

NEW YORK APPELLATE DIGEST, INC.

An Organized Compilation of Summaries of Selected Decisions, Mostly Reversals, Released by Our New York State Appellate Courts April 27 – May 1, 2026, and Posted on the New York Appellate Digest Website on Monday, May 4, 2026. 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. Copyright 2026 New York Appellate Digest, Inc.

Weekly Reversal
Report
April 27 – May 1,
2026

[Table of Contents](#)

Contents

BATTERY, CORRECTION LAW, EMPLOYMENT LAW, COURT OF CLAIMS.....4

THE “RECTAL INTRUSION” BY CORRECTION OFFICERS SEEKING TO FORCE CLAIMANT-INMATE TO COMPLY WITH THEIR ORDERS SHOULD HAVE BEEN CONSIDERED AS AN ELEMENT OF DAMAGES IN THIS BATTERY ACTION AGAINST THE STATE; THE CONDUCT WAS WITHIN THE SCOPE OF THE CORRECTION OFFICERS’ EMPLOYMENT; THE STATE CAN BE HELD VICARIOUSLY LIABLE (THIRD DEPT).....4

CIVIL PROCEDURE, ATTORNEYS, AGENCY.....5

AN ATTORNEY IS NOT AUTOMATICALLY AN AGENT FOR THE ACCEPTANCE OF PROCESS; HERE DEFENDANTS’ FORMER ATTORNEY WAS NOT AUTHORIZED TO ACCEPT SERVICE ON DEFENDANTS’ BEHALF; PERSONAL JURISDICTION WAS NOT OBTAINED (SECOND DEPT).....5

CIVIL PROCEDURE, ATTORNEYS, NEGLIGENCE.....6

LAW OFFICE FAILURE DEEMED AN ADEQUATE EXCUSE FOR A DEFAULT IN RESPONDING TO A SUMMARY JUDGMENT MOTION; TWO JUSTICE DISSENT (FOURTH DEPT).....6

CIVIL PROCEDURE.7

THE DEFENDANTS’ PRE-ANSWER MOTION TO DISMISS EXTENDED THE TIME FOR PLAINTIFFS TO AMEND THE COMPLAINT AS A MATTER OF RIGHT UNTIL TEN DAYS AFTER SERVICE OF THE NOTICE OF ENTRY OF THE ORDER DETERMINING THE MOTION (SECOND DEPT).7

CONTRACT LAW, CIVIL PROCEDURE, FRAUD.7

IN THIS BREACH OF CONTRACT ACTION BROUGHT BY PLAINTIFF DONALD J TRUMP AGAINST MARY L TRUMP, DEFENDANT WAS ENTITLED TO DISCOVERY RELEVANT TO HER AFFIRMATIVE DEFENSE (FIRST DEPT).7

CORRECTION LAW, ATTORNEYS, CIVIL PROCEDURE, JUDGES.8

PETITIONER-INMATE PREVAILED IN THE PROCEEDING TO ANNUL THE PENALTY OF CONFINEMENT FOR 120 DAYS IN A SPECIAL HOUSING UNIT (SHU); PETITIONER WAS ENTITLED THE AWARD OF COUNSEL FEES (THIRD DEPT).8

CRIMINAL LAW, ATTORNEYS, APPEALS, CONSTITUTIONAL LAW, JUDGES. 10

DEFENSE COUNSEL’S FAILURE TO OBJECT TO THE EMPANELING OF AN ANONYMOUS JURY CONSTITUTED INEFFECTIVE ASSISTANCE; NEW TRIAL ORDERED (THIRD DEPT).. 10

Table of Contents

CRIMINAL LAW, JUDGES, ATTORNEYS, CONSTITUTIONAL LAW..... 11

DEFENDANT’S FUNDAMENTAL RIGHT TO BE PRESENT AT RESENTENCING WAS VIOLATED, DESPITE DEFENSE COUNSEL’S STATEMENT THAT DEFENDANT’S PRESENCE WAS NOT NECESSARY (THIRD DEPT). 11

CRIMINAL LAW, JUDGES, ATTORNEYS..... 12

THE JUDGE’S LAW CLERK, WHO REVIEWED DEFENDANT’S MOTION TO VACATE HIS CONVICTION, MAY HAVE PARTICIPATED IN DEFENDANT’S PROSECUTION; TO AVOID THE APPEARANCE OF IMPROPRIETY, THE DENIAL OF THE MOTION WAS REVERSED (THIRD DEPT). 12

FAMILY LAW, JUDGES, ATTORNEYS, CIVIL PROCEDURE, CONSTITUTIONAL LAW. 13

UPON RESPONDENT’S FAILURE TO APPEAR, FAMILY COURT DISMISSED RESPONDENT’S COUNSEL AND HELD THE ORDER-OF-PROTECTION HEARING IN RESPONDENT’S ABSENCE; RESPONDENT WAS DENIED DUE PROCESS OF LAW; ORDER VACATED (THIRD DEPT)..... 13

FAMILY LAW, JUDGES, ATTORNEYS, CONSTITUTIONAL LAW. 14

FATHER IN THIS CHILD SUPPORT MATTER WAS ESSENTIALLY FORCED TO PROCEED PRO SE BY THE SUPPORT MAGISTRATE IN VIOLATION OF FATHER’S RIGHT TO COUNSEL (SECOND DEPT). 14

FAMILY LAW, CONTRACT LAW, JUDGES..... 15

ALL PARTIES AGREE THE TWO SURROGACY AGREEMENTS ARE UNENFORCEABLE; MATTER REMITTED FOR A HEARING TO DETERMINE PARENTAGE BASED ON THE INTENT OF THE PARTIES AND THE BEST INTERESTS OF THE CHILDREN (FOURTH DEPT). 15

FORECLOSURE, CIVIL PROCEDURE. 16

AFTER THE JUDGMENT OF FORECLOSURE AND THE EXPIRATION OF THE TIME FOR APPEAL, DEFENDANT, PRIOR TO THE SALE OF THE PROPERTY, PURSUANT TO CPLR 2221, MOVED TO VACATE THE JUDGMENT BASED ON THE FORECLOSURE ABUSE PREVENTION ACT (FAPA); THE MOTION SHOULD NOT HAVE BEEN DENIED AS UNTIMELY; MATTER REMITTED (FIRST DEPT). 16

FORECLOSURE, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL), EVIDENCE..... 18

PLAINTIFF DID NOT PROVE THE RPAPL 1304 NOTICE OF FORECLOSURE WAS PROPERTY MAILED TO DEFENDANT; THE MAILING WAS DONE BY A THIRD PARTY AND NO FIRST-HAND KNOWLEDGE OF THE THIRD-PARTY’S MAILING PROCEDURE WAS PRESENTED (FIRST DEPT). 18

[Table of Contents](#)

MEDICAL MALPRACTICE, NEGLIGENCE, EVIDENCE. 19

THE EXPERT TESTIMONY OFFERED TO DEMONSTRATE A CAUSAL RELATIONSHIP BETWEEN LOW-BIRTH-WEIGHT AND AUTISM SHOULD HAVE BEEN PRECLUDED; NEW TRIAL ORDERED (SECOND DEPT). 19

NEGLIGENCE, EMPLOYMENT LAW, EDUCATION-SCHOOL LAW, AGENCY. 20

THE DREXEL UNIVERSITY COOPERATIVE EDUCATION PROGRAM (CO-OP) ARRANGES FOR STUDENTS TO WORK FOR PARTICIPATING EMPLOYERS FOR COLLEGE CREDIT; DREXEL DID NOT EXERCISE SUFFICIENT SUPERVISION OVER THE STUDENTS TO BE HELD VICARIOUSLY LIABLE FOR ANY WORKPLACE NEGLIGENCE ON THE STUDENTS' PART (SECOND DEPT). 20

NEGLIGENCE, EMPLOYMENT LAW, AGENCY. 21

THE FACT THAT THE EMPLOYER MAY BE VICARIOUSLY LIABLE FOR AN EMPLOYEE'S NEGLIGENCE DOES NOT WARRANT DISMISSAL OF THE ACTION AGAINST THE EMPLOYEE (SECOND DEPT). 21

NEGLIGENCE, EVIDENCE. 22

IN A REAR-END COLLISION CASE, IN ORDER TO RAISE A QUESTION OF FACT ABOUT WHETHER BRAKE-FAILURE WAS THE CAUSE, THE DEFENDANT MUST DEMONSTRATE THE FAILURE WAS UNANTICIPATED AND REASONABLE CARE WAS TAKEN TO KEEP THE BRAKES IN GOOD WORKING ORDER; NOT THE CASE HERE; PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (SECOND DEPT). 22

PRIVILEGE, CIVIL PROCEDURE, EDUCATION-SCHOOL LAW, EMPLOYMENT LAW, EVIDENCE, LABOR LAW. 23

THE EDUCATION LAW PRIVILEGE WHICH PROTECTS HOSPITAL QUALITY-REVIEW PROCEEDINGS DID NOT APPLY TO REPORTS ABOUT UNSAFE WORKING CONDITIONS AT THE HOSPITAL; PLAINTIFF IN THIS WRONGFUL TERMINATION ACTION WAS ENTITLED TO DISCOVERY OF THE REPORTS (THIRD DEPT). 23

BATTERY, CORRECTION LAW, EMPLOYMENT LAW, COURT OF CLAIMS.
THE “RECTAL INTRUSION” BY CORRECTION OFFICERS SEEKING TO FORCE CLAIMANT-INMATE TO COMPLY WITH THEIR ORDERS SHOULD HAVE BEEN CONSIDERED AS AN ELEMENT OF DAMAGES IN THIS BATTERY ACTION AGAINST THE STATE; THE CONDUCT WAS WITHIN THE SCOPE OF THE CORRECTION OFFICERS’ EMPLOYMENT; THE STATE CAN BE HELD VICARIOUSLY LIABLE (THIRD DEPT).

The Third Department, reversing the Court of Claims, in a full-fledged opinion by Justice Mackey, determined the court should have considered the insertion of an object in claimant’s rectum as an element of damages in this suit by claimant-inmate against the State. The Court of Claims determined the State could not be vicariously liable because the conduct was outside the scope of the correction-officers’ employment. The Third Department disagreed, noting that the officers were attempting to force claimant to comply with their orders and the conduct was not motivated by sexual gratification:

There is no evidence that the rectal intrusion here was for any of the officers’ personal sexual gratification. Rather, the officers’ statements made during and immediately following the incident, as reported by claimant and credited by the Court of Claims, reflect that the sexually related conduct here was part of an overall — albeit objectively excessive — use of force to compel claimant’s compliance with a directive and, thus, was part of the officers’ employment-related function to enforce discipline within the correctional facility (see Correction Law § 137 [5]; 7 NYCRR 251-1.2 [d] ...). ... [T]he potential for such abuse of authority, if not the precise vile conduct engaged in here, is expressly addressed in the applicable instructions to correction officers in performing their employment-related disciplinary duties (see generally Correction Law § 137; 7 NYCRR 251-1.2). The record thus establishes defendant’s liability as to that part of the claim for damages related to the rectal intrusion Accordingly, we reverse the judgment to the extent that it excluded the same and remit for a new determination of claimant’s damages not inconsistent with this Court’s decision [C.J. v State of New York, 2026 NY Slip Op 02699, Third Dept 4-30-26](#)

[Table of Contents](#)

Practice Point: Here the “rectal intrusion” inflicted by correction officers upon claimant-inmate was part of an attempt to force claimant to comply with their orders. Therefore the conduct was within the scope of the officers’ employment for which the State can be vicariously liable.

April 30, 2026

CIVIL PROCEDURE, ATTORNEYS, AGENCY.

AN ATTORNEY IS NOT AUTOMATICALLY AN AGENT FOR THE ACCEPTANCE OF PROCESS; HERE DEFENDANTS’ FORMER ATTORNEY WAS NOT AUTHORIZED TO ACCEPT SERVICE ON DEFENDANTS’ BEHALF; PERSONAL JURISDICTION WAS NOT OBTAINED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that defendants’ former attorney did not have authority to accept service on defendants’ behalf. Personal jurisdiction over defendants was therefore never attained:

”Service of process must be made in strict compliance with statutory methods for effecting personal service upon a natural person pursuant to CPLR 308” CPLR 308(3) permits service upon an individual to be made “by delivering the summons within the state to the agent for service of the person to be served designated under rule 318” “An attorney is not automatically considered the agent of his client for the purposes of the service of process” “[A]n attorney who agrees to accept service on behalf of individual defendants does not automatically become an agent for the acceptance of process, in the absence of proof that his clients actually knew of that representation” Here, the plaintiff served the summons and complaint upon the defendant’s former attorney, who lacked authority to accept service on behalf of the defendant. Thus, personal jurisdiction over the defendant was never obtained. [Nationstar Mtge., LLC v Klamm, 2026 NY Slip Op 02661, Second Dept 4-29-26](#)

Table of Contents

Practice Point: An attorney is not automatically an agent of his client for service of process. Here defendants' former counsel was not authorized to accept service on their behalf.

April 29, 2026

CIVIL PROCEDURE, ATTORNEYS, NEGLIGENCE.

LAW OFFICE FAILURE DEEMED AN ADEQUATE EXCUSE FOR A DEFAULT IN RESPONDING TO A SUMMARY JUDGMENT MOTION; TWO JUSTICE DISSENT (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, over a two-justice dissent, determined that law office failure was an adequate excuse for plaintiffs' default in responding to defendant's motion for summary judgment in this traffic accident case:

... [P]laintiffs proffered a reasonable excuse of law office failure for the brief delay in serving their opposition papers to defendant's motion (see CPLR 2005...). Although plaintiffs' counsel admittedly failed to properly calendar the motion opposition date, counsel did attempt to seek defendant's consent for an adjournment prior to the return date of the motion, which plaintiffs' counsel apparently believed to be the due date for the opposition to defendant's motion. Further, plaintiffs' counsel submitted opposition papers on the return date, albeit after business hours, upon the mistaken belief that the motion was to be taken on submission. There is no evidence of a willful default and the negligible delay cannot be said to have prejudiced defendant [April I.O. v Taylor, 2026 NY Slip Op 02741, Fourth Dept 5-1-26](#)

Practice Point: Consult this decision for a rare instance of law office failure serving as an adequate excuse for a default in responding to a motion for summary judgment.

May 1, 2026

CIVIL PROCEDURE.

THE DEFENDANTS' PRE-ANSWER MOTION TO DISMISS EXTENDED THE TIME FOR PLAINTIFFS TO AMEND THE COMPLAINT AS A MATTER OF RIGHT UNTIL TEN DAYS AFTER SERVICE OF THE NOTICE OF ENTRY OF THE ORDER DETERMINING THE MOTION (SECOND DEPT).

The Second Department, reversing Supreme Court, noted that a pre-answer motion to dismiss extends the time to amend the complaint as a matter of right:

The plaintiffs correctly contend that the Supreme Court erred in determining that the plaintiffs required leave of court to amend the complaint. “Pursuant to CPLR 3211(f), service by the defendant[s] of the pre-answer motion pursuant to CPLR 3211(a) to dismiss the complaint extended the [defendants’] time to answer the complaint until 10 days after service of notice of entry of the order determining the motion, and therefore extended the time in which the [plaintiffs] could amend the complaint as of right” [Karp v Madison Realty Capital, L.P., 2026 NY Slip Op 02637, Second Dept 4-29-26](#)

April 29, 2026

CONTRACT LAW, CIVIL PROCEDURE, FRAUD.

IN THIS BREACH OF CONTRACT ACTION BROUGHT BY PLAINTIFF DONALD J TRUMP AGAINST MARY L TRUMP, DEFENDANT WAS ENTITLED TO DISCOVERY RELEVANT TO HER AFFIRMATIVE DEFENSE (FIRST DEPT).

The First Department, reversing Supreme Court, determined defendant’s discovery requests were relevant to her “fraudulent inducement” affirmative defense and should have been granted:

Plaintiff commenced this action against defendant for breach of the confidentiality provisions of a 2001 settlement agreement. In her answer, defendant asserted the affirmative defense of fraudulent inducement. Specifically, she alleged that she

Table of Contents

relied upon the valuation of certain assets set forth in the parties' 2001 settlement agreement, and that those valuations were false. Defendant's motion to compel seeks discovery of materials related to the valuations provided in the settlement agreement. Plaintiff bears the burden of establishing that the discovery sought by defendant, which relates to an affirmative defense of fraudulent inducement that plaintiff has not otherwise challenged in this action, is improper

Supreme Court improvidently exercised its discretion in denying defendant's motion. CPLR 3101(a) directs "full disclosure of all matter material and necessary in the prosecution or defense of an action," and is to be "interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening issues and reducing delay and prolixity" These principles entitle defendant to the requested discovery material to establish her affirmative defense [Trump v Trump, 2026 NY Slip Op 02735, First Dept 4-30-26](#)

Practice Point: Here in this breach of contract action, defendant was entitled to discovery relevant to her "fraudulent inducement" affirmative defense.

April 30, 2026

CORRECTION LAW, ATTORNEYS, CIVIL PROCEDURE, JUDGES.

PETITIONER-INMATE PREVAILED IN THE PROCEEDING TO ANNUL THE PENALTY OF CONFINEMENT FOR 120 DAYS IN A SPECIAL HOUSING UNIT (SHU); PETITIONER WAS ENTITLED THE AWARD OF COUNSEL FEES (THIRD DEPT).

The Third Department, reversing Supreme Court, determined that petitioner-inmate had prevailed in the proceeding to annul the 120-day confinement in the Special Housing Unit (SHU) (imposed on him for threats of violence) and therefore was entitled to counsel fees. The 120-day confinement was annulled because the correctional facility did not comply with the requirements of the Humane Alternatives to Long-Term Solitary Confinement Act (hereinafter the HALT Act)

[Table of Contents](#)

and the Special Housing Unit Exclusion Law (hereinafter the SHU Exclusion Law):

... [T]he plain language of these statutes clearly required specific conduct and findings to impose a 120-day confinement sanction against an incarcerated individual housed in an RMHU [residential mental health unit]. Even putting aside the lack of the required written findings, respondent did not have a reasonable basis to conclude that petitioner’s statements — made during a crisis call while he was confined in an RMHU without any indication that he had access to the individuals who were the subject of his threats or a history of causing serious physical injury or death to another person — constituted a qualifying threat under Correction Law § 137 (6) (k) (ii) (A). Although Supreme Court recognized as much in annulling the 120-day confinement sanction, expressly stating that “the administrative record . . . does not contain facts from which the court can discern a rational basis for respondent’s determination,” it nevertheless denied petitioner’s application for counsel fees on the ground that respondent’s position was substantially justified. Given the inherent conflict in Supreme Court’s determinations and our finding that respondent’s position was not “substantially justified” within the meaning of CPLR 8601, we find that Supreme Court abused its discretion in denying petitioner’s request for counsel fees on this basis ...

. [Matter of Walker v Martuscello, 2026 NY Slip Op 02701, Third Dept 4-30-26](#)

Practice Point: Consult this decision for insight into the application of the Humane Alternatives to Long-Term Solitary Confinement Act (the HALT Act) and the Special Housing Unit Exclusion Law (the SHU Exclusion Law) with respect to the imposition of long-term solitary confinement on an inmate.

April 30, 2026

CRIMINAL LAW, ATTORNEYS, APPEALS, CONSTITUTIONAL LAW, JUDGES.

DEFENSE COUNSEL’S FAILURE TO OBJECT TO THE EMPANELING OF AN ANONYMOUS JURY CONSTITUTED INEFFECTIVE ASSISTANCE; NEW TRIAL ORDERED (THIRD DEPT).

The Third Department, reversing defendant’s conviction and ordering a new trial, determined defense counsel was ineffective for failing to object to the empaneling of an anonymous jury:

... [D]efendant contends that his trial counsel was ineffective for failing to object when County Court empaneled an anonymous jury. In support of his motion, defendant submitted the affidavit of his trial counsel, who acknowledged that the decision to empanel an anonymous jury “did not sound right” at the time, but that he did not become aware that this was possibly a reversible error until April 2024, when this Court handed down *Heidrich* [.226 AD3d 1096]. Defendant’s trial counsel further stated that he “had not researched the issue before . . . trial” and that the “failure to object was not a result of any strategy on [his] part.” Although the People contend that the leading case on the anonymous jury issue existed prior to defendant’s trial and had not been expanded upon by *Heidrich*, the People acknowledge on appeal that “the empaneling of an anonymous jury in violation of CPL 270.15 constitutes a per se denial of a defendant’s right to a fair trial that cannot be subjected to harmless error analysis.” Indeed, a single error may qualify as ineffective assistance where it “compromise[s] a defendant’s right to a fair trial” . . . , particularly where, like here, the jurors were only identified by numbers and the record fails to reveal whether their names were ever provided to defense counsel — “which materially heightens the risk of prejudice” Accordingly, under the unique circumstances of this particular case and where the legal basis for the motion is undisputed through sworn allegations (see CPL 440.30 [3]), we substitute our discretion for that of the motion court and grant defendant’s motion to vacate the judgment of conviction As such, remittal for a new trial is required. [People v Rahaman, 2026 NY Slip Op 02696, Third Dept 4-30-26](#)

Table of Contents

Practice Point: Defense counsel's failure to object to the empaneling of an anonymous jury can amount to ineffective assistance and warrant a new trial in the absence of preservation.

April 30, 2026

CRIMINAL LAW, JUDGES, ATTORNEYS, CONSTITUTIONAL LAW.

DEFENDANT'S FUNDAMENTAL RIGHT TO BE PRESENT AT RESENTENCING WAS VIOLATED, DESPITE DEFENSE COUNSEL'S STATEMENT THAT DEFENDANT'S PRESENCE WAS NOT NECESSARY (THIRD DEPT).

The Third Department, remitting the matter for resentencing, determined defendant was denied his fundamental right to be present at resentencing. Defense counsel told the court defendant's presence was not necessary:

... [A]s to defendant's assertion that his fundamental right to be present at resentencing was violated, we agree. Here, County Court ... received a letter from DOCCS informing the court that defendant's two sentences of 2 to 4 years for the underlying grand larceny convictions were not in compliance with state law, and, therefore, an amendment was required. The record reflects that defendant was not produced at either the preceding conference or the resentencing proceeding. The record merely indicates that defense counsel stated, orally and in writing, that defendant's presence was not necessary, yet there is no acknowledgment that defendant was even aware of the resentencing proceeding. As such, defendant's fundamental right to be present at his resentencing was violated, and the matter must be remitted to County Court for resentencing on the grand larceny convictions (see CPL 380.40...). [People v Cobbins, 2026 NY Slip Op 02695, Third Dept 4-30-26](#)

Practice Point: A defendant has a fundamental right to be present at resentencing. The error need be preserved and survives defense counsel's statement that defendant's presence is not necessary.

April 30, 2026

CRIMINAL LAW, JUDGES, ATTORNEYS.

THE JUDGE’S LAW CLERK, WHO REVIEWED DEFENDANT’S MOTION TO VACATE HIS CONVICTION, MAY HAVE PARTICIPATED IN DEFENDANT’S PROSECUTION; TO AVOID THE APPEARANCE OF IMPROPRIETY, THE DENIAL OF THE MOTION WAS REVERSED (THIRD DEPT).

The Third Department, reversing the denial of defendant’s motion to vacate his conviction (CPL 440.10), determined the judge’s law clerk who reviewed the motion may have been involved in the defendant’s prosecution:

“A judge must always avoid even the appearance of impropriety and must always act in a manner that promotes public confidence in the judiciary’s integrity and impartiality” As an extension of the judge that they serve, “a law clerk is probably the one participant in the judicial process whose duties and responsibilities are most intimately connected with the judge’s own exercise of the judicial function” Indeed, law clerks serve as “[n]on-judges who perform judicial functions within the judicial system” ... , and therefore a law clerk’s conflict may require the judge they serve to “disqualify in a proceeding in which the judge’s impartiality ‘might reasonably be questioned’ ” Although such disqualification is not automatic, a judge must insulate their law clerk from all matters in which the law clerk had any personal involvement as an attorney during the law clerk’s prior employment and disclose the law clerk’s involvement and insulation to the parties — “even where the law clerk’s involvement in the matter consisted of only a single court appearance” In doing so, a judge must prohibit their law clerk from participating in any way with the proceeding, including conferencing, performing legal research or drafting decisions The failure to do so constitutes reversible error [People v Dickinson, 2026 NY Slip Op 02694, Third Dept 4-30-26](#)

Practice Point: Here the “appearance of impropriety” created by the possibility the judge’s law clerk participated in defendant’s prosecution, required reversal of the denial of defendant’s post-trial motion.

April 30, 2026

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

UPON RESPONDENT’S FAILURE TO APPEAR, FAMILY COURT
DISMISSED RESPONDENT’S COUNSEL AND HELD THE ORDER-OF-
PROTECTION HEARING IN RESPONDENT’S ABSENCE; RESPONDENT
WAS DENIED DUE PROCESS OF LAW; ORDER VACATED (THIRD DEPT).

The Third Department, reversing Family Court, vacated the order of protection issued upon respondent’s “default” based on the denial of respondent’s due process rights:

Petitioner commenced this proceeding in November 2023 seeking an order of protection against respondent. After an initial appearance and subsequent conferences at which the parties variously appeared virtually, in person or through counsel, respondent failed to appear for the April 2024 in-person hearing. Family Court directed respondent’s counsel to leave the courtroom, at which point respondent’s counsel offered to have respondent appear virtually, asserting that respondent was in “hiding” in light of criminal charges filed against petitioner in connection with her alleged stalking of, and firing a rifle at, respondent in August 2023. The court implicitly denied respondent’s request by again directing respondent’s counsel out of the courtroom. The hearing proceeded, during which petitioner testified and was subject to cross-examination by the attorney for petitioner’s children. ...

Typically, “[a] party seeking to vacate a default judgment must establish both a reasonable excuse for the default and a meritorious defense to the underlying claim” “No such showing is required, however, where a party’s fundamental due process rights have been denied” In this case, respondent’s counsel attended in person evidently ready to proceed, offered an excuse for respondent’s nonappearance and provided an alternate means to move forward in his absence Respondent’s counsel made no application to withdraw, and Family Court did not

[Table of Contents](#)

relieve respondent's counsel, and thus respondent's attorneys remained counsel of record when they were dismissed from the courtroom without explanation (see CPLR 321 [b] ...). The court's atypical conduct in that regard, coupled with the court's choice to decline available options to proceed in respondent's absence, deprived respondent of his opportunity to be heard (see CPLR 321 [a] ...). [Matter of April V. v Jonathan U., 2026 NY Slip Op 02702, Third Dept 4-30-26](#)

Practice Point: An order issued upon a party's default may be vacated when the party's due process rights were violated by the judge. Here the judge ordered the party's counsel to leave and held the hearing in the party's absence after the counsel explained the party's absence and offered to proceed virtually.

April 30, 2026

FAMILY LAW, JUDGES, ATTORNEYS, CONSTITUTIONAL LAW.

FATHER IN THIS CHILD SUPPORT MATTER WAS ESSENTIALLY FORCED TO PROCEED PRO SE BY THE SUPPORT MAGISTRATE IN VIOLATION OF FATHER'S RIGHT TO COUNSEL (SECOND DEPT).

The Second Department, reversing Family Court in this child-support matter, determined father was essentially forced to proceed pro se by the support magistrate, in violation of his right to counsel:

... [T]he Support Magistrate relieved the father's assigned counsel upon the father's request.

At the next proceeding ... , the father appeared without counsel and indicated that he had not been assigned a new attorney. The Support Magistrate advised the father that a hearing on the mother's violation petition was scheduled for that date and asked the father if he intended to "present a defense on [his] own, . . . not participat[e], or hir[e] an attorney." After the father gave a nonresponsive answer, the Support Magistrate stated that "the Court will proceed on the [father's] default." The father again protested that he did not have an attorney. The Support Magistrate then found that the father "is choosing not to participate in the

Table of Contents

proceedings.” In an order of disposition . . . , the Support Magistrate found that the father willfully violated the prior order of child support. * * *

... [T]he record demonstrates that the father “did not wish to proceed pro se, but was forced to do so” At the proceeding on August 28, 2024, the father repeatedly protested that he did not have an attorney, and the Support Magistrate did not conduct an inquiry to determine whether the father was waiving his right to counsel or address the possibility of assigning new counsel to the father Moreover, although the Support Magistrate had previously cautioned the father against self-representation when the father’s former assigned counsel was relieved, the Support Magistrate at no point conducted a sufficiently searching inquiry to ensure that the father was knowingly, voluntarily, and intelligently waiving his right to counsel [Matter of Baldwin v Peterkin, 2026 NY Slip Op 02647, Second Dept 4-29-26](#)

Practice Point: Before allowing a party to proceed pro se, the judge or magistrate must conduct a searching inquiry to ensure the party is aware of the dangers. It is a constitutional violation to “force” a party to proceed without an attorney.

April 29, 2026

FAMILY LAW, CONTRACT LAW, JUDGES.

ALL PARTIES AGREE THE TWO SURROGACY AGREEMENTS ARE UNENFORCEABLE; MATTER REMITTED FOR A HEARING TO DETERMINE PARENTAGE BASED ON THE INTENT OF THE PARTIES AND THE BEST INTERESTS OF THE CHILDREN (FOURTH DEPT).

The Fourth Department, reversing (modifying) Family Court, determined that both surrogacy agreements were unenforceable and the parentage determination should not have been made without a hearing on the intent of the parties and the best interests of the children:

... [T]here is no real dispute that neither surrogacy agreement meets the material requirements of Family Court Act article 5-C. The original surrogacy agreement is unenforceable because it was not signed by Robert (see Family Ct Act § 581-403

[Table of Contents](#)

[a] [1]; [d]; see also § 581-402 [b] [3]). The second agreement is unenforceable because it was not executed prior to “the commencement of medical procedures in furtherance of embryo transfer” (§ 581-403 [b]). Thus, the court was required to determine parentage “based on the intent of the parties, taking into account the best interests of the child[ren]” (§ 581-407).

... [A]ll three parties to the second surrogacy agreement—Mary, Robert and the Surrogate—agree that their intent was for Mary and Robert to be the children’s parents, and none of them contemplated anyone else becoming a parent. ... [O]n this record the court failed to give due consideration to the best interests of the children as required by the statute (see Family Ct Act § 581-407; see also § 581-701 ...). We therefore reverse the ... judgment of parentage, and we remit the matter to Family Court to hold an immediate hearing at which the court, in making its parentage determination, must consider evidence of the intent of the parties, taking into account evidence pertaining to the best interests of the children. [Matter of Baby A. \(Mary B.L.–Robert A.L.\), 2026 NY Slip Op 02759, Fourth Dept 5-1-26](#)

Practice Point: Consult this decision for insight into how a court should handle determining parentage where the surrogacy agreements are unenforceable.

May 1, 2026

FORECLOSURE, CIVIL PROCEDURE.

AFTER THE JUDGMENT OF FORECLOSURE AND THE EXPIRATION OF THE TIME FOR APPEAL, DEFENDANT, PRIOR TO THE SALE OF THE PROPERTY, PURSUANT TO CPLR 2221, MOVED TO VACATE THE JUDGMENT BASED ON THE FORECLOSURE ABUSE PREVENTION ACT (FAPA); THE MOTION SHOULD NOT HAVE BEEN DENIED AS UNTIMELY; MATTER REMITTED (FIRST DEPT).

The First Department, reversing Supreme Court, determined that defendant in this foreclosure action used the proper procedure for attempting to apply the Foreclosure Abuse Prevention Act (FAPA) retroactively. The foreclosure action had already proceeded to judgment and the time for appeal had expired. The only way

Table of Contents

to effectuate the FAPA at that point is a motion to renew (CPLR 2221) made before the sale of the property. Defendant's CPLR 2221 motion should not have been denied as untimely:

The court granted plaintiff a judgment of foreclosure and sale Defendant moved pursuant to CPLR 2221 to vacate the judgment based on FAPA.

The court should not have determined that the motion was untimely. Generally, a CPLR 2221 motion based upon a change in the law must be made prior to the entry of a final judgment or before the time to appeal has fully expired However, following the Court of Appeals' decision in *Article 13 LLC v Ponce De Leon Fed. Bank* (—NY3d—, 2025 NY Slip Op 06536 [2025]), this Court held that “the only way to effectuate the retroactive application of FAPA after a judgment has been entered and the time to appeal has expired, is by filing a motion to renew before the sale is conducted” Defendant followed this precise process.

Accordingly, this matter is remanded for further proceedings, including consideration of the parties' arguments concerning whether retroactive application of FAPA would violate the Takings and Due Process Clauses [Bank of N.Y. Mellon v Adam P10tch, LLC, 2026 NY Slip Op 02596, First Dept 4-28-26](#)

Practice Point: After the judgment of foreclosure and the expiration of the time for appeal, but before the sale of the property, a defendant can still make a motion to vacate the judgment based on the FAPA (CPLR 2221).

April 28, 2026

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

PLAINTIFF DID NOT PROVE THE RPAPL 1304 NOTICE OF FORECLOSURE WAS PROPERTY MAILED TO DEFENDANT; THE MAILING WAS DONE BY A THIRD PARTY AND NO FIRST-HAND KNOWLEDGE OF THE THIRD-PARTY'S MAILING PROCEDURE WAS PRESENTED (FIRST DEPT).

The First Department, reversing Supreme Court, determined the plaintiff in this foreclosure action did not demonstrate the RPAPL 1304 notice of foreclosure was properly mailed to defendant. The mailing was done by a third-party and no first-hand evidence of that party's mailing procedure was presented:

... [T]he affiant did not attest that she was familiar with the standard office mailing procedures of Covius Services, LLC, the third-party vendor that sent the RPAPL 1303 and 1304 notices on behalf of plaintiff. The affidavit therefore did not establish proof of a standard office mailing procedure designed to ensure that items were properly addressed and mailed The affidavit also did not address the nature of plaintiff's relationship with Covius, nor did it address whether Covius's records were incorporated into plaintiff's own records or routinely relied upon in plaintiff's business Thus, under the circumstances presented, the tracking numbers on the copies of the 90-day notices did not by themselves suffice to establish proper mailing under RPAPL 1304 [Wells Fargo Bank, N.A. v Merino, 2026 NY Slip Op 02616, First Dept 4-28-26](#)

Practice Point: If the mailing of the RPAPL 1304 notice of foreclosure is done by a third-party, first-hand knowledge of that party's mailing procedure must be presented.

April 28, 2026

MEDICAL MALPRACTICE, NEGLIGENCE, EVIDENCE.

THE EXPERT TESTIMONY OFFERED TO DEMONSTRATE A CAUSAL RELATIONSHIP BETWEEN LOW-BIRTH-WEIGHT AND AUTISM SHOULD HAVE BEEN PRECLUDED; NEW TRIAL ORDERED (SECOND DEPT).

The Second Department, reversing the plaintiffs' verdict in this medical malpractice action and ordering a new trial, determined the expert testimony offered to demonstrate low-birth-weight has a causal relationship with autism should have been precluded:

There was no testimony at the Frye hearing that any of the studies Rubenstein [plaintiffs' expert] relied upon concluded that premature birth causes autism. Rather, Rubenstein's testimony established that the exact mechanism of how autism develops is unknown and that studies found a causal inference or association between prematurity and autism, not a causal relationship. Further, there was no testimony elicited at the Frye hearing that demonstrated that the medical community, specifically pediatric neurologists, have accepted that prematurity causes autism or even that a child's birth at 25 weeks versus 27 weeks increases that child's risk of later being diagnosed with autism. In any event, the gap between the statistical analysis relied upon by Rubenstein regarding the prevalence of autism in preterm, low-birth-weight infants and his testimony that the pathophysiology and causes of autism are unknown was too great to allow him to opine as to his theory of causation in this action. Based upon the foregoing, the Supreme Court erred in denying that branch of the defendants' motion which was to preclude Rubenstein's testimony on this theory of causation. [Terehoff v Frenkel, 2026 NY Slip Op 02688, Second Dept 4-29-26](#)

Practice Point: Consult this decision for insight into when observational studies will not support an expert's testimony about causation. Here the testimony purporting to link low-birth-weight to autism should have been precluded.

April 29, 2026

NEGLIGENCE, EMPLOYMENT LAW, EDUCATION-SCHOOL LAW,
AGENCY.

THE DREXEL UNIVERSITY COOPERATIVE EDUCATION PROGRAM (CO-
OP) ARRANGES FOR STUDENTS TO WORK FOR PARTICIPATING
EMPLOYERS FOR COLLEGE CREDIT; DREXEL DID NOT EXERCISE
SUFFICIENT SUPERVISION OVER THE STUDENTS TO BE HELD
VICARIOUSLY LIABLE FOR ANY WORKPLACE NEGLIGENCE ON THE
STUDENTS' PART (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant Drexel University was not the employer of two students who were operating a forklift which allegedly caused injury to plaintiff. The students were participating in a Drexel Cooperative Education Program. The Second Department found that Drexel was not exercising sufficient supervision and control over the students such that Drexel could be held vicariously liable for the forklift accident:

... [T]he Drexel Cooperative Education Program [the co-op] ... permits students to apply for and obtain paid work experience with participating employers for a period of up to six months. * * *

Drexel demonstrated, prima facie, that it lacked the requisite control over the students' work and conduct during their employment with Jaidan [a participating co-op employer] to give rise to either an employer-employee or principal-agent relationship. Drexel's evidence demonstrated that it provided an online recruiting platform on which students searched job descriptions submitted by participating employers and applied for jobs with those employers. Drexel also required that students work 32 hours per week to receive academic credit for the co-op, that students follow Drexel's code of conduct during the co-op, and that students complete a survey at the end of the co-op to report on their experience. However, the co-op employers decided whether to hire a particular student, paid the co-op students' salaries, and provided IRS documents. Additionally, employers set the students' work schedule and were responsible for supervising and training the students. While participating employers were encouraged to communicate with Drexel if there were performance issues so that Drexel could provide support, the

[Table of Contents](#)

participating employer had the authority to terminate the students' employment. During the time that the students worked at their co-op location, they would have little to no contact with Drexel, which, in the case of the students at issue here, was located approximately 130 miles from where the students were living and working for [the co-op employer]. [Sager v Frontpage Invs., 2026 NY Slip Op 02686, Second Dept 4-29-26](#)

Practice Point: Consult this decision for insight into the level of supervision required for an employer-employee or principal-agent relationship which will trigger vicarious liability.

April 29, 2026

NEGLIGENCE, EMPLOYMENT LAW, AGENCY.

THE FACT THAT THE EMPLOYER MAY BE VICARIOUSLY LIABLE FOR AN EMPLOYEE'S NEGLIGENCE DOES NOT WARRANT DISMISSAL OF THE ACTION AGAINST THE EMPLOYEE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined an employee defendant should not have been granted summary judgment on the ground her employer (New Beginnings) was vicariously liable for the employee's negligence. Allegedly, plaintiff was injured receiving a "facial treatment" from the employee (Wallace):

... [T]he doctrine of respondeat superior does not entitle Wallace to summary judgment dismissing the complaint insofar as asserted against her. "While an employer may be vicariously liable for the torts of its employee while acting within the scope of his or her employment, a claim against the employer does not necessarily preclude a separate claim against the employee" "It is ordinarily immaterial to an agent's liability that the agent's tortious conduct may, additionally, subject the principal to liability" (Restatement [Third] of Agency § 7.01[b]). "It is consistent with encouraging responsible conduct by individuals to impose individual liability on an agent for the agent's torts although the agent's conduct

[Table of Contents](#)

may also subject the principal to liability” [Castellazzo v David’s New Beginnings, LLC, 2026 NY Slip Op 02625, Second Dept 4-29-26](#)

Practice Point: The fact that an employer may be vicariously liable for an employee’s negligence does not preclude a suit against both.

April 29, 2026

NEGLIGENCE, EVIDENCE.

IN A REAR-END COLLISION CASE, IN ORDER TO RAISE A QUESTION OF FACT ABOUT WHETHER BRAKE-FAILURE WAS THE CAUSE, THE DEFENDANT MUST DEMONSTRATE THE FAILURE WAS UNANTICIPATED AND REASONABLE CARE WAS TAKEN TO KEEP THE BRAKES IN GOOD WORKING ORDER; NOT THE CASE HERE; PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff’s motion for summary judgment in this rear-end traffic accident case should have been granted. Defendants’ claim that the brakes failed did not raise a question of fact:

... [A] rear-end collision with a stopped or stopping vehicle establishes a prima facie case of negligence on the part of the operator of the rear vehicle, requiring that operator to come forward with evidence of a nonnegligent explanation for the collision to rebut the inference of negligence” “A nonnegligent explanation may include a mechanical failure, a sudden, unexplained stop of the vehicle ahead, an unavoidable skidding on wet pavement, or any other reasonable cause”

Where the defendants lay the blame for the accident on brake failure, it is incumbent upon them to show that the brake failure was unanticipated and that reasonable care was exercised to keep the brakes in good working order

Here, the plaintiff established his prima facie entitlement to judgment as a matter of law on the issue of liability by submitting his affidavit wherein he averred that his vehicle had been stopped for approximately 10 seconds for a red traffic light

[Table of Contents](#)

when it was struck in the rear by the defendants' vehicle In opposition, the defendants failed to raise a triable issue of fact as to whether the alleged brake failure was unanticipated and whether reasonable care was exercised to keep the brakes in good working order [Wesa v Consolidated Bus Tr., Inc., 2026 NY Slip Op 02690, Second Dept 4-29-26](#)

Practice Point: Where a defendant in a rear-end collision case claims brake failure was the cause, in order to survive summary judgment defendant must demonstrate the failure was unanticipated and reasonable care had been taken to keep the brakes in good working order.

April 29, 2026

PRIVILEGE, CIVIL PROCEDURE, EDUCATION-SCHOOL
LAW, EMPLOYMENT LAW, EVIDENCE, LABOR LAW.

THE EDUCATION LAW PRIVILEGE WHICH PROTECTS HOSPITAL
QUALITY-REVIEW PROCEEDINGS DID NOT APPLY TO REPORTS ABOUT
UNSAFE WORKING CONDITIONS AT THE HOSPITAL; PLAINTIFF IN THIS
WRONGFUL TERMINATION ACTION WAS ENTITLED TO DISCOVERY OF
THE REPORTS (THIRD DEPT).

The Third Department, reversing Supreme Court, determined plaintiff in this wrongful termination and retaliation action was entitled to discovery of so-called RL6 reports addressing unsafe working conditions. Defendant hospital claimed the documents were privileged under Education Law § 6527 (3) and the Patient Safety and Quality Improvement Act of 2005 (42 USC § 299b-21 et seq. [hereinafter PSQIA]):

Plaintiff was employed as a nursing assistant and technician within defendant's secure unit for patients with behavioral health and psychiatric conditions. He commenced this action for wrongful termination and retaliation under Labor Law §§ 740 and 741, claiming that defendant unlawfully fired him after he reported unsafe workplace practices and conditions. During discovery, plaintiff demanded copies of his statements to defendant, including his June 2022 report of safety

[Table of Contents](#)

concerns submitted to defendant’s electronic reporting system. Plaintiff also requested the parties’ communications about the secure unit and defendant’s responses to prior related complaints or concerns. * * *

“[A] party does not obtain the protection of Education Law § 6527 (3) merely because the information sought could have been obtained during the course of a hospital review proceeding[.] . . . The exemption applies only where the information was in fact so obtained” In short, the administrator’s conclusory affidavit is insufficient to satisfy defendant’s burden under Education Law § 6527 (3) Moreover, defendant conceded, both in its brief and at oral argument, that the RL6 reports were not submitted to a quality assurance or peer review committee. . . .

Assuming, without deciding, the doubtful proposition that PSQIA applies to this state law claim, defendant failed to demonstrate that the RL6 reports at issue constitute privileged patient safety work product. [Adams v Bassett Healthcare Network, 2026 NY Slip Op 02706, Third Dept 4-30-26](#)

Practice Point: Consult this decision for insight into the scope of the Education Law privilege protecting hospital quality-review proceedings. Here the privilege did not extend to employee reports about unsafe working conditions.

April 30, 2026

Copyright 2026 New York Appellate Digest, Inc.