# NEW YORK APPELLATE DIGEST, INC.

Weekly Reversal Report
December 30, 2024 – January 3, 2025

An Organized Compilation of Summaries of Selected Decisions, Mostly Reversals, Released by Our New York State Appellate Courts December 30, 2024 – January 3, 2025, and Posted on the New York Appellate Digest on Monday, January 6, 2025. The Entries in the Table of Contents Link to the Summaries Which Link to the Full Decisions on the Official New York Courts Website. Click on “Table of Contents” in the Header on Any Page to Return There. Right Click on the Citations to Keep Your Place in the Reversal Report. 

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## CIVIL PROCEDURE, LABOR LAW-CONSTRUCTION LAW, EVIDENCE.

## PLAINTIFF'S MOTION TO RENEW HIS SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED; NO "NEW FACTS" WERE DEMONSTRATED (THIRD DEPT).

The Third Department, reversing (modifying) Supreme Court in this Labor Law 240(1) action, determined plaintiff's motion to renew his summary judgment motion should not have been granted. Plaintiff was attempting to disassemble a freezer when the freezer roof collapsed and he fell to the floor:

Pursuant to CPLR 2221, a motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination" and "shall contain reasonable justification for the failure to present such facts on the prior motion" … . In his motion for leave to renew and reargue, plaintiff sought to admit a supplemental expert affidavit in which plaintiff's expert sought to clarify that accessing the freezer's ceiling was an essential task of disassembly. Plaintiff averred that this information was not proffered before because he was not on notice that he needed to address the different tasks required for disassembly. However, our review of the original motion papers reveals that, not only did the expert's original affidavit briefly address the need for plaintiff to climb on top of the freezer, but also that [defendant's] affirmations in opposition were sufficient to put plaintiff on notice that the necessity of plaintiff's work on the ceiling would be at issue … . Additionally, as plaintiff had already retained an expert, there was nothing preventing plaintiff from submitting additional evidence in reply to [defendant's] affirmations in opposition, prior to the court's original determination … .Therefore, Supreme Court improperly granted plaintiff's motion to renew, and plaintiff's supplemental expert affidavit should not be considered on summary judgment … . Burgos v Darden Rests., Inc., 2025 NY Slip Op 00009, Third Dept 1-2-25

Practice Point: A motion to renew a summary judgment motion must be based upon new facts which could not have been addressed in the initial motion, not the case here.

January 2, 2025

## CRIMINAL LAW, APPEALS, JUDGES.

## THE PROBATION CONDITION PROHIBITING DEFENDANT FROM USING PUBLIC TRANSPORTATION WAS NOT WARRANTED BY THE UNDERLYING CONVICTION; THE ISSUE NEED NOT BE PRESERVED FOR APPEAL AND SURVIVES A WAIVER OF APPEAL (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined the probation condition prohibiting defendant from using the subway, trains or buses for three years was not warranted because defendant did not commit the underlying crime on public transportation. The issue need not be preserved for appeal and survives a waiver of appeal:

The court improperly imposed, as a condition of probation, a requirement that defendant "[r]efrain from using or entering any Metropolitan Transportation Authority subway, train, bus, or other conveyance or facility for a period of up to three years." Defendant did not commit the instant crime, or have a history of misconduct, on public transportation. Accordingly, the prohibition from using or entering any public transportation conveyance or facility was not reasonably related to defendant's rehabilitation, or necessary to ensure that he will lead a law-abiding life … . Because this issue implicates the legality of the sentence imposed, it survives defendant's waiver of the right to appeal and does not require preservation for appellate review … . People v Alvarez, 2024 NY Slip Op 06662, First Dept 12-31-24

Practice Point: A probation condition which is not warranted by the underlying conviction or by defendant's prior record may be reversed even if the issue has not been preserved and and/or appeal has been waived.

December 31, 2024

## CRIMINAL LAW, APPEALS, JUDGES.

## THE PROBATION CONDITION REQUIRING DEFENDANT TO AGREE TO SEARCHES OF HIS PERSON, VEHICLE AND RESIDENCE WAS NOT WARRANTED BY THE CONVICTION (LEAVING THE SCENE OF AN ACCIDENT); THE ISSUE NEED NOT BE PRESERVED FOR APPEAL (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined the probation condition requiring defendant to agree to searches of his person, residence and vehicle for drugs, weapons or contraband was not warranted by his conviction for leaving the scene of an accident. The issue need not be preserved for appeal:

… [T]he court improperly imposed, as a condition of probation, a requirement that defendant consent to a search by a probation officer of his person, vehicle, or residence for illegal drugs, drug paraphernalia, weapons, or contraband … . "Defendant was not under the influence of any substance or armed with a weapon when he committed the crime of which he was convicted" … , and he "had no history of violence or use of weapons" (People v Hall, 228 AD3d at 467). His single misdemeanor conviction for marijuana possession preceded the instant offense by nearly a decade … . Thus, the consent to search condition was not "'reasonably necessary to insure that the defendant will lead a law-abiding life or to assist him to do so'" … . We note that defendant's challenge to the conditions of his probation did not require preservation … and would not be foreclosed even if the appeal waiver were valid … . People v Fernandez, 2024 NY Slip Op 06671, First Dept 12-31-24

Practice Point: A probation condition requiring that defendant agree to searches of his person, vehicle and residence must be warranted by the nature of the underlying conviction. The condition was not warranted for "leaving the scene of an accident."

December 31, 2024

## CRIMINAL LAW, EVIDENCE.

## THE PEOPLE DID NOT PROVE THE SEARCH OF DEFENDANT'S FANNY PACK WAS A VALID SEARCH INCIDENT TO ARREST; CONVICTIONS REVERSED (FIRST DEPT).

The First Department, reversing defendant's convictions for tampering with evidence and resisting arrest, determined the search of defendant's fanny pack was not demonstrated to have been a valid search incident to arrest:

The People failed to demonstrate that the search of defendant's fanny pack was a proper search incident to a lawful arrest because they failed to establish either that the officer actually arrested defendant or intended to do so before opening his bag … . People v Lamberty, 2024 NY Slip Op 06669, First Dept 12-31-24

Practice Point: Here the People did not prove the officer who searched defendant's fanny pack actually arrested defendant or intended to arrest the defendant before opening pack. Therefore the People did not prove the search was a valid search incident to arrest.

December 31, 2024

## FAMILY LAW, CIVIL PROCEDURE, CONSTITUTIONAL LAW, EVIDENCE, JUDGES.

## REMOVAL OF THE CHILDREN FROM MOTHER'S CARE WITHOUT NOTICE DEPRIVED MOTHER OF HER RIGHT TO DUE PROCESS; THE EVIDENCE DID NOT SUPPORT REMOVAL OF THE CHILDREN (FIRST DEPT).

The First Department, reversing Family Court, determined the removal of the children from mother's care without notice violated mother's due process rights. In addition, the evidence did not support the removal:

… [P]ursuant to a dispositional order, the children were released to their mother's care with ACS [Commissioner of the Administration for Children's Services] supervision. ACS moved pursuant to Family Court Act § 1061 to extend the period of supervision. Family Court violated the mother's due process rights when, on the return date of the motion, it sua sponte removed the children without giving the

mother notice or an opportunity to be heard and, at a later hearing, effectively imposed upon the mother the burden of showing that the removal was unwarranted … . There was nothing in the language of the agency's motion to put the mother on notice that the children might be removed from her care on the return date, and the record demonstrates that the mother was not given a meaningful opportunity to be heard on the issue … . Moreover, the agency maintained that it was in the children's best interests to remain with the mother, and the children's attorney supported the agency's position.

Furthermore, Family Court's decision to continue the children's placement in the agency's care until the next placement hearing was not supported by a sound and substantial basis in the record … Contrary to the court's conclusion, neither the initial neglect petition nor the order to show cause alleged that the mother used illicit substances or was impaired while taking care of the children. Moreover, during the 10-month period of supervision in 2023—2024, the mother submitted to at least three random drug screenings and tested negative for all illicit substances. When the mother underwent an evaluation by a credentialed alcohol and substance abuse counselor on February 1, 2024, she was not found to need any drug treatment services. Matter of E.I. (Eboniqua M.), 2025 NY Slip Op 00022, First Dept 1-2-25

Practice Point: Here removal of the children from mother's care without prior notice to mother violated her due process rights. Removal was not supported by the evidence.

January 2, 2025

## FORECLOSURE, CIVIL PROCEDURE, EVIDENCE.

## PROOF THE MORTGAGE WAS ASSIGNED TO PLAINTIFF WITHOUT PROOF THE NOTE WAS ALSO ASSIGNED BEFORE THE ACTION WAS COMMENCED IS NOT SUFFICIENT TO DEMONSTRATE STANDING TO FORECLOSE (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff did not demonstrate it had standing to foreclosure. Plaintiff proved the assignment of the mortgage to it, but did not prove the assignment of the note. In addition, plaintiff did not prove it physically possessed the note which had been indorsed to it:

While plaintiff's papers established that the original noteholder, nonparty Realty Closing Solution LLC, assigned the note to nonparty 1Sharpe Opportunity Intermediate Trust (1Sharpe) on June 24, 2019, plaintiff did not establish that 1Sharpe assigned the note to plaintiff before this action was commenced. Instead, plaintiff established that 1Sharpe assigned the mortgage to plaintiff. Without also assigning the note, the assignment of the mortgage, by itself, is of no incident because "a transfer of the mortgage without the debt is a nullity" … . …

… [P]laintiff did not establish that it physically possessed the note indorsed to it. Plaintiff relies on an allonge from 1Sharpe included with the note in the complaint. However, plaintiff furnished no evidence, either by producing the physical note or through the attestations of its affiant … that this allonge, which was indorsed in blank, was "firmly affixed" to the note (UCC 3-202[2]…). 1S REO Opportunity 1, LLC v Harlem Premier Residence, LLC, 2025 NY Slip Op 00016, First Dept 1-2-25

Practice Point: Here the plaintiff demonstrate the mortgage was assigned to it but did not demonstrate the note was assigned to it before the action was commenced. Therefore the plaintiff did not prove it had standing to foreclose.

January 2, 2025

## NEGLIGENCE, CONTRACT LAW, ARBITRATION.

## PLAINTIFF WAS INJURED IN A LYFT CAR WHICH HAD BEEN ORDERED BY HIS FRIEND THROUGH THE FRIEND'S ACCOUNT; BECAUSE PLAINTIFF HAD SCROLLED THROUGH AND AGREED TO LYFT'S TERMS OF SERVICE, WHETHER PLAINTIFF WAS BOUND BY THE ARBITRATION CLAUSE MUST BE DETERMINED BY THE ARBITRATOR (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff, who used another's Lyft account to order transportation, and who was injured in an accident involving the Lyft car, was subject to an arbitration provision in the contract between Lyft and the account-holder. Whether the plaintiff was bound by the arbitration clause was deemed to be an issue to be decided by the arbitrator:

Arbitration must be compelled because plaintiff was a party to an arbitration agreement with Lyft that expressly delegated the threshold question of arbitrability

to the arbitrator. It is undisputed that, prior to the subject accident, plaintiff scrolled through and agreed to Lyft's Terms of Service (the TOS), which included an agreement to arbitrate. As part of the arbitration agreement, the parties agreed to delegate "disputes concerning the arbitrability of a Claim (including disputes about the scope, applicability, enforceability, revocability or validity of the Arbitration Agreement)" to the arbitrator. When the parties' contract delegates the arbitrability question to an arbitrator, the courts must respect the parties' decision "even if the arguments of the party seeking to arbitrate 'appear[] to the court to be frivolous' or even 'wholly groundless'" … .

There is no dispute that if plaintiff had ordered the subject ride through his own Lyft account, then the instant claims would be subject to arbitration because plaintiff was party to a valid and enforceable arbitration agreement with a valid and enforceable delegation provision — even if there were a question as to the arbitration agreement's scope … . We find that the question of whether the agreement to arbitrate encompassed claims stemming from plaintiff's presence in a Lyft that he did not order is a question of arbitrability that must be decided by the arbitrator … . Samuel v Islam, 2024 NY Slip Op 06675, First Dept 12-31-24

Practice Point: If you scroll through and agree to the terms of service when a Lyft car is ordered though another's account, and you are subsequently injured in an accident in the Lyft car, you are compelled to arbitrate the question whether you are subject to the arbitration clause just as the account-holder would be.

December 31, 2024

## NEGLIGENCE, EVIDENCE, CONDOMINIUMS.

## PLAINTIFF SLIPPED AND FELL ON A WET SPOT ON THE MARBLE FLOOR IN THE CONDOMINIUM LOBBY DURING A SNOW STORM; THE DEFENDANT CONDOMINIUM HAD PLACED RUBBER MATS ON THE FLOOR AND PERIODICALLY MOPPED WET SPOTS; THE STORM-IN-PROGRESS DOCTRINE APPLIED; DEFENDANT WAS ENTITLED TO SUMMARY JUDGMENT (FIRST DEPT).

The First Department, reversing Supreme Court, determined the defendant condominium was entitled to summary judgment in this wet-marble-floor slip and

fall case. It was snowing at the time of the fall, triggering the storm-in-progress doctrine, and defendant had placed rubber mats on the floor and periodically mopped wet spots:

The condominium established prima facie entitlement to summary judgment by submitting certified weather reports demonstrating that there was an ongoing snowstorm at the time of accident, and that the "storm-in-progress" doctrine therefore applied … . The condominium demonstrated that it undertook reasonable maintenance measures to address the wet conditions created by tracked-in snow by laying rubber mats throughout the lobby, including an eight-foot runner from the building entrance to the elevator bank, as well as having the doorman and other staff dry mop any wet spots … . Although plaintiff's accident took place on a small portion of the floor that was uncarpeted and remained uncovered, a defendant is not required under the "reasonable care" standard to cover all of its floors with mats to prevent someone from falling on moisture … . In response to the condominium's prima facie showing, plaintiff failed to submit evidence sufficient to raise a triable issue of fact.

The condominium also showed lack of actual notice of the specific wet condition that caused plaintiff to slip. The building's doorman testified that he monitored the condition of the lobby throughout the day and would mop any wet spot, and plaintiff admitted that she did not see any wet condition on the floor when she left the building 15 minutes earlier … . Similarly, because the water might have been tracked in by plaintiff or by other residents entering the lobby, there is no basis for a finding of constructive notice … . Nor was the condominium's general awareness that the floor might become wet while it was snowing sufficient to establish constructive notice of the specific condition that caused plaintiff's injury … . Plaintiff's opposition did not raise a triable issue of fact regarding notice…. . Hart v 210 W. 77 St. LLC, 2024 NY Slip Op 06655, First Dept 12-31-24

Practice Point: The storm-in-progress doctrine applied in this slip and fall case where plaintiff slipped on a wet spot on the lobby floor caused by tracked in snow during an snow storm.

Practice Point: A general awareness that tracked-in snow will result in wet spots on a marble floor does not amount to constructive notice of the specific condition which caused plaintiff's slip and fall.

December 31, 2024

## NEGLIGENCE, EVIDENCE.

## THE WORN MARBLE STAIRWAY TREAD WAS NOT AN ACTIONABLE DEFECT; DEFENDANT ENTITLED TO SUMMARY JUDGMENT IN THIS STAIRWAY SLIP AND FALL CASE (FIRST DEPT).

he First Department, reversing Supreme Court, determined defendant property-owner (Marion) was entitled to summary judgment in this stairway slip and fall case. Defendant demonstrated it did not have actual or constructive notice of any defective condition on the stairs:

Marion demonstrated prima facie that the worn marble tread depicted in the photographs taken by plaintiff is not an actionable defect … . Plaintiff and Marion's superintendent testified that the photographs taken by plaintiff accurately reflected the condition of the stair on the day of the accident, and there is no claim that the stair was wet, slippery, or covered with debris. Moreover, Marion's expert opined that the accident could not have occurred as plaintiff described because when she fell, her left foot was in the middle of the tread rather than on the right-hand side where the worn condition she cited was located.

Marion also demonstrated that it did not have actual or constructive notice of a defective condition on the stair in that the superintendent testified that there were no complaints and no violations had been issued with respect to the stair. He stated that he swept the stairs five days and mopped three days a week, and that the photographs accurately depicted the condition of the stair on the day of the accident. Plaintiff's complaints to the prior superintendent about the general condition of the stairs was insufficient to constitute notice of the specific condition cited by plaintiff as the cause of her fall … .

In opposition, plaintiff failed to raise a triable issue of fact as to Marion's negligence. The opinion of her expert cited numerous dangerous conditions on the stairs and in the stairway, but plaintiff did not cite any of them as a proximate cause of her accident … . James v Chestnut Holdings of N.Y., Inc., 2024 NY Slip Op 06656, First Dept 12-31-24

Practice Point: Here, in this stairway slip and fall case, a worn tread in a marble stairway did not constitute an actionable defect.

December 31, 2024

## PUBLIC HEALTH LAW, CIVIL PROCEDURE.

## THE PUBLIC HEALTH LAW DOES NOT CREATE A PRIVATE RIGHT OF ACTION AGAINST "ASSISTED LIVING" AS OPPOSED TO "RESIDENTIAL HEALTH CARE" FACILITIES; COMPLAINT PROPERLY DISMSSED (THIRD DEPT).

The Third Department, affirming Supreme Court, in a full-fledged opinion by Justice Egan, determined the Public Health Law does not create a right of private action against an "assisted living facility" as opposed to a "residential health care facility." Here the plaintiff attempted to sue the defendant assisted living facility for alleged deficiencies and the complaint was properly dismissed:

Public Health Law § 2801-d creates a private right of action distinct from traditional claims for medical malpractice and negligence, and it provides, in relevant part, that "[a]ny residential health care facility that deprives any patient of said facility of any right or benefit, as hereinafter defined [in Public Health Law article 28], shall be liable to [the] patient for injuries suffered as a result of said deprivation" (Public Health Law § 2801-d [1] …). A residential health care facility is defined, in turn, as "a nursing home or a facility providing health-related service" (Public Health Law § 2801 [3]; see Public Health Law § 2801 [4] [b]).

An assisted living facility, in contrast, is governed by Public Health Law article 46-B instead of Public Health Law article 28, being defined as a facility that "provides or arranges for housing, on-site monitoring, and personal care services and/or home care services (either directly or indirectly), in a home-like setting to five or more adult residents unrelated to the assisted living provider" (Public Health Law § 4651 [1]). DeRusso v Church Aid of the Prot. Episcopal Church in the Town of Saratoga Springs, Inc., 2025 NY Slip Op 00008, Third Dept 1-2-25

Practice Point: The statutory private right of action created by the Public Health Law for suits against "residential health care facilities" does not apply to "assisted living facilities."

January 2, 2025