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Weekly Reversal Report
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An Organized Compilation of Summaries of Selected Decisions, Mostly Reversals, Released by Our New York State Appellate Courts May 20 – 24, 2024, and Posted on the New York Appellate Digest Website on Tuesday, May 28, 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. Copyright 2024 New York Appellate Digest, LLC

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DISPUTES INVOLVING THE INTERNAL AFFAIRS OF FOREIGN CORPORATIONS ARE RESOLVED UNDER THE LAW OF THE PLACE OF INCORPORATION (SCOTS LAW HERE); COURTS CAN TAKE JUDICIAL NOTICE OF THE FOREIGN LAW; HERE PLAINTIFFS STATED A CAUSE OF ACTION FOR BREACH OF FIDUCIARY DUTY UNDER SCOTS LAW (CT APP).

The Court of Appeals, reversing the Appellate Division, in a full-fledged opinion by Judge Singas, determined (1) in international business disputes involving the internal affairs of foreign corporations, the law of the place of incorporation (Scots law here) applies; (2) the court can take judicial of the foreign law; and (3) plaintiffs stated a cause of action for breach of fiduciary duty under Scots law:

Consistent with our precedent, we clarify that the substantive law of a company's place of incorporation presumptively applies to causes of action arising from its internal affairs. Moreover, because of the important interests that the internal affairs doctrine represents, we decline to create any broad exceptions to that presumption. Rather, in order to overcome this presumption and establish the applicability of New York law, a party must demonstrate both that (1) the interest of the place of incorporation is minimal—i.e., that the company has virtually no contact with the place of incorporation other than the fact of its incorporation, and (2) New York has a dominant interest in applying its own substantive law ... . * * *

CPLR 4511 gives courts "substantial flexibility in determining whether to take judicial notice of foreign law and ascertaining its content" ... . As the statutory language notes, a court must take judicial notice of foreign law upon request and if the court is furnished with

sufficient information to do so; otherwise, a court may take judicial notice of foreign law in its discretion ... . * * *

Plaintiffs' allegations—viewed in their most favorable light and according them every possible favorable inference—are sufficient to state a claim that the director defendants at least owed limited fiduciary duties to plaintiffs. Eccles v Shamrock Capital Advisors, LLC, 2024 NY Slip Op 02841, CtApp 5-23-24

Practice Point: Disputes involving the internal affairs of foreign corporation are resolved under the law of the place of incorporation (Scots law here).

Practice Point: Courts can take judicial notice of foreign law.

Practice Point: Here plaintiffs stated a cause of action for breach of fiduciary duty under Scots law.

MAY 23, 2024

CRIMINAL LAW, ATTORNEYS, EVIDENCE, APPEALS.

THE RECORD WAS NOT SUFFICIENT TO EVALUATE THE CLAIM DEFENSE COUNSEL'S FAILURE TO IMPEACH THE DETECTIVE'S TESTIMONY WITH AN INCONSISTENT STATEMENT CONCERNING THE IDENTIFICATION OF DEFENDANT AMOUNTED TO INEFFECTIVE ASSISTANCE; DEFENSE COUNSEL'S "PRE-PEOPLE V BOONE" FAILURE TO REQUEST A CROSS-RACIAL IDENTIFICATION JURY INSTRUCTION DID NOT AMOUNT TO INEFFECTIVE ASSISTANCE (CT APP).

he Court of Appeals, affirming defendant's conviction, over a concurring opinion, determined the record was not sufficient to demonstrate defense counsel's failure to impeach the defective's testimony with inconsistencies concerning the identification of defendant amounted to ineffective assistance. And the failure to request the cross-racial identification jury instruction, at a time when the instruction was discretionary (before People v Boone, 30 NY2d 521 (2017)), did not amount to ineffective assistance:

We cannot conclude that counsel's failure to impeach Detective Morales with his suppression hearing testimony that the victim was unsure if defendant was the gunman establishes ineffective assistance of counsel. "The lack of an adequate record bars review

on direct appeal wherever the record falls short of establishing conclusively the merit of the defendant's claim" ... .

... [T]or the reasons set forth in People v Watkins (decided today), the failure to request a cross-racial identification instruction prior to this Court's decision in People v Boone (30 NY3d 521 [2017]), which made such an instruction mandatory upon request, does not alone amount to ineffective assistance of counsel. People v Lucas, 2024 NY Slip Op 02843, CtApp 5-23-24

Practice Point: The record was insufficient to evaluate the claim that defense counsel was ineffective for failure to impeach the detective's testimony with an inconsistent statement concerning the identification of the defendant.

Practice Point: At the time of this pre People v Boone trial a cross-racial identification jury instruction was discretionary. Defense counsel's failure to request the charge did not amount to ineffective assistance.

MAY 23, 2024

CRIMINAL LAW, ATTORNEYS, CONSTITUTIONAL LAW.

A CROSS-RACIAL IDENTIFICATION JURY INSTRUCTION IS NOW MANDATORY UPON REQUEST; AT THE TIME OF DEFENDANT'S TRIAL THE CHARGE WAS DISCRETIONARY; DEFENSE COUNSEL'S FAILURE TO REQUEST THE INSTRUCTION DID NOT AMOUNT TO CONSTITUTIONAL INEFFECTIVE ASSISTANCE (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Halligan, affirming defendant's conviction, over a concurring opinion and two dissenting opinions, determined defense counsel's failure to request a cross-racial identification jury instruction, which is now mandatory upon request (but was not at the time of trial), did not amount to constitutional ineffective assistance of counsel:

Defendant Mark Watkins contends that his trial counsel was ineffective for failing to request a cross-racial identification instruction at the close of his July 2017 trial. Under our decision in People v Boone—decided after Watkins' trial—such an instruction is now mandatory upon request "when identification is an issue in a criminal case and the identifying witness and defendant appear to be of different races," in light of the higher "likelihood of misidentification" and the "significant disparity between what the

psychological research shows and what uninstructed jurors believe" regarding the impact of this cross-race effect (30 NY3d 521, 526, 528-529, 535-536 [2017]). At the time of Watkins' pre-Boone trial, however, a defendant was not entitled to a cross-racial identification instruction upon request; rather, the charge was discretionary. Thus, counsel's failure to request such a charge did not give rise to a single-error ineffective assistance of counsel claim. * * *

Today, as in Boone, we reiterate the importance of instructing jurors "to examine and evaluate the various factors upon which the accuracy of identification depends," including the cross-racial nature, if applicable ... . We continue to view the cross-racial identification charge as a powerful tool for assisting juries in determining whether there has been a mistaken identification, thereby reducing the risk of wrongful convictions caused by the cross-race effect. Still, Watkins has not shown that, as of July 2017, the failure to request a cross-racial instruction rendered his counsel's performance constitutionally deficient ... . People v Watkins, 2024 NY Slip Op 02842, CtApp 5-21-24

Practice Point: A cross-racial identification jury instruction is now mandatory upon request based upon the Court of Appeals' 2017 ruling in People v Boone.

Practice Point: At the time of this 2017 trial, the cross-racial jury instruction was discretionary. Here defense counsel's failure to request the charge did not rise to constitutional ineffective assistance.

Practice Point: It remains an open question whether the failure to request the charge in a post-Boone trial would amount to constitutional ineffective assistance.

MAY 23, 2024

CRIMINAL LAW, JUDGES, ATTORNEYS, CONSTITUTIONAL LAW.

HERE THERE WAS NO VALID REASON TO DENY DEFENDANT'S REQUEST TO REPRESENT HIMSELF; NEW TRIAL ORDERED (FIRST DEPT).

The First Department, reversing defendant's conviction and ordering a new trial, determined defendant's request to represent himself should have been granted:

The court deprived defendant of his constitutional right to self-representation when it denied defendant's motion to proceed pro se despite defendant's knowing and voluntary waiver of his right to counsel. A defendant may invoke the right to self-representation where

"(1) the request is unequivocal and timely asserted, (2) there has been a knowing and intelligent waiver of the right to counsel, and (3) the defendant has not engaged in conduct which would prevent the fair and orderly exposition of the issues" ... . Here, defendant made a timely and unequivocal request to represent himself, and during an extensive inquiry, at which time the court repeatedly warned defendant of the dangers and disadvantages of proceeding pro se, defendant affirmed that he understood the risks and insisted on representing himself at trial ... . Defendant's lack of familiarity with the law was not a proper basis for the denial of his motion ... . Further, nothing in the record indicates that defendant's motion was calculated to undermine or delay the progress of the trial—indeed, the court determined that defendant was not malingering—and defendant's purported "outbursts" during two prior pretrial video conferences did not suggest an intent to disrupt the proceedings ... . People v Ivezic, 2024 NY Slip Op 02785, First Dept 5-21-24

Practice Point: A defendant's lack of knowledge of the law is not a valid reason for denying defendant's request to represent himself at trial.

MAY 21, 2024

CRIMINAL LAW, EVIDENCE.

THE POLICE MAY STOP A VEHICLE IN THE EXERCISE OF THE "COMMUNITY CARETAKING" FUNCTION IF THERE IS CAUSE TO BELIEVE SOMEONE IN THE VEHICLE NEEDS ASSISTANCE; THE QUICK OPENING AND CLOSING OF A PASSENGER DOOR WAS NOT ENOUGH (CT APP).

The Court of Appeals, reversing the Appellate Division, in a full-fledged opinion by Judge Troutman, over a two-judge concurrence, recognized that a vehicle may be stopped by the police exercising the "community caretaking" function if the police have cause to believe someone in the vehicle needs assistance. Here defendant's car was stopped after the passenger door opened and closed quickly. The defendant driver was arrested after admitting he possessed ecstasy. The Court of Appels, after describing the criteria for a "community caretaking" vehicle stop, found that the quick opening and closing of the passenger door was not enough to conclude an occupant needed help:

We conclude that the police may stop an automobile in an exercise of their community caretaking function if two criteria exist. First, the officers must point to specific, objective, and articulable facts that would lead a reasonable officer to conclude that an occupant of

the vehicle is in need of assistance. Second, the police intrusion must be narrowly tailored to address the perceived need for assistance. Once assistance has been provided and the peril mitigated, or the perceived need for assistance has been dispelled, any further police action must be justified under the Fourth Amendment and Article I, section 12 of the State Constitution. People v Brown, 2024 NY Slip Op 02765, CtApp 5-21-24

Practice Point: The police may stop a vehicle if there is cause to believe someone in the vehicle needs assistance. Here the quick opening and closing of a passenger door was not enough to justify the stop.

MAY 21, 2024

CRIMINAL LAW, EVIDENCE.

THE SEARCH OF A SMALL EARBUD CASE IN DEFENDANT-PAROLEE'S POCKET WAS NOT REASONABLY RELATED TO THE CLAIMED PURPOSE OF THE PAROLE OFFICERS' PRESENCE IN DEFENDANT'S RESIDENCE, I.E., A SEARCH FOR A PAROLE ABSONDER; THE HEROIN FOUND IN THE EARBUD CASE SHOULD HAVE BEEN SUPPRESSED (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Troutman, reversing the Appellate Division, determined the search of defendant-parolee's person by a parole officer was not rationally and reasonably related to the parole officers' duty. The parole officers claimed they entered defendant's residence to look for a parole absconder. The search of a small earbud case found inside defendant's pocket, which turned up heroin, was not reasonably related to the claimed purpose of the parole officers' presence:

... [T]he People failed to meet their burden to establish that the search of defendant's pocket was substantially related to the performance of the parole officers' duties in the particular circumstances presented, i.e., the search of defendant's residence for a parole absconder. Nor did the People present any evidence at the hearing that circumstances that developed after the parole officers arrived at defendant's residence rendered the search of his pocket substantially related to the performance of their duties. On this record, the parole officer had no reason to continue the brief pat-down search of the exterior of defendant's person by searching his pocket and investigating the contents of an earbud case. People v Lively, 2024 NY Slip Op 02767, CtApp 5-21-24

Practice Point: Here the parole officers claimed to be in defendant-parolee's residence to search for a parole absconder. Therefore the search of a small earbud case found in defendant-parolee's pocket was not reasonably related to the parole officers' duties and the drugs found in the case should have been suppressed.

MAY 21, 2024

CRIMINAL LAW, EVIDENCE.

THE SEARCH OF DEFENDANT-PAROLEE'S RESIDENCE WAS "RATIONALLY AND REASONABLY RELATED TO THE PERFORMANCE OF THE PAROLE OFFICER'S DUTY" AND THEREFORE DENIAL OF THE MOTION TO SUPPRESS THE WEAPON FOUND IN THE RESIDENCE WAS PROPER (CT APP).

The Court of Appeals, affirming the Appellate Division, determined the search of defendant-parolee's residence after a tip from defendant's mother about defendant's possession of a firearm was "rationally and reasonably related to the performance of the parole officer's duty:"

As a condition of his parole, defendant agreed not to "own, possess, or purchase" any firearm without permission from his parole officer. Defendant was given "the most severe" mental health designation from the Department of Corrections and Community Supervision, OMH Level 1-S, indicating there were "serious" concerns regarding his mental health. Shortly after defendant's release to parole, his parole officer received information from his supervisor that defendant's mother contacted the parole office to inform them that she saw a photograph of defendant with a firearm, and gave the parole officers permission to search the residence that she shared with defendant ... . Acting on this information, defendant's parole officer, with the assistance of other officers, conducted a search of defendant's home and recovered an AR-15 style rifle and two thirty-round extended magazines with extra gun parts from defendant's bedroom.

Based on the foregoing, there is record support for the lower courts' conclusion ... that the search of defendant's residence by defendant's parole officer was "rationally and reasonably related to the performance of the parole officer's duty" and so defendant's motion to suppress this evidence was properly denied ... . The Aguilar-Spinelli test ... for evaluating whether a tip provides police with probable cause for a search or seizure does

not apply in these circumstances … . People v Spirito, 2024 NY Slip Op 02766, Fourth Dept 5-21-24

Practice Point: The criteria for a search of a parolee's residence by a parole officer is not subject to the same constitutional restraints as are searches by the police. Here a tip from defendant's mother about her son's possession of a weapon was sufficient to justify the parole-officer search.

MAY 21, 2024

CRIMINAL LAW, IMMIGRATION LAW, ATTORNEYS.

DEFENDANT WAS ENTITLED TO A HEARING ON HIS MOTION TO VACATE HIS GUILTY PLEA; DEFENDANT DEMONSTRATED DEFENSE COUNSEL PROVIDED ERRONEOUS INFORMATION ABOUT THE DEPORTATION CONSEQUENCES OF THE PLEA; AND DEFENDANT RAISED A QUESTION OF FACT ABOUT WHETHER HE WOULD HAVE DECIDED AGAINST PLEADING GUILTY HAD HE BEEN GIVEN ACCURATE INFORMATION ABOUT THE RISK OF DEPORTATION (THIRD DEPT).

The Third Department, reversing County Court, determined defendant was entitled to a hearing on his motion to vacate his guilty plea on the ground his attorney provided erroneous information about the deportation consequences of the plea. In addition to showing defense counsel's advice was wrong, defendant raised a question of fact whether it was reasonably probable he would not have pled guilty if he had been correctly advised about the risk of deportation:

… [T]rial counsel erroneously advised defendant that he "could . . . be deported" if he were to be "incarcerated for any extensive amount of time," but, if he were sentenced to "probation," defendant would not be deported. "These advisements were erroneous, and … defense counsel readily could have ascertained — simply from a reading of the relevant statutes — that defendant's plea to criminal possession of a controlled substance in the third degree rendered deportation presumptively mandatory and rendered defendant ineligible for cancellation of an order of removal" … . …

... [D]efendant averred in his CPL 440.10 motion that, at the time of his plea, he had resided in the United States for over 20 years and that he "financially supported the mother of his child, as well as her two older children from a prior relationship." Given his family circumstances and their dependency upon him, defendant averred that, had he received correct advice about pleading guilty to an aggravated felony for purposes of immigration, he "would have rejected the plea offer, proceeded to trial, or sought other alternative plea options." These allegations "raise a question of fact as to whether it was reasonably probable that he would not have entered a plea of guilty if he had been correctly advised of the deportation consequences of the plea" ... . People v Pinales-Harris, 2024 NY Slip Op 02844, Third Dept 5-23-24

Practice Point: If, in the papers supporting a motion to vacate the guilty plea, a defendant shows defense counsel provided erroneous information about the deportation consequences of the guilty plea, and raises a question of fact whether it is reasonably probable he would not have pled guilty had the correct information been provided, he is entitled to a hearing on the motion.

MAY 23, 2024

CRIMINAL LAW, JUDGES, ATTORNEYS.

THE JUDGE'S PROVIDING A RACE-NEUTRAL REASON FOR THE PEOPLE'S PEREMPTORY CHALLENGE TO A JUROR, WHILE THE PROSECUTOR REMAINED SILENT, WAS REVERSIBLE ERROR (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Rivera, reversing the Appellate Division, determined the judge's providing a race-neutral reason for the People's peremptory challenge of a juror, while the prosecutor remained silent, was reversible error:

Here, it is undisputed that defendant established a prima facie case of discrimination with respect to the prosecution's exercise of a peremptory challenge against K.S., an African-American female, and that the burden then shifted to the prosecution to provide a race-neutral basis for its peremptory strike. The People failed to do so entirely ... . Rather, the court stepped in to provide an explanation, speculating that the prosecution had gotten a "bad vibe" from K.S. regarding whether her prior jury service resulted in an acquittal. The prosecution remained silent. The court nevertheless ruled that the prosecution had "given a legitimate race neutral reason" for the strike.

This serious departure from the Batson framework was an error of the highest order. When the court supplied a race-neutral reason for the peremptory strike, it failed to hold the prosecution to its burden and instead, effectively became an advocate for the prosecution, thus abandoning its Batson-specific duty to "consider the prosecutor's race-neutral explanations in light of all of the relevant facts and circumstances, and in light of the arguments of the parties" ... . It is the nonmovant's expressed explanation for its peremptory challenge—and whether such explanation is mere pretext for a race-based motive—not simply whether a race-neutral reason could theoretically exist—which is the focus of the Batson framework at steps two and three ... . The court's speculation as to the prosecution's basis for the strike was irrelevant and deprived defendant of any meaningful way to demonstrate pretext in the face of the prosecution's silence. People v Estwick, 2024 NY Slip Op 02768, CtApp 5-21-24

Practice Point: It is the prosecutor's actual reason for a peremptory challenge which is required under Batson, not the theoretical existence of a race-neutral reason. Therefore the Batson procedure is violated where, as here, the judge steps in to provide a reason while the prosecutor remains silent.

MAY 21, 2024

EMPLOYMENT LAW, EDUCATION-SCHOOL LAW, RETIREMENT AND SOCIAL SECURITY LAW.

THE FORMER SCHOOL PRINCIPAL'S PTSD STEMMED FROM A SERIES OF INTERACTIONS WITH A CO-EMPLOYEE OVER A PERIOD OF MONTHS AND THEREFORE WAS NOT THE RESULT OF AN "ACCIDENT;" SHE WAS NOT ENTITLED TO ACCIDENTAL DISABILITY RETIREMENT BENEFITS (ADR) (CT APP).

The Court of Appeals, affirming the Appellate Division, in a full-fledged opinion by Judge Cannataro, determined the petitioner's post-traumatic stress disorder (PTSD) stemming from interactions with a another school employee did not entitle her to accidental disability retirement benefits (ADR) as opposed to ordinary disability retirement benefits (ODR) The court found that the employee interactions took place over a period of time and could not be characterized as "a sudden, unexpected event," i.e., an "accident." The court however refused to rule out that intentional conduct by a co-employee could constitute an "accident" in some circumstances:

... [T]he record supports the [Teachers' Retirement System Medical] Board's determination that petitioner's injuries did not result from an event that was sudden, fortuitous, and unexpected ... . Although petitioner claims that her PTSD was brought on by the April 2019 occurrence, that event was merely the latest of a series of incidents in which the food-service worker trespassed on school property and acted in a confrontational manner toward petitioner, causing her significant stress and anxiety. As early as February 2019, petitioner informed school officials that the employee was continuously disobeying instructions to keep away from the school and that she was "concerned about the students and the building staff that have to endure his confrontational behavior." Following another incident in March, petitioner wrote that she "d[id] not feel comfortable with [the employee] given his behavior in the school." The Board rejected petitioner's initial ADR application on the ground that "based on the description of the events in question that occurred in the work setting on April 18, 2019, as well as the previous events in the work setting in February and March of 2019, [petitioner] has failed to demonstrate that an accident occurred in the work setting." Because that reasoning is supported by the evidentiary record, the Board's determination to deny ADR will not be disturbed on this appeal. Matter of Rawlins v Teachers' Retirement Sys. of the City of N.Y., 2024 NY Slip Op 02840, CtApp 5-23-24

Practice Point: Although an intentional act by a co-employee could constitute an "accident" giving rise to accidental disability retirement benefits (ADR) under the Teachers' Retirement System, here the interactions with the co-employee took place over a period of months and could not be described as "a sudden, unexpected event."

MAY 23, 2024

EMPLOYMENT LAW, MUNICIPAL LAW, CONTRACT LAW.

CITY RETIREES THREATENED WITH ELIMINATION OF THEIR EXISTING HEALTH INSURANCE AND AUTOMATIC ENROLLMENT IN A MEDICARE ADVANTAGE PLAN ENTITLED TO RELIEF UNDER THEIR PROMISSORY ESTOPPEL CAUSE OF ACTION (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Gesmer, determined the doctrine of promissory estoppel justified a permanent injunction prohibiting the city from "eliminating ... retirees' existing health insurance, automatically enrolling them in a new Aetna Medicare Advantage Plan, enforcing a June 30, 2023 deadline for retirees to opt out of the new plan, and implementing any other aspect of the City's new retiree healthcare policy:"

... [T]he record shows a clear and unambiguous promise, made for more than 50 years, that upon an employee's retirement, Medicare would provide the first level of hospital and medical insurance benefits and the City's benefits program would provide the second level to fill in the gaps. * * *

... [T]he record shows detrimental reliance on the promise. * * *

... [P]etitioners have demonstrated injury. Many City retirees stated that their chosen providers and hospitals, like many healthcare providers, do not accept the MAPs [Medicare Advantage Plans]. The City's plan to automatically enroll petitioners in the Aetna MAP and terminate their current Medigap coverage would result in injury to retirees whose medical providers do not accept the Aetna MAP. * * *

The particular manner in which the parties chose to litigate this action before Supreme Court resulted in a record with significant evidentiary support for petitioners' position and very little support for respondents' position. That record and the arguments the parties chose to make on appeal lead to the conclusion that petitioners are entitled to relief under their promissory estoppel cause of action. Matter of Bentkowski v City of New York, 2024 NY Slip Op 02771, First Dept 5-21-24

Practice Point: Here the promissory estoppel doctrine was applied to permanently enjoin the city from eliminating city retirees' health insurance and automatically enrolling them in a Medicare Advantage Plan.

MAY 21, 2024

EMPLOYMENT LAW, RELIGION, CONSTITUTIONAL LAW.

THE "RELIGIOUS EMPLOYER" EXEMPTION FROM MANDATED INSURANCE COVERAGE FOR MEDICALLY NECESSARY ABORTIONS DOES NOT VIOLATE THE FREE EXERCISE CLAUSE (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Wilson, determined the US Supreme Court ruling in Fulton v Philadelphia, 593 US 522 (2021) did not render the "religious employer" exemption to the mandated insurance coverage for medically necessary abortions unconstitutional. The opinion is too detailed and comprehensive to fairly summarize here:

Plaintiffs, the Roman Catholic Diocese of Albany and a variety of entities ranging from churches to religiously affiliated organizations to a single individual, provide medical

insurance plans to their employees. They have challenged a regulation promulgated by the Department of Financial Services as violative of the First Amendment of the United States Constitution. The challenged regulation requires New York employer health insurance policies that provide hospital, surgical, or medical expense coverage to include coverage for medically necessary abortion services (see 11 NYCRR 52.16 [o] [1]). Their challenge is to the regulation's exemption for "religious employers," which is defined by four factors (see 11 NYCRR 52.2 [y]). Plaintiffs' claim, in essence, is that the exemption is too narrow, such that the First Amendment rights of certain types of religiously affiliated employers are violated because they do not meet the terms of the exemption. * * *

Under Fulton, both the regulation itself and the criteria delineating a "religious employer" for the purposes of the exemption are generally applicable and do not violate the Free Exercise Clause. Neither the existence of the exemption in the regulation nor the defined criteria allow for "individualized exemptions" that are standardless and discretionary, nor do they allow for comparable secular conduct while discriminating against religious conduct. Roman Catholic Diocese of Albany v Vullo, 2024 NY Slip Op 02764, Fourth Dept 5-21-24

Practice Point: The 2021 US Supreme Court ruling in Fulton v Philadelphia did not render the "religious exemption" regulation promulgated by the NYS Department of Financial Services unconstitutional. The regulation exempts certain religious employers from mandated insurance coverage for medically necessary abortions.

MAY 21, 2024

FAMILY LAW, APPEALS, EVIDENCE.

THE CUSTODY-RELATED PRINCIPALS UNDERLYING MICHAEL B, 80 NY2D 299, APPLY TO THIS SURROGATE'S COURT GUARDIANSHIP PROCEEDING WHERE BOTH PARENTS SEEK TO BE APPOINTED GUARDIAN OF THEIR DEVELOPMENTALLY DISABLED SON AS HE TURNS 18; NEW EVIDENCE RENDERED THE RECORD INSUFFICIENT FOR A GUARDIANSHIP DETERMINATION; A NEW HEARING WAS ORDERED (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Miller, in this Surrogate's Court guardianship proceeding, determined the principals underlying Matter of Michael B, 80

NY2d 299, a custody case, should apply to this action to determine which parent should be appointed guardian of their developmentally disabled son, Joseph J D II, as he turned 18. Because new evidence was brought to light after the hearing, the record is no longer sufficient and a new hearing was ordered:

These appeals present us with the narrow question of whether a rule set forth by the Court of Appeals in Matter of Michael B. (80 NY2d 299)—that an appellate court may remit a child custody matter for a new hearing if subsequent developments reflect that the record has become insufficient to determine the issues presented—may be extended to this appeal from a Surrogate's Court decree determining a guardianship contest between the parents of an adult with a developmental disability within the meaning of article 17-A of the Surrogate's Court Procedure Act. In light of certain commonalities between this dispute and a custody dispute, including a focus on the best interest of the individual who is the subject of the proceedings, we conclude that the rule and underlying rationale set forth in Matter of Michael B. is equally applicable here. Thus, in this proceeding pursuant to Surrogate's Court Procedure Act article 17-A, we will consider new facts and allegations brought to our attention by the parties for the limited purpose of ascertaining whether the record before us is sufficient make a best interest determination, which is the same standard applied in appeals involving child custody. Upon doing so, we find that a new hearing is warranted because the record is no longer sufficient to determine what, at this juncture, is in the best interest of Joseph J. D. II. Matter of Joseph J.D. (Robert B.D.), 2024 NY Slip Op 02813, Second Det 5-22-24

Practice Point: The custody-related principals underlying Matter of Michael B, 80 NY2d 299, were applied to this Surrogate's Court guardianship proceeding where both parents sought to be appointed guardian of their developmentally disabled son as he turned 18. Because new evidence came to light rendering the record inadequate, a new hearing was ordered.

MAY 22, 2024

FAMILY LAW.

THE CUSTODY/GUARDIANSHIP HEARING TOOK SEVEN YEARS AND THE CHILDREN RESIDED WITH GRANDMOTHER AND UNCLE DURING THAT TIME; THE EXTENDED DISRUPTION OF CUSTODY CAUSED BY THE PROTRACTED COURT PROCEEDINGS DID NOT CONSTITUTE "EXTRAORDINARY CIRCUMSTANCES" WARRANTING AN AWARD OF CUSTODY TO GRANDMOTHER AND UNCLE (SECOND DEPT).

The Second Department, reversing Family Court, noted that the six or seven years during which the children resided with grandmother and uncle did not constitute "extraordinary circumstances" warranting granting grandmother and uncle, as opposed to mother, custody. Mother was seeking custody the entire time. The hearing started in 2014 and didn't conclude until 2021:

... [T]he record does not support the Family Court's determination that extraordinary circumstances existed so as to confer standing on the maternal grandmother and the maternal uncle to seek guardianship and custody of Blessin F. and Frank T., Jr. The evidence failed to establish that the mother voluntarily relinquished care and control of Blessin F. and Frank T., Jr., for an extended period of time ... . Rather, the record evidences that the mother's intention was for Blessin F. and Frank T., Jr., to reside with the maternal grandmother and the maternal uncle only temporarily during her brief period of incarceration so as to prevent them from being placed in foster care, and that the children would be returned to the mother's care and custody as soon as she was released. The hearing testimony demonstrates that from the time the mother was released from her brief period of incarceration in November 2012, she has continued to attempt to regain custody of Blessin F. and Frank T., Jr., she immediately went to Brooklyn when she was released, she made a motion to vacate the temporary orders of guardianship and custody, and she filed a petition, inter alia, for custody of Blessin F. and Frank T., Jr. Moreover, during the proceedings, the mother continued to have supervised and unsupervised parental access with Blessin F. and Frank T., Jr., as permitted by the court, in Brooklyn, although she was still residing in Georgia with her other young children. Additionally, the prolonged separation between the mother and Blessin F. and Frank T., Jr., occurred during the mother's attempts to regain custody during these protracted proceedings, and, thus, the extended disruption of custody does not amount to an extraordinary circumstance ... . When the maternal grandmother and the maternal uncle first filed petitions for guardianship and custody between October 2012 and February 2013, Blessin F. and Frank T., Jr., had only been

residing with them for, at most, a few months; however, the hearing, which commenced in May 2014, did not conclude until March 2021, almost seven years later. "'Indeed, the courts may not deny the natural parent's persistent demands for custody simply because it took so long'" ... . Matter of Teofilo R.F. v Tanairi R.F., 2024 NY Slip Op 02814, Second Dept 5-22-24

Practice Point: Although a prolonged disruption of custody can constitute "extraordinary circumstances" warranting awarding custody to a non-parent, that is not the case where, as here, the disruption was the result of protracted court proceedings (seven years).

MAY 22, 2024

FREEDOM OF INFORMATION LAW (FOIL), PUBLIC HEALTH LAW.

DEATH RECORDS KEPT BY THE DEPARTMENT OF HEALTH ARE EXEMPT FROM DISCLOSURE TO THE PETITIONER, A NON-PROFIT WHICH PROMOTES GENEALOGICAL RESEARCH (THIRD DEPT).

The Third Department, reversing Supreme Court, over a two-justice dissent, determined petitioner's request for the "New York State Death Index" through December 31, 2017, should have been denied:

Petitioner is a not-for-profit organization that promotes public access to government records for historical and genealogical purposes. Respondent is statutorily charged with "procur[ing] the faithful registration of . . . deaths," except in the City of New York ... . * * *

While petitioner's interest in seeking information to assist in genealogical research promotes a legitimate public interest, such a request does not "further the policies of FOIL, which are to assist the public in formulating intelligent, informed choices with respect to both the direction and scope of governmental activities" ... . * * *

We agree with respondent's contention that Public Health Law § 4174 (1) (a) provides an exemption authorizing the withholding of the requested information. That statute allows respondent to release "either a certified copy or a certified transcript of the record of any death" to seven specific categories of applicants. The provision concludes with a qualifier that "no certified copy or certified transcript of a death record shall be subject to disclosure under [FOIL]" ... . The term certified transcript is broadly defined as "a computer generated or other reproduction of information abstracted from the original state or local record the elements of which shall be as determined by the commissioner and certified by the

commissioner . . . as being an accurate abstract of information contained in the original record" ... . We recognize that petitioners are not requesting copies of death certificates or any "certified" records. Even so, in our view, the import of the statute is to limit the disclosure of these records to applicants who fall within the defined categories, whose needs require that the records be certified. The express qualifier precludes a FOIL request otherwise made by a nonqualifying member of the general public. In this context, the statutory focus is not on the certification component but on maintaining the confidentiality of the underlying information ... . Matter of Reclaim the Records v New York State Dept. of Health, 2024 NY Slip Op 02854, Third Dept 5-23-24

Practice Point: The Public Health Law limits the disclosure of death records kept by the health department to specific categories of applicants and state the records are not subject to disclosure under FOIL. Here the request by a non-profit promoting genealogical research was denied in its entirety.

MAY 23, 2024

MEDICAL MALPRACTICE, NEGLIGENCE.

FAILURE TO PROPERLY ASSESS A PATIENT'S RISK OF FALLING AND NEED FOR SUPERVISION SOUNDS IN MEDICAL MALPRACTICE, NOT NEGLIGENCE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the action sounded in medical malpractice, not negligence. Plaintiff's decedent, who was blind, fell from an examining table when the nurse stepped away to throw away gauze in a nearby trash can:

Allegations that a health care provider improperly assessed a patient's risk of falling and need for supervision or restraint, in light of his or her medical condition, "implicate questions of medical competence or judgment linked to . . . treatment" (Weiner v Lenox Hill Hosp., 88 NY2d at 788) and, therefore, sound in medical malpractice ... . Here, the essence of the allegations was that the defendants were negligent in their assessment of "the level of supervision, nursing care, and security required for [Davis]," in light of her physical condition and the administration of narcotic medications ... . Such allegations sound in medical malpractice as opposed to ordinary negligence ... .

Accordingly, the Supreme Court erred in denying the defendants' cross-motion to compel the plaintiff to serve a certificate of merit and notice of medical malpractice and to transfer

the action from the general negligence part to the medical malpractice part. Snow v Gotham Staffing, LLC, 2024 NY Slip Op 02833, Second Dept 5-22-24

Practice Point: Failure to properly assess a patient's risk of falling and need for supervision sounds in medical malpractice, not ordinary negligence.

MAY 22, 2024

MEDICAL MALPRACTICE, NEGLIGENCE.

THE "SHEPPARD-MOBLEY" BAR TO A MOTHER'S RECOVERY FOR EMOTIONAL HARM IF HER BABY IS BORN ALIVE DOES NOT APPLY TO A LACK-OF-INFORMED CONSENT, AS OPPOSED TO A MEDICAL MALPRACTICE, CAUSE OF ACTION; HERE MOTHER ALLEGED SHE DID NOT CONSENT TO TWO UNSUCCESSFUL VACUUM EXTRACTION ATTEMPTS WHICH PRECEDED THE C-SECTION; HER BABY DIED EIGHT DAYS AFTER BIRTH (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Rodriguez, over a partial dissent, determined plaintiff's lack-of-informed-consent cause of action properly survived defendant doctor's (Grimaldi's) motion for summary judgment. Plaintiff mother alleged she did not consent to the two unsuccessful vacuum extraction attempts which preceded the C-section delivery of her baby. The baby died eight days after birth. The First Department questioned the continued relevance of Sheppard-Mobley v King, 4 NY3d 627 (2005) which held, in an action for medical malpractice, mother cannot recover for emotional harm if the baby is born alive. The First Department distinguished Sheppard-Mobley on the ground that the instant action alleges a lack of informed consent, not ordinary medical malpractice:

This appeal concerns, among other issues, whether Sheppard-Mobley v King (4 NY3d 627 [2005]) (Sheppard-Mobley) and related cases bar a plaintiff mother's claim for emotional harm resulting from lack of informed consent for certain prenatal procedures. We hold that they do not.

Sheppard-Mobley held that a mother's damages for emotional harm could not be recovered on a cause of action for ordinary medical malpractice where the child was born alive and in the absence of independent physical injury to the mother. Accordingly, plaintiff's claim based on lack of informed consent—a separate theory of recovery that,

under the circumstances, implicates different interests than the ordinary medical malpractice claim at issue in Sheppard-Mobley—is distinguishable.

In addition, assuming [for the sake of argument] the rule of Sheppard-Mobley applies to claims for ordinary medical malpractice and lack of informed consent alike, we are of the opinion that the rule should be revisited. * * * Now almost 20 years after Sheppard-Mobley, further consideration is warranted with respect to whether a mother may recover for emotional damages resulting from physical injuries to her fetus or infant during pregnancy, labor, or delivery caused by medical malpractice or lack of informed consent. SanMiguel v Grimaldi, 2024 NY Slip Op 02881, First Dept 5-23-24

Practice Point: Here the First Department held that the bar to mother's recovery for emotional harm if her baby is born alive does not apply to a lack-of-informed consent, as opposed to a medical malpractice, cause of action.

MAY 23, 2024

NEGLIGENCE, EDUCATION-SCHOOL LAW.

THERE IS A QUESTION OF FACT WHETHER THE SCHOOL'S DUTY TO SUPERVISE STUDENTS EXTENDS TO AN AREA OUTSIDE THE SCHOOL WHERE PARENTS PICK UP AND DROP OFF THE STUDENTS; INFANT PLAINTIFF TRIPPED AND FELL ON A ROAD DEFECT NEAR THE CURB (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the negligent supervision cause of action against defendant school should not have been dismissed. Infant plaintiff tripped and fell on a road defect that abutted a curb where students were picked up and dropped off by parents:

"Schools are under a duty to adequately supervise the students in their charge and they will be held liable for foreseeable injuries proximately related to the absence of adequate supervision" ... . "Schools are not insurers of safety, however, for they cannot reasonably be expected to continuously supervise and control all movements and activities of students" ... . "[A] school's duty to supervise is generally viewed as being coextensive with and concomitant to its physical custody of and control over the child," and therefore, "[w]hen that custody ceases because the child has passed out of the orbit of its authority in such a way that the parent is perfectly free to reassume control over the child's protection, the

school's custodial duty also ceases" ... . "[W]hile a school has no duty to prevent injury to schoolchildren released in a safe and anticipated manner, the school breaches a duty when it releases a child without further supervision into a foreseeably hazardous setting it had a hand in creating"... .

Under the circumstances of this case, the defendants failed to eliminate all triable issues of fact as to whether the infant plaintiff was released from school without adequate supervision into a foreseeably hazardous setting they had a hand in creating ... . Thus, the defendants failed to establish, prima facie, that their negligent supervision over the infant plaintiff was not a proximate cause of the injuries the infant plaintiff sustained ... . Levy v City of New York, 2024 NY Slip Op 02807, Second Dept 5-22-24

Practice Point: A school's duty to supervise students may extend to areas outside the school, i.e., the area where students are picked up and dropped off by parents.

MAY 22, 2024

REAL ESTATE, CIVIL PROCEDURE, CONTRACT LAW.

THE LAWSUIT SOUGHT RETURN OF A DOWN PAYMENT UNDER A REAL ESTATE CONTRACT; BECAUSE THE LAWSUIT DID NOT AFFECT TITLE, POSSESSION, USE OR ENJOYMENT OF THE PROPERTY A NOTICE OF PENDENCY IS NOT APPROPRIATE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the notice of pendency should have been cancelled because the lawsuit, which sought the return of a down payment under a real estate contract, did not affect title, possession, use or enjoyment of the real property:

Pursuant to CPLR 6501, "[a] notice of pendency may be filed only when 'the judgment demanded would affect the title to, or the possession, use or enjoyment of, real property'" ... . "When the court entertains a motion to cancel a notice of pendency in its inherent power to analyze whether the pleading complies with CPLR 6501, it neither assesses the likelihood of success on the merits nor considers material beyond the pleading itself; 'the court's analysis is to be limited to the pleading's face'" ... .

Here, the complaint, on its face, only asserts causes of action to recover monetary damages and does not seek relief that would affect the title to, or the possession, use, or enjoyment of, the property. Mallek v Felmine, 2024 NY Slip Op 02808, Second Dept 5-22-24

Practice Point: A notice of pendency is appropriate only when the underlying lawsuit involves title, possession, use or enjoyment of real property. A suit for the return of a down payment does not warrant a notice of pendency.

MAY 22, 2024

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