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An Organized Compilation of Summaries of Selected Decisions, Mostly Reversals, Release by Our New York State Appellate Courts September 28 – October 2, 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
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ADMINISTRATIVE LAW, CIVIL PROCEDURE, CONTRACT LAW.

THE “DOCTRINE OF PRIMARY JURISDICTION” APPLIED TO THIS BREACH OF CONTRACT ACTION BETWEEN UTILITY PROVIDERS; THE UNDERLYING ACTION SHOULD HAVE BEEN STAYED, NOT DISMISSED, PENDING A RULING BY THE PUBLIC SERVICE COMMISSION (PSC) (FOURTH DEPT).

The Fourth Department, reversing (modifying) Supreme Court, applying the “doctrine of primary jurisdiction,” determined the underlying breach of contract action between the utility providers should have been stayed (not dismissed without prejudice) pending a ruling by the Public Service Commission (PSC):

Although “[t]here is no fixed formula governing the application of the doctrine to the facts of a particular case . . . [,] the court must determine in each case whether the reasons for the doctrine are present and whether the purposes of the doctrine will be served by its application” Factors considered by courts in determining whether the doctrine applies include, “(1) whether the question at issue is within the conventional experience of judges or whether it involves technical or policy considerations within the agency’s particular field of expertise; (2) whether the question at issue is particularly within the agency’s discretion; (3) whether there exists a substantial danger of inconsistent rulings; and (4) whether a prior application to the agency has been made” * * *

... [W]e conclude that the PSC has primary jurisdiction over plaintiff’s claims because “the determination of the issues involved, under a regulatory scheme, depends upon the specialized knowledge and experience of th[at] agency” * * *

... [T]he court abused its discretion to the extent that it dismissed the complaint without prejudice instead of staying the action pending the PSC’s determination in the proceedings pending before it. In determining the appropriate disposition where the primary jurisdiction doctrine applies, “[a] court in its discretion may choose to dismiss the case without prejudice—but only if the parties would not be unfairly disadvantaged” * * * ... [B]y dismissing the complaint without prejudice

instead of staying the action, the court would unfairly disadvantage plaintiff because, if plaintiff were to commence another action after the PSC issued its determination, the court might dismiss some of its claims on statute of limitations grounds [Agway Energy Servs., LLC v Central Hudson Gas & Elec. Corp., 2026 NY Slip Op 05621, Fourth Dept 10-2-26](#)

Practice Point: Consult this decision for an in-depth discussion of the applicability of the “primary jurisdiction doctrine” which allows an agency (here the Public Service Commission) to rule before court litigation proceeds.

Practice Point: Whether to stay the court proceedings or dismiss the proceedings without prejudice pending the agency ruling is a matter of discretion. Here the action should have been stayed, not dismissed, because the statute of limitations might preclude plaintiff from alleging certain causes of action in a new complaint.

October 2, 2026

CIVIL PROCEDURE, CONTRACT LAW, INSURANCE LAW.

THE \$1 BILLION SETTLEMENT REACHED BY FORMER NFL FOOTBALL PLAYERS AND THE NFL FOR CONCUSSION-RELATED INJURIES WAS DEEMED REASONABLE BY THE FIRST DEPARTMENT (FIRST DEPT).

The First Department, modifying Supreme Court, in a full-fledged opinion by Justice Pitt-Burke, determined the class action settlement in the federal multidistrict litigation (MDL) brought by former football players against the National Football League (NFL) for concussion-related injuries was reasonable. The opinion lays out the lengthy history of this litigation and addresses several insurance-contract-interpretation issues which are too complex to fairly summarize here:

While this Court is not bound by the findings of the federal courts on this issue, their determinations provide guidance as to the question of reasonableness before us. Although the MDL settlement was projected to cost \$1 billion over its lifetime, given the claims asserted, the extensive publicity and media coverage of the case, and the defense costs, we cannot say the settlement was objectionably

unreasonable. In fact, a main contention of the objectors to the settlement in the federal action was that the settlement amount was too lenient (*id.* at 440). Thus, taking into account the complexity of the claims, “it cannot be said . . . that there was no possibility that litigating the case to the end would result in a judgment . . . in an amount greater than the settlement” [Discover Prop. & Cas. Co. v National Football League, 2026 NY Slip Op 05595, First Dept 10-1-26](#)

October 1, 2026

CIVIL PROCEDURE, EVIDENCE, FORECLOSURE.

THE EVIDENCE PRESENTED BY DEFENDANT WAS NOT SUFFICIENT TO REBUT THE PRIMA FACIE PROOF OF PROPER SERVICE PRESENTED IN THE PROCESS SERVER’S AFFIDAVIT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant’s affidavit was not sufficient to rebut the prima facie demonstration of proper service in the process server’s affidavit:

... [T]he affidavit of service constituted prima facie evidence of valid service pursuant to CPLR 308(1) The process server alleged therein that on July 24, 2010, at 8:50 a.m., at the premises, he served the summons and complaint and RPAPL 1303 notice on the defendant by delivery to the defendant personally.

... [T]he defendant failed to rebut the presumption of proper service established by the affidavit of service. In her affidavit submitted in support of the motion, the defendant generally denied receipt of service but failed to specifically address the alleged service at the premises on July 24, 2010 . . . , or aver that she did not meet the description included in the affidavit of service The defendant further provided a letter from the New York City Police Department, Human Resources Division. Although the defendant averred that she was at work at the time she allegedly was served, the evidence submitted failed to establish that she was not at the premises at the time of service Rather, the letter merely established that she was employed as a “Police Comm Tech” from July 20, 1987, to January 26, 2018, and that she worked 35 hours per week. [Wilmington Sav. Fund Socy., FSB v Bryant, 2026 NY Slip Op 05570, Second Dept 9-30-26](#)

Practice Point: Consult this decision for insight into the nature of the evidence necessary to rebut the prima facie proof of proper service presented in a process server's affidavit. Here, defendant failed to rebut the presumption of proper service.

September 30, 2026

CIVIL PROCEDURE, EVIDENCE.

DEFENDANT REBUTTED THE PROCESS SERVER'S AFFIDAVIT; A TRAVERSE HEARING IS NECESSARY (FIRST DEPT).

The First Department, reversing Supreme Court, determined defendant rebutted the process server's affidavit and a traverse hearing should have been held:

Defendant's affidavit was sufficient to rebut plaintiff's prima facie evidence of service. While defendant did not dispute that the service address listed was her home address, she stated that she was not personally served, that she was not the woman described in the affidavit, and provided a detailed, nonconclusory account of how she was in a different state at the time of service, providing childcare to her granddaughter In addition, the discrepancies identified in the descriptions of the woman served, who was white and had brown and blonde hair, and defendant, who is African American, were not "minor" [US Bank Trust N.A. v Smith, 2026 NY Slip Op 05463, First Dept 9-29-26](#)

Practice Point: Consult this decision for insight into the nature of evidence deemed sufficient to rebut a process server's affidavit and necessitate a traverse hearing.

September 29, 2026

CIVIL PROCEDURE, EVIDENCE.

HERE THE DEFENDANT’S AFFIDAVIT SHOULD NOT HAVE BEEN REJECTED BECAUSE IT WAS MADE BY A PARTY; THE AFFIDAVIT WAS BASED ON FIRSTHAND KNOWLEDGE AND WAS COMPETENT TO RAISE A QUESTION OF FACT (FIRST DEPT).

The First Department, reversing Supreme Court, determined that the affidavit which raised a question of fact should not have been rejected because it was made by a party, here the defendant:

... [Defendant’s] affidavit was competent to raise issues of fact as to the parties’ 2007 loan agreement sufficient to preclude summary judgment on [plaintiff’s] breach of contract claim. As we have recognized, “[t]hat an affidavit is submitted by a party or other interested person does not detract from its sufficiency as competent evidence” Such is the case here. Indeed, [defendant’s] affidavit provided firsthand knowledge of the transaction with [plaintiff]. .[Tahari v Narkis, 2026 NY Slip Op 05505, First Dept 9-29-26](#)

Practice Point: Here an affidavit by a party (defendant) was based on firsthand knowledge and was deemed competent to raise a question of fact.

September 29, 2026

CIVIL PROCEDURE, EVIDENCE.

HERE THE EVIDENCE SUBMITTED BY AN ATTORNEY AFFIRMATION WAS REJECTED BECAUSE IT DID NOT STATE THAT IT WAS MADE “UNDER THE PENALTIES OF PERJURY UNDER THE LAWS OF NEW YORK, WHICH MAY INCLUDE A FINE OR IMPRISONMENT” (FIRST DEPT).

The First Department, reversing Supreme Court, determined the evidence submitted by attorney affirmation was not in admissible form:

... [P]laintiff failed to proffer evidence in admissible form, as all of its evidence was submitted by way of an attorney affirmation that failed to substantially conform to the language of CPLR 2106, which requires any affirmation to explicitly state that it is made “under the penalties of perjury under the laws of New York, which may include a fine or imprisonment” [Interasian Digital Tech. Holdings Ltd. v In Jin Moon Park, 2026 NY Slip Op 05478, First Dept 9-29-26](#)

Practice Point: Evidence submitted by attorney affirmation will be rejected if the affirmation does not include the language mandated by CPLR 2106.

September 29, 2026

CIVIL PROCEDURE, FAMILY LAW, CRIMINAL LAW.

THE PARTIES IN THIS FAMILY OFFENSE PROCEEDING HAD NO DIRECT RELATIONSHIP, DEPRIVING FAMILY COURT OF JURISDICTION; THERE MUST BE AN “INTIMATE RELATIONSHIP” BETWEEN THE PARTIES TO CONFER JURISDICTION (SECOND DEPT).

The Second Department, reversing Family Court in this family offense proceeding, determined the petitioner and the appellant (the mother of petitioner’s boyfriend) have no direct relationship. Therefore Family Court did not have jurisdiction over the family offense proceeding (which requires an “intimate relationship”):

Pursuant to Family Court Act § 812(1), the Family Court’s jurisdiction in family offense proceedings is limited to certain prescribed acts that occur “between spouses or former spouses, or between parent and child or between members of the same family or household” “[M]embers of the same family or household” include, among others, “persons who are not related by consanguinity or affinity and who are or have been in an intimate relationship regardless of whether such persons have lived together at any time” Expressly excluded from the ambit of “intimate relationship” are “casual acquaintance[s]” and “ordinary fraternization between two individuals in business or social contexts” Beyond those delineated exclusions, what qualifies as an intimate relationship within the meaning of Family Court Act § 812(1)(e) is determined on a case-by-case basis, and the factors a court may consider include “the nature or type of relationship,

regardless of whether the relationship is sexual in nature; the frequency of interaction between the persons; and the duration of the relationship”

Here, the parties have no direct relationship and are connected only through a third party, who is the petitioner’s former boyfriend and the appellant’s son

Additionally, the parties never resided together and their contact with one another was minimal and related only to a few visits between the appellant and the petitioner’s daughter [Matter of Monahan v Zindman, 2026 NY Slip Op 05538, Second Dept 9-30-26](#)

Practice Point: Here the parties in this family offense proceeding, petitioner and petitioner’s boyfriend’s mother, had no direct relationship. To confer jurisdiction to Family Court in a family offense matter, the parties must have an “intimate relationship.”

September 30, 2026

CIVIL PROCEDURE, FORECLOSURE, TRUSTS AND ESTATES.

THE DEATH OF A DEFENDANT IN THIS FORECLOSURE PROCEEDING AFFECTED THE MERITS OF THE ACTION; THEREFORE THE DEATH TRIGGERED A STAY OF THE PROCEEDINGS PENDING SUBSTITUTION OF A REPRESENTATIVE; HERE ALL THE DETERMINATIONS OF SUPREME COURT MADE AFTER DEFENDANT’S DEATH WERE A NULLITY (SECOND DEPT).

The Second Department, reversing Supreme Court in this foreclosure action, determined the death of a defendant affected the merits of the action triggering a stay of all proceedings. Therefore the determinations made by Supreme Court after defendant’s death were a nullity:

“Generally, the death of a party divests a court of jurisdiction to act, and automatically stays proceedings in the action pending the substitution of a personal representative for the decedent” “Any determination rendered without such a substitution is ordinarily deemed a nullity” However, “if a party’s death does not affect the merits of a case, there is no need for strict adherence to the

requirement that the proceedings be stayed pending substitution” “A judgment of foreclosure and sale entered against a defendant is final as to all questions at issue between the parties, and concludes all matters of defense which were or might have been litigated in the foreclosure action” However, “[a] judgment of foreclosure and sale does not divest the mortgagor of its title and interest in the property until the sale is actually conducted”

Here, the decedent answered the complaint and was entitled to service of all papers in the action, including any motions to extend the time in which to conduct the foreclosure sale and any notice of sale (see CPLR 2103 ...). ... [T]he decedent’s death did affect the merits of this action and triggered a stay of all proceedings in the action pending substitution of a legal representative Any determinations made by the Supreme Court after the decedent’s death were a nullity, including the amended order and judgment of foreclosure and sale and the orders appealed from [Real Estate Mtge. Network, Inc. v Perez, 2026 NY Slip Op 05562, Second Dept 9-30-26](#)

Practice Point: Where a defendant’s death affects the merits of the action, the action is stayed pending substitution of a representative.

Practice Point: All rulings made while the action was stayed were a nullity.

Practice Point: A judgment of foreclosure and sale does not divest a mortgagor of title to and interest in the property until the sale is conducted.

September 30, 2026

CRIMINAL LAW, EVIDENCE, APPEALS.

DEFENDANT’S WAIVER OF APPEAL WAS INVALID; DEFENDANT WAS SUBJECTED TO CUSTODIAL INTERROGATION WHICH WAS NOT PRECEDED BY THE MIRANDA WARNINGS; DEFENDANT’S STATEMENTS SHOULD HAVE BEEN SUPPRESSED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined (1) defendant’s waiver of appeal was invalid, and (2) defendant’s statements made in response to questioning not preceded by the Miranda warnings should have been suppressed:

... [D]efendant was a suspect in the burglary of the victim's home after defendant's fingerprint was found on a bedroom window. Investigators learned that defendant was scheduled to meet his parole officer. After defendant walked into his parole officer's office, three police investigators entered the office to question him. At no point during the questioning of defendant did the officers give defendant his Miranda warnings or inform defendant that he was free to leave. Furthermore, the investigator who testified at the suppression hearing could not answer definitively whether defendant would have violated parole if he had refused to talk with the investigators and left the office. Defendant met with his parole officer only after the investigators concluded their interview. Under these circumstances, a reasonable person would have thought that they were not free to leave during questioning Moreover, the questions by the investigators were accusatory in nature, rather than merely investigatory, and were designed to elicit an incriminating response We conclude that defendant was in custody and was subjected to interrogation. [People v Clegg, 2026 NY Slip Op 05663, Fourth Dept 10-2-26](#)

Practice Point: Here defendant was questioned by investigators when he showed up for a meeting with his parole officer. The investigators did not tell defendant he was free to leave and did not give him the Miranda warnings. The questioning was accusatory and designed to incriminate. Therefore defendant's motion to suppress his statements to the investigators should have been granted.

October 2, 2026

FAMILY LAW, EVIDENCE.

MOTHER WAS ENTITLED TO VACATION OF THE NEGLECT FINDING, CRITERIA EXPLAINED (SECOND DEPT).

The Second Department, reversing Family Court in this neglect proceeding, determined mother was entitled to modification of the order of fact-finding and disposition granting a suspended judgment and vacating the finding of neglect. The neglect finding stemmed from mother's failure to take medication to treat her mental illness:

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Family Court Act § 1061 provides that for good cause shown, a court may set aside, modify, or vacate any order issued in the course of a child protective proceeding As with an initial order, the modified order must reflect a resolution consistent with the best interests of the child after consideration of all relevant facts and circumstances, and must be supported by a sound and substantial basis in the record “Courts have identified four factors to consider when determining whether to vacate a finding of neglect: ‘(1) respondent’s prior child protective history; (2) the seriousness of the offense; (3) respondent’s remorse and acknowledgment of the abusive/neglectful nature of his or her act; and (4) respondent’s amenability to correction, including compliance with court-ordered services and treatment’”

Here, the mother had no prior child protective history; the record demonstrates the mother’s compliance with services, medication, and therapy; and the mother’s therapist reported that the mother “shows good insight about the need for treatment.” Further, a suspended judgment leading to vacatur of the neglect finding was in the child’s best interests because the mother would have access to employment opportunities in childcare [Matter of Naila P. \(Althea P.\), 2026 NY Slip Op 05540, Second Dept 9-30-26](#)

Practice Point: Here mother’s neglect finding was vacated based upon her compliance with mental health services, medication and therapy. The neglect finding stemmed from her failure to take medication to treat her mental illness.

September 30, 2026

NEGLIGENCE, EMPLOYMENT LAW.

PLAINTIFF ALLEGED SHE WAS SUBJECTED TO SEXUAL MISCONDUCT BY BILL COSBY, THE STAR OF THE TELEVISION SERIES “THE COSBY SHOW,” WHILE COSBY WAS EMPLOYED BY DEFENDANT CW, THE OWNER OF THE TV STUDIO; THE MAJORITY DISMISSED THE NEGLIGENT HIRING, RETENTION AND SUPERVISION CAUSE OF ACTION AGAINST CW; THERE WAS A TWO-JUSTICE DISSENT (FIRST DEPT).

The First Department, reversing Supreme Court, over a two-justice dissenting opinion, determined the cause of action against Bill Cosby’s employer (CW) alleging negligent hiring, retention and supervision should have been dismissed Plaintiff alleged she was subjected to sexual misconduct by Bill Cosby, the star of the television series “The Cosby Show,” while Cosby was employed by CW:

To establish a claim of negligence, a plaintiff must show that there was a duty owed to the plaintiff by the defendant, that there was a breach of that duty, and that there was an injury proximately resulting therefrom ... Further, “[w]here the negligence claim relates to an employer’s retention and supervision of an employee, the complaint must include allegations that: (1) the employer had actual or constructive knowledge of the employee’s propensity for the sort of behavior which caused the injured party’s harm; (2) the employer knew or should have known that it had the ability to control the employee and of the necessity and opportunity for exercising such control; and (3) the employee engaged in tortious conduct on the employer’s premises or using property or resources available to the employee only through their status as an employee, including intellectual property and confidential information” ... * * *

... [T]he sole factor that distinguishes the present complaint from the negligent hiring, retention, and supervision claim against CW that we dismissed in B.B [a similar action against Bill Cosby by a different plaintiff] is the allegation in this case that plaintiff visited Cosby at CW’s television studio. But plaintiff does not allege that anything remotely illegal or tortious occurred during this one innocuous

studio visit. Given that plaintiff had no relationship with CW and no tortious act was committed upon CW's premises ... , and given that Cosby is not alleged to have directly used any CW resources in committing his assaults ... , the bare allegations that Cosby met with plaintiff at CW's television studio and used his status as the star of a CW-produced television show to impress her — neither of which constitutes independently tortious or illegal activity — does not give rise to a sufficient nexus between Cosby's employment by CW and his alleged assaults on plaintiff to support making CW liable for Cosby's reprehensible conduct.

From the dissent:

... Cosby's alleged use of the set to gain plaintiff's trust provides the nexus between Cosby's employment by CW and his alleged assaults; that nexus was not present in B.B. The allegation that Cosby groomed and preyed on plaintiff by inviting her to the set, and claiming that The Cosby Show wanted to hire plaintiff, satisfies the pleading requirement that Cosby "us[ed] property or resources available to [him] only through [his] status as an employee" [Picard v Cosby, 2026 NY Slip Op 05612, First Dept 10-1-26](#)

Practice Point: Consult this decision for an in-depth discussion of the elements of "negligent hiring, retention and supervision."

Similar issues and result in [M.P. v Cosby, 2026 NY Slip Op 05859 First Dept 10-8-26](#)

October 1, 2026

NEGLIGENCE, EVIDENCE.

DEFENDANT IN THIS SLIP AND FALL CASE WAS PUT ON NOTICE TO PRESERVE SURVEILLANCE VIDEO AS OF AUGUST 19; DEFENDANT'S EMPLOYEE AVERRED THAT THE VIDEO COULD HAVE BEEN AUTOMATICALLY DESTROYED BEFORE OR AFTER AUGUST 19; THEREFORE THE SPOILIATION ISSUE MUST BE DECIDED BY THE TRIER OF FACT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined there was a question of fact whether defendant (Jet Blue) destroyed video evidence of plaintiff's slip and fall. Therefore, whether there was spoliation of evidence is to be decided by the trier of fact:

... [T]he plaintiff demonstrated that Jet Blue was on notice as of August 19, 2021, that it had an obligation to preserve the video surveillance footage Moreover, the affidavit of Jet Blue's employee raised an issue of fact as to whether the video surveillance footage was destroyed before or after Jet Blue's obligation to preserve it arose on August 19, 2021. Under these circumstances, a triable issue of fact exists as to whether spoliation of evidence occurred, which issue should be determined by the trier of fact The appropriate sanction for any such spoliation of evidence would be an adverse inference charge against Jet Blue, as the destruction of any video surveillance footage of the incident did not deprive the plaintiff of the opportunity to prove her case [Fernandez v Port Auth. of N.Y. & N.J., 2026 NY Slip Op 05518, Second Dept 9-30-26](#)

Practice Point: Sometimes spoliation of evidence is a jury question.

September 30, 2026

NEGLIGENCE, EVIDENCE.

THE CONDITION WHICH CAUSED PLAINTIFF’S SLIP AND FALL WAS “OPEN AND OBVIOUS AND NOT INHERENTLY DANGEROUS” AS A MATTER OF LAW (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the condition which caused plaintiff’s slip and fall was “open and obvious and not inherently dangerous:”

While the owner or possessor of real property may have a duty to maintain its premises in a reasonably safe condition ... , “there is no duty to protect or warn against an open and obvious condition which, as a matter of law, is not inherently dangerous” “A condition is open and obvious if it is readily observable by those employing the reasonable use of their senses, given the conditions at the time of the accident”

Here, the evidence submitted by the defendants established, among other things, that the lighting condition was good at the time of the accident, that the colors of the wooden pallet and the white containers were in contrast to the surrounding floor, that the plaintiff observed the containers of cleaning supplies as she approached the area, and that there was sufficient space to navigate the hallway without incident. Thus, the defendants demonstrated, prima facie, that the condition was open and obvious and not inherently dangerous [Scamardella v A. Duie Pyle, Inc., 2026 NY Slip Op 05565, Second Dept 9-30-26](#)

Practice Point: Consult this “slip and fall” decision for another example of a condition deemed “open and obvious and not inherently dangerous” as a matter of law.

September 30, 2026

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