NEW YORK APPELLATE DIGEST, LLC

Fourth Department Quarterly Reversal Report
October – December 2022

An Organized Compilation of Summaries of Selected Decisions, Mostly Reversals, Released by the Fourth Department and Posted on the New York Appellate Digest Website October – December 2022. The Entries in the Table of Contents Link to the Summaries Which Link to the Full 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 Report.

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The Fourth Department determined the plaintiff's motion to amend the complaint in this dog-bite case by adding a negligence cause of action was properly denied. The Court of Appeals recently held that a veterinarian could be liable for a dog-bite under a negligence theory where a dog in the veterinarian's waiting room bit a customer. Here the dog was owned by an animal society and had been placed with defendant O'Rourke until the society could find someone to adopt him:

Although O'Rourke does not own the dog that bit plaintiff, "[a]n owner's strict liability for damages arising from the vicious propensities and vicious acts of a dog 'extends to a person who harbors the animal although not its owner' " … . * * *

Even assuming, arguendo, … [plaintiff could assert] a negligence cause of action against O'Rourke, … plaintiff would still have to establish in support of her negligence cause of action that O'Rourke had knowledge of the dog's alleged "vicious propensities" … . … "[T]he vicious propensity notice rule has been applied to animal owners who are held to a strict liability standard, as well as to certain non-pet owners—such as landlords who rent to pet owners—under a negligence standard … .

… [P]laintiff's proposed negligence cause of action against O'Rourke does not allege that O'Rourke had knowledge of the dog's vicious propensities; instead, it alleges that O'Rourke was negligent because she did not "investigate the subject dog accepted from the foster care program . . . before introducing it to her property, thereby creating a dangerous condition on the property which she had a nondelegable duty to keep reasonably safe." The proposed complaint therefore fails to state a viable negligence cause of action against O'Rourke. Cicero v O'Rourke, 2022 NY Slip Op 07316, Fourth Dept 12-23-22

Practice Point: The Court of Appeals recently held a veterinarian could be liable under a standard negligence theory for a dog-bite which occurs in the veterinarian's waiting room because of the specialized knowledge of animal behavior attributed to a veterinarian. The negligence standard does not apply to a person who is harboring a dog for an animal society until someone adopts the dog. In that case, the strict liability (requiring knowledge of the dog's vicious propensities) standard still applies.

DECEMBER 23, 2022

ANIMAL LAW, DOG-BITE.

THERE WERE QUESTIONS OF FACT WHETHER DEFENDANTS IN THIS DOG-BITE CASE, INCLUDING THE LANDLORD, WERE AWARE OF THE DOG'S VICIOUS PROPENSITIES; THE PRE-DISCOVERY SUMMARY JUDGMENT MOTION WAS PREMATURE; THE ACTION WAS NOT FRIVOLOUS; THE DEFENDANTS WERE NOT ENTITLED TO ATTORNEY'S FEES (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined defendants in this dog-bite case were not entitled to summary judgment, the action was not frivolous, and defendants were not entitled to attorney's fees. In addition, the summary judgment motion, made before discovery, was deemed premature. The court found there were questions of fact whether defendants, including the landlord (held to an ordinary negligence standard) were aware of the dog's vicious propensities. The relationships among the parties and the unsuccessful arguments made by defendants in support of summary judgment are too detailed to fairly summarize here:

… "[A]n owner of a dog may be liable for injuries caused by that animal only when the owner had or should have had knowledge of the animal's vicious propensities" … . "Once such knowledge is established, an owner faces strict liability for the harm the animal causes as a result of those propensities" … . "Strict liability can also be imposed against a person other than the owner of an

animal which causes injury if that person harbors or keeps the animal with knowledge of its vicious propensit[ies]" … .

… "[A] landlord who, with knowledge that a prospective tenant has a vicious dog which will be kept on the premises, nonetheless leases the premises to such tenant without taking reasonable measures, by pertinent provisions in the lease or otherwise, to protect persons who might be on the premises from being attacked by the dog may be held liable [under a negligence standard] to a person who while thereafter on the premises is bitten by the dog" … . When, "during the term of the leasehold[,] a landlord becomes aware of the fact that [the] tenant is harboring an animal with vicious propensities, [the landlord] owes a duty to protect third persons from injury . . . if [the landlord] 'had control of the premises or other capability to remove or confine the animal' " … . Michael P. v Dombroski, 2022 NY Slip Op 07318, Fourth Dept 12-23-22

Practice Point: A landlord who is aware of a dog's vicious propensities can be held liable in a dog-bite case under a standard negligence theory.

DECEMBER 23, 2022

ATTORNEYS, SUIT AGAINST FORMER CLIENT FOR FEES.

PLAINTIFF LAW FIRM SHOULD HAVE BEEN ALLOWED TO REPRESENT ITSELF IN ITS SUIT FOR ATTORNEY'S FEES AGAINST A FORMER CLIENT; ALTHOUGH THE ATTORNEYS DIRECTLY INVOLVED WITH THE FORMER CLIENT WERE DISQUALIFIED, DEFENDANT DID NOT DEMONSTRATE THE TESTIMONY OF THE DISQUALIFIED ATTORNEYS WOULD PREJUDICE PLAINTIFF LAW FIRM SUCH THAT DISQUALICATION OF THE ENTIRE FIRM WAS WARRANTED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined that plaintiff law firm, HoganWillig, could represent itself in a suit seeking payment from defendant volunteer fire company (SFC), a former client. The attorneys who were directly involved in representing the fire company were disqualified from this suit. The

defendant argued the testimony of the disqualified attorneys would be prejudicial to HoganWillig, a violation of Rules of Professional Conduct rule 3.7[b][1]:

… [W]e agree with HoganWillig that SFC failed to establish that "it is apparent that the testimony [of the disqualified attorneys] may be prejudicial to [HoganWillig]" (Rules of Professional Conduct [22 NYCRR 1200.0] rule 3.7 [b] [1] …). "The word 'apparent' means that prejudice to the client must be visible, as opposed to merely speculative, conceivable, or imaginable," i.e., the prejudice "has to be a real possibility, not just a theoretical possibility" … . Consistent therewith, a movant's "vague and conclusory" assertions are insufficient to establish that an attorney's testimony may be prejudicial to the client … . * * *

Here, the court erred in failing to "consider such factors as [HoganWillig's] valued right to choose its own counsel, and the fairness and effect in the particular factual setting of granting disqualification" … . "Disqualification denies a party's right to representation by the attorney of its choice," and we conclude under the circumstances of this case that depriving HoganWillig of its right to represent itself in the present action is particularly unwarranted given that counsel and client are one and the same … . As the court properly determined when it first considered the original motion, whether HoganWillig thinks it is desirable, despite the disqualification of three of its attorneys, to continue representing itself is a strategic decision that should be left to HoganWillig. Hoganwillig, PLLC v Swormville Fire Co., Inc., 2022 NY Slip Op 06331, Fourth Dept 11-10-22

Practice Point: Here the plaintiff law firm should have been allowed to represent itself in a suit to recover attorney's fees from a former client. The fact that the attorneys directly involved in the former client's case were disqualified did not require disqualification of the law firm itself. It was the defendant's burden to demonstrate the testimony of the disqualified attorneys would prejudice the law firm (that was the basis for Supreme Court's disqualification of the entire firm). The defendant was not able show such prejudice.

NOVEMBER 10, 2022

ATTORNEYS, ATTORNEY-CLIENT PRIVILEGE, INSURANCE LAW.

THE INFORMATION SOUGHT BY DEFENDANT IN THIS SUIT BY THE INSURER TO DISCLAIM COVERAGE WAS PROTECTED BY ATTORNEY-CLIENT PRIVILEGE AS MATERIAL PREPARED IN ANTICIPATION OF LITIGATION (FOURTH DEPT).

The Fourth Department, reversing (modifying) Supreme Court, determined that the information sought by defendant (Charleus) in this insurance coverage dispute was privileged as material prepared in anticipation of litigation. Plaintiff insurance company brought this suit against the defendant, who was injured in a car accident involving its insured, to disclaim coverage because of the insured's lack of cooperation:

"[A]n insurance company's claim file is conditionally exempt from disclosure as material prepared in anticipation of litigation" (… see CPLR 3101 [d] [2]). Nevertheless, material prepared in anticipation of litigation may be subject to disclosure upon "a party's showing that he or she is in substantial need of the material and is unable to obtain the substantial equivalent of the material by other means without undue hardship" … . Here, we conclude that the materials sought by Charleus and ordered by the court to be disclosed following its in camera review constitute material prepared in anticipation of litigation … and were prepared at a time after plaintiff had already determined to reject and defend against the claim made by Charleus … .

Because the materials sought by Charleus and ordered to be disclosed by the court's order were prepared in anticipation of litigation and because Charleus has not made a showing justifying disclosure … , we modify the order by denying the motion in its entirety and granting the cross motion. Merchants Preferred Ins. Co. v Campbell, 2022 NY Slip Op 06370, Fourth Dept 11-10-22

Practice Point: In this suit by an insurer to disclaim coverage of defendant's injuries stemming from an accident with the insured, the information sought by defendant was prepared in anticipation of litigation and was therefore protected by attorney-client privilege.

NOVEMBER 10, 2022

CIVIL PROCEDURE, AMEND COMPLAINT.

THE JUDGE SHOULD NOT HAVE LOOKED BEYOND THE PLEADINGS IN CONSIDERING THE MOTION TO AMEND THE COMPLAINT; THE MOTION SHOULD HAVE BEEN GRANTED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the court abused its discretion by denying the motion to amend the complaint:

"Leave to amend a pleading should be freely granted in the absence of prejudice to the nonmoving party where the amendment is not patently lacking in merit" (… see CPLR 3025 [b]). "A court should not examine the merits or legal sufficiency of the proposed amendment unless the proposed pleading is clearly and patently insufficient on its face" … . Here, we conclude that the court erred in denying the motion inasmuch as there was no showing of prejudice arising from the proposed amendments … and the proposed amended complaint adequately asserts causes of action for slander of title … and removal of a cloud on title by reformation or cancellation of a deed … . In making its determination that the proposed causes of action were palpably insufficient, the court improperly looked beyond the face of the proposed pleading to the documents establishing the chain of title to plaintiffs' properties and a 2011 deed from the Trustees of Grenell Island Chapel to defendant. DiGiacco v Grenell Is. Chapel, 2022 NY Slip Op 06576, Fourth Dept 11-18-22

Practice Point: Here Supreme Court abused its discretion in denying the motion to amend the complaint. The judge should not have looked beyond the pleading in deciding the motion to amend.

NOVEMBER 18, 2022

CIVIL PROCEDURE, CHOICE OF LAW.

THE NOTE REQUIRED THE APPLICATION OF FLORIDA SUBSTANTIVE AND PROCEDURAL LAW TO THE "TERMS OF THE DOCUMENTS" BUT SPECIFICALLY CONTEMPLATED A SUIT IN EITHER NEW YORK OR FLORIDA; THEREFORE SUPREME COURT SHOULD NOT HAVE INTERPRETED THE CHOICE OF LAW PROVISIONS TO RULE OUT A NEW YORK LAWSUIT (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined that the terms of the note which required the application of Florida law did not preclude bringing the action in New York. The language in the note indicated the parties intended suit to be brought either in New York or Florida:

[Supreme Court] stated in its decision that, "having elected to have the 'procedur[al] laws of the State of Florida' apply exclusively in this action, the [p]laintiff could not rely on any of the provisions of New York's Civil Practice Law and Rules in prosecuting this action." The court relied on CPLR 101, which the court quoted in its decision as providing, in pertinent part, that " '[t]he civil practice law and rules shall govern the procedure in civil judicial proceedings in all courts of the state and before all judges, except where the procedure is regulated by inconsistent statute' " … . The court … concluded that, due to the perceived conflict between the contractual choice-of-law provisions and CPLR 101, it could not grant the [plaintiff's summary judgment] motion. * * *

"Contractual '[c]hoice of law provisions typically apply to only substantive issues' " … , although parties can agree otherwise. Here, the note provides that "[t]he terms" of the documents are to be governed by the substantive and procedural rules of Florida, but that does not establish that the rules of Florida were intended to govern the procedures of the New York State court system, which would effectively preclude any action on the note in New York. Indeed, the note itself provides that venue for any action related to the note may be in either "Onondaga County, New York or Broward County, Florida." Thus, the parties anticipated that New York courts could and would be able to handle a judicial action related to the note … . Bankers Healthcare Group, LLC v Pasumbal, 2022 NY Slip Op 06334, Fourth Dept 11-10-22

Practice Point: The choice of law provisions in the note required the application of Florida substantive and procedural law to the "terms of the documents" and also stated suit could be brought in either New York or Florida. Supreme Court should not have interpreted the choice of law provisions to rule out a New York lawsuit.

NOVEMBER 10, 2022

CIVIL PROCEDURE, MEDICAL RECORDS, PRIVILEGE.

DEFENDANT IN THIS PERSONAL INJURY CASE DID NOT WAIVE THE PHYSICIAN-PATIENT PRIVILEGE BY SUBMITTING MENTAL HEALTH RECORDS TO THE SENTENCING COURT IN THE RELATED CRIMINAL CASE; THE RECORDS WERE SUBMITTED AS PART OF A MITIGATION REPORT WHICH IS DEEMED "CONFIDENTIAL" PURSUANT TO THE CRIMINAL PROCEDURE LAW; TWO-JUSTICE DISSENT (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, over a two-justice dissent, determined defendant in this pedestrian-vehicle-accident case was not required to disclose privileged medical (mental health) information which was provided to the sentencing court in the related criminal case as a "mitigation report:"

"CPLR 3121 (a) authorizes discovery of a party's mental or physical condition when that party's condition has been placed in controversy" … . Nevertheless, even where a defendant's mental or physical condition is in controversy, discovery will be precluded if the information falls within the physician-patient privilege and the defendant has not waived that privilege … . Where the physician-patient privilege has not been waived, the party asserting the privilege may "avoid revealing the substance of confidential communications made to [his or] her physician, but may not refuse to testify as to relevant medical incidents or facts concerning [himself or] herself" … .

We agree with defendant that he did not waive the physician-patient privilege by disclosing his mental health information in the sentencing phase of the related criminal proceeding. Here, defendant submitted the mitigation report in the criminal proceeding for the court's consideration in the determination of an

appropriate sentence. Thus, this is not a case where a criminal defendant waived any privilege applicable to that defendant's mental health records by raising a justification or other affirmative defense to be litigated in the criminal proceeding … . Instead, the mitigation report was prepared for and "submitted directly to the court[] in connection with the question of sentence" and, as a result, the mitigation report is "confidential and may not be made available to any person or public or private agency except where specifically required or permitted by statute or upon specific authorization of the court" (CPL 390.50 [1] …). Johnson v Amadorzabala,, 2022 NY Slip Op 07355, Fourth Dept 12-23-22

Practice Point: The defendant in this personal injury case did not waive the physician-patient privilege by submitting mental health records to the sentencing court in the related criminal case. Under the Criminal Procedure Law, the mitigation report was for the judge's eyes only and was confidential.

DECEMBER 23, 2022

CIVIL PROCEDURE, STATEMENT OF MATERIAL FACTS.

THE MOTION COURT ABUSED ITS DISCRETION BY DEEMING PLAINTIFF'S STATEMENT OF MATERIAL FACTS ADMITTED BECAUSE DEFENDANTS DID NOT SUBMIT A COUNTER STATEMENT OF UNDISPUTED FACTS (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined that defendants' failure to submit a counter statement of undisputed facts (22 NYCRR 202.8-g[b]) should not have been deemed an admission to plaintiff's statement of material facts. Therefore plaintiff's motion for summary judgment on the breach of contract cause of action should not have been granted:

Although the court had discretion under section 202.8-g (former [c]) to deem the assertions in plaintiff's statement of material facts admitted, it was not required to do so … . "[B]lind adherence to the procedure set forth in 22 NYCRR 202.8-g" was not mandated … .

Here, considering that plaintiff's statement of material facts did not fully comply with 22 NYCRR 202.8-g (d) and ignored the pivotal factual dispute arising from discovery, we conclude that, although it would have been better practice for defendants to "submit a paragraph-by-paragraph response to plaintiff's statement" … , "the court abused its discretion in deeming the entire statement admitted" … . On the Water Prods., LLC v Glynos, 2022 NY Slip Op 07320, Fourth Dept 12-23-22

Practice Point: Here plaintiff submitted a statement of material facts but defendants did not submit a counter statement of undisputed facts. The motion court was not required to deem the statement of material facts admitted and should not have done so under the specific circumstances of this case. Plaintiff's motion for summary judgment in this breach of contract action should not have been granted.

DECEMBER 23, 2022

CRIMINAL LAW, APPEALS.

THE SUPPRESSION COURT DID NOT RULE ON DEFENDANT'S ARGUMENT THE INITIAL PURSUIT BY THE POLICE WAS NOT JUSTIFIED; AN APPELLATE COURT CANNOT CONSIDER AN ISSUE NOT RULED UPON; MATTER REMITTED (FOURTH DEPT).

The Fourth Department, remitting the matter for a ruling, determined the appellate court could not consider the suppression argument which was not ruled upon by the motion court. Defendant argued the police did not have reasonable suspicion such that the initial pursuit of the suspect was justified:

At the suppression hearing, the People presented evidence that on the night in question, a police officer was flagged down by an unnamed citizen, who stated that shots had been fired in that area. During that conversation, the officer himself heard a gunshot. He went immediately to the location and observed several people hiding or running into a nearby store. One man took flight, grabbing his waistband with both hands. According to the officer, such a gesture was indicative of a person "holding a very heavy object or a handgun." That individual was the only person

not attempting to hide or seek cover. At that point, the officer began his pursuit, but lost sight of the individual. The officer broadcast a description of the suspect, including specifics of his clothing, over the radio, at which point other officers in the area observed a man fitting that description and pursued him, eventually arresting him at a residence and bringing him to the location of the shooting, where he was identified by two eyewitnesses as the person who had fired the shots. Surveillance video from the store and body camera footage from the officers involved confirms the sequence of events. Following the hearing, the court ruled, inter alia, that there was "more than adequate probable cause." However, the court did not explain when probable cause existed or rule on whether the officer who initially observed the suspect had reasonable suspicion to pursue him. People v Anderson, 2022 NY Slip Op 06575, Fourth Dept 11-18-22

Practice Point: If an issue was raised in a suppression motion but was not ruled upon by the suppression court, the appellate court cannot consider the issue. Here the Fourth Department remitted the case for a ruling.

NOVEMBER 18, 2022

CRIMINAL LAW, CONTEMPT.

PHONE CALLS TO THE PROTECTED PERSON SUPPORTED CRIMINAL CONTEMPT SECOND DEGREE BUT NOT CRIMINAL CONTEMPT FIRST DEGREE (FOURTH DEPT).

The Fourth Department determined phone calls, as opposed to "contact with the protected person," did not support the contempt first degree convictions. However the phone calls did support contempt second degree:

The … five counts of criminal contempt in the first degree … are based on evidence establishing that an order of protection had been issued against defendant for the benefit of a person and that on five occasions defendant made telephone calls from the Monroe County Jail to that person. … … With respect to those counts, the People were required to establish that defendant committed the crime of criminal contempt in the second degree … , and that he did so "by violating that

part of a duly served order of protection . . . which requires the . . . defendant to stay away from the person or persons on whose behalf the order was issued" … . Here, defendant was in jail when the calls at issue were made and the People failed to "prove[], beyond a reasonable doubt, that defendant had any contact with the protected person during the charged incident[s]" … . People v Caldwell, 2022 NY Slip Op 07325, Fourth Dept 12-23-22

Practice Point: Here criminal contempt first degree required proof defendant failed to "stay away" from the protected person. That portion of the order was not violated by defendant's phone calls to the protected person (which supported convictions for criminal contempt second degree).

DECEMBER 23, 2022

CRIMINAL LAW, FOREIGN CONVICTION, PREDICATE FELONY.

THIS WAS NOT A CIRCUMSTANCE WHERE THE ACCUSATORY INSTRUMENTS, AS OPPOSED TO THE LANGUAGE OF THE FLORIDA STATUTE ALONE, CAN BE USED TO DETERMINE WHETHER THE FLORIDA CONVICTION ALLOWED DEFENDANT TO BE SENTENCED AS A SECOND CHILD SEXUAL ASSAULT FELONY OFFENDER; THE FLORIDA STATUTE SHOULD NOT HAVE BEEN DEEMED A PREDICATE FELONY (FOURTH DEPT).

The Fourth Department, reversing County Court, determined defendant's Florida conviction could not serve as a predicate felony allowing defendant to be sentenced as a second child sexual assault felony offender. This was not a circumstance where the underlying accusatory instruments, as opposed to the language of the Florida statute, can be the basis of a predicate-felony analysis. The appellate division's analysis is comprehensive and too detailed to fairly summarize here:

We agree with defendant that consideration of the facts and circumstances of the underlying Florida conviction is impermissible in this case … . "[U]nder a narrow exception to the [general] rule, the underlying allegations must be considered when

'the foreign statute under which the defendant was convicted renders criminal several different acts, some of which would constitute felonies and others of which would constitute only misdemeanors [or no crime] if committed in New York' " … . "In those circumstances, the allegations will be considered in an effort to 'isolate and identify' the crime of which the defendant was accused, by establishing 'which of those discrete, mutually exclusive acts formed the basis of the charged crime' " … . * * *

… [W]e conclude that "[b]ecause the [Florida] statute, itself, indicates that a person can be convicted of the [Florida] crime without committing an act that would qualify as a felony in New York (i.e., by [instead committing the misdemeanor of sexual misconduct]), defendant's [Florida] conviction for [lewd or lascivious battery] was not a proper basis for a predicate felony offender adjudication" … . People v Gozdziak, 2022 NY Slip Op 07377, Fourth Dept 12-23-22

Practice Point: Here the Florida statute, and not the accusatory instruments in the Florida prosecution, is the only proper basis for the predicate-felony analysis. The Florida statute should not have served as a predicate felony to allow defendant to be sentenced as a second child sexual assault felony offender.

DECEMBER 23, 2022

CRIMINAL LAW, LESSER INCLUSORY COUNTS.

UNAUTHORIZED USE OF A VEHICLE THIRD DEGRESS IS A LESSER INCLUSORY COUNT OF GRAND LARCENY FOURTH DEGREE (FOURTH DEPT).

The Fourth Department determined the unauthorized use of a vehicle third degree count should nave been dismissed as a lesser inclusory count of grand larceny fourth degree:

… [T]he part of the judgment convicting defendant of unauthorized use of a vehicle in the third degree must be reversed and count two of the indictment dismissed because that offense is a lesser inclusory concurrent count of count one,

grand larceny in the fourth degree … . People v Mitchell, 2022 NY Slip Op 06359, Fourth Dept 11-10-22

Practice Point: Unauthorized use of a vehicle third degree is a lesser inclusory count of grand larceny fourth degree.

NOVEMBER 10, 2022

CRIMINAL LAW, MOTION TO SET ASIDE VERDICT.

A MOTION TO SET ASIDE A VERDICT PURSUANT TO CPL 330.30 (1) MUST BE BASED UPON MATTERS IN THE RECORD WHICH HAVE BEEN PRESERVED FOR APPEAL; A MOTION TO SET ASIDE A VERDICT PURSUANT TO CPL 330.30 (2) CAN BE BASED UPON JUROR MISCONDUCT OF WHICH THE DEFENDANT WAS NOT AWARE PRIOR TO THE VERDICT; BUT HERE THE DEFENSE WAS AWARE OF THE ALLEGED MISCONDUCT PRIOR TO THE VERDICT AND DID NOT OBJECT (FOURTH DEPT).

The Fourth Department explained that a motion to set aside a verdict pursuant to CPL 330.30 (1) or (2) cannot be based upon an issue the defense could have addressed (but did not) prior to the verdict. Although CPL 330.30 (2) allows a motion to set aside the verdict based upon juror conduct of which the defendant was not aware prior to the verdict, here the defense was aware of the alleged juror conduct:

" 'A trial court's authority to set aside a verdict under CPL 330.30 (1) is limited to grounds which, if raised on appeal, would require reversal as a matter of law . . . Accordingly, only a claim of error that is properly preserved for appellate review may serve as the basis to set aside the verdict' " … . Here, despite being afforded an opportunity to object or seek further relief when the court brought the issue to the parties' attention during deliberations, defendant did not do so and thus failed to preserve his claim … .. The court therefore properly denied without a hearing the motion insofar as it was based on CPL 330.30 (1) because defendant's

unpreserved argument "did not furnish a proper predicate for setting aside the verdict" … .

A trial court is also authorized to set aside a verdict on the ground that "during the trial there occurred, out of the presence of the court, improper conduct by a juror, or improper conduct by another person in relation to a juror, which may have affected a substantial right of the defendant and which was not known to the defendant prior to the rendition of the verdict" (CPL 330.30 [2] …). Here, the record establishes that the alleged juror misconduct "was addressed by the court and counsel on the record at the time of trial" and that defendant thus "had knowledge of the matter prior to the verdict" … . We therefore conclude that the court properly denied without a hearing the motion insofar as it was based on CPL 330.30 (2) because "the juror misconduct alleged was known to . . . defendant and . . . defendant had the opportunity to act on the information but failed to do so prior to the verdict" … .People v Kenney, 2022 NY Slip Op 05645, Fourth Dept 10-7-22

Practice Point: A motion to set aside the verdict pursuant to CPL 330.30 (1) must be based upon preserved errors which could be raised on appeal. A motion to set aside the verdict pursuant to CPL 330.30 (2) may be based upon juror misconduct of which the defendant was not aware prior to the verdict. Here, however, the defense was aware of the conduct and did not object.

OCTOBER 7, 2022

CRIMINAL LAW, MOTION TO SET ASIDE VERDICT.

A MOTION TO SET ASIDE A JURY VERDICT PURSUANT TO CPL 330.30 (1) MUST BE BASED UPON MATTERS IN THE RECORD; I.E., ISSUES THAT CAN BE RAISED ON APPEAL; HERE THE MOTION WAS BASED ON MATTERS OUTSIDE THE RECORD AND SHOULD HAVE BEEN DENIED ON THAT GROUND (FOURTH DEPT).

The Fourth Department, reversing County Court's granting of defendant's CPL 330.30 (1) motion to set aside the jury verdict, determined the motion was

improperly based upon matters outside the record. A CPL 330.30 (1) motion must be based upon issues which can be raised on appeal:

Pursuant to CPL 330.30 (1), following the issuance of a verdict and before sentencing a court may set aside a verdict on "[a]ny ground appearing in the record which, if raised upon an appeal from a prospective judgment of conviction, would require a reversal or modification of the judgment as a matter of law by an appellate court." Defendant's motion to set aside the verdict pursuant to CPL 330.30 (1) was procedurally improper because it was "premised on matters outside the existing trial record, and CPL 330.30 (1) did not permit defendant[] to expand the record to include matters that did not 'appear[ ] in the record' prior to the filing of the motion[]" … . We therefore reverse the order, deny the motion, and reinstate the verdict inasmuch as defendant's claim was not reviewable pursuant to CPL 330.30 (1) … . People v Allen, 2022 NY Slip Op 05647, Fourth Dept 10-7-22

Practice Point: A motion to set aside a jury verdict pursuant to CPL 330.30 (1) must be based upon matters which are in the record; i.e., issues which can be raised on appeal. Here the motion was based on matters outside the record and should have been denied on that ground.

OCTOBER 7, 2022

CRIMINAL LAW, SPEEDY TRIAL.

UPON REMITTITUR FROM THE COURT OF APPEALS, THE APPELLATE DIVISION AGAIN FOUND THE SEVEN-YEAR PREINDICTMENT DELAY DID NOT DEPRIVE DEFENDANT OF DUE PROCESS OF LAW (FOURTH DEPT).

The Fourth Department, upon remittal from the Court of Appeals, determined defendant was not deprived of his right to due process by the seven-year preindictment delay. The Fourth Department had reached that same conclusion before the matter was heard by the Court of Appeals. The Court of Appeals sent the matter back because it found the Fourth Department did not correctly analyze the case under the Taranovich (37 NY2d 442, 445 [1975]) factors:

After review of defendant's contention upon remittitur, we conclude that he was not deprived of due process of law by the preindictment delay. In determining whether defendant was deprived of due process, we must consider the factors set forth in Taranovich, which are: "(1) the extent of the delay; (2) the reason for the delay; (3) the nature of the underlying charge; (4) whether or not there has been an extended period of pretrial incarceration; and (5) whether or not there is any indication that the defense has been impaired by reason of the delay" … . "[N]o one factor [is] dispositive of a violation, and [there are] no formalistic precepts by which a deprivation of the right can be assessed" … , but "it is well established that the extent of the delay, standing alone, is not sufficient to warrant a reversal" … . People v Johnson, 2022 NY Slip Op 07407, Fourth Dept 12-23-22

Practice Point: The seven-year preindictment delay, applying the Taranovich factors, did not deprive defendant of due process of law.

DECEMBER 23, 2022

CRIMINAL LAW, STATEMENT OF READINESS.

THE PEOPLE ARE NOT REQUIRED TO HAVE THEIR WITNESSES READY FOR TRIAL IN ORDER FOR A STATEMENT OF READINESS TO BE VALID; THE MOTION TO DISMISS THE INDICTMENT ON SPEEDY-TRIAL GROUNDS SHOULD NOT HAVE BEEN GRANTED; THE STATEMENTS OF READINESS WERE NOT ILLUSORY; THERE WAS A DISSENT (FOURTH DEPT).

The Fourth Department, reversing County Court's speedy-trial dismissal of the indictment, over a dissent, determined County Court should not have deemed several of the prosecutor's statements of readiness illusory because the witnesses were not ready for trial at the time the statements were made:

Prior to August 4, 2021, no adjournment was caused by the People's failure to have their witnesses ready for trial. Rather, the matter was adjourned on those occasions due to other, older matters proceeding to trial before this case was reached. "The People are not required to contact their witnesses on every adjourned date . . . , nor do they have to be able to produce their witnesses

instantaneously in order for a statement of readiness to be valid" … . To the contrary, " '[p]ostreadiness delay may be charge[able] to the People when the delay is attributable to their inaction and directly implicates their ability to proceed to trial' " … . Here, although the time after the People withdrew their statement of readiness was properly charged to them, there was no prior delay attributable to the People's inaction. Consequently, the prior statements of readiness were not illusory … . People v Hill, 2022 NY Slip Op 05626, Fourth Dept 10-7-22

Practice Point: Here the prosecutor acknowledged the trial witnesses had not be contacted at the time statements of readiness were made because other trials were scheduled before the trial in this case. No delay was attributable to the People's inaction. Therefore the statements of readiness should not have been deemed illusory and the indictment should not have been dismissed on speedy-trial grounds.

OCTOBER 7, 2022

CRIMINAL LAW, ATTORNEYS.

DEFENSE COUNSEL INEFFECTIVE FOR FAILING TO FILE A SUPPRESSION MOTION; THE FAILURE "INFECTED" THE GUILTY PLEA BECAUSE SUPPRESSION COULD HAVE LED TO DISMISSAL OF SOME OF THE INDICTMENT (FOURTH DEPT).

The Fourth Department, reversing defendant's conviction, determined defense counsel's failure to make a suppression motion constituted ineffective assistance:

… [W]e conclude that the record establishes that defense counsel could have presented a colorable argument that defendant's detention was illegal and thus that any evidence obtained as a result thereof should have been suppressed as the fruit of the poisonous tree. One of the officers who initially detained defendant testified at a Huntley/Wade hearing that, prior to defendant's arrest, one of the victims of a home invasion had described the suspects as two black men in their twenties, one of whom was wearing a hoodie "with some kind of emblem on the front." About a half-hour later, the officer heard a broadcast of a tip from an unidentified retired

police officer. The tip, as testified to at the hearing, reported "two [black] males [in their twenties] inside [a] corner store that possibly looked suspicious" with one that "might" have had "a handgun on his side" and another that was wearing a "teddy bear type hoodie," which was later described as a hoodie with a teddy bear on the front. Based on that tip, officers responded to the corner store, entered with weapons drawn, and immediately ordered the two men, one of whom was defendant, to raise their hands. The officer testified, however, that the men were not acting suspiciously nor did she observe a weapon when she and her partner entered the store. While handcuffing defendant, the officer for the first time observed a handgun in defendant's waistband, saw blood on defendant's hoodie, and obtained statements from defendant. Defendant was thereafter taken for show-up identifications, during which the victims of the prior home invasion identified him as one of the men involved in that incident.

… [I]t cannot be said that a motion seeking suppression on the ground that defendant was unlawfully detained would have had "little or no chance of success" … , and instead those facts demonstrate that defense counsel failed to pursue a "colorable claim[]" that could have led to suppression … . …

… [D]efense counsel prepared such a motion to suppress evidence on that basis, indicated an intent to make that motion, and simply failed to file the motion despite having been twice informed by the court of the need to do so given the People's refusal to consent to a hearing regarding the legality of the detention without such a motion. …

… [D]efendant's contention survives his guilty plea inasmuch as the error in failing to seek suppression on that basis infected the plea bargaining process because suppression of the challenged evidence would have resulted in dismissal of at least some of the indictment … . People v Roots, 2022 NY Slip Op 06617, Fourth Dept 11-18-22

Practice Point: Defense counsel was deemed ineffective for failing to file a suppression motion. It worth noting that defense counsel had prepared a motion but failed to file it despite requests by the court and the prosecutor. The failure "infected" the guilty plea because suppression could have resulted in dismissal of some of the indictment.

NOVEMBER 18, 2022

CRIMINAL LAW, CUSTODIAL INTERROGATION.

THE DEFENDANT, WHO WAS BEING TREATED AT THE HOSPITAL, WAS IN CUSTODY AND HAD NOT BEEN INFORMED OF HIS MIRANDA RIGHTS; THE DEFENDANT CALLED A POLICE OFFICER OVER AND SAID "I'M BEAT UP;" THE OFFICER THEN ASKED "WHAT HAPPENED?"; DEFENDANT'S ANSWER WAS NOT SPONTANEOUS AND SHOULD HAVE BEEN SUPPRESSED (FOURTH DEPT).

The Fourth Department, vacating defendant's guilty plea, determined statements made by the defendant to a police officer while he was being treated at the hospital should have been suppressed. Although the initial statement "I'm beat up" was spontaneous, the statements made after the police officer asked "what happened?" were not spontaneous and were made while the defendant was in custody:

… [I]t is undisputed that defendant was in police custody at the time he made the statements and that no one read defendant his Miranda warnings prior to defendant making the statements.

The officer testified at the suppression hearing that defendant "called [the officer] over" to his bed and said "I'm beat up," after which the officer asked defendant "what happened." Defendant then explained the circumstances surrounding how he allegedly came into possession of a weapon he was not legally authorized to possess. We conclude that defendant's initial statement, "I'm beat up," was not subject to suppression because it was " 'spontaneous and not the result of inducement, provocation, encouragement or acquiescence' " … . The court, however, erred in refusing to suppress the remainder of his statements, which were made in response to the officer's question that was intended to elicit a response, and thus those statements cannot be said to have been "genuine[ly] spontane[ous]," i.e., they were not " 'spontaneous in the literal sense of that word as having been made without apparent external cause' " … . People v Corey, 2022 NY Slip Op 05646, Fourth Dept 10-7-22

Practice Point: Although defendant's initial statement to the police office "I;m beat up" was spontaneous and not subject to suppression, defendant's answer to the officer's question "what happened?" was not spontaneous and should have been suppressed.

OCTOBER 7, 2022

CRIMINAL LAW, DEFENSE COUNSEL, POSITION ADVERSE TO DEFENDANT.

DEFENSE COUNSEL STATED DEFENDANT'S PRO SE MOTION TO WITHDRAW THE PLEA WAS WITHOUT MERIT; DEFENSE COUNSEL AND THE COURT INCORRECTLY TOLD THE DEFENDANT THE ISSUES RAISED IN THE MOTION TO WITHDRAW HAD BEEN DECIDED IN A PRIOR APPEAL: DEFENDANT DID NOT RECEIVE EFFECTIVE ASSISTANCE (FOURTH DEPT).

The Fourth Department, remitting the matter to determined defendant's pro se motion to withdraw his plea, determined defendant did not receive effective assistance of counsel. Counsel stated the pro se motion did not have merit, taking a position adverse to the client's position. In addition, defense counsel and the court incorrectly told defendant that the issues raised in defendant's motion to withdraw the plea had been determined in a prior appeal:

When defense counsel takes a position adverse to his or her client, "a conflict of interest arises, and the court must assign a new attorney to represent the defendant on the motion" … .

Here, by stating that there were no grounds for defendant's pro se motion, defense counsel essentially said that it lacked merit, which constitutes taking a position adverse to defendant … .

It appears from the record that defense counsel advised defendant that the issues raised by defendant in his pro se motion to withdraw his plea had already been decided against him in the prior appeal. The court agreed with defense counsel's

interpretation of our ruling. Both defense counsel and the court were incorrect. People v Hemingway, 2022 NY Slip Op 06356, Fourth Dept 11-10-22

Practice Point: If defense counsel takes a position adverse to defendant's position, the defendant has not received effective assistance and is entitled to new counsel. Here defense counsel stated defendant's pro se motion to withdraw the plea was without merit. The matter was remitted for assignment of new counsel and consideration of defendant's motion.

NOVEMBER 10, 2022

CRIMINAL LAW, IMPEACHMENT OF COMPLAINANT, SEXUAL ABUSE.

A WITNESS WHO WOULD HAVE TESTIFIED THE COMPLAINANT IN THIS SEXUAL ABUSE PROSECUTION HAD OFFERED TO GIVE FALSE TESTIMONY ABOUT THE WITNESS'S BOYFRIEND SHOULD HAVE BEEN ALLOWED TO TESTIFY (FOURTH DEPT).

The Fourth Department, reversing defendant's conviction in this sexual abuse prosecution, determined a witness who would have testified about the complainant's offer to give false testimony about the witness's boyfriend should have been allowed to testify:

County Court erred in precluding him from calling a witness who would testify that the complainant offered to make a false allegation of abuse against the witness's boyfriend. "Questioning concerning prior false allegations of rape or sexual abuse is not always precluded . . . , and the determination whether to allow such questioning rests within the discretion of the trial court" … . Evidence of a complainant's prior false allegations of rape or sexual abuse is admissible to impeach the complainant's credibility where a "defendant establishe[s] that the [prior] allegation may have been false[, and] . . . that the particulars of the complaints, the circumstances or manner of the alleged assaults, or the currency of the complaints were such as to suggest a pattern casting substantial doubt on the validity of the charges made by the complainant" … . Here, based on the proffer made at trial, defendant's proposed witness would have testified that the

complainant offered to knowingly make a false allegation against the witness's boyfriend and that this conduct took place around the same time as the first incident alleged against defendant and just months before the second such incident. Further, per defense counsel's proffer, the nature and circumstances of the allegations against defendant and the offered allegation against the witness's boyfriend were sufficiently similar to "suggest a pattern casting substantial doubt on the validity of the charges" … . People v Andrews, 2022 NY Slip Op 06366, Fourth Dept 11-10-22

Practice Point: A witness who would have testified the complainant in this sexual abuse prosecution offered to give false testimony against her boyfriend should have been allowed to testify. Evidence of a complainant's prior false allegations of sexual abuse can be admissible to impeach the complainant under certain circumstances (present here).

NOVEMBER 10, 2022

CRIMINAL LAW, JURY INSTRUCTIONS.

ALTHOUGH THE ISSUE WAS NOT PRESERVED FOR APPEAL, THE FAILURE TO GIVE THE CIRCUMSTANTIAL-EVIDENCE JURY INSTRUCTION WAS REVERSIBLE ERROR (FOURTH DEPT).

The Fourth Department, reversing defendant's conviction of criminal possession of a weapon, determined the evidence was entirely circumstantial requiring that the jury be instructed on the circumstantial-evidence standard of proof. The issued had not been preserved for appeal:

Supreme Court erred in failing to give a circumstantial evidence instruction. The evidence against defendant with respect to his possession of the .22 caliber revolver was entirely circumstantial, and the court's jury instructions "failed to convey to the jury in substance that it must appear that the inference of guilt is the only one that can fairly and reasonably be drawn from the facts, and that the evidence excludes beyond a reasonable doubt every reasonable hypothesis of innocence" … . Inasmuch as the proof of defendant's guilt is not overwhelming, the inadequacy of the charge was prejudicial error requiring reversal of those parts

of the judgment convicting defendant under counts one and two of the superseding indictment and a new trial with respect thereto, notwithstanding defendant's failure to request such a charge or to except to the charge as given … . People v Soto, 2022 NY Slip Op 06589, Fourth Dept 11-18-22

Practice Point: Here the failure to give the circumstantial-evidence jury instruction required reversal despite the failure to preserve the issue.

NOVEMBER 18, 2022

CRIMINAL LAW, PROBABLE CAUSE TO ARREST.

AT THE TIME DEFENDANT RAN AS THE POLICE APPROACHED THERE WAS NO INDICATION THE POLICE WERE GOING TO CITE DEFENDANT FOR TRESPASS OR VIOLATION OF AN OPEN-CONTAINER LAW; DEFENDANT THEREFORE COULD NOT HAVE INTENDED TO OBSTRUCT GOVERNMENTAL ADMINISTRATION BY RUNNING; DEFENDANT'S RUNNING DID NOT PROVIDE PROBABLE CAUSE TO ARREST; THE PEOPLE'S ALTERNATIVE PROBABLE CAUSE ARGUMENT (TRESPASS AND OPEN-CONTAINER VIOLATION), ALTHOUGH PRESENTED TO THE SUPPRESSION COURT, WAS NOT RULED ON AND THEREFORE COULD NOT BE CONSIDERED ON APPEAL (FOURTH DEPT).

The Fourth Department, reversing the denial of defendant's suppression motion, determined the police did not have probable cause to arrest defendant for obstructing governmental administration. The People's alternative argument (the police had probable cause to arrest defendant for trespass and violation of an open-container law), made in a post-suppression-hearing memo, could not be considered on appeal because the suppression court did not rule on it. The police approached defendant as he was sitting at a picnic table on vacant property drinking from a cup. As the police approached, defendant got up from the table and ran:

… [A]lthough the officers testified that they were planning to issue citations for violation of the open container ordinance as they approached the picnic table, there

is no evidence that, when defendant jumped up from the table and attempted to run away, the officers were in the process of issuing the citations … or that they had given any directive for defendant to remain in place while they issued such citations … . The officers thus had no reasonable basis to believe that defendant had the requisite intent—i.e., the conscious objective—to prevent them from issuing citations … . * * *

… [T]he court's determination that the officers had probable cause to arrest defendant for obstructing governmental administration, and that the searches and seizures were incident to a lawful arrest for that offense, "was the only issue decided adversely to defendant at the trial court" … . That determination "alone constituted the ratio decidendi for upholding the legality of the [searches and seizures] and denying the suppression of evidence" (id.). Our "review, therefore, is confined to that issue alone" … . People v Tubbins, 2022 NY Slip Op 07317, Fourth Dept 12-23-22

Practice Point: Here defendant did not know the police were going to cite him for trespass and an open-container violation at the time he ran. Therefore his running was not obstruction of governmental administration and did not provide probable cause for arrest on that ground.

Practice Point: The People's alternative argument that the police had probable cause to arrest for trespass and an open-container violation was presented to the suppression court but was not ruled on. Therefore the appellate court could not consider it.

DECEMBER 23, 2022

CRIMINAL LAW, SEIZURE, REASONABLE SUSPICION.

AT THE TIME THE POLICE PARKED THE POLICE CAR BEHIND THE CAR IN WHICH DEFENDANT WAS A PASSENGER SUCH THAT THE DRIVER COULD NOT LEAVE THE AREA, THE POLICE DID NOT HAVE REASONABLE SUSPICION THAT THE OCCUPANTS OF THE CAR HAD COMMITTED A CRIME; DEFENDANT'S MOTION TO SUPPRESS SHOULD HAVE BEEN GRANTED; INDICTMENT DISMISSED (FOURTH DEPT).

The Fourth Department, reversing defendant's conviction and dismissing the indictment, determined the police did not have the requisite reasonable suspicion when they parked behind the vehicle in which defendant was a passenger such that the driver could not leave the area. Therefore defendant's motion to suppress should have been granted:

Police officer testimony at the suppression hearing established that, at the time the officers made the initial stop, they were responding to the sound of multiple gunshots that had originated at or near the gas station, which was known to be a high crime area. The officers also testified, however, that at no time did they visually observe the source of the gunshots, and they did not see any shots emanating from the area where defendant's vehicle was parked. The officers' attention was drawn to defendant's vehicle because, at the time they arrived on the scene, it had collided with another vehicle as it tried to leave the area. Defendant's vehicle was one of a number of vehicles and pedestrians that the police saw trying to leave the gas station due to the ongoing gunfire. Under those circumstances—i.e., where the police are unable to pinpoint the source of the gunfire, and the individuals in defendant's vehicle are not the only potential suspects present at the scene—the evidence does not provide a reasonable suspicion that the individuals in defendant's vehicle had committed, were committing, or were about to commit a crime … . On the record before us, defendant's vehicle was, at most, "simply a vehicle that was in the general vicinity of the area where the shots were heard," which is insufficient to establish reasonable suspicion … . People v Singletary, 2022 NY Slip Op 07392, Fourth Dept 12-23-22

Practice Point: Parking a police car behind a car such that the car cannot leave is a seizure requiring reasonable suspicion a crime has taken place.

DECEMBER 23, 2022

CRIMINAL LAW, SUPPRESSION, APPEALS.

SUPPRESSION OF THE WEAPON WAS PROPERLY DENIED, BUT DEFENDANT'S STATEMENT ADMITTING POSSESSION OF THE WEAPON SHOULD HAVE BEEN SUPPRESSED; ALTHOUGH THE HARMLESS ERROR DOCTRINE IS RARELY APPLIED TO UPHOLD A GUILTY PLEA WHERE SUPPRSSION SHOULD HAVE BEEN GRANTED, HERE THE APPELLATE DIVISION DETERMINED THE PLEA WOULD NOT HAVE BEEN AFFECTED BY SUPPRESSION OF THE STATEMENT; THE DISSENT DISAGREED (FOURTH DEPT).

The Fourth Department, over a dissent, determined defendant's guilty plea to possession of a weapon could not have been affected by the failure to suppress his statement admitting possession of the weapon. The Fourth Department determined the statement was a product of unwarned custodial interrogation:

'The term "interrogation" under Miranda refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response' " … . "Although the police may ask a suspect preliminary questions at a crime scene in order to find out what is transpiring . . . , where criminal events have been concluded and the situation no longer requires clarification of the crime or its suspects, custodial questioning will constitute interrogation" … . Here, after defendant had been restrained and handcuffed, an officer asked defendant, "what's going on? Are you all right? Are you okay?" Defendant responded, "you saw what I had on me. I was going to do what I had to do." We conclude that the interaction between defendant and the officer "had traveled far beyond a 'threshold crime scene inquiry' " and, under the circumstances, it was likely that the officer's particular questions " 'would elicit evidence of a crime and, indeed, it did elicit an incriminating response' " … . …

"[W]hen a conviction is based on a plea of guilty an appellate court will rarely, if ever, be able to determine whether an erroneous denial of a motion to suppress contributed to the defendant's decision, unless at the time of the plea he [or she] states or reveals his [or her] reason for pleading guilty" (People v Grant, 45 NY2d 366, 379-380 [1978]). "The Grant doctrine is not absolute, however, and [the Court of Appeals has] recognized that a guilty plea entered after an improper court ruling may be upheld if there is no 'reasonable possibility that the error contributed to the plea' " … . People v Robles, 2022 NY Slip Op 07336, Fourth Dept 12-23-22

Practice Point: This case is rare exception to the rule that a guilty plea will not stand if a suppression motion should have been granted. Here the appellate division determined suppression of defendant's statement admitting possession of the weapon would not have affected his decision to plead guilty because the weapon itself had not been suppressed. There was a dissent.

DECEMBER 23, 2022

CRIMINAL LAW, VEHICLE AND TRAFFIC LAW, DWI.

REFUSING TO SUBMIT TO A DWI BREATH TEST IS NOT AN OFFENSE (FOURTH DEPT).

The Fourth Department, reversing the conviction, noted that refusing to submit to a DWI field screening test (Alco-Sensor breath test) is not an offense:

We agree with defendant … that his "refusal to submit to a [field screening device] did not establish a cognizable offense" (People v Alim, 204 AD3d 1418, 1419 [4th Dept 2022] … ; see People v Bembry, 199 AD3d 1340, 1342 [4th Dept 2021] …). We therefore modify the judgment by reversing that part convicting defendant of count seven of the indictment and dismissing that count. People v Shirley, 2022 NY Slip Op 05631, Fourth Dept 10-7-22

Practice Point: Refusing to submit to a DWI breath test is not an offense. The "conviction" was reversed that the indictment count was dismissed.

OCTOBER 7, 2022

CRIMINAL LAW, VISUAL ESTIMATE OF SPEED.

THE PEOPLE DID NOT DEMONSTRATE THE POLICE OFFICER HAD SUFFICIENT TRAINING AND EXPERIENCE TO VISUALLY ESTIMATE THE SPEED OF DEFENDANT'S CAR; SUPPRESSION SHOULD HAVE BEEN GRANTED IN THIS SPEEDING CASE (FOURTH DEPT).

The Fourth Department, reversing defendant's conviction, determined the People did not demonstrate the defendant was speeding. No radar gun was used and the officer estimated defendant's speed. The People did not demonstrate the officer had sufficient training and experience to support the speed-estimate:

At the suppression hearing, the officer testified that he stopped the vehicle after he visually estimated defendant's speed at 82 miles per hour in a 65 mph zone, and there was no testimony that the officer used a radar gun to establish defendant's speed. While it is well-settled that a qualified police officer's testimony that he or she visually estimated the speed of a defendant's vehicle may be sufficient to establish that a defendant exceeded the speed limit … , here, the People failed to establish the officer's training and qualifications to support the officer's visual estimate of the speed of defendant's vehicle … . Thus, inasmuch as the People failed to meet their burden of showing the legality of the police conduct in stopping defendant's vehicle in the first instance, we conclude that the court erred in refusing to suppress the physical evidence and defendant's statements obtained as a result of the traffic stop. Because our determination results in the suppression of all evidence supporting the crime charged, the indictment must be dismissed … . People v Reedy, 2022 NY Slip Op 07397, Fourth Dept 12-23-22

Practice Point: Although a police officer's visual estimate of a vehicle's speed may be sufficient to support a speeding conviction, the People must show the officer had sufficient training and experience to make the speed-estimate, which was lacking in this case.

DECEMBER 23, 2022

DEFAMATION, ANTI-SLAPP STATUTES.

THE AMENDMENTS TO THE ANTI-SLAPP STATUTES SHOULD NOT HAVE BEEN APPLIED RETROACTIVELY TO DISMISS PLAINTIFF'S DEFAMATION COMPLAINT (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the amendments to the anti-SLAPP statutes (Civil Rights Law §§ 70-a, 76-a) do not apply retroactively and therefore should not have been the basis for dismissal of plaintiff's defamation complaint:

… [T]the presumption against retroactivity is not overcome because "[n]othing in the text 'expressly or by necessary implication' requires retroactive application of the [anti-SLAPP] statute as amended . . . Nor does the legislative history support such an interpretation" … . First, the text of the legislation does not contain an express statement requiring retroactive application … . Second, while the anti-SLAPP amendments took effect "immediately" (id.), that term "is equivocal in an analysis of retroactivity" … . Third, although the legislation is remedial in nature and such legislation is generally applied retroactively "to better achieve its beneficial purpose" … , simply classifying a statute as remedial "does not automatically overcome the strong presumption of prospectivity" … . Finally, the legislative history establishes that the rationale for the amendments was to better advance the purposes of speech protection for which the anti-SLAPP law was initially enacted and to remedy the courts' failure to use their discretionary powers to award costs and fees in such cases. However, the legislative history does not offer any explicit or implicit support for retroactive application … . Therefore, we conclude that "the presumption of prospective application of the [anti-SLAPP] amendments has not been defeated" … . Hoi Trinh v Nguyen, 2022 NY Slip Op 07387, Fourth Dept 12-23-22

Practice Point: The recent amendments to the anti-SLAPP statutes (Civil Rights Law 70-a, 76-a) do not apply retroactively.

DECEMBER 23, 2022

EMINENT DOMAIN, MUNICIPAL LAW.

IN ORDER TO OBTAIN TITLE TO THE VACANT BUILDING AT A SHOPPING MALL UNDER THE EMINENT DOMAIN PROCEDURE LAW (EDPL), THE TOWN MUST SPECIFY THE PUBLIC PURPOSE FOR WHICH THE PROPERTY WILL BE USED; THE TOWN'S FAILURE TO SPECIFY THE PUBLIC PURPOSE WAS FATAL TO THE CONDEMNATION PROCEEDING (FOURTH DEPT).

The Fourth Department, in a full-fledged opinion by Justice Lindley, annulling the determination authorizing the condemnation of a vacant building at a shopping mall, held that the town's acknowledgment that it did not know how the building would be used was fatal to condemnation proceeding:

Petitioner challenges the taking … contending … that neither the condemnation notice nor the Town's determination and findings specifically identifies or describes a legitimate public project, as required by EDPL [Eminent Domain Procedure Law] 207 (C) (3). We agree. Indeed, the Town readily acknowledges that it has not yet decided what to do with the property after obtaining title, and the notice merely states that "[t]he proposed Acquisition is required for and is in connection with a certain project . . . consisting of facilitating the productive reuse and redevelopment of the vacant and underutilized Proposed Site through municipal and/or economic development projects . . . by attracting and accommodating new tenant(s) and/or end user(s)." In its determination and findings, the Town stated that "no specific future uses or actions have been formulated and/or specifically identified."

Because the Town has not indicated what it intends to do with the property, we are unable to determine whether "the acquisition will serve a public use" … . Of course, "[t]he existence of a public use, benefit, or purpose underlying a condemnation is a sine qua non" to the government's ability to exercise its powers to take private property through eminent domain … . Matter of HBC Victor LLC v Town of Victor, 2022 NY Slip Op 07313, Fourth Dept 12-23-22

Practice Point: In order for a municipality to obtain title to property pursuant to the Eminent Domain Procedure Law, the public purpose for the town's use of the properly must be specified. Here the town sought ownership of a vacant building at

a shopping mall but acknowledged it did not know how the property would be used. The determination authorizing condemnation of the property was annulled.

DECEMBER 23, 2022

EMINENT DOMAIN, MUNICIPAL LAW.

THE CONDEMNATION OF THE REAL PROPERTY WAS NOT FOR A COMMERCIAL PURPOSE AS REQUIRED BY THE CONTROLLING STATUTES; THE DETERMINATION TO CONDEMN THE PROPERTY WAS ANNULLED OVER AN EXTENSIVE DISSENT (FOURTH DEPT).

The Fourth Department, annulling the determination to condemn real property, over an extensive dissent, held that the purpose for the condemnation was not "commercial" as required by the statutes authorizing condemnation by the Oneida County Industrial Development Agency (OCIDA):

Petitioners commenced this original proceeding pursuant to EDPL [Eminent Domain Procedure Law] 207 seeking to annul the determination of respondent Oneida County Industrial Development Agency (OCIDA) to condemn certain real property by eminent domain. Pursuant to EDPL 207 (C), this Court "shall either confirm or reject the condemnor's determination and findings." Our scope of review is limited to "whether (1) the proceeding was constitutionally sound; (2) the condemnor had the requisite authority; (3) its determination complied with [the State Environmental Quality Review Act (SEQRA)] and EDPL article 2; and (4) the acquisition will serve a public use" … .

… OCIDA lacked the requisite authority to acquire the subject property. As an industrial development agency, OCIDA's statutory purposes are … to "promote, develop, encourage and assist in the acquiring . . . [of] . . . commercial . . . facilities" (General Municipal Law § 858). OCIDA's powers of eminent domain are restricted by General Municipal Law § 858 (4), which provides, in relevant part, that an industrial development agency shall have the power "[t]o acquire by purchase, grant, lease, gift, pursuant to the provisions of the eminent domain procedure law, or otherwise and to use, real property . . . therein necessary for its

corporate purposes." The purposes enumerated in the statute do not include projects related to hospital or healthcare-related facilities (see § 858). While OCIDA's determination and findings indicate that the subject property was to be acquired for use as a surface parking lot, the record establishes that, contrary to respondents' assertion, the primary purpose of the acquisition was not a commercial purpose. Rather, the property was to be acquired because it was a necessary component of a larger hospital and healthcare facility project. Matter of Bowers Dev., LLC v Oneida County Indus. Dev. Agency, 2022 NY Slip Op 07327, Fourth Dept 12-23-22

Practice Point: If the purpose for the condemnation of real property does not comply with the purposes allowed by the controlling states, the determination to condemn the property will be annulled by the courts.

DECEMBER 23, 2022

FAMILY LAW, APPEALS.

A MALFUNCTION OF THE AUDIO RECORDING DEVICE MADE IT IMPOSSIBLE TO TRANSCRIBE PORTIONS OF THE TRIAL; THE APPELLATE COURT SENT THE MATTER BACK FOR A RECONSTRUCTION HEARING (FOURTH DEPT).

The Fourth Department, sending the matrimonial action back for a reconstruction hearing, determined the inability to transcribe portions of the audio recording prejudiced the parties:

"Parties to an appeal are entitled to have that record show the facts as they really happened at trial, and should not be prejudiced by an error or omission of the stenographer" or the audio recording device … . Here, contrary to the court's determination, the record establishes that significant portions of the testimony of plaintiff and defendant, including testimony related to child custody and certain other issues, could not be transcribed due to malfunctions of the audio recording system, which would preclude meaningful appellate review of those issues . To the extent that they are properly before us, we have considered and rejected the

parties' remaining contentions. We therefore reverse the order, grant the motion, and remit the matter to Supreme Court to hold a reconstruction hearing with the parties and any witnesses or evidence the court deems helpful in reconstructing, if possible, those portions of the testimony of plaintiff and defendant that could not be transcribed … . Wagner v Wagner, 2022 NY Slip Op 06600, Fourth Dept 11-18-22

Practice Point: If a recording device malfunctions making it impossible to transcribe portions of a trial, the appellate court may send the matter back to reconstruct the missing parts of the record.

NOVEMBER 18, 2022

FAMILY LAW, APPEALS.

FATHER WAS NOT SERVED WITH THE ORDER OF FACT-FINDING AND DISPOSITION IN THE MANNER PRESCRIBED BY FAMILY COURT ACT 1113 (FATHER WAS SERVED BY EMAIL) AND THEREFORE THE 30-DAY APPEAL DEADLINE DID NOT APPLY; FATHER'S STRIKING THE 14-YEAR-OLD CHILD ONCE DURING A MULTI-PERSON MELEE AFTER THE CHILD BROKE THE WINDOW OF FATHER'S CAR WITH A ROCK DID NOT CONSTITUTE NEGLECT (FOURTH DEPT).

The Fourth Department, reversing Family Court, determined: (1) Family Court did not follow the statutory procedure for serving father with the order of fact-finding and disposition and, therefore, father's appeal was timely; and (2) father's striking the child once during a multi-person melee, after the child threw a rock at father's car, did not constitute neglect:

… "[T]here is no evidence in the record that the father was served with the order of fact-finding and disposition by a party or the child's attorney, that he received the order in court, or that the Family Court mailed the order to the father" … . Instead, despite using a form order that provided typewritten check boxes for the two methods of service by the court mentioned in the statute (i.e., in court or by mail) … , the court here crossed out the word "mailed" and edited the form to indicate

that the order was emailed to, among others, the father's attorney. The statute, however, does not provide for service by the court through email or any other electronic means … . … Inasmuch as the father was served the order by the court via email, which is not a method provided for in Family Court Act § 1113, and there is no indication that he was served by any of the methods authorized by the statute, we conclude that the time to take an appeal did not begin to run and that it cannot be said that the father's appeal is untimely … .* * *

… [W]e conclude that, "[g]iven the age of the subject child, the provocation, and the dynamics of the incident, the [father's] act against [the child] did not constitute neglect" … . The record establishes that, during the course of a multi-person melee that included the 15-year-old sister beating up the 18-year-old daughter of the father's girlfriend, the 14-year-old child threw a rock at the vehicle causing the window to break, to which provocation the father instantly reacted by striking the child once either in the face or the back of the head … . Petitioner presented no evidence that the child sustained any injury or required medical treatment as a result of the single strike by the father during the altercation, and the police who investigated the incident did not file any charges … . Matter of Grayson S. (Thomas S.), 2022 NY Slip Op 05649, Fourth Dept 10-7-22

Practice Point: Here father was served with the order of fact-finding and disposition by email, a method not prescribed by Family Court Act 1113. Therefore the 30-day time limit for bringing an appeal did not apply and father's appeal was timely. Father struck the 14-year-old child once during a multi-person melee after the child broke the window of father's car with a rock. Father's striking the child, which did not cause injury, did not constitute neglect.

OCTOBER 7, 2022

FAMILY LAW, ATTORNEYS.

A CHILD IN A CUSTODY PROCEEDING IS ENTITLED TO EFFECTIVE ASSISTANCE OF COUNSEL BY THE ATTORNEY-FOR-THE-CHILD (AFC), WHICH INCLUDES ADVOCATING THE CHILD'S POSITION EVEN IF THE AFC DISAGREES (FOURTH DEPT).

The Fourth Department, reversing Family Court, determined the child received ineffective assistance in this modification of custody proceeding. With a couple of exceptions, even if the attorney-for-the-child (AFC) doesn't agree with it, he or she must argue the child's position:

… [T]he AFC "must zealously advocate the child's position" (22 NYCRR 7.2 [d]). "[I]n ascertaining the child's position, the [AFC] must consult with and advise the child to the extent of and in a manner consistent with the child's capacities, and have a thorough knowledge of the child's circumstances" (22 NYCRR 7.2 [d] [1]). "[I]f the child is capable of knowing, voluntary and considered judgment, the [AFC] should be directed by the wishes of the child, even if the [AFC] believes that what the child wants is not in the child's best interests" (22 NYCRR 7.2 [d] [2]). There are two exceptions, not relevant here, where the child lacks the capacity for knowing, voluntary and considered judgment, or following the child's wishes is likel… y to result in a substantial risk of imminent, serious harm to the child (see 22 NYCRR 7.2 [d] [3]).

… [A] child in an article 6 custody proceeding is entitled to effective assistance of counsel … , which requires the AFC to take an active role in the proceeding … .

Here, the AFC at trial made his client's wish that there be a change in custody known to the court, but he did not "zealously advocate the child's position" (22 NYCRR 7.2 [d] …). He did not cross-examine the mother, the police officers, or the school social worker called by the father, and we agree with the AFC on appeal that the trial AFC's cross-examination of the father was designed to elicit unfavorable testimony related to the father, thus undermining the child's position . His questioning also seemed designed to show that there was no change in circumstances since the entry of the last order. Further, he submitted an email to the court in response to the mother's motion to dismiss in which he stated his opinion that there had been no change in circumstances, which again went against

his client's wishes … . Matter of Sloma v Saya, 2022 NY Slip Op 06587, Fourth Dept 11-18-22

Practice Point: The attorney-for-the-child (AFC), absent two exceptions not relevant to this case, must argue the child's position in a modification of custody proceeding even if he or she disagrees. Here the AFC didn't cross-examine witnesses whose testimony was unfavorable to the child's position and questioned witnesses in a manner which elicited testimony against the child' position. The child was not afforded effective assistance of counsel.

NOVEMBER 18, 2022

FAMILY LAW, CONTEMPT, APPEALS.

DIRECT APPEAL, AS OPPOSED TO AN ARTICLE 78, WAS APPROPRIATE IN THIS CONTEMPT PROCEEDING; MOTHER SHOULD HAVE BEEN GIVEN THE OPPORTUNITY TO ARGUE AGAINST THE CONTEMPT ADJUDICATIONS (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined direct appeal of the contempt adjudications in this custody matter, as opposed to an Article 78 action, was appropriate under the circumstances. The contempt adjudications were vacated because mother was not given the opportunity to argue she should not be held in contempt:

… [T]he mother's challenge to the summary contempt adjudications is properly raised via direct appeal from the order under the circumstances of this case. Although a direct appeal from an order punishing a person summarily for contempt committed in the immediate view and presence of the court ordinarily does not lie and a challenge must generally be brought pursuant to CPLR article 78 to allow for development of the record (see Judiciary Law §§ 752, 755 …), an appeal from such an order is appropriately entertained where, as here, there exists an adequate record for appellate review … .

With respect to the merits, "[b]ecause contempt is a drastic remedy, . . . strict adherence to procedural requirements is mandated" … . Here, we conclude that the

court committed reversible error by failing to afford the mother the requisite "opportunity, after being 'advised that [she] was in peril of being adjudged in contempt, to offer any reason in law or fact why that judgment should not be pronounced' " … . S.P. v M.P., 2022 NY Slip Op 06377, Fourth Dept 11-10-22

Practice Point: A contempt adjudication based upon actions in the court's presence are usually properly contested in an Article 78 proceeding. Under the circumstances here, direct appeal was appropriate. The contempt adjudications were vacated because mother (in this custody proceeding) was not given the opportunity to contest them.

NOVEMBER 10, 2022

FAMILY LAW, CUSTODY, NON-PARENT.

EVEN THOUGH THERE WAS A PRIOR STIPULATED ORDER OF CUSTODY AND VISITATION GRANTING PRIMARY CUSTODY TO GRANDMOTHER, THE NONPARENT (GRANDMOTHER), NOT THE FATHER, HAS THE BURDEN TO SHOW EXTRAORDINARY CIRCUMSTANCES JUSTIFYING THE DENIAL OF FATHER'S SUPERIOR RIGHT TO CUSTODY BEFORE THE BEST INTERESTS OF THE CHILDREN CAN BE CONSIDERED PURSUANT TO FATHER'S PETITION TO MODIFY CUSTODY (FOURTH DEPT).

The Fourth Department, reversing (modifying) Family Court, determined, in a modification of custody case, the nonparent (grandmother here), not the father, has the burden to demonstrate extraordinary circumstances exist before the court can consider the best interests of the children:

Pursuant to the prior order, the parties share joint legal custody of the subject children, with the grandmother having primary physical custody and the mother and the father having visitation under separate visitation schedules. …

Petitioner father appeals from an order granting the motion of respondent Dawn M. Freeland (grandmother), made at the close of the father's case at a hearing, to dismiss his petition seeking modification of a prior stipulated order of custody and

visitation, and his petition alleging that the grandmother violated that prior order. …

… [T]he court erred in requiring the father to prove that there had been a change in circumstances prior to making a determination regarding extraordinary circumstances … . "It is well settled that, as between a parent and a nonparent, the parent has a superior right to custody that cannot be denied unless the nonparent establishes that the parent has relinquished that right because of surrender, abandonment, persisting neglect, unfitness or other like extraordinary circumstances" … . "The nonparent has the burden of establishing that extraordinary circumstances exist," and "it is only after a court has determined that extraordinary circumstances exist that the custody inquiry becomes 'whether there has been a change [in] circumstances [warranting further inquiry into] the best interests of the child[ren]' " … . "The foregoing rule applies even if there is an existing order of custody concerning th[e] child[ren] unless there is a prior determination that extraordinary circumstances exist" … . Here, "there is no indication in the record that, in the history of the parties' litigation, the court previously made a determination of extraordinary circumstances divesting the [father] of [his] superior right to custody" … . Matter of Wells v Freeland, 2022 NY Slip Op 07375, Fourth Dept 12-23-22

Practice Point: Here father brought a violation-of-visitation petition against grandmother and petitioned for a modification of custody which had been agreed to by a stipulated order. Family Court held the father had the burden to show extraordinary circumstances justifying modification of custody. The appellate division disagreed and held the nonparent (grandmother) had that burden because father still had the superior right to custody which could not be disturbed absent extraordinary circumstances. The prior stipulated order of custody and visitation was not a substitute for an extraordinary-circumstances finding.

DECEMBER 23, 2022

FAMILY LAW, CUSTODY.

THE DETERIORATION OF THE RELATIONSHIP BETWEEN FATHER AND MOTHER WAS A SUFFICIENT CHANGE IN CIRCUMSTANCES TO WARRANT AN INQUIRY RE: FATHER'S PETITION FOR A MODIFICATION OF CUSTODY; AFTER CONSIDERING THE MERITS, THE APPELLATE COURT AWARDED SOLE CUSTODY TO FATHER (FOURTH DEPT).

The Fourth Department, reversing Family Court, determined father demonstrated a change in circumstance (deterioration of the relationship with mother, inability to communicate) sufficient to warrant an inquiry into whether the joint custody arrangement should be modified, and the record supported awarding father sole custody:

… [T]he court had previously awarded joint custody to the parties on the basis that communications between them had "improved and the two were working together more than ever before, the results of which were positive for [the subject child]." However, the evidence at the hearing established that, after the initial custody award was entered, the parties reverted to " 'an acrimonious relationship and are not able to communicate effectively with respect to the needs and activities of their child[ ], and it is well settled that joint custody is not feasible under those circumstances' " … . …

… [W]e conclude that it is in the child's best interests to award the father sole custody. Although the parties have shared alternating week custody since the entry of the prior custody order, the evidence at the hearing established that the father "provided a more stable environment for the child and was better able to nurture the child" … . The evidence further established that the mother made a concerted effort to interfere with the father's contact with the child by, inter alia, disparaging him to educational and medical professionals, which raises a strong probability that the mother " 'is unfit to act as custodial parent' " … and warrants the grant of sole custody to the father…. . Matter of Johnson v Johnson, 2022 NY Slip Op 05651, Fourth Dept 10-7-22

Practice Point: A deterioration of the relationship between father and mother was a sufficient change in circumstances to warrant an inquiry re: father's petition for a

modification of custody. The record was sufficient for the appellate court to determined sole custody should be awarded to father.

OCTOBER 7, 2022

FAMILY LAW, NEGLECT, MARIHUANA.

THE AMENDED STATUTE CHANGING THE CRITERIA FOR NEGLECT BASED ON MARIHUANA USE WENT INTO EFFECT TWO DAYS BEFORE THE HEARING AND WAS NOT APPLIED TO THE FACTS; MATTER REMITTED (FOURTH DEPT).

The Fourth Department, modifying Family Court, determined whether mother neglected the children within the meaning of the statute as amended by the Marihuana Regulation and Taxation Act required remittal:

"The Marihuana Regulation and Taxation Act … amended Family [Court] Act § 1046 (a) (iii) … by specifically foreclosing a prima facie neglect finding based solely upon the use of marihuana, while still allowing for consideration of the use of marihuana to establish neglect, provided '[that there is] a separate finding that the child's physical[,] mental or emotional condition was impaired or is in imminent danger of becoming impaired' " … . The amendment to section 1046 (a) (iii) went into effect … two days before the court rendered its decision in this case and, "[a]s a general matter, a case must be decided upon the law as it exists at the time of the decision" … . Inasmuch as petitioner's presentation of evidence was based on the state of the law at the time of the hearing, however, petitioner may not have fully explored the issue of impairment. We therefore remit the matter to Family Court to reopen the fact-finding hearing on the issue whether the children's condition was impaired or at imminent risk of impairment as a result of the mother's use of marihuana … . Matter of Gina R. (Christina R.), 2022 NY Slip Op 07321, Fourth Dept 12-23-22

Practice Point: The Family Court Act was amended to prohibit a finding of neglect based solely on marihuana use unless there is a finding the child's physical, mental

or emotional condition was impaired or in danger of being impaired by the marihuana use.

DECEMBER 23, 2022

FAMILY LAW, JUDGES.

THE JUDGE IN THIS POST-DIVORCE PROCEEDING ENCOMPASSING FIVE APPEALS, WAS DEEMED TO HAVE MADE MANY RULINGS NOT SUPPORTED BY THE RECORD, IN PART BECAUSE NECESSARY HEARINGS WERE NOT HELD; THE IMPROPER RULINGS INCLUDED A RESTRICTION OF THE ATTORNEY-FOR-THE-CHILD'S (AFC'S) INTERACTIONS WITH THE CHILDREN (FOURTH DEPT).

The Fourth Department, reversing (and modifying) Supreme Court in this post-divorce proceeding encompassing several appeals, determined many of the court's rulings were not supported by the record, due in part to the court's failure to hold hearings. The court had imposed "house rules" for the children, refused to hold a Lincoln hearing, made contempt findings, modified father's visitation, suspended father's child support obligations, ordered family unification therapy, limited the attorney-for-the-child's interactions with the children, and made several other rulings with which the appellate division found fault. The decision is far too detailed to fairly summarize here:

The mother and the AFC contend in appeal Nos. 1, 3, and 5 that the court erred in altering the terms of the parties' custody and visitation arrangement and in imposing its house rules without conducting a hearing to determine the children's best interests. We agree. We therefore modify the orders in appeal Nos. 1, 3, and 5 accordingly, and we reinstate the provisions of the agreement and remit the matter to Supreme Court for a hearing, including a Lincoln hearing, to determine whether modification of the parties' custody and visitation arrangement is the children's best interests.

Where there is "a dispute between divorced parents, the first concern of the court is and must be the welfare and the interests of the children" … , and "[a]ny court in considering questions of child custody must make every effort to determine what is for the best interest of the child[ren], and what will best promote [their] welfare and happiness" … . Consequently, visitation and "custody determinations should '[g]enerally' be made 'only after a full and plenary hearing and inquiry' "… , "[u]nless there is sufficient evidence before the court to enable it to undertake a comprehensive independent review of" the children's best interests … . Burns v Grandjean, 2022 NY Slip Op 06577, Fourth Dept 11-18-22

Practice Point: Here the Fourth Department took issue with many, many rulings made by Supreme Court in this post-divorce proceeding. The decision encompassed five appeals and too many issues to fairly summarize. Many of Supreme Court's rulings were deemed to have been unsupported by record, in large part because necessary hearings were not held.

NOVEMBER 18, 2022

FREEDOM OF INFORMATION LAW (FOIL), POLICE OFFICER DISCIPLINARY RECORDS.

THE FOIL REQUEST FOR THE DISCIPLINARY RECORDS OF POLICE OFFICERS SHOULD NOT HAVE BEEN CATEGORICALLY DENIED PURSUANT TO THE PERSONAL PRIVACY EXEMPTION; RATHER THE RECORDS MUST BE REVIEWED AND ANY DENIALS OR REDACTIONS EXPLAINED (FOURTH DEPT).

The Fourth Department, reversing (modifying) Supreme Court, determined the request for the disciplinary records of police officers should not have categorically denied pursuant to the personal privacy exemption. The decision encompasses several important issues not summarized here and therefore should be consulted:

… [T]he personal privacy exemption "does not . . . categorically exempt . . . documents from disclosure", even in the case where a FOIL request concerns release of unsubstantiated allegations or complaints of professional misconduct. In

order to invoke the personal privacy exemption here, respondents must review each record responsive to petitioner's FOIL request and determine whether any portion of the specific record is exempt as an invasion of personal privacy and, to the extent that any portion of a law enforcement disciplinary record concerning an open or unsubstantiated complaint of SPD [Syracuse Police Department] officer misconduct can be disclosed without resulting in an unwarranted invasion of personal privacy, respondents must release the non-exempt, i.e., properly redacted, portion of the record to petitioner … .

Inasmuch as respondents withheld the requested law enforcement disciplinary records concerning open and unsubstantiated claims of SPD officer misconduct in their entirety and did not articulate any particularized and specific justification for withholding any of the records, we conclude that respondents did not meet their burden of establishing that the personal privacy exemption applies … . Respondents further failed to establish that "identifying details" in the law enforcement disciplinary records concerning open and unsubstantiated claims of SPD officer misconduct "could not be redacted so as to not constitute an unwarranted invasion of personal privacy" … . Thus, the court erred in granting that part of respondents' motion seeking to dismiss petitioner's request for law enforcement disciplinary records concerning open or unsubstantiated claims of SPD officer misconduct in reliance on the personal privacy exemption under Public Officers Law § 87 (2) (b). Matter of New York Civ. Liberties Union v City of Syracuse, 2022 NY Slip Op 06348, Fourth Dept 11-10-22

Similar issues in: Matter of New York Civ. Liberties Union v City of Rochester, 2022 NY Slip Op 06346, Fourth Dept 11-10-22

Practice Point: A FOIL request for the disciplinary records of police officers cannot be categorically rejected pursuant to the personal privacy exemption. Rather the records must be reviewed and any denials an redactions explained.

NOVEMBER 10, 2022

INSURANCE LAW, PROFESSIONAL LIABILITY EXCLUSION.

THE PROFESSIONAL LIABILITY EXCLUSION IN THE NAIL SALON'S INSURANCE POLICY IS NOT AMBIGUOUS AND EXCLUDES INJURY RESULTING FROM A "COSMETIC SERVICE;" PLAINTIFF ALLEGED SHE CONTRACTED AN INFECTION DURING A PEDICURE; COVERAGE WAS PROPERLY DENIED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the "professional liability" exclusion from the insured nail salon's policy applied and coverage was properly denied. Plaintiff alleged she contracted an infection during a pedicure:

… [T]he professional liability exclusion states—in clear and unmistakable language—that the insured's policy "does not apply to 'bodily injury' . . . due to . . . [t]he rendering of or failure to render cosmetic . . . services or treatments." We agree with defendant that, contrary to plaintiff's contention, "[t]here is no ambiguity in the wording of the exclusion" inasmuch as it is susceptible of only one reasonable interpretation: there is no coverage for bodily injury due to (i.e., "caused by") the rendering (i.e., the performance) of a cosmetic service or treatment (e.g., a pedicure) … . Thus, employing " 'the test to determine whether an insurance contract is ambiguous [by] focus[ing] on the reasonable expectations of the average insured upon reading the policy and employing common speech' " … , we conclude that the exclusion is unambiguous because the average insured would understand the policy to exclude coverage for injuries caused by the performance of acts that constitute part of the pedicure service … . Walker v Erie Ins. Co., 2022 NY Slip Op 06332, Fourth Dept 11-10-22

Practice Point: Where an exclusion in an insurance policy is unambiguous it will be enforced. Here the nail salon's insurance policy had a professional liability exclusion. Plaintiff alleged she contracted an infection during a pedicure. The pedicure was deemed included in the exclusion of bodily injury caused by the rendering of a cosmetic service (i.e., a pedicure).

NOVEMBER 10, 2022

LABOR LAW-CONSTRUCTION LAW, AGENCY.

THE TOWN CONTRACTED FOR THE CONSTRUCTION PROJECT ON WHICH PLAINTIFF WAS INJURED; DEFENDANT CONTRACTED WITH THE TOWN TO HANDLE BIDS FOR THE PROJECT; DEFENDANT WAS NOT AN AGENT FOR THE TOWN AND THE LABOR LAW 240(1), 241(6), 200 AND NEGLIGENCE ACTIONS AGAINST DEFENDANT SHOULD HAVE BEEN DISMISSED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court in this Labor Law 240(1), 241(6), 200 and negligence action, determined the defendant was not an agent for the town which had contracted for the work plaintiff was doing when injured. Defendant had contracted with the town to prepare a bid package, solicit bids, obtain grant money and review bids for the construction project:

"An agency relationship for the purposes of section 240 (1) arises only when work is delegated to a third party who obtains the authority to supervise and control the job" … . "Thus, unless a defendant has supervisory control and authority over the work being done when the plaintiff is injured, there is no statutory agency conferring liability under the Labor Law" … . Pursuant to the express terms of the contract between the Town and the nonparty contractor—i.e., plaintiff's employer—as well as the terms of the contract between the Town and defendant, defendant had no control over the means or methods of the performance of the work by the contractor, and it also had no control over safety precautions for the workers at the construction site … .

For those same reasons, it was error to deny defendant's motion with respect to the Labor Law § 241 (6) cause of action … . Defendant also established that it did not actually direct or control the work that brought about plaintiff's injuries, and plaintiff raised no issue of fact with respect thereto. Therefore, it was error to deny defendant's motion with respect to the Labor Law § 200 and common-law negligence causes of action … . Smith v MDA Consulting Engrs., PLLC, 2022 NY Slip Op 06389, Fourth Dept 11-10-22

Practice Point: In order for a party to be liable as an agent for the owner in a Labor Law action, the party must have some control over the work the injured plaintiff was engaged in. Here the defendant was in charge of bids for the town's

construction project and exercised no control over the work. The Labor Law causes of action against defendant should have been dismissed.

NOVEMBER 10, 2022

LABOR LAW-CONSTRUCTION LAW.

PLAINTIFF PULLED A LOAD OF WASTE BACKWARDS THROUGH AN ACCESS DOOR APPARENTLY EXPECTING THE LIFT TO BE POSITIONED OUTSIDE THE DOOR; THE LIFT HAD MOVED TO A DIFFERENT FLOOR AND PLAINTIFF FELL FROM THE THIRD FLOOR TO THE GROUND; THE ACCESS DOOR WAS SUPPOSED TO BE LOCKED BEFORE THE LIFT MOVED TO A DIFFERENT FLOOR; PLAINTIFF WAS ENTITLED TO SUMMARY JUDGMENT ON THE LABOR LAW 240(1) CAUSE OF ACTION BECAUSE THE ACCESS DOOR LOCK, A SAFETY DEVICE, WAS MISSING (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined plaintiff was entitled to summary judgment on his Labor Law 240(1) cause of action. Plaintiff pulled a load of waste backwards through an access door which did not have a lock and then fell from the third floor because the lift which he (apparently) assumed was positioned outside the access door had moved to a different floor. Each access door was supposed to have a lock and the lift operator was supposed to lock the door before moving to a different floor:

Plaintiff met his burden of establishing the absence of an adequate safety device that could have prevented his fall, namely, a lock on the third-floor access door … .. In opposition, defendants failed to raise a triable issue of fact whether plaintiff's own negligence was the sole proximate cause of his injuries … . Here, there is no evidence in the record that plaintiff removed the lock and was therefore the sole proximate cause of the accident … . Moreover, even assuming, arguendo, that plaintiff was negligent in walking backwards out the access door and in failing to look back prior to going through the door to ensure the lift was there, we conclude that such "actions [would] render him [merely] contributorily negligent, a defense

unavailable under [Labor Law § 240 (1)]" … . Hyde v BVSHSSF Syracuse LLC, 2022 NY Slip Op 07329, Fourth Dept 12-23-22

Practice Point: Even though plaintiff may have been contributorily negligent in not looking behind him as he pulled a load of waste through an access door, contributory negligence is not a defense to a Labor Law 240(1) cause of action.

DECEMBER 23, 2022

LABOR LAW-CONSTRUCTION LAW.

SUPREME COURT PROPERLY DISMISSED DEFENDANTS' SOLE-PROXIMATE-CAUSE AFFIRMATIVE DEFENSE IN THIS LABOR LAW 240(1) LADDER-FALL CASE; TWO JUSTICE DISSENT (FOURTH DEPT).

The Fourth Department, over a two-justice dissent, determined plaintiff was entitled to summary judgment dismissing defendants' sole-proximate-cause affirmative defense to the Labor Law 240(1) cause of action. Plaintiff used an eight-foot A-frame ladder to work on an overhead door mechanism and stood on the second to the highest step. The dissenters argued there was a question of fact whether the plaintiff's own negligence (standing on the second to the highest step) was the sole proximate cause of the fall. The majority found Supreme Court properly dismissed the sole-proximate-cause affirmative defense. Plaintiff submitted expert evidence that the eight-foot ladder was not an adequate safety device. And plaintiff's standing on the second to the highest step spoke to comparative negligence, which is not a defense to a Labor Law 240(1) cause of action. With respect to plaintiff's motion for summary judgment on liability, Supreme Court properly held there was a question of fact whether plaintiff was performing routine maintenance, which is not covered under Labor Law 240(1):

… [T]here is no evidence in the record that contradicts the opinion of plaintiff's expert that the eight-foot A-frame ladder provided to plaintiff was inadequate because it could not have been placed so as to provide proper protection to plaintiff during his work on the bearing and shaft of the car wash overhead door at the time of the accident (see generally Labor Law § 240 [1]). Plaintiff therefore established

his entitlement to judgment as a matter of law dismissing the sole proximate cause affirmative defense; any failure by plaintiff to refrain from standing on the top steps of the ladder amounts to no more than comparative negligence, which is not a defense under Labor Law § 240 (1) … . * * *

From the dissent:

Inasmuch as unnecessarily standing on the second step from the top of an A-frame ladder constitutes misuse of such a ladder, and plaintiff was depicted standing on the ladder in that manner just before the fall, we conclude that plaintiff's submissions raised an issue of fact whether it was necessary for plaintiff to be on that step in order to perform his work on the 10-foot overhead door and, if not, whether plaintiff's own actions were the sole proximate cause of the accident … . Green v Evergreen Family Ltd. Partnership, 2022 NY Slip Op 06588, Fourth Dept 11-18-22

Practice Point: Here the majority concluded the A-frame ladder was inadequate for the job and plaintiff's standing on the second to the highest step amounted to comparative negligence, which is not a defense to a Labor Law 240(1) cause of action. Two dissenters argued there was a question of fact whether standing on the second to the highest step constituted plaintiff's misuse of the ladder which was the sole proximate cause of the fall.

NOVEMBER 18, 2022

LABOR LAW-CONSTRUCTION LAW.

THE MAJORITY HELD THE INSTALLATION OF AN AIR TANK ON A FLATBED TRAILER WAS NOT A COVERED ACTIVITY UNDER LABOR LAW 240(1); THE DISSENT ARGUED THE TRAILER WAS A "STRUCTURE" WITHIN THE MEANING OF THE STATUTE (FOURTH DEPT).

The Fourth Department, over a two-justice dissent, determined plaintiff was not engaged in an activity protected by Labor Law 240(1) when he was injured. Plaintiff, a diesel technician, was injured installing an air tank on a flatbed trailer at a recycling plant. The majority concluded the plaintiff was not involved in

construction, renovation or alteration of the recycling plant. The two dissenting justices argued that the truck was a "structure" within the meaning of the Labor Law:

… [P]laintiff, a certified diesel technician, was injured while installing an air tank on a flatbed trailer on the premises of a recycling plant. Inasmuch as plaintiff was "engaged in his 'normal occupation' of repairing [vehicles] . . . , a task not a part of any construction project or any renovation or alteration to the [recycling plant] itself," he was not engaged in a protected activity within Labor Law § 240 (1) at the time of the accident … .

From the dissent:

"Labor Law § 240 (1) provides special protection to those engaged in the 'erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure' " … . "Over a century ago, the Court of Appeals made clear that the meaning of the word 'structure,' as used in the Labor Law, is not limited to houses or buildings . . . The Court stated, in pertinent part, that 'the word "structure" in its broadest sense includes any production or piece of work artificially built up or composed of parts joined together in some definite manner' " … .. … [W]e [have] held that it was error to dismiss a Labor Law § 240 (1) claim because the crane upon which the plaintiff's decedent was working fit "squarely within" the definition of a "structure" as set forth by the Court of Appeals … . We have also held that a plaintiff engaged in the conversion of a utility van into a cargo van "was engaged in a protected activity at the time of the accident" and that the van was "a structure" … . "Indeed, courts have applied the term 'structure' to several diverse items such as a utility pole with attached hardware and cables . . . , a ticket booth at a convention center . . . , a substantial free-standing Shell gasoline sign . . . , a shanty located within an industrial basement used for storing tools . . . , a power screen being assembled at a gravel pit . . . , a pumping station . . . , and a window exhibit at a home improvement show" … . Here, the flatbed trailer upon which plaintiff was working also fits "squarely within" the definition of a "structure" … . Stoneham v Joseph Barsuk, Inc., 2022 NY Slip Op 06583, Fourth Dept 11-18-22

Practice Point: Plaintiff was installing an air tank on a flatbed trailer when injured. Because the activity was not connected to a construction site, the majority concluded the accident was not covered under Labor Law 240(1). The two

dissenters argued the flatbed trailer met the definition of a "structure" within the meaning of Labor Law 240(1).

NOVEMBER 18, 2022

MEDICAID, 60-MONTH LOOKBACK, PAYMENT FOR CARE.

THE $40,000 PAID BY DECEDENT TO HER CAREGIVERS SHORTLY BEFORE DECEDENT ENTERED A NURSING HOME WAS PAYMENT FOR PAST SERVICES RENDERED PURSUANT TO A PERSONAL SERVICE AGREEMENT (PSA); IT WAS NOT AN "UNCOMPENSATED TRANSFER" SUBJECT TO THE 60-MONTH LOOKBACK FOR MEDICAID ELIGIBILITY (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the $40,000 paid to decedent's caregivers shortly before decedent entered a nursing home was pursuant to a valid personal service agreement (PSA) for past services rendered. Therefore the payment was not an "uncompensated transfer" to which the Medicaid 60-month lookback applied:

"In determining the medical assistance eligibility of an institutionalized individual, any transfer of an asset by the individual . . . for less than fair market value made within or after the look-back period shall render the individual ineligible for nursing facility services" for a certain penalty period (Social Services Law § 366 [5] [d] [3]). The look-back period is the "[60]-month period[] immediately preceding the date that an [applicant] is both institutionalized and has applied for medical assistance" … . When such a transfer has occurred, a presumption arises that the transfer "was motivated, in part if not in whole, by . . . anticipation of a future need to qualify for medical assistance," and it is the applicant's burden to establish his or her eligibility for Medicaid by rebutting the presumption … . As pertinent here, "an applicant may do so by demonstrating that he or she intended to receive fair consideration for the transfers or that the transfers were made exclusively for purposes other than qualifying for Medicaid" … .

Here, petitioner submitted documentary proof of the PSA, which was entered into in 2015, more than three years before decedent entered the nursing home. As noted

above, while the PSA contemplated monthly payments for the personal care services, it also contemplated that decedent may make payments in advance. In addition, petitioner submitted bank statements demonstrating that decedent did not have money to pay for the services until after she received cash value for the insurance policies. Petitioner also submitted a monthly calendar that documented the care provided to decedent during the relevant time period. While the calendar did not provide the number of hours spent on each task, "a daily log of hours worked and services rendered is not necessarily required" … . Matter of Boldt v New York State Off. of Temporary & Disability Assistance, 2022 NY Slip Op 06344, Fourth Dept 11-10-22

Practice Point: Here decedent entered a personal care agreement (PSA) in which she agreed to pay her caregivers $2500 per month. Shortly before decedent was admitted to a nursing home she paid $40,000 to the caregivers. It was demonstrated that the $40,000 was for past care rendered pursuant to the PSA. The $40,000 payment, therefore, was not an "uncompensated transfer" subject to the 60-month lookback for Medicaid eligibility.

NOVEMBER 10, 2022

MEDICAL MALPRACTICE, TRAFFIC ACCIDENT UNDER INFLUENCE OF PRESCRIBED DRUG.

PLAINTIFF WAS PRESCRIBED ATIVAN, WHICH CAUSES DROWSINESS, IN THE EMERGENCY ROOM, WAS DISCHARGED WHILE UNDER ITS INFLUENCE AND WAS INVOLVED IN A CAR ACCIDENT; THE MEDICAL MALPRACTICE CAUSES OF ACTION BASED ON THE ALLEGEDLY NEGLIGENT DISCHARGE AND THE ALLEGED FAILURE TO EXPLAIN THE EFFECTS OF ATIVAN BOTH SOUNDED IN MEDICAL MALPRACTICE AND PROPERLY SURVIVED SUMMARY JUDGMENT (FOURTH DEPT).

The Fourth Department determined defendants' motion for summary judgment in this medical malpractice action was properly denied. Plaintiff was treated at the emergency department of defendant hospital and prescribed Ativan, a drug which

causes drowsiness. Plaintiff was released while under the influence of the drug and had a car accident. Plaintiff alleged he was negligently discharged and was not informed of the possible effects of Ativan:

… [T]he evidence … raised issues of fact whether Iannolo [the treating physician] deviated from the standard of care by discharging plaintiff at a time when the concentration of Ativan in his system was at or near its peak and while plaintiff was experiencing the effects of the medication, including drowsiness. Those submissions also raised issues of fact whether any such deviation was a proximate cause of plaintiff's injuries … . Regarding the hospital's motion, the evidence that the hospital submitted raised issues of fact whether … a nurse employed by the hospital deviated from the standard of care and committed an act of negligence independent of Iannolo … , by failing to explain the discharge instructions to plaintiff or advise him of the possible effects of Ativan, and whether any such deviation was a proximate cause of plaintiff's injuries … .

… [T]he hospital … contends that the court erred in denying its motion with respect to the negligence cause of action against it. We agree … . "A complaint sounds in medical malpractice rather than ordinary negligence where, as here, the challenged conduct [by a nurse] 'constitutes medical treatment or bears a substantial relationship to the rendition of medical treatment by a licensed physician' to a particular patient" … . Johnson v Auburn Community Hosp., 2022 NY Slip Op 07332, Fourth Dept 12-23-22

Practice Point: Discharging a patient from the hospital emergency room while under the influence of Ativan, which causes drowsiness, may be the basis of a medical malpractice action stemming from a subsequent car accident. The failure to explain the effects of Ativan was deemed a separate cause of action sounding in medical malpractice (not ordinary negligence).

DECEMBER 23, 2022

NEGLIGENCE, LANDLORD-TENANT.

THE LEASE REQUIRED THE OUT-OF-POSSESSION LANDLORD TO REPAIR STRUCTURAL DEFECTS IN THE ROOF AND WALLS; THERE WAS A QUESTION OF FACT WHETHER WATER ENTERED THE PREMISES THROUGH DEFECTS IN THE ROOF AND WALLS CAUSING THE ALLEGED DANGEROUS CONDITION, A CRACK IN THE FLOOR WHICH ALLEGEDLY CONTRIBUTED TO PLAINTIFF'S INJURY (FOURTH DEPT).

The Fourth Department, over a two-justice dissent, determined the out-of-possession landlord was required under the terms of the lease to repair structural defects in the roof and walls and there was a question of fact whether such defects caused a crack in the floor. The cracked floor was alleged to constitute a dangerous condition which cause a load of tines in a payloader to fall and injure plaintiff:

Plaintiff commenced this negligence action seeking damages for personal injuries he sustained when tires that were being moved by a forklift struck him when they fell from the forklift after it drove over a crack in the concrete floor. Insofar as relevant to this appeal, the complaint asserted a negligence cause of action against Estes Express Lines (defendant), which owned the premises on which plaintiff was injured, alleging that defendant negligently permitted a dangerous condition to exist on the premises that contributed to his injury, i.e., the crack in the concrete floor. * * *

… [P]laintiff raised a triable issue of fact whether defendant was liable based on its contractual obligation to maintain the structural integrity of the roof and walls. … [T]he court …. properly denied defendant's motion for summary judgment. … [P]laintiff submitted an affidavit from one of plaintiff's former colleagues and from a code enforcement officer, who each averred that the damage to the floor may have been caused by water damage or water infiltration due to poor maintenance of the roof and walls. Plaintiff's former colleague further averred that defendant had conducted annual inspections of the property and had previously repaired damage to the floor of the premises. Thus, there is a question of fact concerning defendant's liability for defects in the condition of the floor … . Weaver v Deronde Tire Supply, Inc., 2022 NY Slip Op 07328, Fourth Dept 12-23-22

Practice Point: Whether an out-of-possession landlord is liable for injury caused by dangerous conditions on the property can be determined by the terms of the lease. Here the lease required the landlord to repair structural defects in the roof and walls. Plaintiff alleged water entered the premises through those structural defects causing a crack in the floor which contributed to his injury. Plaintiff's allegations survived summary judgment.

DECEMBER 23, 2022

NEGLIGENCE, MUNICIPAL LAW, BICYCLE ACCIDENT.

PLAINTIFF BICYCLIST ALLEGED HE STRUCK A FALLEN SIGNPOST WHICH WAS OBSTRUCTING THE SIDEWALK; THE TOWN DID NOT DEMONSTRATE IT DID NOT HAVE NOTICE OF THE CONDITION; PLAINTIFF DEMONSTRATED HE WAS ENTITLED TO DISCOVERY OF TOWN DOCUMENTS RELATED TO THE REPAIR OF TOWN SIGNS (FOURTH DEPT).

The Fourth Department, reversing (modifying) Supreme Court, determined (1) the town did not demonstrate it did not have written notice of the fallen signpost on the sidewalk (which plaintiff bicyclist allegedly struck), and (2) plaintiff demonstrated the town should comply with discovery demands for documents relating to the existence and repair of signs by the town:

The Town had the initial burden on the motion of establishing that no prior written notice of the alleged condition was given to either the Town Clerk or the Town Superintendent of Highways … . In support of its motion, the Town submitted, inter alia, the deposition testimony of an administrative aide in the Town Highway Department and the Town's sign shop fabricator, each of whom testified that he did not learn of the fallen sign until he received the police report for the incident. However, neither employee testified that he searched the Highway Department's or the Town Clerk's records. Thus, the Town failed to establish as a matter of law that

neither the Town Clerk nor the Town Superintendent of Highways received prior written notice of the alleged condition … . * * *

… [W]e conclude that plaintiff met his burden of establishing that the discovery documents were material and necessary to the prosecution of the action (see generally CPLR 3101 [a]). In opposing the motion, the Town failed to establish that the discovery requests were unduly burdensome … . Garcia v Town of Tonawanda, 2022 NY Slip Op 06584, Fourth Dept 11-18-22

Practice Point: Because the town did not demonstrate that it searched the highway department and town clerk's records it did not demonstrate it had not received notice of the fallen signpost plaintiff bicyclist allegedly struck. Plaintiff was entitled to discovery of town documents relating to the repair of signs.

NOVEMBER 18, 2022

NEGLIGENCE, RELEASES, SNOWMOBILE ACCIDENT.

HERE THE LANGUAGE IN THE RELEASE WAS CLEAR AND UNAMBIGUOUS AND NONE OF THE TRADITIONAL FACTORS WHICH INVALIDATE A CONTRACT WERE PRESENT; DEFENDANT'S MOTION TO DISMISS THE COMPLAINT SHOULD HAVE BEEN GRANTED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the release signed by plaintiff in this snowmobile accident case was enforceable and the complaint should have been dismissed. Plaintiff was a passenger on the snowmobile and she and the driver were represented by the same law firm. The settlement was for $25,000. Plaintiff signed the release but allegedly did not receive any compensation. The decision is comprehensive and well worth consulting; it addresses substantive issues not summarized here:

… [D]efendant met his initial burden of establishing that he was released from any claims by submitting the release executed by plaintiff … . As defendant contends, "the language of [the] release is clear and unambiguous" and plaintiff's action against defendant to recover for personal injuries is barred … . * * *

The release in this case contains preliminary broad language releasing defendant from "any and all claims, demands, damages, costs, expenses, loss of services, actions, and causes of action whatsoever . . . arising from any act or occurrence up to the present time and particularly on account of BODILY INJURY, loss or damages of any kind" that plaintiff sustained or may sustain as a consequence of the accident, which is later narrowed by the language stating that the "agreement only releases the parties named above with respect to BODILY INJURY damages arising out of the accident" and that the "agreement does not waive any other party or parties from making any other claims that are not discharged or settled by this release" … . It is well established that where the language of a release is "limited to only particular claims, demands, or obligations, the instrument will be operative as to those matters alone, and will not release other claims, demands or obligations" … .

Even so, the release of defendant for any "bodily injury damages" arising from the accident clearly and unambiguously encompasses plaintiff's action against defendant to recover for personal injuries sustained in the accident … . Putnam v Kibler, 2022 NY Slip Op 06574, Fourth Dept 11-18-22

Practice Point: Absent any of the traditional factors which will invalidate a contract, the unambiguous language of a release will be enforced to prohibit any further litigation in the matter.

NOVEMBER 18, 2022

NEGLIGENCE, SLIP AND FALL.

THE DEFENDANT CONSTRUCTION COMPANY DID NOT DEMONSTRATE IT DID NOT HAVE CONSTRUCTIVE KNOWLEDGE OF THE SIGN ON THE SIDEWALK OVER WHICH PLAINTIFF ALLEGEDLY TRIPPED AND FELL AND DID NOT DEMONSTRATE IT WAS NOT RESPONSIBLE FOR THE PRESENCE OF THE SIGN ON THE SIDEWALK (FOURTH DEPT).

The Fourth Department, reversing (modifying) Supreme Court, determined defendant construction company (Pinto) did not demonstrate that it did not have constructive notice of the condition alleged to have caused plaintiff's slip and fall (a construction sign on the sidewalk) and that it did not create the condition:

Pinto failed to meet its initial burden on its cross motion with respect to constructive notice because its submissions "failed to establish as a matter of law that the [dangerous] condition [was] not visible and apparent or that [it] had not existed for a sufficient length of time before the accident to permit [Pinto] or [its] employees to discover and remedy [it]" … . Testimony from Pinto's superintendent that Pinto had a general policy of taking down and storing its construction signs at the end of each workday was insufficient to establish that Pinto lacked constructive notice of the dangerous condition because Pinto failed to establish that it had complied with that general policy prior to the occurrence of the incident in question … .

Pinto also failed to establish as a matter of law that it did not create the allegedly dangerous condition because its own submissions raise triable issues of fact with respect to that issue … . There is no dispute that Pinto's submissions established that the sign plaintiff tripped over belonged to Pinto. Although the deposition testimony from Pinto's superintendent established that, at the time of the accident, Pinto had not been present at the work site for about a week, he did not know how the sign ended up on the ground or how long it had been there, and he only speculated that the sign may have been used by another contractor who failed to properly put it away. Brioso v City of Buffalo, 2022 NY Slip Op 06380, Fourth Dept 11-10-22

Practice Point: Defendant construction company did not demonstrate it did not have constructive knowledge of and was not responsible for the presence of the construction sign on the sidewalk over which plaintiff allegedly tripped and fell.

NOVEMBER 10, 2022

NEGLIGENCE, TRAFFIC ACCIDENTS, PUNITIVE DAMAGES, VICARIOUS LIABILITY.

THE EMERGENCY DOCTRINE IS NOT APPLICABLE IN THIS TRAFFIC ACCIDENT CASE BECAUSE THE EMERGENCY (A WATER BOTTLE UNDER THE ACCELERATOR) WAS OF THE DEFENDANT'S OWN MAKING; THE GROSS NEGLIGENCE CAUSE OF ACTION AND THE DEMAND FOR PUNITIVE DAMAGES SURVIVED SUMMARY JUDGMENT; PUNITIVE DAMAGES ARE NOT AVAILABLE AGAINST DEFENDANT DRIVER'S EMPLOYER (FOURTH DEPT).

The Fourth Department determined: (1) the emergency doctrine did not apply in this traffic accident case because the defendant driver caused the water bottle to fall from the cup holder where it lodged under the accelerator; (2) the cause of action alleging gross negligence and seeking punitive damages properly survived summary judgment; and (3) punitive damages are not available against defendant's employer [Silvarole] pursuant to the respondeat superior theory:

… "[T]he emergency doctrine is only applicable when a party is confronted by [a] sudden, unforeseeable occurrence not of their own making" … . The "emergency doctrine has no application where . . . the party seeking to invoke it has created or contributed to the emergency" … . … [T]he record … establishes that Davis [defendant driver] was the only person in the vehicle, and defendants did not submit evidence that any other person was responsible for the alleged emergency … . Thus, we conclude that defendants failed to demonstrate that the emergency encountered was not of Davis's own making, "i.e., that [Davis] did not create or contribute to it" … . * * *

Punitive damages may be awarded "based on intentional actions or actions which, while not intentional, amount to gross negligence, recklessness, or wantonness . . . or conscious disregard of the rights of others or for conduct so reckless as to amount to such disregard" … . * * * Defendants … failed to meet their initial burden of establishing that Davis's conduct, specifically his decision to look for and retrieve the obstacle while the tractor-trailer was in motion—despite the fact that his brakes were in working order—did not "amount to gross negligence, recklessness, or wantonness . . . or conscious disregard of the rights of others" … . …

Plaintiff seeks to hold Silvarole liable for punitive damages under a theory of vicarious liability. However, punitive damages are unavailable under such a theory absent limited circumstances not present here … . Miller v Silvarole Trucking Inc., 2022 NY Slip Op 07348, Fourth Dept 12-23-22

Practice Point: In a traffic accident case, the emergency doctrine does not apply where the emergency is of the defendant's own making, here a water bottle under the accelerator.

Practice Point: The gross negligence cause of action and demand for punitive damages in this traffic accident case survived summary judgment.

Practice Point: Punitive damages are not available against the driver's employer under a vicarious liability theory.

DECEMBER 23, 2022

NEGLIGENCE, EMERGENCY VEHICLES, RECKLESS DISREGARD STANDARD.

ALTHOUGH DEFENDANT WAS A VOLUNTEER AMBULANCE DRIVER AND WAS RESPONDING TO A CALL AT THE TIME OF THE TRAFFIC ACCIDENT, DEFENDANT WAS DRIVING HIS OWN PERSONAL PICKUP TRUCK, WHICH WAS NOT AN AUTHORIZED EMERGENCY VEHICLE; THEREFORE THE "RECKLESS DISREGARD" STANDARD OF CARE DID NOT APPLY TO DEFENDANT (FOURTH DEPT).

The Fourth Department, reversing (modifying) Supreme Court, determined that, although defendant driver was a volunteer ambulance driver responding to a call at the time of the accident, defendant was driving his own personal pickup truck which did not qualify as an emergency vehicle. Therefore the ordinary negligence, not the "reckless disregard," standard applied to the defendant:

We agree with plaintiff, however, that he met his initial burden on his cross motion of establishing that defendant was not operating an "authorized emergency vehicle" at the time of the accident and thus that the reckless disregard standard of care does not apply. " '[T]he reckless disregard standard of care in Vehicle and Traffic Law § 1104 (e) . . . applies when a driver of an authorized emergency vehicle involved in an emergency operation engages in the specific conduct exempted from the rules of the road by Vehicle and Traffic Law § 1104 (b)' " … . …

… [A]t the time of the accident, defendant was driving his personally-owned vehicle, which was not affiliated with Eden Emergency … . The vehicle also did not comply with Vehicle and Traffic Law § 1104 (c), which requires authorized emergency vehicles to be equipped with "at least one red light." Moreover, at the time of the accident, defendant's vehicle was not being "operated by" Eden Emergency because, while defendant was a volunteer with Eden Emergency, he was not on call at the time of the incident … . Further, defendant did not qualify as an ambulance service. Defendant was not an "individual . . . engaged in providing emergency medical care and the transportation of sick or injured persons" (Public Health Law § 3001 [2]). We also note that defendant was not an emergency medical technician … . Spence v Kitchens, 2022 NY Slip Op 06355, Fourth Dept 11-10-22

Practice Point: Here defendant was a volunteer ambulance driver who was responding to a call when the traffic accident occurred. Defendant was driving his own pickup truck, was not "on call" for the ambulance service, was not engaged in emergency care and was not a medical technician. Defendant's truck was not an "authorized emergency vehicle." Therefore the "reckless disregard" standard of care for emergency vehicles did not apply.

NOVEMBER 10, 2022

NEGLIGENCE, MEDICAL MALPRACTICE, PUBLIC HEALTH LAW, COVID-19 TREATMENT.

PURSUANT TO THE EMERGENCY OR DISASTER TREATMENT PROTECTION ACT (EDTPA), HEALTH CARE WORKERS WHO TREATED COVID-19 PATIENTS WERE IMMUNE FROM CIVIL LIABILITY; THE EDTPA HAS SINCE BEEN REPEALED; THE REPEAL SHOULD NOT BE APPLIED RETROACTIVELY; THE CAUSES OF ACTION ALLEGING IMPROPER TREATMENT FOR COVID-19 DURING THE TIME THE EDTPA WAS IN EFFECT MUST BE DISMISSED (FOURTH DEPT).

The Fourth Department determined the repeal of the COVID-19-related Emergency or Disaster Treatment Protection Act (EDTPA) (Public Health Law sections 3080-3082) should not be applied retroactively. Therefore, the immunity from civil liability provided by the EDTPA for health care workers who treated COVID-19 patients was in effect when the causes of action in the complaint arose. The complaint, which alleged plaintiff nursing-home resident was not properly tested and treated for COVID-19, was dismissed:

We … conclude that applying the repeal of EDTPA to the allegations in the complaint would have retroactive effect "by impairing rights [defendants] possessed in the past, increasing their liability for past conduct and imposing new duties with respect to transactions already completed" … . "Because the [repeal of EDTPA], if applied to past conduct, would impact substantive rights and have

retroactive effect, the presumption against retroactivity is triggered" … . Ruth v Elderwood At Amherst, 2022 NY Slip Op 05637, Fourth Dept 10-7-22

Practice Point: The immunity from civil liability provided to health care workers who treated COVID-19 patients while the Emergency or Disaster Treatment Protection Act (EDTPA) was in effect remains despite the subsequent repeal of the EDTPA. In other words, the repeal of the EDTPA is not given retroactive effect. The decision includes an exhaustive discussion and analysis of the retroactive application of statutes.

OCTOBER 7, 2022

NEGLIGENCE, TRAFFIC ACCIDENTS, RECKLESS DISREGARD STANDARD.

THERE WERE QUESTIONS OF FACT WHETHER THE SNOW PLOW WAS "ENGAGED IN HIGHWAY WORK" AT THE TIME OF THE TRAFFIC ACCIDENT; THEREFORE THERE WERE QUESTIONS OF FACT CONCERNING WHETHER THE HIGHER "RECKLESS DISREGARD" STANDARD OF CARE APPLIED; THE STATE'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (FOURTH DEPT).

The Fourth Department, reversing the Court of Claims, determined the state's motion for summary judgment in this snow-plow traffic-accident case should not have been granted because there were questions of fact concerning whether the higher "reckless disregard" standard of care for snow plows was applicable. Although the "reckless disregard" standard may still apply where, as here, the snow plow is raised, the snow plow must be salting the road or otherwise "working its run" at the time of the accident:

Vehicle and Traffic Law § 1103 (b) "exempts from the rules of the road all vehicles, including [snowplows], which are 'actually engaged in work on a highway' . . . , and imposes on such vehicles a recklessness standard of care" … . The exemption "applies only when such work is in fact being performed at the time of the accident" … , which includes a snowplow engaged in plowing or salting a road … . Although the exemption does "not apply if the snowplow . . . [is]

merely traveling from one route to another route" … , a snowplow may be "engaged in work even if the plow blade [is] up at the time of the accident and no salting [is] occurring" when the snowplow is nevertheless "working [its] 'run' or 'beat' at the time of the accident" … .

… [W]e conclude that the State failed to establish as a matter of law that the snowplow was "actually engaged in work on a highway" at the time of the accident (Vehicle and Traffic Law § 1103 [b] …). Lynch-Miller v State of New York, 2022 NY Slip Op 05640, Fourth Dept 10-7-22

Practice Point: Here the snow plow was raised when the traffic accident occurred. There were questions of fact about whether the snow plow was salting the road or otherwise working its run when at the time. Therefore, there were questions of fact about whether the higher "reckless disregard" standard of care for vehicles engaged in highway work applied.

OCTOBER 7, 2022

PRIMA FACIE TORT.

THE COMPLAINT DID NOT STATE A CAUSE OF ACTION FOR PRIMA FACIE TORT BECAUSE IT DID NOT ALLEGE THE SOLE MOTIVATION OF DEFENDANTS WAS DISINETERESTED MALEVOLENCE (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the complaint did not state a cause of action for prima facie tort:

"The requisite elements of a cause of action for prima facie tort are (1) the intentional infliction of harm, (2) which results in special damages, (3) without any excuse or justification, (4) by an act or series of acts which would otherwise be lawful" … .. A plaintiff alleging prima facie tort must therefore allege that the defendant's "sole motivation was 'disinterested malevolence' " … . … Although the complaint alleges that defendants " 'acted maliciously' and 'with disinterested malice,' " … , it does not allege that defendants' "sole motivation was 'disinterested malevolence' " … . "There can be no recovery [for prima facie tort] unless a disinterested malevolence to injure [a] plaintiff constitutes the sole

motivation for [the] defendant[‘s] otherwise lawful act” … . Spine Surgery of Buffalo Niagara, LLC v Geico Cas. Co., 2022 NY Slip Op 07343, Fourth Dept 12-23-22

Practice Point: The criteria for prima facie tort include an allegation that the “sole motivation” for a defendant’s conduct was “disinterested malevolence.”

DECEMBER 23, 2022

REAL PROPERTY LAW, EASEMENTS.

AN UNRESTRICTED EASEMENT ALLOWING ACCESS TO A LAKE ENCOMPASSES THE RIGHT TO INSTALL, MAINTAIN AND USE A DOCK (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined that an unrestricted easement which allows access to a lake encompasses the right to installation, maintenance and use of a dock:

… [T]he relevant deeds … established that there were no restrictions on the easement and that the purpose of the right-of-way was to provide ingress to and egress from the lake … .. Given the purpose of the easement and the absence of restrictions, “any reasonable lawful use [by plaintiffs] within the contemplation of the grant is permissible” … , and the installation, maintenance, and use of a dock at the end of a right-of-way providing access to a lake is a “reasonable use incidental to the purpose of the easement” … . Mosley v Parnell, 2022 NY Slip Op 07342, Fourth Dept 12-23-22

Practice Point: An unrestricted easement allowing access to a lake encompasses the right to install, maintain and use a dock.

DECEMBER 23, 2022

REAL PROPERTY LAW, LICENSES.

ALTHOUGH THE AGREEMENT BETWEEN PLAINTIFF COUNTRY CLUB AND DEFENDANT FOR THE CONSTRUCTION, MAINTENANCE AND USE OF A BOAT SLIP WAS A LICENSE, NOT A LEASE, THE LICENSE, BY THE TERMS OF THE AGREEMENT, WAS NOT TERMINABLE AT WILL BY THE COUNTRY CLUB; TWO-JUSTICE DISSENT (FOURTH DEPT).

The Fourth Department, over a two-justice dissent, determined the agreement between plaintiff country club and defendant concerning the construction, maintenance and use of a boat slip was a license, not a lease, but, under the terms of the agreement, the license was not terminable at will by the country club:

… [T]he terms of the agreement unambiguously state that defendant is required to pay the annual maintenance fee and to comply with plaintiff's rules and policies, thereby establishing through implication that plaintiff may terminate the license only when defendant fails to comply with those specified terms … . Plaintiff's interpretation of the agreement as permitting plaintiff to terminate the license at will, despite the aforementioned provisions governing defendant's obligations, renders those specific provisions nugatory, contrary to the general approach to interpreting contracts …

… [T]he agreement expressly permits defendant to terminate it and receive a return of the monies contributed pursuant to the payment agreement, less any monies owed to plaintiff. We agree with defendant that the express inclusion of a right of termination for her compels the conclusion that the exclusion of any corresponding express right for plaintiff to terminate the agreement was intentional … . … [The] structure of the agreement establishes that the license is not terminable at will by plaintiff. Skaneateles Country Club v Cambs, 2022 NY Slip Op 07315, Fourth Dept 12-23-22

Practice Point: Licenses for the use of real property, here the construction, maintenance and use of a boat slip, are not automatically terminable at will. Here the terms of the underlying agreement were interpreted to mean the license was terminable only if defendant breached the agreement.

DECEMBER 23, 2022