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COURT OF APPEALS

CRIMINAL LAW.

AN ADEQUATE WAIVER OF APPELLATE RIGHTS AT SENTENCING DOES NOT REMEDY AN INADEQUATE WAIVER AT THE TIME OF THE PLEA.

The Court of Appeals, in a concurring opinion by Judge Rivera, explained that an inadequate waiver of appeal at the time of a guilty plea cannot be remedied by an adequate explanation of the waived appellate rights at sentencing: " 'It is the trial court's responsibility 'in the first instance,' to determine 'whether a particular [appellate] waiver satisfies [the] requirements' ... . In order for a trial court's inquiry to be meaningful, by logic and reason, it must be part of the colloquy in which a court engages prior to accepting a defendant's plea ... . It would make little sense, and serve only to encourage the filing of a motion to vacate the plea on the ground that defendant did not appreciate the consequences of the waiver, if a court confirmed, after-the-fact, whether the defendant understood the nature of the rights relinquished. Thus, a court complies with its obligation to ensure that the waiver is knowing, intelligent, and voluntary, when a court adequately explains to defendant the 'separate and distinct' right to appeal . . . , and 'at least prior to the completion of the plea proceeding, [the court] assure[s] itself that defendant adequately understood the right that [defendant] was forgoing' ... . Here, the court's explanation at sentencing came too late to satisfy the court's obligations. While the content of the court's advisement was correct, its timing deprived defendant of the right to know and consider all the terms of the plea bargain prior to his decision to plead guilty." **People v Leach, 2016 NY Slip Op 01253, CtApp 2-23-16**

CRIMINAL LAW, EVIDENCE.

PLAIN VIEW EXCEPTION TO THE WARRANT REQUIREMENT DID NOT APPLY, SUPPRESSION SHOULD HAVE BEEN GRANTED.

The Court of Appeals, in a full-fledged opinion by Judge Fahey, reversing the Appellate Division, determined the plain view exception to the warrant requirement did not apply and defendant's suppression motion should have been granted. Defendant walked in to a hospital with a gunshot wound and the police were notified. When the police officer arrived, defendant's clothes were in a clear plastic bag on the floor. The officer examined the clothes and concluded defendant had shot himself with a gun which had been in his waistband. The defendant was convicted of criminal possession of a weapon. The Court of Appeals concluded one of the conditions of the plain view warrant exception had not been met by the evidence in the record, i.e., there was no showing the incriminating nature of the clothes was immediately apparent to the officer: " 'Under the plain view doctrine, if the sight of an object gives the police probable cause to believe that it is the instrumentality of a crime, the object may be seized without a warrant if three conditions are met: (1) the police are lawfully in the position from which the object is viewed; (2) the police have lawful access to the object; and (3) the object's incriminating nature is immediately apparent' ...". **People v Sanders, 2016 NY Slip Op 01255, CtApp 2-23-16**

MALICIOUS PROSECUTION, FALSE ARREST.

QUESTIONS OF FACT HAD BEEN RAISED IN PLAINTIFF'S MALICIOUS PROSECUTION AND FALSE ARREST ACTIONS AGAINST POLICE OFFICERS, DEFENSE SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED.

The Court of Appeals, in a full-fledged opinion by Judge Abdus-Salaam, reversing (modifying) the Appellate Division, determined questions of fact precluded summary judgment dismissing the complaint against police officers alleging, inter alia, false arrest and malicious prosecution. Plaintiff had been arrested and indicted for murder after signing a confession. The charges were eventually dismissed by the prosecutor. In her civil suit, plaintiff alleged the confession was essentially written by the police and she signed it only after she was subjected to hours of intense interrogation. The Court of Appeals concluded a question of fact had been raised whether the police had probable cause to arrest. The court noted that if the police pass false information on to the prosecutor, the "commencement or continuation of a criminal proceeding" element of malicious prosecution has been satisfied (with respect to the police officers). The absence of probable cause also bears on the "actual malice" element of malicious prosecution: "Just as in the false arrest context, the plaintiff in a malicious prosecution action must also establish at trial the absence of probable cause to believe that he or she committed the charged crimes, but

this element operates differently in the malicious prosecution context because '[o]nce a suspect has been indicted, [ ] the law holds that the Grand Jury action creates a presumption of probable cause' ... . Generally, the plaintiff cannot rebut the presumption of probable cause with evidence merely indicating that the authorities acquired information that, depending on the inferences one might choose to draw, might have fallen somewhat shy of establishing probable cause ... . And, even if the plaintiff shows a sufficiently serious lack of cause for the prosecution and rebuts the presumption at trial, he or she still must prove to the satisfaction of the jury that the defendant acted with malice, i.e., that the defendant 'must have commenced the prior criminal proceeding due to a wrong or improper motive, something other than a desire to see the ends of justice served' ...". **De Lourdes Torres v Jones, 2016 NY Slip Op 01254, CtApp 2-23-16**

FIRST DEPARTMENT

CONTRACT LAW, FRAUD.

EQUITABLE ACTION SEEKING RESCISSION BASED UPON FRAUD NEED NOT ALLEGE PECUNIARY LOSS.

The First Department, in a full-fledged opinion by Justice Tom, determined a triable issue of fact had been raised about whether defendant made misrepresentations in a contract for a condominium such that the contract could be rescinded. Defendant agreed the condominium was to be used for residential purposes, but sought to operate a day care center on the premises. The court noted that pecuniary damages need not be alleged in an equitable action to rescind a contract based upon fraud: "Fraud sufficient to support the rescission requires only a misrepresentation that induces a party to enter into a contract resulting in some detriment, and 'unlike a cause of action in damages on the same ground, proof of scienter and pecuniary loss is not needed' ... . Thus, the fourth cause of action alleging that misrepresentations in defendant's purchase application induced plaintiff to forgo exercise of its right of first refusal has a sound basis in the record, and Supreme Court properly concluded that a triable issue is presented." **Board of Mgrs. of the Soundings Condominium v Foerster, 2016 NY Slip Op 01273, 1st Dept 2-23-16**

CONTRACT LAW, LANDLORD-TENANT.

NO QUESTION OF FACT RAISED ABOUT AN ALLEGED ORAL WAIVER OF A LEASE PROVISION, CRITERIA EXPLAINED.

The First Department, in a lease dispute, determined that the tenant's claim that a provision of the lease requiring percentage rent (based upon the income of the tenant) was orally waived did not raise a question of fact. The lease specifically required any waiver to be in writing. The court explained when an oral waiver can be valid, despite the written-waiver requirement: "An agreement in a lease providing that no waiver of a term shall be inferred absent a writing to that effect is enforceable ... . Thus, 'if the only proof of an alleged agreement to deviate from a written contract is the oral exchanges between the parties, the writing controls' ... . Tenant correctly notes that the parties to a contract may, by mutual agreement, disregard a no-waiver clause. However, some performance confirming the modification must be present, and it must be 'unequivocally referable to the oral modification' . . . As stated by this Court, in the context of a lease dispute, there must be 'sufficient indicia that the reasonable expectations of both parties under the original lease were supplanted by subsequent actions' ...". **Paramount Leasehold, L.P. v 43rd St. Deli, Inc., 2016 NY Slip Op 01258, 1st Dept 2-23-16**

CORPORATION LAW.

NEW YORK COURTS DO NOT HAVE THE POWER TO DISSOLVE A FOREIGN CORPORATION.

The First Department, in a full-fledged opinion by Justice Richter, overruling its own precedent, determined New York courts do not have jurisdiction over the dissolution of a foreign corporation: "We agree with the near-universal view that the courts of one state do not have the power to dissolve a business entity formed under another state's laws. Because a business entity is a creature of state law, the state under whose law the entity was created should be the place that deter-mines whether its existence should be terminated ...". **Matter of Raharney Capital, LLC v Capital Stack LLC, 2016 NY Slip Op 01425, 2nd Dept 2-25-16**

CRIMINAL LAW.

JUSTICES DISAGREE WHETHER STOLEN PROPERTY AND ASSAULT AND ROBBERY OFFENSES SHOULD HAVE BEEN SEVERED AS NOT SIMILAR IN LAW.

In affirming defendant's conviction, the First Department, in two concurring memoranda, disagreed about whether the offenses should have been severed. Defendant assaulted and robbed a subway passenger, and upon arrest several stolen MetroCards were seized. Defendant was tried on all offenses in a single trial. Justice Renwick, disagreeing with Justice Andrias, argued that the severance issue was preserved and the motion should have been granted (although the error was harmless). Justice Renwick's concurring memorandum stated: "Under the principles set forth in *People v Pierce* (14 NY3d 564, 573-574 [2010]), the motion court should have granted defendant's motion to sever the counts charging possession of stolen property, relating to eight stolen MetroCards, from the other counts of the indictment, relating to an assault and rob-

bery. The counts were not properly joined under CPL 200.20(2)(c), because they were not 'similar in law,' except to the extent that 'both offenses involve misappropriated property,' which does not suffice (*id*. at 574). Although the counts at issue here are more closely connected, factually, than were the counts in *Pierce*, we reject the People's argument that this difference warrants a different result under the statute. While factual or evidentiary connections between counts may be relevant to joinder and severance under other portions of CPL 200.20 that are not applicable here, CPL 200.20(2)(c) only involves similarity of statutory provisions defining offenses." **People v Davis, 2016 NY Slip Op 01257, 1st Dept 2-23-16**

CRIMINAL LAW.

THE PEOPLE DID NOT ACT WITH DUE DILIGENCE TO SEEK A DNA TEST, DEFENDANT'S MOTION TO DISMISS BASED ON A SPEEDY TRIAL VIOLATION PROPERLY GRANTED.

The First Department determined Supreme Court properly dismissed the indictment on speedy trial grounds. At issue was the delay associated with obtaining DNA test results. A delay for that purpose can be an "exceptional circumstance" justifying exclusion of the delay from the speedy trial clock, but only if the People act with due diligence. The court determined numerous other delays during the course of the proceedings demonstrated the People did not act with due diligence: "Pursuant to CPL 30.30(4)(g), periods of delay caused by 'exceptional circumstances' are excludable from the time charged to the People; the People have the burden of proving the existence of an exceptional circumstance ... . CPL 30.30(4)(g)(i) specifically makes excludable a continuance 'granted because of the unavailability of evidence material to the People's case, when the district attorney has exercised due diligence to obtain such evidence and there are reasonable grounds to believe that such evidence will become available in a reasonable period.' Under this provision, the unavailability of DNA test results can be considered an exceptional circumstance, so long as the People exercised due diligence to obtain the results ... . Acknowledging that '[t]here is no precise definition of what constitutes an exceptional circumstance,' the Court of Appeals has made clear that the exception to the rule must conform to the legislative intent of discouraging prosecutorial inaction ...". **People v Gonzalez, 2016 NY Slip Op 01388, 1st Dept 2-25-16**

SECOND DEPARTMENT

CIVIL PROCEDURE.

STATUTE OF LIMITATIONS DEFENSE MAY BE RAISED FOR THE FIRST TIME IN AN ANSWER TO AN AMENDED COMPLAINT; RELATION-BACK DOCTRINE NOT APPLICABLE TO ORAL-CONTRACT ACTION WHERE ORIGINAL ACTION WAS BASED SOLELY ON A WRITTEN CONTRACT.

The Second Department, reversing Supreme Court, determined defendant did not waive the statute of limitations defense not raised in the answer to the original complaint, but raised in the answer to the amended complaint. The court further concluded a subsequent action based upon an alleged oral agreement did not relate back to the original action based upon a written agreement and was therefore time-barred: "Generally, a defense based upon the statute of limitations is waived unless raised by pre-answer motion or in the defendant's answer (*see* CPLR 3211[e]). A defendant, however, may assert a statute of limitations defense for the first time in an answer served in response to a plaintiff's amended complaint ... . Moreover, a party may amend its pleading once without leave of court, among other circumstances, within 20 days after service of that pleading (*see* CPLR 3025[a]). An amended answer, made as a matter of right pursuant to CPLR 3025(a), may include a statute of limitations defense previously omitted ... . * * * The relation-back doctrine permits a plaintiff to interpose a claim or cause of action which would otherwise be time-barred, where the allegations of the original complaint gave notice of the transactions or occurrences to be proven and the cause of action would have been timely interposed if asserted in the original complaint ... . The relation-back doctrine is inapplicable where the original allegations did not provide the defendant notice of the need to defend against the allegations of the amended complaint ...". **Moezinia v Ashkenazi, 2016 NY Slip Op 01300, 2nd Dept 2-24-16**

CONVERSION.

CONVERSION THEORY DOES NOT APPLY TO REAL ESTATE OR INTANGIBLE PROPERTY.

The Second Department determined the causes of action for conversion should have been dismissed. Conversion applies only to personal property, not, as here, to real property and a business interest: " 'A conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession' ... . The subject matter of a conversion cause of action 'must constitute identifiable tangible personal property'; real property and interests in business opportunities will not suffice'... . Here, the first cause of action seeks to recover damages for conversion based upon [defendant's] alleged interference with the right of the plaintiff C & B Enterprises, USA, LLC . . . , 'to possession of its Property,' and the second cause of action seeks to recover damages for conversion based upon [defendant's] alleged interference 'with [the plaintiff['s]] right to possession of his ownership of C & B.' Inasmuch as the subjects of these causes of action are real property and [plaintiff's] interest in a

business, respectively, a cause of action in conversion does not lie ...". **C & B Enters. USA, LLC v Koegel, 2016 NY Slip Op 01281, 2nd Dept 2-24-16**

FAMILY LAW.

FAMILY COURT SHOULD HAVE GRANTED AN ADJOURNMENT IN CONTEMPLATION OF DISMISSAL AS THE LEAST RESTRICTIVE ALTERNATIVE, RATHER THAN IMPOSING A PERIOD OF PROBATION; PETITION DISMISSED.
The Second Department determined a juvenile, Nigel H, who admitted committing what would constitute a misdemeanor arson offense, should have been granted an adjournment in contemplation of dismissal as the least restrictive sentencing alternative. The period of probation should not have been imposed. Because the probation term had expired, the court dismissed the petition, noting the potential consequences of a record of the offense: "Here, the Family Court improvidently exercised its discretion in imposing a period of probation. Given Nigel H.'s many positive characteristics, his lack of prior criminal or behavioral issues, the services and support he is already receiving as a result of his placement in foster care, and the minimal risk that he poses to the community, an adjournment in contemplation of dismissal was warranted ...". **Matter of Nigel H., 2016 NY Slip Op 01326, 2nd Dept 2-24-16**

INSURANCE LAW, CONTRACT LAW.

CAUSE OF ACTION FOR BREACH OF IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING NOT DUPLICATIVE OF BREACH OF CONTRACT CAUSE OF ACTION.
The Second Department determined a cause of action alleging breach of the insurer's duty to act in good faith was not duplicative of the breach of contract cause of action. Therefore, the motion to dismiss the "duty to act in good faith" cause of action was properly denied. Plaintiff sued his own car insurance carrier to recover supplementary uninsured/under-insured motorist (SUM) coverage. The court explained the elements of a "duty to act in good faith" cause of action: "The second cause of action alleges a failure to act in good faith. Implicit in every contract is an implied covenant of good faith and fair dealing ... . The implied covenant of good faith and fair dealing is a pledge that neither party to the contract shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruit of the contract, even if the terms of the contract do not explicitly prohibit such conduct ... . Such a cause of action is not necessarily duplicative of a cause of action alleging breach of contract ... . An insurance carrier has a duty to 'investigate in good faith and pay covered claims' ... . Damages for breach of that duty include both the value of the claim, and consequential damages, which may exceed the limits of the policy, for failure to pay the claim within a reasonable time ... . Such a cause of action is not duplicative of a cause of action sounding in breach of contract to recover the amount of the claim ... . Such consequential damages may include loss of earnings not directly caused by the covered loss, but caused, instead, by the breach of the implied covenant of good faith and fair dealing ... . The second cause of action states a claim for consequential damages for breach of the implied covenant of good faith and fair dealing." **Gutierrez v Government Empls. Ins. Co., 2016 NY Slip Op 01292, 2nd Dept 2-24-16**

PERSONAL INJURY, CONTRACT LAW.

SNOW-REMOVAL COMPANY NOT LIABLE TO PLAINTIFF BECAUSE PLAINTIFF WAS NOT A PARTY TO THE SNOW-REMOVAL CONTRACT; NO NEED FOR DEFENDANT TO ADDRESS ESPINAL EXCEPTIONS IN ITS SUMMARY JUDGMENT MOTION IF THE EXCEPTIONS ARE NOT PLED BY THE PLAINTIFF.
The Second Department determined defendant snow-removal company, Brickman, was entitled to summary judgment dismissing the complaint in this slip and fall case. Because the plaintiff was not a party to the snow-removal contract with the owner of the property, Brickman owed no duty to plaintiff. The court noted that, because the plaintiff did not allege the applicability of any of the "Espinal" exceptions to the general rule against tort liability arising from a contract, the defendant was not obligated to address those exceptions in its summary judgment motion: "A contractual obligation, standing alone, generally will not give rise to tort liability in favor of a third party *(see Espinal v Melville Snow Contrs.*, 98 NY2d 136, 138). However, there are three exceptions to that general rule: '(1) where the contracting party, in failing to exercise reasonable care in the performance of his [or her] duties, launches a force or instrument of harm, (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties, and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely' ... . Brickman made a prima facie showing of its entitlement to judgment as a matter of law dismissing the complaint insofar as asserted against it by submitting evidence that the plaintiff was not a party to its snow removal agreement, and that it thus owed her no duty of care ... . Inasmuch as the plaintiff did not allege facts in the complaint or bill of particulars that would establish the possible applicability of any of the *Espinal* exceptions . . . , Brickman was not required to affirmatively demonstrate that these exceptions did not apply in order to establish its prima facie entitlement to judgment as a matter of law ...". **Bryan v CLK-HP 225 Rabro, LLC, 2016 NY Slip Op 01280, 2nd Dept 2-24-16**

PERSONAL INJURY, EDUCATION-SCHOOL LAW.

NEGLIGENT SUPERVISION ACTION AGAINST DAY CARE PROVIDER PROPERLY DISMISSED.

The Second Department determined a negligent supervision action against a day care provider was properly dismissed. Infant plaintiff (Kevin) was hanging by his hands when a student pulled one of his hands off, causing him to fall: "The defendant, as a provider of day care services, was under a duty to adequately supervise the children in its charge and may be held liable for foreseeable injuries proximately related to the absence of adequate supervision ... . In general, the duty of a day care provider is to supervise the children in its care with the same degree of care as a parent of ordinary prudence would exercise in comparable circumstances ... . However, a child care provider cannot reasonably be expected to continuously supervise and control all movements and activities of the children in its care, and cannot reasonably be expected to guard against all of the sudden, spontaneous acts that take place among those children ... . To establish a breach of the duty to provide adequate supervision in a case involving injuries caused by the acts of a fellow child, a plaintiff must show that the day care provider 'had sufficiently specific knowledge or notice of the dangerous conduct which caused injury; that is, that the third-party acts could reasonably have been anticipated' ... . Here, the defendant established its prima facie entitlement to judgment as a matter of law by submitting evidence demonstrating that the accident was the result of a sudden and unforeseeable act of another child, and that it had no actual or constructive notice of prior similar conduct ... . The defendant further established, prima facie, that the incident occurred in so short a period of time that its alleged lack of supervision was not a proximate cause of Kevin's alleged injuries ...". **Lopez v D & D Day Care, Inc., 2016 NY Slip Op 01298, 2nd Dept 2-24-16**

PERSONAL INJURY, LABOR LAW, CIVIL PROCEDURE.

LEVEL OF SUPERVISORY CONTROL NEEDED TO SUPPORT A LABOR LAW § 200 CAUSE OF ACTION AND THE CRITERIA FOR SETTING ASIDE A VERDICT AS AGAINST THE WEIGHT OF THE EVIDENCE EXPLAINED.

The Second Department determined defendants' motions to set aside the verdict in this Labor Law § 200/common law negligence action were properly denied. The court explained the level of supervision required to hold gas station subtenants liable for a forklift injury, and the criteria for setting aside a verdict: " 'To be held liable under Labor Law § 200 for injuries arising from the manner in which work is performed, a defendant must have the authority to exercise supervision and control over the work' ... . 'A defendant has the authority to supervise or control the work for purposes of Labor Law § 200 when [the] defendant bears the responsibility for the manner in which the work [was] performed' ... . '[M]ere general supervisory authority at a work site for the purpose of overseeing the progress of the work and inspecting the work product is insufficient to impose liability under Labor Law § 200' ... . 'If the challenged means and methods of the work are those of a subcontractor, and the owner or contractor exercises no supervisory control over the work, no liability attaches under Labor Law § 200 or the common law' ... . 'To be awarded judgment as a matter of law pursuant to CPLR 4401, a defendant must show that there is no rational process by which the jury could find for the plaintiff against the moving defendant' ... . In considering a motion for judgment as a matter of law, 'the trial court must afford the party opposing the motion every inference which may properly be drawn from the facts presented, and the facts must be considered in a light most favorable to the nonmovant' ... . 'In making this determination, a court must not engage in a weighing of the evidence,' nor may it direct a verdict where the facts are in dispute, or where different inferences may be drawn or the credibility of witnesses is in question' ...". **Hernandez v Pappco Holding Co., Ltd., 2016 NY Slip Op 01295, 2nd Dept 2-24-16**

TRUSTS AND ESTATES.

PROBATE PETITION PROPERLY DISMISSED; WITNESSES DID NOT READ ATTESTATION CLAUSE, EVIDENCE SOME WILL PAGES MISSING AT TIME OF EXECUTION.

The Second Department determined the probate petition was properly dismissed. The presumption the will was properly executed was rebutted because the witnesses did not read the attestation clause before signing and there was evidence some of the pages of the will were missing at the time it was executed: " 'A valid attestation clause raises a presumption of a will's validity, [but] it is nonetheless incumbent upon [the] Surrogate's Court to examine all of the circumstances surrounding the execution of the document in order to ascertain its validity' ... . In conducting this examination, 'the testimony of the attesting witnesses is entitled to great weight' ... . Here, the attesting witnesses both testified at their depositions that they did not read the attestation clause. Under these circumstances, the attestation clause cannot carry any presumption that the will was properly executed ... . The moving objectants met their prima facie burden of establishing that the purported will was not properly executed by submitting evidence that not all of the pages of the document alleged to be the decedent's will were present at the time of the purported execution ... . In opposition, the petitioner failed to raise a triable issue of fact ... . Contrary to the petitioner's contention, the evidence regarding the testamentary intent of the decedent does not raise a triable issue of fact because, with respect to due execution, 'courts do not consider the intention of the testator, but that of the legislature,' such that the statutory requirements of due execution are determinative ...". **Matter of Costello, 2016 NY Slip Op 01322, 2nd Dept 2-24-16**

THIRD DEPARTMENT

DEFAMATION, CIVIL RIGHTS LAW.

MINOR INACCURACIES WILL NOT PREVENT CHARACTERIZATION OF AN ARTICLE ABOUT A JUDICIAL PROCEEDING AS FAIR AND TRUE.

The Third Department determined plaintiff's libel complaint was properly dismissed. The defendant newspaper published an article about plaintiff's conviction in a mortgage fraud prosecution which was based upon a press release from the Department of Justice (DOJ). Civil Rights Law § 74 prohibits a civil action against the publisher of a fair and true report of a judicial proceeding. The Third Department explained that minor inaccuracies will not prevent the characterization of an article as fair and true: "[W]e agree with Supreme Court that defendants' published statements were a fair and true representation of the DOJ press release, thus falling within the statutory privilege afforded by Civil Rights Law § 74. Although defendants used language that differed slightly from the DOJ press release in their article, given plaintiff's criminal charges and convictions detailed in the press release, the language used 'does not suggest more serious conduct than that actually suggested in the official proceeding' ... . A liberal reading of defendants' statements in the context of the article demonstrates that the statements are substantially accurate and, thus, a fair and true report of the DOJ press release ...". **Bouchard v Daily Gazette Co., 2016 NY Slip Op 01364, 3rd Dept 2-25-16**

PERSONAL INJURY, EDUCATION-SCHOOL LAW.

NON-SECURE JUVENILE DETENTION FACILITY DID NOT OWE A DUTY OF CARE TO PLAINTIFF WHO WAS STRUCK BY A CAR DRIVEN BY A FORMER RESIDENT OF THE FACILITY.

The Third Department determined the complaint against defendant non-secure detention facility for juveniles was properly dismissed. Weeks after the juvenile had left and been discharged from the detention facility, the juvenile was in a high-speed car chase and crashed into plaintiff's car. The Third Department concluded that the detention facility did not owe a duty of care to the plaintiff, did not have a duty to supervise the juvenile because the juvenile was not in defendant's custody, and, from the standpoint of the detention facility, the juvenile's actions were not foreseeable: "Defendant's nonsecure residential treatment center is located on an open campus without gates or bars, and residents are not locked in. Here, the resident was attending an educational program when he chose to leave. One of defendant's staff members followed him and tried unsuccessfully to persuade him to return. The staff member did not attempt to physically prevent the resident from leaving, pursuant to defendant's policy that — under the statutory mandate against physical restrictions — permits such intervention only when a resident's behavior is dangerous to the resident or others. After the resident departed, defendant notified DSS and the police and discharged him when directed to do so by DSS a week later. Plaintiff's argument that defendant should have imposed greater supervision or restraints to prevent the resident from leaving disregards the distinction between secure and nonsecure detention facilities and, more fundamentally, disregards the fact that defendant did not make the placement decision. ... The duty owed by a school to prevent foreseeable injuries caused by negligent supervision of its students arises 'from the simple fact that a school, in assuming physical custody and control over its students, effectively takes the place of parents and guardians' ... . Because this duty arises from the school's physical custody of its students, it ceases when a student leaves the premises and the student's parent or legal custodian is free to resume control ...". **Mayorga v Berkshire Farm Ctr. & Servs. for Youth, 2016 NY Slip Op 01375, 3rd Dept 2-25-16**