NEW YORK APPELLATE DIGEST, LLC

December 2021
Negligence
Practice Newsletter

The Significant Decisions Addressing Negligence Released by Our New York State Appellate Courts in December 2021, Distilled to Succinct Practice Points. The Entries in the Table of Contents Link to the Practice Points 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 Newsletter.

Table of Contents

Contents

Table of Contents

Table of Contents

Table of Contents

ASSUMPTION OF THE RISK, SKIIING ACCIDENT.

PLAINTIFF, A NOVICE SKIER, WAS INJURED DURING A LESSON; THERE WAS A QUESTION OF FACT WHETHER THE INSTRUCTOR UNREASONABLY INCREASED THE RISK BY HAVING PLAINTIFF SKI DOWN AN INTERMEDIATE HILL WITHOUT ADEQUATE TRAINING (THIRD DEPT).

Bodden v Holiday Mtn. Fun Park Inc., 2021 NY Slip Op 07330, Third Dept 12-23-21

Practice Point: A ski instructor may have increased the risk to a novice skier by having her ski down an intermediate slope before she was ready. Summary judgment pursuant to the assumption of the risk doctrine should not have been granted.

Table of Contents

ASSUMPTION OF THE RISK.

PLAINTIFF WAS DEEMED TO HAVE ASSUMED THE RISK OF PLAYING CRICKET ON A COURT WITH AN OPEN AND OBVIOUS CRACK (SECOND DEPT).

Maharaj v City of New York, 2021 NY Slip Op 06841, Second Dept 12-8-21

Practice Point: An open and obvious condition, here a crack in a tennis court used for playing cricket, will trigger the assumption of the risk doctrine, insulating the property owner from liability.

EDUCATION-SCHOOL LAW, IMMUNITY, STUDENT INJURED IN AFTER-SCHOOL PROGRAM.

PLAINTIFF-STUDENT ALLEGED INJURY IN AN AFTERSCHOOL PROGRAM RUN BY TWO TEACHERS; THE DEPARTMENT OF EDUCATION IS IMMUNE FROM SUIT UNDER THE DOCTRINE OF GOVERNMENTAL IMMUNITY; THE PRINCIPAL'S APPROVAL OF THE AFTERSCHOOL PROGRAM WAS DISCRETIONARY AND NO SPECIAL DUTY WAS OWED PLAINTIFF (FIRST DEPT).

R.K. v City of New York, 2021 NY Slip Op 07092, First Dept 12-21-21

Practice Point: Here the NYC Department of Education was deemed immune from suit by a student injured in an after-school program run by two teachers. The principal's decision to allow the after-school program was discretionary and no special duty was owed the student. Therefore the governmental immunity doctrine applied.

EDUCATION-SCHOOL LAW, STUDENT INJURED IN GYM CLASS.

PLAINTIFF'S SON SUFFERED A BROKEN JAW IN A COLLISION WITH ANOTHER STUDENT DURING A GYM-CLASS TOUCH FOOTBALL GAME; THERE WERE QUESTIONS OF FACT WHETHER SUCH A COLLISION WAS FORESEEABLE AND WHETHER INADEQUATE SUPERVISION WAS THE PROXIMATE CAUSE (FOURTH DEPT).

Ismahan A. v Williamsville Bd. of Educ., 2021 NY Slip Op 07396, Fourth Dept 12-23-21

Practice Point: Here the inability to supervise several simultaneous touch football games in gym class, combined with allowing the students to call their own penalties, raised a question of fact about whether injuries to a student were foreseeable and proximately caused by a lack of supervision.

JUROR SUBSTITUTION AFTER DELIBERATIONS HAVE BEGUN, CONSTITUTIONAL LAW.

WHEN SUBSTITUTING AN ALTERNATE JUROR AFTER DELIBERATIONS HAVE BEGUN, THE JURY MUST BE INSTRUCTED TO START THE DELIBERATIONS OVER AND DISREGARD THE PRIOR DELIBERATIONS; THE OVER $14 MILLION PLAINTIFF'S VERDICT IN THIS TRAFFIC ACCIDENT CASE SHOULD HAVE BEEN SET ASIDE (SECOND DEPT).

Caldwell v New York City Tr. Auth., 2021 NY Slip Op 07537, Second Dept 12-29-21

Practice Point: A plaintiff in a civil jury trial is entitled under the NY Constitution to a verdict by a six-member jury. If an alternative juror is substituted after deliberations have started and the jury doesn't start over from scratch, that constitutional right is violated.

MEDICAL MALPRACTICE, EXPERT AFFIDAVITS.

THE DEFENDANTS' EXPERT'S AFFIDAVIT DID NOT SUFFICIENTLY ADDRESS THE ALLEGATIONS OF NEGLIGENCE IN THIS ACTION ALLEGING THE FAILURE TO CONDUCT A PROPER SUICIDE ASSESSMENT; THE FLAWS IN THE EXPERT'S AFFIDAVIT PROVIDE A USEFUL CHECKLIST FOR WHAT SHOULD HAVE BEEN ADDRESSED (SECOND DEPT).

Nodar v Pascaretti, 2021 NY Slip Op 06695, Second Dept 12-1-21

Practice Point: Medical malpractice actions are battles of the experts, even at the summary judgment stage. Where, as here, the defense expert's affidavit does not address every allegation of negligence raised by the plaintiff's expert, the defense motion for summary judgment will be denied at the appellate level.

MEDICAL MALPRACTICE, EXPERT AFFIDAVITS.

PLAINTIFF'S EXPERT'S AFFIDAVIT IN THIS MEDICAL MALPRACTICE ACTION DID NOT SPECIFICALLY ADDRESS DEFENDANT'S EXPERT'S OPINIONS, THEREBY WARRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANT (FIRST DEPT).

Akel v Gerardi, 2021 NY Slip Op 06792, First Dept 12-7-21

Practice Point: At the summary judgment stage, a medical malpractice action is a battle of expert affidavits. Here the plaintiff's expert's affidavit did not address all the allegations of malpractice raised by the defense expert's affidavit, thereby requiring judgment in favor of the defense.

MEDICAL MALPRACTICE, "QUALITY ASSURANCE" PROCEEDINGS, PRIVILEGE, EDUCATION-SCHOOL LAW, PUBLIC HEALTH LAW.

WHERE THE MINUTES OF A "QUALITY ASSURANCE" PEER-REVIEW COMMITTEE MEETING ASSESSING THE MEDICAL TREATMENT AFFORDED A PATIENT DO NOT IDENTIFY THE SPEAKERS, THE PARTY-STATEMENT EXCEPTION TO THE PUBLIC HEALTH LAW AND EDUCATION LAW PRIVILEGE APPLIES, MAKING ALL THE STATEMENTS BY UNIDENTIFIED SPEAKERS SUBJECT TO DISCOVERY BY THE PLAINTIFF IN THIS MEDICAL MALPRACTICE ACTION (SECOND DEPT).

Siegel v Snyder, 2021 NY Slip Op 07264, Second Dept 12-22-21

Practice Point: A "quality assurance" proceeding held by a healthcare provider to assess the treatment provided by its personnel is generally privileged except for statements made by a party to a lawsuit. In this case, the minutes of the proceeding did not identify the speakers and the court applied the party-statement exception to the privilege to the entire proceeding. All the statements made by unidentified participants were deemed discoverable by the plaintiff.

MEDICAL MALPRACTICE, INFORMED CONSENT.

THE "LACK OF INFORMED CONSENT" CAUSE OF ACTION IN THIS MEDICAL MALPRACTICE SUIT SHOULD NOT HAVE BEEN DISMISSED; THERE WAS NO EVIDENCE PLAINTIFF INSISTED ON THE PROCEDURE DESPITE THE RISKS OR DECLINED ANY PROFFERED EXPLANATION OF THE RISKS (SECOND DEPT).

Mirshah v Obedian, 2021 NY Slip Op 06994, Second Dept 12-15-21

Practice Point: As defenses to a "lack of informed consent" medical malpractice action the defendant may claim: "the patient assured the medical . . . practitioner that he [or she] would undergo the treatment, procedure or diagnosis regardless of

the risk involved, or the patient assured the medical . . . practitioner that he [or she] did not want to be informed of the matters to which he [or she] would be entitled to be informed." The evidence in this case was not sufficient to support those defenses.

MOVIE THEATER SECURTY, EMPLOYMENT LAW, VICARIOUS LIABILITY, CONFRONTATION BETWEEN MANAGER AND PATRONS.

ALTHOUGH DEFENDANT THEATER MANAGER WAS NOT A SECURITY GUARD, HIS RESPONSIBILITIES INCLUDED DEALING WITH UNRULY PATRONS AND KEEPING THE PREMISES SAFE; THERE WAS A QUESTION OF FACT WHETHER HE WAS ACTING WITHIN THE SCOPE OF HIS EMPLOYMENT WHEN HE THREATENED A PATRON WITH A PELLET GUN; THEREBY RAISING A QUESTION OF FACT WHETHER THE THEATER WAS LIABLE FOR THE MANAGER'S ACTIONS UNDER THE DOCTRINE OF RESPONDEAT SUPERIOR (SECOND DEPT).

Norwood v Simon Prop. Group, Inc., 2021 NY Slip Op 07006, Second Dept 12-15-21

Practice Point: Here there was a question of fact whether the manager of a movie theater was acting within the scope of his employment when he pointed a pellet gun at an unruly patron. Therefore there was a question of fact whether his employer was vicariously liable.

MUNICIPAL LAW, EMPLOYMENT LAW, CONTRACT LAW, ACCIDENTAL SHOOTING OF A POLICE OFFICER BY ANOTHER OFFICER.

WHEN CONFRONTED WITH AN ARMED SUSPECT, DEFENDANT POLICE OFFICER FIRED HER WEAPON AND STRUCK PLAINTIFF, ANOTHER POLICE OFFICER; THE TWO POLICE OFFICERS, WHO WORKED FOR DIFFERENT MUNICIPALITIES, WERE DEEMED CO-EMPLOYEES PURSUANT TO A POLICE MUTUAL AID AGREEMENT; THEREFORE PLAINTIFF'S NEGLIGENCE ACTION WAS PRECLUDED BY GENERAL OBLIGATONS LAW 11-106 (THIRD DEPT).

Ferretti v Village of Scotia, 2021 NY Slip Op 06895, Third Dept 12-9-21

Practice Point: General Obligations Law 11-106 prohibits a negligence suit by a police officer against another police officer who is deemed a co-employee.

MUNICIPAL LAW, SUICIDE, JUMPING FROM BRIDGE.

PLAINTIFF'S DECEDENT COMMITTED SUICIDE BY JUMPING FROM THE GEORGE WASHINGTON BRIDGE; THE COMPLAINT ALLEGING PORT AUTHORITY FAILED TO MAINTAIN THE BRIDGE IN A SAFE CONDITION SHOULD NOT HAVE BEEN DISMSSED (FIRST DEPT).

Lomtevas v City of New York, 2021 NY Slip Op 06953, First Dept 12-14-21

Practice Point: A city may be liable for failing to put up barriers which will prevent people from committing suicide by jumping from a bridge.

Table of Contents

PREMISES LIABILITY, NOTICE, CONSTRUCTIVE OR ACTUAL, CEILING COLLAPSE.

DEFENDANT PROPERTY OWNER DID NOT HAVE ACTUAL OR CONSTRUCTIVE NOTICE OF ANY DEFECTS IN THE CEILING THAT FELL ON PLAINTIFFS; THE RES IPSA LOQUITUR DOCTRINE DID NOT APPLY BECAUSE DEFENDANTS DID NOT HAVE EXCLUSIVE CONTROL OVER THE CONDITION (SECOND DEPT).

Matson v Dermer Mgt., Inc., 2021 NY Slip Op 06842, Second Dept 12-8-21

Practice Point: A property owner will not be liable for a collapsed ceiling under the res ipsa loquitur doctrine if the condition which caused the collapse is not demonstrated to have been under the exclusive control of the property owner. For example, if the collapse was caused by a water leak which only the property owner could have repaired, liability might be imposed. Here there was no evidence the unidentified "condition" which caused the collapse was exclusively within the property owner's control.

PREMISES LIABILITY, PLAINTIFF INJURED BY BROKEN WINDOW.

PLAINTIFF ALLEGED A CRACKED WINDOW PANE BROKE AND FELL, INJURING HER HAND; THERE WAS EVIDENCE OF AT LEAST 33 INSTANCES WHERE A WINDOW IN DEFENDANT'S BUILDING WAS IN NEED OF REPAIR (A RECURRING DANGEROUS CONDITION), RAISING A QUESTION OF FACT WHETHER DEFENDANT HAD A DUTY TO INSPECT THE WINDOWS (SECOND DEPT).

Butnik v Luna Park Hous. Corp., 2021 NY Slip Op 07314, Second Dept 12-22-21

Practice Point: A recurring condition, here problems with several windows in a building, may constitute constructive notice of a dangerous condition. In this case a cracked window pain broke and injured plaintiff's hand.

Table of Contents

PRODUCTS LIABILITY, MEDICAL MALPRACTICE, PREEMPTION.

THE PRODUCTS LIABILITY AND BREACH OF WARRANTY CAUSES OF ACTION ALLEGING THE FAILURE OF AN IMPLANTED MEDICAL DEVICE WHICH ASSISTS THE HEART WERE PREEMPTED BY FEDERAL LAW; THE CAUSES OF ACTION ALLEGING NEGLIGENCE ON THE PART OF THE ENGINEERS WHO REPLACED THE LEAD TO THE DEVICE WERE NOT PREEMPTED (SECOND DEPT).

Accordingly, they are not preempted. Arnold v Lanier, 2021 NY Slip Op 06666, Second Dept 12-1-21

Practice Point: Federal law preempts products liability actions stemming from implanted medical devices, but does not preempt negligence actions stemming from the repair of such devices. Here engineers replaced a lead to the implanted device during the surgical procedure. The action against the engineers was not preempted by the federal Medical Device Amendments of 1976 (MDA).

RESIDENTIAL HEALTH CARE FACILITIES, PUBLIC HEALTH LAW, AVAIABLE DAMAGES COMPARED TO WRONGFUL DEATH.

THE DAMAGES FOR PAIN AND SUFFERING AND DEATH UNDER THE PUBLIC HEALTH LAW PRIVATE RIGHT OF ACTION AGAINST RESIDENTIAL HEALTH CARE FACILITIES ARE NOT LIMITED TO THOSE AVAILABLE FOR WRONGFUL DEATH UNDER THE ESTATES, POWERS AND TRUSTS LAW (EPTL) (THIRD DEPT).

Hauser v Fort Hudson Nursing Ctr., Inc., 2021 NY Slip Op 07325, Third Dept 12-23-21

Practice Point: Damages for death and pain and suffering pursuant to a Public Health Law private right of action against a residential health care facility are not limited to those available for wrongful death pursuant to the Estates, Powers and Trusts Law.

RESIDENTIAL HEALTHCARE FACILITIES VS ASSISTED LIVING FACILITIES. PRIVATE RIGHT OF ACTION, PUBLIC HEALTH LAW.

THE PRIVATE RIGHT OF ACTION CREATED BY THE PUBLIC HEALTH LAW APPLIES TO "RESIDENTIAL HEALTH CARE FACILITIES," NOT TO "ASSISTED LIVING FACILITIES" (SECOND DEPT).

Broderick v Amber Ct. Assisted Living, 2021 NY Slip Op 06981, Second Dept 12-15-21

Practice Point: The private right of action in the Public Health Law allowing residents to sue "residential health care facilities" does not apply to "assisted living facilities."

Table of Contents

SLIP AND FALL, SLIPPERY PAINTED SURFACE.

THERE WAS A QUESTION OF FACT WHETHER THE DEFENDANT DEPARTMENT STORE SHOULD HAVE BEEN AWARE THE PAINT USED ON THE PARKING LOT SURFACE BECAME SLIPPERY WHEN WET AND WAS NOT APPROPRIATE FOR PEDESTRIAN-TRAFFIC AREAS (SECOND DEPT).

Westbay v Costco Wholesale Corp., 2021 NY Slip Op 07023, Second Dept 12-15-21

Practice Point: Although painted or waxed floors usually do not give rise slip and fall liability, here there was a warning that the painted surface became slippery when wet and should not be used in areas of high pedestrian traffic. The paint was used in the parking lot of defendant department store.

SPOLIATION THEORY CANNOT BE APPLIED TO PLAINTIFF'S SURGERY.

PLAINTIFF ALLEGED THE COLLAPSE OF A CEILING CAUSED A BULGING DISC IN HER SPINE; SUPREME COURT HELD THE SURGERY TO REPAIR THE DISC CONSTITUTED SPOLIATION OF EVIDENCE AND PROHIBITED PLAINTIFF FROM INTRODUCING ANY EVIDENCE OF THE SPINE INJURY; THE 1ST DEPARTMENT REVERSED HOLDING THAT A SPOLIATION ANALYSIS CANNOT BE APPLIED TO MEDICAL TREATMENT (FIRST DEPT).

Gilliam v Uni holdings, 2021 NY Slip Op 06798, First Dept 12-7-21

Practice Point: Surgical repair of an injury allegedly caused by the negligence of another, here the collapse of a ceiling, is not spoliation of evidence. Medical records provide sufficient evidence of the nature of the injury.

TRAINS, PLAINTIFF STRUCK, OPEN RUN DEFENSE.

PLAINTIFF WAS STRUCK BY A TRAIN; THE "OPEN RUN" DEFENSE ALLOWS A TRAIN OPERATOR TO PROCEED NORMALLY AND ASSUME A PERSON SEEN AHEAD ON THE TRACKS WILL GET OUT OF THE WAY; THE TRIAL COURT PROPERLY INSTRUCTED THE JURY THAT THE "OPEN RUN" DEFENSE APPLIES WHETHER THE ACCIDENT HAPPENS IN DAYLIGHT OR, AS HERE, AT NIGHT (SECOND DEPT).

Kunnemeyer v Long Is. R.R., 2021 NY Slip Op 07281, Second Dept 12-22-21

Practice Point: The "open run" defense, which allows the operator of a train to assume someone seen ahead on the tracks will get out of the way, applies whether the plaintiff was struck by the train in daylight or at night.