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The Second Department, reversing Supreme Court in this Child Victims Act case against a school (Central Yeshiva), determined the complaint did not state causes of action for negligence or negligent retention of the teacher (Charitonov) who

allegedly sexually abused the plaintiff. Bare allegations that the school knew or should have known of the teacher's propensity for abuse are not enough to avoid dismissal:

Here, the complaint failed to state causes of action alleging negligence and negligent retention, supervision, and direction against Central Yeshiva, as the complaint did not sufficiently plead that Central Yeshiva knew or should have known of Charitonov's propensity to commit the alleged wrongful acts and failed to provide any factual allegations from which it could be inferred that Central Yeshiva had prior notice of similar conduct at its dormitory … . The complaint merely asserted bare legal conclusions that Central Yeshiva knew or should have known of Charitonov's propensity for improper conduct without providing any factual allegations that Charitonov's abuse of the plaintiff was foreseeable … . Moreover, the plaintiff failed to adequately demonstrate any basis to allow him to conduct discovery prior to directing dismissal of those causes of action (see CPLR 3211[d] …). Doe v Educational Inst. Oholei Torah, 2025 NY Slip Op 00948, Second Dept 2-19-25

Practice Point: In a Child Victims Act case against a school stemming from the abuse of a child by a teacher, bare allegations that the school knew or should have known of the teacher's propensity for abuse do not state a cause of action for negligence or negligent retention. The complaint must include supporting factual allegations.

February 19, 2025

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

IT WAS ALLEGED A TEACHER SEXUALLY ABUSED PLAINTIFF STUDENT ONCE OR TWICE A WEEK FOR THREE YEARS ON SCHOOL GROUNDS, SOMETIMES FOLLOWED BY ABUSE OFF SCHOOL GROUNDS; THE NEGLIGENT SUPERVISION CAUSES OF ACTION SHOULD NOT HAVE BEEN DISMISSED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the school's motion for summary judgment in this Child Victims Act case should not have been granted. It was alleged plaintiff-student was sexually abused by a teacher once or twice a week for three years. Based on the frequency of the alleged abuse, the

school did not demonstrate it did not have constructive notice of the abuse and properly supervised the teacher. Because abuse which allegedly occurred off the school premises was preceded by abuse on school grounds, the off-premises-abuse causes of action should not have been dismissed:

… [T]he defendants failed to establish, prima facie, that they lacked constructive notice of the teacher's alleged abusive propensities and conduct … . In particular, given the frequency of the alleged abuse, which occurred once or twice per week over the course of three school years in the same closet while the teacher left the other students in his class unattended, the defendants failed to eliminate triable issues of fact as to whether they should have known of the abuse … . Additionally, the defendants failed to eliminate triable issues of fact as to whether their supervision of the teacher was negligent … .

Further, although the plaintiff alleged acts of sexual abuse that occurred outside of school premises and school hours, the defendants' submissions showed that those alleged acts were preceded by instances when the plaintiff allegedly was sexually abused by the teacher during school hours on a regular basis. Sallustio v Southern Westchester Bd. of Coop. Educ. Servs., 2025 NY Slip Op 00690, Second Dept 2-5-25

Practice Point: Consult this decision for a concise summary of the elements of the causes of action where a teacher is accused of frequently sexually abusing a student both on and off school grounds.

February 5, 2025

CHILD VICTIMS ACT, SIX-MONTHS WAITING PERIOD, EDUCATION-SCHOOL LAW.

THE SIX-MONTH WAITING PERIOD ASSOCIATED WITH THE REVIVAL OF OTHERWISE TIME-BARRED ACTIONS PURSUANT TO THE CHILD VICTIMS ACT IS NEITHER A STATUTE OF LIMITATIONS NOR A CONDITION PRECEDENT; THEREFORE, PURSUANT TO FEDERAL PROCEDURAL LAW, THE SECOND CIRCUIT MAY RULE THAT DEFENDANT FORFEITED THE RIGHT TO A TIMELINESS DISMISSAL OF THE FEDERAL COMPLAINT (BASED ON THE ARGUMENT PLAINTIFF'S ACTION WAS PREMATURE) BY FAILING TO TIMELY RAISE THE ISSUE (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Troutman, answering a certified question from the Second Circuit, determined the six-month waiting period associated with the revival of negligence actions pursuant to the Child Victims Act, creating a two-year window for the filing of otherwise time-barred actions, was neither a statute of limitations nor a condition precedent. Therefore, under federal procedural law, the defendant's failure to timely raise the issue in the federal proceedings forfeited his right to dismissal of the complaint on the ground plaintiff's action was premature:

In 2019, the legislature passed the Child Victims Act (CVA), which provided that previously time-barred tort claims based on sex offenses against children could be brought within a specified time (see CPLR 214-g). As amended, the CVA provided that such a claim "is hereby revived, and action thereon may be commenced not earlier than six months after, and not later than two years and six months after" February 14, 2019—i.e., "the effective date of this section" (id.). In other words, actions on these claims could be commenced "not earlier than" August 14, 2019 and "not later than" August 14, 2021. * * *

On April 26, 2019, plaintiff commenced a negligence action in state court against defendant, alleging that a teacher employed in one of defendant's schools engaged in unlawful sexual conduct with her in and around 2009 and 2010, when she was a student under age 17, and that, in 2013, as a result of that conduct, the teacher pleaded guilty to rape in the third degree. * * *

On September 3, 2021, defendant moved for summary judgment dismissing the complaint on statute of limitations grounds. Defendant argued, for the first time, that the complaint must be dismissed because plaintiff commenced her action before CPLR 214-g's period for filing claims began. Significantly, defendant filed its motion less than three weeks after the statutory period for filing claims ended, meaning that plaintiff would be unable to recommence a timely action if defendant's motion succeeded. Jones v Cattaraugus-Little Val. Cent. Sch. Dist., 2025 NY Slip Op 01007, CtApp 2-20-25

Practice Point: Here the Court of Appeals, answering the Second Circuit's question, determined the six-month waiting period for an otherwise time-barred action brought pursuant to the Child Victims Act was not a statute of limitations or a condition precedent. Therefore the Second Circuit was free to deny a federal defendant's motion to dismiss the Child Victims Act complaint on the ground the action was premature.

February 20, 2025

MEDICAL MALPRACTICE, CIVIL PROCEDURE, ACTION BROUGHT IN WRONG FORM.

ALTHOUGH THIS MEDICAL MALPRACTICE ACTION WAS IMPROPERLY BROUGHT AS AN ORDER TO SHOW CAUSE AND PETITION, IT SHOULD NOT HAVE BEEN DISMISSED; RATHER IT SHOULD HAVE BEEN CONVERTED BY DEEMING THE ORDER TO SHOW CAUSE A SUMMONS AND THE PETITION A COMPLAINT; MATTER REMITTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that the action should not have been dismissed because it was in the form of a proceeding rather than an action. Supreme Court should have converted the proceeding into the proper form:

The petitioner commenced this purported proceeding by the filing of an order to show cause and a petition, inter alia, for injunctive relief and to recover damages for medical malpractice. In opposition to the order to show cause and the petition, the respondent submitted an affirmation of counsel, in which counsel argued,

among other things, that the proceeding should be dismissed because it was not brought in the proper form. The Supreme Court conducted a hearing on the petition. Thereafter, the court issued a judgment, in effect, denying the petition and dismissing the proceeding. The petitioner appeals.

Although this matter was improperly commenced in the form of a proceeding instead of an action, dismissal is not required. "Pursuant to CPLR 103(c), a proceeding should not be dismissed 'solely because it is not brought in the proper form,' and the court has the power to convert a proceeding into the proper form" … . Accordingly, we convert this proceeding into an action, inter alia, for injunctive relief and to recover damages for medical malpractice, with the order to show cause deemed to be the summons and the petition deemed to be the complaint (see CPLR 103[c] …), and remit the matter to the Supreme Court, Nassau County, to afford the respondent an opportunity to serve and file an answer within 20 days of service upon it of this decision and order with notice of entry … . Matter of Robinson v NYU Langone Hosps., 2025 NY Slip Op 00870, Second Dept 2-13-25

Practice Point: A proceeding brought in the wrong form can be converted to the proper form by the court pursuant to CPLR 103 (c).

February 13, 2025

MUNICIPAL LAW, NEGLIGENT PLACEMENT IN FOSTER CARE, SPECIAL DUTY.

A MUNICIPALITY OWES A CHILD IT PLACES IN FOSTER CARE A SPECIAL DUTY SUCH THAT THE MUNICIPALITY CAN BE LIABLE FOR A NEGLIGENT PLACEMENT WHICH LEADS TO FORESEEABLE HARM TO THE CHILD (CT APP).

The Court of Appeals, reversing the Appellate Division, in a full-fledged opinion by Judge Troutman, over a two-judge dissenting opinion, determined a municipality owes a child placed in foster care a special duty, such that the municipality, although performing a governmental function, can be liable for negligent placement of a child:

Today we hold that municipalities owe a duty of care to the children the municipalities place in foster homes because the municipalities have assumed custody of those children. As a result, we reverse the decision of the Appellate Division.

Plaintiff, formerly a child in foster care, commenced this action pursuant to the Child Victims Act (see CPLR 214-g) against defendant Cayuga County and "Does 1-10," who she alleged were "persons or entities with responsibilities for [p]laintiff's safety, supervision and/or placement in foster care." According to the complaint, the County placed plaintiff in foster care in 1974, when she was three months old. While in the foster home selected by the County, plaintiff allegedly suffered horrific abuse. Plaintiff alleged that her foster parent sexually abused her over the course of approximately seven years, beginning when she was 18 months old and continuing until she was eight years old. The foster parent allegedly coerced plaintiff's compliance with the sexual abuse by inflicting severe physical abuse, resulting in plaintiff sustaining broken bones and a head wound. * * *

By assuming legal custody over the foster child, the applicable government official steps in as the sole legal authority responsible for determining who has daily control over the child's life … . We thus hold that a municipality owes a duty to a foster child over whom it has assumed legal custody to guard the child from "foreseeable risks of harm" arising from the child's placement with the municipality's choice of foster parent … . Weisbrod-Moore v Cayuga County, 2025 NY Slip Op 00903, CtApp 2-18-25

Practice Point: A municipality generally is not liable for injury resulting from the exercise of a governmental function absent a special duty owed to the injured party. Resolving a split of authority, here the Court of Appeals held a municipality owes a special duty to a child it places in foster care.

February 18, 2025

PRODUCTS LIABILITY, MEDICAL MALPRACTICE, NO FAILURE-TO-WARN CAUSE OF ACTION.

THE USE OF ICE PACKS WAS NOT PART OF THE DEFENDANT MANUFACTURER'S BURN-TREATMENT SYSTEM; THEREFORE THE DEFENDANT COULD NOT BE HELD LIABLE BY THE INJURED PLAINTIFF FOR THE FAILURE TO WARN AGAINST APPLYING ICE PACKS TO BARE SKIN (FIRST DEPT).

The First Department, reversing Supreme Court, determined defendant Zeltiq, the manufacturer of a system for treating burns (CoolSculpting Systems), could not be held liable for injury allegedly caused by the application of ice packs after the CoolSculpting treatment. The complaint alleged a failure to warn of the the danger of using ice packs. The use of ice packs was not part of the CoolSculpting treatment:

Zeltiq also had no duty to warn plaintiffs of any risks associated with using ice packs after treatment with the CoolSculpting System. Because the CoolSculpting System is a FDA Class II medical device that requires a prescription, Zeltiq's duty to warn runs to physicians, not directly to patients … . Thus, in this case, Zeltiq's duty ran to Silverstein's [plaintiff's] treating physician, Dr. Brauer. However, there is no duty to warn of risks that are obvious, including risks that are well-known to physicians because of their medical training … . Dr. Brauer testified that through his education and training, he was aware of and knew of the dangers of placing ice on bare skin, and that those dangers were basic medical knowledge … . Plaintiffs' expert does not dispute that these dangers are basic knowledge in the medical community and, in fact, opines that it is a deviation from the standard of care to place ice packs on bare skin.

In addition, given Dr. Brauer's awareness of the risk, his status as a "responsible intermediary" breaks the chain of proximate cause between any failure to warn by Zeltiq and the harm to Silverstein … . Silverstein v Coolsculpting Zeltiq Aesthetics, Inc., 2025 NY Slip Op 01183, First Dept 2-27-25

Practice Point: Here the application of ice packs to bare skin was not part of the defendant manufacturer's burn-treatment system. The use of the burn-treatment system is by prescription only, so the duty to warn owed by the manufacturer runs to the physician, not the patient. Here the dangers of applying ice packs to bare

skin are well known to physicians, so the use of ice packs by plaintiff's physician broke the chain of proximate cause re: the defendant manufacturer.

February 27, 2025

SLIP AND FALL, CONSTRUCTIVE NOTICE, EVIDENCE.

DEFENDANT PROPERTY OWNER DID NOT DEMONSTRATE A LACK OF CONSTRUCTIVE NOTICE OF A PROTRUDING NAIL IN A BASEMENT STAIRWAY WHICH ALLEGEDLY CAUSED PLAINTIFF'S SLIP AND FALL; DEFENDANT DID NOT PRESENT EVIDENCE DEMONSTRATING WHEN THE STAIRWAY WAS LAST CLEANED OR INSPECTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant property owner did not demonstrate a lack of constructive notice of a protruding nail in a basement stairway which allegedly caused plaintiff to slip and fall. The defendant did not present any evidence demonstrating when the stairway was last inspected or cleaned:

… [T]he defendants failed to establish, prima facie, that 234-236 Elmendorf Street, LLC [the property owner], lacked constructive notice of the protruding nail condition alleged by the plaintiff … . Although the defendants submitted a transcript of the plaintiff's deposition testimony wherein she averred that she did not notice the protruding nail when she last used the staircase approximately one week prior to her accident, the defendants did not establish that the condition did not exist for a sufficient length of time prior to the alleged accident in order for it to be remedied … . Moreover, the defendants failed to submit sufficient evidence as to when 234-236 Elmendorf Street, LLC, had last cleaned or inspected the staircase at issue … . Jones v 234-236 Elmendorf St., LLC, 2025 NY Slip Op 01083, Second Dept 2-27-25

Practice Point: Here the plaintiff's deposition testimony that she did not notice the protruding nail the week before her fall was not sufficient to demonstrate defendant property owner did not have constructive knowledge of the protruding nail. No evidence of when the stairway was last cleaned or inspected was presented.

February 27, 2025

SLIP AND FALL, OPEN AND OBVIOUS, TRIVIAL DEFECTS, EVIDENCE.

DEFENDANTS IN THIS SLIP AND FALL CASE FAILED TO DEMONSTRATE THE DEFECT WHICH CAUSED PLAINTIFF'S FOOT TO SINK INTO SOFT ASPHALT WAS TRIVIAL OR OPEN AND OBVIOUS AS A MATTER OF LAW (THIRD DEPT).

The Third Department, reversing Supreme Court, determined defendants in this slip and fall case did not demonstrate the defect which allegedly caused plaintiff's foot to sink down about an inch into soft temporary asphalt was trivial or open and obvious as a matter of law:

Although defendants stress that the alleged defect was, at most by plaintiff's own admission, only an inch in height, even physically small defects can be actionable "when their surrounding circumstances or intrinsic characteristics make them difficult for a pedestrian to see or to identify as hazards or difficult to traverse safely on foot" … . When considering the attendant circumstances, including that the defect formed itself only as plaintiff stepped down on it, the location of the alleged defect in front of plaintiff's driveway and that defendants acknowledged temporary asphalt could depress or settle but had no record or knowledge if they performed any inspection in the area where plaintiff fell, we cannot say "as a matter of law that the condition was so trivial and slight in nature that it could not reasonably have been foreseen that an accident would happen" … . Nor can we say that the defect, which may have formed due to voids under the surface of the temporary asphalt and was not physically observable until after plaintiff stepped down on it, "did not constitute a trap for the unwary" … . To this point, the fact that the backfilled trench had a sharply contrasted hue as opposed to the rest of the roadway surface or the mouth of plaintiff's driveway simply does not translate to an open and obvious condition because of the nature of the defect, which only formed after it had been stepped on, and therefore defendants' reliance on these facts as an aegis is misplaced. Santiago v National Grid USA Serv. Co., Inc., 2025 NY Slip Op 01139, Third Dept 2-27-25

Practice Point: The defendant seeking summary judgment in a slip and fall case bears the burden of demonstrating the defect which allegedly caused plaintiff to fall was trivial or open and obvious. Here defendants did not submit sufficient evidence to eliminate questions of fact for either theory.

February 27, 2025

SLIP AND FALL, REAL PROPERTY LAW.

THE JUDGE SHOULD NOT HAVE CONSIDERED A NEW ARGUMENT RAISED FIRST IN REPLY; THE HOLDER OF AN EASEMENT OVER THE PARKING LOT, NOT THE OWNER OF THE PARKING LOT, IS PRIMARILY RESPONSIBLE FOR KEEPING THE LOT FREE OF ICE AND SNOW, NOTWITHSTANDING AN AGREEMENT BETWEEN THE EASEMENT HOLDER AND THE OWNER IN WHICH THE OWNER AGREED TO REMOVE ICE AND SNOW (FOURTH DEPT).

The Fourth Department, reversing Supreme Court in this slip and fall case, determined (1) Supreme Court should not have considered a new argument raised for the first time in reply, and (2) defendant, as the holder of an easement over the parking lot, was primarily responsible for keeping the lot free of ice and snow, notwithstanding the terms of a "parking agreement" between defendant and the owner of the lot in which the owner agreed to remove ice and snow from the lot:

… [T]he court improperly granted the motion based on an argument advanced for the first time in reply [i.e., the existence of the "parking agreement"]. The function of reply papers is "to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds [or evidence] for the motion" … . * * *

We agree with the Second Circuit Court of Appeals that the duty of an easement holder "is the same as that owed by a landowner" and is nondelegable (Sutera v Go Jokir, Inc., 86 F3d 298, 308 [2d Cir 1996] …). We therefore conclude that defendant's "duty to exercise reasonable care toward third parties making use of the parking lot subject to the easement, once established, is not abrogated by a covenant on the part of the servient owner[, i.e., the nonparty owner of 875 East Main Street,] to clear ice and snow from the lot. The general rule that a servient owner may assume duties of maintenance, while undoubtedly relevant as between dominant and servient owners, does not apply when the rights of injured third parties are implicated," as in the case here … . The fact that the nonparty owner of 875 East Main Street may also have had a duty to maintain the parking lot does not serve to insulate defendant from liability to plaintiff. Otero v Rochester Broadway Theatre League, Inc., 2025 NY Slip Op 00769, Fourth Dept 2-7-25

Practice Point: An argument based on new evidence first presented in reply should not have been considered by the court.

Practice Point: Here the holder of the easement over the parking lot, as opposed to the owner of the parking lot, was primarily responsible for the removal of ice and snow.

February 7, 2025

TRAFFIC ACCIDENTS, INSURANCE LAW, "SERIOUS INJURY," LEGAL MALPRACTICE.

PLAINTIFF DID NOT SUFFER A "SERIOUS INJURY" WITHIN THE MEANING OF THE INSURANCE LAW IN THE UNDERLYING PEDESTRIAN-VEHICLE ACCIDENT CASE; THEREFORE PLAINTIFF COULD NOT HAVE SUCCEEDED ON THE MERITS OF THAT ACTION; DEFENDANT ATTORNEY WAS ENTITLED TO SUMMARY JUDGMENT DISMISSING THE INSTANT LEGAL MALPRACTICE ACTION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the defendant attorney was entitled to dismissal of the legal malpractice action because plaintiff could not have succeeded in the underlying traffic accident case. Plaintiff, a pedestrian, was struck by a vehicle. The traffic-accident case was dismissed because plaintiff did not sustain a "serious injury" within the meaning of the Insurance Law:

"A plaintiff seeking to recover damages for legal malpractice must establish that (1) the attorney failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession and (2) the attorney's breach of this duty proximately caused the plaintiff to sustain actual and ascertainable damages" … . "Even if a plaintiff establishes the first prong of a legal malpractice cause of action, the plaintiff must still demonstrate that he or she would have succeeded on the merits of the action but for the attorney's negligence" … . "To succeed on a motion for summary judgment dismissing a legal malpractice action, a defendant must present evidence in admissible form

establishing that at least one of the essential elements of legal malpractice cannot be satisfied" … .

Here, in support of its motion, the defendant submitted evidence demonstrating that the injured plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the accident. The defendant thus established … that the plaintiffs would not have succeeded on the merits of the underlying personal injury action … . Dodenc v Dell & Dean, PLLC, 2025 NY Slip Op 00650, Second Dept 2-5-25

Practice Point: An essential element of a legal malpractice action is that the plaintiff would have succeeded on the merits in the underlying action. Here the attorney demonstrated plaintiff did not sustain a serous injury within the meaning of the Insurance Law and, therefore, plaintiff would not have succeeded in the underlying traffic accident case.

February 5, 2025

TRAFFIC ACCIDENTS, REAR-END COLLISION, EVIDENCE.

DEFENDANT IN THIS REAR-END COLLISION CASE RAISED A NONNEGLIGENT EXPLANATION FOR THE COLLISION; PLAINTIFF'S SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff's summary judgment motion in this rear-end collision case should not have been granted. Defendant had raised a nonnegligent explanation for the collision:

In this action arising from a vehicle collision, plaintiff established prima facie entitlement to summary judgment as to liability. In his sworn affidavit, he averred that he was slowing down on the expressway due to upcoming traffic congestion when his vehicle was hit in the rear by a tractor trailer truck driven by defendant Scott Martin. "It is well settled that a rear-end collision with a stopped or stopping vehicle establishes a prima facie case of negligence on the part of the driver of the rear vehicle and imposes a duty on the part of the operator of the moving vehicle to come forward with an adequate nonnegligent explanation" for the collision … .

However, defendants raised an issue of fact in opposition by submitting Martin's affidavit stating that plaintiff pulled directly in front of him from the nearby on-ramp, during inclement weather, in a manner that Martin described as "sudden." This statement in Martin's affidavit presented a nonnegligent explanation for the collision, raising an issue of fact as to whether plaintiff was comparatively negligent for swerving in front of Martin or cutting him off … . Madera v Charles Hukrston Truck, Inc., 2025 NY Slip Op 00788, Frist Dept 2-11-25

Practice Point: Here is a rare example of a nonnegligent explanation for a rear-end collision which was deemed sufficient to defeat plaintiff's motion for summary judgment.

February 11, 2025

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