NEW YORK APPELLATE DIGEST, LLC

Personal Injury
Reversal Report
April 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 April 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.

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ASSUMPTION OF THE RISK, DEMOLITION DERBY.

ALTHOUGH PLAINTIFF SIGNED A RELEASE AND WAIVER OF LIABILITY BEFORE ATTENDING THE DEMOLITION DERBY, PLAINTIFF RAISED A QUESTION OF FACT WHETHER DEFENDANT UNREASONABLY INCREASED THE RISK BY FAILING TO INSTALL SUFFICIENT BARRIERS TO PROTECT SPECTATORS FROM THE VEHICLES IN THE DERBY (THIRD DEPT).

The Third Department, reversing Supreme Court, determined defendant raised a question of fact whether defendant unreasonably increased the risk of injury at a demolition derby by failing to install sufficient barriers to protect the public from injury. Here one of the cars in the derby pushed through the concrete barriers and injured the plaintiff:

The issue … distills to whether plaintiff's submissions "demonstrate[d] facts from which it could be concluded that defendant unreasonably enhanced the danger or created conditions which were unique or above those inherent in the activity" … . To that end, in his opposition to the motion, plaintiff submitted an affidavit averring that he was not warned that there was a risk that participating vehicles could break through the barricade and strike spectators. Plaintiff also proffered the expert affidavit of Russell E. Darnell, a licensed engineering contractor and certified National Institute of Automotive Service Excellence master technician who holds several racing licenses. … Darnell opined, among other things, that these barriers "were not up to the standard of the industry and are not generally accepted within the demolition derby community which requires sturdy, immovable barricades in a protective ring." Waite v County of Clinton, N.Y., 2023 NY Slip Op 01831, Third Dept 4-6-23

Practice Point: The assumption-of-the-risk doctrine will not apply if the defendant unreasonably increased the risks associated with the activity. Here plaintiff raised a question fact whether the risk to spectators at a demolition derby was increased by the failure to install sufficient barriers between the spectators and the derby vehicles.

APRIL 6, 2023

ASSUMPTION OF THE RISK, EDUCATION-SCHOOL LAW.

THE COURT OF APPEALS UPHELD THE VIABILITY OF THE ASSUMPTION OF THE RISK DOCTRINE AS IT APPLIES TO SCHOOL SPORTS; AN EXTENSIVE DISSENT ARGUED THE DOCTRINE SHOULD BE ABANDONED (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Garcia, over two dissenting opinions, one of which argued the implied assumption of risk doctrine should be abandoned, determined the dismissal of one of the school-sports-assumption-of-risk cases before it (Stecky) should be affirmed and the dismissal of the other (Grady) should be reversed because it raised unresolved questions of fact:

In Secky, the primary assumption of risk doctrine applies, and we affirm the Appellate Division order granting defendants' motion for summary judgment. Plaintiff, who had played basketball at the highest amateur student level, was injured during a drill in which the players competed to retrieve a rebound. Plaintiff's coach had explained that the boundary lines of the court would not apply during the drill and that only major fouls would be called. At the time of the drill, bleachers stationed near the court were retracted. Plaintiff was injured when, pursuing a loose ball from the top of the key towards the bleachers, another player collided with him, causing plaintiff to fall into the bleachers and sustain an injury to his right shoulder. Plaintiff, through his mother, sued the coach and the school district, and defendants moved for summary judgment. * * *

… [P]laintiff's injury is one inherent in the sport of basketball and so he assumed the risk of the injury he sustained. …

In Grady, by contrast, material issues of fact remain to be resolved by a jury. Plaintiff, a senior on the Chenango Valley High School varsity baseball team, was injured during his participation in a fast-moving, intricate drill. The drill involved two coaches hitting balls to players stationed in the infield, with one coach hitting to the third baseman, who would then throw to first base, while another coach hit to the shortstop, who would throw to the second baseman who would, in turn, throw to a player at "short first base," positioned a few feet from regulation first base. Because the drill required baseballs from two parts of the infield to be thrown to two players in the same area by first base, the coaches had positioned a protective screen, measuring seven by seven, between the regulation first baseman and the short first baseman. Plaintiff, in the group of players assigned to first base, was injured when an errant ball, intended for the short first baseman, bypassed the

short first baseman and the protective screen and hit him on the right side of his face, causing serious injury to his eye including significant vision loss. …

… [P]laintiff has raised triable questions of fact regarding whether the drill, as conducted here and with the use of the seven-by-seven-foot screen, "was unique and created a dangerous condition over and above the usual dangers that are inherent" in baseball … , and whether plaintiff's awareness of the risks inherent in both the game of baseball and the practices that are a necessary part of participation in organized sports encompassed the risks arising from involvement in the drill performed here. Grady v Chenango Val. Cent. Sch. Dist., 2023 NY Slip Op 02142, CtApp 4-27-23

Practice Point: The majority rejected the dissenter's argument that the assumption of risk doctrine should be abandoned.

APRIL 27, 2023

CHILD VICTIMS ACE, CIVIL PROCEDURE, CIVIL RIGHTS LAW, FAMILY LAW.

THE EXTENDED STATUTE OF LIMITATIONS IN THE CHILD VICTIMS ACT DOES NOT APPLY TO CIVIL RIGHTS CAUSES F ACTION PURSUANT TO 42 USC 1983; THE DUTY TO REPORT CHILD ABUSE UNDER THE SOCIAL SERVICES LAW APPLIES ONLY TO "PERSONS LEGALLY RESPONSIBLE" FOR THE CARE OF THE CHILD, WHICH DOES NOT INCLUDE TEACHERS (THIRD DEPT).

The Third Department, in a full-fledged opinion by Justice Aarons, reversing (modifying) Supreme Court, determined the negligence and civil rights causes of action against the school district in this Child Victims Act suit were properly dismissed, and the Social Services Law causes of action should have been dismissed. The complaints alleged sexual abuse by a teacher. The Third Department followed the Fourth Department holding that the extended statute of limitations in the Child Victims Act did not apply to the 42 USC 1983 civil rights causes of action. The Third Department also determined the teacher was not a "person legally responsible" for the plaintiffs such that the abuse-reporting requirement in the Social Services Law applied to the school district:

It is true that CPLR 214-g contains broad language. The statute nonetheless limits the types of causes of action — i.e., claims involving child sexual abuse — that are revived and then given a new limitations period. … 42 USC § 1983 does not create any independent, substantive rights but merely provides a vehicle to enforce such rights … .

As the Fourth Department reasoned, to determine whether CPLR 214-g was a related revival statute would require a court to impermissibly consider the particular facts or particular legal theory advanced by a plaintiff in a section 1983 claim (see BL Doe 3 v Female Academy of the Sacred Heart, 199 AD3d at 1422). Accordingly, we decline plaintiffs' invitation to reject the Fourth Department's approach as articulated in BL Doe 3 v Female Academy of the Sacred Heart … . * * *

… [C]ertain individuals must report cases of suspected abuse when reasonable cause exists that a child coming before them is an abused child (see Social Services Law § 413). Civil liability may be imposed upon these individuals who knowingly and willfully fail to make the requisite report (see Social Services Law § 420 [2]). … [F]or purposes of Social Services Law § 413, an "abused child" is one who is abused by a "parent or other person legally responsible for [a child's] care" (Family Ct Act § 1012 [e]; see Social Services Law § 412 [1]).

The School District maintains that plaintiffs' statutory claim should have been dismissed because Wales [defendant teacher] was not a "person legally responsible" for plaintiffs' care at the time of the alleged abuse. … [W]hether an individual constitutes a "person legally responsible" for a child within the meaning of Family Ct Act § 1012 (e) entails the examination of various factors … . The Court of Appeals cautioned … that "persons who assume fleeting or temporary care of a child . . . or those persons who provide extended daily care of children in institutional settings, such as teachers," should not be interpreted as a "person legally responsible" for a child's care … . … [T]he School District cannot be liable for any alleged failure to report any abuse by Wales … . Dolgas v Wales, 2023 NY Slip Op 01830, Third Dept 4-6-23

Practice Point: Here the school district was sued under the Child Victims Act alleging sexual abuse by a teacher. The civil rights causes of action pursuant to 42 USC 1983 are not subject to the extended statute of limitations in the Child Victims Act and, therefore, those causes of action were properly dismissed.

Practice Point: A teacher is not a "person legally responsible" for the care of a child within the meaning of the Family Court Act. Therefore the causes of action under the Social Services Law alleging the school district failed to report abuse by a teacher should have been dismissed.

APRIL 6, 2023

CHILD VICTIMS ACT, COURT OF CLAIMS.

ALTHOUGH THE REQUIREMENTS FOR THE CONTENTS OF A CLAIM AGAINST THE STATE IN COURT OF CLAIMS ACT SECTION 11 ARE STRICT AND JURISDICTIONAL, THE CLAIMANT IS NOT REQUIRED TO ALLEGE EVIDENTIARY FACTS (SECOND DEPT).

The Second Department, reversing the Court of Claims, determined the claim in this Child Victims Act proceeding sufficiently stated the nature of the claim. The claimant alleged he was sexually abused in state-run foster homes every week for two years (1994 – 1996}. The claim alleged negligent hiring, retention or supervision:

The only reason identified by the Court of Claims in the order appealed from, and by the defendant on appeal, for concluding that the claim failed to state the nature of the claim is that, while the claim included an allegation that the defendant had actual or constructive notice of the alleged sexual abuse, it did not supply any "details" as to how the defendant received notice of the alleged abuse. Although the requirements of Court of Claims Act § 11(b) are strict, and jurisdictional in nature, the fact remains that the claim is a pleading, the contents of which are merely allegations. As the defendant correctly contends, "[a] necessary element of a cause of action to recover damages for negligent hiring, retention, or supervision is that the employer knew or should have known of the employee's propensity for the conduct which caused the injury" … . Nonetheless, "[c]auses of action alleging negligence based upon negligent hiring, retention, or supervision are not statutorily required to be pleaded with specificity" ,,, . The manner in which the defendant acquired actual or constructive notice of the alleged abuse is an evidentiary fact, to be proved by the claimant at trial. In a pleading, "the plaintiff need not allege his [or her] evidence" … . Martinez v State of New York, 2023 NY Slip Op 01990, Second Dept 4-19-23

Practice Point: A claim (i.e., the pleading) against the state must meet the strict, jurisdictional "contents" requirements in Court of Claims Act section 11. But the claim is merely a pleading and need not allege evidentiary facts to survive a motion to dismiss.

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CHILD VICTIMS ACT, LONG-ARM JURISDICTION.

NEW YORK HAS LONG-ARM JURISDICTION OVER A SINGLE ALLEGED ACT OF SEXUAL ABUSE WHICH OCCURRED IN NEW YORK IN 1975 OR 1976 WHEN PLAINTIFF WAS ON A FIELD TRIP; THE ACTION WAS BROUGHT BY A CONNECTICUT RESIDENT AGAINST A CONNECTICUT DEFENDANT AND ALLEGED SEVERAL OTHER ACTS OF ABUSE WHICH TOOK PLACE IN CONNECTICUT; BECAUSE THE ALLEGED TORT TOOK PLACE IN NEW YORK, THE CONNECTICUT PLAINTIFF CAN TAKE ADVANTAGE OF THE EXTENDED STATUTE OF LIMITATIONS IN NEW YORK'S CHILD VICTIMS ACT (SECOND DEPT).

The Second Department, reversing Supreme Court, in a full-fledged opinion by Justice Christopher, determined a single alleged act of sexual abuse which took place during a field trip to New York from Connecticut, involving a Connecticut-resident plaintiff and a Connecticut defendant, was sufficient for long-arm jurisdiction in New York. Plaintiff alleged defendant Boys and Girls Club of Greenwich, Inc failed to properly supervise club activities and, as a result, plaintiff was abused on several occasions by a member of the club. Only one of the alleged instances of abuse took place in New York. Although plaintiff is a Connecticut resident, the court ruled plaintiff could take advantage of the extended statute of limitations in New York's Child Victims Act because the alleged tort took place in New York.

Where, as here, the plaintiff has established the requisite minimum contacts, as previously set forth, we must then engage in the second part of the due process inquiry; that is, whether defending a suit in New York comports with "traditional notions of fair play and substantial justice" … . Here, the Club has failed to present a "compelling case" that some other consideration would render jurisdiction unreasonable … . … [T]he exercise of jurisdiction over the Club in New York would "comport with 'fair play and substantial justice'" … . * * *

With regard to CPLR 214-g, the revival statute, enacted under the Child Victims Act, S.H. v Diocese of Brooklyn (205 AD3d 180), does not preclude determining that it is appropriate for New York to exercise long-arm jurisdiction in this case. While S.H. discussed the legislative history of the revival statute and found that the history supports the proposition that the statute was enacted for the benefit of New

York residents, this was in the context of the facts of S.H., wherein the alleged acts of abuse occurred in Florida. In S.H. we held, "that under the circumstances of this case, CPLR 214-g is not available to nonresident plaintiffs where the alleged acts of abuse occurred outside New York" … . In the instant case, while the plaintiff is not a New York resident, unlike the situation in S.H., the alleged abuse occurred in New York.

We note that our finding that the Club is subject to personal jurisdiction pursuant to CPLR 302(a)(2) is limited to the one act of sexual abuse alleged to have occurred in New York. WCVAWCK-Doe v Boys & Girls Club of Greenwich, Inc., 2023 NY Slip Op 02026, Second Dept 4-19-23

Practice Point: Here a Connecticut resident sued a Connecticut defendant alleging several acts of sexual abuse in 1975 or 1976. Most of the alleged abuse took place in Connecticut. One alleged instance of abuse took place when plaintiff was on a field trip to New York. New York has long-arm jurisdiction over that tort, and the Connecticut plaintiff can take advantage of the extended statute of limitations in the Child Victims Act based on the situs of that single instance of abuse. The opinion should be consulted for its comprehensive analysis of jurisdiction under the long-arm statute.

APRIL 19, 2023

GENERAL MUNICIPAL LAW, EMPLOYMENT LAW.

PETITIONER, A CORRECTION OFFICER WHO WAS INJURED MOVING LAUNDRY BAGS BLOCKING A HALLWAY IN THE JAIL, WAS ENTITLED TO GENERAL MUNICIPAL LAW 207-C BENEFITS; ALTHOUGH SUPREME COURT SHOULD NOT HAVE TRANSFERRED THE ARTICLE 78 TO THE APPELLATE DIVISION, THE FOURTH DEPARTMENT CONSIDERED THE MERITS (FOURTH DEPT).

The Fourth Department, reversing the denial of General Municipal Law 207-a benefits in this Article 78 proceeding, determined petitioner, a correction officer, was injured performing her duties when she attempted to move laundry bags blocking the hallway in the jail housing unit. The Fourth Department noted that Supreme Court should not have transferred the Article 78 proceeding to the

appellate division because the determination was not based upon a hearing at which evidence was taken "pursuant to direction by law:"

… Supreme Court erred in transferring the proceeding to this Court pursuant to CPLR 7804 (g) on the ground that the petition raised a substantial evidence issue. Respondent's determination "was not 'made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law' (CPLR 7803 [4]). Rather, the determination was the result of a hearing conducted pursuant to the terms of [an] agreement" between petitioner's union and respondent … . Nevertheless, in the interest of judicial economy, we consider the merits of the petition …. …

Petitioner testified at the hearing that she thought the laundry bags outside the main entrance door were a "safety issue," particularly because they would block other officers from moving through the hallway quickly and because persons using the hallway may get hurt. She further testified that her training and job responsibilities required her to address safety concerns. Petitioner also submitted documentary evidence that correction officers were under the duty to ensure that laundry bags are not placed on the housing unit floor at any time. Moreover, it is undisputed that there was no policy prohibiting correction officers from moving laundry bags. Although respondent submitted testimony that correction officers should order inmates to move laundry bags, that testimony did not address the location of the laundry bags and the safety hazard posed by laundry bags left in a hallway. We therefore conclude that the determination to deny petitioner's application for section 207-c benefits was arbitrary and capricious … . Matter of Williams v County of Onondaga, 2023 NY Slip Op 02262, Fourth Dept 4-28-23

Practice Point: A correction officer injured moving laundry bags blocking a jail hallway was performing her duties and was entitled to General Municipal Law 207-c benefits.

Practice Point: An Article 78 proceeding should not be transferred to the appellate division unless evidence was taken at a hearing "pursuant to direction by law." Here the hearing, which was held pursuant to an agreement between the respondent and petitioner's union, did not meet that criteria.

APRIL 28, 2023

LABOR LAW-CONSTRUCTION LAW.

THE FIRST, THIRD AND FOURTH DEPARTMENTS HAVE HELD THAT THE VIOLATION OF THE INDUSTRIAL CODE PROVISION 12 NYCRR 23-4.2 (K) WILL NOT SUPPORT A LABOR LAW 241(6) CAUSE OF ACTION BECAUSE IT IS NOT SUFFICIENTLY SPECIFIC; THE SECOND DEPARTMENT HAS HELD THE VIOLATION OF THAT SAME PROVISION SUPPORTS A LABOR LAW 241(6) CAUSE OF ACTION (FOURTH DEPT).

The Fourth Department, reversing (modifying) Supreme Court in this Labor Law 241(6) construction-accident action, determined that the violation of the Industrial Code provision 12 NYCRR 23-4.2 (k) will not support a Labor Law 241(6) cause of action. The court noted the split of authority on this issue:

… [T]he court erred in denying the moving defendants' motion with respect to the Labor Law § 241 (6) claim against [defendant] insofar as it was based on the alleged violation of 12 NYCRR 23-4.2 (k). We have repeatedly held that 12 NYCRR 23-4.2 (k) is not sufficiently specific to support a Labor Law § 241 (6) claim … . Inasmuch as the First and Third Departments have held similarly … , we decline to adopt contrary precedent in the Second Department … . Vicki v City of Niagara Falls, 2023 NY Slip Op 02260, Fourth Dept 4-28-23

Practice Point: In the First, Third and Fourth Department the Industrial Code provision 12 NYCRR 23-4.2 (k) is not specific enough to support a Labor Law 241(6) cause of action. The Second Department has held that the violation of the provision will support a Labor Law 241(6) cause of action.

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MEDICAL MALPRACTICE, EVIDENCE.

THE MOTION TO SET ASIDE THE VERDICT APPORTIONING LIABILITY TO THE GYNECOLOGIST WHO NOTED IN HIS REPORT HE FOUND "NO ABNORMALITIES" SHOULD HAVE BEEN GRANTED; PLAINTIFF DID NOT PROVE THE NOTATION MISLED THE PRIMARY CARE PHYICIAN RESULTING IN A DELAY IN DIAGNOSING APPENDICITIS (FIRST DEPT).

The First Department, reversing Supreme Court, determined defendant Dr. Subramanyam's motion to set aside the verdict apportioning liability to him in this medical malpractice case should have been granted. Plaintiff experienced abdominal and was referred by her primary physician (defendant Dr. Selitsky) to Dr. Subramanyam for a gynecological exam. Dr. Subramanyam' noted in his report that "no abnormalities" were found. Plaintiff argued the "no abnormalities" finding misled Dr. Selitsky causing a delay in diagnosis of plaintiff's appendicitis:

We find that the record was insufficient to support the jury's findings that Dr. Subramanyam's notation of "no abnormalities" misled Dr. Selitsky, who was plaintiff's primary care physician, and thereby delayed plaintiff's treatment for appendicitis.

Defendant Dr. Selitsky, testified that she did not rely upon Dr. Subramanyam's sonogram report in ruling in or out the possibility of appendicitis, a diagnosis she already had considered as part of her differential diagnosis. She further testified that her referral of plaintiff to Dr. Subramanyam was solely to determine whether the source of plaintiff's pain was gynecological in origin. Furthermore, Dr. Selitsky testified that while she assumed that she had received a copy of the report, she could not recall reading it, and, if she had read it, when she did so. Dr. Subramanyam also testified that it was not within his role to provide recommendations in his report or advise physicians what they should do next. Ameziani v Subramanyam, 2023 NY Slip Op 01759, First Dept 4-4-23

Practice Point: Defendant primary care doctor referred plaintiff to defendant gynecologist to determine the cause of abdominal pain. The gynecologist noted in his report he found "no abnormalities." Plaintiff alleged that notation misled the primary care physician causing delay in the diagnosis of appendicitis. The appellate division set aside the verdict against the gynecologist.

APRIL 4, 2023

MEDICAL MALPRACTICE, MUNICIPAL LAW.

MEDICAL RECORDS DEMONSTRATED THE NEGLIGENT FAILURE TO DIAGNOSE A SEVERED NERVE; THEREFORE THE MEDICAL FACILITY WAS DEEMED TO HAVE HAD TIMELY NOTICE OF THE NATURE OF THE MALPRACTICE CLAIM; THE PETITION FOR LEAVE TO FILE AND SERVE A LATE NOTICE OF CLAIM SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the petition to file a late notice of claim in this medical malpractice action should have been granted. The medical facilities' (NHCC'S) failure to diagnose a severed nerve was apparent from the medical records. Therefore NHCC had timely notice of the nature of the claim:

Medical records can establish actual knowledge of the essential facts constituting a claim where they "evince that the medical staff, by its acts or omissions, inflicted an[ ] injury on plaintiff" … . "While expert opinion may be helpful to this showing, it is not required where 'the basic facts underlying the malpractice claims [can] be gleaned from the . . . medical records'" … . Here, NHCC acquired actual knowledge of the essential facts constituting the petitioners' claim, since its employees participated in the acts or omissions giving rise to the claim and prepared medical records from which it could be readily inferred that NHCC negligently failed to timely diagnose and treat the injured petitioner's nerve injury … .

Further, under the circumstances of this case, the petitioners demonstrated a reasonable excuse for the delay in serving a notice of claim based upon, inter alia, the injured petitioner not learning of the nerve injury until his surgery on March 11, 2021, followed by his recovery time from the surgery and inability to consult with an attorney until after he was fully vaccinated for COVID-19 due to preexisting health conditions … .

Moreover, the petitioners presented a "plausible argument" that NHCC could conduct an adequate investigation of the claim despite the delay, and thus, NHCC would not be substantially prejudiced by the late notice of claim … . Matter of Cleary v Nassau Health Care Corp., 2023 NY Slip Op 02121, Second Dept 4-26-23

Practice Point: Here the medical records were deemed to have provided the medical facility with timely knowledge of the negligent failure to diagnose a

severed nerve. Therefore the petition for leave to file and serve a late notice of claim should have been granted.

APRIL 26, 2023

RETIREMENT AND SOCIAL SECURITY LAW, POLICE OFFICER INJURED AT WORK.

PETITIONER POLICE OFFICER WAS AWARE OF THE DEFECT IN THE FLOOR WHICH CAUSED HIS CHAIR TO START TO TIP OVER BACKWARDS WHEN THE WHEELS CAUGHT IN THE DEFECT; THEREFORE THE INCIDENT WAS NOT UNEXPECTED AND PETITIONER WAS NOT ENTITLED TO ACCIDENTAL DISABILITY RETIREMENT BENEFITS (THIRD DEPT).

The Third Department, in a full-fledged opinion by Justice Pritzker, over a dissent, determined petitioner police officer was not entitled to accidental disability benefits for injuries incurred at his desk when he prevented himself from falling over backwards in his chair. When he attempted to roll the chair backwards it caught in a rut and petitioner was injured when he grabbed at a desk to keep from tipping over backwards:

Petitioner acknowledged that he was aware that the flooring at the front desk was in poor condition and that, both on previous occasions and prior to the incident that day, he had observed that there were two ruts in the flooring right behind the desk. Petitioner also testified that, in his estimation, the ruts were "three inches across, maybe a little more." His testimony also demonstrates that he was aware that the chair he was utilizing that day had wheels and that, when sitting at the desk, those wheels would be in the "general area" of the holes. Given this testimony and the photographs of the floor that were admitted, respondent's finding that petitioner could have reasonably anticipated the hazard — i.e., that the small wheels catching a depression in the floor would cause the chair to tip — was reasonable and supported by substantial evidence, despite other reasonable interpretations. Therefore, the finding that the precipitating event was not unexpected and did not constitute an accident within the meaning of the Retirement and Social Security Law will not be disturbed … . Matter of Bodenmiller v DiNapoli, 2023 NY Slip Op 01930, Third Dept 4-13-23

Practice Point: To constitute an accident under the Retirement and Social Security Law, the incident must be "unexpected." Here petitioner was aware of the floor-defect which cause his chair to start tipping over backwards when the wheels caught in the defect. Therefore the incident was not "unexpected" within the meaning of the applicable law.

APRIL 13, 2023

SLIP AND FALL, LANDLORD-TENANT, CONTRACT LAW.

HERE THE LEASE MADE THE OUT-OF-POSSESSION LANDLORD RESPONSIBLE FOR STRUCTURAL REPAIRS AND MADE THE TENANT RESPONSIBLE FOR ALL NON-STRUCTURAL REPAIRS; THE CRACKED STEP WAS NOT A STRUCTURAL DEFECT; THE FACT THAT THE LANDLORD WAS AWARE OF THE DEFECT WAS IRRELEVANT (FIRST DEPT).

The First Department, reversing Supreme Court, determined defendant out-of-possession landlord's motion for summary judgment in this slip and fall case should have been granted. The court noted that if, due to the provisions of the lease, an out-of-possession landlord is not responsible for the repair of a defect, the fact that the landlord had notice of the defect is irrelevant:

"An out-of-possession landlord is generally not liable for negligence with respect to the condition of the demised premises unless it '(1) is contractually obligated to make repairs or maintain the premises or (2) has a contractual right to reenter, inspect and make needed repairs and liability is based on a significant structural or design defect that is contrary to a specific statutory safety provision'" … .Here, defendant established that it was an out of possession landlord with no contractual obligation to make repairs or maintain the restaurant premises. Pursuant to Paragraph 4 of the lease agreement, all non-structural repairs to the premises were to be made by the tenant restaurant at its sole cost and expense. Moreover, the cracked step at issue was not a significant structural or design defect that is contrary to a specific statutory safety provision … .

In response, plaintiff failed to raise a triable issue of fact sufficient to defeat defendant's motion. Plaintiff's assertion that there is an issue of fact as to whether defendant had actual notice of the cracked step on which plaintiff fell is without merit. An out of possession landlord may not be held liable even if it had notice of

the defective condition prior to the accident … . Padilla v Holrod Assoc. LLC, 2023 NY Slip Op 02082, First Dept 4-25-23

Practice Point: By the terms of the lease, the out-of-possession landlord was only responsible for structural repairs. The cracked step in this slip and fall case was not a structural defect. The fact that the landlord was aware of the defect was irrelevant.

APRIL 25, 2023

SLIP AND FALL, MUNICIPAL LAW.

ALTHOUGH THE VILLAGE ENGINEER SENT A LETTER TO THE ABUTTING PROPERTY OWNERS REQUIRING REPAIR OF THE SIDEWALK DEFECT WHERE PLAINTIFF SLIPPED AND FELL, THE MAJORITY CONCLUDED PLAINTIFF DID NOT DEMONSTRATE THE VILLAGE HAD WRITTEN NOTICE OF THE DEFECT; THE DISSENT DISAGREED (SECOND DEPT).

The Second Department, over a dissent, determined the village demonstrated it did not have written notice of the sidewalk defect where plaintiff allegedly slipped and fell. The village code requires that the board of trustees be given written notice of the defect in order to hold the village liable. Here there was a letter from the town engineer to the abutting homeowners notifying them of the sidewalk defect and requiring repair within 30 days. The majority held that letter did not meet the written notice requirements in the code, which must be strictly construed. the dissent disagreed:

Where … a municipality has enacted a prior written notice law, neither actual nor constructive notice of a condition satisfies the prior written notice requirement … . Records generated by other agencies of the Village, outside of the strict construction of Code of the Village of Garden City § 132-2, fail to satisfy the requirements of the relevant prior written notice law … .. On this record, the plaintiffs failed to raise a triable issue of fact as to whether any documents to or from other municipal employees found their way to the Village Board of Trustees so as to cognizably qualify as prior written notice under the terms of the Village Code.

Our learned dissenting colleague concludes that the plaintiffs, through the submission of a letter on the Village's letterhead dated May 11, 2015, from the Village Engineer to the defendant homeowners, raised a triable issue of fact as to whether the Village Board of Trustees had prior written notice of the alleged sidewalk defects. … The letter … states … that a recent inspection of the sidewalk and/or driveway apron adjacent to the defendant homeowners' property indicated that concrete was in need of repair or

replacement. The letter continues, stating that it was necessary to repair or replace a defective sidewalk and/or driveway apron for safety reasons and to reduce the likelihood of lawsuits against the property owners and the Village. For these reasons … the Village Board of Trustees had adopted a resolution … providing that property owners are required to repair or replace defective or damaged sidewalks and/or driveway aprons fronting their property within 30 days of receiving notice of such defects. Strictly construing the terms of the Village's prior written notice law, as we must … that letter from the Village Engineer to the defendant homeowners does not constitute the giving of prior written notice to the Village Board of Trustees. … . Kolenda v Incorporated Vil. of Garden City, 2023 NY Slip Op 01783, Second Dept 4-5-23

Practice Point: Here the village code required that written notice of a sidewalk defect be provided to the board of trustees. A letter from the village engineer to the abutting homeowners requiring repair of the defect did not meet the code's written-notice requirements, which must be strictly construed. Therefore the village cannot be held liable for the slip and fall.

APRIL 5, 2023

SLIP AND FALL.

PLAINTIFF'S INABILITY TO IDENTIFY THE WET SUBSTANCE ON THE STEP WHERE SHE ALLEGEDLY FELL WAS NOT AN INABILITY TO IDENTIFY THE CAUSE OF THE FALL (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the slip and fall complaint should not have been dismissed because plaintiff did not know what the wet substance on the step was:

… [T]he defendant failed to establish, prima facie, that the plaintiff did not know what caused her to fall. In support of its motion, the defendant submitted the deposition testimony of the plaintiff, who testified that she slipped and fell on a wet step … . Contrary to the defendant's contention, the plaintiff's alleged inability to identify the "precise nature of the wet substance upon which she allegedly slipped and fell cannot be equated with a failure to identify the cause of her fall" … . Diaz v SCG 502, LLC, 2023 NY Slip Op 01779, Second Dept 4-5-23

Practice Point: Plaintiff alleged she slipped and fell on a wet step. Her inability to identify the wet substance was not an inability to identify the cause of her fall.

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SLIP AND FALL.

THE DEFENDANT RESTAURANT DID NOT DEMONSTRATE WHEN THE AREA WHERE PLAINTIFF SLIPPED AND FELL HAD LAST BEEN INSPECTED PRIOR TO THE FALL; THEREFORE THE RESTAURANT DID NOT DEMONSTRATE A LACK OF CONSTRUCTIVE NOTICE OF THE ALLEGED WET CONDITION (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined defendant restaurant (ABB) did not demonstrated when the area where plaintiff slipped and fell had been last inspected prior to the fall. Therefore ABB did not demonstrate it did not have constructive notice of the wet condition:

ABB … failed to demonstrate … that it lacked constructive notice of the alleged dangerous condition. Although ABB's witness testified that the accident occurred five minutes after the witness had entered the restaurant and observed the floor to be dry, the plaintiff testified that the accident occurred at least one hour later, and ABB did not submit any evidence as to when it last inspected the area prior to the time when the plaintiff asserted the accident occurred … . Carey v Walt Whitman Mall, LLC, 2023 NY Slip Op 01773, Second Dept 4-5-23

Practice Point: To be entitled to summary judgment in a slip and fall case, the defendants must show where the area of the fall was last inspected prior to the fall to demonstrate it did not have constructive notice of the dangerous condition.

APRIL 5, 2023

TOXIC TORTS, MARITIME LAW, FEDERAL EMPLOYERS' LIABILITY ACT (FELA), TRUSTS AND ESTATES.

UNDER THE JONES ACT OHIO HAD JURISDICTION TO APPOINT ADMINSTRATORS OF THE ESTATE OF DECEDENT WHO ALLEGEDLY DIED OF EXPOSURE TO ASBESTOS ON MERCHANT MARINE SHIPS; THE NEW YORK EXECUTOR OF THE ESTATE WAS TIMELY AND PROPERLY SUBSTITUTED FOR THE OHIO ADMINISTRATORS (FIRST DEPT).

The First Department, over a dissent, whichn a complex decision whichh cannot be fairly summarized here, determined: (1) under the Jones Act Ohio had jurisdiction to appoint administrators for decedent who allegedly died from asbestos exposure

on merchant marine ships where he was employed; and (2) substitution of a New York personal representative, executor of the estate, was proper and timely:

… [T]he Jones Act provides that when a seaman dies from an employment injury "the personal representative of the seaman may elect to bring a civil action at law, with the right of trial by jury, against the employer" (46 USC § 30104).

The Jones Act grants a right of action to the personal representative "without other description" … . The Act does not require that the personal representative be either "a domiciliary or ancillary administrator" … . A domiciliary administrator has standing to file a Jones Act or FELA [Federal Employers' Liability Act] lawsuit in another state … . However, nothing "explicitly clothes a domiciliary administrator with the exclusive right to maintain such an action" because such a requirement is inconsistent with "the remedial nature" of FELA and the "representative character" of such a suit … .

Notably, the personal representative's authority under the Jones Act derives from "a federal statutory right and power given to carry out the policy of the federal statutes" and "is not limited to the confines of the State where he was appointed but is co-extensive with general federal jurisdiction" … . Bartel v Maersk Line, Ltd., 2023 NY Slip Op 02058, First Dept 4-20-23

Practice Point: Under the Jones Act, the estate of a merchant-marine employee who died from exposure to asbestos on the employer's ships may sue the employer. Here the suit was deemed properly started by administrators appointed by an Ohio court and the New York executor was properly and timely substituted for the Ohio administrators.

See also the companion decision: Bartel v Farrell Lines, 2023 NY Slip Op 02057, First Dept 4-20-23

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TRAFFIC ACCIDENTS, LEASED CAR, GRAVES AMENDMANT.

THE LESSOR OF THE CAR INVOLVED IN THE TRAFFIC ACCIDENT DID NOT SUBMIT THE BUSINESS RECORDS DEMONSTRATING THE ASSIGNMENT OF THE LEASE; THEREFORE DISMISSAL OF THE COMPLAINT PURSUANT TO THE GRAVES AMENDMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined Chase, the defendant – lessor of the car involved in a traffic accident, did not present sufficient evidence of its status as the lessor for purposes of asserting the Graves-Amendment defense. The business records which would have established the lessor-lessee relationship were either illegible or were not submitted:

When evidentiary material is considered on a motion to dismiss pursuant to CPLR 3211(a)(7), and the motion is not converted into one for summary judgment, the motion should not be granted unless the evidentiary material "conclusively [establishes] that the plaintiff has no cause of action" … .

Pursuant to the Graves Amendment, the owner of a leased or rented motor vehicle cannot be held liable for personal injuries resulting from the use of the vehicle if (1) the owner is engaged in the trade or business of renting or leasing motor vehicles, and (2) there is no negligence or criminal wrongdoing on the part of the owner … .

… Chase attempted to establish the fact that it leased the subject vehicle to [defendant] through the business records exception to the hearsay rule (see CPLR 4518[a]). … [E]ven assuming that the … affidavit had established a proper foundation, "it is the business record itself, not the foundational affidavit, that serves as proof of the matter asserted" … .. Since Chase failed to submit the purported assignment of the lease agreement, it failed to conclusively establish that … it was shielded by the Graves Amendment. Tello v Upadhyaya, 2023 NY Slip Op 01913, Second Dept 4-12-23

Practice Point: Here the lessor of the car involved in the accident attempted to raise the Graves-Amendment defense but did not submit the business records showing the assignment of the lease. Therefore the affidavit laying a foundation for those records was hearsay and the motion to dismiss should not have been granted.

APRIL 12, 2023

TRAFFIC ACCIDENTS, INSURANCE LAW, EXAMINATION UNDER OATH, ARBITRATION.

THE INSURER DID NOT EXPLAIN ITS FAILURE TO TIMELY REQUEST THAT THE INSURED UNDERGO A PHYSICAL EXAM AND AN EXAMINATION UNDER OATH; THE STAY OF ARBITRATION IN THIS UNINSURED MOTORIST BENEFITS DISPUTE SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the insurer, GEICO, should not have been granted a stay of arbitration in this uninsured-motorist-benefits dispute with its insured, Eser. GEICO did not explain its failure to timely request a physical exam and an examination under oath (EUO):

GEICO had ample time after being notified of Eser's claim to seek a medical examination and an examination under oath, but failed to do so. Moreover, it denied the claim, apparently concluding that the medical records were sufficient to determine that Eser did not sustain a serious injury. GEICO offered no excuse for its failure to request a physical examination and an examination under oath. Instead, GEICO represented to the Supreme Court that it had requested the examinations, pointing to [three letters]. Contrary to GEICO's assertion, however, it did not request examinations in those letters, but, rather, merely advised Eser that if it ultimately determined that the other vehicle was uninsured, it "may require [her] to submit to physical examinations and/or Examination(s) Under Oath" … . Since GEICO had ample time to seek this discovery of Eser, but unjustifiably failed to do so, it was not entitled to a stay of arbitration in order to conduct the examinations … . Matter of Government Empls. Ins. Co. v Eser, 2023 NY Slip Op 01999, Second Dept 4-19-23

Practice Point: Here the insurer in this uninsured-motorist-benefits dispute had ample time to request that the insured undergo a physical exam and an examination under oath and did not explain its failure to do so. The stay of arbitration should not have been granted.

APRIL 19, 2023

TRAFFIC ACCIDENTS, INSURANCE LAW, NO-FAULT, EXAMINATION UNDER OATH.

THE DEFENDANTS' FAILURE TO APPEAR AT THE SCHEDULED EXAMINATIONS UNDER OATH BREACHED A CONDITION PRECEDENT FOR INSURANCE COVERAGE ENTITLING THE INSURER TO SUMMARY JUDGMENT ON ITS CAUSE OF ACTION FOR A DECLARATORY JUDGMENT OF NONCOVERAGE (FIRST DEPT).

The First Department, reversing Supreme Court, determined the plaintiff insurer was entitled to summary judgment for a declaratory judgment of noncoverage because the defendants did not appear at the scheduled Examinations Under Oath (EUOs):

Plaintiff insurer seeks a declaratory judgment of noncoverage based, among other things, on its allegations that defendants Munoz, Cameron, and Santiago (collectively, the claimants) each breached a condition precedent to coverage by failing to appear for properly noticed Examinations Under Oath (EUOs). In support of its motion for a default judgment against the defaulting defendants, plaintiff demonstrated through admissible evidence that the claimants each breached a condition precedent to coverage by failing to appear for properly and timely noticed EUOs … . The documentary evidence shows that plaintiff sent the EUO scheduling letters to the claimants within 15 business days of receiving the prescribed verification forms (in this case, NF-3 forms), as required … . Contrary to the motion court's calculation, the 15-day period starts with receipt of the NF-3 forms, not the NF-2 Application for No-Fault Benefits forms … . State Farm Fire & Cas. Co. v Soliman, 2023 NY Slip Op 01949, First Dept 4-13-23

Practice Point: Failure to appear for an Examination Under Oath breaches a condition precedent in the insurance contract, entitling the insurer to a declaratory judgment of noncoverage.

APRIL 13, 2023

TRAFFIC ACCIDENTS, MUNICIPAL LAW, VEHICLE AND TRAFFIC LAW.

A FIRE DISTRICT CANNOT BE HELD VICARIOUSLY LIABLE UNDER A NEGLIGENCE STANDARD FOR THE ACTIONS OF A VOLUNTEER FIREFIGHTER DRIVING A FIRE TRUCK WHERE THE DRIVER DOES NOT VIOLATE THE RECKLESS-DISREGARD STANDARD FOR EMERGENCY VEHICLES (CT APP).

The Court of Appeals, reversing the appellate division, over a two-judge dissent, in a full-fledged opinion by Judge Cannataro, determined a municipality cannot be held vicariously liable under a negligence standard for the actions of a volunteer firefighter driving a firetruck where the driver is protected by the higher reckless-disregard standard for emergency vehicles under the Vehicle and Traffic Law:

Based on undisputed testimony that the firefighter was responding to an alarm of fire, had activated the fire truck's lights and sirens, stopped the fire truck before entering the intersection, and proceeded slowly through the red light, Supreme Court held that the firefighter had "established prima facie entitlement to the exemption in Vehicle and Traffic Law § 1104," and that plaintiff had failed to raise a triable issue in opposition as to whether the firefighter acted with reckless disregard. The court therefore granted summary judgment to the firefighter. However, the court reached a different result with respect to the vicarious liability of the District. Relying on General Municipal Law § 205-b, "which states, in part, that 'fire districts created pursuant to law shall be liable for the negligence of volunteer firefighters,'" the court concluded that questions of fact existed regarding whether the firefighter "was negligent in failing to see plaintiff's vehicle approaching," and, thus, the District was not entitled to summary judgment. * * *

… [S]ection 1104 does more than simply immunize firefighters from negligence liability for otherwise privileged conduct … . It modifies their underlying duties in the defined contexts by (i) permitting categories of conduct which would violate other drivers' ordinary duty of care, (ii) specifying particular safety precautions which must be observed when engaging in such conduct, and (iii) requiring emergency vehicle drivers to avoid recklessness even when engaged in the privileged conduct. When a volunteer firefighter's actions satisfy all of these conditions and thus are privileged, there is simply no breach of duty or negligence

which can be imputed to a fire district under General Municipal Law § 205-b. Anderson v Commack Fire Dist., 2023 NY Slip Op 02028, CtApp 4-20-23

Practice Point: If the volunteer firefighter driving a firetruck does not violate the reckless disregard standard for emergency vehicles, the fire district cannot be held vicariously liable under a negligence standard.

APRIL 20, 2023

TRAFFIC ACCIDENTS, VEHICLE AND TRAFFIC LAW.

THE DRIVER OF THE CAR IN WHICH PLAINTIFF WAS A PASSENGER MADE A LEFT TURN INTO TO THE PATH OF DEFENDANT'S ONCOMING CAR WITHOUT CHECKING FOR ONCOMING TRAFFIC; DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (THIRD DEPT).

The Third Department, reversing Supreme Court, determined defendant driver's motion for summary judgment in this traffic accident case should have been granted. The driver of the car in which plaintiff was a passenger attempted a left turn in front of defendant's vehicle without checking for oncoming traffic:

On this record, defendant established his prima facie entitlement to judgment as a matter of law dismissing the complaint by submitting evidence that Ryan failed to yield the right-of-way and turned directly into the path of his vehicle … . Thus, the burden shifted to plaintiff to demonstrate a triable issue of fact on the issue of defendant's comparative fault. Plaintiff failed to do so. Ohl v Smith, 2023 NY Slip Op 01823, Third Dept 4-6-23

Practice Point: The driver of the car in which plaintiff was a passenger made a left turn into the path of defendant's car without checking for oncoming traffic. There was no evidence of comparative fault on defendant's part. Defendant's motion for summary judgment should have been granted.

APRIL 6, 2023

WORKERS' COMPENSATION.

EXPOSURE TO AND CONTRACTION OF COVID-19 IN THE WORKPLACE IS AN UNUSUAL HAZARD WHICH IS COMPENSABLE UNDER THE WORKERS' COMMPENSATION LAW; HOWEVER HERE THERE WAS NO PROOF DECEDENT CONTRACTED COVID-19 AT HIS WORKPLACE (THIRD DEPT).

The Third Department noted that contracting COVID-19 in the workplace qualifies as an unusual hazard which is compensable under the Workers' Compensation Law. Here the claimant's husband last worked on March 11, 2020, experienced COVID-10 symptoms on March 13 and died on March 29, 2020. But there was no evidence decedent was exposed to COVID-19 in the workplace:

… "[T]he contraction of COVID-19 in the workplace reasonably qualifies as an unusual hazard, not the natural and unavoidable result of employment and, thus, is compensable under the Workers' Compensation Law" … . Nevertheless, whether a compensable accident has occurred is a question of fact to be resolved by the Board, and its determination in this regard will not be disturbed where supported by substantial evidence … . To this end, "the claimant bears the burden of establishing that the subject injury arose out of and in the course of his or her employment" … . …

Claimant offered no evidence or testimony of decedent's specific exposure to COVID-19 in his workplace. Further, no evidence was presented indicating any cases of COVID-19 among those living or working in the group home where decedent was house manager, or among other employees with whom decedent may have had contact, prior to or contemporaneous with his onset of symptoms. In fact, the employer's witness testified that decedent was the first known COVID-19 infection in his workplace. Although another worker at the same group home later contracted COVID-19 and succumbed to the disease, the employer's witness testified that the other worker tested positive two weeks after decedent's positive test. Moreover, claimant did not know the extent to which, if at all, decedent personally interacted with others at the group home where he worked. In view of the foregoing, substantial evidence supports the Board's conclusion that claimant failed to meet her burden to demonstrate that decedent contracted COVID-19 in the course of his employment … . Matter of Holder v Office for People with Dev. Disabilities, 2023 NY Slip Op 02156, Third Dept 4-27-23

Practice Point: Exposure to and contraction of COVID-19 is an unusual hazard which is compensable under the Workers' Compensation Law. Here however there was no proof decedent contracted COVID-19 at his workplace.

APRIL 27, 2023

WORKERS' COMPENSATION LAW, INDEMNIFICATION, CONTRIBUTION.

IF THE WORKER'S COMPENSATION BOARD FINDS A DEFENDANT IN A CONSTRUCTION-ACCIDENT ACTION WAS PLAINTIFF'S EMPLOYER, PLAINTIFF'S RECOVERY AGAINST THE EMPLOYER IS RESTRICTED TO WORKER'S COMPENSATION BENEFITS AND OTHER DEFENDANTS CANNOT MAINTAIN ACTIONS FOR CONTRIBUTION OR INDEMNIFICATION AGAINST THAT EMPLOYER (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, in a full-fledged opinion by Justice Wan, determined the employees were restricted to worker's compensation benefits in this construction-accident action against their employers and the other defendants were precluded from seeking contribution and indemnification from the employers:

Workers' Compensation Law § 11(1) precludes recovery by "any third person" against "[a]n employer" for contribution or indemnity "for injuries sustained by an employee acting within the scope of his or her employment" unless the employee "has sustained a 'grave injury'" or there is a "written contract entered into prior to the accident or occurrence by which the employer had expressly agreed to contribution to or indemnification of the claimant." Despite this clear directive, the Supreme Court, relying on this Court's decision in Baten v Northfork Bancorporation, Inc. (85 AD3d 697), permitted cross-claims sounding in contribution and indemnity to survive against an entity on the ground that triable issues of fact existed with respect to whether that entity was an employer, regardless of a Workers' Compensation Board determination on this issue. Here, we clarify that, notwithstanding our prior decision in Baten, no claim for indemnity or contribution may be maintained against an entity determined to be an employer by the Workers' Compensation Board except in the limited circumstances specified in Workers' Compensation Law § 11.* * *

… [W]e hold that Workers' Compensation Law § 11 precludes recovery by any third party for contribution and indemnity against an entity determined by the WCB [Workers' Compensation Board] to be the plaintiff's employer except where the injured employee has suffered a grave injury or where the employer has expressly agreed in writing to contribute or indemnify. Velazquez-Guadalupe v Ideal Bldrs. & Constr. Servs., Inc., 2023 NY Slip Op 02025, Second Dept 4-19-23

Practice Point: If the Workers' Compensation Board determined a defendant in a construction-accident action was plaintiff's employer, absent a "grave" injury or the employer's agreement to contribute or indemnify, the plaintiff's recovery is restricted to Workers' Compensation benefits and there can be no recovery for contribution or indemnification against the employer by other defendants.

APRIL 19, 2023