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Weekly Reversal Report
April 14 – 18, 2025

An Organized Compilation of Summaries of Selected Decisions, Mostly Reversals, Released by Our New York State Appellate Courts April 14 – 18, 2025, and Posted on the New York Appellate Digest Website on Monday, April 21, 2025. The Entries in the Table of Contents Link to the Summaries which Link to the Full Decisions on the Official New York Courts Website. Click on “Table of Contents” in the Header on Any Page to Return There. Right Click on the Citations to Keep Your Place in the Reversal Report.

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ANIMAL LAW, NEGLIGENCE.

OVERRULING A 2006 OPINION, A PLAINTIFF IN A DOG-BITE ACTION CAN NOW SUE IN STRICT LIABILITY AND COMMON-LAW NEGLIGENCE (CT APP).

The Court of Appeals, reversing the appellate division in this dog-bite case, in a full-fledged opinion by Judge Halligan, reinstating the strict liability and common-law negligence causes of action, overruled the 2006 Court of Appeals case holding that there is no common-law liability for injury caused by a domestic animal:

Plaintiff Rebecca Flanders, a postal carrier, was bitten by a dog owned by Defendants Stephen and Michelle Goodfellow while delivering a package to their residence. She commenced this action to recover damages for her injuries, asserting causes of action sounding in strict liability and negligence. Both causes of action were dismissed, and Flanders asks us to reinstate them.

Under settled law, an owner of a domestic animal who has actual or constructive knowledge of their animal's vicious propensities will be held strictly liable for harm caused as a result of those propensities. There is a triable issue of fact as to whether the Goodfellows had constructive knowledge of their dog's vicious propensities, and so summary judgment should not have been granted to them on the strict liability cause of action.

The lower courts dismissed Flanders's negligence cause of action as barred by Bard v Jahnke (6 NY3d 592 [2006]), which held that there can be no common-law negligence liability when a domestic animal causes harm. Experience has shown that this rule is in tension with ordinary tort principles, unworkable, and, in some circumstances, unfair. Continued adherence to Bard

therefore would not achieve the stability, predictability, and uniformity in the application of the law that the doctrine of stare decisis seeks to promote. Accordingly, we overrule Bard to the extent that it bars negligence liability for harm caused by domestic animals, and reinstate Flanders's negligence cause of action. * * *

Our decision today means that there is a two-pronged approach to liability for harms caused by animals … .. A plaintiff who suffers an animal-induced injury therefore has a choice. If the owner knew or should have known the animal had vicious propensities, the plaintiff may seek to hold them strictly liable. Or they can rely on rules of ordinary negligence and seek to prove that the defendant failed to exercise due care under the circumstances that caused their injury. Of course, a plaintiff might also assert both theories of liability … . Flanders v Goodfellow, 2025 NY Slip Op 02261, CtApp 4-17-25

Practice Point: A plaintiff in a dog-bite case can now assert both strict liability and common-law negligence causes of action.

April 17, 2025

CRIMINAL LAW, EVIDENCE.

UNLIKE A LEVEL-ONE OR LEVEL-TWO STREET STOP, A LEVEL-THREE STREET STOP JUSTIFIES POLICE PURSUIT, EVEN IF THE REASON FOR THE STOP, HERE AN APPARENT IMPENDING ASSAULT, WAS DISSIPATED BY THE SUSPECT'S FLIGHT (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Singas, affirming the appellate division, determined the police were justified in pursuing the defendant after a level three street stop, even though, at the time of the pursuit, the initial reason for the stop, an apparent impending attack on a pedestrian, had dissipated:

We have previously held that an individual's flight from a level one or two police encounter, without more, does not provide the reasonable suspicion necessary to pursue them (see People v Holmes, 81 NY2d 1056, 1058 [1993]; People v May, 81 NY2d 725, 728 [1992]; see generally People v De Bour 40 NY2d 210 [1976]). We now hold that when a suspect flees during a lawful level three stop founded on reasonable suspicion of criminal activity, police may pursue the suspect.

… At the suppression hearing, Officer Kyle Eisenhauer of the Rochester Police Department testified that, on the night of the arrest, he was in uniform in an unmarked patrol vehicle with his partner, Officer Jeremy Nellist. The two were driving behind a sedan when a woman on the sidewalk threw a glass bottle at the sedan, which then came to a stop in the middle of the street.

Defendant exited the driver's door of the sedan and "in a very aggressive manner" began yelling at the woman and approached her with clenched fists. According to Eisenhauer, "[i]t appeared [that defendant] was . . . about to attack" the woman. Eisenhauer and Nellist exited their patrol car and told defendant to stop, and defendant "stopped and looked in [their] direction." The uniformed officers were about 25 feet away from defendant without their guns drawn. Defendant "began to back away, and then quickly turned and began digging in the front of his waistband and running" away from the officers, leaving his car in the middle of the street with the driver's door open. The officers followed in pursuit. * * *

We reject the notion that a suspect can legally flee a level three stop so long as their flight dissipates the reasonable suspicion of the crime that initially gave rise to the stop. People v Cleveland, 2025 NY Slip Op 02144, CtApp 4-15-25

Practice Point: If the police have reasonable suspicion of criminal activity at the time of a level three street stop, they may pursue the fleeing suspect, even if the initial reason for the stop (here an apparent impending assault) is dissipated by the flight. In contrast, flight from a level one or level two street stop does not justify pursuit.

April 15, 2025

CRIMINAL LAW.

CRIMINAL POSSESSION OF A WEAPON SECOND DEGREE AND CRIMINAL POSSESSION OF A FIREARM ARE INCLUSORY CONCURRENT COUNTS; THE CRIMINAL POSSESSION OF A FIREARM CONVICTION WAS VACATED (SECOND DEPT).

The Second Department, vacating the criminal possession of a firearm conviction, determined criminal possession of a weapon second degree and criminal possession of a firearm are inclusory concurrent counts:

CPL 300.30(4) provides that "[c]oncurrent counts are 'inclusory' when the offense charged in one is greater than any of those charged in the others and when the latter are all lesser offenses included within the greater" … . CPL 300.40(3)(b) provides, in relevant part, that with respect to inclusory concurrent counts, "[a] verdict of guilty upon the greatest count submitted is deemed a dismissal of every lesser count submitted" … . Here, the defendant was convicted of criminal possession of a weapon in the second degree and criminal possession of a firearm (Penal Law §§ 265.03[1][b]; 265.01-b[1]). Because the charge of criminal possession of a weapon in the second degree and the charge of criminal possession of a firearm are inclusory concurrent counts, the conviction of criminal possession of a firearm, as well as the sentence imposed thereon, must be

vacated, and that count of the indictment must be dismissed … . People v Walker, 2025 NY Slip Op 02225, Second Dept 4-16-25

Practice Point: Criminal possession of a weapon second degree and criminal possession of a firearm are inclusory concurrent counts requiring vacation of the criminal possession of a firearm conviction.

April 16, 2025

INSURANCE LAW, NEGLIGENCE.

PLAINTIFF INSURER CAN SUE, AS A SUBROGEE, THE CLUB WHICH SERVED ALCOHOL TO ITS INSUREDS, WHO WERE VISIBLY INTOXICATED, PURSUANT TO THE DRAM SHOP ACT; THE INSUREDS WERE INJURED IN A SINGLE CAR ACCIDENT AND THE INSURER PAID OUT MORE THAN $500,000 (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Love, affirming Supreme Court, determined that plaintiff insurance company, Drive Insurance, could stand in the shoes of its insureds (as a subrogee) and sue the defendant club, Atlantis, pursuant to the Dram Shop Act. Plaintiff alleged defendant served alcohol to the visibly intoxicated insureds who were then injured in a single-car accident. Plaintiff paid out over $500,000 to the insureds (named Aly, Perez and Abreu-Mateo):

… Drive Insurance alleged that Aly, Perez, and Abreu-Mateo were injured and the vehicle was damaged by Perez, who was visibly intoxicated at the time that Atlantis sold her alcohol. Accordingly, the Supreme Court properly determined that Drive Insurance was entitled to assert, as subrogee, a cause of action pursuant to the Dram Shop Act and that Drive Insurance stated a claim against Atlantis for violation of the Dram Shop Act. If the owner of the vehicle and the passengers have causes of action pursuant to the Dram Shop Act against Atlantis to recover damages arising out of the accident on the theory that Atlantis unlawfully served Perez when she was visibly intoxicated, causing the accident and their injuries, which causes of action do not fall into one of the exclusions discussed supra, then, since Drive Insurance alleges that it made payments as to the damaged vehicle and the injured passengers pursuant to the policy, Drive Insurance is entitled to stand in the shoes of its insured and seek indemnification from Atlantis based on Atlantis's alleged violation of the Dram Shop Act. Drive N.J. Ins. Co. v RT Hospitality Group, LLC, 2025 NY Slip Op 02188, Second Dept 4-16-25

Practice Point: An insurance company which has paid the insureds' medical bills and vehicle-repair costs after a single-car accident, can, as a subrogee, sue the bar which served alcohol to the visibly intoxicated insureds under the Dram Shop Act.

April 16, 2025

JUDGES, CIVIL PROCEDURE, CRIMINAL LAW.

ONLY THE COURT CHARGED WITH EMPANELING THE GRAND JURY CAN ORDER THE RELEASE OF THE GRAND JURY MINUTES; IN ORANGE COUNTY THE COURT CHARGED WITH EMPANELING GRAND JURIES IS COUNTY COURT; THEREFORE THE PETITON FOR A WRIT OF PROHIBITION PROHIBITING A SUPREME COURT JUSTICE FROM ORDERING THE RELEASE OF THE GRAND JURY MINUTES WAS GRANTED (SECOND DEPT).

The Second Department granted a petition for a writ of prohibition to prohibit a Supreme Court justice from ordering the release of grand jury minutes to the plaintiff in a civil action. Only the court charged with empaneling the grand jury, in this case County Court, can order release of the minutes:

The orders … directing the release of certain grand jury minutes in the subject criminal action and directing the clerk of the court to provide those minutes to the plaintiff's counsel in the underlying civil action, are subject to prohibition for exceeding the Supreme Court's authorized powers, as "only the court in charge of a Grand Jury may release testimony from the secrecy requirements of CPL 190.25(4)" … . In Orange County, only terms of the County Court have been charged with the empaneling of grand juries at the times relevant to this proceeding … , and as such, that was the court in charge of the grand jury in the subject criminal action, and the only court authorized to release those grand jury minutes … . Matter of Hoovler v Vazquez-Doles, 2025 NY Slip Op 02204, Secpmd Dept 5-16-25

Practice Point: If a Supreme Court justice issues an order which exceeds that court's authorized powers, here an an order to release grand jury minutes to a plaintiff in a civil action, a petition for a writ of prohibition will be granted.

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JUDGES, CIVIL PROCEDURE.

THE DEFENDANTS DID NOT RAISE A DEFECT IN SERVICE AS AN AFFIRMATIVE DEFENSE; THE JUDGE SHOULD NOT HAVE RAISED THE ISSUE SUA SPONTE AND DISMISSED THE PROCEEDING ON THAT GROUND (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the judge should not have, sua sponte, raised the propriety of service issue and dismissed the proceeding on that ground:

The Supreme Court should not have, sua sponte, dismissed the proceeding/action on the ground of a defect in service. Lack of personal jurisdiction is an affirmative defense that can be waived by, among other things, "appearing in an action, either formally or informally, without raising the defense of lack of personal jurisdiction in an answer or pre-answer motion to dismiss" … . "When a defendant participates in a lawsuit on the merits, he or she indicates an intention to submit to the court's jurisdiction over the action, and by appearing informally in this manner, the defendant confers in personam jurisdiction on the court" … .

Since the respondents did not object to the Supreme Court's jurisdiction over them in an answer or in their cross-motion pursuant to CPLR 3211(a)(1) and (7) to dismiss the petition/complaint, the court should not have, sua sponte, raised the issue of the propriety of service … . Further, the respondents waived any objection to the propriety of service by appearing in the proceeding/action and cross-moving to dismiss the petition/complaint without raising the defense of lack of personal jurisdiction … . Matter of Weiss v County of Suffolk, 2025 NY Slip Op 02210, Second Dept 4-16-25

Practice Point: Defective service is an affirmative defense which, if not raised by a party, is waived. A judge cannot raise and decide the issue sua sponte.

April 16, 2025

LANDLORD-TENANT, CIVIL PROCEDURE, CONTRACT LAW.

CIVIL COURT WHICH AWARDED RENT ARREARS IN THE EVICTION PROCEEDING DID NOT HAVE SUBJECT MATTER JURISDICTION OVER THE CLAIM FOR RENT DUE FOR THE REMAINDER OF THE LEASE (POST-EVICTION); THEREFORE THE ACTION IN SUPREME COURT FOR THE POST-EVICTION RENT AS LIQUIDATED DAMAGES WAS NOT BARRED BY THE DOCTRINE OF RES JUDICATA (FIRST DEPT).

The First Department, reversing Supreme Court, determined the doctrine of res judicata did not apply to this action for rent due as liquidated damages. Although the eviction proceeding in Civil Court awarded defendant the rent arrears, Civil Court did not have subject matter jurisdiction over the claim for the rent due for the remainder of the lease term (post-eviction). Therefore the rent-as-liquidated-damages claim could be brought in Supreme Court:

This action, in which plaintiff seeks the recovery of rent arrears, is not barred by the doctrine of res judicata, as plaintiff could not have sought relief for its current claims in the Civil Court eviction proceeding. Although the rent arrears claim arises out of the same transaction as the claim for future rent … , res judicata is inapplicable where the plaintiff could not seek a particular remedy in the first action because of a limitation on a court's subject matter jurisdiction, and plaintiff wishes to seek that remedy in the second action … .

The liquidated damages clause in the lease expressly provided that plaintiff was under no duty to mitigate damages by re-letting the premises and further provided that, even if Levant was evicted, it was to remain liable for its monetary obligations under the lease … . However, Civil Court, which determined the eviction proceeding, is "without authority to address a claim for the balance of rent due" as liquidated damages … . Thus, once plaintiff had been awarded judgment in the summary proceeding, the parties' relationship as landlord and tenant ended and whatever monetary liability Levant may have had to plaintiff at that point "was no longer in the nature of rent, but was in the nature of contract damages" … . Prospect Resources Inc. v Levant Capital N. Am., Inc., 2025 NY Slip Op 02169, First Dept 4-15-25

Practice Point: Here the court which handled the eviction proceedings did not have subject matter jurisdiction over the claim for post-eviction rent as liquidated damages. Therefore the doctrine of res judicata did not preclude the suit for the post-eviction rent in Supreme Court.

April 15, 2025

NEGLIGENCE, CIVIL PROCEDURE, JUDGES.

HOME DEPOT RENTED A TRUCK TO A MAN WHO DROVE THE TRUCK INTO A CROWD OF PEDESTRIANS AND BICYCLISTS; THE COMPLAINT DID NOT STATE A CAUSE OF ACTION FOR NEGLIGENT ENTRUSTMENT; THE MOTION COURT IMPROPERLY TREATED THE MOTION TO DISMISS AS A MOTION FOR SUMMARY JUDGMENT; ALTHOUGH THE ALLEGATIONS IN THE COMPLAINT ARE DEEMED TRUE FOR A MOTION TO DISMISS, HERE THOSE ALLEGATIONS WERE PROPERLY REFUTED BY AFFIDAVITS AND DEPOSITIONS SUBMITTED BY HOME DEPOT (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiffs did not state a cause of action for negligent entrustment against defendant Home Depot, which rented a truck to Saipov, referred to in the decision as a "terrorist," who drove the truck into a crowd of pedestrians and bicyclists. The First Department noted that the motion court improperly treated the motion to dismiss as a motion for summary judgment. The First Department further noted that, although allegations in the complaint are deemed to be true for analysis of a motion to dismiss, affidavits and other documents submitted by a defendant can properly refute the allegations made in the complaint, and did so here:

… "[F]actual allegations presumed to be true on a motion pursuant to CPLR 3211 may properly be negated by affidavits and documentary evidence" … .

Plaintiffs' complaints allege that Home Depot negligently entrusted the vehicle to Saipov when it knew or should have known that his use of the pickup truck could be potentially dangerous to others, and that it should have refused to rent it to him. These allegations, even when viewed in the light most favorable to plaintiffs, do not state a cause of action for negligent entrustment. Moreover, documentary evidence as well as deposition testimony submitted by Home Depot conclusively refute these allegations.

… Home Depot established that it did not have "some special knowledge concerning a characteristic or condition peculiar" to Saipov which would render his use of the truck "unreasonably dangerous" … . Grandelli v City of New York, 2025 NY Slip Op 02154, First Dept 4-15-25

Practice Point: On a motion to dismiss, the allegations in the complaint are deemed to be true. However, those allegation can be negated by affidavits, depositions and other documents

submitted by a defendant. The submission of such documents does not convert a motion to dismiss to a motion for summary judgment.

April 15, 2025

NEGLIGENCE, EVIDENCE.

DEFENDANT IN THIS SLIP AND FALL CASE DID NOT PROVE WHEN THE AREA OF THE FALL WAS LAST INSPECTED OR CLEANED; THEREFORE DEFENDANT DID NOT DEMONSTRATE A LACK OF CONSTRUCTIVE NOTICE OF THE CONDITION AND WAS NOT ENTITLED TO SUMMARY JUDGMENT; PROOF OF GENERAL CLEANING PRACTICES IS NOT ENOUGH (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the defendant in this slip and fall did not demonstrate a lack of constructive notice of the flower petals on the floor which caused plaintiff to slip and fall. Therefore defendant was not entitled to summary judgment. A lack of constructive notice can be demonstrated by proof the area was inspected or cleaned close in time to the fall. Proof of general cleaning practices is not sufficient to raise a question of fact on the issue:

A defendant moving for summary judgment in a slip-and-fall case must establish, prima facie, that it did not create the condition that allegedly caused the fall or have actual or constructive notice of that condition for a sufficient length of time to remedy it … . "To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit the defendant's employees to discover and remedy it" … . In order to meet its prima facie burden "on the issue of lack of constructive notice, the defendant must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell" … . "Reference to general cleaning practices is insufficient to establish a lack of constructive notice in the absence of evidence regarding specific cleaning or inspection of the area in question" … .

Here, the defendant failed to demonstrate, prima facie, that it lacked constructive notice of the alleged condition … . The defendant did not submit any evidence with respect to specific cleaning or inspection of the area in question "or any other affirmative proof to demonstrate how long the condition had existed" … . The deposition testimony and affidavit submitted by the defendant as to general cleaning procedures were insufficient to establish lack of constructive notice … . Lisker v Vue Catering, Inc., 2025 NY Slip Op 02196, Second Dept 4-16-25

Practice Point: This genre of reversals appeared monthly for many years. Now these decisions are few and far between. The key issue: to demonstrate a lack of constructive notice of the condition which caused plaintiff's slip and fall a defendant must prove the area was inspected or cleaned close in time to the fall. Proof of general cleaning schedules is not enough.

April 16, 2025

NEGLIGENCE, MUNICIPAL LAW, EMPLOYMENT LAW.

IN THIS CHILD VICTIMS ACT NEGLIGENT-SUPERVISON ACTION AGAINST THE COUNTY, THE PLAINTIFF DID NOT RAISE A QUESTION OF FACT ABOUT WHETHER THE COUNTY HAD NOTICE OF A SOCIAL SERVICES CASEWORKER'S SEXUAL ABUSE OR PROPENSITY FOR SEXUAL ABUSE OF CHILDREN (CT APP).

The Court of Appeals, affirming the dismissal of this Child Victims Act suit against the county, in a full-fledged opinion by Judge Wilson, over a comprehensive dissenting opinion, determined the plaintiff did not raise a question of fact about whether the county had actual or constructive notice that a Department of Social Services caseworker (Hoch) had sexually abused children or had a propensity for the sexual abuse of children. Therefore, the plaintiff did not make out a prima facie "negligent supervision" cause of action:

In the summer of 1993, the parents of 11-year-old Michael Nellenback had him designated as a person in need of supervision (PINS) and placed in the care of Madison County's Department of Social Services. The Madison County Department of Social Services assigned caseworker Karl Hoch to the Nellenback case. According to Mr. Nellenback, over the next three years, Mr. Hoch repeatedly sexually abused and assaulted him. It turned out that Mr. Hoch had sexually abused several other children to whose cases he was assigned.

In 2019, Mr. Nellenback filed suit against Madison County under the claim-revival provision of the Child Victims Act, alleging that that the County was negligent in hiring, supervising, and retaining Mr. Hoch. The sole issue on appeal is whether Mr. Nellenback raised a triable issue of fact on his negligent supervision claim. We hold that he did not: Even viewed in the light most favorable to Mr. Nellenback, the evidence was insufficient to prove the County was on notice of the abuse and that it negligently placed Mr. Hoch in a position to cause harm. * * *

… [T]here was neither evidence that the County had any knowledge of Mr. Hoch's abuse before the report of his abuse of another child in 1996, nor any evidence the County was aware of any conduct that could have alerted them to the potential for harm. Nellenback v Madison County, 2025 NY Slip Op 02263, CtApp 4-17-25

Practice Point: This is a fact-specific opinion which analyzes the proof necessary to raise a question of fact whether a county social services department had constructive notice of its caseworker's propensity for the sexual abuse of children. The majority, over an extensive dissent, determined the evidence relied on by the plaintiff was not sufficient to raise a question of fact.

April 17, 2025

NEGLIGENCE, MUNICIPAL LAW.

PLAINTIFF, WHO TRIPPED AND FELL WHEN HE STEPPED INTO A LARGE CRACK, ASSUMED THE RISK OF PLAYING CRICKET ON A CITY-OWNED TENNIS COURT WITH AN IRREGULAR SURFACE; COMPLAINT PROPERLY DISMISSED; STRONG DISSENT (CT APP).

The Court of Appeals, affirming the dismissal of the complaint, determined plaintiff assumed the risk of playing cricket on a city tennis court with a cracked surface. Judge Rivera, in an extensive dissenting opinion, argued that there is a question of fact whether the city failed to maintain the tennis court in a reasonably safe condition:

Plaintiff was injured while playing cricket on a tennis court in a park owned by the City of New York when he ran to catch a batted ball and stepped into a large crack in the asphalt. The Appellate Division correctly held that the risks of tripping and falling while playing on an irregular surface are inherent in the game of cricket … . There is no evidence in the record that the irregularity in the playing field—the cracked and uneven surface of the tennis court—unreasonably enhanced the ordinary risk of playing cricket on an irregular surface … . Defendants were therefore entitled to summary judgment dismissing the complaint on the ground that the primary assumption of risk doctrine precludes liability on the part of defendants.

From the dissent:

The primary assumption of risk doctrine does not completely displace a landowner's traditional duty of care to maintain their premises in a safe condition. Tripping on a fissure that is allegedly the result of years of neglect is not a risk inherent to cricket, or any other sport, and defendants were therefore not entitled to summary judgment on the theory that plaintiff assumed the risk of injury by playing on a deteriorated surface. The majority empowers defendants to escape all accountability for their alleged negligence, which put plaintiff and other park users at risk of serious injury. Maharaj v City of New York, 2025 NY Slip Op 02143, CtApp 4-15-25

Practice Point: Here the assumption of the risk doctrine was deemed to outweigh any obligation on the city's part to maintain the surface of a tennis court in a safe condition.

April 15, 2025

NEGLIGENCE.

IN LAWSUITS AGAINST THE GOLF-COURSE OWNERS, A GOLFER COMPETING IN A TOURNAMENT ASSUMED THE RISK OF BEING STRUCK BY A GOLF BALL WHILE RIDIING IN A GOLF CART ON THE COURSE, BUT A GOLFER DRIVING A GOLF CART TO HER CAR IN THE COURSE PARKING LOT DID NOT ASSUME THE RISK OF A COLLISION WITH A CAR EXITING THE PARKING LOT (CT APP).

The Court of Appeals, affirming one assumption-of-the-risk case and reversing the other, in a full-fledged opinion by Judge Cannataro, determined, in lawsuits against the owners of the golf courses, a golfer assumes the risk of being struck with a golf ball, but does not assume the risk of injury in a collision while driving a golf cart in the course parking lot:

This Court recently reaffirmed that the primary assumption of risk doctrine must be carefully circumscribed so as not to undermine the legislative comparative fault regime applicable to personal injury actions … . In these appeals, we clarify the scope of two important limitations on the doctrine: its inapplicability to unreasonably enhanced risks and its confinement to cases involving participation in athletics and recreation.

On the same day in June 2020, plaintiffs were injured in separate and very different accidents related to the sport of golf. Plaintiff David Katleski was struck by an errant golf ball while competing in a golf tournament. Plaintiff Mary E. Galante was struck by a car in the parking lot of a golf course before she began to play the course. For the reasons that follow, the primary assumption of risk doctrine precludes Katleski's negligence claim because the risk of being struck by a mishit ball while golfing is inherent in the game and there is no evidence that the design of the course unreasonably enhanced that risk. Galante's claim must be reinstated, however, because the primary assumption of risk doctrine has no application to a person who was not participating in a protected athletic or recreative activity at the time of their injury. Katleski v Cazenovia Golf Club, Inc., 2025 NY Slip Op 02178, CtApp 4-15-25

Practice Point: In lawsuits against the owners of golf courses: a golfer assumes the risk of being struck by an errant ball while riding in a golf cart on the course; but a golfer does not assume the risk of being struck by a car while driving a golf cart to her car in the course parking lot.

April 15, 2025

TAX LAW, ADMINISTRATIVE LAW, CIVIL PROCEDURE, MUNICIPAL LAW.

WHERE, AS HERE, PLAINTIFFS ALLEGE THE CONTESTED SALES TAX STATUTE IS "WHOLLY INAPPLICABLE" TO THEM, AND PLAINTIFFS SEEK A DECLARATORY JUDGMENT TO THAT EFFECT, THE "EXHAUSTION OF ADMINISTRATIVE REMEDIES" REQUIREMENT IS NOT RELEVANT (THRID DEPT).

The Third Department, reversing (modifying) Supreme Court, determined some of the plaintiffs had not failed to exhaust their administrative remedies in this action contesting the imposition of sales tax on the construction and demolition inspection services provided by plaintiffs. There is an exception to the "exhaustion of administrative remedies" requirement where, as here, plaintiffs claim the tax statute at issue is "wholly inapplicable" to them:

… [T]he remaining plaintiffs did not, as Supreme Court held, fail to exhaust their administrative remedies. Generally, a taxpayer must utilize statutory administrative remedies prior to commencing an action against the taxing entity … . That said, there is an exception to this requirement when, as relevant here, a tax statute is attacked as wholly inapplicable to the plaintiff … . "To challenge a statute as wholly inapplicable, the taxpayer must allege that the agency had no jurisdiction over it or the matter that was taxed" … . "This exception to the rule [mandating exhaustion of administrative remedies] is limited to those cases where no factual issue is raised" concerning the subject matter of the tax dispute … .

The remaining plaintiffs qualify for the "wholly inapplicable" exception, as the complaint alleges that DTF [Department of Taxation and Finance] lacks jurisdiction because Tax Law § 1105 (c) (8) does not apply to their site safety services. Further, there are no factual issues at play here. * * * … [T]he complaint simply seeks a declaration that site safety services, as specifically defined in the New York City Building Code, are exempt from sales tax … . Site Safety LLC v New York State Dept. of Taxation & Fin., 2025 NY Slip Op 02255, Third Dept 4-17-25

Practice Point: Here plaintiffs alleged the relevant sales-tax statute was wholly inapplicable to them and sought a declaratory judgment to that effect. The proceeding therefore is excepted from the "exhaustion of administrative remedies" requirement.

April 17, 2025

TAX LAW.

MARKETING INFORMATION PROVIDED TO INDIVIDUAL CLIENTS WHICH IS SUBSEQUENTLY INCLUDED IN REPORTS SOLD TO OTHERS IS SUBJECT TO SALES TAX (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Cannataro, over a comprehensive two-judge dissent, affirming the appellate division, determined the Tax Appeals Tribunal properly held that petitioner's (Dynamic's) information service was subject to sales tax:

Dynamic markets products to help clients measure the effectiveness of their advertising campaigns. At issue here is one such product, AdIndex, which Dynamic describes as using "a control/exposed methodology to measure the effectiveness of digital advertising at communicating brand messaging." To create an AdIndex report, Dynamic identifies individuals who have been exposed to a client's advertisements and then surveys them along with a control group. The survey questions are largely standardized but may contain a small number of campaign-specific questions. The results are compared to broader market data contained in MarketNorms, a database maintained by Dynamic that is also available to clients as a standalone subscription service. Dynamic then generates a report for the client which includes the survey data collected, an analysis of the "story" the data tells, as well as client-specific "insights," "implications," "next steps" and "recommendations" gleaned from the data. The data gathered in each AdIndex report is later incorporated into the MarketNorms database for use in reports prepared for future clients. * * *

… [T]he Tribunal's determination that the inclusion of the information originally generated for individual clients into products eventually sold to others meets the level of substantiality under section [Tax Law] 1105 (c) (1) is reasonable and supported by substantial evidence … . Matter of Dynamic Logic, Inc. v Tax Appeals Trib. of the State of New York, 2025 NY Slip Op 02262, CtApp 4-17-25

Practice Point: Marketing information initially provided to individual clients but subsequently included in reports sold to others is subject to sales tax.

April 17, 2025

TRUSTS AND ESTATES, CONTRACT LAW.

THE LAWSUIT BROUGHT BY PLAINTIFF BENEFICIARY AGAINST DEFENDANT TRUSTEE DID NOT CHALLLENGE THE TRUST, BUT RATHER SOUGHT TO ENFORCE THE PROVISIONS OF THE TRUST;

THEREFORE THE LAWSUIT DID NOT TRIGGER THE IN TERROREM CLAUSE (WHICH DISPOSSES A BENEFICIARY WHO SEEKS TO NULLIFY THE TRUST); THERE WAS A THREE-JUDGE DISSENT (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Rivera, over a three-judge dissent, reversing (modifying) Supreme Court, determined the lawsuit brought by plaintiff beneficiary of the estate (Carlson) against the trustee (Colangelo) did not trigger the "in terrorem" clause in the will and the trust. Therefore the provisions of the will and the trust remained enforceable by the plaintiff and the plaintiff was entitled to the real property bequeathed to her. The opinion is fact-specific and cannot be fairly summarized here:

The trust includes an in terrorem clause, which dispossesses a beneficiary or other challenger who contests or seeks to nullify the trust. The issue on this appeal is whether plaintiff triggered the clause when she commenced the underlying action against the trustee and thereby forfeited her bequests. * * *

We conclude that because plaintiff's lawsuit seeks to enforce the Trust provisions as written and intended by the grantor, plaintiff did not attempt to nullify the Trust or challenge its terms. Thus, plaintiff did not violate the in terrorem clause and defendant is not entitled to summary judgment. We further conclude that plaintiff has established her right to summary judgment on her first cause of action regarding her ownership rights to the Premises and her motion should be granted to that extent. Carlson v Colangelo, 2025 NY Slip Op 02264, CtApp 4-17-25

Practice Point: Consult this opinion for insight into when a lawsuit against a trustee triggers an in terrorem clause in the trust document. Here the majority concluded the lawsuit did not challenge the trust but rather sought to enforce the provisions of the trust. Therefore the in terrorem clause was not triggered.

April 17, 2025