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LEGAL MALPRACTICE

An action to recover damages for legal malpractice must be commenced within three years from the accrual of the claim

Farage v. Ehrenberg, etc.
Second Dept.; Index No.: 7325/11; Slip Op. No.: 07977

Attorneys:
Appellant: Andrew Lavoot Bluestone, Manhattan: respondent pro se: Lance Ehrenberg, Manhattan (Alan Handler of counsel)

The plaintiff had been involved in two separate motor vehicle accidents, one on April 30, 2002 and the other on June 17, 2005. The plaintiff initially engaged attorney Lance Ehrenberg (the defendant in this legal malpractice action) to prosecute an action relating to the 2002 accident. Ehrenberg moved in that action to withdraw as counsel, but while that motion was pending, the action settled on the record in open court on November 16, 2006, for the amount of $100,000. The stipulation of settlement memorialized a reduction of Ehrenberg's contingency fee to 27% and a withdrawal of his motion to be relieved as counsel and was so order by the judge in the New York City Civil Court, Kings County. Thereafter, the plaintiff refused to execute the general release contemplated by the stipulation, as she claimed it was a product of fraud and mistake. The plaintiff canceled three appointments with Ehrenberg between the date of the court settlement on November 16, 2006 and December 13, 2006. In the months In the months that followed, Ehrenberg's attempts to contact or meet with the plaintiff regarding the settlement of the 2002 accident claim were unsuccessful and on May 21, 2007, the defendant filed a second motion to be relieved as counsel. On November 17, 2007, the plaintiff's new counsel advised in writing that the plaintiff regarded Ehrenberg "as her discharged attorney" and that Ehrenberg "was not authorized by her to take any steps to enforce the stipulation form which was so ordered form after she had signed under false pretenses."

The plaintiff's new counsel moved in the Civil Court to vacate the stipulation. The matter was referred to Judicial Hearing Officer Seymour Schwartz to hear and report. Schwartz concluded that the stipulation was enforceable and more favorable to the plaintiff than an alternative handwritten stipulation proffered by the plaintiff. Schwartz's report and recommendations were confirmed in decision and order of the Civil Court dated October 29, 2009. An appeal of the Civil Court's order was ultimately dismissed by the Appellate Term of the Second, Eleventh, and Thirteenth Judicial Districts for failure to perfect. While the plaintiff litigated the enforceability of the stipulation, the parties formalized a substitution of counsel in connection with the 2002 accident claim. A Consent to Change Attorney dated April 11, 2008, was signed by the plaintiff, Ehrenberg, and incoming counsel and included reference to the Ehrenberg charging lien. On May 16, 2008, the defendant filed a closing statement with the Office of Court Administration and mailed a copy of the statement to the plaitniaff on the same date.

In the summer of 2005, the plaintiff also retained the Ehrenberg to represent her interests with regard to the 2005 accident. On January 15, 2007, Ehrenberg wrote to the plaintiff's physical therapist, advising him that he had been asked to stop handling the 2005 matter and requesting that the therapist's bills be forwarded in the future directly to the plaintiff's insurer. However, in mid July 2007, Ehrenberg was negotiating a possible settlement of the plaintiff's 2005 accident claim with an insurance carrier and requested the plaintiff's cooperation in executing medical and insurance authorization forms. On March 13, 2008, the plaintiff took physical possession of Ehrenberg's file on the 2005 accident, and the transfer was memorialized by a receipt signed by the parties and witnessed by the plaintiff's incoming counsel. The plaintiff had not commenced any litigation arising out of the 2005 accident as of that date.

On March 31, 2011, the plaintiff commenced this action against Ehrenberg alleging legal malpractice and asserting related fraud, deceit, negligence, contractual and Judiciary Law causes of action. Ehrenberg moved for summary judgment on the grounds that it was both untimely and barred by the doctrine of collateral estoppel. Ehrenberg argued that all of the plaintiff's theories of recovery as to the 2002 accident arose from alleged legal malpractice subject to a three-year statute of limitations measured from the in-court settlement of that action on November 16, 2006, the date that he maintains the attorney-client relationship ended. Ehrenberg also argued that since the stipulation settling the 2002 accident claim was upheld by the Civil Court in an order dated October 29, 2009, and the plaintiff's appeal form that order was dismissed by the Appellate Term for failure to perfect, the plaintiff's action as to that matter was barred by collateral estoppel. Regarding the handling of the 2005 accident claim, Ehrenberg argued that his representation ended on November 16, 2006, more than three years prior to the commencement of the instant action, rendering the matter untimely as to it.

In opposition, the plaintiff argued that, as to any legal malpractice committed in connection with the 2002 accident claim, the continuing representation doctrine tolled the statute of limitations up to the execution of the Consent to Change Attorney dated April 11, 2008, thus rendering the action timely. Similarly, the plaintiff argued that her causes of action referable to the 2005 accident claim were timely in that the defendant's representation did not ended until he file an Office of Court Administration (OCA) closing statement on May 16, 2008, within three years of the commencement of this action. In the same papers, the plaintiff cross moved for the imposition of sanctions pursuant to CPLR 8303-1 and 22 NYCRR 130-1.1.

The Supreme Court granted Ehrenberg's motion for summary judgment dismissing the complaint on the ground that the plaintiff's action was barred by the statute of limitation. The plaintiff's cross motion for the imposition of sanctions was denied sub silentio. The plaintiff appealed and the Appellate Division affirms.

An action to recover damages for legal malpractice must be commenced within three years from the accrual of the claim. ***CPLR 214 (6); Zorn v. Gilbert, 8 NY3d 933, 934; McCoy v. Feinman, 99 NY2d 295, 301; Weiss v. Manfredi, 83 NY2d 974, 977; Macaluso v. Del Col, 95 AD3d 959, 960; Fleyshman v. Suckle & Schlesinger, PLLC, 91 AD3d 591, 592; Fupolo v. Fish, 87 AD3d 684, 685; Krichmar v. Scher, 82 AD3d 1164, 1165; Hasty Hills Stables, Inc. v. Dorfman, Lynch, Knoebel & Conway, LLP, 52 AD3d 566, 567***. Accrual is measured from the commission of the alleged malpractice, when all facts necessary to the cause of action have occurred and the aggrieved party can obtain relief in court. ***Church, Inc. v. Salzman, 37 AD3d 589, 590 McCoy v. Feinman, 99 NY2d at 301; Landow v. Snow Becker Krauss, P.C>, 111 AD3d 795; 730 J & J LLC v. Polizzotto & Polizzotto, Esq., 69 AD3d 704, 705; Hasty Hills Stables, Inc. v. Dorfman, Lynch, Knoebel & Conway, LLP, 52 AD3d at 566; Town of Wallkill v. Rosenstein, 40 AD3d 972, 973; Iser v. Kerrigan, 37 AD3d 662, 663, regardless of when the operative facts are discovered by the plaintiff. Shumsky v. Eisenstein, 96 NY2d 164, 166; Glamm v. Allen, 57 NY2d 87, 95; McDonald v. Edelman & Edelman, P.C., 118 AD3d 562; Lincoln Place, LLC v. RVP Consulting, Inc., 70 AD3d 594; St. Stephens Baptist***. However, "causes of action alleging legal malpractice which would otherwise be barred by the statute of limitations are timely if the doctrine of continuous representation applies." ***Macaluso v. DelCol, 95 AD3d at 960; Glamm v. Allen, 57 NY2d at 91-94.*** The three-year statute of limitations is tolled for the period following the alleged malpractice until the attorney's continuing representation of the client on a particular matter is completed***. Zorn v. Gilbert, 8 NY3d at 933; Shumsky v. Eisenstein, 96 NY2d at 167-168; Glamm v. Allen, 57 NY2d at 93; Louzoun v. Kroll Moss and Kroll, LLP, 113 AD3d 600, 601; Montes v. Rosenzweig, 21 AD3d 460, 463-564; Griffin v. Brewington, 300 AD2d 283, 284; Pellati v. Lite & Lite, 209 AD2d 544, 545***. For the doctrine to apply there must be clear indicia of an "ongoing, continuous, developing and dependent relationship between the client and the attorney." ***Aseel v. Jonathan E. Kroll & Assoc., PLLC, 106 AD3d 1037, 1038***.

A defendant moving for summary judgment in a legal malpractice action on the ground that it is untimely must make a prima facie showing that the malpractice action was commenced more than three years after the date on which the cause of action accrued. ***Fleyshman v. Suckl.e & Schlesinger, PLLC, 91 AD3d at 592; Rupolo v. Rish, 87 AD3d at 685; Krichmar v. Scher, 82 AD3d at 1165; Hasty Hills Stables, Inc. v. Dorfman, Lynch, Knoebel & Conway, LLP, 52 AD3d at 567.*** If the defendant makes a prima facie showing, the burden then shifts to the plaintiff to raise a triable issue of fact as to whether the statute of limitations was tolled or is otherwise inapplicable. ***Kitty Hie Uan v. 2368 W.12th St., LLC, 119 AD3d 674; Wei Wei v. Westside Women's Med. Pavilion, P.C., 115 AD3d 662, 663***. Here, the plaintiff contends that the statute of limitation was tolled by the continuous representation doctrine. ***Hasty Hills Stables, Inc. v. Dorman, Lynch, Knoebel & Conway, LLP, 52 AD3d at 567.***

There are different ways that attorney-client relationships can be ended. One way is for the client to discharge the attorney, which can be done at any time with or without case***. Matter of Cohen v. Grainger, Tesoriero & Bell, 81 NY2d 655, 658; Campagnola v. Mulholland, Minion & Roe, 76 NY2d 38, 43; Lai Ling Cheng v. Modansky Leasing Co.,73 NY2d 454, 457; Teichner v. W & J Holsteins, 64 NY2d 977, 979; Demov, Morris, Levin & Shein v. Glantz, 53 NY2d 553, 556; Hsu v. Carlyle Towers Coop. "B", Inc., 102 AD3d 835, 836-837; Byrne v. Leblond, 25 AD3d 640, 641***. A second way is for the attorney and client to execute a Consent to Change Attorney or for counsel to execute a stipulation of substitution, which is then filed with the court in accordance with CPLR 321(b). Alternatively, if the attorney deems it necessary to end the relationship without the consent of the client, such as where there is an irretrievable breakdown in the relationship or a failure of cooperation by the client, the attorney may move, on such notice as may be directed by the court, to be relieved as counsel by court order. ***CPLR 321(2); Rules of Professional Conduct [22 NYCRR 1200.0] rule 1.16[c}; Sarlo-Pinzur, 59 AD3d 607, 608; Green v. Gasparini, 24 AD3d 505, 506; McCormack v. Kamalian, 10 AD3d 679***.

An affirmative discharge of an attorney by the client is immediate. By contrast, from the standpoint of adverse parties, counsel's authority as an attorney of record in a civil action continues unabated until the withdrawal, substitution or discharge is formalized in a manner provided by CPLR 321; ***Bevilacqua v. Bloomberg, L.P., 70 AD3d 411, 412; Everready Ins. Co. v. DeLeon, 287 AD2d 536, 537; Moustakas v. Bouloukos, 112 AD2d 981, 983; Blondell v. Malone, 91 AD2d 1201, 1202; Hess v. Tyszko, 46 AD2d 980; Hendry v. Hilton, 283 App Div 168, 171-172***. This rule protects adverse parties from the uncertainty of when or whether the authority of an opposing attorney has been terminated (***Moustakas v. Bouloukas, 112 AD2d at 983***), even when the adverse party is informally aware that a discharge or substitution of an opposing counsel is pending or imminent. ***Drummon v. Petito, 253 AD2d 407; Hawkins v. Lenox Hill Hosp., 138 AD2d 572, 573; Juers v. Barry, 114 AD2d 1009; Blondell v. Malone, 91 AD2d at 1202.***

Defendant Ehrenberg established his prima facie entitlement to judgment as a matter of law dismissing the legal malpractice claim arising from the 2002 accident by pointing to the express allegations of the complaint. Paragraph 23 of the complaint describes circumstances of the open-court settlement of the plaintiff's 2002 accident claim on November 16, 2006, and alleges that Ehrenberg was "formally withdrawn as [plaintiffs] counsel and "no longer represented [plaintiff's] interest as of

that date. The allegations contained in Paragraph 23 are not made upon mere information and belief but are directly verified by the plaintiff, constituting formal judicial admissions, which are evidence of the facts stated. ***GMS Batching, Inc. v. TADCO Const. Corp., 120 AD3d 549; Bogoni v. Friedlander, 197 AD2d 281, 291-291; Pok Rye Kim v. Mars Cup Co., 102 AD2d 812***. The termination of the parties' attorney-client relationship is also verified by Ehrenberg's correspondence to the plaintiff's physical therapist dated January 15, 2007 and by correspondence to Ehrenberg from the plaintiff's incoming counsel dated November 19, 2007, stating that the plaintiff "regards you as her discharged attorney***." Piliero v. Adler & Stavros, 282 AD2d 511, 512***. Whether the termination of the attorney-client relationship is measured from the November 16, 2006 stipulation, the January 15, 2007, correspondence from the defendant or the November 19, 2007, correspondence from the plaintiff's incoming counsel, all three of these potentially operative dates precede the commencement of the instant action by more than three years.

As for the legal malpractice claim arising from the 2005 accident, the defendant established his prima facie entitlement to judgment as a matter of law by proffering a copy of a document signed by the parties on March 13, 2008, which specifically reference the 2005 accident, and which reflected the plaintiff's receipt from the defendant of her entire 2005 case file. The document was witnessed by the plaintiff's then-incoming counsel.

In opposition to Ehrenberg's prima facie showing, the plaintiff failed to present documentary evidence that the parties had a mutual understanding of the needs for further representation by Ehrenberg beyond the 2006 and 2007 correspondences as to the 2002 accident, and the march 13, 2008, transfer of the litigation file as to the 20-05 accident. ***McCoy v. Feinman, 99 NY2d at 306; Landow v. Snow Becker Krauss, P.C., 111 AD3d at 796***. Moreover, there is no evidence of any ongoing, continuous, developing and dependent relationship between the parties. ***Aseel v. Jonathan E. Kroll & Assoc., PLLC, 106 AD3d 1037, 1038; Marro v. Handwerker, Marchelos & Gayner, 1 AD3d 488; Daniels v. Lebit, 299 AD2d 310; Corless v. Mazza, 295 AD2d 848; Pellati v. Lite & Lite 290 AD2d at 544; Wester v. Sussman, 287 AD2d 618; Piliero v. Adler & Stavros, 282 AD2d at 511; Ainbinder v. Jacobi, 268 AD2d 494.***

The plaintiff's argument that there was a continuation of the attorney-client relationship until April 11, 2008, when the Consent to Change Attorney was created and that the action is thus timely, in unavailing. ***Piliero v. Adler & Stavros, 282 AD2d at 511***. The essence of a continuous representation toll is the client's confidence in the attorney's ability and good faith, such that the client cannot be expected to question and assess the techniques employed or the manner in which the services are rendered. ***Shumsky v. Eisenstein, 96 NY2d at 167; Glamm v. Allen, 57 NY2d at 94; Greene v. Greene, 56 NY2d 86, 94***. "One of the predicates for the application of the doctrine is continuing trust and confidence in the relationship between eh parties." ***Aseel v. Jonathan E. Kroll & Assoc., PLLC, 106 AD3d at 1038, quoting Luk Lamellen U. Kupplungbau GmbH v. Lerner, 166 AD2d 505, 507.***

This opinion should not be construed to suggest that a Consent ot Change Attorney cannot ever govern the issue of how long an attorney's legal representation lasted. In a given case, the Consent to Change Attorney may reflect the end date of an attorney-client relationship, in the absence of other evidence that establishes an earlier date. ***Louzoun v. Kroll Moss & Kroll, LLP, 113 AD3d at 602; Sladowski v. Casolaro, 84 AD3d 1056, 1057; Sommers v. Cohen, 14 AD3d 691, 693; Marro v. Handwerker, Marchelos & Gayner, 1 AD3d 488; Wester v. Sussman, 287 AD2d 618***. Here, however, the record is replete with evidence that the plaintiff unequivocally discharged the defendant well prior to the execution and filing of the Consent to Change Attorney, rendering the consent form a mere memorialization of what had already occurred.

Equally unavailing is the plaintiff's argument that her legal malpractice claims are timely when measured against Ehrenberg's filing of the OCA-mandated closing statement. Ehrenberg filed the closing statement dated May 16, 2008, with OCA and a copy was mailed to the plaintiff on the same date, within three years of the commencement of the legal malpractice action. THE OCA statement, filed by Ehrenberg to comply with 22 NYCRR 691.21(b) is merely ministerial in nature and provides no evidence that het parties had any ongoing, continuous, developing and dependent relationship at any particular time within three years before the commencement of this action. The complaint alleges causes of action sounding in deceit and collusion. While a recent case decided by the Court of Appeals hold that causes of action to recover for attorney deceit under common law or under Judiciary Law § 487 are governed by a six-year statute of limitations (***Melcher v. Greenberg Traurig, LLP, 23 NY3d 10, 15***), it does affect the result here. The ***Melcher*** case involved an attorney plaintiff's claims of deceit and collusion under Judiciary Law § 487 against fellow attorneys of the same law firm, to which the Court of Appeals applied the six year statute of limitation of CPLR 213 (1). What distinguishes Melcher from the instant action is that Melcher did not involve any claim of legal malpractice. The Court of Appeals held in 1992 that inactions alleging professional malpractice (other than medical, dental or podiatric), where additional theories of recovery were asserted such as breach of contract, plaintiffs could prosecute cases governed by longer statutes of limitations based on the nature of the remedies sought. ***Santilli v. Englert, Reilly & McHugh, 78 NY2d 700, 708; Sears, Roebuck & Co. v. Enco Assoc., 43 NY2d 389, 394-395***. However, Santulli was abridged by the legislature's 1996 amendment to CPLR 214(6) to provide, s it does today, that such professional malpractice actions are governed by a three-year statute of limitations "regardless of whether the underlying theory is based in contract or tort." ***CPLR 214(6); L 1996, ch 623, as amended: Matter of R.M. Liment & Frances Halsband, Architects [McKinsey & CO., Inc.], 3 NY3d 538, 541; Chase Scientific Research v. NIA Group, 96 NY2d 20, 27***. It is for this reason

that post 1996 legal malpractice actions that also allege breach of contract, fraud, and other causes of action governed by lengthier statues of limitations are dismissed at time-barred in not brought within three years of accrual, if the additional claims involve facts duplicating the legal malpractice claims and do not allege distinct damages. ***Palmieri v. Biggiani, 108 AD3d 604, 608; Soni v. Pryor, 102 AD3d 856, 858; Pace v. Raisman & Assoc., Esqs., LLP, 95 AD3d 1185, 1188-1189; Leon Petroleum, LLC v. Carl S. Levine & Assoc., P.C., 80 AD3d 573, 574; Scartozzi v. Potruch, 72 AD3d 787, 789***. There is no reason not to apply those holdings to the plaintiff's remaining causes of action, including those sounding specifically in deceit.

To establish entitlement to the protection of the attorney judgment rule, an attorney must offer a reasonable strategic explanation' for the alleged negligence

Leon Petroleum, LLC, et al. v. Carl S. Levine & Associates, P.C., et al.
Second Dept; Index No.: 36154/08; Slip Op. No.: 07632

Attorneys:
Appellants: Somer & Heller, LLP, Commack (Michael Marcus of counsel); respondents: McManus & Richter, P.C., Manhattan (Scott Tuttle and Jillian Amagsila of counsel)

The plaintiffs commenced this action to recover damages for legal malpractice. The Supreme Court granted the defendants' motion for summary judgment dismissing the complaint and denied the defendants' motion in limine to preclude certain testimony as academic, rather than on the merits. The plaintiffs appeal and the Appellate Division ordered that the appeal from so much of the order as denied the defendants' motion in limine to preclude certain testimony at trial is dismissed, as the plaintiffs are not aggrieve by that portion of the order (CPLR 5511) and because that portion of the order appealed from is an evidentiary ruling, which is neither appealable as of right nor by permission (***Curtis v. Fishkill Allsport Fitness & Racquetball Club, Inc., 2 AD3d 768***) and affirmed the order and awarded a bill of costs to the defendants.

To establish a cause of action alleging legal malpractice, a plaintiff must show that the attorney failed to exercise the care, skill and diligence commonly possess and exercised by a member of the legal profession, and that such negligence was a proximate cause of the actual damages sustained. ***Rudolf v. Shayne, Dachs, Stanisci, Corker & Sauer, 8 NY3d 438, 442; Frederick v. Meighan, 75 AD3d 528, 531***. Under the attorney judgment rule, "selection of one among several reasonable courses of action does not constitute malpractice." ***Rosner v. Paley, 65 NY2d 736, 738; Ackerman v. Kesselman, 100 AD3d 577; Bua v. Purcell & Ingrao, P.C., 99 AD3d 843, 847***. "To establish entitlement to the protection of the attorney judgment rule, an attorney must offer a reasonable strategic explanation' for the alleged negligence." ***Ackerman v. Kesselman, 100 AD3d at 579, quoting Pillard v. Goodman, 82 AD3d 541, 542***. "To establish causation, a plaintiff must show that he or she would have prevailed in the underlying action or would not have incurred any damages, but for the lawyer's negligence." ***Rudolf v. Shayne, Dachs, Stanisci, Corker & Sauer, 8 NY3d at 442; Blanco v. Polanco, 116 AD3d 892, 894***.

Here, the defendants established their entitlement to judgment as matter of law by demonstrating that the failure to draft clear, specific, and unambiguous language in an agreement for the purchase of assets, so as to provide that the subject assets included certain unpaid condemnation awards, was a reasonable strategic decision taken to avoid an increase in the purchase price, and that the drafting of more specific language would not have resulted in the inclusion of the condemnation awards in the sale without an increase in the purchase price. In opposition, the plaintiffs failed to raise a triable issue of fact with respect to either element of the legal malpractice cause of action. ***Zuckerman v. City of New York, 49 NY2d 557, 562***. "A mere hope…that somehow or other on cross examination credibility of a witness…can be put in issue is not sufficient to resist a motion for summary judgment.'" ***Trails W. v. Wolff, 32 NY2d 207, 221, quoting Hurley v. Northwest Publ Inc., 273 F Supp 967, 974 (D Minn), affd 398 F2d 346 (8th Cir); Angeles v. Goldhirsch, 268 AD2d 217***. Accordingly, the Supreme Court properly granted the defendants' motion for summary judgment dismissing the complaint. ***Rodriguez v. Lipsig, Shapey, Manus & Moverman, P.C., 81 AD3d 551, 552; Noone v. Stieglitz, 59 AD3d 505, 507.***

The plaintiffs are not aggrieved by the denial of the defendants' motion in limine ***(CPLR 5511; Mixon v. TBV, Inc., 76 AD3d 144, 156-157; Quality King Distribs. v. Arvin, 228 AD2d 568, 569***. In addition, the portion of the order denying the defendants' motion in limine is an evidentiary ruling. Such a ruling, even when made "in advance of trial on motion papers, constitutes, at best, an advisory opinion, which is neither appealable as of right nor by permission." ***Chateau Rive Corp. v. Enclave Dev. Assoc., 283 AD2d 537, 537; Curtis v. Fishkill Allsport Fitness & Racquetball Club, Inc., 2 AD3d 768***. For these reasons, that portion of the appeal must be dismissed.

MEDICAL MALPRACTICE

Physician moving for summary judgment dismissing complaint alleging medical malpractice must establish, prima facie, either that there was no departure or that any departure was not a proximate cause of the plaintiff's injuries

Barrocales, etc., et al. v. New York Methodist Hospital, et al.
Second Dept.; Index No.: 6320/04; Slip Op. No.: 07606

Attorneys:
Appellants: Fitzgerald & Fitzgerald, P.C., Yonkers (John Daly, Eugene Pagano, Mitchell Gittin, John Leen, Ann Chase and John Fitzgerald of counsel); respondents New York Methodist Hospital, Madhu Gudavalli and Sumana Mynemi: Aaronson Rappaport Feinstein & Deutsch, LLP, Manhattan (Steven Mandell of counsel); respondent Ifeanyi Obiakor and Ifeanyi Obiakor, M.D., P.C.: DeCorato Cohen Sheehan & Federico, LLP, Manhattan (Joshua Cohen and Anna Schwartz of counsel)

The plaintiff Shawnette Wiggan was admitted to the defendant New York Methodist Hospital (MYMH) form May 2, 2001 to May 7, 2001, and again from May 9, 2001 to May 19, 2001, exhibiting symptoms of preterm labor. The infant plaintiffs were born prematurely on May 19, 2001, and it is undisputed that they suffered various injuries as a result of their premature birth. The plaintiffs commenced this medical malpractice action alleging that the defendant Ifeanyi Obiakor, a private attending physician, failed to take certain steps to delay the premature birth of the infant plaintiffs. The plaintiffs sought to impose liability upon NYMH based on, among other things, the decision to discharge Wiggin on May 7, 2001.

"In order to establish the liability of a physician for medical malpractice, a plaintiff must prove that the physician deviated or departed from accepted community standards of practice, and that such departure was a proximate cause of the plaintiff's injuries." ***Stukas v. Streiter, 83 AD3d 18, 23***. Accordingly, "a physician moving for summary judgment dismissing a complaint alleging medical malpractice must establish, prima facie, either that there was no departure or that any departure was not a proximate cause of the plaintiff's injuries." ***Gillespie v. New York Hosp. Queens***, ***96 AD3d 901, 902; Faicco v. Golub, 91 AD3d 817, 818; Roca v. Perel, 51 AD3d 757, 758-759***. "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." ***Gillespie v. New York Hosp. Queens, 96 AD3d at 902; Stukas v. Streiter, 83 AD3d at 30***. "Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions." ***Feinberg v. Feit, 23 Add 517, 519; Shields v. Baktidy, 11 AD3d 671, 672***. Such conflicting expert opinions will raise credibility issues which can only be resolved by a jury. ***Roca v. Perel, 51 AD3d at 759; Feinberg v. Feit, 23 AD3d at 519***. However, a plaintiff's expert's affidavit that is conclusory or speculative is insufficient to raise a triable issue of fact in opposition to a defendant's prima facie showing of entitlement to judgment as matter of law in a medical malpractice action. ***Gillespie v. New York Hosp. Queens, 96 AD3d at 902***.

In support of that branch of his motion for summary judgment to dismiss the cause of action alleging medical malpractice, Obiakor established, prima facie, that he did not depart from acceptable medical care by submitting, among other things, an expert affirmation concluding that this care and treatment of Wiggan's preterm labor during her two period of admission at NYMH was within the accepted standards of care. ***DeLaurentis v. Orange Regional Med. Ctr.-Horton Campus, 117 AD3d 774; Castelli v. Westchester County Health Care Corp., 116 AD3d 898***. In addition, he established that, in any event, any departure on his part was not a proximate cause of the plaintiffs' injuries. ***Castelli v. Westchester County Health Care Corp., 116 AD3d at 898***. In opposition, the plaintiffs failed to raise a triable issue of fact. Contrary to the plaintiffs' contention, their medical expert's affirmation submitted in opposition to Obiakor's motion was conclusory, speculative, self-contradictory, and lacked reasonable medical certainty, and, therefore, was insufficient to raise a triable issue of fact. ***Callistro v. Bebbington, 94 AD3d 408, 410-411, affd 20 NY3d 945***. The plaintiffs also failed to raise a triable issue of fact in response to Obiakor's prima facie showing that he cannot e held vicariously liable for the alleged medical malpractice of another of Wiggan's private attending physicians, The defendant Barbara Gordon, because Obiakor and Gordon worked together for the defendant professional corporation, Ifeanyi Obiakor, M.D., P.C., rather than as partners in a partnership. ***Keitel v. Kurtz, 54 AD3d 387, 392***. Accordingly, the Supreme Court properly granted that branch of Obiakor's motion which was for summary judgment dismissing so much of the complaint as alleged medical malpractice insofar as asserted against him.

The Supreme Court also properly granted that branch of the motion of NYMH and the defendants Madhu Gudavalli and Sumana Myneni (the hospital defendants) which was for summary judgment dismissing so much of the complaint, insofar as asserted against NYMH, as was based upon Wiggan's discharge therefrom May 7, 2001. "In general, a hospital may not be held vicariously liable for the malpractice of a private attending physician who is not an employee, and may not be held concurrently liable unless its employees committed independent acts of negligence." ***Toth v. Bloshinsky, 39 AD3d 848, 850; Schultz v. Shreedhar, 66 AD3d 666, 667; Cook v. Reisner, 295 AD2d 466, 467***. Here, the hospital defendants established prima facie that the decision to discharge Wiggan on May 7, 2001, was made by one of her private attending physicians who

was not employed by the hospital, and therefore, NYMH cannot be held vicariously liable for that decision. ***Giambona v. Hines, 104 AD3d 807, 811; Corletta v. Fischer, 101 AD3d 929, 930***. In opposition, the plaintiffs failed to raise a triable issue of fact. ***Corletta v. Fischer, 101 AD3d at 930***.

Defendant physician moving for summary judgment in action alleging medical malpractice must make a prima facie showing that there was no departure from good and accepted medical practice or that the plaintiff was not injured thereby

Gressman, etc., et al. v. Stephen-Johnson, et al.
Second Dept.; Index No.: 3002/08; Slip Op. No.: 08318

Attorneys:
Appellant: Fitzgerald & Fitzgerald, P.C., Yonkers (John Daly of counsel); respondents: Aaronson Rappaport Feinstein & Deutsch, LLP, Manhattan (Steven Mandell of counsel)

The plaintiff was born on February 3, 2005 and diagnosed several years later with, among other things, pervasive developmental disorder. The plaintiff's mother commenced this action on his behalf against the physician who delivered him and the medical group where the mother received prenatal care from the defendant physician, alleging medical malpractice. The mother alleged, among other things, that the plaintiff's injuries were proximately caused by the physician's failure to diagnose fetal hypoxia, failure to properly administer pitocin, and failure to deliver the plaintiff by Cesarean section.

The defendants moved for summary judgment dismissing the complaint. By order dated November 29, 2012, the Supreme Court granted the motion. A judgment dated February 8, 2013, was entered upon the order, dismissing the complaint. Thereafter, the plaintiff moved for leave to reargue and renew. By order dated April 11, 2013, the Supreme Court granted reargument, but upon reargument, adhered to its original determination.

A defendant physician moving for summary judgment in an action alleging medical malpractice "must make a prima facie showing that there was no departure from good and accepted medical practice or that the plaintiff was not injured thereby." ***Stukas v. Streiter, 83 AD3d 18, 24; Poter v. Adams, 104 AD3d 925, 926; Gillespie v. New York Hosp. Queens, 96 AD3d 901, 902; Williams v. Bayley Seton Hosp., 112 AD3d 917, 918***. Once a defendant 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. ***Shehebar v. Boro Park Obstetrics & Gynecology, P.C., 106 AD3d 715, 715-716; Gillespie v. New York Hosp. Queens, 96 AD3d at 902; Stukas v. Strieter, 83 AD3d at 23-25.***

Here, the defendants demonstrated their prima facie entitlement to judgment as a matter of law by showing that they did not depart from good and accepted medical practice in their treatment, and therefore that their treatment was no a proximate cause of the plaintiff's injuries. ***McKenzie v. Clarke, 77 AD3d 637, 638; Sheenan-Conrades v. Winifred Masterson Burke Rehabilitation Hosp., 51 AD3d 769, 769***. However, in opposition, the plaintiff's experts raised triable issues of fact as to whether the plaintiff's persistent tachycardia was an indicator of hypoxia, and if so, whether the failure to deliver the plaintiff by Cesarean section and to administer pitocin constituted departures from accepted medical practice, which caused hypoxic/ischemic brain injury. Although the defendant's expert stated that the plaintiff's arterial blood gas levels taken at stated intervals in the hours after his birth, while he was under treatment in the intensive care unit, contraindicated fetal hypoxia, the plaintiff's expert concluded that his paleness at birth and shortly thereafter and the acid levels of his blood were signs of fetal hypoxia. Further, the plaintiff submitted another expert's affidavit stating that the plaintiff's specific symptoms were "consistent with brain damage from hypoxia/ischemia." Contrary to the defendants' contention, the affidavits of the plaintiff's experts were not conclusory or speculative, but were based upon specific facts in the record. ***Fritz v. Burman, 107 AD3d 936; Makinen v. Torelli, 106 AD3d 782, 784; cf. Graziano v. Cooling, 79 AD3d 803, 805; Rebozo v. Wilen, 41 AD3d 457.*** The conflicting medical opinions present triable issues of fact. ***Darwick v. Paternoster, 56 AD3d 714.***

Defendant physician's affidavit or affirmation describing facts in specific detail and opining that care provided did not deviate from applicable standard of care may be sufficient to discharge moving party's initial burden on motion for summary judgment

Howard, etc., et al. v. Stanger, et al.
Third Dept.; Slip Op. No.: 08088

Attorneys:
Appellant: Freeman Howard, PC, Hudson (Paul Freeman of counsel); respondent Stanger: Feldman Kieffer, LLP, Buffalo (James Eagan of counsel); respondent Columbia Memorial Hospital: O'Connor, O'Connor, Bresee & First, P.C., Albany (Justin O'Connor of counsel)

The decedent Scott Howard became ill while testifying at the Columbia County Courthouse. The decedent advised responding emergency services personnel that he was suffering from, among other things, back pain and numbness in his legs and was transported via ambulance to the defendant Columbia Medical Hospital. Upon his arrival in the emergency room, the decedent relayed his symptoms to the nursing staff, indicating that he had experienced dizziness and a sudden onset of back discomfort and that he felt tingling in his legs. While in the emergency room, he displayed various gastrointestinal symptoms, including vomiting and nausea, in response to which defendant Craig Stanger, one of the attending physicians on duty that day, ordered medication to treat the nausea and blood tests to evaluate his condition. After speaking with the decedent and reviewing his lab results, Stanger discharged the decedent with a diagnosis of gastroenteritis, acute stress reaction and renal insufficiency and directed him to follow up with his personal physician. The following day, the decedent returned to the emergency room in cardiac arrest and shortly thereafter died –purportedly as a result of a cardiac tamponade due to a ruptured dissecting thoracic aortic aneurysm.

The plaintiff commenced this medical malpractice and wrongful death action against the hospital, Stanger, and Stanger's employer, Columbia Emergency Services, P.C. The defendants separately moved for summary judgment. The Supreme Court granted the defendants' motions, prompting the plaintiff to move for reconsideration. The Supreme Court denied the motion and the plaintiff appeals.

Regarding the plaintiff's motion for reconsideration, to the extent that such motion sought reargument, no appeal lies from the denial thereof. ***Wells Fargo, N.A. v. Levin, 101 AD3d 1519, 1520 (2012), lv dismissed 21 NY3d 887 (2013)***. TO the extent the plaintiff sought leave to renew, it is well settled that "a motion to renew must be based upon newly discovered evidence which existed at the time the prior motion was made, but was unknown to the party seeking renewal, along with a justifiable excuse as to why the new information was not previously submitted." ***Matter of Kelly v. Director of TRC Programs, 84 AD3d 1657, 1658 (2011); Premo v. Rosa, 93 AD3d 919, 920 (2012)***. A motion to renew is "not a second chance to remedy inadequacies that occurred in failing to exercise due diligence in the first instance." ***Onewest Bank, FSB v. Slowek, 115 Add 1083, 1083 (2014***).

Here, the plaintiff's motion to renew was based upon her discovery that Stanger's license to practice medicine was under a one-year stayed suspension at the time he tendered his affidavit in support of the defendants' respective motions. As Stanger's license was under suspension, the argument continues, his affidavit was necessarily insufficient to discharge the defendants' initial burden for summary judgment. Setting aside the overall sufficiency of Stanger's affidavit, the flaw in the plaintiff's argument on this point –viewed in the context of the motion to renew—is that Stanger's license suspension was effective June 7, 2012, the underlying consent order entered between Stanger and the Office of Professional Medical Conduct was a public document and the plaintiff has failed to offer any explanation as to why such suspension could not have been discovered with due diligence prior to the point in time that the plaintiff opposed the defendants' motions in November 2012. Under these circumstances, the plaintiff's motion to renew was properly denied. ***Vieyra v. Penn Toyata, Ltd., 116 AD3d 840, 841-842 (2014); Webber v. Scarano-Osika, 94 AD3d 1304, 1305-1306 (2012); Hoffman v. Pelletier, 6 AD3d 889, 890 (2004).***

"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." ***Wexelbaum v. Jean, 80 AD3d 756, 757 (2011***). Here, the plaintiff alleged that the defendants departed from accepted standards of medical care by failing to, among other things, appreciate the significance of the decedent's symptoms, properly interpret the results of his blood tests, consider a differential diagnosis of aortic dissection or aneurysm and order appropriate testing –specifically a CAT scan or transesophageal echocardiogram. Hence, in order to prevail upon their respective motions for summary judgment dismissing the complaint the defendants bore the initial burden of demonstrating that they did not deviate from accepted standards of practice or, if they did so, that such deviation did not cause any injury to the decedent. ***Cole v. Champlain Va., Physicians'; Hosp. Med. Ctr., 116 AD3d 1283, 1285 (2014); Longtemps v. Oliva, 110 AD3d 1316, 1317 (2013); LaFountain v. Champlain Val. Physicians Hosp. Med. Ctr., 97 AD3d 1060, 1061 (2012)***. To that end, the defendants primarily relied upon Stanger's affidavit wherein he discussed the "typical presentation for an aortic dissection and/or aortic aneurysm," delineated the decedent's chief complaints and presenting symptoms upon arriving at the hospital, recited the results of the decedent's blood work and explained why he did not believe that further diagnostic testing was warranted.

"A defendant physician's affidavit or affirmation describing the facts in specific detail and opining that the care provided did not deviate from the applicable standard of care" may be sufficient to discharge the moving party's initial burden on a motion for summary judgment (***Cole v. Champlain Val. Physicians' Hosp. Med. Ctr., 116 AD3d at 1285; Martino v. Miller, 97 AD3d 1009, 1009-1010 [2012]; Derusha v. Sellig, 92 AD3d 1193, 1193-1194 [2012]***), and contrary to the plaintiff's assertion, the fact that Stanger's license was under a stayed suspension at the time he prepared the subject affidavit does not render his affidavit inadmissible for purposes of the underlying motions. ***Cf. Williams v. Halpern, 25 Add 467, 468 (2006).*** Additionally, there is no merit to the plaintiff's claim that Stanger prepared his affidavit in violation of either the underlying consent order or the terms of his probation. Although the terms of his probation permitted Stanger to "practice medicine only when monitored by a licensed physician, board certified in an appropriate specialty," the terms of probation did not require the practice monitor to directly supervise Stanger's treatments of patients or to review or supervise the preparation of

Stanger's affidavit. Rather, the terms of probation required the practice monitor to visit Stanger's practice at least on a monthly basis and to review no fewer than 20 of Stanger's patient records in order to determine whether Stanger's medical practice was being conducted in accordance with generally accepted standards of care.

However, the Appellate Division was troubled by the fact that Stanger failed to disclose the status of his medical licenses when he prepared his affidavit. This glaring omission is entirely inconsistent with Stanger's ethical obligations as a practicing physician and seriously calls into question the medical opinion he has rendered regarding his diagnosis, care and treatment of the decedent. Additionally, further review of Stanger's affidavit reveals that the opinion set forth therein was "based on Stanger's review of the medical records in this matter, as well as his personal recollection of the care and treatment rendered to the decedent." In this regard, Stanger acknowledged that he did not complete his charting of decedent's January 29, 2009 hospital visit until after he (1) learned that decedent had returned to the emergency department the following day, (2) was advised that the decedent had died, and (3) had been questioned by another physician regarding the care and treatment he had provided to decedent the preceding day. Under these circumstances, Stanger's affidavit is not sufficient to satisfy the defendants' initial burden on the motions for summary judgment, thereby warranting the denial thereof.

Even if the Appellate Division were to conclude that Stanger's affidavit was sufficient to discharge the defendants' burden in that regard, it would find that the plaintiff's proof in opposition was sufficient to raise a question of fact as to whether the defendants' diagnosis, care and treatment of the decedent deviated from accepted medical standards. The brief and conclusory affidavit tendered by the plaintiff's expert offered no insight into the manner in which Stanger's diagnosis, care, and treatment departed from accepted medical practice and would be insufficient to raise a question of fact. ***Longtemps v. Oliva, 110 AD3d at 1319; Martino v. Miller, 97 AD3d at 1010-1011***. That said, the plaintiff also tendered Stanger's deposition testimony, wherein he acknowledged that the "sudden onset of back pain can be a harbinger of bad stuff," including "aortic aneurysm, aortic dissection, heart attack," and decedent's hospital records reflect "a sudden onset of back discomfort" accompanied by dizziness and a tingling in decedent's legs while he was testifying. Similarly, although Stanger testified that the decedent did not display certain indicators of an aortic dissection/aneurysm and that some of the decedent's noted symptoms (diarrhea) were not "part of that picture," he also testified that nausea, vomiting, and numbness or tingling of the legs –al of which the decedent did complain or of display—either were or could be indicative of an aortic dissection or aneurysm. Stanger further testified that a CAT scan, which he did not order, was the go-to test for diagnosing this condition.

In medical malpractice case, defendant not entitled to summary judgment where plaintiff's medical expert's affidavit was sufficient to raise a material issue of fact regarding whether defendant's treatment of plaintiff deviated from recognized standards of care, thereby causing her injuries

Conto, et al. v. Lynch, et al.
Third Dept.; Slip Op. No.: 08094

Attorneys:
Appellants: Thorn Gershon Tymann & Bonanni, LLP, Albany (Mia VanAuken of counsel); respondents: Keith Schockmel, Albany

The defendant plastic surgeon performed a bilateral breast reduction and lift procedure and bilateral brachioplasty on the plaintiff and, within days of the procedure, the plaintiff complained of complications to her left breast, including severe blistering and skill loss to the areola. Less than a year later, the defendant replaced the saline implant from the plaintiff's left breast and performed a saddlebag procedure in which excess tissue was excised from the plaintiff's thighs. However, due to the plaintiff's continuing pain and other complications in her left breast, the defendant removed the implant. The plaintiff also complained that the thigh excision had disfigured the appearance of her thighs. Although the defendant scheduled an additional corrective procedure, the plaintiff did not return to him for further medical treatment. The plaintiff and her husband commenced this action alleging medical malpractice and lack of informed consent against the defendant surgeon and his medical practice. The defendants moved for summary judgments dismissing the complaint. The Supreme Court denied the motion and the defendants appeal.

The defendants had the initial burden of demonstrating that "there was no departure from accepted standards of practice or that the plaintiff was not injured thereby." ***Derusha v. Sellig, 92 AD3d 1193, 1193 (2012); Maki v. Bassett Healthcare, 85 AD3d 1366, 1368 (2011), appeal dismissed 17 NY3d 855 (2011), lv dismissed and denied 18 NY3d 870 (2012)***. In his affidavit, the defendant averred that within a reasonable degree of medical certainty, the preoperative consultations with the plaintiff, the surgical procedures performed on the plaintiff, and the follow-up care provided to her fully comported with acceptable standards of medical care and that he had fully explained to the plaintiff the inherent risks of the procedures and obtained signed informed consent prior to each surgery. He maintained that he performed the first breast surgery competently and denied that the resulting infection was related to the implants. He further asserted that the plaintiff was given appropriate

postoperative care and treatment. He indicated that the excision performed on the plaintiffs' thighs comported with accepted standards of medical care and that the plaintiff was aware that she might need additional liposuction, but that plaintiff failed to return to his office for such treatment.

The defendants' evidence established their prima facie entitlement to judgment as a matter of law, thereby shifting the burden to the plaintiffs '"to establish, through competent expert medical evidence, that there exists a triable issue of fact as to whether there was a deviation from the accepted standard of care"' that can be causally connected to the injuries sustained by the plaintiff. ***Friedland v. Vassar Bros. Med. Ctr., 119 AD3d 1183, 1187 (2014), quoting Helfer v. Chapin, 96 AD3d 1270, 1272 (2012); Martino v. Miller, 97 AD3d 1009, 1010 (2012)***. The defendants on appeal insist that the complaint should have been dismissed as the plaintiffs' medical expert failed to address certain claims raised in the complaint and, in addition, that the expert's opinion regarding the defendant's purported deviations was wholly speculative and failed to demonstrate that the defendants' allegedly negligent treatment of the plaintiff was the proximate cause of her injuries.

The plaintiffs' expert, a board-certified plastic surgeon, opined that, with regard to the plaintiff's initial breast surgery, the defendant's choice to combine the breast reduction procedure with the insertion of breast implants did not comport with generally accepted medical standards and that such combine procedure is reserved for the rarest of cases. He stated that his review of the evidence did not reveal any "functional reason" to simultaneously perform the discrete procedures and that the likelihood of postoperative complications is heightened where an implant is inserted during surgery. As to the thigh excision procedure, the expert opined that such surgical approach deviated from generally accepted medical standards and that the plaintiff was a candidate for "liposuction…followed as needed by secondary skin contouring." He averred that the deformed appearance of the plaintiff's thighs was a "predicable result" of the defendant's use of tissue excision. Although the expert' affidavit was succinct on the causation element, it was sufficient to raise a material issue of fact regarding whether the defendant's treatment of the plaintiff deviated from recognized standards of care, thereby causing her injuries. ***Longtemps v. Oliva, 110 AD3d 1316, 1318 (2013); Plourd v. Sidoti, 69 AD3d 1038, 1039 (2010); Carter v. Tana, 68 AD3d 1577, 1580 (200)***.

Viewing the evidence in a light favorable to the plaintiffs, the denial of the defendants' summary judgment motion as to the plaintiffs' medical malpractice claims was proper. ***Hauss v. Community Care Physicians, P.C., 119 AD3d 1037, 1039 (2014); Doucett v. Strominger, 112 AD3d 1030, 1033 (2013); Dugan v. Troy Pediatrics, LLP, 105 AD3d 1188, 1192 (2013)***.

The Appellate Division reaches the same conclusion regarding the plaintiffs' lack of informed consent cause of action. The proof in the record adduced by the defendants meets their initial burden of demonstrating that they fully disclosed "the risks, benefits and alternatives" of the plaintiff's surgeries that would have been explored by a reasonable plastic surgeon under the same circumstances, or that a similarly situated patient, "fully informed, would have elected…to undergo the procedure or treatment***." Rivera v. Albany Med. Ctr. Hosp., 119 AD3d 1135, 1138 (2014); Schilling v. Ellis Hosp., 75 AD3d 1044, 1045 (2010)***. The plaintiff, however, denied that the defendant warned her of the possible complications that she experienced, averring that, despite her opposition to breast implants, the defendant was insistent that implants were necessary, compelling her to consent to the procedure. The plaintiff indicates that the defendant failed to fully explain the risks of the complications and that, had she been made aware of the possibility that she would lose a portion of her nipple, she would not have consented to the initial breast procedure. The plaintiff denies defendant's entry in the plaintiff's medical record that the plaintiff and defendant fully discussed the potential consequences of the thigh excision and asserts that the defendant told her that the excision was the only correct procedure to pursue. The plaintiffs' expert opined that a person in the plaintiff's position who was fully informed of the potential consequences of the thigh excision would not have gone forward with it and that the defendant's conduct conflicted with generally accepted standards of medical care, which require the surgeon to provide the patient with "all relevant alternatives." The expert concluded that the defendant's failure to ensure that the plaintiff's consent to the surgeries was truly informed was a dereliction of applicable professional standards of care. As the plaintiffs' evidence raised triable issues of fact as to whether there was a lack of informed consent to the procedures, the denial of the defendants' motion for summary judgment was appropriate. ***Rivera v. Albany Med. Ctr. Hosp., 119 AD3d at 1138.***

CIVIL PRACTICE AND PROCEDURE

Where there is sufficient evidence to support a plaintiff's cause of action pursuant to a particular theory of negligence, it is error to deny a request by the plaintiff to submit an interrogatory to the jury regarding the theory

Abato v. Beller, et al.

Second Dept.; Index No.: 46024/02; Slip Op. No.: 07460

Attorneys:

Appellant: The Law Offices of Jonathan Ginsberg, LLC (Manhattan (Michael Mangan of counsel); respondent; Rawle & Henderson, LLP, Manhattan (Sojee Kim and Robert Fitch of counsel)

On May 2, 2000, the defendant Edward Miller, an oral surgeon, performed a jaw advancement surgery on the plaintiff, then 38-years-old, in coordination with Dr. Marc Lemchen, an orthodontist who referred the plaintiff to Miller. On the Friday before the surgery, which was scheduled for a Monday morning at 9:00 a.m., Miller attempted, without success, to contact Dr. Lemchen to advise him of a change in the preoperative plan that they had agreed upon. On the day of the surgery, Miller implemented the changed version of the preoperative plan. Instead of performing a jaw advancement and moving the plaintiff's jaw several millimeters to the left to correct her mandibular midline, as initially planned. Miller performed the jaw advancement, but left the plaintiff's mandibular midline "as it was pre-op." The plaintiff alleges that Miller's failure to correct her mandibular midline resulted in her requiring corrective surgery two years later.

The verdict sheet submitted to the jury contained a number of interrogatories. Question 2A asked: "Did the defendant, Dr. Edward Miller, depart from good and accepted standards of oral and maxillofacial surgical practice in not adequately communicating to the orthodontist his preoperative plan, to leave the mandibular midline as it was preoperative?" Question number 2B, to be reached only if the jury answered "yes" to 2S, asked: "was this departure by Dr. Edward Miller a substantial factor in causing injury to the plaintiff…?" The plaintiff contends that the court erred in denying her request that the jury be given an interrogatory asking whether there been a departure in the preoperative planning itself, and in the performance of the surgery, rather than just in his failure to communicate the change in plan. The Appellate Division agrees.

"The trial court has broad discretion in deciding whether to submit interrogatories to the jury." ***Lunn v. County of Nassau, 115 AD2d 457, 458; CPLR 4111 (c)***. However, where there is sufficient evidence to support a plaintiff's cause of action pursuant to a particular theory of negligence, it is error to deny a request by the plaintiff to submit an interrogatory to the jury regarding the theory. ***Beizer v. Schwartz, 15 AD3d 433, 434***. Moreover, where a court improperly limits a verdict sheet in this manner, a new trial is warranted. ***Lawson v. Brookdale Hosp. Med. Ctr., 43 AD3d 880, 882; Voulo v. Bozza, 294 AD2d 494, 495; Gargullo v. City of New York, 280 AD2d 515***. Contrary to the Supreme Court's conclusion, there was sufficient evidence to support the plaintiff's theory that Miller departed from accepted standards of dental care in changing the preoperative plan and failing to correct the mandibular midline, and a new trial must be conducted in connection with the complaint as asserted against him. ***Voulo v. Bozza, 294 AD2d at 495; Garguilo v. City of New York, 280 AD2d 515.***

The Supreme Court providently exercised its discretion in permitting Dr. Stephen Sachs to testify as an expert on Miller's behalf. The plaintiff contends that she had an expectation of confidentiality with respect to information obtained in 2002 by Dr. Sach's partner, Dr. Michael Schwartz, when Dr. Schwartz examined her at her request in contemplation of litigation. The court, however, was entitled to credit Dr. Sach's testimony that Dr. Schwartz disclosed no confidential or privileged information to him at an time. ***Roundpoint v. V.N.A., Inc., 207 AD2d 123, 125.***

Verdict rendered in favor of defendant may be successfully challenged as against weight of the evidence only when evidence so preponderated in favor of plaintiff that it could not have been reached on any fair interpretation of evidence

Tallarico, et al. v. Kolli, et al.
Fourth Dept.; Slip Op. No. 08177

Attorneys:
Defendant-appellant: Fager Amsler & Keller L.L.P., Latham (Nancy E. May-Skinner of counsel); plaintiffs-respondents: Dempsey & Dempsey, Buffalo (Helen Kaney Dempsey of counsel)

The plaintiffs, individually and on behalf of their son, commenced this medical malpractice action seeking damages for injuries allegedly sustained by the child during labor and delivery. After a trial, the jury rendered a verdict in favor of the defendants, finding that the defendant was not negligent and that the defendant hospital was negligent, but that its negligence was not a proximate cause of the child's injuries. The Supreme Court subsequently granted in part the plaintiffs' post trial motion to set aside the verdict as against the weight of the evidence by setting aside the verdict in favor of the hospital and ordering a new trial on the issue of proximate cause. The Supreme Court erred in granting in part the plaintiffs' post trial motion, and the Appellate Division therefore reversed the order as appealed from, denied the post trial motion in its entirety, and reinstated the verdict with respect to the hospital.

"A verdict rendered in favor of a defendant may be successfully challenged as against the weight of the evidence only when the evidence so preponderated in favor of the plaintiff[s] that it could not have been reached on any fair interpretation of the evidence." ***Krieger v. McDonald's Rest. of N.Y., Inc., 79 AD3d 1827, 1828, lv dismissed 17 NY3d 734***. There is a fair interpretation of the evidence pursuant to which the jury could have found that the labor and delivery nurses employed by the hospital were negligent, but that their negligence did not proximately cause the child's injuries. The defendants' expert testified that the child's injuries occurred in utero, no earlier than a week before delivery and, thus, that any negligence on the part of the hospital nurses did not cause or contribute to his injuries. The Supreme Court improperly invaded the jury's province in rejecting that opinion and accepting the contrary opinion of the child's treating physician. ***Reilly v. Ninia, 81 AD3d 913, 915; Barton v. Youmans, 24 AD3d 1192, 1192***. Contrary to the Court's determination, the opinion of the defendants' expert was

neither speculative (***cf. Vergara v. Scripps Howard, 261 AD2d 302, 307, lv denied 94 NY2d 757***), nor contrary to the evidence (***cf. Persaud v. City of New York, 307 AD2d 346, 347, lv denied 1 NY3d 502***. "Indeed, this trial presented a classic battle of the experts on the determinative issue of causation" (***Russell v. City of Buffalo, 34 AD3d 1291, 1293***), and it was for the jury to decide which expert was more credible. ***Radish v. DeGraff Mem. Hosp., 291 AD2d 873, 874***.

A motion for judgment as matter of law pursuant to CPLR 4401 may be granted where trial court determines that, upon evidence presented, there is no rational process by which trier of fact could base a finding in favor of nonmoving party

Ruggiero v. Weth
Second Dept.; Index No.: 8883/10; Slip Op. No.: 08002

Attorneys:
Appellant: Mahon, Mahon, Kerins & O'Brien, LLC, Garden City (Joseph Hyland of counsel); respondent: Russo, Apoznanski & Tambasco (Montfort, Healy, McGuire & Salley, Garden City (Donald Neumann, Jr. of counsel)

In an action to recover damages for personal injuries, the plaintiff appeals from a judgment of the Supreme Court, which upon the denial of his motion pursuant to CPLR 4401, made at the close of the evidence, for judgment as a matter of law on the issue of liability, upon a jury verdict and upon the denial of his motion pursuant to CPLR4404 (a) to set aside the verdict as contrary to the weight of the evidence and for a new trial. The judgment is affirmed with costs.

Contrary to the plaintiff's contention, the Supreme Court properly denied his motion pursuant to CPLR 4401 for judgment as matter of law on the issue of liability. A motion for judgment as matter of law pursuant to CPLR 4401 may be granted where the trial court determines that, upon the evidence presented, there is no rational process by which the trier of fact could base a finding in favor of the nonmoving party***. PAS Tech. Servs., Inc. v. Middle Vil. Healthcare Mgt., LLC, 92 AD3d 742; Robinson v. 211-11N., LLC, 46 AD3d 657, 658; C.K. Rehner, Inc. v. Arnell Constr. Corp., 303 AD2d 439, 440***. In considering such a motion, "the trial court must afford the party opposing the motion every inference which may properly be drawn from the facts presented, and the facts must be considered in a light most favorable to the nonmovant.'" ***Robinson v. 211-11 N., LLC, 46 AD3d at 658, quoting Szczerbiak v. Pilat, 90 NY2d 553, 556***. Here, viewing the evidence in the light most favorable to the defendant, a rational process existed by which the jury could find that, although he was negligent, his negligence was not a substantial factor in causing the accident.

A jury verdict should not be set aside as contrary to the weight of the evidence unless the jury could not have reached the verdict by any faire interpretation of the evidence. ***Lolik v. Big V Supermarkets, 86 NY2d 744, 746; Scalogna v. Osipov, 1l17 AD3d 934; Crooks v. E. Peters, LLC, 103 AD3d 828, 829; Verizon N.Y., Inc. v. Orange & Rockland Utils., Inc., 100 AD3d 983***. "A jury's finding that a party was at fault but that such fault was not a proximate cause of the accident is inconsistent and against the weight of the evidence only when the issues are so inextricably interwoven as to make it logically impossible to find negligence without also finding proximate cause." ***Garrett v. Manaser, 8 AD3d 616, 617; Sliwowski v. City of New York, 113 AD3d 749; Niebles v. Manaswer, 110 AD3d 1047, 1047; Spero v. Awasthi Ltd. Partners, 106 AD3d 988, 989***. Here, the Supreme Court properly denied the plaintiff's motion pursuant to CPLR 4404 (a) to set aside the verdict as contrary to the weigh to f the evidence and for a new trial. A fair interpretation of the evidence supports the jury's determination that the plaintiff's actions were the sole proximate cause of the accident. ***Doubrovinskaya v. Dembizer, 77 AD3d 609.***

Contrary to the plaintiff's contentions, the Supreme Court did not err in charging the jury on Motor Vehicle Accidents –Sudden Stopping, set forth in PJI 2:83, as there was adequate evidence to support that charge. ***Johnson v. White, 85 AD3d 977***.

To establish entitlement to relief of setting aside verdict, defendant is required to establish that evidence was legally insufficient to support verdict

Mazella, etc. v. Beals, M.D., et al.
Fourth Dept.; Slip Op. Nos: 08145; 08146; 08147

Attorneys:
Defendant-appellant: Gale Gale & Hunt, LLC, Syracuse, Meiselman, Packman, Nealon, Scialabba & Baker, P.C., White Plains (Myra Packman of counsel); plaintiff-respondent: Del Duchetto & Potter, Syracuse (Ernest Del Duchetto of counsel) and Alessandra DeBlasio, Manhattan

The defendant treated the decedent for depression and other mental health conditions for many years before 2009 by, inter alia, prescribing medications. The defendant did not see the decedent during the last ten years of that time. In a telephone call in April 2009, the decedent telephoned the defendant when his depression had flared up. During that call, the defendant changed the dosage of the decedent' medication and prescribed an additional medication. During a telephone call the next day, the defendant again adjusted the decedent's medication. The next day the plaintiff telephoned the defendant and advised

him of her concern about the decedent' condition. The defendant advised her to take the decedent to a nearby hospital's emergency psychiatric program. The defendant met with the decedent and the plaintiff at the hospital. That was the last contact defendant had with the decedent. The hospital recommended that the decedent receive inpatient care but after staying overnight the decedent refused. He was prescribed different medications than those prescribed by the defendant. The next day the decedent was admitted for inpatient treatment and was then transferred to another facility where he remained for a week. Another physician changed his medications. The decedent was release because the physicians there concluded that he was not suicidal and that his condition had improved enough to continue treatment as an outpatient. The decedent was referred to a psychiatric clinic that had approximately a four-week intake process. Before the decedent's application to be accepted for treatment at the clinic was completed, the decedent committed suicide.

In this medical malpractice and wrongful death action, the defendant physician appeals from an amended judgment awarding money damages to the plaintiff. The defendant contends that the Supreme Court erred in denying his post trial motion seeking to set aside the verdict on the ground that the plaintiff failed to establish a prima facie case of medical malpractice. To establish his entitlement to that relief, the defendant was required to establish that the evidence was legally insufficient to support the verdict, i.e. "that there was simply no valid line of reasoning and permissible inference which could possibly lead rational [person] to the conclusion reached by the jury on the basis of evidence presented at trial." ***Cohen v. Hallmark Cards, 45 NY2d 493, 499***. On this record, "There is a valid line of reasoning supporting the jury's verdict that the defendant deviated from the applicable standard of care in [his treatment] of plaintiff's [decedent]…, and that such deviation was a proximate cause of [the] injuries of plaintiff's decedent. ***Winiarski v. Harris [appeal No.2], 78 AD3d 1556, 1557; Sacchetti v. Giordano, 101 AD3d 1619, 1619-1620***. The Appellate Division also rejects the defendant's alternative contention in support of his post trial motion that the verdict is against the weight of the evidence, i.e., that the evidence so preponderated in the defendant's favor that the verdict in favor of the plaintiff could not have been reach on any fair interpretation of the evidence. ***Lolik v. Big V Supermarkets, 86 NY2d 744, 746***. Here, "the trial was a prototypical battle of the experts, and the jury's acceptance of [plaintiff's] case was a rational and fair interpretation of the evidence.'" ***Holstein v. Community Gen. Hosp. of Greater Syracuse, 86 AD3d 911, 912, affd 20 NY3d 892***. With respect to the dissent's summary of the testimony of the plaintiff's expert, there may have more than one proximate cause of the decedent's injuries. ***Argentina v. Emery World Wide Delivery Corp., 93 NY2d 554, 560, n 2***. The jury was entitled to credit the plaintiff's theory that defendant's actions constituted on those proximate causes.

The defendant further contends that the verdict must be set aside and a new trial granted because he was denied a fair trial by the admission of evidence of documents of the Office of Professional Medical Conduct. Even assuming, arguendo that the Supreme Court erred in admitting those documents in evidence, the defendant's contention lacks merit inasmuch as "that…error would not have affected the result' and…any such error therefore is harmless. ***Cook v. Oswego Country, 90 AD3d 1674, 1675***.

Contrary to the defendant's further contention, the Supreme Court's failure to submit a special verdict sheet to the jury was not prejudicial and does require a new trial. ***Suarez v. New York City Health & Hosps. Corp., 216 AD2d 287, 287; Kolbert v. Maplewood Healthcare Ctr., Inc., 21 AD3d 1301, 1301-1302,***

The dissent disagrees with the majority's conclusion that the negligence of the defendant physician was a proximate cause of the suicide of the decedent and would, therefore, reverse the amended judgment as appealed from, grant the defendant's motion to set aside the verdict as against the weight of the evidence (***Dentes v. Mauser, 91 AD3d 1143, 1145-1146, lv denied 19 NY3d 811; Rivera v. Greenstein, 79 AD3d 564, 568-569***) and dismiss the complaint against the defendant physician. The dissent agrees with the defenatn that the jury's finding that the intervening acts of other medical providers involved in the decedent's care was not an intervening, superseding casue of the decedent's injuries is not supported by the weight of the evidence. Paterson v. Ellis, 284 AD2d 981, 981; Lolik v. Big V. Supermarkets, 86 NY2d 744, 746; Nicastro v. Park 113 AD2d 129, 134.

The dissent further agrees with the defendant that the verdict is against the weight of the evidence under the circumstances presented because the plaintiff failed to establish that the defendant's negligence was a proximate cause of the decedent' suicide. Rather, the psychiatric treatment provided to the decedent after the defendant's involvement in the case ended constituted an intervening act that severed any causal connection between the defendant's nelgience and the decedent's suicide. "Ordinarily, a plaintiff asserting a medical malpractice calim must demonstrate that the doctor deviated from acceptable medical practice and that such deviation was a proximate cause o fhte plaintiff's injury." James v. WOrmuth, 21 NY3d 540, 545. "To establish proximate cause, a plaintiff must generally show that the defendant's negligence was a substantial cause of the events which produced the injury.'" Pomeroy v. Buccina, 289 AD2d 944, 945, quoting Deriarian v. Felix Contr. Corp., 51 NY2d 308, 315, rearg denied 52 NY2d 784; Kuksh v. City of Buffalo, 59 NY2d 26, 32-33.

"An intervening act will be deemed a superseding cause and will serve to relieve defendant of liability when the act…so attenuates defenatn's negligence from the ultimate injury that responsiblilty for the injury may not be reasonably attributed to the defendant'" Gardner v. Perrine, 101 AD3d 1587, 1588, quoting Kush, 59 NY2d at 33. Thus, "if the negligent act of the

third party is extraordinary under the circumstances and unforeseeable as a normal and probable consequence of defenant's negligence, then the third party's negligence supersedes that of the defenatn and relievs the defendant of liablilty." dePesa v. Westchester Sq. Med. Ctr., 239 AD2d 287, 288-289.

In order to grant directed verdict in favor of plaintiff, the court, viewing evidence in light most favorable to defendant, must conclude that there is no rational process by which jury could base a finding in favor of defendant

Vinasco v. Intell Times Square Hotel, LLC, et al.
Second Dept.; Index No.: 24399/04; Slip Op. No.: 07497

Attorneys:
Appellant: Gorayeb & Associates, P.C. (Pollack, Pollack, Isaac & DeCicco, LLP of counsel); respondents: Lewis, Johs Avallone Aviles, LLP, Manhattan (David Metzger of counsel)

The plaintiff was working for nonparty United Steel Production, which had been hired by the defendants to remove an approximately 200-pound metal gate from their premises. The plaintiff allegedly was injured while removing the gate, which was being held up by a hoist from the building. The plaintiff stood on an unsecured ladder and was not wearing a harness. As the plaintiff pulled at a cable which was around the hoisted gate, the gate fell, striking him and the ladder, and propelling them to the ground. The plaintiff commenced two actions, which were subsequently consolidated, and proceeded to trial against the defendants on the cause of action alleging a violation of Labor Law § 240 (1).

At the close of evidence in the liability phase of the bifurcated trial, the plaintiff moved for a directed verdict on his Labor Law § 240 (1) cause of action. The trial court denied the motion, and the jury returned a verdict in favor of the defendants, finding that they did not fail to provide proper protection to the plaintiff. A judgment subsequently was entered on the verdict, and the plaintiff appeals.

The trial court erred in denying the plaintiff's motion pursuant to CPLR 4401 for judgment as a matter of law on the issue of liability on his Labor Law § 240 (1) cause of action. In order to grant such a motion, the court, viewing the evidence in the light most favorable to the defendant, must conclude that there is no rational process by which the jury could base a finding in favor of the defendant. ***CPLR 4401; Szczerbiak v. Pilat, 90 NY2d 553, 556; Nestro v. Harrison, 78 AD3d 1032, 1033***. Here, there was no rational process by which the jury could find that the defendants did not violate Labor Law § 240 (1).

Upon the evidence presented, the jury could not rationally have concluded that the hoist which was holding the gate was adequate under the statute, that the unsecured ladder from which the plaintiff fell afforded him adequate protection, or that the inadequacy of the hoist and ladder was not the proximate cause of the injury. ***Pritchard v. Tully Constr. Co., Inc., 82 AD3d 730***. Accordingly, the Supreme Court erroneously denied the plaintiff's motion pursuant to CPLR 4401 for judgment as a matter of law on the issue of liability on his Labor Law § 240 (1) cause of action.

EMERGENCY DOCTRINE

Although existence of an emergency and the reasonableness of a party's response to it will ordinarily present questions of fact, that may in appropriate circumstances be determined as a matter of law

Flores, et al. v. Metropolitan Transportation Authority, Long Island Bus, et al.
Second Dept.; Index No.: 15288/10; Slip Op. No.: 07622

Attorneys:
Appellants: Sim & Record, LLP, Bayside (Sang Sim of counsel); respondents: Armienti, Debellis, Guglielmo & Rhoden, LLP, Manhattan (Vanessa Corchia of counsel)

The plaintiff allegedly sustained personal injuries shortly after she boarded a bus operated by the defendant Joel Monuma and owned by the defendant Metropolitan Transportation Authority, Long Island Bus. The injured plaintiff and her husband, suing derivatively, commenced this action against the defendants. The defendants moved for summary judgment dismissing the complaint. In support of the motion, the defendants submitted a transcript of the deposition testimony of the defendant bus driver, wherein he stated that he applied the brakes to avoid colliding with an automobile that cut in front of the bus. The Supreme Court granted the motion.

Pursuant to the emergency doctrine, "those faced with a sudden and unexpected circumstance, not of their own making, that leaves them with little or no time for reflection or reasonably causes them to be so disturbed that they are compelled to make a quick decision without weighing alternative courses of conduct, may not be negligent if their actions are reasonable and prudent in the context of the emergency." ***Bello v. Transit Auth. of N.Y. City, 12 AD3d 58, 60; Caristo v. Sanzone, 96 NY2d 172; Marri v. New York City tr. Auth., 106 AD3d 699, 700***. "Although the existence of an emergency and the reasonable-

ness of a party's response to it will ordinarily present questions of fact, that may in appropriate circumstances be determined as a matter of law." ***Bello v. Transit Auth. of N.Y. City, 12 AD3d at 60; Davis v. Metropolitan Tr. Auth., 92 AD3d 825, 826; Milscia v. New York City Bd. of Educ., 70 AD3d 904, 905***.

Here, the defendants established their prima facie entitlement to judgment as a matter of law by demonstrating that the actions of the defendant bus driver in braking abruptly to avoid a collision with another vehicle which suddenly cut in front of the bus were reasonably prudent in an emergency situation not of his own making. ***Marri v. New York City Tr., Auth., 78 AD3d 1120; Miloscia v. New York City Bd. of Educ., 70 AAD3d at 905***. In opposition, the plaintiffs' speculative and conclusory assertions failed to raise a triable issue of fact. ***Fawcett v. Suffolk Transp. Serv., Inc., 55 AD3d 535; Koenig v. Lee, 53 AD3d 567.***

The plaintiffs' remaining contention regarding the defendant bus driver's alleged negligent conduct after the bus came to a stop is raised for the first time on appeal, and, therefore, is not properly before the Appellate Division. ***Daley v. Pelzer, 100 AD3d 949; Pantelon v. Amaya, 85 AD3d 993; Terranova v. Waheed Brokerage, Inc., 78 AD3d 1040***.

INSURANCE LAW

Where members of different families were injured by exposure to lead paint in same apartment, noncumulation clause in landlord's successive insurance policies restricts insurer's maximum total liability to one policy limit

Nesmith, et al. v. Allstate Insurance Company
Court of Appeals; Slip Op. No.: 08217

Attorneys:
Appellants; Mark G. Richter; Respondent; Barry I. Levy; United Policyholders: New York Insurance Association, Inc., amici curiae

In September 1991, Allstate Insurance Company issued an insurance liability policy to the landlord of a two-story house in Rochester. The policy was renewed annually for the years beginning September 1992 and September 1993. It stated on the declarations page a $500,000 limit for each occurrence," and contained the following noncumulation clause:

"Regardless of the number of insured persons, injured persons, claims, claimants or policies involved, our total liability under the Family Liability Protection coverage for damages resulting from one accidental loss will not exceed the limit shown on the declarations page. All bodily injury and property damage resulting from one accidental loss or from continuous or repeated exposure to the same general conditions is considered the result of one accidental loss."

Felicia Young and her children lived in one of the two apartments in the house from November 1992 through September 1993. In July 2993, the Department of Health notified the landlord that one of the children had been found to have an elevated blood lead level and that several areas of the apartment were in violation of State regulations governing lead pain. The Department listed the violations and directed the landlord to correct them. The landlord made some repairs and the Department advised him in August 1993 that the violations "have been corrected."

After the Young family moved out of the apartment in September 1993, Lorenzo Patterson, Sr. and Qyashitee Davis moved in with their two children. Again a child was found to have an elevated blood lead level, and the Department of Health sent another letter saying that violations had been found and instructing the landlord to correct them. This letter was sent in December 1994, but the parties seem to assume that the elevated readings resulted at least in part from events on or before September 29, 1994, the last day of Allstate's coverage.

In 2004, Young, on behalf of her children, and Jannie Nesmith, on the behalf of the Patterson children (her grandchildren) brought two separate actions against the landlord for personal injuries allegedly caused by lead paint exposure. Young's action was settled in 2006 for $350,000, which Allstate paid. In 2008, Nesmith settled her claim pursuant to a stipulation that reserve the issue of the applicable policy limits for future litigation. Allstate paid the $150,000 that it claimed was the remaining coverage. Nesmith then brought the present action against Allstate for a declaratory judgment, asserting that a separate $500,000 limit applied to each family's claim, and that her grandchildren could therefore recover an additional $350,000.

The Supreme Court granted Nesmith the declaration she sought, saying it could not conclude that the children in the two cases were injured by exposure "to the same conditions." The Appellate Division reversed. Nesmith v. Allstate Ins. Co., 103 AD3d 190 (2013). The Appellate Division held that, under ***Hiraldo v. Allstate Ins., Co. (5 NY3d 508 [2005]***), the renewal of the policy could not make an additional limit available; that under the plain terms of the noncumulation clasue, the number of claims and claimants could not do so either; and that the injury to Young's children and Nesmith's grandchildren resulted "from continuous or repeated exposure to the same general conditions,: so that the injuries were only one "accident loss" within the meaning of the policy. Id. at 193-194. The Court of Appeals granted leave to appeal (21 NY3d 866 [2013]) and now affirms.

Hiraldo involved a single child who live had lived in a building for three years while three successive Allstate policies, each with a limit of $300,000 were in force. The plaintiff there claimed that the child had been exposed to lead paint continuously during the terms of all three policies, and that therefore $900,000 in coverage was available to him. The Court of Appeals rejected that argument, relying on a noncuumulation clause. The plaintiffs' argument in ***Hiraldo*** was inconsistent with the policy's plain statement that Allstate's liability was limited to the amount shown on the declaration page, $500,000, "regardless of the number of…policies issued."

Here, Nesmith does not argue that annual renewals of the landlord's policy increased the limits of available coverage. Nesmith's only argument is that the alleged injuries to Young's children and Nesmith's grandchildren were separate losses because they did not result "from continuous or repeated exposure to the same general conditions." The Court of Appeals rejects this argument. Young's children and Nesmith's grandchildren were exposed to the same hazard in the same apartment. The general conditions were the same. No new lead paint hazard had been introduced into the apartment. The only possible conclusion from the record is that the landlord's remedial efforts were not wholly successful, and that the same general conditions continued to exist. Because Young's children and Nesmith's grandchildren were injured by exposure to the same general condition, their injuries were part of a single accidental loss and only one policy limit is available to those two families. The dissent contends that the noncumulation clause does not limit the insurer's maximum total liability to only one policy limit under the circumstances. It argues with the majority's finding that this case turns on the interpretation of the "same general conditions" language of the "Limits of Liability" clause and reasoning that because the Young children and Nesmith children were exposed to the same hazard, in the apartment only one policy limit is triggered. The dissent maintains that this interpretation is inconsistent with the reasonable expectations of the insured. ***Ace Wire & Cable Co., Inc. v. Aetna Cas. & Sur. Co., 60 NY2d 390, 398 (1983***).

LABOR LAW

Labor Law §§ 240 (1) and 241 (6) exempts owners of the one and two-family dwellings who contract for but do not direct or control the work" from the liability imposed by those provisions

Banegas v. Farr, et al.

Second Dept.; Index No.: 40311/10; Slip Op. No.: 07967

Attorneys:

Appellant: Steven Adam Rubin, Manhattan; respondents: Mazzara & Small, P.C., Bohemia (Timothy Mazzara of counsel)

The defendants hired to plaintiff to clean insulation on the roof of their home. While engaged in this work, the plaintiff allegedly fell from the roof and sustained injuries. He commenced this action asserting, among others, causes of action to recover damages for violations of Labor Law §§ 240 (1) and 241 (6) on the ground that the defendants were entitled to the protection of the homeowner exemption contained in those provisions, which exempts "owners of the one and two-family dwellings who contract for but do not direct or control the work" from the liability imposed by those provisions. ***Labor Law §§ 240 (1) and 241 (6); Chowdhury v. Rodriguez, 57 AAD3d 121, 126-127***. The defendants made a prima facie showing that they were entitled to the protection of the homeowner exemption by submitting evidence that their home was a single-family residence and that they did not supervise the methods of manner of the plaintiff's work. ***DiMaggio v. Cataletto, 117 AD3d 984, 986; Nai Ren Jiang v. Shane Yeh, 95 AD3d 970, 972; Chowdhury v. Rodriguez, 57 AD3d at 126-127; Angelucci v. Sands, 297 AD2d 764, 764***. In opposition, the plaintiff failed to raise a triable issue of fact as to the applicability of the exemption. Accordingly, the defendants were entitled to summary judgment dismissing the causes of action alleging violations of Labor Law §§ 240 (1) and 241 (6).

The homeowner's exemptions preclude the imposition of the otherwise absolute statutory liability of Labor Law § §240 (1) and 241 upon owners of one and two-family dwellings who contract for but do not direct or control the work

Farias v. Simon, Jr., et al.

First Dept.; Index No.: 113267/08; Slip Op. No.: 07932

Attorneys:

Appellant: Shapiro Law Offices, PLLC, Bronx (Jason Shapiro of counsel); respondents: Savona D'Erasmo & Hyer, LLC, Manhattan (Raymond D'Erasmo of counsel)

The plaintiff, a laborer, was injured in a fall from a scaffold while he was working on a renovation project at the owners' one-family house in Bronxville. The accident occurred on October 19, 2005. The plaintiff commenced this action against the owners alleging, among other claims, violation of Labor Law § §240 (1) and 241.

The Supreme Court properly applied the homeowner's exemptions set forth in Labor Law § §240 (1) and 241. The homeowner's exemptions preclude the imposition of the otherwise absolute statutory liability upon "owners of one and two-family dwellings who contract for but do not direct or control the work." The exemptions, however, do not "encompass homeowners who use their one and two-family premises entirely and solely for commercial purposes…" ***Van Amerogen v. Donnini, 78 NY2d 880, 882 (1991).***

The owners acquired title to the premises through inheritance in July 2004. They began the renovation in July 2005. The defendant owner testified at deposition that she and her husband renovated the house for the purpose of modernizing it and using it as their second home. As the renovation was ongoing, the house was unoccupied at the time of the plaintiff's injury. The renovation reached the punch list stage in the fall of 2006. The defendant testified that the owners, who never occupied the house, decided to lease it out in the spring of 2007 and did so that August.

The owners made a prima facie showing of their entitlement to the homeowner's exemption of Labor Law § 240 (1) by demonstrating that their premises consist of a one-family dwelling and that they did not direct or control the plaintiff's work. ***Affri v. Basch, 45 AD3d 615, 616 (2nd Dept 2007), affd 13 NY3d 592 (2009)***. Therefore, the burden shifted to the plaintiff to "produce evidentiary proof in admissible form sufficient to establish the existence of material issue of fact which requires a trial of the action. ***Alvarez v. Prospect Hosp., 68 NY2d 320, 324 (1986).*** The plaintiff failed to meet this burden as his arguments are based on unfounded speculation that the owners intended to use the house solely for commercial purposes.

The availability of the homeowner's exemption hinges upon "the site and the purpose of the work, a test which must be employed on the basis of the homeowner's intentions at the time of the injury." ***Landon v. Austin, 88 AD3d 1127, 1128 (3rd Dept 2011).*** Accordingly, the plaintiff and the dissent misplace their reliance on the lease, which the owners entered into almost two years after the plaintiff's injury. The dissent further misplaces its reliance on the defendant's deposition testimony regarding the owners' renovation of their Manhattan property. This testimony is of little consequence in light of the defendant's uncontradicted testimony that the owners intended to use the premises as a second home.

The dissent argues that the owners' intention to make personal use of the premises "is not readily determinable on a motion for summary judgment." ***Thompson v. Geniesse, 62 AD3d 541 (1st Dept 2009); Credit Suisse First Boston v. Utrecht-America Fin. CO., 80 AD3d 485 (1st Dept 2011); Coan v. Estate of Chapin, 156 AD2d 318 (2st Dept 1989).*** While it is defendant's intended use at the time of accident that controls the outcome of this inquiry (***Davis v. Maloney, 49 AD3d 385 [1st Dept 2008]***), dissent contends that there are sufficient facts in the record from which a trier of fact could conclude that the defendants' stated intention is not credible.

Property owner moving for summary judgment dismissing causes of action alleging common law negligence and violation of Labor Law § 200 has initial burden of showing that he neither created dangerous condition nor had actual or constructive notice of it

Nicoletti v. Iracane

Second Dept.; Index No.: 20367/10; Slip Op. No.: 07991

Attorneys:

Appellant: Friedman Sanchez, LLP (Arnold DiJoseph, P.C., Manhattan, of counsel); respondent: Traub, Lieberman, Straus & Shrewsberry, LLP, Hawthorne (Sheryl Sanford of counsel)

The plaintiff was hired as a subcontractor to resurface a deck attached to the defendant's home. Before beginning any work on the project, he came to the defendant's home to assess the manner in which he would perform the work. At that time, while the plaintiff was walking on the deck, it caved in. He fell and allegedly was injured. He commenced this action to recover damages for personal injuries, alleging, inter alia, common law negligence and a violation of Labor Law § 200. The defendant moved for summary judgment dismissing those causes of action and the Supreme Court granted those branches of the motion.

Where, as here, a plaintiff's injury arose from a dangerous condition on the premises, a property owner moving for summary judgment dismissing the causes of action alleging common law negligence and a violation of Labor Law § 200 has the initial burden of showing that he neither created the dangerous condition nor had actual or constructive notice of it. ***Ventimiglia v. Thatch, Ripley & CO., LLC, 96 AD3d 1043, 1046; Rodriguez v. BCRE 230 Riverdale, LLC, 91 AD3d 933, 934***. A defendant has constructive notice of a defect when it is visible and apparent, and has existed for a sufficient length of time before the accident such that it could have been discovered and corrected. ***Gordon v. American Museum of Natural History, 67 NY2d 836, 837; Rendon v. Broadway Plaza Assoc. Ltd. Partnership, 109 AD3d 975, 977***. "When a defect is latent and would not be discoverable upon a reasonable inspection, constructive notice may not be imputed." ***Schnell v. Fitzgerald, 95 AD3d 1295; Lal v. Ching Po Ng, 33 AD3d 668***.

Here the defendant demonstrated her prima facie entitlement to judgment as a matter of law by establishing that she did not have actual or constructive notice of the defect in the deck, which was latent and not discoverable upon a reasonable inspection. The defendant further demonstrated that she did not create the defect. In opposition, the plaintiff failed to raise a triable issue of fact.

LEAD PAINT EXPOSURE

In order for landlord to be held liable for lead pain condition, it must be established that landlord had actual or constructive notice of hazardous condition and reasonable opportunity to remedy it, but failed to do so

Faison, et al. v. Luong, et al.
Fourth Dept.; Slip Op. Nos.: 07794; 07795; 07796

Attorneys:
Plaintiffs-appellants: Athari & Associates, LLC, New Hartford (Mo Athari of counsel); defendant-respondent-appellant Lee Luong: Sliwa & Lane, Buffalo (Stanley Sliwa of counsel); defendants-respondents-appellants James and Georgia Cuyler: Burgio, Kita, Curvin & Banker, Buffalo (Steven Curvin of counsel)

The plaintiffs commenced this action seeking damages for injuries allegedly sustained by the plaintiffs Devon Faison and Tierra Faison as a result of their exposure to lead paint as children. The consolidated complaint asserted causes of action for negligent ownership and maintenance of the subject properties, as well as negligent abatement of the lead paint hazards. The defendant Lee Luong, the landlord of one of the properties, moved for summary judgment dismissing the complaint against him, which was limited to allegations concerning Devon. The plaintiffs cross moved for, inter alia, summary judgment on the issues of "liability (notice, negligence and substantial factor) against defendants" and dismissal of various defenses. The defendants James Cuyler and Georgia Cuyler, the landlords of the other subject property, cross moved for partial summary judgment. By the judgment and order in appeal No. 1, the Supreme Court denied the motion and cross motion. Thereafter, the order in appeal No. 2 was entered, which against denied the Cuylers' cross motion, and the order in appeal No. 3 was entered, which denied Luong's motion. The plaintiffs appeal the defendants cross appeal from the judgment and order in appeal No. 1. In addition, the Cuylers appeal form the order in appeal No. 2, and the plaintiffs appeal and Luong cross appeals from the order in appeal No. 3.

The "judgment and order" in appeal No. 1 encompasses the Supreme Court's determination of the motion and cross motions before it, and orders in appeal Nos.2 and 3 contain no material or substantial change from the judgment and order in appeal No. 2. The Appellate Division dismissed the appeal from the order in appeal No. 2 and the appeal and cross appeal from the order in appeal No. 3, inasmuch as the appeal properly lies from the judgment and order in appeal No. 1. ***Matter of Kolasz v. Levitt, 63 AD2d 777, 778***.

Even assuming, arguendo, that the plaintiffs tendered admissible evidence establishing that Devon and Tierra were exposed to lead paint, the Supreme Court properly denied that part of the plaintiffs' cross motion for summary judgment on the issues of "liability (notice, negligence and substantial factor)." "In order for a landlord to be held liable for a lead pain condition, it must be established that the landlord had actual or constructive notice of the hazardous condition and a reasonable opportunity to remedy it, but failed to do so." ***Spain v. Holl, 115 AD3d 1368, 1369; Pagan v. Rafter, 107 AD3d 1505, 1506; Juarez v. Wavecrest Mgt. Team, 88 NY2d 628, 646***. The plaintiffs failed to meet their initial burden of establishing that the defendants had actual or constructive notice. ***Zuckerman v. City of New York, 49 NY2d 557, 562***. The Supreme Court did not err in denying that part of their cross motion seeking dismissal of the Cuylers' second affirmative defense, alleging the plaintiffs' failure to mitigate. The plaintiffs "failed to show that [the] defense lacked merit as a matter of law." ***Pagan, 107 Ad3d at 1507***.

Luong met his initial burden on his motion with respect to the cause of action for negligent ownership and maintenance of the subject property by establishing that he did not have actual or constructive notice of the hazardous lead paint condition, and Devon failed to raise a triable issue o fact. ***Spain, 115 AD3d at 1369; Chapman v. Silber, 97 NY2d 9, 15***. Luong met his burden with respect to the negligent abatement cause of action by establishing that he abated the lead pain hazard in a reasonable manner, and Devon failed to raise an issue of fact. ***Cf. Pagan, 107 AD3d at 1506-1507; Juarez, 88 NY2d at 646***. The Appellate Division modified the judgment and order in appeal No. 1 by granting Luong's motion and dismissing the complaint against him. Inasmuch as the complaint against Luong is dismissed, the Appellate Division need not address the contentions of plaintiffs concerning the Supreme Court's refusal to dismiss Luong's various defenses.

The Supreme Court erred in denying their cross motion for partial summary judgment dismissing the cause of action for negligent ownership and maintenance against them insofar as it concerns the time period prior to September 30 1994, the date on which they received notification of a lead pain hazard from the Monroe County Department of Health. The Appellate Division modified the judgment and order in appeal No. 1 accordingly. Those defendants established that, prior to that date, they did not have actual or constructive notice of a lead pain hazard at the subject property, and plaintiffs failed to raise a triable issue of fact. ***Spain, 115 AD3d at 1369; Chapman, 97 NY2d at 15.***

Landlord's liability for injuries related to defective condition including lead paint cannot be established without proof that landlord had actual or constructive notice of condition for sufficient period of time such that condition should have been corrected

Harris v. Erfunt, et al.
Third Dept.; Slip Op. No.: 08100

Attorneys:
Appellant: Athari & Associates, LLC, Utica (Mo Athari of counsel); respondents: Horigan, Horigan & Lombardo, PC., Amsterdam (Peter Califano of counsel)

The plaintiff, born in 1991, allegedly sustained injuries as a result of being exposed to lead pain from 1991 to 1995 while residing in an apartment owned by the defendants in the City of Albany. The defendants moved to compel the plaintiff to produce previously demanded medical information and submit to an independent medical examination (IME). The plaintiff cross moved for partial summary judgment on the issue of liability and to dismiss the defendants' first and third alleged affirmative defenses, which alleged contributory culpable conduct and failure to mitigate damages. The Supreme Court ordered the plaintiff to produce pertinent medical information regarding alleged injuries within 30 days (or be precluded from presenting proof of such injuries at trial), and further ordered the defendants to conduct an IME within 60 days of receipt of such documents. The Supreme Court denied the plaintiff's cross motion and the plaintiff appeals.

The Supreme Court did not abuse its discretion in permitting disclosure after the note of issue had been filed. Although disclosure following the filing of a note of issue and certificate of readiness is limited to unusual or unanticipated circumstances (***Uniform Rules for Trial Cts [22 NYCRR] § 202.21 [d]; Boisvert v. Town of Grafton, 131 AD2d 910, 911 (1987)***]), the trial court nonetheless has discretionary power regarding this issue as part of its oversight of disclosure. ***Cole v. Rappazzo Elec. Co., 267 AD2d 550, 552 (199***9). Here, a deadline for conducting an IME had been set at a conference for a date later than when the note of issue was filed. The Supreme Court noted in its decision that the plaintiff had caused a delay in complying with that deadline by refusing to provide required disclosure relevant to an IME. The defendants filed their motion regarding such issue the same month as the deadline for an IME. Under the circumstances, the Supreme Court did not abuse its discretion.

The plaintiff's cross motion for partial summary judgment on the issue of liability was properly denied. "A landlord's liability for injuries related to a defective condition including lead paint cannot be established without proof that the landlord had actual or constructive notice of the condition for a sufficient period of time such that the condition should have been corrected." ***Cunningham v. Anderson, 85 AD3d 1370, 1371 (2011), lv dismissed and denied 17 NY3d 948 (2011)***. The proof is viewed most favorably to the party opposing summary judgment. ***McNally v. Kiki, Inc., 92 AD3d 1105, 1106 (2012)***. The defendant testified that when he purchased the property in 1981, he was not informed that it had been previously cited for the presence of lead pain. He did not recall thinking about or being aware of lead paint at such time. There was evidence that he had received notice of lead paint in the building by 1984. However, he claimed that he had worked in each apartment, including scraping and painting, and that he routinely cleaned and painted apartments between tenants. He did not recall when he became aware that there was an infant in the relevant apartment because the plaintiff as not born until after her mother had moved into the apartment in 1991. The plaintiff's mother did not observe chipping pain in the apartment for several years and then, unaware of the risks of lead pain, she ostensibly delayed reporting the problem. The record reveals triable issues regarding actual notice s well as the constructive notice factors set forth in ***Chapman v. Silber, 97 NY2d 9, 15 (2001); Derr v. Fleming, 106 AD3d 1240, 1241-1242 (2013); Van Wert v. Randall, 100 AD3d 1079, 1080 (2012).***

With regard to whether the Supreme Court should have dismissed the affirmative defenses of contributory negligence and failure to mitigate, the plaintiff referenced this issue in a cursory fashion under a section of her brief arguing another issue. Nevertheless the Appellate Division is unpersuaded that the Supreme Court erred. While such defenses must be carefully limited given the plaintiff's age during the relevant time, nonetheless, in light of proof that, among other things, plaintiff regularly smoked cigarettes, used marijuana and dropped out of school, she did establish that the defenses lacked all merit as a matter of law. ***Derr v. Fleming, 106 AD3d at 1243-1244; Van Wert v. Randall, 100 AD3d at 1081.***

MOTOR VEHICLE NEGLIGENCE

Vehicle and Traffic Law § 388 creates strong presumption that driver of vehicle is operating it with owner's consent, which can only be rebutted by substantial evidence demonstrating that vehicle was not operated with owner's express or implied permission

Han v. BJ Laura & Son, Inc., et al.
Second Dept.; Index No.: 14780/11; Slip Op. No.: 07480

Attorneys:
Appellant: Hammill O'Brien, Croutier, Dempsey, Pender & Koehler, P.C., Syosset (Anton Piotroski); respondent: Gersowitz, Libo & Korek, P.C. (Pollack, Pollack, Isaac & DeCicco, LLP, Manhattan (Brian J. Isaac and Michael Zhu of counsel)

The plaintiff alleges that he was injured in an automobile accident when his vehicle was struck by a vehicle owned by the defendant BJ Laura & Son. The identity of the driver is unknown. The plaintiff commenced this action alleging that the driver of the subject vehicle was operating that vehicle with the defendant's permission and consent, express or implied within the scope of his employment. The plaintiff also alleged that the defendant was negligent in securing his vehicles. The defendant moved for summary judgment dismissing the complaint as asserted against it on the ground that the vehicle was being used without its permission and that it properly secured its vehicles. The Supreme Court denied the motion.

Vehicle and Traffic Law § 388 creates a strong presumption that the driver of a vehicle is operating it with the owner's consent, which can only be rebutted by substantial evidence demonstrating that the vehicle was not operated with the owner's express or implied permission. ***Murdza v. Zimmerman, 99 NY2d 375, 380; Matter of State Farm Ins. Co. v. Walker-Pinckney, 118 AD3d 712; Marino v. City of New York, 95 AD3d 840***.The defendant, on its motion for summary judgment, has the burden of demonstrating its prima facie entitlement to judgment as a matter of law. ***Zuckerman v. City of New York, 49 NY2d 557, 567***. Thus, to obtain summary judgment on its defense that the vehicle was used without its permission, the defendant was required to present substantial evidence that that the vehicle was used without its permission. ***Vinueza v. Tarar, 100 AD3d 742, 743***. "The uncontradicted testimony of a vehicle owner that the vehicle was operated without his or her permission does not, by itself, overcome the presumption of permissive use." ***Marino v. City of New York, 95 AD3d at 841; Ellis v. Witsell, 114 AD3d 636***. The question of consent is ordinarily one for the jury***. Country-Wide Ins. Co. v. National R.R. Passenger Corp., 6 NY3d 172, 178; Marino v. City of New York, 95 AD3d at 841***. Ultimately, "whether summary judgment is warranted depends on the strength and plausibility of the disavowals [of permission], and whether they leave room for doubts that are best left for the jury." ***Country-Wide Ins. Co. v. National R.R. Passenger Corp., 6 NY3d at 179***.

Here, the defendant failed to sufficiently rebut the strong presumption that the driver was operating the subject vehicle with its permission. The deposition testimony of the defendant and some, but not all, of its employees that the driver only had permission to drive the vehicle for work-related purposes did not, by itself, overcome the presumption of permissive use. ***Id. at 177; Markham v. Schmieder, 114 AD3d 1251; Murphy v. Carnesi, 30 AD3d 570***. In addition, the defendant failed to establish that the vehicle was stolen. ***Cf. Fuentes v. Virgil, 119 AD3d 522; McDonald v. Rose, 37 AD3d 781, 783.*** Thus, the defendant failed to establish its prima facie entitlement to judgment as a matter of law on the cause of action alleging that the defendant was vicariously liable for the driver's negligence under Vehicle and Traffic Law § 388. As a result, the Appellate Division need not consider the sufficiency of the plaintiff's opposition papers. ***Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851, 853***.

However, the defendant submitted sufficient its prima facie entitlement to judgment as a matter of law on the second cause of action alleging that it negligently secured its vehicles because it established that it did not owe a duty to the plaintiff to prevent theft from its premises. ***Epstein v. Mediterranean Motors, 109 AD2d 340, affd for reasons stated below 66 NY2d 1018.*** In opposition, the plaintiff failed to raise a triable issue of fact. ***Zuckerman v. City of New York, 49 NY2d 557; Niyazov v. Bradford, 13 AD3d 501; Browne v. Castillo, 288 AD2d 415***.

Accordingly, while the Supreme Court properly denied that branch of the defendant's motion to dismiss the cause of action alleging violation under Vehicle and Traffic Law § 388, it should have granted that branch of the defendant's motion to dismiss the cause of action alleging negligent securing its vehicles.

MUNICIPAL LIABILITY

Liability for a claim that a municipality negligently exercised a governmental function "turns upon the existence of a special duty to the injured person, in contrast to a general duty owed to the public

Coleson, etc., et al. v. City of New York, et al.
@DOCKET = Court of Appeals; Slip Op. No.: 08213

Appellants: Sang J. Sim; respondents: Susan Paulson

Starting in 2000, the plaintiff Jandy Coleson suffered both verbal and physical abuse at the hands of her husband Samuel Coleson. As a result, Coleson was jailed on a number of occasions and the plaintiff obtained numerous orders of protection against him. In May 2004, following an incident where Coleson was abusing drugs, the plaintiff ordered him to leave the apartment and she changed the locks. On June 23, 2004, Coleson tried to force himself into the building and threatened to kill

the plaintiff and stab her with a screwdriver he was carrying. The plaintiff called the New York Police Department but when they arrived at the scene, Coleson had already fled. The officers, including Officer Reyes, searched for Coleson with the plaintiff's assistance. Coleson was apprehended shortly before 10 a.m.

On the same date, the plaintiff applied for another order of protection and was later transported by the police to the local precinct with her son. She testified in her deposition that while at the precinct, an officer told her that "they had arrested Coleson, he's going to be in prison for a while, [and that she should not] worry, [she] was going to be given protection." She was escorted by the policy to Safe Haven, a non-profit organization that provides services to domestic violence victims, to meet with a counselor and receive other assistance. That evening, at approximately 11 p.m., plaintiff received a follow-up phone call from Officer Reyes, who told her that Coleson was "in front of the judge" and "he was going to be sentenced." Reyes also told her that "everything was okay, that everything was in process, [and] that she was going to keep in contact with [her.]" The phone call lasted for approximately two hours.

Two days later, the plaintiff went to pick up her son form his school, which was across from a car wash when she saw Coleson. Coleson approached her, stating that he wanted to speak to her. He took out a knife and stabbed the plaintiff in her back. The child, who was seven-years-old at the time, testified at his deposition that he saw Coleson chasing the plaintiff with a knife while the plaintiff screamed for help. The child hid behind a car and a man who worked at the car wash took the child and locked him a broom closet. About five to ten minute later, the child came out of the closet and saw him mother lying in a pool of blood.

The plaintiff, in behalf of herself and her son, commenced this negligence action against the City and the NYPD (the City defendants). The plaintiffs also asserted a claim for negligent infliction of emotional distress, arguing that the child was in the zone of danger during the incident.

The City moved for summary judgment dismissing the complaint, arguing that the statement Officer Reyes allegedly made to the plaintiff were not definite enough to create justifiable reliance in order to establish a special relationship in satisfaction of the duty prong of the plaintiffs' cause of action. The City further argued that the child was not in the zone of danger because he did not witness the attack on his mother. In opposition, the plaintiffs argued that a special duty existed between the plaintiff and the City based on the NYPD's agreement to provide protection to her. They also asserted that the child did witness the assault because he observed Coleson approach his mother with a knife, and although he was placed in a broom closet, he could hear what was occurring.

The Supreme Court granted the City's motion for summary judgment. ***Coleson v. City of New York, 2012 WL 1048836 (Sup Ct, Bronx County 2012***). The court held that plaintiffs failed to establish the requirements for a special relationship because they failed "to demonstrate that the verbal assurance of protection at the precinct was followed by any visible police protection: and "failed to show any post arraignment promise of protection." ***Id. at *2***. The court also determined that the child was not in the zone of danger because he was locked in a broom closet at the time of the incident.

The Appellate Division affirmed (***Coleson v. City of New York, 106 AD3d 474 [1st Dept 2013]***), holding that "in the absence of any evidence that defendants assumed an affirmative duty to protect the plaintiff from attacks by her husband [the City does] not owe a duty of care to plaintiff." ***Id at 474, citing Valdez v. City of New York, 18 NY3d 69 (2011).*** The court stated that the statements of the officers which plaintiff relied upon "were too vague to constitute promises giving rise to a duty of care." ***106 AD3d at 475, citing Dinardo v. City of New York, 13 NY3d 872, 874 (2009)***. Finally, the court concluded that based on the lack of a special relationship, the child's claim for negligent infliction of emotional distress should also be dismissed.

In a concurring opinion, two justices noted that although the majority's ruling is mandated under ***Valdez***, "if the City's statements in this case are not specific enough to find that [the City] assumed an affirmative duty to protect plaintiff, it is difficult to imagine any statements that would ever be specific enough" and "it seems that no court in this State will ever find a municipality to have a special duty toward a plaintiff unless the municipality affirmatively consents to assume such a duty." ***106 AD3d at 477***.

The Appellate Division granted the plaintiff's motion for leave to appeal to the Court of Appeals and certified the question of whether the order was properly made.

Liability for a claim that a municipality negligently exercised a governmental function "turns upon the existence of a special duty to the injured person, in contrast to a general duty owed to the public." ***Garrett v. Holiday Inns, 58 NY2d 253, 261 (1983); Laratro v. City of New York, 8 NY3d 79 (2006); Cuffy v. City of New York, 9 NY2d 255 (1987).*** "A duty to exercise reasonable care toward a plaintiff' is "born of a special relationship between the plaintiff and the governmental entity." ***Pelaez v. Seide, 2 NY3d 186, 198-199 (2004)***. The Court of Appeals has determined that a special relationship can be formed in three ways: "(1) when the municipality violates a statutory duty enacted for the benefit of a particular class of persons; 92) when it voluntarily assumes a duty that generates justifiable reliance by the person who benefits from the duty; or (30 when the municipality assumes positive direction in the face of a known blatant and dangerous safety violation." ***Pelaez, 2 NY3d at 199-200***.

The requisite elements for a duty voluntarily assumed are "(1) an assumption by the municipality through promises or actions of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) that party's justifiable reliance on the municipality's affirmative undertaking." ***Cuffy v. City of New York, 69 NY2d 255, 260***. "The injured party's reliance…is critical." ***Id. at 261***.

Here, the plaintiffs raised a triable issue of fact as to whether a special relationship existed. A jury could conclude that the police officers made promises to project the plaintiff. She was notified by the police that Coleson was arrested, that he was in front of a judge to be sentenced, would be in jail for a while, and that the police would be in contact with her. The police officers conceivably knew that Coleson would harm the plaintiff if he was not apprehended, as evidenced by his arrest and the issuance of any order of protection to the plaintiff. Given that the plaintiff was told by Officer Reyes that everything was in process and she would keep in contact, there is an issue of fact as to whether the police knew that their inaction could lead to harm. The plaintiff had direct contact with the police, by the policy responding to her call about Coleson's threats, making an arrest, escorting her to the police precinct, and plaintiff' phone call with Officer Reyes. The plaintiff relied justifiably on the assurances that plaintiff received from Officer Reyes that Coleson was in jail and that he would be there for a while, a jury could find that it was reasonable for the plaintiff to believe that Coleson would be jailed for the foreseeable future, and that the police would not contact her if that turned out not to be the case.

Here, the conduct of the police was more substantial, involved and interactive that the police conduct in ***Valdez***. Unlike in ***Valdez***, here the plaintiff was told by the police that Coleson was going to be in prison for a while and that they would stay in contact with the plaintiff. Contrary to the City's and the dissent's contention, these particular assertions were not vague. ***Dinardo v. City of New York, 13 NY3d at 874***. "At the heart of these 'special duty' cases is the unfairness that the courts have perceived in precluding recovery when a municipality's voluntary undertaking has lulled the injured party into a false sense of security and thereby induced [him or her] either to relax [his or her] own vigilance or to forego other available avenues of protection***."Cuffy, 9 NY2d at 261***. Whether a special relationship exists is generally a question for the jury. ***De Long v. County of Erie, 60 NY2d 296, 306 (1983)***. Here, the plaintiff raised a triable issue of fact as to whether a special relationship existed, that should be decided by a jury. As the Appellate Division only addressed the issue of special relationship, remittal to that court to review the City's claim of governmental immunity is warranted.

The plaintiffs argue that the child was in the zone of danger because, although he was in a closet at the time his mother was stabbed, he saw Coleson with the knife and while in the closet heard his mother's screams. "In order to recover for an alleged emotional injury based on the zone of danger theory, a plaintiff must establish that he suffered serious emotional distress that was proximately caused by the observation of a family member's death or serious injury while in the zone of danger." ***Stamm v. PHH Vehicle Mgmt. Serv., LLC, 32 AD3d 784, 786 (1st Dept 2006), citing Bovsun v. Sanperi, 61 NY2d 219 (1984); Trombetta v. Conkling, 82 NY2d 549 (1993)***. The child here was not in the zone of danger because he was in a broom closet while his mother was stabbed and thus neither saw the incident nor was immediately aware of the incident at the time it occurred.

The dissent argues that under the guise of protecting victims of domestic violence by allowing them to recover in tort against a municipality for a police officer's vague promises and assurances during an emotionally charged and dangerous situation, the opinion encourages the police to forgo any meaningful communication or action that could be even remotely construed as creating a special relationship between the complainant and police. In doing so, the dissent argues that the majority retreats from recent decisions in ***Valdez v. City of New York, 18 NY3d 69 (2011); DiNardo v. City of New York, 13 NY3d 872 (2009) and McClean v. City of New York, 12 NY3d 194 (2009)*** where the Court of Appeals reiterated the well-established rule that only an "affirmative undertaking" that creates justifiable reliance can justify holding a municipality liable for negligence in performing a governmental function." ***Cuffy v. City of New York, 69 NY2d 255, 260 (1987).***

PRIMARY ASSUMPTION OF RISK

Doctrine of primary assumption of risk is most persuasively justified for its utility in facilitating free and vigorous participation in athletic activities

Wolfe v. North Merrick Union Free School District
Second Dept.; Index No.: 12160/11; Slip Op. No.: 07499

Attorneys:
Appellant: Congdon, Flaherty, O'Collaghan, Reid, Donlon, Travis & Fishlinger, Uniondale (Gregory Cascino of counsel); respondent: McAndrew, Conboy & Prisco, LLP, Melville (Mary Azzaretto of counsel)

On August 20, 2010, shortly after midnight, the plaintiff and a group of his friends were on the premises of the Old Mill Road School in North Merrick, playing a game they called "manhunt." The rules and object of the game are analogous to hide-and-seek. While they were playing the game, the plaintiff allegedly sustained personal injuries when he tripped over an elevated

concrete platform and fell down an exterior stairway leading to the school's basement. The plaintiff commenced this action against the school district alleging that the area where the accident occurred was pitch dark and that he saw neither the elevated platform nor the staircase before he tripped and fell. The Supreme Court denied the defendant's motion for summary judgment and the defendant appeals and the Appellate Division affirms.

Contrary to the plaintiff's contention, the defendant's motion for summary judgment was timely. ***Steisel v. Golden Reef Diner, 67 AD3d 670, 670-671***. Nevertheless, the Supreme Court properly denied the defendant's motion on the merits. First, the defendant failed to establish its prima facie entitlement to judgment as a matter of law on the ground that the action was barred by the doctrine of primary assumption of risk. ***Gallagher v. County of Nassau, 74 AD3d 877, 879***. As the Court of Appeals explained in ***Trupia v. Lake George Cent. School Dist.(14 NY3d 392)***, the doctrine of primary assumption of risk is most persuasively justified for its utility in facilitating "free and vigorous participation in athletic activities.'" ***Id. at 395, quoting Benitez v. New York City Bd. of Educ., 73 NY2d 650, 657***. By placing the risk of participation on the participants themselves, rather than on the sponsor, the doctrine encourages sponsorship, which leads to more participation. ***Custodi v. Town of Amherst, 20 NY3d 83, 88***. The doctrine of primary assumption of risk is not applicable to the midnight game of manhunt at issue in this case. As with the "horseplay" at issue in Trupia, the game of manhunt at issue in this case is not the sort of "socially valuable voluntary activity" that the doctrine seeks to encourage. ***Trupia v. Lake George Cent. School Dist. 14 NY3d at 3***96. Therefore the defendant did not establish that the doctrine of primary assumption of risk applies here. ***Custodi v. Town of Amherst, 20 NY3d at 88-89; Walker v. City of New York 82 AD3d 966, 966-967***.

Altenratively, the defendant contends that the evidence establishes that the plaintiff's own conduct was the sole proximate cause of his injuries. Inasmuch as there may be more than one proximate cause of a plaintiff's injuries (***Sirlin v. Schreib, 117 AD3d 819, 819***), the defendant was required to demonstrate, prima facie, that it was free from comparative negligence. ***Cortez v. Northeast Realty Holdings, LLC, 78 AD3d 754, 756; cf. Canela v. Audobon Gardens Realty corp., 304 AD2d 702, 703***. The defendant established prima facie entitlement to judgment as a matter of law by submitting the plaintiff's deposition testimony describing the midnight game of manhunt and the affidavit of its expert, who opined that the amount of lighting was sufficient to illuminate the subject staircase on the night of the accident such that the staircase should have been open and obvious. In opposition, the plaintiff raised a triable issue of fact as to whether the defendant was comparatively negligent. The plaintiff submitted the affidavits of two of friends who were also playing manhunt on the night of the accident, who stated that the area of the staircase was completely dark, and the affidavit of an expert who opined that the lighting at the staircase on the night of the accident was insufficient and below the minimum requirements set by good and accepted engineering practice. Even under the plaintiff's account of the incident, his conduct "surely and very substantially contributed to his injury." ***Soto v. New York City Tr. Auth., 6 NY3d 487, 493***. Nonetheless, in light of the existence of triable issues of fact as to the defendant's comparative negligence, it is for the tier of fact to determine whether the defendant bears responsibility for the plaintiff's injuries, and if so, to what degree. ***Id. at 492***. Accordingly, the Supreme Court properly denied the defendant's motion for summary judgment dismissing the complaint. ***Canela v. Audobon Gardens Realty Corp., 304 AD2d at 703***.

PROPERTY OWNER'S LIABILITY

Defendant may be held liable for dangerous condition caused by accumulation of snow or ice upon showing that it had actual or constructive notice of the condition, and that reasonably sufficient time had lapsed since cessation of storm to take protective measures

Fenner, Jr., et al. v. 1011 Route 109 Corp., et al.
Second Dept.; Index No.: 2464/11; Slip Op. No.: 07620

Attorneys:
Appellants: Joseph B. Fruchter, Hauppauge; respondents: Ahmuty, Demers & McManus, Albertson (Nicholas Cardascia and Glenn Kaminska of counsel)

The injured plaintiff allegedly sustained personal injuries when he slipped and fell on snow and ice on the sidewalk/driveway abutting premises owned by the defendant Uniondale Post No. 1487, Inc., American Legion, and leased to the defendant 1011 Route 109 Corp., doing business as Dunkin Donuts (the defendants). After the plaintiff commenced the action, the defendants moved for summary judgment dismissing the complaint on the ground that they did not create the alleged hazardous condition or have actual or constructive notice of it. The Supreme Court granted the motion and the Appellate Division reverses.

"A defendant may be held liable for a dangerous condition on its premises caused by the accumulation of snow or ice upon a showing that it had actual or constructive notice of the condition, and that a reasonably sufficient time had lapsed since the cessation of the storm to take protective measures." ***Sabatino v. 425 Oser Ave. LLC, 87 AD3d 1127, 1128; Rabinowitz v. Marcovecchio, 119 AD3d 762; Robles v. City of New York, 255 AD2d 305, 306***. "Under the so-called storm in progress'

rule, a property owner will not be held responsible for accident occurring as a result of the accumulation of snow and ice on its premises until an adequate period of time has passed following the cessation of the storm to allow the owner an opportunity to ameliorate the hazards caused by the storm." ***Marches v. Skenderi, 51 AD3d 642, 642; Yassa v. Awad, 117 AD3d 1037, 1037-1038; Cheung v. New York City Tr. Auth., 106 AD3d 768; McGowan v. State of New York, 79 AD3d 984, 98 6***. A lull in the storm does not impose a duty to remove te accumulation of snow or ice before the storm ceases in its entirety. ***Mazzella v. City of New York, 72 AD3d 755; DeStefano v. City of New York, 41 AD3d 528***. However, "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." ***Mazzella v. City of New York, 72 AD3d at 75 6; Cheung v. New York City Tr. Auth., 106 AD3d 768; Dancy v. New York City Hous. Auth., 23 AD3d 512; Powell v. MLG Hillside Assoc., 290 AD2d 345.***

Contrary to the Supreme Court's determination, the defendants failed to make a prima facie showing of their entitlement to judgment as a matter of law. The defendants did not submit any climatological data in support of their motion, and the deposition testimony of various witnesses submitted in support of their motion presented conflicting evidence as to how much snow fell and at what time the storm stopped, if at all, in relation to the time of the plaintiff's accident. Theses submissions failed to eliminate triable issues of fact as to whether the defendants had constructive notice of the allegedly dangerous condition, and whether a reasonably sufficient amount of time had elapsed after the cessation of the snowfall to enable them to take remedial measures. ***Sabatino v. 425 Oser Ave., LLC, 87 AD3d at 1128; Roofeh v. 141 Great Neck Rd. Condominium, 85 AD3d 893; Taylor v. Rochdale Vil. Inc., 60 AD3d 930***. Since the defendants failed to meet their prima facie burden, the Supreme Court should have denied their motion for summary judgment dismissing the complaint, regardless of the sufficiency of the plaintiffs' opposition papers. ***Alvarez v. Prospect Hospital, 68 NY2d 320***.

Defendant who moves for summary judgment in a slip-and-fall case has the initial burden of making a prima facie case that it neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it

Wachovsky v. City of New York, et al.
Second Dept.; Index No.: 25844/08; Slip Op. No.: 07652

Attorneys:
Appellant: Budin, Reisman, Kukpferberg & Bernstein, LLP, Manhattan (Gregory McMahon of counsel); respondents: Zachary W. Carter, Corporation Counsel (Pamela Seider Dolgow, Margaret King, and Maureen Fulton of counsel)

The plaintiff allegedly slipped and fell on a slippery substance on a stairwell at a public high school in Brooklyn, where he worked. The plaintiff subsequently commenced this action against the defendants City of New York and the New York City Department of Education, and the defendants moved for summary judgment dismissing the complaint, contending that they did not create or have actual or constructive notice of, the alleged hazardous condition. The Supreme Court granted the motion.

"A defendant who moves for summary judgment in a slip-and-fall case has the initial burden of making a prima facie case that it neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it." ***Bruk v. Razag, 60 AD3d 715, 715; Sloane v. Costco Wholesale Corp., 49 AD3d 522, 5***23. "To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it." ***Gordon v. American Museum of Natural History, 67 NY2d 836, 837; Pryyzwalny v. New York City Tr. Auth., 69 AD3d 598, 599***. "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." ***Pryzywalny v. New York City Tr. Auth., 69 AD3d at 599; Braudy v. Best Buy Co., Inc., 63 AD3d 1092, 1092***.

Here, the defendants submitted evidence in support of their motion which included the deposition testimony of the subject school's custodian engineer that neither he nor any member of his staff was ever made aware of any slippery condition in the subject stairwell prior to the accident, as well as the testimony of a health aide that there was no slippery substance on the stairwell when he used it approximately three hours prior to the accident. The defendants' evidence was sufficient to establish, prima facie, that they did not create or have actual or constructive notice of the alleged hazardous condition. ***Gadzhiyeva v. Smith, 116 AD3d 1001, 1002; Hernandez v. New York City Hous. Auth., 116 AD3d 662, 662-663; Berardi v. Incorporated Vil. of Garden City, 115 AD3d 631, 631-632***.

In opposition, the plaintiff failed to raise a triable issue of fact. ***Alvarez v. Prospect Hosp., 68 NY2d 320, 32***4. The plaintiff's deposition testimony that another school employee told him that she had previously reported the slipper condition to unnamed custodial staff, constituted hearsay. ***Salazar v. City of New York, 104 AD3d 931, 932***. While hearsay evidence may be submitted in opposition to a motion for summary judgment, it is insufficient, standing alone, to raise a triable issue of fact as to notice of a dangerous condition. Id.

Under the "storm in progress rule," landowner generally cannot be held liable for injuries sustained as a result of slippery conditions that occur during an ongoing storm, or for a reasonable time thereafter

Ryan, et al. v. Taconic Realty Associates, et al.
Second Dept.; Index No.: 5270/10; Slip Op. No.: 07642

Attorneys:
Appellants: Basch & Keegan, LLP, Kingston (Derek Spada of counsel); defendants third-party plaintiffs-respondents: Goldberg Segalla, White Plains (William O'Connell of counsel); third-party defendant-respondent: Law Offices of Marc D. Orloff, P.C.(Steven Kimmell, (Washingtonville of counsel)

During the morning of December 31, 2008, the plaintiff allegedly was injured after slipping and falling in the parking lot of her workplace in Hyde Park. In July 2010, the injured plaintiff and her husband suing derivately commenced this action against Taconic Realty Associates and Page Park Associates, LLC (defendants third-party plaintiffs) which thereafter commenced a third-party action against, among others, L & L Enterprises 123, LLC (the third-party defendant), the company that was hired to perform snow removal services at the subject property. The Supreme Court granted the cross motion of the defendants third-party plaintiffs for summary judgment dismissing the complaint and the motion for the third-party defendant for summary judgment dismissing the third-party complaint insofar as asserted against it. The plaintiffs appeal.

As the proponents of the cross motion for summary judgment the defendants third-party plaintiffs had the burden of establishing, prima facie, that they neither created the snow and ice condition nor had actual or constructive notice of the condition. ***Smith v. Christ's First Presbyt. Church of Hempstead, 93 AD3d 839; Meyers v. Big Six Towers, Inc., 85 AD3d 877***. This burden may be satisfied by presenting evidence that there was a storm in progress when the plaintiff allegedly slipped and fell. ***Huan Nu Lu v. New York City Tr. Auth., 113 AD3d 818; Smith v. Christ's First Presbyt. Church of Hempstead, 93 AD3d at 839; Meyers v. Big Six Towers, Inc., 85 AD3d at 877; Sfakianos v. Big Six Towers, Inc., 46 AD3d 665***. Under the "storm in progress rule," a landowner generally cannot be held liable for injuries sustained as a result of slippery conditions that occur during an ongoing storm, or for a reasonable time thereafter. ***Abramo v. City of Mount Vernon, 103 AD3d 760, 761; Smilowitz v. GCA Serv. Group, Inc., 101 AD3d 1101; Weller v. Paul, 91 AD3d 945, 947; Mazzella v. City of New York, 72 AD3d 755, 85***6.

The transcript of the deposition testimony of the injured plaintiff and the certified meteorological records submitted by the defendants third-party plaintiffs in support of their cross motion established, prima facie, that it was snowing at the time of the occurrence and, accordingly, that the "storm in progress" rule applies here. In opposition, the plaintiffs raised what clearly appear to be feigned issues of fact intended solely to avoid the consequences of the injured plaintiff's prior admission that the snow had started falling before the accident. ***Marchese v. Skenderi, 51 AD3d 642; Nieves v. JHH Transp., LLC, 40 AD3d 1060.***

Plaintiff's inability to identify cause of her fall is fatal to claim of negligence in slip-and-fall case because finding that defendant's negligence, if any, proximately caused plaintiff's injuries would be based on speculation

Rodriguez v. 1790 Broadway Associates, LLC, et al.
Second Dept.; Index No.: 28990/06;

Attorneys:
Appellant: G. Wesley Simpson, P.C., Brooklyn; respondent 1790 Broadway Associates, LLC: Margaret G. Klein, Manhattan (Mischel & Horn of counsel); defendant third-party plaintiff-respondent: Ahmuty, Demers & McManus, Albertson, Manhattan (Nicholas Cardascia and Glenn Kaminska of counsel); third-party defendant LRP Construction Corp.: Jones Morrison, LLP, Scarsdale (Daniel Morrison and Jeanette Ynfante of counsel)

The plaintiff allegedly sustained personal injuries when she fell while descending a staircase at certain premises owned by the defendant 1790 Broadway Associates, LLC and leased by HSBC Bank USA, National Association, sued as HSBC Bank. She commenced the instant action against, among others, 1790 Broadway and HSBC.

HSBC moved and 1790 Broadway cross moved for summary judgment dismissing the complaint as asserted against each of them. The plaintiff cross moved pursuant to CPLR 3126 to impose sanctions upon the defendants for spoliation of evidence. The Supreme Court granted the respective branches of the motion and cross motion of HSBC and 1790 Broadway. It denied, as academic, the plaintiff's cross motion pursuant to CPLR 3126 to impose sanctions for spoliation of evidence.

"A plaintiff's inability to identify the cause of her fall is fatal to a claim of negligence in a slip-and-fall case because a finding that the defendant's negligence, if any, proximately caused the plaintiff's injuries would be based on speculation." ***DiLorenzo v. S.I.J. Realty Co., LLC, 115 AD3d 701, 702; Kudrina v. 82-04 Lefferts Tenants Corp., 110 AD3d 963, 964; Deputron v. A & J Tours, Inc., 106 AD3d 944, 945***. Here, 1790 and HSBC established their prima facie entitlement to judgment as a matter of law by submitting, inter alia, a transcript of the deposition testimony of the plaintiff, which demonstrated that the plaintiff could not identify the cause of her fall without resorting to speculation***. Dennis v. Lakhani, 102 AD3d 651, 652;***

Califano v. Maple Lanes, 91 AD3d 896, 897; McFadden v. 726 Liberty Corp., 89 AD3d 1067, 1067. In opposition, the plaintiff failed to raise a triable issue of fact (***Zuckerman v. City of New York, 49 NY2d 557, 562-564***). Accordingly, the Supreme Court properly granted the subject branches of the respective motion and cross motion of HSBC and 1790 Broadway.

In absence of statute or ordinance, owner or lessee of property abutting public sidewalk may be held liable where it undertook snow and ice removal efforts which made the naturally-occurring conditions more hazardous

Harris, etc. v. City of New York, et al.
Second Dept.; Index No.: 10822/04; Slip Op. No.: 08319

Attorneys:
Appellant: Goidel & Siegel, LLP, Manhattan (Andrew Siegel of counsel); defendant third-party plaintiff-respondent John Psaras: Gladstein Keane & Flomenhaft PLLC, Manhattan (Anthony Spiga of counsel); third-party defendants-respondents Blush Salon, Lynn Sanders and Natliya Antonovski: Gannon, Rosenfarb, Balletti & Drossman, Manhattan (Peter Gannon of counsel)

On or about January 6, 2003, the plaintiff's decedent allegedly slipped and fell on a sidewalk adjacent to premises in Kings County allegedly owned by the defendant John Psaras, who leased the premises to tenants. The ground floor store of the premises was occupied by commercial tenants who were obligated pursuant to the terms of their lease to remove snow and ice from "the front sidewalk area of the leased premises."

"A property owner is under no duty to pedestrians to remove snow and ice that naturally accumulates upon the sidewalk in front of the premises unless a statute or ordinance specifically imposes tort liability for failing to do so." ***Crudo v. City of New York, 42 AD3d 479, 480***. No such provision was in place in New York City prior to September 14, 2003, the effective date of a revision to the Administrative Code of the City of New York imposing liability on certain abutting landowners. ***Administrative Code of NY § 7-210; Robles v. City of New York, 56 AD3d 647***. Because the accident occurred on January 6, 2003, Administrative Code of NY § 7-210 is not applicable to this case.

"In the absence of a statute or ordinance, an owner or lessee of property abutting a public sidewalk may be held liable where it undertook snow and ice removal efforts which made the naturally-occurring conditions more hazardous." ***Robles v. City of New York, 56 AD3d at 647, quoting Bruzzo v. County of Nassau, 50 AD3d 720, 721; Schwint v. Bank St. Commons, LLC, 74 AD3d 1312, 1313.*** Here, Psaras made a prima facie showing of entitlement to judgment as a matter of law dismissing the complaint as asserted against him on the ground that neither he nor anyone acting in his behalf performed snow removal of the premises, and that he was not liable for any actions his tenants may have taken with respect to the sidewalk. ***Gavallas v. Health Ins. Plan of Greater N.Y., 35 AD3d 657, 658; Vijayan v. Bally's Total Fitness, 289 AD2d 224***. In opposition to Psaras's prima facie showing, the plaintiff failed to raise a triable issue of fact.

Moreover, the plaintiff's cross motion for leave to amend the complaint and add the third-party defendants as direct defendants in the action pursuant to the relation-back doctrine was properly denied, since the plaintiff failed to show that the third-party defendants were united in interested with Psaras. ***Regina v. Broadway-Bronx Motel Co., 23 AD3d 255.***

Labor Law §§ 240 (1) and 241 impose nondelegable duties upon contractors and owners to comply with safety practices for protection of workers engaged in various construction-related activities but there is exception for owners of one and two-family dwellings who contract for but do not direct or control work

Peck Jr., etc., et al. v. Szwarcberg
Third Dept.; Slip Op. No.: 08290

Attorneys:
Appellant: Towne, Ryan & Partners, P.C.,(Elena DeFio Kean of counsel); defendant and third-party plaintiff-respondent: Pemberton & Briggs, Schenectady (Paul Briggs of counsel); third-party defendant-respondent Riske Building Construction, LLCL Harris Beach, PLLC, Albany (Mark McCarty of counsel)

The defendant and his wife are the owners of a single-family home where they reside. In 2008, the defendant retained an architectural firm to draft blueprint plans, which he used to obtain a permit for the purpose of building a two-story addition to his home with an expanded basement addition. The defendant hired various contractors, including the third-party defendant, a construction company retained to excavate and pour the basement foundation and install and connect the drain pipes. Brett Peck (the decedent), a construction worker employed by the third-party defendant, performed various excavation and foundation work at the site. On October 20, 2008, the decedent was sent to the site with one of the third-party defendant's laborers to dig a trench and install a footing drain line, and also to load some materials onto the trailer, while the decedent, working

alone, used the excavator to dig a trench hole approximately six-to-eight feet deep. The trench walls were unsupported. At some point, the decedent entered the trench and the walls caved in, burying him and causing his death. There were no known eyewitnesses to this accident.

The plaintiff, individually and as administrator of the decedent's estate, thereafter commenced this action against the defendant alleging violations of Labor Law §§ 200, 240, and 241 (6) as well as common law negligence. The defendant impleaded the third-party defendant seeking indemnification. The defendant moved for summary judgment dismissing the complaint as against him and the third-party defendant moved for summary judgment dismissing the third-party complaint against it. The plaintiff opposed the motions. The Supreme Court granted both motions and the plaintiff appeals.

Although Labor Law §§ 240 (1) and 241 "impose nondelegable duties upon contractors, owners and their agents to comply with certain safety practice for the protection of workers engaged in various construction-related activities" (***Landon v. Austin, 88 AD3d 1127, 1128 [2011]***), the Legislature carved out an exception for "owners of one and two-family dwellings who contract for but do not direct or control the work." ***Labor Law §§ 240 (1) and 241(6); Afri v. Basch, 13 NY3d 592, 595 (2009); Cannon v. Putnam, 76 NY2d 644, 646 (1990); Bombard v. Pruiksma, 110 AD3d 1304, 1305 (2013); Snyder v. Gnall, 57 AD3d 1289, 1290 (2008); Rosenblatt v. Wagman, 56 AD3d 1103, 1104 (2008); Van Hoesen v. Dolen, 94 AD3d 1264, 1266 (2012), lv denied 19 NY3d 809 (2012); Chapman v. Town of Copake, 67 AD3d 1174, 1175 (2009***). "In this context, the phrase direct or control is to be strictly construed and, in ascertaining whether a particular homeowner's actions amount to direction or control of a project, the relevant inquiry is the degree to which the homeowner supervised the method and manner of the actual work being performed by the [injured] party***." Bombard v. Pruiksma, 110 AD3d at 1305; Afri v. Basch, 13 NY3d at 596; Van Hoesen v. Dolen, 94 AD3d at 1266***. That is "the owner must significantly participate in the project before he or she will be deemed to have crossed the line from being a legitimately concerned homeowner to a de facto supervisor" who is not entitled to the exemption. ***Rosenblatt v. Wagman, 56 AD3d at 1104; Snyder v. Gnall, 57 AD3d at 1290-1291***.

Here the defendant testified that he secured architectural building plans, obtained the building permits and hired several contractors to perform the necessary work pursuant to those plans. He retained the third-party defendant, who was in the business of commercial and residential construction, to construct the foundation and install and connect the necessary drain pipes, after eliciting a bid proposal from its owner and operator, Steve Fisk; he hired other companies to do the remainder of the work. Fisk testified that the defendant did not direct or control the work and that he assigned workers to this job each day, put the decedent in charge on the day of the accident, and provide all equipment and materials, for which the defendant was billed. Fiske testified that on the morning of the accident, he discussed how to dig the trench and install the drain and all necessary safety measures with the decedent. Sometime later that morning, the defendant looked for the decedent and could not find him. After calling Fiske, the defendant started digging in the trench and recovered the decedent's body, covered beneath several feet of direct. The defendant did not observe any ladders or reinforcements being used in the trench.

The defendant had no prior construction experience, was otherwise employed full time, and did not perform any work upon this project. The record reveals that the defendant observed the work progress when he was present at his home, but that he did not direct the work. The record reveals that the defendant's involvement in the installation of the subject drain consisted of discussing the local drainage requirements with the workers; he did not tell them how or where to install the lines or how to dig the trench. The defendant's only other involvement consisted of homeowner preparations for the project and providing information regarding buried lines in the ground. Viewing this evidence most favorable to the plaintiff (***Chapman v. Town of Copake, 67 AD3d at 1176***) established that the defendant was involved in only minor aspects of the project and that "his participation was never so significant as to support the conclusion that he directed or supervised [decedent's] work." ***Snyder v. Gnall, 57 AD3d at 1290***. That is, his actions were those of a "legitimately concerned homeowner" and not those of a supervisor. ***Rosenblatt v. Wagman, 56 AD3d at 1104.*** Thus, the defendant met his burden of showing entitlement to the §§ 240 (1) and 241 exemption. ***Lombardi v. Stout, 80 NY2d 290, 297 (1992)***.

The plaintiff contends that the facts present factual issues as to whether the defendant acted as the general contractor who directed and controlled the project. However, under established case law, "neither providing site plans, obtaining a building permit, hiring contractors, purchasing materials, offering suggestions/input, inspecting the site, retaining general supervisory authority, performing certain work, nor physical presence at the site, operates to deprive a homeowner of the statutory exemption –so long as the homeowner did not exercise direction or control of the injury-producing work." ***Bombard v. Pruiksma, 110 AD3d at 1305-1306***. Here, while recognizing the terrible tragedy and decedent's youth, the defendant's limited actions were not sufficient to support the conclusion that he "supervised the method and manner of the actual work being performed by the [injured] party." ***Id at 1305***. Accordingly, the Supreme Court properly granted the defendant's motion for summary judgment as to the §§ 240 (1) and 241 causes of action.

Labor Law § 200 codifies the common law duty of owners and general contractors "to maintain a safe construction site." ***Rizzuto v. L.A. Wenger Contr. Co., 91 AD2d 343, 352 (1998).*** As a precondition to the imposition of liability upon the defendant as a homeowner, "it must be shown that [defendant] exercised supervisory control over [decedent's] work and had actual or constructive knowledge of the unsafe manner in which the work was being performed." ***Fassett v. Wegmans Food Mkts, Inc., 66 AD3d 1274, 1276 (2009); Bombard v. Pruiksma, 110 AD3d at 1306; Rought v. Price Chopper Operating***

Co., Inc., 73 AD3d 1414, 1416 (2010). "When an alleged defect or dangerous condition arises from [a] contractor's methods and the owner exercises no supervisory control over the operation, no liability attaches to the owner under the common law or under Labor Law § 200." ***Cook v. Orchard Park Estates, Inc., 73 AD3d 1263, 1264 (2010); Rizzuto v. L.A. Wenger Contr. Co., 91 NY2d at 352; Lombardi v. Stout, 80 NY2d at 295***. Even "the retention of general supervisory control, presence at a work site, or authority to enforce safety standards is insufficient to establish the control necessary to impose liability." ***Biance v. Columbia Washington Ventures, LLC, 12 AD3d 926, 927 (2004)***. As there was no evidence to support the conclusion that the defendant exercised any supervisory control over the decedent's work installing the drain pipes or any aspect of the construction project, and the testimony established that the accident was caused by third-party defendant's construction methods, the manner in which the decedent excavated, his entry into the trench and/or failure to use available safety devices, the plaintiffs Labor Law § 200 and common law negligence claims necessarily fail. ***Cook v. Orchard Park Estates, Inc., 73 AD3d at 1264; Rizzuto v. L.A.Wenger Contr. Co., 91 NY2d at 352; Lombardi v. Stout, 80 NY2d at 295; Van Hoesen v. Dolen, 94 AD3d at 1266; Snyder v. Gnall, 57 AD3d at 1291***. The plaintiff's claims regarding the defendant's violations of town law are unpreserved for review. ***CPLR 5501 (a) (3); Matter of Steele, 85 AD3d 1375, 1376 (2011)***. Accordingly, the Supreme Court properly dismissed the plaintiff's complaint and third-party complaint.

SERIOUS INJURY

In action resulting from motor vehicle accident, defendants not entitled to summary judgment on issue of serious injury where plaintiff submits affirmed medical reports concluding that injuries were permanent and causally related to accident

Master, et al. v. Boiakhtchion, et al.
Second Dept.; Index No.: 31826/09; Slip Op. No.: 07478

Attorneys:
Appellants: Richard T. Lau, Manhattan (Gene Wiggins of counsel); respondents: Novo Law Firm, P.C., Manhattan (Ellie Silverman of counsel)

The plaintiffs commenced this action to recover damages for injuries they allegedly sustained in a motor vehicle accident. The defendants moved for summary judgment on the ground that neither plaintiff sustained a serious injury within the meaning of Insurance Law § 5102 (d). The Supreme Court denied their motion, the defendants appealed, and the Appellate Division affirms.

The defendants met their prima facie burden of showing that neither plaintiff sustained a serious injury within the meaning of Insurance Law § 5102 (d). ***Toure v. Avis Rent A Car Sys., 98 NY2d 345; Gaddy v. Eyler, 79 NY2d 955, 956-957***. The defendants' examining orthopedist set forth in her affirmed medical reports that the plaintiff Alexander Master had a full range of motion in the cervical and lumbar regions of his spine and the plaintiff Natalya Master had a full range of motion in the cervical region of her spine and right knee, based on objective range of motion tests, wherein the numerical findings were compared to what is normal. ***Layne v. Drouillard, 65 AD3d 1197***. Furthermore, the defendants submitted the deposition testimony of each of the plaintiffs, which showed that they both returned to work full time immediately after the accident. ***McIntosh v. O'Brien, 69 AD3d 585, 587; Knox v. Lennihan, 65 AD3d 615; Sanchez v. Williamsburg Volunteer of Hatzolah, Inc., 48 AD3d 664, 665***.

In opposition, the plaintiffs raised a triable issue of fact through the affirmed medical reports of their examining osteopath, and the affirmations and medical reports of their radiologist, as to whether Alexander sustained a serious injury to the cervical and lumbar regions of his spine and whether Natalya sustained a serious injury to the cervical region of her spine and right knee, under the significant limitation of use and/or permanent consequential limitation of use categories of Insurance Law § 5102 (d). ***Lopez v. Senatore, 65 NY2d 1017, 1020***. The plaintiffs' examining osteopath conducted recent examinations of the plaintiffs, during which she observed range-of-motion limitations, reviewed their magnetic resonance imaging reports and other medical reports, and considered the history of the accident presented by the plaintiffs, and concluded that the injuries were permanent and causally related to the subject accident.

SEXUAL HARASSMENT

Executive Law § 296 (1) (a) provides that it is an unlawful discriminatory practice for an employer because of an individual's sex to discriminate against such individual in compensation or in terms, conditions or privileges of employment

Tidball v. Schenectady City School District
Third Dept.; Slip Op. No.: 08092

Attorneys:
Appellants: Girvin & Ferlazzo, PC. Albany (Patrick Fitzgerald of counsel); respondent: Colin Dwyer

The plaintiff, an employee of the defendant, and her husband, derivatively, commenced this action against the defendant the Schenectady City School District and the City of Schenectady in April 2008, grounded upon alleged sexual harassment of the plaintiff by her supervisor, Steven Raucci, In her amended and second amended complaints, the plaintiff asserted that the defendant was liable because it knew of Raucci's conduct through her own reports to the defendant's administration. However, following two motions to dismiss by the defendant and two cross motions by the plaintiff to amend her complaint, the Supreme Court, in two orders, precluded the plaintiff from claiming that the defendant knew of Raucci's alleged harassment based on her own communications with the defendant. In the plaintiff's third amended complaint, her only asserted basis for the defendant's knowledge of Raucci's conduct was "various communications between school administrators and Raucci individually." The Supreme Court denied the defendant's motion for summary judgment dismissing the plaintiff's third amended complaint, finding that questions of fact existed as to defendant's knowledge of Raucci's conduct due to his possible status as a high level supervisor and as to whether Raucci himself put defendant on notice of his conduct through his own actions. The defendant moved to renew the motion, submitting new evidence that Raucci was not a high level supervisor. Upon granting renewal, the Supreme Court partially granted the defendant's motion for summary judgment by precluding the plaintiff from claiming that the defendant was a high level supervisor. The defendant appeals, arguing that the third amended complaint should have been dismissed in its entirety because the defendant did not know, now should it have known of Raucci's conduct against the plaintiff.

Pursuant to Executive Law § 296 (1) (a), it is "an unlawful discriminatory practice for an employer…, because of an individual's…sex…to discriminate against such individual in compensation or in terms, conditions or privileges of employment." ***Catholic Charities of Diocese of Albany v. Serio, 28 AD3d 115, 125 n 4 (2006), affd 7 NY3d 510 (2006), cert denied 552 US 816 (2007); Mauro v. Orville, 259 AD2d 89, 91 (1999), lv denied 94 NY2d 759 (2000)***. An employee may succeed on a sexual harassment claim pursuant to Executive Law § 296 (1) (a) upon establishing that he or she is a member of a protected group, is subjected to unwelcome sexual harassment based on his or her gender that affects a term, condition or privilege of his or her employment, and that the employer "knew or should have known of the harassment and failed to take remedial action." ***Matter of Town of Lumberland v. New York State Div. of Human Rights, 229 AD2d 631, 636 (1996); Matter of Bracci v. New York State Div. of Human Rights, 62 AD3d 1146, 1148 (2009), appeal dismissed 15 NY3d 865 (2010: Matter of R & B Autobody & Radiator, Inc. v. New York State Div. of Human Rights, 31 AD3d 989, 990 (2006)***. An employer will be liable for "an employee's discriminatory act [where] the employer became a party to it by encouraging, condoning, or approving it," and the term condoning includes, as relevant here, "an employer's calculated inaction in response to discriminatory conduct." ***Matter of State Div. of Human Rights v. St. Elizabeth's Hosp., 66 NY2d 684, 687 (1985); Matter of New York State Div. of Human Rights v. Young Legends, LLC, 90 AD3d 1265, 1267 (2011); NYNEX Info. Resources Co., 209 AD2d 834, 834 (1994).***

Between September 2007 and February 2009, the plaintiff worked as Raucci's secretary. Raucci, the facilities' supervisor, reported directly to defendant's human resources administrator, Michael Strico and to the defendant's assistant superintendant of business, Michael San Angelo. On June 5, 2008, Raucci sent the plaintiff a memorandum on the defendant's letterhead informing her that, effective July 7, 2008, she would commence her position as "messenger" and congratulating her on her new position. The memo indicated that it was copied to Strico, San Angelo, and Patrick Paratore, a facilities assistant. On the effective date of her appointment, Raucci sent the plaintiff a memorandum on the defendant's letterhead containing the exact language as the June 5, 2008 memorandum, with a list of additional conditions. These conditions included demands to "take time everyday to keep your appearance pleasing to your supervisor…always remember that your supervisor is a man first and a supervisor second and he should be treated as such in that sequence, and being attractive, sensitive and classy with a touch of sexiness, are crucial to the position." This memorandum also indicated that it was copied to San Angelo, Strico and Paratore, and the plaintiff testified that based on this notation, she believed that they had received it.

It is undisputed that the plaintiff never directly informed anyone in the defendant's administration that she was being sexually harassed by Raucci. However, early in the plaintiff's work with Raucci, he wrote a letter to look as if the plaintiff had written it, and asked her to hand-deliver it to Strico. The mock letter, which accused Raucci of sexually harassing the plaintiff, was apparently meant as a joke because, at that time, a sexual harassment suit was pending against Raucci by a former male employee. According to the plaintiff, the letter was intended to prove "that Raucci harassed women, that he liked women, not men." The plaintiff handed Strico the letter without talking to him. Moreover, the plaintiff asserted that, while defendant "recommended sexual harassment training for [Raucci's] staff, including Raucci," due to the prior sexual harassment suit against him, Raucci himself canceled the meeting and would not comply, which the defendant allowed.

The plaintiff further testified that during a difficult time in her work with Raucci, the two discussed the possibility of her transferring to a different position. After Raucci yelled at her to "just go," she went to Strico's office to wait and speak to him. As she waited, Raucci came and looked into where was sitting and, upon seeing that Strico was not there, left. However, when Strico arrived, Raucci was directly behind him and followed the plaintiff and Strico into their meeting. The plaintiff tes-

tified that, with the exception of a few words at the beginning of the meeting, she was not allowed to explain why she had come to speak to Strico, as Raucci dominated the meeting. Strico never asked plaintiff's purpose of the meeting, nor followed up about issues discussed therein.

In support of its motion, the defendant adduced sufficient evidence to meet its initial burden of establishing as a matter of law that it did not know, nor should it have known, of Raucci's alleged conduct. ***Ferrante v. American Lung Assn., 90 NY2d 623, 631 (1997); Sutherland v. Roman Catholic Diocese of Rochester, 39 AD3d 1151, 1152 (2007)***. In particular, the defendant provided the affidavits of Strico and San Angelo averring that they had no awareness of Raucci's offensive email to the plaintiff concerning her appointment as messenger prior to the commencement of the action. Further the defendant elicited testimony from the plaintiff that she assumed that Strico knew that the mock letter complaining of sexual harassment was a joke from Raucci, due to the personal relationship between Raucci and Strico and their manner of joking with each other. However, viewing the evidence in the light most favorable to the plaintiff, she has successfully raised triable issues of fact as to whether the defendant should have known of Raucci's harassing conduct, based on, among other things, the contradictory evidence as to whether Strico and San Angelo received Raucci's email regarding the plaintiff's appointment as messenger, the inappropriate and suggestive nature of his mock letter to Strico, and Raucci's refusal to allow the plaintiff to meet alone with Strico. ***Forrest v. Jewish Guild for the Blind, 3 NY3d 295, 315 (2004); Vitale v. Rosina Food Prods., 283 AD2d 141, 144, 146 (2001); Goering v. NYNEX Info. Resources Co., 209 AD2d at 835.***

SPOLIATION OF EVIDENCE

Courts have broad discretion in determining what, if any, sanction should be imposed for spoliation of evidence, and may impose sanction even if destruction occurred through negligence rather than willfulness and even if evidence was destroyed before spoliator became a party, provided it was on notice that evidence might be needed for future litigation

Simoneit v. Mark Cerrone, Inc., et al.
Fourth Dept.; Slip Op. No.: 07783

Attorneys:
Plaintiff-appellant-respondent: Cellino & Barnes, P.C., Buffalo (Gregory Pajak of counsel), Damon Morey LLP; defendants-respondents-appellants: The Tarantino Law Firm, LLP, Buffalo (Ann Campbell of counsel)

The plaintiff commenced this action seeking to recover damages for injuries she allegedly sustained in a motor vehicle accident. At the time of the accident, the plaintiff was working as a bus aide on a school bus. The bus was stopped and waiting to make a left turn when it was struck by a payloader operated by the defendant Freeman and owned by the defendant Mark Cerrone, Inc. The plaintiff appeals and the defendants cross appeal from an order that denied part of the plaintiff's motion for partial summary judgment on the issue of the defendants' negligence, granted that part of the motion seeking dismissal of the affirmative defense of the plaintiff's culpable conduct, and granted the cross motion of the defendants for leave to amend their answer to assert various affirmative defenses based upon alleged brake failure.

The Supreme Court abused its discretion in granting the defendants' cross motion and therefore the Appellate Division modifies the order. The motion was made seven months after the plaintiff had filed the note of issue and more than two years after she commenced the action, yet the defendants offered no excuse for their delay in making the motion. ***Simmons v. Pierce, 39 AD3d 1252, 1252-1253; Gross, Shuman, Brizdle & Gilfillan, P.C. v. Bayger, 256 AD2d 1187, 1188***. In addition, preclusion of the affirmative defenses based on brake failure is warranted as a sanction for spoliation. ***Simmons, 39 AD3d at 1253***. After the accident Cerrone replaced the payloader's allegedly defective brake calipers and discarded the old calipers. It is well established that courts have "broad discretion in determining what, if any, sanction should be imposed for spoliation of evidence," and "may, under appropriate circumstances, impose a sanction even if the destruction occurred through negligence rather than willfulness, and even if the evidence was destroyed before the spoliator became a party, provided [the party]…was on notice that the evidence might be needed for future litigation.'" ***Iannucci v. Rose, 8 AD3d 437, 438***. Here, Freeman drove a 32,000-pound construction vehicle into a school bus filled with children, several of whom were removed from the scene in ambulances. Under those circumstances, the defendants should have anticipated that litigation was likely (***New York City Hous. Auth., v. ProQuest Sec., Inc., 108 AD3d 471, 473***), and, therefore, they were on notice that the brake calipers might be needed for future litigation. ***Iannucci, 8 AD3d at 438; DiDomenico v. C & S Aeromatik Supplies, 252 AD2d 41, 53***. Because the calipers were "a crucial piece of evidence with respect to the affirmative defense of brake failure," the Court concludes that denial of the defendants' cross motion to amend their answers to include any affirmative defense is the appropriate sanction for their disposal of the brakes. ***Simmons, 39 AD3d at 1253; Cutroneo v. Dryer, 12 AD3d 811, 813***.

The plaintiff is entitled to partial summary judgment on the issue of the defendants' negligence, and therefore, the Appellate Division modifies the order accordingly. Vehicle and Traffic Law § 1143 provides that "the driver of a vehicle about to enter or cross a roadway from any place other than another roadway shall yield the right of way to all vehicles approaching on the roadway to be entered or crossed." Here, the plaintiff met her initial burden on the motion by establishing as a matter of law

that "the sole proximate cause of the accident was [Freeman's] failure to yield the right of way'" to the school bus in violation of section 1143. ***Guadagno v. Norward, 43 AD3d 1432, 1433; Garza v. Taravella, 74 AD3d 1802, 1804***. At the time of the accident, the school bus was lawfully stopped on a public roadway, and the payloader collided with the school bus after entering the roadway from a parking lot. ***Whitcombe v. Phillips, 61 AD3d 1431, 1431***. In opposition to the motion, the defendants failed to provide a nonnegligent explanation for the accident. ***Long v. Niagara Frontier Transp. Auth., 81 AD3d 1391, 1392; Zuckerman v. City of New York, 49 NY2d 557, 562***. However, the Supreme Court properly denied that part of the plaintiff's motion for summary judgment on the issue of causation. ***Monette v. Trummer, 96 AD3d 1547, 1549***. In opposition to that part of the motion, the defendants submitted an expert affirmation of a radiologist who opined that the plaintiff was not injured in the accident and that any spinal injuries were preexisting and degenerative in nature, thereby raising an issue of fact with respect to causation. ***Zuckerman, 49 NY2d at 562***.

The Supreme Court erred in dismissing the defendants' affirmative defense of the plaintiff's culpable conduct, and therefore the Appellate Division modifies the order accordingly. CPLR 1411 provides that "in any action to recover damages for personal injuries…, the culpable conduct attributable to the plaintiff…, including contributory negligence…, shall not bar recovery, but the amount of damages otherwise recoverable, shall be diminished in the proportion which the culpable conduct attributable to the plaintiff…bears to the culpable conduct which caused the damages." The statute encompasses any culpable conduct that had a "substantial factor in causing the harm for which recovery is sought." ***Arbegast v. Board of Educ. of S. New Berlin Cent. Sch., 65 NY2d 161, 168***. Here, there is no question that the sole proximate cause of the accident was the defendants' negligence. The defendants contend, however, that the injuries the plaintiff allegedly sustained in the accident were caused, in whole or in part, by her position on the bus, i.e., the fact that she was kneeling or standing on the bus rather than sitting in a seat, and they submitted an expert affirmation to that effect. ***Harrity v. Leone, 93 AD3d 1204, 1206-1207; DiCicco v. Cattani, 59 AD3d 660, 661; Warwick v. Cruz, 270 AD2d 255, 255.***

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