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Contents

ASSUMPTION OF THE RISK, GOLF CART ACCIDENT. 3

PLAINTIFF ASSUMED THE RISK OF AN ACCIDENT INVOLVING HER GOLF CART AND A VEHICLE; TWO-JUSTICE DISSENT (FOURTH DEPT). 3

CEILING COLLAPSE, EXPERT EVIDENCE. 4

THE DEFENSE EXPERT SHOULD NOT HAVE BEEN PRECLUDED FROM TESTIFYING IN THIS CEILING-COLLAPSE CASE; THE MOTION TO SET ASIDE THE VERDICT SHOULD HAVE BEEN GRANTED; NEW TRIAL ORDERED (SECOND DEPT). 4

CHILD VICTIMS ACT, ASSOCIATIONS, RELIGION, CIVIL PROCEDURE. 5

"UNITED METHODIST CHURCH" IS NOT A JURAL ENTITY WHICH CAN BE SUED IN THIS CHILD VICTIMS ACT LAWSUIT (SECOND DEPT). 5

CHILD VICTIMS ACT, EDUCATION-SCHOOL LAW, EMPLOYMENT LAW. 7

A TEACHER'S ALLEGED STATEMENT TO THE PLAINTIFF THAT HE WAS AWARE OF THE SEXUAL ABUSE OF THE PLAINTIFF BY ANOTHER TEACHER OCCURRING REPEATEDLY AT SCHOOL WAS DEEMED AN ADMISSION ATTRIBUTABLE TO THE SCHOOL DISTRICT RAISING A QUESTION OF FACT WHETHER THE SEXUAL ABUSE WAS FORESEEABLE BY THE SCHOOL DISTRICT (FOURTH DEPT). 7

CHILD VICTIMS ACT, INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS. 8

PLAINTIFF, IN THIS CHILD VICTIMS ACT SEXUAL ABUSE ACTION, PROPERLY ASSERTED A CAUSE OF ACTION FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS AS AN ALTERNATIVE TO THE NEGLIGENCE CLAIMS, CRITERIA EXPLAINED IN DEPTH (FIRST DEPT). 8

CHILD VICTIMS ACT, WORKERS' COMPENSATION. 10

WHETHER THE CHILD VICTIMS ACT (CVA) REVIVES OTHERWISE TIME-BARRED WORKERS' COMPENSATION CLAIMS AND WHETHER PLAINTIFF'S DAMAGES ARE LIMITED TO WORKERS' COMPENSATION BENEFITS ARE QUESTIONS OF LAW FOR THE COURT, NOT THE WORKERS' COMPENSATION BOARD (FOURTH DEPT). 10

INSURANCE LAW, MEDICAL MALPRACTICE. 11

WHERE THERE ARE MULTIPLE EXCESS COVERAGE POLICIES COVERING THE SAME RISK, THE EXCESS COVERAGE CLAUSES CANCEL EACH OTHER OUT (FOURTH DEPT). 11

LABOR LAW-CONSTRUCTION LAW, SCAFFOLD FALL. 12

ALTHOUGH PLAINTIFF FAILED TO TIE OFF HIS LANYARD, THAT FAILURE WAS NOT THE SOLE PROXIMATE CAUSE OF HIS INJURY; PLAINTIFF FELL WHEN A PLANK ON THE SCAFFOLD BROKE; PLAINTIFF SHOULD HAVE BEEN AWARDED SUMMARY JUDGMENT ON THE LABOR LAW 240(1) CAUSE OF ACTION (SECOND DEPT). 12

LABOR LAW-CONSTRUCTION LAW, UNSECURED LADDER. 13

AS PLAINTIFF WAS REMOVING DUCTS FROM THE CEILING, A PORTION OF A DUCT STRUCK PLAINTIFF AND THE A-FRAME LADDER CAUSING HIM AND THE LADDER TO FALL TO THE FLOOR; IT IS ENOUGH THAT THE LADDER WAS "UNSECURED;" PLAINTIFF NEED NOT SHOW THE LADDER WAS DEFECTIVE (FIRST DEPT). 13

LABOR LAW-CONSTRUCTION LAW, NEGLIGENCE, DUTY OF CARE. 14

PLAINTIFF FELL FROM AN A-FRAME LADDER OWNED BY A CONTRACTOR, DAL, HE DID NOT WORK FOR; BASED ON DISPUTED EVIDENCE THE LADDER WAS DEFECTIVE, DAL'S MOTION FOR SUMMARY JUDGMENT ON THE LABOR LAW 200 AND COMMON LAW NEGLIGENCE CAUSES OF ACTION WAS DENIED BY SUPREME COURT; THE FIRST DEPARTMENT, OVER A DISSENT, REVERSED, FINDING DAL DID NOT OWE PLAINTIFF A DUTY OF CARE (FIRST DEPT). 14

MEDICAL MALPRACTICE, IMMUNITY, COVID. 15

THE IMMUNITY CONFERRED ON HEALTHCARE PROVIDERS DURING THE COVID PANDEMIC CAN BE BASED ON THE OVERALL STRAIN ON THE OVERWHELMED HEALTHCARE SYSTEM; ALTHOUGH THE DEFENDANTS IN THIS MED MAL CASE MAY DEMONSTRATE ENTITLEMENT TO IMMUNITY AS THE CASE PROGRESSES, THEY DID NOT DEMONSTRATE ENTITLEMENT TO IMMUNITY AS A MATTER OF LAW SUCH THAT THE COMPLAINT SHOULD BE DISMISSED (SECOND DEPT). 15

MEDICAL MALPRACTICE, DAMAGES, "PRE-IMPACT TERROR." 17

DISAGREEING WITH THE FIRST DEPARTMENT, THE SECOND DEPARTMENT HELD THAT DAMAGES FOR "PRE-IMPACT TERROR" ARE NOT APPROPRIATE IN A MED MAL CASE; HERE PLAINTIFF SUFFERED A HEART ATTACK IN 2008 AND DIED IN 2011 (SECOND DEPT). 17

MEDICAL MALPRACTICE, EXPERT EVIDENCE. 18

AN EXPERT IN A MED MAL CASE NEED NOT BE A SPECIALIST IN THE RELEVANT FIELD; HERE A PRIMARY CARE PHYSICIAN LAID A PROPER FOUNDATION FOR AN OPINION ABOUT PLAINTIFF'S CARE; PLAINTIFF ALLEGED DEFENDANTS NEGLIGENTLY FAILED TO DIAGNOSE HER HEART CONDITION (SECOND DEPT). 18

MEDICAL MALPRACTICE, EXPERT EVIDENCE. 19

IN A MED MAL CASE, AN EXPERT AFFIDAVIT WHICH MAKES ASSERTIONS UNSUPPORTED AND BELIED BY THE RECORD AND, FOR THE FIRST TIME, ASSERTS ISSUES NOT ENCOMPASSED BY THE COMPLAINT OR BILL OF PARTICULARS, DOES NOT RAISE A QUESTION OF FACT (FIRST DEPT). 19

MUNICIPAL LAW, POLICE CONDUCT, RESPONDEAT SUPERIOR, EMPLOYMENT LAW. 20

A MUNICIPALITY CANNOT BE SUED FOR NEGLIGENT HIRING, RETENTION, TRAINING AND SUPERVISION BASED UPON EMPLOYEES' ACTIONS ALLEGED TO HAVE BEEN WITHIN THE SCOPE OF THEIR EMPLOYMENT; THE PROPER THEORY IS RESPONDEAT SUPERIOR (FOURTH DEPT). 20

RETIREMENT AND SOCIAL SECURITY LAW, POLICE PARADEDIC. 21

PETITIONER, A POLICE PARAMEDIC, INJURED HIS SHOULDER WHEN THE RETRACTABLE PORTION OF A STRETCHER JAMMED; THE UNEXPECTED EQUIPMENT MALFUNCTION WAS AN "ACCIDENT" ENTITLING PETITIONER TO ACCIDENTAL DISABILITY RETIREMENT BENEFITS (THIRD DEPT). 21

SLIP AND FALL, CONTRACT LAW, MUNICIPAL LAW. 22

IN THIS SLIP AND FALL CASE, THERE IS A QUESTION OF FACT WHETHER THE MUNICIPALITY OWED A DUTY TO PLAINTIFF BASED UPON THE MUNICIPALITY'S LAUNCHING AN INSTRUMENT OF HARM; IT WAS ALLEGED THAT SALT APPLIED TO MELT ICE CREATED A POOL OF WATER WHICH FROZE AND CAUSED PLAINTIFF'S FALL (FOURTH DEPT). 22

SLIP AND FALL, LANDLORD-TENANT. 23

QUESTIONS OF FACT WHETHER DEFENDANT WAS AN OUT-OF-POSSESSION LANDLORD PRECLUDED SUMMARY JUDGMENT IN FAVOR OF THE LANDLORD IN THIS SLIP AND FALL CASE (SECOND DEPT). 23

SLIP AND FALL, ACTUAL KNOWLEDGE OF THE CONDITION. 24

DEFENDANT PROPERTY-OWNER HAD ACTUAL KNOWLEDGE OF THE RECURRING RAINWATER LEAKS; PLAINTIFF ENTITLED TO SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE (SECOND DEPT). 24

TRAFFIC ACCIDENTS, RESPONDEAT SUPERIOR, VEHICLE AND TRAFFIC LAW.....25

DEFENDANT FARM'S EMPLOYEE WAS DRIVING FARM EQUIPMENT AT NIGHT WITHOUT LIGHTS WHEN PLAINTIFF COLLIDED WITH IT; PLAINTIFF WAS ENTITLED TO SUMMARY JUDGMENT UNDER A NEGLIGENCE-PER-SE THEORY AND UNDER RESPONDEAT SUPERIOR (FOURTH DEPT).....25

TRAFFIC ACCIDENTS, MUNICIPAL LAW, VEHICLE AND TRAFFIC LAW. 26

A COUNTY RECYCLING TRUCK IS NOT ENGAGED IN ROAD WORK AND THEREFORE IS NOT EXEMPT FROM THE RULES OF THE ROAD UNDER THE VEHICLE AND TRAFFIC LAW (FOURTH DEPT). 26

TRAFFIC ACCIDENTS, VEHICLE AND TRAFFIC LAW, BICYCLISTS. 27

PLAINTIFF BICYCLIST'S MOTION FOR SUMMARY JUDGMENT IN THIS TRAFFIC ACCIDENT CASE SHOULD HAVE BEEN GRANTED; BUT PLAINTIFF'S MOTION TO DISMISS DEFENDANT DRIVER'S CONTRIBUTORY NEGLIGENCE AFFIRMATIVE DEFENSE WAS PROPERLY DENIED (SECOND DEPT). 27

ASSUMPTION OF THE RISK, GOLF CART ACCIDENT.

PLAINTIFF ASSUMED THE RISK OF AN ACCIDENT INVOLVING HER GOLF CART AND A VEHICLE; TWO-JUSTICE DISSENT (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, over a two-justice dissent, determined the assumption of the risk doctrine applied to the operation of a golf cart in the parking lot of a golf course. Defendant county, the owner of the golf course, was therefore not liable for an accident involving a motor vehicle in the parking lot:

… [T]he County defendants met their burden of establishing that the risk of being injured while driving a golf cart is "inherent in the sport" of golf and that plaintiff was aware of the risk and assumed it … , and that plaintiff failed to raise an issue of fact with respect thereto … . At the time of the accident, plaintiff was an experienced golfer who played the golf course regularly throughout the season … .

Moreover, the County defendants demonstrated that plaintiff had routinely driven a golf cart into the parking lot to retrieve her clubs from her vehicle, and that she was aware of the fact that other people would be operating motor vehicles in the parking lot. The County defendants therefore established as a matter of law that being injured while driving a golf cart in the parking lot of the golf course before a round of golf is "within the known, apparent and foreseeable dangers of the sport" of golf … . Galante v Karlis, 2024 NY Slip Op 04001, Fourth Dept 7-26-24

Practice Point: Here, over a two-justice dissent, plaintiff was deemed to have assumed the risk of a golf-cart/motor vehicle accident in the golf course parking lot.

JULY 26, 2024

CEILING COLLAPSE, EXPERT EVIDENCE.

THE DEFENSE EXPERT SHOULD NOT HAVE BEEN PRECLUDED FROM TESTIFYING IN THIS CEILING-COLLAPSE CASE; THE MOTION TO SET ASIDE THE VERDICT SHOULD HAVE BEEN GRANTED; NEW TRIAL ORDERED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendants landlord and property manager were entitled to have the liability verdict set aside in the interest of justice because the judge should not have precluded testimony by defendants' expert. Plaintiff-tenants were injured when their apartment ceiling collapsed. The defendant expert would have testified there would have been no visible signs that the ceiling was about to collapse. The court noted that plaintiffs' request for a Frye hearing was properly denied because the expert would have testified based upon his personal training and experience:

"[E]xpert opinion is proper when it would help to clarify an issue calling for professional or technical knowledge, possessed by the expert and beyond the ken of the typical juror" … . The expert must possess "the requisite skill, training, education, knowledge or experience from which it can be assumed that the information imparted or the opinion rendered is reliable" … . "The expert's opinion, taken as a whole, must also reflect an acceptable level of certainty in order to be admissible" … .

Here, the defendants' CPLR 3101(d) disclosure indicated that Yarmus [the defense expert], a professional engineer with experience in construction management and building and safety code compliance, would testify, inter alia, as to the materials and manner of construction of the ceiling at issue, as well as the manner in which ceilings so constructed may detach and collapse, allegedly, without a defect that is detectable so as to give notice of a dangerous condition. Contrary to the plaintiffs' contention, Yarmus's proposed testimony was neither so conclusory or speculative, nor without basis in the record, as to render it inadmissible … .

… "[T]he long-recognized rule of Frye . . . is that expert testimony based on scientific principles or procedures is admissible but only after a principle or procedure has 'gained general acceptance' in its specified field … . An expert opinion based on personal training and experience is not subject to a Frye analysis … . Ghazala v Shore Haven Apt. Del, LLC, 2024 NY Slip Op 03681, Second Dept 7-3-24

Practice Point; If a judge makes a mistake by precluding admissible testimony, here testimony by the defense expert, the judge has the power to set aside the verdict in the interest of justice. The Appellate Division reversed the denial of the motion to set aside the verdict.

JULY 3, 2024

CHILD VICTIMS ACT, ASSOCIATIONS, RELIGION, CIVIL PROCEDURE.

"UNITED METHODIST CHURCH" IS NOT A JURAL ENTITY WHICH CAN BE SUED IN THIS CHILD VICTIMS ACT LAWSUIT (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Wan, reversing (modifying) Supreme Court, determined the "United Methodist Church" is not a jural entity which can be sued. In this Child Victims Act proceeding, the complaint alleged plaintiff was abused by an employee of the defendants United Methodist Church General Conference … , United Methodist Church Northeastern Jurisdiction New York-Connecticut District, New York Annual Conference of the United Methodist Church, United Methodist Church Long Island East District, Long Island East District of the New York Annual Conference of the United Methodist Church, … United Methodist Church of Woodbury New York. [and the] United Methodist Church … . The complaint alleged … United Methodist Church

"is a not-for profit religious association and/or organization conducting business in the State of New York and organized and existing under the laws of the State of New York with its principal place of business located at c/o GFCA, 1 Music Circle North Nashville, Tennessee 37203."

… [A]pplying neutral principles of law, we determine … the defendants established that United Methodist Church is not a jural entity with the capacity to be sued. Dismissal pursuant to CPLR 3211(a)(8) for lack of personal jurisdiction is warranted where a named defendant is not a legal entity amenable to suit … . New York law recognizes that "[a]n action or special proceeding may be maintained, against the president or treasurer" of an "unincorporated association" "upon any cause of action, for or upon which the plaintiff may maintain such an action or special proceeding, against all the associates, by reason of their interest or ownership, or claim of ownership therein, either jointly or in common, or their liability therefor, either jointly or severally" (General Associations Law § 13; see CPLR 1025 ["Two or more persons conducting a business as a partnership may sue or be sued in the partnership name, and actions may be brought by or against the president or treasurer of an unincorporated association on behalf of the association in accordance with the provisions of the general associations law"]). Although the term "unincorporated association" is not further defined by statute, New York courts have determined that "[i]t is only when a partnership has a President or a Treasurer that it is deemed an association within the meaning of" General Associations Law § 13 … . As such, "[a]n unincorporated association . . . has 'no legal existence separate and apart from its individual members'" … .

* * * [W]e conclude that the defendants established that United Methodist Church … is a religious denomination with a single purpose—"to make disciples for Jesus Christ for the transformation of the world"—and not a jural entity amenable to suit as an unincorporated association. It is undisputed that United Methodist Church does not have a principal place of business, does not have its own offices or employees, and does not and cannot hold title to property, and there is no proof in the record that United Methodist Church has incorporated or held itself out as a jural entity in any other jurisdiction. Moreover, the defendants demonstrated at the hearing that United Methodist Church, as such, does not have any involvement in the staffing or the removal of clergy or staff at the local church level. Chestnut v United Methodist Church, 2024 NY Slip Op 03726, Second Dept 7-11-24

Practice Point: Here the "United Methodist Church" was deemed a nonjural entity which cannot be sued in New York–criteria explained in depth.

JULY 10, 2024

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

A TEACHER'S ALLEGED STATEMENT TO THE PLAINTIFF THAT HE WAS AWARE OF THE SEXUAL ABUSE OF THE PLAINTIFF BY ANOTHER TEACHER OCCURRING REPEATEDLY AT SCHOOL WAS DEEMED AN ADMISSION ATTRIBUTABLE TO THE SCHOOL DISTRICT RAISING A QUESTION OF FACT WHETHER THE SEXUAL ABUSE WAS FORESEEABLE BY THE SCHOOL DISTRICT (FOURTH DEPT).

The Fourth Department, over a concurrence disagreeing with the majority ruling that a teacher's alleged statement was admissible against the school district as an admission, affirmed the denial of the school district's motion for summary judgment in this Child Victims Act negligent supervision case. Plaintiff, who was a student in the late 60's, alleged repeated abuse by a teacher in a back room at the school. Another teacher was alleged to have overheard the abuse and allegedly threatened plaintiff with revealing it in an attempt to sexually abuse plaintiff himself. That statement was deemed an admission which raised a question of fact whether the abuse was foreseeable by the school district:

… [P]laintiff testified that the orchestra teacher offered her a ride home from a bus stop after an evening event at the school. Instead of taking her home, however, the orchestra teacher took her to a park where, according to plaintiff, he told her "that he knew what was going on because he could hear through the walls from the orchestra room into that back room [where Fleming's office was located] and that [plaintiff] didn't want it to get out — [plaintiff] wouldn't want it to come out, so [she] should be nice to him." When plaintiff responded that she did not know what the orchestra teacher was talking about, he attempted to kiss her. * * *

The court determined that the entirety of the statement attributed to the orchestra teacher was admissible as a vicarious party admission of defendant under CPLR 4549 and therefore properly considered when evaluating defendant's motion for summary judgment, because the orchestra teacher was employed by defendant and

"[r]ecognizing and responding to the abuse of students while on school grounds certainly falls within the scope of the duties of a teacher employed by [defendant]."
* * *

We conclude that it is within the scope of a teacher's employment relationship to identify and assist a student who they believe is being sexually abused, and that the orchestra teacher's statement indicating awareness of the abuse of plaintiff was therefore "on a matter within the scope of [the employment] relationship" … . We further conclude that the orchestra teacher's statement professing knowledge of the abuse occurred "during the existence of" the employment relationship, within the meaning of CPLR 4549, inasmuch as it is undisputed that he was employed by defendant at the time the statement was made. Therefore, we agree with the court that the statement is admissible pursuant to CPLR 4549. Bl Doe 5, 2024 NY Slip Op 03608, Fourth Dept 7-3-24

Practice Point: In a negligent supervision action against a school district, is a statement allegedly made by a teacher to a student indicating the teacher's awareness of repeated sexual abuse of the student by another teacher, taking place at school, admissible against the school district as an admission of its awareness of the abuse? Here the court answered "yes" over a concurrence which disagreed.

JULY 3, 2024

CHILD VICTIMS ACT, INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS.

PLAINTIFF, IN THIS CHILD VICTIMS ACT SEXUAL ABUSE ACTION, PROPERLY ASSERTED A CAUSE OF ACTION FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS AS AN ALTERNATIVE TO THE NEGLIGENCE CLAIMS, CRITERIA EXPLAINED IN DEPTH (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, in a full-fledged opinion by Justice Higgitt, determined the intentional infliction of emotional distress (IIED) cause of action should not have been dismissed in this Child Victims Act sexual abuse case. Supreme Court held the IIED cause of action duplicated negligence causes of action. It was alleged that an employee of defendant church who coached a basketball team abused plaintiff, one of the players:

… [P]laintiff is asserting the IIED cause of action as an alternative claim to his negligence claims.

Thus … plaintiff is not barred from pursuing a cause of action for IIED.

… [T]he complaint states a cause of action for IIED. … [P]laintiff pleaded that defendant engaged in extreme and outrageous conduct.

… [P]laintiff alleged that defendant knowingly permitted its employee, a child molester, to coach its youth basketball team, and defendant turned a blind eye to the abuse, allowing the employee to repeatedly subject plaintiff to inappropriate sexual contact. In doing so, defendant abused a position of dominance. Defendant, a trusted institution, enjoyed a position of dominance over plaintiff, a then-adolescent, who wanted to play on a prestigious youth basketball program that the church administered. Additionally, plaintiff, an adolescent coached by a church deacon, was especially vulnerable. Plaintiff's vulnerability is highlighted by the allegations that defendant's employee was permitted by defendant to be alone with plaintiff in a locker room where the sexual contact occurred. And defendant's undesirable conduct was continuing; defendant retained and supervised the coach over the two-year period of abuse.

Crediting plaintiff's allegations, … defendant facilitated manifestly inappropriate physical contact of a sexual nature by a known child molester by allowing him to coach its youth basketball team and providing the coach with ready access to potential child victims. That conduct … goes beyond all possible bounds of decency and is atrocious and utterly intolerable in a civilized society … We believe that an average member of the community would, upon reading the allegations in the complaint, find them to be outrageous … . Brown v Riverside Church in the City of N.Y., 2024 NY Slip Op 03927, First Dept 7-25-24

Practice Point: Consult this opinion for an explanation of when a cause of action for intentional infliction of emotional distress, in addition to negligence causes of action, is allowed.

Practice Point: Consult this opinion for the criteria for an intentional infliction of emotional distress cause of action.

JULY 25, 2024

CHILD VICTIMS ACT, WORKERS' COMPENSATION.

WHETHER THE CHILD VICTIMS ACT (CVA) REVIVES OTHERWISE TIME-BARRED WORKERS' COMPENSATION CLAIMS AND WHETHER PLAINTIFF'S DAMAGES ARE LIMITED TO WORKERS' COMPENSATION BENEFITS ARE QUESTIONS OF LAW FOR THE COURT, NOT THE WORKERS' COMPENSATION BOARD (FOURTH DEPT).

The Fourth Department, reversing (modifying) Supreme Court, held the court, not the Workers' Compensation Board, must determine whether damages in this Child Victims Act (CVA) sexual-abuse action against the alleged perpetrator's employer are limited to Workers' Compensation benefits and whether claims for time-barred Workers' Compensation benefits are revived by the Child Victims Act (CVA):

" 'As a general rule, when an employee is injured in the course of . . . employment, [the employee's] sole remedy against [their] employer lies in [their] entitlement to a recovery under the Workers' Compensation Law' " … . "[T]he issue whether a plaintiff was acting as an employee of a defendant at the time of the injury is a question of fact to be resolved by the Board" … .

"[C]ourts defer to [an] administrative agency where the issue involves knowledge and understanding of underlying operational practices or entails an evaluation of factual data and inferences to be drawn therefrom" … . However, "[w]here . . . the question is one of pure statutory interpretation, [courts] need not accord any deference to [an administrative body's] determination and can undertake its function of statutory construction" … . As relevant here, although a factual determination with respect to the applicability of the Workers' Compensation Law should be referred to the Board, which has primary jurisdiction over that issue, questions of law remain within the domain of the court … . Here, whether the CVA revives otherwise time-barred claims for workers' compensation benefits, based on allegations of sexual abuse by a coworker, and whether plaintiffs are limited to benefits under the Workers' Compensation Law even if their claims are revived, are questions of law to be decided by the court, not the Board. Thus, we agree with the plaintiffs that Supreme Court erred in granting defendant's motion, staying the actions pending review by the Board, and holding plaintiffs' cross-motions to amend their complaints in abeyance pending the Board's decision. Bates v Gannett Co., Inc., 2024 NY Slip Op 03999, Fourth Dept 7-26-24

Practice Point: This decision deals with the questions of law raised by applying the Workers' Compensation Law to sexual abuse claims revived by the Child Victims Act (CVA).

JULY 26, 2024

INSURANCE LAW, MEDICAL MALPRACTICE.

WHERE THERE ARE MULTIPLE EXCESS COVERAGE POLICIES COVERING THE SAME RISK, THE EXCESS COVERAGE CLAUSES CANCEL EACH OTHER OUT (FOURTH DEPT).

The Fourth Department, reversing (modifying) Supreme Court, explained how multiple "excess coverage" insurance policies should be applied:

"[W]here there are multiple policies covering the same risk, and each generally purports to be excess to the other, the excess coverage clauses are held to cancel out each other and each insurer contributes in proportion to its [policy] limit," unless to do so would distort the plain meaning of the policies … . By contrast, "if one party's policy is primary with respect to the other policy, then the party issuing the primary policy must pay up to the limits of its policy before the excess coverage becomes effective" … . Kolli v Kaleida Health, 2024 NY Slip Op 03998, Fourth Dept 7-26-24

Practice Point: The excess coverage clauses in multiple excess coverage policies covering the same risk cancel each other out.

JULY 26, 2024

LABOR LAW-CONSTRUCTION LAW, SCAFFOLD FALL.

ALTHOUGH PLAINTIFF FAILED TO TIE OFF HIS LANYARD, THAT FAILURE WAS NOT THE SOLE PROXIMATE CAUSE OF HIS INJURY; PLAINTIFF FELL WHEN A PLANK ON THE SCAFFOLD BROKE; PLAINTIFF SHOULD HAVE BEEN AWARDED 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. Plaintiff was wearing a safety harness with a lanyard when a coworker asked for help in securing the scaffold to the wall. Plaintiff was not able to hook his lanyard to the scaffold because he was carrying a pipe and a clamp, the lanyard was only four feet long, and he had to walk 20 feet to the wall. A plank on the scaffold broke and plaintiff fell. Supreme Court found that were questions of fact whether plaintiff was the sole proximate cause of his injury and whether he was a recalcitrant worker. Because the plank broke, plaintiff's actions or omissions could not be the sole proximate cause of his injury:

… [T]he plaintiffs established, prima facie, that Labor Law § 240(1) was violated and that the violation was a proximate cause of the injured plaintiff's injuries. The undisputed evidence established that the injured plaintiff was subjected to the elevation-related risk of the wooden plank which broke suddenly, causing the injured plaintiff to fall … .

In opposition to the plaintiffs' prima facie showing, the defendants failed to raise a triable issue of fact as to whether the injured plaintiff's own conduct was the sole proximate cause of his injuries. Since the plaintiffs established a violation of Labor Law § 240(1) and that the violation was a proximate cause of the injured plaintiff's fall, the injured plaintiff's comparative negligence, if any, is not a defense to the cause of action alleging a violation of that statute … . Further, the defendants did not present evidence that the injured plaintiff was recalcitrant in the sense that he was instructed to tie and untie his lanyard to traverse the scaffold and refused to do so … . Amaro v New York City Sch. Constr. Auth., 2024 NY Slip Op 04052, Second Dept 7-31-24

Practice Point: As long as an elevation hazard is a cause of plaintiff's injury (here a scaffold plank broke), whether an act or omission on plaintiff's part (here the

failure to hook up his lanyard) contributed to his injury is not an issue under Labor Law 240(1).

JULY 31, 2024

LABOR LAW-CONSTRUCTION LAW, UNSECURED LADDER.

AS PLAINTIFF WAS REMOVING DUCTS FROM THE CEILING, A PORTION OF A DUCT STRUCK PLAINTIFF AND THE A-FRAME LADDER CAUSING HIM AND THE LADDER TO FALL TO THE FLOOR; IT IS ENOUGH THAT THE LADDER WAS "UNSECURED;" PLAINTIFF NEED NOT SHOW THE LADDER WAS DEFECTIVE (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff was entitled to summary judgment on his Labor Law 240(1) cause of action in this ladder-fall case. Plaintiff was provided with an A-frame ladder to remove duct work from the ceiling. A portion of the duct fell causing the ladder to tip and plaintiff fell to the floor. The court noted that plaintiff need not prove the ladder was defective. In addition, summary judgment is appropriate even where, as here, plaintiff is the only witness to the incident:

Labor Law § 240(1) "mandates that owners and contractors provide devices which shall be so constructed, placed and operated as to give proper protection to persons performing work covered by the statute" … . As the building owner, defendant had the duty to provide proper protection to plaintiff, a worker, pursuant to section 240(1) … .

For purposes of liability under section 240(1), "[i]t is sufficient . . . that adequate safety devices to prevent the ladder from slipping or to protect the plaintiff from falling were absent" … . Here, plaintiff's testimony that he was not provided with any other safety protection except an unsecured ladder, which fell along with plaintiff when both were hit by the duct, established prima facie entitlement to judgment as a matter of law … . Rivera v 712 Fifth Ave. Owner LP, 2024 NY Slip Op 03562, First Dept 7-2-24

Practice Point: If plaintiff falls from an "unsecured" A-frame ladder, summary judgment on the Labor Las 240(1) cause of action is appropriate even where there is no proof the ladder was defective and there were no witnesses.

JULY 2, 2024

LABOR LAW-CONSTRUCTION LAW, NEGLIGENCE, DUTY OF CARE.

PLAINTIFF FELL FROM AN A-FRAME LADDER OWNED BY A CONTRACTOR, DAL, HE DID NOT WORK FOR; BASED ON DISPUTED EVIDENCE THE LADDER WAS DEFECTIVE, DAL'S MOTION FOR SUMMARY JUDGMENT ON THE LABOR LAW 200 AND COMMON LAW NEGLIGENCE CAUSES OF ACTION WAS DENIED BY SUPREME COURT; THE FIRST DEPARTMENT, OVER A DISSENT, REVERSED, FINDING DAL DID NOT OWE PLAINTIFF A DUTY OF CARE (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, in a full-fledged opinion by Justice Oing, over a dissenting opinion, determined defendant contractor, DAL, did not owe a duty of care to plaintiff who fell from an A-frame ladder owned by DAL. Plaintiff had finished his measuring work using a ladder and scaffold which he had removed from the area. Plaintiff was then asked to confirm his measurements. He returned to the area and used an A-frame ladder that was already set up there. The ladder wobbled and he fell. It turned out the ladder was owned by DAL, with which plaintiff had no connection. There was disputed evidence the ladder was defective and DAL was alleged to have created a dangerous condition. Supreme Court found there was a question of fact supporting plaintiff's Labor Law 200 and common-law negligence causes of action. The majority reversed, finding DAL did not owe plaintiff a duty of care:

Because DAL was not an owner, a general contractor, or a statutory agent of an owner or general contractor, the Labor Law § 200 claim against it could not stand … . * * *

… [G]iven that DAL did not enter into a contract with plaintiff or his employer, a duty of care to plaintiff cannot arise out of a contractual relationship … . Any contractual obligations DAL may have had to its employees or to JRM, the general contractor, did not extend to plaintiff … . The question that remains is whether DAL may still owe a duty of care to plaintiff. Generally, a contracting party does not owe a duty of care to a noncontracting third party … . There are three well-settled exceptions to this general rule: (1) where the contracting party, in failing to exercise reasonable care in the performance of his or her duties, launches a force or

instrument of harm; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties; and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely … . * * *

… [T]he record establishes that the DAL ladder was left by a DAL employee in the fifth-floor pantry at some point in the late morning on the day of accident, and that plaintiff saw the unattended ladder when he returned to the fifth-floor pantry to review his measurements from earlier that morning. Plaintiff did not know or ascertain who owned the ladder … . … [P]laintiff did not obtain permission to use the ladder, … DAL did not supply or provide plaintiff with the ladder for use to complete his tasks, … DAL had no duty to provide plaintiff with a safe or adequate ladder, and … DAL did not supervise, direct or control plaintiff's work. … DAL did not launch a force or instrument of harm. Thus, under Espinal, DAL did not owe a duty of care to plaintiff, and plaintiff's common-law negligence claim against it cannot stand. Dibrino v Rockefeller Ctr. North, Inc., 2024 NY Slip Op 03558, First Dept 7-2-24

Practice Point: Here plaintiff fell from an allegedly defective ladder belonging to a contractor he did not work for. Because none of the Espinal factors applied, the contractor did not owe plaintiff a duty of care. There was a dissenting opinion.

JULY 2, 2024

MEDICAL MALPRACTICE, IMMUNITY, COVID.

THE IMMUNITY CONFERRED ON HEALTHCARE PROVIDERS DURING THE COVID PANDEMIC CAN BE BASED ON THE OVERALL STRAIN ON THE OVERWHELMED HEALTHCARE SYSTEM; ALTHOUGH THE DEFENDANTS IN THIS MED MAL CASE MAY DEMONSTRATE ENTITLEMENT TO IMMUNITY AS THE CASE PROGRESSES, THEY DID NOT DEMONSTRATE ENTITLEMENT TO IMMUNITY AS A MATTER OF LAW SUCH THAT THE COMPLAINT SHOULD BE DISMISSED (SECOND DEPT).

The First Department, in a full-fledged opinion by Justice Higgitt, determined defendants in this med mal case were not entitled to dismissal of the complaint

based upon the immunity conferred by the Emergency or Disaster Treatment Protection Act (EDPTA) during the COVID pandemic. The plaintiff-patient, who did not have COVID, fell near his hospital bed and suffered a brain injury. After he fell, and before he suffered any symptoms of the injury from the fall, he was examined by two doctors. The doctors were not made aware of the fall. The defendants moved to dismiss the complaint at the outset of the case based on the EDPTA, noting that the immunity conferred by the statute was based upon the overall strain placed on the healthcare system by the pandemic. The Second Department determined that, although the defendants may be able to demonstrate their entitlement to immunity as the case progresses, they did not demonstrate entitlement to immunity as a matter of law such that the complaint should be dismissed at the outset:

… [O]f the three conditions imposed by former Public Health Law § 3082(1), there is no question that defendants were arranging for or providing health care services as per the statute, and were doing so in good faith. The parties' dispute distills to whether defendants established, conclusively, that "the treatment of [plaintiff was] impacted by [defendants'] decisions or activities in response to or as a result of the COVID-19 outbreak" (former Public Health Law § 3082[1][b]). * * *

A statute conferring immunity must be strictly construed … , and a party seeking its protections "must conform strictly with its conditions" … . In this regard, we note that only minimal discovery had been conducted at the time the motion was made, and that the applicability of the defense, itself, requires a fact-intensive inquiry. Whether or not defendants may ultimately be able to demonstrate that they are entitled to immunity, it is premature to deem the analysis completed at this juncture … . Holder v Jacob, 2024 NY Slip Op 03864, First Dept 7-18-24

Practice Point: Healthcare providers may be entitled to statutory immunity during the COVID pandemic. Here the defendants were unable to demonstrate entitlement to immunity as a matter of law such that the med mal complaint should be dismissed. But they may be able demonstrate entitlement to immunity as the case progresses.

JULY 18, 2024

MEDICAL MALPRACTICE, DAMAGES, "PRE-IMPACT TERROR."

DISAGREEING WITH THE FIRST DEPARTMENT, THE SECOND DEPARTMENT HELD THAT DAMAGES FOR "PRE-IMPACT TERROR" ARE NOT APPROPRIATE IN A MED MAL CASE; HERE PLAINTIFF SUFFERED A HEART ATTACK IN 2008 AND DIED IN 2011 (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court in the med mal case, in a full-fledged opinion by Justice Maltese, determined the damages for "pre-impact terror" were not appropriate. Plaintiff suffered a heart attack in 2008 and died in 2011:

… [P]re-impact terror delineated as emotional pain and suffering as a separate item of damages is inappropriate in this medical malpractice and wrongful death action and would represent an inappropriate extension of the law with respect to this issue. Traditionally, damages for pre-impact terror have been awarded in cases involving motor vehicle accidents and other types of accidents … . Here, where the "impact" was the decedent's heart attack, the damages for emotional pain and suffering cannot accurately be characterized as damages for pre-impact terror, because they were intended to compensate for the fear the decedent experienced after the heart attack occurred in January 2008 at Westchester Medical Center until his death more than three years later on October 27, 2011, at Yale-New Haven Hospital. Further, unlike a motor vehicle accident where the defendant driver causes the impact, the WMC defendants did not cause the decedent's heart attack. To the extent that the Appellate Division, First Department, determined otherwise in Small v City of New York (213 AD3d 475), we decline to follow that decision. Molina v Goldberg, 2024 NY Slip Op 03818, Second Dept 7-17-24

Practice Point: Disagreeing with the First Department, the Second Department held damages for "pre-impact terror" are not appropriate in the med mal case.

JULY 17, 2024

MEDICAL MALPRACTICE, EXPERT EVIDENCE.

AN EXPERT IN A MED MAL CASE NEED NOT BE A SPECIALIST IN THE RELEVANT FIELD; HERE A PRIMARY CARE PHYSICIAN LAID A PROPER FOUNDATION FOR AN OPINION ABOUT PLAINTIFF'S CARE; PLAINTIFF ALLEGED DEFENDANTS NEGLIGENTLY FAILED TO DIAGNOSE HER HEART CONDITION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendants in this med mal case should not have been granted summary judgment. Plaintiff alleged a negligent failure to diagnose her heart condition. Plaintiff's expert was a primary care physician, not a cardiologist. The Second Department noted that an expert need not be a specialist and found plaintiff's expert had laid a proper foundation for his opinion:

"[A] medical expert need not be a specialist in a particular field in order to testify regarding accepted practices in that field" … . However, the expert must "be possessed of the requisite skill, training, education, knowledge or experience from which it can be assumed that the opinion rendered is reliable" … . Here, the expert, who was in the practice of internal medicine and primary care for more than 35 years, demonstrated based on experience and knowledge that he or she was qualified to render an opinion regarding the symptomology and diagnosis of heart disease and as to whether the defendants properly examined the decedent and investigated her symptoms in accordance with accepted medical practices … . Rosenzweig v Hadpawat, 2024 NY Slip Op 03838, Second Dept 7-17-24

Practice Point: An expert in a med mal case need not be a specialist. Here a primary care physician laid a proper foundation for an opinion re: the defendants' failure to diagnose plaintiff's heart condition.

JULY 17, 2024

MEDICAL MALPRACTICE, EXPERT EVIDENCE.

IN A MED MAL CASE, AN EXPERT AFFIDAVIT WHICH MAKES ASSERTIONS UNSUPPORTED AND BELIED BY THE RECORD AND, FOR THE FIRST TIME, ASSERTS ISSUES NOT ENCOMPASSED BY THE COMPLAINT OR BILL OF PARTICULARS, DOES NOT RAISE A QUESTION OF FACT (FIRST DEPT).

The First Department, reversing Supreme Court, in a full-fledged opinion by Justice Mendez, determined the plaintiffs' expert did not raise a question of fact on whether the defendants (the Golden defendants) met the appropriate standard of care in this medical malpractice action:

Opinion evidence must be based on facts in the record. An expert cannot speculate, guess, or reach their conclusion by assuming material facts not supported by the evidence. The opinion must be supported either by facts disclosed by the evidence or by facts known to the expert personally. It is essential that the facts upon which the opinion is based be established, or fairly inferable, from the evidence … .

Here, the Golden defendants' expert's affirmation, which is based on information contained in the relevant medical records and deposition testimony, established prima facie their entitlement to summary judgment. In opposition, plaintiffs' expert affirmations as pertain to the Golden defendants are refuted by the medical records and deposition testimony … , do not specifically controvert the opinion of defendants' expert … , are conclusory and speculative, and fail to raise a triable issue of fact … .

An expert's affirmation that sets forth general conclusions, misstatements of evidence, and unsupported assertions, and which fails to address the opinions of defendant's expert, is insufficient to defeat summary judgment … . As is one which raises for the first time in opposition to summary judgment a new theory of liability that has not been set forth in the bills of particulars or in the complaint … . Plaintiffs' expert affirmations state for the first time in opposition to summary judgment that the Golden defendants departed from accepted practice when, after learning that decedent's headache had lasted from two to four days, Dr. Golden failed to refer him to the emergency room for a CT scan. This theory is neither in plaintiffs' complaints nor bills of particulars; is speculative, conclusory, and

contradicted by the record; and should not have been considered by Supreme Court … . Cabrera v Golden, 2024 NY Slip Op 04112, First Dept 7-31-24

Practice Point: Many med mal decisions reject without explanation expert opinion affidavits which are deemed "speculative" or "conclusory." This opinion provides insight into the meaning of those terms.

JULY 31, 2024

MUNICIPAL LAW, POLICE CONDUCT, RESPONDEAT SUPERIOR, EMPLOYMENT LAW.

A MUNICIPALITY CANNOT BE SUED FOR NEGLIGENT HIRING, RETENTION, TRAINING AND SUPERVISION BASED UPON EMPLOYEES' ACTIONS ALLEGED TO HAVE BEEN WITHIN THE SCOPE OF THEIR EMPLOYMENT; THE PROPER THEORY IS RESPONDEAT SUPERIOR (FOURTH DEPT).

The Fourth Department, reversing (modifying) Supreme Court, determined that a municipality cannot be sued for negligent hiring, retention, training and supervision based upon actions taken by employees within the scope of their employment. In that case, the municipality can only be sued under a respondeat superior theory. Here plaintiff sued the City of Buffalo and police officers for actions relating to plaintiff's arrest:

We agree with defendants that the court erred in denying their motion with respect to the … causes of action against the City of Buffalo, sounding in negligent hiring, negligent retention, and negligent training and supervision … . … [I]n those causes of action plaintiff alleges that the City of Buffalo was negligent in the hiring, retention and training and supervision of [officers] Moriarity and Bridgett, and plaintiff further alleges that Moriarity and Bridgett were acting in their capacities as employees of the City of Buffalo. It is well settled … that "where an employee is acting within the scope of [their] employment, the employer is liable for the employee's negligence under a theory of respondeat superior and no claim may proceed against the employer for negligent hiring, retention, supervision, or training" … . Taylor, 2024 NY Slip Op 03632, Fourth Dept 7-3-24

Practice Point: A municipality cannot be sued for negligent hiring, retention, training and supervision when the employees' actions are alleged to have been within the scope of their employment. The municipality should be sued under a respondeat superior theory.

JULY 3, 2024

RETIREMENT AND SOCIAL SECURITY LAW, POLICE PARADEDIC.

PETITIONER, A POLICE PARAMEDIC, INJURED HIS SHOULDER WHEN THE RETRACTABLE PORTION OF A STRETCHER JAMMED; THE UNEXPECTED EQUIPMENT MALFUNCTION WAS AN "ACCIDENT" ENTITLING PETITIONER TO ACCIDENTAL DISABILITY RETIREMENT BENEFITS (THIRD DEPT).

The Third Department, over a partial concurrence and dissent, determined petitioner, a police paramedic, was entitled to accidental disability retirement benefits based on an injury caused by the malfunction of the retractable portion of a stretcher:

For purposes of accidental disability retirement benefits, "an accident is defined as 'a sudden, fortuitous mischance, unexpected, out of the ordinary, and injurious in impact' " * * *. "An injury which occurs without an unexpected event as the result of activity undertaken in the performance of ordinary employment duties, considered in view of the particular employment in question, is not an accidental injury" … . * * *

… [P]etitioner testified that when he squeezed the handle to extend the retractable head portion of the stretcher and pulled, which petitioner noted usually required "a little bit of force to push it in and out," he was able to extend it a little bit before it unexpectedly jammed — something that petitioner testified had never happened before. Petitioner testified that thereafter it took four firefighters banging on the handle with tools to finally extend the head section to the proper position. Although extending the retractable head portion of the stretcher was no doubt part of petitioner's job duties, the precipitating external event, i.e., the jamming of the retractable head section of the stretcher, was sudden, unexpected and not a risk in his ordinary employment duties. As petitioner's testimony reflects, this appears to

have been a malfunction in the equipment … . Matter of Hamblin v DiNapoli, 2024 NY Slip Op 03787, Third Dept 7-11-24

Practice Point: Injury caused by an equipment malfunction can constitute a compensable "accident" under the Retirement and Social Security Law.

JULY 11, 2024

SLIP AND FALL, CONTRACT LAW, MUNICIPAL LAW.

IN THIS SLIP AND FALL CASE, THERE IS A QUESTION OF FACT WHETHER THE MUNICIPALITY OWED A DUTY TO PLAINTIFF BASED UPON THE MUNICIPALITY'S LAUNCHING AN INSTRUMENT OF HARM; IT WAS ALLEGED THAT SALT APPLIED TO MELT ICE CREATED A POOL OF WATER WHICH FROZE AND CAUSED PLAINTIFF'S FALL (FOURTH DEPT).

The Fourth Department, reversing (modifying) Supreme Court, determined there was a question of fact whether the municipality, which had contracted with the school district to provide salting services, owed plaintiff a duty based upon the municipality's launching an instrument of harm. It was alleged the defendant municipality's use of salt to melt ice resulted in a frozen pool of water where plaintiff slipped and fell:

… [P]laintiffs submitted the affidavit of an expert, who opined that defendants' use of sodium chloride (rock salt) created a dangerous condition and launched a force of harm because the rock salt would have caused water to flow and pool near the area where plaintiff fell. The expert further opined that, due to the temperatures on the date of the incident, the pooled water near the area of plaintiff's fall would have refrozen quickly, thereby creating the alleged dangerous condition … . Plaintiffs also submitted the deposition testimony of defendants' employee, who confirmed that during wintertime, when the temperature can fluctuate above and below freezing, water could accumulate in the parking lot where plaintiff fell, and that the accumulated water could then freeze when the temperature went below freezing … . We conclude that plaintiffs' submissions raised a triable issue of fact whether defendants assumed a duty of care to plaintiff by launching the force or instrument of harm. Kirschler v Village of N. Collins, 2024 NY Slip Op 03977, Fourth Dept 7-26-24

Practice Point: Here the municipality entered a contract with the school district to salt the parking lot and other areas. There was a question of fact whether the application of salt launched an instrument of harm (forming a pool of water which froze causing plaintiff's fall) thereby creating a duty owed plaintiff.

JULY 26, 2024

SLIP AND FALL, LANDLORD-TENANT.

QUESTIONS OF FACT WHETHER DEFENDANT WAS AN OUT-OF-POSSESSION LANDLORD PRECLUDED SUMMARY JUDGMENT IN FAVOR OF THE LANDLORD IN THIS SLIP AND FALL CASE (SECOND DEPT).

The Second Department, reversing Supreme Court in this slip and fall case, determined there were questions of fact whether the landlord was an out-of-possession landlord:

"A property owner has a duty to maintain its premises in a reasonably safe condition" … . "That duty is premised on the landowner's exercise of control over the property, as the person in possession and control of property is best able to identify and prevent any harm to others" … . "It has been held uniformly that control is the test which measures generally the responsibility in tort of the owner of real property" … . "Thus, a landowner who has transferred possession and control is generally not liable for injuries caused by dangerous conditions on the property" … .

… [D]efendants failed to establish their prima facie entitlement to judgment as a matter of law dismissing the complaint insofar as asserted against them on the ground that they were out-of-possession landlords. Although the defendants submitted a lease establishing that a tenant leased the entire office building and was responsible for the maintenance of vestibules and entrances, the defendants' submissions also demonstrated that they maintained an office in the building and that, each work day, the defendants' employee used the building entrance where the plaintiff's slip and fall occurred. The defendants' submissions further demonstrated that this employee would report any defects in the building to the building's security, and the tenant would then remedy those defects. Under these circumstances, triable issues of fact exist as to the defendants' control of the

subject property and whether they were out-of-possession landlords … . Grullon v 57-115 Assoc., L.P., 2024 NY Slip Op 03811, Second Dept 7-17-24

Practice Point: Here, even though the lease made the tenant responsible for maintenance, the fact that the landlord had an office in the building raised a question of fact whether the landlord could escape liability for a slip and fall as an out-of-possession landlord.

JULY 17, 2024

SLIP AND FALL, ACTUAL KNOWLEDGE OF THE CONDITION.

DEFENDANT PROPERTY-OWNER HAD ACTUAL KNOWLEDGE OF THE RECURRING RAINWATER LEAKS; PLAINTIFF ENTITLED TO SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff was entitled to summary judgment in this slip and fall case:

… Karen Myers [was] the defendants' supervisor caretaker assigned to the subject building. At her deposition, the plaintiff testified that, while walking in the hallway of the floor that she resided on, she slipped as a result of rainwater that had leaked into the building from an outside terrace. She also testified that during periods of rainfall, she had noticed water leaking into the hallway from underneath the terrace door on numerous occasions over the years she had resided in the building and had observed building employees mopping the area "a lot of times." Myers testified that she had been aware of the recurring leak for at least one year prior to the plaintiff's accident and that the only remedial measure taken by building employees in response was "spot mopping." She conceded that the recurring leak caused a "slip and fall" "hazard," which she expected employees to "mop up." Based upon this testimony, the plaintiff "established as a matter of law that [the defendants] had actual knowledge of a recurring dangerous and defective condition and, therefore, could be charged with constructive knowledge of each specific recurrence of the condition, which was a proximate cause of the accident" … . Graham v New York City Hous. Auth., 2024 NY Slip Op 03810, Second Dept 7-17-24

Practice Point: A property-owner's actual knowledge of a recurring dangerous condition which causes a slip and fall entitles plaintiff to summary judgment.

JULY 17, 2024

TRAFFIC ACCIDENTS, RESPONDEAT SUPERIOR, VEHICLE AND TRAFFIC LAW.

DEFENDANT FARM'S EMPLOYEE WAS DRIVING FARM EQUIPMENT AT NIGHT WITHOUT LIGHTS WHEN PLAINTIFF COLLIDED WITH IT; PLAINTIFF WAS ENTITLED TO SUMMARY JUDGMENT UNDER A NEGLIGENCE-PER-SE THEORY AND UNDER RESPONDEAT SUPERIOR (FOURTH DEPT).

The Fourth Department, reversing (modifying) Supreme Court, determined plaintiff was entitled to summary judgment in this traffic accident case. Plaintiff collided with a manure spreader with no lights which was being towed by a tractor at night (a violation of the Vehicle and Traffic Law). In addition, the employer of the driver was deemed liable under respondeat superior:

"[A] defendant's unexcused violation of the Vehicle and Traffic Law constitutes negligence per se" … and here, plaintiff met his initial burden on the motion by submitting evidence that the manure spreader was being operated on a public roadway, more than one-half hour after sunset, without "at least two lighted lamps on the rear, one on each side" in violation of Vehicle and Traffic Law § 375 (2) (a) (3), and without "signaling devices and reflectors" in violation of section 376 (a), which constitutes negligence per se … . …

"The general rule is that an employee acts within the scope of his [or her] employment when [the employee] is acting in furtherance of the duties owed to the employer and where the employer is or could be exercising some degree of control, directly or indirectly, over the employee's activities" … . Here, plaintiff established that Sanchez-Rodriguez [the tractor driver] was "acting within the scope of his employment" at the time of the accident … . Durkee v Sanchez-Rodriguez, 2024 NY Slip Op 04002, Fourth Dept 7-26-24

Practice Point: Driving farm equipment on a public road at night without lights constitutes negligence per se.

JULY 26, 2024

TRAFFIC ACCIDENTS, MUNICIPAL LAW, VEHICLE AND TRAFFIC LAW.

A COUNTY RECYCLING TRUCK IS NOT ENGAGED IN ROAD WORK AND THEREFORE IS NOT EXEMPT FROM THE RULES OF THE ROAD UNDER THE VEHICLE AND TRAFFIC LAW (FOURTH DEPT).

The Fourth Department, reversing County Court in this traffic accident case, determined a county recycling truck was not engaged in the type of road work which is exempted from the rules of the road under the Vehicle and Traffic Law. The related affirmative defense should have been dismissed:

Vehicle and Traffic Law § 1103 (b) provides that the rules of the road do not apply to "persons, teams, motor vehicles, and other equipment while actually engaged in work on a highway" … . "[T]he law was intended to exempt from the rules of the road all teams and vehicles that 'build highways, repair or maintain them, paint the pavement markings, remove the snow, sand the pavement and do similar work' . . . Thus, the exemption turns on the nature of the work being performed (construction, repair, maintenance or similar work)—not on the nature of the vehicle performing the work" … .

Inasmuch as municipal refuse collection does not involve building, repairing, or maintaining highways, painting pavement markings, removing snow, sanding the pavement, or doing other similar work (see id.) and is "a task which one would anticipate could be accomplished while obeying the rules of the road"…, we conclude that Vehicle and Traffic Law § 1103 does not apply to the facts presented here … . In reaching that conclusion, we note that the 2016 amendment to Vehicle and Traffic Law § 117-a (L 2016, ch 293, § 1)—which broadened the definition of "hazard vehicle" to include sani-vans and waste collection vehicles—did not broaden the scope of work that would constitute "engag[ing] in work on a highway" … .

Vehicle and Traffic Law § 1103 (b) further provides that section 1202 (a)—which regulates stopping, standing, and parking—does not apply to "hazard vehicles while actually engaged in hazardous operation on or adjacent to a highway" … . That provision, however, does not shield defendants from the allegations of negligence raised by plaintiff, i.e., violations of the right-of-way provisions of Article 26 of the Vehicle and Traffic Law, including, inter alia, sections 1140, 1142 (a), and 1146 (b). Rouse v City of Syracuse Dept. of Pub. Works, 2024 NY Slip Op 03938, Fourth Dept 7-26-24

Practice Point: A county recycling truck is not engaged in road work and therefore is not exempt from the rules of the road under the Vehicle and Traffic Law.

JULY 26, 2024

TRAFFIC ACCIDENTS, VEHICLE AND TRAFFIC LAW, BICYCLISTS.

PLAINTIFF BICYCLIST'S MOTION FOR SUMMARY JUDGMENT IN THIS TRAFFIC ACCIDENT CASE SHOULD HAVE BEEN GRANTED; BUT PLAINTIFF'S MOTION TO DISMISS DEFENDANT DRIVER'S CONTRIBUTORY NEGLIGENCE AFFIRMATIVE DEFENSE WAS PROPERLY DENIED (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined plaintiff bicyclist's motion for summary judgment on liability in this traffic accident case should have been granted. However, plaintiff's motion to dismiss defendant's contributory negligence affirmative defense was properly denied. Defendant suddenly backed up in and attempt to parallel park and struck plaintiff. The court noted that Supreme Court properly refused to consider an uncertified police report submitted by defendant in opposition to summary judgment:

The plaintiff … demonstrated that the defendant reversed her vehicle on the roadway "without taking proper precautions" in violation of Vehicle and Traffic Law § 1211(a) … . In opposition, the defendant failed to raise a triable issue of fact. "The defendant did not submit an affidavit describing the events surrounding the accident which rebutted the version of events presented in the plaintiff's affidavit" … . Further, "[c]ontrary to the defendant['s] contention, the [Supreme Court] properly declined to consider a particular uncertified police accident report in determining the motion as it would have provided the sole basis for denying summary judgment" …

"With few exceptions . . . , a person riding a bicycle on a roadway is entitled to all of the rights and bears all of the responsibilities of a driver of a motor vehicle" (… Vehicle and Traffic Law § 1231). Therefore, "[a] bicyclist is required," inter alia, "to use reasonable care for his or her own safety, to keep a reasonably vigilant lookout for vehicles, and to avoid placing himself or herself in a dangerous position" … . Dieubon v Moore, 2024 NY Slip Op 03881, Second Dept 7-24-24

Practice Point: Backing up without taking precautions violates the Vehicle and Traffic Law and constitutes negligence per se.

Practice Point: A bicyclist must use reasonable care for his or her safety and may therefore be contributorily negligent in a car-bicycle collision.

JULY 24, 2024