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SIGNATURE SERIES:
Personal Injury Update

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June 22, 2022
Suffolk County Bar Association, New York

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Signature Series:

Personal Injury Update

June 22, 2022

5:30 – 5:35 pm **Welcome and Introduction – Paul Devlin**

5:35 – 6:10 pm **Construction Accident/Labor Law – Brian Murphy**

- Key Statutes
- Scope of Labor Law
- What Defendants are Subject to Liability Under the Labor Law?

6:10 – 6:50 pm **Automobile Negligence – Paul Devlin**

- Emergency Doctrine and Rear End Collisions
- Turning Vehicles
- Permissive use
- Alternate Juror
- Set Aside Verdict
- Negligence Standard
- Vicarious Liability
- Crossing Guard
- Summary Judgment Liability

6:50 – 7:00 pm **Break**

7:00 – 7:40 pm **Premises Liability – Christopher Glass**

- Creation or Acatual or Constructive of Hazardous Conditions
- Open and Obvious Condition Defense
- Trivial Defect Defense
- Storm in Progress Defense
- Espinal Exceptions: Contractor Liability
- Adjacent Property Owner Liability
- Out of Possession Landlords
- Primary Assumption of Risk

7:40 – 7:50 pm **Break**

7:50 – 8:30 pm **Medical Malpractice – William G. Spratt**

- Recent Medical Malpractice Decisions

Brian Murphy, Esq. – Rappaport, Glass, Levine & Zullo

Brian Murphy is an experienced personal injury trial attorney with Rappaport, Glass, Levine & Zullo. With offices in Islandia and mid-town Manhattan, he represents individuals all over the New York metropolitan area who are catastrophically injured due to the negligence of others.

Brian's practice focuses on representing victims of construction accidents, car crashes, nursing home neglect and abuse, and medical malpractice. By verdict, arbitration, and settlement, he has personally secured tens of millions of dollars in compensation for his clients. Brian has been named a lifetime member of both the Million Dollar and Multi-Million Dollar Advocates Forum, has been honored by Super Lawyers as a Rising Star, holds an AV Preeminent rating from Martindale-Hubbell, and holds an AVVO rating of 10 out of 10. In 2020, he was honored for having one of the Top 50 motor vehicle settlements in the entire United States. Brian's skills in the courtroom are well-recognized. Today, other personal injury attorneys often seek to bring Brian into their cases to serve as Trial Counsel.

Prior to joining RGLZ, Brian served as the managing attorney for a successful plaintiff's personal injury firm. Earlier, he was an associate in the labor and employment law department at a major New York law firm. After law school, he served as an Assistant District Attorney in the Nassau County District Attorney's Office. There, Brian conducted a substantial number of jury trials, ranging from DWI to murder, with a tremendous success rate.

Brian earned his Juris Doctor degree from St. John's University School of Law, where he served as Executive Articles Editor of the A.B.I. Law Review. Previously, he was a *magna cum laude* graduate of Boston College, earning a Bachelor of Arts degree in History. Brian lives in Babylon Village with his wife and 3 sons, where he enjoys coaching his sons' baseball and soccer teams. Brian and his wife are regular supporters of Island Harvest Food Bank and St. Jude's Children's Research Hospital.

Construction Accident / Labor Law § 240(1) Update

June 22, 2022

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I. Key Statutes

a. Labor Law § 240(1)
   i. All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.

b. Labor Law 241 § (6)
   i. All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
      (6) All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. **The commissioner may make rules to carry into effect the provisions of this subdivision**, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith.
   ii. New York State Industrial Code. Enacted by the Department of Labor
      1. Most commonly implicated part is Part 23 – Protection in Construction, Demolition and Excavation Operations
      2. But check all parts, based on the facts of your particular case.
         a. Part 12 – Control of Air Contaminants
         b. Part 21 – Protection of People Engaged in Window Cleaning
   iii. Under the Industrial Code, "construction work" is defined '[a]ll work of the types performed in the construction, erection, alteration, repair, maintenance, painting or moving of buildings or other structures."
   iv. For a valid § 241(6), you must plead and prove that a violation of the Industrial Code occurred, or else the case will be dismissed.
      1. Not every section of the Industrial Code is viable, it has to be "sufficiently specific" to support a 241(6) claim.

a. Case law… look to Appellate Division decisions.
b. PJI – Volume 1B.

c. Labor Law § 200 – General duty to protect health and safety of employees.
   i. All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons. The board may make rules to carry into effect the provisions of this section.
      1. Applies to owners of the construction site.

d. Common Law Negligence
   i. Standard negligence cause of action. Requires actual and/or constructive notice.
   ii. Often overlaps with § 200.

II. Scope of Labor Law §§ 240 and 241

a. Covered Work – there can be differences between what is covered under §§ 240 and 241.
   i. Broggy v Rockefeller Group, Inc., 8 NY3d 675, 680 (2007). Statutorily listed Labor Law § 240 activities need not necessarily occur "as part of a construction, demolition and repair project" to fall under § 240.
      1. BUT SEE
   ii. Nagel v D & R Realty Corp., 99 NY2d 98, 103 (2002). Labor Law § 241(6) "covers industrial accidents that occur in the context of construction, demolition and excavation."
   iii. For Example:
      1. Cantalupo v Arco Plumbing & Heating, Inc., 194 AD3d 686 (2d Dept. 2021). The plaintiff was part of a team directed to reinstall a 500-pound division plate into the water box of an air conditioning unit. The division plate fell and knocked another component of the air conditioning unit onto the plaintiff's leg. The Second Department held that although there were issues of fact re: whether this was a "repair" within the context of § 240, it was, as a matter of law, not construction, excavation, or demolition within the scope of § 241(6).
      2. Barrios v 19-19 24th Ave. Co., LLC, 169 AD3d 747 (2d Dept. 2019). The plaintiff was injured "when a differential block and chain fell onto his head as he and his coworkers were

preparing a hoisting apparatus to remove and replace a broken roll-up gate on the defendant's premises." The activity was actionable under § 240, but not actionable under § 241(6) because § 241(6) "is limited to those areas in which construction, excavation, or demolition work is being performed."

b. Prats "Relatedness" – Is the activity sufficiently related to covered work?
   i. Seminal case - Prats v Port Auth. of New York and New Jersey, 100 NY2d 878, 882 (2003).
      1. Labor Law §§ 240 and 241(6) apply if the plaintiff was a "member of a team" that "undertook an enumerated activity" even if the plaintiff was not performing covered work at the time that he/she suffered the injury.
   ii. Sufficiently Related
      1. Llamas v Yu Yu Chen, 195 AD3d 702 (2d Dept 2021). The plaintiff worked for a nonparty contractor to work on a broad project that included exterior brick work. The plaintiff was assigned to powerwash a chimney at the site, and the powerwashing involved a corrosive chemical. The plaintiff was not provided with any gloves and the corrosive substance caused severe burns to his hands and arms. The defendant moved to dismiss, arguing that at the time of the incident, the plaintiff wasn't engaged in a specifically enumerated activity under 12 NYCRR 23-1.4(b)(13). The Second Department denied the defendant's motion, holding that the defendant failed to satisfy its *prima facie* burden because that there were triable issues of fact "as to whether the activity in which the plaintiff was engaged at the time of the accident was part of a broader construction or demolition project taking place at the defendant's premises, so as to come within the protection of Labor Law § 241(6)".
      2. Crutch v 421 Kent Dev., LLC, 192 AD3d 977 (2d Dept 2021). The plaintiff was an HVAC mechanic whose shift began at 7:00 a.m. As shift began, he was waiting on a loading dock for the elevator that would take him to the floor we was working on that day. He leaned against the railing of the loading dock and a support gave out, causing him to fall approximately 5 feet onto the concrete floor below. The Second Department held that "accessing and waiting at the loading dock for the elevator, even before working hours began, was necessary to the plaintiff's work" and thus he was entitled to the protections of § 240, because "the pipe railings at the loading dock were inadequate to provide proper safety to the plaintiff" and "that this inadequacy was a proximate cause of his alleged injuries". "Under the

circumstances of this case, the fact that the plaintiff was not engaged in HVAC work at the moment of his accident does not preclude the application of Labor Law § 240(1)".

iii. Not Sufficiently Related to Covered Work
    1. Marney v Cornell Kent II Holdings, LLC, 194 AD3d 917 (2d Dept 2021). The plaintiff was injured while drilling soil samples to investigate the suitability of the soil for the potential excavation and construction of a structure. The Second Department held that where "[n]o construction was ongoing when the plaintiff was injured, and the necessary demolition, clearing, and grading of the lot had already occurred before the plaintiff began his work," and the contract he was working under did not cover any future construction work, the plaintiff's work fell into a separate phase "easily distinguishable from other parts of the larger construction project."
    2. McKnight v Metro-N. R.R., 192 AD3d 679 (2d Dept 2021). Holding that the "defendants established, prima facie, that the plaintiff was not engaged in any of the enumerated activities protected by Labor Law § 241(6) at the time of his accident by presenting evidence that the accident occurred after the plaintiff and his coworker had completed their work for the day."

c. "Altering"
    i. Joblon v Solow, 91 NY2d 457, 465 (1998). Altering is defined as a "significant physical change" to a "building or structure".
        1. The word "significant" itself is a term of art.
        2. Determinations highly fact sensitive.
    ii. Seminal case – Saint v Syracuse Supply Co., 25 NY3d 117 (2015)
        1. Preface it – with earlier Court of Appeals holding in Munoz v DJZ Realty, LLC, 5 NY3d 747 (2005), during which the Court held that the replacement of a billboard advertisement constituted "cosmetic maintenance," not altering.
    iii. Saint v Syracuse Supply Co., 25 NY3d 117 (2015).
        1. The plaintiff was part of a crew working to replace an advertisement on a billboard. The new advertisement was larger than the old one, so it required the installation of 4 extensions to support the new advertisement. The plaintiff was injured when a gust of wind picked up the vinyl advertisement and struck the plaintiff, causing him to fall. The Court of Appeals distinguished Munoz and held § 240(1) applied because here, the job entailed modifying the billboard's structure, not just its appearance (advertising content). Thus, this constituted "altering" and § 240(1) applied.

2. Saint was also supremely important because the Court of Appeals expressly rejected that "altering" only applies to permanent changes. The Court held: "[n]owhere does section 240(1) impose or even mention a requirement that an alteration be of a permanent and fixed nature … in this case the fact that the advertisement extensions stay up as long as the sign does, makes the work no less an alteration within the meaning of section 240(1)."

iv. Alberici v. Gold Medal Gymnastics, 197 AD3d 540 (2021). The plaintiff was hired to install a sign made up of large individual letters on the front soffit of a business. After he used a ladder to climb inside the soffit to attach the letter to the soffit, the floor of the soffit gave way and plaintiff fell 15 feet to the concrete below. The Second Department held that within the confines of § 240(1), the defendants failed to demonstrate, *prima facie*, that the plaintiff was not engaged in "altering" the building at the time of the accident. The defendants also failed to establish, *prima facie*, that the plaintiff was not engaged in "construction" within the meaning of § 241(6).

d. "Cleaning"

i. Dahar v Holland Ladder & Mfg. Co., 18 NY3d 521, 525-526 (2012). The Court of Appeals held that § 240 applies to "cleaning," but not to "every act of cleaning," and not to "cleaning" that occurs in a factory setting, far removed from any construction or demolition activity.

ii. Seminal case – Soto v J. Crew Inc., 21 NY3d 562, 564, 568 (2013). The plaintiff was an employee of a cleaning company hired to provide janitorial services for a retail store. He was injured when he fell from a 4-foot tall ladder while dusting a 6-foot tall shelf. The Court of Appeals held that the plaintiff's activity did not constitute "cleaning" within the ambit of Labor Law § 240(1).

1. "Outside the sphere of commercial window washing (which we have already determined to be covered), an activity cannot be characterized as 'cleaning' under the statute, if the task: (1) is routine, in the sense that it is the type of job that occurs on a daily, weekly or other relatively-frequent and recurring basis as part of the ordinary maintenance and care of commercial premises; (2) requires neither specialized equipment or expertise, nor the unusual deployment of labor; (3) generally involves insignificant elevation risks comparable to those inherent in typical domestic or household cleaning; and (4) in light of the core purpose of Labor Law § 240(1) to protect construction workers, is unrelated to any ongoing construction, renovation, painting, alteration or repair project".

iii. Recent Court of Appeals Case – Healy v. EST Downtown, LLC, 38 NY3d 998 (2022). Decided April 28, 2022.
    1. The plaintiff was employed as a maintenance and repair technician for a building's property manager. On the day of his incident, he responded to a pest control work order filed by a commercial tenant. The tenant complained that birds were depositing excrement from a nest located in one of the building's gutters. The plaintiff was injured when, while attempting to remove the bird's nest, he fell from an unsecured eight-foot ladder when a bird suddenly flew out of the nest.
    2. Reversing the Fourth Department, the Court of Appeals denied the plaintiff's motion for summary judgment on his § 240(1) claim and granted the defendant's motion for summary judgment. Applying the four-factor test set forth in Soto, the Court held that the plaintiff's work was "'routine' within the meaning of the first factor, which therefore weighs against concluding that he was "cleaning." "[V]iewed in totality," the Soto factors do not "militate in favor of placing the task" in the category of "cleaning." (internal citations omitted).

e. "Repairing" v. "Routine Maintenance"
    i. Seminal Case – Esposito v New York City Indus. Dev. Agency, 1 NY3d 526 (2003). Holds that §§ 240 and 241(6) do not apply if the plaintiff was performing "routine maintenance".
    ii. Stockton v H&E Biffer Enters. No. 2, LLC, 196 AD3d 709 (2d Dept. 2021). The plaintiff, a HVAC mechanic, was injured when he fell off a ladder while performing a non-emergency service call that involved replacing a refrigeration unit's fan motor. Affirming the trial court, the Second Department held that the defendants established, *prima facie*, that the replacement of the condenser fan motor, which, according to the testimony of the injured plaintiff's employer, weighed approximately 1½ pounds and was the kind of part that required replacement "all the time," constituted routine maintenance and not repairing, or any of the other enumerated activities under Labor Law § 240(1). "The work here involved replacing [a] component[ ] that require[s] replacement in the course of normal wear and tear." (internal citations omitted).

f. "Painting"
    i. Mejia v. Cohn, 188 AD3d 1035 (2d Dept 2020). The plaintiff was removing several trash bags from an elevated storage area in a building owned by the defendants. To do this, he leaned a closed A-frame ladder against the wall in order to reach the bags. While reaching for the bags, the ladder slipped out, causing the plaintiff to

fall and suffer injuries. There was conflicting deposition testimony as to whether the plaintiff was instructed to plaster and paint the elevated storage area after moving the bags.

ii. The Second Department noted that "[w]hile '[p]ainting is a protected activity that need not [be] incidental to the other listed activities such as construction, repair, or alteration, to be covered by Labor Law § 240(1)' … and acts performed in preparation of painting are enumerated activities under Labor Law § 240(1)." However, in this instance, the court held that the plaintiff failed to establish his entitlement to summary judgment on his § 240(1) claim as a matter of law because there was an issue of fact as to whether the elevated storage area and the area where the plaintiff was working was to be painted around the time of the plaintiff's accident.

g. What types of workers are covered by the Labor Law?
   i. The Labor Law protects plaintiffs who are "employed". Not applicable to volunteers, contract vendees, or observers on the construction site.
      1. Whelen v Warwick Val. Civic and Social Club, 47 NY2d 970 (1979). Volunteers are not covered by the Labor Law.
      2. Mordkofsky v V.C.V. Dev. Corp., 76 NY2d 573 (1990). Contract vendee not covered by Labor Law.
   ii. Contractors and job-site bosses can be "employees"
      1. Eliassian v G.F. Constr., Inc., 163 AD3d 528 (2d Dept 2018). Holding that Labor Law § 240 "may apply to the president of the general contractor for the project, who is inspecting work performed by subcontractors," because inspecting the work on behalf of a general contractor is a protected activity covered by the Labor Law.
      2. Makkieh v Judlau Contr. Inc., 162 AD3d 468 (1st Dept 2018). The injured plaintiff was an engineer supervising the construction of the Second Avenue subway project. The plaintiff was engaged in an activity falling within the protections of the Labor Law.

h. The Labor Law Only Covers Incidents Involving Buildings or Structures.
   i. Buildings – that is pretty straightforward. But what is a structure?
   ii. But what is a structure?
      1. Gordon v E. Ry. Supply, Inc., 82 NY2d 555 (1993). A railroad car is a "structure".
      2. Lewis-Moors v Contel of New York, Inc., 78 NY2d 942 (1991). A telephone pole is a "structure."
      3. Mosher v State, 80 NY2d 286 (1992). A highway is a "structure."

4. Moura v City of New York, 165 AD3d 434 (1st Dept 2018). A large rolling pipe scaffold used to inspect a bridge is a "structure."
5. How about a tree? Lombardi v Stout, 80 NY2d 290 (1992). A tree is not a structure, it is a "product of nature."
    a. Doran v. JP Walsh Realty Group, LLC, 189 AD3d 1363 (2d Dept 2020). "The scope of Labor Law § 241(6) is governed by 12 NYCRR 23-1.4(b)(13), which defines construction work, and tree removal alone does not fall within any of the enumerated categories."
6. So, a tree is not a structure, unless it is a structure.
    a. Tamarez De Jesus v Metro-N. Commuter R.R., 159 AD3d 951 (2d Dept 2018). The plaintiff was on ground level using a chain saw to cut and remove a tree that fell on catenary wires located above the railroad tracks along the New Haven Railroad Line when the tension in the catenary wires suddenly released, propelling the tree into the air and striking the plaintiff's leg. The Second Department held that § 240(1) applied because "the catenary wires could not be repaired and train service restored without first removing the tree." "[W]here, as here, the plaintiff's tree removal work constituted the first step in effectuating repairs to the catenary wires, the provisions of Labor Law § 240(1) are applicable."

III. What Defendants are Subject to Liability Under the Labor Law?

a. Owners of the property
    i. Sanatass v Consol. Inv. Co., Inc., 10 NY3d 333 (2008). For all intents and purposes, any owner is an "owner," regardless of whether the defendant-owner precipitated, controlled, or even knew of the "construction" work on his or her property.
    ii. However, there must be some nexus between the owner and the injured worker.
        1. Yong Qiao Zhao v A.T.C. Constr. Group Corp., 190 AD3d 788 (2d Dept. 2021). The plaintiff was hired to work on a renovation project at 225 Rector Place. However, he went to a dumpster in front of an adjacent property where work was being performed on an unrelated project to dump construction debris. He was injured there. The Second Department held the owner of the adjacent property was properly granted summary judgment because "[o]wnership of the premises where the accident occurred, standing alone, is insufficient to impose liability under Labor Law § 240(1) on

an out-of-possession property owner who does not contract for the injury-producing work." There must be "some nexus between the owner and the worker, whether by a lease agreement or grant of an easement, or other property interest." (internal quotations omitted).

b. Licensees, Lessees and Other Entities Held to be "Owners"
   i. Cruz v 1142 Bedford Ave., LLC, 192 AD3d 859 (2d Dept 2021). "[T]he term 'owner' is not limited to the titleholder of the property where the accident occurred and encompasses a person 'who has an interest in the property and who fulfilled the role of owner by contracting to have work performed for his [or her] benefit."
   ii. Rizo v 165 Eileen Way, LLC, 169 AD3d 943 (2d Dept 2019). The Second Department held there was a triable issue of fact whether the defendant-tenant contracted for the work in issue. Thus, there was a triable issue whether the defendant could be held liable under Labor Law §§ 240(1) or 241(6) because "[t]enants who either contract for or control and supervise the work may be held liable under these statutes … [but] tenants who neither contract for nor control and supervise the work may not be held liable under them."

c. General Contractors – In Title or In Actual Power Over the Job Site
   i. Walkow v. MJ Peterson/Tucker Homes, LLC, 185 AD3d 1463 (4th Dept. 2020). Holding that defendant Tucker Homes was a general contractor based on its power to enforce safety standards and essentially select the responsible subcontractors to perform work on the project. At a minimum, the plaintiff established that Tucker Homes was a statutory agent of the titleholders.
   ii. Alberto v DiSano Demolition Co., Inc., 194 AD3d 607 (1st Dept. 2021). Holding that upon a search of the records, issues of fact exist as to whether either of the defendants were the general contractor on the project, exercised supervisory control over the work and whether it was defendant Niko's Construction workers who created the alleged dangerous condition by digging near the scaffold.

d. Others Who May be Held to be Agents of the Owner or General Contractor
   i. Construction Managers – Kavouras v Steel-More Contr. Corp., 192 AD3d 782 (2d Dept. 2021). One of the defendants, Ammann, was a consultant engineer hired by the transit defendants. Ammann failed to demonstrate, *prima facie*, that it was not a statutory agent for the purpose of liability under Labor Law § 241(6) because (1) "'A party is deemed to be an agent of an owner or general contractor under the Labor Law when it has supervisory control and authority over the work being done where a plaintiff is injured'" and "[t]he

determinative factor is whether the defendant had 'the right to exercise control over the work, not whether it actually exercised that right,'" and, (2) "Ammann failed to eliminate triable issues of fact as to whether it was delegated the authority and responsibility to correct unsafe conditions at the work site and to ensure that the plaintiff's employer carried out its work in a safe manner."

ii. Site Safety Consultants – Pena v Intergate Manhattan LLC, 194 AD3d 576 (1st Dept. 2021). The plaintiff was injured due to an accident involving a motorized scaffold. The court held there were factual issues whether subcontractor Beeche, which designed and constructed the scaffold, was a § 240 "contractor" or "agent" since "[t]he jobsite also had a safety inspector on site employed by Site Safety LLC, and it is unclear whether the Beeche employee or the Site Safety inspector had final decision making authority to monitor wind conditions and determine if the motorized scaffold was safe for use."

e. Exception to the Owner Rule – Owners of One and Two-Family Dwellings that Do Not Control or Direct the Work

i. Affri v Basch, 13 NY3d 592, 596 (2009). Holding that the "direction and control" standard is a high bar. It is not enough that an owner gave the type of directions or guidance that any concerned owner might give.

ii. Khan v. Khan, 197 AD3d 1165 (2d Dept. 2021). The defendant-owner was correctly granted summary judgment where he made a *prima facie* showing that he owned the one-family dwelling and did not direct or control the work being performed.

iii. Navarra v. Hannon, 197 AD3d 474 (2d Dept 2021). The Second Department held that "general supervision with respect to the project, providing instructions related to the aesthetic appearance of the work, and inspecting the work to assess progress are insufficient to meet the requisite direction or control necessary to fall outside the protections of the homeowners' exemption." Here, the owner testified that she visited the property several times per week to pick up the mail, check on progress, and say hello.

IV. Labor Law § 240(1)

a. Strict or Absolute Liability – Good for injured plaintiffs

i. Roblero v. Bais Ruchel High School, Inc., 175 AD3d 1446 (2d Dept. 2019). Under Labor Law § 240(1), "owners and general contractors, and their agents, have a nondelegable duty to provide safety devices necessary to protect workers from risks inherent in elevated work sites … A worker's comparative negligence is not a defense to a claim under Labor Law § 240(1) and does not effect a reduction in liability …."

1. When, however, the worker's own conduct is the sole proximate cause of the accident, no recovery under § 240(1) is available.

b. Injury Must be Caused by an "Elevation-Related" Incident

i. Seminal Case – Runner v New York Stock Exch., Inc., 13 NY3d 599 (2009). Facts:

"The trial evidence showed that plaintiff suffered serious and permanent injuries to both of his hands while performing tasks in connection with the installation of an Uninterruptible Power System on defendant New York Stock Exchange's premises. The manner in which the injuries were sustained is undisputed. Plaintiff and several co-workers had been directed to move a large reel of wire, weighing some 800 pounds, down a set of about four stairs. To prevent the reel from rolling freely down the flight and causing damage, the workers were instructed to tie one end of a ten-foot length of rope to the reel and then to wrap the rope around a metal bar placed horizontally across a door jamb on the same level as the reel. The loose end of the rope was then held by plaintiff and two co-workers while two other co-workers began to push the reel down the stairs. As the reel descended, it pulled plaintiff and his fellow workers, who were essentially acting as counterweights, toward the metal bar. The expedient of wrapping the rope around the bar proved ineffective to regulate the rate of the reel's descent and plaintiff was drawn horizontally into the bar, injuring his hands as they jammed against it. Experts testified that a pulley or hoist should have been used to move the reel safely down the stairs and that the jerry-rigged device actually employed had not been adequate to that task."

ii. Holding:

"… we think the dispositive inquiry framed by our cases does not depend upon the precise characterization of the device employed or upon whether the injury resulted from a fall, either of the worker or of an object upon the worker. Rather, the single decisive question is whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential."

…

The elevation differential here involved cannot be viewed as de minimis, particularly given the weight of the object and the amount of force it was capable of generating, even over the course of a relatively short descent.

iii. Hensel v. Aviator, 198 AD3d 884 (2d Dept. 2021). Facts: The plaintiff was loading heavy soccer boards for an indoor soccer field into the back of a box truck. The boards were all between 6 and 12 feet long and weighed more than 100 pounds each. The plaintiff testifed that while he stood on the ground next to a forklift, one of the boards slid off the forklift and struck him in the head. The complaint alleged that the forklift was defective and lacked certain safety devices which would have secured the boards and prevented the accident.
    1. "Falling object liability under Labor Law § 240 (1) is not limited to cases in which the falling object is in the process of being hoisted or secured. Rather, liability may be imposed where an object or material that fell, causing injury, was a load that required securing for the purposes of the undertaking at the time it fell. In order to prevail on summary judgment in a section 240 (1) 'falling object' case, the injured worker must demonstrate the existence of a hazard contemplated under that statute and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein." (internal citations and quotations omitted).
    2. Held § 240(1) applied.

iv. Contrast
    1. Christie v. Live Nation Concerts, Inc., 192 AD3d 971 (2d Dept 2021). The plaintiff and four coworkers where carrying a heavy steel truss with four coworkers on level ground when he and his coworkers lost their grip, injuring the plaintiff's knee. The Second Department held that "the plaintiff's injury was not caused by the failure to provide adequate protection against an elevation-related hazard encompassed by Labor Law § 240(1)."
    2. Kammerer v Mercado, 145 NYS3d 888 (4th Dept. 2021). The plaintiff and her employer were trying to fix a clogged pipe. The plaintiff was on the first floor and her employer was on the second floor. The employer cut the pipe, and liquid from the pipe fell on the plaintiff, causing burns to her face, neck, arms and body. The Fourth Department held that the plaintiff's injuries were "not caused by a hazard against which the statute was intended to protect" because "the substance in the pipe 'was not a material being hoisted or a load that required securing.'"

c. Typically Two Types of § 240(1) Cases – Falling Person or Falling Object
    i. Falling Worker and Almost Fell Cases

1. Varied… Fall off a ladder, fall of a scaffold, fall through a hole, fall off an elevated platform, caused to fall by a falling object.
2. Mejia v. 69 Mamaronedk Road Corp., 203 AD3d 815 (2d Dept. 2022). At the time of the accident, the plaintiff, a roofer, was working on an inclined portion of the roof. He was wearing a safety harness that was attached to a rope. A coworker asked for the plaintiff's assistance on another portion of the roof. To get to the coworker, the plaintiff walked up the incline to a flat portion of the roof, where he untied his safety harness from the rope, which did not extend to the area where his colleague was working. The flat portion of the roof was covered with a black ice and water shield, which prevented the plaintiff from seeing the hole that had been cut for the chimney. While walking on the flat portion of the roof, the plaintiff fell into the hole.
    a. "The undisputed evidence established that the plaintiff was exposed to the elevation-related risk of the hole that was cut into the roof, that the hole through which the plaintiff fell was uncovered and unguarded, and that the location of the hole was concealed by an ice and water shield. The plaintiff established that the absence of protective equipment covering or guarding the hole was a proximate cause of his injuries."
3. Ging v F.J. Sciame Constr. Co., Inc., 193 AD3d 415 (1st Dept. 2021). The plaintiff was standing on an elevated structural steel tube which was approximately 20-feet long by 6-inches wide. While receiving a piece of material from a coworker, the tube shifted, causing him to fall backward and land on a perpendicular tube on the same level. He prevented himself from falling further by hooking his foot on the tube. Under these facts, the plaintiff established his *prima facie* entitlement to summary judgment on his Labor Law § 240(1) claim.
4. Defenses – de minimis height or an ordinary work hazard.
    a. Eliassian v G.F. Constr., Inc., 190 AD3d 947 (2d Dept. 2021). The plaintiff was inspecting excavation work at a job site when he stepped on a low concrete retaining wall and slipped on oil, which allegedly had leaked from a defective hydraulic line of a backhoe that was brought onto the property by the defendant. The Second Department agreed with the defendant, who moved for summary judgment on the § 240(1) claim on the ground that the plaintiff was not exposed to the type of elevation-related hazard contemplated by that statute because "the height differential from

the concrete retaining wall to the ground did not constitute a physically significant elevation differential covered by the statute."

ii. Falling Object Cases

1. Seminal Case - Fabrizi v 1095 Ave. of Americas, L.L.C., 22 NY3d 658 (2014).
    a. The plaintiff, an electrician, was injured while repositioning a "pencil box" used for telecommunication wires. He was struck in the hand by a steel conduit pipe that had been suspended at ceiling level, and was attached to another piece of pipe by a compression coupling which was inadequate to hold the conduit in place. The Court of Appeals held, as a matter of law, that "in order to prevail on summary judgment in a section 240(1) 'falling object' case … the plaintiff must demonstrate that at the time the object fell, it either was being 'hoisted or secured … or required securing for the purposes of the undertaking. The plaintiff must also show that the object fell … because of the absence or inadequacy of a safety device of the kind enumerated in the statute. This was not done here inasmuch as the missing coupling was not a qualifying safety device." (internal citations and quotations omitted).
2. Peters v. Structure Tone, Inc., 204 AD3d 522 (1st Dept. 2022). The plaintiff, a carpenter, was working in a shaft when pebble-sized debris fell on him, seriously injuring his eye. The First Department held that "[t]here are issues of fact as to whether the debris that fell on plaintiff — taking into account the elevation differential, the debris' weight, and the amount of force it could generate … — was "a load that required securing for the purposes of the undertaking at the time it fell" … , and whether his injury was a direct consequence of defendants' "failure to provide adequate protection against a risk arising from a physically significant elevation differential" … . The trier of fact could find that the elevation differential between plaintiff and the level from which the debris fell was de minimis, that the debris' weight was inconsequential, or that the debris could not have generated any meaningful amount of force, and determine that plaintiff's "injuries were the result of [a] usual and ordinary danger[] at a construction site" … .. However, the trier of fact could determine that the elevation differential of at least one story was not de minimis, that the weight of the debris and the force it was capable of generating were

significant, and that the debris should have been secured for the purpose of the undertaking."

3. Gallegos v. Bridge Land Vestry, LLC, 188 AD3d 566 (1st Dept. 2020). Holding that § 240 "is violated when an object that is improperly hoisted or inadequately secured falls." The plaintiff was injured "when a stone slab weighing more than half a ton that was being raised by a chain hoist or remote-controlled crane came loose from the sling or straps securing it and fell on his legs." "Because the sling proved inadequate to secure the slab against falling, the statute was violated" regardless of how or why it happened. "Either the sling itself or the manner in which it was used to secure the slab was inadequate and failed to provide proper protection, and plaintiff was not required to demonstrate how or why it failed to support the slab".

d. Defenses – "Sole Proximate Cause" and "Recalcitrant Worker"

i. History

1. Blake v Neighborhood Hous. Services of New York City, Inc., 1 NY3d 280 (2003). Where the plaintiff allegedly failed to lock the clips of his extension ladder, a jury could find plaintiff was the "sole proximate cause" of his accident.
2. Cahill v Triborough Bridge and Tunnel Auth., 4 NY3d 35 (2004). The plaintiff's recovery was barred because he was a "recalcitrant" worker who was told to use a safety line and chose to ignore those instructions.
3. Montgomery v Fed. Express Corp., 4 NY3d 805 (2005). The plaintiff, who intentionally jumped and was injured, was barred from any recovery.

ii. Seminal Case – Gallagher v New York Post, 14 NY3d 83 (2010). The Court of Appeals held that "[l]iability under § 240(1) does not attach when the safety devices that plaintiff alleges were absent were readily available at the work site, albeit not in the immediate vicinity of the accident, and plaintiff knew he was expected to use them but for no good reason chose not to do so, causing an accident."

iii. Jurski v City of New York, 204 AD3d 983 (2d Dept. 2022). The plaintiff, a roofer, sustained injuries when he fell from an extension ladder at a public high school in Queens. After discovery, the plaintiff moved for summary judgment on his § 240(1) claim. However, the defendants raised a triable issue of fact as to whether the plaintiff was the sole proximate cause of of the accident. In its opposition, the defendants submitted an affidavit from the plaintiff's supervisor, who stated that the plaintiff had told him, just after the accident occurred while he was still on the roof, that he had lost his balance as he descended the ladder and jumped off the ladder.

"The different versions of the accident given by the plaintiff create triable issues of fact that required denial of the motion, including a triable issue of fact as to the plaintiff's credibility."

iv. Gonzalez v DOLP 205 Props. II, LLC, 2022 NY Slip Op 03868 (1st Dept. 2022). The plaintiff was injured when, while working, he fell due to allegedly unstable stilts. The trial court granted the plaintiff's motion for summary judgment on his § 240(1) claim. On appeal, the First Department reversed on multiple grounds. First, there was evidence that plaintiff's boss specifically instructed him to only work on ground level and not to use stilts. This raised a triable issue of fact as to whether the plaintiff's duties were expressly limited to work that did not expose him to an elevation-related hazard within the purview of § 240(1). Additionally, issues of fact also existed as to whether plaintiff was the sole proximate cause of the accident because when he felt the stilts become unstable his "normal and logical response" should have been to request another pair rather than to keep working on them.

l::'(l **NewYork**
\!._Official Reports

KcyCite Yellow Flag - Negative Treatment
Distinguished by Cicchetti v. Tower Windsor Terrace, LLC, N.Y.A.D. 3 Dept., May 21, 2015

JOO N.Y.2d 878, 800 N.E.2d 351, 768
N.Y.S.2d 178, 2003 N.Y. Slip Op. 17547

Norberto Prats et al., Appellants,

V.

Port Authority of New York
and New Jersey, Respondent.

Court of Appeals of New York
103, USCOA2
Argued September 9, 2003:

Decided October 21, 2003

CITE TITLE AS: Prats v
Port Auth. of N.Y. & N.J.

SUMMARY

Proceeding, pursuant to NY Constitution, article VI, § 3 (b) (9) and Rules of the Court of Appeals (22 NYCRR) § 500.17, to review a question certified to the New York State Court of Appeals by the United States Court of Appeals for the Second Circuit. The following question was certified by the United States Court of Appeals and accepted by the New York State Court of Appeals pursuant to section 500.17: "[W]hcther the conduct at issue in this action, inspections of constmction work, fell within the purview of New York Labor Law § 240 (1)"?

HEADNOTE

Labor
Safe Place to Work
Inspection of Construction Work

The work being performed by plaintiff mechanic at the time of his accidentj inspecting an air-conditioning rehnn fan as part of his work on overhauling air-conditioning systems, falls within the pmview of Labor Law § 240 (I). The question whether a paiiieular inspection falls within the statute must be detennined on a case-by-case basis, depending on the context of the work. Here, plaintiff was employed substantially to perform work that involved alteration of a building, and his employer was carrying out a contract requiring constrnction and alteration, activities enumerated in the statute. Although plaintiff was not actually altering anything when he was injured but instead was about to inspect what he had earlier altered, he is afforded the protection of the statute while perfonning duties ancillmy to enumerated activities.

TOTAL CLIENT SERVICE LIBRARY REFERENCES

Am Jur 2d, Employment Relationship§§ 263, 266, 293, 294, 297.

McKinney's, Labor Law § 240 (l).

NY Jur 2d, Employment Relations §§ 231, 232, 235.

ANNOTATION REFERENCES

See ALR Index under Labor and Employment; Occupational Safety and Health.

POINTS OF COUNSEL

DiJoseph & Portegello, PC., New York City *(Arnold E. DiJoseph, Ill* of counsel), and *Parker & Waichman,* GreatNeck, ***879** for appellants.
The question certified by the Second Circuit must be answered in the affirmative in that the work being done at the time of the accident clearly falls within the pmview of New York State Labor Law § 240 (1). *(Waldm11 v Wild,* 96 AD2d 190; *Weiss v Garfield,* 21 AD2d 156; *O'Connor-Miele v Barhite & Ho/zi11ge,;* 234 AD2d I06; *lvlarco11i v Reil!v,* 254 AD2d 463; *State of'New York v Metz,* 241 AD2d 192; *Reid v Courtesy Bus Co.,* 234 AD2d 531; *T¥ei11stei11 Enters. v Pesso,* 231 AD2d 516; *Prince v DiBe11edetto,* 189 AD2d 757; *HaJ'l'is v City ojNew York,* 147 AD2d 186; *Bay v Timeslvlirmr Mags.,* 936 F2d 112.)
Wilson, Else,; Moskowitz, Edelman & Dicker LLP, New York City *(Richard E. Leme1; Helmut Beron* and *Meredith Drucker* of counsel), for respondent.
1. The appellant misapplies the standard for determining whether summary judgment may be granted. *(Job/on v* SoloH 91 NY2d 457; *Weininger,, Hagedorn* & Co., 91 NY2d 958; *Goad v Southern Elec. Intl.,* 263 AD2d 654; *Jehle v Ada111s Hotel Assoc.,* 264 AD2d 354.) II. The District Court properly determined that the work being performed at the time of the

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accident did not fall within the ambit of Labor Law § 240. *(Panek v County of Albany,* 99 NY2d 452; *Job/on v* So/011\ 91 NY2d 457; *Goad v Sou/hem Elec. Intl.,* 263 AD2d 366; *A1artinez v City of New York,* 93 NY2d 322; *Russ v State of"New York,* 267 AD2d 833; *McMahon ,, HSlvf Packaging Co,p.,* 302 AD2d 1012; *Adair v Bestek Light. & Staging Co,p.,* 298 AD2d 153; *Jel,/e v Adams Hotel Assoc.,* 264 AD2d 354; *Lundquist v Ditmas Real(J' Co.,* 230 AD2d 830; *Sponholz v Benderson Prop. Dev.,* 273 AD2d 791.) III. The court should not even consider granting summary judgment in favor of plaintiff. *(Weininger v Hagedorn & Co.,* 91 NY2d 958; *Bahrman v Holtsvi/le Fire Dist.,* 270 AD2d438; *Lmdaro v New fork City Bldrs. Group,* 271 AD2d 574.)

OPINION OF THE COURT

Rosenblatt, J.

In this Labor Law § 240 (1) case, plaintiff sustained injuries after falling from a ladder. At the time, he was an assistant mechanic for AWL Industries, a company that contracted with defendant Port Authority of New York and New Jersey to work on air-conditioning systems at the World Trade Center complex. AWL's contract involved cleaning, repairing and rehabilitating air handling units, including supports, anchors and piping in several buildings. The agreement provided that AWL, as contractor, was obligated to ascertain "the extent of ***880** all constrnction" related to the project and lo satisfy Port Authority's inspection standards. Some of the air handling units measured 20 by 20 feet and were built into the wall. Accordingly, the contract required AWL to level floors, lay concrete and rebuild walls to replace large air filtering systems.

As an assistant mechanic, plaintiff worked on overhauling air-conditioning systems, and on return and exhaust units. He also assisted a more senior mechanic in changing bearings, motor sheaves and flywheels. His specific tasks varied as he received each dafs assignments when signing in for work. On the day of the injmy, plaintiff and coworker Bob Card were readying air handling units for inspection, using tools (wrenches, a welder set and "Craftsman-type" tools) to perfonn any work that had to be done. Card set up a ladder to inspect an air-conditioning return fan about eight feet tall, suspended at a height of approximately 20 feet. Plaintiff held the ladder while Card climbed up and onto the unit. Card then asked plaintiff to give him a wrench, and plaintiff began to climb the ladder. When he was about 15 feet off the ground, the ladder slid out from under him, and he fell. The ladder bounced off the floor and hit plaintiff in the face before he fell to the grmmd.

Plaintiff and his wife sued the Port Authority in United States District Court for the Southern District of New York, alleging a violation of New York Labor Law § 240 (1). The District Court granted defendant summaiy judgment on the section 240 (l) claim. Plaintiff appealed to the Second Circuit, which certified to us the question "wheU1er the conduct at issue in this action) inspections of construction work, fell within the purview of New York Labor Law § 240 (!)." We accepted certification (99 NY2d 578 [2003]) and now answer the question in the affirmative.*

Labor Law § 240 (1) provides special protection to those engaged in the "erection, demolition, repairing, altering, painting, cleaning or pointing of a building or stTucturc." Citing the language of the statute, defendant makes two arguments. First, defendant contends that "inspection" is not an enumerated activity and second, that plaintiffs inspection involved no more than routine maintenance. Plaintiff, on the other hand, asserts ***881** that the inspection was performed in the context of "altering" the building. We address these contentions in turn.

In asserting that the inspection fa1ls outside of section 240j defendant relies principally on *A1artinez v City of New York* (93 NY2d 322 [1999]). There, an inspector suffered an injmy while checking for asbestos in schools. The inspection was the prelude to an asbestos removal project. The purpose of the examination was to determine whether conditions warranted removal work, and inspection was to end before any asbestos removal would begin. The City employed one contractor to carry out the inspection and another to do the removal. We held that the "merely investigatory" inspection phase fell outside section 240 (l) *(id.* at 326). The Cmut emphasized that the separate, sequential phases involved different employees working for different contractors. Under these circumstances, we held the inspections too remote from any covered work to fall within the statute's ambit.

Unlike *Martinez,* the work here did not fall into a separate phase easily distinguishable from other parts of the larger constrnction project. Plaintiffs inspection was not in anticipation of AWL1s work, nor did it take place after the work was done. The inspections were ongoing and contemporaneous with the other work that formed part of a single contract. The employees who conducted inspections also performed other, more labor-intense aspects of the

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project. Moreover, plaintiff worked for a company that was canying out a contract requiring constrnction and alteration--activities covered by section 240 (1). This contrasts with the asbestos inspector in *lvlartinez,* who did not work for the company that would actually remove the asbestos.

In certifying this case to our Court) the Second Circuit questioned whether *Job/on v* Solow (91 NY2d 457, 465 [1998]) bars plaintiffs recovery. There, we looked to the"time of inju1y,, to determine whether plaintiffs work fell within section 240 (1). Defendant would have us read that phrase in an overly literal manner. In our view, however, the words must be applied in context. At one extreme, a construction worker who, between hammer strokes, pauses to see where to hit the next nail is at that moment "inspecting.ii But this is very different from an inspection conducted by someone carrying a clipboard while smveying a possible construction site long before a conh·actor puts a spade in the ground. Here, AWL employed the plaintiff mechanic substantially to pe1fonn work that involved alteration of a building, and, under tl1e facts of this ***882** case, he enjoyed the protection of section 240 (l) even though he was inspecting, or more precisely, climbing a ladder, at the moment of the accident.

While we have held that job titles are not dispositive *(see Job/on,* 91 NY2d at 465-466), tl1e facts support the conclusion that plaintiff--while working as a mechanic--undertook the kind of work the Legislature intended to protect under section 240 (!). Although at the instant of the injury he was inspecting and putting the finishing touches on what he had altered, he had done heavier alteration work on other days at the same job site on the same project. He was a member of a team that undertook an enumerated activity under a construction contract, and it is neither pragmatic nor consistent with the spirit of the statute to isolate the moment of injury and ignore the general context of the work. The intent of the statute was to protect workers employed in the enumerated acts, even while performing duties ancillary to those acts.

As for defendant's second argument, we agree that section 240 (1) does not cover routine maintenance done outside the context of consh"uction work. Plaintiff, however, argues that the accident occurred while he engaged in "alteration," an enumerated activity. Essentially, routine maintenance for purposes of the statute is work that does not rise to the level of an enumerated term such as repairing or altering. We agree with plaintiff. He was engaged in a process involving the building1s alteration, and his work went beyond mere maintenance.

Job/on (91 NY2d at 465) is insa·uctivc. There, we held that "altering" for pmposes of section 240 (I) "requires making a *sign(ficant* physical change to the configuration or composition of the building or structure." We determined that extending wiring and chiseling a hole through a concrete wall was enough to constitute "altering." Moreover, in *Panek v County of Albauy* (99 NY2d 452 [2003]), we applied the *Job/011* "altering" analysis to the removal of air handlers from a building before its demolition. The Court concluded that the plaintiff"was clearly engaged in a significant physical change to the building when hewas injured, thus satisfying the *Job/on* standard for an alteration" *(id.* at 458). Here, constructing walls and leveling floors are at least as significant as drilling through concrete, the threshold for altering we identified in *Job/011.* AWL's project also has much in common with the work carried out in *Panek.* Applying *Jablon* and *Panek,* we are satisfied that AWL's work involved building alteration, and therefore was not routine maintenance. ***883**

In sum, the question whether a particular inspection falls within section 240 (I) must be determined on a case-by-case basis, depending on the context of the work. Here, a confluence of factors brings plaintifrs activity within the statute: his position as a mechanic who routinely undertook an enumerated activity, his employment with a company engaged under a contract to carry out an enumerated activity, and his parlicipation in an enumerated activity during the specific project and at thesame site where the injury occurred. Accordingly, the certified question should be answered in the affinnative.

Chief Judge Kaye and Judges Smith, Ciparick, Graffeo and Read concur.

Following certification of a question by the United States Court of Appeals for the Second Circuit and acceptance of the question by this Court pursuant to section 500.17 of the Rules of the Comt of Appeals (22 NYCRR 500.17), ai)d after hearing argument by counsel for the parties and consideration of the briefs and the record submitted, certified question answered in the affirmative. ***884**

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Footnotes

* We note that plaintiff made other claims in addition to Labor Law§ 240 (1). Pursuant to the certification, however, we address only whether plaintiffs activities fall within the scope of section 240 (1). We have not been asked and do not address whether defendant violated section 240 (1) or whether any violation was a proximate cause of the injury.

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New York
Official Reports

KeyCitc Yellow Flag - Negative Treatment
Distinguished by Royce v. DIG EH Hotels, LLC, N.Y.A.D. l Dept, May 19, 2016

25 N.Y.3d 117, 30 N.E.3d 872, 8
N.Y.S.3d 229, 2015 N.Y. Slip Op. 02802

**1 Joseph Saint et al., Appellants

v

Syracuse Supply Company, Respondent.

Court of Appeals of New York
Argued February 12, 2015

Decided April 2, 2015

CITE TITLE AS: Saint v Syracnse Supply Co.

SUMMARY

Appeal, by pennission of the Court of Appeals) from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department, entered October 4, 2013. The Appellate Division (1) reversed, on the law, an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), which, insofar as appealed from, had denied defendant's motion for summary judgment dismissing the amended complaint, (2) granted the motion, and (3) dismissed the amended complaint.

Saint v Syracuse Supply Co., 110 AD3d I470, reversed.

HEADNOTES

Labor
Safe Place to Work
What Constitutes Alteration of Building or Structure-Attachment of Extensions on Billboard

(l) In an action for damages arising from work-related injuries plaintiff suffered when he fell from a catwalk while removing and installing advertisements on a billboard, plaintiff was engaged in alteration of the stmcture within the meaning of Labor Law § 240 (!) because his work required the attachment, at an elevated height, of custom-made wooden extensions that changed the dimensions of the billboard's frame to acc01m11odate the unique shape of a new advertisement. Although plaintiff was injured during removal of an old vinyl advertisement from lhe billboard's frame, the analysis was not limited to plaintiffs activity at the moment of his injury, and the vinyl removal was a prerequisite to the attachment of the extensions and therefore an integral part of the extensions installation. Moreover, plaintiffs work entailed a significant change to the billboard shucture because, once the vinyl was removed, the billboard would be enlarged by the attachment of the extensions, work accomplished by the use of an angle iron on the back of each extension and the application of nuts, bolts and nails. The job was not a simple task, involving minimal work, so as to constih1te routine maintenance, nor was it a decorative modification as it entailed far more than a mere change to the outward appearance of the billboard. Finally, notwithstanding that the extensions would stay up only as long as the new advertisement did, the statute does not impose a requirement that an alteration be of a permanent nature.

Labor
Safe Place to Work
Elevation-Related Safety Equipment-Absence of Safety Rail on Billboard Catwalk

(2) In an action for damages arising from work-related injuries plaintiff suffered when he fell from a catwalk while removing and installing advertisements on a billboard, plaintiff alleged a viable claim under Labor Law § 240 (2), which provides that scaffolding or staging more than 20 feet above the ground must be equipped with a safely rail. It was undisputed that the **118 billboard was 59 feet above the ground and that there was no safety rail sunounding the catwalk from which plaintiff fell.

Labor
Safe Place to Work
What Constitutes Constmction Work-Attachment of Extensions on Billboard

(3) In an action for damages arising from work-related injuries plaintiff suffered when he fell from a catwalk while removing and installing advertisements on a billboard, plaintiff was engaged in "construction work" at the time of his injury such that his claim came within Labor Law§ 241 (6). The Industrial Code defines "constmction work" to include

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the alteration of a structure (12 NYCRR 23-1.4 [b] [13]), and plaintiff, at the time of his injmy, was altering the billboard by installing custom-made wooden extensions that changed the dimensions of the billboard's frame to accommodate the unique shape of a new advertisement.

RESEARCH REFERENCES

Am Jur 2d, Employment Relationship§§ 233-235, 250-253.

McKinney's, Labor Law§§ 240 (l), (2); 241 (6).

12 NYCRR 23-1.4 (b) (13).

NY .Tur 2d, Employment Relations §§ 285-290, 293, 295, 306--311.

New York Law of Torts§§ 5:16, 12:85, 12:86.

ANNOTATION REFERENCE

See ALR Index under Billboards and Outdoor Advertising; Labor and Employment; Occupational Safely and Health; Scaffolds.

FIND SIMILAR CASES ON WESTLAW

Database: NY-ORCS

Query: f'll /p alteration & billboard & elevation

POINTS OF COUNSEL

Paul William Beltz, P.C., Buffalo *(Timothy M. Hudson* and *Debra A. Norton* of counsel), for appellants.

I. The *Munoz v DJZ Realty, LLC* (5 NY3d 747 [2005]) wallpaper analogy has no relevance to thesuperflex vinyl on a massive, freestanding billboard. *(LaFonlaine v Albany lVfgt.,* 257 AD2d 319; *Samuel v Simone* Dei, *Co.,* 13 AD3d 112; *Vasquez v Skyline Cons/!: & Restoration Corp.,* 8 AD3d 473, 3 NY3d 611; *Steves v Campus Indus.,* 288 AD2d 914; *Lm,yer v Rotterdam Ventures,* 204 AD2d 878; *Quinn v Fisher Dev.,* 272 AD2d I06; *Kadoic v 1154 First Ave. Tenants Cmp.,* 277 AD2d 66; *LaGiudice v S/eepy's Inc.,* 67 AD3d 969; *Zgoba v Easy Shopping C01p.,* 246 AD2d 539; *Dahar* ***119** *v Holland Ladder & Mfg. Co.,* 18 NY3d 521.) II. The addition being built on the existing strncture was an alteration as defined by this Court. *(Munoz v DJZ Realty, LLC,* 5 NY3d 747; *Joblon v Solow,* 91 NY2cl 457; *Weininger v Hagedorn & Co.,* 91 NY2d 958; *Sana/ass v Consolidated Inv. Co., Inc.,* 10 NY3d 333; *Morales v D & A Food Sen>.,* 10 NY3d 911; *Belding v Verizon* N.} , *Inc.,* 14 NY3d 751; *Vasquez v C2 Dev. C01p.,* 105 AD3d 729; *Lucas v Fulton Realty Partners, LLC,* 60 AD3cl I 004; *Santiago v Rusciano & Son, Inc.,* 92 AD3d 585; *Rico-Castro v Do & CoN.Y Catering, Inc.,* 60 AD3d 749.) Ill. Neither Labor Law§ 241 (6) nor§ 240 (2) limit themselves to "altering" and those claims were improperly dismissed. *(Job/on v Solow,* 91 NY2d 457; *Jock v Fien,* 80 NY2d 965; *Hotaling v Coming Inc.,* 12 AD3d 1064.)

Gibson, McAskill & Crosby, LLP, Buffalo *(Brian P. Crosby* and *Timothy J. Graber* of counsel), for respondent.

I. The Appellate Division correctly determined based on well settled jurisprudence that plaintiff was not altering a building or stn1cture and that he was not engaged in construction work. *(Job/on v Solow,* 91 NY2d 457; *Munoz v DJZ Realty, LLC,* 15 AD3d 363, 5 NY3d 747; *Maes v 408 W 39 LLC,* 24 AD3cl 298; *Kretzschmar v New York State Urban Dev. Cmp.,* 13 AD3d 270, 5 NY3d 703; *Bodtma11 v Lh,ing lv!anor Love, Inc.,* 105 AD3d 434; *Della Croce,, Cit)' of'New York,* 297 AD2d 257; *Zo/ji,glwri v Hughes Nehvork Sys., LLC,* 99 AD3d 1234; *Hatfield v Bridgedale, LLC,* 28 AD3d 608; *Nagel v D & R Reali)' Cmp.,* 99 NY2d 98; *B1J>alll v General Elec. Co.,* 221 AD2d 687.) TI. The memorandum and order appealed from is based on sound public policy. *(Job/on v Solow,* 91 NY2d 457.) III. Affirming the Fourth Department would not expand *Muuoz v DJZ Realty, LLC* (5 NY3d 747 (2005]).

McGaw, Alventosa & Zajac, Jericho *(Andrew Zqjac* and *Dawn C. DeSimone* of counsel), and Ga,J1*A. Rome,* New York City, *Rona L. Platt,* Oakland Gardens, *David B. Hamm,* New York City *andJ011atha11 T Uejio,* New York City, for Defense Association of New York, Inc., amicus curiae.

I. This Comt should reject plaintiffs' attempt to restrict the application of *M11noz v DJZ Real()>, LLC* (5 NY3d 747 [2005]). *(Job/on v Solow,* 91 NY2d 457; *Schapp v Bloomer,* 181 NY 125; *Jock v Fie11,* 80 NY2d 965; *Soto v J. Crell' Inc.,* 21 NY3d 562; *Dahar v Holland Ladder & Mfg. Co.,* 18 NY3d 521; *Brown v Christopher St. Owners Co1p.,* 87 NY2d 938; *Connors v Boorsteini* 4 NY2<l 172; *Esposito v New York City l11d11s. Dev. Age11cy,* 1 NY3d 526; *Abbatiello v Lancaster Studio Assoc.i* 3 NY3d 46; ***120** *Martinez v City of'Ne,v York,* 93 NY2d 322.) II. Where plaintiff was injured while replacing advertisement copy on a billboard in such a manner as to not significantly alter the physical configuration of the structtu-e, this Comt's precedent mandates rejection of plaintiff's effort to expand the scope of Labor Law § 240 (1) to include any activity that results in a change to a building or structure. *(Munoz v DJZ Realty, LLC,* 5 NY3d 747; *Pa11ek v Cou11zi1 cf Albany,* 99 NY2d 452; *Chizh v Hillside Campus /V[eadows Assoc., LLC,* 3 NY3d 664; *Gibson v Worthington*

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Div. ofMcGraw-Ediso11 Co., 78 NY2d 1108; *Marli11ezv City ofNew York,* 93 NY2d 322; *Prctts v Port Auth. ofN.l'. & N.J.,* 100 NY2d 878; *Weiniuger v Hagedorn & Co.,* 91 NY2d 958; *Job/011 v Solow,* 91 NY2d 457; *Cox v Intemational Paper Co.,* 234 AD2d 757; *Amendola v Rheedlen 125th St.. LLC,* 105 AD3d 426.)

Michael S. *Levine,* New York City, for New York State Trial Lawyers Association, amicus curiae.

I. Constrncting an addition onto the existing billboard significantly changed the structure and was not decorative modification. *(Misserilli v Mark JV Co11sl!: Co.,* 86 NY2d 487; *Runner v New York Stock Exch.. Inc.,* 13 NY3d 599; *Ross v C11rtis-Pa/111er Hydro-E/ec. Co.,* 81 NY2d 494; *Bland v lvfanocherian,* 66 NY2d 452; *lzrailev v Ficarra Furniture of long ls.,* 70 NY2d 813; *Job/on v Solow,* 91 NY2d 457; *Weininger v Hagedom* & Co., 91 NY2<l 958; *Sanatass* F *Co11solidated Inv.* Co., *Inc.,* 10 NY3d 333; *Belding v Verizon N.l'.. Inc.,* 14 NY3d 751; *Custer vJordan,* 107 AD3d 1555.)

II. The scope of the work was not "temporaryt and this Courl already has rejected similar temporal arguments as a basis to deny application of the Labor Law. *(Smith v Shell Oil Co.,* 85 NY2d 1000; *lzrailev v Ficarra Fumiture ofL011g Is.,* 70 NY2d 813; *Pa11ek v County of Albany,* 286 AD2d 86, 99 NY2d 452.) Ill. Joseph Saint was engaged in "constrnction work" and is entitled to the protections of Labor Law § 241 (6). *(Munoz v DJZ Realty, LLC,* 5 NY3d 747; *Ross v Curtis-Palmer Hydro-Elec. Co.,* 81 NY2d 494; *Allen v Cloutier Const,: Cm;u.,* 44 NY2d 290; *Nos/mm v A.* TT' *Chesterton Co.,* 15 NY3d 502; *Job/on v Solow,* 91 NY2d 457; *Jock v Fien,* 80 NY2d 965; *Hotaling v Coming Inc.,* 12 AD3d 1064; *Samiento v World Yachtlnc.,* IO NY3d 70; *Matter of Gaines v New York Stale Div. of Haus. & Community Renewal,* 90 NY2d 545; *Nagel v D & R Realty Co1;u.,* 99 NY2d 98.)

OPINION OF THE COURT

Rivera, J.

2 Plaintiffs Joseph Saint and his wife Sheila Saint challenge the dismissal of their claims arising from work-related injuries ***l2I Joseph Saint suffered while he was engaged in the installation and removal of a billboard advertisement. We conclude that because plaintiffs work required the attachment, at an elevated height, of custom-made wooden extensions that changed the dimensions of the billboard frame, plaintiff was engaged in alteration of the structure within the meaning of Labor Law § 240 (I). Moreover, he properly asserted claims for unprotected construction work under Labor Law§§ 240 (2) and 241 (6) based on the lack of a guardrail on the billboard platform. Therefore, we reverse the dismissal of his complaint

According to the undisputed facts, on the day of his injuty plaintiff Joseph Saint was part of a three-person construction crew working *to* replace an advertisement on a billboard located in Erie County. The billboard is elevated approximately 59 feet from the ground, and composed of a tvvo-sided metal frame constructed in an inverted "V" shape, facing east and west, and set on a metal tube embedded in the ground. Each side of the metal frame is approximately 14 by 48 feet in size, and covered by a series of panels which are secured to the frame by iron clips called "stTingers." Each side accommodates an advertisement made of vinyl material which is attached to the panels with ratchet straps.

The billboard has six catwalks used by workers when removing and installing advertisements. Two catwalks are located on the exterior, one on each side of the metal frame. The other four catwalks are located on the interior of the V frame, with a lower and upper catwalk on each side) set l O feet apart vertically. Workers access the upper and lower catwalks by a ladder elevated several feet from the ground and attached externally to the metal tube. All the catwalks have safety cables, but only the platform connecting the two exterior catwalks has a guardrail.

Plaintiff and the other members of the construction crew were working on the installation of a new advertisement which necessitated the attachment of additions to the existing frame. These additions are referred to as "extensions/' and are plywood cutouts shaped to accommodate the advertisemenes artwork in cases where text or a picture exceeds the boundaries of the billboard's frame. For example, if the advertisement included a person with a raised ann and the ann extends past the edge of the top or the sides of the billboard, an extension shaped like an arm would be crafted from plywood and the ***122** advertisement vinyl would be glued to the extension to support the picture of the arm. Once the artvvork is attached an angle iron is bolted *to* the back of the extension, and the extension is attached directly to the billboard frame with nails, nuts and bolts.

Plaintiff was working with the other crew members on an advertisement which required the attachment of four extensions. The extensions had been constructed in advance and h·ansported to the billboard structure the day plaintiff was injured. Dming the course of their work, plaintiff and the construction crew used a crane operated by the plaintiff

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to raise the extensions along the outer side of the structure and onto the billboard's lower outer catwalk. The **3 billboard frame did not contain existing extensions that required removal, so once the new advertisement'sextensions were hoisted onto the catwalk the crew proceeded directly to the removal of the old advertisement vinyl. The job required that the crew move the old advertisement from one side of the frame to the other. Thus, the crew detached the advertisement vinyl from the panels facing the west side, and threw it down to the ground. They then began the process of moving the vinyl from the east-side facing panels in order to pull it up, around, and over the metal frame so that it fell onto the panels facing towards the west) where the vinyl would then be attached to the frame. The crew members were at different locations on the upper and lower catwalks as they worked on removing the old vinyl.

Had the job gone without disruption, after the crew removed the old vinyl they would slide metal rods into pockets around the perimeter of the new vinyl advertisement and then use ratchet straps to secure the new advertisement to the panels. The crew would then bolt the extensions' angle irons to the stringers, to hold the extensions in place on the billboard frame. However, plaintiff fell and was injured while the crew was attempting to move the vinyl from the east side panels over the top of the frame and onto the west side panels.

Plaintiff was on the front catwalk when he heard the other crew members call for assistance because they were having difficulty due to the day's wind conditions. Plaintiff went to the upper rear catwalk to assist them, and in order to get around one of the crew members, plaintiff detached his lanyard from Ll1e catwallc's safety cable. Before he was able to reattach the lanyard, a strong wind gust caused the vinyl to strike plaintiff in the chest, knocking him IO feet below onto the lower rear ***123** catwalk, where he landed with his back on an I-beam, and his shoulder on the metal catwalk. As a result, plaintiff suffered a dislocated right shoulder and several herniated discs in his back, precluding him from engaging in work on billboards. Plaintiff was subsequently terminated from his employment.

Plaintiffs sued defendant Syracuse Supply Company, owner of the property where the billboard is located, alleging violations of Labor Law §§ 240 (!), (2) and 241 (6), and derivative claims for plaintiff Sheila Saint1s loss of support) consortium, and expenses related to Joseph Saint's medical bills.[1] Defendant moved for summary judgment to dismiss plaintiffs' amended complaint in its entirety, asserting that plaintiff Joseph Saint was not engaged in a covered activity under the Labor Law. Plaintiffs cross-moved for partial summaiy judgment on their Labor Law §§ 240 (I), (2) and 241 (6) claims. Supreme Court denied both motions, concluding **4 that Labor Law§§ 240 and 241 applied to plaintiffs' claims and that an issue of fact existed as to whether plaintiff was the sole proximate cause of his injuries for failure to reconnect his lanyard. Only defendant appealed the order.

The Appellate Division reversed and granted summary judgment for defendant and dismissed the amended complaint *(Sai11/ v Symc11se Supplv* Co., l 10 AD3d 1470 [4th Dept 2013]). Relying in part on this Court's decisions in *Job/011 v Solow* (91 NY2d 457 [1998]) and *Mu11oz v DJZ Realty, LLC* (5 NY3d 747 [2005]), the Appellate Division concluded that plaintiffs work on the billboard did not constitute altering the building or structure for purposes of Labor Law § 240, and instead was "more akin to cosmetic maintenance or decorative modification" *(Saini,* 110 AD3d at 1471). The Court also concluded plaintiff was not engaged in construction work within the meaning of section 241 (6) (id.). We granted plaintiffs leave to appeal (22 NY3d 866 [2014]), and now reverse.

Labor Law § 240 (l) provides,

> "All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, ***124** painting, cleaning or pointing of a building or strncture shall fmnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constTucted, placed and operated as to give proper protection to a person so employed.,,

The "purpose of the statute is to protect workers by placing ultimate responsibility for safety practices on owners and contractors instead of on workers themselves" *(Panek v Co11nty of Albany,* 99 NY2d 452, 457 [2003], citing *Marli11ez v City o/New York,* 93 NY2d 322, 325-326 [1999], and *Zi111111er v Chemung County Pe,forming Arts,* 65 NY2d 513, 520 [1985]). To that end, section 240 (l) "is to be construed as liberally as may be for the accomplishment of the purpose for which it was thus framed" *(Panek,* 99 NY2d at 457, citing *Gordon v Eastern Ry. Supp()',* 82 NY2d 555, 559 [1993]). Therefore, the Court has made clear that section 240 (l) imposes on owners or general contractors and their agents a nondelegable duty, and absolute liability for injuries proximately caused by the failure to provide appropriate

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safety devices *to* workers who are subject to elevation-related risks (see *Rocovich v Co11solidated Edison* Co., 78 NY2d 509, 513 [1991]).

Plaintiff claims that he comes within the coverage of section 240 (I) because he physically altered the billboard by installing extensions that changed the physical shape of the stmcture. Defendant responds that plaintiffs injuries are outside the scope of the Labor Law because at the time of plaintiffs fall he was not engaged in the installation or removal of extensions. In any event, according to defendant, plaintiffs work was not an alteration because changing the vinyl advertisement is a routine maintenance activity, and any alleged change to the **5 shucture was not permanent in nature.

In determining whether plaintiff Joseph Saint was engaged in the type of work covered by section 240 (I), we first consider defendant's contention that we should limit our analysis of plaintiffs activity to the moment of his injmy. The Court previously rejected this naITow construction of the statute's application in *Prats v Port Auth. of NY. & NJ.,* because "it is neither pragmatic nor consistent with the spirit of the statute to isolate the moment of injury and ignore the general context of the work" (100 NY2d 878, 882 [2003]). Thus, in *Prats* the Comt ***125** considered the totality of the plaintiffs actions, noting that he was part of the team working on an enumerated activity and on previous days he had done heavier alteration work for the same project at the same work site where he was injured *(id.* at 881-882). Based on the context of that work and because the "intent of the statute [isJ to protect workers employed in the enumerated acts, even while performing duties ancillaiy to those acts" *(id.* at 882), the Court concluded that the plaintiff was engaged in alteration and thus covered under section 240 (I).

(1) Defendants interpretation would compartmentalize a plaintiffs activity and exclude from the statute's coverage preparatory work essential to the enumerated act. This constmction of the Labor Law is exactly what the Court sought to avoid by *Prats's* contextualized analysis, and would strip workers of the "exceptional protection that section 240 (I) provides" *(Rocovich,* 78 NY2d at 514). We therefore reject an interpretation unsupported by the case law and which does no more than undermine the statuto1y purpose of protecting workers from dangers inherent to tasks involving elevation differentials *(see e.g. Robinson v City of New York,* 22 AD3d 293, 293-294 [I st Dept 2005]; *Fitzpatrick v State a/New York,* 25 AD3d 755, 757 [2d Dept 2006]; *Randall v Tillie Wamer Cable, Inc.,* 81 AD3d 1149, 1151 [3d Dept 2011l).

Applying this standard, we conclude that plaintiff was engaged in work that constitutes an alteration within the meaning of the statute. In reaching this determination we apply the definition the Comt adopted in *Job/on,* that the term "altering" in section 240 (!) "requires making a *significant* physical change to the configuration or composition of the building or structure" *(Job/on,* 91 NY2d al 465). This definition excludes "routine maintenance') and "decorative modifications" (id.). Whether a physical change is significant depends on its effect on the physical stmch1re. Thus, the Court held that the plaintiff in *Jablon* who was injured when he fell off a ladder while in the process of chiseling a hole through a concrete block wall so that he could run electrical wires from one room to another to install a wall clock was engaged in "altering" under section 240 (!). As the Court held, extending the wiring and chiseling a hole through the concrete constituted a significant change and entailed "more than a simple, routine activity" *(id.* at 465-466).

Here, plaintiffs job was to install a new advertisement. In order to do so he and the other members of the construction ***126** crew had to attach extensions that changed the dimensions of the billboard's frame and transformed theshape of the billboard to accommodate the **6 advertisement's artwork. Plaintiff was injured when in furtherance of this task he fell while assisting the other crew members with the removal of the old vinyl advertisement from U1e billboard's side panels. The vinyl removal was a prerequisite to the attachment of the extensions and therefore an integral part of the installation of the extensions. We have little difficulty concluding that the plaintiffs work entails a significant change to the billboard stmchtre because once the vinyl is removed, the billboard is enlarged by the attachment of the extensions, work accomplished by the use of the angle iron on the back of each extension, and application of nuts, bolts and nails.

Moreover, plaintiffs facts differ from those of prior cases where the Court found the injured worker's activity constihlted routine maintenance, and thus was outside the coverage of the statute. Those cases involved simple tasks, involving minimal work. In comparison, the removal of anold advertisement and the installation of vinyl-covered plywood extensions for the purpose of enlarging the shape of the billboard to accommodate the new advertisement's artwork involves the type of physical change significant enough to

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constitute a section 240 (1) alteration, and to distinguish plaintiffs work from routine maintenance illustrated by the changing of a lightbulb, as in the case of *Smith v Shell Oil Co.* (85 NY2d !000, 1002 [1995]), the replacement of air conditioning components damaged in the course of normal wear and tear, as in *Esposito v New YOrk Ci v Indus. Dev. Agency* (1 NY3d 526, 528 [2003]), household window cleaning, like that involved in *Bmwn v Christopher St. Owners Cmp.* (87 NY2d 938, 939 [1996]), or the routine, annual inspection of an elevator in *Nagel v D & R Realty Co1p.* (99 NY2d 98, 99 [2002]).

Nor, on the facts of this case, 1s the inslallation of the new advertisement a "decorative modification" because the work here entails far more than a mere "change[ ] [to] the outward appearance of the billboard" *(Munoz,* 5 NY3d at 748). Instead, the job requires a change to the billboard's size and an adjustment of the frame to accommodate the unique shape of the advertisement. Moreover, any change to the billboard frame ensures that a future installation of a new advertisement would require a subsequent alteration of the billboard's strncture. That is to say, if the new adve1iisement did not require extensions ***127** then the existing extensions would be removed and the frame left as is, or if the new advertisement required different extensions the old ones would be removed and the new ones installed. In either case) the billboard frame would be different from the one plaintiff would have altered.

Although plaintiffs job title is irrelevant to our analysis because we must focus on the actual work in which he was engaged *(Job/011,* 91 NY2d at 465-466), we note that plaintiffs activities bear out his designation as a constrnction crew member, and further support our conclusion that he was employed in the type of work covered by section 240 (1). Plaintiff operated the crane used to hoist the extensions. The installation of the new advertisement involved heavy lifting, and the attachment of wood and vinyl to a metal frame several feet above **7 the ground.

We are unpersuaded by defendant's argument that *Munoz v D.JZ Realty,* where the Comt concluded that an employee injured while working on a billboard was not involved in "alteration)' for purposes of section 240 (1), is dispositive of plaintiffs case. In *Munoz,* the plaintiff was applying pre-pasted sheets to a billboard which the Court concluded merely "changed the outward appearance of the billboard, but did not change the billboard's stiucture" *(Munoz,* 5 NY3d at 748). Notably, the *Munoz* plaintiff denied any assertion that the plastering constituted a change in the shape of the billboard (see brief for plaintiffs at 16 n 9 in *Munoz v D.JZ Realty. LLC,* 5 NY3d 747 [2005]).[2] Unlike the plaintiff in *Munoz,* plaintiff and his fellow crew members could not attach the new advertisement-the step that involved changing the outward appearance of the billboard without first changing thesize of the billboard to accommodate the vinyl for the new) larger adve1iisement. Far from the "cosmetic maintenance or decorative modification,, that doomed the *lvlunoz* plaintift,s claim (5 NY3d at 748), plaintiffs activity required attachment of metal bolts, and the eventual attachment of the extension to the billboard frame itself.

Similarly unpersuasive is defendant's argument that plaintiffs work is not an alteration within the meaning of section 240 (1) because the statute applies only to permanent changes. ***128** There is no support in the text or the case law for this limit on the statute's reach. Nowhere does section 240 (1) impose or even mention a requirement that an alteration be of a pe1manent and fixed nature (see Labor Law § 240 [1]). Such a reading is at odds with the Court1s prior decisions. For example, in *Panek,* the alteration was to a building scheduled for demolition, a fact the Cami said "does not change the nature of the work project at the time of [the plaintiffs] accident" *(Panek,* 99 NY2d at 458, citing *Job/on,* 91 NY2d at 465). In *Jablon,* the wall clock could have been removed, the wiring pulled out, and the chiseled hole refilled. Nevertheless, the Court concluded that "the work performed by Jablon was a significant physical change to the configuration or composition of the building" *(Job/on,* 91 NY2d at 465). In *Weininger v Hagedom & Co.,* the Court held that installing computer and telephone cables was an alteration within the meaning of section 240 (1) (9 l NY2d 958 [1998], citing *Job/on,* 91 NY2d at465). Yet, the computer and telephone cables could have been removed and the ceiling repaired. Similarly, in this case the fact that the advertisement extensions stay up as long as the sign docs makes the work no less an alteration within the meaning of section 240 (I). The change to the physical attributes of tl1e strncture is what matters. ****8**

A requirement that the alteration be pennanent would also unde1mine the worker protection purpose of the statute *(see Rocovich,* 78 NY2d at 513). Regardless of the duration of the completed work, the worker's task remains the same, and the pennanency of the alteration in no way diminishes the risk attendant to that task.

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Given the nature of the plaintiffs work on the day of his injury and that the attachment of extensions to the billboard effects a significant change to the sttucture) plaintiff was engaged in work that constitutes "altering" within the meaning of Labor Law§ 240 (I). Dismissal of his claim pursuant to this section was therefore error.

(2) We also find that it was error to dismiss plaintiffs other Labor Law claims. Turning to his section 240 (2) claim, this provision requires, in relevant part, that"[s]caffolding or staging more than twenty feet from the ground or floor ... shall have a safety rail of suitable material properly attached, bolted, braced or othe1wise secured ...."It is undisputed that the billboard platform was 59 feet above the ground and that there was no safety railing surrounding the upper rear catwalk from ***129** which plaintiff fell. Therefore, plaintiff alleged a viable claim under section 240 (2), and its dismissal was etTor.

(3) With respect to plaintiff's section 241 (6) claim, we agree with plaintiff that he was engaged in "consh·uction work" and thus within the ambit of the statute. Pursuant to section 241 (6), "All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, anangedi operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places." In determining what constitutes "construction" for purposes of the statute we look to the Industrial Code which, as relevant here, defines construction to include alteration of a structure (12 NYCRR 23-1.4 [b] [13]). Since plaintiff was altering the billboard by installing the extension at the time of his injury, his claim comes within section 241 (6).

The defendant and Appellate Division's reliance on *Hatfield v Bridgedale, LLC* (28 AD3d 608 [2d Dept 2006]) in support of the opposite conclusion is misplaced. In *Hatfield,* the Appellate Division affinned the dismissal of plaintiff's section 241 (6) claim holding that the section "do[esJ not apply to claims arising out of maintenance of a building or structure outside of the construction context" *(id.* at 610). However, unlike the plaintiff in *Hatfield,* for the reasons we have already discussed, plaintiff here was altering the billboard's dimensions in order to apply the advertisement, and thus was not engaged in maintenance work.

Accordingly, the Appellate Division order should be reversed, with costs, and defendant's motion for summary judgment denied.

Chief Judge Lippman and Judges Read, Pigott, Abdus-Salaam, Stein and Fahey **9 concur.

Order reversed} with costs, and defendanes motion for summmy judgment denied.

FOOTNOTES

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Footnotes

1 Plaintiffs also asserted claims under Labor Law § 200 and common-law negligence, but during the course of the proceedings conceded these claims were not viable. Plaintiffs also filed an amended complaint naming several additional defendants, but later withdrew those claims.

2 The plaintiff in *Munoz* claimed instead that by placing an advertisement on the face of the billboard, the plaintiff "altered" the composition of the billboard structure in a manner consistent with our holding in *Jablon* (brief for plaintiffs at 16 in *Munoz v OJZ Realty, LLC,* 5 NY3d 747 [2005]).

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Distinguished by Healy v, EST Downtown, LLC, N,Y.A.D. 4 Dept., Febmaiy 5,202]

21 N.Y.3d 562,998 N.E.2d 1045, 976
N.Y.S.2d 421, 2013 N.Y. Slip Op. 06603

**1 Jose A. Soto, Appellant

v

J. Crew Inc. et al., Respondents.

Court of Appeals of New York
Argued September 11, 2013

Decided October 10, 2013

CITE TITLE AS: Soto v .T. Crew Inc.

SUMMARY

Appeal, by permission of the Appellate Division of the Supreme Court in the First Judicial Department) from an order of that Court, entered May 29, 2012. The Appellate Division affirmed an order of the Supreme Court, New York County (Jane S. Solomon, J.; op 2011 NY Slip Op 3251S[U] [2011]), which had granted defendants' motions for summary judgment dismissing the complaint and denied plaintiffs cross motion for summary judgment on the issue of liability on his Labor Law § 240 (1) cause of action. The following question was ce1tificd by the Appellate Division: "Was the order of this Court, which affirmed the order of the Supreme Court, properly made?"

Soto vJ. Crew Inc., 95 AD3d 721, affirmed.

HEADNOTE

Labor
Safe Place to Work
Elevation-Related Hazard-"Cleaning" as Protected Activity

Plaintitr: an employee of a commercial cleaning company hired to provide daily custodial services at a retail store, who was injured when he fell from a four-foot-tall ladder while dusting a six-foot-high display shelf, was not engaged in "cleaning" within the meaning of Labor Law § 240 (I). Section 240 (1) imposes absolute liability on owners and contractors when a worker is injured as a direct consequence of the failure to provide safety devices for work involving elevation-related risks in "the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or struchire." An activity cannot be characterized as "cleaning') under the statute if the task is (1) routine, i.e., occm1·ing on a daily, weekly or other recurring basis as part of the ordinary maintenance and care of commercial premises, (2) requires neither specialized equipment or expertise, nor the unusual deployment of labor, (3) generally involves insignificant elevation risks comparable to those in typical household cleaning, and (4) is unrelated to any ongoing construction, renovation, painting, alteration or repair project. The presence or absence of any one factor is not dispositive if, viewed in totality, the remaining considerations militate in favor of placing the task in one catcgmy or another. Here, the dusting ofa six-foot-high display shelf is the type of routine maintenance that occurs frequently in a retail store. It did not require specialized equipment or knowledge and could be accomplished by a single cuslodial worker using tools typically found in a domestic setting. Further) the elevation-related risks involved were comparable to those encountered by homeowners during ordinaiy household cleaning and the task was unrelated to a constmction, renovation, painting, alteration or repair project.

***563 RESEARCH REFERENCES**

Am Jur 2d, Employment Relationship§§ 248,269.

McKinney's, Labor Law § 240 (I).

NY Jur 2d, Employment Relations §§ 286-288, 296.

ANNOTATION REFERENCE

See ALR Index under Janitors and Caretakers; Labor and Employment; Ladders; Occupational Safety and Health.

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POINTS OF COUNSEL

Profeta &Eisenstein, New York City *(Fred R. Profeta,* J,:, of counsel), for appellant.

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I. The Appellate Division erred in concluding that this Court's decision in *Dahar v Holland Ladder & 1vf/g. Co.* (18 NY3d 521 [2012]) precluded Labor Law§ 240 (I) coverage of "routine maintenance)' cleaning. *(Broggy v Rockefeller Group, Inc.,*8 NY3d 675; *Buendia v New York Natl. Bank,* 223 AD2d 456, 91 NY2d 812; *Diaz v Applied Digilal Data Sys.,* 300 AD2d 533; *Swiderska v New York Univ.,* 10 NY3d 792; *Cruz v Bridge Harbor Hg.ts. Assoc.,* 249 AD2d 44; *Retamal v Osborne Nfem. Home Assn.,* 256 AD2d 506; *Fox v Bmznum-Archer Real y Servs.,* 266 AD2<l 97; *Bauerv Female Academy of Sacred Heart,* 97 NY2d 445; *Ojeda v Peak Janitorial Servs.,* 270 AD2d 322; *Aviles v C,ystal Mgt.,* 233 AD2d 129.) II. If the Appellate Division disqualified plaintiff from coverage because he was not cleaning windows, then the Court misread the holding in *Dahar v Holland Ladder & M/g. Co.* (18 NY3d 521 [2012]). *(Gordon v Eastem R)'. Snpply,* 82 NY2d 555; *Robinson lvfotor Xpress, Inc. v HSBC Bank, USA,* 37 AD3d 117; *Vasey v Pym111id Co. of' Buffit!o,* 258 AD2d 906; *Kapovic v 450 Lexington Venture,* 280 AD2d 321; *Roldan v Nlolyneux)* 227 AD2d 240; *Chapman v International Bus. Machs. Co,p.,* 253 AD2d 123; *Cabri v !COS Co,p.* a/ *Am.,* 240 AD2d 456; *Ekere v Airmont Indus. Park,* 249 AD2d 104; *Parraguirre v 27th St. Holding, LLC,* 71 AD3d 594; *Vernu111 v Zilka,* 241 AD2d 885.) III. This Court's decision in *Dalwr v Holland Ladder & Mfg. Co.* (18 NY3d 521 [2012)) has created confusion in the AppcUatc Division, and the instant case should be utilized as a vehicle to eliminate that confusion. *(Grant v Steve Mark, Inc.,* 96 AD3d 614.)

*564 *Maum Li/ling Naparty LLP,* Woodbmy *(Anthony F. DeSt f'ano* and *CaJJ'II L. Lilling* of counsel), for respondents.

I. Routine custodial maintenance is not a type of "cleanini' protected by the "scaffold" law. *(Grant v Steve JV/ark, Inc.,* 96 AD3d 614; *Dahar v Holland Ladder & 1vffg. Co.,* 18 NY3d 521; *Bmggy v Rockefeller Group, Inc.,* 8 NY3d 675; *Prats v Port Auth. of'N.l'. & N.,1.,* 100 NY2d 878; *Gordon v Eastem Ry. Supptv,* 82 NY2d 555; *Swiderska v New York Unh ,* 10 NY3d 792; *Runner v New York Stock Exch., Inc.,* 13 NY3d 599; *Narducci v 1vfa11hasset Bay Assoc.,* 96 NY2d 259; *Smith v Shell Oil Co.,* 85 NY2d 1000; *Izrai!ev v Ficarra Fumitnre of Long Is.,* 70 NY2d 813.) II. This Court did not wholesale overrule *Broggy v RockeJCller Gmup, Inc.* (8 NY3d 675 [2007]) but merely reminded litigants that its holding is limited to commercial window cleaning. *(Brown v Chr;stopher St. Owners C01p.,* 87 NY2d 938; *Dahar v Holland Ladder & Mfg. Co.,* 18 NY3d 521.)

OPINION OF THE COURT

Graffeo, J.

Plaintiff, an employee of a commercial cleaning company hired to provide janitorial services for a retail store, was injured when he fell from a four-foot-tall ladder while dusting a six-foot-high display shelf. He brought a Labor Law § 240 (l) action against J. Crew, the retail store, and The Mercer I L.L.C., the building owner. Both lower comts held that **2 defendants were entitled to summary judgment because the activity plaintiff was engaged in at the time of his fall was not the type of "cleaning" covered by Labor Law § 240 (1). Because we agree, we now affirm.

Defendant J. Crew hired Whelan Cleaning Services to provide custodial services at a retail store located in Lower Manhattan. Whelan assigned plaintiff Jose Soto responsibility for daily maintenance of the store. Each day, Soto would report for work several hours before the establishment opened to ready the premises for business, vacuuming, mopping, cleaning bathrooms, emptying garbage and the like. After the store opened, and for the remainder of his shift, he did spot cleaning, tidying shelves, dusting, wiping down the entrance door, sweeping up debris and scraping gum from the floor, as necessaiy.

On the day of the incident, a J. Crew employee noticed that a six-foot-high wooden shelf used to display clothing was dusty and she asked Soto to clean it. Equipped with a "high duster" (a Swiffer duster with a long handle), Soto-who is five feet, 10 inches ta11-positioned a four-foot-high A-frame ladder on the ***565** floor in front of the shelf. It is undisputed that the ladder was in proper working order and that Soto locked it in the open position prior to climbing the steps. As he was dusting the shelf, however, both Soto and the ladder fell over, allegedly causing Soto to injure his back, lmee and elbow.

Soto commenced this personal injmy action against J. Crew and the building owner seeking recovery under Labor Law § 240 (I), among other theories. After discovery, defendants moved for summaty judgment, asserting that Soto's cleaning activities constituted "routine maintenance" and not the type of cleaning protected by the statute. They further contended that, even if Soto had been engaged in a covered activity, he failed to establish that he was necessarily exposed to an elevation-related risk or that the ladder was defective or inappropriate to the assigned task. Alternatively, defendants noted that Soto was an insulin-dependent diabetic with other health conditions that might have contributed to the fall and that further discovery was warranted to ascertain the extent to which the fall could be attributed to his medical conditions.

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Soto opposed the motions and cross-moved for partial summa,y judgment on liability on the Labor Law§ 240 (l) claim. He argued that the statute applied because he was engaged in "cleaning" and was required *to* dust a shelf at an elevated level, contending that all commercial cleaning is covered by the statute. He also submitted the affidavit of an engineer who opined that Soto was not provided with proper protection for his elevated work because the ladder was not secured in some manner, such as being held by another store employee.

Supreme Court denied Soto's cross motion and granted summary judgment to defendants dismissing the Labor Law § 240 (l) claim, reasoning that the statute does not apply to workers employed on a daily basis to conduct routine commercial cleaning, such as the dusting, sweeping, mopping and general tidying at issue here (2011 NY Slip Op 3251S[U] [2011l). The Appellate Division unanimously **3 affirmed in two separate writings (95 AD3d 721 [1st Dept 2012]). Tn a memorandum, U1e majority held that "[t]he dusting of the shelf constituted routine maintenance and was not the type of activity that is protected under the statute" *(id.* at 721). The concurrence agreed that dismissal of the claim was required on constraint of this Court's then-recent decision in *Dahar v Holland Ladder & Mfg. Co.* (18 NY3d 521 [2012]), which denied recovery to a manufacturing-plant employee injured while cleaning a large wall module at the ***566** conclusion of the manufacturing process. The Appellate Division granted Soto leave to appeal to this Court (2012 NY Slip Op 85967[U] [2012]).

Labor Law § 240 (!) imposes a nondelegahle duty and absolute liability upon owners and contractors for failing to provide safety devices necessmy for workers subjected to elevation-related risks in circumstances specified by the statule *(see Rocovich v Co11solidated Edison Co.,* 78 NY2d 509, 513 [1991]). To recover, the plaintiff must have been engaged in a covered activity-"thc erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure" (Labor Law § 240 [l]; *see Panek,, County of Albany,* 99 NY2d 452, 457 [2003])-and must have suffered an injury as "the direct consequence of a failure to provide adequale protection against a risk arising from a physically significant elevation differential" *(Runner v New York Stock* KYch., *Inc.,* 13 NY3d 599, 603 [2009]). The threshold issue presented in this appeal concerns the first question-whether Soto was engaged in "cleaning" within the meaning of the statute.

Prior to our 2007 decision in *Broggv v Rockefeller Group, Inc.* (8 NY3d 675 [2007]), there were several appellate decisions holding that cleaning activities were covered under the statute only if they were performed in connection with building consh·uction, demolition, repair work or comparable activities that made a significant physical change to the premises. This conclusion was understandable given that the primary legislative concern underlying Labor Law § 240 (1) was the protection of construction workers who often face significant elevation-related dangers on a work site, even when engaged in a task that would not be particularly hazardous if performed in a different context. We nonetheless rejected that view in *Broggy,* noting that "cleaning is separately listed as a covered activity and had been "expressly afforded protection under section 240 (l) whether or not incidental to any other enumerated activity" *(id.* at 680). There, plaintiff had been tasked with cleaning the 9- or IO-foot-tall interior windows of a commercial building. Noting that we had previously held that cleaning the exterior of the windows of a commercial or public building is a covered activity *(see Bauer v Female Academy qf' Sacred Heart,* 97 NY2d 445 [2002]), we saw no basis to distinguish the cleaning of interior windows for Labor Law § 240 (l) purposes. Viewing the statute in the context of the larger legislative scheme, it would have been anomalous for the legislature to categorically exclude *567 c01runercial window washers given the elevation-related risks they typically encounter and the special protection they have long enjoyed under the Labor Law (see Labor Law 202 [imposing a duty to "provide ... safe means for the cleaning of the windows **4 and of exterior surfaces" of public buildings]).

We went on to hold in *Broggy* that the complaint had properly been dismissed because plaintiff failed to surmount the second Labor Law § 240 (l) hurdle that required proof in admissible form that the task he had been assigned necessarily created "an elevation-related risk of the kind that the safety devices listed in section 240 (1) protect against" *(id.* at 68 l). Although plaintiff had fallen from a desk that he stood on while engaged in the assigned job, there was no indication in the record that the tools he had been supplied (a squeegee and a wand) were not long enough to permit him to wash the windows while standing on the floor. He therefore failed to establish that it was necessa1y for him to work at an elevated level to complete the task.

In *Swiderska v New York Univ.* (IO NY3d 792 [2008]), another window washing case, we applied the analysis in

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Broggy to detennine that a plaintiff injured when she fell off a bed that she had climbed on to clean the interior windows of a dormitory as part of a commercial cleaning project was engaged in an activity covered by Labor Law § 240 (I). In contrast to *Broggy,* there plaintiff had been equipped with only cleaning solution and a rag to clean IO-foot-high windows, "which required her lo climb upon pieces of furniture in order to complete her work-creating an elevation-related risk-and she was not provided a ladder, scaffold or other safety device" *(Swiderska,* 10 NY3d al 793).

These commercial window washing cases fonned the backdrop for our decision in *Dahar* (18 NY3d 521) where a manufacturing plant employee was injured when he fell from a ladder while cleaning oil and welding residue from a custom fabricated wall module at the completion of the manufacturing process. Defendants in that case argued, among other defenses, that this type of cleaning was not covered by Labor Law § 240 (l). We agreed, emphasizing that the statute had never been extended so far and that inclusion of this activity within its scope would greatly expand its reach. In dicta, we commented that, if given the broad reading urged by plaintiff, the statute would encompass virtually every kind of cleaning task, including every bookstore employee who climbs a ladder to dust off a bookshelf or eve1y maintenance worker who climbs to a height to clean a light fixture-results never intended by the legislature.

***568** This case presents a scenario analogous to the bookstore example cited in *Dahar* and) consistent with our analysis in that case, we conclude that plaintiff was not engaged in a covered activity. Although commercial window washing constitutes "cleaning" within the ambit of Labor Law § 240 (l) for the reasons explained above, we have nonetheless clarified that "routine, household window washing" does not *(see Brown v Christopher St. Owners C01p.,* 87 NY2d 938, 939 [1996]; *Connors v Boorstein,* 4 NY2d 172 [1958]). Routine maintenance of that type has been deemed excluded from the statute in recognition of the fact that such a task generally does not involve the type of heightened elevation-related risks that justify extension of the provision's special protection.

To be sure, the term "cleaning" is not confined merely to commercial window ***1..5** washing-our courts have reasonably applied Labor Law § 240 (I) to other types of cleaning projects that present hazards comparable in kind and degree to those presented on a construction site *(see e.g. 11cts y v Pyramid Co. of Bu/fc,lo,* 258 AD2d 906 [4th Dept 1999] [cleaning of 35- and 40-foot-high miniledges and bulld1eads in Galleria Mall as part of large-scale cleaning project was a covered activity]; *Fox v Brozmcm-Archer Realty Servs.,* 266 AD2d 97 [1st Dept 1999] [power washing of plexiglass canopy of building in furtherance of contract to clean exterior of entire stlucture was a covered activity]; *see generally Gordon v Eastern Ry. Supply,* 82 NY2d 555 [1993] [use of sandblaster to clean exterior of railroad earl). But we reject plaintiffs argument that the legislature intended to cover all cleaning that occurs in a commercial setting, no matter how mundane.

Outside the sphere of commercial window washing (which we have already determined to be covered), an activity cannot be characterized as "cleaning" under the statute, if the task: (!) is routine, in the sense that it is the type of job that occurs on a daily, weekly or other relatively-frequent and recurring basis as part of the ordinaty maintenance and care of commercial premises; (2) requires neither specialized equipment or expertise, nor the unusual deployment of labor; (3) generally involves insignificant elevation risks comparable to those inherent in typical domestic or household cleaning; and (4) in light of the core purpose of Labor Law § 240 (I) to protect construction workers, is unrelated to any ongoing constmction, renovation) painting, alteration or repair project. Whether the activity is "cleaning" is an issue for the court to decide after reviewing all ***569** of the factors. The presence or absence of any one is not necessarily dispositive if, viewed in totality, the remaining considerations militate in favor of placing the task in one category or the other.

Applying these factors here, the activity undertaken by Soto was not "cleanini' within the meaning of Labor Law § 240 (I). The dusting of a six-foot-high display shelf is the type of rout.inc maintenance that occurs frequenlly in a retail store. It did not require specialized equipment or knowledge and could be accomplished by a single custodial worker using tools commonly found in a domestic setting. Further, the elevation-related risks involved were comparable to those encountered by homeowners during ordinaty household cleaning and the task was um·elated to a constmction, renovation, painting, alteration or repair project. Because plaintiff was not engaged in an activity that fell within the purview of Labor Law § 240 (1), we need not address whether he offered sufficient evidence that he was injured as a consequence of "a failure to provide adequate protection against a risk arising from a physically significanl elevation differential" under our analysis in *Runner.* Defendants were therefore entitled to

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summary judgment dismissing the Labor Law§ 240 (I) claim, **as both lower courts concluded.**

Accordingly, the order of the Appellate Division should be affi1med, with costs. The certified question should not be **answered upon the ground that it is unnecessary. **6**

Chief Judge Lippman and Judges Read, Smith, Pigott, Rivera **and Abdus-Salaam concur.**

Order affim1ed, with costs, and certified question not answered upon the ground that it is unnecessaty.

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Official Reports

--- N.E.3d ----, 38 N.Y.3d 998, 2022 WL 1242800 (N.Y.), 2022 N.Y. Slip Op. 02836

James Healy, Respondent,

v

EST Downtown, LLC, Care of First Amherst Development Group, Appellant.

Court of Appeals of Ncw York
27
Argued March 16, 2022

Decided April 28, 2022

CITE TITLE AS: Healy v EST Downtown, LLC

SUMMARY

Appeal from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department, entered February 5, 2021. The Appellate Division, with two Justices dissenting, affirmed an amended order of the Supreme Court, Erie County (Frank A. Sedita, JJI, J.; op 2019 NY Slip Op 33953[U]), which, insofar as appealed from, had (1) denied defendant's motion to dismiss the complaint to the extent it sought dismissal of plaintiff's Labor Law § 240 (1) cause of action, and (2) granted plaintiffs motion for summary judgment to the extent it sought a deteimination of liability under Labor Law § 240 (I).

HeaZv v EST Dow11tow11, LLC, 191 AD3d 1274, reversed.

HEADNOTE

Labor
Safe Place to Work
Elevation-Related Hazard-Cleaning

Plaintiffs motion for partial sununaiy judgment on his Labor Law § 240 (l) claim was denied and defendant's motion for smnrnary judgment dismissing that claim was granted, as the task plaintiff was involved in when he was injured did not constitute "cleaning" within the meaning of the statute. To recover under section 240 (I) for an injury caused by a failure to provide safety devices for wodcers involved in particular tasks involving elevation-related risks, plaintiffs must first show that they were engaged in one of that section's enumerated activities including) among others) "cleaning." To determine whether an activity is "cleaning" within the meaning of the statute, cmffts apply a four-factor analysis. The first factor considers whether the work is routine, in the sense that it is the type of job that occurs on a daily, weekly or other relatively-frequent and recurring basis as part of the ordinary maintenance and care of commercial premises. This factor does not involve a fact-specific assessment of a plaintiff's regular tasks-it instead asks whether the type of work would be expected to recur with relative frequency as part of the ordinary maintenance and care of a commercial property. Here, plaintiffs work was "routine" within the meaning of the first factor, which weighed against concluding that he was "cleaning.,, Viewed in totality) the four factors did not militate in favor of placing the task in the categoty of "cleaning.,,

APPEARANCES OF COUNSEL

Law Offices of John FVallace, Buffalo *(James J. Navagh* of counsel), for appellant.
Dolce Pa11epi11ta, PC., Buffalo *(Jo11atha11 Nl Gorski* of counsel), for respondent.

OPINION OF THE COURT

Memorandum.

The order of the Appellate Division should be reversed, with costs, plaintift1s motion for partial summaty judgment on his Labor Law § 240 (1) claim denied, and defendant's motion for summmy judgment dismissing the Labor Law § 240 (I) claim granted.

Labor Law § 240 (I) requires certain contractors and property owners to provide adequate safety devices when workers engage in particular tasks involving elevation-related risks. To recover under section 240 (1) for an injury caused by a failure to provide such safety devices, plaintiffs must first show that they were engaged in one of that section's enumerated activities including, among others, "cleaning." To detennine whether an activity is "cleaning" within the meaning of the statute, courts apply a four-factor analysis *(see Soto v .!. Crew Inc.,* 21 NY3d 562, 568 [2013]). The first factor considers whether the ***1000** work is "routine, in the

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sense that it is the *type* of job that occurs on a daily, weeldy or other relatively-frequent and recurring basis as part of the ordina1y maintenance and care of *commercial premises" (id.* [emphasis added]). This factor does not involve a fact-specific assessment of a plaintiffs regular tasks it instead asks whether the type of work would be expected to recur with relative frequency as part of the ordina1y maintenance and care of a commercial property *(see id.* at 569).

Here, plaintiffs work was "routine,, within the meaning of the first factor, which therefore weighs against concluding that he was "cleaning." "[V]icwed in totality," the *Soto* factors do not "militate in favor of placing the task" in the categmy of "cleaning" *(id.* al 568-569). Plaintiffs other coverage arguments are similarly unavailing; **2 thus his work does not fall within the ambit of Labor Law § 240 (1)'s protection. Plaintiffs remaining arguments lack merit or are rendered academic by our decision.

Chief Judge DiFiore and Judges Rivera, Garcia, Wilson, Singas) Cannataro and Troutman concur.

Order reversed) with costs, plaintiffs motion for partial summaty judgment on his Labor Law § 240 (I) claim denied and defendant's motion for summary judgment dismissing the Labor Law § 240 (1) claim granted, in a memorandum.

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Distinguished by Saint v. Syracuse Supply Co., N.Y., April 2, 2015
1 N.Y.3d 526, 802 N.E.2d 1080, 770
N.Y.S.2d 682, 2003 N.Y. Slip Op. 18509

Richard Esposito, Appellant

v

New York City Industrial Development Agency et al., Respondents

Cami of Appeals of New York
1, 169SSM19
Decided November 20, 2003

CITE TITLE AS: Esposito v New York City Indus. Dev. Agency

SUMMARY

Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department, entered May ***527** 1, 2003. The Appellate Division, with two Justices dissenting, (I) affirmed an order of the Supreme Comt, New York County (Marcy Friedman, J.), which, insofar as appealed from, had granted defendant's cross motions for summary judgment dismissing plaintiff's Labor Law§ 240 (I) and§ 241 (6) claims, and (2) affirmed a subsequent order of that same court, which had granted motions by defendants American I11te1national Group, Inc. and American International Really Corp. to renew their motions for summa1y judgment to the extent of dismissing plaintiffs claim against them pursuant to Labor Law § 200 and dismissing the complaint and all cross claims in their entirety against these defendants.

Esposito v Ne\V YorkCityI11d11s.Dev.Agency, 305 AD2d 108.

HEADNOTES

Labor
Safe Place to Work
Routine Maintenance

(l) Plaintiff maintenance worker did not have a claim under Labor Law§ 240 (1) for injuries sustained while performing a monthly maintenance check on an air conditioning unit. Labor Law§ 240 (!) applies where an employee is engaged "in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or strneture." Although repairing is among the enumerated activities, this activity is distinguished from routine maintenance. The work here involved replacing components that require replacement in the course of nmmal wear and tear. It therefore constituted routine maintenance and not "repairing" or any of the other enumerated activities.

Labor
Safe Place to Work
Routine Maintenance

(2) Plaintiff maintenance worker did not have a claim under Labor Law§ 24l (6) for injuries sustained while perfonning a monthly maintenance check on an air conditioning unit Labor Law § 241 (6) is inapplicable outside the construction, demolition or excavation contexts.

Labor
Safe Place to Work
Special Employee

(3) Plaintiff, member of an operating engineers union which did maintenance work for a commercial building, was a special employee of the defendant realty corporation, which leased the building from the owner, and thus summary judgment was properly granted to that defendant on plaintiff's Labor Law claims.

APPEARANCES OF COUNSEL

Rheingold, Vo/et, Rheingold, Shko/nik & McCartney LLP, New York City *(HunterJ. Shkolnik* of counsel), for appellant.
Fiedelman & McGaw, Jericho *(Ross P. Mas/er* of counsel), and *.Jacabowitz, Ga,jinkel & Lesman,* for New York City Industrial Development Agency, respondent.
Shaub, Ahmuty, Citrin & Spratt, LLP, New York City *(Timothy R. Capows/d* of counsel), and *Ahmuty, Demers & McManus,* for American International Group, Inc. and another, respondents. ***528**

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OPINION OF THE COURT

Memorandum.

The order of the Appellate Division should be affirmed, with costs.

Plaintiff was injured after falling from a ladder while attempting to remove a cover from an air conditioning unit on the **2 22nd floor of a com111ercial building in Manhattan. He was a member of Local 94 Operating Engineers Union, which did maintenance work for U1e building. American International Realty (AIR), a subsidiaty of American International Group (AJG), leased the building from its owner, the New York City Industrial Development Agency (NYCIDA). Plaintiff sued AIR, AIG, NYCIDA and the New York City Environmental Development Corporation for violations of Labor Law § 240 (I) and § 241 (6). On the date of the accident, plaintiff was perfonning a monthly maintenance check of the air conditioning units <;m the 22nd through 29th floors. This included taking amperage readings and checking belts, sheaves and bearings. When checking the 22nd floor unit, plaintiff discovered a low amperage reading and heavy vibrations. The motor appeared worn and loose, and the belts were "chewed up." He left and returned with tools and parts needed to fix the machine. As he climbed a ladder and began to remove the unit1s cover a second time, the bottom of the ladder "kicked out" and he fell.

(I) Supreme Coutt held that plaintiff could not sustain a claim under section 240 (l), because he was not engaged in any of the covered activities. The Appellate Division affinnedi as do we. Section 240 (I) applies where an employee is engaged "in the erection) demolition repairing, altering, painting, cleaning or pointing of a building or structure." Although repairing is among the enumerated activities, we have distinguished this from "routine maintenance" *(Smith v Shell Oil Co.,* 85 NY2d 1000, 1002 [1995]). The work here involved replacing components that require replacement in the course of nonnal wear and tear. It therefore constituted routine maintenance and not "repairing" or any of the other enumerated activities.

(2), (3)As for Labor Law § 241 (6), we have held it inapplicable outside the constmction, demolition or excavation contexts *(see Nagel v D & R Realty Cmp.,* 99 NY2d 98 [2002]). Therefore, the maintenance work involved in this case fell outside that section's reach. We also agree that defendants satisfactorily established that plaintiff was a special employee of AIR.

Chief Judge Kaye and Judges G.B. Smith, Cipaiick, Rosenblatt, Graffeo and Read concur. ***529**

On review of submissions pursuant to section 500.4 of the Rules of the Court of Appeals (22 NYCRR 500.4), order affi1n1ed, with costs, in a memorandum.

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196 AD.3d 709
Supreme Court, Appellate Division,
Second Department, New York

Gawayne J. **STOCKTON,** et al., appellants,
v.
H & E BIFFER ENTERPRlSES
NO. 2, **LLC,** et al., respondents.

2017-11254
|
(Index No. 70031/14)
|
Argued-April 20, 2021
|
July 28, 2021

Attorneys and Law Finns

McMahon & McCarthy, Bronx, N.Y. (Matthew J. McMahon and Kevin T. McCarthy of counsel), for appellants.

Lewis Johs Avallone & Aviles, LLP, Islandia, N.Y. (Michael T. Colavecchio, Amy E. Bedell, and John B. Saville of counsel), for respondents.

MARK C. DILLON, J.P., ROBERT J. MILLER, BETSY BARROS, FRANCESCA E. CONNOLLY, JJ.

DECISION & ORDER

In an action to recover damages for personal injuries, etc., the plaintiffs appeal from an order of the Supreme Court, Westchester County (Linda S. Jamieson, J.), dated September 12, 2017. The order, insofar as appealed from, granted that branch of the defendants' motion which was for sununaiy judgment dismissing the cause of action alleging a violation of Labor Law§ 240(1) and denied the plaintiffs' cross motion for summaiy judgment on the issue of liability on that cause of action.

ORDERED that the order is affirmed insofar as appealed from, with costs.

The plaintiff Gawayne J. **Stockton** (hereinafter the injured plaintiff), a mechanic employed by a nonparty HVAC company, allegedly sustained injuries after falling off a ladder while performing a non-emergency service call at the defendant Anthony Scicchitano Italian Pork Store of Jefferson Valley, Inc. (hereinafter the Pork Store). The injured plaintiff testified at his deposition that after inspecting a refrigeration unit on the roof of the store, he determined that the "condenser fan motor was vibrating/' requiring replacement. At the time of the accident, the injured plaintiff was climbing a ladder in order to return to the roof to complete the replacement of the condenser fan motor. After he fell, the injured plaintiff replaced the ladder, climbed to the roof, and replaced the condenser fan motor, which took approximately 45 minutes. The injured plaintiff, and his wife suing derivatively, commenced this personal injmy action against the Pork Store and the owner of the subject premises, alleging, inter alia, a violation of Labor Law § 240(1). The defendants moved for summary judgment dismissing the complaint. The plaintiffs opposed the motion and cross-moved for summary judgment on the issue of liability on the Labor Law§ 240(1) cause of action. The Supreme Court, inter alia, granted that branch of the defendants' motion which was for smmnary jndgment dismissing the Labor Law § 240(1) cause of action and denied the plaintiffs' cross motion. The plaintiffs appeal.

To prevail on a cause of action under Labor Law § 240(l), a plaintiff must establish, among other things, that he or she was injured during the "erection, demolition) repairing, altering, painting, cleaning or pointing of a building or structure" *(see Ferrigno ,,. Jaghab, Jaghab & Jaghab, PC.,* 152 A.D.3d 650, 652---653, 59 N.Y.S.3d 115). "In dete1mining whether a particular activity constitutes 'repairing,' courls are careful to distinguish between repairs and routine maintenance, the latter falling outside the scope of section 240(1)" (***709** *id.* at 653, 59 N.Y.S.3d 115, citing *Esposito v. New York Cit)' Indus. Dev. Agency,* 1 N.Y.3d 526, 528, 770 N.Y.S.2d 682, 802 N.E.2d 1080). "Generally, courts have held that work constitutes routine maintenance where the work involves 'replacing components that require replacement in the course of nonnal wear and tear' [1] *(Ferrigno v. Jaghab, Jagllab & Jaghab, PC.,* 152 A.D.3d at 653, 59 N.Y.S.3d 115, quoting *Esposito v. New York City Indus. Dev. Agency,* 1 N.Y.3<l at 528, 770 N.Y.S.2d 682, 802 N.E.2d 1080; see *Gonzalez* v. *Woodboume Arboretum, Jue.,* 100 A.D.3d 694, 697, 954 N.Y.S.2d 113).

Here, the defendants established, prima facie, that the replacement of the condenser fan motor, which, according to the deposition testimony of the injured plaintiffs employer, weighed approximately IV, pounds and was the kind of part

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that required replacement "all the timet constituted routine maintenance and not repairing, or any of the other enumerated activities under Labor Law § 240(1) (see *Esposito v. New York Cit)' J11d11s. Dev. Age11c"* 1 N.Y.3d at 528, 770 N.Y.S.2d 682, 802 N.E.2d I 080; *Tse,pe/is v. Tamares Real Estate Holdi11gs, !11c.,* 147 A.D.3d 1001, 1002, 47 N.Y.S.3d 131). "The work here involved replacing (a] component[ ] that require[sJ replacement in the course of nonnal wear and tear" *(Esposito v. New YorkCi vlndus. Dev. Agency,* 1 N.Y.3d at 528, 770 N.Y.S.2d 682, 802 N.E.2d 1080). In opposition, the plaintiffs failed to raise a triable issue of fact.

Accordingly, the Supreme Court properly graotcd that branch of the defendants' motion which was for summmy judgment dismissing the Labor Law § 240(1) cause of action and, for the same reasons, properly denied the plaintiffs' cross motion for summmy judgment on the issue of liability on that cause of action.

DILLON, J.P., MILLER, BARROS and CONNOLLY, JJ., concur.

All Citations

196 A.D.3d 709, 148 N.Y.S.3d 708 (Mem), 2021 N.Y. Slip Op. 04568

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Official Reports

KeyCite Yellow Flag - Negative Treatment
Distinguished by Gasqucs v. State, N.Y., October 2 l, 2010
13 N.Y.3d 599, 922 N.E.2d 865, 895
N.Y.S.2d 279, 2009 N.Y. Slip Op. 09310

**1 Victor J. Runner, Respondent

v

New York Stock Exchange,
Inc., et al., Appellants,

Courl of Appeals of New York
Argued November 17, 2009

Decided December 17, 2009

CITE TITLE AS: Runner v
New York Stock Exch., Inc.

SUMMARY

Proceeding) pursuant to NY Constitution, article VI)§ 3 (b) (9) and Rules of the Court of Appeals (22 NYCRR) § 500.27, to review two questions ce1iified to the New York State Court of Appeals by the United States Court of Appeals for the Second Circuit. The following questions were certified by the United States Court of Appeals and accepted by the New York State Court of Appeals: "L Where a worker who is serving as a counte1weight on a makeshift pulley is dragged into the pulley mechanism after a heavy object on the other side of a pulley rapidly descends a small set of stairs, causing an injury to plaintiff's hand, is the injmy (a) an 'elevation related injmy,' and (b) directly caused by the effects of gravity, such that section 240 (I) ofNew York's Labor Law applies? IL If an injury stems from neither a falling worker nor a falling object that strikes a plaintiff, does liability exist under section 240 (1) of New York's Labor Law?"

HEADNOTE

Labor
Safe Place to Work

Plaintiff sustained an elevation related mjmy within the scope of Labor Law § 240 (1) when, while serving as a countenveight on a makeshift pulley to move an 800-ponnd reel of wire down a small set of stairs, he was dragged inlo the pulley mechanism after the reel rapidly descended the stairs. The single decisive question was whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential. Labor Law § 240 (1), a strict liability statute, was designed to prevent accidents in which a protective device of the type enumerated in the statute proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity *to* an object or person. The harm to plaintiff was the direct consequence of the application of the force of gravity to the reel. Since a worker injured while positioned in the descending reel's path would be entitled *to* recover under section 240 (1), plaintiff should not be denied the same legal recourse. The elevation differential involved could not be viewed as de minirnis, patticuiarly given the weight of the object and the amount of force it was capable of generating, even over the course of a relatively short descent.

RESEARCH REFERENCES

Am Jur 2d, Employment Relationship §§ 266---269.

***600** McKinney's, Labor Law§ 240 (I).

NY Jur 2d, Employment Relations §§ 286---290, 293, 302, 379---38 l.

Prosser and Keeton, Torts (5th ed) § 80.

ANNOTATION REFERENCE

See ALR Index under Labor and Employment; Occupational Safety and Health.

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Que1y: elevation /s injur! /s risk /p worker & direct /4 consequence

POINTS OF COUNSEL

Shaub, Ah11111ty, Cih·in & Spratt, LLP, Lake Success *(Steven J. Ahmuty, J1:,* and *Christopher Simone* of counsel), and *Lewis Brisbois Bisgaard & Smith LLP* for appellants.

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Plaintiffs accident did not fall within the ambit of what the Legislature envisioned when enacting Labor Law § 240 (!) as interpreted by the courts. *(Rocovich v Consolidated Edison Co.,* 78 NY2d 509; *De Haen v Rock.wood Sprinkler Co.,* 258 NY 350; *Schreiner v Cremosa Cheese Cmp.,* 202 AD2d 657; *While v Dorose Holding,* 216 AD2d 290; *Blake v Neighborhood Haus. Servs. ofN.Y. City,* 1 NY3d 280; *Ross v Curtis-Palmer Hydro-Blee. Co.,* 81 NY2d 494; *Jastrzebsld v North Shore School Dist.,* 223 AD2d 677, 88 NY2d 946; *Narducci v Manhas.,et Bay Assoc.,* 96 NY2d 259; *Pope v Supreme-KR.W Co11Sli: Co1 1J.,* 261 AD2d 523; *Baker v Barron's Educ.* Sen•. *Co,p.,* 248 AD2d 655.)

Sacks and Sacks, LLP, New York City *(Scott N. Singer* of counsel), for respondent.

I. The issues raised on the present appeal were properly formulated in the Second Circuit's certified questions. II. The District Court's conclusion that Labor Law § 240 (1) was violated as a matter of law was consistent with the statut01y language and controlling decisions of this Court. *(Koenig v Patrick ConsL!: Co1p.,* 298 NY 3l3; *Haimes v New York Tel. Co.,* 46 NY2d 132; *Bland v 1Wanocherian,* 66 NY2d 452; *Rocovich v Consolidated Edison Co.,* 78 NY2d 509; *JV!arti11ez v Ci(y 0fNew York,* 93 NY2d 322; *Karaktin v Gordon Hillside Cmp.,* 143 AD2d 637; *Robinson v East Med. Ch:, LP,* 6 NY3d 550; *Cahill v Ti"ihoroug!, Bridge & llmnel Anth.,* 4 NY3d 35; *Blake v Neighborhood Hous. Servs. of N.Y City,* I NY3<l 280; ***601** *Jastrzebski v North Shore School Dist.,* 223 AD2d 677, 88 NY2d 946.) III. The District Court's determination was consistent with Appellate Division decisions constrning Labor Law § 240 (!). *(Ross v Curtis-Pa/mer 1-lydro-E!ec. Co.,* 81 NY2d 494; *Nanlucci v 1Wanhasse/ Bay Assoc.,* 96 NY2d 259; *Berg v Albany Ladder Co., Inc.,* 10 NY3d 902; *Jock v La11dmark Healthcare Facilities, LLC,* 62 AD3d 1070; *Mattiso11 v Wilmot,* 228 AD2d 991; *Mills v Tumbleweed Mg!. Co.,* 270 AD2d 121; *Carroll v Metropolitan Life Ins. Co.,* 264 AD2<l 336; *Brown v New York City Economic Dev. C01p.,* 234 AD2d 33; *Lopez v Boston Props. Inc.,* 41 AD3d 259; *Rodriguez v 1\dargarel T;etz* Ct,: *for Nursing Care,* 84 NY2d 841.)

Fiede/111a11 & A1cGaw, Jericho *(AndreHi Zajac* and *DmvH* C. *DeSimone* of counsel), *Rona L. Platt, Brendan T. Fitzpatrick, David B. Hamm* and *Timothy J. Keane* for Defense Association of New York, Inc., amicus curiae.

In a scenario where plaintiff did not fall from a height, and no object fell from a height striking him, Labor Law § 240 (1) does not apply; proper interpretation of legislative intent and stare decisis dictates rejection of plaintiffs efforts to expand the scope of Labor Law § 240 (I) to encompass a type of hazard never contemplated for inclusion in the statutory strict liability provided for uniquely height-related hazards. *(lvfisseritti v Mark JV* Co11sh: *Co.,* 86 NY2d 487; *Nieves v Five Baro A.C. & R fi'ig. Co,p.,* 93 NY2d 914; *Rocovich v Co11so!idated Edison Co.,* 78 NY2d 509; *Ross v Curtis-Palmer J-Jydro-E/ec. Co.,* 81 NY2d 494; *Toe/er v Long Is. R.R.,* 4 NY3d 399; *Narducci v Manhassel Bay Assoc.,* 96 NY2d 259; *Martinez v Ci(v of New York,* 93 NY2d 322; *Perchinsk.v v State of New York,* 232 AD2d 34; *Schroeder v KalenakPainli11g & Paperhangh1g, Inc.,* 7 NY3d 797; *l\1unoz v DJZ Realty, LLC,* 5 NY3d 747.)

OPINION OF THE COURT

Chief Judge Lippman.

The Second Circuit Court of Appeals, in the course of considering defendants' appeal from a judgment imposing liability upon them pursuant to section 240 (l) of New York's Labor Law, has certified to us two questions respecting the applicability of that statute. We now answer that the statute is applicable under the circumstances here presented.

The trial evidence showed that plaintiff suffered serious and permanent injuries to ****2** both of his hands while perfmming tasks in connection with the installation of an uninterruptible power system on defendant New York Stock Exchange's premises. The manner in which the injuries were sustained is undisputed. ***602** Plaintiff and several coworkers had been directed to move a large reel of wire, weighing some 800 pounds, down a set of about four stairs. To prevent the reel from rolling freely down the flight and causing damage, the workers were instructed to tie one end of a 10-foot length of rope to the reel and then to wrap tlie rope around a metal bar placed horizontally across a door jamb on the same level as the reel. The loose end of the rope was then held by plaintiff and two coworkers while two other coworkers began to push the reel down the stairs. As the reel descended, it pulled plaintiff and his fellow workers, who were essentially acting as counterweights, toward the metal bar. The expedient of wrapping the rope around the bar proved ineffective to regulate the rate of the reel's descent and plaintiff was drawn horizontally into the bar, injuring his hands as they jammed against it. Experts testified that a pulley or hoist should have been used to move the reel safely down ilie stairs and that the jen-y-rigged device actually employed had not been adequate to that task.

The jury, having been instructed that liability pursuant to Labor Law§ 240 (1) could not be assigned unless plaintiffs injuries had been attributable to a gravity-related risk, and

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having found that no such risk had been implicated, returned a verdict for defendants. A motion by plaintiff to set aside the verdict ensued. ln granting the motion and directing judgment for the plaintiff upon his Labor Law § 240 claim, the District Court found, as a matter of law, that the movement of the reel down the stairs presented a gravity-related risk; that an adequate safety device had not been used to manage the risk; and that that failure had been a substantial factor in causing plaintiff's injury.

Defendants appealed, and the Second Circuit, after its initial review of the matter, certified to us these questions:

> HI. Where a worker who is serving as a counte1weight on a makeshift pulley is dragged into the pulley mechanism after a heavy object on the other side of a pulley rapidly descends a small set of stairs, causing an injmy to plaintiffs hand, is the injmy (a) an 'elevation related injury,' and (b) directly caused by the effects of gravity, such that section 240 (J) of New York's Labor Law applies?
>
> "IL If an injmy stems from neither a falling worker nor a falling object tl1at strikes a plaintiff, does ***603** liability exist under section 240 (1) of New York's Labor Law?" (568 F3d 383,389 [2009].)

While these inquiries are not inapropos, we think the dispositive inquiry framed by our cases does not depend upon the precise characterization of the device employed or upon **3 whether the injmy resulted from a fall, either of the worker or of an object upon the worker. Rather, the single decisive question is whether plaintiffs injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential.

Labor Law§ 240 (1) provides in relevant part:

> "All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.

It is plain that a device precisely of the sort enumerated by the statute was not "placed and operated as to give proper protection" to plaintiff, a person employed in the alteration of a building and thus within the stah1tes stated protective ambit. The breadth of the statute's protection has, however, been constmed to be less wide than its text would indicate. As is here relevant} it is generally agreed that the purpose of the strict liability stah1te is to protect constrnction workers not from routine workplace risks, but from the pronounced risks arising from construction work site elevation differentials, and, accordingly, that there will be no liability under the statute unless the injury producing accident is attributable to the latter sort of risk *(see Rocovich v Consolidated Edison Co.,* 78 NY2d 509, 514 [1991]). The trial court was of the view that plaintiffs accident arose from such a risk: the reel had to be moved from a higher to a lower elevation and the danger to be guarded against plainly arose from the force of the ve1y heavy object's unchecked, or insufficiently checked, descent.

Defendants contend to the contrary that the accident was not sufficiently elevation-related to fall within section 240 (l)'s ***604** scope. The occurrence, they note, did not involve the traversal of an elevation differential either by plaintiff or an object that hit him, and they urge that gravity must operate directly upon either the plaintiff or upon an object falling upon the plaintiff if there is to be Labor Law § 240 (l) liability. In support of this view, defendants point out that in *Ross v C11rtis-Pa/111er Hydro-E/ec. Co.* (81 NY2d 494, 501 [1993]) we observed that "the 'special hazards' covered by section 240 (1)) are limited to such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured *(see, Dellaen v Rochvooc/ Sprinkler Co.,* 258 NY 350)," and that in *Narducci v Manhasset Bay Assoc.* (96 NY2d 259, 267 [200 I)), we noted that "Labor Law § 240 (l) applies to both 'falling worker' and 'falling object' cases." But in refeITing to these familiar **4 scenarios in which section 240 (1) liability may arise, neither decision purports exhaustively to define the statute's protective reach. Rather, the governing rule is to be found in the language from *Ross* following closely upon that just quoted, where we elaborated more generally that"Labor Law§ 240 (1) was designed to prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured workerj,mn *harm directlyflowh1gfrom the application of the force of gravity to an object or person" (Ross,* 81 NY2d at 501).

Manifestly, the applicability of the statute in a falling object case such as the one before us does not under this essential formulation depend upon whether the object has hit the

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worker. The relevant inquiiy----one which may be answered in the affirmative even in situations where the object does not fall on the worker is rather whether the harm flows directly from the application of the force of gravity to the object. Here, as the District Court correctly found, the harm to plaintiff was the direct consequence of the application of the force of gravity to the reel. Indeed, the injury to plaintiff was every bit as direct a consequence of the descent of the reel as would have been an injury to a worker positioned in the descending reel's path. The latter worker would certainly be entitled to recover under section 240 (1) and there appears no sensible basis to deny plaintiff the same legal recourse.

In certifying its questions to us, the Second Circuit observed that "[d]efendants offer a litany of illustrative cases highlighting various limitations on section 240 (l) ... none of which address the material facts of the instant case" ***605** (568 F3d 383, 387 [2009]). And, indeed, we have not, until now, addressed a factual progression which, although not following one of the two scenaTios defendants would have us deem cxhaustive, nonetheless involves an injury directly attributable to a risk posed by a physically significant elevation differential.

The elevation differential here involved cannot be viewed as de minimis, particularly given the weight of the object and the amount of force it was capable of generating, even over the course of a relatively short descent. And, the causal connection between the object's inadequately regulated descent and plaintiffs injmy was, as noted, unmediated --or, demonstrably, at least as umnediated as it would have been had plaintiff been situated paradigmatically at the rope's opposite end. It is in this respect that this case differs from *Toefer v Longh R.R.* (4 NY3d 399 [2005]), upon which defendants rely. There, the injmy was the result of a concatenation of circumstances resulting in the "inexplicabl[e]" launch of an object-not a falling object-- in plaintiffs direction *(id.* at 408); it was not, as here, the direct consequence of a failure to provide statutorily required protection against a risk plainly arising from a workplace elevation differential.

Accordingly, the first certified question, as recast, should be answered in the **5 affirmative and the second certified question left unanswered, as unnecessaiy.

Judges Ciparick, Graffeo, Read, Smith, Pigott and Jones concur.

Following certification of questions by the United States Court of Appeals for the Second Circuit and acceptance of the questions by this Court pursuant tosection 500.27 of the Rules of Practice of the Court of Appeals (22 NYCRR 500.27), and after hearing argument by counsel for the parties and consideration of the briefs and the record submitted, certified questions answered in accordance with the opinion herein.

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KeyCite Yellow Flag - Negative Treatment
Declined to Extend by White v. 855 tv!RU LLC, N.Y.Sup., February 14, 2019

22 N.Y.3d 658
Court of Appeals of New York.

Richard **FABRIZI,** Respondent,
v.
1095 AVENUE OF the **AMERICAS, L.L.C.,** ct al., Appellants,
and
Verizon New York, Inc., ct al.,
Defendants. (And Other Actions.).

Feb. 20, **2014.**

Synopsis
Background: Worker who was injured when conduit pipe fell on his hand brought action against building owner, tenant, and contractor, alleging scaffold law violation. The Supreme Court, New York County, Emily Jane Goodman, J., 2011 WL 2428710, granted summary judgment to worker. Defendants appealed. The Supreme Court\ Appellate Division, First Department, 98 A.D.3d 864, 951 N.Y.S.2d 480, affinned as modified. Question was certified.

Holdings: The Court of Appeals, Pigott, J., held that:

[l] compression coupling connecting conduit that fell on worker was not safety device within the meaning of the scaffold law;

[2] failure to use set screw coupling instead of compression coupling did not violate scaffold law's proper protection directive; and

[3] tenant was not aggrieved by the Appellate Division order, and thus its appeal would be dismissed.

Reversed in part and appeal dismissed in part.

Lippman, Chief Judge, filed dissenting opinion in which Rivera, J., concurred.

Abdus-Salaam, J., took no part.

West Headnotes (7)

111 **Negligence** ,;= Scaffolding laws
Negligence e;= Contractors
Negligence ,;J-7, Liabilities relating to constrnction, demolition and repair

The scaffold law requires owners and conn-actors to provide proper protection to those working on a construction site, and the law imposes absolute liability where the failure to provide such protection is a proximate cause of a worker's injury. McKinney's Labor Law§ 240(1).

10 Cases that cite this headnote

[21 **.Judgment** •>, Torts
Negligence ,: Scaffolding laws

To prevail on summa1y judgment in falling object case under scaffold law, the injured worker must demonstrate the existence of a hazard contemplated under that statute and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein. McKinney's Labor Law § 240(1).

38 Cases that cite this headnote

131 **Negligence** ,>, Scaffolding laws

To prevail on scaffold law claim involving a falling object, the plaintiff must demonstrate that at the time the object fell, it either was being hoisted or secured) or required securing for the purposes of the unde1taking. McKinney's Labor Law § 240(1).

38 Cases that cite this headnote

[4] **Negligence** ,,;= Scaffolding laws

The scaffold law does not automatically apply simply because an object fell and injured a worker; a plaintiff must show that the object fell because of the absence or inadequacy of a safety device of the ldnd enumerated in the statute. McKinney's Labor Law§ 240(1).

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41 Cases that cite this headnote

[SJ **Negligence** ,•> Scaffolding laws

Four-inch compression coupling connecting length of conduit running vertically from a pencil box to a similar horizontal conduit near the ceiling was not a "safety device" within the meaning of the scaffold law that was constrncted, placed, and operated as to give proper protection to a worker from the falling vertical conduit after he had removed the pencil box; coupling's only function was to keep the conduit together as part of the conduit/pencil box assembly, it had been installed a week before the incident and had been se1ving its intended purpose until a change order was issued and worker dismantled the conduit/ pencil box assembly. McKinney's Labor Law § 240(1).

2 Cases that cite this headnote

[6] **Negligence** •> Scaffolding laws

Failure of building owner and contractor that hired worker's employer to overhaul the electrical system in certain offices in the building to use a set screw coupling to connect length of conduit running vertically from a pencil box to a similar horizontal conduit near the ceiling did not violate scaffold law's proper protection directive, notwithstanding that vertical section of conduit fell on worker's hand after he had removed the pencil box; both set screw couplings and the compression coupling that actually connected the vertical and horizontal conduits were basic couplings that served identical purposes, namely, to function as support for the conduit/pencil box assembly, not to provide worker protection. McKinney's Labor Law § 240(1).

1 Cases that cite this headnote

[7] **Appeal and Error** ·>· Who are "aggrieved,, in general

Building tenant, in whose offices worker was injmed when conduit pipe fell on his hand while he was working on electrical system) was not aggrieved by Appellate Division order, which denied worker's motion for summaiy judgment as to liability on his scaffold law claim against building owner and contractor but declined to dismiss the claim, and thus tenant's appeal to the Court of Appeals would be dismissed, since tenant did not move for summaiy judgment and the Appellate Division denied worker's motion for summaiy judgment. McKinney's Labor Law § 240(1).

I Cases that cite this headnote

Attorneys and Law Finns

*****417** London Fischer LLP, New York City (Daniel Zemann, Jr., and David B. Franklin of counsel), for appellants.

Pollack Pollack Isaac & DeCicco, LLP, New York City (Brian J. Isaac, Michael H. Zhu and Kenneth J. Gonnan of counsel), and Block O'Toole & Murphy for respondent.

OPINION OF THE COURT

PIGOTT, J.

792 *660 Plaintiff, an electrician employed by Forest Electric Corp. (Forest), sustained injmy when a 60-80 pound conduit pipe fell on his hand. Forest had been hired by defendantJ.T. Magen Constrnction Company, Inc. (Magen) to overhaul the electrical system in offices leased by defendant Dechert, LLP (Dechert) from the building owner, defendant **1095 Avenue of the **Americas, L.L.C. (1095).**

As pait of the overhaul) Forest was responsible for the installation of conduit piping tlll'ough the building's floors. The conduit enabled telecommunication wires to rnn from the building's sub-cellar through each iloor's respect.ive telecommunication ***661** closet. The run of conduit on each floor contains a "pencil box" that provides access to the telecommunication wire.

On lhe day of the incident, plaintiff was relocating a pencil box that Forest had installed the previous week The pencil box was situated between) and affixed to, two pieces of conduit that were four inches in diameter. The top section of conduit was 8 to 10 feet long and ran vertically from the top

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of the pencil box to the **793 ceiling; the lower section ran vertically from the bottom of the pencil box to the floor. The top conduit was connected to a similar horizontal conduit near lhe ceiling by a four-inch compression coupling.

***418 The pencil box proper was secured by a metal "Kindorf support." Because the pencil box was obstrncting conduit that was to be installed adjacent to the box, plaintiff had to move it, which required him to drill holes in the floor to relocate the Kindorf support. Before drilling the holes, however, plaintiff cut through the conduit just above and below the pencil box. He then removed lhe pencil box leaving the top conduit dangling by the compression coupling near the ceiling. Plaintiff knelt on the floor to begin drilling. Approximately 15 minutes later, while plaintiff was drilling, the top conduit fell, striking plaintiff on the hand.

Plaintiff thereafter brought this action against defendants and others, asserting, as relevant here, that defendants violated Labor Law § 240(l). That statute provides that

> "[a]ll contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or stlucture shall fmnish or erect, or cause to be furnished or erected for the perforn1ance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed."

Afterjoinder of issue and completion of discovery, defendants **1095** and Magen moved for summaiy judgment dismissing the section 240(l) cause of action. Plaintiff opposed the motion and cross-moved for partial summary judgment on liability against *662 **1095,** Magen and Dechert, claiming, in reliance on plaintiffs deposition testimony, that a more secure "set screw coupling,"[2] rather than the purportedly inadequate compression coupling, should have been used to secure the top conduit. Supreme Court granted plaintiffs motion for partial sununaiy judgment on liability, and denied defendants' motion seeking to dismiss the section 240(1) claim, holding that the conduit, being attached to the ceiling by a compression coupling that failed, was not properly secured so as to afford plaintiff protection (2011 N.Y. Slip Op. 31529[U] [201l]).

A divided Appellate Division modified the order of Supreme Court by denying plaintiffs motion for summmy judgment, holding that plaintiff failed to establish as a matter of law that defendants' failure to provide a protective device, i.e., a set screw coupling, was a proximate cause of his accident, but otherwise affinned the order (98 A.D.3d 864, 865, 951 N.Y.S.2d 480 [1st Dept.2012]). The dissenting Justice contended that the coupling did not constitute a statutory safety device of the kind enumerated in section 240(l) and therefore defendants should have been granted summary judgment(id. at 876, 95 l N.Y.S.2d 480 [Tom, J., dissenting]). The Appellate Division certified the following question to this Court: "Was the order of the Supreme Court, as modified by this **794 Court, properly made?" We answer the certified question in the negative.

[1J Labor Law § 240(l) as cited above requires owners and contractors to provide proper protection to those working on a construction site *(see* ***419 *Rocovich v. Consolidated Edison Co.,* 78 N.Y.2d 509, 513, 577 N.Y.S.2d 219, 583 N.E.2d 932 [1991]). It imposes absolute liability where the failure to provide such protection is a proximate cause of a worker's injury (see *Wilinski v. 334 E. 92nd Haus. Dev. Fund Cmp.,* 18 **N.Y.3d** 1, 7, 935 N.Y.S.2d 551, 959 N.E.2d 488 [2011]).

[2] [3] [4] In order to prevail on summary judgment in a section 240(1) "falling object" case, the injured worker must demonstrate the existence of a hazard contemplated under that statute "and the failure to use, or the inadequacy of, a safely device of the kind enumerated therein" *(Narducci v. Manhasset Bay Assoc.,* 96 N.Y.2d 259, 267, 727 N.Y.S.2d 37, 750 N.E.2d 1085 [2001], citing *Ross" Curtis-Palmer Hydro-Elec. Co.,* 81 N.Y.2d 494,501,601 N.Y.S.2d 49,618 N.E.2d 82 [1993]). Essentially, the plaintiff must demonstrate that at the time the object fell, it either was being *663 "hoisted or secured" *(Nmducci,* 96 N.Y.2d al 268, 727 N.Y.S.2d 37, 750 N.E.2d 1085), or "required securing for the purposes of the unde1iaking,, (*Outar v. City of New York,* 5 **N.Y.3d** 731, 732, 799 N.Y.S.2d 770,832 N.E.2d 1186 [2005]; *see Quattrocchi v. FJ. Sciame Co11sh: Co,p.,* **11 N.Y.3d** 757, 759, 866 N.Y.S.2d 592, 896 N.E.2d 75 [2008]). Contra1y to the dissent's contention, section 240(l) does not automatically apply simply because an object fell and injured a worker; "[a] plaintiff must show that the object fell ... *because of* the absence or inadequacy of a *safety device* of the kind enumerated in the statute" *(Narducci,* 96 N.Y.2d at 268, 727 N.Y.S.2d 37, 750 N.E.2d 1085 [second emphasis supplied]).

[SJ The Appellate Division properly concluded that plaintiff had not established entitlement to summary judgment on

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liability. It erred) however, in denying summmy judgment to defendants **1095** and Magen, because they established as a matter of law that the conduit did not fall on plaintiff due to the absence or inadequacy of an enumerated safety device.

The compression coupling, which _plaintiff claims was inadequate, is not a safety device "constructed, placed and operated as to give proper protection" from the falling conduit. lls only function was to keep the conduit together as part of the conduit/ pencil box assembly. The coupling had been installed a week before the incident and had been serving its intended purpose until a change order was issued and plaintiff dismantled the conduit/pencil box assembly. Plaintiffs argument that the coupling itself is a safety device, albeit an inadequate one, extends the reach of section 240(I) beyond its intended purpose to any component that may lend support to a structure. It cannot be said that the coupling was meant to function as a safety device in the same manner as those devices enumerated in section 240(1).

[6] It follows that defendants' failure to use a set screw coupling is not a violation of section 240(I)'s proper protection directive.3 A set screw coupling, utilized in the manner proposed by plaintiff, is not a safety device within the meaning of the **795 statute. Plaintiff concedes that compression and set screw couplings are "basic couplings" lhat serve identical purposes, namely, to function as support for the conduit/pencil box assembly, not to provide worker protection. Given that either coupling would have served the purpose, it is of no moment that defendants ***664** utilized *****420** compression couplings rather than set screw couplings as part of the assembly.

[7] Accordingly, on the appeal by defendants **1095** and Magen, tl1e order of the Appellate Division should be reversed, with costs, the motion by defendants **1095** and Magen for summary judgment dismissing the section 240(I) claims against them should be granted, and the certified question answered in the negative. The appeal) insofar as taken by Decheit, should be dismissed, without costs.4

Chief Judge LIPPMAN (dissenting).

It seems clear to me that plaintiff has established his entitlement to summa1y judgment by demonstrating that his gravity-related injury was proximately caused by the defendants' failure to provide an adequate safety device. Therefore, I dissent.

Plaintiff, an electrician, was injured in the course of repositioning a "pencil box" that served as an access point for telecommunication wires. Plaintiff was assigned this task pursuant to a "change order" intended to remedy an error committed by his employer. Specifically, upon its original installation approximately a week earlier, the pencil box had been positioned in such a way that it threatened to obstTuct part of the building infrastrncture yet to be installed.

To accomplish the task) plaintiff disconnected the box from a structure known as a "Kindorf supportt which anchored the box to the floor and the wall, and also from two sections of conduit pipe running above and below the pencil box, respectively. After the pencil box was disassembled from its supports, a considerable length of galvanized steel conduit, weighing 60-80 pounds, was left hanging above plaintiff as he knelt below to drill. The conduit was connected to another section of pipe near the ceiling by a compression coupling, which is essentially a cylindrical metal sleeve that tightens around the ends of two pipes to secure them together. Next, plaintiff drilled holes in the concrete floor in preparation for relocating the Kindorf. When he commenced the drilling, the suspended conduit came loose from its coupling and plummeted to the floor, crushing plaintiff's right thumb.

Section 240(I) of the Labor Law imposes absolute liability on celiain contractors, owners and their agents when their failure oJ.·665 to provide an adequate safety mechanism caused a worker's injmy in a gravity-related accident. Our recent precedent in this area makes it clear that, in determining whether section 240(I) applies, " 'the dispositive inquiry ... does not depend upon the precise characterization of the device employed'" *(Wi/i11ski v. 334 E. 9211d Haus. De,,. F1111d C01p.,* 18 **N.Y.3d** I, I 0, 935 N.Y.S.2d 55 l, 959 N.E.2d 488 [2011], quoting *Rumier v. New York Stock Exch., bzc.,* 13 **N.Y.3d** 599, 603, 895 N.Y.S.2d 279, 922 N.E.2d 865 [2009]). It follows that the availability of statutmy protection here should not depend on whether couplings can be characterized as safety devices under section 240(1), or whether they should be considered part of a building's permanent infrastructure.

****796** 'Rather, the single decisive question is whether plaintiffs injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential' " (id. [emphasis omitted]). Accordingly, the crucial legal questions arising from the face of this record are whether the task of repositioning the pencil box entailed an elevation-related risk

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*****421** that triggered defendants' duty lo supply adequate safety devices, and whether the failure to do so caused the accident.

Clearly, plaintiff was exposed to a gravity-related hazard within the meaning of the statute. Kneeling on the floor to drill, he was situated several feet below a 60-to- 80-pound segment of conduit pipe made of galvanized steel. The conduit was attached to the pipe above by only a compression coupling whose grip was inadequate to withstand the vibrations of drilling. "The elevation differential here involved cannot be viewed as de minimis, particularly given the weight of the object and the amount of force it was capable of generating, even over the course of a relatively shmt descent" (R111111e1; 13 **N.Y.3d** at 605, 895 N.Y.S.2d 279, 922 N.E.2d 865).

As to the question of proximate cause, the record evidence shows that the absence of an effective safety device caused plaintiffs injury. It requires little imagination to conclude that a tool capable of stabilizing the conduit pipe whether brace, clamp, coupling, or otherwise-would be precisely the sort of device contemplated by section 240(1). Without such a device, however, the pipe was insufficiently secure and plaintiff incurred injmy as a result. As the motion court aptly sununarized, "the conduit was disconnected from the Kindorfl:] support and only attached to the ceiling by a compression coupling, and because it fell, it was not secured as to give plaintiff proper protection" *(F"brizi v. 1095 Ave. of the Americas, L.L.C.,* 2011 N.Y. Slip Op. 3I529[U], *11 [Sup.Ct., N.Y. County 20ll]).

***666** By focusing myopically on whether couplings fall under the statute, the majority loses sight of defendants' burden on summaiy judgment. To prevail, it is not enough for defendants to argue that a pa1iicular alte1native device can be sensibly distinguished from those enumerated in the statute. Instead, they must demonstrate either the absence of a gravity-related risk or, where the risk posed by the elevation differential is readily apparent) a deficient causal nexus between the failure to provide a safety device and plaintift,s injury.

Defendants did raise a challenge with regard to causation in arguing that plaintiffs method of performing the work unnecessarily created the risk. According to defendants, as well as the dissent in the Appellate Division, plaintiff singlehandedly caused the accident by dismantling the pencil box prior to drilling holes in the floor. However) there was no evidence presented that this modus operandi constituted anything but standard procedure in the trade. Plaintiff made a prima facie showing that he had perfonned the same task four or five times in the course of his career and had routinely undertaken it in an identical manner. In opposition, defendants failed to raise a triable issue of fact as to whether plaintiffs own conduct was the proximate cause of the accident *(see e.g. McCal/ister v. 200 Park, L.P.,* 92 A.D.3d 927, 929, 939 N.Y.S.2d 538 [2d Depl.2012]; *Kempisty v. 246 Spring St., LLC,* 92 A.D.3d 474, 474-475, 938 N.Y.S.2d 288 [lst Dept.2012]; *cf Quattrocchi v. F.J. Sciame Cons/J: Cmp.,* 11 **N.Y.3d** 757, 759 [2008] [triable issue offaet as to whetl1er plaintiff caused the accident where he was warned not to enter the accident area]).

**797 In sum, defendants' proof failed to rebut plaintiffs prima facie showing that his injmy resulted from the absence of a safety device capable of guarding against the gravity-related risk. Accordingly, I would grant summaiy judgment to plaintiff. In reaching a contra1y result, the majority imposes an undue burden on plaintiff that serves only to frush·ate the Labor Law's salutaty pmpose of ensuring worker protection.

***422 Judges GRAFFEO, READ and SMITH concur with Judge PIGOTT; Chief Judge LIPPMAN dissents in an opinion in which Judge RIVERA concurs; Judge ABDUS-SALAAM taking no part.

On appeal by defendants **1095 Avenue** of the **Americas, L.L.C.** and J.T. Magen Construction Company, Inc., order reversed, with costs, motion by those defendants for summary judgment dismissing the Labor Law § 240(1) claim as against them ***667** granted and certified question answered in the negative. Appeal, insofar as taken by defendant Dechert, LLP, dismissed, without costs, upon the ground that it is not a party aggrieved (CPLR 5511).

All Citations

22 N.Y.3d 658, 8 N.E.3d 791, 985 N.Y.S.2d 416, 2014 N.Y. Slip Op. 01206

Footnotes

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1 Dechert did not move for summary judgment.

2 A set screw coupling has two screws on both sides that are placed into the conduit and are tightened with either a ratchet or screwdriver, thereby locking the conduit in place.

3 The Appellate Division erroneously stated that plaintiff had "requested a set screw coupling to secure the pipe to prevent the pipe from falling during the disassembly" when he had been directed to move the pencil box (98 A.D.3d at 865, 951 N.Y.S.2d 480). The record demonstrates that plaintiff requested a set screw coupling a week before the incident for a **task unrelated to the one at issue.**

4 Since Dechert did not move for summary judgment and the Appellate Division denied plaintiffs motion for summary judgment, Dechert was not aggrieved by the Appellate Division order.

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New York

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14 N.Y.3d 83, 923 N.E.2d 1120, 896 N.Y.S.2d
732, 30 IER Cases 690, 2010 N.Y. Slip Op. 01014

**1 Hugh Gallagher et al., Appellants

V

The New York Post et al., Respondents.
NYP Holdings, Inc., Third-Party Plaintiff-Respondent, v Francis A. Lee Co., Third-Party Defendant-Respondent.

Court of Appeals of New York
8
Argued January 6, 2010

Decided February 11, 2010

CITE TITLE AS: Gallagher v New York Post

SUMMARY

Appeal, by permission of tbe Appellate Division of the Supreme Court in the First Judicial Department, from an order of that Court, entered October 30, 2008. The Appellate Division order, insofar as appealed from, affirmed so much of an order of the Supreme Court, New York County (Walter B. Tolub, J.; *see* 2007 NY Slip Op 34452[U]) as had adhered, upon reargument, to its prior denial of plaintiffs' motion for summary judgment on the issue of liability on their Labor Law § 240 (I) claim. The following question was certified by the Appellate Division: "Was the order of this Court, which modified the order of the Supreme Court, properly made?"

Gallagher v New YOrk Post, 55 AD3d 488, reversed.

HEADNOTES

Labor
Safe Place to Work
Fall from Height Lack of Safety Devices

(l) Plaintiff, an ironworker who was injured while removing metal decking from the second floor of defendant's building when the blade on the power saw he was using jaimned, propelling him through an opening in the fl.om was granted summary judgment on his Labor Law § 240 (I) claim. Through the affidavits of plaintiff's foreman and another ironworker, who both asserted that the ironworkers were not provided with necessa1y safety devices, thereby corroborating plaintiffs own similar testimony, plaintiff made a prima facie showing that defendant violated Labor Law § 240 (1) by failing to furnish adequate safely devices to plaintiff. Defendant failed to raise a question of fact as to whether plaintiff knew of the availability of the safety devices and unreasonably chose not to use them. There was no evidence in the record that plaintiff !mew where to find the safety devices that defendant argued were readily available or that he was expected to use them.

Labor
Safe Place to Work
Fall from Height-Plaintiff's Actions as Sole Proximate Cause of Accident-Wealmess in Hand from Prior Injury Not Sole Proximate Cause

(2) Plaintiff, an ironworker who was injured while removing metal decking from the second floor of defendant's building when the blade on the power saw he was using jammed, propelling him through an opening in the floor, was granted summa1y judgment on his Labor Law § 240 (!) claim. Through the affidavits of plaintiffs foreman and another ironworker, who both asserted that the ironworkers were not provided with necessaiy safety devices, thereby corroborating *84 plaintiffs own similar testimony, plaintiff made a prima facic showing that defendant violated Labor Law § 240 (!) by failing to furnish adequate safety devices to plaintiff. Defendant failed to raise a question of fact as to whether the sole proximate cause of plaintiff's fall was that he prematurely returned to work following a prior accident and related surgeries to his right ha11d. Even if plaintiffs grip on the saw was not up to full strength as a result of his prior injury, such weakness in his hand would at most have contributed towards his loss of balance, and could not as a matter of law have been the sole proximate cause of his fall.

RESEARCH REFERENCES

Am Jur 2d, Employment Relationship §§ 267-··269; Am Jur 2d, Summary Judgment§§ 8, 37-39, 45--48, 58.

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Cannady-Wait 2d, Smmnary Judgment §§ 39:14, 39:153-39:155.

McKinney's, Labor Law§ 240 (!).

NY Jur 2d, Employment Relations *§§* 286--290, 303, 304, 380, 381; NY Jur 2d, Summary Judgment and Pretrial Motions to Dismiss§§ 9, 10, 16, 17, 22, 76, 79.

New York Pattern Jury Instructions---Civil) PJI 2:217.

Prosser and Keeton, Torts (5th ed) §§ 42, 80.

Siegel, NY Prac § 278.

ANNOTATION REFERENCE

See ALR Index under Labor and Employment; Occupational Safety and Health; Summaty Judgment.

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POINTS OF COUNSEL

Sacks and Sacks, LLP, New York City *(Scott N Singer* and *Kenneth Sacks* of counsel), for appellants.
I. Upon the undisputed proof that no safety devices were provided, plaintiff should have been awarded smmnary judgment under Labor Law § 240 (!). *(Koenig v Patrick Const,: Corp.,* 298 NY 3 l3; *Bland v kfanocherian,* 66 NY2d 452; *Rocovich v Consolidated Edison Co.,* 78 NY2d 509; *Ross v Curtis-Pa/mer Hydro-Elec. Co.,* 81 NY2d 494; *Zimmer v Chemung County Pe,forndng Arts,* 65 NY2d 513; *Brant v Republic Steel Cmp.,* 91 AD2d 841; *Phillips* ı' *Flintkote Co., Glens Falls Portland Cement Div.,* 89 AD2d 724; ***85** *Rea " Elia Bldg. Co.,* 79 AD2d 1102; *Duda v Rouse Cons/I: Cmp.,* 32 NY2d 405; *Joyce v Rumsey Realty Cmp.,* 17 NY2d 118.) II. Plaintiff was not the sole proximate cause of his accident. *(S.J Cape/in Assoc. v Globe Mfg. Cmp.,* 34 NY2d 338; *Cahill* ı' *Ji'iborough Bridge & Tunnel Au//1.,* 4 NY3d 35.) III. Defendants' failure to provide lifelines, stanchions or other anchorage points for safety belts provides an additional basis for liability under Labor Law § 240 (l). *(Conway v New York State Teachers' Reth·e111e11/ Sys.,* 141 AD2d 957; *Zimmer v Chemung County Pe1fonning Arts,* 65 NY2d 513; *Bland v Manocherian,* 66 NY2d 452; *Goldthwait v State of New York,* 120 AD2d 969; *Desrosiers v Barry, Bette & Led Duke, Inc.,* 189 AD2d 947; *Hayes* ı' *Eastman Kodak Co.,* 143 AD2d 510; *Nimimvski v Vomado Realty nus/ Co.,* 29 AD3d 762; *Mig!ionico v Hovis Lend Lease, Inc.,* 47 AD3d 561.)
Jones Hirsch Connors & Bull P.C., New York City *(Richard* C. *Imbrogno* and *Mark Wellman* of counsel)i for respondents and third-party plaintiff-respondent.
The Appellate Division correctly affirmed the denial of plaintiffs' motion for summaiy judgment on their Labor Law § 240 (I) claim beeanse triable issues of fact exist. *(Blake v Neighborhood Haus. Servs. of N.* l'. *City,* I NY3d 280; *Zeitner v Herbmax Sharon Assoc.,* 194 AD2d 414; *Ado11tgome1y v Federal Express Co,p.,* 4 NY3d 805; *Sillman v Jlventieth Centwy-Fox Film C01p.,* 3 NY2d 395; *Sommer v Federal Signal C01p.,* 79 NY2d 540; *Makaj v Metmpolitan Ti'ansp. Au//1.,* 18 AD3d 625; *Land1J1 v Di Sarro Consh: Co.,* 149 AD2d 859, 74 NY2d 940; *Miller" Long Is. Light.* Co., I 66 AD2d 564; *Quattmcchi* ı' *F.J. Sciame Const,: Co,p.,* 44 AD3d 377, 11 NY3d 757; *Miglionico v Bovis Lend Lease, Inc.,* 47 AD3d 561.)
Rafter & Associates, PLLC, New York City *(Howmd K. Fishman* of counsel), for third-party defendant-respondent.
Plaintiffs' motion for summmy judgment was correctly denied because there are questions of fact whether safety devices were available to Hugh Gallagher at the job site. *(Cahill v Jl'ibomugh Bridge & 7lmne! Auth..* 4 NY3d 35; *Robinson v East Med.* C/1:, *LP.* 6 NY3d 550; *Mo11tgome1J' v Federal Express Co1)1.,* 4 NY3d 805; *Bradley v Ibex Cons/J: LLC,* 22 AD3d 380.)

OPINION OF THE COURT

Pigott, J.

On June 28, 2004, plaintiff Hugh Gallagher, an ironworker, was assigned to remove a section of metal decking from the ***86** second floor of a building in the Bronx owned by defendant NYP Holdings, Inc. (NYP), in preparation for the installation of new flooring. He **2 was pminered with another ironworker, Jim Gaffney; the two men worked under the direction of foreman Joe Nover. Gallagher was cutting the metal with a two-handled, powered saw, enlarging an opening created by other workers. According to Gallagher, he was holding both handles of the saw when its blade jmmned, propelling him forward so that he fell through the uncovered opening. Gallagher landed on a temporary floor situated between the first and second levels, sustaining injuries.

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Gallagher and his wife commenced this personal injmy action against NYP, alleging, among other things, violations of Labor Law§§ 200, 240 (1) and§ 241 (6). Relevant to this appeal, plaintiffs allege that NYP failed to provide Gallagher safety devices to prevent a fall from an elevated work site, in violation of Labor Law § 240 (1).

At his deposition, the assistant project manager at the NYP work site, Jonathan Schreck, testified that "safety harnesses with shock-absorbing lanyards" and "retracting lanyards that we refer to as yo-yos" were available for use at the project site on the date of the accident, but he could not say whether any such safety devices were in the area from which Gallagher fell. Schreck also testified that, at the time of the accident, there was a "standing order," issued by project manager Mark Piazza to the project foremen, that the ironworkers should "have a harness on and be tied off." However, he could not recall whether these instructions had been given to the ironworkers.

Schreck, who had taken Gallagher to the hospital after the accident, testified that Gallagher had given him the impression that he had been holding the saw with only one hand and that he had fallen as he reached to grab the jammed saw with his other hand. Hestated that Gallagher had told him that he had not been cleared by his doctor to return to work, following a 2002 accident and related surgeries to his right hand. Gallagher himself stated at his deposition that he could not complete a grip with his right hand, because the tip of his little finger was missing. But he insisted that he had been cleared to return to work by the date of his accident.

Plaintiffs moved for partial sununary judgment on their Labor Law § 240 (1) claim, pointing to an affidavit by Gaffuey stating *87 that "there were no safety lines, lifelines or stanchions in the work area, and [he and Gallagher] were not provided with any safety beltsJ harnesses or yo-yos in order to tie off." NYP cross-moved for summary judgment dismissing the complaint in its entirety.2 NYP relied in large part on Schreck's deposition testimony that safety devices were available for use at the project site, and concerning the "standing order." NYP also **3 argued that Gallagher had not been medically cleared to return to work following his 2002 accident, and that his premature return was the sole proximate cause of his injuries.

In further support of their motion, plaintiffs introduced an affidavit signed by Nover, Gallagher's foreman, who, according to Schreck, would have been the person responsible for relaying safety instructions to the ironworkers. Nover stated that Gallagher had not been "provided with a safety harness or lifeline, nor were any stanchions or safety cables in the accident area at the time of the accident.n

Supreme Court denied plaintiffs' summary judgment motion (2007 NY Slip Op 34452[U]).[3] Initially it did soon the ground that Schreck 's deposition testimony raised a question of fact as to whether safety devices had been provided to Gallagher. On reargument, Supreme Court aclmowledged that it had overlooked Novees affidavit and decided that no triable issue of fact existed as to whether Gallagher had been provided with appropriate safety devices. Nevertheless, Supreme Court ruled that the summmy judgment motion should be denied apparently on the basis that Gallagher may have returned to work prematm'dy, and that the weakness of his grip on the saw may have been the sole proximate cause of his accident.

The Appellate Division agreed with Supreme Court's initial rationale for denying plaintiffs summary judgment, holding that Schrcck's testimony was sufficient to raise issues of fact as to whether Gallagher had been provided with adequate safety devices and instructed to use them, but had declined to do so (55 AD3d 488 [2008]). Two Justices dissented. The Appellate Division granted plaintiffs leave to appeal, and we now reverse.

***88** Through the affidavits of Gaffney and Nover, plaintiffs made a prima facie showing that NYP violated Labor Law § 240 (1) by failing to furnish adequate safely devices to Gallagher. Both men asserted that the ironworkers were not provided with necessary safety devices, cmToborating Gallagher's own similar testimony. The burden then shifted to NYP to raise a question of fact as to whether there was a violation of Labor Law§ 240 (1). NYP argues that it met this burden through evidence that adequate safety devices were provided to Gallagher or, in the alternative, evidence that the sole proximate cause of Gallagher's fall was that he premahirely returned to work.

NYP relies on our decision in *iYJontgomei J v Federal Etpress Corp.* (4 NY3d 805 [2005]). In *Mo11tgome1J',* we held that a worker who injured himself when he jumped from an elevator motor room to a roof, rather than use a "readily available" ladder, was not entitled to recover under Labor Law § 240 (!). Similarly, in **4 *Robi11so11 v East Med. Ct,:, LP* (6 NY3d 550, 553 [2006]), we held that a plumber who lost his balance and injured himself, when he used a six-foot ladder to install pipes at a height of 12 to 13 feet from the floor,

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could not recover under section 240 (1), because he knew that there were eight-foot ladders on the job site and exactly where they could be found. Both cases stand for the same proposition. Liability under section 240 (1) docs not attach when the safety devices that plaintiff alleges were absent were readily available at the work site, albeit not in the immediate vicinity of the accident., and plaintiff knew he was expected to use them but for no good reason chose not to do so, causing an accident. In such cases, plaintiffs own negligence is the sole proximate cause of his injury *(see Cahill v lhborough Bridge & nnmel Ant/1.,* 4 NY3d 35, 39-40 [2004]).

(I) This is not such a case. There is no evidence in the record that Gallagher knew where to find the safety devices that NYP argues were readily available or that he was expected to use them. Although Schreck testified that appropriate safety devices were available at the project site on the date of the accident, nowhere in his testimony did Schreck state that Gallagher had been told to use such safety devices. Sclu·eck referred to a "standing order" issued to the project foremen, directing workers to "have a harness on and be tied off" but could not say whether the order had been conveyed to Ule workers. Moreover, the affidavit of Gallagher's foreman, Nover, who was not deposed, docs not support NYP's claim that Gallagher was told about safety devices. Nover stated that Gallagher had not been ***89** provided with the requisite safety devices, a proposition that is consistent either with Gallagher's ignorance of the availability of safety devices or with his knowledge thereof. Even viewed in the light most favorable to NYP (as it must be when we consider plaintiffs' motion for summaiy judgment), the evidence does not raise a question of fact that Gallagher knew of the availability of the safety devices and unreasonably chose not to use them.

(2) Finally, even if Gallagher's grip on the saw was not up to full strength as a result of his prior injmy, such weakness in his hand would at most have contributed towards his loss of balance, and cannot as a matter of law have been the sole proximate cause of his fall from the second floor to the temporary floor.

Accordingly, the order of the Appellate Division, insofar as appealed from, should be reversed, with costs, plaintiffs' motion for summary judgment as to liability on their Labor Law § 240 (1) claim granted, and the certified question answered in the negative.

Chief Judge Lippman and Judges Ciparick, Graffeo, Read, Smith and Jones concur.

Order, insofar as appealed from, reversed, etc. H-5

FOOTNOTES

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Footnotes

1 Plaintiffs sued NYP as "The New York Post and NYP Holdings. Inc."

2 NYP also commenced a third-party action against Gallagher's employer, Francis A. Lee Co.; that action is not before this Court.

3 S preme Court granted NYP's cross motion to the extent of dismissing the Labor Law§ 200 claim but, on reargument, reinstated the claim. The Appellate Division dismissed the section 200 claim. Plaintiffs do not appeal this part of the Appellate Division order.

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Paul Devlin, Esq. – Gentile & Tambasco

Paul Devlin is an associate at Gentile & Tambasco. He has more than a decade of experience litigating personal injury cases from inception through trial. Paul has taken numerous jury verdicts in both Nassau County and Suffolk County. He has served as an officer for the Suffolk Academy of Law and has also lectured for the Academy. He frequently authors articles for the publications of the Suffolk County Bar Association (SCBA). Paul has held several leadership positions at the SCBA including a seat on the Board of Directors; co-chair of the SCBA's Supreme Court Committee; co-chair of the Membership Services Committee; and co-chair of the New Lawyers Committee.

Paul is an active-duty Army veteran. He was Honorably discharged from active duty in 2004 with the rank of Sergeant. He participated in the Army's World Class Athlete Program (WCAP) in the sport of Greco-Roman Wrestling. While in WCAP, he was also on the USA Wrestling National Team and a resident athlete at the United States Olympic Training Center in Colorado Springs, CO. He competed internationally and ended his wrestling career with a bronze medal at the 2004 US Olympic Team Trials.

Paul graduated from Montclair State University, Magna Cum Laude. He attended Seton Hall University where he eared a Juris Doctorate in 2010. He is admitted to practice in New York and has an inactive license to practice in New Jersey.

AUTOMOBILE NEGLIGENCE UPDATE

PRESENTED BY PAUL DEVLIN, ESQ.

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EMERGENCY DOCTRINE & REAR END COLLISIONS

1. SUN GLARE DID NOT CREATE AN EMERGENCY FOR THE BUS DRIVER WHO STRUCK PLAINTIFF PEDESTRIAN (SECOND DEPT).

The Second Department, reversing Supreme Court, noted that the defendant bus driver and bus company did not raise a question of fact on the applicability of the emergency doctrine.. Defendants alleged sun glare prevented the driver from seeing plaintiff pedestrian in the crosswalk:

… [T]he defendants failed to raise a triable issue of fact as to whether Ruff's foreseeable encounter with sun glare, while driving on a route with which he was familiar, was an emergency not of his own making, which left him with only seconds to react and virtually no opportunity to avoid a collision with the plaintiff … . Morales-Rodriguez v MTA Bus Co., 2022 NY Slip Op 01781, Second Dept 3-16-22

Practice Point: Here the bus driver alleged sun glare created an emergency which should excuse his striking plaintiff pedestrian. The allegation did not raise a triable question of fact.

MARCH 16, 2022

2. QUESTIONS OF FACT WHETHER THE DEFENDANT BUS DRIVER SAW WHAT SHOULD HAVE BEEN SEEN AND WHETHER THE EMERGENCY DOCTRINE APPLIED TO THIS REAR-END COLLISION CASE; THE BUS WAS BEHIND PLAINTIFF'S SCOOTER AND BOTH THE BUS AND THE SCOOTER APPARENTLY CHANGED LANES AT THE SAME TIME (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined there were questions of fact whether defendant bus driver (Payne) failed to see what should have been seen and whether the emergence doctrine applied to this rear-end collision case. Plaintiff was on a motor scooter in front of the bus and both the bus and the scooter changed lanes at approximate the same time:

… [E]ven if Payne had the right of way, she testified at her deposition that she did not see the plaintiff on his motor scooter until "seconds" before the accident. Since the video recording taken from the bus seems to show that the bus was following the plaintiff's motor scooter for approximately two blocks prior to the accident, Payne's testimony raised a triable issue of fact as to whether Payne failed to see what was there to be seen through the proper use of her senses, and thus whether she exercised reasonable care to avoid the accident and whether her actions were a proximate cause of the accident … . …

… [T]he evidence failed to eliminate the existence of triable issues of fact as to whether Payne's actions contributed to or caused the emergency, in light of, inter alia, her failure to observe the motor scooter earlier … . Fergile v Payne, 2022 NY Slip Op 01008, Second Dept 2-16-22

FEBRUARY 16, 2022

3. WILLIAMS, THE DRIVER OF THE VEHICLE IN WHICH PLAINTIFF WAS A PASSENGER, WAS NOT NEGLIGENT IN SLOWING DOWN FOR A WORK CREW AHEAD; THE WILLIAMS CAR WAS STRUCK FROM BEHIND BY A POLICE CAR PURSUING ANOTHER VEHICLE; PLAINTIFF WAS ENTITLED TO SUMMARY JUDGMENT (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff was entitled to summary judgment in this traffic accident case. A police officer pursuing another vehicle rear-ended the vehicle in which plaintiff was a passenger as the driver (Williams) was slowing down for a work crew:

Williams's evidence in support of his motion demonstrated prima facie that he was operating his vehicle in a lawful, reasonable manner given the circumstances on the expressway at the time, and that he was not otherwise culpable in causing the police car to strike the rear of his vehicle. The burden having shifted, plaintiff and the City defendants each failed to offer evidence as would raise a factual issue regarding Williams's comparable negligence in the cause of the accident … . The City defendants failed to proffer a nonnegligent explanation for rear-ending Williams's vehicle, and the claim that the rear-ended vehicle stopped short, standing alone, is insufficient as a nonnegligent explanation for an accident … . Regardless of whether the actions of the police in this incident are to be considered under the reckless standard set forth in Vehicle and Traffic Law § 1104, the nonliability of Williams, given the unrefuted evidence of his nonculpable role in this accident, remains unchanged … . Grant v City of New York, 2022 NY Slip Op 01121, First Dept 2-22-22

FEBRUARY 22, 2022

4. DEFENDANT ALLEGED HE DID NOT SEE THE PEDESTRIAN HE STRUCK UNTIL AFTER THE CONTACT OCCURRED; DEFENDANT'S EMERGENCY-DOCTRINE DEFENSE SHOULD HAVE BEEN STRUCK (FIRST DEPT).

The First Department, reversing (modifying Supreme Court) determined defendant's allegations did not support the "emergency" defense in this vehicle-pedestrian accident case:

Defendant maintains that he did not see plaintiff before she was struck by his vehicle and that she was not in the crosswalk when he began turning onto the avenue; it was only after plaintiff was struck that defendant observed her in the crosswalk. "Without having perceived or reacted to any emergency, the defendant may not rely on the emergency doctrine to excuse [his] conduct" … . De Diaz v Klausner, 2021 NY Slip Op 05624, First Dept 10-14-21

OCTOBER 14, 2021

TURNING VEHICLES

1. THE RIGHT LANE WAS FOR RIGHT TURNS ONLY; THE MIDDLE LANE WAS FOR EITHER GOING STRAIGHT OR TURNING RIGHT; HERE THE DRIVER IN THE FAR RIGHT LANE DID NOT TURN RIGHT AND STRUCK THE CAR IN THE MIDDLE LANE WHICH WAS MAKING A RIGHT TURN; THE DRIVER IN THE MIDDLE LANE WAS ENTITLED TO SUMMARY JUDGMENT DISMISSING THE COMPLAINT (SECOND DEPT).

The Second Department, reversing Supreme Court in this traffic accident case, determined plaintiff's motion for summary judgment against defendant Rubio should not have been granted and defendant

Rubio's motion for summary judgment should have been granted. Plaintiff was a passenger in a taxi driven by defendant Muy-Angamarca. Muy-Angamarca was in the far right lane, which was for right turns only. Rubio was in the middle lane which could be used to go straight or turn right. When Rubio attempted the right turn, Muy-Angamarco continued straight and struck Rubio's car:

… [T]he Rubio defendants established their prima facie entitlement to judgment as a matter of law by demonstrating that the sole proximate cause of the accident was Muy-Angamarca's vehicle continuing straight through the intersection in disregard of a traffic sign directing that his lane was for right turns only … . Based upon Muy-Angamarca's disregard of the traffic sign, he was in violation of the Vehicle and Traffic Law, and thus, he was negligent as a matter of law (see Vehicle and Traffic Law § 1110[a] …). Rubio was entitled to assume that Muy-Angamarca would obey the traffic sign requiring Muy-Angamarca to turn right … . Indeed, the plaintiff testified at his deposition that he observed that Rubio had signaled before making a legal right turn from the middle lane, that Muy-Angamarca "started to accelerate" toward the intersection while Rubio's vehicle was turning, and that he did not believe Rubio was at fault in the happening of the accident. Ellsworth v Rubio, 2022 NY Slip Op 02781, Second Dept 4-27-22

APRIL 27, 2022

2. ALTHOUGH PLAINTIFF WAS STRUCK IN THE ON-COMING LANE WHILE ATTEMPTING A LEFT TURN IN AN INTERSECTION, THERE WERE QUESTIONS OF FACT WHETHER DEFENDANT SHOULD HAVE SEEN THE PLAINTIFF (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the defendant's motion for summary judgment in this intersection traffic accident case should not have been granted. Although plaintiff was making a left turn when he was struck by defendant in the on-coming lane, there was a question of fact whether defendant should have seen plaintiff. Plaintiff was making the turn after a stopped driver in the on-coming law gestured to him:

… [A]lthough the defendant submitted evidence that the plaintiff failed to yield the right-of-way when turning left in violation of Vehicle & Traffic Law § 1141, the defendant failed to establish, prima facie, that the plaintiff's failure to yield was the sole proximate cause of the collision and that the defendant was free from fault … . While testifying, the defendant admitted that he saw nothing out of the ordinary prior to the collision, that he could not recall if he observed the plaintiff's vehicle, and that he only realized that there was a collision from hearing the sound. However, the defendant also testified that he was only driving at approximately 25 miles per hour and was looking straight ahead on a sunny afternoon with no obstructions to his view … . Moreover, the defendant acknowledged that he did not know if his vehicle or the plaintiff's vehicle entered the intersection first. Thus, the defendant's evidentiary submissions failed to eliminate triable issues of fact as to whether the plaintiff's vehicle was already in the intersection as the defendant approached and whether the defendant should have observed the plaintiff's vehicle making a left turn in time to take evasive action to avoid the accident … . Blake v Francis, 2022 NY Slip Op 02974, Second Dept 5-4-22

Practice Point: Although plaintiff may have violated the Vehicle and Traffic Law by making a left turn in the path of defendant's car, there can be more than one proximate cause of an accident. Here there was a question of fact whether defendant should have seen the plaintiff as he attempted the turn. MAY 04, 2022

3. DEFENDANT ATTEMPTED A LEFT TURN IN VIOLATION OF VEHICLE AND TRAFFIC LAW 1141; PLANTIFF'S MOTION FOR SUMMARY JUDGMENT IN THIS INTERSECTION TRAFFIC-ACCIDENT CASE SHOULD HAVE BEEN GRANTED (FIRST DEPT).

The Second Department, reversing (modifying) Supreme Court, determined plaintiff's motion for summary judgment in this intersection traffic accident case should have been granted. Plaintiff was a passenger in a taxi cab when the cab collided with the Katz-defendants' vehicle which was making a left turn in front of the cab:

"Pursuant to Vehicle and Traffic Law § 1141, '[t]he operator of a vehicle intending to turn left within an intersection must yield the right-of-way to any oncoming vehicle that is within the intersection or so close to it as to constitute an immediate hazard'" … . "A violation of this statute constitutes negligence per se" … . Here, the evidence submitted by the plaintiff in support of her motion, which included the deposition testimony of Gabriel Katz as to the happening of the accident, established, prima facie, that Gabriel Katz was negligent in making a left turn when it was not safe for him to do so in violation of Vehicle and Traffic Law §§ 1141 and 1163, and that his negligence was a proximate cause of the collision … . While there are some discrepancies between the deposition testimony of the plaintiff and Gabriel Katz as to the relative position of the vehicles at the time of the impact, even under Gabriel Katz's account, he was "negligent in attempting to make a left turn when the turn could not be made with reasonable safety" … . In opposition, the Katz defendants failed to raise a triable issue of fact. Contrary to their contention, the evidence did not support the possible applicability of the emergency doctrine under the circumstances … . Lindo v Katz, 2022 NY Slip Op 03379, Second Dept 5-25-22

Practice Point: A left turn in violation of Vehicle and Traffic Law 1141 is negligence per se.

MAY 25, 2022

4. THE JURY SHOULD HAVE BEEN INSTRUCTED ON THE VEHICLE AND TRAFFIC LAW PROVISION WHICH REQUIRES SIGNALING FOR 100 FEET BEFORE MAKING A TURN, EVEN THOUGH THE TRUCK WHICH MADE THE TURN WAS STOPPED AT A TRAFFIC LIGHT; DEFENSE VERDICT IN THIS TRUCK-BICYCLE ACCIDENT CASE REVERSED (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Barros, overruling a City Court decision, reversing the jury verdict in this truck-bicycle traffic accident case, determined the jury should have been instructed on the Vehicle and Traffic Law provision requiring that a turn signal be activated for 100 feet before turning. The truck was at a stop light and plaintiff testified the truck's turn signal was not on when she pulled up to the stop light next to the truck. When she started riding straight through the intersection, the truck allegedly made a right turn and ran over her. The driver (Murphy) testified he put his signal on and then made the turn. The trial court instructed the jury on the Vehicle and Traffic Law provision which applies to parked cars and which does not have the "100-foot" signaling requirement. The Second Department found that the truck was not "parked" within the meaning of that provision:

Vehicle and Traffic Law § 1163(b) provides that "[a] signal of intention to turn right or left when required shall be given continuously during not less than the last one hundred feet traveled by the vehicle before turning." Under Vehicle and Traffic § 1163(a), Murphy was required to signal his intention to turn right at the subject intersection. Thus, since a signal of intention to turn was required, the clear and unambiguous words used in Vehicle and Traffic Law § 1163(b) also required Murphy to give such signal

“continuously during not less than the last one hundred feet” that he traveled before making the turn. The provision makes no exception for vehicles that are stopped at a red traffic light … .

… Vehicle and Traffic Law § 1163(d), which applies … to vehicles moving from a parked position, and which does not require a vehicle to signal its turn 100 feet before making it, is inapplicable. Murphy’s truck was not parked within the meaning of “park or parking” under Vehicle and Traffic Law § 129. Rather, it was stopped at a red light … . To the extent that People v Brandt (60 Misc 3d 956, 961 [Poughkeepsie City Ct]) holds otherwise, we overrule it.

The precise and specific duty established in Vehicle and Traffic Law § 1163(b) bore directly on the facts to which the parties testified, and, therefore, the Supreme Court erred in refusing to give that charge … . The statute establishes a standard of care, the unexcused violation of which is negligence per se … . Moore v City of New York, 2021 NY Slip Op 04483, Second Dept 7-21-21

JULY 21, 2021

PERMISSIVE USE

1. DEFENDANT EMPLOYEE DID NOT HAVE HIS EMPLOYER’S PERMISSION TO DRIVE THE TRUCK INVOLVED IN THE ACCIDENT; THEREFORE THE EMPLOYER’S INSURER PROPERLY DISCLAIMED COVERAGE (THIRD DEPT).

The Third Department, reversing Supreme Court, determined the driver, Nichols, did have the permission of his employer (Monro) to drive the truck involved in the accident. Therefore Monro’s insurer properly disclaimed coverage:

Under Vehicle and Traffic Law § 388 (1), the negligence of the operator of a motor vehicle may be imputed to the owner of the vehicle who “operat[ed] the same with the permission, express or implied, of such owner”… . The statute “creates a presumption that the vehicle is being operated with the owner’s consent, but the presumption may be rebutted by substantial evidence showing that the operation was without permission”… .

We find that respondents rebutted the presumption of permissive use. Michael Kio, Monro’s store manager and Nichols’ superior, testified that he advised Nichols on more than one occasion of the company’s longstanding policy proscribing an employee’s personal use of company vehicles, including the truck. Nichols acknowledged to Kio that he was aware and understood this policy and that he did not have permission to operate the truck for personal use or use outside of business hours, and that it was to be used for store business only. As Nichols stated in his written submission to Supreme Court, “I knew I was not supposed to be driving the company truck off company time.” The statements of Kio and Nichols regarding company policy and their understanding of that policy proscribing personal use stand uncontradicted. “Uncontradicted statements by both the vehicle’s owner and its driver that the driver was operating the vehicle without the owner’s permission will constitute substantial evidence that rebuts the presumption” … . Matter of Progressive Specialty Ins. Co. (Travelers Prop. Cas. Co. of Am.), 2021 NY Slip Op 07598, Third Dept 12-30-21

DECEMBER 30, 2021

ALTERNATE JUROR

1. WHEN SUBSTITUTING AN ALTERNATE JUROR AFTER DELIBERATIONS HAVE BEGUN, THE JURY MUST BE INSTRUCTED TO START THE DELIBERATIONS OVER AND DISREGARD THE PRIOR DELIBERATIONS; THE OVER $14 MILLION PLAINTIFF'S VERDICT IN THIS TRAFFIC ACCIDENT CASE SHOULD HAVE BEEN SET ASIDE (SECOND DEPT).

The Second Department, reversing the over $14 million judgment and ordering a new trial on damages, in a full-fledged opinion by Justice Barros, determined defendants' motion to set aside the verdict in this traffic accident case should have been granted. An alternate juror was substituted after deliberations began. The jury should have been instructed to begin deliberations anew:

… [W]e address whether the 2013 amendments to CPLR 4106, which changed the statute to allow trial courts to substitute a regular juror with an alternate juror even after deliberations have begun, may be reconciled with the constitutional right to a trial by a six-member jury wherein each juror deliberates on all issues (see NY Const, art I, § 2 …). We hold that to reconcile CPLR 4106 with the constitutional and statutory requirements for a civil jury verdict, the trial court must, upon substituting an alternate juror in place of a regular juror after deliberations have begun, provide an instruction to the jury directing them, inter alia, to restart their deliberations from the beginning with the substituted juror and disregard and set aside all prior deliberations. Under the circumstances of this case, the Supreme Court's failure to give that instruction resulted in an invalid verdict which, among other things, deprived the defendants of their request to poll each of the jurors whose votes were counted as part of the verdict … , and their right to "a process in which each juror deliberates on all issues and attempts to influence with his or her individual judgment and persuasion the reasoning of the other five" … . Caldwell v New York City Tr. Auth., 2021 NY Slip Op 07537, Second Dept 12-29-21

DECEMBER 29, 2021

SET ASIDE VERDICT

1. PLAINTIFF HAD NO MEMORY OF EVENTS BEYOND WALKING TOWARD THE BUS AT A BUS STOP; SHE SUFFERED A CRUSHED FOOT; THE MOTION TO SET ASIDE THE PLAINTIFF'S VERDICT SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the motion to set aside the plaintiff's verdict in this pedestrian-bus accident case should have been granted. Plaintiff had no memory of the incident beyond walking a couple of feet toward the bus at a bus stop. She suffered a crushed foot. But there was simply no evidence of negligence on the part of the bus driver:

"A motion pursuant to CPLR 4404(a) to set aside a jury verdict and for judgment as [*2]a matter of law will be granted where there is no valid line of reasoning and permissible inferences

which could possibly lead rational persons to the conclusions reached by the jury on the basis of the evidence presented at trial" … . In determining such a motion, a court must accept the plaintiff's evidence as true and accord the plaintiff the benefit of every favorable inference which can reasonably be drawn from the evidence presented at trial … . However, "[a] jury verdict must be based on more than mere speculation or guesswork" …

Here, there was no rational process by which the jury could find in favor of the plaintiff and against the defendants on the issue of liability. Even if the circumstantial evidence sufficiently supported a conclusion that the plaintiff was injured due to an impact with a bus, the mere fact that the plaintiff was struck by a bus did not prove the defendants' negligence … . In addition to establishing the fact of the accident, it was the plaintiff's burden to demonstrate what actually happened at the time of the accident so as to enable the jury to find that the defendants were negligent and that their negligence was a proximate cause of the accident … . Kirwan v New York City Tr. Auth., 2021 NY Slip Op 06350, Second Dept 11-17-21

NOVEMBER 17, 2021

NEGLIGENCE STANDARD

1. PLAINTIFF'S DECEDENT WAS KILLED BY A DRIVER WHO WAS BEING PURSUED BY THE POLICE; THE POLICE DEPARTMENT'S INTERNAL RULES IMPOSED A HIGHER STANDARD OF CARE FOR POLICE-CHASES THAN THE VEHICLE AND TRAFFIC LAW; THE JURY SHOULD HAVE BEEN TOLD THE INTERNAL RULES COULD BE CONSIDERED ONLY AS SOME EVIDENCE OF NEGLIGENCE; PLAINTIFF'S JUDGMENT REVERSED AND NEW TRIAL ORDERED (SECOND DEPT).

The Second Department, reversing the plaintiff's judgment after trial and ordering a new trial in this traffic accident case, determined the defendant police department's internal police-chase rules should not have been admitted in evidence without a limiting instruction explaining the rules could be considered as some evidence of negligence. The internal rules imposed a higher standard of care for police-chases than the reckless-disregard standard imposed by the Vehicle and Traffic Law. Plaintiff's decedent was killed by a driver who was being pursued by the police. The jury found both the driver and the police negligent:

The Suffolk County defendants are correct that the Supreme Court erred in admitting into evidence, without any limiting instruction, the Suffolk County Police Department Rules and Procedures on vehicular pursuits. An organization's internal rules or manuals, "to the extent they impose a higher standard of care than is imposed by law, are inadmissible to establish" a violation of the standard of care … .

Here, the rules and regulations at issue imposed a higher standard of care than the reckless disregard standard imposed by Vehicle and Traffic Law § 1104, which "'qualifiedly exempts drivers of emergency vehicles from certain traffic laws when they are involved in an emergency operation, and precludes the imposition of liability for otherwise privileged conduct except

where the driver acted in reckless disregard for the safety of others'" … . Thus, we conclude that the Supreme Court committed reversible error in admitting the internal rules without providing a limiting instruction that the rules could be considered only as some evidence of recklessness along with other factors … . Foster v Suffolk County Police Dept., 2021 NY Slip Op 05956, Second Dept 11-3-21

NOVEMBER 03, 2021

VICARIOUS LIABILITY

1. DEFENDANT CAR DEALERSHIP OWNED THE CAR IN WHICH PLAINTIFF, ITS SALESMAN, WAS INJURED DURING A TEST DRIVE; THE DEALERSHIP, AS PLAINTIFF'S EMPLOYER, IS IMMUNE FROM SUIT UNDER THE WORKERS' COMPENSATION LAW AND IS NOT VICARIOUSLY LIABLE AS THE OWNER OF THE CAR UNDER THE VEHICLE AND TRAFFIC LAW (FOURTH DEPT).

The Fourth Department, reversing (modifying) Supreme Court, determined defendant Paddock Chevrolet was immune from suit by its employee in this traffic accident case. Plaintiff, a salesman for Paddock, was a passenger in a car owned by Paddock which was being test-driven at the time of the accident. The court noted that the Workers' Compensation Law protected Paddock from vicarious liability as the owner of the car pursuant to the Vehicle and Traffic Law:

Workers' Compensation Law § 11 provides that "[t]he liability of an employer prescribed by [section 10] shall be exclusive and in place of any other liability whatsoever, to such employee, . . . or any person otherwise entitled to recover damages, contribution or indemnity, at common law or otherwise, on account of such injury or death or liability arising therefrom . . ." We thus agree with Paddock that plaintiff's claims against it are barred.

Paddock correctly contends that New York has rejected the "dual capacity" doctrine … , rendering it irrelevant whether the amended complaint and cross claims asserted against Paddock were based on its status as plaintiff's employer or its status as the owner of the vehicle who is vicariously liable for the negligence of a nonemployee driver under Vehicle and Traffic Law … . Mansour v Paddock Chevrolet, Inc., 2021 NY Slip Op 05190, Fourth Dept 10-1-21

OCTOBER 01, 2021

CROSSING GUARD

1. PLAINTIFF WAS STRUCK AFTER DEFENDANT CROSSING GUARD MOTIONED FOR HIM TO CROSS; THE CROSSING GUARD'S MOTION FOR SUMMARY JUDGMENT PROPERLY GRANTED; THE DISSENT WOULD HAVE DENIED THE MOTION (SECOND DEPT).

The Second Department, over a dissent, affirmed the grant of the crossing guard's (Gandolfo's) and the county's motion for summary judgment in this pedestrian-vehicle accident case. Defendant Gandolfo had assumed her position in the crosswalk and motioned for infant

plaintiff to cross the road when plaintiff was struck by a car driven by Upton. The dissent argued there was some evidence that Gandolfo may have been negligent:

Vehicle and Traffic Law § 1102 provides that "[n]o person shall fail or refuse to comply with any lawful order or direction of any police officer or flagperson or other person duly empowered to regulate traffic." Here, the County defendants … [submitted] transcripts of the deposition testimony of Gandolfo, Upton, and an eyewitness to the accident, which demonstrated that Upton's actions were the sole proximate cause of the accident. Gandolfo testified that, upon seeing the infant at the southern corner of the intersection from her post on the northern corner, she entered the crosswalk, and, upon reaching the middle, raised her stop sign toward traffic traveling east on Montauk Highway, and her gloved hand toward traffic traveling west, checked in both directions two times for approaching vehicles, and seeing none, nodded to the infant to enter the crosswalk. Gandolfo further testified that she heard Upton's vehicle, which was traveling east on Montauk Highway, before she saw it, and that, despite Gandolfo's presence in the crosswalk, Upton failed to stop her vehicle, and struck the infant as he had almost reached the middle of the crosswalk. The eyewitness testified that, after dropping her child off at the high school, she was waiting for the infant to walk through the crosswalk before making a right turn onto Montauk Highway, and the crossing guard, dressed in a crossing guard uniform, was in the middle of the crosswalk holding a stop sign, when the infant was struck as he approached the middle of the crosswalk. During her deposition, Upton, who frequently traveled the route where the accident occurred, testified that, prior to striking the infant, she saw Gandolfo in the road, holding up her stop sign, but did not see the infant until after her vehicle struck him. Christopher W. v County of Suffolk, 2021 NY Slip Op 04922, Second Dept 9-1-21

SEPTEMBER 01, 2021

SUMMARY JUDGMENT LIABILITY

1. DEFENDANT DRIVER'S MOTION FOR SUMMARY JUDGMENT IN THIS PEDESTRIAN-ACCIDENT CASE SHOULD NOT HAVE BEEN GRANTED; PLAINTIFF'S EIGHT-YEAR-OLD SON WAS MORE THAN HALFWAY ACROSS THE STREET WHEN STRUCK (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant driver's motion for summary judgment in this pedestrian accident cause should not have been granted. Plaintiff's eight-year-old son was struck by defendant and there was evidence the child was more than halfway across the road at the time he was struck:

… [T]he evidence submitted by the defendant in support of her motion, including a transcript of her own deposition testimony, failed to eliminate triable issues of fact as to whether she was free from fault in the happening of the accident and, if not free from fault, whether the child's purported negligence was the sole proximate cause of the accident … . The evidence the defendant submitted indicated that the front passenger side of her vehicle came into contact

with the child who, approaching from the defendant's left, was more than halfway across the winding and curved roadway prior to impact (see Vehicle and Traffic Law §§ 1146[a], 1180[a], [e] …). Sage v Taylor, 2021 NY Slip Op 04048, Second Dept 6-23-21

JUNE 23, 2021

2. THE MAJORITY CONCLUDED PLAINTIFF WAS ENTITLED TO SUMMARY JUDGMENT IN THIS FATAL VEHICLE-PEDESTRIAN ACCIDENT CASE BECAUSE DECEDENT'S ALLEGED CONTRIBUTORY NEGLIGENCE DOES NOT BAR SUMMARY JUDGMENT; THE DISSENT ARGUED THERE WAS A QUESTION OF FACT WHETHER DECEDENT'S NEGLIGENCE WAS THE SOLE PROXIMATE CAUSE OF THE ACCIDENT (FOURTH DEPT).

The Fourth Department, over a dissent, determined plaintiff was entitled to summary judgment in this fatal vehicle-pedestrian accident case. The majority held that any negligence on the part of plaintiff's decedent constituted comparative negligence which is no longer a bar to summary judgment. The dissent argued there was a question of fact whether decedent's actions constituted the sole proximate cause of the accident, which would preclude summary judgment:

We respectfully disagree with the dissent that the evidence submitted by plaintiff failed to establish proximate causation. The only facts that defendants cite for the proposition that plaintiff failed to meet his burden arise from decedent's actions, i.e., crossing outside a marked crosswalk and wearing dark clothing as daylight faded. The Court of Appeals has made clear, however, "that a plaintiff's comparative negligence is no longer a complete defense and its absence need not be pleaded and proved by the plaintiff, but rather is only relevant to the mitigation of plaintiff's damages" … . Thus, "to obtain partial summary judgment on defendant's liability[, a plaintiff] does not have to demonstrate the absence of his [or her] own comparative fault" … .

… [P]laintiff was therefore not required to establish that decedent was not negligent, rather he was required to demonstrate that defendant was negligent and that such negligence was a proximate cause of decedent's injuries … .

From the dissent:

Even assuming … the majority is correct that the issue of proximate cause was raised by plaintiff and that plaintiff met his burden with respect to that element, I conclude that defendants raised a triable issue of fact in opposition. Defendants presented evidence that plaintiff's decedent was crossing … outside of a designated crosswalk, at dusk, with headphones and dark clothing on and without looking for oncoming traffic. … [D]efendants contend that decedent violated Vehicle and Traffic Law § 1152 (a). Consequently, even though defendants were negligent as a matter of law based on an unexcused violation of Vehicle and Traffic Law § 1146 (a), on this record, a jury could find that decedent's actions were the sole proximate cause of the accident … . Lowes v Anas, 2021 NY Slip Op 03973, Fourth Dept 6-17-21. JUNE 17, 2021

3. NO ONE, INCLUDING DEFENDANT DRIVER, SAW THE 17-MONTH-OLD BEFORE HEARING A LOUD "THUMP" AND FINDING THE CHILD LYING BEHIND DEFENDANT'S CAR; DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant driver did not eliminate all questions of fact about whether she was negligence. Defendant driver heard a loud "thump" and plaintiff's decedent, a 17-month old child, was found lying on the ground right behind defendant's car. No one saw the impact:

Shortly before the accident, the driver had dropped off a passenger in a residential cul-de-sac, with several young children playing nearby. After pulling into a driveway and reversing out in the opposite direction, the driver began moving her vehicle forward again when she heard a loud "thump"—which was also heard by at least four other witnesses in the vicinity. Believing that her vehicle had come into contact with a parked car to her right, the driver began reversing her vehicle when a man outside urgently directed her to stop. Upon exiting the vehicle, the driver observed the infant lying on the ground "right behind" her vehicle, on the passenger side. The infant was taken to a hospital, where she died of her injuries the following day. The driver did not see the infant prior to the accident, and the record does not indicate that anyone actually observed the contact between the infant and the defendants' vehicle.…

Under the circumstances presented, the evidence submitted by the defendants was insufficient to meet their prima facie burden of proof, since it failed to eliminate all triable issues of fact regarding the driver's alleged negligence, including her ability to see the infant prior to the accident … . Danziger v Elias, 2021 NY Slip Op 04008, Second Dept 6-22-21

JUNE 23, 2021

Morales-Rodriguez v MTA Bus Co.

2022 NY Slip Op 01781 [203 AD3d 914]

March 16, 2022

Appellate Division, Second Department

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As corrected through Wednesday, May 4, 2022

[*1]

Francisco Morales-Rodriguez, Appellant,
v
MTA Bus Company et al., Respondents.

Kelner & Kelner, New York, NY (Joshua D. Kelner of counsel), for appellant.

Armienti, DeBellis & Rhoden, LLP, New York, NY (Vanessa M. Corchia of counsel), for respondents.

In an action to recover damages for personal injuries, the plaintiff appeals from (1) an order of the Supreme Court, Queens County (Salvatore J. Modica, J.), entered January 31, 2019, and (2) an order of the same court entered April 8, 2019. The order entered January 31, 2019, denied that branch of the plaintiff's motion which was for summary judgment on the issue of liability and, in effect, denied that branch of his motion which was for summary judgment dismissing the defendants' second affirmative defense, alleging comparative negligence. The order entered April 8, 2019, insofar as appealed from, upon reargument, adhered to the prior determination in the order entered January 31, 2019, denying that branch of the plaintiff's motion which was for summary judgment on the issue of liability.

Ordered that the order entered January 31, 2019, is reversed, on the law, the plaintiff's motion for summary judgment on the issue of liability and dismissing the defendants' second affirmative defense, alleging comparative negligence is granted, and the order entered April 8, 2019, is vacated; and it is further,

Ordered that the appeal from the order entered April 8, 2019, is dismissed as academic in light of our determination on the appeal from the order entered January 31, 2019; and it is

further,

Ordered that one bill of costs is awarded to the plaintiff.

The plaintiff was crossing a street at an intersection in Queens, inside of a crosswalk and with a pedestrian crossing signal in his favor, when he was struck by a bus owned by the defendant MTA Bus Company, and driven by its employee, the defendant Clifford Ruff. Thereafter, the plaintiff commenced this personal injury action against the defendants. The plaintiff moved for summary judgment on the issue of liability and dismissing the defendants' second affirmative defense, alleging comparative negligence. In an order entered January 31, 2019, the Supreme Court denied that branch of the motion which was for summary judgment on the issue of liability and, in effect, denied that branch of the motion which was for summary judgment dismissing the defendants' second affirmative defense, alleging comparative negligence. The plaintiff thereafter [*2]moved for leave to reargue that branch of his motion which was for summary judgment on the issue of liability. In an order entered April 8, 2019, the court, upon reargument, adhered to its prior determination denying that branch of the motion. The plaintiff appeals.

Here, the plaintiff established his prima facie entitlement to judgment as a matter of law on the issue of liability. The evidence submitted by the plaintiff established that he had stopped and looked both ways before entering the crosswalk within which he walking, with the pedestrian signal in his favor, when Ruff failed to yield the right-of-way and struck the plaintiff with the bus (*see* Vehicle and Traffic Law §§ 1111 [a] [1]; 1112 [a]; *Maliakel v Morio*, 185 AD3d 1018, 1019 [2020]; *Wray v Galella*, 172 AD3d 1446, 1447 [2019]). Additionally, the plaintiff demonstrated, prima facie, that he was free from fault in the happening of the accident (*see Maliakel v Morio*, 185 AD3d at 1019; *Wray v Galella*, 172 AD3d at 1447). In opposition, the defendants failed to raise a triable issue of fact as to Ruff's negligence or whether the plaintiff was comparatively at fault in the happening of the accident. Furthermore, the defendants failed to raise a triable issue of fact as to whether Ruff's foreseeable encounter with sun glare, while driving on a route with which he was familiar, was an emergency not of his own making, which left him with only seconds to react and virtually no opportunity to avoid a collision with the plaintiff (*see Lifson v City of Syracuse*, 17 NY3d 492, 498 [2011]). Accordingly, the Supreme Court should have granted the plaintiff's motion for summary judgment on the issue of liability and dismissing the

defendants' second affirmative defense, alleging comparative negligence. Duffy, J.P., Iannacci, Miller and Christopher, JJ., concur.

Fergile v Payne

2022 NY Slip Op 01008 [202 AD3d 928]

February 16, 2022

Appellate Division, Second Department

Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.

As corrected through Wednesday, March 30, 2022

[*1]

Jean D. Fergile, Appellant,
v
Gail June Payne et al., Respondents.

Richard L. Giampa, Esq., P.C., Bronx, NY (Zachary K. Giampa and Eli Wagschal of counsel), for appellant.

Lewis Brisbois Bisgaard & Smith, LLP, New York, NY (James M. Strauss and Nicholas P. Hurzeler of counsel), for respondents.

In an action to recover damages for personal injuries, the plaintiff appeals from an order of the Supreme Court, Nassau County (Roy S. Mahon, J.), dated January 30, 2019. The order denied the plaintiff's motion for summary judgment on the issue of liability, and granted the defendants' cross motion for summary judgment dismissing the complaint.

Ordered that the order is modified, on the law, by deleting the provision thereof granting the defendants' cross motion for summary judgment dismissing the complaint, and substituting therefor a provision denying the cross motion; as so modified, the order is affirmed, without costs or disbursements.

The plaintiff commenced this action to recover damages for personal injuries that he allegedly sustained in a motor vehicle accident that occurred on August 20, 2013. At the time of the incident, the plaintiff was operating a motor scooter in the right lane of traffic. A bus driven by the defendant Gail June Payne, an employee of the defendant Nassau Inter-County Express, was also traveling in the right lane, behind the plaintiff. As the plaintiff approached

an intersection, he moved into the left lane. The bus also moved into the left lane, and then struck the rear of the motor scooter.

The plaintiff moved for summary judgment on the issue of liability, and the defendants cross-moved for summary judgment dismissing the complaint. The Supreme Court denied the plaintiff's motion and granted the defendants' cross motion, and the plaintiff appeals.

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, thereby requiring that operator to rebut the inference of negligence by providing a nonnegligent explanation for the collision (*see Tutrani v County of Suffolk*, 10 NY3d 906, 908 [2008]; *D'Agostino v YRC, Inc.*, 120 AD3d 1291, 1292 [2014]). Here, the evidence submitted by the plaintiff included, inter alia, a video recording taken from the bus that appears to show the bus moving into the left lane, and the plaintiff, driving in front of the bus, also moving into the left lane at approximately the same time. That evidence raises a triable issue of fact as to a whether a potentially nonnegligent explanation for the collision exists or whether the emergency doctrine applied to this case (*see Conroy v New York City Tr. Auth.*, 167 AD3d 977, 978-[*2]979 [2018]; *Finney v Morton*, 127 AD3d 1134 [2015]; *see also Ortiz v New York City Tr. Auth.*, 138 AD3d 809, 810 [2016]). Accordingly, the Supreme Court properly denied the plaintiff's motion for summary judgment on the issue of liability regardless of the sufficiency of the defendants' opposition papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

However, the defendants failed to establish their prima facie entitlement to judgment as a matter of law dismissing the complaint. "Defendants moving for summary judgment in a personal injury action must demonstrate, prima facie, that they did not proximately cause the plaintiff's injuries" (*Fargione v Chance*, 154 AD3d 713, 714 [2017]; *see Wilson v Mazewski*, 175 AD3d 1352, 1353 [2019]). "Since there can be more than one proximate cause of an accident, a defendant seeking summary judgment must establish freedom from comparative fault as a matter of law" (*Wilson v Mazewski*, 175 AD3d at 1353; *see Cattan v Sutton*, 120 AD3d 537, 538 [2014]; *Jones v Vialva-Duke*, 106 AD3d 1052, 1053 [2013]). "[A] driver who has the right-of-way has a duty to exercise reasonable care to avoid a collision, to see what there is to be seen through the proper use of his or her senses, and to drive at a speed that is reasonable and prudent under the conditions, having regard to the actual and potential hazards then existing" (*Pei Ru Guo v Efkarpidis*, 185 AD3d 949, 951-952 [2020]; *see* Vehicle and Traffic Law §§ 1146 [a]; 1180 [a]).

Here, even if Payne had the right of way, she testified at her deposition that she did not see the plaintiff on his motor scooter until "seconds" before the accident. Since the video recording taken from the bus seems to show that the bus was following the plaintiff's motor scooter for approximately two blocks prior to the accident, Payne's testimony raised a triable issue of fact as to whether Payne failed to see what was there to be seen through the proper use of her senses, and thus whether she exercised reasonable care to avoid the accident and whether her actions were a proximate cause of the accident (*see Pei Ru Guo v Efkarpidis*, 185 AD3d at 951-952; *Ballentine v Perrone*, 179 AD3d 993, 994-995 [2020]; *Fargione v Chance*, 154 AD3d at 714).

The defendants also failed to demonstrate, prima facie, that they were absolved of liability based on the emergency doctrine. The emergency doctrine provides that "when an actor is faced with a sudden and unexpected circumstance which leaves little or no time for thought, deliberation or consideration, or causes the actor to be reasonably so disturbed that the actor must make a speedy decision without weighing alternative courses of conduct, the actor may not be negligent if the actions taken are reasonable and prudent in the emergency context" (*Rivera v New York City Tr. Auth.*, 77 NY2d 322, 327 [1991]; *see Ortiz v Zurita*, 195 AD3d 734, 735 [2021]). "However, where the claimed emergency resulted from a defendant's own actions, for example, from the defendant's failure to maintain a safe distance between his or her vehicle and the vehicle in front of him of her, it will not qualify as an emergency under the emergency doctrine" (*Freder v Costello Indus., Inc.*, 162 AD3d 984, 986 [2018]). Moreover, "[b]oth the existence of an emergency and the reasonableness of a party's response to it generally present issues of fact" (*Bravo v Vargas*, 113 AD3d 579, 581 [2014]). Here, the evidence failed to eliminate the existence of triable issues of fact as to whether Payne's actions contributed to or caused the emergency, in light of, inter alia, her failure to observe the motor scooter earlier (*see Johnson v Freedman*, 195 AD3d 1206, 1207 [2021]; *Ortiz v Zurita*, 195 AD3d 734 [2021]; *Aiken v Liotta*, 167 AD3d 826, 827 [2018]; *Bravo v Vargas*, 113 AD3d at 581).

Accordingly, the Supreme Court should have denied the defendants' cross motion for summary judgment dismissing the complaint regardless of the sufficiency of the plaintiff's opposition papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d at 853). Barros, J.P., Iannacci, Chambers and Christopher, JJ., concur.

Grant v City of New York

2022 NY Slip Op 01121 [202 AD3d 593]

February 22, 2022

Appellate Division, First Department

Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.

As corrected through Wednesday, March 30, 2022

[*1]

Andrew Grant, Plaintiff,
v
City of New York et al., Respondents, and Kassim C. Williams, Appellant.

Cheven, Keely & Hatzis, New York (Thomas A. Torto of counsel), for appellant.

Order, Supreme Court, Bronx County (Mitchell J. Danziger, J.), entered on or about September 21, 2020, which, to the extent appealed from, denied defendant Kassim Williams's motion for summary judgment dismissing the complaint and all cross claims against him, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Plaintiff was a front seat passenger in defendant Williams's vehicle, which was suddenly hit in the rear on the Cross Bronx Expressway by the City defendants' police vehicle as it pursued a large truck that had been speeding. Williams testified at deposition that just prior to the accident he was travelling in the left lane of the three-lane northbound expressway, and that he was dropping his speed from 40 mph to 35 mph as he spotted a construction crew setting up safety cones in the left lane to evidently close it off. Defendant Officer Ronald Jurain testified at deposition that he was following the suspect truck in the center lane at approximately 50 to 60 mph, and that when the officer moved into the left lane to get alongside the truck, he kept his sight on the truck and failed to see Williams's vehicle, which was slowing down with the traffic and lane closure ahead. The accident ensued and Officer Jurain admitted both not having seen Williams' car prior to striking it, and that he knew of the ongoing road construction in the area for the past week, inasmuch as he routinely patrolled the expressway.

Williams's evidence in support of his motion demonstrated prima facie that he was operating his vehicle in a lawful, reasonable manner given the circumstances on the expressway at the time, and that he was not otherwise culpable in causing the police car to strike the rear of his vehicle. The burden having shifted, plaintiff and the City defendants each failed to offer evidence as would raise a factual issue regarding Williams's comparable negligence in the cause of the accident (*see e.g. Newell v Bronston*, 183 AD3d 441 [1st Dept 2020]). The City defendants failed to proffer a nonnegligent explanation for rear-ending Williams's vehicle, and the claim that the rear-ended vehicle stopped short, standing alone, is insufficient as a nonnegligent explanation for an accident (*see generally Bajrami v Twinkle Cab Corp.*, 147 AD3d 649 [1st Dept 2017]; *Mitchell v Smith*, 142 AD3d 861 [1st Dept 2016]). Regardless of whether the actions of the police in this incident are to be considered under the reckless standard set forth in Vehicle and Traffic Law § 1104, the nonliability of Williams, given the unrefuted evidence of his nonculpable role in this accident, remains unchanged (*see generally Pilgrim v Campoverde-Bravo*, 175 AD3d 1333 [2d Dept 2019]). Concur—Renwick, J.P., Kennedy, Scarpulla, Rodriguez, Higgitt, JJ.

De Diaz v Klausner
2021 NY Slip Op 05624 [198 AD3d 475]
October 14, 2021
Appellate Division, First Department
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
As corrected through Wednesday, December 1, 2021

[*1]

Evelin Aguilera De Diaz, Appellant,
v
Ronald B. Klausner, Respondent.

Weiss & Rosenbloom, P.C., New York (Andrea R. Krugman of counsel), for appellant.

Varvaro, Cotter & Bender, White Plains (Stephen J. Cassels of counsel), for respondent.

Order, Supreme Court, Bronx County (Mary Ann Brigantti, J.), entered on or about December 21, 2020, which denied in its entirety plaintiff Evelin Aguilera De Diaz's motion for summary judgment on the issue of liability, and to strike defendant's first, second, sixth, eighth, twelfth, and thirteenth affirmative defenses, unanimously modified, on the law, to dismiss the sixth and twelfth affirmative defenses, otherwise affirmed, without costs.

Plaintiff made a prima facie showing of her entitlement to judgment as a matter of law by demonstrating that she was crossing the street, within the crosswalk, with the light in her favor, when she was struck by defendant's vehicle, which was making a left turn (*see Krieger v Glatter*, 129 AD3d 536 [1st Dept 2015]). In opposition, defendant raised a triable issue of fact based on his version of the accident, which conflicted with plaintiff's account (*see Savall v New York City Tr. Auth.*, 173 AD3d 566, 567 [1st Dept 2019]). Defendant asserted that plaintiff, in fact, was not crossing the crosswalk from the northeast side of the street, but rather, out of nowhere, appeared to be coming from the west side of the street, causing impact to the left driver side of his vehicle as he was making a left turn. Defendant also maintained that he did not see plaintiff in the crosswalk until he stopped his vehicle, after plaintiff was struck. Prior to turning left, he looked to both the northeast and northwest bound side of the street and observed that there were no pedestrians in the crosswalk (*see Acton v 1906 Rest.*

Corp., 147 AD3d 1277 [3d Dept 2017]). As there are multiple issues of fact that cannot be resolved as a matter of law, the court properly denied plaintiff's motion for summary judgment on liability. For the same reasons, defendant's first, second, eighth, and thirteenth affirmative defenses cannot be dismissed on this motion (*see 534 E. 11th St. Hous. Dev. Fund Corp. v Hendrick*, 90 AD3d 541, 542 [1st Dept 2011]).

However, the motion court erred in denying the portion of plaintiff's motion to dismiss defendant's sixth affirmative defense, the emergency doctrine. The emergency "doctrine recognizes that when an actor is faced with a sudden and unexpected circumstance which leaves little or no time for thought, deliberation or consideration, or causes the actor to be reasonably so disturbed that the actor must make a speedy decision without weighing alternative courses of conduct, the actor may not be negligent if the actions taken are reasonable and prudent in the emergency context" (*Rivera v New York City Tr. Auth.*, 77 NY2d 322, 327 [1991]).

In his affidavit submitted in opposition to the underlying motion, defendant alleges that, prior to the accident, he was traveling eastbound on East 82nd Street, heading towards the First Avenue intersection—an area with which he was very familiar. Defendant further maintains that he was driving slowly and carefully.

As defendant approached First Avenue, he stopped at [*2]a red traffic light. When the traffic light turned green, defendant maintains that he looked at the northwest and northeast sides of First Avenue, and purportedly proceeded to drive "slowly and carefully," making a left turn onto First Avenue. Defendant further alleges that as he began driving on First Avenue, he "suddenly—and without warning—felt that something or someone had contacted [his] vehicle" while driving at a low speed. Afterwards, defendant stopped his vehicle and observed plaintiff standing in the crosswalk.

These allegations—viewed in a light most favorable to defendant—are insufficient to raise an issue of fact as to the existence of a qualifying emergency. Defendant maintains that he did not see plaintiff before she was struck by his vehicle and that she was not in the crosswalk when he began turning onto the avenue; it was only after plaintiff was struck that defendant observed her in the crosswalk. "Without having perceived or reacted to any emergency, the defendant may not rely on the emergency doctrine to excuse [his] conduct" (*Jablonski v Jakaitis*, 85 AD3d 969, 970 [2d Dept 2011]; *see also Anderson v Krauss*, 204

AD2d 1074, 1074-1075 [4th Dept 1994] [the defendant driver not confronted with emergency where the defendant "heard his vehicle strike something" and he "stopped his vehicle to investigate and discovered plaintiff . . . lying in the street."]; *cf. Powers v Kyong Kwan Min*, 147 AD3d 401 [1st Dept 2017]).

The motion court also erred in denying the portion of plaintiff's motion to dismiss defendant's twelfth affirmative defense for assumption of risk. The assumption of risk doctrine does not apply to situations such as this, where a pedestrian was struck by a vehicle while crossing the street at a crosswalk, while having the right of way (*see generally Ashbourne v City of New York*, 82 AD3d 461, 463 [1st Dept 2011]).

Finally, contrary to plaintiff's argument, the court properly declined to consider the description of the accident contained in the police accident report as it recited hearsay and was prepared by a police officer who did not witness the accident (*see Roman v Cabrera*, 113 AD3d 541, 542 [1st Dept 2014]).

We have considered all remaining arguments and find them unavailing. Concur—Gische, J.P., Moulton, González, Kennedy, Scarpulla, JJ.

Ellsworth v Rubio
2022 NY Slip Op 02781 [204 AD3d 978]
April 27, 2022
Appellate Division, Second Department
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
As corrected through Wednesday, June 1, 2022

[*1]

John Ellsworth, Jr., Respondent,
v
Angel E. Rubio et al., Appellants, and Jorge Orlando Muy-Angamarca, Respondent.

Denis J. Kennedy, Garden City, NY (Lorraine M. Korth of counsel), for appellants.

Salerno & Goldberg, P.C., Deer Park, NY (Allen Goldberg of counsel), for plaintiff-respondent.

Cheven Keely & Hatzis, New York, NY (Thomas Torto of counsel), for defendant-respondent.

In an action to recover damages for personal injuries, the defendants Angel E. Rubio and Noemi Raquel Rubio appeal from an order of the Supreme Court, Queens County (Pam Jackman Brown, J.), entered February 7, 2020. The order, insofar as appealed from, denied those defendants' motion for summary judgment dismissing the complaint and all cross claims insofar as asserted against them and granted that branch of the plaintiff's cross motion which was for summary judgment on the issue of liability insofar as asserted against them.

Ordered that the order is reversed insofar as appealed from, on the law, with one bill of costs, the motion of the defendants Angel E. Rubio and Noemi Raquel Rubio for summary judgment dismissing the complaint and all cross claims insofar as asserted against them is granted, and that branch of the plaintiff's cross motion which was for summary judgment on the issue of liability insofar as asserted against the defendants Angel E. Rubio and Noemi Raquel Rubio is denied.

On January 18, 2017, the plaintiff allegedly was injured when a vehicle in which he was a passenger was involved in a two-car collision at the intersection of 20th Avenue and a service road for the Whitestone Expressway. The plaintiff was a passenger in a taxi operated by the defendant Jorge Orlando Muy-Angamarca, which collided with a vehicle operated by the defendant Noemi Raquel Rubio (hereinafter Rubio) and owned by the defendant Angel E. Rubio (hereinafter together the Rubio defendants). Prior to the accident, Muy-Angamarca's vehicle was driving in the right lane of the three-lane service road for the Whitestone Expressway, which was for right turns only, and Rubio's vehicle was driving in the middle lane, from which drivers could either go straight or make a right turn. At the intersection, the vehicles collided when Rubio made a right turn from the middle lane, and Muy-Angamarca's vehicle continued going straight through the intersection from the right lane. Rubio testified at her deposition that at the time of the impact, about three-quarters of her vehicle was already turned onto 20th Avenue.

[*2] The plaintiff commenced this action to recover damages for personal injuries against Muy-Angamarca and the Rubio defendants. Thereafter, the Rubio defendants moved for summary judgment dismissing the complaint and all cross claims insofar as asserted against them, and the plaintiff cross-moved for summary judgment on the issue of liability. In an order dated February 7, 2020, the Supreme Court, inter alia, denied the Rubio defendants' motion and granted that branch of the plaintiff's cross motion which was for summary judgment on the issue of liability insofar as asserted against the Rubio defendants. The Rubio defendants appeal.

" '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' " (*Jeong Sook Lee-Son v Doe*, 170 AD3d 973, 974 [2019], quoting *Boulos v Lerner-Harrington*, 124 AD3d 709, 709 [2015]). "[A] driver who has the right-of-way is entitled to anticipate that other drivers will obey traffic laws that require them to yield" (*Cruz v DiSalvo*, 188 AD3d 986, 987 [2020]). Further, " '[a]lthough a driver with a right-of-way . . . has a duty to use reasonable care to avoid a collision, . . . a driver with the right-of-way who has only seconds to react to a vehicle which has failed to yield is not comparatively negligent for failing to avoid the collision' " (*Jeong Sook Lee-Son v Doe*, 170 AD3d at 974, quoting *Yelder v Walters*, 64 AD3d 762, 764 [2009]).

Here, the Rubio defendants established their prima facie entitlement to judgment as a matter of law by demonstrating that the sole proximate cause of the accident was Muy-Angamarca's vehicle continuing straight through the intersection in disregard of a traffic sign directing that his lane was for right turns only (*see Jeong Sook Lee-Son v Doe*, 170 AD3d at 974-975; *Rohn v Aly*, 167 AD3d 1054, 1056 [2018]; *Yu Mei Liu v Weihong Liu*, 163 AD3d 611, 612 [2018]). Based upon Muy-Angamarca's disregard of the traffic sign, he was in violation of the Vehicle and Traffic Law, and thus, he was negligent as a matter of law (*see* Vehicle and Traffic Law § 1110 [a]; *Blangiardo v Hirsch*, 29 AD3d 841, 842 [2006]). Rubio was entitled to assume that Muy-Angamarca would obey the traffic sign requiring Muy-Angamarca to turn right (*see Cruz v DiSalvo*, 188 AD3d at 987). Indeed, the plaintiff testified at his deposition that he observed that Rubio had signaled before making a legal right turn from the middle lane, that Muy-Angamarca "started to accelerate" toward the intersection while Rubio's vehicle was turning, and that he did not believe Rubio was at fault in the happening of the accident. In opposition to the Rubio defendants' prima facie showing, the plaintiff and Muy-Angamarca failed to raise a triable issue of fact.

Accordingly, the Supreme Court should have granted the Rubio defendants' motion for summary judgment dismissing the complaint and all cross claims insofar as asserted against them, and denied that branch of the plaintiff's cross motion which was for summary judgment on the issue of liability insofar as asserted against the Rubio defendants. Barros, J.P., Chambers, Maltese and Wooten, JJ., concur.

Blake v Francis
2022 NY Slip Op 02974
Decided on May 4, 2022
Appellate Division, Second Department
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This opinion is uncorrected and subject to revision before publication in the Official Reports.

Decided on May 4, 2022 SUPREME COURT OF THE STATE OF NEW YORK Appellate Division, Second Judicial Department
BETSY BARROS, J.P.
CHERYL E. CHAMBERS
JOSEPH J. MALTESE
PAUL WOOTEN, JJ.

2019-12652
(Index No. 500928/18)

[*1]Stefan A. Blake, appellant,

v

Christopher J. Francis, respondent.

Sacco & Fillas, Astoria, NY (Boris Bernstein of counsel), for appellant.

Jennifer S. Adams, Yonkers, NY (Alicia Pierre-Louis of counsel), for respondent.

DECISION &ORDER

In an action to recover damages for personal injuries, the plaintiff appeals from an order of the Supreme Court, Kings County (Loren Baily-Schiffman, J.), dated October 17, 2019.

The order granted the defendant's motion for summary judgment dismissing the complaint.

ORDERED that the order is reversed, on the law, with costs, and the defendant's motion for summary judgment dismissing the complaint is denied.

On September 11, 2016, at approximately 1:00 p.m., the plaintiff allegedly was injured in a two-car collision at the intersection of Ralph Avenue and Snyder Avenue in Brooklyn. Prior to the collision, the plaintiff was driving northbound on Ralph Avenue and stopped at a red light at the intersection. According to the plaintiff's deposition testimony, when the light turned green, he started moving his vehicle into the intersection to make a left turn onto Snyder Avenue. According to the plaintiff, there were cars in each of the two southbound lanes on Ralph Avenue that did not move forward, and a driver of the car in the innermost southbound lane gestured for the plaintiff to make the left turn. The plaintiff testified that he tried to complete the left turn, and was facing Snyder Avenue when his vehicle was struck by the defendant's vehicle, which was driving southbound on Ralph Avenue. The plaintiff did not see the defendant's vehicle until it was approximately one to two feet away. The plaintiff believed the defendant's vehicle was speeding and had come from an empty parking lane on Ralph Avenue. According to the defendant's deposition testimony, prior to the accident, he was driving southbound in the right lane on Ralph Avenue adjacent to the parking lane, and estimated he was driving at approximately 25 miles per hour. The defendant acknowledged that he did not remember seeing the plaintiff's vehicle making a left turn prior to the collision, that he did not know if his vehicle or the plaintiff's vehicle entered the intersection first, and that he realized there was a collision from hearing the sound.

The plaintiff commenced this action to recover damages for personal injuries. Thereafter, the defendant moved for summary judgment dismissing the complaint. In an order dated October 17, 2019, the Supreme Court granted the defendant's motion. The plaintiff appeals.

"'There can be more than one proximate cause of an accident, and [g]enerally, it is for the trier of fact to determine the issue of proximate cause'" (*Tornabene v Seickel*, 186 AD3d 645, 646, quoting *M.M.T. v Relyea*, 177 AD3d 1013, 1013). "Thus, '[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'" (*Tornabene v Seickel*, 186 AD3d at 646, quoting *M.M.T. v Relyea*, 177 AD3d at 1013 [internal quotation marks omitted]). Further, "'[w]hile the [*2]driver with the right-of-way is entitled to assume that

other drivers will obey the traffic laws requiring them to yield, the driver with the right-of-way also has an obligation to keep proper lookout and see what can be seen through the reasonable use of his or her senses to avoid colliding with other vehicles'" (*Richardson v Cablevision Sys. Corp.*, 173 AD3d 1083, 1085, quoting *Miron v Pappas*, 161 AD3d 1063, 1064).

Here, although the defendant submitted evidence that the plaintiff failed to yield the right-of-way when turning left in violation of Vehicle & Traffic Law § 1141, the defendant failed to establish, prima facie, that the plaintiff's failure to yield was the sole proximate cause of the collision and that the defendant was free from fault (*see Carias v Grove*, 186 AD3d 1484; *Tornabene v Seickel*, 186 AD3d at 646; *Calderon-Scotti v Rosenstein*, 119 AD3d 722, 724). While testifying, the defendant admitted that he saw nothing out of the ordinary prior to the collision, that he could not recall if he observed the plaintiff's vehicle, and that he only realized that there was a collision from hearing the sound. However, the defendant also testified that he was only driving at approximately 25 miles per hour and was looking straight ahead on a sunny afternoon with no obstructions to his view (*see Carias v Grove*, 186 AD3d at 1484; *Tornabene v Seickel*, 186 AD3d at 646). Moreover, the defendant acknowledged that he did not know if his vehicle or the plaintiff's vehicle entered the intersection first. Thus, the defendant's evidentiary submissions failed to eliminate triable issues of fact as to whether the plaintiff's vehicle was already in the intersection as the defendant approached and whether the defendant should have observed the plaintiff's vehicle making a left turn in time to take evasive action to avoid the accident (*see Cortes v Ventura*, 188 AD3d 487, 488; *Calderon-Scotti v Rosenstein*, 119 AD3d at 724).

Since the defendant failed to establish his prima facie entitlement to judgment as a matter of law, the Supreme Court should have denied the defendant's motion for summary judgment dismissing the complaint, without regard to the sufficiency of the opposition papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853).

BARROS, J.P., CHAMBERS, MALTESE and WOOTEN, JJ., concur.

ENTER:

Maria T. Fasulo

Clerk of the Court

Return to Decision List

Lindo v Katz
2022 NY Slip Op 03379
Decided on May 25, 2022
Appellate Division, Second Department
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
This opinion is uncorrected and subject to revision before publication in the Official Reports.

Decided on May 25, 2022 SUPREME COURT OF THE STATE OF NEW YORK Appellate Division, Second Judicial Department
BETSY BARROS, J.P.
REINALDO E. RIVERA
CHERYL E. CHAMBERS
PAUL WOOTEN, JJ.

2020-00844
(Index No. 513215/17)

[*1]Chanel Lindo, appellant,

v

Daniel Katz, et al., respondents.

Law Offices of Spencer H. Herman, P.C. (Pollack, Pollack, Isaac & DeCicco, LLP, New York, NY [Brian J. Isaac and Michael H. Zhu], of counsel), for appellant.

Scahill Law Group P.C., Bethpage, NY (Gerard Ferrara of counsel), for respondents Daniel Katz and Gabriel Katz.

Baker, McEvoy & Moskovits, P.C. (Marjorie E. Bornes, Brooklyn, NY, of counsel), for respondents Fox Ride, Inc., and Nestor Ortiz.

DECISION & ORDER

In an action to recover damages for personal injuries, the plaintiff appeals from an order of the Supreme Court, Kings County (Edgar G. Walker, J.), dated December 13, 2019. The order, insofar as appealed from, denied that branch of the plaintiff's motion which was for summary judgment on the issue of liability.

ORDERED that the order is modified, on the law, by deleting the provision thereof denying that branch of the plaintiff's motion which was for summary judgment on the issue of liability against the defendants Daniel Katz and Gabriel Katz, and substituting therefor a provision granting that branch of the motion; as so modified, the order is affirmed insofar as appealed from, with one bill of costs to the plaintiff payable by the defendants Daniel Katz and Gabriel Katz, and one bill of costs to the defendants Fox Ride, Inc., and Nestor Ortiz payable by the plaintiff.

On April 24, 2017, the plaintiff was a passenger in a taxi owned by the defendant Fox Ride, Inc., and operated by the defendant Nestor Ortiz. The plaintiff allegedly sustained injuries when the taxi collided with a vehicle owned by the defendant Daniel Katz and operated by the defendant Gabriel Katz (hereinafter together the Katz defendants). Subsequently, the plaintiff commenced this personal injury action against the defendants. The plaintiff moved for summary judgment on the issue of liability and dismissing all affirmative defenses alleging comparative negligence and culpable conduct on her part. The Supreme Court granted that branch of the motion which was for summary judgment dismissing all affirmative defenses alleging comparative negligence and culpable conduct, and denied that branch of the motion which was for summary judgment on the issue of liability. The plaintiff appeals.

"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" (*Tsyganash v Auto Mall Fleet Mgt., Inc.*, 163 AD3d 1033, 1033-1034; *see Sapienza v Harrison*, 191 AD3d 1028, 1029). "If the plaintiff fails to demonstrate, prima facie, that the operator of the offending vehicle was at fault, [*2]or if triable issues of fact are raised by the defendants in opposition, . . . summary judgment on the issue of liability must be denied, even if the

moving plaintiff was an innocent passenger" (*Phillip v D & D Carting Co., Inc.*, 136 AD3d 18, 24; *see Wise v Boyd Bros. Transp.*, 194 AD3d 1097, 1098).

Here, the Supreme Court properly denied that branch of the plaintiff's motion which was for summary judgment on the issue of liability against Fox Ride, Inc., and Ortiz. The evidence submitted by the plaintiff in support of her motion failed to eliminate triable issues of fact as to whether Ortiz was negligent in the operation of the taxi (*see S.G. v Singh*, 189 AD3d 786, 787).

However, the Supreme Court should have granted the branch of the plaintiff's motion which was for summary judgment on the issue of liability against the Katz defendants. "Pursuant to Vehicle and Traffic Law § 1141, '[t]he operator of a vehicle intending to turn left within an intersection must yield the right-of-way to any oncoming vehicle that is within the intersection or so close to it as to constitute an immediate hazard'" (*Sapienza v Harrison*, 191 AD3d at 1029, quoting *Ming-Fai Jon v Wager*, 165 AD3d 1253, 1253). "A violation of this statute constitutes negligence per se" (*Ming-Fai Jon v Wager*, 165 AD3d at 1254). Here, the evidence submitted by the plaintiff in support of her motion, which included the deposition testimony of Gabriel Katz as to the happening of the accident, established, prima facie, that Gabriel Katz was negligent in making a left turn when it was not safe for him to do so in violation of Vehicle and Traffic Law §§ 1141 and 1163, and that his negligence was a proximate cause of the collision (*see Jung v Glover*, 169 AD3d 782, 783; *Giwa v Bloom*, 154 AD3d 921, 922). While there are some discrepancies between the deposition testimony of the plaintiff and Gabriel Katz as to the relative position of the vehicles at the time of the impact, even under Gabriel Katz's account, he was "negligent in attempting to make a left turn when the turn could not be made with reasonable safety" (*Jung v Glover*, 169 AD3d at 783). In opposition, the Katz defendants failed to raise a triable issue of fact. Contrary to their contention, the evidence did not support the possible applicability of the emergency doctrine under the circumstances (*see generally Capuozzo v Miller*, 188 AD3d 1137, 1138; *Vasquez v County of Nassau*, 91 AD3d 855, 857).

BARROS, J.P., RIVERA, CHAMBERS and WOOTEN, JJ., concur.

ENTER:

Maria T. Fasulo

Clerk of the Court

Return to Decision List

Moore v City of New York
2021 NY Slip Op 04483 [197 AD3d 93]
July 21, 2021
Barros, J.
Appellate Division, Second Department
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
As corrected through Wednesday, September 8, 2021

[*1]

Barbara Moore, Appellant,
v
City of New York et al., Respondents.

Second Department, July 21, 2021

APPEARANCES OF COUNSEL

Scott Baron & Associates, P.C., Howard Beach (*Scott Baron* of counsel), for appellant.

Georgia M. Pestana, Acting Corporation Counsel, New York City (*Melanie T. West* and *Zachary S. Shapiro* of counsel), for respondents.

{**197 AD3d at 94} OPINION OF THE COURT

Barros, J.

In this personal injury action arising from a collision between a truck and a bicyclist, where evidence was presented at trial that the defendant truck driver first signaled an intention to turn while stopped at a red light and then, while turning, struck the plaintiff bicyclist, we hold that the Supreme Court erred in refusing to instruct the jury that the truck driver was required to have continuously signaled an intention to turn during not less than the last 100 feet the truck traveled before turning, in accordance with Vehicle and Traffic Law §1163 (b). We reject the defendants' contention that a vehicle stopped at a traffic light is "parked" such that it is only required under Vehicle and Traffic Law § 1163 (d) to signal its movement without the need to do so continuously 100 feet before turning.

The plaintiff alleges that, as she was riding her bicycle, she sustained serious personal injuries when she was struck by a truck owned by the defendant City of New York and operated by the defendant Marvin Murphy. At trial, the plaintiff testified that she was riding on 103rd Avenue, which had one lane of travel in her direction, toward the intersection with Woodhaven Boulevard. As she approached the intersection, the traffic light was red. She stopped her bicycle alongside the defendants' truck. As she approached the truck, the truck did not have a turn signal activated. When the light turned green, the plaintiff proceeded straight, and the truck made a right turn, striking her and running her over.

Murphy testified that his truck was the first vehicle stopped at the red light on 103rd Avenue at the intersection. His truck was stopped for approximately one minute, and when the light was about to turn green, he activated his right-turn signal. Before making the turn, he checked all of his mirrors and determined that the intersection was clear. When the light turned green, he proceeded slowly and made a wide right turn{**197 AD3d at 95} onto Woodhaven Boulevard. He never saw the plaintiff before turning, and he denied that his truck ever struck the plaintiff or her bicycle.

In its charge to the jury, the Supreme Court instructed that Murphy "was required under the Vehicle and Traffic Law to signal his intention to turn," but that, "[c]ontrary to what you . . . might have heard during the trial he was, however, not required to signal at least 100 feet before turning his vehicle." The court further instructed that Murphy was "required to put the plaintiff on [*2]reasonable notice that he intended to make a right-hand turn." At the conclusion of the liability phase of the bifurcated trial, the jury found that Murphy was not negligent. A judgment was subsequently entered in favor of the defendants dismissing the complaint, and the plaintiff now appeals therefrom. We reverse.

Courts are "obliged to interpret a statute to effectuate the intent of the Legislature, and when the statutory language is clear and unambiguous, it should be construed so as to give effect to the plain meaning of the words" (*People v Finnegan*, 85 NY2d 53, 58 [1995] [alterations and internal quotation marks omitted]; *see Beck Chevrolet Co., Inc. v General Motors LLC*, 27 NY3d 379, 390 [2016]; *Riley v County of Broome*, 95 NY2d 455, 463 [2000]).

Vehicle and Traffic Law § 1163 (b) provides that "[a] signal of intention to turn right or left when required shall be given continuously during not less than the last one hundred feet

traveled by the vehicle before turning." Under Vehicle and Traffic Law § 1163 (a), Murphy was required to signal his intention to turn right at the subject intersection. Thus, since a signal of intention to turn was required, the clear and unambiguous words used in Vehicle and Traffic Law § 1163 (b) also required Murphy to give such signal "continuously during not less than the last one hundred feet" that he traveled before making the turn. The provision makes no exception for vehicles that are stopped at a red traffic light (*see* Vehicle and Traffic Law § 1111 [d]).

Contrary to the Supreme Court's determination, Vehicle and Traffic Law § 1163 (d), which applies, inter alia, to vehicles moving from a parked position, and which does not require a vehicle to signal its turn 100 feet before making it, is inapplicable. Murphy's truck was not parked within the meaning of "[p]ark or parking" under Vehicle and Traffic Law § 129. Rather, it was *stopped* at a red light (*see* Vehicle and Traffic {**197 AD3d at 96} Law §1111 [d]; *see also* Vehicle and Traffic Law §§ 146, 147). To the extent that *People v Brandt* (60 Misc 3d 956, 961 [Poughkeepsie City Ct 2018]) holds otherwise, we overrule it.

The precise and specific duty established in Vehicle and Traffic Law § 1163 (b) bore directly on the facts to which the parties testified, and, therefore, the Supreme Court erred in refusing to give that charge (*see Green v Downs*, 27 NY2d 205, 207 [1970]; *Collazo v Metropolitan Suburban Bus Auth.*, 68 AD3d 803, 804 [2009]; *Ciatto v Lieberman*, 266 AD2d 494 [1999]). The statute establishes a standard of care, the unexcused violation of which is negligence per se (*see Martin v Herzog*, 228 NY 164, 168 [1920]; *Collazo v Metropolitan Suburban Bus Auth.*, 68 AD3d 803 [2009]; *Coogan v Torrisi*, 47 AD3d 669 [2008]). Since the jury determined that Murphy was not negligent without being instructed on the applicable statutory standard of care (*see* PJI 2:26), the judgment must be reversed.

In light of our determination, we need not reach the plaintiff's remaining contention.

Accordingly, the judgment is reversed, on the law, the complaint is reinstated, and the matter is remitted to the Supreme Court, Queens County, for a new trial.

Dillon, J.P., Miller and Connolly, JJ., concur.

Ordered that the judgment is reversed, on the law, with costs, the complaint is reinstated, and the matter is remitted to the Supreme Court, Queens County, for a new trial.

Matter of Progressive Specialty Ins. Co. (Florkiewicz—Travelers Prop. Cas. Co. of Am.)
2021 NY Slip Op 07598 [200 AD3d 1541]
December 30, 2021
Appellate Division, Third Department
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
As corrected through Wednesday, February 2, 2022

[*1]

In the Matter of the Arbitration between Progressive Specialty Insurance Company, Respondent, and Sarah E. Florkiewicz et al., Respondents, and Travelers Property Casualty Company of America et al., Appellants.

Law Offices of John Wallace, Syracuse (John F. Pfeifer of counsel), for appellants.

Law Offices of Jennifer S. Adams, New York City (Michael A. Zarkower of counsel) and Burke, Scolamiero & Hurd, LLP, Albany, for Progressive Specialty Insurance Company, respondent.

Colangelo, J. Appeal from an order of the Supreme Court (Buchanan, J.), entered December 7, 2020 in Schenectady County, which granted petitioner's application pursuant to CPLR 7503 to permanently stay arbitration between the parties.

On May 25, 2019, respondent Isaiah M. Nichols was involved in a motor vehicle accident with vehicles operated by respondents Noorullah Osmani and Sarah E. Florkiewicz. At the time of the accident, Nichols was the assistant manager of Monroe Muffler Brake, Inc. and was operating a truck owned by Monro. The accident took place outside of regular business hours, and Nichols did not have the express permission of Monro to operate the truck at that time or place, nor did Nichols carry his own policy of auto insurance. Monro's insurer for the truck, respondent Travelers Property Casualty Company of America (hereinafter Travelers), disclaimed insurance coverage for any claims that would be brought against Nichols, stating that he did not have Monro's permission to operate the truck at the time of the accident, and denied any liability on the part of Monro. Florkiewicz then brought an uninsured motorist claim against petitioner, her insurance carrier, which then commenced

this proceeding to stay any uninsured motorist arbitration, objecting to Travelers' disclaimer of coverage. All parties except Nichols entered into a stipulation to submit to a framed issue hearing regarding permissive use of the truck. After such hearing, Supreme Court granted petitioner's application, finding that Nichols had implied permissive use of the truck under the presumption of consent set forth in Vehicle and Traffic Law § 388, such presumption had not been rebutted and, therefore, the truck was insured under Monro's policy with Travelers. Travelers and Monro (hereinafter collectively referred to as respondents) appeal. We reverse.

Under Vehicle and Traffic Law § 388 (1), the negligence of the operator of a motor vehicle may be imputed to the owner of the vehicle who "operat[ed] the same with the permission, express or implied, of such owner" (*see Williams v J. Luke Constr. Co., LLC*, 172 AD3d 1509, 1510 [2019]; *Britt v Pharmacologic PET Servs., Inc.*, 36 AD3d 1039, 1039-1040 [2007], *lv dismissed* 9 NY3d 831 [2007]; *Greater N.Y. Mut. Ins. Co. v Clark*, 205 AD2d 857, 858 [1994], *lv denied* 84 NY2d 807 [1994]). The statute "creates a presumption that the vehicle is being operated with the owner's consent, but the presumption may be rebutted by substantial evidence showing that the operation was without permission" (*Williams v J. Luke Constr. Co.*, 172 AD3d at 1510-1511 [internal quotation marks and citations omitted]; *Britt v Pharmacologic PET Servs., Inc.*, 36 AD3d at 1040; *see New York Cent. Mut. Fire Ins. Co. v Nationwide Mut. Ins. Co.*, 307 AD2d 449, 450 [2003]).

We find that respondents rebutted the presumption of permissive use. Michael Kio, Monro's store manager and Nichols' superior, testified that he advised Nichols on more than one occasion of [*2]the company's longstanding policy proscribing an employee's personal use of company vehicles, including the truck. Nichols acknowledged to Kio that he was aware and understood this policy and that he did not have permission to operate the truck for personal use or use outside of business hours, and that it was to be used for store business only. As Nichols stated in his written submission to Supreme Court, "I knew I was not supposed to be driving the company truck off company time." The statements of Kio and Nichols regarding company policy and their understanding of that policy proscribing personal use stand uncontradicted. "Uncontradicted statements by both the vehicle's owner and its driver that the driver was operating the vehicle without the owner's permission will constitute substantial evidence that rebuts the presumption" (*Britt v Pharmacologic PET Servs., Inc.*, 36 AD3d at 1040 [citation omitted]; *see Country-Wide Ins. Co. v National R.R. Passenger Corp.*,

6 NY3d 172, 177-178 [2006]; *State Farm Fire & Cas. Co. v Sajewski*, 150 AD3d 1297, 1298 [2017]).

Here, Kio went a step further and took steps to prevent permissive use by reiterating to Nichols that he could not use the truck for personal use, after hours, and, at one point, removing the fuel pump fuse to the truck, which rendered it inoperable for a time. Petitioner claims in opposition to respondents' evidence that Kio's testimony that he had suspected that Nichols may have used the truck outside of business hours and that Nichols likely replaced the fuel pump fuse gives credence to the suspicion of personal use. However, said contention is mere supposition, at best. Kio emphasized that he never actually saw Nichols driving the vehicle other than on company business. With respect to the basis for Kio's prior suspicions—i.e., his observation, when he arrived in the morning, that the truck was in Monro's parking lot outside of the garage where it was stored overnight—Nichols had a business reason to so move the truck. Moreover, such use is a far cry from Nichols' driving the truck after business hours and miles from the Monro store, as he did on the night of the accident. In our view, such mere suspicion is insufficient to overcome the evidence presented through Kio's and Nichols' unrefuted testimony negating the presumption of permissive use. In short, respondents adduced sufficient evidence to demonstrate that Monro, through Kio, did not expressly or impliedly consent to Nichol's after hours and personal use of the truck and thus they overcame the presumption of consent to operate. Accordingly, there is a valid uninsured motorist claim and Supreme Court should have denied petitioner's application to stay arbitration.

Egan Jr., J.P., Clark, Aarons and Reynolds Fitzgerald, JJ., concur. Ordered that the order is reversed, on the law, with costs, and application denied.

Caldwell v New York City Tr. Auth.

2021 NY Slip Op 07537 [203 AD3d 6]

December 29, 2021

Barros, J.

Appellate Division, Second Department

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As corrected through Wednesday, March 9, 2022

[*1]

Shana Caldwell, Respondent,
v
New York City Transit Authority et al., Appellants.

Second Department, December 29, 2021

APPEARANCES OF COUNSEL

Anna J. Ervolina, Brooklyn (*Timothy J. O'Shaughnessy* of counsel; *Lawrence Heisler*, former of counsel on the brief), for appellants.

Subin Associates, LLP, New York City (*Herbert Subin* and *Pollack, Pollack, Isaac & DeCicco, LLP* [*Brian J. Isaac*] of counsel), for respondent.

{**203 AD3d at 7} OPINION OF THE COURT

Barros, J.

I.

On this appeal, we address whether the 2013 amendments to CPLR 4106, which changed the statute to allow trial courts to substitute a regular juror with an alternate juror even after deliberations have begun, may be reconciled with the constitutional right to a trial by a six-member jury wherein each juror deliberates on all issues (*see* NY Const, art I, § 2; *Sharrow v Dick Corp.*, 86 NY2d 54 [1995]; *Arizmendi v City of New York*, 56 NY2d 753 [1982]; {**203 AD3d at 8} *Schabe v Hampton Bays Union Free School Dist.*, 103 AD2d 418, 427-428 [1984]). We hold that to reconcile CPLR 4106 with the constitutional and statutory requirements for a civil jury verdict, the trial court must, upon substituting an alternate juror

in place of a regular juror after deliberations have begun, provide an instruction to the jury directing them, inter alia, to restart their deliberations from the beginning with the substituted juror and disregard and set aside all prior deliberations. Under the circumstances of this case, the Supreme Court's failure to give that instruction resulted in an invalid verdict which, among other things, deprived the defendants of their request to poll each of the jurors whose votes were counted as part of the verdict (*see Duffy v Vogel*, 12 NY3d 169 [2009]), and their right to "a process in which each juror deliberates on all issues and attempts to influence with his or her individual judgment and persuasion the reasoning of the other five" (*Sharrow v Dick Corp.*, 86 NY2d at 60).

II.

On July 12, 2013, the plaintiff allegedly sustained personal injuries as result of a collision between a vehicle, in which she was a passenger, and a bus owned by the defendant New York City Transit Authority and operated by the defendant Theo F. Fraser III. During the liability portion of the trial, the jury was polled and found the defendants entirely at fault in the happening of the accident.

[*2]

During the damages portion of the trial, the jury was to decide whether, as a result of the accident, the plaintiff sustained a "serious injury" within the meaning of Insurance Law § 5102 (d), and, if so, the amount of monetary damages to which the plaintiff would be entitled. As the jury began its deliberations, counsel and the Supreme Court discussed whether to discharge the two alternate jurors. A court officer informed the court that juror number 6 had to attend a class at 2:00 p.m.

Plaintiff's counsel argued that CPLR 4106 permits the substitution of a regular juror with an alternate juror even after deliberations have begun. The Supreme Court agreed, but pointed out that "[i]f, in fact, we need one or more of the alternates, they have to start deliberations all over again." Plaintiff's counsel disagreed, and argued that CPLR 4106 does not require the jury to commence deliberations from the beginning. The court then asked, "How would that work? They have been talking, say, for three hours, and then somebody new {**203 AD3d at 9} comes in?" Plaintiff's counsel argued that CPLR 4106 "doesn't require any other procedure." The court, with consent of counsel, decided to retain the alternate jurors in the event that a regular juror could not continue deliberating.

Soon after that colloquy, the jury sent two notes requesting, inter alia, evidence. The first note, among other things, asked for medical bills, and a second note requested a readback of certain testimony. Given that it was not possible for the readback to be completed before the jury's 1:00 p.m. lunch break, the Supreme Court decided that it would send the jury to lunch prior to the readback and have the jury return at 2:15 p.m. The court informed counsel that juror number 6 "has something that he needs to go to today" at 2:00 p.m. The court suggested replacing juror number 6 with the first designated alternate, and asked whether counsel had any objections to the substitution. Plaintiff's counsel immediately consented to the substitution, but defense counsel wanted to "see where they are" before agreeing to the substitution. The court stated that, given the request for a readback, the jury would not finish by 1:00 p.m. Defense counsel then asked whether they could wait until 1:00 p.m. The court responded, "No, we have to read back the testimony, that's where we are." Defense counsel then stated, "Okay, I understand," indicating his consent to the substitution.

The Supreme Court then stated, "Tell juror number six he can go, and alternate number one goes into the deliberations," and the jury broke for lunch. Upon returning to the courtroom, the court informed the jury, "Before you are seated, juror number six we let go because he had to go to school, so alternate number one is now juror number six." The newly-composed jury then heard the readback of requested testimony, and returned to deliberations.

Shortly thereafter, the jury delivered a note indicating that it had reached its verdict. The Supreme Court then read the verdict into the record. The jury unanimously voted "yes" to the first question, which read, "did the plaintiff, Shana Caldwell, sustain a permanent consequential limitation of use of a body organ or member?" Five jurors voted "yes" and one juror dissented in response to the second question, which read, "did the plaintiff, Shana Caldwell, sustain a significant limitation of use of a body function or system?" Five jurors voted "yes" and one juror dissented in response to the third question, which read, "did the plaintiff, Shana Caldwell, sustain an {**203 AD3d at 10}injury which prevented her from performing substantially all of her customary daily activities for at least 90 of the first 180 days following the accident?"

In response to question four, five jurors voted to award the plaintiff the sum of $4,000,000 for pain and suffering, including loss of enjoyment of life, and $155,000 for medical expenses, with one juror dissenting. In response to question five, five jurors voted to award the plaintiff the sum of $8,750,000 for pain and suffering, including the permanent

effect of the injury, from the time of the verdict to the time that the plaintiff could be expected to live, and $1,800,000 for future medical expenses, with one juror dissenting. In response to question six, the jury unanimously indicated that the awards for future pain and suffering and future medical expenses were intended to provide the plaintiff compensation for 48 years.

After reading the verdict, the Supreme Court thanked the jury and was about to discharge the jurors when defense counsel interjected with a request that the jurors be polled. Polling revealed that the announced verdict included the votes of the discharged juror as to questions one through four, and that the substituted juror only voted on questions five and six. As to questions one through four, the substituted juror was "not there."

Defense counsel objected, noting that "[w]e can't poll the juror who wasn't there." The Supreme Court responded, "You have the names on the verdict sheet, you know who the dissenting juror is, there is only one dissenting juror, okay." As the court polled the jurors, it [*3]commented, "you got through more than I thought you got through before we lost the juror."

Immediately after polling the jurors, the Supreme Court discharged the jury. Once the jurors left the courtroom, the court asked counsel whether there was "anything to put on the record." Citing to *Duffy v Vogel* (12 NY3d 169 [2009]), defense counsel contended, inter alia, that "because of the absence of the original juror number six, the verdict is incomplete and the jury cannot properly be polled." The court responded that the defendants "didn't object to what we did, replacing the juror," and "therefore, I don't care what the caselaw says, your objection, at this point, is out of time, and you waived. End of discussion." The plaintiff argued that the defendants' failure to object to the substitution of the alternate juror in place of the regular juror was a "trick to try and work to invalidate the verdict that was upcoming." The court noted that, "we don't play those {**203 AD3d at 11}games in my courtroom," and ruled that the defendants "waived" their objection.

III.

CPLR 4104 provides that a jury shall be composed of six persons. As authorized by article I, § 2 of the New York State Constitution, CPLR 4113 (a) provides that a verdict may be rendered by not less than five-sixths of the jurors constituting a jury (*see Sharrow v Dick Corp.*, 86 NY2d 54 [1995]; *Gallegos v Elite Model Mgt. Corp.*, 28 AD3d 50, 54 [2005]; *State*

of New York v Exxon Corp., 7 AD3d 926 [2004]; *Waldman v Cohen*, 125 AD2d 116 [1987]). "[W]here the parties to a civil case have not agreed to a trial by fewer than six jurors, a valid verdict requires that all six jurors participate in the underlying deliberations" (*Sharrow v Dick Corp.*, 86 NY2d at 59-60). "The parties are entitled to a process in which each juror deliberates on all issues and attempts to influence with his or her individual judgment and persuasion the reasoning of the other five" (*id.* at 60; *see Waldman v Cohen*, 125 AD2d 116, 118 [1987]; *Schabe v Hampton Bays Union Free School Dist.*, 103 AD2d at 427-428).

"In New York, we have long recognized that affording jurors a last opportunity individually to express agreement or disagreement with the reported verdict, is, when requested by a litigant, indispensable to a properly published, and thereby perfected, verdict" (*Duffy v Vogel*, 12 NY3d at 174). Indeed, a verdict is not deemed perfected until it is pronounced and recorded in open court (*see id.*; *Kitenberg v Gulmatico,* 143 AD3d 947, 949 [2016]), and such verdict may not be properly recorded without a jury poll where one has been sought (*see* CPLR 4112; *Duffy v Vogel*, 12 NY3d at 174; *Warner v New York Cent. R.R. Co.*, 52 NY 437, 442 [1873]). A failure to honor a party's request to poll each of the jurors may never be deemed harmless error (*see Duffy v Vogel*, 12 NY3d at 175), and mandates reversal and a new trial (*see Holstein v Community Gen. Hosp. of Greater Syracuse,* 20 NY3d 892, 893 [2012]; *Duffy v Vogel*, 12 NY3d at 175; *Garcia v Rosario,* 192 AD3d 538 [2021]).

Here, the defendants were deprived of the constitutional and statutory right to a civil jury trial of six persons who deliberate on all matters, and the right to poll each of the jurors whose votes were counted as part of the verdict announced in open court. Contrary to the plaintiff's contention, the defendants preserved these contentions by protesting that the discharged {**203 AD3d at 12} juror could not be polled, and by arguing that the verdict was defective. In any event, even assuming that the defendants' protests were insufficient to preserve all of the arguments raised on appeal, given the fundamental errors committed by the Supreme Court, we would reach the defendants' contentions in the interest of justice (*see Martin v City of Cohoes*, 37 NY2d 162, 165 [1975]; *Figueroa-Burgos v Bieniewicz,* 135 AD3d 810, 812-813 [2016]; *Krigsfeld v Feldman,* 115 AD3d 712, 713 [2014]; *Gallagher v Samples,* 6 AD3d 659 [2004]; *Decker v Rassaert*, 131 AD2d 626 [1987]).

Contrary to the Supreme Court's determination, the verdict sheet, which identifies the votes of the jurors, is not a substitute for the polling of the jurors. "A verdict sheet is neither a verdict nor a substantive communication from the jury" (*People v Boatwright*, 297 AD2d 603,

604 [2002]). More importantly, the main purpose of polling the jury is to give jurors "a last opportunity individually to express agreement or disagreement with the reported verdict" (*Duffy v Vogel*, 12 NY3d at 174). Here, such purpose was thwarted since the verdict was not the product of the participation and deliberation of each of the jurors who ultimately delivered the verdict (*see e.g. Rivas v New York City Tr. Auth.*, 103 AD3d 414, 415 [2013]).

By merely consenting to the replacement of a regular juror with an alternate in accordance with CPLR 4106, the defendants did not waive their constitutional and statutory rights to a civil jury of six persons who deliberate on all matters. The plaintiff's waiver argument is premised on its position that CPLR 4106 does not require a court to instruct the jury to restart deliberations from the beginning, and, in effect, contemplates that a substituted juror may continue from wherever the discharged juror left off during deliberations without any instruction from the court. For the following reasons, the plaintiff's interpretation of CPLR 4106, if accepted, would [*4]needlessly render CPLR 4106 unconstitutional, and is therefore without merit.

Former CPLR 4106 authorized the selection of alternate jurors, who were seated with and treated in the same manner as regular jurors "except that after final submission of the case, the court *shall* discharge the alternate jurors" (emphasis added; *see Gallegos v Elite Model Mgt. Corp.*, 28 AD3d at 54; *see also People v Ryan*, 19 NY2d 100, 104 [1966]). Prior to deliberations, there is no material distinction between regular {**203 AD3d at 13} and alternate jurors, and, thus, substitution at that time presents no violation of the right to trial by jury (*see People v Jeanty*, 94 NY2d 507, 517 [2000]; *People v Ortiz*, 92 NY2d 955, 957 [1998]; *Leffler v Feld*, 79 AD3d 491, 492 [2010]; *People v Ballard*, 51 AD3d 1034 [2008]). The rationale of former CPLR 4106's prohibition of a substitution after final submission of the case was that "an alternate juror who enters the jury room after deliberation has begun is not fully qualified to render an intelligent verdict, having missed part of the discussion and consideration which makes up the deliberative process" (1958 2d Prelim Rep of Advisory Comm on Prac and Proc, 1958 NY Legis Doc No. 13 at 228; *see People v Ryan*, 19 NY2d at 104; *Gallegos v Elite Model Mgt. Corp.*, 28 AD3d at 55).

In *People v Ryan*, the Court of Appeals, in discussing former CPLR 4106, held that the New York State Constitution "prohibits the substitution of an alternate juror . . . after the jury has begun its deliberation," since "once the deliberative process has begun, it should not be disturbed by the substitution of one or more jurors who had not taken part in the previous

deliberation and who had 'cease[d] to function as' jurors" (*People v Ryan*, 19 NY2d at 104-105, quoting *People v Mitchell*, 266 NY 15, 18 [1934]; *see People v Garbutt*, 42 AD3d 665 [2007]).

In *Gallegos v Elite Model Mgt. Corp.* (28 AD3d at 55), the First Department extended the principles set forth in *People v Ryan* (19 NY2d 100 [1966]) to civil jury trials. The First Department held that absent consent, the substitution of a regular juror with an alternate once deliberations have begun violates the parties' state constitutional right to a civil jury trial and invalidates any resulting verdict (*see Gallegos v Elite Model Mgt. Corp.*, 28 AD3d at 55; *see also Avila v City of New York*, 73 AD3d 444 [2010]).

In 2013, CPLR 4106 was amended so that a trial court may discharge and replace a regular juror with an alternate even after deliberations have begun, if the regular juror has "become[ ] unable to perform the duties of a juror" (*Garbie v Ahmad*, 168 AD3d 687, 687 [2019]). In determining whether discharge and replacement of a deliberating regular juror is appropriate, "a trial court must, after receiving notice that a juror may not be able to perform his or her duty, make whatever inquiry is reasonably necessary to determine whether the juror should be discharged and replaced with an alternate juror" (*Garbie v Ahmad*, 168 AD3d at 687). The failure to make {**203 AD3d at 14} such inquiry before replacing a deliberating regular juror with an alternate constitutes reversible error (*see Garcia v Rosario*, 192 AD3d 538 [2021]; *Garbie v Ahmad*, 168 AD3d at 688).[FN1]

By enacting the amendments to CPLR 4106, the legislature sought to reduce the possibility of a mistrial due to incapacitation of a regular juror during jury deliberations (*see* Bill Jacket, L 2013, ch 204). The Bill Jacket notes that the former version of the statute required discharge of the alternate jurors after final submission of the case, and that, if a juror became disabled during deliberations, then a mistrial was declared unless all parties consented to a five-person jury, which consent was rarely obtained (*see id.*).

Notably, the Bill Jacket does not address case law holding that the substitution of an alternate juror after deliberations have commenced, without consent, violates the *constitutional* right to a civil trial by jury, and invalidates any resulting verdict (*see People v Ryan*, 19 NY2d 100 [1966]; *Avila v City of New York*, 73 AD3d 444 [2010]; *Gallegos v Elite Model Mgt. Corp.*, 28 AD3d at 55). Even so, courts have an obligation to "avoid, if possible, interpreting a presumptively valid statute in a way that will needlessly render it

unconstitutional" (*Overstock.com, Inc. v New York State Dept. of [*5]Taxation & Fin.*, 20 NY3d 586, 593 [2013] [internal quotation marks omitted]; *see LaValle v Hayden*, 98 NY2d 155, 161 [2002]).[FN2]

The plaintiff's construction of CPLR 4106, which is that the statute does not require the jury to restart deliberations from the beginning upon a juror substitution, would render CPLR 4106 unconstitutional because it would deprive the parties of the right to a civil jury trial wherein, among other things, the {**203 AD3d at 15} same jurors deliberate on all issues and render a verdict (*see Sharrow v Dick Corp.*, 86 NY2d at 59-60; *Waldman v Cohen*, 125 AD2d at 118; *Schabe v Hampton Bays Union Free School Dist.*, 103 AD2d at 427-428). Indeed, the Supreme Court correctly rejected the plaintiff's argument, and determined that, upon substitution, deliberations would have to begin anew. The court, however, inexplicably failed to give the jury any instruction when it substituted juror number 6 with the first designated alternate.

Thus, we hold that to reconcile CPLR 4106 with the constitutional right to a civil jury trial, a trial court permitting, upon adequate inquiry, a substitution of a regular juror with an alternate juror once deliberations have begun, must instruct the jury: (1) that one of its members has been discharged and replaced with an alternate juror as provided by law; (2) that the parties are entitled to a verdict reached only after full participation of the six jurors who will ultimately return the verdict; and (3) in order to assure the parties of that right, the jury must start their deliberations on each issue from the beginning, and must set aside and disregard all past deliberations (*see e.g.* NJ Model Civil Jury Charge 1.16; Judicial Council of Cal Civil Jury Instruction No. 5014; *see also Greisel v Dart Indus., Inc.*, 23 Cal 3d 578, 591 P2d 503 [1979], *overruled on other grounds by Privette v Superior Court*, 5 Cal 4th 689, 854 P2d 721 [1993]; *cf. People v Hubsher*, 176 AD3d 972 [2019]). Further, where the trial court has provided the jury with a verdict sheet, the court should substitute it with a clean verdict sheet in order to ensure that past deliberations do not infect the new deliberation process.

The Supreme Court's failure to give the jury an instruction, inter alia, to begin deliberations anew resulted in an invalid verdict that included the votes of the discharged juror, and did not include votes of the juror who replaced him. Further, the verdict sheet evinces that on questions two through four, the discharged juror voted with the majority, and there were three different dissenting jurors on those questions. Discounting the votes of the

discharged juror on those questions, there were only four votes in favor of the plaintiff. A verdict may not be reached by less than five-sixths of the jurors constituting a jury (*see* CPLR 4113 [a]), and a jury's vote containing less than five votes in favor of a party is tantamount to no verdict (*see State of New York v Exxon Corp.*, 7 AD3d 926 [2004]; *Novo Corp. v Consolidated Edison Co. of N.Y.*, 53 AD2d 570 [1976]; *Fairchild v Cervi Bros. Trucking Co.*, 1 AD2d 508 [1956]).{**203 AD3d at 16}

IV. In light of our determination, we need not reach the defendants' remaining contentions.

Accordingly, the judgment is reversed, on the law, and the matter is remitted to the Supreme Court, Kings County, for a new trial on the issue of damages.

Chambers, J.P., Miller and Iannacci, JJ., concur.

Ordered that the judgment is reversed, on the law, with costs, and the matter is remitted to the Supreme Court, Kings County, for a new trial on the issue of damages.

Footnotes

Footnote 1: The issue of whether the Supreme Court made adequate inquiry as to whether the regular juror's class at 2:00 p.m. rendered him "unable to perform the duties of a juror" is not before us (*cf. Garcia v Rosario*, 192 AD3d 538 [2021] [judgment reversed based upon erroneous discharge of jury foreperson alleged to have been in verbal altercation with another juror]; *Garbie v Ahmad*, 168 AD3d 687 [2019] [judgment reversed based upon court's failure to make adequate inquiry regarding juror's complaint of emotional distress before discharging and replacing such juror]; *Jett v City of New York*, 140 AD3d 511, 511 [2016] [court providently exercised discretion in refusing to discharge juror who "expressed concern about continuing deliberations" in absence of evidence that he was unable to perform duties of a juror]).

Footnote 2: At the request of the Office of Court Administration, legislation has been proposed to amend CPLR 4106 to provide, inter alia, that "[a]fter an alternate juror has been substituted, the jury shall deliberate on all of the issues that were submitted to the jury at the outset of deliberations" (2021 NY Assembly Bill A7799).

Kirwan v New York City Tr. Auth.

2021 NY Slip Op 06350 [199 AD3d 907]

November 17, 2021

Appellate Division, Second Department

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As corrected through Wednesday, December 29, 2021

[*1]

Jennifer Kirwan, Respondent,
v
New York City Transit Authority et al., Appellants.

Anna Ervolina, Brooklyn, NY (Harriet Wong of counsel), for appellants.

Gregory J. Cannata & Associates, LLP, New York, NY (Alison Cannata Hendele of counsel), for respondent.

In an action to recover damages for personal injuries, the defendants appeal from an interlocutory judgment of the Supreme Court, Kings County (Katherine Levine, J.), dated November 29, 2017. The interlocutory judgment, upon a jury verdict on the issue of liability finding the defendants to be 100% at fault in the happening of the accident, and upon the denial of the defendants' motion, inter alia, pursuant to CPLR 4404 (a) to set aside the jury verdict in favor of the plaintiff and against them on the issue of liability and for judgment as a matter of law dismissing the complaint, is in favor of the plaintiff and against the defendants on the issue of liability.

Ordered that the interlocutory judgment is reversed, on the law, with costs, that branch of the defendants' motion which was pursuant to CPLR 4404 (a) to set aside the jury verdict and for judgment as a matter of law dismissing the complaint is granted, and the complaint is dismissed.

The plaintiff commenced this action to recover damages for personal injuries that she allegedly sustained as a result of being struck by a bus owned by the defendants. The action proceeded to a trial on the issue of liability, at which the plaintiff testified that she had been

waiting at a bus stop on a sidewalk in Brooklyn at approximately 11:00 p.m. when she saw a bus approaching. The plaintiff testified that she walked "a couple of feet" toward the bus—that was the last thing that she could recall before she realized that she was on the ground and saw the back of the bus as it was driving away down the street. The plaintiff believed that she was hit by the bus but could not say whether she was hit by "any particular part of the bus." The plaintiff also could not remember, but "assumed," that she had stepped down into the street as the bus was approaching. There were no witnesses to the alleged accident and no accident at that location was reported to the defendants by any bus operator. The plaintiff was taken to the hospital and it was determined that she suffered a crush injury to her foot, among other things.

After hearing the evidence, the jury rendered a verdict finding the defendants 100% at fault in the happening of the accident. The defendants moved, among other things, pursuant to CPLR 4404 (a) to set aside the verdict and for judgment as a matter of law dismissing the complaint. The Supreme Court, inter alia, denied that branch of the motion, and an interlocutory judgment was entered in favor of the plaintiff and against the defendants on the issue of liability. The defendants appeal.

"A motion pursuant to CPLR 4404 (a) to set aside a jury verdict and for judgment as [*2]a matter of law will be granted where there is no valid line of reasoning and permissible inferences which could possibly lead rational persons to the conclusions reached by the jury on the basis of the evidence presented at trial" (*Hilt v Carpentieri*, 198 AD3d 625, 627 [2d Dept 2021] [internal quotation marks omitted]; *see Cohen v Hallmark Cards*, 45 NY2d 493, 499 [1978]). In determining such a motion, a court must accept the plaintiff's evidence as true and accord the plaintiff the benefit of every favorable inference which can reasonably be drawn from the evidence presented at trial (*see Ryan v New York City Tr. Auth.*, 89 AD3d 1005, 1007 [2011]). However, "[a] jury verdict must be based on more than mere speculation or guesswork" (*Bernstein v City of New York*, 69 NY2d 1020, 1021 [1987]).

Here, there was no rational process by which the jury could find in favor of the plaintiff and against the defendants on the issue of liability. Even if the circumstantial evidence sufficiently supported a conclusion that the plaintiff was injured due to an impact with a bus, the mere fact that the plaintiff was struck by a bus did not prove the defendants' negligence (*see Castellano v New York City Tr. Auth.*, 38 AD3d 822, 823 [2007]). In addition to establishing the fact of the accident, it was the plaintiff's burden to demonstrate what actually

happened at the time of the accident so as to enable the jury to find that the defendants were negligent and that their negligence was a proximate cause of the accident (*see id.* at 823). In the present case, there was no evidence presented from which the jury could rationally determine that any impact between the plaintiff and the bus was caused by negligence on the part of a bus operator (*see id.*; *see also Nahar v Socci*, 112 AD3d 592, 593 [2013]; *cf. Berry v Rockville Ctr. Union Free Sch. Dist.*, 195 AD3d 579 [2021]).

Accordingly, that branch of the defendants' motion which was pursuant to CPLR 4404 (a) to set aside the verdict and for judgment as a matter of law dismissing the complaint should have been granted.

In light of our determination, we need not reach the parties' remaining contentions. Rivera, J.P., Brathwaite Nelson, Iannacci and Ford, JJ., concur.

Foster v Suffolk County Police Dept.

2021 NY Slip Op 05956 [199 AD3d 658]

November 3, 2021

Appellate Division, Second Department

Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.

As corrected through Wednesday, December 29, 2021

[*1]

Maureen Foster, Respondent,
v
Suffolk County Police Department et al., Appellants, and John Licausi, Respondent.

Devitt Spellman Barrett, LLP, Smithtown, NY (John M. Denby of counsel), for appellants.

Ira Cooper, Carle Place, NY, for plaintiff-respondent.

John Licausi, Napanoch, NY, defendant-respondent pro se.

In an action, inter alia, to recover damages for wrongful death, the defendants Suffolk County Police Department and County of Suffolk appeal from a judgment of the Supreme Court, Suffolk County (Arthur G. Pitts, J.), dated March 8, 2018. The judgment, upon a jury verdict finding those defendants 15% at fault in the happening of the accident and the defendant John Licausi 85% at fault, is in favor of the plaintiff and against the defendants awarding damages.

Ordered that the judgment is reversed, on the law, with one bill of costs, and the matter is remitted to the Supreme Court, Suffolk County, for a new trial.

The plaintiff's decedent was killed when a vehicle driven by the defendant John Licausi struck his vehicle. At the time of and leading up to the crash, Licausi's vehicle was being pursued by a police vehicle driven by Police Officer Michael Bogliole. The plaintiff commenced the instant action to recover damages for wrongful death and loss of consortium

against the Suffolk County Police Department, the County of Suffolk (hereinafter together the Suffolk County defendants), and Licausi.

Following a jury trial, the Supreme Court determined, as a matter of law, that Licausi was negligent and that his negligence was a substantial factor in causing the accident. Thereafter, the jury returned a verdict finding that Officer Bogliole operated his police vehicle with a reckless disregard for the safety of others, and that Officer Bogliole's reckless disregard was a substantial factor in bringing about the accident. The jury apportioned 85% fault to Licausi and 15% to Officer Bogliole, and awarded the plaintiff damages in the total sum of $1.5 million. Thereafter, judgment was entered in favor of the plaintiff and against the defendants. The Suffolk County defendants appeal.

The Suffolk County defendants are correct that the Supreme Court erred in admitting into evidence, without any limiting instruction, the Suffolk County Police Department Rules and Procedures on vehicular pursuits. An organization's internal rules or manuals, "to the extent they [*2]impose a higher standard of care than is imposed by law, are inadmissible to establish" a violation of the standard of care (*Abraham v Port Auth. of N.Y. & N.J.*, 29 AD3d 345, 347 [2006]; *see Rivera v New York City Tr. Auth.*, 77 NY2d 322, 329 [1991]; *Johnson v City of New York*, 152 AD3d 503, 504 [2017]; *Lesser v Manhattan & Bronx Surface Tr. Operating Auth.*, 157 AD2d 352, 356 [1990], *affd sub nom. Fishman v Manhattan & Bronx Surface Tr. Operating Auth.*, 79 NY2d 1031 [1992]).

Here, the rules and regulations at issue imposed a higher standard of care than the reckless disregard standard imposed by Vehicle and Traffic Law § 1104, which " 'qualifiedly exempts drivers of emergency vehicles from certain traffic laws when they are involved in an emergency operation, and precludes the imposition of liability for otherwise privileged conduct except where the driver acted in reckless disregard for the safety of others' " (*Wonderly v City of Poughkeepsie*, 185 AD3d 632, 633 [2020], quoting *Thomas v City of New York*, 172 AD3d 1132, 1133 [2019]). Thus, we conclude that the Supreme Court committed reversible error in admitting the internal rules without providing a limiting instruction that the rules could be considered only as some evidence of recklessness along with other factors (*see O'Connor v City of New York*, 280 AD2d 309, 309 [2001]; *Clarke v New York City Tr. Auth.*, 174 AD2d 268, 276 [1992]; *see also Saarinen v Kerr*, 84 NY2d 494, 503 n 3 [1994]).

In light of our determination, we need not reach the Suffolk County defendants' remaining contentions.

We do not address the arguments raised in Licausi's brief, as they are based on matter dehors the record. LaSalle, P.J., Austin, Wooten and Zayas, JJ., concur.

Mansour v Paddock Chevrolet, Inc.

2021 NY Slip Op 05190 [198 AD3d 1280]

October 1, 2021

Appellate Division, Fourth Department

Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.

As corrected through Wednesday, December 1, 2021

[*1]

Hanna G. Mansour, Respondent,
v
Paddock Chevrolet, Inc., Appellant, and Kent P. Neubeck, Respondent, et al., Defendant.

The Tarantino Law Firm, LLP, Buffalo (Ann M. Campbell of counsel), for defendant-appellant.

Gibson, McAskill & Crosby, LLP, Buffalo (Kristin A. Tisci of counsel), for plaintiff-respondent.

Smith, Sovik, Kendrick & Sugnet, P.C., Syracuse (Karen G. Felter of counsel), for defendant-respondent.

Appeal from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered December 10, 2020. The order denied the motion of defendant Paddock Chevrolet, Inc. to dismiss the amended complaint and all cross claims against it.

It is hereby ordered that the order so appealed from is unanimously modified on the law by granting the motion of defendant Paddock Chevrolet, Inc. in part and dismissing the amended complaint against it, and converting all cross claims by and against Paddock Chevrolet, Inc. into third-party complaints, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for personal injuries that he allegedly sustained when the vehicle in which he was a passenger, which was owned by defendant Paddock Chevrolet, Inc. (Paddock) and operated by defendant Kent P. Neubeck,

collided with a vehicle owned and operated by defendant Santino C. Lococo. At the time of the accident, plaintiff was employed by Paddock as a car salesman who was accompanying Neubeck as he was test-driving the vehicle, and plaintiff applied for and received workers' compensation benefits following the accident. In their answers, both Neubeck and Lococo asserted cross claims against Paddock and each other for contribution and indemnification.

Paddock moved pursuant to CPLR 3211 (a) (7) to dismiss the amended complaint and all cross claims asserted against it on the ground that they were barred under Workers' Compensation Law § 11. Supreme Court denied the motion without prejudice to renew at the close of discovery. We agree with Paddock that the court erred in denying that part of its motion seeking dismissal of the amended complaint against it, but we conclude that the court properly denied the motion with respect to the cross claims inasmuch as it would be premature to determine the merits of the cross claims at this juncture. We therefore modify the order accordingly.

Aside from an exception not relevant here, Workers' Compensation Law § 11 provides that "[t]he liability of an employer prescribed by [section 10] shall be exclusive and in place of any other liability whatsoever, to such employee, . . . or any person otherwise entitled to recover damages, contribution or indemnity, at common law or otherwise, on account of such injury or death or liability arising therefrom." We thus agree with Paddock that plaintiff's claims against it are barred.

Paddock correctly contends that New York has rejected the "dual capacity" doctrine (*see [*2]generally Billy v Consolidated Mach. Tool Corp.*, 51 NY2d 152, 158-159 [1980], *rearg denied* 52 NY2d 829 [1980]; *Falzon v Brown*, 282 AD2d 498, 499 [2d Dept 2001]), rendering it irrelevant whether the amended complaint and cross claims asserted against Paddock were based on its status as plaintiff's employer or its status as the owner of the vehicle who is vicariously liable for the negligence of a nonemployee driver under Vehicle and Traffic Law § 388 (*see e.g. Szumowski v PV Holding Corp.*, 90 AD3d 415, 415 [1st Dept 2011]; *Testerman v Zielinski*, 68 AD3d 1751, 1752 [4th Dept 2009]; *cf. Preston v APCH, Inc.*, 89 AD3d 65, 72-73 [4th Dept 2011]).

We likewise agree with Paddock that any allegation of an affirmative act of negligence by Paddock, e.g., that it failed to maintain the vehicle properly, does not render the amended complaint and cross claims viable. Such a contention does not apply where, as here, the party

being sued is the party that is actually immune from suit pursuant to Workers' Compensation Law § 11. The cases wherein actions are permitted against owners of vehicles for their affirmative acts of negligence are cases in which the owners are third parties, i.e., the owners are not the employers of either the injured party or the operator of the vehicle, and their immunity from *vicarious* liability is based on the fact that the negligent operator of the vehicle was a co-employee of the injured party (*see* Workers' Compensation Law § 29 [6]; *see generally Isabella v Hallock*, 22 NY3d 788, 794-797 [2014]). "It is well settled that while Workers' Compensation Law § 29 (6) precludes suit against a fellow employee based on his [or her] negligence, it is not a bar to an action against a *third-party owner* based upon the owner's affirmative negligence toward the injured employee" (*Chiriboga v Ebrahimoff*, 281 AD2d 353, 354 [1st Dept 2001] [emphasis added]; *see Rascoe v Riteway Rentals*, 176 AD2d 552, 552 [1st Dept 1991]).

Although plaintiff's action against Paddock is barred by the provisions of Workers' Compensation Law § 11, we reject Paddock's contention that the cross claims asserted against it by Neubeck and Lococo fail to state a cause of action. "As amended by the legislature in 1996, . . . section 11[, as relevant here,] now explicitly limits an employer's exposure to third-party liability to those situations where the employee suffers a grave injury" (*New York Hosp. Med. Ctr. of Queens v Microtech Contr. Corp.*, 22 NY3d 501, 510 [2014]). Inasmuch as there has been no discovery on the nature and degree of plaintiff's injuries, we cannot conclude that the cross claims fail to state a cause of action against Paddock.

Nevertheless, we conclude that all cross claims by and against Paddock should be converted to third-party complaints (*see Cusick v Lutheran Med. Ctr.*, 105 AD2d 681, 682 [2d Dept 1984]; *Javitz v Slatus*, 93 AD2d 830, 831 [2d Dept 1983]; *see also Schilling v Malark*, 13 AD3d 1153, 1153 [4th Dept 2004]), and we therefore further modify the order accordingly. Due to the fact that Paddock has been a party since the commencement of this action, no purpose would be served by compelling the remaining defendants to formally implead Paddock as a third-party defendant, nor by compelling Paddock to protect its claims against the other defendants by serving a third-party complaint (*see Cusick*, 105 AD2d at 682; *Javitz*, 93 AD2d at 831). Present—Smith, J.P., Lindley, Troutman, Bannister and DeJoseph, JJ.

Christopher W. v County of Suffolk
2021 NY Slip Op 04922 [197 AD3d 1126]
September 1, 2021
Appellate Division, Second Department
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
As corrected through Friday, February 4, 2022

[*1]

Christopher W. et al., Appellants,
v
County of Suffolk et al., Respondents, et al., Defendants.

Neil H. Greenberg & Associates, P.C., Massapequa, NY (Keith E. Williams of counsel), for appellants.

Dennis M. Cohen, County Attorney, Hauppauge, NY (Diana T. Bishop of counsel), for respondents County of Suffolk and another.

Kelly, Luglio & Arcuri, LLP, Deer Park, NY (Andrew A. Arcuri of counsel), for respondent Doreen Duque, as executor of the estate of Dorothy Upton.

In an action to recover damages for personal injuries, etc., the plaintiffs appeal from an order of the Supreme Court, Suffolk County (John H. Rouse, J.), dated October 20, 2017. The order granted the motion of the defendants County of Suffolk and Kimberly Gandolfo for summary judgment dismissing the amended complaint insofar as asserted against them.

Ordered that the order is affirmed, with costs payable to the respondents County of Suffolk and Kimberly Gandolfo.

While walking to school on the morning of October 24, 2011, the infant plaintiff (hereinafter the infant), then 16 years old, was struck by a vehicle owned and operated by Dorothy Upton as he was crossing Montauk Highway, at its intersection with Wagstaff Lane and Barberry Road, in West Islip, within a crosswalk. A crossing guard, the defendant Kimberly Gandolfo, employed by the defendant County of Suffolk (hereinafter together the

County defendants), was posted at that school crossing, which was near the rear entrance to West Islip High School.

The infant, by his father and natural guardian, and his father suing derivatively, commenced this action against, among others, the County defendants and Upton. The County defendants moved for summary judgment dismissing the amended complaint insofar as asserted against them. The Supreme Court granted their motion. The plaintiffs appeal.

Vehicle and Traffic Law § 1102 provides that "[n]o person shall fail or refuse to comply with any lawful order or direction of any police officer or flagperson or other person duly empowered to regulate traffic." Here, the County defendants made a prima facie showing of entitlement to judgment as a matter of law by submitting, inter alia, transcripts of the deposition testimony of Gandolfo, Upton, and an eyewitness to the accident, which demonstrated that Upton's [*2]actions were the sole proximate cause of the accident. Gandolfo testified that, upon seeing the infant at the southern corner of the intersection from her post on the northern corner, she entered the crosswalk, and, upon reaching the middle, raised her stop sign toward traffic traveling east on Montauk Highway, and her gloved hand toward traffic traveling west, checked in both directions two times for approaching vehicles, and seeing none, nodded to the infant to enter the crosswalk. Gandolfo further testified that she heard Upton's vehicle, which was traveling east on Montauk Highway, before she saw it, and that, despite Gandolfo's presence in the crosswalk, Upton failed to stop her vehicle, and struck the infant as he had almost reached the middle of the crosswalk. The eyewitness testified that, after dropping her child off at the high school, she was waiting for the infant to walk through the crosswalk before making a right turn onto Montauk Highway, and the crossing guard, dressed in a crossing guard uniform, was in the middle of the crosswalk holding a stop sign, when the infant was struck as he approached the middle of the crosswalk. During her deposition, Upton, who frequently traveled the route where the accident occurred, testified that, prior to striking the infant, she saw Gandolfo in the road, holding up her stop sign, but did not see the infant until after her vehicle struck him.

The evidence submitted by the County defendants established, prima facie, that Gandolfo exercised due care in confirming that the road was clear of approaching vehicles by looking in both directions and by standing in the center of the crosswalk with a stop sign and her arm raised to stop traffic before signaling to the infant to enter the crosswalk, and that Upton, despite seeing Gandolfo in the crosswalk with a stop sign, failed to bring her vehicle

to a stop (*see* Vehicle and Traffic Law § 1102; *see e.g. Wray v Galella*, 172 AD3d 1446, 1448 [2019]; *Huang v Franco*, 149 AD3d 703, 703 [2017]).

In opposition, the plaintiffs failed to raise a triable issue of fact (*see e.g. Huang v Franco*, 149 AD3d at 703). Although the plaintiffs submitted the opinion of a human factors consulting scientist, their expert relied on speculation in rendering his opinion (*see Troy v Grosso*, 173 AD3d 1110, 1111 [2019]).

Accordingly, the Supreme Court properly granted the County defendants' motion for summary judgment dismissing the amended complaint insofar as asserted against them. Mastro, J.P., Austin and Connolly, JJ., concur.

Hinds-Radix, J., dissents, and votes to reverse the order, on the law, and deny the motion of the defendants County of Suffolk and Kimberly Gandolfo for summary judgment dismissing the amended complaint insofar as asserted against them, with the following memorandum: As noted by my colleagues in the majority, while walking to school on the morning of October 24, 2011, at 6:50 a.m. when the sun was still below the horizon, the infant plaintiff (hereinafter the plaintiff), was struck by a vehicle owned and operated by Dorothy Upton as he was crossing from the south side to the north side of Montauk Highway, near where the rear entrance to West Islip High School was located.

Upton was traveling east on Montauk Highway. She testified at her deposition she was driving at about the speed limit of 40 miles per hour. An eyewitness to the accident estimated Upton's speed at 35 miles per hour, while the defendant Kimberly Gandolfo estimated Upton's speed as 50 miles per hour. There was no traffic light, stop sign, or yield sign at that intersection. Gandolfo testified that she looked both east and west to insure that no vehicles were coming in either direction, went to the middle of the street with her hand-held stop sign, and looked at the plaintiff, who started to cross. The eyewitness observed Gandolfo make a hand motion, signaling the plaintiff to cross, but could not make out what Gandolfo's sign said.

Gandolfo testified that she did not see Upton's vehicle because its headlights were off, while Upton testified her headlights were on and she could see the light from her headlights in front of her. Gandolfo saw Upton's vehicle when it was less than a block away, yelled "stop," and then yelled "run" to the plaintiff, "because [she] thought if he ran a little quicker"

Upton would miss [*3]him. As she was issuing these instructions, her whistle dropped out of her mouth, and she never used it. She acknowledged that the plaintiff appeared confused.

Upton testified at her deposition that she saw Gandolfo in the road to her left, which would have been in the westbound lane. Upton never saw the plaintiff. Gandolfo was holding "something" in her hands.

The eyewitness testified that she could not make out what the sign Gandolfo was holding said, but believed it was a stop sign because it was red and white. She estimated that five seconds elapsed between Gandolfo motioning for the plaintiff to cross, and the impact, which the plaintiff's expert claimed was not enough time to make a reasoned decision to avert the accident. The eyewitness noted that, at the time of impact, the plaintiff was less than 50% across the road, which meant he would have still been in the eastbound lane. Gandolfo confirmed that the plaintiff was five feet from her at the time of impact, and closer to the side of the street from which he came—which was the eastbound lane.

My colleagues in the majority find that Upton violated Vehicle and Traffic Law § 1102 by failing to stop in compliance with Gandolfo's direction and by entering the crosswalk despite Gandolfo's presence in the crosswalk, and that this violation was the sole proximate cause of the accident. Although the evidence indicates that Gandolfo's stop sign was difficult to make out, it appears that Upton should have slowed down and ascertained what it said before she entered the crosswalk. However, this does not make Upton's actions the sole proximate cause. There may be more than one proximate cause of an accident (*see Turturro v City of New York*, 28 NY3d 469, 483 [2016]).

It appears from this record that Gandolfo's alleged conduct could have been a substantial contributing cause of this accident. Gandolfo claimed that she could not see Upton's vehicle, because its headlights were not on. However, Upton disputed that testimony, indicating that Gandolfo may not have seen what was there to be seen (*see Felix v Polakoff*, 178 AD3d 561 [2019]). Although Gandolfo had the right to anticipate that motorists will obey traffic laws that require them to yield, she also had an obligation to notice an oncoming vehicle that could have been seen by the exercise of reasonable care (*see Wray v Galella*, 172 AD3d 1446, 1447 [2019]). There is conflicting testimony as to whether Upton was driving in excess of the speed limit, with Upton and the eyewitness claiming she did not exceed the speed limit. Further, the evidence indicates that Gandolfo directed the plaintiff to enter the crosswalk five

seconds before impact, when it was too late to avoid the accident. Moreover it appears that Upton did not see the plaintiff to her right because she was concentrating on what Gandolfo was doing to her left with a sign which was difficult to read. Gandolfo's verbal commands came too late to avert the accident. Further, the plaintiff was distracted by Gandolfo's conflicting verbal instructions to stop and run.

As noted by the Supreme Court, the doctrine of governmental immunity does not apply to this case (*see K.A. v City of New York*, 169 AD3d 655, 656 [2019]).

Since Gandolfo and the County of Suffolk did not eliminate triable issues of fact as to the circumstances under which the accident occurred, and what Gandolfo did or did not do, their motion for summary judgment should have been denied (*see Lopez v Beltre*, 59 AD3d 683, 684 [2009]).

Sage v Taylor
2021 NY Slip Op 04048 [195 AD3d 971]
June 23, 2021
Appellate Division, Second Department
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
As corrected through Wednesday, August 4, 2021

[*1]

Lawrence Sage, Appellant,
v
Tara Taylor, Respondent.

Gair, Gair, Conason, Rubinowitz, Bloom, Hershenhorn, Steigman & Mackauf, New York, NY (Richard M. Steigman of counsel), for appellant.

Burke, Conway & Stiefeld, White Plains, NY (Jayne Monahan of counsel), for respondent.

In an action to recover damages for personal injuries, etc., the plaintiff appeals from an order of the Supreme Court, Westchester County (William J. Giacomo, J.), dated December 2, 2019. The order granted the defendant's motion for summary judgment dismissing the complaint.

Ordered that the order is reversed, on the law, with costs, and the defendant's motion for summary judgment dismissing the complaint is denied.

At approximately 5:29 p.m. on November 27, 2017, the plaintiff's then eight-year-old son, while crossing at or near the intersection of Eiler Lane and Taxter Road in the Town of Greenburgh to retrieve a ball from a neighbor's yard, was struck by a vehicle operated by the defendant. In June 2018, the plaintiff, individually and on behalf of his son (hereinafter the child), commenced this action against the defendant. Issue was joined by service of a verified answer dated July 31, 2018. After discovery, the defendant moved for summary judgment dismissing the complaint. The Supreme Court granted the defendant's motion. The plaintiff appeals.

"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" (*Boulos v Lerner-Harrington*, 124 AD3d 709, 709 [2015]; *see King v Perez*, 160 AD3d 708 [2018]). "A driver is bound to see what is there to be seen with the proper use of his [or her] senses" (*Topalis v Zwolski*, 76 AD3d 524, 525 [2010]; *see Higashi v M&R Scarsdale Rest., LLC*, 176 AD3d 788, 790 [2019]; *Brandt v Zahner*, 110 AD3d 752 [2013]). "Since there can be more than one proximate cause of an accident, a defendant moving for summary judgment is required to make a prima facie showing that he or she is free from fault" (*Carias v Grove*, 186 AD3d 1484, 1484 [2020]). The issue of proximate cause is generally a question for the trier of fact (*see Jaber v Todd*, 171 AD3d 896 [2019]; *Miron v Pappas*, 161 AD3d 1063, 1064 [2018]).

"On a motion for summary judgment, the court must view the evidence in the light most favorable to the nonmoving party" (*Gobin v Delgado*, 142 AD3d 1134, 1136 [2016]). Here, the evidence submitted by the defendant in support of her motion, including a transcript of her own deposition testimony, failed to eliminate triable issues of fact as to whether she was free from fault in the happening of the accident and, if not free from fault, whether the child's purported negligence [*2]was the sole proximate cause of the accident (*see Gaudio v City of New York*, 189 AD3d 1546, 1548 [2020]; *Aponte v Vani*, 155 AD3d 929, 930 [2017]). The evidence the defendant submitted indicated that the front passenger side of her vehicle came into contact with the child who, approaching from the defendant's left, was more than halfway across the winding and curved roadway prior to impact (*see* Vehicle and Traffic Law §§ 1146 [a]; 1180 [a], [e]; *Searless v Karczewski*, 153 AD3d 957, 959 [2017]).

Accordingly, the Supreme Court should have denied the defendant's motion for summary judgment dismissing the complaint, without regard to the sufficiency of the plaintiff's opposition papers (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Dillon, J.P., Chambers, Austin and Duffy, JJ., concur.

Danziger v Elias
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[*1]

Samuel Danziger, Appellant,
v
Leah Breindel Elias et al., Respondents.

Subin Associates, LLP (Pollack, Pollack, Isaac & DeCicco, LLP, New York, NY [Brian J. Isaac and Paul H. Seidenstock], of counsel), for appellant.

Boeggeman, Corde, Ondrovic & Hurley, P.C., White Plains, NY (Richard G. Corde of counsel), for respondents.

In an action to recover damages for personal injuries and wrongful death, the plaintiff appeals from an order of the Supreme Court, Rockland County (Rolf M. Thorsen, J.), dated January 11, 2019. The order granted the defendants' motion for summary judgment dismissing the complaint.

Ordered that the order is reversed, on the law, with costs, and the defendants' motion for summary judgment dismissing the complaint is denied.

The plaintiff, in his capacity as limited administrator of the last goods, chattels, and credits of his deceased infant daughter (hereinafter the infant), commenced this action, inter alia, to recover damages for the wrongful death of the then 17-month-old infant, who allegedly came into contact with the passenger side of a vehicle operated by the defendant Leah Breindel Elias (hereinafter the driver) and owned by the defendant Miriam D. Elias. Shortly before the accident, the driver had dropped off a passenger in a residential cul-de-sac, with several young children playing nearby. After pulling into a driveway and reversing out in the opposite direction, the driver began moving her vehicle forward again when she heard a

loud "thump"—which was also heard by at least four other witnesses in the vicinity. Believing that her vehicle had come into contact with a parked car to her right, the driver began reversing her vehicle when a man outside urgently directed her to stop. Upon exiting the vehicle, the driver observed the infant lying on the ground "right behind" her vehicle, on the passenger side. The infant was taken to a hospital, where she died of her injuries the following day. The driver did not see the infant prior to the accident, and the record does not indicate that anyone actually observed the contact between the infant and the defendants' vehicle.

After joinder of issue, the defendants moved for summary judgment dismissing the complaint. The Supreme Court granted the motion, and the plaintiff appeals.

Under the circumstances presented, the evidence submitted by the defendants was insufficient to meet their prima facie burden of proof, since it failed to eliminate all triable issues of fact regarding the driver's alleged negligence, including her ability to see the infant prior to the accident (*compare Rawls v Simon*, 157 AD3d 418 [2018], *with DeJesus v Alba*, 63 AD3d 460 [2009], *affd* 14 [*2]NY3d 860 [2010]). Accordingly, the defendants' motion for summary judgment dismissing the complaint should have been denied, regardless of the sufficiency of the plaintiff's opposition papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Dillon, J.P., Chambers, Austin and Duffy, JJ., concur.

Christopher Glass, Esq. - Rappaport, Glass, Levine & Zullo, LLP

Christopher Glass is a third generation lawyer who specializes in representing clients who have been injured as a result of medical malpractice, nursing home negligence, car accidents, construction accidents, defective or unsafe products, and trips/slips and falls.

Since joining Rappaport, Glass, Levine and Zullo in 2013, Christopher has secured multiple six and seven figure resolutions. He has been named a "Rising Star" by Super Lawyers and been awarded "Top 40 Under 40" in the category of Civil Plaintiff Lawyers by The National Trial Lawyers. Christopher has published articles and lectured in the field of personal injury and trial practice. He is currently a member of the New York State Trial Lawyers Association, Suffolk County Bar Association, New York State Bar Association, and American Association for Justice.

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PREMISES LIABILITY 2021-2022 UPDATE

I. Creation or Actual or Constructive of a Hazardous Conditions

- **a. Prior Inspections & Notice**
- **b. Recurring Conditions & Notice**
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II. Open & Obvious Condition Defense

III. Trivial Defect Defense

IV. Storm in Progress Defense

V. Espinal Exceptions: Contractor Liability

VI. Adjacent Property Owner Liability

VII. Out of Possession Landlords

IIX. Primary Assumption of Risk

I. DUTY OF CARE: CREATION OR NOTICE

Generally, liability for a dangerous or defective condition on real property must be predicated upon ownership, occupancy, control, or special use of the property. Deutsch v. Green Hills (USA), LLC, 202 A.D.3d 909, 911, 163 N.Y.S.3d 213, 215 (2d Dep't, February 16, 2022). "A property owner, or a party in possession or control of real property, has a duty to maintain the property in a reasonably safe condition." Wittman v. Nespola, 190 A.D.3d 1012, 1013, 136 N.Y.S.3d 885, 886 (2d Dep't, January 27, 2021). Liability for injuries caused by a dangerous or defective condition can be imputed upon a property owner or possessor only where the property owner either (1) created the alleged dangerous condition; or (2) had actual or constructive notice of it. San Antonio v. 340 Ridge Tenants Corp., No. 2019-10079, 2022 WL 1020992, at *2 (2d Dep't, Apr. 6, 2022).

A. INSPECTIONS & NOTICE

"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." Miller v. Terrace City Lodge No. 1499, Improved Benevolent Prot. Ord. of the Elks of the World of Yonkers, New York, Inc., 197 A.D.3d 643, 644, 153 N.Y.S.3d 118, 120 (2d Dep't, August 18, 2021). Mere reference to general cleaning and inspection practices is insufficient to establish a lack of constructive notice. Anderson v. United Parcel Serv., Inc., 194 A.D.3d 675, 677, 148 N.Y.S.3d 230, 233 (2021).

Mermelstein v. Campbell Fitness NC, LLC, 201 A.D.3d 923, 924–25, 161 N.Y.S.3d 321, 324 (2d Dep't, January 26, 2022)

- The plaintiff was exercising at the defendant's fitness center when the treadmill she was using allegedly spontaneously accelerated, causing her to fall off the treadmill and sustain injuries. After discovery the defendant moved for summary judgment which was granted by the Supreme Court. The Second Department reversed, finding that questions of fact were raised as to the defendant's actual notice, and that defendant had failed to meet its burden with respect to the issue of constructive notice. On the issue of actual notice, although one of the defendants' owners testified that there were no prior complaints about the subject treadmill, the plaintiff testified that she had complained to a front desk employee several days prior. Regarding the issue of constructive notice, the defendant

owner's testimony as to a general practice of testing and inspecting exercise equipment once a week was insufficient to meet its burden. "Mere reference to general practices, without evidence regarding any specific inspection of the equipment in question, is insufficient to establish lack of constructive notice."

Nestenborg v. Standard Int'l Mgmt., LLC, 202 A.D.3d 628, 629, 159 N.Y.S.3d 839 (1st Dep't, February 24, 2022)

- Plaintiff alleged a bathroom sink dislodged from the wall of the defendants' hotel. Defendant's moved for summary judgment arguing they lacked any notice of the condition. The Supreme Court denied defendants' motion and the First Department affirmed. In so holding, the First Department noted that the defendants failed to establish prima facie that they did not create or have notice of the allegedly hazardous condition of the bathroom sink. ***"Although defendants submitted testimony regarding their periodic preventive maintenance checks of the hotel guest rooms performed at the time of the witness' deposition, they did not submit any evidence stating when the sink was last inspected before plaintiff's accident***. In fact, it was not clear from the evidence whether any periodic checks at all were taking place at the time of plaintiff's accident in 2014.

"Steffens v. Sachem Cent. Sch. Dist., 190 A.D.3d 1003, 140 N.Y.S.3d 253 (2d Dep't, January 27, 2021)

- Plaintiff was injured when he slipped and fell on a patch of black ice located in the defendant's parking lot. The defendant's custodians ***inspected the area approximately one hour prior to the fall***. The Second Department affirmed the Order of the Supreme Court which denied the defendant's motion for summary judgment. Despite the defendant's inspection close in time to the incident, the custodians ***failure to provide evidence of what he actually saw at the time of his inspection, beyond his general inspection practices of what he would normally do, was insufficient to carry the defendant's burden of proving lack of notice.***

Miller v. Terrace City Lodge No. 1499, Improved Benevolent Prot. Ord. of the Elks of the World of Yonkers, New York, Inc., 197 A.D.3d 643, 644, 153 N.Y.S.3d 118, 120 (2d Dept, August 18, 2021)

- The plaintiff allegedly slipped and fell on ice in the defendant's parking lot. Defendant's moved for summary judgment on the basis that it did not create the condition, and lacked actual or constructive notice of it. Its motion granted by the Supreme Court. The Second Department, reversing the decision, found that the defendant did not meet its prima facie burden, that it lacked constructive notice, in ***failing to submit any evidence as to when the area was last inspected for a period of two days prior to the plaintiff's fall***, warranting denial of the motion.

Anderson v. United Parcel Serv., Inc., 194 A.D.3d 675, 677, 148 N.Y.S.3d 230, 233 (2d Dept, May 5, 2021)

- Plaintiff slipped and fell on a patch of ice at the defendant's facility. The defendant's motion for summary judgment was granted by the Supreme Court, and reversed by the Second Department. ***The Court noted that the defendant submitted no evidence as to when the area was inspected for a period greater than two days prior to the plaintiff's fall***. In reversing the decision, The Second Department's decision concluded that "triable issues of fact exist including whether the alleged ice condition that caused the plaintiff to slip and fall was visible and apparent, and whether it had existed for a sufficient length of time before the accident such that UPS could have discovered and corrected it."

Lanza v. B.H.N.V. Realty Corp., 201 A.D.3d 468, 470, 160 N.Y.S.3d 234, 236 (1st Dep't, January 11, 2022)

- Patron at a Rite Aid drugstore allegedly tripped and fell on a glue trap. The First Department reversed the Supreme Court's denial of defendant's motion for summary judgment. In so holding, the First Department noted that the contractor who placed the traps ***last inspected the store three days prior to the fall***, at which time there were no problems, and that Rite Aid employees had not seen nor received any complaints about the traps during the three days prior to the plaintiff's fall.

Syrnik v. Bd. of Managers of Leighton House Condo., 198 A.D.3d 835, 156 N.Y.S.3d 81 (2d Dep't, October 13, 2021)

- Plaintiff was allegedly injured when a passenger elevator suddenly accelerated and then stopped abruptly. The defendant owner and property management company of the premises was granted summary judgment due to lack of an actual or constructive notice of any defective condition with the elevator. Summary judgment, granted by the lower court to the elevator company, was however overturned. ***Plaintiff's expert offered the opinion that the defective condition which caused the elevator to accelerate then stop would have been revealed by proper inspection and maintenance, raising a question of fact as to the elevator company defendant's actual or constructive notice of the defective condition.*** Questions of fact were further raised with respect to the doctrine of res ipsa loquitur (plaintiff's expert raised a question of fact as to whether the elevator's act should not occur absent negligence, and that the defendant elevator company was in exclusive control of the elevator).

Powell v. BLDG 874 Flatbush LLC, 201 A.D.3d 534, 534, 157 N.Y.S.3d 373, (Mem)–374 (1st Dep't, January 18, 2022)

- Plaintiff allegedly tripped or slipped as a result of a cracked sidewalk. Defendant owner of the abutting property moved for summary judgment which was denied by the Supreme Court. The First Department affirmed, holding that the

defendant failed to satisfy their prima facie burden of demonstrating the defect was "trivial", and noting that the defendant owners did not offer expert evidence or measurements, nor offer any evidence to show that the alleged hazard was not enhanced by the surrounding circumstances. The First Department further held that, in any event, photographs demonstrating the condition and the property manager's testimony that had she known of the condition, she would have directed the tenant to repair it, raised a question of fact as to whether the defect was trivial. With respect to the issue of notice, the First Department noted "***reasonable inferences can be drawn from the photographs*** depicting the sidewalk condition, and the property manager's testimony that she inspected the premises intermittently over many years"

CPLR 4532-b:

- ***An image, map, location, distance, calculation, or other information taken from a web mapping service, a global satellite imaging site, or an internet mapping tool, is admissible in evidence if such image, map, location, distance, calculation, or other information indicates the date such material was created*** and subject to a challenge that the image, map, location, distance, calculation, or other information taken from a web mapping service, a global satellite imaging site, or an internet mapping tool does not fairly and accurately portray that which it is being offered to prove. ***A party intending to offer such image or information in evidence at a trial or hearing shall, at least thirty days before the trial or hearing, give notice of such intent, providing a copy or specifying the internet address at which such image or information may be inspected.*** No later than ten days before the trial or hearing, or later for good cause shown, a party upon whom such notice is served may object to the request to admit into evidence such image or information, stating the grounds for the objection. ***Unless objection is made pursuant to this subdivision, the court shall take judicial notice and admit into evidence such image, map, location, distance, calculation or other information.***

B. RECURRING CONDITIONS & NOTICE

"'A party ... who has actual knowledge of an ongoing and recurring dangerous condition can be charged with constructive notice of each specific [recurrence] of that condition. A question of fact regarding a recurrent dangerous condition can be established by offering evidence that an ongoing and recurring dangerous condition existed in the area of the accident which was routinely left unaddressed'" Taliana v. Hines REIT Three Huntington Quadrangle, LLC, 197 A.D.3d 1349, 1352, 154 N.Y.S.3d 136, 139 (2d Dep't, September 29, 2021)(internal citations omitted)

Butnik v. Luna Park Hous. Corp., 200 A.D.3d 1013, 160 N.Y.S.3d 80, 81–82 (2d Dep't, December 22, 2021)

- An apartment resident brought suit against the building owner alleging injuries as a result of a dangerous window, which shattered and fell onto her hand when she attempted to open it. The superintendent testified that in the period of approximately two years preceding the accident, the ***defendant was made aware of 33 instances in which a window in the building needed to be repaired, and that it was "normal" for windows in the building to break***. The Supreme Court granted the defendant's motion for summary judgment and the Second Department reversed. In so holding, the Second Department noted that "While '[a] general awareness of a recurring problem is insufficient, without more, to establish constructive notice of the particular condition that caused the accident,' the superintendent's testimony regarding the frequency of specific complaints of window damage in the building raised triable issues of fact as to whether Luna had an obligation to inspect the windows" (internal citations omitted).

De Barcacel v. 1015 Concourse Owners Corp., No. 15421, 2022 WL 1248451 (1st Dep't, Apr. 28, 2022)

- Plaintiff slipped and fell in her apartment on water dripping from her ceiling and emanating from a drain pipe leak at an apartment two floors above her apartment. Plaintiff testified two months prior to the fall there was a leak from her ceiling and the building superintendent discovered the source of the leak was a washing machine leak from the same apartment two floors above. Plaintiff's husband also averred in an affidavit that he complained of a leak in the same location to the superintendent four or five times prior to the fall. The defendant building owner/cooperative moved for summary judgment which was denied by the Supreme Court. The First Department affirmed, noting that the complaints of the prior leaks "raises an ***issue of fact as to whether the leak was a symptom of a recurring dangerous condition for which defendants had constructive notice, and thus an obligation to inspect the apartments in the same line for the source of the leak***."

Marazita v. City of New York, 202 A.D.3d 951, 951–52, 163 N.Y.S.3d 219, 221 (2d Dep't, February 16, 2022)

- Plaintiff school teacher was allegedly injured when she was struck by falling ice on the exterior grounds of her school in Queens. Both plaintiff and defendant moved for summary judgment. The Supreme Court denied plaintiff's motion and granted defendant's motion for summary judgment. The Second Department reversed the granting of defendant's motion for summary judgment and upheld the denial of plaintiff's motion. In upholding the denial of the plaintiff's motion, the Second Department held that plaintiff failed to eliminate triable issues of fact as

to the defendant's constructive notice of the alleged dangerous condition, and failed to establish actual notice of a recurring hazardous condition. ***Mere general awareness that snow and ice may have accumulated on the exposed surfaces of the school in the winter months did not demonstrate evidence of a recurring hazardous condition, because the defendants were not aware of snow or ice previously falling from those surfaces***. In denying the defendants' motion for summary judgment, the Second Department noted issues of fact existed as to when the exterior surfaces of the school, which protruded from the building, were actually last inspected prior to the accident.

Taliana v. Hines REIT Three Huntington Quadrangle, LLC, 197 A.D.3d 1349, 1352, 154 N.Y.S.3d 136, 139–40 (2d Dep't, September 29, 2021)

- Plaintiff slipped and fell on water pooling on the floor that was leaking from an HVAC unit in the ceiling of a break room in the defendants building. Defendants moved for summary judgment alleging, among other things, that they did not create the condition, and lacked actual and constructive knowledge. The Supreme Court granted the defendant's motion, and the Second Department reversed. In so holding, the Second Department found that the defendants did not establish their prima facie burden of the lack of actual or constructive notice of a recurring condition, referencing ***the lack of documentation by the defendants of prior complaints or any system to track complaints, the lack of testimony from other employees who may have received complaints, and the lack of any evidence of when the area was last cleaned or inspected prior to the plaintiff's fall***.

Delvalle v. 1733 Unico LLC, 202 A.D.3d 568, 569, 163 N.Y.S.3d 519, 521 (1st Dep't, February 17, 2022)

- Plaintiff slipped and fell in the stairway of the defendant's building as a result of an allegedly wet condition. Defendant moved for summary judgment which was denied by the Supreme Court, and affirmed by the First Department. With respect to the issue of notice, the plaintiff raised issues of fact as to a recurring wet condition. More particularly, plaintiff testified "that ***moisture, particularly after a rainfall, regularly entered the building through a broken window between the third and fourth floors of the building and through an open window between the second and third floors, causing a recurring wet condition on the staircase***. It had rained the night before the accident. Plaintiff testified that she had previously complained to the superintendent about wetness on the marble steps when it rained."

C. VIDEO SURVEILLANCE & CONSTRUCTIVE NOTICE

May v. Am. Multi-Cinema, Inc., 191 A.D.3d 657, 141 N.Y.S.3d 108 (2d Dep't, February 3, 2021)

- Plaintiff alleged she slipped and fell on liquid on the floor of a movie theater. Conflicting testimony amongst various witnesses raised a question of fact as to whether such liquid condition in fact existed, and whether the defendant was informed of the liquid condition prior to the fall, which should properly be resolved by a trier of fact. With respect to the defendant's destruction of surveillance footage, ***questions of fact existed as to whether the destroyed footage actually depicted the area of plaintiff's accident.*** As such, the issue of whether relevant evidence was destroyed, and therefore the issue of whether the plaintiff is entitled to an adverse inference instruction, should be resolved by the trier of fact

Olivares v. Pollack 111 Bruce, LLC, 197 A.D.3d 481, 481–82, 152 N.Y.S.3d 693, 694 (2d Dep't, May 11, 2021)

- Plaintiff allegedly was injured when he slipped and fell on a slippery liquid in a hallway near the entrance to a laundry room in his apartment building. After completion of discovery the defendants (the owner and property manager of the building) moved for summary judgment contending that they did not create or have actual or constructive notice of the allegedly slippery condition. Plaintiff cross-moved for spoliation of evidence, based upon the defendant's failure to preserve video surveillance footage prior to and following the accident. ***The defendant's provided footage for approximately 13 hours prior to the plaintiff's fall and not the three days prior as demanded by plaintiffs***. Olivares v. Pollack 111 Bruce LLC, No. 63814/2016, 2018 WL 11366364 (N.Y. Sup. Ct., 2018)(cited for factual background not included in appellate decision). The lower court granted the defendants' motion for summary judgment, and denied the plaintiff's cross-motion for spoliation, which was upheld by the Second Department. In so holding, the Second Department noted that the plaintiff, in seeking spoliation sanctions, failed to demonstrate that the additional footage was withheld in bad faith, and that ***plaintiff "further failed to show the additional video surveillance footage would support his claim***."

D. LATENT DEFECTS

"When a defect is latent and would not be discoverable upon a reasonable inspection, constructive notice may not be imputed" McNeill v. Town of Islip, 203 A.D.3d 813, 160 N.Y.S.3d 900, 901–02 (2d Dep't, March 9, 2022).

McNeill v. Town of Islip, 203 A.D.3d 813, 160 N.Y.S.3d 900, 901–02 (2d Dep't, March 9, 2022)

- Plaintiff was allegedly injured when a street name sign pole struck her in the head. The defendant's motion to set aside a jury verdict in favor of the plaintiff's and to dismiss the plaintiff's complaint was granted by the Suffolk Supreme Court (J. Farneti). In granting the defendant's motion, the Supreme Court noted that the allegedly defective street name sign was not covered within the ambit of the Town of Islip's prior written notice statute, and as such prior written notice was not required. McNeill v. Town of Islip, No. 34486/2008, 2018 WL 3005663 (Suffolk Sup. Ct., 2018). In upholding the Supreme Court's decision to overturn the verdict, the Second Department noted that although permissible inferences could lead a jury to conclude the sign pole fell due to deterioration and rust over time, ***"the mere presence of rust on the pole, standing alone, was insufficient to establish that the Town had constructive notice of the alleged defect***."

Matson v. Dermer Mgmt., Inc., 200 A.D.3d 772, 155 N.Y.S.3d 98, 99 (2d Dep't, December 8, 2021)

- Plaintiffs were injured when a portion of their bedroom ceiling collapsed on top of them. The defendant, which managed the mixed-use rental building where the accident occurred, moved for summary judgment, claiming they did not create the condition and had no actual or constructive notice of it. The motion was denied by the Supreme Court and reversed by the Second Department. In so holding, the Second Department noted that the plaintiff's had resided in the apartment for more than four years and had not noticed any defects, nor made any complaints. There was furthermore no evidence of any leak causing the collapse. In reversing the decision and granting the defendant summary judgment, the Second Department noted ***"in the absence of a warning about the existence of a latent defect, there was no duty to remove portions of the ceiling plaster to discover what lay behind it." The Supreme Court likewise dismissed any claims under res ipsa loquitur, as the defendants did not have exclusive control over the area of the allegedly defective condition.***

Maroonick v. Rae Realty, LLC, No. 152197/17, 2022 WL 1309892 (1st Dep't, May 3, 2022)

- Plaintiff was allegedly injured when the ceiling in her apartment located in Manhattan collapsed. Plaintiff moved for summary judgment on liability asserting the issue of res ipsa loquitur, and defendants' cross moved for summary judgment, alleging the lack of any notice of the allegedly dangerous condition. The Supreme Court denied both plaintiff and defendant's motions and the First Department affirmed. In so holding, the First Department noted that "***plaintiff may rely on res ipsa loquitur to create a permissible inference of negligence that may be accepted by the finder of fact, because she has***

established the elements of the doctrine", noting that the defendants had "exclusive control of the buildings structure". The Court further noted that, ***even assuming the absence of any actual or constructive notice of the defect to the defendant, "notice is inferred when res ipsa loquitur applies to the accident."***

II. OPEN AND OBVIOUS CONDITIONS:

"The scope of a landowner's duty extends to maintaining its property 'in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk.' Despite this basic duty, 'there is no duty to protect or warn against an open and obvious condition which, as a matter of law, is not inherently dangerous.'" Narainasami v. City of New York, 203 A.D.3d 831 (2d Dep't, March 9 2022)(internal citations omitted). "The issue of whether a dangerous condition is open and obvious is fact-specific, and usually a question of fact for a jury. 'Whether a hazard is open and obvious cannot be divorced from the surrounding circumstances.'" Lazic v. Trump Vill. Section 3, 134 A.D.3d 776, 776, 20 N.Y.S.3d 643, 644–45 (2d Dep't, 2015)(internal citations omitted). "'A condition that is ordinarily apparent to a person making reasonable use of his or her senses may be rendered a trap for the unwary where the condition is obscured or the plaintiff is distracted'" Sebagh v. Cap. Fitness, Inc., 202 A.D.3d 853, 855, 162 N.Y.S.3d 440, 443 (2d Dep't, February 9, 2022)(internal citations omitted)

Narainasami v. City of New York, 203 A.D.3d 831 (2d Dep't, March 9, 2022)

- Plaintiff decedent and several companions attended a New York Mets baseball game at Shea Stadium where they sat in the upper level. The decedent's group left during the eighth inning. Although escalators had been turned off at the end of the seventh inning and barricades had been placed to prevent spectators from walking down the escalators in accordance with the stadium's policy to have spectators exit via ramps, the decedent and his companions instead chose to exit by walking down a stopped escalator. While descending the stopped escalator, the decedent fell over the handrail to a lower escalator approximately 50 feet below and died. In finding the condition of the escalator "open and obvious", the Second Department noted, "We agree with the Appellate Division, First Department, that ***a stationary escalator, without more, is not inherently dangerous***."

Sessa v. Cent. Amusement Int'l, LLC, 203 A.D.3d 863, 160 N.Y.S.3d 883, (Mem)–884 (2d Dep't, March 9, 2022)

- Plaintiff allegedly tripped and fell over a height differential in the pavement while walking at an outdoor amusement park in Coney Island. The defendants moved for summary judgment which was denied by the Supreme Court. The Second Department affirmed the denial, noting "the defendant failed to establish, prima facie, that the alleged defect was open and obvious and not inherently dangerous, given the surrounding circumstances at the time of the accident" and particularly ***considering that the alleged defect may have been obscured or concealed by the large number of people traversing the area*** (internal citations omitted). The Second Department also rejected the defendant's claims that the alleged defect was "trivial" as a matter of law. In so holding, the Court noted that although the defect was "physically small", the defendant failed to demonstrate that the surrounding circumstances did not magnify the dangers the defect posed, particularly noting "the location of the alleged defect in a crowded amusement park with distractions such as lights and noises."

Sebagh v. Cap. Fitness, Inc., 202 A.D.3d 853, 854, 162 N.Y.S.3d 440, 442 (2d Dep't, February 9, 2022)

- The plaintiff alleged that she was injured when she attempted to disembark from a treadmill at a fitness center. As she stepped off the treadmill, the plaintiff allegedly tripped and fell on an electrical box that was located on the floor next to the treadmill. Defendants moved for summary judgment and plaintiff cross moved for summary judgment on the issue of liability and to dismiss various affirmative defenses, including the affirmative defense that the alleged condition was open and obvious. The Supreme Court denied the defendant's motion and granted the plaintiff's motion for summary judgment on the issue of liability and dismissed the affirmative defense alleging the condition was open and obvious. The Second Department affirmed denial of the defendant's motion and reversed the granting of the plaintiff's motion. In so holding, The Second Department noted that the plaintiff raised a triable issue of fact with respect to whether the electric box was not "open and obvious" by submitting testimony and photographs demonstrating the box was a color similar to the carpet and was not readily apparent from the vantage of a person on top of the treadmill. However, ***the photographs and testimony were not so dispositive on the issue of liability and whether the box was "open and obvious" to constitute a finding as a matter of law.***

Farrell v. Ted's Fish Fry, Inc., 196 A.D.3d 893, 895, 151 N.Y.S.3d 528, 530–31 (3d Dep't, July 8, 2021)

- Plaintiff stepped off a deck at the defendant's restaurant causing her to fall and fracture her ankle, alleging the deck and landing were a dangerous and defective condition. Defendants moved for summary judgment dismissing the complaint, arguing that there was no defective condition and that the plaintiff's inability to identify the cause of her fall was fatal to her complaint. The Supreme Court

granted the motion. In upholding the finding of the Supreme Court, the Third Department noted that the 10 inch drop from the edge of the landing to the ground did not constitute a dangerous condition, noting that the **condition was open and obvious and highlighting that photographs demonstrated a bright red wood landing which is sharply contrasted by green grass as the landing's edge**.

III. TRIVIAL DEFECTS:

"Whether a dangerous or defective condition exists on the property of another so as to create liability depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury. Some defects, however, may be considered trivial as a matter of law. Morris v. Buffalo Gen. Health Sys., 203 A.D.3d 1692, 162 N.Y.S.3d 820, (Mem)–821 (4th Dep't, March 18, 2022)(internal citations omitted). "In determining whether a defect is trivial, the court must examine all of the facts presented, including the width, depth, elevation, irregularity and appearance of the defect along with the time, place and circumstances of the injury." E. F. v. City of New York, 203 A.D.3d 887 (2d Dep't, March 16, 2022)(internal citations omitted). "A defendant seeking dismissal of a complaint on the basis that the alleged defect is trivial must make a prima facie showing that the defect is, under the circumstances, physically insignificant and that the characteristics of the defect or the surrounding circumstances do not increase the risks it poses. Only then does the burden shift to the plaintiff to establish an issue of fact" Leem v. 152-24 N., LLC, 201 A.D.3d 917, 918, 157 N.Y.S.3d 747, 748 (2nd Dep't, January 26, 2022)(internal citations omitted). "Moreover, 'there is no minimal dimension test or per se rule that a defect must be of a certain minimum height or depth in order to be actionable,' and therefore 'granting summary judgment to a defendant based exclusively on the dimension[s] of the ... defect is unacceptable.' Camara v. Costco Wholesale Corp., 199 A.D.3d 509, 154 N.Y.S.3d 435, 436 (1st Dep't, November 18, 2021)(internal citations omitted). "Photographs which fairly and accurately represent the accident site may be used to establish that a defect is trivial and not actionable." Boesch v. Comsewogue Sch. Dist., 195 A.D.3d 895, 146 N.Y.S.3d 503, 504 (2d Dep't, June 23, 2021)(internal citations omitted)

Sessa v. Cent. Amusement Int'l, LLC, 203 A.D.3d 863, 160 N.Y.S.3d 883, (Mem)–884 (2d Dep't, March 9, 2022)

- Plaintiff allegedly tripped and fell over a height differential in the pavement while walking at an outdoor amusement park in Coney Island. The defendants moved for summary judgment which was denied by the Supreme Court. The Second Department affirmed the denial, noting "the defendant failed to establish, prima facie, that the alleged defect was open and obvious and not inherently dangerous, given the surrounding circumstances at the time of the accident"

when considering that the ***alleged defect may have been obscured or concealed*** by the large number of people traversing the area (internal citations omitted). The Second Department also rejected the defendant's claims that the alleged defect was "trivial" as a matter of law. In so holding, the Court noted that although the defect was "physically small", the defendant failed to demonstrate that the surrounding circumstances did not magnify the dangers the defect posed, particularly noting "the location of the alleged defect in a crowded amusement park with distractions such as lights and noises."

Camara v. Costco Wholesale Corp., 199 A.D.3d 509, 154 N.Y.S.3d 435, 436 (1st Dep't, November 18, 2021)

- Plaintiff allegedly tripped and fell on a cracked and uneven floor inside a Costco warehouse in Manhattan. The defendants moved for summary judgment on the basis of the defect being "trivial" as a matter of law. The Supreme Court denied the defendants' motion and the First Department affirmed. According to defendants' expert, the alleged defect had a maximum height differential of less than 9/64th of an inch. However, deposition testimony, as noted in the Supreme Court's decision, raised a question as to whether "shoddy" patchwork was performed in the area of the fall. Camara v. Costco Wholesale Corp., No. 152399/2017, 2020 WL 1939660, at *3 (N.Y. Sup. Ct. Apr. 21, 2020). The First Department, in affirming the denial of summary judgment, noted that the defendants' expert's opinion failed to offer any evidence regarding the condition of the floor surrounding the height differential, and performed his inspection two and a half years following the incident, and was therefore speculative.

Morris v. Buffalo Gen. Health Sys., 203 A.D.3d 1692, 162 N.Y.S.3d 820, (Mem)–821 (4th Dep't, March 18, 2022)

- Plaintiff tripped and fell while walking on a sidewalk near the entrance of the defendant's healthcare facility. Defendant moved for summary judgment on the grounds that the alleged defect was "trivial" as a matter of law. The Supreme Court denied the motion and the Fourth Department affirmed. In so holding, the Court noted that deposition testimony and photographs, supporting that plaintiff fell over a ***one-inch height differential*** between two concrete slabs, was insufficient for defendant to meet its burden.

Dingman v. Linchris Hotel Corp., 201 A.D.3d 704, 705, 156 N.Y.S.3d 865, 866 (2d Dep't, January 12, 2022)

- Plaintiff tripped within the lobby of a hotel which was in the process of having its floor re-tiled. The plaintiff allegedly fell as a result of a height differential between a tiled and untiled area of the floor. Defendant's hotel manager estimated the height differential between the tiled and untiled portions of the floor to be ***one quarter of an inch***. The Supreme Court denied the defendant's motion for summary judgment and the Second Department reversed. Relying upon relevant

deposition testimony and photographs, the Court noted that "the small height differential between the newly tiled floor and the exposed cement subflooring was physically insignificant and that the characteristics of the defect or the surrounding circumstances did not increase the risks it posed."

E. F. v. City of New York, 203 A.D.3d 887 (2d Dep't, March 16, 2022)

- Plaintiff alleged she tripped and fell on a defective condition on a sidewalk. Defendant's moved for summary judgment to dismiss the plaintiff's complaint on the basis of the infant plaintiff's inability to specifically identify the cause of her fall as well as on the basis of the defect being "trivial" as a matter of law. The Supreme Court granted the defendant's motion, which was reversed by the Second Department. In so holding, the Court noted that although the infant plaintiff, who was seven years old at the time of her deposition, could not specifically identify the cause or location of her fall, in opposition to the motion the infant's mother submitted an affidavit averring that she witnessed the fall and identifying the defective condition in a photograph. The Second Department further noted that the defendants failed to meet their burden of establishing the defect was "trivial" as a matter of law, noting that the defendants failed to proffer any ***information about the height or actual size of the condition*** and the photographs submitted ***did not "identify the specific dimensions and characteristics of the alleged defect***"

Powell v. BLDG 874 Flatbush LLC, 201 A.D.3d 534, 534, 157 N.Y.S.3d 373, (Mem)–374 (1st Dep't, January 18, 2022)

- Plaintiff allegedly tripped or slipped as a result of a cracked sidewalk. Defendant owner of the abutting property moved for summary judgment which was denied by the Supreme Court. The First Department affirmed, holding that the defendant failed to satisfy their prima facie burden of demonstrating the defect was "trivial", and noting that the ***defendant owners did not offer expert evidence or measurements***, nor offer any evidence to show that the alleged hazard was not enhanced by the surrounding circumstances. The First Department further held that, in any event, photographs demonstrating the condition and the property manager's testimony that had she known of the condition, she would have directed the tenant to repair it, raised a question of fact as to whether the defect was trivial. With respect to the issue of notice, the First Department noted "reasonable inferences can be drawn from the photographs depicting the sidewalk condition, and the property manager's testimony that she inspected the premises intermittently over many years"

Leem v. 152-24 N., LLC, 201 A.D.3d 917, 917, 157 N.Y.S.3d 747, 748 (2nd Dep't, January 26, 2022)

- Plaintiff allegedly sustained personal injuries when she tripped atop a mat covering a concrete ramp/slope as she exited certain premises owned and leased by the defendants. The defendant owner moved for summary judgment,

alleging the defective condition was trivial as a matter of law. The Supreme Court denied the defendant's motion and the Second Department affirmed, finding that photos and video surveillance footage were inconclusive and insufficient to establish the alleged condition as "trivial" as a matter of law.

IV. STORM IN PROGRESS:

"Under the storm-in-progress rule, a property owner, tenant in possession, or, where relevant, a snow removal contractor will not be held responsible for accidents caused by snow or ice that accumulates during a storm until an adequate period of time has passed following the cessation of the storm to allow ... an opportunity to ameliorate the hazards caused by the storm" Keeney v. Hempstead Tpk., LLC, No. 2019-08120, 2022 WL 1561006, at *1 (2d Dep't, May 18, 2022)(internal citations omitted). "While a lull in the storm does not impose a duty to remove the accumulation of snow or ice before the storm ceases in its entirety if the storm has passed and precipitation has tailed off to such an extent that there is no longer any appreciable accumulation, then the rationale for continued delay abates, and commonsense would dictate that the rule not be applied" Johnson v. Pawling Cent. Sch. Dist., 196 A.D.3d 686, 148 N.Y.S.3d 690, (Mem)–691 (2d Dep't, July 28, 2021)(internal citation omitted). "If a storm is ongoing, and a property owner elects to remove snow, the owner must do so with reasonable care or it could be held liable for creating a hazardous condition or exacerbating a natural hazard created by the storm." Flournoy v. Marcy Residence, LLC, 202 A.D.3d 931, 932, 159 N.Y.S.3d 697, 698 (2d Dep't, February 16, 2022)(internal citations omitted)

Canciani v. Stop & Shop Supermarket Co., LLC, 203 A.D.3d 1011 (2d Dep't, March 23, 2022)

- Plaintiff allegedly slipped and fell on snow and ice in a parking lot controlled by Defendant Stop & Shop. The snow removal contractor, O&M, was also named as a defendant. Both defendants moved for summary judgment: Stop and Shop arguing the "storm in progress rule" applied. Defendant O&M on the basis that it owed the plaintiff no duty of care. The defendants motion was granted by the Supreme Court and overturned, as to Defendant Stop & Shop only, by the Second Department. In reversing the decision, the Second Department found relevant that the defendant's ***sworn report from a meteorologist did not include copies of the records which the meteorologist relied upon*** in forming his opinion that a storm was in progress, and was thus conclusory and of no probative value.

Telesco v. Smith, 200 A.D.3d 1140, 159 N.Y.S.3d 211, 215 (3rd Dep't, December 2, 2021)

- Plaintiff slipped and fell at work while walking to an exterior entrance bathroom in the vicinity of a gutter downspout. Defendants' moved for summary judgment

arguing there was a storm in progress, which motion was denied. The Third Department affirmed the denial of summary judgment. Although the defendants satisfied their burden, through testimony and meteorologic data that snow fall continued through the time of the plaintiffs fall, the plaintiff raised a question of fact through his own ***meteorologic report and data that opined that untreated and undisturbed surfaces over a three day period contained an ice condition resulting from current and pre-existing snow events***, and based upon ***expert affidavits opining that, prior to the incident, there were available alternative gutters and downspouts*** appropriate to prevent snowmelt discharge from draining onto the walkway where the fall occurred.

Fitzsimons v. N. Shore Univ. Hosp., 165 N.Y.S.3d 753 (2d Dep't, May 4, 2022)

- Plaintiff allegedly slipped and fell on ice while at the defendant's parking garage. Defendant moved for summary judgment arguing that the "storm in progress rule" applied. The Supreme Court granted the motion and the Second Department Affirmed. In so holding, the Second Department noted "Here, the defendant made a prima facie showing of its entitlement to judgment as a matter of law by submitting an affidavit of a meteorologist with attached certified climatological data, which demonstrated that at the time of the plaintiff's accident, ***less than two hours*** had passed since the end of the storm."

New York City Administrative Code § 16-123 (a):

- Removal of snow, ice and dirt from sidewalks; property owners' duties.
    - a. Every owner, lessee, tenant, occupant, or other person, having charge of any building or lot of ground in the city, abutting upon any street where the sidewalk is paved, shall, ***within four hours after the snow ceases to fall***, the time between nine post meridian and seven ante meridian not being included in the above period of four hours.

Flournoy v. Marcy Residence, LLC, 202 A.D.3d 931, 931, 159 N.Y.S.3d 697, 698 (2d Dep't, February 16, 2022)

- Plaintiff allegedly slipped and fell on a sidewalk abutting the premises owned by the defendant. The plaintiff had testified that there was a mixture of rain and snow flurries falling on the day prior to the accident, but that on the morning of the accident the sidewalk was clear until she encountered a patch of ice in the area of her fall. The defendant's moved to dismiss the action alleging the "storm in progress rule" applied and the Supreme Court denied that motion. In affirming the lower court's ruling, the Second Department noted that the ***defendant failed to submit any evidence establishing what if any snow removal efforts were***

undertaken, and whether any such efforts on their part created or exacerbated the alleged icy condition.

Stukes v. New York City Hous. Auth., 203 A.D.3d 980, 161 N.Y.S.3d 841, 842 (2d Dep't, March 16, 2022)

- Plaintiff slipped and fell on snow and ice in defendants housing complex. Plaintiff alleged in his bill of particulars a "longstanding condition of ice" as the cause of his fall. Defendant moved for summary judgment alleging the "storm in progress rule" applied. The Supreme Court granted the defendant's motion. The Second Department noted that ***it was the defendant's burden of proof to establish that the plaintiff's fall was a result of the ongoing storm, and not as a result of prior snowfalls***. In reversing the Supreme Court's decision, the Second Department noted that the defendant failed to satisfy its prima facie burden on that issue.

Taormina-Fucci v. 100-02 Rockaway Blvd. 26, LLC, 201 A.D.3d 766, 767, 156 N.Y.S.3d 917 (2d Dep't, January 12, 2022)

- Plaintiff allegedly slipped and fell on ice in a parking lot owned by the defendant. Defendant moved for summary judgment on the grounds that the storm in progress defense barred plaintiff's claims. The Supreme Court granted the defendant's motion, and the Second Department reversed. Despite the defendant's submission of a weather report sworn to by an expert meteorologist supporting an ongoing storm in progress, ***plaintiff's deposition testimony raised a question of fact as to whether the ice which caused plaintiff's fall was a result of a prior storm, rather than the storm in progress***.

Kovel v. Glenwood Mgmt. corp., 200 A.D.3d 460, 160 N.Y.S.3d 208, 210 (1st Dep't, December 7, 2021), leave to appeal denied, No. 2022-65, 2022 WL 1259834 (N.Y. Apr. 28, 2022)

- Plaintiff was a pedestrian who allegedly fell on a stone tree well border on a sidewalk adjacent to a building owned and operated by the defendants. The tree well border was obscured to the plaintiff by accumulated snow from an ongoing storm. The defendants moved for summary judgment which was denied by the Supreme Court. The First Department reversed, granting the defendants summary judgment. In so holding, the First Department noted that the ***tree well border itself was not inherently dangerous*** and that plaintiff's expert failed to establish that the construction or design of the tree well border was inconsistent with industry wide standard. In holding that the "storm in progress" defense applied to the instant case, the First Department noted in their decision, ***"Where the accumulation of snow is the reason for liability, there is no analytical basis to limit the storm in progress doctrine to only icy conditions***."

V. ESPINAL EXCEPTIONS: CONTRACTOR LIABILITY

"Because a finding of negligence must be based on the breach of a duty, a threshold question in tort cases is whether the alleged tortfeasor owed a duty of care to the injured party… Under our decisional law a contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party… Having rejected the concept of open-ended tort liability, while recognizing that liability to third persons may sometimes be appropriate, we must determine where to draw the line…

(1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, 'launche[s] a force or instrument of harm'
(2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties and
(3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely"

Espinal v. Melville Snow Contractors, Inc., 98 N.Y.2d 136, 138-140, 773 N.E.2d 485 (2002)

"Where the pleadings do not allege facts which would establish the applicability of any of the *Espinal* exceptions, a defendant is not required to affirmatively demonstrate that the exceptions do not apply in order to establish its prima facie entitlement to judgment as a matter of law." Canciani v. Stop & Shop Supermarket Co., LLC, 203 A.D.3d 1011 (2d Dep't, 2022)(internal citations omitted).

A. ESPINAL EXCEPTIONS MUST BE PLED

Canciani v. Stop & Shop Supermarket Co., LLC, 203 A.D.3d 1011 (2d Dep't, March 23, 2022)

- Plaintiff allegedly slipped and fell on snow and ice in a parking lot controlled by Defendant Stop & Shop. The snow removal contractor, O&M, was also named as a defendant. Both defendants moved for summary judgment: Stop and Shop arguing the "storm in progress rule" applied. Defendant O&M on the basis that it owed the plaintiff no duty of care. The defendants motion was granted by the Supreme Court and overturned, as to Defendant Stop & Shop's only, by the Second Department. In upholding summary judgment as to the snow removal contractor, O&M, the Second Department noted "Since the ***plaintiff did not allege facts in the complaint or bill of particulars that would establish the possible applicability of any of the Espinal exceptions***, O & M, in establishing its prima facie entitlement to judgment as a matter of law, was not required to affirmatively demonstrate that these exceptions did not apply". ***The burden shifted to the plaintiff to raise a question of fact as to the applicability of any of the three Espinal exceptions***, which the Second Department held it had failed to do.

McEleney v. Riverview Assets, LLC, 201 A.D.3d 1159, 1163, 161 N.Y.S.3d 491, 495 (3rd Dep't, January 13, 2022)

- The defendant had been contracted to provide janitorial services to the owners of the building where the plaintiff's fall allegedly occurred. Plaintiff slipped and fell on water while passing the defendant's cleaning machines that had been left in the hallway. The defendant contractor moved for summary judgment arguing that it owed no duty to the plaintiff, and that because plaintiff failed to plead any specific Espinal exception, it was not required to negate that exception in its motion papers. Defendant's motion was denied, and the Third Department upheld. With respect to the plaintiff's failure to include the specifical Espinal exception of "launched a force or instrument of harm," the Third Department noted, ***"Although plaintiffs did not explicitly identify a specific Espinal exception***, their original bill of particulars stated, among other things, that '[i]t will be alleged, that the defendant created the condition in question in that it, and/or its agents or contractors were aware they had a defective piece of equipment that was leaking substance onto the floor and neglected to take appropriate steps to remove the substance.' ***The clear essence of this contention is that ABM [Defendant Contractor] launched a force or instrument of harm*** by allowing the cleaning machine to leak onto the floor, thereby creating a dangerous condition that caused McEleney to slip and injure herself." The Court further found that there was sufficient circumstantial evidence such that a jury could conclude that the defendant "launched the force or instrument of harm while performing its contractual obligations for the owners."

B. LAUNCHED A FORCE OR INSTRUMENT OF HARM EXCEPTION

Under the first *Espinal* exception, a contracting party may be found to have launched a force or instrument of harm when that party creates or exacerbates a dangerous condition. Mizenko v. Intertech Digital Ent., Inc., 204 A.D.3d 1151 (3rd Dep't, April 7, 2022)

Malerba v. New York City Transit Auth., 204 A.D.3d 570, 165 N.Y.S.3d 302, 303 (1ST Dep't, April 26, 2022)

- Plaintiff was allegedly injured by a fire extinguishing system's "Halon" tanks. The Defendant JV, who was contracted by the NYC Transit authority to repair, service, and refill the fire extinguishing system, moved for summary judgment, which was denied by the lower court, and unanimously affirmed by the First Department. The First Department noted that the Defendant JV eliminate all triable questions as to whether it exercised reasonable care in performance of its duties, and if not, whether it thereby *launched "a force or instrument of harm that caused plaintiff's injuries."* Of particular note, there was evidence submitted that the Defendant JV's ***technicians removed components meant to be***

permanently affixed, and whether Defendant JV technicians were licensed as required by applicable Code.

Royland v. McGovern & Co., LLC, 203 A.D.3d 677 (1st Dep't, March 31, 2022)

- Plaintiff was allegedly injured while pulling a floor buffing machine up a three-part ramp at a church, when the ***top section of the ramp came loose and slid down the lower two sections***. The church had contracted with one of the defendants in the action, Peragallo, to refurbishment of its organ and Peragallo had ***retained Defendant Marshall for construction of the ramp*** to permit transport of the organ back into the church. Defendant Marshall moved for summary judgment, arguing that it owed no duty to the plaintiff. The Supreme Court denied Defendant Marshall's motion and the First Department affirmed. In so holding, the First Department noted, "While its contractual relationship with Peragallo is alone insufficient to give rise to tort liability to plaintiff, a third party, Marshall's is subject to tort liability because ***it failed to exercise reasonable care in assembling the ramp, thereby launching an unreasonable instrument of harm"***

Mizenko v. Intertech Digital Ent., Inc., 204 A.D.3d 1151 (3rd Dep't, April 7, 2022)

- Plaintiff was injured when she allegedly stepped into an open hatch in the floor of her laundry room and fell into the crawl space below. ***The hatch door had been left open while defendant's employee was installing a satellite television system*** in the home. Defendant had been subcontracted by the satellite television company to perform the installation. Defendant moved for summary judgment, arguing no duty was owed to the plaintiff. Defendant's motion was denied by the lower court, and affirmed by the Third Department. It was noted in the decision that even if the plaintiff opened the hatch (which was in dispute), questions were raised as to whether the defendant launched an instrument of harm in that the ***defendant's employee failed to take steps to safeguard the opening once it was already opened***.

Payne v. Murray, 198 A.D.3d 795, 796–97, 152 N.Y.S.3d 627, 628 (2d Dep't, October 13, 2021)

- Plaintiff was allegedly injured when a piece of the facade of a brownstone building dislodged and struck him. Plaintiff sued ***contractors who were performing work in the immediate area, alleging that the vibrations from their work created or exacerbated the alleged dangerous condition on the facade of the building***, thereby launching an instrument of harm. The defendant contractors moved for summary judgment, alleging no duty was owed to the plaintiff. The Supreme Court granted defendants' motions, and the Second Department reversed. In so holding, the Second Department noted that conflicting expert affidavits raised a question of fact with respect to whether one contractor defendant created or exacerbated the dangerous condition, and that the ***second contractor defendant failed to meet its prima facie burden in failing to submit any expert affidavit*** from a professional engineer.

Hodzic v. M. Cary, Inc., 202 A.D.3d 1063, 1064, 159 N.Y.S.3d 882 (2d Dep't, February 23, 2022)

- Plaintiff allegedly tripped and fell over a height differential between floors after a bank contracted to raised the floor of a printer room, creating a 2 $^{5}/_{8}$ inch height differential. At the close of the plaintiff's case on liability the defendant general contractor and subcontractor who performed the work moved, pursuant to CPLR 4401, for judgment as a matter of law dismissing the complaint, on the basis that no duty was owed to the plaintiff. That motion was granted and plaintiff appealed. The Second Department affirmed the dismissal. ***In finding that the contractors "did not launch a force or instrument of harm", the Court noted "'[a] builder or contractor is justified in relying upon the plans and specifications which he [or she] has contracted to follow unless they are so apparently defective that an ordinary builder of ordinary prudence would be put upon notice that the work was dangerous and likely to cause injury.***' At the trial, the plaintiff submitted no evidence that the architectural plans and specifications supplied by the bank were so clearly defective that a contractor of ordinary prudence would not have performed the work." With respect to the ***Second Espinal Exception***, the Court noted that the *plaintiff was not a third-party beneficiary to the contract or subcontract between the bank, general contractor, and subcontractor, and therefore could not detrimentally rely upon those contracts*. Regarding the Third Espinal Exception, the Second Department held that *although the contract between the bank and the general contractor included safety obligations, it was "not so comprehensive and exclusive so as to displace the bank's obligation maintain the premises in a safe condition*."

Hamel v. Park Ave. Armory, 201 A.D.3d 410, 156 N.Y.S.3d 724, 725 (1st Dep't, January 4, 2022)

- Plaintiff allegedly fell while traveling to her seat while attending a play, which required she travel through a darkened area, ascend three black steps, cross a rotating stage, and then descend an additional three black steps. Plaintiff alleged that the darkened route to her seat contrasted with the brightly illuminated seating area caused an optical confusion that resulted in her failing to see the descending black steps and causing her fall. Defendant installed the lighting and rotating stage, and moved for summary judgment on the basis that it owed the plaintiff no duty. The Supreme Court denied the defendant's motion, and the First Department affirmed. In so holding, it noted that ***issues of fact existed "as to whether the plans and specifications were so apparently deficient as to have put a contractor of ordinary prudence on notice that the work created a dangerous condition*** and was likely to cause injury."

Petersen v. Forest City Ratner Companies, LLC, 203 A.D.3d 1091 (2d Dep't, March 23, 2022)

- Plaintiff was allegedly injured when a barricade constructed by subcontractor "Drywall" at a shopping mall fell on top of him. The subcontractor "Drywall" had

constructed the barricade with bracing, which had to be removed to permit another entity to perform work in the area. The non-party subcontractor, not "Drywall," replaced the bracing. "Drywall" moved for summary judgment on plaintiff's common law negligence claim, which was initially denied but granted upon a motion to reargue. In upholding the Supreme Court's decision, the Second Department rejected the plaintiff's contention that "Drywall" launched and instrument of harm in failing to correct the manner that the non-party contractor braced the barricade after removing "Drywall's" bracing, noting the plaintiff's contention "is merely ***an argument that [Drywall] failed to become 'an instrument for good,' which is insufficient to impose a duty of care upon a party not in privity of contract*** with the injured party.'"

C. SECOND (DETRIMENTAL RELIANCE) & THIRD (DISPLACEMENT OF DUTY) ESPINAL EXCEPTIONS

Reese v. Raymond Corp., 202 A.D.3d 1304, 1305, 163 N.Y.S.3d 678, 680 (3rd Dep't, February 17, 2022)

- Plaintiff was allegedly injured when an airline in a pneumatically controlled table used to assemble and package hand pallet trucks malfunctioned. Defendant Raymond entered into a written agreement with Defendant Rogers, for Rogers to assemble and package the hand pallet trucks. The written agreement contained a provision stating that Raymond was responsible for all non-preventive maintenance and repair. Defendant Raymond moved for summary judgment, in part, on the basis that it owed the plaintiff no duty of care. The defendant's motion was granted, and then reversed by the Third Department. With respect to the **Second Espinal Exception**, the Third Department noted that ***because the contract made Defendant Raymond responsible for all non-preventive maintenance and repair, the plaintiff's detrimental reliance, that the equipment could be safely used, was induced***. With respect to the application of the **Third Espinal Exception**, as to whether the Defendant Raymond entirely displaced the other parties duty to maintain and repair the table which injured plaintiff, the Third Department noted that ***although the written agreement provided that defendant's responsibility was partial (ie. did not include preventive maintenance), witness testimony raised a question of fact with respect to whether Defendant Raymond was, in practice, responsible for all maintenance (not only non-preventive maintenance).***

Brandner v. Boricua Coll. Dev. Corp., 202 A.D.3d 616, 159 N.Y.S.3d 840, 841 (1st Dep't, February 24, 2022)

- Plaintiff allegedly fell on a sidewalk. The adjacent property owner had hired an independent contractor to enlarge tree wells on the sidewalk adjacent to the premises. The independent contractor was named as a third-party defendant. The Supreme Court granted the independent contractor's motion to dismiss the third-party complaint, and the First Department affirmed. With respect to the contractor's duty to the plaintiff, the independent contractor established, prima

facie, that none of the Espinal exceptions applied: (1) Because the defect existed prior to the contractors work and the contractor did nothing to exacerbate it, the contractor did not launch a force or instrument of harm. (2)(3) Because the ***agreement between the adjacent landowner and contractor did not provide for continued maintenance*** in the area of the fall, and because ***the adjacent landowner performed work before and after the accident at that location***, the contractor did not displace the adjacent landowners duty, and the adjacent landowner did not detrimentally rely on the agreement.

Hodzic v. M. Cary, Inc., 202 A.D.3d 1063, 1064, 159 N.Y.S.3d 882 (2d Dep't, February 23, 2022)

- Plaintiff allegedly tripped and fell over a height differential between floors after a bank contracted to raised the floor of a printer room, creating a 2 $^{5}/_{8}$ inch height differential. At the close of the plaintiff's case on liability the defendant general contractor and subcontractor who performed the work moved, pursuant to CPLR 4401, for judgment as a matter of law dismissing the complaint, on the basis that no duty was owed to the plaintiff. That motion was granted and plaintiff appealed. The Second Department affirmed the dismissal. In finding that the contractors "did not launch a force or instrument of harm", the Court noted "*'[a] builder or contractor is justified in relying upon the plans and specifications which he [or she] has contracted to follow unless they are so apparently defective that an ordinary builder of ordinary prudence would be put upon notice that the work was dangerous and likely to cause injury*.' At the trial, the plaintiff submitted no evidence that the architectural plans and specifications supplied by the bank were so clearly defective that a contractor of ordinary prudence would not have performed the work." With respect to the ***Second Espinal Exception***, the Court noted that the ***plaintiff was not a third-party beneficiary to the contract or subcontract between the bank, general contractor, and subcontractor, and therefore could not detrimentally rely upon those contracts***. Regarding the Third Espinal Exception, the Second Department held that ***although the contract between the bank and the general contractor included safety obligations, it was "not so comprehensive and exclusive so as to displace the bank's obligation maintain the premises in a safe condition***."

Smukall v. Dollar Tree Stores, Inc., 199 A.D.3d 1316, 157 N.Y.S.3d 319 (4th Dep't, November 12, 2021)

- Plaintiff allegedly tripped and fell over a broken sign post in the parking lot of a premises owned by Defendant Dollar Tree Stores. Dollar tree had contracted with Defendant Dent for maintenance of the premises, and Dent subcontracted with the Sailing Defendant for removal of broken sign post bases in the parking lot. The Dent and Sailing defendants (contractors) moved for summary judgment, alleging no duty was owed to the plaintiff, and the Supreme Court granted those motions. In affirming the decision, the Fourth Department noted

that the ***Third Espinal Exception***, as to whether the contractor's entirely displaced Dollar Tree's duty to maintain the premises, did not apply to the instant facts. In so holding, the Fourth Department noted that ***the written service agreement gave the property owner, Dollar Tree, the right to request additional services***, and that in practice ***employees of the Dollar Tree monitored the performance of the contract***. They further noted that plaintiff's failed to establish that the contractual agreements were "so comprehensive and exclusive a maintenance agreement as to entirely displace Dollar Tree's duty to maintain the property safely."

Vidal v. City of New York, 199 A.D.3d 863, 157 N.Y.S.3d 519, 521 (2d Dep't, November 10, 2021)

- Plaintiff allegedly tripped and fell on an uneven area of a public sidewalk abutting a property owned by the Defendant City of New York. ***The City of New York contracted with another entity, Defendant MABID, for maintenance services in the area of the sidewalk where the plaintiff fell.*** Defendant MABID moved for summary judgment, alleging that it did not owe any duty to the plaintiff. The Supreme Court denied, and granted a cross motion by the plaintiff to compel the City to produce an employee with knowledge of the contract for deposition. The Second Department, in affirming, noted that the defendant failed to eliminate all triable issues regarding whether MABID displaced the City's duty to the plaintiff to maintain the sidewalk in a reasonably safe condition.

Lopez v. Limpiex Cleaning Servs., Inc., 199 A.D.3d 418, 153 N.Y.S.3d 849 (1st Dep't, November 4, 2021)

- Plaintiff allegedly slipped and fell on an oil slick on the sidewalk abutting the premises where the defendant provided janitorial services. The defendant janitorial contractor moved for summary judgment on the basis of owing no duty to the plaintiff, granted by the Supreme Court. In affirming the decision the First Department noted no Espinal Exception applied to the facts at bar. In noting the inapplicability of the Third Espinal Exception, finding that the janitorial contractor ***did not entirely displace*** the property owner's duty to maintain the premises and abutting sidewalk in a safe condition, the First Department noted, "The janitorial agreement provided that the building owner had the right to inspect and test all services called for by the contract, and if any of the services did not conform with the contract requirements, it could require defendant to perform the services again in accordance with the contract. The agreement also provided that the building owner had the overall responsibility for the administration of the contract, and was responsible for the day-to-day inspection and monitoring of defendant's work."

VI. ADJACENT OWNER LIABILITY

"Generally, an owner of land abutting a public sidewalk does not, solely by reason of being an abutter, owe to the public a duty to keep the property in a safe condition" Podhurst v. Vill. of Monticello, 202 A.D.3d 1185, 1187, 163 N.Y.S.3d 286, 288 (3rd Dep't, February 3, 2022). "An abutting landowner will be liable to a pedestrian injured by a defect in a public sidewalk only when the owner either created the condition or caused the defect to occur because of a special use, or when a statute or ordinance places an obligation to maintain the sidewalk on the owner and expressly makes the owner liable for injuries caused by a breach of that duty. O'Brien v. Vill. of Babylon, 196 A.D.3d 494, 495 (2d Dep't, July 7, 2021).

Liability can be imposed upon an abutting landowner "where the landowner has affirmatively created the dangerous condition." Thompson v. Nassau Cnty., 200 A.D.3d 823, 160 N.Y.S.3d 274, 277 (2d Dep't, December 8, 2021). "In the absence of a statute or ordinance imposing tort liability on the owner or lessee, it can be held liable only if it, or someone on its behalf, undertook snow and ice removal efforts which made the naturally-occurring conditions more hazardous" Sheikh v. Chinatomby, 165 N.Y.S.3d 888 (2d Dep't, May 11, 2022)(internal citations omitted)(emphasis added).

Liability may also "be imposed upon an abutting landowner where the landowner "derives a special benefit from that public property unrelated to the public use. A special benefit, often referred to as a special use or special purpose, will be found 'where there is a modification to the public sidewalk, such as the installation of a driveway, or a variance of the sidewalk to allow for ingress and egress, that was constructed in a special manner for the benefit of the abutting landowner" Podhurst v. Vill. of Monticello, 202 A.D.3d 1185, 1187, 163 N.Y.S.3d 286, 288 (3rd Dep't, February 3, 2022)(internal citations and quotations omitted)

"Administrative Code of the City of New York § 7–210, which became effective September 14, 2003, shifted tort liability for injuries arising from a defective sidewalk from the City to the abutting property owner, except for sidewalks abutting one-, two-, or three-family residential properties that are owner occupied and used exclusively for residential purposes." Gallis v. 23-21 33 Rd., LLC, 198 A.D.3d 730, 731 (2d Dep't, October 13, 2021)(internal citations omitted). "This provision of the Administrative Code does not apply to "one-, two- or three-family residential real property that is (i) in whole or in part, owner occupied, and (ii) used exclusively for residential purposes." Brachfield v. Sternlicht, 202 A.D.3d 742, 743, 163 N.Y.S.3d 533, 535 (2d Dep't, February 9, 2022) citing Administrative Code § 7–210[b]. "Administrative Code § 7–210 directs landowners to maintain their abutting sidewalks in a "reasonably safe condition." Brachfield v. Sternlicht, 202 A.D.3d 742, 743, 163 N.Y.S.3d 533, 535 (2d Dep't, February 9, 2022). "Administrative Code of the City of New York § 7–210 does not impose strict liability upon the property owner, and the injured party has the obligation to

prove the elements of negligence to demonstrate that an owner is liable. Thus, to prevail on a motion for summary judgment, a plaintiff must demonstrate, prima facie, that the property owner created the defect or had actual or constructive notice of the defect" Curry v. E. Extension, LLC, 202 A.D.3d 907, 908, 159 N.Y.S.3d 684, 685 (2d Dep't, February 16, 2022)(internal citations omitted). The clear unambiguous language of Administrative Code § 7–210, combined with the expressed purpose of the law as set forth in the legislative history, establishes that the City Council intended to ***shift liability for sidewalk accidents away from the City to the abutting landowner***" Gallis v. 23-21 33 Rd., LLC, 198 A.D.3d 730, 731–32 (N.Y. App. Div. 2021).

Section 7–210 of the Administrative Code of the City of New York:

Liability of real property owner for failure to maintain sidewalk in a reasonably safe condition.

a. It shall be the duty of the owner of real property abutting any sidewalk, including, but not limited to, the intersection quadrant for corner property, to maintain such sidewalk in a reasonably safe condition.

b. Notwithstanding any other provision of law, the owner of real property abutting any sidewalk, including, but not limited to, the intersection quadrant for corner property, ***shall be liable*** for any injury to property or personal injury, including death, proximately caused by the failure of such owner to maintain such sidewalk in a reasonably safe condition. ***Failure to maintain such sidewalk in a reasonably safe condition shall include, but not be limited to, the negligent failure to install, construct, reconstruct, repave, repair or replace defective sidewalk flags and the negligent failure to remove snow, ice, dirt or other material from the sidewalk.*** This subdivision shall not apply to one-, two- or three-family residential real property that is (i) in whole or in part, owner occupied, and (ii) used exclusively for residential purposes.

c. Notwithstanding any other provision of law, ***the city shall not be liable for any injury to property or personal injury, including death, proximately caused by the failure to maintain sidewalks (other than sidewalks abutting one-, two- or three-family residential real property that is (i) in whole or in part, owner occupied, and (ii) used exclusively for residential purposes) in a reasonably safe condition.*** This subdivision shall not be construed to apply to the liability of the city as a property owner pursuant to subdivision b of this section.

d. Nothing in this section shall in any way affect the provisions of this chapter or of any other law or rule governing the manner in which an action or proceeding

against the city is commenced, including any provisions requiring prior notice to the city of defective conditions.

Franklin v. Learn, 197 A.D.3d 982, 983, 153 N.Y.S.3d 364, 366 (4th Dep't, August 26, 2021), leave to appeal denied, 37 N.Y.3d 918, 181 N.E.3d 1157 (2022)

- Plaintiff allegedly tripped and fell on an uneven sidewalk abutting the property of Defendant Eric Learn located in the Village of Franklinville (also named as defendant). Defendant Learn and the Defendant Village moved for summary judgment dismissing the complaint. The Supreme Court granted the motion and the Fourth Department affirmed. With respect to the Defendant Eric Learn's motion, the Fourth Department noted that ***although a particular section of the Village Code imposed a duty on the owners of abutting premises to "keep sidewalks, on or running along the street row adjoining [their] property, in reasonably good and safe repair,"*** it was undisputed that, at that time of the incident, ***the Village Code did not "clearly subject landowners to ... liability" for failing to comply with that duty"*** (internal citations omitted). As such, liability could not be imposed upon Defendant Learn, as an abutting property owner, based upon the Village Code. No further basis for liability of an abutting landowner, such as Defendant Learn's special use, negligent construction or repair, or affirmative creation of the alleged sidewalk defect was applicable.

Sheikh v. Chinatomby, 165 N.Y.S.3d 888, (Mem)–889 (2d Dep't, May 11, 2022)

- Plaintiff allegedly injured when he slipped and fell on ice on a public sidewalk abutting the defendant property owner. Defendant property owner moved for summary judgment dismissing the complaint. The Supreme Court denied the motion. The Second Department affirmed. The Second Department noted that the defendant met his burden of establishing the exemption by demonstrating he was an owner of a one-family residential building in which he resided, and that thus he was exempt from statutory liability pursuant to Section 7–210(b). However, ***an abutting property owner can also be held liable where he/she undertakes snow and ice removal efforts in a manner that creates or exacerbates a hazardous condition.*** The defendant failed to establish that he or someone on his behalf did not engage in snow and ice removal efforts that created or exacerbated the hazardous condition of the sidewalk.

Podhurst v. Vill. of Monticello, 202 A.D.3d 1185, 1187, 163 N.Y.S.3d 286, 288 (3d Dep't, February 3, 2022)

- Plaintiff allegedly slipped on ice while walking up the left side of a set of steps, which were part of a public right of way and not the defendant synagogue's property. The steps connected the roadway to the raised sidewalk located adjacent and in line with the synagogue's main entrance. Defendant synagogue moved for summary judgment and the Supreme Court denied the motion, finding

that questions of fact were raised as to whether the defendant created or exacerbated the condition through their snow removal efforts, and further, that questions of fact were raised as to the defendant's special benefit, or use, of the subject steps. The Third Department noted that the defendant met its prima facie burden by establishing that the plaintiff's fall occurred on public property, thereby shifting the burden to the plaintiff to establish either that the defendant created or exacerbated the condition or the defendant's special benefit or use of the area. ***The Court found issues of fact were raised with regard to the defendant's "special use" of the steps based upon testimony that the synagogue rebuilt the steps prior to plaintiff's fall, their use of decorative pavers setting the steps apart from the otherwise concrete sidewalk, that the steps are directly in line and match the synagogues main entrance width, and that congregants would access the synagogue via this entrance only.***

Torres v. 502/12 86th St., LLC, 197 A.D.3d 679, 149 N.Y.S.3d 898, 899 (2d Dep't, August 18, 2021)

- Plaintiff allegedly tripped and fell on a defective sidewalk condition abutting the property of the defendants within the City of New York. The fall occurred near a metal box and metal vault cover owned by a utility company. Defendant property owner moved for summary dismissing the complaint. The Supreme Court granted the motion and the Second Department reversed. The Second Department noted the ***exception to liability imposed on abutting property owners for sidewalk maintenance, pursuant to Section 7-210 of the Administrative Code, exists where the area in question is within 12 inches of a cover or grating on the street.*** More particularly, Rules of City of New York Department of Transportation (34 RCNY) § 2–07(b) provides that owners of covers or gratings on a street and sidewalk are responsible for monitoring the condition of the covers and gratings and the area extending 12 inches outward from the perimeter of the hardware, and for ensuring that the hardware is flush with the surrounding surface. However, in denying the defendant's motion for summary judgment, the Second Department noted that it was the defendant's burden of proof on the motion to establish the alleged defect was within 12 inches of the metal utility box and cover, and that defendant's failed to satisfy this burden.

Santiago v. City of New York, 197 A.D.3d 1259, 1260, 151 N.Y.S.3d 624, 625 (2d Dep't, September 22, 2021)

- Plaintiff allegedly tripped and fell on a hole in a sidewalk abutting the defendants premises. Defendants moved for summary judgment asserting the hole at issue was located in the pedestrian ramp rather than the abutting sidewalk. The Supreme Court denied the motion, and the Second Department affirmed. The Second Department noted, ***"pedestrian ramps are not part of the sidewalk for the purpose of imposing liability on abutting landowners pursuant to that provision [Administrative Code of the City of New York § 7-210]."*** However,

in affirming the denial of summary judgment, the Second Department noted that the defendants failed to establish, as a matter of law, that the hole at issue was located within a pedestrian ramp.

Gallis v. 23-21 33 Rd., LLC, 198 A.D.3d 730, 732 (2d Dep't, October 31, 2021)

- Plaintiff allegedly was injured when he tripped and fell on an uneven or raised condition of a sidewalk near a tree. Plaintiff brought suit against the abutting property owner and the City of New York. The Plaintiff moved for summary judgment on the issue of liability as against the City of New York. Plaintiff argued that Administrative Code 7-210 does not relieve the City of liability for sidewalk defects resulting from tree growth, pointing to separate Administrative Code sections which place the care of trees under the jurisdiction of the City's Department of Parks and Recreation, and prohibits individuals from cutting or removing trees or vegetation (Administrative Codes 18-104 and 18-129). The Supreme Court denied the plaintiff's motion and the Second Department affirmed. In so holding, the Second Department highlighted that a process existed for the abutting property owner to obtain permission to repair or reconstruct a sidewalk when such work may include cutting or removal of tree roots, and as such, "[***w]here a sidewalk may have been damaged by growing tree roots, abutting property owners are responsible for remedying the condition and are liable for damages that may occur because of the defect***."

VII. OUT OF POSSESSION LANDLORD'S LIABILITY

"'Generally, a landowner owes a duty of care to maintain his or her property in a reasonably safe condition.' 'That duty is premised on the landowner's exercise of control over the property, as 'the person in possession and control of [the] property is best able to identify and prevent any harm to others.'" David Herbert v. 1025 Chili Avenue LLC, No. 20-01408, 2022 WL 1836197, at *1 (4th Dep't, June 3, 2022)(internal citations omitted). "An 'out-of-possession landlord [is] not liable for injuries caused by dangerous conditions on leased premises in the absence of a statute imposing liability, a contractual provision placing the duty to repair on the landlord, or a course of conduct by the landlord giving rise to a duty.'" McDonnell v. Blockbuster Video, Inc., 203 A.D.3d 713, 160 N.Y.S.3d 648 (2d Dep't, March 2, 2022)(internal citations omitted). When an out-of-possession landlord retains some control and some contractual duty to make repairs to the leased premises, the question of liability will turn on whether the injury-producing condition fell within the landlord's contractual responsibilities. *Id*. '[C]ontrol is the test which measures generally the responsibility in tort of the owner of real property.'" Dill v. Lahr, 194 A.D.3d 1473, 1474, 148 N.Y.S.3d 582, 584 (4th Dep't, May 7, 2021). Where an out of possession landlord owes no contractual duty to repair and maintain the injury producing condition, liability may still be premised upon the landlords contractual right of re-entry and repair, coupled with a structural or design defect in violation of a specific statutory provision. See Vargas v. Weishaus, 199 A.D.3d 620,

159 N.Y.S.3d 33, 37 (1st Dep't, November 30, 2021); Behluli v. 228 Hotel Corp., 172 A.D.3d 1151, 1152, 98 N.Y.S.3d 873, 874 (2d Dep't, 2019).

Taliana v. Hines REIT Three Huntington Quadrangle, LLC, 197 A.D.3d 1349, 1351, 154 N.Y.S.3d 136, 138–39 (2d Dep't, September 29, 2021)

- Plaintiff slipped and fell on water pooling on the floor that was leaking from an HVAC unit in the ceiling of a break room in a building space occupied by Travelers Insurance Company (plaintiff's employer). Travelers rented the space from the defendants who owned and managed the building (hereafter Defendant Owner). Suit was also filed against the company which installed the HVAC system. The defendants collectively moved for summary judgment, which was granted by the lower court. The Second Department reversed. In so holding, the Second Department noted that the ***defendant owner failed to demonstrate it relinquished that level of control over the premises necessary to extinguish its duty to maintain the premises***. The Court highlighted as significant to its determination that the Defendant Owner's general manager maintained an office at the premises, was present in Traveler's office space at least once a day, had contracted for the installation of the HVAC system at issue, oversaw its installation, and approved the construction work.

Lamb v. BOC Grp., Inc., 199 A.D.3d 909, 158 N.Y.S.3d 192, 194 (2d Dep't, November 17, 2021)

- Plaintiff was an ironworker allegedly injured while at work when he slipped and fell on ice on a walkway at a smelting plant owned by Defendant Eco-Bat and operated by RSR. It was alleged an icy condition was created due to the melting and refreezing of ice on oxygen vaporizing equipment used in the smelting process. Defendant Eco-Bat moved for summary judgment alleging that it was an out of possession landlord without notice of the dangerous condition. The Supreme Court denied the motion and the Second Department affirmed. In upholding the lower court, the Second Department noted that ***Defendant Eco-Bat was not entitled to status as an out of possession landlord, because the management agreement between Defendant Eco-Bat and RSR was not a lease, conveyed no interest in the real property, and did not preclude Eco-Bat from being present on the property.*** The Court noted that Eco-Bat failed to meet its burden of establishing that "it had relinquished control over the premises to such a degree as to extinguish its duty to maintain the premises in a reasonably safe condition".

Souma v. Third Ave. Realty Mgmt., Inc., 204 A.D.3d 622, 622 (1st Dep't, April 28, 2022)

- Plaintiff fell within a stairway alleging the stairway was in a dangerous and hazardous condition. Out of possession landlord, Defendant Third Avenue, moved for summary judgment dismissing the complaint and plaintiff cross-moved for summary judgment on the issue of liability. The defendant's motion was granted and plaintiff's motion was denied by the Supreme Court. The First

Department affirmed. In so holding, the First Department noted that Defendant Third Avenue established it was an out of possession landlord with no responsibility to maintain the subject stairway. Furthermore, ***although the out of possession landlord defendant had a right to re-enter the premises to make repairs within the lease, "[v]arying riser heights and tread and handrail violations are insufficient to impose liability of an out-of-possession landlord since they are not structural defects***."

Padilla v. Hope W. 118th Hous. Co., Inc., 204 A.D.3d 545, 165 N.Y.S.3d 278 (1st Dep't, April 21, 2022)

- Plaintiff slipped and fell on water that leaked from a toilet located on the floor above where her fall occurred. The defendant owner, moved for summary judgment. The Supreme Court granted the defendant's motion and the First Department affirmed. The First Department held the defendant established it was an out of possession landlord with no contractual duty to maintain or repair the toilet. The defendant did have a contractual right to reenter the leased premises to inspect or repair. However, liability upon the out of possession landlord could not be premises on this right of re-entry and repair, because ***the leaking toilet was not a structural defect and did not violate a specific statutory safety provision***.

Lopez v. Mattone Grp. Raceway, LLC, 203 A.D.3d 909, 161 N.Y.S.3d 815 (2d Dep't, March 16, 2022)

- Plaintiff was injured at his place of employment. Plaintiff alleged that dents in the metal floor of a walk-in freezer caused a ladder he was descending to shift and cause his fall. The defendant owner moved for summary judgment. The Supreme Court denied the motion and the Second Department reversed. In reversing the decision, the Second Department held that the defendant established it was an out of possession landlord which was not bound by contract or course of conduct to repair the metal flooring at issue. Furthermore, ***because the plaintiff did not allege that the floor dents violated any statutes, the defendants were not obligated to disprove a statutory duty to repair as part of its prima facie burden***.

IV. PRIMARY ASSUMPTION OF RISK

"Under the doctrine of primary assumption of risk, a voluntary participant in a sporting or recreational activity consents to those commonly appreciated risks that are inherent in and arise out of the nature of the sport generally and flow from such participation" A. L. v. Chaminade Mineola Soc'y of Mary, Inc., 203 A.D.3d 1033 (2d Dep't, 2022)(internal citations omitted). "Assumption of risk is not an absolute defense but a measure of the

defendant's duty of care. The defendant's duty is to exercise care to make the conditions as safe as they appear to be. If the risks of the activity are fully comprehended or perfectly obvious, the participant has consented to them and defendant has performed its duty." Maharaj v. City of New York, 200 A.D.3d 769, 537, 157 N.Y.S.3d 534, 536 (2d Dep't, December 8, 2021)(internal citations omitted). "Risks inherent in a sporting activity are those which are known, apparent, natural, or reasonably foreseeable consequences of the participation. This includes risks associated with the construction of the playing surface and any open and obvious condition on it, including less than optimal conditions However, participants are not deemed to have assumed risks that are concealed or unreasonably increased over and above the usual dangers that are inherent in the sport or recreational activity" Buffalino v. XSport Fitness, 202 A.D.3d 902, 904, 163 N.Y.S.3d 208, 212 (2d Dep't, 2022) (internal citations omitted). "However, participants are not deemed to have assumed risks that are concealed or unreasonably increased over and above the usual dangers that are inherent in the sport… A participant's appreciation of the inherent risk is 'to be assessed against the background of the skill and experience of the particular plaintiff'" A. L. v. Chaminade Mineola Soc'y of Mary, Inc., 203 A.D.3d 1033 (N.Y. App. Div. 2022)(internal citations omitted).

Buffalino v. XSport Fitness, 202 A.D.3d 902, 163 N.Y.S.3d 208 (2nd Dep't, February 16, 2022)

- User of elliptical machine at gym filed action against gym owners, alleging that she sustained personal injuries when the left arm and foot pedal of the elliptical machine detached, hinged out, and caused her to be thrust off the machine. The Supreme Court granted the defendant gym's motion for summary judgment. User appealed. In reversing the decision, the Second Department held that the defendant failed to meet its burden of demonstrating the lack of any notice, in that they failed to provide any specific evidence of when the machine was last inspected. The Second Department further held that the plaintiff did not assume the risk, because the ***risk of the arm and foot pedal detaching are not inherent or reasonably foreseeable consequences of the activity*** of exercising on the machine.

Maharaj v. City of New York, 200 A.D.3d 769, 538, 157 N.Y.S.3d 534, 536 (2d Dep't, December 8, 2021)

- The plaintiff allegedly sustained injuries while playing cricket on tennis courts within the defendant City of New York's park when he tripped over a hole concealed inside a long crack on the asphalt playing surface. In upholding the Supreme Court's granting of summary judgment to the defendant, based upon the doctrine of primary assumption of risk, the Second Department majority opinion noted that the photographs and deposition testimony demonstrate the ***crack which caused the plaintiff's fall was clearly visible, and as such the plaintiff assumed the risk of these "less than optimal conditions"*** on the playing surface. In a concurring opinion, J. Connolly notes that although the Court's precedent compels affirmance of the dismissal of the action, "I maintain

that the doctrine of primary assumption of risk should not be applied to the facts presented here. The cracked condition of the tennis court was not a risk inherent in the sport of tennis or cricket…Placing undue emphasis on the plaintiff's knowledge of the alleged dangerous condition improperly relieves landowners of their duty to maintain their property in a reasonably safe condition."

Schwartz v. Town of Ramapo, 197 A.D.3d 753, 755, 153 N.Y.S.3d 172, 175 (2d Dep't, August 25, 2021)

- The plaintiff was allegedly injured while playing tennis on "Har-Tru" tennis courts by a raised sprinkler head. The Second Department upheld summary judgment granted to the defendants by the Supreme Court, on the basis of the doctrine of "primary assumption of risk". In so holding, the Second Department noted that the ***plaintiff was an experienced tennis player***, was aware the "Har-Tru courts need to be watered, that the particular court she was playing on were watered, and that there were sprinkler heads on the subject tennis courts. The Court further noted that ***the defendant "was not required to prove that she [plaintiff] was aware of the specific sprinkler head on which she tripped"*** because she was aware of the potential for an injury resulting from a sprinkler head.

A. L. v. Chaminade Mineola Soc'y of Mary, Inc., 203 A.D.3d 1033 (2d Dep't, March 23, 2022)

- The infant plaintiff, a member of the defendant girls swim team, dove from a starting block located at the shallow end of the swimming pool at co-defendant's facility. Upon diving into the shallow portion of the pool, with a four foot depth, plaintiff struck her had on the bottom of the pool. The defendants' motion for summary judgment pursuant to the doctrine of "primary assumption of risk" was denied by the Supreme Court. In so holding, Hon. Diccia T. Pineda-Kirwan highlighted the lack of experience of the infant, noting that the infant was in the beginner group on her swim team, that she had only used the pools starting blocks on one prior occasion, and that coaches had encouraged her to use the starting blocks. Lewis v. Chaminade Mineola Soc. of Mary, Inc., No. 602927/18, 2020 WL 1016518, at *1 (N.Y. County Sup. Ct., 2020). In upholding the Supreme Court's determination, the Second Department found that issues of fact were raised as to whether the infant was exposed to an unassumed risk, highlighting particularly that ***"she was a competitive swimming novice*** with little to no experience diving into shallow water from a starting block, and that ***she did not receive adequate training*** from her coaches to safely perform race-start dives in this manner."

Bodden v. Holiday Mountain Fun Park Inc., 200 A.D.3d 1432, 160 N.Y.S.3d 433, 436–37 (3rd Dep't, December 23, 2021)

- Plaintiff was a 16 year old novice skier who was injured while skiing under the instruction of the defendant's ski instructor employee. Defendant moved for

summary judgment on the basis of the infant plaintiff's "primary assumption of risk" and execution of a waiver of liability in connection to her equipment rental. The Supreme Court granted the defendant's motion and the Third Department reversed. In reversing the lower courts decision on this issue of "primary assumption of risk", the Third Department noted as relevant to its decision: factual disputes as to ***whether the plaintiff expressed reservations to the instructor about whether she was ready to progress from the bunny hill to a more challenging part of the mountain; "whether the instructor encouraged [plaintiff] in a manner that was overzealous under the circumstances"; "whether the instructor taught [the plaintiff], before going on the trail, how to safely fall"; as well as the plaintiff's lack of experience***. Based upon the foregoing, questions of fact were raised as to whether the instructor unreasonably increased the risk of injury and whether the plaintiff voluntarily assumed such risk. The Court further found that the liability waiver executed at the time of the plaintiff's equipment rental from the defendant did not preclude recovery under the circumstances, with citation to General Obligations Law § 5–326.

Shaw v. AKT Inmotion Inc., 164 N.Y.S.3d 817, 818 (1st Dep't, April 19, 2022)

- Plaintiff was allegedly injured during a resistance band exercise class. Denial of defendant's motion for summary judgment, relying upon the doctrine of "primary assumption of risk" and GOL §5-326 upheld by the First Department. Issues of fact existed as to whether the facility offered recreational as well as instructional classes, warranting denial based upon GOL §5-326. In upholding the denial of summary judgment based upon the doctrine of primary assumption of risk, the First Department noted that "Plaintiff testified that ***she was inexperienced in the use of the stretching bands and that the class instructor did not give prior instruction regarding their use***" and "whether plaintiff was given sufficient information to fully appreciate the risks of the specific exercise in question."

Haggerty v. N. Dutchess Hosp., 199 A.D.3d 783, 157 N.Y.S.3d 506, 508–09 (2d Dep't, November 10, 2021)

- Plaintiff allegedly fell while at a hospital's fitness and rehabilitation facility, after falling during a balancing exercise. The defendant hospital moved for summary judgment based upon the plaintiff's "assumption of risk" from the activity, and a release executed by the plaintiff. The defendant's motion was granted by the Supreme Court. In reversing the decision, the Second Department noted that deposition testimony raised questions of fact as to ***whether the hospital employee trainer exposed the plaintiff to an unassumed risk, in that the trainer "allegedly encouraged the plaintiff to attempt the exercise after he expressed that he could not perform it, by allegedly offering verbal reassurance*** such as 'I'm right here,' which the plaintiff mistakenly believed meant that the trainer would catch him or stabilize him if he began to fall." With respect to the release executed by the plaintiff, the Second Department noted

"defendant's evidence did not establish as a matter of law that its facility was not a 'gymnasium' within the meaning of [General Obligations Law § 5–326].

Rooney v. Battenkill River Sports & Campground Holding Co., LLC, No. 533765, 2022 WL 1177263 (3rd Dep't., Apr. 21, 2022)

- Plaintiff was allegedly injured after she slipped on a rock on an access path to a river, while attempting to access the river to go water tubing. The defendant tubing company rented the plaintiff a tube and provided shuttle service to the river. In upholding the Supreme Court's granting of summary judgment on the basis of "primary assumption of risk", the Third Department found that t***he risk of falling on the natural rocky terrain of the access path was necessarily "interwoven with and inherent in the sport of river water tubing***" and was therefore assumed by her.

General Obligations Law § 5–326

- Every covenant, agreement or understanding in or in connection with, or collateral to, any contract, membership application, ticket of admission or similar writing, entered into between the owner or operator of any pool, gymnasium, place of amusement or recreation, or similar establishment and the user of such facilities, pursuant to which such owner or operator receives a fee or other compensation for the use of such facilities, which exempts the said owner or operator from liability for damages caused by or resulting from the negligence of the owner, operator or person in charge of such establishment, or their agents, servants or employees, shall be deemed to be void as against public policy and wholly unenforceable.

Shaw v. AKT Inmotion Inc., 164 N.Y.S.3d 817, 818 (1st Dep't, April 19, 2022)

- Plaintiff was allegedly injured during a resistance band exercise class. Denial of defendant's motion for summary judgment, relying upon the doctrine of "primary assumption of risk" and GOL §5-326 upheld by the First Department. Issues of fact existed as to whether the facility offered recreational as well as instructional classes warranting denial of summary judgment on the basis of GOL §5-326. In upholding the denial of summary judgment based upon the doctrine of primary assumption of risk, the First Department noted that "Plaintiff testified that she was inexperienced in the use of the stretching bands and that the class instructor did not give prior instruction regarding their use" and "whether plaintiff was given sufficient information to fully appreciate the risks of the specific exercise in question."

Haggerty v. N. Dutchess Hosp., 199 A.D.3d 783, 157 N.Y.S.3d 506, 508–09 (2d Dep't, November 10, 2021)

- Plaintiff allegedly fell while at a hospital's fitness and rehabilitation facility, after falling during a balancing exercise. The defendant hospital moved for summary judgment based upon the plaintiff's "assumption of risk" from the activity, and a release executed by the plaintiff. The defendant's motion was granted by the Supreme Court. In reversing the decision, the Second Department noted that deposition testimony raised questions of fact as to whether the hospital employee trainer exposed the plaintiff to an unassumed risk, in that the trainer "allegedly encouraged the plaintiff to attempt the exercise after he expressed that he could not perform it, by allegedly offering verbal reassurance such as 'I'm right here,' which the plaintiff mistakenly believed meant that the trainer would catch him or stabilize him if he began to fall." With respect to the release executed by the plaintiff, the Second Department noted "defendant's evidence did not establish as a matter of law that its facility was not a 'gymnasium' within the meaning of [General Obligations Law § 5–326].

Bodden v. Holiday Mountain Fun Park Inc., 200 A.D.3d 1432, 160 N.Y.S.3d 433, 436–37 (3rd Dep't, December 23, 2021)

- Plaintiff was a 16 year old novice skier who was injured while skiing under the instruction of the defendant's ski instructor employee. Defendant moved for summary judgment on the basis of the infant plaintiff's "primary assumption of risk" and execution of a waiver of liability in connection to her equipment rental. The Supreme Court granted the defendant's motion and the Third Department reversed. In reversing the lower courts decision on this issue of "primary assumption of risk", the Third Department noted as relevant to its decision: factual disputes as to whether the plaintiff expressed reservations to the instructor about whether she was ready to progress from the bunny hill to a more challenging part of the mountain; "whether the instructor encouraged [plaintiff] in a manner that was overzealous under the circumstances"; "whether the instructor taught [the plaintiff], before going on the trail, how to safely fall"; as well as the plaintiff's lack of experience. Based upon the foregoing, questions of fact were raised as to whether the instructor unreasonably increased the risk of injury and whether the plaintiff voluntarily assumed such risk. The Court further found that the liability waiver executed at the time of the plaintiff's equipment rental from the defendant did not preclude recovery under the circumstances, with citation to General Obligations Law § 5–326.

Inspection & Notice

Mere Reference to Generalized Inspections Practices is Insufficient To Establish a Lack of Constructive Notice. See

Steffens v. Sachem Cent. Sch. Dist., 190 A.D.3d 1003, 140 N.Y.S.3d 253 (2d Dep't, January 27, 2021)

Despite evidence of a prior inspection one hour before plaintiff's slip & fall, the defendant's failure to establish what was found at that inspection warranted denial of summary judgment

Inspection & Notice

Recency of Inspection to the Plaintiff's Fall

Miller v. Terrace City Lodge No. 1499, et. al, 197 A.D.3d 643, 644, 153 N.Y.S.3d 118, 120 (2d Dept, August 18, 2021)

Anderson v. United Parcel Serv., Inc., 194 A.D.3d 675, 677, 148 N.Y.S.3d 230, 233 (2d Dept, May 5, 2021)

Failure to inspect for a prior of greater than two days prior to fall on ice condition insufficient to establish lack of constructive notice

Lanza v. B.H.N.V. Realty Corp., 201 A.D.3d 468, 470, 160 N.Y.S.3d 234, 236 (1st Dep't, January 11, 2022)

Inspection of glue traps three days prior to the plaintiff's fall, coupled with the absence of complaints, sufficient to establish lack of constructive notice as a matter of law

Inspection & Notice

Expert Testimony on Issue of Constructive Notice

- **Syrnik v. Bd. of Managers of Leighton House Condo., 198 A.D.3d 835, 156 N.Y.S.3d 81 (2d Dep't, October 13, 2021)**

Expert affidavit that the defective condition of an elevator which caused plaintiff's injury would have been revealed by proper maintenance and inspection sufficient to raise a question of fact as to the defendant's constructive notice of the condition.

Constructive Notice Inferred

- **<u>Powell v. BLDG 874 Flatbush LLC</u>, 201 A.D.3d 534, 534, 157 N.Y.S.3d 373, (Mem)–374 (1st Dep't, January 18, 2022)**
  - Reasonable inferences can be drawn from photographs regarding how long the condition existed

<u>CPLR 4532-b:</u>

- ***"An image, map, location, distance, calculation, or other information taken from a web mapping service, a global satellite imaging site, or an internet mapping tool, is admissible in evidence if such image, map, location, distance, calculation, or other information indicates the date such material was created*** …"
- ***"…A party intending to offer such image or information in evidence at a trial or hearing shall, at least thirty days before the trial or hearing, give notice of such intent, providing a copy or specifying the internet address at which such image or information may be inspected…"***
- ***"…Unless objection is made pursuant to this subdivision, the court shall take judicial notice and admit into evidence such image, map, location, distance, calculation or other information."***

Recurring Conditions & Notice

Butnik v. Luna Park Hous. Corp., 200 A.D.3d 1013, 160 N.Y.S.3d 80, 81–82 (2d Dep't, December 22, 2021)

- 33 prior instances of windows needing repair in the defendant landlord's building, and testimony that windows breaking were "normal", was sufficient to raise a question of fact with respect to the defendant's constructive notice of the dangerous condition of the plaintiff's window, which shattered when she attempted to open it.

Marazita v. City of New York, 202 A.D.3d 951, 951–52, 163 N.Y.S.3d 219, 221 (2d Dep't, February 16, 2022)

- Mere general awareness that snow and ice may have accumulated on exposed surfaces of the exterior of the school was insufficient to demonstrate evidence of a recurring hazardous condition without defendant being aware of snow or ice previously falling from those surfaces.

Video Surveillance, Spoliation, & Notice

- May v. Am. Multi-Cinema, Inc., 191 A.D.3d 657, 141 N.Y.S.3d 108 (2d Dep't, February 3, 2021)
    - Plaintiff's application for an adverse inference, premised on the defendants' destruction of surveillance footage, denied as questions of fact existed with respect to whether the destroyed surveillance footage actually depicted the area of plaintiff's fall.

- Olivares v. Pollack 111 Bruce, LLC, 197 A.D.3d 481, 481–82, 152 N.Y.S.3d 693, 694 (2d Dep't, May 11, 2021)
    - Plaintiff's motion for spoliation denied where defendant provided footage for 13 hours prior to plaintiff's fall but not the 3 days prior demaned by plaintiff. The Court noted that plaintiff failed to demonstrate the additional footage was withheld in bad faith, and that the additional

Latent Defects & Res Ipsa Loquitur

- **<u>Res Ipsa Loquitur:</u>**
  1. **The accident would not typically occur absent negligence**
  2. **The cause of the accident was exclusively under the control of the defendant**
  3. **The plaintiff did not voluntarily contribute toward causing the harm**

<u>Matson v. Dermer Mgmt., Inc.</u>, 200 A.D.3d 772, 155 N.Y.S.3d 98, 99 (2d Dep't, December 8, 2021)

- Second Department upholds lower court finding that the defendant landlord did not have exclusive control over the area of the defective condition, where a ceiling collapsed on the plaintiff tenant, and therefore Res Ipsa Loquitur did not apply.

<u>Maroonick v. Rae Realty, LLC</u>, No. 152197/17, 2022 WL 1309892 (1st Dep't, May 3, 2022)

- First Department held that Defendant Landlord ***had exclusive control*** of the buildings structure, and therefore the plaintiff-tenant could rely upon the doctrine of Res Ipsa Loquitur where a ceiling collapsed upon her. Despite the lack of evidence of defendant's actual or constructive notice of the ceiling defect, *"notice is inferred when res ipsa loquitur applies to the accident."*

Open & Obvious Conditions Defense

Sessa v. Cent. Amusement Int'l, LLC, 203 A.D.3d 863, 160 N.Y.S.3d 883, (Mem)–884 (2d Dep't, March 9, 2022)

- Second Department considered that the plaintiff's view at the time of her fall may have been obscured by the large number of people in the vicitiy, in determining that a raised area of the walkway was not open and obvious.

Farrell v. Ted's Fish Fry, Inc., 196 A.D.3d 893, 895, 151 N.Y.S.3d 528, 530–31 (3d Dep't, July 8, 2021)

- 10 inch drop from the edge of a bright red wood landing which contrasted with green grass was not inherently dangerous. Summary judgment granted upon finding that the alleged condition was open and obvious.

TRIVIAL DEFECTS

Sessa v. Cent. Amusement Int'l, LLC, 203 A.D.3d 863, 160 N.Y.S.3d 883, (Mem)–884 (2d Dep't, March 9, 2022)

- Despite the Court noting that the walkway defect was physically small,, the defect was not "trivial" as a matter of law because the location and time of the fall involved a crowded area with lights and noises and questions of fact existed as to whether those circumstances did not magnify the danger.

E. F. v. City of New York, 203 A.D.3d 887 (2d Dep't, March 16, 2022)

Powell v. BLDG 874 Flatbush LLC, 201 A.D.3d 534, 534, 157 N.Y.S.3d 373, (Mem)–374 (1st Dep't, January 18, 2022)

- Submission of photos of the defect without any information as to the actual dimensions insufficient to establish the defect as "trivial" as a matter of law

STORM IN PROGRESS DEFENSE

Canciani v. Stop & Shop Supermarket Co., LLC, 203 A.D.3d 1011 (2d Dep't, March 23, 2022)

- Meteorologic report submitted by defendant was insufficient to establish a "storm in progress" because it failed to include copies of the records which the expert relied upon in forming his opinion.

Telesco v. Smith, 200 A.D.3d 1140, 159 N.Y.S.3d 211, 215 (3rd Dep't, December 2, 2021)

- Summary judgment denied despite defendant establishing the plaintiff's fall on ice occurred during on ongoing storm in progress, where plaintiff submitted expert meteorologic testimony (with accompanying data) that if left untreated the area of plaintiff's fall would have developed an ice condition accumulated over the three days prior.

Taormina-Fucci v. 100-02 Rockaway Blvd. 26, LLC, 201 A.D.3d 766, 767, 156 N.Y.S.3d 917 (2d Dep't, January 12, 2022)

- Despite the defendant establishing the plaintiff's fall occurred during a storm in progress, questions of fact were raised by plaintiff's testimony as to whether the ice he fell from pre-existed the storm.

CONTRACTOR LIABILITY & ESPINAL EXCEPTIONS

- Espinal v. Melville Snow Contractors, Inc., 98 N.Y.2d 136, 138-140, 773 N.E.2d 485 (2002)

  (1) The contracting party launcheed a force or instrument of harm

  (2) The plaintiff detrimentally relies on the continued performance of the contracting party's duties; or

  (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely”

ESPINAL EXCEPTIONS MUST BE PLED

Canciani v. Stop & Shop Supermarket Co., LLC, 203 A.D.3d 1011 (2d Dep't, March 23, 2022)

- **Snow Removal Contractor: Failure to plead an Espinal Exception shifts the burden of demonstrating the applicability of an exception on the plaintiff on a motion for summary judgment.**

McEleney v. Riverview Assets, LLC, 201 A.D.3d 1159, 1163, 161 N.Y.S.3d 491, 495 (3rd Dep't, January 13, 2022)

- **Janitorial Service Contractor: Third Department interpreted plaintiff's claims of that the contractor created the collision to find that, "in essence", plaintiff alleged the defendant "launched an instrument of harm"**

FIRST ESPINAL EXCEPTION

LAUNCHED A FORCE OR INSTRUMENT OF HARM

"a contracting party may be found to have launched a force or instrument of harm when that party ***creates or exacerbates a dangerous condition.***" Mizenko v. Intertech Digital Ent., Inc., 204 A.D.3d 1151, 1152, 166 N.Y.S.3d 366, 368 (2022)(emphasis added)

Construction Contractors & Plans & Specifications: ***A builder or contractor will not be liable under the First Espinal Exception where they relied upon plans and specifications they were hired to follow unless the specifications are so obviously defective that an ordinary builder would be on notice that the work was dangerous***

- **Hodzic v. M. Cary, Inc., 202 A.D.3d 1063, 1064, 159 N.Y.S.3d 882 (2d Dep't, February 23, 2022): First Espinal Exception did not apply where approximate 2 ½ inch height differential in the floor was created pursuant to specifications**
- **Hamel v. Park Ave. Armory, 201 A.D.3d 410, 156 N.Y.S.3d 724, 725 (1st Dep't, January 4, 2022): Issue of fact with respect to the First Espinal Exception and whether an ordinary builder would be on notice that specifications were obviously dangerous, where a theater entrance involved dark lighting, black steps and crossing a rotating stage**

Second & Third Espinal Exceptions: Detrimental Reliance and Displacement of Duty

SECOND ESPINAL EXCEPTION: DETRIMENTAL RELIANCE

- **Reese v. Raymond Corp.,** 202 A.D.3d 1304, 1305, 163 N.Y.S.3d 678, 680 (3rd Dep't, February 17, 2022): Worker was injured by a piece of manufacturing equipment which the defendant contractor was responsible to maintain and repair. Questions of fact existed with respect to the plaintiff's detrimental reliance that the equipment provided could be safely used.

THIRD ESPINAL EXCEPTION: DISPLACEMENT OF DUTY

- **Lopez v. Limpiex Cleaning Servs., Inc., 199 A.D.3d 418, 153 N.Y.S.3d 849 (1st Dep't, November 4, 2021):** Janitorial contractor did not entirely displace the property owner's duty to maintain the premises where the property owner had a right to inspect the services and could require the contractor to perform the services again if not performed properly

ADJACENT LANDOWNER LIABILITY

An adjacent landowner may be liable for a defective condition on a sidewalk not on their property where:

1. **It created the condition;**

2. **The condition was caused by some special use beyond the public's use; or**

   Podhurst v. Vill. of Monticello, 202 A.D.3d 1185, 1187, 163 N.Y.S.3d 286, 288 (3d Dep't, February 3, 2022)

3. **A statute or ordinance obligates the adjacent landowner to maintain the sidewalk, and imposes civil liability for a failure to do so.**

ADMINISTRATIVE CODE OF CITY OF NY §7-210

"Failure to maintain such sidewalk in a reasonably safe condition shall include, but not be limited to, the negligent failure to install, construct, reconstruct, repave, repair or replace defective sidewalk flags and the negligent failure to remove snow, ice, dirt or other material from the sidewalk."

EXCEPTIONS:

1. **One-Three Family Home Exception: "This subdivision shall not apply to one-, two- or three-family residential real property that is (i) in whole or in part, owner occupied, and (ii) used exclusively for residential purposes" §7-210**
2. **Pedestrian Ramps: Pedestrian ramps are not part of the sidewalk pursuant to §7-210. Santiago v. City of New York, 197 A.D.3d 1259, 1260, 151 N.Y.S.3d 624, 625 (2d Dep't, September 22, 2021)**
3. **12 inches Surrounding Covers & Gratings: A landowner is not responsible for the areas on sidewalks within 12 inches of covers or gratings. Torres v. 502/12 86th St., LLC, 197 A.D.3d 679, 149 N.Y.S.3d 898, 899 (2d Dep't, August 18, 2021)**

OUT OF POSSESSION LANDLORD LIABILITY

Taliana v. Hines REIT Three Huntington Quadrangle, LLC, 197 A.D.3d 1349, 1351, 154 N.Y.S.3d 136, 138–39 (2d Dep't, September 29, 2021)

- Plaintiff slipped on water dripping from an HVAC unit while at her work. Defendant landlord failed to demonstrate it was an out of possession landlord as a matter of law, because, in practice, their employee visited the tenant's space daily, and the HVAC systems installation was overseen and approved by the landlord.

Souma v. Third Ave. Realty Mgmt., Inc., 204 A.D.3d 622, 622 (1st Dep't, April 28, 2022)

- Varying riser heights and tread and handrail violations of NYC Administrative Code did not constitute a "significant structural or design defect"

PRIMARY ASSUMPTION OF RISK

Maharaj v. City of New York, 200 A.D.3d 769, 538, 157 N.Y.S.3d 534, 536 (2d Dep't, December 8, 2021)

- Plaintiff assumed the risk of playing tennis on a cracked tennis court because the cracks were visible.

Schwartz v. Town of Ramapo, 197 A.D.3d 753, 755, 153 N.Y.S.3d 172, 175 (2d Dep't, August 25, 2021)

- Plaintiff, who was an experience tennis player, assumed the risk of tripping on a raised sprinkler head, where she was aware the Courts on which she was playing contained sprinklers, even though she was not aware the particular sprinkler head was raised.

A. L. v. Chaminade Mineola Soc'y of Mary, Inc., 203 A.D.3d 1033 (2d Dep't, March 23, 2022)

- Novice swimmer deemed to not assume the risk of diving from a block into the shallow end, considering her age, experience, and the lack of instruction and training.

Haggerty v. N. Dutchess Hosp., 199 A.D.3d 783, 157 N.Y.S.3d 506, 508–09 (2d Dep't, November 10, 2021)

- Plaintiff did not assume the risk of falling during an exercise during her rehab where the trainer encouraged her to perform the exercise despite plaintiff expressing reservations about her ability to do it.

William G. Spratt, Esq. – Senior Partner at Shaub Ahmuty Citrin & Spratt LLP

Bill brings more than 35 years of extensive experience in trial litigation to provide strategic, steadfast defense in medical malpractice cases. Bill's work involves high- stakes, high-exposure claims covering all aspects of medicine, including neurology, neurosurgery, cardiology and more.

Bill began his legal career as an Assistant District Attorney in the Major Offense Bureau of the Bronx County District Attorney's Office. There, he developed a foundation of critical trial skills, from communicating with juries to building credibility with judges and adversaries.

Bill later joined the trial team at Bower & Gardner, where he built a robust medical malpractice defense practice. In 1994, he joined three colleagues in founding Shaub, Ahmuty, Citrin & Spratt; following their vision, the firm has evolved to be a preeminent law firm with an unparalleled trial record.

Although he has served in leadership roles throughout the legal community, including tenure as president of the Nassau-Suffolk Trial Lawyers' Association, Bill is most proud of his time spent volunteering with the Little League Challenger Division, a baseball program for youth with physical and intellectual challenges. For 10 years, he handled coaching duties as well as fundraising and logistics. Bill credits this experience for giving him additional insight and empathy - traits he applies in the courtroom.

INTEROFFICE MEMORANDUM
PRIVILEGED & CONFIDENTIAL

TO: WGS
FROM: NT
DATE: 6/1/22
RE: Recent Medical Malpractice Decisions

Siegel v. Snyder, 2021 WL 2021 WL 6057821 (2d Dep't 2021)

Holdings

- The court held, statements "attributed to the committee, and for which there was no indication as to who specifically made the statements," were not entitled to the quality-assurance privilege.

- However, it found that "any reference in the minutes to corrective actions to be taken subsequent to the inquiry regarding the decedent's care and treatment are beyond the scope of the party-statement exception, and therefore are not discoverable." Accordingly, a protective order should have been granted with regard to those portions of the minutes.

The Party-Statement Exception

- Public Health Law **("PHL")** § 2805-m(2) and Education Law§ 6527(3) shield from disclosure, under CPLR Article 31, the proceedings and records relating to performance of the quality assurance review function as well as any statement of any person attending such a meeting. But both allow for the discovery of "party statements", which, in this context, are statements made by any person attending the quality assurance meeting who is a defendant in the medical malpractice action about which the subject treatment is discussed. Under this exception, the statement made by the defendant is not privileged and thus must be disclosed upon demand in the underlying action.

The *Siegel* Case

- Critical to the discovery ofrecorded statements, Siegel held that it is the hospital's burden in asserting the privilege to identify "who said what at the meeting." Therefore, if the minutes of the meeting do not identify the speaker, the hospital is in no position to confirm that the speaker is not a party to the underlying action. Under those circumstances, therefore, the hospital cannot meet its burden in showing that the quality assurance privilege should apply to the statements it aims to withhold.

- After Siegel's death at defendant South Nassau Communities Hospital ("SNCH") from a head injury, defendants Trauma Medical Director Dr. Kenneth Becker and Assistant Director of the Emergency Department Dr. Mathew Lurin attended a Trauma Peer Review Committee meeting. The minutes of the meeting contained statements attributed

to the "committee" along with one statement attributed to the "Trauma Medical Director", i.e. Dr. Becker.

- In response to plaintiff's demand for quality assurance records, SNCH moved for a protective order asserting privilege under PHL § 2805-m and Education Law § 6527(3). SNCH sought to limit discovery to only those portions of the minutes that constituted statements made by the individually named defendants. SNCH submitted to the court proposed redactions of the meeting minutes and sought a determination that the party-statement exception applied only to a notation that the two defendant physicians were present at the meeting and a single statement made by Dr. Becker. As the other statements in the meeting minutes were attributed to the "committee", they were not subject to disclosure, SNCH asserted, because they fell outside the party-statement exception.

- After an in-camera review, the court denied SNCH's motion. The court found itself unable to identify who provided specific comments at the meeting when the "statements and/or information contained in the minutes [were] attributed to the committee" and, as a consequence, what statements were indeed privileged. Thus, the court ordered disclosure of the statements attributed to the "committee" as party-statements.

Townsend v. Vaisman, 203 A.D.3d 1199 (2d Dep't, March 30, 2022)

Holdings

- Failure by providers to diagnose stroke upon initial visit to emergency room was not proximate cause of patient's injuries, and

- Providers' failure to administer tissue plasminogen activator (TPA) therapy was not departure from accepted standard of care.

Case Summary

- Plaintiff alleged that the defense failed to diagnose her with an ischemic stroke and administer thrombolytic therapies, including tissue plasminogen activator ("TPA"). Defendants moved for summary judgment, submitting expert opinion that, not only was she outside the window to administer TPA, but administering thrombolytics under these circumstances could have induced brain hemorrhage or even death. In opposition, Plaintiff's expert opined that she was not actually having a stroke at the time of her presentation to our hospital but was instead having a transient ischemic event ("TIA") and should have been administered anticoagulants.

- This dismissal was affirmed by the Second Department. In a lengthy, detailed decision, a 3-Justice majority of that Comi found that when viewed against Plaintiff's specific allegations of malpractice, our expert established that the failure to administer TPA at our hospital was not a departure from accepted standards of care and could not be a proximate cause of Plaintiff's injuries, since such therapy could not have been safely

administered at the time of her presentation. The Majority futiher found that Plaintiff failed to raise a triable issue of fact, because her expert failed to support the theories of liability alleged in her pleadings regarding the alleged failure to diagnose a stroke or to administer TPA. Rather, Plaintiffs expert advanced an entirely new theory ofliability for the first time in opposition to the motion. Since this is procedurally improper, the Majority refused to consider this and held that the Supreme Court properly dismissed Plaintiffs claims.

Kim v. Powers, 202 A.D.3d 653 (2d Dep't Feb. 2, 2022) - SACS Case

Holding

- The Appellate Division, Second Department unanimously affirmed an order of the Supreme Court, Nassau County, granting summary judgment to a general surgeon and Hospital defendant in a medical malpractice action involving gallbladder removal surgery secondary to acute cholecystitis. Plaintiff claimed that he suffered a gastrointestinal perforation and developed a bile leak as a result of the laparoscopic cholecystectomy, partial gastrectomy, and jejunostomy.

- In its decision, the Court found that North Shore established its prima facie case through expert proof that "the treatment provided by Powers was in accordance with the accepted standard of care and that, in any event, Powers did not proximately cause the injured plaintiffs alleged injuries." The expert also opined "that Powers only became involved in the injured plaintiffs treatment mid-surgery, that he worked under the direction and supervision of Mondschein, and that he did not exercise independent judgment in the surgical management of the injured plaintiff."

- Citing SACS' recent victory in Lowell v. NSUH, 195 A.D.3d 108 (2d Dep't 2021), lv denied, 37 N.Y.3d 917 (2022), the Second Department affirmed, holding that plaintiffs expert failed to rebut the defense expert's opinions and failed to raise any triable issue of fact.

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T/htr

AD3d Argued - September 10, 2021

FRANCESCA E. CONNOLLY, J.P.
CHERYLE. CHAMBERS
JOSEPH A. ZAYAS
DEBORAH A. DOWLING, JJ.

2018-03060 DECISION & ORDER

Katrina Townsend, appellant,
v Alex Vaisman, etc., et al., respondents.

(Index No. 6476/15)

Krentsel, Guzman & Herbert, LLP, New York, NY (Marcia Raicus of counsel), for appellant.

Martin, Clearwater & Bell, LLP, East Meadow, NY (Gregory A. Cascino, Kenneth R. Larywon, and Karen B. Corbett of counsel), for respondents.

In an action to recover damages for medical malpractice, the plaintiff appeals from an order of the Supreme Court, Queens County (Peter J. 0 'Donoghue, J.), dated December 18, 2017. The order granted the defendants' motion for summary judgment dismissing the complaint.

ORDERED that the order is affirmed, with costs.

In this action to recover damages for medical malpractice, the plaintiff testified at her deposition that on June 21, 2014, she woke up at 5:00 a.m. feeling dizzy. She testified that she "knew something was wrong right away." Nevertheless, the plaintiff ate breakfast and went to work. Around 11:30 a.m., the plaintiff told her supervisor she was not feeling well and took a taxi back home. She slept from approximately 1:00 p.m. until about 8:00 p.m., but still was not feeling any better. When the plaintiff tried to stand up, she realized "it was much worse than what it was earlier that day," so she decided to call an ambulance. She told the emergency medical services personnel that she had been feeling dizzy since 5:00 a.m.

The plaintiff was taken to the emergency room at the defendant Jamaica Hospital Medical Center (hereinafter JHMC), accompanied by her aunt. The plaintiff arrived at JHMC at

malpractice must establish, prima facie, either that there was no departure from accepted standards of medical care or that any departure was not a proximate cause of the plaintiffs injuries *(see Bacalan v St. Vincents Catholic Med. Ctrs. ofN.Y.,*179 AD3d 989,991; *Stukas v Streiter,* 83 AD3d 18, 23-25). "In order to sustain this burden, the defendant must address and rebut any *specific* allegations of malpractice set forth in the plaintiffs bill of particulars" *(Bacalan v St. Vincents Catholic Med. Ctrs. ofN.Y.,* 179 AD3d at 991-992).

Here, in support of their motion, the defendants submitted an expert affirmation from a board-certified expert in emergency medicine, critical care medicine, pulmonary medicine, and internal medicine, along with the medical records and deposition transcripts he reviewed. Based on his experience and his review of the relevant materials, the expert opined, in relevant part, that the plaintiff suffered an ischemic stroke in the thalamus prior to 5:00 a.m. on June 21, 2014. In particular, the expert noted that the plaintiffs "deposition testimony, the JHMC records, the ambulance call reports and the Queens Hospital Center records are all consistent. Each of these sources, including each of these medical records as well as [the plaintiffs] own testimony, confirm that [the plaintiff] reported that her first symptom of stroke, the onset of dizziness, was noted at 5:00 a.m. on June 21, 2014. She also testified that she had not been dizzy when she went to bed around midnight on June 20th. Since she was sleeping between midnight and 5:00 a.m. on June 21, 2014, the onset of the stroke occurred at some time in those early morning hours before 5:00 a.m."

The expert further opined that,"[w]hen an ischemic stroke is diagnosed, there are two potential treatments available that may improve a patient's chances for a good neurological outcome, including intravenous TPA or catheter directed intra-arterial therapy." The expert explained that TPA is a drug that may help dissolve a clot, but that if the drug is administered outside the recommended time window, "the potential for harm far exceeds any potential benefit." The expert opined that, by the time the plaintiff presented to JHMC on the evening of June 21, 2014, approximately 16 hours after the onset of her dizziness, treatment with TPA was not an option since the then 3-hour window for the administration ofTPA had long passed. Thus, even if the plaintiffs stroke had been diagnosed at JHMC on June 21, 2014, treatment with TPA would not have been indicated, and may well have caused more harm than good. In fact, the expert opined that the administration of TPA therapy at JHMC under these circumstances would have been a deviation from good and accepted medical practice and could have induced brain hemorrhage or even death.

Although not expressly included in the plaintiffs pleadings, the defendants' expert also addressed the potential for treatment with catheter directed intra-arterial therapy, the second of the two potential treatments for a stroke that were identified by the defendants' expert. The defendants' expert explained that this treatment "is only of benefit when instituted within a 6-hour time window," and only for certain types of strokes, and that here, by the time the plaintiff presented to JHMC, she was outside the time window for this type of treatment as well.

In light of the above, the defendants' expert opined that "had the stroke been diagnosed at JHMC, [the plaintiffs] outcome would have been the same, as TPA or catheter based therapies were not an option based upon the time of presentation." The defendants' expert further opined that the plaintiff"did not lose the opportunity to receive treatment due to her stroke not being diagnosed at JHMC, as the only potential treatment might have [been] TPA," and the plaintiff"was

not a candidate for TPA simply because she presented to JHMC more than 16 hours after the onset of symptoms." The defendants' expert further asserted that "[n]othing that was done or not done caused or contributed to [the plaintiffs] alleged injuries." While we agree with our dissenting colleague that this assertion in itself is not sufficiently specific to satisfy the defendants' prima facie burden, this general opinion is supported by the defendants' expert's other specific opinions set forth above. Given the defendants' expert's detailed opinion that the potential treatments for an ischemic stroke were no longer available to the plaintiff at the time she presented at JHMC, we disagree with our dissenting colleague's suggestion that the defendants failed to meet their prima facie burden due to the defendants' expert's failure to address specifically the plaintiffs right-sided paralysis or other injuries which allegedly developed after Vaisman's failure to diagnose the stroke.

The defendants' expert stopped short of expressly refuting the plaintiff's allegation that the defendants departed from the acceptable standard of care byfailing to diagnose the plaintiff's stroke on June 21, 2014. Instead, he simply offered that "general fatigue and dizziness, in the absence of any other signs of stroke, are not strongly suggestive of stroke." Thus, the main thrust of the expert's opinion was that it was too late to administer TPA therapy by the time the plaintiff presented at JHMC, so nothing more could have been done even if the stroke had been diagnosed at that time.

When viewed in light of the plaintiff's specific allegations of malpractice, the expert's opinion established, prima facie, that any alleged departure in failing to diagnose the plaintiff's stroke on June 21, 2014, was not a proximate cause of the plaintiff's injuries, and that the failure to administer thrombolytic therapy such as TPA was not a departure from the accepted standard of care since such therapy could not have safely been administered by the time the plaintiff presented at JHMC.

In opposition, the plaintiff failed to raise a triable issue of fact. Indeed, the plaintiff's expert made no attempt to support the theory of liability alleged in the plaintiff's bill of particulars regarding the defendants' failure to diagnose a stroke or to administer thrombolytic therapy such as TPA to treat the plaintiff's stroke *(see Dolan v Halpern,* 73 AD3d 1117, 1119). The plaintiff's expert also failed to address the specific opinions expressed by the defendants' expert *(see DiLorenzo v Zaso,* 148 AD3d 1111, 1114; *Dolan v Halpern,* 73 AD3d at 1119). Crucially, the plaintiff's expert did not dispute the defendants' expert's opinion that, if the plaintiff did suffer a stroke in the early morning hours of June 21, 2014, then it was too late to treat the plaintiff with TPA by the time she presented at JHMC some 16 hours later. Instead, the plaintiff's expert advanced an entirely new theory of liability for the first time in opposition to the motion. "[A] plaintiff cannot defeat a summary judgment motion that made out a prima facie case by merely asserting, without more, a new theory of liability for the first time in the opposition papers" *(Biondi v Behrman,* 149 AD3d 562, 563-564; *see Bacalan v St. Vincents Catholic Med. Ctrs. of N.Y.,* 179 AD3d at 992).

Accordingly, the Supreme Court properly granted the defendants' motion for summary judgment dismissing the complaint.

CONNOLLY, J.P., CHAMBERS and ZAYAS, JJ., concur.

DOWLING, J., dissents, and votes to reverse the order appealed from, on the law, and deny the defendants' motion for summary judgment dismissing the complaint, with the following memorandum:

I respectfully disagree with the conclusion of my colleagues in the majority that the defendants should be granted judgment as a matter of law dismissing the complaint. Therefore, I dissent.

The plaintiff presented to the emergency room of the defendant Jamaica Hospital Medical Center (hereinafter Jamaica Hospital) at approximately 9:47 p.m. on June 21, 2014, complaining of persisting dizziness since approximately 5:00 a.m. that morning. She was seen by the defendant Alex Vaisman, who, despite having noted in the plaintiffs medical records "Neurological: Positive for weakness," and having no information regarding any history of a psychological disorder, seemingly dismissed the plaintiffs complaints and diagnosed her assuffering from "hyperventilation and anxiety." No diagnostic tests to identify the cause of the plaintiffs dizziness were ordered, and the plaintiff was discharged at approximately 1:00 a.m. on June 22, 2014, with a prescription for Ativan, a medication used to treat anxiety. The plaintiffs dizziness continued to worsen after her discharge from Jamaica Hospital on June 22, 2014, and she collapsed in her home hours later, at approximately 3:30 p.m. An ambulance was called and the plaintiff was taken to nonparty Queens Hospital Center. Hospital records from Queens Hospital Center indicate that the plaintiff presented with right-sided weakness, difficulty walking, dizziness, and confusion. A CT scan was performed and the plaintiff was diagnosed as having suffered a stroke. The plaintiff testified at her deposition that the doctors at Queens Hospital Center estimated that the stroke had occurred when she first began experiencing dizziness on June 21, 2014, prior to her admission to Jamaica Hospital. The plaintiff thereafter commenced the instant action against Vaisman and Jamaica Hospital, alleging medical malpractice with respect to the treatment that she received from the defendants on June 21, 2014.

"The elements of a medical malpractice cause of action are a deviation or departure 'from accepted community standards of practice, and that such departure was a proximate cause of the plaintiffs injuries'" *(DiLorenzo v Zaso,* 148 AD3d 1111, 1112, quoting *Stukas v Streiter,* 83 AD3d 18, 23). To prevail on a motion for summary judgment in a medical malpractice action, a defendant must make a prima facie showing either that there was no departure or that his or her acts were not a proximate cause of the plaintiffs injuries *(see Pinnock v Mercy Med. Ctr.,* 180 AD3d 1088, 1090; *Stukas v Streiter,* 83 AD3d at 25; *see also Winegrad v New York Univ. Med. Ctr.,* 64 NY2d 851, 853). '"Inorder to sustain this burden, the defendant must address and rebut any specific allegations of malpractice set forth in the plaintiffs bill of particulars'" *(Anonymous v Gleason,* 175 AD3d 614, 617, quoting *Schwartzberg v Huntington Hosp.,* 163 AD3d 736, 737). "'Conclusory statements set forth in an affirmation of a medical expert which do not refute or address the specific allegations of negligence made by a plaintiff in his or her complaint and bill of particulars are insufficient to make a prima facie showing that a defendant physician is entitled to judgment as a matter of law'" *(Huichun Feng v Accord Physicians, PLLC,* 194 AD3d 795, 796, quoting *Ross-Germmain v Millennium Med. Servs., P.*C., 144 Ad3d 658, 659-660; *see Winegrad v New York Univ. Med. Ctr.,* 64 NY2d at 853).

Here, the defendants failed to establish their prima facie entitlement to judgment as a matter of law dismissing the complaint. In her verified bill of particulars, the plaintiff alleged, inter alia, that the defendants had departed from good and accepted medical practice in failing to diagnose her stroke on June 21, 2014, in failing to administer thrombolytic therapy or a treatment known as "TPA," and in failing to "prevent the worsening of the [plaintiffs] condition." The defendants made no effort to meet their prima facie burden on the departure element, as the defendants' expert did not opine that the failure to diagnose the plaintiffs stroke on June 21, 2014, was not a deviation or departure from accepted community standard of practice. Nor could they under the facts presented on this record, and Vaisman's cavalier diagnosis of anxiety in the face of the plaintiffs complaints, together with the fact that she was 55 years old and overweight, and had a history of other medical conditions, raises concerns as to his apparent failure to treat the plaintiff in accordance with the accepted standard of care. Rather, the defendants' expert merely stated that the symptoms with which the plaintiff presented, namely fatigue and dizziness, "are not strongly suggestive of stroke."

The defendants instead attempted to meet their prima facie burden with respect to causation. To that end, the defendants' expert opined generally that the failure to diagnose the plaintiffs stroke on June 21, 2014, did not result in a loss of opportunity for the plaintiff to receive treatments "that may" have improved the plaintiffs "chances for a good neurological outcome." The defendants' expert explained that the potential treatments identified by the plaintiff in the pleadings "may improve a patient's chances for a good neurological outcome" ifadministered within 3 hours or 6 hours, respectively, of the initial onset of symptoms. The defendants' expert opined that the onset of the stroke symptoms occurred at approximately 5:00 a.m. on June 21, 2014, when the plaintiff first experienced dizziness. Thus, by the time the plaintiff presented to Jamaica Hospital on the evening of June 21, 2014, approximately 16 hours after she first experienced dizziness, the treatment options which she identified were no longer available. However, the defendants' expert failed to provide an actual or specific opinion as to whether the right-sided paralysis and other injuries which the plaintiff suffered in the afternoon on June 22, 2014, could have been prevented had the plaintiffs stroke been properly diagnosed on June 21, 2014. In fact, the defendants' expert's affirmation makes no reference whatsoever to the injuries sustained by the plaintiff following Vaisman's failure to diagnose the plaintiffs stroke, including the right-sided paralysis that she suffered on June 22, 2014. The general opinion of the defendants' expert that there was no loss of treatment which may have improved the plaintiffs "neurological outcome," and that"[nJothing that was done or not done caused or contributed to [the plaintiffs] alleged injuries," is not sufficiently specific to support a finding that the defendants established their prima facie entitlement to judgment as a matter of law dismissing the complaint.

Accordingly, the Supreme Court should have denied the defendants' motion for summary judgment dismissing the complaint, regardless of the sufficiency of the plaintiffs opposition *(see Winegrad v New York Univ. Med. Ctr.,* 64 NY2d at 853).

ENTE ***I.*** **1**

Maria T. Fasulo
Clerk of the Court

202 A.D.3d 653
Supreme Court, Appellate Division,
Second Department, New York.

Bum Yong KIM, et al., appellants,
v.
NORTH SHORE LONG ISLAND JEWISH HEALTH SYSTEM, INC., et al., respondents, et al., defendant.

2018-05600
|
(Index No. 601415/14)
|
Submitted-November 15,2021
|
February 2, 2022

Synopsis

Background: Patient, and wife suing derivatively, brought medical malpractice action against surgeons, health system, gastroenterologist, and gastroenterology center. The Supreme Court, Nassau County, Robert A. Bruno, J., 2018 WL 7047489, granted summary judgment in favor of one surgeon, health center, gastroenterologist, and gastroenterology center, and denied other surgeon's summaiy judgment motion. Patient and wife appealed.

Holdings: The Supreme Court, Appellate Division, held that:

[I] there was no evidence surgeon proximately caused patient's injuries, and

[2] there was no evidence gastroenterologist proximately caused patient's injuries.

Affirmed.

West Headnotes (7)

[1] **Health** Breach of Duty
Health ; Proximate Cause

Essential elements of medical malpractice are (I) a deviation or departure from accepted medical practice, and (2) evidence that such departure was a proximate cause of injury.

(2) **Judgment** Torts

On a motion for summary judgment dismissing the complaint in a medical malpractice action, a defendant must make a prima facie showing either that there was no departure from good and accepted medical practice, or that the plaintiff was not injured by any such departure.

(3) **Judgment** *r'* Torts

Once a defendant physician, on summary judgment motion in medical malpractice action, has shown that there was no departure from good and accepted medical practice, or that plaintiff was not injured by any such departure, burden shifts to plaintiff to demonstrate existence of triable issue of fact, but only as to elements on which defendant met prima facie burden.

[4] **Judgment** Matters of fact or conclusions
Judgment .·'· Totis

General and conclusory allegations of medical malpractice, unsuppotied by competent evidence tending to establish essential elements of medical malpractice, are insufficient to defeat defendant physician's summary judgment motion.

[SJ **Evidence**)"· Speculation, guess, or conjecture; probability or possibility

Judgment ·"·· Matters of fact or conclusions

Judgment .-"" Torts

In order not to be considered speculative or conclusory, expe1i opinions in opposition to defendant physician's summa1y judgment motion in medical malpractice action should address specific assertions made by the movant's experts, setting forth an explanation of the reasoning and relying on specifically cited evidence in the record.

[61 **Health** """" Surgical operations in general

Even if laparoscopic surgery provided by surgeon, who joined another surgeon midway through surgery, to remove patient's gallbladder was not in accordance with standard of care, there was no evidence that surgeon proximately caused patient's injuries, including bilious and feculent drainage and fistula, as would be required to suppo1i claim for medical malpractice in action brought by patient and wife against surgeon and health system.

[71 **Health** '·"·· Surgical operations in general

Even if endoscopic treatment provided by gastroenterologist to remove patient's bile duct stone were not in accordance with standard of care, there was no evidence that gastroenterologist proximately caused patient's injuries, including bilious and feculent drainage and fistula, as would be required to support claim for medical malpractice in action brought by patient and wife against gastroenterologist and gastroenterology center.

Attorneys and Law Firms

****133** Sim & Record, LLP, Bayside, NY (Sang J. Sim of counsel), for appellants.

Shaub, Ahmuty, Citrin & Spratt, LLP, Lake Success, NY (Christopher Simone and Nicholas Tam of counsel), for respondents North Shore Long Island Jewish Health System, Inc., and Colin J. Powers.

Heidel!, Pittoni, Murphy & Bach, LLP, New York, NY (Daniel S. Ratner of counsel), for respondents Paul S. Berg and Port Washington Gastroenterology, P.C.

BETSY BARROS, J.P., CHERYL E. CHAMBERS, JOSEPH A. ZAYAS, LARA J. GENOVESI, JJ.

****134** DECISION & ORDER

***653** In an action to recover damages for medical malpractice, etc., the plaintiffs appeal from an order of the Supreme Court, Nassau County (Robert A. Bruno, J.), dated March 20, 2018. The order, insofar as appealed from, granted that branch of the motion of the defendants North Shore Long Island Jewish Health System, Inc., and Colin J. Powers which was for summaiy judgment dismissing the complaint insofar as asserted against the defendant Colin J. Powers, and granted the separate motion of the defendants Paul S. Berg and Port Washington ***654** Gastroenterology, P.C., for summary judgment dismissing the complaint insofar as asserted against them.

ORDERED that the order is affirmed insofar as appealed from, with one bill of costs.

On May 28, 2013, the plaintiff Bum Yong Kim (hereinafter the injured plaintiff) was referred to an emergency room following multiple visits to his primary care physician because he was experiencing gastric burning, among other symptoms. At the Syosset Hospital Emergency Depa1iment, the injured plaintiff was diagnosed with inflammation of the gallbladder. He was examined by the defendant Robert H. Mondschein, who recommended surgery to remove the injured plaintiff's gallbladder. Mondschein consulted with the defendant Paul S. Berg, a gastroenterologist,

whose impression was that the injured plaintiff had "common bile duct stones."

On May 30, 2013, Berg performed an endoscopic procedure and successfully removed a stone that was approximately nine millimeters in diameter from the plaintiffs bile duct. Immediately thereafter, Mondschein began laparoscopic surgery to remove the gallbladder, which he converted to an open surgical procedure due to inflammation in the gastric area. During the surgery, Mondschein observed that the gallbladder was adherent to the stomach, and, upon separating the two organs, and excising the gallbladder, he observed a large hole in the distal stomach. Mondschein determined that resection of the distal stomach was necessary, and requested the aid of the defendant Colin J. Powers, who thereafter assisted Mondschein. After the surgery, the injured plaintiff improved clinically, but he experienced complications, including bilious and feculent drainage, and a fistula.

In March 2014, the injured plaintiff, and his wife suing derivatively, commenced this action against Powers and the defendant North Shore Long Island Jewish Health System, Inc. (hereinafter together the North Shore defendants), Berg and the defendant Port Washington Gastroenterology, P.C. (hereinafter together the Port Washington defendants), and Mondschein, to recover damages for, inter alia, medical malpractice. The North Shore defendants, the Po1t Washington defendants, and Mondschein separately moved for summary judgment dismissing the complaint insofar as asserted against each of ****135** them. In an order dated March 20, 2018, the Supreme Court granted the motions of the North Shore defendants and the Po1t Washington defendants, and denied Mondschein's motion. The plaintiffs appeal from so much of the order as granted that branch of the North Shore defendants' motion which was for ***655** summary judgment dismissing the complaint insofar as asserted against Powers, and granted the Po1t Washington defendants' motion.

[I] [2] "The essential elements of medical malpractice are (1) a deviation or departure from accepted medical practice, and (2) evidence that such departure was a proximate cause of injury" *(Hayden v. Gordon,* 91 A.D.3d 819, 820, 937 N.Y.S.2d 299 [internal quotation marks omitted]). On a motion for summary judgment dismissing the complaint in a medical malpractice action, a defendant must make a prima facie showing either that there was no departure from good and accepted medical practice, or that the plaintiff was not injured by any such departure *(see JP v. Patel,* 195 A.D.3d 852,853, 150 N.Y.S.3d 120; *Lowell v. Flom,* 195 A.D.3d 801, 802, 145 N.Y.S.3d 823).

[3] [4] [SJ "Once a defendant physician has made such a showing, the burden shifts to the plaintiff to demonstrate the existence of a triable issue of fact, ... but only as to the elements on which the defendant met the prima facie burden" *(Dixon v. Chang,* 163 A.D.3d 525, 527, 79 N.Y.S.3d 648 [internal quotation marks omitted]; *see Scopelliti v. Westmed Med. Group,* 193 A.D.3d 1009, 1011, 146 N.Y.S.3d 656). "General and conclusory allegations of medical malpractice, ... unsupported by competent evidence tending to establish the essential elements of medical malpractice, are insufficient to defeat a defendant physician's summary judgment motion" *(Myers v. Ferrara,* 56 A.D.3d 78, 84, 864 N.Y.S.2d 517). "In order not to be considered speculative or conclusory, expert opinions in opposition should address specific assertions made by the movant's experts, setting forth an explanation of the reasoning and relying on specifically cited evidence in the record" *(Tsitrin v. New York Community Hosp.,* 154 A.D.3d 994, 996, 62 N.Y.S.3d 506 [internal quotation marks omitted]).

[6) Here, the No1th Shore defendants established their prima facie entitlement to judgment as a matter of law dismissing the complaint insofar as asse1ted against Powers by submitting the affirmation of an expert, a board-certified surgeon, who opined, based upon his review of the medical records, the deposition testimony, and the pleadings, that the treatment provided by Powers was in accordance with the accepted standard of care and that, in any event, Powers did not proximately cause the injured plaintiff's alleged injuries *(see Brinkley v. Nassau Health Care Corp.,* 120 A.D.3d 1287, 1289, 993 N.Y.S.2d 73). The expe1t further observed that Powers only became involved in the injured plaintiffs treatment mid-surgery, that he worked under the direction and supervision of Mondschein, and that he did not exercise independent judgment in the surgical ***656**

management of the injured plaintiff *(see Bellafiore v. Ricotta,* 83 A.D.3d 632, 633, 920 N.Y.S.2d 373).

In opposition, the plaintiffs failed to demonstrate the existence of a triable issue of fact. The plaintiffs' expert's brief assessment of the treatment provided by Powers was conclusory and speculative, and failed to address the specific assertions of the defendants' expert *(see Attia v. Klebanov,* 192 A.D.3d 650, 652, 143 N.Y.S.3d 408; *Schwartz v. Partridge,* 179 A.D.3d 963,965, l17N.Y.S.3d 300). The plaintiffs' expert also failed to distinguish between the allegedly negligent acts and omissions committed by Powers and those ****136** allegedly committed by Mondschein *(see Lowell v. Flom,* 195 A.D.3d at 803, 145 N.Y.S.3d 823; *Tsitrin v. New York Community Hosp.,* 154 A.D.3d at 996, 62 N.Y.S.3d 506).

[71 The Port Washington defendants likewise established their prima facie entitlement to judgment as a matter of law dismissing the complaint insofar as asserted against them by submitting the affirmation of an expert, a gastroenterologist, who opined, based upon his review of the medical records, the deposition testimony, and the pleadings, that the treatment provided by Berg was in accordance with the accepted standard of care and, regardless, that Berg did not proximately cause the injured plaintiff's injuries *(see Brinkley v. Nassau Health Care Corp.,* 120 A.D.3d at 1289, 993 N.Y.S.2d 73).

In opposition, the plaintiffs failed to demonstrate the existence of a triable issue of fact. The affirmation of the plaintiffs' expert, as it pertains to the treatment provided by Berg, was conclusory and speculative, and failed to address the specific assertions of the Port Washington defendants' expert *(see Attia v. K!ebanov,* 192 A.D.3d at 652, 143 N.Y.S.3d 408). Moreover, although the plaintiffs' expert opined that Berg failed in his duty to preoperatively diagnose the inflammation affecting the injured plaintiff's gastric area, and that he should have ordered a CT scan to aid in such diagnosis, the plaintiffs' expert failed to explain, let alone cite to facts in the record which demonstrated, that inflammation affecting the gastric area was indicated, or why an additional diagnostic procedure such as a CT scan was warranted *(see Elstein v. Hammer,* 192 A.D.3d 1075, 1078, 145 N.Y.S.3d 572; *Wagner v. Parke,;* 172 A.D.3d 954, 955, 100 N.Y.S.3d 280).

Accordingly, the Supreme Court properly granted that branch of the North Shore defendants' motion which was for summary judgment dismissing the complaint insofar as asserted against Powers, and the Port Washington defendants' separate motion for summary judgment dismissing the complaint insofar as asserted against them.

BARROS, J.P., CHAMBERS, ZAYAS and GENOVESI, JJ., concur.

All Citations

202 A.D.3d 653, 162 N.Y.S.3d 132, 2022 N.Y. Slip Op. 00649

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Appellate Division Clarifies Burden on Quality Assurance Privilege for Non-Party Statements

Introduction

On December 22, 2021, the Appellate Division, Second Department decided Siegel v. Snyder {2021 N.Y. Slip Op. 07264 [2d Dep't 2021]), which impacts discovery of recorded statements made at quality assurance meetings. The appeal focused on the scope of the quality assurance privilege and the corresponding "party-statement exception" to that privilege. The court held that a hospital defendant has the burden of demonstrating that a statement claimed to be privileged made at a quality assurance meeting derived from a person who is not a party to the action.

The Party-Statement Exception

Public Health Law {"PHL") § 2805-m{2} and Education Law§ 6527{3) shield from disclosure, under CPLR Article 31, the proceedings and records relating to performance of the quality assurance review function as well as any statement of any person attending such a meeting. But both allow for the discovery of "party statements", which, in this context, are statements made by any person attending the quality assurance meeting who is a defendant in the medical malpractice action about which the subject treatment is discussed. Under this exception, the statement made by the defendant is not privileged and thus must be disclosed upon demand in the underlying action.

The *Siegel* Case

Critical to the discovery of recorded statements, Siegel held that it is the hospital's burden in asserting the privilege to identify "who said what at the meeting." Therefore, if the minutes of the meeting do not identify the speaker, the hospital is in no position to confirm that the speaker is not a party to the underlying action. Under those circumstances, therefore, the hospital cannot meet its burden in showing that the quality assurance privilege should apply to the statements it aims to withhold.

After Siegel's death at defendant South Nassau Communities Hospital {"SNCH"} from a head injury, defendants Trauma Medical Director Dr. Kenneth Becker and Assistant Director of the Emergency Department Dr. Mathew Lurin attended a Trauma Peer Review Committee meeting. The minutes of the meeting contained statements attributed to the "committee" along with one statement attributed to the "Trauma Medical Director", i.e. Dr. Becker.

In response to plaintiff's demand for quality assurance records, SNCH moved for a protective order asserting privilege under PHL § 2805-m and Education Law§ 6527{3}. SNCH sought to limit discovery to only those portions of the minutes that constituted statements made by the individually named defendants. SNCH submitted to the court proposed redactions of the meeting minutes and sought a determination that the party-statement exception applied only to a notation that the two defendant physicians were present at the meeting and a single statement

made by Dr. Becker. As the other statements in the meeting minutes were attributed to the "committee", they were not subject to disclosure, SNCH asserted, because they fell outside the party-statement exception.

After an in-camera review, the court denied SNCH's motion. The court found itself unable to identify who provided specific comments at the meeting when the "statements and/or information contained in the minutes [were] attributed to the committee" and, as a consequence, what statements were indeed privileged. Thus, the court ordered disclosure of the statements attributed to the "committee" as party-statements.

> ***uro avoid their disclosure, all quality assurance meeting minutes must identify, by full name and professional title, each person making a statement at such a meeting."***

In upholding the disclosure, the Appellate Division reasoned that, by falling to properly identify each speaker, SNCH in turn failed to establish its entitlement to the quality assurance privilege. Put another way, since the speakers were not identified, the hospital necessarily could not show that it was rightfully withholding statements made by nonparties to the underlying action.

Account for Siegel Going Forward

Critically, under Siegel, any recorded statements attributed only to the "committee", or one can assume, to an unidentified speaker, made during a quality assurance meeting will be deemed to be party statements. To avoid their disclosure, all quality assurance meeting minutes must identify, by full name and professional title, each person making a statement at such a meeting. This will ensure that, upon a motion for a protective order in response to a discovery demand, the hospital is able to meet its burden of establishing that certain statements are subject to the quality assurance privilege. If the speakers are identified by name in the meeting minutes, the hospital can then affirmatively establish for the reviewing court that certain statements were indeed made by nonparties to the underlying medical malpractice action. Upon such a showing, the hospital will have met its burden of showing that those statements are privileged and not subject to disclosure because they are not "party statements".

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202 A.D.3d 125
Supreme Court, Appellate Division,
Second Department, New York.

Linda SIEGEL, etc., respondent,

v.

Brian SNYDER, etc., et al., defendants,
Radiological Associates of Long
Island, P.C., et al., appellants.

2018-12888,2019-01026
|
(Index No. 6612/16)
|
Argued-March 15, 2021
|
December 22, 2021

Synopsis

Background: Plaintiff brought action against medical practice and hospital for medical malpractice. Defendants filed motion for protective order as to minutes from hospital's peer-review committee meeting under the quality-assurance privilege and approval of proposed redaction of minutes, which the Supreme Court, Nassau County, Denise L. Sher, J., denied. Defendants appealed.

Holdings: The Supreme Court, Appellate Division, Christopher, J., held that:

[1] defendants failed to establish that statements in minutes were made by party to action, thus, party-statement exception, in effect, applied to permit discovery of minutes, but

[2] statements referring to subsequent corrective actions were beyond scope of party-statement exception, thus, were not discoverable.

Affirmed as modified, and appeal dismissed.

West Headnotes (24)

[1] **Pretrial Procedure** Relevancy and materiality

The liberal discovery policy under the statute governing the scope of discovery broadly mandates full disclosure of all matter material and necessary in the prosecution or defense of an action; the words, "material and necessary" are to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial. N.Y. CPLR § 310l(a).

[2] **Pretrial Procedure** ,7 Liberality in allowance of remedy

The statute governing the scope of discovery embodies the policy determination that liberal discovery encourages fair and effective resolution of disputes on the merits, minimizing the possibility for ambush and unfair surprise. N.Y. CPLR § 310l(a).

[3] **Pretrial Procedure** <= Discovering truth, narrowing issues, and eliminating surprise

The purpose of the disclosure procedures under the statute governing the scope of discovery is to advance the function of a trial to ascertain truth and to accelerate the disposition of suits. N.Y. CPLR § 3101(a).

[4] **Pretrial Procedure** Work-product privilege

Pretrial Procedure Work product privilege; trial preparation materials

Privileged Communications and Confidentiality ,= Privileged Communications and Confidentiality

The rule governing the scope of discovery establishes three categories of protected materials, also supported by policy considerations: privileged matter, which is absolutely immune from discovery, attorney's work product, which is also absolutely immune, and trial prepar tion materials, which are subject to disclosure only on a showing of substantial need and undue hardship. N.Y. CPLR §§ 310l(b), 3!0l{c).

[SJ **Pretrial Procedure** Objections and protective orders

The burden of establishing any right to protection from discovery is on the paiiy asse1iing it; to establish a right to protection, the protection claimed must be narrowly construed, and its application must be consistent with purposes underlying immunity. N.Y. CPLR § 3101.

[6) **Privileged Communications and Confidentiality** '- Nature of privilege

Comis must look to the common law for defining that which is encompassed by the attorney-client privilege statute. N.Y. CPLR § 4503.

[7) **Privileged Communications and Confidentiality** Purpose of privilege

The attorney-client privilege exists to ensure that one seeking legal advice will be able to confide fully and freely in his or her attorney, secure in the knowledge that his or her confidences will not later be exposed to public view to his or her embarrassment or legal detriment. N.Y. CPLR § 4503.

1 Cases that cite this headnote

[8] **Privileged Communications and Confidentiality** Waiver of privilege

A waiver of the attorney-client privilege may be found where the client places the subject matter of a privileged communication in issue or where invasion of the privilege is required to determine the validity of the client's claim or defense and application of the privilege would deprive an adversary of vital information. N.Y. CPLR § 4503(a).

I Cases that cite this headnote

[9) **Privileged Communications and Confidentiality** Waiver of privilege

A waiver of the attorney-client privilege may be found where a party engages in selective disclosure, as a party may not rely on the protection of the privilege regarding damaging communications while disclosing other self-serving communications. N.Y. CPLR § 4503(a).

[10) **Privileged Communications and Confidentiality** ,"-" Construction

Because the attorney-client privilege shields from disclosure pertinent information, and therefore constitutes an obstacle to the truth-finding process, it must be narrowly construed. N.Y. CPLR § 4503.

[11) **Privileged Communications and Confidentiality** " Elements in general

The physician-patient privilege prohibits a physician, dentist, nurse, or other medical personnel from disclosing information acquired in attending a patient in a professional capacity, and which was necessary to enable him or her to act in that capacity. N.Y. CPLR § 4504.

[12] **Privileged Communications and Confidentiality** Purpose of privilege

The rationale supporting the physician-patient privilege, similar to that of the attorney-client privilege and other evidentiary privileges based on confidential communications, is that the protection of confidential information from involuntary disclosure will promote uninhibited communication, in this case, between patient and physician for the purpose of obtaining appropriate medical treatment. N.Y. CPLR § 4504.

1 Cases that cite this headnote

[13] Privileged Communications and Confidentiality > Physical condition and treatment in general

The physician-patient privilege generally does not extend to information obtained outside the realms of medical diagnosis and treatment. N.Y. CPLR § 4504.

(14] Privileged Communications and Confidentiality c: Waiver of Privilege

The physician-patient privilege may be waived by the patient. N.Y. CPLR § 4504(a).

[15] Privileged Communications and Confidentiality ,'-'-' Public interest privilege

The public-interest privilege is invoked to protect the public interest from harm that might be suffered if sensitive material consisting of confidential communications between public officers, and to public officers, in the performance of their duties were to be divulged.

[16) Privileged Communications and Confidentiality "" Public interest privilege

The justification for the public-interest privilege is that the public interest might otherwise be harmed if extremely sensitive material were to lose the privilege's special shield of confidentiality.

[17] Privileged Communications and Confidentiality *r* Public interest privilege

The inquiry as to whether the public-interest privilege attaches to a communication requires a balancing test whereby the encouragement of candor in the development of a policy is weighed against the internal governmental action taken.

[18] Privileged Communications and Confidentiality *C*= Medical or Health Care Peer Review

The purpose of discovery exclusion of records relating to the performance of a medical or quality assurance review function or participation in a medical malpractice prevention program is to enhance objectivity of the review process and to assure that medical review committees may frankly and objectively analyze quality of health services rendered by hospitals. N.Y. Education Law§ 6527(3).

[19] Privileged Communications and Confidentiality = Medical or Health Care Peer Review

The purpose of the party-statement exception to statutory confidentiality provisions for records related to the performance of the quality assurance review function of a hospital, which allows discovery of statements made by any person in attendance at the quality review meeting who is a party to the action or proceeding whose subject was discussed at the meeting, is to permit discovery of statements given by a physician or other health professional

in the course of a hospital's review of the facts and circumstances of an earlier incident which had given rise to a malpractice action. N.Y. Public Health Law § 2805-m(2); N.Y. Education Law § 6527(3).

[20J Privileged Communications and Confidentiality '"· Medical or Health Care Peer Review

It is the party seeking to invoke the quality-assurance privilege, which excludes records relating to the performance of a medical or quality assurance review function or participation in a medical malpractice prevention program, that has the burden of establishing a right to the protection of the privilege. N.Y. Public Health Law § 2805-m; N.Y. Education Law § 6527(3).

I Cases that cite this headnote

[21] Privileged Communications and Confidentiality . Medical or Health Care Peer Review

The paiiy seeking to invoke the quality-assurance privilege, which excludes records relating to the performance of a medical or quality assurance review function or participation in a medical malpractice prevention program, must demonstrate that the documents sought were prepared in accordance with the relevant statutes. N.Y. Public Health Law § 2805-m; N.Y. Education Law § 6527(3).

[22] Privileged Communications and Confidentiality Medical or Health Care Peer Review

The party asserting the quality-assurance privilege, which excludes records relating to the performance of a medical or quality assurance review function or participation in a medical malpractice prevention program, is required at a minimum to show that it has a review procedure and that the information for which the exemption is claimed was obtained or maintained in accordance with that review procedure. N.Y. Public Health Law § 2805-m; N.Y. Education Law § 6527(3).

(23] Privileged Communications and Confidentiality Medical or Health Care Peer Review

Medical practice and hospital failed to establish that statements in the minutes of hospital's peer-review committee meeting that were attributed to the "committee" or an unidentified speaker were made by a party to plaintiffs medical malpractice action against practice and hospital, and thus the party-statement exception to the quality-assurance privilege, in effect, applied to permit discovery of those statements. N.Y. Public Health Law § 2805-m; N.Y. Education Law § 6527(3).

[24] Privileged Communications and Confidentiality Medical or Health Care Peer Review

Statements in the minutes of hospital's peer-review committee meeting referring to the corrective actions taken subsequent to the committee's inquiry into patient's death were beyond the scope of the party-statement exception to the quality-assurance privilege, and thus statements were not discoverable in plaintiffs medical malpractice action against medical practice and hospital; statements did not contain statements by a party regarding the care and treatment of the patient. N.Y. Public Health Law § 2805-m; N.Y. Education Law § 6527(3).

****162** APPEAL by the defendants Radiological Associates of Long Island, P.C., and South Nassau Communities Hospital, in an action, inter alia, to

recover damages for medical malpractice, from (1) an order of the Supreme Court (Denise L. Sher, J.), entered July 18, 2018, in Nassau County, and (2) an order of the same court entered January 18, 2019. The order entered July 18, 2018, insofar as appealed from, denied those branches of those defendants' motion which were pursuant to CPLR 3101(b) and, in effect, CPLR 3103, for a protective order limiting the scope of the plaintiff's notice of discovery and inspection dated November 23, 2016, and approving a proposed redaction of certain meeting minutes. The order entered January 18, 2019, insofar as appealed from, upon renewal, adhered to the prior determination denying those branches of those defendants' motion which were pursuant to CPLR 3101(b) and, in effect, CPLR 3103, for a protective order limiting the scope of the plaintiffs notice of discovery and inspection dated November 23, 2016, and approving a proposed redaction of certain meeting minutes.

Attorneys and Law Firms

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CHERYL E. CHAMBERS, J.P., ROBERT J. MILLER, BETSY BARROS, LINDA CHRISTOPHER, JJ.

OPINION & ORDER

CHRISTOPHER, J.

****163 *127** *Introduction*

The question presented herein involves Education Law § 6527(3) and Public Health Law § 2805-m(2), pursuant to which proceedings and records relating to medical or quality-assurance review meetings are protected from disclosure, except for those statements made therein by "any person in attendance at such a meeting who is a party to an action or proceeding the subject matter of which was reviewed at such meeting," known as the party-statement exception (Education Law § 6527[3]; *see* Public Health Law § 2805-rn[2]). The principal issue presented in this appeal is the scope of the quality-assurance privilege and the corresponding party-statement exception to the privilege. More specifically, the issue is whether a party asserting the quality-assurance privilege with regard to peer-review committee meetings has the burden of demonstrating that any statements made at such a meeting, claimed to be privileged, were made by a person who is not a patiy to an action. The appellants argue that the pa1iy-statement exception is automatically inapplicable when the meeting's minutes do not identify the speaker because it cannot be ascertained whether the speaker is a party or nonparty. For the reasons that follow, we conclude that the party asserting the quality-assurance privilege must demonstrate that any statements made at such a meeting that are claimed to be privileged were made by a nonparty. Therefore, where the meeting's minutes do not identify the speaker, the party-statement exception to the quality-assurance privilege applies. Accordingly, the Supreme Comt properly determined that statements contained in the defendant South Nassau Communities Hospital's peer-review committee meeting minutes that were attributed to the "committee," or wherein the speaker was not identified, were not entitled to the quality-assurance privilege afforded by Education Law § 6527(3) and Public Health Law § 2805-m(2), as it could not be determined if those statements were in fact made by a nonparty.

****164 *128** *Factual and Procedural Background*

In November 2015, the decedent, Michael Siegel, was transported to the defendant South Nassau Communities Hospital (hereinafter SNCH) after he was struck by a car and sustained a head injury. At SNCH, the decedent was evaluated and treated for his injuries by, among others, the defendant physicians Kenneth Becker and Matthew Lurin. The decedent suffered from, inter alia, a skull fracture, hemorrhaging and contusions in the frontal and temporal lobes, a subdural hematoma, and eventually herniation of the brain, progressing toward brain death. He died shortly after being removed from life support.

On December 21, 2015, a "Trauma Peer Review Committee" meeting was held, at which the decedent's treatment was reviewed for quality assurance and medical malpractice prevention. Follow-up meetings took place on January 8, 2016, and February 22, 2016. Both Becker, who was the Trauma Medical

Director, and Lurin, who was the Assistant Director of the Emergency Department, were in attendance at the meetings. The minutes of the December 21, 2015 meeting contain statements attributed to, inter alia, the "committee," along with one statement attributed to the "Trauma Medical Director."

The plaintiff commenced this action 111 September 2016, among other things, to recover damages for medical malpractice, and thereafter served combined demands for discovery and inspection dated November 23, 2016. The plaintiff sought, inter alia, hospital records and incident reports, including, among other things, all peer-review repmis. The defendants SNCH and Radiological Associates of Long Island, P.C. (hereinafter together the defendants), moved, inter alia, pursuant to CPLR 3101(b) and, in effect, CPLR 3103, for a protective order based upon the privileges set forth in Education Law § 6527(3) and Public Health Law § 2805-m. The defendants sought to limit the plaintiff's combined demands, to protect SNCH's peer-review committee meeting minutes from disclosure, and to limit the plaintiffs notice for discovery and inspection to include only those portions of the peer-review committee meeting minutes that constituted statements made by an individually named defendant concerning the care and treatment of the decedent. The defendants also submitted to the Supreme Court a proposed redaction of the peer-review committee meeting minutes, and sought a determination that the party-statement ***129** exception applied only to a notation that Becker and Lurin were present at the meetings and a single statement in the December 21, 2015 minutes that was made by Becker. The defendants asserted that the redacted portions of the minutes reflected only discussions of the committee and did not contain any party statements and, therefore, were not discoverable.

In an order entered July 18, 2018, the Supreme Court, after reviewing the unredacted minutes in camera, inter alia, denied those branches of the defendants' motion which were pursuant to CPLR 3101(b) and, in effect, CPLR 3103, for a protective order based upon the privileges set forth in Education Law § 6527(3) and Public Health Law§ 2805-m, and for approval of their proposed redaction of the meeting minutes. The court found that it was unable to determine who provided specific statements and/or information at the peer-review committee meeting when the "statements and/or information contained in the minutes are attributed to the 'committee.' " The court opined that it was not satisfied with the representation that the statements in the peer-review committee discussion section of the minutes were made by the "committee," as someone at ****165** the meeting, "who may or may not be a paiiy defendant, made a conclusion upon which the committee agreed." The court determined that, without any indication as to who specifically made the statements, it was unable to determine if certain statements were privileged. The defendants thereafter moved for leave to renew and reargue those branches of their motion which were pursuant to CPLR 3101(b) and, in effect, CPLR 3103, for a protective order, and for approval of their proposed redaction of the meeting minutes, contending, among other things, that when peer-review committee minutes are written, they are not intended to identify the individuals who are speaking. In an order entered January 18, 2019, the court, upon renewal, adhered to the prior determination. The court opined that it still could not "determine who provided specific statements and/or information since all of the statements and/or information contained in the subject minutes are attributed to the 'committee.' " The court determined that it could not "rule on the admissibility of the information in the hospital peer review committee meeting minutes without knowing if the 'discussions' referenced in said minutes involve 'statements made by any person in attendance at such a meeting who is a ***130** party to an action or proceeding the subject matter of which was reviewed at such meeting.'" The defendants appeal from both orders.

Discussion

1. Liberal Discovery and Privileges

[1] **[2]** **[3]** New York's liberal discove1y policy, generally governed by CPLR 3101(a), broadly mandates "full disclosure of all matter material and necessary in the prosecution or defense of an action" *(see Forman v. Henkin,* 30 N.Y.3d 656, 661, 70 N.Y.S.Jd 157, 93 N.E.3d 882; *Kavanagh v. Ogden Allied Maintenance Corp.,* 92 N.Y.2d 952, 954, 683 N.Y.S.2d 156, 705 N.E.2d 1197; *McAlwee v. Westchester Health Assoc., PLLC,* 163 A.D.3d 547, 548, 81 N.Y.S.3d 102). "The words, 'material and necessary', are ... to be interpreted liberally to

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require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial" *(Allen v. Crowell-Collier Pub!. Co.,* 21 N.Y.2d 403, 406, 288 N.Y.S.2d 449, 235 N.E.2d 430; *see Forman v. Henkin,* 30 N.Y.3d at 661, 70 N.Y.S.3d 157, 93 N.E.3d 882). The "statute embodies the policy determination that liberal discovery encourages fair and effective resolution of disputes on the merits, minimizing the possibility for ambush and unfair surprise" *(Spectrum Sys. Intl. Corp. v. Chemical Bank,* 78 N.Y.2d 371, 376, 575 N.Y.S.2d 809, 581 N.E.2d 1 055; *see Forman v. Henkin,* 30 N.Y.3d at 661, 575 N.Y.S.2d 809, 93 N.E.3d 882). "The purpose of disclosure procedures is to advance the function of a trial to ascertain truth and to accelerate the disposition of suits" *(Rios v. Donovan.* 21 A.D.2d 409, 411, 250 N.Y.S.2d 818; *see Swartzenberg v. Trivedi,* 189 A.D.2d 151, 153, 594 N.Y.S.2d 927).

[4] **[5]** However, notwithstanding the broad right to disclosure, "the CPLR establishes three categories of protected materials, also supported by policy considerations: privileged matter, absolutely immune from discovery (CPLR 3101[b]); attorney's work product, also absolutely immune (CPLR 310l[c]); and trial preparation materials, which are subject to disclosure only on a showing of substantial need and undue hardship" *(Spectrum Sys. Intl. Corp. v. Chemical Bank,* 78 N.Y.2d at 376-377, 575 N.Y.S.2d 809, 581 N.E.2d 1055; *see Forman v. Henkin,* 30 N.Y.3d at 661-662, 70 N.Y.S.3d 157, 93 N.E.3d 882). "Obvious tension exists between the policy favoring full disclosure and the policy permitting parties to withhold relevant evidence. Consequently, the burden ****166** of establishing any right to protection is on the party asserting it; the protection claimed must be narrowly construed; and its application must be consistent with the purposes underlying the immunity" ***131** *(Spectrum Sys. Intl. Corp. v. Chemical Bank,* 78 N.Y.2d at 377,575 N.Y.S.2d 809,581 N.E.2d *l055;see Forman v. Henkin,* 30 N.Y.3d at 661-662, 70 N.Y.S.3d 157, 93 N.E.3d 882).

In analyzing the privilege prohibiting disclosure of proceedings and records relating to a medical or quality-assurance review meeting pursuant to Education Law § 6527(3) and Public Health Law § 2805-111(2), we look to other privileges that are recognized in New York for guidance, as to the extent of the privilege and the limits of the party-statement exception.

Article 45 of the CPLR contains, inter alia, the evidentiary privileges based on confidential communications between, among others, attorney and client *(see* CPLR 4503); physician, dentist, podiatrist, chiropractor, nurse and patient *(see* CPLR 4504); spouses *(see* CPLR 4502); psychologist and client *(see* CPLR 4507); social worker and client *(see* CPLR 4508); and clergy and penitent *(see* CPLR 4505). These privileges, by maintaining confidentiality, serve the public policy of promoting free disclosure of sensitive information in certain types of relationships, and thereby encourage individuals to seek necessary assistance *(see generally Matter of Grand Jwy Proceedings [Doe},* 56 N.Y.2d 348, 352-353, 452 N.Y.S.2d 361,437 N.E.2d 1118).

[6] (71 (8) (9) Reviewing the history of privilege, "[t]he attorney-client privilege [is] the oldest among common-law evidentiary privileges" *(Spectrum Sys. Intl. Corp. v. Chemical Bank,* 78 N.Y.2d at 377, 575 N.Y.S.2d 809, 581 N.E.2d 1055; *see lvfayorga v. Tate,* 302 A.D.2d 11, 13, 752 N.Y.S.2d 353), dating back to at least 1577, and the English case of *Berd v. Lovelace* (21 Eng Rep 33 [J 577]), where it was ordered that a solicitor in a suit who had received fees from the defendant would not be compelled to be deposed *(see id;* Richard S. Pike, *The English Law of Legal Professional Privilege: A Guide for American Attorneys,* 4 Loy U Chi Int'! L Rev 51 [Fall/Winter 2006]). Subsequently, the reason for the privilege was explained as based upon the interests of justice; without the privilege, everyone would be deprived of professional assistance; they would not consult a counselor, or would only tell a counselor "half [of their] case" *(Greenough v. Gaskell,* 39 Eng Rep 618, 621 [1833]). In 1877, New York enacted a law "which codified the common-law [attorney-client] privilege (former Code of Remedial Justice§ 835, later Code of Civil Procedure§ 835)" *(Mayorga v. Tate,* 302 A.D.2d at 13, 752 N.Y.S.2d 353). At the same time, a statute was also enacted (former Code of Remedial Justice § 836, later former Code of Civil Procedure § 836) that expanded the privilege by making waiver of the privilege more difficult than it ***132** had been under the common law *(see lvfatter of Cunnion,* 201 **N.Y.** 123, 94 N.E. 648; *Mayorga v. Tate,* 302 A.D.2d

at 13, 752 N.Y.S.2d 353). However, under the current version of the statute found in CPLR 4503, the more stringent rules regarding waiver have been relaxed, and courts must now look to the common law for defining that which is encompassed by the privilege *(see Spectrum Sys. Intl. Corp. v. Chemical Bank,* 78 N.Y.2d at 377, 575 N.Y.S.2d 809, 581 N.E.2d 1055; *Mayorga v. Tate,* 302 A.D.2d at 13, 752 N.Y.S.2d 353). The attorney-client privilege "exists to ensure that one seeking legal advice will be able to confide fully and freely in his [or her] attorney, secure in the knowledge that his [or her] confidences ****167** will not later be exposed to public view to his [or her] embarrassment or legal detriment" *(Matter of Priest v. Hennessy,* 51 N.Y.2d 62, 67-68, 431 N.Y.S.2d 511, 409 N.E.2d 983; *see Ambac Assur. Corp. v. Countrywide Home Loans, Inc.,* 27 N.Y.3d 616, 623, 36 N.Y.S.3d 838, 57 N.E.3d 30). Nevertheless, the privilege may be waived by the client *(see* CPLR 4503[a]). "A waiver of the attorney-client privilege may be found where the client places the subject matter of the privileged communication in issue or where invasion of the privilege is required to determine the validity of the client's claim or defense and application of the privilege would deprive the adversary of vital information. Moreover, a waiver may be found where a party engages in selective disclosure, as a party may not rely on the protection of the privilege regarding damaging communications while disclosing other self-serving communications" *(Sous.sis* v. *Lazer, Aptheker, Rosella & Yedid, PC.,* 91 A.D.3d 753, 754, 936 N.Y.S.2d 565 [citations and internal quotation marks omitted]; *see e.g. 601 Realty Corp.* v. *Conway, Farrell, Curtin & Kelly, PC.,* 74 A.D.3d 1179, 1180, 902 N.Y.S.2d 433, 434 [finding that the invasion of the attorney-client privilege with respect to certain documents was required in order for the defendants to assert their defense to the legal malpractice action at trial]). Additionally, the protection of the attorney-client privilege is curtailed to the extent that certain exceptions to the privilege have been created *(see e.g.* CPLR 4503[b] [exception for deceased client's communications with counsel as to the preparation, execution, or revocation of any will, revocable trust, or other relevant instrument]; *Matter of Grand Jwy Subpoena,* 1 A.D.3d 172, 767 N.Y.S.2d 77 [exception for communications in furtherance of fraud or crime]).

***133** **[10]** Moreover, "[b]ecause the [attorney-client] privilege shields from disclosure pertinent information and therefore constitutes an obstacle to the truth-finding process, it must be narrowly construed" *(Ambac Assur. Corp.* v. *Countrywide Home Loans, Inc.,* 27 N.Y.3d at 624, 36 N.Y.S.3d 838, 57 N.E.3d 30 [internal quotation marks omitted]; *see Matter of Jacqueline F,* 47 N.Y.2d 215, 219, 417 N.Y.S.2d 884, 391 N.E.2d 967). The Court of Appeals has, in effect, limited the availability of the attorney-client privilege by limiting the application of the common interest doctrine, which provides that while "[g]enerally, communications between an attorney and a client that are made in the presence of or subsequently disclosed to third parties are not protected by the attorney-client privilege[, u]nder the ... doctrine ..., an attorney-client communication that is disclosed to a third party remains privileged if the third party shares a common legal interest with the client who made the communication and the communication is made in the furtherance of that common legal interest" *(Ambac Assur. Corp.* v. *Countrywide Home loans, Inc.,* 27 N.Y.3d at 620, 36 N.Y.S.3d 838, 57 N.E.3d 30). The Court of Appeals determined, "as the coutis in New York have held for over two decades, that any such communication must also relate to litigation, either pending or anticipated, in order for the exception to apply" *(id).* The Court reasoned that it did not "perceive a need to extend the common interest doctrine to communications made in the absence of pending or anticipated litigation, and any benefits that may attend such an expansion of the doctrine are outweighed by the substantial loss of relevant evidence, as well as the potential for abuse" *(id.* at 629, 36 N.Y.S.3d 838, 57 N.E.3d 30). The Court concluded that "the policy reasons for keeping a litigation limitation on the common interest doctrine ****168** outweigh any purported justification for doing away with it, and therefore maintained the narrow construction that New York courts have traditionally applied" *(id.* at 632, 36 N.Y.S.3d 838, 57 N.E.3d 30).

[IIJ **[121** **[13]** **[14]** Another evidentiary privilege found in article 45 of the CPLR is the physician-patient privilege, which, unlike the attorney-client privilege, was not recognized at common law *(see 1\:fatter of Grand Jwy Investigation in N.Y. County,* 98 N.Y.2d 525, 529, 749 N.Y.S.2d 462, 779 N.E.2d 173; *People v. Sin.ski,* 88 N.Y.2d 487, 491, 646

N.Y.S.2d 651,669 N.E.2d 809; *Hughson v. St. Francis Hosp. of Port Jervis,* 93 A.D.2d 491, 496-497, 463 N.Y.S.2d 224). "In 1828 New York became the first jurisdiction to change the common-law rule when it established a statutory privilege between ***134** physician and patient" *(Koump v. Smith,* 25 N.Y.2d 287, 293, 303 N.Y.S.2d 858, 250 N.E.2d 857; *see Hughson v. St. Francis Hosp. of Port Jervis,* 93 A.D.2d at 497, 463 N.Y.S.2d 224). Presently, the physician-patient privilege is found in CPLR 4504, and prohibits the physician, dentist, nurse, or other medical personnel "from disclosing information acquired in attending a patient in a professional capacity, and which was necessary to enable him [or her] to act in that capacity" *(Hughson v. St. Francis Hosp. of Port Jervis,* 93 A.D.2d at 497, 463 N.Y.S.2d 224; *see* CPLR 4504). The rationale supporting the privilege, similar to that of the attorney-client privilege and other evidentiary privileges based on confidential communications, is that the "protection of confidential information from involuntary disclosure will promote uninhibited communication[, in this case,] between patient and physician for the purpose of obtaining appropriate medical treatment" *(People v. Sinski,* 88 N.Y.2d at 491, 646 N.Y.S.2d 651, 669 N.E.2d 809; *see Hughson v. St. Francis Hosp. of Port Jervis,* 93 A.D.2d at 497, 463 N.Y.S.2d 224). However, the "privilege generally does not extend to information obtained outside the realms of medical diagnosis and treatment" *(Matter of Grand Jury Investigation in N.Y. County,* 98 N.Y.2d at 530, 749 N.Y.S.2d 462, 779 N.E.2d 173; *see Hughson v. St. Francis Hosp. of Port Jervis,* 93 A.D.2d at 499, 463 N.Y.S.2d 224). The physician-patient privilege may be waived by the patient, and with regard to waiver, "over the years there has been a tendency towards relaxation of the privilege" *(Hughson v. St. Francis Hosp. of Port Jervis,* 93 A.D.2d at 500, 463 N.Y.S.2d 224; *see* CPLR 4504[a]).

Moreover, while the Court of Appeals has stated that the physician-patient privilege is to be given a "broad and liberal construction to carry out its policy" *(Matter of Grand Jwy Investigation of Onondaga County,* 59 N.Y.2d 130, 134, 463 N.Y.S.2d 758, 450 N.E.2d 678 [internal quotation marks omitted]; *see lvfatter of Grand Jwy Investigation in N.Y. County,* 98 N.Y.2d at 531, 749 N.Y.S.2d 462, 779 N.E.2d 173), the legislature has enacted a number of narrow exceptions abrogating the privilege for public policy reasons to serve what it deems to be greater interests *(see People v. Rivera,* 25 N.Y.3d 256, 263, 11 N.Y.S.3d 509, 33 N.E.3d 465; *see e.g.* Social Services Law §§ 413, 415 [regarding repo1is of suspected child abuse and maltreatment], 384-b[3][h] [regarding proceedings for guardianship and custody of destitute or dependent children]; Family Ct Act § 1046[a][vii] [regarding child abuse and neglect proceedings]; CPLR 4504[b] [regarding disclosure of"information indicating that a patient who is under the age of sixteen years has been the victim of a crime"], [c] [regarding "information as to the mental or physical condition of a deceased patient"]; ****169** Mental Hygiene Law § 81.09[d] ***135** [regarding records of an alleged incapacitated person in a guardianship proceeding]; Penal Law § 265.25 [requiring medical professionals and hospitals to report "(e)very case of a bullet wound, gunshot wound, powder burn or any other injury arising from or caused by the discharge of a gun or firearm, and every case of a wound which is likely to or may result in death and is actually or apparently inflicted by a knife, icepick or other sharp or pointed instrument"]).

Additionally, notwithstanding the physician-patient privilege, in certain circumstances where "the legislature had created a statutory scheme that charged a governmental body with enforcing ce1iain health care laws ... [the Court of Appeals has] held that the need for the disclosure of confidential records was implied from the powers that the legislature conferred on the governmental body" *(People v. Rivera,* 25 N.Y.3d at 264, 11 N.Y.S.3d 509, 33 N.E.3d 465; *see e.g. Matter of New York City Health & Hasps. Corp. v. New York State Commn. of Correction,* 19 N.Y.3d 239, 245, 946 N.Y.S.2d 547, 969 N.E.2d 765 [finding implied exception to the privilege in connection with deceased inmate's hospital records "from the Legislature's express provisions detailing the Commission's responsibilities and powers, particularly with respect to investigating inmate deaths through its Medical Review Board"]; *Matter of Camper!engo v. Blum,* 56 N.Y.2d 251, 255-256, 451 N.Y.S.2d 697, 436 N.E.2d 1299 [finding implied exception to the privilege in connection with investigation of Medicaid billing practices where the "Federal and State record-keeping and reporting requirements evidence a clear intention to abrogate the ... privilege to the extent necessary to satisfy the important public

interest in seeing that Medicaid funds are properly applied"]; *People v. Fu!ler,* 24 N.Y.2d 292, 306-307, 300 N.Y.S.2d 102, 248 N.E.2d 17 [finding implied exception to the privilege in connection with medical records and statements received in evidence at addiction hearing for purpose of securing treatment under Mental Hygiene Law former§ 200 *et seq.]).*

(15) **[16)** [**17)** Another privilege recognized New York is the public-interest privilege which is invoked to protect the public interest from harm that might be suffered if sensitive material consisting of "confidential communications between public officers, and to public officers, in the performance cif their duties" were to be divulged *(Matter of World Trade Ctr. Bombing litig.,* 93 N.Y.2d I, 8,686 N.Y.S.2d 743, 709 N.E.2d 452 [internal quotation marks omitted]; *Ren Zheng Zheng v. Bermeo,* 114 A.D.3d 743, 744, 980 N.Y.S.2d 541 [internal quotation marks omitted]). "The justification for the privilege is that the public interest might otherwise be hanned if extremely sensitive material were to ***136** lose this special shield of confidentiality" *(Matter of World Trade Ctr. Bombing Litig.,* 93 N.Y.2d at 8, 686 N.Y.S.2d 743, 709 N.E.2d 452; *Ren Zheng Zheng v. Bermeo,* 114 A.D.3d at 744, 980 N.Y.S.2d 541 [internal quotation marks omitted]). The inquiry as to whether the privilege attaches requires a balancing test whereby "the encouragement of candor in the development of policy [is weighed] against the degree to which the public interest may be served by disclosing information which elucidates the governmental action taken" *(Matter of World Trade* Ct,: *Bombing Litig.,* 93 N.Y.2d at 9, 686 N.Y.S.2d 743, 709 N.E.2d 452 [internal quotation marks omitted]).

2. Education Law§ 6527(3) and Public Health Law§ 2805-m

It is against this backdrop of the tension created by the competing public policy interests ****170** that favor protection of cetiain communications and those that favor other policy interests, including the truth-searching process of our judicial system, that we address the scope of the quality-assurance privilege and corresponding paiiy-statement exception set forth in Education Law § 6527(3) and Public Health Law§ 2805-111(2).

Public Health Law § 2805-j provides, in pertinent part, that"[e]very hospital shall maintain a coordinated program for the identification and prevention of medical ... malpractice." Such a program must include at least, among other things, the "establishment of a quality assurance committee with the responsibility to review the services rendered in the hospital in order to improve the quality of medical ... care of patients and in to prevent medical ... malpractice" *(id.* § 2805-j[1][a]).

[18) Education Law§ 6527(3) shields from disclosure under article 31 of the CPLR "the proceedings [and] the records relating to performance of a medical or a quality assurance review function or participation in a medical ... malpractice prevention program," as well as testimony of any person in attendance at such a meeting when a medical or quality assurance review function or medical malpractice prevention program was performed *(see Logue v. Velez,* 92 N.Y.2d 13, 16-17, 677 N.Y.S.2d 6, 699 N.E.2d 365). "The purpose of the discovery exclusion is to enhance the objectivity of the review process and to assure that medical review committees may frankly and objectively analyze the quality of health services rendered by hospitals. By guaranteeing confidentiality to quality review and malpractice prevention procedures, this provision is designed to encourage thorough and candid peer review of ***137** physicians, and thereby improve the quality of medical care" *(id.* at 17, 677 N.Y.S.2d 6, 699 N.E.2d 365 [citation and internal quotation marks omitted]; *see vanBergen v. Long Beach Med.* Ct!:, 277 A.D.2d 374, 374, 717 N.Y.S.2d 191). Public Health Law § 2805-m(2) affords similar protection from disclosure for "records, documentation or committee actions or records" required pursuant to, inter alia, Public Health Law 2805-j.

(19) However, both Education Law § 6527(3) and Public Health Law § 2805-m(2) provide for identical exceptions for the discovery of party statements, that is, " 'statements made by any person in attendance at such a [quality control or medical malpractice] meeting who is a party to an action or proceeding the subject matter of which was reviewed at such meeting' " *(Lamacchia v. Schwartz,* 94 A.D.3d 712, 714, 941 N.Y.S.2d 245, quoting *Logue v. Velez,* 92 N.Y.2d at 18, 677 N.Y.S.2d 6, 699 N.E.2d 365 [internal quotation marks omitted]; *see* Education Law § 6527[3]; Public Health Law § 2805-m[2]). "The evident purpose of

this provision is to permit discovery of statements given by a physician or other health professional in the course of a hospital's review of the facts and circumstances of an earlier incident which had given rise to a malpractice action" *(Logue v. Velez,* 92 N.Y.2d at 18-19, 677 N.Y.S.2d 6, 699 N.E.2d 365; *see Lamacchia v. Schwartz,* 94 A.D.3d at 714, 941 N.Y.S.2d 245). Those persons whose conduct is subject to review were not intended to benefit from the protections afforded by the statutes *(see vanBergen v. Long Beach Med. Cl!:,* 277 A.D.2d at 374-375, 717 N.Y.S.2d 191).

a. It is the Defendants' Burden to Demonstrate Entitlement to the Quality-Assurance Privilege

[20] [21] [22] As with other privileges, it is the party seeking to invoke the quality-assurance privilege pursuant to Education Law § 6527(3) and ****171** Public Health Law § 2805-m that has the burden of establishing a right to the protection of the privilege *(see Robertson v. Brookdale Hosp. Med. Ctr.,* 153 A.D.3d 743, 744, 59 N.Y.S.3d 485; *Daly v. Brunswick Nursing Home, Inc.,* 95 A.D.3d 1262, 1263, 945 N.Y.S.2d 181; *Marte v. Brooklyn Hosp. Cl!'.,* 9 A.D.3d 41, 46, 779 N.Y.S.2d 82). Therefore, that party must demonstrate that the documents sought were prepared in accordance with the relevant statutes *(see Robertson v. Brookdale Hoop. Med. Ct,:,* 153 A.D.3d at 744, 59 N.Y.S.3d 485). "The party asserting the privilege, is required at a minimum, to show that it has a review procedure and that the information for which the exemption is claimed was obtained or maintained in accordance with that review procedure" *(id.* [internal quotation marks omitted]; *see* ***138** *Kivlehan v. Waltne1;* 36 A.D.3d 597, 599, 827 N.Y.S.2d 290; *Bush v. Dolan,* 149 A.D.2d 799, 800-801, 540 N.Y.S.2d 21). Here, it is undisputed that the defendants met their initial burden of demonstrating that the "Trauma Peer Review Committee" meeting minutes at issue were prepared in accordance with the relevant statutes, Education Law § 6527(3), and Public Health Law § 2805-m, as they were created as part of a required quality-assurance review program, and therefore are protected from disclosure *(see Robertson v. Brookdale Hosp. Med Ctr.,* 153 A.D.3d at 744, 59 N.Y.S.3d 485).

[23] However, this case presents the additional question of whether the privilege extends to those statements in the minutes that were attributed to the "committee" or wherein the speaker is not identified. The defendants argue that the privilege extends to those statements, as they were not made by a party, and therefore the party-statement exception does not apply. The plaintiff, in contrast, contends that the party-statement exception applies to the statements attributed to the committee, as it was the defendants' burden to demonstrate that any statements being withheld from disclosure were not made by a party. Guided by the well-settled principles previously discussed herein, we find that as the party seeking to assert the quality-assurance privilege, it was the defendants' burden to demonstrate that the statements they sought to withhold from disclosure were not party statements subject to disclosure *(see Spectrum Sys. Intl. Corp. v. Chemical Bank,* 78 N.Y.2d at 377, 575 N.Y.S.2d 809, 58 l N.E.2d 1055; *Robertson v. Brookdale Hosp. Med Ctr.,* 153 A.D.3d at 744, 59 N.Y.S.3d 485). By failing to properly identify each speaker, the defendants have failed to establish its entitlement to the quality-assurance privilege, as they have not met their burden of demonstrating that the statements were not made by a party.

We find the rationale and analysis of the Appellate Division, Fourth Department, in *Swartzenberg v. Trivedi,* 189 A.D.2d 151,594 N.Y.S.2d 927 instructive, notwithstanding that the facts of that case are dissimilar. In *Swartzeberg v. Trivedi,* in an action alleging that a defendant physician's negligence was the cause of the plaintiffs decedent's death, the court found that a letter written by the defendant physician, who had not attended a medical quality-assurance review committee meeting, and which was written in response to the committee's request that he explain his conduct, was not immune from disclosure pursuant to Education Law § 6527(3). The Fourth Department found that while "[a] hypertechnical reading of the statute might suggest that [the defendant physician's] letter is immune from ***139** disclosure, ... such an interpretation would not serve any statutory purpose" *(Swartzenberg v. Trivedi,* 189 A.D.2d at 153, 594 N.Y.S.2d 927). The court noted that the statute was ****172** not intended to protect those persons such as the defendant physician "whose conduct is the subject of review" (id.). The court reasoned that "granting immunity from disclosure to a letter from a physician under review would subvert the [party-statement] exception to the immunity provided by Education Law

§ 6527(3)" (id.), since had the physician "appeared at a medical or quality assurance review meeting and made the statement embodied in his letter, that statement would be subject to disclosure" *(id* at 154, 594 N.Y.S.2d 927). Further, the court opined that "[t]he statutory exception to immunity from disclosure would be rendered meaningless if it could be avoided merely by submitting a written statement instead of appearing personally and making the same statement before a review committee" *(id.).*

Similarly, if we were to countenance the defendants' argument that they are not required to demonstrate that unidentified statements in the minutes were made by nonparties in order for those statements to be protected from disclosure and not subject to the patty-statement exception, hospitals and medical providers would be incentivized to cloak all statements made at peer-review/quality-assurance meetings as having been made by the "committee," or some other unidentifiable source, and never attribute statements made at such meetings to any specific doctor whether or not they may be a party. This would afford them the benefits of the quality-assurance privilege and immunize them from the party-statement exception. This line of reasoning, urged by the defendants, would effectively render the party-statement exception meaningless and would subvert the intent of the legislature, which was to permit the discovery of statements made by parties at incident review meetings *(see id.; see also Drum v. Co/lure,* 161 A.D.3d 1509, 1510, 75 N.Y.S.3d 746 [finding that a power point slide show presented by a defendant physician at a quality-assurance review meeting that concerned the plaintiff's care, was a statement within the ambit of the party-statement exception and therefore was discoverable]; *Koithan v. Zornek,* 226 A.D.2d 1080, 642 N.Y.S.2d 115 [finding that the notes of a defendant physician were statements within the ambit of the party-statement exception and were, therefore, discoverable]).

Contrary to the defendants' contention, requiring them to demonstrate that the statements sought to be protected from ***140** disclosure were not made by a party does not "extend the statements exception to a point where it would swallow the general rule that materials used by a hospital in quality review and malpractice prevention programs are strictly confidential" *(Logue v. Velez,* 92 N.Y.2d at 19, 677 N.Y.S.2d 6, 699 N.E.2d 365). Our determination herein does not result in an expansion of the party-statement exception to the privilege; it merely is in line. with the well-settled principle that "the burden of establishing any right to protection is on the party asserting it" *(Spectrum Sys. Intl. Corp. v. Chemical Bank,* 78 N.Y.2d at 377,575 N.Y.S.2d 809,581 N.E.2d 1055). Requiring a defendant who is asserting the quality-assurance privilege to identify who made the statements at a medical or quality assurance review meeting, so as to demonstrate that no party statements subject to disclosure are being withheld, will further the goals of the quality-assurance privilege, rather than abrogate the privilege, as argued by the defendants. By identifying the maker of the statements at the medical or quality-assurance review meetings, only those statements that are made by a party will be subject to disclosure, and only those statements entitled to protection from disclosure will be protected. Further, as argued by the defendants, it may be true that the statutes and regulations ****173** setting forth the requirements for medical or quality-assurance review committee meetings do not require the identification of the speaker for any particular statement made at the meeting. However, that is a separate issue, and does not have any bearing on the fact that in order to avail itself of the privilege afforded by Education Law § 6527(3) and Public Health Law§ 2805-111(2), the party asserting the privilege must demonstrate that no party statements subject to disclosure are being withheld, and thus must identify who said what at the meeting.

Accordingly, the Supreme Court properly determined that, in effect, the party-statement exception applied to those statements in the peer-review committee meeting minutes that were attributed to the committee, and for which there was no indication as to who specifically made the statements, as they were not entitled to the quality-assurance privilege set fo1ih in Education Law § 6527(3) and Public Health Law§ 2805-111(2).

b. Corrective Actions Set Forth in the Peer-Review Committee Minutes are Not Discoverable

[24) As the defendants correctly argue, any reference in the minutes to corrective actions to be taken subsequent to the inquiry regarding the decedent's care and treatment are beyond ***141** the scope of the party-statement exception, and therefore are not discoverable. The notations in the "action" and

"status" columns in the December 21, 2015 peer-review committee meeting minutes, as well as the entirety of the January 18, 2016, and February 22, 2016 follow-up peer-review committee meeting minutes, only deal with subsequent corrective actions for the future, and do not contain statements by a party regarding the care and treatment of the decedent; thus, they do not fall under the ambit of the party-statement exception *(see* Education Law § 6527[3]; Public Health Law § 2805-m[2J; *Logue v. Velez,* 92 N.Y.2d at 19, 677 N.Y.S.2d 6, 699 N.E.2d 365; *cf D'Angelisv. Buffalo Gen. Hosp.,* 2 A.D.3d 1477, 1478, 770 N.Y.S.2d 553). Moreover, in opposition to the defendants' motion seeking, inter alia, a protective order, the plaintiff noted that she did not seek discovery of a copy of any documentation of the corrective action plan. Accordingly, the Supreme Court should have granted those branches of the defendants' motion which were for a protective order with respect to the notations in the "action" and "status" columns in the December 21, 2015 peer-review committee meeting minutes, as well as for the entirety of the January 18, 2016, and February 22, 2016 follow-up peer-review committee meeting minutes.

The plaintiffs remaining contention is without merit.

Conclusion

Accordingly, for the reasons stated herein, the order entered January 18, 2019, is modified, on the law, by deleting the provision thereof, upon renewal, adhering to the prior determination denying those branches of the defendants' motion which were pursuant to CPLR 3101(b), and, in effect, CPLR 3103, for a protective order limiting the scope of the plaintiffs notice of discovery and inspection dated November 23, 2016, and for approval of a proposed redaction of the minutes, and substituting therefor a provision, upon renewal, vacating the prior determination and granting those branches of the motion to the extent that the defendants may withhold (l) the entirety of the December 21, 2015 Trauma Peer Review Committee meeting minutes pertaining to the decedent, Michael Siegel, except for those statements set forth in the Peer Review Committee Discussion section of said December 21, 2015 minutes ****174** which were made by a named defendant or wherein the speaker is unidentified; and (2) the entirety of the January 18, 2016 and February 22, 2016 Trauma Peer Review Committee meeting minutes pertaining to the decedent. The December 21, 2015, ***142** January 18, 2016, and February 22, 2016 meeting minutes shall be redacted accordingly. As so modified, the order is affirmed insofar as appealed from.

ORDERED that the appeal from the order entered July 18, 2018, is dismissed, as that order was superseded by the order entered January 18, 2019, made upon renewal; and it is further,

ORDERED that the order entered January 18, 2019, is modified, on the law, by deleting the provision thereof, upon renewal, adhering to the prior determination denying those branches of the motion of the defendants Radiological Associates of Long Island, P.C., and South Nassau Communities Hospital which were pursuant to CPLR 3101(b), and in effect, CPLR 3103, for a protective order limiting the scope of the plaintiffs notice of discovery and inspection dated November 23, 2016, and for approval of a proposed redaction of certain meeting minutes, and substituting therefor a provision, upon renewal, vacating the prior determination and granting those branches of the motion to the extent that the defendants Radiological Associates of Long Island, P.C., and South Nassau Communities Hospital may withhold (1) the entirety of the December 21, 2015 Trauma Peer Review Committee meeting minutes pe1iaining to the decedent, Michael Siegel, except for those statements set fo1ih in the Peer Review Committee Discussion section which were made by a named defendant or wherein the speaker is unidentified; and (2) the entirety of the January 18, 2016 and February 22, 2016 Trauma Peer Review Committee meeting minutes pertaining to the decedent, Michael Siegel, and the December 21, 2015, January 18, 2016, and February 22, 2016 meeting minutes shall be redacted accordingly; as so modified, the order is affirmed insofar as appealed from; and it is fmiher,

ORDERED that one bill of costs is awarded to the plaintiff.

CHAMBERS, J.P., MILLER and BARROS, JJ., concur.

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has been established, who initiated the final contact, and whether the final contact was for the purpose of further or corrective care and treatment of the (illness, injury or condition), the treatment of which gave rise to the claim of malpractice.

Interrogatory

What was the last date of the continuous course of treatment by defendant for the (illness, injury or condition) that plaintiff claims was negligently treated?

PJ: 2:150. Malpract ice- hysic ian

a practice is professional negligence and medical malpractice is the negligence of a doctor. Neglige nce is the failure to use reasonable c e unde the circumstances, doing something that a reasonably pruaent doctor would not do under the circumstances, or failing to do something that a reasonably p udent doctor would do under the circumstances. It **is a deviation or departure from accepted practice.**

A doe tor w o renders medical service to a patient is obligated to hav:e that reasonable degree of knowledg and skill that is expected of an (aver- a g e doctor, average specialist) who (performs, provides) that (operation, treatment, medical service) in the medical community in whic e doctor prac ices. *([If there is evidence that the doctor should have complied with standards that exceed the standards of the medical community in which the doctor practices, the following should be charged:]* **The doctor must also comply with minimum (statewide, national) standards of care.)**

The law recogn·zes that there are differen ces in the abilitie s of doctors, just as **there a** e **aifferences ·n the abilities of eo le engaged in other activitie s. To pra ctice medicine a doctor is not equired to have the ext ·aordinary knowledge and ability that belongs to a few doctors of exceptional ability. However every doctor is required to keep reasona ly: ·nformed** of new **developments in (his,**

her) field and to practice (medicine, surgery) in accordance with approved methods and means of treatment in general use. A doctor must also use his or her best judgment and whatever superior knowledge and skill (he, she) possesses, even if the knowledge and skill exceeds that possessed by the (average doctor, average specialist) in the medical community where the doctor practices.

By undertaking to perform a medical service, a doctor does not guarantee a good result. The fact that there was a bad result to the patient, by itself, does not make the doctor liable. The doctor is liable only if (he, she was negligent. Whether the doctor was negligent is to be decided on the basis of the facts and conditions existing at the time of the claimed negligence.

[This paragraph should only be charged when there is evidence that the doctor made a choice among medically acceptable alternatives. See Caveat 2 below:] A doctor is not liable for an error in judgment if (he, she) does what (he, she) decides is best after careful evaluation if it is a judgment that a reasonably prudent doctor could have made under the circumstances. In other words, a doctor is not liable for malpractice if he or she chooses one of two or more medically acceptable courses of action.

If the doctor is negligent, that is, lacks the skill or knowledge required of (him, her) in providing a medical service, or fails to use reasonable care in providing the service, or fails to exercise his or her best judgment, and such failure is a substantial factor in causing harm to the patient, then the doctor is responsible for the injury or harm caused.

[Where appropriate, add:]

A doctor's responsibility is the same regardless of whether (he, she) was paid.

Comment

The charge should be preceded by a separate charge defining

negligence, see PJI 2:10, and followed by a charge on proximate cause, see PJI 2:70 . It can be adapted for use with respect to claims against other health care pr ovi der s such as den tis ts , podiatrists, nurses, chirop ra ctors , physical therapist s, etc.

Caveat 1: Each claimed departure from accepted medical practice should be the subject of a separate jury ques tion , Steidel v Nassau, 182 AD2d 809 , 582 NYS2d 805 (2d Dept 1992); see Davis v Caldwell, 54 NY2d 176 , 445 NYS2d 63, 429 NE2d 741 (1981); see also Harris v Parwez , 13 AD3d 675, 785 NYS2d 781 (3 d Dept 2004).

Caveat 2: The fifth paragraph of the Charge ("error in judgment") should not be charged unles s there is a showing that defendant considered and chose among several medically acceptable alternatives, Nestorowich v Ricotta, 97 NY2d 393 , 740 NYS2d 668, 767 NE2d 125 (2002) ; Mancuso v Kaleida Health , 172 AD3d 1931, 100 NYS3d 469 (4th Dept 2019), affd, 34 NY3d 1020, 114 NYS3d 773, 138 NE3d 502 (2019); Lacqua v Silich, 141 AD3d 690, 35 NYS3d 488 (2d Dept 2016); Wulbre--cht v Jehle, 89 AD3d 1470, 933 NYS2d 467 (4th Dept 2011); Dumas v Adirondack Medical Center, 89 AD3d 1184 , 932 NYS2d 230 (3d Dept 2011) (citing PJI); Anderson v House of Good Samaritan Hosp., 44 3d 135, 840 NYS2d 508 (4th Dept 2007); see Comment, infra. The fac that defen dan t hysic1a1 1's diagnosis or t r L'at men il.wolvcd the exercise of medica judgment does not y itse f provide a ba ·*it*- for giving an "error iaj udgment"· charge, Anderson v House of Good Samaritan Hosp., supra. Further, it is improper to give the "error in judgment" charge when the evidence simply raises the issue of whether defendant physician deviated from the degree of care that a reasonable physician would have exercised under the same circumstances, Lacqua v Silich, supra; Rospi--erski v Haar, 59 AD3d 1048 , 873 NYS2d 802 (4th Dept 2009); Martin v Lattimore Road Surgicenter, Inc., 281 AD2d 866, 727 NYS2d 836 (4th Dept 2001). An error in giving the "error in judgment" charge when the case does not involve a physician's choice among medically acceptable alternatives is not harmless if the primary issue is whether the physician deviated from accepted standards of care, Anderson v House of Good Samaritan Hosp., supra; see Lacqua v Silich, supra; Rospierski v Haar, supra.

Caveat 3: n a medica nalprac iGe action. a µlaintif n.ay, under certain circumstances, ursue a theoTy of loss of chance. Although all four Depart ments recognize th e loss of chance theory, th e_ Court of-Ap - peals has o :;qu a.r ely addressed the issue, see Wild v Catholic Health System, 21 NY3d 951 969 NYS2d 846, 991 NE2d 704 (2013). The cor - tou rs of the theory are the subject of cleveloping appellate case law and, herefore , t her ' *is* no loss of chance paL-tern charge, see this Comment, infra.

The second paragraph of th e cha rge is based on the analysis in Toth v Community Hospital at Glen Cove, 22 NY2d 255, 292 NYS2d 440, 239 NE2d 368 (1968), which applied the locality rule as a minimum standard, and then added the further requirement that doctors

use their "best judgment and whatever superior knowledge, skill and intelligence" they possess, see Nestorowich v Ricotta, 97 NY2d 3 9,3 740 NYS2d 668, 767 NE2d 125 (2002).

The fifth paragraph of the charge ("error in judgment ") is based on Toth v Community Hospital at Glen Cove, 22 NY2d 255 , 292 NYS2d 440, 239 NE2d 368 (1968); Pike v Honsinger, 155 NY 201, 49 NE 760 (1898); Wulbrecht v Jehle, 89 AD3d 1470, 933 NYS2d 467 (4th Dept 2011); Dumas v Adirondack Medical Center, 89 AD3d 1184, 932 NYS2d 230 (3d Dept 2011) (citing PJI); Hale v State, 53 AD2d 1025, 386 NYS2d 151 (4th Dept 1976); see Nestorowich v Ricotta, 97 NY2d 393, 740 NYS2d 668, 767 NE2d 125 (2002); Lacqua v Silich, 141 AD3d 6 9,0 35 NYS3d 488 | 2d Dept 2016); Scofield v Moreland, 23 AD3d 102 804 NYS2d 207 (4th Dept 2005) (citing PJI). The use of the phrase "medical community " in the pattern charge is supported by Toth, as well as by such cases as Schrempf v State, 66 NY2d 289, 496 NYS2d 973, 487 NE2d 883 (1985) ("[a] physician's duty is to provide the level of care acceptable in the professional community in which he practices"); Bovayv Podolsky, 266 AD2d 843, 697 NYS2d 427 (4th Dept 1999) (same); Kelly v State, 259 AD2d 962, 687 NYS2d 843 (4th Dept 1999) (same); Ressisv Mactye, 108 AD2d 960, 485 NYS2d 132 (3d Dept 1985) (psychologists must have skill of "the average member of their profession"); Littlejohn v State, 87 AD2d 951, 451 NYS2d 225 (3d Dept 1982) (physician must have skill of "the average member of the medical profession"); Hale v State, supra (doctor must have the skill of "the average member of the medical community"); see Stuart by Stuart v Ellis Hosp., 198 AD2d 559, 603 NYS2d 212 (3d Dept 1993); Schoch v Dougherty, 122 AD2d 467, 504 NYS2d 855 (3d Dept 1986).

As to the statute of limitations applicable to malpractice claims, see Introductory Statement, supra. As to itemized verdicts in malpractice cases, see PJI 2:151A(l) and PJI 2:151A(2); as to collateral source payment s, see PJI 2:151B; as to fraudulent concealment of an act of malpractice, see PJI 2:151C; as to informed consent, see PJI 2:150A.

In Alvarez v Prospect Hosp., 68 NY2d 320, 508 NYS2d 923, 501 NE2d 572 (1986), the Court of Appeals held that, in a medical malpractice action, once defendant has made a prima facie showing that he or she was not negligent, plaintiff must submit evidentiary facts in rebuttal to establish the existence of a triable question of fact, see Pullmanv Silverman, 28 NY3d 1060, 43 NYS3d 793, 66 NE3d 663 (2016). The First and Third Departments have held that, when defendant has moved for summary judgment an has made a prima facie showing that there was no deviation from accepted medical practice, plaintiff must meet that showing with evidence of both a departure from accepted practice anda proximate cause between the departure and plaintiffs injuries, Anyie B. v Bronx Lebanon Hosp., 128 AD3d 1, 5 NYS3d 92 (1st Dept 2015); Ramos v Weber, 118 AD3d 408, 987 NYS2d 51 (1st Dept 2014); Kristal R. v Nichter, 115 AD3d 409, 981 NYS2d 399 (1st Dept 2014); Bacaniv Rosenberg, 74 AD3d 500, 903 NYS2d 30 (1st Dept 2010); Chase v Cayuga Medical Center at Ithaca, Inc., 2 AD3d 990, 769 NYS2d 311

(3d Dept 2003); see Park v Kovachevich, 116 AD3d 182, 982 NYS2d 75 (1st Dept 2014). In contrast , the Second and Fourth Departments held that a plaintiff opposing a motion for summary judgment dismissing the complaint need only adduce evidence rebutting the prima facie showing that the defendant has made, Bubar v Brodman , 177 AD3d 1358 , 111 NYS3d 483 (4th Dept 2019) (disavowing O'Shea v Buffalo Medical Group, P.C., 64 AD3d 1140 , 882 NYS2d 619 (4th Dept 2009)); Guctas v Pessolano, 132 AD3d 632, 17 NYS3d 749 (2d Dept 2015); Ahmed v Pannone, 116 AD3d 802, 984 NYS2d 104 (2d Dept 2014); Makin en v Torelli, 106 AD3d 782, 965 NYS2d 529 (2d Dept 2013); Stukas v Streiter, 83 AD3d 18, 918 NYS2d 176 (2d Dept 2011) (disavowing Amsler v Verrilli, 119 AD2d 786, 501 NYS2d 411 (2d Dept 1986). Under the Second and Fourth Departments' rule, where defendant has made a prima facie showing that there was no departure from accepted practice, plaintiff may defeat summary judgment with evidentiary proof that such a departure occurred and need not adduce evidence that the departure was a proximate cause of the alleged injuries, Bubar v Brodman, supra; Stukas v Streiter, supra. In Pullman v Silverman, 28 NY3d 1060, 43 NYS3d 793, 66 NE3d 663 (2016), the Court noted that the issue of the proper medical malpractice summary judgment standard, which was discussed in a concurring opinion, was not before the Court, and the Court therefore did not address it.

The Court of Appeals' decision Orsi v Haralabatos , 20 NY3d 1079, 965 NYS2d 71, 987 NE2d 631 (2013), indicates that the approach of the Second Department is proper. In Orsi, the Court reversed an order granting defendants' summary judgment motion, finding that triable issues of fact existed as to whether defendants departed from the applicable standard of medical care. The Court observed that summary judgment in defendants' favor on the issue of proximate cause was not warranted because defendants failed to make a prima facie showing that any alleged departure was not a proximate cause of plaintiffs injuries. The Orsi decision tacitly suggests that a plaintiff opposing a summary judgment motion need only rebut the prima facie showing a defendant has made, leaving without comment the Second Department's statement to that effect in the order under review, 89 AD3d 997, 934 NYS2d 195 (2d Dept 2011).

I. Elements Generally

The required elements of _proof in a medical malpractice case are (1) a..£._e viat_ion or de a ·ture from accepted prac.:tice an (2) evidence that such departure was a proximate cause of injur or damage, Donnelly v Parikh, 150 AD3d 820, 55 NYS3d 274 (2d Dept 2017); Gallagher v Cayuga Medical Center, 151 AD3d 1349, 57 NYS3d 544 (3d Dept 2017); Stukas v Streiter , 83 AD3d 18, 918 NYS2d 176 (2d Dept 2011); Giambona v Stein, 265 AD2d 775, 697 NYS2d 399 (3d Dept 1999); De Stefano v Immerman, 188 AD2d 448, 591 NYS2d 47 (2d Dept 1992); Amsler v Verr illi, 119 AD2d 786, 501 NYS2d 411 (2d Dept 1986); see Mazella v Beals, 27 NY3d 694, 37 NYS3d 46, 57 NE3d 1083 (2016); Rivera v Kleinman, 16 NY3d 757, 919 NYS2d 480, 944 NE2d 1119 (2011). In addition

to being held liable for conduct falling short of the generally accepted standards of care in the medical community, a doctor may be liable if the doctor's treatment decisions do not reflect his or her own best judgment, Nestorowich v Ricotta, 97 NY2d 393, 740 NYS2d 668, 767 NE2d 125 (2002). Claims for medical malpractice should be distinguished from claims for breach of contract arising out of the rendering of medicalca r.e The latter class of claims will be held legally sufficient only if they are based on an express special promise to effect a cure or accomplish a definite result, Duquette v Oliva, 75 AD3d 727, 905 NYS2d 316 (3d Dept 2010); Delaney v Krafte, 98 AD2d 128 , 470 NYS2d 936 (3d Dept 1984). For a charge and comment on breach of contract claims based on the rendering of medical care, see PJI 4:35.

\ "i ı rnspect to proximate cause, plaintiff must establish the er q uis i te nex us between tl1e malpractice allegedly committed by de endant and the injury, unless the caus ·eJationship is ready apparent to the trier of fact, Horth v Mansur, 243 AD2d 1041, 663 NYS2d 703 (3d Dept 1997). The mere offering of expert opinion on proximate cause does not suffice absent a showing of the requisite nexus between the malpractice allegedly committed and plaintiffs injuries, Koeppelv Park, 228 AD2d 288, 644 NYS2d 210 (1st Dept 1996). Thus, where plaintiffs expert could not state with a reasonable degree of medical certainty that defendant's departures were a proximate cause of plaintiffs injuries, plaintiffs malpractice claim did not lie, Giambonav Stein, 265 AD2d 775, 697 NYS2d 399 (3d Dept 1999); Evans v Holleran, 198 AD2d 472, 604 NYS2d 958 (2d Dept 1993); see Callistro ex rel. Rivera v Bebbington, 94 AD3d 408, 941 NYS2d 137 (1st Dept 2012), a ff,d' 20 NY3d 945, 958 NYS2d 319, 982 NE2d 81 (2012); see also Bossio v Fiorillo, 210 AD2d 836, 620 NYS2d 596 (3d Dept 1994) (malpractice claim did not lie where plaintiff presented no evidence that plaintiffs physical condition would have been any different absent alleged malpractice).

A complaint sounds in medical malpractice rather than ordinary negligence where the challenged conduct constitutes medical treatment or bears a substantial relationship to the rendition of medical treatment bya licensed physician to a particular patient, Davis v South Nassau Communities Hosp., 26 NY3d 563, 26 NYS3d 231, 46 NE3d 614 (2015); Dupree v Giugliano, 20 NY3d 921, 958 NYS2d 312, 982 NE2d 74 (2012) (citing PJI); Weiner v Lenox Hill Hosp., 88 NY2d 784, 650 NYS2d 629, 673 NE2d 914 (1996); Scott v Uljanov, 74 NY2d 673, 543 NYS2d 369, 541 NE2d 398 (1989); Bleiler v Bodnar, 65 NY2d 65, 489 NYS2d 885, 479 NE2d 230 (1985); Caso v St. Francis Hosp., 34 AD3d 714, 825 NYS2d 127 (2d Dept 2006); Toepp v Myers Community Hosp., 280 AD2d 921, 721 NYS2d 177 (4th Dept 2001); Cullinan v Pignataro, 266 AD2d 807, 698 NYS2d 381 (4th Dept 1999). While a cause of action based on medical malpractice must be predicated on an express or implied physician-patient relationship, Lee v New York, 162 AD2d 34, 560 NYS2d 700 (2d Dept 1990); Hickey v Travelers Ins. Co., 158 AD2d 112, 558 NYS2d 554 (2d Dept 1990), the absence of such a relationship does not preclude recovery in ordinary negligence where the physician's al-

leged negligence is readily determinable by the trier of fact based on common knowledge , McKinne y v Bellevue Hosp., 183 AD2d 563 , 584 NYS2d 538 (1st Dept 1992). Thus, the failure to inform a prospective employee that his pre-employment physical revealed a serious medical condition const ituted a basis for an action against the employer where the omission induced plaint iff to rely on his otherwise good health and resulted in his failure to seek trea tment , McKinney v Bellevue Hosp., supra; see Mosezhnik v Berens tein , 33 AD3d 895, 823 NYS2d 459 (2d Dept 2006) (defendant may be liable in ordinary negligence for failing to communicate signific a nt me dic a l findings to patient or treating physician). For a det ailed discussion of the distinction between actions sounding in medical malpractice and thos e sounding in ordinary negligence, see Malpractice, Introductor y Statement, Malpractice Statute of Limitations .

II. Standard o Care

A. Generally

"A doctor is charged with the duty to exercise due care, as measured against the conduct of his or her own peers-the reasonably prudent doctor standard," Nestorowich v Ricotta, 97 NY2d 393, 740 NYS2d 668, 767 NE2d 125 (2002) ; see Pike v Honsinger, 155 NY 201, 49 NE 760 (1898). Not every instance of failed treatment or diagnosis may be attributed to a doctor's failure to exercise due care, Nestorowich v Ricotta, supra.

The practice of chiropractic is distinct from the practice of medicine, and therefore a chiropractor is generally held to the standard of care that a reasonably prudent chiropractor would exercise under the circumst ances , Hoagland v Kamp, 155 AD2d 148, 552 NYS2d 978 (3d Dept 1990). A physician's standard of care applies only when a chiropractor exceeds the restrictions placed upon the practice of his or her profession, Taormina v Goodman, 63 AD2d 1018, 406 NYS2d 350 (2d Dept 1978); see Education Law § 6551; Annot : 58 ALR3d 590; 77 ALR4th 273; see also 73 ALR4th 24. A physical therapist is generally held to the standard of care that a reasonably prudent physical therapist would exercise under the circumstances, and may be held liable for professional malpractice where he or she deviates from good and accepted standards of physical therapy practice, see Shank v Mehling, 84 AD3d 776, 922 NYS2d 495 (2d Dept 2011).

The standard of care imposed on a pharmacist is generally described as ordinary care in the conduct of his or her business, Burton v Sciano, 110 AD3d 1435, 972 NYS2d 755 (4th Dept 2013); see Abrams v Bute, 138 AD3d 179, 27 NYS3d 58 (2d Dept 2016). The rule of ordinary care as applied to a pharmacist means the highest practicable degree of prudence, thoughtfulness and vigilance commensurate with the dangers involved and the consequences that may attend inattention, Burton v Sciano, supra; Brumaghim v Eckel, 94 AD3d 1391, 944 NYS2d 329 (3d Dept 2012); Eberle v Hughes , 77 AD3d 1398 , 909 NYS2d 273 (4th Dept

20 1 0)· Hand v Krakows ki, 89 AD2d 650, 453 NYS2d 121 (3d Dept 1982). Gene;ally, a pharmacist cannot be held liable for negligence in the absence of an allegation that he or she failed to fill a prescription precisely as ?irected by the physician or was. a:1are that the cust?mer had a condition that would render the prescnpt10n of the drug at issue contraindicated, Burton v Scia no, supra; Brumaghim v Eckel, supr a; Elliott v A.H . Robins Co., 262 AD2d 132, 691 NYS2d 501 (1st Dept 1999). In addition, liability or culpable conduct on the part of a pharmacy may be found where there was some active negligence on th e part of the pharmacist, Brumaghim v Eckel, supra (holding th t pharmacist had no duty to warn customer or contact customer's physician prior to filling a prescription that was not contraindicated on its face but which plaintiff alleged was inappropriate for her). In Abrams v Bute, supra, the Second Department concluded that when a pharmacist has demonstrated that he or she did not undertake to exercise any independent professional judgment in filling and dispensing prescription medication, he or she cannot be held liable for negligence unless he or she failed to fill the prescription precisely as directed by the prescribing physician or that the prescription was so clearly contraindicated that ordinary prudence required the pharmacist to take additional measures before dispensing the medication.

The courts have often evaluated medical malpractice claims by reference to the extent to which an exercise in judgment was involved. In this regard, a distinction must be made between an "error in judgment" and a doctor's failure to use his or her best judgment, Nestorowich v Ricotta, 97 NY2d 393, 740 NYS2d 668, 767 NE2d 125 (2002); see Spadaccini v Dolan, 63 AD2d 110, 407 NYS2d 840 (1st Dept 1978) (citing PJI) (failure to select any accepted method of treatment does not constitute an "error in judgment"). For a discussion of that distinction, see Anderson v House of Good Samaritan Hosp., 44 AD3d 135, 840 NYS2d 508 (4th Dept 2007).

Clinical practice guidelines are sometimes used to inform medical expert's opinion as to the standard of care, Ellis v Eng, 70 AD3d 887 , 895 NYS2d 462 (2d Dept 2010). However, practice guidelines are not conclus ive ana. are not necessary elements of plaintiffs proof in a medical malpractice case, id.

In some situations, the courts have limit ea t e scope of a medical practition er's duty based on the type and expected lev el of care. For example, an atten ing physician who had been consulted for the purpose of treating a patient for fractures following the patient's discharge from the emergency room had no duty to scan the patient's chart for irregularities outside the scope of the treatment, Dombroski v Samaritan Hosp., 47 AD3d 80, 846 NYS2d 430 (3d Dept 2007); Donnelly v Parikh, 150 AD3d 820, 55 NYS3d 274 (2d Dept 2017). The failure to investigate a condition that would have led to an incidental discovery of an unindicated condition does not constitute malpractice, Brooks v April, 154 AD3d 564, 63 NYS3d 331 (1st Dept 2017); David v Hutchinson, 114 AD3d 412, 980 NYS2d 38 (1st Dept 2014); see Curry v Dr. Elena Vezza

Physician, P.C., 106 AD3d 413, 963 NYS2d 661 (1st Dept 2013); Rivera v Greenstein , 79 AD3d 564, 914 NYS2d 94 (1st Dept 2010). Similarly, an emc.xge nc · ·Qon hys1cia1 rn.s no duty tu follO\.v u on the results of all o th tests ei:fm:med on a patien: :hi e h or she was in the emergenc room, since a contr ary, ru1' wou ld be· nc onsrnt ent with the limite purpose of lw emergen(:y-room sen ··ce, id; see Ellis v Eng, 70 AD3d 887, 895 NYS2d 462 (2d Dept 2010). Thus , there was no liability for the eme.r:gBnq - 001)h: sicim:r: ailur to foil w u on a patient's ele_vated glucose level. wJiich was reveale a c th :ad oxdered. In concluding £fiat t e emergency room physician could not e eld liable, the Dombrowski court stressed that he had otcd tl1e condi ion on of patien t's cha· before clis.d1arging him to the i1,1.patient attending physician, there were a number of possible non-serious explanations for the condition, a urinalysis had not yet been performe d, there was no immediate threat to the patient, and the condition was in no way related to the trauma for which the patient had sought emergency-room treatment, id.

B. Best J udgmen t

Implicit in the concept of due care is the principle that doctors must employ their best judgment in exercising skill and applying their knowledge, Nestorowich v Ricotta , 97 NY2d 393, 740 NYS2d 668, 767 NE2d 125 (2002). This principle assures conformity to the prevailing standard of care and accepted medical practice , id. A cause of action for medical malpractice may be premised on a physician's failure to use his or her best judgment, as well as lack of knowledge or lack of ability, see Brazie v Williams, 221 AD2d 993, 634 NYS2d 274 (4th Dept 1995) (citing PJI). A doctor may be liable if his or her treatment decisions do not reflect the doctor's best judgmen t , Nestorowich v Ricotta, supra; Pike v Honsinger, 155 NY 201, 49 NE 760 (1898) . In other words, liability may be predicated upon a failure to exercise any professional judgment, Pigno v Bunim, 43 AD2d 718, 350 NYS2d 438 (2d Dept 1973), aff d, 35 NY2d 841, 362 NYS2d 865, 321 NE2d 785 (1974); Larkin v State, 84 AD2d 438, 446 NYS2d 818 (4th Dept 1982).

C. Error in Judgment

When used in the context of medical malpractice litigation, the term "error in judgment" is something of a misnomer, as it is not properly used in a case where the issue involves a claimed misjudgment by the defendant practitioner, see Anderson v House of Good Samaritan Hosp., 44 AD3d 135, 840 NYS2d 508 (4th Dept 2007). Rather, the so-called "error in judgment" rule represents a narrow principle of law that protects medical practitioners from liability when they are sued for making non-negligent choices among medically acceptable alternatives, Nestorowich v Ricotta, 97 NY2d 393, 740 NYS2d 668, 767 NE2d 125 (2002); Mancuso v Kaleida Health, 172 AD3d 1931, 100 NYS3d 469 (4th Dept 2019), affd, 34 NY3d 1020, 114 NYS3d 773, 138 NE3d 502 (2019); Michalko v DeLuccia, 187 AD3d 1365, 133 NYS3d 122 (3d Dept 2020); Anderson v House of Good Samaritan Hosp., supra; see Schrempf v

State, 66 NY2d 289, 496 NYS2d 973, 487 NE2d 883 (1985); Weinreb v Rice, 266 AD2d 454, 698 NYS2d 862 (2d Dept 1999); Ibguy v State, 261 AD2d 510, 690 NYS2d 604 (2d Dept 1999); Darren v Safier, 207 AD2d 473 615 NYS2d 926 (2d Dept 1994). Where alternative procedures are available to a physician, any one of which is medically acceptable and proper under the circumstances, there is no negligence in using one rather than another, Koehler v Schwartz, 48 NY2d 807, 424 NYS2d 119, 399 NE2d 1140 (1979); Henry v Bronx Lebanon Medical Center, 53 AD2d 476, 385 NYS2d 772 (1st Dept 1976); Schreiber v Cestari, 40 AD2d 1025, 338 NYS2d 972 (2d Dept 1972); see Gross v Friedman, 138 AD2d 571, 526 NYS2d 152 (2d Dept 1988), affd, 73 NY2d 721, 535 NYS2d 586, 532 NE2d 92 (1988); Annot: 89 ALR4th 799. To be distinguished from true "error in judgment" cases involving choices among medically acceptable alternatives are those in which the term "error in judgment" or a similar formulation is used but the real question is simply whether the practitioner's treatment represented a permissible exercise of medical judgment, see Oelsner v State, 66 NY2d 636, 495 NYS2d 359, 485 NE2d 1024 (1985); Johnson v Yeshiva University, 42 NY2d 818, 396 NYS2d 647, 364 NE2d 1340 (1977); Davis v Patel, 287 AD2d 479, 731 NYS2d 204 (2d Dept 2001).

The "error in judgment" charge implies the exercise of some judgment in choosing from among two or more available, medically acceptable alternatives, Lacqua v Silich, 141 AD3d 690, 35 NYS3d 488 (2d Dept 2016); Martin v Lattimore Road Surgicenter, Inc., 281 AD2d 866, 727 NYS2d 836 (4th Dept 2001); Spadaccini v Dolan, 63 AD2d 110, 407 NYS2d 840 (1st Dept 1978) (citing PJI). Thus, it should not be given unless there is a showing that defendant considered and chose among several medically acceptable alternatives, Nestorowich v Ricotta, 97 NY2d 393, 740 NYS2d 668, 767 NE2d 125 (2002) (citing PJI) ("error in judgment" charge improper where neither party contended that ligation of renal artery was acceptable alternative means of treatment); Mancuso v Kaleida Health, 172 AD3d 1931, 100 NYS3d 469 (4th Dept 2019), affd on other grounds, 34 NY3d 1020, 114 NYS3d 773, 138 NE3d 502 (2019) (per Fourth Department's decision: "error in judgment" charge not warranted where there was no evidence hospital personnel exercised judgment or chose between medically acceptable treatment alternatives in administering statin at prescribed dose); Michalko v DeLuccia, 187 AD3d 1365, 133 NYS3d 122 (3d Dept 2020) (error in judgment charge should not have been given where there was no evidence that defendant chose between two or more medically accepted alternatives); Lacqua v Silich, supra ("error in judgment" charge appropriate only in narrow category of cases in which there is evidence that defendant physician considered and chose between or among several medically acceptable treatment alternatives); Anderson v House of Good Samaritan Hosp., 44 AD3d 135, 840 NYS2d 508 (4th Dept 2007) (citing PJI) ("error in judgment" charge improper where claim involved physician's alleged misdiagnosis and there was no issue as to whether physician had failed to use best judgment in choosing among medically acceptable alternatives); Martin v Lattimore Road Surgicenter, Inc., supra (citing PJI) ("error in judgment" charge appropriate only in narrow category of

cases in which there is evidence that defendant physician considered and chose among several medically treatment alternatives); Grasso v Capella, 260 AD2cl 600, 688 666 (2d Dept 1999) (where there was no evidence that defendant surgeon had to consider and choose among medically acceptable alternatives, trial court properly refused to give "error in judgment" charge): see Capolino v New York City Health & Hospitals Corp., 199 AD2cl 173. 605 NYS2d 87 (1st Dept 1993) ("error in judgment" charge should have been given where it was possible for jury to determine that there was more than one course acceptable under medical standards at time of treatment); Petko v Ghoorah, 178 AD2d 1013, 580 NYS2d 668 (4th Dept 1991) (court did not err in giving "error in judgment" charge where each party's expert testified to acceptable methods of diagnosing and treating condition). It is improper to give the "error in judgment" charge when the evidence simply raises the issue of whether defendant physician deviated from the degree of care that a reasonable physician would have exercised under the same circumstances, Martin v Lattimore Road Surgicenter, Inc., supra; see Lacqua v Bilich, supra.

A mere difference of opinion among medical providers is not, standing alone, sufficient to sustain a prima facie case of medical malpractice, Weinreb v Rice, 266 AD2d 454, 698 NYS2d 862 (2d Dept 1999); Ibguy v State, 261AD2d 510, 690 NYS2d 604 (2d Dept 1999); Darren v Safier, 207 AD2d 473, 615 NYS2d 926 (2d Dept 1994). The permissible exercise of medical judgment is measured by the state of medical knowledge at the time of the act or omission, Johnson v Yeshiva University, 42 NY2d 818, 396 NYS2d 647, 364 NE2d 1340 (1977); Fallon v Loree, 136 AD2d 956, 525 NYS2d 93 (4th Dept 1988); Paradies v Benedictine Hospital, 77 AD2d 757, 431 NYS2d 175 (3d Dept 1980). Liability for malpractice must be based on the facts confronting defendant at the time of the occurrence and should not be subjected to "the second guess of a jury," Topel v Long Island Je,vish Medical Center, 55 NY2d 682, 685, 446 NYS2d 932, 431 NE2d 293 (1981); see Krapivka v Maimonides Medical Center, 119 AD2d 801, 501 NYS2d 429 (2d Dept 1986); Henry v Bronx Lebanon Medical Center, 53 AD2d 476, 385 NYS2d 772 (1st Dept 1976).

For the application of the "error in judgment" principle to actions against mental health professionals, see VII. Mental Health Professionals: B. Error in Judgment, infra.

D. The Locality Rule

Under the "locality rule," a physician or surgeon is held only to the degree of diligence, skill and learning that is possessed by physicians or surgeons in the particular locality vvhere he or she practices, Pike v Honsinger, 155 NY 201, 49 NE 760 (1898). New York has apparently not abandoned the locality rule, see Toth v Community Hospital at Glen Cove, 22 NY2d 255, 292 NYS2d 440, 239 NE2d 368 (1968), as have some other jurisdictions, see Brune v Belinkoff, 354 Mass 102, 235 NE2d 793 (1968); Pederson v Dumouchel, 72 Wash 2d 73, 431 P2d 973

(1967). However, Toth v Community Hospital at Glen Cove, supra, recognized a two-tiered rule, holding that a specialist may be held liable where a general practitioner would not be and that a specialist must use whatever superior knowledge, skill and intelligence he or she has, see Riley v Wieman, 137 AD2d 309, 528 NYS2d 925 (3d Dept 1988); see also Darren v Safier, 207 AD2d 473, 615 NYS2d 926 (2d Dept 1994) (defendant who was specialist in gastroenterology not subject to liability for failing to exercise that degree of skill and care expected of specialist in psychiatry where defendant referred patient to appropriate specialist). For further discussion, see Annot: 18 ALR4th 603; AmJur2d, Physicians, Surgeons, and Other Healers§ 209.

The two-tiered Toth approach applies the locality rule as a minimum standard and then adds the further requirement that doctors use their "best judgment and whatever superior knowledge, skill and intelligence" they possess, see Nestorowich v Ricotta, 97 NY2d 393, 740 NYS2d 668, 767 NE2d 125 (2002); McGinn v Sellitti, 150 AD2d 967, 541 NYS2d 648 (3d Dept 1989) (oral surgeon subject to "higher standard of practice" than general dentist). Thus, as used in New York, the locality rule does not prohibit plaintiff from establishing that defendant failed to comply with a minimum local, state-wide or national standard of care, McCullough v University of Rochester Strong Memorial Hosp., 17 AD3d 1063, 794 NYS2d 236 (4th Dept 2005); see Payant v Imobersteg, 256 AD2d 702, 681 NYS2d 135 (3d Dept 1998) (national); Hoagland v Kamp, 155 AD2d 148, 552 NYS2d 978 (3d Dept 1990) (state-wide). If the standard of care in a particular locality is less demanding than that which is necessary to attain and maintain licensure within the State, the local standard of care is unacceptably low, Hoagland v Kamp, supra. The Court of Appeals has declared that "(a] physician will usually be insulated from tort liability where there is evidence that he or she conformed to accepted community standards of practice," Spensieri v Lasky, 94 NY2d 231, 701 NYS2d 689, 723 NE2d 544 (1999). Nevertheless, the Court approved the trial court's charge that the standard of care for the physician defendants was measured by "the degree of knowledge and ability of the average Board-certified obstetrician/gynecologist in good standing practicing that specialty in the State of New York." However, there is no rule setting up a separate standard or third analytical tier for specialists who are board-certified, Mayer v Oswego County Ob-Gyn, P.C., 207 AD2d 985,617 NYS2d 92 (4th Dept 1994). As to the statute of limitations applicable to malpractice claims, see Introductory Statement, supra.

III. Persons Who May Be Liable

One who holds himself or herself out as qualified to give treatment but who is not in fact licensed to practice medicine will be held to the professional standards of skill and care of those lawfully offering such treatment, Brown v Shyne, 242 NY 176, 151 NE 197 (1926); Monahan v Devinny, 223 App Div 547, 229 NYS 60 (3d Dept 1928). The fact that defendant practiced medicine without a license is prima facie evidence of negligence, CPLR 4504(d); see also Pagano v Massapequa General

Hosp., 99 AD2d 769, 472 NYS2d 15 (2d Dept 1984) (error to charge that defendant's qualifications were a question of fact and to refuse charge, as a matter of law, that defendant was not a licensed physician, where defendant had certificate from Educational Council for Foreign Medical Graduates); Ellenberger v Pena, 88 AD2d 373, 453 NYS2d 436 (2d Dept 1982) (certificate from Educational Council for Foreign Medical Graduates is not equivalent to permit from State Education Department; holder of the certificate is merely eligible to obtain permit). However, the failure of a licensed physician to obtain board certification before practicing in a specialized area does not constitute malpractice, and a hospital is not negligent in allowing a non-certified but licensed physician to practice a specialty, see Thomas v Solon, 121 AD2d 165, 502 NYS2d 475 (1st Dept 1986). Additionally, treating a patient at a location other than the address registered with the Education Department does not give rise to a fraud cause of action by the patient, Boothe v Weiss, 133 AD2d 603, 519 NYS2d 710 (2d Dept 1987).

A complaint sounds in medical malpractice rather than ordinary negligence where the challenged conduct constitutes medical treatment or bears a substantial relationship to the rendition of medical treatment by a licensed physician to a particular patient, Davis v South Nassau Communities Hosp., 26 NY3d 563, 26 NYS3d 231, 46 NE3d 614 (2015); Dupree v Giugliano, 20 NY3d 921, 958 NYS2d 312, 982 NE2d 74 (2012); Weiner v Lenox Hill Hosp., 88 NY2d 784, 650 NYS2d 629, 673 NE2d 914 (1996); Scott v Uljanov, 74 NY2d 673, 543 NYS2d 369, 541 NE2d 398 (1989); Bleiler v Bodnar, 65 NY2d 65, 489 NYS2d 885, 479 NE2d 230 (1985); Rabinovich v Maimonides Medical Center, 179 AD3d 88, 113 NYS3d 198 (2d Dept 2019); Jeter v New York Presbyterian Hospital, 172 AD3d 1338, 101 NYS3d 411 (2d Dept 2019); Levinson v Health South Manhattan, 17 AD3d 247, 793 NYS2d 401 (1st Dept 2005); Toepp v Myers Community Hosp., 280 AD2d 921, 721 NYS2d 177 (4th Dept 2001); Cullinan v Pignataro, 266 AD2d 807, 698 NYS2d 381 (4th Dept 1999). In distinguishing whether conduct should be deemed medical malpractice or ordinary negligence, the critical factor is the nature of the duty owed to the plaintiff that the defendant is alleged to have breached, Rabinovich v Maimonides Medical Center, supra; Jeter v New York Presbyterian Hospital, supra. The distinction between ordinary negligence and malpractice turns on whether the acts or omissions complained of involve a matter of medical science or art requiring special skills not ordinarily possessed by lay persons or whether the conduct complained of can instead be assessed on the basis of the common everyday experience of the trier of the facts, Rabinovich v Maimonides Medical Center, supra; Jeter v New York Presbyterian Hospital, supra. Therefore, a nurse performing a medical service is subject to a claim for medical malpractice, Bleiler v Bodnar, supra. As to the duty of care a nurse owes to a patient, see Applewhite v Accuhealth, Inc., 81 AD3d 94, 915 NYS2d 223 (1st Dept 2010). The allegations sounded in medical malpractice where a hospital inadequately provided for the treatment and supervision of a patient with memory loss who disappeared from the hospital for five clays, Rabinovich v Maimonides Medical Center, supra; see Jeter v New York Presbyterian

Hospital supra. However, a resident who assists a doctor during a medical rocedure cannot be held liable so long as he or she did not exercise any independent medical judgment and the doctor's directions did not so greatly deviate from normal practice that the resident had a duty to intervene, Tsocanos v Zaidman, 180 AD3d 841, 118 NYS3d 219 (2d Dept 2020); Hatch v St. Joseph's Hospital Health Center, 174 AD3d 1404 105 NYS3d 742 (4th Dept 2019); Soto v Andaz, 8 AD3d 470, 779 NYS2d 104 (2d Dept 2004); see Macancela v Wyckoff Heights Medical Center 176 AD3d 795, 109 NYS3d 411 (2d Dept 2019) (question of fact as to hether resident was obligated to intervene in attending physician's treatment of decedent).

Where full-time psychiatric, psychological and social work personnel were employed at a center for the emotionally disturbed to provide clinical as well as educational services, and where plaintiff was referred to the facility for treatment, she was entitled to assert a claim for medical malpractice against the center based on allegations that the staff failed to exercise reasonable care in their initial evaluation and in the administration of a deleterious course of treatment, Cantone by Cantone v Rosenblum , 186 AD2d 167, 587 NYS2d 743 (2d Dept 1992). In contrast, non-professional staff members who provide supportive and oversight services but not treatment and make daily visits to a residential facility maintained for individuals receiving psychiatric care elsewhere are not engaged in an activity that bears a substantial relationship to the rendition of medical treatment, Avins v Federation Employment and Guidance Service, Inc., 52 AD3d 30, 857 NYS2d 550 (1st Dept 2008). Thus, a cause of action for medical malpractice cannot be sustained against such staff members, id.

An individual who is trained in first aid techniques, but is not a member of the medical profession, is not subject to suit for medical malpractice, Lazzaro v Nassau, 245 AD2d 342, 665 NYS2d 441 (2d Dept 1997). A physician may also be liable for breach of contract, if there is an express contract with the patient to effect a cure or to accomplish some definite result, Nicoleau v Brookhaven Memorial Hosp. Center, 201 AD2d 544, 607 NYS2d 703 (2d Dept 1994); see PJI 4:35.

IV. Physician-Patient lfelationship

A. Gratuitously Provided Services

That the physician's services are rendered gratuitously does not affect the physician's liability, Du Bois v Decker, 130 NY 325, 332, 29 NE 313 (1891), except in cases to which the so-called Good Samaritan statute applies , Education Law §§ 6527(2) (physicians); 6611 (dentists); 6909(1) (nurses), 6537 (licensed physical therapist); 6457 (physician's assis ta nt); Public Health Law § 3013 ("certified emergency medical te ch ician ," "voluntary ambulance service," and "advanced emergency ed1cal technician"); Public Authorities Law § 1266-b (emergency first **aid** treatment by employees of LIRR). However, the Good Samaritan statute applicable to voluntary ambulance services does not protect

against claims of gross negligence, see Kowal v Deer Park Fire Dist., 13 AD3d 489, 787 NYS2d 352 (2d Dept 2004), or claims of negligence based on an alleged failure to provide qualified, competent personnel, Estate of Klinger v Corona Community Ambulance Corps., Inc., 301 AD2d 495, 753 NYS2d 126 (2d Dept 2003). Medical personnel requested by a police officer to take blood samples pursuant to VTL § 1194(4) are immune from liability, VTL § 1194(4)(a)(2) .

General Business Law § 627-a imposes a duty on certain health clubs to have on the premises both automated external defibrillators and individuals trained to use those devices. That provision, however, does not create a duty running from a health club to its members to use that device, Miglino v Bally Total Fitness of Greater New York, Inc., 20 NY3d 342, 961 NYS2d 364, 985 NE2d 128 (2013); Digiulio v Gran, Inc., 74 AD3d 450, 903 NYS2d 359 (1st Dept 2010), affd, 17 NY3d 765, 929 NYS2d 71, 952 NE2d 1064 (2011). When an employee of a club certified to use the device does so to render emergency medical treatment or first aid to a stricken individual, the employee is only liable for gross negligence, General Business Law § 627-a(3); Public Health Law § 3000-a. The club that provided the device is insulated from liability except for its own negligence, gross negligence or intentional misconduct, General Business Law § 627-a(3); Public Health Law § 3000-a(2). Thus, General Business Law § 627-a, in conjunction with Public Health Law §§ 3000-a and 3000-b, protects health clubs and their employees from the risk of liability for ordinary negligence with respect to those devices, Miglino v Bally Total Fitness of Greater New York, Inc., supra. A health club does owe a limited, common law duty of care to a patron struck down by a heart attack or cardiac arrest while engaged in athletic activities on the club's premises, id (club owes common law duty to employ proper lifesaving measures to patron who suffered cardiac arrest at club).

B. Physician's Undertaking to Provide Services

Generally, whether a physician owed a duty of care to plaintiff is a legal question, not a question of medical expertise, Burtman v Brown, 97 AD3d 156 , 945 NYS2d 673 (1st Dept 2012); Koeppel v Park, 228 AD2d 288, 644 NYS2d 210 (1st Dept 1996); Sawh v Schoen, 215 AD2d 291, 627 NYS2d 7 (1st Dept 1995); Lipton by Lipton v Kaye, 214 AD2d 319, 624 NYS2d 590 (1st Dept 1995). Thus, an affidavit by plaintiffs medical expert on the subject intrudes upon the exclusive province of the court and will not defeat summary judgment, Kamhi v Tay, 244 AD2d 266, 664 NYS2d 288 (1st Dept 1997); Sawh v Schoen, supra; Lipton by Lipton v Kaye, supra. However, whether a physician's giving of advice furnishes a sufficient basis upon which to conclude that an implied physician-patient relationship has arisen has been deemed to be a question of fact for the jury, Marshall v Rosenberg, 196 AD3d 817, 151 NYS3d 240 (3d Dept 2021); Campbell v Haber, 274 AD2d 946, 710 NYS2d 495 (4th Dept 2000); Cogswell by Cogswell v Chapman, 249 AD2d 865, 672 NYS2d 460 (3d Dept 1998).

A physician-patient relationship is created when the professional

services of a physician are rendered to and accepted by another person for the purposes of medica or surgical treat men t, Pizzo-Juliano v Southside Hosp., 129 AD3d 695, 10 NYS3d 572 (2d Dept 2015); Cygan v Kaleida Health, 51 AD3d 1373, 857 NYS2d 869 (4th Dept 2008); Garofalo v State, 17 AD3d 1109, 794 NYS2d 269 (4th Dept 2005). To overcome a motion to dismiss based on the question whether a physician-patient relationship existed, it is not necessary to show that the physician saw, examined, took a history or treated the patient, Pizzo-Juliano v Southside Hosp., stipra (dismissal denied where plaintiffs alleged that defendant physician, in his role as on-call plastic surgeon for hospital, made medical determination over telephone that infant plaintiffs laceration was not an emergency requiring defendant's expertise); Tom v Sundaresan, 107 AD3d 479, 966 NYS2d 434 (1st Dept 2013) (summary judgment dismissing complaint denied where defendant physician had consulted by telephone with neurosurgeon and both physicians planned to treat plaintiff as surgical team); see Scalisi v Oberlander, 96 AD3d 106, 943 NYS2d 23 (1st Dept 2012) (summary judgment denied where physician had formulated plans with other medical professionals who later relied on those recommendations); Santos v Rosing, 60 AD3d 500, 875 NYS2d 59 (1st Dept 2009) (summary judgment denied where evidence that physician consulted with nurse midwife concerning plaintiffs treatment). Whether there was in fact an undertaking to provide medical attention may be a question for the jury, Dillon v Silver, 134 AD2d 159, 520 NYS2d 751 (1st Dept 1987); O'Neill v Montefiore Hospital, 11 AD2d 132, 202 NYS2d 436 (1st Dept 1960). If there is such an undertaking, the physician will be liable if he or she abandons treatment prematurely, Meiselman v Crown Heights Hospital, 285 NY 389, 34 NE2d 367 (1941); Lewis v Capalbo, 280 AD2d 257, 720 NYS2d 455 (1st Dept 2001); O'Neill v Montefiore Hospital, supra; see Shapira v United Medical Service, Inc., 15 NY2d 200, 257 NYS2d 150, 205 NE2d 293 (1965); AmJur2d, Physicians, Surgeons, and Other Healers § 218; Annot: 57 ALR2d 432, unless the patient consents or the physician gives the patient sufficient notice so that another physician can be employed, Becker v Janinski, 15 NYS 675 (CP Ct 1891).

The du y owed by a physician may, however, be limited to those medical functions undertaken by the physician and relied upon by the patien t, ann v Okere, 195 AD3d 910, 150 NYS3d 306 (2d Dept 2021); Mosezhnik v Berenstein, 33 AD3d 895, 823 NYS2d 459 (2d Dept 2006); Wasserman v Staten Island Radiological Associates, 2 AD3d 713, 770 NYS2d 108 (2d Dept 2003); Markley by Markley v Albany Medical Center Hosp., 163 AD2d 639, 558 NYS2d 688 (3d Dept 1990). Thus, a radiologist to whom the decedent was referred for a routine mammogram did not assume any duty of care beyond that of reading the mammography images and reporting his findings, despite the fact that the decedent indicated on the intake worksheet that she experienced pain and/or soreness in her breast and allegedly told the radiologist's employee that she felt a lump in her breast, Mann v Okere, supra. A primary care physician has no independent duty to supervise or override a course of treatment initiated by another physician actively treating a patient, Burtman v Brown, 97 AD3d 156, 945 NYS2d 673 (1st

Dept 2012). Moreover, a physician's participation in surgery did not give rise to a duty to supervise or participate in the patient's postoperative care where the physician did not undertake to supervise the case and the patient had a primary care physician, Bettencourt v Long Island College Hosp., Inc., 306 AD2d 425. 762 NYS2d 261 (2d Dept 2003). Similarly, a physician group that deferred to orthopedic specialists for the assessment and treatment of plaintiffs ankle condition was not chargeable with the failure to properiy diagnose that condition, Wasserman v Staten Island Radiological Associates, supra.

C. Medical Examinations Conducted on Referral of Employers and Insurance Carriers

Ordinarily, a physician conducting an independent medical examination for a workers' compensation carrier cannot be held liable in negligence or malpractice to the examinee for a misdiagnosis or failure to report a proper diagnosis to the carrier, Zajac v Wilson, 2 AD3d 1410, 768 NYS2d 889 (4th Dept 2003); Lee v New York, 162 AD2d 34, 560 NYS2d 700 (2d Dept 1990); LoDico v Caputi, 129 AD2d 361, 517 NYS2d 640 (4th Dept 1987); see Bazakos v Lewis, 12 NY3d 631, 883 NYS2d 785, 911 NE2d 847 (2009); Savarese v Allstate Ins. Co., 287 AD2d 492, 731 NYS2d 226 (2d Dept 2001); see also Vi/hite v Southside Hosp., 281 AD2d 474, 721 NYS2d 678 (2d Dept 2001l (physician-patient relationship not established where doctor who performed pre-employment physical advised decedent of positive tuberculosis test and advised her to obtain second opinion); but see McKinney v Bellevue Hosp., 183 AD2d 563, 584 NYS2d 538 (1st Dept 1992J.

A person referred to a physician by a third party such as an employer or workers' compensation carrier is deemed to have a "limited physician-patient relationship." In such a relationship, the physician will ordinarily not be liable for damages resulting from the conclusions he or she reaches or reports, but he or she may be held be liable in malpractice for performing the examination in a manner that causes physical harm, Bazakos v Lewis, 12 NY3d 631, 883 NYS2d 785, 911 NE2d 847 (2009); see Smith v Pasquarella, 201 AD2d 782, 607 NYS2d 489 (3d Dept 1994); Twitchell v MacKay, 78 AD2d 125, 434 NYS2d 516 (4th Dept 1980). Additionally, in such situations, the examinee may maintain a medical malpractice action against the physician based on the physician's providing negligent treatment or rendering negligent medical advice, Badolato v Rosenberg, 67 AD3d 937, 890 NYS2d 85 (2d Dept 2009); Lawliss v Quellman, 38 AD3d 1123, 832 NYS2d 328 (3d Dept 2007); Hickey v Travelers Ins. Co., 158 AD2cl 112, 558 NYS2d 554 (2d Dept 1990) (physician who conducted examination for the purpose of evaluating an injury for workers' compensation carrier may be held liable for alleged malpractice in advising examinee that surgery was not necessary); see Rojas v McDonald, 267 AD2d 130, 701 NYS2d 21 (1st Dept 1999); Heller v Peekskill Community Hosp., 198 AD2d 265, 603 NYS2d 548 (2d Dept 1993). To establish such liability, plaintiff must show: (1) the advice was incorrect, t2) the issuance of such advice constituted medical malpractice, (3) it was foreseeable that the examinee

would rely upon the advice, and (4) the examinee did, in fact, rely upon the advice to the his or her detriment, Hickey v Travelers Ins. Co., supra; Badolato v Rosenberg, supra; see also Violandi v New York, 184 AD2d 364, 584 NYS2d 842 (1st Dept 1992) (physician who examined plaintiff solely for convenience of plaintiffs employer not liable for advice in which plamtiff's personal physician mdependently concurred, since lack of reliance established as matter of law); but see Durso v New York, 251 AD2d 8, 673 NYS2d 651 (1st Dept 1998) (examining doctor's recommendation to plaintiff that he stop taking prescribed pain medication that made him nauseous did not take case out of "well-established rule" that, absent "something more," physician-patient relationship does not exist where examination was conducted solely for the purpose, convenience or on behalf of employer).

D. Relationship Arising From Physician's Providing Medical Advice or Consultation Services

Liability may be imposed on non-treating physicians in situations of joint action in diagnosis or treatment or some control over the course of treatment of one by the other, Cygan v Kaleida Health, 51 AD3d 1373, 857 NYS2d 869 (4th Dept 2008). For example, a question of fact existed as to the involvement of a non-treating physician where there was evidence that the physician, as director of cardiac surgery, affirmatively directed the cancellation of the decedent's previously scheduled surgery, id. Such evidence may have indicated more than an informal interest and involvement on the part of the non-treating physician, id; see Campbell v Haber, 274 AD2d 946, 710 NYS2d 495 (4th Dept 2000). However, a referring physician is not liable if he or she did not undertake to monitor the patient's condition and, in fact, left that function to the physician to whom the patient was referred, Ellis v Eng, 70 AD3d 887, 895 NYS2d 462 (2d Dept 2010).

An implied physician-patient relationship may arise when a physician gives advice to a patient, even where the advice was communicated though another health care professional, Marshall v Rosenberg, 196 AD3d 817, 151 NYS3d 240 (3d Dept 2021); Campbell v Haber, 274 AD2d 946, 710 NYS2d 495 (4th Dept 2000); Cogswell by Cogswell v Chapman, 249 AD2d 865, 672 NYS2d 460 (3d Dept 1998). A doctor-patient relationship can be established by a telephone call when the doctor affirmatively advises a prospective patient as to a course of treatment, it is foreseeable that the patient will rely on the advice, and the patient did in fact rely on the advice, Marshall v Rosenberg, supra; Cogswell by Cogswell v Chapman, supra; Miller v Sullivan, 214 AD2d 822, 625 NYS2d 102 (3d Dept 1995); see Campbell v Haber, supra. An implied physician-patient relationship can arise with a specialist if the patient's treating physician reasonably and foreseeably relied upon the specialist's advice to the patient's detriment, Marshall v Rosenberg, supra.

The exposure of a non-treating physician engaged in a consulting capacity is limited, Alvarez v Prospect Hosp., 68 NY2d 320, 508 NYS2d 923, 501 NE2d 572 (1986); Lipton by Lipton v Kaye, 214 AD2d 319, 624

NYS2d 590 (1st Dept 1995). A non-treating physician is not responsible for the future treatment of a patient for whom the doctor has made an accurate diagnosis, Lipton by Lipton v Kaye, supra. Although physicians ordinarily owe a general duty of care to their patients, that duty may be limited to those medical functions undertaken by the physicians and relied on by the patient, Mosezhnik v Berenstein, 33 AD3d 895, 823 NYS2d 459 (2d Dept 2006); Chulla v DiSte fano, 242 AD2d 657, 662 NYS2d 570 (2d Dept 1997). Similarly, radiologists who had the limited role of interpreting mammography films and documenting their findings had no duty to schedule or urge further testing or diagnose plaintiffs medical conditions, Mosezhnik v Berenstein, supra. However, a fertility specialist who performed in vitro fertilization and embryo implantation on referral from the patient's treating physician had an obligation to ensure that the patient was fully informed of the risks attendant to a potential pregnancy in view of the patient 's personal health and circumstances, even though the treating physician had "medically cleared" the patient for the procedure and was responsible for monitoring her pregnancy, Nieves v Montefiore Medical Center , 305 AD2d 161, 760 NYS2d 419 (1st Dept 2003). Further, a non-treating physician's failure to communicate significant medical findings to a patient or his treating physician may constitute ordinary negligence, see Yaniv v Taub, 256 AD2d 273, 683 NYS2d 35 (1st Dept 1998); McKinney v Bellevue Hosp., 183 AD2d 563, 584 NYS2d 538 (1st Dept 1992) (failure to disclose a potentially life threatening condition detected in a pre-employment physical examination may give rise to liability by employer based on ordinary negligence); see also Glasheen v Long Island Diagnostic Imaging, 303 AD2d 365, 756 NYS2d 589 (2d Dept 2003).

A doctor's participation in weekly group staff meetings of a professional corporation at which a patient's care was discussed does not, without more, give rise to a physician-patient relationship between the doctor and the patient discussed, Sawh v Schoen, 215 AD2d 291, 627 NYS2d 7 (1st Dept 1995); but see Tom v Sundaresan, 107 AD3d 479, 966 NYS2d 434 (1st Dept 2013) (distinguishing *Sawh* where defendant physician had detailed conversation with neurosurgeon and both physicians planned for surgery to be jointly performed). Similarly, a physician-patient relationship did not arise between a patient and members of a team to assess impaired physicians whose involvement with the patient-doctor terminated after they concluded that he did not suffer from a psychological or psychiatric illness, Gedon v Bry-Lin Hospitals, Inc., 286 AD2d 892, 730 NYS2d 641 (4th Dept 2001).

V. Persons to Wh_Q]ll Duty of Care is Owed

A. Duty to General Public

A physician· s duty of care is ordina ril y owed to th atient and not tkte genera l public, Purdy v Public Adm'r of Westcheste r County, 72 NY2d 1, 530 NYS2d 513, 526 NE2d 4 (1988); Fox v Marshall, 88 AD3d 131, 928 NYS2d 317 (2d Dept 2011); Adams v Elgart, 213 AD2d 436, 623 NYS2d 637 (2d Dept 1995) (mu:·ing _home and its admit mg p)l.ysi-

cian owe no dut y to genera public to prev ent voluntary Rafient from driving or to warn of dangers presented by such drivi tg°); Cartier v Long Island College Hosp. 111 AD2d 894 490 NYS2d *602* (2d ept 1985) (physic·ans practicing in alcoholism clini c do not owe duty to public at large to control behavior of out-patients and are not liable for fai - ing to prevent out-patient from driving whil e intoxica ted); see Davis v South assau Communities osp., 26 NY3d 563, 26 NYS3d 231, 46 NE3d 614 (2015). A physician who completes a health report on a patient owes a duty of care only to the patient and those persons the physician knew or reasonably should have known were relying upon the report , Eiseman v State, 70 NY2d 175, 518 NYS2d 608, 511 NE2d 1128 (1987) (prison physician , who erroneously reported that ex-convict seeking college admission was not emotionally unstab le, was not liable wh en ex-convict murdered another stude nt). or a discussi on of mental health professiona ls' duty to th ird persons for claimed negligence· relea sing mentally ill patients, see VII. Mental Health Professionals : A. Duty to Persons Other Than Patient, infra.

B. Duty to Family Members and Others in Contact with Patient

A doctor does not owe a duty of care to a nonpatient who is caring for the patient, even where the nonpatient's role and identity are known to the doctor, unless the physician's treatment of the patient is the cause of the injury to the nonpatient, Candelario v Teperman , 15 AD3d 204, 789 NYS2d 133 (1st Dept 2005). Thus, a doctor does not owe a duty of care to a friend of a patient treated for infectious meningitis based on the doctor's negative answer to the friend's question whether she needed treatment after being in close contact with the patient, McNulty v New York, 100 NY2d 227, 762 NYS2d 12, 792 NE2d 162 (2003). In McNulty, th ere was no allegation that plaintiffs injury arose from the doctors' treatment of the primary patient . The principle that a doctor ordinarily owes no duty of care to a nonpatient who is caring for the patient applies even though the nonpatient caregiver is a close relative of the patient and the action is cast as one for ordinary negligence rather than medical malpractice, Candelario v Teperman, supra.

In Tenuto v Lederle Laboratories, Div. of American Cyanamid Co., 90 NY2d 606, 665 NYS2d 17, 687 NE2d 1300 (1997), the Court held that a doctor treating an infant patient with an oral polio vaccine had a duty to warn the infant's parents to take precautions against contracting polio from exposure to the infant's feces or saliva, see Doe v Lai-Yet Lam, 268 AD2d 206, 701 NYS2d 347 (1st De t 2000). The Tenuto Cour t st ressed that a special relationship existed sufficient to supply the pred - icat e for extending a duty to warn and advise plain tiffs of the danger and the need to use preca uti ons , es ecially since the ph sician was a pediat rician engaged by the parents to provide medical services to their infant and the physicia n's role nece ss arily requir ed advising the patient's parents. However , courts that have analyzed Tenuto suggest that the more significant consideration was the fact that the physician's treatment of the patient was the cause of the nonpatient's injury, Davis v South Nassau Communities Hosp., 26 NY3d 563 , 26 NYS3d 231, 46

NE3d 614 (2015); McNulty v New York, 100 NY2d 227, 762 NYS2d 12, 792 NE2d 162 (2003); Candelario v Teperman, 15 AD3d 204, 789 NYS2d 133 (1st Dept 2005).

A company that provided nursing services for a ventilator-dependent child requiring 24-hour nursing care did not owe a duty of care to a non-patient parent who allegedly suffered emotional distress when she observed her child in a state of suffocation, hypoxia and/or apoxia as a result of the alleged negligence of a nurse the company provided, Shaw v QC-Medi New York, Inc., 10 AD3d 120, 778 NYS2d 791 (4th Dept 2004); see also Landon by Landon v New York Hosp., 65 NY2d 639, 491 NYS2d 607, 481 NE2d 239 (1985), affg for reasons stated in opinion below, 101 AD2d 489, 476 NYS2d 303 (doctor owed no duty to parents to prevent emotional harm from either their witnessing child's deterioration from meningitis or their fear that they might have contracted meningitis where doctor failed to make timely diagnosis of child's meningitis). Although the Court of Appeals allowed a mother to recover emotional-distress damages because of medical malpractice resulting in a stillbirth, Broadnax v Gonzalez, 2 NY3d 148, 777 NYS2d 416, 809 NE2d 645 (2004), the court in Shaw v QC-Medi New York, Inc., supra, reasoned that the Court of Appeals' holding was limited to the physical and psychological injuries suffered by reason of the mother's pregnancy. The fact that the parents in Shaw sent the defendant a letter giving written notice of their concerns did not create an independent duty running from the defendant to the non-patient parents, id.

Where a medical provider has administered medication that impairs or could impair a patient's ability to operate an automobile, the medical provider has a duty to third parties to warn the patient of that danger, Davis v South Nassau Communities Hosp., 26 NY3d 563, 26 NYS3 231, 46 NE3d 614 (2015). The imposition of such a duty in Davis was appropriate because the medical provider administered the medication without warning the patient about the effects of it, thereby creating a peril affecting every motorist in the vicinity of the automobile operated by the patient; the medical provider was the only one who could have provided a proper warning; and the cost imposed on the medical provider by the obligation to warn the patient was small, id.

VI. Malpractice Relating to Fetuses and Newborns

A. "Wrongful Life" and "Wrongful Birth" Claims

A negligent failure to test for or advise prospective parents of the potential for the birth of a disabled child is not actionable by the child as "wrongful life" or "wrongful conception," Becker v Schwartz, 46 NY2d 401, 413 NYS2d 895, 386 NE2d 807 (1978) (Down's Syndrome); Howard v Lecher, 42 NY2d 109, 397 NYS2d 363, 366 NE2d 64 (1977) (Tay-Sachs disease); Stewart v Long Island College Hospital, 35 AD2d 531, 313 NYS2d 502 (2d Dept 1970), affd, 30 NY2d 695, 332 NYS2d 640, 283 NE2d 616 (1972) (effect on fetus of mother's measles during pregnancy);

John v De Vivo, 179 AD3d 597, 117 NYS3d 230 (1st Dept 2020); Weed v Meyers, 251 AD2d 1062, 674 NYS2d 242 (4th Dept 1998) (cause of action on behalf of children cannot be maintained against defendant doctor based on alleged failure to provide genetic counseling to father for retinoblastoma, a hereditary form of eye cancer); see Williams v State, 18 NY2d 481, 276 NYS2d 885, 223 NE2d 343 (1966) (no cause of action for plaintiff born out of wedlock to mentally deficient mother who conceived while patient in State hospital). Likewise, negligence in performing an amniocentesis test and in issuing an erroneous report that a normal child should be expected does not give rise to a "wrongful life" claim on the part of an infant who was born with birth defects, Alquijay by Alquijay v St. Luke's-Roosevelt Hosp. Center, 63 NY2d 978, 483 NYS2d 994, 473 NE2d 244 (1984) (Down's Syndrome). An infant plaintiff born with a genetic condition may not recover under the theory that the doctor's advice led to a delayed diagnosis and treatment of the condition, since he did not owe the infant plaintiff a duty before he was conceived or born, John v De Vivo, supra. The parents of such a child are not entitled to recover damages for emotional distress occasioned by the birth and premature death of the child, Becker v Schwartz, supra; Howard v Lecher, supra; Weed v Meyers, supra; PJI 2:280. The parents may, however, recover damages measured by the cost of care and treatment of the child under a "wrongful birth" theory, Becker v Schwartz, supra; see B.F. v Reproductive Medicine Associates of New York, LLP, 30 NY3d 608, 69 NYS3d 543, 92 NE3d 766 (2017); Foote v Albany Medical Center Hosp., 16 NY3d 211, 919 NYS2d 472, 944 NE2d 1111 (2011); Mayzel v Moretti, 105 AD3d 816, 962 NYS2d 656 (2d Dept 2013). Since parents have no legal obligation to support children who attain age 21, see Family Court Act, § 413; Domestic Relations Law, § 32; Social Services Law,§ 101, such recovery is limited to the extraordinary expenses incurred or to be incurred prior to the child's 21st birthday, Bani-Esraili v Lerman, 69 NY2d 807, 513 NYS2d 382, 505 NE2d 947 (1987). The existence of government programs that provide resources to a disabled child will not, as a matter of law, eliminate the parents' financial obligation for their child's extraordinary medical and educational expenses during the child's minority, Foote v Albany Medical Center Hosp., supra. Therefore, the existence of such programs is not necessarily fatal to the parents' claim, id. The parents, however, must demonstrate that they have incurred or will incur some extraordinary expenses in caring for the child; conclusory or speculative assertions that such expenses have been or will be incurred are insufficient, see Mayzel v Moretti, supra (parents failed to raise triable issue of fact regarding whether they sustained damages as a result of child's "wrongful birth"; child's care was provided by a residential care facility and paid for by Medicaid, and parents offered no evidence that resources provided by government were insufficient or that they actually intended to care for child in future).

Where a normal child is conceived and born after an ineffective sterilization procedure upon one of the parents, the claim sounds in "wrongful life" or "wrongful conception" and there can be no recovery for the future maintenance and support of the child, O'Toole v Greenberg,

64 NY2d 427, 488 NYS2d 1 477 NE2d 4.-15 (1985) (tubal ligation); Miller v Rivard, 180 AD2d 331. 585 NYS2d 523 (3d Dept 1992) (Yasectomy); Abbariao v Blumenthal, 107 AD2d 556. 48:) NYS2cl 296 llst Dept 1985) (tubal ligation); Weintraub v 98 AD2d 339. 470 NYS2d 634 (2d Dept 1983) (vasectomy): see]\/[ears v Alhadeff, 88 AD2d 827, 451 NYS2d 133 (1st Dept 1982) (negligently performed abortion). However, there can be recovery for medical expenses, including the expenses of the unsuccessful sterilization procedure and costs of delivery, loss of services and consortium, and physical pain and suffering arising from the unanticipated pregnancy. lVliller v Rivard. supra; Weintraub v Brown, supra; Sorkin v Lee, 78 AD2d 180, 434 NYS2d 300 (4th Dept 1980); Sala v Tomlinson, 73 AD2d 724, 422 l\TYS2d 506 (3d Dept 1979).

B. Birth Defects

A claim for malpractice may be asserted on behalf of a child who sustained injuries in utero or as a result of premature birth because of defendant physician's failure to advise the mother of the special risks involved in her pregnancy and the need for special monitoring to prevent such occurrences, Nieves v Montefiore Medical Center, 305 AD2d 161, 760 NYS2d 419 (1st Dept 2003).

Neither the parent nor the malformed child may recover for failure to perform an abortion, Stewart v Long Island College Hospital, 35 AD2d 531, 313 NYS2d 502 (2d 1970), affd, 30 NY2d 695, 332 NYS2d 640, 283 NE2d 616 (1972).

C. Emotional Injury

The circumstances under which recovery may be had for purely emotional injury are limited, see Nadal v Jaramillo, 102 AD3d 843, 959 NYS2d 505 (2d Dept 2013) (woman not informed of pregnancy could not recover for emotional distress arising from fear that unborn child might be harmed by CT-scan); Lancellotti v Howard, 155 AD2d 588, 547 NYS2d 654 (2d Dept 1989) (woman erroneously advised that she was pregnant and treated for that condition for months limited to recovery for pecuniary loss and may not, absent physical trauma, recover for emotional distress); see Creed v United Hosp., 190 AD2d 489, 600 NYS2d 151 (2d Dept 1993) (plaintiffs suing for alleged negligent implanting of wife's fertilized ova in another woman may not recover for emotional injury where there was no allegation of negligence or physical injury from initial physical intrusion into wife's body). One such circumstance arises when a pregnant woman generally opposed to abortion decides to submit to one only because of negligent medical advice that the fetus was grossly abnormal. In such circumstances the woman may recover for the emotional distress resulting from the abortion and the death of the fetus, which was in fact normal, Martinez v Long Island Jewish Hillside Medical Center, 70 NY2d 697, 518 NYS2d 955, 512 NE2d 538 (1987). The Martinez Court reasoned that, unlike cases such as Tebbutt v Virostek, 65 NY2d 931, 493 NYS2d 1010, 483 NE2d 1142 (1985), and Becker v Schwartz. 46 NY2d 401, 413 NYS2d 895, 386

NE2d 807 (1978), Martinez did not involve the claim of a bystander seeking to recover for emotional harm caused by observing or learning of injury or death to a thir? person (the fetus). Instead, the mother's mental distress was the direct result of the breach of a duty owed directly to her. Simila_rly, r co:very was allowed. where defendant negligently failed to advise plamtiff that she could still be pregnant due to an incomplete abortion and plaintiff miscarried, Ferrara v Bernstein, 81 NY2d 895, 597 NYS2d 636, 613 NE2d 542 (1993). Likewise, where a physician negligently failed to detect plaintiffs pregnancy before prescribing a drug potentially harmful to the fetus and plaintiff, fearful that the fetus was harmed, underwent an abortion, plaintiff could recover for the physical and emotional injuries resulting from the abortion and the decision to have the abortion, Lynch v Bay Ridge Obstetrical and Gynecological Associates, P.C., 72 NY2d 632, 536 NYS2d 11, 532 NE2d 1239 (1988). Lynch held that, unlike Tebbutt v Virostek, supra, and Vaccaro v Squibb Corp., 52 NY2d 809, 436 NYS2d 871, 418 NE2d 386 (1980), plaintiff was not seeking to recover for an injury to the fetus itself or for emotional distress in witnessing or knowing of an injury to the fetus, but rather for her own physical and emotional injuries.

In Broadnax v Gonzalez, 2 NY3d 148, 777 NYS2d 416, 809 NE2d 645 (2004), the Court of Appeals overruled Tebbutt v Virostek, 65 NY2d 931, 493 NYS2d 1010, 483 NE2d 1142 (1985), and held that an expectant mother may recover damages for emotional distress resulting from a miscarriage or stillbirth that was caused by medical malpractice, even in the absence of independent physical injury. Further, although the physician owes no duty of care to an expectant father, the father may maintain a derivative cause of action for loss of services and consortium where the mother has a cause of action for emotional distress and the facts support such a derivative claim, see Brashaw v Cohen, 154 AD3d 1327, 62 NYS3d 251 (4th Dept 2017). Broadnax appears to have overruled or at least undermined the analyses in such cases as Bauch v Verrilli, 146 AD2d 835, 536 NYS2d 240 (3d Dept 1989) (no recovery for emotional distress suffered by mother when baby died after birth where only injury to mother was episiotomy), and Sceusa v Mastor, 135 AD2d 117, 525 NYS2d 101 (4th Dept 1988) (mother may not recover for emotional distress resulting from loss of twins after emergency caesarean section where no physical injury in addition to those inherent in surgery was sustained); see also Arroyo v New York City Health and Hospitals Corp., 163 AD2d 9, 558 NYS2d 8 (1st Dept 1990) (where two siblings underwent similar hospital treatment, surviving sibling cannot recover **for** emotional harm resulting from other sibling's death since surviving sibling was not in physical danger).

The holding in Broadnax v Gonzalez, 2 NY3d 148, 777 NYS2d 416, **809** NE2d 645 (2004) was intended to remedy an anomaly in tort jurisprudence that exposed medical caregivers to malpractice liability for in utero injuries when the fetus survived but immunized them when their malpractice caused miscarriage or still birth, see Sheppard-Mobley ex rel. Mobley v King, 4 NY3d 627, 797 NYS2d 403, 830 NE2d 301 (2005); Brashaw v Cohen, 154 AD3d 1327, 62 NYS3d 251 (4th Dept 2017); Ward v Safajou, 145 AD3d 836, 43 NYS3d 447 (2d Dept 2016). Thus,

the holding is a narrow one intended to permit recovery where none would otherwise be available and, as such, does not apply in situations where a fetus injured in utero was carried to term and born alive, see Sheppard-Mobley ex rel. Mobley v King, supra; Ward v Safajou, supra; Levin v New York City Health and Hospitals Corp., 119 AD3d 480, 990 NYS2d 490 (1st Dept 2014). In Sheppard-Mobley, for example, a mother was not permitted to recover for emotional distress resulting from the birth of an impaired child where she allegedly was negligently advised to terminate her pregnancy through a chemical abortion and the chemical abortion was incomplete. However, the mother in Sheppard-Mobley could recover for the emotional injuries she suffered independent of the birth of an impaired child, specifically the injuries she suffered because she had to decide whether to seek an out-of-state late-term abortion or risk the birth of a child with congenital defects. The Broadnax holding does not extend to a non-patient parent's emotional distress resulting from allegedly negligent medical treatment of a child, Shaw v QC-Medi New York, Inc., 10 AD3d 120, 778 NYS2d 791 (4th Dept 2004).

A woman may not normally recover for the physical pain and suffering that are natural accompaniments of the childbirth process, Fahey v Canino, 304 AD2d 1069, 758 NYS2d 708 (3d Dept 2003), rev'd on other grounds, 2 NY3d 148, 777 NYS2d 416, 809 NE2d 645 (2004); Parsons v Chenango Memorial Hosp., 210 AD2d 847, 620 NYS2d 604 (3d Dept 1994); Guialdo v Allen, 171 AD2d 535, 567 NYS2d 255 (1st Dept 1991); Prado v Catholic Medical Center of Brooklyn and Queens, Inc., 145 AD2d 614, 536 NYS2d 474 (2d Dept 1988); Wittrock v Maimonides Medical Center-Maimonides Hosp., 119 AD2d 748, 501 NYS2d 684 (2d Dept 1986); see Kakoullis v Harri H. Janssen M.D. P.C., 188 AD2d 769, 591 NYS2d 224 (3d Dept 1992). However, recovery may be had for pain and suffering experienced during a miscarriage resulting from the negligent failure to notify a pregnant woman of her incomplete abortion and to secure her prompt return to the abortion facility, Ferrara v Bernstein, 81 NY2d 895, 597 NYS2d 636, 613 NE2d 542 (1993).

Damages may be recoverable for emotional injuries suffered by a couple whose embryo was mistakenly placed in another woman, Perry-Rogers v Obasaju, 282 AD2d 231, 723 NYS2d 28 (1st Dept 2001). In Perry-Rogers v Obasaju, the couple suffered emotional harm, established through medical affidavits attesting to objective manifestations of their trauma, because of their having been deprived of the opportunity of experiencing pregnancy, prenatal bonding and the birth of their own child, and by their separation from the child for more than four months after his birth.

D. Sterility

Where sterility results from medical malpractice, there can be no recovery for the loss of offspring as such or the deprivation of the companionship of children, but recovery may be had for any physical injuries sustained by the patient, the loss of fertility and any mental

and emotional distress attending those injuries, Hahn v Taefi, 115 AD2d 946, 497 NYS2d 522 (4th Dept 1985); see Stewart v New York City Healt and Hospitals Corp., 207 AD2d 703, 616 NYS2d 499 (1st Dept 1994). The spouse of a patient being treated for male infertility may not maintain a cause of action against the doctor based on the alleged treatment failure, Cohen v Cabrini Medical Center, 94 NY2d 639, 709 NYS2d 151, 730 NE2d 949 (2000).

E. In Utero Injuries

Becker v Schwartz, 46 NY2d 401, 413 NYS2d 895, 386 NE2d 807 (1978), recognizes the continued vitality of the rule that an infant injured in utero by the tort of another "should, when born, be allowed to sue," Woods v Lancet, 303 NY 349, 353, 102 NE2d 691 (1951); Brashaw v Cohen, 154 AD3d 1327, 62 NYS3d 251 (4th Dept 2017). Thus, in Sheppard-Mobley ex rel. Mobley v King, 4 NY3d 627, 797 NYS2d 403, 830 NE2d 301 (2005), an infant plaintiff with congenital defects resulting from an incomplete chemical abortion was permitted to sue for injuries caused by defendants' erroneous advice to his pregnant mother that she would not be able to carry the fetus to term and should have a chemical abortion. Physicians who discontinued plaintiffs mother's tuberculosis medication while she was pregnant with plaintiff, resulting in his contracting tuberculosis meningitis from his mother shortly after his birth, owed a duty of care to plaintiff at the time of the alleged act of malpractice, Moreta v New York City Health and Hospitals Corp., 238 AD2d 149, 655 NYS2d 517 (1st Dept 1997). The fact that the fetus was not viable at the time the in utero injury occurred does not preclude recovery if the child was ultimately born alive, Leighton v New York, 39 AD3d 84, 830 NYS2d 749 (2d Dept 2007).

1. Accrual of Cause of Action for In Utero Injury

An infant plaintiffs medical malpractice cause of action premised on alleged injurious acts or omissions occurring prior to birth accrues on the infant's date of birth, LaBello v Albany Medical Center Hosp., 85 NY2d 701, 628 NYS2d 40, 651 NE2d 908 (1995).

F. Pre-conception Torts

A child has no cause of action for injuries sustained as a result of a preconception tort committed against the mother, Albala v New York, 54 NY2d 269, 445 NYS2d 108, 429 NE2d 786 (1981); see Enright by Enright v Eli Lilly & Co., 77 NY2d 377, 568 NYS2d 550, 570 NE2d 198 (1991); Weed v Meyers, 251 AD2d 1062, 674 NYS2d 242 (4th Dept 1998) (defendant doctor owed no duty to children prior to their birth independent of duty owed to the father).

VII. Mental Health Professionals

A. Duty to Persons Other Than Patient

While there is no bright-line rule regarding whether a me

healt care provide · treating a patien 01 voluntary basis owes a duty r car to lbJ general pul:ilic, a member ' gener al ublic may have a cognizabl ca Ut;e of action for negligenc agains the mental health care provider where that defencl;J.ll has the 1 ,cessary authority or ability to exercis control o ·ıır· apatie·ll 's conduc , Fox v Marshall, 88 AD3d 131, 928 NYS2d 317 (2d Dept 2011); see Purdy v Public Adm'r of Westchester County, 72 NY2d 1, 530 NYS2d 513, 526 NE2d 4 (1988); Winters v New York City Health & Hospitals Cor p., 223 AD2d 405, 636 NYS2d 320 (1st Dept 1996).

In Pingtella *v* Jones , 305 AD2d 38, 758 th_Dept 2003), the court held that a sychia nst owed uo duty of care to the child of his patient, who was stabbed by the patient during a psychotic episode, see Gardenas *v* Rochester egional Health, *92* AD3d 1543, 14 S3d 774 t4t Dept 2021l (in the abc,ence of s ecific thr at , menta health ca re providers did not owe duty to patient's son , who was killed by patien t after she was discharged from in-patient facilit and wa, being trea ted on an outpatient ha·); see also Engelhart v Oran ge 16 AD3d 369 , 790 NYS2ct 704 (g d Dept 2005 doctor who failed to ad cat o· s italization of psychiatric out-patient rm iable t pe ·son injured in car acciden t with pa tient). It has also been held that a ph rs i_gj.a n who prescribed a sedativ for a parent was not liable for injuries sustained by her children when the parent lost consciousness while driving an automobile, since there was no indication that the physician knew the children were relying upon the advice he had given the parent, Conboy v Mogeloff, 172 AD2d 912, 567 NYS2d 960 (3d Dept 1991); see Adams v Elgart, 213 AD2d 436, 623 NYS2d 637 (2d Dept 1995) (doctor treating patient for delirium tremens in surgical unit and who knew of patient's pr.opensities owed no uty to 11U i:s working in th spita who wa s in jured by patient). Wjth res ect to psychiatr ic instit uti ons operated by the St ate, the Court of eals hash ,'d tha a third en,on injured as a resu " iegligent release decision is ot required to esta blish a specia ·elationsh ip between himse· and Ll1 · StaL as a condition to maintaining the claim, Schrempf v State, 66 NY2d 289, 496 NYS2d 973, 487 NE2d 883 (1985).

The Californ ia state 1 gislat ure has enacted a sJa ut Qte ctin g sych othe:rapists from " ailing to ,, arn o or. pr Lee ·om " a patient's violent behavior except where the patient *(or* a member of the atie nt's family) ha,; comm unicated to the sychotlie ·a ist a "serious threat ofi hysical viol enc against a reasonabl y idenLified vie.tin or victi ms," Ca Civ Code § 43.92(a) (modifying holding in Ta .. ;;_off v Regents of University of California, 17 Cal 3d 425, 131 Cal Rptr 14, 551 P2d 334 (1976)); see Ewing v Goldstein, 120 Cal App 4th 807, 15 Cal Rptr 3d 864 (2nd Dist 2004). TheTeare no caS("i in , or, in icating w 1et er this State' s couds will follow that rule.

B. Error in ;Judgment

Whe en.tal ealth provider conducts a proper examination and evaluation and choose a cours of treatment within a rang of i edi-

cally accepted choices, the rofessio ml judgment doctrine will insulate the provider fron liability , Park v Kovachevich , 116 AD3d 182 , 982 NYS2d 75 (1 s t Dept 2014); see Tkacheff v Roberts , 147 AD3d 1271 , 47 NYS3d 782 C3 d De t 2017). Thus, the decisiQn by physicians to r_elease a psychia tric patient from an institutional setting does not give rise o liability on the part of the physicians for harm done by the releas ed patient where t 1e decisio t release the patient constituted a exercise of professional J udgment, Schrempf v St ate , 66 NY2d 289, 496 NYS2d 973, 487 NE2d 883 (198 5); St. George v State, 283 App Div 245, 127 NYS2d 147 (3 d Dept 1954), affd, 308 NY 681, 124 NE2d 320 (19 54); Ozugowski v New York, 90 AD3d 875 , 935 NYS2d 613 (2d Dept 2011); Vera v Bet h Israe l Medical Hosp., 214 AD2d 384, 625 NYS2d 499 (1st Dept 1995); Smith v Fishkill Health-Related Center , Inc., 169 AD2d 309, 572 NYS2d 762 (3 d Dept 1991). In orfler fOT liability to attach, it must be shown that the decision to release the patient was "somethin g less than a professio nal medical det ermin ation," Gallagher v Cayuga Medical Cen ter , 151 AD3d 1349, 57 NYS3d 544 (3d Dept 2017); Ozugow ski v New Yor k, supra; Darren v Safier, 207 AD2d 473, 615 NYS2d 926 (2d Dept 1994); Bell v New York City Health & Hospitals Corp., 90 AD2d 270, 456 NYS2d 787 (2d Dept 1982); see Huntley v State, 62 NY2d 134, 476 NYS2d 99, 464 NE2d 467 (1984); Vera v Beth Israel Medical Hosp ., supra; Wilson v State, 112 AD2d 366, 491 NYS2d 818 (2d Dept 1985 , or that the psychia tris t's decisions were not the product of a careful evalua tion, Tkacheff v Roberts, supra; Gallagher v Cayuga Medical Cent er, su pra ; Ozugowski v New York, supr a, or a careful examination, Park v: ovachevich , supra. A concluso_ry cla im tha t the release decision constituted a departure from accepted standards of practice is not enough to pr.esent a triable issue, Smith v Fish kill Healfh-Related Center, Inc., supra; Mohan v Westchester County Medical Center, 145 AD2d 474, 535 NYS2d 431 (2d Dept 1988); see Weinreb v Rice, 266 AD2d 454, 698 NYS2d 862 (2d Dept 1999).

Likewise, with respect to the failure to hospifalize voluntary outpa tients, a doctor generally does not have sufficient control over the patient to justify imposition of liability, Engelhart v Orange, 16 AD3d 369, 790 NYS2d 704 (2d Dept 2005). The med·cal ecision to treat a mentally ill person as an outpatient, rather than as an inpatient, necessarily involves calculated risks and disagreements among experts and is not actionable if made consistent with accepted standards of practice . L ikewise, where the treating physician learns that a mental outpatient is not taking prescribed medication, a medical decision not to intervene is not negligence where made as an exercise of professional judgment , Sc h re mpf State, 66 NY2d 289, 496 NYS2d 973, 487 NE2d 883 (1985); Killeen v Stat e, 66 NY2d 850, 498 NYS2d 358, 489 NE2d 245 (1985) . How eve r, a physician's decision to cha nge an existing course of medication for a ment ally retarded patient may be found to be malpractice where expert testi mony supported a finding that the physician had dev i at e d from accepted practices, Leal v Simon, 147 AD2d 198, 542 NYS2d 328 (2d Dept 1989). An at tempted suicide by the patient may give rise to a claim against the psychiatrist if the decision to discharge thep at ient was not a mere "error in judgment" but the result of a fail-

ure to make a decision based upon a careful examination of the patient, Bell v New York City Health & Hospitals Corp., 90 AD2d 270, 456 NYS2d 787 (2d Dept 1982); see D'Avolio v Prado, 277 AD2d 877, 715 NYS2d 827 (4th Dept 2000) (reinstating claim based on defendant's failure to remove mentally ill patient from her home); Wilson v State, 112 AD2d 366, 491 NYS2d 818 (2d Dept 1985).

VIII. Negligence in Prescribing Medication

The Physicians' Desk Reference (PDR) is an annual encyclopedia of medications and their side effects, written and compiled by drug manufacturers, Spensieri v Lasky, 94 NY2d 231, 701 NYS2d 689, 723 NE2d 544 (1999); Martin v Hacker, 83 NY2d 1, 607 NYS2d 598, 628 NE2d 1308 (1993). The PDR is hearsay if offered into evidence to establish, by itself, the standard of care for a doctor in prescribing and monitoring a drug, Spensieri v Lasky, supra. The PDR may have some significance in identifying a doctor's standard of care in the administration and use of prescription drugs, but it is not the sole determinant. The information contained in the PDR can only be analyzed in the context of the medical condition of the patient. The testimony of an expert is necessary to interpret whether the drug in question presented an unacceptable risk for the patient in either its administration or the monitoring of its use. Therefore, a plaintiff may offer testimony concerning her expert's professional evaluation of defendant's conduct based, in part, on reliance on the PDR. However, the contents of the PDR may not be offered as the sole evidence of the standard of care in a medical malpractice action.

IX. Other Specific Instances of Malpractice

A physician may be liable for failure to terminate treatment upon discovery that it was adversely affecting the patient, Eisele v Malone, 2 AD2d 550, 157 NYS2d 155 (1st Dept 1956). If the physician has reason to doubt that he or she has sufficient competence to handle the case, the physician may be liable for failure to advise the patient to consult a more skillful physician or surgeon, Benson v Dean, 232 NY 52, 133 NE 125 (1921); see Annot: 35 ALR3d 349.

The physician's obligation includes not only diagnosis and treatment, but also the giving of proper instructions to the patient, Pike v Honsinger, 155 NY 201, 49 NE 760 (1898); Carpenter v Blake, 75 NY 12 (1878), and to hospital staff nurses and physicians who treat or care for the patient, Hollant v North Shore Hospital, Inc., 24 Misc2d 892, 206 NYS2d 177 (Sup 1960), affd, 17 AD2d 974, 235 NYS2d 372 (2d Dept 1962). The physician's duty also includes seeing to it that the physician's orders to hospital personnel are carried out, Toth v Community Hospital at Glen Cove, 22 NY2d 255, 292 NYS2d 440, 239 NE2d 368 (1968); Kless v Paul T.S. Lee, M.D., P.C., 19 AD3d 1083, 796 NYS2d 502 (4th Dept 2005). On the other hand, a hospital that has followed the physician's instructions as set forth in the pre-operative paperwork may not be shielded from liability if the patient has expressed doubts to a

hospital nurse about the site of the planned surgery. Thus, in Muskopf v Maron, 309 AD2d 1232, 764 NYS2d 741 (4th Dept 2003), the court held that a triable issue of fact as the ho?pital's liability was raised where a hospital nurse gave deposition testimony that she would customarilv speak to the treating physician if the patient raised such doubts ;nd plaintiffs expert testified, based in part on the nurse's state- ment, that the failure to follow that practice in plaintiffs case was a departure from accApted standards of care.

Although the federal Food and Drug Administration (FDA) has not approved the marketing and promotion of a prosthetic device for a particular condition, the off-label use of the device is not precluded and does not necessarily constitute malpractice, Sita v Long Island Jewish-Hillside Medical Center, 22 AD3d 743, 803 NYS2d 112 (2d Dept 2005). Thus, where there was evidence that the use of a pedicle screw system to treat plaintiffs back condition was considered the standard of care in the medical community, the off-label use of the product for that purpose was not actionable as malpractice. Further, since plaintiff was not participating in a clinical study, FDA regulations requiring disclosure of the product's regulatory status, see 21 USC § 360j(g); 21 CFR 50.25, were inapplicable, see Sita v Long Island Jewish-Hillside Medical Center, supra.

The physician's duty with respect to organ transplants runs to the patient; therefore, the donor of an organ has no claim against the doctor whose negligence necessitated the transplant, Moore v Shah, 90 AD2d 389, 458 NYS2d 33 (3d Dept 1982). For the same reason, a physician has no duty to a person holding the patient's health care proxy, and Public Health Law article 29-C, which authorizes such proxies, does not confer an independent right to recover, DeCintio v Lawrence Hosp., 299 AD2d 165, 753 NYS2d 26 (1st Dept 2002).

Where defendant-physician prescribed a course of treatment for plaintiff-patient's mental health problems, including medication and counseling, plaintiff may assert a cause of action for medical malpractice stemming from a sexual relationship between plaintiff and defendant on the theory, supported by expert evidence, that defendant failed to manage the "transference" phenomenon, i.e., phenomenon in which patient experiences near-psychotic attraction to treating physician, Dupree v Giugliano, 20 NY3d 921, 958 NYS2d 312, 982 NE2d 74 (2012).

For further specific examples of medical malpractice, see Comment to PJI 2:149(Il(A).

The following annotations are pertinent: 41 ALR2d 329 (X-ray); 54 ALI_{2d 200 (treatment of a fracture or dislocation); 54 ALR2d 273 (diagnosis of a fracture or dislocation); 55 ALR2d 461 (treating cancer); 57 ALR2d 379 (failure to attend diligently); 76 ALR2d 783 (surgery of the ear); 97 ALR2d 473 (burn cases); 99 ALR2d 599 (mental disease gener-

ally); 10 ALR3d 9 (foreign object left in patient); 10 ALR3d 1071 (liability of physician hired by employer or insurer); 14 ALR3d 967 (insertion of prosthetic device); 17 ALR3d 796 (heart attack while undergoing unrelated procedure); 19 ALR3d 825 (heart disease and diseases of the vascular system); 23 ALR3d 1334 (mistakenly administering drug); 27 ALR3d 906 (sterilization or birth control procedures); 28 ALR3d 1364 (diagnosis and treatment of tetanus); 30 ALR3d 988 (diagnosis and treatment of epilepsy); 63 ALR3d 1020 (doctor's duty to warn nurse or attendant); 76 ALR3d 890 (organ or tissue transplants); 79 ALR3d 915 (cancer diagnosis); 80 ALR3d 583 (secs. 3-7 superseded in part by 26 ALR5th 245) (limitation of recovery and submission of claim to pretrial panel); 89 ALR3d 32 (conditions of sexual or urinary organs); 94 ALR3d 317 (electroshock treatment); 8 ALR4th 464 (physical measures in treatment of mental disease); 19 ALR5th 563 (treatment of skin diseases); 30 ALR5th 571 (eyes); 48 ALR5th 575 (male urinary tract and related organs). As t0 malpractice by others than physicians, see Annot: 51 ALR2d 970 (nurse); 53 ALR2d 142 (sec. 2(c) superseded by 49 ALR4th 63) (anesthetist); 80 ALR2d 1278 (chiropodist); 83 ALR2d 7 (sec. 10 superseded in part by 11 ALR4th 748) (dentist); 58 ALR3d 590 (chiropractor's liability for failure to refer patient to medical practitioner); 58 ALR3d 828 (druggist's liability for suicide); 71 ALR4th 811 (veterinarian); 77 ALR4th 273 (chiropractors and other drugless practitioners); see 6 ALR3d 704 (validity of exculpatory contract); see also 73 ALR4th 24 (osteopath).

X. Expert Opinion Evidence

A. When Expert Opinion is Required

Ordinarily, expert medical opinion evidence is necessary to make out a prima facie case of malpractice, Koehler v Schwartz, 48 NY2d 807, 424 NYS2d 119, 399 NE2d 1140 (1979); Meiselman v Crown Heights Hospital, 285 NY 389, 34 NE2d 367 (1941); Gross v Friedman, 138 AD2d 571, 526 NYS2d 152 (2d Dept 1988), affd, 73 NY2d 721, 535 NYS2d 586, 532 NE2d 92 (1988); McGinn v Bellitti, 150 AD2d 967, 541 NYS2d 648 (3d Dept 1989) (alleged inadequate communication between dentist and oral surgeon); Mertsaris v 73rd Corp., 105 AD2d 67, 482 NYS2d 792 (2d Dept 1984) (failure of house physician to examine patient, while patient's own physician was en route); Gibson v D'Amico, 97 AD2d 905,470 NYS2d 739 (3d Dept 1983); Annot: 81 ALR2d 597; see also Elliott v Fay, 105 AD2d 512, 481 NYS2d 462 (3d Dept 1984) (proper to instruct jury to find for defendant if it rejected plaintiff's claim that operation was unnecessary since no expert opinion supported any alternative theory).

Notably, the rule in informed-consent actions is unequivocal. Under CPLR 4401-a, which applies to "cause[s] of action for medical malpractice based solely on lack of informed consent," such causes must be dismissed "if the plaintiff has failed to adduce expert medical testimony in support of the alleged qualitative insufficiency of the consent," see also McDermott v Manhattan Eye, Ear and Throat Hospital, 15 NY2d

O 255 NYS2d 65, 203 NE2d 469 (1964); Gardner v Wider, 32 AD3d 2 28 8 21 NYS2d 74 (1st Dept 2006); Evans v Holleran, 198 AD2d 472, 04' NYS2d 958 (2d Dept 1993); Keane v Sloan-Kettering Institute for Cancer Research, 96 AD2d 505, 464 N_YS2d 548 (_2d Dept 1983). This threshold requirement could not be satisfied by usmg defendant doctor as plaintiffs expert witness, Gardner v Wider, 32 AD3d 728, 821 NYS2d 74 (1st Dept 2006); see McDermott v Manhattan Eye, Ear and Throat Hospital 15 NY2d 20, 255 NYS2d 65, 203 NE2d 469 (1964), since it was unlikely'that defen ant doctor would test fy, in direct c ntradictioi: of his deposition testnnony, that he knowmgly acted without havmg obtained the patient's informed consent, Gardner v Wider, supra. Expert testimony concerning what a reasonable person would have done is not necessary to maintain a malpractice claim premised upon lack of informed consent, Hugh v Ofodile, 87 AD3d 508, 929 NYS2d 122 (1st Dept 2011); Andersen v Delaney, 269 AD2d 193, 703 NYS2d 714 (1st Dept 2000); Osorio v Brauner, 242 AD2d 511, 662 NYS2d 488 (1st Dept 1997); see James v Greenberg, 57 AD3d 849, 870 NYS2d 100 (2d Dept 2008).

The negligent failure to diagnose cancer is not a matter within the ken of a layperson and requires expert testimony, Fiore v Galang, 64 NY2d 999,489 NYS2d 47,478 NE2d 188 (1985); Lyons v McCauley, 252 AD2d 516, 675 NYS2d 375 (2d Dept 1998). Expert testimony is also required on the issue of causal relation unless the matter is within the experience and observation of the ordinary juror, Tatta v State, 19 Z AD3d 817, 797 NYS2d 588 (3d Dept 2005) (whether and to what extent :; lack of nutritional supplement contributed to deterioration of plaintiffs health and immune system is outside the ordinary experience and knowledge of layperson); Giambona v Stein, 265 AD2d 775, 697 NYS2d 399 (3d Dept 1999) (expert failed to demonstrate that defendant's alleged deviation delayed diagnosis of Hodgkin's disease, resulted in different treatment for plaintiff, or adversely affected his physical condition or ultimate prognosis); Duffen v State, 245 AD2d 653, 665 NYS2d 978 (3d Dept 1997) (whether and to what extent medications contributed to claimant's condition is not matter of common knowledge that fact finder can decide in absence of expert testimony); Prete v Rafla-Demetrious, 224 AD2d 674, 638 NYS2d 700 (2d Dept 1996); see Zak v Brookhaven Memorial Hosp. Medical Center, 54 AD3d 852, 863 NYS2d **821** (2d Dept 2008) (although registered nurse qualified to give expert opinion that administration of heparin was departure from accepted standards of care, nurse not qualified to opine that negligent act was substantial cause of patient's injury).

Failure to adduce expert testimony as to causation may result in the failure to make out a prima facie case, see Park v Kovachevich, 116 3d 182, 982 NYS2d 75 (1st Dept 2014) (conclusions that are speculative or unsupported by evidentiary foundation insufficient to withstand summary judgment); Prete v Rafla-Demetrious, 224 AD2d 674, 638 NYS2d 700 (2d Dept 1996); Guillari v Gormley, 142 AD2d 927, 530 NYS2d 353 (4th Dept 1988); Kennedy v Peninsula Hosp. Center, 135 AD2d 788, 522 NYS2d 671 (2d Dept 1987). On the other hand, the mere

offering of expert opinion on proximate cause does not suffice absent a showing of the requisite nexus between the malpractice allegedly committed and plaintiffs injuries, Koeppel v Park, 228 AD2d 288, 644 NYS2cl 210 (1st Dept 1996); see Kaffka v New York Hosp., 228 AD2d 332, 644 NYS2d 243 (1st Dept 1996). Where causation is not an issue, testimony by a medical expert called by plaintiff that provides a basis for a finding that defendant's doctors deviated from accepted medical practice establishes a prima facie case, Brown v Ne\v York, 47 NY2d 927, 419 NYS2d 491, 393 NE2d 486 (1979); however, expert opinion that there was an error of professional medical judgment does not, Centeno v New York, 48 AD2d 812, 369 NYS2d 710 (1st Dept 1975), affd, 40 NY2d 932, 389 NYS2d 837, 358 NE2d 520 (1976).

In dealing with a motion to dismiss based on the fact that the testimony of plaintiffs experts is insufficient to establish causation, the court should, in the absence of prejudice, allow plaintiff to reopen and offer further expert testimony, see Harding v Noble Taxi Corp., 182 AD2d 365, 582 NYS2d 1003 (1st Dept 1992); see also Benjamin v Desai, 228 AD2d 764, 643 NYS2d 717 (3d Dept 1996); Lagana v French, 145 AD2d 541, 536 NYS2d 95 (2d Dept 1988); Kennedy v Peninsula Hosp. Center, 135 AD2d 788, 522 NYS2d 671 (2d Dept 1987).

While, as a general rule, expert medical evidence is necessary in an action to recover damages for negligent medical treatment, Martuscello v Jensen, 134 AD3d 4, 18 NYS3d 463 (3d Dept 2015) (expert evidence is necessary part of medical malpractice action), such evidence is not required where the allegations of lack of due care can be determined by the trier of fact on the basis of common knowledge or the action sounds in ordinary negligence, Reardon v Presbyterian Hosp. in City of New York, 292 AD2d 235, 739 NYS2d 65 (1st Dept 2002). Thus, where plaintiff alleged that the physician was negligent in helping plaintiff alight from an examination table, the crux of the allegations were the physician's failure to exercise ordinary and reasonable care to insure that no unnecessary harm befell plaintiff, and, consequently, no expert medical evidence was required to establish plaintiffs prima facie case, id; see Kerker by Kerker v Hurwitz, 163 AD2d 859, 558 NYS2d 388 (4th Dept 1990).

Opinion evidence is also not necessary when common sense and ordinary experience demonstrate that the condition is incompatible with competent treatment. Thus, opinion testimony is not necessary where a psychiatrist beats his patient in the course of treatment, Hammer v Rosen, 7 NY2d 376, 198 NYS2d 65, 165 NE2d 756 (1960), or engages in sexual intercourse with the patient as part of "therapy," Roy v Hartogs, 85 Misc2d 891, 381 NYS2d 587 (AppT 1976), or a patient with known suicidal tendencies is left alone near an opened unscreened window, Wright v State, 31 AD2cl 421, 300 NYS2cl 153 (4th Dept 1969), or a dentist extracts the wrong tooth, Griffin v Norman, 192 NYS 322 (AppT 1922), (nor), or a part of a broken needle is left at the operative site, Benson v Dean, 232 NY 52, 133 NE 125 (1921), or a young boy is sent home from the hospital, over the protest of his parents, with both

legs in casts, pus draining throng wi?-dows in he ca?ts, the boy running a high temperature and suffermg mtense pam, Me1selman v Crown Heights Hospital, 285 **NY** 389, 34 NE2d 367 (1941). However, where the defendant physician has presented expert evidence to rebut the inference thus arising, plaintiff may be required to come forward with expert evidence, Benson v Dean, supra; see Morwin v Albany Hospital, 7 AD2d 582, 185 NYS2d 85 (3d Dept 1959); see also Shaw v Tague, 257 NY 193, 177 NE 417 (1931); Miller by Miller v Albany Medical Center Hosp., 95 AD2d 977, 464 NYS2d 297 (3d Dept 1983).

With respect to other forms of evidence aimed at establishing what constitutes due care and accepted practice, it is improper to allow the jury to view a videotape of defendant performing a surgical procedure similar to the one at issue upon a different patient, Glusaskas v John E. Hutchinson, III, M.D., P.C., 148 AD2d 203, 544 NYS2d 323 (1st Dept 1989).

Regarding the use of habit evidence in medical malpractice actions, see PJI 1:71.

In Spensieri v Lasky, 94 NY2d 231, 701 NYS2d 689, 723 NE2d 544 (1999), the Court of Appeals stated that the Physician's Desk Reference (PDR) "may have some significance in identifying a doctor's standard of care in the administration and use of prescription drugs, but is not the sole determinant." Thus, the PDR is inadmissible as hearsay and the testimony of an expert is necessary to interpret whether the drug in question presented an unacceptable risk for the patient in either its administration or the monitoring of its use. Other reliable medical reference materials may be admissible if used to explain a physician's decision-making process and not as per se evidence of the standard of care, Hinlicky v Dreyfuss, 6 NY3d 636, 815 NYS2d 908, 848 NE2d 1285 (2006) (approving use of algorithm, table and chart indicating cardiac risk "stratification" for non-cardiac surgical procedures, which were published by American College of Cardiology, where material offered to illustrate physician's decision-making methodology); see Halls v Kiyici, 104 AD3d 502, 960 NYS2d 423 (1st Dept 2013) (clinical guidelines of American Gastroenterological Association regarding recommended frequency of colonoscopies for patients were admissible as mere recommendations regarding treatment; trial court erred in not giving specific instruction to jury that guidelines were not the same as standards of care and that jury was to make its determination on the appropriate standard of care based on particular circumstances of case, not guidelines alone). Whether such out-of-court statements may become admissible evidence solely because of their use as a basis for an expert's testimony remains an open question in New York, id. In Ellis v Eng, 70 AD3d 887, 895 NYS2d 462 (2d Dept 2010), the court held that clinical practice guidelines may inform an expert's opinion, although they are generally not themselves conclusive.

B. Who May Testify As an Expert

An expert witness in a medical malpractice case must possess the

requisite skill, training, knowledge, or experience to insure that an opinion rendered is reliable, see LaMarque v North Shore University Hosp., 227 AD2d 594, 643 NYS2d 221 (2d Dept 1996) (plaintiffs witness, who was not medical doctor, failed to show her qualifications to render expert opinion as to appropriate standards of medical and psychiatric care). For a comprehensive discussion of this subject, see Comment to PJI l:90(I)(B).

A medical expert, if sufficiently knowledgeable, does not have to be a specialist in the relevant field to testify as an expert in a malpractice action against a specialist, Michalko v DeLuccia, 187 AD3d 1365, 133 NYS3d 122 (3d Dept 2020); Leavy v Merriam, 133 AD3d 636, 20 NYS3d 117 (2d Dept 2015); Frank v Smith, 127 AD3d 1301, 6 NYS3d 754 (3d Dept 2015); Williams v Halpern, 25 AD3d 467, 808 NYS2d 68 (1st Dept 2006); Bodensiek v Schwartz, 292 AD2d 411, 739 NYS2d 405 (2d Dept 2002); Forte v Weiner, 200 AD2d 421, 606 NYS2d 220 (1st Dept 1994); Farkas v Saary, 191 AD2d 178, 594 NYS2d 195 (1st Dept 1993); Annot: 31 ALR3d 1163. The fact that two doctors do not practice in the same specialty goes to the weight to be accorded to the testimony, not its admissibility, Michalko v DeLuccia, supra. Thus, an expert with board certification in internal medicine may be qualified to testify even if the expert does not expressly state that he or she possesses the requisite background and knowledge regarding emergency-room medicine, Ocasio-Gary v Lawrence Hosp., 69 AD3d 403, 894 NYS2d 11 (1st Dept 2010), and a cardiologist may be qualified to offer expert opinion on the standards of care of a general surgeon and an anesthesiologist, Leavy v Merriam, supra. An oncologist board certified in internal medicine was qualified to render an opinion as to the standard of care for a primary care physician regarding an alleged failure to diagnose cancer, Goldschmidt v Cortland Regional Medical Center, Inc., 190 AD3d 1212, 141 NYS3d 522 (3d Dept 2021). However, where a physician gives an opinion outside of his or her area of specialization, a foundation must be laid tending to support the reliability of the opinion, see Keane v Dayani, 178 AD3d 797, 114 NYS3d 93 (2d Dept 2019) (although radiologist was qualified to render opinion as to whether fracture was detectable on X-ray, he failed to lay foundation to render orthopedic opinion as to whether defendant's failure to diagnose fracture caused plaintiffs subsequent injuries); Ozugowski v New York, 90 AD3d 875, 935 NYS2d 613 (2d Dept 2011) (absent proper foundation, internist and cardiologist failed to raise triable issue of fact as to psychiatric treatment); Mustello v Berg, 44 AD3d 1018, 845 NYS2d 86 (2d Dept 2007) (general surgeon failed to raise a triable issue of fact as to gastroenterological treatment administered to plaintiff); Behar v Coren, 21 AD3d 1045, 803 NYS2d 629 (2d Dept 2005) (opinion of plaintiffs' expert, a pathologist, submitted in opposition to defendants' motion for summary judgment insufficient to raise issue of fact regarding efficacy of surgical and gastroenterological treatment where expert failed to lay foundation for his asserted familiarity with applicable standards of care); Postlethwaite v United Health Services Hospitals, Inc., 5 AD3d 892, 773 NYS2d 480 (3d Dept 2004) (physician whose expertise was confined to anesthesiology and pharmacology was properly precluded from testifying as to whether

geon and gastroenterologist correctly diagnosed and treated decedent u:ed upon accepted diagnostic practices in their respective fields). A ysiatrist may render an opinion with respect to a plaintiffs need for p rgery Pares v La Prade, 266 AD2d 852, 697 NYS2d 413 (4th Dept 99). However, a chiropractor is not licensed to interpret X-rays for the detection of fractures and is not competent to render an opinion in that regard, Machac v Anderso.n, 261 AD2d 81 , 690 _NYS2d 762 (3 Dept 1999); see Education Law_§ 6551(2)(a). Nor 1s a chiropra?tor quahfie? to render an opinion regardmg the standard of care applicable to spmal fusion surgery, Young v Sethi, 188 AD3d 1339, 134 NYS3d 571 (3d Dept 2020).

Accepted standards of practice for the defendant in question are properly the subject of expert testimony, but, where there is a conflict in testimony with regard to acceptable medical standards, the jury must be left to decide what that standard is, see Ward v Kovacs, 55 AD2d 391, 390 NYS2d 931 (2d Dept 1977).

The deposition of one authorized to practice medicine may be offered by any party for all purposes, including as evidence in chief, without the necessity of showing unavailability or special circumstances, CPLR 3117(a)(4).

Plaintiff may compel defendant doctor to testify as an expert at trial, McDermott v Manhattan Eye, Ear and Throat Hospital, 15 NY2d **20,** 255 NYS2d 65, 203 NE2d 469 (1964); Braun v Ahmed, 127 AD2d 418, 515 NYS2d 473 (2d Dept 1987), and at an examination before trial, Johnson v New York City Health & Hospitals Corp., 49 AD2d 234, 374 NYS2d 343 (2d Dept 1975); see Hardter v Semel, 197 AD2d 846, 602 NYS2d 259 (4th Dept 1993); Lingener v State Farm Mut. Auto. Ins. Co., 195 AD2d 838, 600 NYS2d 395 (3d Dept 1993), even though plaintiff lias other expert witnesses available, Segreti v Putnam Community H9spital, 88 AD2d 590, 449 NYS2d 785 (2d Dept 1982). A number of 13.rly cases held that use of an opponent's expert is not permitted, Magliqne v Cunard S.S. Co., 30 AD2d 784, 291 NYS2d 604 (1st Dept 1968); ,Q:11oj v New York, 29 AD2d 404,288 NYS2d 368 (1st Dept 1968); Gugliano {Levi, 24 AD2d 591, 262 NYS2d 372 (2d Dept 1965). However, an ex. pert who examines a party during pretrial proceedings and whose ort rep is disclosed to all parties may be called by any adverse party to testify to the substance of the report, Gilly v New York, 69 NY2d 509, **q}6** NYS2d 166, 508 NE2d 901 (1987); see also Onondaga v Hiawatha I>laza Associates, 195 AD2d 1009, 600 NYS2d 573 (4th Dept 1993)· I,iddy v Frome, 85 AD2d 716, 445 NYS2d 841 (2d Dept 1981).

As a general rule, when the proposed opinion testimony of a wit- ss who is not a medical doctor is offered against a defendant who is a .edical doctor, the question of the course of treatment the defendant ould have undertaken is beyond the witness's professional and <iucational experience and is not competent opinion evidence on the issue of negligence, Parese v Shankman, 300 AD2d 1087, 752 NYS2d 503

(4th Dept 2002); Jordan v Glens Falls Hosp., 261 AD2d 666, 689 NYS2d 538 (3d Dept 1999); see Elliot v Long Island Home, Ltd., 12 AD3d 481, 784 NYS2d 615 (2d Dept 2004); LaMarque v North Shore University Hosp., 227 AD2d 594, 643 NYS2d 221 (2d Dept 1996). However, where the defendant physician and a non-medical practitioner such as a podiatrist are both licensed to treat the type of injury sustained by the plaintiff, the podiatrist's opinion testimony should not be precluded without consideration of his or her professional and educational experience, Escobar v Allen, 5 AD3d 242, 774 NYS2d 28 (1st Dept 2004); Parese v Shankman, supra.

C. Required Content of Expert Testimony

The expert's opinion, as a whole, must reflect an acceptable level of professional certainty, Matott v Ward, 48 NY2d 455, 423 NYS2d 645, 399 NE2d 532 (1979); Gross v Friedman, 138 AD2d 571, 526 NYS2d 152 (2d Dept 1988), affd, 73 NY2d 721, 535 NYS2d 586, 532 NE2d 92 (1988); see Callistro ex rel. Rivera v Bebbington, 94 AD3d 408, 941 NYS2d 137 (1st Dept 2012), affd, 20 NY3d 945, 958 NYS2d 319, 982 NE2d 81 (2012); Duffen v State, 245 AD2d 653, 665 NYS2d 978 (3d Dept 1997). Although experts often employ the phrase "reasonable degree of medical certainty" to describe the strength of their conclusions, use of that formula is not required as long as the witness's "whole opinion" reflects a degree of confidence sufficient to satisfy accepted standards of reliability, Matott v Ward, supra; Jones v Davis, 307 AD2d 494, 763 NYS2d 136 (3d Dept 2003); see Rosario v Our Lady of Consolation Nursing and Rehabilitation Care Center, 186 AD3d 1426, 128 NYS3d 906 (2d Dept 2020) (expert's opinion rendered with "fair" degree of medical certainty sufficient to raise issue of fact); see Viera v Khasdan, 185 AD3d 405, 126 NYS3d 462 (1st Dept 2020) (where dentist did not provide accepted standards of practice, opinion concluding no deviation was insufficient). If an expert's testimony on direct is somewhat general, the problem may be cured if the expert's testimony on cross-examination and re-direct is more specific and sufficient to establish the requisite certainty, Nicholas v Reason, 84 AD2d 915,447 NYS2d 55 (4th Dept 1981); Ward v Kovacs, 55 AD2d 391, 390 NYS2d 931 (2d Dept 1977).

In contrast to the flexible approach reflected in Matott v Ward, 48 NY2d 455, 423 NYS2d 645, 399 NE2d 532 (1979), it has been held that, in order to establish a prima facie case based solely upon expert testimony, the expert must expressly state that defendant's conduct deviated from the required standard of care; merely reciting the areas of defendant's treatment with which the expert disagrees is insufficient, Salzman v Alan S. Rosell, D.D.S., P.C., 129 AD2d 833, 132 AD2d 807, 513 NYS2d 846 (3d Dept 1987); see Sohn v Sand, 180 AD2d 789, 580 NYS2d 458 (2d Dept 1992); see also Stuart by Stuart v Ellis Hosp., 198 AD2d 559, 603 NYS2d 212 (3d Dept 1993). However, in Knutson v Sand, 282 AD2d 42, 725 NYS2d 350, the court held the expert testimony sufficient although the expert did not use particular or special combination of words or phrases because an inference could be drawn from the expert's testimony, without the need for jury speculation, that defendant's conduct was a deviation from the requisite standard of care.

Generally, as to expert testimony, see PJI 1:90. For a discussion of the disclosure requirements of CPLR 3101(d)(l)(i), see the Comment to pJI 1:90, IHA

XI. Res Ipsa Loquitur

Where the actual cause of an accident is unknown, the doctrine of res ipsa loquitur permits the inference of negligence to be drawn, in a proper case, from the happeni1:-g of the event and defendant's relationship to it, Kambat v St. Francis Hosp., 89 NY2d 489, 655 NYS2d 844, 678 NE2d 456 (1997); see States v Lourdes Hosp., 100 NY2d 208, 762 NYS2d 1, 792 NE2d 151 (2003). The inference arises from "our everyday experience" and a recognition that "some accidents by their very nature would ordinarily not happen without negligence," Dermatossian v New York City Transit Authority, 67 NY2d 219, 501 NYS2d 784, 492 NE2d 1200 (1986). For a discussion of the elements of the res ipsa doctrine, see PJI 2:65.

Res ipsa loquitur is particularly applicable in medical malpractice cases in which an injury to anesthetized patient occurs during surgery in an area remote from the operative site, States v Lourdes Hosp., 100 NY2d 208, 762 NYS2d 1, 792 NE2d 151 (2003); Rosales-Rosario v Brookdale University Hosp. and Medical Center, 1 AD3d 496, 767 NYS2d 122 (2d Dept 2003); Ceresa v Karakousis, 210 AD2d 884, 620 NYS2d 646 (4th Dept 1994); Hill v Highland Hosp., 142 AD2d 955, 530 NYS2d 381 (4th Dept 1988); Mack v Lydia E. Hall Hosp., 121 AD2d 431,503 NYS2d 131 (2d Dept 1986); Fogal v Genesee Hospital, 41 AD2d 468, 344 NYS2d 552 (4th Dept 1973); see Martinez v Adelphi Hospital, 21 AD2d 675, 249 NYS2d 1001 (2d Dept 1964) (because plaintiff did not have to prove exact cause, it was error to charge that verdict must be for defendant if jury was "in doubt as to the exact way in which plaintiff contracted" disease). Nonetheless, the application of the res ipsa doctrine is somewhat different in medical malpractice cases, where the common knowledge and everyday experience of lay jurors may not be sufficient to support the inference of negligence, Kambat v St. Francis Hosp., 89 NY2d 489, 655 NYS2d 844, 678 NE2d 456 (1997). There are some medical and surgical errors, such as when an physician leaves a sponge or implement inside the patient, that may give rise to an inference of negligence based solely on the common experience of lay persons, Kambat v St. Francis Hosp., supra. However, there are also situations in which expert testimony is necessary to provide the basis for concluding that the event would not have occurred in the absence of negligence, States v Lourdes Hosp., supra. In such cases, New York, like the majority of states that have considered the question, permit the use of expert testimony to bridge the gap, States v Lourdes Hosp., supra (plaintiffs right arm injured, allegedly as a result of anesthesiologist's procedure, during course of surgery to remove ovarian cyst); Mattison v OrthopedicsNY, LLP, 189 AD3d 2025, 137 NYS3d 814 (3d Dept 2020) (injury to distal sciatic nerve following total knee revision); Smith v Sommer, 189 AD3d 06, 137 NYS3d 99 (2d Dept 2020) (res ipsa charge properly given to Jury where plaintiffs expert testified that, in first time fundoplication

procedure, injury to vagus nerve does not normally occur if physician performs the proper surgical sequence).

For examples of the application of res ipsa in medical malpractice cases, see Benson v Dean, 232 NY 52, 133 NE 125 (1921); George v New York, 22 AD2d 70, 253 NYS2d 550 (1st Dept 1964), affd, 17 NY2cl 561, 268 NYS2d 325, 215 NE2cl 507 (1966); Mattison v OrthopedicsNY, LLP, 189 AD3d 2025, 137 NYS3d 814 (3d Dept 2020); Smith v Sommer, 189 AD3d 906, 137 NYS3d 99 (2d Dept 2020); Hawkins \' Brooklyn-Caledonian Hosp., 239 AD2cl 549, 658 NYS2d 375 (2d Dept 1997); Schoch v Dougherty, 122 AD2d 467, 504 NYS2d 855 (3d Dept 1986); Cornacchia v Mount Vernon Hosp., 93 AD2d 851, 461 NYS2d 348 (2d Dept 1983); Pipers v Rosenow, 39 AD2d 240, 333 NYS2d 480 (2d Dept 1972); Matlick v Long Island Jewish Hospital, 25 AD2d 538, 267 NYS2d 631 (2d Dept 1966); Robbins v Nathan, 189 App Div 827, 179 NYS 281 (2d Dept 1919); PJI 2:65; Annot: 82 ALR2d 1262; see also Kuhns v Millard Fillmore Hospitals, 296 AD2d 839, 744 NYS2d 787 (4th Dept 2002) (application of res ipsa loquitur in support of negligence claim against hospital).

XII. Causation

The physician's act must be a substantial factor in bringing about the injury for there to be liability, Wild v Catholic Health System, 21 NY3d 951, 969 NYS2d 846, 991 NE2d 704 (2013) (citing PJI) (medical malpractice plaintiff must generally show that defendant's negligence was a substantial factor in producing the injury); Oakes v Patel, 20 NY3d 633, 965 NYS2d 752, 988 NE2d 488 (2013); Clune v Moore, 142 AD3d 1330, 38 NYS3d 852 (4th Dept 2016); Goldberg v Horowitz, 73 AD3d 691, 901 NYS2d 95 (2d Dept 2010) (plaintiff must offer sufficient evidence from which reasonable person might conclude that it wasmore probable than not that defendant's deviation was a substantial factor in causing injury); Candia v Estepan, 289 AD2d 38, 734 NYS2d 37 (1st Dept 2001) (plaintiff must demonstrate that, absent defendant's malpractice, there was a substantial possibility that decedent could have been cured or that life could have been prolonged); Kenigsberg v Cohn, 117 AD2d 652, 498 NYS2d 390 (2d Dept 1986) (plaintiff must show that the conduct depriving plaintiff of a better chance of success more probably than not resulted in injury); see Koehler v Schwartz, 48 NY2d 807, 424 NYS2d 119, 399 NE2d 1140 (1979) (no issue of fact on causation where no evidence that doctor's omission caused or enhanced alleged injury). In a medical malpractice action, causation is relevant both to liability and to damages, Oakes v Patel, 20 NY3d 633, 965 NYS2d 752, 988 NE2d 488 (2013). In such an action, liability cannot be established unless it is shown that the defendant's malpractice was a substantial factor in causing the plaintiffs injury, id. Even where liability is established, the plaintiff may recover only for those injuries and related damages proximately caused by the malpractice, id. Where the plaintiff had a pre-existing condition, the plaintiff is not entitled to recover for injuries that the pre-existing condition would have caused even in the absence of malpractice, id.

For a charge and comment on proximate cause, see PJI 2:70; for a charge and comment on concurrent causes (i.e., where two or more independent, negligent acts or omissions of two or more parties are alleged to have caused the same injury to plaintiff), see PJI 2:71; for a charge and comment on intervening causes (i.e., where defendant is negligent, but it is alleged that the act or omission of plaintiff or a third-party caused plaintiffs injury), see PJI 2:72.

A. Loss of Chance

In a medical malpractice action, a plaintiff may, under certain circumstances, pursue a theory of loss of chance. Although all four Departments recognize the loss of chance theory, the Court of Appeals has not squarely addressed the issue, see Wild v Catholic Health System, 21 NY3d 951, 969 NYS2d 846, 991 NE2d 704 (2013). The contours of the theory are the subject of developing appellate case law and, therefore, there is no loss of chance pattern charge.

In Kallenberg v Beth Israel Hospital, 45 AD2d 177, 357 NYS2d 508 (1st Dept 1974), affd, 37 NY2d 719, 374 NYS2d 615, 337 NE2d 128 (1975), regarded as one of the first loss of chance cases in New York, there was expert testimony that decedent's chance of survival, absent the malpractice, was as much as 20 to 40%. The record on appeal indicates that the trial court charged the jury to "decide whether there was a substantial possibility that [decedent] would have survived if she received proper treatment." The Appellate Division upheld a verdict for plaintiff, finding that, on the issue of proximate cause, such evidence was sufficient to support the verdict. The Court of Appeals affirmed without opinion, id.

Under the loss of chance doctrine, a plaintiff may establish that a defendant's negligence was a substantial factor in bringing about injury, where the defendant's conduct diminished the plaintiffs chance of a better outcome or increased the injury, Flaherty v Fromberg, 46 AD3d 743, 849 NYS2d 278 (2d Dept 2007); see Mortensen v Memorial Hosp., 105 AD2d 151, 483 NYS2d 264 (1st Dept 1984). The plaintiff must demonstrate that the possibility or chance of a better outcome or a decreased injury was substantial, Mortensen v Memorial Hosp., supra. A plaintiff need not quantify the extent to which the defendant's negligence decreased the chance of a better outcome, Hernandez v New York City Health and Hosp. Corp., 129 AD3d 532, 11 NYS3d 588 (1st Dept 2015); King v St. Barnabas Hosp., 87 AD3d 238, 927 NYS2d 34 (1st Dept 2011); Semel v Guzman, 84 AD3d 1054, 924 NYS2d 414 (2d Dept 2011). The mere possibility that the plaintiff would have had a better chance for a better outcome or a decreased injury is insufficient to establish proximate cause, Mortensen v Memorial Hosp., supra; see Kimball v Scors, 59 AD2d 984, 399 NYS2d 350 (3d Dept 1977). In Neyman v Doshi Diagnostic Imaging Services, P.C., 153 AD3d 538, 59 NYS3d 456 (2d Dept 2017), the court held that a plaintiff need not establish that, but for a defendant doctor's malpractice, the patient would have been cured. Rather, a plaintiff need only show a diminished chance at a better

outcome or an increased injury, such as a substantially improved chance for a prolonged life or reduced suffering, id.

Cases where the evidence at trial regarding loss of chance was legally sufficient for the jury to find proximate cause include: Daniele v Pain Management Center of Long Island, 168 AD3d 672, 91 NYS3d 496 (2d Dept 2019) (evidence was legally sufficient to establish defendants' failure to timely diagnose and treat infection and resulting abscesses deprived plaintiff of substantial chance for better outcome); Clune v Moore, 142 AD3d 1330, 38 NYS3d 852 (4th Dept 2016) (plaintiff presented legally sufficient evidence that defendants' negligence deprived decedent of substantial possibility of surviving bowel perforation and resultant peritonitis); Wolf v Persaud, 130 AD3d 1523, 14 NYS3d 601 (4th Dept 2015) (evidence legally sufficient where plaintiffs expert testified that defendant's failure to order timely MRI study of plaintiffs iliac vein diminished her chance of better outcome or increased her injury); Semel v Guzman, 84 AD3d 1054, 924 NYS2d 414 (2d Dept 2011) (defendant's failure to communicate that instruments had been placed in decedent's throat delayed diagnosis of perforated esophagus); Goldberg v Horowitz, 73 AD3d 691, 901 NYS2d 95 (2d Dept 2010) (where defendant failed to recognize that EKG performed in his office indicated decedent was suffering from ischemia at rest, evidence was sufficient to infer decedent would have had better outcome if defendant had immediately referred him to hospital emergency room); Dockery v Sprecher, 68 AD3d 1043, 891 NYS2d 465 (2d Dept 2009) (evidence established defendant's failure to recommend surgery be performed within 24 hours diminished plaintiffs chance for better outcome or increased his injuries); Alicea v Ligouri, 54 AD3d 784, 864 NYS2d 462 (2d Dept 2008) (delayed diagnosis of chorioamnionitis and gestational diabetes contributed to plaintiffs development of cerebral palsy); Imbierowicz v A.O. Fox Memorial Hosp., 43 AD3d 503, 841 NYS2d 168 (3d Dept 2007) (evidence sufficient to establish that, if defendant doctor had ordered appropriate test be done right away, it could have been conducted, accurate diagnosis of aortic dissection could have been made, and corrective surgery begun before decedent suffered cardiac arrest); Flaherty v Fromberg, 46 AD3d 743, 849 NYS2d 278 (2d Dept 2007) (delay in performing cesarean section diminished infant plaintiffs chance for better outcome); Borawski v Huang, 34 AD3d 409, 824 NYS2d 362 (2d Dept 2006) (evidence sufficient to establish that earlier diagnosis would have afforded decedent greater chance of survival where plaintiffs expert opined that defendant's deviation reduced plaintiffs chances of survival from 65-90% chance of being cured, to only 10% chance of long-term survival); Wong v Tang, 2 AD3d 840, 769 NYS2d 381 (2d Dept 2003) (testimony of plaintiffs expert that defendant's failure to call ambulance was substantial factor in causing decedent's death was sufficient to demonstrate that some diminution in chance of survival had occurred); Cavlin v New York Medical Group, P.C., 286 AD2d 469, 730 NYS2d 337 (2d Dept 2001) (failure to perform chest x-ray, which would had revealed cancerous mass, proximate cause of decedent's death sufficient to show it was probable that some diminution in chance of survival occurred); Jump v Facelle, 275 AD2d 345, 712

NYS2d 162 (2d Dept 2000) (evidence of causation was legally sufficient where plaintiffs expert testified negligent delay of 11 to 12 hours in performing sll:rgery increas_ed harm to :Iecedent and decreased his chance of survival); see Gagliardo v Jamaica Hosp., 288 AD2d 179, 732 NYS2d 353 (2d Dept 2001) (where plaintiffs' theory was that earlier performed sonogram would have detected testicular cancer that subsequently caused decedent' death, trial court erred in denying plaintiffs' request for jury ins!ructioi: regarding deprivation of substantial chance for cure); Canmzzo v W1Jeyasekaran, 259 AD2d 960, 689 NYS2d 315 (4th Dept 1999) (court erred in failing to instruct jury on loss of chance doctrine where plaintiffs theory was that defendants' negligence deprived her of substantial possibility of having functioning kidney).

Cases where the evidence of loss of chance was sufficient to raise a triable issue of fact include: Holland v Cayuga Medical Center at Ithaca, Inc., 195 AD3d 1292 (3d Dept 2021) (plaintiffs expert opined that nurse's error in programming pump, which resulted in plaintiff receiving improper dose of medication, deprived plaintiff of substantial possibility of better outcome, up to and including a 100% recovery); Neyman v Doshi Diagnostic Imaging Services, P.C., 153 AD3d 538, 59 NYS3d 456 (2d Dept 2017) (plaintiff raised triable issue of fact through expert opinion that, had chemotherapy been instituted earlier, decedent's chances for recovery, or at least for prolonging her life and reducing her suffering, would have been substantially improved); D'Orta v Margaretville Memorial Hosp., 154 AD3d 1229, 62 NYS3d 620 (3d Dept 2017) (issue of fact where plaintiffs expert opined that defendant's failure to administer drug to plaintiff after he sustained stroke deprived him of "a substantial possibility for a better long-term neurological outcome, meaning a substantial chance for improved speech, movement and cognition"); Hernandez v New York City Health and Hosp. Corp., 129 AD3d 532, 11 NYS3d 588 (1st Dept 2015) (issue of fact as to whether plaintiffs partially severed finger could be salvaged where plaintiffs expert opined that viability of finger diminished with every passing hour, and that amputation could have been avoided had surgery occurred within 4-6 hours of injury, rather than 16-18 hours); King v St. Barnabas Hosp., 87 AD3d 238, 927 NYS2d 34 (1st Dept 2011) (issue of fact as to whether first responders' negligent failure to follow resuscitation protocol diminished decedent's chance for recovery).

Cases where the evidence of loss of chance was insufficient include: Lopes v Lenox Hill Hospital, 172 AD3d 699, 99 NYS3d 384 (2d Dept 2019) (verdict in favor of plaintiff properly set aside where there was no evidence that defendant OB/GYN would have changed his care and treatment of plaintiff if radiologist's interpretation of ultrasound had been communicated to him in timely manner); Allen v Uh, 82 AD3d 1025, 919 NYS2d 179 (2d Dept 2011) (citing PJI) (no rational interpretation of evidence at trial suggested that defendant doctor's negligence deprived plaintiff of substantial chance for cure); Candia v Estepan, 289 AJ?2d 38, 734 NYS2d 37 (1st Dept 2001) (in opposition to defendant's evidence that mesothelioma is, for all practical purposes, incurable,

plaintiff failed to raise issue of fact as to whether, absent defendant's failure to timely diagnose, there was substantial possibility that decedent could have been cured or that her life could have been prolonged); Brown v State, 192 AD2d 936, 596 NYS2d 882 (3d Dept 1993) (affirming dismissal of claim, after trial, where State's witnesses testified that delay in diagnosis and treatment of claimant's tumor would not have resulted in better outcome).

In Wild v Catholic Health System, 85 AD3d 1715, 927 NYS2d 250 (4th Dept 2011) (citing PJI), affd, 21 NY3d 951, 969 NYS2d 846, 991 NE2d 704 (2013), based on evidence presented, the court concluded that plaintiffs "omission" theory should be subject to the trial court's loss of chance charge, while plaintiffs "commission" theory should be subject to PJI 2:70's general proximate cause charge. On appeal, the Court of Appeals determined that the defendant's challenge to the viability of the loss of chance doctrine was not preserved for appellate review and, therefore, was not properly before it. The only issue preserved was whether the trial court's proximate cause charge improperly reduced the plaintiffs burden of proof. In affirming, the Court of Appeals did not address the omission/commission distinction drawn by the Fourth Department, but concluded that the charge as a whole, which included PJI 2:70 and the standard preponderance of the evidence charge, PJI 1:23, did not improperly alter the causation standard or plaintiffs burden of proof.

In Daniele v Pain Management Center of Long Island, 168 AD3d 672, 91 NYS3d 496 (2d Dept 2019), the evidence was legally sufficient to establish that defendants' departures were a substantial factor in depriving plaintiff of a substantial chance for an improved outcome. However, the case was remitted for a new trial because the trial court deprived the defendant physicians of the opportunity, pursuant to CPLR 1601, to adduce evidence of the negligence of two nonparty physicians that may also have deprived plaintiff of a substantial chance for an improved outcome.

Case law from the Second Department uses the phrase "substantial chance," rather than the phrase "substantial possibility," used in the other departments, see Allen v Uh, 82 AD3d 1025, 919 NYS2d 179 (2d Dept 2011) (citing PJI); Gagliardo v Jamaica Hosp., 288 AD2d 179, 732 NYS2d 353 (2d Dept 2001). The "substantial possibility" phrase employed by the First, Third, and Fourth Departments should not be confused with an instruction to the jury that plaintiff has the burden of demonstrating that there was "substantial probability" that the defendant's negligent conduct caused her injuries, Dempsey v Methodist Hosp., 159 AD2d 541, 552 NYS2d 406 (2d Dept 1990). Such a charge would be erroneous because it incorporates an improper standard of proof, thereby increasing the plaintiffs burden of proof from the usual "more probable than not" language, id, which, of course, is the applicable standard, Leal v Simon, 147 AD2d 198, 542 NYS2d 328 (2d Dept 1989); Mertsaris v 73rd Corp., 105 AD2d 67, 482 NYS2d 792 (2d Dept 1984); see Kimball v Scors, 59 AD2d 984, 399 NYS2d 350 (3d Dept 1977).

11 Delayed Diagnosis

A delayed diagnosis, even if the delay constitutes a deviation from accepted practice, is insufficient standing alone to establish proximate cause, Kaffka v New York Hosp., 228 AD2d 332, 644 NYS2d 243 (1st Dept 1996). In Kaffka, plaintiff alleged that defendant was negligent in failing to diagnose her breast cancer. Based on uncontested evidence that plaintiffs cancer was at an advanced stage when the defendant had an opportunity to make a timely diagnosis, the court ruled that no factual nexus existed between the alleged malpractice and the affirmative harm to plaintiff and dismissed plaintiffs claims, id. Likewise, in Lyons v McCauley, 252 AD2d 516, 675 NYS2d 375 (2d Dept 1998), the court ruled that plaintiffs medical malpractice claim for failure to diagnose cancer was properly dismissed because there was no expert testimony causally linking the defendant's negligence with any delay in the diagnosis of her breast cancer or with any injury that was separate and apart from the underlying cancer, see also Giambona v Stein, 265 AD2d 775, 697 NYS2d 399 (3d Dept 1999). In contrast, recovery was permitted for defendant physician's failure timely to diagnose a patient's cancer, where there was expert evidence that the delay in diagnosis had reduced the patient's life expectancy, there was no contention that the patient's cancer was incurable at the time defendant failed to diagnose the condition and the patient's chance of surviving five years had dropped from 78% to 7% by the time the condition was diagnosed, Schaub v Cooper, 34 AD3d 268, 824 NYS2d 241 (1st Dept 2006). In these circumstances, it could not be said as a matter of law that the delay was not responsible for a diminished chance of survival or for a death that was earlier than it should have been, id; see Polanco v Reed, 105 AD3d 438, 963 NYS2d 57 (1st Dept 2013); Hughes v New York Hospital-Cornell Medical Center, 195 AD2d 442, 600 NYS2d 145 (2d Dept 1993). Similarly, in Luna v Spadafora, 127 AD3d 933, 7 NYS3d 413 (2d Dept 2015), a verdict in favor of a plaintiff was sustained for defendants-physicians' failure to timely diagnose plaintiffs thyroid cancer, where plaintiff adduced expert testimony that the delay caused the cancer condition to advance from stage II with a 10-year survival rate of 85-90% to stage IV with a 10-year survival rate of 40-50%. The Second Department determined that the jury rationally concluded that the delay in diagnosing plaintiffs cancer proximately caused her to have a worsened prognosis or decreased 10-year survival rate, Luna v Spadafora, supra. However, a conclusory statement that a physician's departure from accepted practice resulted in delayed diagnosis and treatment leading to a less favorable prognosis is insufficient to raise a triable question of fact regarding causation, Mosezhnik v Berenstein, 33 AD3d 895, 823 NYS2d 459 (2d Dept 2006). Recovery of damages proximately caused by malpractice for the possibility of the future outbreak of latent or new conditions not manifested at the time of trial requires medical proof of a reasonable certainty that such developments will occur, Matott v Ward, 48 NY2d 455, 423 NYS2d 645, 399 NE2d 532 (1979); Bossio v Fiorillo, 210 AD2d 836, 620 NYS2d 596 (3d Dept 1994).

Causation is relevant both to liability and to damages, Oakes v

Patel, 20 NY3d 633, 965 NYS2d 752, 988 NE2d 488 (2013). For example, in a medical malpractice case, liability cannot be established unless it is shown that the defendant's malpractice was a substantial factor in causing the plaintiffs injury, id. But even where liability is established, the plaintiff may recover only for those injuries and related damages proximately caused by the malpractice, id. More specifically, where the plaintiff had a pre-existing condition, the plaintiff is not entitled to recover for injuries that the pre-existing condition would have caused even in the absence of malpractice, id.

C. Effect of Patient's Conduct

A failure by plaintiff to follow medical advice after the alleged malpractice occurred does not constitute comparative negligence, but rather may only be considered in mitigation of damages, Dombrcnvski v Moore, 299 AD2d 949, 752 NYS2d 183 (4th Dept 2002); but see Bellas v Kurpis, 182 AD2d 542, 582 NYS2d 708 (1st Dept 1992) (jury's finding of plaintiffs comparative negligence need not be disturbed where plaintiff declinE;d to follow full course of treatment). The same principle was applied in pre-comparative fault cases, where the patient's failure to follow medical advice could be considered in mitigation of damages, but did not constitute contributory negligence barring recovery, Du Bois v Decker, 130 NY 325, 29 NE 313 (1891); Ferrara v Leventhal, 56 AD2d 490, 392 NYS2d 920 (2d Dept 1977); Dunn v Catholic Medical Center of Brooklyn & Queens, Inc., 55 AD2d 597, 389 NYS2d 123 (2d Dept 1976); Heller v Medine, 50 AD2d 831, 377 NYS2d 100 (2d Dept 1975); Quinones v Public Adm'r of Kings County, 49 AD2d 889, 373 !,TYS2d 224 (2d Dept 1975).

A comparative fault charge is appropriate when there is evidence that a plaintiff shares responsibility for harm that was inflicted as a result of a defendant's medical malpractice, Vallone v Saratoga Hosp., 141 AD3d 886, 35 NYS3d 544 (3d Dept 2016); see DiCicco v Cattani, 59 AD3d 660, 874 l\fYS2d 518 (2d Dept 2009). Thus, where it was claimed that the patient bore major responsibility for her periodontal disease due to heavy use of prescription drugs and tobacco, failure to give complete medical history and delay in treatment, the patient's conduct could be considered on the issue of her comparative fault, Elkins v Ferencz, 263 AD2d 372, 694 NYS2d 27 (1st Dept 1999). The comparative fault rule may apply where prior to the malpractice, the patient fails to reveal part of his or her medical history, Ogle v State, 191 AD2d 878, 594 NYS2d 824 (3d Dept 1993). A comparative fault charge should not be given when a plaintiffs alleged negligence preceded the alleged medical malpractice and is not otherwise alleged to have contributed to the harm resulting from the medical malpractice, id.

Where a patient's criminal conduct is a foreseeable result of the alleged malpractice, recovery may be allowed, Levitt v Lenox Hill Hosp., 184 AD2d 427, 585 NYS2d 401 (1st Dept 1992).

For a charge on mitigation of damages, see P,JI 2:325. For a proximate cause charge, see PJI 2:70.

XIII. Liability for Acts and Omissions of Another

When two or more physicians are employed together by the patient and make a joint diagnosis or treatment, they are jointly liable, see Arshansky v Royal Concourse Co., 28 AD2d 986, 283 NYS2d 646 (1st Dept 1967); Graddy v New York Medical College, 19 AD2d 426, 243 NYS2d 940 (1st Dept 1963); CJS, Physicians and Surgeons, § 107; AmJur2d, Physicians, Surgeons, and Other Healers § 270; see also Ruane v Stillwell, 195 AD2d 836, 600 NYS2d 803 (3d Dept 1993) (evidence insufficient to show that physician who only shared office space with alleged negligent doctor was acting in concert with his "partner"). Where physicians are partners, each is vicariously liable for the negligent acts of a partner undertaken in furtherance of partnership business, Hardter v Semel, 197 AD2d 846, 602 NYS2d 259 (4th Dept 1993).

Referral of a patient by one physician to another competent physician generally does not, absent partnership, employment or agency, furnish a basis for the referring physician's liability, Kavanaugh by Gonzales v Nussbaum, 71 NY2d 535, 528 NYS2d 8, 523 NE2d 284 (1988); Mandel v New York County Public Adm'r, 29 AD3d 869, 815 NYS2d 275 (2d Dept 2006); Harrington v Neurological Institute of Columbia Presbyterian Medical Center, 254 AD2d 129, 679 :t\TYS2d 17 (1st Dept 1998), even where the referral is because of the temporary absence of the referring physician and the referring physician shares in the fee, Arshansky v Royal Concourse Co., 28 AD2d 986, 283 NYS2d 646 (1st Dept 1967); Graddy v New York Medical College, 19 AD2d 426, 243 NYS2d 940 (1st Dept 1963). Thus, a physician is not vicariously liable for the malpractice of another physician who, though not a partner or joint venturer, merely covers for the referring physician, Kavanaugh by Gonzales v Nussbaum, supra; Reeck v Huntington Hosp., 215 AD2d 464, 626 NYS2d 516 (2d Dept 1995). However, a physician who commits malpractice does not avoid liability by referring the patient to another physician who thereafter commits further acts of malpractice, Datiz by Datiz v Shoob, 71 NY2d 867, 527 NYS2d 749, 522 NE2d 1047 (1988); see Yanchynska v Wertkin, 178 AD3d 1122, 115 NYS3d 84 (2d Dept 2019) (defendant who referred plaintiff to breast surgeon potentially liable for her own alleged malpractice in failing to advise breast surgeon that her own examination of plaintiffs breast differed from breast surgeon's examination that detected no palpable lumps); Nicholas v Reason, 84 AD2d 915, 447 NYS2d 55 (4th Dept 1981) (fact that one defendant attended patient while other was on vacation does not absolve former from liability as a matter of law); see also Harding v Noble Taxi Co p., 182 AD2d 365, 582 NYS2d 1003 (1st Dept 1992); Tiernan v Hemzen, 104 AD2d 645, 480 NYS2d 24 (2d Dept 1984). Liability also may be imposed for negligence in the selection of a covering physician and for failure to advise the covering physician of the potential risks confront.ed by the patient, Kavanaugh by Gonzales v Nussbaum, supra. A ref?rrmg physician may be held jointly liable for the negligence of the treatmg physician where the referring physician was involved in decisions regarding diagnosis and treatment to the extent of making them

his or her own negligent acts, Reyz v Khelemsky, 44 AD3d 640, 844 NYS2d 49 (2d Dept 2007); Mandel v New York County Public Adm'r, supra; see Yanchynska v Wertkin, supra. In such circumstances, the referring physician and the treating physician are liable based on each one's relative responsibility, Mandel v New York County Public Adm'r, supra.

A physician can be vicariously liable for another physician's active negligence if the former had some control of the latter's treatment of the patient, Ross v Mandeville, 45 AD3d 755, 846 NYS2d 276 (2d Dept 2007). Thus, a hospital staff physician who allowed a third-year resident to make an incision could be held liable for the injuries resulting from the resident's negligence, since there was evidence that the resident was under defendant physician's direct supervision, id; see Macancela v Wyckoff Heights Medical Center, 176 AD3d 795, 109 NYS3d 411 (2d Dept 2019) (question of fact as to whether attending physician deviated from good and accepted practice by failed to recommend repeat testing in light of notes prepared by medical residents and fellows). With respect to employment, a staff physician may, in the circumstances of a particular case, be the ad hoc employee of the patient's surgeon, O'Rourke v Halcyon Rest, 281 App Div 838, 118 NYS2d 693 (2d Dept 1953), affd, 306 NY 692, 117 NE2d 639 (1954), as may a staff nurse, Annot: 12 ALR3d 1017; 29 ALR3d 1065, 1075. As to ad hoc employees, see PJI 2:238. As to when a physician is an independent contractor, see Brink v Muller, 86 AD3d 894, 927 NYS2d 719 (3d Dept 2011); Roberts v El-Hajal, 23 AD3d 733, 804 NYS2d 819 (3d Dept 2005); Santiago v Archer, 136 AD2d 690, 524 NYS2d 106 (2d Dept 1988); Campbell v Emma Laing Stevens Hosp., 118 AD2d 988, 499 NYS2d 993 (3d Dept 1986); Felice v St. Agnes Hospital, 65 AD2d 388, 411 NYS2d 901 (2d Dept 1978); Mduba v Benedictine Hospital, 52 AD2d 450, 384 NYS2d 527 (3d Dept 1976); PJI 2:255. The key consideration for finding that a medical practitioner was an independent contractor is the alleged principal's lack of power to regulate the manner in which the practitioner's work was performed, Roberts v El-Hajal, supra.

Physicians who are shareholders, employees, or agents of a professional service corporation are liable for their own acts of malpractice and those over whom they exert direct supervision and control when rendering services on behalf of the corporation, BCL § 1505(a) (domestic professional service corporation); § 1527 (foreign professional service corporation); Ruggiero v Miles, 125 AD3d 1216, 4 NYS3d 648 (3d Dept 2015); see Wise v Greenwald, 208 AD2d 1141, 617 NYS2d 591 (3d Dept 1994) (supervising dentist-shareholder may be held liable for malpractice by dentist-employee, who was not a shareholder in professional corporation). However, physicians who are employees, officers or shareholders of a professional corporation are not vicariously liable for the malpractice of other physician employees-officers-shareholders, Yaniv v Taub, 256 AD2d 273, 683 NYS2d 35 (1st Dept 1998); Polokoffv Palmer, 190 AD2d 897, 593 NYS2d 129 (3d Dept 1993); Paciello v Patel, 83 AD2d 73, 443 NYS2d 403 (2d Dept 1981). A doctor who is both an employee and supervisor of a professional services corporation is subject

to liability for the acts of a fellow.employee :vhere, under the circumtances there is an unreasonable risk of physical harm to others resultng fro arisk that the doctor's direction or permission creates, Yaniv v aub supra. A doctor's participation in weekly group staff meetings of a profe sional corporation at which a patient's care was discussed does not without more, give rise to a physician-patient relationship between the' doctor attending the meetings and the patient discussed, Sawh v Schoen, 215 AD2d 291, 627 NYS2d 7 (1st Dept 1995).

A hospital is responsible for the malpractice of a physician or nurse in its employ, see PJI 2:151; Kavanaugh by Gonzales v Nussbaum, 71 NY2d 535, 528 NYS2d 8, 523 NE2d 284 (1988); or a professional whom it holds out as performing the service it offers, even though in fact he or she is an independent contractor, Mduba v Benedictine Hospital, 52 AD2d 450, 384 NYS2d 527 (3d Dept 1976); see Felter v Mercy Community Hosp. of Port Jervis, N.Y., 244 AD2d 385, 664 NYS2d 321 (2d Dept 1997); Felice v St. Agnes Hospital, 65 AD2d 388, 411 NYS2d 901 (2d Dept 1978). Likewise, a party who founded a clinic, was one of its principals, interviewed, hired and paid the clinic's doctors and controlled all aspects of the clinic's administration may be held liable for the negligent acts of its physicians regardless of whether the physicians were independent contractors or employees of the clinic, Brown v LaFontaine-Rish Medical Associates, 33 AD3d 470, 822 NYS2d 527 (1st Dept 2006) (injured patient did not seek out any physician, but instead selected clinic, which assigned particular physicians to procedures). Thus, where a patient has come to a hospital emergency room seeking treatment from the hospital rather than from an individual physician, the hospital is liable for the negligent acts of a physician who provided emergency care, even though the physician was not a hospital employee, St. Andrews v Scalia, 51 AD3d 1260, 857 NYS2d 807 (3d Dept 2008); Salvatore v Winthrop University Medical Center, 36 AD3d 887, 829 NYS2d 183 (2d Dept 2007). The hospital's liability for the negligent acts of non-employee physicians in such situations is based on agency by estoppel principles and applies to acts of an independent physician where the physician was provided by the hospital or was otherwise acting on the hospital's behest or where plaintiff could reasonably believe that the physician was acting at the hospital's behest, Malcolm v The Mount Vernon Hosp., 309 AD2d 704, 766 NYS2d 185 (1st Dept 2003); see Sarivola v Brookdale Hosp. and Medical Center, 204 AD2d 245, 612 NYS2d 151 (1st Dept 1994). To impose liability on a hospital based on a physician's "apparent authority," there must be words or conduct by the hospital that give rise to the appearance that the doctor has authority to act on behalf of the hospital, Pratt v Haber, 105 AD3d 429, 963 NYS2d 32 (1st Dept 2013) (television "blurb" about physician and procedure insufficient to raise issue as to whether physician was hospital's agent). On a motion by a hospital for summary judgment, the hospital must come forward with evidence to rule out any inference that the negligent physician was its agent, Malcolm v The Mount Vernon Hosp., supra.

The facts that the physician had teaching and clinical responsibili-

ties, was chosen from a number of cardiologists "on staff" and came to assist in plaintiffs care in response to a hospital employee's page preclude a grant of summary judgment in the hospital's favor, Malcolm v The Mount Vernon Hosp., 309 AD2d 704, 766 NYS2d 185 (1st Dept 2003). A clinic or hospital is responsible for malpractice committed on patients who sought care from the institution rather than from any individual physician, Hill v St. Clare's Hosp., 67 NY2d 72, 499 NYS2d 904, 490 NE2d 823 (1986) (citing PJI); Johnson v Jamaica Hosp. Medical Center, 21 AD3d 881, 800 NYS2d 609 (2d Dept 2005); Ryan v New York City Health and Hospitals Corp., 220 AD2d 734, 633 NYS2d 500 (2d Dept 1995); Brown v LaFontaine-Rish Medical Associates, 33 AD3d 470, 822 NYS2d 527 (1st Dept 2006); see Santiago v Brandeis, 309 AD2d 621, 766 NYS2d 25 (1st Dept 2003) (defendant hospital's assertion that it did not employ allegedly negligent physician not sufficient to justify summary judgment dismissing complaint where there was no evidence that plaintiff requested physician; fact questions were raised as to whether plaintiff reasonably believed defendant had provided physician and was acting as defendant's agent); Culhane v Schorr, 259 AD2d 511, 686 NYS2d 105 (2d Dept 1999) (although decedent was originally admitted through emergency room of hospital, there was no competent proof in record that decedent believed he was receiving care from hospital in general, as opposed to doctors specifically); Gunther v Staten Island Hosp., 226 AD2d 427, 640 NYS2d 601 (2d Dept 1996), as is a department store which holds itself out as conducting a dentist's business, even though to do so is illegal, Hannon v Siegel-Cooper Co., 167 NY 244, 60 NE 597 (1901). However, where a steamship company provides a physician whose use by a passenger is optional and over whom the company has no control, it is responsible only for the selection of a competent physician, Allan v State S.S. Co., 132 NY 91, 30 NE 482 (1892); Laubheim v De Koninglyke N.S. Co., 107 NY 228, 13 NE 781 (1887). The same rule governs a compensation carrier which provides a doctor for an injured employee, Stone v Goodman, 241 App Div 290, 271 NYS 500 (1st Dept 1934); see Santiago v Archer, 136 AD2d 690, 524 NYS2d 106 (2d Dept 1988) (as to liability of union health and welfare fund for malpractice of physicians at clinic that fund provided for union members).

A defendant that merely leases its premises to medical practitioners is not subject to liability for medical malpractice of the lessee doctors, Slavik v Parkway Hosp., 242 AD2d 376, 661 NYS2d 274 (2d Dept 1997); Hylton v Flushing Hosp. and Medical Center, 218 AD2d 604, 630 NYS2d 748 (1st Dept 1995).

XIY. Liability of Employers Providing Medical Care

If a company maintains a medical facility exclusively for its employees, an action for malpractice arising out of treatment there is barred by workers' compensation, Garcia v Iserson, 33 NY2d 421, 353 NYS2d 955, 309 NE2d 420 (1974); Marange v Slivinski, 257 AD2d 427, 684 NYS2d 199 (1st Dept 1999); Cronin v Perry, 244 AD2d 448, 664 NYS2d 123 (2d Dept 1997). That the facility occasionally treats, on an

emergency basis, other people authorized to be on the employer's grounds does not detract from the fact that the facility was essentially an exclusive employee clinic not open to the general public, Woods v Dador, 187 AD2d 648, 590 NYS2d 240 (2d Dept 1992); see Feliciano Delgado v The New York Hotel Trades Council and Hotel Ass'n of New York City Health Center, Inc., 281 AD2d 312, 722 NYS2d 498 (1st Dept 2001); see also Ruiz v Chase Manhattan Bank, 211 AD2d 539, 621 NYS2d 345 (1st Dept 1995) (fellow-employee rule inapplicable to suit against pharmacist because pharmacist's services available to all persons working in building, not just those employed by plaintiffs employer). Further, the fact that a company-employed physician performed some of the treatment off the premises of the company is not a "distinction of relevance" in determining whether the co-employee rule barring recovery is applicable, Golini v Nachtigall, 38 NY2d 745, 381 NYS2d 45, 343 NE2d 762 (1975).

Workers' compensation is not a bar to a common-law action where the injuries which result from negligent treatment do not arise from the patient's employment, at least where the treatment was provided as part of the medical service available to the public and was not exclusively available to employees, Firestein v Kingsbrook Jewish Medical Center, 137 AD2d 34, 528 NYS2d 85 (2d Dept 1988) (hospital clerk injured at work and treated at employer-hospital where injuries were aggravated by negligence of another hospital employee); see Litwak v Our Lady ofVictory Hosp. of Lackawanna, 238 AD2d 879, 660 NYS2d 912 (4th Dept 1997) (Workers' Compensation Law did not bar action of employee where employee was being treated as hospital patient, not as employee, and defendant doctor was not required as part of his employment with employer to treat employees off employer's premises or personally oversee employees' treatment by other doctors or hospitals); Milashouskas v Mercy Hospital, 64 AD2d 978, 408 NYS2d 808 (2d Dept 1978); Stevens v Nassau, 56 AD2d 866, 392 NYS2d 332 (2d Dept 1977). In any event, the applicability of the Workers' Compensation Law falls within the primary jurisdiction of the Workers' Compensation Board, Botwinick v Ogden, 59 NY2d 909,466 NYS2d 291,453 NE2d 520 (1983); see also Introductory Statement preceding PJI 2:215.

Recovery from a physician whose malpractice aggravated an employee's injury is not precluded by the employee's election to take workers' compensation and medical benefits, Workers' Compensation Law § 29(1); see Becker v Huss Co., Inc., 43 NY2d 527, 402 NYS2d 980, 373 NE2d 1205 (1978); Annot: 28 ALR3d 1066.

XV. Malpractice Actions Against Governmental Entities

Where the State engages in a proprietary function, such as providing medical and psychiatric care, the State is held to the same standards as are applicable to private practitioners and institutions engaging in the same activity, Schrempf v State, 66 NY2d 289, 496 NYS2d 973, 487 NE2d 883 (1985); D'Avolio v Prado, 277 AD2d 877, 715 NYS2d 827 (4th Dept 2000); Rattray v State, 223 AD2d 356, 636 NYS2d 43 (1st Dept 1996).

When the defendant is a physician, intern or resident, dentist, podiatrist or optometrist rendering services to a person, without receiving compensation from such person, in a public institution maintained in whole or in part by a municipal corporation or rendering services in the course of a home care service maintained by such public institution, a notice of claim must be served in compliance with General Municipal Law § 50-e before action can be maintained against either the municipal corporation or such individual defendant, GML § 50-d; Derlicka v Leo, 281 NY 266, 22 NE2d 367 (1939); see Schiavone v Nassau, 51 AD2d 980, 380 NYS2d 711 (2d Dept 1976), affd, 41 NY2d 844, 393 NYS2d 701, 362 NE2d 252 (1977). Similar requirements are imposed with respect to the New York City Health and Hospitals Corporation, see Plummer ex rel. Heron v New York City Health and Hospitals Corp., 98 NY2d 263, 746 NYS2d 647, 774 NE2d 712 (2002); Young v New York City Health & Hospitals Corp., 91 NY2d 291, 670 NYS2d 169, 693 NE2d 196 (1998); Allende v New York City Health and Hospitals Corp., 90 NY2d 333, 660 NYS2d 695, 683 NE2d 317 (1997); Unconsolidated Laws of New York § 7401(2). The continuous treatment doctrine, if otherwise applicable to the facts of a case, applies to the time in which to file a notice of claim under General Municipal Law § 50-e, Plummer ex rel. Heron v New York City Health and Hospitals Corp., supra; Young v New York City Health & Hospitals Corp., supra; Allende v New York City Health and Hospitals Corp., supra.

XVI. **Liability of Health** Insurers

The Employee Retirement Income Security Act iERISA) does not preempt a plaintiffs medical malpractice, breach of contract and breach of fiduciary duty claims against a primary care physician who allegedly delayed in submitting a specialist's referral form for approval by a health maintenance organization governed by ERISA, Nealy v U.S. Healthcare HMO, 93 NY2d 209, 689 NYS2d 406, 711 NE2d 621 (1999). A medical expense insurer in whose plan medical groups participate is not liable for malpractice by one of these groups, Mitts by Mitts v H.I.P. of Greater New York, 104 AD2d 318, 478 NYS2d 910 (1st Dept 1984). However, if a union health and welfare fund provides a clinic for its members and holds itself out as a health care provider or controls the operation of the clinic, the fund may be held liable for malpractice committed by physicians at the clinic, Welch v Scheinfeld, 21 AD3d 802, 801 NYS2d 277 (1st Dept 2005); see Santiago v Archer, 136 AD2d 690, 524 NYS2d 106 (2d Dept 1988).

Public Health Law § 4410 explicitly provides that an HMO is not engaged in the practice of medicine. The Fourth Department has held, however, that nothing in the statute expressly bars an HMO from being held vicariously liable for the acts of its employees, Wisholek v Douglas, 280 AD2d 220, 722 NYS2d 316 (4th Dept 2001), rev'd on other grounds, 97 NY2d 740, 743 NYS2d 51, 769 NE2d 808 (2002); Burg v Health Care Plan, 281 AD2d 976, 722 NYS2d 843 (4th Dept 2001). In Jones v U.S. Healthcare, 282 AD2d 347, 723 NYS2d 478 (1st Dept 2001), the court held that an HMO could not be held vicariously liable for a doctor's and

hospital's alleged malpractice where plaintiffs Group Master Contract, membership card and Member Handbook, clearly stated that doctors and hospitals participating in the HMO's healthcare program were independent contractors.

XVII. Bars to Malpractice Recovery

Since claims of medical malpractice and claims for health service providers' fees are inexorably intertwined, recovery by the doctor of a money judgment against the patient for services rendered bars a later action for malpractice by the patient for the same services, Ahearn v Arvan, 2 AD3d 469, 767 NYS2d 886 (2d Dept 2003); see Blair v Bartlett, 75 NY 150 (1878); Harris v Stein, 207 AD2d 382, 615 NYS2d 703 (2d Dept 1994) (default judgment); Hunt v Godesky, 189 AD2d 854, 592 NYS2d 781 (2d Dept 1993); Kissimmee Memorial Hosp. v Wilson, 188 AD2d 802, 591 NYS2d 239 (3d Dept 1992); but see Kossover v Trattler, 82 AD2d 610, 442 NYS2d 554 (2d Dept 1981) (concurring opinion questioning continued vitality of Blair in light of modern cases applying the doctrine of res judicata). However, an infant plaintiff, not in privity with her father and guardian, was not barred from commencing a malpractice action because of a prior determination against the father-guardian in an action to recover fees for the rendering of the same professional medical services, Palacio by Palacio v Weissberg, 244 AD2d 536, 664 NYS2d 814 (2d Dept 1997). Where a dentist was exonerated of all wrongdoing in a grievance filed by plaintiff with the Office of Professional Discipline of the New York State Education Department, the plaintiff was not collaterally estopped from prosecuting her civil action, David v Biondo, 92 NY2d 318, 680 NYS2d 450, 703 NE2d 261 (1998).

An exculpatory agreement between patient and physician made prior to the commission of an act of malpractice may be invalid or unenforceable if the public interest is affected or the agreement is not clear in its terms. Thus, Creed v United Hosp., 190 AD2d 489, 600 NYS2d 151 (2d Dept 1993), and Ash v New York University Dental Center, 164 AD2d 366, 564 NYS2d 308 (1st Dept 1990), held unenforceable a covenant not to sue a dental clinic that was given by a prospective patient in advance of surgery in consideration of reduced rates.

The National Childhood Vaccine Injury Act of 1986, which provides a no-fault compensation program for "vaccine-related injury or death," 42 USC § 300aa-15(a), precludes civil actions in state or federal court for damages in excess of $1,000 unless a petition has been filed for compensation under the no-fault program, id § 300aa-ll(a)(2)(A); see Bruesewitz v Wyeth LLC, 131 SCt 1068 (2011). The preclusive effect of this provision extends to actions for failures to properly diagnose or treat conditions allegedly caused by vaccinations, Crucen ex rel. Vargas v Leary, 55 AD3d 510, 867 NYS2d 49 (1st Dept 2008).

XVIII. Liability for Breaches of Confidentiality

Although New York does not recognize a common law right of

privacy, Juric v Bergstraesser, 44 AD3d 1186, 844 NYS2d 465 (3d Dept 2007), a physician is liable in tort for breaching physician-patient confidentiality, Chanko v American Broadcasting Companies Inc., 27 NY3d 46, 29 NYS3d 879, 49 NE3d 1171 (2016); see MacDonald v Clinger, 84 AD2d 482, 446 NYS2d 801 (4th Dept 1982); CPLR 4504; Juric v Bergstraesser, supra (characterizing claim as one for breach of implied covenant of trust and confidence inherent in patient-physician relationship); Anderson v Strong Memorial Hosp., 151 AD2d 1033, 542 NYS2d 96 (4th Dept 1989) (merely allowing media or member of public to be in waiting room where other persons in room can be observed does not amount to breach of confidentiality); see also Doe v Roe, 42 AD2d 559, 345 NYS2d 560 (1st Dept 1973), affd, 33 NY2d 902, 352 NYS2d 626, 307 NE2d 823 (1973); Note, Breach of Confidence, An Emerging Tort, 82 Col L Rev 426. The elements of a cause of action for breach of physician-patient confidentiality are: (1) the existence of a physician-patient relationship; (2) the physician's acquisition of information relating to the patient's treatment or diagnosis; (3) the disclosure of such confidential information to a person not connected with the patient's medical treatment, in a manner that allows the patient to be identified; (4) lack of consent for that disclosure; and (5) damages, Chanko v American Broadcasting Companies Inc., supra.

A physician is not liable for disclosing patient records to a malpractice insurer when the physician reasonably believes that the patient will be making a claim against the physician, Rea v Pardo, 132 AD2d 442, 522 NYS2d 393 (4th Dept 1987). A physician may also be justified, under curtain circumstances, in disclosing confidential medical information to a third party to protect that individual from danger posed by the patient, see Juric v Bergstraesser, 105 AD3d 1301, 963 NYS2d 755 (3d Dept 2013). A physician is also under a duty to refrain from providing false statements regarding a patient's medical condition to the patient's insurance company, which duty is part of the existing physician-patient relationship and the confidence and trust arising out of such relationship, Aufrichtig v Lowell, 85 NY2d 540, 626 NYS2d 743, 650 NE2d 401 (1995).

In Arons v Jutkowitz, 9 NY3d 393, 850 NYS2d 345, 880 NE2d 831 (2007), the Court of Appeals discussed the impact of the federal Health Insurance Portability and Accountability Act of 1996 (HIPAA) on the obligation of health care providers to preserve the confidentiality of their patients' information, The issue in Arons was whether a party's attorney may conduct an ex parte interview with the adverse party's treating physician when the adverse party has affirmatively placed his or her medical condition in issue. The Arons Court held that such informal discovery may be conducted, provided that an authorization conforming to 45 CFR 164.508 is executed by the patient, a court or administrative order has been issued, or the health care provider is responding to a validly issued subpoena, discovery request or other lawful process(with satisfactory assurance that the attorney seeking the interview has made reasonable efforts to ensure that the adverse party has been notified or has made reasonable efforts to secure a qualified

rotective o_rd), Arons v Jutkoyvitz, sup a, citing 45 CFR }64.512(e)(l)(1)-(u). The Ar ns C urt d1d not .cons.1der wheth r a health care provider may be held hable m tort for v10latmg HIP AA s confidentiality provisions.

XIX. Collateral Source Rule

At common law, damages awards for personal injuries were not reduced by the amount of payments made to the plaintiff from collateral sources such as wage replacement or medical-expense reimbursement plans, Healy v Rennert, 9 NY2d 202, 213 NYS2d 44, 173 NE2d 777 (1961). However, in 1975, the Legislature responded to a perceived "crisis" in the medical malpractice insurance industry by adopting former CPLR 4010, which permitted juries in medical malpractice cases to consider collateral-source payments, L 1975, ch 109; see Oden v Chemung County Indus. Development Agency, 87 NY2d 81, 637 NYS2d 670, 661 NE2d 142 (1995). In 1981, collateral-source set-offs became mandatory and the responsibility for calculating the set-offs was transferred from the jury to the court, L 1981, ch 269. The rules for collateral source set-offs are now embodied in CPLR 4545. CPLR 4545(a), which governs awards for past and future damages in medical, dental and podiatric malpractice actions, requires set-offs for collateral source payments that plaintiff has received or is reasonably certain to receive. For a more detailed discussion of the principles governing collateral-source reductions under CPLR 4545, see Comment to PJI 2:301.

XX. Punitive Damages

In the context of professional malpractice cases, the standard for an award of punitive damages is that a defendant manifest evil or malicious conduct beyond any breach of professional duty, Dupree v Giugliano, 20 NY3d 921, 958 NYS2d 312, 982 NE2d 74 (2012). Punitive damages may be recovered in a medical malpractice action where defendant's conduct is so "intentional, malicious, outrageous, or otherwise aggravated beyond mere negligence" to warrant such an award, Graham v Columbia-Presbyterian Medical Center, 185 AD2d 753, 588 NYS2d 2 (1st Dept 1992); see Marsh v Arnot Ogden Medical Center, 91 AD3d 1070, 937 NYS2d 383 (3d Dept 2012). Punitive damages may be appropriate in a medical malpractice action where the defendant abandoned the plaintiff when he or she was in need of emergency medical treatment, or willfully failed to disclose pertinent medical information to evade a malpractice claim, id; see Abraham v Kosinski, 251 AD2d 967, 674 NYS2d 557 (4th Dept 1998). Punitive damages may also be appropriate where the defendant's conduct is wantonly dishonest or grossly indifferent to patient care, see Schiffer v Speaker, 36 AD3d 520, 828 NYS2d 363 (1st Dept 2007); see also Williams v Halpern, 25 AD3d 467, 808 NYS2d 68 (1st Dept 2006). Where defendant doctor's conduct was not wantonly dishonest, grossly indifferent to patient care or malicious and/or reckless, an award of punitive damages is not appropriate, Charell v Gonzalez, 251 AD2d 72, 673 NYS2d 685 (1st Dept 1998); see Peltier v Wakhloo, 20 AD3d 870, 798 NYS2d 277 (4th Dept 2005). As to punitive damages generally, see PJI 2:278.

XXI. Actions for Birth-Related Neurological Injuries

Article 29-D of the Public Health Law was enacted in 2011 and established a medical indemnity fund, administered by an agency within the executive branch of state government, to pay health care costs of qualified infant-plaintiffs who have birth-related neurological injuries. The purpose of article 29-D is to reduce the medical malpractice insurance premiums of health care providers by shifting the responsibility of paying the future medical expenses of infants with birth-related neurological injuries from health care providers to the fund, Public Health Law § 2999-g Thus, where article 29-D is applicable, the fund will pay for a plaintiffs "qualified [future] health care costs," Public Health Law § 2999-j(l), to the extent those costs will not be paid by a collateral source other than Medicaid or Medicare, Public Health Law § 2999-j(S). The defendant health care provider is relieved of the obligation to pay an award after trial (or that portion of a settlement) covering future medical expenses, see Public Health Law § 2999-j(l), (6), (13). While article 29-D may have a significant effect on an award for a plaintiffs future medical expenses, it has no direct effect on awards for pain and suffering or past medical expenses or the amount of the attorneys' fee to which plaintiffs counsel is entitled, Public Health Law § 2999-j(14). Article 29-D applies to all actions pending on and after April 1, 2011.

In an action in which a jury or court has made an award for future medical expenses arising out of a birth-related neurological injury, any party may apply to the court for a provision in the judgment that reflects that, in lieu of the award for future medical expenses and upon a determination by the administrator of the fund that plaintiff is a "qualified plaintiff," plaintiffs future medical expenses will be paid out of the fund, Public Health Law § 2999-j(6)(b). Public Health Law § 2999-h(4) defines a "qualified plaintiff' as every plaintiff or claimant who (a) has been found by a jury or court to have sustained a "birth-related neurological injury" as a result of alleged medical malpractice, or (b) has settled a lawsuit or claim therefor. Public Health Law § 2999-h(l), in turn, defines a "birth-related neurological injury" as (a) an injury to the brain or spinal cord of a live-born infant caused by the deprivation of oxygen or mechanical injury occurring in the course of labor, delivery or resuscitation or by other medical services provided or not provided during a delivery admission (b) that rendered the infant with a permanent and substantial motor impairment or with a developmental disability as defined by Mental Hygiene Law § 1.03. The court must grant the application if the court determines that the party making the application made a prima facie showing that plaintiff is a "qualified plaintiff," with the ultimate determination of whether a plaintiff qualifies reserved for the administrator of the fund. In an action arising out of a plaintiffs birth-related neurological injury that is settled, which settlement includes for the payment of plaintiffs future medical expenses, the settlement must contain a provision stating that if the administrator of the fund determines that plaintiff is a "qualified

laintiff' all payments fo futur medical expense will be made by the hmd, Public Health Law § 2999-J(6)(a).

As noted above, the fund administrator determines if a plaintiff is qualified. Generally, where the fund administrator determines that a plaintiff is qualified under article 29-D, the defendant is not obligated to pay that portion of the judgment or settlement allocated to future medical expenses. Once a plaintiff is qualified, the fund will pay for "qualified health care costs," Public Health Law § 2999-h(3), i.e. future medical, hospital, surgical, nursing, dental, rehabilitation, custodial, durable medical equipment, home modifications, assistive technology, vehicle modifications, prescription and non-prescription medications, and other health care costs actually incurred for services rendered to and supplies utilized by plaintiff. The administrator, in accordance with article 29-D and its implementing regulations, determines which future heath costs are to be paid from the fund, Public Health Law § 2999-j(2), (S)(a). A qualified plaintiff is assured of receiving medical care or assistance that would, at a minimum, be authorized under the Medicaid program, id. The fund closes to new applicants if its liabilities reach 80% of its assets, Public Health Law § 2999-i(6)(a). In that event all judgments must be satisfied and all settlements paid as if the fund legislation had not been enacted, Public Health Law § 2999-i(6)(b).

All awards for damages other than future health care costs are to be paid in accordance with article 50-A of the CPLR. The plaintiffs attorney fee is paid by the defendant as if the fund were not involved, that is on the entire sum awarded by the jury or the full amount of the settlement, with the fee portion allocated to non-fund damages deducted from the non-fund portion of the award in a proportional manner, Public Health Law § 2999-j(14). Because the determinations as to whether an individual is a "qualified plaintiff' and, if so, which costs are "qualified health care costs" are assigned to the fund administrator, there does not appear to be any reason to modify either the court's charge or the verdict sheet in a case in which Public Health Law article 29-D may be implicated.

"Wrongful birth" claims would not appear to be affected by Public Health Law article 29-D. Under certain circumstances, a wrongful birth claim permits the parent of a child who was born with a congenital abnormality or defect to recover damages for the costs of the medical care and treatment of the child, see Comment to PJI 2:150. As discussed above, Public Health Law article 29-D only applies to an infant plaintiff who suffered a birth-related neurological injury, i.e. an injury to the brain or spinal cord caused by the deprivation of oxygen or mechanical injury occurring in the course of labor, delivery or resuscitation or by other medical services provided or not provided during a delivery admission, see Public Health Law § 2999-h(l). Thus, a child with a congenital abnormality or defect-the type of condition an infant must exhibit to give rise to a claim for wrongful birth-generally will not exhibit a "birth-related neurological injury" as that phrase is defined under Pub- lic Health Law article 29-D.

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