NEW YORK APPELLATE DIGEST, LLC

Weekly Reversal Report
January 29 – February 2, 2024

An Organized Compilation of Summaries of Selected Decisions, Mostly Reversals, Released by Our New York Appellate Court January 29 – February 2, 2024, and Posted on the New York Appellate Digest Website on Monday, February 5, 2024. 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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CIVIL PROCEDURE, EVIDENCE, FORECLOSURE, JUDGES.

SUCCESSIVE SUMMARY JUDGMENT MOTIONS WHICH ARE NOT BASED ON INFORMATION WHICH WAS NOT AVAILABLE AT THE TIME OF THE PRIOR MOTIONS SHOULD NOT BE ENTERTAINED BY THE COURT (SECOND DEPT).

The Second Department, reversing Supreme Court in this foreclosure action, held that the bank violated the violated the prohibition of successive summary judgment motions:

"Generally, successive motions for summary judgment should not be entertained, absent a showing of newly discovered evidence or other sufficient cause" … . "Evidence is not newly discovered simply because it was not submitted on the previous motion" … . "Rather, the evidence that was not submitted in support of the previous summary judgment motion must be used to establish facts that were not available to the party at the time it made its initial motion for summary judgment and which could not have been established through alternative evidentiary means" … . "Successive motions for summary judgment should not be made based upon facts or arguments which could have been submitted on the original motion for summary judgment" … .

Here, the plaintiff failed to submit any newly discovered evidence on the subject motion that could not have been submitted on either of its prior two motions, and did not demonstrate sufficient cause why the third motion should have been entertained … . Thus, the Supreme Court should have denied those branches of the plaintiff's motion which were for summary judgment on the complaint … . U.S. Bank N.A. v Kelly, 2024 NY Slip Op 00448, First Dept 1-31-24

Practice Point: Unless based on new evidence not available for a prior motion, successive summary judgment motions should not be entertained by the court.

JANUARY 31, 2024

CRIMINAL LAW, EVIDENCE, JUDGES, ATTORNEYS.

THE DEFENSE CHALLENGE TO A JUROR WHO EXPRESSED SERIOUS DOUBTS ABOUT BEING ABLE SERVE SHOULD HAVE BEEN GRANTED, DESPITE HER ULTIMATE STATEMENT SHE COULD DO WHAT IS NECESSARY TO SERVE; THE NEW CPL ARTICLE 245 DISCOVERY STATUTES IMPOSE NEW BURDENS ON THE PEOPLE ENCOMPASSING ROSARIO AND BRADY MATERIAL AND EXTENDING TO DOCUMENTS WHICH ARE NOT IN THE PEOPLE'S POSSESSION, EVEN WHERE THE DEFENSE CAN ACCESS THOSE DOCUMENTS (FOURTH DEPT).

The Fourth Department, reversing defendant's conviction and ordering a new trial, offered important, substantial discussions of (1) how to handle a juror who expresses doubt about the ability to serve on the jury, and (2) the new, much broader and far-reaching disclosure requirements imposed upon the People by the CPL Article 245. The juror expressed doubt about her ability to serve because of her family obligations, her indecisiveness and her inability to follow the orders and instructions of the court. Ultimately when asked if she thought she could do what is necessary to be a juror, she said "yes." The Fourth Department held the defense challenge to the juror should not have been denied. On the CPL Article 245 issue, the Fourth Department explained that the statute goes far beyond the old, pre-statute, criteria for turning over Rosario and Brady material, to include collecting and turning over discovery from agencies outside the prosecutor's office, even if the defendant could gain access to those that discovery him or herself: The Fourth Department held the prosecutor committed numerous violations of CPL Article 245 and left it to the judge in the next trial to impose sanctions:

… [T]he prospective juror never stated, unequivocally or otherwise, that she would follow the court's instructions and apply the law to the facts. Nor did she state that her child care concerns had been alleviated such that she could devote her undivided attention to the trial.

Just as a "general statement of impartiality that does not explicitly address the specific cause of the preexisting bias is not sufficient" … , a general statement from a prospective juror that they can do what it takes to be a juror is not sufficient to rehabilitate the prospective juror where, as here, the prospective juror had previously offered specific reasons for being unable to serve impartially. * * *

Although transcripts that are not in the People's possession and control are not subject to Brady and Rosario disclosure requirements … , that fact is of no moment for purposes of CPL 245.20. Even where documents are "beyond the prosecutor's control under Rosario and constructive possession under CPL 245.20 (2), the presumption of openness, … the duty to maintain the flow of information … , the continuing duty to disclose … , and, perhaps most importantly, the goals of article 245 require that when the prosecutor becomes aware [after making the requisite reasonable inquiries] that an agency outside their control holds information that relates to the subject matter of the case, best practice dictates that the People take steps . . . to obtain those records notwithstanding the fact [that] the information may be available to the defendant by equivalent process" … . People v Heverly, 2024 NY Slip Op 00524, Fourth Dept 2-2-24

Practice Point; A juror who expresses serious doubts about being able to serve, doubts which are not addressed by further questioning, should be excluded, even if the juror ultimately states he or she can do what is necessary to serve.

Practice Point: CPL Article 245 has drastically expanded the burden on the People to timely turn over discovery, including Rosario and Brady material and documents which are not in the People's possession, even where the defense also has access to those documents. The is an important discussion of the new criminal discovery rules which should be required reading for defense counsel, prosecutors and judges.

FEBRUARY 2, 2024

CRIMINAL LAW, EVIDENCE.

AN OFFICER'S OBSERVATION OF DEFENDANT'S CAR FOLLOWING ANOTHER CAR TOO CLOSELY (A TRAFFIC INFRACTION) PROVIDED PROBABLE CAUSE FOR A TRAFFIC STOP, EVEN IF THERE WERE OTHER MOTIVATIONS FOR THE STOP (FOURTH DEPT).

The Fourth Department, reversing County Court, determined defendant's motion to suppress in this traffic stop case should not have been granted. The traffic stop was based upon the deputy sheriff's observation of defendant's car less than one car length from the car in front while both cars were going 65 mph, which constitutes a traffic infraction (following too closely). The Fourth Department noted that a

traffic infraction provides probable cause for traffic stop, even if the officer has another motive for the stop (apparently the case here):

The deputy, having personally observed defendant violate Vehicle and Traffic Law § 1129 (a), thus had probable cause to stop defendant's vehicle … .

… [T]o the extent the court's decision also found the stop unlawful on the basis that it was pretextual, that was error. It is well settled that " 'where a police officer has probable cause to believe that the driver of an automobile has committed a traffic violation, a stop does not violate [the state or federal constitutions, and] . . . neither the primary motivation of the officer nor a determination of what a reasonable traffic officer would have done under the circumstances is relevant' " … . In light of the deputy having personally observed defendant commit a traffic violation, the stop was properly based upon probable cause, and the deputy's other motivations in stopping the vehicle, if any, were irrelevant to determining whether the stop was lawful … . People v Williams, 2024 NY Slip Op 00581, Fourth Dept 2-2-24

Practice Point: If a police officer observes a driver commit a traffic infraction (here following too closely), the officer has probable cause to stop the car, even if the officer has other motivations for the stop.

FEBRUARY 2, 2024

CRIMINAL LAW, EVIDENCE.

DEFENDANT'S INNOCENT TEMPORARY POSSESSION OF A WEAPON WAS THE RESULT OF HIS DISARMING A MAN WHO WAS ASSAULTING THE MAN'S WIFE; THE POSSESSION-OF-A-WEAPON CONVICTION REVERSED (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Mendez, over a two-justice dissenting opinion, determined defendant's temporary possession of a weapon was not "criminal." Defendant took the weapon from his friend, Moscoso, who was assaulting his (Moscoso's) wife in an effort to protect her:

… [T]he evidence established that defendant's possession of the weapon after disarming Moscoso was incidental, temporary, and lawful, and that he did not use the weapon in a dangerous manner. The trial court instructed the jury on

"temporary and lawful possession of a weapon" by giving the charge as it appears in the Criminal Jury Instructions … which states in relevant part:

"A person has innocent possession of a weapon when that person comes into possession of the weapon in an excusable manner, and maintains possession, or intends to maintain possession, of the weapon only long enough to dispose of it safely."

The charge does not define "safely." Instead, it provides a list of non-dispositive factors for the jury to consider — essentially an "amalgam of elements" — with only some relating to how the defendant disposed of the weapon, suggesting that trial courts should expand on or alter the charge where necessary to fit the facts of the case … . People v Ramirez, 2024 NY Slip Op 00390, First Dept 1-30-24

Practice Point: This case has everything you could ever need to know about innocent temporary possession of a weapon.

JANUARY 30, 2024

CRIMINAL LAW, JUDGES, EVIDENCE.

THE JUDGE'S FAILURE TO READ THE NOTE FROM THE JURY VERBATIM WAS A MODE OF PROCEEDINGS ERROR REQUIRING REVERSAL OF DEFENDANT'S MURDER CONVICTION (FOURTH DEPT).

The Fourth Department, reversing defendant's murder conviction, determined the judge committed a mode of proceedings error by paraphrasing the note from the jury instead of reading it verbatim:

The jury note … stated … "[w]e, the Jury, request: to hear the read-back of [a restaurant worker's] cross-examination where she is asked how many times she had seen the defendant at the restaurant. She indicates that she had seen him 2 times while she was working at the counter, and multiple times while she was not at the counter but through the security camera play-back. We wish to hear this portion read back. We also request to hear the portion of the cross-examination where she is asked and answers when she identified [a shooter shown in the surveillance video] as the defendant to the police" … . The court did not read the note aloud verbatim and the record does not reflect that the court showed the note to the parties. Rather, the record reflects that the court addressed the note before

counsel and the jury by stating, "the readback that you have requested of [the restaurant worker's] cross-examination where she is asked how many times she had seen the defendant at the restaurant will now be read back for you along with the second portion of that which reads, 'We also request to hear that portion of the cross-examination where she is asked and answers when she identified [the shooter] as the defendant to the police.' We'll read both those portions." The court failed to read the second and third sentences contained within the jury note. We conclude that by improperly paraphrasing the jury note, the court failed to give meaningful notice of the note … . People v Crawford, 2024 NY Slip Op 00528, Fourth Dept 2-2-24

Practice Point: Here the judge's failure to read the note from the jury verbatim was deemed a mode of proceedings error requiring reversal of a murder conviction.

FEBRUARY 2, 2024

FAMILY LAW, CIVIL PROCEDURE.

A HABEAS CORPUS PETITION WAS AN AVAILABLE METHOD FOR MOTHER TO SEEK CUSTODY DURING FAMILY COURT'S COVID MORATORIUM ON NONESSENTIAL MATTERS; THE PETITION PROVIDED FAMILY COURT WITH JURISDICTION WHICH WAS SUBSEQUENTLY LOST BECAUSE THE CHILDREN WERE TAKEN OUT OF STATE; FAMILY COURT SHOULD HAVE CONVERTED THE HABEAS PETITION TO A CUSTODY PROCEEDING PURSUANT TO CPLR 103 (C) (FIRST DEPT).

The First Department, reversing Family Court, determined that the habeas corpus petition filed by mother during the COVID moratorium on nonessential matters provided Family Court with jurisdiction over mother's custody matter. Because the children had been out state for more than six months when mother made a subsequent custody application, Family Court did not have jurisdiction over them. Family Court should have converted the habeas corpus petition to a custody proceeding:

Family Court had jurisdiction over the parties to decide the mother's custody petition pursuant to article 6 of the Family Court Act and, upon that basis and the

unique circumstances presented in this case, should have converted the action from a writ of habeas corpus to a custody proceeding pursuant to CPLR 103(c) … .

The mother could not have even filed a custody petition in 2020 as a result of the Family Court's Covid-19 moratorium on all nonessential matters but petitioning for a writ of habeas corpus was an available option to seek the return of the children to New York at the time. By the time the restriction was lifted, the children had already been out of state for more than six months, and Family Court had no jurisdiction over them which resulted in dismissal of the mother's subsequently-filed custody application. * * * Although the mother was initially able to serve the father with the writ, her subsequent attempts at serving him were unsuccessful. Matter of Celinette H.H. v Michelle R., 2024 NY Slip Op 00456, First Dept 2-1-24

Practice Point; A habeas corpus petition was an appropriate vehicle for seeking custody during the Family Court COVID moratorium on nonessential matters.

FEBRUARY 1, 2024

FAMILY LAW, CRIMINAL LAW.

ALLEGATIONS THAT RESPONDENT INSTALLED SOFTWARE ON PETITIONER'S COMPUTER ALLOWING RESPONDENT TO CONTROL THE COMPUTER REMOTELY, AND ALLEGATIONS RESPONDENT MADE PHONE CALLS TO PETITIONER INTENDED TO BE THREATENING, SUFFICIENTLY ALLEGED THE FAMILY OFFENSES OF HARASSMENT AND STALKING (FOURTH DEPT).

The Fourth Department, reversing Family Court, determined the petition sufficiently alleged harassment and stalking family offeses based upon allegations respondent, petitioner's estranged husband, installed software on petitioner's computer allowing him to control the computer remotely, and made phone calls to petitioner intended to be threatening:

… [P]etitioner alleged that respondent installed spyware on her Apple laptop computer and that petitioner first noticed in mid-April 2021 that her username had been changed to "Creep" and that all documents related to the divorce proceedings between the parties had been deleted. Petitioner further alleged that, after taking

the laptop to a computer store to have the laptop reset, she noticed about a week later that the laptop began showing the matrimonial files, which then disappeared again. Petitioner alleged that respondent was again controlling her laptop remotely. Petitioner also alleged a series of other related incidents. For example, she noticed in late April 2021 that her iPhone password had changed; she received a "spoofed" text message in early May 2021 and she discovered about a day later that respondent had accessed her Dropbox account; and she received another alarming or annoying text message in mid-May 2021 that referred to respondent's pet name for her. Petitioner thus alleged more than an isolated incident and, upon " '[l]iberally construing the allegations of the [second] family offense petition and giving it the benefit of every possible favorable inference,' " we conclude that the second petition alleges acts that, if committed by respondent, would constitute the family offense of harassment in the second degree … . Matter of Dhir v Winslow, 2024 NY Slip Op 00531, Fourth Dept 2-2-24

Practice Point: Remotely controlling petitioner's computer and making phone calls intended to be threatening may constitute the family offenses of harassment and stalking.

FEBRUARY 2, 2024

FAMILY LAW, JUDGES, CONSTITUTIONAL LAW.

THE OBVIOUS BIAS OF THE JUDGE IN THIS TERMINATION OF PARENTAL RIGHTS PROCEEDING DEPRIVED MOTHER OF HER RIGHT TO DUE PROCESS OF LAW (FOURTH DEPT).

The Fourth Department, reversing Family Court in this termination of parental rights proceeding, determined the bias of the judge deprived mother of due process of law. In another decision issued on February 2, 2024, the Fourth Department criticized the same Family Court judge for abandoning her judicial role and acting as an advocate in a child placement proceeding (Matter of Zyion B …, 2024 NY Slip OP 00550):

… [T]he record demonstrates that Family Court "had a predetermined outcome of the case in mind during the hearing" … . During a break in the hearing testimony, a discussion occurred on the record with regard to a voluntary surrender. When the mother changed her mind and stated that she would not give up her child, the court

responded, "Then I'm going to do it." At that point, the only evidence that had been presented was the direct testimony of one caseworker. The court's comments, in addition to expressing a preconceived opinion of the case, amounted to a threat that, should the mother continue with the fact-finding hearing, the court would terminate her parental rights … . Those comments were impermissibly coercive (see generally Social Services Law § 383-c [6] [d]). That the court made good on its promise to terminate the mother's parental rights cannot be tolerated.

The record further demonstrates that the Family Court Judge was annoyed with the mother's refusal to surrender her parental rights to the child. We are compelled to remind the Family Court Judge "that even difficult or obstreperous litigants are entitled to 'patient, dignified and courteous' treatment from the court, and that judges must perform their duties 'without bias or prejudice' " … . Matter of Anthony J. (Siobvan M.), 2024 NY Slip Op 00574, Fourth Dept 2-2-24

Practice Point: Here the judge made it clear she had already decided mother's parental rights should be terminated at the outset of the hearing. The judge's bias deprived mother of her right to due process of law.

FEBRUARY 2, 2024

FAMILY LAW, JUDGES.

ALTHOUGH FAMILY COURT CAN DIRECT A PARTY TO SUBMIT TO COUNSELING AS PART OF A VISITATION OR CUSTODY ORDER, THE COURT CANNOT SO CONDITION A PARTY'S REAPPLICATION FOR PARENTAL ACCESS AFTER A DENIAL (SECOND DEPT).

The Second Department upheld Family Court's denial of parental access to the father, but Family Court should not have conditioned father's ability to reapply for parental access on completion of a parenting skills class, getting mental health treatment, and submitting a letter from a therapist that he was not a danger to the children:

A court deciding a custody proceeding "may properly direct a party to submit to counseling or treatment as a component of a visitation or custody order" … . "However, a court may not direct that a parent undergo counseling or treatment as a condition of future parental access or reapplication for parental access rights"…

.. Here, the Family Court erred in conditioning the filing of any future petitions by the father to modify his parental access upon his successful completion of a parenting skills class, his enrollment in mental health treatment, and his submission of a letter from his therapist stating that the father would not pose a danger to the child's mental, physical, or moral welfare. Accordingly, we modify the order so as to eliminate those conditions. Matter of Mazo v Volpert, 2024 NY Slip Op 00426, Second Dept 1-31-24

Practice Point: After denying parental access, the judge cannot condition that party's reapplication for access on taking classes and getting therapy.

JANUARY 31, 2024

FAMILY LAW, JUDGES.

FAMILY COURT JUDGE CRITICIZED BY THE FOURTH DEPARTMENT FOR ABANDONING HER ROLE AS A JUDGE AND ACTING AS AN ADVOCATE (FOURTH DEPT).

Although the appeal was moot, the Fourth Department took the opportunity to criticize the Family Court judge for acting as an advocate in this child placement proceeding:

At the hearing, the Judge "took on the function and appearance of an advocate" by choosing which witnesses to call and "extensively participating in both the direct and cross-examination of . . . witnesses" … , with a clear intention of strengthening the case for removal. For example, she asked a … caseworker whether the mother was "hostile, aggressive, violent or out of control," and repeated questions to that caseworker using the same or similar phrasing at least 10 times. When the mother's counsel objected to the Judge's leading questions of another witness regarding incidents outside the relevant time period, the Judge overruled the objection, stating that "there's no one else to run the hearing except for me." She also introduced and admitted several written documents during the mother's testimony over the objection of the mother's counsel, and despite the mother's statement that she could not read and was not familiar with the documents. In short, the Judge "essentially 'assumed the parties' traditional role of deciding what evidence to present' " while simultaneously acting as the factfinder … and thereby

"transgressed the bounds of adjudication and arrogated to [herself] the function of advocate, thus abandoning the impartiality required of [her]" … .

This " 'clash in judicial roles,' " in which the Judge acted both as an advocate and as the trier of fact, "[a]t the very least . . . created the appearance of impropriety" … , particularly when the Judge aggressively cross-examined the mother regarding topics that were not relevant to the issue of the child's removal and seemed designed to embarrass and upset the mother … . One such area of cross-examination concerned the fact that the mother had become pregnant several months before the hearing, but had been forced to terminate the pregnancy when it was determined to be ectopic. The Judge repeatedly questioned the mother regarding how many times the mother had engaged in sexual intercourse with the father of the terminated fetus, even though such information does not appear to have been relevant to the issue of the subject child's placement inasmuch as, inter alia, there was no indication that the man was ever in the subject child's presence. The Judge also asked the mother baseless questions about whether that man was a pedophile. Matter of Zyion B. (Fredisha B.), 2024 NY Slip Op 00550, Fourth Dept 2-2-24

Practice Point: Here the Fourth Department criticized the Family Court judge for acting as an advocate in this child placement proceeding.

FEBRUARY 2, 2024

MUNICIPAL LAW, NEGLIGENCE, CIVIL PROCEDURE.

WHERE THE MUNICIPALITY HAS TIMELY KNOWLEDGE OF THE POTENTIAL LAWSUIT AND HAS CONDUCTED A TIMELY INVESTIGATION INTO THE ALLEGATIONS, LEAVE TO FILE A LATE NOTICE OF CLAIM SHOULD NOT BE DENIED SOLELY BECAUSE PETITIONER DOES NOT HAVE A REASONABLE EXCUSE FOR FAILING TO FILE ON TIME (SECOND DEPT).

The Second Department, reversing Supreme Court, determined leave to file a late notice of claim against the town should have been granted. Petitioner was convinced a neighbor had trapped her cat and taken the cat to the town animal shelter. She communicated with the shelter many times and ultimately petitioner sought to sue the town for conversion and replevin. The Second Department

determined the late notice of claim would not prejudice the town because the town was aware of petitioner's' claims from the beginning and had conducted investigations of those claims. The fact that petitioner did not have a reasonable excuse for failing to file a timely notice of claim did not justify denying leave to file:

Although the petitioner failed to establish a reasonable excuse for her delay in seeking leave to serve a late notice of claim, "where, as here, there is actual knowledge and an absence of prejudice, the lack of a reasonable excuse will not bar the granting of leave to serve a late notice of claim" … . Matter of Anghel v Town of Hempstead, 2024 NY Slip Op 00420, Second Dept 1-31-24

Practice Point: This case illustrates that the most important factor in whether leave to file a late notice of claim against a municipality should be granted is whether the municipality had timely knowledge of the nature of the claim. Where there has been timely knowledge and a timely investigation by the municipality, the absence of a reasonable excuse for failure to timely file the notice of claim will be ignored.

JANUARY 31, 2024

MUNICIPAL LAW.

THE 10-DAY PERIOD DURING WHICH PETITIONER POLICE OFFICER MUST APPLY FOR DISABILITY BENEFITS STARTED TO RUN WHEN HE LEARNED HE HAD SUFFERED PERMANENT LUNG DAMAGE, NOT WHEN HE FIRST CONTRACTED COVID; PETITIONER'S APPLICATION FOR DISABILITY BENEFITS SHOULD NOT HAVE BEEN DENIED AS UNTIMELY (THIRD DEPT).

The Third Department, reversing Sullivan County's denial of disability benefits for petitioner police officer (Ramos), determined the time when petitioner learned he had permanent lung damage (September 9, 2021), not the time when he contracted COVID (August 9, 2021), was the operative date for timely application for General Municipal Law 207-c disability benefits:

Code of the County of Sullivan § 70-7 requires, among other things, applications for benefits under General Municipal Law § 207-c to be made "within 10 days from the date of the incident alleged to have given rise to the claim of disability or illness, or from the time such condition is discovered, whichever date is later. * * *

… [I]t was improper for the Director to use August 9, 2021 as the incident date that commenced the 10-day period within which Ramos was required to file his application for benefits. Ramos' application clearly stated that he was informed on September 9, 2021 about his lung damage stemming from his contraction of COVID-19, and it was on this date that Ramos first discovered the disability (i.e., possible lung damage) that gave rise to his claim and application for benefits. Ramos' September 17, 2021 application was made within 10 days of September 9, 2021 … . Matter of Sullivan County Patrolmen's Benevolent Assn., Inc. v County of Sullivan, 2024 NY Slip Op 00481, Third Dept 2-1-24

Practice Point: Any time period during which a police officer must apply for disability benefits starts to run when the officer first learns of his permanent disability, not when the officer first became ill.

FEBRUARY 1, 2024

NEGLIGENCE, CIVIL PROCEDURE, EVIDENCE, JUDGES.

PLAINTIFF'S MOTION FOR A UNIFIED TRIAL (LIABILITY AND DAMAGES) IN THIS PEDESTRIAN-VEHICLE TRAFFIC ACCIDENT CASE SHOULD HAVE BEEN GRANTED; THE NATURE OF THE INJURIES WAS RELEVANT TO HOW THE ACCIDENT OCCURRED (SECOND DEPT).

The Second Department, reversing the defense verdict and ordering a new trial, determined plaintiff's motion for a unified trial on liability and damages should have been granted. Plaintiff was crossing a street when she was struck by defendant's vehicle which was making a left turn across the crosswalk. Defendant alleged plaintiff walked into the side of defendant's van. Plaintiff's treating physician opined that the injury was consistent with plaintiff being in front of the van when she was struck. Because the injuries were relevant to the liability aspect of the trial, a unified trial was necessary:

Judges are encouraged to direct a bifurcated trial of the issues of liability and damages in any action to recover damages for personal injuries "where it appears that bifurcation may assist in a clarification or simplification of issues and a fair and more expeditious resolution of the action" … . "Although bifurcation is encouraged in appropriate settings, bifurcation is not an absolute given and it is the responsibility of the trial judge to exercise discretion in determining whether

bifurcation is appropriate in light of all relevant facts and circumstances presented by the individual cases" … . A unified trial is appropriate where the nature of the plaintiff's injuries has "an important bearing on the issue of liability" … .

Here, the Supreme Court improvidently exercised its discretion in denying the plaintiff's motion for a unified trial on the issues of liability and damages. The plaintiff and the defendant driver, the only witnesses to the accident, offered conflicting accounts of how the accident occurred, and the plaintiff demonstrated that evidence regarding the nature of her injuries was probative in determining how the accident occurred … . Marisova v Collins-Brewster, 2024 NY Slip Op 00414, Second Dept 1-31-24

Practice Point: Plaintiff, a pedestrian, was struck by defendant's van in a crosswalk. Defendant alleged plaintiff walked into the side of the van and obtained a defense verdict. Plaintiff's injuries indicated she was struck by the front of the van. Plaintiff's motion for a unified trial should have been granted.

JANUARY 31, 2024

NEGLIGENCE, VEHICLE AND TRAFFIC LAW, EVIDENCE.

DEFENDANT OPENED THE DRIVER'S-SIDE DOOR OF HIS PARKED CAR WITHOUT MAKING SURE IT WAS SAFE TO DO SO, A VIOLATION OF THE VEHICLE AND TRAFFIC LAW, AND PLAINTIFF WAS UNABLE TO AVOID STRIKING DEFENDANT'S CAR; PLAINTIFF ENTITLED TO SUMMARY JUDGMENT ON LIABILITY AND THE DISMISSAL OF THE COMPARATIVE-NEGLIGENCE AFFIRMATIVE DEFENSE (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined plaintiff was entitled to summary judgment in this traffic accident case. Defendant suddenly opened the driver's side door of his parked car and plaintiff struck defendant's car. Opening the door without making sure it is safe to do so is a violation of the Vehicle and Traffic Law. Plaintiff was entitled to summary judgment on liability and dismissing defendant's comparative-negligence affirmative defense:

Pursuant to Vehicle and Traffic Law § 1214, "[n]o person shall open the door of a motor vehicle on the side available to moving traffic unless and until it is

reasonably safe to do so, and can be done without interfering with the movement of other traffic, nor shall any person leave a door open on the side of a vehicle available to moving traffic for a period of time longer than necessary to load or unload passengers." Here, the plaintiff established her prima facie entitlement to judgment as a matter of law on the issue of liability by submitting her affidavit, which demonstrated that [defendant] violated Vehicle and Traffic Law § 1214 by opening the door on the side of his vehicle adjacent to moving traffic when it was not reasonably safe to do so, and was negligent in failing to see what, by the reasonable use of his senses, he should have seen, and that his negligence proximately caused the accident … . Gil v Frisina, 2024 NY Slip Op 00407, Second Dept 1-31-24

Practice Point: Opening the drive's side door of a parked car without checking to see it is safe to do so is a violation of the Vehicle and Traffic Law.

JANUARY 31, 2024

NEGLIGENCE, VEHICLE AND TRAFFIC LAW, EVIDENCE.

DEFENDANT-DRIVER RAISED A QUESTION OF FACT ABOUT WHETHER HE WAS NEGLIGENT IN THIS VEHICLE-BICYCLE ACCIDENT CASE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant driver (Medina) raised a question of fact about whether he was negligent in this vehicle-bicycle collision case. Although plaintiff bicyclist made out a prima facie case, defendant's affidavit was sufficient to defeat plaintiff's summary judgment motion:

… [P]laintiff established his prima facie entitlement to judgment as a matter of law on the issue of liability. In support of his motion, the plaintiff submitted, inter alia, his affidavit, which demonstrated that Medina was negligent in attempting to make a left turn at the intersection when the turn could not be made with reasonable safety (see Vehicle and Traffic Law § 1141 …). In opposition, however, the defendants raised triable issues of fact through the submission of Medina's affidavit. Medina averred that he waited until traffic was clear before turning left with his left-turn indicator activated and a green traffic light in his favor. According to Medina, as he was making the turn, he observed a cyclist traveling west on Myrtle Avenue at a high rate of speed. Medina averred that he immediately brought

his vehicle to a stop, but the cyclist was unable to stop due to his speed and collided with Medina's vehicle. Medina's affidavit was sufficient to raise triable issues of fact as to how the accident occurred and whether Medina was negligent in the happening of the accident … . Amancio-Gonzalez v Medina, 2024 NY Slip Op 00400, Second Dept 1-31-24

Practice Point; It is possible that a driver can collide with a bicyclist and not be negligent.

JANUARY 31, 2024

PISTOL PERMITS, ADMINISTRATIVE LAW, EVIDENCE, JUDGES.

DENYING THE APPLICATION FOR A PISTOL PERMIT WITHOUT A HEARING BASED UPON PRIOR ARRESTS WHICH DID NOT INVOLVE VIOLENCE OR A WEAPON WAS ARBITRARY AND CAPRICIOUS; MATTER REMITTED FOR A HEARING (SECOND DEPT).

The Second Department, reversing County Court in this Article 78 proceeding, determined that the respondent-judge's denial of petitioner's application for a pistol permit without a hearing was arbitrary and capricious. Although petitioner had prior arrests, none involved violence or a weapon:

Although the respondent was entitled to consider the petitioner's prior arrests, the record reflects, among other things, that none of the petitioner's arrests involved violent crimes or a weapon. The record also contains the petitioner's explanation of the circumstances surrounding his prior arrests; his activities since, which include employment, home ownership, charitable work, and abstinence from alcohol; evidence of the petitioner's having successfully completed a firearms course; and the opinion of a psychologist that the petitioner has no current risk factors that renders him unsuitable to own and carry a firearm. Further, based upon the record before us, it is apparent that the respondent did not give the petitioner an opportunity to respond to the stated objections to his pistol permit application … .

Accordingly, we annul the determination denying the petitioner's application for a pistol permit and remit the matter to the respondent to afford the petitioner the opportunity to respond to the stated objections to his pistol permit application at a hearing, after which the respondent shall make a new determination of the

petitioner's application. In remitting this matter to the respondent for a new determination, we express no opinion as to the merits of the new determination. Matter of Maher v Hyun Chin Kim, 2024 NY Slip Op 00425, Second Dept 1-31-24

Practice Point: Although prior arrests which were not violence- or weapon-related can be considered by the judge re: an application for a pistol permit, the application should not be denied without a hearing allowing the applicant to address the objections to the application.

JANUARY 31, 2024