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CHILD VICTIMS ACT, COURT OF CLAIMS, CIVIL PROCEDURE.

THE "TIME WHEN" ALLEGATIONS IN THE CLAIM IN THIS CHILD VICTIMS ACT SUIT WERE SUFFICIENT, COURT OF CLAIMS REVERSED (SECOND DEPT).

The Second Department, reversing the Court of Claims, over an instructive concurrence, determined the claim in this Child Victims Act action sufficiently alleged the "time when" the sexual abuse allegedly occurred:

… [T]he date ranges provided in the claim, together with the other information set forth therein, were sufficient to satisfy the "time when" requirement of Court of Claims Act § 11(b). The claimant alleged, among other things, that "[i]n approximately 1987, when [he] was approximately sixteen (16) years old, [he] was admitted to" a State-operated psychiatric hospital "for inpatient residential treatment," and that "[while] admitted to the . . . facility" he was "sexually abused and assaulted" by a staff member on two occasions. Additionally, the claimant identified his alleged abuser in the claim and set forth the details of the two alleged assaults, including the location within the facility where they allegedly occurred. The claimant also alleged that, before the second incident of abuse occurred, he reported to his treating psychiatrist, whom the claimant identified by name, that the alleged perpetrator made the claimant "uncomfortable." "Given that the CVA allows claimants to bring civil actions decades after the alleged sexual abuse occurred, it is not clear how providing exact dates, as opposed to the time periods set forth in the instant claim, would better enable the State to conduct a prompt investigation of the subject claim" … . We note, however, "that our determination that the claimant met the 'time when' requirement in the context of this action brought under the CVA does not change our jurisprudence with respect to the 'time when' requirement under different contexts, such as where a 'single incidence of negligence' occurs on a discrete date or other situations where 'a series of ongoing acts or omissions occur[ ] on multiple dates over the course of a period of time' … . Rodriguez v State of New York, 2023 NY Slip Op 04146, Second Dept 8-2-23

Practice Point: Here the allegations the sexual abuse took place in "approximately 1987" were deemed sufficient in this Child Victims Act suit.

AUGUST 2, 2023

LABOR LAW-CONSTRUCTION LAW, LADDER-FALL, AGENCY.

PLAINTIFF IN THIS LADDER-FALL CASE DID NOT DEMONSTRATE THE BUILDING MANAGEMENT COMPANY WAS ACTING AS THE OWNER'S AGENT OR THAT IT HAD SUPERVISORY AUTHORITY OVER THE WORK; THEREFORE SUMMARY JUDGMENT AS AGAINST THE MANAGEMENT COMPANY ON THE LABOR LAW 240(1) CAUSE OF ACTION SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined summary judgment in this ladder-fall case should not have been granted as against the building manager (Madison) as opposed to the building owner. Plaintiff did not demonstrate Madison was acting as the owner's agent or that it had supervisory authority over the work. The court noted that the assumption-of-the-risk affirmative defense applies to sports activities, not Labor Law causes of action:

Labor Law § 240(1) imposes liability only on contractors, owners, or their agents. "An agency relationship for purposes of section 240(1) arises only when work is delegated to a third party who obtains the authority to supervise and control the job. Where responsibility for the activity surrounding an injury was not delegated to the third party, there is no agency liability under the statute" … . Here, the plaintiff failed to demonstrate, prima facie, either that Madison was the managing agent for the building or that Madison supervised or controlled any of the work being performed in the building … . Depass v Mercer Sq., LLC, 2023 NY Slip Op 04363, Second Dept 8-23-23

Practice Point: In order to hold the building management company liable in this ladder-fall Labor Law 240(1) action, the plaintiff was required to demonstrate the management company was acting as the owner's agent and had supervisory control over the work. Plaintiff failed to do so.

AUGUST 23, 2023

LABOR LAW-CONSTRUCTION LAW, LADDER-FALL.

PLAINTIFF PLACED THE BOTTOM OF THE LADDER ON SMALL LANDSCAPING ROCKS WHICH GAVE WAY CAUSING PLAINTIFF TO FALL; DEFENDANTS DID NOT DEMONSTRATE PLAINTIFF'S ACTION WAS THE SOLE PROXIMATE CAUSE OF HIS FALL AND CONTRIBUTORY NEGLIGENCE IS NOT A DEFENSE; DEFENDANTS' SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendants' motion for summary judgment in this Labor Law 240(1) action should not have been granted on the ground plaintiff's actions were the sole proximate cause of the ladder-fall. Plaintiff had placed the bottom of the ladder on top of small "landscaping" rocks and fell when the rocks gave way:

A plaintiff may be the sole proximate cause of his or her own injuries when, acting as a recalcitrant worker, he or she "(1) 'had adequate safety devices available,' (2) 'knew both that' the safety devices 'were available and that [he or she was] expected to use them,' (3) 'chose for no good reason not to do so,' and (4) would not have been injured had [he or she] 'not made that choice'" … .

Here, UNF and Protection One [defendants] failed to establish, prima facie, that the plaintiff's actions were the sole proximate cause of his injuries … . Although the plaintiff testified at his deposition that he could have placed the ladder in the driveway, where it would not have been resting on the rocks, he further testified that "it wasn't safe for me to place it there, because that's where trucks drive in." Further, UNF and Protection One failed to submit evidence that the plaintiff's injuries could have been prevented if the plaintiff had secured the ladder to the light pole with ties, which were available at Protection One's depot, not the job site … . Iannaccone v United Natural Foods, Inc., 2023 NY Slip Op 04372, Second Dept 8-23-23

Practice Point: In a ladder-fall Labor Law 240(1) action, the defendant's placing the ladder on small landscaping rocks which gave way was not deemed to be the sole proximate cause of the accident. Contributory negligence is not considered. Therefore defendants' summary judgment motion should not have been granted.

AUGUST 23, 2023

LABOR LAW-CONSTRUCTION LAW, LADDER-FALL.

QUESTIONS OF FACT WHETHER PLAINTIFF WAS DOING REPAIR WORK OR ROUTINE MAINTENANCE PRECLUDED SUMMARY JUDGMENT ON THE LABOR LAW 240(1) AND 241(6) CAUSES OF ACTION (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined there were questions of fact whether defendant had notice of the dangerous condition created by oil dripping on the floor (Labor Law 200), and whether plaintiff was engaged in repair (covered by Labor Law 240(1) and 241(6)) rather than routine maintenance (not covered) when working on the garage door:

There was evidence in the record that automotive services were being performed on the defendants' premises by its employees, including changing oil filters and disposing the used oil filters into oil drums, and that oil was dripping from a spigot attached to a barrel close to the location of the plaintiff's accident. This evidence raises a triable issue of fact as to whether the defendants created a dangerous or defective condition, or had actual or constructive notice of such a condition without remedying it within a reasonable time … . …

… [T]he injured plaintiff testified at his deposition that when the accident occurred, he was attempting to remove a bearing plate in order to replace a broken spring on the garage door. He also testified that one of the bolts of the bearing plate was stripped, so he had to widen the hole so that it would accept another bolt. …

Labor Law § 240(1) applies where an employee is engaged "in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure," but does not apply to "routine maintenance" … . Here, the evidence raises a triable issue of fact as to whether the injured plaintiff was involved in a repair or routine maintenance at the time of the accident … .

Labor Law § 241(6) applies to construction, excavation, or demolition work. Construction work is defined in 12 NYCRR 23-1.4 as including the "repair, maintenance, painting or moving of buildings or other structures." Thus, there are triable issues of fact as to whether Labor Law § 241(6) was violated in this matter … . Nusio v Legend Autorama, Ltd., 2023 NY Slip Op 04385, Second Dept 8-23-23

Practice Point: Routine maintenance is not covered by Labor Law 240(1) or 241(6) but repair work is. Here plaintiff was working on the garage door mechanism which required replacement of a stripped bolt. There was a question of fact on the repair versus routine-maintenance question.

AUGUST 23, 2023

LABOR LAW-CONSTRUCTION LAW, LADDER-FALL.

THE MAJORITY CONCLUDED PLAINTIFF WAS DOING ROUTINE MAINTENANCE WHICH WAS NOT PART OF A CONSTRUCTION OR RENOVATION PROJECT WHEN HE WAS ELECTROCUTED AND FELL FROM A LADDER; THEREFORE THE LABOR LAW 240(1) AND 241(6) CAUSES OF ACTION WERE DISMISSED; THE TWO-JUSTICE DISSENT ARGUED PLAINTIFF WAS "CLEANING" WITHIN THE MEANING OF LABOR LAW 240(1) AND WAS DOING CONSTRUCTION OR RENOVATION WORK WITHIN THE MEANING OF LABOR LAW 241(6) (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the work plaintiff was doing was not covered by Labor Law 240(1) or 241(6). Primosch v Peroxychem, LLC, 2023 NY Slip Op 04285, Fourth Dept 8-11-23. The Fourth Department concluded plaintiff's work was routine maintenance, not cleaning covered by Labor Law 240(10, and was not done in connection with construction or renovation work. In a separate decision which incorporated the first, two justices disagreed in a dissent, finding that plaintiff's work was "cleaning" covered by Labor Law 240(1) and was part of construction or renovation work. The dissent lays out in some detail the proof requirements for "cleaning" within the meaning of Labor Law 240(1). Apparently plaintiff was on a ladder cleaning electrical equipment when he was electrocuted and fell from the ladder. Primosch v Peroxychem, LLC, 2023 NY Slip Op 04286, Fourth Dept 8-11-23

Practice Point: The dissent includes a detailed explanation of what constitutes "cleaning" within the meaning of Labor Law 240(1).

AUGUST 11, 2023

LABOR LAW-CONSTRUCTION LAW, TRENCH COLLAPSE.

THE COLLAPSE OF A TRENCH IN WHICH PLAINTIFF WAS WORKING WAS AN ELEVATION-RELATED ACCIDENT COVERED BY LABOR LAW 240(1) (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Higgitt, reversing Supreme Court, determined the collapse of a trench in which plaintiff was working was an elevation-related accident covered by Labor Law 240(1):

… [P]laintiff's injuries were the direct consequence of defendants[‘] … failure to provide adequate protection against a risk arising from a physically significant elevation differential. Viewing the evidence in the light most favorable to those defendants, the trench was approximately six and a half-feet deep at the time of the incident. Plaintiff is five-and-a-half feet tall and was kneeling at the moment of the right wall's collapse. There was, therefore, well over a one-foot height differential between the top of the earthen wall and the top of plaintiff's head. That height differential cannot be characterized as de minimis in light of the extent of that differential, the amount of dirt that poured into the trench when the right wall collapsed suddenly, and the amount of force the dirt was capable of generating … . Moreover, the earthen wall, which required securing for the purposes of the undertaking, collapsed because of the effects of gravity, and the makeshift shoring plainly failed to provide adequate protection against the risk arising from the physically significant elevation differential. The harm to plaintiff flowed directly from the application of the force of gravity to the earthen wall; plaintiff's injury is directly attributable to the risk posed by the physically-significant elevation differential … . Rivas v Seward Park Hous. Corp., 2023 NY Slip Op 04415, First Dept 8-24-23

Practice Point: The collapse of the inadequately secured wall of the trench in which plaintiff was working was an elevation-related, gravity-related accident covered by Labor Law 240(1). Plaintiff was entitled to summary judgment.

AUGUST 24, 2023

MEDICAL MALPRACTICE, CIVIL PROCEDURE, APPEALS.

THE ORDER DENYING DEFENDANTS THE ABILITY TO ASSERT CPLR ARTICLE 16 DEFENSES IS APPEALABLE; DEFENDANTS SHOULD NOT HAVE BEEN PRECLUDED FROM ASSERTING THE CPLR ARTICLE 16 DEFENSES ATTRIBUTING LIABILITY IN THIS MEDICAL MALPRACTICE ACTION TO NON-PARTIES (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined that defendants in this medical malpractice action should not have been precluded from asserting the negligence of non-parties (CPLR article 16 defenses) as an affirmative defenses. The court noted that, although the a ruling on a motion in limine is generally not appealable, a ruling on a motion which seeks to limit the legal theories which can be asserted is appealable:

"Generally, an order ruling [on a motion in limine], even when made in advance of trial on motion papers constitutes, at best, an advisory opinion which is neither appealable as of right nor by permission" … . There is, however, "a distinction between an order that 'limits the admissibility of evidence,' which is not appealable . . . , and one that 'limits the legal theories of liability to be tried' or the scope of the issues at trial, which is appealable" … . * * *

… [D]efendants are entitled to assert their CPLR article 16 defenses regarding the nonparty providers. "As provided in CPLR 1601 (1), a defendant may raise the CPLR article 16 defense regarding a nonparty tortfeasor, provided that the plaintiff could obtain jurisdiction over that party" … . Here, defendants are entitled to raise their pleaded affirmative defenses pursuant to CPLR article 16 … because plaintiff could have sought to maintain an action against the nonparty providers in Supreme Court … .

The crux of the issue on appeal is whether defendants were required, in response to plaintiff's demands for bills of particulars, to particularize the pleaded CPLR article 16 defense, and thus whether the court properly precluded them from asserting that defense at trial when they did not timely particularize that defense. We conclude that no such particularization was required under the circumstances of this case, and thus that the court erred in precluding defendants from asserting the CPLR article 16 defense at trial. Harris v Rome Mem. Hosp., 2023 NY Slip Op 04273, Fourth Dept 8-11-23

Practice Point: Motions in limine generally are not appealable. But motions seeking to preclude legal theories of liability are appealable.

Practice Point: Under the unique circumstances of this case, defendants in this medical malpractice action should not have been precluded from presenting CPLR article 16 affirmative defenses on the ground the defenses were not particularized in the bill of particulars. It was not clear the demands related to the CPLR article 16 affirmative defenses.

AUGUST 11, 2023

MEDICAL MALPRACTICE, EVIDENCE.

IN THIS MEDICAL MALPRACTICE ACTION, DEFENDANTS' EXPERTS DID NOT ADDRESS ALL THE ALLEGATIONS IN THE BILLS OF PARTICULARS AND RELIED ON A DISPUTED FACT; DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the defendants' motion for summary judgment in this medical malpractice actions should not have been granted. It was alleged that plaintiff's decedent was not properly treated for a stroke. The defendants' experts did not address all the allegations in the bills of particulars and relied on a disputed fact:

… [T]he expert physician for the defendants …, failed to address all of the specific allegations set forth in the plaintiff's bill of particulars … . Because [the] affirmation relied upon a disputed fact, specifically that the decedent's condition was improving … , it was insufficient to establish, prima facie, that.[defendants] did not deviate or depart from accepted medical practice or that such deviation or departure was not a proximate cause of the decedent's injuries … . Hiegel v Orange Regional Med. Ctr., 2023 NY Slip Op 04434, Second Dept 8-30-23

Practice Point: In a medical malpractice action, at the summary judgment stage, the defense experts must address all the allegations in the bill of particulars and may not rely on facts which are disputed.

AUGUST 30, 2023

MEDICAL MALPRACTICE, EVIDENCE.

THE EXPERT AFFIDAVITS SUBMITTED BY DEFENDANT HOSPITAL IN THIS MEDICAL MALPPRACTICE ACTION WERE CONCLUSORY AND DID NOT ADDRESS ALL OF PLAINTIFF'S ALLEGATIONS; THEREFORE SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (FIRST DEPT).

The First Department, reversing Supreme Court in this medical malpractice action, determined the expert affidavits were conclusory and did not address all the allegations made by plaintiff. Therefore defendant's (St. Luke's) motion for summary judgment should not have been granted:

The expert nurse and expert neurologist on whose affidavits St. Luke's relied merely averred in a conclusory manner that the decedent could not have been monitored in a way to prevent her fall, that St. Luke's implemented every appropriate fall risk procedure before the decedent's fall, and that the decedent's fall and the resulting subdural hematoma were not substantial factors in causing the decedent's death … . The expert nurse also did not submit the fall risk assessment or hospital fall prevention policy in accordance with which, she claimed, the decedent was monitored … . Because St. Luke's did not carry its prima facie burden on its motion, Supreme Court should have denied defendant's motion with respect to those predicates, regardless of the sufficiency of the moving papers … .

As for the remaining predicates for plaintiffs' medical malpractice claim, St. Luke's did not address them in its moving papers, nor did its experts address them in their affidavits. Accordingly, St. Luke's did not establish its prima facie entitlement to summary judgment dismissing them … . Martir v St. Luke's-Roosevelt Hosp. Ctr., 2023 NY Slip Op 04478, First Dept 8-31-23

Practice Point: To warrant summary judgment in a medical malpractice action, the expert affidavits cannot be conclusory and must address all of the relevant allegations.

AUGUST 31, 2023

MEDICAL RECORDS, PRIVILEGE.

EVEN THOUGH DEFENDANT'S PHYSICAL CONDITION WAS IN CONTROVERSY, DEFENDANT DID NOT WAIVE THE PHYSICIAN-PATIENT PRIVILEGE WITH RESPECT TO THE MEDICAL RECORDS CONCERNING SEXUALLY-TRANSMITTED DISEASE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant did not waive the physician-patient privilege and, therefore, plaintiff was not entitled to defendant's medical records which relate to sexually-transmitted disease:

"A party seeking to inspect a defendant's medical records must first demonstrate that the defendant's physical or mental condition is 'in controversy' within the meaning of CPLR 3121(a)" … . "Even where this preliminary burden has been satisfied, discovery may still be precluded where the information requested is privileged and thus exempt from disclosure pursuant to CPLR 3101(b)" … . Once the physician-patient privilege is validly asserted, it must be recognized, and the information sought may not be disclosed unless it is demonstrated that the privilege has been waived (see CPLR 3101[b]; * * *

… [I]n order to effect a waiver, a defendant must affirmatively assert the condition 'either by way of counterclaim or to excuse the conduct complained of by the plaintiff" … . * * *

The record was insufficient to establish that the defendant voluntarily disclosed any information to the plaintiff or other third parties which would have served as a waiver of privilege … . Hausman v Smith, 2023 NY Slip Op 04457, Second Dept 8-30-23

Practice Point: Even where a party's physical condition is in controversy, the physician-patient privilege may preclude discovery of medical records concerning a condition which was not affirmatively asserted by that party.

AUGUST 30, 2023

NEGLIGENT SUPERVISION, INMATE ON INMATE ASSAULT, COURT OF CLAIMS.

ALTHOUGH THE STATE HAS A DUTY TO PROTECT INMATES FROM ASSAULTS BY OTHER INMATES, THAT DUTY DOES NOT EXTEND TO UNFORESEEABLE ATTACKS (SECOND DEPT).

The Second Department, reversing the Court of Claims. determined the state's motion for summary judgment in this inmate-on-inmate assault case should have been granted. The complaint alleged the assault occurred because of the state's negligent supervision of the inmates in a block yard:

"Having assumed physical custody of inmates, who cannot protect and defend themselves in the same way as those at liberty can, the State owes a duty of care to safeguard inmates, even from attacks by fellow inmates" … . "That duty does not, however, render the State an insurer of inmate safety," and negligence cannot be established by the "mere occurrence of an inmate assault" … . Rather, the scope of the State's duty is "limited to providing reasonable care to protect inmates from risks of harm that are reasonably foreseeable, i.e., those that [the State] knew or should have known" …. .

Here, in support of its motion, the State established its prima facie entitlement to judgment as a matter of law dismissing the claim by demonstrating that the alleged assault upon the claimant was not reasonably foreseeable. The State's submissions demonstrated that the claimant did not know his assailant, who unexpectedly engaged in a "surprise attack" against the claimant. Further, the State proffered evidence that it undertook security measures, including requiring every inmate entering the B Block yard to "go through a [m]agnetometer," as well as subjecting inmates to random "pat frisks" and searches. Contrary to the determination of the Court of Claims, the State's failure to employ the use of a particular magnetometer did not present a triable issue of fact … . Armwood v State of New York, 2023 NY Slip Op 04465, Second Dept 8-30-23

Practice Point: Here the state demonstrated it took adequate steps to prevent inmates from bringing weapons into the block yard and the attack on claimant with a scalpel was not reasonably foreseeable. The state's motion for summary judgment in this inmate-on-inmate assault case should have been granted.

AUGUST 30, 2023

SEXUAL ASSAULT, EMPLOYER LIABILITY, FRAUD.

LYFT WAS NOT VICARIOUSLY LIABLE FOR THE ALLEGED SEXUAL ASSAULT BY A LYFT DRIVER; THE COMPLAINT DID NOT STATE A CAUSE OF ACTION FOR FRAUD BASED UPON THE ASSURANCES OF SAFETY ON LYFT'S WEBSITE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that the vicarious liability and fraud causes of action against defendant Lyft, a livery cab service, should have been dismissed. The complaint alleged infant plaintiff used a mobile app to hire a Lyft driver, Singh, who began masturbating after she got in the car. The complaint failed to allege the driver was acting within the scope of his employment when the alleged sexual assault occurred. The complaint also failed to allege the elements of fraud based on the claim on the Lyft website that its service was safe and the drivers had been screened:

"[W]here an employee's actions are taken for wholly personal reasons, which are not job related, the challenged conduct cannot be said to fall within the scope of employment" … . "A sexual assault perpetrated by an employee is not in furtherance of an employer's business and is a clear departure from the scope of employment, having been committed for wholly personal motives" … . Here, assuming that Singh engaged in the sexual misconduct as alleged in the complaint, it is clear that such conduct was a departure from his duties as a Lyft driver and was committed solely for personal motives unrelated to Lyft's business. As such, the sexual misconduct cannot be said to have been within the scope of employment … . Accordingly, the Supreme Court should have granted that branch of Lyft's motion which was to dismiss the cause of action alleging vicarious liability under the doctrine of respondeat superior. …

"The elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages" … . "Each of the foregoing elements must be supported by factual allegations containing the details constituting the wrong sufficient to satisfy CPLR 3016(b)" … . "To establish causation, the plaintiff must show that defendant's misrepresentation induced plaintiff to engage in the transaction in question (transaction causation) and that the misrepresentations directly caused the loss about which plaintiff complains (loss causation)" … .

Here, although the complaint alleges that the plaintiffs were aware of alleged representations on Lyft's website that the Lyft service was safe to use, it fails to sufficiently specify which statements on Lyft's website were false, and when those representations were made or accessed by the plaintiffs … . Moreover, the complaint fails to set forth any facts sufficient to show that any alleged misrepresentations on Lyft's website regarding the safety of Lyft rides directly and proximately caused the plaintiffs' alleged damages, which were otherwise alleged to have been caused directly by Singh's sexual misconduct while operating the vehicle … . It is not sufficient to merely allege that the infant plaintiff would not have used the Lyft app but for Lyft's alleged misrepresentations regarding safety … . Browne v Lyft, Inc., 2023 NY Slip Op 04102, Second Dept 8-2-23

Practice Point: In a complaint alleging the employer is vicariously liable for the acts of its employee, unless it is alleged the employee was acting within the scope of employment the cause of action will be dismissed. Here the alleged sexual assault by defendant Lyft driver was not alleged to be within the scope of the driver's employment.

Practice Point: Here the plaintiff alleged she was sexually assaulted by defendant Lyft driver. The fraud cause of action alleged the assertions on Lyft's website that the service was safe and the drivers were screened were false. That was not enough to state a cause of action for fraud.

AUGUST 2, 2023

SLIP AND FALL, CIVIL PROCEDURE, MUNICIPAL LAW.

PLAINTIFF'S MOTION TO REARGUE MERELY REPEATED HER EARLIER ARGUMENTS AND DID NOT DEMONSTRATE THE COURT HAD OVERLOOKED OR MISUNDERSTOOD FACTS OR LAW; THE MOTION SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the motion to reargue the summary judgment motion in this slip and fall case should not have been granted. Supreme Court had originally granted the city's motion for summary judgment on the ground it did not have written notice of the dangerous condition. After the motion to reargue was granted, Supreme Court denied the city's motion.

Because the motion to reargue did not present new information and merely repeated the earlier arguments, it should have been denied:

A motion for leave to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion" (CPLR 2221[d][2]). "Motions for reargument are addressed to the sound discretion of the court which decided the prior motion and may be granted upon a showing that the court overlooked or misapprehended the facts or law or for some other reason mistakenly arrived at its earlier decision" … . However, "[a] motion for leave to reargue is not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided or to present arguments different from those originally presented" … . * * *

In support of her motion for leave to reargue, the plaintiff merely repeated her earlier arguments and did not demonstrate that the Supreme Court had overlooked or misapprehended any matter of fact or law in rendering the prior determination … . Hallett v City of New York, 2023 NY Slip Op 04367, Second Dept 8-23-23

Practice Point: A motion to reargue must be based on law or facts allegedly overlooked or misunderstood by the court. Here the motion merely repeated earlier arguments and, therefore, the motion should not have been granted.

AUGUST 23, 2023

SLIP AND FALL.

PLAINTIFF, AT HER DEPOSITION, COULD NOT IDENTIFY THE CAUSE OF HER STAIRWAY SLIP AND FALL; COMPLAINT DISMISSED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff in this stairway slip and fall, based upon her deposition testimony, could not identify the cause of her fall which required dismissal of the complaint:

"… [A] defendant can make its prima facie showing of entitlement to judgment as a matter of law by establishing that the plaintiff cannot identify the cause of his or her fall without [resort to] speculation'" … . "'[A] plaintiff's inability to identify the cause of the fall is fatal to the cause of action, because a finding that the defendant's negligence, if any, proximately caused the plaintiff's injuries would be

based on speculation'" … . "'Where it is just as likely that some other factor, such as a misstep or a loss of balance, could have caused [the plaintiff to fall], any determination by the trier of fact as to causation would be based upon sheer speculation'" … .

Here, the defendants made a prima facie showing of their entitlement to judgment as a matter of law by submitting, inter alia, the plaintiff's deposition testimony, in which she identified a defect in another step than that from which she fell as the cause of her accident and admitted that she did not know what caused her to lose her balance and fall. Thus, any determination that the defect identified by the plaintiff was the proximate cause of her accident, rather than a misstep or loss of balance, would be based on speculation … . De Rose v Anna & Rose Realty Co., LLC, 2023 NY Slip Op 04302, Second Dept 8-16-23

Practice Point: A slip and fall plaintiff who acknowledges in a deposition she does not know what caused her to fall loses the case.

AUGUST 16, 2023

SLIP AND FALL.

THE DEFENDANT IN THIS SLIP AND FALL CASE DID NOT PRESENT EVIDENCE DEMONSTRATING WHEN THE AREA OF THE SLIP AND FALL WAS LAST CLEANED OR INSPECTED; ONLY EVIDENCE OF GENERAL CLEANING PRACTICES WAS PRESENTED; DEFENDANT SHOULD NOT HAVE BEEN GRANTED SUMMARY JUDGMENT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the defendant shopping mall in this slip and fall case did not demonstrate it did not have constructive notice of the oily patch in the parking lot where plaintiff slipped and fell. Plaintiff testified she saw the oily patch on the way into the mall and slipped and fell an hour later. The defendant presented evidence of its general cleaning and inspection practices, but did not demonstrate when the are was last cleaned or inspected:

To meet its burden on the issue of lack of constructive notice, a defendant is required to offer some evidence as to when the accident site was last cleaned or inspected prior to the accident … . "Mere reference to general cleaning practices,

with no evidence regarding any specific cleaning or inspection of the area in question, is insufficient to establish a lack of constructive notice"… .

Here, the defendant failed to establish, prima facie, that it did not have constructive notice of the condition that allegedly caused the plaintiff to fall . The plaintiff testified at her deposition that she saw the oily patch on the ground of the parking lot on her way into the shopping mall, approximately an hour before she slipped and fell after exiting the mall. The defendant's property manager only testified about the defendant's general cleaning and inspection procedures. Armenta v AAC Cross County Mall, LLC, 2023 NY Slip Op 04355, Second Dept. 8-23-23

Practice Point: For years slip and fall cases were reversed on this ground (no proof when the area was last cleaned or inspected) every week, now the reversals have slowed to a trickle but still …

AUGUST 23, 2023

SLIP AND FALL.

THE PAVING CONTRACTOR FAILED TO DEMONSTRATE IT DID NOT LAUNCH AN INSTRUMENT OF HARM (A LIP OR HEIGHT DIFFERENTIAL IN THE ROAD SURFACE) WHICH CAUSED PLAINTIFF'S SLIP AND FALL; THEREFORE THE CONTRACTOR DID NOT NEGATE THE APPLICABILITY OF THE ESPINAL EXCEPTION TO THE RULE THAT CONTRACTORS ARE GENERALLY NOT LIABLE TO THIRD PARTIES (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined the defendant paving company (DeBartolo) failed to eliminate a question of fact about whether it created the dangerous condition (i.e., launched the instrument of harm) which is alleged to have caused plaintiff's slip and fall. The complaint alleged DeBartolo paved over existing pavement, created the height-differential over which plaintiff tripped. Although a contractor like DeBartolo ordinarily does not owe a duty of care to a third party who is not a party to the contract, the so-called Espinal exceptions apply when a contractor is alleged to have "launched an instrument of harm." Once that theory of liability is alleged, the contractor seeking summary judgment must present evidence negating the allegation which DeBartolo failed to do:

… [T]he plaintiffs pleaded in their amended complaint and bill of particulars that DeBartolo Landscaping created the alleged dangerous condition that caused the injured plaintiff to fall as a result of, among other things, failing to properly repave the area. Therefore, DeBartolo Landscaping, in support of that branch of its motion which was for summary judgment dismissing the amended complaint insofar as asserted against it, had to establish, prima facie, that it did not create the dangerous or defective condition alleged (see Espinal v Melville Snow Contrs., 98 NY2d at 140 …). * * * … [The] evidence reveals … that DeBartolo Landscaping resurfaced Shady Glen Court in the area of the crosswalk prior to the subject accident, and that the resurfacing, which involved the application of new asphalt on top of the existing pavement, immediately resulted in a lip or elevation differential at the seam between the existing pavement and new asphalt. Thus, this evidence failed to demonstrate that Debartolo Landscaping did not create the alleged dangerous condition that caused the injured plaintiff to fall … . Camelio v Shady Glen Owners' Corp., 2023 NY Slip Op 04105, Second Dept 8-2-23

Practice Point: Generally contractors are not liable to persons who are not parties to the contract. However, under the Espinal case, contractors can be liable to third persons if they "launch an instrument of harm." If, as here, the plaintiff alleges the contractor launched an instrument of harm, the contractor must negate that allegation to be entitled to summary judgment. Here the proof did not negate the applicability of the Espinal exception.

AUGUST 2, 2023

STATUTE OF LIMITATIONS, COVID TOLL.

THE COVID STATUTE OF LIMITATIONS TOLL FROM MARCH TO NOVEMBER 2020 DID NOT ONLY APPLY TO ACTIONS WHOSE STATUTES OF LIMITATIONS EXPIRED DURING THAT PERIOD; THEREFORE PLAINTIFF'S ACTION WAS TIMELY (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the COVID toll of the statute of limitations rendered plaintiff's negligence action timely, noting that the toll did not apply only to statutes of limitations which expired during the toll period:

Pursuant to CPLR 214(5), an action to recover damages for personal injuries is subject to a three-year statute of limitations. In Brash v Richards, this Court held that the executive orders "constitute a toll" of the filing deadlines applicable to litigation in New York courts (Brash v Richards, 195 AD3d 582, 582 …). … [T]his toll of the statute of limitations did not only apply to statutes of limitations that expired between March 20, 2020, and November 3, 2020 … .

… [D]ue to the tolling provision of the executive orders, the statute of limitations within which the plaintiff was required to commence this action was tolled between March 20, 2020, and November 3, 2020 … Thus, this action … was commenced against those defendants well within the statute of limitations. Williams v Ideal Food Basket, LLC, 2023 NY Slip Op 04436, Second Dept 8-30-23

Practice Point: The COVID toll of the statute of limitations from March to November 2020 applies to all actions, not only those whose statutes of limitations expired during that period of time.

AUGUST 30, 2023

TRAFFIC ACCIDENTS, EVIDENCE, JUDGES.

THERE WAS NO REASONABLE VIEW OF THE EVIDENCE WHICH SUPPORTED THE JURY'S CONCLUSION THE BUS DRIVER WAS NOT NEGLIGENT IN THIS BUS-PEDESTRIAN ACCIDENT CASE; THE MOTION TO SET ASIDE THE DEFENSE VERDICT SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the motion to set aside the defense verdict in this bus-pedestrian accident case should have been granted:

A jury verdict in favor of a defendant should be set aside as contrary to the weight of the evidence where the evidence preponderates so heavily in the plaintiff's favor that it could not have been reached by any fair interpretation of the evidence … . "A driver . . . has 'a statutory duty to use due care to avoid colliding with pedestrians on the roadway (see Vehicle and Traffic Law § 1146), as well as a

common-law duty to see that which he [or she] should have seen through the proper use of his [or her] senses'" … .

Here, no fair interpretation of the evidence supports a finding that Ramirez was free from negligence in the happening of this accident. Although it is unclear whether the plaintiff was crossing the entrance ramp in or near the crosswalk at the time that she was struck, Ramirez's failure to observe the plaintiff crossing the entrance ramp at the time of the accident was a violation of his common-law duty to see that which he should have seen through the proper use of his senses … . Under these circumstances, the jury's verdict that Ramirez was free from negligence was not supported by any fair interpretation of the evidence. Wargold v Hudson Tr. Lines, Inc., 2023 NY Slip Op 04153, Second Dept 8-2-23

Practice Point: A driver has a common law duty to see what he should have seen. The motion to set aside the defense verdict in this bus-pedestrian accident case should have been granted.

AUGUST 2, 2023

TRAFFIC ACCIDENTS, INSURANCE LAW.

PETITIONER WAS ENTITLED TO A HEARING TO DETERMINE WHETHER SHE TOOK ADEQUATE STEPS TO LEARN THE IDENTITY OF THE OWNER AND OPERATOR OF THE CAB IN WHICH SHE WAS A PASSENGER WHEN THE CAB WAS STRUCK BY A HIT AND RUN DRIVER; PETITIONER SOUGHT TO COMMENCE AN ACTION AGAINST THE MOTOR VEHICLE ACCIDENT INDEMNIFICATION CORPORATION (MVAIC) (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the petition to commence an action against the Motor Vehicle Accident Indemnification Corporation (MVAIC) should not have been denied without a hearing. Petitioner was injured when a hit and run driver struck the cab she was riding in. The issue was whether petitioner took adequate steps to learn the identity of the owner and operator of the cab:

MVAIC was created to compensate innocent victims of hit-and-run motor vehicle accidents … . Insurance Law § 5218 sets forth the procedure for applying to a court for leave to commence an action against MVAIC in a hit-and-run case. "This

statute provides, inter alia, that a person may apply to a court for an order permitting an action against MVAIC when, as relevant here, there is a cause of action to recover damages for personal injury arising out of the ownership, maintenance, or use of a motor vehicle, and when the identity of the motor vehicle and of the operator and owner thereof cannot be ascertained" … . "If the court, after a hearing, is satisfied that, inter alia, all reasonable efforts have been made to ascertain the identity of the motor vehicle and of the owner and operator and either the identity of the motor vehicle and the owner and operator cannot be established, then it may issue an order permitting an action against MVAIC" … .

Supreme Court should not have denied the petition and dismissed the proceeding without first having conducted a hearing. * * * Given the efforts made by the petitioner, there are issues of fact as to whether, under the circumstances, her efforts to ascertain the owner and operator of the livery cab were reasonable. Matter of Benalcazar v Motor Veh. Acc. Indem. Corp., 2023 NY Slip Op 04376, Second Dept 8-23-23

Practice Point: Before the Motor Vehicle Accident Indemnification Corporation could be sued in this traffic accident case, the injured party (petitioner) was required take adequate steps to learn the identity of the owner and operator of the cab in which she was a passenger when the cab was struck by a hit and run driver. The efforts made by petitioner here were sufficient to warrant a hearing on the issue.

AUGUST 23, 2023

TRAFFIC ACCIDENTS, VEHICLE AND TRAFFIC LAW.

DEFENDANT DEMONSTRATED PLAINTIFF CAUSED THE TRAFFIC ACCIDENT BY MAKING AN UNREASONABLE LEFT TURN IN VIOLATION OF THE VEHICLE AND TRAFFIC LAW (NEGLIGENCE PER SE); THE COURT MAY DETERMINE THE PROXIMATE CAUSE OF A TRAFFIC ACCIDENT AT THE SUMMARY JUDGMENT STAGE AS A MATTER OF LAW IF ONLY ONE CONCLUSION CAN BE DRAWN FROM THE FACTS (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant in this traffic accident case demonstrated plaintiff violated the Vehicle and Traffic Law by unreasonably making a left turn, which constitutes negligence per se:

… [T]he defendant established her prima facie entitlement to judgment as a matter of law dismissing the complaint by submitting evidence that the plaintiff's conduct in making a left turn directly into the path of the defendant's vehicle without yielding the right-of-way to the defendant, in violation of Vehicle and Traffic Law § 1141, and when it was not reasonably safe to make a left turn, in violation of Vehicle and Traffic Law § 1163(a), was the sole proximate cause of the accident … . The issue of proximate cause may be decided as a matter of law where, as here, only one conclusion may be drawn from the established facts … . Lylan Pham v Lee, 2023 NY Slip Op 04200, Second Dept 8-9-23

Practice Point: Causing a traffic accident by making an unreasonable left turn into defendant's lane of traffic in violation of the Vehicle and Traffic Law is negligence per se.

Practice Point: A judge at the summary judgment stage can determine the proximate cause of a traffic accident as a matter of law if there is only one conclusion which can be drawn from the facts.

AUGUST 9, 2023

TRAFFIC ACCIDENTS.

DEFENDANT ALLOWED PLAINTIFF'S DECEDENT, 18, TO DRIVE HIS LAMBORGHINI WHILE DEFENDANT WAS A PASSENGER; PLAINTIFF'S DECEDENT LOST CONTROL AT 180 MPH, STRUCK A GUARD RAIL, WAS EJECTED AND DIED FROM HIS INJURIES; THERE WAS A QUESTION OF FACT, RAISED BY PLAINTIFF'S EXPERT, WHETHER DEFENDANT HAD SPECIAL KNOWLEDGE WHICH RENDERED PLAINTIFF'S DECEDENT'S USE OF THE CAR UNREASONABLY DANGEROUS; THE NEGLIGENT ENTRUSTMENT CAUSES OF ACTION SHOULD NOT HAVE BEEN DISMISSED (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined negligent entrustment causes of action should not have been dismissed. Defendant owned a high performance car (a Lamborghini) and allowed plaintiff's decedent, who was 18, to drive it. Plaintiff's decedent apparently lost control of the car at 180 mph, struck a guard rail, was ejected and died from his injuries. Defendant was a passenger at the time of the accident:

"The tort of negligent entrustment is based on the degree of knowledge the supplier of a chattel has or should have concerning the entrustee's propensity to use the chattel in an improper or dangerous fashion" … . To establish a cause of action under a theory of negligent entrustment, the defendant must either have some special knowledge concerning a characteristic or condition peculiar to the person to whom a particular chattel is given which renders that person's use of the chattel unreasonably dangerous, or some special knowledge as to a characteristic or defect peculiar to the chattel which renders it unreasonably dangerous … . "An owner of a motor vehicle may be liable for negligent entrustment if [he or she] was negligent in entrusting it to a person [he or she] knew, or in exercise of ordinary care should have known, was not competent to operate it" … .

Here, the defendant failed to establish his prima facie entitlement to judgment as a matter of law dismissing the cause of action alleging negligent entrustment. Although the decedent's possession of a driver license is a factor to be considered, the defendant nevertheless failed to eliminate triable issues of fact as to whether he had special knowledge concerning a characteristic or condition peculiar to the

decedent which rendered his use of the Lamborghini unreasonably dangerous … . Shepard v Power, 2023 NY Slip Op 04330, Second Dept 8-16-23

Practice Point: Here there was a question of fact, raised by plaintiff's expert, whether defendant's allowing plaintiff's decedent, 18, to drive defendant's Lamborghini constituted negligent entrustment. Plaintiff's decedent lost control at 180 mph, crashed and died from his injuries.

AUGUST 16, 2023

TRAFFIC ACCIDENTS.

LOANING PLAINTIFF'S DECEDENT A CAR WITH A BROKEN FUEL GAUGE WAS NOT A PROXIMATE CAUSE OF PLAINTIFF'S DECEDENT'S DEATH; THE CAR RAN OUT OF GAS AND PLAINTIFF'S DECEDENT PULLED OVER ONTO THE SHOULDER OF A TWO-LANE ROAD; SHE WAS STRUCK BY A HIT AND RUN DRIVER WHILE PUTTING GAS IN THE CAR WITH A GAS CAN (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the negligence ascribed to the defendant in this fatal traffic-accident case was not a proximate cause of the accident. Defendant allegedly loaned a car with a broken fuel gauge to plaintiff's decedent. The car ran out of gas on a two-lane highway and plaintiff's decedent pulled the car over onto the shoulder. When plaintiff's decedent was attempting to put gas in the car with a gas can, she was struck and killed by a hit-and-run driver:

… [T]he plaintiff alleged that the defendant knew that his vehicle had a malfunctioning gas gauge but nonetheless "allowed the decedent . . . to borrow and use" the vehicle. The plaintiff further alleged that the defendant negligently failed to maintain the vehicle in proper working order and loaned the vehicle to the decedent while it was in a state of disrepair, and that this negligence caused the decedent's injuries. After the completion of discovery, the defendant moved for summary judgment dismissing the complaint insofar as asserted against him, contending, inter alia, that it was not foreseeable that running out of gas would result in the decedent being struck by a hit-and-run driver, and that the defendant's alleged conduct was not a proximate cause of the accident. …

… [T]he defendant established, prima facie, that his alleged negligence was not a proximate cause of the accident. Even assuming, arguendo, that permitting the decedent to borrow a vehicle with a malfunctioning gas gauge "furnished the condition or occasion" for the accident … , under the circumstances here, a hit-and-run driver striking the decedent constituted an intervening act which was not foreseeable … . Biamonte v Biamonte, 2023 NY Slip Op 04296, Second Dept 8-16-23

Practice Point: Here plaintiff's decedent was struck and killed by a hit and run driver after the car loaned to her by defendant ran out of gas. The broken fuel gauge in the loaned car was not a proximate cause of her death. The hit and run accident was deemed an intervening act which was not foreseeable.

AUGUST 16, 2023

TREE FELL ON CAR, MUNICIPAL LAW.

A MUNICIPALITY HAS A DUTY TO INSPECT TREES ADJACENT TO ROADWAYS EVEN IF THE TREES ARE NOT ON THE MUNICIPALITY'S LAND; HERE THE MUNICIPALITY DID NOT DEMONSTRATE IT DID NOT HAVE CONSTRUCTIVE NOTICE OF THE CONDITON OF THE TREE WHICH FELL ON PLAINTIFFS CAR (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the town's motion for summary judgment in this falling-tree traffic-accident case should not have been granted. Although the tree which fell on plaintiff's car was on private property, it was adjacent to the road. A municipality has a duty to inspect trees adjacent to roads and the town failed to demonstrate it did not have constructive notice of the dangerous condition of the tree:

"A municipality's duty to maintain its roadways in a reasonably safe condition encompasses those trees, adjacent to the roads, which could reasonably be expected to pose a danger to travelers. However, liability will not attach unless the municipality had actual or constructive notice of the dangerous condition and subsequently failed to take reasonable measures to correct the condition" … . "Municipalities also possess a common-law duty to inspect trees adjacent to their roadways" … .

"To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it" … . "Where there is no evidence that the tree showed any visible, outward signs of decay prior to the accident, it cannot be said that the municipality had constructive notice of a defect. Rather, a manifestation of decay must be readily observable in order to give rise to a duty to prevent harm" … . Jourdain v Metropolitan Transp. Auth., 2023 NY Slip Op 04421, Second Dept 8-30-23

Practice Point: A town has a duty to inspect trees which are adjacent to roads, even if the trees are on private property. Here the town did not demonstrate that it did not have constructive notice of the condition of the tree which fell on plaintiff's car.

AUGUST 30, 2023

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