NEW YORK APPELLATE DIGEST, LLC

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An Organized Compilation of the Summaries of Selected Decisions Released by the Fourth Department July – September 2021 and Posted on the New York Appellate Digest Website that Quarter. The Entries in the Table of Contents Link to the Summaries Which Link to the Decisions on the Official New York Courts Website. Click on "Table of Contents" in the Header on Any Page to Return There. Right Click on the Citations to Keep Your Place in the Quarterly.

Contents

Table of Contents

Table of Contents

Table of Contents

Table of Contents

Table of Contents

ATTORNEYS, STIPULATION OF SETTLEMENT, EMAILS.

PLAINTIFF'S ATTORNEY'S EMAIL WAS AN ENFORCEABLE STIPULATION OF SETTLEMENT; PLAINTIFF'S SUBSEQUENT REFUSAL TO EXECUTE THE DOCUMENTS WAS A BREACH OF THE SETTLEMENT AGREEMENT (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined an email sent by plaintiff's attorney constituted an enforceable stipulation of settlement, despite the fact that plaintiff subsequently refused to execute the documents:

… [T]he requirements for a valid and enforceable settlement agreement are satisfied here. The email from plaintiff's lawyer to defendant's lawyer contained the only two material terms of the agreement, i.e., defendant's payment of $32,500 to plaintiff in exchange for plaintiff's release of defendant from further liability; the email plainly manifested the parties' mutual accord, i.e., "[plaintiff] has informed me that he would like to accept the $32,500 settlement [offered by defendant]"; and the lawyer representing the party to be bound, i.e., plaintiff, explicitly typed his name at the end of the email in a manner akin to a hand-signed letter. Nothing more was required, and plaintiff's "subsequent refusal to execute form releases and a stipulation of discontinuance did not invalidate the agreement" … . To the contrary, plaintiff's subsequent refusal to execute the necessary releases and stipulation constituted a breach of the parties' valid settlement agreement. The court thus erred in denying defendant's cross motion to enforce the settlement agreement … . Field v Pet Haven, Inc., 2021 NY Slip Op 04450, Fourth Dept 7-16-21

CIVIL PROCEDURE, DEATH OF PARTY, SUBSTITUTION.

ALTHOUGH DOMINICA, THE EXECUTRIX OF JOSEPHINE'S ESTATE, WAS NEVER SUBSTITUTED FOR JOSEPHINE AFTER JOSEPHINE'S DEATH, DOMINICA APPEARED AND ACTIVELY LITIGATED A MOTION TO VACATE; THE FAILURE TO EFFECT SUBSTITUTION IN THAT CIRCUMSTANCE IS A MERE IRREGULARITY; TWO-JUSTICE DISSENT (FOURTH DEPT).

The Fourth Department, over a two-justice dissent, determined the failure to substitute the executrix of Josephine's estate, Dominica P., after Josephine's death did not nullify the proceedings. Dominca P appeared and actively litigated a motion to vacate brought by Kathleen. In that circumstance the failure to effect substitution was deemed a mere irregularity:

Josephine died at some point before the entry of the order on appeal, and the executrix of her estate, Dominica P., was never formally substituted as the petitioner in this proceeding. There is no dispute, however, that Dominica was properly served with Kathleen's motion to vacate, and Dominica never objected to adjudicating Kathleen's motion in the absence of a formal substitution order. To the contrary, Dominica—acting in her capacity as the executrix of Josephine's estate—appeared and successfully opposed Kathleen's motion on the merits. Dominica likewise appeared in this Court to oppose Kathleen's appeal. Because Dominica appeared and actively litigated Kathleen's motion on the merits, it is well established that any "defect in failing to first effect substitution was a mere irregularity" … . Moreover, to formally correct this irregularity, we now modify the order by substituting Dominica as the petitioner in this proceeding … . Matter of Robinson v Kathleen B., 2021 NY Slip Op 04320, Fourth Dept 7-9-21

CIVIL PROCEDURE, DISCOVERY, APPEALS, PRESERVATION.

DISCOVERY REQUESTS AIMED AT AN ISSUE WHICH WAS ADMITTED BY DEFENDANTS SHOULD NOT HAVE BEEN GRANTED; BECAUSE THE ALTERNATIVE ARGUMENT FOR THE DISCOVERY REQUESTS WAS NOT SUPPORTED BY A MEMO IN THE RECORD DEMONSTRATING THE ISSUE WAS PRESERVED, THE ARGUMENT WAS REJECTED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined defendants' discovery requests in this traffic accident case should not have been granted. The requests for defendants' cell phone records and receipts for food and beverages on the day of the accident were aimed at demonstrating the identity of the driver of defendants' vehicle. But the identity of the driver had been admitted by the defendants. Plaintiff's alternative argument was rejected because there was no memorandum of law in the record to demonstrate the issue had been raised below:

Given the prior admission establishing that [defendant] Vladyslav was the operator of the pickup truck, plaintiff "failed to meet the threshold for disclosure by showing that [his] request for [defendants'] cell phone [records and records for food and beverage purchases] was reasonably calculated to yield information material and necessary to [his action]" … . …

Plaintiff … contends, as an alternative ground for affirmance, that there is a different reason supporting disclosure that was not included in his discovery requests or motion papers in the record on appeal, i.e., the requested records are potentially relevant to identifying witnesses who could testify about Vladyslav's physical condition on the night of the accident and to determining whether Vladyslav was intoxicated or impaired. On the record before us, which does not include any memoranda of law despite our repeated and longstanding advisements that such memoranda may properly be included in the record on appeal for the limited purpose of determining preservation … , we conclude that plaintiff's contention is not properly before us inasmuch as it is raised for the first time on appeal … . Brennan v Demydyuk, 2021 NY Slip Op 04425, Fourth Dept 7-16-21

CIVIL PROCEDURE, JURISDICTION.

THE NONDOMICILIARY DID NOT HAVE MINIMUM CONTACTS WITH NEW YORK; NEW YORK DID NOT HAVE PERSONAL JURISDICTION OVER THIS TRUST LITIGATION (FOURTH DEPT).

The Fourth Department, reversing Surrogate's Court, determined New York did not have jurisdiction over this trust litigation:

In the petition, the settlor and beneficiary of the trust (decedent) sought an accounting and removal of respondent, a Virginia resident, as trustee. The trust was created in 1996 in New Jersey. At the time the trust was created, decedent was a resident of Illinois and respondent was a resident of Georgia. Respondent administered the trust from Georgia until he relocated to Virginia, and he administered the trust from Virginia thereafter. Decedent relocated to New York in 2016. Solely as a consequence of decedent's choice of residence, respondent sent to New York occasional trust-related correspondence, including "five or six" checks disbursing trust assets.

… "Due process requires that a nondomiciliary have 'certain minimum contacts' with the forum and 'that the maintenance of the suit does not offend traditional notions of fair play and substantial justice' " … A nondomiciliary has minimum contacts with New York if he or she "purposefully avails" himself or herself of "the privilege of conducting activities within" New York … . thereby " 'invoking the benefits and protections' " of New York's laws … . Our focus is on " 'the relationship among the [respondent], the forum, and the litigation' "… . We conclude that respondent lacks the requisite minimum contacts with the New York forum. He does not live, own property, or conduct business in New York. The first and only relationship that New York had to the subject trust was 20 years after its creation, when decedent became domiciled in New York and respondent disbursed trust assets to her in New York … . Matter of Murad Irrevocable Trust, 2021 NY Slip Op 04823, Fourth Dept 8-26-21

CIVIL PROCEDURE, REQUEST TO POLL THE JURY.

THE REFUSAL OF DEFENDANT'S REQUEST TO POLL THE JURY REQUIRED A NEW TRIAL (FOURTH DEPT).

The Fourth Department, reversing the judgment, determined defendant's request to poll the jury should not have been denied:

Plaintiff commenced this action seeking damages for, inter alia, assault and battery, and in his amended answer defendant asserted counterclaims for, inter alia, defamation. The matter proceeded to trial, and now plaintiff appeals and defendant cross-appeals from an order and judgment of Supreme Court that denied the parties' respective motions to set aside portions of the jury verdict and, upon the jury verdict, awarded damages both to plaintiff and to defendant. We reverse.

We agree with defendant on his cross appeal that the court erred in denying his request to poll the jury. "A party has an absolute right to poll the jury, and a court's denial of that right mandates reversal and a new trial" … . We therefore reverse the order and judgment and remit the matter to Supreme Court for a new trial … . Fitzgerald v Kula, 2021 NY Slip Op 04452, Fourth Dept 7-16-21

CRIMINAL LAW, APPEALS.

ALTHOUGH THE ARGUMENT THAT THE INDICTMENT WAS DUPLICITOUS WAS PRESERVED FOR APPEAL, THE ISSUE WAS NOT RULED ON BY COUNTY COURT AND THEREFORE CAN NOT BE CONSIDERED ON APPEAL; MATTER REMITTED FOR A RULING (FOURTH DEPT).

The Fourth Department noted that it can not consider an issue which was preserved for appeal but was not ruled upon by County Court. The matter was remitted:

Although defendant did preserve his contention concerning facial duplicity by seeking dismissal of the indictment on that ground in the pretrial omnibus motion …

, we are unable to address that contention because County Court failed to rule on that part of defendant's omnibus motion (see CPL 470.15 [1] …).

The Court of Appeals "has construed CPL 470.15 (1) as a legislative restriction on the Appellate Division's power to review issues either decided in an appellant's favor, or not ruled upon, by the trial court" … , "and thus the court's failure to rule on the motion cannot be deemed a denial thereof" … . We therefore hold the case, reserve decision and remit the matter to County Court for a ruling on that part of defendant's omnibus motion. People v Baek, 2021 NY Slip Op 04424, Fourth Dept 7-16-21

CRIMINAL LAW, DISCOVERY, ROSARIO MATERIAL.

THE MAJORITY APPLIED THE DISCOVERY STATUTE IN EFFECT AT THE TIME THE ORDER TO TURN OVER THE ROSARIO MATERIAL ONE WEEK BEFORE TRIAL WAS MADE, FINDING THE ORDER PROPER; THE CONCURRENCE AGREED BUT ARGUED THE COURT SHOULD EXPLICITLY RULE THAT THE DISCOVERY STATUTE ENACTED IN 2019 SHOULD ALWAYS BE APPLIED PROSPECTIVELY (FOURTH DEPT).

The Fourth Department, over a concurrence, affirmed defendant's conviction. One of the issues in the appeal was whether it was appropriate for the court to order the prosecution to turn over Rosario material one week before trial. The majority ruled the order was proper under the former law, CPL former 240.45. The concurrence agreed but argued the court should decide whether the current law, enacted in 2019 (see CPL 245.10 [1] [a]; 245.20) should always be applied prospectively:

We reject defendant's contention that he was deprived of a fair trial by the prosecutor's failure to produce a video-recorded statement of the victim until one week prior to trial. Defendant does not dispute that the recording constitutes Rosario material. Under the discovery rules in effect at the time of defendant's trial, "[w]here, as here, [a] witness[is] not called to testify at a pretrial hearing, Rosario material need not be disclosed until '[a]fter the jury has been sworn and before the prosecutor's opening address' " (… CPL former 240.45 [1] [a]). Neither party

requested that this Court consider the retroactivity of the new discovery statute now in effect. People v Austen, 2021 NY Slip Op 04798, Fourth Dept 8-26-21

CRIMINAL LAW, GRAND JURY.

DEFENDANT MADE A VALID REQUEST TO APPEAR IN THE GRAND JURY BEFORE THE AMENDED INDICTMENT WAS FILED; THE FACT THAT DEFENDANT HAD PREVIOUSLY DECLINED THE OPPORTUNITY TO TESTIFY WAS OF NO SIGNIFICANCE (FOURTH DEPT).

The Fourth Department, dismissing the indictment, determined defendant should have been allowed to testify before the grand jury:

CPL 190.50 (5) (a) provides that a defendant's request to testify is timely as long as it is made prior to the filing of the indictment" … . Here, defendant's June 8, 2017 notice, which " 'satisfied the statutory requirements for notifying the People of a request to appear before the grand jury' " … , was received by the District Attorney on the same day, prior to the filing of the amended indictment on June 9, 2017. Contrary to the contention of the People and the rationale of the court, it is of no moment under the statute that defendant had previously declined the opportunity to testify … . "Where, as here, defendant's request to testify is received after the grand jury has voted, but before the filing of the indictment, defendant is entitled to a reopening of the proceeding to enable the grand jury to hear defendant's testimony and to revote the case, if the grand jury be so advised" … . People v Royal-Clanton, 2021 NY Slip Op 04856, Fourth Dept 8-26-21

CRIMINAL LAW, JUROR CHALLENGE.

DEFENDANT'S FOR CAUSE JUROR CHALLENGE SHOULD HAVE BEEN GRANTED (FOURTH DEPT).

The Fourth Department, reversing defendant's conviction, determined defendant's for cause challenge to a juror should have been granted:

… [T]he prospective juror in question himself expressed "doubt [as to his] own ability to be impartial in the case at hand" … when he stated during voir dire that he was "not sure" whether he could be fair and impartial due to his family members' experience with domestic violence … . The court erred when it did not obtain thereafter any "unequivocal assurance" from the prospective juror that he could render an impartial verdict … . People v Tillmon, 2021 NY Slip Op 04848, Fourth Dept 8-26-21

CRIMINAL LAW, LAWFUL TEMPORARY POSSESSION OF A WEAPON.

SOMEONE WAS TRYING TO OPEN THE DOOR TO DEFENDANT'S HOME AND SHE SHOT THROUGH THE DOOR, KILLING HER BOYFRIEND; DEFENDANT'S REQUEST FOR A "LAWFUL TEMPORARY POSSESSION OF A WEAPON" JURY INSTRUCTION SHOULD HAVE BEEN GRANTED; STRONG DISSENT (FOURTH DEPT).

The Fourth Department, ordering a new trial on the possession of a weapon charge, over a strong dissent, ,determined defendant was entitled to a "lawful temporary possession of a weapon" jury instruction. Someone was trying to open the door to defendant's home and she shot through the door, killing her boyfriend. She was acquitted of homicide:

Defendant testified that she had inadvertently discovered the firearm while attempting to protect herself in the face of an imminent threat, i.e., a person forcibly trying to enter her home. Specifically, she thought that her estranged husband, who

had previously attacked her in her home, was the person attempting to forcibly enter the home. She discovered the firearm while trying to find in her kitchen an object to defend herself, and she did not know beforehand that the firearm was there. When the person at the door continued trying to enter the home, defendant shot through the door to scare him away. Thereafter, defendant saw that she had shot the victim—her boyfriend. She then dropped the firearm, and started to provide first aid. The firearm was not recovered after the shooting, and defendant did not know what happened to it. …

… [W]e conclude that there is a reasonable view of the evidence … that she came into possession of the firearm in a legally excusable manner that was not " 'utterly at odds with [any] claim of innocent possession' " … . …

We also conclude … there is a reasonable view thereof that defendant's use of the firearm did not require a finding that she had used it in a dangerous manner … . People v Ruiz, 2021 NY Slip Op 04827, Fourth Dept 8-26-21

CRIMINAL LAW, MOTION TO VACATE CONVICTION, INEFFECTIVE ASSISTANCE.

DEFENDANT WAS ENTITLED TO A HEARING ON THE MOTION TO VACATE THE CONVICTION ON INEFFECTIVE ASSISTANCE GROUNDS DESPITE THE ABSENCE OF AN AFFIDAVIT FROM TRIAL COUNSEL (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined defendant was entitled to a hearing on the motion to vacate the conviction on ineffective assistance grounds, despite the absence of an affidavit from trial counsel:

[Defendant's] claim of ineffective assistance of counsel was properly raised on his CPL 440.10 motion inasmuch as it is based on matters outside the trial record … . Here, defendant's submissions on the motion raise factual issues requiring a hearing concerning trial counsel's failure to interview and call the two exculpatory witnesses … , even in the absence of an affidavit from trial counsel … . We thus conclude that defendant is entitled to a hearing on his entire claim of ineffective assistance of

counsel inasmuch as " 'such a claim constitutes a single, unified claim that must be assessed in totality' " … . People v Ross, 2021 NY Slip Op 04820, Fourth Dept 8-26-21

CRIMINAL LAW, SEARCHES AND SEIZURES, IMPROPER ARGUMENTS ON APPEAL.

THE SMELL OF PCP PROVIDED PROBABLE CAUSE FOR THE SEARCH OF DEFENDANT'S VEHICLE; DEFENDANT'S APPELLATE COUNSEL WAS CHASTISED FOR FAILURE TO CALL THE COURT'S ATTENTION TO CONTRARY AUTHORITY, UNFOUNDED ASSERTIONS THAT THE APPEAL PRESENTED A MATTER OF FIRST IMPRESSION, AND UNFOUNDED ALLEGATIONS OF PERJURY, MISCONDUCT AND CIVIL RIGHTS VIOLATIONS AGAINST AN ARRESTING OFFICER (FOURTH DEPT).

The Fourth Department, in a full-fledged opinion by Justice NeMoyer, determined the police officer's (Dorchester's) testimony at the suppression hearing established probable cause to search defendant's car based upon the smell of PCP, or, as the court described it, "olfactory detection of street-level PCP." The opinion was as much directed to improprieties in the appellate brief as to the "olfactory detection of PCP:"

"[A]s soon as I walked up to the vehicle," Dorchester testified, "I could smell a really strong chemical odor that was familiar to myself as PCP." Dorchester had received PCP training at the police academy; he regularly received updated training on PCP and other drugs; and he had encountered PCP and its distinctive smell "hundreds" of times over the course of his career as a police officer. Based on his training and experience, Dorchester testified, he immediately recognized the odor emanating from defendant's vehicle as PCP. When pressed on whether he could have been smelling something else, Dorchester held firm: the smell of PCP, he explained, was "pretty distinct." * * *

[I]t is astoundingly inaccurate for defendant's brief to assert that "[t]his is a case of first impression." Moreover, the representation in defendant's brief that "none of the

Appellate Divisions . . . has ever passed upon the question of whether the smell of PCP may, standing alone, constitute probable cause to search" is an unacceptable dereliction of counsel's duty of candor to our Court, for the First Department has done precisely that in two separate cases … . And given that Sanchez [168 AD3d 584] involved a car search, the statement in defendant's brief that "no appellate case law from this state . . . has approved the search of a vehicle based solely on the smell of PCP" is yet another misrepresentation of the caselaw. We take this opportunity to echo the First Department's monition that "counsel has an obligation to bring adverse authority to [our] attention" … . * * *

… [D]efendant's appellate brief levels serious allegations of perjury, official misconduct, and federal civil rights violations against officer Dorchester. The record, however, lacks any proof to substantiate appellate counsel's accusations. It is one thing to suggest that Dorchester's testimony was legally insufficient to justify the search … . But it is quite another thing to file a brief that directly, repeatedly, and unnecessarily accuses Dorchester of serious crimes without evidentiary support. Counsel's "baseless assertions are shockingly irresponsible" … . People v Fudge, 2021 NY Slip Op 04801, Fourth Dept 8-26-21

CRIMINAL LAW, SENTENCING, JUDGES.

THE SENTENCING JUDGE DID NOT HAVE THE AUTHORITY TO DIRECT THAT THE SENTENCE RUN CONSECUTIVELY WITH A SENTENCE WHICH HAD NOT YET BEEN IMPOSED BY A DIFFERENT COURT; THE APPROPRIATE APPELLATE REMEDY IS TO STRIKE THE DIRECTIVE (FOURTH DEPT).

The Fourth Department, reversing (modifying) County Court, In a full-fledged opinion by Justice NeMoyer, determined the sentencing court did not have the authority to order the sentence to run consecutively with a sentence that had not yet been imposed by a different court. The appropriate appellate remedy is to strike the directive, rather than send the matter back for resentencing:

A sentencing court has no power to dictate whether its sentence will run concurrently or consecutively to another sentence that has not yet been imposed. When a

sentencing court violates that rule and purports to direct the relationship between its present sentence and an anticipated forthcoming sentence, the proper remedy is usually to strike the improper directive, not to remit for a new sentencing proceeding at which the court could exercise the very power it lacked originally. * * *

Rather than remitting for resentencing, the proper remedy under these circumstances is to simply vacate County Court's improper directive with respect to consecutive sentencing. That remedy will put defendant in the same position as if County Court had not issued that illegal directive in the first place. Such a remedy will also adequately "protect" the People's interests, since it will place them in the exact position they would have occupied had County Court not issued its illegal directive. Indeed, because the People had no legitimate right or interest in County Court's original illegal sentence, the People have no right or interest that could be "protected" with a remittal order calculated only to achieve the very outcome — consecutive sentencing — that they had no right to obtain in the first place. People v Barthel, 2021 NY Slip Op 04834, Fourth Dept 8-26-21

CRIMINAL LAW, SENTENCING.

COUNTY COURT SHOULD HAVE DETERMINED WHETHER DEFENDANT WAS A SECOND VIOLENT FELONY OFFENDER BEFORE SENTENCING HIM AS A SECOND FELONY OFFENDER, MATTER REMITTED (FOURTH DEPT).

The Fourth Department determined County Court was obligated to determine whether defendant was a second violent felony offender before sentencing defendant as a second felony offender:

Where it is apparent at the time of sentencing that a defendant may be a second violent felony offender, the People are required to file a second violent felony offender statement in accordance with CPL 400.15 and, if appropriate, the court is then required to sentence the defendant as a second violent felony offender … . Here, no such statement was filed, although the People were aware that, approximately 10 years earlier, defendant had been incarcerated in North Carolina for a period of approximately 38 months on a prior conviction of voluntary manslaughter … . Had

the court concluded based on that predicate offense that defendant is a second violent felony offender for this class C violent felony, the court would have been constrained by statute to impose a sentence that includes a determinate term of incarceration of not less than seven years and not more than 15 years … , and thus the six-year term of incarceration that defendant actually received pursuant to his plea agreement would have been illegal. People v Smith, 2021 NY Slip Op 04883, Fourth Dept 8-26-21

CRIMINAL LAW, CHILD PROTECTIVE SERVICES AS AGENT OF LAW ENFORCEMENT.

THE DEFENDANT'S STATEMENTS MADE TO A CHILD PROTECTIVE SERVICES CASEWORKER SHOULD HAVE BEEN SUPPRESSED; THE CASEWORKER, UNDER THE FACTS, ACTED AS AN AGENT OF LAW ENFORCEMENT DURING THE INTERVIEW (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the statements made by defendant to a Child Protective Services (CPS) caseworker should have been suppressed because, under the facts, she was acting as an agent of law enforcement at the time of the interview:

… [T]he CPS caseworker testified at the Huntley hearing that, at the time she interviewed defendant, she was aware that defendant was being held on criminal charges and that he was represented by counsel. She further testified that she worked on a multidisciplinary task force composed of social services and law enforcement agencies, through which she received training on interviewing individuals accused of committing sexual offenses. Additionally, in keeping with task force protocol directing her to report to law enforcement any inculpatory statements made during CPS interviews, the CPS caseworker called the investigating officer immediately following the interview with defendant and promptly went to his office to report defendant's statements. Under the circumstances of this case as reflected at the hearing, although the police did not specifically direct the CPS caseworker to conduct the interview on a specific date or time or accompany her to the interview … , we conclude that the CPS caseworker here had a "cooperative working arrangement" with police such that she was acting as an agent of the police when

she interviewed defendant and relayed his incriminatory statements … . The statements were thus obtained in violation of defendant's right to counsel, and the court erred in refusing to suppress them … . Further, because defendant's statements to the CPS caseworker were the only statements in which he admitted to having sexual contact with the victim, we cannot say that there is "no reasonable possibility that the error contributed to the plea" … . People v Desjardins, 2021 NY Slip Op 04465, Fourth Dept 7-16-21

CRIMINAL LAW.

INCLUSORY CONCURRENT COUNTS DISMISSED (FOURTH DEPT).

The Fourth Department dismissed course of criminal conduct first degree and rape first degree counts as inclusory concurrent counts of predatory sexual assault against a child:

… [C]ounts two and four of the indictment, charging defendant with course of sexual conduct against a child in the first degree (Penal Law § 130.75 [1] [b]) and rape in the first degree (§ 130.35 [4]), respectively, must be dismissed inasmuch as they are inclusory concurrent counts of counts one and three, respectively, charging defendant with predatory sexual assault against a child (§ 130.96) … . People v Feliciano, 2021 NY Slip Op 04289, Fourth Dept 7-9-21

CRIMNAL LAW, UNENFORCEABLE PROBATION CONDITIONS.

PROBATION CONDITIONS PROHIBITING POSSESSION OF A COMPUTER AND A CELL PHONE WERE NOT ENFORCEABLE UNDER THE FACTS OF THE CASE; DEFENDANT HAD PLED GUILTY TO ATTEMPTED SEXUAL ABUSE FIRST DEGREE (FOURTH DEPT).

The Fourth Department, reversing (modifying) Supreme Court, determined some of the conditions of probation prohibiting defendant from possessing a computer and

cell phone were not warranted. Defendant pled guilty to attempted sexual abuse first degree:

In addition to prohibiting defendant from maintaining an account on a social networking site, condition 34 also prohibits defendant from purchasing, possessing, controlling, or having access to any computer or device with internet capabilities and from maintaining any "internet account," including email, without permission from his probation officer. Condition 35 prohibits defendant from owning, renting, or possessing a cell phone with picture taking capabilities or cameras or video recorders for capturing images. In light of defendant's lack of a prior criminal history and the lack of evidence in the record linking defendant's use of technology to the underlying offense, we conclude that those parts of condition 34 and the entirety of condition 35 do not relate to the goals of probation and thus are not enforceable on that ground … . People v Blanco-Ortiz, 2021 NY Slip Op 04447, Fourth Dept 7-16-21

DEBTOR-CREDITOR, ACCELERATION CLAUSE.

THE FULL AMOUNT OF THE NOTE WAS NOT RECOVERABLE BECAUSE THERE WAS NO ACCELERATION CLAUSE; CLAIMS FOR UNPAID INSTALLMENTS DUE MORE THAN SIX YEARS BEFORE FILING SUIT WERE TIME-BARRED (FOURTH DEPT).

The Fourth Department, reversing (modifying) Supreme Court, determined the full amount of the note could not be recovered because it did not include an acceleration clause. In addition, claims for unpaid installments due more than six years before the filing of the lawsuit were time-barred:

"As a general rule, in the absence of an acceleration clause providing for the entire amount of a note to be due upon the default of any one installment, [a plaintiff is] only entitled to recover past due installments and [can]not unilaterally declare the note[] accelerated" … . "Rather, each default on each installment gives rise to a separate cause of action" … . Here, the record is devoid of any evidence of an acceleration clause and, thus, plaintiff was entitled to recover "only the amount of the installments past due at the time of trial" … . … "Where, as here, 'a loan secured

by a mortgage is payable in installments, separate causes of action accrue for each unpaid installment, and the statute of limitations begins to run on the date that each installment becomes due' " … . As defendant correctly asserted as a defense, inasmuch as plaintiff commenced this action on July 13, 2017, any claims for missed installments that accrued prior to July 13, 2011 were time-barred by the applicable statute of limitations … . Estate of Kathryn Essig v Essig, 2021 NY Slip Op 04301, Fourth Dept 7-9-21

EDUCATION-SCHOOL LAW, NEGLIGENCE.

A SCHOOL FACULTY MEMBER WHO YELLED "BE QUIET" INTO A MICROPHONE, THE LOUDNESS OF WHICH WAS ALLEGED TO HAVE INJURED PLAINTIFF'S CHILD, DID NOT BREACH A DUTY OWED TO THE STUDENT; THE SCHOOL DISTRICT'S MOTION FOR A DIRECTED VERDICT SHOULD HAVE BEEN GRANTED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined defendant school district was entitled to a directed verdict in this action which alleged plaintiff's daughter was injured when a faculty member used a microphone to tell the students to be quiet. It was alleged loudness of the command caused injury:

In order to prevail on a negligence claim, " 'a plaintiff must demonstrate (1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom' "… . On appeal, defendant disputes the element of breach only. To that end, the standard to which defendant and its employees are held is "that degree of care which a reasonable [parent] of ordinary prudence would exercise under the circumstances, commensurate with the apparent risk involved" … . Further, "[w]hen a duty exists, nonliability in a particular case may be justified on the basis that an injury is not foreseeable" … .

Although the proof at trial reflected that a school faculty member had "yelled" two words into a microphone and "was really loud" in doing so, there was no proof presented that those words were spoken in a manner or at a volume that was unreasonable, foreseeably unsafe, or in violation of any applicable standard of care. In other words, "[w]ithout knowing what is 'too loud'," "there [was] no standard of

care by which a jury could determine on the evidence presented that defendant[] had breached a duty owed to plaintiff"… . Because there was no "rational process by which the [jury] could base a finding in favor of [plaintiff]" on the element of breach, we conclude that the court erred in denying defendant's motion for a directed verdict … . Joni C. v Cheektowaga-Sloan Union Free Sch. Dist., 2021 NY Slip Op 04859, Fourth Dept 8-26-21

ELECTION LAW.

BUFFALO MAYOR'S CONSTITUTIONAL CHALLENGE TO THE ELECTION-LAW DEADLINE FOR FILING AN INDEPENDENT NOMINATING PETITION, WHICH WAS ACCEPTED BY SUPREME COURT, REJECTED BY THE 4TH DEPARTMENT (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined Election Law 6-158 (9) was not unconstitutional as applied to a Buffalo mayoral race. The petitioner, who had lost in a primary, attempted to file an independent nominating petition in August but the Election Law required filing in May:

The degree of scrutiny used to analyze the constitutionality of a state election regulation depends on the severity of the regulation's burden on the constitutional rights of candidates and their supporters … . If that burden is severe, the law "must be narrowly drawn to advance a state interest of compelling importance" … . A provision imposing "only reasonable, nondiscriminatory restrictions," however, can be justified by a state's "important regulatory interests" … and is subject to a review that is "quite deferential" and requires "no elaborate, empirical verification" … . The totality of a state's overall plan of election regulation should be considered in determining the severity of the restrictions … . * * *

Because a "reasonably diligent candidate" could be expected to meet New York's requirements for independent candidates and gain a place on the ballot … and because those requirements do not unfairly discriminate against independent candidates … , we conclude that Election Law § 6-158 (9) places only a minimal burden on the constitutional rights of those candidates and their voters. Matter of

Brown v Erie County Bd. of Elections, 2021 NY Slip Op 05014, Fourth Dept 9-16-21

FAMILY LAW, CHILD SUPPORT.

PETITIONER'S OBJECTION TO THE SUPPORT MAGISTRATE'S ORDER SHOULD NOT HAVE BEEN DENIED; THE CSSA APPLIES EVEN WHEN THE CHILD RECEIVES PUBLIC ASSISTANCE; DOWNWARD DEVIATION FROM THE PRESUMPTIVE SUPPORT LEVEL IMPROPERLY APPLIED THE PROPORTIONAL OFFSET METHOD (FOURTH DEPT).

The Fourth Department, reversing Family Court, determined petitioner's objections to the Support Magistrate's order should not have been denied:

It is well settled that "the CSSA [Child Support Standards Act] must be applied to all child support orders, regardless of a child's receipt of public assistance" … . Here, the Support Magistrate purported to reduce the father's obligation pursuant to Family Court Act § 413 (1) (f) (10) because the father made additional expenditures to maintain his house to permit the child to stay there during the time that he stayed with the father. Such a reduction for extended visitation is permitted by section 413 (1) (f) (9), however, and that subdivision of the statute applies only where "the child is not on public assistance" … . Furthermore, we have previously stated that a determination to grant a downward deviation from the presumptive support obligation on the ground that the noncustodial parent incurred expenses while the child was in his or her care " 'was merely another way of [improperly] applying the proportional offset method' " … , and the proportional offset method of calculating child support has been explicitly rejected by the Court of Appeals … . Matter of Livingston County Dept. of Social Servs. v Hyde, 2021 NY Slip Op 04316, Fourth Dept 7-9-21

FAMILY LAW, CUSTODY, PSYCHOLOGICAL EVALUATIONS.

FAMILY COURT'S FAILURE TO CONSIDER THE PSYCHOLOGICAL EVALUATIONS OF THE PARENTS BEFORE AWARDING SOLE CUSTODY TO FATHER REQUIRED REMITTAL (FOURTH DEPT).

The Fourth Department, reversing Family Court, determined the psychological evaluations should have been made before awarding sole custody of the child to father:

The mother's mental and emotional health was the central issue contested in this proceeding, and we conclude that the court abused its discretion in making its determination and awarding the father sole custody of the child without first considering the results of the psychological evaluations that it ordered … . Although a psychological expert testified at the fact-finding hearing on behalf of the father, that expert interviewed the parties and the subject child to assess whether the child had been sexually abused, and therefore he did not provide much information on the mother's emotional functioning, the impact her mental health issues had on [*2]her ability to parent the child, or the fitness of either parent. Thus, on this record, we cannot say that there was sufficient evidence for the court to resolve the custody dispute without considering the court-ordered psychological examinations of the parents … . Matter of Pontillo v Johnson-Kosiorek, 2021 NY Slip Op 04455, Fourth Dept 7-16-21

FAMILY LAW, DIVORCE, AMENDMENT OF DOMESTIC RELATIONS ORDER, LACHES.

THE DOCTRINE OF LACHES DID NOT APPLY TO DEFENDANT'S MOTION TO AMEND THE DRO TO SPECIFY PLAINTIFF WAS NOT ENTITLED TO A SHARE OF DEFENDANT'S DISABILITY RETIREMENT BENEFITS; THE TWO-JUSTICE DISSENT WOULD HAVE APPLIED THE LACHES DOCTRINE (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, over a two-justice dissent, determined the doctrine of laches did not apply and defendant could recoup a lump sum disability retirement payment made to plaintiff. Plaintiff and defendant were divorced and a stipulation provided plaintiff would receive her marital share of defendant's retirement benefits under the New York State and Local Retirement System (NYSLRS). A Domestic Relations Order (DRO) was filed in 2010. In 2011 the NYSLRS approved the DRO with respect to ordinary retirement but was silent on disability retirement. In 2019 the NYSLRS approved defendant's 2016 disability retirement application and a retroactive lump sum payment was made to defendant and plaintiff. In 2019 defendant moved to amend the DRO to specify plaintiff was not entitled to the disability retirement benefits. Supreme Court denied the motion applying the doctrine of laches. The dissent apparently agreed the laches doctrine was properly applied:

"Laches is defined as such neglect or omission to assert a right as, taken in conjunction with the lapse of time, more or less great, and other circumstances causing prejudice to an adverse party, operates as a bar in a court of equity . . . The essential element of this equitable defense is delay prejudicial to the opposing party" … . "The mere lapse of time, without a showing of prejudice, will not sustain a defense of laches" … .

Here, the court found that defendant should have sought to amend the DRO in 2011, after receiving the letter from NYSLRS. But at that time, defendant was not eligible for and had not applied for a disability retirement. When his disability retirement application was approved in February 2019 and defendant became aware that plaintiff's distribution would accordingly increase, he promptly moved to amend the

DRO. Moreover, even if there was a delay here, plaintiff utterly failed to make a showing of prejudice … . Taberski v Taberski, 2021 NY Slip Op 04804, Fourth Dept 8-26-21

FAMILY LAW, RELOCATION, DOMESTIC ABUSE.

MOTHER VIOLATED A COURT ORDER BY RELOCATING TO ARIZONA WITH THE CHILD; HOWEVER, HER ALLEGATIONS OF DOMESTIC ABUSE BY FATHER WERE CREDIBLE AND WARRANTED GRANTING HER CROSS PETITION TO RELOCATE (FOURTH DEPT).

The Fourth Department, in a full-fledged opinion by Justice Troutman, determined mother's cross petition to relocate with the child was properly granted, despite mother's violation of a court order prohibiting her from permanently leaving Monroe County with the child without father's consent, or without a court order allowing relocation. Mother testified that father was abusive and she feared for her life at times. Father denied all allegation of abuse. Family Court found mother's testimony credible and did not credit father's testimony:

Courts place considerable weight on the effect of domestic violence on the child … , particularly when a continuing pattern of domestic violence perpetrated by the child's father compels the mother to relocate out of legitimate fear for her own safety … , or where the father minimized the past incidents of domestic violence … . Indeed, where domestic violence is alleged in a petition for custody, "the court must consider the effect of such domestic violence upon the best interests of the child" … .

… [T]he court appropriately considered the fact that the mother unilaterally removed the child from the jurisdiction, determining that the mother "did not relocate to separate the father from the child, but instead acted in good faith to escape the threat of domestic violence" … . Although the court did not countenance the mother's decision to relocate without permission, "it was the father's [violent] conduct that prompted [her] move to [Arizona] in the first instance and triggered the resulting disruption of his relationship with his daughter" … . Furthermore, although the court did not expressly engage in the analysis required under Tropea (87 NY2d at 740-

741), according deference to the court's factual findings and credibility assessments … we conclude that "there is a sound and substantial basis in the record supporting the court's determination that 'relocation would enhance the child['s life] economically, emotionally, and educationally, and that the child['s] relationship with the father could be preserved through a liberal parental access schedule including, but not limited to, frequent communication and extended summer and holiday visits' " … . Matter of Edwards v Ferris, 2021 NY Slip Op 04306, Fourth Dept 7-9-21

FAMILY LAW, TERMINATION OF PARENTAL RIGHTS, RIGHT TO COUNSEL.

MOTHER'S ATTORNEY SHOULD NOT HAVE BEEN ALLOWED TO WITHDRAW WITHOUT NOTICE TO MOTHER WHO DID NOT ATTEND THE TERMINATION-OF-PARENTAL-RIGHTS HEARING; THE DEFAULT ORDER TERMINATING MOTHER'S PARENTAL RIGHTS WAS THEREFORE IMPROPER AND APPEAL IS NOT PRECLUDED (FOURTH DEPT).

The Fourth Department, reversing Family Court, determined the default order terminating mother's parental rights was improper because mother's attorney was allowed to withdraw without notice to mother. Because the default order was improper, mother's appeal is not precluded (default orders are not appealable):

In this proceeding pursuant to Social Services Law § 384-b,respondent mother contends that Family Court erred in allowing the mother's attorney to withdraw as counsel and in proceeding with the hearing in the mother's absence. We agree. " 'An attorney may withdraw as counsel of record only upon a showing of good and sufficient cause and upon reasonable notice to the client . . . [, and a] purported withdrawal without proof that reasonable notice was given is ineffective' " … . Because there is no indication in the record that the mother's attorney informed her that he was seeking to withdraw as counsel, the court should not have relieved him as counsel … . Although, generally, no appeal lies from an order entered on default (see CPLR 5511 …), here, the absence of evidence that the mother was put on notice of her attorney's motion to withdraw renders the finding of default improper, and

thus the mother's appeal is not precluded … . We therefore reverse the order and remit the matter to Family Court for the assignment of new counsel and a new hearing … . Matter of Calvin L.W. (Dominique H.), 2021 NY Slip Op 04470, Fourth Dept 7-15-21

FORECLOSURE, RIGHT TO REDEEM.

ONCE PLAINTIFF ACCELERATED THE DEBT BY COMMENCING FORECLOSURE DEFENDANTS COULD EXERCISE THE RIGHT TO REDEEM THE MORTGAGE WITHOUT TRIGGERING A CONTRACTUAL PREPAYMENT PENALTY (FOURTH DEPT).

The Fourth Department determined Supreme Court properly ruled defendants could exercise their right of redemption in this foreclosure action without triggering the plaintiff's contractual right to withhold consent to prepayment:

… [D]efendants were not seeking to prepay the amount due under the note, rather plaintiff accelerated the remaining amount due by instituting a foreclosure action and sending the demand letter.

We … reject plaintiff's contention that he is entitled to the remaining amount due on the note, including all unaccrued interest payments. It is well settled that, once a foreclosure proceeding is commenced, "[a] mortgagor or other owner of the equity of redemption of a property subject to a judgment of foreclosure and sale may redeem the mortgage at any time prior to the foreclosure sale" … . "An unconditional tender of the full amount due is all that is required" to exercise the right of redemption … . Thus, defendants' tender of payment of the entire mortgage principal and the accrued interest was all that was required "in response to [plaintiff's] acceleration of the debt upon default [and, as noted,] did not constitute a 'prepayment' of the debt within the meaning of the prepayment clause set forth in the mortgage" … . Inasmuch as "the accelerated payment here is the result of plaintiff[-]mortgagee[] having elected to bring this foreclosure action, [he] may not exact a prepayment penalty" … . Virkler v V.S. Virkler & Son, Inc., 2021 NY Slip Op 04434, Fourth Dept 7-16-21

LEGAL MALPRACTICE, CONTINUOUS REPRESENTATION DOCTRINE, STATUTE OF LIMITATIONS.

PLAINTIFFS RAISED A QUESTION OF FACT WHETHER THE CONTINUOUS REPRESENTATION DOCTINE RENDERED THE LEGAL MALPRACTICE ACTION TIMELY; REFERENCE TO THE "ENFORCEMENT" OF THE LOAN DOCUMENTS INDICATED THE POSSIBILITY OF REPRESENTATION AFTER THE DATE OF THE LOAN TRANSACTION (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined plaintiffs raised a question of fact whether the continuous representation doctrine rendered the legal malpractice action timely:

The continuous representation doctrine tolls the limitations period "where there is a mutual understanding of the need for further representation on the specific subject matter underlying the malpractice claim" … , and " 'where the continuing representation pertains specifically to [that] matter' " … . Here, plaintiffs submitted communication between the Florida attorney and defendants in which the Florida attorney indicated that defendants' role as New York counsel included "enforcement" of the 2014 loan transaction documents. … [W]e conclude that questions of fact exist regarding the extent of defendants' representation of plaintiffs and, more specifically, whether "enforcement" of the loan documents contemplated a continued representation until the loan was paid in full and the transaction completed. Ray-Roseman v Lippes Mathias Wexler Friedman, LLP, 2021 NY Slip Op 04841,, Fourth Dept 8-26-21

MENTAL HYGIENE LAW, SEX OFFENDERS.

SUPREME COURT DID NOT WEIGH THE CONFLICTING EXPERT TESTIMONY ABOUT WHETHER PETITIONER SEX-OFFENDER SUFFERED FROM A MENTAL ABNORMALITY REQUIRING CONFINEMENT PURSUANT TO THE MENTAL HYGIENE LAW; MATTER SENT BACK FOR A NEW HEARING BEFORE A DIFFERENT JUDGE (FOURTH DEPT).

The Fourth Department, reversing Supreme Court in this sex-offender Mental-Hygiene-Law proceeding, determined the court did not base its decision to discharge and release the petitioner on the expert evidence presented at the hearing. The matter was sent back for a new hearing before a different judge:

The State's expert here diagnosed petitioner with ASPD [antisocial personality disorder] with narcissistic features and the condition of psychopathy, and the expert testified that those diagnoses, together with petitioner's enduring hostility towards women, collectively constitute a mental abnormality within the meaning of Mental Hygiene Law § 10.03 (i). She acknowledged that the scientific community has been debating for decades whether psychopathy is a distinct condition from ASPD, but she opined that they were indeed separate conditions. Petitioner's expert, on the other hand, diagnosed petitioner with ASPD but testified that petitioner had no other conditions in addition to that diagnosis that would render him a sex offender within the meaning of Mental Hygiene Law article 10. He further testified that psychopathy was simply an extreme variant of ASPD and should not be considered a condition separate from ASPD.

The court determined that a diagnosis of psychopathy or psychopathic features is still only a diagnosis of ASPD alone and thus, under Donald DD. (24 NY3d at 190), could not constitute an "other condition" to provide a basis for a finding of a mental abnormality. … [I] so holding, the court did not resolve the conflict between the experts regarding ASPD and psychopathy by weighing their testimony but rather made a determination that, generally speaking and without regard to petitioner's specific case, a finding of ASPD and psychopathy can never provide a basis for a finding of mental abnormality. Contrary to the court's apparent conclusion, "the

Court of Appeals in Donald DD. did not state that diagnosis of ASPD with psychopathy is insufficient to support a finding of mental abnormality" … . When supported by expert testimony, a diagnosis of ASPD and psychopathy is legally sufficient to provide a basis for a finding of mental abnormality Inasmuch as there was conflicting expert opinion on the matter, the court should have weighed the testimony of the experts in rendering its determination whether petitioner suffers from a mental abnormality … . Matter of Application for Discharge of Doy S. v State of New York. 2021 NY Slip Op 04456, Fourth Dept 7-16-21

MUNICIPAL LAW, NOTICE OF CLAIM, NUISANCE, TRESPASS, INVERSE TAKING.

NO NOTICE OF CLAIM WAS REQUIRED IN THIS NUISANCE, TRESPASS AND INVERSE TAKING ACTION AGAINST A VILLAGE BECAUSE MONEY DAMAGES WERE INCIDENTAL TO THE DEMAND FOR INJUNCTIVE RELIEF (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined a General Municipal Law notice of claim was not required in this action for nuisance, trespass, inverse taking and injunctive relief against a village. The village had installed drainage pipes in the roadway near plaintiff's property and then repaved the road. Plaintiff alleged water runoff from the roadway flooded his property caused the foundation to collapse. Because the action was essentially for money. No notice of claim was necessary because the money damages were deemed incidental to the demand for injunctive relief. The court noted that a trespass and a taking may be pled in the alternative:

"[I]t is well settled that a notice of claim is not required for an action brought in equity against a municipality where the demand for money damages is incidental and subordinate to the requested injunctive relief" … . Viewing the amended complaint in the light most favorable to plaintiff … , we conclude that the four remaining causes of action alleged continuing harm and primarily sought equitable relief … .

… "[T]he coincidental character of the money damages sought is 'truly ancillary to an injunction suit, i.e., there is a continuing wrong presenting a genuine case for the exercise of the equitable powers of the court' " … . …

Although "[a]n entry cannot be both a trespass and a taking" … , the issue here is the sufficiency of the pleading, and plaintiff sufficiently pleaded both causes of action, albeit in the alternative. Friscia v Village of Geneseo, 2021 NY Slip Op 04793, Fourth Dept 8-26-21

NEGLIGENCE, ALL-TERRAIN-VEHICLE ACCIDENT, PROPERTY OWNER'S IMMUNITY.

DEFENDANT OWNS A VINEYARD IN WHICH PLAINTIFF WAS INJURED IN AN ALL-TERRAIN-VEHICLE ACCIDENT; DEFENDANT WAS ENTITLED TO IMMUNITY PURSUANT TO GENERAL OBLIGATIONS LAW 9-103 BECAUSE THE VINEYARD WAS "SUITABLE FOR RECREATIONAL USE" (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined defendant's property (a vineyard) was suitable for recreational use and therefore defendant was entitled to immunity pursuant to General Obligations Law 9-103. Defendant was not liable for plaintiff's injuries from an all-terrain-vehicle (ATV) accident which occurred when the driver missed a bridge over a culvert:

… "[D]efendant, as the party seeking summary judgment, ha[d] the burden of establishing as a matter of law that he is immune from liability pursuant to the statute" … . We conclude that defendant met his initial burden on the motion of establishing that the site where the accident occurred was suitable for recreational use … . The evidence defendant submitted on the motion showed that the vineyard's dirt and grass-covered roads, as well as the bridge where the accident occurred, were physically conducive to ATV riding. Additionally, defendant established that the vineyard's roads and the bridge were appropriate for public use for recreational ATV riding based on the uncontradicted testimony of defendant Aaron P. Gibbons, an adjoining property owner, that, over a significant period of time, he and his wife had frequently driven ATVs on the vineyard's roads and the bridge and had often

observed others doing the same. Wheeler v Gibbons, 2021 NY Slip Op 04323, Fourth Dept 7-9-21

NEGLIGENCE, ATTACK ON INMATE.

THE STATE BREACHED ITS DUTY TO PROTECT AN INMATE FROM AN ATTACK BY OTHER INMATES; COURT OF CLAIMS REVERSED OVER A TWO-JUSTICE DISSENT (FOURTH DEPT).

The Fourth Department, reversing the Court of Claims and granting judgment in favor of the claimant, over a two-justice dissent, determined claimant, an inmate, demonstrated the state was negligent in failing to protect him from an attack by other inmates:

… [C]laimant—who had an unblemished disciplinary record—cooperated with an investigation by the Department of Corrections and Community Supervision (DOCCS) into an illegal sexual relationship between a female correction officer (Parkinson) and several male inmates. Among the inmates involved in the illegal relationship was a gang leader inside the prison. During the course of the investigation, a state official left documents evidencing claimant's cooperation where an inmate porter could see them, and the porter shared that information with other inmates, including the gang leader implicated in the investigation. The gang leader then collaborated with other inmates to instigate a brutal assault on claimant. Prior to the attack, one of the inmates informed Parkinson of the plan. * * *

… [T]he trial evidence proves decisively that defendant either knew or should have known that claimant was at serious risk of being attacked as a result of his cooperation. Specifically, defendant knew that claimant had just reported an illegal sexual relationship between Parkinson and an inmate gang leader, and defendant's failure to safeguard the investigatory file allowed that fact to spread through the inmate population. As defendant's own witnesses testified at trial, the risk to an inmate in claimant's position under these circumstances would have been obvious and well-known. Notwithstanding the reasonably foreseeable risk to claimant, defendant failed to take any steps to protect him. In short, given Parkinson's prior retaliation, the gang leader's influence, motive, and ability to instigate an attack, and

defendant's failure to safeguard the facility's investigatory file, we conclude that defendant's decision to simply leave claimant in his dormitory, surrounded by associates of the gang leader and guarded only by Parkinson, constituted a grave breach of its duty to use "reasonable care under the circumstances" to protect an inmate in its custody … . McDevitt v State of New York, 2021 NY Slip Op 04795, Fourth Dept 8-26-21

NEGLIGENCE, EDUCATION SCHOOL LAW, MUNICIPAL LAW.

PLAINTIFF'S CHILD ALLEGEDLY WAS INJURED DURING SCHOOL RECESS; PLAINTIFF'S FAILURE TO PRODUCE THE CHILD FOR THE GENERAL MUNICIPAL LAW 50-H HEARING REQUIRED DISMISSAL OF THE COMPLAINT (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the failure to produce the child (who allegedly was injured at school recess) for the General Municipal Law 50-h hearing required dismissal of the complaint:

"As General Municipal Law § 50-h (5) makes clear on its face, compliance with a municipality's demand for a section 50-h examination is a condition precedent to commencing an action against that municipality" … . "A claimant's failure to comply with such a demand generally warrants dismissal of the action"… . "Requiring claimants to comply with section 50-h before commencing an action augments the statute's purpose, which 'is to afford the [municipality] an opportunity to early investigate the circumstances surrounding the accident and to explore the merits of the claim, while information is readily available, with a view towards settlement' " … . " 'The failure to submit to . . . an examination [pursuant to section 50-h], however, may be excused in exceptional circumstances, such as extreme physical or psychological incapacity' " … .

Here, "[b]y refusing to produce for an examination under General Municipal Law § 50-h the minor child on whose behalf they are suing, plaintiffs failed to comply with a condition precedent to commencing the action . . . Nor did they demonstrate exceptional circumstances so as to excuse their noncompliance" … . Jeffrey T.C. v Grand Is. Cent. Sch. Dist., 2021 NY Slip Op 04427, Fourth Dept 7-16-21

NEGLIGENCE, EDUCATION-SCHOOL LAW.

IN THIS NEGLIGENT SUPERVISION ACTION AGAINST A SCHOOL DISTRICT, THE DISTRICT DEMONSTRATED A STUDENT'S SEXUAL ASSAULT OF PLANTIFF WAS NOT FORESEEABLE (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, over a dissent, determined the defendant school district demonstrated a student's sexual assault of plaintiff was not foreseeable:

… [D]efendant met its … burden on the motion by establishing that the "sexual assault against [plaintiff by the student] was an unforeseeable act that, without sufficiently specific knowledge or notice, could not have been reasonably anticipated" … , and plaintiff failed to raise a triable issue of fact … . Defendant's submissions, including plaintiff's testimony, established the undisputed fact that plaintiff and the student did not know each other and did not have any prior interactions before the sexual assault … . Although the student had an extensive and troubling disciplinary history that resulted in several detentions and suspensions, such history did not contain any infractions for physically aggressive conduct directed at other people, sexually inappropriate behavior, or threats of physical or sexual violence … .

… [W]hile the student's history involved attendance issues, insubordination toward school staff, inappropriate verbal outbursts, being under the influence of drugs or alcohol, possession and sale of drugs, and academic problems, that history did not raise a triable issue of fact whether defendant had sufficiently specific knowledge or notice of the injury-causing conduct inasmuch as it was not similar to the student's physically and sexually aggressive behavior that injured plaintiff … . "More significantly, [the student's] prior history did not include any sexually aggressive behavior" … . We also agree with defendant that the court impermissibly drew an unsubstantiated and speculative inference that the student's disclosure to a school social worker about being a victim of sexual abuse during his childhood, coupled with his substance abuse, should have provided defendant with notice of the

student's propensity to commit sexual assault … . Knaszak v Hamburg Cent. Sch. Dist., 2021 NY Slip Op 04441, Fourth Dept 7-16-21

NEGLIGENCE, MEDICAL MALPRACTICE.

PLAINTIFF'S EXPERT'S AFFIDAVIT WAS CONCLUSORY AND DID NOT RAISE A QUESTION OF FACT ABOUT WHETHER DEFENDANTS PROXIMATELY CAUSED PLAINTIFF'S PARALYSIS, THE DISSENT DISAGREED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, over an extensive dissent, determined plaintiff's expert failed to raise a question of fact in opposition to defendants' motion for summary judgment in this medical malpractice case:

… [P]laintiff alleged that if [defendants] Lougee and King had made an appropriate referral to an orthopedic specialist and monitored her condition after the referral was made, plaintiff would have received necessary surgery before she became paralyzed. … [Defendants] appeal from an order denying their motion for summary judgment dismissing the complaint against them. * * *

The affidavit of plaintiff's medical expert failed to raise a triable issue of fact in opposition inasmuch as the conclusory opinion of plaintiff's expert that defendants' "multiple deviations from the standard of care were a substantial contributing factor in causing [plaintiff's injuries]" is insufficient to raise an issue of fact concerning proximate cause … . It is undisputed that treatment of a condition arising out of an issue with plaintiff's spinal hardware is outside the scope of defendants' practice and that referral to an orthopedic specialist … was appropriate, and plaintiff's expert failed to identify what treatments or interventions were necessary, how defendants' monitoring of [the orthopedic specialist] would have necessarily resulted in those treatments or interventions being performed by the specialist, and whether the timing of any such interventions would have prevented plaintiff's injuries. Humbolt v Parmeter, 2021 NY Slip Op 04472, Fourth Dept 7-16-21

NEGLIGENCE, MEDICAL (PSYCHIATRIC) MALPRACTICE.

PLAINTIFF WAS BROUGHT TO THE HOSPITAL PURSUANT TO THE MENTAL HYGIENE LAW AFTER THREATENING FAMILY MEMBERS AND KILLING A DOG; DEFENDANTS RELEASED PLAINTIFF THE SAME DAY AND PLAINTIFF KILLED THE FAMILY MEMBERS; PLAINTIFF ENTERED A PLEA OF NOT RESPONSIBLE BY REASON OF MENTAL ILLNESS; THE RULE PROHIBITING A PLAINTIFF FROM TAKING ADVANTAGE OF HIS OWN WRONG DID NOT APPLY AND DEFENDANTS' MOTION TO DISMISS THIS MEDICAL MALPRACTICE WAS PROPERLY DENIED (FOURTH DEPT).

The Fourth Department determined plaintiff's medical (psychiatric) malpractice action properly survived a motion to dismiss. Plaintiff was treated by defendants after he was brought to the hospital by the police pursuant to Mental Hygiene Law 9.41. Plaintiff had threatened family members and killed a dog. Plaintiff was released the same day and shortly thereafter killed the three family members he had threatened. Ultimately plaintiff entered a plea of not responsible by reason of mental illness or defect. The courts refused to apply the rule prohibiting a plaintiff from taking advantage of his own wrong because plaintiff was not responsible for his conduct:

With respect to the ground for dismissal asserted here, "as a matter of public policy, . . . where a plaintiff has engaged in unlawful conduct, the courts will not entertain suit if the plaintiff's conduct constitutes a serious violation of the law and the injuries for which the plaintiff seeks recovery are the direct result of that violation" … . The rule derives from the maxim that "[n]o one shall be permitted to profit by his [or her] own fraud, or to take advantage of his [or her] own wrong, or to found any claim upon his [or her] own iniquity, or to acquire property by his [or her] own crime" … . In cases in which the doctrine applies, "recovery is precluded 'at the very threshold of the plaintiff's application for judicial relief' " … . Notably, the Court of Appeals has applied the doctrine with caution to avoid overextending it inasmuch as the rule "embodies a narrow application of public policy imperatives under limited circumstances" … . * * *

… [A]ccepting the facts as alleged in the complaint as true, we conclude that the criminal court's acceptance of plaintiff's plea of not responsible by reason of mental disease or defect demonstrates that, at the time of his conduct constituting a serious violation of the law, plaintiff lacked substantial capacity to know or appreciate either the nature and consequences of his conduct or that such conduct was wrong … . Thus, unlike cases applying the rule to preclude recovery, the record here establishes that plaintiff's illegal conduct was not knowing, willful, intentional, or otherwise sufficiently culpable to warrant application of the rule … . Bumbolo v Faxton St. Luke's Healthcare, 2021 NY Slip Op 04429, Fourth Dept 7-16-21

NEGLIGENCE, NURSING HOME, FALL FROM BED.

PLAINTIFF RAISED A QUESTION OF FACT WHETHER PLAINTIFF'S DECEDENT'S FALL FROM HER BED IN A NURSING HOME WAS CAUSED BY DEFENDANTS' NEGLIGENCE (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined plaintiff raised a question of fact about whether defendants' negligence was a proximate cause of plaintiff's decedent's fall from her bed in defendants' nursing home:

Plaintiff submitted an expert affidavit from a physician with extensive experience in the treatment of geriatric patients and who is familiar with the standards of care applicable for skilled nursing facilities, including those in New York as they existed during the relevant time period … .. The expert opined that, based on decedent's history of over 30 falls while at defendants' facility, decedent was a "high fall risk." Plaintiff's expert set forth the interventions that defendants failed to implement to reduce decedent's known and documented risk of falling. Moreover, he opined that, in this case, defendants failed to meet the relevant standard of care because they failed to use bed restraints, which were appropriate and would have prevented decedent's fall, and failed to use side rails, alarms and motion detectors, which also would have prevented decedent's fall. Thus, his affidavit raises a question of fact whether defendants were negligent by failing to implement available precautions to protect decedent from a foreseeable risk of falling … . Rosado v Rosa Coplon Jewish Home, 2021 NY Slip Op 04432, Fourth Dept 7-16-21

NEGLIGENCE, SLIP AND FALL, SPECIAL USE DOCTRINE.

THERE WAS A QUESTION OF FACT WHETHER A DEFENDANT WHICH DID NOT OWN THE AREA WHERE PLANTIFF SLIPPED AND FELL COULD BE LIABLE UNDER THE SPECIAL USE DOCTRINE (FOURTH DEPT).

The Fourth Department, reversing (modifying) Supreme Court, determined there was question of fact whether defendant Ayer made a "special use" of the area of the pavement defect where plaintiff fell:

Although the Ayer defendants met their initial burden on their motion by establishing that the defect in the pavement was located on a portion of the alley owned by the Benderson defendants, the Benderson defendants raised an issue of fact in opposition with respect to whether Ayer could nevertheless be found responsible for plaintiff's injury under application of the special use doctrine … . Specifically, the Benderson defendants' submissions established that the defect in the pavement was located close to the property line, that an entrance to Ayer's apartments was near the defect, and that fixtures attached to the building on Ayer's property encroached over the property line near the defect. Therefore, the Benderson defendants raised an issue of fact as to whether Ayer had the requisite "access to, and control of," the alley where plaintiff fell to give rise to a duty of care … . Jargiello v Ayer Dev., LLC, 2021 NY Slip Op 04828, Fourth Dept 8-26-21

TORTIOUS INTERFERENCE WITH CONTRACT, MALICE.

THE MAYOR'S STATEMENTS WERE TRUE AND DID NOT EVINCE MALICE; PLAINTIFF'S TORTIOUS INTERFERENCE WITH CONTRACT ACTION SHOULD HAVE BEEN DISMISSED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined plaintiff's tortious interference with contract cause of action should have been dismissed. Plaintiff, was

the head of a charter school, The mayor of Rochester (Warren) criticized the school for refusing to allow the school's first African American valedictorian to give a speech at graduation:

To establish a tortious interference cause of action, a plaintiff must establish "(1) that [the plaintiff] had a business relationship with a third party; (2) that the defendant knew of that relationship and intentionally interfered with it; (3) that the defendant acted solely out of malice or used improper or illegal means that amounted to a crime or independent tort; and (4) that the defendant's interference caused injury to the [plaintiff's] relationship with the third party" … . …

Plaintiff testified that he did not allow the student to speak at the graduation ceremony, and the record establishes that Warren's statements, i.e., that "[the student's] school did not allow him to give his valedictorian speech. For some reason, his school, in a country where freedom of speech is a constitutional right, in the city of Frederick Douglass[,] turned his moment of triumph into a time of sorrow, and pain," that the student would "never get that moment back," and that "[t]his is not a time to punish a child because you may not like what they say," were substantially true … . Moreover, in her statements, Warren did not mention plaintiff by name and referred only to the conduct of the "school," and the statements were made during Warren's introduction of the student in the context of providing him with an opportunity to present publicly the valedictory speech that the student was not permitted to give at his graduation ceremony. On that evidence, it cannot be said that defendants "acted solely out of malice" toward plaintiff … . Munno v City of Rochester, 2021 NY Slip Op 04830, Fourth Dept 8-26-21

TOXIC TORTS, STATUTE OF LIMITATIONS.

PLAINTIFFS' CAUSES OF ACTION ALLEGING EXPOSURE TO TOXIC FUMES ARE TIME-BARRED PURSUANT TO CPLR 214-C (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the causes of action alleging exposure to toxic fumes and hazardous substances were time-barred:

… [T]he … causes of action [alleging] the purported exposure to toxic fumes and hazardous substances (exposure claims) because they are untimely under the applicable three-year statute of limitations (see CPLR 214-c [2]). … [T]hat statute of limitations began to run from the date of discovery of plaintiff's injury. Discovery occurs "when the injured party discovers the primary condition on which the claim is based" and not "when the connection between . . . symptoms and the injured's exposure to a toxic substance is recognized" … . By submitting, inter alia, plaintiff's deposition testimony and a workers' compensation claim filed by him in 2011, defendants established that the exposure claims accrued in 2003 when he "made repeated visits to [his] treating providers for symptoms described in [his] bill of particulars as caused by the [chemical] exposure" … , and well over three years prior to the commencement of this action in 2014. To the extent that plaintiff relies on the one-year statute of limitations provided by CPLR 214-c (4), plaintiff cannot avail himself of that limitations period because, inter alia, plaintiff explicitly linked his exposure-related symptoms to exposure at Niagara Lubricant in his workers' compensation claim, i.e., over one year prior to the commencement of this action … . Cotter v Lasco, Inc., 2021 NY Slip Op 04293, Fourth Dept 7-9-21