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## ADULT SURVIVORS ACT, COMPLAINT NEED NOT ALLEGE INTIMATE PARTS WERE TOUCHED.

## LAWSUIT ALLEGING NONCONSENSUAL SEXUAL TOUCHING PURSUANT TO THE ADULT SURVIVORS ACT (CPLR 214-J) NEED NOT ALLEGE PLAINTIFF'S INTIMATE PARTS WERE TOUCHED BY THE DEFENDANT TO STATE A CAUSE OF ACTION; IT IS ENOUGH THAT THE COMPLAINT ALLEGE PLAINTIFF WAS TOUCHED UNDER CIRCUMSTANCES WHICH AFFORDED THE DEFENDANT SEXUAL GRATIFICATION (SECOND DEPT).

The Second Department, reversing Supreme Court, in a full-fledged opinion by Justice Wilson, in a matter of first impression, determined that a complaint under the Adult Survivors Act (CPLR 214-j) need not allege the defendant touched plaintiff's intimate parts to state a cause of action for nonconsensual sexual touching. Here defendant, a doctor, allegedly touched plaintiff's lower back while she was undressed and standing on a step stool facing away from the defendant to

determine whether her kidneys were causing lower back pain. Although defendant did not touch plaintiff's intimate parts, it was alleged the examination was motivated by sexual gratification:

The Adult Survivors Act (ASA) (CPLR 214-j) is a statute that permits adult survivors of sexual abuse to revive otherwise time-barred civil actions against alleged abusers arising from, among other things, conduct that would constitute a sexual offense under Penal Law article 130. The offense of forcible touching under Penal Law § 130.52(1) requires that there be a nonconsensual touching of "sexual or other intimate parts" of another person for the purpose of degradation or abuse of such person or for the purpose of gratifying the actor's sexual desire. The offense of sexual abuse in the third degree under Penal Law § 130.55 requires nonconsensual "sexual contact." This appeal provides our Court with an opportunity to address an issue of first impression in this judicial department regarding how narrow, or broad, we should construe the elemental concepts of sexual touching and sexual contact under the ASA. We hold that where, as here, the alleged nonconsensual touching or sexual contact was to a part of the body other than an anatomically sexual part, in the classic sense, these Penal Law offenses may still qualify as a predicate for an action pursuant to the ASA if the broader facts, manner, and circumstances of the touching or sexual contact involve intimacy or the alleged sexual gratification of the abuser. Aguilar v Wishner, 2025 NY Slip Op 07265, Second Dept 12-24-25

Practice Point: Here the complaint alleged defendant, a doctor, touched plaintiff's lower back during a physical examination under circumstances which afforded defendant sexual gratification. That was sufficient to state a cause of action under the Adult Survivor's Act. Under the Act, a plaintiff need not allege defendant touched plaintiff's intimate parts.

December 24, 2025

## CHILD VICTIMS ACT, EDUCATION-SCHOOL LAW, FREQUENCY OF ALLEGED ABUSE RAISED A QUESTION OF FACT ON NOTICE.

## IN THIS CHILD VICTIMS ACT CASE, DEFENDANT COUNTY, WHICH HAD ASSUMED CUSTODY OF PLAINTIFF FOSTER CHILD, PLACED PLAINTIFF IN DEFENDANT SCHOOL WHERE SHE ALLEGEDLY WAS SEXUALLY ABUSED BY A TEACHER DAILY FOR SIX MONTHS; THE ALLEGED FREQUENCY OF THE ABUSE RAISED A QUESTION OF FACT WHETHER DEFENDANTS HAD CONSTRUCTIVE NOTICE OF IT (SECOND DEPT).

he Second Department, reversing Supreme Court, determined this Child Victims Act (CPLR 214-g) action against the county and a school should not have been dismissed. The county had assumed custody over plaintiff, a foster child, and placed her in defendant school. Plaintiff alleged she was sexually abused by a teacher daily for six months. The alleged frequency of the abuse raised a question of fact whether defendants should have known of the abuse (constructive notice):

"By assuming legal custody over [a] 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" … . Therefore, "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 [home]" … . "In order to find that a child care agency breached its duty to adequately supervise the children entrusted to its care, a plaintiff must establish that the agency had sufficiently specific knowledge or notice of the dangerous conduct which caused injury; that is, that the third-party acts could reasonably have been anticipated" … . "Where the complaint alleges negligent supervision due to injuries related to an individual's [*2]intentional acts, the plaintiff generally must allege that the entity knew or should have known of the individual's propensity to engage in such conduct, such that the individual's acts could be anticipated or were foreseeable" … . M.F. v Putnam County, 2025 NY Slip Op 07283, Second Dept 12-24-25

Practice Point: In Child Victims Act cases alleging sexual abuse by a teacher, courts are finding that allegations of frequent abuse raise a question of fact about whether defendants should have been aware of it.

December 24, 2025

## IMMUNITY, MUNICIPAL LAW, MEDICAL MALPRACTICE, PARAMEDICS' DECISIONS.

## THE TOWN AMBULANCE PARAMEDICS DECIDED NOT TO TAKE PLAINTIFF'S DECEDENT TO THE HOSPITAL; THAT DECISION WAS DISCRETIONARY IN NATURE ENTITLING THE TOWN TO GOVERNMENTAL FUNCTION IMMUNITY IN THIS MED MAL ACTION (FOURTH DEPT).

The Fourth Department, reversing (modifying) Supreme Court, determined the town defendants were entitled to immunity for the actions of the two ambulance paramedics who decided against taking the decedent to the hospital:

"A municipality is immune from liability where the actions of its employees in performing governmental functions involve[ ] the exercise of discretion" … . "[A]mbulance assistance rendered by first responders . . . should be viewed as a classic governmental, rather than proprietary, function" … .

"[D]iscretionary . . . acts involve the exercise of reasoned judgment which could typically produce different acceptable results whereas a ministerial act envisions direct adherence to a governing rule or standard with a compulsory result" … . As the First Department recently made clear, "a generally uniform approach in assessment and care does not change the discretionary nature" of a first responder's actions or the governmental function they provide … . Under the circumstances presented here, we conclude that the Town defendants established that Rutenkroger's and Rice's actions were discretionary and, thus, the Town defendants are entitled to governmental function immunity. Indeed, plaintiff's contentions pertain "to the quality of the care rendered by [Rutenkroger and Rice and,] even if such decisions prove to be erroneous, they do not cast the [Town] in

damages" … . We further note that, "[b]ecause the actions of the [Town's employees] were discretionary, this Court need not address the issue of whether a special duty was owed to [decedent]" … . Gumkowski v Schwaab, 2025 NY Slip Op 07139, Fourth Dept 12-23-25

Practice Point: Consult this decision for insight into the difference between discretionary and ministerial actions by government personnel. Here the town was immune from liability in this med mal case because the town ambulance paramedics' determination that plaintiff's decedent did not need to be taken to the hospital was a discretionary action (governmental function immunity).

December 23, 2025

## IMMUNITY, PUBLIC HEALTH LAW, COVID.

## DEFENDANT REHABILITATION FACILITY WAS IMMUNE FROM SUIT PURSUANT TO THE EMERGENCY OR DISASTER TREATMENT PROTECTION ACT (EDTPA) RE: PLAINTIFF'S DECEDENT'S COVID-RELATED INFECTION AND DEATH (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the suit against defendant rehabilitation facility alleging plaintiff's decedent was infected with COVID at the facility, causing her death, should have been dismissed. The defendant facility was immune from suit pursuant to the Emergency or Disaster Treatment Protection Act (EDTPA):

… [T]he EDTPA initially provided, with certain exceptions, that a health care facility shall have immunity from any liability, civil or criminal, for any harm or damages alleged to have been sustained as a result of an act or omission in the course of arranging for or providing health care services as long as three conditions were met: [1] the services were arranged for or provided pursuant to a COVID-19 emergency rule or otherwise in accordance with applicable law; [2] the act or omission was impacted by decisions or activities that were in response to or as a result of the COVID-19 outbreak and in support of the State's directives; and [3] the services were arranged or provided in good faith" … . * * *

The defendant's submissions, including, inter alia, its various COVID-19 pandemic-related policies and protocols, the directives issued by the New York State Department of Health and the New York State Department of Health and Human Services, and the decedent's medical records, conclusively established that the defendant was entitled to immunity as the three requirements for immunity under the EDTPA were satisfied (see Public Health Law former § 3082[1] …). Costiera v MMR Care Corp., 2025 NY Slip Op 07373, Second Dept 12-31-25

Practice Point: Consult this decision for an explanation of the criteria for the COVID-related immunity afforded health care facilities pursuant to the EDTPA.

Similar issues and result in Byington v North Sea Assoc., LLC, 2025 NY Slip Op 07372, Second Dept 12-31-25

December 31, 2025

## JURIES, LAW CLERK'S IMPROPER DISCUSSION OF NEGLIGENCE WITH DELIBERATING JURORS.

## WHEN THE JUDGE'S LAW CLERK SPOKE TO THE JURORS ABOUT A JURY NOTE WHILE THE JURORS WERE DELIBERATING, THE CLERK DISCUSSED CONCEPTS OF NEGLIGENCE, FAULT AND CERTAIN FACTS OF THE CASE; PLAINTIFFS' MOTION TO SET ASIDE THE VERDICT SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court and ordering a new trial after a defense verdict, determined that the law clerk's discussion with the jurors while they were deliberating, during which concepts of negligence and fault and certain facts were discussed, constituted interference with the deliberations and usurpation of the role of the court. The motion to set aside the verdict should have been granted:

Following the verdict, the plaintiffs moved pursuant to CPLR 4404(a) to set aside the jury verdict in favor of the defendant on the issue of liability in the interest of justice and for a new trial. In an affirmation in support of the motion, the plaintiffs' counsel stated that he had learned, after the jury was discharged, that when the

clerk went to speak to the jurors about writing the actual question on the form, the clerk improperly communicated with the jurors in a way that went beyond the Supreme Court's instructions. In further support of their motion, the plaintiffs submitted an affidavit from a former juror (hereinafter the first juror) who averred, among other things, that the clerk had discussed with the jurors the concepts of negligence and fault, as well as certain facts about the case. The first juror averred that the clerk was in the jury room with the jurors for approximately three to five minutes, and that following that discussion, the jurors "did not feel it [was] necessary to submit further questions to the Court." * * *

"A motion pursuant to CPLR 4404(a) to set aside a verdict and for a new trial in the interest of justice encompasses errors in the trial court's rulings on the admissibility of evidence, mistakes in the charge, misconduct, newly discovered evidence, and surprise" … . "Litigants are entitled, as a matter of law, to a fair trial free from improper comments by counsel or the trial court" … . "The interest of justice thus requires a court to order a new trial where comments [have] deprived [a] party of a fair trial or unduly influenced a jury" … .

… [T]he clerk's conduct cannot be found to be harmless. By offering opinions and/or explanations on the meaning of the legal concepts at issue in the trial, the clerk impermissibly interfered in the jury's deliberations and usurped the role of the court to, in consultation with counsel, instruct the jurors on the law applicable to the facts. Saporito-Elliott v United Skates of Am., Inc., 2025 NY Slip Op 06886, Second Dept 12-10-25

Practice Point: The law clerk's discussion with the deliberating jurors about concepts of negligence, fault and certain facts of the case interfered with the deliberations and usurped the role of the court. The verdict, therefore, must be set aside.

December 10, 2025

## LABOR LAW-CONSTRUCTION LAW, COLLAPSE OF UNPROTECTED TRENCH.

## PLAINTIFF WAS INJURED WHEN AN UNPROTECTED TRENCH CAVED IN AND COLLAPSED; THE ABSENCE OF ANY SAFETY DEVICES, LIKE A SAFETY RAILING, VIOLATED LABOR LAW 240(1) AND 241(6) (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff was entitled to summary judgment on the Labor Law 240(1) and 241(6) causes of action. Plaintiff was directed to retrieve lumber which was near an unprotected trench. He was injured when the trench caved in and collapsed. The facts that the trench was 10 feet deep, unshored, and without planking, barricades or guardrails demonstrated plaintiff was not provided with an adequate safety device in violation of Labor Law 240(1). The same omissions violated 12 NYCRR 23-1.7(b)(1):

… [T]he plaintiff demonstrated, prima facie, that the defendants violated Labor Law § 240(1) by failing to provide the plaintiff with an adequate safety device and that this violation was a proximate cause of his injuries ….* * *

"To establish liability under Labor Law § 241(6), a plaintiff must demonstrate that his or her injuries were proximately caused by a violation of an Industrial Code provision that is applicable under the circumstances of the case" … . Here, the Labor Law § 241(6) cause of action was predicated, inter alia, on a violation of 12 NYCRR 23-1.7(b)(1), "which mandates that holes or hazardous openings at construction sites into which a person may step or fall be guarded by a substantial cover fastened in place or by the installation of a safety railing" … . O'Donnell v Rocklyn Ecclesiastical Corp., 2025 NY Slip Op 06714, Second Dept 12-3-25

Practice Point: If a worker is injured when an unprotected trench caves in, both Labor Law 240(1) and 241(6) have been violated.

December 3, 2025

## LABOR LAW-CONSTRUCTION LAW, LADDER FALL, THE NEED TO STAND AT THE VERY TOP OF THE LADDER DEMONSTRATED THE LADDER WAS NOT AN ADEQUATE SAFETY DEVICE.

## PLAINTIFF WAS STANDING ON THE SECOND RUNG FROM THE TOP, STRADDLING THE LADDER, WHEN IT WOBBLED AND FELL; THE NEED TO STAND NEAR THE TOP OF THE LADDER TO DO THE WORK DEMONSTRATES THE LADDER WAS NOT AN ADEQUATE SAFETY DEVICE ENTITLING PLAINTIFF TO SUMMARY JUDGMENT ON THE LABOR LAW 240(1) CAUSE OF ACTION; THERE WAS A TWO JUSTICE DISSENT WHICH ARGUED THERE WAS A QUESTION OF FACT WHETHER PLAINTIFF'S MISUSE OF THE LADDER WAS THE SOLE PROXIIMATE CAUSE OF THE ACCIDENT (THIRD DEPT).

The Third Department, reversing Supreme Court, over a two-justice dissent, determined plaintiff in this ladder-fall case was entitled to summary judgment on the Labor Law 240(1) cause of action. Plaintiff was standing on the second rung from the top of an extendable step ladder, straddling the ladder, when the ladder fell away from the building. The majority concluded the fact that plaintiff had to stand on the second rung from the top and straddle the ladder to do the work, he was not provided with an adequate safety device. The dissent argued there was a question of fact whether plaintiff's misuse of the ladder was the sole proximate cause of the accident:

Supreme Court erred in finding that plaintiff failed to meet his prima facie burden, as "[w]e have repeatedly held that when a worker injured in a fall was provided with an elevation-related safety device, [here the ladder,] the question of whether that device provided proper protection within the meaning of Labor Law § 240 (1) is ordinarily a question of fact, except in those instances where the unrefuted evidence establishes that the device collapsed, slipped or otherwise failed to perform its function of supporting the worker and his or her materials" … . Accordingly, … an unexplained fall of the ladder while plaintiff was using it to reach an elevated work area, he is entitled to the presumption that the ladder was

not good enough to afford proper protection … . Nusbaum v 1455 Wash. Ave. LLC, 2025 NY Slip Op 07066, Third Dept 12-18-25

Practice Point: Here the fact that plaintiff had to stand on the second rung from the top, straddling the ladder, to do the work demonstrated the ladder was not an adequate safety device, entitling plaintiff to summary judgment on the Labor Law 240(1) cause of action.

December 18, 2025

## LABOR LAW-CONSTRUCTION LAW, PLAINTIFF USED ANOTHER CONTRACTOR'S DEFECTIVE LADDER WITHOUT PERMISSION AND FELL.

## SUBCONTRACTOR DAL HAD ENTERED CONTRACTS FOR THIS RENOVATION PROJECT WITH THE GENERAL CONTRACTOR, JRM, AND THE PROPERTY OWNER, ROCKEFELLER; PLAINTIFF, WHO DID NOT WORK FOR DAL, WITHOUT DAL'S PERMISSION, KNOWING THE LADDER WAS DEFECTIVE, USED A DEFECTIVE LADDER OWNED BY DAL; THE LADDER WOBBLED AND PLAINTIFF FELL; THE COURT OF APPEALS HELD THE INDEMNIFICATION CLAUSES IN DAL'S CONTRACTS WITH JRM AND ROCKEFELLER DID NOT APPLY TO PLAINTIFF'S INJURIES (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Wilson, over a two-judge dissent, determined that DAL, a subcontractor, was not contractually required to indemnify the general contractor, JRM, and the property owner, Rockefeller, for plaintiff's injuries from a ladder-fall. The plaintiff, Dibrino, a carpenter working for a nonparty subcontractor, Jacobsen, had already completed his measurements using his employer's A-frame ladder and a scaffold, which he had moved to his next work-area, when he was asked to redo the measurements. Plaintiff, knowing it was defective, used an A-frame ladder owned by DAL when he remeasured. The ladder wobbled, plaintiff fell; a tool on his belt impaled his abdomen. The ruling

that DAL was not obligated to indemnify the general contractor (JAM) and the owner (Rockefeller) for plaintiff's injuries is based on the contractual language:

Mr. Dibrino's unauthorized use of an unattended ladder (which he knew was not furnished by his employer and knew he was not supposed to use) instead of using the scaffold and ladder supplied by Jacobson that he had used earlier that day in that same spot, to perform work squarely outside the scope of the agreement between DAL and JRM, is not reasonably construed as arising from performance DAL's work. JRM and Rockefeller's reading would mean DAL's contractual duty to indemnify would be triggered by any event that could be traced to DAL through any path—even, for example, had DAL disposed of the defective ladder in a dumpster and Mr. Dibrino retrieved it. Such an expansive reading of these indemnity provisions is implausibly broad, … an indemnification provision "must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed" … . Dibrino v Rockefeller Ctr. N., Inc., 2025 NY Slip Op 07077, CtApp 12-18-25

Practice Point: Consult this opinion for insight into how indemnification clauses in contracts among a subcontractor, the general contractor and the owner should be interpreted under the Labor Law. Here the clauses did not apply to injuries suffered by a worker who (1) did not work for the subcontractor and (2) used the subcontractor's ladder without the subcontractor's permission, knowing that the ladder was defective.

December 18, 2025

## LABOR LAW-CONSTRUCTION LAW, DEFENDANT DID NOT EXERCISE SUPERVISORY CONTROL OVER INJURED PLAINTIFF, NO LABOR LAW 200 OR COMMON-LAW NEGLIGENCE LIABILITY.

## HERE THE OWNER AND GENERAL CONTRACTOR DEMONSTRATED THEY DID NOT EXERCISE SUPERVISION AND CONTROL OVER THE WORK PLAINTIFF WAS DOING WHEN INJURED; THEREFORE THE LABOR LAW 200 AND COMMON LAW NEGLIGENCE CAUSES OF ACTION AGAINST THEM SHOULD HAVE BEEN DISMISSED; THE COURT NOTED THAT THE RIGHT TO GENERALLY SUPERVISE THE WORK OR TO STOP THE WORK FOR SAFETY VIOLATIONS DOES NOT CONSTITUTE "SUPERVISION AND CONTROL" OF THE WORK WITHIN THE MEANING OF LABOR LAW 200 OR COMMON LAW NEGLIGENCE (SECOND DEPT).

The Second Department, dismissing the Labor Law 200 and negligence causes of action against the owner and general contractor, noted that the right to generally supervise the work, to stop the work for a safety violation or to ensure compliance with safety regulations does not amount to the level of supervision and control of the work for liability under Labor Law 200. Plaintiff worked for a subcontractor and was injured while attempting to guide a heavy concrete object as it was lowered into a hole by a crane:

"The right to generally supervise the work, to stop the work if a safety violation is noted, or to ensure compliance with safety regulations does not amount to the supervision and control of the work necessary to impose liability on an owner or a general contractor pursuant to Labor Law § 200" … . Here, … defendants established … that the alleged incident arose from work performed over which they did not exercise supervision or control … . Kelly v RBSL Realty, LLC, 2025 NY Slip Op 07291, Second Dept 12-24-25

Practice Point: In the context of the requirements for Labor Law 200 and common law negligence liability for construction accidents, the owner's and/or general

contractor's right to generally supervise the work and/or to stop the work for safety violations does not amount to "supervision and control" of the work.

December 24, 2025

## LABOR LAW-CONSTRUCTION LAW, OPEN AND OBVIOUS NATURE OF THE DANGEROUS CONDITION.

## PLAINTIFF TRIPPED OVER A FLOOR TO CEILING WOODEN BRACE IN A HOME WHICH WAS UNDER CONSTRUCTION; THE THIRD DEPARTMENT HELD THAT THE OPEN AND OBVIOUS NATURE OF THE BRACE DID NOT WARRANT THE AWARD OF SUMMARY JUDGMENT TO THE DEFENDANTS ON THE LABOR LAW 200 CAUSE OF ACTION (THIRD DEPT).

The Third Department, reversing Supreme Court, determined the open and obvious nature of condition (a wooden brace over which plaintiff tripped) did not warrant summary judgment in defendants' favor on the Labor Law 200 cause of action. The home was under construction and the brace ran at a 45 degree angle from the floor to the ceiling in the middle of the kitchen:

… [D]efendants failed to meet their prima facie burden as questions of fact remain as to whether defendants maintained the worksite in a reasonably safe condition, precluding summary judgment. … [D]efendants presented an affidavit of David Rubin, a former CEO of a general contracting firm with 45 years of experience in the field of general construction. Rubin reviewed, among other things, photographs of the worksite and observed there were two-by-four wooden braces set up throughout the home that were "necessary and fundamental to the construction process." He explained that the brace plaintiff tripped over was "conspicuous and not hidden from sight, and indeed, plaintiff had already seen that particular brace prior to his incident." Ultimately, he opined that neither the use nor the placement of the brace was negligent as it was necessary to support the structure at that stage of construction.

Although Rubin placed great emphasis on the fact that the brace was open and obvious and that plaintiff saw it prior to his fall, this Court has repeatedly held that "the open and obvious nature of an allegedly dangerous condition does not, standing alone, necessarily obviate a [general contractor's] duty to maintain [the worksite] in a reasonably safe condition" … . Rather, the readily observable nature of the wooden brace "merely negated any duty that defendant[s] owed plaintiff to warn of [the] potentially dangerous condition[ ]" … . Nor does plaintiff's testimony at his deposition that he saw the wooden brace prior to his fall defeat his claim as his "previous knowledge of a defective condition, if any, may be considered by a jury in assessing comparative negligence" … . Accordingly, "[v]iewing the evidence in the light most favorable to plaintiff as the nonmoving party, a question of fact remains as to whether defendants' [worksite was] maintained in a reasonably safe condition. That question is for the trier of fact to resolve" … . Sullivan v Flynn, 2025 NY Slip Op 06773, Third Dept 12-4-25

Practice Point: Here the Third Department noted that a condition which is open and obvious and of which the plaintiff was aware before he was injured is not a sufficient ground for the award of summary judgment on a Labor Law 200 cause of action. Here a wooden floor to ceiling brace in the middle of the kitchen in a house under construction, over which plaintiff tripped, was deemed to raise a question of fact.

December 4, 2025

## MEDICAL MALPRACTICE, EXPERT EVIDENCE, "LOCALITY RULE."

## SUPREME COURT SHOULD NOT HAVE RELIED ON THE "LOCALITY RULE" TO DISMISS THE OPINION OF PLAINTIFF'S EXPERT BECAUSE THE EXPERT PRACTICED MEDICINE IN ANOTHER STATE: WHEN AN EXPERT TESTIFIES ABOUT STANDARDS APPLICABLE THROUGHOUT THE UNITED STATES, THE LOCALITY RULE SHOULD NOT BE INVOKED (THIRD DEPT).

The Third Department, reversing Supreme Court in this medical malpractice action, determined plaintiffs' expert affidavit was not conclusory or speculative and

raised triable questions of fact. The Third Department noted that Supreme Court should not have dismissed plaintiffs' expert's (Grant's) opinion on the ground Grant practiced medicine in a different state. Although the "locality rule" has not been set aside, it does not affect the validity of an opinion based on standards applicable throughout the United States:

… [W]e briefly address Supreme Court's reliance on the fact that Grant practiced medicine in another state to ostensibly dismiss his opinions. Over 125 years ago in Pike v Honsinger (155 NY 201 [1898]), the Court of Appeals promulgated what has become known as the locality rule … . Under this rule, "the prevailing standard of care governing the conduct of medical professionals demands that a doctor exercise that reasonable degree of learning and skill that is ordinarily possessed by physicians and surgeons in the locality where the doctor practices" … . While this rule has not been set aside, this Court has indicated that "the development of vastly superior medical schools and postgraduate training, modern communications, the proliferation of medical journals, along with frequent seminars and conferences, have eroded the justification for th[is] rule" … . With the rise of the Internet and the attendant ease with which information is disseminated, this is even more true today. "Thus, where, as here, a medical expert proposes to testify about minimum standards applicable throughout the United States, the locality rule should not be invoked" … . Kosinski v Wladis, 2025 NY Slip Op 06772, Third Dept 12-4-25

Practice Point: In a med mal case, where an expert testifies about standards applicable throughout the United States, the "locality rule" requiring the application of local standards should no longer be invoked. Here plaintiffs' expert's opinion was erroneously dismissed because the expert practiced medicine in a different state.

December 4, 2025

## MUNICIPAL LAW, MEDICAL MALPRACTICE ACTION AGAINST CITY HOSPITAL, APPLICATION TO FILE A LATE NOTICE OF CLAIM SHOULD INCLUDE THE MEDICAL RECORDS.

## HERE, IN SEEKING LEAVE TO FILE A LATE NOTICE OF CLAIM AGAINST A CITY HOSPITAL ALLEGING MEDICAL MALPRACTICE, THE PETITIONER DID NOT SUBMIT THE MEDICAL RECORDS; THEREFORE THE PETITIONER DID NOT SHOW THAT THE HOSPITAL HAD TIMELY KNOWLEDGE OF THE CLAIM; LEAVE TO FILE A LATE NOTICE SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court and dismissing the action, determined the petition for leave to file a late notice of claim, alleging medical malpractice, negligence and violation of the Public Health Law on behalf of decedent, should not have been granted. The petitioner did not establish that the city had timely knowledge of the claim, which is the most important criterium for allowing late notice:

"Merely having or creating hospital records, without more, does not establish actual knowledge of a potential injury where the records do not evince that the medical staff, by its acts or omissions, inflicted any injury on plaintiff" … . The petitioner's "failure to submit evidence of the contents of the alleged records is fatal to [her] argument that the [appellant] acquired actual knowledge from the existence of such records" … . Additionally, there is no suggestion in the record that the appellant refused to produce the medical records or that the petitioner sought to compel the appellant to produce any papers necessary to the determination of the petition pursuant to CPLR 409(a) … . Matter of Giustra v New York City Health & Hosps. Corp., 2025 NY Slip Op 06862, Second Dept 12-10-25

Practice Point: The most important criterium for leave to file a late notice of claim is evidence the city had timely knowledge of the claim. Medical records, depending on their contents, can (but do not necessarily) demonstrate timely knowledge of the claim. Here petitioner did not submit the medical records and therefore did not even attempt to demonstrate the city's timely knowledge of the

nature of the medical malpractice claim. The mere existence of medical records is not enough.

December 10, 2025

## MUNICIPAL LAW, WRITTEN NOTICE REQUIREMENT APPLIES TO A VEHICLE BARRIER WHICH FELL OVER.

## AN ARCH-SHAPED BOLLARD (A BARRIER TO PROTECT A TREE FROM VEHICLES USING A PARKING LOT) IS SUBJECT TO THE WRITTEN-NOTICE REQUIREMENT IN THE GENERAL MUNICIPAL LAW; HERE THE BOLLARD, WHICH FELL OVER WHEN A CHILD TRIED TO SWING ON IT, WAS INSTALLED 14 YEARS AGO; BECAUSE THERE WAS NO WRITTEN-NOTICE AND BECAUSE THE DANGEROUS CONDITION WAS NOT IMMEDIATELY APPARENT WHEN THE BOLLARD WAS INSTALLED, THE CITY WAS NOT LIABLE (CT APP).

The Court of Appeals, affirming the Appellate Division, determined an arch-shaped bollard (a barrier to protect a tree from damage by vehicles using a parking lot), which fell over when a child attempted to swing on it, was subject to the written-notice requirement in the General Municipal Law. Because the city did not have written notice of the dangerous condition it cannot be held not liable. The Court of Appeals noted that a parking lot is a "highway" within the meaning of the General Municipal Law section 50-e "written notice" requirement:

Prior written notice is not required "where the locality created the defect or hazard through an affirmative act of negligence" which "immediately results in the existence of a dangerous condition" … . The exception is meant to "address[] situations where a hazard was foreseeable, insofar as the municipality created it" as opposed to situations where there is "difficulty in determining, after the passage of time," whether the municipality was initially negligent … .

Plaintiffs failed to meet their burden raising a triable issue of fact as to whether the City caused or created an immediately dangerous condition through an act of affirmative negligence … . Nor did the affidavit from plaintiffs' expert create a

triable issue of fact as to the City's affirmative negligence because, among other things, it did not tend to establish that the City left behind an unsafe condition at the time it installed the bollard 14 years prior to the accident. Although the expert opined that the bollard was unsafe from "the moment" it was installed, they failed to explain this conclusory opinion through reliance on industry standards or empirical data, nor did they explain how their "professional experience in construction" supported their conclusion … . Rather, the summary judgment record suggests that, to the extent the installation method created a defect, any such defect resulted from the effects of environmental conditions over time. Gurbanova v City of Ithaca, 2025 NY Slip Op 07076, CtApp 12-18-25

Practice Point: A parking lot is a "highway" for purposes of the General Municipal Law 50-e "written notice" requirement.

Practice Point: A bollard (a post which serves as a vehicle-barrier in a parking lot) is subject to the "highway" "written-notice" requirement in the General Municipal Law.

December 18, 2025

## NOXIOUS ODORS, PRIVATE NUISANCE, PUBLIC NUISANCE, NEGLIGENCE.

## NOXIOUS ODORS FROM A PLASTIC-MANUFACTURING FACILITY CANNOT BE THE BASIS OF A NEGLIGENCE CAUSE OF ACTION BECAUSE THE ODORS HAVE NOT CAUSED PHYSICAL INJURY OR PROPERTY DAMAGE (ECONOMIC LOSS IS NOT SUFFICIENT); THE NOXIOUS ODORS DO SUPPORT A PRIVATE NUISANCE CAUSE OF ACTION EVEN THOUGH A LARGE NUMBER OF PRIVATE CITIZENS IN THIS CLASS ACTION LAWSUIT ARE AFFECTED (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court in this class action lawsuit, in a full-fledged opinion by Justice Voutsinas, over a concurrence and partial dissent, determined (1) noxious odors emanating from defendant's plastic-manufacturing facility are properly the subject of a private nuisance cause of action

on behalf of a collective of individuals, and (2) the noxious odors are not a proper subject for a negligence cause of action because no tangible physical harm or property damage was alleged (diminution in property value is not enough):

"'To recover in negligence [or gross negligence], a plaintiff must sustain either physical injury or property damage resulting from the defendant's alleged negligent conduct . . . This limitation serves a number of important purposes: it defines the class of persons who actually possess a cause of action, provides a basis for the factfinder to determine whether a litigant actually possesses a claim, and protects court dockets from being clogged with frivolous and unfounded claims'" … .

"Although [the] defendant undoubtedly owes surrounding property owners a duty of care to avoid injuring them . . . , the question is whether [the] plaintiff[s] sustained the required injury" … . "'[T]he economic loss resulting from the diminution of [the] plaintiff[s'] property values is not, standing alone, sufficient to sustain a negligence claim under New York law'" … . * * *

"'The elements of a private nuisance cause of action are: (1) an interference substantial in nature, (2) intentional in origin, (3) unreasonable in character, (4) with a person's property right to use and enjoy land, (5) caused by another's conduct in acting or failing to act'" … . …

A private nuisance cause of action is one where "[t]he rights invaded . . . are not suffered by the [plaintiffs] in their status as citizens or part of the public" … . Rather, the harm is suffered by the plaintiffs "in their private capacity in respect of an interference with the comfortable enjoyment of their homes," which does not become a public nuisance "merely because a considerable number are injured" … . Dudley v API Indus., Inc., 2025 NY Slip Op 07379, Second Dept 12-31-25

Practice Point: Noxious odors do not support a negligence cause of action because there is no physical injury of property damage (diminished property value is not enough).

Practice Point: Noxious odors support a private nuisance cause of action, even where a large number of private citizens are affected.

December 31, 2025

## SLIP AND FALL, LANDLORD-TENANT.

## DEFENDANT LANDLORD'S SUMMARY JUDGMENT MOTION IN THIS SIDEWALK SLIP AND FALL CASE RAISED QUESTIONS OF FACT ABOUT WHETHER DEFENDANT HAD TRANSFERRED RESPONSIBILITY FOR SNOW AND ICE REMOVAL IN THE AREA OF THE FALL TO PLAINTIFF TENANT AND WHETHER DEFENDANT HAD ACTUAL KNOWLEDGE OF THE RECURRING COLLECTION OF WATER AND ICE IN THE AREA OF THE FALL (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the evidence submitted by defendant landlord in this icy-sidewalk slip and fall case failed to eliminate questions of fact about whether defendant had completely relinquished to the plaintiff responsibility for snow and ice removal in the area of the fall and whether defendant had actual knowledge of the depression in the sidewalk and the formation of ice in the area of the fall:

Here, the evidence submitted by the defendant demonstrated that the defendant lived at the property where the plaintiff's accident occurred. Additionally, at his deposition, the defendant testified that the garbage cans for both sides of the property, which he maintained, were located on the plaintiff's side of the property and that he approached the garbage cans several times per week both to place trash in the garbage cans and to bring the garbage cans to the street for collection. Moreover, photographs submitted by the defendant depicting the area where the plaintiff fell demonstrated that the garbage cans were stored within a few feet of that area. Although the lease stated that the plaintiff was responsible for cleaning any accumulated snow from the entryway outside his private entrance, the lease also stated that the defendant was required to provide the plaintiff with a shovel and salt to complete this task. Finally, although the plaintiff testified at his deposition that he took care of snow removal for the area where he fell, his son testified at his deposition that in December 2018, approximately one month before the plaintiff's accident, the defendant had, on a few occasions, placed salt on ice in that area.

… Although the defendant denied knowing about the condition or having any conversations with the plaintiff about this condition, at his deposition, the plaintiff testified that prior to the accident, he had told the defendant "[f]our to five times" about the allegedly defective section of the side yard walkway, including that ice and snow would accumulate there in the winter. Moreover, several of the photographs submitted by the defendant depicted an accumulation of ice and snow in the allegedly defective area where the plaintiff fell. Yongxi Li v Pei Xing Huang, 2025 NY Slip Op 07432, Second Dept 12-31-25

Practice Point: Consult this slip-and-fall decision for succinct explanations of the law concerning the responsibility for snow and ice removal as between a resident landlord and a tenant, as well as a landlord's actual knowledge of a recurring dangerous condition.

December 31, 2025

## TOXIC TORTS, EXPERTS DID NOT RELY ON NOVEL OR EXPERIMENTAL METHODS, FRYE AND PARKER HEARINGS SHOULD NOT HAVE BEEN ORDERED.

## IT WAS AN ABUSE OF DISCRETION TO ORDER AN EVIDENTIARY HEARING IN THIS TOXIC TORT CASE; NO FRYE HEARING WAS NECESSARY BECAUSE THE EXPERTS DID NOT USE NOVEL OR EXPERIMENTAL METHODS; NO PARKER HEARING WAS NECESSARY BECAUSE GENERAL AND SPECIFIC CAUSATION WERE ADEQUATELY ADDRESSED IN THE EXPERTS' SUBMISSIONS AND GENERALLY ACCEPTED METHODS WERE USED (THIRD DEPT).

The Third Department, reversing Supreme Court, in a full-fledged opinion by Justice Ceresa, determined there was no need for a Frye hearing in this toxic tort case because none of the three experts used methods that were novel or experimental. In addition, there was no need for a Parker hearing because the expert's used generally accepted methods to determine general and specific causation. Therefore ordering the evidentiary hearing was an abuse of discretion:

"The singular purpose of a Frye hearing is to ascertain the reliability of novel scientific evidence by determining whether the methods used to generate such evidence will, when properly performed, produce results accepted as reliable within the scientific community generally" … . " 'A court need not hold a Frye hearing where it can rely upon previous rulings in other court proceedings as an aid in determining the admissibility of the proffered testimony' " … . "Absent a novel or experimental scientific theory, a Frye hearing is generally unwarranted" … . * * *

… [U]nder Parker, " '[t]he focus moves from the general reliability concerns of Frye to the specific reliability of the procedures followed to generate the evidence proffered and whether they establish a foundation for the reception of the evidence at trial.' . . . [In toxic tort cases,] [i]t is well-established that an opinion on causation should set forth a plaintiff's exposure to a toxin, that the toxin is capable of causing the particular illness (general causation) and that plaintiff was exposed to sufficient levels of the toxin to cause the illness (specific causation)" (Parker v Mobil Oil Corp., 7 NY3d at 447-448 …). … [A] s plaintiffs' [experts'] written submissions … offered the requisite causal links, there was no need for a hearing to determine whether these foundational standards were met. Marpe v Tonoga, Inc., 2025 NY Slip Op 07053, Third Dept 12-18-25

Practice Point: Consult this opinion for insight into when a Frye/Parker hearing is necessary to determine the admissibility of expert evidence in a toxic tort case. The evidentiary hearing had been ordered by the trial judge, but the Third Department held ordering the hearing was an abuse of discretion.

December 18, 2025

## TRAFFIC ACCIDENTS, POLICE OFFICER RESPONDING TO AN EMERGENCY, RECKLESS DISREGARD STANDARD.

## ALTHOUGH THE OFFICER WAS RESPONDING TO AN EMERGENCY WHEN PLAINTIFF'S VEHICLE WAS STRUCK, PLAINTIFF RAISED A QUESTION OF FACT WHETHER THE OFFICER ACTED WITH RECKLESS DISREGARD FOR THE SAFETY OF OTHERS; SPECIFICALLY QUESTIONS WERE RAISED ABOUT THE EXCESSIVE SPEED OF THE POLICE VEHICLE AND WHETHER THE SIREN WAS ON AS REQUIRED BY DEPARTMENT POLICY (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the defendant city was not entitled to summary judgment dismissing this action stemming from plaintiff's vehicle being struck by a police vehicle responding to an emergency. Plaintiff raised a question of fact whether the police officer's conduct rose to the level of reckless disregard for the safety of others. The officer drove in the oncoming lane of traffic where plaintiff was attempting a left turn:

The "reckless disregard standard demands more than a showing of a lack of due care under the circumstances—the showing typically associated with ordinary negligence claims . . . Rather, for liability to be predicated upon a violation of Vehicle and Traffic Law § 1104, there must be evidence that the actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow and has done so with conscious indifference to the outcome" … . Although the reckless disregard standard is a heightened standard compared to ordinary negligence, it "retains and recognizes the potential for liability as a protection for the general public against disproportionate, overreactive conduct" … . * * *

… [P]laintiff's submissions raise questions of fact as to the speed at which the officer's vehicle was traveling at the time of the accident and whether the officer was operating the siren in his vehicle, which would have been required by department policy … . Gwathney v City of Buffalo, 2025 NY Slip Op 07175, Fourth Dept 12-23-25

Practice Point: Here in this police-emergency-traffic-accident case, questions of fact about the speed of the police vehicle (in the oncoming lane where plaintiff was attempting a left turn) and whether the siren was on as required by department policy precluded summary judgment.

December 23, 2025