NEW YORK APPELLATE DIGEST, LLC

Negligence Reversal Newsletter
March 2022

An Organized Compilation of the Summaries of the Most Significant Decisions Addressing Negligence, Mostly Reversals, Released by Our New York State Appellate Courts and Posted on the New York Appellate Digest Website in March 2022, Distilled to Practice Points, One or Two Sentences Each. 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 the Reversal Newsletter.

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BUS PASSENGERS, MUNICIPAL LAW.

THE JURY COULD HAVE FOUND PLAINTIFF BUS PASSENGER'S INJURIES WERE CAUSED BY THE NORMAL JERKS AND JOLTS OF BUS TRAVEL AND NOT BY ANY NEGLIGENCE ON DEFENDANTS' PART; THE MOTION TO SET ASIDE THE DEFENSE VERDICT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

Jones v Westchester County, 2022 NY Slip Op 01774, Second Dept 3-16-22

Practice Point: Here the testimony of the bus driver and the surveillance video allowed the jury to determine plaintiff bus-passenger's injuries were caused by normal movements of the bus and not by the driver's negligence. Therefore the plaintiff's motion to set aside the defense verdict should not have been granted.

BUS PASSENGERS.

THERE WAS NO OBJECTIVE EVIDENCE TO SUPPORT PLAINTIFF'S ALLEGATION THAT THE CITY BUS STOPPED "VIOLENTLY," CAUSING HER TO FALL; THE PLAINTIFF'S VERDICT SHOULD HAVE BEEN SET ASIDE AS AGAINST THE WEIGHT OF THE EVICENCE (SECOND DEPT).

Stark v New York City Tr. Auth., 2022 NY Slip Op 01338, Second Dept 3-2-22

Practice Point: The plaintiff's claim the bus stopped "violently" causing her to fall was not supported by any objective evidence, including her description of the fall. Plaintiff's verdict set aside.

DUTY TO WARN.

PLAINTIFF, WHILE ATTENDING A BEACH-FRONT PARTY, SUFFERED SEVERE INJURY WHEN HE DOVE OFF A BULKHEAD INTO SHALLOW WATER; HIS ACTION AGAINST THE PROPERTY OWNER FOR FAILURE TO WARN SHOULD NOT HAVE BEEN DISMISSED; THE PROPERTY OWNER'S INDEMNIFICATION ACTION AGAINST THE PERSON WHO RENTED THE AREA FOR THE PARTY WAS DISMISSED (SECOND DEPT).

Reilly v Patchogue Props., Inc., 2022 NY Slip Op 01334, Second Dept 3-2-22

Practice Point: Plaintiff was severely injured when he dove off a bulkhead into shallow water on defendant's property. There was a question of fact, based upon the location of the bulkhead near a boating channel, whether there was a duty to warn of the shallow water.

LANDLORD-TENANT, OUT-OF-POSSESSION LANDLORD.

DEFENDANT OUT-OF-POSSESSION LANDLORD WAS NOT OBLIGATED BY THE LEASE OR ANY STATUTE TO REPAIR THE FLOOR OF A WALK-IN FREEZER IN THE LEASED PREMISES; PLAINTIFF ALLEGED DENTS IN THE METAL FLOOR CAUSED HIS LADDER TO FALL OVER; THE LANDLORD'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (SECOND DEPT).

Lopez v Mattone Group Raceway, LLC, 2022 NY Slip Op 01779, Second Dept 3-16-22

Practice Point: Here the lease did not require the out-of-possession landlord to maintain the leased premises and there was no statute imposing a duty to maintain the premises on the landlord. Therefore the out-of-possession landlord was not liable for dents in the walk-in freezer's floor (in the leased premises) which allegedly caused plaintiff's ladder to fall.

LEGAL MALPRACTICE, REAL ESTATE.

PLAINTIFFS' LEGAL MALPRACTICE ACTION SHOULD NOT HAVE BEEN DISMISSED; PLAINTIFFS' 2010 BREACH OF A CONDOMINIUM-SALE CONTRACT ACTION WAS DISMISSED ON STATUTE OF FRAUDS GROUNDS; WHEN A WRITTEN CONTRACT SUBSEQUENTLY SURFACED, DEFENDANT ATTORNEYS DID NOT MOVE TO RENEW, VACATE OR APPEAL THE ORDER (FIRST DEPT).

Komolov v Popik, 2022 NY Slip Op 01966, First Dept 3-22-22

Practice Point: The defendant attorneys apparently represented plaintiffs in their 2010 action for breach of a condominium-sale contract. The 2010 action was dismissed on statute of frauds grounds. Subsequently a written contract surfaced

and defendant attorneys did not move to renew, vacate or appeal the order. Plaintiffs' legal malpractice complaint should not have been dismissed.

LEGAL MALPRACTICE, ATTORNEY-CLIENT RELATIONSHIP.

PLAINTIFF DID NOT HAVE TO PROVE THE EXISTENCE OF A RETAINER AGREEMENT TO DEMONSTRATE AN ATTORNEY-CLIENT RELATIONSHIP WITH DEFENDANTS IN THIS LEGAL MALPRACTICE ACTION (SECOND DEPT).

Ripa v Petrosyants, 2022 NY Slip Op 01336, Second Dept 3-2-22

Practice Point: In a legal malpractice action, the plaintiff need not prove the existence of a retainer agreement to demonstrate there was an attorney-client relationship.

LOSS OF SERVICES.

PLAINTIFFS-PARENTS' CAUSE OF ACTION FOR LOSS OF THEIR INJURED DAUGHTER'S SERVICES SHOULD HAVE BEEN DISMISSED; THE PARENTS DEMONSTRATED ONLY THAT THEIR DAUGHTER PERFORMED SERVICES IN HER EMPLOYMENT AT THE COMPANIES OWNED BY THE PARENTS (FIRST DEPT).

Klaar v Fedex Corp., 2022 NY Slip Op 01393, First Dept 3-3-22

Practice Point: Here the injured daughter's parents sought damages for "loss of (their daughter's) services." Damages for loss of "services" performed for the parents as part of the daughter's employment by the parents' companies were not recoverable under a "loss of services" theory.

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MEDICAL MALPRACTICE, AMEND ANSWERS, AFFIRMATIVE DEFENSES, PLAINTIFF'S WIEGHT AND SMOKING.

CODEFENDANTS' MOTIONS TO AMEND THEIR ANSWERS IN THIS MED MAL CASE TO ALLEGE PLAINTIFF'S CULPABLE CONDUCT AND COMPARATIVE NEGLIGENCE (RE: HER WEIGHT AND SMOKING) SHOULD HAVE BEEN GRANTED; THE DELAY IN MAKING THE MOTION CAUSED NO PREJUDICE; GOOD CAUSE FOR THE DELAY NEED NOT BE SHOWN; FAILURE TO INCLUDE THE AMENDED PLEADINGS WITH THE MOTION PAPERS AND DEFECTS IN VERIFICATIONS SHOULD HAVE BEEN OVERLOOKED (FIRST DEPT).

Johnson v Montefiore Med. Ctr., 2022 NY Slip Op 01418, First Dept 3-8-22

Practice Point: In a med mal case, plaintiff's weight and smoking habit maybe grounds for affirmative defenses.

Practice Point: There was no need to submit a certificate of merit with the motion to amend the answers.

Practice Point: Where there has been no prejudice to the plaintiff, the unexcused delay in seeking amendment of the answers here was not a sufficient ground for denying the amendment.

Practice Point: Failure to include the proposed amended answers with the motion for leave to amend, and defects in defendants' verifications, were technical defects which should have been overlooked.

MEDICAL MALPRACTICE, CATARACT SURGERY.

THE DEFENDANT OPHTHALMOLOGICAL SURGEON'S MOTION TO SET ASIDE THE PLAINTIFF'S VERDICT IN THIS MEDICAL MALPRACTICE ACTION WAS PROPERLY DENIED; CRITERIA EXPLAINED; PLAINTIFF LOST SIGHT IN HER RIGHT EYE AFTER CATARACT-REMOVAL SURGERY (FIRST DEPT).

Rozon v Schottenstein, 2022 NY Slip Op 01278, First Dept 3-1-22

Practice Point: Plaintiff lost sight after cataract-removal surgery. The defense motion to set aside the verdict was properly denied.

MEDICAL MALPRACTICE, EXPERT AFFIDAVITS.

THE EXPERT AFFIDAVITS SUBMITTED ON BEHALF OF THE DEFENDANTS IN THIS MEDICAL MALPRACTICE ACTION DID NOT ADDRESS ALL THE ALLEGATIONS OF NEGLIGENCE; DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

Martinez v Orange Regional Med. Ctr., 2022 NY Slip Op 01780, Second Dept 3-16-22

Practice Point: At the summary judgment stage, medical malpractice actions are determined by the expert affidavits. If a party's expert does not address all the allegations of negligence, that party's motion for summary judgment will be denied without the need to even consider the opposing papers.

MEDICAL MALPRACTICE, VICARIOUS LIABILITY.

THE COMPANY WHICH STAFFED THE HOSPITAL EMERGENCY ROOM DID NOT DEMONSTRATE THE PHYSICIANS WHO TREATED PLAINTIFF IN THIS MEDICAL MALPRACTICE ACTION WERE INDEPENDENT CONTRACTORS, AS OPPOSED TO EMPLOYEES FOR WHOM THE COMPANY WOULD BE VICARIOUSLY LIABLE (SECOND DEPT).

Perez v NES Med. Servs. of N.Y., P.C., 2022 NY Slip Op 02031, Second Dept 3-23-22

Practice Point: In this medical malpractice action, the plaintiff sued the company which staffed the emergency room under a contract with the hospital. The staffing company moved for summary judgment arguing the treating physicians were independent contractors, not employees, and, therefore, the company was not vicariously liable for the acts or omissions of the physicians. The motion should not have been granted. The decision lays out the criteria for the independent-contractor versus employee analysis.

MUNICIPAL LAW, NO-KNOCK WARRANTS.

THE TARGETS OF A NO-KNOCK WARRANT ARE OWED A "SPECIAL DUTY" SUCH THAT A MUNICIPALITY MAY BE LIABLE FOR THE NEGLIGENCE OF THE POLICE OFFICERS EXECUTING THE WARRANT (CT APP).

Ferreira v City of Binghamton, 2022 NY Slip Op 01953, CtApp 3-22-22

Practice Point: This opinion lays out in detail the confusing interplay between the "special duty" requirement for a negligence suit against a municipality and the "governmental-function immunity" affirmative defense which can defeat a negligence suit even where a special duty is deemed to exist. Here the Court of Appeals determined those targeted by a no-knock warrant are owed a special duty such that a party injured in the warrant-execution may sue the municipality for the

negligence of a police officer. The dissent argued the "special duty" requirement is itself invalid and an ordinary negligence standard should apply.

PRIVILEGE, PHYSICIAN-PATIENT, BREACH IS A TORT.

PLAINTIFF STATED A CAUSE OF ACTION FOR BREACH OF THE PHYSICIAN-PATIENT PRIVILEGE, A TORT (THIRD DEPT).

Bonner v Lynott, 2022 NY Slip Op 02175, Third Dept 3-31-22

Practice Point: Here plaintiff stated a cause of action for breach of the patient-physician privilege which sounds in tort and includes damages as an element.

PRODUCTS LIABILITY, ESCALATORS.

ALTHOUGH PLAINTIFF, WHO WAS INJURED WHILE REPAIRING AN ESCALATOR, COULD NOT IDENTIFY THE CAUSE OF THE ESCALATOR'S SUDDEN START-UP, THE MOTION TO COMPEL HIM TO SUPPLEMENT HIS ANSWERS TO INTERROGATORIES WAS PROPERLY DENIED; PRODUCTS LIABILITY ACTIONS CAN BE PROVEN BY CIRCUMSTANTIAL EVIDENCE; AT THIS STAGE PLAINTIFF CAN TESTIFY UNDER OATH THAT HE DOES NOT KNOW THE CAUSE OF THE UNEXPECTED START-UP (FIRST DEPT).

Berkovich v Judlau Contr., Inc., 2022 NY Slip Op 01733, First Dept 3-15-22

Practice Point: Products liability actions can be proven by circumstantial evidence. If a plaintiff does not know the cause of a product malfunction (here, an escalator which allegedly started running unexpectedly) at the discovery stage, the plaintiff can testify to that fact under oath.

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SLIP AND FALL, CAUSE OF FALL.

ALTHOUGH THE INFANT PLAINTIFF COULD NOT IDENTIFY THE CAUSE OF HER SLIP AND FALL; MOTHER, FATHER AND THE DEFENDANTS PROVIDED CIRCUMSTANTIAL EVIDENCE THAT THE FALL WAS CAUSED BY AN IDENTIFIED DEFECT IN THE SIDEWALK, RAISING A QUESTION OF FACT (SECOND DEPT).

E. F. v City of New York, 2022 NY Slip Op 01769, Second Dept 3-16-22

Practice Point: Although the infant plaintiff could not identify the cause of her slip and fall, which is usually a fatal evidentiary problem, mother, father and defendants provided circumstantial evidence which raised a question of fact about an identified sidewalk defect as the cause of the fall.

SLIP AND FALL, CONSTRUCTIVE NOTICE.

CONFLICTING EVIDENCE ABOUT THE ABILITY TO SEE ICE ON THE PARKING LOT RAISED A TRIABLE QUESTION OF FACT WHETHER DEFENDANTS HAD CONSTRUCTIVE NOTICE OF THE CONDITION WHICH ALLEGEDLY CAUSED PLAINTIFF'S SLIP AND FALL (THIRD DEPT).

Carpenter v Nigro Cos., Inc., 2022 NY Slip Op 01857, Third Dept 3-17-22

Practice Point: Where there is conflicting evidence of constructive notice of a dangerous condition, here whether the ice which caused plaintiff's slip and fall was visible, summary judgment is not appropriate.

SLIP AND FALL, MEDICAL RECORDS.

AN ENTRY IN A HOSPITAL RECORD INDICATING PLAINTIFF FELL DOWN A FEW STAIRS WAS NOT GERMANE TO TREATMENT OR DIAGNOSIS AND WAS NOT AN ADMISSION BECAUSE THE SOURCE OF THE ENTRY WAS UNKNOWN; NEW TRIAL ORDERED IN THIS SLIP AND FALL CASE (SECOND DEPT).

Fraser v 147 Rockaway Pkw, LLC, 2022 NY Slip Op 01772, Second Dept 3-16-22

Practice Point: An entry in a hospital record which is not germane to treatment or diagnosis is not admissible. An entry in a hospital record which is inconsistent with a plaintiff's position at trial is admissible as an "admission" only if it is clear plaintiff was the source of the entry. If, as it was here, the source of the entry is unknown, it is inadmissible.

SLIP AND FALL, MUNICIPAL LAW.

DEFENDANT DID NOT DEMONSTRATE IT WAS NOT RESPONSIBLE, PURSUANT TO THE TOWN CODE, FOR MAINTENANCE OF THE AREA OF THE SIDEWALK WHERE PLAINTIFF TRIPPED OVER A PROTRUDING BOLT; DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

SLIP AND FALL, STORM IN PROGRESS.

THE METEOROLOGIST'S AFFIDAVIT SUBMITTED TO SHOW THERE WAS A STORM IN PROGRESS WHEN PLAINTIFF SLIPPED AND FELL WAS NOT ACCOMPANIED BY THE RECORDS RELIED UPON BY THE AFFIANT; THE AFFIDAVIT THEREFORE HAD NO PROBATIVE VALUE (SECOND DEPT).

Canciani v Stop & Shop Supermarket Co., LLC, 2022 NY Slip Op 01986, Second Dept 3-23-22

Practice Point: An affidavit submitted to prove the contents of records which are not attached has no probative value.

TRAFFIC ACCIDENTS, MUNCIPAL LAW, VEHICLE AND TRAFFIC LAW, POLICE VEHICLE.

IN THIS POLICE-CAR TRAFFIC ACCIDENT CASE, THE MUNICIPALITY DID NOT DEMONSTRATE THE POLICE OFFICER'S SPECIFIC CONDUCT WAS EXEMPT FROM THE ORDINARY RULES OF THE ROAD PURSUANT TO VEHICLE AND TRAFFIC LAW 1104, AND DID NOT DEMONSTRATE THE OFFICER WAS NOT LIABLE UNDER THE ORDINARY RULES OF NEGLIGENCE; THE MUNICIPALITY'S SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

Cooney v Port Chester Police Dept., 2022 NY Slip Op 01440, Second Dept 3-9-22

Practice Point: Even if a police car is engaged in an emergency operation at the time of a traffic accident, the police officer's conduct is not automatically judged under the reckless disregard standard for emergency vehicles in Vehicle and Traffic Law 1104. The officer's specific conduct must fall within one of the the categories of privileged conduct in the statute. Otherwise the ordinary rules of negligence apply. At the summary-judgment stage, a municipality must demonstrate either that the specific conduct was exempt from the ordinary rules of negligence, or that the specific conduct was not culpable under the ordinary rules of negligent. Here the municipality did not demonstrate either one.

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TRAFFIC ACCIDENTS, PEDESTRIANS, VEHICLE AND TRAFFIC LAW, EMERGENCY DOCTRINE, SUN GLARE.

SUN GLARE DID NOT CREATE AN EMERGENCY FOR THE BUS DRIVER WHO STRUCK PLAINTIFF PEDESTRIAN (SECOND DEPT).

Morales-Rodriguez v MTA Bus Co., 2022 NY Slip Op 01781, Second Dept 3-16-22

Practice Point: Here the bus driver alleged sun glare created an emergency which should excuse his striking plaintiff pedestrian. The allegation did not raise a triable question of fact.