# NEW YORK APPELLATE DIGEST, INC.

Weekly Reversal Report
September 30 – October 4, 2024

An Organized Compilation of Summaries of Selected Decisions, Mostly Reversals, Released by Our New York State Appellate Courts September 30 – October 4, 2024, and Posted on the New York Appellate Digest Website on Monday October 7, 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, EMPLOYMENT LAW, EVIDENCE, JUDGES.

## THE ARBITRATOR'S INTERPRETATION OF THE COLLECTIVE BARGAINING AGREEMENT WAS NOT IRRATIONAL; THE AWARD MUST BE CONFIRMED EVEN WHERE THE COURT DISAGREES WITH THE INTERPRETATION (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the arbitrator's ruling that petitioner firefighters were entitled to paid emergency leave should have been confirmed. In recent weeks, the appellate courts across the state have been emphasizing the finality of an arbitrator's award, even where the court might have decided the matter differently:

"[J]udicial review of arbitration awards is extremely limited" … . "The court must vacate an arbitration award where the arbitrator exceeds a limitation on his or her power as set forth in the CBA [collective bargaining agreement]" … . The court, however, lacks the authority to "examine the merits of an arbitration award and substitute its judgment for that of the arbitrator simply because it believes its interpretation would be the better one" … .

Here, the arbitrator merely interpreted and applied the provisions of the relevant CBA, as he had the authority to do … . We are powerless to set aside that interpretation even if we disagree with it … . Contrary to respondent's urging, the arbitrator's determination was not irrational; nothing in the CBA suggests that a request for emergency leave may not be made prior to the start of a tour of duty, and the arbitrator provided a justification for his determination … . Matter of Local 32, Intl. Assn. of Fire Fighters, A.F.L.-C.I.O.-C.L.C. (City of Utica), 2024 NY Slip Op 04878, Fourth Dept 10-4-24

Practice Point: The appellate courts are making it clear that an arbitrator's award should not be tampered with by the courts as long as the arbitrator has not exceeded his or her powers.

October 4, 2024

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## CONTRACT LAW, EVIDENCE.

## THE EXISTENCE OF A WRITTEN CONSULTING AGREEMENT BETWEEN THE PARTIES RELATING TO SALES AND MARKETING DID NOT, PURSUANT TO THE PAROL EVIDENCE RULE, PRECLUDE EVIDENCE OF AN ALLEGED ORAL AGREEMENT BETWEEN THE SAME PARTIES RELATING TO THE FORMATION AND OWNERSHIP OF A BUSINESS (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined the counterclaim for breach of an oral contract should not have been dismissed. The court explained when the parol evidence rule does not exclude evidence of an oral contract. Here there was a written consulting agreement for defendant's marketing and sales services. The alleged oral agreement related to the formation and ownership of a company (ION):

… " … [A] written agreement does not exclude proof of a parol collateral agreement made even between the same parties, where the written contract is not intended to embody the whole agreement and does not on its face purport to cover completely the subject-matter of the alleged collateral agreement" … . For a prior oral agreement to be enforceable, "(1) the agreement must in form be a collateral one; (2) it must not contradict express or implied provisions of the written contract; (3) it must be one that parties would not ordinarily be expected to embody in the writing; or put in another way, an inspection of the written contract, read in the light of surrounding circumstances must not indicate that the writing appears to contain the engagements of the parties, and to define the object and measure the extent of such engagement. Or again, it must not be so clearly connected with the principal transaction as to be part and parcel of it" … .

Here, the consulting agreement did not completely cover the same subject matter as the alleged oral agreement, as the alleged oral agreement related to the formation and ownership of ION and the consulting agreement only related to the compensation that Ovadia [defendant] would receive for performing certain marketing and sales services … . Further, the alleged oral agreement did not vary, alter, or supplement any terms of the consulting agreement, which did not address ownership interests in ION … . Moreover, it would not ordinarily be expected that the subject matter of the alleged oral agreement would be addressed in the consulting agreement … . Parizat v Meron, 2024 NY Slip Op 04776, Second Dept 10-2-24

Practice Point: Consult this decision for a clear explanation of the application of the parol evidence rule. Here evidence of an alleged oral contract between the parties was not precluded by the existence of a written consulting agreement because the two agreements covered different subjects and the terms did not conflict.

October 2, 2024

## CRIMINAL LAW, ATTORNEYS, JUDGES.

## DEFENSE COUNSEL WAS DEEMED INEFFECTIVE FOR FAILING TO OBJECT TO THE PROSECUTOR'S REPEATED PREJUDICIAL REMARKS MADE TO PROSPECTIVE JURORS (TO THE EFFECT "I CAN SLEEP AT NIGHT BECAUSE I AM NO LONGER A DEFENSE ATTORNEY"), AND FOR AGREEING TO THE JUDGE'S REQUEST TO HAVE THE TWO SIDES ALTERNATE GOING FIRST IN EXERCISING PEREMPTORY JUROR CHALLENGES (IN VIOLATION OF THE CRIMINAL PROCEDURE LAW) (FOURTH DEPT).

The Fourth Department, over a two-justice dissent, reversed defendant's conviction on ineffective-assistance grounds. Defense counsel did not object to the prosecutor's repeated statements to prospective jurors that he can sleep at night because he is a prosecutor and no longer a defense attorney. Defense counsel agreed to alter the statutory peremptory juror-challenge procedure, which requires that the People must exercise their peremptory challenges first. Defense counsel agreed to alternate which side went first:

The first error occurred during voir dire when defense counsel failed to object to patently improper comments from the prosecutor regarding his ability to sleep at night now that he is a prosecutor and no longer a defense attorney. Perhaps it was a legitimate strategy for defense counsel not to object to the first improper comment of that nature given that defense counsel may not have wanted to draw more attention to the prejudicial comment. For the same reason, defense counsel might be excused for not objecting when the prosecutor repeated the comment to the same group of prospective jurors. We can discern no legitimate strategy, however, for defense counsel to remain quiet when the prosecutor made the same comment for the third, fourth and fifth times during voir dire. At some point, defense counsel was obligated to protect defendant from the prejudice arising from the repeated

acts of prosecutorial misconduct and, at the very least, request a curative instruction from the court.

Defense counsel also erred in not objecting—and, indeed, consenting—to the court's unlawful procedure of having the parties alternate which side went first in declaring whether they wished to exercise a peremptory challenge to a particular prospective juror. CPL 270.15 (2) provides that the People "must exercise their peremptory challenges first and may not, after the defendant has exercised [the defendant's] peremptory challenges, make such a challenge to any remaining prospective juror who is then in the jury box." After the court stated that its practice was to have parties alternate their exercise of peremptory challenges, defense counsel, evidently unaware of the statute's mandate, said, "I'll go first. He can go first. I don't care." As a result, on numerous occasions during voir dire defense counsel stated whether or not she was peremptorily challenging a prospective juror before the prosecutor was required to state his position.

Although the court's violation of CPL 270.15 (2) does not constitute a mode of proceedings error, it was certainly prejudicial to defendant and we can conceive of no legitimate strategy for defense counsel's acquiescence to the unlawful procedure. Viewing the evidence, the law and the circumstances of this case in totality and as of the time of the representation, "[o]ur review of this record indicates that defendant was not afforded meaningful representation and was therefore deprived of a fair trial" … . People v Stewart, 2024 NY Slip Op 04863, Fourth Dept 10-4-24

Practice Point: Although it is not a mode of proceedings error to alternate which side goes first in exercising peremptory challenges to prospective jurors in violation of the criminal procedure law, here defense counsel's agreement to the procedure was deemed ineffective assistance of counsel and a new trial was ordered.

October 4, 2024

## CRIMINAL LAW, EVIDENCE.

### THE FACT THAT THE POLICE WERE AWARE THE VAN THEY STOPPED HAD REPORTEDLY BEEN INVOLVED IN TWO PRIOR INCIDENTS—(1) A ROAD RAGE SHOOTING AND (2) NEARLY RUNNING OVER A TRAFFIC AGENT ABOUT TO ISSUE A PARKING TICKET—PROVIDED REASONABLE SUSPICION SUPPORTING THE LEVEL THREE TRAFFIC STOP, DESPITE THE FACT THE POLICE DID NOT KNOW WHO WAS DRIVING THE VAN DURING THE PRIOR INCIDENTS (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice O'Neill, affirming defendant's conviction, over an extensive dissent, determined the police had reasonable suspicion supporting a level three traffic stop. The registration number of the van defendant was driving had been the subject of police reports for two prior incidents, a road rage incident during which a firearm was discharged, and nearly running a traffic agent over when the agent was about to place a parking ticket on the van. When the van was stopped, the driver was asked to step out of van because of the firearm incident. Defendant refused to get out and picked up a firearm. One of the officers tased the defendant three times and he was arrested:

A forceable stop and detention is authorized "[w]here a police officer entertains a reasonable suspicion that a particular person has committed, is committing or is about to commit a felony or misdemeanor" … .

"Reasonable suspicion is the quantum of knowledge sufficient to induce an ordinarily prudent and cautious [person] under the circumstances to believe criminal activity is at hand. To justify such an intrusion, the police officer must indicate specific and articulable facts which, along with any logical deductions, reasonably prompted that intrusion" … .

Here, before stopping the van, the BOLO [be-on-the-lookout] alert notified Officers Amaral and Stokes of the criminal activity involving the van on April 28th; the officers were also aware of the May 17th incident because they both responded to the traffic enforcement agent's call for backup. The officers' knowledge of either incident alone furnished reasonable suspicion of criminal activity at hand … . People v Zubidi, 2024 NY Slip Op 04824, First Dept 10-3-24

Practice Point: Here the fact that defendant's van had reportedly been involved in a road rage shooting and had nearly run over a traffic agent about to issue a parking ticket provided reasonable suspicion justifying a level three traffic stop, despite the

fact that the identity of the driver involved in the prior incidents was not known at the time of the stop.

October 3, 2024

## CRIMINAL LAW.

### DEFENDANT WAS CHARGED WITH PREDATORY SEXUAL ASSAULT AGAINST A CHILD, A CLASS A-II FELONY PUNISHABLE BY A MANDATORY MAXIMUM TERM OF LIFE IMPRISONMENT; PURSUANT TO CRIMINAL PROCEDURE LAW 195.10[1][B] DEFENDANT CANNOT WAIVE INDICTMENT AND PLEAD TO A SUPERIOR COURT INFORMATION (SCI) (THIRD DEPT).

The Third Department, reversing defendant's conviction by guilty plea to a superior court information (SCI), determined defendant could not waive indictment to an A felony for which a life sentence is available:

CPL 195.10 provides, in relevant part, that a defendant may waive indictment and consent to be prosecuted pursuant to an SCI where "the defendant is not charged with a class A felony punishable by death or life imprisonment" (CPL 195.10 [1] [b] …). Predatory sexual assault against a child is a class A-II felony and "is punishable by an indeterminate sentence with a mandatory maximum term of life imprisonment" (… Penal Law §§ 70.00 [2] [a]; 130.96). Hence, consistent with both CPL 195.10 and prevailing case law, a waiver of indictment "is not available where the defendant is charged with a class A felony" … . Defendant's waiver of indictment was therefore "expressly prohibited under CPL 195.10 and . . . invalid, rendering the resulting procedure employed to procure defendant's guilty plea unauthorized" … . Accordingly, defendant's guilty plea must be vacated and the SCI dismissed … . People v White, 2024 NY Slip Op 04850, Third Dept 10-3-24

Practice Point: A defendant cannot waive indictment and plead to a superior court information (SCI) when charged with an A-II felony punishable by an indeterminate sentence with a mandatory maximum term of life imprisonment.

October 3, 2024

NEGLIGENCE, EDUCATION-SCHOOL LAW, EVIDENCE.

INFANT PLAINTIFFS ALLEGED MULTIPLE INSTANCES OF SEXUAL MISCONDUCT BY A MALE STUDENT ON THE SCHOOL BUS FROM KINDERGARTEN THROUGH SECOND GRADE; THE FOURTH DEPARTMENT DETERMINED THE DEFENDANT SCHOOL'S EVIDENCE DID NOT CONCLUSIVELY ESTABLISH A LACK OF ACTUAL OR CONSTRUCTIVE NOTICE (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the negligent supervision causes of action against the defendant school, school district, board of education and department of transportation should not have been dismissed. Infant plaintiffs alleged they were subjected to sexual misconduct on a school bus by a male student from kindergarten through second grade. The Fourth Department found that the evidence submitted by the defendants did not demonstrate a lack of notice:

Defendants, as parties moving for summary judgment, had the initial burden of establishing as a matter of law that they lacked actual or constructive notice of "the dangerous conduct which caused injury" … . Here, we conclude that defendants did not meet that burden. In support of their motion, defendants submitted, inter alia, the deposition testimony of the principal of the school at the time of the alleged misconduct. The principal, when asked at his deposition whether he had been aware of any prior "incidents of student sexual assaults" on the bus and whether he had ever had to deal with any student at the school who had been characterized as "sexually violent," answered both questions in the negative … . That testimony was insufficient to meet defendants' burden because it failed to address whether the principal knew of incidents within the broader category of sexual misconduct alleged by plaintiffs in their complaints. Plaintiffs alleged that the perpetrator engaged in a wide range of sexual misconduct—some of which was not equivalent to "sexual assault [ ]" and was not "sexually violent." In short, the principal's testimony failed to establish that defendants had no actual or constructive notice of any sexual misconduct of the types alleged by plaintiffs … .

Additionally, to the extent that defendants submitted deposition testimony of various other witnesses—including the infant plaintiffs and the bus driver—we conclude that it was insufficient to satisfy defendants' initial burden with respect to actual or constructive notice. In particular, although the infant plaintiffs and the bus driver testified that they did not report instances of the alleged misconduct to

defendants, they were not in a position to know whether there had been prior incidents of sexual misconduct involving the perpetrator and, if so, whether defendants had actual or constructive notice of any of those incidents prior to the sexual misconduct alleged in the complaint … . Their testimony could not establish whether defendants obtained notice by other means … . Porschia C. v Sodus Cent. Sch. Dist., 2024 NY Slip Op 04885, Fourth Dept 10-4-24

Practice Point: Here, on defendant school's motion for summary judgment in this negligent supervision case, the Fourth Department looked carefully at the school's evidence of a lack of notice of a student's sexual misconduct and found the evidence did not address all the possible scenarios which could demonstrate liability and therefore did not support summary judgment.

October 4, 2024

## REAL PROPERTY LAW.

### CRITERIA FOR AN EASEMENT BY NECESSITY EXPLAINED, NOT MET HERE; THE NECESSITY MUST EXIST AT THE TIME THE LANDLOCKED PARCEL WAS SEVERED; PROOF OF A FUTURE INTENT TO USE THE PARCEL FOR PERSONAL PARKING WAS DEEMED INSUFFICIENT (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined plaintiff did not satisfy the criteria for an easement by necessity for access to a landlocked parcel:

"[T]he party asserting an easement by necessity bears the burden of establishing by clear and convincing evidence . . . that there was a unity and subsequent separation of title, and . . . that at the time of severance an easement over [the servient estate's] property was absolutely necessary" … .

… [P]laintiff established that he had common ownership of the subject parcels at the time of severance. We agree with defendant, however, that, "inasmuch as the existence and extent of an easement by necessity is determined based on the circumstances as they existed at the time of severance" … , plaintiff failed to establish by clear and convincing evidence that the use and extent of a right-of-way he now seeks was "absolutely necessary" upon separation of title … . While plaintiff generally averred in his affidavit in support of his motion that he retained his landlocked parcel "for purposes of utilizing [the] space for personal parking needs," any such statement of future intentions failed to establish the nature and

extent of the access over the conveyed property that was "indispensable to the reasonable use for the [retained] property" upon severance of title … . Trusso v Brev519, LLC, 2024 NY Slip Op 04880, Fourth Dept 10-4-24

Practice Point: The "necessity" for an easement by necessity must be demonstrated to have existed at the time the landlocked parcel was severed. Proof of a future intent to use the parcel for personal parking was therefore deemed insufficient to support an easement by necessity.

October 4, 2024