NEW YORK APPELLATE DIGEST, LLC

Personal Injury
Reversal Report
March 2024

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 March 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. Right Click on the Citations to Keep Your Place in the Reversal Report.

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BATTERY, MUNICIPAL LAW, LATE NOTICES OF CLAIM.

RECORDS ASSOCIATED WITH AN ARREST AND PROSECUTION AND PRISON MEDICAL RECORDS ALLEGEDLY RELATING TO AN ATTACK BY CORRECTION OFFICERS WERE NOT SUFFICIENT TO DEMONSTRATE THE RESPONDENT CITY HAD ACTUAL TIMELY NOTICE OF THE ASSOCIATED CLAIMS; LEAVE TO FILE LATE NOTICES OF CLAIM SHOULD NOT HAVE BEEN GRANTED (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Troutman, reversing the Appellate Division, over a two-judge dissent in one case (Jaime) and concurrences in the other (Orozco), determined that the petitions for leave to file a late notice of claim, brought by the same attorney for the two petitioners, should not have been granted. Orozco alleged false arrest and malicious prosecution and Jaime alleged an attack by corrections officers. In neither case was the petition supported by an affidavit from the petitioner. The records associated with Orozco's arrest and prosecution did not prove the respondent (NYC) had timely actual knowledge of the claim. Because Jaime did not file a grievance about the alleged attack by correction officers and did not provide an affidavit in support of the petition for leave to file late notice, there was no proof the City had actual timely knowledge of the claim:

Insofar as Orozco argued that the City would not be substantially prejudiced by the late filing because it acquired timely actual knowledge, Orozco's failure to establish actual knowledge is fatal. Orozco's further argument—that the City would not be substantially prejudiced because it will have to expend resources to defend against his 42 USC § 1983 claims—misapprehends the purpose served by the notice of claim requirement. … [T]he purpose is to afford the municipality the opportunity to investigate the claims and preserve evidence … , not simply to shield municipalities from litigation costs. Moreover, this argument understates the advantage of facing only a section 1983 claim that can be defended on qualified immunity grounds … , as opposed to facing that claim plus additional state law claims. * * *

The City conceded at oral argument that an incarcerated person might not file a grievance concerning a violent attack by a correction officer for fear of reprisal, a fear that may constitute a reasonable excuse for late service of a notice of claim. It would, however, be entirely speculative for us to consider that possibility here given the absence of any relevant evidence. Were Jaime in fact operating under such a fear, he could have submitted an affidavit attesting to the fact. That affidavit would have constituted evidence supporting an arguably reasonable excuse, which might provide at least some support for a court's discretionary determination to allow late service.

Neither the allegation that Jaime sustained injuries in the attacks for which he sought medical attention in the infirmary, nor the allegation that the DOC created or maintained records relating to those injuries, establishes that the City acquired actual knowledge of the essential facts constituting the claim … . Matter of Jaime v City of New York, 2024 NY Slip Op 01581, CtApp 3-21-24

Practice Point: In these two cases the evidence of an arrest and prosecution in one case and an attack by correction officers in the other was insufficient to demonstrate the respondent City had actual timely knowledge of the facts underlying the claims against the City. The petitioners should not have been granted leave to file late notices of claim.

MARCH 21, 2024

COVID TOLL, STATUTE OF LIMITATIONS, CHILD VICTIMS ACT.

THE COVID EXECUTIVE ORDERS TOLLING STATUTES OF LIMITATIONS EXTENDED THE DEADLINE FOR FILING ACTIONS UNDER THE CHILD VICTIMS ACT UNTIL NOVEMBER 12, 2021 (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the executive orders tolling statutes of limitations during COVID extended deadline for filing Child Victims Act suits for 90 days, from August 14, 2021, to November 12, 2021, rendering the instant lawsuit timely filed:

CPLR 214-g, enacted as part of the CVA, provides a revival window for "civil claims or causes of action alleging intentional or negligent acts or omissions that seek to recover for injuries suffered as a result of conduct which would constitute sex crimes, which conduct was committed against a child less than 18 years of age, for which the statute of limitations had already run" … . In 2019, the CVA became effective and originally permitted actions to be commenced between August 14, 2019, and August 14, 2020 … . On August 3, 2020, the CVA was amended so as to extend the revival window for one additional year, until August 14, 2021 … . After the date of this amendment, however, former Governor Andrew Cuomo, following prior executive orders issued amidst the COVID-19 pandemic, continued to issue executive orders that ultimately tolled statutes of limitations through November 3, 2020 … .

… [T]he executive orders issued subsequent to the CVA's amendment tolled the close of the CVA's revival window for 90 days, from August 14, 2021, until at least November 12, 2021 … . As the instant action was commenced on November 12, 2021, it was timely commenced … . Bethea v Children's Vil., 2024 NY Slip Op 01166,, Second Dept 3-6-24

Practice Point: The COVID executive orders tolling statutes of limitations extended the August 14, 2021, deadline for filing actions under the Child Victims Act until November 12, 2021.

MARCH 6, 2024

EDUCATION-SCHOOL LAW, NEGLIGENT SUPERVISION.

PLAINTIFF STUDENT WAS INJURED WHEN SHE COLLIDED WITH ANOTHER STUDENT DURING A SUPERVISED GAME; THE GAME WAS DEEMED AGE-APPROPRIATE AND THE SUPERVISION WAS DEEMED ADEQUATE; THE SCHOOL DISTRICT SHOULD HAVE BEEN AWARDED SUMMARY JUDGMENT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the defendant school district was entitled to summary judgment in this negligent supervision

case. Plaintiff student was injured when she collided with another student during a supervised game which required running to pick up an object and running back to the finish line. The game was deemed to be age-appropriate and the supervision was deemed adequate:

… [T]he defendant established its prima facie entitlement to judgment as a matter of law dismissing the complaint by demonstrating that it provided adequate supervision and instruction during the infant plaintiff's gym class … . The infant plaintiff and her classmates were instructed "that there was to be no . . . tackling involved" in the game … . Since the inadvertent collision occurred quickly and without warning, the defendant demonstrated that "more intense supervision would not have prevented the spontaneous and accidental collision of the two children" … . S.T. v Island Park Union Free Sch. Dist., 2024 NY Slip Op 01743, Second Dept 3-27-24

Practice Point: Where a game is age-appropriate, the supervision is adequate, and the student's injury was inadvertent and occurred suddenly without warning, the school will not be liable under a negligent supervision theory.

MARCH 27, 2024

EDUCATION-SCHOOL LAW, NEGLIGENT SUPERVISION.

THE DEFENDANT SCHOOL DID NOT ELIMINATE TRIABLE QUESTIONS OF FACT ABOUT WHETHER IT HAD CONSTRUCTIVE NOTICE OF THE TEACHER'S ABUSIVE PROPENSITIES; THE NEGLIGENT HIRING AND NEGLIGENT SUPERVISION CAUSES OF ACTION IN THIS CHILD VICTIMS ACT CASE SHOULD NOT HAVE BEEN DISMISSED (SECOND DEPT).

The Second Department, reversing Supreme Court in this Child Victims Act case, determined the negligent hiring and negligent supervision causes of action against defendant school stemming from a teacher's alleged abuse of plaintiff-student should not have been dismissed. There was a question of fact about whether the school district had constructive notice of the teacher's abusive propensities:

… [G]iven the frequency of the alleged abuse, which occurred over a three-year period, and always occurred inside the same classroom during the school day, the defendants did not eliminate triable issues of fact as to whether they should have known of the abuse … . Additionally, the defendants failed to eliminate triable issues of fact as to whether their supervision of the teacher or the plaintiff was not negligent, in light of, among other things, the teacher was on "probationary" status during the relevant period, the special education lessons during which the alleged abuse occurred were one-on-one and behind closed doors, the plaintiff testified at his deposition that the school principal "never came in" or "checked" on him during the lessons, and only a single observation report from Columbus Avenue Elementary School is available in the teacher's employment file during the relevant period. MCVAWCD-DOE v Columbus Ave. Elementary Sch., 2024 NY Slip Op 01703, Second Dept 3-27-24

Practice Point: Here the defendant school did not eliminate questions of fact about whether it had constructive notice of the teacher's abusive propensities in this Child Victims Act case. The alleged abuse took place often behind closed doors when the teacher, who was on probation, was alone with the plaintiff.

MARCH 27, 2024

EDUCATION-SCHOOL LAW, NEGLIGENT SUPERVISION, SEXUAL ABUSE, DISCOVERY.

THE DISCOVERY DEMANDS IN THIS NEGLIGENT SUPERVISION ACTION AGAINST DEFENDANT SCHOOL DISTRICT ALLEGING SEXUAL ABUSE BY A TEACHER WERE OVERLY BROAD AND UNDULY BURDENSOME AND SHOULD HAVE BEEN STRUCK IN THEIR ENTIRETY (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the discovery demands in this negligent supervision action against a school district, alleging the sexual abuse of plaintiff-student by a teacher, were overly broad and unduly burdensome. Therefore the demands should have been struck in their entirety with no attempt to prune them:

… [A] "' …party is not entitled to unlimited, uncontrolled, unfettered disclosure'" … . "Pursuant to CPLR 3103(a), the Supreme Court may issue a protective order striking a notice for discovery and inspection that is palpably improper" … . A notice for discovery and inspection is palpably improper if it is overbroad, burdensome, fails to specify with reasonable particularity many of the documents demanded, or seeks irrelevant or confidential information (see CPLR 3120[2] …). "Where the discovery demands are overbroad, the appropriate remedy is to vacate the entire demand rather than to prune it" … .

Here, many of the plaintiff's discovery demands were palpably improper in that they were overbroad and burdensome … . The plaintiff's discovery demands broadly sought, among other things, documents pertaining to any complaint of sexual abuse by any employee of the District from January 1, 1997, to the present and any suspected romantic or sexual relationship between any teacher and any student at the school from 1990 to the present. Thus, the Supreme Court should have denied the plaintiff's motion pursuant to CPLR 3124 to compel the District to comply with the plaintiff's first and second demands for discovery and granted the District's application pursuant to CPLR 3103(a) for a protective order striking those demands in their entirety instead of pruning them … . Ferrara v Longwood Cent. Sch. Dist., 2024 NY Slip Op 01293, Second Dept 3-13-24

Practice Point: In this negligent supervision action against a school district alleging sexual abuse by a teacher plaintiff's discovery demands included "documents pertaining to any complaint of sexual abuse by any employee of the District from January 1, 1997, to the present and any suspected romantic or sexual relationship between any teacher and any student at the school from 1990 to the present". The demand was overly broad and unduly burdensome and was struck in its entirety.

MARCH 13, 2024

EMPLOYMENT LAW, NEGLIGENT HIRING, NEGLIGENT SUPERVISION.

IT WAS ALLEGEDLY EVIDENT FROM THE EMPLOYEE'S JOB APPLICATION THAT HE HAD BEEN IN PRISON; THE ALLEGED FAILURE TO INVESTIGATE RAISED QUESTIONS OF FACT IN SUPPORT OF THE NEGLIGENT HIRING AND SUPERVISION CAUSE OF ACTION; THE CORRECTION LAW DOES NOT PROHIBIT CONSIDERATION OF PRIOR CONVICTIONS (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined the negligent hiring and supervision cause of action against defendant LLC stemming from an altercation between plaintiff and the LLC's employee (McIntosh) should not have been dismissed. It was allegedly evident from McIntosh's employment application that he had been in prison:

… [P]laintiff raised triable issues of fact as to whether the LLC "should have known of the employee's propensity for the conduct which caused the injury" … . It is well settled that "an employer has a duty to investigate a prospective employee when it knows of facts that would lead a reasonably prudent person to investigate that prospective employee" … . McIntosh's handwritten job application provided facts that should have led the LLC to investigate, as he indicated that he worked at the address of a state prison, he earned a "stipend" instead of the typical hourly wage, and one of his supervisors was a corrections officer, or "C.O." Although "the depth of inquiry prior to hiring, irrespective of convictions, may vary in reasonable proportion to the responsibilities of the proposed employment," the record shows that the LLC made no effort to investigate … . Its owner-witness admitted that no background check was performed. She did not know whether a restaurant manager called McIntosh's past employers, and she had no knowledge of his criminal background, as would have been revealed by a call to the past employer … . Contrary to the LLC's contention, the Correction Law does not prohibit consideration of a job applicant's prior convictions, but instead provides a balancing test to determine whether there was a "direct relationship between" a prior offense and the job or whether the employment "would involve an unreasonable risk . . . to the safety or welfare of . . . the general public" (Correction

Law §§ 752[1]- Darbeau v 136 W. 3rd St., LLC, 2024 NY Slip Op 01672, First Dept 3-26-24

Practice Point: Where an applicant's job application indicates the applicant had been incarcerated, an employer's failure to investigate may support a negligent hiring and supervision cause of action. The Correction Law does not prohibit an inquiry into prior convictions.

MARCH 26, 2024

GOLF BALL STRUCK PLAINTIFF, ASSUMPTION OF THE RISK.

PLAINTIFF, AN EXPERIENCED GOLFER WHO WAS PARTICIPATING IN A TOURNAMENT, ASSUMED THE RISK OF BEING STRUCK IN THE EYE BY A GOLF BALL WHILE RIDING IN A GOLF CART (THIRD DEPT).

The Third Department, reversing Supreme Court, over a two-justice dissent, determined plaintiff golfer assumed the risk of being struck by a golf ball during a golf tournament. Supreme Court and the dissenters concluded there was a question of fact whether the design of the defendant golf course unreasonably increased the risk:

Plaintiff was riding in a golf cart on the seventh hole fairway when he was hit by a ball struck by defendant Justin Hubbard, who had just teed off from the third hole. Both the third and seventh holes are over 400 yards in length. The fairways on each hole run parallel, in part, in the area in front of the third tee, and that part of the seventh fairway approaching the green, which from a vantage point on the fairway, is adjacent to and to the right of the third tee. * * *

… [I]t is well established that "being hit without warning by a shanked shot" is "a commonly appreciated risk" of participating in the sport … . " '[G]olfers are deemed to assume the risks of open topographical features of a golf course' "… , and "evidence establishing that the proximity of [a tee] to [a different] green and hole was open and obvious" will preclude liability against a golf course for injuries sustained as a result of such proximity … . Katleski v Cazenovia Golf Club, Inc., 2024 NY Slip Op 01366, Third Dept 3-14-24

Practice Point: The majority concluded plaintiff golfer assumed the risk of being struck by a golf ball. Supreme Court and the two dissenters argued the design of defendant golf course unreasonably increased the risk.

MARCH 14, 2024

LABOR LAW-CONSTRUCTION LAW, DEFECTIVE GRINDER.

ALTHOUGH THE PLAINTIFF WAS STANDING ON A LADDER WHEN THE DEFECTIVE GRINDER INJURED HIM, THE LADDER DID NOT FAIL AND THE LABOR LAW 240(1) ACTION WAS PROPERLY DISMISSED; HOWEVER THE DEFECTIVE GRINDER PRESENTED A SAFETY ISSUE COVERED BY LABOR LAW 241(6) AND THE OWNER AND GENERAL CONTRACTOR MAY BE LIABLE EVEN IF THEY DID NOT SUPERVISE THE WORKSITE (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined the Labor Law 240(1) cause of action was properly dismissed because the ladder did not malfunction, but the Labor Law 241(6) cause of action based upon the defective grinder which kicked back and injured plaintiff should not have been dismissed. The court noted defendants had notice of the defective grinder and the property owner and the general contractor may be liable even if they did not control the worksite:

Defendants established their entitlement to summary judgment on plaintiff's Labor Law § 240(1) cause of action by submitting evidence that plaintiff's injury was caused by the grinder and that he did not fall from the ladder. Because plaintiff's injury did not arise from any elevation-related risk presented by the ladder, Labor Law § 240(1) does not apply … .

However, Supreme Court should have denied defendants' motion to dismiss plaintiff's Labor Law § 241(6) claim insofar as it was predicated on a violation of Industrial Code (12 NYCRR) § 23-1.5(c)(3). Despite defendants' assertion otherwise, the section is a sufficiently specific safety standard to support a Labor Law § 241(6) claim, and the deposition testimony established that plaintiff's

grinder had no guard, thus violating the mandate of the regulation … . Plaintiff also proffered evidence that defendants had notice of a defect in the grinder, as he testified that he complained to his supervisor that the grinder shook and lacked a guard and the owner and general contractor bear the ultimate responsibility for safety practices at building construction sites even where they do not control or supervise the worksite … . Desprez v United Prime Broadway, LLC, 2024 NY Slip Op 01607, First Dept 3-19-24

Practice Point: Although plaintiff was standing on a ladder when he was injured by a defective grinder, because the ladder did not fail the incident was not elevation-related within the meaning of Labor Law 240(1).

Practice Point: Because the defective grinder raised a safety issue about which the defendants had notice, the owner and general contractor may be liable pursuant to Labor Law 241(6) even if they did not supervise the worksite.

MARCH 21, 2024

LABOR LAW-CONSTRUCTION LAW, FALL FROM A LIFT.

IT WAS FORESEEABLE THAT DIESEL FUMES FROM A BOOM LIFT USED BY PLAINTIFF FOR INTERIOR PAINTING WOULD ACCUMULATE AND CAUSE DIZZINESS RESULTING IN PLAINTIFF'S FALL FROM THE LIFT; PLAINTIFF'S LABOR LAW 240(1) CAUSE OF ACTION SHOULD NOT HAVE BEEN DISMISSED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined plaintiff's Labor Law 240(1) cause of action should not have been dismissed. Plaintiff was spray painting the interior of a factory using a boom lift when he became dizzy and fell from the lift. Plaintiff diesel fumes from the lift accumulated above him, causing the dizziness:

… [I]t is undisputed that plaintiff fell from the lift while it was raised six to eight feet in the air. In support of his motion, plaintiff submitted evidence establishing that his injuries were causally related to the fall from the lift and that plaintiff was using a boom lift that discharged fumes into the factory. Plaintiff also submitted the

affidavit of an expert who opined that defendants violated Labor Law § 240 (1) by failing to ensure that the boom lift was " 'so constructed, placed and operated as to give proper protection' " to plaintiff and by allowing plaintiff to place the boom lift in a position where diesel fumes were likely to accumulate above him and cause dizziness. We conclude that plaintiff thus met his prima facie burden on his motion by establishing that his fall was a "normal and foreseeable" consequence of the placement of the lift, which exhausted noxious fumes too close to plaintiff … .

In response, defendants failed to raise a triable issue of fact whether the hazard of fumes is "of such an extraordinary nature or so attenuated from the statutory violation as to constitute a superseding cause sufficient to relieve [them] of liability" … . Defendants also failed to raise an issue of fact whether plaintiff deliberately unclipped his safety harness, and we note that the issue presents, at best, a question of comparative negligence, which is not a defense to liability under Labor Law § 240 (1) … . Wolfanger v Once Again Nut Butter Collective Inc., 2024 NY Slip Op 01452, Fourh Dept 3-15-24

Practice Point: Plaintiff was using a boom lift for interior painting and alleged that diesel fumes from the lift made him dizzy, causing him to fall. That scenario was not so attenuated from the statutory violation as to constitute a superseding cause of plaintiff's injury. Plaintiff's Labor Law 240(1) cause of action should not have been dismissed.

MARCH 15, 2024

LABOR LAW-CONSTRUCTION LAW, FALL THROUGH HOLE IN FLOOR.

PLAINTIFF FELL THROUGH AN UNPROTECTED HOLE IN THE ATTIC FLOOR AND WAS ENTITLED TO SUMMARY JUDGMENT ON HIS LABOR LAW 240(1) AND 241(6) CAUSES OF ACTION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff was entitled to summary judgment on the Labor Law 240(1) and 241(6) causes of action. Plaintiff fell through an uncovered hole in the attic floor:

The plaintiffs' evidence established that the injured plaintiff was exposed to an elevation risk within the ambit of Labor Law § 240(1) by virtue of the uncovered, unguarded opening in the attic floor … , that he was not provided with any safety devices to protect him from that hazard, and that the failure to provide him proper protection from the uncovered, unguarded opening was a proximate cause of his injuries … . * * *

… [T]he defendants violated Labor Law § 241(6) by failing to provide a substantial cover or safety railing for the opening in the floor in accordance with 12 NYCRR 23-1.7(b)(1)(i) and that this violation was a proximate cause of the accident … . Fuentes v 257 Toppings Path, LLC, 2024 NY Slip Op 01535, Second Dept 3-20-24

Practice Point: Plaintiff, who fell through an unprotected hole in the floor,, was entitled to summary judgment on the Labor Law 240(1) and 241(6) causes of action.

MARCH 20, 2024

LABOR LAW-CONSTRUCTION LAW, FALLING OBJECTS.

A STACK OF DRYWALL LEANING AGAINST A WALL AND PARTIALLY BLOCKING A DOORWAY FELL OVER ON PLAINTIFF'S ANKLE AS PLAINTIFF ATTEMPTED TO MOVE IT; THE LABOR LAW 240(1) AND 241(6) CAUSES OF ACTION SHOULD NOT HAVE BEEN DISMISSED (FOURTH DEPT).

The Fourth Department, reversing (modifying(Supreme Court, determined the Labor Law 240(1) and 241(6) causes of action should not have been dismissed. A stack of drywall leaning against a wall and partially blocking a doorway fell over onto plaintiff's ankle when plaintiff and another attempted to move it:

Although the drywall that fell on plaintiff was located on the floor and was not being hoisted or secured, issues of fact exist whether section 240 (1) applies to this case … .

… [The] Labor Law § 241 (6) cause of action insofar … is premised on an alleged violation of 12 NYCRR 23-2.1 (a) (1) … .. Issues of fact exist whether the drywall was stored safely at the construction site and whether the drywall was a material pile that blocked a passageway … . Jesmain v Time Cap Dev. Corp., 2024 NY Slip Op 01444, Fourth Dept 3-15-24

Practice Point: A stack of drywall which was leaning against the wall and partially blocked a doorway fell over on plaintiff's ankle when he attempted to move it. That scenario presented issues of fact precluding summary judgment in favor of defendants on the Labor Law 240(1) and 241(6) causes of action.

MARCH 15, 2024

LABOR LAW-CONSTRUCTION LAW, FALLING OBJECTS.

THE EVIDENCE WAS SUFFICIENT TO WARRANT SUMMARY JUDGMENT IN FAVOR OF PLAINTIFF IN THIS LABOR LAW 240(1) FALLING-OBJECT CASE; BRICK WORK WAS BEING DONE ON THE BUILDING ABOVE WHERE PLAINTIFF WAS STANDING AND PLAINTIFF WAS STRUCK BY A FALLING BRICK; THERE WAS NO SAFETY NETTING TO PROTECT AGAINST FALLING OBJECTS (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, in a full-fledged opinion by Justice Manzanet-Daniels, determined plaintiff was entitled to summary judgment on his Labor Law 240(1) cause of action in this falling object case. Plaintiff was unloading a truck in a designated "delivery zone" near the building where bricks were being drilled out to accommodate the installation of windows. Plaintiff was struck on the head by a brick which damaged his hard hat and injured his head:

In the context of falling objects, the risk to be guarded against is the unchecked or insufficiently checked descent of the object" … . It is settled law that a plaintiff establishes a prima facie entitlement to liability on a Labor Law § 240(1) "falling object" claim where he shows that he was struck by a falling object, that such object required securing for the purposes of the undertaking, and that the lack of

adequate overhead protection failed to shield against the falling of such object and therefore proximately caused plaintiff's injuries … . * * *

… [A] "… plaintiff's prima facie case in a Labor Law § 240(1) action involving falling objects is not dependent on whether the plaintiff observed the object that hit him. . A plaintiff is not required to show the exact circumstances under which the object fell, where a lack of a protective device proximately caused the injuries. Further, [the general contractor's project manager] identified a photograph of the brick that struck plaintiff, stating that the brick in the photo was consistent with the lone type of brick that was used on the faÇade of the building at the time of the incident … . Torres-Quito v 1711 LLC, 2024 NY Slip Op 01279, Frist Dept 3-12-24

Practice Point: The absence of safety netting to protect against falling objects was deemed the proximate cause of plaintiff's injury from a falling brick in this Labor Law 240(1) case.

MARCH 12, 2024

LABOR LAW-CONSTRUCTION LAW, INDUSTRIAL CODE, EXPLOSION.

PORTIONS OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT PROPERLY DENIED AS UNTIMELY; THE PORTION OF THE UNTIMELY MOTION WHICH HAD BEEN TIMELY RAISED BY ANOTHER DEFENDANT WAS PROPERLY CONSIDERED; THE LABOR LAW 241(6) CAUSE OF ACTION PROPERLY RELIED ON INDUSTRIAL CODE PROVISIONS REQUIRING THAT ELECTRICAL POWER BE SHUT DOWN TO PROTECT ELECTRICAL WORKERS (SECOND DEPT).

The Second Department, reversing Supreme Court in this Labor Law 241(6, 200 and common law negligence action, determined; (1) portions of a defendant's summary judgment motion brought more than a month after the ordered deadline where properly dismissed as untimely; (2) the aspect of the untimely summary judgment motion which had been timely raised in another defendant's summary judgment motion was properly considered; (3) the industrial code requires shutting

down the electricity when worker's are doing electrical work, therefore plaintiff's Labor Law 241(6) cause of action should not have been dismissed. Plaintiff was in an aerial bucket working on electrical lines when injured in an explosion:

Absent a "satisfactory explanation for the untimeliness," constituting good cause for the delay, an untimely summary judgment motion must be denied without consideration of the merits … . However, "[a]n untimely motion or cross motion for summary judgment may be considered by the court where a timely motion was made on nearly identical grounds" … . * * *

… [T]he defendants … failed to establish their prima facie entitlement to judgment as a matter of law dismissing the cause of action alleging a violation of Labor Law § 241(6), which was predicated on 12 NYCRR 23-1.13(b)(3) and (4). 12 NYCRR 23-1.13(b)(3) provides, among other things, that where the performance of the work may bring any person into physical or electrical contact with an electric power circuit, the employer "shall advise his [or her] employees of the locations of such lines, the hazards involved and the protective measures to be taken." 12 NYCRR 23-1.13(b)(4) requires, in pertinent part, that employees who may come into contact with an electric power circuit be protected against electric shock "by de-energizing the circuit and grounding it or by guarding such circuit by effective insulation or other means" … . These regulations, which refer to the duty of employers, also impose a duty upon owners … . Wittenberg v Long Is. Power Auth., 2024 NY Slip Op 01329

Practice Point: A summary judgment motion brought a month after the ordered deadline may be dismissed as untimely.

Practice Point: A portion of an untimely summary judgment motion which was timely raised by another defendant may be considered.

Practice Point: The industrial code provisions requiring that electrical power be shut down to protect electrical workers supported plaintiff's Labor Law 241(6) cause of action.

MARCH 13, 2024

LANDLORD-TENANT, NEGLIGENCE, HOME INVASION.

THE FACT THAT PLAINTIFF WAS SPECIFICALLY TARGETED FOR A HOME INVASION DID NOT PRECLUDE A FINDING THAT INADEQUATE BUILDING SECURITY WAS A PROXIMATE CAUSE (FIRST DEPT).

The First Department, reversing Supreme Court, determined defendant property owners should not have been awarded summary judgment in this home invasion case. The fact that plaintiff was specifically targeted did not preclude a finding that building security was inadequate:

Plaintiff was the victim of a home invasion of his apartment in a building owned and operated by defendants. The incident began when someone knocked on plaintiff's apartment door and asked by name for his niece, who also lived in the apartment. When plaintiff looked through the peephole, he thought he saw a young woman, but the peephole was blurry, as it had been since plaintiff had moved in three or four years earlier. Plaintiff also testified that the chain guard on the door did not function properly. When plaintiff opened the door slightly, the young woman and a man he had not seen through the peephole pushed their way into the apartment and pistol whipped him. After demanding $5,000 that had purportedly been sent to plaintiff's niece, the two assailants assaulted plaintiff for an extended period and looted the apartment before leaving.

Defendants failed to establish their entitlement to summary judgment dismissing the complaint, as evidence that an attack was targeted toward a particular person does not sever the proximate cause link as a matter of law in cases alleging negligent security … . In light of the record evidence that the building's locks were malfunctioning, and that plaintiff's apartment peephole and chain lock were defective, proximate cause is for the factfinder to decide … . Cabrera-Perez v Promesa Hous. Dev. Fund Corp., 2024 NY Slip Op 01338, First Dept 3-14-24

Practice Point: The fact that plaintiff was deliberately and specifically targeted for a home invasion did not preclude a finding that malfunctioning locks and a defective peephole constituted a proximate cause of the invasion and consequent injury.

MARCH 14, 2024

LANDLORD-TENANT, NEGLIGENCE, SLIP AND FALL.

IN THIS SLIP AND FALL CASE, STEPS WHICH DO NOT HAVE UNIFORM RISER HEIGHTS COULD CONSTITUTE A DANGEROUS CONDITION UNDER COMMON LAW NEGLIGENCE PRINCIPLES, WITHOUT REFERENCE TO WHETHER A BUILDING CODE WAS VIOLATED; BOTH THE PROPERTY OWNER AND THE SUBLESSEE COULD BE LIABLE (FIRST DEPT).

The Second Department, reversing Supreme Court in this slip and fall case, determined the steps which did not have uniform riser heights could constitute a dangerous condition for which the property owner and the sublessee could be liable:

Here, the record demonstrates that the riser heights of the steps were not uniform and that the top riser was approximately three inches taller than the bottom riser. Viewing the evidence in the light most favorable to the plaintiff as the nonmoving party … , we find that both the defendant owner and the defendant car service [the sublessee] failed to demonstrate, prima facie, that a dangerous condition did not exist on the steps or that the disparity in riser heights was not a proximate cause of the accident … . Amparo v Christopher One Corp., 2024 NY Slip Op 01286, 3-13-24

Practice Point: Steps which do not have uniform riser heights can constitute a dangerous condition which is the proximate cause of a slip and fall under common law negligence principles, irrespective of whether the non-uniform riser heights violated a building code.

MARCH 13, 2024

NUISANCE, NOXIOUS ORDERS.

PLAINTIFF REAL ESTATE DEVELOPER'S PRIVATE NUISANCE, PUBLIC NUISANCE AND NEGLIGENCE CAUSES OF ACTION BASED UPON THE ALLEGED NOXIOUS ODORS FROM DEFENDANT'S LANDFILL SHOULD HAVE BEEN DISMISSED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the plaintiff real estate developer causes of action against defendant landfill operation for private nuisance, public nuisance and negligence, based upon noxious odors from the landfill, should have been dismissed: Plaintiff alleged the odors made it difficult to sell homes and reduced the value of properties in the vicinity of the landfill:

… [A] private nuisance is one that "threatens one person or . . . relatively few" … . … [P]laintiff's allegations indicate that the noxious odors affected a large number of community residents and, therefore, we conclude that plaintiff's cause of action for private nuisance must be dismissed … . …

… [A] public nuisance consists of "a substantial interference with the exercise of a common right of the public, thereby offending public morals, interfering with the use by the public of a public place or endangering or injuring the property, health, safety or comfort of a considerable number of persons" … . "A public nuisance is actionable by a private person only if it is shown that the person suffered special injury beyond that suffered by the community at large" … .

Here, plaintiff alleged that it suffered a special injury because it "suffered lost profit[s] and other substantial economic loss," including "irreparable damage to its reputation in the community as a residential home builder." … [P]laintiff did not allege facts sufficient to support a public nuisance cause of action. It failed to allege that it sustained any harm or damages that were "different in kind, not merely in degree," from the community at large … .

* * * [P]laintiff "ha[s] not alleged any tangible property damage or physical injury resulting from exposure to the odors" and, "likewise, the economic loss resulting from the diminution of plaintiff['s] property values is not, standing alone, sufficient to sustain a negligence claim under New York law" … . William Metrose

Ltd. Builder/Developer v Waste Mgt. of N.Y., LLC, 2024 NY Slip Op 01458, Fourth Dept 3-15-24

Practice Point: Here noxious odors from a landfill did not support causes of action for private nuisance, public nuisance or negligence, criteria explained.

MARCH 15, 2024

NURSING HOMES, WRONGFUL DEATH, ARBITRATION, CONTRACT LAW.

THE PLAINTIFF IN THIS WRONGFUL DEATH ACTION AGAINST DEFENDANT NURSING HOME IS THE DECEDENT'S DAUGHTER AND HAD SIGNED THE ADMISSION AGREEMENT AS THE "RESPONSIBLE PARTY;" THE LANGUAGE OF THE AGREEMENT DID NOT CREATE AN AGENCY RELATIONSHIP BETWEEN PLAINTIFF AND HER MOTHER; THE ARBITRATION CLAUSE IN THE ADMISSION AGREEMENT COULD NOT, THEREFORE, BE ENFORCED BY THE NURSING HOME (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the defendant nursing home's (the Facility's) motion to compel arbitration of the wrongful death action should not have been granted. The admission agreement had been signed by plaintiff, not the decedent (the resident of the nursing home). The admission agreement referred to plaintiff as the "responsible party" who was "primarily responsible to assist the [decedent] to meet … her obligations under [the agreement]." But there was no indication the decedent agreed to have plaintiff act on her behalf:

"Essential to the creation of apparent authority are words or conduct of the principal, communicated to a third party, that give rise to the appearance and belief that the agent possesses authority to enter into a transaction. The agent cannot by [her or] his own acts imbue [herself or] himself with apparent authority. Rather, the existence of apparent authority depends upon a factual showing that the third party relied upon the misrepresentation of the agent because of some misleading conduct on the part of the principal — not the agent. Moreover, a third party with whom the

agent deals may rely on an appearance of authority only to the extent that such reliance is reasonable" … .

… [T]he Facility failed to demonstrate that it reasonably relied upon any word or action of the decedent to conclude that the plaintiff had the apparent authority to enter into the agreement or to bind the decedent to arbitration on the decedent's behalf … . To the extent that the Facility contends that it reasonably relied upon the plaintiff's own acts, this contention is also without merit, as an agent cannot "by [her] own acts imbue [her]self with apparent authority" … . … [T]he plaintiff's status as the decedent's daughter did not give rise to an agency relationship … . Lisi v New York Ctr. for Rehabilitation & Nursing, 2024 NY Slip Op 01171, Second Dept 3-6-24

Practice Point: Here decedent's daughter signed the nursing-home admission agreement as the "responsible party." Because there was no indication decedent agreed to have her daughter act on her behalf, the nursing home could not claim the daughter had the "apparent authority" to bind decedent to the agreement. Therefore the nursing home could not enforce the arbitration clause in the wrongful death action.

MARCH 6, 2024

PRIVILEGE, MEDICAL RECORDS, DISCOVERY, NEGLIGENT FAILURE TO RETAIN OR REPORT VIOLENT PATIENT.

SM STABBED INFANT PLAINTIFF SHORTLY AFTER BEING TREATED BY DEFENDANT HOSPITAL WHICH ALLEGEDLY NEGLIGENTLY FAILED TO DETAIN OR REPORT SM; ALTHOUGH SM DID NOT WAIVE THE PATIENT-PHYSICIAN PRIVILEGE, PLAINTIFF WAS ENTITLED TO AN IN CAMERA REVIEW OF SM'S MEDICAL RECORDS AND DISCLOSURE OF ANY RELEVANT NONMEDICAL INFORMATION (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined the demand for disclosure of SM's medical records was properly denied because SM had not waived the physician-patient privilege, but the request for an in camera

review of the records for nonmedical information should have been granted. SM has been treated by defendant New York City Health + Hospital/Lincoln Medical Center (NYCHH) shortly before SM stabbed infant plaintiff. Plaintiff alleged NYCHH should have reported SM and detained her or taken some other measures to protect infant plaintiff:

Infant plaintiff and her father allege that NYCHH's employees negligently treated SM when she presented to the hospital on April 26 and April 27, 2016, shortly before she stabbed the infant plaintiff and brother, resulting in the brother's death. They allege that SM had a history of mental illness for which she had been treated by NYCHH on "scores of previous occasions," and that NYCHH failed to detain SM, call a report to the Statewide Central Register of Child Abuse and Maltreatment, or "take any other action to protect" the infant plaintiff. SM, who is currently incarcerated, has not waived the physician-patient privilege and is believed to be unable or unwilling to do so.

Supreme Court properly determined that Mental Hygiene Law § 33.13(c)(1) does not apply to allow disclosure of SM's hospital records in the interests of justice, absent SM's consent or express or implied waiver of the physician-patient privilege provided by CPLR 4504, 4507 … . … Supreme Court should have granted plaintiffs' alternative request for in camera review to determine whether the records include information of a nonmedical nature, such as observations of SM's conduct, language, and appearance and factual matters, which is subject to disclosure … . S.M. v City of New York, 2024 NY Slip Op 01689, First Dept 3-26-24

Practice Point: Although medical records are protected from disclosure by the patient-physician privilege, relevant nonmedical, factual information in the records may be disclosed pursuant to an in camera review.

MARCH 26, 2024

PRODUCTS LIABILITY, FORKLIFT INJURY AT PORT AUTHORITY AIRPORT, IMMUNITY.

PLAINTIFF WAS INJURED AT JFK AIRPORT, OWNED BY THE PORT AUTHORITY OF NY & NJ, BY A FORKLIFT WHICH WAS BACKING UP; THE FACT THAT REAR-VIEW MIRRORS WERE OPTIONAL WAS NOT A DESIGN DEFECT, CRITERIA EXPLAINED; THE PORT AUTHORITY WAS IMMUNE FROM A NEGLIGENCE ACTION ALLEGING FAILURE TO INSPECT THE FORKLIFT, CRITERIA EXLAINED (SECOND DEPT).

The Second Department, reversing Supreme Court in this forklift-accident case, determined the fact that the rear-view mirrors for the forklift were optional was not a design defect, and the landlord, the Port Authority, was immune from the negligence action alleging a failure to properly inspect the forklift:

… Unicarriers [defendant forklift manufacturer] established … the plaintiff's employer was thoroughly knowledgeable about forklifts and knew that mirrors were available, since it maintained more than 100 forklifts in operation in New York, and the brochure for the forklift listed rearview mirrors as an optional feature. Unicarriers also established that the forklift was not unreasonably dangerous without backup mirrors and that the plaintiff's employer was in the best position to balance the benefits and the risks of not having mirrors on the forklift … . * * *

… [T]he Port Authority established, prima facie, that its alleged failure to properly inspect the forklift and its issuance of a Port Authority license plate were governmental functions. Contrary to the plaintiff's contention, the forklift inspections performed by the Port Authority and the issuance of the license plate were an exercise of the Port Authority's police power for the protection and safety of the public rather than any authority conferred by a landlord-tenant relationship … . The actions of the Port Authority did not create a special duty toward the plaintiff because the inspections were designed to protect public safety rather than the safety of particular individuals … . Strassburger v Unicarriers Ams. Corps., 2024 NY Slip Op 01742, Second Dept 3-27-24

Practice Point: Here in this forklift accident case, the fact that rear-view mirrors were optional was not a designe defect. The relevant criteria are explained.

Practice Point: Here the Port Authority of NY & NJ, the landlord for JFK Airport, was exercising a governmental function when inspecting the forklift and therefore was immune from suit, criteria explained.

MARCH 27, 2024

SLIP AND FALL, MEDICAL EQUIPMENT CORDS AND TUBES ON FLOOR.

PLAINTIFF FELL WHEN HER FOOT BECAME ENTANGLED IN CORDS OR TUBES CONNECTED TO MEDICAL EQUIPMENT IN A HOSPITAL ROOM; DEFENDANT DID NOT DEMONSTRATE THE CORDS OR TUBES WERE OPEN AND OBVIOUS AND NOT INHERENTLY DANGEROUS; DEFENDANT SHOULD NOT HAVE BEEN AWARDED SUMMARY JUDGMENT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the tubes or cords attached to medical equipment in a neurologic intensive care unit which caused plaintiff's slip and fall were not demonstrated to be "open and obvious and not inherently dangerous:"

"While a possessor of real property has a duty to maintain that property in a reasonably safe condition, there is no duty to protect or warn against an open and obvious condition that, as a matter of law, is not inherently dangerous" … . "A condition is open and obvious if it is readily observable by those employing the reasonable use of their senses, given the conditions at the time of the accident" … . Moreover, "[a] condition that is ordinarily apparent to a person making reasonable use of his or her senses may be rendered a trap for the unwary where the condition is obscured or the plaintiff is distracted" … . The question of whether a condition is open and obvious is usually a question of fact properly resolved by a jury … .

Here, the defendant failed to establish, prima facie, that the alleged condition of the tubes or cords was open and obvious and not inherently dangerous under the

circumstances surrounding the accident … . Butler v NYU Winthrop Hosp., 2024 NY Slip Op 01289, Second Dept 3-13-24\

Practice Point: Whether a condition is open and obvious and not inherently dangerous is usually a question for the jury. Here, in this slip and fall case, there was a question of fact whether cords or tubes connected to medical equipment constituted an open and obvious condition which was not inherently dangerous.

MARCH 13, 2024

SLIP AND FALL, MUNICIPAL LAW, BUS STOP.

THE PROOF THAT PLAINTIFF SLIPPED AND FELL AT A BUS STOP, WHERE THE CITY IS RESPONSIBLE FOR KEEPING THE AREA SAFE, AS OPPOSED TO THE SIDEWALK ABUTTING DEFENDANT'S PROPERTY, WHERE DEFENDANT IS RESPONSIBLE, WAS NOT SUFFICIENT TO WARRANT SUMMARY JUDGMENT IN FAVOR OF DEFENDANT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant's motion for summary judgment in this sidewalk slip and fall case should not have been granted. Although the NYC Administrative Code makes abutting property owner's like the defendant responsible for keeping the sidewalks safe, the Code also indicates the City is responsible for keeping bus stops safe. The defendant argued plaintiff slipped and fell at a bus stop, but the Second Department did not find the evidence for that claim sufficient to warrant summary judgment:

Under Administrative Code § 7-210, an abutting property owner has a duty to maintain the public sidewalk, but the City continues to be responsible for maintaining any part of the sidewalk that is within a designated bus stop location … .

Here, the defendant failed to demonstrate, prima facie, that the area of the sidewalk where the accident occurred was within a designated bus stop location maintained by the City … . Moonilal v Roman Catholic Church of St. Mary Gate of Heaven, 2024 NY Slip Op 01172, Second Dept 3-6-24

Practice Point: Pursuant to the NYC Administrative Code, abutting property owners are responsible for keeping the sidewalk safe, but the City is responsible for keeping bus stops safe.

MARCH 6, 2024

SLIP AND FALL, SHINY FLOOR.

THE INABILITY TO IDENTIFY THE SLIPPERY SUBSTANCE WHICH CAUSED PLAINTIFF'S SLIP AND FALL WAS FATAL TO THE LAWSUIT; ALLEGING THE FLOOR WAS SHINY OR SLIPPERY IS NOT ENOUGH, CRITERIA EXPLAINED IN SOME DEPTH (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the plaintiff's inability to identify the cause of her slip and fall was fatal to the lawsuit. Evidence that the floor was shiny or slippery was not enough to survive a summary judgment motion:

The plaintiff expressly testified that she did not know what caused her to fall … , nor did she recall observing garbage or liquid on the floor, either before or after her fall … .

… The plaintiff's affidavit and additional portions of her deposition testimony submitted in opposition to the [summary judgment] motion merely confirmed that she fell as a result of a slippery substance that she could not identify. To the extent that the plaintiff's two witnesses identified the cause of the fall in their affidavits without engaging in speculation … , this evidence was insufficient to raise a triable issue of fact. Although each witness averred that the plaintiff's fall may have been caused by the "shiny" and "slippery" nature of the floor, "the mere fact that a smooth floor may be shiny or slippery," without more, "does not support a cause of action to recover damages for negligence, nor does it give rise to an inference of negligence" … . Alvarez v Staten Is. R.T. Operating Auth., 2024 NY Slip Op 01695, Second Dept 3-27-24

Practice Point: Here plaintiff's inability to identify the slippery substance which caused the fall required summary judgment in defendant's favor. The fact that a

floor is shiny or slippery is not enough. The relevant proof requirements are laid out in detail.

MARCH 27, 2024

SLIP AND FALL, STAIRWAY.

A DEFECT IN THE TOP STEP OF A STAIRWAY WAS ALLEGED TO HAVE CAUSED THE TRIP AND FALL; THERE WERE QUESTIONS OF FACT WHETHER THE DEFECT WAS OPEN AND OBVIOUS AND WHETHER THE DEFECT WAS A DANGEROUS CONDITION; THE COURT NOTED THAT AN OPEN AND OBVIOUS CONDITION MAY STILL BE DANGEROUS AND THE QUESTION IS USUALLY FOR A JURY TO DECIDE (SECOND DEPT).

The Second Department,, reversing Supreme Court, determined defendant's motion for summary judgment in this stairway trip and fall case should not have been granted. The court noted that a condition which is open and obvious may still be dangerous. Here it was alleged a defect on the edge of the top step caused the fall:

While there is "no duty to protect or warn against conditions that are open and obvious and not inherently dangerous" … , when a dangerous condition exists on the premises, proof that the dangerous condition is open and obvious "does not preclude a finding of liability against an owner for failure to maintain property in a safe condition" … . "The determination of whether an asserted hazard is open and obvious cannot be divorced from the surrounding circumstances, and whether a condition is not inherently dangerous, or constitutes a reasonably safe environment, depends on the totality of the specific facts of each case" … . "The issue of whether a condition is open and obvious and not inherently dangerous is case-specific, and usually a question of fact for a jury" … .

Here, the defendants' submissions, including photographs of the alleged defect, failed to eliminate all triable issues of fact as to whether the allegedly defective condition was open and obvious … . While the plaintiff testified at her deposition

that she had previously used the stairway and observed the allegedly defective condition, she also testified that she did not inspect the condition each time that she had used the stairway and that she had not noticed that the condition had worsened since she last observed it. Johnson v 1451 Assoc., L.P., 2024 NY Slip Op 01537, Second Dept 3-20-24

Practice Point: An open and obvious condition can still be a dangerous condition. Whether a condition is open and obvious and whether it is inherently dangerous are usually fact-specific questions for a jury.

MARCH 20, 2024

SLIP AND FALL, STAIRWAY.

EVEN IF PLAINTIFF'S STAIRWAY FALL RESULTED FROM A MISSTEP, EVIDENCE THAT PLAINTIFF WAS "LOOKING FOR A HANDRAIL" RAISED A QUESTION OF FACT WHETHER THE ABSENCE OF A HANDRAIL WAS A PROXIMATE CAUSE OF THE FALL (SECOND DEPT).

The Second Department, reversing Supreme Court in this stairway slip and fall case, determined that plaintiff's testimony that he was "looking for a handrail" at the time he fell was sufficient to raise a question of fact whether the absence of a handrail was a proximate cause of the fall. Even if a fall is the result of a misstep, the absence of a handrail could be a proximate cause of the fall:

… [E]ven if a plaintiff's fall is precipitated by a misstep, where the plaintiff testifies that he or she reached out to try to stop his or her fall, the absence of a handrail, if required by law, may raise an issue of fact as to whether the absence of the handrail was a proximate cause of his or her injury" … . In contrast, the absence of a handrail will not create an issue of fact where the plaintiff does not offer testimony demonstrating "that she [or he] reached out for a handrail either before or during her [or his] fall" or otherwise showing that "the lack of handrails contributed to [the] accident" … .

… Although he was not sure what caused him to lose his balance, the injured plaintiff testified that he was "looking for a handrail" before descending the final

set of steps but observed that no handrails were available. "Even if the [injured] plaintiff's fall was precipitated by a misstep," his testimony indicating that he would have been using a handrail at the time of his accident had one been available was sufficient to create "an issue of fact as to whether the absence of [an accessible] handrail was a proximate cause of h[is] injur[ies]" … . Curto v Kahn Prop. Owner, LLC, 2024 NY Slip Op 01290, Second Dept 3-13-24

Practice Point: In a stairway-fall case, if the plaintiff indicates they reached for a handrail at the time of the fall, that raises a question of fact whether the absence of a handrail was a proximate cause of the fall, even if the fall was due to a misstep.

MARCH 13, 2024

TOXIC TORTS, INSURANCE, ASBESTOS.

QUESTIONS OF FACT ABOUT WHETHER THE INSURER WAS TIMELY NOTIFIED OF THE ASBESTOS-EXPOSURE CLAIM AND WHEN THE INJURY-IN-FACT OCCURRED PRECLUDED SUMMARY JUDGMENT (FOURTH DEPT).

The Fourth Department, reversing (modifying) Supreme Court, determined there are questions of fact whether the defendant insurer was timely notified of the claim in this asbestos-exposure case, and there are questions of fact, raised by conflicting expert evidence, about when the injury-in-fact occurred:

Defendant contends that the Meissners' [plaintiffs'] delay of 68 days—from when they were first informed that Ridge Construction [defendant] had excess insurance policies issued by defendant to the date that the Meissners' counsel wrote to provide defendant notice of the claim—was unreasonable as a matter of law. In response, plaintiff asserts that the delay was reasonable because the Meissners were not aware for the first 63 of those days that Ridge Construction had failed to provide defendant with notice. "The reasonableness of the delay in giving notice is ordinarily a question for the fact-finder" … .

* * * The parties … "dispute when an asbestos-related injury actually begins: plaintiff[ ] assert[s] that injury-in-fact occurs upon first exposure to asbestos, while

defendant denies that assertion and instead maintains that injury-in-fact occurs only when a threshold level of asbestos fiber or particle burden is reached that overtakes the body's defense mechanisms" … . Inasmuch as the parties here submitted conflicting expert opinions as to when the injury-in-fact occurs in an asbestos-related injury, summary judgment on that basis was not proper … . Meissner v Ridge Constr. Corp., 2024 NY Slip Op 01445, Fourth Dept 3-15-24

Practice Point: Whether the insurer was timely notified of the asbestos-exposure claim is a question of fact which should not have been determined as a matter of law at the summary judgment stage.

Practice Point: Here conflicting expert evidence was presented about when the injury-in-fact occurs in an asbestos-exposure case. The issue should not have been determined as a matter of law at the summary judgment stage.

MARCH 15, 2024

TRAFFIC ACCIDENTS, PEDESTRIANS, CONSTRUCTION SITES.

THERE IS A QUESTION OF FACT WHETHER DEFENDANTS LAUNCHED AN INSTRUMENT OF HARM BY ERECTING AN OPAQUE FENCE AROUND A CONSTRUCTION SITE WHICH BLOCKED DRIVERS' AND PEDESTRIANS' LINES OF SIGHT IN AN INTERSECTION; PLAINTIFF PEDESTRIAN WAS STRUCK BY A CAR WHEN HE STEPPED BEYOND THE FENCE INTO A LANE OF TRAFFIC (FIRST DEPT).

The First Department, reversing Supreme Court, determined there was a question of fact whether defendant general contractor and defendant engineer launched an instrument of harm by erecting an opaque fence around a construction site which extended into a road parallel to the crosswalk. Plaintiff, a pedestrian, assumed the fence had blocked off the road to traffic, but there was one lane open. Plaintiff was struck by a car when he walked past the end of the fence into the lane:

The fabric-covered fencing obstructed the line-of-sight of pedestrians and motorists who were in the vicinity of the crosswalk at 29th Street and 9th Avenue in Manhattan, as the fence enclosure extended halfway into 29th Street, paralleling

the crosswalk. Plaintiff, believing 29th Street to be fenced-off to traffic, crossed more than halfway through the crosswalk, against a "Don't Walk" signal, at which time he was hit by a vehicle that passed through a narrow lane on the other side of the fence enclosure from where plaintiff had approached. There was no construction activity taking place on that Saturday, and crossing guards and traffic agents who were ordinarily deployed during actual construction hours were not provided on the weekend. Triable issues exist whether the fence enclosure created a foreseeable, unreasonable risk to others, or exacerbated risks inherent at the subject intersection … .**Hyland v MFM Contr. Corp., 2024 NY Slip Op 01252, First Dept 3-7-24**

Practice Point: Here an opaque fence parallel to a crosswalk made it appear the road had been blocked off. Plaintiff pedestrian, who assumed the street was blocked off and was using the crosswalk parallel to the fence, was struck by a car when he stepped beyond the end of the fence into a lane of traffic. There was question of fact whether the erection of the fence by defendants launched an instrument of harm.

MARCH 7, 2024

TRAFFIC ACCIDENTS, REAR END COLLISION.

ALTHOUGH THE REAR DRIVER IN A REAR-END COLLISION IS NOT ALWAYS NEGLIGENT, THE ALLEGATION THE FRONT DRIVER SUDDENLY STOPPED FOR A YELLOW LIGHT WAS NOT ENOUGH TO AVOID SUMMARY JUDGMENT IN FAVOR OF THE FRONT DRIVER (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff should have been awarded summary judgment in this rear-end collision case. The defendant rear driver alleged plaintiff stopped for a yellow light, which did not raise a question of fact about plaintiff's negligence:

A rear-end collision with a stopped or stopping vehicle establishes a prima facie case of negligence on the part of the operator of the rear vehicle, thereby requiring

that operator to rebut the inference of negligence by providing a nonnegligent explanation for the collision … . "A sudden stop of the lead vehicle may constitute a nonnegligent explanation for a rear-end collision" … . "But 'vehicle stops which are foreseeable under the prevailing traffic conditions, even if sudden and frequent, must be anticipated by the driver who follows'" … .

Here, in support of his motion, the plaintiff submitted his own affidavit that established, prima facie, that the defendant driver was negligent when he struck the rear of the plaintiff's stopped vehicle, and that the defendant driver's negligence was the sole proximate cause of the accident … . In opposition, the defendants failed to raise a triable issue of fact. The defendant driver's explanation for striking the plaintiff's vehicle in the rear, set forth in his affidavit in opposition to the plaintiff's motion, that the plaintiff's vehicle stopped abruptly at a yellow light in front of the intersection's thick white stop line, was insufficient to raise a triable issue of fact as to the defendant driver's negligence or whether the plaintiff's actions contributed to the happening of the accident … . Yawagyentsang v Safeway Constr. Enters., LLC, 2024 NY Slip Op 01580, Second Dept 3-20-24

Practice Point: There are more appellate decisions of late finding questions of fact about whether the rear-driver is negligent in a rear-end collision based upon the allegation the front-driver stopped suddenly for no apparent reason. Here the rear driver alleged the front driver stopped suddenly for a yellow light. That was not enough to raise a question of fact.

MARCH 20, 2024

TRAFFIC ACCIDENTS, REAR-END COLLISION.

NOT ALL REAR-END COLLISIONS ARE SOLELY THE FAULT OF THE REAR DRIVER; HERE PLAINTIFF, THE REAR DRIVER, RAISED CREDIBILITY ISSUES BY CONTRADICTING A STATEMENT ATTRIBUTED TO PLAINTIFF IN THE POLICE REPORT AND AVERRING DEFENDANT STOPPED SUDDENLY WITHOUT USING A TURN SIGNAL (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff, the driver of the car which rear-ended defendant's car, raised a question of fact about the whether the defendant stopped suddenly without using a turn signal:

"There can be more than one proximate cause of an accident" … , and a defendant moving for summary judgment in a negligence action has the burden of establishing, prima facie, that he or she was not at fault in the happening of the accident … . "Not every rear-end collision is the exclusive fault of the rearmost driver. The frontmost driver also has the duty not to stop suddenly or slow down without proper signaling so as to avoid a collision" … .

… [T]he plaintiff raised questions of credibility, which are for the jury to determine … . The plaintiff disputed the content of his statement, as reflected in the police accident report, as well as the veracity of the defendant's deposition testimony as to how the accident occurred. Specifically, the plaintiff disputed that the defendant utilized his left turn signal and averred that the defendant came to a sudden stop at the intersection. Kerper v Betancourt, 2024 NY Slip Op 01296, Second Dept 3-13-24

Practice Point: In this rear-end collision case, the plaintiff, the rear driver, raised credibility issues which can only be resolved by a jury. Plaintiff contradicted a statement attributed to him in the police report and averred that defendant stopped suddenly without using a turn signal. The rear driver in a rear-end collision is not always solely at fault.

MARCH 13, 2024

TRAFFIC ACCIENTS, REAR END COLLISION.

THE REAR-DRIVER IN A REAR-END COLLISION IS NOT ALWAYS NEGLIGENT; HERE THERE IS A QUESTION OF FACT WHETHER THE FRONT DRIVER STOPPED SUDDENLY FOR NO APPARENT REASON (SECOND DEPT).

The Second Department, reversing Supreme Court, determined there were questions of fact about whether the rear driver in this rear-end collision case was negligent. The rear-driver alleged plaintiff's vehicle stopped for no apparent reason when no cars were in front of it:

"'A driver of a vehicle approaching another vehicle from the rear is required to maintain a reasonably safe distance and rate of speed under the prevailing conditions to avoid colliding with the other vehicle'" (… see Vehicle and Traffic Law § 1129[a]). "'There can be more than one proximate cause of an accident, and a defendant moving for summary judgment in a negligence action has the burden of establishing, prima facie, that he or she was not at fault in the happening of the subject accident'" …. "'[N]ot every rear-end collision is the exclusive fault of the rearmost driver. The frontmost driver also has the duty not to stop suddenly or slow down without proper signaling so as to avoid a collision'" … . Laureano v EAN Holdings, LLC, 2024 NY Slip Op 01538, Second Dept 3-20-24

Practice Point: The rear driver in a rear-end collision case is not always negligent. Here there was a question of fact whether the front driver stopped suddenly for no apparent reason.

MARCH 20, 2024

WORKERS' COMPENSATION, PSYCHOLOGICAL INJURY, COVID.

PSYCHOLOGICAL INJURY FROM EXPOSURE TO COVID IN THE WORKPLACE MUST BE ASSESSED USING THE SAME CRITERIA AS ARE APPLIED TO PHYSICAL INJURY; MATTER REMITTED (THIRD DEPT).

The Third Department, in a full-fledged opinion by Justice Clark, reversing the denial of benefits and remitting the matter to the Workers' Compensation Board, determined that psychological injury from exposure to COVID at the workplace must be treated the same as physical injury, taking into consideration the claimant's particular vulnerabilities:

Pursuant to the employer's policy for the 2020-2021 school year, claimant, a second-grade school teacher with a past medical history of asthma and bronchitis, returned to work in person at her assigned school building on September 7, 2020; the students continued to attend classes remotely at that time. On or about September 21, 2020, claimant was informed that another teacher at the school had tested positive for COVID-19, prompting the temporary closure of the school building. Claimant began feeling ill on or about September 23, 2020 but tested negative for COVID-19 on that date. On October 1, 2020, claimant returned to work in person, but she became increasingly anxious in anticipation of the students' return to the building, which was scheduled to occur on Monday, October 5, 2020. She did not return to work after October 2, 2020. * * *

On appeal, claimant argues that, in cases involving exposure to the COVID-19 virus, the Board applies disparate burdens to claimants seeking compensation for a physical injury as compared to those seeking compensation for a psychological injury, in violation of the principle that "psychological or nervous injury precipitated by psychic trauma is compensable to the same extent as physical injury" … . * * *

… Given that the Board did not consider claimant's particular vulnerabilities and that it applied a disparate burden in determining whether the alleged psychological injury was caused by a workplace accident, we must remit this matter for reconsideration not inconsistent with the guidance provided herein. On remittal, the Board is tasked with determining whether claimant's proof establishes that she suffered a workplace accident, as relevant here, by proving either a specific

exposure to COVID-19 or the prevalence of COVID-19 in her work environment so as to present an elevated risk of exposure constituting an extraordinary event. If claimant establishes the existence of such an accident, then the Board must determine, "in light of the commonsense viewpoint of the average [person]" … , and considering claimant's particular vulnerabilities, whether claimant established, by competent medical evidence, a causal connection between the alleged injury and the workplace accident … . Matter of Anderson v City of Yonkers, 2024 NY Slip Op 01755, Third Dept 3-28-24

Practice Point: Re: eligibility for Workers' Compensation benefits, psychological injury from exposure to COVID at the workplace is to be assessed using the same criteria as are applied to physical injury—analytical guidance is laid out in detail.

MARCH 28, 2024