NEW YORK APPELLATE DIGEST, LLC

Personal Injury
Reversal Report
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An Organized Compilation of the Summaries of Selected Decisions—Reversals, Full Opinions, Decisions with Dissents—Addressing Personal Injury (Negligence/Labor Law-Construction Law/Workers' Compensation/Disability, Etc.) Released and Posted on the New York Appellate Digest Website in April 2022. 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 Reversal Report.

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BILLS OF PARTICULAR, SUPPPLEMENTAL VS AMENDED BILL OF PARTICULARS, NEW INJURIES.

THE DOCUMENT LABELED A "SUPPLEMENTAL" BILL OF PARTICULARS WAS ACTUALLY AN "AMENDED" BILL OF PARTICULARS BECAUSE IT ADDED NEW INJURIES AFTER THE NOTE OF ISSUE WAS FILED; THE DEFENDANT'S MOTION TO STRIKE THE AMENDED BILL OF PARTICULARS SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court in this slip and fall case, determined the document labeled a "supplemental" bill of particulars was actually a post-note-of-issue "amended" bill of particulars which should not have been served without leave of the court:

… [T]he document that they denominated a "supplemental bill of particulars" … , was, in reality, an amended bill of particulars, as they sought to add new injuries (see CPLR 3043[b]). Accordingly, the Supreme Court erred in denying that branch of [defendant's] motion which was to strike the amended bill of particulars … , denominated as a supplemental bill of particulars, which was served without leave of court and after the note of issue had been filed … . Naftaliyev v GGP Staten Is. Mall, LLC, 2022 NY Slip Op 02556, Second Dept 4-20-22

Practice Point: A "supplemental" bill of particulars which adds new injuries after the note of issue is filed is actually an "amended" bill of particulars which can only be served with leave of the court.

BUS-PASSENGER INJURY.

THERE WAS NO OBJECTIVE SUPPORT FOR PLAINTIFF BUS PASSENGER'S CLAIM THE MOVEMENT OF THE BUS WHICH CAUSED HER TO FALL WAS "UNUSUAL AND VIOLENT" (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the defendant bus company's, MTA's, motion to dismiss the complaint in this bus-passenger injury case should have been granted:

To establish a prima facie case of negligence against a common carrier for injuries sustained by a passenger as a result of the movement of the vehicle, a plaintiff must establish that the movement consisted of a jerk or lurch that was "'unusual and violent'" … . "Moreover, a plaintiff may not satisfy that burden of proof merely by characterizing the stop as unusual and violent" … . There must be "objective evidence of the force of the stop sufficient to establish an inference that the stop was extraordinary and violent, of a different class than the jerks and jolts commonly experienced in city bus travel and, therefore, attributable to the negligence of defendant" … . "In seeking summary judgment dismissing the complaint, however, common carriers have the burden of establishing, prima facie, that the movement of the vehicle was not unusual and violent" … .

… MTA established its prima facie entitlement to judgment as a matter of law. MTA demonstrated, by submitting the transcript of the plaintiff's deposition testimony, that the movement of the bus was not unusual and violent or of a "different class than the jerks and jolts commonly experienced in city bus travel" … . The nature of the incident, according to the plaintiff's deposition testimony, was that she was caused to fall as the bus stopped at the intersection. According to the plaintiff, who did not provide an estimate as to how fast the bus was traveling prior to stopping at the intersection, she was the only passenger on the bus who fell, although there was another passenger standing within two feet of her at the

time. The plaintiff testified that she landed on the floor near where she was standing prior to falling down. This is not, in itself, sufficient to provide the objective support necessary to demonstrate that the movement of the bus was unusual and violent, and of a different class than the jerks and jolts commonly experienced in city bus travel … . Orji v MTA Bus Co., 2022 NY Slip Op 02811, Second Dept 4-27-22

Practice Point: In order to survive a motion to dismiss, a bus passenger's allegation his or her injury was caused by an "unusual and violent" movement of the bus must have some sort of "objective support," which was absent in this case.

HUNTING-RELATED SHOOTING, SUMMARY JUDGMENT.

PLAINTIFF AND DEFENDANT WERE HUNTING TURKEY WHEN DEFENDANT SHOT PLAINTIFF; PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT ON LIABILITY SHOULD HAVE BEEN GRANTED, NOTWITHSTANDING POSSIBLE COMPARATIVE-NEGLIGENCE ISSUES (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined plaintiffs' motion for summary judgment in this hunting accident case should have been granted. Defendant, like the plaintiff, was hunting turkey when he shot plaintiff and his friend. Defendant subsequently pled guilty to attempted assault:

We agree with plaintiffs that they established as a matter of law that defendant was negligent by failing to exercise the degree of care that a reasonable person "of ordinary prudence would exercise under the circumstances, commensurate with the known dangers and risks reasonably to be foreseen" … , and that defendant failed to raise an issue of fact in response. We also agree with plaintiffs that triable issues of fact regarding plaintiff's comparative negligence do not preclude an award of summary judgment in plaintiffs' favor on the issue of defendant's negligence … . Pachan v Brown, 2022 NY Slip Op 02684, Fourth Dept 4-22-22

Practice Point: Comparative negligence is no longer a bar to summary judgment on liability. Comparative negligence is relevant only to damages.

INMATE INJURY, CONTAMINATED WATER, COUNTY LIABILITY FOR JAIL CONDITIONS.

PLAINTIFF SUED BOTH THE COUNTY AND THE SHERIFF FOR ALLEGED EXPOSURE TO CONTAMINATED WATER IN THE SHOWER AT THE JAIL; THE ACTION AGAINST THE COUNTY WAS NOT BROUGHT UNDER A VICARIOUS LIABILITY THEORY (THE COUNTY IS NOT VICARIOUSLY LIABLE FOR THE ACTS OR OMISSIONS OF THE SHERIFF); RATHER THE CAUSE OF ACTION ALLEGED THE COUNTY WAS NEGLIGENT IN ITS OWN RIGHT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff, an inmate at the Orange County Correctional Facility (OCCF), stated a cause of action against the county, as well as the county sheriff. Plaintiff alleged he was exposed to contaminated shower water at the jail. The cause of action against the county was not based on a vicarious liability theory (the county is not vicariously liable for the acts or omissions of the sheriff's office). Rather plaintiff stated a cause of action alleging the county was negligent in failing to ensure the safety of the water at the jail. That cause of action is distinct from the sheriff's duty to keep inmates safe. The issue was properly raised for the first time on appeal:

… [T]he complaint did not solely seek to hold the County vicariously liable for the actions and omissions of the sheriff and his deputies. The complaint alleged that the County had a duty to maintain the OCCF, including its water supply, in a safe and proper manner, and that the County's breach of that duty caused the plaintiff to sustain personal injuries. The County's duty to provide and maintain the jail building is distinguishable from the sheriff's duty to receive and safely keep inmates in the jail over which the sheriff has custody … . Contrary to the defendants' contention, the plaintiff's argument that the County is liable for its own negligence, as opposed to being vicariously liable for the negligence of the sheriff or his deputies, is not improperly raised for the first time on appeal. Aviles v County of Orange, 2022 NY Slip Op 02384, Second Dept 4-13-22

Practice Point: The county is not liable for the acts or omissions of the county sheriff under a vicarious liability theory. However, here the allegation that the shower water at the jail was contaminated stated a cause of action against the county for its own negligence. Therefore the action against the county should not have been dismissed.

LABOR LAW-CONSTRUCTION LAW, CLEANING AS COVERED ACTIVITY.

WHETHER "CLEANING" IS A COVERED ACTIVITY UNDER LABOR LAW 240(1) DEPENDS ON WHETHER THE CLEANING WORK IS "ROUTINE;" "ROUTINE" CLEANING WORK IS NOT COVERED (CT APP).

The Court of Appeals, reversing the Appellate Division, determine plaintiff should not have been awarded summary judgment on the Labor Law 240(1) cause of action and defendant's summary judgment motion should have been granted. The issue was whether plaintiff was injured doing "cleaning" work covered by the Labor Law. The Court of Appeals held plaintiff was doing "routine" work, which therefore did not qualify as "cleaning" under Labor Law 240(1). The facts were not explained:

Labor Law § 240 (1) requires certain contractors and property owners to provide adequate safety devices when workers engage in particular tasks involving elevation-related risks. To recover under section 240 (1) for an injury caused by a failure to provide such safety devices, plaintiffs must first show that they were engaged in one of that section's enumerated activities including, among others, "cleaning." To determine whether an activity is "cleaning" within the meaning of the statute, courts apply a four-factor analysis (see Soto v J. Crew Inc., 21 NY3d 562, 568 [2013]). The first factor considers whether the work is "routine, in the sense that it is the type of job that occurs on a daily, weekly or other relatively-frequent and recurring basis as part of the ordinary maintenance and care of commercial premises" (id. [emphasis added]). This factor does not involve a fact-specific assessment of a plaintiff's regular tasks—it instead asks whether the type of work would be expected to recur with relative frequency as part of the ordinary maintenance and care of a commercial property (see id. at 569).

Here, plaintiff's work was "routine" within the meaning of the first factor, which therefore weighs against concluding that he was "cleaning." "[V]iewed in totality," the Soto factors do not "militate in favor of placing the task" in the category of "cleaning" (id. at 568-569). Healy v EST Downtown, LLC, 2022 NY Slip Op 02836, CtApp 4-28-22

Practice Point: Injury while "cleaning" is not covered under Labor Law 240(1) if it is "routine."

LABOR LAW-CONSTRUCTION LAW, ELEVATORS.

PLAINTIFF'S DECEDENT WAS IN THE ELEVATOR SHAFT WHEN THE ELEVATOR, OPERATING NORMALLY, DESCENDED AND CRUSHED HIM; THE ELEVATOR WAS NOT A "FALLING OBJECT" WITHIN THE MEANING OF LABOR LAW 240(1); COMPLAINT DISMISSED (FIRST DEPT).

The First Department, reversing Supreme Court, determined the elevator which descended and crushed plaintiff's decedent, who had entered the shaft, was not a "falling object" within the meaning of Labor Law 240(1). Therefore the complaint against defendants must be dismissed:

Plaintiff's decedent, an elevator mechanic, entered an elevator shaft on the lobby level, under an elevator that he had sent to one of the floors above. After the shaft doors closed, the call button was pressed, and the elevator descended to the lobby, crushing the decedent. The parties agree that the elevator was working normally, in the "automatic" setting, at the time of the accident.

The Labor Law § 240(1) claim must be dismissed because the elevator did not "fall" as a result of the force of gravity but descended in automatic mode, as it was designed to do … . Luna v Brodcom W. Dev. Co. LLC, 2022 NY Slip Op 02873, First Dept 4-28-22

Practice Point: In order to be covered under Labor Law 240(1), this elevator accident must have been the result of the elevator "falling." Because the elevator

was descending normally when struck and killed plaintiff, the complaint was dismissed.

LABOR LAW-CONSTRUCTION LAW, FALLING PEBBLE-SIZED DEBRIS.

QUESTIONS OF FACT WHETHER PEBBLE-SIZED DEBRIS WHICH FELL ON PLAINTIFF AND ALLEGEDLY SERIOUSLY INJURED HIS EYE GAVE RISE TO LIABILITY UNDER LABOR LAW 240(1) AND 241(6) (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined there were questions of fact about liability pursuant to Labor Law 240(1) and 241(6). Plaintiff was working in a shaft when pebble-sized debris fell on him, allegedly seriously injuring his eye. There were questions of fact whether the distance the debris fell was de minimus and whether the force with which the debris fell was de minimus. There was also a question of fact whether planking should have been installed above the shaft to protect against falling debris:

There are issues of fact as to whether the debris that fell on plaintiff — taking into account the elevation differential, the debris' weight, and the amount of force it could generate … — was "a load that required securing for the purposes of the undertaking at the time it fell" … , and whether his injury was a direct consequence of defendants' "failure to provide adequate protection against a risk arising from a physically significant elevation differential" … . The trier of fact could find that the elevation differential between plaintiff and the level from which the debris fell was de minimis, that the debris' weight was inconsequential, or that the debris could not have generated any meaningful amount of force, and determine that plaintiff's "injuries were the result of [a] usual and ordinary danger[] at a construction site" … .. However, the trier of fact could determine that the elevation differential of at least one story was not de minimis, that the weight of the debris and the force it was capable of generating were significant, and that the debris should have been secured for the purpose of the undertaking. Peters v Structure Tone, Inc., 2022 NY Slip Op 02518, First Dept 4-19-22

Practice Point: There were questions of fact whether injury from falling pebble-sized debris is covered under Labor Law 240(1) and 241(6). The force generated by the falling debris could be found to be de minimus.

LABOR LAW-CONSTRUCTION LAW, FOLLOWING ORDERS.

PLAINTIFF WAS DIRECTED TO LIFT A HEAVY BOX MANUALLY; THE FACT THAT A FORKLIFT WAS AVAILABLE WAS NOT DETERMINATIVE; A WORKER IS EXPECTED TO FOLLOW ORDERS; PLAINTIFFS' MOTION TO SET ASIDE THE DEFENSE VERDICT IN THIS LABOR LAW 240(1) ACTION SHOULD HAVE BEEN GRANTED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined plaintiffs' motion to set aside the defense verdict in this Labor Law 240(1) action should have been granted. The Labor Law 240(1) claim was reinstated and judgment in favor of plaintiffs was granted. Apparently plaintiff was injured when lifting a heavy box after the stage manager directed him to do so. The fact that a forklift was available would only raise an issue of comparative negligence which will not defeat a Labor Law 240(1) claim:

… [A]lthough defendants established that there was an available safety device, i.e., a forklift, and that plaintiff knew that it was available and that he was expected to use it, plaintiffs established that the stage manager instructed plaintiff and his coworkers to lift the box manually. Regardless of whether that stage manager was plaintiff's actual supervisor, plaintiff was under no obligation to demand safer methods for moving the box … . To expect plaintiff to refuse the stage manager's demands "overlooks the realities of construction work" … .

"When faced with an . . . instruction to use an inadequate device [or no device at all], many workers would be understandably reticent to object for fear of jeopardizing their employment and their livelihoods" … . Finocchi v Live Nation Inc., 2022 NY Slip Op 02680, Fourth Dept 4-22-22

Practice Point: Plaintiff was directed to lift a heavy box manually. A worker is expected to follow directions. The fact that a forklift was available was therefore

not determinative. Plaintiffs' motion to set aside the defense verdict in this Labor Law 240(1) action should have been granted.

LABOR LAW-CONSTRUCTION LAW, HOMEOWNER EXEMPTION.

HEAVY BARN DOORS WHICH HAD BEEN TAKEN OFF THE HINGES FELL ON PLAINTIFF AS HE DELIVERED SHEETROCK TO THE BARN WHICH WAS BEING CONVERTED TO A MUSIC STUDIO; THERE WERE QUESTIONS OF FACT WHETHER THE DOORS PRESENTED A DANGEROUS CONDITION AND CONSTITUTED AN ELEVATION-RELATED HAZARD AND WHETHER THIS WAS A COMMERCIAL PROJECT TO WHICH THE HOMEOWNER EXEMPTION DID NOT APPLY (LABOR LAW 200 AND 240(1)) (THIRD DEPT).

The Third Department, reversing (modifying) Supreme Court, determined defendant's motion for summary judgment on the Labor Law 200 and 240(1) causes of action should not have been granted. Plaintiff was told to deliver sheetrock through an opening where heavy double barn doors were being restored. The hinges had been removed and the doors were held in place by wooden wedges. The doors fell on plaintiff. The Third Department found there were questions of fact whether the doors presented a dangerous condition (Labor Law 200), an elevation-related hazard (Labor Law 240(1), and whether the project was commercial in nature such that the homeowner exemption did not apply. With regard to the homeowner exemption, the court wrote:

Although Labor Law § 240 (1) imposes a nondelegable duty upon owners to protect workers engaged in construction-related activities, "the Legislature has carved out an exemption for the owners of one and two-family dwellings who contract for but do not direct or control the work" … . "That exemption, however, is not available to an owner who uses or intends to use the dwelling only for commercial purposes" … .

… [D]efendants, as the parties seeking the benefit of the statutory exemption, had the burden of establishing that the property was not being used solely for

commercial purposes … . This they failed to do. [Defendant's] deposition testimony established that he is a professional musician and that the structure was being altered to use as a music studio and a photography workspace. Moreover, defendants failed to submit an affidavit addressing whether they intended to use the structure for commercial or noncommercial purposes. [W]e find that defendants failed to demonstrate their entitlement to the homeowner exemption as a matter of law and that a question of fact exists regarding the application of the homeowner exemption … .Hawver v Steele, 2022 NY Slip Op 02322, Third Dept 4-7-22

Practice Point: The homeowner exemption to Labor Law liability does not apply where the construction is for commercial purposes. Here the defendants did not demonstrate the renovation of a barn for use as a music studio was not for commercial purposes. Therefore defendants motion for summary judgment on the Labor Law 240(1) cause of action should not have been granted.

LABOR LAW-CONSTRUCTION LAW, LADDERS.

IN THIS LABOR LAW 240(1) CASE, PLAINTIFF ALLEGED THE LADDER WAS UNSECURED AND SHIFTED; DEFENDANT ALLEGED PLAINTIFF TOLD HIS SUPERVISOR HE LOST HIS BALANCE AND JUMPED FROM THE LADDER, RAISING A QUESTION OF FACT WHETHER PLAINTIFF'S ACTIONS WERE THE SOLE PROXIMATE CAUSE OF THE ACCIDENT (SECOND DEPT).

The Second Department determined conflicting facts precluded summary judgment in this Labor Law 240(1) ladder-fall case. Plaintiff alleged the ladder was unsecured and shifted when he attempted to descend. The defendant alleged plaintiff told his supervisor he lost his balance and jumped off the ladder which raised a question whether plaintiff's actions were the sole proximate cause of the accident:

… [T]he defendants raised a triable issue of fact as to whether the ladder shifted to the right and backwards, as the plaintiff testified, or whether the plaintiff's own actions were the sole proximate cause of the subject accident. The defendants submitted an affidavit from the plaintiff's supervisor, who averred that the plaintiff

had told him, just after the accident occurred while he was still on the roof, that he had lost his balance as he descended the ladder and jumped off the ladder. The different versions of the accident given by the plaintiff create triable issues of fact that required denial of the motion, including a triable issue of fact as to the plaintiff's credibility … . Jurski v City of New York, 2022 NY Slip Op 02783, Second Dept 4-27-22

Practice Point: Evidence that plaintiff told his supervisor he lost his balance and jumped from the ladder created a triable issue of fact about whether plaintiff's actions were the sole proximate cause of the accident in this Labor Law 240(1) action.

LABOR LAW-CONSTRUCTION LAW, LADDERS.

QUESTIONS OF FACT PRECLUDED SUMMARY JUDGMENT IN THIS LABOR LAW 240(1) LADDER-FALL CASE; APPELLATE DIVISION REVERSED; EXTENSIVE THREE-JUDGE DISSENTING OPINION (CT APP).

The Court of Appeals, reversing the Appellate Division, over a three-judge dissenting opinion, determined plaintiff in this Labor Law 240(1) ladder-fall case should not have been awarded summary judgment. Plaintiff used an A-frame ladder in a closed position because of limited space. While rerouting pipes in the ceiling, plaintiff received an electric shock and fell to the floor. The majority found questions of fact were raised about whether the ladder failed to protect plaintiff and whether other safety devices should have been provided:

An "accident alone" is insufficient to establish a violation of Labor Law § 240 (1) or causation … . Moreover, Labor Law § 240 (1) is designed to protect against "harm directly flowing from the application of the force of gravity to an object or person" … . We agree with the dissent below that plaintiff was not entitled to partial summary judgment on his Labor Law § 240 (1) claim … . Indeed, questions of fact exist as to whether "the ladder failed to provide proper protection," whether "plaintiff should have been provided with additional safety devices," and whether the ladder's purported inadequacy or the absence of additional safety devices was a

proximate cause of plaintiff's accident … . Cutaia v Board of Mgrs. of the 160/170 Varick St. Condominium, 2022 NY Slip Op 02834, CtApp 4-28-22

Practice Point: Here plaintiff was apparently electrocuted while standing on a closed A-frame ladder and fell to the floor. The happening of the accident alone did not establish that the ladder failed to protect plaintiff or that other safety equipment should have been provided to plaintiff. Therefore plaintiff was not entitled to summary judgment on his Labor Law 240(1) cause of action. There was a three-judge dissenting opinion.

LABOR LAW-CONSTRUCTION LAW, OBJECT LEANING AGAINST WALL FALLS.

A HEAVY PUMP, 3 TO 4 FEET IN HEIGHT, WHICH WAS LEANING AGAINST THE WALL, TIPPED OVER AND STRUCK THE PLAINTIFF; PLAINTIFF WAS ENTITLED TO SUMMARY JUDGMENT ON THE LABOR LAW 240(1) CAUSE OF ACTION (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff was entitled to summary judgment on his Labor Law 240(1) cause of action. A heavy fire pump that was leaning against the wall, unsecured, tipped over and struck plaintiff:

Liability under Labor Law § 240(1) arises where a safety device of the kind enumerated in the statute either proved inadequate to shield against injury resulting directly from the application of the force of gravity to a person or object or where no safety device was provided to shield against such injury … . Here, plaintiff was injured when he and two coworkers were assigned to run conduits along the wall and ceiling of an approximately 8 by 10-foot fire pump room. As they were looking at the wall and ceiling and deciding how to proceed, plaintiff felt a sharp pain in his leg when a 3-to-4 foot tall, 300-500+ pound fire pump, which had been standing upright on the floor, on its narrower end and unsecured, fell on his leg. Where a load positioned on the same level as the injured worker falls a short distance, Labor Law § 240(1) applies if the load, due to its weight, is capable of generating significant force … . Here, the fire pump was required to be secured against tipping or falling and the failure to secure it was a violation of Labor Law §

240(1) … . Grigoryan v 108 Chambers St. Owner, LLC, 2022 NY Slip Op 02620, First Dept 4-21-22

Practice Point: Here a heavy fire pump, 3 to 4 feet in height, was leaning against a wall on the same level as plaintiff when it tipped over and struck him. An unsecured object positioned on the same level as the injured party which generates significant force when it falls over is covered by Labor Law 240(1).

LABOR LAW-CONSTRUCTION LAW, LADDERS, SUMMARY JUDGMENT MOTION NOT PREMATURE.

PLAINTIFF WAS ENTITLED TO SUMMARY JUDGMENT ON THE LABOR LAW 240(1) CAUSE OF ACTION IN THIS A-FRAME LADDER-FALL CASE; ALTHOUGH NO DEPOSITIONS HAD BEEN TAKEN, THE DEFENDANT FAILED TO SHOW THE SUMMARY JUDGMENT MOTION WAS PREMATURE (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff was entitled to summary judgment on his Labor Law 240(1) cause of action in this A-frame ladder-fall case. The court noted that the motion for summary judgment was not premature, even though no depositions had been taken:

Plaintiff established prima facie that PPC is liable under Labor Law § 240(1) through plaintiff and his coworker's affidavits that the unstable eight-foot A-frame ladder, which was missing rubber feet, shifted, causing him to fall … . It was undisputed that PPC was the owner of the property. Plaintiff also established that his work of retrofitting light fixtures was covered under § 240(1) and did not constitute mere maintenance … .

We reject PPC's argument that plaintiff's motion was premature (CPLR 3212[f]). The fact that no depositions have been taken does not preclude summary judgment in plaintiff's favor, as PPC failed to show that discovery might lead to facts that would support its opposition to the motion … . PPC also failed to show that facts essential to its opposition were within plaintiff's exclusive knowledge … . Its argument that deposition testimony might further illuminate issues raised by the

affidavits is unavailing. "The mere hope that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny such a motion" … . Laporta v PPC Commercial, LLC, 2022 NY Slip Op 02624, First Dept 4-21-22

Practice Point: In order for a pre-discovery summary judgment motion to be deemed premature, the opposing party must show discovery might lead to facts which would support opposition to the motion (not the case here).

LABOR LAW-CONSTRUCTION LAW.

BOARDING UP A VACANT HOUSE WAS WITHIN THE SCOPE OF LABOR LAW 240(1) AND 241(6) (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined plaintiff's work, boarding up a vacant house to prevent access, was within the scope of work covered by Labor Law 240 (1) and Labor Law 241(6). Plaintiff allegedly fell from a ladder when attempting to board up a window:

… [P]laintiff's work of boarding up the house, thus making it uninhabitable, was "altering" the premises within the meaning of Labor Law § 240(1), as it constituted a significant physical change to the configuration or composition of the building … .. Further, as the work the plaintiff was engaged in constituted "alteration," it was within the scope of "construction work" for purposes of Labor Law § 241(6) … . Nucci v County of Suffolk, 2022 NY Slip Op 02423, Second Dept 4-13-22

Practice Point: Boarding up a vacant house is covered by Labor Law 240(1) and 241(6).

LABOR LAW-CONSTRUCTION LAW.

PLAINTIFF FELL LEAVING AN ELEVATOR HE HAD JUST MODIFIED TO PREVENT ACCESS TO A FLOOR; HIS WORK WAS NOT ROUTINE MAINTENANCE; INDUSTRIAL CODE PROVISIONS ABOUT GUARDING HAZARDOUS OPENINGS APPLIED; ONE DEFENDANT MAY BE LIABLE AS A STATUTORY AGENT; LABOR LAW 200, 240(1) AND 241(6) CAUSES OF ACTION SHOULD NOT HAVE BEEN DISMISSED (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined: (1) plaintiff's work on the elevator was not routine maintenance and therefore Labor Law 240(1) and 241(6) were applicable; (2) the Labor Law 241(6) cause of action based on Industrial Code provisions requiring the guarding of hazardous openings should not have been dismissed; and (3) there are questions of fact whether one defendant, Edge, based on a subcontract, was liable as a statutory agent under Labor Law 200, 240(1) and 241(6):

Plaintiff and a coworker lowered a building's freight elevator into the basement to allow plaintiff to perform work on top of the elevator. Plaintiff testified that he spent about 40 minutes performing that work, which involved making changes to the elevator in order to prevent people from accessing a first-floor renovation site by means of the elevator's rear door. The elevator's front door opened onto an outdoor area. After performing this task, plaintiff claims that he tripped on a wooden ramp, which led from a loading dock to the elevator, and fell. …

… [P]laintiff was engaged in altering the premises within the meaning of Labor Law § 240(1), since his work was intended to secure the premises in preparation for the renovation project … .

The Labor Law § 241(6) claim should be reinstated insofar as it is based on alleged violations of Industrial Code §§ 23-1.7(b)(1)(i) and 23-1.15(a), since there are issues of fact as to whether plaintiff's accident was proximately caused by the lack of a compliant "safety railing" guarding the "hazardous opening," and it is

undisputed that the opening was not "guarded by a substantial cover fastened in place" (12 NYCRR § 23-1.7[b][1][i]). …

… [T]here is testimonial evidence that the subcontract made Edge responsible for performing all aspects of the sidewalk excavation, including safety procedures. Moreover, there are issues of fact as to whether Edge created or had notice of the defective condition that caused plaintiff to fall into the excavation hole …
. Rooney v D.P. Consulting Corp., 2022 NY Slip Op 02243, First Dept 4-5-22

Practice Point: This case found that a subcontractor responsible for safety procedures could be liable as a statutory agent under Labor Law 200, 240(1) and 241(6).

LABOR LAW-CONSTRUCTION LAW.

THE EIGHT-INCH WIDE BEAM CLAIMANT WAS MOVING ALONG WHEN HE FELL WAS THE FUNCTIONAL EQUIVALENT OF A SCAFFOLD, BRINGING THE ACTION WITHIN THE SCOPE OF LABOR LAW 240(1); THE SAFETY LINE PROVIDED TO CLAIMANT DID NOT PROTECT HIM FROM THE FALL; CLAIMANT WAS ENTITLED TO SUMMARY JUDGMENT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined claimant's motion for summary judgment on the Labor Law 240(1) cause of action should have been granted. Claimant, Lazo, was moving along an eight-inch wide, 17-foot long, beam suspended above a platform when he fell. He was attached to two safety lines which he had to detach and reattach to anchorage points. He fell while in the process of reattaching one of the lines. The second line did not prevent the fall:

Lazo would use a hook at the end of each safety line to secure it to various anchorage points on another horizontal beam located above him. To move across the beam, workers were instructed to unhook the first safety line from the first anchorage point, connect it to a second anchorage point, and then repeat this process with the second safety line. This effectively allowed workers to move along the beam while always having at least one safety line attached to an anchorage point. * * *

Lazo's deposition testimony established, prima facie, that his accident was within the purview of Labor Law § 240(1), since the beam from which he fell was being used as the functional equivalent of a scaffold … . Lazo's deposition testimony also established, prima facie, that his second safety line was attached to an anchorage point but was nevertheless insufficient to prevent him from falling … . Lazo v New York State Thruway Auth., 2022 NY Slip Op 02400, Second Dept 4-13-22

Practice Point: Here an eight-inch wide, 17 foot-long beam suspended eight feet above a platform was the functional equivalent of a scaffold. The fall from the beam therefore was within the scope of Labor Law 240(1).

MEDICAL MALPRACTICE, CONTRACT LAW, CIVIL PROCEDURE, NURSING HOME ADMISSION AGREEMENT, CHOICE OF VENUE.

THE VENUE DESIGNATION IN THE NURSING HOME ADMISSION AGREEMENT, SIGNED BY PLAINTIFF'S DECEDENT'S WIFE, WAS NOT ENFORCEABLE BY THE NURSING HOME (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the nursing home admission agreement, signed by plaintiff's decedent's wife (Anderson), was not a sufficient basis for changing the venue of this action against the nursing home from plaintiff's residence, Bronx County, to the venue designated in the admission agreement, Westchester County. The decision is comprehensive and addresses several substantive issues (agency, rights of non-signatories, for example) not summarized here:

Although the defendant submitted a copy of the admission agreement, it did not provide an affidavit from anyone who signed the agreement, who was present when it was signed, or who otherwise claimed to have personal knowledge of that agreement. The admission agreement was not signed by the plaintiff or the decedent, and it did not identify or include the names of the plaintiff or the decedent anywhere on that document. * * *

An admission agreement may be enforced against an individual where it was properly executed by that individual's "designated representative" … . As relevant here, "[d]esignated representative shall mean the individual or individuals designated in accordance with [10 NYCRR 415.2(f)] to receive information and to assist and/or act in behalf of a particular resident to the extent permitted by State law" … . The subdivision lists three ways in which a designation may occur … .

As the plaintiff correctly contends, the defendant failed to establish that Anderson was properly designated in any of the three ways authorized by applicable law … . Sherrod v Mount Sinai St. Luke's, 2022 NY Slip Op 02826, Second Dept 4-27-22

Practice Point: Is this case, the venue designation in the nursing home admission agreement, signed by plaintiff's decedent's wife, could not be enforced by the nursing home.

MEDICAL MALPRACTICE, LATE NOTICE OF CLAIM, STATUTE OF LIMITATIONS.

ALTHOUGH THE SECOND ORDER TO SHOW CAUSE SEEKING LEAVE TO FILE A LATE NOTICE OF CLAIM WAS FILED TWO DAYS AFTER THE ONE-YEAR-NINETY-DAY LIMITATIONS PERIOD, THE STATUTE OF LIMITATIONS WAS TOLLED FOR THREE DAYS BETWEEN THE FILING AND THE DENIAL OF THE FIRST ORDER TO SHOW CAUSE; THE MEDICAL RECORDS PROVIDED THE MUNICIPALITY WITH NOTICE OF THE ESSENTAL FACTS OF THE CLAIM; THE MOTION FOR LEAVE TO FILE A LATE NOTICE SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the motion seeking leave to file a late notice of claim was timely and should have been granted. Although the second order to show cause was submitted two days beyond the one year-and-90-day deadline for suing a municipality. the statute of limitations was tolled for three days between the filing of the first order to show cause and the denial of that first motion:

Since the time to serve a notice of claim upon a public corporation cannot be extended beyond the time limited for commencement of an action against that party … , the court lacks authority to grant a motion for leave to serve a late notice of claim made more than one year and 90 days after the cause of action accrued, unless the statute of limitations has been tolled … . "CPLR 204(a) tolls the statute of limitations while a motion to serve a late notice of claim is pending" … . Where "a court declines to sign an initial order to show cause for leave to serve a late notice of claim on procedural grounds, but a subsequent application for the same relief is granted, the period of time in which the earlier application [was] pending [is also] excluded from the limitations period" … . …

… [T]he medical records provided the defendants with actual knowledge of the essential facts constituting the plaintiff's claim. The records evinced that a stroke code was called shortly after the plaintiff's presentation to the hospital, that, based on an assessment of her condition, it was decided that a tissue plasminogen activator was not needed, and that it was later determined that the plaintiff had suffered a stroke but that it was too late to administer that drug.

The plaintiff further made an initial showing that the defendants would not suffer any prejudice by the delay in serving the notice of claim, and the defendants failed to rebut the showing with particularized indicia of prejudice … .

Finally, where, as here, there is actual knowledge and an absence of prejudice, the lack of a reasonable excuse will not bar the granting of leave to serve a late notice of claim … . Ahmed v New York City Health & Hosp. Corp., 2022 NY Slip Op 02521, Second Dept 4-20-22

Practice Point: The one-year-ninety-day statute of limitations for suing a municipality is tolled for the time between submitting an order to show cause seeking leave to file a late notice of claim and the judge's refusal to sign the order to show cause. Here, although the second order to show cause seeking leave to file a late notice was submitted two days after the one-year-ninety-day statute had run, it was timely because of the three-day toll between the filing and denial of first order to show cause. Here the medical records sufficiently notified the municipality of the essential facts of the claim, the municipality did not demonstrate prejudice and there was no need for a reasonable excuse because there was actual knowledge and no prejudice.

MEDICAL MALPRACTICE, DISCHARGE INSTRUCTIONS, REVIEW OF PHYSICIAN ASSISTANT'S CHART.

IN THIS MEDICAL MALPRACTICE CASE, WHETHER DEFENDANT REGISTERED NURSE AND DEFENDANT PHYSICIAN'S ASSISTANT GAVE PLAINTIFF THE APPROPRIATE DISCHARGE INSTRUCTIONS AFTER DISOVERING A LUMP IN PLAINTIFF'S BREAST CREATED A QUESTION OF FACT; THERE WAS A QUESTION OF FACT WHETHER THE DOCTOR WHO COSIGNED THE PHYSICIAN ASSISTANT'S CHART SHOULD HAVE REVIEWED THE CHART (FIRST DEPT).

The First Department, reversing Supreme Court, determined questions of fact precluded summary judgment in favor of defendant registered nurse (Varas), defendant physician's assistant (Rogan), and defendant doctor who cosigned the physician assistant's chart (Shaukat). Plaintiff alleged she was told the lump in her breast was a cyst and was given no follow-up instructions. Defendants allege plaintiff was given the appropriate follow-up instructions (to rule out cancer). Several months later plaintiff was diagnosed with stage IV breast cancer:

Defendants Varas and Rogan made a prima facie showing that they did not depart from the applicable standard of care in providing plaintiff with verbal or written discharge instructions … . There are disputed issues of fact, however, that preclude summary judgment, including what, if anything at all, plaintiff was told upon discharge.

Dr. Shaukat established prima facie that she did not depart from the applicable standard of care through her expert physician's opinion that cosigning a physician assistant's chart "is a customary administrative function in major accredited hospitals," and that she acted within that standard of care by cosigning plaintiff's chart. In opposition, however, plaintiff raised an issue of fact through her expert physician's opinions that "this function is not merely administrative"; that, in accordance with American Medical Association policy, "physician[s] must review the [physician assistants'] work to ensure conformity with the standard of care, not to simply rubberstamp medical records for 'administrative' purposes only"; and

that Dr. Shaukat failed to conform to this standard of care by not recognizing alleged deficiencies in plaintiff's chart and by not instructing Rogan to call plaintiff to tell her that she required imaging promptly in order to rule out a more serious condition, such as breast cancer … . Almonte v Shaukat, 2022 NY Slip Op 02221, First Dept 4-5-22

Practice Point: In this medical malpractice case, whether a registered nurse and a physician's assistant gave plaintiff adequate discharge instructions after discovery of a lump in plaintiff's breast raised a question of fact. In addition, whether the doctor who cosigned the physician assistant's chart should have reviewed the chart raised a question of fact.

MUNICIPAL LAW, FIREFIGHTERS, DISABILITY.

A PROBATIONARY FIREFIGHTER INJURED WHILE TRAINING TO COMPLETE A FIRE BASIC TRAINING PROGRAM WAS INJURED IN THE PERFORMANCE OF HIS DUTIES, ENTITLING HIM TO GENERAL MUNICIPAL LAW 207-A DISBILITY BENEFITS (THIRD DEPT).

The Third Department, in a full-fledged opinion by Justice McShan, determined Supreme Court properly found petitioner, a probationary firefighter, was entitled to disability benefits pursuant to General Municipal Law 207-a. The fact that petitioner was injured while training for a test required for the completion of a fire basic training program did not mean petitioner was not injured in the performance of his duties, as argued by the city:

Although petitioner's injury did not occur in the course of his actual performance of the required test, successful completion of the candidate physical ability test was a necessary requirement of petitioner's position, and petitioner was engaged in the expected and foreseeable task of practicing for that test during a mandatory training program that was part of his duties as a probationary firefighter … . The record further reflects that petitioner was attending the Fire Academy at the direction of the City, that the training was paid for by the City and that petitioner was receiving full pay for his attendance and participation in the program. Mindful that, as a remedial statute, General Municipal Law § 207-a "should be liberally

construed in favor of the injured employees the statute was designed to protect" … , we find that the requisite causal relationship exists between petitioner's job duties and his injury … . Matter of Smith v City of Norwich, 2022 NY Slip Op 02324, Third Dept 4-7-22

Practice Point: A probationary firefighter injured while training to complete a fire basic training program was injured in the "performance of his duties" and is therefore entitled to General Municipal Law 207-a disability benefits.

NEGLIGENT HIRING, SUPERVISION.

PLAINTIFF DANCER STATED CAUSES OF ACTION AGAINST DEFENDANT DANCER AND THEIR EMPLOYER, THE NEW YORK CITY BALLET (NYCB), IN CONNECTION WITH INTIMATE IMAGES ALLEGEDLY DISCLOSED BY THE DEFENDANT DANCER (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Singh, over an extensive dissenting opinion, determined plaintiff, Waterbury, stated causes of action for: (1) violation of the NYC Administrative Code provision which prohibits the disclosure of intimate images without consent; (2) intentional infliction of emotional distress; and (3) negligent hiring, supervision and retention. The plaintiff (Waterbury) was a dancer with the defendant New York City Ballet (NYCB). The defendant Finlay, who allegedly disclosed the images, was also a NYCB dancer. The negligent hiring cause of action is against NYCB as the defendant-dancer's employer:

Waterbury's allegations that images depict her engaged in sexual activity suffice (see Administrative Code § 10-180 [a] …). Construing the complaint liberally and according Waterbury "the benefit of every possible favorable inference" … , the allegations that Finlay shared images of her breasts are also sufficient (see Administrative Code § 10-180 [a] …). …

Waterbury also sufficiently alleges that Finlay intended to cause her economic, physical, or substantial emotional harm. "A result is intended if the act is done with the purpose of accomplishing such a result or with knowledge that to a substantial certainty such a result will ensue" … . …

Waterbury alleges that NYCB dancers and others affiliated with NYCB shared images and commentary regarding other women and that NYCB knew that Finlay and other dancers were degrading and exploiting young women. She asserts that NYCB implicitly encouraged this behavior. Waterbury states that NYCB knew of Finlay's sexual conduct towards young women and took no steps to prevent such conduct. Waterbury v New York City Ballet, Inc., 2022 NY Slip Op 02890, First Dept 4-28-22

REBUTTAL EVIDENCE, PLAINTIFF'S TREATING PHYSICIAN PROPERLY ALLOWED TO TESTIFY IN REBUTTAL RE: DEFENDANTS' EXPERT.

THE TRIAL JUDGE HAS THE DISCRETION TO PERMIT REBUTTAL TESTIMONY; HERE PLAINTIFF'S TREATING PHYSICIAN WAS PROPERLY ALLOWED TO REBUT THE TESTIMONY OF DEFENDANTS' EXPERT, EVEN THOUGH THE TREATING PHYSICIAN'S TESTIMONY COULD HAVE BEEN PRESENTED IN THE CASE-IN-CHIEF (FIRST DEPT).

The First Department noted that the trial judge properly allowed plaintiff to call her treating physician to rebut the testimony of defendants' expert, even though the doctor's testimony could have been presented in her case-in-chief:

The trial court providently exercised its discretion in permitting plaintiff to call her treating radiologist as a rebuttal witness … . While plaintiff's radiologist's testimony could have been offered as part of her case-in-chief, and her failure to offer the testimony at that time deprived her of the right to make use of it as affirmative evidence, she still had the right to offer the testimony in order "to impeach or discredit" the testimony of defendants' expert radiologist … . Reinoso v New York City Tr. Auth., 2022 NY Slip Op 02242, First Dept 4-5-22

Practice Point: In a civil case, a judge has the discretion to allow a plaintiff to rebuttal evidence which could have been presented in the case-in-chief.

SLIP AND FALL, CORPORATION LAW, OFFICER OR SHAREHOLDER LIABILITY.

A CORPORATE OFFICER OR SHAREHOLDER CANNOT BE PERSONALLY LIABLE FOR NONFEASANCE (DOING NOTHING), AS OPPOSED MISFEASANCE (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined the complaint against the individual defendant, John Milevoi, an officer or shareholder of the property management company, defendant M&L Milevoi Management, must be dismissed. Plaintiff alleged a leak in the ceiling of her apartment caused her slip and fall:

The complaint should be dismissed against the individual defendant John Milevoi, because there is no allegation that his liability stems from an act of misfeasance or malfeasance, as opposed to nonfeasance. A corporate officer or shareholder may not be held personally liable for a failure to act … . Defendant owner and defendant management company, on the other hand, have not established their entitlement to judgment as a matter of law. De Barcacel v 1015 Concourse Owners Corp., 2022 NY Slip Op 02869, First Dept 4-28-22

Practice Point: A corporate officer or shareholder cannot be personally liable for nonfeasance (doing nothing), as opposed to misfeasance. The complaint against the corporate officer or shareholder here was dismissed. But the complaint against the corporation was not. The corporation is a property management company and plaintiff's slip and fall complaint alleged there was a water leak in her apartment.

SLIP AND FALL, CREATION OF DANGEROUS CONDITION.

IN ORDER TO HOLD A PROPERTY OWNER LIABLE FOR THE CREATION OF A DANGEROUS CONDITION, HERE THE INSTALLATION OF A COMPOSITE MATERIAL AT THE TOP OF A STAIRWELL WHICH ALLEGEDLY BECAME SLIPPERY WHEN WET, A PLAINTIFF MUST SHOW THE DEFENDANT WAS AWARE OF THE DANGER (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendants' motion for summary judgment in this slip and fall case should not have been granted. Plaintiff alleged a composite material used at the top of a staircase was inappropriate for that purpose because the surface became slippery when wet from rain. The Second Department found that the defendants did not demonstrate they did not have constructive knowledge of the condition, mainly because the evidence relied upon was inadmissible hearsay. But the Second Department also noted the plaintiff must show more than the creation of a dangerous condition to hold the defendants liable. It must also be shown the defendants knew or should have known of the danger:

"In a premises liability case, a defendant property owner, or a party in possession or control of real property, who moves for summary judgment has the initial burden of making a prima facie showing that it neither created the alleged defective condition nor had actual or constructive notice of its existence" … . Contrary to the plaintiff's contention, the defendants may not be held liable merely because they created the allegedly dangerous condition by directing the installation of the composite decking material on the landing. "[A]bsent a statute imposing strict liability, a defendant may not be held liable for creating a dangerous or defective condition upon property unless the defendant had actual, constructive, or imputed knowledge of the danger created" … . San Antonio v 340 Ridge Tenants Corp., 2022 NY Slip Op 02298, Second Dept 4-6-22

Practice Point: It may be an obvious point, but in order to hold a property owner liable for creating a dangerous condition, the plaintiff must not only show that the defendant created the condition, but also that the defendant was aware of the danger. In this case the defendant installed a composite flooring at the top of a stairwell which allegedly became slippery when wet. Just proving the defendant

installed the floor and that the floor became slippery when wet would not be enough.

SLIP AND FALL, INSURANCE LAW, "USE" OF A VEHICLE.

PLAINTIFF'S FALLING INTO A HOLE ON THE PREMISES AFTER HIS TRUCK WAS LOADED WAS NOT THE RESULT OF "USE" OF THE TRUCK WITHIN THE MEANING OF THE INSURANCE POLICIES (FIRST DEPT).

The First Department, reversing Supreme Court, determined the plaintiff's falling into a hole after he was finished loading his truck did not result from his "use" of the truck within the meaning of the applicable insurance policies:

While "use" of an automobile includes loading and unloading , an accident does not arise from the "use" of an automobile merely because it occurs during the loading or unloading process, but rather "must be the result of some act or omission related to the use of the vehicle" … . Tishman Constr. Corp. v Zurich Am. Ins. Co., 2022 NY Slip Op 02886, First Dept 4-28-22

Practice Point: Here plaintiff's falling into a hole on the premises after he had loaded his truck did not result from "use" of the truck within the meaning of the insurance policies.

SLIP AND FALL, EDUCATION-SCHOOL LAW, LATE NOTICE OF CLAIM.

THE FACT THAT THE SCHOOL WAS AWARE OF THE PETITIONERS' CHILD'S INJURY AT THE TIME IT OCCURRED DOES NOT MEAN THE SCHOOL HAD TIMELY KNOWLEDGE OF THE POTENTIAL LAWSUIT; PETITIONERS' APPLICATION TO DEEM A LATE NOTICE OF CLAIM TIMELY SERVED SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the petitioners' application to deem the late notice of claim timely served nunc pro tunc should not

have been granted. Apparently petitioners' child tripped and fell on a stairwell at at her school. The fact that the school was aware of the child's injury at the time does not mean the school was aware of a potential lawsuit. The year-long delay was not adequately explained; infancy is not enough. And the petitioners did not show the school was not prejudiced by the delay:

The appellant's "knowledge of the accident and the injury, without more, does not constitute actual knowledge of the essential facts constituting the claim, at least where the incident and the injury do not necessarily occur only as the result of fault for which it may be liable" … . The petitioner mother stated in an affidavit submitted in support of the application that the school nurse called her on the day of the accident, advising her that her daughter fell on the stairs and injured her right foot. This statement, however, did not provide the appellant with actual knowledge of the facts underlying the petitioners' claim of negligent supervision … .. Similarly, although the petitioner mother stated in her affidavit that she spoke to an employee of the appellant about the accident approximately two months after it occurred, the mother's affidavit indicates that the employee had no information or details to share. Moreover, letters sent by the petitioners' attorneys to the appellant did not advise it of the essential facts underlying the negligent supervision claim. J. G. v Academy Charter Elementary Sch., 2022 NY Slip Op 02251, Second Dept 4-6-22

Practice Point: An application to serve a late notice of claim against a school may be granted if the school had timely knowledge of the claim. But that doesn't mean timely knowledge of the injury or the incident. It means timely knowledge of the potential lawsuit.

TRAFFIC ACCIDENTS, DISCOVERY, VEHICLE AND TRAFFIC LAW, MUNICIPAL LAW, SEALING OF RECORDS.

ALTHOUGH THE RECORDS OF TRAFFIC INFRACTIONS ARE SEALED PURSUANT TO CPL 160.55, THE RECORDS OF A VIOLATION OF NYC ADMINISTRATIVE CODE 19-190(B), AN UNCLASSIFIED MISDEMEANOR WHICH CRIMINALIZES STRIKING A PEDESTRIAN WHO HAS THE RIGHT OF WAY, ARE NOT SEALED; THEREFORE PLAINTIFF IS ENTITLED TO DISCOVERY OF THOSE RECORDS IN THIS VEHICLE-PEDESTRIAN ACCIDENT CASE (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff in this vehicle-pedestrian accident case was entitled to the records of the driver's guilty plea to an unclassified misdemeanor (under the NYC Administrative Code), which criminalizes striking a pedestrian who has the right of way: The unclassified misdemeanor is not covered by the sealing statute, Criminal Procedure Law (CPL) 160.55 which seals records of Vehicle and Traffic Law infractions:

… [Defendant driver] was arrested, charged, and subsequently pled guilty to Administrative Code of City of NY § 19-190(b), an unclassified misdemeanor, and to Vehicle and Traffic Law § 1146(c)(1), a traffic violation, for failing to yield to plaintiff's decedent and causing him injury. Plaintiff … now seeks the records pertaining to [the driver's] unclassified misdemeanor. The City defendants argue that these records are not discoverable because they overlap with [the driver's] traffic infraction records, which are sealed pursuant to CPL 160.55.

Under CPL 160.55, all records and papers relating to the arrest or prosecution of an individual convicted of a traffic infraction or violation, following a criminal action or proceeding, shall be sealed and not made available to any person or public or private agency … . Plaintiff is entitled to [the driver's] records pertaining to his unclassified misdemeanor, as the records are not subject to CPL 160.55, and it does not appear that they were sealed … . To the extent these records contain references or information related solely to [the driver's] sealed traffic violation case, the City must redact or remove it from its production. Lu-Wong v City of New York, 2022 NY Slip Op 02226, First Dept 4-5-22

Practice Point: Although the records of traffic infractions are sealed under CPL 160.55, the records of a violation of the NYC Administrative Code, which criminalizes striking a pedestrian who has the right-of-way, are not subject to that sealing statute. Therefore the plaintiff in this vehicle-pedestrian accident case was entitled to those records.

TRAFFIC ACCIDENTS, FAILURE TO YEILD.

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IN THIS INTERSECTION TRAFFIC-ACCIDENT CASE SHOULD HAVE BEEN GRANTED; THE EVIDENCE ESTABLISHED DEFENDANT FAILED TO STOP AT A STOP SIGN AND FAILED TO SEE WHAT SHOULD HAVE BEEN SEEN (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff's motion for summary judgment in this intersection traffic-accident case should have been granted:

Plaintiffs established their prima facie entitlement to partial summary judgment by averring that, at the time of the accident, their vehicle was traveling westbound through an intersection at 91st Avenue in Queens, when defendants' vehicle failed to stop at a designated stop sign and struck the middle of the driver's side of plaintiffs' vehicle … . A presumption of negligence arises from the failure of a driver at a stop sign to yield the right of way to the vehicle on the highway in violation of Vehicle and Traffic Law § 1142 … . …

Defendants' claim that defendant Bennett stopped at the stop sign, and checked for oncoming traffic but did not see plaintiffs' vehicle until it suddenly appeared in front of her as she proceeded into the intersection, fails to rebut the presumption of negligence arising from her failure to yield the right of way to plaintiffs' vehicle, but instead indicates that she was negligent in failing to see what was there to be seen … . Samnath v Lifespire Servs., Inc., 2022 NY Slip Op 02643, First Dept 4-21-22

Practice Point: Failure to stop at a stop sign raises a presumption of negligence in an intersection traffic-accident case. Proceeding into the intersection and striking a

car which has the right-of-way constituted a negligent failure to see what should have been seen.

TRAFFIC ACCIDENTS, LATE NOTICE OF CLAIM.

TRAFFIC ACCIDENTS, VEHICLE AND TRAFFIC LAW. THE RIGHT LANE WAS FOR RIGHT TURNS ONLY; THE MIDDLE LANE WAS FOR EITHER GOING STRAIGHT OR TURNING RIGHT; HERE THE DRIVER IN THE FAR RIGHT LANE DID NOT TURN RIGHT AND STRUCK THE CAR IN THE MIDDLE LANE WHICH WAS MAKING A RIGHT TURN; THE DRIVER IN THE MIDDLE LANE WAS ENTITLED TO SUMMARY JUDGMENT DISMISSING THE COMPLAINT (SECOND DEPT).

The Second Department, reversing Supreme Court in this traffic accident case, determined plaintiff's motion for summary judgment against defendant Rubio should not have been granted and defendant Rubio's motion for summary judgment should have been granted. Plaintiff was a passenger in a taxi driven by defendant Muy-Angamarca. Muy-Angamarca was in the far right lane, which was for right turns only. Rubio was in the middle lane which could be used to go straight or turn right. When Rubio attempted the right turn, Muy-Angamarco continued straight and struck Rubio's car:

… [T]he Rubio defendants established their prima facie entitlement to judgment as a matter of law by demonstrating that the sole proximate cause of the accident was Muy-Angamarca's vehicle continuing straight through the intersection in disregard of a traffic sign directing that his lane was for right turns only … . Based upon Muy-Angamarca's disregard of the traffic sign, he was in violation of the Vehicle and Traffic Law, and thus, he was negligent as a matter of law (see Vehicle and Traffic Law § 1110[a] …). Rubio was entitled to assume that Muy-Angamarca would obey the traffic sign requiring Muy-Angamarca to turn right … . Indeed, the plaintiff testified at his deposition that he observed that Rubio had signaled before making a legal right turn from the middle lane, that Muy-Angamarca "started to accelerate" toward the intersection while Rubio's vehicle was turning, and that he

did not believe Rubio was at fault in the happening of the accident. Ellsworth v Rubio, 2022 NY Slip Op 02781, Second Dept 4-27-22

TRAFFIC ACCIDENTS, LATE NOTICE OF CLAIM.

IN THIS TRAFFIC ACCIDENT CASE INVOLVING THE DEFENDANT NYC TRANSIT AUTHORITY'S BUS, THE AUTHORITY GAINED TIMELY KNOWLEDGE OF THE POTENTIAL CLAIM WHEN IT INVESTIGATED THE ACCIDENT AND WAS NOT PREJUDICED BY THE DELAY; THE PETITION FOR LEAVE TO FILE A LATE NOTICE OF CLAIM SHOULD HAVE BEEN GRANTED, NOTWITHSTANDING THE ABSENCE OF A REASONABLE EXCUSE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the petition seeking leave to file a late notice of claim in this traffic accident case should have been granted. It was alleged defendant NYC Transit Authority's bus collided with a NYC sanitation truck which then collided with petitioner's car. The Transit Authority investigated the accident and therefore had knowledge of the essential facts of the claim. Because the defendant had timely actual knowledge of the potential claim and did not demonstrate prejudice from the delay, petitioner did not need to present a reasonable excuse for the late notice:

… [A]s the Authority acquired timely knowledge of the essential facts constituting the petitioner's claim, the petitioner met his initial burden of showing that the Authority would not be prejudiced by the late notice of claim … . In response to the petitioner's initial showing, the Authority failed to come forward with particularized evidence demonstrating that the late notice of claim substantially prejudiced its ability to defend the claim on the merits … . Since the Authority had actual knowledge of the essential facts underlying the claim and no substantial prejudice to the Authority was demonstrated, the petitioner's failure to provide a reasonable excuse for the delay in serving the notice of claim did not serve as a bar to granting leave to serve a late notice of claim … . Matter of Manbodh v New York City Tr. Auth., 2022 NY Slip Op 02544, Second Dept 4-20-22

Practice Point: Here the defendant NYC Transit Authority investigated the traffic accident involving petitioner's car and therefore had timely notice of the essential facts of the potential lawsuit. In that situation, in the absence of prejudice to the defendant caused by petitioner's failure to timely file a notice of claim (none here), petitioner need not provide a reasonable excuse and leave to file a late notice should be granted.

WORKERS' COMPENSATION, INJURED ON THE WAY TO WORK.

ALTHOUGH CLAIMANT WAS STRUCK BY A VEHICLE WHILE HE WAS RIDING HIS BICYCLE TO WORK (USUALLY NOT COMPENSABLE), HIS INJURY WAS FOUND COMPENSABLE BY THE WORKERS' COMPENSATION LAW JUDGE (WCLJ) UNDER THE "SPECIAL ERRAND" EXCEPTION; BECAUSE THE WORKERS' COMPENSATION BOARD DID NOT ADDRESS THAT ISSUE, THE MATTER WAS REMITTED (THIRD DEPT).

The Third Department, remitting the matter to the Workers' Compensation Board, determined the Board did not address the basis of the Workers' Compensation Law Judge's (WCLJ's) ruling that claimant was entitled to benefits. Claimant was struck by a vehicle while riding his bicycle to work. Although travel to work is usually not covered by Workers' Compensation, the WCLJ found that "claimant was engaged in a special errand given that he was traveling for the purpose of an overtime assignment and at a location different from his regular work locations." That issue was not addressed by the Board:

In finding that the claim was compensable, the WCLJ found that claimant was engaged in a special errand given that he was traveling for the purpose of an overtime assignment and at a location different from his regular work locations. The Board, however, did not address the exception relied upon by the WCLJ but, instead, found that the outside employee exception did not apply in concluding that the accident did not arise out of or in the course of claimant's employment. Whether an exception to the general rule applies turns on the Board's fact-intensive analysis of the particular circumstances of a given case … , and "[t]he courts are bound by the . . . Board's findings of fact which, including the ultimate

fact of arising out of and in the course [of employment], must stand unless erroneous in law and regardless of whether conflicting evidence is available" … . The fact that claimant was not an outside employee, as found by the Board, is not dispositive as to whether the special errand exception applies, which was the basis of the WCLJ's finding that claimant was entitled to workers' compensation benefits. As the Board has made no findings of fact with regard to whether the special errand exception applies, the matter must be remitted to the Board for further proceedings in regard to this particular issue…. . Matter of Waters v New York City Tr. Auth., 2022 NY Slip Op 02474, Third Dept 4-14-22

Practice Point: Although injury while traveling to work is usually not covered by Workers' Compensation, there are exceptions, including the "special errand" exception which was deemed to apply here by the Workers' Compensation Law Judge.

WORKERS' COMPENSATION, SUCCESSIVE INJURIES.

A SUBSEQUENT INJURY TO THE SAME BODY "MEMBER" WHICH WAS THE SUBJECT OF A PRIOR SCHEDULE LOSS OF USE (SLU) AWARD NEED NOT BE REDUCED BY THE PERCENTAGE LOSS OF THE PRIOR AWARD (CT APP).

The Court of Appeals, in a full-fledged opinion addressing two cases by Judge Cannataro, over an extensive dissent in each case, determined that, under Workers' Compensation Law section 15, a subsequent injury to the same body "member" may be fully compensable, notwithstanding a prior injury involving the same body "member:"

The common issue in these appeals is whether, under Workers' Compensation Law (WCL) § 15, a claimant's schedule loss of use (SLU) award must always be reduced by the percentage loss determined for a prior SLU award to a different subpart of the same body "member" enumerated in section 15. We hold that separate SLU awards for different injuries to the same statutory member are contemplated by section 15 and, when a claimant proves that the second injury, "considered by itself and not in conjunction with the previous disability" (WCL §

15 [7]), has caused an increased loss of use, the claimant is entitled to an SLU award commensurate with that increased loss of use. .Matter of Johnson v City of New York, 2022 NY Slip Op 02579, CtApp 4-21-22

Practice Point: A schedule loss of use (SLU) award for injury to a body "member" need not be reduced based on a prior SLU award for injury to the same body "member" if the claimant proves the second injury has caused an increased loss of use.

WORKERS' COMPENSATION.

BECAUSE CLAIMANT WAS NOT ENTITLED TO A NONSCHEDULE AWARD DUE TO RETIREMENT, HE WAS ENTITLED TO A SCHEDULE LOSS OF USE (SLU) AWARD (THIRD DEPT).

The Third Department, reversing the Workers' Compensation Board, determined claimant was entitled to a schedule loss of use (SLU) award because he was not eligible for a nonschedule award due to retirement:

A nonschedule award "is based [up]on a factual determination of the effect that the [permanent partial] disability has on the claimant's future wage-earning capacity" and is mathematically derived from a claimant's average weekly wages and wage-earning capacity … . On the other hand, an SLU award is designed to compensate for a claimant's "loss of earning power" as a result of anatomical or functional losses or impairments … and, as such, "'is not allocable to any particular period of disability'" … and is "independent of the time an employee actually loses from work" … . That said, "[a] claimant who sustains both schedule and nonschedule injuries in the same accident may receive only one initial award," because SLU and nonschedule awards "are both intended to compensate a claimant for loss of wage-earning capacity sustained in a work-related accident[,] and concurrent payment of an award for a schedule loss and an award for a nonschedule permanent partial disability for injuries arising out of the same work-related accident would amount to duplicative compensation" … . "However, in the unique circumstance where no initial award is made based on a nonschedule permanent

partial disability classification, a claimant is entitled to an SLU award" for the permanent impairments sustained in the same work-related accident … . …

… [T]here is no dispute that claimant is not entitled to a nonschedule award based upon his nonschedule classification because he voluntarily retired in April 2020 and was therefore not attached to the labor market at the time of classification … . Thus, as "no initial award [wa]s made based [up]on [claimant's] nonschedule permanent partial disability classification" … , he "is entitled to an SLU award for the permanent partial impairments to [his] statutorily-enumerated body members" … . Finally, and contrary to the position taken by the Board, the fact that claimant voluntarily retired, and was therefore not attached to the labor market, does not preclude him from receiving an SLU award, because "it is axiomatic that a claimant's lack of attachment to the labor market, voluntary or otherwise, is irrelevant to a determination as to entitlement to an SLU award" … . Matter of Gambardella v New York City Tr. Auth., 2022 NY Slip Op 02475, Third Dept 4-14-22

Practice Point: This Workers' Compensation case includes a clear explanation of a "nonschedule award" versus a "schedule loss of use (SLU)" award.

WORKERS' COMPENSATION.

THERE WAS NO INDICATION ON THE FORM AND NO REGULATION REQUIRING CLAIMANT TO SUBMIT A SEPARATE RB-89 FORM FOR EACH CLAIM; THE BOARD THEREFORE ABUSED ITS DISCRETION WHEN IT REFUSED TO REVIEW THE WORKERS' COMPENSATION LAW JUDGE'S (WCLJ'S) DECISION ON THAT GROUND (THIRD DEPT).

The ThIrd Department, reversing the Workers' Compensation Board and remitting the matter, determined it was an abuse of discretion to deny claimant's application on the ground that a separate copy of the RB-89 form was not submitted for each claim:

We note … that the requirement that a party submit a copy of the RB-89 form when referencing multiple claims, or that failing to provide a copy for each claim

could result in review being denied on one of the claims, is not included on the form, in the instructions to the form or in the Board's regulations. Although the Board may certainly adopt the formatting requirement that applicants provide a copy of their RB-89 form for each claim referenced therein, we find, under the circumstances presented here, that the Board's denial of claimant's application for review of the WCLJ's decision on the 2017 claim for failing to provide the Board with an additional copy of their RB-89 form was an abuse of the Board's discretion … . Matter of Olszewski v PAL Envtl. Safety Corp., 2022 NY Slip Op 02469, Third Dept 4-14-22