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CHILD VICTIMS ACT, CIVIL PROCEDURE, EMPLOYMENT LAW.

IN THIS CHILD VICTIMS ACT CASE, LONG-ARM JURISDICTION WAS PROPERLY EXERCISED OVER AN OUT-OF-STATE CATHOLIC DIOCESE WHICH EMPLOYED DEFENDANT PRIEST WHO WAS ASSIGNED TO A NEW YORK PARISH (FIRST DEPT).

The First Department, reversing Supreme Court, determined the Diocese of Burlington (apparently an out-of-state party) has sufficient contact with New York to warrant the exercise of long-arm jurisdiction in this Child Victims Act case. It was alleged the Diocese of Burlington employed the defendant priest and assigned

him to a parish in New York with actual knowledge of the priest's history of sexually abusing children:

Accepting as true the facts alleged … , plaintiff has made a prima facie showing that Diocese of Burlington is subject to personal jurisdiction under CPLR 302(a)(1) … . Plaintiff alleges that Diocese of Burlington exercised supervision and control over the Priest, placing him on an indefinite, long-term assignment in New York to provide Catholic clergy services to parishioners in New York, including plaintiff even though it knew that he was a sexual predator. Plaintiff also alleges that during this period and in connection with those priestly duties, the Priest sexually assaulted plaintiff on multiple occasions. Therefore, plaintiff adequately alleges that Diocese of Burlington engaged in "purposeful activity" in New York, and that there is a "substantial relationship between the transaction and the claim asserted" …… .

Further, "the exercise of long-arm jurisdiction over defendants per CPLR 302(a)(1) comports with due process, as it must" … . For the reasons stated, "plaintiff adequately alleged Diocese of Burlington's 'minimum contacts' with New York, in the form of their purposeful availment of the privilege of conducting activities here, thus invoking the protections and benefits of New York's laws" … . Diocese of Burlington "failed to present a compelling case that some other consideration would render jurisdiction unreasonable" … . V.Z. v Roman Catholic Diocese of Burlington, 2024 NY Slip Op 04631, First Dept 9-26-24

Practice Point: Here in this Child Victim's Act case, an out-of-state Catholic Diocese employed a priest who was assigned to a New York parish. It was alleged the Diocese had actual knowledge of the priest's history of sexually abusing children. The Diocese was subject to New York's long-arm jurisdiction.

September 26, 2024

CIVIL PROCEDURE, BILLS OF PARTICULAR, MEDICAL MALPRACTICE.

PLAINTIFF'S MOTION FOR LEAVE TO SERVE A SUPPLEMENTAL BILL OF PARTICULARS SHOULD HAVE BEEN GRANTED BECAUSE IT MERELY AMPLIFIED THE ALLEGATIONS IN THE COMPLAINT AND BILL OF PARTICULARS; HOWEVER, THE NEW CAUSES OF ACTION IN THE AMENDED BILLS OF PARTICULARS WERE PROPERLY STRUCK (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined plaintiff in this medical malpractice action should have been allowed to serve a supplemental bill of particulars which amplified the allegations in the complaint and noted that plaintiff's mislabeling an amended bill of particulars as a supplemental bill of particulars could be overlooked:

A party is entitled to amend their bill of particulars "once as of right at any time prior to filing the note of issue" … . A bill of particulars "may be used to amplify the allegations in a complaint [but] may not be used to supply allegations essential to a cause of action that was not pleaded in the complaint" … . Nor can a bill of particulars "add or substitute a new theory or cause of action" not asserted in the complaint … .

Although the second amended bill was denominated as a "Supplemental Bill of Particulars," we may disregard the plaintiff's mistake in labeling her bill of particulars where, as here, a substantial right of a party will not be prejudiced (see CPLR 2001 …).

The Supreme Court properly granted that branch of [defendant's] motion … to strike the first amended bill, as the plaintiff alleged a new cause of action alleging malpractice and negligence in performing the knee replacement surgery, which was not previously set forth in the complaint or original bill of particulars … . Further, the court properly granted that branch of [defendant's] motion … to strike that portion of the second amended bill that alleged malpractice and negligence in the plaintiff's preoperative care, as well as malpractice and negligence in performing the knee replacement surgery, as these causes of action were not previously set forth in the complaint or original bill of particulars … . However, the court should have granted the plaintiff leave to serve a supplemental bill of particulars with respect to the allegations included in the second amended bill related to

postoperative physical therapy and care, as they only served to amplify the allegations in the complaint … , and should have denied that branch of [defendant's] motion which was to preclude the plaintiff from offering evidence at trial relating to her postoperative physical therapy and care. Quinones v Long Is. Jewish Med. Ctr., 2024 NY Slip Op 04471, Second Dept 9-18-24

Practice Point: Here a motion for leave to serve a supplemental bill of particulars which only amplified the allegations in the complaint and bill of particulars should have been granted. But new causes of action included in the amended bills of particulars were properly struck.

September 18, 2024

CIVIL PROCEDURE, MEDICAL MALPRACTICE.

THE RELATION-BACK DOCTRINE APPLIES EVEN WHERE A NEW ACTION HAS BEEN COMMENCED AND CONSOLIDATED WITH A PRIOR ACTION (FIRST DEPT).

The Second Department, reversing (modifying) Supreme Court, in a full-fledged opinion by Justice Rosado, determined the relation-back doctrine applied to the wrongful death action against Dr. Ozcan and reinstated that cause of action. The court noted that the relation-back doctrine applies where, as here, a new action has been commenced and consolidated with a prior action:

Dr. Ozcan does not substantively dispute that the claims in the prior and instant actions arose out of the same conduct or that she is united in interest with Montefiore [Medical Center]. Therefore, the only question to be decided, is whether the third prong of the relation-back doctrine has been established.

Dr. Ozcan, who was named as a defendant in the First Action, should have known that, but for a mistake, the wrongful death claim would have been brought against her as well … .

Application of the relation-back doctrine is proper even where, as here, a new action has been commenced and consolidated with a prior action … . Picchioni v Sabur, 2024 NY Slip Op 04362, First Dept 9–5-24

Practice Point: The relation-back doctrine applies to render an action timely brought even where a new action has been commenced and consolidated with a prior action.

September 5, 2024

DANGEROUS CONDITION, CONSTRUCTIVE NOTICE.

A SAFE ON A HIGH SHELF IN A HOTEL ROOM FELL ON PLAINTIFF; DEFENDANT HOTEL DID NOT ADDRESS WHEN THE SAFE WAS LAST INSPECTED; THEREFORE THE HOTEL DID NOT SHOW IT DID NOT HAVE CONSTRUCTIVE KNOWLEDGE OF THE CONDITION OF THE SAFE (FIRST DEPT).

The First Department, reversing Supreme Court, determined defendant did not sufficiently demonstrate a lack of constructive notice of the allegedly dangerous condition—a 40-t0-60-pound safe which fell from a high shelf in a hotel-room closet, apparently because it was not securely attached to the wall:

Plaintiff commenced this personal injury action after a 40-to-60-pound safe fell on him while he was staying at defendant hotel in January 2022. In moving for summary judgment, defendant failed to meet its prima facie burden that it neither created nor had actual or constructive notice of the dangerous condition by submitting evidence that the room was inspected two years earlier. The inspection report did not have probative value because it was performed two years before plaintiff's accident, and failed to provide any specific details as to the inspection so as to establish defendant's lack of notice … . Defendant did not address how often the hotel safes were inspected, and what, if any, steps were taken to ensure that a safe, which in this case was placed on a high closet shelf, remained securely affixed to the wall … . Here, a physical inspection of the in-room safe would have been reasonable and revealed whether the safe was firmly secured to the wall … . Swallows v W N.Y. Times Sq., 2024 NY Slip Op 04629, First Dept 9-26-24

Practice Point: A defendant's motion for summary judgment in a premises liability case must demonstrate when the area or object in question was last inspected and found safe. A motion that does not address that issue fails to show a lack of constructive notice of the condition and will be denied.

September 26, 2024

LABOR LAW-CONSTRUCTION LAW.

THE FLOOR OF THE ELEVATOR WHERE PLAINTIFF'S ACCIDENT OCCURRED IS NOT A "PASSAGEWAY" WITHIN THE MEANING OF THE INDUSTRIAL CODE (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined the floor of an elevator is not a "passageway" within the meaning of the Industrial Code. Therefore the Labor Law 241(6) cause of action based upon an Industrial Code provision requiring that "passageways" be kept free from dirt, debris and other obstructions was inapplicable, However, the code provision requiring "floors" and "platforms" be kept free from scattered tools, etc., did apply to elevators:

Supreme Court should have granted defendants' motion for summary judgment dismissing plaintiff's Labor Law § 241 (6) claim insofar as it was predicated on 12 NYCRR § 23-1.7 (e) (1). That regulation provides, as relevant here, "All passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping." A passageway for purposes of this regulation "mean[s] a defined walkway or pathway used to traverse between discrete areas as opposed to an open area" … . The elevator in which plaintiff's accident occurred cannot be considered a walkway or pathway, and therefore cannot constitute a passageway within the meaning of the regulation … . Smith v Extell W. 45th LLC, 2024 NY Slip Op 04533, First Dept 9-24-24

Practice Point: The floor of the elevator where plaintiff's accident occurred is not a "passageway" within the meaning of the Industrial Code. Therefore the Labor Law 241(6) cause of action alleging a violation of the "passageway" code provision should have been dismissed.

September 24, 2024

MEDICAL MALPRACTICE, EXPERT OPINION EVIDENCE.

THE MALPRACTICE ACTION WAS AGAINST EMERGENCY-ROOM PHYSICIANS WHO TREATED PLAINTIFF'S DECEDENT'S GUNSHOT WOUNDS; PLAINTIFF'S EXPERT'S AFFIDAVIT DID NOT DEMONSTRATE ANY FAMILIARITY WITH EMERGENCY MEDICINE AND THEREFORE DID NOT RAISE A QUESTION OF FACT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendants' summary judgment in this medical malpractice action should have been granted because the expert affidavit offered in opposition was deemed "conclusory" and insufficient to raise a question of fact. Plaintiff's decedent died from three gunshot wounds. Plaintiff's expert did not demonstrate any familiarity with the practice of emergency medicine:

"While it is true that a medical expert need not be a specialist in a particular field in order to testify regarding accepted practices in that field . . . the witness nonetheless should be possessed of the requisite skill, training, education, knowledge or experience from which it can be assumed that the opinion rendered is reliable" … . "'Thus, where a physician opines outside his or her area of specialization, a foundation must be laid tending to support the reliability of the opinion rendered'" … .

Here, the plaintiff submitted an affirmation of a physician who engaged in the private practice of internal medicine and cardiology. However, the affirmation did not indicate that the physician had training in emergency medicine or what, if anything, the physician did to become familiar with the standard of care for this specialty … . Furthermore, the affirmation was conclusory, speculative, and unsupported by the evidence … . Thus, the plaintiff failed to raise a triable issue of fact. Quinones v Winthrop Univ. Hosp., 2024 NY Slip Op 04406, Second Dept 9-11-24

Practice Point: Here plaintiff's expert did not demonstrate any familiarity with emergency medicine. Plaintiff's decedent died from gunshot wounds. Plaintiff's expert's affidavit was deemed "conclusory" and insufficient to raise a question of fact.

September 11, 2024

MEDICAL MALPRACTICE, NEGLIGENCE, CIVIL PROCEDURE, EVIDENCE.

HERE PLAINTIFF DID NOT IDENTIFY AN EXPERT WITNESS AS REQUIRED BY CPLR 3101 AND THE MEDICAL MALPRACTICE ACTION WAS PROPERLY DISMISSED; HOWEVER PLAINTIFF ALLEGED SCARRING AND BURNING DURING LASER HAIR REMOVAL AND MAY STILL BE ABLE TO PROVE ORDINARY NEGLIGENCE THROUGH THE TESTIMONY OF HIS TREATING PHYSICIAN AND OTHER EVIDENCE; THE NEGLIGENCE CAUSE OF ACTION SHOULD NOT HAVE BEEN DISMISSED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that, although plaintiff was precluded from offering expert evidence and therefore could not prove medical malpractice, the negligence cause of action should not have been dismissed. Plaintiff alleged scarring and burns caused by laser hair removal:

The Supreme Court erred in dismissing the negligence cause of action on the ground that the plaintiff could not establish a prima facie case in the absence of the testimony of an expert witness. At trial, the plaintiff may, through the testimony of his treating physician, records, or "other evidence," be able to establish "the standard of care in performing laser hair removal and the known risks of the procedure" … . Therefore, contrary to the court's determination, although the plaintiff is precluded from offering the testimony of an expert witness whose identity must be disclosed pursuant to CPLR 3101(d)(1)(i), at this juncture, it cannot be determined that the plaintiff will be unable to establish a prima facie case of negligence … . Mishli v Advanced Dermatology Laser & Cosmetic Surgery, P.C., 2024 NY Slip Op 04386, Second Dept 9-11-24

Practice Point: In this case alleging scarring and burning during laser hair removal, the dismissal of a medical malpractice cause of action because the identity of an expert witness has not been disclosed did not necessarily preclude a negligence cause of action proven by the testimony of plaintiff's treating physician.

September 11, 2024

SLIP AND FALL, MUNICIPAL LAW, WRITTEN NOTICE, CREATION OF CONDITION.

HERE THE CITY DEMONSTRATED IT DID NOT HAVE WRITTEN NOTICE OF THE MOUND OF SNOW AND ICE WHERE PLAINTIFF ALLEGEDLY SLIPPED AND FELL, WHICH ORDINARILY WOULD SUPPORT SUMMARY JUDGMENT IN FAVOR OF THE CITY; HOWEVER PLAINTIFF RAISED A QUESTION OF FACT WHETHER THE CITY CREATED THE DANGEROUS CONDITION BY PLOWING, AN EXCEPTION TO THE WRITTEN NOTICE REQUIREMENT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff in this ice and snow slip and fall case raised a question of fact whether the city created the dangerous condition by creating a mound of ice and snow when plowing. The defendant city's "written notice" requirement for liability in slip and fall cases did not apply because plaintiff alleged the dangerous condition was created by the city:

"When a municipality has adopted a prior written notice law, the municipality 'cannot be held liable for a defect within the scope of the law absent the requisite written notice, unless an exception to the requirement applies'" … . Where the municipality makes a prima facie showing that it lacked prior written notice of the alleged defect, "'the burden shifts to the plaintiff to demonstrate the applicability of one of two recognized exceptions to the rule—that the municipality affirmatively created the defect through an act of negligence or that a special use resulted in a special benefit to the locality'" … .

… [T]he City established … that it did not receive prior written notice of the snow/ice mound, thereby shifting the burden to the plaintiffs to demonstrate either that a triable issue of fact existed in that regard or that one of the … exceptions applied … . … [T]he plaintiffs' submissions, including photos of the snow/ice mound and an affidavit of an expert, were sufficient to raise a triable issue of fact as to whether the City's snow plowing operations affirmatively created the snow/ice mound that allegedly caused the injured plaintiff to slip and fall … . Reynolds v City of Poughkeepsie, 2024 NY Slip Op 04472, Second Dept 9-18-24

Practice Point: A city can require written notice of a dangerous condition as a condition precedent to suing the city for a slip and fall. However, where the

plaintiff raises a question of fact about whether the city created the dangerous condition, here by plowing snow, the written notice requirement does not apply.

September 18, 2024

SLIP AND FALL, RECENT INSPECTION OF AREA, NO CONTSTRUCTIVE NOTICE.

DEFENDANT IN THIS SLIP AND FALL CASE PROVED THE AREA WHERE PLAINTIFF ALLEGEDLY SLIPPED AND FELL WAS INSPECTED (AT MOST) AN HOUR AND TEN MINUTES BEFORE THE FALL; THAT PROOF WAS SUFFICIENT TO AWARD DEFENDANT SUMMARY JUDGMENT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant in this slip and fall case proved it did not have actual or constructive notice of the food on the floor where plaintiff slipped and fell. Defendant's motion for summary judgment should have been granted:

… [T]he defendant established, prima facie, that it did not create or have actual or constructive notice of the condition alleged by the plaintiff to have caused the accident. In support of its motion, the defendant submitted, inter alia, the deposition testimony of its employee, as well as the "Daily Floor-walk / Safety Inspection" record for the day of the incident, which demonstrated that the area in question was last inspected between 2:47 p.m. and 3:40 p.m. on the date of the accident and that no hazardous condition was found in that location … . The employee testified that if he had observed any hazardous condition on the floor, he would have immediately cleaned it … . In opposition, the plaintiff failed to raise a triable issue of fact. Arbit v Costco Wholesale Corp., 2024 NY Slip Op 04366, Second Dept 9-11-24

Practice Point: This is a rare decision which gives some insight into how a defendant can prove a lack of constructive notice of a dangerous condition, here food on the floor, which is alleged to have caused a slip and fall. Defendant produced a "Daily Floor-walk/Safety Inspection" record and employee testimony showing the area was inspected, at most, an hour and ten minutes before the alleged slip and fall.

September 11, 2024

SLIP AND FALL, SIDEWALK HEIGHT DIFFERENTIAL, TRIVIAL DEFECT, EVIDENCE.

OBJECTIVE MEASUREMENTS ARE NOT NECESSARY TO PROVE A SIDEWALK HEIGHT DIFFERENTIAL DEFECT IS TRIVIAL; HOWEVER, HERE THE DEPOSITION TESTIMONY, THE PHOTOGRAPHS AND THE OPINION OF A HUMAN FACTORS EXPERT (WHICH WAS NOT BASED ON OBJECTIVE MEASUREMENTS) DID NOT SUPPORT SUPREME COURT'S FINDING THE DEFECT IS TRIVIAL AS A MATTER OF LAW (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Dillon, reversing Supreme Court's finding that the sidewalk defect was trivial as a matter of law, determined (1) objective measurements of a sidewalk defect in a slip and fall case are not required for a defendant to make out a prima facie case that the defect is trivial (2) photographs can be examined to determine triviality and (3) the opinion of a human factors expert about a sidewalk elevation differential is inadmissible if it is not based on an objective measurement or a "fairly inferable estimate of the differential:"

In this trip-and-fall case, the defendants moved for summary judgment dismissing the complaint on the ground that the alleged defect on which the injured plaintiff tripped was trivial as a matter of law and, thus, not actionable. In support of their motion, the defendants submitted photographs of the alleged defect, along with other evidence, but they did not submit an objective measurement of the dimensions of the alleged defect. On the plaintiffs' appeal from the order granting the defendants' motion, we address three specific questions relating to the trivial defect doctrine: (1) To establish, prima facie, that an alleged sidewalk defect was trivial as a matter of law and, thus, not actionable, must a defendant moving for summary judgment present an objective measurement of the alleged defect's dimensions? (2) If not, how are courts to examine photographic evidence in order to determine whether the alleged defect is trivial? (3) Is the opinion of a human factors expert conclusory and speculative, and therefore inadmissible, if the opinion is not based upon objective measurements of the defect? For reasons set forth below, we hold that an objective measurement of a defect is not a per se requirement for a party to meet the prima facie burden of proving an entitlement to summary judgment. We use this occasion to discuss how photographs in such

instances should be examined to render a determination on triviality. Further, we hold, as an issue of first impression, that the opinion of a human factors expert about an elevation differential is conclusory and inadmissible if it is not based upon an objective measurement or at least a fairly inferable estimate of the differential. * * *

In all, the defendants' submissions, including the photographs, even when considered in combination with the deposition testimony and other evidence, did not support the Supreme Court's conclusion of triviality as a matter of law … . Snyder v AFCO Avports Mgt., LLC, 2024 NY Slip Op 04584, Second Dept 9-25-24

Practice Point: Consult this opinion for guidance on the proof required to find a sidewalk height differential trivial as a matter of law, including the role of objective measurements, interpretation of photographs and the sufficiency of a human-factors expert's opinion.

September 25, 2024

TRAFFIC ACCIDENTS, EVIDENCE, HEARSAY.

HEARSAY STATEMENTS IN AN UNCERTIFIED, UNAUTHENTICATED REPORT FOR WHICH NO FOUNDATION WAS PROVIDED DID NOT CREATE AN ISSUE OF FACT (FIRST DEPT).

The Frist Department, reversing Supreme Court in this hit and run traffic accident case, noted that hearsay statements in the Prehospital Care Report, which was not certified or authenticated, did not create an issue of fact:

The court improperly denied petitioner's motion based on hearsay statements in the Prehospital Care Report, as the report was not certified or authenticated and no proper foundation was provided for it … . Therefore, the statements in the Prehospital Care Report cannot create an issue of fact. Even if it were appropriate to consider the report, it would "merely present[] an issue of fact to be resolved in the plenary action" since it is contradicted by the allegations in the petition, petitioner's affidavit, the Household Affidavit, the motor vehicle accident report, and petitioner's deposition testimony concerning whether there was contact between his bicycle and the hit and run vehicle … . Matter of Luna v Motor Veh. Acc. Indem. Corp., 2024 NY Slip Op 04521, First Dept 9-24-24

Practice Point: Hearsay statements in an uncertified, unauthenticated report for which no foundation was provided did not create an issue of fact.

September 24, 2024

TRAFFIC ACCIDENTS, MUNICIPAL LAW, CIVIL PROCEDURE, COVID TOLLS.

THE COVID-19 TOLLS AND THE COURT'S DELAY IN SIGNING THE ORDER TO SHOW CAUSE PROVIDED A REASONABLE EXCUSE FOR FAILING TO TIMELY FILE A NOTICE OF CLAIM IN THIS BUS ACCIDENT CASE; THE POLICE REPORT TIMELY NOTIFIED THE CITY OF THE RELEVANT FACTS; THE MOTION FOR LEAVE TO FILE A LATE NOTICE OF CLAIM SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined petitioners' motion for leave to serve a late notice of claim in this bus accident case should have been granted. The COVID-19 tolls, and the court's delay in signing the order to show cause, provided a reasonable excuse and the police report timely notified the city of the relevant facts:

In determining whether to grant a petition for leave to serve a late notice of claim, the court must consider all relevant circumstances, including whether "(1) the public corporation acquired actual knowledge of the essential facts constituting the claim within 90 days after the claim arose or a reasonable time thereafter, (2) the claimant demonstrated a reasonable excuse for the failure to serve a timely notice of claim, and (3) the delay would substantially prejudice the public corporation in its defense on the merits" … .

Here the petitioner demonstrated a reasonable excuse for the delay, i.e., the COVID-19 pandemic, the tolls resulting therefrom, and the delay by the Supreme Court in signing the petitioner's order to show cause.

Further, the petitioners met their burden of providing a plausible argument supporting a finding of no substantial prejudice. The happening of the accident and relevant facts were documented in a police report, and any prejudice was the result of delays resulting from the COVID-19 pandemic, not the petitioner's

conduct. Matter of Ortiz v New York City Tr. Auth., 2024 NY Slip Op 04464, Second Dept 9-18-24

Practice Point: The COVID-19 tolls and the judge's delay in signing the order to show cause provided a reasonable excuse for failure to timely file a notice of claim in this bus accident case.

Practice Point: The police report provided the city with timely notice of the relevant facts. Therefore the city was not prejudiced by the late notice.

September 18, 2024

WRONGFUL DEATH, TRUSTS AND ESTATES, STANDING.

THE PARTY WHO BROUGHT THE WRONGFUL DEATH ACTION WAS NOT A PERSONAL REPRESENTATIVE OF DECEDENT'S ESTATE AND THEREFORE DID NOT HAVE STANDING; BECAUSE THE PARTY HAD NO RIGHT TO SUE, "SUBSTITUTION" OF THE EXECUTORS FOR THAT PARTY WAS NOT AVAILABLE (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined (1) plaintiffs' cross-motion to substitute the executors of decedent's estate for plaintiffs should not have been granted, and (2) defendants' motion to dismiss the complaint for lack of standing should have been granted. The plaintiff who purportedly brought the wrongful death action (a "proposed" executor) was not a "personal representative" under the Estates, Powers and Trusts Law (EPTL). Therefore, "substitution" of the executors for the plaintiff was not possible:

… [A]s a "[p]roposed" executor who had not obtained letters to administer decedent's estate, plaintiff was not a personal representative within the meaning of the Estates, Powers and Trusts Law at the time the action was commenced and thus did not have standing to commence an action on behalf of decedent's estate … . Thus, we agree with defendants that Supreme Court erred in granting plaintiff's cross-motion to substitute as plaintiffs the executors of decedent's estate inasmuch as "[s]ubstitution . . . is not an available mechanism for replacing a party . . . who had no right to sue with one who has such a right" … .

We … agree with defendants that the court erred in denying that part of their motion seeking to dismiss the complaint on the ground that the action was brought

by a party without standing … . Cappola v Tennyson Ct., 2024 NY Slip Op 04672, Fourth Dept 9-27-24

Practice Point: Only a "personal representative" of a decedent's estate has standing to sue on behalf of the decedent Here the suit was brought by a party who had not obtained letters to administer the estate and therefore did not have standing. "Substitution" of the executors for a party without standing is not possible.

September 27, 2024