

APPELLATE DIVISION REVIEW

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An ACT of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority.¹

These words of Justice Samuel Chase, quoted by the First Department in December 2009, still resonate more than 200 years later. Highlighted below are several cases decided in the past three months by the Appellate Division's four Departments which explicate "principles of the social compact" —some well-accepted and others novel.

First Department

Art Law

Looking to authenticate that giant Calder sculpture you recently inherited? Don't assume that the Alexander & Louisa Calder Foundation will return your calls; it doesn't have to. A private foundation has no legal obligation to authenticate works of art, a unanimous panel of the First Department held in *Thome v. Alexander & Louisa Calder Foundation*.²

The owner of stage sets designed by the renowned artist Alexander Calder, plaintiff Joel Thome, submitted the works to the Calder Foundation for authentication and inclusion in its "catalogue raisonné" (a definitive catalogue of a particular artist's work). The Calder

Foundation did not authenticate the stage sets and did not assign them a number in the catalogue. Thome sued, claiming that without the Foundation's validation, the works were "essentially unmarketable."

In a decision by Justice David B. Saxe, the First Department left Thome hanging. The Foundation's status as "the de facto sole arbiter of authenticity of an artist's work" was not automatically "coupled with a legal obligation to take any particular steps regarding authentication." Rather, "legal obligations must be grounded in contractual duties, tort duties or statutory duties," none of which had been established here. The Foundation's not-for-profit status did not impose such duties; the privileges enjoyed by a charitable foundation are not "accompanied...by a general legal responsibility, enforceable by the public at large, to act at all times in the public interest and avoid actions that could appear self-serving." The court concluded that, while the allegations "evoke our sympathy for plaintiff and some puzzlement at the lack of a formal response [to the plaintiff's request]," the Foundation owed Thome no duty that would entitle him to relief.

Eminent Domain

Exercise of the State's eminent domain power to benefit "a private elite education institution" like

Columbia University is unconstitutional, a divided panel of the First Department held in *Kaur v. New York State Urban Dev. Corp.*³ At issue was Columbia's expansion of its campus onto approximately 17 acres in West Harlem. Noting that a "public use or benefit must be present in order for an agency to exercise its power of eminent domain" under the Federal and New York State Constitutions, Justice James M. Catterson, writing for a 3-2 majority, concluded that the "determination that the project has a public use, benefit or purpose is wholly unsupported by the record and precedent."

Justice Catterson's sharply worded opinion criticized the Empire State Development Corporation (ESDC) for designating the area "blighted" only "years after the scheme was hatched to justify the employment of eminent domain." Because "this project has always primarily concerned a massive capital project for Columbia," the blight designation, in Justice Catterson's view, was "mere sophistry." Stressing the conflict of interest that resulted from Columbia and ESDC employing the same environmental and planning consultant, Justice Catterson noted that "every document constituting the [project] plan was drafted by the preselected private beneficiary's attorneys and consultants and architects."

Addressing ESDC's finding that the area was underutilized, Justice Catterson declared that courts should "categorically reject eminent domain takings solely based on underutilization." Allowing takings based on underutilization would

"transform the purpose of blight removal from the elimination of harmful social and economic conditions in a specific area to a policy affirmatively requiring the ultimate commercial development of all property regardless of the character of the community subject to such urban renewal."

Comparative Negligence

A plaintiff is entitled to summary judgment on the issue of liability where he has established a *prima facie* case of negligence against a defendant, even if fact questions remain regarding his own negligence, the First Department held in *Tselebis v. Ryder Truck Rental, Inc.*⁴ Writing for a unanimous panel, Justice Leland G. DeGrasse explained that under the comparative negligence statute,⁵ a plaintiff's culpable conduct "no longer stands as a bar to recovery," but "merely acts to diminish the plaintiff's recovery in proportion to the culpable conduct of the defendants." The panel rejected "opinions by this Court and others suggest[ing] that freedom from comparative negligence is a required component of a plaintiff's *prima facie* showing on a motion for summary judgment," observing that such opinions "cannot be reconciled" with the comparative negligence law. Accordingly, the First Department reversed the trial court's denial of plaintiff's summary judgment motion on the issue of liability and remanded for a trial on damages.

Second Department

Criminal Procedure

The Supreme Court's Integrated Domestic Violence ("IDV") Parts

were created to apply a "one family—one judge" model for domestic violence victims and their families, reducing the number of court appearances while promoting more informed decisionmaking and greater consistency. But, can the IDV Part, which is a unit of the Supreme Court, hear misdemeanor charges that were brought without an indictment or a superior court information? In *People v. Fernandez*,⁶ a case of first impression for the Second Department, the court held that the answer is "yes."

After the defendant was charged through a misdemeanor complaint in Criminal Court, the action was transferred to the IDV Part of the Supreme Court and the misdemeanor complaint was converted to an information. On appeal, the defendant contended that section 210.05 of the Criminal Procedure Law, which made grand jury indictment and superior court information the "only methods of prosecuting an offense" in Supreme Court, deprived that court of jurisdiction to hear his case.

In a unanimous decision by Justice John M. Leventhal, the Second Department sustained the trial court's jurisdiction. The court concluded that section 210.05 was procedural in nature, "merely prescrib[ing] the method and manner required for a prosecutor to prosecute an offense in a superior court, rather than imposing a limitation on the superior court's constitutional jurisdiction over such a case." The Criminal Procedure Law's provision "was not intended to prohibit the Supreme Court from exercising its jurisdiction under the

New York State Constitution, nor can it.” In an unusual postscript, however, the Second Department suggested that “the issue presented here may be ripe for review by the Court of Appeals,” so this may not be the last you hear of Mr. Fernandez.

Torts

Foster children cannot sue their foster parents for negligent supervision, the Second Department held in *McCabe v. Dutchess County*.⁷ The infant plaintiff fell after climbing out of his playpen at his foster mother’s home. His birthmother, individually and on his behalf, sued the foster mother for negligent supervision.

Writing for a unanimous panel of the Second Department, Justice Plummer E. Lott cited the Court of Appeals’ decision in *Holodook v. Spencer*,⁸ which held that a child cannot sue its parents for negligent supervision, and accorded foster parents the same protection. Allowing lawsuits for negligent supervision would impose “a heavy burden on foster parents, who agree to care for children who often come from difficult backgrounds,” the McCabe court noted. That burden would likely “discourage otherwise qualified and able foster parents from taking on this responsibility.” In addition, the prospect of negligent supervision claims “might discourage foster parents from reporting injuries for fear of being sued by the biological parent on behalf of the child or impleaded as a third-party defendant in an action brought on behalf of the child against a third party.” The Second Department echoed the Court of Appeals’ observation in *Holodook* that most childhood injuries might

be avoided by constant parental surveillance and instruction, but that mode of childrearing could have other ill effects.

Third Department

Negligence

The common-law rule that barred police officers from recovering for injuries sustained in the line of duty was removed by General Municipal Law §205-e. Under that section, police officers may sue for injuries or wrongful death resulting from a person’s neglect in failing to comply with government statutes, rules, orders or requirements. The statute, however, “was not intended to provide police officers with any greater rights than the public at large,” the Third Department clarified in *Brinkerhoff v. County of Saint Lawrence*,⁹ a unanimous decision authored by Justice E. Michael Kavanagh.

The plaintiff was the surviving wife of a police officer who had been shot and killed by an offender who was on probation. The offender’s arrest warrant had not been correctly processed by the defendant county’s probation department. If the probation department had taken proper steps, the plaintiff argued, the fatal shooting would not have occurred. Yet, the Third Department pointed out, government agencies like the probation department may not be held liable for negligently performing a government function unless they owe a “special duty” to the injured person. The county probation department had not assumed any special duty to the deceased officer, and apparently had no contact with him regarding the

offender prior to the shooting. “Absent some evidence of a special duty owed by defendants,” the Third Department held, liability under section 205-e “cannot be said to exist.”

Fourth Department

Metadata

“Metadata,” the bugbear of litigators embroiled in e-discovery, may be obtainable under the Freedom of Information Law (FOIL), the Fourth Department ruled in *Irwin v. Onondaga County Resource Recovery Agency*.¹⁰ The petitioner found his picture used in an e-mail newsletter distributed by the Onondaga County Resource Recovery Agency (OCRRA), a public agency that handles solid waste and recycling for Onondaga County. He made a FOIL request, among other things seeking “[a]ny and all records involving” the photograph used in the newsletter, “including the image file itself and any associated metadata.”

In a 3-2 decision written by Justice Eugene Fahey, the court described three varieties of metadata: “substantive metadata” (information reflecting editing changes or comments to a document); “system metadata” (automatically generated information showing when, and by whom, a document was created or revised); and “embedded metadata” (data input into a file by its creators or users, which cannot be seen in the document’s display). The petitioner’s request was for system metadata, which Justice Fahey characterized as “the electronic equivalent of notes on a file folder.” The Fourth Department held that system metadata is a “record”

subject to disclosure under FOIL. The panel declined to consider whether substantive or embedded metadata would likewise be obtainable under FOIL. (A dissenting opinion would have required OCRRA to disclose additional items.)

Tenancy by the Entirety

Property held in a tenancy by the entirety may be included in meeting the 20% threshold for a valid protest petition under Town Law §265(1)(a) even though only one spouse has signed the petition, the Fourth Department held in *Gosier v. Aubertine*.¹¹ Property owners in the Town of Lyme submitted a protest petition opposing a zoning measure that would have imposed setback requirements on wind energy facilities. If owners of 20% of the affected land supported the protest, §265(1) would have made a 75% majority of the Town Board, rather than the usual simple majority, necessary for passage.

The Town Board disallowed the petitioners' signatures, however, because only one spouse had signed the protest while both owned the property as tenants by the entirety. As a result, the petition failed to meet the 20% threshold requirement and the zoning change passed without a supermajority.

In a unanimous decision written by Justice John V. Centra, the Fourth Department found the protest petition valid. In a tenancy by the entirety, the court explained, both spouses own the entire fee interest. "Based on the nature of property held as tenants by the entirety," the court wrote, "we believe that it is sufficient for only one spouse to sign the petition. If the Legislature deems it appropriate to define 'owners' as all of the record owners of the property, it may certainly revise the statute to do so."

Endnotes

- ¹ *Calder v. Bull*, 3 U.S. 386, 388 (1798), quoted in *Kaur v. New York State Urban Dev. Corp.*
- ² 2009 N.Y. Slip Op. 08976 (1st Dept. Dec. 3, 2009), discussed below.
- ³ 2009 N.Y. Slip Op. 08889 (1st Dept. Dec. 1, 2009).
- ⁴ 2010 N.Y. Slip. Op. 01560 (3d Dept. Feb. 25, 2010).
- ⁵ 2010 N.Y. Slip. Op. 01238 (4th Dept. Feb. 11, 2010).
- ⁶ 2010 N.Y. Slip Op. 01977 (2d Dept. Mar. 9, 2010).
- ⁷ 2010 N.Y. Slip Op. 00823 (2d Dept. Feb. 2, 2010).
- ⁸ 36 N.Y.2d 35 (1974).
- ⁹ 2009 N.Y. Slip. Op. 09925 (4th Dept. Dec. 30, 2009).
- ¹⁰ 2010 N.Y. Slip. Op. 01238 (4th Dept. Feb. 11, 2010).
- ¹¹ 2009 N.Y. Slip. Op. 09925 (4th Dept. Dec. 30, 2009).