NEW YORK APPELLATE DIGEST, LLC

Weekly Reversal Report
April 8 – 12, 2024

An Organized Compilation of Summaries of Selected Decisions, Mostly Reversals, Released by Our New York State Appellate Courts April 8 - 12, 2024, and Posted on the New York Appellate Digest Website on Wednesday, April 17, 2024. The Entries in the Table of Contents Link to the Summaries Which Link to the Full Decisions on the Official New York Courts Websiite. 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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ADMINISTRATIVE LAW, REVOCATION OF MEDICAL LICENSE.

THE REVOCATION OF PETITIONER'S MEDICAL LICENSE WAS CONFIRMED; TWO DISSENTERS ARGUED THERE WAS INSUFFICIENT EVIDENCE OF THE REQUIRED STANDARD OF CARE, ESPECIALLY AS THE STANDARD APPLIES TO TERMINALLY ILL PATIENTS WHO CONSENT TO AGGRESSIVE TREATMENT (THIRD DEPT).

The Third Department, over a two-justice dissent, confirmed the revocation of petitioner's medical license by the New York State Board for Professional Medical Conduct. The dissenters argued the publications used by respondent's expert to

assess the quality of care provided by petitioner were advisory in nature and did not apply to the aggressive care petitioner offered to terminally ill patients:

From the dissent:

… [T]he findings of the Committee were premised entirely on the erroneous understanding of respondent's expert, Isamettin Aral, that professional societies establish the accepted standard of care. The record reflects that, on cross-examination, petitioner's counsel asked Aral the question, "what do you mean when you say standard of care?" In response, Aral testified, "[w]e have accepted guidelines that are published by multiple societies, they include our board, [the] American College of Radiology or [the] American Board of Radiology, [and] national comprehensive cancer networks and these are fairly descriptive, prescriptive guidelines for what a physician should do in the management of cases in very specific areas. When you deviate from those, it is considered to fall short of a standard."

Although we acknowledge that petitioner pursued what appears to have been aggressive care with the goal of prolonging the lives of patients A-G and was in accordance with their wishes, the record lacks any reference to pervasive standards outlining physician obligations relative to the extraordinary circumstances of terminally ill patients with advanced, late-stage disease. As Aral's testimony is unsupported by an evidentiary foundation and the Bureau of Professional Medical Conduct offered no other proof, we would find the Committee's determination to be fatally flawed, fundamentally unfair and affected by an error of law. Matter of Yi v New York State Bd. for Professional Med. Conduct, 2024 NY Slip Op 01955, Third Dept 4-11-24

Practice Point: In an administrative proceeding which resulted in the revocation of petitioner's medical license, two dissenter's argued the evidence used by respondent's expert to determine the required standard of care was only advisory in nature and therefore insufficient, especially as that standard was applied to the consensual aggressive treatment of terminally ill patients.

APRIL 11, 2024

APPEALS, CIVIL PROCEDURE, AGAINST THE WEIGHT OF THE EVIDENCE.

THE THIRD DEPARTMENT JOINS THE OTHER DEPARTMENTS IN HOLDING THAT A PLAINTIFF NEED NOT MAKE A MOTION TO SET ASIDE THE VERDICT TO PRESERVE AN "AGAINST THE WEIGHT OF THE EVIDENCE" ARGUMENT ON APPEAL (THIRD DEPT).

The Third Department, affirming the defense verdict in this medical malpractice case, joined the other appellate division departments in finding that a plaintiff may make a "verdict is against the weight of the evidence" argument on appeal without moving to set aside the verdict on that ground:

… [We now join our colleagues in our sister Departments in concluding that plaintiffs were not required to preserve their weight of the evidence contention by moving to set aside the verdict upon that basis … . A trial court has the authority to order a new trial "on its own initiative" when the verdict is contrary to the weight of the evidence (CPLR 4404 [a]), and this Court's power "is as broad as that of the trial court" … . Although we believe it remains best practice for a party to challenge a verdict upon this basis before the trial court, in light of its superior opportunity to evaluate the proof and credibility of witnesses … , we nonetheless agree that this Court is fully empowered to "order a new trial where the appellant made no motion for that relief in the trial court" … . To the extent that our prior decisions have suggested otherwise, they should no longer be followed … . Fitzpatrick v Tvetenstrand, 2024 NY Slip Op 01956, Third Dept 4-10-24

Practice Point: In this decision, the Third Department joined the other departments in holding that a plaintiff need not make a motion to set aside the verdict to preserve an "against the weight of the evidence" argument on appeal.

APRIL 11, 2024

CIVIL PROCEDURE, CIVIL RIGHTS LAW, DEFAMATION, ANTI-SLAPP, ATTORNEY'S FEES.

A DEFAMATION COMPLAINT DISMISSED FOR FAILURE TO STATE A CAUSE OF ACTION LACKS A "SUBSTANTIAL BASIS IN LAW" WITHIN THE MEANING OF THE ANTI-SLAPP LAW (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Gonzalez, over a two-justice concurrence, determined the defendants were entitled to attorney's fees pursuant to the anti-SLAPP law (see Civil Rights Law §§ 70-a, 76-a; CPLR 3211[g]-[h]). The plaintiffs sued defendant newspaper (The Daily Mail) alleging defamation and several related causes of action. Supreme Court dismissed the complaint for failure to state a cause of action. The defendants argued they were entitled to attorney's fees pursuant to the anti-SLAPP law because the action did not have a "substantial basis in law." The question on appeal was whether a complaint which was dismissed for failure to state a cause of action could still be said to have a "substantial basis in law" such that the defendants would not be able to recover their attorney's fees. The First Department answered "no:"

… [T]he "substantial basis" standard applicable under CPLR 3211(g) is more exacting than the liberal pleading standard applicable to ordinary CPLR 3211(a)(7) motions. Under the CPLR 3211(a)(7) standard, the question is whether a cognizable cause of action is manifested, presuming the complaint's factual allegations to be true, and according the pleading the benefit of every possible favorable inference … . By contrast, a court reviewing the sufficiency of a pleading under CPLR 3211(g) must look beyond the face of the pleadings to determine whether the claim alleged is supported by substantial evidence … .

… [A] complaint which fails to state a claim under CPLR 3211(a)(7) necessarily lacks a "substantial basis in law" for purposes of CPLR 3211(g) … . * * *

… [Plaintiffs'] failure to meet the CPLR 3211(a) standard necessarily establishes their failure to meet the higher CPLR 3211(g) standard. Karl Reeves, C.E.I.N.Y. Corp. v Associated Newspapers, Ltd., 2024 NY Slip Op 01898, First Dept 4-9-24

Practice Point: A complaint which does not state a cause of action lacks a "substantial basis in law" within the meaning of the anti-SLAPP law. Therefore the defendants here were entitled to recover their attorney's fees.

APRIL 9, 2024

CONTRACT LAW, MUNICIPAL LAW (NYC), CORPORATION NOT LICENSED TO DO ELECTRICAL WORK.

THE ELECTRICAL-CONTRACTOR CORP WAS NOT LICENSED TO DO ELECTRICAL WORK IN NYC; THE FACT THAT THE CORPORATION'S VICE PRESIDENT WAS LICENSED AND THE VICE PRESIDENT'S COMPANY, WHICH DID THE ELECTRICAL WORK AS A SUBCONTRACTOR, WAS LICENSED DOESN'T MATTER; THE CORPORATION CAN NOT SUE FOR BREACH OF CONTRACT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff electrical-contractor corporation could not sue for breach of contract because the corporation was not licensed in NYC to do electrical work, even though plaintiff's vice president was licensed and the vice president's company (QNCC) which did the work as plaintiff corporation's subcontractor was licensed:

Administrative Code § 27-3017(a) states that it shall be unlawful for any person to, inter alia, perform electrical work in the City of New York unless that person is a licensed master electrician or special electrician. Licensing statutes are to be strictly construed … . …

The plaintiff's contention that recovery should not be denied because QNCC was a duly licensed subcontractor which performed the electrical work is without merit. This Court has previously held that such a relationship is insufficient to permit an unlicensed contractor to recover for work performed in the City … . "'So strict has been judicial construction of the statutory requirement through concern for the public health and welfare that the requirement may not be satisfied by employing or subletting' the work to an appropriately licensed person" … . Moreover, that the

plaintiff's vice president had a master electrician's license, and that the defendant's architect knew that the electrical work permits were issued to an entity other than the plaintiff, does not bar the application of the above rule … . Electrical Contr. Solutions Corp. v Trump Vil. Section 4, Inc., 2024 NY Slip Op 01907, Second Dept 4-10-24

Practice Point: The NYC Administrative Code requirement that electrical work must be done by licensed entities or persons is strictly construed. Here the electrical-contractor corporation's vice president was licensed and the vice president's company which did the work as a subcontractor was licensed, but the corporation was not. The corporation could not sue for breach of contract.

APRIL 10, 2024

CRIMINAL LAW, MANSLAUGHTER, EXTREME EMOTIONAL DISTURBANCE, ATTORNEYS, EVIDENCE.

DEFENDANT, WHO WAS SUFFERING FROM MENTAL ILLNESS, WAS CONVICTED OF MURDER; THE JURY'S REJECTION OF DEFENDANT'S "EXTREME EMOTIONAL DISTURBANCE" DEFENSE WAS AGAINST THE WEIGHT OF THE EVIDENCE, CONVICTION REDUCED; THE STRONG DISSENT ARGUED DEFENSE COUNSEL WAS INEFFECTIVE IN FAILING TO SUBMIT EVIDENCE OF DEFENDANT'S MENTAL ILLNESS AT THE SUPPRESSION HEARING (SECOND DEPT).

The Second Department, reducing defendant's murder conviction to manslaughter first degree, over an extensive dissent, determined the jury's determination that defendant failed to prove he was acting "under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse" (Penal Law § 125.25[1][a]), was against the weight of the evidence. Defendant, who suffered from mental illness, had been involuntarily committed to to a medical facility. The victim, who was beaten and strangled, allegedly sexually assaulted defendant in the shower. The dissent argued defense counsel was ineffective in failing to introduce

evidence of defendant's mental illness in support of the motion to suppress statements defendant made to a detective:

… [W]e find that the jury's determination that the defendant failed to prove by a preponderance of the evidence that he was acting "under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse" (Penal Law § 125.25[1][a]) when he killed the victim was against the weight of the evidence. The defendant's state of mind is a subjective question, and the existence of a reasonable excuse is an objective question … . The first element, the "subjective element[,] 'focuses on the defendant's state of mind at the time of the crime and requires sufficient evidence that the defendant's conduct was actually influenced by an extreme emotional disturbance'" … . The second element requires an objective determination as to whether there was a reasonable explanation or excuse for the emotional disturbance, and "[w]hether such a reasonable explanation or excuse exists must be determined by viewing the subjective mental condition of the defendant and the external circumstances as the defendant perceived them to be at the time, 'however inaccurate that perception may have been'" … .

From the dissent:

At the suppression hearing, the People presented the testimony of the detective who had interviewed the defendant. The defense did not present any evidence. Defense counsel was well aware of the … voluminous psychiatric documentation concerning the defendant's mental illness. However, defense counsel failed to move to admit into evidence any of these records. Rather, in support of the motion to suppress, defense counsel merely presented arguments that the defendant's mental state at the time that the Miranda warnings were administered precluded the admissibility of his statements to the detective. People v Andrews, 2024 NY Slip Op 01935, Second Dept 4-10-24

Practice Point: Here, the appellate court determined the jury's rejection of defendant's "extreme emotional disturbance" affirmative defense was against the weight of the evidence. The murder conviction was reduced to manslaughter first degree.

APRIL 10, 2024

FAMILY LAW, COURT'S INHERENT POWER TO DETERMINE PATERNITY, JUDICIAL ESTOPPEL.

HERE FAMILY COURT HAD THE INHERENT POWER TO DETERMINE WHETHER RESPONDENT WAS THE CHILD'S FATHER; RESPONDENT WAS JUDICIALLY ESTOPPED FROM CONTESTING PATERNITY BASED ON HIS POSITION IN A PRIOR PROCEEDING (SECOND DEPT).

The Second Department, reversing Family Court, determined Family Court had the power to determine whether father (Gunderson) is responsible for the support of the child and father was judicially estopped from contesting paternity because he was awarded parental access in a prior proceeding:

… [T]he Support Magistrate, sua sponte, dismissed the mother's petition without prejudice on the ground that the Family Court lacked subject matter jurisdiction to enter an order of child support because the parties were never married and there was no acknowledgment of parentage or order of filiation. * * *

… [B]ecause the Family Court has jurisdiction to determine whether an individual parent is responsible for the support of a child (see Family Ct Act § 413[1][a]), in appropriate cases, it also has the inherent authority to ascertain whether a respondent is a child's parent … .

Under the doctrine of judicial estoppel, "a party who assumes a certain position in a prior legal proceeding and secures a favorable judgment therein is precluded from assuming a contrary position in another action simply because his or her interests have changed" … . Here, Granderson successfully obtained an order awarding him parental access with the child based on his assertion that he was a parent to the child. Matter of Joseph v Granderson, 2024 NY Slip Op 01921, Second Dept 4-10-24

Practice Point: Here, based upon Family Court's authority to determine whether a parent is responsible for the support of the child, Family Court had the inherent authority to determine whether respondent is the child's father.

Practice Point: Here respondent sought and was awarded parental access in a prior proceeding. He was judicially estopped from contesting paternity in this proceeding.

APRIL 10, 2024

FAMILY LAW, CUSTODY, CONTINUING JURISDICTION.

BECAUSE FAMILY COURT HAD EXCLUSIVE AND CONTINUING JURISDICTION OVER THIS CUSTODY CASE, MOTHER'S PETITION TO MODIFY CUSTODY SHOULD NOT HAVE BEEN SUMMARILY DISMISSED BECAUSE FATHER AND CHILD RESIDE OUT-OF-STATE (SECOND DEPT).

The Second Department, reversing Family Court, determined mother's petition to modify custody should not have summarily dismissed because father and child were living out-of-state. Because New York has exclusive and continuing jurisdiction pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act, the court should have allowed mother to present evidence on any connections to New York:

Pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act, codified at article 5-A of the Domestic Relations Law, a court of this state which has made an initial custody determination has exclusive, continuing jurisdiction over that determination until it finds, as is relevant here, that it should relinquish that jurisdiction because "neither the child" nor "the child and one parent" have a "significant connection" with New York, and "substantial evidence is no longer available in this state concerning the child's care, protection, training, and personal relationships" … .

… [T]he initial custody determination was rendered in New York. … Family Court should not have summarily dismissed the mother's petitions on the ground that the child was living with the father out of state, without considering whether the court had exclusive, continuing jurisdiction pursuant to Domestic Relations Law § 76-

a(1), and affording the mother an opportunity to present evidence as to that issue … . Matter of Brandon v Brady, 2024 NY Slip Op 01916, Second Dept 4-10-24

Practice Point: Where New York has exclusive and continuing jurisdiction over a custody matter pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act, it is error to summarily dismiss a custody petition on the ground the child lives out-of-state. It must be determined whether there exist sufficient connections with New York to warrant hearing the case in New York.

APRIL 10, 2024

FAMILY LAW, JUDGES, POWER TO ORDER TREATMENT OR COUNSELING.

THE COURT MAY ORDER A PARENT TO SUBMIT TO COUNSELING OR TREATMENT AS PART OF A CUSTODY OR PARENTAL ACCESS ORDER; BUT THE COURT MAY NOT IMPOSE SUCH CONDITIONS ON SEEKING PARENTAL ACCESS IN THE FUTURE (SECOND DEPT).

The Second Department noted that a court may order a parent to submit to counseling or treatment as part of a custody or parental access order, but the court cannot not impose those same conditions upon seeking parental access in the future:

"A court deciding a custody proceeding may 'direct a party to submit to counseling or treatment as a component of a [parental access] or custody order'" … . Here, the Family Court properly directed the father to submit to hair follicle, drug, and alcohol testing as a component of his parental access … . However, the court should not have made the father's submission to such testing a condition to seeking future parental access … . Matter of Buskey v Alexis, 2024 NY Slip Op 01917, Second Dept 4-10-24

Practice Point: A court may impose treatment or counseling conditions in a parental access order, but cannot so condition the seeking of future parental access.

APRIL 10, 2024

TOXIC TORTS, MOLD, PROOF OF CAUSATION UNDER FRYE.

PLAINTIFF'S EXPERT DID NOT ESTABLISH EITHER THE "GENERAL CAUSATION" OR "SPECIFIC CAUSATION" FRYE CRITERIA IN THIS MOLD-INJURY CASE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff's expert did not offer sufficient proof plaintiff's injuries were caused by exposure to mold. Neither the "general causation" nor "specific causation" criteria established by Frye v United States, 293 F 101, were met:

General causation cannot be established through studies showing only a "risk" or "association" between mold exposure and the development of certain medical conditions … . The defendants' expert relied on a position paper of the American Academy of Allergy, Asthma and Immunology published in 2006 … , that controverts the plaintiff's expert's theory of causation … . The scientific literature and testimony proffered by the plaintiff's expert was insufficient to demonstrate that the plaintiff's expert's theory of general causation has gained general acceptance in the scientific community … . …

… [T]he method used by [plaintiff's] expert to establish specific causation did not satisfy Frye. … [I]t is not enough for a plaintiff's expert to testify that "exposure to a toxin is 'excessive' or 'far more' than others," or to offer testimony "that merely links a toxin to a disease or 'work[s] backwards from reported symptoms to divine an otherwise unknown concentration' of a toxin" … . "… [W]e have never dispensed with a plaintiff's burden to establish sufficient exposure to a substance to cause the claimed adverse health effect" … . "At a minimum, . . . there must be evidence from which the factfinder can conclude that the plaintiff was exposed to levels of th[e] agent that are known to cause the kind of harm that the plaintiff claims to have suffered" … . Buist v Bromley Co., LLC, 2024 NY Slip Op 01904, Second Dept 4–10-24

Practice Point: Here the expert evidence purporting to demonstrate plaintiff's injuries were caused by exposure to mold did not satisfy the "general causation" or

“specific causation” criteria established by Frye v United States, 293 F 101, criteria explained.

APRIL 10, 2024