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Personal Injury
Reversal Report
March 2025

An Organized Compilation of Summaries of Selected Decisions, Mostly Reversals, Addressing Personal Injury, Released and Posted on the New York Appellate Digest in March 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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ASSUMPTION OF THE RISK, FOUR-YEAR-OLD HOCKEY PLAYER.

THERE WERE QUESTIONS OF FACT OF WHETHER THE FOUR-YEAR-OLD PLAINTIFF UNDERSTOOD AND ASSUMED THE RISKS OF PARTICIPATING IN A YOUTH HOCKEY CLINIC; THE COACH, WHILE SKATING BACKWARDS, FELL ON THE CHILD; DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant town (Oyster Bay), which offered a youth hockey clinic, was not entitled to summary judgment on the ground the four-year-old plaintiff assumed the risk of injury. Defendant coach (Marlow) was skating backwards when he fell on the four-year-old plaintiff:

The [assumption of the risk] "doctrine applies where a consenting participant in sporting and amusement activities 'is aware of the risks; has an appreciation of the nature of the risks; and voluntarily assumes the risks'" … . "If the risks of the activity are fully comprehended or perfectly obvious, plaintiff has consented to them and defendant has performed its duty" … . Risks that are "commonly encountered" or "inherent" in a sport, as well as risks "involving less than optimal conditions," are risks tha participants have accepted and are encompassed by the assumption of risk doctrine … . "It is not necessary . . . that the injured plaintiff have foreseen the exact manner in which his or her injury occurred, so long as he or she is aware of the potential for injury of the mechanism from which the injury results" … . Awareness of risk is to be assessed against the background of the skill and experience of the particular plaintiff … .

Given the evidence submitted in support of the Town defendants' cross-motion, including the infant plaintiff's age and scant information concerning the infant

plaintiff's skill and experience level with ice hockey, there were triable issues of fact as to whether the infant plaintiff fully appreciated the risks involved in terms of the activity he was engaged in so as to find he assumed the risk of his injuries under the facts of this case … . H.B. v Town of Oyster Bay, 2025 NY Slip Op 01203, Second Dept 3-5-25

Practice Point: Sometimes the application of a legal doctrine seems absurd. Can a four-year-old participant in a hockey clinic appreciate the risk of being injured by a coach who skates backwards and falls on him?

March 5, 2025

CHILD VICTIMS ACT, COURT OF CLAIMS, INSUFFICIENT CLAIM.

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

CHILD VICTIMS ACT, FRAUDULENT INDUCEMENT TO SIGN RELEASES, 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

DISCOVERY, MEDICAL RECORDS OF ANOTHER PATIENT, HOSPITAL PLACED PLAINTIFF IN ROOM WITH COVID PATIENT.

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

EDUCATION-SCHOOL LAW, COLLEGE CODE OF CONDUCT, SEXUAL OFFENSE, ADMINISTRATIVE 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

INSURANCE LAW, NO-FAULT, 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

LABOR LAW-CONSTRUCTION LAW, SUFFICIENCY OF COMPLAINT.

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, LACK OF INFORMED CONSENT.

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

MEDICAL RECORDS, FAILURE TO SAFEGUARD CONFIDENTIALITY, 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

PUBLIC HEALTH LAW, ASSISTED LIVING FACILITY VS RESIDENTIAL HEALTH CARE FACILITY.

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

TRAFFIC ACCIDENTS, ACTION AGAINST STATE EMPLOYEE, COURT OF CLAIMS VS SUPREME COURT, CORRECTION LAW.

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

TRAFFIC ACCIDENTS, INSURANCE LAW, RETURN VEHICLE TO PRE-ACCIDENT CONDITION.

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

TRAFFIC ACCIDENTS, VICARIOUS LIABILITY OF OWNER, 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 PERMI SSION, 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

WORKERS' COMPENSATION, WORLD TRADE CENTER CLEANUP.

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

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