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COURT OF APPEALS

CRIMINAL LAW.

"PURPOSE" ELEMENT OF FORCIBLE TOUCHING INFERRED FROM THE ACT ALLEGED (SLAPPING COMPLAINANT'S BUTTOCKS); INFORMATION SUFFICIENT.

The Court of Appeals, in a full-fledged opinion by Judge Rivera, over a dissent, determined the allegations in an information were sufficient to charge "forcible touching." The information alleged that defendant "smacked the buttocks" of the complainant. The question on appeal was whether the information sufficiently alleged the defendant acted with "no legitimate purpose" for the "purpose of degrading or abusing" the complainant. The court found that the "purpose" element of the offense could be inferred from the act itself: "[W]e conclude that the information provides sufficient factual allegations leading to an inference that defendant forcibly touched the complainant 'for no legitimate purpose' and 'for the purpose of degrading' the complainant (Penal Law § 130.52). Such inference about defendant's criminal purpose is appropriate based on the complainant's lack of consent and the intimate nature of the act, which is commonly considered to cross the line of propriety, absent a prior relationship or experience suggesting the complainant and defendant had a mutual understanding that such conduct was acceptable. Furthermore, by ignoring her right to be free from unwanted intimate contact, defendant disregarded the complainant's autonomy and personhood. Defendant thus behaved in direct contravention of the complainant's right to privacy and security in her person. That he did so on a public street, in the presence of an eyewitness, suggests that he was unconcerned by the public display of his actions, and the humiliation evoked by such conduct. Therefore, the information sufficiently establishes the purpose elements of the crime of forcible touching." **People v Hatton, 2015 NY Slip Op 08606, CtApp 11-23-15**

CRIMINAL LAW.

NEW YORK DOES NOT YET REQUIRE THE RECORDING OF STATEMENTS MADE TO THE POLICE; ABSENT MALFEASANCE, THE FAILURE TO RECORD DOES NOT REQUIRE THE COURT TO GRANT A DEFENSE REQUEST FOR AN ADVERSE INFERENCE JURY INSTRUCTION.

The Court of Appeals, in a full-fledged opinion by Judge Abdus-Salaam, determined that there exists no legal basis (no applicable precedent) for mandating the electronic recording of statements made by the accused to police. Under controlling precedent, to trigger the need for an adverse inference jury instruction, there generally must be some malfeasance on the part of the police (i.e., destruction of evidence). Here, there was no malfeasance. The defense request for an adverse inference jury instruction, based upon the failure to record defendant's statement, was therefore properly denied. The majority, however, expressed support for requiring the recording of statements, leaving it to the Legislature. In a concurring opinion, Judge Lippman suggested that, given the wide availability of recording equipment, it may even now be appropriate for judges to grant an adverse inference charge in this context. The narrow holding of the case was succinctly stated by the majority as follows: "Because defendant's proposed jury instruction was neither required as a penalty for governmental malfeasance nor akin to a missing witness charge, the Appellate Division properly determined that the trial court did not commit legal error or abuse its discretion as a matter of law by declining to deliver the charge to the jury." **People v Durant, 2015 NY Slip Op 08609, CtApp 11-23-15**

CRIMINAL LAW.

SO-CALLED "EXCLUSION OFFENSES" WHICH MAKE DEFENDANTS INELIGIBLE FOR RESENTENCING UNDER THE DRUG LAW REFORM ACT MUST BE COMMITTED BEFORE THE DRUG OFFENSE FOR WHICH RESENTENCING IS SOUGHT.

The Court of Appeals, in a full-fledged opinion by Judge Abdus-Salaam, explained that so-called "exclusion offenses," which make defendants ineligible for resentencing under the Drug Law Reform Act, only apply if committed before the drug offense for which resentencing is sought. However, offenses committed after the drug offense may be considered in deciding a resentencing application. **People v Golo, 2015 NY Slip Op 08611, CtApp 11-23-15**

CRIMINAL LAW.

WHETHER A GUILTY PLEA IS KNOWINGLY, VOLUNTARILY AND INTELLIGENTLY ENTERED DOES NOT DEPEND ON WHETHER WAIVER OF THE *BOYKIN* RIGHTS WAS INCLUDED IN THE ALLOCUTION AND IS DETERMINED BY A LOOK AT THE RECORD AS A WHOLE; PLEA ERRORS MUST BE PRESERVED; NARROW EXCEPTION TO THE PRESERVATION REQUIREMENT APPLIED HERE WHERE THE DEFENDANTS DID NOT HAVE AN OPPORTUNITY TO WITHDRAW THE PLEA.

The Court of Appeals, in a full-fledged opinion by Judge Pigott, over two-judge dissents, looked at the adequacy of guilty pleas in three cases where the *Boykin* rights (jury trial, confrontation of accusers, and protection against self-incrimination) were not mentioned. The court found two of the guilty pleas were valid, because the overall record demonstrated the pleas were knowingly, voluntarily and intelligently entered. In essence, the records demonstrated active pre-plea involvement and litigation by defense counsel. In contrast, the record in the third case did not show any involvement by an attorney preceding the plea. The court made it clear that errors involving a plea must be preserved by moving to withdraw the plea or moving to vacate the plea. A narrow exception to the preservation requirement applied to the three cases here, however, because, in all three cases, the defendant did not have an opportunity to withdraw the plea before sentence was imposed: "Trial courts have 'a vital responsibility' to ensure that a defendant who pleads guilty makes a knowing, voluntary and intelligent choice among alternative courses of action ... . They need not engage in any particular litany, however, as 'we have repeatedly rejected a formalistic approach to guilty pleas and have steered clear of a uniform mandatory catechism of pleading defendants' ... . Instead, we have opted for a flexible rule that considers 'all of the relevant circumstances surrounding' a plea ... . Among other factors, we evaluate '[t]he seriousness of the crime, the competency, experience and actual participation by counsel, the rationality of the 'plea bargain' . . . the pace of the proceedings in the particular criminal court' and whether the defendant consulted with his attorney about the constitutional consequences of the plea ... . So long as the record as a whole 'affirmatively disclose[s] that a defendant who pleaded guilty entered his plea understandingly and voluntarily,' the plea will be upheld ...". **People v Conceicao, 2015 NY Slip Op 08615, CtApp 11-24-15**

CRIMINAL LAW.

GUILTY PLEAS VALID.

The Court of Appeals determined the guilty pleas in the two cases before it were valid. The preservation requirement did not apply because the defendants were sentenced at the time of the plea (and therefore could not preserve any alleged error by moving to withdraw the plea). The court held that, in both cases, the record as a whole indicated the defendant entered the plea knowingly, voluntarily and intelligently: "A court determining the voluntariness of a waiver must review the record as a whole and the circumstances of the plea in its totality ... . Indeed, the voluntariness of [a] plea can be determined only by considering all of the relevant circumstances surrounding it ... . Here, the records in the instant appeals demonstrate that defendants' pleas were knowing, voluntary and intelligent and constitute valid waivers of their constitutional rights." [internal quotation marks omitted] **People v Sougou, 2015 NY Slip Op 08617, CtApp 11-24-15**

CRIMINAL LAW.

GUILTY PLEA VALID.

The Court of Appeals, over a dissent, determined a guilty plea was valid. The defendant was originally charged with a felony and pled to an A misdemeanor after discussing the plea with his attorney for two days: "The Appellate Term correctly concluded that the record in this case affirmatively shows a knowing, intelligent and voluntary waiver. Although he was initially charged with a felony, defendant pleaded guilty to promoting prostitution in the fourth degree (Penal Law § 230.20), a class A misdemeanor, in exchange for a $250 fine. He discussed the plea with his attorney for two days and personally confirmed that he was pleading guilty of his own free will because he was, in fact, guilty of the charge. The court ensured that defendant was aware of any potential immigration consequences and also that the conviction would add to his criminal record. We are satisfied that these facts establish a knowing, intelligent and voluntary waiver." **People v Pellegrino, 2015 NY Slip Op 08618, CtApp 11-24-15**

CRIMINAL LAW.

FAILURE TO ADEQUATELY ALLEGE MARIHUANA WAS POSSESSED IN A "PUBLIC PLACE" REQUIRED DISMISSAL OF MISDEMEANOR COMPLAINT.

The Court of Appeals determined the misdemeanor complaint alleging criminal possession of marihuana did not adequately allege the "in a public place" element of the offense: "'A valid and sufficient accusatory instrument is a nonwaivable jurisdictional prerequisite to a criminal prosecution' ... . Defendant waived prosecution by information and, therefore, the sufficiency of the accusatory instrument is assessed under the standard applicable to a misdemeanor complaint. Under that standard, the complaint must allege 'facts of an evidentiary character supporting or tending to support the charges' (CPL 100.15 [3]), and the factual allegations must 'provide reasonable cause to believe that the defendant committed the offense charged' (CPL 100.40 [4] [b]...). Here, the People concede that the accusatory instrument could have more precisely pled the

public nature of defendant's location by alleging that he was standing on a sidewalk or in a park, when the officer saw him holding a bag of marihuana. We agree that either of these assertions describes a location within the ["public place"] definition of Penal Law § 240.00 (1) ... . Given the absence of such factual allegations, and the instrument's reliance otherwise on conclusory statements that do no more than track the language of Penal Law § 221.10 (1), the complaint fails to meet the reasonable cause requirement and should be dismissed ...". **People v Afilal, 2015 NY Slip Op 08616, CtApp 11-24-15**

CRIMINAL LAW, ATTORNEYS.

UNJUSTIFIABLE FAILURE TO MOVE TO DISMISS A TIME-BARRED CHARGE, STANDING ALONE, CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL.

The Court of Appeals, in a full-fledged opinion by Judge Lippman, over a two-judge dissent, determined defense counsel's failure to move to dismiss a time-barred charge (petit larceny), unjustified by any rational trial strategy, constituted ineffective assistance, even though the motion would not have disposed of the case (burglary charge was timely): "The freestanding claim we have recognized, predicated upon a single representational error, is ... by its nature extremely limited — solitary lapses as egregious and demonstrably prejudicial as an attorney's failure to avoid a conviction on a time-barred count are rare, and can be made rarer still by responsible charging practices. Our decisions today ... , then, signal[s] no broad departure from the ordinarily applicable rule that it is the entire representational effort that should be weighed in judging whether counsel provided constitutionally effective representation." **People v Harris, 2015 NY Slip Op 08607, CtApp 11-23-15**

CRIMNAL LAW, ATTORNEYS.

FAILURE TO MOVE TO DISMISS TIME-BARRED CHARGES DID NOT CONSTITUTE INEFFECTIVE ASSISTANCE; HAVING THE LESSER CHARGES AVAILABLE FOR CONSIDERATION BY THE JURY WAS A LEGITIMATE TRIAL STRATEGY.

The Court of Appeals, in a full-fledged opinion by Judge Abdus-Salaam, determined defense counsel's failure to move to dismiss time-barred "endangering the welfare of a child" charges did not constitute ineffective assistance. It was a legitimate trial strategy to have the lesser charges available for consideration by the jury: "While seeking dismissal of the endangering the welfare of a child counts (class A misdemeanors) based upon the statute of limitations would have eliminated those charges, defendant still would have faced the remaining charges of second-degree rape as well as second-degree course of sexual conduct against a child as to the older child and second-degree course of sexual conduct against a child as to the younger child — both class D felonies ... . Thus, defendant's counsel here ... may have strategically decided to allow the lesser charges of endangering the welfare of a child to remain in order to allow the jury to convict defendant of that crime rather than the greater charges of rape and course of sexual conduct against a child. ... Defendant, therefore, failed to meet his burden of demonstrating the absence of a strategy ...". **People v Ambers, 2015 NY Slip Op 08608, CtApp 11-23-15**

CRIMINAL LAW, ATTORNEYS.

DEFENSE COUNSEL'S FAILURE TO ALERT COURT TO CORRECT STANDARD FOR THE ADMISSIBILITY OF EVIDENCE OF THIRD-PARTY CULPABILITY CONSTITUTED INEFFECTIVE ASSISTANCE; FAILURE TO TURN OVER "THIRD-PARTY CULPABILITY" EVIDENCE WAS A *BRADY* VIOLATION; MOTION TO VACATE CONVICTION SHOULD HAVE BEEN GRANTED.

The Court of Appeals, in a full-fledged opinion by Judge Lippman, over a dissent, determined defendant's motion to vacate his conviction should have been granted. There was evidence suggesting the offense was committed by a third party which the jury should have heard. The trial court excluded the "third-party culpability" evidence using the wrong standard of admissibility. Defense counsel was ineffective for failing to alert the court to the correct, much less stringent, standard. In addition, the People withheld exculpatory evidence from the defense (concerning the culpability of the third party). With respect to ineffective assistance, the court wrote: "Had the court conducted the proper analysis, a determination that the third-party culpability evidence was admissible would have been permissible. More importantly, trial counsel provided an affidavit stating that he had done no research on third-party culpability, was unaware of the correct legal standard and had no excuse or strategic explanation for the lapse in representation. Under these circumstances, defendant did not receive meaningful representation and his right to a fair trial was compromised ...". **People v Negron, 2015 NY Slip Op 08610, CtApp 11-23-15**

CRIMINAL LAW, ATTORNEYS, EVIDENCE.

DEFENDANT ENTITLED TO A HEARING ON THE "INEFFECTIVE ASSISTANCE" ISSUE RAISED IN HER MOTION TO VACATE HER CONVICTION; QUESTION RAISED WHETHER DEFENSE COUNSEL'S FAILURE TO PRESENT EXPERT TESTIMONY, UNDER THE FACTS, CONSTITUTED INEFFECTIVE ASSISTANCE.

The Court of Appeals determined defendant was entitled to a hearing on the "ineffective assistance" issue raised in her motion to vacate her conviction. It was alleged at trial that defendant's baby was injured by violent shaking (Shaken Baby Syn-

drome or SBS). At trial, the People called 13 medical witnesses, nine of whom testified as experts. Defense counsel presented no expert testimony. In support of the motion to vacate, statements by two experts described lines of testimony which were likely to have been helpful to the defense. The motion papers also included an affidavit from defendant's sister indicating defense counsel decided not to call any experts because to do so would be "pointless" in light of the number of prosecution experts: "[I]n a case such as this, where casting doubt on the prosecution's medical proof is the crux of the defense, a decision that it would be futile to call an expert based solely on the volume of expert testimony presented by the People is not a legitimate or reasonable tactical choice. Accordingly, although a hearing is not invariably required on a CPL 440.10 motion, under the circumstances presented here, defendant's proof raised a question — in the absence of any submissions from defense counsel — as to whether counsel's alleged deficiencies were merely the result of a reasonable, but unsuccessful, trial strategy ... , or whether counsel failed to 'pursue the minimal investigation required under the circumstances' ...". **People v Caldavado, 2015 NY Slip Op 08614, CtApp 11-23-15**

SOCIAL SERVICES LAW.

CITY'S COLLECTION OF CHILD SUPPORT PAYMENTS OTHERWISE DUE TO PETITIONER PROPER; CITY ENTITLED TO CHILD SUPPORT PAYMENTS AND ARREARS UP TO THE AMOUNT OF PUBLIC ASSISTANCE PAID TO PETITIONER.

The Court of Appeals, in a full-fledged opinion by Judge Pigott, over a partial two-judge dissent, determined that the city was entitled to collect child-support payments and arrears re: a child who was receiving public assistance because the amount of public assistance paid out exceeded the amount of child-support arrears: "We need not decide whether [the city's] calculations are correct in order to conclude that their determinations were not arbitrary, capricious or erroneous as a matter of law, because even petitioner's proposed calculation yielded no excess. From 1989 until 2007, the City paid petitioner's family $101,884.41 in benefits and has recouped only $58,756.50. Thus, under any calculation petitioner proposes, the City has not yet collected child support arrears that exceed the unreimbursed benefits her family received." **Matter of Hawkins v Berlin, 2015 NY Slip Op 08612, CtApp 11-23-15**

FIRST DEPARTMENT

ARBITRATION, MUNICIPAL LAW, EMPLOYMENT LAW.

REINSTATEMENT OF LAID-OFF CITY EMPLOYEES DID NOT VIOLATE PUBLIC POLICY.

The First Department, in a full-fledged opinion by Justice Acosta, determined the arbitrator's award was properly confirmed. The arbitrator found that the city did not comply with the "meet and confer" provision in the collective bargaining agreement (CBA), which requires the city to meet with employees and discuss alternatives to any lay-offs under consideration. The arbitrator ordered the reinstatement of the employees who were laid off in violation of the "meet and confer" provision. The court found there was a rational basis for the award and the reinstatement of the employees did not violate public policy. With respect to the city's "public policy violation" argument, the court wrote: "The crux of the City's argument is that the directive to reinstate the grievants infringed on the discretion of the City to make firing decisions. The directive does no such thing. Nothing in the arbitrator's award precludes the City from following the citywide CBA procedure to which it agreed and ultimately laying off the grievants. There is no managerial prerogative to violate the contract. As a proper meet-and-confer must precede any layoff, the arbitrator's remedy simply restored the status quo pending a proper meet-and-confer." **Matter of Certain Controversies Between Social Serv. Empls. Union, Local 371 v City of New York, 2015 NY Slip Op 08658, 1st Dept 11-24-15**

CRIMINAL LAW.

O'RAMA VIOLATIONS WERE "MODE OF PROCEEDINGS" ERRORS REQUIRING REVERSAL IN THE ABSENCE OF PRESERVATION.

The First Department reversed defendant's conviction because of the trial judge's inadequate response to a note from the jury. The record indicated the required notice to counsel was lacking and the responses to the jury's requests were not "meaningful." Because the errors rose to the level of "mode of proceedings" errors, preservation was not required: "The court failed to meet its core responsibilities under *People v O'Rama* (78 NY2d 270, 277 [1991]) to provide defense counsel with 'meaningful notice' of a jury note and to provide the jury with a 'meaningful response.'" **People v Smith. 2015 NY Slip Op 08646, 1st Dept 11-24-15**

CRIMINAL LAW.

BROOKLYN RESIDENTS DO NOT CONSTITUTE A "DISTINCTIVE GROUP" UNDER THE LAW REQUIRING THAT JURIES BE DRAWN FROM A FAIR CROSS-SECTION OF THE COMMUNITY.

Defendant argued that the New York County jury before which he was tried was not drawn from a fair cross-section of the community in that Brooklyn residents were excluded from it. The First Department determined Brooklyn residents do not constitute a "distinctive group" within the meaning of the applicable law: "The Sixth Amendment guarantee of trial before an impartial jury guarantees a criminal defendant a jury selected from a fair cross-section of the community ... . In order to establish a prima facie violation of the fair cross-section requirement, the defendant must show: (1) that the group alleged to be excluded is a distinctive group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process (*Duren v Mississippi* , 439 US 357, 364 [1979]). Defendant's claim is premised on the assertion that residents of Brooklyn would constitute the relevant distinctive group for a fair cross-section analysis under the first prong of the *Duren* analysis. We reject that analysis, as the exclusion of Brooklyn residents from the Manhattan jury venire cannot establish underrepresentation of a distinctive group in the community because Brooklyn residents do not constitute such a distinctive group. In any event, even accepting defendant's census-based data concerning racial disparities between the counties of New York City, the claim still fails because the relevant comparison is between New York County, where the case was tried, and the City as a whole, given the undisputedly lawful citywide jurisdiction of the centralized narcotics parts ... . Defendant's census data do not show a significant racial disparity between the County and City of New York." [internal quotation marks omitted] **People v Madison, 2015 NY Slip Op 08650, 1st Dept 11-24-15**

INSURANCE LAW.

INSURER'S ACCEPTANCE OF PREMIUMS AND RENEWAL OF POLICY AFTER IT BECAME AWARE OF MATERIAL MISREPRESENTATIONS PRECLUDED RESCISSION OF THE POLICY.

The insurer's knowledge of the insured's material misrepresentations and the insurer's subsequent acceptance of insurance premiums and renewal of the policy precluded the insurer from rescinding the policy: "The issue on appeal is, as of what date did plaintiff have 'sufficient knowledge of potential material misrepresentations' by its insureds, the Anderson defendants, in their policy or renewal applications, to rescind the policy ... . The critical sequence of events began when plaintiff's examiner conducted a recorded interview of Anderson, Jr., on February 14, 2012. On March 5, 2012, plaintiff disclaimed coverage, and it commenced this declaratory action on June 4, 2012. Thus, as early as March 5, 2012, plaintiff suspected a material misrepresentation. Yet it continued to accept the Andersons' premium payments, and it renewed the policy on December 8, 2012. By accepting the premium payments after learning of the Andersons' material misrepresentation, plaintiff waived its right to rescind the policy ... . This is so even if its reason for accepting the payments was to 'protect' its insureds pending a determination of this action ...". **Tower Ins. Co. of N.Y. v Anderson, 2015 NY Slip Op 08633, 1st Dept 11-24-15**

PERSONAL INJURY, LANDLORD-TENANT.

LEASE MADE TENANT RESPONSIBLE FOR REPAIR OF THE SIDEWALK DEFECT AT ISSUE; LANDLORD ENTITLED TO INDEMNIFICATION BY TENANT.

The terms of a lease spelled out the landlord's (JCNYC's) and tenant's (Citi's) responsibilities for sidewalk maintenance in this slip and fall case. The plaintiff testified the sidewalk defect which caused her to fall had existed for 10 years. The lease obligated Citi (the prior owner of the building) to repair any defects in the sidewalk which arose before the term of the lease (which included the defect at issue). Therefore, Citi was required to indemnify JCNYC for any loss resulting from the defect: "Although the Administrative Code of the City of New York § 7-210 imposes a nondelegable duty on the owner of the abutting premises to maintain and repair the sidewalk … . a tenant may be held liable to the owner for damages resulting from a violation of . . . [a] lease, which imposed on the tenant the obligation to repair or replace the sidewalk in front of [the property] ... . Here, section 10.1 of the lease required Citi to comply with all Laws which shall be applicable to the Premises, or any part thereof, . . . including, without limitation, Laws requiring the sidewalk adjacent to the Premises to be kept clear of obstructions or hazards (e.g., snow). That section also provided that Citi shall, at its sole cost and expense, be responsible for curing any violations of Law applicable to the Premises that existed on or prior to the Term. This language obligated Citi to fix any defects in the sidewalk that existed on or prior to the beginning of the lease term, including the defect at issue here." [internal quotation marks omitted] **Wahl v JCNYC, LLC, 2015 NY Slip Op 08649, 1st Dept 11-24-15**

SECOND DEPARTMENT

CRIMINAL LAW, EVIDENCE.

POST-CRIME USE OF ALIAS ADMISSIBLE TO SHOW STATE OF MIND; EVIDENCE OF PENDING CRIMINAL CASES AND PLEA TO BAIL-JUMPING (POST-CRIME BEHAVIOR) SHOULD NOT HAVE BEEN ADMITTED (HARMLESS ERROR HOWEVER).

Although the errors were deemed harmless, the Second Department determined, with the exception of use of an alias, evidence of defendant's post-crime behavior should not have been admitted: "A person's post-crime behavior is often relevant because the behavior provides clues to the person's state of mind ... . Use of an alias is evidence of consciousness of guilt ... . Here, evidence that the defendant used an alias while in West Virginia was properly introduced into evidence. However, evidence of prior bad acts is not admissible unless such evidence is offered for some purpose other than to show the defendant's bad character or to raise an inference that the defendant has a criminal propensity ... . Here, evidence that there were two criminal cases pending against the defendant and that he pleaded guilty to bail jumping was improperly admitted. Nonetheless, under the circumstances of this case, the evidence was not so prejudicial as to deny the defendant a fair trial. Any potential for prejudice was offset by the jury charge, which emphasized that uncharged crimes were not to be considered proof of propensity to commit the crimes charged ...". **People v Yahya Abdul- Aleem, 2015 NY Slip Op 08743, 2nd Dept 11-25-15**

LABOR LAW, PERSONAL INJURY.

WHISTLEBLOWER-LAW CAUSE OF ACTION NOT SUPPORTED BY VIOLATION OF RULE, LAW OR REGULATION; ALLEGED EMOTIONAL DAMAGE FROM EXPOSURE TO TOXINS NOT SUPPORTED BY EVIDENCE OF TOXIN-RELATED POISONING OR DISEASE.

Plaintiff's complaint was properly dismissed. Plaintiff alleged he was fired in violation of Labor Law 740, the whistleblower statute, because he complained about being exposed to a toxin (formaldehyde). He further alleged his exposure was caused by the employer's negligence and that he suffered emotional damage as a result. The Second Department determined the whistleblower-statute cause of action was properly dismissed because plaintiff did not identify any law, rule or regulation violated by the employer. The negligence causes of action were properly dismissed because plaintiff had not been diagnosed with any disease and had not alleged the presence of the toxin in his body, and thus could not seek damages for purely emotional injury ...". **Kamdem-Ouaffo v Pepsico, Inc., 2015 NY Slip Op 08712, 2nd Dept 11-25-15**

MALICIOUS PROSECUTION, MUNICIPAL LAW.

MALICIOUS PROSECUTION ACTION SHOULD HAVE BEEN DISMISSED; INDICTMENT RAISED PRESUMPTION OF PROBABLE CAUSE TO ARREST AND PROSECUTE; FAILURE TO FOLLOW LEADS WAS NOT AN EGREGIOUS DEVIATION FROM PROPER POLICE CONDUCT.

Plaintiff's malicious prosecution action should have been dismissed. Plaintiff had been convicted of murder, but he was eventually released pursuant to a petition for a writ of habeas corpus. He then sued the city and several police officers for malicious prosecution. Central to the lawsuit was the allegation that the police did not pursue leads which should have been investigated. The court noted that an indictment raises a presumption of probable cause which precludes a malicious prosecution action unless the actions of the police deviated egregiously from proper police conduct. The alleged failure to follow leads during the investigation did not, the Second Department found, rise to the required level of egregiousness: "In an action alleging malicious prosecution, the plaintiff must establish (1) the initiation of a proceeding, (2) its termination favorably to the plaintiff, (3) lack of probable cause, and (4) malice ... . Probable cause to believe that a person committed a crime is a complete defense to claims of . . . malicious prosecution ... . Probable cause consists of such facts and circumstances as would lead a reasonably prudent person in like circumstances to believe plaintiff guilty ... . A grand jury indictment raises a presumption of probable cause ... . However, the presumption may be rebutted by showing that the conduct of the police deviated so egregiously from proper police activity as to indicate intentional or reckless disregard for proper procedures ... . While the failure to make further inquiry when a reasonable person would have done so may be evidence of lack of probable cause ... , the mere failure to follow some leads does not amount to an egregious deviation from accepted practices or fraud ...". [internal quotation marks omitted] **Batten v City of New York, 2015 NY Slip Op 08697, 2nd Dept 11-25-15**

PERSONAL INJURY, VEHICLE AND TRAFFIC LAW.

QUESTION OF FACT WHETHER DEFENDANT'S SPEED WAS A FACTOR IN THE COLLISION; PLAINTIFF'S MAKING A LEFT TURN AND CROSSING INTO DEFENDANT'S ON-COMING PATH MAY NOT, THEREFORE, HAVE BEEN THE SOLE PROXIMATE CAUSE OF THE COLLISION.

Plaintiff had raised a question of fact whether defendant driver was comparatively at fault. Plaintiff was struck by defendant as she attempted to make a left turn and crossed into defendant's on-coming path: "Here, the defendants established their prima facie entitlement to judgment as a matter of law by demonstrating that the plaintiff violated Vehicle and Traffic

Law § 1141 when she made a left turn into the path of the defendants' vehicle, and that this violation was the sole proximate cause of the accident ... . However, the evidence the plaintiff submitted in opposition to the motion, including the affidavit of a nonparty eyewitness, raised a triable issue of fact as to whether the speed at which the defendant ... was traveling may have been a factor in the happening of the accident, and thus whether [defendant] was comparatively at fault ...". **Galagotis v Armenti, 2015 NY Slip Op 08705, 2nd Dept 11-25-15**

REAL PROPERTY, FORECLOSURE.

CURRENT OWNER OF PROPERTY MAY HAVE A DEFENSE TO THE FORECLOSURE ACTION IF SHE CAN SHOW SHE PURCHASED THE PROPERTY FROM A BONA FIDE PURCHASER, EVEN THOUGH THE MORTGAGE WAS RECORDED AT THE TIME OF HER PURCHASE.

The intervenor in this mortgage foreclosure action purchased the property after the mortgage in question was recorded. However, the owner from whom intervenor purchased the property was a bona fide purchaser who bought the property without notice of the mortgage (which had not yet been recorded). The Second Department determined the intervenor has a potentially meritorious defense to the foreclosure action if she can show she obtained good title from a bona fide purchaser: "The intervenor is correct that she has a potentially meritorious defense to this action, despite the fact that the plaintiff's mortgage was recorded before the deed conveying the property to her was recorded, if she can establish that [prior owners] were bona fide purchasers for value who did not have notice of the plaintiff's mortgage when the property was conveyed to them ... . This is because a bona fide purchaser for value who acquires title without notice of an unrecorded and unsatisfied mortgage is then able to confer good title to a third party, notwithstanding the fact that the third party has notice of facts which would have prevented him or her from acquiring good title from the original grantor ... . To not allow the bona fide purchaser for value who acquires title without notice of an unrecorded and unsatisfied mortgage to convey good title would be to prevent him or her from being able to sell the property ...". **Wachovia Bank, N.A. v Swenton, 2015 NY Slip Op 08728, 2nd Dept 11-25-15**

WORKERS' COMPENSATION LAW.

WHERE PLAINTIFF WAS PAID BY A THIRD-PARTY CARRIER WITHOUT THE COMMENCEMENT OF A THIRD-PARTY ACTION, THE COURT IS WITHOUT AUTHORITY TO APPROVE THE SETTLEMENT NUNC PRO TUNC.

The court did not have authority to approve a settlement with a third-party insurance carrier. Although the carrier paid plaintiff the policy limit ($25,000), no third-party action was ever commenced: "Pursuant to Workers' Compensation Law § 29(5), 'an employee may settle a lawsuit arising out of the same incident as his or her Workers' Compensation claim for less than the amount of compensation he or she has received only if the employee has obtained either written consent to the settlement from the compensation carrier, or judicial approval within three months after the case has been settled' ... . However, where, as here, no third-party action was ever commenced on the claim to which the settlement relates, the Supreme Court is without authority to grant a petition pursuant to Workers' Compensation Law § 29(5) to approve a settlement nunc pro tunc ...". **Matter of Russo v New Hampshire Ins. Co., 2015 NY Slip Op 08737, 2nd Dept 11-25-15**

THIRD DEPARTMENT

ADMINISTRATIVE LAW.

REGULATION IMPOSING A LIFETIME BAN ON RELICENSING DRIVERS WITH FIVE OR MORE ALCOHOL-RELATED OFFENSES DID NOT EXCEED THE AUTHORITY OF THE COMMISSIONER OF MOTOR VEHICLES.

The Third Department, over a two-justice dissent, determined the relicensing regulations for persons who have committed alcohol-related offenses do not exceed the regulatory powers of the Commissioner of Motor Vehicles. The petitioner had six lifetime alcohol-related offenses. The most recent offense was treated as a first offense in the courts because more than 10 years had passed since the last offense. However, the Commissioner applied the regulation which effectively imposes a lifetime ban on relicensing persons with five or more offenses: "Determining whether the Commissioner has exceeded this authority involves an examination of both the scope of the statute authorizing the regulatory activity and the degree to which the administrative rules are either inconsistent or out of harmony with the policies expressed in the statute ... . While the regulation at issue here imposes a stricter standard over relicensing determinations than the Vehicle and Traffic Law imposes in the revocation of licenses, we find that it does not exceed the scope of the Commissioner's rule-making authority. As relevant here, the Vehicle and Traffic Law establishes criteria for license revocation and the minimum time periods during which various types of offenders are ineligible to apply for a new license (see Vehicle and Traffic Law § 1193 [2] [b]). The statutes do not guarantee relicensure to any person and, other than barring the Commissioner from granting a relicensing application in a single scenario that is inapplicable to petitioner (see Vehicle and Traffic Law § 1193 [2] [c] [3]), they do not place any absolute limitation on the discretion expressly granted to the Commissioner to approve or deny such applications once the minimum revocation periods expire or are waived ...". [internal quotation marks omitted] **Matter of Carney v New York State Dept. of Motor Vehicles, 2015 NY Slip Op 08681, 3rd Dept 11-25-15**

Similar issues and result in **Matter of Joy v New York State Dept. of Motor Vehicles, 2015 NY Slip Op 08686, 3rd Dept 11-25-15.**

CRIMINAL LAW.

REVERSIBLE ERROR TO DENY DEFENDANT'S REQUEST TO REPRESENT HIMSELF AT TRIAL.
The trial judge's denial of defendant's request to represent himself was reversible error. The record demonstrated the defendant's competence and his understanding of the drawbacks of self-representation: "No reason exists to doubt that defendant was competent to waive his right to counsel and represent himself; significant reason exists to doubt his knowledge of trial procedures. Allowing a defendant who is unfamiliar with the process to conduct his or her own trial undermines the powerful ideal that our criminal justice system must determine the truth or falsity of the charges in a manner consistent with fundamental fairness ... . Nevertheless, the right to self-representation embodies one of the most cherished ideals of our culture; the right of an individual to determine his [or her] own destiny ... . The Court of Appeals has therefore recognized that even in cases where the accused is harming himself [or herself] by insisting on conducting his [or her] own defense, respect for individual autonomy requires that he [or she] be allowed to go to jail under his [or her] own banner if he [or she] so desires and if he [or she] makes the choice with eyes open ... . If a defendant is not dissuaded from representing himself or herself even after being warned that his or her lack of knowledge, relative to that of a lawyer, will be detrimental, he or she must be permitted to do so ...". [internal quotation marks omitted] **People v Hamilton, 2015 NY Slip Op 08661, 3rd Dept 11-25-15**

CRIMINAL LAW.

PROSECUTOR'S IMPROPER REMARKS DURING SUMMATION REQUIRED A NEW TRIAL.
The Third Department reversed defendant's conviction because of the prosecutor's inflammatory and erroneous remarks made during her summation. The prosecutor commented on the defendant's failure to deny the accusations (shifting the burden of proof), insinuated defendant's arrest was proof he committed the crimes, and erroneously stated the defendant had made an admission, among other inflammatory remarks: "In our view, despite County Court's repeated instructions to the jury to disregard parts of the DA's summation, the judgment of conviction must be reversed because her summation so exceeded the bounds of fair advocacy as to warrant a new trial ... . Mindful that not every improper comment made by the prosecuting attorney during the course of closing arguments warrants reversal of the underlying conviction ... , the severity and frequency of the DA's comments here are such that no curative instruction could have alleviated the prejudice created ... . Moreover, in this case, where proof of defendant's guilt was not overwhelming but, rather, turned almost entirely on the jury's assessment of the victim, we cannot conclude that the DA's comments were harmless ... . Accordingly, we find that defendant was deprived of a fair trial by several prejudicial remarks made by the DA in summation and therefore order a new trial ...". [internal quotation marks omitted] **People v Wright, 2015 NY Slip Op 08664, 3rd Dept 11-25-15**

CRIMINAL LAW, APPEALS.

WAIVER OF APPEAL INVALID; STATEMENT SHOULD HAVE BEEN SUPPRESSED; HARMLESS ERROR ANALYSIS INAPPLICABLE (GUILTY PLEA).
Reversing defendant's convictions (by guilty plea), the Third Department determined defendant's waiver of appeal was invalid and his statement should have been suppressed based upon a request for counsel. The court noted that the harmless error analysis could not be applied absent proof defendant would have pled guilty even if his suppression motion had been granted. With respect to suppression of the statement, the court wrote: "The detective admitted at the suppression hearing that he '[b]asically ignored' defendant's remark about having a lawyer and, instead of asking defendant if he wanted to talk to his lawyer, followed up by asking if he 'want[ed] to talk to [the detective]' about the shooting incident. Defendant's response — 'I don't' — left nothing to the imagination. Whatever doubt could have remained in the wake of that statement was removed when defendant added, 'I understand my rights and . . . I don't, ah, incriminate myself over an assumption or anything like that. I can't do that for myself.' Inasmuch as 'a defendant's invocation of the right to remain silent must be scrupulously honored once the right is asserted in an unequivocal and unqualified fashion,' and defendant made what can only be viewed as such an assertion, the interrogation should have stopped at that point ...". **People v Henry, 2015 NY Slip Op 08659, 2nd Dept 11-25-15**

CRIMINAL LAW, APPEALS.

WAIVER OF APPEAL INVALID; GUILTY PLEA INVALID.
The Third Department determined defendant's waiver of his right to appeal was invalid, as was his guilty plea: "[W] e note that County Court failed to adequately convey that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty ... . While defendant's attorney confirmed during the plea allocution that he had discussed a written plea memorandum with defendant and that defendant understood it, the memorandum similarly lumped the appeal waiver with other consequences of the plea and, in so doing, stated only that defendant waives the right to appeal without explaining the nature of the rights that he was waiving. Nor did the court make any inquiry into whether

counsel had discussed the appeal waiver with defendant or whether defendant understood it. ... With regard to the guilty plea, County Court failed to adequately advise defendant of the constitutional trial-related rights that he was waiving by pleading guilty, namely, the privilege against self-incrimination and the rights to a jury trial and to be confronted by witnesses ... . While there is no mandatory catechism required of a pleading defendant ..., there must be an affirmative showing on the record that the defendant waived his [or her] constitutional rights ... . During defendant's plea allocution, County Court merely mentioned that, if defendant were to enter a guilty plea, he would be giving up [his] right to remain silent. The court further failed to ascertain that defendant had discussed with his attorney the trial-related rights he was waiving or the constitutional consequences of a guilty plea ...". [internal quotation marks omitted] **People v Lowe, 2015 NY Slip Op 08665, 3rd Dept 11-25-15**

EMPLOYMENT LAW, CIVIL SERVICE LAW, ADMINISTRATIVE LAW.

UNDER THE CIVIL SERVICE LAW, WITHDRAWAL OF RESIGNATION LETTER REQUIRES CONSENT OF APPOINTING AUTHORITY.

Petitioner, under the Civil Service Law, did not have the power to unilaterally withdraw a letter of resignation. Consent of the appointing authority, here the acting commissioner of the Division of Criminal Justice Services, was required. The court determined the commissioner's consent was not unreasonably withheld based upon petitioner's admitted drug consumption on the job. **Matter of Cowin v New York State Div. of Criminal Justice Servs., 2015 NY Slip Op 08683, 3rd Dept 11-25-15**

FAMILY LAW.

NONPARENT'S PETITION FOR GUARDIANSHIP SHOULD NOT HAVE BEEN DISMISSED WITHOUT AN EVIDENTIARY HEARING.

The nonparent's petition for guardianship of the child should not have been dismissed without an evidentiary hearing: "Generally, a parent has a claim of custody of his or her child, superior to that of all others, in the absence of surrender, abandonment, persistent neglect, unfitness, disruption of custody over an extended period of time or other extraordinary circumstances ... . Accordingly, petitioner, as a nonparent, bore the heavy burden of first establishing the existence of extraordinary circumstances to overcome [respondent's] superior right of custody ... * * * Where, as here, the issue presented is whether a nonparent has demonstrated a superior right to custody, [w]ith few exceptions, an evidentiary hearing [will be] necessary to determine whether extraordinary circumstances exist ... . To properly assess the factors that may constitute extraordinary circumstances, it is necessary to consider[ ] the cumulative effect of all issues present in a given case ... , such as the child's psychological bonding and attachments, the prior disruption of the parent's custody, separation from siblings and potential harm to the child, as well as the parent's neglect or abdication of responsibilities and the child's poor relationship with the parent...". [internal quotation marks omitted] **Matter of Romena Q. v Edwin Q., 2015 NY Slip Op 08680, 3rd Dept 11-25-15**

MEDICAID.

SALE OF PROPERTY WAS AN ARMS-LENGTH TRANSACTION, MEDICAID INELIGIBILITY PERIOD SHOULD NOT HAVE BEEN IMPOSED.

Petitioner's sale of real property was an arms-length transaction for fair market value that was not aimed at qualifying for medical assistance: "The affidavits ... indicate that the sale in question was an arm's length transaction. Specifically, [the buyer] averred that he is not related to the patient and that he 'paid fair market value for the property given [its] dilapidated state' inasmuch as the house required significant repairs before it would even be habitable. These statements were corroborated by the patient's brother, who explained that the patient had been trying to sell the property for approximately two years and that the house, which sat vacant during that time, fell into an even further state of disrepair. The brother further indicated that [the buyer's] offer was the only offer that the patient had on the property in the two years she had been trying to sell it." **Matter of Whittier Health Servs., Inc. v Pospesel, 2015 NY Slip Op 08690, 3rd Dept 11-25-15**

PRIVATE NUISANCE.

QUESTION OF FACT WHETHER THE ERECTION OF A FENCE AND METAL POLES ON DEFENDANTS' LAND CREATED A PRIVATE NUISANCE BY INTERFERING WITH PLAINTIFF'S USE OF PLAINTIFF'S LAND.

There were questions of fact about whether defendants had created a private nuisance by erecting a fence and metal poles across from plaintiff's driveway (on defendants' land) and committed trespass by the discharge of water on plaintiff's land. Plaintiff alleged that the fence and metal poles interfered with use of plaintiff's driveway by large vehicles (necessary for the operation of plaintiff's farm): "[A] private nuisance claim does not require an actual intrusion upon property by the tortfeasor and may be established by proof of intentional action or inaction that substantially and unreasonably interferes with other people's use and enjoyment of their property ... . The issue of whether a use constitutes a private nuisance ordinarily turns on questions of fact and, in light of the above evidence, which reveals material questions of fact, we find that defendants have not made out a prima facie case for summary judgment ... . The evidence, in any event, reveals material

questions of fact as to whether defendants knew or should have known that [they were substantially and unreasonably] interfering with plaintiff's interest in the use and enjoyment of plaintiff's property ...". [internal quotation marks omitted] **Pilatich v Town of New Baltimore, 2015 NY Slip Op 08678, 3rd Dept 11-25-15**

TRUSTS AND ESTATES, STATUTE OF FRAUDS, PROMISSORY ESTOPPEL.

ORAL PROMISE TO WHICH STATUTE OF FRAUDS APPLIED ENFORCEABLE; DOCTRINE OF PROMISSORY ESTOPPEL APPLIED AS AN EXCEPTION TO THE STATUTE OF FRAUDS.

A promise memorialized in a revoked will was deemed enforceable. Decedent owned rental property. In return for his grandsons (the petitioners) assuming responsibility for the property, decedent deeded the property to his grandsons, reserving a life estate for himself. Decedent assured his grandsons that upon his death the mortgage on the property would be paid off, and a provision to do so was put in his will. That will was revoked by a subsequent will which was silent on the mortgage payoff. The grandsons sought to have the mortgage paid off from the estate and the executor denied payment. The majority ruled that the statute of frauds applied to the oral promise to pay off the mortgage and the doctrine of promissory estoppel applied as an exception to the statute of frauds. Two dissenting justices disagreed and would have held that the statute of frauds precluded enforcement of the oral promise. The majority wrote: "[P]romissory estoppel is generally unavailable to bar a statute of frauds defense ... . As such, petitioners were … obliged to show that this case fell within the limited set of circumstances that would permit the doctrine to be applied ... . Petitioners endeavor to do so by arguing that it would be unconscionable to invoke the [s]tatute of [f]rauds to bar [their] claim ... . * * * [A]n application of the statute of frauds would wreak an unconscionable result in this case, and Surrogate's Court properly estopped respondent from invoking the defense." [internal quotation marks omitted] **Matter of Hennel (Hennel), 2015 NY Slip Op 08670, 3rd Dept 11-25-15**

UNEMPLOYMENT INSURANCE.

TEACHER GUILTY OF DISQUALIFYING MISCONDUCT, NOT ELIGIBLE FOR UNEMPLOYMENT INSURANCE BENEFITS.

The Third Department, reversing the Unemployment Insurance Appeal Board, found that a teacher (who had been suspended as a disciplinary measure) committed disqualifying misconduct and was therefore not eligible for unemployment insurance benefits: "[C]laimant here was found to have committed numerous instances of improper, immoral and insubordinate behavior, as well as conduct unbecoming a teacher. He was specifically found to have made inappropriate, demeaning and sarcastic comments to students, to have sent unprofessional emails to staff and parents, and to have violated the employer's policies and procedures governing the treatment of students, parents and fellow employees. A notable example of his cavalier treatment of students was an incident wherein he improperly confiscated a student's cell phone and impersonated that student in order to learn what another student thought of his teaching abilities. Claimant further disregarded the employer's policy regarding the use of multimedia tools in the classroom, despite having previously discussed that policy with administrators, and elected to show a violent movie to his students without obtaining parental consent to do so. An employee's actions that are contrary to established policies and that have a detrimental effect upon the employer's interests have been found to constitute disqualifying misconduct ... and unprofessional behavior that is detrimental to the interests of the employer ... . The Hearing Officer found that claimant repeatedly engaged in that type of behavior and, under the circumstances presented by this case, the decision of the Board that his behavior reflected nothing more than 'poor judgment . . . is erroneous and is not supported by substantial evidence' ...". **Matter of Brown (Commissioner of Labor), 2015 NY Slip Op 08679, 3rd Dept 11-25-15**

UNEMPLOYMENT INSURANCE.

DRIVERS USING THEIR OWN VEHICLES TO TRANSPORT MEDICAL SPECIMENS ARE EMPLOYEES.

Claimants, drivers using their own vehicles to transport medical specimens, were employees entitled to unemployment insurance benefits: "The record demonstrates that Medifleet advertised for drivers, required the drivers to sign a standard contract, provided orientation and training, ensured that safety standards were followed, established delivery routes and supplied drivers with daily manifests. Drivers were required to wear photo identification and uniforms reflecting Medifleet's logo, to purchase or lease specific scanners that allowed Medifleet to track their location and movement and to call in when their deliveries were complete. Medifleet would call the drivers directly if they were not on schedule or not in a proper location. Medifleet collected payment from clients, handled client complaints and would send another driver to collect the specimen in the event that the driver was unable to do so by the client's deadline. The drivers were required to accept additional unscheduled deliveries assigned by Medifleet and could not use substitute drivers. Considering this evidence, the Board's finding of an employer-employee relationship between claimants and Medifleet is supported by substantial evidence ...". **Matter of Mitchum (Commissioner of Labor), 2015 NY Slip Op 08682, 3rd Dept 11-25-15**

ZONING.

"SHARING ECONOMY" RENTAL OF RESIDENTIAL HOMES NOT ADDRESSED BY TOWN ZONING CODE.
The Third Department annulled the zoning board's ruling that petitioner was illegally operating a bed and breakfast or hotel. Petitioner, using the Internet, rented out his home for short terms. While rented, petitioner did not stay in the home. Noting that this practice is relatively new, the court determined the existing zoning code did not address petitioner's rental of the home: "Petitioner's activity does not fit neatly into the definitions in the Town Code. The Town Code does not appear to have been updated to consider the ramifications from the emergence of the so-called sharing economy, which includes the type of house sharing or short-term rentals recently made popular by various platforms on the Internet ... . Residential uses of one-family dwellings are permitted in the relevant A-4 district under the Town Code. And, absent the challenged short-term rentals, petitioner's property is undisputedly a one-family dwelling. The issue thus distills to whether the rentals removed the property from the definition of residential one-family dwellings and whether such activity fits under another definition in the Town Code. * * * Inasmuch as petitioner's use does not fall within the definition of activities requiring a special use permit, and the Town Code does not otherwise expressly prohibit[] petitioner[] from renting [his] residence to vacationers[,] . . . we cannot say that petitioner['s] decision to do so placed [his] otherwise obviously residential structure outside the Town's definition of a [residential one-family dwelling]...". [internal quotation marks omitted] **Matter of Fruchter v Zoning Bd. of Appeals of The Town of Hurley, 2015 NY Slip Op 08689, 3rd Dept 11-25-15**

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