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Weekly Reversal Report

October 7 – 11, 2024

An Organized Compilation of Summaries of Selected Decisions, Mostly Reversals, Released by Our New York State Appellate Courts October 7 – 11, 2024, and Posted on the New York Appellate Digest Website on Monday, October 14, 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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ARBITRATION, CONTRACT LAW, CIVIL PROCEDURE.

THE CONTRACT PROVISIONS MANDATING ARBITRATION WERE PROPERLY ENFORCED BY SUPREME COURT (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Oing, affirming Supreme Court, determined the contract provisions compelling arbitration should be enforced in this complex dispute among the owners and operators of nursing homes in Arizona. The terms of the contracts and the history of the litigation are far too detailed to fairly summarize here. Matter of Fein v Langer, 2024 NY Slip Op 04906, First Dept 10-8-24

Practice Point: In this case, the proverb cited in the opinion—"be careful what you wish for"—-means the contract provisions compelling arbitration controlled and the court litigation which had been commenced was precluded.

October 8, 2024

CIVIL PROCEDURE, EVIDENCE, JUDGES, NEGLIGENCE.

STRIKING THE COMPLAINT WAS TOO SEVERE A SANCTION FOR PLAINTIFF'S FAILURE TO RESPOND TO DISCOVERY DEMANDS; $2500 PENALTY IMPOSED (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined sanctions were in order for plaintiff's failure to respond to discovery demands, but striking the complaint was too severe. A monetary penalty was imposed:

… [T]he plaintiff's failure to comply with discovery demands and orders directing discovery or respond to the letters from the defendants' counsel concerning discovery, without providing a reasonable excuse, supports an inference of willful or contumacious conduct … . However, under the circumstances, the sanction imposed was too drastic a remedy and the defendants' motion pursuant to CPLR 3126 to strike the complaint should have been granted only to the extent of directing the plaintiff's counsel to personally pay the sum of $2,500 as a sanction to the defendants … . Mirabile v Kuwayama, 2024 NY Slip Op 04958, Second Dept 10-9-24

Practice Point: This case presents another instance of an appellate court's determination the striking of a pleading as a sanction is too severe a penalty. Here plaintiff failed to respond to discovery demands and a $2500 penalty was deemed an appropriate sanction by the Second Department.

October 9, 2024

CIVIL PROCEDURE, FORECLOSURE, JUDGES.

DISMISSAL OF THE COMPLAINT IN THIS FORECLOSURE ACTION WAS NOT IN COMPLIANCE WITH CPLR 3216 OR 22 NYCRR 202.7, AND THERE WAS INSUFFICIENT JUSTIFICATION FOR A "SUA SPONTE" DISMISSAL (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the prerequisites for the dismissal of the complaint in this foreclosure action were not met:

… [T]he Supreme Court failed to serve a written demand upon the plaintiff to resume prosecution of the action and to serve and file a note of issue within 90 days of receipt of the demand (see CPLR 3216[b][3]). Since at least one precondition set forth in CPLR 3216 was not met here, the court was without power to direct dismissal of the complaint pursuant to that statute … .

Pursuant to 22 NYCRR 202.27, a court has discretion to dismiss an action where a plaintiff fails to appear "[a]t any scheduled call of a calendar or at any conference" … . In this case, however, the court attorney referee did not recommend dismissal of the complaint based upon a failure to appear at a conference, but rather for failure to move for an order of reference by a date certain without good cause shown. Thus, the dismissal order, which confirmed the report of the court attorney referee, did not direct dismissal of the complaint based upon a default in appearing at a scheduled conference or calendar call, and 22 NYCRR 202.27 could not have provided the basis for dismissal of the complaint … .

Moreover, "'[a] court's power to dismiss a complaint, sua sponte, is to be used sparingly and only when extraordinary circumstances exist to warrant dismissal'" … . Here, the plaintiff's failure to comply with a court conference order directing the plaintiff to move for an order of reference was not a sufficient ground upon which to direct dismissal of the complaint … . Bank of Am., N.A. v Banu, 2024 NY Slip Op 04940, Second Dept 10-9-24

Practice Point: The appellate courts will not affirm dismissals of complaints when the statutory and regulatory requirements for dismissal have not been met.

October 9, 2024

COURT OF CLAIMS, CIVIL PROCEDURE, NEGLIGENCE.

THE APPLICATION TO TREAT THE NOTICE OF INTENTION TO FILE A CLAIM (NOI) AS A TIMELY FILED CLAIM IN THIS PRISON STABBING CASE SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing the Court of Claims, determined the notice of intention to file a claim (NOI) in this negligent supervision case met the requirements of a claim. Therefore the application to treat the NOI as a timely filed claim should have been granted. Claimant, a prison inmate, was stabbed in the eye:

Court of Claims Act § 10(8)(a) provides that a court may grant an application to treat an NOI as a claim if, among other things, the NOI "was timely served, and contains facts sufficient to constitute a claim; and the granting of the application would not prejudice the defendant." Court of Claims Act § 11(b) requires a claim to specify: (1) the nature of the claim; (2) the time when it arose; (3) the place where the claim arose; (4) the items of damage or injuries claimed; and (5) the total sum claimed … . While section 11(b) does not require "absolute exactness," the "guiding principle informing" section 11(b) pleading requirements is whether the State is "able to investigate the claim promptly and to ascertain its liability under the circumstances" … . "In describing the general nature of the claim, . . . or a notice of intention to file a claim, . . . [it] 'should provide an indication of the manner in which the claimant was injured and how the State was negligent, or enough information so that how the State was negligent can be reasonably inferred'" … .

Here … the claimant provided sufficient details to meet the requirements outlined in Court of Claims Act § 11(b), including the nature of the claim and the alleged act of negligence by the State … . Johnson v State of New York, 2024 NY Slip Op 04949, Second Dept 10-9-24

Practice Point: Where a notice of intention to file a claim (NOI) includes sufficient information about the nature of the claim and the alleged negligence by the state, an application to treat the NOI as a timely filed claim should be granted.

October 9, 2024

CRIMINAL LAW, CRIMINAL LAW, EVIDENCE, JUDGES.

THE STIPULATION SIGNED BY DEFENSE COUNSEL, IN AN EFFORT TO AVOID SHOWING CHILD PORNOGRAPHY TO THE JURY, EFFECTIVELY REMOVED THE MENS REA ELEMENT OF THE CHILD PORNOGRAPHY CHARGES FROM THE JURY'S CONSIDERATION; CONVICTION REVERSED ON INEFFECTIVE ASSISTANCE GROUNDS (SECOND DEPT).

The Second Department, reversing defendant's child-pornography conviction, over a two-justice dissent, determined that the stipulation signed by defense counsel and presented to the jury (in an effort to avoid showing the pornography to the jury) effectively removed from the jury consideration of the mens rea element. Therefore, defendant did not receive effective assistance of counsel:

A few days before the trial commenced, defense counsel and the prosecutor executed a stipulation entitled "Stipulation Elements of Crime." Among other things, they stipulated to the fact that certain videos underlying the counts of promoting a sexual performance by a child "depicted . . . a performance, which included sexual conduct by a child less than 17 years of age," and similarly stipulated as to the content of certain images underlying the counts of possessing a sexual performance by a child. …

… [T]he stipulation went on to state, in pertinent part, that "whoever possessed each of the . . . videos, promoted a performance, which included sexual conduct by a child . . . with knowledge of the character and content of the videos," and "whoever possessed these videos and images, knowingly had in his or her possession or control, or knowingly accessed with intent to view, a performance which included sexual conduct by a child" … . A reasonable reading of this additional language in the stipulation is that possession alone is tantamount to promoting a performance with knowledge "of the character and content of" the videos, which is required to support a conviction of promoting a sexual performance by a child under Penal Law § 263.15, and that possession alone is tantamount to knowing "possession or control" or "access[ ] with intent to view," which is required to support a conviction of possessing a sexual performance by a child under Penal Law § 263.16. Thus, this additional language in the stipulation set forth definitions of the crimes that had no mens rea element … , under which possession alone could support a guilty verdict for each crime. People v Guerra, 2024 NY Slip Op 04978, Second Dept 10-9-24

Practice Point: Defense counsel signed a stipulation in an effort to avoid showing child pornography to the jury. The majority concluded the stipulation effectively eliminated the mens rea element from the jury's consideration. The conviction was reversed on ineffective assistance grounds.

October 9, 2024

FORECLOSURE, CIVIL PROCEDURE.

THE FACT THAT A MORTGAGE IS MERELY INSURED BY HUD OR THE FHA DOES NOT MAKE THE BANK WHICH HOLDS THE MORTGAGE AN ASSIGNEE OF A FEDERAL AGENCY SUCH THAT NEW YORK'S STATUTE OF LIMITATIONS DOES NOT APPLY; A BANK IS NOT AN ASSIGNEE OF HUD OR THE FHA IF IT WAS NOT ASSIGNED THE AUTHORITY TO FORECLOSE THE INSURED MORTGAGE (SECOND DEPT).

The Second Department, affirming Supreme Court, in a full-fledged opinion by Justice Maltese, determined New York's six-year statute of limitations applied to the foreclosure of a mortgage insured by the US Department of Housing and Urban Development (HUD). The bank argued that, as an assignee of a federal agency, it is immune from New York's statute of limitations:

"'There is no federal statute of limitations applicable to mortgage foreclosure actions brought by the United States or its federal agencies'" … . "That rule applies equally to an assignee of a federal agency, including a commercial lender, and includes the benefit of immunity from a state limitations period" … . * * *

The relevant distinction in this case is that between a loan that was merely insured by a federal agency and a loan that was held by a federal agency, such that the federal agency had a right to foreclose the mortgage, and then assigned to the plaintiff. A plaintiff seeking to foreclose a mortgage that was merely insured by a federal agency is not entitled to immunity. Allowing immunity in such instances would inappropriately expand its application and would be inconsistent with the purpose of "allow[ing] the government to maintain belated actions to enforce public rights," where the government never had the ability to maintain such an action … . * * *

Although [the] evidence demonstrated that the loan at issue was insured by HUD and/or the FHA, the plaintiff failed to establish that either of those agencies ever

had the right to foreclose the mortgage "unfettered by [the] statute of limitations" or that such a right was ever assigned to the plaintiff … . … [T]he plaintiff was not an assignee of a federal agency merely because the loan was insured by federal agencies. Bank of Am., N.A. v Reid, 2024 NY Slip Op 04942, Second Dept 10-9-24

Practice Point: An assignee of a federal agency is immune from New York's statute of limitations. Here the bank which held the mortgage which was insured by HUD was not an assignee of the federal agency (HUD) because it was not assigned the authority to foreclose the insured mortgage.

October 9, 2024

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

ONCE AGAIN THE FAILURE TO PROVE COMPLIANCE WITH THE NOTICE REQUIREMENTS OF RPAPL 1304 REQUIRED REVERSAL IN A FORECLOSURE ACTION; THE SECOND DEPARTMENT CAREFULLY EXPLAINED ALL THE FLAWS IN THE PROOF (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the proof requirements for sending the RPAPL 1304 notice of foreclosure to the defendants were not met. This frequently recurring error was carefully explained by the Second Department, perhaps in an effort to instruct the bar:

… [T]he plaintiff submitted an affidavit of Kimberly Dutchess, an authorized representative of M & T Bank (hereinafter M & T), the plaintiff's loan servicer and attorney-in-fact, along with a power of attorney authorizing M & T to act on the plaintiff's behalf … . Although Dutchess laid a proper foundation for the admission of various business records annexed to her affidavit, inter alia, by attesting to her "familiar[ity] with business records maintained by M & T for the purpose of servicing mortgage loans," she "failed . . . to attest that [s]he personally mailed the subject notices or that [s]he was familiar with the mailing practices and procedures of [M & T]" at the time the notices were sent … . Nor was Dutchess's assertion that she "acquired personal knowledge of the matters stated in [her] affidavit by examining the [relevant] business records" sufficient to demonstrate her personal knowledge of M & T's mailing procedures, since "a review of records maintained in the normal course of business does not vest an affiant with personal knowledge"

… . Therefore, Dutchess "failed to establish proof of a standard office practice and procedure designed to ensure that items are properly addressed and mailed" … .

Moreover, although Dutchess's affidavit laid a proper foundation for the admission of the business records annexed thereto, the content of those records did not demonstrate, prima facie, the plaintiff's strict compliance with RPAPL 1304 … . The only purported proof of first-class mailing attached to Dutchess's affidavit was a letter log, which "failed to establish that the 90-day notice was actually mailed to both of the defendants . . . by first-class mail" … . Among other issues, the letter log did not contain any information regarding the method of mailing for any of the documents contained therein. It also contained only one entry for the 90-day notice allegedly mailed to both of the defendants in February 2018, notwithstanding that a "plaintiff must separately mail a 90-day notice to each borrower as a condition precedent to commencing the foreclosure action" … . Furthermore, although the letter log listed Alexander W. Swanson III as the borrower, it did not mention Nancy L. Swanson's name, and the plaintiff did not provide any records showing that the 90-day notice was mailed to Nancy L. Swanson by first-class mail … . Notably, "[i]t is the business record itself, not the foundational affidavit, that serves as proof of the matter asserted" … . In any event, even if Dutchess had established that she had personal knowledge of M & T's mailing procedures, her affidavit did not sufficiently clarify any of these issues … . Since the plaintiff did not demonstrate that it mailed the 90-day notices to both of the defendants by first-class mail, it failed to establish, prima facie, its strict compliance with RPAPL 1304 … . Lakeview Loan Servicing, LLC v Swanson, 2024 NY Slip Op 04952, Second Dept 10-9-24

Practice Point: It is not easy to prove compliance with the foreclosure notice requirements in RPAPL 1304 by affidavit. The same flaws in the proof have been the basis for foreclosure reversals for a decade now.

October 9, 2024

NEGLIGENCE, ATTORNEYS, CIVIL PROCEDURE, EVIDENCE, JUDGES.

FAILURE TO PRESERVE VIDEO SHOWING THE AREA WHERE PLAINTIFF SLIPPED AND FELL PRIOR TO THE FALL WARRANTED AN ADVERSE INFERENCE CHARGE; UNDER THE FACTS, STRIKING DEFENDANT'S ANSWER WAS TOO SEVERE A SANCTION (FIRST DEPT).

The First Department, reversing Supreme Court, determined striking defendant's answer for destruction of video evidence in this slip and fall case was not warranted, an adverse inference jury instruction was a sufficient sanction. Defendant provided video of plaintiff's fall in compliance with plaintiff's attorney's request. Nine months later plaintiff's attorney requested video showing the area prior to the fall, but it had been overwritten by then:

Plaintiffs' counsel sent defendants a preservation letter approximately seven days following the accident. Defendants responded by producing several minutes of video of the accident itself, which was reasonably compliant with plaintiffs' request for video surveillance of "the incident." However, there was no pre-fall video footage provided to aid plaintiffs in establishing defendants' actual or constructive notice of the alleged hazardous condition on the floor. Defendants' employee, who culled the video footage provided, was no longer in defendants' employ and was not available to be deposed as to his or her reasons for selecting particular video footage. Plaintiff's counsel did not alert defendants of a need for additional video footage depicting the pre-fall circumstances at the accident site until nine months after receipt of the initial video clip, which was well after the software that operated defendants' surveillance cameras had overwritten the video surveillance from plaintiff's accident date.

Plaintiff's proof established that defendants had control over the relevant surveillance and preserved it to the extent requested, but absent deposition testimony from defendant's former employee who prepared the video clip as to his reasons for selecting the footage he or she did, the culpability issue cannot be definitively resolved. Nevertheless, the destroyed evidence video compromised the fairness of the litigation so as to warrant an adverse inference sanction … . Lev v Eataly USA LLC, 2024 NY Slip Op 04910, First Dept 10-8-24

Practice Point: Plaintiff's counsel requested video of "the incident" in this slip and fall case, which was provided. Nine months later plaintiff's counsel requested video showing the area prior to the fall re: the issue of defendant's notice of the condition. By that time the video had been overwritten. Plaintiff was entitled to an

adverse inference jury instruction. Striking the defendant's answer was deemed too severe a sanction.

October 8, 2024

NEGLIGENCE, EDUCATION-SCHOOL LAW, EVIDENCE.

IN THIS CHILD VICTIMS ACT CASE, THE SCHOOL DEFENDANTS DID NOT ELIMINATE QUESTIONS OF FACT ABOUT CONSTRUCTIVE NOTICE OF THE ALLEGED SEXUAL ABUSE OF PLAINTFF STUDENT BY TWO TEACHERS; THE FREQUENCY OF THE ALLEGED ABUSE RAISED QUESTIONS ABOUT NOTICE (SECOND DEPT).

The Second Department, reversing Supreme Court in this Child Victims Act case, determined the school defendants did not eliminate questions of fact about constructive notice of the sexual abuse of plaintiff student by two teachers. The relevant law is described in detail and should be consulted as a complete overview of the relevant issues:

… [T]o the extent the complaint is premised on the conduct of the music teacher, the defendants failed to establish, prima facie, that they lacked constructive notice of the music teacher's alleged abusive propensities and conduct … . The defendants' own submissions established that the plaintiff testified that the alleged abuse by the music teacher occurred once or twice a week during the school year … . In light of the frequency of the alleged abuse, the defendants did not eliminate a triable issue of fact as to whether they should have known of the alleged abuse … . Additionally, the defendants failed to eliminate triable issues of fact as to whether their supervision of the music teacher or the plaintiff was not negligent … .

Although the single incidence of alleged sexual abuse by the English teacher occurred off of school property and outside of school hours, the defendants' own submissions demonstrate that the music teacher introduced the plaintiff to the English teacher, describing the plaintiff as his "friend" and a "good girl," and that, in the presence of the music teacher, the English teacher made arrangements with the plaintiff during school hours and on school grounds to meet after school when the alleged abuse by the English teacher took place … . C. M. v West Babylon Union Free Sch. Dist., 2024 NY Slip Op 04954, Second Dept 10-9-24

Practice Point: Here the frequency of the alleged sexual abuse of plaintiff student by a teacher raised a question of fact about constructive notice by the school defendants.

October 9, 2024

NEGLIGENCE, EMPLOYMENT LAW, WORKERS' COMPENSATION.

ALTHOUGH DEFENDANT DID NOT PRODUCE AN EMPLOYMENT CONTRACT WITH PLAINTIFF, DEFENDANT DEMONSTRATED IT WAS PLAINTIFF'S SPECIAL EMPLOYER; THEREFORE PLAINTIFF'S PERSONAL INJURY ACTION WAS PRECLUDED BY HIS ELECTION OF WORKERS' COMPENSATION BENEFITS (FIRST DEPT).

The First Department, reversing Supreme Court, determined defendant was plaintiff's special employer and plaintiff's action for personal injury was precluded by his election of workers' compensation benefits:

Plaintiff testified that he received all his work instructions from an employee of defendant, the building's manager … . Both plaintiff and the building's manager testified that they considered the building manager to be plaintiff's boss or supervisor … .

The evidence thus showed that defendant "supervised, directed and controlled plaintiff's work" … . Although defendant has produced no contract between itself and the building owner, such a contract is not a prerequisite for special employment status … . Therefore, defendant has established its prima facie case that it was plaintiff's special employer, which plaintiff has failed to rebut with any issue of fact…. . Payano v Proto Prop. Servs. LLC, 2024 NY Slip Op 04915, First Dept 10-8-2024

Practice Point: Here defendant was deemed plaintiff's special employer, despite the absence of an employment contract. Therefore plaintiff's election to receive workers' compensation benefits precluded his personal injury action against defendant.

October 8, 2024

NEGLIGENCE, EVIDENCE, JUDGES.

THE QUESTION WHETHER THE SEXUAL ASSAULT OF PLAINTIFF IN DEFENDANT GYM'S STEAM ROOM WAS FORESEEABLE SHOULD NOT HAVE BEEN DECIDED AGAINST THE PLAINTIFF AS A MATTER OF LAW; THERE WAS EVIDENCE OF PRIOR SIMILAR ASSAULTS (FIRST DEPT).

The First Department, reversing Supreme Court, determined there were questions of fact about the foreseeability of the underlying incident, an alleged sexual assault in the steam room at defendant Equinox's gym, which precluded summary judgment. Although Equinox had no prior notice with respect to the person who allegedly assaulted plaintiff, there was evidence Equinox was aware of other similar incidents in the steam room:

The Court of Appeals has "repeatedly emphasized" that "[o]nly in rare cases" can questions concerning foreseeability be decided as a matter of law … . * * *

Here, the motion court determined that plaintiff's alleged attack was not foreseeable because "the 'notice' plaintiff relies upon concerns other alleged incidents in the steam room, none of which involved plaintiff's assailant" and that "some of the other incidents]appear to involve consensual behavior." New York courts, however, have never required prior incidents to have been committed by the same assailant or even be of the same type of conduct to which the plaintiff was subjected … . … [A]t least three of the other gym members reported that they had been sexually harassed, including the member who complained mere weeks before the assault on plaintiff … .

The motion court additionally found that, even if defendants did have a duty to plaintiff to prevent his alleged assault, "they met their duty to implement reasonable policies to decrease the likelihood of such an incident" and plaintiff failed to present a material issue of fact "with respect to these policies and procedures." * * *

We find that whether plaintiff's alleged assault was foreseeable to Equinox and whether Equinox implemented adequate security measures to decrease the likelihood of such incidents are questions of fact and plaintiff's negligence claim should advance to a jury trial. We cannot say, as a matter of law, that another gym member allegedly assaulting plaintiff against the backdrop of multiple complaints of inappropriate sexual conduct inside the steam room was "extraordinary under

the circumstances or not foreseeable in the normal course of events" … . Crandall v Equinox Holdings, Inc., 2024 NY Slip Op 04902, First Dept 10-8-24

Practice Point: Whether an injury to plaintiff was foreseeable from defendant's perspective can rarely be decided as a matter of law.

October 8, 2024

NEGLIGENCE, EVIDENCE.

DEFENDANT DID NOT PRESENT A NONNEGLIGENT EXPLANATION FOR THE REAR-END COLLISION AND PLAINTIFF WAS ENTITLED TO SUMMARY JUDGMENT; DEFENDANT'S STATEMENT THAT HIS "BRAKES FAILED" WAS DEEMED SELF-SERVING AND INADMISSIBLE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the defendant's failure to offer a nonnegligent explanation for the rear-end collision warranted the award of summary judgment to plaintiff. The statement attributed to defendant in a certified police report claiming his "brakes failed" was deemed self-serving and inadmissible:

… [T]he plaintiffs established their prima facie entitlement to judgment as a matter of law on the issue of liability by submitting their respective affidavits, which demonstrated, inter alia, that the plaintiffs' vehicle was traveling at a constant speed of 35 miles per hour in the right lane for at least one minute when it was struck in the rear by the defendants' vehicle … . The plaintiffs also established their prima facie entitlement to judgment as a matter of law dismissing the defendants' first affirmative defense, alleging comparative negligence, by demonstrating that they were not comparatively at fault in the happening of the accident … . Barr v Canales, 2024 NY Slip Op 04944, Second Dept 10-9-24

Practice Point: Defendant's statement that his "brakes failed" was deemed self-serving and inadmissible in this rear-end collision case.

October 9, 2024

NEGLIGENCE, PRODUCTS LIABILITY, TOXIC TORTS, CIVIL PROCEDURE, EVIDENCE.

THE IDENTITIES OF THE SUBJECTS OF TWO SCHOLARLY ARTICLES LINKING TALCUM-POWDER PRODUCTS WITH MESOTHELIOMA SHOULD BE RELEASED; THE INFORMATION IS NOT PROTECTED BY HIPAA OR THE FEDERAL COMMON RULE; PRODUCTION OF THE INFORMATION WOULD NOT BE UNDULY BURDENSOME AND WOULD NOT DETER FUTURE RESEARCH (FIRST DEPT).

The First Department, reversing Supreme Court's denial of a petition to enforce an out-of-state subpoena, determined the identities of the subjects of two scholarly articles linking cosmetic talcum powder products with mesothelioma were not protected by HIPAA's privacy rule or the federal Common Rule:

The information sought by the subpoenas … is clearly relevant to the underlying New Jersey personal injury action. It goes directly to the credibility of these articles, which speak to the central issues in dispute and are relied on by three testifying experts, and whose author was to testify as an expert until she voluntarily withdrew … .

The information sought by the subpoenas is not protected from disclosure by HIPAA's privacy rule, which does not apply where, as here, the health care providers did not provide physician services in connection with the articles and the subjects were never their patients … .

The information sought by the subpoenas is also not protected from disclosure by the federal Common Rule because the articles to which they relate fall within the exemption for secondary research based on publicly available identifiable private information or biospecimens … .The burden was on the party opposing the subpoenas to prove that this information was produced in the underlying litigations subject to a protective order … . Neither party opposing disclosure of the information has offered any such proof.

Production of the information sought by the subpoenas would not be unduly burdensome, nor is it likely to have a chilling effect on future medical research. The subject information consists of just a few pages, is easily located, does not concern ongoing research, and does not reveal the unpublished thought processes of the researchers. Moreover, the subjects never actually agreed to participate in any research, having released their information in connection with public litigation,

and so it is unclear how allowing disclosure of their identities might deter future research participation … . Matter of Johnson & Johnson v Northwell Health Inc., 2024 NY Slip Op 04909, First Dept 10-8-24

Practice Point: The decision outlines the issues involved in seeking the identities of the subjects of two scholarly articles linking talcum-powder products with mesothelioma.

October 8, 2024