NEW YORK APPELLATE DIGEST, LLC

Personal Injury
Reversal Newsletter
January 2023

An Organized Compilation of Summaries of Selected Decisions, Mostly Reversals, Addressing Personal Injury, Released by Our New York State Appellate Courts in January 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 Full Decisions on the Official New York Courts Website. Click on "Table of Contents" in the Header on Any Page to Return There. Right Click on the Citations to Keep Your Place in the Reversal Newsletter.

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BATTERY, INMATES, CORRECTIONS OFFICERS, EMPLOYMENT LAW, RESPONDEAT SUPERIOR.

THE ASSAULT AND BATTERY OF CLAIMANT-INMATE BY CORRECTIONS OFFICERS OCCURRED WITHIN THE SCOPE OF THE OFFICERS' EMPLOYMENT AND WAS REASONABLY FORESEEABLE; THEREFORE THE STATE, AS THE OFFICERS' EMPLOYER, COULD BE LIABLE FOR THE ASSAULT AND BATTERY UNDER THE DOCTRINE OF RESPONDEAT SUPERIOR (THIRD DEPT).

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

DISCOVERY DISPUTE, ATTORNEYS, AFFFIRMATION 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

EDUCATION-SCHOOL LAW, MUNICIPAL LAW, NEGLIGENCE, INFANCY TOLL, STATUTE OF LIMITATIONS.

THE ONE-YEAR-AND-NINETY-DAY TIME LIMIT FOR A SUIT AGAINST A SCHOOL DISTRICT IN GENERAL MUNICIPAL LAW 50-I(1)I IS SUBJECT TO THE INFANCY TOLL IN CPLR 208 (SECOND DEPT).

M. S. v Rye Neck Union Free Sch. Dist., 2023 NY Slip Op 00343, Second Dept 1-25-23

Practice Point: The infancy toll of the statute of limitations in CPLR 208 applies to the one-year-ninety-day time limit for a suit against a school district in General Municipal Law 50-i(1)I.

JANUARY 25, 2023

EDUCATION-SCHOOL LAW, MUNICIPAL LAW, NEGLIGENCE.

THE PETITION FOR LEAVE TO FILE A LATE NOTICE OF CLAIM IN THIS SCHOOL PLAYGROUND ACCIDENT CASE SHOULD NOT HAVE BEEN GRANTED; PETITIONER DID NOT DEMONSTRATE THE SCHOOL HAD TIMELY ACTUAL KNOWLEDGE OF THE POTENTIAL NEGLIGENT-SUPERVISION CLAIM AND PETITIONER DID NOT OFFER A REASONABLE EXCUSE FOR FAILURE TO TIMELY FILE (SECOND DEPT).

Matter of R. M. v Board of Educ. Of the Long Beach City Sch. Dist., 2023 NY Slip Op 00320, Second Dept 1-25-23

Practice Point: Here the petition for leave to file a late notice of claim should not have been granted in this school-playground accident case. There was an accident report but the report did not demonstrate the school had timely knowledge of the potential lawsuit. In addition, petitioner did not offer a reasonable excuse for failing to timely file.

JANUARY 25, 2023

LABOR LAW-CONSTRUCTION LAW.

A HEAVY DOOR FELL ON PLAINTIFF'S HAND AS HE AND A CO-WORKER ATTEMPTED TO LIFT THE DOOR ONTO A TRUCK; NO LIFTING DEVICES WERE AVAILABLE; PLAINTIFF WAS ENTITLED TO SUMMARY JUDGMENT ON THE LABOR LAW 240(1) CAUSE OF ACTION (FIRST DEPT).

Taopanta v 1211 6th Ave. Prop. Owner, LLC., 2023 NY Slip Op 00385, First Dept 1-26-23

Practice Point: Although the weight of the door which fell onto plaintiff's hand as he tried to lift the door onto a truck was disputed (300 versus 100-120), it was undisputed that no lifting devices were available. Plaintiff should have been awarded summary judgment on the Labor Law 240(1) cause of action.

JANUARY 26, 2023

LABOR LAW-CONSTRUCTION LAW.

PLAINTIFF ALLEGEDLY FELL INTO A DITCH WHICH WAS COVERED BY A TARP; THE FACT THAT PLAINTIFF WAS THE ONLY WITNESS AND THE ALLEGATION PLAINTIFF COULD HAVE TAKEN A DIFFERENT ROUTE DID NOT PRECLUDE SUMMARY JUDGMENT I N PLAINTIFF'S FAVOR ON THE LABOR LAW 240(1) CAUSE OF ACTION (FIRST DEPT).

Sotelo v TRM Contr., LP, 2023 NY Slip Op 00190, First Dept 1-17-23

Practice Point: Plaintiff fell into a ditch covered by a tarp. He was entitled to summary judgment on the Labor Law 240(1) cause of action despite the fact he was the only witness to the incident and despite the allegation he could have taken a different route (comparative negligence in not a bar to summary judgment on a Labor Law 240(1) cause of action).

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LABOR LAW-CONSTRUCTION LAW.

PLAINTIFF STRUCK HIS HEAD AS HE FELL AND WAS INJURED BY THE ABRUPT STOP OF HIS FALL BY THE SAFETY HARNESS AND LANYARD; PLAINTIFF WAS ENTITLED TO SUMMARY JUDGMENT ON HIS LABOR LAW 240(1) CAUSE OF ACTION (FIRST DEPT).

Arias v 139 E. 56th St. Landlord, LLC, 2023 NY Slip Op 00261, First Dept 1-24-23

Practice Point: Although plaintiff was provided with a safety harness and a lanyard which were tied off, he struck his head when fell and was injured by the abrupt stop of his fall by the harness and lanyard. Plaintiff was entitled to summary judgment on his Labor Law 240(1) cause of action.

JANUARY 24, 2023

LABOR LAW-CONSTRUCTION LAW.

PLAINTIFF'S CONDUCT WAS THE SOLE PROXIMATE CAUSE OF HIS FALL; THE LABOR LAW 240(1), 241(6) AND 200 CAUSES OF ACTION SHOULD HAVE BEEN DISMISSED (SECOND DEPT).

Calle v City of New York, 2023 NY Slip Op 00297, Second Dept 1-25-23

Practice Point: Here ladders were available to climb out of ditch and plaintiff stepped on a wooden brace instead. The brace broke and plaintiff fell. Plaintiff's conduct was the sole proximate cause of the accident and the Labor Law 240(1), 241(6) and 200 causes of action should have been dismissed.

JANUARY 25, 2023

LABOR LAW-CONSTRUCTION LAW.

THERE WAS A QUESTION OF FACT WHETHER REPLACEMENT OF DAMAGED CEILING TILES WAS REPAIR, COVERED BY LABOR LAW 240(1) AND 241(6), OR ROUTINE MAINTENANCE, WHICH IS NOT COVERED (SECOND DEPT).

Nooney v Queensborough Pub. Lib., 2023 NY Slip Op 00327, Second Dept 1-25-23

Practice Point: Routine maintenance is not covered by Labor Law 240(1) or 241(6) but repair is. Here there was a question of fact whether replacing damaged ceiling tiles was repair or routine maintenance.

JANUARY 25, 2023

MEDICAL MALPRACTICE, INFORMED CONSENT.

A SIGNED CONSENT FORM ALONE DOES NOT PRECLUDE A LACK-OF-INFORMED-CONSENT CAUSE OF ACTION IN A MEDICAL MALPRACTICE CASE (SECOND DEPT).

Guinn v New York Methodist Hosp., 2023 NY Slip Op 00308, Second Dept 1-25-23

Practice Point: Even if plaintiff in a medical malpractice action signed a consent form, a lack-of-informed-consent cause of action may survive summary judgment.

JANUARY 25, 2023

MEDICAL MALPRACTICE, VICARIOUS LIABILITY.

ATTENDING PHYSICIAN NOT VICARIOUSLY LIABLE FOR NEGLIGENCE OF PHYSICIAN'S ASSISTANT BASED UPON THE PHYSICIAN'S STATUS AS A SHAREHOLDER IN THE P ROFESSIONAL SERVICE CORPORATION WHICH EMPLOYED THE PHYSICIAN'S ASSISTANT; $3 MILLION VERDICT EXCESSIVE (FIRST DEPT).

Appleyard v Tigges, 2023 NY Slip Op 00260, First Dept 1-24-23

Practice Point: The attending physician in this medical malpractice case could not be held vicariously liable for the negligence of the physician's assistant on the ground that the attending physician was a shareholder in the professional service corporation which employed the physician's assistant.

JANUARY 24, 2023

PRODUCTS LIABILITY, JURISDICTION, FOREIGN CORPORATIONS.

NEW YORK DID NOT HAVE LONG-ARM OR PERSONAL JURISDICTION OVER THE ITALIAN MANUFACTURER OF A HOSE USED AS A COMPONENT IN A DISHWASHER MADE AND SOLD BY A NONPARTY (SECOND DEPT).

Economy Premier Assur. Co. v Miflex 2 S.p.A., 2023 NY Slip Op 00303,Second Dept 1-25-23

Practice Point: Here plaintiff did not demonstrate the Italian company which manufactured a component of a dishwasher purposefully availed itself of the privilege of conducting business in New York. Therefore New York did not have long-arm or personal jurisdiction over the Italian company.

JANUARY 25, 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.

JANUARY 10, 2023

RETIREMENT AND SOCIAL SECURITY LAW.

PETITIONER POLICE OFFICER FELL TWICE AT NIGHT WHILE INVESTIGATING SUSPICIOUS ACTIVITY; HE FELL IN A THREE-FOOT DEEP HOLE WHEN CHECKING OUT A HOUSE AND HE FELL DOWN SOME STAIRS CHECKING OUT A PARKING LOT; NEITHER FALL WAS A COMPENSABLE "ACCIDENT" (THIRD DEPT).

Matter of Compagnone v DiNapoli, 2023 NY Slip Op 00354, Third Dept 1-26-23

Practice Point: This opinion should be consulted when trying to determine what constitutes a compensable "accident" within the meaning of the Retirement and Social Security Law.

JANUARY 26, 2023

SLIP AND FALL, APPEALS, SUMMARY JUDGMENT, SEARCH THE RECORD.

THE SECOND DEPARTMENT SEARCHED THE RECORD AND AWARDED SUMMARY JUDGMENT TO A NONAPPEALING PARTY IN THIS SLIP AND FALL CASE (SECOND DEPT).

Chiamulera v New Windsor Mall, 2023 NY Slip Op 00300, Second Dept 1-25-23

Practice Point: The appellate division has the power to search the record and award summary judgment to a nonappealing party.

JANUARY 25, 2023

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

SLIP AND FALL, CONSTRUCTIVE NOTICE.

DEFENDANT SUPERMARKET DID NOT OFFER PROOF OF WHEN THE AREA OF THE SLIP AND FALL WAS LAST INSPECTED OR CLEANED PRIOR TO THE FALL; THEREFORE DEFENDANT DID NOT DEMONSTRATE A LACK OF CONSTRUCTIVE NOTICE OF THE GRAPES ON THE FLOOR (FIRST DEPT).

Polanco v 756 Jomo Food Corp., 2023 NY Slip Op 00284, First Dept 1-24-23

Practice Point: To prevail on a motion for summary judgment in a slip and fall case the defendant must demonstrate a lack of constructive notice by proof the area was inspected or cleaned close in time to the fall.

JANUARY 24, 2023

SLIP AND FALL, ESPINAL EXCEPTIONS.

IN THIS SLIP AND FALL CASE, THE DEFENDANT SNOW-REMOVAL CONTRACTOR DID NOT NEED TO ADDRESS ANY ESPINAL EXCEPTION IN ITS ANSWER BECAUSE PLAINTIFF DID NOT ALLEGE AN EXCEPTION APPLIED; PLAINTIFF DID NOT DEMONSTRATE THAT AN ESPINAL EXCEPTION APPLIED IN OPPOSITION TO SUMMARY JUDGMENT; DEFENDANT'S SUMMARY JUDGMENT MOTION SHOULD HAVE BEEN GRANTED (SECOND DEPT).

Forbes v Equity One Northeast Portfolio, Inc., 2023 NY Slip Op 00305, Second Dept 1-25-23

Practice Point: Generally, in a slip and fall case, a snow-removal contractor is not liable to a plaintiff who is not a party to the snow-removal contract. The contractor will be liable only if an Espinal exception applies (for example, if the contractor "launches an instrument of harm" which injured plaintiff). If the plaintiff does not allege an Espinal exception applies, the contractor need not address the issue in the

answer. If the plaintiff does not, at the summary judgment stage, demonstrate an exception applies, the contractor will be granted summary judgment.

JANUARY 25, 2023

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.

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SLIP AND FALL, LANDLORD-TENANT, DANGEROUS CONDICTION.

PLAINTIFF FELL THROUGH A STOREFRONT WINDOW IN DEFENDANT PLANET ROSE'S KARAOKE BAR; GIVEN THE CIRCUMSTANCES, THE FAILURE TO INSTALL TEMPERED GLASS MAY HAVE BEEN NEGLIGENT; BY THE TERMS OF THE LEASE, THE OUT-OF-POSSESSION LANDLORD, DEFENDANT 219 AVE. A, COULD NOT BE HELD LIABLE (FIRST DEPT).

Kitziger v 219 Ave. A. NYC LLC, 2023 NY Slip Op 00239, First Dept 1-19-23

Practice Point: Because patrons of defendant karaoke bar stood on the couch to dance, plaintiff's fall through the storefront window was foreseeable and the failure to install tempered glass may have been negligent. This was not a case where the condition (the glass storefront window) merely furnished the occasion for the accident, as opposed to a proximate cause. By the terms of the lease the out-of-possession landlord was responsible only for structural repairs which were not at issue.

JANUARY 19, 2023

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 CITIY 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

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

SLIP AND FALL, PROXIMATE CAUSE.

ALTHOUGH PLAINTIFF ALLEGED HE TRIPPED OVER A HOSE HE HAD PLACED ON THE STEPS, THERE WAS A QUESTION OF FACT WHETHER INADEQUATE LIGHTING WAS ANOTHER PROXIMATE CAUSE OF THE SLIP AND FALL (SECOND DEPT).

Reyes v S. Nicolia & Sons Realty Corp., 2023 NY Slip Op 00340, Second Dept 1-25-23

Practice Point: There can be more than one proximate cause of a slip and fall. Here plaintiff tripped over a hose he had placed on the steps and he alleged he didn't see the hose because of inadequate lighting. Defendant's motion for summary judgment should not have been granted.

JANUARY 25, 2023

TOXIC TORTS, ASBESTOS EXPOSURE, SUMMARY-JUDGMENT EVIDENCE REQUIREMENTS.

DEFENDANT DID NOT DEMONSTRATE AS A MATTER OF LAW THAT PLAINTIFF'S EXPOSURE TO ASBESTOS WHEN MAINTAINING DEFENDANT'S PRODUCTS DID NOT CONTRIBUTE TO PLAINTIFF'S ASBESTOS-INJURIES; AT THE SUMMARY JUDGMENT STAGE, IT IS NOT ENOUGH FOR DEFENDANT TO ARGUE PLAINTIFF COULD NOT PROVE CAUSATION (THIRD DEPT).

Howard v A.O. Smith Water Prods., 2023 NY Slip Op 00017, Third Dept 1-5-23

Practice Point: In a toxic tort case, in order to prevail on a summary judgment motion, defendant must demonstrate as a matter of law that defendant's products did not cause plaintiff's injuries. The defendant will not win a summary judgment motion in this context by arguing plaintiff could not prove causation.

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TOXIC TORTS, JURISDICTION.

DEFENDANT MANUFACTURED VALVES CONTAINING ASBESTOS; ALTHOUGH DEFENDANT HAD A SMALL OFFICE IN NYC THE VALVES WERE MANUFACTURED AND SOLD IN CONNECTICUT, WHERE PLAINTIFF LIVED AND WORKED; THE RELATIONSHIP BETWEEN NEW YORK AND PLAINTIFF'S CLAIMS WAS NOT SUFFICIENT FOR NEW YORK JURISDICTION (FIRST DEPT).

Matter of New York Asbestos Litig., 2023 NY Slip Op 00402, First Dept 1-31-23

Practice Point: Plaintiff alleged exposure to asbestos in valves made by defendant caused his cancer. The valves were manufactured and sold in Connecticut where plaintiff lived and worked. Defendant's small office in New York was not sufficiently connected with plaintiff's claims to support New York jurisdiction.

JANUARY 31, 2023

TRAFFIC ACCIDENTS, LEGAL MALPRACTICE, FAILURE TO SEEK DAMAGES FROM TORTFEASOR PERSONALLY.

PLAINTIFF IN THIS TRAFFIC ACCIDENT CASE ALLEGED DEFENDANT ATTORNEY NEGLIGENTLY FAILED TO PURSUE DAMAGES IN EXCESS OF THE POLICY LIMITS AGAINST THE TORTFEASOR PERSONALLY; DEFENDANT DID NOT DEMONSTRATE PLAINTIFF WOULD NOT HAVE PREVAILED AGAINST THE TORTFEASOR PERSONALLY; DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

Chicas v Cassar, 2023 NY Slip Op 00202, Second Dept 1-18-23

Practice Point: Defendant attorney in this legal malpractice case did not demonstrate plaintiff would not have prevailed in an action against the tortfeasor personally in the underlying traffic accident case. Plaintiff alleged defendant attorney negligently failed to seek damages over and above the policy limits from the tortfeasor. Therefore defendant's motion for summary judgment should not have been granted.

JANUARY 18, 2023

TRAFFIC ACCIDENTS, CORPORATION LAW, VENUE.

EVEN THOUGH THE DEFENDANT CORPORATION DID NOT HAVE AN OFFICE IN NEW YORK COUNTY AND THE TRAFFIC ACCIDENT OCCURRED IN NASSAU COUNTY WHERE THE CORPORATION DID HAVE AN OFFICE, VENUE WAS APPROPRIATELY PLACED IN NEW YORK COUNTY BASED ON DEFENDANT'S CERTIFICATE OF INCORPORATION (FIRST DEPT).

Marte v Lampert, 2023 NY Slip Op 00375, First Dept 1-26-23

Practice Point: Here the traffic accident happened in Nassau County where defendant corporation had an office. But defendant's certificate of incorporation

indicated defendant's principal office was in New York County. The certificate controls, even though the defendant corporation did not actually have an office in New York County.

JANUARY 26, 2023

TRAFFIC ACCIDENTS, 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

TRAFFIC ACCIDENTS, 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

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).

Floricic 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.

JANUARY 10, 2023

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