NEW YORK APPELLATE DIGEST, LLC

Weekly Reversal Report
January 13 – 17, 2025

An Organized Compilation of Summaries of Selected Decisions, Mostly Reversals, Released by Our New York State Appellate Courts January 13 – 17, 2025, and Posted on the New York Appellate Digest Website on Tuesday, January 21, 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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ATTORNEYS, FIDUCIARY DUTY, LIMITED LIABILITY COMPANY LAW.

HERE AN ATTORNEY AND A CONTRACTOR WERE BUSINESS PARTNERS FOR YEARS AND RELIED ON EACH OTHER'S UNIQUE EXPERTISE; THERE WAS A QUESTION OF FACT WHETHER THE ATTORNEY BREACHED A FIDUCIARY DUTY BY TRANSFORMING THE PARTNERSHIP TO AN LLC WITHOUT INFORMING HIS FORMER PARTNER HE COULD NOT UNILATERALLY WITHDRAW FROM THE LLC; HERE THE CRITERIA FOR A STATUTORY DISSOLUTION OF THE LLC WERE MET (THIRD DEPT).

The Third Department, reversing (modifying) Supreme Court, determined there were questions of fact whether defendant attorney, Mazza, breached his fiduciary duty owned to plaintiff when forming a Limited Liability Company (LLC), and further determined that the cause of action seeking a statutory dissolution of the LLC should have been granted. Defendant Mazza and plaintiff were partners in a successful business for many years. It was alleged that when the partnership was transformed to an LLC by Mazza, Mazza did not inform plaintiff he could not unilaterally withdraw from of dissolve the LLC:

There is no dispute that a fiduciary relationship existed between plaintiff and Mazza before the LLC was formed. The record indeed reflects that plaintiff trusted Mazza, an attorney, to act on his behalf in executive matters related to the partners' real estate business, and that Mazza resultingly acquired influence over plaintiff … . The close relationship between the two men, which spanned more than three decades and included Mazza's prior representation of plaintiff, supports this conclusion. And although plaintiff was a skilled and seemingly successful contractor, he admittedly had no knowledge of the legal (and practical) implications of converting a partnership to an LLC and accordingly relied on Mazza's expertise in that area. * * *

Limited Liability Company Law § 702 provides that "the supreme court . . . may decree dissolution of a limited liability company whenever it is not reasonably practicable to carry on the business in conformity with the articles of organization or operating agreement." Although an alleged "deadlock" between the members of a limited liability company will not necessarily render it impracticable for the company to carry on its business … , upon careful review of the record we find that it does in the case at bar. Amici v Mazza, 2025 NY Slip Op 00259, Third Dept 1-16-25

Practice Point: Consult this decision for a detailed discussion the criteria for a fiduciary duty owed by one party to another in a business relationship.

Practice Point: Consult this decision for a discussion of the criteria for a statutory dissolution of an LLC.

January 16, 2025

CONSUMER LAW, CONTRACT LAW, INSURANCE LAW.

PUNITIVE DAMAGES IN A DECEPTIVE BUSINESS PRACTICES ACTION PURSUANT TO GENERAL BUSINESS LAW 349 (H) ARE LIMITED TO THREE TIMES ACTUAL DAMAGES (CT APP).

The Court of Appeals, affirming the Appellate Division, in a full-fledged opinion by Judge Troutman, over a two-judge concurring opinion, determined the terms of the life insurance policy, which was terminated by the defendant insurer, were unambiguous and enforceable. The General Business Law section 349 (h) cause of action alleging deceptive business practices survived but any punitive damages were limited to three times actual damages. The nature of the life insurance policy and payment scheme are too complex to fairly describe here. The $2 million life insurance policy was issued to an 82-year-old woman. With respect to the available damages in a private General Business Law 349 (h) action, the court wrote:

… [T]he legislature carefully calibrated damages at the time section 349 (h) was enacted. We decline to alter that balance by making available a remedy that goes far beyond what the legislature contemplated. As evidenced by the increased penalties on similar statutes, the legislature will act where it believes current remedies are insufficient. It has not done so here. We therefore conclude that punitive damages in addition to the treble damages delineated in section 349 (h)

are unavailable. Hobish v AXA Equit. Life Ins. Co., 2025 NY Slip Op 00183, CtApp 1-14-25

Practice Point: Consult this opinion for an in-depth discussion of the damages available in a private General Business Law 349 (h) deceptive-business-practices action.

January 14, 2025

CONSUMER LAW, CONTRACT LAW.

PRIVATE CONTRACT DISPUTES, UNIQUE TO THE PARTIES, ARE NOT COVERED BY GENERAL BUSINESS LAW 349 OR 35O WHICH ARE APPLICABLE ONLY TO CONSUMER-ORIENTED CONDUCT (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined that a General Business Law section 349 or 350 action must be based upon consumer-oriented conduct, not, as here, on a unique contract between private parties:

"To successfully assert a claim under General Business Law § 349 or § 350, a party must allege that its adversary has engaged in consumer-oriented conduct that is materially misleading, and that the party suffered injury as a result of the allegedly deceptive act or practice" … . "'[P]arties . . . must, at the threshold, charge conduct that is consumer oriented'" … . "Private contract disputes, unique to the parties, . . . [do] not fall within the ambit of the statute" … . A "single shot transaction" … , which is "tailored to meet the purchaser's wishes and requirements" … , "does not, without more, constitute consumer-oriented conduct for the purposes of [General Business Law §§ 349 and 350]" … . Here, the complaint … failed to sufficiently allege that the … defendants engaged in a consumer-oriented deceptive act or practice … . Katsorhis v 718 W. Beech St, LLC, 2025 NY Slip Op 00211, Second Dept 1-15-25

Practice Point: General Business Law 349 and 350 actions must be based upon consumer-oriented conduct. Private contract disputes, unique to the parties, are not encompassed by General Business Law 349 and 350.

January 15, 2025

CRIMINAL LAW, APPEALS, ATTORNEYS, JUDGES.

AT SENTENCING THE PROSECUTOR REFERENCED EXCULPATORY STATEMENTS ATTRIBUTED TO DEFENDANT IN THE PRESENTENCE REPORT BUT, WHEN GIVEN THE OPPORTUNITY, NEITHER DEFENDANT NOR DEFENSE COUNSEL ADDRESSED THE ISSUE; NOTWITHSTANDING THE SILENCE OF THE DEFENSE THE JUDGE SHOULD HAVE INQUIRED INTO WHETHER THE GUILTY PLEA WAS KNOWING AND VOLUNTARY; THERE WAS NO NEED TO PRESERVE THE ERROR FOR APPEAL (FIRST DEPT).

The First Department, vacating defendant's guilty plea, in a full-fledged opinion by Judge Singh, determined the prosecutor's mention of defendant's (Dupree's) exculpatory statements in the presentence report (PSR) required the judge to conduct an inquiry to ensure the guilty plea was knowing and voluntary, despite the defendant's and defense counsel's failure to address the statements at sentencing. Defendant and defense counsel were asked by the judge whether they wished to address the court and both said "no." The issue need not be preserved and was properly raised on appeal:

Before sentencing, Dupree was interviewed by the Department of Probation. He made the following statement: "I admitted to shooting someone in the leg and back and the bullet went through his chest. I was fighting with him (stranger) and was defending myself. I was drinking at the club and someone slipped something in my drink and I was leaving the club to get home. He saw me staggering and wanted to rob me." This statement was included in the presentence report (PSR).

At sentencing, Supreme Court asked whether the parties had any factual difficulties with the PSR. The prosecution replied, "I do have some factual difficulty relating to the defendant's statement which I do not believe there was a valid self-defense claim. In fact, it is not a valid self-defense claim. . . . So I do take issue with that part of his statement as well as his claimed intoxication." The court then asked, "and anything for the defense?" to which defense counsel replied, "no." The court later asked whether the defense would like to be heard as to the promised sentence and, finally, asked Dupree himself if there was anything he

would like to add. Neither Dupree nor his attorney addressed the statement in the PSR or the prosecution's comment made in open court. * * *

The prosecution … argues that if Supreme Court had to inquire further, it did so by asking if defense counsel had anything to say. Yet the Court of Appeals has never held that a court may satisfy its obligation merely by allowing the defense to speak. Neither have we. Rather, the law is clear that "the trial court has a duty to inquire further to ensure that defendant's guilty plea is knowing and voluntary" … . People v Dupree, 2025 NY Slip Op 00199, First Dept 1-14-25

Practice Point: Here the prosecutor, at sentencing, expressed disagreement with exculpatory statements attributed to defendant in the presentence report but neither defendant nor defense counsel chose to address the issue when given the opportunity by the judge. The prosecutor's reference to the statements triggered the need for an inquiry by the judge into whether the plea was knowing and voluntary, notwithstanding the silence of the defense. There was no need to preserve the issue for appeal.

January 14, 2025

CRIMINAL LAW, ATTORNEYS, CONSTITUTIONAL LAW.

THE MAJORITY AFFIRMED WITHOUT DISCUSSION; JUDGE RIVERA IN A DISSENTING OPINION JOINED BY JUDGE WILSON WOULD HAVE REVERSED ON INEFFECTIVE ASSISTANCE GROUNDS (CT APP).

The Court of Appeals affirmed defendant's burglary, assault, criminal contempt and resisting arrest convictions without discussion. Judges Rivera and Wilson would have reversed on ineffective assistance grounds:

From the dissent:

Counsel's performance here was deficient in several respects and no reasonable defense strategy explains those failings. Before trial, counsel's boilerplate motion referenced matters not at issue and lacked factual support in several respects, evincing counsel's failure to properly investigate defendant's case. Counsel also failed to show defendant video crucial to the prosecution's case until shortly before trial—and even then, only after defendant complained to the court and the court ordered counsel to provide the video. During trial, counsel's cross-examination of

the victim resulted in admission of defendant's criminal history, even though the trial court had denied the prosecution's request to present that same history should defendant testify. Counsel then failed to object to an obviously-ambiguous jury instruction that might have resulted in a conviction on the top count. Despite these glaring errors, the majority concludes that defendant received constitutionally-acceptable representation. This outcome ignores our precedents and reduces the right to effective counsel to a platitude spoken to appease defendants. Our State Constitution's guarantee of effective assistance ensures the integrity of the process and a fair trial—including for those defendants who appear guilty. Counsel's many errors fell below that standard. I would therefore reverse and order a new trial. People v Howard, 2025 NY Slip Op 00184, CtApp 1-14-25

Practice Point: Although the majority affirmed the convictions without discussion, the two-judge dissenting opinion described "glaring errors" by defense counsel in detail.

January 14, 2025

CRIMINAL LAW, CONSTITUTIONAL LAW.

DEFENDANT'S UNEQUIVOCAL ASSERTION OF HIS RIGHT TO REMAIN SILENT WAS IGNORED REQUIRING SUPPRESSION OF THE SUBSEQUENT STATEMENTS; THE ERROR WAS DEEMED HARMLESS (THIRD DEPT).

The Third Department determined defendant was improperly questioned after he unequivocally asserted his right to remain silent, but found the error harmless:

Approximately 45 minutes into the interview, after defendant had been provided his Miranda rights and answered numerous inquiries, defendant told the investigators that just prior to the shooting he observed a fight between a man and a woman on Crane Street. Defendant then provided no audible responses to investigators' questions for several minutes. One of the investigators repeated the inquiry as to the next thing defendant remembered, and, after about eight seconds of silence, defendant said "get the f**k out of here b***h, you trying to play me." The investigator then asked defendant what he said and defendant repeated his statement. This prompted the investigator to respond that he would leave if defendant wanted him to. However, the investigator then attempted to persuade

defendant to continue the interview, stressing that the investigators needed defendant's side of the story in light of the damaging evidence against him. It is evident from this interaction that the investigators understood defendant's statement as an unequivocal request for them to leave the room and for the interview to end … . By continuing the interview without providing further warnings, defendant's right to remain silent was violated and the remainder of the recorded interview should have been suppressed … .

Nevertheless, our inquiry is not complete, as we must assess whether that error was harmless. "Where, as here, the asserted error is of a constitutional dimension, the error may be deemed harmless only if there is no reasonable possibility that the error might have contributed to defendant's conviction and that it was thus harmless beyond a reasonable doubt" … . … [T]he … evidence of defendant's guilt, which included multiple angles of video footage that depicted defendant on scene and discharging several projectiles from his firearm at a crowd, together with witness testimony that corroborated the footage, was overwhelming. * * * … [W]e conclude that the error was harmless under the constitutional standard and that reversal is not required … . People v Dorvil, 2025 NY Slip Op 00246, Third Dept 1-16-25

Practice Point: Ignoring defendant's unequivocal assertion of his right to remain silent is an error of constitutional dimension which will be deemed harmless only if there is "no reasonable possibility" the error might have contributed to defendant's conviction.

January 16, 2025

CRIMINAL LAW, EVIDENCE.

THE IMPOUNDMENT OF DEFENDANT'S VEHICLE WAS NOT DEMONSTRATED TO HAVE BEEN NECESSARY AND THE PROCEDURES FOR AN INVENTORY SEARCH OF THE VEHICLE WERE NOT FOLLOWED; THE SEIZED HANDGUN SHOULD HAVE BEEN SUPPRESSED (THIRD DEPT).

The Third Department, granting defendant's motion to suppress a handgun, over a dissent, determined the impoundment of defendant's vehicle after a traffic stop was unnecessary and the search of the vehicle was not a valid inventory search:

Maggs' [the arresting officer's] ambiguous testimony — essentially asserting that any vehicle parked on the street would be unsafe if unattended — falls short of demonstrating that the subject vehicle was not reasonably secure and safe in this residential area, among the many other vehicles parked curbside … . Further, although departmental policy did not require Maggs to investigate whether defendant's father, who was not present at the scene, was in fact willing and able to take control of the vehicle, "facts were brought to [Maggs'] attention to show that impounding would be unnecessary" … . Moreover, defendant's inquiry as to whether the vehicle could be picked up at some later point is tantamount to a request to leave the vehicle where it was, presenting yet another situation in which a vehicle should not be towed per written departmental policy. Given the People's failure to demonstrate that the vehicle was lawfully impounded at the time of the inventory search, defendant's motion should have been granted.

The People also failed to demonstrate that the so-called inventory search was conducted in compliance with established procedures … . * * *

There is also considerable indicia that the purported inventory search was a pretext to search for contraband, including the canvassing of defendant's residence, the absence of any traffic citation, and the fact that the decision to arrest defendant and impound the vehicle came only after defendant refused to provide his consent to search the vehicle … . People v Gray, 2025 NY Slip Op 00249, Third Dept 1-16=25

Practice Point: Here the vehicle could have been safely left parked where it was, or it could have been picked up by someone. To impound the vehicle therefore violated the police department's regulations. Because the People did not prove the

vehicle was legally impounded at the time it was searched the suppression motion should have been granted.

Practice Point: The hallmark of a valid inventory search is an inventory list, which was not created here.

January 16, 2025

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA), CONSTITUTIONAL LAW.

THE DEFENDANT WAS NOT NOTIFIED HE WOULD BE CLASSIFIED AS A SEXUALLY VIOLENT OFFENDER, A VIOLATION OF HIS RIGHT TO DUE PROCESS WHICH DEPRIVED HIM OF THE OPPORTUNITY TO CHALLENGE THE DESIGNATION ON CONSTITUTIONAL GROUNDS; MATTER REMITTED (THIRD DEPT).

The Third Department, vacating the sexually violent offender designation, determined the failure to notify defendant that he would be classified as a violent sexual offender deprived defendant of due process resulting in his inability to argue his constitutional objections to the designation on appeal. The matter was remitted:

Here, neither the Board nor the People requested that County Court designate defendant a sexually violent offender, and the designation was never mentioned at the hearing … . Although the court appropriately concluded that the foreign registration clause compelled it to designate defendant a sexually violent offender … , the court erred when it failed to provide defendant with notice and an opportunity to be heard on his designation before issuing a determination (see Correction Law § 168-k [2] …). This error prejudiced defendant, as he could not timely assert, and thereby preserve, the constitutional defenses he presses on appeal … . Specifically, defendant contends that his designation as a sexually violent offender violates his rights to substantive due process and equal protection of the laws and runs afoul of the Privileges and Immunities Clause … . People v Schultz, 2025 NY Slip Op 00251, Third Department 1-16-25

Practice Point: Although the judge was required to designate defendant as a sexually violent offender, the failure to notify him and give him an opportunity to

be heard deprived him of his right challenge the designation on constitutional grounds. The sexually-violent-offender designation was vacated and the matter remitted.

January 16, 2025

CRIMINAL LAW, JUDGES.

THE JUDGE DID NOT PROVIDE AN ADEQUATE STATEMENT OF THE REASONS FOR CONDUCTING THE TRIAL IN DEFENDANT'S ABSENCE; NEW TRIAL ORDERED (SECOND DEPT).

The Second Department, reversing defendant's convictions and ordering a new trial, determined the judge failed to provide an adequate statement of the reasons for conduction the trial in defendant's absence:

… [T]he defendant is entitled to a new trial because the County Court improperly conducted the trial in the defendant's absence. "Before proceeding in [a] defendant's absence, the court [must make an] inquiry and recite[ ] on the record the facts and reasons it relied upon in determining that [the] defendant's absence was deliberate" … . Here, the court failed to provide an adequate statement of reasons or bases for its determination that the defendant's absence from the trial was deliberate. Although the court stated that it was basing its determination on the defendant's "history" and "conduct within the last few days," it failed to detail the history and conduct upon which its determination was based … . People v Kerr, 2025 NY Slip Op 00236, Second Dept 1-15-25

Practice Point: Before a judge can conduct a trial in a defendant's absence, an adequate statement of the reasons must be in the record. If the statement is inadequate a new trial will be necessary.

January 15, 2025

FAMILY LAW, JUDGES.

COUNSELING OR TREATMENT SHOULD NOT BE MADE A CONDITION FOR ANY FUTURE MODIFICATION OF PARENTAL ACCESS; HOWEVER COUNSELING AND TREATMENT MAY BE MADE A COMPONENT OF CURRENT PARENTAL ACCESS (SECOND DEPT).

The Second Department, modifying Family Court, determined the court should not have made counseling or treatment a condition for any future modification of parental access, but Family Court appropriately directed mother to submit to treatment as a component of her current parental access:

… [A] "court deciding a custody proceeding may properly direct a party to submit to counseling or treatment as a component of a visitation or custody order" … . "However, a court may not direct that a parent undergo counseling or treatment as a condition of future parental access or reapplication for parental access rights" … . Here, the Family Court should not have conditioned any future modification of the mother's parental access with the child, in effect, upon her enrollment in mental health treatment and her resulting improvement in mental status, emotional regulation, psychological functioning, and empathy for the child … . Nonetheless, to the extent the court directed the mother to submit to such treatment as a component of her parental access, this was proper … . Matter of Nathaniel v Mauvais, 2025 NY Slip Op 00223, Second Dept 1-15-257

Practice Point: Counseling or treatment can be made a component of current parental access but cannot be made a condition for any future modification of parental access.

January 15, 2025

FAMILY LAW, JUDGES.

HERE THE PETITION FOR MODIFICATION OF CUSTODY SHOULD NOT HAVE BEEN DISMISSED "WITH PREJUDICE" BECAUSE A FUTURE CHANGE IN CIRCUMSTANCES MAY WARRANT MODIFICATION (SECOND DEPT).

The Second Department, modifying Family Court, determined mother's petition for a modification of custody should not have been dismissed "with prejudice" because a future change in circumstances could warrant modification:

Family Court should not have provided that its dismissal of the mother's petitions was with prejudice. This language could create confusion as to whether the mother could seek relief based upon a change in circumstances. Therefore, we delete that provision of the order appealed from and substitute therefor a provision dismissing the petitions without prejudice … . We note that child custody and parental access orders are not entitled to res judicata effect and are subject to modification based upon a showing of a change in circumstances. Thus, a new petition may be filed where there has been a sufficient change in circumstances since the order or judgment sought to be modified was made … . Matter of Blackman v Barge, 2025 NY Slip Op 00214, Second Dept 1-15-25

Practice Point: Here the petition for modification of custody should not have been dismissed "with prejudice" because a future change in circumstances may warrant modification.

January 15, 2025

FAMILY LAW, JUDGES.

ALTHOUGH A JUDGE HAS THE DISCRETION TO PROHIBIT A PARTY FROM BRINGING ANY FURTHER PETITIONS FOR CUSTODY MODIFICATION, HERE FAMILY COURT ABUSED ITS DISCRETION; FATHER HAD NEVER FILED FRIVOLOUS PETITIONS OR FILED PETITIONS OUT OF ILL WILL OR SPITE (SECOND DEPT).

The Second Department, modifying Family Court, determined Family Court should not have prohibited father from filing any further custody modification

petitions because father had not filed frivolous petitions or filed petitions out of ill will or spite:

Family Court improvidently exercised its discretion in prohibiting the father from filing any further modification petitions without the permission of the court. "While public policy generally mandates free access to the courts, a party may forfeit that right if he or she abuses the judicial process by engaging in meritless litigation motivated by spite or ill will" … . Here, there is no basis in the record to demonstrate that the father filed frivolous petitions or filed petitions out of ill will or spite … . Matter of Freyer v Macruari, 2025 NY Slip Op 00217, Second Dept 1-15-25

Practice Point: Family Court has the discretion to prohibit a party from bringing any future custody modification petitions, it can only do so where the party has filed frivolous motions or has filed motions out of ill will or spite.

January 15, 2025

FREEDOM OF INFORMATION LAW (FOIL), ADMINISTRATIVE LAW.

PETITIONER ADEQUATELY DESCRIBED THE RECORDS SOUGHT FROM THE POLICE DEPARTMENT AND THE DEPARTMENT DID NOT MAKE ANY EFFORT TO ASSIST PETITIONER IN IDENTIFYING THE RECORDS AS REQUIRED BY THE REGULATIONS; DENIAL OF THE PETITION REVERSED AND MATTER REMITTED (SECOND DEPT).

The Second Department, reversing the denial of the petition to compel the disclosure of Nassau County Police Department records and remitting the matter, noted that the applicable regulations require the Department to assist the petitioner in identifying the records sought:

… [P]etitioner made a request pursuant to the Freedom of Information Law … for certain records pertaining to the creation or maintenance of the Department's current databases. Specifically, the petitioner requested: (1) "Any Requests for Proposals (RFPs), Requests for Qualifications (RFQs), and contracts pertaining to the creation or maintenance of the Department's current database(s)"; (2) "The data dictionary, glossary of terms, record layout, entity relationship diagram, user guide, and any other records that describe the Department's database(s)"; and (3)

"The instruction manual or any other type of guide, distributed to law enforcement personnel dictating how they should use the database(s)."

… [T]he Department's Legal Bureau denied the request on the ground that the petitioner did not reasonably describe the database to which he was referring. …

… [T]he petitioner's requests were not vague or unlimited. They were circumscribed as to subject matter—the records pertaining to the creation or maintenance of the Department's current databases—and the time period … . …

… [R]egulations enacted under FOIL by the Committee on Open Government provide that, upon receipt of a FOIL request, agency personnel are required to "assist persons seeking records to identify the records sought, if necessary, and when appropriate, indicate the manner in which the records are filed, retrieved or generated to assist persons in reasonably describing records" (21 NYCRR 1401.2[b][2]). Here, there is no evidence that, before denying the petitioner's request, the Department made any effort to work with the petitioner to more precisely define the information desired, if possible … . Matter of Lane v County of Nassau, 2025 NY Slip Op 00220, Second Dept 1-15-24

Practice Point: Here the petitioner adequately identified the police department records at issue and the police department made no effort to assist petitioner in identifying the records as required by the applicable regulations. The FOIL petition should not have been denied.

January 15, 2025

LABOR LAW-CONSTRUCTION LAW, AGENCY.

THE CONTRACTOR THAT HIRED THE SUBCONTRACTOR FOR WHICH THE INJURED PLAINTIFF WORKED WAS THE CONDOMINIUM DEFENDANTS' STATUTORY AGENT AND THEREFORE CAN BE HELD LIABLE IN THIS LABOR LAW 240(1) ACTION (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined defendant Chelsea, the contractor that hired the subcontractor, Prince, for which the injured plaintiff worked, was the statutory agent of the condominium defendants in this Labor Law 240(1) case. Therefore the action against Chelsea should not have been dismissed:

Supreme Court improperly dismissed Chelsea from this action on the ground that it is not the condo defendants' statutory agent for purposes of Labor Law § 240(1) liability. Chelsea was the only contractor that the condo defendants retained to perform their window-washing project, and Chelsea cannot escape liability under Labor Law § 240(1) because it delegated the work by subcontracting it to Prince, plaintiff's employer … . Chelsea's authority to supervise and control the work is also demonstrated by its subcontracting the work to Prince, and whether Chelsea actually supervised plaintiff's work is irrelevant … . Barreto v Board of Mgrs. of 545 W. 110th St. Condominium, 2025 NY Slip Op 00185, First Dept 1-14-25

Practice Point: Liability under Labor Law 240(1) extends to the statutory agent of the property owner, here the contractor that hired the subcontractor for which the injured plaintiff worked.

January 14, 2025

LABOR LAW-CONSTRUCTION LAW, CONSTRUCTION LAW.

PLAINTIFF WAS WORKING ON POWER LINES WHILE SUSPENDED FROM A HELICOPTER WHEN THE HELICOPTER LOST CONTROL AND CRASHED; PLAINTIFF'S LABOR LAW 200, 240 AND 241(6) CAUSES OF ACTION WERE NOT PREEMPTED BY THE FEDERAL AVIATION ACT (FAA) (THIRD DEPT).

The Third Department, in a full-fledged opinion by Justice Egan, over a two-justice dissent, determined the Federal Aviation Act (FAA) did not preempt New York's Labor Law protections for workers. Plaintiff was working on power lines and towers while suspended from a helicopter when the helicopter collided with a structure, lost control and crashed. Plaintiff sued the general contractor for failure to provide adequate safety devices. This lawsuit did not include the helicopter company or seek damages for negligent operation of the helicopter (apparently addressed by other lawsuits against different defendants):

Plaintiff's complaint … asserted claims against defendant as the general contractor on the project alleging that defendant was negligent and violated Labor Law §§ 200, 240 and 241 (6), as well as the Industrial Code (see 12 NYCRR 23-1.7). * * *

… [T]he FAA "contained a saving provision preserving pre-existing statutory and common-law remedies" …, and it continues to authorize "any other remedies provided by law" in addition to the ones created by the FAA … . In other words, the FAA contemplates that state law remedies survive its enactment and may be pursued within its purview, including "state law personal injury suits" … . The question is accordingly not whether the FAA preempts all state law claims that somehow intersect with air safety — its own terms make clear that it does not — but whether the claims arise in the area of air safety and "interfere with federal laws and regulations sufficiently to fall within the scope of the preempted field" … . …

Plaintiff's claims … arise out of the state's police power to regulate occupational health and safety issues, not aviation, and defendant points to "nothing in [the FAA or implementing regulations] indicating that Congress meant to affect state regulation of occupational health and safety, or the types of damages that may be recovered" for a violation of those workplace safety standard … . Scaletta v Michels Power, Inc., 2025 NY Slip Op 00258, Third Dept 1-16-25

Practice Point: Consult this decision for a discussion of field and conflict preemption issues in the context of the Federal Aviation Act and New York's Labor Law protections for workers. Plaintiff was suspended from a helicopter working on power lines when the helicopter lost control and crashed.

January 16, 2025

NEGLIGENCE, EDUCATION-SCHOOL LAW, EMPLOYMENT LAW, EVIDENCE. THE SCHOOL DISTRICT'S OWN SUBMISSIONS RAISED QUESTIONS OF FACT ABOUT NEGLIGENT HIRING AND RETENTION OF A TEACHER'S AIDE AND NEGLIGENT SUPERVISION OF PLAINTIFF STUDENT IN THIS CHILD VICTIMS ACT CASE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the defendant school district's own submissions raised questions of fact in this Child Victims Act case alleging sexual abuse of plaintiff student by a teacher's aide:

… [T]he defendants failed to establish, prima facie, that the school district was entitled to judgment as a matter of law dismissing the causes of action alleging

negligence and negligent supervision and retention insofar as asserted against … . In support of their motion, the defendants submitted, among other things, transcripts of the deposition testimony of the plaintiff and that of his third grade teacher, who served as the direct supervisor of the teacher's aide. The plaintiff testified that the teacher's aide singled him out for attention in the classroom and hugged him in the hallways … . While such conduct, without more, might not have been enough to warrant denial of the defendants' motion, the plaintiff also testified that, upon dismissal from school, the teacher's aide frequently walked him to her car in the presence of other staff members and then drove him to her home, where the alleged sexual abuse primarily occurred. The third grade teacher also testified that it was "[in]appropriate" for teachers and other school district employees to drive students in their personal vehicles or take students to their homes, conduct which the teacher also believed violated school policies … .

Therefore, the defendants' own submissions failed to eliminate triable issues of fact as to whether the school district "had notice of the potential for harm to the . . . plaintiff such that its alleged negligence in supervising and retaining [the teacher's aide] placed [her] in a position to cause foreseeable harm" … . Kastel v Patchogue-Medford Union Free Sch. Dist., 2025 NY Slip Op 00210, Second Dept 1-15-25

Practice Point: The criteria for a school district's liability for negligent hiring and retention and negligent supervision in a Child Victims Act case concisely laid out.

January 15, 2025

NEGLIGENCE, MUNICIPAL LAW. THE PRIOR WRITTEN NOTICE RULE RE: MUNICIPAL LIABILITY FOR DANGEROUS CONDITIONS APPLIES TO MORE THAN JUST SURFACE DEFECTS; HERE THE RULE APPLIED TO AN ARCH-SHAPED BOLLARD OR BARRIER WHICH FELL OVER WHEN A CHILD WAS SWINGING FROM IT; TWO-JUSTICE DISSENT (THIRD DEPT).

The Third Department, affirming the dismissal of the complaint, over a two-justice dissent, determined the "written notice" requirement in the City of Ithaca code applied to an arch-shaped bollard or barrier placed to protect a tree from being damaged by cars using a parking lot. As plaintiff's child grabbed onto the bollard and swung from it, it came loose from the ground and fell over, injuring the child's

hand. The city demonstrated it did not have written notice of the condition, which, under the code, is a prerequisite for liability. The dissenters argued a bollard was not in any category which triggers the written-notice requirement:

… [T]he operative query is not whether there is a surface defect affecting safe passage but, more broadly, whether there is a defective condition that would not have come to the municipality's attention unless it was notified of it … . As such, the prior written notice rule has been applied to conditions as varied as a low-hanging tree branch …, a sharp metal beam … and a bent parking meter pole … . Therefore, the prior written notice rule governs.

From the Dissent:

First, in our opinion, the defective bollard that crushed plaintiff's child's hand was not in one of the six locations that General Municipal Law § 50-e authorizes municipalities to cover with a prior written notice law. And second, defendants failed to submit any proof that they installed the bollard properly, in accordance with industry standards. Thus, the burden never shifted to plaintiff, and defendants' summary judgment motion should have been denied regardless of the adequacy of plaintiff's proof. Finally, even if defendants had shifted the burden, we believe that plaintiff submitted proof presenting a question of fact as to whether the bollard was unreasonably dangerous when installed, precluding a grant of summary judgment. Gurbanova v City of Ithaca, 2025 NY Slip Op 00252, Third Dept 1-16-25

Practice Point: The written-notice rule, which requires that a municipality have written notice of a dangerous condition before it can be held liable for injury caused by the condition, applies to more than just surface defects. Here the rule applied to an arch-shaped bollard or barrier which fell over when a child swung on it.

January 16, 2025

NEGLIGENCE, MUNICIPAL LAW, ADMINISTRATIVE LAW.

THE TREE WELL IN THE SIDEWALK WHERE PLAINTIFF TRIPPED AND FELL WAS THE RESPONSIBILTY OF THE CITY, NOT DEFENDANT ABUTTING PROPERTY OWNER (FIRST DEPT).

The First Department, reversing Supreme Court in this slip and fall case, determined that maintenance of the tree well within the sidewalk where plaintiff fell was the responsibility of the city, not the defendant property owner:

Defendant established its prima facie entitlement to summary judgment by submitting plaintiff's pleadings and deposition testimony, along with photographic evidence showing the area where the sidewalk connects to the tree well and marked by plaintiff at her deposition to show where she fell. This evidence, taken together, establishes that plaintiff fell when she stepped into and out of the perimeter of the tree well, not when she stepped on an uneven sidewalk slab or other sidewalk defect … . The perimeter of the tree well is not part of the sidewalk whose maintenance is the responsibility of the abutting property owner under Administrative Code of City of NY § 7-210 … . Rather, the perimeter of the tree well is part of the tree well itself, which the City, not the property owner responsible for the sidewalk, has the obligation to maintain in a safe condition … .

Defendant also submitted an affidavit and deposition testimony from one of its owners, stating that the tree wells near the property were installed by the City and that neither defendant nor any building tenant constructed the tree well, maintained it, repaired it, or put it to special use. This evidence was sufficient to show that defendant did not affirmatively create the dangerous condition, negligently make repairs to the area, or cause the dangerous condition to occur through a special use of the area. Thus, there was no basis to impose liability on the defendant … . Cabral v Triangle, LLC, 2025 NY Slip Op 00187, First Dept 1-14-25

Practice Point: In NYC tree wells, as opposed to the surrounding sidewalks, are the responsibility of the city, not the abutting property owner. Here plaintiff tripped and fell stepping into a tree well. Defendant abutting property owner was off-the-hook.

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