SURVEY OF NEW YORK LAW: TORTS

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INTRODUCTION

Between July 1, 2020 and June 30, 2021,[1] the Courts of the State of New York issued thousands of pages of decisions, including hundreds of decisions dealing with tort law. This Article highlights several cases decided during the Survey Year from the thousands of pages of reported case law New York courts developed.

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1. The "Survey Year."

I. LABOR LAW

Courts continue to grapple with *Runner v. New York Stock Exchange, Inc.*[2] In *Runner*, the Court of Appeals explained, "the single decisive question" in Labor Law § 240 (1) claims "is whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential."[3] As noted in last year's Article, courts continue to struggle with *Runner*'s principles.[4]

The First Department faced a close call in *Greene v. Raynors Lane Property, LLC*.[5] There, the plaintiff was lifting manufactured lumber beams "to allow the blades of the forklift to slide under the board."[6] The plaintiff's accident occurred because muddy ground caused his foot to slip, which caused the beam to wrench the plaintiff's back.[7] Supreme Court granted Plaintiff summary judgment on liability, holding the accident occurred because of the direct effects of gravity under *Runner v. New York Stock Exchange, Inc.*[8] The First Department reversed, holding "Supreme Court should have denied plaintiff summary judgment" under *Runner* with little explanation.[9]

Greene can be contrasted with *Christie v. Live Nation Concerts, Inc.*, which involved a similar incident.[10] In *Christie*, "[t]he plaintiff, a construction laborer, allegedly injured his knee while carrying a heavy steel truss with four coworkers on level ground."[11] Quoting *Runner*, the Court noted, "the single decisive question is whether [the] plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential."[12] Unlike the First Department, however, the Second Department held the case should have been dismissed: "[h]ere,

2. 13 N.Y.3d 599, 922 N.E.2d 865, 895 N.Y.S.2d 279 (2009).

3. *Id.* at 603, 922 N.E.2d at 867, 895 N.Y.S.2d at 281.

4. David M. Katz, *Torts*, 71 SYRACUSE L. REV. 327, 329 (2021).

5. 194 A.D.3d 520, N.Y.S.3d 449 (1st Dep't 2021).

6. *Id.* at 521, N.Y.S.3d at 450.

7. *See id*.

8. *Id*. (citing *Runner*, 13 N.Y.3d at 604, 895 N.Y.S.2d at 282, 922 N.E.2d at 868).

9. *Id.* at 522, N.Y.S.3d at 450 (citing N.Y. LAB. LAW § 240(1) (McKinney 2021)).

10. 192 A.D.3d 971, 145 N.Y.S.3d 98 (2d Dep't 2021).

11. *Id.* at 972, 145 N.Y.S.3d at 100.

12. *Id.* (first citing *Runner*, 13 N.Y.3d at 603, 922 N.E.2d at 866–67, 895 N.Y.S.2d at 280–81; then citing Wilinski v. 334 E. 92d Hous. Dev. Fund Corp., 18 N.Y.3d 1, 10, 959 N.E.2d 488, 494, 935 N.Y.S.2d 551, 557 (2011)).

the defendants' evidence demonstrated that the plaintiff twisted his knee when he and his coworkers lost their grip on the truss they were carrying on level ground," which "demonstrated, prima facie, that the plaintiff's injury was not caused by the failure to provide adequate protection against an elevation-related hazard encompassed."[13] As a result, the Court dismissed the case.[14]

In *Chrisman v. Syracuse SOMA Project, LLC*, the Fourth Department addressed a critical distinction in Labor Law § 241(6) claims, which had been lurking in its own case law for over a decade.[15] "Section 241(6) requires owners and contractors to 'provide reasonable and adequate protection and safety' for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor."[16] The issue in *Chrisman* was whether proving a regulation had been violated constituted negligence as a matter of law.[17] The Fourth Department resoundingly answered no.[18]

II. NEGLIGENCE

A. Foster Care Administrators Owed a Duty of care to a Biological

13. *Id.* at 972–73, 145 N.Y.S.3d at 100. (first citing N.Y. LAB. LAW § 240(1); then citing Simmons v. City of N.Y., 165 A.D.3d 725, 728, 85 N.Y.S.3d 462, 467 (2d Dep't 2018); and then citing Sullivan v. N.Y. Athletic Club of City of N.Y., 162 A.D.3d 955, 958, 80 N.Y.S.3d 93, 97 (2d Dep't 2018); and then citing Portalatin v. Tully Constr. Co.-E.E. Cruz & Co., 155 A.D.3d 799, 800, 63 N.Y.S.3d 520, 522 (2d Dep't 2017)).

14. *Id.* at 973, 145 N.Y.S.3d at 100.

15. 192 A.D.3d 1594, 1594, 145 N.Y.S.3d 717, 719 (4th Dep't 2021) (citing N.Y. LAB. LAW § 241(6) (McKinney 2021)). *See* Brian J. Shoot, *The News from Rochester*, N.Y. L. J. (ONLINE) (May 5, 2021), law.com/newyorklawjournal/2021/05/05/the-news-from-rochester/.

16. *Chrisman*, 192 A.D.3d at 1595, 145 N.Y.S.3d at 720 (quoting LAB. § 241(6)) (first citing Ross v. Curtis-Palmer Hydro-Elec. Co., 81 N.Y.2d 494, 501–02, 618 N.E.2d 82, 86, 601 N.Y.S.2d 49, 53 (1993); then citing St. Louis v. Town of N. Elba, 16 N.Y.S.3d 411, 413, 947 N.E.2d 1169, 1170, 923 N.Y.S.2d 391, 392 (2011)).

17. *See id.* (first citing LAB. § 241(6); then citing N.Y. COMP. CODES R. & REGS. tit. 12, § 23-1.7(d) (2022)).

18. *See id.* ("There is, however, a 'clear distinction between a violation of an administrative regulation promulgated pursuant to statute, and a violation of an explicit provision of a statute proper: while the latter gives rise to absolute liability without regard to whether the failure to observe special statutory precautions was caused by the fault or negligence of any particular individual, the former is simply some evidence of negligence which the jury could take into consideration with all the other evidence bearing on that subject.'") (quoting Rizzuto v. L.A. Wenger Contracting Co., 91 N.Y.2d 343, 349, 693 N.E.2d 1068, 1070–71, 670 N.Y.S.2d 816, 818–19 (1998)).

Child of Foster Parents Where the Foster Care Administrators Failed to Disclose a Foster Child's History of Sexually Inappropriate Behavior and Animal Abuse

The Fourth Department case of *Stephanie L. v. House of the Good Shepherd* presents a thought-provoking case involving the duty of care owed to third parties.[19] There, Plaintiffs—who also had a biological child—sued a foster care program administrator after it failed to disclose "a history of animal abuse and engaging in sexually inappropriate behavior" of a foster child.[20] After Plaintiffs began the process of adopting the foster child, "foster child began acting in a sexually inappropriate manner toward [Plaintiffs'] biological child and other children," which continued after the adoption was initially finalized.[21] "Thereafter, plaintiffs discovered that they had not been given a complete set of records concerning the foster child, which records would have revealed his full history of engaging in animal abuse and sexually inappropriate behavior."[22] Ultimately, "[t]he foster child was removed from plaintiffs' home, and the adoption was vacated."[23]

The plaintiff-parents asserted a fraud claim individually based on the concealment of the foster child's history.[24] The Court began by acknowledging "[a] defendant's mere *knowledge* of something is not an element of a fraud cause of action; instead, a fraud cause of action requires a showing of, inter alia, the false representation of a material fact with the intent to deceive."[25] But Plaintiffs alleged more: "plaintiffs alleged that, on numerous occasions in early 2012, they contacted Good Shepherd about the foster child's sexually inappropriate behavior and that, on each occasion, Good Shepherd assured them that the foster child had no history of that type of behavior."[26]

19. 186 A.D.3d 1009, 1014, 129 N.Y.S.3d 570, 576 (4th Dep't 2020).

20. *Id.* at 1009, 129 N.Y.S.3d at 573. ("Plaintiffs were informed that the foster child had been sexually abused by members of his biological family and that he exhibited some behavioral problems.") *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. Stephanie L. v. House of the Good Shepherd, 186 A.D.3d 1009, 1010, 129 N.Y.S.3d 570, 573 (4th Dep't 2020).

25. *Id.* at 1010, 129 N.Y.S.3d at 574 (citing Ross v. Louise Wise Servs., Inc., 8 N.Y.S.3d 478, 488, 868 N.E.2d 189, 195–96, 836 N.Y.S2d 509, 515 (2007)).

26. *Id.* at 1011, 129 N.Y.S.3d at 574.

The Court turned to the negligence cause of action assured by the biological child.[27] The Court held, "defendants owed a duty of care to the biological child to warn plaintiffs, as the child's parents, of the foster child's complete behavioral history."[28] The Court acknowledged, "as a general rule a defendant does not have a duty 'to control the conduct of third persons so as to prevent them from harming others,'" but it also noted, "control over a third-person tortfeasor is just one way to establish a duty."[29] It reasoned,

> [t]he amended complaint in this action alleged a relationship between the parties that placed defendants in the best position to protect the biological child from the risk of harm and that required defendants to protect the child from the sexual abuse by the foster child by warning plaintiffs of the foster child's history of sexually inappropriate behavior.[30]

Indeed, the Court found it persuasive that "Defendants were in the best position to protect the biological child from that sexual abuse because of their superior knowledge of the foster child's behavioral history and because of the relative ease with which they could have apprised plaintiffs of that history."[31]

The Court also rejected the defendants' argument that its holding would lead to "limitless liability."[32] Further, the Court explained, "the cost of the duty imposed on defendants is a small one, i.e., simply disclosing to plaintiffs the information regarding the foster child's behavioral history that was in defendants' possession," which the Court also noted was a duty imposed by Social Services Law § 373-a.[33] Finally, the Court noted the duty would not attach to a large, indistinct group of people.[34] Instead, the Court noted the duty would extend "to a very small, readily ascertainable population—children of prospective adoptive parents."[35] Accordingly, the Court announced a

27. *Id.*

28. *Id.* at 1013, 129 N.Y.S.3d at 576 (first citing Davis v. S. Nassau Cmties. Hosp., 26 N.Y.3d 563, 577, 46 N.E.3d 614, 622, 26 N.Y.S.3d 231, 239 (2015); then citing Leon v. Martinez, 84 N.Y.2d 511, 614 N.Y.S.2d 972 (1994)).

29. Stephanie L. v. House of the Good Shepherd, 186 A.D.3d 1009, 1012–13, 129 N.Y.S.3d 570, 575–76 (4th Dep't 2020) (quoting Hamilton v. Beretta U.S.A. Corp., 96 N.Y.2d 222, 233, 750 N.E.2d 1055, 1061, 727 N.Y.S.2d 7, 13 (2001)).

30. *Id.* at 1013, 129 N.Y.S.3d at 576.

31. *Id.*

32. *Id.* (quoting *Davis*, 26 N.Y.3d at 589, 46 N.E.3d at 631, 26 N.Y.S.3d at 248).

33. *Id.* (citing N.Y. SOC. SERV. LAW § 373-a (McKinney 2021)).

34. *See Stephanie L.*, 186 A.D.3d at 1014, 129 N.Y.S.3d at 576.

35. *Id.*

duty of care ran from the foster care administrators to the biological child of a foster parent.[36]

B. A Fire Department Fighting a Fire Performs a Discretionary Governmental Function and Owes a Duty of Care to an Adjacent Landowner to Act Reasonably in Fighting the Fire

The Third Department addressed a fire department's duty to an adjacent landowner while fighting a fire in *Stevens & Thompson Paper Co., Inc. v. Middle Falls Fire Department, Inc.*[37] "In the early morning hours of April 6, 2014, a large fire with the hallmarks of arson broke out at a vacant paper mill in the Town of Greenwich, Washington County."[38] The plaintiff used to own the paper mill and "still owned an adjacent hydroelectric facility . . . that relied upon water from an intake canal branching off from the Battenkill River."[39] The fire department responded and found no fire hydrants available for use.[40] Therefore, the "firefighters stationed a fire engine near the facility to pump water from the intake canal."[41] The pump operated even when the firefighters did not need water to fight the fire, so "when the water was not needed, a deck gun on the engine shot the water into a ravine where it would flow back" to the river.[42] During those times, "stream of water from the deck gun passed over the facility . . . and caused what was essentially rainfall over its powerhouse."[43] Water "seeped into the powerhouse" for the adjacent facility and shut the power down.[44] The powerhouse "sustained significant mechanical damage that forced it offline for a prolonged period" as a result of the water penetration.[45] The plaintiff alleged negligence among other related causes of action.[46] The fire department argued it did not owe the plaintiff a duty and, even if it did, that it should be entitled to the

36. *Id.* (quoting Davis v. S. Nassau Cmties. Hosp., 26 N.Y.3d 563, 577, 46 N.E.3d 614, 622, 26 N.Y.S.3d 231, 239 (2015)).

37. 188 A.D.3d 1504, 1505, 137 N.Y.S.3d 529, 532 (3d Dep't 2020).

38. *Id.* at 1504, 137 N.Y.S.3d at 531.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Stevens & Thompson*, 188 A.D.3d at 1504–05, 137 N.Y.S.3d at 532.

43. *Id.* at 1505, 137 N.Y.S.3d at 532.

44. *Id.*

45. *Id.*

46. *Id.*

governmental immunity doctrine.[47] The Third Department began by noting there could be questions of fact as to whether the fire department owed the plaintiff a special relationship, which could give rise to a duty.[48] However, the Third Department held the fire department was nevertheless immune from liability because it established any damage occurred while it performed a discretionary governmental function, which triggered the governmental immunity doctrine.[49] "The key issue [was] therefore whether the fire department['s] . . . purportedly negligent acts—choosing to use the deck gun and aim it in a direction that caused a rain to fall around the powerhouse—were discretionary in that they arose from 'the exercise of reasoned judgment which could typically produce different acceptable results.'"[50]

The Third Department found the firefighters made a number of reasonable, discretionary decisions. First,

> the [Village] firefighters tasked with obtaining water for the paper mill fire explained that they selected the pumping site because of its ready access to the intake canal and used the deck gun to discharge unneeded water so that the pump could continuously operate and supply water to the paper mill at a moment's notice.[51]

47. *Stevens & Thompson*, 188 A.D.3d at 1505, 137 N.Y.S.3d at 532 (quoting Valdez v. City of N.Y., 18 N.Y.3d 69, 76, 960 N.E.2d 356, 361, 936 N.Y.S.2d 587, 592 (2011)) (first citing Feeney v. Cty. of Del., 150 A.D.3d 1355, 1357, 55 N.Y.S.3d 737, 739 (3d Dep't 2017); then citing Trimble v. City of Albany, 144 A.D.3d 1484, 1485–86, 42 N.Y.S.3d 432, 434 (2016)); then citing Mc.Lean v. City of N.Y., 12 N.Y.3d 194, 202, 905 N.E.2d 1167, 1173, 878 N.Y.S.2d 238, 244 (2009); and then citing Lauer v. City of N.Y., 95 N.Y.2d 95, 99, 733 N.E.2d 184, 187, 711 N.Y.S.2d 112, 115 (2000)).

48. *Id.* (first citing *Feeney*, 150 A.D.3d at 1357, 55 N.Y.S.3d at 738; and then citing *Trimble*, 144 A.D.3d at 1485–86, 42 N.Y.S.3d at 434).

49. *Id.* at 1505, 137 N.Y.S.3d at 532 (quoting *Valdez*, 18 N.Y.3d at 76, 960 N.E.2d at 361, 936 N.Y.S.2d at 592) (first citing *McLean*, 12 N.Y.3d at 202, 905 N.E.2d at 1173, 878 N.Y.S.2d at 244; and then citing *Lauer*, 95 N.Y.2d at 99, 733 N.E.2d at 187, 711 N.Y.S.2d at 115).

50. *Id.* (quoting Tango v. Tulevech, 61 N.Y.2d 34, 41, 459 N.E.2d 182, 186, 471 N.Y.S.2d 73, 77 (1986)) (first citing Haddock v. City of N.Y., 75 N.Y.2d 478, 484, 553 N.E.2d 987, 991, 554 N.Y.S.2d 439, 443 (1990); then citing *Valdez*, 18 N.Y.3d at 79–80, 960 N.E.2d at 364, 936 N.Y.S.2d at 595; and then citing *Trimble*, 144 A.D.3d at 1487, 42 N.Y.S.3d at 435).

51. *Id.* at 1506, 137 N.Y.S.3d at 533.

Second, while the firefighters "chose to aim the deck gun so that the stream of water would arc over the facility," the Court noted the "choice reflect[ed] their training to consider the safety of themselves and the public, as well as the potential for property damage, in using the deck gun."[52] Third, "the firefighters had no reason to anticipate that this would affect the interior of the powerhouse."[53] Finally, while the facility owner claimed "that alternatives to using the deck gun were not considered and that the potential hazards of its use were overlooked," the Court noted, "a fire department is not chargeable with negligence for failure to exercise perfect judgment in discharging the governmental function of fighting fires."[54] As a result, the Court affirmed dismissal of the claims.[55]

C. General Negligence

In *Miller v. Miller*, the Fourth Department decided an interesting negligent supervision claim.[56] Plaintiff

> s[ought] damages on behalf of herself and her late husband's estate for an alleged course of harassing conduct that was perpetrated against . . . by Mark Mendy following plaintiff's termination of her relationship with Mendy . . . and continuing through the commencement of plaintiff's relationship with and eventual marriage to her husband in 2008.[57]

Plaintiff also sought to impose vicarious liability on Mendy's employer through a negligent supervision claim.[58]

52. *Stevens & Thompson*, 188 A.D.3d at 1506, 137 N.Y.S.3d at 533 ("It was further explained why the consideration of those factors led the Village firefighters to aim the deck gun as they did, as they did not know where the water would fall if aimed in some directions and saw that it would imperil their own safety or the ability to use local roads if aimed in others."). *Id.*

53. *Id.* ("A surveillance video of the area shows wet ground, but no flooding, and it appears that water that drained into an outdoor catch basin as designed then seeped into the powerhouse through a masonry joint."). *Id.*

54. *Id.* at 1507, 137 N.Y.S.3d at 533 (quoting Harland Enters. v. Commander Oil Corp., 64 N.Y.2d 708, 709, 475 N.E.2d 104, 105, 485 N.Y.S2d 733, 734 (1984)) (first citing Kenavan v. City of N.Y., 70 N.Y.2d 558, 569–70, 517 N.E.2d 872, 876–77, 523 N.Y.S.2d 60, 64–65 (1987); then citing Helman v. Cty. of Warren, 114 A.D.2d 573, 573–74, 494 N.Y.S.2d 188, 189 (1985)).

55. *Id.* at 1505, 137 N.Y.S.3d at 532.

56. 189 A.D.3d 2089, 137 N.Y.S.3d 853 (4th Dep't 2020).

57. *Id.* at 2090, 137 N.Y.S.3d at 856.

58. *Id.*

The employer argued the lower court should have granted summary judgment because "there [was] no evidence of a causal connection between defendant and the alleged acts of harassment committed by Mendy, specifically, that there is no evidence that the harassment was committed using defendant's premises or equipment."[59] But the defendant failed to meet its burden because the defendant moved "*on the absence of evidence*" as opposed to by establishing affirmatively that the calls did not originate from its premises or equipment.[60]

In *Jones v. Saint Rita's Roman Catholic Church*, the Second Department interacted with an interesting iteration of the intervening cause doctrine.[61] There, "[t]he plaintiff was working as a set dresser for a film production on location at a school . . . in a classroom that had double pane and double sash windows that opened into the room in a horizontal position" where "[a]ll of the windows were screwed shut."[62] Except one.[63] "According to the plaintiff's coworker, when it became hot in the classroom, another set dresser removed the screws from one of the windows with screw gun, but, rather than slide up as anticipated, the window opened by dropping forward into the classroom."[64] The plaintiff suffered injuries when "the frame of the lower sash of the window hit her in the back of her head."[65]

The defendants claimed the co-worker unscrewing the window constituted a superseding cause of the plaintiff's accident," and the Second Department agreed.[66] The Court reasoned, "the window being unscrewed and opened is an intervening act that relieves the defendants of liability."[67] While "in general, opening a window is foreseeable, the defendants had screwed the window shut, which was a plain indication that it was not supposed to be opened."[68] Notably, "[t]he window was only able to be opened using tools to remove multiple screws and, in the normal course of events, a person would

59. *Id.* at 2091, 137 N.Y.S.3d at 856 (citing MS v. Arlington Cent. Sch. Dist., 128 A.D.3d 918, 919, 9 N.Y.S.3d 632, 633 (2d Dep't 2015)).

60. *Id.*

61. 187 A.D.3d 727, 133 N.Y.S.3d 40 (2d Dep't 2020).

62. *Id.* at 728, 133 N.Y.S.3d at 41.

63. *See id.* at 728, 133 N.Y.S.3d at 42.

64. *Id.*

65. *Id.*

66. *Jones*, 187 A.D.3d at 729 133 N.Y.S.3d at 42.

67. *Id.*

68. *Id.*

have refrained from opening the window when he or she saw that it was screwed shut."[69] Thus, "[t]he intervening act of unscrewing the window and opening it was unforeseeable in the normal course of events and was sufficient to relieve the defendants of liability."[70]

The scope of a parent's liability during a sleepover came to the forefront in *Lisa I v. Manikas*.[71] There, a fourteen-year-old girl attended a sleepover at her friend's house.[72] The girl and her friend "spent the night in the bedroom of an adult male relative of defendants," the hosting parents.[73] "After the friend fell asleep, the relative allegedly raped the child."[74] The girl's parents sued, alleging premises liability and negligent supervision.[75] The defendants moved for summary judgment, which the trial court denied.[76]

The Second Department affirmed in an opinion that illuminated how to plead and prove similar claims.[77]

> As defendants' duty was limited to risks that were reasonably foreseeable, whether they owed a duty to protect the child from the criminal conduct that allegedly occurred in their home depends on whether, based on their prior experience, they should reasonably have foreseen that the relative posed a threat of harm to the child.[78]

But, while duty is usually a question of law for the Court, in these cases the question becomes a hybrid question of law and fact because

> foreseeability is a question to be resolved by the factfinder, and it may not be determined on summary judgment unless the

69. *Id.* at 729, 133 N.Y.S.3d at 42–43.

70. *Id.* at 729, 133 N.Y.S.3d at 43 (first citing Murray v. N.Y. City Hous. Auth., 269 A.D.2d 288, 70 N.Y.S.2d 140; then citing Green v. N.Y. City Hous. Auth., 82 A.D.2d 780, 780, 440 N.Y.S.2d 654; and then citing Van Dyk v. C & M 974 Route 45 LLC, 181 A.D.3d 457, 458, 117 N.Y.S.3d 574, 574–75 (2020)).

71. 188 A.D.3d 1392, 135 N.Y.S.3d 510 (3d Dept 2020).

72. *Id.* at 1393, 135 N.Y.S.3d at 511.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Lisa I.*, 188 A.D.3d at 1393, 135 N.Y.S.3d at 512.

77. *Id.*

78. *Id.* (first citing Pink v. Rome Youth Hockey Ass'n, Inc., 28 N.Y.3d 994, 998, 63 N.E.3d 1148, 1151, 41 N.Y.S.3d 204, 207 (2016); then citing Ahlers v. Wildermuth, 70 A.D.3d 1154, 1154–55, 894 N.Y.S.2d 235, 237 (3d Dep't 2010); and then citing Crowningshield v. Proctor, 31 A.D.3d 1001, 1002, 820 N.Y.S.2d 330, 331 (3d Dep't 2006)).

> relevant facts are undisputed and only one inference may be drawn therefrom.[79]

The Court explained the defendants' motion papers established sufficient evidence that the risks their relative presented could be foreseeable, which raised a question of fact as to the defendants' duty on the plaintiff's premises liability claim.[80] Specifically, ". . . they had been notified of prior incidents of alleged sexual misconduct by the relative, and that they were aware of disciplinary actions that had been instituted in response to these prior allegations." [81] The defendants argued "the fact that the prior incidents took place at school does not foreclose the conclusion that his conduct in their home was reasonably foreseeable," which the Court flatly rejected.[82] Instead, the Court explained, "the issue . . . whether the risk of the relative engaging in the alleged conduct was foreseeable," regardless of the location of the prior incidents.[83]

The Court also held the plaintiff's negligent supervision claim could proceed.[84] The defendants argued they acted reasonably under the circumstances by imposing "house rules . . . to prevent misconduct, including an open-door policy when children and guests were in bedrooms and prohibitions against the use of drugs and alcohol, and that they checked on the child several times during the night."[85] As a preliminary matter, the evidence conflicted regarding whether the rules had been followed.[86] But, more fundamentally, the Court held the situation itself raised a question of fact: "in view of the child's youth, defendants' testimony that they knowingly permitted her to sleep in the relative's room, considered in light of their knowledge of his prior acts of sexual misconduct, presents factual

79. *Id*. (quoting Elwood v. Alpha Sigma Phi, Iota Chapter of Alpha Sigma Phi Fraternity, Inc., 62 A.D.3d 1074, 1076, 878 N.Y.S.2d 499, 501 (3d Dep't 2009)).

80. *Id*. at 1393–94, 135 N.Y.S.3d at 512.

81. *Lisa I.*, 188 A.D.3d at 1394, 135 N.Y.S.3d at 512.

82. *See id*.

83. *Id*. (first citing *Crowningshield*, 31 A.D.3d at 1003, 820 N.Y.S.2d at 331; then citing Tambriz v. P.G.K. Luncheonette, Inc., 124 A.D.3d 626, 627–28, 2 N.Y.S.3d 150, 152–53 (2d Dep't 2015)).

84. *Id*.

85. *Id*. at 1394–95, 135 N.Y.S.3d at 513.

86. *Lisa I.*, 188 A.D.3d at 1394, 135 N.Y.S.3d at 513.

issues as to whether defendants used reasonable care in supervising the child."[87]

Stryker v. Conners reminds attorneys that a defendant invoking the emergency doctrine must *both* establish that an emergency occurred *and* that the defendant acted reasonably in response to the emergency.[88] "Following a jury trial, the jury determined that defendant was faced with a sudden condition that could not have been reasonably anticipated, but that his response to the emergency was not "that of a reasonably prudent person."[89] On appeal, the defendant argued that the jury's determination "that defendant was faced with a sudden condition that could not have been reasonably anticipated, precluded a finding of negligence."[90] But "[a] person facing an emergency is not automatically absolved . . . from liability."[91] Indeed, "a driver confronted with an emergency situation may still be found to be at fault for a resulting accident where, as here, his or her reaction is found to be unreasonable."[92] As a result, the Court held the verdict was not inconsistent as a matter of law.[93]

D. Medical Malpractice

In *Young v. Sethi*, the Third Department revisited the age-old distinction between intentional torts and malpractice.[94] *Young* arose out of an "interbody fusion surgery on plaintiff's spine to correct her spondylolisthesis, in which her L5 vertebrae was displaced over the S1 vertabrae.[95] The "plaintiff asserted that she was born with a genetic physical anomaly known as a twisted or rotated pelvis . . ."

87. *Id*. at 1395, 135 N.Y.S.3d at 513 (citing Mary Ann "ZZ" v. Blasen, 284 A.D.2d 773, 775, 726 N.Y.S.2d 767, 769 (3d Dep't 2001)).

88. 189 A.D.3d 2077, 2079, 138 N.Y.S.3d 765, 767 (4th Dep't 2020) (first citing Caristo v. Sanzone, 96 N.Y.2d 172, 174, 750 N.E.2d 36, 37, 726 N.Y.S.2d 334, 335 (2001); then citing Lifson v. City of Syracuse, 17 N.Y.3d 492, 497, 958 N.E.2d 72, 74, 934 N.Y.S.2d 38, 40 (2011); and then citing Colangelo v. Marriott, 120 A.D.3d 985, 986–87, 990 N.Y.S.2d 763, 765 (4th Dep't 2014)).

89. *Id*. at 2078, 138 N.Y.S.3d at 766.

90. *Id*.

91. *Id*. at 2079, 138 N.Y.S.3d at 767 (citing Gilkerson v. Buck, 174 A.D.3d 1282, 1284, 105 N.Y.S.3d 739, 742 (4th Dep't 2019)).

92. *Id*. (first citing Kizis v. Nehring, 27 A.D.3d 1106, 1108, 811 N.Y.S.2d 509, 511 (4th Dep't 2006); then citing Sossin v. Lewis, 9 A.D.3d 849, 851, 780 N.Y.S.2d 448, 449–50 (4th Dep't 2004)).

93. *Stryker*, 189 A.D.3d at 2078, 138 N.Y.S.3d at 767.

94. 188 A.D.3d 1339, 134 N.Y.S.3d 571 (3d Dep't 2020).

95. *Id*. at 1339, 134 N.Y.S.3d at 572.

which the defendants "negligently . . . reposition[ed] or derotat[ed]" during the surgery ". . . without her knowledge or consent."[96] On summary judgment, the defendants submitted expert evidence through a neurosurgeon establishing they did not deviate from the standard of care.[97] In response, Plaintiff offered the opinions of a chiropractor, who was not qualified to opine on any alleged negligence during the surgery.[98] But, the Third Department noted, Plaintiff's claims faced another defect: timeliness.[99] Because the plaintiff claimed the surgeon-defendant "derotated plaintiff's pelvis as a separate procedure from the surgery to which she consented," the Court explained the plaintiff had alleged a battery as opposed to malpractice.[100] As a result, the Court held the plaintiff had not timely commenced suit.[101]

In *Cardenas v. Rochester Regional Health*, the Fourth Department analyzed the duty of care a medical provider owes to the family of a mental health patient.[102] In this wrongful death action, the plaintiff (suing on behalf of the decedent, his child) claimed the defendants negligently treated his wife and failed to properly instruct the decedent's family.[103] After spending weeks at a mental health facility, the wife had been discharged for outpatient care.[104] After two sessions, the plaintiff felt his wife's condition had worsened and sought "additional care" for her.[105] But "[h]e was advised that his wife should keep her upcoming psychiatric appointment, which was

96. *Id*. at 1339–40, 134 N.Y.S.3d at 572–73.

97. *See id*. at 1340, 134 N.Y.S.3d at 573.

98. *Id*. at 1341, 1343, 134 N.Y.S.3d at 574, 575.

99. *See Young*, 188 A.D.3d at 1343, 134 N.Y.S.3d at 575.

100. *Id.* at 1342, 134 N.Y.S.3d at 574. "This conclusion is not altered by the fact that plaintiff does not claim that defendants acted intentionally in inflicting her injuries and pain; it is the intent to make unauthorized or offensive contact, rather than to do harm, that establishes a battery." *Id.* at 1342, 134 N.Y.S.3d at 575.

101. *See id.* at 1343, 134 N.Y.S.3d at 575 (first citing Dray v. Staten Island. Univ. Hosp., 160 A.D.3d 614, 617–18, 75 N.Y.S.3d 59, 63 (3d Dep't 2018); then citing Messina v. Matarasso, 284 A.D.2d 32, 35–36, 729 N.Y.S.2d 4, 7 (1st Dep't 2001)). Indeed, the concurrence would have stopped at determining the plaintiff's claim sounded in battery. *Id.* at 1344, 134 N.Y.S.3d at 575 (Lynch, J., concurring) ("Since plaintiff emphasizes that no claim is being made that defendants were negligent in performing the actual fusion surgery, I respectfully submit we need go no further.").

102. 192 A.D.3d 1543, 1543–44, 144 N.Y.S.3d 774, 775–76 (4th Dep't 2021).

103. *See id.* at 1543, 144 N.Y.S.3d at 775.

104. *Id.*

105. *Id.*

scheduled for approximately two weeks in the future."[106] Two days later, the "plaintiff's wife killed their son (decedent) with a knife."[107]

The Fourth Department started from the general proposition that "medical providers owe a duty of care only to their patients, and courts have been reluctant to expand that duty to encompass nonpatients because doing so would render such providers liable to a 'prohibitive number of possible plaintiffs.'"[108] Nevertheless, the court acknowledged, "[t]he scope of that duty of care has, on occasion, been expanded to include nonpatients where the defendants' relationship to the tortfeasor 'placed them in the best position to protect against the risk of harm.'"[109] Courts determining whether to expand a medical provider's duty to a nonpatient "balanc[e] of factors such as the expectations of the parties and society in general, the proliferation of claims, and public policies affecting the duty proposed herein . . . tilt[ed] in favor of establishing a duty running from defendants to plaintiffs under the facts alleged."[110]

In this case, the Fourth Department held the defendants' duty of care did not reach the decedent.[111] The court's decision turned on the absence of three factual allegations, which could otherwise have triggered a duty: (1) the plaintiff did not allege his "wife sought treatment specifically in order to prevent physical injury to decedent or her family"; (2) the plaintiff did not allege "defendants were aware whether she had threatened or displayed violence towards her family in the past"; and (3) the plaintiff did not allege "defendants directly

106. *Id.*

107. *Cardenas*, 192 A.D.3d at 1543, 144 N.Y.S.2d at 775.

108. *Id.* at 1544, 144 N.Y.S.3d at 776 (quoting McNulty v. City of N.Y., 100 N.Y.2d 227, 232, 792 N.E.2d 162, 166, 762 N.Y.S.2d 12, 16 (2003)) (citing Pingtella v. Jones, 305 A.D.2d 38, 41, 758 N.Y.S.2d 717, 719–20 (4th Dep't 2003)).

109. *Id.* (quoting Davis v. S. Nassau Cmties. Hosp., 26 N.Y.3d at 576, 46 N.E.3d at 622, 26 N.Y.S.3d at 239 (2015)) (citing Tenuto v. Lederle Lab, 90 N.Y.2d 606, 613–14, 687 N.E.2d 1300, 1303–04, 665 N.Y.S.2d 17, 20–21 (1997)).

110. *Id.* (quoting *Davis*, 26 N.Y.3d at 576, 46 N.E.3d at 622, 26 N.Y.S3d at 239) (citing *Tenuto*, 90 N.Y.2d at 613–14, 687 N.E.2d at 1303–04, 665 N.Y.S.2d at 20–21).

111. *Id.* ("Under the circumstances of this case, however, we conclude that those factors do not favor establishing a duty running from defendants to decedent.").

put in motion the danger posed by the patient."[112] As a result, the court reversed the trial court's decision and dismissed the case.[113]

III. NUISANCE

In *Burdick v. Tonoga, Inc.*, the Third Department decided a toxic tort claim sounding in nuisance.[114] The "defendant ha[d] operated a manufacturing facility in Rensselaer County since 1961."[115] The "[p]laintiffs, who live within the area of the facility, commenced this action alleging that defendant improperly disposed of perfluorooctanoic acid and its predecessor, ammonium perfluorooctanoate (hereinafter jointly referred to as PFOA), among other chemical compounds, thereby contaminating the water of private wells in the surrounding area."[116] The "[d]efendant argue[d] that it owed no duty of care to plaintiffs and, even if it did, there was no breach of that duty."[117] But the Third Department held, "defendant, as a landowner who engaged in activity that could cause injury to individuals in adjoining areas, owed a duty of care to plaintiffs to take reasonable steps to prevent injury to them."[118] Turning to breach, the court explained, "defendant may be liable if it 'failed to exercise due care in conducting the allegedly polluting activity or in installing the allegedly polluting device, and that [it] knew or should have known that such conduct could result in contamination.'"[119]

The defendant argued it acted reasonably under the circumstances when it "[1] provided bottles of water to affected community members, [2] voluntarily tested the water through an independent

112. *Cardenas*, 192 A.D.3d at 1543, 144 N.Y.S.2d at 775 (first citing *Pingtella*, 305 A.D.2d at 41–42, 758 N.Y.S.2d at 720; then citing *Davis*, 26 N.Y.3d at 576–77, 46 N.E.3d at 622, 26 N.Y.S.3d at 239; and then citing *Tenuto*, 90 N.Y.2d at 613–14, 687 N.E.2d at 1303–04, 665 N.Y.S.2d at 20–21).

113. *Id.* at 1543–44, 144 N.Y.S.3d at 775.

114. 191 A.D.3d 1220, 1221, 143 N.Y.S.3d 123, 126 (3d Dep't 2021).

115. *Id.*

116. *Id.*

117. *Id.* at 1222, 143 N.Y.S.3d at 126.

118. *Id.* (citing 532 Madison Ave. Gourmet Foods, Inc. v. Finlandia Ctr., Inc., 96 N.Y.2d 280, 290, 750 N.E.2d 1097, 1102, 727 N.Y.S.2d 49, 54 (2001)).

119. *Burdick*, 191 A.D.3d at 1222, 143 N.Y.S.3d at 126–27 (quoting Strand v. Neglia, A.D.2d 907, 907, 649 N.Y.S.2d 729, 730 (3d Dep't 1996)) (first citing Ivory v. Int'l Bus. Machs. Corp., 116 A.D.3d 121, 127, 983 N.Y.S.2d 110, 114–15 (3d Dep't 2014); then citing Phillips v. Sun Oil Co., 307 N.Y. 328, 331, 121 N.E.2d 249, 251 (1954)).

laboratory prior to the promulgation of regulatory guidance, [3] installed water treatment systems and [4] provided testing results to appropriate governmental agencies."[120] Indeed, the Third Department determined these facts shifted the burden to plaintiffs to raise a question of fact.[121]

The plaintiffs successfully met their shifted burden. Specifically, the plaintiffs "submitted evidence that defendant was aware of the potential harmful effects of PFOA at a time when it could have taken remedial action but nonetheless continued to discharge contaminated wastewater into the neighboring areas."[122] Further, one expert "demonstrated an issue of fact as to whether defendant failed to disclose to regulatory agencies or the surrounding communities that the discharged water was contaminated, especially when considering the proof that it engaged in some mitigation efforts with its own employees."[123]

IV. DEFAMATION

In *Laguerre v. Maurice*, a "plaintiff alleges that he was defamed by the pastor of the defendant church when the pastor told members of the congregation that the plaintiff was a homosexual who viewed gay pornography on the church's computer."[124] The plaintiff, "a former elder" of a Seventh Day Adventist congregation sued the "pastor in charge of the church" after the pastor "stated before approximately 300 members of the church that 'the [p]laintiff was a homosexual,' and that 'the [p]laintiff disrespected the church by viewing gay pornography on the church's computer.'"[125] The plaintiff claimed defamation per se, and the "defendants argued that . . . falsely ascribing homosexuality to a person no longer constituted defamation per se."[126] The defendants "further argued . . . that the allegedly defamatory statements, which allegedly were made at a church

120. *Id.* at 1222, 143 N.Y.S.3d at 127.

121. *Id.* at 1222–23, 143 N.Y.S.3d at 127.

122. *Id.*

123. *Id.* at 1223, 143 N.Y.S.3d at 127.

124. 192 A.D.3d 44, 46, 138 N.Y.S.3d 123, 126 (2d Dep't 2020).

125. *Id.*

126. *Id.* at 46–47, 138 N.Y.S.3d at 126; *see also id.* ("The complaint further alleged that Pastor Maurice used these statements to influence the church to vote to relieve the plaintiff of his responsibilities at the church and to terminate his membership.").

membership meeting, were protected by a common-interest privilege."[127]

On appeal, the Second Department decided two issues: (1) "whether resolution of the issues raised would necessarily involve an impermissible inquiry into religious doctrine or practice in violation of the First Amendment"; and (2) "whether the false imputation that a person is a homosexual constitutes defamation per se."[128]

Addressing the first issue, the Court began by noting the general rule that "[t]he First Amendment forbids civil courts from interfering in or determining religious disputes, because there is substantial danger that the state will become entangled in essentially religious controversies or intervene on behalf of groups espousing particular doctrines or beliefs."[129] But, the Court also acknowledged, "'[c]ivil disputes involving religious parties or institutions may be adjudicated without offending the First Amendment as long as' they 'can be "decided solely upon the application of neutral principles of . . . law, without reference to any religious principle."'"[130] Applying these principles, the Second Department rejected the defendants' argument that "adjudication of the claim would require the court to impermissibly inquire into internal church governance."[131] Instead, it held, "[t]he allegedly defamatory remarks at issue, i.e., that the plaintiff is a homosexual who viewed gay pornography on the church's computer, may be evaluated without reference to religious principles."[132] The decision ultimately turned on the remedies the

127. *Id.* at 47, 138 N.Y.S.3d at 126.

128. *Id.* at 46, 138 N.Y.S.3d at 126. Whether a statement constitutes defamation per se has the practical effect of eliminating the pleading and proof requirement of special damages. *Id.* at 51, 138 N.Y.S.3d at 129–30 (quoting Matherson v. Marchello, 100 A.D.2d 233, 242, 473 N.Y.S.2d 998, 1005 (2d Dep't 1984)).

129. *Laguerre*, 192 A.D.3d at 47–48, 138 N.Y.S.3d at 127 (quoting Congregation Yetev Lev D'Satmar, Inc. v. Kahana, 9 N.Y.3d 282, 286, 879 N.E.2d 1282, 1284, 849 N.Y.S.2d 463, 465–466 (2007)) (first citing First Presbyterian Church v. United Presbyterian Church, 62 N.Y.2d 110, 116, 464 N.E.2d 454, 457–458, 476 N.Y.S.2d 86, 89–90 (1984); then citing Eltingville Lutheran Church v. Rimbo, 174 A.D.3d 856, 857–58, 108 N.Y.S.3d 39, 41–42 (2d Dep't 2019)).

130. *Id.* at 48, 138 N.Y.S.3d at 127 (first quoting *Congregation Yetev*, 9 N.Y.3d at 286, 879 N.E.2d at 1284–85, 849 N.Y.S.2d at 466; then quoting Avitzur v. Avitzur, 58 N.Y.2d 108, 115, 446 N.E.2d 136, 138, 459 N.Y.S.2d 572, 574–75 (1983)).

131. *Id.* at 48, 138 N.Y.S.3d at 127.

132. *Id.* (first citing Sieger v. Union of Orthodox Rabbis of the U.S. & Can., Inc., 1 A.D.3d 180, 182, 767 N.Y.S.2d 78, 80 (1st Dep't 2003); then citing Berger

plaintiff sought: because "plaintiff d[id] not challenge his expulsion from the church, or request reinstatement as a church elder," and only requested a judgment on the defamation claim, the first amendment was not implicated.[133]

Addressing the second issue, the Court confronted prior cases that held false imputation of homosexuality constitutes defamation per se.[134] The Second Department followed the Third Department's decision in *Yonaty v. Mincolla*, where the Third Department held, "[g]iven this state's well-defined public policy of protection and respect for the civil rights of people who are lesbian, gay or bisexual, we now overrule our prior case to the contrary and hold that such statements are not defamatory per se."[135] The Third Department had reasoned, "cases categorizing statements that falsely impute homosexuality as defamatory per se are based upon the flawed premise that it is shameful and disgraceful to be described as lesbian, gay or bisexual."[136] The Second Department explained, the "profound and notable transformation of cultural attitudes" toward the LGBTQIA+ community "and governmental protective laws" outweighed any consideration of stare decisis concerns.[137] As a result, the Court held, "the false imputation of homosexuality does not constitute defamation per se" and dismissed the case.[138]

v. Temple Beth-El of Great Neck, 303 A.D.2d 346, 348, 756 N.Y.S.2d 94, 96 (2d Dep't 2003)).

133. *Id.* (citing Drake v. Moulton Mem'l Baptist Church, 93 A.D.3d 685, 686, 940 N.Y.S.2d 281, 282 (2d Dep't 2012)).

134. *Laguerre*, 192 A.D.3d at 51, 138 N.Y.S.3d at 129(first citing Matherson v. Marchello, 100 A.D.2d 233, 242, 473 N.Y.S.2d 998, 1005 (2d Dep't 1984); then citing Klepetko v. Reisman, 41 A.D.3d 551, 552, 839 N.Y.S.2d 101, 102–03 (2d Dep't 2007)); *see also id.* at 52, 138 N.Y.S.3d at 130 ("[T]he Appellate Division in all four Departments had recognized statements falsely imputing homosexuality as a category of defamation per se.") (first citing Yonaty v. Mincolla, 97 A.D.3d 141, 144, 945 N.Y.S.2d 774, 777 (3d Dep't 2012); then citing *Klepetko*, 41 A.D.3d at 552, 839 N.Y.S.2d at 102–03; and then citing Tourge v. City of Albany, 285 A.D.2d 785, 786, 727 N.Y.S.2d 753, 755 (3d Dep't 2001); and then citing Nacinovich v. Tullet & Tokyo Forex, 257 A.D.2d 523, 524, 685 N.Y.S.2d 17, 19 (1st Dep't 1999); and then citing *Matherson*, 100 A.D.2d at 242, 473 N.Y.S.2d at 1005; and then citing Privitera v. Phelps, 79 A.D.2d 1, 3, 435 N.Y.S.2d 402, 404 (4th Dep't 1981)).

135. 97 A.D.3d at 142, 945 N.Y.S.2d at 776; *see Laguerre*, 192 A.D.3d at 52, 138 N.Y.S.3d at 130 (citing *Matherson*, 100 A.D.2d at 233, 473 N.Y.S.2d at 998).

136. *Yonaty*, 97 A.D.3d at 144, 945 N.Y.S.2d at 777.

137. *Laguerre*, 192 A.D.3d at 52, 138 N.Y.S.3d at 130.

138. *Id.* at 53, 138 N.Y.S.3d at 131.

The First Department decided *Gottwald v. Sebert*, which involve pop music artist Kesha's allegedly defamatory statements about her music producer, Lukasz Gottwald (popularly known as Dr. Luke).[139] The case presented three interesting defamation issues, which yielded a two-justice dissent: (1) the scope of public figure status; (2) the scope of the litigation privilege; and (3) liability for third-parties' defamatory statements.

The Court first addressed whether Gottwald constituted an all-purpose public figure because of his status as "an acclaimed and influential music producer."[140] The court reasoned Gottwald had not become a "celebrity" or a "household word."[141] The majority—departing from the dissent—held "Gottwald's success in the music business is not enough to bring him into the realm of a general-purpose public figure."[142] Further, the majority held Gottwald had not attained all-purpose public figure status by virtue of the fact that "the music he produces is known to the general public or [that] he is associated with famous or household word musicians, especially where he has used his efforts as a producer to obtain publicity not for himself, but for the artists that he represents."[143]

The Court also determined Gottwald was not a limited purpose public figure.[144] "A limited-purpose public figure, more commonly, is an individual who has voluntarily injected himself or is drawn into a

139. 193 A.D.3d 573, 574 148 N.Y.S.3d 37, 41 (1st Dep't 2021). Kesha asserted cross-claims sounding in breach-of-contract, which are outside this *Survey* article's scope. *Id.* This article highlights two issues decided by the Court, but the Court decided other issues, including that a text between Kesha and Lady Gaga, where Kesha stated "Gottwald had raped another singer, was defamatory per se." *Id.* at 581, 148 N.Y.S.3d at 47 (citing Torati v. Hodak, 147 A.D.3d 502, 504, 47 N.Y.S.3d 288, 290 (1st Dep't 2017)).

140. *Id.* at 576, 148 N.Y.S.3d at 43.

141. *Id.* at 576, 148 N.Y.S.3d at 43 (quoting Waldbaum v. Fairchild Publ'ns, 627 F.2d 1287, 1292 (D.C. Cir. 1980) (citing Gertz v. Robert Welch, Inc., 418 U.S. 323, 345, 94 S. Ct. 2997, 3009, 41 L. Ed. 2d 789, 808 (1974)).

142. *Gottwald*, 193 A.D.3d at 576, 148 N.Y.S.3d at 43 (citing Krauss v. Globe Int'l., Inc., 251 A.D.2d 191, 192, 674 N.Y.S.2d 662, 664 (1st Dep't 1998)) (citing *Waldbaum*, 627 F.2d at 1294).

143. *Id.* at 576–77, 148 N.Y.S.3d at 43 (citing *Krauss*, 251 A.D.2d at 192, 674 N.Y.S.2d at 664); *see also id.* at 577, 148 N.Y.S.3d at 43 ("His success in a high-profile career, without more, does not warrant a finding that he is a general-purpose public figure.") (citing *Waldbaum*, 627 F.2d at 1299).

144. *Id.* at 578, 148 N.Y.S.3d at 44.

particular public controversy with a view toward influencing it."[145] The Court found it determinative that *Kesha*, not *Gottwald*, put Gottwald into the public light, explaining, "[a] person may generally not be made a public figure through the unilateral acts of another."[146] Notably, while Gottwald tweeted about the dispute once in 2016, the bulk of his voluntarily-induced publicity came from "his contributions to pop music."[147] Because "he has not injected himself into the debate about sexual assault or abuse of artists in the entertainment industry, which is the subject of the defamation," the majority found he did not obtain limited-purpose public figure status.[148]

The next issue involved whether Kesha would receive litigation privilege for statements made in prior California litigation between the parties "in which she alleged that Gottwald drugged and raped her," which Gottwald claimed Kesha alleged falsely "to pressure Gottwald into renegotiating her contracts or to release her from her contracts with plaintiffs."[149] While the litigation privilege usually immunizes statements made during court proceedings, it does not apply if the underlying action was a "sham" and, therefore, was only filed as a vehicle to immunize defamation.[150] The majority held issues of fact existed as to whether the litigation privilege applied because "[t]he record shows that there are factual issues as to whether Kesha's public relations team, Sunshine Sachs, created a press plan to pressure plaintiffs into renegotiating or releasing Kesha from her contracts" and the "record support[ed] plaintiffs' allegation and creates an issue of

145. *Id.* at 577, 148 N.Y.S.3d at 43 ("Here, contrary to the dissent's view, the specific public dispute as framed by Kesha is sexual assault and the abuse of artists in the entertainment industry.") Gottwald v. Sebert, 193 A.D.3d 573, 577, 148 N.Y.S.3d 37, 43–44 (1st Dep't 2021).

146. *Id.* at 577–78, 148 N.Y.S.3d at 44 (first citing United States v. Sergentakis, No. 15 Cr. 33(NSR), 2015 U.S. Dist. LEXIS 77719, at *14 (S.D.N.Y. June 15, 2015), *aff'd*, 787 F. App'x 51, 53 (2d Cir. 2019); then citing Chandok v. Klessig, 648 F. Supp. 2d 449, 458 (N.D.N.Y. 2009)).

147. *Id.* at 578, 579, 148 N.Y.S. 3d at 44, 45 (citing Wolston v. Reader's Digest Ass'n Inc., 443 U.S. 157, 167, 99 S. Ct. 2701, 2707, 61 L. Ed. 2d 450, 460 (1979)).

148. *Id.* at 579, 148 N.Y.S.3d at 45.

149. *Gottwald*, 193 A.D.3d at 580, 148 N.Y.S.3d at 46 (citing Flomenhaft v. Finkelstein, 127 A.D.3d 634, 637, 8 N.Y.S.3d 161, 164 (1st Dep't 2015)).

150. *Id.* at 580, 148 N.Y.S.3d at 46 (quoting *Flomenhaft*, 127 A.D.3d at 638, 8 N.Y.S.3d at 165) (citing Lacher v. Engel, 33 A.D.3d 10, 13–14, 817 N.Y.S.2d 37, 40 (1st Dep't 2006)).

fact as to whether the California complaint was a 'sham' precluding the grant of summary judgment."[151]

Additionally, the Court held Kesha could be liable for the statements of her agents, including "her lawyer and her press agent" because "[a] person authorizing others to speak on their behalf can be held vicariously liable for defamatory statements made by its agents."[152] Her lawyer, Mark Geragos, "held authority to speak on her behalf" and "filed the complaint in California," evincing his authority to speak on the subject.[153] Kesha's public relations firm was "responsible for the publicity surrounding the California complaint" and "was hired for the sole purpose of managing Kesha's publicity and to formulate a press plan on how to interact and disseminate information, with the press."[154] Accordingly, the Court held Kesha could be liable for those statements as a matter of law.[155]

But the Court left open whether Kesha could be held liable for statements made by her mother and a blogger.[156] "[A] person is not responsible for the recommunication of their original defamatory statement if the recommunication was done without the person's authority or request over another whom the person has no control."[157] As to Kesha's mother, the Court held "[i]t is unclear if [her] statements about Gottwald were made as Kesha's agent or as [Kesha's] mother, with an independent purpose."[158] And, as to the blogger, the Court held "[i]t is unclear if [his] statements were made as Kesha's fan, or under Kesha's direction in order to help the publicity around her California complaint."[159]

In *Sagaille v. Carrega*, the First Department addressed whether "whether a sexual assault victim may be subject to a defamation suit based solely on her report to the police of the incident," which would normally be subject to qualified privilege because it constituted a

151. *Id.*

152. *Id.* at 580, 148 N.Y.S.3d at 46 (citing Nat'l Puerto Rican Day Parade, Inc. v. Casa Publ'ns, Inc., 79 A.D.3d 592, 594–95, 914 N.Y.S.2d 120, 122–23 (1st Dep't 2010)).

153. *Id.* at 581, 148 N.Y.S.3d at 46.

154. *Gottwald*, 193 A.D.3d at 581, 148 N.Y.S.3d at 46.

155. *Id.* at 581, 148 N.Y.S.3d at 47.

156. *Id.* at 580, 148 N.Y.S.3d at 46.

157. *Id.* at 581, 148 N.Y.S.3d at 46 (citing Hoffman v. Landers, 146 A.D.2d 744, 747, 536 N.Y.S.2d 228, 231 (2d Dep't 1989)).

158. *Id.* at 581, 148 N.Y.S.3d at 46–47.

159. *Gottwald*,193 A.D.3d at 581, 148 N.Y.S.3d at 47.

report to law enforcement.[160] The First Department reversed a lower court holding "that the making of such a complaint in and of itself amounted to malice sufficient to overcome the qualified privilege attaching to the making of police complaints, finding that reports of sexual assault by their very nature are presumptively malicious."[161] The First Department began by chiding the lower court ruling, which "rings of the outdated assumptions that have plagued sexual assault victims over time—namely, that women are likely to lie about sexual assaults and that such complaints are inherently vituperative."[162]

"On May 1, 2017, defendant reported that plaintiff had sexually assaulted her while she was driving home."[163] The report led to a criminal prosecution on "two counts of sexual abuse and one count of forcible touching."[164] More specifically, "Defendant alleged that plaintiff 'grabbed [her] face and placed [his] tongue into [her] mouth on two occasions, without [her] consent and grabbed [her] breast over [her] clothing without [her] consent.'"[165] The criminal trial ended in a mistrial because "the jurors announced that they were unable to reach a unanimous verdict."[166] Ultimately, the criminal proceeding ended when the criminal proceeding parties "agreed to an adjournment in contemplation of dismissal."[167]

The First Department had to decide whether the sensitive nature of Defendant's report to law enforcement meant the Court could "presume[] actual malice" sufficient to overcome the qualified immunity given to statements made to law enforcement seeking criminal prosecution, which was the lower court's holding.[168] The First Department flatly rejected any exception: "[t]here is no authority, however, for the [lower] court's sweeping proposition that it might infer actual malice based solely upon the nature of defendant's complaint."[169]

160. 194 A.D.3d 92, 93, 143 N.Y.S.3d 36, 38 (1st Dep't 2021).

161. *Id.*

162. *Id.*

163. *Id.* at 94, 143 N.Y.S.3d at 38.

164. *Id.* at 94, 143 N.Y.S.3d at 38–39.

165. *Sagaille*, 194 A.D.3d at 94, 143 N.Y.S.3d at 39.

166. *Id.*

167. *Id.*

168. *Id.* at 95, 143 N.Y.S.3d at 39.

169. *Id.* at 95–96, 143 N.Y.S.3d at 39 ("Indeed, such a holding would effectively extinguish any burden on a defamation plaintiff asserting claims predicated on reports of sexual assault to law enforcement and enable the plaintiff to subvert the

The final defamation case in this Article is *DiMauro v. Advance Publications, Inc.*[170] There, a plaintiff sued a journalist and newspaper after the newspaper "published an article . . . reporting that allegations of sexual abuse against a pastor at Blessed Sacrament Roman Catholic Church had been substantiated."[171] But Plaintiff was not the priest depicted, but rather a child depicted with the priest in the photograph: "the defendants included a photograph from 2000 depicting the pastor at issue, two other priests or pastors, and three children—including the plaintiff, walking in a church processional, with several parishioners in the background."[172] The issue became whether the picture (as a part of the article) was a statement "of and concerning" the plaintiff as opposed to the priest.[173] The Court held Plaintiff could not recover because "as a matter of law, 'viewing the article as a whole, the average reader would' not conclude that the article was of and concerning the plaintiff."[174] The Court noted Plaintiff was never named and "article did not state that [the priest's] victims were children."[175] As a result it held, "defendants' article did not expressly or impliedly pertain to the plaintiff."[176]

shield of qualified privilege that protects victims reporting sexual assault, an unacceptable result."). After declining to presume malice generally, the First Department determined Plaintiff had not pled malice. *Id.* at 96, 143 N.Y.S.3d at 39.

170. 190 A.D.3d 942, 139 N.Y.S.3d 627 (2d Dep't 2021).

171. *Id.* at 943, 139 N.Y.S.3d at 628.

172. *Id.* at 943, 139 N.Y.S.3d at 628–29.

173. *Id.* at 944, 139 N.Y.S.3d at 629.

174. *Id.* (quoting Alf v. Buffalo News, Inc., 21 N.Y.3d 988, 990, 995 N.E.2d 168, 168, 972 N.Y.S.2d 206, 207 (2013)) (first citing Three Amigos SJL Rest., Inc. v. CBS News Inc., 28 N.Y.3d 82, 87, 65 N.E.3d 35, 37, 42 N.Y.S.3d 64, 66 (2016); then citing Russian Am. Found., Inc. v. Daily News, L.P., 109 A.D.3d 410, 413, 970 N.Y.S.2d 216, 219 (1st Dep't 2013)).

175. *DiMauro*, 190 A.D.3d at 944, 139 N.Y.S.3d at 629 (first citing Aboutaam v. Dow Jones & Co., 180 A.D.3d 573, 574, 119 N.Y.S.3d 458, 460 (1st Dep't 2020); then citing Partridge v. N.Y., 173 A.D.3d 86, 95, 100 N.Y.S.3d 730, 737–38 (3d Dep't 2019)).

176. *Id.* (citing Julian v. Am. Bus. Consultants, Inc., 2 N.Y.2d 1, 17, 137 N.E.2d 1, 11, 155 N.Y.S.2d 1, 16 (1956); and then citing Stepanov v. Dow Jones & Co., Inc., 120 A.D.3d 28, 34, 987 N.Y.S.2d 37, 42 (1st Dep't 2014)). The Court also dismissed Plaintiff's right-to-privacy cause of action based on the public-interest privilege. *Id.* at 945, 139 N.Y.S.3d at 630.

V. LEGISLATIVE/EXECUTIVE DEVELOPMENTS

A. The Child Victim's Act

As discussed last year, Governor Cuomo signed the Child Victim's Act (the "Act") into law and extended its reporting period—which contains powerful provisions allowing for suits resulting from sexual abuse of children—on February 14, 2019.[177] During this *Survey* period (and after executive orders extending the revival period), the legislature passed a law extending the revival period through August 14, 2021.[178] Additionally, the Fourth Department decided the first appellate division case interpreting the Act on *Doe v. Amherst Central School District*, which held CVA plaintiffs can proceed anonymously but only after courts perform the relevant multi-factored analysis.[179]

B. The COVID Executive Orders Constituted a Toll

On March 20, 2020, as a result of COVID-19, the Governor tolled

> any specific time limit for the commencement, filing, or service of any legal action . . . as prescribed by the procedural laws of the state, including but not limited to . . . the civil practice law and rules, the court of claims act, . . . or by any other statute, local law, ordinance, order, rule, or regulation, . . . until April 19, 2020[180]

By further Executive Orders, the Governor extended the toll through November 3, 2020, when the Governor lifted the toll.[181] The Second Department held the Executive Orders constituted a true toll––and not a mere suspension—on June 2, 2021, which resolved the controversy reported in last year's Article.[182]

177. *See* Act of Feb. 14, 2019, 2019 McKinney's Sess. Laws of N.Y., ch. 11, at 38 (codified at N.Y. CRIM. PROC. LAW § 30.10 (McKinney 2021)).

178. *See* Act of Aug. 3, 2020, 2020 McKinney's Sess. Laws of N.Y., ch. 130, at 823–24 (codified at N.Y. PENAL LAW §§ 130.45, 263.05, 255.25–.27 (McKinney 2021)).

179. 196 A.D.3d 9, 12–13, 148 N.Y.S.3d 305, 308 (4th Dep't 2021).

180. N.Y. Exec. Order No. 202.8, 9 N.Y.C.R.R. § 8.202.8 (2020).

181. N.Y. Exec. Order No. 202.72, 9 N.Y.C.R.R. § 8.202.72 (2020).

182. Brash v. Richards, 195 A.D.3d 582, 585, 149 N.Y.S.3d 560, 563 (2d Dep't 2021) (quoting N.Y. EXEC. LAW § 29-a(2)(d) (McKinney 2021)) (citing Foy v. N.Y., 71 Misc. 3d 605, 608, 144 N.Y.S.3d 285, 288 (N.Y. Ct. Cl. 2021)).

CONCLUSION

The law of torts is ever-changing. As with other areas of law, decisions abound with greater and greater frequency. But the underlying principles remain. This Article has presented doctrinal developments from the last twelve-month *Survey* period. By the time the *Survey* is published, hundreds more cases will have been decided.

Stay tuned.