NEW YORK APPELLATE DIGEST, LLC

Personal Injury Reversal Report October 2023

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ANIMAL LAW, FALL FROM HORSE.

PLAINTIFF, WHO FELL FROM A HORSE, COULD SUE UNDER STANDARD PRINCIPLES OF NEGLIGENCE, AS OPPOSED TO THE STRICT LIABILITY THEORY IN THE AGRICULTURE AND MARKETS LAW; PLAINTIFF'S SUIT WAS PRECLUDED BY THE ASSUMPTION OF THE RISK DOCTRINE (THIRD DEPT).

The Third Department, reversing Supreme Court, determined standard negligence principles, not strict liability, applied to this falling-off-a-horse case. Plaintiff, who fell from the horse when the horse stopped suddenly, assumed the risk of such an injury:

Defendant argues that, because the injury at issue was caused by a horse — a domestic animal — plaintiff may only sue in strict liability (see Agriculture and Markets Law § 108 [7]; …). However, where a plaintiff suffers injuries stemming from horseback riding, such as here, the plaintiff may bring suit against the owner of the horse under traditional negligence standards … . Regardless, the primary assumption of risk doctrine functions as a "principle of no duty," serving to "den[y] the existence of any underlying cause of action" … . Stanhope v Burke, 2023 NY Slip Op 05427, Third Dept 10-26-23

Practice Point: Plaintiff could maintain a standard negligence action against to owner of a horse stemming from plaintiff's fall from the horse, as opposed to a strict liability action pursuant to the Agriculture and Markets Law.

Practice Point: Whether plaintiff sued in negligence or strict liability, the assumption of risk doctrine would apply to preclude the action.

OCTOBER 26, 2023

BUS PASSENGER INJURY, EVIDENCE, CIVIL PROCEDURE.

ALTHOUGH PLAINTIFF'S COMPARATIVE NEGLIGENCE IS NOT A BAR TO SUMMARY JUDGMENT ON LIABILITY, IT IS A VALID AFFIRMATIVE DEFENSE WHICH IS RELEVANT TO DAMAGES; THE COMPARATIVE NEGLIGENCE AFFIRMATIVE DEFENSE SHOULD NOT HAVE BEEN DISMISSED (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined defendant's comparative-negligence affirmative defense should not have been dismissed. Although plaintiff's comparative negligence is no longer a bar to summary judgment on liability, it is relevant to damages:

Plaintiff was injured when he was struck by the wheelchair ramp of a bus. That bus was owned by defendants and operated by an employee of defendants. The bus operator testified that he deployed the ramp and saw it hit plaintiff. He testified that he gave warnings in a loud voice before lowering the ramp, which made a "very loud" beeping noise that was "excruciating."

Plaintiff met his prima facie burden by submitting evidence, including his deposition testimony, that the operator was negligent in lowering the ramp onto the sidewalk when it was not reasonably safe to do so … . In opposition, defendants did not offer any nonnegligent explanation for the accident … . This accident was not within plaintiff's exclusive knowledge, because it occurred in the presence of a potential witness, namely the operator … . Defendants' remaining arguments effectively assert comparative negligence by plaintiff, which he was not required to disprove to be entitled to partial summary judgment … .

Supreme Court should not, however, have dismissed the affirmative defense of comparative negligence. At summary judgment, issues of credibility may not be resolved, and all reasonable inferences must be drawn in favor of the nonmoving party … . Prendergast v New York City Tr. Auth., 2023 NY Slip Op 05378, First Dept 10-24-23

Practice Point: Even where a plaintiff is entitled to summary judgment on liability, a defendant's comparative-negligence affirmative defense remains relevant to damages.

OCTOBER 24, 2023

BUS PASSENGER INJURY, EVIDENCE.

PLAINTIFF BUS PASSENGER WAS INJURED WHEN THE BUS DRIVER TOOK ACTION IN AN EMERGENCY; DEFENDANTS ENTITLED TO SUMMARY JUDGMENT (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff-bus-passenger's injuries resulted from the bus driver's reaction to an emergency:

In this action for personal injuries arising from a fall on a public bus, defendants established prima facie entitlement to judgment as a matter of law by demonstrating that their bus driver was presented with an emergency situation that was not of his own making when a vehicle abruptly swerved into his lane without signaling, and that he took reasonable action by braking to avoid a collision … .

In opposition, plaintiff failed to submit any evidence tending to show that the bus driver created the emergency or could have avoided a collision by taking a different action other than applying the brakes … . Plaintiff's claim that an issue of

fact is raised by conflicting testimony over whether the driver braked abruptly or gradually is unavailing. The undisputed evidence demonstrates that the driver was required to take immediate action to avoid striking the vehicle and that braking with sufficient force to prevent an accident was a reasonable response to the emergency … . Febres v Metropolitan Transp. Auth., 2023 NY Slip Op 05095, First Dept 10-10-23

Practice Point: Defendants demonstrated the bus driver took justifiable action in an emergency. Plaintiff, a bus passenger, was injured by the movement of the bus. Defendants were entitled to summary judgment.

OCTOBER 10, 2023

CHILD VICTIMS ACT, CIVIL PROCEDURE, COURT OF CLAIMS.

CLAIMANT ALLEGED SHE WAS SEXUALLY ABUSED BY TWO NAMED COUNSELORS FROM 1976 – 1978; THE CLAIM SUFFICIENTLY STATED A CAUSE OF ACTION PURSUANT TO THE CHILD VICTIMS ACT (SECOND DEPT).

The Second Department, reversing the Court of Claims, determined the claim sufficiently stated a Child Victims Act cause of action stemming from claimant's time in foster care from 1976 to 1978:

In August 2021, the claimant commenced this claim pursuant to the Child Victims Act (see CPLR 214-g) against the defendant, inter alia, to recover damages for negligent hiring, retention, and supervision. The claim alleged that the claimant, who had been placed in a group home for foster children when she was a child, was sexually abused by two named counselors at the facility from approximately 1976 to 1978. * * *

Court of Claims Act § 11(b) requires a claim to specify: "(1) the nature of the claim; (2) the time when it arose; (3) the place where it arose; (4) the items of damage or injuries claimed to have been sustained; and (5) the total sum claimed" … . These statutory requirements are "strictly construed," and a failure to comply with any of those requirements "constitutes a jurisdictional defect mandating dismissal" … . The purpose of the pleading requirements is to provide "a sufficiently detailed description of the particulars of the claim" so that the

defendant can "investigate and promptly ascertain the existence and extent of its liability" … . "However, absolute exactness is not required, so long as the particulars of the claim are detailed in a manner sufficient to permit investigation" … .

Contrary to the Court of Claims' determination, the claim set forth the nature of the claim with sufficient detail to allow the defendant to investigate the claim in a prompt manner and to assess its potential liability … . Brown v State of New York, 2023 NY Slip Op 04997, Second Dept 10-4-23

Practice Point: To state a cause of action pursuant to the Child Victims Act, the claim need only provide sufficient detail to allow a prompt investigation. Here the claimant alleged sexual while in foster care from 1976 – 1978 by two named counselors. The claim should not have been dismissed.

OCTOBER 4, 2023

CHILD VICTIMS ACT, CIVIL PROCEDURE, COURT OF CLAIMS.

THE "TIME WHEN" THE ALLEGED SEXUAL ABUSE TOOK PLACE IN 1997 WAS ADEQUATELY ALLEGED IN THE CLAIM IN THIS CHILD VICTIMS ACT SUIT (SECOND DEPT).

The Second Department, reversing the Court of Claims, determined the claim in this Child Victims Act action sufficiently described when the alleged sexual abuse took place:

… [T]he Court of Claims incorrectly determined that the claim was insufficient to satisfy Court of Claims Act § 11(b)'s "time when" requirement … . The claimant's allegations, including that the abuse occurred in approximately 1997 when she was approximately 15 years old by a named employee of the facility shortly after her arrival at the facility, provided sufficient information to enable the State to investigate and ascertain its liability under the circumstances … . Ford v State of New York, 2023 NY Slip Op 05124, Second Dept 10-11-23

Practice Point: In Child Victims Act cases where the alleged sexual abuse took place decades ago, the courts are forgiving when determining the sufficiency of the "time when" allegations. Here the allegations claimant was abused by a named

employee in 1997, when she was 15, shortly after her arrival at the facility, were deemed sufficient.

OCTOBER 11, 2023

FALL FROM WINDOW, MUNICIPAL LAW, REAL PROPERTY LAW, CONDOMINIUMS.

BECAUSE INDIVIDUAL CONDOMINIUM OWNERS ARE RESPONSIBLE FOR THE INSTALLATION OF WINDOW GUARDS, THE DEFENDANT CONDOMINIUM DID NOT HAVE A DUTY TO INSTALL WINDOW GUARDS; THEREFORE THE CONDOMINIUM COULD NOT BE LIABLE FOR PLAINTIFFS' DAUGHTER'S FALL FROM THE WINDOW UNDER THE FAILURE-TO-INSTALL THEORY; HOWEVER, THE CAUSE OF ACTION BASED UPON THE CONDOMINIUM'S FAILURE TO GIVE PLAINTIFFS NOTICE OF THE CITY'S WINDOW-GUARD REQUIREMENT SURVIVED THE DISMISSAL MOTION (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined the negligence cause of action against the condominium (Cherry Tower) premised on the failure to install window guards should have been granted. Plaintiffs' five-year-old daughter fell from the fifth floor window and died. Defendants submitted the deed to the condominium in support of their motion to dismiss. Because plaintiffs owned the condo unit, the defendants had no duty to install window guards. However, the cause of action alleging defendants' failure to give notice of the window-guard requirements in the NYC Administrative Code properly survived dismissal:

"The characteristics of condominium ownership are individual ownership of a unit, an undivided interest in designated common elements, and an agreement among unit owners regulating the administration and maintenance of property" … . Accepting the allegations in the complaint as true and giving the plaintiff the benefit of every favorable inference, the documentary evidence submitted by the Cherry Tower defendants, including the deed demonstrating that the unit owners purchased the subject apartment in 2007 and the condominium bylaws placing the responsibility to install and maintain window guards on the unit owners,

conclusively demonstrates that the Cherry Tower defendants had no duty to install window guards in the subject apartment (see Administrative Code of City of NY § 27-2043.1[a]; Real Property Law § 339-ee[1] …).

However, the Supreme Court properly denied that branch of the Cherry Tower defendants' motion which was to dismiss so much of the complaint as was based on their failure to provide the plaintiff with notice of the window guard requirements. Accepting the allegations in the complaint as true and giving the plaintiff the benefit of every favorable inference, the complaint sufficiently alleges that the Cherry Tower defendants failed in their responsibility to deliver the required notice to the subject apartment (see Administrative Code § 17-123[b]). Kwan v Kuie Chin Yap, 2023 NY Slip Op 05005, Second Dept 10-4-23

Practice Point: The individual owners of condominium units are responsible for the installation of window guards. Therefore the condominium itself has no duty to do so. However, in New York City, the condominium must provided the individual owners with notice of the window-guard requirement in the NYC Administrative Code.

OCTOBER 4, 2023

FIREFIGHER INJURED IN TRAINING, EMPLOYMENT LAW, MUNICIPAL LAW, RETIREMENT AND SOCIAL SECURITY LAW.

PETITIONER FIREFIGHTER WAS INJURED WHEN HE BECAME DEHYDRATED DURING TRAINING; HE WAS NOT ENTITLED TO ACCIDENTAL DISABILITY RETIREMENT BENEFITS BECAUSE THE INJURY DID NOT OCCUR AS A RESULT OF AN UNEXPECTED EVENT (FIRST DEPT).

The First Department, reversing Supreme Court, determined petitioner NYC firefighter was not entitled to accidental retirement (ADR) benefits because he was injured performing routine duties and not when responding to an unexpected event. Petitioner suffered an injury to his leg due to dehydration during training:

ADR benefits are awardable only where the individual's disability was the natural and proximate result of a service-related accident, i.e., "a 'sudden, fortuitous mischance, unexpected, out of the ordinary, and injurious in impact'" … . Petitioner's injury was the result of an incidental — not accidental — event …

because the injury was sustained while petitioner was performing routine duties, not as a result of an unexpected event … . Dehydration suffered by petitioner while running in hot weather in heavy gear was a foreseeable risk of the firefighting training exercise … . Matter of Rivera v Board of Trustees of N.Y. Fire Dept., 2023 NY Slip Op 05379, First Dept 10-24-23

Practice Point: Here a NYC firefighter was injured during training, not as a result of an "unexpected event." Therefore he was not entitled to accidental disability retirement benefits.

OCTOBER 24, 2023

LABOR LAW-CONSTRUCTION LAW, EVIDENCE.

THE SCAFFOLD COLLAPSED ENTITLING PLAINTIFF TO SUMMARY JUDGMENT ON THE LABOR LAW 240(1) CAUSE OF ACTION; THE HEARSAY SUBMITTED IN OPPOSITION DID NOT DEFEAT THE MOTION (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff was entitled to summary judgment on the Labor Law 240(1) cause of action in this scaffold-collapse case. Plaintiff alleged he was told to assemble use the scaffold despite mismatched parts. The defendants relied on hearsay statements attributed to Sabato, plaintiff's supervisor, to the effect that Sabato told plaintiff to wait until the correct scaffold parts were supplied. Hearsay alone will not defeat a summary judgment motion:

… [T]estimony establishing that a safety device collapsed is sufficient for a prima facie showing on liability … . * * *

Because defendants' submissions in opposition rely entirely on Sabato's inadmissible hearsay statements, they are insufficient to raise a triable issue of fact as to whether plaintiff's conduct — namely, using a scaffold that he was allegedly instructed not to use – may be the sole proximate cause for his accident and therefore warrant a denial of plaintiff's motion … . Garcia v 122-130 E. 23rd St. LLC, 2023 NY Slip Op 05096, First Dept 10-10-23

Practice Point: The collapse of a scaffold warrants summary judgment on a Labor Law 240(1) cause of action. Hearsay alone offered in opposition will not defeat the motion.

OCTOBER 10, 2023

LABOR LAW-CONSTRUCTION LAW.

IN A FALLING OBJECT CASE WHERE INADEQUATE SAFETY EQUIPMENT IS ALLEGED, THE FACT THAT THE PLAINTIFF DOES NOT KNOW WHAT THE OBJECT WAS DOES NOT PRECLUDE SUMMARY JUDGMENT ON THE LABOR LAW 240(1) CAUSE OF ACTION (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff was entitled to summary judgment on the Labor Law 240(1) cause of action in this falling object case. Plaintiff did not see or know what struck him. There was a hole in the protective netting:

… [T]he fact that the injured plaintiff could not identify the object that struck him or its origin did not preclude summary judgment in plaintiffs' favor. A plaintiff's prima facie case in a Labor Law § 240(1) action involving falling objects is not dependent on whether the plaintiff observed the object that hit him … . Further, a plaintiff is not required to show the exact circumstances under which the object fell, where a lack of a protective device proximately caused the injuries … . Here, plaintiff testified that he was struck on the head and neck by an unknown object while working on an outrigging platform on the 25th floor of the building under construction. He also testified that he heard workers stripping wood on the floors above him at the time of the accident, and submitted photographs depicting a large hole in the safety netting that served as overhead protection. This evidence was sufficient to establish prima facie that the accident was the result of a violation of Labor Law § 240(1) … . In opposition, defendants failed to provide any version of the accident under which they could not be held liable, making summary judgment appropriate … . Harsanyi v Extell 4110 LLC, 2023 NY Slip Op 05313, First Dept 10-19-23

Practice Point: Here plaintiff alleged he was struck by a falling object and the safety netting was inadequate. The fact that he did not know what the object was did not preclude summary judgment on his Labor Law 240(1) cause of action.

OCTOBER 19, 2023

LABOR LAW-CONSTRUCTION LAW.

PLAINTIFF DEMONSTRATED THE SCAFFOLD FROM WHICH HE FELL DID NOT HAVE GUARDRAILS; HIS MOTION FOR SUMMARY JUDGMENT ON THE LABOR LAW 240(1) CAUSE OF ACTION SHOULD HAVE BEEN GRANTED (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff in this scaffold-fall case was entitled to summary judgment on the Labor Law 240(1) cause of action. Plaintiff demonstrated the scaffold lacked guardrails. That was enough:

Plaintiff … established prima facie that defendant violated Labor Law § 240(1) and that the violation proximately caused his injuries, as his uncontroverted affidavit demonstrated that the scaffold supplied to him for the work he was performing lacked guardrails and that no other protective devices were provided to protect him from falling. The motion was not premature as defendants failed to show what discovery was needed or what any additional discovery could be expected to reveal (see CPLR 3212 [f] …). Velasquez v 94 E. 208 St. Partners LLC, 2023 NY Slip Op 05110, First Dept 10-10-23

Practice Point: Here, falling from a scaffold with no guardrails warranted summary judgment on the Labor Law 240(1) cause of action.

OCTOBER 10, 2023

MEDICAL MALPRACTICE, EVIDENCE.

IN THIS MEDICAL MALPRACTICE ACTION, PLAINTIFF'S EXPERT'S AFFIDAVIT DID NOT DEMONSTRATE FAMILIARITY WITH THE APPLICABLE STANDARD OF CARE, WAS SPECULATIVE AND CONCLUSORY AND DID NOT ADDRESS ALL THE ASSERTIONS MADE BY DEFENDANTS' EXPERTS; THE DEFENDANTS WERE ENTITLED TO SUMMARY JUDGMENT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the affidavit from plaintiff's expert did not demonstrate familiarity with the applicable standard of care, was speculative and conclusory, and did not address all the allegations raised by defendants' experts:

… [T]he plaintiff failed to raise a triable issue of fact by submitting a redacted physician's affidavit. "While it is true that a medical expert need not be a specialist in a particular field in order to testify regarding accepted practices in that field, the witness nonetheless should be possessed of the requisite skill, training, education, knowledge[,] or experience" necessary to establish the reliability of his or her opinion … Here, the redacted physician's affidavit failed to lay the requisite foundation for the affiant's familiarity with the applicable standard of nursing care … . Moreover, the opinions of the plaintiff's expert that the defendants deviated from the applicable standard of care were speculative, conclusory, and nonresponsive to the specific assertions raised by the defendants' experts … . Blank v Adiyody, 2023 NY Slip Op 05243, Second Dept 10-18-23

Practice Point: In a med mal action, in the context of a summary judgment motion, an expert's affidavit must demonstrate familiarity with the applicable standard of care, must not be speculative or conclusory, and must address all the assertions made by the opposing party's expert(s).

OCTOBER 18, 2023

MEDICAL MALPRACTICE, EVIDENCE.

THE PLAINTIFF'S EXPERT'S ASSERTION THAT THE FAILURE TO DIAGNOSE ATHEROSCLEROTIC CARDIOVASCULAR DISEASE PROXIMATELY CAUSED DECEDENT'S PREMATURE DEATH WAS SUFFICIENT TO RAISE A QUESTION OF FACT ON CAUSATION IN THIS MEDICAL MALPRACTICE ACTION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff's expert's affidavit raised a question of fact whether defendants' failure to diagnose plaintiff's decedent's atherosclerotic cardiovascular disease proximately caused decedent's premature death:

… Supreme Court properly determined that the affirmation of the defendants' expert established, prima facie, that the treatment provided by the defendants was not a proximate cause of the decedent's alleged injuries … . However, … the affirmation of the plaintiff's expert, wherein the expert opined to a reasonable degree of medical certainty that the defendants' departures from accepted standards of medical care proximately caused the decedent to die prematurely … , as a result of atherosclerotic cardiovascular disease, was sufficient to raise an issue of fact with respect to causation … . Persuad v Hassan, 2023 NY Slip Op 05279, Second Dept 10-18-23

Practice Point: Here plaintiff alleged defendants' failure to diagnose decedent's atherosclerotic cardiovascular disease constituted medical malpractice. Plaintiff's expert raised a question of fact on causation by asserting the failure to diagnose the disease proximately caused decedent's premature death.

OCTOBER 18, 2023

MEDICAL MALPRACTICE, PUBLIC HEALTH LAW, IMMUNITY, COVID.

IN THIS MEDICAL MALPRACTICE ACTION, PLAINTIFF WAS ADMITTED WITH COVID, WAS TREATED FOR COVID AND DIED FROM COVID; PURSUANT TO THE EMERGENCY OR DISASTER TREATMENT PROTECTION ACT (EDTPA) THE DEFENDANT WAS IMMUNE FROM SUIT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant New York City Health and Hospitals Corporation was immune from a lawsuit stemming from a COVID-19-related death pursuant to the Emergency or Disaster Treatment Protection Act (EDTPA):

… [T]he EDTPA initially provided, with certain exceptions, that a health care facility "shall have immunity from any liability, civil or criminal, for any harm or damages alleged to have been sustained as a result of an act or omission in the course of arranging for or providing health care services" as long as three conditions were met: the services were arranged for or provided pursuant to a COVID-19 emergency rule or otherwise in accordance with applicable law; the act or omission was impacted by decisions or activities that were in response to or as a result of the COVID-19 outbreak and in support of the State's directives; and the services were arranged or provided in good faith … . The health care services covered by the immunity provision included those related to the diagnosis, prevention, or treatment of COVID-19; the assessment or care of an individual with a confirmed or suspected case of COVID-19; and the care of any other individual who presented at a health care facility or to a health care professional during the period of the COVID-19 emergency declaration … . Mera v New York City Health & Hosps. Corp., 2023 NY Slip Op 04975, Second Dept 10-4-23

Practice Point: Pursuant to the Emergency or Disaster Treatment Protection Act (EDTPA), the defendant health care facility was immune from a lawsuit premised upon admission, treatment and death from COVID-19.

OCTOBER 4, 2023

MEDICAL MALPRACTICE.

MALPRACTICE TREATING THE INITIAL MEDICAL INJURY AT ANOTHER HOSPITAL IS A FORESEEABLE CONSEQUENCE OF THE INITIAL MEDICAL INJURY (FIRST DEPT).

The First Department, reversing Supreme Court and reinstating the medical malpractice action, noted that malpractice in treating an injury is a foreseeable consequence of the injury. Plaintiff's decedent was injured during surgery and the injury was subsequently treated at another hospital (The Valley Hospital). Defendants' expert opined that a delay in treatment at The Valley Hospital was the cause of decedent's injuries:

Although defendants' expert opined that the cause of decedent's injuries was negligent delay by The Valley Hospital, any such delay "does not absolve defendant[s] from liability because there may be more than one proximate cause of an injury" … . Malpractice in treating an injury is a foreseeable consequence of that injury, which does not supersede the causal role of the initial tort … . Therefore, regarding these injuries, defendants' expert "never actually opined that [decedent's] claimed injuries were not causally related to defendants' alleged malpractice" … . Murphy v Chinatown Cardiology, P.C., 2023 NY Slip Op 05321, First Dept 10-19-23

Practice Point: If the initial medical injury leads to subsequent treatment at another hospital, any malpractice in the subsequent treatment is a foreseeable consequence of the initial medical injury.

OCTOBER 19, 2023

SLIP AND FALL, CIVIL PROCEDURE, EVIDENCE.

THE MOTION TO BIFURCATE THE LIABILITY AND DAMAGES ASPECTS OF THE TRIAL IN THIS SLIP AND FALL CASE SHOULD NOT HAVE BEEN GRANTED; STATEMENTS MADE TO HEALTHCARE PERSONNEL AND MEDICAL RECORDS WERE RELEVANT TO LIABILITY (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the defendant's motion to bifurcate the trial (liability versus damages) in this slip and fall case

should not have been granted. Plaintiff made statements to medical personnel which were relevant to liability:

Plaintiff commenced this action seeking damages for injuries that he allegedly sustained when he fell from an "upper patio or balcony" of an apartment building … . We agree with plaintiff that Supreme Court abused its discretion in granting defendants-respondents' motion to bifurcate the trial with respect to the issues of liability and damages. "As a general rule, issues of liability and damages in a negligence action are distinct and severable issues which should be tried separately" … . Here, however, we conclude that the issue of liability is not distinct from the issue of plaintiff's injuries because plaintiff made statements to several of his medical care providers following his fall that render the testimony of several medical witnesses as well as hospital and medical records relevant to the liability phase of the trial. Plaintiff has thus established that bifurcation would not "assist in a clarification or simplification of issues and a fair and more expeditious resolution of the action" … . Bogumil v Greenbaum Family Holdings, LP, 2023 NY Slip Op 05069, Fourth Dept 10-6-23

Practice Point: It is usual to bifurcate the liability and damages aspects of negligence trials. Here plaintiff's statements to medical personnel and his medical records were relevant to liability as well as damages. The motion to bifurcate should not, therefore, have been granted.

OCTOBER 6, 2023

SLIP AND FALL, CONTRACT LAW.

IN THIS SLIP AND FALL CASE, THERE WAS NO EXPRESS INDEMNIFICATION AGREEMENT BETWEEN DEFENDANT GROCERY STORE AND THE FLOOR-CLEANING DEFENDANTS AND THERE WAS NO EVIDENCE THE FLOOR-CLEANING DEFENDANTS WERE NEGLIGENT OR CAUSED THE INJURY; THEREFORE THE GROCERY STORE'S INDEMNIFICATION AND CONTRIBUTION ACTIONS SHOULD HAVE BEEN DISMISSED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the indemnification and contribution causes of action brought by the defendant grocery store

(ShopRite) against the floor-cleaning defendants (Advance and Corporate) in this slip and fall case should have been dismissed. There was no express indemnification agreement. There was no showing Advance and Corporate were negligent. Safier v Wakefern Food Corp., 2023 NY Slip Op 05413, Second Dept 10-25-23

OCTOBER 25, 2023

SLIP AND FALL, EVIDENCE.

DEFENDANT PROPERTY OWNERS PRESENTED NO EVIDENCE TO DEMONSTRATE WHEN THE STEPS WHERE PLAINTIFF SLIPPED AND FELL WERE LAST INSPECTED OR CLEANED; THEREFORE DEFENDANTS WERE NOT ENTITLED TO SUMMARY JUDGMENT (FIRST DEPT).

The First Department, reversing Supreme Court, determined there was a question of fact whether defendants created or had notice of the slippery condition of the steps alleged to have caused plaintiff's slip and fall. Defendants presented no evidence about when the steps were last cleaned or inspected:

Defendant Bruhilde Koenig testified during her deposition that she painted the concrete steps leading down to plaintiff's basement apartment with nonslip paint, and that she never had issues with the patio being slippery when wet prior to plaintiff's accident. However, she presented no testimony as to the condition of the steps on the day of the accident or as to when the steps had most recently been inspected or cleaned. Plaintiff testified that it was "wet and misty" at the time of the accident, that he observed standing water on the steps, and that he had previously asked Koenig to place safety strips on the staircase, as he and his daughter had slipped and fallen in the past during rainy weather. Plaintiff also testified that the steps were "irregular" and not "very well uniformed [sic]." Plaintiff has raised a triable issue of fact as to whether defendants created or had notice of the alleged defect. Iaccarino v Koenig, 2023 NY Slip Op 05037, First Dept 10-5-23

Practice Point: In a slip and fall case, the property owner cannot demonstrate a lack of notice of the slippery condition without presenting evidence demonstrating when the area was last inspected or cleaned.

OCTOBER 5, 2023

SLIP AND FALL, EVIDENCE.

THE CIRCUMSTANTIAL EVIDENCE PRESENTED BY PLAINTIFF DID NOT IDENTIFY THE CAUSE OF PLAINTIFF'S DECEDENT'S SLIP AND FALL; DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant property owner in this slip and fall case was entitled to summary judgment because plaintiff, the administrator of plaintiff's decedent's estate, could not identify the cause of plaintiff's decedent's fall. Plaintiff's decedent died from a brain injury incurred by the fall in a bathroom. Although the complaint alleged the floor was wet and slippery, that allegation was not supported by any of the circumstantial evidence. Plaintiff's decedent said he had lost his balance:

Viewing the evidence in the light most favorable to the plaintiff as the nonmoving party … , the defendants demonstrated, prima facie, that the plaintiff was unable to identify the cause of the decedent's accident without engaging in speculation, since the evidence demonstrated that the plaintiff was unable to identify how the decedent's accident occurred or what dangerous condition or defect, if any, in the men's bathroom caused the decedent's fall … . In opposition, the plaintiff failed to raise a triable issue of fact. Cruz v Flatlands Christian Ctr., Inc., 2023 NY Slip Op 05120, Second Dept 10-11-23

Practice Point: If the cause of a slip and fall cannot be identified without speculation, the action will be dismissed.

OCTOBER 11, 2023

SLIP AND FALL, LANDLORD-TENANT.

DEFENDANT DEMONSTRATED IT WAS AN OUT-OF-POSSESSION LANDLORD WHICH HAD RELINQUISHED CONTROL OVER THE AREA WHERE PLAINTIFF SLIPPED AND FELL ON A FLOOR ALLEGED TO HAVE BEEN SLIPPERY BECAUSE IT HAD BEEN WAXED (FIRST DEPT).

The First Department, reversing Supreme Court, determined defendant Trinity demonstrated it was an out-of-possession landlord and the area where plaintiff slipped and fell was under the control of the lessee (LSSNY), plaintiff's employer. Plaintiff alleged the floor was slippery because it had been waxed:

Defendant established prima facie that it was an out-of-possession landlord with no contractual obligation to maintain the demised premises. Defendant also established prima facie, that the accident was not caused by a structural or design defect that violated a specific statutory safety provision … . * * *

… [P]laintiff failed to raise a triable issue of fact as to whether defendant possessed and controlled the leased premises for purposes of liability. Plaintiff's averment that she saw defendant's personnel freely using the location during the three years she worked at the premises was insufficient to demonstrate that there exists a triable issue of fact as to whether defendant relinquished complete control over the area before she fell … . Rodriguez v Trinity Evangelical Lutheran Church, 2023 NY Slip Op 05453, First Dept 10-26-23

Practice Point: Here the out-of-possession landlord was not liable for plaintiff's fall on a slippery floor. The alleged defect was not structural and did not violate a statutory duty.

OCTOBER 26, 2023

SLIP AND FALL, MUNICIPAL LAW.

A NYC REGULATION REQUIRES FOR-HIRE VEHICLES TO BE WITHIN 12 INCHES OF THE CURB WHEN PICKING UP OR DISCHARGING PASSENGERS; THE DRIVER STOPPED TWO FEET FROM THE CURB AND PLAINTIFF FELL TRYING TO GET INTO THE VEHICLE; THE NEGLIGENCE ACTION AGAINST THE UBER DRIVER SHOULD NOT HAVE BEEN DISMISSED (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined the negligence action against the driver and owner of an UBER vehicle should not have been dismissed. The driver stopped two feet from the curb and plaintiff tripped trying to get into the vehicle. A NYC regulation requires vehicles-for-hire to be within 12 inches of the curb:

"To hold a defendant liable in common-law negligence, a plaintiff must demonstrate (1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, and (3) that the breach constituted a proximate cause of the injury" … "Although the issue of proximate cause is generally one for the finder of fact, liability may not be imposed upon a party who merely furnishes the condition or occasion for the occurrence of the event but is not one of its causes" … .

"A common carrier owes a duty to a passenger to provide a reasonably safe place to board and disembark its vehicle" … . 34 RCNY 4-11(c) requires taxis and for-hire vehicles to be within 12 inches of the curb when picking up or discharging passengers. Porcasi v Oji, 2023 NY Slip Op 05281, Second Dept 10-18-23

Practice Point: Here the NYC regulation requiring for-hire vehicle to be within 12 inches of the curb when picking up a passenger created a duty on the part of the driver which was breached when the driver stopped two-feet from the curb. The defendant driver did not demonstrate the breach was not the proximate cause of plaintiff's fall and did not demonstrate the driver's action merely furnished a condition for the fall. Therefore there are questions of fact for the jury.

OCTOBER 18, 2023

TRAFFIC ACCIDENTS, CIVIL PROCEDURE, TRUSTS AND ESTATES.

THE FIVE-YEAR DELAY BETWEEN PLAINTIFF-DECEDENT'S DEATH AND THE MOTION TO SUBSTITUTE AN ADMINISTRATOR DID NOT WARRANT DISMISSAL OF THE ACTION; DECEDENT HAD BEEN AWARDED SUMMARY JUDGMENT ON LIABILITY IN THIS TRAFFIC-ACCIDENT CASE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the four year delay in appointment of an administrator and the addition one year in moving for substitution in this traffic accident case did not warrant dismissal of the action:

… [T]he approximately four-year delay in obtaining letters of administration followed by an approximately one-year delay in moving for substitution shows a lack of diligence … . However, even if the "explanation for the delay is not satisfactory, the court may still grant the motion for substitution if there is no showing of prejudice and there is potential merit to the action, in light of the strong public policy in favor of disposing of matters on the merits" … .

Here, where the decedent was awarded summary judgment on the issue of liability against the defendants, the action has potential merit … . Further, the defendants provided mere "conclusory allegations of prejudice based solely on the passage of time" … . This record reflects that the defendants will suffer little or no prejudice as a result of the delay, particularly because this case, which is set for a trial on damages only, is likely to turn on medical records and an extant deposition transcript … . Hemmings v Rolling Frito-Lay Sales, LP, 2023 NY Slip Op 05125, Second Dept 10-11-23

Practice Point: Plaintiff had been awarded summary judgment on liability in this traffic accident case. Plaintiff died and there was a five-year delay before the motion to substitute an administrator. The action should not have been dismissed.

OCTOBER 11, 2023

TRAFFIC ACCIDENTS, CIVIL PROCEDURE.

THE MOTION TO AMEND THE COMPLAINT TO ADD A CLAIM FOR PUNITIVE DAMAGES SHOULD HAVE BEEN GRANTED; ADDING ALLEGATIONS WHICH INCREASE A DEFENDANT'S EXPOSURE TO LIABILITY DOES NOT CONSTITUTE PREJUDICE TO THE DEFENDANT (FIRST DEPT).

The First Department, reversing Supreme Court, determined the motion to amend the complaint to add a claim for punitive damages did not prejudice defendant (Eldridge) and should have been granted:

The court improvidently exercised its discretion and should have granted plaintiffs' motion to amend the complaint to add a claim for punitive damages against Eldridge based on his deposition testimony that he knowingly drove a truck on a public roadway with defective brakes, horn, and one inoperable windshield wiper, and was reaching for his cell phone that had fallen to the floor of the car when his truck collided with the rear of plaintiffs' vehicle. A jury might find that such conduct sufficiently demonstrated a conscious and willful disregard of the interests of others … .

The court denied plaintiffs' motion to reargue their … order upon a finding that the amendment would prejudice Eldridge because it subjected him to personal exposure in the accident. However, greater exposure to liability does not constitute prejudice. There must be some indication that defendant has been hindered in the preparation of its case or has been prevented from taking some measure to support its position, and the burden of demonstrating prejudice is on the party opposing amendment … . Eldridge failed to sustain his burden of showing prejudice. Owens v STD Trucking Corp., 2023 NY Slip Op 05323, First Dept 10-19-23

Practice Point: Here the fact that the proposed amendment to the complaint exposed the defendant to greater exposure to liability does not constitute prejudice. The motion to amend the complaint to add a claim for punitive damages should have been granted.

OCTOBER 19, 2023

TRAFFIC ACCIDENTS, DRAM SHOP ACT, EVIDENCE.

DEFENDANT DID NOT PRESENT SUFFICIENT EVIDENCE TO WARRANT SUMMARY JUDGMENT IN THIS DRAM SHOP ACT CASE; POINTING TO GAPS IN PLAINTIFF'S PROOF WILL NOT MEET THE BURDEN OF PROOF AT THE SUMMARY JUDGMENT STAGE (FIRST DEPT).

The First Department, reversing Supreme Court, determined defendant in this Dram Shop Act did not present enough evidence to warrant summary judgment, noting that pointing to gaps in plaintiffs' proof never sufficient:

Defendant failed to establish its prima facie entitlement to summary judgment dismissing plaintiffs' claim based on violation of the Dram Shop Act (General Obligations Law § 11—101; Alcoholic Beverage Control Law § 65[2]). "[A] defendant when moving for summary judgment cannot merely point to gaps in the plaintiffs' evidence, but must affirmatively demonstrate entitlement to summary judgment" … .

Although defendant's manager testified about employee training and practices generally, his testimony regarding the incident at issue—including, inter alia, that he did not know whether any patrons were intoxicated on the date of the alleged incident, that he was not aware of anyone being asked to leave the establishment due to intoxication during the month of the incident, and that defendant did not keep records of intoxicated individuals—failed to carry defendant's initial burden. Defendant's further "reli[ance] on plaintiffs' inability to prove that the assailants were served alcohol or were intoxicated" was similarly insufficient to carry its prima facie burden … . Bauseman v Pamdh Enters. Inc., 2023 NY Slip Op 05355, First Dept 10-24-23

Practice Point: Defendant's pointing to gaps in plaintiffs' proof is not be enough to support summary judgment.

OCTOBER 24, 2023

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TRAFFIC ACCIDENTS, INSURANCE LAW, NEGLIGENCE, VEHICLE AND TRAFFIC LAW.

PETITIONER-PEDESTRIAN ESTABLISHED THE IDENTITY OF THE DRIVER WHO STRUCK HER COULD NOT BE ASCERTAINED THROUGH REASONABLE EFFORTS; THEREFORE SHE COULD SUE THE MOTOR VEHICLE ACCIDENT INDEMNIFICATION CORPORATION (MVAIC) (FIRST DEPT).

The First Department, reversing Supreme Court, determined petitioner-pedestrian demonstrated the driver who violated the Vehicle and Traffic Law, struck her and fled the scene could not be identified. Therefore she was entitled to sue the Motor Vehicle Accident Indemnification Corporation (MVAIC). The court noted that, although petitioner relied on a hearsay police report, the report could be considered because the MVAIC also relied on it:

Petitioner alleged that on March 4, 2021, she was injured as a pedestrian in the crosswalk after a two-motor-vehicle collision between a BMW and Cadillac. The police report stated that petitioner was struck by the Cadillac after its driver disobeyed a traffic light and collided with the BMW, and the driver of the Cadillac subsequently fled from the scene by foot. The police later discovered that the Cadillac's license plate did not match the vehicle.

… [P]etitioner proffered … a police accident report pertaining to the incident, a letter from the BMW's insurer disclaiming coverage on the ground that its insured driver did not disobey any traffic law, and a sworn Notice of Intention to Make a Claim (Notice of Intention) attesting that the Cadillac's driver was unknown, and the vehicle had a fake license plate. … [T]hese documents were sufficient to satisfy the requirements of Insurance Law § 5218 to commence an action against MVAIC … . Petitioner met her burden of demonstrating that the subject accident was one in which the identity of the owner and operator of the Cadillac was not ascertainable through reasonable efforts … . Although a police report is generally inadmissible as hearsay, MVAIC also relied on it in opposing the petition, and thus it may be considered in support of the Notice of Intention .. . Matter of Richardson v Motor Veh. Acc. Indem. Corp., 2023 NY Slip Op 04950, Second Dept 10-3-23

Practice Point: This decision gives some insight into the proof required to demonstrate the identity of a driver involved in an accident cannot be ascertained, clearing the way for a suit against the MVAIC.

OCTOBER 3, 2023

TRAFFIC ACCIDENTS, MUNICIPAL LAW, CIVIL PROCEDURE.

THE PROPOSED AMENDMENT TO THE NOTICE OF CLAIM DID NOT PRESENT A NEW THEORY OF NEGLIGENCE; THE MOTION TO AMEND SHOULD NOT HAVE BEEN DENIED (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff's motion to amend the notice of claim should have been granted. The amendments merely fleshed out the theory of negligence described in the original notice and did not present a new theory of liability:

The purpose of prohibiting new theories of liability in notices of claim is to prevent prejudicing the city in its ability to timely investigate the claim and provide an adequate defense … . Contrary to defendants' argument, to the extent the notice of claim alleges affirmative negligence, plaintiff did so in the first instance. Plaintiff's original notice of claim alleged that his injuries were caused by New York City's "negligent . . . design, maintenance, construction and installation . . ." of the "the traffic island/extra curb/bumper" in question. Plaintiff only adds that his injuries were related to the "design, installation, and maintenance" of the delineators and bollards which are specific elements of the traffic island. This addition only alleges specific facts related to the theories of liability contained in the original claim, unlike in cases cited by defendants … . Accordingly, we find that this amendment does not seek to assert a new theory of liability, and instead merely clarifies the facts alleged in the claim, as permitted by General Municipal Law § 50-e. Burnes v City of New York, 2023 NY Slip Op 05221, First Dept 10-17-23

Practice Point: The motion to amend the notice of claim merely fleshed out the theory of negligence in the original notice and did not present a new theory. Therefore the motion should have been granted.

OCTOBER 17, 2023

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TRAFFIC ACCIDENTS, MUNICIPAL LAW, VEHICLE AND TRAFFIC LAW.

THE DRIVER OF THE FIRE ENGINE RESPONDING TO AN EMERGENCY STRUCK PLAINTIFF'S STOPPED CAR WHILE MAKING A RIGHT TURN FROM A LANE TO THE LEFT OF PLAINTIFF; IT WAS NOT DEMONSTRATED THE FIRE-ENGINE DRIVER ACTED IN RECKLESS DISREGARD FOR THE SAFETY OF OTHERS (SECOND DEPT).

The Second Department determined the city was entitled to summary judgment in this traffic accident case involving a fire engine responding to an emergency. Plaintiff had stopped in the right lane and was struck by the fire engine as it made a right turn from the lane to the left of plaintiff, or possibly from the oncoming lane. The Second Department determined the city had demonstrated, as a matter of law, the reckless-disregard standard was not triggered:

"The reckless disregard standard requires evidence that the actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow and has done so with conscious indifference to the outcome" … . "The reckless disregard standard, which requires that a plaintiff show more than a momentary judgment lapse on the part of the defendant, allows emergency personnel to act swiftly and resolutely while at the same time protecting the public's safety" … .

… [T]he defendants demonstrated, prima facie, that the applicable standard of care was reckless disregard, as Roberts [the engine driver] was engaging in conduct specified in Vehicle and Traffic Law §§ 1104(b)(2) and 1104(b)(4) at the time of the collision … . The defendants further demonstrated, prima facie, that Roberts's conduct did not rise to the level of reckless disregard for the safety of others … . Moore v City of New York, 2023 NY Slip Op 05128, Second Dept 10-11-23

Practice Point: The fact that the fire engine struck plaintiff's stopped car while making a right turn from a lane to the plaintiff's left did not raise a question of fact about whether the engine-driver demonstrated a reckless disregard for the safety of others.

OCTOBER 11, 2023

TRAFFIC ACCIDENTS, VEHICLE AND TRAFFIC LAW.

QUESTIONS OF FACT ABOUT WHO HAD THE GREEN LIGHT AND WHETHER DEFENDANT DRIVER SAW WHAT SHOULD HAVE BEEN SEEN PRECLUDED SUMMARY JUDGMENT IN THIS INTERSECTION TRAFFIC ACCIDENT CASE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined there were questions of fact which precluded summary judgment in favor of defendants in this intersection traffic accident case. Although plaintiffs' car was struck when attempting a left turn across defendant's oncoming lane, there was conflicting evidence about which party had the green light and whether defendant failed to see what should have been seen:

Susan [plaintiff] testified at her deposition that she entered the subject intersection to turn left when a traffic arrow controlling the left turn was green in her favor. In contrast, Peter [defendant] testified at his deposition that the traffic light was green in his favor as he approached the subject intersection from the opposite direction. In addition, Peter testified that there was nothing obstructing his view of the intersection as he began to drive through it, and it is undisputed that he then struck the plaintiff's vehicle on the middle portion of the passenger side door. Thus, although the defendants submitted some evidence that Susan failed to yield the right-of-way to the defendants' vehicle at the intersection in apparent violation of Vehicle and Traffic Law § 1141, the evidence submitted by the defendants failed to eliminate triable issues of fact as to whether Peter entered the intersection against a red traffic light in violation of Vehicle and Traffic Law § 1111(d)(1) or, if the traffic light was green in his favor, failed to exercise reasonable care notwithstanding the invitation to proceed by the green light facing him … . Accordingly, the defendants did not establish, prima facie, that Susan's failure to yield the right-of-way was the sole proximate cause of the accident and that the defendants were themselves free from fault … . Schmitz v Pinto, 2023 NY Slip Op 04983, Second Dept 10-4-23

Practice Point: There can be more than one proximate cause of a traffic accident. Although plaintiff was struck making a left turn across defendant's lane, there were questions of fact about who had the green light, and, if defendant had the green light, whether he should have seen what was there to be seen (plaintiff's car was struck in the middle of the passenger door).

OCTOBER 4, 2023

TRAFFIC ACCIDENTS, VEHICLE AND TRAFFIC LAW.

IN THIS REAR-END COLLISION CASE, THE DRIVER OF THE REAR VEHICLE ALLEGED THE OTHER VEHICLE CHANGED LANES ABRUPTLY AND CAME TO A STOP IN FRONT OF HIM; THAT CONSTITUTED A NON-NEGLIGENT EXPLANATION WHICH RAISED A QUESTION OF FACT (SECOND DEPT).

The Second Department, reversing Supreme Court in this rear-end traffic accident case, determined defendant raised a question of fact about a non-negligent explanation for his striking the car in front:

At his deposition, Guo Lin Wu [the driver of the United vehicle] testified that the Castillo/Lopez vehicle changed lanes abruptly in front of the United vehicle and then came to a sudden stop. Guo Lin Wu's deposition testimony, if true, would constitute a nonnegligent explanation for his actions, and would establish that Castillo's negligence was a proximate cause of the accident … . The differing versions of events raised issues of credibility to be resolved by the factfinder … . Balanta v Guo Lin Wu, 2023 NY Slip Op 05111, Second Dept 10-11-23

Practice Point: Ordinarily a rear-end collision with a stopped vehicle warrants summary judgment in favor of the stopped vehicle. Here the driver of the rear vehicle raised a question of fact by alleging the other vehicle changed lanes abruptly and stopped in front of him.

OCTOBER 11, 2023

TRAFFIC ACCIDENTS, VEHICLE AND TRAFFIC LAW.

PLAINTIFF PASSENGER SUED THE DRIVER WHO STRUCK A CAR FROM BEHIND; PLAINTIFF WAS NOT ENTITLED TO SUMMARY JUDGMENT; THERE WAS NO EVIDENCE THE DRIVER FAILED TO MAINTAIN A SAFE DISTANCE IN VIOLATION OF THE VEHICLE AND TRAFFIC LAW (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff passenger was not entitled to summary judgment in this traffic accident case. The defendant,

Rodriguez, was driving the car in which plaintiff was a passenger when it stuck another car driven by Espada. Plaintiff did not demonstrate that Rodriguez did not maintain a safe distance from the Espada car. Therefore plaintiff did not make out a prima facie case that Rodriguez was liable for a rear-end collision:

Plaintiff failed to make a prima facie showing that the accident was a rear-end collision resulting from Rodriguez's failure to maintain a safe distance behind Espada's vehicle, in violation of Vehicle and Traffic Law § 1129(a) … . Rather, plaintiff testified that Rodriguez's vehicle came in contact with Espada's vehicle as Rodriguez was turning into an intersection, and plaintiff did not see the Espada vehicle prior to the accident and did not know if it was moving or stopped at the moment of impact. Absent a showing that Rodriguez negligently struck Espada's vehicle due to a failure to maintain a safe distance, plaintiff, even as an innocent passenger, was not entitled to summary judgment … . McDowell v Rodriguez, 2023 NY Slip Op 05368, First Dept 10-24-23

Practice Point: To be entitled to summary judgment in a rear-end collision case, the plaintiff must demonstrate the driver did not maintain a safe distance from the car in front.

OCTOBER 24, 2023

TRAFFIC ACCIDENTS.

PLAINTIFF WAS STRUCK BY DEFENDANT'S VEHICLE; DEFENDANT DRIVER IS EXPECTED TO SEE WHAT SHOULD BE SEEN; WHETHER PLAINTIFF WAS CONTRIBUTORILY NEGLIGENT SHOULD NOT HAVE BEEN CONSIDERED; PLAINTIFF WAS ENTITLED TO SUMMARY JUDGMENT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff's motion for summary judgment in this vehicle-pedestrian accident case should have been granted. Whether plaintiff was contributorily negligent should not have been considered:

… [P]laintiff, who was wearing a bright green safety vest, was standing at or near the sideview mirror of the cab while the cab was stopped at a tollbooth when the cab pulled forward and came into contact with the plaintiff's foot or ankle … . In opposition, the defendants failed to raise a triable issue of fact. Although the

Supreme Court made a determination that, based on the evidence presented, a jury could determine whether the plaintiff was "vigilant" under the circumstances, that is immaterial to the plaintiff's entitlement to summary judgment on the issue of liability in this case. "To be entitled to summary judgment on the issue of a defendant's liability, a plaintiff does not bear the burden of establishing the absence of his or her own comparative negligence" … .

… [P]laintiff's motion was not premature, as the defendants failed to offer an evidentiary basis to suggest that discovery may lead to relevant evidence on the issue of the defendants' liability, or that facts essential to opposing the motion were exclusively within the knowledge and control of the plaintiff (see CPLR 3212[f] …). Vasquez v Vullis Corp, 2023 NY Slip Op 05286, Second Dept 10-18-23

Practice Point: Here plaintiff was struck by defendant's car. At the summary judgment stage, whether plaintiff was contributorily negligent is not relevant. Defendant driver was expected to see what should have been seen.

OCTOBER 18, 2023

WORKERS' COMPENSATION.

ALTHOUGH THE PARKING/STORAGE AREA WHERE CLAIMANT WAS INJURED WAS NOT ON THE CONSTRUCTION SITE, THERE WAS A SUFFICIENT NEXUS BETWEEN THE PARKING/STORAGE AREA AND THE CONSTRUCTION SITE SUCH THAT CLAIMANT'S PLACE OF EMPLOYMENT EXTENDED TO THE PARKING/STORAGE AREA (THIRD DEPT).

The Third Department, reversing the Workers' Compensation Board, determined the parking area where claimant was injured had a "sufficient nexus" with the construction site. Therefore claimant's injury, incurred pulling the gate to the parking/storage area, arose from petitioner's employment:

Although the parking area where claimant was injured was not part of the construction site, and notwithstanding the fact that the injury occurred after claimant's shift had ended for the day, claimant's uncontradicted testimony demonstrates that he was instructed to park in that area. Moreover, because claimant also testified without contradiction that the general contractor stored building materials in the at-issue area and restricted the public's access to that area,

there was a sufficient nexus in time and place between the construction site and the parking area such that claimant's place of employment — i.e. the construction site — extended to the parking area where claimant's injury occurred, and "claimant was [thus] exposed to a risk not shared by the public generally" … . Matter of Espinoza v City Safety Compliance Corp., 2023 NY Slip Op 05172, Third Dept 10-12-23

Practice Point: The Third Department determined the parking/storage area across from the construction site should be considered part of claimant's place of employment. Therefore, his injury, which stemmed from claimant's opening or closing the gate to the parking/storage area, arose from his employment.

OCTOBER 12, 2023

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