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Summarizing recent significant
New York appellate cases

For those of us who don't regularly practice in Trusts and Estates, the Latin words *in terrorem* produce fear and anxiety. As Trusts and Estates practitioners know, however, in terrorem clauses in wills and trusts can often be used to protect a decedent's or grantor's intent that no one challenge their plan for their assets. Indeed, such a clause generally provides that if a beneficiary challenges the validity of a will or trust, they lose their inheritance entirely. The Court of Appeals recently clarified this interesting area of the law, holding that in terrorem clauses in trusts, like those in wills, must be strictly construed, and a lawsuit seeking to enforce the terms of the trust, rather than to its validity, should not result in a disinheritance. Moreover, the Court of Appeals, in a different case decided the same day, overruled its prior precedent that precluded common law negligence claims against owners of domestic animals, holding instead that plaintiffs injured by domestic animals can now seek to hold their owners strictly liable or for their negligence. Let's take a look at those opinions and what else has been happening in New York's appellate courts over the past week.

COURT OF APPEALS

TRUSTS AND ESTATES, IN TERROREM CLAUSE

Carlson v Colangelo, 2025 NY Slip Op 02264 (Ct App Apr. 17, 2025)

Issue: **Does a trust beneficiary violate an in terrorem clause, "which dispossesses a beneficiary or other challenger who contests or seeks to nullify the trust," by seeking declaratory relief to enforce the terms of the trust?**

Facts: "Plaintiff is a beneficiary of a revocable trust that, she asserts, entitles her to certain real property and income. The trust includes an in terrorem clause, which dispossesses a beneficiary or other challenger who contests or seeks to nullify the trust." In particular, the trust provided: "In the event that any heir, distributee, beneficiary, agency, organization or other individual ('challenger') shall contest any aspect of this Trust, or the distribution of the Grantor's assets pursuant to his Last Will, *inter vivos* Trust Agreement, beneficiary designations or non-probate beneficiary designations, or shall attempt to set aside, nullify, contest, or void the distribution thereof in any way, then the Grantor directs that such rights of such challenger shall be ascertained as they would have been determined had that challenger predeceased the execution of this instrument and the Grantor, without living issue."

Following the grantor's death, "the Trustee's counsel informed plaintiff by letter of the Premises and stream-of-income bequests," but claimed that the stream-of-income bequest used "precatory language" that gave the Trustee discretion whether to pay it. Plaintiff disagreed, and after refusing to waive her rights to the bequests, sued the Trustee, seeking, among other things, "a declaration that plaintiff is entitled to the income stream" and that she was 50% owner of the grantor's business. The Trustee moved to dismiss, arguing that "plaintiff's assertion that the payment of the income stream was mandatory, rather than discretionary, triggered the Trust's in terrorem clause. Supreme Court denied the motion, explaining that outstanding factual issues precluded a determination that, as a matter of law, plaintiff's complaint triggered the clause." Following other partial summary judgment motion practice regarding plaintiff's ownership of the business, in which the Trustee did not invoke the in terrorem clause, the Trustee again moved for summary judgment, "this time arguing that plaintiff's unsuccessful claim of a 50% interest in Dempsaco triggered the in terrorem clause. Plaintiff opposed the motion, responding that her action was meant to construe and enforce the Trust, not to contest it. Plaintiff also moved for summary judgment on her claims concerning the Premises, the income stream, and the Trustee's alleged unjust enrichment."

Supreme Court the Trustee summary judgment, holding that "the clear intent of the grantor, as gleaned from the Trust, was to prevent . . . conduct that would delay or dilute the dispositions under the Trust, place the Grantor's game plan in jeopardy, and threaten [the Trustee's] clear right to [the business] . . . . It cannot be disputed that Plaintiff contested the distribution of the Grantor's 100% interest in [the business] to [the Trustee] under the Trust." Supreme Court thus held that plaintiff's suit violated the in terrorem clause, and consequently disinherited her. The Appellate Division, Second Department affirmed in all relevant respects.

Holding: The Court of Appeals disagreed, explaining that "in terrorem clauses in trust agreements, like those in wills, are enforceable but not favored, and must be strictly construed. When construing a trust agreement, a court must first look within the four corners of a trust instrument to determine the grantor's intent. We are mindful that in terrorem clauses are normally used to deter challenges to the *validity* of various types of donative instruments and their provisions, thus generally serving purposes other than inhibiting litigation to enforce a trust created by the instrument." Plaintiff's complaint here, seeking declaratory relief regarding the bequests, the Court held did not trigger the in terrorem clause because it did not seek to challenge the validity of the Trust, but rather to enforce it according to its terms. The Court reasoned, "the complaint nowhere asserts that the Trust was created in violation of law. There is no express or implied

claim that the Trust was not properly executed, or that the Trust lacks a beneficiary, a trustee, a trust res, or delivery of the res. Nor did the complaint allege that the grantor lacked mental capacity to create the Trust or that he was subject to duress or undue influence. Nor does plaintiff challenge any of the Trust's bequests. To the contrary, she seeks distribution of her bequests in full accord with the Trust and in satisfaction of the grantor's intent."

Plaintiff's claim that she was a 50% owner of the business too did not run afoul of the in terrorem clause, the Court held, because it did "not amount to a challenge to the Trust or to the grantor's intent. The Trust provides that 'all of the Grantor's interest or this Trust's interest in and to [the business]" would be distributed to defendant Colangelo. Plaintiff sought a declaration of her interests in [the business]—a legal affirmation that in no way undermines distribution of the *grantor's* interest as provided in the Trust. Nevertheless, defendants contend that plaintiff's mere allegation of an interest in [the business] constitutes a challenge to [the grantor's] interest in the company which is effectively a challenge to Colangelo's interest, and thus to the Trust itself. We disagree. Nowhere does the Trust declare that the grantor is the sole member of [the business] or that he holds a 100% interest in the company. It is hornbook law that a person can transfer no more than they legally own or control. Since [the grantor] could only transfer to Colangelo his own interests, plaintiff's action to recognize her alleged 50% membership in [the business] is not a challenge to the Trust's distribution of any part of [the grantor's] interest in the company. Plaintiff merely seeks what she asserts is hers and nothing more."

TORTS, DOG BITE

Flanders v Goodfellow, 2025 NY Slip Op 02261 (Ct App Apr. 17, 2025)

Issue: **May plaintiffs bring common law negligence claims for personal injuries caused by domestic animals?**

Facts: "On December 8, 2018, Flanders arrived at the Goodfellows' house to deliver mail, but found their mailbox missing. She pulled her vehicle into the horseshoe driveway to leave a package on the Goodfellows' porch and, as she did so, heard a dog barking. She had not seen a warning that the Goodfellows had a dangerous dog either at the post office or on the scanner given to postal carriers, and she did not see a 'beware of dog' sign on the property. After waiting a moment to confirm the barking dog was not outside, Flanders exited her vehicle.

Stephen Goodfellow opened the door to meet Flanders on the porch. As she handed him the package and began to tell him that the mailbox was down, Flanders heard the sound of nails 'ticking' on a hardwood floor and saw a large dog approaching the door from inside the house. The dog slipped past Stephen through the open door and, as Stephen yelled its name, lunged towards Flanders's neck. Flanders raised her hand to cover her face and neck. The dog bit her shoulder, latching its teeth into her flesh and breaking skin. With the package still in hand, Stephen tugged at the dog to release its hold. When he managed to break the dog's grip, Flanders went directly to her vehicle without looking back. She later learned that the dog bite had caused a 'snap tear' in her shoulder muscle, an injury that required multiple surgeries and resulted in permanent scarring."

Flanders then commenced this personal injury action against the Goodfellows, asserting claims for, among other things, strict liability and common law negligence. "Supreme Court awarded summary judgment to the Goodfellows and dismissed the claim. With respect to strict liability, the court concluded that the evidence created no triable issue of fact as to whether the Goodfellows had actual or constructive knowledge of the dog's alleged vicious propensity, which is an essential element of a strict liability cause of action. The court considered the affidavits from the postal workers, but found them insufficient because they did not show that the Goodfellows were home while the dog acted aggressively towards postal workers or that the Goodfellows otherwise knew about the dog's behavior. The court also dismissed Flanders's negligence cause of action under Fourth Department precedent foreclosing such liability for harms caused by domestic animals." The Appellate Division, Fourth Department affirmed.

Holding: The Court of Appeals reversed, holding that Flanders had produced sufficient evidence to raise a triable issue of fact on the strict liability claim. The Court explained, "[t]he contours of our long-standing rule of strict liability are not in dispute. We have held that the owner of a domestic animal who either knows or should have known of that animal's vicious propensities will be held liable for the harm the animal causes as a result of those propensities. A vicious propensity includes the propensity to do any act that might endanger the safety of the persons and property of others in a given situation. Once an owner's actual or constructive knowledge of their animal's vicious propensities is established, the owner faces strict liability for the harm the animal causes as a result of those propensities. Two additional points have informed our applications of the strict liability rule. First, although knowledge of vicious propensities may of course be established by proof of prior acts of a similar kind of which the owner had notice, a triable issue of fact might be raised—even in the absence of proof that the dog had actually bitten some-one—by evidence that it had been known to growl, snap or bare its teeth. Second, we have held that a vicious propensity should be understood to include any behavior that reflects a proclivity to act in a way that puts others at risk of harm." Here, the affidavits of other postal workers "stated that anyone in the Goodfellows' home would have been aware of the dog's aggressive behavior, which included growling, snarling, barking, slamming into windows, and trying to bite at the postal workers through the glass" and the Goodfellows' response that they did not know merely presented issues of credibility for a jury to resolve.

Most notably, the Court, on Flanders' common law negligence claim, overruled its prior precedent in *Bard v Jahnke* (**6 NY3d 592 [2006]**), "which held that there can be no common-law negligence liability when a domestic animal causes harm." Although stare decisis counsels that a court "rarely" overrule its prior precedent, the Court explained, "rarely does not mean never. Stare decisis is not an inexorable com-

mand. Rather, it is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable. Although a court should be slow to overrule its precedents, there is little reason to avoid doing so when persuaded by the lessons of experience and the force of better reasoning. That may be especially true of tort cases, including personal injury cases, which offer an example where courts will, if necessary, more readily re-examine established precedent to achieve the ends of justice. Thus, where we have concluded that a rule of nonliability is out of tune with the life about us, at variance with modern-day needs and with concepts of justice and fair dealing, we have overruled it."

Here, the Court reasoned, "[t]ort law seeks to incentivize us to be mindful of the risk that our behavior might harm others by imposing a duty to act with due care. That is why, under ordinary principles of negligence, a victim may seek recovery by proving that a defendant failed to exercise due care and thereby proximately caused a victim's injuries. Chief Judge Cardozo laid down the canonical formulation in *Palsgraf*: 'Negligence is the absence of care, according to the circumstances.'" "By exempting owners of domestic animals from negligence liability, *Bard* departed from these principles, and the standard incentives of our tort system, in several respects. For one thing, foreclosing negligence liability shifts both the burden of due care and cost of injuries away from owners of domestic animals to parties injured by those animals. And by allowing liability only upon proof that the owner had actual or constructive knowledge of a vicious propensity, the rule gives owners of domestic animals little reason to familiarize themselves with any potential proclivities that might lead the animal to cause harm, and in turn, to take reasonable steps to prevent any harm that may result. This position made New York an outlier."

Indeed, the Court held, "[w]hatever advantages of certainty were offered by *Bard*'s bright-line rule, they have been much eroded by later decisions that carve out various exceptions to a blanket preclusion of negligence liability," including for wandering farm animals and veterinary clinics, among others. "These developments confirm that *Bard*'s bright-line rule has been muddied by various carve-outs that allow negligence liability against owners of domestic animals. The availability of a negligence action appears increasingly unpredictable, perhaps constrained only by the creativity of lawyers seeking recovery for those harmed by a domestic animal. The benefits the *Bard* court anticipated from its blanket preclusion of negligence liability have been much diminished by the subsequent exceptions to the rule." Moreover, "*Bard*'s decision to foreclose negligence liability laid bare a fundamental question: 'Why should a person who is negligent in managing an automobile or a child be subject to liability, and not one who is negligent in managing a horse or bull?' That question is essentially one of fairness: why should someone harmed by a domestic animal bear the risk—and the cost—of injury, provided that the animal's owner did not know or have reason to know of a vicious propensity? Granted, this issue was apparent when *Bard* was decided. But it has continued to trouble both this Court and the lower courts. In some instances, we have carved out ad hoc exceptions to *Bard*'s no-negligence rule, and lower courts have either done the same or voiced significant concern with our doctrine. These cases confirm that precluding negligence liability has proven unworkable, and at times unjust."

Finally, the Court explained that going forward, "there is a two-pronged approach to liability for harms caused by animals, as set forth in sections 509 and 518 of the Restatement (Second) of Torts. A plaintiff who suffers an animal-induced injury therefore has a choice. If the owner knew or should have known the animal had vicious propensities, the plaintiff may seek to hold them strictly liable. Or they can rely on rules of ordinary negligence and seek to prove that the defendant failed to exercise due care under the circumstances that caused their injury. Of course, a plaintiff might also assert both theories of liability, as Flanders chose to do."

FOURTH DEPARTMENT

TORTS, FALSE ARREST, EXCESSIVE FORCE

***Thomas v Niagara Frontier Tr. Auth.*, 2025 NY Slip Op 02433 (4th Dept Apr. 25, 2025)**

Issue: **When may a court grant summary judgment on an excessive use of force tort claim, and is a guilty plea in a criminal case sufficient to establish probable cause to defeat a false arrest claim?**

Facts: "A police officer for defendant Niagara Frontier Transit Authority (NFTA) stopped a car being driven by plaintiff for certain alleged parking violations and having tinted windows that were impermissibly dark. After the stop, a second NFTA officer, defendant Robert Gawlak, individually and in his representative capacity, approached plaintiff's side of the vehicle. There is conflicting deposition testimony as to what happened next. According to Gawlak, plaintiff rolled down the window, began yelling at him, and then began to roll the window back up. Gawlak drew his weapon and told plaintiff he needed to keep the window down. Gawlak testified that plaintiff then threatened to shoot him, reached to his right, and began to drive toward him. At that point, Gawlak fired shots through the windshield. In contrast, plaintiff testified at his deposition that Gawlak was being aggressive and told him to exit the vehicle while Gawlak was clutching his firearm. In response, plaintiff rolled up his window. According to plaintiff, Gawlak thereafter drew his service weapon, moved toward the front of the vehicle, aimed the firearm at plaintiff, and shot him through the windshield, striking his left finger. Plaintiff testified that upon being shot, he fled. Plaintiff was stopped, arrested, and taken to the hospital where he underwent surgery for his finger, which had been almost completely severed." Plaintiff was charged in a five-count indictment, and "ultimately pleaded guilty to unlawful fleeing a police officer in a motor vehicle in the third degree in full satisfaction of the indictment."

Plaintiff then commenced this action seeking damages for false arrest and excessive force. Defendant moved for summary judgment, and Supreme Court granted the motion, dismissing Plaintiff's first cause of action for false arrest and unlawful imprisonment and second cause of action for negligent use of excessive force.

Holding: The Appellate Division, Fourth Department, however, reversed and denied summary judgment as to those claims. In particular, the Court held, excessive force claims must be evaluated under the "Fourth Amendment's objective reasonableness standard," which requires the court to examine whether the perspective of a reasonable officer, at the time and not with 20/20 hindsight, would have needed to use the same degree of force under the "facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether the suspect is actively resisting arrest or attempting to evade arrest by flight." The Court explained, "[t]he fact that a person whom a police officer attempts to arrest resists, threatens, or assaults the officer no doubt justifies the officer's use of some degree of force, but it does not give the officer license to use force without limit. The force used by the officer must be reasonably related to the nature of the resistance and the force used, threatened, or reasonably perceived to be threatened, against the officer." Here, the Court held that the very different accounts of what happened, "including video from a passing NFTA bus and plaintiff's deposition testimony that he fled only after Gawlak shot him," raised a material issue of fact for a jury to decide whether the officer's use of force was reasonable under the circumstances.

As to the false arrest claim, the Court explained, although "the existence of probable cause serves as a legal justification for the arrest and an affirmative defense to the false imprisonment cause of action," and a guilty plea in a criminal case related to the conduct "establishes probable cause for arrest on the underlying conduct and any other charges satisfied by the plea," that question too is typically for a jury to decide. Here, in particular, the Court reasoned, "the deposition testimony of the nonparty NFTA officer who initially stopped plaintiff's car, in which he testified that the police lacked probable cause to arrest plaintiff at relevant points of the encounter" similarly raised a question of fact not properly resolved on summary judgment.

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