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An Organized Compilation of Summaries of Selected Decisions, Mostly Reversals, Released by Our New York State Appellate Courts July 21 – 25, 2025, and Posted on the New York Appellate Digest Website on Monday, July 28, 2025. The Entries in the Table of Contents Link to the Summaries which Link to the Full Decisions on the Official New York Courts Website. Click on “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

Table of Contents

Table of Contents

CIVIL PROCEDURE, JUDGES.

SHANE, A CO-DEFENDANT WITH HIS PARENTS WITH WHOM HE LIVED, WAS NOT DISQUALIFIED FROM ACCEPTING SERVICE ON BEHALF OF HIS PARENTS DUE TO A CONFLICT OF INTEREST; THE ACTION AGAINST THE PARENTS SHOULD NOT HAVE BEEN VACATED BASED ON A LACK OF PERSONAL JURISDICTION (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the evidence did not support the finding that Shane, who was living with his parents when he was served with process on behalf of his parents, was not a person of suitable age and discretion due to a conflict of interest with his parents. Shane was a co-defendant along with his parents. The parents were granted vacatur under CPLR 5015(a)(4) on the ground the court lacked personal jurisdiction over them:

"A person would not be considered a person of suitable age and discretion where their interests in the proceeding were sufficiently adverse to the party for whom they were accepting service" … . Furthermore, "[g]ood faith is implicit in the spirit of the statutory scheme. If a plaintiff knows, or should know, that service according to [CPLR 308 (2)] will not afford notice, then, by definition, it is not reasonably calculated to afford notice, and is constitutionally infirm" … .

… [T]here is no evidence in the record to support a determination that plaintiff was aware, or should have been aware, of any alleged conflict between Shane and the parent defendants. We cannot conclude that Shane had a conflict of interest with the parent defendants and, therefore, was not a person of suitable age and discretion, merely because he is a codefendant … . Moreover, on the record before us, we note that this is not a case where plaintiff can be charged with any knowledge that service upon Shane with respect to his parents might be deficient … . Thus, based on the evidence adduced at the traverse hearing, we conclude that plaintiff established that Shane was a person of suitable age and discretion for purposes of serving his parents … . Seebald v Spoonley, 2025 NY Slip Op 04324, Fourth Dept 7-25-25

Practice Point: The fact that a person is a co-defendant does not render that person unqualified to accept service on behalf of other defendants. Here the person served,

Shane, a co-defendant in the action, accepted service on behalf of his parents with whom he lived. It was not demonstrated at the traverse hearing that Shane had interests sufficiently adverse to those of his parents to render the service on the parents constitutionally infirm. There was no evidence the plaintiff was aware service upon Shane would be deficient with respect to service on the parents.

July 25, 2025

CIVIL PROCEDURE.

THE ADULT SURVIVORS ACT, CPLR SECTION 214-J, REVIVES AN OTHERWISE TIME-BARRED ACTION COMMENCED IN 2005 AND DISMISSED FOR LACK OF PERSONAL JURISDICTION IN 2009 (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that the Adult Survivors Act (ASA), which is CPLR section 214-j, may be applied to revive an otherwise time-barred action commenced in 2005 and dismissed for lack of personal jurisdiction in 2009. The ASA concerns lawsuits alleging damages for sexual assault:

CPLR 214-j, enacted as part of the ASA and effective May 24, 2022, opened a revival window during which adult victims of sexual abuse could assert civil claims or causes of action against their abusers for acts committed against them when they were 18 years or older that would otherwise be time-barred … . CPLR 214-j provides, inter alia, that "every civil claim or cause of action brought against any party alleging intentional or negligent acts or omissions by a person for physical, psychological, or other injury or condition suffered as a result of conduct which would constitute a sexual offense . . . committed against such person who was eighteen years of age or older . . . which is barred as of the effective date of this section because the applicable period of limitation has expired, and/or the plaintiff previously failed to file a notice of claim or a notice of intention to file a claim, is hereby revived." CPLR 214-j further provides that, "[i]n any such claim or action, dismissal of a previous action, ordered before the effective date of this section, on grounds that such previous action was time barred, and/or for failure of

a party to file a notice of claim or a notice of intention to file a claim, shall not be grounds for dismissal of a revival action pursuant to this section." * * *

The plain language of CPLR 214-j provides that it revives "every civil claim or cause of action" alleging the subject conduct "which is barred . . . because the applicable period of limitation has expired" (emphasis added). The use of the word "every" in describing such claims or causes of action imports no limitation and evidences the Legislature's intent for revival to apply to all claims and causes of action that would otherwise be barred on statute of limitations grounds …
. Esposito v Isaac, 2025 NY Slip Op 04231, Second Dept 7-23-25

Practice Point: The Adult Survivors Act (ASA), CPLR 214-j, revives "every civil claim" alleging damages for sexual assault of persons over 18, including an otherwise time-barred action which was dismissed in 2009 for lack of personal jurisdiction.

July 23, 2025

CONTRACT LAW, AGENCY, REAL ESTATE.

THE BROKERAGE AGREEMENT DID NOT GIVE PLAINTIFF THE EXCLUSIVE RIGHT TO NEGOTIATE A LOAN ON DEFENDANT'S BEHALF; THEREFORE PLAINTIFF WAS NOT ENTITLED TO A COMMISSION ON A LOAN PROCURED BY DEFENDANT WITHOUT PLAINTIFF'S ASSISTANCE; "EXCLUSIVE RIGHT TO ..." CRITERIA IN THIS CONTEXT EXPLAINED (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Warhit, determined the brokerage agreement did not give plaintiff the right to a commission when the defendant procured financing on its own:

This appeal presents the opportunity to examine the law of brokerage agreements granting an "exclusive right to sell," as well as the application of such agreements outside the context of transactions involving the sale or lease of real property. In the present case, the plaintiff broker contends that it had an exclusive agreement to secure certain financing on behalf of the defendant and that it was entitled to a

commission even though it was not the procuring cause of a loan the defendant ultimately obtained. * * *

The agreement did not clearly and expressly provide the plaintiff with the exclusive right to deal or negotiate on the defendant's behalf … . The defendant demonstrated that the plaintiff was not the procuring cause of the loan … . Angelic Real Estate, LLC v Aurora Props., LLC, 2025 NY Slip Op 04223, Second Dept 7-23-25

Practice Point: Consult this opinion for an explanation of the contractual terms necessary to confer on a broker an exclusive right to procure a loan, such that a commission is owed even when the loan is procured without the broker's assistance (not the case here).

July 23, 2025

CRIMINAL LAW, ATTORNEYS, APPEALS.

DEFENDANT MOVED TO VACATE HIS CONVICTION ARGUING HIS ATTORNEY WAS INEFFECTIVE FOR WAIVING AN INTERPRETER; COUNTY COURT SHOULD HAVE HELD A HEARING ON THE MOTION; TWO-JUSTICE DISSENT (FOURTH DEPT).

The Fourth Department, reversing County Court, over a two-justice dissent. determined County Court should have held a hearing on defendant's motion to vacate his conviction. Defendant argued defense attorney's waiver of an interpreter constituted ineffective assistance. Defendant's ineffective-assistance argument on direct appeal had been rejected, but the motion to vacate properly raised the waiver of an interpreter as a new issue:

We agree with defendant that County Court erred in its determination that defendant's claim that he was denied effective assistance of counsel was procedurally barred pursuant to CPL 440.10 (2) (a) … . Although on direct appeal we rejected defendant's contention that he was denied effective assistance of counsel … , we conclude that his present contentions are properly raised by way of a CPL 440.10 motion because they concern matters outside the record that was

before us on his direct appeal … . Defendant's motion contained sufficient evidence, including "sworn allegations . . by . . . defendant or by another person or persons" (CPL 440.30 [1] [a]), demonstrating that a hearing is necessary to determine whether trial counsel's waiver of an interpreter for defendant adversely affected defendant's right to meaningfully participate in his own defense … . Specifically, defendant submitted evidence that, although he was able to navigate conversational topics in English, he required the assistance of an interpreter when discussing more technical or esoteric topics and that he had in fact utilized the assistance of an interpreter at all but one court appearance prior to his trial counsel waiving such services for defendant just prior to trial. "Although the evidence in support of the motion does not 'conclusively substantiate[ ] by unquestionable documentary proof' that vacatur is required due to a violation of defendant's right to [effective assistance of] counsel . . . , it is nonetheless suggestive of that fact" … . Defendant is therefore entitled to a hearing "on his entire claim of ineffective assistance of counsel inasmuch as such a claim constitutes a single, unified claim that must be assessed in totality" … . People v Anwar, 2025 NY Slip Op 04301, Fourth Dept 7-25-25

Practice Point: This decision gives some insight into when the court must conduct a hearing on a motion to vacate a conviction. The discussion is enriched by a two-justice dissent.

July 25, 2025

CRIMINAL LAW, ATTORNEYS, JUDGES.

DEFENDANT DID NOT MAKE AN UNEQUIVOCAL REQUEST TO REPRESENT HIMSELF; THEREFORE THE JUDGE WAS NOT REQUIRED TO CONDUCT A SEARCHING INQUIRY TO DETERMINE WHETHER DEFENDANT'S REQUEST WAS KNOWING, VOLUNTARY AND INTELLIGENT; A TWO-JUSTICE DISSENT DISAGREED (FOURTH DEPT).

The Fourth Department, affirming defendant's conviction, determined he did not make an unequivocal request to represent himself. The two-justice dissent disagreed:

… [D]efendant did not unequivocally request to proceed pro se inasmuch as he only "ask[ed] to proceed pro se as an alternative to receiving new counsel," thereby seeking to "leverage his right of self-representation in an attempt to compel the court to appoint another lawyer" … . Indeed, defendant repeatedly "made clear that he did not wish to proceed pro se," and "couched [his requests] as a means to secure new counsel" … , including by stating that he had "no choice" but to represent himself if the court did not assign new counsel, and that he "d[id]n't want to represent [him]self" but would do so if the court refused to appoint another attorney … . Defendant made no "standalone request to proceed pro se" … ; rather, all of his "requests to proceed pro se were made in the alternative; he sought to represent himself only because [the court] refused to replace . . . assigned counsel who had displeased him" … . A request to proceed pro se is equivocal where, as here, "it 'does not reflect an affirmative desire for self-representation' and instead shows that 'self-representation was reserved as a final, conditional resort' " … . Inasmuch as defendant's requests consisted of "equivocal and hesitant statements about proceeding pro se" … , the court's duty to "make a searching inquiry . . . to determine whether [the] request[s] w[ere] knowing, voluntary, and intelligent" was not triggered … . People v Davis, 2025 NY Slip Op 04300, Fourth Dept 7-25-25

Practice Point: Consult this decision for a thorough discussion of what makes a defendant's request to represent himself "unequivocal" (thereby by triggering the need for a searching inquiry by the judge into whether the request is knowing, voluntary and intelligent).

July 25, 2025

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

COUNTY COURT VIOLATED DEFENDANT'S RIGHT TO DUE PROCESS OF LAW BY FAILING TO NOTIFY DEFENDANT IT INTENDED TO ASSESS POINTS IN THE SORA RISK-LEVEL HEARING THAT WERE NOT RECOMMENDED BY THE BOARD OR PROPOSED BY THE PEOPLE; NEW HEARING ORDERED IN THE INTEREST OF JUSTICE (FOURTH DEPT).

The Fourth Department, reversing County Court and ordering a new SORA risk assessment hearing, determined County Court violated defendant's right to due process of law by failing to notify defendant it intended to assess points that were not recommended by the Board of Examiners of Sex Offenders or proposed by the People. Although the defendant did not object to the assessment, the Fourth Department exercised its interest of justice jurisdiction and considered the appeal. People v Buckmaster, 2025 NY Slip Op 04378, Fourth Dept 7-25-25

Practice Point: Defendants are entitled to notice that the court intends to assess points in a SORA risk-level proceeding that were not recommended by the Board or proposed by the People. Failure to provide notice is a violation of due process.

July 25, 2025

CRIMINAL LAW, ATTORNEYS, EVIDENCE.

THE MAJORITY DETERMINED THE PEOPLE DID NOT EXERCISE DUE DILIGENCE IN LOCATING REQUESTED DISCOVERY MATERIALS; THE INDICTMENT WAS PROPERLY DISMISSED ON SPEEDY TRIAL GROUNDS; A TWO-JUSTICE DISSENT ARGUED THE TIME WHEN THE OMNIBUS MOTIONS WERE UNDER CONSIDERATION SHOULD NOT HAVE BEEN CHARGED TO THE PEOPLE (FOURTH DEPT).

The Fourth Department, over a two-justice dissent, affirmed the dismissal of the indictment on speedy trial grounds. The dissenting justices agreed that the

certificate of compliance was invalid, but argued the time that the defense omnibus motions were under consideration should not have been charged to the People:

… [T]he People contend that the court erred in determining that they violated their initial discovery obligations by failing to disclose the police report and body-worn camera footage relating to a welfare check of two of defendant's children conducted by police officers two days after the alleged assault, inasmuch as they acted in good faith and with due diligence in an attempt to recover the report and footage. We reject that contention. * * *

… [D]espite being aware of the welfare check, which directly related to an issue upon which they presented testimony at the grand jury proceeding, the People failed to undertake the requisite efforts to ascertain the existence of, and obtain, the police report and body-worn camera footage, sending only a single letter to the police department that had conducted the welfare check and failing to follow up. We conclude under the circumstances presented here that the People failed to meet their burden of establishing that they exercised due diligence and made reasonable inquiries prior to filing the initial COC [certificate of compliance] and, thus, the court properly determined that the initial COC was improper and struck the statement of readiness as illusory … .

From the dissent:

… [W]e agree with the majority's conclusion that the certificate of compliance in this case was invalid … , we cannot agree with the majority's further conclusion that the People could be charged with more than six months of speedy trial time while defendant's omnibus motion remained pending. In our view, it cannot be disputed that the omnibus motion remained pending before Supreme Court, i.e., "under consideration" (CPL 30.30 [4] [a]), at least in part, during the relevant time frame inasmuch as the portion of the motion seeking to compel production of certain materials pertaining to a welfare check … was neither decided by the court nor withdrawn by defendant before defendant moved to dismiss the indictment. Because we conclude that defendant's omnibus motion remained pending before the court until defendant moved to dismiss the indictment on speedy trial grounds, we further conclude that all of the time that elapsed during that period was excludable, and that the People could not be charged with more than six months of

statutory speedy trial time as a result … . People v Ernst, 2025 NY Slip Op 04329, Fourth Dept 7-25-25

Practice Point: Consult this decision for a discussion of the meaning of "due diligence" in the context of the People's response to discovery demands.

July 25, 2025

CRIMINAL LAW, EVIDENCE.

AFTER A VALID TRAFFIC STOP, ASKING DEFENDANT TO STEP OUT OF THE CAR AND PLACING DEFENDANT IN HANDCUFFS IN THE ABSENCE OF ANY VALID "SAFETY REASONS" CONSTITUTED AN ILLEGAL DETENTION WARRANTING SUPPRESSION OF DEFENDANT'S STATEMENTS (FOURTH DEPT).

The Fourth Department, reversing County Court, suppressing defendant's statements and ordering a new trial, determined the statements were the fruit of an unlawful detention at a traffic stop. A two-justice dissent argued the unlawful detention lasted less than a minute before the police had probable cause to arrest, and, therefore, a hearing should be held to determine whether the spontaneous statements made by the defendant at the police station were the fruit of the poisonous tree:

The Troopers … directed the driver and defendant to exit the vehicle so the Troopers could conduct an inventory search. Pursuant to standard procedure, the driver and defendant were placed in handcuffs. No other basis for placing the driver and defendant in handcuffs was offered by the People, and at the suppression hearing one of the Troopers testified that, in the City of Rochester, "for our safety reasons, every single time we have somebody exit the vehicle, we put them in handcuffs." Before the inventory search was conducted, the vehicle's driver began acting nervous, and when one of the Troopers inquired about her behavior, the driver stated that there was a gun in a bag in the vehicle. The Troopers retrieved and searched the bag, which contained a loaded handgun. Defendant and the driver were then arrested and taken to the State Police station

for processing, where defendant began talking to one of the Troopers and made spontaneous statements indicating that the gun belonged to him. * * *

We agree with defendant that by placing him in handcuffs after directing him to exit the vehicle, the Troopers transformed the traffic stop into a "forcible stop and detention" … , which "must be justified by some additional circumstances, such as a threat of evasive conduct . . . ; a need to transport the defendant for a showup procedure . . . ; a fear that the suspect may interfere with the execution of a search warrant . . . ; or a concern for officer safety" … . The People did not present evidence at the suppression hearing of " 'articulable facts' from the encounter to establish reasonable suspicion that defendant posed any danger to the officers" … .

From the dissent:

As the majority concludes, two New York State Troopers unlawfully detained defendant in handcuffs following the traffic stop. At the time, the Troopers had no reason to believe that either defendant or the driver had committed a crime. But the unlawful detention lasted less than a minute before the driver informed the Troopers that there was a gun in the vehicle, thus providing the Troopers with probable cause to arrest both the driver and defendant for criminal possession of a weapon. Thus, at the time he made his statements, defendant was lawfully under arrest. People v Hernandez, 2025 NY Slip Op 04315, Fourth Dept 7-25-25

Practice Point: Apparently the State Police consider the City of Rochester a high crime area and it is standard procedure for them, after a traffic stop in the city, to place the occupants of the car in handcuffs for "safety reasons." The Fourth Department held that standard procedure constitutes an illegal detention.

July 25, 2025

CRIMINAL LAW, EVIDENCE.

CO-CONSPIRATOR EXCEPTION TO THE HEARSAY RULE EXPLAINED (FOURTH DEPT).

The Fourth Department, affirming the convictions, explained the co-conspirator exception to the hearsay rule. A two-justice partial dissent argued there was

insufficient evidence of defendant's guilt of murder, attempted murder and assault as an accessory:

…[T]he court properly admitted in evidence the text messages sent by the female codefendant to defendant's cell phone pursuant to the coconspirator exception to the hearsay rule. " 'A declaration by a coconspirator during the course and in furtherance of the conspiracy is admissible against another coconspirator as an exception to the hearsay rule' " … . Such a declaration may be admitted only where the People have established a prima facie case of conspiracy " 'without recourse to the declarations [of that coconspirator]' " … . "The prima facie case of conspiracy does not need to be established before the coconspirator's statements are admitted in evidence, so long as 'the People independently establish a conspiracy by the close of their case' " … . People v Brown, 2025 NY Slip Op 04331, Fourth Dept 7-25-25

Practice Point: Consult this decision for insight into the application of the co-conspirator exception to the hearsay rule.

July 25, 2025

CRIMINAL LAW, EVIDENCE.

THE MAJORITY CONCLUDED THE QUESTIONING OF DEFENDANT IN HIS BACKYARD AND AT THE HOSPITAL WAS INVESTIGATORY AND DID NOT REQUIRE THE MIRANDA WARNINGS; THERE WAS A DETAILED, FACT-SPECIFIC DISSENT (FOURTH DEPT).

The Fourth Department, affirming defendant's conviction, determined the questioning of defendant in his backyard and at the hospital constituted "a noncustodial investigatory inquiry" for which the Miranda warnings were not required. A comprehensive and detailed dissent argued the questioning was in fact "custodial" and the need for the Miranda warnings was triggered:

It is well settled that Miranda warnings must be given when a defendant is subject to custodial interrogation … . "In determining whether suppression is required, the court 'should consider: (1) the amount of time the defendant spent with the police,

(2) whether [defendant's] freedom of action was restricted in any significant manner, (3) the location and atmosphere in which the defendant was questioned, (4) the degree of cooperation exhibited by the defendant, (5) whether [the defendant] was apprised of [their] constitutional rights, and (6) whether the questioning was investigatory or accusatory in nature' " … . Although no Miranda warnings were given to defendant while in his backyard or at the hospital, we conclude upon our review of the relevant factors that, under the circumstances here, the questioning by the police officers in each instance "constituted a noncustodial investigatory inquiry for which Miranda warnings were not required" … .

From the dissent:

In my view, each and every factor in determining whether defendant was in custody for Miranda purposes weighs in defendant's favor. First, defendant was with the police in his backyard for almost an hour … . Second, defendant's freedom of action, notwithstanding his leg injury, was restricted in a significant manner from the inception of the encounter. The encounter started with police officers yelling at defendant not to move, to get on the ground, and to let the officers see his hands at all times … . Moreover, defendant was informed multiple times that nothing would happen until the officers found the gun … . Next, the atmosphere in which defendant was questioned was highly intrusive because his backyard was full of officers searching for a gun … . It is apparent from the body camera footage that defendant did not cooperate with the officers because he never told them where the gun was, despite repeated accusatory questioning on the topic … . Despite the above, defendant was not advised of his Miranda warnings, and the officers' questions to defendant were not merely investigatory in nature … . People v Casiano, 2025 NY Slip Op 04316, Fourth Dept 7-25-25

Practice Point: Consult the dissent for some insight into when questioning by the police crosses the line from an investigatory inquiry to a custodial interrogation.

July 25, 2025

CRIMINAL LAW, EVIDENCE.

THE MAJORITY HELD THAT DEFENDANT'S FLIGHT PROVIDED REASONABLE SUSPICION OF CRIMINALITY JUSTIFYING PURSUIT IN THIS STREET STOP SCENARIO; THE DISSENT ARGUED FLIGHT ALONE DURING A LEVEL TWO ENCOUNTER DOES NOT JUSTIFY PURSUIT (FOURTH DEPT).

The Fourth Department, after a detailed analysis of the De Bour criteria for a street stop, determined the initial encounter with defendant was lawful, the request for consent to frisk the defendant was lawful, and defendant's flight provided reasonable suspicion of criminality justifying pursuit. The dissent agued the information available to the police never provided more than a level two right to inquire:

From the dissent:

I respectfully dissent inasmuch as I conclude that the pursuit of defendant was unlawful. At the time the two officers in question approached defendant, they mistakenly believed that they could properly detain defendant. The information they had before them, a general description of a suspect, gave them, as the majority agrees, a level two right to inquire … . In other words, defendant, at the time the officers approached him, had the right to be let alone.

The majority concludes that the degree of suspicion ripened from founded suspicion of criminality to reasonable suspicion upon defendant's flight, thereby justifying the officers' pursuit. " 'Flight alone, however, or even in conjunction with equivocal circumstances that might justify a police request for information, is insufficient to justify pursuit because an individual has a right to be let alone and refuse to respond to police inquiry' " … . A level two founded suspicion of criminality plus flight cannot equate to level three reasonable suspicion or else a defendant's right to be let alone during a level two encounter will be rendered utterly meaningless. In my view, the majority ignores binding New York jurisprudence on this point in favor of a standard that erodes the rights that individuals maintain in a level two encounter. As the Court of Appeals recently reiterated, "an individual's flight from a level one or two police encounter, without

more, does not provide the reasonable suspicion necessary to pursue them" … , and defendant, during the lawful level two encounter, and even upon the officers' requests and his momentary acquiescence, retained his "right to be let alone and refuse to respond to police inquiry" … . People v Smith, 2025 NY Slip Op 04317, Fourth Dept 7-25-25

Practice Point: Consult this decision and the dissent for insight into when a defendant's flight during a level two street stop will justify police pursuit.

July 25, 2025

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

THE PROSECUTOR RECOMMENDED A LEVEL ONE RISK ASSESSMENT BUT THE JUDGE ASSESSED ADDITIONAL POINTS AT THE CONCLUSION OF THE HEARING RAISING THE RISK LEVEL TO TWO; BECAUSE DEFENDANT WAS NOT GIVEN THE OPPORTUNITY TO ARGUE FOR A DOWNWARD DEPARTURE, DEFENDANT IS ENTITLED TO A NEW HEARING (FOURTH DEPT).

The Fourth Department, reversing County Court and remitting the matter, determined defendant was not given an adequate opportunity to argue for a downward departure. The prosecutor had requested a level one risk assessment, but the judge assessed additional points and raised the risk level to two at the conclusion of the hearing:

Defendant further … the court abused its discretion in not granting a downward departure based on certain mitigating factors. At the SORA hearing, the People requested that defendant be designated a level one sex offender, but at the conclusion of the hearing, the court assessed additional points, rendering defendant a level two sex offender. Although defendant does not contend on appeal that the court violated his right to due process by sua sponte assessing additional points … , the court's ruling did not afford defendant a meaningful opportunity to request a downward departure … . We therefore reverse the order, vacate defendant's risk level determination, and remit the matter to County Court for a new hearing and

risk level determination … . People v Kuhn, 2025 NY Slip Op 04434, Fourth Dept 7-25-25

Practice Point: Here the prosecutor recommended risk- level one but the judge, at the conclusion of the hearing, assessed additional points and raised the risk-level to two. The defendant should have been given the opportunity to argue for a downward departure in that circumstance. New hearing ordered.

July 25, 2025

CRIMINAL LAW, JUDGES.

SUPREME COURT PROPERLY CONSOLIDATED TWO INDICTMENTS, CRITERIA EXPLAINED; THERE WAS A COMPREHENSIVE DISSENT (FOURTH DEPT).

The Fourth Department, affirming the convictions, determined Supreme Court properly consolidated two indictments. A comprehensive dissent disagreed:

… [T]he court properly exercised its discretion in granting consolidation pursuant to CPL 200.20 (2) (b) because there is significant common evidence supporting both indictments. Most importantly, the same weapon was involved in the events underlying both indictments, and—indeed—is the critical piece of evidence supporting both … . * * *

… [T]he court properly exercised its discretion in granting consolidation of the indictments on the additional basis that they charged offenses that are "defined by the same or similar statutory provisions" (CPL 200.20 [2] [c]). * * *

In opposing joinder, defendant failed to meet the statutory standard of showing that he had "a genuine need to refrain from testifying . . . [to] satisf[y] the court that the risk of prejudice is substantial" (CPL 200.20 [3] [b]). * * * …[D]efendant failed to demonstrate "that he had 'both important testimony to give concerning one [offense] and a genuine need to refrain from testifying on the other' " … . People v Spinks, 2025 NY Slip Op 04303, Fourth Dept 7-25-25

Practice Point: Consult this decision for insight into the criteria for consolidating two indictments, fleshed out by a comprehensive, detailed dissent.

July 25, 2025

DEBTOR-CREDITOR, CONTRACT LAW.

WHAT IS THE DIFFERENCE BETWEEN A REVENUE PURCHASE AGREEMENT AND A LOAN?

The Fourth Department, reversing Supreme Court, over a two-justice concurrence, determined the contract between plaintiff and defendants was a revenue purchase agreement, not a loan. Therefore defendants' argument the agreement constituted a usurious loan was rejected. However, questions of fact about the extent of the damages precluded summary judgment in favor of plaintiff. The concurring justices agreed the contract was a revenue purchase agreement, but argued the analysis of the issue used by the majority, based upon a specific case, was wrong and suggested a different approach:

Under the agreement, plaintiff advanced a monetary amount to the entity defendants in exchange for 25% of the future revenues of their business, until the purchased amount, i.e., an agreed-upon amount that was greater than the advanced amount, was paid to plaintiff. There was no interest rate or payment schedule and no time period during which the purchased amount was to be collected by plaintiff. Indeed, the agreement specifically stated that it was not a loan and that the entity defendants were "not borrowing money from" plaintiff. The agreement contained a daily remittance amount, which constituted "a good faith estimate of" plaintiff's share of the future revenue stream. The agreement also contained an acknowledgment from plaintiff that it was "entering this [a]greement knowing the risks that [the entity defendants'] business may slow down or fail, [that plaintiff] assumes these risks," and that there would be no recourse for plaintiff in the event the entity defendants went bankrupt, went out of business, or experienced a slowdown in business, among other things. The agreement also contained two reconciliation provisions, whereby the daily remittance would be modified both

retroactively and prospectively upon request and with proof of earned revenue amounts. * * *

In determining whether a transaction constitutes a loan, courts must determine whether the plaintiff " 'is absolutely entitled to repayment under all circumstances' "; "[u]nless a principal sum advanced is repayable absolutely, the transaction is not a loan" … . "Usually, courts weigh three factors when determining whether repayment is absolute or contingent: (1) whether there is a reconciliation provision in the agreement; (2) whether the agreement has a finite term; and (3) whether there is any recourse should the merchant declare bankruptcy" (… see Samson MCA LLC, 219 AD3d at 1128 …). Bridge Funding Cap LLC v SimonExpress Pizza, LLC, 2025 NY Slip Op 04306, Fourth Dept 7-25-25

Practice Point: Consult this decision for a discussion of the nature of a revenue purchase agreement, as opposed to a loan. The majority used a Second Department case to structure its analysis. The two-justice concurrence agreed with the majority that the contract was a revenue purchase agreement, but suggested a different approach to the analysis.

July 25, 2025

FAMILY LAW, JUDGES, APPEALS, CONSTITUTIONAL LAW.

THE FIRST DEPARTMENT, AGREEING WITH THE SECOND, DETERMINED THE ADMINISTRATION FOR CHILDREN'S SERVICES (ACS) DOES NOT HAVE THE AUTHORITY TO SUPERVISE A NONRESPONDENT MOTHER WHO HAD BEEN ABUSED BY RESPONDENT FATHER IN THE CHILD'S PRESENCE; THE AUTHORITY TO SUPERVISE A NONRESPONDENT MOTHER IS ONLY TRIGGERED WHEN THE COURT ORDERS THE CHILD REMOVED FROM THE HOME, NOT THE CASE HERE (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Gesmer, considering the appeal as an exception to the mootness doctrine, determined the court did not have the authority under the Family Court Act to order the Administration for Children's

Services (ACS) to supervise a so-called "nonrespondent" mother who had been abused by respondent father in the presence of the 14-month-old child. By all accounts mother was "a good mother" and "very strong [and] hard-working." Yet over the course of six months mother was subjected to 15 announced and unannounced home visits by an ACS caseworker who searched every room, the contents of the refrigerator, and inspected the child's body:

As noted by the Sapphire W. Court [237 AD3d 41, Second Dept, 2-5-25] "in 2015, the Legislature enacted sweeping legislation that amended various statutes, including Family Court Act § 1017, in order to provide nonrespondent parents with greater participation in abuse or neglect proceedings, while also expand[ing] the options available to Family Court judges when craft[ing] appropriate orders respecting the rights of non-respondent parents [and] assuring the safety and well being of children who are the subjects of the proceedings . . . . Among other things, the legislation clarifie[d] the language of Family Court Act § 1017 by referring specifically to non-respondent parent, relative or suitable person as potential resources a court may consider after determining that a child must be removed from his or her home" … .

We agree with the sound reasoning in Matter of Sapphire W. and hold that Family Court Act §§ 1017 and 1027(d) do not permit supervision of a nonrespondent parent who has been caring for the child, in the absence of a court-ordered removal of the child. We further concur with the Second Department that, "[c]onsidering the intrusive and potentially traumatic impact of ACS involvement in a family's life, the disproportionate involvement of Black and Hispanic children in the child welfare system cannot be ignored" … . Matter of R.A. (A.R.), 2025 NY Slip Op 04295, First Dept 7-24-25

Practice Point: The Administration for Children's Services' (ACS') authority to supervise a nonrespondent mother who was abused by respondent father in the child's presence is only triggered if and when the court orders the removal of the child from the home, not the case here. All agreed mother was "a good mother," yet she was subjected to 15 announced and unannounced searches of her home and inspections of her child over the course of six months.

July 24, 2025

FAMILY LAW, JUDGES, EVIDENCE, APPEALS.

THE JUDGE FAILED TO ADEQUATELY CONSIDER FATHER'S ARGUMENTS OPPOSING THE CHILD'S RELOCATION WITH MOTHER AND FAILED TO MAKE FINDINGS OF FACT IN SUPPORT OF THE AWARD OF SOLE CUSTODY TO MOTHER, MATTER REMITTED (FOURTH DEPT).

The Fourth Department, reversing Family Court in this modification of custody proceeding and remitting the matter, determined the judge failed to consider father's arguments opposing relocation with the mother, and failed to make findings of fact to support awarding sole custody to mother:

… [T]he court failed "to consider and give appropriate weight to all of the factors that may be relevant to the determination" … . Although the court properly considered facts supporting the conclusion that the child would be better off economically and emotionally in Massachusetts given, among other things, the mother's family support system there, it failed to consider or evaluate the father's reasons for opposing the relocation. Specifically, the court did not consider the mother's immigration status and the father's concerns that the mother might try to remove the child from the country … . Indeed, the father testified that the mother still had connections to Morocco and had previously expressed a desire to move back there with the child. He also testified about an incident where the mother took the child's passport from the father without his consent and in violation of the stipulated order. In short, the court failed to consider whether the father had "a good faith basis for opposing a requested move," which "is a factor bearing on a relocation determination" … .

… [T]he court failed to make any factual findings to support the award of sole custody—both legal and physical—to the mother … . Effectively, the court awarded the mother sole custody of the child on the basis of its determination on the petition insofar as it sought permission to relocate the child. However, it is "well established that the court is obligated 'to set forth those facts essential to its decision' " … . Here, the court did not make any findings with respect to the

relevant factors that it considered in making a determination regarding the best interests of the child … . Crucially, as with its analysis on the issue of relocation, the court, in awarding the mother sole custody, did not consider the father's stated concerns about the mother's immigration status and whether she intended to remove the child from the country. "Effective appellate review, whatever the case but especially in child visitation, custody or neglect proceedings, requires that appropriate factual findings be made by the trial court—the court best able to measure the credibility of the witnesses" … . Matter of Eddaoudi v Obtenu, 2025 NY Slip Op 04430, Fourth Dept 7-25-25

Practice Point: Consult this decision for some insight into the findings an appellate court needs to consider an appeal in a modification of custody proceeding. A judge's failure to consider a party's argument and failure to make findings of fact in support of the award of custody renders an appellate review impossible.

July 25, 2025

FAMILY LAW, JUDGES.

THE JUDGE SHOULD NOT HAVE DELEGATED ITS AUTHORITY TO SET A SCHEDULE FOR MOTHER'S PARENTAL ACCESS TO THE PARTIES IN THIS CUSTODY ACTION (SECOND DEPT).

The Second Department, reversing (modifying) Family Court, held the judge should not have left it up to mother and the non-family-member (Pierce) who brought the custody petition to determine mother's parental access:

… [A["court may not delegate its authority to determine parental access to either a parent or a child" … . Here, the Family Court improperly delegated the determination of the mother's parental access to the mother and Pierce. The record reflects that the relationship between Pierce and the mother has deteriorated and reveals troubling interactions between the parties, including one alleged instance where Pierce prevented the mother from visiting the child during a scheduled visitation. Accordingly, we remit the matter … to expeditiously establish both a supervisor for the mother's parental access with the child as well as a specific schedule for the mother's parental access in accordance with the best interests of

the child that shall be observed by both the mother and Pierce … . Matter of Pierce v Joyner, 2025 NY Slip Op 04250, Second Dept 7-23-25

Practice Point: The court cannot delegate its authority to set up a parental-access schedule to the parties in a custody action.

July 23, 2025

FORECLOSURE, CIVIL PROCEDURE.

FILING A REQUEST FOR JUDICIAL INTERVENTION CONSTITUTED TAKING PROCEEDINGS FOR THE ENTRY OF JUDGMENT WITHIN ONE YEAR OF DEFENDANT'S DEFAULT; THE FORECLOSURE ACTION SHOULD NOT HAVE BEEN DISMISSED AS ABANDONED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined this foreclosure action should not have been dismissed as abandoned on the ground plaintiff failed to take action within one year of defendant's default. In fact plaintiff filed a request for judicial intervention which constituted taking "proceedings for the entry of judgment within one year after the default:"

Pursuant to CPLR 3215(c), "[i]f the plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court shall not enter judgment but shall dismiss the complaint as abandoned . . . unless sufficient cause is shown why the complaint should not be dismissed." To avoid dismissal pursuant to CPLR 3215(c), "[i]t is not necessary for a plaintiff to actually obtain a default judgment within one year of the default" … . "Rather, 'as long as proceedings are being taken, and these proceedings manifest an intent not to abandon the case but to seek a judgment, the case should not be subject to dismissal'" … .

Here, the plaintiff demonstrated that, within one year after the defendant's default, the plaintiff filed a request for judicial intervention that sought a foreclosure settlement conference as mandated by CPLR 3408. "Where, as here, a settlement conference is a necessary prerequisite to obtaining a default judgment (see CPLR 3408[a], [m]), a formal judicial request for such a conference in connection with an

ongoing demand for the ultimate relief sought in the complaint constitutes 'proceedings for entry of judgment' within the meaning of CPLR 3215(c)" … . U.S. Bank N.A. v Newson, 2025 NY Slip Op 04269, Second Dept 7-23-25

Practice Point: The CPLR does not require a plaintiff to obtain a default judgment within a year of the default to preclude dismissal. Plaintiff need only take some action which indicates it does not intend to abandon the action. Here the filing of a request for judicial intervention was sufficient.

July 23, 2025

FORECLOSURE, CIVIL PROCEDURE.

THE PURPOSE AND REACH OF THE FORECLOSURE ABUSE PREVENTION ACT (FAPA) EXPLAINED IN SOME DETAIL (THIRD DEPT).

The Third Department, in a full-fledged opinion by Justice Reynolds Fitzgerald, determined that the Foreclosure Abuse Prevention Act (FAPA) applied and required the dismissal of the complaint on statute of limitations grounds:

… FAPA's enactment amended numerous CPLR provisions as well as other statutes, including: CPLR 213 (4) (a), stating that "[i]n any action [upon a note or mortgage], if the statute of limitations is raised as a defense, and if that defense is based on a claim that the [note] at issue was accelerated prior to, or by way of commencement of a prior action, a plaintiff shall be estopped from asserting that the instrument was not validly accelerated, unless the prior action was dismissed based on an expressed judicial determination, made upon a timely interposed defense, that the instrument was not validly accelerated"; CPLR 203 (h), stating that "[o]nce a cause of action upon a [note or mortgage] has accrued, no party may, in form or effect, unilaterally waive, postpone, cancel, toll, revive, or reset the accrual thereof, or otherwise purport to effect a unilateral extension of the limitations period prescribed by law to commence an action and to interpose the claim"; CPLR 3217 (e), stating that "[i]n any action on [a note or mortgage], the voluntary discontinuance of such action, whether on motion, order, stipulation or by notice, shall not, in form or effect, waive, postpone, cancel, toll, extend, revive or reset the limitations period to commence an action and to interpose a claim";

and CPLR 205-a (a), prohibiting the six-month period savings provision within which a plaintiff may recommence an action if the original action was terminated due to any form of neglect.

Having determined that FAPA applies to this foreclosure action and turning to the merits underlying defendant's motion for summary judgment based upon the statute of limitations, plaintiff is estopped from asserting that the mortgage debt was not validly accelerated pursuant to CPLR 213 (4), since the 2015 action was dismissed for plaintiff's failure to prosecute and was not dismissed based upon an expressed judicial determination that the debt was not validly accelerated … . HSBC Bank USA, N.A. v Vesely, 2025 NY Slip Op 04279, Third Dept 7-24-25

Practice Point: Consult this opinion for an in-depth discussion of the purpose and reach of the Foreclosure Abuse Prevention Act (FAPA).

July 24, 2025

FORECLOSURE, CIVIL PROCEDURE, JUDGES.

PLAINTIFF'S FAILURE TO COMPLY WITH A STATUS CONFERENCE ORDER REQUIRING THE FILING OF AN APPLICATION FOR AN ORDER OF REFERENCE DID NOT JUSTIFY THE SUA SPONTE DISMISSAL OF THE COMPLAINT (SECOND DEPT).

The Second Department, reversing Supreme Court in this foreclosure action, determined plaintiff's failure to comply with status conference order to file an application for an order of reference by a date certain did not warrant a sua sponte dismissal of the complaint:

"[A] court's power to dismiss a complaint, sua sponte, is to be used sparingly and only when extraordinary circumstances exist to warrant dismissal" … . "Here, the plaintiff's failure to comply with the status conference order directing it to file an application for an order of reference was not a sufficient ground upon which to direct dismissal of the complaint" … . … Supreme Court should have granted those branches of the plaintiff's motion which were pursuant to CPLR 5015(a) to

vacate the dismissal order and to restore the action to the active calendar …
. Federal Natl. Mtge. Assn. v Davis, 2025 NY Slip Op 04232, Second Dept 7-23-25

Practice Point: Failure to comply with a status conference order to apply for an order of reference by a certain date does not justify a judge's sua sponte dismissal of the complaint.

July 23, 2025

IMMUNITY, NEGLIGENCE, PRODUCTS LIABILITY, CONSTITUTIONAL LAW.

PLAINTIFFS ALLEGED A TEENAGER WHO COMMITTED RACIALLY-MOTIVATED MASS MURDER WAS ADDICTED TO SOCIAL MEDIA CONTENT PRESENTING THE VIEW THAT WHITES ARE BEING REPLACED BY NON-WHITES; PLAINTIFFS ALLEGED THE SOCIAL MEDIA PLATFORMS WERE DEFECTIVELY DESIGNED TO BE ADDICTIVE; OVER A TWO-JUSTICE DISSENT, THE DEFENDANT SOCIAL MEDIA PLATFORMS WERE DEEMED IMMUNE FROM SUIT BASED UPON THIRD-PARTY CONTENT PURSUANT TO SECTION 230 OF THE COMMUNICATIONS DECENCY ACT (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, in a full-fledged opinion by Justice Lindley, over a two-justice dissent, determined the actions against social media platforms alleging the platforms are defectively designed to be "addictive" such that a teenager's addiction to racist content led him to commit a racially-motivated mass shooting, should have been dismissed:

These consolidated appeals arise from four separate actions commenced in response to the mass shooting on May 14, 2022 at a grocery store in a predominately Black neighborhood in Buffalo. The shooter, a teenager from the Southern Tier of New York, spent months planning the attack and was motivated by the Great Replacement Theory, which posits that white populations in Western countries are being deliberately replaced by non-white immigrants and people of

color. After driving more than 200 miles from his home to Buffalo, the shooter arrived at the store and opened fire on Black individuals in the parking lot and inside the store with a Bushmaster XM-15 semiautomatic rifle, killing 10 people and wounding three others. * * *

The social media defendants moved to dismiss the complaints against them for failure to state a cause of action (see CPLR 3211 [a] [7]), contending, inter alia, that they are immune from liability under section 230 of the Communications Decency Act (section 230) (see 47 USC § 230 [c] [1], [2]) and the First Amendment of the Federal Constitution, applicable to the states through the Fourteenth Amendment. * * *

… [I]t is undisputed that the social media defendants qualify as providers of interactive computer services. The dispositive question is whether plaintiffs seek to hold the social media defendants liable as publishers or speakers of information provided by other content providers. Based on our reading of the complaints, we conclude that plaintiffs seek to hold the social media defendants liable as publishers of third-party content. We further conclude that the content-recommendation algorithms used by some of the social media defendants do not deprive those defendants of their status as publishers of third-party content. It follows that plaintiffs' tort causes of action against the social media defendants are barred by section 230. Patterson v Meta Platforms, Inc., 2025 NY Slip Op 04385, Fourth Dept 7-25-25

Practice Point: Consult this opinion for an in-depth discussion of whether social medial platforms can be liable for the actions of persons who become addicted to and are motivated to act by third-party social-media content. Here plaintiffs unsuccessfully argued that social media platforms are defectively designed using algorithms which foster addiction.

July 25, 2025

LABOR LAW-CONSTRUCTION LAW, EVIDENCE.

THERE IS NO BRIGHT-LINE MINIMUM HEIGHT DIFFERENTIAL FOR AN ELEVATION HAZARD PURSUANT TO LABOR LAW 240(1); HERE A FALL OF 10.5 TO 20 INCHES FROM A STACK OF PALLETS WARRANTED SUMMARY JUDGMENT (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff was entitled to summary judgment on the Labor Law 240(1) cause of action based upon a fall from a height of 10.5 to 20 inches. The court noted that, despite caselaw holding that a fall of 12 inches did not trigger the statute, there is no bright-line minimum height differential for an elevation hazard. Plaintiff was standing on a stack of pallets to operate a masonry saw when a plank broke and he fell:

The fact that plaintiff fell from a height of approximately 10 ½ to 20 inches is not a bar to summary judgment because the height differential is not, as a matter of law, de minimis. While this Court has previously held that a height differential of at most 12 inches above the floor was insufficient to find an elevation-related risk … , the jurisprudence of this Court has since evolved, recently reiterating that "[t]here is no bright-line minimum height differential that determines whether an elevation hazard exists" … . We have repeatedly found violations of Labor Law § 240(1) predicated upon falls from similar heights as the one at bar (see Ferguson v Durst Pyramid, LLC, 178 AD3d 634, 635 [1st Dept 2019] [fall from inverted bucket]; see also Megna, 306 AD2d at 164 [fall from temporary two-step wooden staircase]; Brown, 137 AD3d at 703-704 [fall through an opening in latticework rebar deck to plywood 12 to 18 inches below]; Arrasti, 60 AD3d at 583 [fall from ramp to the floor 18 inches below]; Haskins, 227 AD3d at 409 [fall into hole 2 to 2 ½ feet deep]). Furthermore, here, the senior superintendent of defendant Tishman Construction Corporation of New York admitted that the makeshift pallet structure was an "improper work platform" that was "against the most basic safety rules." Palumbo v Citigroup Tech., Inc., 2025 NY Slip Op 04298, First Dept 7-24-25

Practice Point: There is no bright-line minimum height differential for an elevation hazard which will trigger liability under Labor Law 240(1). Here a fall of between 10.5 and 20 inches from a stack of pallets warranted summary judgment.

July 24, 2025

MEDICAL MALPRACTICE, NEGLIGENCE, EVIDENCE, JUDGES.

PLAINTIFF IN THIS MED MAL ACTION SHOULD NOT HAVE BEEN PRECLUDED FROM PRESENTING EVIDENCE DECEDENT SHOULD HAVE BEEN GIVEN A BLOOD TRANSFUSION ON THE GROUND THE ISSUE WAS NOT PLED AND PLAINTIFF'S REQUEST FOR A MISSING WITNESS JURY INSTRUCTION WHEN THE DEFENSE INDICATED IT WAS NOT GOING TO CALL THREE DEFENDANTS SHOULD HAVE BEEN GRANTED; DEFENSE VERDICT REVERSED AND NEW TRIAL ORDERED (FOURTH DEPT).

The Fourth Department, ordering a new trial in this medical malpractice action after a defense verdict, determined plaintiff's should not have been precluded from presenting evidence that decedent should have received a blood transfusion in the emergency room on the ground the issue had not been pled and the judge should have given the missing witness jury instruction after the defense indicated it was not going call three defendants:

… [P]laintiff from the outset alleged that the ED [emergency department] defendants failed to act upon complaints, signs, symptoms, and diagnostic testing, and such allegations were neither new nor would have been a surprise to the ED defendants because they had responded during summary judgment motion practice to the allegation that they should have acted upon the drop in hemoglobin and hematocrit levels. …

… [T]he court abused its discretion in failing to give a missing witness charge for defendants Patel, Chan, and Alexander. A trier of fact in a civil proceeding may draw the strongest inference that the opposing evidence permits against a party who fails to testify … . This type of instruction, which is commonly referred to as a missing witness charge, "derives from the commonsense notion that the nonproduction of evidence that would naturally have been produced by an honest and therefore fearless claimant permits the inference that its tenor is unfavorable to

the party's cause" … . In seeking use of this charge, "[t]he burden, in the first instance, is upon the party seeking the charge to promptly notify the court that there is an uncalled witness believed to be knowledgeable about a material issue pending in the case, that such witness can be expected to testify favorably to the opposing party and that such party has failed to call [the witness] to testify" … . Once the foregoing is established, the burden shifts to the party opposing the charge "to account for the witness'[s] absence or otherwise demonstrate that the charge would not be appropriate" … . The opposing party's burden can be met by demonstrating, inter alia, that "the testimony would be cumulative to other evidence" … . Heinrich v Serens, 2025 NY Slip Op 04318, Fourth Dept 7-25-25

Practice Point: Consult this decision for insight into when the court should give the missing witness jury instruction. Here in the med mal case the defense notification that it was not going to call three defendants as witnesses justified plaintiff's request for the instruction. Under the facts, the request should have been granted.

July 25, 2025

MEDICAL MALPRACTICE, NEGLIGENCE, EVIDENCE.

IN A MED MAL ACTION, AN EXPERT'S AFFIRMATION WHICH IS NOT SUPPORTED BY THE RECORD WILL BE DEEMED "CONCLUSORY" AND WILL NOT SUPPORT SUMMARY JUDGMENT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendants' motion for summary judgment in this medical malpractice case should not have been granted because the expert affirmation submitted is support of the motion was "conclusory and not supported by the record:"

… [D]efendants failed to establish their prima facie entitlement to judgment as a matter of law dismissing the complaint insofar as asserted against them. The defendants submitted, inter alia, the affirmation of an expert, whose opinions regarding the defendants' alleged failure to diagnose the plaintiff's aortic dissection after receipt of certain X-ray results and blood test results were conclusory and unsupported by the record … . That expert's opinion regarding proximate cause was also conclusory and insufficient to meet the defendants' burden as the parties

moving for summary judgment … . In v Maimonides Med. Ctr., 2025 NY Slip Op 04238, Second Dept 7-23-25

Practice Point: In a med mal case. an expert affirmation which is not supported by the record will be deemed "conclusory" and insufficient to support summary judgment.

July 23, 2025

MUNICIPAL LAW, ZONING.

BEFORE GRANTING THE AREA VARIANCE, THE ZONING BOARD OF APPEALS DID NOT REFER THE APPLICATION TO THE PLANNING BOARD AS REQUIRED BY THE GENERAL MUNICIPAL LAW; THE DETERMINATION WAS ANNULLED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the petition contesting the area variance granted by the Village of Brockport Zoning Board of Appeals (ZBA) should not have been dismissed on statute of limitations grounds. The General Municipal Law requires that the ZBA first refer a variance application to the planning board, which was not done. Therefore the ZBA 's determination was annulled and the petition reinstated:

… General Municipal Law § 239-m requires that a village zoning body, before taking final action on specified proposed actions, refer such proposed actions to a county planning agency for its recommendation (see § 239-m [2]-[4] …). Use and area variances, if they apply to real property set forth in the statute, are proposed actions for which referral is required … . Nevertheless, a county planning agency may enter into an agreement with a village "to provide that certain proposed actions . . . are of local, rather than inter-community or county-wide concern, and are not subject to referral" under the statute … . * * *

Inasmuch as the agreement does not exempt [the] application for an area variance from the referral requirement … and the ZBA did not refer the application to the county planning agency, the ZBA's approval of the application is jurisdictionally defective … . Consequently, the statute of limitations did not begin to run upon the

filing of the jurisdictionally defective document with the village clerk, and the court thus erred in granting the motion to dismiss the petition as untimely … . Moreover, the ZBA's failure to refer [the] application for an area variance to the county planning agency under these circumstances renders its approval of the application " 'null and void' " … . Inasmuch as the ZBA's approval of the area variance is null and void, the further appropriate remedy is to remit the matter to the ZBA for a new determination on [the] application … . … [W]e reverse the judgment, deny the motion, reinstate the petition, grant the petition in part, annul the ZBA's determination granting the area variance, and remit the matter to the ZBA for a new determination on the application. Matter of Johnson v Zoning Bd. of Appeals of Vil. of Brockport, 2025 NY Slip Op 04326, Fourth Dept 7-25-25

Practice Point: When dealing with local zoning issues, read the applicable statutes and rules carefully. The municipality's failure to comply with them may provide an opening for judicial action. Here the ZBA's failure to refer an area variance application to the planning board before granting the application rendered the ZBA determination null and void.

July 25, 2025

NEGLIGENCE, EDUCATION-SCHOOL LAW, EVIDENCE.

PLAINTIFF, A DEVELOPMENTALLY DISABLED STUDENT, WAS KNOCKED OVER BY ANOTHER STUDENT; THE DEFENDANT SCHOOL HAS A DUTY TO PROPERLY SUPERVISE ITS STUDENTS; QUESTIONS OF FACT PRECLUDED SUMMARY JUDGMENT IN FAVOR OF DEFENDANT SCHOOL (THE YOUNG ADULT INSTITUTE, INC.) (SECOND DEPT).

The Second Department, reversing Supreme Court, determined there were questions of fact precluding summary judgment in favor of defendant in this negligent supervision case. Plaintiff, a developmentally disable adult and a member of defendant Young Adult Institute, Inc. (YAI) was knocked over in a parking lot by a fellow student:

Programs such as YAI that provide services to developmentally disabled adults have a duty to adequately supervise such students in their care, "and are liable for foreseeable injuries proximately related to the absence of adequate supervision" … . "'[I]n determining whether the duty to provide adequate supervision has been breached in the context of injuries caused by the acts of fellow students, it must be established that school authorities had sufficiently specific knowledge or notice of the dangerous conduct which caused injury; that is, that the third-party acts could reasonably have been anticipated'" … . "'Even if a breach of the duty of supervision is established, it must [also] be demonstrated that such negligence was a proximate cause of the injuries sustained'" … . "'The test for causation is whether under all the circumstances the chain of events that followed the negligent act or omission was a normal or foreseeable consequence of the situation created by the school's negligence'" … . Sclafani v Young Adult Inst., Inc., 2025 NY Slip Op 04266, Second Dept 7-23-25

Practice Point: A provider of services to developmentally disabled adults has a duty to adequately supervise its students. Here there were questions of fact about whether supervision was adequate. Plaintiff student was knocked over by another student in a parking lot.

July 23, 2025

NEGLIGENCE, EVIDENCE.

IN A SLIP AND FALL, PROOF OF GENERAL CLEANING PRACTICES DOES NOT DEMONSTRATE A LACK OF CONSTRUCTIVE NOTICE OF THE ALLEGED DANGEROUS CONDITION; ONLY PROOF THE AREA WAS INSPECTED OR CLEANED CLOSE IN TIME TO THE FALL WILL SUFFICE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendants in this slip and fall case did not demonstrate a lack of constructive notice of the dangerous condition and therefore were not entitled to summary judgment:

… [T]he evidence submitted by the defendants in support of their motion failed to demonstrate, prima facie, that they lacked constructive notice of the allegedly dangerous condition that caused the plaintiff to fall. The defendants' property manager provided information only as to the building's general cleaning and inspection practices, and the defendants did not proffer any evidence demonstrating when the staircase was last cleaned or inspected before the plaintiff slipped and fell … . Johnson v 2525-2537 Realty, LLC, 2025 NY Slip Op 04239, Second Dept 7-23-25

Practice Point: In a slip and fall, a lack of constructive notice of the alleged dangerous condition cannot be proved by evidence of general cleaning practices. There must be evidence the area was cleaned or inspected close in time to the fall.

July 23, 2025

NEGLIGENCE, EVIDENCE.

PLAINTIFF TRIPPED OVER AN EMPTY MILK CRATE ON A CARPETED FLOOR; THE CONDITION WAS DEEMED "OPEN AND OBVIOUS" AS A MATTER OF LAW ENTITLING DEFENDANTS TO SUMMARY JUDGMENT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendants were entitled to summary judgment in this slip and fall case on the ground the empty milk crate plaintiff tripped over was an "open and obvious" condition:

The accident occurred in the morning, during one of the plaintiff's usual daytime shifts. As the plaintiff was walking in a hallway with carpeting she described as "reddish, green-ish . . . earth colors," she tripped on an empty, black milk crate. By all accounts, the milk crate was an ordinary milk crate and it was not attached to the floor in any way … . * * *

… [T]he hotel defendants established … the empty milk crate was open and obvious, as it was readily observable by those employing the reasonable use of their senses, and was not inherently dangerous under all the existing circumstances

… . Raspberry v Best W. JFK Airport Hotel, 2025 NY Slip Op 04264, Second Dept 7-23-25

Practice Point: This decision presents a rare example of a condition which caused a trip and fall, i.e. an empty milk crate on a carpeted floor, deemed "open and obvious" as a matter of law.

July 23, 2025

NEGLIGENCE, EVIDENCE, VEHICLE AND TRAFFIC LAW.

TO BE ENTITLED TO SUMMARY JUDGMENT IN THIS TRAFFIC ACCIDENT CASE THE TOWN DEFENDANTS NEEDED TO DEMONSTRATE EITHER THAT THEY WERE NOT NEGLIGENT OR THAT THEIR NEGLIGENCE WAS NOT A PROXIMATE CAUSE OF THE ACCIDENT; BY FOCUSING ONLY ON PROXIMATE CAUSE, THE TOWN DEFENDANTS EFFECTIVELY ASSUMED THEY WERE NEGLIGENT; THE EVIDENCE THE DRIVER OF THE TOWN DUMP TRUCK WAS TRAVELING TOO FAST FOR THE CONDITIONS PRECLUDED SUMMARY JUDGMENT IN THE TOWN'S FAVOR (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the town defendants' motion for summary judgment in this traffic accident case should not have been granted. The town's dump truck collied with a car which failed to yield the right–of-way at an intersection, veered into plaintiff's decedent's lane and collided with plaintiff's decedent's car. The town focused its argument on proximate cause, contending that the car which failed to yield the right-of-way was the sole proximate cause of the accident. But, to be entitled to summary judgment in this context, the defendant must demonstrate it was not negligent. By focusing on proximate case, the town defendants "must assume, arguendo, that they were negligent:"

The Town defendants' submissions established that LaRocca, who was driving a dump truck containing 10 tons of asphalt, did not adhere to an advisory traffic sign

recommending that speed be reduced to 35 miles per hour prior to entering the intersection and further established that the tree line limited his view of cross traffic at the intersection. If a trier of fact were to determine that LaRocca's speed was unreasonable under the existing conditions, the trier of fact could also conclude that LaRocca's own unreasonable speed was what deprived him of sufficient time to avoid the collision … . * * *

By focusing on "sole proximate cause" in this common-law negligence action, the Town defendants overlook the fact that their burden on their motion was to establish "as a matter of law that [they were] not negligent or that, even if [they were] negligent, [their] negligence was not a proximate cause of the accident" … . In other words, when moving for summary judgment in the negligence context and addressing only the issue of proximate cause, the Town defendants must effectively assume, arguendo, that they were negligent … . Inasmuch as the Town defendants did not do that here, we need not address their proximate cause argument. Gates v Simpson, 2025 NY Slip Op 04313, Fourth Dept 7-25-24

Practice Point: A defendant in a traffic accident case is entitled to summary judgment (1) if defendant was not negligent; or (2) even if defendant was negligent, defendant was not a proximate cause of the accident. In making a motion for summary judgment, if a defendant does not address defendant's own negligence and focuses only on proximate cause, the defendant is "assuming" defendant was negligent.

July 25, 2025

RELIGION, CONSTITUTIONAL LAW, FAMILY LAW.

A COURT CANNOT MANDATE A SPECIFIC RELIGIOUS EXERCISE FOR A CHILD (ORDERING THAT A CHILD ATTEND A SPECIFIC CHURCH FOR EXAMPLE); RATHER, THE COURT SHOULD DESIGNATE A PARENT TO HAVE DECISION-MAKING AUTHORITY OVER A CHILD'S RELIGIOUS EDUCATION AND EXCERCISE (FOURTH DEPT).

The Fourth Department, reversing (modifying) Family Court, determined the order that a child "shall attend the Church of Jesus Christ of Latter-Day Saints …" was unconstitutional in that it mandated specific religious exercise:

… [T]he court's order that the parties' middle child "shall attend the Church of Jesus Christ of Latter-Day Saints every Sunday" except for six Sundays per year when the mother has access with the child, is unconstitutional insofar as it mandates specific religious exercise … . … [W]e remit the matter to Family Court to designate which parent will have decision-making authority for that child's religious education and practice. Matter of Clark v Strassburg, 2025 NY Slip Op 04390, Fourth Dept 7-25-25

Practice Point: It is unconstitutional for a court, in the context of a Family Court proceeding, to order that a child attend a particular church. The court should designate a parent to have decision-making authority over a child's religious education and practice.

July 25, 2025

TOXIC TORTS, EVIDENCE.

THE MAJORITY CONCLUDED PLAINTIFF IN THIS ASBESTOS-EXPOSURE CASE PROVED GENERAL AND SPECIFIC CAUSATION THROUGH EXPERT TESTIMONY; THE DISSENT ARGUED NEITHER CAUSATION ELEMENT WAS SUPPORTED BY SUFFICIENT EVIDENCE (FOURTH DEPT).

The Fourth Department, affirming the denial of the defense motion to set aside the verdict in this asbestos-exposure case, determined plaintiff, through expert testimony, demonstrated both general and specific causation. The dissent found the causation evidence insufficient:

… [I]t is well established that, in cases involving exposure to asbestos or other toxins, " 'an opinion on causation should set forth a plaintiff's exposure to a toxin, that the toxin is capable of causing the particular illness (general causation) and that plaintiff was exposed to sufficient levels of the toxin to cause the illness (specific causation)' " … . " '[I]t is not always necessary for a plaintiff to quantify exposure levels precisely or use the dose-response relationship, provided that whatever methods an expert uses to establish causation are generally accepted in the scientific community' " … . Indeed, "there may be several ways" for an expert to demonstrate causation, but "any method used must be 'generally accepted as reliable in the scientific community' " … .

From the dissent:

I do not believe that Joseph A. Skrzynski (plaintiff) established general causation, i.e., that exposure to chrysotile asbestos as a component of friction products can cause peritoneal mesothelioma, nor did plaintiff meet his burden of proof on specific causation, i.e., that he was exposed to sufficient levels of chrysotile asbestos to cause peritoneal mesothelioma. Thus, in my view, there is "no valid line of reasoning and permissible inferences [that] could possibly lead rational people to the conclusion reached by the jury on the basis of the evidence presented at trial," and the verdict should be set aside on the ground that it is not supported by legally sufficient evidence … . Skrzynski v Akebono Brake Corp., 2025 NY Slip Op 04322, Fourth Dept 7-25-25

Practice Point: Consult this decision and the dissent for insight into the proof requirements for general and specific causation in a toxic torts action. Plaintiff must prove the toxin (asbsestos in this case) is capable of causing the disease (mesothelioma in this case) and the toxin in fact caused plaintiff's disease.

July 25, 2025