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Weekly Reversal Report, November 9 – 13, 2026

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CIVIL RIGHTS LAW, COUNTY LAW, MUNICIPAL LAW, NEGLIGENCE.

THE COUNTY SHOULD NOT HAVE BEEN HELD LIABLE FOR THE CIVIL RIGHTS VIOLATIONS (18 USC 1983) COMMITTED BY COUNTY EMPLOYEES WHICH LED TO THE DEATH OF AN ARRESTEE; CRITERIA EXPLAINED (FOURTH DEPT).

The Fourth Department, reversing (modifying) the judgment, determined (among many other issues not summarized here) the 42 USC 1983 and state negligence claims against the county should have been dismissed. The lawsuit stemmed from the actions taken by county law enforcement and medical personnel in response to combative behavior by plaintiff's decedent atter decedent's arrest. Plaintiff's decedent died because of the actions taken to subdue him. The Fourth Department explained that the county could not be held liable under 18 USC 1983 for the torts committed by county employees. In addition the state negligence claims against the county were dismissed because they were not alleged in the notice of claim:

… "Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort" … . As distinguished from the section 1983 claims asserted against the individual defendants, plaintiff's section 1983 claim against the County required "an official policy or custom of the . . . government itself [that] caused the . . . violat[ion] of [decedent's] constitutional rights," which in turn may be "shown by proof that the municipality had a custom or practice that was both widespread and reflected a deliberate indifference to its citizens' constitutional rights" … . In that way, it must be an act of the municipality itself, not merely an act of its employees, that generates the claim—"constitutional torts committed by [municipal] employees without official sanction or authority do not typically implicate the municipality in the deprivation of constitutional rights, and therefore the employer-employee relationship is in itself insufficient to establish the necessary causation … .

* * * … [T]here was no evidence that any County "policymaker was aware of a subordinate's unconstitutional actions, and consciously chose to ignore them, effectively ratifying the actions" … , or of the County's "deliberate indifference to constitutional deprivations caused by subordinates" … . Metcalf v County of Erie, 2026 NY Slip Op 06613, Fourth Dept 11-13-26

Practice Point: Here the county should not have been deemed liable for the civil rights (section 1983) violations committed by county employees. There was no proof the violations were the result of a county policy or deliberate indifference.

November 13, 2026

CRIMINAL LAW, ATTORNEYS, APPEALS, EVIDENCE.

THE GRAND JURY EVIDENCE DID NOT SUPPORT THE PEOPLE'S BURGLARY THEORY BUT THE EVIDENTIARY INSUFFICIENCY WAS NOT ARGUED BY DEFENSE COUNSEL; BECAUSE OF COUNSEL'S INEFFECTIVENESS, THE FIRST DEPARTMENT, DESPITE THE GUILTY PLEA AND WAIVER OF APPEAL, REVERSED AND DISMISSED THE INDICTMENT IN THE INTEREST OF JUSTICE (FIRST DEPT).

The First Department, vacating the conviction and dismissing the indictment, determined the evidence of burglary presented to the grand jury was insufficient. Although the error was not preserved and defendant pled guilty and waived the right to appeal, the First Department reversed in the interest of justice because of counsel's ineffectiveness: Counsel's skeletal motion to dismiss could have been strengthened significantly by reference to the grand jury testimony. Counsel ordered the grand jury minutes but did not use them to supplement the "skeletal" motion to dismiss:

The evidence before the grand jury established that defendant was unlawfully in the building, and that the building was a dwelling. However, the evidence fell short of establishing that defendant entered, or remained, in the building intending to commit a crime.

The crime relied on by the People to support the burglary count was the endangering charge. As is relevant here, a person is guilty of endangering the welfare of a child when "[h]e knowingly acts in a manner likely to be injurious to the physical, mental or moral welfare of a child less than 17 years old." In addition to acts of sexual assault or excessive corporal punishment, examples of conduct which courts have held likely to be injurious to a child include possessing loaded

and unloaded firearms and ammunition which were fully accessible to children … ; engaging in domestic violence in front of children against their mother … ; and repeatedly directing vulgar remarks at a toddler over a six week period … .

Here, the evidence before the grand jury was that defendant's comments made the sisters uncomfortable and afraid, but his statements were not intrinsically threatening, vulgar, or otherwise indicative of an intent to endanger. At no time, either in the elevator or when he got off on their floor did he touch the sisters in any way. This evidence was insufficient to establish the requisite intent to commit the crime of endangering the welfare of a child … .People v Henry, 2026 NY Slip Op 06579, First Dept 11-12-26

Practice Point: Ineffective assistance may justify reversal and dismissal of the indictment in the interest of justice, despite a waiver of appeal and a guilty plea.

November 12, 2026

CRIMINAL LAW, CONSTITUTIONAL LAW, APPEALS, EVIDENCE, JUDGES.

DEFENDANT MISSED HIS PRESENTENCE INTERVIEW AND AN ENHANCED SENTENCE WAS IMPOSED WITHOUT FIRST HOLDING A HEARING; DEFENDANT HAD A RIGHT TO A HEARING TO EXPLAIN HIS REASONS FOR MISSING THE INTERVIEW; MATTER REMITTED (SECOND DEPT).

The Second Department, vacating the sentence and remanding for resentencing, determined defendant had the right to a hearing before the judge found that he had violated the plea agreement warranting an enhanced sentence. The issue was not preserved and was considered in the interest of justice:

The defendant's contention that he was deprived of due process by the County Court's failure to hold hearing pursuant to People v Outley (80 NY2d 702) prior to imposing an enhanced sentence is unpreserved for appellate review … . Nonetheless, we reach it in the exercise of our interest of justice jurisdiction (see CPL 470.15[6][a]).

"Due process requires that, before imposing an enhanced sentence, the court conduct an inquiry sufficient for it to determine that the defendant indeed violated the plea condition" … .

Here, the County Court failed to conduct a sufficient inquiry, in accordance with the requirements of due process, to determine whether the defendant intentionally failed to appear for his presentence interview with the Probation Department … . Under the circumstances of this case, the defendant should have been given an opportunity to confront adverse information relied on at sentencing and to present evidence or corroborate his explanation for failing to complete the interview … . People v Scarry, 2026 NY Slip Op 06731, Second Dept 11-12-26

Practice Point: A defendant has a right to a hearing before the imposition of an enhanced sentence. Here the issue was not preserved but it was considered in the interest of justice. The matter was remitted for a hearing.

November 12, 2026

CRIMINAL LAW, EVIDENCE.

THE OFFICER KNEW THE BAG DID NOT BELONG TO THE PERSON FROM WHOM HE RECEIVED "PERMISSION" TO SEARCH IT; THE OFFICER THEREFORE DID NOT HAVE AUTHORITY TO SEARCH THE BAG AND THE DRUGS SHOULD HAVE BEEN SUPPRESSED; CONVICTION VACATED AND INDICTMENT DISMISSED (FIRST DEPT).

The First Department, vacating defendant's conviction and dismissing the indictment, determined the officer who stopped the vehicle, which was operated by Nunez with defendant as a passenger, did not have the authority to search a bag in which drugs were found. The officer, Decker, had seen the defendant with the bag and knew it did not belong to Nunez. When Decker asked Nunez if he could look in the bag, she said "it's fine, it's not mine, take a look:"

… [W]hile Decker had a founded suspicion to inquire as to what was inside the bag, he did not have the authority to search the bag. Decker lacked a "good faith" reason to believe that Nunez, the driver of the Jeep had authority to consent to a

search of the bag … . The testimony at the suppression hearing established that Decker knew the bag did not belong to Nunez, and that she never said she had authority over the bag. Decker had already seen defendant in possession of the bag. He observed defendant carry the bag from the house and place it into the Jeep. Nunez repeatedly and explicitly denied that the bag belonged to her, denied knowing the contents of the bag, and stated that the bag had "nothing to do with" her. She also stated that the car belonged to her brother and not to her. Under the facts presented, Decker could not have been said to have had a good faith basis to conclude that Nunez was capable of giving consent to search the bag. Notably, Decker never inquired of defendant of whether the bag was his or whether defendant consented to the search of the bag. People v Jimenez, 2026 NY Slip Op 06577, First Dept 11-12-26

Practice Point: The police knew the bag belonged to the defendant. "Permission" to search the bag from a woman who was with the defendant did not provide the officer with the authority to search it.

November 12, 2026

CRIMINAL LAW, EVIDENCE.

THE RECORD WAS NOT CLEAR ABOUT WHETHER AN AFFIDAVIT WAS ATTACHED TO THE SEARCH WARRANT; IF THE AFFIDAVIT WERE ATTACHED, THE SEARCH WOULD NOT HAVE EXCEEDED THE SCOPE OF THE WARRANT; MATTER REMITTED FOR A HEARING (FOURTH DEPT).

The Fourth Department remitted the matter for reconsideration of whether the police exceeded the scope of the search warrant when they entered the attic where the handgun was found:

We … conclude that the court erred in denying the reconsideration motion without a hearing to the extent that defendant argued that the officers exceeded the scope of the search warrant. The record before the court presented an issue of fact whether the attic where the handgun was found was part of the rear apartment residence

such that the executing officers did not exceed the stated scope of the warrant … . In denying the reconsideration motion without a hearing, the court found the description in an affidavit submitted in support of the search warrant, wherein the applying detective described the rear apartment as including defendant's bedroom in the attic, to be dispositive of whether the executing officers exceeded the scope of the warrant. We disagree with the court on that point inasmuch as the search warrant itself merely mentions the existence of that affidavit, but does not expressly incorporate all or part of its contents and no evidence was presented that the supporting affidavit was physically attached to the search warrant at the time of its execution … . People v Myers, 2026 NY Slip Op 06633, Fourth Dept 11-13-26

Practice Point: Here, if an affidavit were attached to the search warrant, the search would not have exceeded the scope of the warrant. The matter was sent back for a hearing in the issue.

November 13, 2026

CRIMINAL LAW, JUDGES, ATTORNEYS.

THE JUDGE TOLD THE JURY "A PERSON IS GUILTY OF BURGLARY … WHEN THAT PERSON KNOWINGLY ENTERS AND REMAINS UNLAWFULLY IN A BUILDING WITH THE INTENT TO COMMIT A CRIME; THE PHRASE "UNLAWFULLY REMAINS" SHOULD NOT HAVE BEEN INCLUDED BECAUSE "UNLAWFUL REMAINING" AND "UNLAWFUL ENTRY" HAVE DIFFERENT ELEMENTS (APPARENTLY THIS WAS AN "UNLAWFUL ENTRY" CASE); NEW TRIAL ORDERED (FIRST DEPT).

The First Department, reversing the conviction and ordering a new trial, determined the burglary jury instruction was incorrect:

Defendant was charged with entering a residential building at 320 West 56th in New York County and taking property from three separate apartments in the building. The court instructed the jury that it could convict defendant of burglary in the second degree if the prosecution proved that defendant "knowingly entered and remained" in the building and the individual apartments he was accused of

burglarizing. Specifically, the court stated: “Under our law, a person is guilty of burglary in the second degree when, that person knowingly enters and remains unlawfully in a building with the intent to commit a crime therein, and, when the building is a dwelling.” Defense counsel objected arguing that the correct charge was that defendant “unlawfully entered with the intent to commit a crime therein.”

“In order to be guilty of burglary for unlawful remaining, a defendant must have entered legally but remain for the purpose of committing a crime after authorization to be on the premises terminates. And in order to be guilty of burglary for unlawful entry, a defendant must have had the intent to commit a crime at the time of entry. In either event, contemporaneous intent is required” … . The court’s erroneous inclusion of “unlawfully remains” in its instructions to the jury requires reversal and remand for a new trial.

The People concede that the court erred in including the “unlawfully remains” in its instructions to the jury. They argue, however, that any error was harmless. Since the jury was presented with a definition of an offense requiring proof of two mutually exclusive circumstances, which made it logically impossible to follow the court’s instructions and still convict, a harmless error analysis is inapplicable … . People v Rivera, 2026 NY Slip Op 06557, First Dept 11-12-26

Practice Point: There are different jury instructions for a burglary involving an “unlawful entry” into a building versus a burglary involving “unlawfully remaining” in a building.

November 10, 2026

CRIMINAL LAW, JUDGES.

DEFENDANT ATTEMPTED TO LEAVE THE COURTROOM DURING THE SUPPRESSION HEARING AND WAS REMOVED FROM A PORTION OF THE HEARING; BEFORE REMOVING THE DEFENDANT, THE JUDGE SHOULD HAVE WARNED THE DEFENDANT OF THE CONSEQUENCES OF FURTHER MISBEHAVIOR AND/OR ASCERTAINED WHETHER DEFENDANT WAS WAIVING HIS RIGHT TO BE PRESENT; NEW TRIAL ORDERED (FOURTH DEPT).

The Fourth Department, ordering a new trial and a new suppression hearing, determined the defendant should not have been removed from the courtroom during the suppression hearing without first warning him he could be removed if he continued to misbehave:

A defendant's right to be present at material stages of trial is not absolute, and that right may be expressly or impliedly waived … , or it may be forfeited when the defendant "engag[es] in courtroom conduct so disruptive that the trial cannot proceed in their presence" … . Before a court may lawfully remove a defendant from the courtroom, however, the "defendant must be warned that their continued disruptive conduct will result in removal from the courtroom, unless such warning is impracticable under the circumstances" … . "It will be the rare case where waiting to provide such warning imperils the safety of those in the courtroom" … .

This is not one of those rare cases where it was "impracticable under the circumstances" to warn defendant that he would be removed if his conduct continued (id.). The record shows that defendant jumped out of his chair during the hearing and attempted to leave the courtroom. There is no indication that he attempted to hurt or verbally accost anyone, and he was immediately subdued by court deputies. We cannot conclude that defendant's conduct "was violent in nature or that it create[d] an emergency necessitating his immediate removal" … . While defendant's attempt to flee the courtroom may have reflected a willingness to waive his right to be present for the remainder of the suppression hearing, the court, before ordering his removal from the courtroom, did not ascertain whether he wished to expressly waive his right to be present and return to jail and failed to

warn defendant that continued "disorderly and disruptive" conduct would result in his removal (CPL 260.20). That was error … . People v Velazquez, 2026 NY Slip Op 06666, Fourth Dept 11-13-26

Practice Point: Here removal of the defendant from a portion of the suppression hearing because he attempted to leave the courtroom warranted a new trial. The defendant should first have been warned that continued misbehavior would result in removal. Or the defendant should have been asked whether he was waiving his right to be present.

November 13, 2026

CRIMINAL LAW, JUDGES.

THE FOR CAUSE CHALLENGES TO TWO JURORS SHOULD HAVE BEEN GRANTED; NEW TRIAL ORDERED (THIRD DEPT).

The Third Department, reversing the convictions and ordering a new trial, determined the defense for-cause challenges to two jurors should have been granted:

… [P]rospective juror No. 94 stated that he had "a very dim view of substance abuse." The People did not inquire further into the specifics of that statement, but defense counsel subsequently questioned whether this prospective juror would be impacted if drugs were involved in the case. Although he answered in the negative, counsel continued engaging this individual in questioning by asking if he had already formed an opinion based on hearing the list of the charges against defendant. Prospective juror No. 94 stated that he had, explaining that he questioned "why [defendant] didn't take the plea." Counsel explained that there may be many reasons not to accept a guilty plea, including maintaining innocence. In response, prospective juror No. 94 commented that "[12] charges is a lot of charges," which caused him concern. Defendant lodged a for-cause challenge, maintaining that these statements demonstrated a belief on the part of prospective juror No. 94 that the number of charges defendant was facing implicates his guilt. The People opposed, arguing that these statements did not indicate prejudice.

County Court ultimately denied the challenge, stating that this prospective juror had been rehabilitated by the line of inquiry from defense counsel.

Later in jury selection, when asked if he believed the number of charges meant defendant must be guilty of a crime, prospective juror No. 178 stated defendant is "here for a reason." This prospective juror then answered in the affirmative when County Court probed whether he could follow instructions and disregard the indictment, which the court explained was governed by a different standard than that applicable at trial. Defendant made a vacillating for-cause challenge to prospective juror No. 178, while also simultaneously stating that the court would likely find the prospective juror had been rehabilitated. The People opposed and, when the court denied the challenge, defendant exhausted his peremptory challenges to excuse prospective juror No. 178.

… Prospective juror No. 94's statements undoubtably signaled that he had already formed an opinion in the matter. Defense counsel's subsequent questioning did not result in an unequivocal statement of impartiality and County Court made no inquiry of this prospective juror … . As a result, defendant's challenge should have been granted as to this prospective juror because no rehabilitation occurred. Although a closer call, we find that the court also erred in denying defendant's for-cause challenge to prospective juror No. 178. This prospective juror was asked whether he could follow the court's instruction and disregard the indictment. However, by directing its inquiry in this manner, the court "did not specifically address the concern expressed by [prospective juror No. 178] in any meaningful way or otherwise obtain assurances of his impartiality" … . Thus, defendant is entitled to a new trial. People v Mulverhill, 2026 NY Slip Op 06588, Second Dept 11-12-26

Practice Point: Here there was no rehabilitation of two jurors who expressed a bias based on the number of charges. The for cause challenges, therefore, should have been granted. New trial required.

November 12, 2026

FAMILY LAW, JUDGES, APPEALS.

IN THIS CUSTODY PROCEEDING, THE JUDGE DID NOT MAKE SUFFICIENT FINDINGS TO ALLOW APPELLATE REVIEW; MATTER REMITTED (FOURTH DEPT).

The Fourth Department, reversing the custody determination and remitting the matter for specific findings by the judge, determined the judge's failure to make the required findings rendered an informed appellate ruling impossible:

In its bench decision and the order on appeal, Family Court failed to set forth on the record specific credibility determinations or factual findings regarding matters disputed during the custody hearing. "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" … .

Further, it is well established that "alteration of an established custody arrangement will be ordered only upon a showing of a change in circumstances which reflects a real need for change to ensure the best interest[s] of the child[ren]" … . Here, the court failed to satisfy its obligation to make an express finding whether the father, in support of his petition to modify the prior custody order, established the requisite change in circumstances before it analyzed whether an order granting custody to the father was in the children's best interests. Given the court's failure to make credibility and other factual findings, we decline to exercise our power " 'to independently review the record' to ascertain whether the requisite change in circumstances existed" … .

Moreover, the court failed to set forth sufficient findings concerning the factors that must be considered in making a best interests determination … , and we conclude that the record is insufficient for us to make an independent determination in that regard … . Matter of Castro v Hawkins, 2026 NY Slip Op 06667, Fourth Dept 11-13-26

November 13, 2026

FAMILY LAW, JUDGES.

FATHER'S FUTURE PARENTAL ACCESS SHOULD NOT HAVE BEEN CONDITIONED ON PARTICIPATION IN COUNSELING (SECOND DEPT).

The Second Department, reversing (modifying) Family Court, determined future parental access should not have been conditioned on father's participation in counseling:

A court deciding a custody proceeding may properly direct a party to submit to counseling or treatment as a component of a visitation or custody order … . However, a court may not direct that a parent undergo counseling or treatment as a condition of future parental access or reapplication for parental access rights … . Here, the Family Court erred in conditioning the filing of any future petition by the father to modify parental access upon his completion of a parenting class or his enrollment in treatment with a licensed therapist. Accordingly, we modify the order so as to eliminate those conditions. Matter of Chew v Iheukumere, 2026 NY Slip Op 06713, Second Dept 11-12-26

Practice Point: Future parental access should not be conditioned upon a parent's participation in counseling.

November 12, 2026

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

THE BANK DID NOT PROVE THE RPAPL 1304 NOTICE OF FORECLOSURE WAS MAILED TO THE DEFENDANT; THEREFORE SUMMARY JUDGMENT SHOULD NOT HAVE BEEN AWARDED TO THE BANK (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined plaintiff bank in this foreclosure action did not prove the RPAPL 1304 notice of foreclosure was actually mailed to the defendant. Therefore summary judgment should not have been awarded to the bank:

The plaintiff can establish strict compliance with RPAPL 1304 by submitting domestic return receipts, proof of a standard office procedure designed to ensure that items are properly addressed and mailed, or an affidavit from someone with personal knowledge that the mailing of the RPAPL 1304 notice actually happened … . Here, the affidavit of Vanessa Giorgiani, a vice president of the plaintiff's loan servicer, was insufficient to establish that the required notices were actually mailed, since she did not aver that she had personal knowledge of the mailing, did not describe any standard office procedure designed to ensure that the notices are mailed, and did not attach domestic return receipts for the mailing … . Moreover, contrary to the plaintiff's contention, the plaintiff failed to submit any evidence to establish that the RPAPL 1304 requirement was inapplicable to the instant loan … . Deutsche Bank Trust Co. Ams. v Routier, 2026 NY Slip Op 06689, Second Dept 11-12-26

Practice Point: Foreclosure actions are still being reversed because of the bank's failure to prove the notice of foreclosure was mailed to the defendant.

November 12, 2026

FREEDOM OF INFORMATION LAW (FOIL), EDUCATION-SCHOOL LAW.

A FOIL REQUEST FOR DEPARTMENT OF EDUCATION (DOE) DOCUMENTS WHICH DISCUSS THE IMPLICATIONS OF A US SUPREME COURT CASE WITH REGARD TO STANDARDS FOR COMPULSORY EDUCATION WAS NOT AN INAPPROPRIATE REQUEST FOR "LEGAL CONCLUSIONS" (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined the FOIL request for Department of Education (DOE) documents describing the implications of a US Supreme Court decision with regard to the standards for compulsory education should not have been denied as an inappropriate request for "legal conclusions:"

Contrary to the DOE's contention, there is no categorical exemption for "legal conclusions" (see Public Officers Law § 87[2]). The DOE's reliance on certain

advisory opinions in which the request failed to seek records already in existence is misplaced … . Public Officers Law § 89(3)(a) provides in relevant part that "[n]othing in this article shall be construed to require any entity to prepare any record not possessed or maintained by such entity." Thus, an agency has no obligation to create a new record or to accommodate a request to compile data in a particular format when the agency does not maintain the records in such a manner … . Here, part 3(b) of the FOIL request sought particular "[r]ecords which describe implications of Wisconsin v. Jonas Yoder, 406 U.S. 205 (1972) with regard to standards for compulsory education" … . Contrary to the DOE's contention, the request does not seek legal conclusions, nor would it require the DOE to conduct legal analysis of its records. The DOE did not contend that it has no records which facially describe implications of Yoder with regard to the standards for compulsory education. Accordingly, to the extent that such records exist, the DOE may not withhold them on the ground that they involve a legal conclusion. Matter of Jewish Press, Inc. v New York City Dept. of Educ., 2026 NY Slip Op 06715, Second Dept 11-12-26

Practice Point: A FOIL request made to the Department of Education (DOE) for documents which discuss the implications of a US Supreme Court decision with respect to educational standards is not an inappropriate request for "legal conclusions."

November 12, 2026

LANDLORD-TENANT, CIVIL PROCEDURE.

THE LANDLORD'S RENT-NONPAYMENT PROCEEDING ACKNOWLEDGED THE EXISTENCE OF THE TENANCY, REQUIRING THE DISMISSAL OF THE HOLDOVER PROCEEDING (FOURTH DEPT).

The Fourth Department, reversing County Court, determined the landlord's nonpayment action action against the tenant acknowledged the existence of the tenancy requiring dismissal of the holdover proceeding:

"Generally, if a landlord initiates a holdover proceeding and then commences a nonpayment proceeding, the nonpayment case operates as a waiver of the right to

proceed with the holdover because it reaffirms the tenancy" … . Not only do "the affirmative acts involved in commencing the nonpayment summary proceeding . . . reaffirm[the] tenancy, but the existence of the nonpayment petition itself . . . is documentary proof of the existence of [the] tenancy" … .

Here, "[o]nce [petitioner] obtained a final judgment for unpaid rent in the nonpayment proceeding, it was conclusively determined that a valid lease existed between the parties" and, under these circumstances, we conclude that "dismissal of the holdover proceeding [is] proper" … . Inasmuch as the nonpayment proceeding cannot be maintained in the absence of a landlord-tenant relationship, and the nonpayment proceeding was commenced after the issuance of the warrant of eviction in the earlier holdover proceeding, "[petitioner] waived its right to maintain the holdover proceeding" … . Matter of Pine View Circle, LLC v Atherton, 2026 NY Slip Op 06628, Fourth Dept 11-13-26

Practice Point: A rent-nonpayment proceeding acknowledges the existence of the tenancy, thereby requiring dismissal of a pending holdover proceeding.

November 13, 2026

NEGLIGENCE, MUNICIPAL LAW, ADMINISTRATIVE LAW, EVIDENCE.

ALTHOUGH THE CITIZEN'S REPORT DID NOT IDENTIFY THE EXACT POTHOLE WHICH CAUSED PLAINTIFF'S FALL, IT WAS SUFFICIENT TO ALERT THE CITY TO POTHOLES IN THE VICINITY, THEREBY RAISING A QUESTION OF FACT ABOUT WHETHER THE CITY HAD PRIOR WRITTEN NOTICE OF THE POTHOLE IN QUESTION (SECOND DEPT).

The Second Department, reversing Supreme Court in this pothole slip and fall case, determined the city did not prove it did not have written notice of the pothole. Although a notice which had been provided to the city did not alert the city to the specific pothole identified by the plaintiff, it alerted the city to the presence of potholes in the vicinity, raising a question of fact on the notice-issue:

The Administrative Code does not set forth any requirements for the specificity of the notice … . Therefore, a notice is sufficient if it brought the particular condition

at issue to the attention of the authorities … . To satisfy a prior written notice statute, the notice relied upon by a plaintiff must not be too remote in time or location … . However, a recent prior written notice that does not provide an exact location, but which nevertheless reasonably identifies the area of the purported defect, may give rise to a question of fact for the jury as to the sufficiency of the notice … .

Here, the City failed to establish, prima facie, that it did not have prior written notice of the subject pothole. The City's submissions included a citizen report made on May 5, 2016, of a pothole at "SOUTHWEST INTERSECTION OF AVE 'H' AND NY AVE," which was marked "closed" on May 11, 2016, only 13 days before the plaintiff's fall. Although the photograph attached to the report depicted a separate pothole at another corner of the intersection, the citizen's report nevertheless reasonably identified the area of the purported defect and was not too remote in time or location to bring the particular condition at issue to the attention of the authorities Hernandez v City of New York, 2026 NY Slip Op 06700, Second Dept 11-12-26

Practice Point: Here a prior citizen's report about potholes in the vicinity was sufficient to raise a question of fact whether the city had prior written notice of the pothole in question.

November 12, 2026

NEGLIGENCE, MUNICIPAL LAW, EVIDENCE.

THE VILLAGE PROVED IT DID NOT HAVE WRITTEN NOTICE OF THE PIECE OF METAL PROTRUDING FROM A SIDEWALK WHICH CAUSED PLAINTIFF TO FALL; HOWEVER THE PLAINTIFF RAISED A QUESTION OF FACT ABOUT WHETHER THE VILLAGE CREATED THE CONDITION, AN EXCEPTION TO THE WRITTEN-NOTCE REQUIREMENT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the village's motion for summary judgment in this slip and fall case should not have been

granted. Although the village demonstrated in did not have written notice of the piece of metal protruding from the sidewalk, plaintiff raised a question of fact about whether the village created the condition (an exception to the written notice requirement):

… [T]he Village established, prima facie, that it did not have prior written notice of the alleged defect, thereby shifting the burden to the plaintiff to demonstrate either that a triable issue of fact existed in that regard or that one of the exceptions to the prior written notice requirement applied … .

In opposition, when viewed in the light most favorable to the nonmoving party, the evidence submitted by the plaintiff, including an affirmation of a Department of Transportation resident engineer and the deposition testimony of the Superintendent of the Village, was sufficient to raise a question of fact as to whether the Village affirmatively created the condition … . Anderson v County of Suffolk, Inc., 2026 NY Slip Op 06676, Second Dept 11-12-26

Practice Point: Here using an expert affidavit and other evidence, the plaintiff raised a question of fact whether the village created the dangerous condition which caused plaintiff's fall, an exception to the written-notice requirement.

November 12, 2026

NEGLIGENCE, MUNICIPAL LAW, EVIDENCE.

THERE WAS A QUESTION OF FACT WHETHER THE MUNICIPALITY CREATED THE ICY SIDEWALK CONDITION BY PILING SNOW ON THE EDGE OF THE SIDEWALK, THEREBY ELIMINATING THE PRIOR WRITTEN NOTICE REQUIREMENT (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined plaintiff in this slip and fall case raised a question of fact whether the municipality created the icy sidewalk-condition, thereby eliminating the prior written-notice requirement:

"While the mere failure to remove all snow or ice from a sidewalk is an act of omission, rather than an affirmative act of negligence, a municipality's act in piling snow as part of its snow removal efforts, which snow pile then melts and refreezes

to create a dangerous icy condition, constitutes an affirmative act" … . Here, we conclude that, "when viewed in the light most favorable to plaintiff and giving her the benefit of every reasonable inference" … , the deposition testimony submitted by plaintiff, combined with the opinion of plaintiff's meteorological expert, is sufficient to raise a triable issue of fact whether the Town deliberately pushed snow onto the edge of the sidewalk and whether that snow then melted and refroze to create a dangerous icy condition … . Shearing v Town of Gates, 2026 NY Slip Op 06619, Fourth Dept 11-13-26

Practice Point: If the municipality creates the dangerous condition which causes plaintiff to slip and fall, the prior written notice requirement in not applicable.

November 13, 2026

RETIREMENT AND SOCIAL SECURITY LAW.

HERE AN ASSISTANT DISTRICT ATTORNEY TRANSITIONED TO EMPLOYMENT BY THE STATE DIVISION OF HUMAN RIGHTS AND SOUGHT A REFUND OF CERTAIN PENSION CONTRIBUTIONS; THE REFUND WAS DENIED BY THE COMPTROLLER; THE THIRD DEPARTMENT AFFIRMED (THIRD DEPT).

The Third Department, in a full-fledged opinion by Justice Reynolds Fitzgerald, affirming Supreme Court, determined the Comptroller correctly ruled petitioner, a former assistant district attorney who transitioned to employment with the State Division of Human Rights, was not entitled to a refund of certain pension contributions. The opinion is too detailed to allow a fair summary here. Matter of Pasinkoff v New York State & Local Retirement Sys., 2026 NY Slip Op 06599, Third Dept 11-12-26

November 12, 2026

SOCIAL SERVICES LAW.

THE DEPARTMENT OF HEALTH'S DENIAL OF PETITIONER'S APPLICATION FOR A ROBOTIC ARM WAS ANNULLED; PETITIONER HAS CEREBRAL PALSY AND IS UNABLE TO GRASP OBJECTS; THE DOH'S DETERMINATION THAT THE ROBOTIC ARM WAS NOT MEDICALLY NECESSARY WAS AFFECTED BY ERRORS OF LAW (FOURTH DEPT).

The Fourth Department, annulling the determination of the "… New York State Department of Health (DOH), made after a fair hearing, which upheld a determination of the New York State Office of People with Developmental Disabilities (OPWDD) denying [petitioner's] application for adaptive technology under New York's Home and Community Based Services (HCBS) Medicaid Waiver program …". Petitioner has cerebral palsy and has very limited use of his limbs. Petitioner had applied for a robotic arm which can attach to his wheelchair and allow him to pick up objects:

… DOH's determination that the robotic arm is not medically necessary was affected by an error of law because the agency did not consider the entire definition of medical necessity in affirming OPWDD's determination. In its decision after the fair hearing, DOH held that the robotic arm was not medically necessary inasmuch as it would not be "preventing, diagnosing or curing" petitioner's cerebral palsy. … [H]owever, medically necessary care also includes care that "correct[s]" a condition (Social Services Law § 365-a [2]; see 18 NYCRR 513.3 [a]). DOH thus erred in improperly narrowing the definition contained in the applicable statute and regulations … .

DOH's determination that the robotic arm was not medically necessary was also affected by an error of law to the extent that DOH determined that the arm was not essential and could not perform tasks that an aide also could not perform. The definition of medically necessary does not require that the medical care, services, or supplies be essential (see 18 NYCRR 513.1 [c]), nor do the applicable statute and regulations require that the requested equipment be capable of performing services that cannot be performed by an aide. DOH thus erred to the extent that it applied a definition of medically necessary that conflicts with its own regulations … . Matter of Hamilton v Baer, 2026 NY Slip Op 06618, Fourth Dept 11-13-26

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