NEW YORK APPELLATE DIGEST, LLC

Personal Injury
Reversal Newsletter
December 2022

An Organized Compilation of Summaries of Selected Decisions, Mostly Reversals, Released and Posted on the New York Appellate Digest Website in December 2022, Distilled to Practice Points, One or Two Sentences Each. The Entries in the Table of Contents Link to the Summaries Which Link to the Decisions on the Official New York Courts Website. Click on "Table of Contents" in the Header on Any Page to Return There. Right Click on the Citations to Keep Your Place in the Reversal Newsletter.

Table of Contents

Contents

Table of Contents

Table of Contents

Table of Contents

Table of Contents

Table of Contents

Table of Contents

ANIMAL LAW, DOG-BITE.

THE STRICT LIABILITY STANDARD IN DOG-BITE CASES APPLIES HERE WHERE THE DOG WAS HARBORED BY THE DEFENDANT UNTIL THE ANIMAL SOCIETY COULD FIND SOMEONE TO ADOPT HIM; THE NEGLIGENCE STANDARD WHICH APPLIES TO A DOG-BITE IN A VETERINARIAN'S WAITING ROOM (WHERE THE VETERINARIAN IS THE DEFENDANT) IS NOT APPLICABLE (FOURTH DEPT).

Cicero v O'Rourke, 2022 NY Slip Op 07316, Fourth Dept 12-23-22

Practice Point: The Court of Appeals recently held a veterinarian could be liable under a standard negligence theory for a dog-bite which occurs in the veterinarian's waiting room because of the specialized knowledge of animal behavior attributed to a veterinarian. The negligence standard does not apply to a person who is harboring a dog for an animal society until someone adopts the dog. In that case, the strict liability (requiring knowledge of the dog's vicious propensities) standard still applies.

DECEMBER 23, 2022

ANIMAL LAW, DOG-BITE.

THERE WERE QUESTIONS OF FACT WHETHER DEFENDANTS IN THIS DOG-BITE CASE, INCLUDING THE LANDLORD, WERE AWARE OF THE DOG'S VICIOUS PROPENSITIES; THE PRE-DISCOVERY SUMMARY JUDGMENT MOTION WAS PREMATURE; THE ACTION WAS NOT FRIVOLOUS; THE DEFENDANTS WERE NOT ENTITLED TO ATTORNEY'S

Michael P. v Dombroski, 2022 NY Slip Op 07318, Fourth Dept 12-23-22

Practice Point: A landlord who is aware of a dog's vicious propensities can be held liable in a dog-bite case under a standard negligence theory.

DECEMBER 23, 2022

DENTAL MALPRACTICE, COURT OF CLAIMS, NOTICE OF INTENT TO FILE CLAIM, JURISDICTIONAL DEFECT.

STATING THE WRONG DATE FOR THE ALLEGED NEGLIGENCE IN THE NOTICE OF INTENTION TO FILE A CLAIM RENDERED THE NOTICE JURISDICTIONALLY DEFECTIVE; THE NOTICE THEREFORE DID NOT EXTEND THE 90-DAY PERIOD FOR FILING A CLAIM, RENDERING THE CLAIM FILED MORE THAN A YEAR AND A HALF LATER UNTIMELY; THE DENTAL MALPRACTICE ACTION WAS PROPERLY DISMISSED; THERE WAS AN EXTENSIVE DISSENT (SECOND DEPT).

Sacher v State of New York, 2022 NY Slip Op 07087, Second Dept 12-14-22

Practice Point: Including the wrong date for the allegedly negligent act in the notice of intention to file a claim renders the notice jurisdictionally defective pursuant to the Court of Claims Act.

Practice Point: Ordinarily filing a notice of intention to file a claim extends the period for filing a claim from 90 days to two years. However, the extension is not

triggered by a jurisdictionally defective notice of claim. The claim here, filed more than a year and a half after the notice of intention, was therefore untimely.

DECEMBER 14, 2022

FIGHT, ATTEMPT TO BREAK-UP, INSURANCE LAW, INTENTIONAL VS UNINTENTIONAL INJURY.

THE INSURANCE POLICY EXCLUDED COVERAGE FOR BODILY INJURY INTENDED OR EXPECTED BY THE INSURED; HERE THE INSURED UNINTENTIONALLY STRUCK COLE, WHO WAS ATTEMPTING TO BREAK UP A FIGHT BETWEEN THE INSURED AND A THIRD PERSON; BECAUSE THE INJURY TO COLE WAS UNINTENDED, THE INSURER WAS REQUIRED TO DEFEND THE INSURED IN COLE'S PERSONAL INJURY ACTION AGAINST THE INSURED (THIRD DEPT).

Vermont Mut. Ins. Group v LePore, 2022 NY Slip Op 06978, Third Dept 12-8-22

Practice Point: Here the insurance policy excluded coverage for bodily injury intended or expected by the insured, LePore. Cole was injured when LePore unintentionally struck her as Cole tried to break up a fight between LePore and another. Because LePore injured Cole unintentionally, the insurer was obligated to defend LePore in the personal injury action brought by Cole.

DECEMBER 8, 2022

LABOR LAW-CONSTRUCTION LAW, COURT OF CLAIMS, FAILURE TO SERVE NOTICE OF INTENT TO FILE CLAIM ON NYS THRUWAY AUTHORITY.

CLAIMANT IN THIS LABOR LAW 240(1) AND 241(6) ACTION AGAINST THE STATE SERVED THE ATTORNEY GENERAL WITH THE NOTICE OF INTENTION TO FILE A CLAIM BUT NOT THE NEW YORK STATE THRUWAY AUTHORITY (NYSTA); ALTHOUGH THE EXCUSE (IGNORANCE OF THE LAW) WAS NOT VALID, THE ACTION HAD MERIT AND THE NYSTA HAD TIMELY KNOWLEDGE OF THE FACTS; THEREFORE CLAIMANT'S MOTION TO SERVE AND FILE A LATE CLAIM SHOULD HAVE BEEN GRANTED (SECOND DEPT).

Swart v State of New York, 2022 NY Slip Op 07088, Second Dept 12-14-22

Practice Point: The Court of Claims, pursuant to Court of Claims Act section 10(6), has the discretion to allow a claimant to file a late claim. Here the excuse, ignorance of the law, was not valid. But the claim was deemed to have merit and the respondent had timely knowledge of the underlying facts. Therefore the Court of Claims should have granted claimant's motion to file a late claim.

DECEMBER 14, 2022

LABOR LAW-CONSTRUCTION LAW, COVERED ACTIVITIES.

INSTALLING A TV ON A WALL IS NOT AN ACTIVITY COVERED BY LABOR LAW 240(1) (SECOND DEPT).

Saitta v Marsah Props., LLC, 2022 NY Slip Op 07467, Second Dept 12-28-22

Practice Point: Installing a TV on a wall is not one of the activities covered by Labor Law 240(1).

DECEMBER 28, 2022

LABOR LAW-CONSTRUCTION LAW, HOIST AS SAFETY DEVICE.

THE HOIST WHICH PLAINTIFF WAS OPERATING WAS A SAFETY DEVICE WITHIN THE MEANING OF LABOR LAW 240(1); WHEN PLAINTIFF OPENED THE EMERGENCY HATCH ON THE HOIST FOR A REPAIRMAN, THE HATCH DOOR SLAMMED BACK DOWN ON HIS HEAD; PLAINTIFF WAS ENTITLED TO SUMMARY JUDGMENT (FIRST DEPT).

Ladd v Thor 680 Madison Ave LLC, 2022 NY Slip Op 07031, First Dept 12-13-22

Practice Point: Here the hoist plaintiff was operating was deemed a safety device covered by Labor Law 240(1). The door on the hoist's emergency hatch slammed back down on plaintiffs' head after he opened it to allow access to the hoist by a repairman. Plaintiff was entitled to some sort of protection which would prevent the open hatch door from falling back down. As an alternative, the hatch door was a falling object which should have been secured.

DECEMBER 13, 2022

LABOR LAW-CONSTRUCTION LAW, LADDER-FALL.

THE ALLEGATION THE A-FRAME LADDER SHIFTED FOR NO APPARENT REASON WARRANTED SUMMARY JUDGMENT ON THE LABOR LAW 240(1) CAUSE OF ACTION, NOTWITHSTANDING DEFENDANT'S EXPERT'S OPINION THE ACCIDENT WAS NOT THE PROXIMATE CAUSE OF PLAINTIFF'S INJURIES (FIRST DEPT).

Pinzon v Royal Charter Props., Inc., 2022 NY Slip Op 06891, First Dept 12-6-22

Practice Point: Here the allegation the A-frame ladder shifted for no apparent reason warranted summary judgment on liability pursuant to Labor Law 240(1). The facts that there were no witnesses, plaintiff inspected the ladder before use,

and defendant's expert opined plaintiff's injuries were not proximately caused by the fall did not preclude summary judgment.

DECEMBER 6, 2022

LABOR LAW-CONSTRUCTION LAW.

PLAINTIFF PULLED A LOAD OF WASTE BACKWARDS THROUGH AN ACCESS DOOR APPARENTLY EXPECTING THE LIFT TO BE POSITIONED OUTSIDE THE DOOR; THE LIFT HAD MOVED TO A DIFFERENT FLOOR AND PLAINTIFF FELL FROM THE THIRD FLOOR TO THE GROUND; THE ACCESS DOOR WAS SUPPOSED TO BE LOCKED BEFORE THE LIFT MOVED TO A DIFFERENT FLOOR; PLAINTIFF WAS ENTITLED TO SUMMARY JUDGMENT ON THE LABOR LAW 240(1) CAUSE OF ACTION BECAUSE THE ACCESS DOOR LOCK, A SAFETY DEVICE, WAS MISSING (FOURTH DEPT).

Hyde v BVSHSSF Syracuse LLC, 2022 NY Slip Op 07329, Fourth Dept 12-23-22

Practice Point: Even though plaintiff may have been contributorily negligent in not looking behind him as he pulled a load of waste through an access door, contributory negligence is not a defense to a Labor Law 240(1) cause of action.

DECEMBER 23, 2022

LABOR LAW-CONSTRUCTION, LANDLORD-TENANT.

THE LEASE REQUIRED THE OUT-OF-POSSESSION LANDLORD TO REPAIR STRUCTURAL DEFECTS IN THE ROOF AND WALLS; THERE WAS A QUESTION OF FACT WHETHER WATER ENTERED THE PREMISES THROUGH DEFECTS IN THE ROOF AND WALLS CAUSING THE ALLEGED DANGEROUS CONDITION, A CRACK IN THE FLOOR WHICH ALLEGEDLY CONTRIBUTED TO PLAINTIFF'S INJURY (FOURTH DEPT).

Weaver v Deronde Tire Supply, Inc., 2022 NY Slip Op 07328, Fourth Dept 12-23-22

Practice Point: Whether an out-of-possession landlord is liable for injury caused by dangerous conditions on the property can be determined by the terms of the lease. Here the lease required the landlord to repair structural defects in the roof and walls. Plaintiff alleged water entered the premises through those structural defects causing a crack in the floor which contributed to his injury. Plaintiff's allegations survived summary judgment.

DECEMBER 23, 2022

LIMITED LIABILITY COMPANY LAW, PERSONAL INJURY ACTION AGAINST BAR, PIERCING CORPORATE VEIL.

THE CRITERIA FOR PIERCING THE CORPORATE VEIL IN THIS PERSONAL INJURY ACTION AGAINST A BAR OWNED AND OPERATED BY A LIMITED LIABILITY COMPANY WERE NOT MET; THE OVER $2,000,000 JUDGMENT AGAINST THE SOLE MEMBER OF THE LLC REVERSED (SECOND DEPT).

Matter of DePetris v Traina, 2022 NY Slip Op 07232, Second Dept 12-21-22

Practice Point: The criteria for piercing the corporate veil in this personal injury action against a bar owned and operated by a limited liability company were not met. The over $2,000,000 judgment against the sole member was reversed.

DECEMBER 21, 2022

Table of Contents

MEDICAL MALPRACTICE, EXPERT AFFIDAVITS.

PLAINTIFF'S EXPERT'S AFFIDAVIT DID NOT ADDRESS OR CONTROVERT THE EXPERT'S OPINION; DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IN THIS MEDICAL MALPRACTICE ACTION SHOULD HAVE BEEN GRANTED (FIRST DEPT).

Camacho v Pintauro, 2022 NY Slip Op 06743, First Dept 11-29-22

Practice Point: Medical malpractice cases are battles between experts. At the summary judgment stage, if supported opinions in the defense expert's affidavit are not addressed or controverted by the plaintiff's expert's affidavit, defendant wins.

NOVEMBER 29, 2022

MEDICAL MALPRACTICE, EXPERT EVIDENCE, VICARIOUS LIABILITY.

PLAINTIFF'S EXPERT'S AFFIDAVIT IN THIS MEDICAL MALPRACTICE ACTION WAS NOT CONCLUSORY AND THE ACTION SHOULD NOT HAVE BEEN DISMISSED ON THAT GROUND; A HOSPITAL WILL NOT BE VICARIOUSLY LIABLE FOR SURGERY COMPETENTLY PERFORMED BY HOSPITAL STAFF AT THE DIRECTION OF THE PRIVATE PHYSICIANS WHO DID THE PRIMARY SURGERY (SECOND DEPT).

Bhuiyan v Germain, 2022 NY Slip Op 06901, Second Dept 12-7-22

Practice Point: Here, in this medical malpractice case, the fact that plaintiff's expert did not review the pleadings and all the evidence was not a legitimate reason for rejecting the expert's affidavit. The expert relied on relevant evidence and the affidavit was not conclusory.

Practice Point: A hospital will not be vicariously liable for surgery competently done by hospital staff at the direction of the private physicians who did the primary surgery.

DECEMBER 7, 2022

MEDICAL MALPRACTICE, TRAFFIC ACCIDENT UNDER INFLUENCE OF PRESCRIBED DRUG.

PLAINTIFF WAS PRESCRIBED ATIVAN, WHICH CAUSES DROWSINESS, IN THE EMERGENCY ROOM, WAS DISCHARGED WHILE UNDER ITS INFLUENCE AND WAS INVOLVED IN A CAR ACCIDENT; THE MEDICAL MALPRACTICE CAUSES OF ACTION BASED ON THE ALLEGEDLY NEGLIGENT DISCHARGE AND THE ALLEGED FAILURE TO EXPLAIN THE EFFECTS OF ATIVAN BOTH SOUNDED IN MEDICAL MALPRACTICE AND PROPERLY SURVIVED SUMMARY JUDGMENT (FOURTH DEPT).

Johnson v Auburn Community Hosp., 2022 NY Slip Op 07332, Fourth Dept 12-23-22

Practice Point: Discharging a patient from the hospital emergency room while under the influence of Ativan, which causes drowsiness, may be the basis of a medical malpractice action stemming from a subsequent car accident. The failure to explain the effects of Ativan was deemed a separate cause of action sounding in medical malpractice (not ordinary negligence).

DECEMBER 23, 2022

MEDICAL MALPRACTICE, VACCINES.

THE NATIONAL VACCINE INJURY COMPENSATION PROGRAM (PART 2 OF THE NATIONAL CHILDHOOD VACCINE INJURY ACT OF 1986), WHICH LIMITS THE LIABILITY OF A PHYSICIAN WHO ADMINISTERS A VACCINE TO $1000, DOES NOT APPLY TO PHYSICIANS WHO SUBSEQUENTLY TREAT A VACCINATED PERSON FOR A VACCINE-RELATED CONDITION (FIRST DEPT).

Batish v Gandhi 2022 NY Slip Op 07494, First Dept 12-29-22

Practice Point: The National Vaccine Injury Compensation Program, Part 2 of the National Childhood Vaccine Injury Act of 1986 (VICP or NCVIA) (42 USC § 300aa-10 et seq.) limits the liability of a physician who administers a vaccine to $1000.

DECEMBER 29, 2022

MEDICAL MALPRACTICE, WRONGFUL DEATH.

ALTHOUGH THE MEDICAL MALPRACTICE ACTIONS WERE TIME-BARRED, THE RELATED WRONGFUL DEATH ACTION, BROUGHT WITHIN TWO YEARS OF DEATH, WAS NOT (SECOND DEPT).

Proano v Gutman, 2022 NY Slip Op 07253, Second Dept 12-21-22

Practice Point: Here the medical malpractice actions were time-barred, but the related wrongful death actions, brought within two years of death, were not.

DECEMBER 21, 2022

NURSING-HOME-RESIDENT INJURY, NURSING HOME ADMISSION AGREEMENT.

PLAINTIFF, DECEDENT'S SON, SIGNED THE NURSING HOME ADMISSION AGREEMENT WHEN HIS FATHER, WHO HAD DEMENTIA, WAS ADMITTED; THE NURSING HOME DID NOT DEMONSTRATE PLAINTIFF, BY SIGNING THE ADMISSION AGREEMENT, HAD THE AUTHORITY TO BIND DECEDENT TO ARBITRATION OF DECEDENT'S NEGLIGENCE/PERSONAL INJURY ACTION AGAINST THE NURSING HOME (SECOND DEPT).

Wolf v Hollis Operating Co., LLC, 2022 NY Slip Op 06954, Second Dept 12-7-22

Practice Point: Plaintiff, decedent's son, signed the nursing-home admission agreement when decedent, who had dementia, was admitted. The nursing home did not demonstrate plaintiff, by signing the agreement, had the authority to bind decedent to arbitration of decedent's negligence/personal injury action against the nursing home. The fact that plaintiff represented that he had power of attorney for decedent was not enough.

DECEMBER 7, 2022

RETIREMENT AND SOCIAL SECURITY LAW, POLICE OFFICERS, "ACCIDENT."

PETITIONER POLICE OFFICER'S SLIP AND FALL WHEN LEAVING A BATHROOM MET THE DEFINITION OF AN "ACCIDENT" IN THE RETIREMENT AND SOCIAL SECURITY LAW; SHE WAS THEREFORE ENTITLED TO ACCIDENTAL DISABILITY RETIREMENT BENEFITS (THIRD DEPT).

Matter of Bucci v DiNapoli, 2022 NY Slip Op 06968, Third Dept 12-8-22

Practice Point: Petitioner police officer slipped and fell when leaving a bathroom. That was an "accident" within the meaning of the Retirement and Social Security Law entitling her to accidental disability retirement benefits.

DECEMBER 8, 2022

SLIP AND FALL, CIVIL PROCEDURE, VACATE DEFAULT.

DEFENDANT DID NOT UPDATE ITS ADDRESS FILED WITH THE SECRETARY OF STATE FOR SERVICE OF PROCESS AND DID NOT HAVE A REASONABLE EXCUSE FOR DEFAULT IN THIS SLIP AND FALL CASE; HOWEVER, NO REASONABLE EXCUSE NEED BE SHOWN IN A MOTION TO VACATE A DEFAULT PURSUANT TO CPLR 317; DEFAULT VACATED (FIRST DEPT).

Gomez v Karyes Realty Corp., 2022 NY Slip Op 07187, First Dept 12-20-22

Practice Point: No reasonable excuse for a default need be shown in a motion the vacate the default pursuant to CPLR 317, Here the defendant's failure to update its address for the service of process with the Secretary of State was not an attempt to avoid service. The motion to vacate the default should have been granted.

DECEMBER 20, 2022

Table of Contents

SLIP AND FALL, LANDLORD-TENANT.

BY THE TERMS OF HIS LEASE, PLAINTIFF WAS RESPONSIBLE FOR SNOW AND ICE REMOVAL IN THIS SLIP AND FALL CASE; THE OUT–OF-POSSESSION LANDLORDS WERE NOT RESPONSIBLE AND THEIR MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (SECOND

Sweeney v Hoey, 2022 NY Slip Op 07471, Second Dept 12-28-22

Practice Point: Here the out-of-possession landlords were not responsible for snow and ice removal in the are where plaintiff-tenant fell. In fact, plaintiff, by the terms of his lease was himself responsible for the snow and ice removal.

DECEMBER 28, 2022

SLIP AND FALL, LANDLORD-TENANT.

DEFENDANT OUT-OF-POSSESSION LANDLORD WAS NOT RESPONSIBLE FOR MAINTENANCE OF THE STAIRWAY WHERE PLAINTIFF ALLEGEDLY SLIPPED AND FELL (FIRST DEPT).

Kamara v 323 Pas Owner LLC, 2022 NY Slip Op 07296, First Dept 12-22-22

Practice Point: The tenant, pursuant to the lease, had assumed responsibility for maintenance of the stairway where plaintiff fell. The defendant out-of-possession landlord was entitled to summary judgment.

DECEMBER 22, 2022

SLIP AND FALL, MUNICIPAL LAW.

ALTHOUGH THE RAISED PORTION OF THE SIDEWALK FLAG OVER WHICH PLAINTIFF TRIPPED DID NOT ABUT DEFENDANTS' PROPERTY SEVERAL FEET OF THE FLAG EXTENDED IN FRONT OF DEFENDANTS' PROPERTY; THE VILLAGE CODE MANDATES THAT ABUTTING PROPERTY OWNER'S MAINTAIN SIDEWALKS IN A SAFE CONDITION; DEFENDANTS DID NOT SUBMIT ANY EVIDENCE THAT THEY MAINTAINED THE ABUTTING PORTION OF THE SIDEWALK IN A SAFE CONDITION OR THAT ANY FAILURE TO DO SO WAS NOT A PROXIMATE CAUSE OF PLAINTIFF'S FALL (SECOND DEPT).

Kuritsky v Meshenberg, 2022 NY Slip Op 07066, Second Dept 12-14-22

Practice Point: Here the village code placed responsibility for maintaining sidewalks in a reasonably safe condition on the abutting property owners. The raised portion of a sidewalk flag over which plaintiff tripped was not in front of defendants' property. But several feet of that same sidewalk flag extended in front of defendants' property. To warrant summary the defendants were required to show either that they maintained the portion of the sidewalk which abutted their property in a reasonably safe condition, or that the failure to do so was not the proximate cause of plaintiff's fall. The defendants presented no evidence on the issue.

DECEMBER 14, 2022

SLIP AND FALL, TRIVIAL DEFECT.

IN THIS SLIP AND FALL CASE, DEFENDANT DID NOT DEMONSTRATE THE FOUR-AND-ONE-HALF-INCH RISER AT THE ENTRANCE TO A SHOWER WAS OPEN AND OBVIOUS AS A MATTER OF LAW (SECOND DEPT).

Lore v Fitness Intl., LLC, 2022 NY Slip Op 06922, Second Dept 12-7-22

Practice Point: Here in this slip and fall case, defendant did not demonstrate a 4 1/2 riser at the entrance to a shower was open and obvious as a matter of law.

DECEMBER 7, 2022

SLIP AND FALL, TRIVIAL DEFECT.

WHETHER THE SIDEWALK DEFECT WHICH CAUSED PLAINTIFF'S SLIP AND FALL WAS NONACTIONABLE AS "TRIVIAL" IS A QUESTION OF FACT FOR THE JURY; IN OTHER WORDS, DEFENDANT DID NOT DEMONSTRATE THE DEFECT WAS TRIVIAL AS A MATTER OF LAW (SECOND DEPT).

Butera v Brookhaven Mem. Hosp. Med. Ctr., Inc., 2022 NY Slip Op 06783, Second Dept 11-30-22

Practice Point: Here the defendant did not demonstrate the sidewalk defect which caused plaintiff's slip and fall was trivial as a matter of law, criteria explained.

NOVEMBER 30, 2022

SLIP AND FALL.

THE ATTEMPT TO HOLD DEFENDANT PLUMBING COMPANY LIABLE FOR THE LEAK WHICH CAUSED PLAINTIFF'S SLIP AND FALL RELIED ON PURE SPECULATION; THE DOCTRINE OF RES IPSA LOQUITUR FAILS BECAUSE DEFENDANT DID NOT HAVE EXCLUSIVE CONTROL OVER THE BUILDING'S PLUMBING (FIRST DEPT).

Taitt v Riehm Plumbing Corp., 2022 NY Slip Op 06775, First Dept 11-29-22

Practice Point: Here the leaking pipe which caused plaintiff's slip and fall could not be connected to repairs made by defendant plumbing company two months before. The res ipsa loquitiur doctrine did not apply because defendant did not have exclusive control over the water pipes.

NOVEMBER 29, 2022

TRAFFIC ACCIDENTS, COMPARATIVE NEGLIGENCE.

DEFENDANT IN THIS REAR-END TRAFFIC ACCIDENT CASE DID NOT RAISE A QUESTION OF FACT ABOUT A NON-NEGLIGENT EXPLANATION FOR DEFENDANT'S ACTIONS OR PLAINTIFF'S COMPARATIVE NEGLIGENCE (FIRST DEPT).

Vasquez v Strickland, 2022 NY Slip Op 06876, First Dept 12-1-22

Practice Point: In a rear-end traffic accident, defendant's allegation plaintiff "stopped short" does not raise a question of fact.

DECEMBER 1, 2022

TRAFFIC ACCIDENTS, DRAM SHOP ACT.

THE CLUB'S MOTION FOR SUMMARY JUDGMENT DISMISSING THE DRAM SHOP ACT CAUSE OF ACTION SHOULD NOT HAVE BEEN GRANTED (FIRST DEPT).

Denenberg v 268 W. 47th Rest., Inc., 2022 NY Slip Op 06866, First Dept 12-1-22

Practice Point: Here there were questions of fact whether plaintiff was served alcohol by defendant club when he was visibly intoxication. The Dram Shop Act cause of action should not have been dismissed. Because the accident did not happen on the club's premises, the common law negligence cause of action was properly dismissed.

DECEMBER 1, 2022

TRAFFIC ACCIDENTS, IMMUNITY, MUNICIPAL LAW, HIGHWAY DESIGN.

THE CITY WAS NOT ENTITLED TO QUALIFIED IMMUNITY IN THIS "UNSAFE INTERSECTION DESIGN" CASE BECAUSE NO STUDIES OF THE INTERSECTON HAD BEEN UNDERTAKEN AND NO HIGHWAY-PLANNING DECISIONS HAD BEEN MADE; THE FACTS THAT THE CITY HAD NO NOTICE OF THE CONDITION AND NO PRIOR ACCIDENTS HAD BEEN REPORTED DID NOT WARRANT SUMMARY JUDGMENT ON WHETHER THE CITY HAD CREATED A DANGEROUS CONDITION (SECOND DEPT).

Petronic v City of New York, 2022 NY Slip Op 07085, Second Dept 12-14-22

Practice Point: In an "unsafe intersection design" case, the municipality is not entitled to qualified immunity unless a study of the intersection had been undertaken and a highway-planning decision concerning the intersection had been made.

Practice Point: Because it was alleged the city created the dangerous intersection, the lack of notice and prior accidents did not warrant summary judgment dismissing the negligent-design cause of action.

DECEMBER 14, 2022

TRAFFIC ACCIDENTS, INSURANCE LAW.

THE ARBITRATOR'S RULING IN THIS STATUTORY, COMPULSORY ARBITRATION WAS ARBITRARY AND CAPRICIOUS, CRITERIA EXPLAINED (SECOND DEPT).

Matter of GEICO Gen. Ins. Co. v Wesco Ins. Co., 2022 NY Slip Op 06926, Second Dept 12-7-22

Similar issues and result in Matter of Wesco Ins. Co. v GEICO Indem. Co., 2022 NY Slip Op 06933, Second Dept 12-7-22

Practice Point: The Second Department explained that the criteria for judicial review of statutory, compulsory arbitration is more stringent than for judicial review of arbitration by voluntary agreement.

DECEMBER 7, 2022

Table of Contents

TRAFFIC ACCIDENTS, PUNITIVE DAMAGES, VICARIOUS LIABILITY.

THE EMERGENCY DOCTRINE IS NOT APPLICABLE IN THIS TRAFFIC ACCIDENT CASE BECAUSE THE EMERGENCY (A WATER BOTTLE UNDER THE ACCELERATOR) WAS OF THE DEFENDANT'S OWN MAKING; THE GROSS NEGLIGENCE CAUSE OF ACTION AND THE DEMAND FOR PUNITIVE DAMAGES SURVIVED SUMMARY JUDGMENT; PUNITIVE DAMAGES ARE NOT AVAILABLE AGAINST DEFENDANT DRIVER'S EMPLOYER (FOURTH DEPT).

Miller v Silvarole Trucking Inc., 2022 NY Slip Op 07348, Fourth Dept 12-23-22

Practice Point: In a traffic accident case, the emergency doctrine does not apply where the emergency is of the defendant's own making, here a water bottle under the accelerator.

Practice Point: The gross negligence cause of action and demand for punitive damages in this traffic accident case survived summary judgment.

Practice Point: Punitive damages are not available against the driver's employer under a vicarious liability theory.

DECEMBER 23, 2022

TRAFFIC ACCIDENTS, SET ASIDE VERDICT.

ALTHOUGH DEFENDANTS' MOTION TO SET ASIDE THE VERDICT AS A MATTER OF LAW IN THIS TRAFFIC ACCIDENT CASE WAS PROPERLY DENIED, THE MOTION TO SET ASIDE THE VERDICT AS AGAINST THE WEIGHT OF THE EVIDENCE SHOULD HAVE BEEN GRANTED; NEW TRIAL ORDERED (SECOND DEPT).

Blair v Coleman, 2022 NY Slip Op 06902, Second Dept 12-7-22

Practice Point: In this traffic accident case, defendants' motion to set aside the verdict as a matter of law was properly denied. But the motion to set aside the verdict as against the weight of the evidence should have been granted. The appellate court ordered a new trial on liability.

DECEMBER 7, 2022

TRAFFIC ACCIDENTS, VEHICLE AND TRAFFIC LAW.

ALTHOUGH DEFENDANT WAS PROCEEDING THROUGH AN INTERSECTION WHEN THE CAR IN WHICH PLAINTIFF WAS A PASSENGER ATTEMPTED A LEFT TURN, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED; THE POLICE REPORT, PHOTOS AND DASHBOARD VIDEO WERE INADMISSIBLE AND DEFENDANT'S AFFIDAVIT DID NOT DEMONSTRATE HE WAS FREE FROM FAULT (SECOND DEPT).

Rosa v Gordils, 2022 NY Slip Op 07466, Second Dept 12-28-22

Practice Point: Even the driver of the car with the right-of-way in an intersection accident can be liable if reasonable care to avoid the collision is not taken.

Practice Point: The police report, photos and dashboard video submitted by defendant in support of summary judgment were not in admissible form (the police

report was uncertified and the photos and video were not authenticated) and defendant's affidavit did not demonstrate he was free from fault. Therefore, even though defendant apparently had the right-of-way when the other driver attempted a left turn, defendant's summary judgment motion should not have been granted.

DECEMBER 28, 2022

TRAFFIC ACCIDENTS, WORKERS' COMPENSATION.

BOTH PLAINTIFF BUS DRIVER AND THE DRIVER OF THE CAR WHICH STRUCK PLAINTIFF'S BUS WERE DEEMED COUNTY EMPLOYEES IN A RELATED PROCEEDING; THEREFORE, PURSUANT TO THE COLLATERAL ESTOPPEL DOCTRINE, WORKERS' COMPENSATION WAS PLAINTIFF'S EXCLUSIVE REMEDY (THIRD DEPT).

Bryant v Gulnick, 2022 NY Slip Op 07284, Third Dept 12-22-22

Practice Point: In a related proceeding it was determined that both plaintiff bus driver and the driver of the car which struck plaintiff's bus were county employees. Therefore, pursuant to the doctrine of collateral estoppel, Workers' Compensation was plaintiff's exclusive remedy.

DECEMBER 22, 2022

Table of Contents

TRAFFIC ACCIDENTS.

HYDE, THE DRIVER OF THE CAR IN WHICH PLAINTIFF WAS A PASSENGER, LOST CONTROL AND CROSSED INTO THE PATH OF AN ONCOMING COUNTY BUS; HYDE WAS FATALLY INJURED AND PLAINTIFF HAD NO MEMORY OF THE ACCIDENT; THE COUNTY'S MOTION FOR SUMMARY JUDGMENT DISMISSING THE COMPLAINT AGAINST THE BUS DRIVER SHOULD HAVE BEEN GRANTED (THIRD DEPT).

Northacker v County of Ulster, 2022 NY Slip Op 07285, Third dept 12-22-22

Practice Point: The only evidence of the accident was that the driver of the car in which plaintiff was a passenger crossed into the path of the oncoming county bus and the bus driver had only a second to react. The county's motion for summary judgment dismissing the complaint against the bus driver should have been granted.

DECEMBER 22, 2022

TRAFFIC ACCIDENTS.

THERE ARE QUESTIONS OF FACT ABOUT WHETHER THE EMERGENCY DOCTRINE SHOULD HAVE BEEN APPLIED TO DISMISS THE COMPLAINT IN THIS CHAIN-REACTION TRAFFIC ACCIDENT CASE; THE FACT THAT IT WAS SNOWING AND THERE WERE ICY ROAD CONDITIONS DID NOT SUPPORT THE APPLICABILIITY OF THE EMERGENCY DOCTRINE AS A MATTER OF LAW (THIRD DEPT).

Williams v Ithaca Dispatch, Inc., 2022 NY Slip Op 07278, Third Dept 12-22-22

Practice Point: Although it was snowing and there were icy road-conditions at the time of this chain-reaction traffic accident, the emergency doctrine should not have been applied to dismiss the complaint as a matter of law.

DECEMBER 22, 2022

WORKERS' COMPENSATION, REMOVAL FROM LIST OF AUTHORIZED MEDICAL PROVIDERS.

PETITIONER CHIROPRACTOR ACKNOWLEDGED RECEIVING PAYMENTS DIRECTLY FROM A MEDICAL EQUIPMENT PROVIDER IN VIOLATION OF THE WORKERS' COMPENSATION LAW; BECAUSE THERE WERE NO CONTESTED FACTS, THE WORKERS' COMPENSATION BOARD HAD THE POWER TO REMOVE PETITIONER FROM THE LIST OF AUTHORIZED MEDICAL PROVIDERS WITHOUT HOLDING A HEARING (THIRD DEPT).

Matter of Levi v New York State Workers' Compensation Bd., 2022 NY Slip Op 06850, Third Dept 12-1-22

Practice Point: In the absence of contested facts about whether petitioner-chiropractor violated the Workers' Compensation Law by taking payments directly from a medical equipment provider, the Workers' Compensation Board properly

removed petitioner's name from the list of authorized providers without first holding a hearing.

DECEMBER 1, 2022

WORKERS' COMPENSATION.

DECEDENT'S WIFE'S CLAIM FOR DEATH BENEFITS BASED UPON DECEDENT'S WORK AT THE WORLD TRADE CENTER AFTER 9-11 IS SUBJECT TO THE TWO-YEAR DEADLINE FOR NOTICE IN WORKERS' COMPENSATION LAW 28; BECAUSE THE NOTICE REQUIREMENT WAS NOT COMPLIED WITH, THE DEATH BENEFITS CLAIM WAS PROPERLY DENIED; THERE WAS A DISSENT (THIRD DEPT).

Matter of Garcia v WTC Volunteer, 2022 NY Slip Op 07110 Third Dept 12-15-22

Practice Point: Here decedent's wife sough death benefits stemming from decedent's work at the World Trade Center after 9-11. The claim was deemed subject to the two-year notice deadline in Workers' Compensation Law 28 and properly denied.

DECEMBER 15, 2022

WORKERS' COMPENSATION.

HERE THE CLAIMANT WAS DEEMED DISABLED BY AN OCCUPATIONAL DISEASE (CANCER) CAUSED BY EXPOSURE TO ASBESTOS; THE EMPLOYER RESPONSIBLE FOR COMPENSATION IS THE LAST EMPLOYER WHERE THE NATURE OF THE WORK EXPOSED CLAIMANT TO ASBESTOS, NOT NECESSARILY THE EMPLOYER AT THE TIME THE CANCER WAS DIAGNOSED (THIRD DEPT).

Matter of Candela v Skanska USA Bldg. Inc., 2022 NY Slip Op 07113, Third Dept 12-15-22

Practice Point: Here the occupational disease which disabled claimant was cancer caused by exposure to asbestos. The employer responsible for compensation is the last employer where the nature of the work exposed claimant to asbestos, not necessarily the employer at the time the cancer was diagnosed.

DECEMBER 15, 2022