NEW YORK APPELLATE DIGEST, LLC

Personal Injury
Reversal Report
May 2022

An Organized Compilation of the Summaries of Selected Decisions Addressing Personal Injury (Negligence, Labor Law, Workers' Compensation), Mostly Reversals, Released by Our New York State Appellate Courts and Posted on the New York Appellate Digest Website in May 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.

Table of Contents

Contents

Table of Contents

Table of Contents

LABOR LAW-CONSTRUCTION LAW, FALL FROM BATHTUB RIM.

PLAINTIFF FELL OFF THE EDGE OF A BATHTUB WHEN HE WAS ATTEMPTING TO INSTALL A SHOWER-CURTAIN ROD; THE EDGE OF THE TUB WAS THE EQUIVALENT OF A SCAFFOLD AND PLAINTIFF WAS ENTITLED TO SUMMARY JUDGMENT ON HIS LABOR LAW 240(1) CAUSE OF ACTION; TWO-JUSTICE DISSENT (FIRST DEPT).

The First Department, over a two-justice dissent, determined plaintiff was entitled to summary judgment on his Labor Law 240(1) cause of action. Plaintiff alleged he needed to stand on the rim of a bathtub to install a shower-curtain rod. He hit his head and fell when attempting to step up on the rim of the tub. The defendants argued the installation could have been done from floor level. There was no room in the bathroom for an A-frame ladder:

The motion court properly granted plaintiff's motion for partial summary judgment on his section 240(1) claim. Plaintiff established prima facie that he was entitled to judgment by evidence that he suffered harm that "flow[ed] directly from the application of the force of gravity" when he fell from the edge of the bathtub, which served as the functional equivalent of a scaffold or ladder … . The evidence showed that there was insufficient room inside the bathroom for plaintiff to use an A-frame ladder and that plaintiff instead was forced to reach the elevated work area by standing on the edge of the bathtub in order to install the shower-curtain rods. Plaintiff testified that standing on the edge of the tub was necessary because he otherwise would lack the necessary leverage to tighten the screws with an Allen wrench.

In opposition, [defendants] failed to raise an issue of fact. They rely on an affidavit by their biomechanical expert, Mr. Bove, who opined that plaintiff's overhead reach was sufficient to perform the task while standing on the ground or inside the bathtub. Bove's initial affidavit, however, ignored plaintiff's testimony that he needed the height in order to have leverage so that he would have enough strength

to tighten the screws with the Allen wrench. Vitucci v Durst Pyramid LLC, 2022 NY Slip Op 02968, First Dept 5-3-22

Practice Point: Here plaintiff fell attempting to stand on the edge of a bathtub to install a shower-curtain rod. The majority concluded the edge of the bathtub was the equivalent of a scaffold and plaintiff's fall was covered under Labor Law 240(1). Two dissenters argued the job could have been performed from ground level.

LABOR LAW-CONSTRUCTION LAW, SUBCONTRACTOR LIABILITY.

ALTHOUGH PLAINTIFF FELL FROM THE SCAFFOLDING SYSTEM CONSTRUCTED BY SWING, A SUBCONTRATOR, PLAINTIFF'S LABOR LAW 240(1) AND 241(6) CAUSES OF ACTION AGAINST SWING SHOULD HAVE BEEN DISMISSED; SWING WAS NOT A CONTRACTOR OR OWNER, OR A CONTRACTOR'S OR OWNER'S STATUTORY AGENT, WITHIN THE MEANING OF THE STATUTES (FIRST DEPT).

The First Department, reversing Supreme Court, determined the Labor Law 240(1) and 241(6) causes of action against Swing, the company which constructed the scaffolding, should have been dismissed. Plaintiff fell when, instead of using the scaffold walkway system, he attempted to descend from some scaffolding pipes to the wooden walkway and a wooden plank broke:

The lower court should have dismissed the Labor Law §§ 240(1) and 241(6) claims as against Swing, the scaffold system subcontractor to general contractor 4 Star, because it is undisputed that Swing was not a contactor or owner within the meaning of the statutes. Nor was it a contractor or owner's statutory agent. Although it contractually retained the right to reenter the premises and inspect the scaffold system, Swing did not have any employees on site during 4 Star's work, and it did not inspect the scaffold system while it was in place … . For all intents and purposes, once Swing constructed the scaffold system, it returned to the premises only to deliver supplies and to disassemble the scaffold system at the end of the project. Guevara-Ayala v Trump Palace/Parc LLC, 2022 NY Slip Op 03049, First Dept 5-5-22

Practice Point: Here the subcontractor which constructed the scaffolding from which plaintiff fell was not a contractor or owner, or a contractor's or owner's statutory agent within the meaning of Labor Law 240(1) or 241(6). Therefore the Labor Law 240(1) and 241(6) causes of action against the subcontractor should have been dismissed.

LABOR LAW-CONSTRUCTION LAW, CONTRACT LAW, INDEMNIFICATION CLAUSE.

THE INDEMNIFICATION CLAUSE IN THIS LADDER-FALL CASE STATED THAT THE CONTRACTOR FOR WHOM THE INJURED PLAINTIFF WORKED WOULD HOLD THE "OWNER'S AGENT" HARMLESS AND DID NOT MENTION THE PROPERTY OWNER; THE CONTRACT MUST BE STRICTLY CONSTRUED; THE PROPERTY OWNER'S INDEMNIFICATION ACTION AGAINST THE CONTRACTOR SHOULD HAVE BEEN DISMISSED (FIRST DEPT).

The First Department, reversing Supreme Court, determined the indemnification clause in the ladder-fall case must be strictly construed. The clause stated that the contractor for whom plaintiff worked, Collins, would hold harmless the "owner's agent" but did not mention the property owner, LIC. Therefore LIC's indemnification action against Collins should have been dismissed:

Plaintiff alleged common-law negligence, including failure to provide her with a safe ladder, and violations of Labor Law §§ 200, 202, 240(1)-(3), and 241(6). * * *

LIC commenced this third-party action against Collins asserting that "Collins was obligated to provide plaintiff, its employee, with the necessary equipment to enable her to properly and safely perform her cleaning related duties" at the premises, and that plaintiff's injuries were due to Collins' failure to perform its duties under the contract and provide her with the proper tools, equipment, supervision, direction, and control. The third-party complaint also asserted that Collins agreed to indemnify LIC from any accidents, injuries, claims, or lawsuits arising out of the cleaning related services Collins provided at the premises. …

The indemnification provision states that Collins shall "hold harmless the OWNER'S AGENT from all claims by Tenants or others whose personnel or property may be damaged by [Collins], its operators, and including but not limited to the use of any of the required equipment or material." Tishman is designated as the "owner's agent" in the contract. LIC is neither identified nor included under the indemnification provision and the indemnification provision must be "strictly construed" … . Tavarez v LIC Dev. Owner, L.P., 2022 NY Slip Op 03339, First Dept 5-19-22

Practice Point: Indemnification clauses in contracts must be strictly construed. Here the contract said the contractor for whom the injured plaintiff worked would hold harmless the "owner's agent" and did not mention the owner. Therefore the owner's action against the contractor for indemnification should have been dismissed.

LABOR LAW-CONSTRUCTION LAW.

PLAINTIFF ALLEGEDLY TRIPPED AND FELL CARRYING A PIPE DOWN A PLYWOOD RAMP IN THIS LABOR LAW 200 ACTION; THERE WERE QUESTIONS OF FACT WHETHER THE RAMP CONSTITUTED A DANGEROUS CONDITION AND WHETHER THE DEFENDANTS HAD CONSTRUCTIVE NOTICE OF IT (FIRST DEPT).

The First Department, reversing Supreme Court, determined there were questions of fact whether a plywood ramp was a dangerous condition and whether the defendants had constructive knowledge of the ramp in this Labor Law 200 action. Plaintiff allegedly tripped and fell when carrying a pipe down the ramp:

Defendants established their prima facie entitlement to judgment as a matter of law on the causes of action alleging a violation of Labor Law § 200 and common-law negligence by demonstrating that they did not have authority to supervise or control the means and methods of plaintiff's work. However, to the extent those causes of action are also predicated on the existence of a dangerous or defective condition (a defective plywood ramp), triable issues of fact remain as to whether the owner or general contractor had actual or constructive notice … . Defendants'

witnesses all testified to a lack of knowledge of the plywood ramp, thereby establishing lack of actual notice. However, plaintiff raised a triable issue as to constructive notice by his deposition testimony and affidavit that he had seen the plywood ramp in place when he began working at the construction site, although he never traversed it prior to his accident, which occurred months into his work, and that defendants' trailers were located only 30 to 50 feet from where plaintiff's accident occurred. Contrary to defendants' insinuations, the number of witnesses contradicting plaintiff's account is not a basis for granting them summary judgment; it merely raises issues of credibility for the fact-finder. Jackson v Hunter Roberts Constr., L.L.C., 2022 NY Slip Op 03321, First Dept 5-19-22

Practice Point: The First Department in this Labor Law 200 action noted that a conflict between the plaintiff's testimony and several of defendants' witnesses on the issue of constructive notice of the allegedly dangerous condition which caused plaintiff's slip and fall was not a sufficient ground for granting defendants' summary judgment motion. The conflict merely raised a credibility issue for trial which is not appropriately determined at the summary judgment stage.

LABOR LAW-CONSTRUCTION LAW.

PLAINTIFF FELL DOWN AN OPEN, UNGUARDED MANHOLE AS HE ATTEMPTED TO STEP OVER IT; PLAINTIFF'S ACTION WAS NOT THE SOLE PROXIMATE CAUSE OF THE FALL BECAUSE THERE WAS NO PROTECTIVE RAILING AROUND THE MANHOLE (FIRST DEPT).

The First Department determined plaintiff was entitled to summary judgment on his Labor Law 240(1) cause of action. Plaintiff fell into an unguarded, open manhole. Defendants argued plaintiff's attempting to step over the manhole was the sole proximate cause of the fall. But the fact that the manhole was unguarded (another cause of the fall) defeated the sole proximate cause argument:

Plaintiff established prima facie his entitlement to summary judgment on his Labor Law § 240(1) claim, it being undisputed that he was injured when he fell down an open and unguarded manhole that he had been attempting to cover, as instructed, while working on a construction site … . In opposition, defendants, the operator of

the subway facility and its general contractor on the project, failed to raise an issue of fact. Their argument that plaintiff was the sole proximate cause of the accident because he allegedly stepped over the open manhole — at which point he was accidentally bumped by another individual and fell into it — is unavailing, given the lack of protective railing around the manhole or any other safety devices … . Piccone v Metropolitan Tr. Auth., 2022 NY Slip Op 03458, First Dept 5-26-22

Practice Point: A defense to a Labor Law 240(1) construction-accident cause of action is that the plaintiff's own act or omission was the sole proximate cause of the accident. Here, even if plaintiff's attempt to step over the open manhole was a proximate cause of his fall, the absence of a protective railing around the manhole was also a proximate cause. Plaintiff's comparative negligence is not considered in a Labor Law 240(1) cause of action.

LABOR LAW-CONSTRUCTION LAW, WORKERS' COMPENSATION.

PLAINTIFF'S SUMMARY JUDGMENT MOTION ON HIS LABOR LAW 241(6) CAUSE OF ACTION SHOULD HAVE BEEN DENIED BECAUSE IT WAS BASED ON EVIDENCE FIRST PRESENTED IN REPLY; PLAINTIFF WAS COLLATERALY ESTOPPED FROM CLAIMING TRAUMATIC BRAIN INJURY AND COGNITIVE DISORDER BY THE RULING IN HIS WORKERS' COMPENSATION CASE (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court in this construction accident case, determined plaintiff's motion for summary judgment on his Labor Law 241(6) cause of action should not have been granted because it was based upon information raised for the first time in reply. The First Department noted that Supreme Court properly found that the ruling in plaintiff's Workers' Compensation case collaterally estopped plaintiff from claiming traumatic brain injury and cognitive disorder in this Labor Law action:

Supreme Court should have denied plaintiff's motion for summary judgment with respect to Labor Law § 241(6), which was based on an expert affidavit submitted in reply. The affidavit, which constituted the first time plaintiff asserted violations of 12 NYCRR 23-2.2(a) and (b), was not addressed to the arguments made in

defendants' opposition, and instead sought to assert new grounds for the motion … .

Plaintiff is collaterally estopped from litigating his allegation that he sustained traumatic brain injury and cognitive disorder, since the allegation was previously raised and conclusively decided against him in a Workers' Compensation Board proceeding, where plaintiff had a full and fair opportunity to litigate the issue … . Douglas v Tishman Constr. Corp., 2022 NY Slip Op 03344, First Dept 5-24-22

Practice Point: Evidence first presented in reply and which does not address anything raised by the other party's opposition papers should not be considered by the court. A ruling in a Workers' Compensation case, here rejecting the worker's traumatic brain injury and cognitive disorder claims, may preclude the same claims in a Labor Law action pursuant to the collateral estoppel doctrine.

NEGLIGENCE, SLIP AND FALL, CAUSE OF FALL.

PLAINTIFF IN THIS SLIP AND FALL CASE DID NOT SEE THE CONDITION THAT CAUSED HIM TO FALL NEAR A SINK IN DEFENDANTS' BATHROOM, BUT HIS PANTS WERE WET AFTER THE FALL; DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON THE GROUND THAT PLAINTIFF COULD NOT IDENTIFY THE CAUSE OF HIS FALL SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendants did not demonstrate plaintiff could not identify the cause of his slip and fall. Plaintiff fell near a sink in defendants' bathroom. Although he did not see the condition which caused him to fall, hisRR pants were wet after the fall:

… [T]he defendants failed to establish, prima facie, that the plaintiff did not know what had caused him to fall. The plaintiff testified at his deposition that he did not see the condition that caused him to fall prior to the accident. However, he testified that, after he fell, his pants became wet. "Contrary to the defendants' contention, this testimony does not establish that the cause of the plaintiff's fall cannot be

identified without engaging in speculation" … . Redendo v Central Ave. Chrysler Jeep, Inc., 2022 NY Slip Op 03411, Second Dept 5-25-22

Practice Point: Plaintiff did not see the condition which caused him to fall near a sink in defendants' bathroom, but his pants were wet after the fall. Defendants were not entitled to summary judgment on the ground the plaintiff could not identify the cause of his fall.

NEGLIGENCE, SLIP AND FALL, CONSTRUCTIVE NOTICE.

DEFENDANTS DID NOT DEMONSTRATE THEY DID NOT HAVE CONSTRUCTIVE NOTICE OF THE CONDITION OF THE STAIRS ALLEGED TO HAVE CAUSED PLAINTIFF'S SLIP AND FALL BECAUSE THEY OFFERED NO PROOF OF WHEN THE STAIRS WERE LAST INSPECTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendants' motion for summary judgment in this stairway slip and fall case should not have been granted. To warrant summary judgment on the issue of constructive notice, defendants must show when the stairway was last inspected, which they failed to do:

The defendants … failed to show … that they did not have constructive notice of the condition that the plaintiff alleged caused her to fall. "A defendant has constructive notice of a hazardous condition on property when the condition is visible and apparent, and has existed for a sufficient length of time to afford the defendant a reasonable opportunity to discover and remedy it" … . "To meet its initial burden on the issue of lack of constructive notice, the defendant must offer some evidence as to when the area in question was last . . . inspected relative to the time when the plaintiff fell" … . Here, the evidence submitted on the defendants' motion failed to demonstrate when the subject staircase was last inspected relative to the plaintiff's accident … . Weiss v Bay Club, 2022 NY Slip Op 03026, Second Dept 5-4-22

Practice Point: In a slip and fall case, to warrant summary judgment the defendant must show it did not have constructive notice of the dangerous condition by demonstrating that the area of the fall was inspected close in time to the incident.

NEGLIGENCE, SLIP AND FALL, CONSTRUCTIVE NOTICE.

DEFENDANTS PRESENTED NO PROOF OF WHEN THE AREA OF THE SLIP AND FALL WAS LAST INSPECTED; THERFORE DEFENDANTS DID NOT DEMONSTRATE A LACK OF CONSTRUCTIVE NOTICE (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. The defendants did not submit proof of when the area was last inspected and therefore did not demonstrate they lacked constructive notice of the condition:

A defendant has constructive notice of a hazardous condition on property when the condition is visible and apparent, and has existed for a sufficient length of time prior to the accident to afford the defendant a reasonable opportunity to discover and remedy it … . To meet its burden on the issue of constructive notice, a defendant is required to offer evidence as to when the accident site was last inspected relative to the time when the plaintiff fell … . Here, the defendants failed to demonstrate when they last inspected the walkway prior to the incident and they failed to establish, prima facie, that they did not have constructive notice of the alleged hazardous condition … . The defendants also failed to establish, prima facie, that the cinder block was open and obvious and not inherently dangerous … . Ferrer v 120 Union Ave., LLC, 2022 NY Slip Op 03096, Second Dept 5-11-22

Practice Point: For years hundreds of cases were reversed because there was no evidence of when the area of a slip and fall was last inspected by a defendant and therefore defendant did not demonstrate a lack of constructive notice and was not entitled to summary judgment. Now there are just a few cases reversed for this reason in a given year. The bar has learned this lesson.

NEGLIGENCE, SLIP AND FALL, CONTRACTOR LIABILTY.

A CONTRACTOR WHICH CREATES A DANGEROUS CONDITION ON A PUBLIC SIDEWALK MAY BE LIABLE FOR A SLIP AND FALL BY A MEMBER OF THE PUBLIC (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the defendant sidewalk-repair contractor's motion for summary judgment in this slip and fall case should not have been granted. There was a question of fact whether the contractor who repaired the sidewalk created the hole which caused plaintiff to trip. A contractor may be liable for an affirmative act of negligence which results in a dangerous condition on a public street or sidewalk:

"A contractor may be [held] liable for an affirmative act of negligence which results in the creation of a dangerous condition upon a public street or sidewalk" … . Here, Amato [the defendant contractor] failed to establish its prima facie entitlement to judgment as a matter of law.

At his deposition, Victor Amato, Amato's owner, testified that his company had replaced a portion of the sidewalk at the subject location. … He acknowledged … that a two-by-four had been installed as a vertical "stake" to support a form that was used when the concrete was poured, and that he or one of his employees would have removed the stake after the concrete had set.

… [T]he plaintiff testified that she had not seen the hole because, from the direction she was walking, it was on the other side of an uneven, or sloped, portion of the sidewalk. Victor Amato admitted that this slope had been created deliberately (through a process known as "feathering") because the new portion of the sidewalk was at a different height from the existing sidewalk. Pizzolorusso v Metro Mech., LLC, 2022 NY Slip Op 03018, Second Dept 5-4-22

Practice Point: Contactors which create a dangerous condition on a public sidewalk or road may be liable to a member of the public who is injured by the dangerous condition. The theory is similar to the "launch an instrument of harm" theory of contractor liability under the Espinal case.

NEGLIGENCE, SLIP AND FALL, LACK OF CONSTRUCTIVE NOTICE.

RARE SLIP AND FALL WON BY THE DEFENDANT AT SUMMARY JUDGMENT BY DEMONSTRATING A LACK OF CONSTRUCTIVE NOTICE OF THE PRESENCE OF THE BOX WHICH ALLEGEDLY CAUSED PLAINTIFF'S FALL (FIRST DEPT).

The First Department, reversing Supreme Court, determined defendant demonstrated it did not have constructive notice of the presence of a cardboard box over which plaintiff allegedly tripped and fell—a rare slip and fall case where a lack of constructive notice was successfully demonstrated at the summary judgment stage:

Defendant sustained its initial burden of showing that it lacked notice of the presence of the cardboard box near the walkway of its building before the accident and that it observed a reasonable cleaning routine … .. Plaintiff testified that she did not see the box when she left work at 4:00 p.m. on the day before her fall, and defendant's caretaker stated that it was not there when he left work at 4:30 p.m. on the same day. The caretaker also testified that he cleaned the area twice a day, first thing in the morning and last thing at night. Thus, the box could have been deposited near the walkway a few minutes before plaintiff's accident … . Defendant is not required to patrol the area 24 hours a day … , and plaintiff failed to show that the cleaning schedule described by the caretaker was "'manifestly unreasonable'" … .

Plaintiff's argument that the caretaker admitted that tenants regularly left garbage near the walkway and that it was a recurring problem is unavailing. The caretaker's testimony shows that defendant was aware of the general problem, not that it was aware of the specific presence of the cardboard box at issue, and that it addressed the problem by having the caretaker clean the area twice a day … . Rodriguez v New York City Hous. Auth., 2022 NY Slip Op 03461, First Dept 5-26-22

Practice Point: In this slip and fall case, the defendant, at the summary judgment stage, presented evidence, including the plaintiff's deposition testimony, which demonstrated the box which allegedly caused plaintiff's fall was not in the walkway long enough to raise a question of fact whether defendant was or should have been aware of it.

NEGLIGENCE, SLIP AND FALL, STORM IN PROGRESS, EXPERT OPINION.

DEFENDANT PROPERTY OWNER DEMONSTRATED THAT THE STORM IN PROGRESS DOCTRINE APPLIED IN THIS SLIP AND FALL CASE (A PROPERTY OWNER WILL NOT BE LIABLE FOR A SNOW AND ICE CONDITION UNTIL A REASONABLE TIME AFTER THE PRECIPITATION HAS STOPPED); THE BURDEN THEN SHIFTED TO PLAINTIFF TO SHOW DEFENDANT'S EFFORT TO REMOVE SNOW HOURS BEFORE THE FALL CREATED THE DANGEROUS CONDITION; TO MEET THAT BURDEN AN EXPERT AFFIDAVIT SHOULD HAVE BEEN, BUT WAS NOT, SUBMITTED (FIRST DEPT).

The First Department, reversing Supreme Court, determined the property owner's (Site A's) motion for summary judgment in this ice and snow slip and fall case should have been granted. The evidence demonstrate it was still snowing at the time of plaintiff's fall and plaintiff did not submit an expert affidavit demonstrating how defendant's snow removal efforts exacerbated the condition:

Site A made a prima facie showing of entitlement to summary judgment based on the storm-in-progress doctrine, because the meteorological data, its expert meteorological affidavit, and plaintiff's deposition testimony annexed to its moving papers establish that there was a storm in progress when the accident occurred … . …

Although the burden shifted to plaintiff to establish that Site A created the alleged condition or made it more hazardous by attempting to remove the precipitation from the driveway about five hours before he fell, plaintiff failed to meet that burden as he submitted no expert affidavit explaining how Site A, by not salting or sanding the area before the accident, could have created or exacerbated the naturally occurring ice condition … . Colon v Site A – Wash. Hgts., 2022 NY Slip Op 03173, First Dept 5-12-22

Practice Point: Here in this ice and snow slip and fall case, the defendant property owner presented prima facie proof that the storm-in-progress doctrine applied

because it was snowing hours before plaintiff fell and was still snowing when plaintiff fell. The burden then shifted to the plaintiff to show that defendant's snow removal efforts undertaken hours before the fall exacerbated the dangerous condition. Because plaintiff did not submit an expert affidavit on that issue, plaintiff's burden of proof was not met.

NEGLIGENCE, TRAFFIC ACCIDENTS, ROADWAY DESIGN.

THE NEGLIGENT ROADWAY DESIGN CAUSE OF ACTION IN THIS TRAFFIC ACCIDENT CASE SHOULD NOT HAVE BEEN DISMISSED; PLAINTIFFS ALLEGED THE ABSENCE OF TURNOUTS FOR DISABLED VEHICLES CREATED A DANGEROUS CONDITION (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined the negligent roadway design cause of action against the city should not have been dismissed in this traffic accident case. Plaintiffs alleged the absence of turnouts for disabled vehicles on Harlem River Drive created a dangerous condition:

Defendants failed to establish that they were unaware of dangerous highway conditions on the northbound Harlem River Drive where the decedent's accident occurred … , or that the previous accidents in that area of the Drive disclosed by the record were not of a similar nature to the decedent's accident, or that the causes of those accidents were not similar to the alleged design-related cause(s) of the decedent's accident … .

… [I]n or about 1983, "the City had received a study recommending that shoulders be added to this section of the Harlem River Drive, and even the City's engineer admitted that the absence of a shoulder or other place of refuge created an unsafe traffic condition" … . … [T]he record in this case discloses that at least 11 more motor vehicle accidents occurred on the Harlem River Drive between 165th and 183rd Streets between October 1990 and September 1993 that were "related to disabled vehicles in the travel lanes that could be directly attributed to the Drive's lack of shoulders." The record also reveals that … the City has justified its inaction by minimizing the significance of pertinent accident data, suggesting that the safety benefit of adding shoulders or turnouts to the Harlem River Drive would be

outweighed by the onerousness of the undertaking, and estimating a multimillion-dollar cost of the endeavor. A municipality breaches its "nondelegable duty to keep its roads reasonably safe . . . when [it] is made aware of a dangerous highway condition and does not take action to remedy it" … . Chowdhury v Phillips, 2022 NY Slip Op 03067, First Dept 5-10-22

Practice Point: Where, as here, the municipality (or the state) has undertaken studies which concluded a roadway design, here the absence of turnouts for disabled vehicles, created a dangerous condition, the city (or the state) will be liable for an accident caused by that dangerous condition.

NEGLIGENCE, TRAFFIC ACCIDENTS, SOVEREIGN IMMUNITY.

PLAINTIFF WAS STRUCK BY A NEW JERSEY TRANSIT CORP (NJT) BUS IN NEW YORK; NJT IS AN ARM OF THE STATE OF NEW JERSEY AND THE SOVEREIGN IMMUNITY DOCTRINE APPLIES; HOWEVER, UNDER NEW JERSEY LAW PLANTIFF CANNOT SUE IN NEW JERSEY BECAUSE THE CAUSE OF ACTION DID NOT ARISE THERE; APPLYING THE FORUM NON CONVENIENS DOCTRINE AS AN ANALYTICAL FRAMEWORK, PLAINTIFF'S NEW YORK LAWSUIT WAS ALLOWED TO GO FORWARD (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Oing, over an extensive two-justice dissenting opinion, determined the doctrine of sovereign immunity did not require the dismissal of plaintiff's suit against the New Jersey Transit Corp. (NJT) in this bus-pedestrian accident case. Plaintiff was struck by the NJT bus in New York. The plaintiff, under New Jersey law, could not sue in New Jersey because the cause of action did not arise in New Jersey. The First Department held that the forum non coveniens criteria provided an appropriate analytical framework:

We have previously held that NJT is an arm of the State of New Jersey and that, as such, it is entitled to invoke the doctrine of sovereign immunity … . * * *

… Should we dismiss a personal injury action on the ground of sovereign immunity when the action cannot be commenced in the sovereign's own courts because the injury arose outside of the sovereign's borders?

We resolve this issue by analogizing it to the legal framework for the forum non conveniens doctrine. Among the factors to consider in determining whether to dismiss an action under this doctrine, with no single factor controlling, are the burden on New York courts, the potential hardship to the defendant, the availability of an alternate forum in which the plaintiff may bring suit, the residency of the parties, the forum in which the cause of action arose, and the extent to which the plaintiff's interests may otherwise be properly served by pursing the claim in New York … . Colt v New Jersey Tr. Corp., 2022 NY Slip Op 03343, First Dept 5-24-22

Practice Point: A bus operated by the New Jersey Transit Corp (NJT) struck plaintiff in New York. NJT is an arm of the state of New Jersey to which the sovereign immunity doctrine applies. But, under New Jersey law, the suit cannot be brought in New Jersey. After analyzing the case using the forum non coveniens criteria, the First Department allowed the New York lawsuit to go forward.

NEGLIGENCE, TRAFFIC ACCICENTS, VEHICLE AND TRAFFIC LAW, GRAVES AMENDMENT, LIABILITY OF LESSOR.

PLAINTIFF DID NOT DEMONSTRATE THE GRAVES AMENDMENT, WHICH RELIEVES THE OWNER OF A LEASED VEHICLE FROM LIABILITY FOR A TRAFFIC ACCIDENT, DID NOT APPLY TO THE DEFENDANT OWNER; THEREFORE PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff did not demonstrate the Graves Amendment did not apply to the owner of the vehicle involved in the accident, relieving the owner of a leased vehicle of liability:

Pursuant to Vehicle and Traffic Law § 388(1), "[e]very owner of a vehicle used or operated in this state shall be liable and responsible for death or injuries to person

or property resulting from negligence in the use or operation of such vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owner." However, pursuant to the Graves Amendment, which "preempt[s] conflicting New York law" … , the owner of a leased or rented motor vehicle (or an affiliate of the owner) cannot be held liable by reason of being the owner of the vehicle (or an affiliate of the owner) for personal injuries resulting from the use of such vehicle if: (1) the owner (or an affiliate of the owner) is engaged in the trade or business of renting or leasing motor vehicles, and (2) there is no negligence or criminal wrongdoing on the part of the owner (or an affiliate of the owner) (see 49 USC § 30106[a] …). Keys v PV Holding Corp., 2022 NY Slip Op 03105, Second Dept 5-11-22

Practice Point: If the owner of a leased vehicle is not negligent (i.e., improper maintenance, etc.), the Graves Amendment relieves the owner of liability for a traffic accident involving the leased vehicle. Here the plaintiff did not demonstrate the Graves Amendment didn't apply. Therefore the burden to prove the amendment did apply never shifted to the defendant vehicle-owner and plaintiff's motion for summary judgment should not have been granted.

NEGLIGENCE, TRAFFIC ACCIDENTS, VEHICLE AND TRAFFIC LAW.

DEFENDANT ATTEMPTED A LEFT TURN IN VIOLATION OF VEHICLE AND TRAFFIC LAW 1141; PLANTIFF'S MOTION FOR SUMMARY JUDGMENT IN THIS INTERSECTION TRAFFIC-ACCIDENT CASE SHOULD HAVE BEEN GRANTED (FIRST DEPT).

The Second Department, reversing (modifying) Supreme Court, determined plaintiff's motion for summary judgment in this intersection traffic accident case should have been granted. Plaintiff was a passenger in a taxi cab when the cab collided with the Katz-defendants' vehicle which was making a left turn in front of the cab:

"Pursuant to Vehicle and Traffic Law § 1141, '[t]he operator of a vehicle intending to turn left within an intersection must yield the right-of-way to any oncoming vehicle that is within the intersection or so close to it as to constitute an immediate

hazard'" … . "A violation of this statute constitutes negligence per se" … . Here, the evidence submitted by the plaintiff in support of her motion, which included the deposition testimony of Gabriel Katz as to the happening of the accident, established, prima facie, that Gabriel Katz was negligent in making a left turn when it was not safe for him to do so in violation of Vehicle and Traffic Law §§ 1141 and 1163, and that his negligence was a proximate cause of the collision … . While there are some discrepancies between the deposition testimony of the plaintiff and Gabriel Katz as to the relative position of the vehicles at the time of the impact, even under Gabriel Katz's account, he was "negligent in attempting to make a left turn when the turn could not be made with reasonable safety" … . In opposition, the Katz defendants failed to raise a triable issue of fact. Contrary to their contention, the evidence did not support the possible applicability of the emergency doctrine under the circumstances … . Lindo v Katz, 2022 NY Slip Op 03379, Second Dept 5-25-22

Practice Point: A left turn in violation of Vehicle and Traffic Law 1141 is negligence per se.

NEGLIGENCE, TRAFFIC ACCIDENTS.

ALTHOUGH PLAINTIFF WAS STRUCK IN THE ON-COMING LANE WHILE ATTEMPTING A LEFT TURN IN AN INTERSECTION, THERE WERE QUESTIONS OF FACT WHETHER DEFENDANT SHOULD HAVE SEEN THE PLAINTIFF (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the defendant's motion for summary judgment in this intersection traffic accident case should not have been granted. Although plaintiff was making a left turn when he was struck by defendant in the on-coming lane, there was a question of fact whether defendant should have seen plaintiff. Plaintiff was making the turn after a stopped driver in the on-coming law gestured to him:

… [A]lthough the defendant submitted evidence that the plaintiff failed to yield the right-of-way when turning left in violation of Vehicle & Traffic Law § 1141, the defendant failed to establish, prima facie, that the plaintiff's failure to yield was the

sole proximate cause of the collision and that the defendant was free from fault … . While testifying, the defendant admitted that he saw nothing out of the ordinary prior to the collision, that he could not recall if he observed the plaintiff's vehicle, and that he only realized that there was a collision from hearing the sound. However, the defendant also testified that he was only driving at approximately 25 miles per hour and was looking straight ahead on a sunny afternoon with no obstructions to his view … . Moreover, the defendant acknowledged that he did not know if his vehicle or the plaintiff's vehicle entered the intersection first. Thus, the defendant's evidentiary submissions failed to eliminate triable issues of fact as to whether the plaintiff's vehicle was already in the intersection as the defendant approached and whether the defendant should have observed the plaintiff's vehicle making a left turn in time to take evasive action to avoid the accident … . Blake v Francis, 2022 NY Slip Op 02974, Second Dept 5-4-22

Practice Point: Although plaintiff may have violated the Vehicle and Traffic Law by making a left turn in the path of defendant's car, there can be more than one proximate cause of an accident. Here there was a question of fact whether defendant should have seen the plaintiff as he attempted the turn.

NEGLIGENT-HIRING, DOCTOR EMPLOYED BY HOSPITAL, PATIENT ASSAULTS.

PLAINTIFF IN THIS NEGLIGENT-HIRING ACTION AGAINST THE HOSPITAL WHICH EMPLOYED A DOCTOR WHO ALLEGEDLY SEXUALLY ASSAULTED HER AND OTHER PATIENTS SOUGHT DISCOVERY; THE IDENTITIES OF THE OTHER ASSAULTED PATIENTS WERE NOT PROTECTED BY THE DOCTOR-PATIENT PRIVILEGE; PARTY STATEMENTS WERE NOT PROTECTED BY THE QUALITY ASSURANCE PRIVILEGE; AND PLAINTIFF WAS ENTITLED TO THE NAMES OF THE DOCTOR'S COWORKERS (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined plaintiff, who, along with other patients, was allegedly sexually assaulted by a doctor, Newman, employed by defendant hospital (Mount Sinai), was entitled to certain discovery. Plaintiff sought discovery of party statements, incident reports, the identities of the other assaulted patients, and the names of the doctor's coworkers at the time of each assault. Plaintiff was entitled to documents not protected by the quality assurance privilege. The doctor-patient privilege did not extend to the identities of the other assaulted patients. And the names of the doctor's coworkers were in a statement prepared by the Health and Human Services Department to which plaintiff was entitled:

We reject Mount Sinai's assertion that privilege excuses it from complying with plaintiff's discovery demands regarding the identities of the other three patients that defendant Newman assaulted. The doctor-patient privilege provided for by CPLR 4504(a) protects information relevant to a patient's medical treatment, but the privilege does not cover incidents of abuse not part of a patient's treatment … . Moreover, while the court stated that disclosure would violate HIPAA, federal regulations provide for disclosure of HIPAA-protected documents subject to a showing that the party seeking disclosure has made a good faith effort to secure a qualified protective order, and plaintiff has done so in each of her motions (45 CFR 164.512[e][ii], [v] …).

… [T]he identities of defendant Newman's coworkers at the times of each of the assaults are relevant and must be disclosed, as those coworkers may have information concerning his conduct … . The names of the coworkers were

contained in a statement of deficiencies prepared by Department of Health and Human Services, Center for Medicare and Medicaid Services, and plaintiff is entitled to production of that statement, redacted to remove conclusions of law and opinions of the Department of Health and Human Services … . Newman v Mount Sinai Med. Ctr., Inc., 2022 NY Slip Op 03327, First Dept 5-19-22

Practice Point: Here plaintiff was allegedly sexually assaulted by a doctor who pled guilty to assaulting other patients. Plaintiff sued the hospital which employed the doctor under a negligent hiring and retention theory. The names of the other assaulted patients were not protected by the physician-patient privilege. Party statements were not protected by the quality assurance privilege. And plaintiff was entitled to the names of the doctor's coworkers.

PRODUCTS LIABILITY, ROUTER, SEVERED THUMB.

IN THIS PRODUCTS LIABILITY ACTION WHERE A ROUTER SEVERED PLAINTIFF'S THUMB, THE FAILURE-TO-WARN CAUSE OF ACTION BASED ON THE MANUAL SHOULD HAVE BEEN DISMISSED BECAUSE PLANTIFF NEVER READ IT; THE GENERALIZED FAILURE-TO-WARN CAUSE OF ACTION PROPERLY SURVIVED SUMMARY JUDGMENT; DISAGREEING WITH THE SECOND DEPARTMENT, THE DESIGN-DEFECT CAUSE OF ACTION BASED ON THE LACK OF AN INTERLOCK DEVICE PROPERLY SURVIVED SUMMARY JUDGMENT (FIRST DEPT).

The First Department, modifying Supreme Court in this products liability case where plaintiff severed his thumb using a router, determined: (1) the failure-to-warn cause of action based upon the product manual should have been dismissed because plaintiff testified he never read it; (2) the generalized failure-to-warn cause of cause properly survived summary judgment; and (3) the design defect cause of action alleging the router should have had an interlock device which would shut it down properly survived summary judgment. Whether plaintiff was familiar with the risk of amputation such that the defendant was relieved of the duty to warn is a question of fact. And whether the lack of an interlock device is a design defect is a question of fact (disagreeing with decisions from the Second Department):

… [T]he record contains evidence that plaintiff had knowledge of power tools other than the router and the general hazards associated with cutting devices. Plaintiff also had used the router on one prior occasion at the premises before the accident. However, it is for a jury, not the court, to determine whether, based on the evidence and testimony presented, plaintiff had sufficient knowledge of the specific hazards from the use of the router to relieve defendants of their duty to warn of them. Further, whether the router presented an open and obvious danger is also a jury issue. * * *

The branch of defendants' motion for summary judgment dismissing the design defect claim based on the lack of an interlock was also properly denied. We recognize that the Second Department has held that such a claim is per se unviable in Chavez v Delta Intl. Mach. Corp. (130 AD3d 667 [2d Dept 2015]), Patino v Lockformer Co. (303 AD2d 731 [2d Dept 2003]), and Giunta v Delta Intl. Mach. (300 AD2d 350 [2d Dept 2002]). Chavez (at 669), the most recent of these cases, cited Patino and Giunta for this proposition, and in Giunta (at 351), the Second Department held that a theory of liability that a "table saw should have been designed with an interlock which would have prevented the motor from starting if the blade guard was off. . . . was explicitly rejected as a matter of law in David v Makita U.S.A. (233 AD2d 145 [1st Dept 1996]), and implicitly rejected in Banks v Makita, U.S.A. (226 AD2d 659 [2d Dept 1996], lv denied 89 NY2d 805 [1996])."

However, we read neither David nor Banks as supporting Giunta's conclusion. Vasquez v Ridge Tool Pattern Co., 2022 NY Slip Op 03488, First Dept 5-31-22

Practice Point: In this products liability case where plaintiff lost a thumb using a router, there was a question of fact whether plaintiff was familiar enough with the danger of amputation that the defendant should be relieved of liability for the failure to warn. Here the First Department, disagreeing with the Second Department, determined the absence of an interlock device which would shut the router down raised a question of fact on the design-defect cause of action.