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Negligence
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An Organized Compilation of Summaries of Selected Decisions Addressing Negligence Released by Our New York State Appellate Courts and Posted on the New York Appellate Digest Website in October 2021. 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. Right Click on the Citations to Keep Your Place in the Pamphlet.

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Contents

ELEVATORS, NEGLIGENT MAINTENACE, RES IPSA LOQUITUR. 4

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). 4

EMPLOYMENT LAW, NO LIABILITY FOR SEXUAL ASSAULT BY AN EMPLOYEE, NEGLIGENT HIRING AND SUPERVISION. 5

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). 5

FALLING OBJECTS, BUILDING FAÇADE LOOSENED BY EXCAVATION. 6

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). 6

LANDFILL, NOXIOUS ODORS, NUISANCE, NEGLIGENCE. 7

NOXIOUS ODORS FROM A LANDFILL DID NOT SUPPORT THE PUBLIC NUISANCE AND NEGLIGENCE CAUSES OF ACTION; COMPLAINT DISMISSED (THIRD DEPT). 7

MEDICAL MALPRACTICE, DEFENDANT DOCTOR PRACTICES IN TWO COUNTIES, VENUE. 8

ALTHOUGH DEFENDANT DOCTOR PRACTICED IN THE BRONX FOR PART OF EACH WEEK, THE PRINCIPAL OFFICE OF HIS BUSINESS AND HIS RESIDENCE WERE IN WESTCHESTER COUNTY, WHERE PLAINTIFF WAS TREATED; SUPREME COURT PROPERLY GRANTED DEFENDANTS' MOTION TO CHANGE THE VENUE FROM BRONX TO WESTCHESTER COUNTY (CT APP). 8

Table of Contents

MEDICAL MALPRACTICE, SISTER'S OVARIAN-CANCER GENE....................................... 9

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). 9

MUNICIPAL LAW, NYC RIGHT OF WAY LAW CRIMINALIZES NEGLIGENCE. 10

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).. 10

MUNICIPAL LAW, SPECIAL DUTY OWED BY POLICE TO PASSENGER. 11

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). 11

MUNICIPAL LAW, TRAFFIC ACCIDENTS, LIBILITY FOR FIREFIGHTERS................... 12

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). 12

NURSING HOMES, RESIDENT FELL FROM BED, MEDICAL MALPRACTICE, NEGLIGENCE. 14

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). 14

POLICE OFFICERS, NO SUIT IN NEGLIGENCE AGAINST FELLOW OFFICERS, WORKERS' COMPENSATION IS SOLE REMEDY. 15

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). 15

PREMISES LIABILITY, OWNER'S SUPERVISORY CONTROL OVER CONTRACTOR. . 16

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).. 16

PRODUCTS LIABILITY, VEHICLE ROLLOVER, EXPERT AFFIDAVITS. 17

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). 17

TRAFFIC ACCIDENTS, EMERGENCY-DOCTRINE DEFENSE... 18

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). 18

TRAFFIC ACCIDENTS, EMPLOYMENT LAW, VEHICLE AND TRAFFIC LAW, WORKERS' COMPENSATION. 19

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). 19

TRAFFIC ACCIDENTS, TREATING PHYSICIAN'S TESTIMONY AND MEDICAL RECORDS ERRONEOUSLY EXCLUDED FROM TRIAL. 20

SUPREME COURT ERRONEOUSLY PRECLUDED PLAINTIFF'S TREATING PHYSICIAN'S TESTIMONY AND THE ADMISSION OF MEDICAL RECORDS IN THIS TRAFFIC ACCIDENT CASE; PLAINTIFF'S MOTION TO SET ASIDE THE DEFENSE VERDICT SHOULD HAVE BEEN GRANTED (SECOND DEPT). 20

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).

The Second Department, reversing Supreme Court, determined there were questions of fact whether the elevator company (Otis) was liable for injuries allegedly caused by the sudden acceleration and stop of the elevator under a negligent maintenance theory and a res ipsa loquitur theory:

The plaintiff's expert, Patrick Carrajat, an elevator and escalator consultant, whose affidavit the plaintiff submitted in opposition to Otis's summary judgment motion, concurred with McPartland's [defendant's expert's] opinion that "the probable cause of the accident was a clipped interlock." Carrajat disagreed, however, with McPartland's contention that a clipped interlock was something Otis could not reasonably have been expected to prevent. In Carrajat's view, proper inspection and maintenance would have revealed either improper adjustment, loosening or shifting, or excessive wear of certain components. Carrajat also explained why he disagreed with McPartland's opinion that external factors, such as a person making contact with the hallway elevator doors or some sort of debris caught in the elevator's "door sill," could have caused the accident. …

The plaintiff also raised a triable issue of fact as to Otis's liability under the doctrine of res ipsa loquitur by submitting proof that the sudden descent and abrupt stop of the elevator was an occurrence that would not ordinarily occur in the absence of negligence, that the maintenance and service of the elevator was in the exclusive control of Otis, and that no act or negligence on the part of the plaintiff contributed to the occurrence of the accident … . 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.

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).

The Second Department, reversing (modifying) Supreme Court, determined the negligent hiring and retention cause of action against the church defendants should have been dismissed. The complaint alleged plaintiff, who was seven years old, was abducted near her home, taken to a secluded area, and sexually assaulted by the defendant. The court noted that the church defendants may have been negligent in hiring the defendant, but there was no connection between the offense committed by the defendant and his employment:

With respect to a cause of action alleging negligent hiring and retention, "[t]he employer's negligence lies in having placed the employee in a position to cause foreseeable harm, harm which would most probably have been spared the injured party had the employer taken reasonable care in making decisions respecting the hiring and retention of the employee" … . As such, a necessary element of a cause of action to recover damages for negligent hiring and retention is a nexus or connection between the defendant's negligence in hiring and retaining the offending employee and the plaintiff's injuries … . Here, the plaintiff failed to allege any such nexus, since the sexual assault occurred far from the Church's premises, and there is no allegation in the complaint that the plaintiff had any prior contact with the alleged attacker, any prior relationship with any of the defendants, or even any knowledge, at the time of the sexual assault, that the alleged attacker was employed by the

defendants. 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).

The Second Department, reversing Supreme Court, determined defendants' motions for summary judgment should not have been granted. Plaintiff was struck by a piece of the facade of a brownstone which came loose. Plaintiff sued Keyspan Energy Delivery and Harris Water Main and Sewer Contractors alleging excavation work done by the defendants near the building loosened the facade:

Keyspan established its prima facie entitlement to judgment as a matter of law … by demonstrating, through the submission of … an affidavit of a professional engineer, that its work in the roadway did not create the alleged dangerous condition … . However, in opposition, the plaintiffs raised triable issues of fact by submitting … an affidavit from a professional engineer that rebutted the opinion of Keyspan's expert. …

Harris contracted with the building owners to complete work on a broken pipe connecting the building to the sewer line in the middle of the street. A contractual obligation, standing alone, generally will not give rise to tort liability in favor of a third party (see Espinal v Melville Snow Contrs., 98 NY2d 136, 140). "[A]n

exception to this rule applies where the contracting party, in failing to exercise reasonable care in the performance of contractual duties, launches a force or instrument of harm, such as by creating or exacerbating a dangerous condition” … . The plaintiffs alleged that the vibrations from Harris’s work in the roadway created or exacerbated the alleged dangerous condition on the facade of the subject building. Harris’s submissions, which did not include an expert affidavit from a professional engineer, were insufficient to establish, prima facie, that its work in the roadway did not create or exacerbate the dangerous condition … . 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.

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).

The Third Department, in a full-fledged opinion by Justice Lynch, over a dissent, reversing Supreme Court, determined the public nuisance and negligence causes of action stemming from odors from a landfill should have been dismissed. The public nuisance cause of action alleged only injury to the public at large, not the required special injury unique to the parties. The negligence cause of action did not allege any tangible property damage or physical injury:

… [P]laintiffs here have not asserted an injury that is different in kind from the relevant community at large, which, in our view, consists of the other homeowners and renters impacted by the landfill’s odors … . * * *

To recover in negligence, a plaintiff must sustain either physical injury or property damage resulting from the defendant’s alleged negligent conduct … . …

… [T]he noxious odors at issue are transient in nature and do not have a continuing physical presence. … [P]laintiffs have not alleged any tangible property damage or

physical injury resulting from exposure to the odors. … [T]he economic loss resulting from the diminution of plaintiffs' property values is not, standing alone, sufficient to sustain a negligence claim under New York law … . 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, DEFENDANT DOCTOR PRACTICES IN TWO COUNTIES, VENUE.

ALTHOUGH DEFENDANT DOCTOR PRACTICED IN THE BRONX FOR PART OF EACH WEEK, THE PRINCIPAL OFFICE OF HIS BUSINESS AND HIS RESIDENCE WERE IN WESTCHESTER COUNTY, WHERE PLAINTIFF WAS TREATED; SUPREME COURT PROPERLY GRANTED DEFENDANTS' MOTION TO CHANGE THE VENUE FROM BRONX TO WESTCHESTER COUNTY (CT APP).

The Court of Appeals, reversing the Appellate Division, over an extensive two-judge dissent, determined Supreme Court had properly granted defendants' motion for a change of venue from Bronx County to Westchester County in this medical malpractice action. The defendant doctor (Goldstein) was described by plaintiff as an "individually-owned business" with a "principal office" in Bronx County. Dr. Goldstein treats some patients in Bronx County. But plaintiff was treated by Dr. Goldstein in Westchester County, where defendant business (Westmed) is located and where Dr. Goldstein resides:

Under CPLR 503(d), "[a] partnership or an individually-owned business shall be deemed a resident of any county in which it has its principal office, as well as the county in which the partner or individual owner suing or being sued actually resides." * * *

While … registration documents confirmed … that Dr. Goldstein also worked in the Bronx, the venue statute does not deem an individually-owned business a resident of every county where it has an office or transacts business. To conclude otherwise would read the phrase "principal office" out of the statute. Lividini v Goldstein, 2021 NY Slip Op 05618, CtApp 10-14-21

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).

The Second Department, reversing Supreme Court in this medical malpractice action, determined evidence that plaintiff's decedent's sister carried a gene which increased the chance of developing ovarian cancer should have been admitted:

"Establishing proximate cause in medical malpractice cases requires a plaintiff to present sufficient medical evidence from which a reasonable person might conclude that it was more probable than not that the defendant's departure was a substantial factor in causing the plaintiff's injury" … . "'A plaintiff's evidence of proximate cause may be found legally sufficient even if his or her expert is unable to quantify the extent to which the defendant's act or omission decreased the plaintiff's chance of a better outcome or increased the injury, as long as evidence is presented from which the jury may infer that the defendant's conduct diminished the plaintiff's chance of a better outcome or increased [the] injury'" … .

The evidence that the decedent's sister tested positive for the harmful variant of the BRCA2 gene was not unduly prejudicial and was relevant to the issue of proximate cause, as it would have supported the plaintiff's argument and the testimony of the plaintiff's expert that the decedent would have undergone gene testing if properly advised to do so, and more likely than not would have tested positive for the harmful gene variant and undergone a procedure to remove her ovaries, diminishing her chances of developing ovarian cancer. This evidence also would have contradicted the position of the Akhund defendants that the decedent's chances of testing positive

for the harmful gene variant were as low as 2.5 to 5% … . The weight to be accorded to this evidence is a matter to be determined by the jury … . 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.

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).

The Court of Appeals, in a full-fledged opinion by Judge Garcia, over a concurring opinion, determined New York City's "Right of Way Law," which criminalizes ordinary negligence when a vehicle strikes a pedestrian or bicyclist who has the right of way, is constitutional and is not preempted by other laws. Both defendants were convicted under the Right of Way Law (NYC Administrative Code 19-190), a misdemeanor. The defendants unsuccessfully argued (1) the law is void for vagueness; (2) ordinary negligence cannot constitute the mens rea for a criminal act; and (3) the law is preempted by the Penal Law and the Vehicle and Traffic Law:

Article 15 of the Penal Law lists and defines four "culpable mental states"— "intentionally," "knowingly," "recklessly," and "criminal negligence" … . However, strict liability is also contemplated by article 15: "[t]he minimal requirement for criminal liability is the performance by a person of conduct which includes a voluntary act or the omission to perform an act which [such person] is physically capable of performing," and, "[i]f such conduct is all that is required for commission of a particular offense, . . . such offense is one of 'strict liability'" … . * * *

The provisions of the Penal Law "govern the construction of and punishment for any offense defined outside" of the Penal Law, "[u]nless otherwise expressly provided, or unless the context otherwise requires" (Penal Law § 5.05 [2]). The two key provisions at issue, Penal Law § 15.00 (Culpability; definitions of terms) and § 15.05 (Culpability; definitions of culpable mental states), expressly provide otherwise by making clear that they are "applicable to this chapter" only. Further contradicting defendants' interpretation of article 15 is the legislature's own use of an ordinary negligence mens rea for offenses defined outside the Penal Law. For example … Vehicle and Traffic Law § 1146 and Agriculture and Markets Law § 370—which were enacted after the relevant provisions in article 15 of the Penal Law—both employ an ordinary negligence standard for imposing criminal liability. 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).

The Second Department determined: (1) the action against the town police department should have been dismissed because the police department cannot be sued as an entity separate from the town; and (2) the action against the town properly survived summary judgment. The police had stopped a car occupied by teenagers and arrested the driver and one passenger for possession of marijuana. The police then released to car to defendant Tatavitto who was not authorized to drive a car with more than one passenger under 21. Tatavitto then had an accident. There was a

question of fact whether the town breached a special duty owed to plaintiff by allowing Tatavitto to drive the car:

… [A] special duty has four elements: "'(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) that party's justifiable reliance on the municipality's affirmative conduct'" … . Here, there was direct contact between the officers and the occupants of the vehicle. The Town defendants failed to eliminate triable issues of fact as to whether the officers, through their affirmative acts, assumed an affirmative duty to the plaintiff, whether the officers had reason to believe that releasing the vehicle to Tatavitto would permit him to drive the vehicle in violation of law, which increased the risk of an accident, and whether their conduct "lulled" the plaintiff into a false sense of security and induced him either to relax his own vigilance or forgo other avenues of protection—which was not offered by the officers—and thereby placed him in a worse position than he would have been had the officers never assumed any duty to him … . 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.

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).

The Fourth Department, reversing Supreme Court, determined the application for leave to file a late notice of claim against the town in this traffic accident case should

not have been denied on the ground the town was not liable for an accident caused by a member of the fire company. Plaintiff alleged the defendant driver was acting within the scope of his duties as a firefighter at the time of the accident. The Fourth Department noted that a town is not liable for the negligence of a volunteer fireman in the employ of a "fire district," but is liable for the negligence of a member of a "fire protection district:"

A fire district is a "wholly independent political subdivision whose members, including its volunteer firemen, are employees of the district and not of the town" … . The "fire district rather than the town appoints its own members, furnishes fire and ambulance service and is liable for negligence on the part of its members, including their negligent operation of vehicles" … . Accordingly, a "town is not liable on the theory of respondent superior for the negligence of a volunteer fireman in the employ of a fire district" … .

In contrast, "a fire protection district is simply a geographic area, with no independent corporate status, for which the town board is responsible for providing for the furnishing of fire protection" … and, "[t]o that end, [a town board] may 'contract with any city, village, fire district or incorporated fire company . . . for the furnishing of fire protection' " … . "Members of the fire departments or companies established within a fire protection district 'are deemed officers, employees, or appointees of the town[,] and the town is liable for any negligence on the part of such members' " … . 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).

The Fourth Department, reversing (modifying) Supreme Court, determined some of plaintiff's causes of action alleging medical malpractice and negligence against defendant nursing home should have been dismissed. The complaint alleged plaintiff's decedent, a double amputee, was left unsupervised and fell from his bed. The Fourth Department noted the complaint alleged claims sounding in medical malpractice and in negligence:

… [T]he complaint … alleges several claims sounding in medical malpractice … [and]]he summary judgment standard for medical malpractice claims should apply to those claims. … [P]laintiff alleges that defendants failed to "provide proper services to the decedent[,] . . . provide . . . adequate . . . staff[ing,] . . . change and/or adjust the decedent's care plan . . . [, and] adequately formulate and/or promulgate a care plan in accordance with a comprehensive assessment[]," all of which sound in medical malpractice because they challenge defendants' assessment of the decedent's need for supervision … . * * * … [P]laintiff raised a triable issue of fact … by submitting the affidavit of her own expert, who opined that defendants deviated from the standard of care insofar as they did not amend the decedent's care plan to require greater supervision after he was noted to be experiencing confusion and delirium … . Plaintiff's expert did not, however, address the claims regarding inadequate staffing procedures and training, and those claims are accordingly deemed abandoned … .

… [P]laintiff's claims that defendants were negligent in failing to follow the care plan and to equip the decedent's wheelchair with a seatbelt sound in ordinary negligence inasmuch as they relate to defendants' general duty to safeguard the nursing home's residents, measured by "the capacity of [a resident] to provide for his or her own safety" … and "the [resident's] physical and mental ailments known

to the [agency's] officials . . . and employees" … . … Defendants met [their] burden with respect to the claim alleging negligence in failing to equip the decedent's wheelchair with a seatbelt by submitting evidence that they formulated a plan of care that addressed the decedent's risk of falling, and that a restrictive lap belt was not used in their facility. Plaintiff failed to raise a triable issue of fact in opposition with respect to that claim inasmuch as plaintiff's expert failed to opine how a nonrestrictive lap belt would have prevented the subject accident … . 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.

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).

The Second Department, reversing Supreme Court, determine plaintiff police officer's petition for leave to file a late notice of claim should not have been granted and his complaint against two fellow police officers should have been dismissed. Plaintiff alleged the two officers negligently tased him. Plaintiff cannot sue the fellow officers in tort, and his exclusive remedy is Workers' Compensation:

While a police officer can assert a common-law tort cause of action against the general public pursuant to General Obligations Law § 11-106(1), "liability against a fellow officer or employer can only be based on the statutory right of action in General Municipal Law § 205-e" … . General Municipal Law § 205-e(1) specifies that "nothing in this section shall be deemed to expand or restrict any right afforded to or limitation imposed upon an employer, an employee or his or her representative by virtue of any provisions of the workers' compensation law" … .

Under the Workers' Compensation Law, "[t]he right to compensation or benefits under this chapter, shall be the exclusive remedy to an employee . . . when such employee is injured or killed by the negligence or wrong of another in the same employ" … . Thus, the Workers' Compensation Law "offers the only remedy for injuries caused by [a] coemployee's negligence" in the course of employment … . "[A] defendant, to have the protection of the exclusivity provision, must himself [or herself] have been acting within the scope of his [or her] employment and not have been engaged in a willful or intentional tort" … . 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).

The Third Department, reversing (modifying) Supreme Court, determined defendant homeowner's motion for summary judgment in this ladder-fall case should have been granted. Plaintiff alleged defendant asked him to trim some tree branches. Plaintiff placed his own ladder on mulch which he (plaintiff) had spread there as part of his landscaping work. Plaintiff alleged the mulch constituted a dangerous condition which caused the ladder to tip. Plaintiff also alleged the owner exercised supervision and control over his work and was liable for directing him to trim the tree:

Even assuming that defendant had a conversation with plaintiff, the request to trim the trees was a general instruction about what needed to be done without any direction about how to perform the task … . It is undisputed that defendant neither provided any equipment for the project nor directed the manner in which the ladder was placed or the trimming performed … . …

As to the dangerous condition theory of liability, … defendant did not create the hazard, as it is undisputed that plaintiff and his associates were the ones who spread the mulch and placed the ladder … . Nor is there any evidence that defendant had actual or constructive notice of the allegedly dangerous condition. Defendant was not shown to have expertise in landscaping and, even if he was inside the house when the ladder was being set up on the mulch, this general awareness would be insufficient to establish notice of an unsafe condition … . 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.

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).

The First Department, reversing Supreme Court, determined defendant's expert's conclusory affidavit alleging defendant's vehicle was unsafe did not raise a question of fact in this products liability action stemming from the rollover of a vehicle made by defendant (Ford):

The defective design claim should have been dismissed because plaintiff failed to rebut defendant's prima facie showing that the Ford van was not negligently designed. 'Where a qualified expert opines that a particular product is defective or dangerous, describes why it is dangerous, explains how it can be made safer, and concludes that it is feasible to do so, it is usually for the jury to make the required risk-utility analysis" whether the product was reasonably safe … . However, an expert cannot raise an issue of fact to defeat a motion for summary judgment when the opinion consists of only bare conclusory allegations of alleged defects or industry wide knowledge … . Here, plaintiffs' expert's assertions that the vehicle at issue was unsafe and prone to rollovers was unsupported by any data or calculations concerning the testing he purportedly performed, testing he described in the most conclusory of terms and general of statements … . 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).

The First Department, reversing (modifying Supreme Court) determined defendant's allegations did not support the "emergency" defense in this vehicle-pedestrian accident case:

Defendant maintains that he did not see plaintiff before she was struck by his vehicle and that she was not in the crosswalk when he began turning onto the avenue; it was only after plaintiff was struck that defendant observed her in the crosswalk. "Without having perceived or reacted to any emergency, the defendant may not rely on the emergency doctrine to excuse [his] conduct" … . 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.

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).

The Fourth Department, reversing (modifying) Supreme Court, determined defendant Paddock Chevrolet was immune from suit by its employee in this traffic accident case. Plaintiff, a salesman for Paddock, was a passenger in a car owned by Paddock which was being test-driven at the time of the accident. The court noted that the Workers' Compensation Law protected Paddock from vicarious liability as the owner of the car pursuant to the Vehicle and Traffic Law:

Workers' Compensation Law § 11 provides that "[t]he liability of an employer prescribed by [section 10] shall be exclusive and in place of any other liability whatsoever, to such employee, . . . or any person otherwise entitled to recover damages, contribution or indemnity, at common law or otherwise, on account of such injury or death or liability arising therefrom . . ." We thus agree with Paddock that plaintiff's claims against it are barred.

Paddock correctly contends that New York has rejected the "dual capacity" doctrine … , rendering it irrelevant whether the amended complaint and cross claims asserted against Paddock were based on its status as plaintiff's employer or its status as the owner of the vehicle who is vicariously liable for the negligence of a nonemployee driver under Vehicle and Traffic Law … . 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.

TRAFFIC ACCIDENTS, TREATING PHYSICIAN'S TESTIMONY AND MEDICAL RECORDS ERRONEOUSLY EXCLUDED FROM TRIAL.

SUPREME COURT ERRONEOUSLY PRECLUDED PLAINTIFF'S TREATING PHYSICIAN'S TESTIMONY AND THE ADMISSION OF MEDICAL RECORDS IN THIS TRAFFIC ACCIDENT CASE; PLAINTIFF'S MOTION TO SET ASIDE THE DEFENSE VERDICT SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff's motion to set aside the defense verdict in this traffic accident case should have been granted. The trial court had erroneously precluded some of the testimony of one of plaintiff's treating physicians and the admission of another treating physician's medical records. The defendant had waived any objection to the records by failing to object after service of plaintiff's notice of intention to enter the documents:

At the trial on the issue of damages, the plaintiff called one of her treating physicians, Irving Friedman, as a witness. The Supreme Court erred in granting the defendant's application to preclude Friedman's testimony concerning the cervical and thoracic regions of the plaintiff's spine based upon a conceded error Friedman made wherein he misidentified the MRI of the plaintiff's spine … . Under the circumstances of this case, any defects in Friedman's opinions or the foundations on which those opinions are based "should go to the weight to be accorded that evidence by the trier of fact, not to its admissibility in the first instance" … .

In addition, the Supreme Court erred in precluding Friedman's testimony regarding future treatment and possible need for future surgery, as Friedman had addressed these issues in his medical reports … .

… [T]he Supreme Court erred in precluding the admission of the medical records of another of the plaintiff's treating physicians, Rubin Ingber, under the business records exception to the hearsay rule. The defendant waived his right to any objection to the admission of the records as business records, as he failed to timely object after having been served with the plaintiff's notice of her intention to enter the documents into evidence pursuant to CPLR 3122- … . Benguigui v Racer, 2021 NY Slip Op 05318, Second Dept 10-6-21

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