NEW YORK APPELLATE DIGEST, LLC

Personal Injury
Reversal Report
February 2023

An Organized Compilation of Summaries of Selected Decisions, Mostly Reversals, Addressing Personal Injury, Released by Our New York State Appellate Courts and Posted on the New York Appellate Digest Website in February 2023. 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 Report.

Table of Contents

Contents

Table of Contents

ANIMAL LAW.

THE MAJORITY IN THIS DOG-BITE CASE DETERMINED DEFENDANT DID NOT DEMONSTRATE A LACK OF KNOWLEDGE OF THE DOG'S VICIOUS PROPENSITIES; TWO DISSENTERS ARGUED DEFENDANT'S MOTION FOR SUMMARY JUDGMENT WAS PROPERLY GRANTED BECAUSE THE DOG HAD NEVER EXHIBITED VICIOUS BEHAVIOR BEFORE (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, over a two-justice dissent, determined defendant's motion for summary judgment in this dog-bite case should not have been granted. The dissenters argued defendant demonstrated she did not have knowledge of the dog's vicious propensities:

… [D]efendant submitted plaintiff's deposition testimony that, while plaintiff was at defendant's door, the dog came running and was barking, pushed the door open, and lunged at plaintiff, biting him in the right thigh. After plaintiff was on the ground, having been knocked to the bottom of the front steps, the dog bit the back of plaintiff's left leg and then his calf. Plaintiff further testified that, immediately after the incident, defendant told plaintiff, who was wearing a winter coat at the time of the attack, that "the dog doesn't like people who wear coats." Plaintiff also testified that defendant told him that "the dog was protective." Defendant further

submitted the deposition testimony of defendant Jennifer McMahon, who lived in the home and was familiar with the dog, that the dog was "protective" of the persons who lived in the home and that, when a stranger was present in the house, the dog would get in front of a member of the household to protect him or her. That evidence, combined with the evidence of the unprovoked and vicious nature of the attack and the severity of the injuries sustained by plaintiff, is "sufficient to raise triable issues of fact as to whether the dog[] had vicious propensities and whether. . . defendant[] knew or should have known of them" … .

From the dissent:

… [D]efendant's submissions in support of the motion, including the deposition testimony of defendant and the tenant, establish that the dog was a gentle, well-behaved family dog, who was not aggressive, menacing, or intimidating, was not a guard dog, and had never growled at, nipped, or bitten anyone before … . Neither defendant nor the tenant had ever observed the dog exhibit any aggressive behavior in the past. In sum, defendant established that the dog had not previously behaved in a threatening or menacing manner … .

The majority nonetheless cites evidence in defendant's submissions that defendant and the tenant characterized the dog as protective and having a dislike of people wearing coats, but conspicuously absent from the majority's analysis is any explanation of how these characteristics reflect a " 'propensity to do any act that might endanger the safety of the persons and property of others in a given situation' " … . Zicari v Buckley, 2023 NY Slip Op 00788, Fourth Dept 2-10-23

Practice Point: The majority in this dog-bite case held that the defendant did not demonstrate she had no knowledge of the dog's vicious propensities. The two dissenters disagreed.

FEBRUARY 10, 2023

LABOR LAW-CONSTRUCTION LAW, CIVIL PROCEDURE.

PLAINTIFF IN THIS LABOR LAW 240(1) AND 241(6) ACTION WAS STRUCK BY A PIPE WHICH FELL AS IT WAS BEING HOISTED FROM A TRUCK; DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON THE LABOR LAW 240(1) CAUSE OF ACTION SHOULD NOT HAVE BEEN GRANTED; PLAINTIFF'S MOTION TO ADD THE VIOLATION OF ADDITIONAL INDUSTRIAL CODE PROVISIONS TO THE BILL OF PARTICULARS SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendants' summary judgment motion in this Labor Law 240(1) and 241(6) action should not have been granted and plaintiff's motion to amend the bill of particulars should have been granted. Plaintiff was unloading pipes from a flatbed truck when a pipe which was being lifted by an excavator came loose and fell on plaintiff's leg:

"With respect to falling objects, Labor Law § 240(1) applies where the falling of an object is related to 'a significant risk inherent in . . . the relative elevation . . . at which materials or loads must be positioned or secured'" … . "[A] plaintiff must show that, at the time the object fell, it was being hoisted or secured, or that the falling object required securing for the purposes of the undertaking" … . A plaintiff must also show that "the object fell . . . because of the absence or inadequacy of a safety device of the kind enumerated in the statute" … . * * *

Supreme Court improvidently exercised its discretion in denying the plaintiff's cross-motion pursuant to CPLR 3025(b) for leave to amend the bill of particulars to allege certain additional violations of sections of the Industrial Code with regard to the Labor Law § 241(6) cause of action. The plaintiff made a showing of merit, and the proposed amendment did not prejudice the defendants and did not involve new factual allegations or raise new theories of liability … . Castano v Algonquin Gas Transmission, LLC, 2023 NY Slip Op 00983, Second Dept 2-22-23

Practice Point: As long as no additional facts are involved, a motion to amend the pleadings to add Industrial Code violations (re: a Labor Law 241(5) action) should be granted, even after the note of issue has been filed (absent prejudice).

FEBRUARY 22, 2023

Table of Contents

LABOR LAW-CONSTRUCTION LAW.

BECAUSE LOOSE PLANKS ON A SCAFFOLD CONSTITUTED A PROXIMATE CAUSE OF PLAINTIFF'S FALL IN THIS LABOR LAW 240(1) ACTION, PLAINTIFF'S ACTS OR OMISSIONS COULD NOT BE THE SOLE PROXIMATE CAUSE OF THE FALL AND THE RECALCITRANT WORKER DEFENSE WAS NOT AVAILABLE (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined plaintiff was entitled to summary judgment on his Labor Law 240(1) cause of action stemming from a fall from a scaffold. Because the scaffold was defective, plaintiff's actions or omissions could not be the sole proximate cause of the accident. The "recalcitrant worker" defense was also rejected:

Plaintiff made a prima facie showing of entitlement to summary judgment on his claim pursuant to Labor Law § 240 (1). His deposition testimony established that a proximate cause of his injury was the unsecured outrigger scaffold's planks, which collapsed when he stepped on it with his boss, causing them to fall approximately 16 feet to the ground. Contrary to the court's finding, defendants did not raise a triable issue of fact as to whether plaintiff was the sole proximate cause of his injuries. Since the statutory violation of a defective scaffold was a proximate cause of the accident, plaintiff cannot be the sole proximate cause of his accident and defendants cannot avail themselves of the recalcitrant worker defense … . Francis v 3475 Third Ave. Owner Realty, LLC, 2023 NY Slip Op 00951, First Dept 2-21-23

Practice Point: In a Labor Law 240(1) scaffold-fall case, as long as a defect in the scaffold was a proximate cause of the fall, the plaintiff's acts or omissions could not be the sole proximate cause and the recalcitrant worker defense won't fly.

FEBRUARY 21, 2023

MEDICAL MALPRACTICE, CIVIL PROCEDURE, EMPLOYMENT LAW.

PLAINTIFF IN THIS MEDICAL MALPRACTICE ACTION SOUGHT TO ADD TWO PHYSICIAN'S ASSISTANTS (PA'S) AS DEFENDANTS AFTER THE STATUTE OF LIMITATIONS HAD RUN; PLAINTIFF DID NOT DEMONSTRATE THE DEFENDANT DOCTORS WERE THE PA'S EMPLOYERS OR SUPERVISORS; PLAINTIFF DID NOT DEMONSTRATE THE PA'S HAD TIMELY KNOWLEDGE OF THE ACTION; THEREFORE THE RELATION-BACK DOCTRINE SHOULD NOT HAVE BEEN APPLIED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff did not demonstrate the relation-back doctrine applied such that two physician's assistants (PA's) could be added as defendants after the statute of limitations had expired. There was no evidence the PA's and the doctors were united in interest and no evidence the PA's had timely notice of the suit:

In a negligence or malpractice action "the defenses available to two defendants will be identical, and thus their interests will be united, only where one is vicariously liable for the acts of the other" … . … As the PA defendants were employed by the practice, not the individual doctor defendants, there is no vicarious liability based on respondeat superior … . … [T]he plaintiff failed to set forth sufficient facts to demonstrate that the PA defendants were directly supervised or controlled by the doctor defendants in their care and treatment of the decedent.

… The record is devoid of evidence that the PA defendants had notice that an action had been commenced against the doctor defendants prior to the expiration in 2014 of the statute of limitations for the medical malpractice and wrongful death causes of action. Sanders v Guida, 2023 NY Slip Op 00455, Second Dept 2-1-23

Practice Point: Here two of the three prongs of the relation-back doctrine should not have been applied to allow adding two physician's assistants (PA's) as defendants in this med mal case after the statute of limitations had run. The defendant doctors were not the PA's employers or supervisors (the doctors and PA's were not united in interest) and the plaintiff did not show the PA"s had timely knowledge of the suit.

FEBRUARY 1, 2023

Table of Contents

MEDICAL MALPRACTICE, CIVIL RIGHTS LAW, MUNICIPAL LAW, EMPLOYMENT LAW.

PLAINTIFF ALLEGED HE WAS DENIED PROPER MEDICAL CARE IN THE NIAGARA COUNTY JAIL AND SUED THE JAIL DOCTOR, THE COUNTY AND THE SHERIFF; THE CAUSES OF ACTION ALLEGING THE VIOLATION OF PLAINTIFF'S CIVIL RIGHTS PURSUANT TO 42 USC 1983 SURVIVED MOTIONS TO DISMISS; OTHER CAUSES OF ACTION WERE DEEMED TIME-BARRED; ACTIONS ALLEGING THE COUNTY WAS VICARIOUSLY LIABLE FOR THE ACTS OF THE SHERIFF WERE DISMISSED; THE RELATION-BACK DOCTRINE DID NOT APPLY BECAUSE THE COUNTY AND SHERIFF WERE NOT DEEMED "UNITED IN INTEREST" (FOURTH DEPT).

The Fourth Department, reversing (modifying) Supreme Court, determined some causes of action should have been dismissed and others should not have been dismissed in this action against the county, county employees and sheriff alleging plaintiff was denied proper medical care while he was an inmate in the Niagara County Jail. The medical malpractice and negligence causes of action against a doctor employed by the county were time-barred pursuant to General Municipal Law 50-d (one year and ninety days). The causes of action against the doctor and the county alleging civil rights violations pursuant to 42 USC 1983 properly survived motions to dismiss. But the 42 USC 1983 cause of action against the sheriff should have been dismissed because the sheriff had no personal involvement in plaintiff's medical care. The relation-back doctrine was improperly invoked for time-barred causes of action against the sheriff because the county and the sheriff are not united interest (the county is not vicariously liable for the acts of the sheriff and the sheriff's department does not have an identity separate from the county). The negligent investigation cause of action should have been dismissed because New York does not recognize it. Claims alleging the county was vicariously liable for the acts of the sheriff should have been dismissed because plaintiff did not allege there was a local law imposing such a responsibility. Prezioso v County of Niagara, 2023 NY Slip Op 00768, Fourth Dept 2-10-23

Practice Point: Plaintiff alleged he was denied proper medical care in the Niagara County Jail. Plaintiff's causes of action alleging a violation of his civil rights pursuant to 42 USC 1983 survived dismissal. The confusing relationship between the county and the sheriff resulted in the dismissal of several causes of action. The one-year-ninety day statute of limitations in the General Municipal Law applied to some causes of action. Absent a local law to the contrary, a county is not vicariously liable for the acts of the sheriff. The decision is worth reading because of the sheer number of unique issues which arise in suits against counties, county employees and county sheriffs.

FEBRUARY 10, 2023

NEGLIGENT SUPERVISION, EDUCATION-SCHOOL LAW, INJURED STUDENT, EVIDENCE.

HERE THE STUDENT WITH DISABILITIES WAS UNSUPERVISED IN GYM CLASS WHEN SHE WAS INJURED; THE DEFENDANT SCHOOL DISTRICT SUCCESSFULLY EXCLUDED EVIDENCE THAT MORE SUPERVISION OF THE STUDENT WAS NEEDED BECAUSE SUCH EVIDENCE PURPORTEDLY CONFLICTED WITH THE STUDENT'S "AMERICANS WITH DISABILITIES ACT 504 PLAN" (WHICH DID NOT CALL FOR EXTRA SUPERVISION) AND THEREFORE EXTRA SUPERVISION WOULD HAVE AMOUNTED TO DISCRIMINATION; THE THIRD DEPARTMENT REJECTED THE ARGUMENT FINDING THAT THE 504 PLAN DID NOT ACT AS A CEILING FOR THE LEVEL OF SUPERVISION TO BE AFFORDED THE STUDENT AND ORDERED A NEW TRIAL (THIRD DEPT).

The Third Department, in a full-fledged opinion by Justice Garry, reversing the judgment and ordering a new trial, determined expert evidence and lay-witness testimony should not have been excluded from this negligent-supervision-of-a-student trial. The student had some physical disabilities and a "504 plan" had been developed for her pursuant to the Americans with Disabilities Act (ADA). The plan did not explicitly call for extra supervision. The student was injured when she was practicing jumps in gym class while the teacher was working with other students. The school district successfully argued to the judge that any evidence that

the “504 plan” was inadequate to protect the student amounted to discrimination because the plan did not call for extra supervision. That argument was rejected by the Third Department:

… [A] school district’s written 504 plan does not operate as a supervision ceiling in all respects and circumstances.The central purpose of Section 504 is to assure that students with disabilities receive equal treatment in relation to their peers … , that is, that they receive support, based on their individual needs, so that they may also meaningfully access a given educational experience … . This stands in stark contrast to defendant’s reliance upon federal antidiscrimination law as a shield from liability. Plainly put, if two kindergarteners have difficulty performing a skill in a mainstream physical education class, adequate support should be provided to both of them — not, illogically, only the one who does not have a 504 plan. Yet that is precisely what defendant’s argument devolves to. Jaquin v Canastota Cent. Sch. Dist., 2023 NY Slip Op 01039, Third Dept 2-23-23

Practice Point: Here the injured student had certain disabilities and the school district put in place a 504 Plan pursuant to the Americans with Disabilities Act to accommodate for her disabilities. The plan did not call for extra supervision. The student was injured while unsupervised in gym class. The school district successfully argued evidence that more supervision was needed conflicted with the 504 plan. The argument was rejected and a new trial ordered.

FEBRUARY 23, 2023

NEGLIGENT SUPERVISION, EDUCATION-SCHOOL LAW, INJURED STUDENT.

PLAINTIFF-STUDENT'S CHEMICAL BURNS WERE CAUSED BY THE INTENTIONALLY WRONGFUL, SPONTANEOUS, UNFORESEEABLE ACTS OF THIRD PARTIES OVER WHOM DEFENDANT SCHOOL HAD NO CONTROL OR AUTHORITY; STUDENTS HAD APPARENLY PUT DRANO IN A WATER BOTTLE WHICH PLAINTIFF KICKED; TWO-JUSTICE DISSENT ARGUED THE SCHOOL DID NOT MEET ITS BURDEN OF PROOF ON ITS LACK OF NOTICE (FIRST DEPT).

The First Department, over a two-justice dissent, determined defendant charter school [Mission] did not have notice of the dangerous condition which allegedly caused plaintiff-student's chemical burns. Plaintiff kicked a plastic water bottle which had Drano in it, called a Drano bomb. Plaintiff alleged school personnel knew or should have known other students were making the Drano bombs:

The court properly granted Mission's summary judgment motion, even assuming that a triable issue exists as to whether plaintiff was participating in Mission's afterschool program at the time she was injured. Plaintiff testified that, before she was injured, she had seen other children, who were not participating in Mission's afterschool program, on a different basketball court in the public park pouring a liquid into a Poland Spring bottle, not a Vitamin Water bottle. Plaintiff theorizes that Mission's staff should have observed the conduct of these children and intervened to stop them. However, plaintiff's own testimony, on which Mission was entitled to rely to satisfy its prima facie burden on the summary judgment motion, established that the actions of the children — even indulging the speculative assumption that they created the Drano bomb that later injured plaintiff — were the intentionally wrongful, spontaneous, and unforeseeable acts of third parties over whom Mission had no control or authority … .

From the dissent:

Mission's motion presented no evidence whatsoever from any of its employees, teachers, supervisors, or in the form of records from the afterschool program. Mission consequently failed to address, in the first instance, the issue of whether it had "notice of the dangerous conduct which caused injury" … . Under the circumstances, Mission's reliance on the testimony of other parties was insufficient

to carry its prima facie burden. S. G. v Harlem Vil. Academy Charter Sch., 2023 NY Slip Op 01069, First Dept 2-28-23

Practice Point: Here the school successfully argued the plaintiff-student's chemical burns were caused by the intentionally wrongful, spontaneous, and unforeseeable acts of other children over whom the school had no control. Plaintiff kicked a water bottle which had Drano in it (a Drano bomb). Two dissenters argued the school did not present sufficient evidence of its lack of notice.

FEBRUARY 28, 2023

SEXUAL ABUSE, CHILD VICTIMS ACT, CIVIL PROCEDURE, FAMILY LAW, SOCIAL SERVICES LAW.

IN THIS CHILD VICTIMS ACT LAWSUIT ALLEGING PLAINTIFF WAS ABUSED BY A SCHOOL JANITOR, THE SOCIAL SERVICES LAW 413 CAUSE OF ACTION SHOULD HAVE BEEN DISMISSED BECAUSE THE JANITOR WAS NOT "A PERSON LEGALLY RESPONSIBLE" FOR PLAINTIFF'S CARE; THEREFORE THE SCHOOL HAD NO DUTY TO REPORT THE ABUSE PURSUANT TO THE SOCIAL SERVICES LAW (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined the Social Services Law cause of action in this Child Victims Act complaint should have been dismissed. Plaintiff alleged she was abused by a school janitor and the defendant school violated Social Services Law 413 by not reporting the abuse. Social Services Law 413 applies only to a "person legally responsible" for the plaintiff's care:

… [T]he Supreme Court should have granted that branch of the defendants' motion which was pursuant to CPLR 3211(a)(7) to dismiss the third cause of action, alleging a violation of Social Services Law § 413. Since the janitor was not a "person legally responsible" for the plaintiff's care within the meaning of Family Court Act § 1012(e), the defendants had no duty under Social Services Law § 413(1)(a) to report the alleged abuse of the plaintiff by the janitor (see Social Services Law § 412[1] …). Sullivan v Port Wash. Union Free Sch. Dist., 2023 NY Slip Op 01022, Second Dept 2-22-23

Practice Point: Pursuant to Social Services Law 413 a school is under a duty to report abuse by a person legally responsible for a student's care. That statute did not apply here in this Child Victims Act lawsuit alleging abuse by a school janitor.

FEBRUARY 22, 2023

SEXUAL ABUSE, CHILD VICTIMS ACT, COURT OF CLAIMS.

IN THIS CHILD VICTIMS ACT CASE, THE ALLEGATION THE ABUSE TOOK PLACE IN 1982 – 1983 WAS SPECIFIC ENOUGH TO MEET THE PLEADING REQUIREMENTS OF THE COURT OF CLAIMS ACT (SECOND DEPT).

The Second Department, reversing the Court of Claims in this Child Victims Act proceeding, determined the claim sufficiently described when the sexual abuse occurred. The claimant alleged she was abused by a state employee in 1982 and 1983 when she was 17. The Court of Claims had dismissed the claim finding that the allegations when the abuse took place were not specific enough. The Second Department found the 1982 – 1983 time frame adequate:

Court of Claims Act § 11(b) "places five specific substantive conditions upon the State's waiver of sovereign immunity by requiring the claim to specify (1) the nature of [the claim]; (2) the time when it arose; (3) the place where it arose; (4) the items of damage or injuries claimed to have been sustained; and (5) the total sum claimed" … . ***

Under the particular circumstances of this case, the date ranges provided in the claim stating that the sexual abuse commenced in approximately 1982 and occurred "repeatedly" and "multiple times" from approximately 1982 to 1983, during periods when the claimant was directed to the Workshop to receive counseling, along with other information contained in the claim including, inter alia, that there was a criminal investigation, prosecution, and conviction of West based upon the claimant's complaints of sexual abuse, were sufficient to satisfy the "time when" requirement of Court of Claims Act § 11(b) … . Fenton v State of New York, 2023 NY Slip Op 00650, Second Dept 2-8-23

Practice Point: Here in this Child Victims Act case against a state employee, the allegation the sexual abuse took place in 1982 – 1983 was deemed specific enough to satisfy the pleading requirements in the Court of Claims Act.

Similar issues and result in Meyer v State of New York, 2023 NY Slip Op 00658, Second Dept 2-8-23

FEBRUARY 8, 2023

SLIP AND FALL, MUNICIPAL LAW, EVIDENCE, MUNICIPAL LAW.

PLAINTIFF STEPPED OFF A CURB AND FELL INTO A FOUR-FOOT DEEP STORM DRAIN; THE GRATE WHICH USUALLY COVERED THE DRAIN WAS FOUND AT THE BOTTOM; THE DEFENDANT MUNICIPALITY DID NOT DEMONSTRATE IT DID NOT HAVE CONSTRUCTIVE NOTICE OF THE CONDITION; DEFENDANT'S SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined defendant municipality's motion for summary judgment in this slip and fall case should not have been granted. Plaintiff stepped off a curb into a four-foot deep storm drain. The grate which usually covers the drain was found at the bottom of the drain. The municipality did not show the missing grate was not obvious or visible and did not prove when the area had last been inspected:

… [P]laintiff's testimony that he did not notice the uncovered storm drain before he stepped off the curb onto the street "does not establish defendants' entitlement to judgment as a matter of law on the issue whether that condition was visible and apparent" … . Indeed, plaintiff testified that he was looking for any oncoming traffic on the street before falling into the uncovered storm drain, which he observed immediately after he fell … . We further conclude that the photographs included in defendants' moving papers, which were taken within days of the accident and, according to plaintiff's testimony, constitute fair and accurate representations of the uncovered storm drain at the time of the accident …), raise a triable issue of fact whether the allegedly dangerous condition was visible and apparent … .

Moreover, while defendants submitted evidence that its employees generally maintained storm drains, including by cleaning them out and reporting missing grates, their submissions failed to establish when the storm drain into which

plaintiff fell was last cleaned out or inspected … . Lobianco v City of Niagara Falls, 2023 NY Slip Op 00787, Fourth Dept 2-10-23

Practice Point: The defendant municipality did not show the missing storm drain grate was not obvious or visible and did not show when the storm drain had last been inspected. Therefore the municipality did not show it did not have constructive notice of the condition and its summary judgment motion should not have been granted.

FEBRUARY 10, 2023

TRAFFIC ACCIDENTS, EVIDENCE.

THE PLAINTIFF MADE A LEFT TURN IN FRONT OF DEFENDANT WHEN DEFENDANT HAD THE RIGHT OF WAY; DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IN THIS TRAFFIC ACCIDENT CASE SHOULD HAVE BEEN GRANTED; PLAINTIFF'S AFFIDAVIT ALLEGING DEFENDANT ATTEMPTED TO GO AROUND ANOTHER VEHICLE WAS BASED ON SPECULATION WHICH IS NOT SUFFICIENT TO DEFEAT SUMMARY JUDGMENT (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined defendant's motion for summary judgment in this intersection traffic accident case should have been granted. Plaintiff made a left turn in front of defendant who had the right of way:

… [D]efendant met his initial burden of establishing that he was not negligent because he had the right-of-way while traveling along Route 5, was operating his vehicle in a lawful and prudent manner, and was traveling at a lawful rate of speed, and that there was nothing he could have done to avoid the accident, which occurred when plaintiff suddenly turned left into defendant's lane of travel … . We further conclude that plaintiff failed to raise an issue of fact in opposition to the motion … . Contrary to plaintiff's assertion, the deposition testimony did not raise an issue of fact whether defendant was negligently passing another vehicle on the right in violation of Vehicle and Traffic Law § 1123 at the time of the collision. Although there is conflicting deposition testimony concerning the precise lane in which defendant was traveling at the time of the collision, there is no dispute that defendant never changed lanes while driving along Route 5 at the time of the

collision. Thus, plaintiff's assertion that defendant unsafely attempted to go around another vehicle at the time of the accident " 'is based on speculation and is insufficient to defeat a motion for summary judgment' " … . Gomez v Buczynski, 2023 NY Slip Op 00771, Fourth Dept 2-10-23

Practice Point: The traffic accident was caused by plaintiff's making a left turn in front of defendant's oncoming car when defendant had the right of way. Plaintiff's affidavit alleging defendant was attempting to go around another car at the time of the accident was based on speculation which was not sufficient to defeat defendant's motion for summary judgment.

FEBRUARY 10, 2023

TRAFFIC ACCIDENTS, GRAVES AMENDMENT, EVIDENCE.

AFFIDAVITS NOT BASED ON PERSONAL KNOWLEDGE AND NOT SUPPORTED BY CERTIFIED BUSINESS RECORDS HAVE NO PROBATIVE VALUE; HERE THE AFFIDAVITS FAILED TO PROVE DEFENDANT WAS IN THE BUSINESS OF RENTING TRUCKS SUCH THAT THE GRAVE'S AMENDMENT APPLIED, AND FAILED TO PROVE THE TRUCK WAS PROPERLY MAINTAINED; DEFENDANT SHOULD NOT HAVE BEEN AWARDED SUMMARY JUDGMENT IN THIS TRAFFIC ACCIDENT CASE (FIRST DEPT).

The First Department, reversing Supreme Court, in a full-fledged opinion by Justice Mendez, determined defendant lessor of the truck which struck plaintiff's vehicle did not present sufficient evidence that it was in the business of renting trucks, such that the Grave's amendment applied, or that the truck was properly maintained. The defendant attempted to show it was in the business of renting trucks with affidavits which referred to documents that were not attached. In addition, the papers did not demonstrate the truck was properly maintained:

… [Defendant] failed to establish their entitlement to summary judgment under the Graves Amendment, which bars state law vicarious liability actions against owners of motor vehicles when (1) they are engaged in the trade or business of renting or leasing motor vehicles, (2) they leased the vehicle involved in the accident, (3) the subject accident occurred during the period of the lease or rental and (4) there is no

triable issue of fact as to the plaintiff's allegation of negligent maintenance contributing to the accident ,,, , ,,,

Neither affidavit sufficiently establishes the basis — personal knowledge or from identifiable business records — for the affiants' knowledge of the contents of the affidavits. Therefore, they are of no probative value.

The documents submitted with the motion cannot be admitted as business records because they are not certified, and the affidavits do not lay a sufficient foundation for their admissibility … . Although an affidavit that is not based on the affiant's personal knowledge may still serve to authenticate a document for its admissibility as a business record, as long as the affiant demonstrates sufficient personal knowledge of the document in question … , and the affidavit sufficiently establishes that the document falls within the business record exception to the hearsay rule … , here we are lacking both. The "acknowledgment of lease" letters — which refer to an unattached "previously executed Equipment Rental Agreement" — submitted with these affidavits are not certified as business records, nor do the affidavits lay a sufficient foundation for the letters' introduction as business records. Without a proper foundation, these documents are not admissible. …

When a plaintiff seeks to hold a vehicle owner liable for the failure to maintain a rented vehicle, the owner is not afforded protection under the Graves Amendment if it fails to demonstrate that it did not negligently maintain the vehicle … , or to prove that it was not responsible for the maintenance and repair of the vehicle during the lease … . Muslar v Hall, 2023 NY Slip Op 01063, First Dept 2-28-23

Practice Point: Affidavits must either be based upon the affiant's personal knowledge or supported by certified business records. Here the affidavits did not show defendant was in the business of renting trucks and did not show the truck involved in the accident was properly maintained. Therefore the Grave's amendment criteria were not proven and defendant was not entitled to summary judgment. The Grave's amendment provides that the vehicle-owner who is in the business of renting vehicles will not be liable for an accident if the vehicle was properly maintained.

FEBRUARY 28, 2023

TRAFFIC ACCIDENTS, INSURANCE LAW, ARBITRATION, CIVIL PROCEDURE.

THE PETITION TO STAY ARBITRATION PENDING A FRAMED ISSUE HEARING SHOULD HAVE BEEN GRANTED IN THIS UNINSURED MOTORIST TRAFFIC ACCIDENT CASE; PROCEDURAL CRITERIA EXPLAINED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the motion for a stay of arbitration pending a framed issue hearing should have been granted in this uninsured motorist traffic accident case:

"The party seeking a stay of arbitration has the burden of showing the existence of sufficient evidentiary facts to establish a preliminary issue which would justify the stay" … . "Thereafter, the burden shifts to the party opposing the stay to rebut the prima facie showing" … . "Where a triable issue of fact is raised, the Supreme Court, not the arbitrator, must determine it in a framed-issue hearing, and the appropriate procedure under such circumstances is to temporarily stay arbitration pending a determination of the issue" … .

Here, the appellants concede that Infinity [petitioner insurer] satisfied its prima facie burden of showing sufficient evidentiary facts to establish a preliminary issue that would justify a stay of arbitration. In support of its petition, Infinity submitted, inter alia, an affidavit from its investigator, who stated that he found that a claim for property damage was previously made to GEICO arising out of the subject accident … . In opposition, the appellants raised issues of fact as to whether GEICO's insured was involved in the accident … . Matter of Infinity Indem. Ins. Co. v Leo, 2023 NY Slip Op 01003, Second Dept 2-22-23

Practice Point: The procedural criteria for a determining a petition for a stay of arbitration pending a framed issue hearing in an uninsured motorist traffic accident case are explained.

FEBRUARY 22, 2023

TRAFFIC ACCIDENTS, REAR-END COLLISIONS, EVIDENCE.

AN AFFIDAVIT FROM A WITNESS TO THIS REAR-END TRAFFIC ACCIDENT STATING THAT PLAINTIFF WAS BACKING UP AT THE TIME DEFENDANT'S CAR STRUCK PLAINTIFF'S RAISED ONLY A QUESTION OF PLAINTIFF'S COMPARATIVE FAULT WHICH WILL NOT DEFEAT PLANTIFF'S MOTION FOR SUMMARY JUDGMENT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff's motion for summary judgment in this rear-end traffic accident case should have been granted. The affidavit of a witness stating that plaintiff was backing up when defendant's car struck it raised an issue of comparative negligence, which is no longer a bar to summary judgment:

"A driver of a vehicle approaching another vehicle from the rear is required to maintain a reasonably safe distance and rate of speed under the prevailing conditions to avoid colliding with the other vehicle" … . As such, "[a] rear-end collision with a stopped or stopping vehicle establishes a prima facie case of negligence on the part of the operator of the rear vehicle, thereby requiring that operator to rebut the inference of negligence by providing a non-negligent explanation for the collision" … . "A nonnegligent explanation includes, but is not limited to, sudden or unavoidable circumstances" … . "[V]ehicle stops which are foreseeable under the prevailing traffic conditions, even if sudden and frequent, must be anticipated by the driver who follows" … . "A plaintiff is no longer required to show freedom from comparative fault to establish her or his prima facie entitlement to judgment as a matter of law on the issue of liability"… .

… [T]he plaintiff submitted an affidavit in which he averred that his vehicle was at a full stop when it was struck in the rear by the defendants' vehicle … . In opposition, the defendants failed to rebut the inference of negligence by providing a nonnegligent explanation for the collision … . The defendants submitted an affidavit … a witness to the accident … who stated that he saw the plaintiff's vehicle backing up while the defendants' vehicle was moving forward and, as a result, the front of the defendants' vehicle made contact with the rear of the plaintiff's vehicle. … [The]statement that the plaintiff's vehicle was backing up … was insufficient to raise a triable issue of fact because that statement related only to the plaintiff's comparative fault … . An v Abbate, 2023 NY Slip Op 00977, Second Dept 2-22-23

Same result (but no comparative negligence evidence) in another rear-end traffic accident case: Balgobin v McKenzie, 2023 NY Slip Op 00978, Second Dept 2-22-23

Practice Point: Here a witness to the rear-end traffic accident provided an affidavit stating plaintiff was backing up when defendant struck the rear of plaintiff's car. The affidavit raised a question of plaintiff's comparative fault which was not enough to defeat plaintiff's motion for summary judgment.

FEBRUARY 22, 2023

TRAFFIC ACCIDENTS, TRUSTS AND ESTATES, CIVIL PROCEDURE, JUDGES, ATTORNEYS.

INSURANCE LAW. SUPREME COURT HAD THE POWER TO APPOINT THE PUBLIC ADMINISTRATOR TO REPRESENT THE ESTATE IN THIS TRAFFIC ACCIDENT CASE; DEFENSE COUNSEL REPRESENTED THE INSURER, NOT THE DEFENDANT ESTATE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined Supreme Court should have granted plaintiff's motion to appoint the Public Administrator to represent the defendant estate in this traffic accident case. Defense counsel represented the insurance company, not the estate:

… [C]ounsel's affirmation stated that he "was retained by Truck Insurance Exchange to represent the interests of their insured Arthur Ketterer herein." Under these circumstances, moving counsel lacked authority to represent the defendant estate … . …

In appropriate circumstances, the Supreme Court is empowered to appoint a temporary administrator, in order to "avoid delay and prejudice in a pending action" … . Such a determination is addressed to the broad discretion of the court … . Here, a Surrogate's Court decree appointed the Public Administrator to represent the estate of Arthur C. Ketterer in a related prior action. That decree did not expressly grant to the Public Administrator the authority to represent the defendant estate in this action. Under these circumstances, the plaintiff's cross-motion should have been granted, and we remit the matter to the Supreme Court, Kings County, for the appointment of a temporary administrator to represent the

defendant in the instant action … . Franco v Estate of Arthur C. Ketterer, 2023 NY Slip Op 00988, Second Dept 2-22-23

Practice Point: Here in this traffic accident case, defense counsel represented the insurer, not the defendant estate. Therefore Supreme Court had the authority, upon plaintiff's motion, to appoint the Public Administrator to represent the estate.

FEBRUARY 22, 2023

TRAFFIC ACCIDENTS, POLICE CAR, VEHICLE AND TRAFFIC LAW, MUNICIPAL LAW.

QUESTION OF FACT WHETHER THE POLICE OFFICER ACTED IN RECKLESS DISREGARD FOR THE SAFETY OF OTHERS WHEN HE ATTEMPTED TO MAKE A U-TURN TO PURSUE A VEHICLE AND STRUCK PLAINTIFF'S CAR (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendants in this police-car traffic accident case did not demonstrate the defendant officer (Hughes) did not act with reckless disregard for the safety for the safety of others when he attempted a U-turn and struck plaintiff's car:

"Conduct exempted from the rules of the road by Vehicle and Traffic Law § 1104(b) includes disregarding regulations governing the direction of movement or turning in "specified directions" … . Here, the defendants established, prima facie, that Hughes's conduct in attempting to execute a U-turn to pursue a suspected violator of the law was exempted from the rules of the road by Vehicle and Traffic Law § 1104(b)(4), and that, as a result, his conduct was governed by the reckless disregard standard of care in Vehicle and Traffic Law § 1104€ … .

… The reckless disregard standard "requires evidence that 'the actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow' and has done so with conscious indifference to the outcome" … .
… Hughes testified that after the offending vehicle passed him, he took his eyes off the road and looked into his left side mirror to see the offending vehicle's license plate number. When he resumed looking straight ahead, the plaintiff's vehicle was less than half a car length in front of him. Although Hughes testified

that he applied the brakes once he saw the plaintiff's vehicle, the plaintiff testified that the collision occurred when Hughes turned sharply into the path of the plaintiff's vehicle and then accelerated. … Hughes did not activate his turn signal, lights, or siren before he started the U-turn. … [D]efendants' submissions presented a triable issue of fact as to whether Hughes was reckless in attempting to make a U-turn without taking precautionary measures to avoid causing harm to others … . Bourdierd v City of Yonkers, 2023 NY Slip Op 00981, Second Dept 2-22-23

Practice Point: The evidence that the police officer took his eyes off the road in front of him before attempting a U-turn and striking plaintiff's car raised a question of fact whether the officer acted in reckless disregard of the safety of others (Vehicle & Traffic Law 1104).

FEBRUARY 22, 2023