NEW YORK APPELLATE DIGEST, INC.

Weekly Reversal Report
April 21 – 25, 2025

An Organized Compilation of Summaries of Selected Decisions, Mostly Reversal, Released by Our New York State Appellate Courts April 21 – 25, 2025, and Posted on the New York Appellate Digest Website on Monday, April 28, 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 the "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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The First Department, reversing Supreme Court in this breach of contract action, determined that, although the defendant's attorney-affidavit did not lay a proper foundation for the admissibility of the attached documents, the documents were admissible because plaintiff never objected to the admissibility of the documents and relied on those documents in opposing defendant's motion:

Supreme Court improvidently concluded that defendant's documentary evidence was not admissible for purposes of its motion. An attorney's affirmation "'may properly serve as the vehicle for the submission of acceptable attachments which provide evidentiary proof in admissible form, like documentary evidence,' so long as the [affirmation] 'constitute[s] a proper foundation for the admission of the records'" … . The court was correct that defendant's attorney, in her affirmation, did not lay a foundation for the admission of the records, such as her personal knowledge or her certification of the documents as true and complete copies of the originals. However, plaintiff never objected to the admissibility of any of the documents annexed to the attorney's affirmation … and relied on the same

documents in opposition to defendant's motion … . AWL Indus., Inc. v New York City Hous. Auth., 2025 NY Slip Op 02402, First Dept 4-24-25

Practice Point: An attorney affidavit can be used as a vehicle for the admission of documentary evidence if the affidavit lays a proper foundation.

Practice Point: Here, although the defendant's attorney affidavit did not lay a proper foundation for the admissibility of the attached documents, the documents were admissible because the plaintiff did not object to them and relied on them in opposition to the defendant's motion.

April 24, 2025

CIVIL PROCEDURE, CORPORATION LAW, CONTRACT LAW.

PLAINTIFF'S MOTION TO AMEND THE COMPLAINT TO ADD ALLEGATIONS SUPPORTING "PIERCING THE CORPORATE VEIL" SHOULD HAVE BEEN GRANTED, CRITERIA EXPLAINED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff's motion to amend the complaint to add allegations supporting "piercing the corporate veil" in this breach of contract action should have been granted:

"Broadly speaking, the courts will disregard the corporate form, or, to use accepted terminology, pierce the corporate veil, whenever necessary to prevent fraud or to achieve equity" … . "Because a decision whether to pierce the corporate veil in a given instance will necessarily depend on the attendant facts and equities, the New York cases may not be reduced to definitive rules governing the varying circumstances when the power may be exercised" … . However, "[g]enerally, a plaintiff seeking to pierce the corporate veil must show that (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury. The plaintiff must adequately allege the existence of corporate obligation and that defendant exercised complete domination and control over the corporation and abused the

privilege of doing business in the corporate form to perpetrate a wrong or injustice" … . "[T]he corporate veil will be pierced to achieve equity, even absent fraud, when a corporation has been so dominated by an individual or another corporation and its separate entity so ignored that it primarily transacts the dominator's business instead of its own and can be called the other's alter ego. In determining whether to pierce the corporate veil, [g]enerally considered are such factors as whether there is an overlap in ownership, officers, directors and personnel, inadequate capitalization, a commingling of assets, or an absence of separate paraphernalia that are part of the corporate form" … . Another factor to be considered is whether the corporation and its owners shared "common office space" … . "A cause of action under the doctrine of piercing the corporate veil is not required to meet any heightened level of particularity in its allegations" … , and "a fact-laden claim to pierce the corporate veil is unsuited for resolution on a pre-answer, pre-discovery motion to dismiss" … . HLI Rail & Rigging, LLC v Franklin Exhibit Mgt. Group, LLC, 2025 NY Slip Op 02330, Second Dept 4-23-25

Practice Point: Consult this decision for a concise description of the criteria for "piercing the corporate veil" in the context of a motion to amend the complaint to add the relevant allegations.

April 23, 2025

CIVIL PROCEDURE, JUDGES, EVIDENCE.

THE USE OF POST-DISCHARGE AFFIDAVITS FROM TWO JURORS, CLAIMING JUROR CONFUSION, AS THE BASIS FOR THE MOTION TO SET ASIDE THE VERDICT WAS IMPROPER BECAUSE THERE WAS NO SUPPORT FOR THE CLAIMS IN THE RECORD; THE MOTION SHOULD HAVE BEEN DENIED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the motion to set aside the jury verdict should not have been granted. The motion was based upon affidavits from two jurors which were drafted after the jury was discharged. There was no support in the record for the claims made in the affidavits:

"It has long been the law that, with narrow exceptions, jury verdicts may not be impeached by probes into the jury's deliberative process" …. Further, "jurors may not impeach their own verdict unless they have been subjected to outside influence" … . This principle, however, is subject to two exceptions. First, "where an error is made in reporting the verdict, the trial judge may, upon the unanimous affidavits or statements of the jurors, correct the judgment to conform to the actual verdict" … . Second, "where the record demonstrates substantial confusion among the jurors in reaching a verdict, the court must direct a new trial to prevent a miscarriage of justice to the litigants" … . However, "[t]he use of post-discharge juror affidavits to attack the verdict is 'patently improper' where the record is devoid of any evidence of external influence, juror confusion, or ministerial error in reporting the verdict" … .

… [Defendant] sought to set aside the jury verdict on the issue of apportionment of liability based upon post-discharge affidavits from two jurors indicating that the jury was confused regarding the apportionment of liability. However, the trial record is devoid of any evidence of juror confusion regarding the issue of apportionment of liability, and thus, the use of post-discharge affidavits from jurors to attack the verdict is patently improper … . Gleneida Med. Care, P.C. v DBG Mgt. Corp., 2025 NY Slip Op 02323, Second Dept 4-23-25

Practice Point: Consult this decision for an explanation of when a jury verdict may be impeached by probing into the jury's deliberative process.

April 23, 2025

CIVIL PROCEDURE, JUDGES.

A JUDGE SHOULD NOT, SUA SPONTE, ORDER THE DISMISSAL OF A COMPLAINT ABSENT "EXTRAORDINARY CIRCUMSTANCES," NOT PRESENT HERE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined there were no extraordinary circumstances to justify the judge's "sua sponte" dismissal of the complaint:

"A court's power to dismiss a complaint, sua sponte, is to be used sparingly and only when extraordinary circumstances exist to warrant dismissal" … . Here, no extraordinary circumstances existed warranting dismissal of the complaint … . Accordingly, the Supreme Court should not have, sua sponte, directed dismissal of the complaint. Project Guardianship v Chai 91 St. Marks PLC, LLC, 2025 NY Slip Op 02360, Second Dept 4-23-25

Practice Point: There have been many reversals of "sua sponte" dismissals of complaints.

April 23, 2025

CIVIL PROCEDURE, JUDGES.

PLAINTIFF SHOULD NOT HAVE BEEN GRANTED MORE TIME TO SERVE DEFENDANT UNDER EITHER THE "GOOD CAUSE" OR "INTEREST OF JUSTICE" CRITERIA (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff should not have been granted more time to serve the summons and complaint under either the "good cause" or "interest of justice" criteria:

Pursuant to CPLR 306-b, a plaintiff is required to serve the summons and complaint within 120 days after commencement of the action. If service of the summons and complaint is not made upon the defendant within that time, "the court, upon motion, shall dismiss the action without prejudice as to that defendant, or upon good cause shown or in the interest of justice, extend the time for service" … . "To establish good cause, a plaintiff must demonstrate reasonable diligence in attempting service" … . Such a showing is not required to obtain an extension of time under the interest of justice standard, which is a broader standard intended to "'accommodate late service that might be due to mistake, confusion or oversight, so long as there is no prejudice to the defendant'" … . "The interest of justice standard requires a careful judicial analysis of the factual setting of the case and a balancing of the competing interests presented by the parties" … . In reaching its determination, "the court may consider diligence, or lack thereof, along with any other relevant factor in making its determination, including expiration of the

Statute of Limitations, the meritorious nature of the cause of action, the length of delay in service, the promptness of a plaintiff's request for the extension of time, and prejudice to defendant" … .

Here, the plaintiff failed to establish good cause to extend the time to serve [defendant], as no evidence was offered that she attempted to serve him with reasonable diligence. Further, … the plaintiff failed to establish that an extension of time to serve … was warranted in the interest of justice. The plaintiff failed to offer any explanation for the eight-month delay in filing the affidavit of service, the delay in moving, among other things, for leave to enter a default judgment … , and the four-month delay in moving to extend the time to serve … after the defendants had cross-moved … to dismiss the complaint … for lack of personal jurisdiction. There is no evidence in the record that [defendant] had notice of the action during the 120-day period after the commencement of the action … . Druss v Scher, 2025 NY Slip Op 02318, Second Dept 4-23-25

Practice Point: Even though the statute of limitations had passed. plaintiff's failure to exercise reasonable diligence precluded an extension of time to serve the defendant, under either the "good cause" or "interest of justice" criteria.

April 23, 2025

CIVIL PROCEDURE, JUDGES.

THE FAILURE TO COMPLY WITH THE CONDITIONS PRECEDENT IN CPLR 3216 PRECLUDED DISMSSAL OF THE COMPLAINT (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the failure to comply with the requirements of CPLR 3216 precluded the dismissal of the complaint:

… [A]bsent strict compliance with the conditions precedent to dismissal set forth in CPLR 3216 (b) (3), "[n]o dismissal shall be directed" … . Indeed, "[t]he conditions precedent to bringing a motion to dismiss for failure to prosecute under CPLR 3216 must be complied with strictly" … .

Among those conditions precedent are the service of a ninety-day demand to resume prosecution, by registered or certified mail, which specifically states that the failure to file the note of issue within ninety days will serve as a basis for a motion to dismiss for want of prosecution … . Where the ninety-day demand is served by the court, the demand shall also "set forth the specific conduct constituting the neglect, which conduct shall demonstrate a general pattern of delay in proceeding with the litigation" … .

Here, the court did not serve a ninety-day demand upon plaintiff, and for that reason alone, the court erred in directing dismissal pursuant to CPLR 3216. Even assuming, arguendo, that the court's second supplemental scheduling order could serve as the substitute for a ninety-day demand, that scheduling order did not indicate that dismissal would result if plaintiff failed to file the note of issue, nor did it set forth the specific conduct constituting plaintiff's neglect … . "While an order may have the same effect as a valid 90-day demand, that order must advise as to the consequences for failing to comply, i.e., dismissal of the complaint" … , and here, the order wholly failed to do so. Woloszuk v Logan-Young, 2025 NY Slip Op 02444, Fourth Dept 4-25-25

Practice Point: The conditions precedent for dismissal of a complaint in CPRL 3216 must be strictly complied with by the judge or reversal is mandatory.

April 25, 2025

CIVIL RIGHTS LAW, CONSTITUTIONAL LAW, CRIMINAL LAW, EVIDENCE, FALSE ARREST, FALSE IMPRISONMENT, NEGLIGENCE.

CONFLICTING EVIDENCE RAISED QUESTIONS OF FACT IN THIS "NEGLIGENT USE OF EXCESSIVE FORCE," "FALSE ARREST," AND "UNLAWFUL IMPRISONMENT" ACTION STEMMING FROM THE STREET STOP, SHOOTING AND ARREST OF THE PLAINTIFF; THE DEFENDANT TRANSIT AUTHORITY'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined conflicting evidence precluded summary judgment in this civil action stemming from the street stop and arrest of the plaintiff. Although plaintiff pled guilty, which usually forecloses any argument that the arrest was not supported by probable cause, here evidence submitted the defendant transit authority raised a question of fact about probable cause. The action alleged the negligent use of excessive force (plaintiff was shot through the windshield of his vehicle), false arrest and unlawful imprisonment:

Excessive force claims are evaluated " 'under the Fourth Amendment's "objective reasonableness" standard' " … . * * *

"Because of its intensely factual nature, the question of whether the use of force was reasonable under the circumstances is generally best left for a jury to decide" … .

" 'The fact that a person whom a police officer attempts to arrest resists, threatens, or assaults the officer no doubt justifies the officer's use of some degree of force, but it does not give the officer license to use force without limit. The force used by the officer must be reasonably related to the nature of the resistance and the force used, threatened, or reasonably perceived to be threatened, against the officer' " … . …

Though "[t]he existence of probable cause serves as a legal justification for the arrest and an affirmative defense to the [false imprisonment cause of action]" … , the issue of probable cause is "generally a question of fact to be decided by the

jury, and should 'be decided by the court only where there is no real dispute as to the facts or the proper inferences to be drawn surrounding the arrest' " … . Thomas v Niagara Frontier Tr. Auth., 2025 NY Slip Op 02433, Fourth Dept 4-25-25

Practice Point: Consult this decision for an analysis of "negligent use of excessive force," "false arrest," and "unlawful imprisonment" causes of action at the summary-judgment stage, in the face of conflicting evidence.

April 25, 2025

CRIMINAL LAW, EVIDENCE.

ALTHOUGH ALL JUSTICES AGREED THE CERTIFICATE OF COMPLIANCE WAS NOT ILLUSORY, THE CONCURRENCE ARGUED THE PEOPLE SHOULD HAVE ASCERTAINED THE NAMES OF WITNESSES CAPTURED ON A VIDEO (FOURTH DEPT).

The Fourth Department determined the People's certificate of compliance (COC) was not illusory and, therefore, the speedy trial statute was not violated. The concurrence agreed the COC was not illusory, but argued the People should have ascertained and turned over the names of witnesses which were depicted in a video:

… [W]ith respect to defendant's claim that the People failed to turn over the names and contact information of several witnesses who were depicted on surveillance footage inside the convenience store when defendant was arrested, CPL 245.20 (1) (c) provides in relevant part that the People are required to disclose "[t]he names and adequate contact information for all persons other than law enforcement personnel whom the prosecutor knows to have evidence or information relevant to any offense charged or to any potential defense thereto." The People are not, however, required "to ascertain the existence of witnesses not known to the police or another law enforcement agency" … . The record shows that the People did not know or have in their possession the names of those witnesses with the exception of one witness whose name they learned just prior to the scheduled trial. The court thus properly determined that the People exercised due diligence and made reasonable efforts to ascertain the existence of the discovery materials … .

From the concurrence (Justice Whalen):

I respectfully disagree with the majority's conclusion that the People had no obligation to make reasonable inquiries to ascertain the names and contact information of several witnesses who were depicted on surveillance footage inside the convenience store when defendant was arrested. Although the People are not required to "ascertain the existence of witnesses" not known to law enforcement … , here the record establishes that, at the time their discovery obligation under CPL article 245 arose, the People possessed knowledge that several of the witnesses depicted on the surveillance footage had "evidence or information relevant to any offense charged" … . Specifically, the People possessed the statements of the store owner and the victim, as well as the police report from the arresting officer, each of which reflects that just prior to defendant's arrest, the depicted store employees tackled defendant to the ground, locked the door, and waited for police to arrive. Inasmuch as there is no plausible argument that the store employees who held defendant down after an attempted robbery did not "have evidence or information relevant to any offense charged" … , the People were obligated to "make a diligent, good faith effort to ascertain" … the "names and adequate contact information for [those] persons" … . In my opinion, the majority, in concluding otherwise, is conflating the statutory requirement that the People possess knowledge of the "existence of witnesses" … with knowledge of the names of witnesses. People v Burrows, 2025 NY Slip Op 02436, Fourth Dept 4-25-25

Practice Point: The concurrence argued the majority conflated the fact that the People need not ascertain the existence of witnesses they are not aware of with the obligation to ascertain the names of witnesses of which the People are aware.

April 25, 2025

CRIMINAL LAW, JUDGES, ATTORNEYS.

THE JUDGE SUMMARILY DENIED DEFENDANT'S REQUEST TO REPRESENT HIMSELF WITHOUT CONDUCTING THE MANDATORY "SEARCHING INQUIRY;" NEW TRIAL ORDERED (FOURTH DEPT).

The Fourth Department, ordering a new trial, determined defendant's request to proceed pro se was summarily denied without the required "searching inquiry:"

It is well established that a defendant in a criminal case may invoke the right to proceed pro se provided that "(1) the request is unequivocal and timely asserted, (2) there has been a knowing and intelligent waiver of the right to counsel, and (3) the defendant has not engaged in conduct which would prevent the fair and orderly exposition of the issues" … . Here, the record establishes that defendant requested to represent himself before the start of trial, stating: "I would like to go pro se, and I would like to bring something to the [c]ourt's attention if I may, your Honor." The court initially ignored the request, but defense counsel raised the issue twice more, causing the court to tell defendant: "We are not going to address the issue of pro se. You are here with [defense counsel]," whom the court described as "one of the most experienced defense attorneys in town." Given that the court "recognized defendant as having unequivocally requested to proceed pro se," it was then required to conduct a "searching inquiry to ensure that . . . defendant's waiver [of the right to counsel was] knowing, intelligent, and voluntary" … . People v Taylor, 2025 NY Slip Op 02473, Fourth Dept 4-25-25

Practice Point: Once a judge recognizes a defendant has unequivocally requested to represent himself, the judge is required to make a "searching inquiry" to ensure defendant's waiver of counsel is knowing, intelligent and voluntary. The failure to conduct the inquiry requires reversal.

April 25, 2025

CRIMINAL LAW, EVIDENCE, JUDGES.

HERE THE EVIDENCE WAS PURELY CIRCUMSTANTIAL; DEFENDANT'S REQUEST FOR A CIRCUMSTANTIAL-EVIDENCE JURY INSTRUCTION SHOULD HAVE BEEN GRANTED; NEW TRIAL ORDERED ON THE MURDER AND ATTEMPTED MURDER CHARGES (FOURTH DEPT).

The Fourth Department, ordering a new trial on the murder and attempted murder charges, determined the judge should have given the circumstantial-evidence jury instruction:

"[A] trial court must grant a defendant's request for a circumstantial evidence charge when the proof of the defendant's guilt rests solely on circumstantial evidence . . . By contrast, where there is both direct and circumstantial evidence of the defendant's guilt, such a charge need not be given" … .

The People argue that certain statements made by defendant provided some direct evidence of defendant's guilt of those charges. A defendant's "statement[s are] direct evidence only if [they] constitute a relevant admission of guilt" … . Here, we conclude that the statements identified by the People were not admissions of guilt; rather, because they "merely includ[ed] inculpatory acts from which a jury may or may not infer guilt, the statement[s were] circumstantial and not direct evidence" … . The People thus failed to present " 'both direct and circumstantial evidence of . . . defendant's guilt' " that would have negated the need for a circumstantial evidence charge … . People v Rodriguez, 2025 NY Slip Op 02454, Fourth Dept 4-25-25

Practice Point: Where the evidence against a defendant is both circumstantial and direct, a request for a circumstantial-evidence jury instruction is properly denied. Where the evidence is purely circumstantial, the request must be granted.

Practice Point: A defendant's statements are direct evidence only if they constitute an admission of guilt. Where, as here, the statements include inculpatory acts from which guilt can be inferred the statements constitute circumstantial evidence.

April 25, 2025

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA), APPEALS, ATTORNEYS, CONSTITUTIONAL, EVIDENCE, JUDGES. THERE WAS NO PROOF DEFENDANT WAS NOTIFIED OF THE SORA RISK-LEVEL ASSESSMENT HEARING AND VOLUNTARILY WAIVED HIS RIGHT TO BE PRESENT; THE DUE PROCESS ISSUE NEED NOT BE PRESERVED FOR APPEAL BECAUSE DEFENDANT DID NOT HAVE THE OPPORTUNITY TO OBJECT; LEVEL-THREE RISK-LEVEL ASSESSMENT REVERSED (THIRD DEPT).

The Third Department, reversing County Court's level-three SORA risk-level assessment and remitting the matter, determined the People did not demonstrate defendant waived his right to be present at the virtual SORA risk-assessment hearing. The judge relied on an email from the Department of Corrections and Community Supervision stating that defendant "is waiving his right to be present in court," which was not sufficient proof defendant was notified of the hearing and his rights and voluntarily waived his rights. Although defense counsel did not object, the issue did not require preservation for appeal because the defendant had "no practical ability to object" to the due process error:

The record does not establish that defendant was advised of the hearing date, the right to be present or of the consequences of failing to appear and/or participate. County Court's passing remark at the outset of the hearing that defendant had been "served" and did not wish to be present did not demonstrate such advisement or the basis for finding a waiver, and defense counsel did not represent that he had provided such advisements to defendant, that defendant was aware of his rights or that defendant had "expressed a desire to forego his presence at the hearing" … .

Although the People submitted a July 19, 2022 email correspondence indicating that an order to produce defendant for the SORA hearing was sent by County Court to the facility where defendant was apparently incarcerated, the responsive email from a Department of Corrections and Community Supervision employee stated only that defendant "is waiving his right to be present in court" for the SORA hearing, which was insufficient to establish that defendant was advised of the hearing date, his right to participate remotely or the consequences of failing to

appear or participate. As such, the record fails to establish that defendant voluntarily waived his right to participate in the hearing, where County Court may have had the opportunity to assess any cognitive impairment and its impact, if any, on the appropriate risk level classification. Therefore, without expressing any opinion as to the appropriate risk level, the order must be reversed and the matter remitted to County Court for a new risk level assessment hearing and a new determination, preceded by the required notice (see Correction Law § 168-n [3]). People v Santiago, 2025 NY Slip Op 02381, Thrid Dept 4-24-25

Practice Point: Here an email from the Department of Corrections stating defendant "is waiving his right to be present in court" was deemed insufficient to prove defendant was notified of the SORA risk-level-assessment hearing and voluntarily waived his right to be present, a due process violation.

Practice Point: Although defense counsel did not object to the hearing being held in defendant's absence, the issue need not be preserved for appeal because defendant had "no practical ability to object."

April 23, 2025

EMPLOYMENT LAW, CONTRACT LAW, ARBITRATION.

FAILURE TO COMPLY WITH THE EMPLOYER'S DIRECTIVE TO TAKE THE COVID-19 VACCINE JUSTIFIED THE TERMINATION OF PETITIONER'S EMPLOYMENT; THE ARBITRATOR'S RULING TO THAT EFFECT DID NOT VIOLATE PUBLIC POLICY AND WAS NOT IRRATIONAL (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, affirmed the arbitrator's determination petitioner was properly terminated because she refused the COVID-19 vaccine:

… [T]he court "erred in vacating the award on the ground that it was against public policy because petitioners failed to meet their heavy burden to establish that the award in this employer-employee dispute violated public policy" … . We further agree with respondents that the court "erred in vacating the award on the ground that it was irrational" … . " 'An award is irrational if there is no proof whatever to

justify the award' … . Where, however, "an arbitrator 'offer[s] even a barely colorable justification for the outcome reached,' the arbitration award must be upheld" … . Here, inasmuch as it is undisputed that [the employer] directed petitioner to receive the vaccine by a date certain, that it apprised her that her continued employment was dependent upon her compliance, and that petitioner refused to be vaccinated by the required date, the court erred in concluding that the arbitrator's award was irrational … . Further, the court was not permitted to vacate the award merely because it believed vacatur would better serve the interest of justice … . Matter of Cooper (Roswell Park Comprehensive Cancer Ctr., 2025 NY Slip Op 02445, Fourth Dept 4-25-25

Practice Point: The arbitrator's determination petitioner was properly terminated for refusing a COVID-19 vaccination did not violate public policy and was not irrational.

April 25, 2025

FAMILY LAW, CRIMINAL LAW, APPEALS, ATTORNEYS, MENTAL HYGIENE LAW.

THE MAJORITY CONCLUDED THE COURT SHOULD USE ITS AUTHORITY TO DISMISS THE JUVENILE DELINQUENCY PETITION IN THE INTEREST OF JUSTICE, AN EXTRAORDINARY REMEDY WHICH SHOULD BE EMPLOYED SPARINGLY, FACTORS EXPLAINED (THIRD DEPT).

The Third Department, over a concurring decision and an extensive dissent, determined the juvenile delinquency petition should be dismissed in the interest of justice. The concurrence argued the dismissal should be based upon ineffective assistance of counsel. The dissent argued this difficult situation was properly handled:

Although we are mindful that "[d]ismissal in the furtherance of justice is an extraordinary remedy that must be employed sparingly," it is our opinion that this is one of "those rare cases where there [are] compelling factor[s] which clearly

demonstrate[ ] that prosecution [resulted in an] injustice" .. . … [A]ttempted assault in the third degree, a class B misdemeanor, is not serious … . … [T]he DSS caseworker was not seriously injured. * * * … [A]t the time of the attempted assault, respondent was in DSS' care and custody because her mother was deceased and her grandmother, who subsequently adopted respondent, ultimately surrendered her rights. Respondent has a reportedly low IQ and a history of mental illness which was so severe that Family Court ordered a capacity evaluation … . Indeed, respondent had been brought to the hospital emergency room based on what was legally designed to be a temporary Mental Hygiene Law § 9.41 hold. Respondent remained in what was essentially a lock and key detention in the hospital, mostly in the emergency room, under dubious circumstances for an outrageous period of six months.

… Respondent already had numerous strikes against her, not only her lack of a parent/guardian and her serious mental health challenges, but also a previous juvenile delinquency adjudication. This additional juvenile delinquency finding is a red flag that will undoubtedly hinder opportunities and could cause difficulty for respondent should she seek mental health assistance in the future. Simply put, respondent needs no additional baggage, especially not baggage stemming from a juvenile delinquency petition that was admittedly filed and continued because of the difficulty of placing her in a suitable setting … . Matter of A. WW., 2025 NY Slip Op 02377, Third Dept 4-24-25

Practice Point: Consult this decision for a detailed analysis of an appellate court's authority under the Family Court Act to dismiss a juvenile delinquency petition "in the interest of justice."

April 24, 2025

FAMILY LAW, JUDGES, EVIDENCE.

MOTHER'S ALLEGATIONS OF CHANGES IN CIRCUMSTANCES WERE SUFFICIENT TO WARRANT A HEARING ON HER CUSTODY PETITION; MATTER REMITTED (FOURTH DEPT).

The Fourth Department, reversing Family Court, determined mother's custody petition should not have been summarily dismissed without a hearing:

"A hearing is not automatically required whenever a parent seeks modification of a custody [or visitation] order" … . Rather, "[t]he petitioner must make a sufficient evidentiary showing of a change in circumstances to require a hearing on the issue whether the existing custody [and visitation] order should be modified" … . "In order to survive a motion to dismiss and warrant a hearing, a petition seeking to modify a prior order of custody and visitation must contain factual allegations of a change in circumstances warranting modification to ensure the best interests of the child" … . "When faced with such a motion, 'the court must give the pleading a liberal construction, accept the facts alleged therein as true, accord the nonmoving party the benefit of every favorable inference, and determine only whether the facts fit within a cognizable legal theory' " … .

… The mother alleged that the father had repeatedly and consistently neglected to exercise his right to supervised visitation and had not seen or spoken with the children in over two years … .

… The mother further alleged that, subsequent to entry of the prior order, the older child newly disclosed that, in addition to the previously known sexual abuse to which he and the younger child had been subjected by their paternal uncle at the father's home, the father too had sexually abused him.

… [T]he mother adequately alleged a change in circumstances based on information—which she received directly from child protective services personnel from the county where the father resides—that the father and his paramour had engaged in conduct that led to the removal of the father's other children from his care … . Matter of Catherine M.C. v Matthew P.C., 2025 NY Slip Op 02480, Fourth Dept 4-25-25

Practice Point: The most common basis for a Family-Court reversal is the failure to hold a hearing.

April 25, 2025

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

THE DISMISSAL OF A FORELCOSURE ACTION ON THE GROUND THE BANK FAILED TO COMPLY WITH THE NOTICE OF DEFAULT PROVISIONS IN RPAPL 1304 IS NOT AN EXPRESS JUDICIAL DETERMINATION THAT THE ACTION DID NOT VALIDLY ACCELERATE THE DEBT; THEREFORE, HERE, THE 2013 FORECLOSURE ACTION IS TIME-BARRED PURSUANT TO THE FORECLOSURE ABUSE PREVENTION ACT (FAPA) (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the foreclosure action was time-barred. The bank's argument that the the foreclosure complaint filed in 2013 did not accelerate the debt was rejected. The 2013 action was dismissed in 2018 because the bank did not comply with the notice of default requirement in Real Property Actions and Proceedings Law (RPAPL) 1304. That dismissal did not constitute an express judicial finding that the debt had not been validly accelerated when the 2013 complaint was filed:

Deutsche Bank's argument that the complaint in the 2013 action did not constitute a valid acceleration of the debt is precluded by the Foreclosure Abuse Prevention Act (hereinafter FAPA) … . FAPA amended CPLR 213(4) to provide that in an action pursuant to RPAPL 1501(4) to cancel and discharge of record a mortgage, "a defendant shall be estopped from asserting that the period allowed by the applicable statute of limitation for the commencement of an action upon the instrument has not expired because the instrument was not validly accelerated prior to, or by way of commencement of a prior action, unless the prior action was dismissed based on an expressed judicial determination, made upon a timely interposed defense, that the instrument was not validly accelerated" … . Here, the

Supreme Court directed dismissal of the complaint in the 2013 action upon a determination that Deutsche Bank failed to establish … its strict compliance with RPAPL 1304. The mailing of a RPAPL 1304 notice, while a condition precedent to commencing a foreclosure action, is not a precondition for acceleration of the debt … , and thus, the 2013 action was not dismissed upon an expressed judicial determination that the debt was not validly accelerated. Brennan v Deutsche Bank Trust Co. Ams., 2025 NY Slip Op 02308, Second Dept 4-23-25

Practice Point: A foreclosure action is time-barred six years after the debt was accelerated by the filing of the complaint, unless there is an express judicial determination that the filing of the complaint did not accelerate the debt. A dismissal of the foreclosure action based upon the bank's failure to comply with the RPAPL 1304 notice of default requirements is not an express judicial determination that the foreclosure complaint did not validly accelerate the debt. Therefore, in this case, the 2013 foreclosure action, which was dismissed in 2018 for failure to comply with RPAPL 1304, is time-barred.

April 23, 2025

LABOR LAW-CONSTRUCTION LAW.

PLAINTIFF TRIPPED AND FELL AS HE WALKED THROUGH A "ROOM," NOT A "PASSAGEWAY;" THEREFORE THE LABOR LAW 241(6) CAUSE OF ACTION BASED ON THE INDUSTRIAL CODE PROVISION PROHIBITING OBSTRUCTIONS IN A "PASSAGEWAY" SHOULD HAVE BEEN DISMISSED (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined the Labor Law 241(6) cause of action based on an Industrial Code regulation requiring passageways be kept free of obstructions did not apply to the room where plaintiff tripped and fell:

… [P]laintiff testified that while he was walking through a room, he slipped upon and became tangled in a portion of a plastic tarp that was covering a pool table that extended past the table onto the floor, causing him to fall. * * *

… [D]efendants established, prima facie, that 12 NYCRR 23-1.7(e)(1), which requires owners and general contractors, among other things, to keep all passageways free of obstructions that could cause tripping, is inapplicable, because the site where the plaintiff allegedly fell was not a passageway … . Bittrolff v City of New York, 2025 NY Slip Op 02307, Second Dept 4-23-25

Practice Point: For purposes of Labor Law 241(6) which bases liability on a violation of the Industrial Code, an Industrial Code provision prohibiting obstructions and tripping hazards in a "passageway" does not apply to obstructions and tripping hazards in a "room."

April 23, 2025

LABOR LAW-CONSTRUCTION LAW. STANDING ON AN INVERTED BUCKET CONSTITUTED A "PHYSICALLY SIGNIFICANT" HEIGHT-DIFFERENTIAL FOR PURPOSES OF LIABILITY UNDER LABOR LAW 240(1); INJURY WHILE PREVENTING A FALL IS COVERED BY LABOR LAW 240(1) (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined there was a question of fact whether plaintiff's injury, suffered as he tried to maintain his balance while standing on an inverted bucket, was covered by Labor Law 240(1), despite the fact that plaintiff did not actually fall:

Plaintiff … testified at his deposition that he sustained biceps and shoulder injuries while installing a heavy marble slab on a bathroom wall during a construction project. To install the marble slab, plaintiff and his coworker were required to lift the slab onto two 15-inch-high inverted buckets set up on opposite ends of the slab, then stand on the buckets and attach two suction cups to the slab to lift it to the height of the bathroom ceiling. Plaintiff testified that his injury occurred as he was standing in an awkward position, trying to maintain his balance, because the "buckets were wobbling." …

… [T]he record presents an issue of fact as to whether plaintiff was injured while trying to avoid falling from the bucket while lifting the marble slab, and whether the injury could have been prevented if defendants had provided an adequate

protective device to enable him to accomplish his work at a height … . Because Labor Law § 240(1) applies so long as the "harm directly flowed from the application of the force of gravity to an object or person" … , plaintiff's claim is not defeated by the fact that he did not actually fall. On the contrary, this Court has consistently held that the statute applies where a worker was injured in the process of "preventing himself from falling" … .

We reject defendants' argument that the protection of Labor Law § 240(1) is not available because the 15-inch-tall bucket was not a "physically significant" elevation differential. This Court has found that an inverted bucket is an inadequate safety device to raise a worker to the height required to perform the work and presents a risk within the ambit of the statute … . LaGrippo v 95th & Third LLC, 2025 NY Slip Op 02288, First Dept 4-22-25

Practice Point: Standing on an inverted bucket constitutes a physically significant height-differential for purposes of liability under Labor Law 240(1).

Practice Point: Plaintiff's injury, not from a fall, but rather from his efforts to prevent his falling, can be covered under Labor Law 240(1).

April 22, 2025

LABOR LAW-CONSTRUCTION LAW.

THE FAILURE TO PROVIDE PLAINTIFF WITH EYE-PROTECTION EQUIPMENT WARRANTED SUMMARY JUDGMENT ON THE LABOR LAW 241(6) CAUSE OF ACTION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff's motion for summary judgment on the Labor Law 241(6) cause of action should have been granted. Plaintiff suffered an injury to his eye when a discharge hose disconnected from a sandblaster. Plaintiff alleged the violation of two Industrial Code provisions requiring that he be provided with protective equipment:

The plaintiff alleged … violations of (1) 12 NYCRR 23-1.5(c)(3), which provides that "[a]ll safety devices, safeguards and equipment in use shall be kept sound and operable, and shall be immediately repaired or restored or immediately removed

from the job site if damaged," and (2) 12 NYCRR 23-1.8(a), which provides that "[a]pproved eye protection equipment suitable for the hazard involved shall be provided for and shall be used by all persons . . . while engaged in any . . . operation which may endanger the eyes." * * *

"Labor Law § 241(6) imposes a nondelegable duty upon owners and contractors to provide reasonable and adequate protection and safety to construction workers" … .. "'To establish liability under Labor Law § 241(6), a plaintiff must demonstrate that the injuries allegedly sustained were proximately caused by a violation of an Industrial Code provision that is applicable under the circumstances of the case'" … ,. "An owner or contractor may be held liable under Labor Law § 241(6) even if it did not have control of the site or notice of the allegedly dangerous condition" … .

Here, the plaintiff demonstrated, prima facie, that the defendants violated Labor Law § 241(6) by failing to provide adequate eye protection equipment and to ensure that the plaintiff used safety equipment while working at the job site in accordance with 12 NYCRR 23-1.5(c)(3) and 23-1.8(a), and that those violations were a proximate cause of the accident … . Castellon v 38 E. 85th St., Inc., 2025 NY Slip Op 02311, Second Dept 4-23-25

Practice Point: Owners and contractors have a nondelegable duty to provide their workers with adequate safety equipment and can be held liable even if they did not have control of the work site or notice of the dangerous condition.

April 23, 2025

LABOR LAW-CONSTRUCTION LAW.

THE INDUSTRIAL CODE PROVISIONS RELIED UPON BY PLAINTIFF DO NOT APPLY TO A SLIPPERY SUBSTANCE ON A LADDER, REQUIRING THE DISMISSAL OF A LABOR LAW 241(6) CAUSE OF ACTION (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined certain provisions of the Industrial Code did not apply to a slippery substance on a ladder, requiring the dismissal of a Labor Law 241(6) cause of action:

The court should have dismissed the Labor Law § 241 (6) claim … on the basis that the Industrial Code provisions on which plaintiffs rely are inapplicable or abandoned. Industrial Code (12 NYCRR) § 23-1.7 (d) does not apply to this case because the ladder from which plaintiff fell "was not 'a floor, passageway, walkway, scaffold, platform or other elevated working surface'" … . 12 NYCRR 23-1.7 (e) (1) and (2) do not apply because there is no evidence that Thomas "tripped over any materials, debris or equipment" … . 12 NYCRR 23-1.21 (b) (3) (iv) is limited to structural defects in ladders … and does not apply to the slippery substance on the ladder in this case … . D'Angelo v Legacy Yards Tenant LLC, 2025 NY Slip Op 02409, First Dept 4-24-25

Practice Point: A ladder is not a "floor, passageway, walkway, scaffold, platform or other elevated working surface" within the meaning of the Industrial Code section 12 NYCRR) § 23-1.7 (d).

Practice Point: Industrial Code sections12 NYCRR 23-1.7 (e) (1) and (2) address tripping over "materials, debris or equipment" and does not apply to a slippery substance on a ladder.

Practice Point: Industrial Code section 12 NYCRR 23-1.21 (b) (3) (iv) applies to structural defects in ladders and does not apply to a slippery substance on a ladder.

April 24, 2025

MEDICAL MALPRACTICE, PUBLIC HEALTH LAW, NEGLIGENCE, EVIDENCE, CONTRACT LAW.

PLAINTIFF FELL AT HER NURSING HOME AND EMERGENCY PERSONNEL FOUND HER UNATTENDED ON THE FLOOR WITH NO IDENTIFICATION BAND; DEFENDANT'S EXPERT, A CARDIAC CRITICAL CARE PHYSICIAN, DID NOT DEMONSTRATE FAMILIARITY WITH NURSING HOME CARE AND DID NOT ADDRESS ALL THE ALLEGATIONS IN THE PLEADINGS; SUMMARY JUDGMENT SHOULD NOT HAVE BEEN AWARDED TO DEFENDANT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant's motion for summary judgment in this medical malpractice/Public Health Law 2801-d action should not have been granted. The defendant relied on the expert opinion of a physician who did not demonstrate familiarity with nursing home care and did not address the allegations that plaintiff's decedent was left unattended on the floor after she fell and defendant's personnel did not cooperate with the EMS personnel who attended the decedent:

"On a motion for summary judgment dismissing the complaint in a medical malpractice action, a defendant must make a prima facie showing either that there was no departure from good and accepted medical practice, or that the plaintiff was not injured by any such departure" … . "In order to sustain this prima facie burden, the defendant must address and rebut any specific allegations of malpractice set forth in the plaintiff's complaint and bill of particulars" … .

"Liability under the Public Health Law contemplates injury to the patient caused by the deprivation of a right conferred by contract, statute, regulation, code or rule, subject to the defense that the facility exercised all care reasonably necessary to prevent and limit the deprivation and injury to the patient. …

… [W]here a physician opines outside his or her area of specialization, a foundation must be laid tending to support the reliability of the opinion rendered" … . …

… [T]he defendant relied on an expert affirmation of a physician who engaged in, inter alia, the practice of cardiac critical care. This affirmation did not indicate that the physician had training in geriatric or nursing home care or what, if anything, the physician did to become familiar with the standard of care for these specialties … . … [T]he defendant's expert failed to specifically address the allegations that the defendant's staff members left the decedent on the floor unattended while awaiting the arrival of EMS and failed to cooperate with EMS personnel upon their arrival … . … [T]he EMS report reflected that the defendant failed to provide EMS personnel with more than mere transfer paperwork. … [T]he decedent initially could not be identified because she did not have an identification band, and EMS personnel did not know whether the patient was on blood thinners or subject to any "advance directives." Deitch v Sands Point Ctr. for Health & Rehabilitation, 2025 NY Slip Op 02317, Second Dept 4-23-25

Practice Point: Consult this decision for a clear explanation of the very different nature of a medical malpractice action as compared with a Public Health Law 2801-d action.

Practice Point: Here plaintiff's decedent fell at her nursing home. Defendant's expert, a cardiac physician, did not demonstrate any familiarity with nursing home care, rendering his affidavit insufficient.

Practice Point: In a medical malpractice/Public Health Law 2801-d action, the expert's failure to address all the allegations in the pleadings renders the expert evidence insufficient.

April 23, 2025

MENTAL HYGIENE LAW, CONSTITUTIONAL LAW, ATTORNEYS.

THE "ALLEGEDLY INCAPACITATED PERSON" (AIP) WAS NOT PRESENT FOR THE MENTAL HYGIENE LAW GUARDIANSHIP HEARING; THE AIP'S ATTORNEY CANNOT CONSENT TO THE APPOINTMENT OF A GUARDIAN IF THE AIP IS NOT PRESENT; MATTER REMITTED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the absence of the allegedly incapacitated person (AIP) from the proceeding to appoint a guardian pursuant to the Mental Hygiene Law required remittal:

"Guardianship proceedings, as a drastic intervention in a person's liberty, must adhere to proper procedural standards" … . Pursuant to Mental Hygiene Law § 81.11, where a petition to have a guardian appointed for an AIP has been filed … , "[a] determination that the appointment of a guardian is necessary for a person alleged to be incapacitated shall be made only after a hearing" … . Any party to the proceeding "shall" have the right to present evidence, call witnesses, cross-examine witnesses and be represented by counsel … .

Most importantly, "[t]he hearing must be conducted in the presence of the person alleged to be incapacitated, either at the courthouse or where the person alleged to be incapacitated resides" … , unless the person is outside the state or "all the information before the court clearly establishes that (i) the person alleged to be incapacitated is completely unable to participate in the hearing or (ii) no meaningful participation will result from the person's presence at the hearing" … . "There is an 'overarching value in a court having the opportunity to observe, firsthand, the allegedly incapacitated person' " … .

Here, the court did not conduct a hearing in the presence of the AIP. Although the court evaluator informed the court that "[a]ll of the parties here right now agree that the AIP needs a guardian," it is unclear whether that statement by the court evaluator constitutes an agreement by the AIP's attorney to the court's determination to appoint a guardian for all of the AIP's person and property. Regardless, even if we were to deem this a situation where the AIP's attorney agreed that the AIP consented to the appointment, "a court should not accept

counsel's representation that the AIP has consented to the appointment of a guardian where the AIP is not present" … . "[T]he court must first determine whether the AIP has the requisite capacity to consent, and must then make a finding of the AIP's agreement to the terms of the guardianship, on the record" … . Matter of Chang v Billie J.C.-W., 2025 NY Slip Op 02446, Fourth Dept 4-25-25

Practice Point: A Mental Hygiene Law guardianship hearing must be held in the presence of the allegedly incapacitated person (AIP) absent proof the AIP cannot meaningfully participate. The judge should be able to observe the AIP.

Practice Point: The AIP's attorney cannot consent to the appointment of a guardian in the AIP's absence.

April 25, 2025

NEGLIGENCE, EVIDENCE.

A CONDITION WHICH MIGHT BE DEEMED OPEN AND OBVIOUS CAN BECOME A "TRAP FOR THE UNWARY" WHEN A PERSON IS DISTRACTED; HERE PLAINTIFF SLIPPED AND FELL WHEN HIS FOOT WAS CAUGHT IN A DEPRESSION BETWEEN DEFENDANT'S FENCE AND THE SIDEWALK AS PLAINTIFF TRIED TO SEPARATE TWO FIGHTING DOGS; DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant's motion for summary judgment in this slip and fall case should not have been granted on the ground the condition was open and obvious. Plaintiff was trying to separate two fighting dogs when his foot was caught in a depression between defendant's fence and the sidewalk. The depression was about a foot wide and five or six inches deep. The court noted that a condition that might ordinarily be deemed open and obvious can be a "trap or the unwary" when a person is distracted:

"Property owners have a common-law duty to maintain property in a reasonably safe condition, but there is no duty to protect or warn against conditions that are

open and obvious and not inherently dangerous" … . However, "[w]hether a hazard is open and obvious cannot be divorced from the surrounding circumstances" … . "A condition that is ordinarily apparent to a person making reasonable use of his or her senses may be rendered a trap for the unwary where the condition is obscured or the plaintiff is distracted" … . "[W]hether a dangerous or defective condition exists on the property of another so as to create liability depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury" … .

Here, the defendants failed to establish, prima facie, that the alleged condition was open and obvious and not inherently dangerous under the circumstances surrounding the accident. In addition, the defendants failed to establish, prima facie, that they lacked constructive notice of the alleged defective condition … . Niyazov v Ditmas Mgt. Corp., 2025 NY Slip Op 02349, Second Dept 4-23-25

Practice Point: This decision presents an example of when an "open and obvious" condition can be deemed a "trap for the unwary" for someone who is distracted. Here plaintiff was trying to separate two fighting dogs when his foot became caught in a five-or-six-inch-deep depression between defendant's fence and the sidewalk.

April 23, 2025

NEGLIGENCE, EVIDENCE.

BECAUSE THE RES IPSA LOQUITUR DOCTRINE IS DEPENDENT UPON CIRCUMSTANTIAL EVIDENCE FROM WHICH INFERENCES MUST BE DRAWN, SUMMARY JUDGMENT IS USUALLY NOT APPROPRIATE; HERE A GARAGE DOOR CLOSED OR FELL ON PLAINTIFF; PLAINTIFF'S SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the res ipsa loquitur doctrine was not a proper basis for granting plaintiff's summary judgment motion. Plaintiff was injured when a garage door at defendant's vehicle-repair shop

closed on her as she left the customer waiting area. Plaintiff could have used an exterior door rather than the open garage door:

"The doctrine of res ipsa loquitur permits an inference of negligence to be drawn solely from the happening of an accident" … . It requires evidence of an event which ordinarily does not occur in the absence of negligence, was caused by an agency or instrumentality within the exclusive control of the defendant, and was not due to any voluntary action or contribution on the part of the plaintiff … . "Since the circumstantial evidence allows but does not require the jury to infer that the defendant was negligent, res ipsa loquitur evidence does not ordinarily or automatically entitle the plaintiff to summary judgment, even if the plaintiff's circumstantial evidence is unrefuted" … . Summary judgment on the issue of liability should only be granted "in the rarest of res ipsa loquitur cases" where "the plaintiff's circumstantial proof is so convincing and the defendant's response so weak that the inference of [the] defendant's negligence is inescapable" … .

Here, the plaintiff did not establish, by sufficiently convincing circumstantial proof, "that the inference of [the] defendant's negligence is inescapable" … . Specifically, the plaintiff failed to submit sufficiently convincing circumstantial proof that the garage door and its mechanism were within the defendant's exclusive control, and that the accident was not due to any fault on the part of the plaintiff … . "'In those cases where conflicting inferences may be drawn, choice of inference must be made by the jury'" … . Hafeez v TT of Freeport, 2025 NY Slip Op 02327, Second Dept 4-23-25

Practice Point: Consult this decision for insight into the proof requirements for liability under the res ipsa loquitur doctrine.

Practice Point: Because the res ipsa loquitur doctrine is dependent upon circumstantial evidence, summary judgment is rarely appropriate even where plaintiff's evidence is unrefuted.

April 23, 2025

NEGLIGENCE, EVIDENCE.

IN A SLIP AND FALL CASE, TO DEMONSTRATE A LACK OF CONSTRUCTIVE NOTICE OF THE CONDITION, THE DEFENDANT MUST PROVE THE AREA OF THE SLIP AND FALL WAS CLEANED OR INSPECTED CLOSE IN TIME TO THE INCIDENT; PROOF OF GENERAL CLEANING OR INSPECTION PRACTICES IS NOT ENOUGH; DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the defendant in this black-ice slip and fall case did not demonstrate when the area was last inspected or cleaned. Therefore the defendant did not demonstrate a lack of constructive notice of the condition. Proof of general cleaning and inspection practices is insufficient. Defendant's motion for summary judgment should not have been granted:

"A property owner will be held liable for a slip-and-fall accident involving snow and ice on its property only when it created the dangerous condition which caused the accident or had actual or constructive notice of its existence" … . "Accordingly, a property owner seeking summary judgment in a slip-and-fall case 'has the initial burden of making a prima facie showing that it neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it'" … .

Here, the defendant failed to submit sufficient evidence establishing, prima facie, that it did not have constructive notice of the alleged black ice condition. The defendant's station cleaner provided only general information about his cleaning and inspection practices, and he failed to specify when he last cleaned or inspected the area where the plaintiff fell relative to the time of the accident … . Ravello v Long Is. R.R., 2025 NY Slip Op 02361, Second Dept 4-23-25

Practice Point: There are hundreds of reversals on this ground. A lack of constructive notice of a condition alleged to have caused a slip and fall can only be demonstrated by proof the area was actually cleaned or inspected close in time to

the fall. Proof of general cleaning or inspection practices will not support a summary judgment.

April 23, 2025

NEGLIGENCE, IMMUNITY, EVIDENCE.

PLAINTIFF DECEDENT'S LAWSUIT AGAINST DEFENDANT NURSING HOME, WHICH APPARENTLY ALLEGED, AMONG OTHER THINGS, THAT PLAINTIFF'S DECEDENT WAS NEGLIGENTLY EXPOSED TO COVID-19, WAS NOT PRECLUDED BY THE "EMERGENCY OR DISASTER TREATMENT PROTECTION ACT" OR THE "FEDERAL PUBLIC READINESS AND EMERGENCY ACT" (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the wrongful death complaint, which apparently alleged, among other things, decedent was negligently exposed to COVID-19 in defendant nursing home, should not have been dismissed. The Fourth Department held that the defendants submissions did not demonstrate the COVID-19-releated immunity provided by the Emergency or Disaster Treatment Protection Act (EDTPA) (Public Health Law former art 30-D, §§ 3080-3082) and the Federal Public Readiness and Emergency Preparedness Act (PREP Act) (42 USC § 247d-6d) precluded the lawsuit:

… [D]efendants' submission of the affidavit of Robert G. Hurlbut, the administrator of the facility during the relevant time period, does not conclusively establish that the act or omission constituting defendants' alleged negligence occurred in the course of arranging for or providing health care services, and it likewise does not conclusively establish that the treatment of decedent was impacted by the health care facility's or health care professionals' decisions or activities in response to or resulting from the COVID-19 outbreak … . We therefore conclude that defendants' submissions did not conclusively establish the three requirements for immunity under the EDTPA … . …

With respect to the PREP Act * * * plaintiff alleged … that defendants failed to properly sterilize equipment to prevent the spread of infection, failed to follow

their own infection control practices, and failed to maintain and utilize the proper personal protective equipment as required by federal law. Plaintiff further alleged that decedent suffered a range of injuries from defendants' negligence, including pressure ulcers, head injuries, and lacerations, in addition to the contraction of COVID-19. Defendants' submissions failed to establish that decedent's injuries arose from the use of an approved countermeasure under the PREP Act … . Sweatman v The Hurlbut, 2025 NY Slip Op 02522, Fourth Dept 4-25-25

Practice Point: In the context of a motion to dismiss the complaint, which apparently alleged, among other things, that plaintiff's decedent was negligently exposed to COVID-19 in defendant nursing home, the immunity provided by the Emergency or Disaster Treatment Protection Act (EDTPA) (Public Health Law former art 30-D, §§ 3080-3082) and the Federal Public Readiness and Emergency Preparedness Act (PREP Act) (42 USC § 247d-6d) was not demonstrated to preclude the lawsuit.

April 25, 2025

NEGLIGENCE, MUNICIPAL LAW, VEHICLE AND TRAFFIC LAW.

AT THE TIME OF THE COLLISION, THE SHERIFF'S DEPUTY WAS ENGAGED IN AN EMERGENCY OPERATION AND DID NOT ACT WITH RECKLESS DISREGARD FOR THE SAFETY OF OTHERS; TWO-JUSTICE DISSENT (FOURTH DEPT).

The Fourth Department, affirming Supreme Court, over a two-justice dissent, determined the police vehicle (driven by Deputy Fong) which collided with plaintiff's vehicle was engaged in an emergency operation and was not being operated in reckless disregard for the safety of others. The dissenters argued there was a question of fact on the "reckless disregard" issue:

… [I]t is undisputed that the reckless disregard standard of care applies because Fong was driving an emergency vehicle and was engaged in an emergency operation at the time she proceeded through the red traffic signal (see Vehicle and Traffic Law § 1104 [b] [2]). In addition, defendants established that Fong's conduct did not rise to a level of reckless disregard for the safety of others. Defendants'

submissions established, in particular, that Fong took several precautions before proceeding into the intersection against the red traffic signal, including bringing her vehicle to a complete stop, looking in all directions, activating her emergency lights, and proceeding slowly into the intersection … . Granath v Monroe County, 2025 NY Slip Op 02521, Fourth Dept 4-25-25

April 25, 2025

NEGLIGENCE.

IN THIS ALL-TERRAIN-VEHICLE (ATV) ACCIDENT CASE, THERE IS A QUESTION OF FACT WHETHER THE DRIVER UNREASONABLY INCREASED THE RISK TO PLAINTIFF-PASSENGER THEREBY PRECLUDING THE APPLICATION OF THE ASSUMPTION-OF-THE-RISK DOCTRINE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined there was a question of fact whether assumption of the risk doctrine precluded plaintiff from recovery in this all-terrain vehicle (ATV) accident case. There was a question whether the driver unreasonably increased the risk to plaintiff-passenger:

"Pursuant to the doctrine of primary assumption of risk, a voluntary participant in a sporting or recreational activity 'consents to those commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation'" … . Participants, however, are not deemed to have assumed the risks of reckless or intentional conduct or concealed or unreasonably increased risks … . Here, the evidence submitted by the defendant in support of the motion raised triable issues of fact as to whether the manner in which the decedent was operating the ATV unreasonably enhanced the risk of injury and whether the doctrine of primary assumption of risk applies to this case … . Bulfamante v Bulfamante, 2025 NY Slip Op 02310, Second Dept 4-23-25

Practice Point: Here there was no question that the assumption-of-the-risk doctrine could apply to plaintiff-passenger injured in an all-terrain-vehicle (ATV) accident.

Practice Point: Although the assumption-of-the-risk doctrine could apply to the plaintiff-passenger in this ATV accident case, there was a question of fact whether the doctrine was precluded because the driver unreasonably increased the risk.

April 23, 2025