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Personal Injury
Reversal Report
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ASSUMPTION OF RISK, SLIPPERY BASKETBALL COURT.

PLAINTIFF ASSUMED THE RISK OF SLIPPING ON THE BASKETBALL COURT WHICH WAS WET WITH CONDENSATION; PLAINTIFF WAS AWARE OF THE RECURRING CONDITION (SECOND DEPT).

The Second Department determined defendants were entitled to summary judgment in this basketball-injury case. Plaintiff was deemed to have assumed the risk of slipping and falling on condensation on the floor of the court:

… [T]he defendants established … ,that the plaintiff was aware of and had assumed the risk that the floor of the basketball courRt would be slippery from condensation that had formed due to humid conditions in the gymnasium. The defendants' submissions, including the plaintiff's own deposition testimony, demonstrated that the plaintiff had played basketball in the gymnasium on more than 50 occasions prior to the day of the accident, knew that the gymnasium air was "humid" and had dry-mopped the gymnasium floor while playing basketball in the past when it was "getting wet" from "[c]ondensation," and nevertheless continued playing basketball in the gymnasium on multiple occasions up until the date of the accident despite his awareness of this condition. Under these circumstances, the plaintiff assumed the risk of injury inherent in playing basketball on an indoor court which he knew to become slippery due to humid conditions in the gymnasium … . Lungen v Harbors Haverstraw Homeowners Assn., Inc., 2022 NY Slip Op 03717, Second Dept 6-8-22

Practice Point: Plaintiff was aware that the basketball court routinely became wet with condensation. Therefore he assumed the risk of slipping on the condensation while playing basketball.

COURT OF CLAIMS, HARNESS RACING ACCIDENT.

THE NYS GAMING COMMISSION'S DUTIES TO INSPECT HORSES AND EQUIPMENT BEFORE A HARNESS RACE ARE PROPRIETARY, NOT GOVERMENTAL, IN NATURE; THEREFORE ORDINARY NEGLIGENCE PRINCIPLES APPLY AND THE IMMUNITY DEFENSE IS NOT AVAILABLE; DURING THE RACE A HORSE FELL AND CLAIMANT'S HORSE COLLIDED WITH THE FALLEN HORSE; THERE ARE QUESTIONS OF FACT ABOUT THE SAFETY OF THE FALLEN HORSE'S EQUIPMENT AND WHETHER THE HORSE EXHIBITED INDICATIONS HE WAS LAME; THERE ARE QUESTIONS OF FACT ABOUT THE APPLICABILTY OF THE ASSUMPTION OF THE RISK DOCTRINE; REGULATIONS RE: THE INSPECTION OF HORSES AND EQUIPMENT ALLOWED CONSTRUCTIVE NOTICE OF THE DANGEROUS CONDITION TO BE IMPUTED (THIRD DEPT).

The Third Department, in a comprehensive decision which should be consulted on the issues of governmental immunity, assumption of the risk and constructive notice, reversing Supreme Court, determined the New York State Gaming Commission was exercising a proprietary, not governmental, function when its employees inspected a harness-racing horse's (Mister Miami's) equipment and failed to scratch the horse, which exhibited indications he was "lame," from the upcoming race. Claimant was injured when, during the race, claimant's horse collided with Mister Miami after Mister Miami fell. Because the state's alleged negligence stemmed from a proprietary function, ordinary negligence principles applied and there was no need to show a special relationship between claimant and the state, and the governmental immunity affirmative defense was not available. There were questions of fact whether the assumption-of-the-risk doctrine applied because the state may have acted to unreasonably increase the risk. As for notice, the regulations requiring the state to inspect the horses and equipment allowed the state's constructive notice of the dangerous condition to be imputed:

… [T]he duties of [the state's] officials are fundamentally intertwined with the operation of each and every race and, while such tasks may tangentially relate to the overall function of ensuring fair and honest gambling in this state, they are more specifically directed to the goal of ensuring the safety of the participants in

those races … . … [I]t is apparent that at least part of the Commission's role in harness racing is to work hand in hand with the private racing industry to further the state's goal of "deriv[ing] a reasonable revenue for the support of government" … . * * *

… [W]e find that there are triable issues as to whether Commission officials adequately performed their duties and whether their alleged failures unreasonably increased the risk beyond a level generally inherent in harness track racing … . …

Because [the inspection] duties were imposed upon the Commission officials by regulation, constructive notice of Mister Miami's health and equipment issues that would have been observable during those inspections may be imputed … . Bouchard v State of New York, 2022 NY Slip Op 04202, Third Dept 6-30-22

Practice Point: This opinion has valuable discussions of; (1) how to analyze whether a government is exercising a governmental function (to which the "special relationship" and "governmental immunity" doctrines apply) or a proprietary function (to which ordinary negligence principles apply); (2) the assumption of the risk doctrine; and (3) the imputation of constructive notice when there are regulations mandating inspections which allegedly would have revealed the dangerous condition. Here claimant was injured during a harness race when his horse collided with a fallen horse. The complaint alleged the NYS Gaming Commission did not inspect the fallen horse and the fallen horse's equipment prior to the race as required by the relevant regulations.

EXPERT DISCLOSURE, TREATING PHYSICIAN, THIRD DEPARTMENT'S UNIQUE REQUIREMENTS.

CLAIMANT'S ATTORNEY WAS NOT AWARE OF THE THIRD DEPARTMENT'S UNIQUE REQUIREMENT OF FULL EXPERT-WITNESS DISCLOSURE FOR A TREATING PHYSICIAN; THAT WAS AN ADEQUATE EXCUSE FOR AN UNTIMELY DISCLOSURE (THIRD DEPT).

The Third Department, reversing Supreme Court, determined claimant's treating physician (Hopson) in this personal injury case should have been allowed to testify

as an expert, despite the failure to comply with full expert disclosure pursuant to CPLR 3101. The Third Department is the only department which requires such full expert disclosure by a treating physician and claimant's attorney had not practiced in the Third Department:

There is no dispute that claimant failed to comply with the expert disclosure requirements of CPLR 3101 (d) (1) (i) in identifying Hopson as a witness. Nevertheless, we disagree with the Court of Claims' finding that claimant's excuse was unreasonable. The situation here mirrors that in Schmitt v Oneonta City Sch. Dist. (151 AD3d 1254), where we accepted the explanation of the plaintiffs' attorney that he was "unaware of this Court's interpretation of CPLR 3101 (d) (1) (i) and the corresponding need to file an expert disclosure for a treating physician, and the record [was] otherwise devoid of any indication that counsel's failure to file such disclosure was willful" … . The same holds true here, as claimant's attorney revealed that she practices law in a different judicial department and candidly conceded that she was unaware of this Court's interpretation that the statute requires expert disclosure for treating physicians. There is nothing in the record calling into question the veracity of counsel's representations and no basis to conclude that the noncompliance with CPLR 3101 (d) (1) (i) was willful. As such, the court erred in precluding Hopson's testimony as an expert witness…. . Freeman v State of New York, 2022 NY Slip Op 03559, Third Dept 6-2-22

Practice Point: Only the Third Department requires full expert-witness disclosure for a treating physician.

GENERAL MUNICIPAL LAW 207-1, FIREFIGHTERS, ARBITRATION.

THE MANNER IN WHICH THE FIREFIGHTER'S GENERAL MUNICIPAL LAW 207-A INJURY CLAIM SHOULD BE PROCESSED IS ARBITRABLE BECAUSE THE ISSUE IS ADDRESSED IN THE COLLECTIVE BARGANING AGREEMENT (CBA); THE PETITION TO STAY ARBITRATION SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the petition to stay arbitration in this General Municipal Law 207-a injury claim by a firefighter

should not have been granted. The manner in which a section 207-a claim is processed is an arbitrable matter:

… [T]he union filed a grievance alleging, inter alia, that the City was in violation of the CBA [collective bargaining agreement] and the negotiated General Municipal Law § 207-a policy by failing to adhere to the required procedures in processing a claim by one of the union's members for General Municipal Law § 207-a benefits. . …

It is undisputed that there is no constitutional, statutory, or public policy provision prohibiting the arbitration of the dispute at issue in this matter…. [G]iven the breadth of the arbitration clause in this case, the dispute regarding the City's processing of claims for General Municipal Law § 207-a benefits bore a reasonable relationship to the general subject matter of the CBA, since Article 10 of the CBA expressly refers to the negotiated policy for the provision of such benefits … . "[T]he question of the scope of the substantive provisions of the CBA is a matter of contract interpretation and application reserved for the arbitrator" … . Matter of City of New Rochelle v Uniformed Fire Fighters Assn., Inc., 2022 NY Slip Op 03722, Second Dept 6-8-22

Practice Point: Here the issue (how a firefighter's General Municipal Law 207-a injury claim should be processed) was addressed in the collective bargaining agreement (CBA) was therefore arbitrable. The petition to stay arbitration should not have been granted.

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GENERAL MUNICIPAL LAW 207-A BENEFITS, FIREFIGHTERS.

A FIREFIGHTER INJURED ON THE JOB RETURNED TO THE JOB BUT COULD NOT WORK THE 10 TO 24 HOUR SHIFTS WHICH ARE THE "REGULAR DUTIES" OF A FIREFIGHTER; BECAUSE SHE WAS NOT OFFERED THE FULL-TIME EQUIVALENT OF THE SHORTER SHIFTS OR LIGHT-DUTY WORK, SHE WAS ENITLTED TO GENERAL MUNICIPAL LAW 207-A BENEFITS (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined petitioner, a firefighter who had injured her shoulder on the job, was entitled to General Municipal Law 207-a benefits:

A firefighter seeking section 207-a benefits must show "that his or her injury or illness results from the performance of his or her duties and that he or she is physically unable to perform his or her regular duties as a firefighter … . The regular duties of a firefighter for the City required shifts of between 10-24 hours, and the medical evidence is undisputed that petitioner could work only 8-hour shifts. Inasmuch as the evidence established that petitioner could not work the longer shifts, and she was not offered the full-time equivalent of the shorter shifts or light-duty work, the determination that she is not entitled to General Municipal Law § 207-a benefits is arbitrary and capricious. Matter of Newman v City of Tonawanda, 2022 NY Slip Op 03834, Fourth Dept 6-9-22

Practice Point: Here petitioner-firefighter was injured on the job. When she returned to the job she could not work the 10 to 24 hour shifts which are the "regular duties' of a firefighter. She was assigned shorter shifts which resulted in less pay. She was therefore entitled to General Municipal Law 207-a benefits.

LABOR LAW-CONSTRUCTION LAW, FAILURE TO FOLLOW INSTRUCTIONS, SOLE PROXIMATE CAUSE.

QUESTIONS OF FACT ABOUT WHETHER PLAINTIFF WAS INSTRUCTED TO WORK ONLY ON GROUND LEVEL AND NOT TO USE STILTS, AND WHETHER THE SOLE PROXIMATE CAUSE OF THE ACCIDENT WAS PLAINTIFF'S CONTINUED USE OF THE STILTS AFTER HE FELT THEM BECOME UNSTABLE, PRECLUDED SUMMARY JUDGMENT ON THE LABOR LAW 240 (1) CAUSE OF ACTION (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined there were questions of fact which precluded summary judgment on plaintiff's Labor Law 240 (1) cause of action. Apparently, plaintiff fell while using stilts. There was a question of fact whether plaintiff's boss told him to work only on ground level without stilts. And there was a question of fact whether plaintiff was the sole proximate cause of his accident because he kept using the stilts when they became unstable and did not request another pair:

… [G]iven the nature of the work plaintiff was performing at the time of his accident, the distance he fell presented a physically significant elevation within the meaning of Labor Law § 240(1) … . While the distance may have been physically significant within the meaning of Labor Law § 240(1), evidence that plaintiff's boss … specifically instructed him to only work on ground level and not to use stilts "raises triable issues of fact as to whether plaintiff's duties were expressly limited to work that did not expose him to an elevation-related hazard within the purview of Labor Law § 240(1) … .

Issues of fact also exist as to whether plaintiff was the sole proximate cause of the accident because when he felt the stilts become unstable his "normal and logical response" should have been to request another pair rather than to keep working on them … . …

While it is disputed whether plaintiff was using his own stilts or his employer provided them, and it is further unclear whether the stilts failed because a screw came out while they were in use or because they had been jerry-rigged with a wire threaded through a bolt hole, any use of defective stilts or failure to properly

inspect them to discern any such defect was not the sole proximate cause of the accident where, as here, no proper safety devices were provided … . Gonzalez v DOLP 205 Props. II, LLC, 2022 NY Slip Op 03868, First Dept 6-14-22

Practice Point: Here, where plaintiff fell using stilts, evidence plaintiff was instructed to work only on ground level precluded summary judgment on the Labor Law 240 (1) cause of action. Plaintiff's continued use of the stilts after he felt them become unstable raised a question of fact whether plaintiff was the sole proximate cause of the injury.

LABOR LAW-CONSTRUCTION LAW, INJURY LIFTING A HEAVY OBJECT FOUR OR FIVE INCHES.

PLAINTIFF FELT HIS ARM SNAP WHEN ATTEMPTING TO LIFT A 400 POUND ELEVATOR PLATFORM FOUR OR FIVE INCHES TO PLACE A PALLET JACK UNDER IT; PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON HIS LABOR LAW 240(1) CAUSE OF ACTION SHOULD HAVE BEEN GRANTED (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff's motion for summary judgment in this Labor Law 240(1) action should have been granted. The pallet jack, which was deemed a safety device, wasn't long enough to fully lift the 400 pound elevator platform. Plaintiff was lifting the end of the platform which was not supported by the pallet jack (in order to place another pallet jack under it) when he felt his arm snap:

Plaintiff … was injured as he was attempting to move a 400-pound elevator platform from the front of a flatbed truck to the tailgate. The platform, which was about seven feet long, rested on a pallet jack that was too small to allow the platform to rest properly on it, causing the platform to dip and touch the flatbed. As plaintiff lifted the platform about four or five inches off the pallet jack in order to place a second pallet underneath to facilitate moving the platform, he felt a snap in his left arm.

The pallet jack was a safety device that was insufficient to allow plaintiff to move the platform from the front of the flatbed truck to the tailgate. In view of the weight of the platform and the amount of force it was able to generate, even in falling a relatively short distance, plaintiff's injury resulted from a failure to provide adequate protection, required by Labor Law § 240(1), against a risk arising from a significant elevation differential … . Schoendorf v 589 Fifth TIC I LLC, 2022 NY Slip Op 03580, First Dept 6-2-22

Practice Point: Even a height-differential of four or five inches can support a Labor Law 240(1) cause of action. Here plaintiff was attempting to lift a 400 pound elevator platform a few inches in order to place a pallet jack under it when he injured his arm.

LABOR LAW-CONSTRUCTION LAW, PROXIMATE CAUSE.

IF PLAINTIFF, A FOREMAN, HAD THE AUTHORITY TO STOP WORK BECAUSE OF RAIN, THEN HIS CONTINUING TO WORK MAY HAVE BEEN THE SOLE PROXIMATE CAUSE OF HIS FALL; IF PLAINTIFF HAD BEEN INSTRUCTED TO WORK IN THE RAIN, THEN THE WET PLYWOOD MAY HAVE BEEN THE SOLE PROXIMATE CAUSE OF HIS FALL; BECAUSE OF THE CONFLICTING OR ABSENCE OF EVIDENCE ON THESE ISSUES, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED; TWO JUSTICE DISSENT (THIRD DEPT).

The First Department, in a full-fledged opinion by Justice Kennedy in this Labor Law 241 (6) action, over a two-justice dissenting opinion, determined conflicting testimony about whether plaintiff, who was a foreman, had the authority to stop work because of rain, or was instructed to work in the rain, raised a question of fact about the cause of the accident. Plaintiff slipped on wet plywood and fell as he was passing steel rebar to workers below:

The deposition testimony raised issues of fact as to whether plaintiff's injuries were proximately caused by a slippery condition in violation of Industrial Code (12 NYCRR) § 23-1.7(d), or whether the sole proximate cause was plaintiff's decision,

as a foreman, to work on a plywood surface exposed to the elements while it was raining … . * * *

… [T]he evidence is inconclusive as to whether plaintiff's decision to work in the rain, rather than simply following his general foreman's instructions about what work to perform, was the sole proximate cause of his slip-and-fall accident. … [T]his case is distinguishable from the line of cases relied upon by the dissent that conclude that a plaintiff is not the proximate cause of an accident when there is undisputed evidence that they were following the instructions of a foreman. Here, plaintiff was also a foreman with specific duties and potential control over the work that he and his crew were performing. Whether he could or should have ceased work based on his own authority, as a foreman, his extensive work experience and conditions of the site, there are issues of fact that cannot be resolved on this record. Sutherland v Tutor Perini Bldg. Corp., 2022 NY Slip Op 04228, First Dept 6-30-22

Practice Point: Here the plaintiff was a foreman on a construction site. He was working in the rain when he slipped and fell on wet plywood. If plaintiff had the authority to stop work because of the rain, he may be deemed the sole proximate cause of his fall. If plaintiff was ordered to work in the rain, then the slippery plywood may be deemed to be the sole proximate cause of his fall. Because there was conflicting and/or a lack of evidence on these issues, plaintiff's motion for summary judgment should not have been granted.

LABOR LAW-CONSTRUCTION LAW, HOMEOWNER'S EXEMPTION.

HOMEOWNER'S EXEMPTION PRECLUDED THE LABOR LAW 240(1) AND 241(6) CAUSES OF ACTION AGAINST THE DEFENDANT PROPERTY OWNER, A RELIGIOUS ORGANIZATION; THE LABOR LAW 200 AND NEGLIGENCE CAUSES OF ACTION ALLEGING THE HOMEOWNER'S LADDER WAS DEFECTIVE PROPERLY SURVIVED SUMMARY JUDGMENT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the homeowner's exemption applied to preclude plaintiff's Labor Law 240(1) and 241(6) causes of

action in this ladder-fall case. The Labor Law 200 and negligence causes of action (alleging defendant property-owners' ladder was defective) properly survived summary judgment. The fact that the property-owner is a religious organization did not affect the applicability of the homeowner's exemption:

The deposition transcripts of the plaintiff and of the defendant's employee demonstrated that the defendant did not direct or control the plaintiff's work. Additionally, the deposition transcript of the defendant's employee and the affidavit of the defendant's expert architect demonstrated that the defendant was the owner of a one-family dwelling to which the meditation room [which plaintiff was painting when he fell] was an accessory. Contrary to the plaintiff's contention, the defendant is entitled to the protections of this exemption even though it is a religious organization … . …

The defendant failed to demonstrate, prima facie, that it lacked notice of the allegedly dangerous or defective condition with respect to the ladder … . Reinoso v Han Ma Um Zen Ctr. of N.Y., Inc., 2022 NY Slip Op 03755, Second Dept 6-8-22

Practice Point: The homeowner's exemption precludes Labor Law 240(1) and 241(6) causes of action against a homeowner which/who does not direct plaintiff's work, even if the homeowner is a religious organization. The homeowner's exemption does not apply to Labor Law 200 or negligence causes of action, here based on allegations the homeowner's ladder was defective.

LANDLORD-TENANT, LIABILITY FOR SHOOTING.

ALTHOUGH THE SPECIFIC CRIME, I.E., THE SHOOTING OF PLAINTIFF'S DECEDENT IN DEFENDANTS' BUILDING, MAY NOT HAVE BEEN FORESEEABLE, THE RELEVANT QUESTION IS WHETHER THE DOOR SECURITY WAS DEFICIENT AND THEREFORE WAS A CONCURRENT FACTOR IN THE SHOOTING (SECOND DEPT).

The Second Department determined the defendants (the building owner, the building manager, and the security company) were not entitled to summary

judgment in this wrongful death case stemming from a shooting in the building. Although the specific crime, i.e., the shooting of plaintiff's decedent, may not have been foreseeable by the defendants, the relevant question was whether the building's door security was deficient and was therefore a concurrent factor in shooting:

… [U]nder this Department's jurisprudence, "[t]he test in determining summary judgment motions involving negligent door security should . . . not focus on whether the crime committed within the building was 'targeted' or 'random,' but whether or not, and to what extent, an alleged negligently maintained building entrance was a concurrent contributory factor in the happening of the criminal occurrence" … .

… [W]hile the precise nature and manner of [the shooter's] crime could not necessarily have been anticipated, the alleged longstanding inoperability of the front door intercom system, involving a front door that was unlocked remotely from an off-premises security booth, along with the alleged failure of the security officers to properly screen visitors, and the chronic problem of piggy-backing, "made it foreseeable that some form of criminal conduct could occur to the detriment of one or more of the residents therein, at some point in time" … . In examining whether there are triable issues of fact as to issues of foreseeability and proximate cause requiring a trial, "a jury could conceivably conclude" that the alleged condition of the front door security equipment that included the inoperable intercom system, along with the failure of the security officers to engage in proper screening of visitors, would result in the improper piggy-back "entry of intruders into the [subject apartment] building for the commission of criminal activities against known or unknown specific tenants" … . Carmona v Sea Park E., L.P., 2022 NY Slip Op 04149, Second Dept 6-29-22

Practice Point: In the Second Department, a landlord can be liable for a crime committed in the landlord's building if the door security system was deficient and was therefore a concurrent factor in the happening of the crime. The plaintiff need not demonstrate the specific crime, here the shooting of plaintiff's decedent, could have been foreseen by the landlord.

MEDICAL MALPRACTICE, EMOTIONAL DISTRESS, BIRTH.

MOTHER'S CAUSES OF ACTION FOR EMOTIONAL DISTRESS WOULD NOT BE AVAILABLE IF HER BABY WAS BORN ALIVE; THERE WERE QUESTIONS OF FACT ABOUT WHETHER THE BABY WAS BORN ALIVE OR STILLBORN; THEREFORE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the defendants' motion for summary judgment in this medical malpractice action should not have been granted because there was a question of fact whether the baby was born alive or was stillborn:

The plaintiffs commenced this action to recover damages … for emotional distress allegedly sustained by the plaintiff Kristina Khanra as a result of the defendants' medical malpractice, which caused her to deliver a stillborn baby. The hospital records indicated that, upon removal from the womb by caesarean section, it was observed that the infant was "floppy," had "no spontaneous respirations," and had "no heart rate." The defendants … moved for summary judgment dismissing the first three causes of action insofar as asserted against them, which were premised, among other things, upon Kristina Khanra's emotional distress, on the ground that the plaintiffs could not recover for any alleged emotional distress because the infant was born alive. …

The defendants established their prima facie entitlement to judgment as a matter of law … , by tendering evidence that the infant born to Kristina Khanra by emergency cesarean section was born alive, as a heartbeat was generated 20 minutes after the infant was removed from the womb, as a result of continuous resuscitative efforts … . However, in opposition, the plaintiffs raised a triable issue of fact as to whether the infant was in fact stillborn, as the infant had no respiratory response, the infant's Apgar score was zero at 1 minute, 5 minutes, 10 minutes, and 15 minutes after the infant was removed from the womb, the infant otherwise had no indicia of life, and the infant was declared deceased approximately two hours after being removed from a ventilator … . Khanra v Mogilyansky, 2022 NY Slip Op 04160, Second Dept 6-29-22

Practice Point: Whether mother can recover for emotional distress in this medical malpractice action depended upon whether her baby was born alive or stillborn. There can be no recovery for mother's emotional distress if the baby was born alive. Because there were questions of fact about whether the baby was born alive, the defendants' motion for summary judgment should not have been granted.

MEDICAL MALPRACTICE, NEGLIGENCE, LIABILITY OF REHABILITATION SERVICE FOR RAPE AND KIDNAPPING BY CLIENT.

DEFENDANT REHABILITATION AND RECOVERY SERVICES DID NOT DEMONSTRATE IT DID NOT HAVE A DUTY TO PREVENT A PERSON UNDER ITS SUPERVISION AND CARE FROM HARMING MEMBERS OF THE GENERAL PUBLIC; PLAINTIFF WAS KIDNAPPED AND RAPED BY A PERSON WITH A VIOLENT PAST WHO WAS UNDER DEFENDANT'S CARE AND SUPERVISION (THIRD DEPT).

The Third Department determined the defendant Rehabilitation Support Services' (RSS's) motion for summary judgment in this negligence, negligent supervision, medical malpractice, negligent infliction of emotional distress action was properly denied. Plaintiff was kidnapped and raped by Jose Marlett who was under the care and supervision provided by RSS, a rehabilitation and recovery program for persons who have mental illness and substance abuse issues:

Marlett had been an outpatient client at RSS for approximately one year and had been a resident in its apartment program for approximately one to three months prior to his receipt of personal recovery services. Marlett's application for RSS services included his diagnoses of bipolar disorder and schizoaffective disorder, and a history of delusions, hallucinations, paranoia, suicidal and homicidal ideations and incarceration. RSS identified Marlett's risks as suicide and violence, and noted that he had a history of physical altercations, threatening and attempting to harm others and was a danger to himself and others. In order to receive RSS services, Marlett was required to forego other psychiatric and mental health treatment and RSS essentially became the exclusive provider of Marlett's

medication management, clinical counseling, therapy and psychiatric assessments. * * *

… [W]e find that defendants failed to prove a lack of duty to take reasonable steps to prevent Marlett from harming members of the general public. * * *

[Re: medical malpractice] Defendants failed to submit a competent expert medical opinion, instead submitting a speculative and conclusory affidavit by its nonphysician director that failed to provide any factual basis showing that they complied with professional standards … .* * *

"A cause of action for negligent infliction of emotional distress generally requires the plaintiff to show a breach of a duty owed to him or her which unreasonably endangered his or her physical safety, or caused him or her to fear for his or her own safety" … . "Unlike intentional infliction of emotional distress, … the Court of Appeals has not stated that extreme and outrageous conduct is an essential element of a cause of action to recover damages for negligent infliction of emotional distress" … . Doe v Langer, 2022 NY Slip Op 03957, Third Dept 6-15-22

Practice Point: Here defendant provided rehabilitative and recovery services for persons with mental illness and substance abuse problems. A person, with a violent past, was under defendant's care and supervision when he kidnapped and raped plaintiff. Defendant did not demonstrate that it did not have a duty to protect members of the general public from a violent person under its care and supervision.

MEDICAL MALPRACTICE, NEGLIGENCE, PRECONCEPTION NEGLIGENCE, WRONGFUL LIFE.

IN NEW YORK THERE ARE NO CAUSES OF ACTION FOR "PRECONCEPTION NEGLIGENCE" OR "WRONGFUL LIFE;" HERE MOTHER ALLEGED THE DRUG SHE HAD BEEN TAKING FOR EPILEPSY BEFORE SHE LEARNED SHE WAS PREGNANT CAUSED THE BABY TO BE BORN WITH SPINA BIFIDA (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiffs' actions for "preconception negligence" and "wrongful life" should have been dismissed. Plaintiff mother had been treated for epilepsy for years with a drug (VPA). She became pregnant while taking the drug and stopped taking it as soon as she learned she was pregnant. The baby was born with spina bifida:

Defendants treated the infant plaintiff's mother for epilepsy. To control her seizures, they prescribed valproic acid (VPA), which the mother had been taking for years while under the care of other physicians. Unbeknownst to all, while she was on VPA, the mother conceived the infant plaintiff. Although the VPA was discontinued when the mother learned that she was pregnant, the infant was born with spina bifida, for which she seeks to hold defendants responsible.

It is well established that an infant has no cause of action for preconception negligence … . The infant's claims that defendants failed to ensure that her mother was on birth control and monitored regularly for pregnancy while on VPA sound in "wrongful life," for which there is also no cause of action … . Z.L. v Mount Sinai Hosp., 2022 NY Slip Op 04112, First Dept 6-23-22

Practice Point: New York does not recognize actions for "preconception negligence" or "wrongful life." Here mother alleged the epilepsy drug she was taking until she learned she was pregnant caused her baby to be born with spina bifida. Both causes of action should have been dismissed.

MENTAL CONDITION IN CONTROVERSY, COMPEL INDEPENDENT MEDICAL EXAMINATION.

DEFENDANT'S MOTION TO COMPEL PLANTIFF TO APPEAR FOR A PSYCHIATRIC EXAMINATION (INDEPENDENT MEDICAL EXAMINATION [IME]) SHOULD HAVE BEEN GRANTED BECAUSE PLAINTIFF HAD PLACED HER MENTAL CONDITION IN CONTROVERSY; DEFENDANT'S MOTION TO VACATE THE NOTE OF ISSUE SHOULD HAVE BEEN GRANTED BECAUSE DISCOVERY WAS NOT COMPLETE (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined defendant's motions to compel plaintiff to appear for an independent medical examination (IME) and to vacate the note of issue should have been granted:

We find that plaintiff's mental condition is, in fact, in controversy. Plaintiff requests compensatory damages only for her alleged emotional distress, and she has testified that she experienced depression, anxiety, and dizziness, as well as headaches brought on by severe mental anguish (CPLR 3121[a]). As a result, a mental examination by a psychiatrist is warranted to enable defendants to rebut plaintiff's causes of action for emotional distress … .

… [W]e grant defendants' motion to vacate the note of issue. Contrary to the certificate of readiness, discovery had not been completed, as plaintiff had not yet complied with the court's directive to submit a Jackson affidavit detailing the process she had undertaken to search her social media post … . Lopez v Bendell, 2022 NY Slip Op 03990, First Dept 6-21-22

Practice Point: Plaintiff had placed her mental condition in controversy by testifying about depression, anxiety, dizziness and headaches caused by mental anguish. Defendant was therefore entitled to compel a psychiatric exam (an independent medical examination [IME]). Here defendant's motion to vacate the note of issue should have been granted because defendant's discovery was not complete.

MUNICIPAL LAW, LATE NOTICE OF CLAIM.

THE NOTICE OF CLAIM WAS SERVED ONLY FIVE DAYS LATE WHICH WAS DEEMED TIMELY NOTICE OF THE NATURE OF THE ACTION AND A SHOWING OF THE ABSENCE OF PREJUDICE; THE CITY DID NOT AFFIRMATIVELY DEMONSTRATE PREJUDICE; THE ABSENCE OF AN ADEQUATE EXCUSE WAS NOT FATAL; LEAVE TO FILE A LATE NOTICE OF CLAIM SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the petitionR for leave to file a late notice of claim should have been granted. The notice of claim was served five days after the expiration of the 90-day time-limit. The court deemed that to constitute timely knowledge of the claim. The city did not demonstrate prejudice. The absence of an excuse was not a fatal defect:

… [T]he petitioner served the notice of claim upon the respondents five days after the 90-day period for service had expired and commenced the instant proceeding the next day. Under such circumstances, the respondents acquired actual knowledge of the essential facts constituting the claim within a reasonable time after the expiration of the 90-day statutory period … . Since the respondents acquired timely knowledge of the essential facts constituting the petitioner's claim, the petitioner met his initial burden of showing a lack of prejudice … .

… [T]he respondents "failed to come forward with particularized evidence showing that the late notice had substantially prejudiced [their] ability to defend the claim on the merits" … . Rather, the respondents' counsel made only conclusory assertions that the petitioner's five-day delay in serving the notice of claim had hindered the respondents' ability to conduct a prompt and thorough investigation of the subject incident, which "were insufficient to rebut the petitioner's initial showing of lack of prejudice" … .

Although the petitioner failed to offer a reasonable excuse for his failure to timely serve the notice of claim, "the absence of a reasonable excuse is not fatal to the petition where there was actual notice and absence of prejudice" … . Matter of Gabriel v City of Long Beach, 2022 NY Slip Op 04169, Second Dept 6-29-22

Practice Point: Here the notice of claim was served only five days late. The city was thereby deemed to have had timely notice of the nature of the claim and the petitioner was deemed to have demonstrated a lack of prejudice. The fact that the petitioner did not have an adequate excuse was not a fatal defect. Leave to file a late notice of claim should have been granted.

PRODUCTS LIABILITY, LONG-ARM JURISDICTION.

PLAINTIFF, A TEXAS RESIDENT WHO WAS A FLIGHT ATTENDANT FOR 30 YEARS WITH MONTHLY STAY-OVERS IN NEW YORK, DEMONSTRATED NEW YORK HAD LONG-ARM JURISDICTION OVER THE NEW JERSEY COMPANY WHICH MANUFACTURED AND DISTRIBUTED TALCUM POWDER PLAINTIFF USED; THE TALCUM POWDER ALLEGEDLY CAUSED PLAINTIFF'S MESOTHELIOMA (FIRST DEPT).

The First Department determined New York had specific long-arm jurisdiction of defendant Shulton, the manufacturer and distributor of talcum powder alleged to have cause plaintiff's peritoneal mesothelioma. Plaintiff (English) was a flYight attendant for 30 years who used the talcum powder when she stayed in New York. Shulton has its principal place of business in New Jersey but has an office in New York and markets the product in New York:

English, a Texas resident, was employed as a flight attendant for 33 years, from 1966 to 1999. During a substantial part of that time, she used Desert Flower on a daily basis after showering. From 1966 to 1984, English was regularly assigned to flights into New York and flew into this state two to four times a month. She usually remained in New York on two- or three-day layovers. When English travelled, she packed Desert Flower in her luggage, so she would have it available for use when she showered. There is no claim that the Desert Flower English used in New York was purchased in New York.

Shulton is incorporated in New Jersey, where it had its principal place of business during the time that English claims to have used Desert Flower. Shulton never manufactured Desert Flower in New York, and in the mid-1970s the manufacture of its talc products shifted from Tennessee to New Jersey. Desert Flower was

marketed nationally, including in New York. During the relevant period of time, Shulton maintained a New York office from which it conducted its marketing activities for its Cosmetics and Toiletries Division. The New York office was also headquarters for its International Division. * * * Shulton's maintenance of its own New York office satisfies the first prong under CPLR 302(a)(1). * * * Desert Flower was marketed and sold nationally, and English used Desert Flower when she travelled to and while she stayed in New York. Shulton's activities and contacts with New York and the allegedly hazardous talcum powder used by English are sufficient to support an assertion of specific jurisdiction over Shulton…. . English v Avon Prods., Inc., 2022 NY Slip Op 03571, First Dept 6-2-22

Practice Point: Even though plaintiff was a Texas resident and the company she was suing was based in New Jersey, she was able to sue using New York courts. Plaintiff was a flight attendant for 30 years with monthly stay-overs in New York. Defendant had an office in New York and marketed the talcum powder which allegedly cause plaintiff's mesothelioma nationwide.

SLIP AND FALL, ASSAULT AND BATTERY.

PLAINTIFF'S DEPOSITION TESTIMONY THAT HE DID NOT RECALL HOW OR WHERE HE SLIPPED AND FELL AND DID NOT RECALL A FIGHT OR BEING HIT WERE FATAL TO THE SLIP AND FALL AND ASSAULT CAUSES OF ACTION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff's deposition testimony that he didn't recall how or where he slipped and fell, and, with respect to his assault cause of action, did not recall the fight or being hit, was fatal to the complaint:

In a slip-and-fall case, a plaintiff's inability to identify the cause of the fall is fatal to the cause of action, because a finding that the defendant's negligence, if any, proximately caused the plaintiff's injuries would be based on speculation … . Here, with regard to that branch of their motion which was for summary judgment dismissing the cause of action alleging negligence, the defendants established,

prima facie, that the plaintiff could not identify the cause of his alleged fall without engaging in speculation … . …

"To sustain a cause of action to recover damages for assault, there must be proof of physical conduct placing the plaintiff in imminent apprehension of harmful contact" … . Here, the plaintiff testified at his deposition that he could not recall a physical altercation at the premises on the date of the alleged incident and did not "recall being hit." Barnett v Fusco, 2022 NY Slip Op 04147, Second Dept 6-29-22

Practice Point: In a slip and fall case, the failure to recall the cause of the fall requires dismissal. In an assault and battery case, the failure to recall the fight or being hit requires dismissal.

SLIP AND FALL, EMPLOYMENT LAW, INDEMNITY, CONTRIBUTION.

PLAINTIFF'S EMPLOYER'S MOTIONS FOR SUMMARY JUDGMENT ON DEFENDANT'S CONTRACTUAL INDEMNITY, COMMON-LAW INDEMNITY AND CONTRIBUTION CAUSES OF ACTION SHOULD HAVE BEEN GRANTED; CRITERIA EXPLAINED (THIRD DEPT).

The Third Department, reversing Supreme Court, determined defendant property-owner's indemnity claims against plaintiff's employer (Sodexo) in this slip and fall case should have been dismissed. Defendant, as the property-owner, was responsible for the structural maintenance of the stairwell where plaintiff fell. The fall was not caused by debris on the stairwell, which was Sodexo's only responsibility under its contract with defendant:

While defendant argued … that Sodexo's responsibility to "provide basic housekeeping to all areas of operation during the course of the operating day" included the subject stairs, it is clear from the incident report and post incident/accident root cause analysis form that the staircase was clear of obstructions, objects, substances and debris of any sort. Accordingly, defendant failed to raise a triable issue of fact regarding whether [the] accident was caused by Sodexo's sole negligence, so Sodexo was entitled to summary judgment dismissing defendant's cause of action for contractual indemnity. * * *

Defendant has not alleged any scenario under which it could be held vicariously or statutorily liable for any negligence of Sodexo. Accordingly, Sodexo was entitled to summary judgment dismissing defendant's cause of action for common-law indemnification … .

… Inasmuch as defendant failed to raise an issue of fact as to Sodexo's negligence, defendant is not entitled to contribution from Sodexo, and Sodexo's motion for summary judgment dismissing defendant's contribution cause of action should have been granted. O'Toole v Marist Coll., 2022 NY Slip Op 03560, Third Dept 6-2-22

Practice Point: Defendant property owner's actions against plaintiff's employer for contractual and common law indemnity and contribution should have been dismissed because plaintiff's slip and fall was not the result of any act or omission on plaintiff's employer's part. The criteria for indemnity and contribution causes of action are explained.

SLIP AND FALL, EMPLOYMENT LAW, WORKERS' COMPENSATION.

DEFENDANT PROPERTY OWNER FAILED TO DEMONSTRATE IT WAS THE ALTER EGO OF PLAINTIFF'S EMPLOYER OR THAT PLAINTIFF WAS DEFENDANT'S SPECIAL EMPLOYEE; THEREFORE PLAINTIFF'S PERSONAL INJURY ACTION WAS NOT PRECLUDED BY THE EXCLUSIVE REMEDY ASPECT OF THE WORKERS' COMPENSATION LAW (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant Zorn Realties, the owner of the property, did not demonstrate it was the alter ego of plaintiff's employer, Zorn Poultry Farm, and did not demonstrate plaintiff was a special employee of Zorn Realties. Therefore, the negligence action stemming from plaintiff's fall through a chute or a hole on defendant's property was not precluded by the exclusive-remedy aspect of the Workers' Compensation Law:

"'A defendant moving for summary judgment based on the exclusivity defense of the Workers' Compensation Law under this theory must show, prima facie, that it was the alter ego of the plaintiff's employer'" … . "A defendant may establish

itself as the alter ego of a plaintiff's employer by demonstrating that one of the entities controls the other or that the two operate as a single integrated entity" … . However, "a mere showing that the entities are related is insufficient where a defendant cannot demonstrate that one of the entities controls the day-to-day operations of the other" … .

… Although the defendant presented evidence that the two entities were related inasmuch as they shared an address and a liability insurance policy, the defendant failed to establish that the entities shared officers or had identical owners. Additionally, the evidence showed that the entities served different purposes, had separate bank accounts, filed separate tax returns, and did not have a shared workers' compensation policy … . …

"Many factors are weighed in deciding whether a special employment relationship exists, and generally no single one is decisive . . . Principal factors include who has the right to control the employee's work, who is responsible for the payment of wages and the furnishing of equipment, who has the right to discharge the employee, and whether the work being performed was in furtherance of the special employer's or the general employer's business . . . The most significant factor is who controls and directs the manner, details, and ultimate result of the employee's work'" … .

… [T]he defendant failed to establish … that the plaintiff was its special employee at the time of the accident because it did not submit sufficient evidence to establish, inter alia, that it controlled and directed the manner, details, and ultimate result of the plaintiff's work, nor did it establish that the plaintiff had knowledge of and consented to a special employment relationship … . Mauro v Zorn Realties, Inc., 2022 NY Slip Op 03509, Second Dept 6-1-22

Practice Point: Here the defendant property owner was not able to take advantage of the exclusive-remedy aspect of the Workers' Compensation Law in this personal injury action. Plaintiff's employer was not the alter ego of defendant and plaintiff was not defendant's special employee.

SLIP AND FALL, PROOF OF CAUSE.

DESPITE THE FACT THAT PLAINTIFF COULD NOT SAY WHICH OF TWO CRACKS IN THE PAVEMENT CAUSED HIS FALL, THE CAUSE OF THE FALL WAS SUFFICIENTLY IDENTIFIED TO WITHSTAND SUMMARY JUDGMENT (THIRD DEPT).

The Third Department, reversing Supreme Court, determined defendant's motion for summary judgment in this slip and fall case should not have been granted on the ground plaintiff could not identify the cause of his fall. Plaintiff alleged that one of two cracks in the pavement caused the fall:

Plaintiff testified that, on the day of the incident, the weather was clear and there was no snow or debris on the surface of the parking lot. He had parked his car in the parking lot and was approaching the front door of the store when his foot suddenly "hit something along the pavement and . . . stopped," causing him to fall to the ground. An individual who was walking behind plaintiff came to his aid, helping plaintiff up off the ground and assisting him back to his vehicle. At the time of his fall, plaintiff did not look at the ground to determine the cause. However, he recalled that, after being helped back to his vehicle, he looked back and noticed a cracked area of the pavement where he had fallen. Plaintiff was shown photographs of the parking lot and identified the location of his fall by circling in one of the photographs an uneven area of the pavement with two cracks in close proximity to one another. Upon further questioning, plaintiff was unable to identify which of the two cracks caused the fall, but repeatedly testified that he knew it was one of those two cracks based upon where he landed when he fell.

… Although plaintiff's statements were not without some inconsistencies, he was steadfast in his testimony that he tripped on one of the two identified cracks in the pavement of the parking lot. Despite Supreme Court's suggestion to the contrary, plaintiff was not required to state for certain which particular crack caused him to fall in order to withstand summary judgment … . Bovee v Posniewski Enters., Inc., 2022 NY Slip Op 03561, Third Dept 6-2-22

Practice Point: Plaintiff was able to testify that one of two cracks in the pavement was the cause of his fall. The cause was sufficiently identified to withstand summary judgment.

SLIP AND FALL, TREE WELLS.

UNDER THE NYC ADMINISTRATIVE CODE, ABUTTING PROPERTY OWNERS ARE LIABLE FOR THE CONDITION OF SIDEWALKS BUT NOT CITY OWNED TREE WELLS, UNLESS THEY AFFIRMATIVELY CREATE THE DANGEROUS CONDITION, NEGLIGENTLY REPAIR THE AREA, OR CREATE THE DANGEROUS CONDITION BY A SPECIAL USE; HERE PLAINTIFF SLIPPED AND FELL BECAUSE OF THE CONDITION OF THE TREE WELL, NOT THE SIDEWALK, AND NONE OF THE OTHER LIABILITY THEORIES APPLIED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the defendant property owner and manager could not be held liable for the condition of a tree well within a city sidewalk. Therefore their motion for summary judgment in this slip and fall case should have been granted:

Administrative Code of the City of New York § 7-210, which became effective September 14, 2003, shifted tort liability for injuries arising from a defective sidewalk from the City to the abutting property owner … . However, "section 7-210 does not impose civil liability on property owners for injuries that occur in city-owned tree wells" … . Thus, "liability may be imposed on the abutting landowner in such instances only where she or he has 'affirmatively created the dangerous condition, negligently made repairs to the area, [or] caused the dangerous condition to occur through a special use of that area'" … . Ivry v City of New York, 2022 NY Slip Op 04157, Second Dept 6-29-22

Practice Point: Under the NYC Administrative Code, abutting property owners can be liable for a slip and fall due to the condition of the sidewalk, but not a city-owned tree well.

SLIP AND FALL.

A FLATTENED CARDBOARD BOX ON THE FLOOR WAS NOT ACTIONABLE IN THIS SLIP AND FALL CASE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined a flattened cardboard box was not actionable in this slip and fall case;

The plaintiff commenced this action to recover damages for personal injuries after she slipped and fell on a flattened cardboard box that was lying on the floor in an aisle of the defendant's grocery store. At her deposition, the plaintiff testified that she saw the cardboard box prior to the accident, as well as an employee of the defendant stocking shelves in the aisle close by. The plaintiff testified that, prior to her fall, it was her intention to step onto the cardboard in order to reach a product on a nearby shelf. …

While a possessor of real property has a duty to maintain that property in a reasonably safe condition … , "there is no duty to protect or warn against an open and obvious condition that, as a matter of law, is not inherently dangerous" … .

Here, the defendant established its prima facie entitlement to judgment as a matter of law dismissing the complaint by submitting evidence demonstrating that the flattened cardboard box, which was readily observable to the plaintiff prior to her fall, was open and obvious, and not inherently dangerous … . DiScalo v Mannix Family Mkt. @ Forest & Richmond Ave, LLC, 2022 NY Slip Op 03708, Second Dept 6-8-22

Practice Point: A flattened cardboard box on the floor was not actionable in this slip and fall case because it was "open and obvious."

TRAFFIC ACCIDENTS, INSURANCE LAW, RESCISSION OF ARBITRATION AGREEMENT, UNILATERAL MISTAKE.

IN THIS VEHICLE ACCIDENT CASE, PLAINTIFF ENTERED AN ARBITRATION AGREEMENT WHICH INDICATED THE AWARD WOULD BE BETWEEN $0 AND $50,000, BUT THE POLICY LIMITS WERE $100,000/300,000; THE UNILATERAL MISTAKE BY PLAINTIFF'S ATTORNEY RE: THE POLICY LIMITS WAS NOT INDUCED BY DEFENDANT OR DEFENDANT'S CARRIER, THEREFORE RESCISSION OF THE AGREEMENT WAS NOT AN AVAILABLE REMEDY (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant's motion to compel arbitration in this vehicle-accident case should have been granted. Plaintiff wanted the agreement to arbitrate rescinded because it did not reflect the actual policy limits. But the unilateral mistake by plaintiff's attorney was not induced by the defendant because defendant's insurance carrier had twice notified plaintiff's attorney of the policy limits. The agreement to arbitrate set the award at between $0 and $50,000, but the policy limits were $100,000/300,000:

"Generally, a party's unilateral mistake is a ground for rescission of a contract only where it was induced by fraud or other wrongful conduct by the other party" … . Moreover, "the equitable remedy of rescission is not available to relieve an allegedly mistaken party of the consequences of their failure to exercise ordinary care" … .

Contrary to the plaintiff's contention, he failed to establish that the arbitration agreement was subject to the equitable remedy of rescission on the ground of unilateral mistake by his attorney regarding the policy limits … . The purported mistake in the high-low agreement at issue arose not from any fraudulent inducement by the defendant, but from the failure of the plaintiff's attorney to exercise ordinary care under the circumstances … . Maynard v Smith, 2022 NY Slip Op 04017, Second Dept 6-22-22

Practice Point: A unilateral mistake by one party which was not induced by the other party is not a ground for rescission of a contract.

TRAFFIC ACCIDENTS, JOINT TRIAL.

PLAINTIFF'S TWO SEPARATE TRAFFIC ACCIDENTS SHOULD BE TRIED TOGETHER BECAUSE PLAINTIFF ALLEGED THE INJURIES FROM THE FIRST ACCIDENT WERE EXACERBATED BY THE SECOND ACCIDENT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff's two separate traffic accidents should be tried jointly because plaintiff claimed the second accident exacerbated the injuries from the first accident:

… [I]n view of the plaintiff's allegations that certain injuries which he sustained in the first automobile accident were exacerbated by the second automobile accident, in the interest of justice and judicial economy, and to avoid inconsistent verdicts, the two actions should be tried jointly … . The respondents failed to demonstrate prejudice to a substantial right if the actions are tried jointly … . Although the plaintiff moved to consolidate the two actions, the appropriate procedure is a joint trial, particularly since the actions involve different defendants … . Frank v Y. Mommy Taxi, Inc., 2022 NY Slip Op 04151, Second Dept 6-29-22

Practice Point: Here two separate traffic accidents should be tried together because plaintiff alleged the second accident exacerbated his injuries from the first accident.

TRAFFIC ACCIDENTS, MUNICIPAL LAW, RECKLESS DISREGARD, VEHICLE AND TRAFFIC LAW, POLICE CHASE.

PLAINTIFFS RAISED QUESTIONS OF FACT (1) WHETHER THE POLICE ACTED IN RECKLESS DISREGARD OF THE SAFETY OF OTHERS DURING A HIGH-SPEED CHASE AND IN FAILING TO NOTIFY THE DISPATCHER OF THE CHASE, AND (2) WHETHER THE CHASE WAS A PROXIMATE OR CONCURRENT CAUSE OF PLAINTFFS' ACCIDENT (THERE WAS NO CONTACT WITH EITHER VEHICLE INVOLVED IN THE CHASE) (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, in a full-fledged opinion by Justice Kapnick, determined plaintiffs raised questions of fact about whether the police acted in reckless disregard of the safety of others during a high-speed chase, and whether the chase of the BMW driven by Llewellyn was a proximate or concurrent cause of the accident (neither vehicle involved in the chase struck plaintiffs' vehicle):

… [T]he motion court properly held that the reckless disregard standard applied in evaluating the City defendants' conduct in pursuing Llewellyn (see Vehicle and Traffic Law §§ 1104[b], 1104[e]). However, the motion court erred in determining that "there is no evidence that the NYPD officers acted recklessly as a matter of law, and that the pursuit was not the proximate cause or a concurrent cause of this incident" … . …

Plaintiffs … submitted evidence that the City defendants initiated a high-speed chase of Llewellyn's BMW at close proximity after observing it run a single red light, and continued the high-speed chase, which included crossing over a double yellow line and running two red lights, in a known congested and heavily populated residential area which at the time of the pursuit had moderate to heavy traffic and numerous pedestrians…. . …

Plaintiffs also raised an issue of fact concerning whether the NYPD officers acted recklessly in failing to notify the radio dispatcher at the start of the pursuit and inform headquarters with relevant information, including the nature of the offense. Handelsman v Llewellyn, 2022 NY Slip Op 04093, First Dept 6-23-22

Practice Point: Here there were questions of fact whether the police acted in reckless disregard of the safety of others during a high-speed chase such that the city would be liable for plaintiffs' accident, and whether the high-speed chase was a proximate or concurrent cause of plaintiffs' accident (there was no contact with either vehicle involved in the chase). There were questions of fact whether the police drove "in reckless disregard of the safety of others" and whether their failure to notify the dispatcher of the chase was also reckless.

TRAFFIC ACCIDENTS, MUNICIPAL LAW.

IN THIS Y-INTERSECTION TRAFFIC ACCIDENT CASE, (1) THE TOWN DEMONSTRATED IT DID NOT HAVE THE REQUIRED WRITTEN NOTICE THAT OVERGROWN FOLIAGE BLOCKED LINES OF SIGHT; (2) QUESTIONS OF FACT PRECLUDED SUMMARY JUDGMENT ON THE CAUSES OF ACTION ALLEGING INADQUATE SIGNAGE AND NEGLIGENT ROADWAY DESIGN (THIRD DEPT).

The Third Department, reversing (modifying) Supreme Court in this RY-intersection traffic accident case, determined:(1) the cause of action against the town alleging overgrown foliage blocked drivers' line of sight should have been dismissed because the town demonstrated it did not have written notice of the condition; (2) the written-notice requirement does not apply to the causes of action alleging inadequate signage and negligent design, which properly survived summary judgment:

By its submission of the affidavits of its Town Clerk and Superintendent of Highways who both averred that, after review of the pertinent records, no written notice was received pertaining to any alleged defective or dangerous condition caused by or from overgrown trees … , the Town successfully shifted the burden to plaintiffs to establish an issue of fact as to prior written notice, which plaintiffs failed to do … .

As to plaintiffs' claims pertaining to inadequate signage and negligent design of the intersection, we agree that prior written notice requirements do not apply to these alleged defects … . * * *

… [T]he record demonstrates that, at the very least, at some point in the modern era the roads were paved and signage was installed. The Town has provided no proof as to when or how often these activities have been undertaken or that they were completed in compliance with the standards in place at the time … .

We further agree that Supreme Court properly rejected the Town's contention that plaintiffs' allegations of negligence by the Town were negated by [the drivers'] familiarity with the intersection. … … [I]t cannot be said that this Y intersection was reasonably safe as a matter of law, nor did the Town conclusively demonstrate that placing the stop sign in a different location would have resulted in the same conduct by [the drivers]. … [T]riable issues of fact exist as to whether the signage at the intersection was a proximate cause of the accident … . Read v Bell, 2022 NY Slip Op 03563, Third Dept 6-2-22

Practice Point: In a traffic accident case, a municipality will not be liable for overgrown foliage which blocks lines of sight if the town has not been provided with written notice of the condition. The written-notice requirement does not apply to causes of action alleging the accident was caused by inadequate signage or negligent roadway design.

WORKERS' COMPENSATION, INADEQUATE RECORD FOR APPEAL.

THE BOARD FAILED TO ADEQUATELY EXPLAIN ITS DECISION TO DENY COVERAGE OF MEDICAL BILLS ON THE GROUND THEY WERE NOT CAUSALLY RELATED TO CLAIMANT'S MEDICAL CONDITION, MAKING APPELLATE REVIEW IMPOSSIBLE; MATTER REMITTED (THIRD DEPT).

The Third Department, reversing the Workers' Compensation Board, determined the Board did not explain its decision to deny coverage of 25 medical bills based on the conclusion the bills did not relate to claimant's medical condition:

Although, "the Board has the exclusive province to resolve conflicting medical opinions" and to evaluate medical evidence before it, and its factual determinations on causal relationship will not be disturbed if supported by substantial evidence in the record, its decision here fails to indicate what medical opinions or reports

formed the basis for the conclusions reached regarding causal relationship … . It is further noted that many of the bills or supporting records include multiple diagnoses and charges, with some of the diagnoses appearing to match the established conditions, such as treatment for a urinary tract infection. No basis is provided for denying compensability for portions of the bills related to established conditions, i.e., for denying payment for the entire medical bill based upon the inclusion of non-compensable treatment in the bill or records.

By failing to provide the reasons for its rulings or the basis upon which the determination was made, the WCLJ [Workers' Compensation Law Judge] and the Board "failed to satisfy [their] obligation to provide some basis for appellate review" … . Matter of Sequino v Sears Holdings, 2022 NY Slip Op 04070, Third Dept 6-23-22

Practice Point: When the Workers' Compensation Board fails to adequately explain its denial of coverage for medical bills it concluded were not related to claimant's medical condition, appellate review by a court is not possible and the matter must be remitted.

WORKERS' COMPENSATION, SCHEDULE LOSS OF USE (SLU).

THE BOARD SHOULD HAVE CONSIDERED WHETHER A PRIOR ELBOW INJURY ADDED TO THE SCHEDULE LOSS OF USE (SLU) ASSOCIATED WITH THE SUBSEQUENT SHOULDER INJURY; THE BOARD DEPARTED FROM PRECEDENT WITHOUT EXPLANATION (THIRD DEPT).

The Third Department, reversing the Workers' Compensation Board, determined the schedule loss of use (SLU) award for a shoulder injury should not have been offset by a prior award for an elbow injury. Rather, whether the second injury resulted in an increased loss of use should have been considered:

… [T]he Board credited Coniglio's [the employer's expert's] opinion of a 20% SLU as being consistent with the guidelines and expressly declined to add any additional loss of use. …

… [W]e note that the Board has previously determined that adding value for posterior extension to an overall SLU award that also includes a documentation of deficits of flexion or abduction is consistent with the guidelines … . The Board did not address Coniglio's failure to add any value for his finding of a posterior extension defect to his overall SLU calculation and, as such, has not provided a rational basis for departing from its precedent. Accordingly, its finding of a 20% SLU of the left arm must also be reversed and the matter remitted for further consideration by the Board … . Matter of Kromer v UPS Supply Chain Solutions, 2022 NY Slip Op 04072, Third Dept 6-23-22

Practice Point: Here claimant's prior schedule loss of use (SLU) award for an elbow injury was not considered in connection with the SLU for the subsequent shoulder injury, a departure from precedent. Because the departure from precedent was not explained, the decision was reversed and remitted.

WORKERS' COMPENSATION, SCHEDULE LOSS OF USE (SLU).

THE WORKERS' COMPENSATION BOARD MISINTERPRETED SPECIAL CONSIDERATION 4 TO LIMIT SCHEDULE LOSS OF USE (SLU) OF PLAINTIFF'S LEG TO 10% (THIRD DEPT).

The Third Department, reversing the Workers' Compensation Board, determined "special consideration 4" of the Workers' Compensation Guidelines for Determining Impairment was not properly interpreted, resulting in a schedule lossR of use (SLU) for claimant's leg that is inappropriately low (10%):

Claimant argues that the Board's interpretation of special consideration 4 and the instructions regarding its application is irrational and runs afoul of the purpose of Workers' Compensation Law § 15 (3). We agree. "SLU awards are not given for particular injuries, but they are made to compensate an injured worker for his or her loss of earning power or capacity that is presumed to result, as a matter of law, from the residual permanent physical and functional impairments to statutorily-enumerated body members" … . * * *

Relying on the plain language of the 2018 guidelines, the Board reads special consideration 4 as making no provision for additional values due to flexion or extension deficits, reasoning that the enumerated SLU range already takes into account range of motion deficits…. . …

Although special consideration 4 may arguably be said to rationally limit an SLU value when it is based upon only a finding of chondromalacia patella, the Board's interpretation of the foregoing instructions results in the obvious inequity identified by claimant and cannot be upheld. To accept the Board's interpretation would be to sanction an application of the 2018 guidelines that results in claimants with only meniscus tears routinely receiving SLU awards far greater than 7½ to 10% based upon their range of motion deficits … . Matter of Blue v New York State Off. Of Children & Family Servs., 2022 NY Slip Op 03565, Third Dept 6-2-22

Practice Point: In determining the schedule loss of use (SLU) for claimant's leg, the Workers' Compensation Board misinterpreted "special consideration 4" resulting in an inappropriately low SLU percentage.