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Weekly Reversal Report
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CIVIL PROCEDURE, CONTRACT LAW, FRAUD.

HERE THE PLAINTIFF WAS IN PRIVITY WITH A NONPARTY WHICH WAS DEEMED TO HAVE HAD A "VICARIOUS DAY IN COURT" SUCH THAT THE DOCTRINE OF RES JUDICATA PRECLUDED PLAINTIFF'S ACTION (FIRST DEPT).

The First Department, reversing Supreme Court, in a full-ledged opinion by Justice Scarpulla, determined the doctrine of res judicata required dismissal of plaintiff's fraudulent conveyance cause of action. The lawsuit concerned disputed ownership of precious gems. The opinion is fact-specific and too complex to fairly summarize here. With respect to the application of the res judicata doctrine, the court wrote:

This appeal stems from a dispute between precious gemstone traders. Plaintiff Shanghai Pearls & Gems, Inc. … alleges that defendants … improperly transferred gems they received on consignment from nonparty Diamond Corporation Capital Group, LLC (D&M). The transferred gems included the "Pink Diamond," in which plaintiff held a one-third interest, and the "Kashmir Sapphire." * * *

Although defendants' settlement with D&M did not release plaintiff's original one-third interest in the Pink Diamond, plaintiff's fraudulent conveyance claims based on that interest should be dismissed because the claims are barred by res judicata. Pursuant to the doctrine of res judicata, a valid final judgment precludes "future actions between the same parties or those in privity with them on any claims arising out of the same transaction or series of transactions . . . , even if based upon different theories or if seeking a different remedy" … .

A determination that privity exists, in the context of res judicata, must be based on a "flexible analysis" of the relationship between the party and the nonparty in the previous litigation … . This analysis, in turn, requires courts to consider "whether the circumstances of the actual relationship, the mutuality of interests, and the manner in which the nonparty's interest were represented in the earlier litigation established a functional representation such that the nonparty may be thought to have had a vicarious day in court" … .

Here, plaintiff was in privity with D&M vis-À-vis the assignment of the interests in the Pink Diamond and Kashmir Sapphire. D&M's claims against defendants in the bankruptcy proceeding and plaintiff's claims against defendants in this action "are closely related in time, space, motivation, or origin" such that the claims "arise out of the same transaction, and res judicata should apply" … . Shanghai Pearls & Gems, Inc. v Paul, 2025 NY Slip Op 01433, First Dept 3-13-25

Practice Point: Although this opinion is complicated and fact-specific, it provides useful insight into the flexibility of the "privity" element of the res judicata doctrine. Here the nonparty with which plaintiff was in privity was deemed to have had a "vicarious day in court" triggering the application of the res judicata doctrine to the plaintiff's action.

March 13, 2025

CIVIL PROCEDURE, CONTRACT LAW, LEGAL MALPRACTICE, NEGLIGENCE, EVIDENCE.

THERE WAS NO EVIDENCE SUBSTANTIATING THE PURPORTED "OFF THE RECORD" STIPULATION OF SETTLEMENT; THE TERMS OF THE SETTLEMENT AGREEMENT WERE NEVER FILED WITH THE COUNTY CLERK; A PRETRIAL CONFERENCE WITH THE JUDGE'S CLERK DOES NOT MEET THE "OPEN COURT" REQUIREMENT FOR A STIPULATION OF SETTLEMENT (FOURTH DEPT).

The Fourth Department, reversing (modifying) Supreme Court, determined the purported stipulation of settlement of this legal malpractice action did not meet the requisite criteria and could not be enforced:

It is well settled that " '[a]n oral stipulation of settlement that is made in open court and stenographically recorded is enforceable as a contract and is governed by general contract principles for its interpretation and effect' " (… see generally CPLR 2104). Here, however, in support of her cross-motion, plaintiff failed to attach any transcripts or other evidence substantiating the purported settlement agreement. Indeed, we conclude that "[t]he record provides no basis for concluding

that an enforceable stipulation was entered into between the parties" inasmuch as "[p]ertinent discussions took place off the record" … . Plaintiff also failed to establish that the terms of the settlement agreement were ever filed with the county clerk (see CPLR 2104 …).

Even if plaintiff had submitted written evidence of the parties' purported stipulation of settlement, we conclude that said stipulation was not entered in "open court" inasmuch as there is no dispute that the alleged settlement was reached during a pretrial conference with the court's law clerk … . Indeed, the "open court requirement . . . is not satisfied in locations without a Justice presiding . . . , and it is not satisfied during less formal stages of litigation, such as a pretrial conference" … . Guzman-Martinez v Rosado, 2025 NY Slip Op 01483, Fourth Dept 3-14-25

Practice Point: Consult this decision for the criteria for an enforceable stipulation of settlement, i.e., a transcript or other evidence of the terms of any oral agreement, the filing of the terms of the agreement with the county clerk, and the entering of the agreement in open court with a judge presiding.

March 14, 2025

CONTRACT LAW, EDUCATION-SCHOOL LAW.

PLAINTIFF, A CANISIUS COLLEGE STUDENT IN 2020, DID NOT STATE A CAUSE OF ACTION FOR BREACH OF IMPLIED CONTRACT BASED ON THE SHIFT FROM IN-PERSON TO REMOTE LEARNING BECAUSE OF COVID (FOURTH DEPT).

The Fourth Department, affirming Supreme Court, over a two-justice dissent, determined plaintiff did not state a cause of action for breach of contract based on the cessation of in-person classes at Canisius College during COVID:

Plaintiff contends on his appeal that the court erred in granting the motion insofar as it sought to dismiss the breach of contract cause of action to the extent it sought recovery of the tuition he paid to Canisius for the spring 2020 semester. "New York courts have long recognized that the relationship between a university and its

students is contractual in nature . . . , and that specific promises set forth in a school's bulletins, circulars and handbooks, which are material to the student's relationship to the school, can establish the existence of an implied contract" (Rynasko v New York Univ., 63 F4th 186, 197 [2d Cir 2023] …). Here, however, we reject plaintiff's contention because "the amended complaint contains only conclusory allegations of an implied contract to provide exclusively in-person learning during the spring 2020 semester which are unsupported by any specific promise that is material to" plaintiff's relationship with Canisius … . We agree with the Second Department that, in this context, the cause of action for breach of contract requires an allegation of "a specific promise to provide the plaintiff with exclusively in-person learning" … . The amended complaint also fails to state, in anything more than a conclusory fashion, the manner in which plaintiff's unspecified course of study was impacted by Canisius's shift to remote operations … . McCudden v Canisius Coll., 2025 NY Slip Op 01539, Fourth Dept 3-14-25

March 14, 2025

CRIMINAL LAW, VEHICLE AND TRAFFIC LAW, EVIDENCE.

THE OFFICER'S TESTIMONY HE COULD NOT SEE INSIDE THE CAR FROM A DISTANCE OF 10 TO 15 FEET PROVIDED PROBABLE CAUSE TO STOP THE CAR FOR A "TINTED WINDOWS" VIOLATION; THE DISSENT ARGUED IT WAS DARK AT THE TIME OF THE STOP AND THE OFFICER DID NOT LINK HIS INABILITY TO SEE INSIDE THE CAR TO THE TINTED WINDOWS AS OPPOSED TO THE AMBIENT DARKNESS (FOURTH DEPT).

The Fourth Department, affirming County Court, over a dissent, determined the officer's testimony he could not see the driver's face from a distance of 10 to 15 feet demonstrated probable cause of a "tinted window" violation which supported the vehicle stop. The dissent argued the officer's testimony was insufficient to demonstrate probable cause because it was dark at the time of the stop and the officer did not link his inability to see inside the car to the tinted windows, as opposed to the ambient darkness:

Here, the officer who initiated the stop testified at the suppression hearing that he looked directly at the driver's side window of the vehicle defendant was operating, that he did so from a distance of no more than 10 to 15 feet, and that he was "unable to see the driver of the vehicle" through the window. We conclude that the officer's testimony contained sufficient facts to establish that he reasonably believed that the windows were excessively tinted in violation of Vehicle and Traffic Law § 375 (12-a) (b) (2) … .

From the dissent:

The officer who attempted to initiate the stop of defendant's vehicle testified that he believed any level of tint on the front driver's side window or the front passenger window would be illegal and that the actual tint on the vehicle's windows was never tested with a tint meter. He further testified that he initially observed the vehicle when it was dark outside and that he was unable to see the driver inside the vehicle. At no point did the officer testify that it was the window tint, as opposed to the ambient darkness, that prevented him from seeing the driver. The officer's failure to link the allegedly excessive tint with his inability to see into the vehicle distinguishes this case from those cited by the majority, in which the arresting officer "testified at the suppression hearing that he could tell the window tints were too dark because he could not see into the [vehicle]" … or "specifically testified that the driver's side windows were 'so dark that [he] was unable to actually see the operator of the vehicle as the vehicle was going by' " … . Because the officer's testimony here failed to link his conclusory belief that the windows were excessively tinted with an objective fact in support of that belief, I conclude that the People failed to meet their burden … . People v Hall, 2025 NY Slip Op 01457, Fourth Dept 3-14-25

Practice Point: Consult this decision for some insight into the proof required for a valid "tinted-windows-violation" traffic stop.

March 14, 2025

CRIMINAL LAW, APPEALS.

ASSAULT THIRD IS AN INCLUSORY CONCURRENT COUNT OF ASSAULT SECOND; THE ASSAULT THIRD CONVICTION REVERSED AND THE COUNT DISMISSED; THE ISSUE NEED NOT BE PRESERVED FOR APPEAL (FOURTH DEPT).

The Fourth Department determined the assault third conviction must be reverses as an inclusory concurrent count of the assault second degree conviction. The issue need not be preserved for appeal:

… [A]ssault in the third degree is an inclusory concurrent count of assault in the second degree … . Thus, that part of the judgment convicting defendant of assault in the third degree must be reversed and count 2 of the indictment dismissed … , and we therefore modify the judgment accordingly. Contrary to the People's contention, preservation of this issue is not required … . People v Niles, 2025 NY Slip Op 01502, Fourth Dept 3-14-25

Practice Point: Assault third is an inclusory concurrent count of assault second. A defendant cannot stand convicted of both. The issue can be raised for the first time on appeal.

March 14, 2025

CRIMINAL LAW, ATTORNEYS.

DEFENSE COUNSEL'S LACK OF PREPARATION AND FAILURE TO LIMIT MOLINEUX EVIDENCE DEPRIVED DEFENDANT OF EFFECTIVE ASSISTANCE; NEW TRIAL ORDERED (FOURTH DEPT).

The Fourth Department, reversing defendant's conviction, determined defendant was not provided with effective assistance of counsel:

… [T]he record reveals that on several occasions as the case neared trial, including during the Mapp and Molineux hearings, and subsequently at the trial defense counsel was unfamiliar with and had not reviewed relevant and critical discovery

obtained from defendant's cell phones following the execution of a search warrant. For example, defense counsel initially failed to object to the admission of a flash drive containing the entire contents of defendant's cell phones, but, when the People later isolated a portion of the cell phone contents as a separate exhibit for the jury, defense counsel objected—although the contents had already been admitted—and acknowledged that he had not had a chance to review "the exact exhibit." Defense counsel also failed to object to the portion of those contents containing voice notes, which constituted improper hearsay … . Additionally, defense counsel's failure to review the contents of defendant's cell phones had the result that he could not appreciate how important certain text messages and other communications were to the People's case. Defense counsel belatedly sought to admit certain physical evidence of financial transactions that had not previously been disclosed during discovery to counter the communications presented by the People. County Court, however, precluded that physical evidence. Furthermore, defense counsel never sought a limiting instruction on the Molineux evidence that the People were permitted to introduce … . We conclude that "[t]here is simply no legitimate explanation for" defense counsel's failure to properly investigate the law, facts, and issues relevant to the case and that "[t]his failure seriously compromised defendant's right to a fair trial" … . People v Cousins, 2025 NY Slip Op 01535, Fourth Dept 3-14-25

Practice Point: Here defense counsel did not review evidence provided in discovery and failed to seek a limiting instruction on the Molineux evidence the People were allowed to introduce. A new trial was ordered.

March 14, 2025

CRIMINAL LAW, EVIDENCE.

ALTHOUGH THE DEFENDANT WAS NOT THE PAROLE ABSCONDER FOR WHOM THE POLICE HAD AN ARREST WARRANT, THE MAJORITY DETERMINED THE PEOPLE PROVED THE POLICE REASONABLY BELIEVED DEFENDANT WAS THE PAROLE ABSCONDER WHEN THEY APPROACHED HIM, WHICH JUSTIFIED THE PURSUIT OF THE DEFENDANT; TWO DISSENTERS ARGUED THE PROOF AT THE SUPPRESSION HEARING, WHICH DID NOT INCLUDE TESTIMONY BY THE OFFICERS WHO FIRST APPROACHED DEFENDANT, DID NOT DEMONSTRATE THE POLICE REASONABLY BELIEVED DEFENDANT WAS THE SUBJECT OF THE ARREST WARRANT (FOURTH DEPT).

The Fourth Department, over a two-justice dissent, determined the police reasonably (but erroneously) believed defendant was the parole absconder for whom they had an arrest warrant. The pursuit and arrest, based in part on observing the defendant discard an handgun, were deemed proper:

… [T]here is no dispute that the apprehension team had probable cause to arrest the parole absconder inasmuch as an arrest warrant had been issued. As for the second element, "[t]he reasonableness of the arresting officers' conduct must be determined by considering the totality of the circumstances surrounding the arrest"… , and "great deference should be given to the determination of the suppression court, which had the opportunity to observe the demeanor of the witnesses and to assess their credibility, and its factual findings should not be disturbed unless clearly erroneous" … . Even though "[f]light alone . . . is insufficient to justify [a] pursuit" … , we conclude that under the totality of the circumstances present here the arresting officer's testimony establishes that he reasonably believed that defendant was the absconder when he initiated his pursuit. Defendant closely matched the height and weight provided in the parole absconder's description, covered his face with a ski mask, was in the location provided by the absconder's girlfriend, and immediately fled upon being approached by one of the apprehension team's unmarked vehicles. Inasmuch as the initial pursuit and subsequent arrest of defendant—which occurred after he was

observed holding and then discarding a handgun—were lawful, the court did not err in refusing to suppress the physical evidence recovered during the post-arrest search of defendant and the surrounding area … .

From the dissent:

In our view, however, it does not appear that the pursuing officers had even a subjectively reasonable belief that defendant was the parolee for whom they had an arrest warrant. Indeed, the People, who are "put to the burden of going forward to show the legality of the police conduct in the first instance" … , failed to adduce anything other than that defendant matched the generic height and weight of the average male in the general population. Notably, the People failed to call the approaching officers, and thus adduced no testimony with respect to their actions, observations, or whether they believed—reasonably or not—that defendant was the parole absconder, particularly in the absence of any evidence that they chased defendant when he fled.

The officers who did testify at the suppression hearing—the pursuing officers—testified simply that defendant roughly matched the height and weight of the parolee and that he fled. As set forth above, the pursuing officers did not testify that the approaching officers gave chase when defendant fled. Coupled with the pursuing officer's testimony that at the point when defendant fled, he was "free to leave," the record at the suppression hearing undercuts any possible claim that the pursuing officers were not simply chasing a man who fled, but that they actually believed defendant to be the parolee for whom they had an arrest warrant. People v Jones, 2025 NY Slip Op 01524, Fourth Dept 3-14-25

Practice Point: Consult this decision for insight into the validity of an arrest of the "wrong person," i.e., the approach, pursuit and arrest of one person based upon an arrest warrant for issued for another.

March 14, 2025

CRIMINAL LAW, EVIDENCE.

THE MAJORITY CONCLUDED THE HEARSAY ALLEGATIONS IN THE SEARCH WARRANT APPLICATION PROVIDED PROBABLE CAUSE TO SEARCH TWO DIFFERENT RESIDENCES; THE TWO-JUSTICE DISSENT ARGUED THE APPLICATION DID NOT PROVIDE PROBABLE CAUSE TO SEARCH ONE OF THE TWO RESIDENCES, I.E., THERE WERE NO DETAILS DESCRIBING THE NARCOTICS THE INFORMANT OBSERVED IN THE RESIDENCE AND NO INDICATION WHEN THE OBSERVATON WAS MADE (FOURTH DEPT).

The Fourth Department, over a two-justice dissent, determined the hearsay allegations in the search warrant application were sufficient to provide probable cause to search two different residences. The two dissenting justices agued that the search warrant application focused on one residence and barely mentioned the other:

From the dissent:

Here, the warrant application in question concerned two addresses, i.e., 205 Curtis Street and 215 Curtis Street, but contained a mere two statements based on the confidential informant's claimed knowledge regarding 205 Curtis Street. Specifically, it stated that "[t]he [confidential informant] has been inside 205 Curtis St[reet] on multiple occasions and is aware that narcotics are kept inside the location," and that "[t]he [confidential informant] . . . has been to 205 and 215 Curtis Street multiple times for narcotics transactions." The remaining contents of the six-page, single-spaced warrant application focused on 215 Curtis Street.

… [W]e agree with defendant that the hearsay information regarding 205 Curtis Street does not provide the requisite basis of knowledge justifying the issuance of the search warrant for that address … . First, we note that the application neither details any transaction that occurred at 205 Curtis Street, nor specifies the type of narcotic exchanged during such transaction. Second, no time frame is provided for the hearsay statements concerning 205 Curtis Street, and it is therefore entirely possible that the unspecified drug transaction occurred years or decades ago. In fact, the warrant application entirely fails to set forth what was actually observed

by the informant at 205 Curtis Street or when it was observed … . On this record, we conclude that there is no basis provided to support the informant's claimed awareness of narcotics at 205 Curtis Street. People v Berry, 2025 NY Slip Op 01523, Fourth Dept 3-14-25

Practice Point: According to the dissent, the bare allegation the informant observed narcotics in a residence, without any detail and without any time frame, did not provide probable cause for the search of that residence.

March 14, 2025

CRIMINAL LAW, FAMILY LAW.

RESTRAINING A PERSON FOR A FEW SECONDS WHILE ATTEMPTING TO PULL THAT PERSON INTO A VEHICLE DOES NOT SATISFY THE CRITERIA FOR KIDNAPPING (SECOND DEPT).

The Second Department, reversing (modifying) Family Court in this juvenile delinquency proceeding, determined the evidence did not support the kidnapping charge:

… Family Court's determination that the appellant committed acts which, if committed by an adult, would have constituted the crime of kidnapping in the second degree was against the weight of the evidence. "A person is guilty of kidnapping in the second degree when he [or she] abducts another person" (Penal Law § 135.20 …). As relevant here, abduction "means to restrain a person with intent to prevent his [or her] liberation by either secreting or holding him [or her] in a place where he [or she] is not likely to be found" … . "Restrain means to restrict a person's movements intentionally and unlawfully in such manner as to interfere substantially with his [or her] liberty by moving him [or her] from one place to another, or by confining him [or her] . . . without consent and with knowledge that the restriction is unlawful" … . Here, the presentment agency's evidence demonstrated that the appellant restrained the complainant for a very short time while the two were in the midst of a physical altercation. Although the complainant testified that the appellant pulled her partway into a vehicle, at least one door of the vehicle remained open and the vehicle traveled only a very short

distance before stopping again within a matter of mere seconds. The evidence established only that the appellant restrained the complainant, without the requisite "secreting or holding [her] in a place where [she] is not likely to be found" (Penal Law § 135.00[2][a]). Matter of Marco F., 2025 NY Slip Op 01365, Second Dept 3-12-25

Practice Point: Consult this decision for a clear explanation of the elements of "kidnapping." Briefly restraining a person while unsuccessfully trying to pull that person into a vehicle is not enough.

March 12, 2025

CRIMINAL LAW, JUDGES.

WHERE A DEFENDANT IS AN "ELIGIBLE YOUTH," THE SENTENCING COURT MUST CONSIDER YOUTHFUL OFFENDER TREATMENT; IF THE RECORD IS SILENT ON THE ISSUE, THE SENTENCE WILL BE VACATED AND THE MATTER REMITTED (SECOND DEPT).

The Second Department, vacating defendant's sentence and remitting the matter, determined defendant was an "eligible youth" but the record was silent about whether the court considered youthful offender treatment:

"Criminal Procedure Law § 720.20(1) requires a court to make a youthful offender determination in every case where the defendant is eligible, even where the defendant fails to request it, or agrees to forego it as part of a plea bargain" … . "Where a defendant is an eligible youth, the determination of whether to afford him or her youthful offender treatment must be explicitly made on the record" … . Here, even though the defendant was an eligible youth, the record does not demonstrate that the Supreme Court made such a determination. Accordingly, the defendant's sentence must be vacated and the matter remitted to the Supreme Court, Queens County, for resentencing after a determination as to whether the defendant should be afforded youthful offender treatment … . People v Suckoo, 2025 NY Slip Op 01396, Second Dept 3-12-25

Practice Point: If the record does not reflect that the court considered youthful offender treatment for an "eligible youth," the sentence will be vacated.

March 12, 2025

CRIMINAL LAW, JUDGES.

A DEFENDANT'S RIGHT TO BE PERSONALLY PRESENT FOR SENTENCING EXTENDS TO RESENTENCING AND TO THE AMENDMENT OF A SENTENCE (SECOND DEPT).

The Second Department, reversing Supreme Court and remitting the matter, determined defendant had a right to be present at his resentencing:

The defendant was not present at the resentencing proceeding in June 2023 because he was incarcerated in Florida. The Supreme Court nonetheless resentenced the defendant to the same sentence as had been previously imposed.

"A defendant has a fundamental right to be personally present at the time sentence is pronounced" … , which "extends to resentencing or to the amendment of a sentence" … . Although the defendant had already completed serving the incarceration portion of his sentence as of resentencing, the defendant had not completed the postrelease supervision component of his sentence, for which the Supreme Court could have resentenced the defendant to a minimum period of 3 years and a maximum period of 10 years (see Penal Law § 70.45[2-a][a]). The defendant was not present at the resentencing proceeding, and the record is devoid of any indication that he waived his right to be present … . People v Allen, 2025 NY Slip Op 01381, Second Dept 3-12-25

Practice Point: Absent a waiver, a defendant has the right to be personally presented at a resentencing.

March 12, 2025

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

THE EVIDENCE THAT DEFENDANT HAD USED ALCOHOL TO EXCESS AT THE TIME OF THE CRIME WAS CONFLICTING AND INSUFFICIENT; IN ADDITION, THE DEFENDANT WAS NOT IN CUSTODY OR UNDER SUPERVISION AT THE TIME OF ALLEGED MISCONDUCT; THEREFORE 25 POINTS WERE TAKEN OFF DEFENDANT'S RISK-LEVEL ASSESSMENT (FOURTH DEPT).

The Fourth Department determined the evidence did not support the finding that defendant was intoxicated at the time of the offense. In addition the SORA court wrongly found that defendant was in custody or under supervision at the time of alleged misconduct. Therefore a total of 25 points were wrongly applied to the risk-level assessment:

… [I]n order to demonstrate that [defendant] was abusing . . . alcohol at the time of the offense, the People [were required to] show by clear and convincing evidence that [defendant] used alcohol in excess . . . at the time of the crime" … . Here, the victim informed a caseworker that, on the night of that incident, defendant had been "outside by the fire drinking." Defendant's ex-wife also indicated in her victim impact statement that defendant was "drunk" on the night of that incident, but it is unclear whether the source of her information was the victim or hearsay from an unidentified third-party with whom the victim had spoken and whose reliability could not be tested … . In contrast, the victim denied that defendant had been drinking at the time of the second incident and indicated that defendant "normally doesn't drink." In his interview with probation, defendant denied "current alcohol or substance use and . . . any current or past treatment for such." We conclude that there is no indication in the record that defendant abused alcohol by drinking in excess, that defendant became intoxicated, or that alcohol affected his behavior during the incident … . Nor is it "clear from the record what time the drinking occurred, how much [defendant] had to drink, and how much time passed before he abused [the] victim" … . The People thus failed to establish that defendant abused alcohol at the time of the offensive conduct, and the court erred

in assessing 15 points under risk factor 11. People v Crane, 2025 NY Slip Op 01530,Fourth Dept 3-14-25

Practice Point: Here the evidence that defendant had used alcohol to excess at the time of the crime was weak and conflicting, rendering it insufficient to support the 15 points assessed on that ground.

March 14, 2025

CRIMINAL LAW, VEHICLE AND TRAFFIC LAW.

IN THE CONTEXT OF DRIVING WITH A SUSPENDED LICENSE, THE COURT OF APPEALS EXPLAINED THE CRITERIA FOR A VALID MISDEMEANOR COMPLAINT, VERSUS A MISDEMEANOR INFORMATION (CT APP).

The Court of Appeals, affirming the convictions by guilty pleas to misdemeanor complaints, in a full-fledged opinion by Judge Troutman, determined the factual allegations in the complaints were sufficient. The defendants were charged with driving with a suspended license and argued the complaints did not demonstrate reasonable cause to believe they knew they their licenses had been suspended:

The misdemeanor complaints here satisfy the reasonable cause standard. The complaints "state[d] the time, date and location of the[ ] events," and otherwise "provide[d] [defendants] with enough information" of how defendants committed the crime "to put [them] on notice of the crime" and "to prevent defendant[s] from facing double jeopardy on the same charges" … . Defendants knew from the complaints what they were accused of doing and where, when, and how they allegedly did it. Based on the complaints' allegations, defendants could assess what defenses were available to them, such as contending that they never knew their licenses were suspended, that they were never served with a summons, or that the summonses didn't warn them that their licenses would be suspended if they failed to respond.

… [D]efendants contend that the complaints failed to provide reasonable cause because they did not specifically allege that defendants personally received the

summonses. * * * … [T]he numerous summonses issued to each defendant are sufficient to convince a person of ordinary intelligence, judgment, and experience that it is reasonably likely defendants received at least one of them. …

… [D]efendants' consent to prosecution by misdemeanor complaint relieved the People of their obligation under a misdemeanor information to proffer "[n]on-hearsay allegations establishing every element of each charge" … . Although that obligation—known as "the prima facie case requirement"—applies to an information, "[a] misdemeanor complaint, in comparison, need only set forth facts that establish reasonable cause to believe that the defendant committed the charged offense" … .

Nor were the complaints deficient simply because they did not explain how the officers knew about suspension warnings appearing on traffic summonses or about those suspensions occurring automatically (by computer) within four weeks of a defendant's failure to answer those summonses. We do not require complaints to contain such "formulaic recitation" … . Moreover, at this stage, the officers' statements about summonses "appear[] reliable" … , inasmuch as the law tasks officers with delivering traffic summonses to alleged violators … . People v Willis, 2025 NY Slip Op 01405. CtApp 3-13-25

Practice Point: Consult this decision for an explanation of the criteria for a valid misdemeanor complaint, versus a misdemeanor information.

March 13, 2025

FAMILY LAW, JUDGES.

FATHER'S RIGHT TO FILE FUTURE PETITIONS FOR MODIFICATION OF CUSTODY SHOULD NOT HAVE BEEN CONDITIONED ON MENTAL HEALTH TREATMENT; RATHER THE TREATMENT SHOULD BE A CONDITION FOR SUPERVISED VISITATION (FOURTH DEPT).

The Fourth Department noted that father's right to file future modification-of-custody petitions should not have been conditioned upon mental health treatment:

"It is well established that a court lacks authority to condition any future application for modification of a parent's [custody or] visitation on [that parent's] participation in mental health treatment" … . We therefore modify the order … by striking the provision requiring that the father submit proof that he is engaged in and compliant with mental health counseling with a psychiatrist as a prerequisite to filing a modification petition and providing instead that the father comply with that condition as a component of supervised visitation … . Matter of Shakema R. v Mesha B., 2025 NY Slip Op 01512, Fourth Dept 3-14-25

Practice Point: It is not OK for a judge to condition a party's ability to file future petitions for modification of custody upon mental health treatment. However treatment can be made a condition for supervised visitation.

March 14, 2025

INSURANCE LAW, ARBITRATION, CIVIL PROCEDURE.

PLAINTIFF INSURER DENIED FOUR CLAIMS FOR NO-FAULT INSURANCE BENEFITS ASSOCIATED WITH FOUR DISTINCT CHIROPRACTIC TREATMENTS PROVIDED BY DEFENDANT TO A WOMAN INJURED IN A TRAFFIC ACCIDENT; EACH OF THE FOUR CLAIMS WAS FOR AN AMOUNT BELOW $5000; AN ARBITRATOR AWARDED THE CLAIMED BENEFITS TO THE DEFENDANT; PLAINTIFF THEN SOUGHT DE NOVO REVIEW OF THE ARBITRAL AWARDS WHICH HAS A $5000 THRESHOLD; THE FOUR DISTINCT ARBITRAL AWARDS CANNOT BE COMBINED TO MEET THE $5000 THRESHOLD (SECOND DEPT).

The Second Department, reversing Supreme Court, in a full-fledged opinion by Justice Duffy, determined the complaint in this no-fault insurance-benefit action should have been dismissed for lack of subject matter jurisdiction:

The issue on appeal, an issue of first impression for this Court, is whether, under certain circumstances, separate and distinct arbitral awards can be treated by a court as, in effect, a single arbitral award under Insurance Law § 5106(c) and pursuant to 11 NYCRR 65-4.10(h)(1)(ii) for the purposes of determining whether

the requisite $5,000 threshold establishing subject matter jurisdiction has been met to allow for a de novo review of claims for no-fault insurance benefits…. [W]e hold that the plain language of Insurance Law § 5106(c) and 11 NYCRR 65-4.10(h)(1) does not contemplate allowing separate and distinct arbitral awards to be treated as, in effect, a single arbitral award or to be combined by a court for the purposes of meeting the required monetary jurisdictional threshold under Insurance Law § 5106(c) and 11 NYCRR 65-4.10(h)(1)(ii). …

… [P]laintiff American Transit Insurance Company commenced this action pursuant to Insurance Law § 5106(c) and 11 NYCRR 65-4.10(h)(1)(ii) to seek de novo review of four separate arbitral awards issued by a master arbitrator (hereinafter the arbitral awards). The four arbitral awards were issued by the same master arbitrator, following separate arbitration proceedings upon the plaintiff's denial of payment for medical services performed by the defendant for Nancy Bayona, an individual who alleged that she was injured as a result of a motor vehicle accident in February 2019 when she was riding as a passenger in a taxi insured by the plaintiff. The arbitration proceedings arose upon the plaintiff's denial of each of four claims submitted to it by the defendant for a repeated course of chiropractic treatment of Bayona performed by the defendant between March 8 and September 4, 2019. After each of the four arbitration proceedings, the master arbitrator issued an arbitral award in favor of the defendant, respectively, as follows: $4,767.63 for chiropractic services performed in March 2019; $4,767.63 for chiropractic services performed in March 2019 and April 2019; $4,767.63 for chiropractic services performed in April 2019 and May 2019; and $3,178.42 for chiropractic services performed in August 2019. … [P]laintiff commenced this action seeking de novo review of the four arbitral awards. American Tr. Ins. Co. v Comfort Choice Chiropractic, P.C., 2025 NY Slip Op 01337, Second Dept 3-12-25

Practice Point: De novo review of an arbitral award of no-fault benefits has a threshold of $5000. Here there were four claims for no-fault benefits for four distinct chiropractic treatments provided to a woman injured in a traffic accident. Each of the four claims was for an amount below $5000. The Second Department held the $5000 threshold for de novo review could not be met by combining the four distinct arbitral awards.

March 12, 2025

INSURANCE LAW, CONTRACT LAW, EMPLOYMENT LAW, NEGLIGENCE.

BOTH INSURANCE POLICIES WERE DEEMED TO COVER SEXUAL HARASSMENT CLAIMS AGAINST AN EMPLOYER AND ITS EMPLOYEE BROUGHT BY SEVERAL CO-EMPLOYEES SPANNING YEARS AND DIFFERENT WORKPLACES; THE POLICY LANGUAGE DID NOT RESTRICT THE COVERAGE FOR "RELATED" OR "INTERRELATED ACTS" TO A SINGLE PLAINTIFF (FIRST DEPT).

The First Department, reversing Supreme Court, in a full-fledged opinion by Justice Singh, determined the language of the two insurance policies covered sexual harassment claims against an employer and its employee brought by several co-employees spanning years and different workplaces. The case is fact-specific and turned on the contractual definition of "related wrongful acts" in one policy and "interrelated wrongful acts" under the other policy:

Nothing in the language of either policy restricts Related or Interrelated Wrongful Acts to those harming the same plaintiff. * * *

… [I] both policies, common facts and common causation are presented in the disjunctive. Shared causation is necessary only in that the allegations must "aris[e] from" the "common nexus or nucleus of facts." "In insurance contracts, the phrase 'arising out of' is ordinarily understood to mean originating from, incident to, or having connection with. It requires only that there be some causal relationship between the injury and the risk for which coverage is provided or excluded" … . * * * Zurich Am. Ins. Co. v Giorgio Armani Corp., 2025 NY Slip Op 01335, First Dept 3-11-25

Practice Point: The language used in an insurance policy determines the coverage. Here the policy language was such that it covered sexual harassment claims spanning years and different workplaces brought by several plaintiffs as "related" or "interrelated acts."

March 11, 2025

LABOR LAW-CONSTRUCTION LAW, CIVIL PROCEDURE, JUDGES. IN REINSTATING THE ACTION AFTER VACATING THE ORDER GRANTING SUMMARY JUDGMENT TO DEFENDANTS', THE SECOND DEPARTMENT EXPLAINED WHAT SHOULD BE ALLEGED IN A COMPLAINT FOR LABOR LAW 240(1), 241(6) AND 200 CAUSES OF ACTION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff's motion to vacate the order granting defendants' motion for summary judgment in this Labor Law 240(1), 241(6) and 200 action should have been granted. Plaintiff fell through the roof of the building he was working on. Apparently plaintiff failed to answer the summary judgment motion because of law office failure. In reinstating the action, the Second Department noted that the causes of action had been adequately pled as follows:

"'Labor Law § 240(1) imposes a nondelegable duty upon owners and general contractors to provide safety devices to protect workers from elevation-related risks'" … . "'To impose liability pursuant to Labor Law § 240(1), there must be a violation of the statute and that violation must be a proximate cause of the plaintiff's injuries'" … . Here, the plaintiff alleged that his fall through the roof was the result of an elevation-related hazard caused by the failure to keep necessary safety devices in place and identified the defendants as the owners of the premises. …

"'Labor Law § 241(6) imposes on owners and contractors a nondelegable duty to provide reasonable and adequate protection and safety to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed'" … . "'To establish liability under Labor Law § 241(6), a plaintiff or a claimant must demonstrate that his [or her] injuries were proximately caused by a violation of an Industrial Code provision that is applicable under the circumstances of the case'" … . Here, the plaintiff alleged that he was employed in an area where construction was being performed and that his injuries were proximately caused by the failure to comply with applicable statutes, ordinances, rules, and regulations. ….

"'Labor Law § 200 essentially codifies landowners' and general contractors' common-law duty to maintain a safe workplace'" … . "'Where a plaintiff's claims implicate the means and methods of the work, an owner or contractor will not be held liable under Labor Law § 200 unless it had the authority to supervise or control the performance of the work'" … . Here, the plaintiff alleged that the defendants failed to provide a safe place to work and that the defendants controlled and supervised the work at issue. Bayron Chay Mo v Ultra Dimension Place, LLC, 2025 NY Slip Op 01338, Second Dept 3-12-25

Practice Point: Consult this decision for a clear explanation of what should be alleged in the complaint for Labor Law 240(1), 241(6) and 200 causes of action.

March 12, 2025

MEDICAL MALPRACTICE, NEGLIGENCE.

WHERE THE ESSENCE OF A MEDICAL MALPRACTICE ACTION IS THE FAILURE TO PROPERLY DIAGNOSE PLAINTIFF'S CONDITION, THE CRITERIA FOR A "LACK OF INFORMED CONSENT" CAUSE OF ACTION ARE NOT MET (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court in this medical malpractice action, determined the "lack of informed consent" cause of action should have been dismissed because the gravamen of the the allegations was the failure to evaluate the seriousness of plaintiff's condition:

To establish a cause of action to recover damages for medical malpractice based on lack of informed consent, "a plaintiff must prove (1) that the person providing the professional treatment failed to disclose alternatives thereto and failed to inform the patient of reasonably foreseeable risks associated with the treatment, and the alternatives, that a reasonable medical practitioner would have disclosed in the same circumstances, (2) that a reasonably prudent patient in the same position would not have undergone the treatment if he or she had been fully informed, and (3) that the lack of informed consent is a proximate cause of the injury" … . "The third element is construed to mean that the actual procedure performed for which there was no informed consent must have been a proximate cause of the injury" …

. However, where, as here, the gravamen of a plaintiff's allegations are essentially that, due to their negligence, the defendants failed to evaluate the seriousness of the patient's condition, "'with the result that affirmative treatment was not sought in a timely manner,'" a plaintiff fails to state cause of action based on lack of informed consent … . Danziger v Mayer, 2025 NY Slip Op 01354, Second Dept 3-12-25

Practice Point: Consult this decision for a clear explanation of the nature and elements of a "lack of informed consent" cause of action in a med mal case.

March 12, 2025

NEGLIGENCE, COURT OF CLAIMS, CORRECTION LAW, CIVIL PROCEDURE.

ALTHOUGH THE DEFENDANT STATE PAROLE OFFICER WAS DRIVING A STATE-OWNED VEHICLE AND ACTING WITHIN THE SCOPE OF HER EMPLOYMENT WHEN THE TRAFFIC ACCIDENT OCCURRED, PLAINTIFF PROPERLY BROUGHT SUIT IN SUPREME COURT AS OPPOSED TO THE COURT OF CLAIMS (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined that the Correction Law did not require that plaintiff bring this traffic accident case involving a Department of Corrections and Community Supervision (DOCCS) parole officer in the Court of Claims. Although the defendant officer was driving a State-owned vehicle and was acting within the scope of her employment at the time of the accident, the lawsuit was properly brought in Supreme Court:

"Not every suit against an officer of the State, however, is a suit against the State" … . "A suit against a State officer will be held to be one which is really asserted against the State when it arises from actions or determinations of the officer made in his or her official role and involves rights asserted, not against the officer individually, but solely against the State" … . If, however, "the suit against the State agent or officer is in tort for damages arising from the breach of a duty owed individually by such agent or officer directly to the injured party, the State is not

the real party in interest—even though it could be held secondarily liable for the tortious acts under respondeat superior" … .

Correction Law § 24 (2) provides that claims for damages "arising out of any act done or the failure to perform any act within the scope of the employment and in the discharge of the duties" of any State employee shall be brought in the Court of Claims as claims against the State. Thus, Correction Law § 24 "places actions for money damages against [DOCCS] employees within the jurisdiction of the Court of Claims only where the conduct alleged is within the scope of the officer's employment and in the discharge of his or her official duties" … .

Here, the complaint asserts a single cause of action based on allegations that defendant operated the vehicle in a negligent manner, i.e., that defendant's alleged negligence arises from her violation of a duty she owed plaintiff as a fellow driver, and not as a DOCCS employee. Thus, plaintiff's action is "against . . . defendant individually for an alleged breach of a duty of care owed by the defendant directly to [plaintiff], and not one against State officers as representatives of the State in their official capacity which had to be brought in the Court of Claims pursuant to Correction Law § 24" … . Maiorana v Green, 2025 NY Slip Op 01518, Fourth Dept 12-14-25

Practice Point: Although the defendant parole officer was acting within the scope of her employment when she was driving the state-owned vehicle, the traffic accident allegedly breached a duty of care owed directly to the plaintiff by the defendant as a fellow driver, not as a state employee.

March 14, 2025

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PUBLIC HEALTH LAW, NEGLIGENCE.

THE COMPLAINT DID NOT SUFFICIIENTLY ALLEGE DEFENDANT ASSISTED LIVING FACILITY FUNCTIONED AS A DE FACTO RESIDENTIAL HEALTH CARE FACILITY BY PROVIDING HEALTH-RELATED SERVICES; THEREFORE THE PUBLIC HEALTH LAW CAUSES OF ACTION, AVAILABLE ONLY FOR SUITS AGAINST RESIDENTIAL HEALTH CARE FACILITIES, SHOULD HAVE BEEN DISMISSED (FOURTH DEPT).

The Fourth Department, reversing (modifying) Supreme Court, determined the allegations in the complaint did not sufficiently allege that defendant assisted living facility operated as a de facto residential health care facility. Therefore the Public Health Law causes of action, which are available only for suits against residential health care facilities, should have been dismissed. The concurring justices argued that the case which allowed assisted living facilities to be considered de facto residential health care facilities if they provide health-related services should be overruled:

… Supreme Court erred in denying their motion with respect to the second and third causes of action. We have held that an assisted living facility licensed pursuant to Public Health Law article 46-B … could operate as a de facto residential health care facility subject to liability under Public Health Law article 28 if it provides health-related services (see Cunningham v Mary Agnes Manor Mgt., L.L.C., 188 AD3d 1560, 1562 [4th Dept …]. We conclude that, unlike the complaint in Cunningham, the complaint here failed to “sufficiently allege[ ] facts to overcome defendants’ argument that the facility is an assisted living facility and not subject to . . . sections [2801-d and 2803-c] of the Public Health Law” … .

From the concurrence:

… [W]e would overrule our prior decision in Cunningham to the extent that it authorizes a cause of action under article 28 of the Public Health Law against an assisted living facility indisputably licensed pursuant to article 46-B of the Public Health Law … . Kingston v Tennyson Ct., 2025 NY Slip Op 01522, Fourth Dept 3-14-25

Practice Point: Private causes of action pursuant to the Public Health Law are available only for suits against residential health care facilities, and not suits against assisted living facilities. In the Fourth Department, however, the Public Health Law causes of action can be viable against an assistant living facility if the facility offers health-related services. The two concurring justices in the instant decision would overrule that "assisted living facility" caveat. which conflicts with rulings in other appellate division departments.

March 14, 2025

REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL), MUNICIPAL LAW, CIVIL PROCEDURE.

THE TREBLE DAMAGES PROVISION IN RPAPL 861 FOR THE IMPROPER TRIMMING OR REMOVAL OF TREES FROM ANOTHER'S PROPERTY IS PUNITIVE IN NATURE; HERE THE TOWN TRIMMED AND REMOVED TREES FROM PLAINTIFF'S LAND; BECAUSE A MUNICIPALITY CANNOT BE ASSESSED PUNITIVE DAMAGES, THE TREBLE DAMAGES AWARD WAS REVERSED (CT APP).

The Court of Appeals, reversing the Appellate Division, determined the treble damages provision in RPAPL 861 is punitive in nature and therefore cannot be imposed upon a municipality. Here the town removed and trimmed trees along a roadway. Plaintiff, the owner of the land abutting the road, sued and was awarded treble damages. The Appellate Division had concluded the treble damages provision was compensatory, not punitive:

RPAPL 861 provides that "[i]f any person, without the consent of the owner thereof, cuts, removes, injures or destroys . . . tree[s] or timber on the land of another . . . an action may be maintained against such person for treble the stumpage value of the tree or timber or two hundred fifty dollars per tree, or both and for any permanent and substantial damage caused to the land or the improvements thereon . . . ." … .

* * * Treble damages are the default measure for any recovery, but the statute also provides that "if the defendant establishes by clear and convincing evidence, that when the defendant committed the violation, he or she had cause to believe the land was his or her own, or that he or she had an easement or right of way across such land which permitted such action, or he or she had a legal right to harvest such land, then he or she shall be liable for the stumpage value or two hundred fifty dollars per tree, or both . . . ." …

In other words, the defendant's good faith "does not insulate that person from the imposition of statutory damages, but merely saves him or her from having to pay the plaintiff treble damages" .. . * * *

The "good faith" provision in RPAPL 861 demonstrates the punitive nature of the treble damages available under the statute. Matter of Rosbaugh v Town of Lodi, 2025 NY Slip Op 01406, CtApp 3-13-25

Practice Point: Here the statute allowed treble damages for the removal of trees only if the removal was not in good faith. Therefore the treble damages provision was punitive in nature. Punitive damages cannot be assessed against a municipality, here the town which removed the trees.

March 13, 2025

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

RECORDING THE DEED IS NOT NECESSARY FOR THE TRANSFER OF TITLE; THEREFORE A FORGED SIGNATURE ON THE TRANSFER DOCUMENT DOES NOT RENDER THE DEED VOID (SECOND DEPT).

The Second Department noted that a forged signature on the transfer document necessary to record a deed would not render the deed void:

"A deed that is forged is a legal nullity, which conveys nothing, and a mortgage based on such a deed is likewise invalid" … . A deed that is "acquired by fraudulent means," however, is merely voidable … . A "voidable deed, 'until set aside, . . . has the effect of transferring the title to the fraudulent grantee, and . . .

being thus clothed with all the evidences of good title, may incumber the property to a party who becomes a purchaser in good faith'" … .

… [T]he plaintiff claims that [the grantor's] signature on an RP-5217-NYC transfer document necessary to record the deed was forged. However, "recording is not required in order to transfer title to real property" … . "In order to transfer title, an executed deed must be delivered to and accepted by the grantee" … . Consequently, title to the property was transferred to [the grantee] upon delivery to and acceptance of the executed deed by [the grantee], and any forged signature on the RP-5217-NYC transfer document necessary to record the deed would not affect the validity of the transfer of title or of the subsequent mortgage … . Canecchia v Richmond Assoc. NY, LLC, 2025 NY Slip Op 01341, Second Dept 3-12-25

Practice Point: Title is transferred by delivery and acceptance of an executed deed. Recording the deed is not a necessary component of the transfer of title.

March 12, 2025

WORKERS' COMPENSATION.

THE WORKERS' COMPENSATION BOARD'S CONCLUSION THAT CLAIMANT DID NOT PARTICIPATE IN THE WORLD TRADE CENTER RESCUE AND CLEANUP OPERATION WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE (THIRD DEPT).

The Third Department, reversing the Workers' Compensation Board, determined the Board's conclusion that claimant did not participate in the rescue, recovery and cleanup operations at the World Trade Center (WTC) was not supported by the evidence:

… [C]laimant testified that, during her October 2001 and December 2001 assignments, she was assigned to the NYPD's command center for the rescue, recovery and cleanup operations. The command center was located 600 feet from the WTC site and there were areas set up at the command center for claimant and others to provide mental health support to police and fire department personnel working on the rescue, recovery and cleanup operations at the site. According to

claimant, she would respond to calls concerning distressed workers and those individuals would be brought to the command center or claimant would go the rubble pile where they were working. Claimant would do an assessment as to the extent of the individual's mental health condition and determine whether the individual could continue working or be taken off line and provided mental health treatment through the NYPD employee assistance program. McArdle [NYPD on-site coordinator] testified that he remembered claimant being at the command center and providing support to those working in the rescue, recovery and cleanup operation and that she was "well received" by the NYPD. McArdle further testified that identifying those individuals who needed to be taken off line for treatment was instrumental in continuing the operation and that many of those individuals were able to return to the operation after treatment. Matter of Goss v WTC Volunteer, 2025 NY Slip Op 01413, Third Dept 3-13-25

March 13, 2025

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