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Weekly Reversal Report

April 28 – May 2, 2025

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The Second Department, reversing Supreme Court, determined plaintiff did not present a reasonable excuse for failing to timely answer the complaint. Therefore, plaintiff's motion to compel defendant to accept the late answer should not have been granted:

A defendant seeking to compel the plaintiff to accept a late answer "must show both a reasonable excuse for the default and the existence of a potentially meritorious defense" … . "Generally, the determination of what constitutes a reasonable excuse for a default lies within the sound discretion of the court; however, reversal is warranted where the court improvidently exercises that discretion" … .

Here, the defendant failed to establish a reasonable excuse for its defaults based upon law office failure. "[T]he movant must provide a detailed and credible explanation for the purported law office failure" … . "[A] conclusory, undetailed, and uncorroborated claim of law office failure does not amount to a reasonable excuse" … . Here, the defendant's counsel asserted in a conclusory and undetailed manner that the initial deadline to serve an answer and the extension consented to by the plaintiff's former counsel were missed due to an office backlog and miscalendaring, and that the plaintiff's motion for leave to enter a default judgment was "misplaced" in the office … . Raphael v City of Peekskill, 2025 NY Slip Op 02616, Second Dept 4-30-25

Practice Point: Here allegations of "law office failure" did not warrant compelling the plaintiff to accept a late answer.

April 30, 2025

CIVIL PROCEDURE, EVIDENCE, JUDGES, LABOR LAW-CONSTRUCTION LAW.

PLAINTIFF FELL 15 TO 20 FEET SUFFERING A FRACTURED RIB AND A FRACTURED FEMUR WHICH REQUIRED AN OPEN REDUCTION AND INTERNAL FIXATION SURGERY; THE VERDICT AWARDING $1.5 MILLION FOR PAST PAIN AND SUFFERING, $2.5 MILLION FOR FUTURE PAIN AND SUFFERING, AND $800,000 FOR FUTURE MEDICAL EXPENSES SHOULD NOT HAVE BEEN SET ASIDE AS EXCESSIVE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the motion to set aside the jury verdict as excessive should not have been granted:

The plaintiff was injured when, while standing on a beam performing demolition work, a heating, ventilation, and air conditioning duct fell and struck him, causing him to fall approximately 15 to 20 feet to the floor. As a result of the accident, the plaintiff suffered, inter alia, a fractured rib and a fractured femur that required open reduction internal fixation surgery. A metal rod and screws were inserted into the plaintiff's left leg. The plaintiff later underwent a surgical procedure to remove one of the screws. Furthermore, as a result of the accident, the plaintiff developed problems with both of his knees and his spine, requiring arthroscopic surgery on each knee and a laminotomy. The plaintiff walks with a limp, has limited motion of the hip and knees, and has developed arthritis that will worsen over time. Since the accident, the plaintiff has experienced constant pain despite having been administered numerous injections, including trigger-point injections and transforaminal injections, and having been prescribed several medications, including opioids. Further, the evidence demonstrated that the plaintiff will continue to experience pain and will require future medical treatment, including pain management and, likely, a spinal fusion.

The jury awarded the plaintiff damages in the principal sums of $1,500,000 for past pain and suffering, $2,500,000 for future pain and suffering over a period of 35 years, and $800,000 for future medical expenses over a period of 35 years.

Thereafter, the defendants third-party plaintiffs and the third-party defendant separately moved, among other things, pursuant to CPLR 4404(a) to set aside, as excessive, the jury verdict on the issue of damages for past pain and suffering, future pain and suffering, and future medical expenses. In an order dated June 8, 2020, the Supreme Court granted those branches of the separate motions to the extent of directing a new trial on those categories of damages, unless the plaintiff stipulated to reduce the damages awards to the principal sums of $800,000 for past pain and suffering, $1,000,000 for future pain and suffering, and $400,000 for future medical expenses. …

* * * … [C]onsidering the nature and extent of the injuries sustained by the plaintiff, the damages awards for past pain and suffering, future pain and suffering, and future medical expenses, as awarded by the jury, were appropriate and did not deviate materially from what would be reasonable compensation … . Aguilar v Graham Terrace, LLC, 2025 NY Slip Op 02564, Second Dept 4-30-25

Practice Point: A jury's damages award for past and future pain and suffering and future medical expenses should not be set aside unless the award is demonstrated to "deviate materially from what would be considered reasonable compensation," not the case here.

April 30, 2025

CRIMINAL LAW, ATTORNEYS, APPEALS, CONSTITUTIONAL LAW.

THE CASE WAS REMITTED TO SUPREME COURT TO PROCURE A RULING ON WHETHER DEFENDANT SHOULD BE AFFORDED YOUTHFUL OFFE NDER STATUS; YET DEFENSE COUNSEL FOCUSED ON DEFENDANT'S SENTENCING AS AN ADULT AND ESSENTIALLY IGNORED THE "YOUTHFUL OFFENDER" ISSUE; DEFENDANT DID NOT RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL (FOURTH DEPT).

The Fourth Department, reserving decision on the appeal and remitting the matter again, determined defendant did not receive effective assistance of counsel. The sole purpose for initially remitting the matter to Supreme Court was to procure a

ruling on whether defendant should be afforded youthful offender status. But defense counsel focused only on defendant's sentencing as an adult and essentially ignored the "youthful offender" issue. The Fourth Department offered a concise description of the New York State (as opposed to the federal) criteria for ineffective assistance:

Where, as here, a defendant contends that they received ineffective assistance of counsel under both the Federal and New York State Constitutions, "we evaluate the claim using the state standard, which affords greater protection than its federal counterpart" … . "In New York, the standard for effective assistance is 'meaningful representation' by counsel" … . The " 'state standard . . . offers greater protection than the federal test' because, 'under our State Constitution, even in the absence of a reasonable probability of a different outcome, inadequacy of counsel will still warrant reversal whenever a defendant is deprived of [fair process]' … . Although our courts "remain 'skeptical' of ineffective assistance of counsel claims where the defendant is unable to demonstrate any prejudice at all" … , in applying our state standard, we consider prejudice to be " 'a significant but not indispensable element in assessing meaningful representation' " … . Stated differently, "[w]hile the inquiry focuses on the quality of the representation provided to the [defendant], the claim of ineffectiveness is ultimately concerned with the fairness of the process as a whole rather than its particular impact on the outcome of the case" … . "[T]he right to effective representation includes the right to assistance by an attorney who has taken the time to review and prepare both the law and the facts relevant to the defense . . . and who is familiar with, and able to employ[,] . . . basic principles of criminal law and procedure" … . Inasmuch as the defendant "bears the burden of establishing [a] claim that counsel's performance is constitutionally deficient[,] . . . [the] defendant must demonstrate the absence of strategic or other legitimate explanations for counsel's alleged failure" … . * * *

The record establishes that, despite the specified purpose of the remittal, defense counsel submitted a memorandum riddled with spelling, grammatical, and syntax errors in which he requested that defendant be resentenced as an adult to a reduced determinate term of imprisonment and an unspecified period of postrelease supervision. Rather than providing an affirmative argument for adjudicating defendant a youthful offender based on the various factors to be considered … , defense counsel merely mentioned youthful offender status in passing to note that

which was already known, namely, that the sentencing court had originally failed to address whether defendant should receive youthful offender status and thus never considered certain circumstances related to defendant. Defense counsel thereafter proceeded to make arguments that were relevant to defendant's initial sentencing as an adult and the appellate challenges thereto but were unrelated to the factors applicable to determining upon remittal whether defendant should be afforded youthful offender status and, in doing so, defense counsel also occasionally misstated the issues considered on defendant's prior appeals … . People v Nathan, 2025 NY Slip Op 02700, Fourth Dept 5-2-25

Practice Point: Consult this decision for a concise description of the criteria for effective assistance of counsel under the New York State (as opposed to the United States) Constitution.

May 2, 2025

CRIMINAL LAW, EVIDENCE, JUDGES.

THE QUESTIONING OF DEFENDANT CONTINUED DESPITE HER REPEATED STATEMENTS THAT SHE HAD NOTHING ELSE TO SAY AND WAS DONE TALKING; THE MOTION TO SUPPRESS SHOULD HAVE BEEN GRANTED; NEW TRIAL ORDERED (FOURTH DEPT).

The Fourth Department, reversing defendant's conviction and ordering a new trial, determined the defendant had unequivocally and repeated stated that she was "done talking" and had "nothing else to say" during her interrogation by investigators. The interrogators continued questioning her as if they hadn't heard her assert her right to remain silent:

… [W]hile being interrogated at the police station, defendant stated to the investigators six separate times that she had "nothing else to . . . say" and that she was "done talking." Even if defendant's initial statement that she had nothing else to say may have been prompted by her "unwillingness to change [her] story" ,,, , she repeated her desire to stop talking even after the conversation shifted to another topic … . It is clear from a viewing of the interrogation video that defendant repeatedly stated in no uncertain terms that she no longer wished to answer any

more questions from the investigators. There was nothing equivocal about defendant's invocations of the right to remain silent, which were not scrupulously honored by the investigators, who continued the interrogation as if they did not hear what defendant had said.

We thus conclude that the court erred in refusing to suppress any and all statements made by defendant on August 19, 2020 after 12:03 a.m. on the interrogation video. "Inasmuch as there is a reasonable possibility that the erroneous admission of defendant's inculpatory statements contributed to the verdict, the error in refusing to suppress all of those statements cannot be considered harmless, and reversal is required" … . People v Lipton, 2025 NY Slip Op 02691, Fourth Dept 5-2-25

Practice Point: Any statements made in response to questioning after a defendant has told the interrogators he/she is "done talking" and has "nothing else to say" must be suppressed.

May 2, 2025

CRIMINAL LAW, EVIDENCE.

ALTHOUGH DEFENDANT PLED GUILTY TO MANSLAUGHTER AND ATTEMPTED ASSAULT PURSUANT TO A PLEA AGREEMENT WITH A NEGOTIATED SENTENCE, THE CONSECUTIVE SENTENCES WERE ILLEGAL; THERE WAS NO PROOF IN THE PLEA ALLOCUTION THAT THE DEFENDANT FIRED MORE THAN ONE BULLET (THERE WAS A SECOND SHOOTER) (THIRD DEPT).

The Third Department, over a two-justice dissent, determined the 25-year sentence for manslaughter and the 10-year sentence for attempted assault, which, pursuant to a plea agreement with a negotiated sentence, were imposed consecutively, must be served concurrently. Because the defendant pled guilty, the only relevant evidence is in the plea allocution. The majority concluded the record did not demonstrate that the defendant fired more than one bullet and therefore there was no proof the manslaughter and attempted assault charges stemmed from two separate acts (there was a second shooter):

"Consecutive sentences are appropriate only when either the elements of the crimes do not overlap or if the facts demonstrate that the defendant's acts underlying the crimes are separate and distinct" … . The People bear the burden of establishing the legality of consecutive sentences and, when a defendant pleads guilty to a count in the indictment, may meet their burden by relying on the allegations in the accusatory instrument and any facts adduced at the plea allocution … . Where, as here, a defendant also pleads guilty to a lesser offense than that charged in the indictment, the People may only rely upon those facts and circumstances admitted during the plea allocution with respect to that count … . To this point, the facts necessary to support consecutive sentences may not be discerned from statements included in a presentence report … .

… [T]he People failed to meet their burden inasmuch as there are no facts alleged in the count of the indictment to which defendant pleaded guilty, or in the plea allocution relating to either count, that would establish that defendant's "shooting a firearm," which constituted manslaughter in the first degree by causing the death of the victim (count 1) and attempted assault in the first degree to a different victim (count 4), "arose from a separate and distinct pull of the trigger by defendant" … . People v Sabb, 2025 NY Slip Op 02624, Third Dept 5-1-25

Practice Point: To justify consecutive sentences the offenses must be the result of distinct acts. When conviction is by guilty plea, the plea allocution is the only admissible evidence of what happened (the pre-sentence report cannot be considered). Here, because the defendant did not admit to firing more than one bullet in the plea allocution, the sentences for manslaughter and attempted assault cannot be imposed consecutively. There was a cogent two-justice dissent.

May 1, 2025

CRIMINAL LAW, JUDGES, APPEALS.

DEFENDANT WAS NOT GIVEN A REASONABLE OPPORTUNITY TO EXPLAIN HIS REQUEST TO WITHDRAW HIS GUILTY PLEA; MATTER REMITTED FOR THAT PURPOSE AND A REPORT TO THE APPELLATE COURT (SECOND DEPT).

The Second Department, remitting the matter and holding the appeal, determined the judge should have conducted an inquiry when defendant stated he wished to withdraw his guilty plea. The defendant did not have a reasonable opportunity to present his reasons:

"When a defendant moves to withdraw a guilty plea, the nature and extent of the fact-finding inquiry rest[s] largely in the discretion of the Judge to whom the motion is made and a hearing will be granted only in rare instances" … . "[O]ften a limited interrogation by the court will suffice" … . "[W]hen a motion 'is patently insufficient on its face, a court may simply deny the motion without making any inquiry'" … . Nevertheless, "[t]he defendant should be afforded reasonable opportunity to present his [or her] contentions and the court should be enabled to make an informed determination" … .

Here, the defendant was not afforded a reasonable opportunity to present his contentions regarding his application to withdraw his plea of guilty and, consequently, the court was not able to make an informed determination of that application … . Accordingly, the matter must be remitted to the County Court, Nassau County, for further proceedings on the defendant's application to withdraw his plea of guilty, and thereafter a report to this Court limited to the County Court's findings with respect to the application and whether the defendant established his entitlement to the withdrawal of his plea of guilty. People v Nesbitt, 2025 NY Slip Op 02611, Second Dept 4-30-25

Practice Point: A defendant must be afforded a "reasonable opportunity" to explain any request to withdraw a guilty plea. The appellate court can hold the appeal and remit the case to afford the defendant that opportunity.

April 30, 2025

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CRIMINAL LAW, JUDGES, APPEALS.

DUE TO AN APPARENT DRAFTING ERROR, A 16-YEAR SENTENCE IS VALID FOR A FIRST TIME VIOLENT FELONY OFFENDER BUT IS ILLEGAL (EXCESSIVE) FOR A SECOND VIOLENT FELONY OFFENDER; THE FACIALLY ILLEGAL SENTENCE MUST BE VACATED; THE ERROR NEED NOT BE PRESERVED (FOURTH DEPT).

The Fourth Department, vacating defendant's sentence, determined the sentence was illegal due to an apparent drafting error. The court noted the error need not be preserved for appeal:

… [T]he 16-year determinate sentence of imprisonment imposed by County Court is illegal. Had defendant been sentenced as a first-time violent felony offender, the court could have imposed a determinate sentence between 7 and 20 years of imprisonment for the conviction of attempted aggravated assault upon a police officer (see Penal Law § 70.02 [3] [b] [ii]). As a second violent felony offender convicted of a class C violent felony, however, defendant faced a determinate sentence of between 7 and 15 years (§ 70.04 [3] [b]). Thus, although seemingly a statutory anomaly resulting from a drafting error … , the 16-year sentence is illegal because it exceeds the maximum sentence permitted by the unambiguous statutory text based on defendant's predicate felony offender status. "Although [that] issue was not raised before the [sentencing] court . . . , we cannot allow an [illegal] sentence to stand" … . We therefore modify the judgment by vacating the sentence, and we remit the matter to County Court for resentencing … . People v Barnes, 2025 NY Slip Op 02694, Fourth Dept 5-2-25

Practice Point: A statutory limit placed on a sentence must be complied with by the judge even where, as here, the limit is an obvious drafting error.

May 2, 2025

CRIMINAL LAW, JUDGES, APPEALS.

THE RECORD IS SILENT ABOUT THE REASON FOR DEFENDANT'S PERIODIC ABSENCE FROM THE TRIAL; WHERE THERE IS NO EVIDENCE A DEFENDANT'S ABSENCE WAS DELIBERATE, CONDUCTING THE TRIAL IN DEFENDANT'S ABSENCE IS A "MODE OF PROCEEDINGS" ERROR REQUIRING REVERSAL (FOURTH DEPT).

The Fourth Department, reversing defendant's conviction and ordering a new trial, determined that conducting the trial in the defendant's absence was a "mode of proceedings" error which need not be preserved for appeal. If it is clear from the record that a defendant's absence from the trial was deliberate, there is no error. But here the record was silent about the reason for defendant's periodic absence:

Because defendant initially appeared for trial, the court was required to determine that his absence was deliberate in order to find that he had forfeited his right to be present … . In making such a determination, a court should "inquire[ ] into the surrounding circumstances" and "recite[ ] on the record the facts and reasons it relied upon in determining that defendant's absence was deliberate" … . Even if the court fails to recite those facts and reasons on the record, no error will be found so long as the court found the absence to be deliberate and the record contains sufficient facts to support that determination, such as where the court granted a brief adjournment to attempt to locate the defendant to no avail … .

Here, the court proceeded in defendant's absence without making a finding on the record that defendant's absence was deliberate, without stating facts and reasons that would support a finding of deliberateness, and without granting an adjournment or taking other steps to locate defendant. Under these circumstances, the court committed reversible error and a new trial is required … . People v Taft, 2025 NY Slip Op 02685, Fourth Dept 5-2-25

Practice Point: Where, as here, a defendant is periodically absent from the trial a "mode of proceedings" error has been committed unless the record demonstrates defendant's absence was a deliberate choice on defendant's part. Here the record was silent about the reason for defendant's absence requiring reversal.

May 2, 2025

CRIMINAL LAW, JUDGES.

THE TRIAL PROOF COULD BE INTERPRETED TO SUPPORT AN INTENT TO CAUSE SERIOUS PHYSICAL INJURY (ASSAULT SECOND) OR AN INTENT TO CAUSE PHYSICAL INJURY (ASSAULT THIRD); DEFENDANT'S REQUEST THAT THE JURY BE INSTRUCTED ON ASSAULT THIRD AS A LESSER INCLUDED OFFENSE SHOULD HAVE BEEN GRANTED; NEW TRIAL ORDERED ON THAT COUNT (THIRD DEPT).

The Third Department, ordering an new trial on the assault second count, determined defendant's request that the jury be instructed on assault third as a lesser included offense should have been granted:

… County Court erred in refusing [defendant's] request to charge assault in the third degree as a lesser included offense of assault in the second degree. Assault in the second degree is committed when a person acts "[w]ith intent to cause serious physical injury to another person [and] causes such injury to such person or to a third person" … ; assault in the third degree, in contrast, is committed when a person acts "[w]ith intent to cause physical injury to another person [and] causes such injury to such person or to a third person" … . There is no dispute that assault in the third degree as defined in Penal Law § 120.00 (1) is a lesser included offense of assault in the second degree as defined in Penal Law § 120.05 (1), as a person could intend and cause physical injury to a victim while not intending or causing serious physical injury … . The trial proof here left little doubt that defendant began by attempting to discipline the victim but that things soon escalated to the point where he was trying to injure her, including by picking her up by her throat and holding her against a wall for a few minutes, allowing her to fall to the floor and then slapping her. This proof permitted the finding that defendant intended to cause a serious physical injury which "create[d] a substantial risk of death, or . . . serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ," and such an injury resulted when the victim fell to the floor and broke her tooth … .

… [I]t was unclear whether defendant anticipated that the conscious victim would fall when he released her, and there was conflicting testimony as to whether he threw her to the floor with enough force to break her tooth or she simply took a bad fall after he let her drop. The victim's treating dentist further conceded in his testimony that a tooth could accidentally break and that he had seen such injuries result from incidents as minor as "biting down on forks wrong." When viewed in the light most favorable to defendant, this proof could allow "a jury [to] reasonably conclude that defendant intended and caused 'physical injury' to the victim" as opposed to serious physical injury … . People v Hooper, 2025 NY Slip Op 02623, Third Dept 5-1-25

Practice Point: There is no question that Assault third is a lesser included offense of Assault second. Here, the trial proof could be interpreted to support an intent to cause serious physical injury (Assault second) or an intent to cause physical injury (Assault third). Therefore defendant's request for a jury instruction on Assault third should have been granted. A new trial was ordered on that count.

May 1, 2025

FAMILY LAW, CIVIL PROCEDURE, JUDGES.

ALTHOUGH FATHER IS INCARCERATED FOR ASSAULTING MOTHER WHEN SHE WAS SEVEN MONTHS PREGNANT, FATHER IS ENTITLED TO A HEARING ON WHETHER VISITATION WITH THE CHILD, WHICH NEED NOT INCLUDE CONTACT VISITATION, IS IN THE BEST INTERESTS OF THE CHILD; IT IS THE MOTHER'S BURDEN TO DEMONSTRATE VISITATION WOULD BE HARMFUL (THIRD DEPT).

The Third Department, reversing (modifying) Family Court, determined the incarcerated father was entitled to a hearing on whether visitation would be in the best interests of the child. Father was convicted of assaulting mother when mother was seven months pregnant. Family Court had granted mother's summary judgment motion precluding father's contact until the child turns 18. The Third Department found that summary judgment in the absence of a hearing was inappropriate:

… [W]e agree with the father's contention that a hearing was required regarding the issue of visitation. Plainly stated, we do not find that, given the specific circumstances of this case, denying the father any contact with the child until the child's 18th birthday was appropriate on a summary judgment motion … . This is especially so given that "visitation . . . need not always include contact visitation at the prison" … . As such, the father is entitled to a hearing to determine what, if any, visitation is in the best interests of the child. By way of reminder, at this hearing, it is not the father's burden to demonstrate that visitation is in the child's best interests, but rather it is the mother, as the party opposing visitation, who has the burden of demonstrating, by a preponderance of the evidence, "that visitation with [the father] would, under all of the circumstances, be harmful to the child['s] welfare or contrary to [her] best interests" … . This includes a consideration of whether updates, photographs and/or letters may be appropriate and in the best interests of the child … . Matter of Jaime T. v Ryan U., 2025 NY Slip Op 02638, Third Dept 5-1-25

Practice Point: Once again it is Family Court's failure to hold a hearing which results in reversal. Here the incarcerated father is entitled to a hearing on whether visitation, which need not include contact visitation, would be in the best interests of the child. At the hearing, it is mother's burden to demonstration visitation would be harmful to the child.

May 1, 2025

FAMILY LAW, EVIDENCE.

GRANDFATHER DEMONSTRATED "EXTRAORDINARY CIRCUMSTANCES" AFFORDING HIM STANDING TO PETITION FOR CUSTODY OF THE CHILD (SECOND DEPT).

The Second Department, reversing Family Court, determined the maternal grandfather demonstrated extraordinary circumstances and therefore had standing to seek custody of the child. The matter was remitted for a custody award based on the best interests of the child:

“Pursuant to Domestic Relations Law § 72(2)(a), a grandparent has standing to seek custody of a child where the grandparent demonstrates the existence of extraordinary circumstances, such as ‘surrender, abandonment, persisting neglect, unfitness, and unfortunate or involuntary disruption of custody over an extended period of time,’ ‘or other like extraordinary circumstances'” … . An “extended disruption of custody” between the child and the parent “shall constitute an extraordinary circumstance” … . “The statute defines ‘extended disruption of custody’ as including, but not limited to, ‘a prolonged separation of the respondent parent and the child for at least twenty-four continuous months during which the parent voluntarily relinquished care and control of the child and the child resided in the household of the petitioner grandparent or grandparents'” … . “However, the statute does not preclude a court from finding the existence of extraordinary circumstances even if the prolonged separation lasted less than 24 months” … . “Moreover, lack of contact is not a separate element under th[e] statute, ‘[r]ather, the quality and quantity of contact between the parent and child are simply factors to be considered in the context of the totality of the circumstances when determining whether the parent voluntarily relinquished care and control of the child, and whether the child actually resided with the grandparents for the required “prolonged” period of time'” … . “‘Inasmuch as the Family Court is in the best position to evaluate the credibility, temperament, and sincerity of the parties, its determination should be set aside only if it lacks a sound and substantial basis in the record'” … .

The evidence at the hearing established that, even though the father had regular contact and parental access with the child, the maternal grandparents have taken care of the child for most of her life and provided her with stability. Additionally, the father allowed the mother and the maternal grandparents to assume control over, and responsibility for the care of, the child while the father assumed the role of a noncustodial parent, the child has developed a close relationship with her half-siblings and extended family in New York, and the child expressed a desire to continue residing with the maternal grandfather … . Matter of Clifton C. v Tory P. R., 2025 NY Slip Op 02585, Second Dept 4-30-25

Practice Point: Here the maternal grandparents had cared for the child for most of her life and father had assumed the role of a noncustodial parent. These and other

factors rose to the level of “extraordinary circumstances” affording grandfather standing to petition for custody.

April 30, 2025

FAMILY LAW, JUDGES, APPEALS, EVIDENCE.

FAMILY COURT, AFTER A NONJURY TRIAL, AWARDED SOLE CUSTODY TO FATHER WHO RESIDES IN FLORIDA; THE CHILDREN APPEALED; THE SECOND DEPARTMENT REVERSED AND AWARDED SOLE CUSTODY TO MOTHER, IN PART BECAUSE FAMILY COURT DID NOT CONSIDER THE WISHES OF THE CHILDREN AGES 12 AND 15 (SECOND DEPT).

The Second Department, in an appeal by the children, reversing Family Court’s order issued after a nonjury trial, determined the record did not support the award of sole custody to plaintiff father who resides in Florida and who indicated during the proceedings he was not seeking residential custody of the children. The Second Department awarded sole custody to defendant mother:

“The court’s paramount concern in any custody dispute is to determine, under the totality of the circumstances, what is in the best interests of the child” … . “In determining an initial petition for child custody, the totality of the circumstances, includes, but is not limited to, (1) which alternative will best promote stability; (2) the available home environments; (3) the past performance of each parent; (4) each parent’s relative fitness, including his or her ability to guide the child, provide for the child’s overall well being, and foster the child’s relationship with the noncustodial parent; and (5) the child’s desires” … . “Custody determinations depend to a great extent upon an assessment of the character and credibility of the parties and witnesses, and therefore, deference is accorded to the trial court’s findings in this regard” … . “However, an appellate court would be seriously remiss if, simply in deference to the finding of a trial judge, it allowed a custody determination to stand where it lacked a sound and substantial basis in the record” … .

Here, the Supreme Court's determination to award sole legal and residential custody of the children to the plaintiff lacks a sound and substantial basis in the record. The plaintiff, who resides in Florida, represented during the proceedings that he was not seeking residential custody of the children. Moreover, while strict application of the factors relevant to relocation petitions … is not required in the context of an initial custody determination, the record does not indicate the court fully considered the impact of moving the children away from the defendant, and the only home they have known, to live with the plaintiff in Florida … . In addition, under the circumstances presented, the court failed to give sufficient weight to the expressed preference of the children, who were 12 and 15 years old, respectively, as of the conclusion of the trial, to reside with the defendant … . Joseph P. A. v Martha A., 2025 NY Slip Op 02562, Second Dept 4-30-25

Practice Point: Here the appellate court reversed Family Court which had awarded sole custody to father after a nonjury trial. It appears that the main basis for the reversal was Family Court's failure to consider the wishes of the children who were 12 and 15. The children appealed Family Court's order.

April 30, 2025

FAMILY LAW, CIVIL PROCEDURE, JUDGES.

WHETHER FAMILY COURT HAS SUBJECT MATTER JURISDICTION OVER THIS FAMILY OFFENSE PROCEEDING DEPENDS ON WHETHER THERE EXISTS AN "INTIMATE RELATIONSHIP" BETWEEN THE CHILD AND THE RESPONDENT, THE PARAMOUR OF PETITIONER'S FORMER HUSBAND; BEFORE THE COURT CAN RULE ON THE JURISDICTION ISSUE A HEARING TO DETERMINE WHETHER THERE IS AN "INTIMATE RELATIONSHIP" IS REQUIRED; MATTER REMITTED (SECOND DEPT).

The Second Department, reversing Family Court, determined Family Court should have held a hearing before ruling it did not have subject matter jurisdiction in this family offense proceeding. The proceeding was against respondent, the paramour of petitioner's former husband. Whether Family Court has jurisdiction depends on

whether the respondent is or has been in an “intimate relationship” with petitioner’s child:

“Beyond expressly excluding from the definition of ‘intimate relationship’ a ‘casual acquaintance’ and ‘ordinary fraternization between two individuals in business or social contexts'” … , “the [L]egislature left it to the courts to determine, on a case-by-case basis, what qualifies as an ‘intimate relationship’ within the meaning of Family Court Act § 812(1)(e)” … . The factors that a court may consider while making such a determination are “the nature or type of relationship, regardless of whether the relationship is sexual in nature; the frequency of interaction between the persons; and the duration of the relationship” … . “[T]he determination as to whether persons are or have been in an ‘intimate relationship’ within the meaning of Family Court Act § 812(1)(e) is a fact-specific determination which may require a hearing” … .

Here, in light of the parties’ conflicting allegations as to whether there was an “intimate relationship” between the child and the respondent within the meaning of Family Court Act § 812(1)(e), the Family Court, prior to determining whether it had subject matter jurisdiction, should have conducted a hearing on that issue … . Matter of De Phillips v Perez, 2025 NY Slip Op 02588, Second Dept 4-30-25

Practice Point: Family Court can have subject matter jurisdiction over a family offense petition against a person who is not a family member but has an “intimate relationship” with the child. Here Family Court should not have found it did not have subject matter jurisdiction without first holding a hearing to determine whether there was an “intimate relationship” between the respondent and petitioner’s child.

April 30, 2025

LANDLORD-TENANT, CONTRACT LAW, REAL PROPERTY LAW.

TENANT WAS PRECLUDED FROM ASSERTING A CLAIM FOR BREACH OF THE COVENANT OF QUIET ENJOYMENT BECAUSE THE TENANT HAD ALREADY STOPPED PAYING RENT WHEN IT VACATED THE PREMISES (FIRST DEPT).

The First Department, reversing Supreme Court, determined the tenant's claim for breach of the covenant of quiet enjoyment was precluded because the tenant was in default (failure to pay rent) at the time the tenant vacated the premises:

Under … the lease between the landlord and defendant tenant … , the tenant was entitled to "peaceabl[y] and quietly enjoy the premises," which were in the basement of the landlord's building, as long as it performed its obligations under the lease, which included the obligation to pay rent. Under … the lease, the tenant waived the provisions of Real Property Law § 227. The premises were shut down in March 2020 under Executive Order 202.7 (9 NYCRR 8.202.7) in response to COVID. At that time, the tenant stopped paying rent. * * *

The tenant is precluded from asserting a claim for breach of the covenant of quiet enjoyment because it was already in default of its obligation to pay rent at the time it vacated the leased premises. The law is clear that, in order for a tenant to assert a claim for breach of the covenant of quiet enjoyment, the tenant must have performed all obligations which are a condition precedent to its right to insist upon the covenant … . When a tenant vacates the premises after defaulting on its obligation to pay rent, it is deprived of its right to insist upon the performance of the covenant of quiet enjoyment … . By the express terms of the lease, the tenant was obligated to pay rent while remaining in possession of the premises as a condition precedent to receiving the benefit of quiet enjoyment of the premises. Since the tenant remained in possession of the premises without paying rent, the tenant has failed to satisfy the condition precedent in the lease and is thereby precluded from claiming a breach of the covenant of quiet enjoyment … . 558 Seventh Ave. Corp. v E&B Barbers Inc., 2025 NY Slip Op 02546, Frist Dept 4-29-25

Practice Point: Here, under the terms of the lease, payment of rent was a condition precedent for the benefit of quiet enjoyment of the premises. Therefore the tenant, who had stopped paying rent at the time the premises were vacated, could not make a claim for breach of the covenant of quiet enjoyment.

April 29, 2025

LEGAL MALPRACTICE, ATTORNEYS, NEGLIGENCE, EVIDENCE.

THE RAISED SIDEWALK FLAG WAS NOT A “TRIVIAL DEFECT” AS A MATTER OF LAW, YET PLAINTIFF’S ATTORNEYS DID NOT SUBMIT WRITTEN OPPOSITION TO THE SUMMARY JUDGMENT MOTION IN THE SLIP AND FALL CASE WHICH WAS DISMISSED; PLAINTIFF THEREFORE RAISED A QUESTION OF FACT IN THIS LEGAL MALPRACTICE ACTION (FIRST DEPT).

The First Department, reversing Supreme Court in this legal malpractice action, determined there was a question of fact in the underlying slip and fall case which plaintiff’s attorneys could have, but failed to, raise. The raised sidewalk flag which caused plaintiff’s fall was not trivial as a matter of law, as the judge in the slip and fall case ruled. Plaintiff’s attorneys did not submit written opposition to the defendants’ summary judgment in the slip and fall case:

There is no “per se rule that a defect must be of a certain minimum height or depth in order to be actionable” (id. at 510). A “holding of triviality must be based on all the specific facts and circumstances of the case, not size alone” … . Thus, the “issue is generally a jury question because it is a fact-intensive inquiry” … .

Even assuming defendants met their initial burden of proof in showing that plaintiff could not prevail on her negligence claim, plaintiff raised an issue of fact in opposition. Plaintiff estimated that the elevation differential of the defect was an inch and a half or “a couple of inches” at the time of her accident, and the adjacent building’s superintendent testified that the elevation was about half an inch to one inch on the day of the accident. Administrative Code of the City of New York requires remediation for sidewalk flags with a height differential of one-half inch

or more (see Administrative Code § 19-152[a][4]). Violation of that code is "not per se non-trivial . . . [but] is one factor to consider when deciding the issue of triviality" … . Barrett v Sacks & Sacks, LLP, 2025 NY Slip Op 02547, First Dept 4-29-25

Practice Point: Plaintiff's attorneys could have successfully precluded summary judgment in the underlying slip and fall case but failed to submit written opposition to the summary judgment motion. That failure raised a question of fact in the instant legal malpractice action.

April 29, 2025

MUNICIPAL LAW, TOWN LAW.

THERE ARE TWO STATUTORY PROCEDURES FOR APPROVING AN EXTENSION OF A SEWER DISTRICT; HERE THE REQUEST FOR AN EXTENSION WAS INITIATED UNDER ONE STATUTORY PROCEDURE, WHICH DOES NOT REQUIRE A REFERENDUM, BUT THE TOWN APPLIED THE OTHER STATUTORY PROCEDURE, WHICH DOES REQUIRE A REFERENDUM; THAT WAS ERROR (THIRD DEPT).

The Third Department, reversing Supreme Court, determined the town failed to follow the correct statutory procedure for approval of an extension of a sewer district to include petitioner's commercial development There are two statutory procedures. The Town Law Article 12 procedure applies when a petition is filed by an owner of taxable property (like the petitioner in this case). The Article 12 procedure has no "referendum" requirement. The Town Law Article 12-A procedure is initiated by the town and requires a referendum. Here the town required a referendum and thereby applied the wrong statutory procedure:

… [W]ithout formally ruling on the article 12 petition, the Town Board … essentially approved the extension project under the framework of article 12-A by providing for a permissive referendum. Recognizing that these articles do not contain any mechanism for such a conversion, we find that the Town Board erred

and, as a result, its resolutions must be invalidated. Matter of Glen Wild Land Co., LLC v Town of Thompson, 2025 NY Slip Op 02628, Third Dept 5-1-25

Practice Point: Where the Town Law provides two distinct statutory procedures for approval of an extension of a sewer district, the town must follow the procedure in the applicable statute. Here the applicable statute did not require a referendum but the inapplicable statute did. The town erred when it required a referendum.

May 1, 2025

NEGLIGENCE, EVIDENCE.

DEFENDANT IN THIS SLIP AND FALL CASE OFFERED NO EVIDENCE THAT THE AREA OF THE FALL WAS CLEANED OR INSPECTED CLOSE IN TIME TO THE FALL; THEREFORE THE DEFENDANT DID NOT DEMONSTRATE A LACK OF CONSTRUCTIVE NOTICE OF THE SLIPPERY CONDITION; DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court in this slip and fall case, determined defendant did not not demonstrate a lack of constructive notice of the slippery substance because no proof the area was inspected or cleaned close in time to the fall was presented:

The defendant … failed to establish … that it lacked actual or constructive notice of the alleged slippery substance on the floor. "To meet its burden on the issue of lack of constructive notice, the defendant must offer some evidence as to when the accident site was last cleaned or inspected prior to the plaintiff' … . Evidence of general cleaning practices are inadequate to show "lack of constructive notice in the absence of evidence regarding specific cleaning or inspection of the area in question" … . Here, the managing member of the defendant testified only that all staff had a general responsibility for the upkeep and cleanliness of the restaurant. Outside these general statements, the defendant provided no further information on when the specific area of the plaintiff's fall had last been inspected or cleaned … . Rhoden v 515 Rest., LLC, 2025 NY Slip Op 02617, Second Dept 4-30-25

Practice Point: This case presents another instance of the failure to demonstrate a lack of constructive notice of the condition alleged to have caused plaintiff's slip and fall. A lack of constructive notice is demonstrated by specific proof the area of the fall was cleaned or inspected close in time to the fall, not by proof of general cleaning practices.

April 30, 2025

PUBLIC HEALTH LAW, NEGLIGENCE, CIVIL PROCEDURE, IMMUNITY.

THE LAWSUIT AGAINST DEFENDANT RESIDENTIAL NURSING FACILITY STEMMING FROM PLAINTIFF'S DECEDENT'S COVID-19-RELATED DEATH IS PRECLUDED BY THE EMERGENCY OR DISASTER TREATMENT PROTECTION ACT (EDTPA); THE REPEAL OF THE ACT IS NOT RETROACTIVE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the negligence-based lawsuit against defendant residential nursing facility stemming from plaintiff's decedent's death from COVID-19 was precluded by the immunity conferred by the Emergency or Disaster Treatment Protection Act (Public Health Law former art 30-D, §§ 3080-3082, repealed by L 2021, ch 96, § 1) (EDTPA). The repeal of the EDTPA was not retroactive:

The EDTPA, as effective August 3, 2020, to April 5, 2021, provided, with certain exceptions, that a health care facility "shall have immunity from any liability, civil or criminal, for any harm or damages alleged to have been sustained as a result of an act or omission in the course of providing health care services," if: (a) the health care facility "is providing health care services in accordance with applicable law, or where appropriate pursuant to a COVID-19 emergency rule"; (b) the act or omission occurs in the course of providing health care services and the treatment of the individual is impacted by the health care facility's "decisions or activities in response to or as a result of the COVID-19 outbreak and in support of the state's directives"; and (c) the health care facility "is providing health care services in good faith" (Public Health Law former § 3082[1][a]-[c]). …

Here, the Supreme Court should have granted the defendant's motion to dismiss the complaint on the ground of immunity … . Contrary to the plaintiff's contention, the repeal of the EDTPA is not retroactive … . Lara v S&J Operational, LLC, 2025 NY Slip Op 02582, Second Dept 4-30-25

Practice Point: Although the EDTPA has been repealed. the repeal is not applied retroactively. The COVID-19-related immunity conferred by the act precluded the lawsuit here.

April 30, 2025

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