NEW YORK APPELLAT DIGEST, LLC

Weekly Reversal Report
July 15 – 19, 2024

An Organized Compilation of Summaries of Selected Decisions, Mostly Reversals, Released by Our New York State Appellate Courts July 15 – 19, 2024, and Posted on the New York Appellate Digest Website on Monday, July 22, 2024. The Entries in the Table of Contents Link to the Summaries Which Link to the Full Decisions on the Official New York Courts Website. Click on “Table of Contents” in the Header on Any Page to Return There. Right Click on the Citations to Keep Your Place in the Reversal Report.

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CONTRACT LAW, CIVIL PROCEDURE.

THE DENTISTS' FEE-SPLITTING AGREEMENT VIOLATED THE EDUCATION LAW; A COURT WILL NOT ENFORCE AN ILLEGAL CONTRACT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the complaint seeking to enforce an illegal contract should have been dismissed:

… [T]he plaintiff entered into an asset purchase agreement (hereinafter the APA) to sell certain assets of its dental practice to the defendant, a licensed dentist who retained his own separate practice. The APA specified a purchase price of $250,000. A portion of that amount was to be paid as a percentage of the monthly revenue generated by the plaintiff's practice or, under certain conditions, a percentage of the revenue generated from a potential sale of the defendant's separate practice. * * *

The defendant established his entitlement to dismissal of the causes of action alleging breach of contract and unjust enrichment pursuant to CPLR 3211(a)(7). As the defendant correctly contends, the APA constituted a voluntary prospective arrangement for the splitting of fees in violation of the Education Law because it required the defendant to pay the plaintiff a percentage of revenue generated by the plaintiff's practice and, under certain conditions, the defendant's own separate

dental practice (see Education Law §§ 6509-a, 6530[19] …). "'It is the settled law of this State (and probably of every other State) that a party to an illegal contract cannot ask a court of law to help him or her carry out his or her illegal object, nor can such a person plead or prove in any court a case in which he or she, as a basis for his or her claim, must show forth his or her illegal purpose'" … . "'Where the parties' arrangement is illegal the law will not extend its aid to either of the parties . . . or listen to their complaints against each other, but will leave them where their own acts have placed them'" … . Advanced Dental of Ardsley, PLLC v Brown, 2024 NY Slip Op 03804, Second Dept 7-17-24

Practice Point: A fee-splitting agreement between dentists violates the Education Law.

Practice Point: A court will not enforce an illegal contract.

JULY 17, 2024

CRIMINAL LAW, EVIDENCE.

THE TRAFFIC STOP WAS A PROPER EXERCISE OF THE POLICE "COMMUNITY CARETAKING FUNCTION;" BUT THERE WAS NO SHOWING THE SUBSEQUENT QUESTIONING WHICH LED TO DEFENDANT'S DWI ARREST WAS "COMMENSURATE WITH ANY PERCEIVED NEED FOR ASSISTANCE;" INDICTMENT DISMISSED (SECOND DEPT).

The Second Department, reversing County Court and dismissing the indictment, determined the statements made to police after a traffic stop, including his refusal to submit to a breath test, should have been suppressed. Defendant was behind the police car when he flashed his lights several times. The police pulled over but defendant just drove past them. The police then followed the defendant, pulled him over and asked why he flashed his lights and whether he was ok. Defendant's response was not in the record. After it was clear defendant gave the police a phony birth date, he was asked to step out of the car. At that point the police suspected he was intoxicated:

… [T]he Constitution "is not a barrier to a police officer seeking to help someone in immediate danger" … . Deemed the "community caretaking function[ ]" by the

United States Supreme Court … , this concept recognizes that police do not just fight crime, but "perform varied public service roles, including protecting citizens from harm" … . The police's community caretaking function is "'totally divorced from the detection, investigation, or acquisition of evidence' of criminal conduct" … .

The Court of Appeals has determined that the police may stop an automobile in an exercise of their community caretaking function if two criteria are met. "First, the officers must point to specific, objective, and articulable facts that would lead a reasonable officer to conclude that an occupant of the vehicle is in need of assistance. Second, the police intrusion must be narrowly tailored to address the perceived need for assistance. Once assistance has been provided and the peril mitigated, or the perceived need for assistance has been dispelled, any further police action must be justified under the Fourth Amendment and Article I, section 12 of the State Constitution" … .

… [T]he People failed to establish … that the police intrusion in this matter was narrowly tailored to address the perceived need for assistance. Upon permissibly stopping the defendant's vehicle, [Officer} Pavinski appropriately asked the defendant why he had flashed his lights and whether everything was okay. However, there is no evidence as to the defendant's response to this inquiry. Without such evidence, and in light of [Officer} Spilotros's testimony that the defendant did not appear to be in distress, the People have not demonstrated that the continued questioning of the defendant was an intrusion "commensurate with [any] perceived need for assistance" … . … [T]here is nothing in the record indicating that the officers had suspicions that the defendant was intoxicated until after they determined that he had lied about his birth date and asked him to exit the vehicle. People v Serrano, 2024 NY Slip Op 03833, Second Dept 7-17-24

Practice Point: The police can stop a vehicle if they believe the driver may be in distress (community caretaking function). But the subsequent questioning of the driver must address the perceived need for assistance and should stop once it is determined no assistance is required.

JULY 17, 2024

CRIMINAL LAW.

TWO DISSENTERS ARGUED DEFENDANT WAS ENTITLED TO RESENTENCING UNDER THE DOMESTIC VIOLENCE SURVIVORS JUSTICE ACT (THIRD DEPT).

The Third Department, over a two-justice dissent, determined County Court properly denied defendant's request to be resentenced under the Domestic Violence Survivors Justice Act (DVSJA). Defendant pled guilty to manslaughter after her murder and assault convictions were vacated on appeal. She had been in an intimate relationship with the man she killed for a little more than a year:

From the dissent:

Pursuant to Penal Law § 60.12, a court may impose an alternative sentence under the DVSJA when a defendant has established by a preponderance of the evidence following a hearing that "(a) at the time of the instant offense, the defendant was a victim of domestic violence subjected to substantial physical, sexual or psychological abuse inflicted by a member of the same family or household as the defendant as such term is defined in [CPL 530.11 (1)]; (b) such abuse was a significant contributing factor to the defendant's criminal behavior; [and] (c) having regard for the nature and circumstances of the crime and the history, character and condition of the defendant, that a sentence of imprisonment pursuant to [Penal Law §§ 70.00, 70.02, 70.06 or 70.71 (2) or (3)] would be unduly harsh" … . At such a hearing, "the court shall consider oral and written arguments, take testimony from witnesses offered by either party, and consider relevant evidence to assist in making its determination" … . "Reliable hearsay shall be admissible at such hearings" … . "The court may consider any fact or circumstances relevant to the imposition of a new sentence which are submitted by the applicant or the district attorney," including "the institutional record of confinement of such person" … . "The court's consideration of the institutional record of confinement of such applicant shall include, but not be limited to, such applicant's participation in or willingness to participate in programming such as domestic violence, parenting and substance abuse treatment while incarcerated and such applicant's disciplinary history" … . * * *

… [D]efendant explained that she and the victim had been in a relationship for a little [*8]over a year at the time of the subject incident. Around seven months into

their relationship, the victim — who was 65 years old while defendant was 28 — became verbally, sexually and physically abusive. Defendant, who was financially dependent on the victim, detailed "almost daily" acts of violence perpetrated against her during their relationship, including threats to her life and instances in which the victim "slam[med] his fist into the side of [her]head," "s[u]nk his nails into [her]," punched her, slapped her and scratched her. Defendant also testified that the victim bragged about having previously killed someone, sexually assaulted her while she was bound with a rope and drugged her with hallucinogens. In other statements contained in the record, defendant recounted the victim telling her: "I own you" and "If you leave, I'll kill you." He also attempted to control her weight and isolated her from friends and family, taking away her vehicle and phone and leaving her alone for "days on end" at the camp where they resided. She further explained that October 2013 — the month before the incident — was the worst month she had ever experienced in her entire relationship. As for defendant's assertion that the victim isolated her, defendant's mother confirmed that, for almost a year before the subject incident, there had been "no communication between [defendant] and her."

Defendant also presented independent corroborative evidence in this regard … . * * *

A resentencing under CPL 440.47 is warranted. People v Angela VV., 2024 NY Slip Op 03851, Third Dept 7-18-24

Practice Point: CPL 60.12 allows a reduced sentence for defendants who suffered domestic violence at the hands of the victim, criteria explained.

JULY 18, 2024

ENVIRONMENTAL LAW, ADMINISTRATIVE LAW, CIVIL PROCEDURE.

PETITIONER, A NONPROFIT ORGANIZATION FOR THE PRESERVATION AND PROTECTION OF THE HEALTH OF THE FINGER LAKES, HAD STANDING TO CONTEST A PERMIT ALLOWING THE DUMPING OF TREATED WASTE IN CAYUGA LAKE; ONE OF PETITIONER'S MEMBER'S DRINKING WATER COMES FROM CAYUGA LAKE (THIRD DEPT).

The Third Department, reversing Supreme Court, determined petitioner, a nonprofit organization for the preservation and protection of the health of the Finger Lakes, had standing to contest a permit allowing treated waste to be dumped into Cayuga Lake. Standing is conferred if one of petitioner's members suffers harm greater than that suffered by the general public. Here a member's drinking water comes from Cayuga Lake:

… [T]he sole issue on this appeal is whether petitioner sufficiently pleaded that at least one of its members would suffer an injury-in-fact that is different from harm suffered by the public at large, such as to confer petitioner with standing. Petitioner alleged in its petition/complaint that its members would be harmed by the leachate produced by County Line [waste treatment facility], which would be treated by the Ithaca treatment facility and then dumped into Cayuga Lake. According to petitioner, the type of solid waste that County Line would handle would create leachate that contains per- or polyfluoroalkyl substances (hereinafter PFAS), a by-product linked to adverse health outcomes and which the Ithaca treatment facility is not capable of completely filtering out of the treated leachate. Because the Ithaca treatment facility dumps treated leachate into Cayuga Lake and is incapable of completely filtering out PFAS, petitioner alleged that if County Line was permitted to operate its facility in accordance with its application, as DEC's [*3]permit requires, PFAS would enter the lake and cause petitioner's members harm. In setting forth this harm, petitioner specifically identified a member whose potable drinking water is only filtered through the ground in "beach wells" on Cayuga Lake. As these wells do not filter out PFAS, allowing PFAS to be dumped into the lake would render this member's water contaminated and unsafe to drink. Matter of Seneca Lake Guardian v New York State Dept. of Envtl. Conservation, 2024 NY Slip Op 03856, Third Dept 7-18-24

Practice Point: Here a nonprofit whose purpose is to preserve and protect the health of the Finger Lakes had standing to contest a permit allowing the dumping of

treated waste in Cayuga Lake. One of the member's drinking water came from Cayuga Lake. Therefore the member suffered an injury greater than that suffered by the general public.

JULY 18, 2024

FAMILY LAW, JUDGES.

THE CHILD DID NOT WANT PARENTAL ACCESS WITH FATHER; IT WAS AN ABUSE OF DISCRETION TO ORDER VISITATION WITH FATHER WITHOUT CONDUCTING AN IN CAMERA INTERVIEW OF THE CHILD (SECOND DEPT).

The Second Department, reversing Family Court, determined, under the circumstances of this case, it was an abuse of discretion to order father's visitation with the child without an in camera interview of the child:

"Absent extraordinary circumstances, where visitation would be detrimental to the child's well-being, a noncustodial parent has a right to reasonable visitation privileges" … . Although an appeal may be taken by the attorney for the child, "the child does not have full-party status and cannot veto a settlement reached by the parents and force a trial after the attorney for the child had a full [and] fair opportunity to be heard" … . However, "[t]he decision to conduct an in camera interview to determine the best interests of the child is within the discretion of the hearing court" … .

Under the circumstances of this case, the Family Court improvidently exercised its discretion in failing to conduct an in camera interview of the child, particularly given the child's position, as stated by the attorney for the child, regarding his fear and hatred of the father, his expressed concerns about the father's lifestyle, and his strong wishes not to have parental access with the father … . The record reflects that the child is of such an age and maturity that his preferences are necessary to create a sufficient record to determine what parental access would be in his best interests … . While the attorney for the child recounted the child's objections on the record, in the absence of an in camera interview, the court did not have sufficient information to assess what parental access arrangement would be in the child's best interests … . Matter of Dionis F. v Daniela Z., 2024 NY Slip Op 03822, Second Dept 7-17-24

Practice Point: Here the child objected to visitation with father. Visitation should not have been ordered without an in camera interview of the child.

JULY 17, 2024

FREEDOM OF INFORMATION LAW (FOIL), CIVIL RIGHTS LAW.

RECORDS OF POLICE DISCIPLINARY PROCEEDINGS WHICH DID NOT RESULT IN DISCIPLINARY ACTION ARE PROPER SUBJECTS OF A FOIL REQUEST (SECOND DEPT).

The Second Department, reversing Supreme Court, determined records of police disciplinary proceedings which did not result in disciplinary action were a proper subject of petitioner's FOIL request. The records had been denied on the ground disclosure would constitute an unwarranted invasion of personal property pursuant Public Officers Law 87(2)(b). Petitioner, who prevailed, was entitled to attorney's fees:

… [C]ontrary to the respondents' contention, the withheld records were not categorically exempt from disclosure. "[T]here is no categorical exemption from disclosure for unsubstantiated allegations or complaints of police misconduct" … . "Upon repealing Civil Rights Law § 50-a, the Legislature amended . . . Public Officers Law to specifically contemplate the disclosure of 'law enforcement disciplinary records,' which it defines to include 'complaints, allegations, and charges against an employee'" … . "If the Legislature had intended to exclude from disclosure complaints and allegations that were not substantiated, it would simply have stated as much" … . "It did not, and instead included 'complaints, allegations, and charges' in its definition of disciplinary records, along with 'the disposition of any disciplinary proceeding,' without qualification as to the outcome of the proceeding" … .

Accordingly, disclosure of the withheld records was required unless those records "'[fell] squarely within the ambit of one of [the] statutory exemptions … . Matter of New York Civ. Liberties Union v Village of Freeport, 2024 NY Slip Op 03824, Second Dept 7-17-24

Practice Point: Records of police disciplinary proceedings which did not result in disciplinary action are not exempt from a FOIL request.

JULY 17, 2024

MEDICAL MALPRACTICE, CIVIL PROCEDURE, IMMUNITY.

THE IMMUNITY CONFERRED ON HEALTHCARE PROVIDERS DURING THE COVID PANDEMIC CAN BE BASED ON THE OVERALL STRAIN ON THE OVERWHELMED HEALTHCARE SYSTEM; ALTHOUGH THE DEFENDANTS IN THIS MED MAL CASE MAY DEMONSTRATE ENTITLEMENT TO IMMUNITY AS THE CASE PROGRESSES, THEY DID NOT DEMONSTRATE ENTITLEMENT TO IMMUNITY AS A MATTER OF LAW SUCH THAT THE COMPLAINT SHOULD BE DISMISSED (SECOND DEPT).

The First Department, in a full-fledged opinion by Justice Higgitt, determined defendants in this med mal case were not entitled to dismissal of the complaint based upon the immunity conferred by the Emergency or Disaster Treatment Protection Act (EDPTA) during the COVID pandemic. The plaintiff-patient, who did not have COVID, fell near his hospital bed and suffered a brain injury. After he fell, and before he suffered any symptoms of the injury from the fall, he was examined by two doctors. The doctors were not made aware of the fall. The defendants moved to dismiss the complaint at the outset of the case based on the EDPTA, noting that the immunity conferred by the statute was based upon the overall strain placed on the healthcare system by the pandemic. The Second Department determined that, although the defendants may be able to demonstrate their entitlement to immunity as the case progresses, they did not demonstrate entitlement to immunity as a matter of law such that the complaint should be dismissed at the outset:

… [O]f the three conditions imposed by former Public Health Law § 3082(1), there is no question that defendants were arranging for or providing health care services as per the statute, and were doing so in good faith. The parties' dispute distills to whether defendants established, conclusively, that "the treatment of [plaintiff was] impacted by [defendants'] decisions or activities in response to or as a result of the COVID-19 outbreak" (former Public Health Law § 3082[1][b]). * * *

A statute conferring immunity must be strictly construed … , and a party seeking its protections "must conform strictly with its conditions" … . In this regard, we note that only minimal discovery had been conducted at the time the motion was

made, and that the applicability of the defense, itself, requires a fact-intensive inquiry. Whether or not defendants may ultimately be able to demonstrate that they are entitled to immunity, it is premature to deem the analysis completed at this juncture … . Holder v Jacob, 2024 NY Slip Op 03864, First Dept 7-18-24

Practice Point: Healthcare providers may be entitled to statutory immunity during the COVID pandemic. Here the defendants were unable to demonstrate entitlement to immunity as a matter of law such that the med mal complaint should be dismissed. But they may be able demonstrate entitlement to immunity as the case progresses.

JULY 18, 2024

MEDICAL MALPRACTICE, DAMAGES.

DISAGREEING WITH THE FIRST DEPARTMENT, THE SECOND DEPARTMENT HELD THAT DAMAGES FOR "PRE-IMPACT TERROR" ARE NOT APPROPRIATE IN A MED MAL CASE; HERE PLAINTIFF SUFFERED A HEART ATTACK IN 2008 AND DIED IN 2011 (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court in the med mal case, in a full-fledged opinion by Justice Maltese, determined the damages for "pre-impact terror" were not appropriate. Plaintiff suffered a heart attack in 2008 and died in 2011:

… [P]re-impact terror delineated as emotional pain and suffering as a separate item of damages is inappropriate in this medical malpractice and wrongful death action and would represent an inappropriate extension of the law with respect to this issue. Traditionally, damages for pre-impact terror have been awarded in cases involving motor vehicle accidents and other types of accidents … . Here, where the "impact" was the decedent's heart attack, the damages for emotional pain and suffering cannot accurately be characterized as damages for pre-impact terror, because they were intended to compensate for the fear the decedent experienced after the heart attack occurred in January 2008 at Westchester Medical Center until his death more than three years later on October 27, 2011, at Yale-New Haven Hospital. Further, unlike a motor vehicle accident where the defendant driver causes the impact, the WMC defendants did not cause the decedent's heart attack. To the extent that the Appellate Division, First Department, determined otherwise

in Small v City of New York (213 AD3d 475), we decline to follow that decision. Molina v Goldberg, 2024 NY Slip Op 03818, Second Dept 7-17-24

Practice Point: Disagreeing with the First Department, the Second Department held damages for "pre-impact terror" are not appropriate in the med mal case.

JULY 17, 2024

MEDICAL MALPRACTICE, EVIDENCE.

AN EXPERT IN A MED MAL CASE NEED NOT BE A SPECIALIST IN THE RELEVANT FIELD; HERE A PRIMARY CARE PHYSICIAN LAID A PROPER FOUNDATION FOR AN OPINION ABOUT PLAINTIFF'S CARE; PLAINTIFF ALLEGED DEFENDANTS NEGLIGENTLY FAILED TO DIAGNOSE HER HEART CONDITION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendants in this med mal case should not have been granted summary judgment. Plaintiff alleged a negligent failure to diagnose her heart condition. Plaintiff's expert was a primary care physician, not a cardiologist. The Second Department noted that an expert need not be a specialist and found plaintiff's expert had laid a proper foundation for his opinion:

"[A] medical expert need not be a specialist in a particular field in order to testify regarding accepted practices in that field" … . However, the expert must "be possessed of the requisite skill, training, education, knowledge or experience from which it can be assumed that the opinion rendered is reliable" … . Here, the expert, who was in the practice of internal medicine and primary care for more than 35 years, demonstrated based on experience and knowledge that he or she was qualified to render an opinion regarding the symptomology and diagnosis of heart disease and as to whether the defendants properly examined the decedent and investigated her symptoms in accordance with accepted medical practices … . Rosenzweig v Hadpawat, 2024 NY Slip Op 03838, Second Dept 7-17-24

Practice Point: An expert in a med mal case need not be a specialist. Here a primary care physician laid a proper foundation for an opinion re: the defendants' failure to diagnose plaintiff's heart condition.

JULY 17, 2024

SLIP AND FALL, LANDLORD-TENANT.

QUESTIONS OF FACT WHETHER DEFENDANT WAS AN OUT-OF-POSSESSION LANDLORD PRECLUDED SUMMARY JUDGMENT IN FAVOR OF THE LANDLORD IN THIS SLIP AND FALL CASE (SECOND DEPT).

The Second Department, reversing Supreme Court in this slip and fall case, determined there were questions of fact whether the landlord was an out-of-possession landlord:

"A property owner has a duty to maintain its premises in a reasonably safe condition" … . "That duty is premised on the landowner's exercise of control over the property, as the person in possession and control of property is best able to identify and prevent any harm to others" … . "It has been held uniformly that control is the test which measures generally the responsibility in tort of the owner of real property" … . "Thus, a landowner who has transferred possession and control is generally not liable for injuries caused by dangerous conditions on the property" … .

… [D]efendants failed to establish their prima facie entitlement to judgment as a matter of law dismissing the complaint insofar as asserted against them on the ground that they were out-of-possession landlords. Although the defendants submitted a lease establishing that a tenant leased the entire office building and was responsible for the maintenance of vestibules and entrances, the defendants' submissions also demonstrated that they maintained an office in the building and that, each work day, the defendants' employee used the building entrance where the plaintiff's slip and fall occurred. The defendants' submissions further demonstrated that this employee would report any defects in the building to the building's security, and the tenant would then remedy those defects. Under these circumstances, triable issues of fact exist as to the defendants' control of the subject property and whether they were out-of-possession landlords … . Grullon v 57-115 Assoc., L.P., 2024 NY Slip Op 03811, Second Dept 7-17-24

Practice Point: Here, even though the lease made the tenant responsible for maintenance, the fact that the landlord had an office in the building raised a

question of fact whether the landlord could escape liability for a slip and fall as an out-of-possession landlord.

JULY 17, 2024

SLIP AND FALLL.

DEFENDANT PROPERTY-OWNER HAD ACTUAL KNOWLEDGE OF THE RECURRING RAINWATER LEAKS; PLAINTIFF ENTITLED TO SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff was entitled to summary judgment in this slip and fall case:

… Karen Myers [was] the defendants' supervisor caretaker assigned to the subject building. At her deposition, the plaintiff testified that, while walking in the hallway of the floor that she resided on, she slipped as a result of rainwater that had leaked into the building from an outside terrace. She also testified that during periods of rainfall, she had noticed water leaking into the hallway from underneath the terrace door on numerous occasions over the years she had resided in the building and had observed building employees mopping the area "a lot of times." Myers testified that she had been aware of the recurring leak for at least one year prior to the plaintiff's accident and that the only remedial measure taken by building employees in response was "spot mopping." She conceded that the recurring leak caused a "slip and fall" "hazard," which she expected employees to "mop up." Based upon this testimony, the plaintiff "established as a matter of law that [the defendants] had actual knowledge of a recurring dangerous and defective condition and, therefore, could be charged with constructive knowledge of each specific recurrence of the condition, which was a proximate cause of the accident" … . Graham v New York City Hous. Auth., 2024 NY Slip Op 03810, Second Dept 7-17-24

Practice Point: A property-owner's actual knowledge of a recurring dangerous condition which causes a slip and fall entitles plaintiff to summary judgment.

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