

NEW YORK APPELLATE DIGEST, LLC

An Organized Compilation of Selected Decisions, Mostly Reversals, Released by Our New York State Appellate Courts February 27 – March 3, 2023, and Posted on the New York Appellate Digest Website on Monday, March 6, 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. Copyright 2023 New York Appellate Digest, LLC

Weekly Reversal
Newsletter
February 27 – March
3, 2023

Contents

CIVIL PROCEDURE, EVIDENCE, JUDGES.....	3
AFTER AN IMPORTANT PLAINTIFFS' WITNESS BECAME ILL DURING CROSS-EXAMINATION AND WAS TAKEN BY AMBULANCE TO THE HOSPITAL, THE JUDGE, SUA SPONTE, DECLARED THE WITNESS UNAVAILABLE, STRUCK HIS TESTIMONY AND ADMITTED HIS DEPOSITION TESTIMONY; THERE WAS NO SUPPORT IN THE RECORD FOR THE FINDING THE WITNESS WOULD BE UNABLE TO TESTIFY; JUDGMENT REVERSED (SECOND DEPT).....	3
CIVIL PROCEDURE.....	4
THE MOTION TO CHANGE VENUE WAS MADE MORE THAN 15 DAYS AFTER THE DEMAND TO CHANGE VENUE; THE 15-DAY TIME-LIMIT IS STRICTLY ENFORCED AND THE MOTION SHOULD HAVE BEEN DENIED (FIRST DEPT).	4
CRIMINAL LAW, EVIDENCE.....	4
ALTHOUGH DEFENDANT AND DEFENDANT'S SISTER TOLD THE COMPLAINANT TO HAVE SEX WITH THEIR BOYFRIENDS, THERE WAS NO EVIDENCE OF FORCIBLE COMPULSION; DEFENDANT, WHO RECORDED SOME OF THE SEXUAL ACTS, HAD A REASONABLE BELIEF COMPLAINANT WAS OVER 17; RAPE, CRIMINAL SEXUAL ACT AND USE OF A CHILD IN A SEXUAL PERFORMANCE CONVICTIONS REVERSED (SECOND DEPT).....	4
CRIMINAL LAW, EVIDENCE.....	5
EVIDENCE DEFENDANT COMMITTED A BANK ROBBERY ONE MONTH AFTER THE CHARGED MURDER WAS NOT ADMISSIBLE UNDER MOLINEUX TO FILL IN A GAP IN THE EVIDENCE OR EXPLAIN A RELATIONSHIP WITH A WITNESS OR TO SHOW A CONSCIOUSNESS OF GUILT; A WITNESS SHOULD NOT HAVE BEEN ALLOWED TO TESTIFY DEFENDANT THREATENED TO KILL ANOTHER WITNESS UNDER THE "OPENING THE DOOR" THEORY BECAUSE THERE WAS NO MISLEADING TESTIMONY WHICH NEEDED TO BE CORRECTED (SECOND DEPT).....	5
CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA).....	6
20 POINTS SHOULD NOT HAVE BEEN ASSESSED UNDER RISK FACTOR 7 (RELATIONSHIP WITH THE VICTIM) BECAUSE THE VICTIM WAS NOT A STRANGER; ALTHOUGH SUBTRACTING 20 POINTS WOULD RESULT IN A LEVEL TWO SEX OFFENDER CLASSIFICATION, THE MATTER WAS SENT BACK BECAUSE THE PEOPLE INDICATED IF DEFENDANT WAS NOT DESIGNATED A LEVEL THREE OFFENDER THEY WOULD SEEK AN UPWARD DEPARTURE (SECOND DEPT).....	6
CRIMINAL LAW.....	6
CRIMINAL POSSESSION OF A WEAPON SECOND DEGREE AND CRIMINAL POSSESSION OF A FIREARM ARE INCLUSORY CONCURRENT COUNTS (SECOND DEPT).	6
EDUCATION-SCHOOL LAW, NEGLIGENCE.....	7
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 APPARENTLY 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).	7

[Table of Contents](#)

EMPLOYMENT LAW, ADMINISTRATIVE LAW, COVID..... 7

PETITIONER OPERATED HIS BARBER SHOP OUT OF HIS HOME IN MARCH 2020 AFTER THE GOVERNOR ORDERED BARBER SHOPS CLOSED DUE TO COVID-19; REVOCATION OF PETITIONER’S BARBER LICENSES WAS DEEMED TOO SEVERE A PENALTY; THERE WAS A DISSENT (THIRD DEPT). 7

ENVIRONMENTAL LAW, ZONING..... 8

PERMIT/ORDER ALLOWING DEVELOPMENT OF MARINAS ON LOWER SARANAC LAKE IN THE ADIRONDACK PARK ANNULLED (THIRD DEPT)..... 8

FAMILY LAW, EVIDENCE..... 8

EVIDENCE OF NEGLIGENCE BASED UPON ALCOHOL USE WAS INSUFFICIENT; THE BASIS WAS OUT-OF-COURT STATEMENTS OF THE CHILD WHICH WERE NOT CORROBORATED (FIRST DEPT)..... 8

FAMILY LAW, JUDGES, ATTORNEYS. 9

A JUDGE MAY NOT ORDER THAT ONLY THE ATTORNEY FOR THE CHILD (AFC), AND NOT THE DEPARTMENT OF SOCIAL SERVICES, IS ALLOWED TO DISCUSS MATTERS OF SURRENDER OR ADOPTION WITH THE CHILD; SUCH AN ORDER INTERFERES WITH THE DEPARTMENT’S STATUTORY DUTIES (THIRD DEPT)..... 9

INSURANCE LAW, NEGLIGENCE. 9

THE INJURED PARTY WAS STRUCK WITH A BATON IN AN ALTERCATION OUTSIDE A BAR; IT WAS ALLEGED THE INJURY WAS ACCIDENTAL; THE INSURER SOUGHT A DECLARATORY JUDGMENT RE: THE OBLIGATION TO DEFEND AND INDEMNIFY; THERE WERE QUESTIONS OF FACT WHETHER THE INCIDENT FELL OUTSIDE THE COVERAGE OF THE POLICY (NO DISCLAIMER REQUIRED) OR WHETHER THE INCIDENT WAS SUBJECT TO A POLICY EXCLUSION (TIMELY DISCLAIMER REQUIRED) (SECOND DEPT)..... 9

LANDLORD-TENANT, MUNICIPAL LAW, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL), REAL PROPERTY LAW. 10

AN ALBANY LOCAL LAW ADDED RESTRICTIONS TO EVICTION PROCEEDINGS AND RENT INCREASES WHICH ARE NOT IN THE STATE’S REAL PROPERTY ACTIONS AND PROCEEDINGS LAW AND REAL PROPERTY LAW; THE LOCAL LAW WAS THEREFORE PREEMPTED BY THE STATE LAW (CONFLICT PREEMPTION) (THIRD DEPT). 10

LEGAL MALPRACTICE. 10

CONCLUSORY AND SPECULATIVE ALLEGATIONS PLAINTIFF WOULD NOT HAVE LOST ITS DISADVANTAGED BUSINESS ENTERPRISE (DBE) STATUS HAD DEFENDANT ATTORNEYS NOT FAILED TO FILE AN ADMINISTRATIVE APPEAL AND REQUEST A HEARING WERE NOT SUFFICIENT TO SURVIVE A MOTION TO DISMISS PURSUANT TO CPLR 3211 (A) (SECOND DEPT). 10

NEGLIGENCE, SLIP AND FALL, MUNICIPAL LAW. 11

DEFENDANT NYC HOUSING AUTHORITY (NYCHA) UNILATERALLY ADJOURNED THE 50-H HEARING IN THIS SLIP AND FALL CASE AND ALLEGEDLY SENT A FOLLOW-UP LETTER TO PLAINTIFF; PLAINTIFF DENIED RECEIPT OF THE LETTER AND DEFENDANT IMPROPERLY SUBMITTED AN AFFIDAVIT OF SERVICE IN REPLY; THE AFFIDAVIT WAS NOT CONSIDERED; IN ADDITION, THE AFFIDAVIT DID NOT PROVE THE LETTER WAS MAILED TO PLAINTIFF (SECOND DEPT). 11

[Table of Contents](#)

NEGLIGENCE, TRAFFIC ACCIDENTS, GRAVES AMENDMENT, EVIDENCE..... 11

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)..... 11

NEGLIGENCE, TRAFFIC ACCIDENTS. 12

DEFENDANT’S CAR WAS STRUCK BY AN ONCOMING CAR WHICH CROSSED A DOUBLE YELLOW LINE; DEFENDANT WAS ENTITLED TO SUMMARY JUDGMENT PURSUANT TO THE EMERGENCY DOCTRINE (SECOND DEPT). 12

NEGLIGENCE, TRAFFIC ACCIDENTS. 12

IN A REAR-END COLLISION, THE ALLEGATION THE CAR IN FRONT STOPPED SHORT DOES NOT RAISE A QUESTION OF FACT (FIRST DEPT). 12

NEGLIGENCE, TRAFFICE ACCIDENTS. 13

THE ALLEGATION THE CAR IN FRONT MADE A SUDDEN STOP DOES NOT RAISE A QUESTION OF FACT IN A REAR-END COLLISION (SECOND DEPT). 13

CIVIL PROCEDURE, EVIDENCE, JUDGES.

AFTER AN IMPORTANT PLAINTIFFS’ WITNESS BECAME ILL DURING CROSS-EXAMINATION AND WAS TAKEN BY AMBULANCE TO THE HOSPITAL, THE JUDGE, SUA SPONTE, DECLARED THE WITNESS UNAVAILABLE, STRUCK HIS TESTIMONY AND ADMITTED HIS DEPOSITION TESTIMONY; THERE WAS NO SUPPORT IN THE RECORD FOR THE FINDING THE WITNESS WOULD BE UNABLE TO TESTIFY; JUDGMENT REVERSED (SECOND DEPT).

[244 Linwood One, LLC v Tio Deli Grocery Corp., 2023 NY Slip Op 01072, Second Dept 3-1-23](#)

Practice Point: Here a witness became ill during cross-examination and was taken to the hospital by ambulance. Without putting any additional information on the record, the judge declared the witness unavailable, struck his testimony and admitted his deposition. Because there was no support in the record for the judge’s

[Table of Contents](#)

(sua sponte) determination the witness would not be able to testify, the judgment after trial was reversed.

MARCH 1, 2023

CIVIL PROCEDURE.

THE MOTION TO CHANGE VENUE WAS MADE MORE THAN 15 DAYS AFTER THE DEMAND TO CHANGE VENUE; THE 15-DAY TIME-LIMIT IS STRICTLY ENFORCED AND THE MOTION SHOULD HAVE BEEN DENIED (FIRST DEPT).

[Gomez v Cypser, 2023 NY Slip Op 01060, First Dept 2-28-23](#)

Practice Point: Once defendant makes a demand to change venue, defendant has 15 days to make a motion to change venue pursuant to CPLR 511(b). The 15-day time-limit is strictly enforced. Here the motion was made 20 days after the demand and Supreme Court should not have granted it.

FEBRUARY 28, 2023

CRIMINAL LAW, EVIDENCE.

ALTHOUGH DEFENDANT AND DEFENDANT'S SISTER TOLD THE COMPLAINANT TO HAVE SEX WITH THEIR BOYFRIENDS, THERE WAS NO EVIDENCE OF FORCIBLE COMPULSION; DEFENDANT, WHO RECORDED SOME OF THE SEXUAL ACTS, HAD A REASONABLE BELIEF COMPLAINANT WAS OVER 17; RAPE, CRIMINAL SEXUAL ACT AND USE OF A CHILD IN A SEXUAL PERFORMANCE CONVICTIONS REVERSED (SECOND DEPT).

[People v Patterson, 2023 NY Slip Op 01103, Second Dept 3-1-23](#)

Practice Point: Here, although the defendant told the complainant to have sex with her boyfriend, there was no evidence of forcible compulsion. There also was no evidence defendant, who recorded some of the sexual acts, was aware the complainant was less than 17. Rape, criminal sexual act and use of a child in a sexual performance convictions reversed.

MARCH 1, 2023

CRIMINAL LAW, EVIDENCE.

EVIDENCE DEFENDANT COMMITTED A BANK ROBBERY ONE MONTH AFTER THE CHARGED MURDER WAS NOT ADMISSIBLE UNDER MOLINEUX TO FILL IN A GAP IN THE EVIDENCE OR EXPLAIN A RELATIONSHIP WITH A WITNESS OR TO SHOW A CONSCIOUSNESS OF GUILT; A WITNESS SHOULD NOT HAVE BEEN ALLOWED TO TESTIFY DEFENDANT THREATENED TO KILL ANOTHER WITNESS UNDER THE “OPENING THE DOOR” THEORY BECAUSE THERE WAS NO MISLEADING TESTIMONY WHICH NEEDED TO BE CORRECTED (SECOND DEPT).

[People v Smith, 2023 NY Slip Op 01106, Second Dept 3-1-23](#)

Practice Point: This decision demonstrates the limits that should be placed on allowing Molineux (other-crime) evidence to come in. Evidence defendant committed a bank robbery after the charged murder was not necessary to fill in a gap in the proof, explain a relationship with a witness or to demonstrate a consciousness of guilt. Testimony the defendant threatened to kill another witness was not admissible under the “opening the door” theory because there was no misleading testimony to be corrected.

MARCH 1, 2023

[Table of Contents](#)

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA).

20 POINTS SHOULD NOT HAVE BEEN ASSESSED UNDER RISK FACTOR 7 (RELATIONSHIP WITH THE VICTIM) BECAUSE THE VICTIM WAS NOT A STRANGER; ALTHOUGH SUBTRACTING 20 POINTS WOULD RESULT IN A LEVEL TWO SEX OFFENDER CLASSIFICATION, THE MATTER WAS SENT BACK BECAUSE THE PEOPLE INDICATED IF DEFENDANT WAS NOT DESIGNATED A LEVEL THREE OFFENDER THEY WOULD SEEK AN UPWARD DEPARTURE (SECOND DEPT).

[People v Perez, 2023 NY Slip Op 01108, Second Dept 3-1-23](#)

Practice Point: Defendant should not have been assessed 20 points under risk factor 7 because the victim was not a stranger. Subtracting 20 points designated defendant a level two sex offender. Because the People indicated they would seek an upward departure if defendant was not designated a level three offender, the matter was remitted.

MARCH 1, 2023

CRIMINAL LAW.

CRIMINAL POSSESSION OF A WEAPON SECOND DEGREE AND CRIMINAL POSSESSION OF A FIREARM ARE INCLUSORY CONCURRENT COUNTS (SECOND DEPT).

[People v Harvey, 2023 NY Slip Op 01099, Second Dept 3-1-23](#)

Practice Point: Criminal possession of a weapon second degree and criminal possession of a firearm are inclusory concurrent counts. The criminal possession of a firearm conviction and sentence were vacated.

MARCH 1, 2023

EDUCATION-SCHOOL LAW, NEGLIGENCE.

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 APPARENTLY 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).

[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

EMPLOYMENT LAW, ADMINISTRATIVE LAW, COVID.

PETITIONER OPERATED HIS BARBER SHOP OUT OF HIS HOME IN MARCH 2020 AFTER THE GOVERNOR ORDERED BARBER SHOPS CLOSED DUE TO COVID-19; REVOCATION OF PETITIONER'S BARBER LICENSES WAS DEEMED TOO SEVERE A PENALTY; THERE WAS A DISSENT (THIRD DEPT).

[Matter of Lalima v New York State Dept. of State, 2023 NY Slip Op 01121, Third Dept 3-2-23](#)

Practice Point: Here revocation of petitioner's barber licenses was deemed too severe a penalty. After the governor ordered barber shops closed in March 2020 due to COVID, petitioner continued cutting hair in his home.

MARCH 2, 2023

ENVIRONMENTAL LAW, ZONING.

PERMIT/ORDER ALLOWING DEVELOPMENT OF MARINAS ON LOWER SARANAC LAKE IN THE ADIRONDACK PARK ANNULLED (THIRD DEPT).
[Matter of Jorling v Adirondack Park Agency, 2023 NY Slip Op 01118, Third Dept 3-2-23](#)

Practice Point: Here the Adirondack Park Agency misapplied its wetlands regulations with respect to a permit for the development of marinas on Lower Saranac Lake in the Adirondack Park. The permit/order was therefore annulled.

MARCH 2, 2023

FAMILY LAW, EVIDENCE.

EVIDENCE OF NEGLIGENCE BASED UPON ALCOHOL USE WAS INSUFFICIENT; THE BASIS WAS OUT-OF-COURT STATEMENTS OF THE CHILD WHICH WERE NOT CORROBORATED (FIRST DEPT).
[Matter of Kaylee S. \(Kyle L. S.\), 2023 NY Slip Op 01150, First Dept 3-2-23](#)

Practice Point: A neglect finding based upon uncorroborated out-of-court statements by a child is not supported by a preponderance of the evidence.

MARCH 2, 2023

FAMILY LAW, JUDGES, ATTORNEYS.

A JUDGE MAY NOT ORDER THAT ONLY THE ATTORNEY FOR THE CHILD (AFC), AND NOT THE DEPARTMENT OF SOCIAL SERVICES, IS ALLOWED TO DISCUSS MATTERS OF SURRENDER OR ADOPTION WITH THE CHILD; SUCH AN ORDER INTERFERES WITH THE DEPARTMENT'S STATUTORY DUTIES (THIRD DEPT).

[Matter of Michael H. \(Catherine I.\), 2023 NY Slip Op 01119, Third Dept 3-2-23](#)

Practice Point: Family Court can not order the Department of Social Services to refrain from discussing matters of surrender or adoption with the child. Here the attorney for the child (AFC) asked Family Court for the order allowing only the AFC to discuss surrender or adoption with the child and the request was granted.

MARCH 2, 2023

INSURANCE LAW, NEGLIGENCE.

THE INJURED PARTY WAS STRUCK WITH A BATON IN AN ALTERCATION OUTSIDE A BAR; IT WAS ALLEGED THE INJURY WAS ACCIDENTAL; THE INSURER SOUGHT A DECLARATORY JUDGMENT RE: THE OBLIGATION TO DEFEND AND INDEMNIFY; THERE WERE QUESTIONS OF FACT WHETHER THE INCIDENT FELL OUTSIDE THE COVERAGE OF THE POLICY (NO DISCLAIMER REQUIRED) OR WHETHER THE INCIDENT WAS SUBJECT TO A POLICY EXCLUSION (TIMELY DISCLAIMER REQUIRED) (SECOND DEPT).

[Mapfre Ins. Co. of N.Y. v Ferrall, 2023 NY Slip Op 01082, Second Dept 3-1-23](#)

Practice Point: Here there was an altercation outside a bar and the injured party was struck with a baton. It was alleged the injury was accidental and the insurer sought a declaratory judgment on its obligation to defend and indemnify. There were questions of fact whether the incident fell within the coverage terms (if so, no disclaimer was required) and whether the incident was subject to an exclusion from coverage (if so, a timely disclaimer was required).

MARCH 1, 2023

LANDLORD-TENANT, MUNICIPAL LAW, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL), REAL PROPERTY LAW.

AN ALBANY LOCAL LAW ADDED RESTRICTIONS TO EVICTION PROCEEDINGS AND RENT INCREASES WHICH ARE NOT IN THE STATE'S REAL PROPERTY ACTIONS AND PROCEEDINGS LAW AND REAL PROPERTY LAW; THE LOCAL LAW WAS THEREFORE PREEMPTED BY THE STATE LAW (CONFLICT PREEMPTION) (THIRD DEPT).

[Pusatere v City of Albany, 2023 NY Slip Op 01124, Third Dept 3-2-23](#)

Practice Point: Here an Albany Local Law added restrictions to eviction proceedings and rent increases which are not in the state's Real Property Actions and Proceedings Law and Real Property Law. The Local Law was therefore preempted by the state law (conflict preemption). Ultimately the entire Local Law was nullified.

MARCH 1, 2023

LEGAL MALPRACTICE.

CONCLUSORY AND SPECULATIVE ALLEGATIONS PLAINTIFF WOULD NOT HAVE LOST ITS DISADVANTAGED BUSINESS ENTERPRISE (DBE) STATUS HAD DEFENDANT ATTORNEYS NOT FAILED TO FILE AN ADMINISTRATIVE APPEAL AND REQUEST A HEARING WERE NOT SUFFICIENT TO SURVIVE A MOTION TO DISMISS PURSUANT TO CPLR 3211 (A) (SECOND DEPT).

[Mid City Elec. Corp. v Peckar & Abramson, 2023 NY Slip Op 01085, Second Dept 3-1-23](#)

Practice Point: To survive a motion to dismiss the complaint in a legal malpractice action, the plaintiff must make specific factual allegations demonstrating that but for the attorney's negligence the outcome would have been more favorable. Conclusory or speculative "but for" allegations are not enough.

MARCH 1, 2023

NEGLIGENCE, SLIP AND FALL, MUNICIPAL LAW.

DEFENDANT NYC HOUSING AUTHORITY (NYCHA) UNILATERALLY ADJOURNED THE 50-H HEARING IN THIS SLIP AND FALL CASE AND ALLEGEDLY SENT A FOLLOW-UP LETTER TO PLAINTIFF; PLAINTIFF DENIED RECEIPT OF THE LETTER AND DEFENDANT IMPROPERLY SUBMITTED AN AFFIDAVIT OF SERVICE IN REPLY; THE AFFIDAVIT WAS NOT CONSIDERED; IN ADDITION, THE AFFIDAVIT DID NOT PROVE THE LETTER WAS MAILED TO PLAINTIFF (SECOND DEPT).

[Acevedo v Hope Gardens I, LLC, 2023 NY Slip Op 01073, Second Dept 3-1-23](#)

Practice Point: Yet again an affidavit did not prove a document was mailed because the affiant did not have personal knowledge of the mailing and there was no evidence of a standard office practice to ensure proper mailing.

MARCH 1, 2023

NEGLIGENCE, 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).

[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

NEGLIGENCE, TRAFFIC ACCIDENTS.

DEFENDANT'S CAR WAS STRUCK BY AN ONCOMING CAR WHICH CROSSED A DOUBLE YELLOW LINE; DEFENDANT WAS ENTITLED TO SUMMARY JUDGMENT PURSUANT TO THE EMERGENCY DOCTRINE (SECOND DEPT).

[Lizares v Conklin, 2023 NY Slip Op 01081, Second Dept 3-1-23](#)

Practice Point: A driver is not obligated to anticipate that an oncoming car will cross a double yellow line into the driver's lane. In such a situation, the emergency doctrine applies to insulate the driver from liability.

MARCH 1, 2023

NEGLIGENCE, TRAFFIC ACCIDENTS.

IN A REAR-END COLLISION, THE ALLEGATION THE CAR IN FRONT STOPPED SHORT DOES NOT RAISE A QUESTION OF FACT (FIRST DEPT).

[Obando v Espeut, 2023 NY Slip Op 01144, First Dept 3-2-23](#)

Practice Point: In a rear-end collision case, the allegation by the driver of the rear-most car that the car in front stopped short is not a non-negligent explanation for the accident.

MARCH 2, 2023

NEGLIGENCE, TRAFFICE ACCIDENTS.

THE ALLEGATION THE CAR IN FRONT MADE A SUDDEN STOP DOES NOT RAISE A QUESTION OF FACT IN A REAR-END COLLISION (SECOND DEPT).

[Genao v Cassetta, 2023 NY Slip Op 01078, Second Dept 3-1-23](#)

Practice Point: In a rear-end collision case, the allegation the car in front made a sudden stop does not raised a question of fact about whether there is a non-negligent explanation for the accident.

MARCH 1, 2023

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