New York State Law Digest

EDITOR: DAVID L. FERSTENDIG

No. 774 May 2025

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

NYSBA

CASE LAW DEVELOPMENTS

Court of Appeals Seeks to Clarify the Primary Assumption of Risk Doctrine

Results in One Affirmance and One Reversal

As the *Law Digest* has previously reported, there has been a flurry of recent cases interpreting the primary assumption of risk doctrine. To review, in 1975, New York enacted a pure comparative fault statute in CPLR article 14. Nevertheless, the Court of Appeals has retained a form of primary assumption of risk in very limited circumstances, specifically with respect to athletic and recreative activities, based on a premise that "[o]ne who takes part in . . . a sport, accepts the dangers that inhere in it so far as they are obvious and necessary" (citation omitted). *Grady v. Chenango Val. Cent. Sch. Dist.*, 40 N.Y.3d 89, 94 (2023).

Grady was a split decision, which we covered in a prior edition of the *Law Digest*. In one case (*Secky*), the Court of Appeals held that a collision between two players on a basketball court was an inherent risk and thus the doctrine applied. In the other (*Grady*), the Court ruled that the defendants had not shown as a matter of law that plaintiff's injuries occurring during a drill in which multiple balls were in play on a baseball field resulted from baseball's inherent risks or were due to "suboptimal playing conditions." Judge Rivera's dissent (in part) insisted that the Court should abandon the implied assumption of risk doctrine, which she found to be at odds with New York's adoption of pure comparative negligence.

Now, in *Katleski v. Cazenovia Golf Club, Inc.*, 2025 N.Y. Slip Op. 02178 (April 15, 2025), the Court returns to "clarify the scope of two important limitations on the doctrine: its inapplicability to unreasonably enhanced risks and its confinement to cases involving participation in athletics and recreation." *Id.* at *1. Again, the Court was dealing with two cases (*Katleski* and *Galante*) and came to differing conclusions.

Katleski

In *Katleski*, an experienced golfer was struck in the left eye by a golf ball during defendant's golf tournament. Plaintiff was riding in a golf cart on the seventh hole fairway when he was hit by a ball struck by defendant Justin Hubbard, teeing off from the third hole. The fairways for the two holes run parallel in part, and a portion of the seventh fairway approaching the green is adjacent to and to the right of the third tee. The Court affirmed the Appellate Division split decision granting defendant's summary judgment motion.

The Court noted that there was no dispute that being struck by a mishit golf ball "is a risk that naturally inheres in the sport of golf" and that the "sole question" was whether the plaintiff raised a triable issue of fact "that the placement of tee box A on the third hole unreasonably enhanced that risk." That can include an assessment as to whether " 'the risks [were] concealed or unreasonably enhanced' by the complexity of the drill performed." Moreover, "[t]he risks of a sport can also be unreasonably enhanced through the negligent design or operation of a sports venue." *Id.* at *2. In *Katleski*, the plaintiff

> failed to rebut the club's showing that golf courses commonly lack clear visibility and barriers between holes. The club's expert cited numerous facilities in New York and across the world that contain holes in close proximity—including some that share greens and fairways, and one location that even features crossing shot lines—but have no barriers between holes. There is no basis in the record to infer that the risks of the subject course exceeded the risks presented by those comparable facilities, and thus no basis to conclude that its design gave rise to an "enhanced" risk.

Id.

In addition, the Court noted that

> the club presented unrebutted evidence that the placement of tee box A served a competitive purpose—name-

IN THIS ISSUE

> ly, increasing the difficulty of the third hole "to conform with more modern golf." . . . "The primary means of improving one's sporting prowess and the inherent motivation behind participation in sports is to improve one's skills by undertaking and overcoming new challenges and obstacles" (citations omitted).

Id.

Galante

In *Galante*, the plaintiff sought damages for injuries she sustained when the golf cart she was driving was struck by a car *in the parking lot* of a golf course. The Court of Appeals held the primary assumption of risk doctrine did *not* apply because the plaintiff was not "playing, observing, or otherwise participating in an athletic or recreative activity at the time she was injured." To the contrary, she was merely driving a golf cart in a parking lot and the analysis was not impacted by the fact that the incident occurred next to a golf course.

> [W]e have instructed that primary assumption of risk applies only to "personal injury claims arising from sporting events, sponsored athletic and recreative activities, or athletic and recreational pursuits that take place at designated venues." "[P]ersons injured while traversing streets and sidewalks" generally are not subject to the doctrine because this "would create an unwarranted diminution of the general duty of landowners—both public and private—to maintain their premises in a reasonably safe condition," potentially "swallow[ing] the general rule of comparative fault" (citations omitted).

Id. at *3.

Court Further Holds Plaintiff's Claims to Be Precluded by Doctrine

Finds Tripping and Falling on Uneven Surface While Playing Cricket As Being Inherent in Sport

The Court of Appeals was not finished. On the same day as the *Katleksi-Gallante* decision, the Court issued another one, with the majority issuing a very brief opinion affirming the Appellate Division's order finding the plaintiff's claims to be precluded by the primary assumption of risk doctrine.

In *Parnand Maharaj v. City of New York*, 2025 N.Y. Slip Op. 02143 (April 15, 2025), the plaintiff was injured when he fell while playing cricket on a City-owned asphalt tennis court. He alleged that as he ran to catch a batted ball he stepped into and tripped over a two-to-four-inch-deep hole that was concealed inside a long crack, approximately seven feet long and between three to eight inches wide. A majority of the Court ruled that the Appellate Division had correctly concluded that inherent in the game of cricket is the risk of tripping and falling when playing on an irregular surface. Moreover, there was no evidence "that the irregularity in the playing field—the cracked and uneven surface of the tennis court—unreasonably enhanced the ordinary risk of playing cricket on an irregular surface." *Id.* at *1.

Judge Rivera was the sole dissent. While reminding us in a footnote that she has previously taken the position that the primary assumption of risk doctrine should be abandoned, she insisted that the majority got it wrong because the doctrine as is simply did not apply to the "plaintiff's negligent maintenance claim in the first place." Judge Rivera stressed that

> [t]he primary assumption of risk doctrine does not completely displace a landowner's traditional duty of care to maintain their premises in a safe condition. Tripping on a fissure that is allegedly the result of years of neglect is not a risk inherent to cricket, or any other sport, and defendants were therefore not entitled to summary judgment on the theory that plaintiff assumed the risk of injury by playing on a deteriorated surface. The majority empowers defendants to escape all accountability for their alleged negligence, which put plaintiff and other park users at risk of serious injury.

Id.

Court of Appeals Reverses Lower Courts' Grant of Summary Judgment Under Vicious Propensities Doctrine

Court Finds Material Issues of Fact and Credibility Questions

In *Flanders v. Goodfellow*, 2025 N.Y. Slip Op. 02261 (April 17, 2025), the plaintiff, a postal worker, was delivering a package to the defendants when one of the defendants' dogs escaped from their house, jumped up, and bit the plaintiff, injuring her shoulder. Plaintiff commenced this action to recover damages for her injuries, asserting negligence and strict liability causes of action. The lower courts dismissed both causes of action. The Court of Appeals reversed, denying defendants' summary judgment motion.

The case raised two issues. First, the law is clear that an owner of a domestic animal who knows or should have known of their animal's vicious propensities is strictly liable for the harm caused by those propensities. The lower courts found that the defendants carried their burden, establishing that they had neither actual nor constructive knowledge of the dog's allegedly vicious propensities. The Court of Appeals concluded that there were triable issues of fact as to whether the defendants had constructive knowledge.

The second issue—which we will treat separately below—relates to what appeared to be established law: under New York law, there can be no common-law negligence liability where a domestic animal causes harm. Here, the Court of Appeals decided to overrule its precedent.

Back to the strict liability claim. The Court noted that "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' (citations omitted)." *Id.* at *1. Moreover, "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" ' (citations omitted)." *Id.*

The Court concluded that here there were triable issues of fact as to whether the defendants had constructive knowledge of the dog's propensity to bite. This included that "postal work-

ers stated that anyone in the Goodfellows' [defendants'] 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." The defendants' contention that they were unaware of the dog's behavior or that the postal workers never advised them of the behavior was unavailing since these are credibility determinations. In addition, the defendants conceded that the dog got into a fight with another dog while being briefly trained and "the dog had not previously interacted with strangers because they were not allowed in the house, without explaining whether concerns about the dog prompted that practice." *Id.*

Court of Appeals Takes Bull by the Horns Overturning Precedent Prohibiting Common-Law Negligence Liability

Court Reviews Policy Behind Stare Decisis and Circumstances Where Precedent Can Be Overruled

The other issue in *Flanders* related to the dismissal of the plaintiff's negligence cause of action based on the Court's holding in *Bard v. Jahnke,* 6 N.Y.3d 592 (2006), that there can be no common-law negligence liability when a domestic animal causes harm. The *Flanders* Court concluded that it was time to overturn that precedent and to recognize negligence as an alternative to strict liability for injuries caused by a domestic animal. This, of course, raised issues relating to stare decisis. That doctrine provides that courts are generally expected to follow precedent from prior, similar cases. The *Flanders* Court explained the purpose behind the principle:

> "The doctrine " 'is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process'." "Its purpose is to promote efficiency and provide guidance and consistency in future cases by recognizing that legal questions, once settled, should not be reexamined every time they are presented." In light of these concerns, we will overrule a prior decision only "in the rarest of cases" (citations omitted).

Id. at *2–3.

Nevertheless, while "rare," there can be circumstances where precedent can and should be overruled:

> One consideration is whether the decision is well-reasoned and consistent with relevant general principles of law. More specifically, we have held that if a recent precedent "fits uncomfortably into our tort jurisprudence," that tension may be a reason to abandon its decisional law. Also relevant is whether legal developments in the doctrine undermine an earlier decision. Finally, we may consider how courts grapple with a decision over time—for example, whether it is "unworkable," "creates more questions than it resolves," or "no longer serves the ends of justice" (citations omitted).

Id. at *3.

The Court in *Flanders* concluded that, based on those factors, the time had come to overrule *Bard*. Initially, the Court described the purpose of tort law:

> Tort 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. . . . As our case law makes clear, these principles apply to persons engaged in quite a wide array of activities—just to name a few, riding a bike, driving a car, and manufacturing factory machinery. A single idea unites these decisions: when people go about their daily lives, the law generally requires them to take reasonable steps to prevent foreseeable harm (citations omitted).

Id.

Exempting owners of domestic animals from negligence liability departs from these principles:

> 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.

Id.

The Court noted that when *Bard* was decided New York's law was contrary to the Restatement and the law of virtually all other states that had considered the issue. And since then, even more states have adopted the Restatement approach.

The *Bard* Court had emphasized that the chief benefit of its decision was to provide a bright-line rule. However, since then there have evolved various exceptions that have "muddled" and diminished that rule (e.g., harm caused by some "wandering animals" could give rise to a negligence action; *Bard* protection only applied to owners of the domestic animals but not to third partes, such as a veterinary clinic). Thus, "[t]he 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." *Flanders* at *4.

Moreover, the courts have been troubled by the *Bard* rule. As noted by Judge Smith dissenting in *Bard*, for example, how is one to understand the distinction between finding there to be liability for someone who negligently manages a car or child but not for one who negligently manages a horse or bull? Thus, *Bard* has " 'failed to achieve the efficiency, consistency and uniformity in the application of the law which the doctrine of stare decisis seeks to promote' " (citation omitted). *Id.*

First Department Reiterates That There is No General Jurisdiction Over Individual for Actions Taken on Behalf of Corporation in New York

But Case Raises Several Questions

In *Grosso v. Cy Twombly Found.*, 2025 N.Y. Slip Op. 02007 (1st Dep't April 3, 2025), the First Department states a fairly straightforward principle:

> [P]laintiff's arguments ignore that a nondomiciliary "does not subject himself, individually, to the CPLR 301 jurisdiction of our courts . . . unless he is doing business in our State individually," as opposed to the business he is conducting on behalf of a corporation (Laufer v Ostrow, 55 NY2d 305, 313, 434 N.E.2d 692, 449 N.Y.S.2d 456 [1982]).

Id. at *1–2.

The proposition is simple: a court will not assert general jurisdiction over an individual based solely on actions she takes on behalf of a corporation in New York. One of the problems, of course, is that the "doing business" standard enunciated in *Laufer (*whether a foreign corporation's in-forum contacts, including maintaining an office, solicitation of business, bank accounts and other property, and employees in the state, are "continuous and systematic") no longer controls. In *Daimler AG v. Bauman*, 571 U.S. 117 (2014), the U.S. Supreme Court rejected that standard in favor of the "at home" one. And we know that, apart from the elusive exceptional case, that translates into whether the corporation is incorporated or has its principal place of business in the forum state.

The analysis does not end there. First, there has been a conflict in New York as to whether an individual can even "do business" for CPLR 301 jurisdictional purposes. *Compare Abkco Industries v. Lennon,* 52 A.D.2d 435 (1st Dep't 1976) (permitting such a jurisdictional predicate) and *Nilsa B. v. Clyde Blackwell H.*, 84 A.D.2d 295, 445 N.Y.S.2d 579 (2d Dep't 1981) (questioning First Department holding in *Abkco*). *See also Pichardo v. Zayas*, 122 A.D.3d 699 (2d Dep't 2014) ("In contrast to the common-law approach to corporations, the common law, as developed through case law predating the enactment of CPLR 301, did not include any recognition of general jurisdiction over an individual based upon that individual's cumulative business activities within the State (citations omitted)."). Ironically, the common law predating the CPLR regarding the corporate doing business standard no longer applies, thus making the language of CPLR 301 inaccurate at the least.

Second, exactly where is plaintiff "at home." The Second Circuit Court of Appeals has stated that "[g]eneral jurisdiction over an individual comports with due process in the forum where he is 'at home,' meaning the place of 'domicile.' " *Reich v. Lopez*, 858 F.3d 55, 63 (2d Cir. 2017). While that court has acknowledged that there could also be an "exceptional case" where "an individual's contacts with a forum might be so extensive as to support general jurisdiction notwithstanding domicile elsewhere, . . . the Second Circuit has yet to find such a case." *Id.*

In *Lebron v. Encarnacion*, 253 F. Supp. 3d 513 (E.D.N.Y. 2017), a federal district court held that occasional visits to New York (for an estimated 9–12 games a year) by a Toronto Blue Jays baseball player, a citizen and permanent resident of the Dominican Republic, and association with New York-based union and sports management agency, did not establish that defendant was "at home" in New York. "[A]fter Daimler it is reasonable to presume that a professional athlete who competes in many places can scarcely be deemed at home in all of them." *Id.* at 520.

We hope to return to this issue.

A Motion to Change Venue Based on the Convenience of Witnesses Must Contain the Relevant Details

Elementary is to Establish That the Witnesses Will Be Inconvenienced by Having to Testify in the County Where the Action Was Commenced

Nir v. Wakeford, 2025 N.Y. Slip Op. 02012 (1st Dep't April 3, 2025) highlights the burden imposed upon a party who seeks to change the venue of an action based on the convenience of witnesses. Such a motion requires a submission setting forth the identity of the proposed witnesses, their expected testimony, the need for their material testimony, their stated availability and willingness to testify, and the witnesses' actual inconvenience. *See Rodriguez-Lebron v. Sunoco, Inc.,* 18 A.D.3d 275 (1st Dep't 2005). There are cases that suggest that affidavits from the actual witnesses be provided. However, whether you go that route or perhaps submit an affidavit of an investigator or an attorney who interviewed the witnesses, it is critical that you provide the detailed information noted above.

In *Nir*, a New York County action, defendant's counsel referenced four allegedly material witnesses who lived and worked in Suffolk County. However, (i) he contacted only two of those witnesses directly, (ii) he did not show that the two witnesses he did not contact would be inconvenienced, (iii) as to the witnesses he did contact, he did not represent that one of the witnesses stated that he would be inconvenienced by having to travel to New York County and there was a dispute as to whether the other witness, a Suffolk County detective, would be inconvenienced:

> The "mere fact that the courthouse is in a different county does not give rise to a presumption that a witness will be inconvenienced." Contrary to defendant's contention, the fact that the witnesses are police officers does not negate the argument that distance alone is insufficient to justify a change of venue (citations omitted).

Id. at *1.

ISSN 0028-7636 (print) ISSN 2379-1225 (online)