NEW YORK APPELLATE DIGEST, INC.

Personal Injury Reversal Report January 2025

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 January 2025. 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. Copyright 2025 New York Appellate Digest, Inc.

Table of Contents

Contents

CHILD VICTIMS ACT, EDUCATION-SCHOOL LAW, EMPLOYMENT LAW, EVIDENCE....4

THE SCHOOL DISTRICT'S OWN SUBMISSIONS RAISED QUESTIONS OF FACT ABOUT NEGLIGENT HIRING AND RETENTION OF A TEACHER'S AIDE AND NEGLIGENT SUPERVISION OF PLAINTIFF STUDENT IN THIS CHILD VICTIMS ACT CASE (SECOND DEPT). 4

CHILD VICTIMS ACT, EDUCATION-SCHOOL LAW, EMPLOYMENT LAW, EVIDENCE....5

THE SCHOOL DISTRICT DID NOT ELIMINATE QUESTIONS OF FACT ABOUT WHETHER IT PROPERLY EVALUATED THE TEACHER'S BACKGROUND BEFORE HIRING HER AND WHETHER IT HAD CONSTRUCTIVE KNOWLEDGE OF THE TEACHER'S ALLEGED ABUSE OF PLAINTIFF STUDENT (SECOND DEPT). 5

CHILD VICTIMS ACT, MUNICIPAL LAW EMPLOYMENT LAW, IMMUNITY. 6

PLAINTIFF ALLEGED HE WAS SEXUALLY ABUSED BY AN EMPLOYEE OF THE COUNTY SHERIFF'S DEPARTMENT IN A GUARDED DEPARTMENT PARKING LOT AND IN A LOCKED BATHROOM IN THE JAIL; BECAUSE THE COUNTY WAS ENGAGED IN A GOVERNMENTAL, NOT A PROPRIETARY, FUNCTION (PROVIDING SECURITY FOR THE PARKING LOT AND JAIL), PLAINTIFF MUST DEMONSTRATE THE COUNTY OWED HIM A SPECIAL DUTY, WHICH HE WAS UNABLE TO DO (SECOND DEPT). 6

DANGEROUS CONDITION, MUNICIPAL LAW, CIVIL PROCEDURE....7

THE CITY DEMONSTRATED IT DID NOT HAVE WRITTEN NOTICE OF THE OPEN MANHOLE PLAINTIFF DROVE OVER; PLAINTIFF UNSUCCESSFULLY TRIED TO RAISE, FOR THE FIRST TIME, AN EXCEPTION TO THE WRITTEN NOTICE REQUIREMENT IN RESPONSE TO THE CITY'S MOTION FOR SUMMARY JUDGMENT (SECOND DEPT)....7

DANGEROUS CONDITION, WRITTEN NOTICE REQUIREMENT, MUNICIPAL LAW. 8

THE PRIOR WRITTEN NOTICE RULE RE: MUNICIPAL LIABILITY FOR DANGEROUS CONDITIONS APPLIES TO MORE THAN JUST SURFACE DEFECTS; HERE THE RULE APPLIED TO AN ARCH-SHAPED BOLLARD OR BARRIER WHICH FELL OVER WHEN A CHILD WAS SWINGING FROM IT; TWO-JUSTICE DISSENT (THIRD DEPT)....8

DOG BITE, MUNICIPAL LAW, EMPLOYMENT LAW, IMMUNITY. 10

PLAINTIFF POLICE OFFICER WAS PARTICIPATING IN A TRAINING SESSION WHEN HE WAS BITTEN BY A POLICE DOG; THE TRAINING WAS A GOVERNMENTAL FUNCTION; THEREFORE THE MUNICIPALITY MUST HAVE OWED PLAINTIFF A SPECIAL DUTY TO BE LIABLE, NOT THE CASE HERE (SECOND DEPT). 10

LABOR LAW-CONSTRUCTION LAW, AGENCY. 11

THE CONTRACTOR THAT HIRED THE SUBCONTRACTOR FOR WHICH THE INJURED PLAINTIFF WORKED WAS THE CONDOMINIUM DEFENDANTS' STATUTORY AGENT AND THEREFORE CAN BE HELD LIABLE IN THIS LABOR LAW 240(1) ACTION (FIRST DEPT)....11

LABOR LAW-CONSTRUCTION LAW, CIVIL PROCEDURE, EVIDENCE....12

PLAINTIFF'S MOTION TO RENEW HIS SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED; NO "NEW FACTS" WERE DEMONSTRATED (THIRD DEPT). 12

Table of Contents

LABOR LAW-CONSTRUCTION LAW, CONSTITUTIONAL LAW. 13

PLAINTIFF WAS WORKING ON POWER LINES WHILE SUSPENDED FROM A HELICOPTER WHEN THE HELICOPTER LOST CONTROL AND CRASHED; PLAINTIFF'S LABOR LAW 200, 240 AND 241(6) CAUSES OF ACTION WERE NOT PREEMPTED BY THE FEDERAL AVIATION ACT (FAA) (THIRD DEPT). 13

LABOR LAW-CONSTRUCTION LAW, EVIDENCE. 14

PLAINTIFF FELL FROM A SCAFFOLD WITHOUT GUARDRAILS; DEFENDANTS' EVIDENCE THAT GUARDRAILS WERE AVAILABLE WAS NOT STRONG ENOUGH TO RAISE A QUESTION OF FACT (FIRST DEPT). 14

LABOR LAW-CONSTRUCTION LAW, EVIDENCE. 15

PLAINTIFF WAS CROUCHING DOWN MARKING THE FLOOR WITH DUCT TAPE WHEN A LADDER FELL OVER AND STRUCK HIM; PLAINTIFF WAS ENTITLED TO SUMMARY JUDGMENT IN THIS LABOR LAW 240(1) ACTION (FIRST DEPT). 15

LABOR LAW-CONSTRUCTION LAW, NEGLIGENCE, EVIDENCE. 16

PLAINTIFF WAS NOT IN AN AREA IN WHICH FALLING OBJECTS COULD BE ANTICIPATED, SO THE LABOR LAW 240(1) AND 241(6) CAUSES OF ACTION SHOULD HAVE BEEN DISMISSED; PLAINTIFF WAS STRUCK BY A BOARD INTENTIONALLY THROWN INTO THE EXCAVATED AREA WHERE HE WAS WORKING; THE LABOR LAW 200 AND NEGLIGENCE CAUSES OF ACTION PROPERLY SURVIVED (THIRD DEPT). 16

LABOR LAW-CONSTRUCTION LAW. 17

PLAINTIFF'S WORK, DELIVERING TILES TO THE WORK SITE, WAS COVERED BY LABOR LAW 240(1) AS "NECESSARY AND INCIDENTAL" TO THE PROTECTED CONSTRUCTION-ACTIVITY (FIRST DEPT). 17

PUBLIC HEALTH LAW, ASSISTED LIVING FACILITIES, CIVIL PROCEDURE. 18

THE PUBLIC HEALTH LAW DOES NOT CREATE A PRIVATE RIGHT OF ACTION AGAINST "ASSISTED LIVING" AS OPPOSED TO "RESIDENTIAL HEALTH CARE" FACILITIES; COMPLAINT PROPERLY DISMSSED (THIRD DEPT). 18

SLIP AND FALL, EVIDENCE. 20

EVIDENCE THAT THE AREA BELOW THE STAIRS WHERE PLAINTIFF SLIPPED AND FELL HAD BEEN RECENTLY MOPPED, TOGETHER WITH TESTIMONY THAT THE STAIRS WERE WET, WARRANTED SUMMARY JUDGMENT (SECOND DEPT). 20

SLIP AND FALL, MUNICIPAL LAW. 22

ALTHOUGH THE ABUTTING PROPERTY OWNER CAN BE LIABLE FOR A SLIP AND FALL CAUSED BY A SIDEWALK DEFECT CREATED BY THE PROPERTY OWNER'S SPECIAL USE, HERE A CURB CUT FOR A DRIVEWAY, A SUBSEQUENT PURCHASER OF THE PROPERTY WHO DOES NOT CONTINUE THE SPECIAL USE WILL NOT BE HELD LIABLE FOR THE DEFECT (SECOND DEPT). 22

SLIP AND FALL, STORM IN PROGRESS. MUNICIPAL LAW. 24

THE COMPLAINT ALLEGED THE FAILURE TO CLEAR ICE AND SNOW AND CERTAIN BUILDING CODE VIOLATIONS CAUSED HER SLIP AND FALL; THE "STORM IN PROGRESS" RULE ONLY NEGATED THE CAUSE OF ACTION BASED UPON THE FAILURE TO CLEAR THE ICE AND SNOW; THE DEFENDANTS DID NOT DEMONSTRATE THE BUILDING CODE VIOLATIONS WERE INAPPLICABLE; DEFENDANTS' SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT). 24

TRAFFIC ACCIDENTS, INSURANCE LAW, POLICE OFFICERS, MUNICIPAL LAW. 25

DESPITE THE COURT OF APPEALS RULING THAT THE INSURANCE LAW PROVISION REQUIRING UNINSURED MOTORIST COVERAGE DOES NOT APPLY TO POLICE VEHICLES, PLAINTIFF POLICE OFFICER, INJURED IN AN ACCIDENT WITH AN UNINSURED MOTORIST WHILE DRIVING HIS POLICE VEHICLE, WAS ENTITLED TO UNINSURED MOTORIST COVERAGE UNDER HIS OWN PERSONAL INSURANCE POLICY (SECOND DEPT). 25

TRAFFIC ACCIDENTS, MUNICIPAL LAW, IMMUNITY. 26

A POLICE OFFICER DIRECTING TRAFFIC IS PERFORMING A GOVERNMENTAL FUNCTION REQUIRING THE EXERCISE OF DISCRETION; THE OFFICER AND THE CITY ARE THEREFORE IMMUNE FROM LIABLITY FOR A RELATED ACCIDENT (SECOND DEPT). 26

TRAFFIC ACCIDENTS, VEHICLE AND TRAFFIC LAW, EVIDENCE. 27

PLAINTIFF VIOLATED THE VEHICLE AND TRAFFIC LAW BY MAKING A LEFT TURN DIRECTLY INTO DEFENDANT'S PATH OF TRAVEL WHEN DEFENDANT HAD A GREEN LIGHT; PLAINTIFF'S TESTIMONY THAT DEFENDANT WAS SPEEDING WAS NOT ENOUGH TO RAISE A QUESTION OF FACT (SECOND DEPT). 27

WORKERS' COMPENSATION, EVIDENCE. 28

DETERMINING SCHEDULE LOSS OF USE BY COMPARING THE RANGE OF MOTION OF LIMBS ON THE INJURED SIDE TO THE RANGE OF MOTION OF CORRESPONDING LIMBS ON THE OTHER SIDE MAY NOT BE APPROPRIATE IF THE OTHER SIDE HAS ALSO SUFFERED INJURIES, WHETHER PERMANENT OR TEMPORARY, IN THE PAST (THIRD DEPT). 28

WORKERS' COMPENSATION, NEGLIGENCE, CIVIL PROCEDURE. 29

THE JUSTICE FOR INJURED WORKERS ACT (JIWA), WHICH TOOK EFFECT DECEMBER 30, 2022, AMENDED THE WORKERS' COMPENSATION LAW SUCH THAT A WORKERS' COMPENSATION BOARD RULING CANNOT BE GIVEN COLLATERAL ESTOPPEL EFFECT IN A SUBSEQUENT PERSONAL INJURY ACTION; THE FIRST DEPARTMENT HELD THE JIWA APPLIES RETROACTIVELY (FIRST DEPT). 29

WORKERS' COMPENSATION, EXCLUSIVE REMEDY, NEGLIGENCE, ADMINISTRATIVE LAW, CIVIL PROCEDURE. 31

HERE THE ADMINISTRATOR OF PLAINTIFF'S DECEDENT'S ESTATE BROUGHT A WRONGFUL DEATH ACTION IN SUPREME COURT AND DEFENDANTS MOVED FOR SUMMARY JUDGMENT ARGUING PLANTIFF'S EXCLUSIVE REMEDY WAS WORKERS' COMPENSATION; RATHER THAN DECIDE THE MOTION, SUPREME COURT SHOULD HAVE REFERRED THE MATTER TO THE WORKERS' COMPENSATION BOARD WHICH HAS PRIMARY JURISDICTION RE: THE APPLICABILITY OF THE WORKERS' COMPENSATION LAW (SECOND DEPT). 31

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

THE SCHOOL DISTRICT'S OWN SUBMISSIONS RAISED QUESTIONS OF FACT ABOUT NEGLIGENT HIRING AND RETENTION OF A TEACHER'S AIDE AND NEGLIGENT SUPERVISION OF PLAINTIFF STUDENT IN THIS CHILD VICTIMS ACT CASE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the defendant school district's own submissions raised questions of fact in this Child Victims Act case alleging sexual abuse of plaintiff student by a teacher's aide:

… [T]he defendants failed to establish, prima facie, that the school district was entitled to judgment as a matter of law dismissing the causes of action alleging negligence and negligent supervision and retention insofar as asserted against … . In support of their motion, the defendants submitted, among other things, transcripts of the deposition testimony of the plaintiff and that of his third grade teacher, who served as the direct supervisor of the teacher's aide. The plaintiff testified that the teacher's aide singled him out for attention in the classroom and hugged him in the hallways … . While such conduct, without more, might not have been enough to warrant denial of the defendants' motion, the plaintiff also testified that, upon dismissal from school, the teacher's aide frequently walked him to her car in the presence of other staff members and then drove him to her home, where the alleged sexual abuse primarily occurred. The third grade teacher also testified that it was "[in]appropriate" for teachers and other school district employees to drive students in their personal vehicles or take students to their homes, conduct which the teacher also believed violated school policies … .

Therefore, the defendants' own submissions failed to eliminate triable issues of fact as to whether the school district "had notice of the potential for harm to the . . . plaintiff such that its alleged negligence in supervising and retaining [the teacher's aide] placed [her] in a position to cause foreseeable harm" … . Kastel v Patchogue-Medford Union Free Sch. Dist., 2025 NY Slip Op 00210, Second Dept 1-15-25

Practice Point: The criteria for a school district's liability for negligent hiring and retention and negligent supervision in a Child Victims Act case concisely laid out.

January 15, 2025

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

THE SCHOOL DISTRICT DID NOT ELIMINATE QUESTIONS OF FACT ABOUT WHETHER IT PROPERLY EVALUATED THE TEACHER'S BACKGROUND BEFORE HIRING HER AND WHETHER IT HAD CONSTRUCTIVE KNOWLEDGE OF THE TEACHER'S ALLEGED ABUSE OF PLAINTIFF STUDENT (SECOND DEPT).

The Second Department, reversing Supreme Court in this Child Victims Act case, determined the defendant school district did not demonstrate it took adequate measures to the evaluate the teacher's background and did not demonstrate it did not have constructive notice of the teacher's alleged sexual abuse of plaintiff student:

… [T]he defendants failed to establish, prima facie, that the School District was not negligent with respect to the hiring of the teacher. The defendants' submissions in support of their motion failed to eliminate triable issues of fact as to whether the School District took appropriate measures to evaluate the teacher's employment and fitness at the time she was hired … .

… [T]he defendants failed to establish, prima facie, that the School District lacked constructive notice of the teacher's abusive propensities and conduct … . In particular, given the frequency of the alleged abuse, which occurred between 50 and 100 times over the course of two school years, inter alia, in a classroom and the school parking lot during school hours, the defendants did not eliminate triable issues of fact as to whether the School District should have known of the abuse … . The defendants similarly failed to demonstrate, prima facie, that the School District's supervision of both the teacher and the plaintiff was not negligent given that, among other things, the teacher was on "probationary" status during the relevant period, some of the incidences occurred while the plaintiff was alone with the teacher in her classroom, the teacher's personnel file contains only a single evaluation from the school during the relevant period, and multiple former students testified at their respective depositions that the teacher's inappropriate relationship with the plaintiff was readily apparent … . Brauner v Locust Val. Cent. Sch. Dist., 2025 NY Slip Op 00418, Second Dept 1-29-25

Practice Point: Here in this Child Victims Act case the school district did not demonstrate it properly evaluated the teacher's background before hiring her and did not demonstrate it did not have constructive notice of the teachers' alleged abuse of plaintiff student which allegedly occurred up to 100 times in a classroom and the school parking lot.

January 29, 2025

CHILD VICTIMS ACT, MUNICIPAL LAW EMPLOYMENT LAW, IMMUNITY.

PLAINTIFF ALLEGED HE WAS SEXUALLY ABUSED BY AN EMPLOYEE OF THE COUNTY SHERIFF'S DEPARTMENT IN A GUARDED DEPARTMENT PARKING LOT AND IN A LOCKED BATHROOM IN THE JAIL; BECAUSE THE COUNTY WAS ENGAGED IN A GOVERNMENTAL, NOT A PROPRIETARY, FUNCTION (PROVIDING SECURITY FOR THE PARKING LOT AND JAIL), PLAINTIFF MUST DEMONSTRATE THE COUNTY OWED HIM A SPECIAL DUTY, WHICH HE WAS UNABLE TO DO (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the negligence action against the county in this Child Victims Act case should have been dismissed. Plaintiff alleged defendant Weis, a corrections officer employed by defendant Suffolk County Sheriff's Department, sexually abused him in a guarded parking lot at the Sheriff's Department and in a locked bathroom in the jail. The Second Department held that the alleged negligence related to a governmental function, not a proprietary function of the Sheriff's Department, requiring plaintiff to demonstrate he was owed a "special duty:"

… [T]he specific acts or omissions that allegedly caused the plaintiff's injuries were the defendant's decisions regarding the level of security and surveillance to provide in a fenced-in jail parking lot, with admission controlled by a posted guard, or within the facility itself. Those decisions go beyond the scope of the defendant's duty as a landlord and constitute actions undertaken in the defendant's police protection capacity … . Accordingly, the specific acts or omissions at issue here involved a governmental function.

… [B]ecause the defendant was engaged in a governmental function, the plaintiff was required to demonstrate that the municipality owed him a "special duty" … . A special duty can arise, as relevant here, where "the plaintiff belonged to a class for whose benefit a statute was enacted" or "the government entity voluntarily assumed a duty to the plaintiff beyond what was owed to the public generally" … . Here, the defendant demonstrated, prima facie, that it did not owe a special duty to the plaintiff, and the plaintiff failed to raise a triable issue of fact in opposition … . Neary v Suffolk County Sheriff's Dept., 2025 NY Slip Op 00105, Second Dept 1-8-25

Practice Point: It is not easy to determine whether a governmental entity is engaged in a governmental function or a proprietary function at the time of an alleged negligent act or omission. Here plaintiff alleged abuse by a Sheriff's Department employee in the guarded department parking lot and in a locked bathroom in the jail. The Second Department deemed the security of the parking lot and the jail a governmental function (acting as a landlord) and held the county could not be liable unless it owed plaintiff a 'special duty." Plaintiff was unable to demonstrate a "special duty."

January 8, 2025

DANGEROUS CONDITION, MUNICIPAL LAW, CIVIL PROCEDURE.

THE CITY DEMONSTRATED IT DID NOT HAVE WRITTEN NOTICE OF THE OPEN MANHOLE PLAINTIFF DROVE OVER; PLAINTIFF UNSUCCESSFULLY TRIED TO RAISE, FOR THE FIRST TIME, AN EXCEPTION TO THE WRITTEN NOTICE REQUIREMENT IN RESPONSE TO THE CITY'S MOTION FOR SUMMARY JUDGMENT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the municipality proved it did not have written notice of the road defect and plaintiff's attempt to raise for the first time an exception to the written notice requirement in response to the summary judgment motion was improper:

The plaintiff allegedly was injured when she drove her vehicle over an uncovered manhole … .

"A municipality that has enacted a prior written notification law may avoid liability for a defect or hazardous condition that falls within the scope of the law if it can establish that it has not been notified in writing of the existence of the defect or hazard at a specific location" … . "Such [prior written] notice is obviated where the plaintiff demonstrates that the municipality 'created the defect or hazard through an affirmative act of negligence' or that a 'special use' conferred a benefit on the municipality" … .

Here, the plaintiff did not dispute that the defendants established, prima facie, that they had no prior written notice of the alleged roadway defect. In opposition, the plaintiff instead argued that the special use exception applied. The plaintiff, however, failed to allege that exception in either the notice of claim or the complaint … . Therefore, that new theory of liability was improperly raised in opposition to the defendants' motion for summary judgment dismissing the complaint … . Anderson v City of New York, 2025 NY Slip Op 00414, Second Dept 1-29-25

Practice Point: Here plaintiff raised an exception to the written-notice prerequisite to municipal liability for road defects for the first time in response to the municipality's motion for summary judgment. That is too late. The exception should be raised in the notice of claim and/or the complaint.

January 29, 2025

DANGEROUS CONDITION, WRITTEN NOTICE REQUIREMENT, MUNICIPAL LAW.

THE PRIOR WRITTEN NOTICE RULE RE: MUNICIPAL LIABILITY FOR DANGEROUS CONDITIONS APPLIES TO MORE THAN JUST SURFACE DEFECTS; HERE THE RULE APPLIED TO AN ARCH-SHAPED BOLLARD OR BARRIER WHICH FELL OVER WHEN A CHILD WAS SWINGING FROM IT; TWO-JUSTICE DISSENT (THIRD DEPT).

The Third Department, affirming the dismissal of the complaint, over a two-justice dissent, determined the "written notice" requirement in the City of Ithaca code applied to an arch-shaped bollard or barrier placed to protect a tree from being damaged by cars using a parking lot. As plaintiff's child grabbed onto the bollard

and swung from it, it came loose from the ground and fell over, injuring the child's hand. The city demonstrated it did not have written notice of the condition, which, under the code, is a prerequisite for liability. The dissenters argued a bollard was not in any category which triggers the written-notice requirement:

… [T]he operative query is not whether there is a surface defect affecting safe passage but, more broadly, whether there is a defective condition that would not have come to the municipality's attention unless it was notified of it … . As such, the prior written notice rule has been applied to conditions as varied as a low-hanging tree branch …, a sharp metal beam … and a bent parking meter pole … . Therefore, the prior written notice rule governs.

From the Dissent:

First, in our opinion, the defective bollard that crushed plaintiff's child's hand was not in one of the six locations that General Municipal Law § 50-e authorizes municipalities to cover with a prior written notice law. And second, defendants failed to submit any proof that they installed the bollard properly, in accordance with industry standards. Thus, the burden never shifted to plaintiff, and defendants' summary judgment motion should have been denied regardless of the adequacy of plaintiff's proof. Finally, even if defendants had shifted the burden, we believe that plaintiff submitted proof presenting a question of fact as to whether the bollard was unreasonably dangerous when installed, precluding a grant of summary judgment. Gurbanova v City of Ithaca, 2025 NY Slip Op 00252, Third Dept 1-16-25

Practice Point: The written-notice rule, which requires that a municipality have written notice of a dangerous condition before it can be held liable for injury caused by the condition, applies to more than just surface defects. Here the rule applied to an arch-shaped bollard or barrier which fell over when a child swung on it.

January 16, 2025

DOG BITE, MUNICIPAL LAW, EMPLOYMENT LAW, IMMUNITY.

PLAINTIFF POLICE OFFICER WAS PARTICIPATING IN A TRAINING SESSION WHEN HE WAS BITTEN BY A POLICE DOG; THE TRAINING WAS A GOVERNMENTAL FUNCTION; THEREFORE THE MUNICIPALITY MUST HAVE OWED PLAINTIFF A SPECIAL DUTY TO BE LIABLE, NOT THE CASE HERE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the municipality (City of Middletown) did not owe a special duty to plaintiff police officer, who was bitten by a police dog during training: The dog handler, Officer McDonald (a City of Middletown police officer), and plaintiff were participants in training sessions conducted by the NYS Homeland Security and Emergency Services when the unleased dog bit plaintiff:

As part of the training, the police dogs were off-leash. The plaintiff, who was participating in a different training event in a different building, entered the building where the explosives detection training exercise was being held and was still in progress when he was bitten by Officer McDonald's police dog.

When a negligence cause of action is asserted against a municipality, and the municipality was exercising a governmental function, a municipality may not be held liable unless it owed a special duty to the injured party … . Such a special duty can arise, as relevant here, where "the municipality took positive control of a known and dangerous safety condition" … . Here, the defendants established, prima facie, that they did not owe a special duty to the plaintiff. There was no evidence that Officer McDonald [the dog handler] took positive control of a known and dangerous safety condition which gave rise to the plaintiff's injuries … . The defendants established that Officer McDonald was an attendee at a training program conducted by the New York State Homeland Security and Emergency Services at a New York State facility, that he merely participated in the training exercise, and that he took direction from the NYPD canine instructor. Mahar v McDonald, 2025 NY Slip Op 00315, Second Dept 1-22-25

Practice Point: Here the police dog handler did not have control of the unleashed dog when it bit plaintiff. The dog and the handler were participating in an explosive-detection training session conducted by a third party. Because the dog handler had not taken control of a known and dangerous safety condition (the dog)

at the time plaintiff was injured, the dog handler did not owe plaintiff a special duty, a prerequisite to municipal liability.

January 22, 2025

LABOR LAW-CONSTRUCTION LAW, AGENCY.

THE CONTRACTOR THAT HIRED THE SUBCONTRACTOR FOR WHICH THE INJURED PLAINTIFF WORKED WAS THE CONDOMINIUM DEFENDANTS' STATUTORY AGENT AND THEREFORE CAN BE HELD LIABLE IN THIS LABOR LAW 240(1) ACTION (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined defendant Chelsea, the contractor that hired the subcontractor, Prince, for which the injured plaintiff worked, was the statutory agent of the condominium defendants in this Labor Law 240(1) case. Therefore the action against Chelsea should not have been dismissed:

Supreme Court improperly dismissed Chelsea from this action on the ground that it is not the condo defendants' statutory agent for purposes of Labor Law § 240(1) liability. Chelsea was the only contractor that the condo defendants retained to perform their window-washing project, and Chelsea cannot escape liability under Labor Law § 240(1) because it delegated the work by subcontracting it to Prince, plaintiff's employer … . Chelsea's authority to supervise and control the work is also demonstrated by its subcontracting the work to Prince, and whether Chelsea actually supervised plaintiff's work is irrelevant … . Barreto v Board of Mgrs. of 545 W. 110th St. Condominium, 2025 NY Slip Op 00185, First Dept 1-14-25

Practice Point: Liability under Labor Law 240(1) extends to the statutory agent of the property owner, here the contractor that hired the subcontractor for which the injured plaintiff worked.

January 14, 2025

LABOR LAW-CONSTRUCTION LAW, CIVIL PROCEDURE, EVIDENCE.

PLAINTIFF'S MOTION TO RENEW HIS SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED; NO "NEW FACTS" WERE DEMONSTRATED (THIRD DEPT).

The Third Department, reversing (modifying) Supreme Court in this Labor Law 240(1) action, determined plaintiff's motion to renew his summary judgment motion should not have been granted. Plaintiff was attempting to disassemble a freezer when the freezer roof collapsed and he fell to the floor:

Pursuant to CPLR 2221, a motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination" and "shall contain reasonable justification for the failure to present such facts on the prior motion" … . In his motion for leave to renew and reargue, plaintiff sought to admit a supplemental expert affidavit in which plaintiff's expert sought to clarify that accessing the freezer's ceiling was an essential task of disassembly. Plaintiff averred that this information was not proffered before because he was not on notice that he needed to address the different tasks required for disassembly. However, our review of the original motion papers reveals that, not only did the expert's original affidavit briefly address the need for plaintiff to climb on top of the freezer, but also that [defendant's] affirmations in opposition were sufficient to put plaintiff on notice that the necessity of plaintiff's work on the ceiling would be at issue … . Additionally, as plaintiff had already retained an expert, there was nothing preventing plaintiff from submitting additional evidence in reply to [defendant's] affirmations in opposition, prior to the court's original determination … .Therefore, Supreme Court improperly granted plaintiff's motion to renew, and plaintiff's supplemental expert affidavit should not be considered on summary judgment … . Burgos v Darden Rests., Inc., 2025 NY Slip Op 00009, Third Dept 1-2-25

Practice Point: A motion to renew a summary judgment motion must be based upon new facts which could not have been addressed in the initial motion, not the case here.

January 2, 2025

LABOR LAW-CONSTRUCTION LAW, CONSTITUTIONAL LAW.

PLAINTIFF WAS WORKING ON POWER LINES WHILE SUSPENDED FROM A HELICOPTER WHEN THE HELICOPTER LOST CONTROL AND CRASHED; PLAINTIFF'S LABOR LAW 200, 240 AND 241(6) CAUSES OF ACTION WERE NOT PREEMPTED BY THE FEDERAL AVIATION ACT (FAA) (THIRD DEPT).

The Third Department, in a full-fledged opinion by Justice Egan, over a two-justice dissent, determined the Federal Aviation Act (FAA) did not preempt New York's Labor Law protections for workers. Plaintiff was working on power lines and towers while suspended from a helicopter when the helicopter collided with a structure, lost control and crashed. Plaintiff sued the general contractor for failure to provide adequate safety devices. This lawsuit did not include the helicopter company or seek damages for negligent operation of the helicopter (apparently addressed by other lawsuits against different defendants):

Plaintiff's complaint … asserted claims against defendant as the general contractor on the project alleging that defendant was negligent and violated Labor Law §§ 200, 240 and 241 (6), as well as the Industrial Code (see 12 NYCRR 23-1.7). * * *

… [T]he FAA "contained a saving provision preserving pre-existing statutory and common-law remedies" …, and it continues to authorize "any other remedies provided by law" in addition to the ones created by the FAA … . In other words, the FAA contemplates that state law remedies survive its enactment and may be pursued within its purview, including "state law personal injury suits" … . The question is accordingly not whether the FAA preempts all state law claims that somehow intersect with air safety — its own terms make clear that it does not — but whether the claims arise in the area of air safety and "interfere with federal laws and regulations sufficiently to fall within the scope of the preempted field" … . …

Plaintiff's claims … arise out of the state's police power to regulate occupational health and safety issues, not aviation, and defendant points to "nothing in [the FAA or implementing regulations] indicating that Congress meant to affect state regulation of occupational health and safety, or the types of damages that may be recovered" for a violation of those workplace safety standard … . Scaletta v Michels Power, Inc., 2025 NY Slip Op 00258, Third Dept 1-16-25

Practice Point: Consult this decision for a discussion of field and conflict preemption issues in the context of the Federal Aviation Act and New York's Labor Law protections for workers. Plaintiff was suspended from a helicopter working on power lines when the helicopter lost control and crashed.

January 16, 2025

LABOR LAW-CONSTRUCTION LAW, EVIDENCE.

PLAINTIFF FELL FROM A SCAFFOLD WITHOUT GUARDRAILS; DEFENDANTS' EVIDENCE THAT GUARDRAILS WERE AVAILABLE WAS NOT STRONG ENOUGH TO RAISE A QUESTION OF FACT (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff in this scaffold-fall case was entitled to summary judgment on his Labor Law 240(1) cause of action. Defendants argued that guardrails for the scaffold were available but plaintiff failed to use them. The First Department held that the evidence of the availability of the guardrails was not strong enough to raise a question of fact:

"Liability under section 240(1) does not attach when the safety devices that plaintiff alleges were absent were readily available at the work site, albeit not in the immediate vicinity of the accident" … . Caselaw has not further defined the meaning of "readily available," beyond qualifying that a safety device need not be "in the immediate vicinity." Nonetheless, the seminal Gallagher case itself specifies that the worker should at least "kn[o]w where to find the safety devices" … . Conversely, a defendant may do much to show that safety devices were readily available by showing that the worker knew "exactly where they could be found" … .

While defendants indicated that workers were generally aware that railings were available throughout the site, defendants failed to show that their precise locations were made known to the workers. The affidavits of the three foremen and coworker are conclusory, the record does not specify or even approximate the location of the guardrails, and at oral argument, counsel was unable to specify where these safety devices could be found. Moreover, although the record contains photos of the subject scaffold, there are no photographs of the missing guardrails that might serve as a guide to their possible location. Defendant's proof demonstrated only "[t]he general availability of safety equipment at a work site

[which] does not relieve the defendants of liability" … . Perez v 1334 York, LLC, 2025 NY Slip Op 00066, First Dept 1-7-25

Practice Point: Although a defendant may escape liability in a Labor Law 240(1) action if the plaintiff failed to use available safety equipment, proof of the "general availability" of the safety equipment does not raise a question of fact. The proof of available safety equipment must be specific. Here there was no evidence the defendants even knew where the safety devices were.

January 7, 2025

LABOR LAW-CONSTRUCTION LAW, EVIDENCE.

PLAINTIFF WAS CROUCHING DOWN MARKING THE FLOOR WITH DUCT TAPE WHEN A LADDER FELL OVER AND STRUCK HIM; PLAINTIFF WAS ENTITLED TO SUMMARY JUDGMENT IN THIS LABOR LAW 240(1) ACTION (FIRST DEPT).

The First Department, reversing Supreme Court, determined the defense motion for judgment for summary judgment in this Labor Law 240(1) action should not have been granted and plaintiff's cross-motion for summary judgment should have been granted. Plaintiff was crouching down marking off areas of the floor with duct tape when an ladder fell over and struck him, causing him to lose consciousness:

The elevation differential involved here cannot be described as de minimis … . The evidence also established that the ladder was not adequately secured for the purposes of the undertaking … .

… [P]laintiff established prima facie entitlement to summary judgment through his deposition testimony that he was struck by a ladder that was not properly secured. … [I]t was foreseeable for a ladder resting against a wall to topple over and strike a nearby worker. Nor could a worker knocking over the ladder be considered an intervening superseding cause in this case … . Silva v 770 Broadway Owner LLC, 2025 NY Slip Op 00299, First Dept 1-21-25

Practice Point: Here plaintiff was marking the floor with duct tape when a ladder which had been leaning against a wall fell over and struck him. It was foreseeable

that an unsecured ladder could fall over. If a worker knocked it over, that would be foreseeable as well and would not be a superseding cause.

January 21, 2025

LABOR LAW-CONSTRUCTION LAW, NEGLIGENCE, EVIDENCE.

PLAINTIFF WAS NOT IN AN AREA IN WHICH FALLING OBJECTS COULD BE ANTICIPATED, SO THE LABOR LAW 240(1) AND 241(6) CAUSES OF ACTION SHOULD HAVE BEEN DISMISSED; PLAINTIFF WAS STRUCK BY A BOARD INTENTIONALLY THROWN INTO THE EXCAVATED AREA WHERE HE WAS WORKING; THE LABOR LAW 200 AND NEGLIGENCE CAUSES OF ACTION PROPERLY SURVIVED (THIRD DEPT).

The Third Department, reversing (modifying) Supreme Court, determined plaintiff's Labor Law 240(1) and 241(6) causes of action should have been dismissed. Plaintiff was in an excavated area four or five feet below ground level when a worker at ground level threw a board into the excavated area which struck plaintiff. Apparently throwing boards into the excavated area was part of the work, so the Labor Law 200 and negligent supervision causes of action survived:

Defendant thus demonstrated prima facie entitlement to judgment as a matter of law by showing that plaintiff was not injured by an "object [that] fell, while being hoisted or secured, because of the absence or inadequacy of a safety device of the kind enumerated in the statute" … .T he burden thus shifted to plaintiff to raise a triable issue of fact, which plaintiff failed to do" … , requiring dismissal of the Labor Law § 240 (1) cause of action. * * *

Defendant's proof showed that the dig area was not "normally exposed to falling material or objects" (12 NYCRR 23-1.7 [a] [1]), and, in any event, plaintiff was working only four to five feet below grade. Thus, defendant demonstrated the "overhead protection" regulation was not applicable … . Accordingly, defendant met its preliminary burden to show that plaintiff could not recover under Labor Law § 241 (6) as a matter of law … . Plaintiff's proof does not raise an issue of fact on this point, thus dismissal of the Labor Law § 241 (6) claim should have been granted … . James v Marini Homes, LLC, 2025 NY Slip Op 00132, Second Dept 1-9-25

Practice Point: If the safety precautions related to falling objects are not applicable because the plaintiff was working in an area where falling objects could not be anticipated, then the “falling objects” protections in Labor Law 240(1) and 241(6) will not be triggered.

January 9, 2025

LABOR LAW-CONSTRUCTION LAW.

PLAINTIFF’S WORK, DELIVERING TILES TO THE WORK SITE, WAS COVERED BY LABOR LAW 240(1) AS “NECESSARY AND INCIDENTAL” TO THE PROTECTED CONSTRUCTION-ACTIVITY (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff’s work, delivering tiles to the construction site, was covered by Labor Law 240(1). Therefore plaintiff was entitled to summary judgment for injury suffered after stepping in the two-foot-deep hole near the loading ramp:

Labor Law § 240(1) protects persons engaged “in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure.” The task that a plaintiff is performing at the exact moment of their accident is not dispositive of whether they were engaged in a protected activity for purposes of liability under this statute … . Rather, the inquiry includes whether the plaintiff’s employer was contracted to perform the kind of work enumerated in the statutes … and whether the plaintiff was performing work “necessary and incidental to” a protected activity … . Because plaintiff’s work in delivering and unloading tiles to be used in the activity covered by Labor Law § 240(1) was “necessary and incidental” to the protected activity, he was within the class of workers protected by those statues, notwithstanding that he was not assigned to participate in the installation of the tiles … . Rodriguez v Riverside Ctr. Site 5 Owner LLC, 2025 NY Slip Op 00411, First Dept 1-28-25

Practice Point: Although plaintiff was not involved in installation of the tiles, delivery of the tiles to the work site was a protected activity pursuant to Labor Law 240(1) as “necessary and incidental” to the installation.

January 28, 2025

PUBLIC HEALTH LAW, ASSISTED LIVING FACILITIES, CIVIL PROCEDURE.

THE PUBLIC HEALTH LAW DOES NOT CREATE A PRIVATE RIGHT OF ACTION AGAINST “ASSISTED LIVING” AS OPPOSED TO “RESIDENTIAL HEALTH CARE” FACILITIES; COMPLAINT PROPERLY DISMSSED (THIRD DEPT).

The Third Department, affirming Supreme Court, in a full-fledged opinion by Justice Egan, determined the Public Health Law does not create a right of private action against an “assisted living facility” as opposed to a “residential health care facility.” Here the plaintiff attempted to sue the defendant assisted living facility for alleged deficiencies and the complaint was properly dismissed:

Public Health Law § 2801-d creates a private right of action distinct from traditional claims for medical malpractice and negligence, and it provides, in relevant part, that “[a]ny residential health care facility that deprives any patient of said facility of any right or benefit, as hereinafter defined [in Public Health Law article 28], shall be liable to [the] patient for injuries suffered as a result of said deprivation” (Public Health Law § 2801-d [1] …). A residential health care facility is defined, in turn, as “a nursing home or a facility providing health-related service” (Public Health Law § 2801 [3]; see Public Health Law § 2801 [4] [b]).

An assisted living facility, in contrast, is governed by Public Health Law article 46-B instead of Public Health Law article 28, being defined as a facility that “provides or arranges for housing, on-site monitoring, and personal care services and/or home care services (either directly or indirectly), in a home-like setting to five or more adult residents unrelated to the assisted living provider” (Public Health Law § 4651 [1]). DeRusso v Church Aid of the Prot. Episcopal Church in the Town of Saratoga Springs, Inc., 2025 NY Slip Op 00008, Third Dept 1-2-25

Practice Point: The statutory private right of action created by the Public Health Law for suits against “residential health care facilities” does not apply to “assisted living facilities.”

January 2, 2025

SLIP AND FALL, ARBITRATION, CONTRACT LAW.

THE DEFENDANT HOTEL BOOKING SERVICE, AGODA, COULD NOT BE COMPELLED TO ARBITRATE IN PLAINTIFF'S SLIP AND FALL ACTION AGAINST THE HOTEL; AGODA'S TERMS OF USE LIMITED LIABILITY TO THE BOOKING SERVICES AND EXPRESSLY EXCLUDED LIABILITY FOR PERSONAL INJURY AT THE HOTEL (FIRST DEPT).

The First Department, reversing Supreme Court, determined the defendant hotel booking service, Agoda, could not be compelled to arbitrate in this slip and fall action against the hotel booked through Agoda. The terms of use confined Agoda's potential liability to the booking services and expressly excluded liability for personal injury:

A "party cannot be compelled to submit to arbitration unless the agreement to arbitrate expressly and unequivocally encompasses the subject matter of the particular dispute" … . Where arbitration provisions do not clearly and unequivocally provide that questions about the scope of the arbitration provisions are for the arbitration panel to determine, the threshold question whether the dispute is encompassed within an agreement to arbitrate is for the courts (CPLR 7503[b] …).

The arbitration clause in the terms of use covers "all disputes or claims arising out of or relating to your relationship with Agoda." The terms of use also define Agoda's role as providing a platform for individuals to browse information about accommodations and make reservations at accommodations. Furthermore, the terms of use make clear that "Agoda does not in any way . . . own, manage, operate or control" the accommodations and that Agoda will not be liable in damages for any "(PERSONAL) INJURY . . ., OR OTHER DAMAGES, ATTRIBUTABLE TO THE ACCOMMODATION." Because plaintiff's claim is one to recover damages for a personal injury caused by the resort's negligence, it does not arise from or relate to the relationship between plaintiff and Agoda, which was limited to plaintiff's booking a reservation at the resort, and therefore is not arbitrable … .

As for Agoda's motion to dismiss, the terms of use constitute documentary evidence under CPLR 3211(a)(1), and the limitation of liability clause in the terms of use definitively disposes of plaintiff's claim to recover damages from Agoda for

personal injury caused by the resort's alleged negligence … . McWashington v Hyatt Corp., 2025 NY Slip Op 00050, First Dept 1-7-25

Practice Point: Here the hotel booking service's terms of use expressly excluded liability for plaintiff's personal injury at the hotel. Therefore the booking service could not be compelled to arbitrate in plaintiff's slip and fall case.

January 7, 2025

SLIP AND FALL, EVIDENCE.

EVIDENCE THAT THE AREA BELOW THE STAIRS WHERE PLAINTIFF SLIPPED AND FELL HAD BEEN RECENTLY MOPPED, TOGETHER WITH TESTIMONY THAT THE STAIRS WERE WET, WARRANTED SUMMARY JUDGMENT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the evidence that the stairs had recently been mopped and were wet when plaintiff slipped and fell was sufficient to warrant summary judgment:

… [T]he plaintiffs submitted a transcript of the injured plaintiff's deposition testimony, wherein she noted that after she fell, her pants and the bottom of her shirt became wet. The plaintiffs also submitted a transcript of the deposition testimony of their son, who testified that when he came to the lobby to help his mother, the floor and the stairs were wet and the stairs felt slippery under his feet. That testimony, along with the surveillance video [of the area below the stairs being mopped], established the plaintiffs' entitlement to judgment as a matter of law on the issue of liability against the defendant. In opposition, the defendant failed to raise a triable issue of fact. Tkachuk v D&J Realty of N.Y., LLC, 2025 NY Slip Op 00472, Second Dept 1-29-25

Practice Point: Video evidence showing the area below the stairs being mopped, together with testimony the stairs were wet, warranted the award of summary judgment to the plaintiffs.

January 29, 2025

SLIP AND FALL, BLACK ICE, EVIDENCE.

THE FACT THAT PLAINTIFF SLIPPED AND FELL ON “BLACK ICE” DOES NOT SUPPORT THE CONCLUSION THE ICE WAS NOT VISIBLE; THIS SLIP AND FALL COMPLAINT SHOULD NOT HAVE BEEN DISMISSED ON THE GROUND DEFENDANT DID NOT HAVE CONSTRUCTIVE NOTICE OF THE CONDITION (FOURTH DEPT).

The Fourth Department, reversing Supreme Court in this slip and fall case, determined there was a question of fact whether the “black ice” in the parking lot was visible such that defendant had constructive notice of its presence:

“To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit [a] defendant’s employees to discover and remedy it” … . In moving for summary judgment, defendants argued, and the court agreed, that they did not have constructive notice inasmuch as plaintiff slipped on black ice and thus the icy condition was not visible and apparent. Although plaintiff allegedly slipped on black ice, “that fact alone does not establish as a matter of law that the ice was not visible and apparent” … . Moreover, the fact that plaintiff did not see the ice before she fell is not dispositive of whether the condition was visible and apparent … . Here, defendants submitted excerpts from plaintiff’s deposition where she described the ice, as she observed it after she fell, as “[a] wide circle” and “a big patch” that “was the same color as the ground” and not shiny. We conclude that defendants failed to meet their initial burden of establishing as a matter of law that the icy condition was not visible and apparent … . Doyle v Tops Mkts., LLC, 2025 NY Slip Op 00577, Fourth Dept 1-31-25

Practice Point: Black ice is not invisible as a matter of law.

January 31, 2025

SLIP AND FALL, MUNICIPAL LAW.

ALTHOUGH THE ABUTTING PROPERTY OWNER CAN BE LIABLE FOR A SLIP AND FALL CAUSED BY A SIDEWALK DEFECT CREATED BY THE PROPERTY OWNER'S SPECIAL USE, HERE A CURB CUT FOR A DRIVEWAY, A SUBSEQUENT PURCHASER OF THE PROPERTY WHO DOES NOT CONTINUE THE SPECIAL USE WILL NOT BE HELD LIABLE FOR THE DEFECT (SECOND DEPT).

The Second Department, reversing Supreme Court in this slip and fall case, determined defendant property owner was not liable for any sidewalk defects created by the prior owner's special use (a driveway) because defendant did not continue with that special use:

… [T]he defendants established, prima facie, that the property was a one-family residence that was owner occupied, and used exclusively for residential purposes. Therefore, pursuant to section 7-210(b) of the Administrative Code of the City of New York, the defendants established, prima facie, that they were not liable for dangerous conditions on the sidewalk abutting the property, which they did not affirmatively create, voluntarily but negligently repair, or create through a special use of the sidewalk … . The defendants also met their burden of demonstrating, prima facie, that they did not affirmatively create, voluntarily but negligently repair, or create through a special use of the sidewalk, the alleged hole in curb cut which caused the plaintiff to fall.

In opposition, the plaintiff failed to raise a triable issue of fact. Even assuming, arguendo, that the plaintiff provided competent evidence that a prior owner of the property made a special use of the sidewalk as a driveway, the defendants had no obligation to repair damage to the sidewalk because they did not continue to derive any special benefit from the use of the sidewalk after they purchased the property … . Byrams v Hamilton, 2025 NY Slip Op 00419, Second Dept 1-29-25

Practice Point: In order for a property owner to be liable for a sidewalk defect created by a prior owner's special use, the current owner must have continued that special use, not the case here.

January 29, 2025

Table of Contents

SLIP AND FALL, MUNICIPAL LAW, ADMINISTRATIVE LAW.

THE TREE WELL IN THE SIDEWALK WHERE PLAINTIFF TRIPPED AND FELL WAS THE RESPONSIBILTY OF THE CITY, NOT DEFENDANT ABUTTING PROPERTY OWNER (FIRST DEPT).

The First Department, reversing Supreme Court in this slip and fall case, determined that maintenance of the tree well within the sidewalk where plaintiff fell was the responsibility of the city, not the defendant property owner:

Defendant established its prima facie entitlement to summary judgment by submitting plaintiff's pleadings and deposition testimony, along with photographic evidence showing the area where the sidewalk connects to the tree well and marked by plaintiff at her deposition to show where she fell. This evidence, taken together, establishes that plaintiff fell when she stepped into and out of the perimeter of the tree well, not when she stepped on an uneven sidewalk slab or other sidewalk defect … . The perimeter of the tree well is not part of the sidewalk whose maintenance is the responsibility of the abutting property owner under Administrative Code of City of NY § 7-210 … . Rather, the perimeter of the tree well is part of the tree well itself, which the City, not the property owner responsible for the sidewalk, has the obligation to maintain in a safe condition … .

Defendant also submitted an affidavit and deposition testimony from one of its owners, stating that the tree wells near the property were installed by the City and that neither defendant nor any building tenant constructed the tree well, maintained it, repaired it, or put it to special use. This evidence was sufficient to show that defendant did not affirmatively create the dangerous condition, negligently make repairs to the area, or cause the dangerous condition to occur through a special use of the area. Thus, there was no basis to impose liability on the defendant … . Cabral v Triangle, LLC, 2025 NY Slip Op 00187, First Dept 1-14-25

Practice Point: In NYC tree wells, as opposed to the surrounding sidewalks, are the responsibility of the city, not the abutting property owner. Here plaintiff tripped and fell stepping into a tree well. Defendant abutting property owner was off-the-hook.

January 14, 2025

SLIP AND FALL, STORM IN PROGRESS. MUNICIPAL LAW.

THE COMPLAINT ALLEGED THE FAILURE TO CLEAR ICE AND SNOW AND CERTAIN BUILDING CODE VIOLATIONS CAUSED HER SLIP AND FALL; THE "STORM IN PROGRESS" RULE ONLY NEGATED THE CAUSE OF ACTION BASED UPON THE FAILURE TO CLEAR THE ICE AND SNOW; THE DEFENDANTS DID NOT DEMONSTRATE THE BUILDING CODE VIOLATIONS WERE INAPPLICABLE; DEFENDANTS' SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined that, although the "storm in progress" applied to this slip and fall because it was snowing at the time, summary judgment should not have been awarded to defendants. In addition to alleging the negligent failure to clear ice and snow, the complaint alleged the ramp where plaintiff fell violated certain provision of the NYC Building Code. The defendants did not demonstrate the code did not apply. Because there can be more than one proximate cause the defendants were not entitled to summary judgment:

… "[T]here can be more than one proximate cause of an accident, and generally, it is for the trier of fact to determine the issue of proximate cause" … . Although there is no disagreement that the snow and ice from the storm was a proximate cause of the plaintiff's fall, Avenue L and the Sesame defendants each failed to establish, prima facie, that the provisions of the 1968, 2008, and 2014 New York City Building Codes relied upon by the plaintiff were inapplicable and that an alleged violation of those provisions did not proximately cause the plaintiff to fall … . Wechsler v Ave. L., LLC, 2025 NY Slip Op 00347, Second Dept 1-22-25

Practice Point: Here plaintiff conceded it was snowing when she slipped and fell, triggering the "storm in progress" rule which let defendants off the hook for any failure to clear ice and snow. But the plaintiff also alleged certain building code violations caused her fall. The defendants did not demonstrate the code was inapplicable so they were not entitled to summary judgment. There can be more than one proximate cause of a slip and fall.

January 22, 2025

TRAFFIC ACCIDENTS, INSURANCE LAW, POLICE OFFICERS, MUNICIPAL LAW.

DESPITE THE COURT OF APPEALS RULING THAT THE INSURANCE LAW PROVISION REQUIRING UNINSURED MOTORIST COVERAGE DOES NOT APPLY TO POLICE VEHICLES, PLAINTIFF POLICE OFFICER, INJURED IN AN ACCIDENT WITH AN UNINSURED MOTORIST WHILE DRIVING HIS POLICE VEHICLE, WAS ENTITLED TO UNINSURED MOTORIST COVERAGE UNDER HIS OWN PERSONAL INSURANCE POLICY (SECOND DEPT).

The Second Department, reversing Supreme Court, in a full-fledged opinion by Justice Dowling, determined that a police officer driving a police vehicle involved in an accident with an uninsured driver can seek uninsured motorist (UM/SUM) coverage under the officer's personal insurance policy, notwithstanding the Court of Appeals ruling that "Insurance Law § 3420(f)—providing that all 'motor vehicle' insurance policies must contain uninsured motorist coverage— has no application to police vehicles" … :

In Matter of State Farm Mut. Auto. Ins. Co. v Fitzgerald (25 NY3d 799), the Court of Appeals held that "a police vehicle is not a 'motor vehicle' covered by a [supplementary uninsured/underinsured (hereinafter SUM) motorist] endorsement under Insurance Law § 3420(f)(2)(A)" (id. at 801). This appeal requires us to address, for the first time, whether Fitzgerald and Insurance Law § 3420(f)(2)(A) preclude the principal named insured under an automobile insurance liability policy that includes a SUM endorsement from receiving SUM coverage where he or she is injured in an automobile accident with an uninsured motor vehicle while occupying a police vehicle. We conclude that the named insured is not precluded from receiving SUM coverage under those circumstances, and reverse the order appealed from. * * *

… [T]he exclusion of police vehicles from the definition of "motor vehicle" under Insurance Law § 3240(f)(1) and (2) is not determinative of this particular proceeding. Matter of Esurance Ins. Co. v Burdeynyy, 2025 NY Slip Op 00445, Second Dept 1-29-25

Practice Point: Here a police officer driving his police vehicle was involved in an accident with an uninsured motorist. Although insurers of police vehicles are not required to include uninsured motorist coverage, that did not preclude the officer from uninsured motorist coverage under his own personal policy.

January 29, 2025

TRAFFIC ACCIDENTS, MUNICIPAL LAW, IMMUNITY.

A POLICE OFFICER DIRECTING TRAFFIC IS PERFORMING A GOVERNMENTAL FUNCTION REQUIRING THE EXERCISE OF DISCRETION; THE OFFICER AND THE CITY ARE THEREFORE IMMUNE FROM LIABLITY FOR A RELATED ACCIDENT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the city defendants and defendant police officer (McMillan) were entitled to summary judgment in this traffic accident case. It was alleged that McMillan negligently directed the vehicle which struck plaintiff to enter the intersection. Because directing traffic is a governmental function requiring the exercise of discretion, the governmental function immunity doctrine controls:

… [T]he City defendants and McMillan established their prima facie entitlement to judgment as a matter of law dismissing the negligence cause of action insofar as asserted against them irrespective of the conflicting evidence as to whether McMillan directed the driver of the vehicle into the intersection. Under the facts as alleged, if McMillan directed the driver of the vehicle into the intersection, McMillan's action was discretionary and he and the City defendants are thus immune from liability under governmental function immunity … . If, on the other hand, McMillan was standing on the side of the road not directing any traffic, there was no negligent act and no basis for liability for him or the City defendants … . In opposition, the plaintiff failed to raise a triable issue of fact. Hershkovitz v Brown, 2025 NY Slip Op 00436, Second Dept 1-29-25

Practice Point: A police officer directing traffic is performing a governmental function requiring the exercise of discretion. The officer and the city are therefore immune from liability for a related traffic accident.

January 29, 2025

TRAFFIC ACCIDENTS, VEHICLE AND TRAFFIC LAW, EVIDENCE.

PLAINTIFF VIOLATED THE VEHICLE AND TRAFFIC LAW BY MAKING A LEFT TURN DIRECTLY INTO DEFENDANT'S PATH OF TRAVEL WHEN DEFENDANT HAD A GREEN LIGHT; PLAINTIFF'S TESTIMONY THAT DEFENDANT WAS SPEEDING WAS NOT ENOUGH TO RAISE A QUESTION OF FACT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant driver was entitled to summary judgment in this intersection traffic accident case. Defendant had the right-of-way (green light) when plaintiff made a left turn directly into defendant's path of travel. Plaintiff's testimony that defendant was speeding was not enough to raise a question of fact:

"A violation of a standard of care imposed by the Vehicle and Traffic Law constitutes negligence per se" … . "Vehicle and Traffic Law § 1141 provides that the driver of a vehicle intending to turn to the left within an intersection . . . shall yield the right of way to any vehicle approaching from the opposite direction which is within the intersection or so close as to constitute an immediate hazard. Further, Vehicle and Traffic Law § 1163(a) provides that no person shall turn a vehicle at an intersection . . . until such movement can be made with reasonable safety" … . "Although a driver with the right-of-way is entitled to anticipate that the other driver will obey the traffic laws requiring him or her to yield, a driver is bound to see what is there to be seen through the proper use of his or her senses and is negligent for failure to do so" … . However, "a driver with the right-of-way who has only seconds to react to a vehicle which has failed to yield is not comparatively negligent for failing to avoid the collision" … . * * *

… [P]laintiff's contention that the defendant was operating his vehicle at an excessive speed "is speculative and unsupported by any competent evidence" … . The defendant testified at his deposition that he was driving below the speed limit, and the plaintiff admitted during her deposition that she did not see the defendant's vehicle prior to the collision … . Although evidence regarding the force of a collision or the manner in which a vehicle moved as a result thereof may be sufficient to create an inference that a driver was speeding in some circumstances … , the plaintiff's deposition testimony was not sufficient to create such an inference … . Further, the plaintiff's "contention[ ] that [the defendant] could have

avoided the accident . . . w[as] speculative and unsupported by the record … . Morante v Blaney, 2025 NY Slip Op 00086, Second Dept 1-8-25

Practice Point: Although proof that defendant driver with the right-of-way was speeding when the plaintiff driver violated the Vehicle and Traffic Law by making a left turn may raise a question of fact, here plaintiff driver's testimony standing alone, claiming defendant was speeding, was not enough to raise a question of fact.

January 8, 2025

WORKERS' COMPENSATION, EVIDENCE.

DETERMINING SCHEDULE LOSS OF USE BY COMPARING THE RANGE OF MOTION OF LIMBS ON THE INJURED SIDE TO THE RANGE OF MOTION OF CORRESPONDING LIMBS ON THE OTHER SIDE MAY NOT BE APPROPRIATE IF THE OTHER SIDE HAS ALSO SUFFERED INJURIES, WHETHER PERMANENT OR TEMPORARY, IN THE PAST (THIRD DEPT).

The Third Department, reversing the Workers' Compensation Board, determined comparison of the ranges of motion of the injured limbs to the corresponding limbs on the other side of the body (contralateral members), which resulted in 0 % loss of schedule use (SLU), was a flawed approach. The Board concluded that such a comparison was not appropriate only if the injuries on the other side of the body are permanent, which was not demonstrated to be the case here. The Third Department disagreed and held that the comparison may also be inappropriate if the prior injuries on the other side of the body were temporary, The matter was remitted:

… [W]e agree that evidence of a permanent physical or functional impairment of the contralateral member due to traumatic injury or other condition that does not affect the subject member would render a comparison to the contralateral member when determining range of motion inappropriate. However, comparing contralateral members that have temporary physical or functional impairments, either due to work-related or nonwork-related injuries, would also be inappropriate as such comparisons could equally result in inequitable range of motion findings. In our view, the Board's interpretation of section 1.3 (3) (b) of the guidelines to apply only to permanent physical or functional impairments is unreasonable and cannot be upheld … . Here, the Board rejected [the] findings that a comparison of

the contralateral members was inappropriate due to a lack of evidence that the injuries that claimant suffered to those members in the 2014 work-related accident resulted in permanent impairments. Under these circumstances, we remit the matter to the Board so that a proper assessment regarding a comparison of contralateral members may occur … . Matter of Brooks v New York City Tr. Auth., 2025 NY Slip Op 00130, Third Dept 1-9-25

Practice Point: Consult this decision for insight into the problems raised by determining a loss of schedule use by comparing ranges of motion on both sides of the body. Comparison of the injured side to the other side may not be appropriate if the other side has been injured in the past.

January 9, 2025

WORKERS' COMPENSATION, NEGLIGENCE, CIVIL PROCEDURE.

THE JUSTICE FOR INJURED WORKERS ACT (JIWA), WHICH TOOK EFFECT DECEMBER 30, 2022, AMENDED THE WORKERS' COMPENSATION LAW SUCH THAT A WORKERS' COMPENSATION BOARD RULING CANNOT BE GIVEN COLLATERAL ESTOPPEL EFFECT IN A SUBSEQUENT PERSONAL INJURY ACTION; THE FIRST DEPARTMENT HELD THE JIWA APPLIES RETROACTIVELY (FIRST DEPT).

The First Department, reversing Supreme Court, in a full-fledged opinion by Justice Moulton, determined the amendment to the Workers' Compensation Law (the Justice for Injured Workers Act [JIWA]), which precludes giving a Workers' Compensation Board's ruling collateral estoppel effect in a subsequent personal injury action, applies retroactively. Therefore the defendants' motion for leave to amend their answer to add the collateral estoppel defense should have been denied:

Plaintiff alleges that he sustained neck and back injuries in a construction site accident that occurred on August 6, 2020. He commenced this action on September 28, 2020, and separately applied for workers' compensation benefits. In a decision filed October 19, 2021, a three-judge panel of the Workers' Compensation Board held that plaintiff's claimed injuries were not causally related to his accident. … [D]efendants moved, in effect, for summary judgment dismissing plaintiff's neck

and back claims, based on the Workers' Compensation Board's decision to which, they argued, the court should give collateral estoppel effect. * * *

JIWA's legislative sponsor explained that its purpose was to correct what the Legislature perceived to be an injustice to injured workers caused by Second Department precedent (see Langdon v WEN Mgt. Co. (147 AD2d 450 [2d Dept 1989]) and left unresolved by the Court of Appeals' decision in Auqui v Seven Thirty One Ltd. Partnership (22 NY3d 246 [2013]) … . Thus, JIWA was intended to return to what the Legislature perceived to have been the rule "for almost 80 years" — namely that courts, in third-party actions, would "reject[ ] attempts by defendants to apply collateral estoppel" to decisions reached in the "swift[ ]" and "cursory" workers' compensation context — and that workers would not be prevented "from exercising their constitutional right to a jury trial" … . Accordingly, the Legislature clearly intended JIWA to be remedial in nature, to correct an unintended judicial interpretation, and to reaffirm what the Legislature believed the law should be. Garcia v Monadnock Constr., Inc., 2025 NY Slip Op 00154, First Dept 1-9-25

Practice Point: The December 30, 2022, amendment to the Workers' Compensation Law which precludes giving Workers' Compensation Board rulings collateral estoppel effect in subsequent personal injury actions applies retroactively.

January 9, 2025

WORKERS' COMPENSATION, EXCLUSIVE REMEDY, NEGLIGENCE, ADMINISTRATIVE LAW, CIVIL PROCEDURE.

HERE THE ADMINISTRATOR OF PLAINTIFF'S DECEDENT'S ESTATE BROUGHT A WRONGFUL DEATH ACTION IN SUPREME COURT AND DEFENDANTS MOVED FOR SUMMARY JUDGMENT ARGUING PLANTIFF'S EXCLUSIVE REMEDY WAS WORKERS' COMPENSATION; RATHER THAN DECIDE THE MOTION, SUPREME COURT SHOULD HAVE REFERRED THE MATTER TO THE WORKERS' COMPENSATION BOARD WHICH HAS PRIMARY JURISDICTION RE: THE APPLICABILITY OF THE WORKERS' COMPENSATION LAW (SECOND DEPT).

The Second Department reversed Supreme Court's denial of defendants' summary judgment motion in this wrongful death action and referred the matter to the Workers' Compensation Board. Whether, as defendants argued in their motion, plaintiff's decedent's exclusive remedy is Workers' Compensation must be determined by the Workers' Compensation Board before a court can consider the issue:

"The Workers' Compensation Law 'is designed to insure that an employee injured in course of employment will be made whole and to protect a coemployee who, acting within the scope of his [or her] employment caused the injury'" … . "[P]rimary jurisdiction" for determinations as to the applicability of the Workers' Compensation Law has been vested in the Workers' Compensation Board (hereinafter the Board) … , and it is therefore inappropriate for the courts to express views with respect thereto in the absence of a determination by the Board … . "Where the issue of the applicability of the Workers' Compensation Law is in dispute, and a plaintiff fails to litigate that issue before the Board, a court should not express an opinion as to the availability of compensation, but should refer the matter to the Board because the Board's disposition of the plaintiff's compensation claim is a jurisdictional predicate to the civil action … . Guang Qi Lin v Xiaoping Lu, 2025 NY Slip Op 00309, Second Dept 1-22-25

Practice Point: Here in this wrongful death action defendants argued plaintiff's exclusive remedy was Workers' Compensation. Because that issue had not been determined by the Workers' Compensation Board, Supreme Court could not rule

on it and should have referred the matter to the Board which has primary jurisdiction on the applicability of the Workers' Compensation Law.

January 22, 2025

Copyright 2025 New York Appellate Digest, Inc.