NEW YORK APPELLATE DIGEST, LLC

Weekly Reversal Newsletter
July 18 – 22, 2022

An Organized Compilation of Summaries of Selected Decisions, Mostly Reversals, Released by Our New York State Appellate Courts and Posted on the New York Appellate Digest Website July 18 – 22, 2022, Distilled to Practice Points, One or Two Sentences Each. 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 Reversal Summaries.

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CIVIL PROCEDURE, HYBRID ACTION, PLEADING REQUIREMENTS, STANDING.

IN A HYBRID ACTION SEEKING AN ANNULMENT PURSUANT TO ARTICLE 78 AND A DECLARATORY JUDGMENT (AND DAMAGES), THE BURDENS TO DEMONSTRATE STANDING ARE DIFFERENT; IN AN ARTICLE 78 THE PETITIONER MUST AFFIRMATIVELY DEMONSTRATE STANDING; AND IN A DECLARTORY-JUDGMENT/DAMAGES ACTION, THE RESPONDENT (DEFENDANT) MUST DEMONSTRATE PETITIONER DOES NOT HAVE STANDING AS A MATTER OF LAW TO WARRANT SUMMARY JUDGMENT (SECOND DEPT).

Matter of Crown Castle NG E., LLC v City of Rye, 2022 NY Slip Op 04626, Second Dept 7-20-22

Practice Point: The burdens on the issue of standing are different in an Article 78 proceeding and a declaratory judgment/damages action. Here both were brought in a hybrid proceeding. The petitioner must demonstrate standing in the Article 78 proceeding. The respondent (defendant) must demonstrate petitioner does not have standing as a matter of law to warrant summary judgment in the declaratory judgment/damages action.

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CRIMINAL LAW, APPEALS, CONSTITUTIONAL LAW, RIGHT OF CONFRONTATION, HARMLESS ERROR.

ON REMAND FROM THE US SUPREME COURT, THE COURT OF APPEALS FOUND THAT THE VIOLATION OF DEFENDANT'S RIGHT OF CONFRONTATION WAS HARMLESS ERROR (CT APP).

People v Hemphill, 2022 NY Slip Op 04663, CtApp 7-21-22

Practice Point: It is worth remembering that even a constitutional error, here the violation of defendant's right to confront the witnesses against him, is subject to a harmless-error analysis.

CRIMINAL LAW, SECOND FELONY OFFENDER, EQUIVALENT FELONY.

THE FEDERAL POSSESSION-OF-A-FIREARM-BY-A-FELON STATUTE IS NOT THE EQUIVALENT OF A NEW YORK FELONY BECAUSE THE FEDERAL STATUTE DOES NOT REQUIRE A SHOWING THE WEAPON WAS OPERABLE; DEFENDANT'S SECOND FELONY OFFENDER ADJUDICATION VACATED (SECOND DEPT).

People v Bilfulco, 2022 NY Slip Op 04637, Second Dept 7-20-22

Practice Point: The federal possession-of-a-weapon statute (18 USC 922[g][1]) is not the equivalent of a New York felony because it does not require that the weapon be operable. Therefore that federal statute cannot be the basis for a second felony offender adjudication.

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CRIMINAL LAW, SENTENCING, DOMESTIC VIOLENCE SURVIVORS JUSTICE ACT.

DEFENDANT WAS ENTITLED TO THE VACATION OF THE SENTENCE FOR THE MURDER OF HIS FATHER'S GIRLFRIEND UNDER THE DOMESTIC VIOLENCE SURVIVORS JUSTICE ACT (SECOND DEPT).

People v Burns, 2022 NY Slip Op 04638, Second Dept 7-20-22

Practice Point: Here defendant was 19 when he killed his father and his father's girlfriend. Based on the facts, which were not discussed, the Second Department determined the sentences should be vacated and defendant should be resentenced pursuant to the Domestic Violence Survivors Justice Act.

CRIMINAL LAW, SENTENCING.

HERE DEFENDANT SET A FIRE TO CONCEAL EVIDENCE AND WAS CONVICTED OF ARSON AND TAMPERING WITH EVIDENCE; BECAUSE BOTH CHARGES AROSE FROM A SINGLE ACT, THE SENTENCES MUST RUN CONCURRENTLY (THIRD DEPT).

People v Franklin, 2022 NY Slip Op 04677, Third Dept 7-21-22

Practice Point: The defendant set a fire to conceal evidence and was charged with and convicted of arson and tampering with evidence. Because both convictions arose from a single act, the sentences must run concurrently.

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CRIMINAL LAW, ACCOMPLICE LIABILITY JURY INSTRUCTION.

THE PRINCIPAL WITNESS AGAINST DEFENDANT IN THIS FIRST DEGREE MURDER (MURDER-FOR-HIRE) TRIAL WAS AN ACCOMPLICE AS A MATTER OF LAW; IT WAS REVERSIBLE ERROR TO FAIL TO SO INSTRUCT THE JURY; ALTHOUGH THE ISSUE WAS NOT PRESERVED, IT WAS CONSIDERED IN THE INTEREST OF JUSTICE; THE DEFENDANT'S ALLEGED SILENCE IN RESPONSE TO AN ACCUSATION (ADOPTIVE ADMISSION) WAS INADMISSIBLE BECAUSE THE PEOPLE DID NOT PROVE DEFENDANT HEARD THE ACCUSATION (SECOND DEPT).

People v Noel, 2022 NY Slip Op 04647, Second Dept 7-20-22

Practice Point: The testimony of defendant's paramour, who was involved in the murder-for-hire, was the principal evidence against the defendant. The failure to instruct the jury that the paramour was an accomplice as a matter of law whose testimony must be corroborated was reversible error. Although the error was not preserved the Second Department considered it ion appeal in the interest of justice. The defendant's silence in the face of an accusation (an adoptive admission) should not have been admitted in evidence because the People did not prove the defendant heard the accusation.

EDUCATION-SCHOOL LAW, EMPLOYMENT LAW, ILLEGAL STRIKE.

ONE OF THE PERSONS INVOLVED IN A VIOLENT CONFRONTATION OUTSIDE A SCHOOL THREATENED TO RETURN THE NEXT DAY WITH A GUN; A TEACHER IMMEDIATELY HELD A MEETING WHERE CALLING IN SICK THE NEXT DAY WAS DISCUSSED; 23 TEACHERS CALLED IN SICK; THAT ACTION CONSTITUTED AN ILLEGAL STRIKE PURSUANT TO CIVIL SERVICE LAW 210 (THIRD DEPT).

Matter of Buffalo Teachers Fedn., Inc. v New York State Pub. Empl. Relations Bd., 2022 NY Slip Op 04680, Third Dept 7-21-22

Practice Point: 23 teachers called in sick after a person threatened to return to the school the next day with a gun and kill the teachers who showed up for work. That action was deemed an illegal strike in violation of the Civil Service Law section 210.

FAMILY LAW, MODIFICATION OF CALIFORNIA CUSTODY ORDER.

FATHER, WHO LIVES IN CALIFORNIA, SOUGHT MODIFICATION OF THE CALIFORNIA CUSTODY ORDER; MOTHER, WHO LIVES IN NEW YORK, SOUGHT MODIFICATION OF THE CALIFORNIA ORDER IN NEW YORK; FAMILY COURT CORRECTLY COMMUNICATED WITH THE CALIFORNIA COURT BUT DID NOT ALLOW THE PARTIES TO PRESENT FACTS AND LEGAL ARGUMENTS BEFORE DISMISSING THE NEW YORK PETITION; FAMILY COURT REVERSED (SECOND DEPT).

Matter of Touchet v Horstman, 2022 NY Slip Op 04633, Second Dept 7-20-22

Practice Point: When a New York resident seeks modification of an out-of-state custody order, Family Court must communicate with the out-of-state court about whether the New York petition should be dismissed. Where the parties did not participate in the communication, before ruling, Family Court must allow the

parties to present facts and legal arguments. Here the court's failure to allow the parties to present facts and legal arguments required reversal.

FORECLOSURE, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL), NOTICE REQUIREMENTS.

THE BANK IN THIS FORECLOSURE ACTION DID NOT DEMONSTRATE COMPLIANCE WITH RPAPL 1303 WHICH REQUIRES THE NOTICE OF FORECLOSURE TO USE SPECIFIC TYPE SIZES AND A PAPER-COLOR DIFFERENT FROM THE SUMMONS AND COMPLAINT; THE BANK'S SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

Bank of N.Y. Mellon v McCaffrey, 2022 NY Slip Op 04619, Second Dept 7-20-22

Practice Point: In a foreclosure action, the bank's strict compliance with the notice requirements in the Real Property Actions and Proceedings Law (RPAPL) is a condition precedent for the action. Here the bank did not demonstrate that the notice of foreclosure complied with RPAPL 1303 which requires certain type sizes and a paper-color different from that of the summons and complaint. The bank's motion for summary judgment should not have been granted.

FORECLOSURE, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL), NOTICE REQUIREMENTS.

THE BANK'S PROOF THAT THE RPAPL 1304 NOTICE OF FORECLOSURE WAS MAILED TO THE DEFENDANTS WAS INSUFFICIENT; THE BANK'S SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

Bank of N.Y. Mellon Corp. v Salvador, 2022 NY Slip Op 04618, Second Dept 7-20-22

Practice Point: These foreclosure summary-judgment reversals based on the bank's failure to submit sufficient proof of the mailing of the RPAPL 1304 notice of foreclosure to the defendants just keep coming, week after week, year after year.

INSURANCE LAW, MISREPRESENTION IN APPLICATION.

THE ALLEGED MISPRESENTATION IN PLAINTIFF'S APPLICATION FOR CAR INSURANCE, I.E., THAT SHE LIVED IN NEW ROCHELLE AND THE CAR WOULD BE GARAGED THERE WHEN IN FACT SHE LIVED IN BROOKLYN AND THE CAR WOULD BE GARAGED THERE, WAS NOT DEMONSTRATED TO HAVE BEEN "MATERIAL" AS A MATTER OF LAW; THE INSURER HAD DENIED COVERAGE BASED UPON THE ALLEGED MISREPRESENTATION; THE INSURER'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

Rodriguez v Mercury Cas. Co., 2022 NY Slip Op 04656, Second Dept 7-20-22

Practice Point: To warrant a denial of coverage based on a misrepresentation in an application for insurance, the misrepresentation must be "material." Here there was a question of fact on that question and the insurer's motion for summary judgment should have been denied. It was alleged plaintiff stated in her application she lived in New Rochelle and the car would be garaged there, when in fact she lived in

Brooklyn and the car was garaged there. The underlying incident was a hit-and-run accident.

MEDICAL MALPRACTICE, EXPERT AFFIDAVITS.

PLAINTIFF'S EXPERT'S AFFIDAVIT WAS NOT CONCLUSORY AND SPECULATIVE; DEFENDANT DOCTOR'S MOTION FOR SUMMARY JUDGMENT IN THIS MEDICAL MALPRACTICE CASE SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

Shirley v Falkovsky, 2022 NY Slip Op 04659, Second Dept 7-20-22

Practice Point: A conclusory or speculative expert affidavit will not raise a question of fact in a medical malpractice case. Here plaintiff's expert opined that defendant doctor should have considered cardiac disease in his differential diagnosis, based on plaintiff's symptoms, which included swelling of the lower extremities. Plaintiff died from his cardiac disease. Supreme Court should not have found plaintiff's expert's affidavit to have been speculative and conclusory and therefore should not have granted the doctor's motion for summary judgment.

NEGLIGENCE, EDUCATION-SCHOOL LAW, INJURED STUDENT.

INFANT PLAINTIFF WAS INJURED WHEN HE INADVERTENTLY SLAPPED A DISPLAY CASE IN THE HALL OF A SCHOOL AND THE GLASS SHATTERED; THERE WAS EVIDENCE A SIMILAR INCIDENT HAD OCCURRED IN THE PAST AND SOME OF THE PANELS IN THE DISPLAY CASE WERE MADE OF SHATTERPROOF PLEXIGLASS; PLAINTIFF'S PREMISES-LIABILITY CAUSE OF ACTION SHOULD NOT HAVE BEEN DISMISSED (SECOND DEPT).

R.B. v Sewanhaka Cent. High Sch. Dist., 2022 NY Slip Op 04616, Second Dept 7-20-22

Practice Point: Here a glass panel in a display case located in the hallway of a school shattered when plaintiff-student slapped it. There was evidence a similar incident occurred in the past, and some of the panels in the display case were made of shatterproof plexiglass. Therefore there was evidence the school had notice of the dangerous condition and there was a question whether the dangerous condition was open and obvious.

NEGLIGENCE, SLIP AND FALL.

ALTHOUGH THE STEP WAS MARKED AND THERE WAS A WARNING SIGN, THERE WAS EVIDENCE THE STEP AND THE SIGN COULD NOT BE SEEN WHEN THE AREA WAS CROWDED; DEFENDANTS' MOTION FOR SUMMARY JUDGMENT IN THIS STAIR-FALL CASE SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

Kernell v Five Dwarfs, Inc., 2022 NY Slip Op 04624, Second Dept 7-20-22

Practice Point: Here the step where plaintiff allegedly fell was marked and there was a warning sign. But there was evidence that when this area of defendants' nightclub was crowded neither the step nor the sign could be seen. Defendants' motion for summary judgment in this stair-fall case should not have been granted.

NEGLIGENCE, TRAFFIC ACCIDENTS, VEHICLE AND TRAFFIC LAW.

THERE WAS A QUESTION OF FACT WHETHER PLAINTIFF'S MOTORCYCLE WAS SO CLOSE AS TO CONSTITUTE AN IMMEDIATE HAZARD WHEN DEFENDANT ATTEMPTED TO MAKE A LEFT TURN ACROSS PLAINTIFF'S LANE OF TRAFFIC; PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

DePass v Beneduci, 2022 NY Slip Op 04622, Second Dept 7-20-22

Practice Point: Vehicle and Traffic Law 1141 prohibits making a left turn when oncoming traffic is "so close as to constitute an immediate hazard." Plaintiff motorcyclist collided with defendant's car as defendant attempted a left turn across plaintiff's lane of traffic. Supreme Court granted plaintiff's motion for summary judgment but the Second Department held there was a question of fact whether plaintiff was '"so close as to constitute an immediate hazard" when defendant initiated her turn.

NEGLIGENCE. SLIP AND FALL, CONSTRUCTIVE NOTICE.

THE BUILDING DEFENDANTS DEMONSTRATED THE AREA WHERE PLAINTIFF ALLEGED SHE SLIPPED AND FELL ON WATER ON THE FLOOR WAS INSPECTED AND FOUND TO BE DRY CLOSE IN TIME TO THE ALLEGED FALL; DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (SECOND DEPT).

Serebrenik v Chelsea Apts., LLC, 2022 NY Slip Op 04658, Second Dept 7-20-22

Practice Point: When a defendant brings a summary judgment motion in a slip and fall case, the motion papers must demonstrate the defendant did not create the alleged dangerous condition and did not have notice of the alleged dangerous condition. If defendant can show the area was inspected close in time to the fall

and the area was clean (or dry in this case), the defendant will have demonstrated a lack of constructive notice of the condition. Absent evidence to the contrary presented in opposition, summary judgment in favor of the defendant is warranted.

TOXIC TORTS, ASBESTOS EXPOSURE.

PLAINTIFF DID NOT PRESENT EXPERT OPINION TO SUPPORT THE ALLEGATION HE INHALED SUFFICIENT AMOUNTS OF ASBESTOS TO HAVE CAUSED HIS CANCER; DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (FIRST DEPT).

Killian v A.C. & S., Inc., 2022 NY Slip Op 04610, First Dept 7-19-22

Practice Point: Here defendant presented evidence of simulation studies to show that plaintiff's exposure to asbestos was not sufficient to have caused his cancer and plaintiff presented no expert evidence in opposition. Defendant's motion for summary judgment should have been granted.

TOXIC TORTS, ASBESTOS EXPOSURE.

PLAINTIFF'S EXPERT EVIDENCE WAS NOT SUFFICIENT TO DEMONSTRATE PLAINTIFF INHALED ENOUGHT ASBESTOS FIBERS TO CAUSE HIS CANCER; DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (FIRST DEPT).

Pomponi v A.O. Smith Water Prods. Co., 2022 NY Slip Op 04612, First Dept 7-19-22

Practice Point: The general evidentiary requirements for a plaintiff's prima facie case in an asbestos-exposure care are clearly explained. Plaintiff's expert evidence was not sufficient to raise a question of fact about whether the exposure caused his cancer.

TOXIC TORTS, ASBESTOS EXPOSURE.

THE PROOF AT TRIAL DID NOT DEMONSTRATE PLAINTIFF INHALED SUFFICIENT LEVELS OF ASBESTOS WHEN USING DEFENDANT'S TALCUM POWDER TO HAVE CAUSED HER MESOTHELIOMA; DEFENDANT'S MOTION TO SET ASIDE THE VERDICT AS A MATTER OF LAW SHOULD HAVE BEEN GRANTED (FIRST DEPT).

Matter of New York City Asbestos Litig., 2022 NY Slip Op 04611, First Dept 7-19-22

Practice Point: This is another decision in a group of four decisions released on the same day by the First Department finding plaintiff's expert evidence failed, as a matter of law, to demonstrate plaintiff had inhaled enough asbestos to have caused lung disease.

TOXIC TORTS, ASBESTOS EXPOSURE.

WHETHER PLAINTIFF INHALED ENOUGH ASBESTOS TO CAUSE HIS CANCER WAS THE SUBJECT OF COMPETING SIMULATION STUDIES; PLAINTIFF'S EXPERT EVIDENCE WAS NOT SUFFICIENT TO DEFEAT DEFENDANT'S MOTION FOR SUMMARY JUDGMENT (FIRST DEPT).

Dyer v Amchem Prods. Inc., 2022 NY Slip Op 04609, First Dept 7-19-22

Practice Point: This decision includes a useful discussion of the proof requirements in an asbestos-exposure case. The decision characterized the plaintiff's task of demonstrating sufficient exposure to cause cancer as "difficult, if not impossible."