# NEW YORK APPELLATE DIGEST, LLC

Negligence Practice
Newsletter
October 2021

A Succinct Compilation of the Salient Issues Raised in the Decisions Addressing Negligence Released by Our New York State Appellate Courts and Summarized on the New York Appellate Digest in October 2021. Right Click on the Citations to Keep Your Place in the Pamphlet.

**ELEVATORS, NEGLIGENT MAINTENACE, RES IPSA LOQUITUR.**

**QUESTIONS OF FACT ABOUT THE LIABILITY OF THE ELEVATOR COMPANY UNDER A NEGLIGENT MAINTENANCE THEORY OR A RES IPSA LOQUITUR THEORY REQUIRED THE DENIAL OF THE COMPANY'S MOTION FOR SUMMARY JUDGMENT; PLAINTIFF ALLEGED THE ELEVATOR SUDDENLY ACCELERATED AND THEN STOPPED (SECOND DEPT).**

Syrnik v Board of Mgrs. of the Leighton House Condominium, 2021 NY Slip Op 05603, Second Dept 10-13-21

Practice Point: The allegation that the elevator suddenly accelerated raised questions of fact about negligent maintenance and the applicability of res ipsa loquitur.

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**EMPLOYMENT LAW, NO LIABILITY FOR SEXUAL ASSAULT BY AN EMPLOYEE, NEGLIGENT HIRING AND SUPERVISION.**

**ALTHOUGH THE DEFENDANTS MAY HAVE BEEN NEGLIGENT IN HIRING THE DEFENDANT WHO SEXUALLY ASSAULTED THE SEVEN-YEAR-OLD PLAINTIFF, THERE WAS NO CONNECTION BETWEEN DEFENDANT'S EMPLOYMENT AND THE PLAINTIFF OR THE OFFENSE, WHICH OCCURRED NEAR PLAINTIFF'S HOME; THEREFORE THE NEGLIGENT HIRING AND RETENTION CAUSE OF ACTION SHOULD HAVE BEEN DISMISSED (SECOND DEPT).**

Roe v Domestic & Foreign Missionary Socy. of the Prot. Episcopal Church, 2021 NY Slip Op 05360, Second Dept 10-6-21

Practice Point: Defendant's employee sexually assaulted a child. The assault did not take place on the employer's property and there was no relationship between the victim and the employer. Although the employer may have been negligent in hiring the employee, there was no nexus between the employment and the assault and therefore no liability on the employer's part.

**FALLING OBJECTS, BUILDING FAÇADE LOOSENED BY EXCAVATION.**

**PLAINTIFF WAS STRUCK BY A PIECE OF A BUILDING FACADE WHICH CAME LOOSE; PLAINTIFF SUED TWO DEFENDANTS WHO HAD DONE WORK IN THE ROADWAY NEAR THE BUILDING, ALLEGING THE EXCAVATION LOOSENED THE FACADE MATERIAL; DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).**

Payne v Murray, 2021 NY Slip Op 05576, Second Dept 10-13-21

Practice Point: Excavation work in the street may give rise to liability for injury caused by a piece of a nearby building façade coming loose and striking plaintiff.

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**LANDFILL, NOXIOUS ODORS, NUISANCE, NEGLIGENCE.**

**NOXIOUS ODORS FROM A LANDFILL DID NOT SUPPORT THE PUBLIC NUISANCE AND NEGLIGENCE CAUSES OF ACTION; COMPLAINT DISMISSED (THIRD DEPT).**

Davies v S.A. Dunn & Co., LLC, 2021 NY Slip Op 05751, Third Dept 10-21-21

Similar issues and result in Duncan v Capital Region Landfills, Inc., 2021 NY Slip Op 05757, Third Dept 10-21-21

Practice Point: Noxious odors from a landfill did not constitute a public nuisance because the alleged injury affected the public at large, and the transient odors did not cause physical injury such that a negligence theory would apply.

**MEDICAL MALPRACTICE, SISTER'S OVARIAN-CANCER GENE.**

**EVIDENCE PLAINTIFF'S DECEDENT'S SISTER CARRIED A GENE WHICH INCREASED THE CHANCE OF DEVELOPING OVARIAN CANCER SHOULD NOT HAVE BEEN EXCLUDED FROM THIS MEDICAL MALPRACTICE TRIAL (SECOND DEPT).**

Walsh v Akhund, 2021 NY Slip Op 05890, Second Dept 10-27-21

Practice Point: Evidence that plaintiff's decedent's sister carried an ovarian-cancer gene was relevant to the diagnosis and treatment of plaintiff's decedent, who died from ovarian cancer. Exclusion of the evidence warranted a new trial.

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**MUNICIPAL LAW, NYC RIGHT OF WAY LAW CRIMINALIZES NEGLIGENCE.**

**NYC'S RIGHT OF WAY LAW CRIMINALIZES ORDINARY NEGLIGENCE WHEN A VEHICLE STRIKES A PEDESTRIAN OR A BICYCLIST WHO HAS THE RIGHT OF WAY; THE LAW IS NOT VOID FOR VAGUENESS, PROPERLY IMPOSES ORDINARY NEGLIGENCE AS THE MENS REA, AND IS NOT PREEMPTED BY OTHER LAWS (CT APP).**

People v Torres, 2021 NY Slip Op 05448, CtApp 10-12-21

Practice Point: New York City's right-of-way law criminalizes striking a pedestrian or bicyclist who has the right of way. The mens rea of the misdemeanor is ordinary negligence.

**MUNICIPAL LAW, SPECIAL DUTY OWED BY POLICE TO PASSENGER.**

**AFTER STOPPING THE CAR OCCUPIED BY TEENAGERS AND ARRESTING THE DRIVER AND A PASSENGER, THE POLICE RELEASED THE CAR TO DEFENDANT WHO WAS NOT AUTHORIZED TO DRIVE A CAR WITH MORE THAN ONE PASSENGER UNDER 21; THE DEFENDANT DRIVER THEN HAD AN ACCIDENT: THERE IS A QUESTION OF FACT WHETHER THE POLICE BREACHED A SPECIAL DUTY OWED THE INJURED PLAINTIFF (SECOND DEPT).**

Stevens v Town of E. Fishkill Police Dept., 2021 NY Slip Op 05602, Second Dept 10-13-21

Practice Point: After a traffic stop, the police released the car to a driver who was not authorized to drive a car with more than one passenger under 21. The driver had an accident and plaintiff, a passenger, was injured. There was a question of fact whether the police owed a special duty to the plaintiff, making the city liable.

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**MUNICIPAL LAW, TRAFFIC ACCIDENTS, LIBILITY FOR FIREFIGHTERS.**

**A TOWN IS NOT LIABLE FOR THE NEGLIGENCE OF A VOLUNTEER FIREFIGHTER IN A "FIRE DISTRICT," BUT IS LIABLE FOR THE NEGLIGENCE OF A VOLUNTEER FIREFIGHTER IN A "FIRE PROTECTION DISTRICT" (FOURTH DEPT).**

Matter of Froelich v South Wilson Volunteer Fire Co., 2021 NY Slip Op 05207, Fourth Dept 10-1-21

Practice Point: A municipality can be liable for a traffic accident caused by a volunteer firefighter in a "fire protection district," but not in a "fire district."

**NURSING HOMES, RESIDENT FELL FROM BED, MEDICAL MALPRACTICE, NEGLIGENCE.**

**CLAIMS AGAINST DEFENDANT NURSING HOME SOUNDED IN MEDICAL MALPRACTICE AND IN NEGLIGENCE, REQUIRING ANALYSES USING DIFFERENT CRITERIA; SOME CAUSES OF ACTIONS SHOULD HAVE BEEN DISMISSED (FOURTH DEPT).**

Noga v Brothers of Mercy Nursing & Rehabilitation Ctr., 2021 NY Slip Op 05189, Fourth Dept 10-1-21

Practice Point: Plaintiff's decedent, a nursing home resident, allegedly fell from his bed when unsupervised. Some of the causes of action sounded in medical malpractice and some in negligence.

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**POLICE OFFICERS, NO SUIT IN NEGLIGENCE AGAINST FELLOW OFFICERS, WORKERS' COMPENSATION IS SOLE REMEDY.**

**PLAINTIFF POLICE OFFICER ALLEGED TWO FELLOW OFFICERS NEGLIGENTLY INJURED HIM WITH A TASER; PLAINTIFF CANNOT SUE HIS FELLOW OFFICERS IN TORT AND HIS EXCLUSIVE REMEDY IS WORKERS' COMPENSATION (SECOND DEPT).**

Walsh v Knudsen, 2021 NY Slip Op 05607, Second Dept 10-13-21

Practice Point: A police officer, who was tased by fellow officers, cannot not sue those officers in negligence. Workers' Compensation is the only remedy.

**PREMISES LIABILITY, OWNER'S SUPERVISORY CONTROL OVER CONTRACTOR.**

**PLAINTIFF, A LANDSCAPING CONTRACTOR, DID YARD WORK FOR DEFENDANT HOMEOWNER, INCLUDING SPREADING MULCH AND USING HIS OWN LADDER TO TRIM A TREE; PLAINTIFF POSITIONED THE LADDER ON THE MULCH; THE LADDER FELL OVER WHEN PLAINTIFF WAS STANDING ON IT; DEFENDANT HOMEOWNER DID NOT CREATE OR HAVE NOTICE OF THE DANGEROUS CONDITION (THE MULCH) AND DID NOT SUPERVISE OR DIRECT PLAINTIFF'S TREE-TRIMMING WORK; DEFENDANT'S SUMMARY JUDGMENT MOTION SHOULD HAVE BEEN GRANTED (THIRD DEPT).**

Vickers v Parcells, 2021 NY Slip Op 05762, Third Dept 10-21-21

Practice Point: A landscaping contractor sued the homeowner alleging mulch around a tree, which he had placed there as part of his routine landscaping work, was a dangerous condition which caused his ladder to fall. The contractor also alleged the homeowner was liable under the theory that the homeowner directed and supervised the tree trimming work the contractor was attempting when the ladder fell. Neither theory should have survived summary judgment.

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**PRODUCTS LIABILITY, VEHICLE ROLLOVER, EXPERT AFFIDAVITS.**

**THIS PRODUCTS LIABILITY (DEFECTIVE DESIGN) ACTION AROSE FROM THE ROLLOVER OF A VEHICLE MADE BY DEFENDANT FORD; PLAINTIFF'S EXPERT'S AFFIDAVIT ALLEGING THE VEHICLE WAS UNSAFE AND PRONE TO ROLLOVERS WAS CONCLUSORY AND THEREFORE DID NOT RAISE A QUESTION OF FACT (FIRST DEPT).**

Richards v Ford Motor Co., 2021 NY Slip Op 05469, First Dept 10-12-21

Practice Point: In a products liability case, like a med mal case, a conclusory expert affidavit in support of the action will not raise a question of fact.

**TRAFFIC ACCIDENTS, EMERGENCY-DOCTRINE DEFENSE.**

**DEFENDANT ALLEGED HE DID NOT SEE THE PEDESTRIAN HE STRUCK UNTIL AFTER THE CONTACT OCCURRED; DEFENDANT'S EMERGENCY-DOCTRINE DEFENSE SHOULD HAVE BEEN STRUCK (FIRST DEPT).**

De Diaz v Klausner, 2021 NY Slip Op 05624, First Dept 10-14-21

Practice Point: Where a defendant in a pedestrian traffic accident case alleges he did not see the plaintiff until after he struck her, the emergency-doctrine defense is not available. By definition, the defendant did not react to an emergency situation.

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**TRAFFIC ACCIDENTS, EMPLOYMENT LAW, VEHICLE AND TRAFFIC LAW, WORKERS' COMPENSATION.**

**DEFENDANT CAR DEALERSHIP OWNED THE CAR IN WHICH PLAINTIFF, ITS SALESMAN, WAS INJURED DURING A TEST DRIVE; THE DEALERSHIP, AS PLAINTIFF'S EMPLOYER, IS IMMUNE FROM SUIT UNDER THE WORKERS' COMPENSATION LAW AND IS NOT VICARIOUSLY LIABLE AS THE OWNER OF THE CAR UNDER THE VEHICLE AND TRAFFIC LAW (FOURTH DEPT).**

Mansour v Paddock Chevrolet, Inc., 2021 NY Slip Op 05190, Fourth Dept 10-1-21

Practice Point: When a salesman is injured during a test drive of a car owned by the dealership, workers' compensation is the only remedy. The car dealership is not liable as the owner of the car pursuant to the vicarious-liability provision in the Vehicle and Traffic Law.