NEW YORK APPELLATE DIGEST, LLC

Personal Injury
Reversal Report
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An Organized Compilation 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 April 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. Right Click on the Citations to Keep Your Place in the Reversal Report.

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CHILD VICTIMS ACT, ABUSE OCCURS OUT-OF-STATE.

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The Second Department, joining the First and Third Departments, determined an action brought under the Child Victims Act by a person who was a resident of New York at the time the cause of action accrued can take advantage of the extended statute of limitations (CPLR 214-g) even where the wrongful conduct occurred out-of-state:

The plaintiff alleges that, when he was a resident of New York, he was the victim of childhood sexual abuse committed against him by Philip Foglietta, a football coach, while attending summer football camp in Vermont in 1972 and in Massachusetts in 1973 and 1975. * * *

… [W]e agree with the Appellate Division, First and Third Departments, that a plaintiff's residence in New York at the time his or her claims or causes of action accrued is sufficient to bring those claims or causes of action within the purview of CPLR 214-g, even where, as here, the wrongful conduct underlying the New York resident's causes of action occurred out-of-state … . * * *

The appellants' focus on the location of the alleged wrongdoing is misplaced in this context, because the subject of CPLR 214-g is not the wrongful conduct itself, but rather the statute of limitations or notice of claim requirements that barred some New Yorkers from recovering damages for the underlying wrongdoing. CPLR 214-g did not criminalize or penalize behavior that was previously lawful, nor did it create a new private right of action. Rather, the statute revived prior claims or causes of action that already existed but were barred either because of the expiration of the applicable statute of limitations or the plaintiff's failure to file a timely notice of claim (see id. § 214-g). Smith v Pro Camps, Ltd., 2024 NY Slip Op 02074, Second Dept 4-17-24

Practice Point: The Child Victims Act extends the statute of limitations for a plaintiff who was a New York resident at the time the cause of action accrued, even if the abuse took place in another state.

APRIL 17, 2024

INSURANCE LAW, WORKERS' COMPENSATION, CONTRACT LAW.

A FORUM SELECTION CLAUSE IN AN INSURANCE POLICY WHICH VIOLATES NEW YORK LAW IS NOT ENFORCEABLE (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Miller, determined that the forum selection clause in an insurance policy which violates New York law is not enforceable. The opinion is comprehensive and discusses several substantive civil procedure, contract law, corporation law, insurance law, workers' compensation law and public policy issues which cannot fairly be summarized here:

This action is just one of many such actions commenced across the country alleging that the defendant Applied Underwriters, Inc. (hereinafter Applied Underwriters), and affiliated entities, all subsidiaries of Berkshire Hathaway, Inc., deceptively circumvented state laws and regulations in the marketing and sale of an unlawful workers' compensation insurance program. Here, the defendants seek to enforce a forum selection clause, in favor of Nebraska, contained in an insurance policy that New York State regulators have found violates New York law. While

parties are generally free to select a forum in which to resolve their contractual disputes, here, where it is alleged by the plaintiff, and found by New York State regulators, that New York law has been violated, a foreign corporation may not profit from such violation to the detriment of New York employers and workers. The forum selection clause contained in an illegal insurance policy is not enforceable. As a matter of public policy, New York companies shall not be compelled to litigate in Nebraska to vindicate their rights. Air-Sea Packing Group, Inc. v Applied Underwriters, Inc., 2024 NY Slip Op 02032, Second Dept 4-17-24

Practice Point: A forum selection clause (designating Nebraska as the forum) in an insurance policy which violates New York law is not enforceable.

APRIL 17, 2024

LABOR LAW-CONSTRUCTION LAW, INDUSTRIAL CODE.

PLAINTIFF WAS INJURED WHEN A PIECE OF WIRE STRUCK HIS EYE WHEN HE WAS USING A NAIL GUN; PLAINTIFF DID NOT ELIMINATE QUESTIONS OF FACT ABOUT WHETHER THE WORK HE WAS DOING REQUIRED EYE PROTECTION WITHIN THE MEANING OF THE RELEVANT INDUSTRIAL CODE PROVISION; THEREFORE PLAINTIFF SHOULD NOT HAVE BEEN AWARDED SUMMARY JUDGMENT ON THE LABOR LAW 241(6) CAUSE OF ACTION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff did not demonstrate defendant was required to provided eye protection for the work plaintiff was engaged in at the time his eye was injured:

The plaintiff allegedly was injured while operating a nail gun to attach wood plates to a building roof when debris from a metal wire to which nails were secured, such that they could be loaded into the nail gun, flew off and hit his right eye. * * *

Labor Law § 241(6) imposes a nondelegable duty on owners and contractors to provide reasonable and adequate protection and safety for workers without regard to direction and control … . "In order to establish liability under Labor Law §

241(6), a plaintiff must 'establish the violation of an Industrial Code provision which sets forth specific safety standards,' and which 'is applicable [to the facts] of the case'" … . Industrial Code (12 NYCRR) § 23-1.8(a) requires the furnishing of eye protection equipment to employees who, inter alia, are "engaged in any . . . operation which may endanger the eyes."

Here, the plaintiff's submissions failed to eliminate a triable issue of fact as to whether, at the time of his accident, the plaintiff was engaged in work that "may endanger the eyes" so as to require the use of eye protection pursuant to Industrial Code (12 NYCRR) § 23-1.8(a) … . Chuqui v Cong. Ahavas Tzookah V'Chesed, Inc., 2024 NY Slip Op 02166, Second Dept 4-24-24

Practice Point: Although plaintiff was struck in the eye by a piece of wire when using a nail gun, he did not eliminate questions of fact about whether the work he was doing triggered the eye-protection requirement in the Industrial Code. Therefore plaintiff was not entitled to summary judgment on his Labor Law 241(6) cause of action.

APRIL 24, 2024

LABOR LAW-CONSTRUCTION LAW.

PLAINTIFF FELL THROUGH AN UNGUARDED STAIRWAY OPENING AND WAS ENTITLED TO SUMMARY JUDGMENT ON THE LABOR LAW 240(1) CAUSE OF ACTION; DEFENDANTS DID NOT SHOW THAT THE PRE-DEPOSITION SUMMARY JUDGMENT MOTION WAS PREMATURE (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff should have been awarded summary judgment on the Labor Law 240(1) cause of action and the pre-deposition summary judgment motion was not premature. While transporting large wooden panels past a stairway, plaintiff fell through an unguarded stairway opening:

The court should have granted plaintiff partial summary judgment on the Labor Law § 240 (1) claim because he was not provided with adequate protection to prevent his fall into the unguarded stairway opening … . …

… Labor Law § 240(1) is not dependent on a finding that the owner or general contractor had notice of the violation … …. [D]efendants failed to raise an issue of fact as to whether plaintiff was the sole proximate cause of his injuries. Defendants' assertion that plaintiff removed the plywood barrier is speculative … .

The fact that no depositions have been taken does not preclude summary judgment in plaintiff's favor, as defendants failed to show that discovery might lead to facts that would support their opposition to the motion … . Defendants also failed to show that facts essential to their opposition were within plaintiff's exclusive knowledge … . Blacio v Related Constr. LLC,2024 NY Slip Op 02008, First Dept 4-16-24

Practice Point: A plaintiff's pre-deposition summary judgment motion will not be dismissed as premature unless defendant demonstrates discovery might lead to relevant facts or relevant facts are within plaintiff's exclusive knowledge.

APRIL 16, 2024

MEDICAL MALPRACTICE VS NEGLIGENCE, STATUTES OF LIMITATIONS.

RE: IN VITRO FERTILIZATION: RETRIEVING AND FERTILIZING THE EGGS ARE SUBJECT TO THE MEDICAL-MALPRACTICE STATUTE OF LIMITATIONS; STORING AND MAINTAINING THE FROZEN EGGS ARE SUBJECT TO THE ORDINARY NEGLIGENCE STATUTE OF LIMITATIONS; THE MEDICAL MALPRACTICE ACTIONS ARE UNTIMELY; THE ORDINARY NEGLIGENCE ACTIONS ARE TIMELY (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, in a full-fledged opinion by Justice Shulman, determined plaintiffs' causes of action alleging defendants did not properly freeze, store and maintain embryos for future implantation sounded in negligence, not medical malpractice, and were therefore timely:

The underlying parts of the IVF [in vitro fertilization] process implicate both medical malpractice and ordinary negligence. Retrieving the eggs from the ovaries, fertilizing the egg with a donated sperm, grading the quality of the embryos, and preparing them for cryopreservation are clear acts of medical science or art requiring a specialized skillset appropriately characterized as medical in nature. However, all of these acts concluded on August 11, 2008, when the embryos were cryopreserved, rendering the causes of action based on such treatment untimely (see CPLR 214-a). Further, because those processes firmly ended on that date, the continuous treatment doctrine does not toll the statute of limitations … . As plaintiffs' causes of action for medical malpractice based upon these allegations are untimely, we need not address their merits.

On the other hand, once cryopreservation has commenced, the mere maintenance of the storage tanks containing the frozen embryos does not comprise acts of "medical science or art requiring special skills not ordinarily possessed by lay persons" … . Where an act is more "'administrative' than medical in nature," conduct is "measured by ordinary negligence standards" … . While the cryopreservation storage tanks … were checked at least twice weekly for leaks and the levels of liquid nitrogen, such acts are more administrative than medical in nature. Thus, once the embryos entered cryopreservation, [defendants] merely owed a duty to plaintiffs to maintain the successful operability of the storage tanks.

The alleged failure in "fulfilling [this] different duty" "sounds in negligence," rather than medical malpractice … . Bledsoe v Center for Human Reproduction, 2024 NY Slip Op 02088, First Dept 4-18-24

Practice Point: The opinion in this "in vitro fertilization" case clearly demonstrates the distinction between medical malpractice and ordinary negligence. The retrieving, fertilizing and grading of the embryos involve specialized medical skills and implicate the medical-malpractice criteria. The storage and maintenance of the frozen embryos, on the other hand, implicate ordinary negligence criteria. Here the medical malpractice causes of action were untimely. But the ordinary negligence causes of action were timely.

APRIL 18, 2024

MEDICAL MALPRACTICE, EVIDENCE.

REVERSING THE FOURTH DEPARTMENT WITHOUT OPINION OR MEMORANDUM DECISION, THE COURT OF APPEALS HELD QUESTIONS OF FACT PRECLUDED SUMMARY JUDGMENT IN DEFENDANTS' FAVOR IN THIS MEDICAL MALPRACTICE ACTION (CT APP).

The Court of Appeals, reversing the Fourth Department without an opinion or memorandum decision, determined questions of fact precluded summary judgment in defendants' favor in this medical malpractice case. **Amber R. v Pediatric & Adolescent Urgent Care of W. N.Y., PLLC, 2024 NY Slip Op 02085, CtApp 4-18-24**

From the dissent in Amber R. v Pediatric & Adolescent Urgent Care of W. N.Y., PLLC, 2023 NY Slip Op 04063 [218 AD3d 1344], Fourth Dept 7-28-23:

The medical records proferred by defendants established that, after a failed first intubation attempt with a 3.5 mm ET by defendant Katelyn Johnson-Clark, D.O., a physician with little training in the intubation process, Johnson-Clark attempted intubation using a smaller 3.0 mm ET. It is undisputed that there was no verification of the proper placement of that ET by way of an end-tidal CO2 detector. The medical records further establish that one minute after the placement of the ET, the infant's heart rate quickly dropped and one minute thereafter, the infant's belly was distended. Another physician testified at her deposition that both of those signs indicate that there was a potential issue with the intubation. When the specialized transport team arrived, it was determined by way of a CO2 detector that the ET was not in the proper place. Thus, we conclude that defendants' own submissions raise questions of fact whether Johnson-Clark acted negligently in the intubation of the infant and the motion was properly denied in part without regard to the sufficiency of plaintiff's opposition papers … . We would therefore affirm that part of the order denying defendants' motion insofar as it seeks summary judgment dismissing the claim of malpractice related to the intubation of the infant.

APRIL 18, 2024

NOTICE OF CLAIM, CHARTER SCHOOLS, ASSAULT.

CHARTER SCHOOLS ARE NOT SUBJECT TO THE NOTICE OF CLAIM REQUIREMENTS IN THE EDUCATION LAW AND GENERAL MUNICIPAL LAW; PLAINTIFF-STUDENT, WHO HAD BEEN BULLIED AND WAS PUSHED TO THE FLOOR BY ANOTHER STUDENT, RAISED QUESTIONS OF FACT SUPPORTING THE NEGLIGENT SUPERVISION CAUSE OF ACTION (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Iannacci, determined (1) charter schools are not subject to the notice of claim requirements of the Education Law and the General Municipal Law, and (2) plaintiff student, who allegedly had been bullied and was pushed to the floor by another student when the hallway was unsupervised, raised questions of fact supporting the negligent supervision cause of action:

Since charter schools are independent from school districts with respect to civil liability, financial obligations, and liability insurance coverage, it stands to reason that the extraordinary safeguards of prelitigation notification of claims applicable to school districts, municipalities and other wholly public entities would not apply to charter schools. * * *

The evidence presented triable issues of fact as to whether there were monitors present in the hallway at the time of the incident as required by the School's policies and procedures and whether the presence of such monitors could have prevented the alleged pushing incident … . A. P. v John W. Lavelle Preparatory Charter Sch., 2024 NY Slip Op 02205, Second Dept 4-24-24

Practice Point: Charter schools are not subject to the notice-of-claim requirement in the Education Law and General Municipal Law; i.e., a plaintiff suing a charter school for negligence need not file or serve a notice of claim as a condition precedent.

APRIL 24, 2024

SLIP AND FALL, DISCOVERY, INSPECTION OF ACCIDENT SCENE.

DEFENDANT CARPET AND FLOORING SUBCONTRACTOR'S REQUEST TO INSPECT THE AREA OF THE FLOOR WHERE PLAINTIFF ALLEGEDLY STEPPED INTO AN UNGUARDED VENT HOLE SHOULD HAVE BEEN GRANTED; ALTHOUGH THE VENT COVER HAD BEEN REPLACED, IT CAN NOT BE SAID THE INSPECTION WOULD BE FRUITLESS, OR THAT THE INSPECTION WOULD CAUSE UNREASONABLE ANNOYANCE, EXPENSE, EMBARRASSMENT OR OTHER PREJUDICE (FIRST DEPT).

The First Department, reversing Supreme Court, determined defendant carpet and flooring subcontractor's (S&'s) request to inspect the area of the building where plaintiff stepped into a vent hole from which a cover had been dislodged should not have been denied. Although the vent cover had been replaced, it could not be said for certain that an inspection would be fruitless:

CPLR 3101(a) provides that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action." The Court of Appeals has directed that the phrase "material and necessary" in this statute should be "interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity" … . Under this standard, S&F is entitled to inspect the site of the incident giving rise to plaintiff's allegedly serious injuries.

While the replacement of the … cover might reduce the likelihood that a site inspection will produce evidence useful to S&S's defense, it does not make it certain that an inspection will be useless. … It is for S&F, not its adversary, to determine whether the inspection of the site of the accident is sufficiently likely to produce relevant information to be worth S&F's time and effort. … . …

… [A] court's power to limit otherwise proper use of a disclosure device should be exercised only for the purpose of avoiding "unreasonable annoyance, expense, embarrassment, disadvantage or other prejudice."

We fail to see how an inspection of the site of the accident giving rise to this lawsuit would impose on plaintiff, or on anyone else, any of the burdens

enumerated by CPLR 3103(a) to an "unreasonable" extent. Balsamello v Structure Tone, Inc., 2024 NY Slip Op 02251, First Dept 4-25-24

Practice Point: An inspection by defendant of the area where plaintiff was injured should be allowed absent unreasonable annoyance, expense, embarrassment, disadvantage or other prejudice.

APRIL 25, 2024

SLIP AND FALL, NOTICE OF CLAIM, MUNICIPAL LAW.

BECAUSE A CONTEMPORARY REPORT PROVIDED THE CITY WITH NOTICE OF THE NATURE OF THE SLIP AND FALL, THE PETITION FOR LEAVE TO FILE A LATE NOTICE OF CLAIM SHOULD HAVE BEEN GRANTED, DESPITE THE LACK OF A REASONABLE EXCUSE FOR FAILING TO TIMELY FILE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the petition for leave to file a late notice of claim in this slip and fall case should have been granted. The line-of-duty report provided the city with timely knowledge of the nature of the claim and demonstrate the city would not be prejudiced by the delay in filing the notice. Where a defendant has timely knowledge of the incident, the lack of a reasonable explanation for failing to timely file is often overlooked:

The line-of-duty injury report's specificity regarding the location and circumstances of the incident, permitted the City to readily infer that a potentially actionable wrong had been committed … .

Further, as the petitioner has shown the City's actual knowledge of the essential facts underlying the claim, the petitioner's failure to provide a reasonable excuse for the delay in serving the notice of claim was not fatal to her claim … .

… [A]s the City acquired timely knowledge of the essential facts constituting the claim, the petitioner met her initial burden of showing that the City would not be prejudiced by the late notice of claim … . In response …, the City has failed to provide particularized evidence establishing that the late notice substantially

prejudiced its ability to defend the claim on the merits … . Matter of Steward v City of New York, 2024 NY Slip Op 02058, Second Dept 4-17-24

Practice Point: If the municipal defendant has timely notice of the nature of the incident (here by virtue of a contemporary report) and the city cannot demonstrate prejudice, a petition for leave to file a late notice of claim should be granted, even in the absence of a reasonable excuse for failing to timely file.

APRIL 17, 2024

SLIP AND FALL, NOTICE OF SIDEWALK DEFECT, MUNICIPAL LAW.

A NOTICE OF VIOLATION FROM THE CITY TO THE ABUTTING PROPERTY OWNER REGARDING THE DETERIORATED CONDITION OF THE SIDEWALK RAISED A QUESTION OF FACT WHETHER THE CITY HAD WRITTEN NOTICE OF THE SIDEWALK DEFECT (A PROTRUDING METAL BAR) WHICH CAUSED PLAINTIFF'S SLIP AND FALL (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff had raised a question of fact whether the city had notice of the condition of the sidewalk which allegedly caused her slip and fall; Plaintiff demonstrated a notice of violation had been issued to the abutting property owner concerning the deterioration of the sidewalk. Plaintiff had alleged she tripped over a metal bar protruding from the sidewalk. The notice of violation raised a question of fact whether that specific defect was encompassed by the notice:

The plaintiff submitted … a Notice of Violation from the Department of Public Works, Office of the Commissioner, to the purported owner of the property abutting the sidewalk on which the plaintiff fell. The Notice of Violation was issued by the Commissioner of the Department of Public Works, the very individual who was statutorily designated to receive written notice of sidewalk defects. The Notice of Violation stated that an inspection, which … found … that "deteriorated and hazardous conditions" existed on the abutting sidewalk. Under the circumstances, the plaintiff raised a triable issue of fact as to whether the City

did, in fact, have prior written notice of the alleged defect … . Whether the Notice of Violation "encompassed the particular condition which allegedly caused the subject accident is an issue of fact which should await resolution at trial" … . Douglas v City of Mount Vernon, N.Y., 2024 NY Slip Op 02173, Second Dept 4-24-24

Practice Point: Here a notice of violation issued by the city to the abutting property owner concerning the deteriorated condition of the sidewalk raised a question of fact whether the city had prior written notice of the specific defect, a protruding metal bar, which caused plaintiff's fall.

APRIL 24, 2024

TOXIC TORTS, MOLD, PROOF OF CAUSATION UNDER FRYE.

PLAINTIFF'S EXPERT DID NOT ESTABLISH EITHER THE "GENERAL CAUSATION" OR "SPECIFIC CAUSATION" FRYE CRITERIA IN THIS MOLD-INJURY CASE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff's expert did not offer sufficient proof plaintiff's injuries were caused by exposure to mold. Neither the "general causation" nor "specific causation" criteria established by Frye v United States, 293 F 101, were met:

General causation cannot be established through studies showing only a "risk" or "association" between mold exposure and the development of certain medical conditions … . The defendants' expert relied on a position paper of the American Academy of Allergy, Asthma and Immunology published in 2006 … , that controverts the plaintiff's expert's theory of causation … . The scientific literature and testimony proffered by the plaintiff's expert was insufficient to demonstrate that the plaintiff's expert's theory of general causation has gained general acceptance in the scientific community … . …

… [T]he method used by [plaintiff's] expert to establish specific causation did not satisfy Frye. … [I]t is not enough for a plaintiff's expert to testify that "exposure to a toxin is 'excessive' or 'far more' than others," or to offer testimony "that merely

links a toxin to a disease or 'work[s] backwards from reported symptoms to divine an otherwise unknown concentration' of a toxin" … . "… [W]e have never dispensed with a plaintiff's burden to establish sufficient exposure to a substance to cause the claimed adverse health effect" … . "At a minimum, . . . there must be evidence from which the factfinder can conclude that the plaintiff was exposed to levels of th[e] agent that are known to cause the kind of harm that the plaintiff claims to have suffered" … . Buist v Bromley Co., LLC, 2024 NY Slip Op 01904, Second Dept 4–10-24

Practice Point: Here the expert evidence purporting to demonstrate plaintiff's injuries were caused by exposure to mold did not satisfy the "general causation" or "specific causation" criteria established by Frye v United States, 293 F 101, criteria explained.

APRIL 10, 2024

TRAFFIC ACCIDENTS, EMPLOYMENT LAW, CONTRACT LAW.

PLAINTIFF IN THIS TRAFFIC ACCIDENT CASE ALLEGED DEFENDANT DRIVER WAS DEFENDANT COMPANY'S EMPLOYEE AND WAS ACTING WITHIN THE SCOPE OF EMPLOYMENT AT THE TIME OF THE ACCIDENT; DEFENDANT COMPANY FAILED TO DEMONSTRATE THE DRIVER WAS AN INDEPENDENT CONTRACTOR, NOT AN EMPLOYEE; THE FACT THAT THE EMPLOYMENT CONTRACT USES THE TERM "INDEPENDENT CONTRACTOR" IS NOT DISPOSITIVE OF THE ISSUE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant employer in this traffic accident case did not demonstrate the defendant driver was an independent contractor as opposed to an employee acting within the scope of employment:

… [Plaintiff] allegedly was injured when a vehicle he was operating collided with a vehicle owned and operated by the defendant Luis F. Leal. * * * The plaintiffs alleged … that Leal was [defendant] Publishers' employee, and that Leal was acting within the scope of his employment at the time of the accident. …

"The doctrine of respondeat superior renders a master vicariously liable for a tort committed by his [or her] servant within the scope of employment. Conversely, the general rule is that an employer who hires an independent contractor is not liable for the independent contractor's negligent acts" … . "[T]he critical inquiry in determining whether an employment relationship exists pertains to the degree of control exercised by the purported employer over the results produced or the means used to achieve the results" … . "Factors relevant to assessing control include whether the worker (1) worked at his [or her] own convenience, (2) was free to engage in other employment, (3) received fringe benefits, (4) was on the employer's payroll and (5) was on a fixed schedule" … . "The fact that a contract exists designating a person as an independent contractor is to be considered, but is not dispositive" … . Whether an actor is an independent contractor or an employee is usually a factual issue for a jury … . Brielmeier v Leal, 2024 NY Slip Op 02163, Second Dept 4-24-24

Practice Point: An employer may be responsible for the negligence of an employee, but is not responsible for the negligence of an independent contractor. The fact that the employment contract uses the term "independent contractor" is not dispositive. The relevant criteria are explained.

APRIL 24, 2024

TRAFFIC ACCIDENTS, REAR-END COLLISIONS.

ALTHOUGH DEFENDANT RAISED A QUESTION OF FACT ABOUT PLAINTIFF'S CONTRIBUTORY NEGLIGENCE IN THIS REAR-END COLLISION CASE, DEFENDANT DID NOT RAISE A QUESTION OF FACT ABOUT HIS OWN LIABILTY; THE JUDGE SHOULD NOT HAVE DEEMED PLAINTIFF'S SUMMARY JUDGMENT MOTION PREMATURE (SECOND DEPT).

The Second Department, reversing Supreme Court in this rear-end collision case, determined that although defendant raised a question of fact about whether plaintiff was contributorily negligent, defendant did not raise a question of fact about the

defendant-driver's liability. In addition, plaintiff's motion for summary judgment should not have been deemed premature:

… [T]he defendants submitted an affidavit from the defendant driver, in which he stated that he was "not fully responsible" for the accident. The defendant driver also averred that the traffic light had turned green and that the plaintiff had moved forward and then suddenly stopped, causing the defendant driver to strike the rear of the plaintiff's vehicle despite his efforts to stop his vehicle. This evidence raised a triable issue of fact as to whether the plaintiff was comparatively at fault in the happening of the accident, thereby supporting the denial of that branch of her motion which was for summary judgment dismissing the affirmative defenses alleging comparative negligence … . However, since the defendants' evidence related only to the plaintiff's comparative fault, the defendants failed to raise a triable issue of fact in opposition to that branch of the plaintiff's motion which was for summary judgment on the issue of liability on the cause of action alleging negligent operation of a motor vehicle … .

Furthermore, the Supreme Court erred in determining that the plaintiff's motion was premature. "[W]hile a party is entitled to a reasonable opportunity to conduct discovery in advance of a summary judgment determination, [a] party contending that a summary judgment motion is premature must demonstrate that discovery might lead to relevant evidence or that the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the movant" … . Here, the defendants had personal knowledge of the relevant facts, and their mere hope or speculation that evidence might be uncovered during discovery was an insufficient basis for denying the plaintiff's motion …. Martin v Copado-Esquivel, 2024 NY Slip Op 01804, Second Dept 4-3-24

Practice Point: In a rear-end collision case, the fact that defendant raises a question of fact about plaintiff's contributory negligence does not preclude granting plaintiff summary judgment on the issue of defendant's liability.

Practice Point: Here, where the facts of the rear-end collision were within defendant's personal knowledge, plaintiff's motion for summary judgment should not have been dismissed as premature.

APRIL 3, 2024

WORKERS' COMPENSATION, WORLD TRADE CENTER CLEAN-UP.

CLAIMANT PARTICIPATED IN THE CLEAN UP AFTER THE WORLD TRADE CENTER ATTACK ON 9-11 AND WAS THEREFORE ENTITLED TO WORKERS' COMPENSATION BENEFITS UNDER ARTICEL 8-A (THIRD DEPT).

The Third Department, reversing (modifying) the Workers' Compensation Board, determined that some of the World Trade Center clean-up activities of the claimant qualified for benefits pursuant to Workers' Compensation Law article 8-A:

"Workers' Compensation Law article 8-A was enacted to remove statutory obstacles to timely claims filing and notice for latent conditions resulting from hazardous exposure for those who worked in rescue, recovery or cleanup operations following the [WTC] September 11th, 2001 attack" … . * * *

… [W]e find, in light of the liberal construction afforded to Workers' Compensation Law article 8-A, that claimant's activities of assisting with clearing the area — which notably was located within the statutorily-defined WTC site — in order for the emergency vehicles to access Ground Zero had a tangible connection to the rescue efforts. As such, the Board's determination that claimant did not participate in the rescue [*3]effort operations to qualify under Workers' Compensation Law article 8-A is not supported by substantial evidence … . Matter of Liotta v New York State Unified Ct. Sys., 2024 NY Slip Op 02237, Third Dept 4-25-24

Practice Point: Article 8-A of the Worders' Compensation Law was enacted to cover rescue and other worker's who responded to the World Trade Center attack on 9-11. Here claimant participated in clean-up activities to keep the area clear for emergency vehicles and was therefore entitled to benefits pursuant to article 8-A.

APRIL 25, 2024