NEW YORK APPELLATE DIGEST, LLC

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

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APPEALS, DISMISSAL OF APPEAL FOR FAILURE TO PROSECUTE, MOTION TO REARGUE, LABOR LAW-CONSTRUCTION LAW.

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Thorpe v One Page Park, LLC, 2022 NY Slip Op 05053, Second Dept 8-24-22

Practice Point: Here the appellate court exercised its discretion to hear an appeal from the denial of a motion to reargue, even though the appeal from the initial denial of summary judgment was dismissed for failure to prosecute.

Practice Point: Plaintiff's Labor Law 240(1) cause of action stemming from his fall into a pit should not have been dismissed.

COLLATERAL ESTOPPEL, CHILD VICTIMS ACT, EVIDENCE, FAMILY LAW, COLLATERAL ESTOPPEL.

SEXUAL ABUSE FINDINGS IN A FAMILY COURT PROCEEDING COULD NOT BE THE BASIS FOR APPLYING THE COLLATERAL ESTOPPEL DOCTRINE IN THIS CIVIL ACTION UNDER THE CHILD VICTIMS ACT; HEARSAY ADMITTED IN THE FAMILY COURT PROCEEDING IS NOT ADMISSIBLE IN THIS CIVIL ACTION (FOURTH DEPT).

Of Doe 44 v Erik P.R., 2022 NY Slip Op 04839, Fourth Dept 8-4-22

Practice Point: Here the sexual abuse findings in a Family Court proceeding could not be the basis for collateral estoppel prohibiting defendant from disputing the child abuse allegation in this Child Victims Act action. Hearsay admitted in the Family Court proceeding is inadmissible in this civil proceeding.

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DEFAULT JUDGMENTS, FORECLOSURE.

TO AVOID DISMISSAL PURSUANT TO CPLR 3215 (C) THE PLAINTIFF NEED ONLY TAKE PROCEEDINGS FOR THE ENTRY OF A DEFAULT JUDGMENT WITHIN ONE YEAR AND NEED NOT OBTAIN A DEFAULT JUDGMENT WITHIN A YEAR; ANY DELAYS AFTER THE ONE-YEAR PERIOD ARE IRRELEVANT (SECOND DEPT).

Deutsche Bank Natl. Trust Co. v Khalil, 2022 NY Slip Op 04898, Second Dept 8-10-22

Practice Point: To avoid dismissal pursuant to CPLR 3215 (c) a plaintiff need only take proceedings for the entry of a default judgment within one year of the default and need not obtain a default judgment within a year; any delays after the one-year period are irrelevant.

DEFAULT JUDGMENTS, REASONABLE EXCUSE.

DEFENDANT DID NOT OFFER A REASONABLE EXCUSE FOR FAILING TO TIMELY ANSWER THE COMPLAINT; DEFENDANT'S MOTION TO VACATE THE DEFAULT JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

195-197 Hewes, LLC v Citimortgage, Inc., 2022 NY Slip Op 05065, Second Dept 8-31-22

Practice Point: Here defendant's failure to offer a reasonable excuse for failing to timely answer the complaint required denial of defendant's motion to vacate the default judgment. Apparently the COVID toll of time limits did not suffice.

DISCOVERY, DEFAULTING DEFENDANT, INQUEST ON DAMAGES.

THE DEFAULTING DEFENDANT WHOSE ANSWER HAD BEEN STRUCK WAS NOT ENTITLED TO FURTHER DISCOVERY PRIOR TO THE INQUEST ON DAMAGES (SECOND DEPT).

Brasil-Puello v Weisman, 2022 NY Slip Op 04893, Second Dept 8-10-22

Practice Point: A defaulting defendant whose answer has been struck is not entitled to discovery prior to the inquest on damages.

DISCOVERY, DEPOSITION OF EXPERTS, MEDICAL MALPRACTICE, CONTRACT LAW.

AN AGREEMENT SIGNED BY THE PLAINTIFF IN THIS MEDICAL MALPRACTICE ACTION REQUIRING THE DEPOSITION OF EXPERT WITNESSES 120 DAYS BEFORE TRIAL IS VOID AND UNENFORCEABLE AS AGAINST THE POLICY UNDERLYING THE EXPERT DISCLOSURE PROVISIONS OF THE CPLR (SECOND DEPT).

Mercado v Schwartz, 2022 NY Slip Op 04962, Second Dept 8-17-22

Practice Point: An agreement sighed by a patient, who became a plaintiff in this medical malpractice action, which required the deposition of expert witnesses 120 days before trial is void and unenforceable as against the policy underlying the expert disclosure provisions of the CPLR.

DISCOVERY, NEGLIGENCE, TRAFFIC ACCIDENTS, CELL PHONES.

THE CELL PHONE RECORDS OF PLAINTIFF-DRIVER IN THIS TRAFFIC ACCIDENT CASE HAD BEEN PROVIDED TO DEFENDANTS BUT THERE ARE SEVERAL POSSIBLE USES OF THE CELL PHONE WHICH ARE NOT REVEALED BY THE RECORDS; DEFENDANTS WERE ENTITLED TO DISCOVERY OF THE CELL PHONE TO DETERMINE WHETHER PLAINTIFF WAS USING IT AT THE TIME OF THE ACCIDENT (FOURTH DEPT).

Tousant v Aragona, 2022 NY Slip Op 04871, Fourth Dept 8-4-22

Practice Point: Here defendants were entitled to discovery of plaintiff-driver's cell phone to determine whether plaintiff was using it at the time of the traffic accident. Although defendants had already been provided with the cell-phone records, there are several uses of the phone which are not revealed by the records.

DISCOVERY, PRECLUSION ORDER.

THE CONDITIONAL PRECLUSION ORDER BECAME ABSOLUTE WHEN PLAINTIFF DID NOT COMPLY BY PROVIDING DEFENDANTS WITH MEDICAL AUTHORIZATIONS BY THE SPECIFIED DATE; BECAUSE PLAINTIFF OFFERED NO REASONABLE EXCUSE, PLAINTIFF SHOULD HAVE BEEN PRECLUDED FROM PRESENTING ANY MEDICAL EVIDENCE AT TRIAL (SECOND DEPT).

Martin v Dormitory Auth. of the State of N.Y., 2022 NY Slip Op 04907, Second Dept 8-10-22

Practice Point: Here the preclusion order became absolute when plaintiff failed to provide medical authorizations to defendants by the specified date. Plaintiff had no excuse for the failure to comply. Therefore plaintiff should have been precluded from offering any medical evidence at trial.

DISCOVERY, FAILURE TO PROVIDE DISCOVERY, SANCTIONS.

DEFENDANTS' REPEATED FAILURES TO COMPLY WITH DISCOVERY DEMANDS WARRANTED STRIKING THE ANSWER AND COUNTERCLAIMS; SUPREME COURT HAD IMPOSED LESS SEVERE SANCTIONS, BUT THE APPELLATE COURT REVERSED AND IMPOSED THE ULTIMATE SANCTION–A RARE EXAMPLE OF CONDUCT DEEMED "WILLFUL AND CONTUMACIOUS" (SECOND DEPT).

255 Butler Assoc., LLC v 255 Butler, LLC, 2022 NY Slip Op 05067, Second Dept 8-31-22

Practice Point: This is a rare case where Supreme Court's sanctions for defendants' failures to comply with discovery demands were deemed inadequate. The appellate court stuck defendants' answer and counterclaims finding defendants' conduct "willful and contumacious."

DOCTRINE OF VESTED INTERESTS, ZONING, LAND USE.

PETITIONER WAS ISSUED A PERMIT TO CONSTRUCT COMMERCIAL SPACE WITH 557 PARKING SPACES; THE PERMIT WAS REVOKED BECAUSE THE TOWN CODE REQUIRED 624 PARKING SPACES; BECAUSE THE PERMIT WAS INVALID, PETITIONER COULD NOT INVOKE THE "DOCTRINE OF VESTED RIGHTS" FOR A VARIANCE ALLOWING 557 SPACES (SECOND DEPARTMENT).

Matter of C & B Realty #3, LLC v Van Loan, 2022 NY Slip Op 05036, Second Dept 8-24-22

Practice Point: Here the petitioner was issued a permit for construction which was later revoked as invalid because it violated the town code. The "doctrine of vested rights" does not apply to the provisions in an invalid permit. Therefore petitioner's

application for a variance to build according to the provisions of the revoked permit was denied. The "doctrine of vested rights" is explained in the decision.

FAILURE TO PROSECUTE.

AN ACTION CANNOT BE DISMISSED FOR FAILURE TO PROSECUTE PURSUANT TO CPLR 3216 WHEN ISSUE HAS NEVER BEEN JOINED (SECOND DEPT).

Wells Fargo Bank, N.A. v Frederic, 2022 NY Slip Op 04999, Second Dept 6-17-22

Practice Point: Where issue has not been joined the action cannot be dismissed for neglect to prosecute pursuant to CPLR 3216.

JURISDICTION, FAMILY LAW.

ALTHOUGH NEW YORK DID NOT HAVE JURISDICTION OVER THE MICHIGAN CUSTODY ORDER; FAMILY COURT SHOULD HAVE EXERCISED TEMPORARY EMERGENCY JURISDICTION AND HELD A HEARING ON THE CHILD'S SAFETY; THE CHILD WAS IN NEW YORK DURING FATHER'S PARENTING TIME WHEN FATHER BROUGHT A NEGLECT/CUSTODY PETITION IN NEW YORK (THIRD DEPT).

Matter of Chester HH. v Angela GG., 2022 NY Slip Op 05002, Third Dept 8-18-22

Practice Point: Although New York did not have jurisdiction over a Michigan custody order and therefore properly dismissed father's neglect/custody petition brought in New York when the child was in New York, Family Court should have exercised its temporary emergency jurisdiction and held a hearing on the child's safety.

NOTICE OF CLAIM, MUNICIPAL LAW, NEGLIGENCE, LATE NOTICE OF CLAIM.

EVEN THOUGH THE CITY WAS NOT ABLE TO SHOW IT WAS PREJUDICED BY THE NINE MONTH DELAY BEFORE THE PETITION SEEKING LEAVE TO FILE A LATE NOTICE OF CLAIM, AND DESPITE THE FACT THAT A SLIP AND FALL INCIDENT REPORT WAS CREATED BY THE POLICE ON THE DAY OF THE INCIDENT, LEAVE TO FILE A LATE NOTICE OF CLAIM SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

Matter of Ortiz v Westchester County, 2022 NY Slip Op 04807, Second Dept 8-3-22

Practice Point: Here an incident report prepared by the police on the day of the slip and fall was deemed not to have provided the city with timely notice of a potential lawsuit. And the fact that the city did not demonstrate it was prejudiced by the delay did not prevent the Second Department from finding the petition for leave to file a late notice of claim should not have been granted.

NOTICE OF CLAIM, MUNICIPAL LAW, NEGLIGENCE, LATE NOTICE OF CLAIM.

THE CITY HAD TIMELY KNOWLEDGE OF THE POTENTIAL LAWSUIT FROM AN ACCIDENT REPORT AND THEREFORE WAS NOT PREJUDICED BY THE FAILURE TO FILE A NOTICE OF CLAIM; THE PETITION FOR LEAVE TO FILE A LATE NOTICE SHOULD HAVE BEEN GRANTED DESPITE THE ABSENCE OF A REASONABLE EXCUSE (SECOND DEPT).

Matter of Dautaj v City of New York, 2022 NY Slip Op 04802, Second Dept 8-3-22

Practice Point: Where a municipal defendant has actual timely notice of a potential lawsuit from an accident report, the delay is not long, and the city suffers no prejudice from the failure to timely file, a petition for leave to file a late notice of claim should be granted even when petitioner does not have a reasonable excuse.

NOTICE OF CLAIM, MUNICIPAL LAW.

THE COUNTY HAD TIMELY KNOWLEDGE OF THE NATURE OF PETITIONER'S EXCESSIVE-FORCE CLAIM AGAINST THE POLICE AND DID NOT DEMONSTRATE PREJUDICE FROM THE DELAY IN FILING A NOTICE OF CLAIM; THAT PETITIONER DID NOT HAVE AN ADEQUATE EXCUSE WAS NOT DETERMINATIVE; THE APPLICATION TO SERVE A LATE NOTICE OF CLAIM SHOULD HAVE BEEN GRANTED (SECOND DEPT).

Matter of Romero v County of Suffolk, 2022 NY Slip Op 04966, Second Dept 8-17-22

Practice Point: Here the county had timely knowledge of the nature of petitioner's excessive-force claim against the police and the county could not demonstrate any prejudice from petitioner's late filing. The absence of an adequate excuse for

failure to file on time was not determinative. Petitioner's application to file a late notice of claim should have been granted.

PLEADINGS, AMENDMENT OF COMPLAINT, FORECLOSURE, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL), DEBTOR-CREDITOR.

ONCE PLAINTIFF'S FORECLOSURE ACTION WAS DISCONTINUED BY STIPULATION, THE FORECLOSURE COMPLAINT COULD BE AMENDED TO SEEK RECOVERY ON THE NOTE (SECOND DEPT).

Stewart Tit. Ins. Co. v Zaltsman, 2022 NY Slip Op 05107, Second Dept 8-31-22

Practice Point: Here the foreclosure action was discontinued and plaintiff was allowed to amend the foreclosure complaint to seek recovery on the note.

PLEADINGS, LEGAL MALPRACTICE, "BUT FOR" ALLEGATION.

FAILURE TO ALLEGE THAT "BUT FOR" DEFENDANT ATTORNEY'S NEGLIGENCE PLAINTIFF WOULD HAVE PREVAILED REQUIRED DISMISSAL OF THE LEGAL MALPRACTICE COMPLAINT (FIRST DEPT).

Markov v Barrows, 2022 NY Slip Op 04780, First Dept 8-2-22

Practice Point: To sufficiently allege legal malpractice, the complaint must allege that "but for" the attorney's negligence plaintiff would have prevailed.

PLEADINGS, MEDICAL MALPRACTICE.

IN THIS MEDICAL MALPRACTICE ACTION, THE PLAINTIFF WAS NOT REQUIRED TO IDENTIFY EACH ALLEGEDLY NEGLIGENT EMPLOYEE OF THE DEFENDANT MEDICAL CENTER TO SURVIVE SUMMARY JUDGMENT (FOURTH DEPT).

Braxton v Erie County Med. Ctr. Corp., 2022 NY Slip Op 04866, Fourth Dept 8-4-22

Practice Point: In this medical malpractice action, the plaintiff was not required to identify each allegedly negligent employee of the medical center to survive summary judgment.

REPLIES, FORECLOSURE, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL), EVIDENCE SUBMITTED IN REPLY.

PLAINTIFF BANK DID NOT DEMONSTRATE THE RPAPL 1304 NOTICE OF FORECLOSURE WAS PROPERLY MAILED AND THE DEFECT COULD NOT BE CURED BY THE SECOND AFFIDAVIT SUBMITTED IN REPLY (SECOND DEPT).

Ditech Fin., LLC v Cummings, 2022 NY Slip Op 04949, Second Dept 8-17-22

Practice Point: Plaintiff bank did not submit the records proving the notice of foreclosure was properly mailed and the affiant did not demonstrate familiarity with the mailing procedures used by the party which mailed the notice. The defects were not cured by a second affidavit submitted in reply. The bank's motion for summary judgment should not have been granted.

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Hudson Val. Bank, N.A. v Eagle Trading, 2022 NY Slip Op 04956, Second Dept 8-17-22

Practice Point: A party who affirmatively takes steps to mislead the party attempting to serve him will be estopped from claiming the address in the affidavit of service is not his dwelling place.

STANDING, FORECLOSURE, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL).

EVIDENCE OF COMPLIANCE WITH THE NOTICE-OF-FORECLOSURE MAILING REQUIREMENTS OF RPAPL 1304 FIRST SUBMITTED IN REPLY SHOULD NOT HAVE BEEN CONSIDERED; THE EVIDENCE THE BANK HAD STANDING TO BRING THE FORECLOSURE ACTION WAS INSUFFICIENT (SECOND DEPT).

Wells Fargo Bank, N.A. v Murray, 2022 NY Slip Op 05110, Second Dept 8-31-22

Practice Point: Evidence of compliance with the notice-of-foreclosure mailing requirements of RPAPL 1304 first submitted in reply should not have been considered.

Practice Point: The bank did not demonstrate standing to bring the foreclosure action.

STATUTE OF LIMITATIONS, BORROWING STATUTE, CHILD VICTIMS ACT.

HERE PLAINTIFFS ALLEGED THEY WERE SEXUALLY ABUSED DECADES AGO IN MASSACHUSETTS AND SUED UNDER THE CHILD VICTIMS ACT WHICH SERVES TO EXTEND THE STATUTE OF LIMITATIONS; ORDINARILY THE BORROWING STATUTE APPLIES TO OUT-OF-STATE TORTS REQUIRING THE ACTION TO BE TIMELY UNDER BOTH NEW YORK AND THE FOREIGN STATE'S LAWS; HERE THE "RESIDENT EXCEPTION" APPLIED BECAUSE THE PLAINTIFF'S WERE NEW YORK RESIDENTS AT THE TIME OF THE ALLEGED ABUSE; THEREFORE THE ACTION NEED ONLY BE TIMELY UNDER NEW YORK'S CHILD VICTIMS ACT (FOURTH DEPT).

Shapiro v Syracuse Univ., 2022 NY Slip Op 04835, Fourth Dept 8-4-22

Practice Point: Ordinarily an action based on out-of-state sexual abuse of a child decades ago must be timely under both New York's Child Victim's Act and the foreign state's statute of limitations. However, if the child was a New York resident at the time of the out-of-state abuse, only the extended statute of limitations provided by the Child Victims Act applies.

STATUTE OF LIMITATIONS, FORECLOSURE, ACCELERATION OF DEBT.

THE LETTER SENT TO THE BORROWER BY THE BANK IN THIS FORECLOSURE ACTION DID NOT EXPLICITLY INDICATE THE DEBT WAS BEING IMMEDIATELY ACCELERATED; THEREFORE THE DEBT HAD NOT BEEN ACCELERATED AND THE FORECLOSURE ACTION WAS NOT TIME-BARRED (SECOND DEPT).

HSBC Bank USA v Pantel, 2022 NY Slip Op 04954, Second Dept 8-17-22

Practice Point: A letter from the bank to the borrower which discussed the acceleration of the mortgage debt but did not indicate the debt was in fact

accelerated did not trigger the six-year statute of limitations on the foreclosure action. The foreclosure action was not, therefore, time-barred.

STATUTE OF LIMITATIONS, MEDICAL MALPRACTICE, CONTINUOUS TREATMENT DOCTRINE.

THE MOTION TO DISMISS ALLEGATIONS OF MEDICAL MALPRACTICE PRIOR TO APRIL 2013 AS TIME-BARRED WAS PROPERLY GRANTED BECAUSE THE CONTINUOUS TREATMENT DOCTRINE DID NOT APPLY; THERE WAS A SUBSTANTIVE DISSENT ARGUING THAT DOCUMENTS SUBMITTED BY THE DEFENDANTS SUPPORTED APPLYING THE CONTINUOUS TREATMENT DOCTRINE AND THE MATTER SHOULD PROCEED TO DISCOVERY (SECOND DEPT).

Weinstein v Gewirtz, 2022 NY Slip Op 04997, Second Dept 8-17-22

Practice Point: Here the pre-discovery motion to dismiss medical malpractice causes of action as time-barred was affirmed. The dissenter argued the defendants' own documents demonstrated the possible applicability of the continuous treatment doctrine and the matter should proceed to discovery.

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STATUTE OF LIMITATIONS, MEDICAL MALPRACTICE, NEGLIGENCE, BABY DROPPED IN DELIVERY ROOM.

THE ACTION, WHICH STEMMED FROM PLAINTIFF'S BEING DROPPED IN THE DELIVERY ROOM IMMEDIATELY AFTER BIRTH, SOUNDED IN MEDICAL MALPRACTICE, NOT NEGLIGENCE, AND WAS THEREFORE TIME-BARRED (SECOND DEPT).

Rojas v Tandon, 2022 NY Slip Op 04989, Second Dept 8-17-22

Practice Point: The infancy toll of the statute of limitations in CPLR 208 is limited to ten years in medical malpractice cases. Here plaintiff alleged she was dropped in the delivery room immediately after birth in 1999. The action would have been timely if it sounded in negligence. But the action was deemed to sound in medical malpractice rendering it time-barred.

SUA SPONTE DISMISSAL, FORECLOSURE, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL), NOTICE OF FORECLOSURE.

THE BANK DID NOT PROVE COMPLIANCE WITH THE RPAPL 1304 NOTICE-OF-FORECLOSURE MAILING REQUIREMENTS; THE JUDGE SHOULD NOT HAVE, SUA SPONTE, DISMISSED THE FORECLOSURE COMPLAINT (SECOND DEPT).

Wells Fargo Bank, N.A. v Cascarano, 2022 NY Slip Op 04998, Second Dept 8-17-22

Practice Point: The bank did not prove the notice of foreclosure was properly mailed, requiring denial of the bank's motion for summary judgment. But the judge should not have, sua sponte, dismissed the foreclosure complaint.

SUBPOENAS, NONPARTY SUBPOENAS, PROTECTIVE ORDERS.

THE NONPARTY SUBPOENA SHOULD NOT HAVE BEEN QUASHED AND THE RELATED PROTECTIVE ORDER SHOULD NOT HAVE BEEN ISSUED (SECOND DEPT).

Nunez v Peikarian, 2022 NY Slip Op 04969, Second Dept 8-17-22

Practice Point: Here in this Labor Law 240(1) and 241(6) action the plaintiff subpoenaed a nonparty who listed for sale the property where plaintiff was injured. The information plaintiff sought was relevant to whether the homeowner's exemption to Labor Law 240(1) and 241(6) applied. The subpoena should not have been quashed and the related protective order should not have been issued.

SUMMARY JUDGMENT, MEDICAL MALPRACTICE, EVIDENCE FIRST RAISED IN OPPOSITION TO SUMMARY JUDGMENT.

CONFLICTING EXPERT OPINIONS IN THIS MEDICAL MALPRACTICE ACTION REQUIRED DENIAL OF DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT; THE FACT THAT THE ISSUE WHETHER ASPIRIN SHOULD HAVE BEEN ADMINISTERED AS TREATMENT FOR STROKE WAS RAISED IN A DEPOSITION (BUT NOT IN THE COMPLAINT OR BILL OF PARTICULARS) ALLOWED PLAINTIFF TO RAISE THE ISSUE IN OPPOSITION TO SUMMARY JUDGMENT (SECOND DEPT).

Walker v Jamaica Hosp. Med. Ctr., 2022 NY Slip Op 04996, Second Dept 8-17-22

Practice Point: Summary judgment is not appropriate in a medical malpractice action where there are conflicting expert opinions. Here, whether aspirin should have bean administrated to treat stroke was raised in a deposition, but not in the complaint or bill of particulars. Because it was raised in a deposition, it was properly raised in opposition to the defendants' summary judgment motions.

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SUMMARY JUDGMENT, NEGLIGENCE, TRAFFIC ACCIDENTS, COMPARATIVE NEGLIGENCE BETWEEN DEFENDANTS.

PLAINTIFF WAS A PASSENGER IN DEFENDANT MC RAE'S VEHICLE WHEN MC RAE'S VEHICLE WAS STRUCK FROM BEHIND; THE ALLEGATION THAT MC RAE STOPPED FOR NO APPARENT REASON RAISED A QUESTION OF FACT WHETHER MC CRAE WAS COMPARATIVELY NEGLIGENT; COMPARATIVE NEGLIGENCE WILL PRECLUDE SUMMARY JUDGMENT WITH RESPECT TO CROSS CLAIMS BETWEEN DEFENDANTS (SECOND DEPT).

Thompson v New York City Tr. Auth., 2022 NY Slip Op 05052, Second Dept 8-24-22

Practice Point: Plaintiff was a passenger in defendant McRae's car which was struck from behind by a NYC Transit Authority (NYCTA) bus. Defendant NYCTA raised a question fact about Mc Rae's comparative negligence by alleging Mc Rae stopped suddenly for no apparent reason. Comparative negligent will preclude summary judgment with respect to cross-claims between defendants.