NEW YORK APPELLATE DIGEST, INC.

Weekly Reversal Report
June 23 – 27, 2025

An Organized Compilation of Summaries of Selected Decisions, Mostly Reversals, Released by Our New York State Appellate Courts June 23 – 27, 2025, and Posted on the New York Appellate Digest Website on Monday, June 30, 2025. The Entries in the Table of Contents Link to the Summaries Which Link to the Full Decisions on the Official New York Courts Website. Click on “Table of Contents” in the Header on Any Page to Return There. Right Click on the Citations to Keep Your Place in the Reversal Report.

Table of Contents

Contents

ARBITRATION, CONTRACT LAW, EMPLOYMENT LAW, JUDGES.

A COURT'S POWER TO VACATE AN ARBITRATOR'S AWARD IS EXTREMELY LIMITED; AN ARBITRATOR'S INTERPRETATION OF A COLLECTIVE BARGAINING AGREEMENT CANNOT BE REVIEWED UNLESS IT IS "COMPLETELY IRRATIONAL;" HERE THE ARBITRATOR'S AWARD UPHOLDING THE SUSPENSION OF PETITIONER-DENTAL-HYGIENIST FOR HER FAILURE TO OBTAIN A COVID-19 VACCINE WAS CONFIRMED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the arbitrator's award in this COVID-19 vaccine-mandate case should not have been vacated. The arbitrator found that the petitioner-employee, a dental hygienist, was properly suspended without pay and issued a Notice of Discipline for failure to obtain a COVID-19 vaccine. A court's power to vacate an arbitration award is extremely limited:

We agree with respondent that the court "erred in vacating the award on the ground that it was against public policy because petitioner[] failed to meet [her] heavy burden to establish that the award in this employer-employee dispute violated public policy" … . We further agree with respondent 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, there is no dispute that respondent directed petitioner to fully receive the COVID-19 vaccine by a specific date, that it apprised her that her continued employment was contingent upon her compliance, and that petitioner refused to be vaccinated by the required date. It is also undisputed that petitioner was never granted a reasonable accommodation that excused her compliance with the vaccine mandate. Consequently, the court erred in concluding that the arbitrator's award was irrational … . To the extent petitioner argues that the arbitrator erred in not considering the propriety of respondent's denial of petitioner's request for a reasonable accommodation based on a pre-existing health condition, we note that the arbitrator interpreted the CBA as precluding any review of that decision. Inasmuch as we conclude that "the

arbitrator's 'interpretation of the [CBA] [is] not . . . completely irrational, [it] is beyond [our] review power' " … . Finally, we note that the court was not permitted to vacate the award merely because it believed vacatur would better serve the interest of justice … . Matter of Davis (State of New York Off. of Mental Health), 2025 NY Slip Op 03910, Fourth Dept 6-27-25

Practice Point: Consult thee decisions for an explanation of the limits on a court's review of an arbitration award.

June 27, 2025

CIVIL PROCEDURE, CIVIL RIGHTS LAW, DEFAMATION.

PLAINTIFF STATED A CAUSE OF ACTION FOR DEFAMATION PER SE (DEFENDANT ALLEGEDLY STATED PLAINTIFF ENGAGED IN MONEY LAUNDERING); ALTHOUGH DEFENDANT DEMONSTRATED THE ACTION INVOLVED "PUBLIC PETITION AND PARTICIPATION" WITHIN THE MEANING OF THE SLAPP STATUTE, PLAINTIFF DEMONSTRATED THE DEFAMATION ACTION HAD A SUBSTANTIAL BASIS IN LAW; THEREFORE THE SLAPP STATUTE SHOULD NOT HAVE BEEN APPLIED TO DISMISS THE COMPLAINT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff had stated a cause of action for defamation and defendant was not entitled to dismissal of the complaint pursuant to the SLAPP statute (strategic lawsuit against public participation—Civil Rights Law section 70-a(1)(a)). Plaintiff operated a marina under a 60-year lease from the National Park Service, a US governmental agency. Defendant allegedly told plaintiff's customer that plaintiff was engaged in money-laundering:

… [D]efendant satisfied his initial burden of establishing that this action is an action involving public petition and participation, since it involves a claim based upon "lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public interest" (id. § 76-a[1][a][2]). * * * … [T]he defendant established that the causes of action were asserted in

connection with an issue of public interest, as the defendant allegedly accused an entity operating with the authority of a governmental agency of criminal conduct … .

Since the defendant established that this action constitutes an action involving public petition and participation, the burden shifted to the plaintiff to demonstrate that the causes of action had a substantial basis in law … .

… [T]he defendant's alleged statement that the plaintiff "is engaged in money laundering" did not constitute pure nonactionable opinion … . * * * …[T]he complaint alleged that the defendant acted with "actual malice" or reckless disregard as to whether the statements were true or false … . … [T]he complaint was not required to allege special damages, since it asserted a cause of action alleging defamation per se based upon allegations that the defendant made statements charging the plaintiff with a serious crime or tending to injure it in its trade, business, or profession … . Thus, the plaintiff established that the cause of action alleging defamation per se had a substantial basis in law … . Moonbeam Gateway Mar., LLC v Tai Chan, 2025 NY Slip Op 03802, Second Dept 6-25-25

Practice Point: The motion court dismissed the defamation action on the ground it was precluded by the SLAPP statute. However the Second Department held that plaintiff had demonstrated the defamation action had a substantial basis in law. Therefore defendant did not demonstrate entitlement to dismissal under the SLAPP statute.

June 25, 2025

CIVIL PROCEDURE, CONSTITUTIONAL LAW, LANDLORD-TENANT, MUNICIPAL LAW, SOCIAL SERVICES LAW.

THE NEW YORK CITY LOCAL LAWS REFORMING THE NYC FIGHTING HOMELESSNES AND EVICTION PREVENTION SUPPLEMENT ARE NOT PREEMPTED BY THE NEW YORK STATE SOCIAL SERVICES LAW (FIRST DEPT).

The First Department, reversing Supreme Court, in a full-fledged opinion by Justice Higgitt, determined that the local laws passed by the City Council modifying the New York City Fighting Homelessness and Eviction Prevention Supplement (FHEPS) were not preempted by the New York State Social Services Law. The opinion is comprehensive and too detailed to fairly summarize here:

[The] FHEPS reform laws were prompted by three conditions faced by the City: the rising number of evictions of residential tenants, a dramatic increase in the rate of homelessness, and an overburdened shelter system. These laws were designed to broaden eligibility for City-funded rental assistance, and promote quantitatively and qualitatively greater assistance. Thus, the FHEPS reform laws increased the income eligibility threshold, eliminated a 90-day shelter residency requirement, eliminated recipient work requirements, prohibited the New York City Department of Social Services (City DSS) from deducting a utility allowance from the maximum rental allowance for a FHEPS voucher, and expanded the list of individuals eligible for rental assistance (see Local Law Nos. 99-102). * * *

Several individuals who hoped to avail themselves of the benefits of the FHEPS reform laws commenced this CPLR article 78 proceeding, challenging the Mayor's refusal to implement those laws. The individuals initiated the proceeding as a putative class action, and bring the case on behalf of themselves and others similarly situated. The City Council was granted leave to intervene in the proceeding, and sought an order directing the Mayor to implement the FHEPS reform laws or, alternatively, a declaration that those laws are valid. With respect to the principal relief sought, the City Council makes plain that it "seeks only that the Mayor be directed to take action to implement [the new local laws]. How the administration implements the [FHEPS] Reform Laws is within the administration's discretion."

The Mayor opposed the article 78 petition on the ground that the FHEPS reform laws are preempted by the State's Social Services Law. Matter of Vincent v Adams, 2025 NY Slip Op 04146, First Dept 5-27-25

Practice Point: Consult this opinion for an analysis of the preemption doctrine in the context of NYC Local Laws and the NYS Social Services Law.

June 27, 2025

CIVIL PROCEDURE, EDUCATION-SCHOOL LAW, MUNICIPAL LAW.

HERE THE ASSISTANT SUPERINTENDENT WHO WAS HANDED THE SUMMONS AND COMPLAINT IN THIS PROPERTY-DAMAGE ACTION WAS AN AUTHORIZED AGENT OF THE SCHOOL DISTRICT; THEREFORE THE COMPLAINT SHOULD NOT HAVE BEEN DISMISSED FOR FAILURE TO COMPLETE PROPER SERVICE (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Voutsinas, reversing Supreme Court, determined the assistant superintendent who was handed the summons and complaint in this property-damage action against the school district was an authorized agent of the district. Therefore the complaint should not have been dismissed for failure to complete proper service:

It is evident, however, that the role of assistant superintendent was intended, under Education Law § 2(13), to be considered another appointive officer whose duties generally relate to the administration of affairs within a school district. An assistant superintendent … directly carries out duties that typically would be carried out by the superintendent. These duties fit closely with the statutory definition of "school officer" as contemplated by Education Law § 2(13).

Moreover, as set forth in the Education Law, the role of assistant superintendent is generally created directly by an elected board of education, such as the defendant's Board of Education. Specifically, Education Law § 2503(5), applicable to the defendant herein, grants the Board of Education the ability to "create, abolish, maintain and consolidate such positions . . . as, in its judgment, may be necessary for the proper and efficient administration of its work" and "shall appoint properly

qualified persons to fills such positions, including a superintendent of schools" and "such associate, assistant and other superintendents . . . as said board shall determine necessary for the efficient management of the schools." Here, the defendant, in accordance with the relevant provisions of the Education Law, has given … the assistant superintendent for curriculum and instruction … authority and command to administer the affairs of the defendant and its superintendent as it pertains to the offering of the curriculum to the student body and the instruction of each student. It is evident that [the assistant superintendent], in this role, reports directly to the superintendent of schools and the Board of Education and is charged with administering functions that otherwise would be tasked to the Board of Education and/or the superintendent of schools. Aideyan v Mount Vernon City Sch. Dist., 2025 NY Slip Op 03787, Second Dept 6-25-25

Practice Point: Consult this decision if you need to know who is authorized to accept service on behalf of a school district.

June 25, 2025

CIVIL PROCEDURE, EMPLOYMENT LAW, JUDGES, LABOR LAW.

IN THIS CLASS-ACTION-CERTIFICATION PROCEEDING ALLEGING FAILURE TO PROVIDE NOTICE OF PAY RATE AND PAY DAY AS REQUIRED BY LABOR LAW SECTION 195(1), THE COURT SHOULD NOT HAVE GRANTED CERTIFICATION FOR THE CLAIM FOR LIQUIDATED DAMAGES AND SHOULD NOT HAVE GRANTED THE REQUEST FOR THE SOCIAL SECURITY NUMBERS OF CLASS MEMBERS WHOSE CLASS-ACTION NOTICE WAS RETURNED AS UNDELIVERABLE (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court in this class-action-certification proceeding concerning wage notice violations, noted that CPLR 901(b) prohibits class actions seeking liquidated damages and the request for social security numbers for class members whose notice was returned as undeliverable should not have been granted:

… [T]he court should not have granted class certification for the wage notice claims, which are based on the alleged failure to provide a notice of pay rate and pay day as required by Labor Law § 195(1), and seek liquidated damages, plus reasonable attorneys' fees and costs under Labor Law § 198(1-b). Where, as here, defendant pleaded a Labor Law § 198 statutory affirmative defense to the wage notice claim, the court should have declined to grant certification by applying the CPLR 901(b) prohibition against class actions seeking liquidated damages … .

To the extent the court ordered defendants to provide the names, addresses, phone numbers, and email addresses of all class members, as well as social security numbers for all class members whose notice is returned as undeliverable without a forwarding address, the order is modified to deny the request for social security numbers. The court otherwise properly granted the request for phone numbers and e-mail addresses, which is a reasonable request to expedite class notification. Idahosa v MFM Contr. Corp., 2025 NY Slip Op 03762, First Sept 6-24-25

Practice Point: Where class-action notices are returned as undeliverable, the request for phone numbers and e-mail addresses is properly granted to expedite class notification, but the request for social security numbers should not be granted.

June 24, 2025

CIVIL PROCEDURE, EVIDENCE, JUDGES.

IN THE ABSENCE OF A MOTION TO DISMISS THE COMPLAINT BY THE DEFENDANTS, THE JUDGE DID NOT HAVE THE AUTHORITY TO DISMISS THE ACTION ON THE EVE OF TRIAL "IN THE INTEREST OF JUDICIAL ECONOMY" BASED UPON PERCEIVED EVIDENTIARY DEFICIENCIES (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the judge should not have, sua sponte, dismissed the complaint on the eve of trial, in the interest of

judicial economy, based on an evidentiary issue. Absent a motion by the defendants, the judge lacked the power to dismiss the action:

… [I]t is undisputed that there was no motion by defendants requesting dismissal of the complaint. Rather, defendants opposed the request by plaintiff that he be permitted to admit in evidence at trial certain medical records. Inasmuch as there was no motion for dismissal pending before the court—either on the basis that defendants were entitled to judgment as a matter of law or based on plaintiff's admissions—the court lacked authority to dismiss the complaint in the interest of judicial economy … . Indeed, by sua sponte dismissing the complaint before plaintiff presented any evidence, the court deprived plaintiff of an opportunity to oppose dismissal and deprived defendants of an opportunity to state the grounds that supported dismissal (see generally CPLR 4401). Additionally, we can find no legal authority (nor do the parties identify any), that permits a court to, on its own volition, dismiss a complaint on the eve of trial without any request for such relief—absent extraordinary circumstances not present here … . Although the court determined that plaintiff cannot substantiate his claims, the court nevertheless erred in dismissing the complaint on that basis moments before trial was to commence without any request for such relief from defendants. Wallace v Kinney, 2025 NY Slip Op 03879, Fourth Dept 6-27-25

Practice Point: On the eve of trial, absent a motion to dismiss by the defendant, a trial judge generally does not have the authority to dismiss complaint "in the interest of judicial economy" based on perceived evidentiary deficiencies.

June 27, 2025

CIVIL PROCEDURE, JUDGES.

FAILURE TO REJECT A LATE ANSWER WITHIN 15 DAYS WAIVES LATE SERVICE AND THE DEFAULT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff waived any objection to late service of the answer by not rejecting it within 15 days:

Pursuant to CPLR 2101(f), "[t]he party on whom a paper is served shall be deemed to have waived objection to any defect in form unless, within fifteen days after the

receipt thereof, the party on whom the paper is served returns the paper to the party serving it with a statement of particular objections" … . Here, the plaintiff's undisputed failure to reject [the] answer within the 15-day statutory time frame constituted a waiver of the late service and the default … . Moreover, the plaintiff did not move for leave to enter a default judgment against [defendants] … . Therefore, the Supreme Court should not have rejected the answer … .Globalized Realty Group, LLC v Crossroad Realty NY, LLC, 2025 NY Slip Op 03797, Second Dept 6-25-25

Practice Point: Failure to reject a late answer following the procedure in CPLR 2101(1) waives late service and the default.

June 25, 2025

CIVIL PROCEDURE, NEGLIGENCE, EVIDENCE, JUDGES.

IN THIS CHILD VICTIMS ACT CASE AGAINST A TEACHER, PLAINTIFF'S MOTION TO AMEND THE BILL OF PARTICULARS TO ADD DEPOSITION TESTIMONY CONCERNING STATEMENTS MADE BY WITNESSES TO PLAINTIFF'S ATTORNEYS SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court in this Child Victims Act suit, determined plaintiff should have been allowed to amend the bill of particulars to add deposition testimony which included witness statements made to plaintiff's attorneys concerning the defendant teacher:

"Pursuant to CPLR 3025(b), leave to amend or supplement a pleading is to be 'freely given'" … . "'In the absence of prejudice or surprise resulting directly from the delay in seeking leave, such applications are to be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit'" … . "The burden of proof in establishing prejudice or surprise, or that the proposed amendment lacks merit, falls to the party opposing the motion for leave to amend" … . "[T]he decision of whether to grant or deny leave to amend is subject to the discretion of the trial court" … .

The Supreme Court improvidently exercised its discretion in denying that branch of the plaintiff's motion which was for leave to amend the bill of particulars to include the proposed witness's statements to [plaintiff's attorneys]. The proposed amendment was not palpably insufficient or patently devoid of merit … . In this case, having failed to oppose the motion, the District defendants failed to satisfy their burden of demonstrating any prejudice or surprise … . Fitzpatrick v Pine Bush Cent. Sch. Dist., 2025 NY Slip Op 03794, Second Dept 6-25-25

Practice Point: Amendments to pleadings should be freely allowed. Here deposition testimony about vague and contradictory statements made to plaintiff's counsel by witnesses concerning defendant teacher's alleged interaction with students can properly be added to the bill of particulars, criteria explained.

June 25, 2025

CIVIL PROCEDURE, PRIVILEGE, IMMUNITY, CONTRACT LAW, DEFAMATION.

THE LITIGATION PRIVILEGE WHICH APPLIES TO DEFAMATION ACTIONS WAS NOT APPLICABLE HERE IN THIS BREACH OF CONTRACT ACTION ALLEGING BREACH OF CONFIDENTIALITY AND NONDISPARAGEMENT PROVISIONS; DEFENDANT ALLEGEDLY THREATENED TO PROVIDE DAMAGING TESTIMONY IN ANOTHER ACTION INVOLVING PLAINTIFFS, IN WHICH DEFENDANT WAS NOT A PARTY, IF DEFENDANT'S DEMANDS WERE NOT MET (FIRST DEPT).

The First Department, reversing Supreme Court, determined defendant was not entitled to immunity in this breach of contract action alleging breach of confidentiality and nondisparagement provisions. The immunity and privilege which applies to statements made in defamation litigation does not apply in breach of contract litigation:

Plaintiffs allege that defendant breached the confidentiality and nondisparagement provisions of their agreement when he threatened to provide damaging testimony in a separate action between plaintiffs and Reebok (a litigation to which defendant

was not a party) if his demands in an unrelated arbitration with plaintiffs were not accepted. Plaintiffs further allege that when his demands were rejected, defendant acted on his threats, contacted Reebok, and offered to provide damaging false testimony in that action.

Defendant … argues … that the Court of Appeals' recent holding in Gottwald v Sebert (40 NY3d 240 [2023]) bars plaintiffs' action. In Gottwald, the court held that there is no "sham exception" to the litigation privilege in a defamation action, thus conferring absolute litigation privilege no matter the motivation for the suit … . The motion court agreed that Gottwald barred plaintiff's action and granted defendant summary judgment on that basis.

Gottwald specifically holds that "absolute immunity from liability for defamation exists for . . . statements made . . . in connection with a proceeding before a court when such words and writings are material and pertinent to the questions involved" … . However, here, plaintiffs' sole cause of action is for breach of contract, not defamation, and thus, Gottwald is not applicable. Moreover, the absolute litigation privilege granted by the Gottwald court was conferred upon parties to the suit. Gottwald does not speak to whether that privilege extends to individuals ancillary or collateral to the litigation, such as a potential witness. TRB Acquisitions LLC v Yedid, 2025 NY Slip Op 03872, First Dept 6-26-25

Practice Point: The litigation privilege which applies in defamation actions was not applicable here in this breach of contract action where defendant threatened to give damaging testimony in another action involving plaintiffs in which defendant was not a party.

June 26, 2025

CIVIL PROCEDURE.

A SHOOTER WEARING BODY ARMOR OPENED FIRE AT A BUFFALO GROCERY STORE KILLING TEN AND INJURING MANY OTHERS; THE COMPLAINT ALLEGED THE BODY ARMOR ALLOWED THE SHOOTER TO KILL THE SECURITY GUARD WHICH LEFT THE SHOPPERS UNPROTECTED; THE ISSUE IS WHETHER NEW YORK HAS LONG-ARM JURISDICTION OVER THE MANUFACTURER OF THE BODY ARMOR AND TWO INDIVIDUAL DEFENDANTS; PLAINTIFFS' ALLEGATIONS WERE SUFFICIENT TO WARRANT JURISDICTIONAL DISCOVERY; THE COMPLAINT SHOULD NOT HAVE BEEN DISMISSED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined plaintiffs were entitled to jurisdictional discovery to determine whether New York has long-arm jurisdiction over two individual employees of RMA, Waldrop and Clark, which sells body armor. An 18-year-old man committed a racially motivated mass shooting at a grocery store in Buffalo, killing ten people and injuring many others. The complaint alleges that the body armor protected the shooter, allowing him to kill the security guard and shoot more people inside and outside the store:

… "[I]n order to defeat a motion to dismiss based upon lack of personal jurisdiction, a plaintiff need only demonstrate that facts may exist to exercise personal jurisdiction over the defendant[s]" … . We agree with plaintiffs that they have set forth a "sufficient start" … to show that their position is not " 'frivolous' " … . …

… With respect to Waldrop, plaintiffs allege that he was intimately involved in the daily operations of RMA, was involved in developing the body armor used by the shooter, and was directly involved in the marketing and sales of that body armor. They also allege that he chose to allow the sale of body armor to civilians, i.e., non-military and non-law enforcement personnel, or was "deliberately indifferent" to such sales, and that he knew RMA body armor was being marketed to and sold in New York. We conclude that those allegations are sufficient to warrant discovery on the matter of personal jurisdiction vis-à-vis Waldrop … . …

With respect to Clark, plaintiffs allege that he, personally, marketed the body armor to, and communicated directly with, the shooter, encouraging him to purchase the body armor, either knowing or having reason to know that the shooter was a civilian. Plaintiffs further allege that, as a result of that individual conduct, Clark knew that RMA's body armor was being sold to civilians in New York, presenting grave risks to New York residents. We thus likewise conclude that plaintiffs' allegations are sufficient to warrant discovery on the matter of personal jurisdiction vis-à-vis Clark … . Salter v Meta Platforms, Inc., 2025 NY Slip Op 03896, Fourth Dept 6-27-25

Practice Point: Consult this decision for a concise explanation of New York's long-arm jurisdiction and the criteria for jurisdictional discovery.

June 27, 2025

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA), CONSTITUTIONAL LAW, CORRECTION LAW, EVIDENCE, JUDGES.

THE SORA HEARING JUDGE SHOULD NOT HAVE GRANTED AN UPWARD DEPARTURE, INCREASING DEFENDANT'S SORA RISK LEVEL, BASED ON INFORMATION WHICH WAS NOT IN THE RISK ASSESSMENT INSTRUMENT (RAI) OR RAISED BY THE PEOPLE AT THE HEARING; TO DO SO VIOLATED DEFENDANT'S RIGHT TO DUE PROCESS (FOURTH DEPT).

The Fourth Department, reversing County Court, determined the judge should not have increased defendant's SORA risk-level based upon information which was not included in the risk assessment instrument (RAI) or raised by the People at the SORA hearing:

"The due process guarantees in the United States and New York Constitutions require that a defendant be afforded notice of the hearing to determine [their] risk level pursuant to SORA and a meaningful opportunity to respond to the [RAI]" … . It is therefore improper for a court to depart from the presumptive risk level based on a ground for departure that has never been raised (see id.). Here, because

defendant's employment was not presented as a basis for departure in the RAI or by the People at the hearing, defendant was not afforded notice and a meaningful opportunity to respond to it … . We therefore reverse the order, vacate defendant's risk level determination, and remit the matter to County Court for a new risk level determination and, if necessary, a new hearing in compliance with Correction Law § 168-n (3) and defendant's due process rights … . People v Lincoln, 2025 NY Slip Op 03930, Fourth Dept 6-27-25

Practice Point: A defendant is entitled to notice of all the evidence which the court will rely for a SORA risk-level assessment such that the defendant has an opportunity to respond.

June 27, 2025

CRIMINAL LAW, CONSTITUTIONAL LAW, EVIDENCE.

IN THIS CHILD PORNOGRAPHY CASE, COMPELLING DEFENDANT TO UNLOCK THE CELL PHONE WITH HIS FINGERPRINT AMOUNTED TO TESTIMONIAL EVIDENCE THAT HE OWNED, CONTROLLED AND HAD ACCESS TO THE CONTENTS OF THE PHONE, A VIOLATION OF HIS FIFTH AMENDMENT RIGHT AGAINST SELF-INCRIMINATION; THE MOTION TO SUPPRESS THE TESTIMONIAL EVIDENCE AND THE CONTENTS OF THE PHONE SHOULD HAVE BEEN GRANTED (FOURTH DEPT).

The Fourth Department, in a full-fledged opinion by Justice Ogden, determined compelling defendant to unlock his cell phone with his finger (the cell phone was programmed to recognize defendant's fingerprint) violated defendant's Fifth Amendment right against self-incrimination. The police were acting pursuant to a child-pornography search warrant when defendant was compelled to unlock the phone. The cell phone contained child pornography. Defendant pled guilty. The issue on appeal was whether defendant's motion to suppress the images on the phone should have been granted:

… [T]he People do not dispute that the opening of the cell phone was compelled and incriminating. We are thus tasked with determining whether defendant's compelled opening of his cell phone, upon the warrant's execution, had a testimonial aspect sufficient to trigger Fifth Amendment protection.

… [W]e conclude that defendant's "act of unlocking the phone represented the thoughts 'I know how to open the phone,' 'I have control over and access to this phone,' and 'the print of this specific finger is the password to this phone' " … . The biometric data defendant provided "directly announce[d] [defendant's] access to and control over the phone, as well as his mental knowledge of how to unlock the device" … . The act of production cases also support the conclusion that, upon execution of the warrant, defendant's compelled unlocking of his phone through biometric data was testimonial. We conclude that "in response to the command to unlock the phone, [defendant] opened it, [and] that act disclosed his control over the phone [and] his knowledge of how to access it" … . At a minimum, the authentication through biometric data implicitly communicated that the contents contained therein were in defendant's possession or control … .

… [T]he way in which the warrant was executed effectively required defendant to answer "a series of questions about ownership or control over the phone, including how it could be opened and by whom" … .

… "Because the compelled opening of the cellphone [during the execution of the search warrant] was testimonial, both the message and any evidence obtained from that communication must be suppressed" … . People v Manganiello, 2025 NY Slip Op 03873, Fourth Dept 6-27-25

Practice Point: At least where there is a question whether defendant owns and controls a cell phone which contains child pornography, compelling defendant to unlock the phone with his fingerprint is tantamount to defendant's testimony that defendant owns, controls and has access to the contents of the phone—constituting a violation of a defendant's Fifth Amendment right against self-incrimination.

June 27, 2025

CRIMINAL LAW, CONSTITUTIONAL LAW, EVIDENCE.

THE DETECTIVE DID NOT READ THE MIRANDA RIGHTS TO DEFENDANT AND IT IS CLEAR FROM THE VIDEOTAPE THAT DEFENDANT COULD NOT HAVE READ THE WRITTEN EXPLANATION OF THOSE RIGHTS BEFORE HE WAIVED THEM; THE PEOPLE, THEREFORE, DID NOT PROVE DEFENDANT KNOWINGLY, INTELLIGENTLY AND VOLUNTARILY WAIVED THE MIRANDA RIGHTS; THE MOTION TO SUPPRESS DEFENDANT'S STATEMENTS SHOULD HAVE BEEN GRANTED (FOURTH DEPT).

The Fourth Department, reversing the conviction, suppressing defendant's statements and ordering a new trial, over a dissent, determined the People did not demonstrate defendant knowingly, intelligently and voluntarily waived his right to remain silent and his right to counsel before speaking with the detective. The detective never explained the Miranda rights verbally. Defendant was given a paper which explained the rights. The videotape of defendant's interview showed that defendant looked at the paper for no more than five seconds before signing it:

As can be seen from the videotape, neither the detective nor defendant read all of the Miranda rights out loud and, while they did discuss Miranda in general, the focus of the oral interaction was about the waiver of the right to counsel and not the other rights described on the Miranda form. There is no indication that defendant actually read all of the warnings or comprehended them. Indeed, the videotape establishes that defendant looked at the form for less than five seconds before he reached for the pen to sign it. Based on our review of the video, we conclude that it is highly improbable, if not impossible, for defendant to have read to himself all of the Miranda warnings during the five seconds the piece of paper was in front of him before he signed. More to the point, the People failed to meet their burden of proving beyond a reasonable doubt that defendant was adequately apprised of his relevant constitutional rights before waiving them.

Although "[t]here is no rule, statutory or otherwise, requiring that Miranda warnings be read to a suspect" … , there is no evidence in this case that defendant was actually "administered" such rights … or that such rights were "verbally

outline[d]" to him … . People v Marsh, 2025 NY Slip Op 03874, Fourth Dept 6-27-25

Practice Point: There is no requirement that the police read the Miranda rights to a suspect out loud. But the People have the burden of proving the defendant knowingly, intelligently and voluntarily waived those rights before defendant was interviewed. Here the videotape of the interview demonstrated the detective did not explain the rights verbally. Rather, the detective provided defendant with a paper explaining the rights. The videotape demonstrated defendant looked at the paper for no more than five seconds before signing it. The People therefore failed to prove a knowing, intelligent and voluntary waiver of the Miranda rights and suppression was warranted.

June 27, 2025

CRIMINAL LAW, EVIDENCE, ATTORNEYS, JUDGES.

ALTHOUGH A REVIEW OF POLICE DISCIPLINARY RECORDS BY A PANEL OF SENIOR PROSECUTORS IN RESPONSE TO A DEFENDANT'S DISCOVERY DEMAND IS NOT PERMITTED, THE REMEDY FOR SUCH A REVIEW IS NOT GRANTING DEFENDANT'S SPEEDY TRIAL MOTION; RATHER THE MATTER IS REMITTED FOR A REVIEW OF THE RECORDS BY THE TRIAL JUDGE AND A FINDING WHETHER THE PEOPLE EXERCISED DUE DILIGENCE; IF NOT, DEFENDANT'S SPEEDY TRIAL MOTION CAN BE CONSIDERED (FOURTH DEPT).

The Fourth Department, remitting the matter, held that the trial judge should review the police disciplinary records, which had been reviewed by a panel of senior prosecutors before they were provided to the defense, to determine if any relevant records were improperly withheld. If the People did not exercise due diligence, the certificate of compliance could be illusory and defendant might be entitled to a speedy-trial dismissal. The court noted that prior caselaw has ruled that the review of police disciplinary records by a panel of senior prosecutors is not permitted:

According to defendant, reversal is required because, as in People v Sumler (228 AD3d 1350, 1354 [4th Dept 2024]) and People v Rojas-Aponte (224 AD3d 1264, 1266 [4th Dept 2024]), the People used a screening panel of senior prosecutors to determine which police disciplinary records were related to the subject matter of the case, i.e., subject to discovery as impeachment material under CPL 245.20 (1) (k), and which police disciplinary matters did not relate to the subject matter of the case and thus not subject to automatic discovery. Although the People's use of a screening panel in this case is not permitted under our prior case law, we do not agree with defendant that he is necessarily entitled to dismissal under CPL 30.30.

Instead, we hold the case, reserve decision, and remit the matter to County Court for the court to determine whether the People withheld any police disciplinary records that relate to the subject matter of the case. If the court determines that there were disciplinary records subject to disclosure that were not turned over to the defense in a timely manner, then the court must determine whether the People exercised due diligence in locating and disclosing those records … . People v Sanders, 2025 NY Slip Op 03884, Fourth Dept 6-27-25

Practice Point: A review by senior prosecutors to determine whether police disciplinary records should be provided to the defense is not permitted.

Practice Point: Where, as here, that review process was used, the remedy is remitting the matter for a review of the records by the trial judge and a finding whether the People exercised due diligence.

June 27, 2025

CRIMINAL LAW, EVIDENCE, JUDGES.

DEFENDANT CLAIMED HE TOOK POSSESSION OF THE VICTIM'S GUN AND FIRED AFTER THE VICTIM FIRED AT HIM; DEFENDANT WAS ACQUITTED OF ATTEMPTED MURDER, ATTEMPTED ASSAULT AND ASSAULT BUT CONVICTED OF CRIMINAL POSSESSION OF A WEAPON; THE JURY SHOULD HAVE BEEN INSTRUCTED ON "TEMPORARY LAWFUL POSSESSION OF A WEAPON;" NEW TRIAL ORDERED (SECOND DEPT).

The Second Department, reversing defendant's possession of a weapon conviction and ordering a new trial, determined the defense request for a jury instruction on lawful possession of a weapon should have been granted. Defendant raised the justification defense and was acquitted of the attempted murder, attempted assault and assault charges:

According to the defense theory, Farmer [the victim] fired several shots at the defendant before the defendant took possession of a gun and fired back at Farmer. Defense counsel also requested a charge on the defense of justification … as to the counts of criminal possession of a weapon, and a charge on the defense of temporary and lawful possession of a weapon as to those counts. The Supreme Court issued a deadly physical force justification charge, but declined to instruct the jury on the defenses of justification pursuant to Penal Law § 35.05(2) and temporary and lawful possession of a weapon with respect to the counts of criminal possession of a weapon. * * *

As reflected by the fact that the jury acquitted the defendant of the charges of attempted murder in the second degree, assault in the second degree, and attempted assault in the first degree, based upon a justification defense, there was a reasonable view of the evidence that the defendant took possession of the gun with a valid legal excuse … . The fact that the defendant fired a gun on a public street does "not negate a defendant's entitlement to a temporary lawful possession instruction where the shooting was justified and the possession was otherwise lawful" … . Further, "the defendant's intent to turn the subject weapon over to the lawful authorities is not a necessary element of the defense of temporary and

lawful possession" … . Moreover, there is no evidence that the defendant retained the gun after fleeing the location of the shooting … . People v Walker, 2025 NY Slip Op 03830, Second Dept 6-25-25

Practice Point: Defendant claimed he took possession of the victim's gun and fired only after the victim had fired at him. The jury should have been instructed on "temporary lawful possession of a weapon."

June 25, 2025

CRIMINAL LAW, EVIDENCE, JUDGES.

EVEN WHERE THERE IS EVIDENCE DEFENDANT INTENTIONALLY AIDED IN THE COMMISSION OF THE UNDERLYING FELONY, THE TRIAL JUDGE MUST INSTRUCT THE JURY ON THE FELONY-MURDER AFFIRMATIVE DEFENSE WHERE THERE IS EVIDENCE THE DEFENDANT DID NOT PARTICIPATE IN THE ACTS CAUSING THE VICTIM'S DEATH AND THERE IS EVIDENCE TO SUPPORT ALL THE ELEMENTS OF THE DEFENSE (FOURTH DEPT).

The Fourth Department, reversing the murder second degree conviction and ordering a new trial, determined the judge should have given the jury instruction for the affirmative defense to felony murder. When defendant's back was turned, a co-defendant shot and killed a man standing at the passenger door of a vehicle. Defendant then knocked to the ground a woman standing at the driver's side of the vehicle and stole her purse. Defendant was not armed and stated to the police he did not know the co-defendant intended to commit a crime:

It is an affirmative defense to felony murder that the defendant "(a) Did not commit the homicidal act or in any way solicit, request, command, importune, cause or aid the commission thereof; and (b) Was not armed with a deadly weapon, or any instrument, article or substance [*2]readily capable of causing death or serious physical injury and of a sort not ordinarily carried in public places by law-abiding persons; and (c) Had no reasonable ground to believe that any other participant was armed with such a weapon, instrument, article or substance; and (d)

Had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury" (Penal Law § 125.25 [3]). * * *

Even where, as here, the evidence shows that a defendant "intentionally aided [the primary assailant] in the commission of" the underlying felony, a trial court errs in refusing to charge the affirmative defense to felony murder where there is evidence that the defendant "did not participate in the acts causing the victim's death" … . Here, the trial evidence was "reasonably supportive of the view" that defendant satisfied the four elements of the affirmative defense and, "regardless of evidence to the contrary, the court [was] without discretion to deny the charge, and error in this regard requires reversal and a new trial" … . People v Rosa, 2025 NY Slip Op 03907, Fourth Dept 6-27-25

Practice Point: Where there is evidence to support the elements of the affirmative defense to felony murder, the judge has no discretion and must instruct the jury on the defense, even where there is evidence to the contrary.

June 27, 2025

CRIMINAL LAW, EVIDENCE, JUDGES.

THE POLICE SUSPECTED DEFENDANT HAD SPECIFIC WEAPONS IN A SPECIFIC VEHICLE; AFTER A TRAFFIC STOP, THE POLICE SEARCHED THE CAR AND FOUND A WEAPON; LATER THEY SEARCHED THE CAR AGAIN AND FOUND A SECOND WEAPON; ONLY AFTER THE SEARCHES DID THEY START TO FILL OUT THE INVENTORY SEARCH FORM; THIS WAS NOT A VALID INVENTORY SEARCH; THE WEAPONS SHOULD HAVE BEEN SUPPRESSED (FOURTH DEPT).

The Fourth Department, reversing County Court, determined the weapons seized from defendant's vehicle after a traffic stop should have been suppressed. The police were looking for specific weapons in a specific car at the time of the search. Therefore the search could not be considered a valid inventory search:

… [T]he record reveals that the purported inventory search was actually a pretext to search for contraband. At the suppression hearing, the testimony and body-worn camera footage established that one of the officers who stopped defendant's vehicle identified him and testified that defendant had, earlier that day, been identified as someone likely to be in possession of a weapon. Following the traffic stop and while defendant was being detained pursuant to an outstanding arrest warrant, two other officers arrived on the scene. One of the arriving officers identified the vehicle defendant was driving as one that the police thought defendant would be using and would be keeping a weapon in. The other arriving officer promptly began searching the front passenger area of the vehicle; he opened the glove box and found a weapon, prompting a police officer to observe "oh, there it is." At that point, another officer said "let's check for the second one," and shortly thereafter a second weapon was found in the same spot, precisely as predicted by that officer. * * *

Our conclusion is not based merely on the fact that, in conducting the first search, the "officers knew that contraband might be recovered" from the vehicle … . Rather, the evidence at the suppression hearing demonstrated that the officers' purpose in conducting the first search was to find specific weapons in a specific vehicle possessed by a specific person, i.e., defendant. We also note that the officers did not begin the second search until about ten minutes after the weapons were discovered, and it was only at that time that an officer began filling out an inventory search form. The facts that the inventory search form was not made contemporaneously with the first search, as required by Buffalo Police Department policy, and that it was incomplete to the extent it failed to note, as required, obvious damage to the vehicle, merely underscores and corroborates our conclusion that the first search of the vehicle was pretextual. People v Cunningham, 2025 NY Slip Op 03890, Fourth Dept 6-27-25

Practice Point: Here the fact that the police did not start filling out the inventory-search form until after two searches of the vehicle had turned up weapons demonstrated the attempt to color the warrantless search as an inventory search was a ruse.

June 27, 2025

CRIMINAL LAW, EVIDENCE, JUDGES.

THE SENTENCING COURT SHOULD REDACT FROM THE PRESENTENCE REPORT ANY REFERENCE TO CRIMINAL CONDUCT OF WHICH THE DEFENDANT WAS ACQUITTED (FOURTH DEPT).

The Fourth Department determined defendant's presentence report should have been redacted to remove reference to criminal conduct of which defendant was acquitted:

We agree with defendant, however, that the court erred in failing to redact improper statements from the presentence report (PSR) because they reference criminal conduct of which defendant was acquitted … . Specifically, we agree with defendant that the inclusion in the PSR of statements regarding alleged sexual offenses by defendant involving another child, of which he was acquitted, "was inappropriate and inflammatory" … . We therefore direct County Court to redact the sentence on page 10 of the PSR referring to a statement by the victim "that there could be another victim . . . who was inappropriately touched by [defendant]"; the quotation on page 10 from an investigator stating that defendant " 'was having sexual intercourse with another underage female as well. High risk for children' "; and the sentence on page 12 referring to a disclosure "that [defendant] has been sexually assaulting [the other victim] since she was nine years old" from all copies of defendant's PSR. People v Wilmet, 2025 NY Slip Op 03901, Fourth Dept 6-27-25

Practice Point: A presentence report should not include any references to criminal conduct of which defendant was acquitted.

June 27, 2025

CRIMINAL LAW, EVIDENCE, JUDGES.

WHEN A WITNESS'S IDENTIFICATION OF THE DEFENDANT FROM A PHOTOGRAPH SHOWN TO HIM BY THE POLICE IS DEEMED "CONFIRMATORY," THAT CONCLUSION IS TANTAMOUNT TO A DETERMINATION AS A MATTER OF LAW THAT THE POLICE IDENTIFICATION PROCEDURE WAS NOT SUGGESTIVE AND COULD NOT HAVE LED TO THE MISIDENTIFICATION OF THE DEFENDANT BECAUSE THE WITNESS KNEW THE DEFENDANT WELL; HERE THE PROOF THE IDENTIFICATION WAS CONFIRMATORY WAS INSUFFICIENT; THE IDENTIFICATION TESTIMONY SHOULD HAVE BEEN SUPPRESSED; NEW TRIAL ORDERED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, suppressing identification testimony and ordering a new trial, determined the evidence did not support the conclusion the witness's identification of the defendant from a photograph shown to him by the police was "confirmatory." Deeming an identification as confirmatory is tantamount to finding there is no chance the police identification procedure could lead to misidentification because the witness knows the defendant well:

"A court's invocation of the 'confirmatory identification' exception is . . . tantamount to a conclusion that, as a matter of law, the witness is so familiar with the defendant that there is 'little or no risk' that police suggestion could lead to a misidentification" … . "In effect, it is a ruling that however suggestive or unfair the identification procedure might be, there is virtually no possibility that the witness could misidentify the defendant" … . "The People bear the burden in any instance they claim that a citizen identification procedure was 'merely confirmatory' " … . "[T]he People must show that the protagonists are known to one another, or where . . . there is no mutual relationship, that the witness knows defendant so well as to be impervious to police suggestion" … . "[W]hether the exception applies depends on the extent of the prior relationship, which is necessarily a question of degree" … . In determining whether the witness is sufficiently familiar with the defendant, a court may consider factors such as "the number of times [the witness] viewed

[the] defendant prior to the crime, the duration and nature of the encounters, the setting, the period of time over which the viewings occurred, the time elapsed between the crime and the previous viewings, and whether the two had any conversations" … .

Here … the evidence was insufficient to establish that the witness's pretrial photo identification of defendant was confirmatory as a matter of law because, "[a]lthough the witness testified that he knew defendant because he had seen him 'a couple of times' at the barber shop, and that the two had each other's phone numbers, [the witness] also testified that he did not know defendant well, that he knew him only by a common nickname, and that they never spoke again after the assault" … . … [T]he witness testified at trial that he had seen defendant a couple times at the barber shop … , and the evidence at the hearing similarly established that the witness had either interacted with defendant twice or approximately four or five times including a couple of times at the barber shop. … [T]he witness testified … that he knew defendant "not much but a little bit," that he knew defendant only by his nickname and not his given name, and that he never heard from defendant again after the assault … . People v Alcaraz-Ubiles, 2025 NY Slip Op 03929, Fourth Dept 6-27-25

Practice Point: Consult this decision for insight into the quantum of evidence necessary to prove a witness's identification of the defendant from a photograph shown to him by the police was "confirmatory" because the defendant was well known to the witness.

June 27, 2025

CRIMINAL LAW, EVIDENCE.

THE CONCLUSORY STATEMENTS BY THE OWNER OF THE STOLEN CAR AND AN INVESTIGATING OFFICER FAILED TO DEMONSTRATE THE VALUE OF THE CAR WAS GREATER THAN $3000; CRIMINAL POSSESSION OF STOLEN PROPERTY THIRD DEGREE CONVICTION REVERSED (FOURTH DEPT).

The Fourth Department, reversing the possession-of-stolen-property-third-degree conviction, determined the value of the stolen property, a vehicle, was not proven:

Here, in addition to photographs of the vehicle admitted in evidence, the victim testified that he purchased the subject 2010 Toyota Prius as a new vehicle for approximately $20,000, that he drove it 240,000 miles over the course of the subsequent 12 years, and that it was in a "[h]eavily used," albeit running, condition when it was stolen. Although the victim testified that he had previously consulted the "blue book" when considering whether to sell the vehicle, he ultimately provided, based on the condition of the vehicle and unspecified research, only vague testimony that his "guess" or "approximate estimation" was that the vehicle was valued at $4,000, which constituted a "[c]onclusory statement[or] rough estimate[ ] of value [that is] not sufficient to establish the value of the property" at the time of its theft … . Moreover, although a police officer testified that he estimated that the vehicle was valued between $6,000 and $10,000 based on his observations of the vehicle and consultation with the "blue book," that testimony was also conclusory. Indeed, there was no evidence that the officer had accurately ascertained the "blue book" value—which inexplicably varied significantly from the victim's estimate—by appropriately accounting for the age, mileage, and condition of the vehicle … . Based on the evidence of value in the record, we cannot conclude " 'that the jury ha[d] a reasonable basis for inferring, rather than speculating, that the value of the property exceeded the statutory threshold' of $3,000″ … . Consequently, we conclude on this record that the evidence is legally insufficient to establish that the value of the stolen vehicle was greater than $3,000 … . People v Szurgot, 2025 NY Slip Op 03906, Fourth Dept 6-27-25

Practice Point: Here the conclusory statements by the owner of the stolen car and the investigating officer estimating the value of the car constituted legally insufficient evidence that the value of the stolen property was greater than $3000.

June 27, 2025

CRIMINAL LAW, EVIDENCE.

THE MARIJUANA REGULATION AND TAXATION ACT (MRTA) APPLIES TO THE EVIDENCE PRESENTED AT A SUPPRESSION HEARING AND PRECLUDES A FINDING OF PROBABLE CAUSE TO SEARCH A VEHICLE BASED SOLELY ON THE ODOR OF MARIJUANA; THEREFORE THE STATUTE APPLIES HERE WHERE, ALTHOUGH THE SEARCH WAS PRE-ENACTMENT, THE SUPPRESSION HEARING WAS POST-ENACTMENT (THIRD DEPT).

The Third Department, granting defendant's suppression motion and vacating defendant's guilty plea, in a full-fledged opinion by Justice Lynch, over a dissent, determined the Marijuana Regulation and Taxation Act (MRTA), which prohibits the search of a vehicle based solely on the odor of marijuana, applied to defendant's case, even though the statute had not been enacted at the time of the search. The statute had been enacted at the time of the suppression hearing:

On this appeal, we are tasked with answering a question left open by the Court of Appeals in People v Pastrana (41 NY3d 23, 29 [2023] …) — namely, whether Penal Law § 222.05 (3) (a), enacted as part of the Marihuana Regulation and Taxation Act (hereinafter MRTA), applies to a post-enactment suppression hearing concerning a pre-enactment search. * * *

… Penal Law § 222.05 (3) (a) — enacted as part of the MRTA — provides that "in any criminal proceeding including proceedings pursuant to [CPL] 710.20 . . . , no finding or determination of reasonable cause to believe a crime has been committed shall be based solely on evidence of . . . the odor of cannabis" … . CPL 710.20 pertains to motions to suppress evidence. By this comprehensive and present tense language, Penal Law § 222.05 (3) (a) expressly limits a suppression

court's authority to base a probable cause finding solely upon evidence of the odor of marihuana without regard to when the vehicle search occurred. * * *

… [T]his provision is directed at the present evidentiary findings of a court, "and no real question of retroactive effect on past conduct or events is presented" … . Since Penal Law § 222.05 (3) (a) was in effect at the time of the suppression hearing and the suppression court's probable cause finding was based solely upon the fact that the trooper smelled the odor of marihuana emanating from the vehicle, that determination was erroneous as a matter of law … . People v Martin, 2025 NY Slip Op 03842, Third Dept 6-26-25

Practice Point: Here the Marijuana Regulation and Taxation Act (MRTA) was deemed to apply to the evidence which can be considered at a probable-cause-to-search-a-vehicle hearing. Therefore there was no need to apply the statute retroactively where the search was pre-enactment but the suppression hearing was post-enactment.

June 26, 2025

CRIMINAL LAW.

HERE THE MURDER SECOND DEGREE COUNTS MUST BE DISMISSED AS INCLUSORY CONCURRENT COUNTS OF THE COUNT OF MURDER IN THE FIRST DEGREE (FOURT DEPT).

The Fourth Department, modifying the judgment of conviction, noted that the murder second degree counts must be dismissed as inclusory concurrent counts of the count of murder in the first degree. People v Dean, 2025 NY Slip Op 03878, Fourth Dept 6-27-25

June 27, 2025

FAMILY LAW, JUDGES, ATTORNEYS.

IN THIS DIVORCE PROCEEDING, THE ATTORNEY FOR THE CHILDREN DID NOT ASCERTAIN THE POSITION OF THE ELDEST CHILD (WHO IS AUTISTIC, NONVERBAL AND HAS A SEIZURE DISORDER) AND DID NOT HAVE A THOROUGH UNDERSTANDING OF THE CHILD'S CIRCUMSTANCES; THE MOTION TO APPOINT A NEW ATTORNEY SHOULD HAVE BEEN GRANTED; IN ADDITION, GIVEN THE CONFLICTING CONTENTIONS AND THE ELDEST CHILD'S SPECIAL NEEDS, THE MOTION FOR A NEUTRAL OR INDEPENDENT FORENSIC EXAMINATION SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court in this divorce proceeding, determined the defendant's motion to appoint a new attorney for two of the children and for a neutral or independent forensic examination should have been granted:

The parties were married in 2010 and have three children. The eldest child is autistic, is nonverbal, and has a seizure disorder. * * *

Pursuant to 22 NYCRR 7.2, the attorney for the child must zealously advocate the child's position … . "In ascertaining the child's position, the attorney for the child must consult with and advise the child to the extent of and in a manner consistent with the child's capacities, and have a thorough knowledge of the child's circumstances" … . "If the child is capable of knowing, voluntary and considered judgment, the attorney for the child should be directed by the wishes of the child . . . . The attorney should explain fully the options available to the child, and may recommend to the child a course of action that in the attorney's view would best promote the child's interests" … . An attorney for the child may substitute his or her judgment only when he or she is "convinced either that the child lacks the capacity for knowing, voluntary and considered judgment, or that following the child's wishes is likely to result in a substantial risk of imminent, serious harm to the child" … . In such circumstance, "the attorney for the child must inform the court of the child's articulated wishes if the child wants the attorney to do so, notwithstanding the attorney's position" … . "An [attorney for the child] should

not have a particular position or decision in mind at the outset of the case before the gathering of evidence . . . . After an appropriate inquiry, it is entirely appropriate, indeed expected, that a[n attorney for the child] form an opinion about what action, if any, would be in a child's best interest" … .

… [T]he defendant demonstrated that the attorney for the children failed to adequately ascertain the eldest child's position to the extent of and in a manner consistent with the child's capacities and failed to have a thorough knowledge of the child's circumstances … .

… In any action for a divorce, the court may appoint an appropriate expert to give testimony with respect to custody or parental access (see 22 NYCRR 202.18). "In custody disputes, the value of forensic evaluations of the parents and children has long been recognized" … . "Although forensic evaluations are not always necessary, such evaluations may be appropriate where there exist sharp factual disputes that affect the final determination" … .

… Supreme Court improvidently exercised its discretion when it failed to direct a neutral forensic evaluation of the parties and the children, in light of, inter alia, the parties' conflicting contentions and the eldest child's special needs (see 22 NYCRR 202.18 …). Sandiaes v Sandiaes, 2025 NY Slip Op 03833, Second Dept 6-25-24

Practice Point: Consult this decision for an explanation of the role of the attorney for the child in divorce proceedings and an example of when the failure to direct an independent or neutral forensic examination in divorce proceedings is an abuse of discretion.

June 25, 2025

FORECLOSURE, DEBTOR-CREDITOR.

A PARTY WHO IS NOT A OBLIGOR ON THE NOTE, BUT IS A SIGNATORY ON THE MORTGAGE, IS SUBJECT TO FORECLOSURE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that defendant (Lucy), who was not an obligor on the note, but who executed the mortgage, was subject to foreclosure:

A party who is not an obligor on a note but is a signatory on the corresponding mortgage, while not personally liable for the debt, is a mortgagor and has agreed to mortgage his or her interest in the property as security for the debt … . Here, although Lucy did not execute the Obligation to Pay and is not personally liable for the payment obligation, she executed the mortgage whereby she pledged her interest in the property as security for the obligations set forth in the co-ownership agreement and the Obligation to Pay, and thus, Lucy's interest in the property is subject to foreclosure … . Deutsche Bank Trust Co. Ams. v Zzoha, 2025 NY Slip Op 03793, Second Dept 6-25-25

Practice Point: A party who is not on obligor on the note but is a signatory on the corresponding mortgage is subject to foreclosure.

June 25, 2025

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

RPAPL 1306 REQUIRES INFORMATION TO BE FILED WITH THE SUPERINTENDENT OF FINANCIAL SERVICES WITHIN THREE BUSINESS DAYS OF THE MAILING OF THE NOTICE OF FORECLOSURE; THE FILING IS A CONDITION PRECEDENT TO A FORECLOSURE ACTION; HERE THE FILING WAS EIGHT DAYS LATE, REQUIRING DISMISSAL OF THE COMPLAINT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant in this foreclosure action was entitled to dismissal of the complaint because the plaintiff failed to timely file the information required by RPAPL 1306. The information must be filed within three business days of the mailing of the foreclosure notice pursuant to RPAPL 1304:

"Compliance with RPAPL 1306 is a condition precedent to the commencement of a foreclosure action" … . "RPAPL 1306 requires that within three business days of the mailing of the foreclosure notice pursuant to RPAPL 1304(1), each lender or assignee 'shall file' certain information with the superintendent of financial

services" … . "[S]trict compliance" with the statutory requirement of making the appropriate filing within three business days of the mailing of the RPAPL 1304 notice is required … .

… [I]t is undisputed that the plaintiff did not make the requisite filing pursuant to RPAPL 1306 until … eight business days after the purported mailing of the RPAPL 1304 notice … . Since the plaintiff failed to strictly comply with the statutory requirement of making the appropriate filing within three business days of the mailing of the RPAPL 1304 notice, the Supreme Court should have granted that branch of the defendant's motion which was for summary judgment dismissing the complaint insofar as asserted against him … . Bank of N.Y. Mellon v Peralta, 2025 NY Slip Op 03790, Second Dept 6-25-25

Same issue and result in Deutsche Bank Natl. Trust Co. v Goetz, 2025 NY Slip Op 03792, Second Dept 6-25-25

Practice Point: The bank's failure to file the information required by RPAPL 1306 within three business days of the mailing of the notice of foreclosure mandates dismissal of the foreclosure action.

June 25, 2025

FREEDOM OF INFORMATION LAW (FOIL), ATTORNEYS.

PETITIONER PREVAILED IN THE FOIL PROCEEDING AND WAS THEREFORE ENTITLED TO ATTORNEY'S FEES; HOWEVER, PETITIONER WAS NOT ENTITLED TO LEGAL COSTS INCURRED IN PROSECUTING THE PETITIONER'S CLAIM FOR ATTORNEY'S FEES, SO-CALLED "FEES ON FEES" (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that, although the petitioner in this FOIL action prevailed and was entitled to attorney's fees, the petitioner was not entitled to the fees incurred in seeking to recover the attorney's fees, so-called "fees on fees:"

… [W]e find that the award of attorneys' fees included amounts for legal fees and costs incurred by the petitioner in prosecuting its claim for an award of attorneys' fees, or so called "fees on fees." In New York, an attorney's fee is "'merely an incident of litigation and is not recoverable absent a specific contractual provision or statutory authority'" … . An award of fees on fees—fees for services performed to recover a fee award—also must be based upon a specific contractual provision or statute … . Here, "[g]iven the absence of unmistakably clear intent regarding the recovery of fees on fees [in Public Officers Law § 89(4)(c)], a right to recover those fees should not be implied" … .

As the petitioner is entitled to an award of attorneys' fees, we remit the matter to the Supreme Court, Kings County, for a new hearing on the issue of the amount of reasonable attorneys' fees arising solely from the prosecution of this proceeding, without the inclusion of legal fees and costs incurred in prosecuting the petitioner's claim for an award of attorneys' fees … . Matter of Aron Law, PLLC v New York City Fire Dept., 2025 NY Slip Op 03806, Second Dept 6-25-25

Practice Point: The prevailing party in a FOIL proceeding is entitled to attorney's fees. However the petitioner is not entitled to "fees on fees," i.e., legal costs incurred in prosecuting the claim for attorney's fees.

June 25, 2025

LABOR LAW-CONSTRUCTION LAW, EVIDENCE.

WHERE AN UNSECURED LADDER MOVES AND PLAINTIFF FALLS, PLAINTIFF CANNOT BE THE SOLE PROXIMATE CAUSE OF THE ACCIDENT; THEREFORE PLAINTIFF IS ENTITLED TO SUMMARY JUDGMENT ON THE LABOR LAW 240(1) CAUSE OF ACTION (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined plaintiff was entitled to summary judgment on the Labor Law 240(1) cause of action in this ladder-fall case:

… [P]laintiffs established, prima facie, that Labor Law § 240(1) was violated and that the violation was a proximate cause of the injured plaintiff's injuries by submitting evidence that the unsecured ladder moved and fell, causing the injured plaintiff to fall, and that he was not provided with any safety devices … .

In opposition … defendants … failed to raise a triable issue of fact as to whether the injured plaintiff's alleged misuse of the ladder was the sole proximate cause of the accident. Where, as here, the injured plaintiff is provided with an unsecured ladder and no safety devices, he cannot be held solely at fault for his injuries … . Garcia v Fed LI, LLC, 2025 NY Slip Op 03795, Second Dept 6-25-25

Practice Point: As long as the failure to provide adequate safety equipment is a proximate cause of a ladder fall, i.e., the failure to secure the ladder to prevent movement, defendant will not be able to win the argument that plaintiff's actions were to sole proximate cause of the accident. Plaintiff will be entitled to summary judgment on the Labor Law 240(10 cause of action.

June 25, 2025

NEGLIGENCE, EVIDENCE, CIVIL PROCEDURE, EVIDENCE.

IN THIS REAR-END COLLISION CASE, DEFENDANT DID NOT PRESENT EVIDENCE OF A NONNEGLIGENT EXPLANATION OF THE ACCIDENT; PLAINTIFF WAS ENTITLED TO A JUDGMENT NOTWITHSTANDING THE VERDICT FINDING DEFENDANT NEGLIGENT; THE ARGUMENT THAT PLAINTIFF STOPPED QUICKLY IN STOP AND GO TRAFFIC IS NOT A NONNEGLIGENT EXPLANATION OF A REAR-END COLLISION (FOURTH DEPT).

The Fourth Department, reversing Supreme Court in this rear-end collision case, determined plaintiff's motion for a judgment not withstanding the verdict finding defendant rear-driver negligent should have been granted. Plaintiff was stopped when her car was struck from behind. Defendant had struck the car directly behind plaintiff. Although there was evidence plaintiff stopped suddenly (in stop and go

traffic), defendant did not offer proof of a nonnegligent explanation for the accident:

We … agree with plaintiff that the court erred in denying that part of her posttrial motion for judgment as a matter of law on the issue of defendant's negligence (see generally CPLR 4404 [a]). A party is entitled to judgment notwithstanding the verdict where there is "no valid line of reasoning and permissible inferences which could possibly lead rational [persons] to the conclusion reached by the jury on the basis of the evidence presented at trial" … . As relevant here, "[t]he rearmost driver in a chain-reaction collision bears a presumption of responsibility . . . , and . . . a rear-end collision with a stopped or stopping vehicle creates a prima facie case of negligence with respect to the operator of the moving vehicle, and imposes a duty on the operator of the moving vehicle to come forward with an adequate, [nonnegligent] explanation for the accident" … .

Here, the evidence at trial established that, at the time of the collision, plaintiff and defendant were driving in "stop-and-go" traffic during rush hour on a "wet, [d]rizzly" morning. Plaintiff testified that, at the time of the collision, she had come to a stop because the vehicle in front of her had stopped. Defendant testified that the collision occurred when the vehicle in front of her suddenly stopped; she thought the middle vehicle hit plaintiff's vehicle first. Defendant tried to turn her vehicle to avoid the collision, but was unsuccessful and collided with the middle vehicle. The driver of the middle vehicle in the chain testified that plaintiff's vehicle stopped suddenly. He denied initially colliding with plaintiff's vehicle; it was only after he was hit by defendant that his vehicle collided with plaintiff's vehicle.

In short, the undisputed evidence at trial established that defendant was the rear-most driver involved in the chain-reaction collisions and, therefore, is presumed negligent absent the proffering of a nonnegligent explanation for the collision. We conclude that there is no valid line of reasoning and permissible inferences establishing such a nonnegligent explanation based on the trial record here. Specifically, under the circumstances of this case, the " '[e]vidence that plaintiff's lead vehicle was forced to stop suddenly in [stop-and-go] traffic' " did not constitute a nonnegligent explanation for the collision sufficient to support the jury's verdict inasmuch as " 'it can easily be anticipated that cars up ahead will

make frequent stops in [stop-and-go] traffic' " Blatner v Swearengen, 2025 NY Slip Op 03880, Fourth Dept 6-27-25

Practice Point: The plaintiff in this rear-end collision case made a motion for judgment notwithstanding the verdict, which preserved the issue of defendant's negligence for appeal. The appellate court held defendant was negligent as a matter of law. The matter was remitted for a trial to determine proximate cause (there was a car between defendant's and plaintiff's cars) and, if necessary, damages.

June 27, 2025

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

CLAIMANT MADE AN APPLICATION FOR LEAVE TO FILE A LATE NOTICE OF CLAIM CONCERNING INJURIES INCCURRED WHEN WORKING FOR THE CITY; CLAIMANT WAS ENTITLED TO PRE-ACTION DISCOVERY TO ESTABLISH WHEN THE CITY GAINED ACTUAL KNOWLEDGE OF THE FACTS UNDERLYING THE CLAIM (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined claimant was entitled to pre-action discovery to support his allegation that the city had timely notice of his accident which would warrant leave to file a late notice of claim:

In determining whether to grant an application for leave to serve a late notice of claim, "the court must consider, inter alia, whether the claimant has shown a reasonable excuse for the delay, whether the municipality had actual knowledge of the facts surrounding the claim within 90 days of its accrual, and whether the delay would cause substantial prejudice to the municipality" … . " 'While the presence or absence of any single factor is not determinative, one factor that should be accorded great weight is whether the [municipality] received actual knowledge of the facts constituting the claim in a timely manner' " … .

… In support of his application, claimant sought, inter alia, any incident reports concerning the accident and any correspondence between respondents concerning the accident. Claimant alleged that he told his employer about the incident five days after it occurred and believed that his employer notified the City of the accident at that time.

… Supreme Court abused its discretion in denying that part of his application seeking pre-action discovery (see CPLR 3102 [c]). Under the circumstances of this case, claimant demonstrated that pre-suit discovery is needed in support of his application for leave to serve a late notice of claim for the purpose of establishing when the City had actual knowledge of the facts constituting the claim … . Matter of Wisnowski v City of Buffalo, 2025 NY Slip Op 03886, Fourth Dept 6-27-25

Practice Point: When applying for leave to file a late notice of claim, demonstrating the municipality had actual knowledge of the facts underlying the claim within 90 days of the accident is crucial. Here the claimant alleged his employer told the city about the accident five days after it occurred. Claimant was entitled to pre-action discovery on that issue.

June 27, 2025

NEGLIGENCE, VEHICLE AND TRAFFIC LAW, EVIDENCE.

DEFENDANT'S VEHICLE WAS STRUCK BY A VEHICLE WHICH WAS BEING CHASED BY POLICE AND WHICH FAILED TO OBEY A STOP SIGN; DEFENDANT WAS ENTITLED TO SUMMARY JUDGMENT; TWO-JUSTICE DISSENT (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, over a two-justice dissent, determined defendant was entitled to summary judgment in this intersection traffic accident case. Plaintiff was a passenger in a Honda which was being chased by police. Defendant, whose car was struck by the Honda when the driver of the Honda failed to obey a stop sign, could justifiably assume the driver of the Honda would obey the stop sign. The dissent argued there was a question of fact whether defendant breached the duty to see what should be seen:

We respectfully disagree with our dissenting colleagues that defendant failed to meet his initial burden of establishing that he was free of comparative fault. … [Defendant testified] the collision occurred "instantly" after he first saw the car. * * * … [P]laintiff testified that he "blacked out" in the accident and did not know how it was caused. He was not even sure that the accident occurred at an intersection. All he could remember was the Honda proceeding straight with the police behind them and that he was "a little shaken up because [he had] never been in a high speed [chase]." That was "all [he could] remember, and [then] it was just boom." Another occupant of the Honda testified that, as the Honda approached the intersection, "[i]t tried to stop, but . . . [they] were going a little too fast" and slid into the intersection. Defendant therefore established that the Honda never stopped at the stop sign before proceeding into the intersection and colliding with defendant's vehicle. Inasmuch as the evidence submitted by defendant established that he had, at most, "only seconds to react" to the Honda that failed to yield the right-of-way, he established as a matter of law that he was not comparatively negligent … . Brown v City of Buffalo, 2025 NY Slip Op 03902, Fourth Dept 6-27-25

Practice Point: Here defendant's vehicle was struck by a vehicle which was being chased by police and which did not obey a stop sign. The complaint against defendant, brought by a passenger in the vehicle which ran the stop sign, should have been dismissed. A two-justice dissent argued there was a question of fact whether defendant breached the duty of a driver to see what could be seen.

June 27, 2025

UTILITIES.

AN AMENDMENT TO THE PUBLIC SERVICE LAW REQUIRES UTILITY COMPANIES TO COMPENSATE CUSTOMERS FOR STORM-OUTAGE-RELATED LOSSES WHERE THE OUTAGE IS FOR 72 HOURS OR MORE AND PROHIBITS UTILITIES FROM RECOVERING THOSE COSTS FROM RATEPAYERS (THIRD DEPT).

The Third Department, affirming Supreme Court, in a full-fledged opinion by Justice Fisher, determined that an amendment to the Public Service Law requires utilities to compensate customers for storm-outage-related losses when the outage lasts for 72 hours or more, and prohibits utilities from recovering those costs from ratepayers. The Third Department disagreed with Supreme Court and found this declaratory judgment action was ripe for judicial review, but affirmed Supreme Court's dismissal of the petition. The opinion has a comprehensive discussion of statutory interpretation which is too detailed to fairly summarize here. Matter of Central Hudson Gas & Elec. Corp. v State of N.Y. Pub. Serv. Commission, 2025 NY Slip Op 03849, Third Dept 6-25-25

June 26, 2025