NEW YORK APPELLATE DIGEST, LLC

Negligence
December 2021

An Organized Compilation of the Summaries of Selected Decisions Addressing Negligence Released by Our New York State Appellate Courts and Posted on the New York Appellate Digest Website in December 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.

Table of Contents

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).

The Third Department, reversing Supreme Court, determined plaintiff-skier's (Bodden's) negligence complaint should not have been dismissed on the ground she assumed the risks inherent in skiing. Plaintiff was a novice and was taking a lesson at the time she was injured. The instructor had plaintiff go down the "bunny hill" a few times and then took plaintiff to an intermediate hill. Plaintiff lost control, was unable to stop and struck a fence:

A factual dispute remains as to whether Bodden [plaintiff] expressed reservations to the instructor about whether she was ready to progress to Benson's Glade and whether the instructor encouraged her in a manner that was overzealous under the circumstances. It is also unclear whether the instructor taught Bodden, before going on the trail, how to safely fall if she could not remain in the pizza wedge formation, and whether she yelled out to Bodden to do so after she lost control.

Although Bodden conceded that she knew the risks associated with skiing and had successfully completed several runs down the bunny hill, she had limited opportunity to practice the technique that she had been taught for slowing down and stopping under real life circumstances, as the bunny hill was primarily flat and, according to Bodden, "skiers stop[ped] on their own there." Not to be overlooked is the fact that Bodden was a novice skier and was taken on a trail designated as intermediate on the trail map. We recognize that defendants proffered an affidavit from the instructor explaining that, although Benson's Glade is formally designated an intermediate trail, it is more akin to a beginner's trail. Notably, however, the instructor revealed that she was aware of an area of Benson's Glade that had a "sharper turn" and had "witnessed multiple people coming straight down and ending up in the trees" near that area. Such testimony creates a question of fact as to whether Benson's Glade was appropriate for a novice skier such as Bodden. Viewing the evidence in the light most favorable to plaintiffs, we conclude that triable issues of fact exist as to whether the instructor unreasonably increased the risk of injury and whether Bodden voluntarily assumed such risk … . 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.

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).

The Second Department determined defendants' summary judgment motion was properly granted in this slip and fall, assumption of the risk case. Plaintiff alleged he stepped in a hole inside a crack in a tennis court while playing cricket. The crack was deemed open and obvious:

"Assumption of risk is not an absolute defense but a measure of the defendant's duty of care" … . The defendants' duty is "to exercise care to make the conditions

as safe as they appear to be. If the risks of the activity are fully comprehended or perfectly obvious, [the participant] has consented to them and defendant has performed its duty" … . "This includes risks associated with the construction of the playing surface and any open and obvious condition on it, including less than optimal conditions" . "It is not necessary to the application of assumption of risk that the injured plaintiff have foreseen the exact manner in which his or her injury occurred, so long as he or she is aware of the potential for injury of the mechanism from which the injury results" … . "However, participants are not deemed to have assumed risks that are concealed or unreasonably increased over and above the usual dangers that are inherent in the sport" … . Further, "the doctrine of assumption of risk does not exculpate a landowner from liability for ordinary negligence in maintaining a premises" … .

Here, the defendants' submissions in support of their motion, which included the plaintiff's deposition testimony and photographs allegedly depicting the accident site, reveal that the crack in the surface of the subject tennis courts, which allegedly caused the plaintiff's accident, was clearly visible … . In opposition, the plaintiff failed to raise a triable issue of fact as to whether the open and obvious crack concealed the depth and extent of the alleged hole … . 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).

The First Department determined the NYC Department of Education (DOE) was immune from suit by a student who alleged injury in an afterschool program run two teachers (Polanish and Gallagher) called "Mind, Body & Sport" (MBS). The school principal's approval of the program was a discretionary act and no special duty was owned plaintiff:

The school principal's granting of a permit for MBS to operate on school grounds was a discretionary action taken during the performance of a governmental function, and thus, the DOE was shielded from liability by the doctrine of governmental immunity … . Plaintiffs have failed to establish that the DOE owed the infant plaintiff a special duty that would render the DOE liable to plaintiffs for negligent acts … . Likewise, as to the MBS flyer, the DOE cannot be held liable through the doctrine of apparent authority for issuance of the flyer without the required disclaimer. As with the approval of the permit, the school principal's approval of the MBS flyer involved the exercise of her reasoned judgment and discretionary authority, thus entitling DOE to governmental function immunity … .

The DOE also cannot be held liable for negligently supervising Polanish and Gallagher's conduct during the MBS program. That the DOE permitted MBS to run as an afterschool program on school grounds does not provide a basis for holding the DOE liable, since "[a] defendant generally has no duty to control the conduct of third persons so as to prevent them from harming others, even where as a practical matter defendant can exercise such control" … . 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).

The Fourth Department, reversing Supreme Court, determined the school's motion for summary judgment in this negligent supervision action shiould not have been granted. Plaintiff's son, a high school freshman, suffered a broken jaw during a touch football game during gym class when a taller student collided with him. The students were to call their own penalties and, according to plaintiff's son, there were four games going on at once:

The testimony of the physical education teacher raised an issue of fact with respect to notice inasmuch as it established that, on the day before the collision, there was a "very similar" incident involving a collision between two boys during a touch football game in physical education class, resulting in injury. Nonetheless, the students in his game were, according to the testimony of plaintiff's son, expected to call their own penalties. In addition, although the substitute teacher who was supervising the class that day testified that the class was divided into three separate games and that he was able to supervise them all simultaneously, plaintiff's son further testified that the class was divided into four games, and the substitute teacher acknowledged that he did not see the collision that caused the injury to plaintiff's son.

… Plaintiff's son testified that he believed the collision was intentional because he "was nowhere near the ball handler" at the time he was hit from behind and "the

only way" that the other student, who was six inches taller, could have hit plaintiff's son's jaw was if he had lowered his shoulder. Thus, considering that testimony together with the testimony that the students were expected to call their own penalties, we conclude that there exists a question of fact whether this was a "foreseeable consequence of the situation created by the school's negligence" … . 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).

The Second Department, reversing the over $14 million judgment and ordering a new trial on damages, in a full-fledged opinion by Justice Barros, determined defendants' motion to set aside the verdict in this traffic accident case should have been granted. An alternate juror was substituted after deliberations began. The jury should have been instructed to begin deliberations anew:

… [W]e address whether the 2013 amendments to CPLR 4106, which changed the statute to allow trial courts to substitute a regular juror with an alternate juror even after deliberations have begun, may be reconciled with the constitutional right to a trial by a six-member jury wherein each juror deliberates on all issues (see NY Const, art I, § 2 …). We hold that to reconcile CPLR 4106 with the constitutional and statutory requirements for a civil jury verdict, the trial court must, upon substituting an alternate juror in place of a regular juror after deliberations have

begun, provide an instruction to the jury directing them, inter alia, to restart their deliberations from the beginning with the substituted juror and disregard and set aside all prior deliberations. Under the circumstances of this case, the Supreme Court's failure to give that instruction resulted in an invalid verdict which, among other things, deprived the defendants of their request to poll each of the jurors whose votes were counted as part of the verdict … , and their right to "a process in which each juror deliberates on all issues and attempts to influence with his or her individual judgment and persuasion the reasoning of the other five" … . 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).

The Second Department, reversing Supreme Court, determined the defendants' expert did not sufficiently address the allegations of negligence. Therefore defendant's motion for summary judgment in this medical malpractice action should have been denied. Plaintiffs alleged defendants did not properly conduct a suicide assessment of plaintiffs' decedent (Nodor), who committed suicide four weeks after he was seen by defendants. The description of the flaws in the expert's affidavit reads like a checklist for the required contents of a defense expert's affidavit in a medical malpractice action:

… [T]he defendants failed to establish, prima facie, that they did not depart from the standard of care, or that any such departure did not proximately cause Nodar's

injuries. With respect to the plaintiffs' allegations that the defendants failed to conduct a proper suicide risk assessment during a scheduled doctor visit by Nodar, which was just weeks before Nodar attempted suicide by jumping off his roof, the defendants' expert failed to set forth the standard of care for conducting a suicide risk assessment … . The expert's conclusory assertion that the suicide risk assessment that was conducted on that date did not deviate from the standard of care was insufficient to refute the plaintiffs' specific allegations of negligence … . In addition, the defendants' expert did not address the plaintiffs' allegation that the defendants failed to schedule or conduct a timely follow-up visit with Nodar after changing one of his antidepressant medications and adding an anti-anxiety medication, or otherwise assert that the one-month follow-up appointment that Nodar was advised to do was appropriate under the circumstances … . Moreover, the defendants' expert failed to establish, prima facie, that any departure from the standard of care did not proximately cause Nodar's injuries … . 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).

The Frist Department determined plaintiff's expert's affidavit in this medical malpractice action was conclusory and did not address defendants' expert's opinions specifically. Therefore defendant's motion for summary judgment was properly granted:

… [P]laintiff failed to raise an issue of fact. His expert, who is board certified in surgery and thoracic surgery, was qualified to render an opinion … . However, the opinion is conclusory and speculative and fails to address defendant's expert's opinions specifically … . In addition, in forming his opinion, plaintiff's expert disregarded facts and medical evidence in the record, including a post-operative pathology report that indicated that plaintiff had a connective tissue disorder that put him at greater risk for developing serious complications if his aortic aneurysm were left untreated … . 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).

The Second Department, in a full-fledged opinion by Justice Christopher, determined the party-statement exception to the privilege afforded statements made in a peer-review "quality assurance" committee's review of the medical treatment afforded a patient applied to all of the statements made by speakers who were not identified in the meeting minutes. The defendants, who were asserting the privilege, were unable to demonstrate the statements attributed in the minutes to the "committee" were not made by a party and therefore not subject to the party-statement exception to the privilege. In other words, the statements made at the

meeting by unidentified speakers were discoverable by the plaintiff in this medical malpractice action:

Requiring a defendant who is asserting the quality-assurance privilege to identify who made the statements at a medical or quality assurance review meeting, so as to demonstrate that no party statements subject to disclosure are being withheld, will further the goals of the quality-assurance privilege … . By identifying the maker of the statements at the medical or quality-assurance review meetings, only those statements that are made by a party will be subject to disclosure, and only those statements entitled to protection from disclosure will be protected. … [I]n order to avail itself of the privilege afforded by Education Law § 6527(3) and Public Health Law § 2805-m(2), the party asserting the privilege must demonstrate that no party statements subject to disclosure are being withheld, and thus must identify who said what at the meeting. …

… [T]he party-statement exception applied to those statements in the peer-review committee meeting minutes that were attributed to the committee, and for which there was no indication as to who specifically made the statements, as they were not entitled to the quality-assurance privilege set forth in Education Law § 6527(3) and Public Health Law § 2805-m(2). 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).

The Second Department, reversing (modifying) Supreme Court) determined the "lack of informed consent" to back surgery (implantation of an X-STOP device) should not have been dismissed:

As a defense to a medical malpractice action premised upon lack of informed consent, a practitioner may proffer evidence that "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" (Public Health Law § 2805-d[4][b]). Here, although [plaintiff's] deposition testimony made clear that he deferred to [defendant surgeon's] judgment as to whether he should undergo a procedure and, if so, which procedure, it does not establish that [plaintiff] either insisted on the procedure to implant the X-STOP devices, rather than other treatment options, regardless of risk, or that he refused any proffered advice. On the contrary, the record establishes that, far from insisting on a contraindicated procedure, [plaintiff] relied upon [defendant surgeon's] professional expertise in determining the correct course of treatment. Likewise, although [defendant surgeon's] testimony establishes that he explained the benefits of performing the procedure to implant the X-STOP devices rather than a laminectomy, he did not testify that he offered, or that [plaintiff] declined, any proffered explanation of the risks and limitations of the procedure to implant the X-STOP devices. 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).

The Second Department, reversing (modifying) Supreme Court, determined the defendant movie- theater manager, Adams, may have been acting within the scope of his employment by the theater, AMC, when he threatened plaintiff, a theater patron, with a pellet gun. Therefore AMC's motion for summary judgment should not have been granted:

… [T]he general manager of the theater, Adams's supervisor, stated, during his deposition, that managers, like Adams, have security-related responsibilities, including ensuring that the theater is safe for customers and dealing with unruly patrons. And the plaintiff, during his deposition, stated that he believed Adams was a security guard.

When a business employs security guards or bouncers to maintain order, the use of physical force may be within the scope of their employment … . Adams did not hold either of these job titles, but his responsibilities included maintaining order at the theater, ensuring the safety of customers and staff, and, if necessary, facilitating the removal from the theater of "disruptive or potentially violent" customers. The accomplishment of these ends by means prohibited by the AMC defendants' policy was not necessarily unforeseeable. … Unquestionably, Adams's response to the

plaintiff and his friends was "in poor judgment" … and contrary to the AMC defendants' policy, but "this in itself does not absolve [the AMC] defendants of liability for his acts" … . 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).

The Third Department, reversing (modifying) Supreme Court, determined that plaintiff police officer and defendant police were co-employees pursuant a Police Mutual Aid Agreement between two municipalities, the Town of Glenville and the Village of Scotia. Plaintiff, a Glenville police officer, alleged defendant , a Scotia police officer, was negligent in firing her weapon at a suspect, thereby causing a bullet to strike plaintiff. Because the plaintiff and defendant were deemed co-employees pursuant to the agreement, General Obligations Law 11-106 prohibited plaintiff from suing in negligence:

Pursuant to General Obligations Law § 11-106, a police officer may now assert a cause of action sounding in negligence "for injuries suffered while in the line of duty against entities other than municipal employers and fellow workers" … . The issue thus boils down to whether plaintiff and Peck [defendant] were acting as coemployees at the time of the incident, which would bar plaintiff's action. Based

primarily upon the operative provisions of the Agreement, we find that they were coemployees on the night of the incident, thereby insulating defendants from liability. 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).

The First Department, reversing (modifying) Supreme Court, determined the complaint alleging defendant Port Authority breached its duty to maintain the George Washington Bridge (GWB) in a reasonably safe condition must be reinstated. Plaintiff's decedent committed suicide by jumping from the bridge:

Plaintiff's decedent died by suicide when he jumped from the George Washington Bridge (GWB), which is owned and operated by the Port Authority. Contrary to the Port Authority's contention that the complaint is addressed to actions taken in its governmental capacity, both this Court and the Second Department have recently held, in cases involving similar facts, that the Port Authority's responsibility for maintaining the guardrail on the pedestrian walkway over the Bridge is a proprietary function rather than a governmental function … . .. [P]laintiff states a cause of action by alleging that the Port Authority, as a property owner, "failed to maintain the GWB in a reasonably safe condition by negligently failing to install suicide barriers along the walkways to prevent suicides," thus presenting a foreseeable risk of harm in light of the allegations concerning the history of the George Washington Bridge's walkway as a place where frequent suicides occur. 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.

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).

The Second Department, reversing Supreme Court, determined defendants' motion for summary judgment in this premises liability case should have been granted. Plaintiffs alleged a portion of their bedroom ceiling collapsed on them. Defendant owner of the property demonstrated the lack of actual or constructive notice of any defect in the ceiling. The res ipsa loquitur doctrine did not apply because the condition was not under defendants' exclusive control:

The owner of property has a duty to maintain its property "in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk" … . Here, the defendants established their entitlement to judgment as a matter of law by demonstrating, prima facie, that they did not have actual or constructive notice that the bedroom ceiling was in a defective condition … . The evidence submitted by the defendants established that at least one of the plaintiffs had been residing in the third-floor apartment for more than four years, and that prior to the accident, the plaintiffs did not notice any defects in the bedroom ceiling, and had never complained to the defendants about the bedroom ceiling. Moreover, the debris and the ceiling from which it had fallen were dry, and there was no evidence of a leak in the building at or about the time of the accident.

In opposition, the plaintiffs failed to raise a triable issue of fact. Contrary to the contention of the plaintiffs' expert, in the absence of a warning about the existence of a latent defect, there was no duty to remove portions of the ceiling plaster to

discover what lay behind it … . Additionally, the plaintiffs failed to raise a triable issue of fact as to whether the doctrine of res ipsa loquitur applied to this case since the defendants did not have the requisite exclusive control over the allegedly defective condition … . 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).

The Second Department, reversing Supreme Court, determined there was a question of fact whether defendant had constructive notice of a recurring condition, i.e., windows in need repair in defendant's (Luna's) building. Plaintiff alleged a cracked window shattered, injuring her hand:

Luna's submissions, which included a transcript of the deposition testimony of its building superintendent, failed to eliminate all triable issues of fact as to whether it had constructive notice of a recurrent dangerous condition. The superintendent testified that in the period of approximately two years preceding the accident, Luna was made aware of 33 instances in which a window in the building needed to be repaired … . Moreover, the superintendent testified that it was "normal" for

windows in the building to break. While "[a] general awareness of a recurring problem is insufficient, without more, to establish constructive notice of the particular condition that caused the accident" …, the superintendent's testimony regarding the frequency of specific complaints of window damage in the building raised triable issues of fact as to whether Luna had an obligation to inspect the windows … . 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.

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).

The Second Department, reversing (modifying) Supreme Court, determined the products liability and breach of warranty causes action alleging decedent's death was caused by an implanted medical device which assisted the heart were preempted by the Federal Food, Drug, and Cosmetic Act as amended by the Medical Device Amendments of 1976 (MDA). But the causes of action alleging negligence of the engineers who replaced a lead on the device were not preempted by the MDA:

The MDA … includes an express preemption provision, prohibiting state requirements "with respect to a device intended for human use" (21 USC 360k[a]) which are "different from, or in addition to, any requirement" … applicable under federal law and which "relate[ ] to the safety or effectiveness of the device" … . Pursuant to this provision, it has been held that common-law causes of action which

"challenge the safety and effectiveness of a medical device and seek to impose requirements that are 'different from, or in addition to,' federal requirements," such as those sounding in products liability and breach of warranty, are preempted … .

… [P]laintiff … claims in her first and fifth causes of action that negligent acts or omissions of the engineers … , allegedly committed during the course of their replacement of the lead in the decedent's LVAD, were a proximate cause of his death. Those claims in those causes of action do not "challenge the safety and effectiveness of a medical device and seek to impose requirements" different or additional to federal law … . 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).

The Third Department, in a full-fledged opinion by Justice Garry, explained the differences between damages available for the private right of action against residential health care facilities under the Public Health Law, and the damages available for wrongful death under the Estates, Powers and Trusts Law (EPTL). (1) Public Health Law 2801-d encompasses compensatory and punitive damages for death; (2) the Public Health Law "death" damages are not limited to the pecuniary

loss suffered by surviving family members as they are under the EPTL; and (3) damages under the Public Health Law are not the same as pain and suffering under the EPTL and do not require proof the decedent experienced cognitive awareness of the injury:

The express language of Public Health Law § 2801-d (1) provides that a nursing home facility is liable to a "patient" for "injuries suffered as a result of" the deprivation of a right or benefit conferred by any contract, statute or regulation, expressly defining "injury" to include "death of a patient." …

… [T]he wrongful death and survivorship statutes do not permit damages to a person for his or her own death. Hence, imposing here [theese] limits … would render meaningless a nursing home's potential statutory liability to a patient for his or her death. …

Although, at common law, damages for loss of enjoyment of life cannot be awarded to a person whose injuries preclude awareness of the loss as such damages serve no compensatory purpose … , the Legislature chose to allow such damages through the [Public Health Law] statute at issue here to serve a purpose beyond simply compensating the victim, i.e., to deter violations of patient rights. "It is precisely because of the inadequacy of the existing common-law causes of action to redress the abuse of patients in nursing homes that Public Health Law § 2801-d was enacted … . 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).

The Second Department determined the Public Health Law 2801-d and 2803-c causes of action against defendant "assisted living facility" should have been dismissed. The private right of action created by the Public Health Law applies only to "residential health care facilities:

… [T]he plaintiff concedes that the facility in which Kramer was a resident was licensed as an "assisted living" facility, but asserts that it was operated as a de facto residential health care facility by virtue of the health-related services it provided, including management of medications, assistance with dressing and eating, and visits by nursing staff and physicians. Even accepting these allegations as true, they are insufficient to state a claim that the assisted living facility in which Kramer resided was a residential health care facility against which a private right of action pursuant to Public Health Law article 28 may be maintained (see Public Health Law § 2801[3] …). 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."

SLIP AND FALL, NOTICE, MUNICIPAL LAW.

IN THIS SIDEWAIK ICE-AND-SNOW SLIP AND FALL CASE, THE MUNICIPALITY DEMONSTRATED IT DID NOT HAVE WRITTEN NOTICE OF THE CONDITION, AND THE ABUTTING PROPERTY OWNERS FAILED TO DEMONSTRATE THEY DID NOT CREATE THE CONDITION (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court in this sidewalk ice-and-snow slip and fall case, determined; (1) the municipality demonstrated it did not have written notice of the ice-and-snow condition and plaintiff did not raise a question of fact about whether the municipality created the condition or benefitted from a special use; and (2), the abutting property-owner defendants did not demonstrate that they did not create the ice-and-snow condition. Summary judgment was properly granted to the municipality, but should not have been granted to the abutting property owners:

Generally, liability for injuries sustained as a result of a dangerous condition on a public sidewalk or street is placed on the municipality, and not on the owner or lessee of abutting property … . There is an exception to this general rule, however, where the landowner has affirmatively created the dangerous condition … . The [abutting property-owner defendants] failed to demonstrate, prima facie, that their snow removal efforts around the time of the injured plaintiff's fall did not create or exacerbate the allegedly dangerous condition on the roadway … . Thompson v Nassau County, 2021 NY Slip Op 06878, Second Dept 12-8-21

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).

The Second Department, reversing Supreme Court in this slip and fall case, determined there was a question of fact whether the department store, Costco, should have been aware that paint used in its parking lot was slippery when wet:

"A defendant may not be held liable for the application of 'wax, polish, or paint to a floor . . . unless the defendant had actual, constructive, or imputed knowledge' that the product could render the floor dangerously slippery" … . Here, Costco established, prima facie, that it did not have actual, constructive, or imputed knowledge that the subject paint could render the walkway slippery … .

In opposition, however, the plaintiff raised a triable issue of fact … . The plaintiff relied on, among other things, an "application bulletin" for the traffic marking paint used by Appell [the company hired by Costco], which was annexed to the expert report submitted by Appell … . The application bulletin acknowledges the inherent danger present when painted surfaces become wet, and explicitly states that the paint "should not be used to paint large areas subject to pedestrian traffic." Considering the size of the painted area outside of the store entrance, there was a triable issue of fact as to whether Costco should have known that the product could render the parking lot slippery. 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).

The First Department, reversing Supreme Court, in a full-fledged opinion by Justice Scarpulla, determined plaintiff's surgery to repair a bulging disc in her spine should not have been deemed spoliation of evidence. Plaintiff alleged the bulging disc was caused by the collapse of the ceiling in her apartment. Supreme Court prohibited plaintiff from introducing any evidence of the disc injury:

Spoliation analysis has long been applied to a party's destruction of inanimate evidence … .

The state of one's body is fundamentally different from inanimate evidence, and medical treatment, including surgery, is entirely distinct from the destruction of documents or tangible evidence which spoliation sanctions attempt to ameliorate. To find that a person has an "obligation," to preserve his or her body in an injured state so that a defendant may conduct an ME, is antithetical to our belief in personal liberty and control over our own bodies. 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).

The Second Department, in a full-fledged opinion by Justice Wooten, determined the jury instruction for the "open run" defense was proper. Plaintiff was lying near train tracks with one leg over the rails when he was struck by the defendant's train at night. The "open run" defense allows the train operator to proceed normally when someone is seen ahead on the tracks and assume he or she will get out of the way. The question raised by this case is whether the "open run" defense applies only in the daylight hours. The Second Department held the trial judge properly concluded the defense applied at night because the sound of the train would be heard by, and the light from the train would be seen to, anyone on the tracks. Although the jury was instructed on the "open run" defense, the uncontested evidence at trial demonstrated the train personnel sounded the horn and initiated an emergency stop when plaintiff was first spotted on the tracks. Any error in the jury instruction, therefore, would have been harmless:

… [W]e hold that the open run defense is not exclusively limited to cases involving daytime train accidents, but rather may be applicable under any circumstances in which an oncoming train would be readily observable to a person on or near the tracks making reasonable use of his or her senses. 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.