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Personal Injury
Reversal Report
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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 February 2024. 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. Rights Click on the Citations to Keep Your Place in the Reversal Report.

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THE ALLEGATIONS OF DEFENDANTS' CONDUCT DURING PHOTO SHOOTS OF PLAINTIFF-MODEL WHEN SHE WAS 16 AND 17 YEARS OLD MET THE "SEXUAL CONDUCT" CRITERIA FOR THE EXTENDED STATUTE OF LIMITATIONS UNDER THE CHILD VICTIMS ACT (CVA), THE COMPLAINT STATED CAUSES OF ACTION FOR INVASION OF PRIVACY PURSUANT TO CIVIL RIGHTS LAW SECTION 50 (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Higgitt, modifying Supreme Court in this Child Victims Act (CVA) action, determined: (1) the conduct alleged to have been committed by defendant modeling agency (Wilhelmina) and defendant-seller of sun tan products (Cal Tan) during photo shoots of plaintiff-model when she was 16 and 17 years old met the criteria for "sexual conduct" within the meaning of the extended statute of limitations under the CVA (CPLR 214-g); (2) New York has jurisdiction over the case against Cal Tan, even though the Cal Tan photo shoot took place in Mexico (plaintiff was a New York resident); (3) the negligent supervision and breach of fiduciary causes of action against Cal Tan were properly dismissed because no allegations supported a duty to supervise; (4) the negligent supervision and breach of fiduciary duty causes of action against Wilhelmina should not have been dismissed because no arguments in opposition were interposed; and (5) the invasion of privacy causes of action (Civil Rights Law section 50) against both defendants survived the motions to dismiss. The following allegations were deemed sufficient to meet the "sexual conduct" criteria for the applicability of the CVA's extended statute of limitations:

Plaintiff's allegations as to Cal Tan include that she was "instructed . . . to arch her back and look at the camera 'sexy,' 'like a lover,' and think about doing 'naughty things with your boyfriend,'" and that the photographs generated from the photoshoot "included ones in which Doe was depicted topless with her back arched in a sexually suggestive pose; looking out to the sea in a sultry manner; in which she was completely topless and 'naked in the water'; where she is posed

suggesting a willingness to engage in sexual activity; and where Doe is standing on a roof, semi- or totally naked."

As to Wilhelmina, plaintiff alleged that at one photoshoot, "[s]he was photographed in [see-through lingerie] with another girl, also wearing see-through lingerie, together in bed. Doe and the other underage model wore coy expressions, as if together they had been doing something naughty, or sexual;" at another photoshoot, where plaintiff was unclothed, she was "instructed . . . to look 'innocent, but sexy' for some photos, and like a 'bad girl' for others"; and that at a third photoshoot she "was made to sit nude on a bed with a white sheet covering part, but not all, of her breast and buttocks." Doe v Wilhelmina Models, Inc., 2024 NY Slip Op 00969, First Dept 2-27-24\

Practice Point: This comprehensive opinion lays out the criteria for "sexual conduct" within the meaning of the extended statute of limitations under the Child Victims Act (CVA). Here allegations of defendants' conduct during photo shoots of plaintiff-model when she was 16 and 17 years old met the CVA sexual-conduct criteria.

FEBRUARY 27, 2024

COVID, EMERGENCY OR DISASTER TREATMENT PROTECTION ACT (EDTPA).

THE REPEAL OF THE EMERGENCY OR DISASTER TREATMENT PROTECTION ACT (EDTPA) WAS NOT RETROACTIVE; THEREFORE DEFENDANT'S NURSING HOME WAS IMMUNE FROM SUIT STEMMING FROM PLAINTIFF'S DECEDENT'S DEATH FROM COVID-19 (FIRST DEPT).

The First Department determined the repeal of the Emergency or Disaster Treatment Protection Act (EDTPA) in April 2021 was not retroactive. Therefore defendant's nursing home was immune from suit stemming from plaintiff's decedent's death from COVID-19. Although the Act does not confer immunity

from gross negligence, gross negligence was not demonstrated because the Department of Health required nursing homes to admit COVID-positive patients:

As to the application of the EDTPA, defendant was entitled to immunity under that statute. The documents submitted with defendant's motion to dismiss, including several pandemic-related policies, State Department of Health directives, and more than 1600 of pages of the decedent's medical records, demonstrate that defendant was providing health care services to the decedent under the COVID-19 emergency orders when he was infected and, before that, "in accordance with applicable law"; the care provided was "impacted by" defendant's "decisions or activities in response to or as a result of the COVID-19 outbreak and in support of the state's directives"; and the decedent was provided care "in good faith" … . Hasan v Terrace Acquisitions II, LLC, 2024 NY Slip Op 00739, First Dept 2-13-24

Practice Point: This decision includes an extensive discussion of when a statute can be deemed to apply retroactively.

FEBRUARY 13, 2024

COVID, INSURANCE LAW.

A RESTAURANT PROPERTY-INSURANCE POLICY WHICH COVERS "DIRECT PHYSICAL LOSS OR DAMAGE" DOES NOT COVER THE LOSS OF BUSINESS CAUSED BY COVID-19 (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Halligan, determined the cessation of in-person dining services because of COVID-19 did not constitute "direct physical loss or damage" within the meaning of plaintiff's property insurance policy:

We do not take lightly the severe economic losses incurred by restaurants and other businesses serving the public as a result of the COVID-19 pandemic. But our task is to faithfully interpret the terms of the insurance policy before us, not to "rewrite the language of the polic[y] at issue" to reach a result with "equitable appeal" … . The coverage provisions relied upon by [plaintiff] CRO [Consolidated Restaurant Operations] only cover economic losses to the extent they are caused by "direct physical loss or damage" to insured property. We conclude that the business

interruption caused by the actual presence of the coronavirus on the premises of CRO's insured property, as alleged in the complaint, is insufficient to trigger such coverage. Consolidated Rest. Operations, Inc. v Westport Ins. Corp., 2024 NY Slip Op 00795, CtApp 2-15-24

Practice Point: Property insurance covering "direct physical loss or damage" does not cover a restaurant's loss of business caused by COVID-19.

FEBRUARY 15, 2024

COVID, WORKERS' COMPENSATION.

CLAIMANT DEMONSTRATED SHE CONTRACTED COVID AT THE WORKPLACE AND WAS ENTITLED TO WORKERS' COMPENSATION BENEFITS (THIRD DEPT).

The Third Department noted that contracting COVID-19 at the workplace entitled claimant to Worders' Compensation benefits:

… [S]ubstantial evidence supports the Board's determination that claimant sustained a work-related injury by contracting COVID-19 in the course of her employment due to specific exposure to COVID-19 in the workplace … . Further, the Board correctly employed the presumption provided by Workers' Compensation Law § 21 (1), "that an accident that occurs in the course of employment also arises out of that employment" … . Claimant's treating pulmonary and critical care physician testified that, assuming the facts as claimant and the lay witness testified, which the Board credited, there was a "strong probability" that claimant contracted COVID-19 in the workplace, and the carrier did not submit contrary testimony negating a causal relationship … . Although the medical providers could not offer a conclusive medical opinion as to where claimant contracted COVID-19 so as to establish a causal connection between her contraction of COVID-19 and her employment, the testimony credited by the Board combined with the statutory presumption sufficiently established that she contracted COVID-19 at work from a coworker, and the medical providers' testimony established that her injuries were the result of, and arose out of, contracting COVID-1 … . Matter of Leonard v David's Bridal, Inc., 2024 NY Slip Op 00837, Third Dept 2-15-24

Practice Point: This decision demonstrates it is possible to prove COVID was contracted at the workplace entitling the worker to Workers' Compensation benefits.

FEBRUARY 15, 2024

LABOR LAW-CONSTRUCTION LAW, FALL.

PLAINTIFF FELL THROUGH AN OPENING IN THE FLOOR WHEN THE PLYWOOD COVERING THE OPENING SHIFTED; PLAINTIFF WAS ENTITLED TO SUMMARY JUDGMENT ON THE LABOR LAW 240(1) CAUSE OF ACTION (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined plaintiff's motion for summary judgment on the Labor Law 240(1) cause of action should have been granted. Plaintiff fell through an opening in the floor when the plywood covering the opening shifted:

While [defendants] argue that plaintiff was the sole proximate cause of his accident, that defense is inapplicable here, since "if a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it" … . Their argument that there was no violation in that the opening, which had no railings or other affixed barricades, was adequately protected by the sheet of plywood, is unavailing … . Similarly, their claim that an unattributed statement in plaintiff's … accident report that he was lifting wood at the time of the accident implies that he intentionally removed the plywood himself does not create a question of fact … . The argument that plaintiff should not have been working in that area is contradicted by the scope of his employer's contract, photographs, and his coworker's testimony. In any event, it is irrelevant and would constitute, at most, comparative negligence, which is not a defense to a Labor Law § 240(1) claim … . Devlin v AECOM, 2024 NY Slip Op 00673, First Dept 2-8-24

Practice Point: A fall through an opening in the floor which was inadequately protected by a sheet of plywood warranted summary judgment on plaintiff's Labor Law 240(1) cause of action.

FEBRUARY 8, 2024

LABOR LAW-CONSTRUCTION LAW, LIFTING INJURY.

THE BED OF A VAN IS NOT AN ELEVATED WORK SURFACE FOR PURPOSES OF LABOR LAW 240(1) (FOURTH DEPT).

The Fourth Department noted the bed of a van is not considered an elevated work surface for purposes of Labor Law 240(1):

Plaintiff and defendant's principal moved the loaner jack to the edge of the van bed in preparation for lifting the device onto a four-wheeled cart. Plaintiff was injured when he and defendant's principal lifted the loaner jack to place it onto the cart. * * *

The bed of a truck or similar vehicle does not constitute an elevated work surface for purposes of Labor Law § 240 (1) … , and the protections of Labor Law § 240 (1) do not apply where a plaintiff is injured while unloading equipment from the bed of a vehicle … . Inasmuch as there is no dispute that plaintiff's injury occurred as he helped lift the loaner jack from the bed of defendant's vehicle, the court properly determined that Labor Law § 240 (1) does not apply. Triest v Nixon Equip. Servs., Inc., 2024 NY Slip Op 00714, Fourth Dept 2-9-24

Practice Point: Here the Fourth Department held that the bed of a van was not an elevated work surface for purposes of Labor Law 240(1).

FEBRUARY 9, 2024

LABOR LAW-CONSTRUCTION LAW, MOVING HEAVY OBJECT.

QUESTIONS OF FACT ABOUT WHETHER REPLACING A WATER HEATER CONSTITUTED A REPAIR AS OPPOSED TO MAINTENANCE AND WHETHER AN ELEVATION-RELATED HAZARD WAS INVOLVED IN MOVING THE WATER HEATER WITH A HAND TRUCK PRECLUDED DISMISSAL OF THE LABOR LAW 240(1) CAUSE OF ACTION (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined replacement of a 700 pound water heater which involved moving it with a hand truck raised questions of fact about the applicability of Labor Law 240 (1):

Plaintiff's evidence * * * raised triable issues whether the day-long work that involved multiple workers to replace a 6-foot tall, 30-inch diameter water heater, weighing, by some estimates approximately 700 pounds, constituted a repair within the meaning of Labor Law § 240(1), as distinguished from routine maintenance … . Defendants did not offer proof, apart from conclusory statements, as to the cause of the water heater's breakdown other than that the mechanism was leaking and no longer functioning. Defendants offered no specific proof that the water heater's failure was due to normal wear and tear of particular parts or of its system itself. Triable issues were also raised as to whether an elevation differential existed such that the weight of the water heater, as it was strapped to the hand truck, created a hazardous gravitational force which devices enumerated in Labor Law § 240(1) were meant to protect against … . Rodriguez v Fawn E. Fourth St. LLC, 2024 NY Slip Op 00690, First Dept 2-8-24

Practice Point: There were questions of fact whether replacing a water heater was a "repair" and whether moving the 700-pound water heater on a hand truck was an "elevation-related" hazard within the meaning of Labor Law 240(1).

FEBRUARY 8, 2024

LABOR LAW-CONSTRUCTION LAW, SLIP AND FALL.

HERE SLIPPERY PLASTIC SHEETING WAS USED TO PROTECT AN ESCALATOR DURING A PAINTING PROJECT; PLAINTIFF, A PAINTER, SLIPPED AND FELL WHEN HE STEPPED ONTO THE PLASTIC; THE PLASTIC SHOULD BE VIEWED AS A "FOREIGN SUBSTANCE," LIKE ICE OR GREASE, WITHIN THE MEANING OF THE INDUSTRIAL CODE; IN ADDITION, THE PLASTIC SHOULD NOT BE VIEWED AS "INTEGRAL TO THE JOB" WITHIN THE MEANING OF THE INDUSTRIAL CODE BECAUSE THERE WERE SAFER ALTERNATIVES (CT APP).

The Court of Appeals, reversing the Appellate Division, in a full-fledged opinion by Judge Rivera, with a three-judge concurring opinion by Judge Garcia, determined the plastic sheeting placed on an escalator during painting was a "foreign substance" within the meaning the Industrial Code and the sheeting was not "integral to the work" within the meaning of the Industrial Code. Plaintiff was therefore entitled to summary judgment on the Labor Law 241(6) cause of action. Plaintiff was required to stand on the plastic while painting. He slipped and fell as he stepped onto the sheeting. There was testimony that drop cloths or wood panels would be safer alternative coverings:

As to whether the covering's properties are the type encompassed within the affirmative mandate of 12 NYCRR 23-1.7 (d), because that section specifically lists ice, snow, water and grease, the catchall reference to "other foreign substance" includes those substances that share a quality common to the enumerated items. The listed items are, by their nature, types of material that are slippery when in contact with an area where someone walks, seeks passage, or stands, and, when the substance is present, would make it difficult if not impossible to use the work area safely, necessitating one of the affirmative mitigating measures set forth in section 23-1.7 (d) as a means to provide safe footing. The plastic covering used here similarly made [plaintiff's] work area slippery upon contact, with the result that [plaintiff] could not traverse the plastic-covered escalator without risking a fall. * * *

… [T]he use of some cover was integral to [plaintiff's] assignment to paint around the escalator. But that does not mean that any cover used—even one that was inherently slippery—was necessarily "integral," particularly where a safer

alternative would have accomplished the same goal. The plastic covering that was placed on the escalator was not integral to the paint job because it made [plaintiff's] work area slippery, creating one of the hazards that the cover was intended to avoid. … Defendant was in a position to avoid this danger because … there were alternative coverings—drop cloths and wood panels—that were familiar, previously-used options that would have achieved the goal of protecting the worker from injuries caused by a slipping hazard and also protected the escalator from possible damage. Bazdaric v Almah Partners LLC, 2024 NY Slip Op 00847, CtApp 2-20-24

Practice Point: A prohibited "foreign substance" within the meaning of the Industrial Code can include slippery plastic sheeting (here used as a drop cloth during a painting project). Therefore requiring workers to stand or walk on slippery plastic sheeting can be a violation of the Industrial Code, triggering Labor Law 241(6) liability.

Practice Point: Because there were safer alternatives, the slippery plastic covering was not "integral to the job" within the meaning of the Industrial Code.

FEBRUARY 20, 2024

LABOR LAW-CONSTRUCTION LAW, SLIP AND FALL.

THE FACT THAT PLAINTIFF SLIPPED AND FELL DOWN A PERMANENT CONCRETE STAIRWAY DID NOT REMOVE THE INCIDENT FROM THE REACH OF LABOR LAW 240(1); PLAINTIFF'S SUMMARY JUDGMENT MOTION SHOULD HAVE BEEN GRANTED (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff was entitled to summary judgment on his Labor Law 240(1) cause of action. Plaintiff was ordered to carry a 200 pound mold up a concrete stairway. He slipped on concrete debris and fell down the stairs. The fact that the concrete stairway was a permanent structure (as opposed to a scaffold or ladder, for example) did not remove it from the reach of Labor Law 240(1):

Contrary to defendants' contention, the fact that the staircase on which plaintiff fell was constructed as a permanent structure does not remove it from the reach of Labor Law § 240(1) .. . Because plaintiff's foreman instructed him to work on an

elevated work platform—namely, the stairway—defendants were required to provide plaintiff with an adequate safety device to carry the staircase mold up the stairs. Defendants failed to do so, and the absence of a safety device was a proximate cause of plaintiff's injuries. At the time of his fall, plaintiff was following his foreman's instructions to manually carry the mold up the stairs, and thus, he was not the sole proximate cause of the accident … . DaSilva v Toll GC LLC, 2024 NY Slip Op 00862, First Dept 2-20-24

Practice Point: Labor Law 240(1) can apply to a fall from a permanent concrete stairway. The statute does not apply exclusively to temporary structures like scaffolds, for example.

FEBRUARY 20, 2024

MEDICAL MALPRACTICE, EVIDENCE.

DEFENDANTS DID NOT ATTEMPT TO SHIFT LIABILITY TO PHYSICIANS WHO HAD BEEN AWARDED SUMMARY JUDGMENT PRIOR TO TRIAL (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Warhit, determined defendant doctor and hospital in this med mal case did not attempt at trial to shift liability to the physician-defendants who had been awarded summary judgment before trial. The opinion is fact-specific and therefore will not be summarized here. The issue is discussed in detail and relevant authority is analyzed in some depth:

The principal question presented on this appeal is whether the defendants improperly attempted at trial to shift liability to certain physician-defendants who had been awarded summary judgment prior to trial. We answer this question in the negative, and find that the Supreme Court providently exercised its discretion in denying the application of the plaintiff … , in effect, for a new trial on this ground. We further conclude that the verdict was not contrary to the weight of the evidence. Angieri v Musso, 2024 NY Slip Op 00887, Second Dept 2-21-24

Practice Point: Under the specific facts brought out at trial in this med mal case, the plaintiff did not attempt to shift liability to doctors who had been awarded summary judgment prior to trial. The issue and the relevant authority are discussed in some detail.

FEBRUARY 21, 2024

MEDICAL MALPRACTICE, EXPERT OPINION.

IN A MED MAL ACTION PLAINTIFF'S EXPERT NEED NOT HAVE PRACTICED IN THE SAME SPECIALTY AS DEFENDANT DOCTOR TO BE QUALIFIED TO OFFER EXPERT OPINION EVIDENCE (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined plaintiff's expert laid an adequate foundation for their qualifications in orthopedic medicine. The court noted that plaintiff's expert need not have practiced in the same specialty as the defendant:

"[A] plaintiff's expert need not have practiced in the same specialty as the defendant[]" … , and "any alleged lack of knowledge in a particular area of expertise goes to the weight and not the admissibility of the testimony" … . Here, plaintiffs' expert is board certified as a medical examiner, an orthopedic surgeon and an arthroscopic laser surgeon. The expert completed a residency in general and orthopedic surgery. The expert is now a clinical instructor of orthopedic surgery and a clinical assistant professor of orthopedic surgery. The expert is affiliated with four hospitals and previously served as the chair of the department of orthopedic surgery at one hospital. Thus, we conclude that plaintiffs' expert "had the requisite skill, training, education, knowledge or experience from which it can be assumed that [the expert's] opinion[ ] . . . [is] reliable" … . McMahon-DeCarlo v Wickline, 2024 NY Slip Op 00730, Fourth Dept 2-9-24

Practice Point: Although plaintiff's expert had not practiced in the same specialty as defendant doctor in this med mal action, plaintiff's expert was qualified to offer reliable expert opinion evidence.

FEBRUARY 9, 2024

MEDICAL MALPRACTICE, EXPERT OPINION.

IN A MEDICAL MALPRACTICE CASE, CONFLICTING EXPERT OPINIONS WHICH ARE EVIDENCE-BASED (I.E., NOT MERELY "CONCLUSORY") REQUIRE DENIAL OF SUMMARY JUDGMENT (THIRD DEPT).

The Third Department, reversing Supreme Court in this medical malpractice case, determined plaintiff's expert raised questions of fact about whether defendant surgeon failed to diagnose and treat a post-operative infection of plaintiff's knee. Therefore, defendant's motion for summary judgment should not have been granted. The decision is fact-specific and cannot be fairly summarized here. But the simple issue is: if experts on both sides of a med mal case come to conflicting conclusions which are evidence-based, summary judgment is inappropriate:

Based on the conflicting expert proof, plaintiff raised triable issues of fact … . Accordingly, defendants were not entitled to summary judgment. Kelly v Herzog, 2024 NY Slip Op 01137, Third Dept 2-29-24

Practice Point: In a med mal case, conflicting expert affidavits which are not "conclusory," but rather are supported by evidence, preclude summary judgment.

FEBRUARY 29, 2024

MUNICIPAL LAW, DISABILITY RETIREMENT, PERMANENT LUNG DAMAGE.

THE 10-DAY PERIOD DURING WHICH PETITIONER POLICE OFFICER MUST APPLY FOR DISABILITY BENEFITS STARTED TO RUN WHEN HE LEARNED HE HAD SUFFERED PERMANENT LUNG DAMAGE, NOT WHEN HE FIRST CONTRACTED COVID; PETITIONER'S APPLICATION FOR DISABILITY BENEFITS SHOULD NOT HAVE BEEN DENIED AS UNTIMELY (THIRD DEPT).

The Third Department, reversing Sullivan County's denial of disability benefits for petitioner police officer (Ramos), determined the time when petitioner learned he had permanent lung damage (September 9, 2021), not the time when he contracted

COVID (August 9, 2021), was the operative date for timely application for General Municipal Law 207-c disability benefits:

Code of the County of Sullivan § 70-7 requires, among other things, applications for benefits under General Municipal Law § 207-c to be made "within 10 days from the date of the incident alleged to have given rise to the claim of disability or illness, or from the time such condition is discovered, whichever date is later. * * *

… [I]t was improper for the Director to use August 9, 2021 as the incident date that commenced the 10-day period within which Ramos was required to file his application for benefits. Ramos' application clearly stated that he was informed on September 9, 2021 about his lung damage stemming from his contraction of COVID-19, and it was on this date that Ramos first discovered the disability (i.e., possible lung damage) that gave rise to his claim and application for benefits. Ramos' September 17, 2021 application was made within 10 days of September 9, 2021 … . Matter of Sullivan County Patrolmen's Benevolent Assn., Inc. v County of Sullivan, 2024 NY Slip Op 00481, Third Dept 2-1-24

Practice Point: Any time period during which a police officer must apply for disability benefits starts to run when the officer first learns of his permanent disability, not when the officer first became ill.

FEBRUARY 1, 2024

NEGLIGENCE, BICYCLE ACCIDENT.

THE SIDEWALK ON WHICH PLAINTIFF WAS RIDING HIS MOTORIZED BICYCLE WHEN HE FELL WAS NOT DESIGNED OR SUITABLE FOR RECREATIONAL USE; THEREFORE THE PROPERTY OWNER, SYRACUSE UNIVERSITY, COULD NOT RELY ON THE RECREATIONAL-USE STATUTE (GENERAL OBLIGATIONS LAW 9-103) TO ESCAPE LIABILITY (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the recreational use statute (General Obligations Law 9-103(1)(a)) did not apply to the sidewalk on which plaintiff was riding his motorized bicycle when he fell. Therefore defendant was not entitled escape liability based upon the statute. The sidewalk was along a

busy road on the Syracuse University campus and therefore was not designed or suitable for recreational use:

General Obligations Law § 9-103 (1) (a) provides that "an owner, lessee or occupant of premises . . . owes no duty to keep the premises safe for entry or use by others for . . . bicycle riding . . . or to give warning of any hazardous condition . . . on such premises to persons entering for such purposes." The statute was enacted to "induce property owners, who might otherwise be reluctant to do so for fear of liability, to permit persons to come on their property to pursue specified activities" … . The rationale for the statute is that "outdoor recreation is good; New Yorkers need suitable places to engage in outdoor recreation; [and] more places will be made available if property owners do not have to worry about liability when recreationists come onto their land" … . The statute applies when two conditions are met: (1) the plaintiff is engaged in one of the activities identified in section 9-103 and (2) the plaintiff is recreating on land suitable for that activity … .

… In evaluating the suitability of a property for a particular activity, courts look to whether the premises is the "type of property which is not only physically conducive to the particular activity or sport but is also a type which would be appropriate for public use in pursuing the activity as recreation" … . … [W]e conclude that plaintiff sufficiently alleged that the sidewalk at issue was not appropriate for public use in pursuing the recreational activity of bike riding. Plaintiff alleged that the sidewalk area where [plaintiff] fell was not designated by defendant for bike riding and was situated along a busy campus roadway near the front entrance of an academic building containing classrooms and offices. Such a property is not appropriate for public use in pursuing bicycle riding as a recreational activity … . Inasmuch as the recreational use statute does not apply here, the court erred in granting the motion [to dismiss]. Delaney v Syracuse Univ., 2024 NY Slip Op 00731, Fourth Dept 2-9-24

Practice Point: General Obligations Law 9-103 allows property owners to open up their property for recreational use, including bicycling, without fear of liability for injury to those using the property for recreational purposes, Here the sidewalk on which plaintiff was riding when he fell was nether designed nor appropriate for recreational use. Therefore the property owner could not take advantage of the recreational-use statute to escape liability.

FEBRUARY 9, 2024

NEGLIGENCE, CHILD VICTIMS ACT.

IN THIS CHILD VICTIM'S ACT (CVA) ACTION, THE COMPLAINT ADEQUATELY ALLEGED CAUSES OF ACTION FOR NEGLIGENT SUPERVISION, NEGLIGENT RECRUITMENT AND NEGLIGENT FAILURE TO WARN AGAINST BIG BROTHERS BIG SISTERS OF AMERICA (BBBS) AND FAMILY SERVICES OF WESTCHESTER (FSW) BASED ON THE ALLEGED SEXUAL CONDUCT BY A VOLUNTEER MENTOR (SECOND DEPT).

The Second Department determined defendant Big Brothers Big Sisters of America (BBBS)'s and defendant Family Services of Westchester (FSW)'s motions to dismiss the negligent supervision, negligent recruitment and negligent failure to warn causes of action were properly denied in this Child Victims Act (CVA) lawsuit. Plaintiff alleged he was sexually abused by a mentor associated with defendants:

… [T]he amended complaint adequately alleged that the defendants owed a duty of care to the plaintiff and that the sexual abuse by the mentor was foreseeable. Specifically, the amended complaint alleged that the mentor groomed and sexually abused the plaintiff "in connection with [the mentor's] position as a volunteer with BBBS and FSW" and "in connection with BBBS and FSW sponsored activities." During all relevant times, BBBS and FSW had allegedly assumed custody and control over the plaintiff "as a minor child in their care." The amended complaint alleged that the defendants had a duty to "take reasonable measures to guard against child sexual abuse by volunteers" and that the defendants failed to ensure that there were reasonable screening or recruitment measures in place to prevent such abuse. The amended complaint further alleged that BBBS published two reports demonstrating that, while the plaintiff's abuse was ongoing, BBBS was aware that the services it offered "attract[ed] child sexual abusers," that the clients of BBBS were at "high risk" for potential abuse, and that the selection process used to match mentors with mentees did not appropriately incorporate child sexual abuse prevention training (internal quotation marks omitted). Moreover, the amended complaint alleged that the mentor had "dangerous propensities," that the defendants "should have known" that the mentor had a propensity to sexually

abuse children, and that oversight and monitoring of the mentor's interactions with his prior mentees "would have revealed [the mentor's] pattern of predatory behavior." At the pleading stage of the litigation, where the plaintiff's allegations are accepted as true and are accorded the benefit of every possible favorable inference, the plaintiff adequately alleged that the defendants owed the plaintiff a duty of care and that the sexual abuse by the mentor was foreseeable … . Brophy v Big Bros. Big Sisters of Am., Inc., 2024 NY Slip Op 00993, Second Dept 2-28-24

Practice Point: Here in this Child Victims Act (CVA) case, the complaint adequately alleged negligent supervision, negligent recruitment and negligent failure to warn.

FEBRUARY 28, 2024

NEGLIGENCE, CIVIL PROCEDURE, SLIP AND FALL.

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE WAS PREMATURE AND SHOULD HAVE BEEN DENIED; CRITERIA EXPLAINED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendants' motion for summary judgment in this slip and fall case was premature and should have been denied:

A motion for summary judgment may be denied as premature where it appears that the facts essential to oppose the motion exist but cannot then be stated (see CPLR 3212[f] …). "A party who contends that a summary judgment motion is premature is required to demonstrate that discovery might lead to relevant evidence or the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the movant" … .

Here, the plaintiff demonstrated that further discovery, including records of the United States Postal Service, a deposition of the plaintiff's former coworker, and discovery related to hearsay statements that the alleged defect had been reported to the defendants, may result in the disclosure of evidence relevant to the issue of whether the defendants had notice of the alleged defective condition … . Knowles v 21-43 27th St., LLC, 2024 NY Slip Op 00759, Second Dept 2-14-24

Practice Point: Here the defendants' motion for summary judgment was deemed premature; criteria explained.

FEBRUARY 14, 2024

NEGLIGENCE, CIVIL PROCEDURE, LANDLORD-TENANT.

FOR PURPOSES OF THE RELATION-BACK DOCTRINE, A LANDLORD AND A TENANT ARE NOT "UNITED IN INTEREST" (FIRST DEPT).

The First Department, reversing Supreme Court, determined the landlord-tenant relationship between the insured and the defendant building owner, Marion, did not constitute a "unity of interest" such that a negligence action against Marion could be commenced after the statute of limitations had run:

There are three conditions that must be satisfied for a claim asserted against a subsequent defendant such as Marion to relate back to claims asserted against another defendant: (1) both claims must arise out of the same conduct, occurrence, or transaction; (2) the new party must be "united in interest" with the original defendant, and by reason of that relationship can be charged with such notice of the institution of the lawsuit such that he will not be prejudiced in maintaining his defense on the merits; and (3) the new party knew or should have known that, but for a mistake by the plaintiff as to the identity of the proper parties, the action would have been brought against him as well … . * * *

… [A] landlord-tenant relationship, standing alone, does not give rise to vicarious liability or otherwise create unity of interest, which, as the Court of Appeals has recently reaffirmed, requires a situation in which the parties "stand or fall together and the judgment against one will similarly affect the other" … . Kingstone Ins. Co. v Marion Pharm. Inc., 2024 NY Slip Op 00805, First Dept 2-15-24

Practice Point: A landlord and a tenant are not united in interest for purposes of the relation-back doctrine and will not support adding a landlord to a complaint after the statute of limitations has run.

FEBRUARY 15, 2024

NEGLIGENCE, COURT OF CLAIMS, BICYCLE ACCIDENT.

RIDING A BICYCLE ON A PUBLIC PATH USED BY BOTH BICYCLISTS AND PEDESTRIANS IS NOT A RECREATIONAL ACTIVITY WHICH TRIGGERS THE ASSUMPTION OF THE RISK DOCTRINE (SECOND DEPT).

The Second Department, reversing the Court of Claims in this bicycle-fall case, determined the assumption of the risk doctrine did not apply. Plaintiff was riding on public path which was not a designated venue for bicycling when he hit an area of broken asphalt:

… [T]he Court of Claims erred in determining that the path where the claimant's accident occurred was a designated venue used specifically for bicycling. When the injury occurred, the claimant was engaged in a recreational bicycle ride on a paved, public surface. The claimant was not participating in an organized group event or sponsored ride. The claimant testified at trial that he could both bike and walk the path. That, in addition to the presence of pedestrians who precipitated the accident, demonstrated that the path was for public use, and not a designated venue for bicycling. Therefore, the claimant, by participating in recreational bicycling, cannot be said to have assumed the risk of being injured as a result of an alleged defective condition on the paved path, and therefore, the doctrine of primary assumption of risk is inapplicable to the claimant's activity … . Alfieri v State of New York, 2024 NY Slip Op 00886, Second Dept 2-21-24

Practice Point: Riding a bicycle on a public path used by pedestrians and bicyclists is not a recreational activity which triggers the assumption of the risk doctrine.

FEBRUARY 21, 2024

NEGLIGENCE, INDEMNIFICATION VERSUS CONTRIBUTION.

INDEMNIFICATION IS ONLY AVAILABLE IF THE PARTY SEEKING IT IS NOT NEGLIGENT (VICARIOUS LIABILITY); A PARTY WHO IS PARTIALLY NEGLIGENT MAY ONLY SEEK CONTRIBUTION, NOT INDEMNIFICATION, FROM OTHER TORT-FEASORS (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the third-party complaint against defendant seeking indemnification should have been dismissed because the third-party plaintiff could not be vicariously liable for the negligence of the defendant. Where a party is partially liable based on its own negligence, only contribution from other tort-feasors, not indemnification, is available:

"The principle of common-law, or implied indemnification, permits one who has been compelled to pay for the wrong of another to recover from the wrongdoer the damages it paid to the injured party" … . "The predicate of common-law indemnity is vicarious liability without actual fault on the part of the proposed indemnitee, that is, the defendant's role in causing the plaintiff's injury is solely passive, and thus its liability is purely vicarious" … . However, "where a party is held liable at least partially because of its own negligence, contribution against other culpable tort-feasors is the only available remedy" … . De Heras v Avant Gardner, LLC, 2024 NY Slip Op 00999, Second Dept 2-28-24

Practice Point: Indemnification is only available to a party who is vicariously liable for the negligence of another. A party who is partially negligence can only seek contribution, not indemnification, from other tort-feasors.

FEBRUARY 28, 2024

NEGLIGENCE, MEDICAL EMERGENCY IN SWIMMING POOL, EVIDENCE.

ALTHOUGH THE SANITARY CODE DID NOT REQUIRE DEFENDANT SUMMER CAMP TO HAVE A LIFEGUARD, THE CODE DID REQUIRE THE CAMP TO OFFER SOME SUPERVISION OF PERSONS USING THE SWIMMING POOL; THEREFORE THE SUMMER CAMP OWED PLAINTIFF'S DECEDENT, WHO SUFFERED A MEDICAL EMERGENCY IN THE POOL, A DUTY OF CARE (THIRD DEPT).

The Third Department, reversing Supreme Court, determined defendant summer-camp-owners' motion to dismiss the complaint in this swimming-pool-incident case should not have been granted. Plaintiff's decedent suffered some sort of "medical emergency" in defendants' swimming pool. Supreme Court dismissed the complaint, finding that the Sanitary Code did not require the camp to have a lifeguard and therefore defendants owed no duty to the plaintiff's decedent. The Third Department held that, although the Sanitary Code did not require a lifeguard, it did require some level of supervision of persons using the pool:

While the CPR [lifeguard] requirement is specifically exempted for temporary residences [like defendants' summer camp], the aquatic supervisor for a supervision level III [defendants had chosen to offer supervision level III] at a temporary residence must still possess the other enumerated qualifications (see 10 NYCRR 6-1.31 [c]). To find otherwise would render meaningless 10 NYCRR 6-1.23 (a) (3), which provides that if supervision level III is chosen then the temporary residence must adhere to the supervision level III requirements … . While it is true that 10 NYCRR 6-1.23 (a) (1) (i) exempts CPR certified staff [lifeguards] from a temporary residence that selects supervision level III, it plainly does not exempt these facilities from providing any supervision. As such, we find that Supreme Court erred in determining that defendants did not owe any duty to decedent and granting defendants summary judgment on this basis. Matter of Tamrazyan v Solway Props. LLC, 2024 NY Slip Op 00960, Third Dept 2-22-24

Practice Point: Here the duty owed by defendant summer camp to persons using the swimmer pool was spelled out in the Sanitary Code. Although the defendant summer camp, pursuant to the Code, was not required to provide a lifeguard, it was required to offer some supervision of persons using the swimming pool. Therefore

the complaint should not have been dismissed on the ground that defendant did not owe a duty to plaintiff's decedent, who suffered a medical emergency in the pool.

FEBRUARY 22, 2024

NEGLIGENCE, SLIP AND FALL, MUNICIPAL LAW.

THE STREET REPAIR WORK DONE BY THE CITY IN THE AREAWHERE PLAINTIFF SLIPPED AND FELL WAS DONE MORE THAN A YEAR BEFORE AND DETERIORATED GRADUALLY OVER TIME; IN ORDER FOR THE CITY TO BE LIABLE FOR CREATING THE DANGEROUS CONDITION THE DEFECT MUST HAVE BEEN THE IMMEDIATE RESULT OF THE WORK (FOURTH DEPT).

The Fourth Department, reversing (modifying) Supreme Court, dismissed the action against the city in this slip and fall case. There was a question whether the city repair to the street deteriorated over a period of a year or more. But in order to be liable for creating a dangerous condition, the defect must be the "immediate result" of the work done:

Plaintiffs failed to raise "a triable issue of fact concerning the applicability of [an] exception to the prior written notice requirement, i.e., whether the City created the allegedly dangerous condition through an affirmative act of negligence" … . The exception is limited to work by the City that immediately results in the existence of a dangerous condition. Although the record supports the inference that the City may have created a dangerous condition by failing to replace a temporary cold patch with a permanent repair, the resulting allegedly dangerous condition here developed over a period greater than a year and did not "immediately result" from the City's work … . Graham v City of Syracuse, 2024 NY Slip Op 00710, Fourth Dept 2-9-24

Practice Point: In a slip and fall case, in order for a city to be liable for creating the dangerous condition, the defect must be the "immediate result" of the work done by the city. Here the work was done more than a year before and the defect developed gradually over time. The city was not liable.

FEBRUARY 9, 2024

NEGLIGENCE, TRIP AND FALL, CONTRACTOR-LIABILITY, OWNER-LIABILITY.

THE CONTRACTOR WHICH UNDERTOOK THE DUTY TO INSTALL FLOORING WAS REQUIRED TO PERFORM THAT DUTY WITH REASONABLE CARE; THE OWNER OF THE PROPERTY HAD A SEPARATE NONDELEGABLE DUTY TO KEEP THE PROPERTY SAFE WHICH MAY ALLOW THE CONTRACTOR'S NEGLIGENCE TO BE IMPUTED TO THE OWNER; DEFENDANTS' MOTION FOR SUMMARY JUDGMENT IN THIS TRIP AND FALL CASE SHOULD NOT HAVE BEEN GRANTED (FIRST DEPT).

The First Department, reversing Supreme Court, determined (1) defendant contractor (AW&S) undertook the duty to install flooring and was therefore required to perform that duty with reasonable care, and (2) the owner of the property (UJA) had a separate, nondelegable duty to keep the premises safe. There was evidence AW&S failed to secure portions of the flooring it installed and that failure was the proximate cause of plaintiff's trip and fall. Defendants did not present any evidence of when the floor was last inspected prior to the fall and therefore did not demonstrate the absence of constructive notice of the defect:

Defendants failed to establish prima facie that they were not negligent in the installation and maintenance of the Masonite flooring on which plaintiff tripped and fell … . Although defendants claim that they neither created nor had actual or constructive notice of the condition that caused plaintiff's injuries, the record establishes that defendant owner … (UJA) requested that defendant … (AW&S) protect the floors during a renovation project in its building for which AW&S served as general contractor. … AW&S specifically undertook responsibility for the installation, maintenance, and inspection of the protective Masonite flooring while it was on site, and the project superintendent noted that there were sections of Masonite that lacked duct tape securing it to the floor in the area where plaintiff tripped and fell. Based on this testimony, there are questions of fact as to whether AW&S's failure to secure the Masonite, or to note that it was not secured upon

inspection, was the proximate cause of plaintiff's injuries … . … [W]here a defendant has undertaken a specific duty, it is obligated to perform that duty with reasonable care or be liable for any hazards it creates … . UJA, as owner, has a separate, nondelegable duty to maintain its premises, and AW&S's negligent maintenance of the Masonite, if established, could be imputed to UJA …

Defendants also failed to make a prima facie showing that they lacked constructive notice of the condition. Neither defendant offered evidence of maintenance and inspection records despite testimony that the duct tape on the Masonite required routine replacement when it became curled or wet … . …[P]laintiff was not required to establish how long the condition existed … . Bolson v UJA-FED Props. Inc., Ltd., 2024 NY Slip Op 00966, First Dept 2-27-24

Practice Point: A contractor which assumes the duty to do work, here floor-installation, is required to do so with reasonable care.

Practice Point: The property owner which hires a contractor to do work has a separate nondelegable duty to keep the premises safe such that a contractor's negligence may be imputed to the owner.

FEBRUARY 27, 2024

NEGLIGENCE, TRIP AND FALL, EVIDENCE.

THE ROLLING LADDER LEFT IN THE AISLE OF DEFENDANT'S STORE WAS READILY OBVERSABLE, WHICH SPEAKS ONLY TO DEFENDANT'S DUTY TO WARN, NOT TO THE DUTY TO KEEP THE PREMISES SAFE; THE PROTRUDING BAR ON THE LADDER CREATED A POTENTIAL TRIPPING HAZARD; DEFENDANTS' SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED (THIRD DEPT).

The Third Department, reversing Supreme Court, determined defendant store's motion for summary judgment in this trip and fall case should not have been granted. A rolling ladder had been left in an aisle of the store. The was a stabilizer bar which protruded out several inches on each side of the ladder. Plaintiff picked up something from the shelf, took one step back and tripped over the stabilizer bar

as she turned. Supreme Court held the bar was readily observable and not inherently dangerous. The Third Department noted that the "readily observable" aspect of a condition goes to the duty to warn, but the duty to keep the area safe remains:

That the ladder was readily observable obviates defendants' duty to warn of the ladder's presence but not defendants' continuing obligation to maintain the property in a reasonably safe condition … . For her part, plaintiff acknowledged seeing the ladder, but was unaware of the protruding stabilizer bar prior to her fall. Given the circumstances surrounding the incident, we cannot agree with Supreme Court's assessment that the ladder was not inherently dangerous … . The record includes a photograph of the ladder which shows that the stabilizer bar protruded out several inches on each side. This feature, coupled with the placement of the ladder into the center of the aisle, presented a potential tripping hazard. Viewing the evidence in the light most favorable to plaintiff as the nonmoving party … , a question of fact remains as to whether defendants' premises were maintained in a reasonably safe condition. Wolfe v Staples, Inc., 2024 NY Slip Op 00957, Third Dept 2-22-24

Practice Point: The fact that an object over which plaintiff tripped was readily observable goes to defendant's duty to warn, but not to the duty to keep the premises safer. Here a protruding bar on a readily observable rolling ladder created a potential tripping hazard and raised a question of fact about defendant's duty to keep the premises safe.

FEBRUARY 22, 2024

NEGLIGENCE, CAR ACCIDENT, VEHICLE AND TRAFFIC LAW, MUNICIPAL LAW.

THERE ARE QUESTIONS OF FACT WHETHER DEFENDANT POLICE OFFICER ACTED IN RECKLESS DISREGARD FOR THE SAFETY OF OTHERS DURING A HIGH-SPEED CHASE; THE PURSUED CAR STRUCK PLAINTIFF'S CAR; THE ACTION AGAINST THE OFFICER AND THE TOWN SHOULD NOT HAVE BEEN DISMISSED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the action against a town police officer (Cunningham) and the town alleging the officer acted in reckless disregard for the safety of others during a high speed chase should not have been dismissed. The car which was pursued by Cunningham struck plaintiff's (Kolvenbach's) car:

… [T]he Town defendants failed to eliminate all triable issues of fact as to whether Cunningham acted with reckless disregard for the safety of others and whether such conduct was a proximate cause of Kolvenbach's injuries … . In support of the Town defendants' motion, they submitted, among other things, transcripts of the deposition testimony of Cunningham and other witnesses who testified that, on the day at issue, Cunningham pursued Williams at high speeds on damp roads through a main thoroughfare, and that Williams' vehicle narrowly avoided colliding with other vehicles at earlier points during the pursuit. Thus, contrary to the determination of the Supreme Court, there are triable issues of fact as to whether Cunningham acted in reckless disregard of the safety of others in continuing the pursuit … . There also remain triable issues of fact as to whether Cunningham activated the siren on his police vehicle … and whether he violated police protocols by failing to update his supervisors on the progress of the pursuit via his police radio … . Kolvenbach v Cunningham, 2024 NY Slip Op 00900, Second Dept 2-21-24

Practice Point: This case demonstrates what may constitute "reckless disregard for the safety of others" by a police officer during a high-speed chase which may result in municipal liability for injuries caused by the pursued vehicle.

FEBRUARY 21, 2024

WORKERS' COMPENSATION, CIVIL PROCEDURE, INSURANCE LAW.

WHERE THERE ARE UNRESOLVED QUESTIONS OF FACT CONCERNING ELIGIBILITY FOR WORKERS' COMPENSATION BENEFITS THE WORKERS' COMPENSATION BOARD HAS PRIMARY JURISDICTION AND MUST RULE BEFORE ANY RELATED ACTION CAN BE BROUGHT IN SUPREME COURT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the Workers' Compensation Board had primary jurisdiction and must rule on defendant's eligibility for benefits before Supreme Court can hear an action by the insurer for reimbursement of no-fault payments made to defendant:

In July 2018, the subrogors of the plaintiff no-fault insurer, State Farm Mutual Automobile Insurance Company, allegedly were injured in a motor vehicle accident while traveling in a vehicle insured by the plaintiff. After the plaintiff provided payments for medical services on behalf of the subrogors, it learned that the subrogors had applied for workers' compensation benefits and that the Workers' Compensation Board had directed the defendant workers' compensation insurer, Amtrust North America, Inc., to pay for necessary medical treatments for the subrogors. Thereafter, the plaintiff demanded that the defendant reimburse it for the full amount of no-fault benefits the plaintiff had provided on behalf of its subrogors. * * *

"[W]here the availability of workmen's compensation hinges upon the resolution of questions of fact or upon mixed questions of fact and law, the plaintiff may not choose the courts as the forum for the resolution of such questions" … . "Since 'primary jurisdiction with respect to determinations as to the applicability of the Workers' Compensation Law has been vested in the Workers' Compensation Board,' it is 'inappropriate for the courts to express views with respect thereto pending determination by the board'" … . State Farm Mut. Auto. Ins. Co. v Amtrust N. Am., Inc., 2024 NY Slip Op 00646, Second Dept 2-7-24

Practice Point: Where there are unresolved questions of fact about a party's eligibility for Workers' Compensation benefits, any action in Supreme Court should be transferred to the Workers' Compensation Board, which is vested with primary jurisdiction.

FEBRUARY 7, 2024