NEW YORK APPELLATE DIGEST, LLC

Weekly Reversal Report
May 6 – 10, 2024

An Organized Compilation of Summaries of Selected Decisions, Mostly Reversals, Released by Our New York State Appellate Courts May 6 – 10, 2024, and Posted on the New York Appellate Digest Website on Tuesday, May 15, 2024. The Entries in the Table of Contents Link to the Summaries Which Link to the Full Decisions on the Official New York Courts Website. Click on “Table of Contents” in the Header on Any Page to Return There. Right Click on the Citations to Keep Your Place in the Reversal Report.

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ACCOUNT STATED, ATTORNEYS, JUDGES.

THE JUDGE SHOULD NOT HAVE CONSIDERED WHETHER THE INVOICES FOR ATTORNEY'S FEES WERE "REASONABLE;" THE ONLY QUESTION IN AN ACCOUNT-STATED ACTION IS WHETHER THE CLIENT OBJECTED TO THE AMOUNTS OF THE INVOICES (FIRST DEPT).

The First Department, reversing Supreme Court, determined the judge should not have considered whether the invoices for attorney's fees were "reasonable" in this account-stated action. The only relevant question is whether defendant objected to the amounts of the invoices:

The court improperly engaged in a reasonableness analysis with regard to the invoices which were the subject of plaintiff's account stated claim (see Matter of Lawrence, 24 NY3d 320, 343 [2014] ["an attorney or law firm may recover on a cause of action for an account stated with proof that a bill, even if unitemized, was issued to a client and held by the client without objection for an unreasonable period of time(,) (and) need not establish the reasonableness of the fee since the client's act of holding the statement without

objection will be construed as acquiescence as to its correctness"] ...; see L.E.K. Consulting LLC v Menlo Capital Group, LLC, 148 AD3d 527, 528 [1st Dept 2017). Jones Law Firm, P.C. v Peck, 2024 NY Slip Op 02502, First Dept 5-7-24

Practice Point: The "reasonableness" of an invoice is not a concern in an account-stated action. The only question is whether the recipient of the invoice objected to the amount.

MAY 7, 2024

CIVIL PROCEDURE, CONTRACT LAW, JUDGES.

ALTHOUGH PLAINTIFF WAS AWARDED SUMMARY JUDGMENT IN THIS QUANTUM MERUIT CASE. DEFENDANT DID NOT WAIVE A JURY TRIAL AND WAS THEREFORE ENTITLED TO A JURY TRIAL ON DAMAGES; BENCH-TRIAL VERDICT REVERSED (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined defendant never waived a jury trial in this quantum-meruit action. Therefor, although plaintiff was granted summary judgment, defendant was entitled to a jury trial on damages:

... [T]he order awarding damages must be reversed, and the judgment vacated ... . Upon granting plaintiff summary judgment for liability on its quantum meruit claim, Supreme Court conducted a hearing on attorneys' fees. However, claims seeking recovery under the "quasi-contractual theory of quantum meruit" for "only money damages" are considered "actions at law" entitling parties to a trial by jury ... . Defendant did not waive a jury trial, but instead filed his jury demand "within fifteen days after service of the note of issue," and more than a year before the purported attorney fee hearing was held (CPLR 4102[a]). Defendant's "right to a jury trial [wa]s not lost, when [the] motion [and cross-motion] for summary judgment [were] decided against [him]" ... , yet Supreme Court deprived him of this right by conducting a bench trial on damages ... . Hilton Wiener LLC v Zenk, 2024 NY Slip Op 02595, First Dept 5-9-24

Practice Point: Quantum meruit is an action at law entitling parties to a jury trial.

Practice Point: Here defendant never waived a jury trial and, although summary judgment was awarded to plaintiff, defendant was entitled to a jury trial on damages.

MAY 9, 2024

CIVIL PROCEDURE, JUDGES, FAMILY LAW.

SUPREME COURT DID NOT CITE ANY "EXTRAORDINARY CIRCUMSTANCES" TO JUSTIFY ITS SUA-SPONTE DISMISSAL OF THE COMPLAINT IN THIS DIVORCE ACTION (SECOND DEPT).

The Second Department, reversing Supreme Court in this divorce action, determined there was no demonstration of "extraordinary circumstances" to justify Supreme Court's sua sponte dismissal of the complaint:

"A court's power to dismiss a [complaint], sua sponte, is to be used sparingly, and only when extraordinary circumstances exist to warrant dismissal" ... . Here, the Supreme Court did not identify any extraordinary circumstances warranting sua sponte dismissal of the complaint ... . The plaintiff moved, inter alia, to consolidate custody and family offense proceedings that were pending in the Family Court, Queens County, and the Family Court, Kings County, with the instant action. There was no motion to dismiss the complaint in its entirety or to change venue before the court ... . Ivashchenko v Borukhov, 2024 NY Slip Op 02526, Second Dept 5-8-24

Practice Point: This decision illustrates the appellate-courts' discomfort with sua sponte dismissals of complaints (dismissal in the absence of a motion requesting it).

MAY 8, 2024

CIVIL PROCEDURE, JUDGES.

"GOOD CAUSE" FOR FILING A LATE SUMMARY JUDGMENT MOTION MUST BE DEMONSTRATED IN THE INITIAL MOTION PAPERS, NOT IN THE REPLY PAPERS (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the defendant's late summary judgment motion should not have been granted because the initial papers did not demonstrate "good cause" for the late filing. The "good cause" allegations in defendant's reply papers should not have been considered:

Defendant's motion was ... untimely ... and, thus, defendant was required to demonstrate "good cause" for the untimeliness of the motion in its initial motion papers (CPLR 3212 [a] ...). Indeed, "[i]t is well settled that it is improper for a court to consider the 'good cause' proffered by a movant if it is presented for the first time in reply papers" ... . Inasmuch as it

is undisputed here that defendant did not proffer any good cause for the delay in its initial motion papers, the court erred in considering the motion and should have denied it as untimely ... . Worden v City of Utica, 2024 NY Slip Op 02628, Fourth Dept 5-10-24

Practice Point: If you make a late summary judgment motion, you must demonstrate "good cause" for being late in the initial motion papers. A "good cause" demonstration in the reply papers should not be considered by the judge.

MAY 10, 2024

CIVIL PROCEDURE, JUDGES.

A DEPOSITION ERRATA SHEET SUBMITTED PAST THE 60-DAY DEADLINE SHOULD HAVE BEEN STRUCK (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the deposition errata sheet should have been struck because it was submitted after the 60-day period expired:

Supreme Court erred in denying their joint motion to the extent that it seeks to strike plaintiff's errata sheet inasmuch as the errata sheet was untimely (see CPLR 3116 [a]). We therefore modify the order accordingly. CPLR 3116 (a) provides, in relevant part, that "[n]o changes to the transcript may be made by the witness more than sixty days after submission to the witness for examination." It is undisputed that plaintiff did not submit the errata sheet within 60 days of her deposition, and submitted it over a month after the 60-day period expired, in opposition to defendants' motions for summary judgment. Plaintiff's reasons for the lateness under the circumstances did not constitute a good cause for the delay (see CPLR 2004 ...). We note that we did not consider the errata sheet when reviewing defendants' contentions regarding their motions for summary judgment. Pagan v GPK, LLC, 2024 NY Slip Op 02631, Fourth Dept 5-10-24

Practice Point: A motion to strike a deposition errata sheet submitted past the 60-day deadline should be granted.

MAY 10, 2024

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CONSTITUTIONAL LAW.

THE EXECUTIVE LAW WHICH CREATED THE NYS COMMISSION ON ETHICS AND LOBBYING IN GOVERNMENT IS UNCONSTITUTIONAL; THE LAW CREATED AN AGENCY WITH EXECUTIVE POWERS WHICH USURPED THE GOVERNOR'S POWER TO ENSURE FAITHFUL EXECUTION OF ETHICS LAWS (THIRD DEPT)

The Third Department, in a full-fledged opinion by Justice Powers. determined the Executive Law provision which created the New York State Commission on Ethics and Lobbying in Government is unconstitutional. The law was challenged by former governor Andrew Cuomo after ethics charges were brought against him by the Commission stemming from a book by Governor Cuomo entitled "American Crisis: Leadership Lessons from the COVID-19 Pandemic:"

Pursuant to the Governor's authority to execute the laws, she is afforded wide discretion in determining the proper methods of enforcement ... . However, Executive Law § 94 revokes the Governor's enforcement power with respect to the ethics laws, thereby depriving her of all discretion in determining the methods of enforcement of these laws. Instead, it places this power into the hands of defendant [Commission], an entity over which she maintains extremely limited control and oversight, as she appoints a minority of members and has no ability to remove members. Moreover, appointments must be approved by the IRC [independent review committee], an external nongovernmental entity made up of people who are in that position solely by virtue of their employment and do not answer to the populace. As such, Executive Law § 94 creates an agency with executive power, in that it has the authority to investigate and impose penalties for the violation of the ethics laws, while being entirely outside the control of the executive branch. Thus, it usurps the Governor's power to ensure the faithful execution of the applicable ethics laws ... . Cuomo v New York State Commn. on Ethics & Lobbying in Govt., 2024 NY Slip Op 02568, Third Dept 5-9-24

MAY 9, 2024

CRIMINAL LAW, APPEALS, EVIDENCE.

THE SHOOTER, WHO WAS NEVER FOUND OR IDENTIFIED, WAS A PASSENGER IN A CAR DRIVEN BY DEFENDANT WHEN THE SHOOTER SHOT AT AND MISSED A PERSON SITTING IN A PARKED CAR; THE ATTEMPTED MURDER AND ASSAULT CONVICTIONS WERE AGAINST THE WEIGHT OF THE EVIDENCE; TWO-JUSTICE DISSENT (FOURTH DEPT).

The Fourth Department, reversing defendant's attempted murder and assault convictions as against the weight of the evidence, over a two-justice dissent, determined there was no evidence defendant shared the shooter's intent. It was alleged defendant was the driver when his passenger shot at and missed a person sitting in a parked car. The shooter was never identified. There was no evidence defendant knew the victim:

... [T]he question is whether defendant shared the shooter's intent to kill or seriously injure the victim. Even assuming, arguendo, that the conviction is supported by legally sufficient evidence ... , we conclude that the verdict is against the weight of the evidence ... . Viewing the evidence in light of the elements of those crimes as charged to the jury ... and considering that "a defendant's presence at the scene of the crime, alone, is insufficient for a finding of criminal liability" ... , here the People failed to prove beyond a reasonable doubt that defendant "shared the [shooter's] intent to kill" or cause serious physical injury to the victim, or the intent to use the gun unlawfully against the victim ... , particularly given the lack of evidence "that defendant knew that the [shooter] was armed at the time defendant transported him" ... .

From the dissent:

Defendant drove the vehicle while the shooter fired several times at the parked vehicle in which the victim was sitting in the front passenger seat, and the victim heard someone say "yo" as soon as the gunshots started. The police found the parked vehicle's driver's side windows shattered and shell casings on the ground next to the vehicle. A permissible and eminently reasonable inference from the facts was that defendant stopped or slowed down the vehicle in order to allow the shooter to fire several shots at the parked vehicle ... . In other words, defendant shared the shooter's intent to use a gun to kill or cause serious physical injury to the victim and "intentionally aid[ed]" the shooter to engage in such conduct (Penal Law § 20.00). In addition, defendant fled from the scene after the gunshots were fired and collided with another vehicle. The driver of that vehicle testified that, when

she asked defendant to exchange paperwork and information, he told her to "move the f*** out of the way," before he pushed her vehicle with his vehicle and drove off again. People v Lathrop, 2024 NY Slip Op 02618, Fourth Dept 5-10-24

Practice Point: Here the appellate court found the evidence of attempted murder legally sufficient but the verdict against the weight of the evidence (a difficult concept).

MAY 10, 2024

CRIMINAL LAW, JUDGES, APPEALS, JUDGES.

PROOF OF THE VALUE OF STOLEN PROPERTY WAS INSUFFICIENT; CONVICTION REDUCED IN THE INTEREST OF JUSTICE (FOURTH DEPT).

The Fourth Department, reducing defendant's possession-of-stolen-property conviction, determined the value of the property was not established:

We agree with defendant that, with respect to his conviction of criminal possession of stolen property in the third degree under count 1 of the indictment, there is legally insufficient evidence establishing the value of the items seized from the storage unit. Although defendant did not preserve that issue for our review, we exercise our power to address it as a matter of discretion in the interest of justice ... . "A person is guilty of criminal possession of stolen property in the third degree when [that person] knowingly possesses stolen property, with intent to benefit [that person] or a person other than an owner thereof or to impede the recovery by an owner thereof, and when the value of the property exceeds three thousand dollars" ... . It is well settled that "a victim must provide a basis of knowledge for [their] statement of value before it can be accepted as legally sufficient evidence of such value" ... . "Conclusory statements and rough estimates of value are not sufficient" to establish the value of the property ... . Although the People elicited some valuation testimony from the victims at trial, such testimony did not include the basis for the victims' knowledge of the value of most of the items in the storage unit ... . We conclude on this record that the evidence is legally insufficient to establish that the value of the property taken exceeded $3,000 ... . The evidence is legally sufficient, however, to establish that defendant committed the lesser included offense of criminal possession of stolen property in the fifth degree (see § 165.40). People v Hensley, 2024 NY Slip Op 02650, Fourth Dept 5-10-24

Practice Point: The basis for the victim's knowledge of the value of the stolen property was not demonstrated; possession-of-stolen-property conviction reduced.

MAY 10, 2024

CRIMINAL LAW, JUDGES, APPEALS.

DEFENDANT WAS NOT INFORMED OF THE PERIOD OF POSTRELEASE SUPERVISION, GUILTY PLEA VACATED; THE WAIVER OF APPEAL WAS NOT DISCUSSED UNTIL AFTER THE GUILTY PLEA, WAIVER INVALID (SECOND DEPT).

The Second Department, vacating defendant's guilty plea and finding the waiver of appeal invalid, held that the judge's failure to inform defendant of the period of postrelease supervision rendered the guilty plea involuntary. In addition, the judge did not discuss the waiver of appeal until after the guilty plea:

... County Court did not specify the period of postrelease supervision to be imposed and did not explain that a term of postrelease supervision would be imposed even if the defendant successfully completed a substance abuse diversion program. ... [T]he court's failure to so advise the defendant prevented his plea from being knowing, voluntary, and intelligent ... .

... County Court did not discuss the appeal waiver until after the defendant had already admitted his guilt ... , and the court failed to ascertain whether the defendant "understood the nature of the appellate rights being waived" and the consequences of waiving those rights ... . People v Reyes, 2024 NY Slip Op 02547, Second Dept 5-8-24

Practice Point: Failure to inform defendant of the period of postrelease supervision renders the guilty plea involuntary.

Practice Point: Failure to discuss the waiver of appeal until after the defendant pleads guilty renders the waiver invalid.

MAY 8, 2024

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CRIMINAL LAW, JUDGES, APPEALS.

WHEN DEFENDANT MADE STATEMENTS AT THE TIME OF THE PLEA WHICH RAISED A POSSIBLE INTOXICATION DEFENSE THE JUDGE SHOULD HAVE INQUIRED FURTHER; THE ISSUE NEEDN'T BE PRESERVED FOR APPEAL (FIRST DEPT).

The First Department, vacating defendant's guilty plea, determined the defendant's statement at the time of the plea raised questions the judge should have explored. A narrow exception to the preservation requirement applies here:

The narrow exception to the preservation requirement applies in this "rare case" where defendant made statements that cast doubt upon his guilt and the court failed to satisfy its duty of inquiring further to ensure that defendant's plea was knowing and voluntary ... . Although defendant's statements at sentencing raised a possible intoxication defense, the court did not make any inquiry regarding the statements or the applicability of the defense. The court's failure to ensure that defendant understood the defense and was waiving his right to pursue it at trial requires vacatur of the plea ... . People v Dozier, 2024 NY Slip Op 02602, First Dept 5-9-24

Practice Point: If a defendant makes statements at the time of a plea which indicates a possible defense, the judge must make inquiries sufficient to ensure the plea is voluntary and intelligent.

Practice Point: When a defendant makes statements at the time of the plea which indicate a possible defense and the judge fails to make sufficient inquiries, the issue is appealable in the absence of preservation.

MAY 9, 2024

ELECTION LAW, CONSTITUTIONAL LAW.

THE NEW YORK EARLY MAIL VOTER ACT, EFFECTIVE JANAURY 1, 2024, IS CONSTITUTIONAL (THIRD DEPT).

The Third Department, in a full-fledged opinion by Justice Lynch, determined the 2923 New York Early Mail Voter Act (Election Law 8-700 et seq) is constitutional:

In 2023, the Legislature passed the New York Early Mail Voter Act (Election Law § 8-700 et seq), permitting all registered voters in New York to apply to "vote early by mail . . . in any election . . . in which the voter is eligible to vote" ... . To be considered for processing, an application to vote early by mail must be received by a local Board of Elections (hereinafter BOE) no later than 10 days before the election ... . Once received, the BOE confirms that the applicant is "a registered voter of the county or city at the address listed in the application and is eligible to vote in the election or elections for which the application is filed" ... . A ballot is then issued to the applicant, along with a postage-paid return envelope, which must be cast and counted by the BOE if received by the close of polls on election day or postmarked by that date and received no later than seven days thereafter ... . The Act contains safeguards to protect against fraud, requiring the State BOE to maintain "an electronic early mail ballot tracking system" that records, among other information, whether it "received such voter's completed early mail ballot" and "counted or rejected" it ... . Correspondingly, each local BOE is required to "maintain an early mail ballot tracking system integrated with the [S]tate [BOE's] system" ... . Concomitant with the Act's passage, the Legislature also amended Election Law § 9-209 to make the canvass procedures set forth in that section — which contain substantial protections to ensure election integrity — applicable to early mail ballots. The express purpose of the Act is to ensure "ease of participation" in elections and to "make New York State a leader in engaging the electorate, meeting voters where they are and opening up greater opportunities for people to have their choices made on the ballot" ... . It was signed into law on September 20, 2023 and became effective January 1, 2024. Stefanik v Hochul, 2024 NY Slip Op 02569, Second Dept 5-9-24

MAY 9, 2024

FAMILY LAW, JUDGES, APPEALS.

FAMILY COURT SHOULD NOT HAVE SUSPENDED FATHER'S VISITATION WITHOUT MAKING FINDINGS OF FACT, MATTER REMITTED (FOURTH DEPT).

The Fourth Department, reversing Family Court, determined Family Court should not have suspended father's visitation without making findings of fact:

The father ... contends that the court failed to make any factual findings whatsoever to support the determination to suspend the father's visitation with the child, and that the matter should be remitted to allow the court to make such findings. We agree. It is "well established that the court is obligated 'to set forth those facts essential to its decision' " ... .

Here, the court completely failed to follow that well-established rule when it failed to issue any factual findings to support its determination … , either with respect to whether there had been a change in circumstances … or the relevant factors that it considered in making a best interests of the child determination … . "Effective appellate review, whatever the case but especially in child visitation, custody or neglect proceedings, requires that appropriate factual findings be made by the trial court—the court best able to measure the credibility of the witnesses" … . We therefore reverse the amended order and remit the matter to Family Court to make a determination on the petition including specific findings as to a change in circumstances and the best interests of the child, following an additional hearing if necessary … . Matter of Miller v Boyden, 2024 NY Slip Op 02648, Fourth Dept 5-10-24

Practice Point: Here Family Court should not have suspended father's visitation without making findings of fact because appellate review is impossible; matter remitted.

MAY 10, 2024

FORECLOSURE, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL).

ALTHOUGH ONLY STEPHEN BOTT SIGNED THE NOTE, BOTH HE AND CHRISTINE BOTT SIGNED THE MORTGAGE; THEREFORE CHRISTINE BOTT WAS A "BORROWER" ENTITLED TO SEPARATE NOTICE OF THE FORECLOSURE PURSUANT TO RPAPL 1304; THE JOINT NOTICE WAS INVALID (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the bank's failure to notify both borrowers of the foreclosure action violated RPAPL 1304 and required that defendants' summary judgment motion be granted. Although only Stephen Bott signed the note, he and Christine Bott executed the mortgage instrument. Therefor the joint RPAPL 1304 notice was invalid:

Although Stephen Bott was the only signatory to the note, both he and Christine Bott executed the mortgage, and Christine Bott is identified as a borrower on the first page of the mortgage. "Where, as here, a homeowner defendant is referred to as a 'borrower' in the mortgage instrument and, in that capacity, agrees to pay amounts due under the note, that defendant is a 'borrower' for the purposes of RPAPL 1304, notwithstanding . . . any

ambiguity created by a provision in the mortgage instrument to the effect that parties who did not sign the underlying note are not personally obligated to pay the sums secured" ... . Therefore, Christine Bott was entitled to notice pursuant to RPAPL 1304 ... . Since it is undisputed that a jointly addressed 90-day notice, rather than individually addressed notices in separate envelopes, was sent to the defendants, the plaintiff failed to comply with RPAPL 1304, and the defendants established their prima facie entitlement to judgment as a matter of law dismissing the complaint insofar as asserted against them ... . HSBC Bank USA, N.A. v Bott, 2024 NY Slip Op 02524, Second Dept 5-8-24

Practice Point: A person obligated to pay the mortgage is a "borrower" within the meaning of RPAPL 1304 even if that person did not sign the note. Each "borrower" is entitled to separate notice of the foreclosure. Here, the joint notice was invalid and defendant-borrowers' motion for summary judgment should have been granted.

MAY 8, 2024

LABOR LAW-CONSTRUCTION LAW, EVIDENCE.

ALTHOUGH PLAINTIFF MADE OUT A PRIMA FACIE CASE IN THIS LABOR LAW 240(1) LADDER-FALL ACTION, DEFENDANTS RAISED TRIABLE ISSUES OF FACT BY POINTING TO INCONSISTENCIES IN PLAINTIFF'S ACCOUNT (FIRST DEPT).

The First Department, reversing Supreme Court, determined defendants were able to raise triable issues of fact in this ladder-fall Labor Law 240(1) cause by pointing to inconsistencies in the plaintiff's version of events:

Plaintiff was allegedly injured while removing and replacing bricks on a building at a construction site. At his deposition, plaintiff testified that while working, he climbed up an extension ladder to retrieve materials necessary for the project. According to plaintiff, when he reached a point around seven to eight feet off the ground, the ladder suddenly moved, causing him to fall.

Plaintiff established prima facie entitlement to summary judgment by submitting his deposition testimony describing the accident, along with photographic evidence of the accident site.

... [D]efendants raised triable issues of fact sufficient to defeat the motion by identifying various inconsistencies in plaintiffs account of the accident, thus calling into question his

overall credibility and the circumstances underlying his claimed injuries ... . For example, plaintiff testified inconsistently about the day that he was allegedly injured, whether he continued working after his alleged accident, and whether he promptly reported his accident. Further, the record evidence shows that plaintiff first went to the hospital at least several days after his employer had allegedly terminated him for unexplained, repeated absenteeism. Simpertegui v Carlyle House Inc., 2024 NY Slip Op 02609, First Dept 5-9-24

Practice Point: Credibility issues can defeat a motion for summary judgment.

MAY 9, 2024

LABOR LAW-CONSTRUCTION LAW.

DEFENDANT IN THIS LADDER-FALL CASE RAISED A QUESTION OF FACT WHETHER PLAINTIFF MISSED A STEP AND WAS THEREFORE THE SOLE PROXIMATE CAUSE OF THE FALL; A TWO-JUSTICE DISSENT DISAGREED (FOURTH DEPT).

The Fourth Department determined defendant in this ladder-fall case raised a question of fact whether plaintiff was the sole proximate cause of his fall. The two-justice dissent disagreed:

We conclude that plaintiff met his initial burden on the motion of establishing that the ladder was "not so placed . . . as to give proper protection to [him]" through evidence that plaintiff fell when the ladder suddenly and unexpectedly shifted ... . The burden then shifted to defendant to raise a triable issue of fact whether plaintiff's "own conduct, rather than any violation of Labor Law § 240 (1), was the sole proximate cause of [his] accident"... . We conclude that defendant met that burden through evidence suggesting that plaintiff fell from the ladder because he missed a step while descending, not because the ladder shifted or otherwise failed ... .

From the dissent:

... [E]ven if there was non-hearsay evidence that plaintiff mis-stepped and missed a rung while descending the ladder, defendant still does not raise a triable question of fact with respect to proximate cause. "It is well settled that [the] failure to properly secure a ladder to insure that it remains steady and erect while being used, constitutes a violation of Labor Law § 240 (1)" ... and, here, defendant does not dispute plaintiff's allegations that defendant failed to properly erect, secure or place the ladder to prevent it from shifting.

Missing a rung while descending the ladder is not an act of "such an extraordinary nature or so attenuated from the statutory violation as to constitute a cause sufficient to relieve [defendant] of liability" ... . Krause v Industry Matrix, LLC, 2024 NY Slip Op 02653, Fourth Dept 5-10-24

Practice Point: Here evidence plaintiff "missed a step' raised a question of fact whether plaintiff was the sole proximate cause of his fall from a ladder.

MAY 10, 2024

MEDICAL MALPRACTICE, EVIDENCE, JUDGES.

THE JUDGE SHOULD NOT HAVE REJECTED PLAINTIFF'S EXPERT'S OPINION BECAUSE SHE WAS A REGISTERED NURSE, NOT A DOCTOR; THE REGISTERED NURSE WAS QUALIFIED TO OFFER AN OPINION ON FALL PREVENTION; AN EXPERT'S QUALIFICATIONS SPEAK TO THE WEIGHT OF THE OPINION EVIDENCE, NOT ADMISSIBILITY (FIRST DEPT).

The First Department, reversing Supreme Court, determined the evidence submitted by plaintiff's expert, a registered nurse, should not have been rejected because she was not a physician. Plaintiff's decedent was a nursing-home patient with dementia who fell. The registered nurse was qualified to offer opinion evidence about measures to prevent elderly patients from falling:

Supreme Court disregarded plaintiff's nursing expert's opinion because she is not a medical doctor. However, the standard of care at issue clearly falls within the duties and expertise of a registered nurse. At the defendant nursing home, patient assessments were performed by registered nurses and evaluated by a team which included registered nurses. The nursing expert's curriculum vitae demonstrates that she has a Bachelor of Science in nursing from the University of the State of New York, is licensed as a registered nurse in New York, and has worked in nursing since 1980. In particular, she has over fifteen years of experience conducting plan of care assessments for high-risk nursing home patients. Therefore, plaintiff's nursing expert demonstrated that she has the requisite experience and expertise to opine as to the proper medical standard for preventing falls in elderly patients with dementia residing in skilled nursing facilities and whether defendant deviated from that standard ... .

Furthermore, challenges regarding an expert witness's qualifications affect the weight to be accorded the expert's views, not their admissibility ... . Rodriguez v Isabella Geriatric Ctr. Inc., 2024 NY Slip Op 02608, First Dept 5-9-24

Practice Point: Here the registered nurse was qualified to offer an opinion on the measures necessary to prevent geriatric patients from falling.

Practice Point: An expert's qualifications speak to the weight of the opinion evidence, not its admissibility. Here the registered nurses opinion should not have been rejected because she was not a physician.

MAY 9, 2024

MEDICAL MALPRACTICE, NEGLIGENCE.

THE MEDICAL MALPRACTICE ACTION AGAINST THE RESIDENT WHO PERFORMED THE SURGERY UNDER THE SUPERVISION OF ANOTHER SURGEON SHOULD HAVE BEEN DISMISSED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the medical malpractice action against the resident who performed the surgery (Kent) should have been dismissed because the resident was acting under the supervision of another surgeon (Doak):

With respect to the appeal by Kent and the Kaleida Health defendants, we conclude that Supreme Court erred in denying that part of their motion (Kaleida motion) seeking summary judgment dismissing the complaint and any cross-claims against Kent because Kent did not exercise independent medical judgment during the surgery. It is well settled that a " 'resident who assists a doctor during a medical procedure, and who does not exercise any independent medical judgment, cannot be held liable for malpractice so long as the doctor's directions did not so greatly deviate from normal practice that the resident should be held liable for failing to intervene' " ... , even where the resident " 'played an active role in [the plaintiff's] procedure' " ... . Kent and the Kaleida Health defendants met their burden on the Kaleida motion with respect to Kent by submitting evidence that plaintiff was Doak's patient, Doak determined the surgery that was to be performed, and Doak directly supervised Kent during the facetectomy, and plaintiff failed to raise a triable issue of fact in opposition ... . Van Hook v Doak, 2024 NY Slip Op 02641, Fourth Dept 5-10-24

Practice Point: A resident who does not exercise independent medical judgment when performing surgery under the supervision of another surgeon cannot be sued for medical malpractice.

MAY 10, 2024

NEGLIGENCE, CONTRACT LAW, EVIDENCE.

IN THIS CAR ACCIDENT CASE, PLAINTIFF RAISED A QUESTION OF FACT WHETHER THE RELEASE SHE SIGNED WAS THE RESULT OF MUTUAL MISTAKE CONCERNING THE EXTENT OF HER INJURIES (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined there was a question of fact whether the release signed by plaintiff after a car accident was the result of mutual mistake. At the time plaintiff signed the release it appeared her injuries, including whiplash, involved only her cervical, thoracic and lumbar regions. After signing the release she was diagnosed as having suffered a mild traumatic brain injury:

... [I]nasmuch as the submissions indicate that plaintiff had been diagnosed with neck and back injuries only at the time she signed the release and that plaintiff's symptoms were not medically attributed to postconcussive syndrome until after the execution of the release with additional uncertainty in the interim, we conclude that plaintiff raised an issue of fact whether, at the time the release was executed, the parties were under "[a] mistaken belief as to the nonexistence of [a] presently existing injury," i.e., a traumatic brain injury ... . We therefore ... reinstate the complaint. DiDomenico v McWhorter, 2024 NY Slip Op 02634, Fourth Dept 5-10-24

Practice Point: A release signed when both parties are not aware of an existing injury may be invalid as the result of mutual mistake.

MAY 10, 2024

PRODUCTS LIABILITY, NEGLIGENCE, EVIDENCE.

PLAINTIFF ALLEGED THE AIR BAG UNEXPECTEDLY DEPLOYED, CAUSING INJURY; DEFENDANT FORD'S EXPERT EVIDENCE SUBMITTED IN SUPPORT OF DEFENDANT'S SUMMARY JUDGMENT MOTION DID NOT DEMONSTRATE THE CAUSE OF THE DEPLOYMENT WAS NOT ATTRIBUTABLE TO A PRODUCT DEFECT (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined defendant Ford Motor did not present sufficient expert evidence to warrant summary judgment in this "unexpected-air-bag-deployment" case:

Just prior to the airbag's deployment, decedent's vehicle had collided with a deer. After the collision, decedent parked his vehicle on the side of the road, then he looked to his right to check on his passengers in the vehicle and looked to the left to see the deer. At that point the airbag deployed. * * *

It is well settled that a strict products liability cause of action may be established by circumstantial evidence, and thus a plaintiff " 'is not required to prove the specific defect' " in the product ... . "In order to proceed in the absence of evidence identifying a specific flaw, a plaintiff must prove that the product did not perform as intended and exclude all other causes for the product's failure that are not attributable to defendants" ... . " 'Proof that will establish strict liability will almost always establish negligence' " ... . * * *

Ford Motor's expert failed to assert that there existed a likely cause of the unexpected deployment of the airbag that was "not attributable to any defect in the design or manufacturing of the product," and therefore Ford Motor failed to meet its burden on its motion with respect to the strict products liability and negligence causes of action ... . Keem v Ford Motor Co., 2024 NY Slip Op 02632, Fourth Dept 5-10-24

Practice Point: Defendant Ford Motor did not present sufficient expert evidence to warrant summary judgment in this products liability/negligence action based upon the alleged unexpected deployment of an air bag.

MAY 10, 2024

NEGLIGENCE, EVIDENCE.

PLAINTIF'S DECEDENT COMMITTED SUICIDE BY JUMPING FROM A LEDGE OUTSIDE HIS HOTEL ROOM; HOTEL STAFF DID NOT ASSUME A DUTY OF CARE FOR PLAINTIFF'S DECEDENT; A DELAY AFTER A FAMILY MEMBER'S REQUEST THAT HOTEL STAFF CALL THE POLICE WAS NOT DEMONSTRATED BY EXPERT OPINION TO HAVE CAUSED THE SUICIDE (FIRST DEPT).

The First Department, reversing Supreme Court, in a full-fledged opinion by Justice Pitt-Burke, over an extensive dissenting opinion, determined the defendant hotel did not assume a duty of care for a hotel guest who committed suicide and did not proximately cause plaintiff-decedent's suicide. Hotel staff had been made aware of decedent's family's fear that decedent, who was in a room at the hotel, was suicidal. Hotel staff checked on the decedent, who indicated he was "fine." Subsequently a family member, who had been communicating with decedent, asked hotel staff to call the police. The crux of the lawsuit is the allegation that a delay in calling the police caused decedent to commit suicide. After breaking into decedent's locked room, the police found decedent on a ledge outside the window and unsuccessfully tried to talk him back into the room:

An entity in control of a premises, "whether [it] be a landowner or a leaseholder, is not an insurer of the visitor's safety" ... . Absent a duty of care, there is no breach and no liability, regardless of how careless the conduct ... . * * *

Plaintiffs ... contend that defendants breached an assumed duty of care when they agreed to check on the decedent after being informed of his suicidal ideations and failed to act carefully or reasonably in contacting the police.

While "one who assumes a duty to act, even though gratuitously, may thereby become subject to the duty of acting carefully" ... , a defendant can only be held "liable for a breach of an assumed duty where the plaintiff shows reliance on the defendant's course of conduct, such that the defendant's conduct placed him or her in a more vulnerable position than he or she would otherwise have been in had the defendant done nothing" ... . * * *

... [T]he record on appeal clearly shows ... that despite defendants' delay in calling the police, a period of at least thirty minutes elapsed from the time the police entered the hotel and decedent jumped from the ledge in the police officer's presence. Beadell v Eros Mgt. Reality, LLC, 2024 NY Slip Op 02496, First De[t 5-7-24

Practice Point: A landowner or leaseholder in control of a hotel is not an insurer of a hotel guest's safety and does not owe a duty of care to hotel guests absent the assumption of a duty to act (not the case here where a hotel guest committed suicide).

Practice Point: The expert opinion evidence here fell short of demonstrating that hotel staff's delay in calling the police at the request of decedent's family was the proximate cause of plaintiff's decedent's suicide.

MAY 7, 2024

NEGLIGENCE, LANDLORD-TENANT.

PLAINTIFF'S ALLOWING HIS ATTACKER INTO HIS APARTMENT WAS AN INTERVENING ACT AND A SUPERSEDING PROXIMATE CAUSE WHICH RELIEVED THE BUILDING DEFENDANTS OF ANY LIABILITY FOR LAPSES IN SECURITY (FIRST DEPT).

The First Department, reversing Supreme Court, determined that there was evidence building security was lax, but plaintiff's allowing the attacker, whom plaintiff knew, into to plaintiff's apartment was an intervening act relieving the building defendants from liability:

Plaintiff, a psychiatrist, was conducting a patient session in his home office when Jacob Nolan, the cousin of his estranged former partner barged unannounced into the office. He was carrying a large black duffel bag and demanded that plaintiff give him certain financial documents required for the child shared by plaintiff and the former partner.... Plaintiff reproached Nolan, successfully expelled him from the apartment and locked the door. After the session, the patient departed but quickly returned to advise the plaintiff that the man who barged in was loitering in a common area of the building. Plaintiff then escorted his patient to the elevator and again engaged Nolan in dialogue. Nolan again communicated that his purported purpose was to retrieve some financial documents for the former partner and asked to use the bathroom in plaintiff's apartment (which plaintiff made available to patients). Plaintiff then permitted Nolan into his locked apartment to use the bathroom, while plaintiff printed the form Nolan had requested. Nolan then suddenly emerged from the bathroom and attacked plaintiff, hitting him with a sledgehammer and stabbing him multiple times with a knife. Nolan and the former partner were both arrested and convicted for felony assaults upon the plaintiff.

... Supreme Court should have granted defendant's motion for summary judgment dismissing the complaint. ... [P]laintiff raised legitimate issues regarding lapses in the

defendants' security protocols, such as defendants' allowing Nolan to enter and wander around the building for over twenty minutes before exiting, only to re-enter the building minutes later without being challenged by the building staff about his continued presence. Plaintiff's conduct in re-admitting Nolan into the apartment after earlier expelling him, however, constituted an intervening act and a superseding proximate cause ... . Weiss v Park Towers S. Co., LLC, 2024 NY Slip Op 02612, First Dept 5-9-24

Practice Point: Here plaintiff knew his attacker and allowed the attacker into his apartment. That was an intervening act and a superseding proximate cause of plaintiff's injuries which insulated the building defendants from liability for lapses in security.

MAY 9, 2024

NEGLIGENCE, SOCIAL SERVICES LAW, MUNICIPAL LAW.

FORMER AND CURRENT SECTION 413 OF THE SOCIAL SERVICES LAW REQUIRES THE REPORTING OF ANY SUSPECTED INTENTIONAL INFLICTION OF SERIOUS PHYSICAL INJURY UPON A CHILD, WHICH INCLUDES SEXUAL ABUSE, EVEN WHEN THE PERSON SUSPECTED OF THE ABUSE IS NOT LEGALLY RESPONSIBLE FOR THE CARE OF THE CHILD; TWO JUSTICE DISSENT (FOURTH DEPT).

The Fourth Department, over a two-justice dissent, determined former section 413 of Social Services Law, as the current section mandates, requires that all instances of suspected intentionally inflicted serious injury upon a child be reported, regardless of who is suspected of inflicting it. In other words, the suspected intentional infliction of serious injury upon a child must be reported, even if the person suspected of inflicting it is not a person legally responsible for the child. Despite this finding, the Fourth Department held that the cause of action based upon former section 413 should have been dismissed because the complaint does not allege the defendant town had received information that its employee, plaintiff's youth baseball coach, was sexually assaulting plaintiff:

... [W]e conclude that Social Services Law former § 413 mandated, as the current version mandates, the reporting of every instance of suspected intentionally inflicted serious physical injury upon a child, regardless of who is suspected to have inflicted it, thereby triggering an investigation of the child's parent or other legally responsible person—as a "subject of the report"—to determine whether, inter alia, that person inflicted or allowed

the harm to be inflicted upon the child. "[T]he purpose of [the child protective services provisions under Social Services Law article 6, title 6, is] to encourage more complete reporting of suspected child abuse and maltreatment," not less (Social Services Law § 411), and the former and current versions of sections 412 (2) (b) and 413 apply equally to children who have had a serious physical injury intentionally inflicted by, inter alia, a coach, a classroom teacher, a neighbor, another child or a distant relative who is not legally responsible for the child's care.

From the dissent:

We write separately only to express our disagreement with the conclusion of the majority that ... a mandated reporter is statutorily required to report any person who inflicted serious physical injury upon a child regardless of whether there is a parental or guardianship relationship, even where that same mandated reporter would not be required to report conduct constituting abuse. LG 70 Doe v Town of Amherst, 2024 NY Slip Op 02651, Fourth Deppt 5-10-24

Practice Point: Even where a person who is not legally responsible for the care of child is suspected of sexually abusing the child, the abuse must be reported pursuant to Social Services Law section 413.

MAY 10, 2024

NEGLIGENCE, VEHICLE AND TRAFFIC LAW, EVIDENCE.

IN THIS BUS-PASSENGER INJURY CASE, THE BUS DRIVER RAISED A QUESTION OF FACT WHETHER THE EMERGENCY DOCTRINE APPLIED; THE BUS STRUCK A VEHICLE WHICH STOPPED SUDDENLY AFTER IT WAS CUT OFF BY A THIRD VEHICLE; THE BUS DRIVER'S AFFIDAVIT WAS SUPPORTED BY SURVEILLANCE VIDEO (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant bus driver raised a question of fact about the applicability of the emergency doctrine in this bus-passenger injury case. The bus driver's affidavit, together with video evidence, indicated that the vehicle struck by the bus stopped suddenly after being cut off by a third vehicle:

... [T]he defendants raised a triable issue of fact as to whether there was a nonnegligent explanation for the collision through the submission of an affidavit from Mendes [the bus driver] and a surveillance video of the accident ... . In Mendes' affidavit, she attested,

among other things, that she collided with the vehicle owned by Paratransit when that vehicle made a sudden stop after being "cut off" by another vehicle. Moreover, the surveillance video was consistent with the assertions in Mendes' affidavit. Yearwood v New York City Tr. Auth., 2024 NY Slip Op 02555, Second Dept 5-8-24

Practice Point: Although most rear-end collisions are deemed the fault of the rear driver, here it was alleged the front vehicle stopped suddenly after being cut off by a third vehicle, raising a question of fact about the applicability of the emergency doctrine as a defense.

Practice Point: Here is this rear-end collision case, the availability of surveillance video supported the applicability of the emergency doctrine as a defense.

MAY 8, 2024

ZONING, ADMINISTRATIVE LAW, MUNICIPAL LAW.

THE RULING OF THE TOWN PLANNING BOARD ENGINEER RE: A PROPOSED INDUSTRIAL PARK MUST BE CHALLENGED BEFORE THE TOWN ZONING BOARD OF APPEALS, NOT SUPREME COURT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the petitioners' challenge to a ruling by the town's planning board engineer must first be brought in front of the town's zoning board of appeals before a court can hear it:

"It is hornbook law that one who objects to the act of an administrative agency must exhaust available administrative remedies before being permitted to litigate in a court of law" ... . "This doctrine . . . reliev[es] the courts of the burden of deciding questions entrusted to an agency, prevent[s] premature judicial interference with the administrators' efforts to develop[ ] . . . a co-ordinated, consistent and legally enforceable scheme of regulation," and allows the agency "to prepare a record reflective of its expertise and judgment" ... . "Planning boards are without power to interpret the local zoning law, as that power is vested exclusively in local code enforcement officials and the zoning board of appeals" ... .

As required by Code of the Town of New Windsor § 300-86(D)(3), the Planning Board Engineer reported to the Planning Board that the proposed site plan met all applicable zoning laws. Since the Town's Zoning Board of Appeals had the authority to review determinations of administrative officials with respect to local zoning laws ... , the

petitioners were required to challenge the determination of the Planning Board Engineer before the Zoning Board of Appeals … . Matter of O'Malley v Town of New Windsor Planning Bd., 2024 NY Slip Op 02537, Second Dept 5-8-24

Practice Point: Here the petitioners did not exhaust their administrative remedies before bringing a petition in Supreme Court. The town planning board engineer's ruling on an application for approval of an industrial park must first be challenged in front of the town zoning board of appeals before an Article 78 petition is an available remedy.

MAY 8, 2024