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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).

The Fourth Department determined the plaintiff's motion to amend the complaint in this dog-bite case by adding a negligence cause of action was properly denied. The Court of Appeals recently held that a veterinarian could be liable for a dog-bite under a negligence theory where a dog in the veterinarian's waiting room bit a customer. Here the dog was owned by an animal society and had been placed with defendant O'Rourke until the society could find someone to adopt him:

Although O'Rourke does not own the dog that bit plaintiff, "[a]n owner's strict liability for damages arising from the vicious propensities and vicious acts of a dog 'extends to a person who harbors the animal although not its owner' " … . * * *

Even assuming, arguendo, … [plaintiff could assert] a negligence cause of action against O'Rourke, … plaintiff would still have to establish in support of her negligence cause of action that O'Rourke had knowledge of the dog's alleged "vicious propensities" … . … "[T]he vicious propensity notice rule has been applied to animal owners who are held to a strict liability standard, as well as to certain non-pet owners—such as landlords who rent to pet owners—under a negligence standard … .

… [P]laintiff's proposed negligence cause of action against O'Rourke does not allege that O'Rourke had knowledge of the dog's vicious propensities; instead, it alleges that O'Rourke was negligent because she did not "investigate the subject dog accepted from the foster care program . . . before introducing it to her property, thereby creating a dangerous condition on the property which she had a nondelegable duty to keep reasonably safe." The proposed complaint therefore fails to state a viable negligence cause of action against O'Rourke. 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 FEES (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined defendants in this dog-bite case were not entitled to summary judgment, the action was not frivolous, and defendants were not entitled to attorney's fees. In addition, the summary judgment motion, made before discovery, was deemed premature. The court found there were questions of fact whether defendants, including the landlord (held to an ordinary negligence standard) were aware of the dog's vicious propensities. The relationships among the parties and the unsuccessful arguments made by defendants in support of summary judgment are too detailed to fairly summarize here:

… "[A]n owner of a dog may be liable for injuries caused by that animal only when the owner had or should have had knowledge of the animal's vicious propensities" … . "Once such knowledge is established, an owner faces strict liability for the harm the animal causes as a result of those propensities" … . "Strict liability can also be imposed against a person other than the owner of an animal which causes injury if that person harbors or keeps the animal with knowledge of its vicious propensit[ies]" … .

… "[A] landlord who, with knowledge that a prospective tenant has a vicious dog which will be kept on the premises, nonetheless leases the premises to such tenant without taking reasonable measures, by pertinent provisions in the lease or otherwise, to protect persons who might be on the premises from being attacked by the dog may be held liable [under a negligence standard] to a person who while thereafter on the premises is bitten by the dog" … . When, "during the term of the leasehold[,] a landlord becomes aware of the fact that [the] tenant is harboring an animal with vicious propensities, [the landlord] owes a duty to protect third persons from injury . . . if [the landlord] 'had control of the premises or other

capability to remove or confine the animal' " … . 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).

The Second Department, over a dissent, determined the claimant's failure to set forth the correct date of the alleged dental malpractice in the notice of intention to file a claim was a jurisdictional defect, notwithstanding the correct date set forth in the subsequently filed claim: Because the notice of intention was jurisdictionally defective it 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 claimant served the defendant with a notice of intention to file a claim dated January 9, 2017, which alleged that the claimant was injured when her mouth and lips were burned during the course of her treatment as a patient at a particular address where the defendant operated a school of dental medicine. The notice of intention to file a claim stated that "[t]he claim arose on or about October 15, 2016, the last date of continuous treatment and prior to said date."

In the subsequent claim, dated October 16, 2018, the claimant stated that she was injured on October 20, 2016, when hot wax was negligently spilled on her face and

mouth while an employee of the defendant was attempting to make a wax mold for dentures. * * *

Section 10(3) of the Court of Claims Act sets forth time limitations for asserting "[a] claim to recover damages . . . for personal injuries caused by . . . negligence." Such a claim "shall be filed and served upon the attorney general within [90] days after the accrual of such claim" (id.). However, if the claimant serves "a written notice of intention to file a claim" within 90 days after the accrual of the claim, "the claim shall be filed and served upon the attorney general within two years after the accrual of such claim" … . * * * Since the claimant's notice of intention to file a claim was substantively deficient (see Court of Claims Act § 11[b]), it did not extend the claimant's time to file and serve a claim beyond the 90-day statutory period … . Under the circumstances, the claim was untimely (see Court of Claims Act § 10[3] …). "The claimant's failure to comply with the filing requirements of the Court of Claims Act deprived the Court of Claims of subject matter jurisdiction" … . Accordingly, the Court of Claims properly granted the defendant's motion pursuant to CPLR 3211(a)(2) to dismiss the claim for lack of subject matter jurisdiction. 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

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DISCOVERY SANCTIONS, ATTORNEYS.

PLAINTIFF'S DISCOVERY-RELATED ACTIONS WERE NOT WILLFUL AND CONTUMACIOUS SUCH THAT THE COMPLAINT SHOULD HAVE BEEN DISMISSED; HOWEVER PLAINTIFF'S DISCOVERY DELAYS WARRANTED VACATING THE NOTE OF ISSUE AND PAYMENT OF $3000 TO DEFENDANTS' ATTORNEY (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined the complaint in this traffic accident case should not have been dismissed as a discovery sanction. But defendant's motion to vacate the note of issue due to plaintiff's delay in disclosing prior relevant injuries should have been granted. In addition the appellate court ordered plaintiff's attorney to pay defendants' attorney $3000:

Supreme Court improvidently exercised its discretion in granting the defendants' motion to the extent of directing dismissal of the complaint pursuant to CPLR 3126(3). Although the plaintiff initially failed to provide authorizations for the release of medical records relating to pertinent injuries which pre-date the subject accident, the plaintiff did provide date-restricted authorizations for the release of medical records relating to pertinent injuries approximately one week after the defendants requested them. … [D]efendants did not clearly demonstrate that the plaintiff's discovery-related conduct was willful and contumacious … .

However, in light of the plaintiff's delay in disclosing information about prior injuries that bear on the controversy and would assist preparation for trial … . the Supreme Court should have granted the defendants' motion to the extent of vacating the note of issue … , directing the plaintiff to provide the defendants with authorizations permitting the release of medical records relating to pertinent injuries which pre-date the subject accident, and directing the plaintiff's attorney to pay the sum of $3,000 to the defendants' attorney….. Lopez v Maggies Paratransit Corp., 2022 NY Slip Op 06793, Second Dept 11-30-22

Practice Point: Here in this traffic accident case plaintiff's delays in providing information about prior relevant injuries warranted vacating the note of issue and payment of $3000 by plaintiff's attorney to defendants' attorney.

NOVEMBER 30, 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).

The Third Department determined plaintiff insurer was required, under the terms of the policy, to defend the insured, LePore, in the personal injury action by Cole against LePore. LePore was fighting with another and Cole was injured attempting to break it up. The policy excluded coverage for bodily injury intended or expected by the insured. The complaint alleged LePore negligently and carelessly struck Cole when LePore was trying to strike another person:

Plaintiff contends that no coverage exists under the insurance policy because LePore intended to cause physical harm to another person. An insured, however, may be indemnified for an intentional act that causes an unintended injury … . To determine whether a result was accidental, "it is customary to look at the causalty from the point of view of the insured, to see whether or not, from [the insured's] point of view, it was unexpected, unusual and unforeseen" … . In describing the incident at issue, LePore stated that she did not intend to hit Cole. The record also contains evidence that Cole was inadvertently hit. In view of this, a sufficient basis exists to conclude that Cole's injuries were not expected or intended within the embrace of the policy exclusion … . To that end, LePore can be indemnified under the policy, not because she acted negligently, but because her intentional act caused unintended harm. …

Plaintiff may be correct that LePore committed an intentional tort based upon [the transferred-intent] doctrine. … Plaintiff, however, erroneously conflates tort principles with contract principles — the latter of which governs the interpretation of insurance policies … . 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).

The Second Department, reversing the Court of Claims, determined claimant's motion for leave to file a late claim in this Labor Law 240(1) and 241(6) action should have been granted. Claimant was injured working on the Tappan Zee Bridge and served a notice of intention to file a claim on the attorney general but not, as required, on the New York State Thruway Authority (NYSTA). The absence of a valid excuse (ignorance of the law) was not determinative. The action had merit and the NYSTA had timely knowledge of the facts underlying the claim:

Court of Claims Act § 10(6) permits a court, in its discretion, upon consideration of the enumerated factors set forth therein, to allow a claimant to file a late claim … . "In determining whether to permit the filing of a [late] claim . . . the court shall consider, among other factors, [1] whether the delay in filing the claim was excusable; [2] whether the state had notice of the essential facts constituting the claim; [3] whether the state had an opportunity to investigate the circumstances underlying the claim; [4] whether the claim appears to be meritorious; [5] whether the failure to file or serve upon the attorney general a timely claim . . . resulted in substantial prejudice to the state; and [6] whether the claimant has any other available remedy" … .. "No one factor is deemed controlling, nor is the presence or absence of any one factor determinative" … . 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).

The Second Department, reversing Supreme Court, determined defendants' motions for summary judgment dismissing the Labor law 240(1) cause of action should have been granted. Plaintiff fell from an A-frame ladder while attempting to install a television on a wall in a doctor's office:

Labor Law § 240(1) states that all contractors, owners, and their agents must supply protective equipment to laborers who are engaged in the "erection, demolition, repairing, altering, painting, cleaning or pointing of a building" … . As such, "[t]o successfully assert a cause of action under Labor Law § 240(1), a plaintiff must establish that he or she was injured during 'the erection, demolition,

repairing, altering, painting, cleaning or pointing of a building or structure'" … . "[T]he term 'altering' in section 240(1) 'requires making a significant physical change to the configuration or composition of the building or structure'" … . This definition excludes "'routine maintenance'" and "'decorative modifications'" … ,

The defendants established that the plaintiff was not engaged in any of the enumerated activities under Labor Law § 240(1). Contrary to the plaintiff's contention, affixing a bracket to a wall so that a television might be mounted on it did not make a "significant physical change to the configuration or composition of the building or structure" … . 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).

The First Department, in a full-fledged opinion by Justice Gonzalez, determined plaintiff was entitled to summary judgment on the Labor Law 240(1) cause of action. Plaintiff was attempting to aid in the repair of a hoist when he opened the emergency hatch and the hatch door fell back down, striking plaintiff's head. The court ruled that the hoist was a covered safety device and plaintiff was entitled to some form of protection that would prevent the hatch door from falling back down after it was opened: In the alternative, the court noted that the hatch was a falling object which should have been secured:

Plaintiff was injured when the hatch door slammed onto his head as he stood on a ladder with his head protruding above the hatch aperture. We note that, in isolation, a hatch door is not necessarily a safety device … . Here, however, the hatch door was an essential component of a safety device — the hoist — being employed by plaintiff in an elevation-related capacity. It was foreseeable that the hoist could get stuck; indeed, a purpose of the hatch door was to serve as an emergency egress in such instances. When he was injured, plaintiff was still engaged in an elevation-related activity and attempting to safely remove himself from a height. Under these circumstances, the safety device — the hoist — was inadequate for its purpose of keeping plaintiff safe while engaged in an elevation-related activity. Plaintiff is thus entitled to partial summary judgment on the issue of liability on his claim under Labor Law § 240(1) … . 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).

The First Department, reversing Supreme Court in this A-frame ladder-fall case, determined plaintiff was entitled to summary judgment based upon the allegation the ladder shifted for no apparent reason. The facts that plaintiff inspected the ladder before using it, there were no witnesses and defendant's expert opined the

accident was not the proximate cause of plaintiff's injuries did not preclude summary judgment on liability:

It is irrelevant that plaintiff inspected the ladder and found it to be in good order before using it, as plaintiff is not required to demonstrate that the ladder was defective in order to make a prima facie showing of entitlement to summary judgment on his Labor Law § 240(1) claim … .

… [P]laintiff is entitled to summary judgment in his favor even though he was the only witness to his accident, as "nothing in the record controverts his account of the accident or calls his credibility into question" … . While the opinions of defendants' expert engineer might relate to the issue of proximate causation of plaintiff's damages, i.e., whether plaintiff's claimed injuries were proximately caused by his accident … , they do not raise material issues … as to liability on the Labor Law § 240(1) claim. 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).

The Fourth Department, reversing Supreme Court, determined plaintiff was entitled to summary judgment on his Labor Law 240(1) cause of action. Plaintiff pulled a load of waste backwards through an access door which did not have a lock and then fell from the third floor because the lift which he (apparently) assumed was positioned outside the access door had moved to a different floor. Each access door was supposed to have a lock and the lift operator was supposed to lock the door before moving to a different floor:

Plaintiff met his burden of establishing the absence of an adequate safety device that could have prevented his fall, namely, a lock on the third-floor access door … .. In opposition, defendants failed to raise a triable issue of fact whether plaintiff's own negligence was the sole proximate cause of his injuries … . Here, there is no evidence in the record that plaintiff removed the lock and was therefore the sole proximate cause of the accident … . Moreover, even assuming, arguendo, that plaintiff was negligent in walking backwards out the access door and in failing to look back prior to going through the door to ensure the lift was there, we conclude that such "actions [would] render him [merely] contributorily negligent, a defense unavailable under [Labor Law § 240 (1)]" … . 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).

The Fourth Department, over a two-justice dissent, determined the out-of-possession landlord was required under the terms of the lease to repair structural defects in the roof and walls and there was a question of fact whether such defects caused a crack in the floor. The cracked floor was alleged to constitute a dangerous condition which cause a load of tines in a payloader to fall and injure plaintiff:

Plaintiff commenced this negligence action seeking damages for personal injuries he sustained when tires that were being moved by a forklift struck him when they fell from the forklift after it drove over a crack in the concrete floor. Insofar as relevant to this appeal, the complaint asserted a negligence cause of action against Estes Express Lines (defendant), which owned the premises on which plaintiff was injured, alleging that defendant negligently permitted a dangerous condition to exist on the premises that contributed to his injury, i.e., the crack in the concrete floor. * * *

… [P]laintiff raised a triable issue of fact whether defendant was liable based on its contractual obligation to maintain the structural integrity of the roof and walls. … [T]he court …. properly denied defendant's motion for summary judgment. … [P]laintiff submitted an affidavit from one of plaintiff's former colleagues and from a code enforcement officer, who each averred that the damage to the floor may have been caused by water damage or water infiltration due to poor maintenance of the roof and walls. Plaintiff's former colleague further averred that defendant had conducted annual inspections of the property and had previously repaired damage to the floor of the premises. Thus, there is a question of fact concerning defendant's liability for defects in the condition of the floor …

. 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).

The Second Department, reversing Supreme Court after a non-jury trial awarding plaintiff over $2,000,000, determined plaintiff was not entitled to pierce the corporate veil to hold defendant Traina, the sole member of defendant limited liability company (LLC), personally liable. Plaintiff brought a personal injury action against the bar owned and operated by the LLC and was awarded a default judgment:

Generally, a member of a limited liability company cannot personally be held liable for any debts, obligations or liabilities of the limited liability company, "whether arising in tort, contract or otherwise" (Limited Liability Company Law § 609[a]). The concept of piercing the corporate veil is an exception to this general rule, permitting, in certain circumstances, the imposition of personal liability on members for the obligations of the limited liability company … . " … [G]enerally . . . piercing the corporate veil requires a showing that: (1) the owners exercised complete domination of the corporation [or LLC] in respect to the transaction

attacked; and (2) that such domination was used to commit a fraud or wrong against the [party seeking to pierce the corporate veil] which resulted in [the party's] injury" … . * * *

… [A]lthough Traina did not observe all corporate formalities, the evidence established that he ran a real business, with employees, customers, and vendors, and the petitioner presented no evidence that the LLC was undercapitalized or that Traina commingled the assets of the LLC with his own or used corporate funds for personal use … . … w[W]ile the petitioner demonstrated that Traina exercised complete domination and control over the LLC, he failed to show that Traina's actions, including abandoning certain fixtures and equipment to his landlord, were for the purpose of leaving the LLC judgment proof or to perpetrate a wrong against the petitioner … . … [P]etitioner did not meet his burden of proof to establish that there was a basis to pierce the corporate veil … . 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

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).

The First Department, reversing Supreme Court, determined defendant's motion for summary judgment in this medical malpractice action should have been granted. Plaintiff's expert's affidavit did not address or controvert the defendant's expert's opinion. Plaintiff alleged her "foot drop" was caused by prescribed medication: Defendant's expert opined the foot drop could not have been caused by the medication plaintiff took:

Defendant made a prima facie case of summary judgment through its expert who stated that there was no medical evidence that methotrexate, a drug in use since 1947, causes peripheral neuropathy or a foot drop, either alone or in combination with one of plaintiff's other medications, and opined that foot drop would not have manifested at the single low dose of methotrexate consumed by plaintiff over the course of one day; the short period that elapsed between this consumption of the drug and the emergence of foot drop, was atypical for a drug-induced peripheral neuropathy; if plaintiff's condition were a drug induced peripheral neuropathy, it would have resolved within weeks of the discontinuance of methotrexate and the fact that plaintiff's condition persisted for years and did not resolve upon discontinuing methotrexate, was a presentation atypical for drug-induced peripheral neuropathy; and plaintiff's presumed diagnosis of sarcoidosis, could be an explanation for her condition.

In opposition to defendants' prima facie showing, plaintiff's expert failed to demonstrate the existence of triable issues of fact by demonstrating that defendants' prescription of the drug methotrexate was a "substantial factor" in causing her claimed injury of "foot drop" … . The expert failed to address or controvert many of the points made by defendants' expert. He did not address or controvert defendant's expert's opinion that 5mg of methotrexate taken in one day could not cause foot drop, or, if it did, why the foot drop did not resolve within weeks of discontinuation of the medication. Plaintiff's expert also failed to address defendant's expert's opinion that the more likely culprit for plaintiff's foot drop was her presumed diagnosis of neuro-sarcoidosis, as indicated in the medical records. 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

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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).

The Second Department, reversing (modifying) Supreme Court, determined the medical malpractice action against the defendant surgeons should not have been dismissed on the ground plaintiff's expert's affidavit was conclusory. The affidavit raised questions of fact about whether defendant surgeon deviated from the requisite standard of care. The court noted that the plaintiff's expert did not review the pleadings and all the evidence was irrelevant. The court also noted that the action against the hospital based upon the surgical procedures performed by hospital staff was properly dismissed. A hospital will not be vicariously liable where hospital staff competently carry out the orders of the private physicians who did the primary surgery:

… [T]he plaintiffs' expert's opinion did not consist of merely general and conclusory allegations unsupported by competent evidence. The plaintiffs' expert made specific allegations based upon the operative reports and CT scan which were part of the medical records, and addressed specific assertions made [defendants'] expert. …

Although the plaintiffs' expert did not review the pleadings, and all the evidence, that failure went to the weight, not the admissibility of his opinion . The operative report regarding the hysterectomy was part of the injured plaintiff's hospital records, was electronically signed by Germain [defendant surgeon], and was relied upon by [defendants'] expert … . Therefore, the plaintiffs' expert properly relied upon that report in reaching his conclusions. * * *

At the conclusion of the surgery, the physician assisting Germain was replaced by an employee of the hospital. However, by that time, the surgery was over, and the doctors were closing up the injured plaintiff. There is no allegation or evidence that

the hospital physician committed malpractice or could have had any influence on the course of the surgery at that juncture.

“Where hospital staff, such as resident physicians and nurses, have participated in the treatment of the patient, the hospital may not be held vicariously liable for resulting injuries where the hospital employees merely carried out the private attending physician’s orders,” except when the hospital staff follows orders knowing that the doctor’s orders are so clearly contraindicated by normal practice that ordinary prudence requires inquiry into the correctness of the orders, the hospital’s employees have committed independent acts of negligence, or the words or conduct of the hospital give rise to the appearance and belief that the physician possesses the authority to act on behalf of the hospital … . 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).

The Fourth Department determined defendants' motion for summary judgment in this medical malpractice action was properly denied. Plaintiff was treated at the emergency department of defendant hospital and prescribed Ativan, a drug which causes drowsiness. Plaintiff was released while under the influence of the drug and had a car accident. Plaintiff alleged he was negligently discharged and was not informed of the possible effects of Ativan:

… [T]he evidence … raised issues of fact whether Iannolo [the treating physician] deviated from the standard of care by discharging plaintiff at a time when the concentration of Ativan in his system was at or near its peak and while plaintiff was experiencing the effects of the medication, including drowsiness. Those submissions also raised issues of fact whether any such deviation was a proximate cause of plaintiff's injuries … . Regarding the hospital's motion, the evidence that the hospital submitted raised issues of fact whether … a nurse employed by the hospital deviated from the standard of care and committed an act of negligence independent of Iannolo … , by failing to explain the discharge instructions to plaintiff or advise him of the possible effects of Ativan, and whether any such deviation was a proximate cause of plaintiff's injuries … .

… [T]he hospital … contends that the court erred in denying its motion with respect to the negligence cause of action against it. We agree … . "A complaint sounds in medical malpractice rather than ordinary negligence where, as here, the challenged conduct [by a nurse] 'constitutes medical treatment or bears a substantial relationship to the rendition of medical treatment by a licensed

physician' to a particular patient" ... . 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).

The First Department determined 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.), which limits the liability of a physician who administers a vaccine to $1000, applies only to those who actually administer the vaccine and not to those who subsequently treat the vaccinated person for medical problems that may be linked to the vaccine:

On April 14, 2006, defendant Gargi Gandhi, M.D. administered two vaccines to infant plaintiff Diksha Batish, then age 13. Plaintiff's condition subsequently deteriorated. Two weeks after vaccination, plaintiff received care from defendant Drs. Imundo and Pascual. Several months later, in September 2006, plaintiff first sought treatment from Dr. Spiro. There is no dispute that only Dr. Gandhi administered the vaccines. * * *

Here, none of the moving defendants administered the vaccine. Neither … did they treat plaintiff for conditions allegedly exacerbated by subsequent vaccinations. They only provided post-vaccination care. Thus, the moving defendants cannot be considered vaccine administrators under the VICP. Since the moving defendants are not vaccine administrators, the VICP is inapplicable, and any toll authorized by the VICP is also inapplicable (see 42 USC § 300aa-16[c]). 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).

The Second Department, reversing (modifying) Supreme Court, determined that, although the medical malpractice actions were time-barred, the related wrongful death action, brought within two years of death, was not:

Although the plaintiff denominated the second cause of action as one for “loss of services,” she alleged all the elements necessary to plead a cause of action for wrongful death, including “(1) the death of a human being, (2) the wrongful act, neglect or default of the defendant by which the decedent’s death was caused, (3) the survival of distributees who suffered pecuniary loss by reason of the death of decedent, and (4) the appointment of a personal representative of the decedent” … . … [T]he wrongful death cause of action was timely. EPTL 5-4.1 provides that an action for wrongful death “must be commenced within two years after the decedent’s death.” Here, the decedent died on November 9, 2013, and this action was commenced on November 9, 2015. Thus, “the cause of action alleging

wrongful death was timely commenced within two years of the decedent's death, since, at the time of [his] death, [the] cause of action sounding in medical malpractice was not time-barred" … .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).

The Second Department, reversing Supreme Court, determined defendant nursing home did not demonstrate plaintiff had the authority to bind the decedent to arbitration concerning the decedent's negligence/personal injury action against the nursing home. Plaintiff is the decedent's son who signed the admission agreement when his father, who suffered from dementia, was admitted. The nursing home did not present sufficient proof of plaintiff's authority to sign the admission agreement on decedent's behalf:

A party seeking to compel arbitration must establish "the existence of a valid agreement to arbitrate" … . Here, the defendants failed to meet that burden because they did not submit sufficient evidence of the plaintiff's authority to bind the decedent to arbitration at the time he signed the admission agreement on the decedent's behalf. Most significantly, the defendants failed to submit the instrument through which the plaintiff allegedly derived his authority to bind the decedent to arbitration … . Evidence showing that the plaintiff represented to the

defendants that he held a power of attorney when signing the admission agreement was insufficient to establish that he, in fact, held such authority as a matter of law … . Contrary to the defendants' further contention, neither the plaintiff's status as the decedent's son … , nor his apparent willingness to be the decedent's "responsible party" under the terms of the admission agreement … , have any bearing on his authority to bind the decedent to arbitration…. . 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).

The Third Department, annulling the comptroller's ruling, determined the police officer's slip and fall was an accident within the meaning of the Retirement and Social Security Law entitling her to accidental disability retirement benefits:

Petitioner's slip and fall while exiting the bathroom was sudden and unexpected, and the precipitating event was not a risk of the work performed by her, i.e., was not the result of activity undertaken in the performance of her ordinary employment as a police officer … . Petitioner was not required to demonstrate that the slippery substance was not readily observable … . The Retirement System

conceded at the hearing that the 2012 accident rendered petitioner permanently incapacitated and on appeal respondent — in conceding that petitioner was entitled to performance of duty disability retirement based upon the 2012 incident — necessarily conceded causation, i.e. that the 2012 fall caused her permanent incapacitation. 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).

The First Department, reversing Supreme Court, determined defendant property-owner's (St. Andrews') motion to vacate the default judgment in this slip and fall case should have been granted. St. Andrews had not updated its address with the Secretary of State and did not have a reasonable excuse. However a reasonable excuse is not required by CPLR 317:

St. Andrews's principal demonstrated that he had received a letter notification of plaintiff's accident before commencement of the action which he forwarded to his insurance broker, but that he never received any further notice until he received the information subpoena. The principal of DP Realty [designated by St. Andrews to receive service of process] also averred that he was unaware of the summons and complaint ever having been received, and therefore it would not have forwarded any papers to St. Andrews. That evidence was sufficient under CPLR 317 to establish St. Andrews's lack of personal notice of the summons in time to defend.

St. Andrews also demonstrated a meritorious defense in that the Yonkers City Code “does not expressly make the landowner liable for failure to perform” the duty to clean snow and ice from the sidewalk, and an abutting landowner is not liable in the absence of such a statute for failure to clear snow, ice and dirt … .

… [P]laintiff demonstrated that St. Andrews never updated its address with the Secretary of State, and thus could not show a reasonable excuse for its default under CPLR 5015(a)(1). However, no showing of a reasonable excuse is required under CPLR 317 … , and it cannot be inferred solely from the failure to update defendant’s address with the Secretary of State that defendant was deliberately avoiding receiving notice … . In light of the strong public policy favoring resolution of cases on their merits … , we find that St. Andrews demonstrated entitlement to vacatur under CPLR 317… . 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

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 DEPT).

The Second Department, reversing Supreme Court, determined defendants-out-of-possession landlords were not responsible for snow and ice removal in the area where plaintiff slipped and fell, In fact, plaintiff, by the terms of his lease, was responsible for the snow and ice removal:

… [T]he defendants demonstrated, prima facie, that they were out-of-possession landlords who were not contractually obligated to remove snow and ice from the subject driveway, that they did not assume such a duty through a course of conduct, and that they did not violate any relevant statute or regulation … . In opposition, the plaintiff failed to raise a triable issue of fact as to whether the defendants had a duty to remove snow or ice under statute or regulation, the terms of the lease, or a course of conduct … . 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).

The First Department, reversing Supreme Court, determined defendant in this stairway slip and fall case was an out-of-possession landlord who was not responsible for maintenance of the stairway treads:

Article 7(A)(i) of the lease imposed on Cava [the tenant] the obligation to maintain and repair the nonstructural portions of the demised premises … . The testimonial evidence established that Cava, consistent with its obligations under the lease, assumed responsibility over the subject staircase … . Although the lease granted defendants the right to re-enter to make repairs, the stairway condition was not a significant structural or design defect that was contrary to a specific statutory safety provision … . 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).

The Second Department, reversing Supreme Court, determined the defendant homeowners were not entitled to summary judgment in this sidewalk slip and fall case. Apparently the raised part of a sidewalk flag over which plaintiff tripped was not in front of defendants' property, but much of that same flag abutted defendants' property. Because the village code placed responsibility on the homeowners to keep the sidewalk in a safe condition, in order to warrant summary judgment, the defendants were required to demonstrate they maintained the portion of the sidewalk in front of their property in a reasonable safe condition or that the failure to do so was not a proximate cause of plaintiff's fall. Defendants offered no evidence on that issue:

While the homeowners demonstrated that the section of the sidewalk containing the defect on which the plaintiff allegedly tripped did not abut their property, their submissions in support of their motion also included evidence that the sidewalk flag on one side of the defect—which was not level with the adjacent flag, resulting in the height differential on which the plaintiff tripped—extended several

feet onto their side of the property line. To meet their prima facie burden, the homeowners were "required to do more than simply demonstrate that the alleged defect was on another landowner's property" … . They were required to make a prima facie showing that they maintained the portion of the sidewalk abutting their own property in a reasonably safe condition, or that any failure to do so was not a proximate cause of the plaintiff's injuries … . 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).

The Second Department, reversing Supreme Court, determined the 4 1/2 inch riser at the entrance to a shower, over which plaintiff tripped and fell, was open and obvious as a matter of law:

… [T]he plaintiff allegedly tripped and fell on a tiled single-step riser while entering a shower stall in the locker room at the defendant's fitness club. The single-step riser was approximately 4½ inches high and was tiled in the same color and pattern as the floor tiles which bordered the top and bottom of the step. * * *

"[T]he issue of '[w]hether a hazard is open and obvious cannot be divorced from the surrounding circumstances'" … . In addition, "whether a dangerous condition is open and obvious is fact-specific, and usually a question of fact for the jury" … .

Here, contrary to the Supreme Court's determination, the defendant failed to establish, prima facie, that the single-step riser was open and obvious and not inherently dangerous under the surrounding circumstances, including the lighting conditions at the time of the accident … . 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).

The Second Department, reversing Supreme Court, determined defendant's motion for summary judgment asserting the sidewalk defect which caused plaintiff's slip and fall was trivial should not have been granted:

… [P]laintiff allegedly was injured when she tripped and fell due to a height differential between two sidewalk slabs abutting premises owned by the defendant … . …

"Generally, the issue of whether a dangerous or defective condition exists on the property of another depends on the facts of each case and is a question of fact for the jury" … . "A defendant seeking dismissal of a complaint on the basis that [an] alleged defect is trivial must make a prima facie showing that the defect is, under the circumstances, physically insignificant and that the characteristics of the defect or the surrounding circumstances do not increase the risks it poses. Only then does

the burden shift to the plaintiff to establish an issue of fact" … . In determining whether a defect is trivial, the court must examine all of the facts presented, including the "width, depth, elevation, irregularity and appearance of the defect along with the time, place and circumstance of the injury" … . There is no "minimal dimension test" or "per se rule" that the condition must be of a certain height or depth in order to be actionable … . 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).

The First Department, reversing Supreme Court, determined defendant plumbing company's motion for summary judgment in this slip and fall case should have been granted. The First Department held the attempt to connect the pipe-repair to the leak which caused the slip and fall was pure speculation:

Plaintiff slipped and fell on water that spilled out of a garbage bin positioned to catch a leak from a pipe in the ceiling of the basement storeroom in a building owned by plaintiff's employer. About two months before plaintiff's accident, defendant had repaired a sanitary waste line pipe in a basement corridor outside the storeroom in which the accident occurred. Upon these undisputed facts established by the record, defendant should have been granted summary judgment, as there is nothing but speculation to connect defendant's work on the waste pipe in the corridor with the leak from the water pipe in the storeroom that appeared two months later and caused plaintiff's mishap.

We note that plaintiff cannot rely upon the doctrine of res ipsa loquitur, because he has not established that the pipes were within defendant's exclusive control … . Defendant made a showing, which plaintiff failed to rebut, that defendant was part of a rotation of plumbers who made only emergency repairs at the hospital, and that plaintiff's employer employed in-house plumbers. 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).

The First Department, reversing Supreme Court in this rear-end traffic accident case, determined defendant's allegation that the plaintiff "stopped short" did not raise a question of fact:

The court should have granted plaintiff for summary judgment on liability. Plaintiff established prima facie that defendant was negligent by submitting his affidavit that defendant's vehicle rear-ended his vehicle as he slowed down or stopped to accommodate another vehicle that was merging in from his right, and defendant failed to provide a nonnegligent explanation for the collision … Defendant claimed only that defendant [plaintiff?] stopped short, which, by itself, was insufficient to rebut the presumption of negligence … . Contrary to the motion court's finding, plaintiff was not required to establish absence of comparative negligence on his part to be entitled to summary judgment on liability … .

In view of plaintiff's affidavit establishing his own lack of fault and his seatbelt usage, and the absence of any proof to the contrary, the affirmative defenses of comparative negligence and failure to wear a seatbelt, as well as the irrelevant defense of assumption of risk, are also dismissed … . 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).

The First Department, reversing (modifying) Supreme Court, determined the club's (Copacabana") motion for summary judgment dismissing the Dram Shop Act cause of action should not have been granted. Because the subsequent accident did not occur on the club's premises, the common law negligence cause of action was properly dismissed:

Copacabana was not entitled to summary judgment dismissing the claim alleging violation of the Dram Shop Act (General Obligations Law § 11-101; Alcohol Beverage Control Law § 65 [2]), as it did not satisfy its initial burden of negating the possibility that it served alcohol to a visibly intoxicated person … . While Copacabana relied on defendant Anslem Trotman's deposition testimony that he arrived to the establishment after having only one beer, and that he did not recall anyone from Copacabana serving him drinks, Trotman's testimony was insufficient to rule out the possibility that he was served alcohol by Copacabana waitstaff while he was visibly intoxicated. Trotman had also testified that he was drunk and could not remember large portions of the night, and his testimony was equivocal as to whether Copacabana waitstaff served him drinks or whether he purchased additional alcohol beyond what came with his party package. …

Plaintiff's common-law negligence was properly dismissed, as the accident that resulted in plaintiff's injuries occurred off Copacabana's premises … . The claim for punitive damages was also properly dismissed, as there is no independent cause of action for punitive damages … and plaintiff failed to establish a basis for such damages. 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).

The Second Department, reversing Supreme Court, determined the "unsafe intersection design" cause of action against the city in this traffic accident case should not have been dismissed. The city was not entitled to qualified immunity because there was no evidence any studies of the intersection had been undertaken or any highway-planning decision concerning the intersection had been made. The court noted the fact that the city had no notice the intersection was unsafe and no accidents had been reported did not warrant summary judgment on whether the city had created a dangerous condition:

… [W]here the initial traffic design is challenged, the municipality must show that there was a reasonable basis for the traffic plan in the first instance … . As the City defendants failed to establish that the original design of the subject intersection was based on a deliberative decision-making process which entertained and passed on the very same question of risk that the plaintiff would put to a jury, the City defendants did not sustain their prima facie burden on the issue of qualified immunity … .

… [T]he lack of prior similar accidents or notice did not establish the City defendants' prima facie entitlement to judgment as a matter of law under ordinary negligence principles. Since the City defendants created the alleged dangerous condition with their design of the intersection, "the 'usual questions of notice of the condition are irrelevant'" … . … [T]he lack of prior similar accidents within the five years preceding the plaintiff's accident did not establish, by itself, that the intersection was reasonably safe. Whether a dangerous or defective condition exists "depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury" … . A lack of prior accidents "is some evidence that a condition is not dangerous or unsafe" … . However, it is only a factor to be considered and does not negate the possibility of negligence … . 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).

The Second Department, reversing Supreme Court, determined the arbitrator's ruling in this no=fault insurance case was arbitrary and capricious, noting that judicial review of statutory, compulsory arbitration is more stringent than review of a voluntary agreement to arbitrate. Plaintiff GEICO paid the injured driver's no-fault benefits and sought reimbursement from the insurer of the loaner car involved in the accident. The arbitrator denied reimbursement and the Second Department reversed:

Where, as here, the obligation to arbitrate arises through a statutory mandate, the arbitrator's determination is subject to "closer judicial scrutiny" under CPLR 7511(b) than it would receive had the arbitration been conducted pursuant to a voluntary agreement between the parties … . To be upheld, an award in a compulsory arbitration proceeding "must have evidentiary support and cannot be arbitrary and capricious" … . "Moreover, with respect to determinations of law, the applicable standard in mandatory no-fault arbitrations is whether 'any reasonable hypothesis can be found to support the questioned interpretation'" … . …

The arbitrator's interpretation of the rental agreement … as relieving [defendant insurance company] of its obligation to provide mandatory personal injury protection (hereinafter PIP) coverage was contrary to 11 NYCRR part 65, which provides … that all motor vehicle insurance policies must contain a mandatory PIP endorsement; expressly sets forth the language of the PIP endorsement; permits deviations from the prescribed language only upon prior approval; and prohibits any release, express or implied, from mandatory or optional PIP benefits … . 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

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).

The Fourth Department determined: (1) the emergency doctrine did not apply in this traffic accident case because the defendant driver caused the water bottle to fall from the cup holder where it lodged under the accelerator; (2) the cause of action alleging gross negligence and seeking punitive damages properly survived summary judgment; and (3) punitive damages are not available against defendant's employer [Silvarole] pursuant to the respondeat superior theory:

… "[T]he emergency doctrine is only applicable when a party is confronted by [a] sudden, unforeseeable occurrence not of their own making" … . The "emergency doctrine has no application where . . . the party seeking to invoke it has created or contributed to the emergency" … . … [T]he record … establishes that Davis [defendant driver] was the only person in the vehicle, and defendants did not submit evidence that any other person was responsible for the alleged emergency … . Thus, we conclude that defendants failed to demonstrate that the emergency encountered was not of Davis's own making, "i.e., that [Davis] did not create or contribute to it" … . * * *

Punitive damages may be awarded "based on intentional actions or actions which, while not intentional, amount to gross negligence, recklessness, or wantonness . . .

or conscious disregard of the rights of others or for conduct so reckless as to amount to such disregard" … . * * * Defendants … failed to meet their initial burden of establishing that Davis's conduct, specifically his decision to look for and retrieve the obstacle while the tractor-trailer was in motion—despite the fact that his brakes were in working order—did not "amount to gross negligence, recklessness, or wantonness . . . or conscious disregard of the rights of others" … . …

Plaintiff seeks to hold Silvarole liable for punitive damages under a theory of vicarious liability. However, punitive damages are unavailable under such a theory absent limited circumstances not present here … . 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).

The Second Department, reversing Supreme Court and ordering a new trial, determined defendants' motion to set aside the verdict in this traffic accident case

as against the weight of the evidence should have been granted. The evidence, including video evidence, demonstrated defendant's bus had a green left-turn arrow when the bus collided with plaintiff's oncoming vehicle as the bus was turning. The court also found the damages for future pain and suffering excessive:

… [V]iewing the evidence in the light most favorable to the plaintiff, there was a "valid line of reasoning" that could lead a rational person to the liability verdict in this case … . Accordingly, the Supreme Court properly denied that branch of the defendants' motion which was pursuant to CPLR 4404(a) to set aside the jury verdict on the issue of liability and for judgment as a matter of law.

However, the jury verdict on the issue of liability was contrary to the weight of the evidence, as "the evidence preponderate[d] so heavily in the [defendants'] favor that it could not have been reached on any fair interpretation of the evidence" … . * * * … [W]e remit the matter to the Supreme Court … for a new trial on the issue of liability. 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).

The Second Department, reversing Supreme Court, determined the defendant (Wen Xu) in this intersection traffic accident case should not have been granted summary judgment. The defendant was apparently proceeding through the intersection when the driver of the car in which plaintiff was a passenger was attempting to make a left turn. The uncertified police report, photos and dashboard video submitted by the defendant were inadmissible and his affidavit did not demonstrate he was free from fault:

Pursuant to Vehicle and Traffic Law § 1141, "[t]he driver of a vehicle intending to turn . . . left within an intersection . . . shall yield the right of way to any vehicle approaching from the opposite direction which is within the intersection or so close [to it] as to constitute an immediate hazard." "The operator of a vehicle with the right-of-way is entitled to assume that the opposing driver will obey the traffic laws requiring him or her to yield" … "However, a driver who has the right-of-way has a duty to exercise reasonable care to avoid a collision with another vehicle that allegedly failed to yield the right-of-way" … .

Here, Wen Xu failed to demonstrate his prima facie entitlement to judgment as a matter of law, as he failed to establish that he was free from fault in the happening of the accident. In support of his motion, Wen Xu submitted, inter alia, an uncertified police accident report, photographs, a dashboard video camera recording, and his own affidavit. However, the uncertified police accident report constitutes inadmissible hearsay evidence … The photographs and dashboard video camera recording are similarly inadmissible, as they were not properly authenticated … . Moreover, Wen Xu's affidavit was insufficient to establish his prima facie entitlement to judgment as a matter of law as it failed to eliminate

triable issues of fact with regard to whether he was free from fault in the happening of the accident … . Wen Xu failed to establish that he "took reasonable care to avoid the collision" with the other vehicle … . 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).

The Third Department, in a full-fledged opinion by Justice Egan, determined the doctrine of collateral estoppel required the dismissal of plaintiff bus-driver's causes of action against the estate of driver of the car which struck plaintiff's county bus, and against Jewish Family Services (JFS) for whom the decedent-driver was volunteering at the time of the accident. JFS and the county collaborated on a program to drive senior citizens to medical appointments. Plaintiff sued JFS under a respondeat superior theory. Pursuant to the Workers' Compensation Law, workers' compensation benefits were plaintiff's exclusive remedy because both she and the driver of the car had been deemed county employees in a related action:

A review of the papers supporting [the county's] cross motion [in the related proceeding] establishes, however, that [the county] focused upon the provisions of Workers' Compensation Law § 29 (6). Plaintiff thereafter had a full and fair opportunity to respond to that issue, which was discussed at length in the 2019 order. Indeed, Supreme Court … expressly held that the provisions of that statute applied because "both [plaintiff] and Hyde were within the same employ and acting within the scope of employment at the time the alleged injuries occurred, therefore rendering them co-employees which results in workers' compensation being the exclusive remedy." Accordingly, under the circumstances of this case, the issue of whether plaintiff and Hyde were coemployees was "actually litigated, squarely addressed and specifically decided" against plaintiff … .

Plaintiff's claim against JFS is premised upon the theory that JFS exercised sufficient control over Hyde to render it vicariously liable for her negligence. The issue of whether plaintiff and Hyde are coemployees has been resolved against plaintiff with preclusive effect, however, and plaintiff's exclusive remedy for the negligence of Hyde is therefore workers' compensation benefits. As noted above, as Workers' Compensation Law § 29 (6) "deprive[s] the injured employee of a right to maintain an action against a negligent coemployee, [it also] bars a derivative action which necessarily is dependent upon the same claim of negligence for which the exclusive remedy has been provided" … . Thus, as "plaintiff[] did not assert any allegation that [JFS] had committed an act constituting affirmative negligence," the cross motion of JFS for summary judgment dismissing the complaint against it should have been granted … . 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

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).

The Third Department, in a full-fledged opinion by Justice Egan, reversing (modifying) Supreme Court in this traffic accident case, determined the complaint against Bryant, the driver of the county bus involved in the accident, should have been dismissed. The driver of the car in which plaintiff was a passenger, Hyde, lost control of the car and crossed into the path of the oncoming bus. Hyde was fatally injured and plaintiff had no memory of the accident:

Bryant stated in her affidavit and deposition testimony that a mixture of snow and ice was falling in the leadup to the accident and that, although the road was coated in snow, she was still able to see the center line and fog lines. Bryant added that she was travelling two to five miles below the speed limit and was comfortable driving the bus in the weather conditions. As for the accident itself, Bryant stated that Hyde's vehicle entered her lane about 1½ car lengths in front of the bus and that she had a second to react before striking it, as well as that she had "nowhere to go" to evade Hyde's vehicle and that she lightly applied her brakes in an effort to slow down without losing control of the bus. Plaintiff had no recollection of the accident, and nothing else in the record, including the police accident report, contradicted Bryant's version of events. Bryant accordingly established that she reacted reasonably when Hyde's vehicle entered her lane of traffic, and plaintiff's speculation that Bryant might have been able to avoid the collision had she been driving even further below the speed limit or taken other evasive action despite having "at most, a few seconds to react," did not raise a question of fact … . 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).

The Third Department, reversing Supreme Court in this chain-reaction traffic accident case, determined there were questions of fact about the weather (snow and ice) and traffic conditions at the time of the accident. Plaintiff was a passenger in the middle car: Supreme Court had dismissed the complaint pursuant to the emergency doctrine:

Striking a vehicle in the rear is negligence as a matter of law absent a sufficient excuse" … . The excuse proffered by defendants here, and accepted by Supreme Court, was that they were confronted with an emergency in the form of sudden snowfall and icy road conditions such that they could not avoid the respective collisions. "[I]n order for a driver to be entitled to summary judgment based upon the emergency doctrine, he or she must demonstrate, as a matter of law, that the emergency situation with which he or she was confronted was not of his or her own making and that his or her reaction was reasonable under the circumstances such that he or she could not have done anything to avoid the collision" … . "Whether [a] defendant was presented with an emergency is generally a question of fact" … . In addition, "the emergency doctrine is inapplicable [where a] defendant driver was aware of . . . icy road conditions and should have accounted

for them properly" … . "[A] driver is expected to maintain enough distance between himself [or herself] and cars ahead of him [or her] so as to avoid collisions with [slowing or] stopped vehicles, taking into account weather and road conditions" … . 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).

The Third Department, in a full-fledged opinion by Justice Lynch (too detailed to fully summarize here), determined petitioner chiropractor was not entitled to a hearing before the Workers' Compensation Board removed petitioner from the list of authorized medical providers. Petitioner acknowledged taking payments directly from a supplier of medical equipment, which is a violation of the Workers' Compensation Law. Petitioner's only argument on appeal was his entitlement to a hearing before removal from the list. After analyzing the applicable statutes, the Third Department determined, absent any contested facts about the statutory violation, petitioner was not entitled to a hearing:

… [W]e agree with respondent that the chair [Workers' Compensation Board] has authority independent of the CPC [chiropractic practice committee] to conduct an investigation, find that the provider is disqualified from rendering care under the

Workers' Compensation Law for statutorily specified acts of misconduct and, upon such a finding, remove the provider from the list of authorized chiropractors (see Workers' Compensation Law § 13-l [10], [12]; see also Workers' Compensation Law § 13-l [10] [g]). * * *

In an instance where questions of fact attend the asserted charges of professional misconduct or incompetency, a hearing would be in order. Here, however, petitioner has admitted and documented his receipt of payments from [the medical equipment supplier] for treatment rendered to workers' compensation claimants in direct violation of Workers' Compensation Law § 13-l (10) (g). Under these circumstances, no hearing was warranted and respondent's decision to remove petitioner from the list of authorized providers was not arbitrary and capricious. 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).

The Third Department, over a dissent, determined the claim by decedent's wife for death benefits pursuant to Workers' Compensation Law Article 8-a (re: disability due to work at the World Trade Center after 9-11) was properly denied because the

two-year notice requirement in Worker's Compensation Law 28 applies and was not complied with:

… [G]iven that decedent, not claimant, was a participant within the meaning of Workers' Compensation Law § 161, it was decedent who was entitled to file a claim for benefits outside of the period allowed by Workers' Compensation Law § 28. Claimant cannot piggyback upon that entitlement, as her claim for death benefits "accrue[d] at the time of [decedent's] death and 'is a separate and distinct legal proceeding' from [decedent's] original disability claim" … .The language of the … statutory provisions … clearly reflects that claimant cannot avail herself of the exception to the two-year filing requirement created by Workers' Compensation Law § 168. 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).

The Third Department, reversing the Workers' Compensation Board and remitting the matter, determined the Board did not use the correct criteria for determining the employer or insurer responsible to pay for claimant's disability due to occupational disease, i.e., lung cancer caused by asbestos exposure:

… [I]n determining that the carrier was on the risk for the claim, the Board premised its finding solely on the date of disablement, or October 15, 2019, instead of evidence concerning the timing of claimant's contraction of lung cancer and the "employer who last employed the employee in the employment to the nature of which the disease was due and in which it was contracted" (Workers' Compensation Law § 44). This reasoning resulted in a misapplication of Workers' Compensation Law § 44. "Simply put, disability while employed by a previous employer is not a prerequisite to a finding that a claimant contracted an occupational disease while employed by that employer" … . As such, we reverse and remit for a determination in the first instance of the proper employer and/or carrier on the risk utilizing the correct standard set forth in Workers' Compensation Law § 44 … . 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

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