NEW YORK APPELLATE DIGEST, LLC

Weekly Reversal Report
July 1 – 5, 2024

An Organized Compilation of Summaries of Selected Decisions, Mostly Reversals, Released by Our New York State Appellate Courts July 1 – 5, 2024, and Posted on the New York Appellate Digest Website on Monday, July 8, 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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CIVIL PROCEDURE, INDIAN LAW.

THE JUDGMENTS ISSUED BY THE NATION COURT FOR A VIOLATION OF A CAYUGA NATION ORDINANCE CONSTITUTED FINES; A FOREIGN COUNTRY'S JUDGMENTS FOR FINES ARE NOT RECOGNIZED OR ENFORCEABLE IN NEW YORK STATE COURTS (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the judgments granted by the Nation Court for violation of a Cayuga Nation ordinance constituted fines. Under the CPLR, a foreign -country judgment for a fine is not recognized or enforceable in New York State:

"Under CPLR article 53, a judgment issued by a foreign country is recognized and enforceable in New York State if it is 'final, conclusive and enforceable where rendered' " … . Article 53, however, "does not apply to a foreign country judgment, even if the judgment grants or denies recovery of a sum of money, to the extent the judgment is . . . a fine or penalty" … . "A party seeking recognition of a foreign country judgment has the burden of establishing that [article 53] applies to the foreign country judgment" .. .

Here, there is no dispute that each of the foreign country judgments at issue in these appeals is a fine. The foreign country judgments were granted by the Nation Court against respondents after the Nation Court found respondents in contempt of an order permanently enjoining respondents from operating Pipekeepers and in violation of a Cayuga Nation ordinance and assessed fines based on those findings. Thus, inasmuch as petitioner failed to meet its burdens of establishing that article 53 applied to the foreign country judgments … , the burdens never shifted to

respondents to establish a mandatory or discretionary ground for non-recognition of the judgments under CPLR 5304 … . Matter of Cayuga Nation v Parker, 2024 NY Slip Op 03603, Fourth Dept 7-3-24

Practice Point: Judgments issued by the Nation Court for violations of a Cayuga Nation ordinance are considered foreign-county judgments by the CPLR. Foreign-country judgments for fines, like those issued here, are not recognized or enforceable in New York State courts.

JULY 3, 2024

CONTEMPT, JUDGES.

CIVIL CONTEMPT AIMS TO COMPENSATE THE OTHER PARTY FOR ANY LOSS ASSOCIATED WITH THE CONTEMPT (FAILURE TO COMPLY WITH A COURT ORDER); CRIMINAL CONTEMPT AIMS TO PUNISH; THEREFORE A $250 A DAY FINE, ALTHOUGH APPROPRIATE FOR CRIMINAL CONTEMPT, WAS NOT APPROPRIATE FOR THE CIVL CONTEMPT AT ISSUE HERE (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined fining defendants $250 a day for civil contempt was not appropriate. Civil contempt, unlike criminal contempt, is designed to compensate the other party for any loss, not to punish. The matter was remitted for a determination of any losses to plaintiffs associated with defendants' contempt. Defendants had ignored a court order requiring that the contested reservation fee (over $700,000) be placed in escrow to prevent defendants from dissipating it:

"Unlike criminal contempt sanctions which are intended to punish, civil contempt fines are intended to compensate victims for their actual losses" … . Plaintiff did not establish an actual loss or injury as a result of the contempt … , and therefore Judiciary Law § 773 authorized the court to impose "a fine . . . not exceeding the amount of the complainant's costs and expenses, and two hundred and fifty dollars in addition thereto." Under these circumstances, the fine of $250 per day until the contempt was purged is not authorized by the statute and improperly sought to punish defendants for their continuing contempt, rather than to compensate

plaintiff for an amount of damages suffered … . Rpower, LLC, 2024 NY Slip Op 03598, Fourth Dept 7-3-24

Practice Point: Civil contempt aims to address the contempt of the opposing party by compensating for the loss caused by the contempt. Criminal contempt, on the other hand, is designed to punish a party for failing to obey a court order. A fine is therefore appropriate for criminal contempt, but not for civil contempt.

JULY 3, 2024

CRIMINAL LAW, APPEALS, ATTORNEYS, JUDGES.

THE PROSECUTOR WHO ARGUED DEFENDANT'S APPEAL WAS A CLERK FOR THE TRIAL JUDGE; PRIOR DECISION AFFIRMING THE CONVICTION VACATED AND CASE REMITTED FOR THE APPOINTMENT OF A SPECIAL PROSECUTOR (THIRD DEPT)

The Third Department, vacating its prior affirmance of defendant's conviction, determined a special prosecutor should be appointed for the appeal because the appeal was handled by a prosecutor who had been the trial judge's law clerk:

… [T]he Chief Assistant District Attorney (hereinafter ADA) who argued the appeal on behalf of the People was the confidential law clerk to the trial judge who presided over this matter and served in this capacity at the time of the underlying trial. … [D]efendant moved to vacate our prior determination and sought the appointment of a special prosecutor, arguing that the ADA had a conflict of interest under Rule 1.12 of the Rules of Professional Conduct (22 NYCRR 1200.0) disqualifying her from representing the People on appeal … . The ADA maintained that she did not have a conflict of interest because she was not "personally and substantially" involved in this matter as the trial judge's law clerk, revealing that her involvement consisted of drafting County Court's decision and order on defendant's omnibus motion as well as the decision and order on the prosecutor's motion for consolidation of the separate indictments filed against defendant and the codefendant … . We have determined that the ADA's involvement in this matter as the trial judge's law clerk was personal and substantial … . Moreover, defendant did not provide written informed consent waiving the conflict and the required screening procedures were clearly not undertaken "to prevent the flow of information about the matter between the personally disqualified lawyer and the

others in the [District Attorney's office]" … . … [T]he decision on appeal is being withheld and the matter remitted to County Court for the expeditious appointment of a special prosecutor … . People v Butts, 2024 NY Slip Op 03567, Third Dept 7-3-24

Practice Point: If the prosecutor handling the appeal was a clerk for the trial judge at the time of defendant's trial, there is a conflict requiring the appointment of a special prosecutor for the appeal. Here the decision affirming the conviction was vacated and the matter was remitted for the appointment of a special prosecutor.

JULY 3, 2024

CRIMINAL LAW, APPEALS.

HERE THE APPELLATE DIVISION, IN THE INTEREST OF JUSTICE, ADJUDICATED DEFENDANT A YOUTHFUL OFFENDER (FOURTH DEPT).

The Fourth Department, reversing County Court, over a two-justice dissent, determined defendant should have been sentenced as a youthful offender for his role in a robbery::

… [T]he factors weighing against affording defendant youthful offender treatment are the seriousness of the offense, defendant's alleged gang affiliation, and defendant's failure to complete interim probation … . However, defendant was 15 years old at the time of the crime and had no prior criminal record. He accepted responsibility for his actions and cooperated with both police on the date of the incident and probation during his presentence report interview. According to his probation officer, although he had not yet begun substance abuse treatment in the extremely short period of time between his release from custody and his remand, he "report[ed] as directed, and ha[d] not secured any new charges." Probation described defendant as "[m]otivated to avoid further difficulties" and his prognosis for lawful behavior as "guarded." Indeed, probation asked that defendant's "sentencing be adjourned for sixty days to allow . . . defendant the opportunity to be placed on electronic monitoring through Probation." In addition, despite the senseless nature of this incident, defendant did not use a weapon, there is no allegation that this crime was gang-related, defendant was the youngest participant in the crime by approximately three years, and it was clearly an unplanned, spur-

of-the-moment decision for which youthful offender adjudication is meant … . People v Davonte S.B., 2024 NY Slip Op 03635, Fourth Dept 7-3-24

Practice Point: The Appellate Division has the power to review the record and adjudicate a defendant a youthful offender in the interest of justice.

JULY 3, 2024

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

BECAUSE DEFENDANT'S 20-YEAR-OLD OUT-OF-STATE CONVICTION DID NOT INVOLVE A SEXUALLY VIOLENT OFFENSE, THE CORRECTION LAW WHICH REQUIRES THAT HE BE DESIGNATED A SEXUALLY VIOLENT OFFENDER IS UNCONSTITUTIONAL AS APPLIED TO HIM (FOURTH DEPT).

The Fourth Department, reversing County Court, determined defendant should not have been designated a sexually violent offender based upon a 20-year-old out-of-state conviction of an offense which would not qualify as a sexually violent offense in New York:

There is no dispute that the crime of which defendant was convicted, sexual assault in violation of 18 Pa Cons Stat § 3124.1, does not include all of the essential elements of a sexually violent offense in New York enumerated in Correction Law § 168-a (3) (a), and therefore is not a sexually violent offense under the first disjunctive clause of Correction Law § 168-a (3) (b). Instead, after defendant moved to New York approximately 20 years after the sexual assault conviction was entered and the Board of Examiners of Sex Offenders determined that he was required to register as a sex offender in New York …, the People contended that County Court should designate him a sexually violent offender under the second disjunctive clause of Correction Law § 168-a (3) (b). That clause defines a sexually violent offense as including a "conviction of a felony in any other jurisdiction for which the offender is required to register as a sex offender in the jurisdiction in which the conviction occurred." The court designated defendant a sexually violent offender under the foreign registration clause.

… [W]e agree with defendant that the foreign registration clause of Correction Law § 168-a (3) (b) is unconstitutional, as applied to him, under the Due Process Clause of the Fourteenth Amendment to the Federal Constitution. People v Zellefrow, 2024 NY Slip Op 03605, Fourth Dept 7-3-24

Practice Point: The Correction Law which requires a person convicted of a registrable offense in another state to be designated a sexually violent offender upon moving to New York is unconstitutional as applied to the defendant here, whose out-of-state conviction did not involve a sexually violent offense under New York law.

JULY 3, 2024

CRIMINAL LAW, EVIDENCE, APPEALS.

ALTHOUGH THE VICTIM, AFTER IDENTIFYING DEFENDANT IN A PHOTO ARRAY, ASKED TO SEE A SECOND PHOTO ARRAY, HER IDENTIFICATION OF THE DEFENDANT WAS NOT AGAINST THE WEIGHT OF THE EVIDENCE; THERE WAS A STRONG DISSENT (FOURTH DEPT).

The Fourth Department, affirming defendant's conviction, in a full-fledged opinion by Justice Greenwood, over a strong dissent, determined the one-witness identification of the defendant was not against the weight of the evidence. After identifying the defendant in a photo array the victim asked to see another photo array. In the second array she again picked out the defendant, but apparently she didn't think she was identifying the same person. But she had in fact identified the same person from an older photograph:

In determining whether a verdict is against the weight of the evidence, we must first determine whether, "based on all the credible evidence[,] a different finding would not have been unreasonable" … . If so, "then [we] must, like the trier of fact below, 'weigh the relative probative force of conflicting testimony and the relative strength of conflicting inferences that may be drawn from the testimony' " … . Weight of the evidence review is not an "open invitation" for an appellate court to substitute its judgment for that of the jury … . Rather, in reviewing the evidence, we "must give '[g]reat deference' to the jury's verdict . . . precisely because '[t]he memory, motive, mental capacity, accuracy of observation and statement,

truthfulness and other tests of the reliability of witnesses can be passed upon with greater safety by those who see and hear than by those who simply read the printed narrative' " … . Stated another way, it is the "fact-finder[ ]" that has the "opportunity to view the witnesses, hear the testimony and observe demeanor" … , and "those who see and hear the witnesses can assess their credibility and reliability in a manner that is far superior to that of reviewing judges who must rely on the printed record" … .

Contrary to the conclusion of the dissent, the facts of this case do not warrant the substitution of our credibility determinations for those made by the jury … We conclude that the second victim's identification of defendant was not "incredible and unbelievable, that is, impossible of belief because it [was] manifestly untrue, physically impossible, contrary to experience, or self-contradictory" … . The issues of her identification of defendant and her credibility "were properly considered by the jury and there is no basis for disturbing its determinations" … . We note that the second victim "never wavered in her testimony regarding the events or her identification of defendant" … .People v Clark, 2024 NY Slip Op 03586, Fourth Dept 7-3-24

Practice Point: The criteria for a "weight of the evidence" appellate review is clearly illustrated here.

JULY 3, 2024

CRIMINAL LAW, EVIDENCE, JUDGES.

HERE THE PLEA ALLOCUTION DID NOT INDICATE TWO SEPARATE AND DISTINCT ACTS WERE ENCOMPASSED BY COUNTS 2 AND 3; THEREFORE CONSECUTIVE SENTENCES FOR THOSE COUNTS SHOULD NOT HAVE BEEN IMPOSED (FOURTH DEPT).

The Fourth Department, vacating defendant's consecutive sentences, determined there was no evidence the counts to which defendant pled guilty involved two separate and distinct acts:

Sentences imposed for two or more offenses may not run consecutively where, inter alia, "a single act constitutes two offenses" … . Thus, in order for a consecutive sentence to be legally imposed, the People have the burden of

demonstrating by "identifiable facts . . . that the defendant's acts underlying the crimes are separate and distinct" … . Where, as here, the defendant is "convicted upon a plea to a lesser offense than that charged in the indictment, the People may rely only on those facts and circumstances admitted during the plea allocution" in order to meet that burden … .

Here, no facts were adduced at defendant's plea allocution that would establish two separate and distinct acts causing injury to the victims named in counts 2 and 3, and thus there was no basis for imposing consecutive sentences for those counts … . People v Wright, 2024 NY Slip Op 03613, Fourth Dept 7-3-24

Practice Point: To impose consecutive sentences based upon a guilty plea, the plea allocution must demonstrate the counts encompass separate and distinct acts.

JULY 3, 2024

CRIMINAL LAW, EVIDENCE.

THE DOCTRINE OF MERGER REQUIRED REVERSAL OF THE KIDNAPPING CONVICTION AND THE INCLUSORY-CONCURRENT-COUNT DOCTRINE REQUIRED REVERSAL OF THE FORCIBLE TOUCHING CONVICTION (FOURTH DEPT).

The Fourth Department, reversing the kidnapping and forcible touching convictions determined the doctrine of merger precluded the kidnapping conviction and the forcible touching count was in inclusory concurrent count re: stalking:

Defendant appeals from a judgment convicting him, upon a jury verdict, of attempted kidnapping in the second degree as a sexually motivated felony … , stalking in the first degree … , and forcible touching … .

Defendant approached the victim while she was walking alone on a street. After a brief verbal encounter, defendant began to follow the victim, grabbing her buttocks and then restraining her before ultimately releasing her and walking away. * * *

The merger doctrine is "a means of effectuating the Legislature's intent [to effectuate a statutory scheme presenting a range of offenses and penalties measured by the gravity of a defendant's conduct] by precluding additional kidnapping sanctions for conduct that, while literally falling within the definition of that crime,

was not intended to be separately treated as kidnapping," such as "conduct that, in fairness, should result in a single conviction" … . The "guiding principle" of the merger doctrine inquiry is whether the acts of restraint or abduction were " 'so much the part of another substantive crime that the substantive crime could not have been committed without such acts and that independent criminal responsibility may not fairly be attributed to them' " … . Where the alleged "abduction and underlying crime are discrete, for example, there is no merger," but "where there is minimal asportation immediately preceding [the underlying crime], the abduction should not be considered kidnapping" … . Here, defendant's restraint of the victim was "simultaneous [with] and inseparable from" defendant's stalking and forcible touching of the victim … , such that "independent criminal responsibility may not fairly be attributed" to the attempted kidnapping … .

Finally, we conclude that, as charged … , it was impossible for defendant to commit stalking in the first degree without, by the same conduct, committing forcible touching, thereby rendering forcible touching an inclusory concurrent count of stalking in the first degree … . People v Woods, 2024 NY Slip Op 03606, fourth Dept 7-3-24

Practice Point: Here is an illustration of the merger doctrine applied to reverse a kidnapping conviction and the inclusory-concurrent-count doctrine applied to reverse a forcible touching conviction.

JULY 3, 2024

CRIMINAL LAW, EVIDENCE.

THE WARRANT AUTHORIZING THE SEARCH OF THE CONTENTS OF DEFENDANT'S CELL PHONE DID NOT RESTRICT THE SEARCH TO EVIDENCE OF ANY PARTICULAR CRIME AND DID NOT INCORPORATE THE POLICE INVESTIGATOR'S AFFIDAVIT WHICH PURPORTEDLY LAID OUT THE BASIS FOR FINDING PROBABLE CAUSE; THE WARRANT DID NOT MEET THE "PARTICULARITY REQUIREMENT" (FOURTH DEPT).

The Fourth Department, reversing defendant's conviction by guilty plea, determined the motion to suppress evidence seized from defendant's cell phone should have been granted because the search warrant lacked particularity:

A search warrant must be "specific enough to leave no discretion to the executing officer" … . To meet the particularity requirement, a search warrant must (1) "identify the specific offense for which the police have established probable cause," (2) "describe the place to be searched," and (3) "specify the items to be seized by their relation to designated crimes" … . Here, the search warrant authorized and directed the police to search for … "cellular phones (including contents)" located in defendant's vehicle. Significantly, the search was not restricted by reference to any particular crime. Thus, the search warrant failed to meet the particularity requirement and left discretion over the search to the executing officers …. The search warrant states that an affidavit from a police investigator provided the basis for the finding of probable cause for the search. Although that affidavit contained information about the crime and defendant's exchange of text messages with the victim before the crime, the mere mention in a search warrant of an affidavit or application "does not save the warrant from its facial invalidity" where the search warrant contains no language incorporating that document … . People v Wiggins, 2024 NY Slip Op 03614, Fourth Dept 7-3-24

Practice Point: A search warrant which does not restrict the search to evidence of a particular crime is invalid because it fails to meet the particularity requirement.

Practice Point: Reference in a search warrant to an affidavit which is not incorporated into the warrant doesn't overcome the defect.

JULY 3, 2024

EMPLOYMENT LAW, LABOR LAW, NEGLIGENCE.

LABOR LAW 193 PROHIBITS AN EMPLOYER FROM REDUCING AN EMPLOYEE'S PAY TO COMPENSATE FOR THE EMPLOYEE'S ALLEGEDLY POOR PERFORMANCE; HERE THE EMPLOYER REDUCED PLAINTIFF'S PAY TO RECOUP COSTS ASSOCIATED WITH PLAINTFF'S TRAFFIC ACCIDENT WITH A COMPANY TRUCK (SECOND DEPT).

The Second Department, reversing Supreme Court, determined Labor Law section 193 prohibited plaintiff-truck-driver's employer from reducing plaintiff's pay to recoup costs associated with a traffic accident alleged to have been the result of plaintiff's negligence:

Labor Law § 193 "prohibits an employer from making any deduction from an employee's wages unless permitted by law or authorized by the employee for certain purposes" … . To allow an employer to recover the return of paid wages based upon an employee's alleged lack of performance "would be permitting [that employer] to do indirectly and retroactively that which the law specifically prohibits it from doing directly" … . This principle applies equally whether the cause of action sounds in negligence or in contract, as an employee may not waive the protections of Labor Law § 193 … .

… [T]he defendants' counterclaims are explicit attempts to recoup costs for their business allegedly arising out of the plaintiff's negligence or poor performance. Because such causes of action are barred by the Labor Law, the Supreme Court erred in denying the plaintiff's motion pursuant to CPLR 3211(a)(7) to dismiss the defendants' counterclaims. Craig v Fastex Logistics Transp., LLC, 2024 NY Slip Op 03678, Second Dept 7-3-24

Practice Point: Here plaintiff-truck-driver's employer reduced his pay to recoup costs associated with plaintiff's traffic accident with a company truck. Such a pay reduction is prohibited by Labor Law section 193.

JULY 3, 2024

FAMILY LAW, EVIDENCE.

HACKED WEB CAM VIDEO EVIDENCE ALLEGED TO DEPICT ABUSE OF A CHILD IN MOTHER'S HOME WAS DEEMED BY THE MAJORITY TO HAVE BEEN SUFFICIENTLY AUTHENTICATED; STRONG DISSENT (FOURTH DEPT).

The Fourth Department, over a strong and comprehensive dissent, determined the video evidence allegedly showing abuse of her daughter was properly authenticated. The video was obtained in an unrelated investigation of a suspect who hacked into a security web camera which was linked to mother's house:

The testimony at the fact-finding hearing established that the videos depicted the living room of the home in which the mother, the subject children, and the boyfriend lived. The State Police detective testified that the mother identified her daughter and boyfriend in screenshots taken from the videos; that he observed

cameras in the house, including in the living room; and that he observed that the living room and its furnishings matched what was shown in the videos. As the court noted, the same couch, afghan, end table, and lamp were all visible in the videos and photographs. Other particularly specific items the police recovered from the home were also seen in the videos. In addition, the mother, the children, and the boyfriend were all easily identifiable in the videos. The court determined that the "actions, dialogue, and behavior shown in the videos show no indication of any tampering." In other words, there were "distinctive identifying characteristics" in the videos themselves … . There was also the "significant fact" that the mother did not dispute that … . Rather, the mother confirmed through the screenshots from the videos that the individuals shown were her children and boyfriend. In addition, the FBI agent testified that he primarily investigated child pornography and performed digital forensic work and that he saw no signs of alteration or tampering with the videos. Matter of Mekayla S., 2024 NY Slip Op 03584, Third Dept 7-3-24

Practice Point; Here hacked web cam video footage was alleged to have been properly authenticated by the identification of persons depicted in screen shots from the video and the lay out and contents of the room depicted in the video. There was a strong dissent.

Same issue and result in the abuse proceeding against mother's boyfriend, this time with two different dissenting justices, agreeing with and adopting the rationale of the dissenting justice in the proceeding against mother. Matter of Gabriel H., 2024 NY Slip Op 03588, Fourth Dept 7-3-24

JULY 3, 2024

FAMILY LAW, EVIDENCE, JUDGES.

THE COURT'S PRIOR ORDER STATED FATHER'S COMPLIANCE FOR SIX MONTHS WOULD CONSTITUTE A CHANGE IN CIRCUMSTANCES AND FATHER DEMONSTRATED SUCH COMPLIANCE; IN ADDITION MOTHER'S RELOCATION TO ARIZONA WITHOUT PERMISSION CONSTITUTED A CHANGE IN CIRCUMSTANCES; IN-PERSON VISITATION ORDERED (FOURTH DEPT).

The Fourth Department, reversing Family Court, determined father demonstrated a change in circumstances warranting in-person visitation with the children. The prior order of the court stated that father's compliance for six months would constitute a change in circumstances and father demonstrated such compliance. In addition, mother's relocation to Arizona without permission also constituted an actionable change in circumstances:

The prior order provided "that sufficient compliance with [the] order for a period of six (6) months will constitute a change of circumstances for [f]ather to re[-]petition for additional visitation time and overnights." The father testified that he had been exercising his visitation consistently until the mother moved to Arizona with the children, an assertion that went unchallenged during the hearing. We conclude that the father established a change in circumstances based on his compliance with the terms of the prior order. We also conclude that the mother's relocation without permission constituted a change in circumstances because it resulted in a substantial interference with the father's visitation rights … .

Based on the record before us, we further conclude that modification of the father's visitation schedule to include in-person visitation would serve the children's best interests … . Matter of Hudson v Carter, 2024 NY Slip Op 03615, Fourth Dept 7-3-24

Practice Point: If a court order indicates compliance for six months will constitute a change in circumstances warranting modification of custody, that condition should be honored by the court.

JULY 3, 2024

LABOR LAW-CONSTRUCTION LAW, NEGLIGENCE.

PLAINTIFF FELL FROM AN A-FRAME LADDER OWNED BY A CONTRACTOR, DAL, HE DID NOT WORK FOR; BASED ON DISPUTED EVIDENCE THE LADDER WAS DEFECTIVE, DAL'S MOTION FOR SUMMARY JUDGMENT ON THE LABOR LAW 200 AND COMMON LAW NEGLIGENCE CAUSES OF ACTION WAS DENIED BY SUPREME COURT; THE FIRST DEPARTMENT, OVER A DISSENT, REVERSED, FINDING DAL DID NOT OWE PLAINTIFF A DUTY OF CARE (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, in a full-fledged opinion by Justice Oing, over a dissenting opinion, determined defendant contractor, DAL, did not owe a duty of care to plaintiff who fell from an A-frame ladder owned by DAL. Plaintiff had finished his measuring work using a ladder and scaffold which he had removed from the area. Plaintiff was then asked to confirm his measurements. He returned to the area and used an A-frame ladder that was already set up there. The ladder wobbled and he fell. It turned out the ladder was owned by DAL, with which plaintiff had no connection. There was disputed evidence the ladder was defective and DAL was alleged to have created a dangerous condition. Supreme Court found there was a question of fact supporting plaintiff's Labor Law 200 and common-law negligence causes of action. The majority reversed, finding DAL did not owe plaintiff a duty of care:

Because DAL was not an owner, a general contractor, or a statutory agent of an owner or general contractor, the Labor Law § 200 claim against it could not stand … . * * *

… [G]iven that DAL did not enter into a contract with plaintiff or his employer, a duty of care to plaintiff cannot arise out of a contractual relationship … . Any contractual obligations DAL may have had to its employees or to JRM, the general contractor, did not extend to plaintiff … . The question that remains is whether DAL may still owe a duty of care to plaintiff. Generally, a contracting party does not owe a duty of care to a noncontracting third party … . There are three well-settled exceptions to this general rule: (1) where the contracting party, in failing to exercise reasonable care in the performance of his or her duties, launches a force or instrument of harm; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties; and (3) where the contracting party

has entirely displaced the other party's duty to maintain the premises safely … . * * *

… [T]he record establishes that the DAL ladder was left by a DAL employee in the fifth-floor pantry at some point in the late morning on the day of accident, and that plaintiff saw the unattended ladder when he returned to the fifth-floor pantry to review his measurements from earlier that morning. Plaintiff did not know or ascertain who owned the ladder … . … [P]laintiff did not obtain permission to use the ladder, … DAL did not supply or provide plaintiff with the ladder for use to complete his tasks, … DAL had no duty to provide plaintiff with a safe or adequate ladder, and … DAL did not supervise, direct or control plaintiff's work. … DAL did not launch a force or instrument of harm. Thus, under Espinal, DAL did not owe a duty of care to plaintiff, and plaintiff's common-law negligence claim against it cannot stand. Dibrino v Rockefeller Ctr. North, Inc., 2024 NY Slip Op 03558, First Dept 7-2-24

Practice Point: Here plaintiff fell from an allegedly defective ladder belonging to a contractor he did not work for. Because none of the Espinal factors applied, the contractor did not owe plaintiff a duty of care. There was a dissenting opinion.

JULY 2, 2024

LABOR LAW-CONSTRUCTION LAW.

AS PLAINTIFF WAS REMOVING DUCTS FROM THE CEILING, A PORTION OF A DUCT STRUCK PLAINTIFF AND THE A-FRAME LADDER CAUSING HIM AND THE LADDER TO FALL TO THE FLOOR; IT IS ENOUGH THAT THE LADDER WAS "UNSECURED;" PLAINTIFF NEED NOT SHOW THE LADDER WAS DEFECTIVE (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff was entitled to summary judgment on his Labor Law 240(1) cause of action in this ladder-fall case. Plaintiff was provided with an A-frame ladder to remove duct work from the ceiling. A portion of the duct fell causing the ladder to tip and plaintiff fell to the floor. The court noted that plaintiff need not prove the ladder was defective. In addition, summary judgment is appropriate even where, as here, plaintiff is the only witness to the incident:

Labor Law § 240(1) "mandates that owners and contractors provide devices which shall be so constructed, placed and operated as to give proper protection to persons performing work covered by the statute" … . As the building owner, defendant had the duty to provide proper protection to plaintiff, a worker, pursuant to section 240(1) … .

For purposes of liability under section 240(1), "[i]t is sufficient . . . that adequate safety devices to prevent the ladder from slipping or to protect the plaintiff from falling were absent" … . Here, plaintiff's testimony that he was not provided with any other safety protection except an unsecured ladder, which fell along with plaintiff when both were hit by the duct, established prima facie entitlement to judgment as a matter of law … . Rivera v 712 Fifth Ave. Owner LP, 2024 NY Slip Op 03562, First Dept 7-2-24

Practice Point: If plaintiff falls from an "unsecured" A-frame ladder, summary judgment on the Labor Las 240(1) cause of action is appropriate even where there is no proof the ladder was defective and there were no witnesses.

JULY 2, 2024

NEGLIGENCE, EDUCATION-SCHOOL LAW, EMPLOYMENT LAW, EVIDENCE, CIVIL PROCEDURE.

A TEACHER'S ALLEGED STATEMENT TO THE PLAINTIFF THAT HE WAS AWARE OF THE SEXUAL ABUSE OF THE PLAINTIFF BY ANOTHER TEACHER OCCURRING REPEATEDLY AT SCHOOL WAS DEEMED AN ADMISSION ATTRIBUTABLE TO THE SCHOOL DISTRICT RAISING A QUESTION OF FACT WHETHER THE SEXUAL ABUSE WAS FORESEEABLE BY THE SCHOOL DISTRICT (FOURTH DEPT).

The Fourth Department, over a concurrence disagreeing with the majority ruling that a teacher's alleged statement was admissible against the school district as an admission, affirmed the denial of the school district's motion for summary judgment in this Child Victims Act negligent supervision case. Plaintiff, who was a student in the late 60's, alleged repeated abuse by a teacher in a back room at the school. Another teacher was alleged to have overheard the abuse and allegedly threatened plaintiff with revealing it in an attempt to sexually abuse plaintiff

himself. That statement was deemed an admission which raised a question of fact whether the abuse was foreseeable by the school district:

… [P]laintiff testified that the orchestra teacher offered her a ride home from a bus stop after an evening event at the school. Instead of taking her home, however, the orchestra teacher took her to a park where, according to plaintiff, he told her "that he knew what was going on because he could hear through the walls from the orchestra room into that back room [where Fleming's office was located] and that [plaintiff] didn't want it to get out — [plaintiff] wouldn't want it to come out, so [she] should be nice to him." When plaintiff responded that she did not know what the orchestra teacher was talking about, he attempted to kiss her. * * *

The court determined that the entirety of the statement attributed to the orchestra teacher was admissible as a vicarious party admission of defendant under CPLR 4549 and therefore properly considered when evaluating defendant's motion for summary judgment, because the orchestra teacher was employed by defendant and "[r]ecognizing and responding to the abuse of students while on school grounds certainly falls within the scope of the duties of a teacher employed by [defendant]." * * *

We conclude that it is within the scope of a teacher's employment relationship to identify and assist a student who they believe is being sexually abused, and that the orchestra teacher's statement indicating awareness of the abuse of plaintiff was therefore "on a matter within the scope of [the employment] relationship" … . We further conclude that the orchestra teacher's statement professing knowledge of the abuse occurred "during the existence of" the employment relationship, within the meaning of CPLR 4549, inasmuch as it is undisputed that he was employed by defendant at the time the statement was made. Therefore, we agree with the court that the statement is admissible pursuant to CPLR 4549. Bl Doe 5, 2024 NY Slip Op 03608, Fourth Dept 7-3-24

Practice Point: In a negligent supervision action against a school district, is a statement allegedly made by a teacher to a student indicating the teacher's awareness of repeated sexual abuse of the student by another teacher, taking place at school, admissible against the school district as an admission of its awareness of the abuse? Here the court answered "yes" over a concurrence which disagreed.

JULY 3, 2024

NEGLIGENCE, EMPLOYMENT LAW, MUNICIPAL LAW.

A MUNICIPALITY CANNOT BE SUED FOR NEGLIGENT HIRING, RETENTION, TRAINING AND SUPERVISION BASED UPON EMPLOYEES' ACTIONS ALLEGED TO HAVE BEEN WITHIN THE SCOPE OF THEIR EMPLOYMENT; THE PROPER THEORY IS RESPONDEAT SUPERIOR (FOURTH DEPT).

The Fourth Department, reversing (modifying) Supreme Court, determined that a municipality cannot be sued for negligent hiring, retention, training and supervision based upon actions taken by employees within the scope of their employment. In that case, the municipality can only be sued under a respondeat superior theory. Here plaintiff sued the City of Buffalo and police officers for actions relating to plaintiff's arrest:

We agree with defendants that the court erred in denying their motion with respect to the … causes of action against the City of Buffalo, sounding in negligent hiring, negligent retention, and negligent training and supervision … . … [I]n those causes of action plaintiff alleges that the City of Buffalo was negligent in the hiring, retention and training and supervision of [officers] Moriarity and Bridgett, and plaintiff further alleges that Moriarity and Bridgett were acting in their capacities as employees of the City of Buffalo. It is well settled … that "where an employee is acting within the scope of [their] employment, the employer is liable for the employee's negligence under a theory of respondeat superior and no claim may proceed against the employer for negligent hiring, retention, supervision, or training" … . Taylor, 2024 NY Slip Op 03632, Fourth Dept 7-3-24

Practice Point: A municipality cannot be sued for negligent hiring, retention, training and supervision when the employees' actions are alleged to have been within the scope of their employment. The municipality should be sued under a respondeat superior theory.

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NEGLIGENCE, EVIDENCE, CIVIL PROCEDURE, JUDGES, LANDLORD-TENANT.

THE DEFENSE EXPERT SHOULD NOT HAVE BEEN PRECLUDED FROM TESTIFYING IN THIS CEILING-COLLAPSE CASE; THE MOTION TO SET ASIDE THE VERDICT SHOULD HAVE BEEN GRANTED; NEW TRIAL ORDERED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendants landlord and property manager were entitled to have the liability verdict set aside in the interest of justice because the judge should not have precluded testimony by defendants' expert. Plaintiff-tenants were injured when their apartment ceiling collapsed. The defendant expert would have testified there would have been no visible signs that the ceiling was about to collapse. The court noted that plaintiffs' request for a Frye hearing was properly denied because the expert would have testified based upon his personal training and experience:

"[E]xpert opinion is proper when it would help to clarify an issue calling for professional or technical knowledge, possessed by the expert and beyond the ken of the typical juror" … . The expert must possess "the requisite skill, training, education, knowledge or experience from which it can be assumed that the information imparted or the opinion rendered is reliable" … . "The expert's opinion, taken as a whole, must also reflect an acceptable level of certainty in order to be admissible" … .

Here, the defendants' CPLR 3101(d) disclosure indicated that Yarmus [the defense expert], a professional engineer with experience in construction management and building and safety code compliance, would testify, inter alia, as to the materials and manner of construction of the ceiling at issue, as well as the manner in which ceilings so constructed may detach and collapse, allegedly, without a defect that is detectable so as to give notice of a dangerous condition. Contrary to the plaintiffs' contention, Yarmus's proposed testimony was neither so conclusory or speculative, nor without basis in the record, as to render it inadmissible … .

… "[T]he long-recognized rule of Frye . . . is that expert testimony based on scientific principles or procedures is admissible but only after a principle or procedure has 'gained general acceptance' in its specified field … . An expert opinion based on personal training and experience is not subject to a Frye analysis

… . Ghazala v Shore Haven Apt. Del, LLC, 2024 NY Slip Op 03681, Second Dept 7-3-24

Practice Point; If a judge makes a mistake by precluding admissible testimony, here testimony by the defense expert, the judge has the power to set aside the verdict in the interest of justice. The Appellate Division reversed the denial of the motion to set aside the verdict.

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