NEW YORK APPELLATE DIGEST, LLC

Personal Injury Reversal Report
May 2024

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 May, 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.

Copyright 2024 New York Appellate Digest, LLC

Table of Contents

Contents

DUTY OF CARE, EVIDENCE. 5

PLAINTIF'S DECEDENT COMMITTED SUICIDE BY JUMPING FROM A LEDGE OUTSIDE HIS HOTEL ROOM; HOTEL STAFF DID NOT ASSUME A DUTY OF CARE FOR PLAINTIFF'S DECEDENT; A DELAY AFTER A FAMILY MEMBER'S REQUEST THAT HOTEL STAFF CALL THE POLICE WAS NOT DEMONSTRATED BY EXPERT OPINION TO HAVE CAUSED THE SUICIDE (FIRST DEPT). 5

EDUCATION-SCHOOL LAW, MUNICIPAL LAW. 6

DEFENDANT NYC DEPARTMENT OF EDUCATION DID NOT OWE A DUTY TO A SCHOOL ADMINISTRATOR WHO WAS ATTACKED BY A STUDENT IN A SCHOOL HALLWAY; THERE WAS NO "SPECIAL RELATIONSHIP" BETWEEN DEFENDANTS AND PLAINTIFF (SECOND DEPT). 6

EDUCATION-SCHOOL LAW. 8

THERE IS A QUESTION OF FACT WHETHER THE SCHOOL'S DUTY TO SUPERVISE STUDENTS EXTENDS TO AN AREA OUTSIDE THE SCHOOL WHERE PARENTS PICK UP AND DROP OFF THE STUDENTS; INFANT PLAINTIFF TRIPPED AND FELL ON A ROAD DEFECT NEAR THE CURB (SECOND DEPT). 8

EMPLOYMENT LAW, EDUCATION-SCHOOL LAW, RETIREMENT AND SOCIAL SECURITY LAW. 9

THE FORMER SCHOOL PRINCIPAL'S PTSD STEMMED FROM A SERIES OF INTERACTIONS WITH A CO-EMPLOYEE OVER A PERIOD OF MONTHS AND THEREFORE WAS NOT THE RESULT OF AN "ACCIDENT;" SHE WAS NOT ENTITLED TO ACCIDENTAL DISABILITY RETIREMENT BENEFITS (ADR) (CT APP). 9

GLASS DOOR SHATTERS, EVIDENCE. 10

A LOOSE DOOR HANDLE CAUSED THE GLASS DOOR TO SHATTER; DEFENDANTS PRESENTED INSUFFICIENT EVIDENCE OF WHEN THE DOOR HANDLE WAS LAST INSPECTED AND THEREFORE DID NOT DEMONSTRATE A LACK OF CONSTRUCTIVE NOTICE OF THE CONDITION (FIRST DEPT). 10

INSURANCE LAW, MEDICAL MALPRACTICE. 11

THE DEFENDANT INSURANCE COMPANY IS OBLIGATED TO DEFEND PLAINTIFF PEDIATRICIAN IN THE UNDERLYING ACTION BY A FORMER PATIENT ALLEGING SEXUAL ABUSE DURING A PHYSICAL EXAM (FOURTH DEPT). 11

LABOR LAW-CONSTRUCTION LAW, CIVIL PROCEDURE. 13

LABOR LAW 240(1) DOES NOT APPLY TO SLIPPING ON A STAIRCASE STEP, THE PERMANENT STAIRCASE IS NOT A SAFETY DEVICE; PLAINTIFF'S MOTION TO AMEND THE PLEADINGS TO ADD AN INDUSTRIAL CODE VIOLATION SHOULD HAVE BEEN GRANTED (SECOND DEPT). 13

LABOR LAW-CONSTRUCTION LAW, EVIDENCE. 14

ALTHOUGH PLAINTIFF MADE OUT A PRIMA FACIE CASE IN THIS LABOR LAW 240(1) LADDER-FALL ACTION, DEFENDANTS RAISED TRIABLE ISSUES OF FACT BY POINTING TO INCONSISTENCIES IN PLAINTIFF'S ACCOUNT (FIRST DEPT). 14

LABOR LAW-CONSTRUCTION LAW. 15

ALTHOUGH THE PIPE WAS A DANGEROUS CONDITION INHERENT IN THE WORK, IT WAS AN AVOIDABLE DANGEROUS CONDITION AND THERE REMAIN QUESTIONS ABOUT MEASURES TAKEN TO MINIMIZE THE TRIPPING HAZARD (FIRST DEPT). 15

LABOR LAW-CONSTRUCTION LAW. 16

DEFENDANT IN THIS LADDER-FALL CASE RAISED A QUESTION OF FACT WHETHER PLAINTIFF MISSED A STEP AND WAS THEREFORE THE SOLE PROXIMATE CAUSE OF THE FALL; A TWO-JUSTICE DISSENT DISAGREED (FOURTH DEPT). 16

LANDLORD-TENANT, ASSAULT BY TENANT. 17

TENANT'S ATTACK ON PLAINTIFF WAS NOT FORESEEABLE; THEREFORE THE LANDLORD WAS NOT LIABLE IN NEGLIGENCE FOR FAILING TO EVICT THE TENANT (FIRST DEPT)...................................17

LANDLORD-TENANT, ASSAULT ON TENANT. 18

PLAINTIFF'S ALLOWING HIS ATTACKER INTO HIS APARTMENT WAS AN INTERVENING ACT AND A SUPERSEDING PROXIMATE CAUSE WHICH RELIEVED THE BUILDING DEFENDANTS OF ANY LIABILITY FOR LAPSES IN SECURITY (FIRST DEPT). 18

MEDICAL MALPRACTICE, EVIDENCE. 19

THE NEARLY $10 MILLION VERDICT IN THIS MEDICAL MALPRACTICE ACTION WAS SUPPORTED BY SUFFICIENT EVIDENCE OF PROXIMATE CAUSE; IT WAS ALLEGED DEFENDANT DOCTOR SHOULD HAVE SENT PLAINTIFF'S DECEDENT TO THE EMERGENCY ROOM AND THE FAILURE TO DO SO PLAYED A ROLE IN PLAINTIFF'S DECEDENT'S SUICIDE THE NEXT DAY (SECOND DEPT). 19

MEDICAL MALPRACTICE, EVIDENCE, JUDGES...20

THE JUDGE SHOULD NOT HAVE REJECTED PLAINTIFF'S EXPERT'S OPINION BECAUSE SHE WAS A REGISTERED NURSE, NOT A DOCTOR; THE REGISTERED NURSE WAS QUALIFIED TO OFFER AN OPINION ON FALL PREVENTION; AN EXPERT'S QUALIFICATIONS SPEAK TO THE WEIGHT OF THE OPINION EVIDENCE, NOT ADMISSIBILITY (FIRST DEPT). 20

MEDICAL MALPRACTICE, EVIDENCE. 21

THE DEFENSE EXPERT'S AFFIRMATION IN THIS MED MAL CASE DID NOT ADDRESS ALL THE MALPRACTICE ALLEGATIONS IN THE PLEADINGS; DEFENDANTS' SUMMARY JUDGMENT MOTON SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT). 21

MEDICAL MALPRACTICE. 22

FAILURE TO PROPERLY ASSESS A PATIENT'S RISK OF FALLING AND NEED FOR SUPERVISION SOUNDS IN MEDICAL MALPRACTICE, NOT NEGLIGENCE (SECOND DEPT). 22

MEDICAL MALPRACTICE. 23

THE "SHEPPARD-MOBLEY" BAR TO A MOTHER'S RECOVERY FOR EMOTIONAL HARM IF HER BABY IS BORN ALIVE DOES NOT APPLY TO A LACK-OF-INFORMED CONSENT, AS OPPOSED TO A MEDICAL MALPRACTICE, CAUSE OF ACTION; HERE MOTHER ALLEGED SHE DID NOT CONSENT TO TWO UNSUCCESSFUL VACUUM EXTRACTION ATTEMPTS WHICH PRECEDED THE C-SECTION; HER BABY DIED EIGHT DAYS AFTER BIRTH (FIRST DEPT). 23

MEDICAL MALPRACTICE. 24

THE MEDICAL MALPRACTICE ACTION AGAINST THE RESIDENT WHO PERFORMED THE SURGERY UNDER THE SUPERVISION OF ANOTHER SURGEON SHOULD HAVE BEEN DISMISSED (FOURTH DEPT). 24

MUNICIPAL LAW, CIVIL PROCEDURE. 25

PHYSICAL INCAPACITY CAN BE A REASONABLE EXCUSE FOR FAILING TO TIMELY FILE A NOTICE OF CLAIM, BUT THE PERIOD OF DISABILITY DOES NOT TOLL THE ONE YEAR AND 90 DAY PERIOD FOR FILING A MOTION FOR LEAVE TO FILE A LATE NOTICE OF CLAIM (FIRST DEPT). 25

MUNICIPAL LAW. 26

THE REPORT OF THE INCIDENT IN WHICH PETITIONER WAS INJURED DID NOT PROVIDE THE CITY DEFENDANTS WITH NOTICE OF A CONNECTION BETWEEN THE INJURIES AND ANY NEGLIGENCE ON THE PART OF THE DEFENDANTS; THEREFORE THE CITY DEFENDANTS DID NOT HAVE NOTICE OF THE CLAIM WITHIN 90 DAYS; IN ADDITION, IGNORANCE OF THE LAW IS NOT A VALID EXCUSE FOR FAILURE TO TIMELY FILE A NOTICE OF CLAIM; THE PETITION FOR LEAVE TO FILE AND SERVE LATE NOTICES OF CLAIM SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT). 26

PRODUCTS LIABILITY, CIVIL PROCEDURE, EVIDENCE. 28

PLAINTIFF WAS INJURED USING DEFENDANT'S BOW; DEFENDANT MOVED FOR PERMISSION TO PERFORM TESTS ON THE BOW WHICH INVOLVED REMOVING AND THEN REPLACING THE DAMAGED COMPONENT OF THE BOW; THE JUSTIFICATION FOR SUCH TESTING WAS NOT DEMONSTRATED (FOURTH DEPT). 28

PRODUCTS LIABILITY, EVIDENCE. 29

PLAINTIFF ALLEGED THE AIR BAG UNEXPECTEDLY DEPLOYED, CAUSING INJURY; DEFENDANT FORD'S EXPERT EVIDENCE SUBMITTED IN SUPPORT OF DEFENDANT'S SUMMARY JUDGMENT MOTION DID NOT DEMONSTRATE THE CAUSE OF THE DEPLOYMENT WAS NOT ATTRIBUTABLE TO A PRODUCT DEFECT (FOURTH DEPT). 29

SEXUAL ABUSE, SOCIAL SERVICES LAW, MUNICIPAL LAW. 30

FORMER AND CURRENT SECTION 413 OF THE SOCIAL SERVICES LAW REQUIRES THE REPORTING OF ANY SUSPECTED INTENTIONAL INFLICTION OF SERIOUS PHYSICAL INJURY UPON A CHILD, WHICH INCLUDES SEXUAL ABUSE, EVEN WHEN THE PERSON SUSPECTED OF THE ABUSE IS NOT LEGALLY RESPONSIBLE FOR THE CARE OF THE CHILD; TWO JUSTICE DISSENT (FOURTH DEPT). ...30

SLIP AND FALL, EVIDENCE. 31

ALTHOUGH PLAINTIFF DID NOT KNOW WHICH STEP SHE SLIPPED AND FELL FROM, THERE WAS EVIDENCE ALL THE STEPS WERE UNLEVEL AND SLOPING; DEFENDANT DID NOT DEMONSTRATE THE CONDITION OF THE STAIRWAY WAS LATENT AND NOT DISCOVERABLE; DEFENDANT'S SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT). 31

SLIP AND FALL, EVIDENCE. 32

PLAINTIFF RAISED A QUESTION OF FACT RE: THE NEGLIGENT APPLICATION OF FLOOR WAX IN THIS SLIP AND FALL CASE (FIRST DEPT). 32

TRAFFIC ACCIDENTS, CONTRACT LAW, EVIDENCE. 33

IN THIS CAR ACCIDENT CASE, PLAINTIFF RAISED A QUESTION OF FACT WHETHER THE RELEASE SHE SIGNED WAS THE RESULT OF MUTUAL MISTAKE CONCERNING THE EXTENT OF HER INJURIES (FOURTH DEPT). 33

TRAFFIC ACCIDENTS, VEHICLE AND TRAFFIC LAW, EVIDENCE. 34

DEFENDANT'S ALLEGATION PLAINTIFF CAME TO A SUDDEN STOP IN THIS REAR-END COLLISION CASE DID NOT RAISE A QUESTION OF FACT ABOUT DEFENDANT'S LIABILITY; HOWEVER A QUESTION OF FACT REMAINED CONCERNING DEFENDANT'S COMPARATIVE-NEGLIGENCE AFFIRMATIVE DEFENSE (SECOND DEPT). 34

TRAFFIC ACCIDENTS, VEHICLE AND TRAFFIC LAW, EVIDENCE. 35

EVEN THOUGH PLAINTIFF BICYCLIST ADMITTED ROLLING THROUGH A BIKE-PATH STOP SIGN BEFORE ENTERING THE INTERSECTION, THERE REMAINED QUESTIONS OF FACT ABOUT WHETHER DEFENDANT DRIVER FAILED TO SEE WHAT WAS TO BE SEEN (THIRD DEPT). 35

TRAFFIC ACCIDENTS, VEHICLE AND TRAFFIC LAW, EVIDENCE. 36

IN THIS BUS-PASSENGER INJURY CASE, THE BUS DRIVER RAISED A QUESTION OF FACT WHETHER THE EMERGENCY DOCTRINE APPLIED; THE BUS STRUCK A VEHICLE WHICH STOPPED SUDDENLY AFTER IT WAS CUT OFF BY A THIRD VEHICLE; THE BUS DRIVER'S AFFIDAVIT WAS SUPPORTED BY SURVEILLANCE VIDEO (SECOND DEPT). 36

WORKERS' COMPENSATION, EVIDENCE. 37

A SCHEDULE LOSS OF USE (SLU) EVALUATION BASED UPON THE EXPIRED 2012 GUIDELINES SHOULD NOT HAVE BEEN CONSIDERED BY THE WORKER'S COMPENSATION BOARD; A SECOND SLU EVALUATION BASED UPON THE CURRENT 2018 GUIDELINES HAD BEEN SUBMITTED BUT WAS NOT RELIED UPON BY THE BOARD (THIRD DEPT). 37

WORKERS' COMPENSATION, EVIDENCE. 38

UNDER THE WORKERS' COMPENSATION LAW PRESUMPTION IN SECTION 21, AN ASSAULT AT WORK IS EMPLOYMENT-RELATED AND COMPENSABLE ABSENT SUBSTANTIAL EVIDENCE THE ASSAULT WAS MOTIVATED BY PERSONAL ANIMOSITY (CT APP). 38

DUTY OF CARE, EVIDENCE.

PLAINTIF'S DECEDENT COMMITTED SUICIDE BY JUMPING FROM A LEDGE OUTSIDE HIS HOTEL ROOM; HOTEL STAFF DID NOT ASSUME A DUTY OF CARE FOR PLAINTIFF'S DECEDENT; A DELAY AFTER A FAMILY MEMBER'S REQUEST THAT HOTEL STAFF CALL THE POLICE WAS NOT DEMONSTRATED BY EXPERT OPINION TO HAVE CAUSED THE SUICIDE (FIRST DEPT).

The First Department, reversing Supreme Court, in a full-fledged opinion by Justice Pitt-Burke, over an extensive dissenting opinion, determined the defendant hotel did not assume a duty of care for a hotel guest who committed suicide and did not proximately cause plaintiff-decedent's suicide. Hotel staff had been made aware of decedent's family's fear that decedent, who was in a room at the hotel, was suicidal. Hotel staff checked on the decedent, who indicated he was "fine." Subsequently a family member, who had been communicating with decedent, asked hotel staff to call the police. The crux of the lawsuit is the allegation that a delay in calling the police caused decedent to commit suicide. After breaking into decedent's locked room, the police found decedent on a ledge outside the window and unsuccessfully tried to talk him back into the room:

An entity in control of a premises, "whether [it] be a landowner or a leaseholder, is not an insurer of the visitor's safety" … . Absent a duty of care, there is no breach and no liability, regardless of how careless the conduct … . * * *

Plaintiffs … contend that defendants breached an assumed duty of care when they agreed to check on the decedent after being informed of his suicidal ideations and failed to act carefully or reasonably in contacting the police.

While "one who assumes a duty to act, even though gratuitously, may thereby become subject to the duty of acting carefully" … , a defendant can only be held "liable for a breach of an assumed duty where the plaintiff shows reliance on the defendant's course of conduct, such that the defendant's conduct placed him or her

in a more vulnerable position than he or she would otherwise have been in had the defendant done nothing” … . * * *

… [T]he record on appeal clearly shows … that despite defendants’ delay in calling the police, a period of at least thirty minutes elapsed from the time the police entered the hotel and decedent jumped from the ledge in the police officer’s presence. Beadell v Eros Mgt. Reality, LLC, 2024 NY Slip Op 02496, First De[t 5-7-24

Practice Point: A landowner or leaseholder in control of a hotel is not an insurer of a hotel guest’s safety and does not owe a duty of care to hotel guests absent the assumption of a duty to act (not the case here where a hotel guest committed suicide).

Practice Point: The expert opinion evidence here fell short of demonstrating that hotel staff’s delay in calling the police at the request of decedent’s family was the proximate cause of plaintiff’s decedent’s suicide.

MAY 7, 2024

EDUCATION-SCHOOL LAW, MUNICIPAL LAW.

DEFENDANT NYC DEPARTMENT OF EDUCATION DID NOT OWE A DUTY TO A SCHOOL ADMINISTRATOR WHO WAS ATTACKED BY A STUDENT IN A SCHOOL HALLWAY; THERE WAS NO “SPECIAL RELATIONSHIP” BETWEEN DEFENDANTS AND PLAINTIFF (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the absence of a special relationship between plaintiff high school administrator and defendant NYC Department of Education precluded recovery for an attack on the administrator by a student in the school’s hallway:

“Absent the existence of a special relationship between the defendants and the . . . plaintiff, liability may not be imposed on the defendants for a breach of a duty owed generally to persons in the school system and members of the public” … . To

succeed on a cause of action sounding in negligence, the plaintiff must establish that the defendants owed her a special duty of care … .

A plaintiff may demonstrate that a special relationship exists by showing, among other things, that the municipality "voluntarily assume[d] a duty that generate[d] justifiable reliance by the person who benefits from the duty," or that "the municipality assume[d] positive direction and control in the face of a known, blatant and dangerous safety violation" … . A special relationship based upon a duty voluntarily assumed by the municipality requires proof of the following: "'(1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) that party's justifiable reliance on the municipality's affirmative undertaking'" … .

… The defendants' submissions demonstrated that they did not voluntarily assume a duty toward the plaintiff. The defendants did not make any promises to the plaintiff or take any actions regarding security protocols in the school that amounted to an affirmative undertaking of protection by them on her behalf, nor could the plaintiff have justifiably relied on any such actions … . Notably, the plaintiff testified at her deposition that she had no reason to fear the student who allegedly assaulted her. The plaintiff also testified that, prior to the incident, the student had never made any threats toward her and she never asked the school to provide her with protection from the student. Moreover, the defendants did not take positive direction and control in the face of a known, blatant, and dangerous safety violation … . Villa-Lefler v Department of Educ. of the City of N.Y., 2024 NY Slip Op 02343, Second Dept 5-1-24

Practice Point: Absent a "special relationship' between plaintiff school administrator and defendant NYC Department of Education, defendant is not liable for an attack on the administrator by a student in a school hallway.

MAY 1, 2024

EDUCATION-SCHOOL LAW.

THERE IS A QUESTION OF FACT WHETHER THE SCHOOL'S DUTY TO SUPERVISE STUDENTS EXTENDS TO AN AREA OUTSIDE THE SCHOOL WHERE PARENTS PICK UP AND DROP OFF THE STUDENTS; INFANT PLAINTIFF TRIPPED AND FELL ON A ROAD DEFECT NEAR THE CURB (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the negligent supervision cause of action against defendant school should not have been dismissed. Infant plaintiff tripped and fell on a road defect that abutted a curb where students were picked up and dropped off by parents:

"Schools are under a duty to adequately supervise the students in their charge and they will be held liable for foreseeable injuries proximately related to the absence of adequate supervision" … . "Schools are not insurers of safety, however, for they cannot reasonably be expected to continuously supervise and control all movements and activities of students" … . "[A] school's duty to supervise is generally viewed as being coextensive with and concomitant to its physical custody of and control over the child," and therefore, "[w]hen that custody ceases because the child has passed out of the orbit of its authority in such a way that the parent is perfectly free to reassume control over the child's protection, the school's custodial duty also ceases" … . "[W]hile a school has no duty to prevent injury to schoolchildren released in a safe and anticipated manner, the school breaches a duty when it releases a child without further supervision into a foreseeably hazardous setting it had a hand in creating"… .

Under the circumstances of this case, the defendants failed to eliminate all triable issues of fact as to whether the infant plaintiff was released from school without adequate supervision into a foreseeably hazardous setting they had a hand in creating … . Thus, the defendants failed to establish, prima facie, that their negligent supervision over the infant plaintiff was not a proximate cause of the injuries the infant plaintiff sustained … . Levy v City of New York, 2024 NY Slip Op 02807, Second Dept 5-22-24

Practice Point: A school's duty to supervise students may extend to areas outside the school, i.e., the area where students are picked up and dropped off by parents.

MAY 22, 2024

EMPLOYMENT LAW, EDUCATION-SCHOOL LAW, RETIREMENT AND SOCIAL SECURITY LAW.

THE FORMER SCHOOL PRINCIPAL'S PTSD STEMMED FROM A SERIES OF INTERACTIONS WITH A CO-EMPLOYEE OVER A PERIOD OF MONTHS AND THEREFORE WAS NOT THE RESULT OF AN "ACCIDENT;" SHE WAS NOT ENTITLED TO ACCIDENTAL DISABILITY RETIREMENT BENEFITS (ADR) (CT APP).

The Court of Appeals, affirming the Appellate Division, in a full-fledged opinion by Judge Cannataro, determined the petitioner's post-traumatic stress disorder (PTSD) stemming from interactions with a another school employee did not entitle her to accidental disability retirement benefits (ADR) as opposed to ordinary disability retirement benefits (ODR) The court found that the employee interactions took place over a period of time and could not be characterized as "a sudden, unexpected event," i.e., an "accident." The court however refused to rule out that intentional conduct by a co-employee could constitute an "accident" in some circumstances:

… [T]he record supports the [Teachers' Retirement System Medical] Board's determination that petitioner's injuries did not result from an event that was sudden, fortuitous, and unexpected … . Although petitioner claims that her PTSD was brought on by the April 2019 occurrence, that event was merely the latest of a series of incidents in which the food-service worker trespassed on school property and acted in a confrontational manner toward petitioner, causing her significant stress and anxiety. As early as February 2019, petitioner informed school officials that the employee was continuously disobeying instructions to keep away from the school and that she was "concerned about the students and the building staff that have to endure his confrontational behavior." Following another incident in March, petitioner wrote that she "d[id] not feel comfortable with [the employee] given his

behavior in the school." The Board rejected petitioner's initial ADR application on the ground that "based on the description of the events in question that occurred in the work setting on April 18, 2019, as well as the previous events in the work setting in February and March of 2019, [petitioner] has failed to demonstrate that an accident occurred in the work setting." Because that reasoning is supported by the evidentiary record, the Board's determination to deny ADR will not be disturbed on this appeal. Matter of Rawlins v Teachers' Retirement Sys. of the City of N.Y., 2024 NY Slip Op 02840, CtApp 5-23-24

Practice Point: Although an intentional act by a co-employee could constitute an "accident" giving rise to accidental disability retirement benefits (ADR) under the Teachers' Retirement System, here the interactions with the co-employee took place over a period of months and could not be described as "a sudden, unexpected event."

MAY 23, 2024

GLASS DOOR SHATTERS, EVIDENCE.

A LOOSE DOOR HANDLE CAUSED THE GLASS DOOR TO SHATTER; DEFENDANTS PRESENTED INSUFFICIENT EVIDENCE OF WHEN THE DOOR HANDLE WAS LAST INSPECTED AND THEREFORE DID NOT DEMONSTRATE A LACK OF CONSTRUCTIVE NOTICE OF THE CONDITION (FIRST DEPT).

The First Department, reversing Supreme Court, determined the defendants did not demonstrate the glass door which shattered had been inspected close in time to the incident. Therefore a question of fact remained whether defendants had constructive knowledge of the loose handle which caused the door to shatter when plaintiff attempted to open it:

Although 730-Gen's urban portfolio manager testified that he inspected the interior vestibule doors following an incident that involved the exterior doors in the weeks prior to plaintiff's accident, his testimony only provided a vague description of the inspection performed. Importantly, he could not identify exactly when the

inspection occurred, and he did not indicate that any steps were taken to examine the door's metal handle.

The urban portfolio manager further testified that defendants had a daily inspection protocol in place to inspect the vestibule doors. However, he admitted that he had never seen anyone perform a daily inspection and he could not identify when the last inspection occurred prior to plaintiff's accident. …

730-Gen also asserts that the doors received cursory inspections, in that they were used on a daily basis. Yet, there is no record of these cursory inspections taking place … , or any indication that they involved a reasonable inspection of the door handle … .

… 730-Gen's reliance on the urban portfolio manager's inspection, which occurred almost two weeks prior to plaintiff's accident, failed to establish, prima facie, that inspecting the door handle on a biweekly basis is reasonable, especially in light of the daily inspection protocol defendant contends was in place to ensure the handles were tightly secured … . Doherty v 730 Fifth Upper, LLC, 2024 NY Slip Op 02979, First Dept 5-30-24

Practice Point: Unless the defendant can show the instrumentality which caused plaintiff's injury was inspected and found safe close in time to the injury, a defendant's motion for summary judgment will not be granted.

MAY 30, 2024

INSURANCE LAW, MEDICAL MALPRACTICE.

THE DEFENDANT INSURANCE COMPANY IS OBLIGATED TO DEFEND PLAINTIFF PEDIATRICIAN IN THE UNDERLYING ACTION BY A FORMER PATIENT ALLEGING SEXUAL ABUSE DURING A PHYSICAL EXAM (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined defendant insurance company was obligated to defend plaintiff pediatrician who stands accused of the sexual abuse of a former patient:

Supreme Court denied plaintiff's [summary judgment] motion and granted defendant's cross-motion [for summary judgment] on the grounds that the complaint in the underlying action did not assert claims arising from a "medical incident" or "professional services," as those terms are defined in the subject insurance policy, and in any event that the policy's exclusion for sexual assault precluded coverage. * * *

… [A]lthough the complaint in the underlying action primarily alleges that plaintiff sexually abused his former patient during a medical examination, it also contains "facts or allegations" that bring the claim "potentially within the protection purchased" for claims arising from professional services rendered by plaintiff, thus triggering the duty to defend … . For instance, the underlying complaint alleges that plaintiff improperly diagnosed, cared for and treated the former patient in question, and failed to provide her with "proper and appropriate pediatric care." The underlying complaint further alleges that plaintiff inserted his finger into the former patient's vagina "without gloves," suggesting that perhaps such action would have been medically proper had plaintiff been wearing gloves. Without any context or details regarding the nature of the medical treatment being provided by plaintiff at the time of the alleged improper touching of the former patient, we cannot categorically conclude that the underlying complaint is devoid of facts or allegations that potentially bring the former patient's claims within the protection purchased by plaintiff in the subject liability policy. Mscichowski v MLMIC Ins. Co., 2024 NY Slip Op 02391, Fourth Dept 5-3-24

Practice Point: As long as some of the allegations in a complaint arguably fall within the protection of the insurance policy, the insurer is obligated to defend the insured.

MAY 3, 2024

LABOR LAW-CONSTRUCTION LAW, CIVIL PROCEDURE.

LABOR LAW 240(1) DOES NOT APPLY TO SLIPPING ON A STAIRCASE STEP, THE PERMANENT STAIRCASE IS NOT A SAFETY DEVICE; PLAINTIFF'S MOTION TO AMEND THE PLEADINGS TO ADD AN INDUSTRIAL CODE VIOLATION SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined (1) Labor Law 240(1) does not apply to slipping on a staircase step; and (2) plaintiff should have been allowed to amend the pleadings to assert a violation the Industrial Code in support of the Labor Law 241(6) cause of action:

"'[L]eave to amend the pleadings to identify a specific, applicable Industrial Code provision may properly be granted, even after the note of issue has been filed, where the plaintiff makes a showing of merit, and the amendment involves no new factual allegations, raises no new theories of liability, and causes no prejudice to the defendant'" … . "Mere lateness is not a barrier" to amendment, absent prejudice … , which exists where the nonmoving party "has been hindered in the preparation of [its] case or has been prevented from taking some measure in support of [its] position" … .

Here, the Supreme Court improvidently exercised its discretion in denying that branch of the plaintiff's motion which was for leave to amend the bill of particulars to allege a violation of 12 NYCRR 23-3.3(e) with regard to the Labor Law § 241(6) cause of action. The plaintiff made a showing of merit, the amendment presented no new factual allegations or new theories of liability, and the amendment did not prejudice the defendants. The defendants were put on sufficient notice through the complaint, the bill of particulars, and the plaintiff's deposition testimony that the Labor Law § 241(6) cause of action related to the defendants' alleged failure to provide proper safety devices, such as a chute or hoist, to be used in the removal of demolition debris from the building during demolition operations. * * *

… [D]efendants established, prima facie, that Labor Law § 240(1) was inapplicable to the facts of this case … . The permanent staircase from which the

plaintiff fell was a normal appurtenance to the building and was not designed as a safety device to protect him from an elevation-related risk … . Verdi v SP Irving Owner, LLC, 2024 NY Slip Op 02721, Second Dept 5-15-24

Practice Point: A permanent staircase is not a safety device within the meaning of Labor Law 240(1).

Practice Point: Amendment of pleadings alleging a violation of Labor Law 241(6) to add the violation of an Industrial Code provision should generally be allowed, even if late.

MAY 15, 2024

LABOR LAW-CONSTRUCTION LAW, EVIDENCE.

ALTHOUGH PLAINTIFF MADE OUT A PRIMA FACIE CASE IN THIS LABOR LAW 240(1) LADDER-FALL ACTION, DEFENDANTS RAISED TRIABLE ISSUES OF FACT BY POINTING TO INCONSISTENCIES IN PLAINTIFF'S ACCOUNT (FIRST DEPT).

The First Department, reversing Supreme Court, determined defendants were able to raise triable issues of fact in this ladder-fall Labor Law 240(1) cause by pointing to inconsistencies in the plaintiff's version of events:

Plaintiff was allegedly injured while removing and replacing bricks on a building at a construction site. At his deposition, plaintiff testified that while working, he climbed up an extension ladder to retrieve materials necessary for the project. According to plaintiff, when he reached a point around seven to eight feet off the ground, the ladder suddenly moved, causing him to fall.

Plaintiff established prima facie entitlement to summary judgment by submitting his deposition testimony describing the accident, along with photographic evidence of the accident site.

… [D]efendants raised triable issues of fact sufficient to defeat the motion by identifying various inconsistencies in plaintiffs account of the accident, thus calling into question his overall credibility and the circumstances underlying his claimed

injuries … . For example, plaintiff testified inconsistently about the day that he was allegedly injured, whether he continued working after his alleged accident, and whether he promptly reported his accident. Further, the record evidence shows that plaintiff first went to the hospital at least several days after his employer had allegedly terminated him for unexplained, repeated absenteeism. Simpertegui v Carlyle House Inc., 2024 NY Slip Op 02609, First Dept 5-9-24

Practice Point: Credibility issues can defeat a motion for summary judgment.

MAY 9, 2024

LABOR LAW-CONSTRUCTION LAW.

ALTHOUGH THE PIPE WAS A DANGEROUS CONDITION INHERENT IN THE WORK, IT WAS AN AVOIDABLE DANGEROUS CONDITION AND THERE REMAIN QUESTIONS ABOUT MEASURES TAKEN TO MINIMIZE THE TRIPPING HAZARD (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined there were questions of fact which rendered the summary judgment motion premature in this Labor Law 241(6) action. A pipe 5-12 inches above the floor, although a dangerous condition inherent in the work, was an "avoidable dangerous condition." There remain questions of fact about preventative measures taken to minimize the tripping hazard:

Plaintiff, a welder, tripped over electrical conduit piping that rose vertically 5-12 inches in height from the floor surface in the lobby of a new building under construction and was injured. While the presence of the electrical conduit piping was a "dangerous condition" "inherent to the task at hand," the risk of tripping over the conduit was an "avoidable dangerous condition" for which defendants could have utilized preventative measures that would not have made it impossible to complete the work … . Indeed, it is undisputed that plywood boxes ordinarily were placed on the protruding conduit piping, which mitigated the risk of tripping without rendering the overall work impossible to complete. The plywood boxes, however, were removed at the time of plaintiff's accident. Issues of fact remain regarding the preventative measures taken to mitigate the risks associated with the

dangerous condition. Accordingly, summary judgment on the Labor Law § 241 (6) is premature and the claim is reinstated to resolve the issues of fact detailed above. Maldonado v Hines 1045 Ave. of the Ams. Invs. LLC, 2024 NY Slip Op 02666, First Dept 5-14-24

Practice Point: In the context of a Labor Law 241(6) cause of action, even though a dangerous condition is inherent in the work, it may be an avoidable dangerous condition requiring measures to mitigate the risk.

MAY 14, 2024

LABOR LAW-CONSTRUCTION LAW.

DEFENDANT IN THIS LADDER-FALL CASE RAISED A QUESTION OF FACT WHETHER PLAINTIFF MISSED A STEP AND WAS THEREFORE THE SOLE PROXIMATE CAUSE OF THE FALL; A TWO-JUSTICE DISSENT DISAGREED (FOURTH DEPT).

The Fourth Department determined defendant in this ladder-fall case raised a question of fact whether plaintiff was the sole proximate cause of his fall. The two-justice dissent disagreed:

We conclude that plaintiff met his initial burden on the motion of establishing that the ladder was "not so placed . . . as to give proper protection to [him]" through evidence that plaintiff fell when the ladder suddenly and unexpectedly shifted … . The burden then shifted to defendant to raise a triable issue of fact whether plaintiff's "own conduct, rather than any violation of Labor Law § 240 (1), was the sole proximate cause of [his] accident"… . We conclude that defendant met that burden through evidence suggesting that plaintiff fell from the ladder because he missed a step while descending, not because the ladder shifted or otherwise failed … .

From the dissent:

… [E]ven if there was non-hearsay evidence that plaintiff mis-stepped and missed a rung while descending the ladder, defendant still does not raise a triable question of fact with respect to proximate cause. "It is well settled that [the] failure to

properly secure a ladder to insure that it remains steady and erect while being used, constitutes a violation of Labor Law § 240 (1)" … and, here, defendant does not dispute plaintiff's allegations that defendant failed to properly erect, secure or place the ladder to prevent it from shifting. Missing a rung while descending the ladder is not an act of "such an extraordinary nature or so attenuated from the statutory violation as to constitute a cause sufficient to relieve [defendant] of liability" … . Krause v Industry Matrix, LLC, 2024 NY Slip Op 02653, Fourth Dept 5-10-24

Practice Point: Here evidence plaintiff "missed a step' raised a question of fact whether plaintiff was the sole proximate cause of his fall from a ladder.

MAY 10, 2024

LANDLORD-TENANT, ASSAULT BY TENANT.

TENANT'S ATTACK ON PLAINTIFF WAS NOT FORESEEABLE; THEREFORE THE LANDLORD WAS NOT LIABLE IN NEGLIGENCE FOR FAILING TO EVICT THE TENANT (FIRST DEPT).

The First Department, reversing Supreme Court, determined a tenant's (Girard's) attack on plaintiff was not foreseeable. Therefore the negligence action against the landlord for failing to evict Girard was dismissed:

Defendant demonstrated … that it was not liable for third-party defendant Girard's attack on plaintiff because it was not reasonably foreseeable … . No evidence was presented that Girard had engaged in criminal conduct prior to the attack or that he was violent, had a propensity toward violence, or had threatened any tenants of the building. Inconsiderate behavior, such as playing loud music at all hours, engaging in loud arguments with his sister in the apartment, and banging on the apartment walls, is insufficient to have placed defendant on notice that Girard would stab plaintiff in response to plaintiff's noise complaints … . While it was conceivable that the dispute might escalate into violence, "conceivability is not the equivalent of foreseeability" … . Plaintiff failed to present evidence sufficient to raise a triable issue of fact concerning whether defendant was negligent in not taking steps to

evict Girard prior to the attack…. . Goris v New York City Hous. Auth., 2024 NY Slip Op 02661, First Dept 5-14-24

Practice Point: Here the tenant who attacked plaintiff, although loud and argumentative, had never been violent. Therefore the tenant's attack was not foreseeable and the landlord could not be held liable in negligence for failing to evict the tenant.

MAY 14, 2024

LANDLORD-TENANT, ASSAULT ON TENANT.

PLAINTIFF'S ALLOWING HIS ATTACKER INTO HIS APARTMENT WAS AN INTERVENING ACT AND A SUPERSEDING PROXIMATE CAUSE WHICH RELIEVED THE BUILDING DEFENDANTS OF ANY LIABILITY FOR LAPSES IN SECURITY (FIRST DEPT).

The First Department, reversing Supreme Court, determined that there was evidence building security was lax, but plaintiff's allowing the attacker, whom plaintiff knew, into to plaintiff's apartment was an intervening act relieving the building defendants from liability:

Plaintiff, a psychiatrist, was conducting a patient session in his home office when Jacob Nolan, the cousin of his estranged former partner barged unannounced into the office. He was carrying a large black duffel bag and demanded that plaintiff give him certain financial documents required for the child shared by plaintiff and the former partner.… Plaintiff reproached Nolan, successfully expelled him from the apartment and locked the door. After the session, the patient departed but quickly returned to advise the plaintiff that the man who barged in was loitering in a common area of the building. Plaintiff then escorted his patient to the elevator and again engaged Nolan in dialogue. Nolan again communicated that his purported purpose was to retrieve some financial documents for the former partner and asked to use the bathroom in plaintiff's apartment (which plaintiff made available to patients). Plaintiff then permitted Nolan into his locked apartment to use the bathroom, while plaintiff printed the form Nolan had requested. Nolan then suddenly emerged from the bathroom and attacked plaintiff, hitting him with a

sledgehammer and stabbing him multiple times with a knife. Nolan and the former partner were both arrested and convicted for felony assaults upon the plaintiff.

… Supreme Court should have granted defendant's motion for summary judgment dismissing the complaint. … [P]laintiff raised legitimate issues regarding lapses in the defendants' security protocols, such as defendants' allowing Nolan to enter and wander around the building for over twenty minutes before exiting, only to re-enter the building minutes later without being challenged by the building staff about his continued presence. Plaintiff's conduct in re-admitting Nolan into the apartment after earlier expelling him, however, constituted an intervening act and a superseding proximate cause … . Weiss v Park Towers S. Co., LLC, 2024 NY Slip Op 02612, First Dept 5-9-24

Practice Point: Here plaintiff knew his attacker and allowed the attacker into his apartment. That was an intervening act and a superseding proximate cause of plaintiff's injuries which insulated the building defendants from liability for lapses in security.

MAY 9, 2024

MEDICAL MALPRACTICE, EVIDENCE.

THE NEARLY $10 MILLION VERDICT IN THIS MEDICAL MALPRACTICE ACTION WAS SUPPORTED BY SUFFICIENT EVIDENCE OF PROXIMATE CAUSE; IT WAS ALLEGED DEFENDANT DOCTOR SHOULD HAVE SENT PLAINTIFF'S DECEDENT TO THE EMERGENCY ROOM AND THE FAILURE TO DO SO PLAYED A ROLE IN PLAINTIFF'S DECEDENT'S SUICIDE THE NEXT DAY (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the nearly $10 million verdict should not have been set aside on the ground the evidence of proximate cause was insufficient. Plaintiff alleged defendant doctor (Strange) should have sent plaintiff's decedent to the emergency room the day before plaintiff's decedent committed suicide. The matter was remitted for consideration of other grounds for setting aside verdict:

… Supreme Court erred in granting that branch of Strange's motion which was to set aside the verdict on the issue of proximate cause and for judgment as a matter of law dismissing the complaint insofar as asserted against him, since the jury reasonably concluded, based on the evidence presented at trial, that Strange's alleged departures were a proximate cause of the decedent's death. The plaintiff's expert witness testified that the decedent's suicide was preventable and that a referral to the emergency room would have allowed the decedent to be admitted to the hospital. Such testimony was sufficient to allow a reasonable person to conclude that it was more probable than not that Strange's conduct, under these circumstances, diminished the decedent's chance of a better outcome … . Shouldis v Strange, 2024 NY Slip Op 02340, Second Dept 5-2-24

Practice Point: Proximate cause in a medical malpractice case is demonstrated if the doctor's conduct "diminished the … chance of a better outcome."

MAY 1, 2024

MEDICAL MALPRACTICE, EVIDENCE, JUDGES.

THE JUDGE SHOULD NOT HAVE REJECTED PLAINTIFF'S EXPERT'S OPINION BECAUSE SHE WAS A REGISTERED NURSE, NOT A DOCTOR; THE REGISTERED NURSE WAS QUALIFIED TO OFFER AN OPINION ON FALL PREVENTION; AN EXPERT'S QUALIFICATIONS SPEAK TO THE WEIGHT OF THE OPINION EVIDENCE, NOT ADMISSIBILITY (FIRST DEPT).

The First Department, reversing Supreme Court, determined the evidence submitted by plaintiff's expert, a registered nurse, should not have been rejected because she was not a physician. Plaintiff's decedent was a nursing-home patient with dementia who fell. The registered nurse was qualified to offer opinion evidence about measures to prevent elderly patients from falling:

Supreme Court disregarded plaintiff's nursing expert's opinion because she is not a medical doctor. However, the standard of care at issue clearly falls within the duties and expertise of a registered nurse. At the defendant nursing home, patient

assessments were performed by registered nurses and evaluated by a team which included registered nurses. The nursing expert's curriculum vitae demonstrates that she has a Bachelor of Science in nursing from the University of the State of New York, is licensed as a registered nurse in New York, and has worked in nursing since 1980. In particular, she has over fifteen years of experience conducting plan of care assessments for high-risk nursing home patients. Therefore, plaintiff's nursing expert demonstrated that she has the requisite experience and expertise to opine as to the proper medical standard for preventing falls in elderly patients with dementia residing in skilled nursing facilities and whether defendant deviated from that standard … .

Furthermore, challenges regarding an expert witness's qualifications affect the weight to be accorded the expert's views, not their admissibility … . Rodriguez v Isabella Geriatric Ctr. Inc., 2024 NY Slip Op 02608, First Dept 5-9-24

Practice Point: Here the registered nurse was qualified to offer an opinion on the measures necessary to prevent geriatric patients from falling.

Practice Point: An expert's qualifications speak to the weight of the opinion evidence, not its admissibility. Here the registered nurses opinion should not have been rejected because she was not a physician.

MAY 9, 2024

MEDICAL MALPRACTICE, EVIDENCE.

THE DEFENSE EXPERT'S AFFIRMATION IN THIS MED MAL CASE DID NOT ADDRESS ALL THE MALPRACTICE ALLEGATIONS IN THE PLEADINGS; DEFENDANTS' SUMMARY JUDGMENT MOTON SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that the defendants' medical expert in this medical malpractice case did not address all the malpractice allegations in the pleadings:

"Medical expert affirmations that fail to address the essential factual allegations in the plaintiff's complaint or bill of particulars fail to establish prima facie

entitlement to judgment as a matter of law" … . Bare conclusory assertions that a defendant did not deviate from good and accepted medical practice, with no factual relationship to the alleged injury, do not establish that the cause of action has no merit so as to entitle a defendant to summary judgment … .

Here, the affirmation of the defendants' fetal medicine expert was insufficient to establish the absence of any departure from good and accepted medical practice by [two defendants].. The affirmation failed to eliminate triable issues of fact as to whether the plaintiff was in preterm labor … , and whether the preterm delivery could have been prevented … . Neumann v Silverstein, 2024 NY Slip Op 02712, Second Dept 5-15-24

Practice Point: In a med mal case, if the defense expert does not address all the allegations of malpractice the defense motion for summary judgment should not be granted.

MAY 15, 2024

MEDICAL MALPRACTICE.

FAILURE TO PROPERLY ASSESS A PATIENT'S RISK OF FALLING AND NEED FOR SUPERVISION SOUNDS IN MEDICAL MALPRACTICE, NOT NEGLIGENCE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the action sounded in medical malpractice, not negligence. Plaintiff's decedent, who was blind, fell from an examining table when the nurse stepped away to throw away gauze in a nearby trash can:

Allegations that a health care provider improperly assessed a patient's risk of falling and need for supervision or restraint, in light of his or her medical condition, "implicate questions of medical competence or judgment linked to . . . treatment" (Weiner v Lenox Hill Hosp., 88 NY2d at 788) and, therefore, sound in medical malpractice … . Here, the essence of the allegations was that the defendants were negligent in their assessment of "the level of supervision, nursing care, and security required for [Davis]," in light of her physical condition and the

administration of narcotic medications … . Such allegations sound in medical malpractice as opposed to ordinary negligence … .

Accordingly, the Supreme Court erred in denying the defendants' cross-motion to compel the plaintiff to serve a certificate of merit and notice of medical malpractice and to transfer the action from the general negligence part to the medical malpractice part. Snow v Gotham Staffing, LLC, 2024 NY Slip Op 02833, Second Dept 5-22-24

Practice Point: Failure to properly assess a patient's risk of falling and need for supervision sounds in medical malpractice, not ordinary negligence.

MAY 22, 2024

MEDICAL MALPRACTICE.

THE "SHEPPARD-MOBLEY" BAR TO A MOTHER'S RECOVERY FOR EMOTIONAL HARM IF HER BABY IS BORN ALIVE DOES NOT APPLY TO A LACK-OF-INFORMED CONSENT, AS OPPOSED TO A MEDICAL MALPRACTICE, CAUSE OF ACTION; HERE MOTHER ALLEGED SHE DID NOT CONSENT TO TWO UNSUCCESSFUL VACUUM EXTRACTION ATTEMPTS WHICH PRECEDED THE C-SECTION; HER BABY DIED EIGHT DAYS AFTER BIRTH (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Rodriguez, over a partial dissent, determined plaintiff's lack-of-informed-consent cause of action properly survived defendant doctor's (Grimaldi's) motion for summary judgment. Plaintiff mother alleged she did not consent to the two unsuccessful vacuum extraction attempts which preceded the C-section delivery of her baby. The baby died eight days after birth. The First Department questioned the continued relevance of Sheppard-Mobley v King, 4 NY3d 627 (2005) which held, in an action for medical malpractice, mother cannot recover for emotional harm if the baby is born alive. The First Department distinguished Sheppard-Mobley on the ground that the instant action alleges a lack of informed consent, not ordinary medical malpractice:

This appeal concerns, among other issues, whether Sheppard-Mobley v King (4 NY3d 627 [2005]) (Sheppard-Mobley) and related cases bar a plaintiff mother's claim for emotional harm resulting from lack of informed consent for certain prenatal procedures. We hold that they do not.

Sheppard-Mobley held that a mother's damages for emotional harm could not be recovered on a cause of action for ordinary medical malpractice where the child was born alive and in the absence of independent physical injury to the mother. Accordingly, plaintiff's claim based on lack of informed consent—a separate theory of recovery that, under the circumstances, implicates different interests than the ordinary medical malpractice claim at issue in Sheppard-Mobley—is distinguishable.

In addition, assuming [for the sake of argument] the rule of Sheppard-Mobley applies to claims for ordinary medical malpractice and lack of informed consent alike, we are of the opinion that the rule should be revisited. * * * Now almost 20 years after Sheppard-Mobley, further consideration is warranted with respect to whether a mother may recover for emotional damages resulting from physical injuries to her fetus or infant during pregnancy, labor, or delivery caused by medical malpractice or lack of informed consent. SanMiguel v Grimaldi, 2024 NY Slip Op 02881, First Dept 5-23-24

Practice Point: Here the First Department held that the bar to mother's recovery for emotional harm if her baby is born alive does not apply to a lack-of-informed consent, as opposed to a medical malpractice, cause of action.

MAY 23, 2024

MEDICAL MALPRACTICE.

THE MEDICAL MALPRACTICE ACTION AGAINST THE RESIDENT WHO PERFORMED THE SURGERY UNDER THE SUPERVISION OF ANOTHER SURGEON SHOULD HAVE BEEN DISMISSED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the medical malpractice action against the resident who performed the surgery (Kent) should

have been dismissed because the resident was acting under the supervision of another surgeon (Doak):

With respect to the appeal by Kent and the Kaleida Health defendants, we conclude that Supreme Court erred in denying that part of their motion (Kaleida motion) seeking summary judgment dismissing the complaint and any cross-claims against Kent because Kent did not exercise independent medical judgment during the surgery. It is well settled that a " 'resident who assists a doctor during a medical procedure, and who does not exercise any independent medical judgment, cannot be held liable for malpractice so long as the doctor's directions did not so greatly deviate from normal practice that the resident should be held liable for failing to intervene' " … , even where the resident " 'played an active role in [the plaintiff's] procedure' " … . Kent and the Kaleida Health defendants met their burden on the Kaleida motion with respect to Kent by submitting evidence that plaintiff was Doak's patient, Doak determined the surgery that was to be performed, and Doak directly supervised Kent during the facetectomy, and plaintiff failed to raise a triable issue of fact in opposition … . Van Hook v Doak, 2024 NY Slip Op 02641, Fourth Dept 5-10-24

Practice Point: A resident who does not exercise independent medical judgment when performing surgery under the supervision of another surgeon cannot be sued for medical malpractice.

MAY 10, 2024

MUNICIPAL LAW, CIVIL PROCEDURE.

PHYSICAL INCAPACITY CAN BE A REASONABLE EXCUSE FOR FAILING TO TIMELY FILE A NOTICE OF CLAIM, BUT THE PERIOD OF DISABILITY DOES NOT TOLL THE ONE YEAR AND 90 DAY PERIOD FOR FILING A MOTION FOR LEAVE TO FILE A LATE NOTICE OF CLAIM (FIRST DEPT).

The First Department, reversing Supreme Court, determined the motion for leave to file a late notice claim against the NYC Transit Authority should not have been granted because the motion was made more than one year and 90 days after the cause of action accrued. Although physical incapacity can be a reasonable excuse

for failing to file a notice of claim withing 90 days, it does not toll the period for making a timely motion for leave to file a late notice of claim:

The court erred … in concluding that plaintiff's hospitalization from the February 12, 2020 accident until April 11, 2020 rendered timely plaintiff's January 25, 2021 notice of claim upon defendant NYC Transit Authority … . Although physical incapacity may be properly considered as a reasonable excuse under General Municipal Law § 50-e (5) for the failure to timely file a notice of claim … , it is relevant only upon timely motion for leave to file a late notice of claim "made before or after the commencement of the action but not more than one year and 90 days after the cause of action accrued" … . Melgarejo v City of New York, 2024 NY Slip Op 02892, First Dept 5-28-24

Practice Point: A period of physical incapacity may be a reasonable excuse for failing to file a timely notice of claim, but it does not toll the one year and 90 day statute of limitations for filing a motion for leave to file a late notice of claim.

MAY 28, 2024

MUNICIPAL LAW.

THE REPORT OF THE INCIDENT IN WHICH PETITIONER WAS INJURED DID NOT PROVIDE THE CITY DEFENDANTS WITH NOTICE OF A CONNECTION BETWEEN THE INJURIES AND ANY NEGLIGENCE ON THE PART OF THE DEFENDANTS; THEREFORE THE CITY DEFENDANTS DID NOT HAVE NOTICE OF THE CLAIM WITHIN 90 DAYS; IN ADDITION, IGNORANCE OF THE LAW IS NOT A VALID EXCUSE FOR FAILURE TO TIMELY FILE A NOTICE OF CLAIM; THE PETITION FOR LEAVE TO FILE AND SERVE LATE NOTICES OF CLAIM SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the petition for leave to file and serve late notices of claim in this construction accident case should not have been granted. Although there was a report about the incident, nothing in the report made a connection between petitioner's injuries and

negligence on the part of the city defendants. Another incident report made by one municipal entity (MTA Capital Construction) cannot be imputed to other municipal entities:

The evidence submitted in support of the petition failed to establish that the City, NYC Department of Design and Construction, NYC Department of Transportation, and New York City Transit Authority (hereinafter collectively the City appellants) or the MTA [Metropolitan Transportation Authority] acquired actual knowledge of the essential facts constituting the claim within 90 days after the claim arose or a reasonable time thereafter. "'A report which describes the circumstances of the accident without making a connection between the petitioner's injuries and negligent conduct on the part of the public corporation will not be sufficient to constitute actual notice of the essential facts constituting the claim'" … The incident report upon which the petitioner relied did not connect his injuries to negligent conduct on the part of the City appellants or the MTA, and the incident report, prepared by MTA Capital Construction, cannot be imputed to other municipal entities … . Moreover, the petitioner testified at a hearing pursuant to General Municipal Law § 50-h that only his employer's personnel were present at the construction site when the accident occurred.

The petitioner also failed to provide a reasonable excuse for failing to timely serve the notices of claim. The petitioner's ignorance of the law does not constitute a reasonable excuse … . Furthermore, the petitioner did not adduce sufficient evidence to support his claim that he was unable to timely serve the notices of claim because he was seeking medical treatment and recovering from medical procedures, as he provided evidence only that he was unable to work for intermittent periods during the eight-month interval between the date of the accident and the service of the notices of claim … . Matter of Almeida v City of New York, 2024 NY Slip Op 02699, Second Dept 5-15-24

Practice Point: In order for an incident report to provide notice of a potential lawsuit against a municipality such that a late notice of claim will be excused, the report must connect the injuries to negligence on the part of the municipal defendants (not the case here).

Practice Point: In the context of a petition for leave to file a late notice of a claim against a municipality, an incident report created by one municipal entity will not be deemed to have provided notice of the incident to other municipal entities.

MAY 15, 2024

PRODUCTS LIABILITY, CIVIL PROCEDURE, EVIDENCE.

PLAINTIFF WAS INJURED USING DEFENDANT'S BOW; DEFENDANT MOVED FOR PERMISSION TO PERFORM TESTS ON THE BOW WHICH INVOLVED REMOVING AND THEN REPLACING THE DAMAGED COMPONENT OF THE BOW; THE JUSTIFICATION FOR SUCH TESTING WAS NOT DEMONSTRATED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined defendant bow manufacturer (PSE) was not entitled to testing of the bow beyond the visual inspection already done. Plaintiff was struck in the eye when using the bow. Defendant moved for permission to replace the damaged component of the bow, test the bow, and then replace the damaged component. Supreme Court had granted the motion:

A party "seeking to conduct destructive testing should provide a reasonably specific justification for such testing including, inter alia, the basis for its belief that nondestructive testing is inadequate and that destructive testing is necessary; further, there should be an enumeration and description of the precise tests to be performed, including the extent to which each such test will alter or destroy the item being tested" … . Even assuming, arguendo, that the additional testing proposed by PSE is non-destructive, we conclude that PSE failed to establish in the first instance that the additional testing is "material and necessary" to its defense of the action (CPLR 3101 [a] …). PSE's expert made only a conclusory statement that re-stringing the bow with an undamaged component "should better represent the condition it was in prior to the" accident … . Therefore, even in the absence of an abuse of the court's discretion, we substitute our own discretion for that of the motion court and deny the motion … . Roche v Precision Shooting Equip., Inc., 2024 NY Slip Op 02419, Fourth Dept 5-3-24

Practice Point: There are standards which must be met in a products liability case before a court will allow testing, either nondestructive of destructive testing, of the product. Those standards were not met by the motion papers in this case.

MAY 3, 2024

PRODUCTS LIABILITY, EVIDENCE.

PLAINTIFF ALLEGED THE AIR BAG UNEXPECTEDLY DEPLOYED, CAUSING INJURY; DEFENDANT FORD'S EXPERT EVIDENCE SUBMITTED IN SUPPORT OF DEFENDANT'S SUMMARY JUDGMENT MOTION DID NOT DEMONSTRATE THE CAUSE OF THE DEPLOYMENT WAS NOT ATTRIBUTABLE TO A PRODUCT DEFECT (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined defendant Ford Motor did not present sufficient expert evidence to warrant summary judgment in this "unexpected-air-bag-deployment" case:

Just prior to the airbag's deployment, decedent's vehicle had collided with a deer. After the collision, decedent parked his vehicle on the side of the road, then he looked to his right to check on his passengers in the vehicle and looked to the left to see the deer. At that point the airbag deployed. * * *

It is well settled that a strict products liability cause of action may be established by circumstantial evidence, and thus a plaintiff " 'is not required to prove the specific defect' " in the product … . "In order to proceed in the absence of evidence identifying a specific flaw, a plaintiff must prove that the product did not perform as intended and exclude all other causes for the product's failure that are not attributable to defendants" … . " 'Proof that will establish strict liability will almost always establish negligence' " … . * * *

Ford Motor's expert failed to assert that there existed a likely cause of the unexpected deployment of the airbag that was "not attributable to any defect in the design or manufacturing of the product," and therefore Ford Motor failed to meet its burden on its motion with respect to the strict products liability and negligence

causes of action … . Keem v Ford Motor Co., 2024 NY Slip Op 02632, Fourth Dept 5-10-24

Practice Point: Defendant Ford Motor did not present sufficient expert evidence to warrant summary judgment in this products liability/negligence action based upon the alleged unexpected deployment of an air bag.

MAY 10, 2024

SEXUAL ABUSE, SOCIAL SERVICES LAW, MUNICIPAL LAW.

FORMER AND CURRENT SECTION 413 OF THE SOCIAL SERVICES LAW REQUIRES THE REPORTING OF ANY SUSPECTED INTENTIONAL INFLICTION OF SERIOUS PHYSICAL INJURY UPON A CHILD, WHICH INCLUDES SEXUAL ABUSE, EVEN WHEN THE PERSON SUSPECTED OF THE ABUSE IS NOT LEGALLY RESPONSIBLE FOR THE CARE OF THE CHILD; TWO JUSTICE DISSENT (FOURTH DEPT).

The Fourth Department, over a two-justice dissent, determined former section 413 of Social Services Law, as the current section mandates, requires that all instances of suspected intentionally inflicted serious injury upon a child be reported, regardless of who is suspected of inflicting it. In other words, the suspected intentional infliction of serious injury upon a child must be reported, even if the person suspected of inflicting it is not a person legally responsible for the child. Despite this finding, the Fourth Department held that the cause of action based upon former section 413 should have been dismissed because the complaint does not allege the defendant town had received information that its employee, plaintiff's youth baseball coach, was sexually assaulting plaintiff:

… [W]e conclude that Social Services Law former § 413 mandated, as the current version mandates, the reporting of every instance of suspected intentionally inflicted serious physical injury upon a child, regardless of who is suspected to have inflicted it, thereby triggering an investigation of the child's parent or other legally responsible person—as a "subject of the report"—to determine whether, inter alia, that person inflicted or allowed the harm to be inflicted upon the child.

"[T]he purpose of [the child protective services provisions under Social Services Law article 6, title 6, is] to encourage more complete reporting of suspected child abuse and maltreatment," not less (Social Services Law § 411), and the former and current versions of sections 412 (2) (b) and 413 apply equally to children who have had a serious physical injury intentionally inflicted by, inter alia, a coach, a classroom teacher, a neighbor, another child or a distant relative who is not legally responsible for the child's care.

From the dissent:

We write separately only to express our disagreement with the conclusion of the majority that … a mandated reporter is statutorily required to report any person who inflicted serious physical injury upon a child regardless of whether there is a parental or guardianship relationship, even where that same mandated reporter would not be required to report conduct constituting abuse. LG 70 Doe v Town of Amherst, 2024 NY Slip Op 02651, Fourth Deppt 5-10-24

Practice Point: Even where a person who is not legally responsible for the care of child is suspected of sexually abusing the child, the abuse must be reported pursuant to Social Services Law section 413.

MAY 10, 2024

SLIP AND FALL, EVIDENCE.

ALTHOUGH PLAINTIFF DID NOT KNOW WHICH STEP SHE SLIPPED AND FELL FROM, THERE WAS EVIDENCE ALL THE STEPS WERE UNLEVEL AND SLOPING; DEFENDANT DID NOT DEMONSTRATE THE CONDITION OF THE STAIRWAY WAS LATENT AND NOT DISCOVERABLE; DEFENDANT'S SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant did not demonstrate plaintiff could not identify the cause of her stairway fall and defendant did not demonstrate the nonlevel and sloping condition of the steps was latent and could not have been discovered:

… [T]he plaintiff testified that her fall was caused by the fact that the "stairs were not level . . . not straight." Although the plaintiff testified that she might have lost her balance on either the fourth step from the top of the staircase or the fourth step from the bottom of the staircase, the report of the plaintiff's expert witness … stated that the treads on the staircase were "uneven and pitched forward," creating an "inherent walking hazard," and that the "out-of-level and sloping condition" affected "the entire staircase."

* * * "In moving for summary judgment on the ground that [a] defect was latent, a defendant must establish, prima facie, that the defect was indeed latent—i.e., that it was not visible or apparent and would not have been discoverable upon a reasonable inspection"….. Here, the evidence proffered in support of the defendant's motion failed to establish, prima facie, that the nonlevel and sloping condition that allegedly caused the plaintiff to fall amounted to a latent condition and could not have been discovered upon a reasonable inspection. Toro v McComish, 2024 NY Slip Op 02945, Second Dept 5-29-24

Practice Point: Here the unlevel and sloping condition of the steps in the stairway where plaintiff fell was not shown to be latent and undiscoverable upon inspection.

MAY 29, 2024

SLIP AND FALL, EVIDENCE.

PLAINTIFF RAISED A QUESTION OF FACT RE: THE NEGLIGENT APPLICATION OF FLOOR WAX IN THIS SLIP AND FALL CASE (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined plaintiff raised a question of fact whether the area where she slipped and fell was excessively waxed:

… [P]laintiff raised an issue of fact as to "the negligent application of wax . . . by evidence that a dangerous residue of wax was present" … . Plaintiff testified that the waxy substance on the floor was on the side of her clothing and that where she fell there was an indentation into the substance. This testimony is sufficient to establish an issue of fact as to whether wax was negligently applied … . This

evidence “conflicted with [defendants’] assertions that the area was never waxed, creating triable issues of fact precluding the grant of summary judgment” … . Scaccia v Brookfield Props. One WFC Co., LLC, 2024 NY Slip Op 02677, First Dept 5-14-23

Practice Point: The negligent application of floor wax can result in liability for a slip and fall.

MAY 14, 2024

TRAFFIC ACCIDENTS, CONTRACT LAW, EVIDENCE.

IN THIS CAR ACCIDENT CASE, PLAINTIFF RAISED A QUESTION OF FACT WHETHER THE RELEASE SHE SIGNED WAS THE RESULT OF MUTUAL MISTAKE CONCERNING THE EXTENT OF HER INJURIES (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined there was a question of fact whether the release signed by plaintiff after a car accident was the result of mutual mistake. At the time plaintiff signed the release it appeared her injuries, including whiplash, involved only her cervical, thoracic and lumbar regions. After signing the release she was diagnosed as having suffered a mild traumatic brain injury:

… [I]nasmuch as the submissions indicate that plaintiff had been diagnosed with neck and back injuries only at the time she signed the release and that plaintiff’s symptoms were not medically attributed to postconcussive syndrome until after the execution of the release with additional uncertainty in the interim, we conclude that plaintiff raised an issue of fact whether, at the time the release was executed, the parties were under “[a] mistaken belief as to the nonexistence of [a] presently existing injury,” i.e., a traumatic brain injury … . We therefore … reinstate the complaint. DiDomenico v McWhorter, 2024 NY Slip Op 02634, Fourth Dept 5-10-24

Practice Point: A release signed when both parties are not aware of an existing injury may be invalid as the result of mutual mistake.

MAY 10, 2024

TRAFFIC ACCIDENTS, VEHICLE AND TRAFFIC LAW, EVIDENCE.

DEFENDANT'S ALLEGATION PLAINTIFF CAME TO A SUDDEN STOP IN THIS REAR-END COLLISION CASE DID NOT RAISE A QUESTION OF FACT ABOUT DEFENDANT'S LIABILITY; HOWEVER A QUESTION OF FACT REMAINED CONCERNING DEFENDANT'S COMPARATIVE-NEGLIGENCE AFFIRMATIVE DEFENSE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff in this rear-end collision case should have been awarded summary judgment on liability, but defendant's comparative negligence affirmative defense properly survived dismissal. Defendant alleged that plaintiff made a sudden stop, which was not enough to raise a question of fact on defendant's liability:

… [P]laintiff established her entitlement to judgment as a matter of law on the issue of liability through her own affidavit, which demonstrated, prima facie, that the defendant's vehicle struck the plaintiff's vehicle in the rear while the plaintiff's vehicle was stopped on the LIE due to traffic conditions … . In opposition, the defendant failed to raise a triable issue of fact. The defendant's averments in his affidavit that the plaintiff's vehicle made a sudden stop and that the plaintiff had told the defendant after the accident that she had stopped her vehicle to allow another car merge into the lane ahead of her, do not provide a nonnegligent explanation for striking the plaintiff's vehicle …

However, the plaintiff failed to establish her prima facie entitlement to judgment as a matter of law dismissing the defendant's affirmative defense alleging comparative negligence on the ground that the defendant's negligence was the sole proximate cause of the accident. The plaintiff's affidavit failed to provide sufficient details to demonstrate, prima facie, that she was not comparatively at fault in causing the accident … . Fischetti v Simonovsky, 2024 NY Slip Op 02302, Second Dept 5-1-24

Practice Point: A defendant in a rear-end collision case will not escape summary judgment on liability by alleging plaintiff came to a sudden stop.

MAY 1, 2024

TRAFFIC ACCIDENTS, VEHICLE AND TRAFFIC LAW, EVIDENCE.

EVEN THOUGH PLAINTIFF BICYCLIST ADMITTED ROLLING THROUGH A BIKE-PATH STOP SIGN BEFORE ENTERING THE INTERSECTION, THERE REMAINED QUESTIONS OF FACT ABOUT WHETHER DEFENDANT DRIVER FAILED TO SEE WHAT WAS TO BE SEEN (THIRD DEPT).

The Third Department, reversing Supreme Court, determined defendant-driver's motion for summary judgment in this intersection bicycle-car collision case should not have been granted. Although plaintiff-bicyclist acknowledged he did not completely stop at the bike-path stop sign before entering the intersection, there were questions of fact whether defendant driver (Butler) failed to see what was to be seen:

… [P]laintiff's admission that he came to a "rolling stop" at the stop sign, which amounts to a violation of Vehicle and Traffic Law § 1172 (a) and establishes some degree of fault on his part. Nevertheless, that fact is not dispositive as to whether he was the sole proximate cause of the accident … . To this point, Butler's testimony suggests that no other vehicles were at the intersection prior to her turning left and that her visibility down the bike path was limited to approximately 20 feet, due in part to a building, trees and bushes obstructing her view. However, our review of the photographs of the intersection contained in the record casts doubt on that account, as a lengthy portion of the bike trail both preceding and after the stop sign located on said trail appears visible from Butler's vantage point both at the light and after she commenced the left turn. Whether plaintiff should have been visible to Butler is further unresolved by the time frames relative to Butler commencing the turn and the time to impact as well as the varying accounts from plaintiff, Butler and the police report specific as to how far Butler had traveled into the intersection before the collision took place … . Ruberti v Butler, 2024 NY Slip Op 02358, Third Dept 5-2-24

Practice Point: In this intersection bicycle-car collision case, plaintiff-bicyclist's failure to come to a complete stop at the bike-path stop sign did not establish he

was the sole proximate cause of the accident.. There were questions of fact about whether defendant driver failed to see what was there to be seen.

MAY 2, 2024

TRAFFIC ACCIDENTS, VEHICLE AND TRAFFIC LAW, EVIDENCE.

IN THIS BUS-PASSENGER INJURY CASE, THE BUS DRIVER RAISED A QUESTION OF FACT WHETHER THE EMERGENCY DOCTRINE APPLIED; THE BUS STRUCK A VEHICLE WHICH STOPPED SUDDENLY AFTER IT WAS CUT OFF BY A THIRD VEHICLE; THE BUS DRIVER'S AFFIDAVIT WAS SUPPORTED BY SURVEILLANCE VIDEO (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant bus driver raised a question of fact about the applicability of the emergency doctrine in this bus-passenger injury case. The bus driver's affidavit, together with video evidence, indicated that the vehicle struck by the bus stopped suddenly after being cut off by a third vehicle:

… [T]he defendants raised a triable issue of fact as to whether there was a nonnegligent explanation for the collision through the submission of an affidavit from Mendes [the bus driver] and a surveillance video of the accident … . In Mendes' affidavit, she attested, among other things, that she collided with the vehicle owned by Paratransit when that vehicle made a sudden stop after being "cut off" by another vehicle. Moreover, the surveillance video was consistent with the assertions in Mendes' affidavit. Yearwood v New York City Tr. Auth., 2024 NY Slip Op 02555, Second Dept 5-8-24

Practice Point: Although most rear-end collisions are deemed the fault of the rear driver, here it was alleged the front vehicle stopped suddenly after being cut off by a third vehicle, raising a question of fact about the applicability of the emergency doctrine as a defense.

Practice Point: Here is this rear-end collision case, the availability of surveillance video supported the applicability of the emergency doctrine as a defense.

MAY 8, 2024

WORKERS' COMPENSATION, EVIDENCE.

A SCHEDULE LOSS OF USE (SLU) EVALUATION BASED UPON THE EXPIRED 2012 GUIDELINES SHOULD NOT HAVE BEEN CONSIDERED BY THE WORKER'S COMPENSATION BOARD; A SECOND SLU EVALUATION BASED UPON THE CURRENT 2018 GUIDELINES HAD BEEN SUBMITTED BUT WAS NOT RELIED UPON BY THE BOARD (THIRD DEPT).

The Third Department, reversing the Workers' Compensation Board, determined the fact that the claimant's treating physician's (Harley's) initial schedule loss of use (SLU) evaluation was based on the expired 2012 guidelines, not the most recent 2018 guidelines, and therefore should not have been considered. The treating physician had subsequently submitted another SLU evaluation based on the 2018 guidelines with a significantly higher percentage of loss:

Inasmuch as Harley's permanency examination of claimant was "the first medical evaluation of SLU" and occurred after January 1, 2018, Harley improperly relied upon and applied the 2012 Guidelines in rendering his SLU opinion. As such, the Board's reliance upon Harley's medical report and testimony was erroneous; its decision is therefore not supported by substantial evidence and must be reversed … . Matter of Garofalo v Verizon N.Y., Inc., 2024 NY Slip Op 02961, Third Dept 5-30-24

Practice Point: A schedule loss of use (SLU) evaluation based upon expired guidelines should not be relied upon in a Worders' Compensation proceeding.

MAY 30, 2024

WORKERS' COMPENSATION, EVIDENCE.

UNDER THE WORKERS' COMPENSATION LAW PRESUMPTION IN SECTION 21, AN ASSAULT AT WORK IS EMPLOYMENT-RELATED AND COMPENSABLE ABSENT SUBSTANTIAL EVIDENCE THE ASSAULT WAS MOTIVATED BY PERSONAL ANIMOSITY (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Halligan, reversing the Appellate Division, determined the presumption that injury from an assault at work is employment-related and compensable applied in this hospital-shooting case. A former hospital employee entered the hospital wearing a white medical coat and shot six people in a non-public area, killing one. Petitioner, a first-year resident, was one of the wounded. Petitioner did not know and had never had any contact with the shooter. The Appellate Division held that there was no connection between petitioner's employment and the shooting and, therefore, the presumption the assault was work-related did not apply:

The Appellate Division essentially inverted Seymour's "nexus" standard by requiring the Board to come forward with evidence of a nexus to employment. Instead … Seymour stands for the principle that "an assault which arose in the course of employment is presumed to have arisen out of the employment, absent substantial evidence that the assault was motivated by purely personal animosity" (… see … Seymour, 28 NY2d at 409 [presumption cannot be rebutted by the inference of personal animosity "in the absence of substantial evidence to support it"]). To the extent the Appellate Division has read Matter of Seymour to require an additional affirmative showing of a "nexus" with employment when there is a workplace assault, such a showing is not required.

… [I]t is undisputed that the assault occurred in the course of Mr. Timperio's [petitioner's] employment, thereby triggering the WCL [Workers' Compensation Law] § 21 (1) presumption. It is also undisputed that the record includes no evidence of the motivation for the assault or any indication of a prior relationship between the assailant and the claimant; Bello [the shooter] and Timperio never worked together, did not know each other, and had no prior communication. The Appellate Division therefore erroneously disturbed the WCB's [Workers'

Compensation Board's] determination that the claim is compensable. Matter of Timperio v Bronx-Lebanon Hosp., 2024 NY Slip Op 02723, CtApp 5-16-24

Practice Point: Here petitioner was shot at work by a former employee he did not know. The presumption that the assault was employment-related (section 21 of the Workers' Compensation Law) applied because there was no evidence the assault was motivated by personal animosity. The injury from the assault was therefore compensable under the Workers' Compensation Law.

MAY 16, 2024

Copyright 2024 New York Appellate Digest, LLC