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Weekly Reversal Report
March 17 – 21, 2025

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

THE COMMISSIONER OF AGRICULTURE AND MARKETS HAD JURISDICTION OVER THE DISPUTE BETWEEN THE TOWN AND A FARM IN WHICH THE TOWN ALLEGED THE FARM WAS RUNNING A COMMERCIAL MULCHING OPERATION IN VIOLATION OF THE TOWN CODE; THE COMMISSIONER PROPERLY DETERMINED THE FARM WAS NOT VIOLATING THE TOWN CODE (THIRD DEPT).

The Third Department, in a full-fledged opinion by Justice Egan, determined the Commissioner of Agriculture and Markets had jurisdiction over the matter and had the authority to determine a farm located in the Long Island Pine Barrens Maritime Reserve (Central Pine Barrens) was not running a commercial mulching operation in violation of the Code of the Town of Brookhaven:

Respondent Delea Sod Farms, Inc. (hereinafter Delea Farms) operates a farm in an agricultural district in the Town of Brookhaven, Suffolk County, where it primarily produces sod for sale that is used at, among other places, Yankee Stadium. Mulch and compost are stored and sold at the farm as well. The farm also lies within the Central Pine Barrens area as defined by the Long Island Pine Barrens Maritime Reserve Act (ECL 57-0101 et seq. [hereinafter the Pine Barrens Act]), the Pine Barrens being an environmentally sensitive area of Long Island that contains an aquifer from which many locals obtain drinking water and is subject to "laws and policies . . . at all government levels to protect [it] from unbridled development" (… see also ECL 57-0107 [10]). Petitioner sued Delea Farms in March 2020 to enjoin it from running what was, in petitioner's view, a commercial mulching operation that allegedly ran afoul of the farmland bill of rights and zoning regulations contained in the Code of the Town of Brookhaven (hereinafter the Town Code) as well as the terms of a conditional discharge entered following a 2017 guilty plea by Delea Farms in a code enforcement matter. Delea Farms reacted by requesting an informal opinion from respondent Commissioner of Agriculture and Markets as to whether its storage and sale of compost and mulch on the farm was "agricultural in nature" within the meaning of Agriculture and Markets Law § 308 (4). The Commissioner issued an opinion in July 2020 that the storage and sale of mulch and compost was an incidental agricultural use to the production and sale of sod at the farm. * * *

The Commissioner determined that Delea Farms was primarily operating the farm for sod production and harvesting, that it was not manufacturing or processing mulch at the farm and that the mulch and compost at the farm was either used on the farm itself or sold to customers who needed it to install the sod and nursery stock that was the farm's actual focus. Matter of Town of Brookhaven v Ball, 2025 NY Slip Op 01686, Third Dept 3-20-25

March 20, 2025

ADMINISTRATIVE LAW, LANDLORD-TENANT, MUNICIPAL LAW.

THE LANDLORD'S APPLICATION TO AMEND PRIOR ANNUAL REGISTRATION STATEMENTS TO PERMANENTLY EXEMPT AN APARTMENT FROM RENT STABILIZATION WAS PROPERLY DENIED BY THE DIVISION OF HOUSING AND COMMUNITY RENEWAL (DHCR); ONLY MINISTERIAL AMENDMENTS TO PRIOR ANNUAL REGISTRATION STATEMENTS, SUCH AS CLERICAL ERRORS AND MISSPELLINGS, ARE ALLOWED (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Singas, over an extensive two-judge dissenting opinion, determined the Division of Housing and Community Renewal (DHCR) properly rejected petitioner-landlord's application to amend two prior annual registration statements to permanently exempt an apartment from rent stabilization. The ability to amend the annual registration statements extends only to ministerial issues such as clerical errors, misspellings, incorrect lease terms, etc.:

DHCR's chosen limiting principle—that amendments may correct only "ministerial" issues—does not permit amendments that seek to remove a housing accommodation's rent-stabilized status. The application of that rule to this case was clearly rational. Matter of LL 410 E. 78th St. LLC v Division of Hous. & Community Renewal, 2025 NY Slip Op 01672, CtApp 3-20-25

March 20, 2025

ATTORNEYS, CIVIL PROCEDURE, FORECLOSURE.

WHEN DEFENDANT'S ATTORNEY WAS SUSPENDED ANY FURTHER PROCEEDINGS IN THIS FORECLOSURE ACTION WERE STAYED; NEITHER PROCEDURE FOR LIFTING THE STAY WAS INVOKED; DEFENDANT'S MOTION TO VACATE SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined a stay of the foreclosure action was in effect because of the suspension of defendant McGrath's attorney. Because plaintiff never served McGrath with the required notice to lift the stay, the summary judgment order should have been vacated:

When an attorney is suspended from the practice of law, "as with an attorney's death, incapacitation, removal from an action, or other disability, CPLR 321(c) protects the client by automatically staying the action from the date of the disabling event" … . "The express language of CPLR 321(c) sets no particular time limit to the stay of proceedings that is automatically triggered by a qualifying event" … .

"[D]uring the stay imposed by CPLR 321(c), no proceedings against the party will have any adverse effect" … , and "[o]rders or judgments that are rendered in violation of the stay provisions of CPLR 321(c) must be vacated" … .

"[T]here are actually two ways in which a CPLR 321(c) stay may be lifted. One way is if the party that lost its counsel retains new counsel at its own initiative, or otherwise communicates an intention to proceed pro se" … . "The second way is by means of [a] notice procedure pursuant to CPLR 321(c)" … .

Here, the plaintiff did not serve McGrath with the notice to appoint "either personally or in such manner as the court direct[ed]" (CPLR 321[c]). It is undisputed that no attempt was made to personally serve the required notice, nor is it alleged that the Supreme Court directed that service of the notice be made in some other manner … . Moreover, it is undisputed that McGrath did not communicate an intention to proceed pro se … . Therefore, the automatic stay was not lifted until McGrath opposed the plaintiff's motion to confirm the referee's report and for a judgment of foreclosure and sale and cross-moved to vacate the

summary judgment order … . HSBC Bank USA, N.A. v McGrath, 2025 NY Slip Op 01614, Second Dept 3-19-25

Practice Point: When a party's attorney is suspended, the proceedings are automatically stayed. There are two statutory procedures for lifting the stay, neither of which was invoked here.

March 19, 2025

CIVIL PROCEDURE, JUDGES.

THE MOTIONS TO AMEND THE COMPLAINT AND JOIN AN ACTION SHOULD HAVE BEEN GRANTED; CRITERIA EXPLAINED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff's motions to amend the complaint and to join another action should have been granted. The proposed amendment was not time-barred because the original complaint gave notice of the transactions and occurrences upon which the amendment is based. The motion to join another action should have been granted because there were common questions of law or fact and defendants would not be prejudiced:

While a proposed amendment generally is considered patently devoid of merit if it is time-barred under the applicable statute of limitations" … , here, the proposed amendment relates back to the original complaint and is deemed to have been timely interposed because the original complaint gave "notice of the transactions, occurrences, or series of transactions or occurrences" on which the claims in the proposed amended complaint were based (CPLR 203[f] …). [Defendants] failed to establish that they were prejudiced or surprised by the plaintiff's delay in seeking leave to amend the complaint, as discovery was still ongoing at the time the plaintiff's motion was made … , the proposed amended complaint was "premised upon the same facts, transactions, or occurrences" alleged in the original complaint … , and the proposed amendment merely elaborated on the same theory of liability alleged in the original complaint … . …

The Supreme Court also improvidently exercised its discretion in denying that branch of the plaintiff's motion which was pursuant to CPLR 602(a) to join Action No. 2 with Action No. 1 for purposes of trial. "Where common questions of law or fact exist, a motion to consolidate or for a joint trial pursuant to CPLR 602(a) should be granted absent a showing of prejudice to a substantial right by the party opposing the motion" … . Here, Action No. 1 and Action No. 2 both arise from the project, concern the same parties, and involve common questions of law and fact … , and a failure to try the two actions jointly would result in a "duplication of trials, unnecessary costs and expense, and a danger of an injustice resulting from divergent decisions" … . Contrary to the contentions of KGD and OLA, the possibility of prejudice resulting from a joint trial can be mitigated by appropriate jury instructions … , and any potential prejudice is outweighed by the possibility of inconsistent verdicts if separate trials ensue … . Great Neck Lib. v Kaeyer, Garment & Davidson Architects, P.C., 2025 NY Slip Op 01613, Second Dept 3-19-24

Practice Point: Consult this decision for the criteria for amending a complaint, including a determination whether the amendment is time-barred (it is not if the original complaint gave notice of the transactions or occurrences referenced in the amendment).

Practice Point: Consult this decision for the criteria for consolidating two actions which involve common questions of law or fact.

March 19, 2025

CIVIL PROCEDURE, APPEALS, ATTORNEYS, JUDGES.

WHERE THERE IS A FACTUAL DISPUTE ON A MATERIAL ISSUE WHICH MUST BE RESOLVED BEFORE THE COURT CAN DECIDE A LEGAL ISSUE, THE FACTUAL DISPUTE MUST BE RESOLVED IN A HEARING BEFORE THE COURT CAN DECIDE THE LEGAL ISSUE; WHETHER THE RECORD GIVES RISE TO A FACTUAL DISPUTE ON A MATERIAL ISSUE IS A QUESTION OF LAW (CT APP).

The Court of Appeals, reversing the Appellate Division, determined a factual dispute about whether an attorney (Santamarina) validly waived personal jurisdiction on behalf of defendant Koukis required a hearing:

Supreme Court decided Mr. Koukis's motion without a factual hearing, holding that Mr. Santamarina lacked authority to act on Mr. Koukis's behalf and vacating his waiver of personal jurisdiction and service defenses. But Supreme Court concluded that personal jurisdiction existed over Mr. Koukis pursuant to CPLR 302 (a) (2). It therefore set the matter down for a traverse hearing to determine if service on Mr. Koukis of the summons and complaint was proper.

Before the traverse hearing occurred, the Appellate Division modified the order of Supreme Court by vacating the default judgment and granting Mr. Koukis's motion to dismiss based upon a lack of jurisdiction. The Appellate Division held that "there was no basis to conclude that Koukis authorized Santamarina to appear and waive all jurisdictional defenses on his behalf" … . Additionally, the majority departed from Supreme Court in its analysis of CPLR 302 (a) (2), concluding that the court did not have personal jurisdiction and dismissing the complaint in its entirety … . Two Justices partially dissented on the ground that Supreme Court should have held a hearing to determine whether Mr. Santamarina had the authority to represent Mr. Koukis … . We now reverse on the basis that there is a material factual dispute as to whether Mr. Koukis authorized or ratified the waiver of personal jurisdiction

[Plaintiff] was entitled to a factual hearing to determine whether Mr. Santamarina validly appeared on Mr. Koukis's behalf and waived personal jurisdiction. Where the record shows a "factual dispute on a material point which must be resolved

before the court can decide the legal issue," the court may not grant the motion without first holding a hearing (… see … CPLR 2218). Whether the record gives rise to such a factual dispute is a question of law … .Gibson, Dunn & Crutcher LLP v Koukis, 2025 NY Slip Op 01565, CtApp 3-18-25

Practice Point: Here there was a factual dispute on a material issue which had to be decided before the related legal question could be answered. Therefore a hearing was required to resolve the factual issue before the court addressed the legal issue. Whether a factual dispute on a material issue exists raises a question of law.

March 18, 2025

CIVIL PROCEDURE, FORECLOSURE.

WHERE IT HAS BEEN MORE THAN A YEAR SINCE DEFENDANT FAILED TO ANSWER THE COMPLAINT, THE DEFENDANT IS ENTITLED TO NOTICE BEFORE ENTRY OF A DEFAULT JUDGMENT; HERE THE FAILURE TO GIVE DEFENDANT NOTICE RENDERED THE DEFAULT JUDGMENT A NULLITY (SECOND DEPT).

The Second Department, reversing Supreme Court in this foreclosure action, determined it had been more than a year since defendant Callahan had failed to answer the complaint and, therefore, Callahan was entitled to notice before a default judgment could be entered. No notice was given:

"Pursuant to CPLR 3215(g)(1), 'whenever application [for judgment by default] is made to the court or to the clerk, any defendant who has appeared is entitled to at least five days' notice of the time and place of the application, and if more than one year has elapsed since the default any defendant who has not appeared is entitled to the same notice unless the court orders otherwise'" … . "[T]he failure to provide a defendant who has appeared in an action with the notice required by CPLR 3215(g)(1), like the failure to provide proper notice of other kinds of motions, is a jurisdictional defect that deprives the court of the authority to entertain a motion for leave to enter a default judgment" … . As such, "'the failure to provide a defendant with proper notice of a motion renders the resulting order and judgment

entered upon that order nullities'" … . Flagstar Bank, FSB v Powers, 2025 NY Slip Op 01610, Second Dept 3-19-25

Practice Point: Where it has been more than a year since defendant failed to answer a complaint, the defendant is entitled to notice before entry of a default judgment. Failure to provide notice renders the judgment a nullity.

March 19, 2025

CRIMINAL LAW, APPEALS.

HERE THE FOURTH DEPARTMENT HAD ORDERED A RECONSTRUCTION HEARING BECAUSE THE ORIGINAL RECORD WAS WOEFULLY INCOMPLETE; THE MAJORITY CONCLUDED THE RECONSTRUCTION HEARING WAS PROPERLY DONE AND AFFIRMED DEFENDANT'S CONVICTION; THE DISSENT TOOK ISSUE WITH NATURE OF THE RECONSTRUCTION HEARING (FOURTH DEPT).

The Fourth Department, affirming defendant's conviction over a dissent, determined the reconstruction hearing compelled by the incomplete original record was properly done. The dissent disagreed:

We … reserved decision … and remitted the matter to County Court "to conduct a reconstruction hearing with respect to the missing and irregular transcripts" … .

Upon remittal, the court conducted a reconstruction hearing during which it heard the testimony of the trial judge and his confidential law clerk, the trial prosecutor, defendant's former attorneys, a court clerk, and a county clerk. The court also admitted in evidence the trial judge's notes; the court's voir dire challenge sheet; the trial prosecutor's notes on the jury charge and his copy of the verdict sheet; the court clerk's minutes, exhibit list, and witness list; the county clerk's case summary; and various court exhibits from the trial. Based on the record of the reconstruction hearing and the original record, we now affirm.

From the dissent:

Upon remittal, the court convened a reconstruction hearing without expressly delineating the missing and irregular transcripts to be reconstructed. Instead, the court heard the testimony of witnesses offered by the People and closed the hearing without determining whether the evidence submitted was sufficient to reconstruct a record that would permit defendant to review "whether genuine appealable and reviewable [trial] issues do or do not exist" … . That was error. Although the reconstruction required by the substantial irregularities in this trial transcript was considerably broader than the discrete issues for which reconstruction is more frequently directed … , the intent of our prior decision was for the court to make a determination whether the missing and irregular transcripts were sufficiently reconstructed, not merely to assist in the marshaling of evidence from which this Court could reconstruct the trial record behind closed doors … . People v Meyers, 2025 NY Slip Op 01762, Fourth Dept 3-21-25

Practice Point: Consult this decision for the issues raised, and the procedures to be followed, when the original record is too incomplete to allow an appellate review.

March 21, 2025

CRIMINAL LAW, APPEALS, JUDGES, VEHICLE AND TRAFFIC LAW.

DEFENDANT'S GUILTY PLEA WAS NOT VOLUNTARY BECAUSE HE WAS NOT INFORMED OF THE MANDATORY FINES FOR THE VEHICLE AND TRAFFIC LAW OFFENSES; AN EXCEPTION TO THE PRESERVATION REQUIREMENT APPLIED; AN APPEAL WAIVER DOES NOT PRECLUDE ARGUING THE PLEA WAS INVOLUNTARY (CT APP).

The Court of Appeals, reversing the Appellate Division, determined defendant's guilty plea was not voluntary because he was not informed of the mandatory fines for the Vehicle and Traffic Law offenses. Although the error was not preserved, the "no actual or practical ability to object" preservation exception was invoked: An appeal waiver does not preclude the defendant from arguing the plea was involuntary:

An exception to the preservation requirement exists where, as here, a defendant had "no actual or practical ability to object" prior to the imposition of the fines by the sentencing court … . Further, a valid appeal waiver does not preclude a defendant from challenging a plea as involuntary, where the court fails to advise a defendant of a component of their sentence before it is imposed … .

Supreme Court erred in failing to inform defendant at the time of his plea that the sentences for two of the offenses to which he was pleading guilty included mandatory fines (see Vehicle and Traffic Law § 511 [3] [b]; Vehicle and Traffic Law § 1193 [1] [a]) The failure to "ensure that . . . defendant, before pleading guilty, ha[d] a full understanding of what the plea connotes and its consequences" … , requires vacatur of the plea. People v Padilla-Zuniga, 2025 NY Slip Op 01563, CtApp 3-18-25

Practice Point: The failure to inform the defendant of mandatory fines renders the guilty plea involuntary.

Practice Point: Here the "no actual or practical ability to object" exception to the preservation requirement applied.

Practice Point: An appeal waiver does not preclude the argument that the plea was involuntarily entered.

March 18, 2025

CRIMINAL LAW, ATTORNEYS, JUDGES.

A JUROR, AN ATTORNEY, ALLEGEDLY TOLD THE OTHER JURORS THAT THE "BEYOND A REASONABLE DOUBT" STANDARD COULD BE DISREGARDED; DEFENDANT WAS ENTITLED TO A "JUROR MISCONDUCT" HEARING IN CONNECTION WITH HIS MOTION TO SET ASIDE THE VERDICT (FIIRST DEPT).

The First Department, holding the matter in abeyance, determined the allegations that a juror, A.H., an attorney, told the other jurors the "beyond a reasonable doubt"

standard did not apply to everything in the case necessitated an evidentiary hearing on defendant's motion to set aside the verdict:

Some of the alleged conduct of juror A.H., an attorney, described in the supporting affidavits of two jurors, was an emphatic expression of the juror's thoughts, his strong belief in defendant's guilt, his understanding of the court's instructions, his personal antipathy to the defendant, and, to the extent it was incorrect, his understanding of the law, none of which constitutes juror misconduct under CPL 330.30(2) … . However, the affidavit of one juror (E.A.) affirmed that A.H. "told us that we did not have to apply the beyond a reasonable doubt standard for everything in the case." The other juror (S.D.) affirmed that A.H. averred, without any stated exception, "that the proof did not have to be beyond a reasonable doubt."

Considering these attestations regarding A.H.'s alleged direction to the jury members to disregard the court's instruction concerning the burden of proof, defendant was entitled to an evidentiary hearing on his motion to set aside the verdict. We hold the appeal in abeyance for that purpose. People v Hernandez, 2025 NY Slip Op 01589, Ct App 3-18-25

Practice Point: Consult this decision for some insight into what is, and what is not, juror-misconduct, here in the context of a juror, an attorney, telling the other jurors the "beyond a reasonable doubt" standard may be disregarded.

March 18, 2025

CRIMINAL LAW, ATTORNEYS, JUDGES.

THIS CASE PRESENTS THE RARE CIRCUMSTANCE WHERE DEFENDANT'S SECOND MOTION TO VACATE HIS CONVICTION SHOULD BE CONSIDERED, DESPITE THE DENIAL OF DEFENDANT'S PRIOR MOTION WHICH WAS BASED ON THE SAME GROUND, I.E., DEFENSE COUNSEL'S MISINFORMATION ABOUT WHEN DEFENDANT WOULD BE ELIGIBLE FOR PAROLE (THIRD DEPT).

The Third Department, reversing County Court, determined the defendant's second motion to vacate his murder conviction (by guilty plea) based on his attorney's erroneously informing him he would be eligible for parole haff-way through the 15-year sentence required a hearing. Defendant had made a prior motion on the same ground which was denied by another judge. The Third Department noted that ordinarily the prior motion would preclude the instant motion, but irregularities in the prior order denying the motion and the facts asserted in support of the instant motion justified giving the defendant a second chance:

… [T]he Legislature anticipated there would be times when it would be appropriate to reconsider issues previously decided on the merits (see CPL 440.10 [3] …). Doubtless those times should be rare; but, in our view, this is one of them.

Critically, the instant motion includes witness affidavits affirming that counsel assured defendant that he would be eligible for parole review as early as halfway through his minimum 15-year term of imprisonment (see CPL 440.30 [1] [a]; compare CPL 440.30 [4] [d]). Also attached is correspondence between defendant and counsel from December 2020. In one letter, defendant asks why counsel advised him that he would be eligible for early parole; counsel's response does not address defendant's question. Given defendant's submissions, plus his relatively young age and inexperience with the criminal justice system at the time of his guilty plea, along with the irregularities in the June 2020 order, summary denial of defendant's motion was an improvident exercise of discretion. Accordingly, in the exercise of our broad authority to substitute our discretion for that of County Court … , we set aside the procedural bars to relief on the issue of counsel's alleged

erroneous parole advice and remit the matter for a hearing … . People v Phelps, 2025 NY Slip Op 01680, Third Dept 3-20-25

Practice Point: Here irregularities in the order denying defendant's first motion to vacate his conviction and the facts presented in support of defendant's second motion on the same ground justified consideration of the second motion.

March 20, 2025

CRIMINAL LAW, EVIDENCE.

IN THIS STRANGULATION CASE, A POLICE OFFICER'S TESTIMONY ABOUT UNRELATED ALLEGED STRANGULATIONS INVOLVING OTHER COMPLAINANT'S DEPRIVED DEFENDANT OF A FAIR TRIAL (FOURTH DEPT).

The Fourth Department, reversing defendant's strangulation conviction and ordering a new trial, determined the admission of the testimony of a police officer describing unrelated allegations of strangulation by other complainants deprived defendant of a fair trial:

… County Court erred in admitting in evidence testimony from a police officer who responded to the scene regarding his observations of other, unnamed complainants in prior, unspecified cases. The officer was permitted to testify that he had taken photographs "once or twice" of complainants who had "alleged strangulations," and that he could not recall having observed bruises on those other complainants. The officer's testimony was used by the People in order to explain that the lack of marks on the neck of the victim in the present case did not mean that defendant did not strangle her. Indeed, during closing argument the People invited the jury to "recall the testimony of [the officer], that he did not observe any signs of bruising on [the victim's] neck. You'll also recall that he has been to other strangulations and investigated those, and he didn't find any injuries there either." We conclude that the officer's testimony regarding prior, unrelated cases is entirely irrelevant to the instant case, and that it was error to admit that "irrelevant and highly prejudicial testimony" … . People v Iqbal, 2025 NY Slip Op 01746, Fourth Dept 3-21-25

Practice Point: Here a police officer's vague testimony about unrelated allegations of strangulation involving complainants other than the victim in this strangulation case deprived defendant of a fair trial.

March 21, 2025

CRIMINAL LAW, EVIDENCE.

THE MAJORITY AFFIRMED DEFENDANT'S DRIVING-RELATED RECKLESS-ENDANGERMENT-FIRST-DEGREE CONVICTION STEMMING FROM HIS STRIKING SEVERAL CARS, CAUSING ONE TO FLIP, AND CRASHING INTO A HOUSE; TWO DISSENTERS ARGUED THE PROOF DID NOT SUPPORT THE "DEPRAVED INDIFFERENCE" ELEMENT OF THE OFFENSE (THIRD DEPT).

The Third Department affirmed defendant's reckless endangerment first degree conviction over a two-justice dissent which argued the evidence did not support the "depraved indifference" element of the offense:

From the dissent:

As the majority details, on the morning of June 27, 2018, defendant was driving his vehicle in the Town of Colonie, Albany County when he collided with several vehicles — causing one to flip over — before hitting a curb and crashing into the foundation of a house. We acknowledge that the People were able to rely on the circumstantial evidence surrounding defendant's conduct to establish that he acted with the requisite mens rea of depraved indifference to human life … . Nevertheless, in reviewing these particular circumstances, we believe there is insufficient evidence to show that he was aware of, appreciated and disregarded the risks caused by his behavior (see id.). It is uncontroverted that defendant was driving recklessly and that, in doing so, he caused significant property damage as well as various degrees of injury to the victims. However, throughout this ordeal, which lasted less than five minutes and spanned less than half a mile, defendant was not driving well in excess of the posted speed limit, and there is no evidence that he ever drove against oncoming traffic or failed to obey traffic lights … . Even

viewing the particular circumstances here in the light most favorable to the People, we do not believe that this case presents one of the rare circumstances where "the mens rea of depraved indifference . . . [is] established by risky behavior alone" … . People v Bender, 2025 NY Slip Op 01678, Third Dept 3-20-25

Practice Point: Consult this decision for some insight into the proof necessary for the "depraved indifference" element of reckless endangerment first degree in context of reckless driving.

March 20, 2025

CRIMINAL LAW, JUDGES, APPEALS.

THE DEFENDANT'S MAXIMUM SENTENCE WAS 20 YEARS BUT THE JUDGE REPEATEDLY TOLD DEFENDANT HE WAS FACING 45 YEARS; THE MAJORITY DETERMINED THE GUILTY PLEA WAS NOT VOLUNTARILY ENTERED; THE DISSENT ARGUED THE ISSUE WAS NOT PRESERVED (CT APP).

The Court of Appeals, reversing the Appellate Division, in a full-fledged opinion by Judge Rivera, over a two-justice dissent, determined defendant's guilty plea was not entered voluntarily, knowingly and intelligently because the judge repeatedly told the defendant he was facing 45 years in prison when his sentence was capped at 20. The dissent argued the error was not preserved:

The issue on appeal is whether defendant Marquese Scott's guilty plea was knowing, voluntary, and intelligent. Supreme Court made an egregious error during the plea proceedings, repeatedly asserting that defendant faced up to 45 years' incarceration if found guilty after trial, when his maximum exposure was statutorily capped at 20 years. As we have long recognized, inaccurate information regarding a sentence is a significant factor in determining whether a plea was voluntary. Given defendant's young age, his inexperience facing serious charges with the risk of consecutive sentencing, and the vast disparity between the plea offer of 6 to 8 years and the court's erroneous assertion that he faced 25 years more

than the law allowed, we hold that defendant's guilty plea was not the result of a free and informed choice. Accordingly, defendant's plea cannot stand. * * *

From the dissent:

With only narrow exceptions, we have unequivocally required a defendant to preserve a challenge to the voluntariness of their plea by making "a motion to withdraw the plea under CPL 220.60 (3) or a motion to vacate the judgment of conviction under CPL 440.10" … . People v Scott, 2025 NY Slip Op 01562, CtApp 3-18-25

Practice Point: A guilty plea entered after the defendant is erroneously told he is facing 45 years in prison when the sentence is statutorily capped at 20 is not voluntary.

Practice Point: Here the dissent argued the majority should not have carved out a new exception to the preservation requirement to consider the merits of this case.

March 18, 2025

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA).

THE FACT THAT THE SENTENCING COURT IN 2016 DID NOT USE DEFENDANT'S 2006 CONVICTION TO ENHANCE HIS SENTENCE DID NOT REQUIRE THE SORA COURT TO IGNORE THE 2006 CONVICTION WHICH WAS NEVER DIRECTLY ATTACKED AS UNCONSTITUTIONAL AND WAS NEVER VACATED; THEREFORE THE 2006 CONVICTION WAS PROPERLY RELIED UPON BY THE SORA COURT TO ASSESS DEFENDANT A LEVEL THREE RISK (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Singas, determined the fact that the resentencing court in 2016 found defendant's 2006 conviction by guilty plea "constitutionally infirm" for purposes of sentencing did not require the SORA court to ignore the 2006 conviction. Defendant had never directly attacked the constitutionality of the 2006 conviction:

Defendant's reliance on the resentencing court's collateral determination that his 2006 conviction cannot be used as a predicate to impose an enhanced sentence is misplaced. As the resentencing court explained, it lacked authority to vacate the 2006 conviction and instead properly stressed that its determination governed only the question of whether the People could use the conviction to establish defendant's status as a second child sexual assault felony offender for purposes of sentencing. Furthermore, at the resentencing hearing, defendant bore the burden of offering substantial evidence that the 2006 conviction is constitutionally infirm … . If defendant directly challenged the conviction's constitutionality, however, he would face a higher burden of proof … . No court has determined that defendant's 2006 conviction is unconstitutional or otherwise invalid under that more demanding standard. Nor have the People had an opportunity to be heard in opposition to defendant's attempt to make such a showing. Against this backdrop, it is logical for the Guidelines to require an offender with a prior felony sex offense conviction to satisfy the higher evidentiary burden that they must meet to vacate or reverse that conviction, if they wish to avoid the override's application.

Given that defendant failed to pursue any procedural pathway to vacate the 2006 conviction, we see no reason to depart from the Guidelines' text stating that the override is triggered if "[t]he offender has a prior felony conviction for a sex crime" (Guidelines, override 1). We therefore apply the Guidelines and hold that the override was properly implemented … . People v Moss, 2025 NY Slip Op 01673, CtApp 3-20-25

Practice Point: The fact that a sentencing court found a prior conviction "constitutionally infirm" such that the conviction was not used to enhance defendant's sentence did not require that the SORA court ignore the prior conviction. The SORA court properly relied upon the prior conviction here.

March 20, 2025

EDUCATION-SCHOOL LAW, ADMINISTRATIVE LAW, EDUCATION-SCHOOL LAW.

IN A FACT-SPECIFIC OPINION, THE COURT OF APPEALS, REVERSING THE APPELLATE DIVISION, DETERMINED THERE WAS SUBSTANTIAL EVIDENCE SUPPORTING THE UNIVERSITY'S RULING THAT PETITIONER-STUDENT VIOLATED THE CODE OF STUDENT CONDUCT BY ENGAGING IN UNWANTED SEXUAL ACTIVITY (CT APP).

The Court of Appeals, reversing the Appellate Division, in a full-fledged opinion by Judge Cannatara, in a fact-specific analysis, determined the university's ruling that petitioner, P.C., a university student, violated the Code of Student Responsibility by engaging in unwelcome sexual activity with another student, S.G., was supported by the evidence:

… [S]ubstantial evidence supports the determination that P.C. violated the Code of Student Responsibility by engaging in unwanted sexual activity with S.G. despite her physical resistance and loss of consciousness during separate encounters. Although some aspects of the sexual encounters may have been consensual, there is ample evidence that other aspects were not. S.G.'s unrebutted testimony was deemed credible and she provided consistent evidence, both in her written statement for the investigator and in her hearing testimony, that she tried unsuccessfully to physically remove P.C.'s hands from her neck during an encounter in the woods. Under the Code of Student Responsibility, her physical resistance is inconsistent with affirmative consent.

Similarly, with respect to the allegation that P.C. had sex with S.G. in the car without her affirmative consent, S.G. consistently maintained that she lost consciousness, woke up while P.C. was still having sex with her, and that P.C. then told her she had only been "out" for a moment. Under the Code, sexual activity must stop when a person is incapacitated by lack of consciousness or being asleep. Moreover, P.C.'s own text messages acknowledge the sexual contact and, to some degree, evince a consciousness of guilt.

The evidence adduced depicting unwelcome sexual conduct by P.C. constitutes substantial evidence supporting all three charges. In reaching the opposite conclusion, the Appellate Division majority improperly reweighed the evidence by relying on S.G.'s statements concerning consensual conduct that transpired earlier in the evening, to the exclusion of her testimony regarding the contact to which she did not consent, and disregarded the conclusion that P.C.'s text messages reflected a consciousness of guilt. Matter of P.C. v Stony Brook Univ., 2025 NY Slip Op 01566, CtApp 3-18-25

Practice Point: Consult this opinion for some insight into the evidence which is sufficient to support a university's ruling that a student should be suspended for violating the Code of Student Responsibility by engaging in unwanted sexual activity.

March 18, 2025

ELECTION LAW, CONSTITUTIONAL LAW, MUNICIPAL LAW.

NEW YORK CITY LOCAL LAW 11, WHICH ALLOWS NON-CITIZENS TO VOTE, VIOLATES THE NEW YORK STATE CONSTITUTION (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Wilson, over an extensive dissenting opinion, determined New York City Local Law 11, which allowed non-citizens to vote, violates the New York Constitution:

Local Law 11 allows "municipal voters" to vote in New York City elections for the offices of Mayor, Public Advocate, Comptroller, Borough President and City Council Member (New York City Charter §§ 1057-aa, 1057-bb). The law defines a municipal voter as "a person who is not a United States citizen on the date of the election on which he or she is voting," and who: (1) "is either a lawful permanent resident or authorized to work in the United States"; (2) "is a resident of New York city and will have been such a resident for 30 consecutive days or longer by the date of such election"; and (3) "meets all qualifications for registering or preregistering to vote under the election law, except for possessing United States citizenship, and who has registered or preregistered to vote with the board of elections in the city of New York under this chapter" … . * * *

Whatever the future may bring, the New York Constitution as it stands today draws a firm line restricting voting to citizens. Fossella v Adams, 2025 NY Slip Op 01668, CtApp 3-20-25

Practice Point: The NYS Constitution restricts the right to vote to citizens.

March 20, 2025

EMPLOYMENT LAW, CIVIL PROCEDURE, CONTRACT LAW, EDUCATION-SCHOOL LAW.

IN ORDER TO SEEK COURT REVIEW OF AN ALLEGED VIOLATION OF A COLLECTIVE BARGAINING AGREEMENT BY AN EMPLOYER AND/OR A UNION, AN EMPLOYEE MUST BRING A PLENARY ACTION, NOT AN ARTICLE 78 PROCEEDING (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Wilson, affirming the dismissal of appellant-employee's Article 78 petition, determined an employee who has exhausted the contractual grievance process and alleges the employer breached a collective bargaining agreement must bring a plenary action, not an Article 78 proceeding, for any further review:

… [W]hen a claim arises under a collective bargaining agreement that creates a mandatory grievance process, the employee "may not sue the employer directly for breach of that agreement but must proceed, through the union, in accordance with the contract. Unless the contract provides otherwise, only when the union fails in its duty of fair representation can the employee go beyond the agreed procedure and litigate a contract issue directly against the employer" … . Allegations that an employer has breached the collective bargaining agreement are contract claims that may not be resolved in an article 78 proceeding … . Thus, when an employee alleges that an employer has breached a term in a collective bargaining agreement, the proper mechanism is a plenary action alleging both breach of contract by the employer and breach of the duty of fair representation by the union … . * * *

The procedure applicable to an employee's claim depends on the source of the right or benefit the employee asserts. Statutory or constitutional claims are

appropriately brought in an article 78 proceeding … . Claims arising exclusively from an alleged breach of a term in a collective bargaining agreement must be brought through a civil action for breach of contract … and must meet the requirements set out in Ambach (70 NY2d at 508). Matter of Dourdounas v City of New York, 2025 NY Slip Op 01671, CtApp 3-20-25

Practice Point: An employee who, after exhausting the grievance mechanism in a collective bargaining agreement, seeks court review of whether the employer and/or the union breached the collective bargaining agreement must bring a plenary action, not an Article 78 proceeding.

March 20, 2025

EMPLOYMENT LAW, CIVIL PROCEDURE, CIVIL RIGHTS LAW, CONTRACT LAW.

THE SIX-MONTH STATUTE OF LIMITATIONS IN THE EMPLOYMENT CONTRACT WITH PLAINTIFF WAS REASONABLE AND ENFORCEABLE; THEREFORE PLAINTIFF'S EMPLOYMENT DISCRIMINATION ACTION, WHICH WAS COMMENCED SIX MONTHS AND ONE DAY AFTER PLAINTIFF'S EMPLOYMENT WAS TERMINATED, WAS TIME-BARRED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the six-month statute of limitations in the employment contract with plaintiff was reasonable and enforceable. Therefore plaintiff's action, which was commenced one day after the six-month limitation period had expired, was time-barred:

"Parties to a contract may agree to limit the period of time within which an action must be commenced to a period shorter than that provided by the applicable statute of limitations" … . "'[A]n agreement which modifies the Statute of Limitations by specifying a shorter, but reasonable, period within which to [*2]commence an action is enforceable provided it is in writing'" … . CPLR 201 provides that an action "must be commenced within the time specified in this article unless a

different time is prescribed by law or a shorter time is prescribed by written agreement."

Pursuant to CPLR 3211(a)(5), "'a moving defendant must establish, prima facie, that the time within which to commence the action has expired'" … . Once this threshold showing is met, the burden then shifts to the plaintiff to "'raise a question of fact as to whether the statute of limitations was tolled or was otherwise inapplicable, or whether the action was actually commenced within the applicable limitations period'" … .

Here, the defendants produced the employment application, which contained the provision regarding the six-month limitations period and which was signed by the plaintiff. The plaintiff does not dispute that her employment was terminated on November 23, 2021. The defendants therefore established … that the limitations period expired on May 23, 2022. The plaintiff commenced this action on May 24, 2022, one day after the expiration of the limitations period. Salati v Northwell Health, 2025 NY Slip Op 01660, Second Dept 3-19-25

Practice Point: Here the six-month statute of limitations in plaintiff's employment contract was deemed reasonable and enforceable. Therefore plaintiff's employment discrimination action, commenced six months and one day after her employment was terminated, was time-barred.

March 19, 2025

FAMILY LAW, CRIMINAL LAW.

PRIVATE MESSAGES SENT BY THE JUVENILE DID NOT MEET THE CRITERIA FOR A "TERRORISTIC THREAT" (FOURTH DEPT).

The Fourth Department, reversing Family Court, determined the messages sent by the juvenile did not meet the criteria for a terroristic threat:

… [A] person is guilty of making a terroristic threat when "with intent to intimidate or coerce a civilian population . . . [they] threaten[ ] to commit or cause to be committed a specified offense and thereby cause[ ] a reasonable expectation or fear of the imminent commission of such offense" (Penal Law § 490.20 [1]).

Here, petitioner presented testimony that respondent sent private messages to another student in a different school district that respondent was planning to commit a mass shooting to end bullying in his school. There was no evidence that those threats were made to anyone other than the student or that respondent requested that the student relay the threats to others. "A private conversation between immature teenage friends, without more, does not establish the element of intent to intimidate a civilian population" … . Matter of Jose M.F. (Seneca County Presentment Agency), 2025 NY Slip Op 01734, Fourth Dept 3-21-25

Practice Point: Threatening to commit a mass shooting to end school bullying in a private message to another student does not satisfy the criteria for a "terroristic threat."

March 21, 2025

FAMILY LAW, JUDGES.

THE JUDGE SHOULD NOT HAVE PLACED CONDITIONS ON MOTHER'S VISITATION; MATTER REMITTED FOR A SPECIFIC VISITATION SCHEDULE (FOURTH DEPT).

The Fourth Department, reversing (modifying) Family Court, determined the judge should not have placed conditions on mother's visitation and remitted the matter for a visitation schedule:

We agree with the mother … that the court erred in conditioning her visitation upon either her participation in domestic violence counseling or that she no longer reside with her husband … . We therefore modify the order accordingly, and we remit the matter to Family Court to fashion a specific and definitive schedule for visitation, if any, between the mother and the children. Matter of Seeley-Sick v Allison, 2025 NY Slip Op 01747, Fourth Dept 3-21-25

Practice Point: Conditioning mother's visitation on domestic violence counseling or on no longer resided wither her husband was deemed improper. Mother was entitled to a specific visitation schedule.

March 21, 2025

FRAUD, CONTRACT LAW, NEGLIGENCE, EDUCATION-SCHOOL LAW, EMPLOYMENT LAW.

THE DEFENDANT SCHOOL IN THIS CHILD VICTIMS ACT CASE DID NOT DEMONSTRATE WHEN PLAINTIFF COULD HAVE DISCOVERED THE ALLEGED FRAUD WHICH INDUCED HIM TO SIGN RELEASES; THEREFORE THIS FRUAD-BASED ACTION SHOULD NOT HAVE BEEN DISMISSED AS TIME-BARRED; THE COMPLAINT STATED CAUSES OF ACTION FOR FRAUDULENT INDUCEMENT AND FRAUDULENT CONCEALMENT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the defendant school in this Child Victims Act case (1) did not demonstrate the fraud-based causes of action to set aside or rescind the releases signed by the plaintiff were time-barred and (2) was not entitled to dismissal of the fraudulent inducement and fraudulent concealment causes of action. Plaintiff alleged he would not have signed the releases had he known the guidance counsellor who allegedly sexually abused him would be allowed to continue in his employment, and he would not have signed the releases had he known there were other instances of sexual misconduct by the guidance counsellor of which the school was aware: With respect to the statute of limitations for a fraud-based action, the court explained:

"A fraud-based action must be commenced within six years of the fraud or within two years from the time the plaintiff discovered the fraud or could with reasonable diligence have discovered it, whichever is later" (… see CPLR 203[g]; 213[8]). "The inquiry as to whether a plaintiff could, with reasonable diligence, have discovered the fraud turns on whether the plaintiff was possessed of knowledge of facts from which the fraud could be reasonably inferred" … . "Generally, knowledge of the fraudulent act is required and mere suspicion will not constitute a sufficient substitute. Where it does not conclusively appear that a plaintiff had knowledge of facts from which the fraud could reasonably be inferred, a [fraud-based cause of action] should not be dismissed on motion and the question should

be left to the trier of facts" … . "Ordinarily, an inquiry into when a plaintiff should have discovered an alleged fraud presents a mixed question of law and fact" … .

Here, the defendant failed to establish that the causes of action to set aside or rescind the releases on the ground of fraud were time-barred pursuant to CPLR 3211(a)(5) … . "[T]here was no indication in the [amended complaint] or in the papers submitted by the defendant[ ] on [its] motion as to when the plaintiff became aware" of the alleged fraudulent conduct … . In any event, the plaintiff, in affidavits submitted in opposition to the motion, indicated that he learned of certain facts underlying the fraud-based causes of action in early 2021 … . The defendant failed to demonstrate that the plaintiff, by exercising reasonable diligence, could have discovered those facts at some point prior to the two-year period immediately preceding the commencement of this action … . Gormley v Marist Bros. of the Schs., Province of the United States of Am., 2025 NY Slip Op 01612, Second Dept 3-19-25

Practice Point: Here defendant did not demonstrate when plaintiff could or should have become aware of the defendant's alleged fraud. Therefore the motion to dismiss the fraud-based action as time-barred should not have been granted.

Practice Point: Consult this decision for an explanation of what must be alleged to state causes of action for fraudulent inducement and fraudulent concealment in the context of setting aside or rescinding a release.

March 19, 2025

LANDLORD-TENANAT, FRAUD, CIVIL PROCEDURE, MUNICIPAL LAW.

TO SUFFICIENTLY ALLEGE THE APPLICABILITY OF THE FRAUD EXCEPTION TO THE FOUR-YEAR LOOKBACK FOR A "FRAUDULENT SCHEME TO INFLATE RENTS" ACTION, THE PLAINTIFF NEED NOT ALLEGE RELIANCE ON A FRAUDULENT REPRESENTATION; IT IS ENOUGH TO ALLEGE SUFFICIENT INDICIA OF FRAUD OR A COLORABLE CLAIM OF FRAUD (CT APP).

The Court of Appeals, reversing (modifying) the Appellate Division, in a full-fledged opinion by Judge Garcia, determined that to sufficiently allege the applicability of the fraud exception to the four-year statute of limitations ("lookback" period) in a "fraudulent scheme to inflate rents" action, a plaintiff need not allege satisfaction of each element of common-law fraud (including reliance), rather the plaintiff need only allege "sufficient indicia" of fraud:

… [T]he fraud exception serves a far different purpose than an allegation of common law fraud. The fraud exception, applicable only to an overcharge claim, simply allows for review of the rental history outside the four-year lookback period and then … "solely to ascertain whether fraud occurred—not to furnish evidence for calculation of the base date rent or permit recovery for years of overcharges barred by the statute of limitations" … . The exception operates to protect not only current tenants, who may or may not have relied on a fraudulent representation, but future tenants and the overall rent regulatory system. Requiring that a tenant show reliance on a landlord's fraudulent representation would exempt an "unscrupulous landlord in collusion with a tenant" from the consequences of engaging in a scheme to evade the law's protection … . Given the narrow purpose and scope of the fraud exception, there is no basis for imposing the pleading requirements of a common law fraud claim. Instead, we require plaintiffs to put forth "sufficient indicia of fraud" or a "colorable claim" of a fraudulent scheme but do not impose a burden to establish each element of a common law fraud claim.

… [T]o invoke the fraud exception, a plaintiff must allege sufficient indicia of fraud, or a colorable claim of a fraudulent scheme to evade the protections of the rent stabilization laws, to withstand a motion to dismiss on statute of limitations

grounds. Such allegations must include more than an assertion that a tenant was overcharged—a mere allegation of a high rent increase is insufficient for the fraud exception to apply … We address only the reliance issue here. On remittal the Appellate Division should apply our established standard—assessing whether plaintiffs' complaint alleges sufficient indicia of fraud or a colorable claim of a fraudulent scheme "to remove tenants' apartment from the protections of rent stabilization" … . Burrows v 75-25 153rd St., LLC, 2025 NY Slip Op 01669, CtApp 3-20-25

Practice Point: Consult this opinion for insight into what the complaint must allege to invoke the fraud exception to the four-year lookback period for a "fraudulent scheme to inflate rents" action.

March 20, 2025

NEGLIGENCE, CIVIL PROCEDURE, EVIDENCE, JUDGES.

PLAINTIFF ALLEGED DEFENDANT HOSPITAL WAS NEGLIGENT IN PLACING HIM IN A ROOM WITH A PERSON WITH COVID; PLAINTIFF WAS ENTITLED TO DISCOVERY OF THAT PERSON'S MEDICAL RECORDS TO DETERMINE WHEN THE HOSPITAL BECAME AWARE OF THE COVID DIAGNOSIS (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined plaintiff was entitled to discovery of another's medical records. Plaintiff alleged the hospital was negligent in placing plaintiff in a room with a person with COVID. The sought medical records may reveal when the hospital became aware of the COVID diagnosis:

Although "discovery determinations rest within the sound discretion of the trial court, the Appellate Division is vested with a corresponding power to substitute its own discretion for that of the trial court, even in the absence of abuse" … . CPLR 3101 (a) provides that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof." "What is material and necessary is left to the sound discretion of the lower

courts and includes any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason" … .

Pursuant to CPLR 4504 (a), "a person authorized to practice medicine . . . shall not be allowed to disclose any information which [they] acquired in attending a patient in a professional capacity, and which was necessary to enable [them] to act in that capacity." The physician-patient privilege may be overcome, however, where the plaintiff establishes that the information in the medical records is material and necessary to their claim … . Here, plaintiffs established that the nonparty patient's hospital records would show when defendant, its agents, servants and employees became aware that the patient had tested positive for COVID-19 and that such information is material and necessary to establish whether defendant had notice that it was placing plaintiff in the same room as a person who had COVID-19 … . Martin v Kaleida Health, 2025 NY Slip Op 01756, Fourth Dept 3-21-25

Practice Point: Here plaintiff was entitled to limited discovery of another's medical records because the records were "material and necessary to the prosecution of the action."

March 21, 2025

NEGLIGENCE, COURT OF CLAIMS, CIVIL PROCEDURE.

THE INFORMATION IN THE CHILD-VICTIMS-ACT CLAIM WAS NOT SPECIFIC ENOUGH TO ALLOW THE STATE TO INVESTIGATE THE ALLEGATIONS OF SEXUAL ABUSE BETWEEN 1986 AND 1990; CLAIM DISMISSED (CT APP).

The Court of Appeals, reversing the Appellate Division, in a full-fledged opinion by Judge Halligan,, determined the Child Victims Act claim did not provide sufficient information to allow the State to investigate the allegations of sexual abuse between 1986 and 1990:

… [W]e conclude that Wright's [claimant's] claim lacks the specificity section [Court of Claims Act] 11 (b) requires. Because the allegations are too spare to

enable the State promptly to investigate and ascertain the existence and extent of its liability, the claim suffers a jurisdictional defect and therefore must be dismissed.

The claim lacks critical information about the abusers. It alleges that the perpetrators included teachers, coaches, counselors, and perhaps other employees of the State, but it does not explain whether those employees were Wright's teachers, coaches, and counselors, or why, as a child, he was in their company multiple times between 1986 and 1990. The claim also alleges that members of the public were responsible for some of the abuse he suffered, but it does not explain why Wright came into contact with those persons as a child, the context in which adult supervision of any particular activity allegedly should have been provided, or the extent to which the State bore responsibility for Wright's contact with the abusers. Nor does the claim adequately allege what repeatedly brought Wright to The Egg [a State performing arts center] over a four-year period in the late 1980s, or why, once on the premises, he frequently engaged with both members of the public and State employees.

In the absence of such information, the State cannot promptly investigate the claim and determine its liability under Wright's theories of negligence. … The State is left to "guess" whether at any point during the four-year period alleged in the claim it owed some duty to Wright and, if so, whether it breached that obligation … . But it "is not the State's burden . . . to assemble information" not included in a claim so that it may promptly investigate and assess its liability … . Section 11 (b) places that burden on the claimant. Wright v State of New York, 2025 NY Slip Op 01564, CtApp 3-18-25

Practice Point: If the claim in a Child Victims Act suit against the State does not provide enough information to allow the State to investigate, it will be deemed to lack the specificity required by Court of Claims Act section 11 (b) and will be dismissed.

March 18, 2025

NEGLIGENCE, EMPLOYMENT LAW.

A MEDICAL CORPORATION CAN BE LIABLE IN TORT FOR FAILURE TO SAFEGUARD THE CONFIDENTIALITY OF MEDICAL RECORDS (FOURTH DEPT).

The Fourth Department, reversing (modifying) Supreme Court, determined the complaint against defendant medical corporations stated a cause of action for negligent failure to safeguard the confidentiality of medical records:

Plaintiffs commenced this action alleging that, attendant to the health care services they received from defendant Rochester General Hospital (RGH), confidential medical records were generated and that those confidential medical records were stored on computer systems and networks maintained by RGH and defendants Rochester Regional Health ACO, Inc. (RRH) and Greater Rochester Independent Practice Association, Inc. (GRIPA). Plaintiffs further allege that defendant Christine M. Smith, R.N., a nurse at RGH, impermissibly accessed those records due to the failure of RGH, RRH and GRIPA "to exercise reasonable care in obtaining, retaining, securing, safeguarding, and protecting this confidential medical information from unlawful access."

"A medical corporation may . . . be liable in tort for failing to establish adequate policies and procedures to safeguard the confidentiality of patient information or to train their employees to properly discharge their duties under those policies and procedures. These potential claims provide the requisite incentive for medical providers to put in place appropriate safeguards to ensure protection of a patient's confidential information" … . Here, plaintiffs alleged that defendants generated and maintained the medical records that Smith impermissibly accessed and that they breached their duty to properly safeguard or monitor access to those records. Accepting as true the allegations in the complaint and the averments in the affidavits submitted in opposition to the motion, we conclude that plaintiffs have sufficiently alleged a negligence claim. * * * Hurley v Rochester Regional Health Aco, Inc., 2025 NY Slip Op 01729, Fourth Dept 3-21-25

Practice Point: A medical corporation can be liable for failure to safeguard the confidentiality of medical records.

March 21, 2025

NEGLIGENCE, INSURANCE LAW.

THE COMPLAINT STATED CAUSES OF ACTION FOR DAMAGES STEMMING FROM THE ALLEGED FAILURE TO RETURN PLAINTIFF'S TESLA TO ITS PRE-ACCIDENT CONDITION AND THE ALLEGED FAILURE TO PROVIDE PLAINTIFF WITH COMPARABLE TRANSPORTATION WHILE THE TESLA WAS BEING REPAIRED (FOURTH DEPT).

The Fourth Department, reversing (modifying) Supreme Court, determined the complaint stated causes of action for damages relating to the alleged failure to restore plaintiff's Tesla to its pre-accident condition and damages relating to the alleged failure to provide plaintiff with comparable transporting while the Tesla was repaired:

We agree with plaintiff … that the court erred in granting defendant's motion for summary judgment dismissing the complaint. In support of his motion, defendant offered no proof establishing as a matter of law that the repairs to plaintiff's vehicle restored the vehicle to its pre-accident condition. Defendant relied largely on an affirmation from his attorney, who has no personal knowledge of the facts, along with plaintiff's deposition testimony. Although defendant contends that plaintiff admitted during his deposition that the repairs to his vehicle were done to his satisfaction, plaintiff made clear during his testimony that, due to the gaps in the paneling, the vehicle was not in the same condition as before the accident. Defendant offered no evidence to the contrary, and it is well established that a party moving for summary judgment "must affirmatively establish the merits of its cause of action or defense and does not meet its burden by noting gaps in its opponent's proof" … .

… [W]ith respect to the loss of use cause of action, defendant merely asserted that plaintiff was not entitled to the use of a vehicle comparable to his Tesla while the Tesla was being repaired. According to defendant, any operable vehicle will suffice regardless of its make, model, size, or safety features. We agree with plaintiff … that he is entitled to damages to the extent that he was not provided with the use of

a vehicle generally comparable to his Tesla Model 3 … . Hazlett v Niezgoda, 2025 NY Slip Op 01730, Fourth Dept 3-21-25

Practice Point: A plaintiff can seek damages for the failure to return a vehicle to its pre-accident condition and the failure to provide plaintiff with comparable transportation during the repair-period.

March 21, 2025

NEGLIGENCE, VEHICLE AND TRAFFIC LAW.

ALTHOUGH THE VEHICLE OWNER, HERE A CAR DEALERSHIP, IS USUALLY VICARIOUSLY LIABLE FOR AN ACCIDENT CAUSED BY A DRIVER OPERATING THE VEHICLE WITH THE OWNER'S PERMISSION, HERE THERE IS A QUESTION OF FACT WHETHER THE DRIVER, WHO WAS TEST DRIVING THE VEHICLE, EXCEEDED THE SCOPE OF THE PERMISSION (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined summary judgment against the owner of the vehicle in this traffic accident case should not have been granted. Although summary judgment against the driver, Patel, was properly granted, there was a question of fact whether the driver had exceeded the scope of the permission granted by the owner, Paragon, a car dealership. There was evidence the sales rep told Patel he could drive around the block and return in five or ten minutes. Patel had taken the car on the expressway and called the dealership 35 minutes after leaving to say he had accident:

"Vehicle and Traffic Law § 388(1) provides that, with the exception of bona fide commercial lessors of motor vehicles, which are exempt from vicarious liability under federal law, the owner of a motor vehicle is liable for the negligence of one who operates the vehicle with the owner's express or implied consent" … . "The strong presumption of permissive use afforded by Vehicle and Traffic Law § 388, can only be rebutted by substantial evidence sufficient to show that the driver of the vehicle was not operating the vehicle with the owner's consent" … . "An owner may place limitations on a driver's permission to use a vehicle, such as

granting consent to drive only to a particular area or for a specific purpose, and use outside the scope of permission negates the owner's liability under the statute" … . "Thus, an owner may avoid liability under the statute if the driver exceeded the time, place[,] and purpose of the use permitted by the owner" … . Madrigal v Paragon Motors of Woodside, Inc., 2025 NY Slip Op 01620, Second Dept 3-19-25

Practice Point: The owner of a vehicle may impose limits on the permissive use of the vehicle by another. If the driver exceeds the scope of the permission to use the vehicle, the owner may not be vicariously liable under Vehicle and Traffic Law section 388.

March 19, 2025

REAL PROPERTY LAW, TRUSTS AND ESTATES.

UNBEKNOWNST TO ALL DURING THE 1992 SURROGATE'S COURT PROCEEDING, THE DECEDENT'S BROTHER WAS STILL ALIVE; DECEDENT'S NEPHEW TOOK POSSESSION OF DECEDENT'S PROPERTY, A THREE-STORY BUILDING, IN 1993; THE NEPHEW FIRST BECAME AWARE OF DECEDENT'S BROTHER'S INTEREST IN THE PROPERTY IN 2019; THE COURT OF APPEALS DETERMINED THE NEPHEW ACQUIRED THE PROPERTY BY ADVERSE POSSESSION (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Wilson, over a dissenting opinion, determined respondent (Mr. Golobe), who "inherited" the building after his aunt (Dorothy) died, was entitled to the building through adverse possession after it became known that Dorothy's brother, Yale, was still alive. During the Surrogate's Court proceeding a family friend testified that Yale predeceased Dorothy by six or seven years:

Mr. Golobe. Mr. Golobe took possession of the Premises in October 1992 and has maintained possession since then. He has negotiated leases, collected and retained rent, paid property taxes, executed a construction mortgage, and made substantial renovations to the Premises. Those renovations include a complete structural

support overhaul, an interior gut renovation, the replacement of the front entrance and door, the replacement of the second and third floor windows, and the replacement of the roof.

Yale actually died the year after Dorothy, in 1993. His estate passed to his wife Helen, then to Helen's sister Beatrice, then to Beatrice's husband Emil Kraus. Upon Mr. Kraus's death, his estate passed to the Trust, the defendant-appellant in this case. * * *

The question—whether a cotenant may adversely possess property when neither cotenant is aware of the existence of the co-tenancy—is an issue of first impression in New York. We hold that a cotenant may obtain full ownership of jointly owned property even when neither party is aware of the other cotenant's interest. Mr. Golobe did so.

"To establish a claim of adverse possession, the occupation of the property must be (1) hostile and under a claim of right (i.e., a reasonable basis for the belief that the subject property belongs to a particular party), (2) actual, (3) open and notorious, (4) exclusive, and (5) continuous for the statutory period (at least 10 years)" … . The parties agree that Mr. Golobe actually, exclusively and continuously occupied the Premises for over 20 years, beginning in October 1992. We must determine whether Mr. Golobe's possession was hostile, under a claim of right, and open and notorious. It was all three. Golobe v Mielnicki, 2025 NY Slip Op 01670, CtApp 3-20-25

Practice Point: In a matter of first impression, the Court of Appeals determined a cotenant may adversely possess property even when neither cotenant is aware of the existence of the co-tenancy.

March 20, 2025

REAL PROPERTY TAX LAW, RELIGION, CORPORATION LAW.

THE RELIGIOUS NOT-FOR-PROFIT CORPORATION, THE OWNER OF THE RESIDENCE PROVIDED FOR THE TORAH READER AND HIS FAMILY, WAS ENTITLED TO A REAL-PROPERTY-TAX EXEMPTION (SECOND DEPT).

The Second Department, reversing Supreme Court, in a full-fledged opinion by Justice Ventura, determined the not-for-profit religious corporation was entitled to an exemption from real property tax for a residence used by Marcus, the Torah reader, and his family:

This appeal provides this Court with an opportunity to clarify the standards courts should consider when deciding whether a covered not-for-profit corporation is entitled to a full tax exemption pursuant to RPTL 420-a for property allegedly utilized primarily in furtherance of exempt purposes. The circumstances presented here involve an Orthodox Jewish religious corporation seeking an exemption for a residential property used, inter alia, to house its Torah reader and his family. … [W]e conclude … that the petitioner demonstrated that the subject property was used primarily in furtherance of its religious purposes during the 2015 tax year. Therefore, the Supreme Court should have granted the petitioner's motion for summary judgment on the petition to review the real property tax assessment for that year. * * *

… [T]he petitioner's submissions established that it offered Marcus housing within walking distance of the synagogue in order to continue to retain his expert services as a Torah reader, as his religious beliefs prohibited him from driving to the synagogue on the Sabbath and on Jewish holy days, and he had a growing family which made walking from his prior apartment impractical … . The petitioner's rabbi also stated that, upon learning that Marcus could not continue in his role as Torah reader without residing closer to the synagogue, "[t]he congregation was unable to identify any qualified Torah [r]eader within walking distance [thereof]." Considering … that "[t]he requirement of reading from the Torah" during services "is absolute and cannot be waived," as explained by the rabbi, the petitioner's religious "goal[s]" were "advance[d]" by providing Marcus with housing closer to

the synagogue … . Matter of Harrison Orthodox Minyan, Inc. v Town/Village of Harrison, 2025 NY Slip Op 01634, Second Dept 3-19-25

Practice Point: Here a not-for-profit religious corporation was entitled to an exemption from real property tax for a residence provided to the Torah reader and his family because the residence was used "primarily in furtherance of its religious purposes" during the relevant tax year.

March 19, 2025