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Personal Injury
Reversal Report
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An Organized Compilation of Summaries of Selected Decisions, Mostly Reversals, Addressing Personal Injury, Released by Our New York State Appellate Courts and Posted on the New York Appellate Digest Website in November 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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AUTOMATIC DOORS.

HERE THE AUTOMATIC DOOR AT A RESIDENTIAL FACILITY CLOSED ON THE ELDERLY PLAINTIFF; SENSORS WHICH WOULD PREVENT THE DOOR FROM CLOSING WERE AVAILABLE; THERE WAS A QUESTION OF FACT WHETHER THE DOOR WAS SAFE (THIRD DEPT).

The Third Department, reversing Supreme Court, determined the lawsuit stemming from an automatic door at a residential facility closing on the elderly plaintiff should not have been dismissed, despite the evidence that the door was not defective. There was evidence that sensors which would stop the door from closing when a person is in the doorway could have been installed:

Given the competing expert affidavits on whether defendants maintained their property in a reasonably safe condition under the circumstances, Supreme Court erred in awarding defendants summary judgment dismissing the complaint … . Context is essential in gauging whether a property owner has maintained its premises in a reasonably safe condition. Here, defendants knew certain residents required walkers or wheelchairs that would impact their ability to navigate through a doorway, that the facility's doors were previously serviced for closing too quickly, and that presence sensors were a readily available option from the manufacturer. Plaintiff also sustained a serious injury to her right leg requiring surgery. Viewing the facts in the light most favorable to plaintiff as the nonmoving party, we find that there are triable issues of fact as to whether the premises were reasonably safe … . Any issue of comparative fault on the part of plaintiff and/or her daughter and grandson who were with her at the time of this incident is a question to be resolved by a factfinder … . Spielman v Glenwyck Dev., LLC, 2024 NY Slip Op 05932, Third Dept 11-27-24

Practice Point: Here there was no evidence the automatic door which closed on plaintiff was defective, but there was a question of fact whether the installation of sensors would have rendered the door safe for use by the elderly.

November 27, 2024

CHILD VICTIMS ACT, EDUCATION-SCHOOL LAW, EMPLOYMENT LAW. DEFENDANT SCHOOL DISTRICT DID NOT MAKE OUT A PRIMA FACIE CASE DEMONSTRATING IT LACKED CONSTRUCTIVE NOTICE OF THE TEACHER'S ALLEGED PROPENSITY TO SEXUALLY ABUSE CHILDREN; THEREFORE ITS MOTION FOR SUMMARY JUDGMENT IN THIS CHILD VICTIMS ACT CASE SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant school district was not entitled to summary judgment in this case alleging sexual abuse by a teacher in 2013 – 2014. A question of fact had been raised about whether the school district knew or should have known of the teacher's alleged propensity to abuse children:

"Although an employer cannot be held vicariously liable for torts committed by an employee who is acting solely for personal motives unrelated to the furtherance of the employer's business, the employer may still be held liable under theories of negligent hiring, retention, and supervision of the employee" … . "'[A] necessary element of such causes of action is that the employer knew or should have known of the employee's propensity for the conduct which caused the injury'" … .

"A school 'has a duty to exercise the same degree of care toward its students as would a reasonably prudent parent, and will be held liable for foreseeable injuries proximately related to the absence of adequate supervision'" … . "'The standard for determining whether the school has breached its duty is to compare the school's supervision and protection to that of a parent of ordinary prudence placed in the same situation and armed with the same information'" … . "'The adequacy of a school's supervision of its students is generally a question left to the trier of fact to resolve, as is the question of whether inadequate supervision was the proximate cause of the plaintiff's injury'" … . "Where the complaint alleges negligent supervision due to injuries related to an individual's intentional acts, the plaintiff generally must demonstrate that the school knew or should have known of the individual's propensity to engage in such conduct, such that the individual's acts could be anticipated or were foreseeable" … . "'Actual or constructive notice to the school of prior similar conduct generally is required'" … .

Here, the defendants failed to establish, prima facie, that they lacked constructive notice of the teacher's alleged abusive propensities and conduct … . In particular,

the defendants submitted a transcript of the plaintiff's deposition testimony, in which the plaintiff testified that the principal and other teachers were aware of the teacher's inappropriate behavior, which occurred multiple times throughout the school year in a classroom on the defendants' premises during school hours … . J.J. v Mineola Sch. Dist., 2024 NY Slip Op 05580, Second Dept 11-13-24

Practice Point: Here the plaintiff's testimony that the principal and other teachers were aware of the teacher's inappropriate behavior which occurred multiple times in a classroom was enough to prevent the school from making out a prima facie case that it did not have constructive notice of the teacher's alleged propensity.

November 13, 2024

CHILD VICTIMS ACT, FOSTER CARE, DUTY OWED BY COUNTY.

IN THIS CHILD VICTIM'S ACT CASE ALLEGING SEXUAL ABUSE AFTER PLACEMENT IN FOSTER CARE BY THE DEFENDANT COUNTY, THE SECOND DEPARTMENT, DISAGREEING WITH THE FIRST AND FOURTH DEPARTMENTS, DETERMINED THE COUNTY OWED PLAINTIFF A SPECIAL DUTY UPON ASSUMING CUSTODY OVER HER FOR FOSTER-CARE PLACEMENT (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Ventura, affirming Supreme Court's denial of the county's motion for summary judgment, expressly disagreeing with contrary rulings in the First and Fourth Departments, determined a municipal agency which assumes custody over a child for the purpose of placing the child in foster care owes a special duty to the child. In this Child Victims Act case, plaintiff alleged sexual abuse during the 1970's by her foster father and, during a different foster placement, by her adult neighbor:

The Court of Appeals has long held that "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" … . In this case, we consider how this rule applies in the context of claims against municipalities for the negligent placement and supervision of children in foster care. In contrast to the recent holdings of the Appellate Division, First and Fourth Departments, we conclude that a municipal agency owes a special duty to a foster

child upon assuming legal custody of that child. An agency that assumes custody of a foster child, and which selects and supervises that child's foster parents, necessarily owes a duty to the child "more than that owed the public generally" … . Thus, where, as here, a plaintiff asserts causes of action to recover damages for harm suffered by a foster child due to the negligent performance of a governmental function and alleges facts sufficient to show that the defendant municipal agency assumed legal custody over that child, that plaintiff need not prove any additional facts in order to satisfy the special duty rule. Adams v Suffolk County, 2024 NY Slip Op 05428, Second Dept 11-6-24

Practice Point: A municipality's liability for negligence in performing a governmental function is predicated upon owing the injured party a special duty, over and above that owed to the general public. Here, disagreeing with contrary holdings in the First and Fourth Departments, the Second Department held a county which assumes custody of a child for placement in foster care owes a special duty to that child.

November 6, 2024

DAMAGES, LOSS OF SERVICES.

PROOF THAT PLAINTIFF WIFE ASSUMED FULL RESPONSIBILITY FOR HOUSEHOLD CHORES, COOKING, TRANSPORTIING THE CHILDREN, AND CARED FOR THE INJURED PLAINTIFF, WARRANTED A $40,000 AWARD FOR LOSS OF SERVICES; THE JURY HAD AWARDED $0 DAMAGES (FIRST DEPT).

The First Department, remanding for a new trial unless the parties stipulate to a damages award of $40,000 for loss of services, determined the jury's award of $0 damages constituted a material deviation from reasonable compensation:

Plaintiff wife testified that after the injured plaintiff's accident, she assumed full responsibility for household chores, cooking, and transportation for plaintiffs' children, and also had to care for the injured plaintiff. This testimony is sufficient to support an award for past loss of services … . Lind v Tishman Constr. Corp. of N.Y., 2024 NY Slip Op 05540, First Dept 11-12-24

Practice Point: Consult this decision for some insight into the value of "loss of services" in a personal injury case.

November 12, 2024

ELEVATORS, EXPERT EVIDENCE, JUDGES.

ALTHOUGH PLAINTIFF'S EXPERT IN THIS ELEVATOR ACCIDENT CASE WAS NOT A PROFESSIONAL ENGINEER, HE HAD BEEN QUALIFIED AS AN EXPERT IN 120 CASES; THE JUDGE SHOULD NOT HAVE SUMMARILY DISQUALIFIED HIM (FIRST DEPT).

The First Department, reversing Supreme Court, determined the trial judge should not have disqualified plaintiff's expert in this elevator accident case. Although the expert was not a professional engineer, he had been qualified as an expert in over 120 state and federal cases:

Supreme Court erred in summarily disqualifying the opinion of Patrick A. Carrajat as an expert. Although Carrajat was not a professional engineer, he nonetheless had the requisite knowledge and experience to render an opinion on the cause of the accident, as he averred that he had been qualified as an elevator expert and testified as an expert witness 120 times in state and federal courts throughout the country … . Furthermore, challenges regarding an expert witness' qualifications affect the weight to be accorded the expert's views, not their admissibility … .

Plaintiff's expert's affidavit creates issues of fact as to both the nature of the incident, and the cause of the incident. While defendants' experts opined that the elevator could not have malfunctioned as plaintiff described, and that the elevator descended to the lobby at regular speed, Carrajat disputed this and posited ways in which the elevator could have malfunctioned that were consistent with plaintiff's account of the accident. Given the conflicting expert affidavits, the building defendants have not established their entitlement to summary judgment … . Escolastico v Rigs Mgt. Co., LLC, 2024 NY Slip Op 05769, First Dept 11-19-24

Practice Point: Here in this elevator-accident case plaintiff's expert was not a professional engineer but had been qualified as an expert in over 120 cases. It was reversible error to summarily disqualify him.

November 19, 2024

LABOR LAW-CONSTRUCTION LAW, EVIDENCE.

A 400-POUND DUCT LIFT TOPPLED OFF AN UNSTEADY RAMP AND STRUCK PLAINTIFF; ALTHOUGH THE LIFT DROPPED ONLY 10 TO 12 INCHES, PLAINTIFF WAS ENTITLED TO SUMMARY JUDGMENT ON THE LABOR LAW 240(1) CAUSE OF ACTION (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined plaintiff's motion for summary judgment on the Labor Law 240(1) cause of action should have been granted. Plaintiff was struck by a 400 pound duct lift which toppled off an unsteady ramp. The lift fell only 10 to 12 inches, but met the criteria for a gravity-related accident covered by Labor Law 240(1):

… Supreme Court should have denied that branch of the defendants' motion which was for summary judgment dismissing the cause of action alleging a violation of Labor Law § 240(1), as the defendants failed to satisfy their prima facie burden. Although the defendants submitted evidence establishing that the alleged elevation differential measured only 10 to 12 inches, given the heavy weight of the duct lift and the amount of force it was capable of generating, the elevation differential was not de minimis … . The plaintiff submitted evidence to show that he suffered harm that flowed directly from the application of the force of gravity to the duct lift … .

Moreover, the Supreme Court should have granted that branch of the plaintiff's cross-motion which was for summary judgment on the issue of liability on the cause of action alleging a violation of Labor Law § 240(1). The plaintiff submitted, inter alia, a transcript of his deposition testimony, which established, prima facie, that the defendants violated Labor Law § 240(1) by failing to provide an appropriate safety device, namely a secured ramp, to protect against the elevation-related hazard that was posed by maneuvering the heavy duct lift over the ramp … . Davila v City of New York, 2024 NY Slip Op 05433, Second Dept 11-6-24

Practice Point: A heavy object falling 10 to 12 inches from an unsteady ramp, striking plaintiff, is covered by Labor Law 240(1). The incident was caused by defendants' failure to provided an adequately secured ramp.

November 6, 2024

LABOR LAW-CONSTRUCTION LAW, FALLING OBJECTS.

PLAINTIFF WAS STRUCK BY A FALLING BEAM WHICH SHOULD HAVE BEEN SECURED; PLAINTIFF WAS NOT OTHERWISE PROTECTED FROM FALLING OBJECTS; PLAINTIFF WAS 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. Plaintiff was struck by a falling beam which should have been secured. The fact that plaintiff did not know where the beam came from did not preclude summary judgment:

Plaintiff's proof showed that the support beam was a load that required securing for the purposes of the undertaking … .Further, the elevated platform was not guarded by a safety device such as netting or enclosure that would have prevented the beam from falling on plaintiff … .

While plaintiff and his coworker did not actually witness where the beam came from, plaintiff "is not required to show the exact circumstances under which the object fell," provided he can demonstrate that the lack of a protective device called for under Labor Law § 240(1) proximately caused his injuries … A plaintiff's prima facie case is "not dependent on whether he had observed what had hit him, or whether the object in question was dropped or fell in some other manner " … . Fromel v W2005/Hines W. Fifty-Third Realty, LLC, 2024 NY Slip Op 05828, First Dept 11-21-24

Practice Point: Being struck by an unsecured falling object, and the failure to provide protection from falling objects, may warrant summary judgment on a Labor law 240(1) cause of action.

November 21, 2024

LABOR LAW-CONSTRUCTION LAW, "INHERENT IN THE WORK."

THE PEBBLES ON WHICH PLAINTIFF SLIPPED MET THE CRITERIA FOR A "FOREIGN SUBSTANCE" AND A "SLIPPERY CONDITION" WITHIN THE MEANING OF THE INDUSTRIAL CODE; THE LABOR LAW 241(6) CAUSES OF ACTION SHOULD NOT HAVE BEEN DISMISSED; THE MECHANICS OF THE 30-DAY COURT-OF-APPEALS "APPEAL CLOCK" EXPLAINED IN THE CONTEXT OF ELECTRONIC FILING (CT APP).

The Court of Appeals, reversing the Appellate Division's dismissal of the Labor Law 241(6) causes of action, determined the loose pebbles on which plaintiff slipped were not "inherent in the work" and, therefore, the Industrial Code provisions prohibiting "foreign substances" and "slippery conditions" applied. In addition, the Court of Appeals held one party's appeal to the Court was untimely and explained how the 30-day appeal clock works with electronic filing:

* * * To be effective to start CPLR 5513 (b)'s 30-day clock, service must comply with CPLR 2103. CPLR 2103 (b) (7), in turn, empowers the Chief Administrative Judge to authorize electronic service. * * * … [I]n an electronic filing case, service via filing on the NYSCEF docket for the trial court is effective to start CPLR 5513 (b)'s 30-day clock. * * *

Plaintiff testified … that, while attempting to install a 500-pound glass panel into a metal channel cut into the floor of the construction site, he slipped on concrete pebbles—that he believed came from the installation of the metal channel—and sustained injuries to his spine. …

… {Defendants] failed to demonstrate that the concrete pebbles that allegedly created the slipping hazard were integral to the work, because they did not conclusively show that the pebbles were "inherent to the task at hand, and not . . . avoidable without obstructing the work or imperiling the worker" … . As to … Industrial Code § 23-1.7 (d), [defendants] did not demonstrate that the concrete pebbles were not a "foreign substance" because, at the time of the alleged injury, the pebbles were "not a component of the [floor] and w[ere] not necessary to the [floor]'s functionality" … . [Defendants] did not demonstrate that the pebbles did not cause a "slippery condition" … . Regarding Industrial Code § 23-1.7 (e) (2), this provision is not limited to "tripping" hazards … . Ruisech v Structure Tone Inc., 2024 NY Slip Op 05866, CtApp 11-25-24

Practice Point: The pebbles on which plaintiff slipped were not inherent in the work and met the criteria for a "foreign substance" and "slippery condition" in the Industrial Code.

Practice Point. Consult this decision for an explanation of the mechanics of the 30-day period for taking an appeal to the Court of Appeals in the context of electronic filing.

November 25, 2024

LABOR LAW-CONSTRUCTION LAW.

PLYWOOD DELIBERATELY PLACED AS A TEMPORARY FLOOR DOES NOT CONSTITUTE "DIRT AND DEBRIS" OR "SCATTERED TOOLS AND MATERIALS" OR "SHARP PROTECTIONS" WITHIN THE MEANING OF THE INDUSTRIAL CODE; THEREFORE PLAINTIFF'S STEPPING IN A HOLE IN THE PLYWOOD AND FALLING IS NOT COVERED BY LABOR LAW 241(6) (FIRST DEPT).

The First Department determined Supreme Court properly dismissed the Labor Law 241(6) cause of action because the plywood used for temporary flooring, which had a hole in it which caused plaintiff to fall, was not "dirt and debris" or "scattered tools or materials" or "sharp projections" within the meaning of the Industrial Code:

… Industrial Code (12 NYCRR) § 23-1.7 (e) (2), … provides:

"Working areas. The parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed."

On its face, section 23-1.7(e)(2) does not apply to all potential tripping hazards but only to "accumulations of dirt and debris," "scattered tools and materials," and "sharp projections." As plaintiff admitted in his deposition testimony, the perforated plywood board on which he tripped had been deliberately placed on the stripped floor as a protective measure, in response to plaintiff's own complaints. Thus, as a matter of law, the plywood board, notwithstanding its hole, could not be

described as an "accumulation[] of . . . debris" or as part of a "scatter[ing]" of "tools and materials" … . Accordingly, as a matter of law, the plywood board did not fall within the scope of Industrial Code § 23-1.7(e)(2). Cioppa v ESRT 112 W. 34th St., L.P., 2024 NY Slip Op 05482, First Dept 11-7-24

Practice Point: Plywood placed as a temporary floor does not constitute "dirt and debris" within the meaning of the Industrial Code. Therefore stepping in a hole in the plywood and falling is not covered by Labor Law 241(6).

November 7, 2024

MEDICAL MALPRACTICE, JURY INTERROGATORY.

THE FAILURE TO GRANT PLAINTIFF'S REQUEST THAT THE JURY BE GIVEN AN INTERROGATORY ON THE THEORY THE SURGEON IMPROPERLY PERFORMED A PROCEDURE WAS REVERSIBLE ERROR (SECOND DEPT).

The Second Department, ordering a new trial on one of the theories of negligence, determined plaintiff's request that the jury be given an interrogatory should have been granted:

… [T]he Supreme Court erred in denying the plaintiff's request that the jury be given an interrogatory asking whether [defendant] Lazzaro departed from good and accepted standards of medical practice by "the improper performance of a surgical procedure," and therefore a new trial is required on this theory of negligence. "'Jury interrogatories must be based on claims supported by the evidence'" … . "'The trial court has broad discretion in deciding whether to submit interrogatories to the jury'" … . "However, where there is sufficient evidence to support a plaintiff's cause of action pursuant to a particular theory of negligence, it is error to deny a request by the plaintiff to submit an interrogatory to the jury regarding that theory" … .

Here, the plaintiff introduced sufficient evidence at trial to support her theory that Lazzaro departed from good and accepted standards of medical practice by the manner in which he performed the surgery … . Lawrence v New York Methodist Hosp., 2024 NY Slip Op 05571, Second Dept 11-13-24

Practice Point: In this medical malpractice case, there was sufficient proof a defendant improperly performed a surgical procedure to warrant granting plaintiff's request to give the jury an interrogatory on the issue. The denial of the request was deemed reversible error.

November 13, 2024

MEDICAL MALPRACTICE, EXPERT EVIDENCE.

DEFENDANT DOCTOR'S EXPERT'S AFFIDAVIT IN THIS MEDICAL MALPRACTICE ACTION DID NOT ADDRESS ALL THE ALLEGATIONS IN THE BILL OF PARTICULARS, RENDERING IT CONCLUSORY AND SPECULATIVE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant doctor's (Buono's) motion for summary judgment in this medical malpractice action should not have been granted: Buono's expert's affidavit did not address all the allegations in the bill of particulars, rendering it conclusory and speculative:

"To prevail on a motion for summary judgment in a medical malpractice action, a defendant must establish, prima facie, either that there was no departure from good and accepted medical practice or that any departure was not a proximate cause of the plaintiff's injuries" … . "In order to sustain this burden, the defendant must address and rebut any specific allegations of malpractice set forth in the plaintiff's bill of particulars" … . Here, Buono failed to establish his prima facie entitlement to judgment as a matter of law dismissing the cause of action alleging medical malpractice insofar as asserted against him. The plaintiff specifically alleged in his bill of particulars, inter alia, that Buono was negligent in abandoning the plaintiff in the operating room before the procedure was completed. In support of his motion, Buono submitted an affirmation of an expert who opined that Buono did not depart from good and accepted medical practice because, "as an assistant, DR. BUONO was entitled to leave the operating room as soon as his services were no longer required." That opinion, however, failed to address certain evidence, including medical records and deposition testimony of Brady and Buono, that raised a triable issue of fact as to whether Buono was the assistant or the surgeon performing the procedure. As such, the expert's opinion is conclusory, speculative, and wholly insufficient to establish Buono's prima facie entitlement to judgment as

a matter of law … . The expert also failed to establish that Buono's alleged negligence was not a proximate cause of the plaintiff's injuries. Woehrle v Buono, 2024 NY Slip Op 05815, Second Dept 11-20-24

Practice Point: In a medical malpractice action an expert affidavit in support of a defendant's motion for summary judgment must address all the allegations in the pleadings or it will be deemed conclusory and speculative.

Similar issue and result in Bonocore v Ravindranath, 2024 NY Slip Op 05824, First Dept 11-21-24.

November 20, 2024

MEDICAL MALPRACTICE, TIME OF DIAGNOSIS, EVIDENCE.

PLAINTIFF RAISED A QUESTION OF FACT WHETHER THE STROKE DIAGNOSIS WAS TIMELY AND WHETHER THE FAILURE TO MAKE A TIMELY DIAGNOSIS DECREASED THE CHANCES OF A BETTER OUTCOME (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff's expert raised a question of fact in this medical malpractice action alleging the failure to timely diagnose a stroke:

Where a plaintiff in a medical malpractice action alleges a failure to timely diagnose a condition, the plaintiff must show that the departures from the standard of care delayed diagnosis and decreased the chances of a better outcome or increased the injury … . The plaintiff submitted an affirmation of an emergency medicine physician who opined, inter alia, that the hospital's staff failed to take a thorough history of the decedent's symptoms and failed to provide an interpreter for that purpose in contravention of the applicable standard of care. The plaintiff also submitted an affirmation of a radiologist, who opined that a CT scan of the decedent's brain performed on the day that the decedent presented to the hospital showed an infarct and that the hospital's radiologist had failed to recognize this evidence of a stroke. The plaintiff's emergency medicine expert opined that had the decedent been properly and timely diagnosed, treatment options were available, including the possible administration of tPA or the use of certain other medications.

Under these circumstances, the plaintiff raised triable issues of fact as to whether there was a departure from the standard of care and whether such departure decreased the chances of a better outcome or increased the decedent's injuries … . Hanna v Staten Is. Univ. Hosp., 2024 NY Slip Op 05435, Second Dept 11-6-24

Practice Point: Here plaintiff's expert raised a question of fact about whether the stroke diagnosis was timely and whether the delay decreased the chances of a better outcome.

November 6, 2024

NEGLIGENCE, STATUTE OF LIMITATIONS, COVID-19 TOLLS.

THE COVID-19 TOLLS SUSPENDED THE RUNNING OF THE STATUTE OF LIMITATIONS IN THIS PERSONAL INJURY CASE RENDERING THE ACTION TIMELY COMMENCED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the COVID-19 tolls suspended the running of the statute of limitations in this personal injury case, rendering the action timely commenced:

Pursuant to CPLR 214 (5), a three-year statute of limitations applies to an action to recover damages for personal injury. Plaintiff's cause of action accrued on June 27, 2019, the date of the accident … , and plaintiff did not commence this action until June 29, 2022. However … plaintiff established that the statute of limitations was tolled. On March 20, 2020, then-Governor Andrew Cuomo issued Executive Order (A. Cuomo) No. 202.8, which tolled "any specific time limit for the commencement, filing, or service of any legal action, notice, motion, or other process or proceeding, as prescribed by the procedural laws of the state, including but not limited to . . . the civil practice law and rules" … . Then-Governor Cuomo issued a series of nine subsequent executive orders that extended the tolling period, eventually through November 3, 2020 … . "A toll does not extend the statute of limitations indefinitely but merely suspends the running of the applicable statute of limitations for a finite and, in this instance, readily identifiable time period" … . "[T]he period of the toll is excluded from the calculation of the time in which the plaintiff can commence an action" … . Paul v Lyons, 2024 NY Slip Op 05661, Fourth Dept 11-15-24

Practice Point: Consult this decision for a concise explanation of how the COVID-19 tolls affect the running of a statute of limitations.

November 15, 2024

NEGLIGENT HIRING, BACKGROUND CHECKS.

DEFENDANT' CLOTHING STORE'S EMPLOYEE ALLEGEDLY ATTEMPTED TO RECORD PLAINTIFF IN A CHANGING ROOM; THE NEGLIGENT HIRING CAUSE OF ACTION, BASED ON THE ALLEGATION THE STORE DID NOT CONDUCT A BACKGROUND CHECK BEFORE HIRING THE EMPLOYEE, SHOULD HAVE BEEN DISMISSED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant clothing store (Gap) was entitled to summary judgment dismissing the negligent-hiring-supervision complaint. Plaintiff alleged a store employee, Medel, attempted to record her on a cell phone as she was changing in a fitting room. The negligent hiring cause of action alleged Gap did not do a background check before hiring Medel, which was alleged to have been in violation of store policy:

The Supreme Court erred in denying those branches of the store defendants' motion which were for summary judgment dismissing the causes of action alleging negligent hiring, training, supervision, and retention insofar as asserted against them. "'[A] necessary element of such causes of action is that the employer knew or should have known of the employee's propensity for the conduct which caused the injury'" … . Here, the submissions of the store defendants in support of their motion demonstrated, prima facie, that they did not have notice of any propensity of Medel to commit misconduct … .

In opposition, the plaintiff failed to raise a triable issue of fact as to whether Gap or Old Navy knew or should have known that Medel had a propensity to commit misconduct … . The plaintiff's contention, via the affidavit of her expert, that neither Gap nor Old Navy appeared to have conducted a background check prior to hiring Medel, as was their apparent internal policy before hiring any employees, is without merit. "There is no common-law duty to institute specific procedures for hiring employees unless the employer knows of facts that would lead a reasonably prudent person to investigate the prospective employee" … . Moreover, the plaintiff failed to submit any evidence that a background check of Medel would

have revealed a propensity to commit misconduct … . Hashimi v Gap, Inc., 2024 NY Slip Op 05961, Second Dept 11-27-24

Practice Point: A negligent hiring cause of action based on the allegation the employer did not conduct a background check, without more, will not survive a motion to dismiss. Plaintiff must demonstrate the employer knew of facts which should have triggered a background check.

November 27, 2024

NEGLIGENT SUPERVISION, EDUCATION-SCHOOL LAW, ONE STUDENT ATTACKS ANOTHER.

THE HISTORY OF THE INTERACTION BETWEEN INFANT PLAINTIFF AND ANOTHER STUDENT RAISED A QUESTION OF FACT ABOUT WHETHER THE ATTACK ON INFANT PLAINTIFF WAS FORESEEABLE FROM THE SCHOOL'S PERSPECTIVE (THIRD DEPT).

The Third Department, reversing Supreme Court, determined the negligent supervision action against defendant school should not have been dismissed. Infant plaintiff (E.E.) had been attacked and seriously injured by another student (J.H.). Supreme Court found the attack was not foreseeable. The Third Department found the evidence of foreseeability sufficient to raise a question of fact:

The record contains evidence of the following. J.H. had a school disciplinary history of 18 incidents between 2015 and 2018, which resulted in numerous detentions and suspensions. Of these 18 incidents, it appears that at least five involved acts of violence on J.H.'s part. One of the suspensions was for lighting a fellow student's hair on fire, while another suspension was for her previous attack on E.E. That particular incident involved J.H. borrowing rings from other students in order to maximize the injuries that she could inflict upon E.E. J.H. was also suspended for obtaining unclothed photos of E.E. and posting them online under the guise that it was E.E. who was posting them. By the spring of 2017, school officials were aware that J.H. was suffering from anxiety and depression, had been the subject of a PINS petition, was a runaway risk, exhibited violent behavior, had "no judgment" and was "very unpredictable." At some point around the middle of the 2017-2018 school year, J.H. screamed at E.E. in a school hallway, "what are you looking at?", and E.E. reported this to a teacher. Approximately two weeks

before the incident in question, J.H.'s mother called a school guidance counselor and warned that J.H. was planning to do something to get herself expelled from school. The district superintendent stated that if she had been made aware of this call, she would have advised the high school principal about it and ensured that there was a safety plan in place.

While we are mindful that there were no specific incidents between J.H. and E.E. for a number of months prior to the subject assault, the evidence of J.H.'s extensive disciplinary history, including acts of violence together with the prior incidents aimed at E.E. herself, as well as the recent warning call from J.H.'s mother, was sufficient to raise triable issues of fact with respect to whether J.H.'s attack on E.E. was foreseeable and whether it was a consequence of a lack of adequate supervision on defendant's part … . To the extent that defendant argues a lack of foreseeability by pointing to J.H.'s deposition testimony wherein she indicated that she did not plan the attack in advance, we are unpersuaded. "The issue is not the speed of the punch, but the circumstances leading up to and surrounding that conduct" … . In light of the foregoing, it was error to grant defendant's motion for summary judgment. T.E. v South Glens Falls Cent. Sch. Dist., 2024 NY Slip Op 05934, Third Dept 11-27-24

Practice Point: Consult this decision for insight into the proof necessary to raise a question of fact about the foreseeability of an attack on a student by another student.

November 27, 2024

SLIP AND FALL, PLAINTIFF'S STATEMENTS IN MEDICAL RECORDS.

ACCORDING TO THE MEDICAL RECORDS, PLAINTIFF PROVIDED HER TREATING PHYSICIAN WITH A DESCRIPTION OF HER SLIP AND FALL WHICH DIFFERED FROM HER DESCRIPTION IN HER DEPOSITION TESTIMONY; PLAINTIFF'S MOTION TO QUASH THE SUBPOENA SERVED ON THE PHYSICIAN SHOULD NOT HAVE BEEN GRANTED (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff's motion to quash the subpoena served on plaintiff's treating physician, Dr. Monfett, in this slip and fall case should not have been granted. The medical records revealed plaintiff told the treating physician she tripped and fell breaking up a fight in a subway

station. Plaintiff testified she fell because of a broken sidewalk in front of defendant's building. The court noted that the statement in the medical record may be inadmissible hearsay without the physician's testimony linking the statement to the plaintiff:

Dr. Monfett's deposition is material and necessary to the defense because plaintiff's account of her accident to the doctor conflicts with her deposition testimony, and this discrepancy bears directly on defendants' potential liability, as well as plaintiff's credibility … . Furthermore, the deposition is necessary because plaintiff's statements in the medical record likely would be inadmissible as hearsay without the doctor's testimony attributing them to her … . Defendants were not required to demonstrate "special circumstances" warranting Dr. Monfett's deposition because they seek to depose him "solely with regard to plaintiff's account of the accident, not for any expert medical opinion regarding plaintiff's diagnosis or treatment" … . Ogando v 40 X Owner LLC, 2024 NY Slip Op 05491, First Dept 11-7-24

Practice Point: Here defendants subpoenaed plaintiff's treating physician because the statement attributed to plaintiff in her medical records differed from her description of the trip and fall in her deposition testimony. The defendants were not seeking to depose the physician as an expert concerning plaintiff's diagnosis or treatment, but rather were focused on plaintiff's apparently conflicting account of the accident, which would be inadmissible hearsay without the physician's testimony.

November 7, 2024

SLIP AND FALL, NOTICE OF CONDITION.

DEFENDANTS DEMONSTRATED THEY DID NOT HAVE ACTUAL OR CONSTRUCTIVE NOTICE OF THE WATER ON THE FLOOR WHERE PLAINTIFF ALLEGEDLY SLIPPED AND FELL; DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendants in this slip and fall case were entitled to summary judgment, in part because they

demonstrated they did not have actual or constructive notice of the water on the floor in the laundry room where plaintiff allegedly fell:

… [T]he defendants established, prima facie, that they maintained their premises in a reasonably safe condition and that they did not create the alleged hazardous condition or have actual or constructive notice of its existence … . In support of their motion, the defendants submitted, inter alia, a transcript of the deposition testimony of the plaintiff, who testified that she did not see any water when she was last in the laundry room approximately 40 minutes prior to the accident. The defendants also submitted evidence that the machine was serviced by a vendor three days prior to the incident and that when the vendor left the premises, the machine was in working condition. When the vendor inspected the machine again on the day of the accident, the vendor determined that the machine was in working condition and that any leak was caused by the use of too much soap. In opposition, the plaintiff failed to raise a triable issue of fact as to whether the defendants had actual notice of a recurring hazardous condition and, thus, could be charged with constructive notice of the subject condition. The plaintiff's daughter's affidavit submitted in opposition to the motion merely showed that the defendants had a general awareness that, at times, water leaked from the machine at issue … . Daniel v York Terrace, Inc., 2024 NY Slip Op 05432, Second Dept 11-6-24

Practice Point: In this slip and fall case, defendants demonstrated the area where plaintiff allegedly slipped and fell had been inspected 40 minutes prior to the fall and there was no water on the floor. In addition the defendants demonstrated the washing machine was serviced three days before the fall. That proof was sufficient to demonstrate, prima facie, that defendants did not have actual or constructive notice of the water on the floor.

November 6, 2024

SLIP AND FALL, ERRORS IN NOTICE OF CLAIM.

THE ERRORS MADE IN THE NOTICE OF CLAIM IN THIS SLIP AND FALL CASE WERE NOT MADE IN BAD FAITH AND DID NOT PREJUDICE THE MUNICIPAL DEFENDANT; THEREFORE AMENDMENT OF THE NOTICE OF CLAIM SHOULD HAVE BEEN ALLOWED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the erroneous incident-date in the notice of claim did not justify dismissal of the action in this sidewalk slip and fall case. The error was not made in bad faith and did not prejudice the municipal defendant:

The Transit defendants … moved … pursuant to CPLR 3211(a) to dismiss the complaint … on the ground that the notice of claim did not comply with General Municipal Law § 50-e(2), as it incorrectly listed the date of the accident as March 5, 2016, instead of April 5, 2016, and identified the plaintiff as "Maria Hernandez," instead of "Maria Hernandez-Panell." …

General Municipal Law § 50-e(2) requires that a notice of claim set forth … "the time when, the place where and the manner in which the claim arose" … . "[I]n determining compliance with the requirements of General Municipal Law § 50-e, courts should focus on the purpose served by a Notice of Claim: whether based on the claimant's description municipal authorities can locate the place, fix the time and understand the nature of the accident" … . Pursuant to General Municipal Law § 50-e(6), a court has discretion to grant leave to serve an amended notice of claim where the error in the original notice was made in good faith and where the other party has not been prejudiced thereby … .

Here, there is no indication that the date originally listed in the notice of claim as the accident date was set forth in bad faith, and the Transit defendants did not demonstrate any prejudice as a result of the error … . Moreover, the plaintiff supplied the correct date of the accident at the hearing pursuant to General Municipal Law § 50-h and Public Authorities Law § 1212(5) … . Hernandez-Panell v City of New York, 2024 NY Slip Op 05962, Second Dept 11-27-24

Practice Point: Errors in a notice of claim against a municipality should not result in dismissal of the action if the errors were not made in bad faith and did not prejudice the municipal defendant.

November 27, 2024

SLIP AND FALL, SIDEWALKS, MUNICIPAL LAW, WRITTEN NOTICE REQUIREMENT.

IN A SIDEWALK SLIP AND FALL CASE, COMMUNICATION WITH THE CITY BY PHONE DOES NOT SATISFY THE WRITTEN NOTICE REQUIREMENT, EVEN IF THE COMMUNICATION WAS REDUCED TO WRITING; PLAINTIFF DID NOT DEMONSTRATE AN EXCEPTION TO THE WRITTEN NOTICE REQUIREMENT APPLIED (FIRST DEPT).

The First Department, reversing Supreme Court in this sidewalk slip and fall case, determined the "written notice" requirement for municipal liability was not met and plaintiff did not demonstrate an exception to the written notice requirement was applicable:

While walking down a sidewalk on West 26th Street in Manhattan, plaintiff tried to navigate around other pedestrians and tripped and fell on a metal fence surrounding a tree well, known as a tree guard, where there was no longer a tree. Plaintiff seeks to hold the City of New York and New York City Parks Department and Recreation liable for his fall on the theory that defendants created a hazard by leaving the tree guard after they removed the tree. Defendants' motion for summary judgment should have been granted.

The City sustained its initial burden of demonstrating that it did not receive prior written notice of the condition that caused plaintiff's accident. A search of Department of Transportation and Department of Parks and Recreation records revealed only two 311 calls for the accident site. The calls resulted in service reports reflecting removal of dead trees and a direction for a City employee to investigate whether replacement of the trees was appropriate. No party disputes that the trees were not replaced before the accident. However, verbal or telephonic communication to a municipal body that is reduced to writing does not satisfy the prior written notice requirement, even if the writing includes a service report, as it does here … … .

As a result, the burden shifted to plaintiff to demonstrate that one of the exceptions to the prior written notice requirement applied … . Plaintiff failed to raise a triable issue of fact concerning whether the City affirmatively created the defective condition through an act of negligence or that a special use resulted in a special

benefit to it … . Plaintiff's theory was that his accident was the result of a combination of inadequate lighting, the height and color of the tree well guard, and the removal of the tree without replacement. However, his expert failed to cite relevant industry-wide standards and practices regarding the construction or design of a tree well border from which the City may have deviated. Moreover, plaintiff did not show that the City's failure to replace the trees was an affirmative act of negligence, rather than a negligent omission, that created an immediately apparent dangerous condition … . Carney v City of New York, 2024 NY Slip Op 05884, First Dept 11-26-24

Practice Point: Re: municipal liability for a sidewalk slip and fall, phone communications about the defect do not satisfy the written notice requirement even if the communications are reduced to writing.

November 26, 2024

SLIP AND FALL, SIDEWALKS, SNOW AND ICE, NOTICE.

THE LANDOWNER ABUTTNG A SIDEWALK IN NYC HAS A NONDELEGABLE DUTY TO MAINTAIN THE SIDEWALK; HERE THE LANDOWNER FAILED TO DEMONSTRATE IT DID NOT HAVE CONSTRUCTIVE NOTICE OF THE PRESENCE OF ICE AND SNOW ON THE SIDEWALK BECAUSE IT DID NOT AVER WHEN THE SIDEWALK WAS LAST INSPECTED OR CLEANED PRIOR TO THE SLIP AND FALL (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant landowner's motion for summary judgment in this sidewalk ice and snow slip and fall case should not have been granted. The landowner failed to demonstrate it did not have constructive notice of the presence of snow and ice:

Section 7-210 of the Administrative Code of the City of New York imposes a nondelegable duty on certain landowners, which includes 149-53 14th Avenue, LLC, to maintain sidewalks abutting their land, including the removal of snow and ice … "[T]he duty applies with full force notwithstanding an owner's transfer of possession to a lessee or maintenance agreement with a nonowner" … . Landowners, however, are not strictly liable for all personal injuries that occur on

the abutting sidewalk, as "section 7-210 adopts a duty and standard of care that accords with traditional tort principles of negligence and causation" … .

"A defendant property owner moving for summary judgment in an action predicated upon the presence of snow or ice has the burden of establishing, prima facie, that it neither created the snow or ice condition that allegedly caused the plaintiff to fall nor had actual or constructive notice of that condition" … . "A defendant has constructive notice of a hazardous condition on property when the condition is visible and apparent, and has existed for a sufficient length of time to afford the defendant a reasonable opportunity to discover and remedy it" … . "To meet its initial burden on the issue of lack of constructive notice, the defendant must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell" … .

Here, the defendants failed to establish, prima facie, that 149-53 14th Avenue, LLC, did not have constructive notice of the alleged snow and ice condition that caused the plaintiff to fall. The evidence submitted by the defendants failed to establish when the sidewalk was last cleaned or inspected relative to when the plaintiff fell … . Marinis v Loschiavo, 2024 NY Slip Op 05970, Second Dept 11-27-24

Practice Point: Pursuant to the NYC Administrative Code a landowner abutting a sidewalk has a nondelegable duty to maintain the sidewalk, which includes removal of ice and snow. The landowner can demonstrate it did not have constructive notice of the presence of ice and snow by proof the sidewalk was inspected or cleaned close in time to the slip and fall, not the case here.

November 27, 2024

SLIP AND FALL, SIDEWALKS, TRIVIAL DEFECTS.

DEFENDANTS DID NOT DEMONSTRATE THE SIDEWALK DEFECT WAS TRIVIAL AS A MATTER OF LAW IN THIS SLIP AND FALL CASE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendants in this slip and fall case did not make out a prima facie case that the sidewalk defect was trivial as a matter of law. Therefore defendants' summary judgment motion should not have been granted:

… [T]he evidence submitted by the defendants, including, inter alia, a transcript of the plaintiff's deposition testimony, as well as photographs of the allegedly defective sidewalk condition, was insufficient to establish, prima facie, that the height differential was physically insignificant and that the characteristics of the defect or the surrounding circumstances did not increase the risks the alleged defect posed … . The evidence submitted did not include objective measurements of the dimensions of the defect, specifically the height of the allegedly misleveled sidewalk. The evidence further failed to sufficiently quantify or estimate the dimensions of the defect. The plaintiff identified the photographs as fairly and accurately representing the allegedly defective sidewalk condition as it existed on the date of the accident. While the photographs demonstrated the irregular nature of the sidewalk … , it is impossible to ascertain or to reasonably infer the extent of the defect from the photographs submitted … .

Therefore, the defendants failed to make a prima facie showing of their entitlement to judgment as a matter of law dismissing the complaint on the ground that the defect was trivial and not actionable. Abreu v Pursuit Realty Group, LLC, 2024 NY Slip Op 05781, Second Dept 11-20-24

Practice Point: Here the photos of the sidewalk defect were not supplemented with objective measurements. The proof did not establish the defect was trivial as a matter of law.

November 20, 2024

SLIP AND FALL, TRACKED-IN RAIN.

PLAINTIFF SLIPPED AND FELL ON TRACKED-IN-RAIN DURING AN ONGOING STORM; DEFENDANT HAD PLACED MATS NEAR THE DOOR AND ELSEWHERE; DEFENDANT'S SUMMARY JUDGMENT MOTION SHOULD HAVE BEEN GRANTED (THIRD DEPT).

The Third Department, reversing Supreme Court, determined the defendant (Open Kitchen) in this tracked-in-rain slip and fall case was entitled to summary judgment. Open Kitchen demonstrated plaintiff slipped and fell during an ongoing rain storm and it had placed mats near the door and elsewhere:

… [T]here is no evidence that Open Kitchen either created the wet condition in the entryway or had notice of a hazard that could have been prevented by the exercise

of reasonable care … . Open Kitchen satisfied its duty by employing reasonable remedial measures to address the ongoing rainstorm by laying mats in front of the entrance doors and elsewhere throughout the premises … . There was no active notice in the form of prior complaints received … . Nor did the undisputed fact that it was raining at the time of plaintiff's accident, causing water to be tracked into the premises, constitute constructive notice of a dangerous situation requiring Open Kitchen to cover the entire floor with mats or continuously mop the floor … . Moreover, plaintiff testified that that he only noticed water on the floor after his fall, and thus it cannot be inferred that Open Kitchen had constructive notice of "a hazard sufficiently visible as to permit discovery and remedy" … . Betancourt v ARC NYC123 William, LLC, 2024 NY Slip Op 05628, Third Dept 11-14-24

Practice Point: Here a slip and fall on tracked-in-rain during an ongoing storm was not actionable. Defendant had placed mats near the door and elsewhere and was deemed not have had constructive notice of a dangerous condition.

November 14, 2024

TRAFFIC ACCIDENTS, UBER, ARBITRATION, CONTRACT LAW.

BY CLICKING ON CONTRACT TERMS ON HER SMART PHONE, PLAINTIFF AGREED TO ARBITRATE HER PERSONAL INJURY CLAIM AGAINST UBER; PLAINTIFF ALLEGED INJURY AFTER AN UBER DRIVER LEFT HER OFF IN TRAFFIC (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Cannataro, over a two-judge dissent, determined that plaintiff, by clicking on notifications of contract terms from Uber on her smart phone, agreed to submit her personal injury action against Uber to arbitration. Plaintiff alleged the Uber driver left her off in traffic and she was injured as a result. The opinion is too detailed to fairly summarize here. The precise language of the notifications from Uber are laid out:

On this appeal, we apply centuries-old principles of contract law to a web-based "terms of use" update containing an arbitration agreement. The parties dispute the validity of that agreement and its applicability to this personal injury action, which plaintiff commenced two months before she indicated her assent to the updated terms of use by means of a series of clicks on her smartphone.

We conclude that the "clickwrap" process Uber used to solicit plaintiff's assent resulted in the formation of an agreement to arbitrate. Moreover, a key term of that agreement expressly delegates to an arbitrator the exclusive authority to resolve all disputes as to the applicability and enforceability of the agreement. Because plaintiff has not established that the delegation provision is invalid, her challenges to the portions of the agreement that purportedly apply to pending legal claims were properly directed to the arbitrator. Wu v Uber Tech., Inc., 2024 NY Slip Op 05869, CtApp 11-25-24

Practice Point: Here plaintiff was notified by Uber of updated contract terms in a message sent to her smart phone. By "clicking" agreement to the terms on her phone's screen, plaintiff agreed to arbitrate her personal injury action against Uber.

November 25, 2024

TRAFFIC ACCIDENTS, PROPERTY DAMAGE, EVIDENCE.

PLAINTIFF'S AFFIDAVIT DID NOT STATE IT WAS BASED ON FIRST-HAND KNOWLEDGE AND THE UNCERTIFIED POLICE REPORT WAS INADMISSIBLE; PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IN THIS PROPERTY-DAMAGE CASE SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined summary judgment should not have been awarded plaintiff in this property-damage case. Plaintiff alleged defendant's vehicle struck a brick wall and fence on plaintiff's property. Plaintiff's affidavit did not state it was based on first-hand knowledge and the uncertified police report was inadmissible:

"A plaintiff in a negligence action moving for summary judgment on the issue of liability must establish, prima facie, that the defendant breached a duty owed to the plaintiff and that the defendant's negligence was a proximate cause of the alleged injuries" … . "'A conclusory affidavit or an affidavit by an individual without personal knowledge of the facts does not establish the proponent's prima facie burden' on a motion for summary judgment" … .

Here, the plaintiff's conclusory affidavit, which failed to set forth whether he had firsthand knowledge of the event, was insufficient to establish, prima facie, that a

vehicle operated by the defendant struck a brick wall and fence located on the plaintiff's property … . The uncertified police accident report submitted in support of the plaintiff's motion was not admissible … . Felle v Maxaner, 2024 NY Slip Op 05959, Second Dept 11-27-24

Practice Point: Affidavits which do mot make clear the allegations are based on first-hand knowledge will not support summary judgment.

Practice Point: Uncertified police reports are not admissible.

November 27, 2024

TRAFFIC ACCIDENTS, REAR-END COLLISIONS.

ALTHOUGH THE ALLEGATION PLAINTIFF STOPPED SUDDENLY DOES NOT REBUT THE PRESUMPTION THE REAR DRIVER WAS NEGLIGENT IN A REAR-END COLLISION, THE REAR-DRIVER'S ALLEGATION THE PLAINTIFF STOPPED SUDDENLY FOR NO APPARENT REASON CREATES A QUESTION OF FACT ON THE ISSUE OF PLAINTIFF'S COMPARATIVE NEGLIGENCE (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined defendants' claim that plaintiff stopped suddenly for no apparent reason supported defendant's comparative-negligence affirmative defense in this rear-end collision case:

The Supreme Court should have denied that branch of the plaintiff's motion which was for summary judgment dismissing the defendants' affirmative defense alleging comparative negligence. In support of his motion, the plaintiff submitted his affidavit, in which he averred that his vehicle, after having been stopped at an intersection for approximately 20 to 30 seconds, was struck in the rear by the defendants' vehicle. Thus, the plaintiff established, prima facie, that he was not at fault in the happening of the accident … . In opposition, however, the defendants raised a triable issue of fact as to whether the plaintiff was comparatively at fault in the happening of the accident because he stopped suddenly for no apparent reason … . Martinez v Colonna, 2024 NY Slip Op 05971, Second Dept 11-27-24

Practice Point: In a rear-end collision, defendant's allegation plaintiff stopped suddenly does not rebut the presumption defendant was negligent. But defendant's allegation plaintiff stopped suddenly for no apparent reason raises a question of fact in support of defendant's comparative-negligence affirmative defense.

November 27, 2024

TRAFFIC ACCIDENTS, SOVEREIGN IMMUNITY.

NEW JERSEY TRANSIT CORPORATION CANNOT ASSERT THE SOVEREIGN IMMUNITY DEFENSE IN THIS TRAFFIC ACCIDENT CASE; THE ACCIDENT INVOLVED A NEW JERSEY TRANSIT CORPORATION BUS AND OCCURRED IN NEW YORK CITY (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Singas, over two concurrences and a dissent, determined the New Jersey Transit Corporation could not assert the sovereign immunity defense in this traffic-accident case:

In Franchise Tax Bd. of Cal. v Hyatt, the United States Supreme Court recognized that the text and structure of the Federal Constitution not only preserved States' pre-ratification sovereign immunity, but compelled absolute recognition of that immunity in other States' courts as a matter of "equal dignity and sovereignty" … . However, the Court did not address how to determine whether a state-created entity is entitled to this immunity. We glean from the Court's analysis that the relevant inquiry is whether subjecting a state-created entity to suit in New York would offend that State's dignity as a sovereign. We hold that, to answer this question, courts must analyze how the State defines the entity and its functions, its power to direct the entity's conduct, and the effect on the State of a judgment against the entity. Considering these factors, we conclude that maintaining this action against defendant New Jersey Transit Corporation (NJT) in our courts would not offend New Jersey's sovereign dignity and accordingly hold that defendants are not entitled to invoke a sovereign immunity defense. On February 9, 2017, a bus owned and operated by NJT allegedly struck and injured plaintiff Jeffrey Colt as he traversed a crosswalk on 40th Street in Manhattan. The bus was driven by defendant Ana Hernandez, an employee of NJT. Colt and his wife, plaintiff Betsy Tsai, commenced this action on September 18, 2017, asserting causes of action for negligence, negligent hiring, and loss of consortium. Defendants answered the

complaint and denied many of plaintiffs' factual allegations. Defendants asserted—as part of an exhaustive list including many boilerplate defenses—that plaintiffs' recovery was "barred by lack of jurisdiction over NJT" and "barred as this Court lacks jurisdiction," and that defendants were "immune from suit." Colt v New Jersey Tr. Corp., 2024 NY Slip Op 05867, CtApp 11-25-24

Practice Point: Here the New Jersey Transit Corporation could not invoke the sovereign immunity defense to a New York City traffic accident involving a New Jersey Transit Corporation bus.

November 25, 2024