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Reversal Report
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An Organized Compilation of Summaries of Selected Decisions, Mostly Reversals, Addressing Personal Injury, Released by Our New York State Appellate Courts and Posted on the New York Appellate Digest Website in November 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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HERE THE AUTOMATIC DOOR AT A RESIDENTIAL FACILITY CLOSED ON THE ELDERLY PLAINTIFF; SENSORS WHICH WOULD PREVENT THE DOOR FROM CLOSING WERE AVAILABLE; THERE WAS A QUESTION OF FACT WHETHER THE DOOR WAS SAFE (THIRD DEPT).

The Third Department, reversing Supreme Court, determined the lawsuit stemming from an automatic door at a residential facility closing on the elderly plaintiff should not have been dismissed, despite the evidence that the door was not

defective. There was evidence that sensors which would stop the door from closing when a person is in the doorway could have been installed:

Given the competing expert affidavits on whether defendants maintained their property in a reasonably safe condition under the circumstances, Supreme Court erred in awarding defendants summary judgment dismissing the complaint … . Context is essential in gauging whether a property owner has maintained its premises in a reasonably safe condition. Here, defendants knew certain residents required walkers or wheelchairs that would impact their ability to navigate through a doorway, that the facility's doors were previously serviced for closing too quickly, and that presence sensors were a readily available option from the manufacturer. Plaintiff also sustained a serious injury to her right leg requiring surgery. Viewing the facts in the light most favorable to plaintiff as the nonmoving party, we find that there are triable issues of fact as to whether the premises were reasonably safe … . Any issue of comparative fault on the part of plaintiff and/or her daughter and grandson who were with her at the time of this incident is a question to be resolved by a factfinder … . Spielman v Glenwyck Dev., LLC, 2024 NY Slip Op 05932, Third Dept 11-27-24

Practice Point: Here there was no evidence the automatic door which closed on plaintiff was defective, but there was a question of fact whether the installation of sensors would have rendered the door safe for use by the elderly.

November 27, 2024

BAR FIGHT, INADEQUATE SECURITY THEORY.

IN THIS "BAR FIGHT" "INADEQUATE SECURITY" ACTION, THE DEFENDANT BAR HAD TIMELY SUED ITS SECURITY COMPANY AS A THIRD-PARTY DEFENDANT; AFTER THE STATUTE OF LIMITATIONS EXPIRED, PLAINTIFF SOUGHT TO SUE THE SECURITY COMPANY DIRECTLY UNDER A "RELATION BACK" THEORY; PLAINTIFF'S MOTION TO SERVE AND FILE AN AMENDED COMPLAINT AGAINST THE SECURITY COMPANY DIRECTLY SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the motion for leave to serve and file an amended complaint adding defendant security company, MAS, after the statute of limitations had expired, should have been granted. Plaintiff was punched in a bar owned by defendant B&M. Plaintiff sued the bar alleging inadequate security, The bar then sued MAS, which provided security for the bar. MAS, therefore, was involved in the litigation as a third-party defendant before the statute of limitations expired:

Supreme Court improvidently exercised its discretion in denying that branch of the plaintiff's motion which was for leave to serve and file a supplemental summons and amended complaint adding MAS as a direct defendant. "In the absence of prejudice or surprise to the opposing party, leave to amend a pleading should be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit" … . "Delay alone is insufficient to bar an amendment to the pleading; [i]t must be lateness coupled with significant prejudice to the other side" … .

Here, … the three-year statute of limitations applicable to the plaintiff's cause of action alleging negligence (see CPLR 214[5]) had expired by the time that the plaintiff moved … for leave to serve and file a supplemental summons and amended complaint adding MAS as a direct defendant, whether the amendment may be allowed depends upon whether the relation-back doctrine applies (see CPLR 203[f] …), with the burden being on the plaintiff to establish that the doctrine applies … . B & M's third-party complaint and the plaintiff's proposed

amended complaint arise out of the same conduct, transaction, or occurrence … . Also, there is no dispute that MAS was "a participant in the litigation" … . Moreover, "[t]he proposed amendment was not palpably insufficient or devoid of merit, and there was no prejudice to [MAS] in allowing the plaintiff to amend the complaint to add it as a direct defendant" … .

Contrary to the Supreme Court's determination, the plaintiff was not required to demonstrate that MAS and B & M were united in interest since the record demonstrates that MAS had actual notice of the plaintiff's potential cause of action against it within the applicable limitations period and was a third-party defendant in the action … . Egelandsdal v Massaro, 2025 NY Slip Op 06156, Second Dept 11-12-25

Practice Point: Consult this decision for insight into the criteria for the application of the "relation back" theory which allows suit after the statute of limitations has run. Here in this bar-fight "inadequate security" action against defendant bar, the bar had timely sued its security company as a third-party defendant. Because the security company was already involved in the litigation, and because the complaint against the bar and the security company arose out of the same conduct, the "relation back" criteria of CPLR 203(f) were met and plaintiff should have been allowed to sue the security company directly after the statute of limitations had expired.

November 12, 2025

CHILD VICTIMS ACT, DISCOVERY OF DEFENDANT PRIEST'S MENTAL HEALTH RECORDS, NO PRIVILEGE PROTECTION.

DOCUMENTS RELATING TO THE MENTAL-HEALTH TREATMENT OF A PEDOPHILE PRIEST WERE NOT PROTECTED BY PRIEST-PENITENT, PHYSICIAN-PATIENT OR PSYCHOLOGIST-PATIENT PRIVILEGES; THE NAMES OF OTHER CHILDREN ABUSED BY THE PRIEST ALLEGED TO HAVE ABUSED PLAINTIFF ARE DISCOVERABLE (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Dillon, determined progress reports concerning the mental health treatment of a pedophile priest were discoverable without redaction in this Child Victims Act case against the Diocese. The Diocese claimed the redacted information was protected from disclosure by the priest-penitent, physician-patient and psychologist-patient privileges. The Second Department determined those privileges were waived by the (pedophile) priest who consented to forwarding the reports to a third-party, a Bishop overseeing the priest's progress. In addition, the priest-penitent privilege did not apply because the documents did not relate to spiritual guidance. The Second Department further determined that the names of other victims allegedly abused by the same priest were discoverable:

This appeal permits us to address two principal sets of issues. The first is a rare two-step analysis regarding the potential disclosure of progress reports and letters generated at the request of a religious organization to determine whether an alleged pedophile priest could be safely returned to duties at a parish. Under the circumstances of this appeal, we hold that the progress reports of an alleged pedophile priest that are shared with his Bishop with accompanying letters, to assist the Bishop in determining whether the priest may return to parish duties, fall outside the scope of the clergy-penitent privilege of confidentiality under CPLR 4505. Further, we hold that the physician-patient and psychologist-patient privileges of confidentiality for progress reports and letters generated by a psychological treatment facility to assist the same Bishop's determination, and disclosed to the Bishop for that purpose, are waived under CPLR 4504 and 4507. Relatedly, we hold that the Appellate Division, Second Department, agrees with the reasoning of the Appellate Divisions, First and Third Departments, that in actions

pursuant to the Child Victims Act (CVA) (see CPLR 214-g), courts may exercise discretion in favor of requiring the unredacted disclosure of the identities of alleged abuse victims other than the plaintiff, so long as those abuses were committed by the same alleged abuser rather than by any other alleged abuser. Maida v Diocese of Brooklyn, 2025 NY Slip Op 06314, Second Dept 11-19-25

Practice Point: Consult this opinion for discussions of the nature of the priest-penitent, physician-patient and psychologist-patient privileges in the context of the discovery of documents relating to the mental health treatment of a pedophile priest accused of abusing children.

Practice Point: Consult this opinion for a discussion of the discoverability of the names of other children abused by the priest who is alleged to have abused the plaintiff.

November 19, 2025

DRUG-OVERDOSE DEATH, HEARSAY IN PLAINTIFF'S AFFIDAVIT INSUFFICIENT TO DEFEAT A MOTION TO DISMISS.

ALTHOUGH PLAINTIFF'S COUNSEL IN THIS NEGLIGENCE ACTION DEMONSTRATED A JUSTIFIABLE EXCUSE FOR NOT TIMELY FILING A NOTE OF ISSUE AFTER A NINETY-DAY DEMAND, PLAINTIFF DID NOT DEMONSTRATE A MERITORIOUS CAUSE OF ACTION; PLAINTIFF SUBMITTED AN AFFIDAVIT WHICH RELIED ON HEARSAY PROVIDED BY TWO SOURCES, BUT DID NOT SUBMIT AFFIDAVITS FROM THOSE SOURCES (FIRST DEPT).

The First Department, reversing Supreme Court, determined, although plaintiff offered a justifiable excuse for failing to timely file a note of issue, plaintiff did not demonstrate a meritorious cause of action. Therefore the complaint should have been dismissed. The complaint alleged the defendants negligently failed to provide adequate mental health and substance abuse treatment to the decedent, who died of a drug overdose in a shelter owned and operated by defendants:

Following a period of over one year during which plaintiff failed to respond to their discovery demands, defendants served plaintiff with a written demand to serve and file a note of issue within 90 days (see CPLR 3216[b]). Plaintiff failed to respond within the 90-day period, resulting in defendants' motions to dismiss for failure to prosecute.

Although plaintiff's counsel offered a justifiable excuse for the failure to file a note of issue following defendants' service of 90-day notices, plaintiff failed to submit an adequate affidavit of merit demonstrating a meritorious cause of action in opposition to defendants' motions … . In her affidavit, plaintiff, who had no personal knowledge of the events in question, relied on two unnamed hearsay sources … . Plaintiff offered no excuse for failing to provide affidavits from the shelter residents who supplied her with the information upon which her affidavit was based … , and, in any event, she did not show that defendants' negligence was "a substantial cause of the events" resulting in her son's death … . Felipe v Volunteers of Am.-Greater N.Y., 2025 NY Slip Op 06252, First Dept 11-13-25

Practice Point: In seeking to avoid dismissal of a complaint for failing to timely file a note of issue after a 90-day demand, a plaintiff must offer a justifiable excuse and demonstrate a meritorious cause of action. Here plaintiff's counsel provided a justifiable excuse. But to demonstrate a meritorious cause of action plaintiff submitted an affidavit which relied on hearsay. Without affidavits from the sources of the hearsay, a meritorious cause of action was not demonstrated and the complaint should have been dismissed.

November 13, 2025

ELEVATOR-DOOR INJURY, CONSTRUCTIVE NOTICE.

PLAINTIFF WAS INJURED WHEN SHE USED HER ARM TO KEEP THE ELEVATOR DOOR FROM CLOSING; DEFENDANTS DEMONSTRATED THE ELEVATOR WAS IN GOOD WORKING CONDITION TWO WEEKS BEFORE PLAINTIFF'S INJURY; DEFENDANTS WERE ENTITLED TO SUMMARY JUDGMENT (FIRST DEPT).

The First Department, reversing Supreme Court, determined defendants (building owner and elevator company) were entitled to summary judgment dismissing the complaint which alleged the elevator doors slammed shut on plaintiff's hand. A video showed that plaintiff extended her arm between the door frame and the elevator door to keep it from closing:

Movants sustained their initial burden of demonstrating that the elevator door was safe and code compliant at the time of the accident and that plaintiff's conduct was the sole proximate cause of the accident. The report prepared by defendant … , approximately two weeks prior to the accident, found that the subject elevator was maintained commensurate with local industry practices and that the systems functioned at or near recommended standards. Moreover, the video of the incident, which plaintiff authenticated by testifying that it was a fair and accurate depiction of the events, showed that plaintiff extended her arm between the door frame and the elevator door to keep the door from closing. Such evidence was sufficient to demonstrate the absence of a triable issue of fact … . Ellerbee v 61 W. 62 Owners Corp., 2025 NY Slip Op 06386, First Dept 11-20-25

Practice Point: If you are injured using your arm or hand to stop an elevator door from closing and it is shown the elevator was working properly, your complaint will be dismissed. (But isn't it foreseeable that people will try to stop an elevator door from closing with their hands, and shouldn't there be a safety mechanism which would prevent the door from closing?)

November 20, 2025

LABOR LAW-CONSTRUCTION LAW, FALL ON PERMANENT STEPS NOT COVERED BY LABOR LAW.

PLAINTIFF FELL GOING DOWN PERMANENT STEPS AFTER HE STEPPED OFF THE LADDER; THERE WAS NO LIABILITY UNDER LABOR LAW 240(1)—NO FAILURE OR ABSENCE OF A SAFETY DEVICE (FIRST DEPT).

The First Department, reversing Supreme Court, determined there was no liability under Labor Law 240(1) because plaintiff fell going down permanent steps after he stepped off the ladder:

Plaintiff testified that on the day of his accident he was working in a meeting room that had projection screens, soundproof walls, and raised floors, including a platform for the speakers. The platform had two access points — one via a ramp and the other on the opposite side of the platform, via a two-step staircase. Plaintiff needed to work on the ceiling above the platform, so he placed his ladder on the platform near the staircase. After he completed his work, he descended the ladder and placed both feet on the platform floor. He then turned to walk down the two-step staircase, missed a step, and fell.

There is no liability pursuant to Labor Law § 240(1) where the plaintiff's injuries are not related to the failure of a safety device, such as a ladder, to protect the plaintiff from a gravity-related hazard … . Where the "injury results from a separate hazard wholly unrelated to the risk which brought about the need for the safety device in the first instance, no [Labor Law § 240(1)] liability exists" … . Healy v Trinity Hudson Holdings, 2025 NY Slip Op 06278, First Dept 11-18-25

Practice Point: The failure of absence of a safety device is a prerequisite for liability under Labor Law 240(1). Here plaintiff safely stepped onto a permanent platform from the ladder and then fell going down permanent steps—no Labor Law 240(1) liability.

November 18, 2025

LABOR LAW-CONSTRUCTION LAW, HOMEOWNER'S EXEMPTION DOES NOT APPLY WHERE PROPERTY USED FOR A COMMERCIAL PURPOSE.

GENERALLY A HOMEOWNER WHO DOES NOT DIRECT THE WORK ON THE HOME CANNOT BE HELD LIABLE FOR A LADDER-FALL PURSUANT TO LABOR LAW 240(1); BUT THE HOMEOWNER'S EXEMPTION DOES NOT APPLY WHEN THE WORK IS RELATED TO A COMMERCIAL PURPOSE; HERE THERE WERE QUESTIONS OF FACT WHETHER THE PROPERTY WAS TO BE USED FOR COMMERCIAL PURPOSES (SECOND DEPT).

The Second Department, reversing Supreme Court, determined there were questions of fact whether the defendant property-owner in this ladder-fall case was entitled to the homeowner's exemption from Labor Law 240(1) liability because the work related to a commercial purpose:

"Although the Labor Law generally imposes liability for worker safety on property owners and contractors, it exempts from liability 'owners of one and two-family dwellings who contract for but do not direct or control the work'" (… Labor Law §§ 240[1]; 241[6]). However, "[t]he exemption 'was not intended to insulate from liability owners who use their one- or two-family houses purely for commercial purposes'" … . "'[R]enovating a residence for resale or rental plainly qualifies as work being performed for a commercial purpose'" … . "Where the property serves both residential and commercial purposes, [a] determination as to whether the exemption applies in a particular case turns on the nature of the site and the purpose of the work being performed, and must be based on the owner's intentions at the time of the injury" … .

Here, the defendant failed to eliminate triable issues of fact as to whether he was entitled to the homeowner's exemption, including whether the work being performed related to a commercial purpose of the premises … and whether the defendant intended to use the premises as a three-family dwelling … . Reyes v Rahman, 2025 NY Slip Op 06348, Second Dept 11-19-25

Practice Point: The homeowner's exemption from Labor Law 240(1) liability does not apply where the home is used for commercial purposes.

November 19, 2025

LABOR LAW-CONSTRUCTION LAW, LADDER FALL, NO WITNESSES.

PLAINTIFF TESTIFIED HE WAS STANDING AT THE TOP OF AN UNSECURED A-FRAME LADDER WHEN IT MOVED AND HE FELL; THE FACT THAT THERE WERE NO WITNESSES DID NOT PRECLUDE SUMMARY JUDGMENT IN PLAINTIFF'S FAVOR ON THE LABOR LAW 240(1) CAUSE OF ACTION (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 A-frame ladder-fall case. Plaintiff was standing at the top of the unsecured ladder when it moved and he fell. The fact that there were no witnesses to the accident did not raise a question fact because plaintiff's testimony was not contradicted and his credibility was not called into question:

Plaintiff testified at his deposition that he worked at the top of the ladder, which was unsecured, it suddenly moved and fell, causing him to land on the floor and injure his shoulder. Plaintiff also testified that after he fell from the ladder, he stood it back up before his supervisor returned. The supervisor stated that upon his return to the room, plaintiff, who was standing next to the upright ladder, told him that the ladder was shaky and had fallen because no one was holding it.

Plaintiff made a prima facie showing that his injuries were proximately caused by a violation of Labor Law § 240(1). The evidence established that defendant failed to provide a safety device to ensure that the ladder, which plaintiff was instructed to use, would remain upright while he worked. The evidence also showed that plaintiff fell off the ladder when it shifted and fell … . This evidence was sufficient to establish a prima facie case, and plaintiff was not obligated to show that the ladder itself was defective … . Molina v Chatham Towers, Inc., 2025 NY Slip Op 06285, First Dept 11-18-25

Practice Point: To warrant summary judgment in a ladder-fall case, it is enough that the ladder was unsecured and moved. There is no need to show the ladder was defective.

November 18, 2025

MEDICAL MALPRACTICE, PLAINTIFF'S ATTORNEYS DISCOURAGED DOCTORS FROM SPEAKING WITH DEFENSE, PROTECTIVE ORDER.

THE MOTION COURT PROPERLY ISSUED A PROTECTIVE ORDER REQUIRING PLAINTIFF'S COUNSEL IN THIS MED MAL CASE TO RESCIND THE CORRESPONDENCE SENT TO PLAINTIFF'S TREATMENT PROVIDERS WHICH DISCOURAGED THEM FROM SPEAKING WITH DEFENSE COUNSEL; THE DISSENT ARGUED THE MAJORITY WAS IMPROPERLY ISSUING AN ADVISORY OPINION (FOURTH DEPT).

The Fourth Department, over a dissent which argued the majority was improperly issuing an advisory opinion, determined the trial judge in this medical malpractice action properly ordered plaintiff's counsel rescind correspondence sent to treatment providers which discouraged the treatment providers from speaking with defense counsel. The correspondence accompanied the "Arons" speaking authorizations executed by the plaintiff:

… [A] plaintiff who signs an authorization allowing a treating physician to speak to defense counsel about the plaintiff's medical condition at issue should not be allowed to send a letter separately to the same physician requesting that the physician not speak to defense counsel. Permitting plaintiffs to make such a request would undermine the purpose of the Arons authorization and, at the very least, be confusing to the physician … .

Adding to the confusion is the statement "I value and wish to protect the confidentiality of our physician-patient relationship," which may lead the physician to conclude that, notwithstanding plaintiff's execution of the speaking authorization, plaintiff was not actually waiving the physician-patient privilege or the privacy protections afforded by HIPAA. …

… [T]he letter … might lead the physician to believe, wrongly, that plaintiff has a right to attend any informal interview with defense counsel. … [A] defendant's attorney may ask treating physicians to participate in ex parte interviews, which by definition do not involve the plaintiff. While a physician may insist that the plaintiff be present for such an interview, that is a decision for the physician alone to make. Just as a defendant's attorney has no right to interview the physician informally … , a plaintiff has no right to attend the interview (the plaintiff has only the right to ask the physician for permission to attend an interview).

Based on the above, we cannot conclude that the court abused its discretion in directing plaintiff "to send correspondence to his treating physicians rescinding all prior letters sent containing the language that the [c]ourt has deemed to be confusing, misleading and/or intimidating." Murphy v Kaleida Health, 2025 NY Slip Op 06421, Fourth Dept 11-21-25

Practice Point: Here the letters sent to treatment providers by plaintiff's counsel, which accompanied the "Arons" speaking authorizations, improperly discouraged the treatment providers from speaking with defense counsel. Plaintiff's counsel was properly ordered to rescind the correspondence.

November 21, 2025

MEDICAL MALPRACTICE, EXPERT EVIDENCE INSUFFICIENT.

DEFENDANT HOSPITAL'S EMERGENCY ROOM PERSONNEL WERE UNAWARE PLAINTIFF HAD EXECUTED A "MOLST" DECLINING LIFE-SAVING TREATMENT WHEN THEY PERFORMED CHEST COMPRESSIONS WHICH REVIVED PLAINTIFF BUT FRACTURED RIBS; PLAINTIFF SUFFERED ANOTHER HEART ATTACK SEVEN HOURS LATER AND DIED; A JURY AWARDED DAMAGES FOR PAIN AND SUFFERING; PLAINTIFF'S EXPERT DID NOT SUFFICIENTLY ARTICULATE A STANDARD OF CARE OR A VIOLATION OF A STANDARD OF CARE; THE DEFENSE MOTION FOR A DIRECTED VERDICT SHOULD HAVE BEEN GRANTED (FOURTH DEPT).

The Fourth Department, reversing the denial of defendant hospital's motion for a directed verdict in this med mal case, determined the plaintiff's expert did not establish the applicable standard of care or a breach thereof. Plaintiff had executed a Medical Order for Life-Sustaining Treatment (MOLST) declining life-saving measures. Hospital personnel were not aware of the MOLST when plaintiff presented in the emergency room. When plaintiff became unresponsive, chest compressions were performed. Plaintiff was revived but he had suffered rib fractures. The plaintiff suffered a second heart attack and died seven hours later. The jury awarded damages for pain and suffering:

… [T]he court erred in denying [defendant's] motion for a directed verdict. "[V]iewing the evidence in [the] light most favorable to [plaintiff] and affording [plaintiff] the benefit of every inference," we conclude that there was "no rational process by which a jury could find in favor of" plaintiff inasmuch as there was no expert testimony establishing the applicable standard of care or a breach thereof … . At trial, plaintiff's expert described how a hospital could communicate a patient's MOLST in order to ensure that it was honored, what hospitals were "allowed" to do, what he would "expect," what "should" happen, and what "option[s]" were available, but he did not state what an accepted standard of care required. Further, even assuming, arguendo, that plaintiff's expert articulated a standard of care, we conclude that he failed to opine that any such standard was violated under the

specific circumstances of this case … . Cianci v University of Rochester, 2025 NY Slip Op 06492, Fourth Dept 11-21-25

Practice Point: Consult this decision for an example of vague expert testimony in a med mal case which failed to articulate a standard of care or a breach thereof.

November 21, 2025

NEGLIGENT HIRING, NO REQUIRMENT THAT AN EMPLOYER CONDUCT A BACKGROUND CHECK, EMPLOYMENT LAW.

DEFENDANT CLOTHING STORE'S EMPLOYEE ALLEGEDLY ATTEMPTED TO RECORD PLAINTIFF IN A CHANGING ROOM; THE NEGLIGENT HIRING CAUSE OF ACTION, BASED ON THE ALLEGATION THE STORE DID NOT CONDUCT A BACKGROUND CHECK BEFORE HIRING THE EMPLOYEE, SHOULD HAVE BEEN DISMISSED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant clothing store (Gap) was entitled to summary judgment dismissing the negligent-hiring-supervision complaint. Plaintiff alleged a store employee, Medel, attempted to record her on a cell phone as she was changing in a fitting room. The negligent hiring cause of action alleged Gap did not do a background check before hiring Medel, which was alleged to have been in violation of store policy:

The Supreme Court erred in denying those branches of the store defendants' motion which were for summary judgment dismissing the causes of action alleging negligent hiring, training, supervision, and retention insofar as asserted against them. "'[A] necessary element of such causes of action is that the employer knew or should have known of the employee's propensity for the conduct which caused the injury'" … . Here, the submissions of the store defendants in support of their motion demonstrated, prima facie, that they did not have notice of any propensity of Medel to commit misconduct … .

In opposition, the plaintiff failed to raise a triable issue of fact as to whether Gap or Old Navy knew or should have known that Medel had a propensity to commit misconduct … . The plaintiff's contention, via the affidavit of her expert, that neither Gap nor Old Navy appeared to have conducted a background check prior to

hiring Medel, as was their apparent internal policy before hiring any employees, is without merit. "There is no common-law duty to institute specific procedures for hiring employees unless the employer knows of facts that would lead a reasonably prudent person to investigate the prospective employee" … . Moreover, the plaintiff failed to submit any evidence that a background check of Medel would have revealed a propensity to commit misconduct … . Hashimi v Gap, Inc., 2024 NY Slip Op 05961, Second Dept 11-27-24

Practice Point: A negligent hiring cause of action based on the allegation the employer did not conduct a background check, without more, will not survive a motion to dismiss. Plaintiff must demonstrate the employer knew of facts which should have triggered a background check.

November 27, 2024

NEGLIGENT SUPERVISION, STUDENT ON STUDENT ATTACK, EDUCATION-SCHOOL LAW.

THE HISTORY OF THE INTERACTION BETWEEN INFANT PLAINTIFF AND ANOTHER STUDENT RAISED A QUESTION OF FACT ABOUT WHETHER THE ATTACK ON INFANT PLAINTIFF WAS FORESEEABLE FROM THE SCHOOL'S PERSPECTIVE (THIRD DEPT).

The Third Department, reversing Supreme Court, determined the negligent supervision action against defendant school should not have been dismissed. Infant plaintiff (E.E.) had been attacked and seriously injured by another student (J.H.). Supreme Court found the attack was not foreseeable. The Third Department found the evidence of foreseeability sufficient to raise a question of fact:

The record contains evidence of the following. J.H. had a school disciplinary history of 18 incidents between 2015 and 2018, which resulted in numerous detentions and suspensions. Of these 18 incidents, it appears that at least five involved acts of violence on J.H.'s part. One of the suspensions was for lighting a fellow student's hair on fire, while another suspension was for her previous attack on E.E. That particular incident involved J.H. borrowing rings from other students in order to maximize the injuries that she could inflict upon E.E. J.H. was also suspended for obtaining unclothed photos of E.E. and posting them online under the guise that it was E.E. who was posting them. By the spring of 2017, school

officials were aware that J.H. was suffering from anxiety and depression, had been the subject of a PINS petition, was a runaway risk, exhibited violent behavior, had "no judgment" and was "very unpredictable." At some point around the middle of the 2017-2018 school year, J.H. screamed at E.E. in a school hallway, "what are you looking at?", and E.E. reported this to a teacher. Approximately two weeks before the incident in question, J.H.'s mother called a school guidance counselor and warned that J.H. was planning to do something to get herself expelled from school. The district superintendent stated that if she had been made aware of this call, she would have advised the high school principal about it and ensured that there was a safety plan in place.

While we are mindful that there were no specific incidents between J.H. and E.E. for a number of months prior to the subject assault, the evidence of J.H.'s extensive disciplinary history, including acts of violence together with the prior incidents aimed at E.E. herself, as well as the recent warning call from J.H.'s mother, was sufficient to raise triable issues of fact with respect to whether J.H.'s attack on E.E. was foreseeable and whether it was a consequence of a lack of adequate supervision on defendant's part … . To the extent that defendant argues a lack of foreseeability by pointing to J.H.'s deposition testimony wherein she indicated that she did not plan the attack in advance, we are unpersuaded. "The issue is not the speed of the punch, but the circumstances leading up to and surrounding that conduct" … . In light of the foregoing, it was error to grant defendant's motion for summary judgment. T.E. v South Glens Falls Cent. Sch. Dist., 2024 NY Slip Op 05934, Third Dept 11-27-24

Practice Point: Consult this decision for insight into the proof necessary to raise a question of fact about the foreseeability of an attack on a student by another student.

November 27, 2024

SLIP AND FALL, ERRORS IN NOTICE OF CLAIM, MUNICIPAL LAW, CIVIL PROCEDURE.

THE ERRORS MADE IN THE NOTICE OF CLAIM IN THIS SLIP AND FALL CASE WERE NOT MADE IN BAD FAITH AND DID NOT PREJUDICE THE MUNICIPAL DEFENDANT; THEREFORE AMENDMENT OF THE NOTICE OF CLAIM SHOULD HAVE BEEN ALLOWED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the erroneous incident-date in the notice of claim did not justify dismissal of the action in this sidewalk slip and fall case. The error was not made in bad faith and did not prejudice the municipal defendant:

The Transit defendants … moved … pursuant to CPLR 3211(a) to dismiss the complaint … on the ground that the notice of claim did not comply with General Municipal Law § 50-e(2), as it incorrectly listed the date of the accident as March 5, 2016, instead of April 5, 2016, and identified the plaintiff as "Maria Hernandez," instead of "Maria Hernandez-Panell." …

General Municipal Law § 50-e(2) requires that a notice of claim set forth … "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 that the date originally listed in the notice of claim as the accident date was set forth in bad faith, and the Transit defendants did not demonstrate any prejudice as a result of the error … . Moreover, the plaintiff supplied the correct date of the accident at the hearing pursuant to General Municipal Law § 50-h and Public Authorities Law § 1212(5) … . Hernandez-Panell v City of New York, 2024 NY Slip Op 05962, Second Dept 11-27-24

Practice Point: Errors in a notice of claim against a municipality should not result in dismissal of the action if the errors were not made in bad faith and did not prejudice the municipal defendant.

November 27, 2024

SLIP AND FALL, MUNICIPAL LAW.

7/8 INCH HEIGHT DIFFERENTIAL BETWEEN THE FLOOR AND DOORWAY THRESHOLD WAS DEEMED TRIVIAL AS A MATTER OF LAW IN THIS SLIP AND FALL CASE; THE NYC BUILDING CODE, WHICH REQUIRES A HEIGHT DIFFERENTIAL OF NO MORE THAN 1/2 INCH, DID NOT APPLY TO THE HOME PURCHASED IN 1980 (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined the 7/8 height-differential between the floor and the threshold was trivial as a matter of law in thus slip and fall case. The court noted that the NYC Building Code, which requires a height-differential of no more than 1/2 inch did not apply to the home which was purchased in 1980:

The 7/8-inch height differential between defendant's kitchen tile floor and the door saddle is readily discernible from the photographs authenticated by plaintiff, and the alleged defect had none of the characteristics of a trap or snare … . Plaintiff's deposition testimony established that she was not distracted and could see the door saddle before the accident. Plaintiff had repeatedly walked over the saddle in the days leading up to her accident and had noticed the raised condition of the door saddle … . Defendant was not required to provide an expert's affidavit to make a prima facie showing that the height differential was trivial … . * * *

"Existing buildings are generally exempt from the provisions of the current [New York City Building Code] unless there is substantial renovation or change in use" … . Defendant testified that the linoleum flooring adjacent to the door saddle was changed to tile in the "late" 1990s. However, plaintiff's professional engineer made no showing that changing the flooring constituted a substantial renovation or change in use causing the 2008, 2010, and 2022 Building Codes to apply. Mejias v Basch, 2025 NY Slip Op 06137, First Dept 11-6-25

Practice Point: Here a 7/8 inch height differential between the floor and a doorway threshold was deemed trivial as a matter of law and the slip and fall case was

dismissed. The Building Code, which requires a height differential of no more than 1/2 inch, did not apply because the home was purchased before that building code provision was enacted.

November 6, 2025

SLIP AND FALL, SIDEWALK ICE AND SNOW, ABUTTING LANDOWNER, MUNICIPAL LAW, ADMINISTRATIVE LAW.

THE LANDOWNER ABUTTNG A SIDEWALK IN NYC HAS A NONDELEGABLE DUTY TO MAINTAIN THE SIDEWALK; HERE THE LANDOWNER FAILED TO DEMONSTRATE IT DID NOT HAVE CONSTRUCTIVE NOTICE OF THE PRESENCE OF ICE AND SNOW ON THE SIDEWALK BECAUSE IT DID NOT AVER WHEN THE SIDEWALK WAS LAST INSPECTED OR CLEANED PRIOR TO THE SLIP AND FALL (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant landowner's motion for summary judgment in this sidewalk ice and snow slip and fall case should not have been granted. The landowner failed to demonstrate it did not have constructive notice of the presence of snow and ice:

Section 7-210 of the Administrative Code of the City of New York imposes a nondelegable duty on certain landowners, which includes 149-53 14th Avenue, LLC, to maintain sidewalks abutting their land, including the removal of snow and ice … "[T]he duty applies with full force notwithstanding an owner's transfer of possession to a lessee or maintenance agreement with a nonowner" … . Landowners, however, are not strictly liable for all personal injuries that occur on the abutting sidewalk, as "section 7-210 adopts a duty and standard of care that accords with traditional tort principles of negligence and causation" … .

"A defendant property owner moving for summary judgment in an action predicated upon the presence of snow or ice has the burden of establishing, prima facie, that it neither created the snow or ice condition that allegedly caused the plaintiff to fall nor had actual or constructive notice of that condition" … . "A defendant has constructive notice of a hazardous condition on property when the condition is visible and apparent, and has existed for a sufficient length of time to

afford the defendant a reasonable opportunity to discover and remedy it" … . "To meet its initial burden on the issue of lack of constructive notice, the defendant must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell" … .

Here, the defendants failed to establish, prima facie, that 149-53 14th Avenue, LLC, did not have constructive notice of the alleged snow and ice condition that caused the plaintiff to fall. The evidence submitted by the defendants failed to establish when the sidewalk was last cleaned or inspected relative to when the plaintiff fell … . Marinis v Loschiavo, 2024 NY Slip Op 05970, Second Dept 11-27-24

Practice Point: Pursuant to the NYC Administrative Code a landowner abutting a sidewalk has a nondelegable duty to maintain the sidewalk, which includes removal of ice and snow. The landowner can demonstrate it did not have constructive notice of the presence of ice and snow by proof the sidewalk was inspected or cleaned close in time to the slip and fall, not the case here.

November 27, 2024

SLIP AND FALL, TREE GUARD NEAR SIDEWALK, MUNICIPAL LAW, WRITTEN NOTICE REQUIREMENT.

IN A SIDEWALK SLIP AND FALL CASE, COMMUNICATION WITH THE CITY BY PHONE DOES NOT SATISFY THE WRITTEN NOTICE REQUIREMENT, EVEN IF THE COMMUNICATION WAS REDUCED TO WRITING; PLAINTIFF DID NOT DEMONSTRATE AN EXCEPTION TO THE WRITTEN NOTICE REQUIREMENT APPLIED (FIRST DEPT).

The First Department, reversing Supreme Court in this sidewalk slip and fall case, determined the "written notice" requirement for municipal liability was not met and plaintiff did not demonstrate an exception to the written notice requirement was applicable:

While walking down a sidewalk on West 26th Street in Manhattan, plaintiff tried to navigate around other pedestrians and tripped and fell on a metal fence surrounding a tree well, known as a tree guard, where there was no longer a tree. Plaintiff seeks to hold the City of New York and New York City Parks Department

and Recreation liable for his fall on the theory that defendants created a hazard by leaving the tree guard after they removed the tree. Defendants' motion for summary judgment should have been granted.

The City sustained its initial burden of demonstrating that it did not receive prior written notice of the condition that caused plaintiff's accident. A search of Department of Transportation and Department of Parks and Recreation records revealed only two 311 calls for the accident site. The calls resulted in service reports reflecting removal of dead trees and a direction for a City employee to investigate whether replacement of the trees was appropriate. No party disputes that the trees were not replaced before the accident. However, verbal or telephonic communication to a municipal body that is reduced to writing does not satisfy the prior written notice requirement, even if the writing includes a service report, as it does here … … .

As a result, the burden shifted to plaintiff to demonstrate that one of the exceptions to the prior written notice requirement applied … . Plaintiff failed to raise a triable issue of fact concerning whether the City affirmatively created the defective condition through an act of negligence or that a special use resulted in a special benefit to it … . Plaintiff's theory was that his accident was the result of a combination of inadequate lighting, the height and color of the tree well guard, and the removal of the tree without replacement. However, his expert failed to cite relevant industry-wide standards and practices regarding the construction or design of a tree well border from which the City may have deviated. Moreover, plaintiff did not show that the City's failure to replace the trees was an affirmative act of negligence, rather than a negligent omission, that created an immediately apparent dangerous condition … . Carney v City of New York, 2024 NY Slip Op 05884, First Dept 11-26-24

Practice Point: Re: municipal liability for a sidewalk slip and fall, phone communications about the defect do not satisfy the written notice requirement even if the communications are reduced to writing.

November 26, 2024

TRAFFIC ACCIDENTS, ALLEGATION FRONT DRIVER STOPPED SUDDENLY FOR NO APPARENT REASON IS RELEVANT TO COMPARATIVE NEGLIGENCE.

ALTHOUGH THE ALLEGATION PLAINTIFF STOPPED SUDDENLY DOES NOT REBUT THE PRESUMPTION THE REAR DRIVER WAS NEGLIGENT IN A REAR-END COLLISION, THE REAR-DRIVER'S ALLEGATION THE PLAINTIFF STOPPED SUDDENLY FOR NO APPARENT REASON CREATES A QUESTION OF FACT ON THE ISSUE OF PLAINTIFF'S COMPARATIVE NEGLIGENCE (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined defendants' claim that plaintiff stopped suddenly for no apparent reason supported defendant's comparative-negligence affirmative defense in this rear-end collision case:

The Supreme Court should have denied that branch of the plaintiff's motion which was for summary judgment dismissing the defendants' affirmative defense alleging comparative negligence. In support of his motion, the plaintiff submitted his affidavit, in which he averred that his vehicle, after having been stopped at an intersection for approximately 20 to 30 seconds, was struck in the rear by the defendants' vehicle. Thus, the plaintiff established, prima facie, that he was not at fault in the happening of the accident … . In opposition, however, the defendants raised a triable issue of fact as to whether the plaintiff was comparatively at fault in the happening of the accident because he stopped suddenly for no apparent reason … . Martinez v Colonna, 2024 NY Slip Op 05971, Second Dept 11-27-24

Practice Point: In a rear-end collision, defendant's allegation plaintiff stopped suddenly does not rebut the presumption defendant was negligent. But defendant's allegation plaintiff stopped suddenly for no apparent reason raises a question of fact in support of defendant's comparative-negligence affirmative defense.

November 27, 2024

TRAFFIC ACCIDENTS, ARBITRATION CLAUSE IN UBER CONTRACT, CONTRACT LAW.

BY CLICKING ON CONTRACT TERMS ON HER SMART PHONE, PLAINTIFF AGREED TO ARBITRATE HER PERSONAL INJURY CLAIM AGAINST UBER; PLAINTIFF ALLEGED INJURY AFTER AN UBER DRIVER LEFT HER OFF IN TRAFFIC (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Cannataro, over a two-judge dissent, determined that plaintiff, by clicking on notifications of contract terms from Uber on her smart phone, agreed to submit her personal injury action against Uber to arbitration. Plaintiff alleged the Uber driver left her off in traffic and she was injured as a result. The opinion is too detailed to fairly summarize here. The precise language of the notifications from Uber are laid out:

On this appeal, we apply centuries-old principles of contract law to a web-based "terms of use" update containing an arbitration agreement. The parties dispute the validity of that agreement and its applicability to this personal injury action, which plaintiff commenced two months before she indicated her assent to the updated terms of use by means of a series of clicks on her smartphone.

We conclude that the "clickwrap" process Uber used to solicit plaintiff's assent resulted in the formation of an agreement to arbitrate. Moreover, a key term of that agreement expressly delegates to an arbitrator the exclusive authority to resolve all disputes as to the applicability and enforceability of the agreement. Because plaintiff has not established that the delegation provision is invalid, her challenges to the portions of the agreement that purportedly apply to pending legal claims were properly directed to the arbitrator. Wu v Uber Tech., Inc., 2024 NY Slip Op 05869, CtApp 11-25-24

Practice Point: Here plaintiff was notified by Uber of updated contract terms in a message sent to her smart phone. By "clicking" agreement to the terms on her phone's screen, plaintiff agreed to arbitrate her personal injury action against Uber.

November 25, 2024

TRAFFIC ACCIDENTS, DRAM SHOP ACT.

IN THIS DRAM SHOP ACT CASE, DEFENDANT BAR DID NOT DEMONSTRATE DEFENDANT DRIVER WAS NOT VISIBLY INTOXICATED WHEN SERVED AND THEREFORE DID NOT MEET ITS INITIAL BURDEN FOR ITS SUMMARY JUDGMENT MOTION; A TWO-JUSTICE DISSENT ARGUED DEFENDANT BAR MET ITS INITIAL BURDEN, THUS SHIFITNG THE BURDEN TO THE PLANTIFF (FOURTH DEPT).

The Fourth Department, over a two-justice dissent, determined, in this Dram Shop Act case, defendant bar did not demonstrate defendant driver was not visibly intoxicated when served alcohol. The dissenters argued the bar met its initial burden on its motion for summary judgment:

In support of the motion, defendant submitted evidence that, throughout the evening preceding the accident, plaintiff and a group of others—including the driver—were out celebrating and consumed alcohol. Just before they went to defendant's bar, the entire group had been denied entry into another establishment because some members of the group were visibly intoxicated. At defendant's bar, the group was served and consumed more alcohol. Although defendant's owner and employees testified that defendant's employees as a general practice do not allow visibly intoxicated persons to drink alcohol and that the employees were trained to recognize visibly intoxicated people, no one could specifically recall seeing the driver, nor could they describe the driver's level of intoxication on the night at issue … . In fact, none of the deposition testimony submitted by defendant was from an individual physically present inside the bar at the time the driver was allegedly served.

From the dissent:

…. [W]e conclude that defendant met its initial burden on the motion by submitting uncontradicted deposition testimony "in which its employees averred that they had no recollection that [the driver] was visibly intoxicated while she was . . . at [defendant]'s establishment" … . … [D]efendant's employees testified that staff are trained to recognize visibly intoxicated persons; that bartenders do not allow visibly intoxicated persons to drink alcohol; and that bouncers do not allow

visibly intoxicated persons to enter the bar, that they make rounds inside the establishment in order to observe the patrons and determine if anyone is visibly intoxicated, and that they signal the bartenders to stop serving alcohol to patrons who are visibly intoxicated. Additionally, a bouncer testified that he recalled conducting "rounds inside the establishment" on the night of the incident and that he observed the patrons, as was his routine, but did not "signal[ ] to the bartenders that anyone was intoxicated." Gonzalez v City of Buffalo, 2025 NY Slip Op 06423, Fourth Dept 11-21-25

Practice Point: In moving for summary judgment in a Dram Shop Act case, the defendant bar had the initial burden to demonstrate it did not serve a visibly intoxicated defendant. Because the majority concluded that initial burden was not met, the summary judgment motion was denied without the need to consider the plaintiff's response. The dissent disagreed with the majority and argued the bar had met its initial burden.

November 21, 2025

TRAFFIC ACCIDENTS, POLICE CHASE, MUNICIPAL LAW.

QUESTIONS OF FACT WHETHER DEFENDANT POLICE OFFICER ACTED WITH "RECKLESS DISREGARD" FOR THE SAFETY OF OTHERS DURING A POLICE CHASE PRECLUDED SUMMARY JUDGMENT; PLAINTIFF POLICE OFFICER WAS INJURED WHEN HER PATROL CAR WAS STRUCK BY THE PURSUED CAR (SECOND DEPT).

The Second Department, reversing Supreme Court, determined there were questions of fact whether defendant police officer, Encarnation, acted with "reckless disregard" during a police chase. The pursued car crashed into plaintiff police officer's, Corsi's, patrol car. Defendant Encarnation worked for the Village of Ossining police department. Plaintiff Corsi worked for the Village of Briarcliff Manor police department. Plaintiff sued both Encarnation and the Village of Ossining:

The plaintiff commenced the instant action against, among others, the Village of Ossining and Encarnacion pursuant to General Municipal Law § 207-c(6) for the reimbursement of all salary, benefits, and expenses paid by the plaintiff to Corsi as a result of injuries she sustained in the line of duty due to the allegedly reckless or negligent conduct of the Village of Ossining and Encarnacion that took place during Encarnacion's pursuit of Hester and Hester's eventual crash into Corsi's vehicle. * * *

… [T]he Village of Ossining and Encarnacion failed to eliminate all triable issues of fact as to whether Encarnacion acted with reckless disregard for the safety of others and whether such conduct was a proximate cause of Corsi's injuries … . In support of their motion, the Village of Ossining and Encarnacion submitted, among other things, transcripts of the deposition testimony of Encarnacion, Hester, and Corsi, who collectively testified that on the day at issue, Encarnacion pursued Hester at high speeds through residential and commercial roads and that Hester struck another vehicle and narrowly avoided striking pedestrians during the chase. Village of Briarcliff Manor v Village of Ossining, 2025 NY Slip Op 06214, Second Dept 11-12-25

Practice Point: Consult this decision for insight into the evidence which will raise a question of fact whether a police officer, during an emergency car-chase, acted with "reckless disregard" for the safety of others such that a police officer injured when the pursued car crashed into her patrol car can sue pursuant to General Municipal Law 207-c (6).

November 12, 2025

TRAFFIC ACCIDENTS, PROPERTY DAMAGE, INSUFFICIENT EVIDENCE.

PLAINTIFF'S AFFIDAVIT DID NOT STATE IT WAS BASED ON FIRST-HAND KNOWLEDGE AND THE UNCERTIFIED POLICE REPORT WAS INADMISSIBLE; PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IN THIS PROPERTY-DAMAGE CASE SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined summary judgment should not have been awarded plaintiff in this property-damage case. Plaintiff alleged defendant's vehicle struck a brick wall and fence on plaintiff's property. Plaintiff's affidavit did not state it was based on first-hand knowledge and the uncertified police report was inadmissible:

"A plaintiff in a negligence action moving for summary judgment on the issue of liability must establish, prima facie, that the defendant breached a duty owed to the plaintiff and that the defendant's negligence was a proximate cause of the alleged injuries" … . "'A conclusory affidavit or an affidavit by an individual without personal knowledge of the facts does not establish the proponent's prima facie burden' on a motion for summary judgment" … .

Here, the plaintiff's conclusory affidavit, which failed to set forth whether he had firsthand knowledge of the event, was insufficient to establish, prima facie, that a vehicle operated by the defendant struck a brick wall and fence located on the plaintiff's property … . The uncertified police accident report submitted in support of the plaintiff's motion was not admissible … . Felle v Maxaner, 2024 NY Slip Op 05959, Second Dept 11-27-24

Practice Point: Affidavits which do mot make clear the allegations are based on first-hand knowledge will not support summary judgment.

Practice Point: Uncertified police reports are not admissible.

November 27, 2024

TRAFFIC ACCIDENTS, SOVEREIGN IMMUNITY, NEW JERSEY BUS INVOLVED IN NEW YORK ACCIDENT.

NEW JERSEY TRANSIT CORPORATION CANNOT ASSERT THE SOVEREIGN IMMUNITY DEFENSE IN THIS TRAFFIC ACCIDENT CASE; THE ACCIDENT INVOLVED A NEW JERSEY TRANSIT CORPORATION BUS AND OCCURRED IN NEW YORK CITY (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Singas, over two concurrences and a dissent, determined the New Jersey Transit Corporation could not assert the sovereign immunity defense in this traffic-accident case:

In Franchise Tax Bd. of Cal. v Hyatt, the United States Supreme Court recognized that the text and structure of the Federal Constitution not only preserved States' pre-ratification sovereign immunity, but compelled absolute recognition of that immunity in other States' courts as a matter of "equal dignity and sovereignty" … . However, the Court did not address how to determine whether a state-created entity is entitled to this immunity. We glean from the Court's analysis that the relevant inquiry is whether subjecting a state-created entity to suit in New York would offend that State's dignity as a sovereign. We hold that, to answer this question, courts must analyze how the State defines the entity and its functions, its power to direct the entity's conduct, and the effect on the State of a judgment against the entity. Considering these factors, we conclude that maintaining this action against defendant New Jersey Transit Corporation (NJT) in our courts would not offend New Jersey's sovereign dignity and accordingly hold that defendants are not entitled to invoke a sovereign immunity defense. On February 9, 2017, a bus owned and operated by NJT allegedly struck and injured plaintiff Jeffrey Colt as he traversed a crosswalk on 40th Street in Manhattan. The bus was driven by defendant Ana Hernandez, an employee of NJT. Colt and his wife, plaintiff Betsy Tsai, commenced this action on September 18, 2017, asserting causes of action for negligence, negligent hiring, and loss of consortium. Defendants answered the complaint and denied many of plaintiffs' factual allegations. Defendants asserted—as part of an exhaustive list including many boilerplate defenses—that plaintiffs' recovery was "barred by lack of jurisdiction over NJT" and "barred as this Court lacks jurisdiction," and that defendants were "immune from suit." Colt v New Jersey Tr. Corp., 2024 NY Slip Op 05867, CtApp 11-25-24

Practice Point: Here the New Jersey Transit Corporation could not invoke the sovereign immunity defense to a New York City traffic accident involving a New Jersey Transit Corporation bus.

November 25, 2024

WORKERS' COMPENSATION, 9-11 CLEANUP, STATUTORY DEADLINE FOR DEATH BENEFITS.

THE EXTENSION (NOW TO 2026) OF THE TIME FOR PARTICIPANTS IN THE 9-11 CLEANUP TO FILE CLAIMS FOR MEDICAL BENEFITS DOES NOT APPLY TO CLAIMS FOR DEATH BENEFITS BY A BENEFICIARY OF A DECEASED PARTICIPANT; HERE THE PARTICIPANT'S WIFE MADE A CLAIM FOR DEATH BENEFITS WHICH WAS PROPERLY DENIED BECAUSE THE STATUTORY DEADLINE IN WORKERS' COMPENSATION LAW SECTION 28 HAD PASSED (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Garcia, determined the two-year death-benefit statute of limitations in Workers' Compensation Law section 28 precluded a claim for death benefits made by the wife of a volunteer who participated in the 9-11 cleanup and who had received lifetime benefits for resulting medical conditions. Although the deadline for claims for medical benefits has been extended (to 2026), that extension does not apply to claims for death benefits by surviving beneficiaries:

[Workers' Compensation Law 168] explicitly refers to "[a] claim by a participant," permits such participant's claim to be filed within the enumerated extended time period, and again repeats "[a]ny such participant" when stating that certain previously denied claims "shall be reconsidered by the board" … . The phrase "claim by a participant" does not encompass claims by the surviving beneficiaries of those individuals. This is made clearer by comparison with the language in Workers' Compensation Law § 18, which expressly provides that notice may be given by "any person claiming to be entitled to compensation or some one in his behalf" and can be "signed by [the employee] or by a person on his behalf or, in

case of death, by any one or more of his dependents, or by a person, on their behalf." Likewise, Workers' Compensation Law § 28 refers to "the claimant" and references payments "to an employee or his dependents in case of death." Workers' Compensation Law § 168's use of the phrase "[a] claim by a participant" must therefore be understood to mean that only a claim brought by a participant, and not by the survivors or beneficiaries of a participant, may benefit from the extended time limits of Workers' Compensation Law § 168. As the Appellate Division reasoned, "it was decedent who was entitled to file a claim for benefits outside of the period allowed by Workers' Compensation Law § 28" … .

No other provision provides claimant with relief from the requirement that claims be filed within the two-year limitations period. Matter of Garcia v WTC Volunteer, 2025 NY Slip Op 06360, CtApp 11-20-25

Practice Point: Claims for death benefits by the beneficiaries of deceased participants in the 9-11 cleanup are subject to the two-year statute of limitations in Workers' Compensation Law.

November 20, 2025

WORKERS' COMPENSATION, EFFECT OF PRIOR "LOSS OF USE" RE: THE SAME PART OF THE BODY.

CONTRARY TO THE STANDARD USED BY THE WORKERS' COMPENSATION BOARD, AN SLU NEED NOT BE REDUCED BY THE AMOUNT OF ANY PRIOR SLU TO THE SAME PART OF THE BODY; MATTER REMITTED FOR APPLICATION OF THE PROPER STANDARD (THIRD DEPT).

The Third Department, reversing and remitting the matter to the Workers' Compensation Board, determined the Board applied the wrong standard for compensation for an injury to a member for which an SLU had been made for a prior injury. The Board used the erroneous standard that an SLU "must always be reduced by the amount of any prior SLU to the same statutory member:"

The Court of Appeals has clarified … that successive and "separate SLU awards for different injuries to the same statutory member are contemplated by [Workers' Compensation Law §] 15 and, when a claimant proves that the second injury, 'considered by itself and not in conjunction with the previous disability,' has caused an increased loss of use, the claimant is entitled to an SLU award commensurate with that increased loss of use" … . Thus, a claimant's entitlement to an additional SLU award for a successive injury to the same statutory member "turns upon the sufficiency of the medical proof adduced" … . "Such demonstration may include medical evidence that a prior injury and the current injury to the same member are 'separate pathologies that each individually caused a particular amount of loss of use of [the subject member]' and that the current injury resulted in a greater degree of loss of use of the body member in question 'beyond that . . . [of] the prior injury' " … .

… [T]he standard articulated and then applied by the Board, which relied solely upon Matter of Genduso v New York City Dept. of Educ. (164 AD3d at 1510), was that an SLU "must always be reduced by the amount of any prior SLU to the same statutory member" (emphasis supplied). The Board is not required to reduce or offset the SLU by the prior SLU where a "claimant demonstrates that a subsequent injury increased the loss of use of a body member beyond that resulting from the prior injury" (Matter of Johnson v City of New York, 38 NY3d at 444). Given that the Board's decision did not consider, or otherwise ascertain the credibility of, the conflicting medical evidence that was before it — which included documentary and testimonial evidence from claimant's treating physician — regarding the extent to which claimant's injuries were "separate pathologies that each individually caused a particular amount of loss of use" of his right leg … , the Board's finding of a 12.5% SLU of the right leg must be reversed and the matter remitted for further consideration by the Board in accordance with the holding in Matter of Johnson [supra]. Matter of Krein v Green Haven Corr. Facility, 2025 NY Slip Op 06238, Third Dept 11-13-25

Practice Point: When an SLU has been made for a prior injury, a subsequent SLU for the same part of the body need not be reduced by the amount of the prior SLU. The claimant can submit medical evidence that the injuries are separate pathologies which individually caused a specific amount of loss of use.

November 13, 2025

WORKERS' COMPENSATION, NO OBJECTION TO CLAIMANT'S MEDICAL REPORT, REPORT SHOULD NOT HAVE BEEN PRECLUDED.

ALTHOUGH CLAIMANT'S MEDICAL REPORT DID NOT ADHERE TO THE REQUIREMENTS OF WORKERS' COMPENSATION LAW 137 AND COULD BE DEEMED INADMISSIBLE FOR THAT REASON, THE EMPLOYER FAILED TO MAKE A TIMELY OBJECTION TO THE REPORT; THE PRECLUSION OF THE REPORT WAS THEREFORE ERROR (THIRD DEPT).

The Third Department, reversing the Workers' Compensation Board, determined the medical report (by Dr, Kountis) finding claimant had a 42.5% schedule loss of use (SLU) of the right wrist should not have been precluded because it did not meet the requirements of Workers' Compensation Law 137. Although the Board has the power to preclude the report for that reason, the employer did not make a timely objection to the report:

Although "[a] report of an examination that does not substantially comply with the requirements of Workers' Compensation Law [§] 137 . . . shall not be admissible as evidence," a party raising an objection to such a report's admissibility must "raise [that] objection in a timely manner" … . Claimant filed Kountis' report in March 2023, after which the employer was notified that it had 75 days to respond in any of several enumerated ways, including by filing a memorandum to refute the sufficiency and credibility of the report. At no time during that 75-day period did the employer challenge Kountis' report for failing to adhere to the requirements of Workers' Compensation Law § 137. Further, the employer failed to raise the argument during the subsequent hearing held in September 2023. It is clear that the employer had, and failed to avail itself of, ample opportunity to challenge Kountis' report prior to the WCLJ's determination. As a result, the employer's eventual challenge was untimely, and it was error for the Board to preclude Kountis' report … . Matter of Troiano v New York City Hous. Auth., 2025 NY Slip Op 06377, Third Dept 11-20-25

Practice Point: If there are grounds for precluding a medical report for failure to meet the requirements of Workers' Compensation Law 137, the employer must make a timely objection to the report. Here the employer failed to object to the report during the 75-day period allowed for objections and failed to object in a hearing held six or seven months after the report was filed. The Third Department determined, under those facts, it was error to preclude the report.

November 20, 2025

WORKERS' COMPENSATION, REMOVAL FROM THE WORKFORCE.

CLAIMANT DEMONSTRATED HE HAD NOT REMOVED HIMSELF FROM THE LABOR MARKET WITH DOCUMENTARY EVIDENCE; CLAIMANT WAS THEREFORE ENTITLED TO BENEFITS FROM THE TIME HE DEMONSTRATED ATTACHMENT TO THE WORKFORCE (THIRD DEPT).

The Third Department, reversing the Workers' Compensation Board, over a dissent, determined claimant sufficiently demonstrated he had not removed himself from the job market and was therefore entitled to benefits:

Claimant submitted extensive evidence of his job search, both through job location services and individually, providing more than 600 pages of proof that he filed applications to numerous job postings. These included applications for positions such as dishwasher, doorman, cook, parking garage attendant, kitchen attendant/helper, juice barista and laundry attendant. However, as claimant testified, despite having applied for innumerable jobs, he did not receive any interviews. He also applied for vocational rehabilitation services and was advised to enroll in English as a second language classes, which he promptly did. The WCLJ found that claimant demonstrated attachment to the workforce as of November 16, 2021, the date his English classes started, and we agree.

We are mindful that the Board "is the sole arbiter of witness credibility" … , but the decision here does not hinge on witness credibility. Rather, documentary evidence amply demonstrates that claimant has engaged in a "diligent and persistent job search so as to demonstrate attachment to the labor market" …, and we find that the Board's conclusion to the contrary is not supported by substantial

evidence…. . Matter of Lapan v Trade Winds Envtl., 2024 NY Slip Op 05929, Third Department 11-27-24

Practice Point: Here there was documentary evidence claimant was trying to find work. The Workers' Compensation Board's conclusion claimant had removed himself from the workforce was reversed.

November 27, 2024