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

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The Second Department, reversing the denial of defendants' motion to set aside the verdict and ordering a new trial, held the jury should have been instructed to determine whether the security guard (Vetell) who assaulted plaintiff was acting within the scope of his employment at the time of the assault. Apparently plaintiff left the defendant diner to get money at an ATM to pay the bill. When he retuned to the diner, the security guard knocked him to the ground and choked him:

… Supreme Court erred in denying the appellants' counsel's request to ask the jury to determine whether Vetell was acting within the scope of his employment when he attacked the plaintiff. The interrogatories that were given to the jury made it possible for the jury to find the appellants liable for Vetell's acts based only on his being a special employee without determining that he was acting within the scope of his employment when he attacked the plaintiff. Since a determination that Vetell was acting within the scope of his employment is a necessary element to render the appellants vicariously liable for his acts, the court should have added the requested interrogatory to the verdict sheet … . Eaton v Fiotos, 2025 NY Slip Op 03553, Second Dept 6-10-25

Practice Point: Whether an employer is vicariously liable for the actions of an employee depends upon whether the employee's conduct was within the scope of employment. Here the failure to so instruct the jury required a new trial.

June 11, 2025

BATTERY.

DEFENDANT HOSPITAL DISCHARGED A PATIENT WITH A HISTORY OF SCHIZOPHRENIA BUT NO HISTORY OF THREATENING OR ASSAULTING PEOPLE; THE PATIENT ASSAULTED PLAINTIFF, THE CAB DRIVER PAID BY THE HOSPITAL TO TAKE THE PATIENT HOME; THE HOSPITAL DID NOT OWE A DUTY OF CARE TO PLAINTIFF (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant hospital did not owe a duty of care to the cab driver injured (assaulted) by a patient (Barrio) who was just released, despite the fact that the cab fare was paid by the hospital:

… [T]he defendant Francis Barrios was taken by ambulance to the emergency department of the defendant John T. Mather Memorial Hospital (hereinafter the hospital). Barrios, who had a history of schizophrenia, complained of anxiety, tremors, and blurry vision. The hospital records indicated that Barrios did not have a history of threatening or attempting to hurt others, or of actually hurting others, and that Barrios did not display any signs of violent behavior. After consultation

with the psychiatrist on call, it was determined that Barrios should be discharged and should seek outpatient treatment. * * *

"The elements of a cause of action alleging common-law negligence are a duty owed by the defendant to the plaintiff, a breach of that duty, and a showing that the breach was a proximate cause of the plaintiff's injury" … . "Without a duty running directly to the injured person, there can be no liability" … . "Generally, a defendant has no duty to control the conduct of third persons so as to prevent them from harming others" … . "A duty may arise, however, where there is a relationship either between defendant and a third-person tortfeasor that encompasses defendant's actual control of the third person's actions, or between defendant and plaintiff that requires defendant to protect plaintiff from the conduct of others" … .

Here, the plaintiffs failed to establish, prima facie, that the hospital owed the injured plaintiff a duty. There is no evidence that the hospital had sufficient authority and ability to control Barrios's actions after he was discharged and left the hospital … . The hospital's decision to pay for a taxi service for Barrios after his discharge did not make the hospital the injured plaintiff's employer, make the hospital an agent for Barrios, or otherwise create a special duty … . Further, absent evidence in the record that the hospital knew or should have known that Barrios posed a threat to the injured plaintiff, she was a member of the general public and not of a class of people to whom the hospital owed a duty … . Melio v John T. Mather Mem. Hosp., 2025 NY Slip Op 03562, Second Dept 6-11-25

Practice Point: Here a discharged patient with schizophrenia assaulted the cab driver paid by the hospital to take the patent home. The hospital did not owe a duty of care to the cab driver.

June 11, 2025

CHILD VICTIMS ACT, CIVIL PROCEDURE, EDUCATION-SCHOOL LAW, EVIDENCE, JUDGES.

IN THIS CHILD VICTIMS ACT CASE AGAINST A TEACHER, PLAINTIFF'S MOTION TO AMEND THE BILL OF PARTICULARS TO ADD DEPOSITION TESTIMONY CONCERNING STATEMENTS MADE BY WITNESSES TO PLAINTIFF'S ATTORNEYS SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court in this Child Victims Act suit, determined plaintiff should have been allowed to amend the bill of particulars to add deposition testimony which included witness statements made to plaintiff's attorneys concerning the defendant teacher:

"Pursuant to CPLR 3025(b), leave to amend or supplement a pleading is to be 'freely given'" … . "'In the absence of prejudice or surprise resulting directly from the delay in seeking leave, such applications are to be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit'" … . "The burden of proof in establishing prejudice or surprise, or that the proposed amendment lacks merit, falls to the party opposing the motion for leave to amend" … . "[T]he decision of whether to grant or deny leave to amend is subject to the discretion of the trial court" … .

The Supreme Court improvidently exercised its discretion in denying that branch of the plaintiff's motion which was for leave to amend the bill of particulars to include the proposed witness's statements to [plaintiff's attorneys]. The proposed amendment was not palpably insufficient or patently devoid of merit … . In this case, having failed to oppose the motion, the District defendants failed to satisfy their burden of demonstrating any prejudice or surprise … . Fitzpatrick v Pine Bush Cent. Sch. Dist., 2025 NY Slip Op 03794, Second Dept 6-25-25

Practice Point: Amendments to pleadings should be freely allowed. Here deposition testimony about vague and contradictory statements made to plaintiff's counsel by witnesses concerning defendant teacher's alleged interaction with students can properly be added to the bill of particulars, criteria explained.

June 25, 2025

CIVIL PROCEDURE, NEGLIGENCE, PUBLIC HEALTH LAW, TRUSTS AND ESTATES.

HERE, EVEN THOUGH THE INITIAL ACTION WAS TIMELY ONLY BECAUSE OF THE SIX-MONTH "SAVINGS PROVISION" EXTENSION IN CPLR 205(A), THE SECOND ACTION, COMMENCED AFTER THE DISMISSAL OF THE FIRST FOR LACK OF STANDING, CAN BE DEEMED TIMELY UNDER A SECOND CPLR 205(A) SIX-MONTH "SAVINGS PROVISION" EXTENSION (SECOND DEPT).

The Second Department, reversing Supreme Court, in a full-fledged opinion by Justice LaSalle, determined the "savings provision" of CPLR 205(a) allows a second six-month extension of the time to file a new action after a dismissal which is not on the merits. In this wrongful death and Public Health Law 2801-d action against a nursing home and hospital, the complaint was filed an served while the application for appointment of an executor was pending. The complaint was dismissed because the plaintiff did not have standing. Although the statute of limitations had run, the initial action was timely because of the savings provision in CPLR 205(a). The action was commenced again whiled the application for appointment of an executor was still pending. This time the complaint was dismissed with prejudice on the ground the six-month extension in CPLR 205(a) is only available once:

The primary issue raised on this appeal is whether CPLR 205(a) permits a litigant to commence an otherwise untimely new action within six months of the dismissal of a prior action where that prior action was, itself, made timely only by a previous application of CPLR 205(a). This issue appears to be one of first impression in a State apellate court. Although the United States Court of Appeals for the Second Circuit (hereinafter the Second Circuit) has answered this question in the negative (see Ray v Ray, 22 F4th 69 [2d Cir]), that holding is not binding on this Court, and we respectfully disagree with it and conclude that the plain language of CPLR 205(a) does allow a litigant to commence such an action. Accordingly, while the Supreme Court properly dismissed the instant complaint on the ground that the

plaintiff had not yet obtained letters testamentary to become the personal representative of the decedent's estate, the dismissal should have been without prejudice instead of with prejudice. Tumminia v Staten Is. Univ. Hosp., 2025 NY Slip Op 03352, Second Dept 6-4-25

Practice Point: Here an action which was timely only by the application of the six-month "savings provision" extension in CPLR 205(a), and which was dismissed for lack of standing, did not preclude a second identical action which could only be deemed timely by a second application of the CPLR 205(a) savings provision.

June 4, 2025

DAMAGES, PAIN AND SUFFERING, EVIDENCE, COURT OF CLAIMS.

THE AMOUNT OF DAMAGES FOR PAST PAIN AND SUFFERING SHOULD BE BASED UPON THE EVIDENCE; THE AWARD SHOULD NOT HAVE BEEN LIMITED TO THE AMOUNT IN THE AD DAMNUM CLAUSE (SECOND DEPT).

The Second Department, reversing the Court of Claims and remitting the matter for a new determination of damages for past pain and suffering. The Court of Claims interpreted the ad damnum clause which read "!0.000.000" to mean $10,000 and awarded that amount. The Second Department noted that the amount of damages should be based on the evidence, not on the ad damnum clause:

… [A]lthough the Court of Claims found that the claimant's evidence could support a "substantial recovery for past and future pain and suffering," it limited the award of damages to $10,000 based on its interpretation of the ad damnum clause. The court should have granted "any type of relief within its jurisdiction appropriate to the proof whether or not demanded" (CPLR 3017[a] …). Although the trier of fact's "determination is entitled to great deference, it may be set aside if the award deviates materially from what would be reasonable compensation" … . An award of $10,000 deviates materially from awards for similar injuries … . Consequently, the court should have awarded an amount for past pain and suffering that was supported by the evidence submitted by the claimant … . Bonneau v State of New York, 2025 NY Slip Op 03699, Second Dept 6-18-25

Practice Point: The damages awarded for past pain and suffering should be based on the evidence. The award is not limited to the amount in the ad damnum clause of the claim.

June 18, 2025

LABOR LAW-CONSTRUCTION LAW, EVIDENCE.

IN THIS LADDER-FALL CASE, CONFLICTING EVIDENCE ABOUT WHETHER A LADDER WAS REQUIRED FOR PLAINTIFF'S WORK MANDATED DENIAL OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON THE LABOR LAW 240(1) CAUSE OF ACTION; RE: THE LABOR LAW 241(6) CAUSE OF ACTION, DEFENDANT-OWNER HAD A NONDELEGABLE DUTY TO ENSURE COMPLIANCE WITH THE LADDER-SAFETY PROVISIONS OF THE INDUSTRIAL CODE, THE OWNER'S LABOR LAW 241(6) LIABILITY IS NOT BASED UPON CONTROL OF THE WORK SITE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined there were questions of fact precluding the award of summary judgment to the defendants on the Labor Law 240(1) cause of action in this ladder fall case. There was conflicting evidence whether a ladder was required for the work assigned to plaintiff. In addition, the Labor Law 241(6) cause of action should not have been dismissed on the ground the defendant owner did not exercise control over the worksite because the owner has a nondelegable duty to ensure compliance with the Industrial Code:

Where, as here, "credible evidence reveals differing versions of the accident," one under which the defendant would be liable and another under which it would not, questions of fact exist making summary judgment inappropriate … . Accordingly, the court should have denied that branch of the defendant's cross-motion which was for summary judgment dismissing the cause of action alleging a violation of Labor Law § 240(1), regardless of the sufficiency of the plaintiffs' opposition … .

Labor Law § 241(6) imposes a nondelegable duty on "owners and contractors to provide reasonable and adequate protection and safety for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor" … . Because an owner's duty under Labor Law § 241(6) is nondelegable, the Supreme Court incorrectly concluded that the defendant was entitled to summary judgment dismissing the cause of action alleging a violation of Labor Law § 241(6) on the ground that the record was "devoid of any information" that the defendant had "control over the worksite" … . …

12 NYCRR 23-1.21(b)(3)(iv), which requires that ladders "be maintained in good condition" and must not be used if they have "any flaw or defect of material that may cause ladder failure," is sufficiently specific to support a cause of action under Labor Law § 241(6) …. . Contrary to its contention, the defendant failed to demonstrate, prima facie, that it did not violate this provision. … [Plaintiff] testified that the ladder shook beneath him, and the defendant did not submit evidence of the condition of the specific ladder at issue or the surface on which the ladder was situated … . Under these circumstances, the defendant also failed to demonstrate, prima facie, that it did not violate 12 NYCRR 23-1.21(b)(4)(ii), which provides that "[a]ll ladder footings shall be firm," and "[s]lippery surfaces and insecure object … . Cabrera v Provident Alpine Partners, L.P., 2025 NY Slip Op 03700,, Second Dept 6-18-25

Practice Point: Here in this ladder-fall case, conflicting evidence about whether a ladder was required for plaintiff's work mandated denial of defendants' motion for summary judgment on the Labor Law 240(1) cause of action.

Practice Point: An owner's liability under Labor Law 241(6) is based on a nondelegable duty, not on whether the owner controls the work site.

June 18, 2025

LABOR LAW-CONSTRUCTION LAW, EVIDENCE.

PLAINTIFF WAS STANDING ON AN A-FRAME LADDER WHEN A CEILING TILE DROPPED, THE LADDER WIGGLED, AND PLAINTIFF FELL; PLANTIFF WAS ENTITLED TO SUMMARY JUDGMENT ON THE LABOR LAW 240(1) CAUSE OF ACTION; THE LADDER WAS NOT AN ADEQUATE SAFETY DEVICE (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff was entitled to summary judgment on the Labor Law 240(1) cause of action in this ladder-fall case. It was enough to demonstrate the A-frame ladder wiggled when a ceiling tile dropped unexpectedly and there was nothing for plaintiff to grab on to:

Plaintiff established prima facie entitlement to summary judgment on the Labor Law § 240(1) claim through his deposition testimony which showed that the A-frame ladder he was using to perform overhead ceiling-wiring work proved inadequate as a safety device … . Furthermore, we have repeatedly held that "'[i]t is irrelevant that plaintiff inspected the ladder and found it to be in good order before using it, as [a] plaintiff is not required to demonstrate that the ladder was defective in order to make a prima facie showing of entitlement to summary judgment on his Labor Law 240(1) claim'" … . Plaintiff testified that he was using both hands to perform the overhead ceiling work, when he was suddenly "jolted" by an unexpected drop of a ceiling tile that he was handling, resulting in a "wiggle" in the ladder, which preceded his loss of balance and eventual fall, as there was nothing available for plaintiff to grab onto to brace himself against a fall.

Defendants fail to raise an issue of fact. Contrary to their contention, plaintiff's fall from the ladder was "directly related to the work that he was performing, as opposed to his own misstep" or an unexplained loss of balance … . To the extent defendants argue that the ladder did not fall until plaintiff first lost his balance, such argument does not, based on the facts here, show that the ladder was an adequate safety device for plaintiff's task (… [It is "no moment whether the ladder shook prior to plaintiff's fall, or as defendants maintain, after plaintiff lost his balance and grabbed the top of it to steady himself. In either event, the ladder was an inadequate safety device"]). Daniello v J.T. Magen & Co. Inc., 2025 NY Slip Op 03649, First Dept 6-17-25

Practice Point: Here plaintiff was standing on an A-frame ladder when a ceiling tile dropped, the ladder wiggled, and plaintiff fell because there was nothing for him to grab on to. That is enough for summary judgment on the ground the ladder was not an adequate safety device. There is no need to demonstrate the ladder was defective.

June 17, 2025

LABOR LAW-CONSTRUCTION LAW, EVIDENCE.

WHERE AN UNSECURED LADDER MOVES AND PLAINTIFF FALLS, PLAINTIFF CANNOT BE THE SOLE PROXIMATE CAUSE OF THE ACCIDENT; THEREFORE PLAINTIFF IS ENTITLED TO SUMMARY JUDGMENT ON THE LABOR LAW 240(1) CAUSE OF ACTION (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined plaintiff was entitled to summary judgment on the Labor Law 240(1) cause of action in this ladder-fall case:

… [P]laintiffs established, prima facie, that Labor Law § 240(1) was violated and that the violation was a proximate cause of the injured plaintiff's injuries by submitting evidence that the unsecured ladder moved and fell, causing the injured plaintiff to fall, and that he was not provided with any safety devices … .

In opposition … defendants … failed to raise a triable issue of fact as to whether the injured plaintiff's alleged misuse of the ladder was the sole proximate cause of the accident. Where, as here, the injured plaintiff is provided with an unsecured ladder and no safety devices, he cannot be held solely at fault for his injuries … . Garcia v Fed LI, LLC, 2025 NY Slip Op 03795, Second Dept 6-25-25

Practice Point: As long as the failure to provide adequate safety equipment is a proximate cause of a ladder fall, i.e., the failure to secure the ladder to prevent movement, defendant will not be able to win the argument that plaintiff's actions were to sole proximate cause of the accident. Plaintiff will be entitled to summary judgment on the Labor Law 240(10 cause of action.

June 25, 2025

LABOR LAW-CONSTRUCTION LAW, MUNICIPAL LAW, CIVIL PROCEDURE, EVIDENCE, JUDGES.

CLAIMANT MADE AN APPLICATION FOR LEAVE TO FILE A LATE NOTICE OF CLAIM CONCERNING INJURIES INCCURRED WHEN WORKING FOR THE CITY; CLAIMANT WAS ENTITLED TO PRE-ACTION DISCOVERY TO ESTABLISH WHEN THE CITY GAINED ACTUAL KNOWLEDGE OF THE FACTS UNDERLYING THE CLAIM (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined claimant was entitled to pre-action discovery to support his allegation that the city had timely notice of his accident which would warrant leave to file a late notice of claim:

In determining whether to grant an application for leave to serve a late notice of claim, "the court must consider, inter alia, whether the claimant has shown a reasonable excuse for the delay, whether the municipality had actual knowledge of the facts surrounding the claim within 90 days of its accrual, and whether the delay would cause substantial prejudice to the municipality" … . " 'While the presence or absence of any single factor is not determinative, one factor that should be accorded great weight is whether the [municipality] received actual knowledge of the facts constituting the claim in a timely manner' " … .

… In support of his application, claimant sought, inter alia, any incident reports concerning the accident and any correspondence between respondents concerning the accident. Claimant alleged that he told his employer about the incident five days after it occurred and believed that his employer notified the City of the accident at that time.

… Supreme Court abused its discretion in denying that part of his application seeking pre-action discovery (see CPLR 3102 [c]). Under the circumstances of this case, claimant demonstrated that pre-suit discovery is needed in support of his application for leave to serve a late notice of claim for the purpose of establishing when the City had actual knowledge of the facts constituting the claim … . Matter of Wisnowski v City of Buffalo, 2025 NY Slip Op 03886, Fourth Dept 6-27-25

Practice Point: When applying for leave to file a late notice of claim, demonstrating the municipality had actual knowledge of the facts underlying the claim within 90 days of the accident is crucial. Here the claimant alleged his employer told the city about the accident five days after it occurred. Claimant was entitled to pre-action discovery on that issue.

June 27, 2025

MASS SHOOTING, CIVIL PROCEDURE, LONG-ARM JURISDICTION.

A SHOOTER WEARING BODY ARMOR OPENED FIRE AT A BUFFALO GROCERY STORE KILLING TEN AND INJURING MANY OTHERS; THE COMPLAINT ALLEGED THE BODY ARMOR ALLOWED THE SHOOTER TO KILL THE SECURITY GUARD WHICH LEFT THE SHOPPERS UNPROTECTED; THE ISSUE IS WHETHER NEW YORK HAS LONG-ARM JURISDICTION OVER THE MANUFACTURER OF THE BODY ARMOR AND TWO INDIVIDUAL DEFENDANTS; PLAINTIFFS' ALLEGATIONS WERE SUFFICIENT TO WARRANT JURISDICTIONAL DISCOVERY; THE COMPLAINT SHOULD NOT HAVE BEEN DISMISSED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined plaintiffs were entitled to jurisdictional discovery to determine whether New York has long-arm jurisdiction over two individual employees of RMA, Waldrop and Clark, which sells body armor. An 18-year-old man committed a racially motivated mass shooting at a grocery store in Buffalo, killing ten people and injuring many others. The complaint alleges that the body armor protected the shooter, allowing him to kill the security guard and shoot more people inside and outside the store:

… "[I]n order to defeat a motion to dismiss based upon lack of personal jurisdiction, a plaintiff need only demonstrate that facts may exist to exercise personal jurisdiction over the defendant[s]" … . We agree with plaintiffs that they have set forth a "sufficient start" … to show that their position is not " 'frivolous' " … . …

… With respect to Waldrop, plaintiffs allege that he was intimately involved in the daily operations of RMA, was involved in developing the body armor used by the shooter, and was directly involved in the marketing and sales of that body armor. They also allege that he chose to allow the sale of body armor to civilians, i.e., non-military and non-law enforcement personnel, or was "deliberately indifferent" to such sales, and that he knew RMA body armor was being marketed to and sold in New York. We conclude that those allegations are sufficient to warrant discovery on the matter of personal jurisdiction vis-à-vis Waldrop … . …

With respect to Clark, plaintiffs allege that he, personally, marketed the body armor to, and communicated directly with, the shooter, encouraging him to purchase the body armor, either knowing or having reason to know that the shooter was a civilian. Plaintiffs further allege that, as a result of that individual conduct, Clark knew that RMA's body armor was being sold to civilians in New York, presenting grave risks to New York residents. We thus likewise conclude that plaintiffs' allegations are sufficient to warrant discovery on the matter of personal jurisdiction vis-à-vis Clark … . Salter v Meta Platforms, Inc., 2025 NY Slip Op 03896, Fourth Dept 6-27-25

Practice Point: Consult this decision for a concise explanation of New York's long-arm jurisdiction and the criteria for jurisdictional discovery.

June 27, 2025

MEDICAL MALPRACTICE, CIVIL PROCEDURE, EVIDENCE, TRUSTS AND ESTATES.

PLAINTIFF IN THIS MED-MAL WRONGFUL-DEATH ACTION DID NOT RESPOND TO THE NINETY-DAY DEMAND TO FILE A NOTE OF ISSUE, DID NOT PRESENT A REASONABLE EXCUSE FOR THE FAILURE TO RESPOND, AND DID NOT DEMONSTRATE A MERITORIOUS CAUSE OF ACTION; THE COMPLAINT SHOULD HAVE BEEN DISMISSED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the plaintiff's failure to respond to the ninety-day CPLR 3216 demand to file a note of issue required dismissal of the medical malpractice action. The law-office-failure excuse was vague and conclusory and plaintiff did not demonstrate a meritorious cause of action:

"Where, as here, a plaintiff has been served with a 90-day demand . . . pursuant to CPLR 3216(b)(3), the plaintiff must comply with the demand by filing a note of issue or by moving, before the default date, either to vacate the demand or to extend the 90-day demand period" … . Here, the plaintiff did neither.

"In opposition to a motion to dismiss pursuant to CPLR 3216, a plaintiff may still avoid dismissal if he or she demonstrates 'a justifiable excuse for the failure to timely abide by the 90-day demand, as well as the existence of a potentially meritorious cause of action'" … . "'Although the court has the discretion to accept law office failure as a justifiable excuse (see CPLR 2005), a claim of law office failure should be supported by a detailed and credible explanation of the default at issue'" … . Here, the vague and conclusory claim of law office failure set forth by the plaintiff's attorney did not constitute a justifiable excuse … . Moreover, the plaintiff failed to submit evidentiary proof from a medical expert demonstrating the existence of a potentially meritorious cause of action … . Kresberg v Kerr, 2025 NY Slip Op 03559, Second Dept 6-11-25

Practice Point: Here a vague and conclusory allegation of law-office-failure was not a reasonable excuse for failure to respond to the ninety-day demand to file a note of issue.

June 11, 2025

MEDICAL MALPRACTICE, JUDGES.

THE ERRONEOUS "LOSS OF CHANCE" JURY INSTRUCTION REQUIRED REVERSAL; THE CHARGE USED THE PHRASES "SUBSTANTIAL FACTOR" AND "SUBSTANTIAL PROBABILITY" WHEN THE CORRECT PHRASE IS "SUBSTANTIAL POSSIBILITY" IN REFERENCE TO WHETHER A BETTER OUTCOME WAS DENIED DUE TO A DEVIATION FROM THE STANDARD OF CARE (FOURTH DEPT).

The Fourth Department, reinstating the complaint and ordering a new trial in this medical malpractice action, determined the "loss of chance" jury instruction was erroneous and required reversal:

As this Court has held since at least 2011, a "loss of chance instruction" is "entirely appropriate for . . . omission theories" in medical malpractice actions … . Although the Pattern Jury Instructions did not include a loss of chance pattern charge until 2023, i.e., after the second trial in this matter took place in December 2022, this Court had already issued numerous decisions prior to December 2022 indicating that "the loss of chance theory of causation . . . requires only that a plaintiff 'present evidence from which a rational jury could infer that there was a "substantial possibility" that the patient was denied a chance of the better outcome as a result of the defendant's deviation from the standard of care' " … .

Here, the court instructed the jury that, in order for plaintiff to recover under a loss of chance theory, it was plaintiff's burden to establish that the act or omission alleged was a "substantial factor in bringing about the death." The court also instructed the jury that, if it should find that "there was a substantial probability that the decedent . . . would have survived . . . if he had received proper treatment," then it could find that defendants' alleged negligence was a "substantial factor" in causing his death … .

… [T]he charge, as given, did not " 'adequately convey[ ] the sum and substance of the applicable law' " to the jury … . The primary issue at trial was whether

defendants deviated from accepted standards of care in failing to timely treat decedent. Inasmuch as the "court did not adequately charge the jury concerning" the appropriate standard to determine that issue, we conclude that "the court's failure to define [the correct] standard for the jury" cannot be considered harmless under the circumstances of this case … . Wright v Stephens, 2025 NY Slip Op 03416, Fourth Dept 6-7-25

Practice Point: The "loss of chance" medical malpractice jury instruction requires that plaintiff show there was a "substantial possibility" that a deviation from the standard of care precluded a better outcome. Here the judge used the phrase "substantial probability," requiring reversal.

June 6, 2025

SEXUAL ASSAULT, EDUCATION-SCHOOL LAW, ADMINISTRATIVE LAW, CONSTITUTIONAL LAW.

AN ADMINISTRATIVE PROCEEDING WAS BROUGHT BY THE UNIVERSITY AGAINST PETITIONER-STUDENT BASED UPON ANOTHER STUDENT'S (THE REPORTING INDIVIDUAL'S) ALLEGATIONS SHE WAS SEXUALLY ASSAULTED; THE UNIVERSITY'S TITLE IX GRIEVANCE POLICY PROVIDES THAT WHERE, AS HERE, THE REPORTING INDIVIDUAL IS ABSENT FROM THE HEARING AND IS NOT SUBJECT TO CROSS-EXAMINATION, ANY DETERMINATION BY THE UNIVERSITY CANNOT BE BASED UPON STATEMENTS ATTRIBUTED TO THE REPORTING INDIVIDUAL; THE DETERMINATION WAS ANNULLED ON THAT GROUND (THIRD DEPT).

The Third Department, annulled the university's determination petitioner had violated the university's "Community Rights and Responsibilities" by sexually assaulting the reporting individual. Petitioner did not deny kissing an touching the reporting individual, but contended all the interactions were consensual. The reporting individual did not testify at the hearing. The university's Title IX

grievance policy provides that, when the reporting individual does not testify and is not subject to cross-examination, the determination cannot be based upon any statement attributed to the reporting individual. Here statements by the reporting individual were the basis for the university's determination:

Petitioner contends that he was denied due process because he was not afforded the opportunity to question the reporting individual, who did not testify at the hearing or otherwise submit to cross-examination. Under the circumstances presented here, we agree and conclude that annulment is required. "In general, there is a limited right to cross-examine an adverse witness in an administrative proceeding, and the right to cross-examine witnesses generally has not been considered an essential requirement of due process in school disciplinary proceedings" … . Nevertheless, "[i]t is well established that once having adopted rules or guidelines establishing the procedures to be followed in relation to suspension or expulsion of a student, colleges or universities — both public and private — must substantially comply with those rules and guidelines" … . Matter of Bibler v State Univ. of N.Y. at Albany, 2025 NY Slip Op 03373, Third Dept 6-5-25

Practice Point: In a university disciplinary proceeding stemming from an allegation of sexual assault, the right to cross-examine the accuser is not considered an essential requirement of due process. However, the university is required to abide by its own rules. Here the rules stated that, where the accuser is absent from the hearing and is not cross-examined, the university's determination cannot be based upon statements made by the accuser. The university's failure to comply with that rule required that the determination be annulled.

June 5, 2025

SLIP AND FALL, EVIDENCE.

THE DEFENDANT DID NOT SUBMIT ACTUAL MEASUREMENTS OF THE DEFECT WHICH CAUSED PLAINTIFF'S FALL; THE PHOTOGRAPHS AND THE TESTIMONY THAT THE DEFECT WAS ONE-INCH IN HEIGHT WAS NOT ENOUGH TO PROVE THE DEFECT WAS TRIVIAL AS A MATTER OF LAW; DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE GRANTED (FIRST DEPT).

The First Department, reversing Supreme Court, determined the defendant did not demonstrate the defect which cause plaintiff's fall was trivial as a matter of law. Plaintiff tripped over the raised edge of a cellar door in a sidewalk:

Defendant Teng Dragon, as the party seeking dismissal of the complaint on the basis that the alleged defect is trivial, "must make a prima facie showing that the defect is, under the circumstances, physically insignificant and that the characteristics of the defect or the surrounding circumstances do not increase the risks it poses" … . While it is true that "there is no 'minimal dimension test' or per se rule that a defect must be of a certain minimum height or depth in order to be actionable" … , producing measurements of the defect together with evidence of the surrounding circumstances is required for a prima facie showing that the defect was trivial as a matter of law … . Photographs produced by the plaintiff appear to show a non-trivial defect in the raised cellar door, and the testimony of defendant Mazal Ubracha 101 LLC's principal indicates a surface differential between the sidewalk and cellar door of approximately one inch. The Court of Appeals has made it clear that summary judgment should not be granted in a case in which "the dimensions of the alleged defect are unknown and the photographs and descriptions inconclusive" … . Teng Dragon has not provided the actual measurements of the defect here, and thus, making every favorable inference in favor of the nonmovant plaintiff, has failed to establish its prima facie entitlement to summary judgment … . Weatherspoon v Mazal Ubracha 101 LLC, 2025 NY Slip Op 03662, First Dept 6-17-25

Practice Point: Here the defendant did not submit actual measurements of the defect over which plaintiff slipped and fell. Despite photographs of the defect and

testimony it was one-inch in height, defendant did not prove the defect was trivial as a matter of law.

June 17, 2025

SOLITARY CONFINEMENT, CORRECTION LAW.

THE SANCTION THAT PETITIONER BE CONFINED TO A SPECIAL HOUSING UNIT (SHU), NOW KNOWN AS SEGRETATED CONFINEMENT, FOR 730 DAYS VIOLATED THE HUMANE ALTERNATIVES TO LONG-TERM SOLITARY CONFINEMENT ACT (HALT ACT); THE CORRECTION LAW LIMITS SUCH CONFINEMENT TO 15 CONSECUTIVE DAYS (THIRD DEPT).

The Third Department, in a full fledged opinion by Justice Pritzker, determined that the Humane Alternatives to Long-Term Solitary Confinement Act (the HALT Act) prohibited petitioner's confinement in a special housing unit (SHU), now known as segregated confinement, for 730 days. The maximum permitted by the Correction Law is 15 consecutive days:

… [P]ursuant to Correction Law § 137 (6) (k) (i), DOCCS [NYS Department of Corrections and Community Supervision] "may place a person in segregated confinement for up to three consecutive days and no longer than six days in any [30-]day period if, pursuant to an evidentiary hearing, it determines that the person violated [DOCCS] rules which permit a penalty of segregated confinement. [DOCCS] may not place a person in segregated confinement for longer than three consecutive days or six days total in a [30-]day period unless the provisions of subparagraph (ii) . . . are met." … Correction Law § 137 (6) (k) (ii) provides that DOCCS "may place a person in segregated confinement beyond the limits of subparagraph (i) . . . or in [an RRU] only if, pursuant to an evidentiary hearing, it determines by written decision that the person committed one of [certain statutorily provided] acts and if the [C]ommissioner or his or her designee determines in writing based on specific objective criteria the acts were so heinous or destructive that placement of the individual in general population housing creates a significant risk of imminent serious physical injury to staff or other incarcerated persons, and

creates an unreasonable risk to the security of the facility." Although Correction Law § 137 (6) (k) (ii) does not contain a specific temporal limitation, this can be found in Correction Law § 137 (6) (i) (i), which provides, with certain exceptions, that "[n]o person may be placed in segregated confinement for longer than necessary and no more than [15] consecutive days. Nor shall any person be placed in segregated confinement for more than [20] total days within any [60-]day period." Given these limitations, we find that not only the penalty imposed by the Hearing Officer, but also the reduced penalty of 730 days in SHU, violates the HALT Act. Matter of Peterkin v New York State Dept. of Corr. & Community Supervision, 2025 NY Slip Op 03617, Third Dept 6-12-25

June 12, 2025

TRAFFIC ACCIDENTS, ARBITRATION, CIVIL PROCEDURE, CONTRACT LAW, TRUSTS AND ESTATES, APPEALS.

PLAINTIFF'S DECEDENT WAS KILLED WHEN THROWN FROM A RENTED MOPED; THE RENTAL AGREEMENT INCLUDED AN ARBITRATION CLAUSE; THE NEGLIGENCE CAUSES OF ACTION ARE SUBJECT TO THE ARBITRATION CLAUSE; HOWEVER, THE WRONGFUL DEATH CAUSE OF ACTION IS NOT SUBJECT TO THE ARBITRATION CLAUSE; NEGLIGENCE AND WRONGFUL-DEATH CAUSES OF ACTION ARE DISTINCT AND ADDRESS DIFFERENT INJURIES; THE WINNING ISSUE WAS RAISED FOR THE FIRST TIME ON APPEAL (SECOND DEPT).

The Second Department, reversing Supreme Court, in a full-fledged opinion by Justice McCormack, determined the plaintiffs in this wrongful death action, who are the parents of plaintiffs' decedent and the administrators of decedent's estate, are not bound by the decedent's agreement to arbitrate. The decedent rented an electric moped from defendant Ravel by downloading an app with an arbitration clause. Decedent was killed when he was thrown from the moped and struck by a car. All agreed that the negligence causes of action were subject to the arbitration clause. Plaintiffs successfully argued the wrongful death action is distinct from the

negligence actions and is not subject to the arbitration clause. The winning argument was first raised on appeal. The court heard the appeal because it "present[ed] a pure question of law that appears on the face of the record and could not have been avoided if raised at the proper juncture" …:

Here, it is undisputed that the plaintiffs, individually, did not enter into an agreement with Revel to arbitrate. However, the plaintiffs are the administrators of the decedent's estate, and the causes of action arise from the same incident that caused the decedent's death. The issue, therefore, turns on the nature of wrongful death causes of action and whether they are derivative of negligence causes of action or independent of negligence causes of action. * * *

The law of this State is clear that a wrongful death cause of action is a separate and distinct cause of action to redress the injuries suffered by a decedent's distributees as a result of the decedent's death. "'A cause of action to recover damages for wrongful death is a property right belonging solely to the distributees of the decedent and vests in them at the decedent's death'" … . This is true even where no cause of action alleging negligence exists. * * * … [T]his Court [has] determined that a cause of action alleging wrongful death was not derivative of a negligence cause of action, but [is] an independent cause of action vested in the distributees. "… [T]he surviving personal injury action and the wrongful death cause of action … are different in many respects. The two causes of action exist in order to protect the rights of different classes of persons, and the measure of damages is entirely different" … . "Wrongful death actions are brought not to compensate the decedent or his [or her] estate for the pain and suffering attendant to the injury, but rather to recover, on behalf of decedent's distributees, the pecuniary value of the decedent's life" … . Further, the different causes of action accrue at different times. A negligence cause of action accrues at the time of the injury, while a wrongful death cause of action does not accrue until the decedent's death, which can occur after the injury is sustained … . Marinos v Brahaj, 2025 NY Slip Op 03561, Second Dept 6-11-25

Practice Point: Negligence and wrongful death causes of action are distinct and address different injuries. Here an arbitration clause in a moped rental contract executed to by plaintiffs' decedent was deemed to apply to the negligence causes of

action stemming from the moped accident, but not to the related wrongful death cause of action.

Practice Point: Consult this opinion for an example of when an issue raised for the first time on appeal will be considered by the appellate court.

June 11, 2025

TRAFFIC ACCIDENTS, CONTRACT LAW, FRAUD.

PLAINTIFF IN THIS TRAFFIC ACCIDENT CASE RAISED QUESTIONS OF FACT ABOUT WHETHER THE RELEASE HE SIGNED WAS INVALID DUE TO MUTUAL MISTAKE ABOUT THE EXISTENCE OF LUMBAR DISC INJURIES AND LEFT HIP DEGENERATIVE JOINT DISEASE; IN ADDITION, PLAINTIFF RAISED QUESTIONS OF FACT ABOUT WHETHER THE RELEASE WAS INVALID BECAUSE IT WAS "NOT FAIRLY AND KNOWINGLY MADE;" CRITERIA EXPLAINED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined plaintiff had raised questions of fact the validity of the release he signed in this traffic accident case:

A plaintiff seeking to invalidate a release on the ground that there was a mutual mistake with respect to the extent of the injuries that the plaintiff sustained must establish that, at the time the release was executed, "the parties were under '[a] mistaken belief as to the nonexistence of [a] presently existing injury' " … . "[I]n resolving claims of mutual mistake as to injury at the time of release, there has been delineated a sharp distinction between injuries unknown to the parties and mistake as to the consequence of a known injury" … . "A mistaken belief as to the nonexistence of presently existing injury is a prerequisite to avoidance of a release" … , whereas "[i]f the injury is known, and the mistake . . . is merely as to the consequence, future course, or sequelae of [the] known injury, then the release will stand" … . "Even where a releasor has knowledge of the causative trauma, . . . there must be actual knowledge of the injury. Knowledge of injury to an area of the body cannot cover injury of a different type and gravity" … . Accepting the facts as alleged in the complaint as true and according plaintiff the benefit of every

possible favorable inference … , we agree with plaintiff that he sufficiently alleged facts on which to invalidate the release on the ground of mutual mistake inasmuch as, despite the fact that at the time the release was signed plaintiff had pain in the cervical spine and left hip and a diagnosis of a cervical strain, plaintiff alleged that neither party was aware of plaintiff's lumbar disc injuries or left hip degenerative joint disease at that time … .

A plaintiff seeking to invalidate a release on the ground that it was not fairly and knowingly entered into must establish that "the release was signed by the plaintiff under circumstances that indicate unfairness, [or that] it was not 'fairly and knowingly' made" … . Again accepting the facts as alleged in the complaint as true and according plaintiff the benefit of every possible favorable inference … , we agree with plaintiff that, in the complaint and his affidavit in opposition to the motion, he sufficiently alleged facts on which to invalidate the release on the ground of whether the release was fairly and knowingly entered into inasmuch as plaintiff averred in his affidavit in opposition to the motion that, inter alia, he signed the release a short time after the accident occurred, he is unable to fluently read, understand or speak English, he did not understand the release, at the time he signed the release he did not have an attorney, he was not provided with an interpretation of the release, and he needed money for a vehicle in order to attend medical appointments … . Pastrana-Ortiz v Wemple, 2025 NY Slip Op 03425, Fourth Dept 6-6-25

Practice Point: Consult this decision for explanations of the criteria for invalidating a release (1) due to fraud, (2) due to mutual mistake, and (3) because it was "not fairly and knowingly made."

June 6, 2025

TRAFFIC ACCIDENTS, EVIDENCE, JUDGES.

IN THIS TRAFFIC-ACCIDENT DAMAGES TRIAL, THE DEFENDANT OFFERED PHOTOGRAPHS OF PLAINTIFF'S DAMAGED VEHICLE AND PLAINTIFF'S EMPLOYMENT RECORDS WHICH WERE ADMITTED INTO EVIDENCE WITHOUT PROPER FOUNDATIONS; NEW TRIAL ORDERED (SECOND DEPT).

The Second Department, reversing the judgment and ordering a new damages trial in this traffic accident case, determined the photographs of plaintiff's damaged vehicle and the plaintiff's employment records, offered in evidence by the defendant, should not have been admitted because defendant did not lay a sufficient foundation:

The proponent must lay a proper foundation for the admission of photographs into evidence, "which generally requires proof that the photographs were taken close in time to the accident and fairly and accurately represent the conditions as they existed on the date of the accident" … . Here, the plaintiff, who was the sole witness who testified about the photographs, stated that they did not fairly and accurately depict the condition of her vehicle after the accident and that she did not know when the photographs were taken. Thus, the defendant failed to lay a proper foundation for admission of the photographs, and the Supreme Court erred in admitting them into evidence.

"[D]ocuments obtained by subpoena cannot be admitted into evidence without a proper evidentiary foundation" … . Furthermore, "[a] proper foundation for the admission of a business record must be provided by someone with personal knowledge of the maker's business practices and procedures" … . Here, the defendant failed to lay a proper foundation for the admission of the plaintiff's employment documents, which had been obtained via subpoena, since no witness testified to having personal knowledge of the business practices and procedures of the plaintiff's former employer. Accordingly, the Supreme Court erred in admitting the employment documents into evidence.

Postaccident photographs of a vehicle are "relevant to show the force of an impact, and [would] therefore 'help[ ] in determining the nature or extent of injuries and

thus relate[ ] to the question of damages'" … . Additionally, the employment documents were relevant to both the plaintiff's credibility and her prior injury history. Since the improperly admitted photographs and employment documents related to the extent of the plaintiff's injuries and her credibility, these errors were not harmless … . Powell v Burg, 2025 NY Slip Op 03348, Second Dept 6-4-25

Practice Point: If a party offers photographs and documents which are admitted in evidence without proper foundations, and the evidence is detrimental to the other party, a new trial may be ordered on appeal.

June 4, 2025

TRAFFIC ACCIDENTS, MUNICIPAL LAW, CIVIL PROCEDURE, JUDGES.

HERE IN THIS BUS-PASSENGER-INJURY ACTION AGAINST THE CITY TRANSIT AUTHORITY, PLAINTIFF STATED THE WRONG ACCIDENT-DATE IN THE NOTICE OF CLAIM; BECAUSE THE WRONG DATE WAS NOT USED IN BAD FAITH AND THE CITY WAS NOT PREJUDICED, PLAINTIFF SHOULD HAVE BEEN ALLOWED TO AMEND THE NOTICE OF CLAIM (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the wrong accident-date in the notice of claim did not warrant dismissal of the action. The wrong date was not willful and the municipality was not prejudiced. The plaintiff alleged she was injured when the driver of the defendant NYC Transit Authority's bus stopped short:

"'To enable authorities to investigate, collect evidence and evaluate the merit of a claim, persons seeking to recover in tort against a municipality are required, as a precondition to suit, to serve a Notice of Claim'" … . General Municipal Law § 50-e(2) requires that the notice of claim set forth, among other things, "the time when, the place where and the manner in which the claim arose" … . "'[I]n determining compliance with the requirements of General Municipal Law § 50-e, courts should focus on the purpose served by a Notice of Claim: whether based on the claimant's description municipal authorities can locate the place, fix the time and understand

the nature of the accident'" … . "Pursuant to General Municipal Law § 50-e(6), a court has discretion to grant leave to serve an amended notice of claim where the error in the original notice was made in good faith and where the other party has not been prejudiced thereby" … .

Here, there is no indication in the record that the accident date listed in the notice of claim and the complaint was set forth in bad faith … . Rather, the plaintiff's mistake was based upon her reliance on a police report that incorrectly listed the accident date … . Moreover, contrary to the Supreme Court's determination, the proposed amendment to the accident date was purely technical in nature and did not substantively change the nature of the claim … .

Furthermore, the record does not reflect that the defendants will be prejudiced by the plaintiff's delay in moving for leave to amend the notice of claim. Under the circumstances of this case, including that the plaintiff received medical assistance at the accident site, that specific details regarding the circumstances of the accident, including the accident location and bus route, were set forth in a police report and the notice of claim, and that the plaintiff's error in listing an accident date several days prior to the actual date of the accident was minimal, the defendants could have ascertained the date of the accident "with a modicum of effort" … . Hernandez v City of New York, 2025 NY Slip Op 03312, Second Dept 5-4-25

Practice Point: Here the wrong accident-date was included in the notice of claim and the plaintiff moved to amend the notice. Because the wrong date was not used in bad faith (the date was taken from the police report) and because the city was not prejudiced by the error, plaintiff's motion to amend the notice of claim should have been granted.

June 4, 2025

TRAFFIC ACCIDENTS, MUNICIPAL, CIVIL PROCEDURE, EVIDENCE.

THE ABSENCE OF A REASONABLE EXCUSE FOR FAILING TO FILE A TIMELY NOTICE OF CLAIM IS NOT NECESSARILY FATAL TO A PETITION FOR LEAVE TO FILE A LATE NOTICE WHERE, AS HERE, THE MUNICIPALITY HAD ACTUAL TIMELY NOTICE OF THE FACTS UNDERLYING THE CLAIM AND IS NOT PREJUDICED BY THE DELAY (SECOND DEPT).

The Second Department, reversing Supreme Court, determined petitioners' motion for leave to file a late notice of claim in this traffic accident case involving a city bus should have been granted. Although the excuse for failure to time file (petitioners' infancy) was not reasonable, that flaw was not fatal because the city had timely actual knowledge of the essential facts underlying the claim and was not prejudiced by the delay:

Here, the respondents acquired timely, actual knowledge of the essential facts constituting the petitioners' claim. Although a police report regarding an automobile accident does not, in and of itself, constitute notice of a claim to a municipality or public corporation, where the report reflects that an employee of the municipality or public corporation committed a potentially actionable wrong, such entity can be found to have actual knowledge … . In this case, the police report, which the petitioners sent to the NYCTA [NYC Transit Authority] on or about July 2, 2021, indicated that the multivehicle collision was set in motion by Robinson, who caused the bus to come into contact with the rear of another vehicle. The police report also indicated that several bus passengers reported injuries and named the injured petitioners, among others. In addition, the respondents were in possession of the injured petitioners' medical records. Under these circumstances, the respondents acquired timely, actual knowledge of the essential facts constituting the petitioners' claim … .

Moreover, since the respondents acquired timely, actual knowledge of the essential facts constituting the petitioners' claim, the petitioners met their initial burden of showing a lack of prejudice to the respondents' ability to maintain a defense …

. Matter of Arvizu v New York City Tr. Auth., 2025 NY Slip Op 03323, Second Dept 6-4-25

Practice Point: A municipality will be deemed to have timely actual notice of a claim where, as here, the police report reflects that an employee of the municipality committed a potentially actionable wrong.

June 4, 2025

TRAFFIC ACCIDENTS, REAR-END COLLISIONS, EVIDENCE, CIVIL PROCEDURE.

IN THIS REAR-END COLLISION CASE, DEFENDANT DID NOT PRESENT EVIDENCE OF A NONNEGLIGENT EXPLANATION OF THE ACCIDENT; PLAINTIFF WAS ENTITLED TO A JUDGMENT NOTWITHSTANDING THE VERDICT FINDING DEFENDANT NEGLIGENT; THE ARGUMENT THAT PLAINTIFF STOPPED QUICKLY IN STOP AND GO TRAFFIC IS NOT A NONNEGLIGENT EXPLANATION OF A REAR-END COLLISION (FOURTH DEPT).

The Fourth Department, reversing Supreme Court in this rear-end collision case, determined plaintiff's motion for a judgment not withstanding the verdict finding defendant rear-driver negligent should have been granted. Plaintiff was stopped when her car was struck from behind. Defendant had struck the car directly behind plaintiff. Although there was evidence plaintiff stopped suddenly (in stop and go traffic), defendant did not offer proof of a nonnegligent explanation for the accident:

We … agree with plaintiff that the court erred in denying that part of her posttrial motion for judgment as a matter of law on the issue of defendant's negligence (see generally CPLR 4404 [a]). A party is entitled to judgment notwithstanding the verdict where there is "no valid line of reasoning and permissible inferences which could possibly lead rational [persons] to the conclusion reached by the jury on the basis of the evidence presented at trial" … . As relevant here, "[t]he rearmost driver in a chain-reaction collision bears a presumption of responsibility . . . , and .

. . a rear-end collision with a stopped or stopping vehicle creates a prima facie case of negligence with respect to the operator of the moving vehicle, and imposes a duty on the operator of the moving vehicle to come forward with an adequate, [nonnegligent] explanation for the accident" … .

Here, the evidence at trial established that, at the time of the collision, plaintiff and defendant were driving in "stop-and-go" traffic during rush hour on a "wet, [d]rizzly" morning. Plaintiff testified that, at the time of the collision, she had come to a stop because the vehicle in front of her had stopped. Defendant testified that the collision occurred when the vehicle in front of her suddenly stopped; she thought the middle vehicle hit plaintiff's vehicle first. Defendant tried to turn her vehicle to avoid the collision, but was unsuccessful and collided with the middle vehicle. The driver of the middle vehicle in the chain testified that plaintiff's vehicle stopped suddenly. He denied initially colliding with plaintiff's vehicle; it was only after he was hit by defendant that his vehicle collided with plaintiff's vehicle.

In short, the undisputed evidence at trial established that defendant was the rear-most driver involved in the chain-reaction collisions and, therefore, is presumed negligent absent the proffering of a nonnegligent explanation for the collision. We conclude that there is no valid line of reasoning and permissible inferences establishing such a nonnegligent explanation based on the trial record here. Specifically, under the circumstances of this case, the " '[e]vidence that plaintiff's lead vehicle was forced to stop suddenly in [stop-and-go] traffic' " did not constitute a nonnegligent explanation for the collision sufficient to support the jury's verdict inasmuch as " 'it can easily be anticipated that cars up ahead will make frequent stops in [stop-and-go] traffic' " Blatner v Swearengen, 2025 NY Slip Op 03880, Fourth Dept 6-27-25

Practice Point: The plaintiff in this rear-end collision case made a motion for judgment notwithstanding the verdict, which preserved the issue of defendant's negligence for appeal. The appellate court held defendant was negligent as a matter of law. The matter was remitted for a trial to determine proximate cause (there was a car between defendant's and plaintiff's cars) and, if necessary, damages.

June 27, 2025

TRAFFIC ACCIDENTS, VEHICLE AND TRAFFIC LAW, EVIDENCE.

DEFENDANT'S VEHICLE WAS STRUCK BY A VEHICLE WHICH WAS BEING CHASED BY POLICE AND WHICH FAILED TO OBEY A STOP SIGN; DEFENDANT WAS ENTITLED TO SUMMARY JUDGMENT; TWO-JUSTICE DISSENT (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, over a two-justice dissent, determined defendant was entitled to summary judgment in this intersection traffic accident case. Plaintiff was a passenger in a Honda which was being chased by police. Defendant, whose car was struck by the Honda when the driver of the Honda failed to obey a stop sign, could justifiably assume the driver of the Honda would obey the stop sign. The dissent argued there was a question of fact whether defendant breached the duty to see what should be seen:

We respectfully disagree with our dissenting colleagues that defendant failed to meet his initial burden of establishing that he was free of comparative fault. … [Defendant testified] the collision occurred "instantly" after he first saw the car. * * * … [P]laintiff testified that he "blacked out" in the accident and did not know how it was caused. He was not even sure that the accident occurred at an intersection. All he could remember was the Honda proceeding straight with the police behind them and that he was "a little shaken up because [he had] never been in a high speed [chase]." That was "all [he could] remember, and [then] it was just boom." Another occupant of the Honda testified that, as the Honda approached the intersection, "[i]t tried to stop, but . . . [they] were going a little too fast" and slid into the intersection. Defendant therefore established that the Honda never stopped at the stop sign before proceeding into the intersection and colliding with defendant's vehicle. Inasmuch as the evidence submitted by defendant established that he had, at most, "only seconds to react" to the Honda that failed to yield the right-of-way, he established as a matter of law that he was not comparatively negligent … . Brown v City of Buffalo, 2025 NY Slip Op 03902, Fourth Dept 6-27-25

Practice Point: Here defendant's vehicle was struck by a vehicle which was being chased by police and which did not obey a stop sign. The complaint against defendant, brought by a passenger in the vehicle which ran the stop sign, should have been dismissed. A two-justice dissent argued there was a question of fact whether defendant breached the duty of a driver to see what could be seen.

June 27, 2025

WORKERS' COMPENSATION.

THE EMPLOYER'S WORKERS' COMPENSATION CARRIER WAS ENTITLED, PURSUANT TO WORKERS' COMPENSATION LAW SECTION 15(3)(W), TO TAKE CREDIT TOWARD AWARDS OF TEMPORARY DISABILITY (THIRD DEPT).

The Third Department, in a full-fledged opinion by Justice Garry, determined the Workers' Compensation Board properly held that the employer's workers' compensation carrier was entitled, pursuant to Workers' Compensation Law section 15 (3)(w), to take credit toward awards of temporary disability. The opinion is too detailed to fairly summarize here.:

On December 19, 2017, claimant was involved in a work-related accident, and his subsequent claim for workers' compensation benefits was established for injuries to his back, thoracic spine and both shoulders. Awards were made at various rates for periods of temporary disability and lost time beginning on December 20, 2017. In April 2021, claimant's treating pain management specialist opined that claimant had reached maximum medical improvement (hereinafter MMI) with respect to his lumbar spine, and, in November 2021, the carrier's consultant in physical medicine and rehabilitation, who conducted an independent medical examination of claimant, found that MMI in the field of physical medicine and rehabilitation had been established. In a June 2022 decision, a Workers' Compensation Law Judge (hereinafter WCLJ) directed the parties to produce medical evidence of permanency. Following subsequent examinations for permanency, as well as deposition testimony from several of the physicians who examined claimant for permanency and testimony from claimant, the WCLJ, in a November 2022

decision, classified claimant as having a permanent partial disability with a loss of wage-earning capacity of 65%, entitling him to 375 weeks of compensation at the specified rate. The WCLJ also found that, pursuant to Workers' Compensation Law § 15 (3) (w), the employer's workers' compensation carrier was entitled to a credit against the number of statutory cap weeks based upon its payment of 78.8 weeks of awards to claimant for periods of temporary partial disability after June 16, 2020 — the 130th week following the accident of record. Matter of Quoma v Bob's Discount Furniture, 2025 NY Slip Op 03610, Third Dept 6-12-25

June 12, 2025