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Reporting on Significant Court of Appeals Opinions and Developments in New York Practice

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CASE LAW DEVELOPMENTS

Court of Appeals Majority and Dissent Agree That the Plaintiff Can Go Forward With Claim Against Municipality Based on No-Knock Warrant Issue

But Their Analysis Reflects Deep Differences in How They Reached Their Conclusion

Ferreira v. City of Binghamton, 2022 N.Y. Slip Op. 01953 (March 22, 2022), is one of the more unusual decisions you will read. The Court of Appeals was asked to answer a certified question from the Second Circuit. That question related to whether New York's "special duty" requirement applied "to claims of injury inflicted through municipal negligence" or if it was limited to claims based on a municipality's negligent "failure to protect the plaintiff from an injury inflicted other than by a municipal employee." *Id*. at *7. In a 5–2 decision, the majority and dissent disagreed vehemently on the basic standard to apply. Ironically, however, with respect to the facts on the ground in this case, they agreed that a municipality can be liable for negligently planning and executing a no-knock warrant at a person's home.

In August, 2011, the Binghamton police had obtained a no-knock search warrant for the residence of an alleged armed and dangerous felony suspect, Michael Pride. That night, the police surveilled the residence for about an hour and confirmed Pride's connection with the apartment. They then observed Pride and another man in front of the home engaging in what appeared to be drug activity. Significantly, however, the police later saw that Pride had left the residence, never saw him return, and conducted no further surveillance. Fearing that Pride was dangerous, a heavily armed SWAT team made a "dynamic entry" the next morning, without knowing that Pride was there. "A dynamic entry uses speed and surprise to gain an advantage before occupants have time to access weapons, destroy evidence, or resist the police." *Id*. at *2–3. After a difficult time entering, a police officer (Kevin Miller) shot the plaintiff, who was unarmed and had slept on a couch in the living room near the front door.

The plaintiff brought a federal court action alleging, among others, a state law negligence claim. He contended that the City of Binghamton breached a special duty and was liable under a theory of respondeat superior for the police officer's and for the department's negligence in the raid. The jury found that the officer was not negligent, but the City was (under a respondeat superior theory), and awarded $3 million (with 90% apportioned to the City). The plaintiff and the City both moved for judgment as a matter of law (or alternatively, for a new trial). Plaintiff argued that the jury's verdict with regard to Miller's negligence and liability should be set aside as against the weight of the evidence. The City claimed that there was no evidence supporting a finding that the City owed the plaintiff a special duty and, regardless, the City's liability was precluded by the governmental function immunity defense. The District Court denied the plaintiff's motion and granted the City's motion.

The Second Circuit upheld the District Court's finding that a reasonable jury could have concluded that the officer was not negligent. However, it found that

> the governmental function immunity defense did not protect the City from liability because plaintiff had "elicited evidence to support a jury finding that the City, through the actions of its employees in the police department and SWAT unit, violated established police procedures and acceptable police practice" by "failing to conduct adequate pre-raid surveillance of the residence or gather other intelligence."

Id. at *5–6.

With regard to the special duty requirement, and the plaintiff's assertion that it only applied to instances where the government failed to protect plaintiffs from the actions

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of non-governmental third parties, the Second Circuit found that New York law offered "conflicting guidance" and certified the question referenced above to the Court of Appeals.

A majority of the Court of Appeals noted that in a New York common law negligence action against a municipality, the plaintiff must establish that there was a breach of a duty owed by the defendant to the plaintiff which proximately causes injury; where the municipality is engaged in a governmental as opposed to a proprietary function, "the existence of a special duty is an element of the plaintiff's negligence cause of action"; and a proprietary function is where the government's actions "essentially substitute for or supplement traditionally private enterprises," while "a municipality will be deemed to have been engaged in a governmental function when its acts are undertaken for the protection and safety of the public pursuant to the general police powers." *Id.* at *9.

Significantly, the majority asserted that if the municipality's actions are proprietary in nature, ordinary rules of negligence apply to a lawsuit against it. In the case of a governmental function, however, the municipality must owe a "special duty" to the injured party for there to be a viable cause of action. Moreover, even if a special duty is established, a municipality that acts in a discretionary governmental capacity can still assert a governmental function immunity defense.

As for the question presented here, the majority rejected the plaintiff's argument that the special duty requirement did not apply where the municipal employee inflicts the injury. In fact, the Court has never limited the special duty rule to instances where a non-governmental third party directly inflicts the harm. Nevertheless, the majority held that a special duty can be established where the police plan and execute a no-knock search warrant on a targeted residence. That special duty runs to the individuals within the residence at the time of the warrant's execution. The Court explained that

> [i]n a no-knock warrant situation, the police exercise extraordinary governmental power to intrude upon the sanctity of the home and take temporary control of the premises and its occupants. In such circumstances, the police direct and control a known and dangerous condition, effectively taking command of the premises and temporarily detaining occupants of the targeted location. As a result, the municipality's duty to the individuals in the targeted premises, a limited class of potential plaintiffs, exceeds the duty the municipality owes to the members of the general public.

Id. at *24–25,

The dissent asserted that prior precedent "repeatedly evaluated negligence claims against governmental actors by asking whether an ordinary duty exists." In addition, the majority "improperly incorporates the governmental/proprietary distinction from immunity law into negligence law." *Id*. at *27. The dissent stressed that municipalities indeed can owe an *ordinary* duty of care to individual members of the public. Thus, the dissent maintained that the majority got it backwards. The special duty rule does not limit the municipality's liability; it expands it. If the plaintiff cannot establish that the governmental entity owes an ordinary duty, a negligence claim can still be maintained by showing that the governmental entity owed a special duty to the plaintiff.

In fact, the dissent argued that the inherent dangers of no-knock warrants referenced by the majority "more than suffices to establish an ordinary duty of care under settled negligence doctrine." *Id.* at *35. The dissent cautioned that while the difference between the majority and the dissent's views might be semantic (that is, whether the duty here was ordinary or special), the ramifications of the majority's approach will be felt

> in future cases in which the majority's decision may be interpreted to bar any negligence claims against a governmental actor unless a "special duty" is proved. One of two things will likely happen: either legitimate claims of negligence will be barred by the majority's misinterpretation of "special duty" here, or "special duty" will no longer turn on individual facts, but will be applied categorically, as the majority does here.

Id. at *37.

Narrow Majority of Court of Appeals Finds That Interactive Fantasy Sports Contests Are Not "Gambling" Under the New York Constitution Because They Involve Skill

Dissent Believes Gambling by Any Other Name is Still Gambling and the Decision Should Have Been Left to the Voters

White v. Cuomo, 2022 N.Y. Slip Op. 01954 (March 22, 2022), asks whether Article 14 of the Racing, Pari-Mutuel Wagering and Breeding Law (Article 14), which authorized Interactive Fantasy Sports (IFS) competitions, is in violation of the New York State Constitution. In a 4–3 decision, a majority of the Court of Appeals ruled that IFS competitions were not gambling and thus did not violate the New York State Constitution. The crux of the majority's position was that the historic prohibition against gambling did not include "skill-based competitions in which participants who exercise substantial influence over the outcome of the contest are awarded predetermined fixed prizes by a neutral operator." *Id*. at *1. The Court found that IFS contests fall within that category of skill-based competitions.

IFS contests are competitions where contestants pay a fixed entry fee and compete for a set, predetermined prize. Participants "create virtual 'teams,' drawing from their knowledge of the sport and athlete performance to draft rosters comprised of simulated players based on professional athletes." *Id*. at *2. These virtual teams compete against virtual teams created by other participants. While the virtual teams do not resemble an actual team, each player's performance during the virtual team's competitions is based on the player's prior performance in actual sporting events.

In 2016, in response to actions brought by the Attorney General attempting to enjoin two IFS operators, alleging that IFS contests were "unlawful gambling" in violation of the Penal Law and the State Constitution, the New York State legislature reviewed the legality of IFS contests. After public hearings and "robust debate," the legislature enacted Article 14, authorizing registered prize-based IFS contests, declaring that such contests were

> not "gambling" within the meaning of the Penal Law because the outcomes of such contests are dependent upon "the skill and knowledge of the participants,"

> rather than chance, and the "contests are not wagers on future contingent events not under the contestants control or influence," because the outcome is dependent upon the comparative skill of each IFS participant as measured against one another (citations omitted).

Id. at *5.

Article 1, § 9 of the New York State Constitution permits "gambling" in certain circumstances while prohibiting it in others. The Court of Appeals was therefore asked to determine if the legislature violated the Constitution when it enacted Article 14. The majority noted that generally, legislative enactments are entitled to a "strong presumption" of constitutionality; a party challenging the constitutionality of a statute must prove its invalidity "beyond a reasonable doubt"; and the party maintaining a facial challenge as here bears "the substantial burden of demonstrating that in any degree and in every conceivable application, the law suffers wholesale constitutional impairment" (citations omitted). *Id*. at 8. The Court emphasized that it is the judiciary's role to determine the rights and prohibitions in the Constitution. However, it is "improper for courts to lightly disregard the considered judgment of a legislative body that is also charged with a duty to uphold the Constitution." *Id*. at *10.

The Constitution does not define what "gambling" exactly is "and the extent to which it has been permitted by the Constitution has evolved over time." *Id*. at *10–11. The parties in this action agreed that "the prohibition on 'gambling' should be understood to prohibit games of chance and bets and wagers on contests of skill unless otherwise authorized by article 1, § 9." *Id*. at *16–17. The question here is where IFS contests fall within this discussion and whether they are a game of chance.

The Court maintained that "the proper benchmark for assessing whether an activity is a 'game of chance' for purposes of the constitutional gambling prohibition is whether chance is the dominating or controlling element." *Id*. at *19–20. Here, in concluding that IFS contests were not games of chance, the majority pointed to the following: (1) The evidence presented to the legislature and its factual conclusion that IFS contests are not a game of chance, but of skill, "has resounding support"; (2) IFS competitions involve a significant exercise of skill, since "[p]articipants draw from their knowledge of the relevant sport, player performance and histories, offensive and defensive strengths of players and teams, team schedules, coaching strategies, how certain players on opposing teams perform against each other, statistics, strategy, and the fantasy scoring system in order to exercise considerable judgment in selecting virtual players for their rosters" (*Id*. at *21); (3) the authorized IFS contests "are structured in the manner of fixed prices for skill-based competitions"; (4) IFS contest participants "engage in a distinct game of their own, separate from the real-life sporting events"; and (5) the outcome of IFS contests does not turn on the performance of real-life athletes but on whether participants skillfully compose and manage a virtual roster.

The Court acknowledged that chance played some role in IFS contests. However, "as the record demonstrates, the legislature's determination that IFS contests are *predominantly* games of skill because they pit the strategic rosters of participants against one another . . . is firmly grounded in evidence and logic." *Id*. at *22. Thus, the courts should not substitute their own judgment for that of the legislature.

The dissent, written by Judge Wilson, posited that the majority got it all wrong. Since the "Constitution prohibits any kind of gambling, the policy issues must be put to the voters of this state, in the form of a popular referendum to amend the Constitution (or via a constitutional convention)." *Id*. at *31.

The dissent stressed that everyone understood the Constitution's prohibition on gambling to be far-reaching; the majority "manufactures a constitutional definition of gambling along a skill-chance divide"; the history and text of article 1, § 9 of the Constitution does not support such a dichotomy and the constitutional meaning turns on "what types of activities are commonly understood to constitute gambling"; the "very purpose of placing the prohibition on gambling into our Constitution was to prevent alteration by mere legislative action" (*Id*. at *56); the cases cited by the majority did not deal with the Constitution's gambling prohibition, but rather with statutory constraints on gambling; and even if the skill/chance dichotomy was proper, the majority's analysis was not credible: "There is no escaping the real-world fact that IFS bettors have absolutely no influence on how any of the athletes they have selected will perform." *Id*. at *62–63.

Equally Narrow Majority of Court of Appeals Finds Regulation Not Sufficiently Specific to Support Labor Law §241(6) Claim

Dissent Concludes Regulation was Specific Enough and Criticizes Prior Court Ruling as Establishing "Unintelligible Standard"

In *Toussaint v. Port Auth. of N.Y.*, 2022 N.Y. Slip Op. 01955 (March 22, 2022), the Court of Appeals was split (another 4–3 decision) on whether a particular regulation set forth a concrete specification sufficient to give rise to a non-delegable duty under Labor Law § 241(6). That statute provides that:

> All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith.

The first sentence reiterates the common-law standards of care, while the second sentence, requiring compliance with the Commissioner's rules, creates a non-delegable duty.

In *Toussaint*, the plaintiff was struck by a power buggy when he was operating a rebar-bending machine at the World Trade Center Transportation Hub construction site, which was owned by the Port Authority. The power buggies, used to move materials on construction sites, were owned and operated by contractors or subcontractors. The question here surrounded Industrial Code § 23-9.9(a) which provides that "[n]o person other than a trained and competent operator designated by the employer shall operate a power buggy." The issue was whether this regulation was sufficiently specific to support the Labor Law § 241(6) claim.

The majority noted that since its decision in *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494 (1993), and reaffirmed "repeatedly," the law has been that in order to state a claim under Labor Law § 241(6), a plaintiff needs to allege a violation of an Industrial Code regulation setting forth "a specific standard of conduct" and "not simply a recitation of common-law safety principles." *Toussaint*, 2022 N.Y. Slip Op. 01955 at *5. Here, the Court concluded that the regulation was not specific enough:

> With respect to 12 NYCRR 23-9.9 (a), we agree with the majority and dissent below that the "trained and competent operator" requirement "is general, as it lacks a specific requirement or standard of conduct." We disagree, however, with the Appellate Division majority's conclusion that the additional direction that "trained and competent" individuals must also be "designated" somehow transforms the provision from a general standard of conduct to a "specific, positive command." Because the regulation does not mandate compliance with concrete specifications, plaintiff's section 241 (6) claim must be dismissed (citations omitted).

Id. at *6.

The dissent disagreed with the majority that the regulation was not specific enough. It insisted that the regulation *does* state specific requirements beyond those applicable to the common law duty of care, by adding the elements of training and designation:

> "Trained" adds an element beyond competence: section 23-9.9 (a) requires that the operator must have been trained in power buggy operation, not just have figured it out and become competent without any training. The "designated" requirement likewise adds a safety requirement absent in the common law by preventing even trained and competent operators from operating power buggies unless they have been designated to do so by their employer. The designation requirement has the potential to increase safety in at least two ways: concentrating the work among a reduced set of persons who have it as their specialized job improves performance and safety, and requiring employers to go through a designation process compels them to consider whether the designated persons are the best suited to the job. The common law contains no such designation requirement.

Id. at *11–12.

In addition, the dissent contended that the majority's position did not comport with existing case law. That case law, the dissent argued, found regulations *less* specific than the one in this case to be sufficiently specific to support a § 241(6) claim. Moreover, the dissent criticized the *Ross* decision for holding "quite out of thin air" that "workers injured by breaches of 'nonspecific' regulations could not state any claim at all under section 241(6)." *Id*. at *25. To the contrary, "if the legislature had intended that these parties could not be held liable for violations of regulations that merely restated the common law, it could have done so. In fact, the legislative history suggests the opposite: the Legislature sought to strengthen injured workers' right to recover and restore the law to its original form." *Id*. at *28.

The dissent contended that this contradiction was the reason why the trend of the courts after the *Ross* decision and its "unworkable" standard was to hold that the regulations were "sufficiently specific and distinct from the common law even when they were hardly, if at all, different from the common-law standard." *Id*. at *30.

Second Department Holds That Process Server Cannot Rely on Third Party's Misrepresentation as to Defendant's Proper Residential Address

Thus, Service Was Held to Be Defective

CPLR 308(2) provides that service can be made in the first instance, without first resorting to personal delivery, via "leave and mail." Specifically, the statute requires that you must

- leave the initiating pleadings with a person of suitable age and discretion at the defendant's actual place of business, dwelling place, or usual place of abode; *and*

- mail the pleadings to the defendant at his or her last known residence or send them via first class mail to the defendant's actual place of business in an envelope marked "personal and confidential" and without any indication that it is from a lawyer or concerns an action.

This section has provoked quite a few issues. For example, as to whether you can serve a person of suitable age and discretion who answers the door but does not reside there (yes, you can), or whether the recipient is of a "suitable age and discretion" (if he or she is "of sufficient maturity, understanding, and responsibility under the circumstances so as to be reasonably likely to convey the summons." *See Roldan v. Thorpe*, 117 A.D.2d 790 (2d Dep't 1986)).

Recently, *Everbank v. Kelly*, 203 A.D. 3d 138 (2d Dep't 2022) provides another scenario. The defendant's daughter present at the premises affirmatively misrepresented to the process server that it was the defendant's actual residence, and the process server relied on that misrepresentation. Was service effective, even when it was established that the address was not the defendant's dwelling place or usual place of abode? Stated differently, could the process server reasonably rely on the daughter's (mis)representation? The Second Department here answered in the negative.

The court noted that there are few exceptions to CPLR 308's strict service requirements. For example, a process server can rely on apparent authority; a situation where the defendant engages in affirmative conduct to mislead; a process server's reliance on inaccurate DMV records where the defendant failed to timely notify the DMV of an address change; or where a defendant resists service.

Here, however, the court noted that the defendant's daughter did not misrepresent as to *who* could accept service, rather where her father resided. And estoppel would not apply to the defendant since he did not make the statement. The court concluded that the misrepresentation here did "not transform an improper service address into a proper one, given how exacting the Legislature has prescribed the methods of service and the need for courts and litigants to have certainty and reliability in how the law is applied in order to avoid generating collateral disputes over these matters." *Id*. at 147.

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