NEW YORK APPELLATE DIGEST, LLC

Personal Injury
Reversal Report
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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).

The Fourth Department, reversing (modifying) Supreme Court, determined the "resident exception" to the borrowing statute applied to New-York-resident plaintiffs who allegedly were sexually abused decades ago at a camp in Massachusetts run by Syracuse University. Ordinarily New York's borrowing statute requires that an action for an out-of-state tort be timely under both New York's Child Victims Act and the foreign state's statute of limitations. However, there is an exception to that rule when the plaintiffs, abused in a foreign state, were New York residents at the time of the abuse:

"When a nonresident sues on a cause of action accruing outside New York, CPLR 202 requires the cause of action to be timely under the limitation[s] periods of both New York and the jurisdiction where the cause of action accrued" … . In tort cases, the Court of Appeals has held that "a cause of action accrues at the time and in the place of the injury" … . Thus, for [such] claims to survive, they must be timely under both CPLR 214-g and the applicable [foreign state's] statute of limitations. …

… [Plaintiffs] were New York residents when the … causes of action accrued. Pursuant to the "resident exception" of the borrowing statute … , a claim that accrues in favor of a New York resident will be governed by the New York statute of limitations regardless of where the claim accrued (see CPLR 202 … . … [Teh Child Victims Act] revival statute applies … . 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).

The Fourth Department, reversing Supreme Court, over a substantial dissent, determined defendant in this Child Victims Act action was not collaterally estopped from disputing the sexual abuse allegations based upon the related Family Court proceedings. Hearsay evidence properly admitted in Family Court is not admissible in this civil action in Supreme Court:

… [A]lthough the burden of proof for both the Family Court proceeding and these personal injury actions is the same, i.e., preponderance of the evidence … , hearsay evidence that was admissible in the underlying Family Court proceeding would not be admissible in the instant personal injury actions … . Inasmuch as our determination in the prior Family Court proceeding was based largely on hearsay evidence that would not be admissible in these civil actions, we agree with defendant that he should not be collaterally estopped from defending these actions and that the court erred in granting plaintiffs' motions for partial summary judgment on liability. 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).

The Second Department, reversing Supreme Court, determined plaintiff-police officer's (Maldonado's) action against Domino's Pizza (DP) as the employer of defendant pizza-delivery-driver (Alum) should have been dismissed. Maldonado pulled Alum over to issue a ticket for a defective headlight. Alum allegedly became violent and injured Maldonado sued DP under vicarious-liability theory negligent hiring-supervision theories. The Second Department held Alum was not acting within the scope of his employment when he resisted arrest, DP demonstrate it did not have knowledge or notice that Alum had a propensity for violence:

… [DP demonstrated] that Allum's allegedly tortious conduct was not within the scope of his employment. … DP demonstrated that the violent conduct displayed by Allum during the course of receiving a ticket for a defective headlight was not reasonably foreseeable or incidental to the furtherance of DP's business interests and that Allum was not authorized to use force to effectuate the goals and duties of his employment … . …

… DP demonstrated its prima facie entitlement to judgment as a matter of law dismissing the cause of action to recover damages for negligent hiring and negligent supervision. In this regard, DP demonstrated that it did not have knowledge, or notice, of Allum's propensity for the violent conduct that resulted in Maldonado's injury … . Moreover, "[t]here is no common-law duty to institute specific procedures for hiring employees unless the employer knows of facts that would lead a reasonably prudent person to investigate the prospective employee" … . 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.

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).

The Second Department upheld a jury verdict (reducing it however) in favor of plaintiff who was detained in defendant Home Depot's store by a Home Depot employee based upon the false allegation plaintiff had assaulted a woman. Plaintiff was detained until the police arrived and then arrested. Plaintiff was a court attorney and was seeking a judicial nomination. Plaintiff was awarded $1.8 million, which the Second Department reduced to $500,000:

The jury, after a trial on the issue of liability, returned a verdict in favor of the plaintiff and against the defendants on the causes of action alleging battery and false imprisonment. …

… False arrest and false imprisonment are two different names for the same common-law tort … . The elements of the tort are intent to confine the plaintiff, the plaintiff was conscious of the confinement, the plaintiff did not consent to the confinement, and the confinement was not otherwise privileged … . "Probable cause is a complete defense to an action alleging . . . false imprisonment" … .

The fact that the police had probable cause to detain the plaintiff based on what Marrugo [the Home Depot employee] told them does not mean that Marrugo had probable cause to detain the plaintiff. Although a civilian complainant generally cannot be found liable for false imprisonment merely for providing information to

the police which turns out to be wrong … , a private person can be liable for false imprisonment for actively participating in the arrest such as "'importuning the authorities to act'" … . The record indicates that the plaintiff would not have been arrested but for Marrugo's detention of him, and importuning the police to arrest him. Marrugo instigated the arrest, making the police his agents in confining the plaintiff … . Marrugo did so based upon false information that the plaintiff assaulted the female customer with a shopping cart. 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).

The Second Department, reversing Supreme Court, determined: (1) the appeal from the denial of a motion to reargue would be considered even though the appeal from the initial denial of summary judgment was dismissed for failure to prosecute; (2) the Labor Law 240(1) cause of action stemming from plaintiff's fall into a pit should not have been dismissed:

"As a general rule, we do not consider any issue raised on a subsequent appeal that was raised, or could have been raised, in an earlier appeal that was dismissed for lack of prosecution, although we have the inherent jurisdiction to do so" … . Since the plaintiff appealed from an order superseding the prior order appealed from at a time before the prior appeal was deemed dismissed, we exercise that discretion here. …

… [T]he defendants failed to establish their prima facie entitlement to judgment as a matter of law dismissing the Labor Law § 240(1) cause of action … . Contrary to the defendants' contention, the risk of falling into a 16-foot pit on an excavation site is a type of elevation-related risk within the purview of protection of Labor Law § 240(1) … . Furthermore, the defendants failed to establish, prima facie, that the plaintiff's negligence was the sole proximate cause of his injuries. The deposition testimony of the plaintiff and the foreman, which were submitted in support of the defendants' motion, contain conflicting testimony raising a triable issue of fact as to whether the plaintiff received instructions not to stand within five feet of the pit. The defendants also did not establish, prima facie, that the installation of a protective device "would have been contrary to the objectives of the work" … . 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).

The Second Department, reversing (modifying) Supreme Court, determined 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 and defendant general contractor (Lad) did not exercise supervisory control over defendant's work and was not therefore liable under Labor Law 200:

… [T]he cause of action alleging a violation of Labor Law § 241(6) is predicated on Industrial Code 12 NYCRR 23-3.3(c), which mandates continuing inspections during hand demolition operations to detect hazards "resulting from weakened or deteriorated floors or walls or from loosened material." … [Defendant] established …the inapplicability of this provision by demonstrating that the hazard arose from the plaintiff's actual performance of the demolition work itself, and not structural instability caused by the progress of the demolition … . …

"Although property owners [and general contractors] often have a general authority to oversee the progress of the work, mere general supervisory authority at a work site for the purpose of overseeing the progress of the work and inspecting the work product is insufficient to impose liability under Labor Law § 200" or for common-law negligence … . "A defendant has the authority to supervise or control the work for the purposes of Labor Law § 200 when that defendant bears the responsibility for the manner in which the work is performed" … .

Here, Lad established, prima facie, that it did not possess the authority to supervise or control the means and methods of the plaintiff's work … . 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).

The First Department, reversing (modifying) Supreme Court, determined the Industrial Code did not apply to the small concrete pebbles on which plaintiff allegedly slipped when attempting to install a heavy glass divider:

When plaintiff stepped forw. ard to place the glass into the track, he stepped onto "minute" pebbles near the track. His right foot slipped forward a few inches, but he did not fall. Plaintiff claims that he sustained injuries, not only because of pebbles he slipped on, but also because of [his employer's] decision to remove one worker from his team when he undertook to move the glass.

… Neither of the Industrial Code regulations that plaintiff relies on apply to the accident. The floor was not in "a slippery condition" nor were the pebbles a "foreign substance which may cause slippery footing" within the meaning of Industrial Code § 23-1.7(d) … . Section 23-1.7 (e)(2) of the Industrial Code also does not apply as this was not a passageway, within the meaning of the regulation. In any event, the pebbles were debris that were an integral part of the construction work. The integral to the work defense applies to things and conditions that are an integral part of the construction, not just to the specific task a plaintiff may be performing at the time of the accident … . 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).

The Fourth Department, over a substantial dissent, determined plaintiff's Labor Law 240(1) action should have survived summary judgment. Plaintiff fell from a ladder attempting to pass sheet rock to another worker on a scissors lift. The dissent argued plaintiff should have used the scissors lift and therefore was the sole proximate cause of the fall. There was evidence the operator of the scissors lift refused to reposition it to allow plaintiff to access it, and, therefore, plaintiff's use of the ladder was not the sole proximate case of his fall:

With respect to the Labor Law § 240 (1) claim, we conclude that defendants did not meet their initial burden of establishing as a matter of law that plaintiff was the sole proximate cause of the accident … . … [D]efendants established that the coworker, who was operating and standing in the scissor lift at the time of the accident, denied plaintiff's request for access to the device by refusing to reposition it to allow plaintiff to safely lift the sheetrock into place. We note that "[i]t is well established that there may be more than one proximate cause of an injury" … , and that "[q]uestions concerning . . . proximate cause are generally questions for the jury" … .

Our dissenting colleague argues that the court properly concluded that, as a matter of law, plaintiff was the sole proximate cause of the accident because he chose to use the ladder instead of the scissor lift. The court's conclusion was based on plaintiff's deposition testimony admitting that use of the scissor lift was the proper and expected way to perform the task of lifting the sheetrock. We disagree with the dissent's conclusion. Although plaintiff testified that the scissor lift was the proper device to use for his work, that statement alone does not, under the unique circumstances of this case, establish that plaintiff knew that the scissor lift was

"available" and "chose for no good reason" not to use it … . Further, "[w]here causation is disputed, summary judgment is not appropriate unless only one conclusion may be drawn from the established facts" … and, here, in light of the coworker's alleged conduct, the evidence is not conclusive about whether plaintiff chose to use the ladder over an "available" scissor lift for "no good reason." 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).

The Second Department determined Supreme Court properly granted defendants' motion for summary judgment on the Labor Law 240(1) cause of action. Plaintiff fell off an inverted bucket when he was installing stacked washers and dryers. Defendant demonstrated plaintiff did not need to elevate himself to do the work:

According to the plaintiff, on the day at issue, he was standing on an inverted bucket in order to reach the power cable for the stacked washer dryer unit that he had just pushed into the closet before he had plugged in the power cable. The plaintiff contended that the power cable was resting on top of the dryer and was out of reach, and that the washer dryer unit, although on wheels, was difficult to move, so he stood on an inverted bucket to reach the power cable. The plaintiff alleged that the bucket slipped out from under him and he fell and was injured. …

… [T]he plaintiff was the sole proximate cause of his injuries because his conduct unnecessarily exposed him to an elevation-related risk … . The plaintiff's deposition testimony … established that a ladder was not necessary for the plaintiff to do his work. The plaintiff testified that each of the stacked washer and dryer units that he was installing was on wheels and not secured within the closet in which they were being installed. … [P]rior to the incident, he had installed approximately 20 stacked washer and dryer units without using a ladder. … [W]ith respect to the unit he was installing on the day at issue, in order to reach the power cable, he could have moved the stacked washer and dryer out of the closet rather than stand on an inverted bucket, but he chose not to do so. 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).

The Second Department determined sheetrock panels which were stored upright and fell over on plaintiff did not constitute an elevation-related hazard within the meaning of Labor Law 240(1):

"The extraordinary protections of Labor Law § 240(1) extend only to a narrow class of special hazards, and do 'not encompass any and all perils that may be connected in some tangential way with the effects of gravity'" … . Therefore, to recover under Labor Law § 240(1), the injured plaintiff "must have suffered an injury as 'the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential'" … .

"With respect to falling objects, Labor Law § 240(1) applies where the falling of an object is related to 'a significant risk inherent in . . . the relative elevation . . . at which materials or loads must be positioned or secured'" … . "Therefore, a plaintiff must show more than simply that an object fell, thereby causing injury to a worker. A plaintiff must show that, at the time the object fell, it was being hoisted or secured, or that the falling object required securing for the purposes of the undertaking" … .

Here, [defendant] established … the injured plaintiff's injuries were not caused by an elevation-related or gravity-related risk within the scope of Labor Law § 240(1) … . 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).

The Second Department, reversing (modifying) Supreme Court, determined the Industrial Code provisions which require passageways to be kept clear of debris applied to electric "stub ups" which protrude from the floor, even though the stub ups are integral parts of the construction, to which those Code provisions do not

apply. Apparently the absence of safety markers calling attention to the stub ups was deemed to be covered by those "free of debris" Code provisions:

Although neither subdivision (1) nor (2) of 12 NYCRR 23-1.7(e) applies where the object over which the plaintiff trips is an integral part of construction …, that exception does not apply here. While it is undisputed that the stub up was an integral part of the construction, none of the defendants have pointed to evidence that it was necessary that the stub ups be unmarked or that safety markings or other protective measures would have interfered with the work … . 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).

The Second Department, in a full-fledged opinion by Justice Maltese, determined the agreement signed by plaintiff in this medical malpractice action which required the deposition of expert witnesses 120 days before trial was void and unenforceable:

The issue on this appeal is whether the defendants Benjamin M. Schwartz, M.D., and Island Gynecologic Oncology, PLLC (hereinafter together the defendants), may enforce a provision in an agreement that the defendant physician's

receptionist asked the injured plaintiff to sign among other routine medical releases prior to undergoing surgery. Pursuant to this provision, if a patient commenced a medical malpractice action against the defendant physician, each party's counsel would have the right to depose the other parties' expert witness(es) at least 120 days before trial. We hold that this provision is unenforceable as against public policy and, in any event, the defendants waived the right to enforce the provision. Furthermore, the entire agreement is unenforceable because the Supreme Court found certain other provisions to be unenforceable, the defendants do not challenge the court's holding regarding those provisions on appeal, and those provisions are not severable from the remainder of the agreement, including the provision at issue on appeal. * * *

Requiring experts to be made available for deposition 120 days before trial also directly contradicts the provision in CPLR 3101(d)(1)(i) that gives trial courts the discretion to "make whatever order may be just" in the event that a party retains an expert in an insufficient period of time before the commencement of trial to provide appropriate notice. This statutory provision reflects the important public policy of allowing courts to retain discretion in their role as gatekeeper in determining the admissibility of expert testimony … . For all of the foregoing reasons, we conclude that, here, the public policy in favor of freedom of contract is overridden by these other important and countervailing public policy interests … . 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).

The Second Department, reversing Supreme Court, determined defendants' motions for summary judgment in this medical malpractice action should not have been granted. The was conflicting expert-opinion evidence about whether plaintiff should have been administered aspirin as treatment for a stroke. Although the aspirin-issue was first raised in opposition to defendants' motions, the issue had been raised in a deposition and was therefore properly raised in the opposition papers:

… [T]he plaintiffs raised triable issues of fact as to whether Nandakumar departed from the accepted standard of care in his neurological evaluation and treatment of the injured plaintiff's condition by failing to timely order and administer aspirin to the injured plaintiff, and whether such alleged departures proximately caused her alleged injuries … . Although the plaintiffs' theory regarding the administration of aspirin was not specifically alleged in the complaint or bill of particulars, this theory was referred to by the plaintiffs' counsel when deposing a … resident, and thus, was appropriately raised in opposition to [defendant's] motion … . 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).

The Second Department, reversing Supreme Court, determined plaintiff's action, which stemmed from being dropped in the delivery room immediately after birth in 1999, sounded in medical malpractice, not negligence, and was therefore time-barred:

CPLR 208 provides that the statute of limitations is tolled throughout the period of infancy, but limits such toll to 10 years in medical malpractice actions … . In determining whether conduct should be deemed medical malpractice or ordinary negligence, the critical factor is the nature of the duty owed to the plaintiff that the defendant is alleged to have breached … . A negligent act or omission by a health care provider that constitutes medical treatment or bears a substantial relationship to the rendition of medical treatment by a licensed physician to a particular patient constitutes medical malpractice … .

Here, the defendant established … the conduct at issue derived from the duty owed to plaintiff by the defendant as a result of the physician-patient relationship and was substantially related to the plaintiff's medical treatment … . 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).

The Fourth Department, reversing (modifying) Supreme Court, determined plaintiff was not obligated to provide the name of every negligent employee of the defendant Erie County Medical Center Corporation (ECMC) to survive summary judgment in this medical malpractice action:

Contrary to the court's determination, plaintiff was not required to provide the name of every allegedly negligent actor engaging in conduct within the scope of employment for ECMC … inasmuch as ECMC was on notice of the claims against it based on the allegations in the amended complaint, as amplified by plaintiff's bill of particulars to ECMC, noting failures and omissions by ECMC's employees. Indeed, ECMC is in the best position to identify its own employees and contractors and, as the creator of decedent's medical records, ECMC had notice of who treated decedent and of any allegations of negligence by its nursing staff. 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.

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).

The Second Department, over an extensive dissent, determined the continuous treatment doctrine did not apply and defendants' motion to dismiss allegations of medical malpractice occurring before April 9, 2013, was properly granted. The decision is detailed and fact-specific and cannot be fairly summarized here:

Accepting the plaintiff's expansive view that the mere status of receiving treatment for menopausal symptoms necessarily encompasses all conditions related to menopause and aging, would undermine the sound policy reasons behind the continuous treatment doctrine … . Such a result is contrary to the foundational policy reasons for creating the continuous treatment doctrine, and could result in expanding it to virtually all the medical care a patient receives … . * * *

From the dissent:

The Supreme Court's determination, endorsed by my colleagues in the majority, that the records submitted by the defendants never reference or address osteoporosis is, in fact, belied by those medical records created and submitted by the defendants, which document, inter alia, that, during the relevant period, the defendants assessed, treated, and monitored the plaintiff's bone health, despite their failure to order a bone density test.

In sum, the majority's characterization of certain of the defendants' own documents fails to afford the plaintiff the favorable view through which the documents should be read … . Moreover, no discovery has been conducted yet, and "[t]he resolution of the continuous treatment issue . . . should abide relevant

discovery" … . 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).

The Second Department, reversing Supreme Court, determined petitioner's application to file a late notice of claim in this "excessive force" action against the police should have been granted. The county had timely knowledge of the nature of the claim and the county did not demonstrate prejudice from the delay. The absence of an adequate excuse was not determinative:

… [T]he petitioner commenced this proceeding pursuant to General Municipal Law § 50-e(5) for leave to serve a late notice of claim upon the County of Suffolk and the SCPD, alleging, inter alia, that he had sustained personal injuries due to the use of excessive force by the arresting officers. …

In determining whether to grant an application for leave to serve a late notice of claim, the court is required to consider all relevant facts and circumstances, including whether the public corporation acquired actual knowledge of the essential facts constituting the claim within 90 days after the claim arose or a reasonable time thereafter, whether the claimant has a reasonable excuse for the failure to timely serve a notice of claim, and whether the delay would substantially prejudice the public corporation in maintaining its defense … . …

… [T]he respondents had timely actual knowledge of the essential facts constituting the petitioner's claim, since their employees participated in the acts giving rise to the claim and filed reports and prepared other documentation with respect to the subject incident from which it could be readily inferred that the respondents had committed a potentially actionable wrong … . 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).

The Second Department, reversing Supreme Court, determined leave to file a late notice of claim in this slip and fall case should not have been granted. There was a nine-month delay. There was an incident report prepared on the day of the accident but the Second Department found the report did not notify the city of a potential lawsuit stemming from the accident. The attorney affirmation submitted by the city was speculative and therefore did not demonstrate the city was prejudiced by the failure to timely file the notice of claim. Petitioner did not have a reasonable excuse for failing to timely file. Despite the city's failure to show prejudice, the petition should have been denied:

… [T]he appellants did not acquire actual knowledge of the essential facts constituting the claim within 90 days after the claim arose or a reasonable time thereafter … . … [A] Yonkers Police Department incident report prepared on the

day of the accident by a responding officer did not provide the appellants with actual knowledge of the essential facts constituting the claim. For reports to provide actual knowledge of the essential facts, "one must be able to readily infer from that report that a potentially actionable wrong had been committed" … . A police accident report prepared by a responding officer, establishing knowledge of the accident, generally does not, without more, provide actual knowledge to the municipal defendants of the essential facts underlying the claim against them … . Here, the Yonkers Police Department report indicated that the petitioner stated that she had slipped and fallen while exiting a ramp on the appellants' property and turning the corner, but there is no identification of the cause of the fall from which negligence on the part of the appellants could be inferred.

The petitioner asserts that there is no prejudice to the appellants' ability to conduct an investigation inasmuch as the transitory nature of the icy condition would be difficult to investigate whether 90 days later or months later … . In response, the appellants rely upon an attorney affirmation stating that their ability to conduct an investigation was substantially prejudiced by the delay because one of the responding officers retired and might not be available to testify, and the others could not be expected to recall the accident, given the passage of time. This affirmation, based solely on speculation and conjecture, is insufficient for the appellants to rebut the petitioner's showing of lack of prejudice with particularized evidence in the record … .

Nevertheless, weighing the appropriate factors, the Supreme Court should have denied the petition in light of the lack of reasonable excuse, the time elapsed, and the lack of actual knowledge of the essential facts giving rise to the claim … . 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).

The Second Department, reversing Supreme Court, determined the petition for leave to file a late notice of claim should have been granted. The accident alerted the city to the potential lawsuit and the delay was minimal. The absence of a reasonable excuse for the delay was overlooked:

It was readily inferable from a police accident report, a line-of-duty injury report, and witness statements taken on the day of the subject accident "that a potentially actionable wrong had been committed by [an employee of] the public corporation" … . Thus, the defendant was not prejudiced by the petitioner's delay, which was, in any event, minimal. Accordingly, the court should have granted the petition notwithstanding the lack of a reasonable excuse … . 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).

The Frist Department, reversing Supreme Court, over a dissent, determined defendant bicyclist's motion for summary judgment in this bicycle-pedestrian collision case should have been granted. Thee was a video of the incident. Defendant had the green light when plaintiff stepped off the curb into the bike lane. Defendant's expert presented evidence defendant was travelling at a reasonable speed and could not have avoided striking the plaintiff without striking an obstruction or entering a traffic lane. Plaintiff's expert's opinions that defendant was travelling at an excessive speed and could have stopped before striking plaintiff were not based upon facts in the record:

… [P]laintiff failed to raise an issue of fact. There is no evidence that defendant operated his bicycle at an excessive rate of speed, in a negligent manner, or without due care to avoid colliding with any pedestrian, in violation of Vehicle and Traffic Law §§ 1180(a), 1146. Plaintiff attempts to raise an issue of fact through her expert, who opines, without any factual basis in the record, and in a conclusory and speculative manner, that defendant operated his bicycle at an excessive speed when compared to the speed of the three other bicyclists, and that in the three seconds (at most) that defendant had to react from the moment he is seen entering the screen, he could have slowed down, stopped, or maneuvered his bicycle to go around plaintiff to avoid the collision, or to make the impact substantially less severe.

Opinion evidence must be based on facts in the record. An expert cannot speculate, guess, or reach their conclusion by assuming material facts not supported by the evidence … The opinion must be supported either by facts disclosed by the

evidence or by facts known to the expert personally. It is essential that the facts upon which the opinion is based be established, or fairly inferable, from the evidence … . 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).

The Second Department, reversing Supreme Court, determined the "negligent parental supervision" cause of action against the parents of an autistic child who assaulted plaintiff school psychologist should not have been dismissed. In addition, the parents did not demonstrate their son was, due to his disability, incapable of being liable for negligence or assault. The facts are not discussed:

The plaintiff * * * was assaulted by the defendant David George (hereinafter David), an autistic student with an IQ of 41, who was almost 14 years old at the time. * * *

"While, as a general rule, parents are not liable for the torts of their child, a parent may be held liable, inter alia, where the parent[s] negligence consists entirely of his [or her] failure reasonably to restrain the child from vicious conduct imperilling others, when the parent has knowledge of the child's propensity toward such conduct'" … . Thus, a parent moving for summary judgment dismissing a cause of action alleging negligent supervision based on the physical tortious conduct of the parent's child, must establish, prima facie, that the parent was not aware that, prior to the subject incident, his or her child engaged in violent or vicious conduct that would endanger a third party … . …

The defendants' contention that the branch of their motion which was for summary judgment dismissing the complaint insofar as asserted against David, on the ground that due to his developmental disability he was "non sui juris and incapable of being liable for negligence" or assault …, is without merit. 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.

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).

The Second Department, reversing Supreme Court, determined defendant property owners (Monacos) did not have constructive notice of the deteriorated condition of a tree limb which fell on plaintiff's car:

In cases involving fallen trees, a property owner will only be held liable for a tree that falls outside of his or her premises and injures another if he or she knew or should have known of the defective condition of the tree … . Constructive notice may be based upon signs of decay or other defects that are readily observable by someone on the ground or that a reasonable inspection would have revealed … . "At least as to adjoining landowners, the concept of constructive notice with respect to liability for falling trees is that there is no duty to consistently and constantly check all trees for nonvisible decay. Rather, the manifestation of said decay must be readily observable in order to require a landowner to take reasonable steps to prevent harm" … . * * *

The plaintiff's expert's affidavit failed to raise a triable issue of fact as to whether any visible defect or decay would have been readily observable by the Monacos

prior to the fall of the limb … . Although the plaintiff's expert concluded that there was visible decay at the top of the branch where it had been attached to the trunk, approximately 12 feet above grade, and that such decay caused the branch to fall, his conclusions were based upon close observation, and therefore, failed to raise a triable issue of fact as to whether the Monacos should have realized that a potentially defective condition existed … . 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).

The Second Department, reversing Supreme Court, determined defendant bar owner could not be liable for the spontaneous act of a bar patron which injured plaintiff:

… [T]he plaintiff allegedly sustained personal injuries at the defendants' bar in Nassau County. At the time of the alleged incident, a female patron purportedly jumped onto the lap of a male patron, who was sitting on a bar stool. This apparently caused the two patrons and the bar stool to fall on top of the plaintiff, who was standing nearby. The plaintiff was "knocked" down to the floor…. ….

A property owner, which must act in a reasonable manner to prevent harm to those on its premises, has a duty to control the conduct of persons on its premises when it has the opportunity to control such conduct, and is reasonably aware of the need to do so … . Here, the defendants established, prima facie, that the alleged incident was spontaneous, and could not have been reasonably anticipated and prevented … . 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).

The Fourth Department, reversing (modifying) Supreme Court, determined plaintiff's causes of action based upon res ipsa loquitur and vicarious liability for a contractor who constructed the deck should have survived a motion for summary judgment. Plaintiff rented a cottage from defendant. While plaintiff was on the deck, it collapsed:

In New York, in order to establish liability under that doctrine, the plaintiff must establish that the event was: "(1) of a kind which ordinarily does not occur in the absence of someone's negligence; (2) . . . caused by an agency or instrumentality within the exclusive control of the defendant; [and] (3) . . . not . . . due to any voluntary action or contribution on the part of the plaintiff"…. . "The exclusive control requirement . . . is that the evidence must afford a rational basis for concluding that the cause of the accident was probably such that the defendant would be responsible for any negligence connected with it" … .. "The purpose is simply to eliminate within reason all explanations for the injury other than the defendant's negligence" … . …

"Generally, a party who retains an independent contractor, as distinguished from a mere employee or servant, is not liable for the independent contractor's negligent

acts" … . The "most commonly accepted rationale" for that rule is that "one who employs an independent contractor has no right to control the manner in which the work is to be done and, thus, the risk of loss is more sensibly placed on the contractor" … . There are, of course, exceptions to the general rule. "A party may be vicariously liable for the negligence of an independent contractor in performing [n]on-delegable duties . . . arising out of some relation toward the public or the particular plaintiff" … . To determine whether a nondelegable duty exists, the court must conduct "a sui generis inquiry" because the court's conclusion rests on policy considerations … . Although "[t]here are no clearly defined criteria for identifying duties that are nondelegable[,] . . . [t]he most often cited formulation is that a duty will be deemed nondelegable when the responsibility is so important to the community that the employer should not be permitted to transfer it to another" … . Here, we conclude that defendant owes a nondelegable duty to the public to maintain the premises in reasonably safe condition … , and thus that defendant failed to establish as matter of law that she may not be held liable for the actions of her independent contractor … . 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).

The Second Department, reversing Supreme Court, determined there were questions of fact whether the driver of the bus negligent in closing the door on plaintiff's hand and in failing to open the door to release plaintiff's hand:

A "defendant moving for summary judgment in a negligence action has the burden of establishing, prima facie, that he or she was not at fault in the happening of the subject accident" … . "There can be more than one proximate cause of an accident" …, and "[g]enerally, it is for the trier of fact to determine the issue of proximate cause" … .

Here, the defendants failed to establish their prima facie entitlement to judgment as a matter of law dismissing the complaint … . The evidence submitted in support of the motion failed to eliminate all triable issues of fact as to whether [the driver] negligently closed the doors as the plaintiff was attempting to board the bus, and negligently failed to reopen the doors and release the plaintiff's hand after it became trapped. 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).

The Second Department, reversing Supreme Court, determined plaintiff sufficiently identified the cause of the slip and fall. Defendant's motion for summary judgment should not have been granted:

… [T]he defendant failed to establish, prima facie, that the plaintiff was unable to identify the cause of his fall without resort to speculation. In support of his motion, the defendant submitted, inter alia, a transcript of the plaintiff's deposition testimony, who identified a "raised up" sidewalk flag in photographs depicting the sidewalk where he fell, and, referring to the photographs, testified that he "tripped there." Contrary to the determination of the Supreme Court, this evidence raised a triable issue of fact as to whether the plaintiff tripped on the sidewalk defect

referenced … . 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).

The Second Department, reversing Supreme Court, determined plaintiff did not know the cause of her staircase fall. The fact that there was only one handrail, which did not violate any statute or code provision, was not tied to the fall:

… [E]ven if a plaintiff's fall is precipitated by a misstep, where the plaintiff testifies that he or she reached out to try to stop his or her fall, the absence of a handrail, if required by law, may raise an issue of fact as to whether the absence of the handrail was a proximate cause of his or her injury" … .

… [T]he plaintiff did not know what had caused her to fall … . … [T]he building was not subject to the particular code provisions relied upon by the plaintiff … .. … [T]he plaintiff failed to raise a triable issue of fact as to whether there was an applicable statutory or code provision that required a second handrail on the staircase. The plaintiff also failed to raise a triable issue of fact as to whether the defendant breached her common-law duty to maintain the staircase in a reasonably safe condition by failing to install a second handrail … . 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).

The Second Department, reversing Supreme Court, determined the inspection pit into which plaintiff fell was open and obvious and therefore not actionable:

… "[T]here is no duty to protect or warn against an open and obvious condition that, as a matter of law, is not inherently dangerous" ,,, , or "where the condition on the property is inherent or incidental to the nature of the property, and could be reasonably anticipated by those using it" … .

Here, the defendants established, prima facie, that the inspection pit was an open and obvious condition that was inherent or incidental to the nature of the property and was not inherently dangerous … . In opposition, the plaintiff failed to raise a triable issue of fact. The speculative and conclusory affidavit of the plaintiff's expert submitted in opposition to the motion did not allege that there was a violation of any applicable statute or relevant industry standard, and it was insufficient to raise a triable issue of fact … . 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).

The Second Department, reversing Supreme Court, determined the leg of a large decorative throne in defendant's bar was open and obvious and therefore was not an actionable tripping hazard:

… [T]he defendant established … that the large decorative throne that allegedly caused the plaintiff to fall was open and obvious and not inherently dangerous … . "'[T]here is no duty to protect or warn of conditions that are not inherently dangerous and that are readily observable by the reasonable use of one's senses'" … . "'A condition is open and obvious if it is readily observable by those employing the reasonable use of their senses, given the conditions at the time of the accident'" … . "'The determination of [w]hether an asserted hazard is open and obvious cannot be divorced from the surrounding circumstances, and whether a condition is not inherently dangerous, or constitutes a reasonably safe environment, depends on the totality of the specific facts of each case'" … .

Here, … the alleged defective condition was readily observable by those employing the reasonable use of their senses and was not inherently dangerous. The deposition testimony of a pianist who had performed at the bar for more than 20 years established that the throne was a novelty of the establishment, which drew in patrons. Further, the plaintiff's own testimony established that he was aware of the throne, as he frequented the establishment and purported to have previously complained to the manager about its location … . 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).

The Second Department, reversing Supreme Court, determined defendant store (Whole Foods) did not demonstrated it did not have constructive notice of the puddle of liquid which caused plaintiff's slip and fall:

… [V]iewing the evidence in the light most favorable to Yerry [plaintiff] as the nonmovant, the defendants failed to establish, prima facie, that the accident was not the result of the defendants' failure to take appropriate remedial measures within a reasonable period of time after acquiring actual notice of a hazardous condition … . The evidence submitted by the defendants in support of their motion demonstrated the existence of a triable issue of fact as to whether the defendants' employees made the condition "more hazardous by incomplete remedial measures" … . 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).

The Second Department, reversing Supreme Court, determined plaintiff's injury was not the result of a defective condition on defendant movie theater's property. The 15-year-old plaintiff was sitting on one rail of an escalator with his feet on the other rail and leaning back against the wall as the escalator descended. But the wall came to an end halfway down and plaintiff fell backwards to the floor:

"In order for a landowner to be liable in tort to a plaintiff who is injured as a result of an allegedly defective condition upon property, it must be established that a defective condition existed and that the landowner affirmatively created the condition or had actual or constructive notice of its existence" … . Here, the defendants established, prima facie, that the escalator and the adjacent wall were not in violation of any applicable statutes or regulations and that they maintained their premises in a reasonably safe condition … . In opposition, the plaintiff failed to raise a triable issue of fact as to whether the defendants violated their common-law duty to maintain the premises in a reasonably safe condition … . The affidavit of the plaintiff's expert was speculative and insufficient to raise a triable issue of fact … . 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).

The Fourth Department, reversing Supreme Court, determined defendants in this traffic accident case were entitled to access to plaintiff-driver's (Farrell's) cell phone to determine whether the phone was being used at the time of the accident. There are certain uses of the phone which were not revealed by the cell phone records already provided to defendants:

Although the cell phone records subsequently obtained from the service provider established that Farrell was not talking on his phone at the time of the accident, they did not indicate whether he opened or sent text messages during the relevant time period. On the phone used by Farrell, texts were sent as encrypted "iMessages" that do not show up on phone records. Moreover, the phone records did not indicate whether Farrell was using any applications on his phone, such as Snapchat or Facebook. * * *

Defendants "42atisfy[ied] the threshold requirement that the[ir] request [was] reasonably calculated to yield information that [was] 'material and necessary'—i.e., relevant—" to issues involved in the action … . "The test is one of usefulness and reason" … . In support of the motion … defendants submitted evidence that Farrell was traveling at close to 80 miles per hour seconds before the accident, which occurred on a residential road near an elementary school. Defendants also submitted evidence that Farrell did not brake before colliding with the school bus. Evidence concerning whether Farrell was distracted before the collision is relevant to the issues involved in this negligence action, and defendants' request for production of or access to his cellular phone is reasonably calculated to yield relevant information … , especially considering that Farrell is unable, due to his injuries, to provide any information regarding his activities in the moments before the accident … . 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).

The Second Department, reversing (modifying) Supreme Court, determined defendant driver's (McRae's) motion for summary judgment in this rear-end collision case should not have been granted. Plaintiff was a passenger in defendant McRae's vehicle. McRae alleged his vehicle was stopped when it was struck by defendant NYC Transit Authority's (NYCTA's) bus (driven by defendant Pena). Defendants NYCTA and Pena alleged McRae stopped his vehicle for no apparent reason raising a question of fact about whether defendant McRae was comparatively negligent. Comparative negligence will preclude summary judgment with respect to cross claims between defendants:

… [T]he plaintiff established, prima facie, that NYCTA and Pena were negligent. In support of his motion, the plaintiff submitted, inter alia, the transcript of his deposition testimony, which demonstrated that the bus Pena was operating struck McRae's stopped vehicle in the rear. In opposition, the NYCTA defendants failed to raise a triable issue of fact. The NYCTA defendants submitted, among other things, an affidavit in which Pena averred that McRae made a right turn into the path of the bus and began to move forward, but then stopped short. In essence, this explanation amounts to nothing more than a claim that McRae's vehicle came to a

sudden stop which, without more, failed to raise a triable issue of fact as to NYCTA and Pena's liability … .

The Supreme Court should have denied that branch of McRae's motion which was for summary judgment dismissing all cross claims insofar as asserted against him. In support of his motion, McRae submitted his affidavit, in which he averred that his vehicle, while stopped at a red light, was struck in the rear by the bus operated by Pena. Thus, McRae established, prima facie, that Pena was solely at fault in the happening of the accident … . In opposition, however, the NYCTA defendants raised a triable issue of fact as to whether McRae was comparatively at fault in the happening of the accident because he stopped suddenly for no apparent reason … . 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).

The Second Department, reversing Supreme Court, determined there was a question of fact about whether plaintiff, the front-most driver in this rear-end collision action, was negligent:

Hersh [defendant] raised a triable issue of fact sufficient to defeat summary judgment … . Hersh submitted his own affidavit in which he asserted that, prior to the accident, traffic was moving well and there was no ongoing road construction. Hersh asserted that the plaintiff then "suddenly and unexpectedly jammed on his brakes in front of me," that Hersh "braked hard" and was able to stop without hitting the plaintiff's vehicle, but that the vehicle behind Hersh then struck Hersh's

vehicle "twice in the rear," pushing Hersh's vehicle into the plaintiff's vehicle. Hersh stated in his affidavit that, after the accident, he "looked all around on the nearby grass and even under plaintiff's SUV but did not see any cone" obstructing the lane as the plaintiff claimed. Hersh's affidavit was sufficient to raise a triable issue of fact as to whether Hersh had a nonnegligent explanation for hitting the plaintiff's vehicle … . 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).

The Second Department, reversing Supreme Court, determined the damages-award in this traffic accident case was against the weight of the evidence. The jury found that plaintiff suffered permanent injuries but awarded nothing for future pain and suffering and future medical expenses. Plaintiff's motion to set aside the verdict pursuant to CPLR 4404(a) should have been granted:

A jury verdict on the issue of damages may be set aside as contrary to the weight of the evidence only if the evidence on that issue so preponderated in favor of the movant that the jury could not have reached its determination on any fair interpretation of the evidence … . Further, while the amount of damages to be

awarded for personal injuries is a question for the jury, and the jury's determination is entitled to great deference … , a jury award may be set aside if it deviates materially from what would be reasonable compensation (see CPLR 5501[c] …).

Where, as here, "the jury . . . concludes that a plaintiff was injured as a result of an accident, the jury's failure to award damages for pain and suffering is contrary to a fair interpretation of the evidence and constitutes a material deviation from what would be reasonable compensation" … . 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).

The Second Department, reversing Supreme Court, determined plaintiff was entitled to summary judgment in this rear-end collision case. Defendant's allegation plaintiff stopped suddenly is not sufficient to raise a question of fact and will not support a comparative-negligence affirmative defense:

… [T]the plaintiff established his prima facie entitlement to judgment as a matter of law through the submission of his own affidavit, in which he averred that his vehicle was slowing due to traffic when it was struck in the rear by the defendant's vehicle … . The plaintiff also established his prima facie entitlement to judgment as a matter of law dismissing the defendant's third affirmative defense, which alleged comparative fault, by demonstrating that he was not negligent in the happening of the accident … .. In opposition to the plaintiff's prima facie showings, the defendant failed to raise a triable issue of fact. Contrary to the

defendant's contention, his claim that the plaintiff made a sudden stop, standing alone, was insufficient to raise a triable issue of fact as to whether the plaintiff negligently contributed to the accident under the circumstances of this case … . 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).

The Second Department, reversing Supreme Court, determined plaintiff's motion for summary judgment on liability and dismissing the comparative negligence affirmative defense in this intersection traffic accident case should have been granted:

… [T]he plaintiff established his prima facie entitlement to judgment as a matter of law on the issue of liability by submitting his deposition testimony and the deposition testimony of the defendant driver, which demonstrated that the defendant driver made a left turn directly into the path of the plaintiff's vehicle without yielding the right-of-way to the plaintiff, in violation of Vehicle and Traffic Law § 1141, and when it was not reasonably safe to make a left turn, in violation of Vehicle and Traffic Law § 1163(a) … . The plaintiff also established, prima facie, that he was entitled to judgment as a matter of law dismissing the affirmative defense alleging comparative negligence by demonstrating that he was not at fault in the happening of the accident and that the defendant driver's negligence was the sole proximate cause of the accident … . The plaintiff, who had the right-of-way, was entitled to anticipate that a vehicle turning left would obey

the traffic laws requiring that vehicle to yield, and the evidence established that the plaintiff did not have a sufficient opportunity to avoid the accident when the defendant driver turned left directly into the path of the plaintiff's vehicle … . 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).

The Second Department, reversing Supreme Court, determined plaintiff motorcyclist raised a question of fact whether defendant's double-parked truck was a proximate cause of the accident. Plaintiff alleged the motorcycle struck a defect in the road which cause the motorcycle to veer toward defendant's truck. Plaintiff flipped over the motorcycle when he braked to avoid colliding with truck. The issue was whether the double-parked trucked merely furnished the occasion for the accident or whether the double-parked truck was a proximate cause of the accident (a difficult distinction which comes up occasionally in the appellate decisions):

In support of its motion, [defendant] Peapod submitted the transcript of the plaintiff's deposition testimony in which the plaintiff testified that his motorcycle struck a road defect, but that the defect did not cause him to immediately fall or apply the brakes. Instead, when the motorcycle encountered the defect, the motorcycle veered toward Peapod's double-parked truck 40 yards ahead of him in the same lane of traffic. In order to avoid colliding with the truck, the plaintiff applied the front brakes of the motorcycle, which resulted in him flipping over the

motorcycle. Given this evidence, it cannot be said that Peapod established as a matter of law that the truck merely furnished the occasion for the accident … . Rather, this testimony demonstrated the existence of a triable issue of fact as to whether the presence of Peapod's double-parked truck was a proximate cause of the accident … . Further, the evidence relied upon by Peapod in support of its motion failed to establish, prima facie, that its truck was not negligently parked or violating applicable traffic regulations … . 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).

The Second Department, reversing Supreme Court, determined plaintiff was entitled to summary judgment in this intersection traffic accident case. Defendant attempted to make a left turn in front of plaintiff's vehicle from the middle lane, cutting off plaintiff. The court noted that a plaintiff's comparative negligence is not a bar to summary judgment:

The accident allegedly occurred when the defendants' vehicle attempted to make a left turn from the middle lane of Rockaway Boulevard in front of the plaintiff's vehicle, and cut off the plaintiff's vehicle. …

"A plaintiff in a negligence action moving for summary judgment on the issue of liability must establish, prima facie, that the defendant breached a duty owed to the plaintiff and that the defendant's negligence was a proximate cause of the alleged injuries" … . "To be entitled to . . . summary judgment [on the issue of liability] a

plaintiff does not bear the . . . burden of establishing . . . the absence of his or her own comparative fault" … . A violation of the Vehicle and Traffic Law constitutes negligence as a matter of law … .

Here, the plaintiff established his prima facie entitlement to judgment as a matter of law on the issue of liability by submitting, inter alia, his own affidavit, which demonstrated that the driver of the defendants' vehicle was negligent in striking the plaintiff's vehicle while attempting to make a left turn from the middle lane of traffic (see Vehicle and Traffic Law §§ 1128[a]; 1160[b …). 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).

The Second Department, reversing Supreme Court, determined plaintiffs' motion for summary judgment in this pedestrian-cross-walk traffic accident case should have been granted. Defendant driver alleged sun-glare prevented her from seeing the infant plaintiff in the cross-walk. Sun-glare is not an "emergency" and did not raise a question of fact:

… [A] "violation of a standard of care imposed by the Vehicle and Traffic Law constitutes negligence per se" … . "A driver who faces a green light has a duty to yield the right-of-way to pedestrians who are lawfully within a crosswalk in accordance with the standard of care imposed by Vehicle and Traffic Law § 1111(a)(1)" … . "A driver also has 'a statutory duty to use due care to avoid

colliding with pedestrians on the roadway [pursuant to Vehicle and Traffic Law § 1146], as well as a common-law duty to see that which he [or she] should have seen through the proper use of his [or her] senses" … .

Here, the plaintiffs established their prima facie entitlement to judgment as a matter of law on the issue of liability by submitting the police accident report, and an affidavit from a witness who averred that the defendants' vehicle struck the infant plaintiff with its front bumper while the infant plaintiff was crossing Stillwell Avenue in a marked crosswalk with an active "white pedestrian signal" … . In opposition to the plaintiffs' prima facie showing, the defendants failed to raise a triable issue of fact as to whether the defendant driver had a non-negligent explanation for the accident … . By the defendant driver's own admissions in the police accident report and her affidavit, she did not see the infant plaintiff prior to the accident, which she only realized had occurred upon "hear[ing] the impact," and she continued to drive into the crosswalk after being "blinded" by sun glare, which "caus[ed] her to collide into [the infant plaintiff]." Further, as the plaintiffs contend, the foreseeable occurrence of sun glare while the defendant driver was driving west at sundown did not constitute a 'qualifying emergency' under the emergency doctrine … . 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).

The Second Department, reversing Supreme Court, over a dissent, determined that substantial evidence supported the ruling by the Board of Trustees of the New

York City Employees' Retirement System (hereinafter the Board of Trustees) that petitioner-correction-officer's disabling condition was not related to an altercation with an inmate. Therefore petitioner was not entitled to disability benefits. The dissent would have ordered a new hearing because of the possibility untrue information in the record (i.e., that petitioner altered an MRI report) affected the ruling:

Ordinarily, the decision of the board of trustees as to the cause of an officer's disability will not be disturbed unless its factual findings are not supported by substantial evidence or its final determination and ruling is arbitrary and capricious" … . Substantial evidence has been construed in disability cases, as requiring some credible evidence … . Credible evidence has been described as evidence that proceeds from a credible source, which reasonably tends to support the proposition for which it is offered … . * * *

Contrary to the petitioner's contention and the position of our dissenting colleague, the record does not demonstrate that the Board of Trustees was misled by reports prepared by the Medical Board that contained a statement that the petitioner altered an MRI report or by statements that he returned to "full duty" after the incident and continued to work for "several years." With regard to the MRI report, … the Chair of the Medical Board informed the Board of Trustees that the discrepancy between the MRI reports submitted on two different days was resolved by the inspector general's office and that the addendum was written by a doctor. With regard to the issue of whether the petitioner returned to full duty and continued to work for several years, when he worked for approximately one year and seven months after the incident, the petitioner had multiple opportunities to testify and to present evidence of these facts, which the Board of Trustees considered. 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.