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Contents

CHILD VICTIMS ACT, DUTY OWED BY STATE, COURT OF CLAIMS, CIVIL PROCEDURE.

HERE THE COMPLAINT STATED A CHILD-VICTIMS-ACT CAUSE OF ACTION AGAINST THE STATE; THE STATE ASSUMES A DUTY OF PROTECTION AGAINST HARM FOR A CHILD IN ITS CUSTODY; THE COMPLAINT WAS NOT DEFECTIVE FOR FAILURE TO ALLEGE THE STATE OWED PLAINTIFF A SPECIAL DUTY, OVER AND ABOVE THAT OWED THE GENERAL PUBLIC (THIRD DEPT).

The Third Department, in a full-fledged opinion by Justice Aarons, over a concurrence, determined the complaint in this Child Victims Act action alleging sexual abuse which under the care of the state should not have been dismissed. The issue was whether the complaint must allege a special duty owed by the government to the plaintiff. The Third Department found that a special duty need not be alleged to survive a motion to dismiss under the facts alleged:

A cause of action for negligence requires proof that defendant owed the claimant a legally recognized duty, that "defendant breached that duty and that such breach was a proximate cause of an injury suffered by the [claimant]" … . That said, "an agency of government is not liable for the negligent performance of a governmental function unless there existed a special duty to the injured person, in contrast to a general duty owed to the public" … . "A special duty can arise in three situations: (1) the plaintiff belonged to a class for whose benefit a statute was enacted; (2) the government entity voluntarily assumed a duty to the plaintiff beyond what was owed to the public generally; or (3) the municipality took positive control of a known and dangerous safety condition" … . Claimant does not dispute that he has not pleaded one of those three bases for a special duty, instead contending that he was not required to so plead because he was in OCFS's [Office of Children's and Family Services'] custody.

We agree. Mindful that our review requires us to determine "whether the alleged facts fit within any cognizable legal theory" … , claimant's failure to plead a special duty is not fatal to the extent his claim alleges negligence in the performance of obligations stemming from OCFS's custody of him during his placement at the Schenectady facility … . When a government entity assumes

custody of a person, thus diminishing that person's ability to self-protect or access those usually charged with such protection, that entity owes to that person a duty of protection against harms that are reasonably foreseeable under the circumstances … . The duty of protection is coextensive with the entity's "physical custody of and control" of the person, terminating at the point the person passes out of the "orbit of [the entity's] authority" … . Thus, we have held that "[a] governmental foster care agency is under a duty to adequately supervise the children in its charge and will be held liable for foreseeable injuries proximately related to the absence of adequate supervision," including "negligence in the selection of foster parents and in supervision of the foster home" … . A.J. v State of New York, 2024 NY Slip Op 04231, Third Dept 8-15-24

Practice Point; When the state assumes custody of a child, it owes the child a duty of protection against harm. Under the facts of this case, the plaintiff was not required to alleged the state owed a special duty to the plaintiff.

AUGUST 15, 2024

CORPORATION LAW, EMPLOYMENT LAW, MEDICAL MALPRACTICE, PIERCING THE CORPORATE VEIL.

HERE THERE WAS A QUESTION OF FACT WHETHER THE CORPORATE VEIL SHOULD BE PIERCED SUCH THAT THE DEFENDANT HOSPITAL WOULD BE DEEMED VICARIOUSLY LIABLE FOR THE ALLEGED MALPRACTICE BY A CORPORATION OWNED BY A HOSPITAL EMPLOYEE AND WHOSE OFFICE WAS IN THE HOSPITAL (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined there was a question of fact whether defendant hospital was vicariously liable for the purported medical malpractice by a corporation (Meeting House) under a piercing-the-corporate-veil theory:

Generally, … piercing the corporate veil requires a showing that: (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury" … . "'[T]he corporate veil

will be pierced to achieve equity, even absent fraud, when a corporation has been so dominated by an individual or another corporation and its separate entity so ignored that it primarily transacts the dominator's business instead of its own and can be called the other's alter ego'" … . In determining whether to pierce the corporate veil, "[g]enerally considered are such factors as whether there is an overlap in ownership, officers, directors and personnel, inadequate capitalization, a commingling of assets, or an absence of separate paraphernalia that are part of the corporate form, such that one of the corporations is a mere instrumentality, agent and alter ego of the other" … .

… Meeting House failed to adhere to corporate formalities, such as holding board of directors' meetings. Meeting House was owned and controlled by an employee of the hospital, whose office was in the hospital, pursuant to a contract with the hospital. The hospital had sole discretion over the number of shares and who would be the shareholders. Meeting House was also undercapitalized, since it appears that its assets consisted of a non-interest-bearing loan from the hospital … . Its budget and any amendments thereto had to be approved by the hospital. The common ownership, leadership, and control, and the common location on the grounds of the hospital and in the hospital itself, raised a triable issue of fact as to whether the corporate veil should be pierced … . Midson v Meeting House Lane Med. Practice, P.C., 2024 NY Slip Op 04261, Second Dept 8-21-24

Practice Point: Consult this decision for what it takes to raise a question of fact whether the corporate veil should be pierced in support of a vicarious liability theory.

AUGUST 21, 2024

DAMAGES FOR PERSONAL INJURY, AFFORDABLE CARE ACT AS COLLATERAL SOURCE.

THE UNINSURED PLAINTIFF WAS AWARDED TENS OF MILLIONS OF DOLLARS, INCLUDING FUTURE MEDICAL COSTS, AFTER TRIAL FOR AN INJURY WHICH LEFT HIM PARALYZED; DEFENDANT REQUESTED A COLLATERAL SOURCE HEARING PURSUANT TO CPLR 4545 BECAUSE PLAINTIFF MAY BE ABLE TO RECOVER FUTURE MEDICAL COSTS UNDER THE PATIENT PROTECTION AND AFFORDABLE CARE ACT; IN A MATTER OF FIRST IMPRESSION THE SECOND DEPARTMENT HELD DEFENDANT WAS ENTITLED TO A COLLATERAL SOURCE HEARING (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Ventura, in a matter of first impression, determined defendant in this negligence action was entitled to a hearing pursuant to CPLR 4545 concerning damages awarded for future medical expenses. Plaintiff, a bicyclist, was struck by a railroad tie which was dropped from above, and was paralyzed. Plaintiff was awarded tens of millions of dollars after trial. Defendant argued the uninsured plaintiff may be entitled to future medical costs under the Patient Protection and Affordable Care Act and requested a CPLR 4545 collateral source hearing:

This appeal presents a question of first impression in New York involving the effect of the Patient Protection and Affordable Care Act on collateral source offsets in personal injury actions, to wit: whether a defendant may be entitled to a collateral source hearing pursuant to CPLR 4545 for the purpose of establishing that an uninsured plaintiff's future medical expenses will, with reasonable certainty, be covered in part by a private health insurance policy, as long as the plaintiff takes the steps necessary to procure the policy. Among other reasons, since providing a defendant an offset under such circumstances would serve the "ultimate goal of CPLR 4545 to eliminate duplicate recovery by a plaintiff" … , we conclude that the defendant was entitled to a hearing pursuant to CPLR 4545 to demonstrate the extent, if any, to which the plaintiff's future medical expenses would be reduced by available insurance coverage. We express no opinion, however, about the appropriate outcome following the hearing.

… [W]e modify the amended judgment by deleting the award of damages for the plaintiff's future medical expenses and … remit this matter to the Supreme Court … , for a collateral source hearing on the issue of those expenses, with entry of an appropriate second amended judgment thereafter. Liciaga v New York City Tr. Auth., 2024 NY Slip Op 04257, Second Dept 8-21-24

Practice Point: If an uninsured plaintiff, who was awarded damages to cover future medical costs, may be entitled to future medical costs under the Patient Protection and Affordable Care Act, defendant may be entitled to a CPLR 4545 collateral source hearing.

AUGUST 21, 2024

DANGEROUS CONDITION, CONSTRUCTIVE NOTICE, EVIDENCE.

A DANGEROUS CONDITION, A DOOR WHICH SWUNG CLOSED ABRUPTLY, IS ALLEGED TO HAVE INJURED PLAINTIFF; TO DEMONSTRATE A LACK OF CONSTRUCTIVE NOTICE OF THE CONDITION OF THE DOOR, THE DEFENDANT MUST SUBMIT EVIDENCE THE DOOR WAS INSPECTED OR MAINTAINED AND FOUND SAFE CLOSE IN TIME TO THE INJURY; THE FAILURE TO SUBMIT SUCH EVIDENCE REQUIRED DENIAL OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the defendants in this premises liability case should not have been granted summary judgment. Plaintiff alleged a door closed abruptly, striking her and causing her to fall. The defendants presented no evidence when the door was last inspected or maintained. Therefore the defendants did not demonstrate a lack of constructive notice of the condition:

… [T]he defendants failed to establish, prima facie, that the condition of the door on the date of the accident did not constitute a dangerous condition … . … [T]he defendants failed to establish, prima facie, that they lacked actual or constructive notice of the alleged dangerous condition, as the defendants failed to submit any inspection or maintenance records or any other evidence showing when, if ever, the

door was last inspected or maintained prior to the accident … . Ogletree v Long Is. Univ., 2024 NY Slip Op 04329, Second Dept 8-28-24

Practice Point: To warrant summary judgment where plaintiff alleges a defective condition on defendant's property caused injury, the defendant must present proof the specific area or object alleged to be defective was inspected or maintained and found safe close in time to the incident. Over the past few years, hundreds of reversals have been based on defendant's failure to submit such proof in support of summary judgment. The proof is essential to demonstrating defendant did not have constructive notice of the allegedly dangerous condition.

AUGUST 28, 2024

DANGEROUS CONDITION, OUT-OF-POSSESSION LANDLORD.

DEFENDANT, AS AN OUT-OF-POSSESSION LANDLORD, WAS NOT LIABLE FOR AN ALLEGED DANGEROUS CONDITION ON THE PROPERTY; PLAINTIFF'S REFERENCES TO UNPLEADED CAUSES OF ACTION (LABOR LAW 240(1) AND LABOR LAW 241(6)) IN THE BILL OF PARTICULARS WERE UNSUPPORTED; THE COMPLAINT SHOULD HAVE BEEN DISMISSED (SECOND DEPT).

The Second Department, reversing Supreme Court and dismissing plaintiff's complaint, determined defendant was an out-of-possession landlord who was not responsible for the alleged dangerous condition on the property and the Labor Law 240(1) and 241(6) causes of action, although mentioned in the bill of particulars, were not pleaded. Plaintiff was doing work on cabinets when she was struck by a piece of wood that flew off a table saw operated by another worker. She sued under a negligence theory (dangerous condition) and under Labor Law section 200 (which codifies common law negligence):

"[A] landowner who has transferred possession and control is generally not liable for injuries caused by dangerous conditions on the property" … . "'An out-of-possession landlord can be held liable for injuries that occur on its premises only if the landlord has retained control over the premises and if the landlord is contractually or statutorily obligated to repair or maintain the premises or has

assumed a duty to repair or maintain the premises by virtue of a course of conduct'" … .

… [T]he evidence … , including … the written lease … and transcripts of the deposition testimony … established … that the defendant was an out-of-possession landlord that had relinquished control of the subject property to Tobin and had not assumed a duty to maintain the property in a reasonably safe condition by a course of conduct … . Although the defendant reserved a right of entry under the lease, this did not provide a sufficient basis on which to impose liability upon the defendant for injuries caused by a dangerous condition, as the condition did not violate a specific statute, nor was it a significant structural or design defect … .

Modern practice permits a plaintiff, in some circumstances, to successfully oppose a motion for summary judgment by relying on an unpleaded cause of action that is supported by the plaintiff's submissions, where the plaintiff has not engaged in unexcused protracted delay in presenting the new theory of liability… . … Here … the plaintiff's unpleaded causes of action alleging violations of Labor Law §§ 240(1) and 241(6) are not supported by the plaintiff's submissions, as the record demonstrates that the plaintiff's work at the time of her injury did not involve "construction, excavation or demolition work" within the meaning of Labor Law § 241(6), or "erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure" within the meaning of Labor Law § 240(1) … . Miranda v 1320 Entertainment, Inc., 2024 NY Slip Op 04313, Second Dept 8-28-24

Practice Point: Here the defendant demonstrated out-of-possession landlord status and was therefore not liable for an alleged dangerous condition on the property.

Practice Point: Although unpleaded causes of action mentioned for the first time in the bill of particulars can be considered in opposition to a summary judgment motion, here the unpleaded Labor Law 240(1) and 241(6) causes of action were unsupported by the plaintiff's submissions. The complaint should have been dismissed.

AUGUST 28, 2024

DESIGN DEFECT, FAILURE TO WARN, PREEMPTION OF STATE ACTION BY FEDERAL STATUTE.

STATE DESIGN DEFECT AND FAILURE TO WARN ACTION IS PREEMPTED BY THE FEDERAL HAZARDOUS MATERIALS TRANSPORTATION ACT (HMTA), CRITERIA EXPLAINED (FIRST DEPT).

The First Department, reversing Supreme Court, in a full-fledged opinion by Justice Rodriguez, determined the state defective-design and failure-to-warn action stemming from an allegedly defective compressed gas cylinder was preempted by the federal Hazardous Materials Transportation Act (HMTA). …"… [T]he HMTA's express preemption provision encompasses state law claims 'about' 'the designing, manufacturing, fabricating, inspecting, marking, maintaining, reconditioning, repairing, or testing [of] a package, container, or packaging component that is represented, marked, certified, or sold as qualified for use in transporting hazardous material in commerce' … ":

… Federal preemption is based on the US Constitution's Supremacy Clause … …

The issue of federal preemption is a question of law …, since it concerns whether, as a matter of statutory interpretation … , Congress has enacted a law for which a particular state rule is "to the Contrary" … .

An "inquiry into the scope of a statute's pre-emptive effect is guided by the rule that 'the purpose of Congress is the ultimate touchstone' in every pre-emption case" … .. "If a federal law contains an express pre-emption clause," as here, "it does not immediately end the inquiry because the question of the substance and scope of Congress' displacement of state law still remains" …

Whether dealing with "express or implied pre-emption, we begin our analysis 'with the assumption that the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress'" … . "That assumption applies with particular force when Congress has legislated in a field traditionally occupied by the States" … . "Thus, when the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily 'accept the reading that disfavors pre-emption'" … .

Notwithstanding the above, "[i]f the statute contains an express pre-emption clause, the task of statutory construction must in the first instance focus on the

plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent" … .

Accordingly, although courts will not hesitate to hold that state common-law claims are preempted by federal legislation, the analysis in each express preemption case must turn on the precise language of the relevant preemption provision … .

… [T]he defense of preemption may be raised at any time … .Malerba v New York City Tr. Auth., 2024 NY Slip Op 04344, First Dept 8-29-24

Practice Point: Consult this opinion for the analysis of and criteria for preemption of a state action by a federal statute.

AUGUST 29, 2024

LABOR LAW-CONSTRUCTION LAW, COURT OF CLAIMS.

CLAIMANT FELL ATTEMPTING TO MOVE FROM AN UPPER WALKWAY TO A LOWER WALKWAY; CLAIMANT WAS ENTITLED TO SUMMARY JUDGMENT ON THE LABOR LAW 240(1) AND LABOR LAW 241(6) CAUSES OF ACTION (SECOND DEPT).

The Second Department, reversing the Court of Claims, determined claimant construction-worker's motions for summary judgment pursuant to Labor Law 240(1) and Labor Law 241(6) should have been granted. Claimant was attempting to move from a walkway on one level to a walkway on a lower level when the handrail swung away from him, the walkway shifted, and he fell. The defendant's failure to provide a ladder warranted summary judgment on the Labor Law 240(1) cause of action. And the violation of two Industrial Code provisions warranted summary judgment on the Labor Law 241(6) cause of action:

Although the defendant contended that the sole proximate cause of the accident was the claimant's decision to use the wooden pallet, rather than a readily available ladder, to descend from the upper walkway, the defendant failed to submit sufficient evidence to raise a triable issue of fact as to whether a proper ladder was readily available to the claimant or whether the claimant had been instructed to use a ladder rather than the wooden pallet installed between the walkway levels … . …

… [T]he defendant violated 12 NYCRR 23-1.7(f) by failing to provide "ladders or other safe means of access" from walkway levels on the work site and that this violation was a proximate cause of the accident. ,,, [T]he defendant violated 12 NYCRR 23-1.15(a) by failing to provide a safety railing that was "securely supported." Chiarella v New York State Thruway Auth., 2024 NY Slip Op 04122, Second Dept 8-7-24

Practice Point: Defendant in the Labor Law 240(1) cause of action did not demonstrate a ladder was readily available. Therefore defendant did not demonstrate claimant's failure to use a ladder to move from an upper walkway to a lower walkway was the sole proximate cause of claimant's fall.

AUGUST 7, 2024

MUNICIPAL LAW, NEGLIGENCE, LATE NOTICE OF CLAIM.

ALTHOUGH THE CITY HAD TIMELY KNOWLEDGE OF THE ROAD DEFECT WHICH ALLEGEDLY CAUSED PETITIONER-BUS-DRIVER'S ACCIDENT, THERE WAS NO SHOWING THE CITY HAD TIMELY KNOWLEDGE OF PETITIONER'S ACCIDENT, INJURIES OR THE FACTS UNDERLYING HER THEORY OF LIABILITY; THE PETITION FOR LEAVE TO FILE A LATE NOTICE OF CLAIM SHOULD HAVE BEEN DENIED; THERE WAS AN EXTENSIVE DISSENT (SECOND DEPT).

The Second Department, reversing Supreme Court, over an extensive dissent. determined the petition for leave to file a late notice of claim against the city should not have been granted. Although petitioner demonstrated the city had timely knowledge of the existence of the pothole which allegedly caused petitioner-bus-driver's injury, petitioner did not demonstrate the city had timely knowledge of her accident, injuries or the facts underlying her theory of liability:

… [T]he evidence submitted in support of the petition failed to establish that the appellants acquired actual knowledge of the essential facts constituting the claim within 90 days after the claim arose or a reasonable time thereafter … . "'Actual knowledge of the essential facts underlying the claim means knowledge of the facts that underlie the legal theory or theories on which liability is predicated in the [proposed] notice of claim; the public corporation need not have specific notice of

the theory or theories themselves'" … . "Unsubstantiated and conclusory assertions that the municipality acquired timely actual knowledge of the essential facts constituting the claim through the contents of reports and other documentation are insufficient" … .

Here, although the petitioner's submission of photographs and evidence that the defect was repaired after the accident may have demonstrated that the appellants had actual knowledge of the defect, actual knowledge of a defect is not tantamount to actual knowledge of the facts constituting the claim where, as here, the record did not establish that the appellants were aware of the petitioner's accident, her injuries, and the facts underlying her theory of liability … . Matter of Ippolito v City of New York, 2024 NY Slip Op 04265, Second Dept 8-21-24

Practice Point: Here petitioner's inability to demonstrate the city had timely knowledge of her accident, injuries or the facts underlying her theory of liability supported denial of her petition for leave to file a late notice of claim. The fact that the city had timely knowledge of the road defect which allegedly caused petitioner's accident was not enough.

AUGUST 21, 2024

MUNICIPAL LAW, NEGLIGENCE, STATUTE OF LIMITATIONS, COVID TOLL.

THE COVID TOLL OF THE STATUTE OF LIMITATIONS RENDERED THIS NEGLIGENCE ACTION AGAINST A MUNICIPALITY TIMELY (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the COVID toll of the statute of limitations applied and the negligence action against defendant municipality was timely commenced:

The plaintiff alleged that he was injured on May 24, 2019, when he was seated on a swing that collapsed at a playground owned and operated by the defendants, causing him to fall to the ground. Thereafter, the defendants moved for summary judgment dismissing the complaint as time-barred, arguing that the action was not timely commenced within the applicable one-year and 90-day statute of limitations. In an order dated August 3, 2022, the Supreme Court granted the defendants' motion. The plaintiff appeals.

Pursuant to General Municipal Law § 50-i and CPLR 217-a, an action against a municipality to recover damages for personal injuries must be commenced within one year and 90 days after the happening of the event upon which the claim is based. Here, the defendants established, prima facie, that the applicable statute of limitations started to run from January 5, 2020, the date on which the plaintiff turned 18 years old (see CPLR 208), and that the action was not timely commenced within one year and 90 days from that date by April 5, 2021 … . However, in opposition, the plaintiff established that Executive Order (A. Cuomo) No. 202.8 (9 NYCRR 8.202.8), which was issued in connection with the COVID-19 public health crisis, and subsequent executive orders extending the duration thereof, tolled the applicable statute of limitations for a 228-day period from March 20, 2020, to November 3, 2020, and thus, the action was timely commenced prior to the expiration of the statute of limitations on November 19, 2021 … . Fuhrmann v Town of Riverhead, 2024 NY Slip Op 04248, Second Dept 8-21-24

Practice Point: Here the COVID toll of the statute of limitations extended the time for commencing the negligence action against the municipality by 228 days.

AUGUST 21, 2024

PHARMACIST MALPRACTICE, COMPLAINT STATED A CAUSE OF ACTION.

ALTHOUGH THE MEDICATION DISPENSED BY DEFENDANT PHARMACY WAS PRESCRIBED, THE COMPLAINT ALLEGED THE MEDICATION WAS CLEARLY CONTRAINDICATED; THE PHARMACIST MALPRACTICE ACTION SHOULD NOT HAVE BEEN DISMSSED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that the pharmacist malpractice lawsuit should not have been dismissed, despite the fact that the medication was duly prescribed, criteria explained:

"On a motion to dismiss a complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the complaint is to be afforded a liberal construction, the facts alleged are presumed to be true, the plaintiff is afforded the benefit of every

favorable inference, and the court is to determine only whether the facts as alleged fit within any cognizable theory" … .

"[W]hen a pharmacist has demonstrated that he or she did not undertake to exercise any independent professional judgment in filling and dispensing prescription medication, that pharmacist cannot be held liable for negligence in the absence of evidence that he or she failed to fill the prescription precisely as directed by the prescribing physician or that the prescription was so clearly contraindicated that ordinary prudence required the pharmacist to take additional measures before dispensing the medication" … . Here, the amended complaint does not allege that the pharmacy exercised independent professional judgment or that it did not fill the prescriptions as directed by Gibson. Nevertheless, accepting the facts as alleged in the amended complaint as true, and according the plaintiff the benefit of every possible favorable inference, the amended complaint sufficiently alleges that the prescriptions were so clearly contraindicated that ordinary prudence required the pharmacy to take additional measures before dispensing the medication. Bistrian v Gibson, 2024 NY Slip Op 04303, Second Dept 8-28-24

Practice Point: Usually a pharmacist cannot be held liable for dispensing a duly prescribed medication (as was the case here), but the allegation that the medication was clearly contraindicated was deemed sufficient to state a cause of action for pharmacist malpractice.

AUGUST 28, 2024

SLIP AND FALL, SPOLIATION OF EVIDENCE, CIVIL PROCEDURE.

PLAINTFF'S MOTION TO STRIKE DEFENDANTS' ANSWER FOR SPOLIATION OF EVIDENCE IN THIS SLIP AND FALL CASE SHOULD HAVE BEEN CONSIDERED BY THE MOTION COURT BEFORE GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT (SECOND DEPT).

The Second Department, reversing Supreme Court in this slip and fall case, determined the motion court should have first considered plaintiff's (decedent's) motion to strike defendants' answer (for spoliation of evidence) before considering defendants' motion for summary judgment (which was granted). Decedent alleged

there was video footage showing the slip and fall which was overwritten 72 hours after the fall:

"Under the common-law doctrine of spoliation, when a party negligently loses or intentionally destroys key evidence, the responsible party may be sanctioned under CPLR 3126" … . The Supreme Court has broad discretion in determining what, if any, sanction would be imposed for spoliation of evidence … . "The sanction of dismissal of a pleading may be imposed even absent willful and contumacious conduct if a party has been so prejudiced that dismissal is necessary as a matter of fundamental fairness" … "However, a less severe sanction or no sanction is appropriate where the missing evidence does not deprive the moving party of the ability to establish his or her case or defense" … .

A defendant whose answer is stricken is "deemed to admit all traversable allegations in the complaint, including the basic allegation of liability" … , and summary judgment is warranted in favor of the plaintiff on the issue of liability upon the appropriate motion … .

Here, since the decedent's motion pursuant to CPLR 3126 to strike the defendants' answer or, in the alternative, for an adverse inference instruction at trial for spoliation of evidence sought sanctions that would impact the defendants' ability to establish, prima facie, that they were entitled to judgment as a matter of law on the issue of liability, the Supreme Court should have considered the merits of the decedent's motion before rendering a determination on the issue of liability on the defendants' motion for summary judgment dismissing the complaint insofar as asserted against them … . Hudesman v Dawson Holding Co., 2024 NY Slip Op 04307, Second Dept 8-28-24

Practice Point: Where a plaintiff's motion can affect a defendant's ability to defend an action (here a motion to strike the answer for spoliation of evidence), that motion should be considered first, before considering a defendant's motion for summary judgment.

AUGUST 28, 2024

TRAFFIC ACCIDENTS, INNOCENT PASSENGER, CIVIL PROCEDURE.

PLAINTIFF, AN INNOCENT PASSENGER IN THIS TRAFFIC ACCIDENT CASE, WAS ENTITLED TO SUMMARY JUDGMENT DISMISSSING DEFENDANT'S AFFIRMATIVE DEFENSES AS AGAINST HER (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined that plaintiff (Brizan), a passenger in a car involved in an accident, was entitled to summary judgment dismissing defendant's affirmative defenses alleging comparative negligence, contributory negligence and culpable conduct on Brizan's part:

The right of an innocent passenger to summary judgment on the issue of whether he or she was at fault in the happening of an accident is not restricted by potential issues of comparative negligence as between two defendant drivers (see CPLR 3212[g] …). Brizan demonstrated, prima facie, that she did not engage in any culpable conduct that contributed to the happening of the accident … . Husbands v City of New York, 2024 NY Slip Op 04126, Second Dept 8-7-24

Practice Point: An innocent passenger in a traffic accident is not subject to the affirmative defenses raised by the defendant against the driver of the car in which plaintiff was riding.

AUGUST 7, 2024

TRAFFIC ACCIDENTS, REAR-END COLLISIONS, EVIDENCE.

THE MOTION COURT IN THIS REAR-END TRAFFIC-ACCIDENT CASE SHOULD HAVE CONSIDERED THE CERTIFIED BUT UNSIGNED DEPOSITION TRANSCRIPTS SUBMITTED BY DEFENDANT; DEFENDANT WAS ENTITLED TO SUMMARY JUDGMENT AND DISMISSAL OF THE CROSS-CLAIMS (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the motion court should have considered the deposition transcripts, which were certified but unsigned, and should have granted defendant driver's (Jara Mejia's) motions for

summary judgment and dismissal of the cross-claims. Jara Mejia's car was stopped when it was struck from behind:

"A defendant moving for summary judgment in a negligence action has the burden of establishing, prima facie, that he or she was not at fault in the happening of the subject accident" … . In support of his motion, Jara Mejia submitted, inter alia, a transcript of his deposition testimony and transcripts of the deposition testimony of the plaintiffs, Tsering, and Cruz Arce. Contrary to the Supreme Court's determination, Jara Mejia's unsigned but certified deposition transcript was admissible, "since the transcript was submitted by the party deponent himself and, therefore, was adopted as accurate by the deponent" … . In addition, while the remaining deposition transcripts were also unsigned, they were certified and their accuracy was not challenged … . Thus, the deposition transcripts were admissible and should have been considered by the court on Jara Mejia's motion. Gironza v Macedonio, 2024 NY Slip Op 04306, Second Dept 8-28-24

Practice Point: Certified but unsigned deposition transcripts are admissible in support of summary judgment when submitted by the party deponent himself.

Practice Point: Certified but unsigned deposition transcripts are admissible in support of summary judgment when their accuracy is not challenged.

AUGUST 28, 2024

TRAFFIC ACCIDENTS, REAR-END COLLISIONS, VEHICLE AND TRAFFIC LAW, EVIDENCE.

THE VEHICLE WHICH STRUCK PLAINTIFF'S STOPPED VEHICLE FROM BEHIND FLED THE SCENE BUT WAS IDENTIFIED BY A LICENSE PLATE FOUND AT THE SCENE; DEFENDANT ACKNOWLEDGED OWNERSHIP OF THE VEHICLE BUT DENIED OPERATING IT AT THE TIME OF THE ACCIDENT; THAT ALLEGATION DID NOT OVERCOME THE PRESUMPTION OF PERMISSIVE USE UNDER THE VEHICLE AND TRAFFIC LAW; PLAINTIFF ENTITLED TO SUMMARY JUDGMENT (SECOND DEPT).

The Second Department, reversing Supreme Court in this rear-end traffic-accident case, determined defendant's allegation he was not driving his vehicle at the time of the accident did not overcome the presumption of permissive use under Vehicle and Traffic Law section 388(1). The vehicle which struck plaintiffs' stopped vehicle fled the scene. But defendant admitted the license plate found at the scene was from his vehicle:

The plaintiff Manu Kanwar was a passenger in a vehicle owned and operated by the plaintiff Mahesh Kashyap when it was struck in the rear by another vehicle. Although the rear vehicle fled the scene, it allegedly was identified by its license plate, which had fallen off that vehicle at the accident scene. The plaintiffs commenced this action against the defendant to recover damages for personal injuries allegedly sustained in the accident. In his answer, the defendant, inter alia, admitted to owning a vehicle bearing the license plate number identified in the complaint, asserted an affirmative defense alleging that the plaintiffs were comparatively at fault, and asserted a counterclaim against Kashyap. * * *

The plaintiffs' affidavits demonstrated, inter alia, that Kashyap's vehicle was stopped for the traffic condition ahead when it was struck in the rear by the defendant's vehicle and that the defendant, as the owner of the vehicle, was negligent (see Vehicle and Traffic Law §§ 388, 1129[a] …). In opposition, the defendant failed to raise a triable issue of fact. In his affidavit in opposition to the plaintiffs' motion, the defendant merely averred that he was not operating his vehicle at the time of the accident. However, this was insufficient to overcome the statutory presumption of permissive use under Vehicle and Traffic Law § 388(1)…

, and it was also insufficient to raise a triable issue of fact as to whether his vehicle was not involved in the accident … . Kashyap v Dasilva, 2024 NY Slip Op 04308, Second Dept 8-28-24

Practice Point: Here the defendant acknowledged ownership of the vehicle which struck plaintiff's stopped vehicle from behind and left the scene, but denied he was operating it at the time of the accident. That denial did not overcome the presumption that whoever was driving the vehicle was doing so with the owner's permission (Vehicle and Traffic Law 388). Plaintiff was entitled to summary judgment.

AUGUST 28, 2024

TRAFFIC ACCIDENTS, REAR-END COLLISIONS, VEHICLE AND TRAFFIC LAW.

PLAINTIFF WAS STOPPED WHEN PLAINTIFF WAS REAR-ENDED BY DEFENDANT; BECAUSE DEFENDANT DID NOT OFFER A NONNEGLIGENT EXPLANATION, PLAINTIFF WAS ENTITLED TO SUMMARY JUDGMENT ON LIABILITY; HOWEVER PLAINTIFF MAY HAVE BEEN STOPPED ON AN ENTRANCE RAMP; THEREFORE DEFENDANT'S COMPARATIVE NEGLIGENCE AFFIRMATIVE DEFENSE PROPERLY SURVIVED DISMSSAL (SECOND DEPT).

The Second Department, reversing ("odif'Ing) Supreme Court, determined plaintiff was entitled to summary judgment on liability in the rear-end-collision traffic accident case. However, because plaintiff may have been parked on an entrance ramp to an expressway, the comparative negligence affirmative defense properly survived dismissal:

A rear-end collision with a stopped vehicle establishes a prima facie case of negligence on the part of the operator of the rear vehicle, thereby requiring that operator to rebut the inference of negligence by providing a nonnegligent explanation for the collision … . Here, the plaintiff established her prima facie entitlement to judgment as a matter of law on the issue of liability through the submission of, among other things, her affidavit, which established that the plaintiff's vehicle was parked on the side of a service road to the Major Deegan

Expressway in the Bronx (hereinafter the expressway), with the hazard lights activated, when it was struck in the rear by the defendants' vehicle … . In opposition to the plaintiff's prima facie showing, the defendants failed to rebut the inference of negligence with admissible evidence … . …

The plaintiff also established her prima facie entitlement to judgment as a matter of law dismissing the defendants' affirmative defenses alleging comparative negligence by demonstrating that she was not at fault in the happening of the accident … . In opposition to the plaintiff's prima face showing, however, the defendants raised triable issues of fact as to whether the plaintiff was comparatively at fault in the happening of the accident, including whether the plaintiff's vehicle was stopped on the entrance ramp to the expressway (see Vehicle and Traffic Law § 1202[a][1][j] …). Ramirez v Greiner, 2024 NY Slip Op 04154, Second Dept 8-7-24

Practice Point: Unless defendant offers a nonnegligent explanation for a rear-end collision with plaintiff's stopped vehicle, plaintiff is entitled to summary judgment on liability.

Practice Point: However, summary judgment on liability in favor of plaintiff does not preclude a valid comparative-fault affirmative defense.

AUGUST 7, 2024