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An Organized Compilation of Summaries of Selected Decisions, Mostly Reversals, Released by Our New York State Appellate Courts August 11 – 15, 2025, and Posted on the New York Appellate Digest Website on Monday, August 18, 2025. The Entries in the Table of Contents Link to the Summaries Which Link to the Full Decisions on the Official New York Courts Website. Click on “Table of Contents” in the Header on Any Page to Return There. Right Click on the Citations to Keep Your Place in the Reversal Report.

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ADMINISTRATIVE LAW, ATTORNEYS, CIVIL PROCEDURE, LANDLORD-TENANT.

OVERRULING PRECEDENT, THE THIRD DEPARTMENT NOW ACCEPTS THE "CATALYST THEORY" WHICH, UNDER THE NYS EQUAL ACCESS TO JUSTICE ACT (EAJA), ALLOWS THE RECOVERY OF ATTORNEY'S FEES BY A PARTY WHO INSTIGATES LITIGATION AGAINST THE STATE AND THE STATE VOLUNTARILY GRANTS THE SOUGHT RELIEF WITHOUT FUTHER LITIGATION; THE "CATALYST THEORY" APPLIES ONLY WHERE THE PARTY "PREVAILS IN WHOLE," NOT WHERE THE PARTY HAS ONLY "SUBSTANTIALLY PREVAILED" (THIRD DEPT).

The Third Department, reversing Supreme Court and overruling precedent, in a full-fledged opinion by Justice Aarons, determined petitioner was not precluded from an award of counsel fees because the agency petitioner sued, the Office of Temporary and Disability Housing (OTDA), voluntarily granted the relief petitioner sought without the need for further litigation. In so doing, the Third Department overruled Matter of Clarke v Annucci, 190 AD3d 1245, Third Dept

2021, which rejected the so-called catalyst theory and precluded recovery under the NYS Equal Access to Justice Act (EAJA) when the sued agency voluntarily grants the sought relief after litigation has been started: The "catalyst theory" is now accepted as valid in the Third Department where, as in this case, the party "prevails in whole," but not where a party has only "substantially prevailed:"

The text of the state EAJA, the legislative record, our collective judicial experience and common sense all lead us to conclude that the Legislature could have rationally determined that parties who receive complete relief from the State after the commencement of litigation have prevailed "in whole" even if the State folds and gives it to them. * * *

… [W]e hold that a party prevails in whole when the party obtains all of the relief sought in a lawsuit against the State — including when that relief is granted voluntarily by the State after the action is commenced — and is thus a prevailing party under the state EAJA as a matter of law (see CPLR 8602 [f]). To the extent Clarke is to the contrary, it should no longer be followed. * * *

… [A]lthough we no longer read the state EAJA to require every prevailing party to obtain judicially sanctioned relief, we do not otherwise address a party "who prevails . . . in substantial part" (CPLR 8602 [f]). Petitioner's case does not require us to resolve whether the catalyst theory applies where a party has substantially, but not wholly, prevailed. We continue to impose an additional requirement on a substantially prevailing party to show a win against the State on the merits of one or more "issues" in litigation, and a corresponding win by the State on the merits of one or more "separate issues" (CPLR 8602 [f] …). Therefore, a party claiming to have prevailed in substantial part must still demonstrate that relief was obtained on the merits in an outcome that changes the legal relationship between the party and the State — for example, a judgment on the merits or a settlement agreement. Matter of Markey v Tietz, 2025 NY Slip Op 04689, Third Dept 8-14-25

Practice Point: If a party starts litigation against the state and the state voluntarily grants the sought relief, the party is entitled to attorney's fees under the NYS Equal Access to Justice Act (EAJA).

August 14, 2025

CIVIL PROCEDURE, JUDGES.

FAILURE TO COMPLY WITH THE SERVICE-OF-PROCESS REQUIREMENTS IN CPLR 308 AND 311 ARE JURISDICTIONAL DEFECTS, NOT "TECHNICAL" DEFECTS WHICH CAN BE OVERLOOKED PURSUANT TO CPLR 2001 (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the incarcerated plaintiff's failure to comply with the service of process requirements in CPLR 308(2) and 311 were jurisdictional defects which could not be overlooked by the judge pursuant to CPLR 2001. CPLR 2001, which allows a court to cure a "technical" defect in effecting service, presupposes the court has acquired jurisdiction:

"'The court's ability to apply CPLR 2001 . . . presupposes that the court has acquired jurisdiction'" … . Thus, "CPLR 2001 may be used to cure only a 'technical infirmity'" in effecting service … . "'In deciding whether a defect in service is merely technical, courts must be guided by the principle of notice to the defendant—notice that must be reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections'" … . "Defendant's actual receipt of the summons and complaint is not dispositive of the efficacy of service" … .

Here, notwithstanding the plaintiff's status as an incarcerated pro se litigant, the plaintiff's failure to comply with the personal delivery requirements of CPLR 308(2) and CPLR 311, or to effect the requisite mailings within the required time period under CPLR 308(2) are jurisdictional defects that the Supreme Court may not overlook pursuant to CPLR 2001 … . Baptiste v County of Suffolk, 2025 NY Slip Op 04618, Second Dept 8-13-25

Practice Point: CPLR 2001, which allows the cure of "technical" defects in the service of process, does not apply to "jurisdictional" defects such as failing to comply with the requirements in CPLR 308 and 311.

August 13, 2025

ELECTION LAW, ADMINISTRATIVE LAW, CIVIL PROCEDURE, EVIDENCE.

THE PETITION SEEKING REVIEW OF THE BOARD OF ELECTIONS' DECISION TO PURCHASE NEW VOTING MACHINES WHICH OPERATE BY SCANNING A BAR CODE SHOULD NOT HAVE BEEN DISMISSED ON THE GROUND PETITIONER, COMMON CAUSE NEW YORK, DID NOT DEMONSTRATE AN INJURY-IN-FACT; COMMON CAUSE ARGUED THE USE OF A BAR CODE WHICH IS SCANNED BY THE MACHINE WILL IMPEDE VERIFICATION OF THE VOTING BALLOTS; THERE WAS A TWO-JUSTICE DISSENT (THIRD DEPT).

The Third Department, reversing Supreme Court, over a two-justice dissent, determined the petitioner, Common Cause New York, had standing to contest the State Board of Elections' (the Board's) approval of the use of a new voting machine on the ground the machine's mechanism for counting votes (using a bar code) impeded the right to independently verify the voting ballots. The majority held the petitioner met the "injury-in-fact" requirement. The dissenters disagreed. Although the writ of mandamus to compel was not the proper mechanism because a discretionary, as opposed to a ministerial, act was at issue, the petition was converted to a writ of mandamus to review:

The Board … posits that petitioners cannot establish the existence of an injury that differs from the public at large. We do not believe that the facts of this case warrant "an overly restrictive analysis of [that] requirement" … . Indeed, that requirement is tempered by the principle "that standing is not to be denied simply because many people suffer the same injury," as doing so would insulate the "most injurious and widespread Government actions" from scrutiny … . Within that context, petitioners have alleged a particularized harm flowing from the approval of the ExpressVote XL [voting machine] and, although it likely affects numerous high-propensity voters … , it is sufficiently "different in kind or degree from that of the public at large" to permit standing … . * * *

We may consider the modern view of a petitioner's pleading requirements in a CPLR article 78 proceeding, which merely require that the petitioner " 'set forth

his [or her] facts and his [or her] prayer for relief and such relief as is proper may be given to him [or her]' " … . Accordingly, "notwithstanding the nomenclature of [petitioners'] application," … we find that their request can be readily construed as one for mandamus to review, which asks "whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion" … . Matter of Common Cause N.Y. v Kosinski, 2025 NY Slip Op 04690, Third Dept 8-14-25

Practice Point: Here the petition brought in the form of a writ of mandamus to compel was deemed improper because the underlying act, the purchase of voting machines, is discretionary, not ministerial. But the court had the authority to consider the petition as a writ of mandamus to review, which was the appropriate mechanism.

August 14, 2025

FAMILY LAW, EVIDENCE, CIVIL PROCEDURE, CONSTITUTIONAL LAW, JUDGES.

THERE WAS NO EVIDENCE MOTHER WAS SERVED WITH THE ORDER OF PROTECTION PROHIBITING THE FATHER'S CONTACT WITH HER AND THE CHILDREN; THE PROOF IN THIS CHILD NEGLECT PROCEEDING AGAINST MOTHER DID NOT MATCH THE ALLEGATIONS IN THE PETITION; THE JUDGE EFFECTIVELY AMENDED THE PETITION BY IMPROPERLY CONFORMING THE PETITION TO SERIOUSLY CONFLICTING AND CONTRADICTORY PROOF; MOTHER WAS NEVER GIVEN THE OPPORTUNITY ADDRESS THE "AMENDED" PETITION; NEGLECT FINDING VACATED (FIRST DEPT).

The First Department, vacating the neglect finding against mother, in a full-fledged opinion by Justice Rosada, determined there was insufficient support in the record for the judge's resolution of conflicting evidence, which amounted to an amendment of the petition to conform to the proof. Mother was never given the opportunity to address the judge's sua sponte amendment of the petition, a

violation of due process. In addition, there was no proof mother was served with an order of protection prohibiting father's contact with the children (it was alleged mother left the children in father's care when she was hospitalized). The facts of the case are too complex to fairly summarize here:

… ACS [Administration for Children's Services] failed to adduce any proof of actual or imminent danger of physical, emotional, or mental impairment to the children in remaining in a home with the father and M.H. [paternal grandmother] during the mother's brief hospitalization … . * * *

… Family Court unduly relied upon the contradictory testimony of Trazile [CPS worker] and M.H. in rendering its determination that respondent neglected the children. While credibility determinations of Family Court are normally accorded due deference … , the determination here "lacks a sound and substantial evidentiary basis," and the court should have dismissed the petition (… see also Family Ct Act § 1051[c]). The court credited the testimonies of both Trazile and M.H., which together presented three markedly different and contradictory accounts of how the children came to be in M.H.'s care. Significantly, all three accounts are departures from the allegations set forth in the amended petition.

While the court is empowered sua sponte to conform the pleadings to the proof, as it arguably did here via its restatement of the allegations in its written decision, Family Ct Act § 1051(b) requires that in such cases, the respondent be given reasonable time to prepare to answer the amended allegations, which was not done here … . "Absent additional allegations set forth in an amended petition that conforms to the proof with notice to the respondent, the court must not base a finding of neglect on allegations not set forth in the petition" … . Matter of Kaius A. v Abigail H., 2025 NY Slip Op 04692, First Dept 8-14-25

Practice Point: If Family Court is confronted with internally inconsistent and contradictory proof which does not match the allegations in the neglect petition, the petition should be dismissed.

Practice Point: If mother is accused of violating an order of protection, there must be proof she was served with the order.

Practice Point: Although Family Court has the power to sua sponte conform a neglect petition to the proof by issuing findings of fact, due process requites that

mother be given the opportunity to address the "new" allegations in the "amended" petition.

August 14, 2025

FAMILY LAW, CIVIL PROCEDURE, JUDGES.

FATHER, WHO LIVED IN FLORIDA, BROUGHT THIS PARENTAL ACCESS PETITION; FATHER INDICATED HE COULD NOT AFFORD TO TRAVEL TO NEW YORK; HE APPEARED SEVERAL TIMES VIRTUALLY; HE DID NOT APPEAR AT THE LAST COURT DATE, BUT HIS ATTORNEY WAS PRESENT; THE JUDGE SHOULD NOT HAVE DISMISSED THE PETITION AS ABANDONED (SECOND DEPT).

The Second Department, reversing Family Court, determined that the dismissal of father's parental access petition for failure to prosecute was not warranted. Father lived in Florida, had made appearances virtually, and, although he did not appear at the last court date, his attorney was present:

… [F]ather commenced this proceeding pursuant to Family Court Act article 6 for parental access with the child. The Family Court directed the parties to cooperate with a clinical assessment program in New York so as to aid the court in making a parental access determination. However, the father, who lived in Florida, alleged that he was financially unable to participate in the program and to travel to New York. He also informed the court that he was initially seeking to have only telephone contact with the child. Following several virtual appearances by the father, the court advised the father that he would no longer be permitted to appear virtually, citing the father's disruptions during his prior virtual appearances. Thereafter, prior to the next scheduled court appearance, the father made "multiple" requests to be able to appear virtually but the court denied his requests. While the father was not present at the next scheduled court appearance, his attorney was present. … [T]he court dismissed the petition without prejudice for failure to prosecute. …

"[D]ismissal is a harsh remedy which ought not to be imposed without the utmost caution" … . A petition should not be dismissed for failure to prosecute where there is no indication of intentional default or willful abandonment … . Here, inasmuch as the father made several appearances in the proceeding virtually and appeared through counsel during the latest scheduled court appearance, the record does not reflect that the father willfully abandoned his parental access petition … . Matter of Lopez v Estrella, 2025 NY Slip Op 04649, Second Dept 8-13-25

Practice Point: Dismissal of a parental access petition for failure to prosecute is a harsh remedy which was not justified in this case. Father lived in Florida and appeared virtually. His requests to continue to appear virtually were denied. He was seeking only telephonic contact with the child. There was no indication of intentional default or willful abandonment of the petition.

August 13, 2025

FAMILY LAW, JUDGES, EVIDENCE.

THE MAJORITY, LAYING OUT ITS FACTUAL FINDINGS IN GREAT DETAIL, AFFIRMED FAMILY COURT'S MODIFICATION OF CUSTODY RULING ALLOWING MOTHER TO RELOCATE WITH THE CHILD; THE TWO-JUSTICE DISSENT ARGUED THE MAJORITY IGNORED SUBSTANTIAL EVIDENCE WHICH CONFLICTED WITH AND CONTRADICTIED ITS RULINGS, LAYING OUT THAT EVIDENCE IN GREAT DETAIL; ESSENTIALLY THE DISSENT ARGUED THAT THE CONFLICTING AND CONTRADICTORY EVIDENCE IGNORED BY THE MAJORITY DEMONSTRATES MOTHER DID NOT MEET HER BURDEN TO DEMONSTRATE RELOCATION WAS IN THE "BEST INTEREST OF THE CHILD" (FIRST DEPT).

The First Department, over a comprehensive two-justice dissent, affirmed Family Court's modification of custody ruling allowing mother to relocate to Florida with the child. The dissenters argued the majority ignored evidence which conflicted

with its findings, effectively finding relocation was in mother's best interest, not the child's. The dissent laid out, in detail, the evidence purportedly ignored by the majority and would have held mother did not meet her burden to prove relocation was in the best interest of the child:

From the dissent:

A parent's request to relocate with the parties' child has been described as one of "the knottiest and most disturbing problems that our courts are called upon to resolve" … . Foremost, a court's role in resolving immensely personal family matters of this nature is to ensure that the final decision is in the best interest of the child and that its findings have a sound and substantial basis in the record, as that is the sine qua non of any credibility determination … . Therefore, the threshold issue here is not whether the Family Court's credibility determinations should be disturbed as the majority posits. Rather, it is whether there is a substantial basis in the record to support the finding that granting the mother primary physical custody of the subject child and permission to relocate to Florida, served the child's best interest … . In my opinion, the Family Court's determination fails on both accounts, as the evidence clearly establishes that a predominant emphasis was placed on those facts and circumstances most likely to serve the mother's best interest, rather than that of the child, thereby undermining the exact premise set forth in Matter of Tropea ([87 NY2d 727] at 740-741). As the mother has failed to establish that it would be in the child's best interest to relocate to Florida under the factors set forth in Matter of Tropea …, I respectfully dissent. Matter of Jasmine M. v Albert M., 2025 NY Slip Op 04695, First Dept 8-14-25

Practice Point: In this decision and in Matter of Kaius A. v Abigail H., 2025 NY Slip Op 04692, First Dept 8-14-25, the First Department is addressing concerns with the credibility determinations made by Family Court judges, raising the question whether starkly contradictory but credible proof should be analyzed in the context of whether the party seeking the relief has met the burden of proof.

August 14, 2025

FORECLOSURE, EVIDENCE.

BUSINESS RECORDS SUBMITTED BY A PERSON WHO DOES NOT ALLEGE PERSONAL KNOWLEDGE OF THE PARTY'S RECORD-KEEPING PRACTICES AND PROCEDURES CANNOT BE RELIED UPON BY THE REFEREE IN A FORECLOSURE PROCEEDING (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the referee's report in this foreclosure action should not have been confirmed because relied-upon business records were not incorporated into an affidavit from someone with personal knowledge of the plaintiff's record-keeping practices and procedures:

… [T]he supplemental business records were not identified by [the affiant] "or otherwise incorporated into[ ] her affidavit. Rather, those records were attached as an exhibit to [a letter] of the plaintiff's attorney, and the attorney did not allege personal knowledge of the plaintiff's record-keeping practices and procedures" … . For this reason, the referee's findings were not substantially supported by the record … . Citimortgage, Inc. v Rooney, 2025 NY Slip Op 04624, Second Dept 8-13-25

Practice Point: Here the referee's report relied on business records submitted attached to a letter from plaintiff's attorney. Because the attorney did not allege personal knowledge of the plaintiff's record-keeping practices and procedures, the records should not have been considered and the referee's report was not substantially supported by the record.

August 13, 2025

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

STRICT COMPLIANCE WITH THE NOTICE OF FORECLOSURE PROVISIONS IN RPAPL 1304 IS REQUIRED; HERE THE BANK FAILED TO SHOW THAT IT SENT RPAPL 1304 NOTICES ADDRESSED INDIVIDUALLY TO DEFENDANTS (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the bank's failure to comply with the notice of foreclosure requirements of RPAPL 1304 precluded summary judgment:

RPAPL 1304(1) provides that "at least ninety days before a lender, an assignee or a mortgage loan servicer commences legal action against the borrower, . . . including mortgage foreclosure, such lender, assignee or mortgage loan servicer shall give notice to the borrower." "Strict compliance with RPAPL 1304 notice to the borrower or borrowers is a condition precedent to the commencement of a foreclosure action" … . RPAPL 1304(2) states that "[t]he notices required by this section shall be sent by the lender, assignee or mortgage loan servicer in a separate envelope from any other mailing or notice" … .

… [A] "'defense based on noncompliance with RPAPL 1304 may be raised at any time'" prior to the entry of a judgment of foreclosure and sale … . … [T]he plaintiff failed to establish its strict compliance with the service requirements of RPAPL 1304. … [T]he plaintiff failed to show that it sent RPAPL 1304 notices addressed individually to each of those defendants as required by the statute … . HSBC Bank USA, N.A. v Stein, 2025 NY Slip Op 04638, Second Dept 8-13-25

Practice Point: Strict compliance with the notice of foreclosure provisions of RPAPL 1304 is required. The notices must be sent to defendants individually.

August 13, 2025

INSURANCE LAW, CONTRACT LAW.

PLAINTIFFS REQUESTED GENERAL LIABILITY INSURANCE WHICH WAS PROCURED BY THE BROKER; THE BROKER WAS NOT UNDER A DUTY TO ADVISE, GUIDE OR DIRECT PLAINTIFFS TO OBTAIN ADDITIONAL COVERAGE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the plaintiff did not demonstrate the defendant insurance broker breached its duty to procure additional insurance for the plaintiffs. Defendant proved plaintiffs requested general liability insurance which was procured:

"As a general principle, insurance brokers have a common-law duty to obtain requested coverage for their clients within a reasonable time or inform the client of the inability to do so" … . "Absent a specific request for coverage not already in a client's policy or the existence of a special relationship with the client, an insurance agent or broker has no continuing duty to advise, guide, or direct a client to obtain additional coverage" … .

… [P]laintiffs did not make a specific request for a particular kind of insurance coverage that the defendant failed to procure … . The plaintiffs' CEO and president testified … [the] plaintiffs needed general liability insurance. The defendant's vice president of operations testified that the plaintiffs' application was for general liability insurance, which the record reflects is the kind of insurance the defendant procured for the plaintiffs. In opposition, the plaintiffs failed to raise a triable issue of fact Spa Castle, Inc. v Choice Agency Corp., 2025 NY Slip Op 04676, Second Dept 8-13-25

Practice Point: An insurance broker's duty to a client does not extend beyond procuring the coverage requested by the client. There is no duty to advise the client to obtain additional coverage.

August 13, 2025

LABOR LAW-CONSTRUCTION LAW, EVIDENCE.

DEFENDANTS RELIED ON A STATEMENT TRANSLATED FROM SPANISH ATTRIBUTED TO PLAINTIFF BUT FAILED TO SHOW THAT THE TRANSLATION WAS PROVIDED BY A COMPETENT, OBJECTIVE INTERPRETER WHOSE TRANSLATION WAS ACCURATE; THEREFORE THE STATEMENT DID NOT RAISE A QUESTION OF FACT IN THIS LADDER-FALL CASE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff was entitled to summary judgment in this ladder-fall case. Plaintiff testified the unsecured ladder moved and he fell, which made out a prima facie case under Labor Law 240(1). Defendants attempted to raise a question of fact by submitting a statement plaintiff allegedly made to his foreman in Spanish, but defendants presented no evidence that the translation was accurate:

… [P]laintiff demonstrated his prima facie entitlement to judgment as a matter of law on the issue of liability on the cause of action alleging a violation of Labor Law § 240(1) insofar as asserted against the defendants. In support of his motion, the plaintiff submitted, inter alia, a transcript of his deposition testimony, which established that the unsecured ladder moved, causing him to fall … . In opposition, the defendants failed to raise a triable issue of fact. The documents submitted by the defendants in opposition to the plaintiff's motion, which relied on a statement the plaintiff allegedly made to his foreman in Spanish, were insufficient to raise a triable issue of fact. The defendants did not submit any deposition testimony or affidavit from the foreman, and they failed to show that the translation of the statement was provided by a competent, objective interpreter whose translation was accurate … . Batis v 85 Jay St. (Brooklyn), LLC, 2025 NY Slip Op 04619, Second Dept 8-13-25

Practice Point: Before a court will consider a statement translated from another language, the party offering the statement must show the translation was provided by a competent, objective interpreter whose translation was accurate.

August 13, 2025

MEDICAL MALPRACTICE, IMMUNITY, PUBLIC HEALTH LAW, CIVIL PROCEDURE.

HERE IN THIS MED MAL ACTION, THE COVID-RELATED IMMUNITY CODIFIED IN THE EMERGENCY OR DISASTER TREATMENT PROTECTION ACT (EDTPA) WARRANTED SUMMARY JUDGMENT DISMISSING THE CAUSES OF ACTION STEMMING FROM THE TREATMENT OF PLAINTIFF BY DEFENDANT PHYSICIAN IN APRIL 2020, BUT NOT THE CAUSE OF ACTION STEMMING FROM THE TREATMENT OF PLAINTIFF BY DEFENDANT PHYSICIAN IN MARCH 2020, BEFORE HIS OFFICE WAS CLOSED PURSUANT TO THE COVID EMERGENCY DECLARATION (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined (1) the repeal of the Emergency or Disaster Treatment Protection Act (EDTPA) does not apply retroactively, and (2), the EDTPA did not provide COVID-related immunity for defendants' treatment of plaintiff in March, 2020, but did provide immunity for defendants' treatment of plaintiff in April, 2020:

On March 16, 2020, the plaintiff sought treatment for nausea, constipation, and vomiting from the defendant Joseph Tromba and was examined at Tromba's medical office at the defendant Long Island Gastroenterology, P.C. On March 23, 2020, the medical office was closed pursuant to the emergency declaration in New York State during the COVID-19 pandemic, but Tromba spoke to the plaintiff on the telephone on April 1, April 3, and April 6, 2020. On April 6, 2020, the plaintiff presented to a hospital and underwent emergency surgery for a bowel obstruction.
* * *

"[T]he EDTPA … provided … that a health care facility 'shall have immunity from any liability, civil or criminal, for any harm or damages alleged to have been sustained as a result of an act or omission in the course of arranging for or providing health care services' [if] the services were arranged for or provided pursuant to a COVID-19 emergency rule or otherwise in accordance with applicable law, the act or omission was impacted by decisions or activities that

were in response to or as a result of the COVID-19 outbreak and in support of the State's directives, and the services were arranged or provided in good faith" … .

… [T]he defendants' submissions in support of their motion for summary judgment failed to establish … that the treatment of the plaintiff on March 16, 2020, was impacted by the defendants' decisions or activities that were in response to or as a result of the COVID-19 outbreak and in support of the State's directives. * * *

[Defendants established] the three requirements for immunity were satisfied with respect to their treatment of the plaintiff on April 1, April 3, and April 6, 2020 … . Tromba testified at his deposition that from March 23, 2020, through May 2020, his office was closed pursuant to the emergency declaration and he was "dealing with" his patients "as well as [he could] without seeing them physically." Regarding the plaintiff specifically, Tromba testified that he could not see her in his office due to the COVID-19 pandemic and her reticence to leave the house. He also testified that he wanted the plaintiff to go for an X-ray in order to see the quantity of stool in her bowel. However, due to the COVID-19 pandemic, the only place that the plaintiff could obtain an X-ray was an emergency room. The plaintiff testified at her deposition, among other things, that she did not want to go for an X-ray because she had COPD, her husband had emphysema, and it "was in the middle of COVID." Although she also testified that she would have gone for an X-ray if she thought it would have helped her, she nevertheless testified that this "was when COVID was going on" and she "didn't even know where [she] could get an X-ray at that point." This testimony was sufficient to establish, prima facie, that the plaintiff's treatment on April 1, April 3, and April 6, 2020, was impacted by decisions or activities that were in response to or as a result of the COVID-19 outbreak and in support of the State's directives … . Sapienza v Tromba, 2025 NY Slip Op 04672, Second Dept 8-13-25

Practice Point: Consult this decision for an example of how the COVID-related immunity codified in the Emergency or Disaster Treatment Protection Act (EDTPA) can be applied in a medical malpractice action.

August 13, 2025

NEGLIGENCE, EVIDENCE, MUNICIPAL LAW.

PLAINTIFF SLIPPED AND FELL ON SNOW FIVE HOURS AFTER THE "EXTRAORDINARY SNOWSTORM" HAD ENDED; THE STORM-IN-PROGRESS RULE APPLIED AND DEFENDANT TRANSIT AUTHORITY WAS ENTITLED TO SUMMARY JUDGMENT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the defendant transit authority's motion for summary judgment in this slip and fall case should have been granted pursuant to the "storm in progress" rule. :Plaintiff slipped an fell on an uncovered staircase at a subway station. The fall happened five hours after the end of "an extraordinary snowstorm:"

Under the storm in progress rule, a property owner will not be held liable for accidents caused by accumulation of snow unless "an adequate period of time has passed following the cessation of the storm to allow the owner an opportunity to ameliorate the hazards caused by the storm" … . "[T]he question of whether a reasonable time has elapsed may be decided as a matter of law by the court, based upon the circumstances of the case" … .

Here, the defendant made a prima facie showing of its entitlement to judgment as a matter of law by submitting an affidavit of a meteorologist, with attached certified climatological data, which demonstrated that at the time of the plaintiff's accident, less than five hours had passed since the end of an extraordinary snowstorm … . In opposition, the plaintiff failed to raise a triable issue of fact … . Harris v New York City Tr. Auth., 2025 NY Slip Op 04635, Second Dept 8-13-25

Practice Point: The storm in progress rule applies for a period of time after the precipitation stops. Here the rule was applied to a slip and fall which occurred five hours after an "extraordinary snowstorm."

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