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ASSAULT ON INMATE, NEGLIGENCE, COURT OF CLAIMS, EVIDENCE.

CLAIMANT-INMATE WAS SEXUALLY ASSAULTED IN HER CUBICLE IN A DORMITORY WITHOUT DOORS WHILE THE CORRECTION OFFICER (CO) GUARDING THE DORMITORY WAS ASLEEP; CLAIMANT PRESENTED ADEQUATE PROOF THE ASSAULT WAS FORESEEABLE (THIRD DEPT).

The Third Department, reversing the Court of Claims, determined claimant-inmate in this negligent supervision action presented sufficient proof the sexual assault by another inmate was foreseeable. Claimant was in a dormitory with cubicles and no doors. A male inmate crawled into claimant's cubicle when the correction officer (CO) guarding dormitory was asleep:

… [T]he question is not what the State actually knows, but what it should have known, i.e., whether defendant has constructive notice … . There was a preponderance of evidence that defendant was aware that this claimant was at risk of sexual assault because defendant's own sexual victimization risk screening procedures, and placement in the 10-1 dorm's PREA cube as a result of her complaints about harassment immediately before the sexual assault, identified her as being in a class of individuals vulnerable to the risk of sexual assault … . Moreover, placement in the PREA cube generally, and in this case specifically, is a tacit acknowledgement that individuals who are identified as vulnerable and live in

a general population dormitory consisting of a communal sleeping area, must have more protection at night. A sleeping CO negates this added protection at this critical time. Thus, it was not necessary for defendant to have notice that COs generally, or this CO specifically, slept during shifts. It is not unreasonable to expect that COs are conscious, alert and attentive while on duty monitoring an open-floor-plan dormitory of incarcerated individuals in a maximum-security prison. R.S. v State of New York, 2024 NY Slip Op 05253, Third Dept 10-24-24

Practice Point: Here there was sufficient proof that the sexual assault by another inmate was foreseeable. Claimant was recognized as vulnerable to sexual assault, was placed in a dormitory cubicle with no door, and the correction officer assigned to guard the dormitory was asleep. The fact that the CO's falling asleep may not have been foreseeable was not the determinative issue.

October 24, 2024

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

IN THIS CHILD VICTIMS ACT CASE BASED ON ALLEGATIONS OF SEXUAL ABUSE BY A TEACHER IN THE 70'S, EVIDENCE SUBMITTED BY PLAINTIFF AND DEFENDANTS RAISED QUESTIONS OF FACT WHICH SUPPORTED THE NEGLIGENT SUPERVISION, TRAINING AND HIRING AND RETENTION CAUSES OF ACTION (FOURTH DEPT).

The Fourth Department, reversing Supreme Court in this Child Victims Act case, determined the negligent supervision, negligent training, and negligent hiring and retention causes of action against the school district, based on allegations of sexual abuse of plaintiff by a music teacher in the 70's, should not have been dismissed. The evidence presented by the plaintiff and defendants included the observed behavior of the music teacher by another teacher, the dismissal of the music teacher from other schools, the conflicting information about arrests in the teacher's employment applications, the suspicions of other teachers and the failure to report those suspicions:

… [P]laintiff submitted an affidavit wherein he averred that on two occasions the music teacher entered the boys' locker room while plaintiff and his classmates were changing and that on each occasion the gym teacher instructed the music teacher to leave. Although the gym teacher denied observing the music teacher in the boys' locker room during his deposition, plaintiff submitted an affidavit that the gym teacher executed in an unrelated case wherein he averred that he had "heard rumors from many students" that the music teacher had a sexual interest in the male students at the school and that he was "suspicious that [the music teacher] may have had inappropriate relationships with students." The affidavit reflects that the gym teacher was "vigilant" and "kept an eye on" the music teacher—meeting weekly with another coach to "see if the other had witnessed any inappropriate behavior" by the music teacher—but nonetheless permitted the music teacher to transport students to and from games and swim meets.

* * * [[P]laintiff submitted the music teacher's testimony, wherein he testified that he had "always" had students visit him at his home and that other teachers were aware that students would visit him at his home, where the abuse of plaintiff is, in part, alleged to have occurred … . …

Plaintiff also submitted an expert affidavit asserting that defendants failed to appropriately train and supervise other teachers and staff to report their knowledge of inappropriate behavior. * * *

… [D]efendants submitted the music teacher's employment applications, wherein he submitted contradictory responses about whether he had been arrested; a reference from the principal of a junior high school where the music teacher had taught, who stated that the music teacher had been "dismissed or denied tenure" and "had a tendency to more or less pal with his seventh grade male students"; and a reference completed by a school counselor employed by a different district, who stated that the music teacher had been "dismissed or denied tenure" and that she would not employ him as a teacher in her school system. Harper v Buffalo City Sch. Dist., 2025 NY Slip Op 05595, Fourth Dept 10-10-25

Practice Point: Consult this decision for insight into the nature of the proof which will raise questions of fact in a Child Victims Act case against a school district alleging negligent supervision, training, hiring and retention.

October 10, 2025

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

THERE IS A QUESTION OF FACT WHETHER THE SCHOOL DISTRICT HAD CONSTRUCTIVE NOTICE OF THE ALLEGED SEXUAL ABUSE OF PLAINTIFF-STUDENT IN THIS CHILD VICTIMS ACT CASE (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined defendants in this Child Victims Act case against the school district for negligent hiring, retention and supervision did not demonstrate a lack of constructive notice of the alleged sexual abuse of plaintiff-student by a custodian. Therefore the defendant's motion for summary judgment should not have been granted:

"To establish a cause of action based on negligent hiring, negligent retention, or negligent supervision, it must be shown that the employer knew or should have known of the employee's propensity for the conduct which caused the injury" … .

Here, the defendants' evidence included testimony given by the plaintiff during his deposition that he was abused on dozens of occasions over three to four years, that there were several other students who were similarly abused, and that other custodians employed by the District were present in the school building after hours and on weekends and saw the plaintiff alone with the custodian in the building. Thus, contrary to the defendants' contention, they failed to establish, prima facie, that the District lacked constructive notice of the custodian's alleged abusive propensities and conduct … . PC-14 Doe v Lawrence Union Free Sch. Dist., 2025 NY Slip Op 05693, Second Dept 10-15-25

Practice Point: Consult this decision for insight into how a question of fact is raised about a school-defendant's constructive notice of sexual abuse of a student by a school employee.

October 15, 2025

CHILD VICTIMS ACT, NEGLIGENCE, MUNICIPAL LAW, FAMILY LAW, IMMUNITY, SOCIAL SERVICES LAW, CIVIL PROCEDURE.

IN THIS CHILD VICTIMS ACT SUIT AGAINST THE COUNTY ALLEGING NEGLIGENT PLACEMENT IN FOSTER CARE, THE COUNTY DID NOT DEMONSTRATE IT WAS ENTITLED TO GOVERNMENTAL FUNCTION IMMUNITY OR IMMUNITY PURSUANT TO THE SOCIAL SERVICES LAW (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the county did not have immunity in this Child Victims Act lawsuit alleging negligent foster-care placement of plaintiff. Plaintiff alleged she was sexually abused by her foster father in the late 70's:

"The governmental function immunity defense provides immunity for the exercise of discretionary authority during the performance of a governmental function" … . "[T]he governmental function immunity defense cannot attach unless the municipal defendant establishes that the discretion possessed by its employees was in fact exercised in relation to the conduct on which liability is predicated" … .

… [T]he County failed to establish, prima facie, that the relevant acts of the County's employees relating to the alleged negligent supervision of the plaintiff's foster care placement were discretionary and thus entitled to immunity … . … [E]ven if the acts at issue could potentially be considered discretionary, the County failed to demonstrate that the alleged discretion was in fact exercised in relation to the conduct on which liability is predicated … .

… Contrary to the County's contention, it "was not entitled to qualified immunity pursuant to Social Services Law § 419, as qualified immunity does not bar recovery for the negligent supervision of children in foster care" … . M.W. v Nassau County, 2025 NY Slip Op 05550, Second Dept 10-8-25

Practice Point: Use this decision as a starting point for research into how governmental function immunity and immunity under the Social Services Law

apply to a county foster-care placement. Here the court determined neither type of immunity applied in this Child Victims Act lawsuit.

October 8, 2025

CHILD VICTIMS ACT, OFFICE OF CHILDREN AND FAMILY SERVICES, NEGLIGENCE, COURT OF CLAIMS.

WHEN THE OFFICE OF CHILDREN AND FAMILY SERVICES (OCFS) ASSUMED CUSTODY OF CLAIMANT, IT OWED CLAIMANT A DUTY TO PROTECT HIM AGAINST FORESEEABLE HARM, INCLUDING SEXUAL ASSAULT; THIS CHILD VICTIMS ACT ACTION SHOULD NOT HAVE BEEN DISMISSED ON THE GROUND THE STATE DID NOT OWE CLAIMANT A SPECIAL DUTY (THIRD DEPT).

The Third Department, reversing the Court of Claims, determined this Child Victims Act action against the Office of Children and Family Services (OCFS) should not have been dismissed on the ground the state did not owe plaintiff a special duty:

For the reasons set forth in our recent decision in A.J. v State of New York (___ AD3d ___, 2024 NY Slip Op 04231 [3d Dept 2024]), we reverse. As in that case, claimant was in OCFS's custody at the time he was allegedly assaulted. "When a government entity assumes custody of a person, thus diminishing that person's ability to self-protect or access those usually charged with such protection, that entity owes to that person a duty of protection against harms that are reasonably foreseeable under the circumstances"(A.J. v State of New York,2024 NY Slip Op 04231 at *2). Because defendant owed claimant a duty of care, the claim stated a cause of action and the motion to dismiss should have been denied. McTighe v State of New York, 2024 NY Slip Op 05251, Third Dept 10-24-24

Practice Point: In the Third Department, the claimant in a Child Victims Act case against the Office of Children and Family Services (OCFS) alleging sexual abuse while in its custody does need to demonstrate the state owed claimant a special duty. The state is deemed to have assumed a duty to protect children in its custody from foreseeable harm.

October 24, 2024

FORKLIFT ACCIDENT, PRODUCTS LIABILITY, EVIDENCE, JUDGES.

PLAINTIFF WAS SEVERELY INJURED IN A FORKLIFT ACCIDENT AND BROUGHT THIS ACTION ALLEGING DEFECTIVE DESIGN; THERE WAS A DEFENSE VERDICT WHICH WAS REVERSED BECAUSE SOME EXPERT TESTIMONY SHOULD NOT HAVE BEEN ADMITTED AND SOME EXPERT TESTIMONY SHOULD NOT HAVE BEEN STRUCK (THIRD DEPT).

The Third Department, reversing the judgment finding the defendant's forklift was not defectively designed, determined the admission and exclusion of expert evidence required a new trial. Plaintiff's leg was crushed when the forklift he was operating struck a support beam in a warehouse. A portion of his leg was amputated. Defendant's expert's analysis was based in part on statistics that did not involve forklift-accidents and therefore was inadmissible. Plaintiff's expert's testimony about the need for future medical treatment was competent and should not have been struck:

Because the underlying data was specific to accidents involving defendant's forklifts and plaintiff's expert also relied upon and testified to that database, we find that Supreme Court properly allowed Marais [the defense expert] to testify as to the rate of injuries sustained in the operation of defendant's forklifts as computed from defendant's database. However, the court abused its discretion in permitting testimony related to the utilization of the wider category of accidents involving "industrial truck and tractor operators," as defendant failed to establish that the underlying conditions of those accidents were substantially similar to the facts presented here … . The core of Marais' testimony was that the rate of injuries involving defendant's forklifts was significantly lower than other industrial-related injuries. Even crediting that the federal database Marais utilized to make this comparison included forklift injuries, it also included a variety of other dissimilar industrial vehicles. In addition, there was no way to determine how many of the reported injuries therein were the result of forklift operations or, equally as important, the underlying conditions precipitating those accidents. * * *

… Supreme Court abused its discretion by striking Root's (plaintiff' medical expert's] testimony and then limiting certain aspects of Thomas' [plaintiff's economist's] testimony regarding plaintiff's future medical expenses because the testimony was supported by "competent proof of necessary, anticipated medical costs through [a qualified physician] and [an] expert economist" … . Johns v Crown Equip. Corp., 2025 NY Slip Op 05856, Third Dept 10-23-25

Practice Point: Here plaintiff was injured in a forklift accident. Statistical evidence offered by defendant's expert which included data that did not relate to forklifts should not have been admitted. To be admissible, statistical evidence must relate to substantially similar accidents.

Practice Point: Here the evidence of future medical procedures and costs offered by plaintiff's medical expert and economist was competent and should not have been struck.

October 23, 2025

IMMUNITY, MUNICIPAL LAW, NEGLIGENCE.

THE ACTIONS TAKEN BY THE 911 DISPATCHER AND THE EMERGENCY MEDICAL TECHNICIANS CONSTITUTED THE EXERCISE OF DISCRETION IN THE PERFORMANCE A GOVERNMENT FUNCTION; THE GOVERNMENT FUNCTION IMMUNITY DEFENSE INSULATED THE MUNICIPAL DEFENDANTS FROM LIABILITY (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the municipal defendants were entitled to summary judgment dismissing the negligence action stemming from decisions made by emergency personnel in response to a 911 call. The emergency services, including the dispatch of a "Basic Life Support" (BLS), as opposed to an "Advanced Life Support" (ALS) ambulance, and the attempts to intubate the unresponsive plaintiff rather than to immediately transport her to the hospital, were deemed the exercise of discretion while performing a government function. Discretionary actions taken in performance of a government function are insulated from liability by the government-function-immunity defense:

"[W]hen both the special duty requirement and the governmental function immunity defense are asserted in a negligence case, the rule that emerges is that government action, if discretionary, may not be a basis for liability, while ministerial actions may be, but only if they violate a special duty owed to the plaintiff, apart from any duty to the public in general" … . In other words, in a negligence action where the municipality has raised the governmental function immunity defense, a plaintiff may only hold the municipality liable for actions taken in its governmental capacity where (1) a special duty exists and (2) the municipality's actions were ministerial in nature and not the result of discretionary decision-making … . * * *

The defendants demonstrated that the 911 dispatcher's decision, among other things, to send a BLS ambulance rather than an ALS ambulance "was discretionary and, therefore, protected by the doctrine of governmental immunity" … . Under the circumstances presented, the defendants also established that the EMTs exercised their discretion in declining to immediately transport [plaintiff] to the nearby hospital and to instead wait for the paramedics in the ALS ambulance to arrive. Similarly, the defendants demonstrated that the actions of the paramedics resulted from discretionary decision-making, including with regard to the type of treatment to render … . Walker-Rodriguez v City of New York, 2024 NY Slip Op 05237, Second Dept 10-23-24

Practice Point: Consult this decision for a concise but complete one-paragraph compilation of all the issues associated with municipal liability for negligence–proprietary versus government function, special duty, discretionary versus ministerial acts, etc.

October 23, 2024

LABOR LAW-CONSTRUCTION LAW, EMPLOYMENT LAW, NEGLIGENCE.

WITH RESPECT TO THE MANNER IN WHICH WORK IS PERFORMED, A GENERAL CONTRACTOR'S LIABILITY UNDER LABOR LAW 200 AND COMMON-LAW NEGLIGENCE STEMS FROM THE EXERCISE OF SUPERVISORY AUTHORITY; INFORMING THE WORKER OF WHAT WORK SHOULD BE DONE, MONITORING THE TIME AND QUALITY OF THE WORK, ENSURING COMPLIANCE WITH SAFETY REGULATIONS, AND HAVING THE AUTHORITY TO STOP WORK FOR SAFETY REASONS, DO NOT AMOUNT TO THE EXERCISE OF "SUPERVISORY AUTHORITY" (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined that defendant general contractor's motion for summary judgment on the Labor Law 200 and common-law negligence causes of action should have been granted because defendant did not exercise supervisory authority over plaintiff's work. The Fourth Department took pains to describe what does not constitute the exercise of supervisory authority:

… [T]he court erred in denying defendant's motion with respect to the portions of plaintiff's Labor Law § 200 and common-law negligence causes of action alleging negligence in the manner in which work was performed. It is well settled that " '[w]here the alleged defect or dangerous condition arises from the contractor's methods and the [defendant] exercises no supervisory control over the operation, no liability attaches to the [defendant] under the common law or under Labor Law § 200' " … .

Here, defendant established as a matter of law that it " 'did not actually direct or control' " the work [plaintiff was hired to do.] Contrary to plaintiff's assertion, " '[t]here is no direction or control if the [general contractor merely] informs the worker what work should be performed . . . [;] there is direction and control [only where the general contractor] specifies how that work should be performed' " … . "Similarly, 'a general duty to ensure compliance with safety regulations or the authority to stop work for safety reasons' " … , or even the " 'monitoring and

oversight of the timing and quality of the work' " … are insufficient to raise a triable issue of fact whether defendant exercised direction and control over the manner of plaintiff's work. Szlapak v The L.C. Whitford, Co., Inc., 2025 NY Slip Op 05385, Fourth Dept 10-3-25

Practice Point: Informing a worker of what work is to be done, monitoring the time and quality of the work, ensuring compliance with safety regulations, having the authority to stop work for safety reasons, do not constitute the "the exercise of supervisory authority" such that a general contractor can be liable under Labor Law 200 and common-law negligence for the manner in which the work was done.

October 3, 2025

LABOR LAW-CONSTRUCTION LAW, COLLAPSE OF NEIGHBORING STRUCTURE, EVIDENCE. THE COLLAPSE OF A NEIGHBORING STRUCTURE WAS FORESEEABLE; PLAINTIFF, WHO WAS STRUCK BY A PIECE OF CONCRETE FROM THE STRUCTURE, WAS ENTITLED TO SUMMARY JUDGMENT ON THE LABOR LAW 240(1) CAUSE OF ACTION (FIRST DEPT).

The First Department, reversing Supreme Court, determined the collapse of a neighboring structure which resulted in a piece of concrete striking the plaintiff, was foreseeable. Therefore the plaintiff was entitled to summary judgment on the Labor Law 240(1) cause of action:

Contrary to defendants' position, the event was foreseeable, rendering Labor Law § 240(1) applicable and summary judgment on that claim appropriate … . Whether the collapse of a permanent structure is foreseeable is analyzed "not in a strict negligence sense, but in the sense of foreseeability of exposure to an elevation-related risk" … . Here, the possibility of insecurity in the foundation developing after adjacent demolition was well known to defendants, as evinced by the need for a support plan in the first instance. As noted by an expert engaged by defendants themselves in earlier motion practice, photographs of the facade showed poorly consolidated and deteriorated concrete with numerous voids, obvious discontinuities, several cold unbonded joints, and the appearance of having been

constructed without steel reinforcing bars. It was thus foreseeable that the newly exposed and unsupported wall, or a portion thereof, would fail.

Moreover, plaintiffs established that [plaintiff's] injuries were caused by the lack of any safety device of the kind enumerated in Labor Law § 240(1) to secure the neighboring foundation. Plaintiffs' expert established that defendants failed to properly underpin the foundation of the adjoining building by bracing and shoring the "poor conditions of the concrete and the obvious presence of cold joints within the excavated pins of the underpinning work." Moises-Ortiz v FDB Acquisition LLC, 2025 NY Slip Op 05746, First Dept 10-16-25

Practice Point: Here the collapse of the neighboring structure, injuring plaintiff, was foreseeable, entitling plaintiff to summary judgment on his Labor Law 240(1) cause of action.

October 16, 2025

LABOR LAW-CONSTRUCTION LAW, SCAFFOLDS.

PLAINTIFF FELL WHEN A TEMPORARY SCAFFOLD HE HAD BUILT COLLAPSED; DEFENDANTS ARGUED PLAINTIFF DID NOT FOLLOW INSTRUCTIONS ON HOW TO PROPERLY BUILD THE SCAFFOLD; THE RECALCITRANT-WORKER DEFENSE DID NOT APPLY BECAUSE PLAINTIFF WAS NEVER PROVIDED WITH AN ADEQUATE SAFETY DEVICE AND PLAINTIFF'S ALLEGED COMPARATIVE NEGLIGENCE WILL NOT DEFEAT A LABOR LAW 240(1) SUMMARY JUDGMENT MOTION (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff's summary judgment motion on the Labor Law 240(1) cause of action should have been granted. Defendant raised the recalcitrant worker defense which the First Department found inapplicable. Plaintiff was standing on a scaffold when it collapsed. Defendant argued plaintiff disregarded instructions on how to construct the scaffold, a comparative-negligence argument which will not defeat a summary judgment motion:

[Defendants'] reliance on the recalcitrant worker defense was misplaced because that defense requires a showing that plaintiff refused to use a safety device that was provided to him … . Defendants' allegations that plaintiff disregarded instructions on how to properly build the scaffolding, built the scaffolding incorrectly, selected defective wood for its construction, and failed to have the scaffold inspected before its use, are insufficient to establish that plaintiff was a recalcitrant worker … . Indeed, defendants failed to demonstrate whether the scaffolding, if properly constructed, constituted adequate protection under Labor Law § 240(1). Thus, the recalcitrant worker defense "has no application where, as here, no adequate safety devices were provided" … , and any conduct on plaintiff's part would go to comparative negligence, which is not a defense to a plaintiff's Labor Law § 240(1) claim … . Peralta v Hunter Roberts Constr. Group LLC, 2025 NY Slip Op 05928, First Dept 10-28-25

Practice Point: The recalcitrant-worker defense only applies if plaintiff was provided with an adequate safety device and refuses to use it, not the case here.

October 28, 2025

MEDICAL MALPRACTICE, NEGLIGENCE, PRE-NATAL TORTS, EMOTIONAL DAMAGES.

MOTHER IS PRECLUDED FROM RECOVERING PURELY EMOTIONAL DAMAGES FOR PRENATAL TORTS BASED ON A LACK-OF-INFORMED-CONSENT THEORY; THE CHILD WAS BORN ALIVE IN SERIOUS CONDITION AND DIED SOON THEREAFTER; MOTHER ALLEGED SHE DID NOT CONSENT TO THE FAILED VACUUM EXTRACTION PROCEDURE (CT APP).

The Court of Appeals, reversing the Appellate Division, in a full-fledged opinion by Judge Singas, over two dissenting opinions (three judges), determined plaintiff mother was precluded from recovering purely emotional damages for prenatal torts based on lack of informed consent. The child was born alive but died shortly

thereafter. Mother alleged she did not consent to the unsuccessful vacuum extraction procedure:

In this appeal, we must determine whether this Court's precedent limiting recovery of purely emotional damages for prenatal torts, as reaffirmed in Sheppard-Mobley v King (4 NY3d 627 [2005]), applies to medical malpractice claims premised on lack of informed consent. We hold that it does. We are further asked, by plaintiff and the Appellate Division, to overrule our unanimous holding in Sheppard-Mobley and prior cases dictating that result. Adherence to stare decisis principles leads us to decline that invitation. * * *

Though Sheppard-Mobley involved a "traditional" medical malpractice claim, its holding was clear: a birthing parent may not "recover damages for emotional harm where . . . alleged medical malpractice causes in utero injury to the fetus, subsequently born alive" (4 NY3d at 634). As our case law and the Public Health Law make clear, a lack of informed consent claim is a type of medical malpractice claim … . Thus, a straightforward reading of Sheppard-Mobley forecloses plaintiff's claim. SanMiguel v Grimaldi, 2025 NY Slip Op 05780, CtApp 10-21-25

Practice Point: Adhering to precedent, the Court of Appeals determined mother was precluded from recovering purely emotional damages for prenatal torts based on a lack-of-informed-consent theory. The child was born alive in serious condition. Mother alleged she did not consent to the failed vacuum extraction procedure.

October 21, 2025

SLIP AND FALL, NEGLIGENCE, EVIDENCE.

ALTHOUGH PLAINTIFF TESTIFIED SHE DID NOT KNOW WHAT CAUGHT HER HEEL AND CAUSED HER TO FALL, THE CIRCUMSTANTIAL EVIDENCE THAT A MIS-LEVELED CONCRETE SLAB CAUSED THE FALL COULD ALLOW THE JURY TO DETERMINE THE CAUSE WITHOUT RESORT TO SPECULATI ON; DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined that, defendant's motion for summary judgment in this slip and fall case should have been denied. Plaintiff testified "something caught her heel" when she was walking backwards from a gravel driveway to the garage and she fell onto concrete in the garage. Plaintiff could not identify the cause of her fall, but the circumstantial evidence indicated her heel caught on the mis-leveled concrete slab:

… [W]e conclude that defendant failed to establish as a matter of law that the cause of plaintiff's fall was speculative … . " 'Although [mere] conclusions based upon surmise, conjecture, speculation or assertions are without probative value . . . , a case of negligence based wholly on circumstantial evidence may be established if the plaintiff[ ] show[s] facts and conditions from which the negligence of the defendant[ ] and the causation of the accident by that negligence may be reasonably inferred' " … .

Although plaintiff testified that she did not know what caught her heel and caused the fall, she also stated that she fell in the immediate vicinity of the entry to the garage from the gravel driveway and landed inside the garage. Viewing the evidence in the light most favorable to plaintiff as the nonmoving party … , we conclude that the testimony and the allegations in the bill of particulars regarding the mis-leveled concrete slab "render[ed] any other potential cause of her fall 'sufficiently remote or technical to enable [a] jury to reach [a] verdict based not upon speculation, but upon the logical inferences to be drawn from the evidence' " … . Withers v Roblee, 2025 NY Slip Op 05620, Fourth Dept 10-10-25

Practice Point: Here the plaintiff could not say precisely what "caught her heel" and caused her to fall, but the circumstantial evidence was such that a jury could

determine the cause without resort to speculation. Defendant's motion for summary judgment should have been denied.

October 10, 2025

TRAFFIC ACCIDENTS, NEGLIGENCE, EVIDENCE.

APPELLANT WAS SLOWING DOWN APPROACHING PLAINTIFF'S VEHICLE WHICH WAS STOPPED WHEN APPELLANT WAS STRUCK FROM BEHIND AND PUSHED INTO PLAINTIFF'S VEHICLE; APPELLANT WAS ENTITLED TO SUMMARY JUDGMENT DISMISSING THE COMPLAINT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined appellant was entitled to summary judgment in this rear-end collision case. Appellant was slowing down approaching plaintiff's car in front, which was stopped, when appellant was struck from behind and pushed into plaintiff:

"A 'defendant moving for summary judgment in a negligence action has the burden of establishing, prima facie, that he or she was not at fault in the happening of the subject accident'" … . "A rear-end collision with a stopped or stopping vehicle establishes a prima facie case of negligence on the part of the operator of the rear vehicle, requiring that operator to come forward with evidence of a nonnegligent explanation for the collision in order to rebut the inference of negligence" … . "'Evidence that a vehicle was struck in the rear and propelled into the vehicle in front of it may provide a sufficient non-negligent explanation for the collision'" … . The operator of the middle vehicle in a three-vehicle chain-collision accident may establish prima facie entitlement to judgment as a matter of law by demonstrating that the middle vehicle was stopped or safely slowing down to a stop behind the lead vehicle when it was struck from behind by the rear vehicle and propelled into the lead vehicle … .

Here, the appellant submitted evidence that demonstrated that his vehicle was struck in the rear by the respondents' vehicle while his foot was on the brake and he was in the process of slowing down. Since the appellant was in the process of

safely slowing down to a stop behind the plaintiffs' vehicle, which was at a stop, when his vehicle was struck from behind, he established his prima facie entitlement to judgment as a matter of law … . Sherman v Edwards, 2025 NY Slip Op 05713, Second Dept 10-15-25

Practice Point: When a driver is in the process of braking approaching a stopped vehicle and is struck from behind and pushed into the stopped vehicle, the driver is not negligent.

October 15, 2025

TRAFFIC ACCIDENTS, NEGLIGENCE, INSURANCE, EVIDENCE.

THE CONFLICTING EXPERT REPORTS AND OTHER EVIDENCE RAISED A QUESTION OF FACT WHETHER THE TRAFFIC ACCIDENT CAUSED SERIOUS INJURY DESPITE PLAINTIFF'S DECEDENT'S PREEXISTING CONDITIONS (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Michael, determined Supreme Court properly denied summary judgment on the question whether plaintiff's decedent, Kenneth Moore, suffered "serious injury" within the meaning of Insurance Law 5102(d) in a traffic accident. The conflicting expert evidence raised questions of fact about whether the accident exacerbated preexisting conditions, including arthritis

… [A] preexisting condition does not foreclose a finding that the plaintiff's injuries were causally related to the subject accident … . Where a defendant meets its prima facie burden in establishing that the preexisting condition is the cause of the plaintiff's injuries, the burden shifts to the plaintiff to present evidence addressing causation … .

To meet his burden, the plaintiff must address the evidence of preexisting conditions "and explain why [his] current reported symptoms [are] not related to the preexisting conditions" or how the accident aggravated his underlying degenerative conditions … . * * *

… [P]laintiff's evidence, including conflicting expert reports; testimony as to Moore's increased pain and diminished physical capabilities; and medical records showing a new course of treatment, new diagnoses, and aggravated injuries, raised issues of fact as to whether Moore's worsened physical condition was causally related to the accident … . Moore v Maley, 2025 NY Slip Op 05304, First Dept 10-2-25

Practice Point: Consult this opinion for an an explanation of how to deal with a plaintiff's preexisting conditions when assessing whether plaintiff has suffered "serious injury" in a traffic accident within the meaning of the Insurance Law.

October 2, 2025

TRAFFIC ACCIDENTS, TRAFFIC SIGNAL, NEGLIGENCE, MUNICIPAL LAW, EVIDENCE.

PLAINTIFF ALLEGED A DEFECTIVELY MAINTAINED AND/OR INSTALLED TRAFFIC SIGNAL ALLOWED A SIGNAL HEAD IN EACH DIRECTION TO SHOW A GREEN LIGHT, THEREBY CAUSING THE INTERSECTION COLLISION; ALTHOUGH THE TOWN DEMONSTRATED A LACK OF NOTICE OF THE CONDITION OF THE TRAFFIC SIGNAL, THE PLAINTIFF RAISED QUESTIONS OF FACT ON THE "FAILURE TO MAINTAIN THE INTERSECTION IN A SAFE CONDITION" AND "CREATION OF A DANGEROUS CONDITION" CAUSES OF ACTION, AND THE NEGLIGENCE CAUSE OF ACTION WAS SUFFICIENTLY ALLEGED (FOURTH DEPT).

The Fourth Department, reversing (modifying) Supreme Court and reinstating the complaint, determined the complaint and bill of particulars sufficiently alleged negligence and questions of fact were raised about whether the county failed to properly maintain a traffic signal and created a dangerous condition. The plaintiff alleged a pipe holding the traffic signal broke allowing it to rotate 90 degrees such that at least one of the signal heads in each direction showed a green light, causing

the intersection collision. The fact that the county demonstrated it did not have notice of the defective traffic signal did not affect the viability of the "failure to maintain the intersection in a safe condition" and the "creation of a dangerous condition" causes of action:

"A municipality has a duty to maintain its streets in a reasonably safe condition" … . "[T]he municipality breaches such duty if it permits a dangerous or potentially dangerous condition to exist and cause injury" … . Here, to meet its burden on that part of the motion seeking summary judgment, defendant was required to "demonstrate that it maintained the intersection in a reasonably safe condition and that it neither created the alleged defective condition nor had actual or constructive notice of same" … .

… [W]e conclude that plaintiff raised triable issues of fact by submitting the affidavit of his expert … . We also agree with plaintiff that questions of fact exist with respect to whether the doctrine of res ipsa loquitur applies here … . Duncan v Town of Greece, 2025 NY Slip Op 05588, Fourth Dept 10-10-25

Practice Point: The municipality's lack of notice of a dangerous condition, here an allegedly defective traffic signal, does not affect the viability of causes of action alleging the failure to maintain the intersection in a safe condition and/or the municipality's creation of the dangerous condition.

October 10, 2025

WORKERS' COMPENSATION, COVID, EVIDENCE.

ALTHOUGH CONTRACTING COVID-19 IS COMPENSABLE UNDER WORKERS' COMPENSATION, HERE THE PROOF THAT CLAIMANT CONTRACTED COVID-19 BECAUSE OF WORKPLACE EXPOSURE WAS INSUFFICIENT (THIRD DEPT).

The Third Department, reversing the Workers' Compensation Board, determined the record did not support the finding that claimant, a school custodian, contracted COVID-19 from workplace exposure. The decision is fact-specific. Claimant had

little contact with students during his work hours and there were other possible sources of infection:

We acknowledge that "the contraction of COVID-19 in the workplace is compensable under the Workers' Compensation Law" … , that the issue of whether a compensable accident has occurred is a question of fact for the Board to resolve and that the Board's findings in this regard, if supported by substantial evidence, will not be disturbed … . Additionally, our case law makes clear that where, as here, the injured claimant alleges that he or she contracted COVID-19 at work, such claimant "bears the burden of demonstrating either a specific exposure to COVID-19 or that COVID-19 was so prevalent in the work environment as to present an elevated risk of exposure constituting an extraordinary event" … ; "for example, workers with significant contact with the public in communities with high rates of infection or workers in a workplace experiencing high rates of infection" … .

… Although claimant's job included cleaning various areas of the school and picking up supplies, he acknowledged that his only contact with students would occur while he was mopping the hallways, at which time approximately 20 students would pass by him on their way to the locker rooms. During the relevant time frame, no other member of claimant's household tested positive for COVID-19, but claimant's then-spouse worked in-person and did the grocery shopping, her son attended sporting events three days each week and claimant attended church each week with approximately 40 other people. Claimant, who did not wear a mask during church services, testified that his fellow attendees "wouldn't have been [sitting] that close" to one another. The record is silent as to the rate of infection in either the school where claimant worked or the surrounding community.

Upon reviewing the record as a whole, we cannot say that the Board's decision is supported by substantial evidence. As a starting point, the record is devoid of proof that there was a high rate of infection present in claimant's work environment at the relevant point in time … . Further, claimant's brief encounters with a passing group of students in a corridor falls short of the degree of regular, consistent and close interaction with the public at large necessary to sustain a finding of prevalence … . Finally, the record reflects that either claimant or members of his household engaged in other in-person pursuits during the relevant time period.

Under these circumstances, the Board's finding that claimant's employment exposed him to an elevated risk of exposure to COVID-19 cannot stand. Matter of Angelo (Southwestern Cent. Sch.), 2025 NY Slip Op 05998, Third Dept 10-30-25

Practice Point: Contracting COVID-19 is compensable under Workers' Compensation but claimant must present proof exposure at the workplace was the source of the infection, not the case here.

October 30, 2025

WORKERS' COMPENSATION, HEARING LOSS, EVIDENCE.

CONFLICTING EVIDENCE OF THE CAUSES OF CLAIMANT'S HEARING LOSS DID NOT SUPPORT THE MEDICAL EXPERTS' CONCLUSIONS THAT THE LOSS WAS ATTRIBUTABLE TO THE OPERATION OF HEAVY MACHINERY (THIRD DEPT).

The Third Department, reversing the Workers' Compensation Board, determined the conflicting evidence of the causes of claimant's hearing loss did not support the experts' conclusions that the hearing loss was "likely" caused by exposure to noise from the operation of heavy equipment:

… [T]he medical opinion evidence on the issue of causation need not be expressed with certainty or in absolute terms … , and we acknowledge that the Board is vested with the exclusive authority to weigh conflicting medical opinions and to evaluate the medical evidence before it … . That said, the medical opinions upon which the Board bases its finding of a causal relationship nonetheless must be supported by a rational basis … . Here, each of the foregoing physicians indeed expressed that it was "likely or "very obvious" that claimant's hearing loss was attributable to work-related noise exposure. However, given the other documented sources of noise exposure … , the conflicting medical histories provided by claimant and, most notably, the testimony of the carrier's consultant, who made clear that the results of claimant's audiograms were decidedly inconsistent with noise-related hearing loss, we are unable to conclude that these generalized statements of causation are otherwise supported by a rational basis in the record as a whole. Under these circumstances, the Board's finding that claimant sustained a

work-related binaural hearing loss is not supported by substantial evidence … . Matter of Spada v Keeler Constr. Co., 2025 NY Slip Op 05553, Third Dept 10-9-25

Practice Point: In the context of a hearing loss alleged to have been caused by prolonged exposure to noise from heavy machinery, the medical experts' conclusions must be supported by evidence in the record. Here the experts' conclusions that the hearing loss was attributable to the operation of heavy machinery were weakened by conflicting causation-evidence in the record and the finding of causation was reversed.

October 9, 2025

WORKERS' COMPENSATION, OFF-SET FOR PRIOR INJURY.

THE WORKERS' COMPENSATION BOARD SHOULD NOT HAVE OFFSET THE SLU AWARD FOR CLAIMANT'S ARM INJURY BASED ON A PRIOR SLU AWARD FOR INJURY TO THE SAME ARM; THE TWO INJURIES WERE NOT RELATED (THIRD DEPT)

The Third Department, reversing the Workers' Compensation Board, determined claimant was entitled to a schedule loss of use (SLU) award for injury to his arm, despite a prior SLU award for injury to the same arm. The injuries involved different pathologies:

"Pursuant to Matter of Genduso [v New York City Dept. of Educ. (164 AD3d 1509 [3d Dept 2018])] and its progeny, the Board may offset an SLU award by previous SLU awards for the same body member, regardless of whether the prior injuries involved the same or separate parts of that member" … . However, the Court of Appeals has held that an offset of an SLU award by previous SLU awards for the same body member "is not required when the claimant demonstrates that a subsequent injury increased the loss of use of [the] body member beyond that resulting from the prior injury" (Matter of Johnson v City of New York, 38 NY3d at 444 …). 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" … . * * *

… [C]laimant's physician clearly stated that claimant had "received a scheduled loss of use of 27% for the right shoulder," and, in his July 2021 report, claimant's physician opined that the surgery he had performed for claimant's 2015 shoulder injury was "unrelated" to the 2019 biceps injury. Claimant's physician made it clear that the 33.33% SLU that he found claimant had sustained for the biceps injury was separate from, and in addition to, the prior shoulder injury. Thus, in accordance with the holding in Matter of Johnson, the SLU attributable to the prior shoulder injury should not have been deducted from the SLU attributable solely to the biceps injury, and we find that the Board's determination is not supported by substantial evidence. Matter of Germano v Dynamic Appliances, Inc., 2024 NY Slip Op 05259, Third Dept 10-24-24

Practice Point: A claimant is eligible for more than one SLU award for injuries to the same body part if the injuries are not related and involve different pathologies.

October 24, 2024

WORKERS' COMPENSATION, PSYCHOLOGICAL INJURY.

BECAUSE CLAIMANT SUFFERED PHYSICAL TRAUMA, TO RECOVER FOR PSYCHOLOGICAL INJURIES SHE NEED ONLY DEMONSTRATE A CONNECTION BTWEEN THE PSYCHOLOGICAL INJURIES AND THE PHYSICAL TRAUMA; CLAIMANT WAS NOT REQUIRED TO PROVE A SEPARATE AND DISTINCT WORKPLACE INJURY CAUSED THE PSYCHOLOGICAL INJURIES (THIRD DEPT).

The Third Department, reversing the Workers' Compensation Board, determined the claimant need only demonstrate a connection between the physical trauma she suffered when a dog jumped on her and the psychological injuries which followed. Claimant did not have to prove the psychological injuries were caused by a separate workplace accident. Claimant, a social worker, was making a home visit when a family dog charged at her:

… [I]t has long been recognized that where a workplace accident is found to have occurred as a result of a physical impact/trauma, resulting physical and

psychological injuries are both compensable, so long as the claimant establishes the causal connection between the accident and the alleged injuries … .

Here, the Board established a claim for a physical injury to claimant's chest based upon the dog jumping on her chest and knocking her into the side of the house. As claimant alleges that her psychological injuries resulted from that same physical impact that the Board found amounted to a workplace accident, the Board erred in requiring that she establish a separate workplace accident comprised of work-related stress to recover for her alleged direct psychological injuries … . Rather, upon finding that a workplace accident had been established, the Board's inquiry was limited to whether claimant showed, through competent medical evidence, that there was a causal relation between the accident and the injury … . Accordingly, the Board's decision is reversed, and the matter is remitted to the Board to examine whether a causal connection was established between the workplace accident and the alleged psychological injuries consisting of PTSD, anxiety and acute stress disorder. Matter of Lewis v NYC Admin. for Children Servs., 2024 NY Slip Op 05254, Third Dept 10-24-24

Practice Point: The Workers' Compensation Law allows recovery for psychological injuries caused by physical trauma.

October 24, 2024

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