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Weekly Reversal Report
February 17 – 21, 2025

An Organized Compilation of Summaries of Selected Decisions, Mostly Reversals, Released by Our New York State Appellate Courts February 17 – 21, 2025, and Posted on the New York Appellate Digest Website on Monday, February 24, 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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ADMINISTRATIVE LAW, CONSTITUTIONAL LAW.

THE ETHICS COMMISSION REFORM ACT OF 2022, WHICH VESTS A COMMISSION WITH THE POWER TO INVESTIGATE AND ENFORCE ETHICS AND LOBBYING LAWS WITH RESPECT TO ELECTED OFFICIALS, EMPLOYEES OF THE LEGISLATURE, STATE OFFICERS AND THEIR EMPLOYEES, CURRENT AND FORMER CANDIDATES FOR PUBLIC OFFICE, AND LOBBYISTS (AMONG OTHERS), DOES NOT VIOLATE THE SEPARATION OF POWERS DOCTRINE (CT APP).

The Court of Appeals, reversing the Appellate Division, in a full-fledged opinion by Judge Rivera, over a three-judge dissent, determined the Ethics Commission Reform Act of 2022 did not unconstitutionally vest the State Commission on Ethics and Lobbying in Government with executive power. The Act is not unconstitutional:

The issue on this appeal is whether, on its face, the Ethics Commission Reform Act of 2022 unconstitutionally vests the State Commission on Ethics and Lobbying in Government with executive power. Plaintiff's principal argument is that because the Commission exercises executive power, the Governor must have power to appoint and remove the Commissioners. In New York, however, the Legislature—not the Governor—may ordinarily define the terms on which non-constitutional state officers may be appointed and removed. Moreover, the Legislature structured the Commission to address a narrow but crucial gap arising from the inherent disincentive for the Executive Branch to investigate and discipline itself, which has serious consequences for public confidence in government. The Act does not displace the Executive Branch to accomplish that goal; instead, it confers upon an independent agency power to enforce a narrow set of laws, thus mitigating the unique danger of self-regulation. The Act addresses a threat to the legitimacy of government itself with an extraordinary response. While the Act extends very close to the boundary of permissible legislation, it is not "intrinsically a constitutional affront to the separation of powers doctrine" … . * * *

The Legislature … enacted … the Ethics Commission Reform Act of 2022 (the Act), which amended Executive Law § 94 and replaced JCOPE [Judicial Commission on Public Ethics] with the Commission on Ethics and Lobbying in Government. Like JCOPE, the Commission is established in the Department of State and charged with the investigation and enforcement of the ethics and

lobbying laws … . Those under the Commission's jurisdiction include statewide elected officials; members and employees of the Legislature; certain statutorily defined state officers and employees; current and former candidates for statewide office, Senate, and Assembly; the political party chair; and current and former lobbyists and their clients … . The Commission also enforces financial disclosure requirements and reviews disclosure forms of statewide elected officials, their officers and employees and other persons subject to disclosure under Public Officers Law 73-a … . As part of its specific grant of authority under the Act, the Commission has rulemaking power to "adopt, amend and rescind any rules and regulations pertaining to" Public Officers Law § 73 (concerning official ethics), Public Officers Law § 73-a (financial disclosure), Legislative Law Article 1-a (lobbying) and Civil Service Law § 107 (political activities and contributions) (Executive Law § 94 [5] [a]). With respect to members and employees of the Legislature, the Commission's powers are limited: the Commission may investigate such persons but must refer any potential violations of the ethics laws to the legislative ethics commission … . Cuomo v New York State Commn. on Ethics & Lobbying in Govt., 2025 NY Slip Op 00902, CtApp 2-18-25

February 18, 2025

CIVIL PROCEDURE, JUDGES.

WHERE PLAINTIFF HAS FAILED TO FILE A NOTE OF ISSUE BY A COURT-ORDERED DEADLINE, RESTORATION TO THE ACTIVE CALENDAR IS AUTOMATIC WHERE NO 90-DAY NOTICE HAD BEEN SERVED AND THERE HAD BEEN NO COURT-ORDERED DISMISSAL (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff's motion to restore the action to the active calendar should have been granted. Although plaintiff had failed to file a note of issue by the court-ordered deadline, no 90-day notice had been served nor had the court ordered dismissal of the action:

"When a plaintiff has failed to file a note of issue by a court-ordered deadline, restoration of the action to the active calendar is automatic, unless either a 90-day notice has been served pursuant to CPLR 3216 or there has been an order directing dismissal of the complaint pursuant to 22 NYCRR 202.27" … . "In the absence of those two circumstances, the court need not consider whether the plaintiff had a

reasonable excuse for failing to timely file a note of issue" … . Adams v Frankel, 2025 NY Slip Op 00939, Second Dept 2-19-25

Practice Point: Where plaintiff fails to fails to file a note of issue by the court-ordered deadline, restoration of the action to the active calendar is automatic where no 90-day notice has been served and dismissal has not been ordered by the court.

February 19, 2025

CRIMINAL LAW, APPEALS, EVIDENCE.

ALTHOUGH THE ERRORS WERE NOT PRESERVED, DEFENDANT'S CONVICTIONS WERE REVERSED IN THE INTEREST OF JUSTICE; THE CREDIBILITY OF ONE OF THE VICTIMS WAS IMPROPERLY BOLSTERED IN OPINION TESTIMONY BY A POLICE OFFICER AND A PSYCHOLOGIST ASSERTING THAT THE VICTIM WAS BELIEVABLE AND RELIABLE; A PRIOR INCONSISTENT STATEMENT BY ONE OF THE VICTIMS, IN WHICH THE VICTIM DENIED DEFENDANT HAD EVER MOLESTED THE VICTIM, SHOULD HAVE BEEN ADMITTED (THIRD DEPT).

The Third Department, in the interest of justice, reversed the "predatory sexual assault against a child" convictions which involved two victims, and ordered a severance if a new trial is held. The Third Department determined the credibility of one of the victims was improperly bolstered by the testimony by a police officer and a psychologist that they found the victim's version of events believable and reliable. In addition, the Third Department held that a prior inconsistent statement by one of the victims, denying that defendant ever molested the victim, should have been admitted in evidence:

… [W]e find merit in defendant's contention that he was deprived of a fair trial based upon the testimonies of Breslin [a police officer] and Spagli [a psychologist], who each offered their opinion as to victim 2's credibility. Accordingly, notwithstanding defendant's failure to properly preserve his claim, we exercise our discretion and reverse in the interest of justice (see CPL 470.15 [6] [a] …). "It is always within the sole province of the jury to decide whether the testimony of any witness is truthful or not" … . As such, "to bolster the testimony of another witness . . . by explaining that his [or her] version of the events is more believable than the

defendant's, the . . . testimony is equivalent to an opinion that the defendant is guilty, and the receipt of such testimony may not be condoned" … . Here, Breslin testified that he "felt . . . [victim 2] was telling the truth." Spagli, in turn, agreed that the goal of reaching the truth "was done in this case" and further testified that she "felt [victim 2] was reliable throughout the course of the investigation." Supreme Court did not provide a curative instruction.

We are similarly persuaded by defendant's claim that he was improperly denied the opportunity to impeach victim 2 about an alleged prior inconsistent statement given in an unrelated Family Court matter, in which victim 2 reportedly denied ever having been molested by defendant. * * * The impeachment testimony sought here … concerned the ultimate issue before the jury. Accordingly, we conclude that it was error to preclude defendant from exercizing his right to confront victim 2 about their prior statement; the court could have crafted limitations to prevent the disclosure of unduly prejudicial information upon such questioning … . People v Swartz, 2025 NY Slip Op 01015, Third Dept 2-20-25

Practice Point: If trial errors are severe enough, as they were here, an appellate court has the power to overlook the failure to preserve the errors and reverse in the interest of justice.

February 20, 2025

CRIMINAL LAW, ATTORNEYS, JUDGES.

DEFENDANT'S COMPLAINTS ABOUT THE ACTIONS OF DEFENSE COUNSEL WERE NOT SPECIFIC OR SERIOUS ENOUGH TO WARRANT AN INQUIRY BY THE JUDGE; THREE-JUDGE DISSENT (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Troutman, over a three-judge dissent, determined defendant had not made specific and serious allegations about the behavior of his attorney which were sufficient to warrant an inquiry by the judge:

… [D]efendant argues that the complaints contained in his letter were factually specific and serious enough to require a minimal inquiry. He points to his accusations that defense counsel was not working in his best interest; disregarded his request to visit, "even via [v]ideo"; hung up on him; disrespected him and his wife; was prolonging the proceedings; and told him to accept a plea even though

he was "in fact innocent." Contrary to defendant's contention, these statements did not constitute "specific factual allegations of 'serious complaints about counsel' " … . Defendant's assertions that counsel was not working in his best interest, was prolonging the proceedings, and was advising him to take a plea were too general and conclusory to require a minimal inquiry. There are simply no facts elucidating these allegations that would have signaled to the trial court that a serious conflict emerged between defendant and his counsel.

… The seriousness of defendant's allegation that counsel failed to visit him was undermined by other statements in the letter, which clearly indicated that counsel and his private investigator were communicating with defendant. Moreover, defendant failed to explain how defense counsel allegedly disrespected him and his wife. Nor did he provide any context regarding defense counsel allegedly hanging up on him. For instance, it is entirely unclear whether defense counsel intentionally or inadvertently hung up on defendant or whether defense counsel simply hung up because the conversation had ended. … [D]efendant's complaints … lacked sufficient elaboration to signal to the trial court that the complaints were serious enough to warrant minimal inquiry … . People v Fredericks, 2025 NY Slip Op 01011, CtApp 2-20-25

Practice Point: The nature of defendant's complaints about the behavior of defense counsel were not specific or serious enough to trigger the need for an inquiry by the judge. There was a three-judge dissent.

February 20, 2025

CRIMINAL LAW, EVIDENCE, ATTORNEYS.

THE EVIDENCE WAS LEGALLY SUFFICIENT TO DEMONSTRATE DEFENDANT INTENDED TO STEAL TWO CANS OF RED BULL WHEN HE ENTERED THE CVS; THE DISSENT ARGUED THE EVIDENCE OF FELONY BURGLARY WAS LEGALLY INSUFFICIENT, NOTING THAT THE PROSECUTOR COULD HAVE CHARGED PETTY LARCENY OR TRESPASS, THEREBY SAVING THE STATE THE MILLION DOLLARS IT COST TO INCARCERATE THE HOMELESS, MENTALLY ILL AND DRUG-ADDICTED DEFENDANT FOR AN ATTEMPT TO STEAL ITEMS WORTH $6 (CT APP).

The Court of Appeals affirmed defendant's burglary conviction rejecting the "legally insufficient evidence" argument. In a dissenting opinion, Judge Wilson (Judge Halligan concurring), argued the evidence was legally insufficient. Judge Wilson wrote "no evidence in the case could have led a jury to conclude beyond a reasonable doubt that Mr. Williams intended to steal the two Red Bulls" when he entered the CVS:

From the dissent:

Two cans of Red Bull cost about $6. Seven years of incarceration costs anywhere between $800,000 and $4 million, depending on the location within New York State … . For attempting to take two cans of Red Bull from a CVS, Raymond Williams was convicted of third-degree burglary, a felony, and sentenced to three and a half to seven years in prison. Mr. Williams was a perpetual petty shoplifter with substance abuse and mental health problems, so perhaps this result makes sense to someone. It does not to me.

Mr. Williams's story is not uncommon. For much of his life, he has struggled with homelessness and drug addiction. Both factors disproportionately increase the risk of being caught up in the criminal justice system and sentenced to spend time in prison. Mr. Williams had previously been found guilty of many minor shoplifting offenses, including from other CVS stores. His problems were addressed by sentences of incarceration and probation, not treatment. * * *

Putting both psychiatric and fiscal wisdom aside, although it was within the discretion of prosecutors to charge Mr. Williams with felony burglary instead of,

for example, petty larceny or trespass, the trial evidence was legally insufficient to convict him of burglary. No evidence in the case could have led a jury to conclude beyond a reasonable doubt that Mr. Williams intended to steal the two Red Bulls. I would therefore reverse his conviction. People v Williams, 2025 NY Slip Op 00901, CtApp 2-18-25

Practice Point: Consult the dissent for a strong argument for prosecutorial discretion in shoplifting cases, especially where the defendant is homeless, mentally ill and addicted to drugs. Here the defendant was sentenced to three and a half to seven years in prison for attempting to steal two cans of Red Bull from a CVS (burglary third).

February 18, 2025

CRIMINAL LAW, EVIDENCE.

ANY DEVIATIONS FROM THE STATE POLICE INVENTORY-SEARCH POLICY WERE MINOR AND DID NOT WARRANT SUPPRESSION OF THE HANDGUN FOUND IN THE SEARCH; THERE WAS A TWO-JUSTICE DISSENT (THIRDD DEPT).

The Third Department, reversing County Court's suppression of a handgun found in an inventory search, determined any deviations from the State Police's inventory-search procedure were minor and did not warrant suppression of evidence seized during the search:

As for whether the trooper who conducted the search of the Kia sufficiently complied with that policy, County Court determined that the trooper did not because "there [were] a great many items and effects within the vehicle that are not memorialized within the inventory form" and because the form "was not filled out until some many hours — if not days — after the search was conducted." * * *

The foregoing were "minor deviation[s] from procedure" under the circumstances of this case "and did not undermine the reasonableness of the limited search," particularly because "there was no indication that the police were using the procedure as a pretext to search for incriminating evidence" to begin with … . It is not the role of either County Court or this Court to "micromanage the procedures used to search properly impounded" vehicles and, as the record leaves no question

both that the towing]and inventory search of the Kia were justified and that the ensuing list of the vehicle's contents sufficiently complied with State Police policy to meet the constitutional minimum, defendant's motion to suppress should have been denied in its entirety … . People v Craddock, 2025 NY Slip Op 01016, Third Dept 2-20-25

Practice Point: Here the Third Department held that any deviations from the State Police inventory-search procedure were minor and did not warrant suppression. Two justices dissented.

February 20, 2025

CRIMINAL LAW.

MAJORITY: THE DEFENDANT'S WAIVER OF PARTICIPATION IN THE SHOCK INCARCERATION PROGRAM WAS NOT A COMPONENT OF THE SENTENCE AND THEREFORE THE LEGALITY OF THE SENTENCE CANNOT BE CHALLENGED BASED ON THE WAIVER; DISSENT: THE SHOCK WAIVER VIOLATES PUBLIC POLICY AND RENDERS THE SENTENCE ILLEGAL (CT APP).

The Court of Appeals affirmed the First Department's rejection of defendant's argument that his waiver of shock incarceration program violated public policy, over an extensive two-judge dissenting opinion. The dissent argued the waiver was against public policy rendering defendant's sentence illegal. The majority avoided the issue entirely by holding the waiver was not part of the sentence:

Defendant's sole contention on appeal is that the shock waiver is an illegal component of the sentence. We reject that contention on the ground that the waiver is not a component of the sentence … . * * *

From the dissent:

Shock is a six-month discipline and treatment-oriented program selectively administered to qualifying incarcerated persons selected by DOCCS when they are approximately three years away from the end of their prison sentence (see Correction Law §§ 867, 865). It has proven wildly successful on both the crime prevention and cost reduction fronts. In this case, the plea offer made by the People

to Mr. Silva Santos [defendant] required him to waive participation in Shock. He told the sentencing court that he wished to be able to participate in Shock, and the court refused, citing the terms of the waiver of Shock in the plea agreement. The sole question on appeal is whether including the Shock waiver as part of the plea agreement is contrary to statutory authority or public policy. People v Santos, 2025 NY Slip Op 01008, CtApp 2-20-25

Practice Point: A defendant's waiver of participation in the shock incarceration program is not a component of a sentence. Therefore a sentence cannot be challenged as illegal based on a defendant's shock-waiver.

February 20, 2025

CRIMINAL LAW, APPEALS, JUDGES.

DEFENDANT WAS 16 AT THE TIME OF THE CRIME AND WAS CONVICTED OF MANSLAUGHTER IN 2012; THE CONVICTION WAS AFFIRMED IN 2014; PURSUANT TO A MOTION FOR A WRIT OF CORAM NOBIS BROUGHT IN 2022 IT HAS BEEN DETERMINED THAT SUPREME COURT ERRED IN FAILING TO CONSIDER WHETHER DEFENDANT SHOULD BE AFFORDED YOUTHFUL OFFENDER STATUS AND THE MATTER IS NOW REMITTED TO SUPREME COURT FOR THAT PURPOSE (THIRD DEPT).

The Third Department, vacating defendant's sentence, determined the matter should be remitted for a ruling on whether defendant defendant should be afforded youthful offender status. Defendant, who was 16 at the time of the crime was convicted of manslaughter in 2012. His conviction was affirmed in 2014. In 2022 defendant moved for a writ of coram nobis to permit him to argue that Supreme Court erred by failing to determine whether he should be afforded youthful offender status:

The decision to grant or deny youthful offender status rests within the sound exercise of the sentencing court's discretion to determine "if in the opinion of the court the interest of justice would be served by relieving the eligible youth from the onus of a criminal record" … . "Among the factors to be considered are the gravity of the crime and manner in which it was committed, mitigating

circumstances, the defendant's prior criminal record, prior acts of violence, recommendations in the presentence reports, the defendant's reputation, the level of cooperation with authorities, the defendant's attitude toward society and respect for the law, and the prospects for rehabilitation and hope for a future constructive life" … . Defendant argues, the People concede, and we agree that defendant is an eligible youth; thus, Supreme Court erred in failing to determine defendant's eligibility for youthful offender status in the first instance … .

Although this Court has the authority to determine whether defendant is entitled to youthful offender status … , we decline the People's invitation to do so here in the complete absence of any consideration by the sentencing court as to whether defendant should be adjudicated a youthful offender … . Accordingly, we remit the matter to Supreme Court for the explicit purpose of providing an opportunity to the parties to fully advocate for and against whether youthful offender status for defendant is warranted … . People v Vanderhorst, 2025 NY Slip Op 01012, Third Dept 2-20-25

Practice Point: Here Supreme Court's erroneous failure to consider whether defendant should be afforded youthful offender status was first raised in a motion for a writ of coram nobis after defendant's conviction had been affirmed on appeal.

February 20, 2025

CRIMINAL LAW.

THE FEDERAL OFFENSE WHICH SERVED AS A PREDICATE FOR DEFENDANT'S SECOND-FELONY-OFFENDER DESIGNATION DOES NOT REQUIRE THAT THE FIREARM INVOLVED BE OPERABLE; THE RELEVANT NEW YORK FELONY OFFENSE INCLUDES OPERABILITY AS AN ELEMENT; THEREFORE THE FEDERAL OFFENSE IS NOT A VALID PREDICATE OFFENSE (SECOND DEPT).

The Second Department, vacating defendant's second-felony-offender designation, determined the federal crime constituting the predicate offense was not a felony in New York One of the elements of the relevant New York felony was that the firearm involved in the offense be operable. That element was missing from the federal offense:

"Penal Law § 70.06 requires the imposition of enhanced sentences for those found to be predicate felons" … . Among other criteria, for the purpose of determining whether a prior conviction is a predicate felony conviction, the conviction must have been in New York of a felony, "or in any other jurisdiction of an offense for which a sentence to a term of imprisonment in excess of one year or a sentence of death was authorized and is authorized in this state irrespective of whether such sentence was imposed" (Penal Law § 70.06[1][b][i]). "Since New York authorizes sentences exceeding one year only for felonies, the second prong of this statutory test requires an inquiry to determine whether the foreign conviction has an equivalent among New York's felony-level crimes" … . "As a general rule, this inquiry is limited to a comparison of the crimes' elements as they are respectively defined in the foreign and New York penal statutes" … . Here, the defendant's predicate crime does not require as one of its elements that the firearm be operable … and, thus, does not constitute a felony in New York for the purpose of enhanced sentencing … . People v Davis, 2025 NY Slip Op 00977, Second Dept 2-19-25

Practice Point: Here defendant's prior federal offense did not require that the firearm involve be operable. The corresponding New York felony requires operability. Therefore the federal offense could not serve as a predicate offense for a second-felony-offender designation.

February 19, 2025

CRIMINAL LAW.

THE TEN-YEAR LOOKBACK FOR A PERSISTENT VIOLENT FELONY OFFENDER DESIGNATION FOR SENTENCING PURPOSES IS TOLLED BY PRESENTENCE, AS WELL AS POST-SENTENCE, INCARCERATION (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Garcia, over an extensive two-judge dissenting opinion, determined the ten-year lookback for a persistent violent felony offender designation is tolled by any presentence period of incarceration:

A person convicted of a violent felony offense is a "persistent violent felony offender" for sentencing purposes if that person has "two or more predicate violent felony convictions" (Penal Law § 70.08 [1] [a], [b]). Those potentially qualifying

felony convictions must satisfy the timing requirement set forth in Penal Law § 70.04, namely that the sentence on the prior crime must have been imposed not more than ten years before the commission of the current felony (Penal Law § 70.04 [1] [b] [iv]). This ten-year lookback period is extended by any period of incarceration between commission of the prior felony and commission of the current felony (Penal Law § 70.04 [1] [b] [v]). Defendant challenges any extension of the ten-year lookback period using time he spent in presentence incarceration on his earliest qualifying felony conviction. We now hold that pursuant to Penal Law § 70.04, defendant's presentence incarceration time did extend the ten-year period and therefore defendant was properly sentenced as a persistent violent felony offender. People v Hernandez, 2025 NY Slip Op 00904, CtApp 2-18-25

Practice Point: The ten-year lookback for a persistent violent felony offender designation is tolled by both presentence and post-sentence incarceration.

February 18, 2025

CRIMINAL LAW, JUDGES.

THE PROBATION CONDITION THAT DEFENDANT "SUPPORT DEPENDENTS AND MEET OTHER FAMILY RESPONSIBILITIES" WAS NOT TAILORED TO THE OFFENSE (CRIMINAL POSSESSION OF A WEAPON) AND WAS THEREFORE DELETED (SECOND DEPT).

The Second Department, deleting a condition of probation, determined that the condition that defendant "support dependents and meet other family responsibilities" was not tailored to the offense (criminal possession of a weapon):

"Pursuant to Penal Law § 65.10(1), conditions of probation 'shall be such as the court, in its discretion, deems reasonably necessary to insure that [a] defendant will lead a law-abiding life or to assist [the defendant] to do so'" … . "The statute 'quite clearly restricts probation conditions to those reasonably related to a defendant's rehabilitation'" … .

Here, under the circumstances of this case, Condition No. 14, requiring that the defendant "[s]upport dependents and meet other family responsibilities," was improperly imposed because it was not individually tailored in relation to the offense and therefore, was not reasonably related to the defendant's rehabilitation

or necessary to insure that he will lead a law-abiding life … . People v Sobers, 2025 NY Slip Op 00992, Second Dept 2-19-25

Practice Point: Probation conditions must be tailored to the offense to which defendant pled guilty. Here the condition that defendant support dependents and meet family responsibilities was not relevant to the offense (criminal possession of a weapon).

February 19, 2025

ENVIRONMENTAL LAW, MUNICIPAL LAW, ADMINISTRATIVE LAW.

THE RECORD DOES NOT DEMONSTRATE THAT THE TOWN PLANNING BOARD TOOK THE REQUIRED "HARD LOOK" AT THE EFFECTS OF THE EMISSION OF HAZARDOUS AIR POLLUTANTS [HAPS] FROM THE PROPOSED "BIOSOLIDS REMEDIATION AND FERTILIZER PROCESSING FACILITY;" THE NEGATIVE DECLARATION WAS THEREFORE DEEMED ARBITRARY AND CAPRICIOUS (THIRD DEPT).

The Third Department, reversing Supreme Court's dismissal of the Article 78 petition contesting the town planning board's "negative declaration" regarding a proposed "biosolids remediation and fertilizer processing facility." The record did not demonstrate that the planning board took the required "hard look" at the effects of the emissions from the facility. Instead the board relied on proposed mitigation measures overseen by the Department of Environmental Conservation (DEC):

… [T]he planning board failed to take a hard look at the project's potential adverse impacts on air, resulting in an arbitrary and capricious negative declaration (see CPLR 7803 [3]). The voluminous record includes the planning board's meeting minutes, recordings and other documents, all of which are devoid of evidence that the planning board "thoroughly analyze[d]" the project's generation of 12.7 tons of designated HAPs [hazardous air pollutants] before it issued a negative declaration … . Instead, the planning board appears to have determined that, because the project's HAP emissions were "mitigated" to fall below the 25-ton threshold for a major source, then emissions at 50% of that rate were also mitigated … . Not only is this conclusion "without sound basis in reason" — it is not clear why the planning board decided that mitigating the impact of 25 tons of HAPs would do the

same for 12.7 tons of HAPs — but also "without . . . regard to the facts," as the record confirms that the planning board never considered the potential impacts of the project's HAP emissions at al … . * * *

… [T]he planning board's unexplained deference to DEC's permitting standards and periodic monitoring with respect to the impacts of the project's emissions on air quality does not satisfy its SEQRA obligations, resulting in an arbitrary and capricious negative declaration (see CPLR 7803 [3] …). Matter of Clean Air Action Network of Glens Falls, Inc. v Town of Moreau Planning Bd., 2025 NY Slip Op 01020, Third Dept 2-20-25

Practice Point: The lead agency for a State Environmental Quality Review Act (SEQRA) declaration cannot avoid a "hard look" at the potential hazardous air pollutants (HAPS} which will be produced by a proposed facility by simply deferring to the Department of Environmental Conservation's (DEC's) permitting and monitoring of the facility.

February 20, 2025

FAMILY LAW, CIVIL PROCEDURE, ATTORNEYS.

MOTHER'S OBJECTIONS TO THE CHILD SUPPORT ORDER WERE NEVER SERVED ON FATHER'S COUNSEL; THE SUBSEQUENT ORDER GRANTING THE OBJECTIONS IS VOID (THIRD DEPT).

The Third Department, reversing Family Court, determined that the mother's objections to the Support Magistrate's child support order, which Family Court granted, should have been served on father's counsel. Under the circumstances of the case, the failure to serve counsel rendered the related court orders void:

Family Ct Act § 439 (e) directs that "[a] party filing objections shall serve a copy of such objections upon the opposing party, who shall have [13] days from such service to serve and file a written rebuttal to such objections." This provision does not address the issue of whether service on an attorney representing a party constitutes service on the opposing party. Where a method of procedure is not prescribed, Family Ct Act § 165 (a) provides that "the provisions of the [CPLR] shall apply to the extent that they are appropriate to the proceedings involved … ." CPLR 2103 specifically pertains to the service of papers and provides that "papers to be served upon a party in a pending action shall be served upon the party's

attorney" (CPLR 2103 [b]). Accordingly, "service on an opposing party represented by counsel requires service on the attorney, not the party" … . The record supports that counsel was not served with the objections, and in fact only became aware of them upon receipt of Family Court's order granting same. * * * … [C]ounsel never obtained a copy of the objections, and thus never responded to same. Matter of Andersen v Bosworth, 2025 NY Slip Op 01029, Third Dept 2-20-25

Practice Point: Here the failure to serve father's counsel with mother's objections to the child support order, which were subsequently granted by Family Court, rendered the order granting the objections void.

February 20, 2025

FAMILY LAW, CIVIL PROCEDURE.

IN THIS TERMINATION OF PARENTAL RIGHTS PROCEEDING, ABSENT THE CONSENT OF THE PARTIES TO DISPENSE WITH IT, A DISPOSITIONAL HEARING MUST BE HELD AFTER THE COMPLETION OF THE FACT-FINDING HEARING (THIRD DEPT).

The Third Department determined the record supported termination of father's parental rights, but the order must be reversed because the court failed to hold a dispositional hearing after the completion of the fact-finding hearing. The matter was remitted:

Family Court erred in failing to hold a dispositional hearing. "Family Ct Act § 625 (a) expressly provides that, upon completion of a fact-finding hearing, a dispositional hearing may commence immediately after the required findings are made; provided, however, that if all parties consent the court may, upon motion of any party or upon its own motion, dispense with the dispositional hearing and make an order of disposition on the basis of competent evidence admitted at the fact-finding hearing" … . Given that the record is devoid of the parties' consent to dispense with a dispositional hearing, the matter is remitted for a dispositional hearing "or to otherwise affirmatively gain the parties' consent to dispense of the matter without one" … . Matter of Konner N. (Justin O.), 2025 NY Slip Op 01017, Third Dept 2-20-25

Practice Point: Here the order terminating father's parental rights was reversed because no dispositional hearing was held, and there was no indication the parties consented to proceeding without one. The matter was remitted.

February 20, 2025

FAMILY LAW, CIVIL PROCEDURE, JUDGES.

DENYING FATHER'S REQUEST FOR AN ADJOURNMENT IN THIS CUSTODY MODIFICATION PROCEEDING EFFECTIVELY DEPRIVED HIM OF HIS RIGHT TO TESTIFY AND HIS RIGHT TO A FULL AND FAIR EVIDENTIARY HEARING (SECOND DEPT).

The Second Department, reversing Family Court, determined the court improvidently exercised its discretion when it denied father's request for an adjournment of the custody modification proceedings. Father was effectively denied his right to testify:

"The granting of an adjournment rests in the sound discretion of the hearing court upon a balanced consideration of all relevant factors" … . "The determination to grant or deny an adjournment will not be overturned absent an improvident exercise of discretion" … . While adjournments are within the discretion of the hearing court, the range of that discretion is narrowed where a fundamental right of the parties is involved … . Generally, in a proceeding pursuant to Family Court Act article 6 seeking modification of a prior custody and visitation order, a full and comprehensive hearing is required, where due process requires that a parent be afforded a full and fair opportunity to be heard … .

After balancing the relevant factors, we find that under the circumstances of this case, the Family Court improvidently exercised its discretion in denying the father's request for an adjournment, as the court's denial of the requests for adjournment deprived the father entirely of his right to testify on his own behalf in the custody modification hearing, thereby depriving him of a full and fair evidentiary hearing … . Matter of Panizo v Douglas, 2025 NY Slip Op 00966, Second Dept, 2-19-25

Practice Point: Although the decision to grant or deny a request for an adjournment is discretionary, here the denial of the request effectively deprived father of his

right to a full and fair evidentiary hearing in this custody modification proceeding, requiring reversal.

February 19, 2025

FIDUCIARY DUTY, FRAUD, CIVIL PROCEDURE.

WHERE THE ONLY RELIEF SOUGHT FOR BREACH OF FIDUCIARY DUTY IS MONEY DAMAGES, THE STATUTE OF LIMITATIONS IS THREE YEARS (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the "breach of fiduciary duty" cause of action was subject to a three-year, not a six-year, statute of limitations and was time-barred:

"'New York law does not provide a single statute of limitations for breach of fiduciary duty claims'" … . Rather, "[t]he statute of limitations for a cause of action sounding in breach of fiduciary duty is dependent on the relief sought" … . Generally, "[a] cause of action [alleging] breach of fiduciary duty is governed by a six-year statute of limitations where the relief sought is equitable in nature (see CPLR 213[1]), or by a three-year statute of limitations where the only relief sought is money damages (see CPLR 214[4])" … . "Moreover, where an allegation of fraud is essential to a breach of fiduciary duty claim, courts have applied a six-year statute of limitations under CPLR 213(8)" … . "The statute of limitations for a cause of action alleging a breach of fiduciary duty does not begin to run until the fiduciary has openly repudiated his or her obligation or the relationship has been otherwise terminated" … . Berejka v Huntington Med. Group, P.C., 2025 NY Slip Op 00942, Second Dept 2-19-25

Practice Point: Where the relief sought for breach of fiduciary duty is equitable, or where fraud is an essential element, the applicable statute of limitations is six years. Where the only relief sought is money damages, the applicable statute of limitations in three years.

February 19, 2025

FREEDOM OF INFORMATION LAW (FOIL), CIVIL RIGHTS LAW.

THE FOIL PERSONAL PRIVACY EXEMPTION DOES NOT PROVIDE A BLANKET EXEMPTION FOR CIVILIAN COMPLAINTS AGAINST POLICE OFFICERS, INCLUDING UNSUBSTANTIATED COMPLAINTS; WHETHER SUCH A DOCUMENT SHOULD BE REDACTED OR WITHHELD MUST BE DETERMINED DOCUMENT-BY-DOCUMENT (CT APP).

The Court of Appeals, affirming the Appellate Division, in a full-fledged opinion by Judge Cannataro, determined the personal privacy exemption in FOIL did not provide a blanket exemption for civilian complaints against police officers, including unsubstantiated complaints. Rather, whether the personal privacy exemption applies must be determined on a record-by-record basis:

FOIL's personal privacy exemption permits an agency to withhold from public access any record that "if disclosed would constitute an unwarranted invasion of personal privacy" (Public Officers Law § 87 [2] [b]). We agree with respondents that FOIL, as amended in conjunction with the repeal of Civil Rights Law § 50-a, does not deny law enforcement officers the benefit of this exemption. However, the Appellate Division correctly concluded—consistent with uniform appellate precedent—that there is no categorical or blanket personal privacy exemption for records relating to complaints against law enforcement officers that are not deemed substantiated … . * * *

Rather than withhold all such records, Public Officers Law § 87 (2) requires an agency to evaluate each record individually and determine whether "a particularized and specific justification" exists for denying access on the ground that disclosing all or part of the record would constitute an unwarranted invasion of privacy … . Where redactions would prevent such an invasion and can be made without unreasonable difficulty, the agency must disclose the record with those necessary redactions … . The Appellate Division properly directed respondents to undertake this process, subject to further judicial review … . Matter of New York Civ. Liberties Union v City of Rochester, 2025 NY Slip Op 01010, CtApp 2-20-25

Practice Point: The personal privacy exemption in FOIL does not provide a blanket exemption for civilian complaints against police officers, even unsubstantiated complaints. Whether a document should be redacted or withheld under the personal privacy exemption must be determined document-by-document.

February 20, 2025

FREEDOM OF INFORMATION LAW (FOIL), CIVIL RIGHTS LAW.

THE FORMER EXEMPTION FROM A FOIL REQUEST FOR POLICE DISCIPLINARY RECORDS WAS REPEALED IN 2020; THE REPEAL APPLIES RETROACTIVELY SUCH THAT DISCIPLINARY RECORDS CREATED PRIOR TO THE REPEAL ARE NO LONGER EXEMPT (CT APP).

The Court of Appeals, affirming the Appellate Division, in a full-fledged opinion by Judge Halligan, determined that the repeal of the exemption from a FOIL request for police disciplinary records applies retroactively to documents created before the repeal:

… [W]e conclude that the Legislature intended for the statutory repeal to have retroactive effect. For starters, there is no indication that the repeal was intended to affect the usual manner in which FOIL operates. FOIL requires agencies to "make available for public inspection and copying all records" (Public Officers Law § 87 [2]), and it defines "records" with reference to whether an agency possesses information, but without reference to the date the information was created (id. § 86 [4] [defining "record" as "any information kept" or "held . . . in any physical form whatsoever"]). The amendments impose various redaction requirements and personal privacy protections for law enforcement disciplinary records specifically, yet they do not, for example, single out records created before a certain date for special treatment, or direct that disclosure of any record is tethered to the date it was created. Had the Legislature intended to deviate from FOIL's presumption that information kept or held by an agency is disclosable by exempting records created prior to the repeal, or to mandate that an agency responding to a FOIL request ascertain and apply the law that governed when each responsive record was created, then surely it would have said as much. Matter of NYP Holdings, Inc. v New York City Police Dept., 2025 NY Slip Op 01009, CtApp 2-20-25

Practice Point: The exemption from a FOIL request for police disciplinary records was repealed in 2020. The repeal applies retroactively to police disciplinary records created prior to the repeal.

February 20, 2025

NEGLIGENCE, CIVIL PROCEDURE, EDUCATION-SCHOOL LAW.

THE SIX-MONTH WAITING PERIOD ASSOCIATED WITH THE REVIVAL OF OTHERWISE TIME-BARRED ACTIONS PURSUANT TO THE CHILD VICTIMS ACT IS NEITHER A STATUTE OF LIMITATIONS NOR A CONDITION PRECEDENT; THEREFORE, PURSUANT TO FEDERAL PROCEDURAL LAW, THE SECOND CIRCUIT MAY RULE THAT DEFENDANT FORFEITED THE RIGHT TO A TIMELINESS DISMISSAL OF THE FEDERAL COMPLAINT (BASED ON THE ARGUMENT PLAINTIFF'S ACTION WAS PREMATURE) BY FAILING TO TIMELY RAISE THE ISSUE (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Troutman, answering a certified question from the Second Circuit, determined the six-month waiting period associated with the revival of negligence actions pursuant to the Child Victims Act, creating a two-year window for the filing of otherwise time-barred actions, was neither a statute of limitations nor a condition precedent. Therefore, under federal procedural law, the defendant's failure to timely raise the issue in the federal proceedings forfeited his right to dismissal of the complaint on the ground plaintiff's action was premature:

In 2019, the legislature passed the Child Victims Act (CVA), which provided that previously time-barred tort claims based on sex offenses against children could be brought within a specified time (see CPLR 214-g). As amended, the CVA provided that such a claim "is hereby revived, and action thereon may be commenced not earlier than six months after, and not later than two years and six months after" February 14, 2019—i.e., "the effective date of this section" (id.). In other words, actions on these claims could be commenced "not earlier than" August 14, 2019 and "not later than" August 14, 2021. * * *

On April 26, 2019, plaintiff commenced a negligence action in state court against defendant, alleging that a teacher employed in one of defendant's schools engaged in unlawful sexual conduct with her in and around 2009 and 2010, when she was a student under age 17, and that, in 2013, as a result of that conduct, the teacher pleaded guilty to rape in the third degree. * * *

On September 3, 2021, defendant moved for summary judgment dismissing the complaint on statute of limitations grounds. Defendant argued, for the first time, that the complaint must be dismissed because plaintiff commenced her action before CPLR 214-g's period for filing claims began. Significantly, defendant filed its motion less than three weeks after the statutory period for filing claims ended, meaning that plaintiff would be unable to recommence a timely action if defendant's motion succeeded. Jones v Cattaraugus-Little Val. Cent. Sch. Dist., 2025 NY Slip Op 01007, CtApp 2-20-25

Practice Point: Here the Court of Appeals, answering the Second Circuit's question, determined the six-month waiting period for an otherwise time-barred action brought pursuant to the Child Victims Act was not a statute of limitations or a condition precedent. Therefore the Second Circuit was free to deny a federal defendant's motion to dismiss the Child Victims Act complaint on the ground the action was premature.

February 20, 2025

NEGLIGENCE, EDUCATION-SCHOOL LAW, CIVIL PROCEDURE.

BARE ALLEGATIONS THAT A SCHOOL KNEW OR SHOULD HAVE KNOWN OF A TEACHER'S PROPENSITY TO ABUSE STUDENTS, UNSUPPORTED BY ANY FACTUAL ALLEGATIONS, ARE NOT ENOUGH TO STATE A CAUSE OF ACTION FOR NEGLIGENCE OR NEGLIGENT RETENTION (SECOND DEPT).

The Second Department, reversing Supreme Court in this Child Victims Act case against a school (Central Yeshiva), determined the complaint did not state causes of action for negligence or negligent retention of the teacher (Charitonov) who allegedly sexually abused the plaintiff. Bare allegations that the school knew or should have known of the teacher's propensity for abuse are not enough to avoid dismissal:

Here, the complaint failed to state causes of action alleging negligence and negligent retention, supervision, and direction against Central Yeshiva, as the complaint did not sufficiently plead that Central Yeshiva knew or should have known of Charitonov's propensity to commit the alleged wrongful acts and failed to provide any factual allegations from which it could be inferred that Central

Yeshiva had prior notice of similar conduct at its dormitory … . The complaint merely asserted bare legal conclusions that Central Yeshiva knew or should have known of Charitonov's propensity for improper conduct without providing any factual allegations that Charitonov's abuse of the plaintiff was foreseeable … . Moreover, the plaintiff failed to adequately demonstrate any basis to allow him to conduct discovery prior to directing dismissal of those causes of action (see CPLR 3211[d] …). Doe v Educational Inst. Oholei Torah, 2025 NY Slip Op 00948, Second Dept 2-19-25

Practice Point: In a Child Victims Act case against a school stemming from the abuse of a child by a teacher, bare allegations that the school knew or should have known of the teacher's propensity for abuse do not state a cause of action for negligence or negligent retention. The complaint must include supporting factual allegations.

February 19, 2025

NEGLIGENCE, MUNICIPAL LAW, CIVIL PROCEDURE, FAMILY LAW, IMMUNITY.

A MUNICIPALITY OWES A CHILD IT PLACES IN FOSTER CARE A SPECIAL DUTY SUCH THAT THE MUNICIPALITY CAN BE LIABLE FOR A NEGLIGENT PLACEMENT WHICH LEADS TO FORESEEABLE HARM TO THE CHILD (CT APP).

The Court of Appeals, reversing the Appellate Division, in a full-fledged opinion by Judge Troutman, over a two-judge dissenting opinion, determined a municipality owes a child placed in foster care a special duty, such that the municipality, although performing a governmental function, can be liable for negligent placement of a child:

Today we hold that municipalities owe a duty of care to the children the municipalities place in foster homes because the municipalities have assumed custody of those children. As a result, we reverse the decision of the Appellate Division.

Plaintiff, formerly a child in foster care, commenced this action pursuant to the Child Victims Act (see CPLR 214-g) against defendant Cayuga County and "Does

1-10," who she alleged were "persons or entities with responsibilities for [p]laintiff's safety, supervision and/or placement in foster care." According to the complaint, the County placed plaintiff in foster care in 1974, when she was three months old. While in the foster home selected by the County, plaintiff allegedly suffered horrific abuse. Plaintiff alleged that her foster parent sexually abused her over the course of approximately seven years, beginning when she was 18 months old and continuing until she was eight years old. The foster parent allegedly coerced plaintiff's compliance with the sexual abuse by inflicting severe physical abuse, resulting in plaintiff sustaining broken bones and a head wound. * * *

By assuming legal custody over the foster child, the applicable government official steps in as the sole legal authority responsible for determining who has daily control over the child's life … . We thus hold that a municipality owes a duty to a foster child over whom it has assumed legal custody to guard the child from "foreseeable risks of harm" arising from the child's placement with the municipality's choice of foster parent … . Weisbrod-Moore v Cayuga County, 2025 NY Slip Op 00903, CtApp 2-18-25

Practice Point: A municipality generally is not liable for injury resulting from the exercise of a governmental function absent a special duty owed to the injured party. Resolving a split of authority, here the Court of Appeals held a municipality owes a special duty to a child it places in foster care.

February 18, 2025