NEW YORK APPELLATE DIGEST, LLC

Weekly Reversal Report
June 10 – 14, 2024

An Organized Compilation of Summaries of Selected Decisions, Mostly Reversals, Released by Our New York State Appellate Courts Released June 10 – 14, 2024, and Posted on the New York Appellate Digest Website on Monday, June 17, 2024. The Entries in the Table of Contents Link to the Summaries Which Link to the Full Decisions on the Official New York Courts 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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ATTORNEYS, CONTRACT LAW, AGENCY.

ABSENT SELF-INTEREST OR SELF-DEALING, AN ATTORNEY CAN NOT BE LIABLE TO A THIRD PERSON FOR INDUCING THE CLIENT TO BREACH A CONTRACT WITH THAT THIRD PERSON (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined that the attorney's (Treco's) inducing his client (Reynolds) to breach a contract with a third person is not actionable:

"[I]nasmuch as the relationship created between an attorney and his [or her] client is that of principal and agent, an attorney is not liable for inducing his [or her] principal to breach a contract with a third person, at least where he [or she] is acting on behalf of his [or her] principal within the scope of his [or her] authority" … . "Absent a showing of fraud or collusion, or of a malicious or tortious act, an attorney is not liable to third parties for purported injuries caused by services performed on behalf of a client or advice offered to that client" … . Here, the Treco defendants demonstrated, prima facie, that Treco was acting on Reynolds's behalf

and within the scope of Treco's authority as Reynolds's attorney … . In opposition, the plaintiffs failed to raise a triable issue of fact. The evidence cited by the plaintiffs did not support a finding that Treco's acts in representing Reynolds were motivated by any self-interest or self-dealing or that the acts personally benefitted Treco … . Kugel v Reynolds, 2024 NY Slip Op 03173, Second Dept 6-12-24

Practice Point: Absent self-interest or self-dealing, and attorney is not liable to a third person for inducing a client to breach a contract with that third person.

JUNE 12, 2024

CIVIL PROCEDURE, FORECLOSURE.

THE COVID FORECLOSURE MORATORIUM INSTITUTED BY HUD FOR FHA INSURED MORTGAGES APPLIED TO RENDER THE REVERSE MORTGAGE FORECLOSURE IN THIS CASE TIMELY (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Miller, addressing a question of first impression, determined that the COVID foreclosure moratorium instituted by the US Department of Housing and Urban Development (HUD) which stayed foreclosures on mortgages issued by the Federal Housing Administration (FHA) applied to render an action to foreclose a reverse mortgage timely:

Courts and the legal community are now likely familiar with the 2020 executive orders that tolled time limitations due to the COVID-19 pandemic … . On this appeal, we are asked to consider another governmental pause on business as usual that was spurred by the COVID-19 pandemic. On March 18, 2020, the United States Department of Housing and Urban Development (hereinafter HUD) instituted a COVID-19-related moratorium that effectively stayed foreclosures with respect to mortgages insured by the Federal Housing Administration (hereinafter FHA). This moratorium (hereinafter the FHA COVID-19 moratorium) remained in effect until July 31, 2021. This appeal presents an issue of apparent first impression for an appellate court in this State, namely, whether the statute of limitations for commencing a foreclosure action may be tolled by virtue of the FHA COVID-19 moratorium. We hold that the FHA COVID-19 moratorium, which constituted a stay of foreclosures of federally backed mortgages, may indeed toll the statute of limitations for commencing a foreclosure action, and, on the facts of this case, the

FHA COVID-19 moratorium did toll the applicable limitations period. Given the benefit of the toll, one of the defendants timely commenced a separate but related action to foreclose a home equity conversion mortgage, also known as a reverse mortgage, and the Supreme Court properly granted the defendants' motion pursuant to CPLR 3211(a) to dismiss the complaint, seeking to quiet title, brought by the alleged owner of the property encumbered by the reverse mortgage. Trento 67, LLC v OneWest Bank, N.A., 2024 NY Slip Op 03198, Second Dept 6-12-24

Practice Point: Here the COVID foreclosure moratorium instituted by HUD for FHA-insured mortgages rendered the reverse mortgage foreclosure timely.

JUNE 12, 2024

CIVIL PROCEDURE, INSURANCE LAW, EVIDENCE, NEGLIGENCE.

STATEMENTS DEFENDANT MADE TO HIS INSURANCE CARRIER IN THIS TRAFFIC ACCIDENT CASE ARE NOT DISCOVERABLE (FOURTH DEPT).

The Fourth Department, reversing (modifying) Supreme Court in this traffic-accident case, determined plaintiff's request for discovery of statements made by defendant to his insurance carrier should have been denied:

The statements sought in plaintiff's cross-motion constitute materials "produced solely in connection with the report of an accident to a liability insurance carrier . . . with respect to plaintiff's claim [that] are not discoverable under CPLR 3101 (g), but rather are conditionally immunized from discovery under CPLR 3101 (d) (2)" … . Plaintiff failed to establish either that he has a "substantial need of the materials" or that he is "unable without undue hardship to obtain the substantial equivalent of the materials by other means" (CPLR 3101 [d] [2] …). Fusco v Hansen, 2024 NY Slip Op 03262, Fourth Dept 6-14-24

Practice Point; Here in this traffic-accident case, plaintiff did not demonstrate a need for discovery of statements made by defendant to his insurance carrier (CPLR 3101(d)(2)).

JUNE 14, 2024

CIVIL PROCEDURE, MEDICAL MALPRACTICE, NEGLIGENCE.

PLAINTIFF MOVED TO AMEND THE COMPLAINT AFTER THE NOTE OF ISSUE AND CERTIFICATE OF READINESS HAD BEEN FILED; EVEN THOUGH THE AMENDMENT ADDED A CAUSE OF ACTION REQUIRING FURTHER DISCOVERY, THE MOTION WAS GRANTED BECAUSE DEFENDANT DID NOT DEMONSTRATE PREJUDICE (FOURTH DEPT).

The Fourth Department, reversing (modifying) Supreme Court, determined plaintiff should be allowed to amend the complaint, even though the note of issue and certificate of readiness had been filed. Defendant was unable to show any prejudice from the proposed amendment. The case was brought as a slip and fall which had been dismissed because plaintiff's decedent did not identify the cause of the fall. Plaintiff sought to add a cause of action for negligent discharge from the hospital where the slip and fall occurred, which sounds in medical malpractice:

While "[i]t is well settled that [l]eave to amend the pleadings shall be freely given absent prejudice or surprise resulting directly from the delay" … , that policy does not apply "on the eve of trial," and once a case has been certified ready for trial "there is a heavy burden on [a] plaintiff to show extraordinary circumstances to justify amendment by submitting affidavits which set forth the recent change of circumstances justifying the amendment and otherwise giving an adequate explanation for the delay" … . Inasmuch as plaintiff failed to offer any explanation for the delay, we reject plaintiff's contention that the court abused its discretion in denying the cross-motion for leave to amend the amended complaint to add a medical malpractice cause of action. Nevertheless, because defendant failed to establish any prejudice that would result from plaintiff's delay in seeking leave to amend, if further discovery is conducted, we modify the order in the exercise of our discretion by granting plaintiff leave to amend his amended complaint to assert a cause of action for the allegedly negligent discharge of decedent from defendant's facility, and, further, striking the note of issue and certificate of readiness to allow for additional discovery … . Chapman v Olean Gen. Hosp., 2024 NY Slip Op 03271, Fourth Dept 6-14-24

Practice Point: Here the post-note-of-issue motion to amend the complaint to add a cause of action requiring further discovery was granted because the defendant was unable to demonstrate any prejudice.

JUNE 14, 2024

CIVIL PROCEDURE, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL).

ALL OF THE PROPERTY OWNERS POTENTIALLY AFFECTED BY THE DECLARATION OF RIGHTS TO A RECREATIONAL EASEMENT ARE NECESSARY PARTIES BUT NOT ALL WERE INCLUDED AS PLAINTIFFS; ALTHOUGH THE JUDGMENT WAS REVERSED, THE ACTION MAY BE RECOMMENCED WITH ALL THE PROPER PARTIES (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined all the necessary parties were not included in this suit seeking a declaration of the rights of property owners with respect to a recreational easement:

CPLR 1001 (a) provides, in relevant part, that all "[p]ersons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants." It is well established that "[t]he absence of a necessary party may be raised at any stage of the proceedings, by any party or by the court on its own motion" … . In an action seeking to determine the extent of a recreational easement, the owners of all parcels of land burdened or benefitted by the easement are necessary parties because there is a potential that their real property rights will be affected by the outcome of the litigation … . Inasmuch as owners of real property who are not currently named as parties may be affected by the outcome of litigation concerning the subject parcel, we reverse the judgment and dismiss the complaint without prejudice (see CPLR 1003). Plaintiffs are thus "not precluded from recommencing the action in the proper manner naming all necessary parties" … . Follett v Dumond, 2024 NY Slip Op 03272, Fourth Dept 6-4-24

Practice Point: All property owners who may be affected by a declaration of rights to a recreational easement are necessary parties.

JUNE 14, 2024

COURT OF CLAIMS, CIVIL PROCEDURE, NEGLIGENCE, EVIDENCE.

THE CLAIM IN THIS CHILD VICTIMS ACT PROCEEDING DID NOT SET FORTH ANY FACTUAL BASIS FOR THE ALLEGATION THE STATE WAS OR SHOULD HAVE BEEN AWARE OF SEXUAL ABUSE BY ANOTHER CHILD IN A FOSTER HOME AND BY AN EMPLOYEE OF A CHILDREN'S FACILITY; THE CLAIM SHOULD HAVE BEEN DISMISSED (THIRD DEPT).

The Third Department, reversing the Court of Claims in this Child Victims Act proceeding, determined the claim did not set forth any factual basis for the allegation defendants were or should have been aware of the abuse by a child in a foster home and by a staff member of a children's facility. The claim, therefore, should have been dismissed:

Here, as to the abuse alleged at the foster home, the verified claim alleges only bare legal conclusions and lacks any factual specificity as to how defendant was put on notice of the danger posed by the minor perpetrator. As to the facility, the allegation that other staff members knew about the adult perpetrator's participation in the off-campus overnight trips would not have put defendant on notice about the adult perpetrator's propensity to sexually abuse children … . Although the allegation that a counselor discovered the sexual abuse may suffice to provide actual notice about the foreseeability of future abuse, the claim fails to allege that any such subsequent abuse took place … . Even granting the verified claim a liberal construction, presuming its allegations true and providing claimant the benefit of every possible inference, said claim failed to set forth any factual basis upon which defendant could have reasonably anticipated the perpetrators' harmful conduct and, thus, it failed to "provide a sufficiently detailed description of the particulars of the claim to enable defendant to investigate and promptly ascertain the existence and extent of its liability" … . As such, the Court of Claims erred in denying defendant's motion to dismiss … . Berg v State of New York, 2024 NY Slip Op 03206, Third Dept 6-13-24

Practice Point: Here the allegation that the state was aware or should have been aware of the sexual abuse of the claimant by another child in a foster home and by a staff member of a children's facility were not supported by any facts which would allow the state to investigate. Therefore the claim should have been dismissed by the Court of Claims.

JUNE 13, 2024

CRIMINAL LAW, ATTORNEYS, CONSTITUTIONAL LAW, JUDGES.

DEFENDANT WAIVED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL BY REFUSING TO ATTEND THE TRIAL AND DIRECTING DEFENSE COUNSEL NOT TO PARTICIPATE IN THE TRIAL; A TWO-JUSTICE DISSENT CONCLUDED DEFENSE COUNSEL'S FAILURE TO PARTICIPATE CONSTITUTED INEFFECTIVE ASSISTANCE (FOURTH DEPT).

The Fourth Department, over a two-justice dissent, affirmed defendant's conviction after he was tried in absentia. Defendant was properly denied a request for new counsel. Defendant then directed his attorney not to participate in the trial and defendant did not attend the trial. Defense counsel did not participate, except to make a motion for a trial order of dismissal outside the presence of the jury. The two-justice dissent would have reversed on ineffective assistance grounds, concluding that defense counsel should have participated in the trial, despite defendant's directive:

Defendant contends that he was denied effective assistance of counsel. We reject that contention inasmuch as defendant waived the right to effective assistance of counsel by directing defense counsel not to participate in the proceedings … . * * * When the court had defendant brought into the courtroom and informed him that he had the right to be present for trial and participate in his defense, defendant again objected to the entire proceeding, reiterated that he had fired defense counsel, refused to answer the court's questions, and renewed his request for substitute counsel. When the court responded that defendant would not receive another attorney but had the right to proceed pro se, defendant left the courtroom. Defense counsel subsequently informed the court that he intended to follow defendant's directive not to participate in the proceedings. The trial was then held in defendant's absence. Defense counsel was present but did not participate, except to move, outside the presence of the jury, for a trial order of dismissal.

We conclude that, under these circumstances, defendant waived his right to effective assistance of counsel … . Defendant's "desire to prevent counsel's participation, coupled with his adamant refusal to represent himself, translates into an intentional failure to avail himself of his constitutional right to a fair opportunity

to defend against the State's accusations" (id. [internal quotation marks omitted]), and he must therefore "accept the decision he knowingly, voluntarily and intelligently made, and the consequences of his intentional actions and choices" … . People v Lewis, 2024 NY Slip Op 03245. Fourth Dept 6-14-24

Practice Point: Defendant did not attend the trial and directed his attorney not to participate in the trial. Defense counsel did not participate. The majority held defendant had waived his right to effective assistance. A two-justice dissent argued defense counsel's failure to participate constituted ineffective assistance and would have ordered a new trial.

JUNE 14, 2024

CRIMINAL LAW, APPEALS, JUDGES.

THE FAILURE TO RULE ON A MOTION FOR A TRIAL ORDER OF DISMISSAL IS NOT A DENIAL OF THE MOTION; AN APPELLATE COURT MUST REMIT FOR A RULING BY THE TRIAL COURT (FOURTH DEPT).

The Fourth Department, remitting the matter for a ruling, noted that a judge's failure to rule on a trial order of dismissal motion does not constitute a denial of the motion. Therefore an appellate court cannot rule on the evidentiary issue raised in the motion and must send the matter back for a ruling:

The failure of a trial court to rule on a motion for a trial order of dismissal cannot be deemed a denial of that motion, and thus we must hold the case, reserve decision, and remit the matter to County Court for a ruling on defendant's motion … . People v Kohmescher, 2024 NY Slip Op 03287, Fourth Dept 6-14-24

Practice Point: Because the failure to rule on a motion for a trial order of dismissal is not a denial of the motion an appellate court cannot address the issue and must remit for a ruling by the trial court.

JUNE 14, 2024

CRIMINAL LAW, ATTORNEYS, EVIDENCE.

OVER A TWO-JUSTICE DISSENT, THE MATTER WAS SENT BACK FOR A RULING ON WHETHER THE PEOPLE COMPLIED WITH THEIR DISCOVERY OBLIGATIONS RE: LAW ENFORCEMENT DISCIPLINARY RECORDS (FOURTH DEPT).

The Fourth Department, sending the matter back for a ruling on whether the People complied with their discovery obligations, over a two-justice dissent, noted that the People cannot use a "screening panel" to review law enforcement disciplinary records:

Defendant … contends that the court erred in denying his motion to dismiss the indictment on statutory speedy trial grounds (see CPL 30.30). In particular, he contends that the People's failure to disclose existing disciplinary records of potential law enforcement witnesses for use as impeachment materials … rendered any certificate of compliance (COC) filed pursuant to CPL 245.50 improper and thereby rendered any declaration of trial readiness made pursuant to CPL 30.30 illusory and insufficient to stop the running of the speedy trial clock. As the Court of Appeals recently stated in People v Bay, "the key question in determining if a proper COC has been filed is whether the prosecution has 'exercis[ed] due diligence and ma[de] reasonable inquiries to ascertain the existence of material and information subject to discovery' " … . Due diligence "is a familiar and flexible standard that requires the People to make reasonable efforts to comply with statutory directives" (id. [internal quotation marks omitted]). "[W]hether the People made reasonable efforts sufficient to satisfy CPL article 245 is fundamentally case-specific, as with any question of reasonableness, and will turn on the circumstances presented" … . "[C]ourts should generally consider, among other things, the efforts made by the prosecution and the prosecutor's office to comply with the statutory requirements, the volume of discovery provided and outstanding, the complexity of the case, how obvious any missing material would likely have been to a prosecutor exercising due diligence, the explanation for any discovery lapse, and the People's response when apprised of any missing discovery" … . Although the statute does not require a " 'perfect prosecutor,' " the Court emphasized that the prosecutor's good faith, while required, "is not sufficient standing alone and cannot cure a lack of diligence" … . People v Sumler, 2024 NY Slip Op 03307, Fourth Dept 6-14-24

Practice Point: A "screening panel" cannot be used to determined what law enforcement disciplinary records must be supplied to the defense in discovery.

Practice Point: The People's failure to comply with discovery obligations may render the certificate of compliance improper and the ready-for-trial announcement illusory, warranting dismissal on speedy trial grounds.

JUNE 14, 2024

CRIMINAL LAW, ATTORNEYS, EVIDENCE.

THE BURGLARY COUNT CHARGED THAT DEFENDANT ENTERED THE VICTIM'S APARTMENT WITH THE INTENT TO "HOLD A KNIFE TO THE VICTIM'S THROAT;" THE JURY WAS INSTRUCTED ONLY THAT DEFENDANT ENTERED THE APARTMENT WITH THE INTENT TO "COMMIT A CRIME;" DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO REQUEST A JURY INSTRUCTION TAILORED TO MATCH THE CRIME CHARGED IN THE INDICTMENT (FOURTH DEPT).

The Fourth Department, reversing defendant's burglary conviction on ineffective assistance grounds, determined defense counsel should have insisted on a jury instruction which reflected the crime charged in the indictment. The indictment alleged defendant entered the victim's apartment with the intent to hold a knife to the victim's throat. The jury was instructed that it need only find defendant unlawfully entered and remained in the victim's apartment with the intent "to commit a crime" with no mention of holding a knife to the victim's throat. At trial whether defendant possessed a knife was contested and defendant was acquitted of criminal possession of a weapon and menacing:

In its charge to the jury, County Court made no mention of the People's theory of the crime as limited by the indictment. The court charged, with respect to the intent element, that the People must prove beyond a reasonable doubt that defendant entered or remained in the building "with the intent to commit a crime inside the building," without specifying the intended crime. Defense counsel did not seek a tailored instruction limited to the theory in the indictment.

"There is no requirement that the People allege or establish what particular crime was intended," to secure a conviction for burglary … . However, "[i]f the People . .

. expressly limit[ ] their theory of the 'intent to commit a crime therein' element to a particular crime, then they . . . have . . . to prove that the defendant intended to commit that crime" … .

Here, defense counsel failed to seek an appropriately tailored instruction to the jury on burglary in the second degree or object to the burglary charge given. Defense counsel thereby permitted the jury to convict defendant upon a theory of the intent element that was not set forth in the indictment … . People v Mcclendon, 2024 NY Slip Op 03260, Fourth Dept 6-14-24

Practice Point: If the burglary count in the indictment charges that defendant unlawfully entered the victim's apartment to "hold a knife to the victim's throat," the jury instruction should match the language in the indictment. Here the jury was instructed it need only find that defendant entered the apartment "to commit a crime" with no mention of a knife. Whether there was a knife was contested at trial and defendant was acquitted of criminal possession of a weapon and menacing. Under those facts, defense counsel was ineffective for failing to request a jury instruction which matched the knife-related crime charged in the indictment.

JUNE 14, 2024

CRIMINAL LAW, ATTORNEYS, EVIDENCE.

THE PEOPLE DID NOT EXERCISE DUE DILIGENCE BEFORE STATING IN THE CERTIFICATE OF COMPLIANCE (COC) THAT COMPLAINANT DID NOT HAVE A CRIMINAL RECORD AND ANNOUNCING READINESS FOR TRIAL; IF DEFENSE COUNSEL KNEW OF COMPLAINANT'S CRIMINAL RECORD, THE DEFENSE WAS STATUTORILY REQUIRED TO ALERT THE PEOPLE TO THE DEFECT IN THE COC; MATTER REMITTED FOR DETERMINATION OF THE SPEEDY-TRIAL MOTION; EXTENSIVE TWO-JUSTICE DISSENT (FOURTH DEPT).

The Fourth Department, reversing County Court, determined the People, who initially erroneously asserted the complainant did not have a criminal record, did not comply with their discovery obligations and therefore the initial certificate of compliance (COC) and ready-for-trial announcement were illusory. The matter was sent back for the court to determine the motion to dismiss on speedy-trial grounds.

On remittal County Court is to consider whether defense counsel met the statutory requirement that the defense alert the People to any defects in the COC of which defense counsel is aware. The two-justice dissent argued the People had exercised due diligence to determine whether the complainant had a criminal record and that, therefore, the initial COC indicating she had no convictions was not improper:

[The People's] [r]eliance on the report provided by the OCSO [Ontario County Sheriff's Office] may have been in good faith, but "while good faith is required, it is not sufficient standing alone and cannot cure a lack of diligence" … . The DA's office, as a qualified agency entitled to access such information maintained pursuant to statute by DCJS [New York State Division of Criminal Justice Services], did not mention any pre-COC attempts to obtain the complainant's criminal history record from DCJS (see Executive Law §§ 835 [9]; 837 [6]; 845-b), nor did the DA suggest that the People, prior to filing the initial COC, ever checked their own files to determine whether the complainant—their prime witness on whose testimony the success of the prosecution would depend—had a criminal history. Instead, the People relied entirely on a non-DCJS report provided by the OCSO that appeared to have been prepared by an unidentified third-party responsible for running background checks, and the People did not independently check the complainant's repository to determine whether the complainant had a criminal history until prompted by defense counsel's request for a judicial subpoena, at which point the People easily obtained and disclosed the complainant's certificates of conviction … . Under these circumstances, we conclude that the People's explanation for the discovery lapse was insufficient … .

… We … remit the matter to County Court to determine whether the People were ready within the requisite time period … , including the applicability and effect, if any, of defendant's obligation under CPL 245.50 (4) (b)—which became effective during the pendency of the prosecution—to notify or alert the People to the extent he was aware of a potential defect or deficiency related to the COC, which awareness was a disputed issue before the court … . People v Mitchell, 2024 NY Slip Op 03256, Fourth Dept 6-14-24

Practice Point: The People must exercise due diligence in providing discovery. Here the failure to contact the NYS Division of Criminal Justice Services to determine whether the complainant had a criminal record rendered the ready-for-trial announcement illusory (the accompanying certificate of compliance erroneously stated the complainant had no prior convictions).

Practice Point: Defense counsel has a statutory duty to report to the People any defects in the certificate of compliance of which the defense is aware. Here it was alleged defense counsel knew of the complainant's criminal record and did not alert the People. The court may consider the failure to notify the People of a defect in the certificate of compliance in determining a speedy-trial motion.

JUNE 14, 2024

CRIMINAL LAW, EVIDENCE, CONSTITUTIONAL LAW.

UNDER THE CONSTITUTIONAL ERROR STANDARD, HEARSAY STATEMENTS ADMITTED IN THIS ATTEMPTED MURDER AND FIRST DEGREE EXPLAINED (CT APP).

The Court of Appeals, reversing the Appellate Division, determined the hearsay statements allowed in evidence in the attempted murder and assault first degree trial constituted harmless error:

Before this Court, the parties primarily focus on whether the erroneous admission of testimony reflecting the daughter's statements was harmless. Applying the standard for constitutional errors, we conclude that it was. The evidence against defendant was overwhelming, particularly as it related to the critical issue of intent … .. Properly admitted evidence demonstrated that the victim and her daughter fled the home seeking help immediately after the attack; one of them called defendant the "culprit" as he attempted to flee; defendant had to be physically subdued by a bystander until his arrest; both women told several witnesses that defendant "stabbed" the victim; the weapon used was a large, sharp knife; medical records reflect that the victim reported to hospital staff that her husband had stabbed her; and those records, as well as a treating physician's testimony, demonstrate that the victim sustained two serious knife wounds to the neck and chest, both over two inches in length and one of which was a direct stabbing so forceful that it fractured her breastbone. These facts leave no doubt that defendant acted with the intent to cause the victim serious physical injury. For that reason, the properly admitted evidence rendered the improper testimony recounting the daughter's description of the attack redundant and therefore harmless, as "there is no reasonable possibility that the error might have contributed to defendant's conviction" … .

The errors in admission of statements by the 911 caller and defendant's son were also harmless and do not warrant a new trial. Because the statements supplied information properly provided to the jury through several testifying witnesses and the victim's medical records, there is no "significant probability . . . that the jury would have acquitted the defendant had it not been for" their admission … . People v Vargas, 2024 NY Slip Op 03200, CtApp 6-13-24

Practice Point: Here the Court of Appeals applied the constitutional error standard and found the hearsay statements admitted at trial constituted harmless error because the evidence of guilt was overwhelming.

JUNE 13, 2024

CRIMINAL LAW, JUDGES, EVIDENCE.

THE JURY REQUESTED A READBACK OF BOTH THE DIRECT AND THE CROSS; THE JUDGE ONLY PROVIDED A READBACK OF THE DIRECT AND ERRONEOUSLY INDICATED THE TOPIC WAS NOT ADDRESSED ON CROSS; NEW TRIAL ORDERED (FOURTH DEPT).

The Fourth Department, reversing the conviction and ordering a new trial, determined the judge did not meaningfully respond to a jury note requesting both the direct testimony and the cross-examination on a specific topic. The judge only provided the direct testimony and erroneously told the jury the cross-examination did not address the topic:

… [T]he jury submitted a note requesting, inter alia, a readback of testimony from the victim "about the time she was in the car on Glenwood until she was out of the car from both defense and the DA's questions." The court responded to the jury's request by reading back only testimony from the victim on direct examination about the time that she was inside the car. The court did not order the readback of any cross-examination, which included questioning about inconsistencies in the victim's account of the incident, including questions about the victim's earlier statement to the police describing a conversation that she had with defendant outside the car and questions regarding her statement to the police on the day of the incident that the driver of a car attempted to pull her into the car through the window. The court also instructed the jury that only direct examination included questions with respect to the victim being inside the car and, despite the jury's

request to hear questioning from both the prosecution and the defense, the court did not request clarification from the jury whether they wanted to hear the defense's cross-examination regarding the incident. A meaningful response to a request for a readback of testimony "is presumed to include cross-examination which impeaches the testimony to be read back … . People v Dortch, 2024 NY Slip Op 03283, Fourth Dept 6-14-24

Practice Point: Here the jury requested a readback of the direct and cross on a specific topic. The judge provided only the direct which did not constitute a meaningful response to the jury note. New trial ordered.

JUNE 14, 2024

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA), CORRECTION LAW, CONSTITUTIONAL LAW.

DEFENDANT, PURSUANT TO CORRECTION LAW 168-A (3)(B), WAS DESIGNATED A "SEXUALLY VIOLENT OFFENDER" BASED SOLELY ON HIS OUT-OF-STATE CONVICTION OF A REGISTRABLE SEXUAL OFFENSE WHICH DID NOT INVOLVE VIOLENCE; THE CORRECTION LAW AS APPLIED TO DEFENDANT VIOLATED HIS RIGHT TO DUE PROCESS; TWO-JUSTICE DISSENT (FOURTH DEPT).

The Fourth Department, reversing County Court, over a concurrence and a two-justice dissent, determined designating defendant a "sexually violent offender" based solely upon an out-of-state conviction of a non-violent sexual offense violated defendant's right to due process. The concurrence argued the Correction Law statute which allows such a "sexually violent offender" designation based on an out-of-state conviction is unconstitutional on its face:

We conclude that designating defendant as sexually violent merely because he had an out-of-state sex conviction requiring out-of-state registration, regardless of whether that underlying offense is violent—as is currently required by the text of Correction Law § 168-a (3) (b)—bears no rational relationship to the legitimate governmental interest of informing the public of threats posed by sex offenders. Indeed, the animating notification purpose of SORA presupposes that the information available to the public as a consequence of a SORA registration is

accurate. Where, as here, an offender is designated a sexually violent offender merely because of an out-of-state conviction requiring out-of-state registration, the public is not accurately informed of the true risk posed by the offender. We further conclude that the designation of defendant as a sexually violent offender—augmenting defendant's SORA registration period from a term of 20 years to his entire lifetime—merely because of the location of the registrable offense does not result in "a criminal designation that rationally fits [defendant's] conduct and public safety risk" … . People v Malloy, 2024 NY Slip Op 03264, Fourth Dept 6-14-24

Practice Point: The Correction Law (section 168-a (3)(b)) pursuant to which defendant was designated a "sexually violent offender" based solely on an out-of-state registrable offense which did not involve violence was deemed to violate defendant's right to due process of law.

JUNE 14, 2024

EMPLOYMENT LAW, NEGLIGENCE, EVIDENCE, RELIGION.

DEFENDANTS "EVANGELICAL LUTHERAN CHURCH IN AMERICA (ELCA)" AND "UPSTATE NEW YORK SYNOD OF THE EVANGELICAL LUTHERAN CHURCH IN AMERICA (SYNOD)" HAD THE POWER TO DISCIPLINE AND TERMINATE A PASTOR ACCUSED OF ABUSE; THEREFORE THERE WAS A QUESTION OF FACT WHETHER THOSE DEFENDANTS WERE THE PASTOR'S EMPLOYERS; THE NEGLIGENT HIRING, SUPERVISION AND RETENTION CAUSES OF ACTION SHOULD NOT HAVE BEEN DISMISSED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the negligent hiring, retention and supervision causes of action against Evangelical Lutheran Church in America (ELCA) and Upstate New York Synod of the Evangelical Lutheran Church in America (Synod) should not have been dismissed on the ground that the alleged abuser (a pastor) was not an employee. Although the abuser was hired by a third-party church, St. Nicodemus, the ELCA's and the Synod's constitution provided that ELCA and Synod exercised control over discipline and termination

of the pastor. Therefore there were questions of fact about ELCA's and Synod's status as employers:

… According to the ELCA Constitution and Bylaws, the authority to discipline pastors within the ELCA was granted to the synods and the ELCA. The authority to remove a pastor from the roster of ordained ministers remained with the synods and the ELCA. Once a pastor was removed from the roster of ordained ministers, a congregation that chose to retain that pastor could be removed from the ELCA. The entire disciplinary process was created by and governed by the ELCA Constitution and Bylaws. Under these circumstances, we conclude that plaintiffs' submissions raised an issue of fact whether the ELCA and the Synod exercised sufficient control over the retention and supervision of plaintiffs' alleged abuser so as to constitute his employers … . PB-20 Doe v St. Nicodemus Lutheran Church, 2024 NY Slip Op 03246, Fourth Dept 6-14-24

Practice Point: Here, although the pastor accused of abuse was hired by a specific Lutheran church (St. Nicodemus), the defendants Evangelical Lutheran Church in America (ELCA) and Upstate New York Synod of the Evangelical Lutheran Church in America (Synod) had the power to discipline and terminate the pastor. Therefore there was a question of fact whether defendants were the pastor's employers such that the negligent hiring, retention and supervision causes of action should not have been dismissed.

JUNE 14, 2024

FAMILY LAW, CRIMINAL LAW.

INCARCERATED FATHER SHOULD NOT HAVE BEEN AWARDED IN-PERSON VISITATION WITH HIS SON ONCE EVERY SIX MONTHS; FATHER HAD STABBED MOTHER WHILE SHE WAS HOLDING THE CHILD AND FATHER HAD HARASSED MOTHER DURING PERMITTED PHONE CALLS (FIRST DEPT).

The First Department, reversing Family Court, determined the award of in-person visitation by the child with the incarcerated father once every six months was not supported by the record:

Visitation with a noncustodial parent, including an incarcerated parent, is generally presumed to be in the best interests of the child … . However, that presumption is rebuttable, and "a demonstration that such visitation would be harmful to the child will justify denying such a request" … .

Here, the evidence was sufficient to overcome the presumption in favor of visitation. The father is incarcerated in connection with his conviction for robbing and stabbing the mother while she was holding their child in her arms. The record indicates that the father has been incarcerated for most of the child's life and that the father has had no meaningful relationship with the child … . … [T]he now five-year-old child would have to travel several hours each way to visit the prison at which the father is incarcerated, and the child is not comfortable being in a car or being away from her mother for an extended period … .

… [M]other testified that the father has used his permitted phone-calls with the child to harass the mother, despite her order of protection against him … . The position advocated by the attorney for the child was also entitled to serious consideration and supports modification of the court's order … . Matter of Leroy W. (Shanequa W.), 2024 NY Slip Op 03238, First Dept 6-13-24

Practice Point: Here the presumption incarcerated father was entitled to in-person visitation with his son was rebutted.

JUNE 13, 2024

FAMILY LAW, JUDGES, CRIMINAL LAW.

ALTHOUGH FATHER FAILED TO COOPERATE WITH THE PLACEMENT OF HIS CHILDREN WHILE INCARCERATED; HE MADE SERIOUS EFFORTS TO RECONNECT WITH THE CHILDREN AFTER HIS RELEASE; FAMILY COURT SHOULD HAVE GRANTED A SUSPENDED JUDGMENT RATHER THAN PERMANENTLY TERMINATING HIS PARENTAL RIGHTS (FOURTH DEPT).

The Fourth Department, reversing Family Court, determined father, after his release from prison, made efforts to reconnect with his children which warranted a suspended judgment rather than permanent termination of his parental rights. While incarcerated father had not cooperated with efforts to place the children:

A suspended judgment "provides a brief grace period to give a parent found to have permanently neglected a child a second chance to prepare for reunification with the child" … . Notably, we may substitute our discretion for that of the trial court even in the absence of an abuse of discretion … , and here we conclude that a suspended judgment, rather than termination of parental rights, was in the children's best interests … . At the time of the dispositional hearing—just two months after his release from prison—the father had found full-time employment, participated in weekly visitation with the children, had started communicating regularly with the children's foster family regarding the children, and was in the process of finding housing and completing a mental health evaluation and parenting classes, while the children were reportedly happy to be visiting with the father regularly. "Given the child[ren]'s . . . young age, [the father's] recommencement of regular visitation, . . . the sustained efforts on the part of [the father following his release from prison], and the Legislature's express desire to return children to their natural parents whenever possible" … , we conclude that the father "should have been granted a 'second chance' in the form of a suspended judgment" … . Matter of Rodcliffe M., Jr. (Rodcliffe M., Sr.), 2024 NY Slip Op 03267, Fourth Dept 6-14-24

Practice Point: Family Court has the option of issuing a suspended judgment to give a parent a second chance to avoid termination of parental rights.

JUNE 14, 2024

INSURANCE LAW, NEGLIGENCE, VEHICLE AND TRAFFIC LAW.

THERE IS A QUESTION OF FACT WHETHER PLAINTIFF'S SLIP AND FALL ON ICE AND SNOW AFTER GETTING OUT OF A VEHICLE RESULTED FROM OPERATION OF THE VEHICLE SUCH THAT THE INSURER IS OBLIGATED TO DEFEND THE OWNER OF THE VEHICLE (SECOND DEPT).

The Second Department, reversing Supreme Court, over a partial dissent, determined the insurer, Progressive, was obligated to defend the owner of a vehicle for injuries suffered by a passenger (Malone) who slipped and fell on ice and snow after getting out of the car. The question was whether the injury resulted from "operation" of the vehicle:

"Use of an automobile encompasses more than simply driving it, and includes all necessary incidental activities such as entering and leaving its confines" … . While a claim that an accident occurred during unloading "does not require a showing that the vehicle itself produced the injury . . . , it is insufficient to show merely that the accident occurred during the period of loading or unloading. Rather, the accident must be the result of some act or omission related to the use of the vehicle" … .

… Malone specifically alleged in the underlying action that Anthony (the vehicle-owner's son) parked his vehicle in a negligent manner on a slippery surface and that such negligence was a proximate cause of her accident. Progressive submitted an affidavit from Malone … in which she stated, "I slipped on the snowy and icy condition as I was taking my first steps toward the house. I dropped my child and my legs slid, along the gradient, underneath the CAPERNA Vehicle." Progressive further submitted Malone's deposition testimony in the underlying action, which demonstrated that the door of the vehicle was open and that she had only taken two steps away from the vehicle when she slipped and fell on snow and ice located on the lawn. As such, Progressive failed to establish its prima facie entitlement to judgment as a matter of law declaring that the accident was not a covered event, as there is a triable issue of fact as to whether Malone had completed unloading the vehicle. As there are allegations that the vehicle was used negligently and that such negligence contributed to the accident, Progressive was not entitled to summary judgment declaring that it is not obligated to defend or indemnify Arthur (the vehicle owner) in the underlying action … . Matter of Progressive Dr. Ins. v Malone, 2024 NY Slip Op 03178, Second Dept 6-12-24

Practice Point: "Operation" of a vehicle may include parking the vehicle in a manner which makes getting out of it dangerous. Here a passenger slipped and fell on ice and snow after getting out of the parked vehicle and the insurer was obligated to defend the owner of the vehicle.

JUNE 12, 2024

LANDLORD-TENANT, CONTRACT LAW.

A LANDLORD WHO SEEKS TO RETAIN PART OF A TENANT'S SECURITY DEPOSIT MUST PROVIDE THE TENANT WITH AN ITEMIZED STATEMENT OF THE DAMAGE WITHIN 14 DAYS OF THE VACATION OF THE PROPERTY; HERE THE ITEMIZED STATEMENT WAS SIX DAYS LATE, PRECLUDING SUMMARY JUDGMENT IN FAVOR OF THE LANDLORD (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the fact that defendant landlord did not comply with General Obligations Law section 7 (which requires the landlord who seeks to retain a portion of a security deposit for damage to the property to submit an itemized statement within 14 days of the tenant's vacation of the property} precluded summary judgment in favor of the landlord. Here the landlord submitted the itemized statement six days late:

"In 2019, the legislature enacted the Housing Stability and Tenant Protection Act of 2019 (hereinafter HSTPA) (L 2019, ch 36)" … , "landmark legislation making sweeping changes to the rent laws and adding greater protections for tenants throughout the State" … . In order to use security deposit funds to pay the cost of repairing damages caused by a tenant … , a landlord must comply, among other things, with General Obligations Law § 7-108(1-a)(e), one of the statutory provisions enacted by HSTPA. Pursuant to General Obligations Law § 7-108(1-a)(e), "[w]ithin fourteen days after the tenant has vacated the premises, the landlord shall provide the tenant with an itemized statement indicating the basis for the amount of the deposit retained, if any, and shall return any remaining portion of the deposit to the tenant." General Obligations Law § 7-108(1-a)(e) further provides that, "[i]f a landlord fails to provide the tenant with the statement and deposit within fourteen days, the landlord shall forfeit any right to retain any portion of the deposit" … . Cohen v Abruzzo, 2024 NY Slip Op 03163, Second Dept 6-12-24

Practice Point: Pursuant to General Obligations Law section 7, a landlord who seeks to retain part of a tenant's security deposit must provide the tenant with an itemized statement of the damages within 14 days of the vacation of the property.

JUNE 12, 2024

NEGLIGENCE, EMPLOYMENT LAW, AGENCY.

PLAINTIFF ALLEGED THE DRIVER WORKING FOR A LIVERY CAB COMPANY (CURB) AND THE NEW YORK CITY TRANSIT AUTHORITY (NYCTA) DROPPED HIM OFF NEAR A HOLE IN THE ROAD WHICH CAUSED HIM TO FALL; THE RESPONDEAT SUPERIOR (AGENCY) CAUSE OF ACTION SURVIVED; BUT THE COMPLAINT DID NOT SUPPORT THE NEGLIGENT HIRING, RETENTION AND SUPERVISION CAUSE OF ACTION (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined the complaint did not state a cause of action for negligent hiring, retention and supervision. Plaintiff alleged the driver of car which provided a service to the New York City Transit Authority (NYCTA) through a livery cab company called Curb was negligent in dropping plaintiff off near a hole in the road. Although the negligence action against the NYCTA and Curb survived under an agency (respondeat superior) theory, there were no factual allegations in the complaint which supported the negligent hiring, retention and supervision cause of action:

"An employer can be held liable under theories of negligent hiring, retention, and supervision where it is shown that the employer knew or should have known of the employee's propensity for the conduct which caused the injury" … . "[A] necessary element of such causes of action is that the employer knew or should have known of the employee's propensity for the conduct which caused the injury" … . Although such causes of action need not be pleaded with specificity … , the complaint must contain more than bare legal conclusions unsupported by factual allegations … . Here, the complaint did not allege that Curb or the NYCTA knew or should have known of the driver's propensity for the conduct which caused the injury, nor contain any factual allegations to support such an inference. The bare legal conclusions were insufficient to state a cause of action alleging negligent hiring, training, and retention … . Bailey v City of New York, 2024 NY Slip Op 03156, Second Dept 6-12-24

Practice Point: Conclusory, as opposed to fact-based, allegations of negligent hiring, retention and supervision will not survive a pre-discovery motion to dismiss.

JUNE 12, 2024

NEGLIGENCE, EMPLOYMENT LAW, CIVIL PROCEDURE.

PLAINTIFF IN THIS CHILD VICTIMS ACT CASE RAISED A QUESTION OF FACT WHETHER DEFENDANT SUMMER CAMP WAS AWARE OR SHOULD HAVE BEEN AWARE OF ITS EMPLOYEE'S PROPENSITY FOR SEXUAL ABUSE; THE NEGLIGENT HIRING, RETENTION AND SUPERVISION CAUSE OF ACTION SHOULD NOT HAVE BEEN DISMISSED (SECOND DEPT).

The Second Department, reversing Supreme Court in this Child Victims Act case alleging abuse at defendant's summer camp in 1970, determined plaintiff had raised a question of fact supporting the negligent hiring, retention and supervision cause of action. Plaintiff alleged he informed defendant of the abuse by the employee (Puello):

"Although an employer cannot be held vicariously liable for torts committed by an employee who is acting solely for personal motives unrelated to the furtherance of the employer's business, the employer may still be held liable under theories of negligent hiring and retention of the employee" … . "To establish a cause of action based on negligent hiring, negligent retention, or negligent supervision, it must be shown that the employer knew or should have known of the employee's propensity for the conduct which caused the injury" … . "The employer's negligence lies in having placed the employee in a position to cause foreseeable harm, harm which would most probably have been spared the injured party had the employer taken reasonable care in making decisions respecting the [supervision,] hiring and retention of the employee" … .

Here, the defendant demonstrated, prima facie, that it lacked actual or constructive notice of Puello's alleged propensity for the conduct that caused the plaintiff's injury. However, in opposition, the plaintiff raised a triable issue of fact as to whether the defendant had constructive notice of Puello's alleged propensity for sexual abuse, given, among other things, the frequency and nature of the alleged abuse perpetrated by Puello … . Moreover, the plaintiff averred in his affidavit submitted in opposition to the defendant's motion that he "clearly told" Thomas Brown, an employee in the camp's infirmary, about the first of Puello's alleged assaults, which continued thereafter, raising a triable issue of fact as to whether the

defendant had actual notice of Puello's alleged propensity for sexual abuse. Hammill v Salesians of Don Bosco, 2024 NY Slip Op 03170, Second Dept 6-12-24

Practice Point: Here in this child victims act case alleging abuse of the plaintiff in 1970, plaintiff raised a question of fact whether defendant summer camp was aware of its employee's propensity for sexual abuse. Among other allegations, plaintiff alleged he told an infirmary employee about the abuse and it continued thereafter.

JUNE 12, 2024

NEGLIGENCE, EVIDENCE.

ALTHOUGH THE PHOTOGRAPH OF THE SIDEWALK DEFECT WAS TAKEN A YEAR BEFORE THE SLIP AND FALL, PLAINTIFF'S TESTIMONY THE PHOTO ACCURATELY AND FAIRLY DEPICTED THE CONDITION OF THE SIDEWALK AT THE TIME OF THE FALL WAS SUFFICIENT (FIRST DEPT).

The First Department, reversing Supreme Court's denial of plaintiff's summary judgment motion, determined the raised sidewalk flag which caused plaintiff's slip and fall was sufficiently proven by a photograph taken a year before the accident because plaintiff testified the photo accurately depicted the condition of the sidewalk at the time of the accident:

Plaintiff demonstrated prima facie, through his deposition testimony, photographs and other evidence, that his accident was caused by a hazardous defect in the sidewalk, i.e. a raised sidewalk flag … . Although the photographs were taken over a year prior to plaintiff's accident and in connection with a different accident at the same location, plaintiff's testimony that they "fairly and accurately" depicted the condition of the sidewalk at the time of his accident rendered the photographs "probative on the issue of whether the defect was dangerous" … .

The record also demonstrates that the Condo had actual and constructive notice of the sidewalk defect and that the defect existed, unremedied, for a significant period of time prior to plaintiff's accident. Richard v 1550 Realty LLC, 2024 NY Slip Op 03236, First Dept 6-13-24

Practice Point: Even if the photo of the dangerous condition, here a raised sidewalk flag in a slip and fall case, predates the accident, plaintiff's testimony the photo fairly and accurately depicts the condition of the sidewalk at the time of slip and fall renders the photo admissible and sufficient.

JUNE 13, 2024

NEGLIGENCE, EVIDENCE.

PLAINTIFF SUFFICIENTLY IDENTIFIED THE CAUSE OF HER SLIP AND FALL AND DEFENDANTS FAILED TO DEMONSTRATE A LACK OF CONSTRUCTIVE NOTICE OF THE CONDITION; DEFENDANTS' SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined plaintiff sufficiently identified the cause of her slip and fall and defendants failed to demonstrate a lack of constructive notice of the condition:

… [D]efendants' own submissions raise a triable issue of fact whether a dangerous condition existed on the premises. Defendants submitted the deposition testimony of plaintiff, who testified that she fell "on something slippery." Although plaintiff did not see anything on the floor before she fell, she testified that "the back of [her] sweatshirt, the back of [her] legs," and her "entire back" were damp after she fell and that the floor was "really shiny[and] glossy" and had a "medicinal stench." Plaintiff also testified that she told the store manager that "there was something on the floor that [she] slipped on" and denied having described the slippery condition as "droplets of water" on the floor. We therefore conclude that defendants' submissions raised triable issues of fact whether something other than water, incidental to the use of the bathroom, was on the floor "constitut[ing] an 'unreasonably dangerous condition' " … . We further conclude that, "[a]lthough plaintiff was unable to identify the precise cause of her fall," her testimony regarding the shiny, glossy floor that smelled medicinal rendered "any other potential cause of her fall sufficiently remote or technical to enable [a] jury to reach [a] verdict based not upon speculation, but upon the logical inferences to be drawn from the evidence" … .

… Although defendants submitted the deposition testimony of the store manager, in which she testified that the store was cleaned by a crew every morning and that employees were charged with remedying any dangerous condition that they observed throughout their shifts, defendants' evidence "failed to establish that the employees actually performed any [inspection] on the day of the incident, or that anyone actually inspected the area in question before plaintiff's fall" … . Byrd v Target, 2024 NY Slip Op 03252, Fourth Dept 6-14-24

Practice Point: Plaintiff sufficiently identified the substance that caused her slip and fall in the bathroom as something other than water (a medicinal stench).

Practice Point: Defendants failed to prove the area was inspected close in time to the fall. Evidence of routine cleanings is not enough to show the lack of constructive notice.

JUNE 14, 2024

NEGLIGENCE, MUNICIPAL LAW.

IN THIS CROSSWALK SLIP AND FALL CASE, THE FACT THAT THE MUNICIPALITY REPAIRED THE AREA FIVE MONTHS BEFORE DID NOT CONSTITUTE AN EXCEPTION TO THE PRIOR WRITTEN NOTICE REQUIREMENT (FIRST DEPT).

The First Department, reversing Supreme Court, determined the fact that the municipality repaired the crosswalk where plaintiff slipped and fell five months before did not constitute an exception to the prior written notice requirement:

Prior written notice of a defect is a condition precedent which plaintiff is required to plead and prove to maintain an action against the City, in the absence of a recognized exception … . The only recognized exceptions to the prior written notice requirement involve situations in which the municipality created the defect or hazard through an affirmative act of negligence or where a special use confers a benefit upon the municipality … . The affirmative negligence exception is limited to work which immediately results in the existence of a dangerous condition … . In support of her motion, plaintiff submitted evidence that the most recent repair work was performed five months prior to the accident in the general area of the subject defect. This does not raise an issue of fact as to whether defendants created the

defect that caused plaintiff's fall through an affirmative act of negligence at the location where the injury occurred, which immediately resulted in the existence of a dangerous condition … . Smith v City of New York, 2024 NY Slip Op 03150, First Dept 6-11-24

Practice Point: Unless the plaintiff can allege the dangerous condition which caused the slip and fall was created by the municipality at the time the repair was made, prior written notice of the defect is a condition precedent for the lawsuit. Here the allegation the area was repaired five months before the slip and fall was not sufficient.

JUNE 11, 2024

NEGLIGENCE, EVIDENCE, VEHICLE AND TRAFFIC LAW.

ALTHOUGH THERE WAS NO QUESTION PLAINTIFF'S CAR HYDROPLANED AND SLID INTO DEFENDANT'S LANE, DEFENDANT INCLUDED PLAINTIFF'S DEPOSITION TESTIMONY IN HIS MOTION FOR SUMMARY JUDGMENT WHICH RAISED A QUESTION OF FACT ABOUT HOW LONG PLAINTIFF'S CAR WAS IN DEFENDANT'S LANE BEFORE IT WAS STRUCK (THIRD DEPT).

The Third Department, reversing Supreme Court, determined defendant's own motion papers, which included the deposition testimony of plaintiffs, raised questions of fact about whether the emergency doctrine applied in this car accident case. Plaintiff testified her car hydroplaned on rain water and slid into the oncoming lane where her car was struck by defendant's. Plaintiff testified he car came to a complete stop for as much as 20 seconds before the collision. Defendant alleged he had no time to brake when plaintiff's car entered his lane:

"[I]n order for a driver to be entitled to summary judgment based upon the emergency doctrine, he or she must demonstrate, as a matter of law, that the emergency situation with which he or she was confronted was not of his or her own making and that his or her reaction was reasonable under the circumstances such that he or she could not have done anything to avoid the collision" … . There is no question that an emergency situation may arise "when a car going in the opposite direction crosses into the driver's lane" … . Nevertheless, "summary

judgment is only appropriate where it is established that the driver invoking the doctrine 'did not contribute to the creation of the emergency situation, and that his or her reaction was reasonable under the circumstances such that he or she could not have done anything to avoid the collision' " … . Lee v Helsley, 2024 NY Slip Op 03213, Third Dept 6-13-24

Practice Point: If a party includes the opposing party's deposition testimony in a summary judgment motion and the opposing party's testimony raises a question of fact, summary judgment will be denied without the need to consider the opposing papers.

JUNE 13, 2024

NEGLIGENCE.

GENERAL OBLIGATIONS LAW 9-103 PROVIDES IMMUNITY FROM NEGLIGENCE SUITS STEMMING FROM AUTHORIZED RECREATIONAL USE OF THE OWNER'S PROPERTY, BUT DOES NOT PROVIDE IMMUNITY FOR ACTIONS OR OMISSIONS BY THE OWNER ALLEGED TO BE "WILLFUL OR MALICIOUS" (THIRD DEPT).

The Third Department, reversing (modifying) Supreme Court, determined plaintiff mountain biker's (Fleming's) cause of action alleging defendants' failure to properly maintain a wooden bridge on a trail was properly dismissed pursuant to General Obligations law section 9-103. But the cause of action alleging the negligent failure to maintain the bridge and the negligent failure to to warn of the dangerous condition, which further alleged the failure was "willful or malicious," should not have been dismissed. Willful and malicious actions are not within the scope of the immunity provided by General Obligations Law 9-103:

Plaintiffs [allege] that defendants had constructed and maintained the bridge in a manner that created a dangerous condition, and that, by failing to maintain the bridge and failing to warn of the dangerous condition, defendants' actions had been willful and malicious. … [T]he limitation of liability provided by General Obligations Law § 9-103 does not extend to the failure to warn of a dangerous condition if that failure was "willful or malicious" … .

… Fleming avowed that he was riding a mountain bike on trails that were publicized to be suitable for such activity by the Town of Malta. Because the first cause of action alleged only ordinary negligence, defendants were entitled to the immunity afforded by General Obligations Law § 9-103 if they could establish that Fleming was "engaged in one of the enumerated recreational activities on land suitable for that activity" … . Fleming v Jenna's Forest Homeowners' Assn., Inc., 2024 NY Slip Op 03216, Third Dept 6-13-24

Practice Point: General Obligations Law 9-103 protects property owners from negligence suits based on the authorized recreational use of the property, but does not protect property owners from suits alleging injury from "willful or malicious" actions or omissions.

JUNE 13, 2024

REAL PROPERTY TAX LAW, CIVIL PROCEDURE.

THE FAILURE TO TIMELY SERVE THE COUNTY TREASURER WITH THE PETITION SEEKING JUDICIAL REVIEW OF A PROPERTY TAX ASSESSMENT, A VIOLATION OF RPTL 708 (3), REQUIRED DISMISSAL OF THE PETITION (THIRD DEPT).

The Third Department, reversing Supreme Court, determined the petitioners in this action seeking judicial review of a property tax assessment did not demonstrate good cause for failing to timely serve the county treasurer. The petition should have been dismissed:

RPTL 708 (3) requires that "one copy of the petition and notice shall be mailed within [10] days from the date of service thereof . . . to the superintendent of schools of any school district within which any part of the real property on which the assessment to be reviewed is located and, in all instances, to the treasurer of any county in which any part of the real property is located" … . "Failure to strictly comply with the statute's notice requirements 'shall result in the dismissal of the petition, unless excused for good cause shown' " … .

The inquiry before us … distills to whether petitioners have demonstrated sufficient good cause to avoid mandatory dismissal. Petitioners rely on the affidavit of their counsel's employee, who avers that she was unable to find the treasurer's

address on Sullivan County's website and, consequently, she determined that she could send the petition and notice to the local school district's superintendent and two unrelated county agencies based upon her evaluation of the responsibilities of those agencies pertaining to the assessment of properties in Sullivan County. … [T]he failure to locate the treasurer's contact information on the County website neither provides justification for the conclusion that service on a different County office could be made in lieu of the treasurer, nor does it establish that respondents made some affirmative misrepresentation as to the proper location to serve the treasurer … . … [T]here is no indication that petitioners undertook any additional action to ascertain the appropriate contact information for the County treasurer before resorting to service on other government officials, thus negating petitioners' contention that they engaged in diligent efforts … . Matter of Tribeca Estates LLC v Town of Fallsburg, 2024 NY Slip Op 03214, Third Dept 6-13-24

Practice Point: RPTL 708(3) is strictly construed. Here petitioner could not demonstrate good cause for failing to timely serve the county treasurer with the petition seeking judicial review of a tax assessment and the petition was dismissed.

JUNE 13, 2024