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An Organized Compilation of Summaries of Selected Decisions Addressing Personal Injury, Mostly Reversals, Released by Our New York State Appellate Courts and Posted on the New York Appellate Digest Website in October 2024. The Entries in the Table of Contents Link to the Summaries Which Link to the Full Decisions on the Official New York Courts Website. Click on “Table of Contents” in the Header on Any Page to Return There. Right Click on the Citations to Keep Your Place in the Reversal Report.

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ASSAULT, FORESEEABILITY OF, JUDGES.

THE QUESTION WHETHER THE SEXUAL ASSAULT OF PLAINTIFF IN DEFENDANT GYM'S STEAM ROOM WAS FORESEEABLE SHOULD NOT HAVE BEEN DECIDED AGAINST THE PLAINTIFF AS A MATTER OF LAW; THERE WAS EVIDENCE OF PRIOR SIMILAR ASSAULTS (FIRST DEPT).

The First Department, reversing Supreme Court, determined there were questions of fact about the foreseeability of the underlying incident, an alleged sexual assault in the steam room at defendant Equinox's gym, which precluded summary judgment. Although Equinox had no prior notice with respect to the person who

allegedly assaulted plaintiff, there was evidence Equinox was aware of other similar incidents in the steam room:

The Court of Appeals has "repeatedly emphasized" that "[o]nly in rare cases" can questions concerning foreseeability be decided as a matter of law … . * * *

Here, the motion court determined that plaintiff's alleged attack was not foreseeable because "the 'notice' plaintiff relies upon concerns other alleged incidents in the steam room, none of which involved plaintiff's assailant" and that "some of the other incidents]appear to involve consensual behavior." New York courts, however, have never required prior incidents to have been committed by the same assailant or even be of the same type of conduct to which the plaintiff was subjected … . … [A]t least three of the other gym members reported that they had been sexually harassed, including the member who complained mere weeks before the assault on plaintiff … .

The motion court additionally found that, even if defendants did have a duty to plaintiff to prevent his alleged assault, "they met their duty to implement reasonable policies to decrease the likelihood of such an incident" and plaintiff failed to present a material issue of fact "with respect to these policies and procedures." * * *

We find that whether plaintiff's alleged assault was foreseeable to Equinox and whether Equinox implemented adequate security measures to decrease the likelihood of such incidents are questions of fact and plaintiff's negligence claim should advance to a jury trial. We cannot say, as a matter of law, that another gym member allegedly assaulting plaintiff against the backdrop of multiple complaints of inappropriate sexual conduct inside the steam room was "extraordinary under the circumstances or not foreseeable in the normal course of events" … . Crandall v Equinox Holdings, Inc., 2024 NY Slip Op 04902, First Dept 10-8-24

Practice Point: Whether an injury to plaintiff was foreseeable from defendant's perspective can rarely be decided as a matter of law.

October 8, 2024

FALLING TREE LIMB, MUNICIPAL LAW, EVIDENCE.

PLAINTIFF WAS INJURED BY A FALLING TREE LIMB; THE CITY AND COUNTY, AS PART OWNERS OF THE TREE, CANNOT BE LIABLE BECAUSE THERE WERE NO VISIBLE SIGNS OF DECAY; THE PRIVATE PARTY WHOSE NEIGHBOR WAS INJURED BY THE FALLING LIMB, HOWEVER, MAY BE LIABLE BECAUSE HE WAS AWARE THE LIMB WAS WEAK (THIRD DEPT).

The Third Department, reversing (modifying) Supreme Court, determined that the city and county defendants (part owners of the tree) could not be held liable for injuries caused by a falling tree limb because there were no visible signs of decay. The defendant property-owner, whose neighbor was struck by the limb, however, may be liable because he was aware the limb was weak:

Accepting for purposes of the respective motions that the City and the Land Bank are part owners of the tree, we note, and the parties do not otherwise suggest, that neither had actual notice of any potential danger posed by the tree, thus requiring that the contribution claim against both entities be established on a theory of constructive notice. To that end, "the concept of constructive notice with respect to liability for falling trees is that there is no duty to consistently and constantly check all trees for nonvisible decay. Rather, the manifestation of said decay must be readily observable in order to require a landowner to take reasonable steps to prevent harm" … . Weaver v Metsker, 2024 NY Slip Op 05380, Third Dept 10-31-24

Practice Point: In order to demonstrate the county and city, part owners of a tree along with a private party, had constructive notice that a tree limb posed a danger of falling, there must have been some visible sign of decay.

Practice Point: Even if there are no visible signs of decay, a private party who owns a tree may be liable for a neighbor's injury from a falling limb if he or she is aware the limb was "weak."

October 31, 2024

IMMUNITY, MUNICIPAL LAW, NEGLIGENCE, IMMUNITY.

THE ACTIONS TAKEN BY THE 911 DISPATCHER AND THE EMERGENCY MEDICAL TECHNICIANS CONSTITUTED THE EXERCISE OF DISCRETION IN THE PERFORMANCE A GOVERNMENT FUNCTION; THE GOVERNMENT FUNCTION IMMUNITY DEFENSE INSULATED THE MUNICIPAL DEFENDANTS FROM LIABILITY (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the municipal defendants were entitled to summary judgment dismissing the negligence action stemming from decisions made by emergency personnel in response to a 911 call. The emergency services, including the dispatch of a "Basic Life Support" (BLS), as opposed to an "Advanced Life Support" (ALS) ambulance, and the attempts to intubate the unresponsive plaintiff rather than to immediately transport her to the hospital, were deemed the exercise of discretion while performing a government function. Discretionary actions taken in performance of a government function are insulated from liability by the government-function-immunity defense:

"[W]hen both the special duty requirement and the governmental function immunity defense are asserted in a negligence case, the rule that emerges is that government action, if discretionary, may not be a basis for liability, while ministerial actions may be, but only if they violate a special duty owed to the plaintiff, apart from any duty to the public in general" … . In other words, in a negligence action where the municipality has raised the governmental function immunity defense, a plaintiff may only hold the municipality liable for actions taken in its governmental capacity where (1) a special duty exists and (2) the municipality's actions were ministerial in nature and not the result of discretionary decision-making … . * * *

The defendants demonstrated that the 911 dispatcher's decision, among other things, to send a BLS ambulance rather than an ALS ambulance "was discretionary and, therefore, protected by the doctrine of governmental immunity" … . Under the circumstances presented, the defendants also established that the EMTs exercised their discretion in declining to immediately transport [plaintiff] to the nearby hospital and to instead wait for the paramedics in the ALS ambulance to arrive. Similarly, the defendants demonstrated that the actions of the paramedics resulted from discretionary decision-making, including with regard to the type of treatment

to render … . Walker-Rodriguez v City of New York, 2024 NY Slip Op 05237, Second Dept 10-23-24

Practice Point: Consult this decision for a concise but complete one-paragraph compilation of all the issues associated with municipal liability for negligence–proprietary versus government function, special duty, discretionary versus ministerial acts, etc.

October 23, 2024

LABOR LAW-CONSTRUCTION LAW, EVIDENCE.

PLAINTIFF FELL FROM A SCAFFOLD WITH NO GUARDRAILS; DEFENDANTS' AFFIDAVIT ALLEGING GUARDRAILS WERE AVAILABLE WAS NOT BASED ON FIRST-HAND KNOWLEDGE AND THEREFORE DID NOT RAISE A QUESTION OF FACT; PLAINTIFF ENTITLED TO SUMMARY JUDGMENT ON THE LABOR LAW 240(1) CAUSE OF ACTION (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff was entitled to summary judgment on the Labor Law 240(1) cause of action in this scaffold-fall case. The scaffold had no guardrails. The affidavit presented by the defendants stating that there were guardrails available did not raise a question of fact because the affiant was not at the site on the day of the fall:

Plaintiff made a prima facie showing of entitlement to judgment as a matter of law on his Labor Law § 240(1) cause of action by submitting undisputed evidence that he fell off a scaffold, which lacked guardrails that would have prevented his fall, after the scaffold moved while he was standing atop it … .

Defendants failed to raise an issue of fact in opposition as to whether plaintiff was a recalcitrant worker. Although defendants presented an affidavit from the principal of nonparty contactor and plaintiff's employer stating that there was a standing order for its employees to use only baker scaffolds with safety railings, that there were safety railings available at the worksite, and that safety railings would be provided upon request, this testimony does not suffice to raise an issue of fact. On the contrary, the principal expressly acknowledged that he was not present on the worksite on the date of plaintiff's injury, and he offered no basis to find that he

personally knew sufficient guardrails were present at the worksite for plaintiff to use on the scaffold … . Indeed, plaintiff testified that there were no guardrails available for use on the date of the incident. Ruiz v BOP 245 Park LLC, 2024 NY Slip Op 05419, First Dept 10-31-24

Practice Point: Here an affidavit which was not based on first-hand knowledge was deemed insufficient to raise a question of fact.

October 31, 2024

LABOR LAW-CONSTRUCTION LAW, EVIDENCE.

PLAINTIFF WAS NOT PROVIDED WITH A SECURED A-FRAME LADDER AND WAS NOT PROVIDED WITH ANYTHING TO SECURE THE PIPE HE WAS ATTEMPTING TO REMOVE WHEN IT FELL AND STRUCK THE LADDER; PLAINTIFF WAS ENTITLED TO SUMMARY JUDGMENT ON THE LABOR LAW 240(1) CAUSE OF ACTION; THE "RECALCITRANT WORKER" AND "FAILURE TO FOLLOW SAFETY INSTRUCTIONS" ALLEGATIONS DID NOT RAISE A QUESTION OF FACT (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff was entitled to summary judgment on the Labor Law 240(1) cause of action. Plaintiff was standing on an unsecured A-frame ladder when a piece of pipe he was attempting remove fell and struck the ladder. The unsecured ladder was not an adequate safety device and no safety device was provided to secure the pipe. Allegations the plaintiff was a recalcitrant worker and was the proximate cause of the accident did not raise a question of fact:

Defendants are liable for these injuries because plaintiff was not provided any safety devices except an unsecured ladder … .

Plaintiff was also not provided any safety devices to secure the pipe while it was being removed … . The use of a safety device to secure the pipe would not have impeded the work in progress … . Even if plaintiff's coworkers were supposed to hold the pipe as he cut it, "people are not safety devices within the meaning of Labor Law § 240(1)" … .

… While defendants contend that plaintiff's foreman gave him safety instructions concerning how to cut the pipe and where to place the ladder so that it would not be hit by a falling pipe, plaintiff was not recalcitrant because he was not provided with an adequate safety device to secure the pipe "in the first instance" … .

There is also no issue of fact as to whether plaintiff was the sole proximate cause of the accident because, even if the length of the pipe that plaintiff cut was too long, he was not provided with an adequate safety device to secure the pipe … . Furthermore, even if plaintiff disregarded an instruction not to place the ladder where the pipe could hit it, that was not the sole proximate cause of the accident as "an instruction to avoid an unsafe practice is not a sufficient substitute for providing a worker with a safety device to allow him to complete his work safely" … . Jara-Salazar v 250 Park, L.L.C., 2024 NY Slip Op 05407, First Dept 10-31-24

Practice Point: If an accident is the result of the failure to provide plaintiff with adequate safety equipment, the allegation plaintiff failed to follow safety instructions will not raise a question of fact.

Practice Point: Here the failure to provide safety devices to secure a pipe which was being removed from the ceiling when it fell was a ground for defendants' liability.

October 31, 2024

LABOR LAW-CONSTRUCTION LAW. CIVIL PROCEDURE, EVIDENCE.

PHOTOS SUBMITTED AS A NOTICE TO ADMIT DID NOT SHOW THE METAL OVER WHICH PLAINTIFF ALLEGEDLY TRIPPED AND FELL; ALTHOUGH THE PHOTOS ARE DEEMED TO SHOW THE PROJECT SITE ON THE DAY OF THE FALL, THERE WAS NO EVIDENCE THE PHOTOS DEPICTED THE CONDITION OF THE SITE AT THE TIME OF THE FALL OR IMMEDIATELY PRIOR TO THE FALL (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined plaintiff was entitled to summary judgment on the Labor Law 240(1) cause of action. Plaintiff alleged he tripped on metal debris and fell. Defendants submitted three photographs alleged to depict the project site on the day of the plaintiff's fall as a notice to admit. The photos did not show any metal debris. Although plaintiff did

not respond to the notice to admit, thereby deeming the allegations admitted, the photos did not establish the condition of the depicted area at the time of plaintiff's trip and fall, or immediately prior to the fall:

According to plaintiff, his accident occurred as he was retrieving wooden planks for his coworker to install on the floor. Doing so required plaintiff to traverse over an uncovered beam pocket measuring three feet wide and three feet deep. His accident occurred when he tripped over metal debris on the floor and fell into the beam pocket. Plaintiff was wearing a harness with a yo-yo/at the time of his accident, but there was no place for him to tie off. * * *

… Defendants rely on a notice to admit that they served on plaintiff seeking his admissions that three photos annexed thereto … depicted the project site on the day of plaintiff's accident. Plaintiff did not respond to the notice to admit, deeming the allegations admitted (CPLR 3123 [a]). However, these admissions do not establish that those photos fairly and accurately depict the location of plaintiff's accident either at the time thereof or immediately prior thereto. Thus, the absence from those photos of the metal on which plaintiff claims to have tripped does not raise an issue of fact as to the manner in which plaintiff's accident occurred. Guzman-Saquisili v Harlem Urban Dev. Corp., 2024 NY Slip Op 05420, First Dept 10-31-24

Practice Point: Photos which depict the condition of the area of plaintiff's fall on the day of the fall, without more specificity about when the photos were taken, may not be deemed to depict the area at the time of the fall or immediately prior to the fall.

October 31, 2024

LABOR LAW-CONSTRUCTION LAW.

INSTALLING ELECTRIC CABLES IS CONSTRUCTION WORK WITHIN THE MEANING OF LABOR LAW 241(6); PLAINTIFF, WHO WAS STRUCK IN THE EYE BY A CABLE, SUFFICIENTLY DEMONSTRATED THE EYE-PROTECTION-EQUIPMENT REGULATION IN THE INDUSTRIAL CODE APPLIED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant, Kamco, was not entitled to summary judgment dismissing plaintiff's Labor Law 241(6) cause of action. Plaintiff (Lopez) alleged he was struck in the eye by an electrical cable as he was attempting to connect it. Plaintiff (Lopez) alleged Kamco violated the Industrial Code by failing to provide eye-protection equipment:

"'[T]he courts have generally held that the scope of Labor Law § 241(6) is governed by 12 NYCRR 23-1.4(b)(13), which defines construction work expansively. Under that regulation, construction work consists of [a]ll work of the types performed in the construction, erection, alteration, repair, maintenance, painting or moving of buildings or other structures'" … . Construction work pursuant to 12 NYCRR 23-1.4(b)(13) may include "the work of hoisting, land clearing, earth moving, grading, excavating, trenching, pipe and conduit laying, road and bridge construction, concreting, . . . equipment installation and the structural installation of wood, metal, glass, plastic, masonry and other building materials in any form or for any purpose."

… "In order to establish prima facie entitlement to summary judgment, a defendant must show that the plaintiff failed to identify a section of the Industrial Code that was allegedly violated, that any such section is insufficiently specific to support liability or is inapplicable to the facts of the case, or that the defendant complied with the requirements of the identified provision" … .

Here, since Lopez was engaged in the installation and furnishing of electrical cables, Kamco failed to establish, prima facie, that Labor Law § 241(6) was inapplicable to Lopez's activities … . Kamco also failed to establish, prima facie, that 12 NYCRR 23-1.8(a) was inapplicable or that Lopez's actions were the sole proximate cause of his alleged injuries, as Kamco failed to eliminate triable issues of fact as to whether Lopez was engaged in work that might endanger the eyes, whether approved eye protection was provided to Lopez on the date of the accident, and whether Kamco's failure to require Lopez to wear safety goggles was

a proximate cause of his alleged injuries … . Lopez v Kamco Servs., LLC, 2024 NY Slip Op 05338, Second Dept 10-30-24

Practice Point: Installing electric cables is construction work covered by Labor Law 241(6).

Practice Point: The Industrial Code provision requiring eye-protection-equipment may apply to plaintiff here who was struck in the eye by an electric cable.

October 30, 2024

LABOR LAW-CONSTRUCTION LAW.

PLAINTIFF FELL FROM AN UNSECURED LADDER WHEN STRUCK BY FALLING OBJECTS; PLAINTIFF WAS ENTITLED TO SUMMARY JUDGMENT ON THE LABOR LAW 240(1) CAUSE OF ACTION (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined plaintiff was entitled to summary judgment on the Labor Law 240(1) cause of action. Plaintiff fell from an unsecured ladder when hit by small beams falling from the ceiling:

Plaintiff is entitled to partial summary judgment on his Labor Law § 240(1) claim. Plaintiff met his prima facia burden by establishing that he was injured when he was hit by 20-to-30-pound small beams falling from the ceiling, causing him to lose balance while standing on an unsecured ladder … , and [defendant's] evidence in opposition to this claim did not raise a triable issue of fact. Urquia v Deegan 135 Realty LLC, 2024 NY Slip Op 05080, First Dept 10-15-24

Practice Point: Losing one's balance on an unsecured ladder when struck by a falling object makes out a prima facie case under Labor Law 240(1).

October 15, 2024

MEDICAL MALPRACTICE, CONTINUOUS TREATMENT DOCTRINE.

THE NEARLY THREE-YEAR GAP BETWEEN PLAINTIFF'S KNEE SURGERY AND HIS SEEING THE SURGEON TO COMPLAIN OF KNEE PAIN DID NOT PRECLUDE THE APPLICABILITY OF THE CONTINUOUS TREATMENT DOCTRINE TO TOLL THE STATUTE OF LIMITATIONS (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined there was a question of fact about whether the continuous treatment doctrine applies to render the action timely. Plaintiff had knee surgery and did not see the surgeon again for nearly three years when he experienced pain. He had not seen any other orthopedic surgeons in the interim:

Defendants fail to establish that plaintiff's claims involving treatment of her right knee before May 21, 2016 are time-barred. Given the evidence of "an ongoing relationship of trust and confidence between the patient and physician," the record presents disputed issues of fact regarding whether the continuous treatment doctrine applies, thus precluding dismissal at this stage of the litigation … . The 34-month gap between the one-year postoperative follow-up visit after plaintiff's right total knee replacement and her next complaint to defendant Dr. Steven B. Haas, M.D. about pain in his right knee does not prevent application of the doctrine as a matter of law, as plaintiff visited no orthopedic surgeon other than defendant Dr. Haas during that period, and she returned to Dr. Haas to address increased pain in her right knee, which even he determined would require revision surgery. Karanevich-Dono v Haas, 2024 NY Slip Op 05137, First Dept 10-17-24

Practice Point: Plaintiff had knee surgery and did not see the surgeon again for nearly three years to complain of knee pain. Plaintiff did not see any other orthopedic surgeon in the interim. There was a question of fact whether the continuous treatment doctrine applied to render the medial malpractice action timely.

October 17, 2024

MEDICAL MALPRACTICE, EXPERT EVIDENCE.

IN A MEDICAL MALPRACTICE ACTION, A SPECULATIVE AND CONCLUSORY EXPERT AFFIDAVIT WILL NOT SUPPORT SUMMARY JUDGMENT IN FAVOR OF DEFENDANT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant (Andre) was not entitled to summary judgment dismissing the medical malpractice action because defendant's expert's affidavit was "speculative and conclusory:"

The affidavit and supplemental affidavit of Andes's expert physician, Reed E. Phillips, were insufficient to establish the absence of any departure from good and accepted medical practice … . Phillips's opinion that Andes did not depart from the standard of care by failing, inter alia, to obtain the decedent's prior medical records, to order a CT scan, MRI, or other imaging, and to timely diagnose the decedent with liver cancer, as well as his opinion that the decedent's cancer was incurable by the time the decedent first treated with Andes, was speculative and conclusory and otherwise insufficient to demonstrate that Andes comported with good and accepted standards of practice in his care and treatment of the decedent or that any alleged departure was not a proximate cause of the decedent's injuries and ultimate death … . Miller-Albert v EmblemHealth, 2024 NY Slip Op 05340, Second Dept 10-30-24

Practice Point: In medical malpractice cases, at the summary judgment stage, the action survives or fails based upon the quality of the expert affidavits. Conclusory or speculative assertions in expert affidavits have no probative value.

October 30, 2024

NEGLIGENCE, SET ASIDE VERDICT, ATTORNEYS, JUDGES.

DEFENDANTS FAILED TO MOVE FOR A MISTRIAL BASED ON PLAINTIFF'S COUNSEL'S ALLEGED BEHAVIOR PRIOR TO THE VERDICT; THE ALLEGED BEHAVIOR WAS NOT SO WRONGFUL OR PERVASIVE AS TO JUSTIFY SETTING ASIDE THE VERDICT IN THE INTEREST OF JUSTICE (THIRD DEPT).

The Third Department, reversing Supreme Court, determined the motion to set aside the verdict based on the conduct of plaintiff's counsel should have been denied because (1) no motion for a mistrial was made before the verdict, and (2) counsel's behavior was not so wrongful and pervasive as to justify setting aside the verdict in the interest of justice. Allegedly, plaintiff's daughter was raped by defendants' son, in defendants' house, during a sleep over. It was alleged defendants were aware of the danger posed by their son:

Although some of counsel's comments may have been objectionable, because defendants did not move for a mistrial their "argument respecting these remarks [was] not preserved" … . Nor, in our opinion, have defendants shown this to be "the rare case in which the misconduct of counsel for the prevailing party was so wrongful and pervasive as to constitute a fundamental error and a gross injustice warranting the exercise of the trial court's discretionary power under CPLR 4404 (a) to set aside a verdict in the interest of justice" … . Accordingly, Supreme Court erred in granting defendants' posttrial motion to set aside the verdict in the interest of justice. Lisa I. v Manikas, 2024 NY Slip Op 05164, Third Dept 10-17-24

Practice Point: To address objectionable courtroom behavior of opposing counsel, a motion for a mistrial should be made before the verdict.

Practice Point: A post-verdict motion to set aside the verdict based upon opposing counsel's courtroom behavior should not be granted absent "misconduct so wrongful and pervasive as to constitute a fundamental error and a gross injustice."

October 17, 2024

NEGLIGENT SUPERVISION, EDUCATION-SCHOOL LAW, EVIDENCE.

INFANT PLAINTIFFS ALLEGED MULTIPLE INSTANCES OF SEXUAL MISCONDUCT BY A MALE STUDENT ON THE SCHOOL BUS FROM KINDERGARTEN THROUGH SECOND GRADE; THE FOURTH DEPARTMENT DETERMINED THE DEFENDANT SCHOOL'S EVIDENCE DID NOT CONCLUSIVELY ESTABLISH A LACK OF ACTUAL OR CONSTRUCTIVE NOTICE (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the negligent supervision causes of action against the defendant school, school district, board of education and department of transportation should not have been dismissed. Infant plaintiffs alleged they were subjected to sexual misconduct on a school bus by a male student from kindergarten through second grade. The Fourth Department found that the evidence submitted by the defendants did not demonstrate a lack of notice:

Defendants, as parties moving for summary judgment, had the initial burden of establishing as a matter of law that they lacked actual or constructive notice of "the dangerous conduct which caused injury" … . Here, we conclude that defendants did not meet that burden. In support of their motion, defendants submitted, inter alia, the deposition testimony of the principal of the school at the time of the alleged misconduct. The principal, when asked at his deposition whether he had been aware of any prior "incidents of student sexual assaults" on the bus and whether he had ever had to deal with any student at the school who had been characterized as "sexually violent," answered both questions in the negative … . That testimony was insufficient to meet defendants' burden because it failed to address whether the principal knew of incidents within the broader category of sexual misconduct alleged by plaintiffs in their complaints. Plaintiffs alleged that the perpetrator engaged in a wide range of sexual misconduct—some of which was not equivalent to "sexual assault [ ]" and was not "sexually violent." In short, the principal's testimony failed to establish that defendants had no actual or constructive notice of any sexual misconduct of the types alleged by plaintiffs … .

Additionally, to the extent that defendants submitted deposition testimony of various other witnesses—including the infant plaintiffs and the bus driver—we conclude that it was insufficient to satisfy defendants' initial burden with respect to actual or constructive notice. In particular, although the infant plaintiffs and the bus

driver testified that they did not report instances of the alleged misconduct to defendants, they were not in a position to know whether there had been prior incidents of sexual misconduct involving the perpetrator and, if so, whether defendants had actual or constructive notice of any of those incidents prior to the sexual misconduct alleged in the complaint … . Their testimony could not establish whether defendants obtained notice by other means … . Porschia C. v Sodus Cent. Sch. Dist., 2024 NY Slip Op 04885, Fourth Dept 10-4-24

Practice Point: Here, on defendant school's motion for summary judgment in this negligent supervision case, the Fourth Department looked carefully at the school's evidence of a lack of notice of a student's sexual misconduct and found the evidence did not address all the possible scenarios which could demonstrate liability and therefore did not support summary judgment.

October 4, 2024

NEGLIGENT SUPERVISION, ASSAULT IN PRISON, COURT OF CLAIMS, EVIDENCE.

CLAIMANT-INMATE WAS SEXUALLY ASSAULTED IN HER CUBICLE IN A DORMITORY WITHOUT DOORS WHILE THE CORRECTION OFFICER (CO) GUARDING THE DORMITORY WAS ASLEEP; CLAIMANT PRESENTED ADEQUATE PROOF THE ASSAULT WAS FORESEEABLE (THIRD DEPT).

The Third Department, reversing the Court of Claims, determined claimant-inmate in this negligent supervision action presented sufficient proof the sexual assault by another inmate was foreseeable. Claimant was in a dormitory with cubicles and no doors. A male inmate crawled into claimant's cubicle when the correction officer (CO) guarding dormitory was asleep:

… [T]he question is not what the State actually knows, but what it should have known, i.e., whether defendant has constructive notice … . There was a preponderance of evidence that defendant was aware that this claimant was at risk of sexual assault because defendant's own sexual victimization risk screening procedures, and placement in the 10-1 dorm's PREA cube as a result of her complaints about harassment immediately before the sexual assault, identified her

as being in a class of individuals vulnerable to the risk of sexual assault … . Moreover, placement in the PREA cube generally, and in this case specifically, is a tacit acknowledgement that individuals who are identified as vulnerable and live in a general population dormitory consisting of a communal sleeping area, must have more protection at night. A sleeping CO negates this added protection at this critical time. Thus, it was not necessary for defendant to have notice that COs generally, or this CO specifically, slept during shifts. It is not unreasonable to expect that COs are conscious, alert and attentive while on duty monitoring an open-floor-plan dormitory of incarcerated individuals in a maximum-security prison. R.S. v State of New York, 2024 NY Slip Op 05253, Third Dept 10-24-24

Practice Point: Here there was sufficient proof that the sexual assault by another inmate was foreseeable. Claimant was recognized as vulnerable to sexual assault, was placed in a dormitory cubicle with no door, and the correction officer assigned to guard the dormitory was asleep. The fact that the CO's falling asleep may not have been foreseeable was not the determinative issue.

October 24, 2024

NEGLIGENT SUPERVISION, CHILD VICTIMS ACT, COURT OF CLAIMS.

WHEN THE OFFICE OF CHILDREN AND FAMILY SERVICES (OCFS) ASSUMED CUSTODY OF CLAIMANT, IT OWED CLAIMANT A DUTY TO PROTECT HIM AGAINST FORESEEABLE HARM, INCLUDING SEXUAL ASSAULT; THIS CHILD VICTIMS ACT ACTION SHOULD NOT HAVE BEEN DISMISSED ON THE GROUND THE STATE DID NOT OWE CLAIMANT A SPECIAL DUTY (THIRD DEPT).

The Third Department, reversing the Court of Claims, determined this Child Victims Act action against the Office of Children and Family Services (OCFS) should not have been dismissed on the ground the state did not owe plaintiff a special duty:

For the reasons set forth in our recent decision in A.J. v State of New York (___ AD3d ___, 2024 NY Slip Op 04231 [3d Dept 2024]), we reverse. As in that case, claimant was in OCFS's custody at the time he was allegedly assaulted. "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"(A.J. v State of New York,2024 NY Slip Op 04231 at *2). Because defendant owed claimant a duty of care, the claim stated a cause of action and the motion to dismiss should have been denied. McTighe v State of New York, 2024 NY Slip Op 05251, Third Dept 10-24-24

Practice Point: In the Third Department, the claimant in a Child Victims Act case against the Office of Children and Family Services (OCFS) alleging sexual abuse while in its custody does need to demonstrate the state owed claimant a special duty. The state is deemed to have assumed a duty to protect children in its custody from foreseeable harm.

October 24, 2024

NEGLIGENT SUPERVISION, ASSAULT IN PRISON, COURT OF CLAIMS, CIVIL PROCEDURE.

THE APPLICATION TO TREAT THE NOTICE OF INTENTION TO FILE A CLAIM (NOI) AS A TIMELY FILED CLAIM IN THIS PRISON STABBING CASE SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing the Court of Claims, determined the notice of intention to file a claim (NOI) in this negligent supervision case met the requirements of a claim. Therefore the application to treat the NOI as a timely filed claim should have been granted. Claimant, a prison inmate, was stabbed in the eye:

Court of Claims Act § 10(8)(a) provides that a court may grant an application to treat an NOI as a claim if, among other things, the NOI "was timely served, and contains facts sufficient to constitute a claim; and the granting of the application would not prejudice the defendant." Court of Claims Act § 11(b) requires a claim to specify: (1) the nature of the claim; (2) the time when it arose; (3) the place where the claim arose; (4) the items of damage or injuries claimed; and (5) the total sum claimed … . While section 11(b) does not require "absolute exactness," the "guiding principle informing" section 11(b) pleading requirements is whether the State is "able to investigate the claim promptly and to ascertain its liability under the circumstances" … . "In describing the general nature of the claim, . . . or a notice of intention to file a claim, . . . [it] 'should provide an indication of the

manner in which the claimant was injured and how the State was negligent, or enough information so that how the State was negligent can be reasonably inferred'" … .

Here … the claimant provided sufficient details to meet the requirements outlined in Court of Claims Act § 11(b), including the nature of the claim and the alleged act of negligence by the State … . Johnson v State of New York, 2024 NY Slip Op 04949, Second Dept 10-9-24

Practice Point: Where a notice of intention to file a claim (NOI) includes sufficient information about the nature of the claim and the alleged negligence by the state, an application to treat the NOI as a timely filed claim should be granted.

October 9, 2024

NEGLIGENT SUPERVISION, EDUCATION-SCHOOL LAW, CHILD VICTIMS ACT, EVIDENCE.

IN THIS CHILD VICTIMS ACT CASE, THE SCHOOL DEFENDANTS DID NOT ELIMINATE QUESTIONS OF FACT ABOUT CONSTRUCTIVE NOTICE OF THE ALLEGED SEXUAL ABUSE OF PLAINTFF STUDENT BY TWO TEACHERS; THE FREQUENCY OF THE ALLEGED ABUSE RAISED QUESTIONS ABOUT NOTICE (SECOND DEPT).

The Second Department, reversing Supreme Court in this Child Victims Act case, determined the school defendants did not eliminate questions of fact about constructive notice of the sexual abuse of plaintiff student by two teachers. The relevant law is described in detail and should be consulted as a complete overview of the relevant issues:

… [T]o the extent the complaint is premised on the conduct of the music teacher, the defendants failed to establish, prima facie, that they lacked constructive notice of the music teacher's alleged abusive propensities and conduct … . The defendants' own submissions established that the plaintiff testified that the alleged abuse by the music teacher occurred once or twice a week during the school year … . In light of the frequency of the alleged abuse, the defendants did not eliminate a triable issue of fact as to whether they should have known of the alleged abuse …

. Additionally, the defendants failed to eliminate triable issues of fact as to whether their supervision of the music teacher or the plaintiff was not negligent … .

Although the single incidence of alleged sexual abuse by the English teacher occurred off of school property and outside of school hours, the defendants' own submissions demonstrate that the music teacher introduced the plaintiff to the English teacher, describing the plaintiff as his "friend" and a "good girl," and that, in the presence of the music teacher, the English teacher made arrangements with the plaintiff during school hours and on school grounds to meet after school when the alleged abuse by the English teacher took place … . C. M. v West Babylon Union Free Sch. Dist., 2024 NY Slip Op 04954, Second Dept 10-9-24

Practice Point: Here the frequency of the alleged sexual abuse of plaintiff student by a teacher raised a question of fact about constructive notice by the school defendants.

October 9, 2024

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

IN A CHILD VICTIMS ACT CASE AGAINST A TEACHER ALLEGED TO HAVE SEXUALLY ABUSED A STUDENT IN THE 60'S, THE BARE ALLEGATION IN THE COMPLAINT THAT THE EMPLOYER KNEW OR SHOULD HAVE KNOWN OF THE TEACHER'S PROPENSITY WAS NOT SUFFICIENT TO STATE A CAUSE OF ACTION; COMPLAINT DISMISSED (SECOND DEPT).

The Second Department, reversing Supreme Court in this Child Victims Act case, determined the complaint did not state a cause of action for negligent retention or negligent supervision of a teacher alleged to have sexually abused plaintiff in the 60's. An allegation which merely states a bare legal conclusion is not entitled to consideration on a motion to dismiss. Here the complaint alleged defendant employer, YCQ, "knew or should have known of the employee's propensity for the conduct which caused the injury:"

… [T]o sustain the cause of action sounding in negligent supervision of a child, the plaintiff was required to allege that YCQ "had sufficiently specific knowledge or

notice of the dangerous conduct which caused injury; that is, that the third-party acts could reasonably have been anticipated" … . Similarly, "[a]n employer can be held liable under theories of negligent hiring, retention, and supervision where it is shown that the employer knew or should have known of the employee's propensity for the conduct which caused the injury" … .

Here, the complaint failed to state a cause of action alleging negligent retention of the religious studies teacher by YCQ and a cause of action alleging negligent supervision based upon YCQ's failure to adequately supervise the plaintiff and/or the religious studies teacher, as the complaint did not sufficiently plead that YCQ knew or should have known of the religious studies teacher's propensity for the type of conduct at issue … . While it is true that such causes of action need not be pleaded with specificity … , the complaint merely asserted the bare legal conclusion that YCQ "knew or should have known of [the religious studies teacher's] propensity to sexually abuse minor students," without providing any factual allegations that the religious studies teacher's sexual abuse of the plaintiff was foreseeable … . Kessler v Yeshiva of Cent. Queens, 2024 NY Slip Op 05337, Second Dept 10-30-24

Practice Point: In a Child Victims Act case alleging negligent retention and negligent retention of a teacher who allegedly sexually abused a student, the bare allegation that the teacher's employer knew or should have known of the teacher's propensity was not enough to survive a motion to dismiss for failure to state a cause of action. Allegations which amount to bare legal conclusions will not be considered on a motion to dismiss.

October 30, 2024

PRODUCTS LIABILITY, TOXIC TORTS, DISCOVERY, EVIDENCE.

THE IDENTITIES OF THE SUBJECTS OF TWO SCHOLARLY ARTICLES LINKING TALCUM-POWDER PRODUCTS WITH MESOTHELIOMA SHOULD BE RELEASED; THE INFORMATION IS NOT PROTECTED BY HIPAA OR THE FEDERAL COMMON RULE; PRODUCTION OF THE INFORMATION WOULD NOT BE UNDULY BURDENSOME AND WOULD NOT DETER FUTURE RESEARCH (FIRST DEPT).

The First Department, reversing Supreme Court's denial of a petition to enforce an out-of-state subpoena, determined the identities of the subjects of two scholarly articles linking cosmetic talcum powder products with mesothelioma were not protected by HIPAA's privacy rule or the federal Common Rule:

The information sought by the subpoenas … is clearly relevant to the underlying New Jersey personal injury action. It goes directly to the credibility of these articles, which speak to the central issues in dispute and are relied on by three testifying experts, and whose author was to testify as an expert until she voluntarily withdrew … .

The information sought by the subpoenas is not protected from disclosure by HIPAA's privacy rule, which does not apply where, as here, the health care providers did not provide physician services in connection with the articles and the subjects were never their patients … .

The information sought by the subpoenas is also not protected from disclosure by the federal Common Rule because the articles to which they relate fall within the exemption for secondary research based on publicly available identifiable private information or biospecimens … .The burden was on the party opposing the subpoenas to prove that this information was produced in the underlying litigations subject to a protective order … . Neither party opposing disclosure of the information has offered any such proof.

Production of the information sought by the subpoenas would not be unduly burdensome, nor is it likely to have a chilling effect on future medical research. The subject information consists of just a few pages, is easily located, does not concern ongoing research, and does not reveal the unpublished thought processes of the researchers. Moreover, the subjects never actually agreed to participate in any research, having released their information in connection with public litigation,

and so it is unclear how allowing disclosure of their identities might deter future research participation … . Matter of Johnson & Johnson v Northwell Health Inc., 2024 NY Slip Op 04909, First Dept 10-8-24

Practice Point: The decision outlines the issues involved in seeking the identities of the subjects of two scholarly articles linking talcum-powder products with mesothelioma.

October 8, 2024

SLIP AND FALL, ASSUMPTION OF THE RISK, SKIERS, COURT OF CLAIMS, EVIDENCE.

AFTER SKIING ALL DAY AND RETURNING THE EQUIPMENT, CLAIMANT SLIPPED AND FELL ON ICE AND SNOW IN A PARKING LOT; THE ASSUMPTION OF THE RISK DOCTRINE DOES NOT APPLY; THE COURT NOTED THAT INADMISSIBLE HEARSAY, HERE AN INCIDENT REPORT, MAY BE CONSIDERED ON A SUMMARY JUDGMENT MOTION IF IT DUPLICATES NON-HEARSAY (THIRD DEPT).

The Third Department, reversing (modifying) the Court of Claims, determined that the assumption of the risk doctrine did not apply to claimant who had finished skiing for the day and was walking to his car in the parking lot when he sipped and fell on ice and snow. The court noted that inadmissible hearsay, here and incident report, may be considered on a summary judgment motion where it duplicates non-hearsay evidence:

… [I]t is undisputed that [claimant] fell at a time when he was finished skiing for the day, and he no longer had any ski equipment on or near his person. He was, instead, returning to his parked vehicle, intending to exit defendants' property entirely. As a matter of law, [claimant] was not engaged in any facet of skiing at the time that he was injured, and the primary assumption of risk doctrine is therefore inapplicable … . * * *

To the extent that defendants argue that the incident report, as well as certain aspects of Weichsel's testimony, is inadmissible hearsay and thus may not be relied upon by claimants, we first note that such evidence was proffered by defendants in support of their own motion. In any event, inadmissible hearsay may be considered

at the summary judgment stage where it exists alongside admissible evidence in support of the same argument … . Weichsel v State of New York, 2024 NY Slip Op 05384, Third Dept 10-31-24

Practice Point: The assumption of the risk doctrine does not apply to a skier who, after skiing all day and returning the equipment, slips and falls in the parking lot.

Practice Point: Inadmissible hearsay, here an incident report, can be considered on a summary judgment motion it it duplicates non-hearsay.

October 31, 2024

SLIP AND FALL, DISCOVERY SANCTIONS, EVIDENCE, JUDGES.

FAILURE TO PRESERVE VIDEO SHOWING THE AREA WHERE PLAINTIFF SLIPPED AND FELL PRIOR TO THE FALL WARRANTED AN ADVERSE INFERENCE CHARGE; UNDER THE FACTS, STRIKING DEFENDANT'S ANSWER WAS TOO SEVERE A SANCTION (FIRST DEPT).

The First Department, reversing Supreme Court, determined striking defendant's answer for destruction of video evidence in this slip and fall case was not warranted, an adverse inference jury instruction was a sufficient sanction. Defendant provided video of plaintiff's fall in compliance with plaintiff's attorney's request. Nine months later plaintiff's attorney requested video showing the area prior to the fall, but it had been overwritten by then:

Plaintiffs' counsel sent defendants a preservation letter approximately seven days following the accident. Defendants responded by producing several minutes of video of the accident itself, which was reasonably compliant with plaintiffs' request for video surveillance of "the incident." However, there was no pre-fall video footage provided to aid plaintiffs in establishing defendants' actual or constructive notice of the alleged hazardous condition on the floor. Defendants' employee, who culled the video footage provided, was no longer in defendants' employ and was not available to be deposed as to his or her reasons for selecting particular video footage. Plaintiff's counsel did not alert defendants of a need for additional video footage depicting the pre-fall circumstances at the accident site until nine months after receipt of the initial video clip, which was well after the

software that operated defendants' surveillance cameras had overwritten the video surveillance from plaintiff's accident date.

Plaintiff's proof established that defendants had control over the relevant surveillance and preserved it to the extent requested, but absent deposition testimony from defendant's former employee who prepared the video clip as to his reasons for selecting the footage he or she did, the culpability issue cannot be definitively resolved. Nevertheless, the destroyed evidence video compromised the fairness of the litigation so as to warrant an adverse inference sanction … . Lev v Eataly USA LLC, 2024 NY Slip Op 04910, First Dept 10-8-24

Practice Point: Plaintiff's counsel requested video of "the incident" in this slip and fall case, which was provided. Nine months later plaintiff's counsel requested video showing the area prior to the fall re: the issue of defendant's notice of the condition. By that time the video had been overwritten. Plaintiff was entitled to an adverse inference jury instruction. Striking the defendant's answer was deemed too severe a sanction.

October 8, 2024

SLIP AND FALL, VIDEO EVIDENCE, SPOLIATION.

PLAINTIFF DID NOT DEMONSTRATE SANCTIONS FOR SPOLIATION OF EVIDENCE WERE WARRANTED; THE VIDEO FOOTAGE FOR THE DAY OF THE FALL HAD BEEN AUTOMATICALLY DELETED BEFORE THE PRESERVATION LETTER WAS RECEIVED; HOWEVER DEFENDANTS HAD PRESERVED 52 SECONDS OF VIDEO SHOWING JUST BEFORE THE FALL, THE FALL AND PLAINTIFF WALKING AWAY (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the restrictions placed on defendants' presentation of evidence of liability relevant to plaintiff's slip and fall constituted an abuse of discretion. Plaintiff fell on March 24, 2018, and defendants received a letter requesting that 12 hours of video footage be preserved on April 9, 2018. By April 9 the video had been automatically deleted. Defendants had preserved 52 seconds of the video which included just before the fall, the fall, and plaintiff walking away:

The plaintiff did not establish that the defendants were placed on notice that the video evidence might be needed for future litigation before the surveillance footage was automatically deleted … . Further, the defendants' preservation of only a portion of the surveillance footage did not indicate a culpable state of mind, as the defendants' representative averred in an affidavit that, on the date of the accident, she saved a 52-second clip of the incident. The representative testified at her deposition that to locate this clip, she had entered the date and time that the alleged accident occurred, and she averred that, by the time she received the preservation letter, the surveillance footage had been automatically deleted … . In addition, the plaintiff did not establish that the absence of the additional surveillance footage deprived her of the ability to prove her case … . De Abreu v Syed Rests. Enters., Inc., 2024 NY Slip Op 05326, Second Dept 10-30-24

Practice Point: The criteria for spoliation of evidence were not met by the facts here. The video footage for the day of the fall was automatically deleted before the preservation letter was received. Defendants preserved video footage of just before the fall, the fall and plaintiff walking away.

October 30, 2024

TRAFFIC ACCIDENTS, REAR-END COLLISIONS.

DEFENDANT DID NOT PRESENT A NONNEGLIGENT EXPLANATION FOR THE REAR-END COLLISION AND PLAINTIFF WAS ENTITLED TO SUMMARY JUDGMENT; DEFENDANT'S STATEMENT THAT HIS "BRAKES FAILED" WAS DEEMED SELF-SERVING AND INADMISSIBLE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the defendant's failure to offer a nonnegligent explanation for the rear-end collision warranted the award of summary judgment to plaintiff. The statement attributed to defendant in a certified police report claiming his "brakes failed" was deemed self-serving and inadmissible:

… [T]he plaintiffs established their prima facie entitlement to judgment as a matter of law on the issue of liability by submitting their respective affidavits, which demonstrated, inter alia, that the plaintiffs' vehicle was traveling at a constant speed of 35 miles per hour in the right lane for at least one minute when it was

struck in the rear by the defendants' vehicle … . The plaintiffs also established their prima facie entitlement to judgment as a matter of law dismissing the defendants' first affirmative defense, alleging comparative negligence, by demonstrating that they were not comparatively at fault in the happening of the accident … . Barr v Canales, 2024 NY Slip Op 04944, Second Dept 10-9-24

Practice Point: Defendant's statement that his "brakes failed" was deemed self-serving and inadmissible in this rear-end collision case.

October 9, 2024

TRAFFIC ACCIDENTS, REAR-END COLLISIONS.

DEFENDANTS IN THIS REAR-END COLLISION CASE WERE ENTITLED TO SUMMARY JUDGMENT; DEFENDANTS' STOPPED VEHICLE WAS HIT FROM BEHIND AND PUSHED INTO PLANTIFF'S VEHICLE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the Menegos defendants were entitled to summary judgment in this rear-end collision case. The Menegos defendants demonstrated their vehicle had come to a stop behind plaintiff's vehicle before it was struck from behind and pushed into plaintiff's vehicle:

"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" … . "'A rear-end collision with a stopped or stopping vehicle establishes a prima facie case of negligence on the part of the operator of the rear vehicle, requiring that operator to come forward with evidence of a nonnegligent explanation for the collision to rebut the inference of negligence'" … . "Evidence that a vehicle was struck in the rear and propelled into the vehicle in front of it may provide a sufficient non-negligent explanation for the collision" … . Thus, in a three-vehicle chain-collision accident, the defendant operator/owner of the middle vehicle "may establish prima facie entitlement to judgment as a matter of law by demonstrating that the middle vehicle was properly stopped behind the lead vehicle when it was struck from behind by the rear vehicle and propelled into the lead vehicle" … . Beltre v Menegos, 2024 NY Slip Op 05322, Second Dept 10-30-24

Practice Point: In a rear-end collision case, if a stopped car is hit from behind and pushed into the car in front, the driver of the stopped car is not negligent.

October 30, 2024

TRAFFIC ACCIDENTS, MUNICIPAL LAW, VEHICLE AND TRAFFIC LAW.

HERE THE SUPERINTENDENT OF HIGHWAYS WAS NOT "ENGAGED IN HIGHWAY WORK" WHEN HE COLLIDED WITH PLAINTIFF; THEREFORE THE ORDINARY NEGLIGENCE STANDARD, NOT THE HIGHER "RECKLESS" STANDARD FOR HIGHWAY WORKERS IN THE VEHICLE AND TRAFFIC LAW, APPLIED TO THIS TRAFFIC ACCIDENT (CT APP).

The Court of Appeals, reversing the Appellate Division and awarding summary judgment to plaintiff, in a full-fledged opinion by Judge Cannataro, determined the defendant, Simone, the Superintendent of Highways for the Town of Carmel, was not engaged in highway work when he failed to look to his right before pulling out of an intersection and collided with plaintiff's car. Simone had driven to a vantage point to see how much snow had fallen on the town's roads and had ordered the highway department employees to salt the roads. He was on his way back to his office when the accident happened:

… [T]itle VII of the Vehicle and Traffic Law sets out a uniform set of traffic regulations, or "rules of the road," which generally "apply to drivers of all vehicles owned or operated by the United States, this state, or any county, city, town, district, or any other political subdivision of the state" … . Vehicle and Traffic Law § 1103 (b), however, provides that those rules "shall not apply to persons, teams, motor vehicles, and other equipment while actually engaged in work on a highway" … . Although such parties remain liable for "the consequences of their reckless disregard for the safety of others," they bear no liability for ordinary negligence … . * * *

… [A]ccording to Simone's own deposition testimony, the accident occurred after he had fully completed his assessment of roadway conditions at his bellwether location and mobilized his entire team to salt the town's roads. At the time of the accident, Simone was merely using the road to return to work. Although he testified that he saw a slushy accumulation of snow to his left shortly before the collision occurred, he took no action in response to observing that condition.

Indeed, he testified that as he pulled into the intersection where the collision occurred, there was nothing keeping his attention drawn to his left and he was no longer looking at the condition.

Because the uncontested evidence demonstrates that Simone was not actually engaged in work on a highway at the time the accident occurred, defendants are not entitled to the protections of [Vehicle and Traffic Law] section 1103 (b). Orellana v Town of Carmel, 2024 NY Slip Op 05131, CtApp 10-17-24

Practice Point: Here ordinary negligence rules applied to the Superintendent of Highways when he had an accident returning to his office after assessing how much snow had fallen. At the time of the accident he had already ordered his employees to salt the roads. He therefore was not "engaged in highway work" when he collided with plaintiff.

October 17, 2024

WORKERS' COMPENSATION.

BECAUSE CLAIMANT SUFFERED PHYSICAL TRAUMA, TO RECOVER FOR PSYCHOLOGICAL INJURIES SHE NEED ONLY DEMONSTRATE A CONNECTION BTWEEN THE PSYCHOLOGICAL INJURIES AND THE PHYSICAL TRAUMA; CLAIMANT WAS NOT REQUIRED TO PROVE A SEPARATE AND DISTINCT WORKPLACE INJURY CAUSED THE PSYCHOLOGICAL INJURIES (THIRD DEPT).

The Third Department, reversing the Workers' Compensation Board, determined the claimant need only demonstrate a connection between the physical trauma she suffered when a dog jumped on her and the psychological injuries which followed. Claimant did not have to prove the psychological injuries were caused by a separate workplace accident. Claimant, a social worker, was making a home visit when a family dog charged at her:

… [I]t has long been recognized that where a workplace accident is found to have occurred as a result of a physical impact/trauma, resulting physical and psychological injuries are both compensable, so long as the claimant establishes the causal connection between the accident and the alleged injuries … .

Here, the Board established a claim for a physical injury to claimant's chest based upon the dog jumping on her chest and knocking her into the side of the house. As claimant alleges that her psychological injuries resulted from that same physical impact that the Board found amounted to a workplace accident, the Board erred in requiring that she establish a separate workplace accident comprised of work-related stress to recover for her alleged direct psychological injuries … . Rather, upon finding that a workplace accident had been established, the Board's inquiry was limited to whether claimant showed, through competent medical evidence, that there was a causal relation between the accident and the injury … . Accordingly, the Board's decision is reversed, and the matter is remitted to the Board to examine whether a causal connection was established between the workplace accident and the alleged psychological injuries consisting of PTSD, anxiety and acute stress disorder. Matter of Lewis v NYC Admin. for Children Servs., 2024 NY Slip Op 05254, Third Dept 10-24-24

Practice Point: The Workers' Compensation Law allows recovery for psychological injuries caused by physical trauma.

October 24, 2024

WORKERS' COMPENSATION.

THE WORKERS' COMPENSATION BOARD SHOULD NOT HAVE OFFSET THE SLU AWARD FOR CLAIMANT'S ARM INJURY BASED ON A PRIOR SLU AWARD FOR INJURY TO THE SAME ARM; THE TWO INJURIES WERE NOT RELATED (THIRD DEPT)

The Third Department, reversing the Workers' Compensation Board, determined claimant was entitled to a schedule loss of use (SLU) award for injury to his arm, despite a prior SLU award for injury to the same arm. The injuries involved different pathologies:

"Pursuant to Matter of Genduso [v New York City Dept. of Educ. (164 AD3d 1509 [3d Dept 2018])] and its progeny, the Board may offset an SLU award by previous SLU awards for the same body member, regardless of whether the prior injuries involved the same or separate parts of that member" … . However, the Court of Appeals has held that an offset of an SLU award by previous SLU awards for the same body member "is not required when the claimant demonstrates that a

subsequent injury increased the loss of use of [the] body member beyond that resulting from the prior injury" (Matter of Johnson v City of New York, 38 NY3d at 444 …). Such demonstration may include medical evidence that a prior injury and the current injury to the same member are "separate pathologies that each individually caused a particular amount of loss of use of [the subject member]" … and that the current injury resulted in a greater degree of loss of use of the body member in question "beyond that . . . [of] the prior injury" … . * * *

… [C]laimant's physician clearly stated that claimant had "received a scheduled loss of use of 27% for the right shoulder," and, in his July 2021 report, claimant's physician opined that the surgery he had performed for claimant's 2015 shoulder injury was "unrelated" to the 2019 biceps injury. Claimant's physician made it clear that the 33.33% SLU that he found claimant had sustained for the biceps injury was separate from, and in addition to, the prior shoulder injury. Thus, in accordance with the holding in Matter of Johnson, the SLU attributable to the prior shoulder injury should not have been deducted from the SLU attributable solely to the biceps injury, and we find that the Board's determination is not supported by substantial evidence. Matter of Germano v Dynamic Appliances, Inc., 2024 NY Slip Op 05259, Third Dept 10-24-24

Practice Point: A claimant is eligible for more than one SLU award for injuries to the same body part if the injuries are not related and involve different pathologies.

October 24, 2024

WORKERS' COMPENSATION, NEGLIGENCE, EMPLOYMENT LAW.

ALTHOUGH DEFENDANT DID NOT PRODUCE AN EMPLOYMENT CONTRACT WITH PLAINTIFF, DEFENDANT DEMONSTRATED IT WAS PLAINTIFF'S SPECIAL EMPLOYER; THEREFORE PLAINTIFF'S PERSONAL INJURY ACTION WAS PRECLUDED BY HIS ELECTION OF WORKERS' COMPENSATION BENEFITS (FIRST DEPT).

The First Department, reversing Supreme Court, determined defendant was plaintiff's special employer and plaintiff's action for personal injury was precluded by his election of workers' compensation benefits:

Plaintiff testified that he received all his work instructions from an employee of defendant, the building's manager … . Both plaintiff and the building's manager testified that they considered the building manager to be plaintiff's boss or supervisor … .

The evidence thus showed that defendant "supervised, directed and controlled plaintiff's work" … . Although defendant has produced no contract between itself and the building owner, such a contract is not a prerequisite for special employment status … . Therefore, defendant has established its prima facie case that it was plaintiff's special employer, which plaintiff has failed to rebut with any issue of fact…. . Payano v Proto Prop. Servs. LLC, 2024 NY Slip Op 04915, First Dept 10-8-2024

Practice Point: Here defendant was deemed plaintiff's special employer, despite the absence of an employment contract. Therefore plaintiff's election to receive workers' compensation benefits precluded his personal injury action against defendant.

October 8, 2024