NEW YORK APPELLATE DIGEST, LLC

Personal Injury
Reversal Report
June 2024

An Organized Compilation of Summaries of Selected Decisions, Mostly Reversals, Addressing Personal Injury, Released and Posted on the New York Appellate Digest Website in June 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.

Contents

ABUSE BY PASTOR, NEGLIGENT HIRING, RETENTION AND SUPERVISON, EMPLOYMENT LAW, RELIGION.

DEFENDANTS "EVANGELICAL LUTHERAN CHURCH IN AMERICA (ELCA)" AND "UPSTATE NEW YORK SYNOD OF THE EVANGELICAL LUTHERAN CHURCH IN AMERICA (SYNOD)" HAD THE POWER TO DISCIPLINE AND TERMINATE A PASTOR ACCUSED OF ABUSE; THEREFORE THERE WAS A QUESTION OF FACT WHETHER THOSE DEFENDANTS WERE THE PASTOR'S EMPLOYERS; THE NEGLIGENT HIRING, SUPERVISION AND RETENTION CAUSES OF ACTION SHOULD NOT HAVE BEEN DISMISSED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the negligent hiring, retention and supervision causes of action against Evangelical Lutheran Church in America (ELCA) and Upstate New York Synod of the Evangelical Lutheran Church in America (Synod) should not have been dismissed on the ground that the alleged abuser (a pastor) was not an employee. Although the abuser was hired by a third-party church, St. Nicodemus, the ELCA's and the Synod's constitution provided that ELCA and Synod exercised control over discipline and termination of the pastor. Therefore there were questions of fact about ELCA's and Synod's status as employers:

… According to the ELCA Constitution and Bylaws, the authority to discipline pastors within the ELCA was granted to the synods and the ELCA. The authority to remove a pastor from the roster of ordained ministers remained with the synods and the ELCA. Once a pastor was removed from the roster of ordained ministers, a congregation that chose to retain that pastor could be removed from the ELCA. The entire disciplinary process was created by and governed by the ELCA Constitution and Bylaws. Under these circumstances, we conclude that plaintiffs' submissions raised an issue of fact whether the ELCA and the Synod exercised sufficient control over the retention and supervision of plaintiffs' alleged abuser so

as to constitute his employers … . PB-20 Doe v St. Nicodemus Lutheran Church, 2024 NY Slip Op 03246, Fourth Dept 6-14-24

Practice Point: Here, although the pastor accused of abuse was hired by a specific Lutheran church (St. Nicodemus), the defendants Evangelical Lutheran Church in America (ELCA) and Upstate New York Synod of the Evangelical Lutheran Church in America (Synod) had the power to discipline and terminate the pastor. Therefore there was a question of fact whether defendants were the pastor's employers such that the negligent hiring, retention and supervision causes of action should not have been dismissed.

JUNE 14, 2024

BANKRUPTCY, NOTICE OF PERSONAL INJURY ACTION.

PLANTIFF HAD NOT INFORMED THE BANKRUPTCY COURT OF THIS PERSONAL INJURY CAUSE OF ACTION; DEFENDANTS WERE ENTITLED TO SUMMARY JUDGMENT DISMISSING THE COMPLAINT PURSUANT TO THE DOCTRINE OF JUDICIAL ESTOPPEL (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff's failure to inform the Bankruptcy Court of this personal injury action triggered the doctrine of judicial estoppel entitling defendants to summary judgment dismissing the complaint:

While a chapter 13 bankruptcy debtor has standing to litigate cases that belong to the estate … , here the "[p]laintiff's prolonged failure to disclose this lawsuit to the [b]ankruptcy [c]ourt renders him judicially estopped from pursuing it" … . The plaintiff took an inconsistent position in the bankruptcy proceeding by, in effect, representing that he did not have the instant legal claim. The characterization of his assets was accepted and endorsed by the bankruptcy court throughout the duration of the bankruptcy proceeding, which included, among other things, confirmation of the plaintiff's plan … .

Based on the defense of judicial estoppel, [defendants] established their prima facie entitlement to judgment as a matter of law dismissing the amended complaint insofar as asserted against each of them … . Cussick v R.L. Baxter Bldg. Corp., 2024 NY Slip Op 03028, Second Dept 6-5-24

Practice Point: Failure to inform the Bankruptcy Court of a cause of action (here a personal-injury suit) triggers the doctrine of judicial estoppel, prohibiting the plaintiff from bringing the suit.

JUNE 5, 2024

BICYCLE ACCIDENT, IMMUNITY, GENERAL OBLIGATIONS LAW.

GENERAL OBLIGATIONS LAW 9-103 PROVIDES IMMUNITY FROM NEGLIGENCE SUITS STEMMING FROM AUTHORIZED RECREATIONAL USE OF THE OWNER'S PROPERTY, BUT DOES NOT PROVIDE IMMUNITY FOR ACTIONS OR OMISSIONS BY THE OWNER ALLEGED TO BE "WILLFUL OR MALICIOUS" (THIRD DEPT).

The Third Department, reversing (modifying) Supreme Court, determined plaintiff mountain biker's (Fleming's) cause of action alleging defendants' failure to properly maintain a wooden bridge on a trail was properly dismissed pursuant to General Obligations law section 9-103. But the cause of action alleging the negligent failure to maintain the bridge and the negligent failure to to warn of the dangerous condition, which further alleged the failure was "willful or malicious," should not have been dismissed. Willful and malicious actions are not within the scope of the immunity provided by General Obligations Law 9-103:

Plaintiffs [allege] that defendants had constructed and maintained the bridge in a manner that created a dangerous condition, and that, by failing to maintain the bridge and failing to warn of the dangerous condition, defendants' actions had been willful and malicious. … [T]he limitation of liability provided by General Obligations Law § 9-103 does not extend to the failure to warn of a dangerous condition if that failure was "willful or malicious" … .

… Fleming avowed that he was riding a mountain bike on trails that were publicized to be suitable for such activity by the Town of Malta. Because the first cause of action alleged only ordinary negligence, defendants were entitled to the immunity afforded by General Obligations Law § 9-103 if they could establish that Fleming was "engaged in one of the enumerated recreational activities on land suitable for that activity" … . Fleming v Jenna's Forest Homeowners' Assn., Inc., 2024 NY Slip Op 03216, Third Dept 6-13-24

Practice Point: General Obligations Law 9-103 protects property owners from negligence suits based on the authorized recreational use of the property, but does not protect property owners from suits alleging injury from "willful or malicious" actions or omissions.

JUNE 13, 2024

CHILD VICTIMS ACT, COURT OF CLAIMS, CLAIM, NO ALLEGATION ABUSE WAS FORESEEABLE.

THE CLAIM IN THIS CHILD VICTIMS ACT PROCEEDING DID NOT SET FORTH ANY FACTUAL BASIS FOR THE ALLEGATION THE STATE WAS OR SHOULD HAVE BEEN AWARE OF SEXUAL ABUSE BY ANOTHER CHILD IN A FOSTER HOME AND BY AN EMPLOYEE OF A CHILDREN'S FACILITY; THE CLAIM SHOULD HAVE BEEN DISMISSED (THIRD DEPT).

The Third Department, reversing the Court of Claims in this Child Victims Act proceeding, determined the claim did not set forth any factual basis for the allegation defendants were or should have been aware of the abuse by a child in a foster home and by a staff member of a children's facility. The claim, therefore, should have been dismissed:

Here, as to the abuse alleged at the foster home, the verified claim alleges only bare legal conclusions and lacks any factual specificity as to how defendant was put on notice of the danger posed by the minor perpetrator. As to the facility, the allegation that other staff members knew about the adult perpetrator's participation in the off-campus overnight trips would not have put defendant on notice about the adult perpetrator's propensity to sexually abuse children … . Although the allegation that a counselor discovered the sexual abuse may suffice to provide actual notice about the foreseeability of future abuse, the claim fails to allege that any such subsequent abuse took place … . Even granting the verified claim a liberal construction, presuming its allegations true and providing claimant the benefit of every possible inference, said claim failed to set forth any factual basis upon which defendant could have reasonably anticipated the perpetrators' harmful conduct and, thus, it failed to "provide a sufficiently detailed description of the particulars of the claim to enable defendant to investigate and promptly ascertain the existence and extent of its liability" … . As such, the Court of Claims erred in

denying defendant's motion to dismiss … . Berg v State of New York, 2024 NY Slip Op 03206, Third Dept 6-13-24

Practice Point: Here the allegation that the state was aware or should have been aware of the sexual abuse of the claimant by another child in a foster home and by a staff member of a children's facility were not supported by any facts which would allow the state to investigate. Therefore the claim should have been dismissed by the Court of Claims.

JUNE 13, 2024

CHILD VICTIMS ACT, EDUCATION-SCHOOL LAW, CRIMINAL LAW.

HERE IN THIS CHILD VICTIMS ACT (CVA) CASE, THE ALLEGATIONS OF ABUSE OF PLAINTIFF BY A TEACHER WERE BASED ON HER INABILITY TO CONSENT UNDER THE PENAL LAW; THEREFORE THE SCHOOL COULD ONLY BE LIABLE FOR NEGLIGENT SUPERVISION UNTIL PLAINTIFF TURNED 17; ALTHOUGH THE ABUSE WAS ALLEGED TO HAVE TAKEN PLACE OFF SCHOOL GROUNDS, THE TEACHER, DURING SCHOOL HOURS, ALLEGEDLY MADE PUBLIC COMMENTS ABOUT PLAINTIFF'S APPEARANCE AND MADE ARRANGEMENTS TO MEET HER AFTER SCHOOL; THE NEGLIGENT SUPERVISION CAUSE OF ACTION AGAINST THE SCHOOL SHOULD NOT HAVE BEEN DISMISSED (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined the negligent supervision cause of action against the school based upon alleged conduct by a teacher should not have been dismissed, despite the fact the abuse allegedly took place off school grounds: The abuse was alleged to be conduct which would violate article 130 of the Penal Law. Plaintiff was legally incapable of consent until she turned 17. The school was deemed responsible for supervision only until plaintiff turned 17:

The allegations of criminal conduct against the teacher were based on the plaintiff's inability to consent to sexual conduct due to the plaintiff's age, which ended when the plaintiff turned 17 years old (see Penal Law § 130.05[3][a]).

Accordingly, the court properly determined that the CVA did not revive so much of the cause of action alleging negligent supervision of the plaintiff as was related to alleged conduct that occurred after the plaintiff turned 17 years old … .

… The defendants' submissions included … the transcript of the plaintiff's deposition testimony, wherein the plaintiff testified that all of the sexual abuse occurred off school property and outside of school hours … . In opposition, however, the plaintiff … averred that the teacher singled her out for attention, made extended eye contact with her, winked at her, and complimented her appearance in front of other staff in school. According to the plaintiff, the teacher made comments directly to other staff and in the presence of other students about the plaintiff's appearance, and the teacher made arrangements with the plaintiff during school hours and on school grounds to meet after school where the alleged abuse took place … . Fain v Berry, 2024 NY Slip Op 03032, Second Dept 6-5-24

Practice Point: Allegations of violations of Penal Law article 130 based upon the legal incapacity to consent apply only until the victim turns 17.

Practice Point: Although the alleged abuse by a teacher took place off school grounds, the teacher, during school hours, made public comments about plaintiff's appearance and arranged to meet her after school. There the negligent supervision cause of action against the school should not have been dismissed.

JUNE 5, 2024

CHILD VICTIMS ACT, EDUCATION-SCHOOL LAW, EMPLOYMENT LAW, NEGLIGENT SUPERVISION, RESPONDEAT SUPERIOR.

IN THIS CHILD VICTIMS ACT CASE ALLEGING SEXUAL ABUSE BY A TEACHER DURING THE SCHOOL DAY OVER THE COURSE OF A YEAR, PLAINTIFF RAISED QUESTIONS OF FACT UNDER BOTH RESPONDEAT SUPERIOR AND NEGLIGENT SUPERVISION CAUSES OF ACTION (SECOND DEPT).

The Second Department, reversing Supreme Court in this Child Victims Act action, determined the respondeat superior and negligent supervision causes of action against the school alleging sexual abuse of the plaintiff by a teacher should not have been dismissed. Essentially the complaint alleged negligent supervision of

both the teacher and the child. The defendant school did not demonstrate a lack of constructive notice of the abuse which allegedly took place over the course of a year in the same classroom during the school day:

"The employer's negligence lies in having placed the employee in a position to cause foreseeable harm, harm which would most probably have been spared the injured party had the employer taken reasonable care in making decisions respecting the hiring, . . . retention, or supervision of the employee" … .

… "[A] school has a duty to exercise the same degree of care toward its students as would a reasonably prudent parent, and will be held liable for foreseeable injuries proximately related to the absence of adequate supervision. The duty owed derives from the simple fact that a school, in assuming physical custody and control over its students, effectively takes the place of parents and guardians" … . * * *

… [T]he defendants failed to establish, prima facie, that they lacked constructive notice of the teacher's alleged abusive propensities and conduct … . "In particular, given the frequency of the alleged abuse, which occurred over" the entirety of a school year, "and always occurred inside the same classroom during the school day, the defendants did not eliminate triable issues of fact as to whether they should have known of the abuse" … .. The defendants similarly failed to demonstrate, prima facie, that their supervision of both the teacher and the plaintiff was not negligent … . Sayegh v City of Yonkers, 2024 NY Slip Op 03065, Second Dept 6-5-24

Practice Point: Here it was alleged plaintiff was sexually abused by a teacher repeatedly over a year during the school day. There were questions of fact whether the school had constructive notice of the abuse which supported causes of action under a respondeat superior theory (negligent supervision of the teacher) and a negligent supervision theory (negligent supervision of the child).

JUNE 5, 2024

CHILD VICTIMS ACT, NEGLIGENT HIRING, RETENTION AND SUPERVISION, EMPLOYMENT LAW.

PLAINTIFF IN THIS CHILD VICTIMS ACT CASE RAISED A QUESTION OF FACT WHETHER DEFENDANT SUMMER CAMP WAS AWARE OR SHOULD HAVE BEEN AWARE OF ITS EMPLOYEE'S PROPENSITY FOR SEXUAL ABUSE; THE NEGLIGENT HIRING, RETENTION AND SUPERVISION CAUSE OF ACTION SHOULD NOT HAVE BEEN DISMISSED (SECOND DEPT).

The Second Department, reversing Supreme Court in this Child Victims Act case alleging abuse at defendant's summer camp in 1970, determined plaintiff had raised a question of fact supporting the negligent hiring, retention and supervision cause of action. Plaintiff alleged he informed defendant of the abuse by the employee (Puello):

"Although an employer cannot be held vicariously liable for torts committed by an employee who is acting solely for personal motives unrelated to the furtherance of the employer's business, the employer may still be held liable under theories of negligent hiring and retention of the employee" … . "To establish a cause of action based on negligent hiring, negligent retention, or negligent supervision, it must be shown that the employer knew or should have known of the employee's propensity for the conduct which caused the injury" … . "The employer's negligence lies in having placed the employee in a position to cause foreseeable harm, harm which would most probably have been spared the injured party had the employer taken reasonable care in making decisions respecting the [supervision,] hiring and retention of the employee" … .

Here, the defendant demonstrated, prima facie, that it lacked actual or constructive notice of Puello's alleged propensity for the conduct that caused the plaintiff's injury. However, in opposition, the plaintiff raised a triable issue of fact as to whether the defendant had constructive notice of Puello's alleged propensity for sexual abuse, given, among other things, the frequency and nature of the alleged abuse perpetrated by Puello … . Moreover, the plaintiff averred in his affidavit submitted in opposition to the defendant's motion that he "clearly told" Thomas Brown, an employee in the camp's infirmary, about the first of Puello's alleged assaults, which continued thereafter, raising a triable issue of fact as to whether the defendant had actual notice of Puello's alleged propensity for sexual

abuse. Hammill v Salesians of Don Bosco, 2024 NY Slip Op 03170, Second Dept 6-12-24

Practice Point: Here in this child victims act case alleging abuse of the plaintiff in 1970, plaintiff raised a question of fact whether defendant summer camp was aware of its employee's propensity for sexual abuse. Among other allegations, plaintiff alleged he told an infirmary employee about the abuse and it continued thereafter.

JUNE 12, 2024

CHILD VICTIMS ACT, CRIMINAL LAW.

PLAINTIFF MODEL SUFFICIENTLY ALLEGED PHOTOSHOOTS DONE WHEN SHE WAS 16 AND 17 FOR A SUNTANNING-PRODUCT MARKETING CAMPAIGN CONSTITUTED "SEXUAL PERFORMANCES" TRIGGERING THE EXTENDED STATUTE OF LIMITATIONS IN THE CHILD VICTIMS ACT (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, in a full-fledged opinion by Justice Higgitt, determined certain causes of action against the modeling agency which represented plaintiff and the seller of suntanning products which used the photos of plaintiff should not have been dismissed as time-barred under the extended statute of limitations in the Child Victims Act [CVA] (CPLR 214-g). The photoshoots took place when plaintiff was 16 and 17. One of the issues was whether the complaint adequately alleged the photoshoots constituted a "sexual performance" with triggered the applicability of the CVA. After a comprehensive discussion too detailed to summarize here, the First Department held the complaint stated causes of action based on the "sexual performance" criteria in Penal Law 263.05:

At the pleading stage, as to both defendants, we find that a reasonable inference to be drawn from plaintiff's allegations regarding the photographing of her while she was unclothed is that the resulting photographs may have captured plaintiff's genitalia, thus satisfying the "sexual conduct" component of a Penal Law § 263.05 sexual performance. It is not merely the allegation of nudity that suffices, but the permissible inference that nudity occasioned the exhibition of genitalia, lewdly, in a photographic performance. We need not and do not reach whether plaintiff will

ultimately be successful … , and at this stage, in light of the allegations contained in the complaint and the reasonable inferences to be drawn therefrom, we need not confine our analysis of the allegations to photographs that were ultimately used in Cal Tan's marketing campaign, as submitted on the appeal. * * *

We … find that a plaintiff's age at the time of the alleged acts, so long as under 18 years of age, does not prevent application of the CVA to revive claims otherwise meeting CPLR 214-g's requirements. Thus, plaintiff adequately pleaded that, with respect to her age at the time of the alleged acts, the CVA applies to her. Doe v Wilhelmina Models, Inc., 2024 NY Slip Op 03081, First Dept 6-6-24

Practice Point: Here photoshoots for a suntanning-product marketing campaign were sufficiently alleged to constitute "sexual performances' triggering the extended statute of limitations in the Child Victims Act.

JUNE 6, 2024

COURT OF CLAIMS, LATE NOTICE OF CLAIM.

CLAIMANT INITIALLY BELIEVED THE ROAD WHERE HE STEPPED IN A POTHOLE AND FELL WAS OWNED BY THE VILLAGE, BUT IN FACT IT WAS OWNED BY THE STATE; CLAIMANT'S LATE NOTICE OF CLAIM SHOULD HAVE BEEN ACCEPTED BY THE COURT OF CLAIMS (THIRD DEPT).

The Third Department, reversing the Court of Claims, determined claimant's late notice of claim in this roadway defect case should not have been rejected. Plaintiff alleged he stepped in a depression in the road and fell. Plaintiff initially believed the road was owned by the village, when, in fact, it was owned by the state. The defect in the road was patched within a week of plaintiff's fall:

The delay here was minimal, with defendant having received notice approximately three weeks after the 90-day deadline lapsed … . It is significant that when [claimant] returned to the accident scene … , he discovered that the pothole had been patched with blacktop, as shown in the photographs taken that day. Claimant further averred that the depression was "almost a foot wide and around ten feet long," specifying that it was "about three to four inches deep where [his] foot ended up." Given this postaccident development, claimant's attorney argued that

"[w]hile [defendant] may not have obtained notice of the . . . accident within 90 days of its occurrence, it is highly likely that it had notice of the condition of the pavement that caused the accident as it patched it within a week of when the accident happened," emphasizing that defendant's "records should indicate precisely when it was patched as well as when the decision to patch it occurred and why." * * *

"A claim has the appearance of merit so long as it is not patently groundless, frivolous or legally defective, and the record as a whole gives reasonable cause to believe that a valid cause of action exists" … . To hold defendant liable for his injuries, claimant will need to prove that defendant either created the condition itself by affirmative acts of negligence, or had actual or constructive notice of a dangerous condition and failed to remedy such condition, thereby causing claimant's injuries … . Constructive notice exists where a depression in the roadway was "visible and apparent and existed for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it" … . Grasse v State of New York, 2024 NY Slip Op 03110, Third Dept 6-6-24

Practice Point: The criteria for acceptance or rejection of a late notice of claim in the Court of Claims is explained.

JUNE 6, 2024

COVID IMMUNITY, PUBLIC HEALTH LAW.

ALTHOUGH THE FORMER "EMERGENCY OR DISASTER TREATMENT PROTECTION ACT (EDTPA)" PROVIDED IMMUNITY TO HEALTHCARE PROVIDERS RE: COVID-19, HERE DEFENDANT NURSING HOME DID NOT DEMONSTRATE THE THREE REQUIREMENTS FOR IMMUNITY WERE MET (SECOND DEPT).

The Second Department reversing Supreme Court, determined defendant nursing home did not demonstrate the three statutory requirements for immunity for COVID-related treatment were met. Plaintiff alleged plaintiff's decedent, during his admission to defendant's facility in March 2020, was infected with SARS-CoV-2 and COVID-19:

… [T]he EDTPA [Emergency or Disaster Treatment Protection Act] initially provided, with certain exceptions, that a health care facility "shall have immunity from any liability, civil or criminal, for any harm or damages alleged to have been sustained as a result of an act or omission in the course of arranging for or providing health care services" as long as three requirements were met: the services were arranged for or provided pursuant to a COVID-19 emergency rule or otherwise in accordance with applicable law, the act or omission was impacted by decisions or activities that were in response to or as a result of the COVID-19 outbreak and in support of the State's directives, and the services were arranged or provided in good faith (Public Health Law former § 3082[1] …).

* * * [W]hile the EDTPA "immunized healthcare facilities from civil liability for certain acts or omissions in the treatment of patients for COVID-19 during the period of the COVID-19 emergency declaration" … , the defendant's submissions did not establish that the three requirements for immunity were satisfied … . Damon v Clove Lakes Healthcare & Rehabilitation Ctr., Inc., 2024 NY Slip Op 03029, Second Dept 6-5-24

Practice Point: The repeal of the former Emergency or Disaster Treatment Protection Act (EDTPA) does not apply retroactively.

Practice Point: A healthcare provider asserting immunity from COVID-related injury under the former EDTPA must demonstrate the three statutory requirements for immunity have been met.

JUNE 5, 2024

LABOR LAW-CONSTRUCTION LAW.

DEBRIS LEFT BEHIND AFTER WORK ON ANOTHER PROJECT WAS NOT "INTEGRAL" TO THE WORK PLAINTIFF WAS PERFORMING WHEN HE TRIPPED AND FELL; PLAINTIFF WAS ENTITLED TO SUMMARY JUDGMENT ON CERTAIN LABOR LAW 241(6) CAUSES OF ACTION BASED UPON INDUSTRIAL CODE VIOLATIONS; IN ADDITION THE CITY DID NOT DEMONSTRATE A LACK OF CONSTRUCTIVE NOTICE OF THE DEBRIS; THEREFORE THE LABOR LAW 200 AND COMMMON-LAW NEGLIGENCE CAUSES OF ACTION SHOULD NOT HAVE BEEN DISMISSED (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined plaintiff was entitled to summary judgment on certain Labor Law 241(6) causes of action and the city's motion to dismiss the Labor Law 200 and common-law negligence claims should not have been granted. Plaintiff tripped on discarded plastic and rock debris from prior sidewalk demolition and construction. Plaintiff was working on reconstruction of a sidewalk bridge when he fell. Therefore the plastic and rock debris did not constitute material integral to the work plaintiff was performing as Supreme Court had held. In addition, although the city did not exercise supervisory control over the work, the Labor Law 200 and common-law negligence causes of action should not have been dismissed because the city did not demonstrate a lack of constructive notice of the dangerous condition created by the debris:

The plastic and the rock were not integral to the work performed by plaintiff or his coworkers because it constituted an accumulation of debris from previous work that was left in a "passageway" or "working area" which should have been kept free of debris … . * * *

The "task at hand" did not involve demolition. It is uncontested that plaintiff and his coworkers were dismantling and rebuilding a sidewalk bridge at a new location and that plaintiff fell when he slipped and tripped while manually transporting a heavy beam to the new location. While it is undisputed that Padilla was a general contractor that did demolition work, the court's overly broad view of the integral to the work defense reads [Industrial Code] sections 23-1.7(e)(1) and (2) out of existence. Lourenco v City of New York, 2024 NY Slip Op 03540, First Dept 6-27-24

Practice Point: Debris left over from another job was not "integral" to the work being performed at the time of plaintiff's fall, therefore the presence of the debris violated certain provisions of the Industrial Code.

Practice Point: Although the city did not exercise supervisory control over the work, it did not demonstrate a lack of constructive notice of the dangerous condition. Therefore the Labor Law 200 and common-law negligence causes of action should not have been dismissed.

JUNE 27, 2024

LABOR LAW-CONSTRUCTION LAW.

DEFENDANT WAS NOT AN OWNER OR A GENERAL CONTRACTOR AND EXERCISED NO SUPERVISORY AUTHORITY OVER THE INJURED PLAINTIFF'S WORK, THEREFORE THE LABOR LAW CAUSES OF ACTION WERE PROPERLY DISMISSED; HOWEVER DEFENDANT MAY HAVE BEEN RESPONSIBLE FOR CREATING THE ALLEGEDLY DANGEROUS CONDITION DURING PRIOR WORK ON THE PROPERTY; THEREFORE THE COMMON-LAW NEGLIGENCE CAUSE OF ACTION SHOULD NOT HAVE BEEN DISMSSED (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined that, although the Labor Law causes of action were properly dismissed, the common-law negligence cause of action should not have been dismissed. Defendant BHI was not an owner of the property or a general contractor and was not present on site when plaintiff was injured. The injured plaintiff worked for another prime contractor. But BHI had previously done the work which allegedly caused plaintiff's injury. Because BHI was not an owner or a general contractor and had no supervisory authority on the day of the accident, the Labor Law causes of action did not apply. But the common-law negligence cause of action was applicable:

A defendant that is not an owner, general contractor, or agent pursuant to the Labor Law with regard to a plaintiff's work may nonetheless be held liable to the plaintiff under a theory of common-law negligence "where the work" the defendant "performed created the condition that caused the plaintiff's injury" … . "An award of summary judgment in favor of a subcontractor [or prime contractor] dismissing

a negligence cause of action is improper where the evidence raises a triable issue of fact as to whether [it] created an unreasonable risk of harm that was the proximate cause of the . . . plaintiff's injuries" … . Delaluz v Walsh, 2024 NY Slip Op 03030, Second Dept 6-5-24

Practice Point: This case illustrates why it is a good idea to allege a common-law negligence cause of action in addition to a Labor Law 200 cause of action.

JUNE 5, 2024

LABOR LAW-CONSTRUCTION LAW.

IF AN UNSECURED A-FRAME LADDER MOVES CAUSING PLAINTIFF TO FALL, PLAINTIFF IS ENTITLED TO SUMMARY JUDGMENT ON THE LABOR LAW 240(1) CAUSE OF ACTION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff was entitled to summary judgment on the Labor Law 240(1) cause of action in this A-frame ladder-fall case. Plaintiff alleged the unsecured ladder moved causing him to fall:

… [T]he plaintiff demonstrated his prima facie entitlement to judgment as a matter of law on the issue of liability on the cause of action alleging a violation of Labor Law § 240(1). The plaintiff's deposition testimony established that the unsecured ladder moved and fell, causing him to fall … . In opposition, the defendants failed to raise a triable issue of fact as to whether the plaintiff's own acts or omissions were the sole proximate cause of his injuries … . Paiba v 56-11 94th St. Co., LLC, 2024 NY Slip Op 03437, Second Dept 6-20-24

Practice Point: Because contributory negligence is not a defense to a Labor Law 240(1) cause of action, it is enough to allege an A-frame ladder was unsecured and moved, causing plaintiff to fall.

JUNE 20, 2024

LABOR LAW-CONSTRUCTION LAW.

IN THIS LABOR LAW 240(1) ACTION, PLAINTIFF STEPPED ON A SMALL WOODEN "PATCH" COVERING A HOLE IN THE FLOOR AND HIS LEG WENT THROUGH THE HOLE; DEFENDANT'S ARGUMENT THE ACCIDENT WAS NOT FORESEEABLE WAS REJECTED; THE PRECISE NATURE OF THE ACCIDENT NEED NOT BE FORESEEN; IT IS ENOUGH PLAINTIFF WAS SUBJECTED TO AN ELEVATION-RELATION RISK AND NO SAFETY EQUIPMENT WAS PROVIDED (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff was entitled to summary judgment on his Labor Law 240(1) cause of action. Plaintiff was walking on a floor which had holes in it where mechanical equipment had been removed. When plaintiff stepped on a 12-inch by 12-inch "patch" which had been placed over a hole his leg went through and he was injured. The First Department rejected defendant's argument that the incident was not foreseeable:

Plaintiff was working in the interstitial space, approximately eight feet from the 11th floor below, and was thus exposed to the effects of gravity. … [T]he affixing of "harnesses and safety lines attached to a safe structure" are the type of safety devices envisioned by § 240(1) to prevent a worker from falling through a collapsing floor … , which plaintiff was not provided.

… "A plaintiff in a case involving the collapse of a permanent structure must establish that the collapse was 'foreseeable,' not in a strict negligence sense, but in the sense of foreseeability of plaintiff's exposure to an elevation-related risk"… . To establish foreseeability, "[a] plaintiff need not demonstrate that the precise manner in which the accident happened, or the injuries occurred was foreseeable; it is sufficient that [plaintiff] demonstrate that the risk of some injury from defendant's conduct was foreseeable" … . This foreseeability analysis … applies to the partial collapse of a permanent structure … . Ciaurella v Trustees of Columbia Univ. in the City of N.Y., 2024 NY Slip Op 03455, First Dept 6-25-24

Practice Point; This is the second Labor Law 240(1) case in recent weeks involving the collapse of a permanent structure (a roof in the prior case and here a floor). In both cases the Appellate Division rejected the argument the accident was not foreseeable.

JUNE 25, 2024

LABOR LAW-CONSTRUCTION LAW.

IN THIS LADDER-FALL CASE, DEFENDANT PROPERTY MANAGER DID NOT DEMONSTRATE A LACK OF CONTRUCTIVE NOTICE OF THE DANGEROUS CONDITION OR THAT IT LACKED CONTROL OVER THE WORK SITE; THE LABOR LAW 200 AND COMMON LAW NEGLIGENCE CAUSES OF ACTION SHOULD NOT HAVE BEEN DISMISSED; IN ADDITION PLAINTIFF WAS ENTITLED TO SUMMARY JUDGMENT ON HIS LABOR LAW 240(1) CAUSE OF ACTION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant property management company (Fulton) was not entitled to dismissal of the Labor Law 200 and common-law negligence causes of action and plaintiff was entitled to summary judgment on his Labor Law 240(1) cause of action in this ladder-fall case. Plaintiff fell when a permanent ladder attached to the building came loose:

… [T]he Fulton defendants failed to establish … that they lacked actual or constructive notice of the allegedly dangerous condition of the ladder, which the plaintiff described in his deposition as rusty and old. The evidence the Fulton defendants submitted in support of their motion "did not eliminate triable issues of fact as to whether the allegedly dangerous condition of the [ladder] should have been discovered upon a reasonable inspection" … . Furthermore, the Fulton defendants failed to establish … that they lacked control over the work site … . * * *

"The collapse of a scaffold or ladder for no apparent reason while a plaintiff is engaged in an activity enumerated under the statute creates a presumption that the ladder or scaffold did not afford proper protection" … . Through the submission of his deposition testimony, the plaintiff established … that he was exposed to an elevation risk within the ambit of Labor Law § 240(1), that the ladder collapsed for no apparent reason, and that the inadequately secured ladder was a proximate cause of his injuries … .

… [I]n opposition … the … defendants … failed to present a plausible view of the evidence—enough to raise a triable issue of fact—that there was no statutory

violation and that the plaintiff's own acts or omissions were the sole cause of the accident … . Valentin v Stathakos, 2024 NY Slip Op 03512, Second Dept 6-26-24

Practice Point: Here the permanent ladder which came loose causing plaintiff's fall was "old and rusty" which raised a question of fact whether the defendant property manager had constructive notice of the condition. The Labor Law 200 and common law negligence causes of action should not have been dismissed.

Practice Point: In the absence of evidence plaintiff was the sole proximate cause of the accident, the collapse of a ladder warrants summary judgment on a Labor Law 240(10 cause of action.

JUNE 26, 2024

LABOR LAW-CONSTRUCTION LAW.

IT WAS FORSEEABLE THAT A LEAKY ROOF NEEDING REPAIR WOULD COLLAPSE WHEN PLAINTIFF WAS STANDING ON IT; PLAINTIFF WAS ENTITLED TO SUMMARY JUDGMENT ON THE LABOR LAW 240(1) CAUSE OF ACTION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff, who fell when the roof he was working on collapsed, was entitled to summary judgment on his Labor Law 240(1) cause of action. The court noted the accident was foreseeable and no protective device was provided:

"'In order for liability to be imposed under Labor Law § 240(1), there must be a foreseeable risk of injury from an elevation-related hazard . . . as defendants are liable for all normal and foreseeable consequences of their acts'" … . "Thus, to establish a prima facie case pursuant to Labor Law § 240(1), a plaintiff must demonstrate that the risk of injury from an elevation-related hazard was foreseeable, and that an absent or defective protective device of the type enumerated in the statute was a proximate cause of the injuries alleged" … .

Here, the plaintiffs demonstrated, prima facie, that the need for safety devices to protect the injured plaintiff from an elevation-related hazard was foreseeable, as the injured plaintiff was replacing wood decking on a pitched, elevated roof that had sustained water leaks, and that his injuries were proximately caused by the

lack of adequate safety devices … . Sanchez v Congregation of Emanuel of Westchester, 2024 NY Slip Op 03446, Second Dept 6-20-24

Practice Point: An accident must be foreseeable to trigger liability under Labor Law 240(1). Here the court deemed it foreseeable that a roof which leaked and needed repair would collapse when plaintiff was standing on it.

JUNE 20, 2024

MEDICAL MALPRACTICE, MOTION TO VACATE DEFAULT JUDGMENT.

IN MOVING TO VACATE A MORE THAN $2 MILLION DEFAULT JUDGMENT IN THIS MED MAL CASE, DEFENDANT DOCTOR RAISED A QUESTION OF FACT WHETHER SHE WAS EVER SERVED WITH PROCESS; A HEARING IS REQUIRED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined a hearing was required to determine whether defendant was properly served in this medical malpractice action. Defendant doctor never appeared and a default judgment of over $2 million had been entered:

In order to warrant a hearing to determine the validity of service of process, the denial of service must be substantiated by specific, detailed facts that contradict the affidavit of service … .

Here, the affidavit of service constituted prima facie evidence of proper service. In moving … to vacate the judgment, the defendant did not merely make a conclusory denial of service, but provided specific, detailed facts that contradicted the affidavit of service. The defendant denied having an employee who had the same name or matched the physical description as the individual allegedly served, "Pearl Unan." … [T]he defendant stated that at the time of the alleged service his office was closed and there was no one at his reception desk. The defendant's sworn, nonconclusory denial of service was sufficient to dispute the veracity or contents of the affidavit, requiring a hearing … . … [T]he affidavits of Alexis Malone and Scott Sachs, who were employed by the defendant, also provided specific and detailed facts that contradicted the affidavit of service. Harrison v Schottenstein, 2024 NY Slip Op 03418, Second Dept 6-20-24

Practice Point: Although a process server's affidavit is prima facie evidence of proper service, a sworn, nonconclusory, fact-based denial of service by the defendant requires a hearing. If defendant is never served, the court never had jurisdiction.

JUNE 20, 2024

MEDICAL MALPRACTICE, SERVICE OF PROCESS.

DEFENDANT IN THIS MED MAL CASE WAS NOT PROPERLY SERVED AND PLAINTIFF WAS NOT ENTITLED TO AN EXTENSION OF THE TIME TO SERVE IN THE INTEREST OF JUSTICE (FIRST DEPT).

The First Department, reversing Supreme Court, determined defendant in this medical malpractice case was entitled to dismissal of all claims because he was not properly served:

Defendant Michael B. Shannon, M.D. contends that this action should have been dismissed as against him for lack of timely service under CPLR 306-b … . It is undisputed on appeal that plaintiff failed to properly serve Shannon within 120 days of commencement of this action. Plaintiff does not purport to have demonstrated good cause for the delay. We find that an extension of time to serve Shannon was not warranted in the interest of justice.

Shannon's unrebutted affidavit reflects that service was attempted at an office where he worked only as an independent contractor and that his residence and principal place of business were in Ohio. Plaintiff failed to make any effort to investigate further or to correct this error when Shannon failed to appear or answer. She did not file her default motion until nearly two years after commencing this action, which is well over the one-year deadline to make such a motion (see CPLR 3215[c]). The motion was also filed after discovery and motion practice were well underway. Diaz v Nasir, 2024 NY Slip Op 03536, First Dept 6-27-24

Practice Point: Plaintiff did not exercise due diligence in attempting to serve defendant and did not make a timely motion to extend the time to serve, complaint dismissed.

JUNE 27, 2024

MEDICAL MALPRACTICE, NEGLIGENT DISCHARGE.

PLAINTIFF MOVED TO AMEND THE COMPLAINT AFTER THE NOTE OF ISSUE AND CERTIFICATE OF READINESS HAD BEEN FILED; EVEN THOUGH THE AMENDMENT ADDED A CAUSE OF ACTION REQUIRING FURTHER DISCOVERY, THE MOTION WAS GRANTED BECAUSE DEFENDANT DID NOT DEMONSTRATE PREJUDICE (FOURTH DEPT).

The Fourth Department, reversing (modifying) Supreme Court, determined plaintiff should be allowed to amend the complaint, even though the note of issue and certificate of readiness had been filed. Defendant was unable to show any prejudice from the proposed amendment. The case was brought as a slip and fall which had been dismissed because plaintiff's decedent did not identify the cause of the fall. Plaintiff sought to add a cause of action for negligent discharge from the hospital where the slip and fall occurred, which sounds in medical malpractice:

While "[i]t is well settled that [l]eave to amend the pleadings shall be freely given absent prejudice or surprise resulting directly from the delay" … , that policy does not apply "on the eve of trial," and once a case has been certified ready for trial "there is a heavy burden on [a] plaintiff to show extraordinary circumstances to justify amendment by submitting affidavits which set forth the recent change of circumstances justifying the amendment and otherwise giving an adequate explanation for the delay" … . Inasmuch as plaintiff failed to offer any explanation for the delay, we reject plaintiff's contention that the court abused its discretion in denying the cross-motion for leave to amend the amended complaint to add a medical malpractice cause of action. Nevertheless, because defendant failed to establish any prejudice that would result from plaintiff's delay in seeking leave to amend, if further discovery is conducted, we modify the order in the exercise of our discretion by granting plaintiff leave to amend his amended complaint to assert a cause of action for the allegedly negligent discharge of decedent from defendant's facility, and, further, striking the note of issue and certificate of readiness to allow for additional discovery … . Chapman v Olean Gen. Hosp., 2024 NY Slip Op 03271, Fourth Dept 6-14-24

Practice Point: Here the post-note-of-issue motion to amend the complaint to add a cause of action requiring further discovery was granted because the defendant was unable to demonstrate any prejudice.

JUNE 14, 2024

NEGLIGENT SUPERVISION, MUNICIPAL LAW.

A COUNTY MAY BE LIABLE FOR NEGLIGENT SUPERVSION OF A VISIT BETWEEN MOTHER AND CHILD BY A COUNTY SOCIAL SERVICES CASEWORKER AT A PUBLIC PARK; HERE THE CHILD FELL WALKING UP A SLIDE; THE CASEWORKER DID NOT OBSERVE THE ACCIDENT BUT MOTHER WAS NEXT TO THE SLIDE AT THE TIME (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Wooten, determined the county's motion for summary judgment in this negligent supervision case was properly denied. Plaintiff father alleged the county social services caseworker (Byrne) who supervised a visit between mother and the infant plaintiff at a public playground was negligent in allowing the child to walk up a slide where the infant plaintiff fell. Byrne did not observe the accident. The Second Department held Byrne was performing a governmental function, the county owed infant plaintiff a special duty, Byrne's actions were not demonstrated to be discretionary, and the county did not demonstrate Byrne's acts or omissions were not a proximate cause of the accident. The opinion provides a clear explanation of the complex issues associated with governmental liability in this "negligent supervision" context:

"Once it is determined that a municipality was exercising a governmental function, the next inquiry focuses on the extent to which the municipality owed a duty to the injured party" … . "In order to sustain liability against a municipality engaged in a governmental function, 'the duty breached must be more than that owed the public generally'" … . * * *

… "[U]nder the doctrine of governmental function immunity, government action, if discretionary, may not be a basis for liability, while ministerial actions may be, but only if they violate a special duty owed to the plaintiff, apart from any duty to the public in general" … . * * *

… [T]he County may assume a special duty to a foster child during the course of visitation supervised by a DSS caseworker. * * *

Since Byrne acknowledged that he did not observe the infant plaintiff walking up the portion of the slide intended for children to slide down prior to the accident, it cannot be said that he made a discretionary decision whether or not the infant plaintiff's behavior warranted his intervention. Thus, any exercise of discretion by

Byrne during visitation bore no relation to the conduct on which liability is predicated. P.D. v County of Suffolk, 2024 NY Slip Op 03405, Second Dept 6-20-24

Practice Point: The complex criteria for government liability in a negligent-supervision-of-a-child case are clearly and comprehensively explained.

JUNE 20, 2024

SLIP AND FALL, CONSTRUCTIVE NOTICE.

PLAINTIFF SUFFICIENTLY IDENTIFIED THE CAUSE OF HER SLIP AND FALL AND DEFENDANTS FAILED TO DEMONSTRATE A LACK OF CONSTRUCTIVE NOTICE OF THE CONDITION; DEFENDANTS' SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined plaintiff sufficiently identified the cause of her slip and fall and defendants failed to demonstrate a lack of constructive notice of the condition:

… [D]efendants' own submissions raise a triable issue of fact whether a dangerous condition existed on the premises. Defendants submitted the deposition testimony of plaintiff, who testified that she fell "on something slippery." Although plaintiff did not see anything on the floor before she fell, she testified that "the back of [her] sweatshirt, the back of [her] legs," and her "entire back" were damp after she fell and that the floor was "really shiny[and] glossy" and had a "medicinal stench." Plaintiff also testified that she told the store manager that "there was something on the floor that [she] slipped on" and denied having described the slippery condition as "droplets of water" on the floor. We therefore conclude that defendants' submissions raised triable issues of fact whether something other than water, incidental to the use of the bathroom, was on the floor "constitut[ing] an 'unreasonably dangerous condition' " … . We further conclude that, "[a]lthough plaintiff was unable to identify the precise cause of her fall," her testimony regarding the shiny, glossy floor that smelled medicinal rendered "any other potential cause of her fall sufficiently remote or technical to enable [a] jury to reach [a] verdict based not upon speculation, but upon the logical inferences to be drawn from the evidence" … .

… Although defendants submitted the deposition testimony of the store manager, in which she testified that the store was cleaned by a crew every morning and that employees were charged with remedying any dangerous condition that they observed throughout their shifts, defendants' evidence "failed to establish that the employees actually performed any [inspection] on the day of the incident, or that anyone actually inspected the area in question before plaintiff's fall" … . Byrd v Target, 2024 NY Slip Op 03252, Fourth Dept 6-14-24

Practice Point: Plaintiff sufficiently identified the substance that caused her slip and fall in the bathroom as something other than water (a medicinal stench).

Practice Point: Defendants failed to prove the area was inspected close in time to the fall. Evidence of routine cleanings is not enough to show the lack of constructive notice.

JUNE 14, 2024

SLIP AND FALL, EMPLOYMENT LAW, AGENCY.

PLAINTIFF ALLEGED THE DRIVER WORKING FOR A LIVERY CAB COMPANY (CURB) AND THE NEW YORK CITY TRANSIT AUTHORITY (NYCTA) DROPPED HIM OFF NEAR A HOLE IN THE ROAD WHICH CAUSED HIM TO FALL; THE RESPONDEAT SUPERIOR (AGENCY) CAUSE OF ACTION SURVIVED; BUT THE COMPLAINT DID NOT SUPPORT THE NEGLIGENT HIRING, RETENTION AND SUPERVISION CAUSE OF ACTION (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined the complaint did not state a cause of action for negligent hiring, retention and supervision. Plaintiff alleged the driver of car which provided a service to the New York City Transit Authority (NYCTA) through a livery cab company called Curb was negligent in dropping plaintiff off near a hole in the road. Although the negligence action against the NYCTA and Curb survived under an agency (respondeat superior) theory, there were no factual allegations in the complaint which supported the negligent hiring, retention and supervision cause of action:

"An employer can be held liable under theories of negligent hiring, retention, and supervision where it is shown that the employer knew or should have known of the

employee's propensity for the conduct which caused the injury" … . "[A] necessary element of such causes of action is that the employer knew or should have known of the employee's propensity for the conduct which caused the injury" … . Although such causes of action need not be pleaded with specificity … , the complaint must contain more than bare legal conclusions unsupported by factual allegations … . Here, the complaint did not allege that Curb or the NYCTA knew or should have known of the driver's propensity for the conduct which caused the injury, nor contain any factual allegations to support such an inference. The bare legal conclusions were insufficient to state a cause of action alleging negligent hiring, training, and retention … . Bailey v City of New York, 2024 NY Slip Op 03156, Second Dept 6-12-24

Practice Point: Conclusory, as opposed to fact-based, allegations of negligent hiring, retention and supervision will not survive a pre-discovery motion to dismiss.

JUNE 12, 2024

SLIP AND FALL, EVIDENCE.

ALTHOUGH THE PHOTOGRAPH OF THE SIDEWALK DEFECT WAS TAKEN A YEAR BEFORE THE SLIP AND FALL, PLAINTIFF'S TESTIMONY THE PHOTO ACCURATELY AND FAIRLY DEPICTED THE CONDITION OF THE SIDEWALK AT THE TIME OF THE FALL WAS SUFFICIENT (FIRST DEPT).

The First Department, reversing Supreme Court's denial of plaintiff's summary judgment motion, determined the raised sidewalk flag which caused plaintiff's slip and fall was sufficiently proven by a photograph taken a year before the accident because plaintiff testified the photo accurately depicted the condition of the sidewalk at the time of the accident:

Plaintiff demonstrated prima facie, through his deposition testimony, photographs and other evidence, that his accident was caused by a hazardous defect in the sidewalk, i.e. a raised sidewalk flag … . Although the photographs were taken over a year prior to plaintiff's accident and in connection with a different accident at the same location, plaintiff's testimony that they "fairly and accurately" depicted the

condition of the sidewalk at the time of his accident rendered the photographs "probative on the issue of whether the defect was dangerous" … .

The record also demonstrates that the Condo had actual and constructive notice of the sidewalk defect and that the defect existed, unremedied, for a significant period of time prior to plaintiff's accident. Richard v 1550 Realty LLC, 2024 NY Slip Op 03236, First Dept 6-13-24

Practice Point: Even if the photo of the dangerous condition, here a raised sidewalk flag in a slip and fall case, predates the accident, plaintiff's testimony the photo fairly and accurately depicts the condition of the sidewalk at the time of slip and fall renders the photo admissible and sufficient.

JUNE 13, 2024

SLIP AND FALL, INSURANCE LAW, VEHICLE AND TRAFFIC LAW.

THERE IS A QUESTION OF FACT WHETHER PLAINTIFF'S SLIP AND FALL ON ICE AND SNOW AFTER GETTING OUT OF A VEHICLE RESULTED FROM OPERATION OF THE VEHICLE SUCH THAT THE INSURER IS OBLIGATED TO DEFEND THE OWNER OF THE VEHICLE (SECOND DEPT).

The Second Department, reversing Supreme Court, over a partial dissent, determined the insurer, Progressive, was obligated to defend the owner of a vehicle for injuries suffered by a passenger (Malone) who slipped and fell on ice and snow after getting out of the car. The question was whether the injury resulted from "operation" of the vehicle:

"Use of an automobile encompasses more than simply driving it, and includes all necessary incidental activities such as entering and leaving its confines" … . While a claim that an accident occurred during unloading "does not require a showing that the vehicle itself produced the injury . . . , it is insufficient to show merely that the accident occurred during the period of loading or unloading. Rather, the accident must be the result of some act or omission related to the use of the vehicle" … .

… Malone specifically alleged in the underlying action that Anthony (the vehicle-owner's son) parked his vehicle in a negligent manner on a slippery surface and

that such negligence was a proximate cause of her accident. Progressive submitted an affidavit from Malone … in which she stated, "I slipped on the snowy and icy condition as I was taking my first steps toward the house. I dropped my child and my legs slid, along the gradient, underneath the CAPERNA Vehicle." Progressive further submitted Malone's deposition testimony in the underlying action, which demonstrated that the door of the vehicle was open and that she had only taken two steps away from the vehicle when she slipped and fell on snow and ice located on the lawn. As such, Progressive failed to establish its prima facie entitlement to judgment as a matter of law declaring that the accident was not a covered event, as there is a triable issue of fact as to whether Malone had completed unloading the vehicle. As there are allegations that the vehicle was used negligently and that such negligence contributed to the accident, Progressive was not entitled to summary judgment declaring that it is not obligated to defend or indemnify Arthur (the vehicle owner) in the underlying action … . Matter of Progressive Dr. Ins. v Malone, 2024 NY Slip Op 03178, Second Dept 6-12-24

Practice Point: "Operation" of a vehicle may include parking the vehicle in a manner which makes getting out of it dangerous. Here a passenger slipped and fell on ice and snow after getting out of the parked vehicle and the insurer was obligated to defend the owner of the vehicle.

JUNE 12, 2024

SLIP AND FALL, MUNICIPAL LAW, WRITTEN NOTICE.

IN THIS CROSSWALK SLIP AND FALL CASE, THE FACT THAT THE MUNICIPALITY REPAIRED THE AREA FIVE MONTHS BEFORE DID NOT CONSTITUTE AN EXCEPTION TO THE PRIOR WRITTEN NOTICE REQUIREMENT (FIRST DEPT).

The First Department, reversing Supreme Court, determined the fact that the municipality repaired the crosswalk where plaintiff slipped and fell five months before did not constitute an exception to the prior written notice requirement:

Prior written notice of a defect is a condition precedent which plaintiff is required to plead and prove to maintain an action against the City, in the absence of a recognized exception … . The only recognized exceptions to the prior written notice requirement involve situations in which the municipality created the defect

or hazard through an affirmative act of negligence or where a special use confers a benefit upon the municipality … . The affirmative negligence exception is limited to work which immediately results in the existence of a dangerous condition … . In support of her motion, plaintiff submitted evidence that the most recent repair work was performed five months prior to the accident in the general area of the subject defect. This does not raise an issue of fact as to whether defendants created the defect that caused plaintiff's fall through an affirmative act of negligence at the location where the injury occurred, which immediately resulted in the existence of a dangerous condition … . Smith v City of New York, 2024 NY Slip Op 03150, First Dept 6-11-24

Practice Point: Unless the plaintiff can allege the dangerous condition which caused the slip and fall was created by the municipality at the time the repair was made, prior written notice of the defect is a condition precedent for the lawsuit. Here the allegation the area was repaired five months before the slip and fall was not sufficient.

JUNE 11, 2024

TRAFFIC ACCIDENTS, EVIDENCE, VEHICLE AND TRAFFIC LAW.

ALTHOUGH THERE WAS NO QUESTION PLAINTIFF'S CAR HYDROPLANED AND SLID INTO DEFENDANT'S LANE, DEFENDANT INCLUDED PLAINTIFF'S DEPOSITION TESTIMONY IN HIS MOTION FOR SUMMARY JUDGMENT WHICH RAISED A QUESTION OF FACT ABOUT HOW LONG PLAINTIFF'S CAR WAS IN DEFENDANT'S LANE BEFORE IT WAS STRUCK (THIRD DEPT).

The Third Department, reversing Supreme Court, determined defendant's own motion papers, which included the deposition testimony of plaintiffs, raised questions of fact about whether the emergency doctrine applied in this car accident case. Plaintiff testified her car hydroplaned on rain water and slid into the oncoming lane where her car was struck by defendant's. Plaintiff testified he car came to a complete stop for as much as 20 seconds before the collision. Defendant alleged he had no time to brake when plaintiff's car entered his lane:

"[I]n order for a driver to be entitled to summary judgment based upon the emergency doctrine, he or she must demonstrate, as a matter of law, that the emergency situation with which he or she was confronted was not of his or her own making and that his or her reaction was reasonable under the circumstances such that he or she could not have done anything to avoid the collision" … . There is no question that an emergency situation may arise "when a car going in the opposite direction crosses into the driver's lane" … . Nevertheless, "summary judgment is only appropriate where it is established that the driver invoking the doctrine 'did not contribute to the creation of the emergency situation, and that his or her reaction was reasonable under the circumstances such that he or she could not have done anything to avoid the collision' " … . Lee v Helsley, 2024 NY Slip Op 03213, Third Dept 6-13-24

Practice Point: If a party includes the opposing party's deposition testimony in a summary judgment motion and the opposing party's testimony raises a question of fact, summary judgment will be denied without the need to consider the opposing papers.

JUNE 13, 2024

TRAFFIC ACCIDENTS, INSURANCE LAW.

AVILA WAS INJURED WHEN HER SPOUSE LOST CONTROL OF THE CAR AND STRUCK A PARKED CAR; THE POLICY EXPRESSLY STATED COVERAGE DID NOT EXTEND TO THE INSURED'S SPOUSE; IN THE ABSENCE OF AN EXPRESS PROVISION THE INSURER IS NOT REQUIRED TO COVER THE INSURED'S SPOUSE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the uninsured motorist claim by the driver's spouse was precluded based on the policy. Avila was a passenger in a vehicle driven by her spouse who lost control of the car:

Pursuant to Insurance Law § 3420(g)(1), "no policy or contract shall be deemed to insure against any liability of an insured because of death of or injuries to his or her spouse or because of injury to, or destruction of property of his or her spouse unless express provision relating specifically thereto is included in the policy." "'[I]n the absence of an express provision in an insured's policy, a carrier is not required to provide insurance coverage for injuries sustained by an insured's

spouse'" … . This provision creates "a statutory presumption that interspousal liability is excluded from coverage unless an express provision relating specifically thereto is included in the policy" … . Moreover, here, the language of GEICO's policy provides that its liability coverage does not apply "[t]o any insured for bodily injury to the spouse of that insured." Thus, Avila's uninsured motorist claim was precluded … . Matter of Government Employees Ins. Co. v Avila, 2024 NY Slip Op 03481, Second Dept 6-26-24

Practice Point: Here the insured, Avila's spouse, lost control of the car and hit a parked car. Avila was a passenger and was injured. The policy did not include a provision expressly covering the insured's spouse. In addition, the policy expressly stated the insured's spouse was not covered. Avila's uninsured motorist claim was precluded.

JUNE 26, 2024

TRAFFIC ACCIDENTS, SUCCESSIVE MOTIONS FOR SUMMARY JUDGMENT.

ALTHOUGH SUCCESSIVE SUMMARY JUDGMENT MOTIONS ARE DISFAVORED; HERE THE ISSUES IN EACH MOTION DID NOT OVERLAP AND APPELLANTS OFFERED A SUFFICIENT REASON. I.E. THE FIRST MOTION PRECEDED DEFENDANT'S DEPOSITION IN WHICH HE ADMITTED SWERVING INTO APPELLANTS' VEHICLE (FIRST DEPT).

The First Department, reversing Supreme Court, determined appellants' second summary judgment motion in this traffic accident case did not violate the prohibition of successive motions. The first motion dealt with whether plaintiff suffered a serious injury within the meaning of the Insurance Law. The second motion addressed defendant's liability. Appellants demonstrated a sufficient reason for the failure to include both issues in a single motion, i.e., the first motion was made before defendant was deposed and admitted swerving into appellants' vehicle:

… [A]ppellants' first motion for summary judgment was on the issue of serious injury. Their second motion was on the issue of liability. The issue of whether plaintiff sustained a serious injury within the meaning of the Insurance Law, "is a threshold matter separate from the issue of fault" and which must, therefore, be

determined separately … . "[S]erious injury is quintessentially an issue of damages, not liability" … . Under the facts presented, appellants' failure to raise the issue of liability in their first motion for summary judgment does not run afoul of the general disfavor of successive motions since the issue of serious injury was not germane to the issue of liability … .

Appellants have also established the existence of sufficient cause … . Here, the record indicates that the first motion for summary judgment was filed prior to the deposition testimony of defendant-respondent Phanor. In his testimony Phanor admitted that he swerved into appellant's vehicle in order to avoid another unidentified vehicle. Priester v Phanor, 2024 NY Slip Op 03554, First Dept 6-27-24

Practice Point: Here the fact that successive summary judgment motions are generally prohibited was overlooked. The issues in the two motions did not overlap (one dealt with plaintiff's damages, the other with defendant's liability). And the first motion was brought before the deposition in which defendant admitted swerving into appellants' vehicle.

JUNE 27, 2024

TRAFFIC ACCIDENTS, TRUSTS AND ESTATES, DECEASED DEFENDANT.

IN THIS TRAFFIC ACCIDENT CASE, THE COURT DID NOT HAVE JURISDICTION TO HEAR A MOTION TO DISMISS BROUGHT ON BEHALF OF THE DECEASED DEFENDANT BY DECEDENT'S FORMER ATTORNEYS WHO HAD NOT BEEN SUBSTITUTED FOR THE DECEDENT; PLAINTIFF'S MOTION TO HAVE DECEDENT'S DAUGHTER SUBSITITUTED AS A REPRESENTATIVE FOR THE DECEDENT REQUIRED NOTICE TO ALL PERSONS INTERESTED IN DECEDENT'S ESTATE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the death of the defendant in this traffic accident case divested the court of jurisdiction and the motion to dismiss by the decedent's former attorneys, who had not been substituted for the decedent, should not have been considered by the court. The Appellate Division also noted that plaintiff's motion to substitute decedent's daughter as a

representative for the decedent required notice to all persons interested in decedent's estate:

"The death of a party divests the court of jurisdiction and stays the proceedings until a proper substitution has been made pursuant to CPLR 1015(a). Moreover, any determination rendered without such substitution will generally be deemed a nullity" .. . "The death of a party terminates his or her attorney's authority to act on behalf of the deceased party" … . Although the determination of a motion pursuant to CPLR 1021 made by the successors or representatives of a party or by any party is an exception to a court's lack of jurisdiction, here, the motion, inter alia, pursuant to CPLR 1021 to dismiss the complaint was made by the former attorneys for the decedent purportedly on behalf of the decedent. Since the former attorneys lacked the authority to act, the Supreme Court lacked jurisdiction to consider the motion … . Accordingly, so much of the order as granted the motion purportedly made on behalf of the decedent is a nullity.

Further, any motion pursuant to CPLR 1021 requires that notice be provided to persons interested in the decedent's estate … . Here, the plaintiff failed to provide notice to persons interested in the decedent's estate. Accordingly, the Supreme Court should have denied the plaintiff's cross-motion with leave to renew upon service on persons interested in the decedent's estate. Fazilov v Acosta, 2024 NY Slip Op 03470, Second Deppt 6-26-24

Practice Point: Here the defendant in a traffic accident case died. The decedent's former attorneys did not have the authority to make a motion to dismiss and the court should not have considered it.

Practice Point: Here plaintiff's motion to have decedent's daughter substituted for decedent required notice all persons interested in decedent's estate.

JUNE 26, 2024

TRAFFIC ACCIDENTS, INSURANCE LAW, EVIDENCE.

STATEMENTS DEFENDANT MADE TO HIS INSURANCE CARRIER IN THIS TRAFFIC ACCIDENT CASE ARE NOT DISCOVERABLE (FOURTH DEPT).

The Fourth Department, reversing (modifying) Supreme Court in this traffic-accident case, determined plaintiff's request for discovery of statements made by defendant to his insurance carrier should have been denied:

The statements sought in plaintiff's cross-motion constitute materials "produced solely in connection with the report of an accident to a liability insurance carrier . . . with respect to plaintiff's claim [that] are not discoverable under CPLR 3101 (g), but rather are conditionally immunized from discovery under CPLR 3101 (d) (2)" … . Plaintiff failed to establish either that he has a "substantial need of the materials" or that he is "unable without undue hardship to obtain the substantial equivalent of the materials by other means" (CPLR 3101 [d] [2] …). Fusco v Hansen, 2024 NY Slip Op 03262, Fourth Dept 6-14-24

Practice Point; Here in this traffic-accident case, plaintiff did not demonstrate a need for discovery of statements made by defendant to his insurance carrier (CPLR 3101(d)(2)).

JUNE 14, 2024