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Negligence
July 2021

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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).

The Fourth Department, reversing Supreme Court, determined defendant's property (a vineyard) was suitable for recreational use and therefore defendant was entitled to immunity pursuant to General Obligations Law 9-103. Defendant was not liable for plaintiff's injuries from an all-terrain-vehicle (ATV) accident which occurred when the driver missed a bridge over a culvert:

… "[D]efendant, as the party seeking summary judgment, ha[d] the burden of establishing as a matter of law that he is immune from liability pursuant to the statute" … . We conclude that defendant met his initial burden on the motion of establishing that the site where the accident occurred was suitable for recreational use … . The evidence defendant submitted on the motion showed that the vineyard's dirt and grass-covered roads, as well as the bridge where the accident occurred, were physically conducive to ATV riding. Additionally, defendant established that the vineyard's roads and the bridge were appropriate for public use for recreational ATV riding based on the uncontradicted testimony of defendant Aaron P. Gibbons, an adjoining property owner, that, over a significant period of time, he and his wife had frequently driven ATVs on the vineyard's roads and the bridge and had often observed others doing the same. 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.

CHILD VICTIMS ACT, DISCOVERY.

IN THIS CHILD-VICTIMS-ACT SEXUAL-ABUSE (NEGLIGENT-SUPERVISION) ACTION AGAINST THE CATHOLIC DIOCESE OF ALBANY, PLAINTIFFS' DISCOVERY REQUEST FOR THE FILES OF SEVERAL NONPARTY PRIESTS WAS PROPERLY GRANTED ON THE GROUND THE FILES MAY REVEAL A "HABIT" OR "CUSTOM" REGARDING HOW THE DIOCESE HANDLED SUSPECTED CHILD-SEXUAL-ABUSE (THIRD DEPT).

The Third Department determined plaintiffs' discovery request for the files of several nonparty priests in this Child-Victims-Act sexual-abuse (negligent-supervision) action against defendant Catholic Diocese of Albany was properly granted. The discovery was relevant to whether the diocese followed a "habit" or "custom" in dealing with priests suspected of sexually abusing children:

Although the Diocese raises several arguments concerning the appropriateness of habit evidence in this context — namely, that it is prejudicial and that the circumstances surrounding allegations of abuse vary and do not yield habitual responses from the Diocese — these arguments conflate plaintiffs' requirement on their motion to compel with plaintiffs' future requirements to introduce the files into evidence. For now, on their motion to compel discovery, plaintiffs are merely required to show that their discovery request is reasonably calculated to yield material and necessary information … . Whether plaintiffs can actually demonstrate "a sufficient number of instances" of the Diocese's repetitive conduct in order to introduce the subject files into evidence as habit evidence is plaintiffs' future burden … . Melfe v Roman Catholic Diocese of Albany, N.Y., 2021 NY Slip Op 04179, Third Dept 7-1-21

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).

The Fourth Department, reversing Supreme Court, determined the failure to produce the child (who allegedly was injured at school recess) for the General Municipal Law 50-h hearing required dismissal of the complaint:

"As General Municipal Law § 50-h (5) makes clear on its face, compliance with a municipality's demand for a section 50-h examination is a condition precedent to commencing an action against that municipality" … . "A claimant's failure to comply with such a demand generally warrants dismissal of the action"… . "Requiring claimants to comply with section 50-h before commencing an action augments the statute's purpose, which 'is to afford the [municipality] an opportunity to early investigate the circumstances surrounding the accident and to explore the merits of the claim, while information is readily available, with a view towards settlement' " … . " 'The failure to submit to . . . an examination [pursuant to section 50-h], however, may be excused in exceptional circumstances, such as extreme physical or psychological incapacity' " … .

Here, "[b]y refusing to produce for an examination under General Municipal Law § 50-h the minor child on whose behalf they are suing, plaintiffs failed to comply with a condition precedent to commencing the action . . . Nor did they demonstrate exceptional circumstances so as to excuse their noncompliance" … . 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).

The Fourth Department, reversing Supreme Court, over a dissent, determined the defendant school district demonstrated a student's sexual assault of plaintiff was not foreseeable:

… [D]efendant met its … burden on the motion by establishing that the "sexual assault against [plaintiff by the student] was an unforeseeable act that, without sufficiently specific knowledge or notice, could not have been reasonably anticipated" … , and plaintiff failed to raise a triable issue of fact … . Defendant's submissions, including plaintiff's testimony, established the undisputed fact that plaintiff and the student did not know each other and did not have any prior interactions before the sexual assault … . Although the student had an extensive and troubling disciplinary history that resulted in several detentions and suspensions, such history did not contain any infractions for physically aggressive conduct directed at other people, sexually inappropriate behavior, or threats of physical or sexual violence … .

… [W]hile the student's history involved attendance issues, insubordination toward school staff, inappropriate verbal outbursts, being under the influence of drugs or alcohol, possession and sale of drugs, and academic problems, that history did not raise a triable issue of fact whether defendant had sufficiently specific knowledge or notice of the injury-causing conduct inasmuch as it was not similar to the student's physically and sexually aggressive behavior that injured plaintiff … . "More significantly, [the student's] prior history did not include any sexually aggressive behavior" … . We also agree with defendant that the court impermissibly drew an unsubstantiated and speculative inference that the student's disclosure to a school social worker about being a victim of sexual abuse during his childhood, coupled with his substance abuse, should have provided defendant with notice of the

student's propensity to commit sexual assault … . 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).

The Third Department, reversing Supreme Court, determined the defendants' motions for summary judgment in this medical malpractice action should not have been granted. One of the issues was whether defendants, who had never seen plaintiff, could be found to have had a patient-physician relationship based upon the failure to schedule an appointment within the time-frame ordered by another doctor:

… [P]laintiff acknowledges that she never received treatment from or spoke with Connolly or Retina Associates. Instead, plaintiff relies on a notation in her medical records from Twin Tiers stating that Rosenberg initially requested that she be evaluated by Retina Associates within one to two days and that a later appointment was scheduled only after Connolly apparently informed Twin Tiers that she "could wait to be seen until next week." Moreover, after allegedly giving this advice regarding timing, Retina Associates scheduled the appointment beyond that acceptable time frame — for 13 days later. * * *

Viewing the evidence in a light most favorable to plaintiff, a triable factual question exists regarding whether the notation in Twin Tiers' chart — attributing a comment to Connolly regarding scheduling of treatment — is sufficient to establish an implied

physician-patient relationship between plaintiff and Connolly or Retina Associates … . 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).

The Fourth Department determined plaintiff's medical (psychiatric) malpractice action properly survived a motion to dismiss. Plaintiff was treated by defendants after he was brought to the hospital by the police pursuant to Mental Hygiene Law 9.41. Plaintiff had threatened family members and killed a dog. Plaintiff was released the same day and shortly thereafter killed the three family members he had threatened. Ultimately plaintiff entered a plea of not responsible by reason of mental illness or defect. The courts refused to apply the rule prohibiting a plaintiff from taking advantage of his own wrong because plaintiff was not responsible for his conduct:

With respect to the ground for dismissal asserted here, "as a matter of public policy, . . . where a plaintiff has engaged in unlawful conduct, the courts will not entertain suit if the plaintiff's conduct constitutes a serious violation of the law and the injuries for which the plaintiff seeks recovery are the direct result of that violation" … . The rule derives from the maxim that "[n]o one shall be permitted to profit by his [or her] own fraud, or to take advantage of his [or her] own wrong, or to found any claim

upon his [or her] own iniquity, or to acquire property by his [or her] own crime" … . In cases in which the doctrine applies, "recovery is precluded 'at the very threshold of the plaintiff's application for judicial relief' " … . Notably, the Court of Appeals has applied the doctrine with caution to avoid overextending it inasmuch as the rule "embodies a narrow application of public policy imperatives under limited circumstances" … . * * *

… [A]ccepting the facts as alleged in the complaint as true, we conclude that the criminal court's acceptance of plaintiff's plea of not responsible by reason of mental disease or defect demonstrates that, at the time of his conduct constituting a serious violation of the law, plaintiff lacked substantial capacity to know or appreciate either the nature and consequences of his conduct or that such conduct was wrong … . Thus, unlike cases applying the rule to preclude recovery, the record here establishes that plaintiff's illegal conduct was not knowing, willful, intentional, or otherwise sufficiently culpable to warrant application of the rule … . 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.

MEDICAL MALPRACTICE, EXPERT AFFIDAVITS.

PLAINTIFF'S EXPERT'S AFFIDAVIT WAS CONCLUSORY AND DID NOT RAISE A QUESTION OF FACT ABOUT WHETHER DEFENDANTS PROXIMATELY CAUSED PLAINTIFF'S PARALYSIS, THE DISSENT DISAGREED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, over an extensive dissent, determined plaintiff's expert failed to raise a question of fact in opposition to defendants' motion for summary judgment in this medical malpractice case:

… [P]laintiff alleged that if [defendants] Lougee and King had made an appropriate referral to an orthopedic specialist and monitored her condition after the referral was made, plaintiff would have received necessary surgery before she became paralyzed.

… [Defendants] appeal from an order denying their motion for summary judgment dismissing the complaint against them. * * *

The affidavit of plaintiff's medical expert failed to raise a triable issue of fact in opposition inasmuch as the conclusory opinion of plaintiff's expert that defendants' "multiple deviations from the standard of care were a substantial contributing factor in causing [plaintiff's injuries]" is insufficient to raise an issue of fact concerning proximate cause … . It is undisputed that treatment of a condition arising out of an issue with plaintiff's spinal hardware is outside the scope of defendants' practice and that referral to an orthopedic specialist … was appropriate, and plaintiff's expert failed to identify what treatments or interventions were necessary, how defendants' monitoring of [the orthopedic specialist] would have necessarily resulted in those treatments or interventions being performed by the specialist, and whether the timing of any such interventions would have prevented plaintiff's injuries. Humbolt v Parmeter, 2021 NY Slip Op 04472, Fourth Dept 7-16-21

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).

The Fourth Department, reversing Supreme Court, determined plaintiff raised a question of fact about whether defendants' negligence was a proximate cause of plaintiff's decedent's fall from her bed in defendants' nursing home:

Plaintiff submitted an expert affidavit from a physician with extensive experience in the treatment of geriatric patients and who is familiar with the standards of care applicable for skilled nursing facilities, including those in New York as they existed during the relevant time period … .. The expert opined that, based on decedent's history of over 30 falls while at defendants' facility, decedent was a "high fall risk." Plaintiff's expert set forth the interventions that defendants failed to implement to reduce decedent's known and documented risk of falling. Moreover, he opined that, in this case, defendants failed to meet the relevant standard of care because they failed to use bed restraints, which were appropriate and would have prevented

decedent's fall, and failed to use side rails, alarms and motion detectors, which also would have prevented decedent's fall. Thus, his affidavit raises a question of fact whether defendants were negligent by failing to implement available precautions to protect decedent from a foreseeable risk of falling … . 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 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).

The Second Department, reversing (modifying) Supreme Court in this premises liability case, determined the sole member of the LLC (Romanoff) which owned the premises was not liable, but there was a question of fact whether the LLC had constructive knowledge of the defective railing which collapsed when plaintiff leaned on it:

… [T]he plaintiff failed to raise a triable issue of fact. Romanoff, as a member of the LLC, cannot be held liable for the company's obligations by virtue of that status alone … , and the plaintiff failed to adduce evidence as to the existence of circumstances that would entitle him to pierce the corporate veil to impose personal liability on Romanoff … .

… [T]he Romanoff defendants failed to establish, prima facie, that the LLC did not have constructive notice of the alleged hazardous condition … . In support of their motion, the Romanoff defendants submitted … evidence that the porch railing that collapsed had not been physically inspected in the eight months following the purchase of the premises. They also failed to demonstrate that the alleged dangerous

condition of the porch railing was latent and not discoverable upon a reasonable inspection. … [T]he Romanoff defendants relied upon the plaintiff's deposition testimony that, as he leaned onto the railing to shake dust out of a blanket, he felt the railing move as soon as he made contact with it, and it did not appear to be attached to anything. 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).

The Third Department, reversing the Court of Claims, determined the doctrine of res ipsa loquitur applied to a plastic chair in the recreational room of a state correctional facility. Claimant alleged the back legs of the chair broke off at the same time causing him to fall to the concrete floor:

… [T]he evidence of defendant's exclusive control, under the circumstances of this case, was sufficiently established … . Indeed, "[a]s a species of circumstantial proof, . . . res ipsa [loquitor] does not depend on a showing that the instrumentality causing the harm was within the defendant's exclusive control; it is enough that the degree of dominion be such that the defendant can be identified with probability as the party responsible for the injury produced" … .

… [D]efendant was "under an affirmative duty to use reasonable care in making sure that the chair it provided was safe for the purpose for which it was to be used. That [claimant] had temporary possession of the chair does not negate the inference that its sudden collapse, under normal usage, was most likely caused by defendant's

negligence" … . Moreover, defendant, who no doubt had sole and exclusive possession of the chair immediately after the accident, failed to offer any evidence to support an inference of any other possible explanation for the accident … . 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).

The First Department, in an extensive opinion by Justice Moulton, addressed several unusual issues stemming from the allegation the renovation of defendant's neighboring property damaged plaintiffs' property. Two separate trials were held: a jury trial on tort (negligence) claims; and a nonjury trial on breach of contract claims (i.e., the contract allowing defendants access to plaintiffs' property to facilitate the renovation). In the nonjury breach of contract action plaintiffs were awarded $6,255,007 for repair costs and $1,152,000 for alternate living expenses. In the jury trial (tort action) plaintiffs were awarded $5,000,000 for repair and $500,000 for alternate living expenses. The issues decided in plaintiff's appeal are: the breach of contract judgment is appealable as a final judgment; Supreme Court properly precluded expert testimony on the loss of market value in plaintiffs' home. The

issues decided in defendant's cross appeals are: Supreme Court properly denied defendant's motion to set aside the breach of contract judgment and adopt the jury's tort judgment; plaintiffs were entitled to conditional contractual indemnification from defendant. The final judgment which was entered used the breach of contract (nonjury trial) damages, plus interest and attorney's fees totaling over $12 million. With respect to whether the judgment was appealable as a final judgment, the court wrote:

Our conclusion that the contract judgment is a final judgment starts with the definition of a judgment. "A judgment is the determination of the rights of the parties in an action or special proceeding and may be either interlocutory or final" (CPLR 5011; see also CPLR 105 [k] ["The word 'judgment' means a final or interlocutory judgment"]). "[A] fair working definition of the concept can be stated as follows: a 'final' order or judgment is one that disposes of all of the causes of action between the parties in the action or proceeding and leaves nothing for further judicial action apart from mere ministerial matters" … . 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).

The Second Department, reversing Supreme Court, determined the defendant did not demonstrate it didn't have constructive notice of the liquid on the floor in this slip and fall case. Proof of general cleaning and inspection practices is not enough:

… [T]he defendant failed to eliminate triable issues of fact as to whether it had constructive notice of the hazardous condition and a reasonable time to correct it … . In that respect, the deposition testimony of the defendant's witnesses as to their general cleaning and inspection practices, as well as the deposition testimony of a security supervisor surmising, based upon such general practices, when another security officer would have inspected the subject stairwell prior to the accident, was insufficient to demonstrate, as a matter of law, that the defendant lacked constructive notice of the hazardous condition … . 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, CONSTRUCTIVE NOTICE.

THERE IS A QUESTION OF FACT WHETHER DEFENDANTS HAD CONSTRUCTIVE NOTICE OF THE WORN STEP IN THIS SLIP AND FALL CASE; DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (FIRST DEPT).

The First Department, reversing Supreme Court, determined there was a question of fact whether defendants had constructive notice of the condition of a step in this slip and fall case:

… [T]he affidavit of plaintiff's expert and the photographic evidence were sufficient to raise an issue of fact as to constructive notice. The expert opined that the condition depicted in the photographs violated the Building Code and that the step was worn for several years prior to the accident. Furthermore, the photographs depicted a condition that a jury might find was present for a sufficient time for defendants to have discovered and remedied it … . Martinez v 560-568 Audubon Realty LLC, 2021 NY Slip Op 04277, First Dept 7-8-21

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).

The Second Department, reversing Supreme Court, determined defendant property-owner was not entitled to summary judgment in this slip and fall case. The plaintiff allegedly tripped over a decorative fence located in the grassy area between the curb and the sidewalk abutting defendants' home. The defendants argued the fence was open and obvious:

"The determination of whether an asserted hazard is open and obvious cannot be divorced from the surrounding circumstances, and whether a condition is not inherently dangerous, or constitutes a reasonably safe environment, depends on the totality of the specific facts of each case" … . "A condition that is ordinarily apparent to a person making reasonable use of his or her senses may be rendered a trap for the unwary where the condition is obscured or the plaintiff is distracted" … .

Here, contrary to the Supreme Court's determination, the homeowner defendants failed to establish, prima facie, that the decorative fence was open and obvious and not inherently dangerous given the circumstances at the time of the accident, including the lighting conditions and color of the fence … . 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).

The Second Department, reversing Supreme Court, determined defendant's motion for summary judgment in this black-ice slip and fall case should not have been granted. The climatological records submitted to demonstrate there was a storm in progress at the time of the fall were not certified as business records and were otherwise insufficient. The evidence of a routine inspection practices was not sufficient to demonstrate a lack of constructive notice:

… [T]he defendant relied upon, among other things, climatological data for Poughkeepsie Airport and Danbury Municipal Airport in Connecticut, as well as spotter reports of snowfall accumulation in neighboring towns. However, because these records were not certified as business records, they were inadmissible (see CPLR 4518[a] …). In any event, the climatological data and spotter reports gathered from nearby areas were insufficient to demonstrate, prima facie, that the storm in progress rule applied … . Moreover, the climatological data was inconsistent and contradicted the parties' deposition testimony, transcripts of which the defendant also submitted in support of its motion, as to whether precipitation was falling at or near the time of the plaintiff's accident … . * * *

… "[M]ere reference to general cleaning practices, with no evidence regarding any specific cleaning or inspection of the area in question, is insufficient to establish a lack of constructive notice" … . Here, the testimony of the defendant's witness, at best, established the defendant's general inspection practices with respect to snow and ice on the defendant's property … . Thus, absent specific evidence that this area was inspected prior to the plaintiff's fall, the defendant cannot rely on this testimony in meeting its prima facie burden … . 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 a 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).

The Second Department, reversing Supreme Court, determined defendant's motion for summary judgment in this ice and snow slip and fall case should not have been granted. The climatological data presented to show there was a storm in progress at the time of the fall was not authenticated, related to a different county, and conflicted with plaintiff's testimony at the 50-h hearing:

… [T]he defendant failed to meet its initial burden as the movant. Contrary to the defendant's contention, the three pages of climatological data that it submitted in support of its motion should have been authenticated because these pages themselves did not indicate that the data contained therein was "taken under the direction of the United States weather bureau" (CPLR 4528). In any event, the climatological data was gathered from a neighboring county, and it was inconsistent with the plaintiff's testimony at a General Municipal Law § 50-h hearing that light snow fell about [*2]six hours prior to the accident. Under the circumstances, the defendant failed to establish, prima facie, that a storm was in progress at the time of the accident or that it did not have a reasonable opportunity after the cessation of the storm to remedy the alleged slippery condition … . 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, DISCOVERY.

DISCOVERY REQUESTS AIMED AT AN ISSUE WHICH WAS ADMITTED BY DEFENDANTS SHOULD NOT HAVE BEEN GRANTED; BECAUSE THE ALTERNATIVE ARGUMENT FOR THE DISCOVERY REQUESTS WAS NOT SUPPORTED BY A MEMO IN THE RECORD DEMONSTRATING THE ISSUE WAS PRESERVED, THE ARGUMENT WAS REJECTED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined defendants' discovery requests in this traffic accident case should not have been granted. The requests for defendants' cell phone records and receipts for food and beverages on the day of the accident were aimed at demonstrating the identity of the driver of defendants' vehicle. But the identity of the driver had been admitted by the defendants. Plaintiff's alternative argument was rejected because there was no memorandum of law in the record to demonstrate the issue had been raised below:

Given the prior admission establishing that [defendant] Vladyslav was the operator of the pickup truck, plaintiff "failed to meet the threshold for disclosure by showing that [his] request for [defendants'] cell phone [records and records for food and beverage purchases] was reasonably calculated to yield information material and necessary to [his action]" … . …

Plaintiff … contends, as an alternative ground for affirmance, that there is a different reason supporting disclosure that was not included in his discovery requests or motion papers in the record on appeal, i.e., the requested records are potentially relevant to identifying witnesses who could testify about Vladyslav's physical condition on the night of the accident and to determining whether Vladyslav was intoxicated or impaired. On the record before us, which does not include any memoranda of law despite our repeated and longstanding advisements that such

memoranda may properly be included in the record on appeal for the limited purpose of determining preservation … , we conclude that plaintiff's contention is not properly before us inasmuch as it is raised for the first time on appeal … . Brennan v Demydyuk, 2021 NY Slip Op 04425, Fourth Dept 7-16-21

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).

The Second Department, in a full-fledged opinion by Justice Barros, overruling a City Court decision, reversing the jury verdict in this truck-bicycle traffic accident case, determined the jury should have been instructed on the Vehicle and Traffic Law provision requiring that a turn signal be activated for 100 feet before turning. The truck was at a stop light and plaintiff testified the truck's turn signal was not on when she pulled up to the stop light next to the truck. When she started riding straight through the intersection, the truck allegedly made a right turn and ran over her. The driver (Murphy) testified he put his signal on and then made the turn. The trial court instructed the jury on the Vehicle and Traffic Law provision which applies to parked cars and which does not have the "100-foot" signaling requirement. The Second Department found that the truck was not "parked" within the meaning of that provision:

Vehicle and Traffic Law § 1163(b) provides that "[a] signal of intention to turn right or left when required shall be given continuously during not less than the last one hundred feet traveled by the vehicle before turning." Under Vehicle and Traffic § 1163(a), Murphy was required to signal his intention to turn right at the subject intersection. Thus, since a signal of intention to turn was required, the clear and unambiguous words used in Vehicle and Traffic Law § 1163(b) also required Murphy to give such signal "continuously during not less than the last one hundred

feet" that he traveled before making the turn. The provision makes no exception for vehicles that are stopped at a red traffic light … .

… Vehicle and Traffic Law § 1163(d), which applies … to vehicles moving from a parked position, and which does not require a vehicle to signal its turn 100 feet before making it, is inapplicable. Murphy's truck was not parked within the meaning of "park or parking" under Vehicle and Traffic Law § 129. Rather, it was stopped at a red light … . To the extent that People v Brandt (60 Misc 3d 956, 961 [Poughkeepsie City Ct]) holds otherwise, we overrule it.

The precise and specific duty established in Vehicle and Traffic Law § 1163(b) bore directly on the facts to which the parties testified, and, therefore, the Supreme Court erred in refusing to give that charge … . The statute establishes a standard of care, the unexcused violation of which is negligence per se … . 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.