NEW YORK APPELLATE DIGEST, LLC

Personal Injury
Reversal Newsletter
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An Organized Compilation of the Summaries of Selected Decisions, Mostly Reversals, Addressing Personal Injury, 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 Full 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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CHILD VICTIMS ACT, STATUTE OF LIMITATIONS, BORROWING STATUTE.

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.

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.

EMPLOYMENT LAW, VICARIOUS LIABILITY, RESISTING ARREST, INJURY TO POLICE OFFICER.

DEFENDANT PIZZA-DELIVERY DRIVER WAS NOT ACTING WITHIN THE SCOPE OF HIS EMPLOYMENT WHEN HE ALLEGELDY RESISTED ARREST AND INJURED PLAINTIFF POLICE OFFICER; THE OFFICER'S SUIT AGAINST THE DRIVER'S EMPLOYER, UNDER VICARIOUS LIABILITY AND NEGLIGENT HIRING THEORIES, SHOULD HAVE BEEN DISMISSED (SECOND DEPT).

Maldonado v Allum, 2022 NY Slip Op 04798, Second Dept 8-3-22

Practice Point: An employer will not be liable for the tortious behavior of an employee unless the employee is acting within the scope of his employment. Here a pizza-delivery driver allegedly resisted arrest after a traffic stop and injured plaintiff police officer. The employer was not liable for the violent behavior of the employee under either a vicarious liability or negligent hiring theory.

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EMPLOYMENT LAW, VICARIOUS LIABILITY, BATTERY, FALSE IMPRISONMENT.

PLAINTIFF WAS DETAINED BY DEFENDANT HOME DEPOT'S EMPLOYEE BASED ON A FALSE ALLEGATION AND WAS SUBSEQUENTLY ARRESTED; PLAINTIFF'S VERDICT ON HIS BATTERY AND FALSE IMPRISONMENT CAUSES OF ACTION UPHELD (SECOND DEPT).

Wieder v Home Depot U.S.A., Inc., 2022 NY Slip Op 04830, Second Dept 8-3-22

Practice Point: Here a Home Depot employee detained plaintiff until the police arrived based on the false allegation he had assaulted a woman. Plaintiff sued Home Depot and the verdict in plaintiff's favor was upheld.

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

APPEAL FROM A DENIAL OF A MOTION TO REARGUE CONSIDERED DESPITE THE DISMISSAL OF THE APPEAL FROM THE INITIAL DENIAL OF SUMMARY JUDGMENT FOR FAILURE TO PROSECUTE; PLAINTIFF'S LABOR LAW240(1) CAUSE OF ACTION STEMMING FROM A FALL INTO A PIT SHOULD NOT HAVE BEEN DISMISSED (SECOND DEPT).

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.

LABOR LAW-CONSTRUCTION LAW, DEMOLITON, INDUSTRIAL CODE.

THE INDUSTRIAL CODE PROVISION WHICH WAS THE BASIS OF THE LABOR LAW 241(6) CAUSE OF ACTION DID NOT APPLY TO PLAINTIFF'S DEMOLITION-WORK-INJURY; THE DEFENDANT GENERAL CONTRACTOR DID NOT EXERCISE SUPERVISORY CONTROL OVER PLAINTIFF'S WORK AND WAS NOT, THEREFORE, LIABLE UNDER LABOR LAW 200 (SECOND DEPT).

Flores v Crescent Beach Club, LLC, 2022 NY Slip Op 04901, Second Dept 8-10-22

Practice Point: Here the cited Industrial Code provision did not apply to plaintiff's Labor Law 241(6) demolition-work-injury cause of action and Labor Law 200 did not apply to defendant general contractor which did not exercise supervisory control over plaintiff's work.

LABOR LAW-CONSTRUCTION LAW.

THE SMALL CONCRETE PEBBLES UPON WHICH PLAINTIFF ALLEGEDLY SLIPPED DID NOT CONSTITUTE A "SLIPPERY CONDITION" WITHIN THE MEANING OF THE INDUSTRIAL CODE AND WERE NOT IN A "PASSAGEWAY" WITHIN THE MEANING OF THE INDUSTRIAL CODE; THE LABOR LAW 241(6) ACTION SHOULD HAVE BEEN DISMISSED (FIRST DEPT).

Ruisech v Structure Tone Inc., 2022 NY Slip Op 04941, First Dept 8-16-22

Practice Point: Small pebble-sized pieces of concrete are an integral part of the construction and therefore do not constitute a slippery "foreign substance" within the meaning of the Industrial Code. The Labor Law 241(6) action should have been dismissed.

LABOR LAW-CONSTRUCTION LAW.

ALTHOUGH THERE WAS EVIDENCE PLAINTIFF'S USE OF A LADDER INSTEAD OF THE SCISSORS LIFT CREATED THE SAFETY ISSUE LEADING TO PLAINTIFF'S FALL IN THIS LABOR LAW 240(1) ACTION, THERE WAS EVIDENCE THE OPERATOR OF THE SCISSORS LIFT WOULD NOT ALLOW PLAINTIFF TO ACCESS IT, RAISING A QUESTION OF FACT WHETHER PLAINTIFF'S USE OF A LADDER WAS THE SOLE PROXIMATE CAUSE OF THE ACCIDENT; THERE WAS A SUBSTANTIAL DISSENT (FOURTH DEPT).

Thomas v North Country Family Health Ctr., Inc., 2022 NY Slip Op 04836, Fourth Dept 8-4-22

Practice Point: Apparently use of a scissors lift, not a ladder, was the appropriate method for the work. Plaintiff fell from a ladder attempting to do the work. There was evidence the operator of the scissors lift would not allow plaintiff to access it. Therefore plaintiff's use of the ladder may not have been the sole proximate cause of the fall and the defense motion for summary judgment on the Labor Law 240(1) cause of action should not have been granted. There was a substantial dissent.

LABOR LAW-CONSTRUCTION LAW.

PLAINTIFF IN THIS LABOR LAW 240(1) ACTION FELL FROM AN INVERTED BUCKET HE WAS STANDING ON TO REACH A POWER CABLE; DEFENDANTS DEMONSTRATED THERE WAS NO NEED FOR PLAINTIFF TO ELEVATE HIMSELF TO DO HIS JOB; THEREFORE PLAINTIFF WAS THE SOLE PROXIMATE CAUSE OF HIS INJURY (SECOND DEPT).

Morales v 50 N. First Partners, LLC, 2022 NY Slip Op 04801, Second Dept 8-3-22

Practice Point: In this unusual Labor Law 240(1) action, the defendants demonstrated plaintiff did not need to stand on an inverted bucket to do his job.

Therefore plaintiff was the sole proximate cause of his fall (from the bucket) and defendants were entitled to summary judgment.

LABOR LAW-CONSTRUCTION LAW.

STORED SHEETROCK PANELS WHICH FELL OVER ON PLAINTIFF DID NOT CONSTITUTE THE KIND OF ELEVATION/GRAVITY-RELATED INCIDENT COVERED BY LABOR LAW 240(1) (SECOND DEPT).

Parrino v Rauert, 2022 NY Slip Op 04970, Second Dept 8-17-22

Practice Point: Here stored sheetrock panels which fell over on plaintiff did not constitute the kind of elevation/gravity-related incident that is covered by Labor Law 240(1). The facts are not explained. If the sheetrock should have been secured, it would seem Labor Law 240(1) would apply. Apparently defendant demonstrated there was no need to secure the sheetrock?

LABOR LAW-CONSTRUCTION LAW.

THE ELECTRICAL STUB UP OVER WHICH PLAINTIFF TRIPPED IN THIS LABOR LAW 241(6) ACTION WAS AN INTEGRAL PART OF THE CONSTRUCTION; THE INDUSTRIAL CODE PROVISIONS REQUIRING PASSAGEWAYS TO BE KEPT CLEAR OF DEBRIS GENERALLY DO NOT APPLY TO AN OBSTRUCTION WHICH IS AN INTEGRAL PART OF CONSTRUCTION; HERE THE FAILURE TO PROVIDE SAFETY MARKERS CALLING ATTENTION TO THE STUB UPS APPARENTLY BROUGHT THE FACTS WITHIN THE REACH OF THOSE "KEEP PASSAGEWAYS FREE OF DEBRIS" CODE PROVISIONS (SECOND DEPT).

Murphy v 80 Pine, LLC, 2022 NY Slip Op 04811, Second Dept 8-3-22

Practice Point: The Industrial Code provisions requiring passageways to be kept clear of debris do not apply to tripping hazards that are integral parts of construction. Here the electrical stub up over which plaintiff tripped was an integral part of construction. Nevertheless, the Second Department deemed the Code provisions to apply because of the absence of safety markers to alert workers to the location of the stub ups (which protrude from the floor).

MEDICAL MALPRACTICE, DISCOVERY, DEPOSITION OF EXPERTS, 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.

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.

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

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.

MEDICAL MALPRACTICE, PLEADING.

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.

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MEDICAL MALPRACTICE, STATUTE OF LIMITATIONS, 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.

MUNICIPAL LAW, NOTICE OF CLAIM.

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.

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.

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.

NEGLIGENCE, BICYCLE-PEDESTRIAN COLLISION, EXPERT EVIDENCE.

IN THIS BICYCLE-PEDESTRIAN COLLISION CASE WHERE THERE WAS A VIDEO OF THE INCIDENT, DEFENDANT'S EXPERT DEMONSTRATED, USING FACTS IN THE RECORD, THAT DEFENDANT BICYCLIST HAD THE RIGHT OF WAY, WAS TRAVELLING AT A REASONABLE SPEED, AND WAS NOT ABLE TO AVOID THE COLLISION WHEN PLAINTIFF STEPPED OFF THE CURB; PLANTIFF'S EXPERT'S OPINION TO THE CONTRARY WAS NOT SUPPORTED BY FACTS IN THE RECORD; DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (FIRST DEPT).

Min Zhong v Matranga, 2022 NY Slip Op 05063, First Dept 8-30-22

Practice Point: Expert opinion which is not supported by facts in the record will not raise a question of fact sufficient to preclude summary judgment.

NEGLIGENCE, EDUCATION-SCHOOL LAW, ASSAULT BY STUDENT, NEGLIGENT PARENTAL SUPERVISION.

PLAINTIFF, A SCHOOL PSYCHOLOGIST, WAS ASSAULTED BY AN AUTISTIC STUDENT; THE NEGLIGENT-PARENTAL-SUPERVISION CAUSE OF ACTION AGAINST THE STUDENT'S PARENTS SHOULD NOT HAVE BEEN DISMISSED (SECOND DEPT).

Levine v George, 2022 NY Slip Op 05032, Second Dept 8-24-22

Practice Point: Parents are usually not responsible for the torts of their child. In this case the autistic child assaulted plaintiff school psychologist. The facts were not discussed, But the appellate court determined the "negligent parental supervision" cause of action should not have been dismissed.

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NEGLIGENCE, FALLING TREE LIMB, EXPERT EVIDENCE.

PLAINTIFF'S EXPERT'S AFFIDAVIT DID NOT RAISE A QUESTION OF FACT WHETHER THE DEFENDANT PROPERTY OWNERS HAD CONSTRUCTIVE KNOWLEDGE OF THE DETERIORATION OF A TREE LIMB WHICH FELL ON PLANTIFF'S CAR (SECOND DEPT).

Sasso v Village of Bronxville, 2022 NY Slip Op 05105, Second Dept 8-31-22

Practice Point: Here a tree limb fell on plaintiff's car. Plaintiff's expert concluded the tree limb was deteriorated, but only after close inspection of the limb. The expert evidence did not raise a question of fact about whether the property owner's had constructive knowledge of the condition of the limb.

NEGLIGENCE, INJURY BY BAR PATRON.

DEFENDANT PROPERTY OWNER NOT LIABLE FOR INJURY CAUSED BY THE SPONTANEOUS ACT OF A BAR PATRON (SECOND DEPT).

York v Paddy's Loft Corp., 2022 NY Slip Op 04931, Second Dept 8-10-22

Practice Point: Here defendant bar owner could not be held liable for the spontaneous act of a bar patron which injured plaintiff.

NEGLIGENCE, LIABILITY FOR INDEPENDENT CONTRACTOR.

PLAINTIFF RENTED DEFENDANT'S COTTAGE AND WAS INJURED WHEN THE DECK COLLAPSED; PLAINTIFF'S CAUSES OF ACTION BASED UPON RES IPSA LQUITUR AND VICARIOUS LIABILITY FOR AN INDEPENDENT CONTRACTOR WHO CONSTRUCTED THE DECK SHOULD HAVE SURVIVED SUMMARY JUDGMENT; A PROPERTY OWNER HAS A NONDELEGABLE DUTY TO THE PUBLIC TO KEEP THE PREMISES SAFE, AN EXCEPTION TO THE GENERAL RULE THAT A PROPERTY OWNER WILL NOT BE LIABLE FOR THE ACTS OR OMISSIONS OF AN INDEPENDENT CONTRACTOR (FOURTH DEPT).

McGirr v Shifflet, 2022 NY Slip Op 04831, Fourth Dept 8-4-22

Practice Point: Here plaintiff was injured when the deck of the cottage rented from defendant collapsed. Plaintiff's causes of action based on res ipsa loguitur and vicarious liability for the contractor who built the deck should not have been dismissed. There was a question of fact whether defendant had a nondelegable duty to the public to keep the premises safe, an exception to the general rule that a property owner is not vicariously liable for the acts or omissions of an independent contractor.

NEGLIGENCE, MUNICIPAL LAW, BUSES.

QUESTIONS OF FACT WHETHER DEFENDANT BUS DRIVER WAS NEGLIGENT; PLAINTIFF'S HAND WAS CAUGHT IN THE CLOSED DOOR OF THE BUS (SECOND DEPT).

John v Dobson, 2022 NY Slip Op 05029, Second Dept 8-24-22

Practice Point: Plaintiff's hand was caught in the closed door of the defendants' bus. There were questions of fact whether the driver was negligent in closing the door on plaintiff's hand and failing to open the door to release plaintiff's hand.

NEGLIGENCE, SIDWALK SLIP AND FALL.

PLAINTIFF'S EVIDENCE OF THE CAUSE OF THE SLIP AND FALL, A RAISED SIDEWALK FLAG IDENTIFIED IN A PHOTOGRAPH, WAS SUFFICIENT TO DEFEAT DEFENDANT'S MOTION FOR SUMMARY JUDGMENT (SECOND DEPT).

Santiago v Williams, 2022 NY Slip Op 04922, Second Dept 8-10-22

Practice Point: Plaintiff's evidence of the cause of his slip and fall, a raised sidewalk flag identified in a photograph, was sufficient to defeat defendant's motion for summary judgment.

NEGLIGENCE, SLIP AND FALL, HANDRAILS.

THE PLAINTIFF DID NOT KNOW THE CAUSE OF HER STAIRCASE FALL AND DID NOT TIE THE FALL TO THE ABSENCE OF A SECOND HANDRAIL; THERE WAS NO STATUTE OR CODE PROVISION, AND NO COMMON LAW DUTY, REQUIRING TWO HANDRAILS; DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (SECOND DEPT).

Mancini v Nicoletta, 2022 NY Slip Op 04961, Second Dept 8-17-22

Practice Point: Here the plaintiff did not know the cause of her staircase fall. There was one handrail. There was no code provision or statute requiring a second handrail. Defendant was entitled to summary judgment.

NEGLIGENCE, SLIP AND FALL, OPEN AND OBVIOUS.

THE INSPECTION PIT, WHICH DID NOT VIOLATE ANY STATUTE OR REGULATION, WAS OPEN AND OBVIOUS AND NOT INHERENTLY DANGEROUS; PLAINTIFF'S FALL INTO THE PIT WAS NOT ACTIONABLE (SECOND DEPT).

Lebron v City of New York, 2022 NY Slip Op 04960, Second Dept 8-17-22

Practice Point: The open and obvious condition, an inspection pit, into which plaintiff fell, was open and obvious and did not violate any statute or code provision. Therefore, plaintiff's fall was not actionable.

NEGLIGENCE, SLIP AND FALL, OPEN AND OBVIOUS.

THE LEG OF A LARGE DECORATIVE THRONE IN DEFENDANT'S BAR WAS OPEN AND OBVIOUS AND THEREFORE WAS NOT AN ACTIONABLE TRIPPING HAZARD; PLAINTIFF HAD FREQUENTED THE BAR AND THE THRONE WAS READILY OBSERVABLE (SECOND DEPT).

Rider v Manhattan Monster, Inc., 2022 NY Slip Op 05048, Second Dept 8-24-22

Practice Point: Here plaintiff allegedly tripped over the leg of a large decorative throne in defendant's bar. The throne was a readily observable novelty which drew patrons to the bar. Plaintiff frequented the bar and was well aware of the location of the throne. Because the throne was open and obvious it did not constitute an actionable tripping hazard.

NEGLIGENCE, SLIP AND FALL.

THE DEFENDANT RETAIL STORE IN THIS SLIP AND FALL CASE DID NOT DEMONSTRATE IT DID NOT HAVE CONSTRUCTIVE NOTICE OF AND/OR CREATE THE DANGEROUS CONDITION (A PUDDLE OF LIQUID) WHICH CAUSED PLAINTIFF'S SLIP AND FALL (SECOND DEPT).

Yerry v Whole Food Mkt. Group, Inc., 2022 NY Slip Op 05000, Second Dept 8-17-22

Practice Point: Unusual case where there was a question of fact whether defendant's inadequate clean-up of a puddle of liquid caused plaintiff's slip and fall.

NEGLIGENCE, SLIP AND FALLS, IMPROPER USE OF ESCALATOR, EXPERT EVIDENCE.

THE 15-YEAR-OLD PLAINTIFF WAS RIDING THE ESCALATOR IN DEFENDANT'S THEATER IMPROPERLY WHEN HE FELL OFF BACKWARDS TO THE FLOOR; THERE WAS NO EVIDENCE OF A DEFECTIVE CONDITION AND PLAINTIFF'S EXPERT AFFIDAVIT WAS SPECULATIVE; THE THEATER'S SUMMARY JUDGMENT MOTION SHOULD HAVE BEEN GRANTED (SECOND DEPT).

Boris L. v AMC Entertainment Holdings, Inc., 2022 NY Slip Op 05080, Second Dept 8-31-22

Practice Point: Here plaintiff's fall from an escalator was caused by the improper way he was riding the escalator, not by any defect in the property. The property owner's motion for summary judgment should have been granted.

NEGLIGENCE, TRAFFIC ACCIDENTS, CELL PHONES, DISCOVERY.

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.

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.

NEGLIGENCE, TRAFFIC ACCIDENTS, COMPARATIVE NEGLIGENCE.

DEFENDANT IN THIS REAR-END COLLISION CASE RAISED A QUESTION OF FACT ABOUT A NONNEGLIGENT EXPLANATION FOR DEFENDANT'S STRIKING PLAINTIFF'S CAR (SECOND DEPT).

Joseph-Felix v Hersh, 2022 NY Slip Op 04905, Second Dept 8-10-22

Practice Point: Here the defendant in this rear-end collision case raised a question of fact about whether there was a nonnegligent explanation for defendant's striking plaintiff's car.

Practice Point: Although plaintiff's lack of comparative negligence need no longer be asserted in plaintiff's motion for summary judgment in a rear-end collision case, the issue may be considered at the summary judgment stage if plaintiff moves to dismiss defendant's comparative-negligence affirmative defense.

NEGLIGENCE, TRAFFIC ACCIDENTS, DAMAGES.

THE JURY FOUND PLAINTIFF SUFFERED PERMANENT INJURY IN THE TRAFFIC ACCIDENT BUT AWARDED $0 DAMAGES FOR FUTURE PAIN AND SUFFERING AND FUTURE MEDICAL EXPENSES; THE DAMAGES AWARD WAS AGAINST THE WEIGHT OF THE EVIDENCE AND SHOULD HAVE BEEN SET ASIDE (SECOND DEPT).

Carter v City of New Rochelle, 2022 NY Slip Op 05072, Second Dept 8-31-22

Practice Point: Where a jury finds plaintiff was permanently injured in an accident but awards nothing for future pain and suffering and future medical expenses, the damages award should be set aside as against the weight of the evidence.

NEGLIGENCE, TRAFFIC ACCIDENTS, REAR-END COLLISIONS.

IN THIS REAR-END COLLISION CASE, THE ALLEGATION PLAINTIFF STOPPED SUDDENLY WAS NOT SUFFICIENT TO RAISE A QUESTION OF FACT AND DID NOT PRECLUDE THE DISMISSAL OF THE COMPARATIVE-NEGLIGENCE AFFIRMATIVE DEFENSE (SECOND DEPT).

Mahmud v Feng Ouyang, 2022 NY Slip Op 05081, Second Dept 8-31-22

Practice Point: In this rear-end collision case, defendant's allegation plaintiff stopped suddenly was not enough to raise a question of fact and did not preclude the dismissal of the comparative-negligence affirmative defense.

NEGLIGENCE, TRAFFIC ACCIDENTS, COMPARATIVE NEGLIGIENCE, VEHICLE AND TRAFFIC LAW.

DEFENDANT MADE A LEFT TURN IN THE PATH OF PLAINTIFF'S VEHICLE IN VIOLATION OF THE VEHICLE AND TRAFFIC LAW; PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON LIABILITY AND DISMISSING THE COMPARATIVE NEGLIGENCE AFFIRMATIVE DEFENSE SHOULD HAVE BEEN GRANTED (SECOND DEPT).

Seizeme v Levy, 2022 NY Slip Op 05049, Second Dept 8-24-22

Practice Point: Defendant made a left turn in violation of the Vehicle and Traffic causing a collision with plaintiff in the oncoming lane. Plaintiff was entitled to summary judgment on liability and dismissing the comparative negligence affirmative defense.

NEGLIGENCE, TRAFFIC ACCIDENTS, VEHICLE AND TRAFFIC LAW, DOUBLE-PARKED TRUCK.

QUESTION OF FACT WHETHER DEFENDANT'S DOUBLE-PARKED TRUCK MERELY FURNISHED THE OCCASION FOR THE MOTORCYCLE ACCIDENT OR WAS A PROXIMATE CAUSE OF THE ACCIDENT; PLAINTIFF FLIPPED OVER THE MOTORCYCLE BRAKING TO AVOID COLLIDING WITH THE TRUCK (SECOND DEPT).

Colletti v City of New York, 2022 NY Slip Op 05019, Second Dept 8-24-22

Practice Point: Accident cases sometimes require making a difficult distinction between merely furnishing an occasion for an accident, which is not actionable, and a proximate cause of an accident. Supreme Court held the presence of defendant's double-parked truck merely furnished the occasion for plaintiff's motorcycle accident. The Second Department reversed finding a question of fact whether the presence of the truck was a proximate cause of the accident.

NEGLIGENCE, TRAFFIC ACCIDENTS, VEHICLE AND TRAFFIC LAW.

DEFENDANT MADE A LEFT TURN IN FRONT OF PLAINTIFF IN VIOLATION OF THE VEHICLE AND TRAFFIC LAW; PLAINTIFF SHOULD HAVE BEEN AWARDED SUMMARY JUDGMENT (SECOND DEPT).

Jaipaulsingh v Umana, 2022 NY Slip Op 05028, Second Dept 8-24-22

Practice Point: Here defendant violated the Vehicle and Traffic Law by making a left turn from the middle lane, cutting plaintiff off. Comparative negligence is not a bar to summary judgment. Plaintiff's motion for summary judgment should have been granted.

NEGLIGENCE, TRAFFIC ACCIDENTS, VEHICLE AND TRAFFIC LAW.

INFANT PLAINTFF WAS STRUCK BY DEFENDANT DRIVER WHILE IN A CROSS-WALK WITH THE WALK SIGNAL ON; SUN-GLARE IS NOT AN "EMERGENCY" WHICH WILL RAISE A QUESTON OF FACT; PLAINTIFFS' SUMMARY JUDGMENT MOTION SHOULD HAVE BEEN GRANTED (FIRST DEPT).

E.B. v Gonzalez, 2022 NY Slip Op 04942, Second Dept 8-17-22

Practice Point: Here the infant plaintiff was lawfully crossing the street in a cross-walk when struck by defendant driver. The driver's allegation she was blinded by sun-glare was not an emergency and did not raise a question of fact. Plaintiffs' motion for summary judgment should have been granted.

RETIREMENT AND SOCIAL SECURITY LAW, DISABILITY, EVIDENCE.

THE RULING THAT PETITIONER-CORRECTION-OFFICER'S DISABLING CONDITION WAS NOT CAUSED BY AN ALTERCATION WITH AN INMATE WAS SUPPORTED BY "SUBSTANTIAL EVIDENCE;" "SUBSTANTIAL EVIDENCE" IN THIS CONTEXT IS DEFINED (SECOND DEPT).

Matter of Singleton v New York City Employees' Retirement Sys., 2022 NY Slip Op 05089, Second Dept 8-31-22

Practice Point: In the context of a Retirement and Social Security Law disability-benefits hearing to determine whether a correction officer's disabling condition was caused by an altercation with an inmate, the denial of disability benefits must be supported by "substantial evidence" which requires "some credible evidence," meaning evidence from a "credible source." Here the denial of benefits was upheld.