON TO SHOW THE ABSENCE OF CONSTRUCTIVE NOTICE OF THE BLACK ICE (SECOND DEPT).

Johnson v Pawling Cent. Sch. Dist., 2021 NY Slip Op 04543, Second Dept 7-28-21

Practice Point: Climatological records introduced to show a storm in progress at the time of the slip and fall must be certified as business records.

Practice Point: Proof of general cleaning practices is not enough to demonstrate a lack of constructive notice of the dangerous condition in a slip and fall case.

SLIP AND FALL, STORM IN PROGRESS.

THE CLIMATOLOGICAL DATA SUBMITTED BY DEFENDANT IN THIS ICE AND SNOW SLIP AND FALL CASE WAS NOT AUTHENTICATED; BECAUSE DEFENDANT DID NOT DEMONSTRATE THERE WAS A STORM IN PROGRESS AT THE TIME OF THE FALL, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

Beaton v City of New York, 2021 NY Slip Op 04477, Second Dept 7-21-21

Practice Point: The climatological records submitted to demonstrate a storm in progress in this slip and fall case were not authenticated in that the records did not indicate the data was "taken under the direction of the United States weather bureau" (CPLR 4528).

TRAFFIC ACCIDENTS, VEHICLE AND TRAFFIC LAW.

THE JURY SHOULD HAVE BEEN INSTRUCTED ON THE VEHICLE AND TRAFFIC LAW PROVISION WHICH REQUIRES SIGNALING FOR 100 FEET BEFORE MAKING A TURN, EVEN THOUGH THE TRUCK WHICH MADE THE TURN WAS STOPPED AT A TRAFFIC LIGHT; DEFENSE VERDICT IN THIS TRUCK-BICYCLE ACCIDENT CASE REVERSED (SECOND DEPT).

Moore v City of New York, 2021 NY Slip Op 04483, Second Dept 7-21-21

Practice Point: It may be negligence per se if you are stopped at a stop light and don't put your turn signal on until the light changes. The Vehicle and Traffic Law requires the signal to be turned on 100 feet before the turn. Here a bicyclist was struck by a truck making the turn.