NYSBA CasePrepPlus

A New York State Bar Association member benefit

June 28, 2024

Editor:
Robert S. Rosborough IV

Summarizing recent significant New York appellate cases

Can a municipality be held liable for negligent supervision during a supervised custodial visit? Although a municipality is generally immune from tort liability, the Second Department here held that the municipality assumed a special duty to a child by having a Department of Social Services employee supervise the custodial visit and could potentially face liability for the child's injuries during the supervised visit. Let's take a look at that opinion and what else has been happening in New York's appellate courts over the past week.

COURT OF APPEALS

SEX OFFENDER REGISTRATION ACT, OUT-OF-STATE CONVICTION

***People v Corr*, 2024 NY Slip Op 03379 (Ct App June 20, 2024)**

Issue: Does the Sex Offender Registration Act entitle sex offenders who are classified in the lowest risk category upon relocating to New York following out-of-state convictions for registrable sex offenses to credit for their time registered as sex offenders under the laws of other states?

Facts: "Defendant in each of these appeals was convicted in another state of an offense that required him to register as a sex offender under the laws of that state. Some years later, each defendant relocated to New York and was required to register as a level-one risk under SORA. Neither is designated a sexual predator, sexually violent offender, or predicate sex offender. During the risk level determination hearings under Correction Law § 168-k (2), each defendant requested that Supreme Court order him registered nunc pro tunc to the date when he registered as a sex offender in the state where he was convicted of his sex offense, in effect giving him credit for the time registered in the foreign jurisdiction against the 20-year registration period. The courts denied the requests, and the Appellate Division affirmed."

Holding: The Court of Appeals, in a 4-3 opinion, held that for sex offenders classified as level one risks, the 20-year sex offender registration period begins when the offender first registers in New York, not when the offender first registered in another jurisdiction. The Court explained, "[t]he meaning of the phrase 'initial date of registration' cannot be discerned by reading Correction Law § 168-h (1) in isolation, and therefore we look to its use in other sections of SORA for guidance . . . The durational requirements in Correction Law § 168-h (1) are explicitly tied to the annual verification requirements, which are set forth in a preceding section of SORA[—s]pecifically, Correction Law § 168-f (2)." "Considering the two interconnected provisions together, we conclude that the 'initial date of registration' refers to the date when an offender first registers under SORA, not the date an offender is required to register under the laws of another jurisdiction." The majority acknowledged that "the statue, as written, may lead to unfair results in some circumstances," but noted that if credit for registration in another jurisdiction was to be given, "it is for the legislature to make those policy determinations, pass the relevant law, and delegate any rulemaking authority."

FIRST DEPARTMENT

CIVIL PROCEDURE, SERVICE OF PROCESS

***AMK Capital Corp. v Plotch*, 2024 NY Slip Op 03324 (1st Dept June 18, 2024)**

Issue: Do CPLR 308(2)'s restrictions prohibiting the inclusion of information indicating that a communication "is from an attorney or concerns an action against the person to be served" on an envelope in which process is mailed to a place of business apply when the mailing address serves both as a defendant's residence and place of business?

Facts: In a mortgage foreclosure action, the plaintiff's process server averred that "a copy of the summons and complaint and notice of pendency were mailed via first class mail to defendant's residence at '95 West 95th Street, Apt. 29E, New York, NY 10025' in a first-class, postage paid envelope 'not indicating that the mailing was from an attorney or concerned legal action and marked 'Personal and Confidential.' In actuality, however, the envelope had no marking indicating that its contents were 'personal and confidential' and bore information revealing that the contents were litigation-related." Defendant defaulted, and the plaintiff obtained a default judgment of foreclosure and the property was sold to a third party. Four years later, the defendant moved to vacate the default judgment of foreclosure, challenging the service as unauthorized by CPLR 308. "As to his challenge to CPLR 308(2)'s mailing requirement, he asserted that his address serves as both his residence and place of business; that, to the extent the address was his business address, the envelope's

extensive litigation-related information markings violated CPLR 308(2)'s prohibition; and that the violation mandates vacatur of the foreclosure judgment and dismissal of the foreclosure complaint for lack of personal jurisdiction as a matter of law." Supreme Court rejected that argument.

Holding: The First Department affirmed, holding that "where a defendant's address serves a dual purpose, a mailing in conformity with CPLR 308(2)'s residential requirement is proper and that the restrictions concerning litigation-related information do not apply." The Court explained, "[t]he placement of the phrase 'last known residence' before the phrase 'actual place of business' signals the Legislature's clear intent to deem mailing to a defendant's residence to be primary over a place of business. Indeed, the legislative history for the 1987 amendment to CPLR 308(2) strongly supports this reasoning. The amendment providing for mailing to a place of business was to ameliorate the inability to locate a defendant's residence. Thus, mailing to a residential address is primary over a mailing to a place of business, an option that was intended to be secondary in effectuating service of process." Thus, inclusion of the litigation information on the service envelope did not invalidate the service under CPLR 308(2).

SECOND DEPARTMENT

TORTS, MUNICIPAL LIABILITY

P.D. v County of Suffolk, 2024 NY Slip Op 03405 (2d Dept June 20, 2024)

Issue: **Is a municipality immune from liability for personal injuries allegedly sustained by a foster child during visitation supervised by a department of social services caseworker?**

Facts: During a supervised custodial visit, which was supervised by a county employee, the two-year-old infant plaintiff walked the wrong way up a slide and fell off, injuring herself. The county supervisor was not present in the area of and did not observe the accident. Nor did the county supervisor call for an ambulance following the accident, but rather told the mother "to 'give [the infant plaintiff] a couple of minutes' because there was no visible redness or swelling." The supervisor "testified that his role during the supervised visit was to '[b]asically observe,' although he acknowledged that he could intervene if he observed anything during the visit that he believed 'might be inappropriate or dangerous for the child' or if the mother permitted the infant plaintiff to engage in an activity that he felt was inappropriate." The infant plaintiff's father then commenced a suit against the County, alleging that the accident was caused by the supervisor's negligent supervision. Following discovery, the County moved for summary judgment, arguing that "it was immune from liability, since [the supervisor] was performing a governmental function involving the exercise of discretion and did not owe a special duty to the infant plaintiff." Supreme Court denied the motion.

Holding: The Second Department affirmed, holding that municipalities are typically immune from tort liability when they are exercising a governmental function. The Court explained, "although a municipality owes a general duty to the public at large . . . this does not create a duty of care running to a specific individual sufficient to support a negligence claim, unless the facts demonstrate that a special duty was created . . . A special duty can arise where, as relevant here, the municipality voluntarily assumed a duty to the plaintiff beyond what was owed to the public generally. A municipality will be held to have voluntarily assumed a special duty where there is: (1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) that party's justifiable reliance on the municipality's affirmative undertaking." First, the Court held that a county employee providing supervision for custodial visitation is unquestionably exercising a governmental function and, thus, the County could only be liable for negligent supervision if it assumed a special duty to the infant plaintiff. Likening supervised visitation to a school exercising supervision over students, the Court held that the County assumed a special duty to the infant plaintiff because the visit could not start without the County employee present and the parent was not permitted to interact with the infant plaintiff outside of the supervisor's supervision.

THIRD DEPARTMENT

SEX OFFENDER REGISTRATION ACT

People v Pardee, 2024 NY Slip Op 03360 (3d Dept June 20, 2024)

Issue: **What test should be used to determine whether a foreign conviction supports the assessment of any points under the Sex Offender Registration Act's risk assessment instrument risk factor 9, for any criminal history not involving a sex crime or felony?**

Facts: Defendant was convicted, in 1993, of first-degree child molestation in the State of Washington. In 2021, he moved to New York, and the Board of Examiners of Sex Offenders prepared a risk assessment instrument assigning defendant 110 points, including 5 points under risk factor 9 for a 1987 Texas conviction for driving while intoxicated. County Court assigned the points for the out-of-state conviction, and classified defendant as a level three sex offender.

Holding: The Third Department held that when a sex offender moves to New York, they are required to register and the trial court is required to assess whether points should be assessed for criminal history not involving a sex crime or felony. When that criminal history

includes out-of-state convictions, the court's task is to determine whether those convictions are similar to New York offenses that qualify. Although the Court of Appeals has applied the "essential elements" test previously in those circumstances to decide whether an out-of-state conviction qualified as New York's endangering the welfare of a child, it declined to decide whether that test applied outside of those circumstances. The Appellate Division departments, including the Third Department, "previously have deemed it appropriate to utilize the essential elements test to determine whether a foreign conviction falls within the scope of a New York offense to assess points under any category of risk factor 9" to ensure that "courts properly assess 'prior crimes' and accurately determine a sex offender's risk level in accordance with acts that the Legislature has deemed apt to criminalize." And here, the Third Department clarified that it was formally adopting the essential elements test in these circumstances, under which "a court must compare the elements of the foreign offense with the analogous New York offense to identify points of overlap and, where the offenses overlap but the foreign offense also criminalizes conduct not covered under the New York offense, the court must review the conduct underlying the foreign conviction to determine if that conduct is, in fact, within the scope of the New York offense."

Here, the Third Department determined that defendant's out-of-state conviction for DWI did not fall within the scope of New York's DWI offense, so he should not have been assessed 5 points under risk factor 9. Although the Court took away those points, it nonetheless affirmed defendant's level three classification because his prior pedophilia diagnosis allowed an automatic override of his presumptive level two classification back to level three. The Court therefore affirmed.

CasePrepPlus | June 28, 2024

To view archived issues of CasePrepPlus,
visit NYSBA.ORG/caseprepplus/.