NEW YORK APPELLATE DIGEST, LLC

Weekly Reversal Report
April 15 – 22, 2024

An Organized Compilation of Summaries of Selected Decisions, Mostly Reversals, Released by Our New York State Appellate Courts April 15 – 19, 2024, and Posted on the New York Appellate Digest Website on Monday, April 22, 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 iin the Reversal Report.

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APPEALS, CRIMINAL LAW, EVIDENCE.

ACQUITTAL ON THE RAPE AND FORCIBLE TOUCHING CHARGES RENDERED THE "ENDANGERING THE WELFARE OF A CHILD" CONVICTION AGAINST THE WEIGHT OF THE EVIDENCE (SECOND DEPT).

The Second Department, reversing defendant's "endangering the welfare of a child" conviction, determined defendant's acquittal on the rape and forcible touching charges rendered the conviction "against the weight of the evidence:"

In conducting our weight of the evidence review, we consider the jury's acquittal on other counts, and, under the circumstances of this case, find the jury's acquittal on the other counts supportive of a reversal of the conviction on the count of endangering the welfare of a child … . Here, the defendant was charged with, but acquitted of, rape in the second degree, rape in the third degree, and forcible touching, and the alleged conduct that formed the basis of those charges was essentially the same alleged conduct that formed the basis of the charge of endangering the welfare of a child. Once the jury discredited the complainant's testimony with respect to the charges of rape and forcible touching, the record was devoid of any evidence that the defendant "knowingly act[ed] in a manner likely to be injurious to the physical, mental or moral welfare of a child less than seventeen

years old" … , as charged on the count of endangering the welfare of a child. People v Liston, 2024 NY Slip Op 02066, Second Dept 4-17-24

Practice Point; Defendant was acquitted of the rape and forcible touching charges which were based on the same allegations as was the conviction on the "endangering the welfare of a child" charge. The conviction, therefore, was "against the weight of the evidence."

APRIL 17, 2024

ATTORNEYS, JUDGES, SANCTIONS.

COUNSEL'S CONDUCT WAS NOT FRIVILOUS OR DESIGNED TO DELAY; COUNSEL WAS NOT GIVEN THE OPPORTUNITY TO BE HEARD BEFORE SANCTIONED; THE JUDGE DID NOT INDICATE WHY THE AMOUNT OF THE SANCTION WAS APPROPRIATE, $100 SANCTION REVERSED (FIRST DEPT).

The First Department, reversing Supreme Court, determined the arguments made by counsel (appellant) were not "frivolous," counsel's conduct was not designed to delay, harass or maliciously injure another, the judge did not give counsel an opportunity to be heard before imposing sanctions, and the judge did not indicate why the amount of the sanction was appropriate:

Appellant properly raised procedural and substantive arguments concerning why the court should not direct petitioner to compel respondent, a 62-year-old woman with end stage renal failure, to undergo painful dialysis three times a week for three hours a day and receive powerful psychotropic medication against her wishes in order to restrain her. …

Although the court warned the parties not to interrupt each other or the court, and admonished appellant a couple of times during the hearing about such conduct, the record does not reflect a pattern of such behavior on her part or demonstrate that it caused delay. Further, the court did not cite any false statements made by appellant sufficient to warrant sanctions.

The court also failed to give appellant a reasonable opportunity to he heard on the sanction before it was actually imposed …, and did not indicate why the amount imposed was appropriate … . Matter of Kings County Hosp. v M.R., 2024 NY Slip Op 02016, First Dept 4-16-24

Practice Point: Conduct by counsel in this case was not frivolous; it was not designed to delay and did not involve false statements; sanctions were not warranted.

Practice Point: Before a judge sanctions an attorney, the attorney should be given the opportunity to be heard.

Practice Point: A judge sanctioning an attorney should indicate why the amount of the sanction is appropriate.

APRIL 16, 2024

CIVIL PROCEDURE, RES JUDICATA.

PLAINTIFF IS THE SUCCESSOR IN INTEREST TO THE PLAINTIFF IN A PRIOR IDENTICAL ACTION WHICH WAS DISMISSED FOR FAILURE TO COMPLY WITH DISCOVERY DEMANDS AND ORDERS; THE INSTANT ACTION IS PRECLUDED BY THE DOCTRINE OF RES JUDICATA (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff 120 Lexington Ave Corp, as the successor in interest to 122-24 Lexington Ave Corp, was precluded from bringing the action by the doctrine of res judicata. A nearly identical action by 122-24 Lexington Ave Corp had been dismissed based upon plaintiff's failure to comply with discovery demands and orders, which is deemed a dismissal on the merits:

Plaintiff concedes that it is the successor in interest to 122-24 Lexington Avenue Corp., an entity whose nearly identical case against Wesco was dismissed in May 2021 for failure to comply with discovery demands and court orders after the court had issued a conditional preclusion order. Because plaintiff is the successor to 122-

24 Lexington, it is in privity with that entity and is bound by prior adjudications against it … . Furthermore, a dismissal based on a failure to provide discovery in the face of a preclusion order is considered an award on the merits, and thus is given res judicata effect … . 120 Lexington Ave. Corp. v Wesco Ins. Co., 2024 NY Slip Op 02004, First Dept 4-16-24

Practice Point: An action which was dismissed because plaintiff failed to comply with discovery demands and orders bars a subsequent action pursuant to the doctrine of res judicata.

APRIL 16, 2024

CIVIL PROCEDURE, CHILD VICTIMS ACT, NEGLIGENCE.

THE SECOND DEPARTMENT JOINED THE FIRST AND THIRD DEPARTMENTS IN HOLDING THAT THE EXTENDED STATUTE OF LIMITATIONS IN THE CHILD VICTIMS ACT APPLIES TO A NEW YORK RESIDENT WHO WAS ABUSED OUT-OF-STATE (SECOND DEPT).

The Second Department, joining the First and Third Departments, determined an action brought under the Child Victims Act by a person who was a resident of New York at the time the cause of action accrued can take advantage of the extended statute of limitations (CPLR 214-g) even where the wrongful conduct occurred out-of-state:

The plaintiff alleges that, when he was a resident of New York, he was the victim of childhood sexual abuse committed against him by Philip Foglietta, a football coach, while attending summer football camp in Vermont in 1972 and in Massachusetts in 1973 and 1975. * * *

… [W]e agree with the Appellate Division, First and Third Departments, that a plaintiff's residence in New York at the time his or her claims or causes of action accrued is sufficient to bring those claims or causes of action within the purview of CPLR 214-g, even where, as here, the wrongful conduct underlying the New York resident's causes of action occurred out-of-state … . * * *

The appellants' focus on the location of the alleged wrongdoing is misplaced in this context, because the subject of CPLR 214-g is not the wrongful conduct itself, but rather the statute of limitations or notice of claim requirements that barred some New Yorkers from recovering damages for the underlying wrongdoing. CPLR 214-g did not criminalize or penalize behavior that was previously lawful, nor did it create a new private right of action. Rather, the statute revived prior claims or causes of action that already existed but were barred either because of the expiration of the applicable statute of limitations or the plaintiff's failure to file a timely notice of claim (see id. § 214-g). Smith v Pro Camps, Ltd., 2024 NY Slip Op 02074, Second Dept 4-17-24

Practice Point: The Child Victims Act extends the statute of limitations for a plaintiff who was a New York resident at the time the cause of action accrued, even if the abuse took place in another state.

APRIL 17, 2024

CIVIL PROCEDURE, CONTRACT LAW, FRAUD.

A BREACH OF CONTRACT ACTION SHOULD NOT BE CONSOLIDATED WITH A TORT ACTION (FIRST DEPT).

The First Department, reversing Supreme Court, determined the breach of contract action and the fraudulent conveyance action should not have been consolidated:

In 2016, plaintiff commenced a breach of contract action against defendant eCommission Solutions, LLC (eCommission). In 2022, plaintiff commenced a fraudulent conveyance action against eCommission and its president, Paul Hoffman, and his wife, alleging that Hoffman transferred millions from eCommission to himself with the intent to defraud creditors like plaintiff.

… When one action sounds in contract and the other in tort, it is inappropriate to grant consolidation … . Indeed, the breach of contract and fraudulent conveyance actions present different questions of law and fact … . Moreover, the fraudulent conveyance action will be moot if plaintiffs fail to win the breach of contract action … . Finally, the two actions are at different stages, so that consolidation would lead to delay in trying the breach of contract action … .

Discovery in the fraudulent conveyance action should be stayed until the breach of contract action is resolved … . 3B Assoc. LLC v Ecommission Solutions, LLC, 2024 NY Slip Op 02086, First Dept 4-18-24

Practice Point: A breach of contract action should not be consolidated with a tort action (here an action for fraudulent conveyance).

APRIL 18, 2024

CIVIL PROCEDURE, CONTRACT LAW, INSURANCE LAW, WORKERS' COMPENSATION.

A FORUM SELECTION CLAUSE IN AN INSURANCE POLICY WHICH VIOLATES NEW YORK LAW IS NOT ENFORCEABLE (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Miller, determined that the forum selection clause in an insurance policy which violates New York law is not enforceable. The opinion is comprehensive and discusses several substantive civil procedure, contract law, corporation law, insurance law, workers' compensation law and public policy issues which cannot fairly be summarized here:

This action is just one of many such actions commenced across the country alleging that the defendant Applied Underwriters, Inc. (hereinafter Applied Underwriters), and affiliated entities, all subsidiaries of Berkshire Hathaway, Inc., deceptively circumvented state laws and regulations in the marketing and sale of an unlawful workers' compensation insurance program. Here, the defendants seek to enforce a forum selection clause, in favor of Nebraska, contained in an insurance policy that New York State regulators have found violates New York law. While parties are generally free to select a forum in which to resolve their contractual disputes, here, where it is alleged by the plaintiff, and found by New York State regulators, that New York law has been violated, a foreign corporation may not profit from such violation to the detriment of New York employers and workers. The forum selection clause contained in an illegal insurance policy is not enforceable. As a matter of public policy, New York companies shall not be

compelled to litigate in Nebraska to vindicate their rights. Air-Sea Packing Group, Inc. v Applied Underwriters, Inc., 2024 NY Slip Op 02032, Second Dept 4-17-24

Practice Point: A forum selection clause (designating Nebraska as the forum) in an insurance policy which violates New York law is not enforceable.

APRIL 17, 2024

CIVIL PROCEDURE, CORPORATION LAW.

A CORPORATION WHICH ACQUIRES THE ASSETS AND LIABILITIES OF, BUT DOES NOT MERGE WITH, A PREDECESSOR CORPORATION, "INHERITS" THE CONTACTS THE PREDECESSOR CORPORATION HAD WITH NEW YORK STATE FOR PURPOSES OF NEW YORK'S PERSONAL JURISDICTION OVER THE SUCCESSOR CORPORATION (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Halligan, answering a certified question from the Second Circuit, determined that a corporation which acquires all the liabilities and assets of another corporation, but does not merge with the predecessor corporation, acquires the predecessor's contacts with New York for purposes of New York's personal jurisdiction over the successor corporation:

[The relevant] factors tip in favor of allowing successor jurisdiction where a successor purchases all assets and liabilities. … Sophisticated corporate entities such as SGBL [defendant] will undoubtedly engage in robust due diligence before agreeing to acquire all assets and liabilities of another entity. In doing so, they should understand where jurisdiction over such liabilities may lie and the potential cost if ultimately found liable, and will presumably negotiate a purchase price that is discounted by that prospect … .Lelchook v Société Générale de Banque au Liban SAL, 2024 NY Slip Op 02081, CtApp 4-18-24

Practice Point: A corporation which acquires the assets and liabilities of a predecessor corporation but does not merge with the predecessor corporation "inherits" the contacts the predecessor corporation had with New York for purposes of New York's personal jurisdiction over the successor corporation.

APRIL 18, 2024

CRIMINAL LAW.

A YOUTHFUL OFFENDER MUST CONSENT TO COMMUNITY SERVICE IMPOSED AS PART OF A SENTENCE (SECOND DEPT).

The Second Department, modifying the sentence imposed by County Court, noted that the defendant youthful offender did not consent to community service as part of his sentence, as required by the Penal Law:

… [A] court may require a defendant, as a condition of a sentence of probation, to "[p]erform services for a public or not-for-profit corporation, association, institution[,] or agency" (Penal Law § 65.10[2][h]; cf. CPL 170.55). However, a community service condition "may only be imposed upon conviction of" certain types of crimes, including a "class E felony, or a youthful offender finding replacing any such conviction, where the defendant has consented to the amount and conditions of such service" … . …

… [T]he defendant correctly asserts that "the record is . . . devoid of any indication that [he] actually consented to the terms and conditions of community service imposed at the time of sentencing" … . The comments of defense counsel at sentencing did not provide the requisite consent, as defense counsel's suggestion of community service was made in the context of arguing that a term of incarceration was unwarranted. In any event, even if defense counsel's statements could be construed as providing the defendant's "consent to the possibility of community service . . . , there is no proof whatsoever on the record that [the] defendant consented to the amount and conditions of the community service actually imposed by [the] County Court, which is what is specifically required by [Penal Law § 65.10(2)(h)]" … . People v Joseph D., 2024 NY Slip Op 02064, Second Dept 4-17-24

Practice Point: Penal Law 65.10 requires the consent of a youthful offender to community service as part of a sentence.

APRIL 17, 2024

CRIMINAL LAW, FAMILY LAW, SEX OFFENDER REGISTRATION ACT (SORA).

ALTHOUGH ARTICLE 3 OF THE FAMILY COURT ACT PROHIBITS CONSIDERATION OF A NEW YORK JUVENILE DELINQUENCY ADJUDICATION IN A SORA RISK-LEVEL ASSESSEMENT, CONSIDERATION OF A NEW JERSEY JUVENILE DELINQUENCY ADJUDICATION IS NOT PROHIBITED (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Brathwaite Nelson, determined that, although a New York juvenile delinquency adjudication under article 3 of the Family Court Act cannot be considered in a SORA risk-level determination, a New Jersey juvenile delinquency adjudication can be considered:

Although the express language in the Guidelines provides that a juvenile delinquency adjudication constitutes proof for the assessment of points under risk factors 8 and 9, in People v Campbell (98 AD3d 5), this Court held that a juvenile delinquency adjudication rendered under Family Court Act article 3 could not properly be considered in a SORA proceeding. * * *

… [T]his Court's holding in Campbell does not preclude a SORA court from considering the defendant's New Jersey adjudication. As discussed above, the prohibition in Campbell rested on the language of Family Court Act § 381.2 … . The Legislature, while protecting Family Court Act article 3 proceedings, has also identified the age of a sex offender at the time of the first sex offense to be a factor "indicative of high risk of repeat offense" to be considered under the Guidelines … , in addition to the nature of prior offenses … . While an adjudication or statements made to the court or an officer in a Family Court Act article 3 proceeding may not be used as proof at a SORA hearing, the People are not precluded from establishing the underlying conduct by other means … . The defendant's juvenile delinquency adjudication was not rendered under New York's Family Court Act article 3, and, thus, the provisions of the Family Court Act … do not apply to it. People v Hart, 2024 NY Slip Op 02071, Second Dept 4-17-24

Practice Point: A New York juvenile delinquency adjudication cannot be considered in a SORA risk-level assessment because of a prohibition in the Family Court Act. Because the Family Court Act does not apply to a New Jersey juvenile delinquency determination, and because New Jersey does not have a similar prohibition, the New Jersey adjudication can be considered in a New York SORA risk-level assessment.

APRIL 17, 2024

DISCIPLINARY HEARINGS (INMATES), APPEALS, CONSTITUTIONAL LAW.

HERE THE FACILITY REVIEW OFFICER VIEWED THE VIDEO EVIDENCE AND EXPRESSED THE CONCLUSION PETITIONER HAD VIOLATED PRISON RULES BEFORE THE DISCIPLINARY HEARING; THAT SAME OFFICER DECIDED PETITIONER'S ADMINISTRATIVE APPEAL; THAT SCENARIO VIOLATED DUE PROCESS; THE MISBEHAVIOR DETERMINATION WAS ANNULLED (THIRD DEPT).

The Third Department, annulling the determination petitioner had violated prison rules, determined the fact that the facility review officer reviewed petitioner's misbehavior report and decided the administrative appeal violated due process:

Petitioner contends … he was denied due process because the facility review officer that reviewed his misbehavior report … also decided petitioner's administrative appeal of the guilty determination as the facility superintendent's designee … . … Generally, the facility review officer is charged with reviewing each misbehavior report issued and, considering the seriousness of the alleged violations in the report, determining the appropriate tier level classification … . Here, petitioner, both during the hearing and in his administrative appeal, challenged certain actions taken by the facility review officer concerning his review of the misbehavior report. … [I]n reviewing the misbehavior report, the facility review officer viewed the video that was to be presented as evidence of guilt at the hearing. Based upon his viewing of the video, the facility review officer

informed petitioner in a memorandum prepared prior to the disciplinary hearing that the video shows "you and your visitor acting in an unacceptable manner in the visit room." The review officer further states "that the video does not show your penis being exposed as stated in the [misbehavior] report that's why I downgraded the tiering, . . . it does clearly show your visitor with her right hand between your legs in the groin area and her hand moving in a stroking motion." In light of the fact that certain challenges to the review officer's actions were raised by petitioner in his administrative appeal, as well as the facility review officer's expressed predeterminations regarding petitioner's guilt, we conclude that his serving as the superintendent's designee to decide the appeal denied petitioner a fair and impartial administrative appeal. Matter of Williams v Panzarella, 2024 NY Slip Op 02118, Third Dept 4-18-24

Practice Point: In the context of prison disciplinary proceedings, the prisoner's right to due process of law is violated when the same officer who viewed the evidence and indicated the prisoner was guilty prior to the hearing also decided the prisoner's administrative appeal.

APRIL 18, 2024

EMPLOYMENT LAW, LABOR LAW, CONTRACT LAW.

PLAINTIFF'S COMPLAINT STATED CAUSES OF ACTION FOR FAILURE TO PAY WAGES UNDER THE "NO WAGE THEFT LOOPHOLE ACT" AND RETALIATION (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff's claims for failure to pay wages and retaliation pursuant to Labor Law sections 193, 198 and 215 should not have been dismissed:

The court incorrectly dismissed plaintiff's Labor Law claims on the ground that the dispute was governed solely by the parties' contract. Contrary to defendants' contention, Labor Law claims for unpaid wages can be asserted alongside claims for breach of an employment contract … . …

The complaint … adequately states a claim for "unauthorized failure to pay wages" under the No Wage Theft Loophole Act … . Plaintiff alleges that his employment contract entitled him to an annual salary of $425,000 per year, which would increase in six months to $450,000 per year unless his performance was deemed "unsatisfactory," and a cash bonus incentive … ." These "earnings . . . for labor or services rendered" constituted "wages" within the meaning of Labor Law 190(1) … . …

The complaint also states a claim for retaliation. Plaintiff's notice of resignation subject to cure constituted protected activity, as plaintiff "made a complaint" to defendants that they had "engaged in conduct that [plaintiff], reasonably and in good faith, believe[d]" constituted unlawful withholding of his earned wages, specifically his nondiscretionary annual bonus (Labor Law § 215[1][a]). Plaintiff's characterization of the bonus as "formulaic and a nondiscretionary wage" evidences his belief that he had a legal entitlement to the bonus and that defendants' withholding of it was unlawful … . Neu v Amelia US LLC, 2024 NY Slip Op 02019, First Dept 4-16-24

Practice Point: Here plaintiff alleged he was not paid the salary and bonuses called for in his employment contract. The complaint stated causes of action for "unauthorized failure to pay wages" and "retaliation" under the Labor Law.

APRIL 16, 2024

EMPLOYMENT LAW, RELIGION, CONSTITUTIONAL LAW.

THE UNIFIED COURT SYSTEM'S DENIAL OF COURT EMPLOYEES' APPLICATIONS FOR RELIGIOUS EXEMPTIONS FROM THE COVID VACCINE MANDATE AFFIRMED (FIRST DEPT).

The First Department affirmed the NYS Unified Court System's (UCS's) denial applications for religious exemptions from the COVID vaccine mandate. The issue was analyzed under both the US and NYS Constitutions. The USC held the petitioners (USC employees) failed to meet the qualifications for employment by not complying with the mandate. The decision is too detailed to fairly summarize here, but is well worth reading for the constitutional analyses:

Conducting the appropriate level of review, we find that the vaccine mandate was rationally related to the legitimate goals of slowing the spread of COVID-19 and fully reopening courts to "promote efficient access to justice" … . Indeed, "[w]hatever their merits or efficacy, it cannot be said that the State's policies are an irrational means to achieve the legitimate goal of curbing the spread of COVID-19" … . Matter of Ferrelli v State of New York, 2024 NY Slip Op 02012, First Dept 4-16-24

Practice Point: The NYS Unified Court System's denial of employees' applications for religious exemptions from the COVID vaccine mandate did not violate the US or NYS Constitutions.

APRIL 16, 2024

FAMILY LAW, JUDGES.

WHERE ALLEGATIONS IN A PETITION TO MODIFY CUSTODY ARE CONTROVERTED, THE PETITION SHOULD NOT BE RULED UPON WITHOUT A HEARING (SECOND DEPT).

The Second Department, reversing Family Court, determined a hearing should have been held in this modification of parental access proceeding. Family Court granted father's petition without a hearing, despite the parties' controverted allegations:

"Although [a] parent seeking a change of custody is not automatically entitled to a hearing, custody determinations should [g]enerally be made only after a full and plenary hearing and inquiry" … . "'This general rule furthers the substantial interest, shared by the State, the children, and the parents, in ensuring that custody proceedings generate a just and enduring result that, above all else, serves the best interest of a child'" … . "Accordingly, [w]hen the allegations of fact in a petition to change custody are controverted, the court must, as a general rule, hold a full hearing" … .

Here, the Family Court erred in granting the father's modification petition to the extent of awarding him certain parental access without a hearing and without

inquiring into the best interests of the children, especially in light of the parties' controverted allegations … . Matter of Valedon v Naqvi, 2024 NY Slip Op 02059, Second Dept 4-17-24

Practice Point: As a general rule, controverted allegations in a petition to modify custody require a hearing.

APRIL 17, 2024

LABOR LAW-CONSTRUCTION LAW, CIVIL PROCEDURE.

PLAINTIFF FELL THROUGH AN UNGUARDED STAIRWAY OPENING AND WAS ENTITLED TO SUMMARY JUDGMENT ON THE LABOR LAW 240(1) CAUSE OF ACTION; DEFENDANTS DID NOT SHOW THAT THE PRE-DEPOSITION SUMMARY JUDGMENT MOTION WAS PREMATURE (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff should have been awarded summary judgment on the Labor Law 240(1) cause of action and the pre-deposition summary judgment motion was not premature. While transporting large wooden panels past a stairway, plaintiff fell through an unguarded stairway opening:

The court should have granted plaintiff partial summary judgment on the Labor Law § 240 (1) claim because he was not provided with adequate protection to prevent his fall into the unguarded stairway opening … . …

… Labor Law § 240(1) is not dependent on a finding that the owner or general contractor had notice of the violation … …. [D]efendants failed to raise an issue of fact as to whether plaintiff was the sole proximate cause of his injuries. Defendants' assertion that plaintiff removed the plywood barrier is speculative … .

The fact that no depositions have been taken does not preclude summary judgment in plaintiff's favor, as defendants failed to show that discovery might lead to facts that would support their opposition to the motion … . Defendants also failed to show that facts essential to their opposition were within plaintiff's exclusive

knowledge … . Blacio v Related Constr. LLC,2024 NY Slip Op 02008, First Dept 4-16-24

Practice Point: A plaintiff's pre-deposition summary judgment motion will not be dismissed as premature unless defendant demonstrates discovery might lead to relevant facts or relevant facts are within plaintiff's exclusive knowledge.

APRIL 16, 2024

MEDICAL MALPRACTICE, NEGLIGENCE, CIVIL PROCEDURE.

RE: IN VITRO FERTILIZATION: RETRIEVING AND FERTILIZING THE EGGS ARE SUBJECT TO THE MEDICAL-MALPRACTICE STATUTE OF LIMITATIONS; STORING AND MAINTAINING THE FROZEN EGGS ARE SUBJECT TO THE ORDINARY NEGLIGENCE STATUTE OF LIMITATIONS; THE MEDICAL MALPRACTICE ACTIONS ARE UNTIMELY; THE ORDINARY NEGLIGENCE ACTIONS ARE TIMELY (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, in a full-fledged opinion by Justice Shulman, determined plaintiffs' causes of action alleging defendants did not properly freeze, store and maintain embryos for future implantation sounded in negligence, not medical malpractice, and were therefore timely:

The underlying parts of the IVF [in vitro fertilization] process implicate both medical malpractice and ordinary negligence. Retrieving the eggs from the ovaries, fertilizing the egg with a donated sperm, grading the quality of the embryos, and preparing them for cryopreservation are clear acts of medical science or art requiring a specialized skillset appropriately characterized as medical in nature. However, all of these acts concluded on August 11, 2008, when the embryos were cryopreserved, rendering the causes of action based on such treatment untimely (see CPLR 214-a). Further, because those processes firmly ended on that date, the continuous treatment doctrine does not toll the statute of limitations … . As plaintiffs' causes of action for medical malpractice based upon these allegations are untimely, we need not address their merits.

On the other hand, once cryopreservation has commenced, the mere maintenance of the storage tanks containing the frozen embryos does not comprise acts of "medical science or art requiring special skills not ordinarily possessed by lay persons" … . Where an act is more "'administrative' than medical in nature," conduct is "measured by ordinary negligence standards" … . While the cryopreservation storage tanks … were checked at least twice weekly for leaks and the levels of liquid nitrogen, such acts are more administrative than medical in nature. Thus, once the embryos entered cryopreservation, [defendants] merely owed a duty to plaintiffs to maintain the successful operability of the storage tanks.

The alleged failure in "fulfilling [this] different duty" "sounds in negligence," rather than medical malpractice … . Bledsoe v Center for Human Reproduction, 2024 NY Slip Op 02088, First Dept 4-18-24

Practice Point: The opinion in this "in vitro fertilization" case clearly demonstrates the distinction between medical malpractice and ordinary negligence. The retrieving, fertilizing and grading of the embryos involve specialized medical skills and implicate the medical-malpractice criteria. The storage and maintenance of the frozen embryos, on the other hand, implicate ordinary negligence criteria. Here the medical malpractice causes of action were untimely. But the ordinary negligence causes of action were timely.

APRIL 18, 2024

MEDICAL MALPRACTICE, NEGLIGENCE, EVIDENCE.

REVERSING THE FOURTH DEPARTMENT WITHOUT OPINION OR MEMORANDUM DECISION, THE COURT OF APPEALS HELD QUESTIONS OF FACT PRECLUDED SUMMARY JUDGMENT IN DEFENDANTS' FAVOR IN THIS MEDICAL MALPRACTICE ACTION (CT APP).

The Court of Appeals, reversing the Fourth Department without an opinion or memorandum decision, determined questions of fact precluded summary judgment in defendants' favor in this medical malpractice case. **Amber R. v Pediatric &**

Adolescent Urgent Care of W. N.Y., PLLC, 2024 NY Slip Op 02085, CtApp 4-18-24

From the dissent in Amber R. v Pediatric & Adolescent Urgent Care of W. N.Y., PLLC, 2023 NY Slip Op 04063 [218 AD3d 1344], Fourth Dept 7-28-23:

The medical records proferred by defendants established that, after a failed first intubation attempt with a 3.5 mm ET by defendant Katelyn Johnson-Clark, D.O., a physician with little training in the intubation process, Johnson-Clark attempted intubation using a smaller 3.0 mm ET. It is undisputed that there was no verification of the proper placement of that ET by way of an end-tidal CO2 detector. The medical records further establish that one minute after the placement of the ET, the infant's heart rate quickly dropped and one minute thereafter, the infant's belly was distended. Another physician testified at her deposition that both of those signs indicate that there was a potential issue with the intubation. When the specialized transport team arrived, it was determined by way of a CO2 detector that the ET was not in the proper place. Thus, we conclude that defendants' own submissions raise questions of fact whether Johnson-Clark acted negligently in the intubation of the infant and the motion was properly denied in part without regard to the sufficiency of plaintiff's opposition papers … . We would therefore affirm that part of the order denying defendants' motion insofar as it seeks summary judgment dismissing the claim of malpractice related to the intubation of the infant.

APRIL 18, 2024

MUNICIPAL LAW, NEGLIGENCE.

BECAUSE A CONTEMPORARY REPORT PROVIDED THE CITY WITH NOTICE OF THE NATURE OF THE SLIP AND FALL, THE PETITION FOR LEAVE TO FILE A LATE NOTICE OF CLAIM SHOULD HAVE BEEN GRANTED, DESPITE THE LACK OF A REASONABLE EXCUSE FOR FAILING TO TIMELY FILE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the petition for leave to file a late notice of claim in this slip and fall case should have been

granted. The line-of-duty report provided the city with timely knowledge of the nature of the claim and demonstrate the city would not be prejudiced by the delay in filing the notice. Where a defendant has timely knowledge of the incident, the lack of a reasonable explanation for failing to timely file is often overlooked:

The line-of-duty injury report's specificity regarding the location and circumstances of the incident, permitted the City to readily infer that a potentially actionable wrong had been committed … .

Further, as the petitioner has shown the City's actual knowledge of the essential facts underlying the claim, the petitioner's failure to provide a reasonable excuse for the delay in serving the notice of claim was not fatal to her claim … .

… [A]s the City acquired timely knowledge of the essential facts constituting the claim, the petitioner met her initial burden of showing that the City would not be prejudiced by the late notice of claim … . In response …, the City has failed to provide particularized evidence establishing that the late notice substantially prejudiced its ability to defend the claim on the merits … . Matter of Steward v City of New York, 2024 NY Slip Op 02058, Second Dept 4-17-24

Practice Point: If the municipal defendant has timely notice of the nature of the incident (here by virtue of a contemporary report) and the city cannot demonstrate prejudice, a petition for leave to file a late notice of claim should be granted, even in the absence of a reasonable excuse for failing to timely file.

APRIL 17, 2024