

# NEW YORK APPELLATE DIGEST, LLC

An Organized Compilation of Summaries of Selected Decisions, Mostly Reversals, Released by Our New York State Appellate Courts and Posted on the New York Appellate Digest Website on Monday, January 16, 2023, 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. Copyright 2023 New York Appellate Digest, LLC

Weekly Reversal  
Newsletter  
January 9 – 13, 2023

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[Galloway v State of New York, 2023 NY Slip Op 00137, Third Dept 1-12-23](#)

**Practice Point:** The assault and battery of claimant-inmate was deemed to be within the scope of the corrections officers' employment and foreseeable. Therefore the state, as the officers' employer, could be liable under the doctrine of respondeat superior.

JANUARY 12, 2023

CIVIL PROCEDURE, VERDICT SHEETS, JUROR CONFUSION.

NO ONE OBJECTED TO THE VERDICT SHEET BEFORE THE VERDICT AND JUROR AFFIDAVITS ALLEGING CONFUSION ARE NOT TO BE CONSIDERED EXCEPT IN EXTRAORDINARY CIRCUMSTANCES NOT PRESENT HERE; THE MOTION TO SET ASIDE THE VERDICT SHOULD NOT HAVE BEEN GRANTED (FIRST DEPT).

[Suarez v Ades, 2023 NY Slip Op 00175, First Dept 1-12-23](#)

**Practice Point:** The verdict should not have been set aside on jury-confusion grounds. No one objected to the verdict sheet before the verdict and the juror

affidavits alleging confusion should only be considered in extraordinary circumstances not present in this case.

JANUARY 12, 2023

CIVIL PROCEDURE, MOTION TO DISMISS, DOCUMENTARY EVIDENCE.

THE EVIDENCE SUBMITTED IN SUPPORT OF THE MOTION TO DISMISS WAS NOT “DOCUMENTARY EVIDENCE” WITHIN THE MEANING OF CPLR 3211(A)(1); THE MOTION SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

[Davis v Henry, 2023 NY Slip Op 00076, Second Dept 1-11-23](#)

Practice Point: “Documentary evidence” which will support a motion to dismiss include mortgages, deeds, contracts, etc., not affidavits, deposition testimony or letters.

JANUARY 11, 2023

EMPLOYMENT LAW, HUMAN RIGHTS LAW, LABOR LAW, DISCRIMINATION.

PLAINTIFF STATED CAUSES OF ACTION FOR EMPLOYMENT DISCRIMINATION AND VIOLATIONS OF THE LABOR LAW (FIRST DEPT).

[Kirby v Carlo’s Bakery 42nd & 8th LLC, 2023 NY Slip Op 00059, First Dept 1-10-23](#)

Practice Point: Here plaintiff stated causes of action for employment discrimination (a racist remark just prior to her termination), as well as failure to pay overtime and failure to pay weekly in violation of the Labor Law.

JANUARY 10, 2023

NEGLIGENCE, ATTORNEYS, DISCOVERY DISPUTE, AFFIRMATION OF GOOD FAITH.

PLAINTIFFS' COUNSEL'S GOOD-FAITH AFFIRMATION DID NOT INCLUDE DETAILS OF ANY EFFORTS TO RESOLVE THE DISCOVERY ISSUE AND WAS THEREFORE INADEQUATE; PLAINTIFFS' MOTION TO COMPEL DEFENDANT TO SUBMIT TO A DEPOSITION UNDER THREAT OF PRECLUSION SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

[Muchnik v Mendez Trucking, Inc., 2023 NY Slip Op 00100, Second Dept 1-11-23](#)

Practice Pont: Here the affidavit plaintiffs' counsel submitted did not detail the efforts made to resolve the discovery issue and was therefore inadequate. Therefore Supreme Court should not have granted plaintiffs' motion to compel defendant's deposition under threat of preclusion.

JANUARY 11, 2023

NEGLIGENCE, DAMAGES, EVIDENCE, PRIOR INJURY.

MEDICAL (SURGICAL) RECORDS IN A NO-FAULT FILE RELATED TO A PRIOR INJURY SUFFERED BY PLAINTIFF SHOULD NOT HAVE BEEN ADMITTED IN THIS DAMAGES TRIAL; NEW TRIAL ON DAMAGES ORDERED (FIRST DEPT).

[Basden v Liberty Lines Tr., Inc., 2023 NY Slip Op 00050, First Dept 1-10-22](#)

Practice Pont: Although the no-fault file re: a prior accident in which plaintiff was injured was admissible, the surgical records included in the file were not. New trial on damages ordered.

JANUARY 10, 2023

NEGLIGENCE, SLIP AND FALL, INDEPENDENT MEDICAL EXAMINATION.

PLAINTIFF SLIPPED AND FELL COMING OUT OF THE SHOWER, INJURING HER GENITAL AND PELVIC AREAS; DEFENDANTS WERE ENTITLED TO AN INDEPENDENT MEDICAL EXAMINATION WHICH MIRRORED THE EXAM DONE BY PLAINTIFF'S OWN PHYSICIAN, INCLUDING A GYNECOLOGICAL EXAM AND A FULL PELVIC EXAM; SUPREME COURT HAD DENIED THE FULL PELVIC EXAM; THERE WAS AN EXTENSIVE DISSENT (FIRST DEPT).

[Pettinato v EQR-Rivertower, LLC, 2023 NY Slip Op 00068, First Dept 1-10-23](#)

Practice Point: Here plaintiff fell coming out of the shower injuring her genital and pelvic areas. Defendants requested an independent medical examination (IME) which mirrored the exam done by plaintiff's physician. The motion court allowed a gynecological exam but denied the full pelvic exam. Because plaintiff's physician had conducted a full pelvic exam to determine the injuries, defendants were entitled to conduct their own full pelvic exam.

JANUARY 10, 2023

NEGLIGENCE, SLIP AND FALL, MUNICIPAL LAW.

THE PETITION FOR LEAVE TO FILE A LATE NOTICE OF CLAIM IN THIS ROAD-DEFECT SLIP AND FALL CASE SHOULD NOT HAVE BEEN GRANTED; THE NINE-MONTH DELAY WAS NOT EXPLAINED; THE CITY DID NOT HAVE TIMELY NOTICE OF THE POTENTIAL LAWSUIT; AND PETITIONER DID NOT SHOW THE CITY WOULD NOT BE PREJUDICED BY THE DELAY (SECOND DEPT).

[Matter of Salazar v City of New York, 2023 NY Slip Op 00095, Second Dept 1-11-23](#)

**Practice Point:** Here the petition for leave to file a late notice of claim should not have been granted. The nine-month delay was not explained; the city did not have timely notice of the potential lawsuit, and petitioner did not show the city would not be prejudiced by the delay.

JANUARY 11, 2023

NEGLIGENCE, SLIP AND FALL, OUT-OF-POSSESSION LANDLORD.

THE TERMS OF THE LEASE DID NOT DEMONSTRATE DEFENDANT OUT-OF-POSSESSION LANDLORD DID NOT HAVE A DUTY TO MAKE NONSTRUCTURAL FLOOR REPAIRS; THE LANDLORD'S MOTION FOR SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

[Weidner v Basser-Kaufman 228, LLC, 2023 NY Slip Op 00126, Second Dept 1-11-23](#)

**Practice Point:** The lease provided the out-of-possession landlord was required to “make all structural, exterior walls, floor and roof repairs and replacements to Tenant’s Building.” The landlord was not entitled to summary judgment in this slip



and fall case on the ground the lease did not create a duty to make nonstructural floor repairs.

JANUARY 11, 2023

NEGLIGENCE, TRAFFIC ACCIDENTS, MUNICIPAL LAW, IMMUNITY.

THE CITY IS NOT ENTITLED TO GOVERNMENTAL FUNCTION IMMUNITY WHEN ENGAGED IN THE PROPRIETARY FUNCTION OF MAINTAINING ROADS; IN THE ABSENCE OF A STUDY TO DETERMINE THE RISKS OF A HIGHWAY DESIGN, THE CITY IS NOT ENTITLED TO QUALIFIED IMMUNITY; THERE WAS A QUESTION OF FACT WHETHER THE ABSENCE OF SIGNS AND ROADWAY MARKINGS WAS A PROXIMATE CAUSE OF THE INTERSECTION TRAFFIC ACCIDENT (FIRST DEPT).

[Floricio v City of New York, 2023 NY Slip Op 00055, First Dept 1-10-23](#)

**Practice Point:** In this intersection traffic accident case there was a question of fact whether the city's removal of traffic markings and signs during construction was a proximate cause of the accident. Roadwork is a proprietary function so the city was not entitled to governmental function immunity. There was no study of roadway design so the city was not entitled to qualified immunity.

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NEGLIGENCE, SLIP AND FALL, CIVIL PROCEDURE, WORKERS' COMPENSATION.

HERE THERE IS AN UNRESOLVED QUESTION ABOUT WHETHER PLAINTIFF IS ENTITLED TO WORKERS' COMPENSATION BENEFITS; SUPREME COURT SHOULD GRANTED SUMMARY JUDGMENT TO DEFENDANTS AND REFERRED THE MATTER TO THE WORKERS' COMPENSATION BOARD (SECOND DEPT).

[Lall v Harnick, 2023 NY Slip Op 00080, Second Dept 1-11-23](#)

Practice Point: Any question about whether plaintiff is entitled to Workers' Compensation benefits must be resolved by the Workers' Compensation Board. Here in this slip and fall case Supreme Court should have granted defendants' motion for summary judgment and referred the matter to the Workers' Compensation Board.

JANUARY 11, 2023

PRODUCTS LIABILITY, UNIFORM COMMERCIAL CODE, IMPLIED WARRANTIES.

THE COMPLAINT DID NOT STATE CAUSES OF ACTION FOR BREACH OF IMPLIED WARRANTY FOR A PARTICULAR PURPOSE OR BREACH OF IMPLIED WARRANTY OF MERCHANTABILITY (FIRST DEPT).

[Fiuzzi v Paragon Sporting Goods Co. LLC, 2023 NY Slip Op 00054, First Dept 1-10-23](#)

Practice Point: The complaint in this case did not state causes of action for breach of implied warrant of fitness for purpose of breach of warranty of merchantability, criteria explained.

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