# NEW YORK APPELLATE DIGEST, INC.

Personal Injury
Reversal Report
December 2024

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 December 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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The Second Department, reversing Supreme Court in this negligent hiring and negligent supervision case, over a two-justice dissent, determined the defendant school district did not demonstrate it did not have constructive notice of the sexual abuse of plaintiff by a teacher (Faralan) which occurred repeatedly over an extended period during school hours:

… [T]he district failed to meet its prima facie burden of demonstrating that it was not negligent with respect to the hiring, retention, and supervision of Faralan or that it was not negligent with respect to its supervision of the plaintiff. The district submitted no evidence regarding its hiring, retention, or supervision of Faralan, who was a probationary employee during the time when he sexually abused the plaintiff on school grounds, including times when he was tutoring her one-on-one … . Furthermore, the district failed to establish, prima facie, that it lacked constructive notice of Faralan's abusive propensities and conduct, particularly given the frequency of the abuse, which occurred several times per week over an extended period of time in the same classroom and hallway during tutoring sessions and at times when others were present … . Stanton v Longwood Cent. Sch. Dist., 2024 NY Slip Op 06600, Second Dept 12-24-24

Practice Point: To warrant summary judgment in a negligent hiring and supervision suit alleging abuse of a student by a teacher, the school district must affirmatively

demonstrate it did not have constructive notice of the teacher's propensity for abuse and/or the abuse itself. Plaintiff's allegations of repeated abuse during school hours over an extended period of time raised a question of fact re: the district's constructive notice.

December 24, 2024

## CIVIL RIGHTS LAW, MUNICIPAL LAW, BATTERY.

## THE 18 USC 1983 CAUSE OF ACTION AGAINST THE POLICE AND MUNICIPALITY WAS PROPERLY DISMISSED BECAUSE THE DOCTRINE OF REPONDEAT SUPERIOR DOES NOT APPLY AND THERE WAS NO EVIDENCE THE POLICE WERE ACTING PURSUANT TO A MUNICIPAL CUSTOM OR POLICY WHEN THEY ALLEGEDLY PUSHED PLAINTIFF TO THE GROUND, HANDCUFFED HER AND TASED HER; HOWEVER THE BATTERY CAUSE OF ACTION SHOULD NOT HAVE BEEN DISMISSED (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined the battery cause of action in this Civil Rights Law (18 USC 1983) case should not have been dismissed. The lawsuit stemmed from the police allegedly pushing plaintiff to the ground, striking her, handcuffing her and tasing her. The 18 USC 1983 cause of action was properly dismissed because plaintiff did not prove the police were acting pursuant to a municipal custom or policy. However, the battery cause of action should not have been dismissed:

However … a jury could rationally conclude that the defendants are liable for battery. "'To recover damages for battery, a plaintiff must prove that there was bodily contact, made with intent, and offensive in nature'" … . "[A]n assault and battery cause of action may be based on contact during an unlawful arrest" … .

At trial, the plaintiff presented evidence from which the jury could rationally conclude that the detention was not privileged under Mental Hygiene Law § 9.41, and the trial evidence showed that the officers engaged in contact with the plaintiff during the allegedly unlawful detention. The trial evidence, viewed in the light most favorable to the plaintiff, was sufficient to allow the jury to rationally conclude that the two officers were acting within the scope of their official duties at the relevant time. Accordingly, the defendants were not entitled to dismissal of

the cause of action alleging battery … . Mac v County of Suffolk, 2024 NY Slip Op 06330, Second Dept 12-18-24

Practice Point: A municipality cannot be held liable pursuant to 18 USC 1983 for the actions of police officers under a respondeat superior theory. The plaintiff must show the police were acting pursuant to a municipal custom or policy.

Practice Point: A municipality may be liable for battery committed by police officers acting within the scope of their employment.

December 18, 2024

## LABOR LAW-CONSTRUCTION LAW, EVIDENCE.

## PLAINTIFF WAS REPAIRING THE FLASHING ON THE ROOF, NOT DOING ROUTINE MAINTENANCE, AT THE TIME HE WAS INJURED ENTITLING HIM TO SUMMARY JUDGMENT ON THE LABOR LAW 240(1) CAUSE OF ACTION (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined plaintiff was performing repairs, not routine maintenance, when he was injured, entitling him to summary judgment on the Labor Law 240(1) cause of action:

"Delineating between routine maintenance and repairs is frequently a close, fact-driven issue . . . , and that distinction depends upon whether the item being worked on was inoperable or malfunctioning prior to the commencement of the work . . . , and whether the work involved the replacement of components damaged by normal wear and tear" … . Here, the testimony submitted by plaintiffs established, and the court found, that the rubber flashing was malfunctioning and inoperable prior to replacement and that the work being performed by plaintiff at the time of the accident was necessary to restore the proper functioning of the roof. To the extent that defendant asserts that the flashing plaintiff was repairing at the time of his fall was not actively leaking, such a contention is immaterial to whether plaintiff was performing a protected activity, inasmuch as it would be "[in]consistent with the spirit of the [Labor Law] to isolate the moment of injury and ignore the general context of the work" … .

Further, contrary to the court's determination, we agree with plaintiffs that the rubber flashing was not merely a "component" of a ventilation system and instead

was an integral part of a proper functioning roof. Here, plaintiff was performing roofing repair to ensure that the roof of the concession stand was no longer leaking—precisely the type of work that we have long held to be protected by Labor Law § 240 (1) … . Verhoef v Dean, 2024 NY Slip Op 06465, Fourth Dept 12-20-24

Practice Point: Here plaintiff was repairing the roof when he was injured. He was not performing routine maintenance. He was therefore entitled to summary judgment on the Labor Law 240(1) cause of action.

December 20, 2024

## LABOR LAW-CONSTRUCTION LAW.

## PLAINTIFF WAS STRUCK BY A LADDER WHICH FELL BECAUSE IT WAS PLACED ON A SLIPPERY MAT; PLAINTFF WAS ENTITLED TO SUMMARY JUDGMENT ON THE LABOR LAW 240(1) CAUSE OF ACTION; DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT ON THE LABOR LAW 241(6) AND 200 CAUSES OF ACTION SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant's motions for summary judgment on the Labor Law 240(1), 241(6) and 200 causes of action should not have been granted. In addition, plaintiff was entitled to summary judgment on the Labor law 240(1) cause of action. Plaintiff was working at ground level. A coworker placed a ladder on a mat which was covered with cow manure and started climbing the ladder. The ladder slipped on the mat and fell, hitting plaintiff on the head:

The failure to properly place and secure the ladder amounted to a violation of Labor Law § 240(1) … . Moreover, the violation of Labor Law § 240(1) proximately caused the plaintiff's injuries because the plaintiff was injured when the ladder "proved inadequate to shield [him] from harm directly flowing from the application of the force of gravity to an object or person" … . …

… [T]he coworker's improper placement of the ladder was not of such an extraordinary nature or so attenuated from a violation of Labor Law § 240(1) as to

sever the causal nexus between the defendant's statutory violation and the plaintiff's injuries … . …

"In order to prevail on a Labor Law § 241(6) cause of action premised upon a violation of 12 NYCRR 23-1.8(c)(1), the plaintiff must establish that the job was a hard hat job, and that the plaintiff's failure to wear a hard hat was a proximate cause of his [or her] injury" … . Here, the defendant failed to establish, prima facie, that the relevant work was not a hard hat job or that the plaintiff's lack of head protection played no role in the injuries he sustained when he was struck in the head by the ladder … .

12 NYCRR 23-1.21(b)(4)(ii) provides that "[a]ll ladder footings shall be firm. Slippery surfaces and insecure objects such as bricks and boxes shall not be used as ladder footings." Here, the defendant failed to establish, prima facie, that the rubber mat covered with cow manure and hay was not a slippery surface for the purpose of 12 NYCRR 23-1.21(b)(4)(ii). …

"Labor Law § 200 is a codification of the common-law duty of an owner or employer to provide employees with a safe place to work" … . … When a claim is based on an alleged dangerous condition of a work site, the defendant may be liable where he or she had actual or constructive notice of the condition or created the condition … . A defendant has constructive notice of a defect when it is visible and apparent and has existed for a sufficient length of time before the accident such that it could have been discovered and corrected … . Here, the defendant's conclusory statements in his affidavit that he did not recall having entered the barn on the day of the accident and that he was unaware of the plaintiff's accident were insufficient to establish, prima facie, that he did not have actual or constructive notice of the alleged slippery condition … . Wright v Pennings, 2024 NY Slip Op 06233, Second Dept 12-11-24

Practice Point: A coworker placed a ladder on a slippery mat and the ladder fell and struck plaintiff when the coworker started to climb it. Plaintiff was entitled to summary judgment on the Labor Law 240(1) cause of action. The coworker's actions did not sever the causal connection between the statutory violation (an unsecured ladder) and plaintiff's injuries.

December 11, 2024

## LABOR LAW-CONSTRUCTION LAW.

## THE FOLD-DOWN LADDER WHICH WAS PERMANENTLY ATTACHED TO THE CEILING WAS THE FUNCTIONAL EQUIVALENT OF A LADDER FOR GAINING ACCESS TO THE ATTIC; PLAINTIFF FELL WHEN THE LADDER DETACHED FROM THE CEILING; PLAINTIFF IS ENTITLED TO SUMMARY JUDGMENT ON THE LABOR LAW 240(1) AND 241(6) CAUSES OF ACTION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff was entitled to summary judgment on his Labor :Law 240(1) and 241(6) causes of action. Plaintiff needed to access the attic using a fold-down ladder which was permanently attached to the ceiling. The ladder came loose from the ceiling and plaintiff fell to the floor:

… [T]he plaintiff described the ladder as "a type of stairs that are up on the attic and you pull them" with a rope, and the stairs would unfold and extend to the floor to allow someone to climb up them. The plaintiff acknowledged that the pull-down attic stairs were permanently affixed to the ceiling, but he also testified that climbing the pull-down attic stairs was the only way to access the attic, which he was required to access to connect certain cables to a security camera. * * *

… [T]he pull-down attic stairs, in effect, operated as a safety device within the meaning of Labor Law § 240(1) … , since the pull-down attic stairs served as the functional equivalent of a ladder at the time of the accident … . The plaintiff's testimony that the pull-down attic stairs detached from the ceiling and fell as he was ascending them, causing him to fall, demonstrated, prima facie, that the defendants violated Labor Law § 240(1) and that this violation proximately caused the plaintiff's injuries … . …

To establish liability under Labor Law § 241(6), a plaintiff must demonstrate that his or her injuries were proximately caused by a violation of an Industrial Code provision mandating compliance with concrete specifications … Pursuant to 12 NYCRR 23-1.21(b)(1), "[e]very ladder shall be capable of sustaining without breakage, dislodgment or loosening of any component at least four times the maximum load intended to be placed thereon." Here, given the plaintiff's testimony that the pull-down attic stairs fell as he was ascending them, the plaintiff established, prima facie, that the defendants violated 12 NYCRR 23-1.21(b)(1) …

. Jaimes-Gutierrez v 37 Raywood Dr., LLC, 2024 NY Slip Op 06187, Second Dept 12-11-24

Practice Point: Although the fold-down stairs to the attic were permanently attached to the ceiling, it it was the functional equivalent of a ladder and served as a safety device within the meaning of Labor Law 240(1) and 241(6).

December 11, 2024

## MEDICAL MALPRACTICE, MUNICIPAL LAW, CIVIL PROCEDURE.

## THE MOTION FOR LEAVE TO FILE A LATE NOTICE OF CLAIM AND THE MOTION FOR LEAVE TO RENEW SHOULD HAVE BEEN GRANTED IN THIS MEDICAL MALPRACTICE ACTION AGAINST THE NEW YORK CITY HEALTH AND HOSPITALS CORPORATION (NYCHHC); CRITERIA EXPLAINED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the motion for leave to file a late notice of claim against the New York City Health and Hospitals Corporation (NYCHHC) for medical malpractice, as well as the motion for leave to renew based upon recently disclosed medical records, should have been granted:

… [P]etitioner established a reasonable excuse for the delay, to wit, the serious medical condition of the infant, which required hospitalization of the infant after his birth, feeding through a feeding tube, and numerous medical appointments while the condition of the infant was being assessed … . Considering the overall circumstances, including the petitioner's natural predisposition to be more concerned with the infant's medical condition and the treatment those injuries required, rather than with commencing legal action during the prescribed time period, the delay in serving a late notice of claim should have been excused … . Further, in support of that branch of the petitioner's motion which was for leave to renew the petition, the petitioner submitted her medical records and an expert's affidavit, which established that NYCHHC had actual knowledge of the essential facts constituting the claim since the alleged malpractice was apparent from an independent review of the medical records … . The medical records were not submitted earlier because, although the petitioner sought her medical records in August 2022, she only received those records on December 22, 2022 … . Further, the medical records were voluminous.

Since the conduct at issue was fully documented in the medical records, the petitioner made an initial showing that NYCHHC was not prejudiced by the delay in serving the notice of claim … , and, in response, the NYCHHC made no showing of prejudice. Matter of Bergado v New York City Health & Hosps. Corp., 2024 NY Slip Op 06039, Second Dept 12-4-24

Practice Point: Here the mother of the injured infant proffered an adequate excuse for failing to timely file a notice of claim in this medical malpractice action against the NYC Health and Hospitals Corporation (NYCHHC) and demonstrated the NYCHHC had timely notice of the nature of the action and suffered no prejudice from the delay through the medical records.

Practice Point: The motion for leave to renew was properly based upon mother's recent receipt of medicals records not previously provided.

December 4, 2024

## RETIREMENT AND SOCIAL SECURITY LAW.

### A PATROL OFFICER'S FALLING INTO A HOLE DUG FOR A SEWER LINE WHILE INVESTIGATING, AT NIGHT, A SUSPICIOUS LIGHT FROM A VACANT HOUSE UNDER CONSTRUCTION WAS NOT AN "ACCIDENT" WITHIN THE MEANING OF THE RETIREMENT AND SOCIAL SECURITY LAW (CT APP).

The Court of Appeals, affirming the Appellate Division, determined petitioner, a former police officer, was not injured in an "accident" within the meaning of the Retirement and Social Security Law. Therefore, petitioner was not entitled to accidental disability retirement (ADR) benefits. Petitioner, at night, was investigating a suspicious light in a vacant house which was under construction. Petitioner was aware the house was under construction. He was injured when he fell into a hole which had been dug for a sewer line:

As our caselaw makes clear, an incident caused by "a risk inherent in the petitioner's regular [job] duties" is not an accident for purposes of ADR benefits … . In determining whether an accident occurred, respondent appropriately considered whether, at the time of the incident, petitioner was "acting within the scope of [his] 'ordinary employment duties, considered in view of [his] particular

employment,' " and whether the incident was caused by "an inherent risk of [those] regular duties" … . On this record, respondent "reasonabl[y] and plausibl[y]" determined that petitioner's risk of being injured by an unseen hazard while investigating a potential crime in the dark was inherent in his ordinary job duties as a patrol officer … . Matter of Compagnone v DiNapoli, 2024 NY Slip Op 06235, CtApp 12-12-24

Practice Point: A patrol officer investigating, at night, a suspicious light from a vacant house under construction, could or should have anticipated injury from an unseen hazard at the construction site, here a hole dug for a sewer line. Falling into the hole was not a compensable "accident" within the meaning of the Retirement and Social Security Law.

December 12, 2024

## RETIREMENT AND SOCIAL SECURITY LAW.

## AN INCIDENT WHICH "COULD OR SHOULD HAVE REASONABLY BEEN ANTICIPATED" IS NOT AN "ACCIDENT" WITHIN THE MEANING OF THE RETIREMENT AND SOCIAL SECURITY LAW (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Halligan, affirming the Appellate Division, determined petitioner, a former police officer, was not entitled to accidental disability retirement (ADR) benefits for injuries suffered when a wheel on his desk chair caught in a rut and the chair began to tip over backwards. Petitioner, who was aware of the ruts in the floor, was able to stop the chair from tipping over by grabbing the desk, injuring his shoulder and neck:

An event which is "a risk inherent" in the work performed is not an "accident" for purposes of ADR benefits … . Further, an event that is not a risk inherent in one's job must be a "sudden, unexpected" occurrence in order to amount to an "accident" … . We held in Matter of Rizzo v DiNapoli that a known danger cannot be the cause of a compensable accident, but we left open whether an event that could or should have reasonably been anticipated by the claimant can result in an accident for purposes of section 363 (see 39 NY3d 991, 992 [2022]). We answer that question today.

We hold that a precipitating event that could or should have reasonably been anticipated by a person in the claimant's circumstances is not an "accident" for

purposes of ADR benefits. It is well established that "an injury which occurs without an unexpected event . . . is not an accidental injury" for purposes of section 363 (Lichtenstein, 57 NY2d at 1012). The unexpected nature of the precipitating event is key to this definition. * * *

… [W]e conclude that substantial evidence supports the Comptroller's determination that petitioner could or should have reasonably anticipated the near-fall from his desk chair. Matter of Bodenmiller v DiNapoli, 2024 NY Slip Op 06234, CtApp 12-12-24

Practice Point: Here petitioner was aware of ruts in the floor in which the wheels on his desk chair could catch. Therefore injuries stemming from a wheel catching in a rut were not the result of a compensable "accident" under the Retirement and Social Security Law.

December 12, 2024

## SLIP AND FALL, STATUTE OF LIMITATION, COVID TOLLS.

## THE STATUTE OF LIMITATIONS FOR THIS SLIP AND FALL CASE WAS SUSPENDED DURING THE COVID TOLLS, RENDERING THE ACTION TIMELY (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the slip and fall action was timely brought because the running of the statute of limitations was suspended during the COVID tolls:

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" … .

Here, 651 days of the 1,096-day limitation period had elapsed by the time the toll began on March 20, 2020. Upon the expiration of the toll on November 3, 2020, the remaining 445 days of the limitation period began to run again, expiring on January 22, 2022. Thus, the action was timely commenced on June 17, 2021 … . Jackson v Goodfellas Pizzeria, Inc., 2024 NY Slip Op 06454, Fourth Dept 12-20-24

Practice Point: The COVID tolls suspended the running of statutes of limitations from March 20, 2020, to November 3, 2020.

December 20, 2024

## SLIP AND FALL, CONTRACT LAW, EVIDENCE.

## DEFENDANT SNOW-REMOVAL CONTRACTOR WAS ENTITLED TO SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE; NO "ESPINAL" EXCEPTIONS WERE ALLEGED IN THE COMPLAINT OR DEMONSTRATED IN RESPONSE TO THE SUMMARY JUDGMENT MOTION; THE CONTRACT WITH THE PROPERTY OWNER DID NOT MAKE THE SNOW-REMOVAL CONTRACTOR COMPLETELY RESPONSIBLE FOR MAINTENANCE OF THE PARKING LOT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant snow-removal contractor was entitled to summary judgment in this parking-lot slip and fall case. The defendant demonstrated plaintiff was not a party to the snow-removal contract with the owner of the parking lot, a nursing home. The plaintiff had not alleged in the complaint that any "Espinal" exception applied and was unable to raise a question of fact on the "Espinal" issue in response to defendant's summary judgment motion:

"'As a general rule, a limited contractual obligation to provide snow removal services does not render the contractor liable in tort for the personal injuries of third parties'" … . However, the Court of Appeals has recognized three exceptions to the general rule: "(1) where the contracting party, in failing to exercise reasonable care in the performance of his [or her] duties, launche[s] a force or instrument of harm; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties and (3) where the contracting party

has entirely displaced the other party's duty to maintain the premises safely" … * * *

… [T]he defendants demonstrated their prima facie entitlement to judgment as a matter of law dismissing the complaint by submitting evidence that the plaintiff was not a party to the snow removal contract … . Since the plaintiff did not allege facts in the pleadings that would establish the possible applicability of any of the Espinal exceptions, the defendants were not required to affirmatively demonstrate that these exceptions did not apply to establish their prima facie entitlement to judgment as a matter of law … .

… [T]he plaintiff failed to raise a triable issue of fact based on any of the Espinal exceptions. The plaintiff failed to raise a triable issue of fact as to whether the defendants launched a force or instrument of harm. The affidavit of a former coworker that the plaintiff relied upon was insufficient because it only addressed the general conditions of the parking lot and not the cause of the specific ice on which the plaintiff allegedly was injured … . The plaintiff also failed to raise a triable issue of fact as to whether the defendants entirely displaced the nursing home's duty to maintain the parking lots. The affidavit of the former assistant to the head administrator of the nursing home that the plaintiff submitted failed to address the language in the snow removal contract that provided that the nursing home retained some duties and responsibilities to maintain the parking lots … . Brito-Hernandez v Superior Contr., 2024 NY Slip Op 06619, Second Dept 12-24-24

Practice Point: Consult this decision for a discussion of all the issues relevant to suing a snow-removal contractor for a slip and fall. Are any "Espinal" exceptions raised or applicable? Did the snow-removal contract make the contractor completely responsible for maintenance of the parking lot, or did the property-owner retain some responsibility?

December 24, 2024

## SLIP AND FALL, STAIRWAY, EVIDENCE.

## THE WORN MARBLE STAIRWAY TREAD WAS NOT AN ACTIONABLE DEFECT; DEFENDANT ENTITLED TO SUMMARY JUDGMENT IN THIS STAIRWAY SLIP AND FALL CASE (FIRST DEPT).

he First Department, reversing Supreme Court, determined defendant property-owner (Marion) was entitled to summary judgment in this stairway slip and fall case. Defendant demonstrated it did not have actual or constructive notice of any defective condition on the stairs:

Marion demonstrated prima facie that the worn marble tread depicted in the photographs taken by plaintiff is not an actionable defect … . Plaintiff and Marion's superintendent testified that the photographs taken by plaintiff accurately reflected the condition of the stair on the day of the accident, and there is no claim that the stair was wet, slippery, or covered with debris. Moreover, Marion's expert opined that the accident could not have occurred as plaintiff described because when she fell, her left foot was in the middle of the tread rather than on the right-hand side where the worn condition she cited was located.

Marion also demonstrated that it did not have actual or constructive notice of a defective condition on the stair in that the superintendent testified that there were no complaints and no violations had been issued with respect to the stair. He stated that he swept the stairs five days and mopped three days a week, and that the photographs accurately depicted the condition of the stair on the day of the accident. Plaintiff's complaints to the prior superintendent about the general condition of the stairs was insufficient to constitute notice of the specific condition cited by plaintiff as the cause of her fall … .

In opposition, plaintiff failed to raise a triable issue of fact as to Marion's negligence. The opinion of her expert cited numerous dangerous conditions on the stairs and in the stairway, but plaintiff did not cite any of them as a proximate cause of her accident … . James v Chestnut Holdings of N.Y., Inc., 2024 NY Slip Op 06656, First Dept 12-31-24

Practice Point: Here, in this stairway slip and fall case, a worn tread in a marble stairway did not constitute an actionable defect.

December 31, 2024

## SLIP AND FALL, STORM IN PROGRESS DOCTRINE, TRACKED-IN RAIN.

## PLAINTIFF SLIPPED AND FELL ON A WET SPOT ON THE MARBLE FLOOR IN THE CONDOMINIUM LOBBY DURING A SNOW STORM; THE DEFENDANT CONDOMINIUM HAD PLACED RUBBER MATS ON THE FLOOR AND PERIODICALLY MOPPED WET SPOTS; THE STORM-IN-PROGRESS DOCTRINE APPLIED; DEFENDANT WAS ENTITLED TO SUMMARY JUDGMENT (FIRST DEPT).

The First Department, reversing Supreme Court, determined the defendant condominium was entitled to summary judgment in this wet-marble-floor slip and fall case. It was snowing at the time of the fall, triggering the storm-in-progress doctrine, and defendant had placed rubber mats on the floor and periodically mopped wet spots:

The condominium established prima facie entitlement to summary judgment by submitting certified weather reports demonstrating that there was an ongoing snowstorm at the time of accident, and that the "storm-in-progress" doctrine therefore applied … . The condominium demonstrated that it undertook reasonable maintenance measures to address the wet conditions created by tracked-in snow by laying rubber mats throughout the lobby, including an eight-foot runner from the building entrance to the elevator bank, as well as having the doorman and other staff dry mop any wet spots … . Although plaintiff's accident took place on a small portion of the floor that was uncarpeted and remained uncovered, a defendant is not required under the "reasonable care" standard to cover all of its floors with mats to prevent someone from falling on moisture … . In response to the condominium's prima facie showing, plaintiff failed to submit evidence sufficient to raise a triable issue of fact.

The condominium also showed lack of actual notice of the specific wet condition that caused plaintiff to slip. The building's doorman testified that he monitored the condition of the lobby throughout the day and would mop any wet spot, and plaintiff admitted that she did not see any wet condition on the floor when she left the building 15 minutes earlier … . Similarly, because the water might have been tracked in by plaintiff or by other residents entering the lobby, there is no basis for a finding of constructive notice … . Nor was the condominium's general awareness

that the floor might become wet while it was snowing sufficient to establish constructive notice of the specific condition that caused plaintiff's injury … . Plaintiff's opposition did not raise a triable issue of fact regarding notice…. . Hart v 210 W. 77 St. LLC, 2024 NY Slip Op 06655, First Dept 12-31-24

Practice Point: The storm-in-progress doctrine applied in this slip and fall case where plaintiff slipped on a wet spot on the lobby floor caused by tracked in snow during an snow storm.

Practice Point: A general awareness that tracked-in snow will result in wet spots on a marble floor does not amount to constructive notice of the specific condition which caused plaintiff's slip and fall.

December 31, 2024

## TRAFFIC ACCIDENTS, COURT OF CLAIMS, NOTICE OF ROAD DEFECT.

## WITNESS TESTIMONY DEMONSTRATED CLAIMANT LOST CONTROL OF HIS MOTORCYCLE AFTER GETTING CAUGHT IN A RUT IN THE ROAD; THE STATE HAD TAKEN PICTURES A FEW MONTHS BEFORE WHICH DEPICTED THE ROAD DEFECT; DEFENSE VERDICT REVERSED (SECOND DEPT).

The Second Department, reversing the Court of Claims, determined the state had actual or constructive notice of the road defect which caused claimant to lose control of his motorcycle. Photographs of the area, taken by the State a few months before claimant's accident in connection with the clean-up of a fuel-truck-accident, depicted the road defect:

Anthony Monzillo testified that he was riding his own motorcycle approximately 15 to 20 feet behind the claimant, and he observed the front wheel of the claimant's motorcycle go into a "rutted area" and "get caught and begin to wobble side to side" and saw the motorcycle fall over. * * *

Quadri [a State engineer] oversaw the clean-up and remedial work of the roadway in April and May 2017, following the truck accident, and photographs taken in April 2017 of the clean-up and remediation work depicted the defect in the roadway. Quadri testified that he was at the truck accident site at least six times during April and May 2017. While Quadri acknowledged during his testimony that he could see "a separation in the pavement" in a photograph taken in April or May

2017, he further testified that he could not remember seeing the separation in the pavement when he was at the site in April 2017. Quadri also testified that DOT maintenance crews would patrol Route 293 at least once a week looking for areas that require maintenance or repairs and would repair "potholes in the travel lanes . . . right away." … . …

Based upon our review of the record, including the photographs and the witnesses' testimony, we conclude that the claimant met his burden of proving by a preponderance of the evidence the existence of a dangerous condition of which the defendant was actually or constructively aware and which it failed to take reasonable measures to correct and that such failure was a proximate cause of the claimant's accident … . Paci v State of New York, 2024 NY Slip Op 06569, Second Dept 12-24-24

Practice Point: A witness demonstrated the road defect caused claimant's accident. Photographs demonstrated the State had constructive notice of the road defect. The defense verdict was not supported.

December 24, 2024

## TRAFFIC ACCIDENTS, LYFT VEHICLE, CONTRACT LAW, ARBITRATION.

## PLAINTIFF WAS INJURED IN A LYFT CAR WHICH HAD BEEN ORDERED BY HIS FRIEND THROUGH THE FRIEND'S ACCOUNT; BECAUSE PLAINTIFF HAD SCROLLED THROUGH AND AGREED TO LYFT'S TERMS OF SERVICE, WHETHER PLAINTIFF WAS BOUND BY THE ARBITRATION CLAUSE MUST BE DETERMINED BY THE ARBITRATOR (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff, who used another's Lyft account to order transportation, and who was injured in an accident involving the Lyft car, was subject to an arbitration provision in the contract between Lyft and the account-holder. Whether the plaintiff was bound by the arbitration clause was deemed to be an issue to be decided by the arbitrator:

Arbitration must be compelled because plaintiff was a party to an arbitration agreement with Lyft that expressly delegated the threshold question of arbitrability to the arbitrator. It is undisputed that, prior to the subject accident, plaintiff scrolled through and agreed to Lyft's Terms of Service (the TOS), which included an

agreement to arbitrate. As part of the arbitration agreement, the parties agreed to delegate "disputes concerning the arbitrability of a Claim (including disputes about the scope, applicability, enforceability, revocability or validity of the Arbitration Agreement)" to the arbitrator. When the parties' contract delegates the arbitrability question to an arbitrator, the courts must respect the parties' decision "even if the arguments of the party seeking to arbitrate 'appear[] to the court to be frivolous' or even 'wholly groundless'" … .

There is no dispute that if plaintiff had ordered the subject ride through his own Lyft account, then the instant claims would be subject to arbitration because plaintiff was party to a valid and enforceable arbitration agreement with a valid and enforceable delegation provision — even if there were a question as to the arbitration agreement's scope … . We find that the question of whether the agreement to arbitrate encompassed claims stemming from plaintiff's presence in a Lyft that he did not order is a question of arbitrability that must be decided by the arbitrator … . Samuel v Islam, 2024 NY Slip Op 06675, First Dept 12-31-24

Practice Point: If you scroll through and agree to the terms of service when a Lyft car is ordered though another's account, and you are subsequently injured in an accident in the Lyft car, you are compelled to arbitrate the question whether you are subject to the arbitration clause just as the account-holder would be.

December 31, 2024

## TRAFFIC ACCIDENTS, NOTICE OF ROAD DEFECT, MUNICIPAL LAW, IMMUNITY.

## A REPORT OF A ROAD DEFECT SUBMITTED THROUGH A CITY'S ONLINE REPORTING SYSTEM MAY CONSTITUTE "WRITTEN NOTICE" TRIGGERING MUNICIPAL LIABILITY FOR INJURY CAUSED BY THE DEFECT (CT APP).

The Court of Appeals, in full-fledged opinion by Judge Garcia, determined there was a question of fact whether the online reporting of a road defect constituted "written notice" of the defect such that the municipality may be liable for plaintiff's motorcycle accident. The Court noted that the plaintiff also raised a question of fact whether the city created the road defect, obviating the need for written notice, and the doctrine of sovereign immunity does not apply to the proprietary function of road repair:

Plaintiff was injured when he lost control of his motorcycle on Lark Street in the City of Albany. He brought this lawsuit claiming that the accident was caused by a road defect that the City knew about and had failed to repair. The primary issue on appeal is whether certain reports submitted to the City through an online reporting system called "SeeClickFix" (SCF) served as "written notice" of that defect and, if so, whether those reports were "actually given" to the official designated by statute to receive such notice. Viewing the evidence in the light most favorable to plaintiff, based on the implementation and use of the SCF system by the City and its Department of General Services (DGS), we hold that plaintiff raised a triable issue of fact as to prior written notice to the appropriate City official. We further hold that plaintiff raised a triable issue of fact regarding the affirmative negligence exception to the prior written notice requirement, and that the City lacks governmental immunity from suit. We therefore affirm. * * *

… [A]t the time of the accident, the City's prior written notice statute provided:

"No civil action shall be maintained against the City for damages or injuries to person or property sustained in consequence of any street . . . being defective, out of repair, unsafe, dangerous or obstructed unless, previous to the occurrence resulting in such damages or injury, written notice of the defective, unsafe, dangerous or obstructed condition of said street . . . was actually given to the Commissioner of Public Works and there was a failure or neglect within a reasonable time after the receipt of such notice to repair or remove the defect, danger or obstruction complained of" (Albany City Code former § 24-1 …). Calabrese v City of Albany, 2024 NY Slip Op 06289, CtApp 12-17-24

Practice Point: Here a report of a road defect had been submitted through an online reporting system implemented by the city. There was a question of fact whether such a report constituted "written notice" of the road defect, and whether the notice was actually given to the commissioner of public works.

December 17, 2024

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

## A STATEMENT ATTRIBUTED TO DEFENDANT IN A POLICE REPORT TO THE EFFECT THAT PLAINTIFF STOPPED SUDDENLY DID NOT RAISE A QUESTION OF FACT IN THIS REAR-END COLLISION CASE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that plaintiff was entitled to summary judgment on liability in this rear-end collision case. The court noted that evidence the car in which plaintiff was a passenger stopped suddenly was not enough to raise a question of fact:

"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 in order to rebut the inference of negligence" … . "[A]n assertion that the lead vehicle came to a sudden stop, standing alone, is insufficient to rebut the presumption of negligence on the part of the operator of the rear vehicle" … .

Here, the plaintiff established her prima facie entitlement to judgment as a matter of law by demonstrating that the vehicle owned by Elshaer and operated by Elnaggar struck Chowdhury's vehicle in the rear, and in opposition, Elshaer and Elnaggar failed to raise a triable issue of fact. Contrary to Elshaer and Elnaggar's contention, although a police report recounted Elnaggar's statement that Chowdhury's vehicle stopped suddenly prior to the rear-end collision, this statement was insufficient, in and of itself, to raise a triable issue of fact as to whether there was a nonnegligent explanation for the happening of the collision … . Chowdhury v Elshaer, 2024 NY Slip Op 06603, Second Dept 12-24-24

Practice Point: Here a statement attributed to defendant in a police report to the effect that plaintiff stopped suddenly was not sufficient to raise a question of fact about whether there was a nonnegligent explanation for the rear-end collision.

December 24, 2024

## TRAFFIC ACCIDENTS, SERIOUS INJURY, INSURANCE LAW, JURY SELECTION.

## PLAINTIFFS WERE PREJUDICED BY THE JURY SELECTION PROCESS WHICH DID NOT ALTERNATE THE PEREMPTORY CHALLENGES; THE FIRST QUESTION POSED TO THE JURY EFFECTIVELY PRECLUDED THE JURORS FROM CONSIDERING THE APPROPRIATE LEGAL ISSUE, I.E., WHETHER THE PLAINTIFF SUFFERED A "SERIOUS INJURY" WITHIN THE MEANING OF THE INSURANCE LAW (THIRD DEPT).

The Third Department, reversing the jury verdict and ordering a new trial in this Insurance Law 5102(d) "serious injury" case, determined the plaintiffs were prejudiced by the jury selection method used the trial judge, and the first question on the verdict sheet was improper because it effectively precluded the jury from considering the relevant question, whether plaintiff suffered a "serious injury:"

The court's failure to alternate the peremptory challenge process … placed plaintiffs in the untenable position of having to utilize a peremptory challenge for a prospective juror that may not have been necessary had defendants been required to go first. This error compromised the fairness of the jury selection process.

Plaintiffs further contend that Supreme Court erred by including the first question on the verdict sheet — i.e., "[h]ave the plaintiffs . . . established that the incident . . . was a substantial factor in causing [Mormile's] injuries?" We agree. The specific issue for the jury to resolve was whether, as a result of the subject accident, Mormile sustained a "serious injury" as set forth in question 2 on the verdict sheet (did Mormile "sustain a significant limitation of use of a body function or system"); question 3 (did Mormile "sustain a permanent consequential limitation of use of a body organ or member"); question 4 (did Mormile "sustain a injury that resulted in a significant disfigurement"); and question 5 (did Mormile "suffer a medically determined injury or impairment of a non-permanent nature . . . that prevented him from performing all of the material acts that constituted his usual and customary daily activities for not less than 90 days during the 180 days immediately following the accident?").

The first question effectively only asks whether there was probable cause to establish that Mormile's injuries resulted from the accident (see PJI 2:70). Having answered "No" to that global question, the jury did not answer questions 2 through

5. In effect, the jury did not resolve the appropriate legal issue, i.e., whether Mormile sustained a "serious injury" in the accident, as defined under each of the four distinct categories at issue … . Mormile v Marshall, 2024 NY Slip Op 06390, Third Dept 12-19-24

Practice Point: Failure to alternate the peremptory challenges compromised the fairness of the jury selection process.

Practice Point: The first question on the verdict sheet effectively precluded the jury from considering the appropriate legal issue, i.e., whether plaintiff suffered a "serious injury" within the meaning of the Insurance Law.

December 19, 2024

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

## DEFENDANT POLICE OFFICER WAS ENGAGED IN AN "EMERGENCY OPERATION" WITHIN THE MEANING OF VEHICLE AND TRAFFIC LAW 1104 WHEN HIS POLICE VAN STRUCK PLAINTIFF AS SHE STEPPED INTO THE ROAD FROM BETWEEN PARKED CARS; DEFENDANT DID NOT ACT WITH RECKLESS DISREGARD FOR THE SAFETY OF OTHERS AND, THEREFORE, COULD NOT BE HELD LIABLE FOR PLAINTIFF'S INJURIES (FIRST DEPT).

The First Department, reversing Supreme Court, determined defendant police officer's motion for summary judgment dismissing the complaint should have been granted. Plaintiff was struck by defendant's police van when plaintiff stepped into the road from between two parked cars. Defendant police office was responding to an "assault in progress" when plaintiff was struck:

Defendants demonstrated that defendant police officer was engaged in an "emergency operation" within the meaning of Vehicle and Traffic Law § 1104, by submitting evidence that he was responding to a radio call about an "assault in progress" at the time of the accident … . The police officer therefore was privileged to drive in the wrong direction on the roadway … , and can be found liable only if he operated the vehicle in reckless disregard for the safety of others … .

Defendants demonstrated that the officer did not act with reckless disregard based on his testimony that he entered the eastbound lane after ascertaining that there was no traffic, turned on the siren and lights, and was unable to avoid striking plaintiff when she stepped out in front of the police van, despite hitting the brakes hard … . Yuet C. Chiu-Yu v Chin, 2024 NY Slip Op 06273, First Dept 12-12-24

Practice Point: Defendant police officer was responding to an "assault in progress" and testified he had activated his siren and lights and had checked for pedestrians prior to striking plaintiff as she stepped into the road from between parked cars. The officer testified he braked hard but could not avoid striking plaintiff. Defendants were entitled to summary judgment because the officer demonstrated he did not operate his vehicle in "reckless disregard" for the safety of others.

December 12, 2024

## TRAFFIC ACCIDENTS, MUNICIPAL LAW, CIVIL PROCEDURE, JUDGES, VEHICLE AND TRAFFIC LAW. PLAINTIFF'S MOTION TO AMEND THE NOTICE OF CLAIM TO ADD ALLEGATIONS WHICH MERELY AMPLIFIED THE ALLEGATIONS IN THE ORIGINAL NOTICE SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined plaintiff's motion to amend the notice of claim in this traffic accident case should have been granted to the extent the amendment merely amplified the allegations in the original notice. By contrast, the attempts to amend the notice by adding new theories of liability were properly denied. Plaintiff, a police officer, was a passenger in a police car driven by another officer, Lassen. Plaintiff sued Lassen for negligent operation of the police car and the city for negligent supervision and training:

… Supreme Court should have granted that branch of the plaintiff's motion which was for leave to amend the complaint to add allegations relating to purported acts or omissions regarding Lassen's operation of the police vehicle, including causes of action pursuant to General Municipal Law § 205-e asserted against the City defendants and predicated upon Lassen's alleged violation of various provisions of the Vehicle and Traffic Law regulating the operation of motor vehicles … . These causes of action were based upon the same purported acts and omissions already

set forth in the notice of claim … . Since Lassen's alleged negligent and/or reckless operation of the police vehicle and the City's concomitant negligence in failing to properly supervise and/or train Lassen were set forth in the notice of claim and the complaint, the new allegations effectively "amplif[ied]" the previously asserted allegations and did not constitute "new, distinct, and independent theories of liability" … . The fact that the proposed amended complaint alleged violations of statutory provisions not set forth in the notice of claim or original complaint, was not, standing alone, a basis to deny leave to amend … . Since the notice of claim "provided information . . . sufficient to alert the [defendants] to the potential [General Municipal Law § 205-e] cause[s] of action" predicated upon Lassen's alleged failure to properly operate the police vehicle … , the court should not have denied that branch of the plaintiff's motion which was for leave to amend the complaint to add those allegations on the ground that they were outside the existing notice of claim. Mitchell v Jimenez, 2024 NY Slip Op 06192, Second Dept 12-11-24

Practice Point: A motion to amend a notice of claim which seeks to amplify allegations in the original notice should be granted. A motion to amend a notice of claim which seeks to add new theories of liability is properly denied.

December 11, 2024