# NEW YORK APPELLATE DIGEST, LLC

Personal Injury Reversal Report
December 2023

An Organized Compilation of Summaries of Selected Decisions, Mostly Reversals, Addressing Personal Injury Released by Our New York State Appellate Courts and Posted on the New York Appellate Digest Website in December, 2023. The Entries in the Table of Contents Link to the Summaries Which Link to the Full Decisions on the Official New York Courts Website. Click on "Table of Contents" in the Header on Any Page to Return There. Right Click on the Citations to Keep Your Place in the Reversal Report. 

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## ASSAULT AND BATTERY, POLICE OFFICERS, IMMUNITY, MUNICIPAL LAW.

## PLAINTIFF ALLEGED ASSAULT AND BATTERY BY POLICE OFFICERS; THE NEGLIGENCE CAUSE OF ACTION SHOULD HAVE BEEN DISMISSED BECAUSE ASSAULT AND BATTERY IS INTENTIONAL, NOT NEGLIGENT, CONDUCT; THE IMMUNITY AFFORDED POLICE OFFICERS RE: ASSAULT AND BATTERY EXTENDS ONLY TO "OBJECTIVELY REASONABLE" CONDUCT; THERE WERE QUESTIONS OF FACT ABOUT WHETHER THE POLICE CONDUCT WAS OBJECTIVELY REASONABLE (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined the negligence cause of action against the county based upon the alleged assault and battery of plaintiff by police officers should have been dismissed. Assault and battery stem from intentional, not negligent, acts. The assault and battery allegations properly survived summary judgment, however:

… [T]he defendants established their prima facie entitlement to summary judgment dismissing the plaintiff's cause of action alleging negligence by submitting, inter alia, a transcript of the plaintiff's testimony at a General Municipal Law § 50-h hearing, in which she testified that a police officer grabbed her, picked her up, and threw her to the ground, causing her injuries. Where, as here, intentional offensive conduct has been established, the actor may be found liable for assault or battery, but not negligence … . In opposition, the plaintiff failed to raise a triable issue of fact as to whether any of her alleged injuries were caused by unintentional conduct … . Accordingly, the Supreme Court should have granted that branch of the defendants' motion which was for summary judgment dismissing the cause of action alleging negligence.

However, the Supreme Court properly denied those branches of the defendants' motion which were for summary judgment dismissing the causes of action alleging assault and battery. Police officers are entitled to qualified immunity on state law claims if their actions are "objectively reasonable" … . The determination of whether a use of force was objectively reasonable is an "intensely factual" question "best left for a jury to decide" … . Here, the defendants' submissions failed to eliminate triable issues of fact as to whether the police officer's actions were objectively reasonable under the circumstances. Pleva v County of Suffolk, 2023 NY Slip Op 06394, Second Dept 12-13-23

Practice Point: Allegations of intentional conduct, here assault and battery, will not support a negligence cause of action.

Practice Point: Police officers have immunity which will protect them from allegations of assault and battery, but only if the police conduct was "objectively reasonable" (a question of fact).

DECEMBER 13, 2023

## ASSAULT BY PATRON OF DEFENDANT'S SPA.

### THE SPA PATRON WHO SEXUALLY ASSAULTED PLAINTIFF WAS INVOLVED IN A FIGHT IN THE SPA BUT WAS ALLOWED TO REMAIN; THE FIGHT DID NOT RENDER THE SUBSEQUENT SEXUAL ASSAULT OF THE PLAINTIFF FORESEEABLE BY THE DEFENDANT SPA (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff's action against defendant spa based on a sexual assault by a spa patron should have been dismissed. The patron pretended to be an employee of the spa and offered plaintiff a massage. From the standpoint of the defendant spa, the patron's assault was not foreseeable. The fact that the assailant was involved in a fight before the sexual assault and was allowed to remain in the spa did not render the sexual assault foreseeable:

While landowners in general have a duty to act in a reasonable manner to prevent harm to those on their property, an owner's duty to control the conduct of persons on its premises arises only when it has the opportunity to control such persons and is reasonably aware of the need for such control … . Thus the owner of a public establishment has no duty to protect patrons against unforeseeable and unexpected assaults … . To establish foreseeability based upon prior history of third-party criminal behavior, the criminal conduct at issue must be shown to be reasonably predictable based on the prior occurrence of the same or similar criminal activity at a location sufficiently proximate to the subject location … .

Contrary to plaintiff's allegations, it was not reasonably foreseeable that a fight occurring amongst male patrons, who had been drinking there, could lead to the alleged assailant pretending to be an employee of the spa and then sexually assaulting her … . The prior altercation noted by plaintiff was completely unrelated

to her situation and thus cannot support a claim that the instant assault was a foreseeable consequence of defendant permitting the men involved in the altercation [to remain at the premises … . Memeh v Spa 88, LLC, 2023 NY Slip Op 06315, First Dept 12-7-23

Practice Point: Here a spa patron pretending to be a masseuse employed by the spa sexually assaulted the plaintiff. The facts that the patron had been drinking and was involved in a fight but was allowed to remain in the spa did not render the subsequent sexual assault foreseeable.

DECEMBER 7, 2023

## ASSAULT, MUNICIPAL LAW, DISCOVERY.

## BECAUSE THE NONPARTY WITNESS, WHO WAS PLAINTIFF'S ASSAILANT, HAD A COMMON NAME AND WAS HOMELESS, PLAINTIFF WAS ENTITLED TO DISCOVERY OF THE WITNESS'S DATE OF BIRTH AS AN AID IN LOCATING HIM; PLAINTIFF WAS NOT ENTITLED TO THE WITNESS'S SOCIAL SECURITY NUMBER HOWEVER (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff was entitled to the birth date of a nonparty witness who was plaintiff's assailant's in the underlying event. Because the witness was homeless and had a common name, the witness's date of birth would help in locating him. Plaintiff was not entitled to the witness's social security number, however:

Supreme Court should have granted plaintiff's request that defendants provide the date of birth of the nonparty witness. "[O]rdinarily the names and addresses of witnesses are a proper subject of disclosure" … . The identity of an active participant in an incident is discoverable because "'the witness was so closely related to the [incident] that his testimony [became] essential in establishing [its] happening'" … .

Plaintiff seeks disclosure of the date of birth and social security number of the nonparty witness, who was also plaintiff's assailant in the incident underlying the litigation. Defendants have already disclosed that plaintiff's assailant, who has a remarkably common name, was homeless. Accordingly, the ordinary disclosure of "names and addresses" is unlikely to assist plaintiff in locating the witness.

Disclosure of his date of birth may assist plaintiff in identifying and locating the witness. Defendants are not required to provide the witness's social security number, however, as courts have recognized a heightened level of confidentiality with respect to an individual's social security number. Lane v City of New York. 2023 NY Slip Op 06480, First Dept 12-19-23

Practice Point: Here plaintiff was entitled to discovery of a witness's date of birth as an aid to locating him because the witness was homeless and had a very common name. However plaintiff was not entitled to the witness's social security number which is protected by a higher level of confidentiality.

DECEMBER 19, 2023

## HORSES, LIABILITY FOR A KICK.

### THE STRICT LIABILITY THEORY APPLIES HERE WHERE PLAINTIFF WAS KICKED BY DEFENDANT'S HORSE; QUESTIONS OF FACT ABOUT WHICH HORSE KICKED PLAINTIFF AND PLAINTIFF'S AWARENESS OF THE RISK PRECLUDED SUMMARY JUDGMENT (FOURTH DEPT).

The Fourth Department determined questions of fact precluded summary judgment in this action stemming from defendant being kicked by plaintiff's horse. There were questions of fact about which of plaintiff's horses kicked the plaintiff and whether plaintiff was aware of the risk of approaching the horse. Plaintiff was familiar with the horses and defendant had called plaintiff because two of the horses were fighting. The court rejected the argument that negligence, as opposed to strict liability, was the applicable theory:

Agriculture and Markets Law § 108 (7) classifies horses as domestic animals, and " '[w]hen harm is caused by a domestic animal, its owner's liability is determined solely by application of the rule' . . . of strict liability for harm caused by a domestic animal whose owner knows or should have known of the animal's vicious propensities" … (quoting Bard v Jahnke, 6 NY3d 592, 599 [2006] …) . Contrary to plaintiff's contention, the exception to that rule set forth in Hastings v Sauve (21 NY3d 122, 125-126 [2013]) does not apply here, inasmuch as the horse did not stray from defendant's property .. . Contrary to plaintiff's further contention, he may not maintain a negligence claim against defendant under the reasoning of Hewitt v Palmer Veterinary Clinic, PC (35 NY3d 541 [2020]). In that

case, the Court of Appeals held that the Bard rule, set forth above, does not apply to a veterinary clinic … . The Court reasoned that the Bard "line of precedent concerning animal owners [was not] directly implicated" in Hewitt … . By contrast, inasmuch as defendant was the owner of the horse that injured plaintiff, the Bard rule of strict liability applies here. Shuttleworth v Cory, 2023 NY Slip Op 06635, Fourth Dept 12-22-23

Practice Point: Strict liability, not negligence, controls in this horse-kick case. The recent Court of Appeals applications of a negligence theory to injury caused by animals do not apply here.

DECEMBER 22, 2023

## LABOR LAW-CONSTRUCTION LAW, FALLING OBJECT.

## QUESTIONS OF FACT WHETHER INJURY FROM A WOODEN CONCRETE FORM FALLING OVER WERE COVERED BY LABOR LAW 240(1) AND 241(6) (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined plaintiff raised questions of fact about whether injury caused by a 50-poind wooden concrete form falling over was covered by Labor Law 240(1) and 241(6):

… [P]laintiff raised triable issues of fact as to whether plaintiff's injuries flowed directly from the application of the force of gravity to the form, whether the weight of the form could generate a significant amount of force as it fell and whether plaintiff's injuries were proximately caused by the lack of a safety device of the kind required by the statute … . …

Plaintiff also raised triable issues as to his Labor Law § 241(6) claim predicated on Industrial Code (12 NYCRR) § 23-2.2(d), inasmuch as that section provides that stripped concrete forms "shall be promptly stockpiled or removed from areas in which persons are required to work or pass." The evidence indicated … that the concrete forms were scattered about the garage area following concrete work performed in the garage two weeks earlier by plaintiff's employer, the cement contractor. Lopez v 106 LPA LLC, 2023 NY Slip Op 06481, First Dept 12-19-23

Practice Point: Here a wooden form weighing 50 pounds, which was leaning against a wall, fell over on plaintiff. There were questions of fact whether this

gravity-related event was covered by Labor Law 240(1), and whether violation of the Industrial Code provision requiring the stacking of concrete forms was covered by Labor Law 241(6).

DECEMBER 19, 2023

## LABOR LAW-CONSTRUCTION LAW, SCAFFOLD COLLAPSE.

## THE SCAFFOLD ON WHICH PLAINTIFF WAS WORKING COLLAPSED FOR NO APPARENT REASON; PLAINTIFF WAS ENTITLED TO SUMMARY JUDGMENT ON THE LABOR LAW 240(1) CAUSE OF ACTION; THE DEFENDANTS' EXPERT'S AFFIDAVIT WAS CONCLUSORY AND DID NOT RAISE A QUESTION OF FACT; IN ANY EVENT THE EXPERT'S OPINION THAT PLAINTIFF FAILED TO LOCK THE SCAFFOLD SPOKE TO CONTRIBUTORY NEGLIGENCE WHICH IS NOT A DEFENSE (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff, who was on a scaffold when it collapsed, was entitled to summary judgment on the Labor Law 240(1) cause of action. Defendants' expert's affidavit was conclusory and did not raise a question of fact. The noted that plaintiff's comparative negligence (the alleged failure to lock all the pins in place) was not a defense to a Labor Law 240(1) cause of action:

The evidence that the scaffold on which plaintiff was working at the time of his accident collapsed under him for no apparent reason established his prima facie entitlement to partial summary judgment on the issue of liability on his Labor Law § 240 (1) claim … . Defendants failed to raise an issue of fact in opposition. Their expert's opinion that the cause of plaintiff's accident was his alleged failure to properly lock all of the scaffold's pins in place was conclusory, and unsupported by anyone "with personal knowledge of the circumstances surrounding plaintiff's work at the time of the accident" … . "Furthermore, even if it could be established that plaintiff did not lock all the pins in place before ascending the scaffold, this would have amounted to only comparative negligence, which is not a defense to a Labor Law § 240 (1) claim" … . Bialucha v City of New York, 2023 NY Slip Op 06470, First Dept 12-19-23

Practice Point: A scaffold which collapses for no apparent reason supports summary judgment on a Labor Law 240(1) cause of action.

Practice Point: The conclusory affidavit by defendants' expert did not raise a question of fact.

Practice Point: Contributory negligence is not a defense to a Labor Law 240(1) cause of action.

DECEMBER 19, 2023

## LABOR LAW-CONSTRUCTION LAW, VEHICLE AND TRAFFIC LAW.

### LABOR LAW 240(1) DOES NOT COVER INJURY TO A MECHANIC REPAIRING A VEHICLE, EVEN IF THE EVENT IS "GRAVITY-RELATED;" HERE AN ELEVATED TRAILER FELL ON PLAINTIFF (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Singas, determined that injury to a mechanic repairing a vehicle is not covered by Labor Law 240(1). Plaintiff was repairing a trailer which had been lifted up five feet by a backhoe. The backhoe rolled backward and the trailer fell on the plaintiff, causing serious injuries:

Labor Law § 240 (1) applies to workers "employed" in the "erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure" … . The statute's "central concern is the dangers that beset workers in the construction industry" (id. at 525). If an employee is engaged in an activity covered by section 240 (1), "contractors and owners" must "furnish or erect" enumerated safety devices "to give proper protection" to the employee. "Whether a plaintiff is entitled to recovery under [section] 240 (1) requires a determination of whether the injury sustained is the type of elevation-related hazard to which the statute applies" … . To make this determination, a court must examine the "type of work the plaintiff was performing at the time of injury" … . * * *

Employing a holistic view of the statute, we conclude that the activity in which plaintiff was engaged, ordinary vehicle repair, is not an activity covered by Labor Law § 240 (1). Such work is analogous to that of a factory worker engaged in the normal manufacturing process. Plaintiff is a mechanic who was fixing the brakes on a trailer, a "[v]ehicle" as that term is defined in Vehicle and Traffic Law § 159.

Expanding the statute's scope to cover a mechanic engaged in ordinary vehicle repair would "extend the statute . . . far beyond the purposes it was designed to serve" … . Stoneham v Joseph Barsuk, Inc., 2023 NY Slip Op 06467, CtApp 12-19-23

Practice Point: Labor Law 240(1) does not cover injuries to a mechanic who is repairing a vehicle. Here the elevated trailer plaintiff was repairing fell on him.

DECEMBER 19, 2023

## LABOR LAW-CONSTRUCTION LAW. AMEND COMPLAINT.

## THE MOTION TO AMEND THE COMPLAINT TO CORRECT A TYPO SHOULD HAVE BEEN GRANTED (LABOR LAW 241 AND 241(B) RATHER THAN 240(1)); SUMMARY JUDGMENT CAN BE GRANTED ON AN UNPLEADED CAUSE OF ACTION; HERE THERE WAS A QUESTION OF FACT WHETHER THE FOUR-INCH ELEVATION DIFFERENTIAL WAS DE MINIMIS (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the motion to amend the complaint to correct a typographical error should have been granted and noted that a motion for summary judgment can be granted on an unpleaded cause of action. The complaint alleged violation of Labor Law 241 and 241 (b) instead of Labor Law 240(1). The Second Department went on to find that plaintiff was not entitled to summary judgment because there was a question of fact whether the accident was an "elevation-related" event–a cylinder had dropped four inches and injured plaintiff's finger. The question of fact concerned whether the four-inch height differential was de minimis:

… [T]he proposed amendment corrected a typographical error, did not result in any prejudice or surprise to the defendants, and was not palpably insufficient or patently devoid of merit … .

We note that, despite the fact that the plaintiff had not yet properly pleaded a Labor Law § 240(1) cause of action at the time that he made a motion for summary judgment on the issue of liability pursuant to Labor Law § 240(1), "summary judgment may be awarded on an unpleaded cause of action if the proof supports such cause and if the opposing party has not been misled to its prejudice" … . * * *

The plaintiff failed to meet his prima facie burden, as he did not prove, as a matter of law, that he sustained the type of elevation-related injury that Labor Law § 240(1) was intended to protect against. Namely, where the cylinder fell only four inches but did so with such force as to crush the plaintiff's finger, there are triable issues of fact as to whether the elevation differential between the plaintiff and the falling object was de minimis … . Castillo v Hawke Enters., LLC, 2023 NY Slip Op 06505, Second Dept 12-20-23

Practice Point: The motion to amend the complaint to correct a typo should have been granted.

Practice Point: Where the facts support it, a summary judgment motion may be based on an unpleaded cause of action.

Practice Point: Here a cylinder dropped four inches, injuring plaintiff's finger. There was a question of fact whether the elevation-differential was de minimis.

DECEMBER 20, 2023

## MEDICAL MALPRACTICE, INMATE SUING STATE.

## PETITIONER PATHOLOGIST IS BEING SUED BY AN INMATE WHO ALLEGES MISDIAGNOSIS OF A BIOPSY; BECAUSE THE REQUEST FOR THE BIOPSY CAME FROM A DOCTOR WHO WAS UNDER CONTRACT WITH THE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION (DOCCS), AND NOT DIRECTLY FROM DOCCS, THE STATE IS NOT OBLIGATED TO DEFEND OR INDEMNIFY THE PATHOLOGIST (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Cannataro, affirming the Appellate Division, determined the state did not have an obligation to defend or indemnify the petitioner, a pathologist, who concluded the lump under an inmate's arm was benign. Dr. Cotie, a physician who provided services to inmates under a contract with the Department of Corrections and Community Supervision (DOCCS), had taken a biopsy and had sent it to petitioner for analysis. One year after the "benign" finding, the inmate was diagnosed with Hodgkin's lymphoma. Because the request for the biopsy analysis did not come directly from DOCCS, pursuant to the language in the Correction Law, the state was not required to defend or indemnify the petitioner pathologist:

Under Correction Law § 24-a, the provisions of Public Officers Law § 17 are made applicable to "any person holding a license to practice a profession. . . who is rendering or has rendered professional services authorized under such license while acting at the request of the department or a facility of the department in providing health care and treatment or professional consultation to incarcerated individuals of state correctional facilities" … . The Attorney General has interpreted this language to mean that the State's obligation to defend and indemnify applies only where there has been an express request by DOCCS for the services of a particular provider—i.e., a formal arrangement or understanding made in advance between DOCCS and the healthcare professional. * * *

Petitioner performed pathology services on the biopsy sample as a result of his contract with the hospital, not because he was acting at DOCCS' request or executing any public responsibility associated with the care or treatment of incarcerated individuals. Matter of Jun Wang v James, 2023 NY Slip Op 06405, CtApp 12-14-23

Practice Point: Unless DOCCS directly and expressly requests that a doctor provide a service for an inmate, the state will not indemnify or defend the doctor in a lawsuit by an inmate. A request from a doctor under contract with DOCCS will not trigger indemnification or defense.

DECEMBER 14, 2023

## MEDICAL MALPRACTICE, "INADEQUATE FALL-PROTECTION.

## PLAINTIFF'S "INADEQUATE FALL-PROTECTION" CAUSES OF ACTION SOUNDED IN MEDICAL MALPRACTICE, NOT NEGLIGENCE; THEREFORE PLAINTIFF'S AFFIDAVIT FROM A NURSE WAS NOT SUFFICIENT TO OVERCOME DEFENDANTS' MOTION FOR SUMMARY JUDGMENT WHICH WAS SUPPORTED BY AN AFFIDAVIT FROM A PHYSICIAN (THIRD DEPT).

The Third Department, reversing (modifying) Supreme Court, determined the two "inadequate fall-prevention" causes of action in the complaint sounded in medical malpractice, not negligence. Therefore the affidavit from a nurse was not sufficient to support the malpractice causes of action:

Defendants established their prima facie entitlement to summary judgment with respect to the specific allegations sounding in medical malpractice, by and through an expert's affidavit from a physician opining that decedent was provided with fall prevention interventions throughout her admission that met or exceeded the standard of care, and that, following each fall, decedent was rendered the appropriate medical care and treatment. Moreover, this physician opined that the treatment plan developed for decedent and the care rendered to her were within the standard of care and were not a substantial factor in causing the alleged injuries … . In opposition, plaintiff tendered an expert affidavit from a nurse. However, inasmuch as certain allegations sound in medical malpractice and pertain to medical determinations and what a physician should or should not have done, plaintiff's nurse rendered opinions that "went beyond her professional and educational experience and cannot be considered competent medical opinion" … . Currie v Oneida Health Sys., Inc., 2023 NY Slip Op 06780, Second Dept 12-28-23

Practice Point: Re: the medical malpractice causes of action, the affidavit from a physician in support of defendants' motion for summary judgment prevailed over plaintiff's affidavit from a nurse who, based on her experience and education, could not offer a competent medical opinion.

DECEMBER 28, 2023

## MUNICIPAL LAW, AMEND NOTICE OF CLAIM.

## PLAINTIFF'S MOTION TO AMEND THE NOTICE OF CLAIM TO ADD A VERIFICATION IN THIS WRONGFUL DEATH ACTION AGAINST THE CITY SHOULD NOT HAVE BEEN DENIED (SECOND DEPT).

The Second Department, reversing Supreme Court, held that the plaintiff's motion to amend the notice of claim in this wrongful death action against the defendant city should not have been denied:

"Where there is no showing of prejudice to a municipality, the fact that a notice of claim was not verified by a claimant may be disregarded" … . Here, the Supreme Court improvidently exercised its discretion in denying the plaintiff's cross-motion pursuant to General Municipal Law § 50-e(6) for leave to amend the notice of claim to add a verification from the plaintiff's attorney that the plaintiff lives in a

different county than the attorney, as the City defendants failed to demonstrate that they would be prejudiced by the amendment … . Watts v Jamaica Hosp. Med. Ctr., 2023 NY Slip Op 06276, Second Dept 12-6-23

Practice Point: Where there is no prejudice to the municipality, the fact that a notice of claim was not verified can be disregarded.

DECEMBER 6, 2023

## SCHOOL SPORTS, ASSUMPTION OF THE RISK.

### INFANT PLAINTIFF ASSUMED THE RISK OF FALLING BECAUSE OF PEBBLES AND WET GRASS ON THE SOCCER FIELD (SECOND DEPT).

The Second Department, reversing Supreme Court, determined infant plaintiff assumed the risk of falling in a school pick-up soccer game. Plaintiff alleged he fell because of pebbles and wet grass on the playing field:

The infant plaintiff testified that he fell because of a combination of, among other things, pebbles on the field and wet and muddy grass. The infant plaintiff further testified that there were no puddles, and the grass was wet from the previous day's rain and other students playing with water balloons on the field. However, neither the pebbles nor the wet grass described in this case presented a concealed or unreasonably increased risk beyond those inherent in the activity of outdoor soccer … , regardless of whether the wet grass was caused by rain or water balloons … . Furthermore, merely allowing children to play on a field with pebbles and wet grass does not constitute negligent supervision … . To hold otherwise would effectively prohibit schools from utilizing outdoor playing fields … . C.P.G. v Uniondale Sch. Dist., 2023 NY Slip Op 06512, Second Dept 12-20-23

Practice Point: Here the infant plaintiff assumed the risk of falling because of pebbles and wet grass on the soccer playing field.

DECEMBER 20, 2023

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## SLIP AND FALL, CONTRACTOR LIABILITY, ESPINAL.

## NONE OF THE ESPINAL EXCEPTIONS APPLIED TO THE DEFENDANT FIRE SAFETY AND SECURITY CONTRACTOR IN THIS SLIP AND FALL CASE; THEREFORE THE CONTRACTOR'S SUMMARY JUDGMENT MOTION SHOULD HAVE BEEN GRANTED; THE ISSUE WAS PROPERLY CONSIDERED ON APPEAL, DESPITE THE FAILURE TO RAISE IT BELOW, BECAUSE IT CONCERNED A QUESTION OF LAW (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined the defendant fire safety and security contractor's motion for summary judgment in this slip and fall case should have been granted. It was alleged the steps where plaintiff fell were in disrepair and were not sufficiently illuminated, which had nothing to do with defendant-contractor's duties. Therefore the contractor did not "launch and instrument of harm," plaintiff could not have relied upon the contractor to make the area safe, and the contractor's contract with the owner did not displace the owner's safety-related responsibilities:

Unity, the building's fire safety and security contractor, should have been granted summary judgment. Even assuming that Unity's contractual fire safety inspection duties extended to the identification of premises defects such as the broken step involved in plaintiff's mishap, any failure by Unity to identify that defect would not have constituted the affirmative launching of a force or instrument of harm within the meaning of Espinal … . The same is true of any failure by Unity to call attention to insufficient lighting of the stairway. Further, Unity's contract did not completely displace the duty of the owner or managing agent to maintain the safety of the premises … . Nor is there any evidence that plaintiff detrimentally relied on Unity to perform its contractual duties. Accordingly, on this record, none of the Espinal conditions for holding a premises contractor liable for an injury to a third party are satisfied with respect to Unity. Diamond v TF Cornerstone Inc., 2023 NY Slip Op 06473, First Dept 12-19-23

Practice Point: Here none of the Espinal exceptions applied such that the contractor could be held liable for the slip and fall.

Practice Point: Although the "Espinal" issue was not raised below, it could be raised on appeal because it presented a question of law.

DECEMBER 19, 2023

## SLIP AND FALL, LANDLORD-TENANT.

## DEFENDANT OUT-OF-POSSESSION LANDLORD DID NOT DEMONSTRATE IT DID NOT HAVE RESPONSIBILITY FOR MAINTENANCE OF THE AREA WHERE PLAINTIFF FELL (PARKING LOT RAMP); THE LANDLORD'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the defendant out-of-possession landlord's motion for summary judgment in this slip and fall case should not have been granted. The lease indicated the landlord had responsibility for maintenance of the ramp where plaintiff fell:

… "[A]n out-of-possession landlord is not liable for injuries that occur on its premises unless the landlord has retained control over the premises and has a duty imposed by statute or assumed by contract or a course of conduct" … .

Here, the defendant failed to establish its prima facie entitlement to judgment as a matter of law dismissing the complaint on the ground that it was an out-of-possession landlord. The defendant's submissions in support of its motion, including its written lease with Petco and a transcript of the deposition testimony of its principal, did not demonstrate that it was an out-of-possession landlord with respect to the subject ramp. The lease obligated the defendant to maintain all appurtenant exterior areas, including the parking area, and the defendant's principal testified at his deposition that the ramp was part of the parking lot, which the defendant maintained … . Further, the defendant failed to eliminate triable issues of fact as to whether its allegedly negligent maintenance of the ramp was a proximate cause of the plaintiff's accident … . Thepenier v BGTWO Realty, LLC, 2023 NY Slip Op 06272, Second Dept 12-6-23

Practice Point: Whether an out-of-possession landlord can be liable for a slip and fall on the property depends on the terms of the lease. Here the landlord had the responsibility to maintain the parking lot ramp where plaintiff fell.

DECEMBER 6, 2023

## SLIP AND FALL, MUNICIPAL LAW.

## THE COURT PARKING LOT WHERE PLAINTIFF ALLEGEDLY TRIPPED AND FELL WAS DEEMED TO BE THE FUNCTIONAL EQUIVALENT OF A SIDEWALK; THEREFORE THE STATUTE REQUIRING WRITTEN NOTICE OF A DANGEROUS SIDEWALK CONDITION AS A PREREQUISITE FOR COUNTY LIABILITY APPLIED; THE COUNTY'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant county's motion for summary judgment in this trip and fall case should have been granted. Plaintiff allegedly tripped over a section of rebar protruding from a concrete island in a court parking lot. Although parking lots are not explicitly mentioned in the statute requiring written notice of a dangerous condition as a prerequisite for the county's liability, the Second Department held that the parking lot served the function of a sidewalk and therefore was subject to the written notice requirement:

The County has a prior written notice statute which provides, in relevant part, that "'[n]o civil action shall be maintained against the County for damages or injuries to person or property sustained by reason of any sidewalk . . . unless written notice of such defective, unsafe, dangerous or obstructed condition of such sidewalk [is given] . . . [and s]uch written notice shall specify the particular place and nature of such defective, unsafe, dangerous or obstructed condition . . . [and that n]otice required to be given as herein provided shall be made in writing by certified or registered mail directed to the Office of the County Attorney'" … . * * *

The County demonstrated … that its prior written notice statute applied here because the concrete island with the protruding metal "served the same functional purpose as a sidewalk" … . The County further demonstrated, prima facie, that it lacked prior written notice of the alleged defect. Sanchez v County of Nassau, 2023 NY Slip Op 06270, Second Dept 12-6-23

Practice Point: Here the statute required written notice of a dangerous condition on a sidewalk before the county could be liable for a slip or trip and fall. The plaintiff tripped in a county parking lot. The parking lot was deemed the functional equivalent of a sidewalk, triggering the written-notice requirement.

DECEMBER 6, 2023

## SLIP AND FALL, NOTICE.

### THE TRIAL EVIDENCE DEMONSTRATED THE STATE HAD CONSTRUCTIVE NOTICE OF THE POTHOLE WHERE PLAINTIFF FRACTURED HER ANKLE AND FAILED TO REPAIR IT; NONJURY VERDICT REVERSED (THIRD DEPT).

The Third Department, reversing a nonjury verdict in the Court of Claims, determined the evidence demonstrated the defendant (NYS) had constructive notice of the pothole where plaintiff fractured her ankle in September 2017:

All four DOT [Department of Transportation] witnesses acknowledged that they did not know how long the pothole existed prior to [plaintiff's] accident. One DOT witness, a retired assistant resident engineer, confirmed that with a "freeze/thaw in the winter . . . the actual [popping out [of a pothole] . . . can occur sometime later, even in warmer months." The key testimony came from George Laundrie, DOT's resident engineer … . When asked whether the pothole "must have formed sometime prior to the summer" of 2017, Laundrie responded: "I don't think it's fair to say it must have formed prior to June of 2017. I think it'd be fair to say it's likely it probably formed prior to that . . . , I wouldn't say must have, but it's probably pretty likely it formed prior to June." …

In reviewing a nonjury verdict on appeal, this Court has broad, independent authority to weigh the evidence and render a judgment "warranted by the facts" … . In our view, Laundrie's testimony was not ambiguous and established that it was probable that the pothole existed for several months before Feeney's accident. Correspondingly, the record shows that defendant's road maintenance crews worked in this area six times since January 2017, and most recently in July 2017. On this record, we conclude that claimants met their burden of proving that despite having constructive notice, defendants were negligent in failing to repair the pothole (see PJI 1:60). Inasmuch as issues of comparative negligence and damages remain to be determined, the claim must be remitted to the Court of Claims (see Court of Claims Act … . Feeney v State of New York, 2023 NY Slip Op 06574, Third Dept 12-21-23

Practice Point: Here the Third Department reversed a nonjury verdict in the Court of Claims finding that the evidence demonstrated the State had constructive notice of the pothole where plaintiff fractured her ankle and negligently failed to repair.

The matter was sent back for determination of the comparative negligence and damages issues.

DECEMBER 21, 2023

## SLIP AND FALL, NOTICE.

## IN THIS SLIP AND FALL CASE, EVIDENCE THE AREA WHERE PLAINTIFF FELL WAS INSPECTED "MORE THAN AN HOUR" BEFORE AND EVIDENCE OTHERS WERE IN THE AREA AT THE TIME OF THE FALL DID NOT ELIMINATE QUESTIONS OF FACT ABOUT DEFENDANT'S CONSTRUCTIVE NOTICE OF THE CONDITION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant hospital did not demonstrate it did not have constructive notice of the wet substance on the floor alleged to have cause plaintiff's slip and fall. Evidence that the corridor in question was inspected "more than an hour" before the slip and fall and evidence others were in the corridor when plaintiff fell did not eliminate questions fact about whether the hospital had constructive notice of the condition:

… [T]he defendant failed to eliminate triable issues of fact as to whether it had constructive notice of the alleged slippery condition. The defendant's evidence that the corridor was inspected more than an hour before the accident was insufficient to establish that the condition did not exist for a sufficient length of time prior to the accident to permit the defendant's employees to discover and remedy the condition. The plaintiff's deposition testimony, submitted by the defendant in support of its motion, established that there were at least three nurses and a doctor present in the corridor at the time of her fall … . Contrary to the defendant's contention, the plaintiff's deposition testimony that she did not notice anything on the floor before she fell was insufficient to establish that the condition would not have been discoverable upon a reasonable inspection … . Croake v Flushing Hosp. & Med. Ctr., 2023 NY Slip Op 06723, Second Dept 12-27-23

Practice Point: In a slip and fall, evidence the area of the fall was inspected "more than an hour" before the fall does not demonstrate the defendant did not have constructive notice of the condition.

DECEMBER 27, 2023

## SLIP AND FALL, PROXIMATE CAUSE.

## IN A SLIP AND FALL CASE. WHETHER THE CONDITION IS OPEN AND OBVIOUS SPEAKS TO COMPARATIVE NEGLIGENCE AND THE PROPERTY OWNER'S DUTY TO WARN, BUT DOES NOT SPEAK TO PROXIMATE CAUSE OR NEGLIGENCE; HERE THE IRREGULARLY-SHAPED LANDING AND ABSENCE OF A HANDRAIL VIOLATED THE CITY BUILDING CODE; DEFENDANTS' SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED (FIRST DEPT).

The First Department, reversing Supreme Court, determined the fact that the condition (an irregularly-shaped landing) is open and obvious does not speak to proximate cause but may be relevant to plaintiff's comparative negligence (which will not defeat a summary judgment motion).. Here there was evidence the landing and the lack of a handrail violated the NYC Building Code. Defendants' motion for summary judgment should not have been granted:

Plaintiff … raised a material issue of fact as to whether the irregular shape and dimensions of the landing and the lack of a handrail were the causes of his fall through, inter alia, his testimony that the "shortness" and "angle" of the landing caused his ankle to roll and through his expert engineer's unrebutted affidavit that the "irregular shape" and "shortness" of the landing, which was in violation of the City of New York Building Code, and the lack of a handrail, proximately caused the fall.

The lower court's assessment that the landing's purported dangerous defects were open and obvious has no bearing upon the central, threshold issue of whether there was a causal connection between the defects and the plaintiff's injury … . Further, it is axiomatic that the open and obvious nature of a hazard pertains to an owner's duty to warn of such danger but does "not eliminate a claim that the presence of the hazardous condition constituted a violation of the property owner's duty to maintain the premises in a reasonably safe condition" … . Perry v Sada Three, LLC, 2023 NY Slip Op 06456, First Dept 12-14-23

Practice Point: In a slip and fall, the "open and obvious" character of the condition speaks to plaintiff's comparative negligence and defendant's duty warn, not to proximate cause or negligence. In other words, if there is evidence that an open and obvious condition was was the proximate cause of the fall, a defendant's summary judgment motion should be denied.

DECEMBER 14, 2023

## TRAFFIC ACCIDENTS, CONTRACT LAW, RELEASE, FRAUD, INSURANCE LAW.

## THE COMPLAINT IN THIS TRAFFIC ACCIDENT CASE STATED CAUSES OF ACTION (1) FOR FRAUDULENT INDUCEMENT TO SIGN A RELEASE AND (2) FOR RESCISSION OF THE RELEASE BASED UPON UNILATERAL MISTAKE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff's complaint stated causes of action for fraudulent inducement (to sign a release) and for recsission of the release based on a unilateral mistake. Plaintiff in this traffic accident case alleged the defendant insurer fraudulently induced him to sign the release by telling him the release applied only to property damage, not to personal injury. Plaintiff alleged English was his second language, he did not have his reading glasses, and he relied on the insurance agent's representations:

"To state a [cause of action to recover damages] for fraudulent inducement, there must be a knowing misrepresentation of material present fact, which is intended to deceive another party and induce that party to act on it, resulting in injury'" … . "The plaintiff must also establish that he or she reasonably relied upon the alleged misrepresentation" … . "A party is under an obligation to read a document before signing it, and cannot generally avoid the effect of the document on the ground that he or she did not read it or know its contents" … . However, "there are situations where an instrument will be deemed void because the signer was unaware of the nature of the instrument he or she was signing, such as where the signer is illiterate, or blind, or ignorant of the alien language of the writing, and the contents thereof are misread or misrepresented to him [or her] by the other party, or even by a stranger" … .

Here, the complaint stated a cause of action by Israel to recover damages for fraudulent inducement against Progressive and Roberts by alleging, inter alia, that English is Israel's second language, his ability to read English is limited, and he justifiably relied on the misrepresentations made by Progressive's agent, Roberts, as to the effect of the release, which has resulted in financial damages to him … .

Moreover, the complaint stated a cause of action by Israel, in effect, to rescind the release based on a unilateral mistake against Progressive and Roberts, as the complaint alleged that Israel's mistake was induced by fraudulent misrepresentation … . Israel v Progressive Cas. Ins. Co., 2023 NY Slip Op 06357, Second Dept 12-13-24

Practice Point: Plaintiff alleged English was his second language, he didn't have his reading glasses, he was told the release pertained only to property damage, not personal injury, and he relied on that representation. The complaint stated causes of action for fraudulent inducement and rescission of the release based on unilateral mistake.

DECEMBER 13, 2023

## TRAFFIC ACCIDENTS, CONTRACT LAW, RELEASE.

## IN THIS TRAFFIC ACCIDENT CASE, THE PASSENGER IN PLAINTIFF'S CAR EXECUTED A RELEASE IN FAVOR OF PLAINTIFF-DRIVER; DEFENDANT'S COUNTERCLAIM FOR CONTRIBUTION FROM PLAINTIFF FOR ANY INJURY SUFFERED BY THE PASSENGER SHOULD HAVE BEEN DISMISSED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the release executed by the passenger (Jelissa) in favor of the plaintiff-driver (Nicole) required the dismissal of the defendant's counterclaim seeking contribution for any injuries suffered by Jelissa:

Pursuant to General Obligations Law § 15-108(b), "[a] release given in good faith by the injured person to one tortfeasor as provided in [General Obligations Law § 15-108(a)] relieves him [or her] from liability to any other person for contribution

as provided in article fourteen of the civil practice law and rules." Here, pursuant to General Obligations Law § 15-108(b), the release executed by Jelissa in favor of Nicole relieves Nicole from liability to the defendant for contribution … . Moraskin v Lati, 2023 NY Slip Op 06362, Second Dept 12-13-23

Practice Point: Here in this traffic accident case, the passenger in plaintiff's car released plaintiff-driver from any liability. Therefore the defendant's counterclaim against plaintiff for contribution for any injury to the passenger should have been dismissed.

DECEMBER 13, 2023

## TRAFFIC ACCIDENTS, CONTRACT LAW, RELEASE.

## PLAINTIFF IN THIS TRAFFIC ACCIDENT CASE RAISED QUESTIONS OF FACT WHETHER THE RELEASE WAS SIGNED BY PLAINTIFF UNDER UNFAIR CIRCUMSTANCES; DEFENDANT'S MOTION FOR SUMMARY JUDGMENT BASED UPON THE RELEASE SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff in this traffic accident case had raised questions of fact about when the release signed by plaintiff under unfair circumstances:

… [P]laintiff's allegations were sufficient to raise questions of fact as to whether the release was signed by the plaintiff under circumstances that indicate unfairness, and whether it was not "fairly and knowingly" made … . The plaintiff averred, among other things, that shortly after the accident, an insurance representative for the defendants called him "repeatedly;" that he had difficulty understanding the defendants' representative due to a language barrier; that the defendants' representative, who had him sign the release to obtain money for medical bills, never explained that the document he signed was a release or had the legal effect of the release; and that the plaintiff was not represented by an attorney at the time he signed the release. Moreover, the plaintiff raised questions of fact as to whether there was mutual mistake as to the nature of the injuries sustained by plaintiff from the alleged accident … . Wei Qiang Huang v Llerena-Salazar, 2023 NY Slip Op 06772, Second Dept 12-27-23

Practice Point: Unfair circumstances surrounding the signing of a release, short of fraud, can invalidate it.

DECEMBER 27, 2023

## TRAFFIC ACCIDENTS, MUNICIPAL LAW, NOTICE OF CLAIM.

## THE RESPONDENT CITY HAD TIMELY KNOWLEDGE OF THE ESSENTIAL FACTS SURROUNDING THE BUS-VEHICLE COLLISION AND WAS NOT PREJUDICED BY THE TEN MONTH DELAY IN FILING THE NOTICE OF CLAIM; PETITIONER'S MOTION FOR LEAVE TO FILE A LATE NOTICE OF CLAIM SHOULD HAVE BEEN GRANTED, EVEN IN THE ABSENCE OF AN ADEQUATE EXCUSE (LAW OFFICE FAILURE) (FIRST DEPT).

The First Department, reversing Supreme Court, determined that the respondent city in this bus-vehicle accident case had timely knowledge of the essential facts of the incident and therefore was not prejudiced by the late notice of claim. The court noted that law office failure is not an adequate excuse for failing to timely file a notice of claim, but using that excuse did not mandate denial of the motion:

Supreme Court improvidently exercised its discretion in denying petitioner's application, as petitioner established that respondents acquired actual knowledge of the essential facts within the statutorily prescribed filing period … . As the record showed, the accident involved an NYCTA-owned bus and an NYCTA driver, and was immediately investigated by an NYCTA supervisor. Therefore, petitioner sustained his burden of showing that respondents would not be substantially prejudiced in maintaining a defense on the merits if he were permitted leave to file a late notice of claim … .

In response to petitioner's showing, respondents offered no particularized evidence suggesting that they would be prejudiced by the delay. Therefore, respondents have failed to rebut petitioner's showing … . Clarke v New York City Tr. Auth., 2023 NY Slip Op 06591, First Dept 12-21-23

Practice Point: If the municipality has timely knowledge of the essential fact underlying a claim (here a bus-vehicle accident) and is not prejudiced by the delay, a motion for leave to file a late notice of claim may be granted even in the absence of an adequate excuse.

DECEMBER 21, 2023

## TRAFFIC ACCIDENTS, MUNICIPAL LAW, VEHICLE AND TRAFFIC LAW.

## ALTHOUGH THE BACKHOE WHICH COLLIDED WITH PLAINTIFF'S VEHICLE HAD BEEN USED FOR ROADWORK THAT DAY, AT THE TIME OF THE ACCIDENT THE BACKHOE WAS BEING USED TO TRANSPORT GRAVEL TO THE WORK SITE; THE SECOND DEPARTMENT DETERMINED THE BACKHOE WAS NOT "ACTIVELY ENGAGED" IN ROADWORK AT THE TIME OF THE ACCIDENT AND, THEREFORE, THE HIGHER "RECKLESS DISREGARD" STANDARD FOR LIABILITY IN THE VEHICLE AND TRAFFIC LAW DID NOT APPLY (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Chambers, reversing Supreme Court, determined the county employee who rear-ended the plaintiff's vehicle with a backhoe was not engaged in road construction work within the meaning of the Vehicle and Traffic Law at the time of the accident and, therefore, was not subject to the higher "reckless disregard" standard for liability. Although the backhoe had been used to repair a road, at the time of the accident the backhoe was transporting gravel to the work site. The Second Department determined transporting gravel was did not meet the definition of being "actively engaged" in construction work:

… [W]e conclude that the defendant driver was not actually engaged in work on a highway at the time of the accident …, because the act of transporting gravel to a highway worksite does not itself constitute construction, repair, maintenance, or similar work on a highway … . When a vehicle travels on a highway to transport equipment or materials, the road itself is not being worked on; instead, the road is being used for its intended purpose of facilitating travel. Moreover, the mere transporting of materials or equipment is different in kind from acts that have been deemed to constitute work "on" a highway, such as clearing or cleaning the road or its shoulder … , or actively assessing the conditions of the road or searching for a reported hazard on the road … . …

… [T]he defendants do not contend that the mere transporting of construction materials on a public road will in every instance constitute being actually engaged in work on a highway. Rather, in advancing their claim, the defendants contend that the defendant driver's transport of materials fell within the scope of the statute

because the defendant driver had been repairing a roadbed on the day of the collision and had not yet completed his work for the day. We disagree. The defendants' position is inconsistent with the statute's use of the phrase "actually engaged" (Vehicle and Traffic Law § 1103[b]), as reflected in the plain language of the statute and its interpretation by the courts. Qosaj v Village of Sleepy Hollow, 2023 NY Slip Op 06395, Second Dept 12-13-23

Practice Point: A road-construction vehicle involved in an accident will not be subject to the higher "reckless disregard" standard of liability unless the vehicle is "actively engaged" in roadwork at the time of the accident. Transporting gravel to the work site is not considered "active engagement."

DECEMBER 13, 2023

## TRAFFIC ACCIDENTS, SUMMARY JUDGMENT, COMPARATIVE NEGLIGENCE.

## IN A TRAFFIC ACCIDENT CASE A PLAINTIFF'S COMPARATIVE NEGLIGENCE CAN ONLY BE CONSIDERED ON A SUMMARY JUDGMENT MOTION IF THE PLAINTIFF MOVES TO DISMISS THE DEFENDANT'S COMPARATIVE-NEGLIGENCE AFFIRMATIVE DEFENSE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff bicyclist's motion for summary judgment in this traffic accident case should not have been granted. The court noted that plaintiff's comparative negligence in a traffic accident case is usually not considered on a summary judgment motion except where, as here, plaintiff moved to dismiss the defendant's comparative-negligence affirmative defense:

"A plaintiff in a negligence action moving for summary judgment on the issue of liability must establish, prima facie, that the defendant breached a duty owed to the plaintiff and that the defendant's negligence was a proximate cause of the alleged injuries" … . A plaintiff is no longer required to show freedom from comparative fault in establishing his or her prima facie case against a defendant on the issue of that defendant's liability … . "[However], the issue of a plaintiff's comparative negligence may be decided in the context of a plaintiff's motion for summary judgment on the issue of liability where, as here, the plaintiff also seeks dismissal

of the defendant's affirmative defense alleging comparative negligence"… . A motion for]summary judgment "shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party" (CPLR 3212[b] …). On a motion for summary judgment, the court must view the evidence in the light most favorable to the nonmoving party … . Garutti v Kim Co Refrig. Corp., 2023 NY Slip Op 06354, Second Dept 12-13-24

Practice Point: If a plaintiff in a traffic accident case makes a motion for summary judgment which includes a motion to dismiss defendant's comparative-negligence affirmative defense, the plaintiff's comparative negligence can properly be considered by the motion court.

DECEMBER 13, 2023

## TRAFFIC ACCIDENTS, VEHICLE AND TRAFFIC LAW.

### QUESTION OF FACT WHETHER DEFENDANT DRIVER, WHO ALLEGEDLY MADE A TURN IN FRONT OF PLAINTIFF BICYCLIST, SAW WHAT WAS THERE TO BE SEEN (SECOND DEPT).

The Second Department, reversing Supreme Court, determined there was a question of fact whether defendant driver saw what was there to be seen in this bicycle-vehicle accident. Plaintiff bicyclist alleged he was halfway across the road in a crosswalk when defendant made a sudden turn into his path:

"Pursuant to Vehicle and Traffic Law § 1231, a person riding a bicycle upon a roadway shall be granted all of the rights and shall be subject to all of the duties applicable to the driver of a vehicle. A bicyclist is required to use reasonable care for his or her own safety, to keep a reasonably vigilant lookout for vehicles, and to avoid placing himself or herself into a dangerous position" … . Pursuant to Vehicle and Traffic Law § 1146(a), motorists must "exercise due care to avoid colliding with any bicyclist, pedestrian, or domestic animal" on the roadway and to "give warning by sounding the horn when necessary" … . A motorist also has a "common-law duty to see that which he [or she] should have seen through the proper use of his [or her] senses" … .

… T]he defendant … failed to establish … that his conduct was not a proximate cause of the accident. The defendant testified at his deposition that he slowly made his turn, and that he did not see the plaintiff prior to the impact. The plaintiff testified at his deposition that he saw the defendant's vehicle make a sudden right turn in front of him one second prior to the impact. Thus, the defendant's own submissions raised triable issues of fact as to whether the defendant failed to see what was there to be seen through the proper use of his senses … . Khalil v Garcia-Olea, 2023 NY Slip Op 06517, Second Dept 12-20-23

Practice Point: A driver is expected to see what is there to be seen. Here it was alleged defendant driver made a turn into the path of plaintiff bicyclist. Defendant driver's motion for summary judgment should not have been granted.

DECEMBER 20, 2023