CasePrepPlus

February 17, 2016

An advance sheet service summarizing recent and significant New York appellate cases

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COURT OF APPEALS

CRIMINAL LAW.

FOR PURPOSES OF THE 10-YEAR LOOK-BACK PERIOD FOR SECOND VIOLENT FELONY OFFENDER STATUS, THE DATE OF THE ORIGINAL SENTENCE TO PROBATION, NOT THE DATE OF THE SUBSEQUENT SENTENCE FOR VIOLATION OF PROBATION, CONTROLS.

The Court of Appeals, in a full-fledged opinion by Judge Fahey, reversing the Appellate Division, determined defendant should not have been sentenced as a second violent felony offender because the operative prior conviction occurred outside the 10-year look-back period. Defendant was convicted of assault and sentenced to probation in 1994. He subsequently violated probation and was sentenced to incarceration in 1995. The lower courts used the 1995 sentence, which was within the 10-year look-back. But the Court of Appeals determined the 1994 sentence controlled. The revocation of probation in 1995 did not annul the original 1994 sentence: "The People would have us believe that sentence was imposed with respect to the prior conviction twice — once, in 1994, when defendant was subject to a period of probation through the original sentence, and again in 1995, when defendant was subject to a period of incarceration through the resentence. To be sure, the period of probation was imposed as part of a revocable sentence (Penal Law § 60.01 [2] [a] [i]), which is a 'tentative [punishment in] that it may be altered or revoked' (Penal Law § 60.01 [2] [b]). For all other purposes, however, a revocable sentence 'shall be deemed to be a final judgment of conviction' (*id.*), and where '*the part of the sentence* that provides for probation is revoked, the court must sentence [a defendant] to imprisonment or to [a] sentence of imprisonment and probation' (Penal Law § 60.01 [4] [emphasis added]). The legislature's reference to the revocation of the *part* of the sentence imposing probation suggests that the substitution of a different punishment — such as incarceration — for the probation a defendant has violated does not constitute a new sentence, but rather a replacement of the original, conditional penalty reflected in the sentence. Put differently, to revoke a penalty of probation does not equate to annulling a sentence." **People v Thompson, 2016 NY Slip Op 00997, CtApp 2-11-16**

CRIMINAL LAW, ATTORNEYS.

TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT RELIEVED DEFENSE COUNSEL ON CONFLICT OF INTEREST GROUNDS BECAUSE A POTENTIAL WITNESS HAD BEEN REPRESENTED BY ANOTHER ATTORNEY IN THE SAME LARGE CRIMINAL DEFENDER ORGANIZATION.

The Court of Appeals, in a full-fledged opinion by Judge Stein, reversing the Appellate Division, determined the trial judge did not err by relieving defendant's attorney, over defendant's objection, on conflict of interest grounds. The defense attorney, Fisher, worked for New York County Defender Services (NYCDS). Another NYCDS attorney had represented Stephens, who was involved in the same incident which led to the charges against the defendant. Fisher had no knowledge of the facts of Stephens' case, but, before he learned of the conflict, Fisher had been looking for Stephens during his investigation as a possible witness. Fisher was instructed by his supervisors at NYCDS he could not question Stephens, call Stephens as a witness, or cross-examine Stephens if the People called him. The defendant told the trial judge he was willing to waive the conflict, because he wanted Fisher to act as his attorney, but he wanted to call Stephens as a witness. The trial judge determined the conflict warranted the assignment of new counsel: "[T]he Appellate Division erred in holding that the trial court abused its discretion. Supreme Court appropriately balanced defendant's countervailing rights, based on the information it had at the time, and reasonably concluded that Fisher could not effectively represent defendant due to NYCDS's representation of Stephens and the duty of loyalty Fisher's supervisors were asserting toward that former client." **People v Watson, 2016 NY Slip Op 00998, CtApp 2-11-16**

INSURANCE LAW, CLASS ACTIONS, MUNICIPAL LAW.

BASED ON THE UNAMBIGUOUS LANGUAGE OF THE POLICY, THE TERM "OCCURRENCE" REFERRED TO EACH TIME A MEMBER OF THE CLASS WAS INJURED, NOT TO A SINGLE INJURY TO THE CLASS AS A WHOLE; THEREFORE THE DEDUCTIBLE WAS TRIGGERED SEPARATELY FOR EACH INJURED CLASS MEMBER.

The Court of Appeals, in a full-fledged opinion by Judge Abdus-Salaam, determined the policy-term "occurrence," for purposes of applying the deductible for each "occurrence," meant each time a member of the class was injured, and not

the single injury to the class as a whole. The class action was brought by an arrestee who was illegally strip-searched at the county jail. Eight hundred others similarly searched made up the class. The insurance policy taken out by the county included a deductible of $10,000 for each "occurrence." The county argued that the injury to the class as a whole was a single occurrence and triggered only one $10,000 deductible. The court held that, based on the plain language of the policy, each strip-search constituted a separate occurrence. Therefore, the $10,000 deductible applied to each member of the class (making the county liable for all the damage payments). **Selective Ins. Co. of Am. v County of Rensselaer, 2016 NY Slip Op 01001, CtApp 2-11-16**

NEGLIGENCE, MUNICIPAL LAW.

FACT THAT SIDEWALK DEFECT OVER WHICH PLAINTIFF TRIPPED WAS NOT IN FRONT OF DEFENDANT'S PROPERTY. STANDING ALONE, DOES NOT ENTITLE DEFENDANT TO SUMMARY JUDGMENT.

The Court of Appeals, in a full-fledged opinion by Judge Pigott, reversing the Appellate Division, found that a property owner, West River, which had a statutory duty to maintain an abutting sidewalk, was not entitled to summary judgment based solely on the fact that the defect in the sidewalk over which plaintiff tripped was not in front of West River's property. The expansion joint over which plaintiff tripped was in front of a neighboring property (the Mercado property). However, a nearby portion of the sidewalk which had subsided was in front of West River's property. Therefore, to be entitled to summary judgment, West River was required to demonstrate it did not breach its duty to maintain the sidewalk, or that any such breach was not the proximate cause of plaintiff's fall. Simply demonstrating the expansion joint over which plaintiff tripped was not in front of West River's property was not enough: "Here, most of the sunken sidewalk flag that plaintiff traversed abutted West River's property, and plaintiff claims that West River's sidewalk flag had sunk lower than the expansion joint upon which plaintiff allegedly tripped. Thus, West River failed to meet its burden of demonstrating entitlement to judgment as a matter of law, leaving factual questions as to whether West River breached its duty to maintain the sidewalk flag abutting its property and, if so, whether that breach was a proximate cause of plaintiff's injuries. Under the circumstances of this case, summary judgment should have been denied." **Sangaray v West Riv. Assoc., LLC, 2016 NY Slip Op 01002, CtApp 2-11-16**

TOXIC TORTS, EVIDENCE.

PLAINTIFF'S EXPERTS DID NOT DEMONSTRATE THAT THEIR OPINIONS ON THE CAUSE OF PLAINTIFF'S IN UTERO INJURIES WERE ARRIVED AT USING A GENERALLY ACCEPTED METHODOLOGY; PLAINTIFF ALLEGED IN UTERO INJURY FROM GASOLINE FUMES IN CAR MANUFACTURED BY DEFENDANT BMW.

The Court of Appeals, in a full-fledged opinion by Judge Pigott, determined the trial court's preclusion of plaintiff's experts' opinions on causation of plaintiff's *in utero* injuries was proper. Plaintiff alleged his severe birth defects were caused by gasoline fumes breathed by his mother when she drove a car manufactured by defendant BMW. Plaintiff's experts attempted to demonstrate a causal connection between breathing the fumes and the *in utero* injuries. The Court of Appeals held the experts had not demonstrated their opinions were reached by employing a methodology generally accepted in the scientific community: "Plaintiff and his experts have failed to make that showing in this case. Dr. Frazier and Dr. Kramer concluded that plaintiff was exposed to a sufficient amount of gasoline vapor to have caused his injuries based on the reports by plaintiff's mother and grandmother that the smell of gasoline occasionally caused them nausea, dizziness, headaches and throat irritation. Plaintiff and his experts have not identified any text, scholarly article or scientific study, however, that approves of or applies this type of methodology, let alone a 'consensus' as to its reliability. Therefore, the courts below properly granted defendants' motion to preclude their testimony at trial." **Sean R. v BMW of N. Am., LLC, 2016 NY Slip Op 01000, CtApp 2-11-16**

ZONING.

DEVELOPER DID NOT HAVE A VESTED RIGHT IN A CONDITIONAL FINAL SITE APPROVAL IN LIGHT OF A CONFLICTING REZONING LAW IN EFFECT PRIOR TO THE CONDITIONAL APPROVAL.

The Court of Appeals determined petitioners did not have a vested right in a conditional final site approval because it was not reasonable for petitioners to rely on the approval in light of the conflicting local law rezoning the property: "An owner of real property can acquire a common law vested right to develop the property in accordance with prior zoning regulations when, in reliance on a 'legally issued permit,' the landowner 'effect[s] substantial changes and incur[s] substantial expenses to further the development' and '[t]he landowner's actions relying on [the] valid permit [are] so substantial that the municipal action results in serious loss rendering the improvements essentially valueless' (*see generally* 4 Rathkopf's The Law of Zoning and Planning § 70:20 [4th ed]). Here, it was not reasonable for petitioners to rely on the December 2007 conditional Final Site Approval of the development, in carrying out any substantial actions furthering the development. In particular, in 2005, the year before the rezoning of petitioners' property by means of Local Law No. 3 (2006) of Town of Newburgh, the Town Planning Board had repeatedly warned petitioners of the proposed rezoning. The December 2007 Approval itself did not engender expectations to the contrary. It included a statement of the new zoning status of the property. Additionally, while petitioners challenged the rezoning in court, petitioners must have been 'cognizant of the potential for an eventual

legal ruling that the Local Law was in fact valid' ...". **Matter of Exeter Bldg. Corp. v Town of Newburgh, 2016 NY Slip Op 00999, CtApp 2-11-16**

FIRST DEPARTMENT

APPEALS.

APPEAL OF ACTION SEEKING TO ENJOIN CONSTRUCTION OF A BUILDING DISMISSED; PLAINTIFFS DID NOT APPLY FOR AN INJUNCTION PENDING APPEAL AND CONSTRUCTION HAD CONTINUED TO THE POINT IT COULD NOT BE UNDONE WITHOUT CAUSING UNDUE HARM.

In an action seeking to enjoin the construction of a high-rise tower, the First Department dismissed the appeal because the plaintiffs did not apply for an injunction pending appeal and the construction had progressed to the point it could not be undone without undue hardship: "Plaintiffs failed to apply for an injunction pending appeal — on the contrary, they moved for an enlargement of time within which to perfect the appeal — and construction is now 'so far advanced that it could not be undone without undue hardship' (*Matter of Weeks Woodlands Assn., Inc. v Dormitory Auth. of the State of N.Y.*, 95 AD3d 747, 753 [1st Dept 2012], *affd* 20 NY3d 919 [2012]). Plaintiffs' contention that *Weeks Woodlands* does not apply because the tower being built by defendants . . . is not substantially complete is without merit. *Weeks Woodlands* specifically says that 'construction need not be virtually completed to render the dispute moot' (*id.* [internal quotation marks omitted]). Contrary to plaintiffs' claim that they are not seeking to enjoin the construction project, their amended complaint sought to enjoin defendant Art Students League of New York (ASL)'s conveyance of air rights or to set it aside. The practical effect of such an injunction or setting aside would be to force [defendant] Extell to demolish the construction it has accomplished to date and start over again from scratch, which would cost more than $200 million." **Caraballo v Art Students League of N.Y., 2016 NY Slip Op 00883, 1st Dept 2-9-11**

CORPORATION LAW, RESIDENTIAL COOPERATIVES, LANDLORD-TENANT, CONTRACT LAW.

BOARD OF RESIDENTIAL COOPERATIVE CORPORATION UNREASONABLY WITHHELD CONSENT TO TRANSFER SHARES AND PROPRIETARY LEASE TO TWO SONS OF THE DECEASED APARTMENT RESIDENTS.

The First Department, over a two-justice dissent, determined the board of defendant residential cooperative corporation unreasonably withheld consent for the shares and proprietary lease to be transferred to the two sons of the deceased holders of the shares and proprietary lease. The case turned on the language of the proprietary lease. The application was made by the two sons, only one of whom was to live in the apartment. The dissent emphasized the term "a family member," arguing the proprietary lease did not allow a transfer to more than one family member. **Estate of Del Terzo v 33 Fifth Ave. Owners Corp., 2016 NY Slip Op 01039. 1st Dept 2-11-16**

CRIMINAL LAW.

SENTENCING YOUTHFUL OFFENDER TO CONSECUTIVE TERMS EXCEEDING FOUR YEARS WAS INCONSISTENT WITH THE CONCEPT OF YOUTHFUL OFFENDER TREATMENT.

The First Department determined that sentencing a youthful offender to consecutive sentences which exceeded four years was inconsistent with the underlying concept of youthful offender treatment: "By adjudicating defendant a youthful offender and sentencing him to a term of 1 to 4 years, to run consecutively to a sentence of one to three years on another YO adjudication, the court effectively imposed an aggregate term in excess of four years for two YO adjudications. The imposition of consecutive terms with an aggregate term of more than the normal YO maximum of four years 'is inconsistent with the underlying concept of youthful offender treatment and it is unrealistic to conclude that one eligible for such treatment requires prolonged confinement to achieve the objectives of the legislation' ...". **People v Christopher P., 2016 NY Slip Op 00904, 1st Dept 2-9-11**

CRIMINAL LAW.

DEFENDANT ENTITLED TO 10 DAYS NOTICE OF SORA JUDGE'S INTENT TO, SUA SPONTE, DEPART FROM THE BOARD OF EXAMINER'S RISK ASSESSMENT.

The First Department determined defendant, in a Sex Offender Registration Act (SORA) proceeding, was entitled to notice the judge (not the prosecutor, as is the usual case) intended to seek a risk assessment different from that recommended by the Board of Examiners of Sex Offenders. Because the defendant was not so notified, and a new SORA hearing was ordered: "SORA protects a defendant's due process rights by requiring written notice, at least 10 days prior to the hearing, to determine his risk level, if a determination differing from the Board's recommendation is to be sought (Correction Law § 168-n[3]). The purpose of the notice is to afford the defendant a meaningful opportunity to respond at the hearing ... . No less than when the People fail to give the required notice that they will seek a departure from the Board's recommendation, a court's sua sponte departure from the Board's recommendation at the hearing, without prior notice, deprives the defendant of a meaningful opportunity to respond ... . Defendant is therefore entitled to a new hearing at which he is afforded a

meaningful opportunity to respond to the contention that he should be assessed points for forcible compulsion." **People v Segura, 2016 NY Slip Op 01041, 1st Dept 2-11-16**

CRIMINAL LAW, APPEALS.

WAIVER OF APPEAL ENCOMPASSES APPELLATE DIVISION'S INTEREST-OF-JUSTICE JURISDICTION, INCLUDING THE POWER TO REVIEW THE HARSHNESS OF AN AGREED SENTENCE.

The First Department, in a full-fledged opinion by Justice Tom, determined defendant's waiver of appeal was valid, and included in the waiver was the Appellate Division's interest-of-justice power to review the harshness of a negotiated sentence: "A defendant who has validly waived his right to appeal may not invoke this Court's interest-of-justice jurisdiction to reduce a bargained-for sentence (*Lopez*, 6 NY3d at 255-256). 'By pleading guilty and waiving the right to appeal, a defendant has forgone review of the terms of the plea, including harshness or excessiveness of the sentence' (*id.* at 256). To be sure, as the Court of Appeals clarified in *Lopez*, the Appellate Division may be divested of its unique interest-of-justice jurisdiction only by constitutional amendment (6 NY3d at 255, citing *People v Pollenz*, 67 NY2d 264, 267-268 [1986]). However, as *Lopez* went on to hold, 'a defendant is free to relinquish the right to invoke that authority and indeed does so by validly waiving the right to appeal' (*id.* at 256)." **People v Jenkins, 2016 NY Slip Op 01056, 1st Dept 2-11-16**

PERSONAL INJURY.

PLAINTIFF'S EXPERT DID NOT RAISE A QUESTION OF FACT ABOUT WHETHER THE INJURY WAS CAUSED BY THE CAR ACCIDENT, AS OPPOSED TO A DEGENERATIVE DISEASE.

The First Department, over a two-justice dissent, determined defendants' motion for summary judgment in a personal injury (car accident) action was properly granted. The majority concluded the plaintiff's expert did not raise a question of fact about whether the injury was caused by the accident. Defendants' experts opined the injury was caused by a pre-existing degenerative condition. The dissent felt that plaintiff's expert raised a question of fact about causation because tearing of the relevant tissue was detected, a condition not mentioned by the defendants' experts: "The dissent, taking the position that an issue of fact exists as to whether the accident caused plaintiff's shoulder injury, does not deal with the aforementioned opinions of Dr. Lang and Dr. Lyons in plaintiff's own medical records. It appears to be the dissent's view that the support in plaintiff's medical records for the shoulder injury having a degenerative origin are of no moment because plaintiff's medical expert, Dr. Louis C. Rose, in his affirmation prepared for this litigation, offered a 'diagnosis [that] . . . contrasts significantly with the one proffered by defendants' experts.' However, the dissent offers no support for its view that there is a 'factual disagreement' between the defense experts and plaintiff's expert (Dr. Rose) on the diagnosis of the shoulder injury, as opposed to its etiology. Specifically, the dissent simply assumes that the defense experts' diagnosis of osteoarthritis of the AC joint and chronic impingement syndrome were inconsistent with the presence of tears to the labrum and rotator cuff, which was Dr. Rose's diagnosis. Nothing in the record supports the assumption that the conditions diagnosed by the defense experts do not result in tears to the labrum and rotator cuff." **Franklin v Gareyua, 2016 NY Slip Op 00886, 1st Dept 2-9-16**

PERSONAL INJURY, MUNICIPAL LAW.

APPLICATION FOR LATE NOTICE OF CLAIM SHOULD HAVE BEEN GRANTED, DESPITE ABSENCE OF REASONABLE EXCUSE AND NOTICE BY OTHER MEANS; PURPOSE OF NOTICE OF CLAIM REQUIREMENT EXPLAINED.

The First Department, reversing Supreme Court, granted petitioner's application to file a late notice of claim alleging injury in a slip and fall accident caused by a badly broken sidewalk in front of property owned by the New York City Housing Authority (NYCHA). Petitioner's attorney had assumed the city, not the NYCHA, owned the abutting property. After noting that an error in identifying the correct public corporation was not a reasonable excuse, and further noting the NYCHA did not have notice of the accident by other means, the First Department explained the purpose of the notice requirement and why late notice was appropriate in this case: "The notice of claim requirement 'is not intended to operate as a device to frustrate the rights of individuals with legitimate claims,' but to protect the public corporation from 'unfounded claims' and ensure that it has an adequate opportunity 'to explore the merits of the claim while information is still readily available' ... . While the error of petitioner's counsel concerning the identity of the responsible public corporation does not provide a reasonable excuse for the delay in giving notice ... , 'the absence of a reasonable excuse is not, standing alone, fatal to the application' ... . Although NYCHA did not receive actual notice of the accident until the petition was served, it did not contest petitioner's assertion that the condition of the badly broken sidewalk remains unchanged since the time of the accident and that there were no witnesses to the accident, so that NYCHA will not be substantially prejudiced by the eight-month delay in providing notice (. . . General Municipal Law § 50-e[5]). NYCHA's conclusory claim that the 'passage of time may affect the availability or memories of potential witnesses is insufficient to establish prejudice' ... . In light of the policies underlying General Municipal Law § 50-e(5), which is to be liberally construed to achieve its remedial purposes ...". **Matter of Richardson v New York City Hous. Auth., 2016 NY Slip Op 00909, 1st Dept 2-9-16**

SECOND DEPARTMENT

CIVIL PROCEDURE, CORPORATION LAW.

DEFENDANT'S MOTION TO CHANGE VENUE SHOULD HAVE BEEN GRANTED, CRITERIA EXPLAINED.
The Second Department determined defendant's motion for change of venue should have been granted. The court noted that the sole residence of a domestic corporation for venue purposes is the county designated in its certificate of incorporation: " '[T]o prevail on a motion pursuant to CPLR 510(1) to change venue, a defendant must show that the plaintiff's choice of venue is improper, and also that the defendant's choice of venue is proper' ... . The venue of an action is proper in the county in which any of the parties resided at the time of commencement (*see* CPLR 503[a]...). '[T]he sole residence of a domestic corporation for venue purposes is the county designated in its certificate of incorporation, despite its maintenance of an office or facility in another county' ...". **Matoszko v Kielmanowicz, 2016 NY Slip Op 00942, 2nd Dept 2-10-16**

CIVIL PROCEDURE, PERSONAL INJURY.

COURT SHOULD NOT HAVE REJECTED NEGOTIATED STIPULATION SETTLING THE ACTION WITH ONE PLAINTIFF AND PROCEEDING TO TRIAL WITH THE OTHER PLAINTIFF.
The Second Department determined Supreme Court should not have rejected a stipulation which settled the personal injury action with respect to one of the plaintiffs and allowed the matter to proceed to trial with respect to another plaintiff. The Second Department explained the deference which should be accorded a negotiated stipulation: " '[P]arties to a civil dispute are free to chart their own litigation course and, in so doing, they may stipulate away statutory, and even constitutional rights' ... . The subject stipulation of settlement was made after negotiations among counsel for the respective parties, and the litigants agreed to its terms. In consenting to the stipulation, these parties fashioned the basis upon which their particular controversy would be resolved by providing for the termination of the action with respect to [one plaintiff] and the continuation of the action with respect [to the other]...". **Astudillo v MV Transp., Inc., 2016 NY Slip Op 00915, 2nd Dept 2-10-16**

CIVIL PROCEDURE, TRUSTS AND ESTATES.

COMPLAINT NAMING DECEDENT, RATHER THAN DECEDENT'S REPRESENTATIVE, AS A DEFENDANT WAS A NULLITY; THE DEFECT COULD NOT BE REMEDIED BY AMENDING THE COMPLAINT.
The Second Department determined plaintiff's action should have been dismissed as a nullity. The defendant in this car-accident action had died before the complaint was filed. Therefore, the complaint was a nullity. The defect could not be remedied by amending the complaint to name the decedent's estate: "In this action to recover damages for alleged injuries arising from a vehicular accident, the plaintiff did not commence this action against the operator of the offending vehicle until several months after the operator died. Since '[a] party may not commence a legal action or proceeding against a dead person' . . . , the action was a nullity from its inception, and the plaintiff was instead required to commence an action against the personal representative of the decedent's estate ... . Moreover, the plaintiff's attempt to amend the caption of the void complaint to designate the decedent's estate as the defendant was invalid ... . The plaintiff never properly commenced an action against the decedent's personal representative, and the time within which to do so had expired prior to the defendant's motion for summary judgment." **Krysa v Estate of Qyra, 2016 NY Slip Op 00940, 2nd Dept 2-10-16**

CRIMINAL LAW.

DISCHARGE OF SWORN JUROR WITHOUT CONDUCTING AN APPROPRIATE INQUIRY AND WITHOUT SEEKING INPUT FROM COUNSEL WAS AN ABUSE OF DISCRETION, NEW TRIAL ORDERED.
The Second Department determined the court's discharging a sworn juror without allowing counsel to be heard was an abuse of discretion requiring reversal and a new trial. The juror became upset when she learned the defendant was a relative of a person she sees every day. With counsel's permission, the trial judge interviewed the juror alone. The judge discharged her without conducting a proper inquiry, without first explaining to counsel what was discussed and without hearing from both counsel on what should be done: "As a matter of procedure, the court, at a minimum, should have informed all parties of the substance of the in camera interview and provided each side with an opportunity to be heard before making its determination to discharge the sworn juror (. . . *cf.* CPL 270.35[2][b]). Contrary to the defendant's contention, however, this procedural error, standing alone, was not inherently prejudicial ... . Nevertheless, affording all sides an opportunity to be heard in this case might well have allowed counsel to oppose the court's proposed disposition before it became a fait accompli. Further questioning of the juror might have revealed the underlying reasons for her uncertainty, thereby assisting the court in making an informed decision as to whether discharge of the juror was warranted. Based on the Supreme Court's very limited questioning of the subject juror, we find that the court improvidently exercised its discretion in discharging her. Assuming, as both parties contend, that the court's authority to discharge the sworn juror must be considered under CPL 270.35 . . . , the court made little effort to ascertain whether the juror could, in fact, deliberate fairly and render an impartial

verdict. In making such an important determination with respect to a sworn juror, 'the court may not speculate as to possible partiality of the juror based on her equivocal responses. Instead, it must be convinced that the juror's knowledge will prevent her from rendering an impartial verdict' ...". **People v Owens, 2016 NY Slip Op 00993, 2nd Dept 2-10-16**

EMINENT DOMAIN, LANDLORD-TENANT.

QUESTION OF FACT WHETHER TENANT ENTITLED TO COMPENSATION FOR TRADE FIXTURES ON PROPERTY TO WHICH VILLAGE ACQUIRED TITLE BY EMINENT DOMAIN.

The Second Department, reversing Supreme Court, determined there was a question of fact whether tenant was entitled to compensation for trade fixtures in property to which the village acquired title by eminent domain. The court explained the relevant law: "Providing compensation to a trade fixture owner is in derogation of the common-law rule that government taking of real property encompasses the land and everything annexed thereto, including trade fixtures ... . Under the trade fixture rule, a tenant who owns the trade fixture, but not the property to which the fixture is annexed, may seek compensation for trade fixtures it had a right to remove, but elected not to remove, and thus remained annexed to the property at the time of the taking ... . A tenant's right to compensation for fixtures installed on the leasehold exists despite provisions in the lease which terminate the lease in the event of a condemnation. Such provisions have been interpreted as 'an agreement between landlord and tenant that the tenant shall receive out of the award no compensation for his leasehold interest. Even so, the tenant retains the right to compensation for his interest in any annexation to the real property which but for the fact that the real property has been taken, he would have had the right to remove at the end of his lease' ...". **Matter of Village of Spring Val., N.Y.. (Sport Club Intl., Inc.), 2016 NY Slip Op 00985, 2nd Dept 2-10-16**

LABOR LAW, PERSONAL INJURY.

DEFENDANT FAILED TO AFFIRMATIVELY ADDRESS ALL THEORIES OF RECOVERY ALLEGED IN THE COMPLAINT; DEFENDANT'S SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined defendant property owner was not entitled to summary judgment in this common-law negligence and Labor Law 200, 240(1) and 241(6) action. Plaintiff was injured working on defendant's building. Defendant, in his motion papers, did not affirmatively address all the possible theories of recovery available to the plaintiff. Therefore summary judgment should not have been granted. [Another example of the need for a defendant bringing a summary judgment motion to affirmatively address every theory raised in the complaint.]: "Liability on common-law negligence and Labor Law § 200 causes of action 'generally falls into two broad categories: instances involving the manner in which the work is performed, and instances in which workers are injured as a result of dangerous or defective premises conditions at a work site' ... . Where, as alleged here, the plaintiff's accident arose from an allegedly dangerous premises condition, a property owner may be held liable in common-law negligence and under Labor Law § 200 when the owner has control over the work site and either created the dangerous condition causing an injury, or failed to remedy the dangerous or defective condition while having actual or constructive notice of it ... . Thus, where a plaintiff's injury arose from a dangerous condition at a work site, a property owner moving for summary judgment dismissing a cause of action alleging common-law negligence has 'the initial burden of making a prima facie showing that it neither created the dangerous condition nor had actual or constructive notice of its existence' ... . Here, the defendant failed to establish, prima facie, that he did not create or have actual or constructive notice of the allegedly dangerous condition. ... Further, the defendant failed to demonstrate the absence of any triable issues of fact as to whether he had actual or constructive notice of the dangerous condition ... . Moreover, the Supreme Court erred in directing the dismissal of the Labor Law §§ 240(1) and 241(6) causes of action because, while the defendant generally sought dismissal of the plaintiff's complaint insofar as asserted against him, he did not demonstrate the absence of any triable issues of fact in connection with these causes of action ...". **Korostynskyy v 416 Kings Highway, LLC, 2016 NY Slip Op 00939, 2nd Dept 2-10-16**

LABOR LAW, PERSONAL INJURY.

SUBTLE DIFFERENCE BETWEEN AMOUNT OF SUPERVISORY CONTROL NECESSARY TO SUPPORT A LABOR LAW § 240(1) CAUSE OF ACTION AND THE AMOUNT OF SUPERVISORY CONTROL NECESSARY TO SUPPORT A LABOR LAW § 200/COMMON LAW NEGLIGENCE CAUSE OF ACTION.

The Second Department determined defendant general contractor (Metro) was not entitled to summary judgment on the Labor Law §§ 240(1) and 241(6) causes of action, but was entitled to summary judgment on the Labor Law § 200 and common law negligence causes of action. Plaintiff was injured when the knot on a rope he was tied to while pushing snow off a roof gave way and he fell three stories. The decision illustrates the subtle difference between the amount of supervisory control necessary to hold a general contractor liable under Labor Law § 240(1) and the greater amount of supervisory control necessary to hold a general contractor liable under Labor Law § 200 and common law negligence: "[Re: the Labor Law § 240(1) cause of action] Metro was [demonstrated to be] a statutory agent of the property owner on the construction project through the submission of Metro's admission that it was hired by the property owners as the general contractor on the project, and evidence that Metro undertook general contractor duties by coordinating and supervising the project, and hiring and paying subcontractors... . ... 'A defendant has the authority to supervise or control the work for purposes of Labor

Law § 200 when that defendant bears the responsibility for the manner in which the work is performed' ... . However, '[t]he right to generally supervise the work, stop the contractor's work if a safety violation is noted, or to ensure compliance with safety regulations and contract specifications is insufficient to impose liability under Labor Law § 200 or for common-law negligence' ...". **Sanchez v Metro Bldrs. Corp., 2016 NY Slip Op 00957, 2nd Dept 2-10-16**

PERSONAL INJURY.

FAILURE TO ADDRESS EVERY ELEMENT OF THE THEORIES OF RECOVERY ALLEGED IN THE COMPLAINT, I.E., COMMON-LAW NEGLIGENCE AND RES IPSA LOQUITUR, REQUIRED DENIAL OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT.

The plaintiff alleged she was injured by a picture frame which fell on her inside an office leased by defendant. Plaintiff alleged liability under common-law negligence and res ipsa loquitur. The Second Department determined defendant's summary judgment was properly denied because defendant did not affirmatively demonstrate (1) a lack of exclusive control over the picture frame, (2) the picture frame did not constitute a dangerous condition, and (3) defendant did not create a dangerous condition. [Again, failure of the defense to affirmatively address every alleged theory of liability requires denial of summary judgment.]. **Assil v Camba, Inc., 2016 NY Slip Op 00914, 2nd Dept 2-10-16**

PERSONAL INJURY.

DEFENDANT FAILED TO AFFIRMATIVELY ADDRESS EVERY THEORY OF LIABILITY RAISED BY THE COMPLAINT, SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED IN THIS SLIP AND FALL CASE.

The Second Department, reversing Supreme Court, determined summary judgment should not have been granted to the defendant in this slip and fall case. The plaintiffs had sufficiently identified the cause of the fall (uneven floor). Defendant failed to affirmatively demonstrate the uneven floor was not a dangerous condition, and further failed to affirmatively demonstrate she had no notice of the condition and she did not create the condition. [Once again, a defendant must affirmatively address all possible theories of recovery in a motion for summary judgment.]: "To impose liability upon a defendant for a plaintiff's injuries, there must be evidence showing the existence of a dangerous or defective condition, and that the defendant either created the condition or had actual or constructive notice of it and failed to remedy it within a reasonable time ... . Whether a dangerous or defective condition exists on the property of another so as to create liability depends on the circumstances of each case, and is generally a question of fact for the jury ... . The defendant failed to establish, prima facie, that the subject staircase was not in a defective condition and that she did not create the alleged hazardous condition or have actual or constructive notice of such condition ... . Since the defendant failed to meet her burden as the movant, it is not necessary to review the sufficiency of the plaintiffs' opposition papers." **Davis v Sutton, 2016 NY Slip Op 00923, 2nd Dept 2-10-16**

PERSONAL INJURY.

DEFENDANTS' FAILURE TO DEMONSTRATE AREA WHERE PLAINTIFF FELL WAS ADEQUATELY ILLUMINATED, AND FAILURE TO AFFIRMATIVELY DEMONSTRATE DEFENDANTS DID NOT CREATE OR HAVE ACTUAL OR CONSTRUCTIVE NOTICE OF THE DANGEROUS CONDITION, REQUIRED DENIAL OF DEFENSE MOTION FOR SUMMARY JUDGMENT.

The Second Department, reversing Supreme Court, determined defendant property owners were not entitled to summary judgment in this slip and fall case. The defendants had directed plaintiff to a parking lot as a smoking area (where plaintiff fell). Therefore, defendants were obliged to make sure the parking lot was adequately illuminated. The defendants' failure to affirmatively demonstrate the area was adequately illuminated and their failure to demonstrate they did not create the dangerous condition or have actual or constructive notice of it, required denial of their summary judgment motion. [Yet another example of the necessity of affirmatively addressing every possible theory of recovery available to a plaintiff in a defense summary judgment motion.]: "[H]aving directed guests to use the rear parking lot as a smoking area, they had a duty to provide adequate illumination ... . The defendants failed to establish, prima facie, that the parking lot was adequately illuminated ... . Contrary to the defendants' further contention, the plaintiff was able to identify what had caused her to fall ... . Additionally, the defendants failed to establish, prima facie, that they did not create the alleged hazardous condition of the parking lot or have actual or constructive notice thereof ... . Since the defendants failed to meet their initial burden as the movants, it is not necessary to review the sufficiency of the plaintiff's opposition papers ...". **Steed v MVA Enters., LLC, 2016 NY Slip Op 00960, 2nd Dept 2-10-16**

PERSONAL INJURY, CIVIL PROCEDURE, EVIDENCE.

AFFIDAVITS IDENTIFYING THE CAUSE OF PLAINTIFF'S FALL, SUBMITTED IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT, SHOULD NOT HAVE BEEN REJECTED ON CREDIBILITY GROUNDS; IN

THE CONTEXT OF SUMMARY JUDGMENT, THE COURT'S FUNCTION DOES NOT INCLUDE THE ASSESSMENT OF CREDIBILITY.

In this slip and fall case, the Second Department determined Supreme Court should not have rejected affidavits submitted by the plaintiff in opposition to a summary judgment motion because of inconsistencies. The affidavits were from witnesses who saw plaintiff fall and who were able to identify the cause of plaintiff's fall. In the context of a summary judgment motion, assessing credibility is not the court's function: "Here, the defendant established, prima facie, his entitlement to judgment as a matter of law by submitting the deposition testimony of the plaintiff, which demonstrated that she was unable to identify the cause of her fall ... . However, in opposition to the defendant's prima facie showing on this ground, the plaintiff raised a triable issue of fact. The plaintiff's submissions included affidavits from two individuals who witnessed the accident and identified the cause of her fall ... . The Supreme Court erred in rejecting these two eyewitness affidavits on the ground that they gave inconsistent accounts of the accident. 'It is not the court's function on a motion for summary judgment to assess credibility' . . . , and any inconsistencies in the affidavits of the two eyewitnesses did not render them both incredible as a matter of law, but rather, raised issues of credibility to be resolved by the factfinder ...". **McRae v Venuto, 2016 NY Slip Op 00944, 2nd Dept 2-10-16**

PERSONAL INJURY, CIVIL PROCEDURE, MUNICIPAL LAW.

SECOND SUMMARY JUDGMENT MOTION PROPERLY ENTERTAINED; ABSENCE OF SPECIAL RELATIONSHIP REQUIRED DISMISSAL OF NEGLIGENCE ACTION AGAINST POLICE.

In finding the defendant-city's motion for summary judgment should have been granted, the Second Department noted that, although successive summary judgment motions are disfavored, the defendant-city's second motion was properly entertained. The complaint alleged negligence on the part of the police stemming from an attack on her by her husband and the shooting of her husband by the police. Prior to the attack and the shooting, plaintiff had gone to the police station seeking protection but was sent home. The negligence action against the city/police was dismissed on governmental immunity grounds because no "special relationship" between plaintiff and the police had been demonstrated: "That branch of the defendants' cross motion which was for summary judgment should have been granted. Although successive motions for summary judgment are disfavored, a subsequent summary judgment motion may be properly entertained when it is substantively valid and the granting of the motion will further the ends of justice and eliminate an unnecessary burden on the resources of the courts ... . A special duty is 'a duty to exercise reasonable care toward the plaintiff,' and 'is born of a special relationship between the plaintiff and the governmental entity' ... . The elements required to establish a special relationship are: '(1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) that party's justifiable reliance on the municipality's affirmative undertaking' ... . Here, the defendants established their prima facie entitlement to judgment as a matter of law by demonstrating that the police did not assume an affirmative duty to act on [plaintiff's] behalf ...". **Graham v City of New York, 2016 NY Slip Op 00932, 2nd Dept 2-10-16**

PERSONAL INJURY, EMPLOYMENT LAW (RESPONDEAT SUPERIOR).

QUESTION OF FACT WHETHER EMPLOYEE WAS ACTING WITHIN THE SCOPE OF HIS EMPLOYMENT WHEN THE CAR ACCIDENT OCCURRED.

The Second Department determined there was a question of fact whether the driver of a car involved in an accident was acting within the scope of his employment at the time. Therefore, Supreme Court erred when it dismissed the complaint against the employer, alleging liability under the doctrine of respondeat superior. Here, the employee was driving to the employer's house, which had been used as the employer's office, when the accident occurred: " 'The doctrine of respondeat superior renders an employer vicariously liable for torts committed by an employee acting in furtherance of the employer's business and within the scope of his or her employment ...'. 'An employee's actions fall within the scope of employment where the purpose in performing such actions is to further the employer's interest, or to carry out duties incumbent upon the employee in furthering the employer's business' ... . 'Conversely, where an employee's actions are taken for wholly personal reasons, which are not job related, his or her conduct cannot be said to fall within the scope of employment' ... . 'An act is considered to be within the scope of employment if it is performed while the employee is engaged generally in the business of his employer, or if his act may be reasonably said to be necessary or incidental to such employment' ... . '[T]he employer may be liable when the employee acts negligently or intentionally, so long as the tortious conduct is generally foreseeable and a natural incident of the employment' ... . '[B]ecause the determination of whether a particular act was within the scope of the servant's employment is so heavily dependent on factual considerations, the question is ordinarily one for the jury' ...". **Brandford v Singh, 2016 NY Slip Op 00920, 2nd Dept 2-10-16**

PERSONAL INJURY, MEDICAL MALPRACTICE.

FAILURE TO DEMONSTRATE SCARRING WAS DISCUSSED PRIOR TO THE SIGNING OF THE CONSENT FORM, AND FAILURE TO DEMONSTRATE PLAINTIFF WOULD HAVE GONE THROUGH WITH THE SURGERY DESPITE FULL DISCLOSURE ABOUT SCARRING, REQUIRED DENIAL OF PHYSICIAN'S MOTION FOR SUMMARY JUDGMENT.

The Second Department determined defendant physician (Barazani) was not entitled to summary judgment on the "lack of informed consent" cause of action, despite the plaintiff's signing of a consent form. Although the consent form mentioned scarring as a possibility, there was no showing the defendant discussed scarring with the plaintiff before the consent form was signed. In addition, there was no showing plaintiff would have gone through with the surgery had scarring been adequately discussed. [Another example of the need for a defendant seeking summary judgment to affirmatively address every possible theory of recovery.]: "Here, the defendants failed to establish their prima facie entitlement to judgment as a matter of law dismissing the cause of action alleging lack of informed consent. The mere fact that the plaintiff signed a consent form does not establish the defendants' prima facie entitlement to judgment as a matter of law ... . The consent form provided by the defendants and signed by the plaintiff warned generally that there was a risk of scarring after the biopsy was conducted. However, the deposition testimony of the plaintiff and Barazani, which was submitted by the defendants in support of their motion, revealed a factual dispute as to whether Barazani properly advised the plaintiff of the risk of scarring before she signed the form ... . The defendants also failed to establish, prima facie, that if the plaintiff had received full disclosure, she still would have consented to the procedure ...". **Schussheim v Barazani, 2016 NY Slip Op 00958, 2nd Dept 2-10-16**

PERSONAL INJURY, VEHICLE AND TRAFFIC LAW, MUNICIPAL LAW.

QUESTION OF FACT WHETHER DRIVER OF CITY TRUCK EXERCISED REASONABLE CARE DURING AN EMERGENCY STOP IN THE LEFT LANE OF A HIGHWAY.

The Second Department, reversing Supreme Court, determined decedent's representative had raised a question of fact whether the driver of a city dump truck was negligent. Decedent was a passenger in a car which struck the back of the dump truck which was either stopped or coming to a stop in the left lane of the highway. Although the driver of the truck testified a tire had just blown, causing the truck to veer to the left, the truck was still moving when struck, and the emergency flashing lights were on, the sole eyewitness testified the truck was parked and its lights were not on: "Generally, when one causes a public road to become obstructed, there is a duty to 'exercise[ ] the care that a reasonably prudent person should have under all the circumstances' ... . The exercise of reasonable care under the circumstances may include warning other motorists of the hazards posed by the obstruction ... . Typically, whether reasonable care was exercised is a question of fact …". **Pinilla v City of New York, 2016 NY Slip Op 00953, 2nd Dept 2-10-16**

THIRD DEPARTMENT

CRIMINAL LAW.

DEFENDANT ENTITLED TO BE HEARD ON APPLICATION FOR RESENTENCING UNDER DRUG LAW REFORM ACT, DENIAL OF APPLICATION ON THE PAPERS REVERSED.

The Third Department determined denial of defendant's application for resentencing under the Drug Law Reform Act without allowing defendant to be heard was error: "The Drug Law Reform Act of 2009 requires that, upon receipt of an application for resentencing, 'the court shall offer an opportunity for a hearing and bring the applicant before it' (L 2004, ch 73, § 23; *see* CPL 440.46 [3]…). Inasmuch as the record does not reflect that defendant was afforded 'an opportunity to be heard on the merits of [his] application,' the order appealed from must be reversed and the matter remitted to County Court so that a new determination can be made on defendant's application after the proper procedure has been followed ...". **People v Davis, 2016 NY Slip Op 01006, 3rd Dept 2-11-16**

CRIMINAL LAW.

JUDGE IMPOSED RESTITUTION AT SENTENCING WHICH WAS NOT PART OF THE PLEA AGREEMENT, SENTENCE VACATED.

The Third Department vacated defendant's sentence because restitution was imposed but was not part of the plea agreement. Defendant should have been given the opportunity to withdraw his plea: "Inasmuch as the record fails to establish that payment of restitution was part of defendant's plea agreement, we must agree that County Court erred in imposing the enhanced sentence without giving defendant an opportunity to withdraw his plea ... . Accordingly, defendant's sentence must be vacated and the matter remitted to County Court to either impose the agreed-upon sentence or give defendant the option of withdrawing his plea before imposing the enhanced sentence ...". **People v Brasmeister, 2016 NY Slip Op 01019, 3rd Dept 2-11-16**

UNEMPLOYMENT INSURANCE.

MUSIC TEACHERS ARE EMPLOYEES, NOT INDEPENDENT CONTRACTORS.

The Third Department determined a business, Eray Inc., which matched students with music teachers, was required to pay unemployment insurance contributions. The court affirmed the Unemployment Insurance Appeal Board's finding that the musicians were employees, not independent contractors: "[W]here the provision of professional services is involved, the relevant inquiry becomes 'whether the purported employer retains overall control of important aspects of the services performed' ... . The 'overall control' test 'has been applied to musicians who do not easily lend themselves to direct supervision or control'... . During the period in question, Eray matched students with music instructors based upon its assessment of the students' needs and the instructors' qualifications, scheduled the lessons and followed up with both the instructors and the students to ensure that they were matched appropriately. While Eray did not dictate the curriculum or the method of instruction, it rented and provided the space in which the teachers almost exclusively conducted their lessons, equipped the space with chairs, music stands, a piano, a drum set and a collection of music books that could be used during those lessons, billed the students, paid the teachers an agreed-upon portion of the fee collected from each student and fielded student complaints. In addition, Eray required the teachers to submit any scheduling changes to it for its approval and notify it if they were going to be late to a lesson or send a substitute in their stead and, when requested, Eray would arrange for substitute instructors. Furthermore, although Eray maintained that the agreements were not enforced, several of the instructors signed agreements that, among other things, prohibited them from contacting students directly or providing private lessons to their students in the two years following their resignation." **Matter of Eray Inc. (Commissioner of Labor), 2016 NY Slip Op 01024, 3rd Dept 2-11-16**

UNEMPLOYMENT INSURANCE.

OIL-SPILL DAMAGES INVESTIGATOR WAS AN EMPLOYEE ENTITLED TO UNEMPLOYMENT BENEFITS.

The Third Department determined claimant, who was hired by Guidepost to investigate damages claims relating to an oil spill, was an employee entitled to unemployment insurance benefits: "[T]he record contains substantial evidence that Guidepost exercised the requisite control to establish an employer-employee relationship. Claimant received three days of training on how the written reports of his investigations were to be drafted and was reimbursed for the related travel expenses. Guidepost provided the claims to be investigated to claimant, who worked from home in New York. Claimant used reports filed by Guidepost's field investigators in Louisiana in evaluating the veracity of the damage claims. Claimant submitted his final written reports to Guidepost, which forwarded them on to its client. Guidepost handled all of the client's complaints, and the client was not aware of who had actually prepared the report. Claimant and Guidepost entered into a written agreement, pursuant to which claimant was paid a set hourly rate and was required to submit monthly invoices to Guidepost containing a log of times and dates and a detailed description of the work performed. Guidepost agreed to pay all approved business expenses. Guidepost also placed restrictions on claimant's solicitation of or provision of services to Guidepost's clients during his employment and for a year following separation and required him to adhere to a code of conduct." **Matter of Zaharuk (Guidepost Solutions LLC—Commissioner of Labor), 2016 NY Slip Op 01028, 3rd Dept 2-11-16**

FOURTH DEPARTMENT

ADMINISTRATIVE LAW, EDUCATION-SCHOOL LAW.

COLLEGE'S DETERMINATION WAS NOT ARBITRARY AND CAPRICIOUS; AGENCY'S RATIONAL RULING MUST BE UPHELD EVEN IF THE REVIEWING COURT WOULD HAVE DECIDED DIFFERENTLY.

The Fourth Department determined Supreme Court should not have annulled the respondent college's ruling as arbitrary and capricious. The controversy concerned the hiring of a business manager by the student government (Brockport Student Government or BSG). Although BSG had the power to hire a manager at approximately $50,000 a year, the college, which must ultimately approve the hiring, rejected it and engaged a managing service for $20,000 less. Because the college's ruling had a rational basis, it could not be deemed arbitrary and capricious simply because the reviewing court would have decided differently. The Fourth Department explained what "arbitrary and capricious" means: "[T]the court erred in determining that their denial of BSG's budget allocation for a business manager was arbitrary and capricious. It is well established that '[a]n action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts . . . An agency's determination is entitled to great deference and, [i]f the [reviewing] court finds that the determination is supported by a rational basis, it must sustain the determination even if the court concludes that it would have reached a different result than the one reached by the agency' ... . Here, we conclude that respondents' discretionary determination to reject BSG's proposed $49,800 salary for a business manager which was based on a comparison of the 'hiring practices and compensation rates of other campus-affiliated organizations'... is supported by a rational basis." **Matter of Brockport Student Govt. v State Univ. of N.Y. at Brockport, 2016 NY Slip Op 01099, 4th Dept 2-11-16**

APPEALS, CIVIL PROCEDURE, FAMILY LAW.

ORDER ENTERED ON CONSENT IS NOT APPEALABLE; ONLY REMEDY IS MOTION TO VACATE.

In a Family Court matter, the Fourth Department noted that no appeal lies from an order entered by consent. The correct remedy is a motion to vacate the order: "Respondent mother appeals from an order denying her motion to vacate an order of fact-finding and disposition, which was entered on the consent of the parties. We agree with the mother that Family Court erred in denying the motion on the sole ground that a direct appeal from that order was pending. It is well settled that '[n]o appeal lies from an order entered upon the parties' consent' . . . and, indeed, we dismissed the mother's appeal from the consent order for that very reason ... . Thus, contrary to the court's determination, the mother's sole remedy was 'to move in Family Court to vacate the order, at which time [she] [could] present proof in support of [her] allegations of duress, proof which is completely absent from this record' ...". **Matter of Annabella B.C. (Sandra L.C.), 2016 NY Slip Op 01064, 4th Dept 2-11-16**

CIVIL PROCEDURE, FORECLOSURE.

COURT SHOULD HAVE ALLOWED SUBSTITUTION OF AN AFFIDAVIT OF MERIT PURSUANT TO CPLR 2001; SUA SPONTE DISMISSAL OF COMPLAINT NOT WARRANTED.

The Fourth Department determined Supreme Court should have granted plaintiff's motion to substitute nunc pro tunc an affidavit of merit and amount due in a foreclosure proceeding. Plaintiff could not confirm the proper execution of the original affidavit (a requirement of an administrative order of the chief administrative judge) and sought to substitute the original with an identical affidavit, the proper execution of which could be confirmed. Supreme Court denied the motion and dismissed the complaint sua sponte. The Fourth Department held that the dismissal was not warranted and CPLR 2001 permitted the substitution. **Wells Fargo Bank, N.A. v Watanabe, 2016 NY Slip Op 01096, 4th Dept 2-11-16**

CRIMINAL LAW.

SECOND FELONY DRUG OFFENDER SENTENCE: COURT ABUSED ITS DISCRETION BY PROMISING TO OBTAIN TRANSCRIPTS TO ALLOW DEFENDANT TO CHALLENGE THE PRIOR CONVICTION AND THEN DECIDING NOT TO ORDER THE TRANSCRIPTS.

The Fourth Department determined defendant, who was sentenced as a second felony drug offender, should have been afforded a hearing to substantiate a constitutional challenge to a prior conviction. County Court indicated the transcripts of the prior proceedings would be provided, but ultimately sentenced defendant without providing them: "[T]he court abused its discretion in sentencing him as a second felony drug offender without affording him the opportunity to substantiate his constitutional challenge to the predicate felony conviction with the transcripts of the proceeding underlying that conviction and without holding a hearing for that purpose. Inasmuch as defendant did not controvert the existence of the predicate felony conviction, it was incumbent upon defendant 'to allege and prove facts to establish his claim that the conviction was unconstitutionally obtained' ... . The record establishes that defendant, who was proceeding pro se, alleged certain constitutional violations in writing, and repeatedly and timely requested the necessary transcripts in order to prepare his constitutional challenge. The court promised to obtain the transcripts for defendant, acknowledged on the scheduled hearing date its oversight in failing to act on that promise and, upon being challenged by defendant at a rescheduled hearing, ultimately admitted that, after months of adjournments, it had decided not to order the transcripts as it had previously promised. Although there is no requirement that a trial court obtain such transcripts on a defendant's behalf, we conclude that, under the circumstances of this case, the court should not have proceeded to sentencing without at least attempting to obtain the transcripts sought by defendant and providing defendant a hearing on his constitutional challenge to the predicate felony conviction ...". **People v Farmer, 2016 NY Slip Op 01095, 4th Dept 2-11-16**

CRIMINAL LAW.

OFFICER DID NOT HAVE GROUNDS TO PROCEED TO A LEVEL TWO INQUIRY, ASKING DEFENDANT IF HE HAD ANY WEAPONS OR DRUGS; SEIZURE WHEN DEFENDANT WALKED AWAY WAS ILLEGAL.

The Fourth Department reversed defendant's conviction because it determined the suppression motion should have been granted. Although the arresting officer validly stopped the car in which defendant was a passenger because of tinted windows, validly asked about defendant's identity and destination, and validly asked defendant to step out of the car, there were no grounds for asking defendant if he had any weapons or drugs. The escalation of the officer's questioning was based only on defendant's nervousness and not on a grounded suspicion of criminal activity. Therefore, the officer's seizure of defendant when defendant walked away and did not obey the officer's command to stop was illegal. The cocaine, which was disposed of by the defendant during the illegal pursuit, should have been suppressed: "Defendant responded to the officer's level two inquiry by saying, 'you're harassing me,' and then walking away. The encounter escalated further to a level three seizure when the officer commanded him to stop, defendant continued to walk away, and the officer pursued defendant with a taser ... . We reject the People's contention that defendant's conduct provided the officer with the requisite reasonable suspicion of criminality ... . 'Flight alone is insufficient to justify pursuit because an individual has a right to be

let alone and refuse to respond to police inquiry' ... . Finally, we conclude that defendant's disposal of the bags containing cocaine during the officer's pursuit was precipitated by the illegality of that pursuit ... . Thus, the court erred in refusing to suppress the bags of cocaine." **People v Hightower, 2016 NY Slip Op 01083, 4th Dept 2-11-16**

CRIMINAL LAW, APPEALS.

THE RECORD DID NOT SUPPORT A FINDING THAT DEFENDANT, WHO WAS MENTALLY ILL, UNDERSTOOD THE APPEAL WAIVER; DEFENDANT SHOULD HAVE BEEN ACCORDED YOUTHFUL OFFENDER STATUS.

The Fourth Department, over a two-justice dissent, determined defendant's waiver of appeal was invalid and defendant should have been accorded youthful offender status. The appeal waiver, the court noted, may have been valid for another defendant, but this defendant's mental illness, which was evident in the appeal-waiver colloquy, indicated defendant did not understand the waiver. Defendant was between the ages of 16 and 19 when he committed the burglary, he had no prior contact with the criminal justice system, and reports indicated the criminal behavior was an aberration caused by defendant's mental illness and inappropriate treatment: "We agree with defendant's contention in both appeals that he should be afforded youthful offender status. It is undisputed that defendant, who was between the ages of 16 and 19 when the crimes were committed, is eligible for youthful offender treatment under CPL 720.10 (1) and (2) ... . In determining whether to afford such treatment to a defendant, a court must consider 'the gravity of the crime and manner in which it was committed, mitigating circumstances, defendant's prior criminal record, prior acts of violence, recommendations in the presentence reports, defendant's reputation, the level of cooperation with authorities, defendant's attitude toward society and respect for the law, and the prospects for rehabilitation and hope for a future constructive life' ...". **People v Thomas R.O., 2016 NY Slip Op 01086, 4th Dept 2-11-16**

CRIMINAL LAW, ATTORNEYS.

UNNECESSARILY ALLOWING THE JURY TO KNOW DEFENDANT WAS A REGISTERED SEX OFFENDER WAS NOT JUSTIFIED BY ANY REASONABLE DEFENSE STRATEGY, DEFENDANT DID NOT RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL; CONVICTION REVERSED.

The Fourth Department reversed defendant's conviction, finding he did not receive effective assistance of counsel. Defendant was accused of rape. Although it was not necessary to do so, defense counsel allowed the jury to learn that defendant was a registered sex offender and mentioned the sex-offender status in voir dire, in his opening, during cross-examination and in his closing. The Fourth Department determined there was no reasonable defense strategy which could justify repeated reference to defendant's sex-offender status: "[W]e conclude that defense counsel's strategy, i.e., to allow the jury to know that defendant was a registered sex offender and then argue that the police focused their investigation on defendant because he was a registered sex offender, was based on an obviously false premise. The police focused their investigation on defendant because his DNA profile matched that of the rapist, not because he was a registered sex offender. Moreover, defendant's DNA profile was in CODIS because he was a convicted felon, not because he had committed a sexual offense. This is not to say that defense counsel pursued an unreasonable defense theory at trial. The theory was that defendant had consensual intercourse with the victim on the same day that she was raped by someone else. In pursuing that theory, however, it was unnecessary for defense counsel to inform the jury that defendant was a registered sex offender. In fact, any chance that the jurors would have believed defendant's testimony about the intercourse being consensual was likely extinguished once they learned that he had previously committed a sex offense. In short, defendant derived no discernible benefit from the jury knowing that he was a registered sex offender, and was highly prejudiced thereby." **People v Stefanovich, 2016 NY Slip Op 01070, 4th Dept 2-11-16**

CRIMINAL LAW, DRIVING WHILE INTOXICATED.

AIR FRESHENERS HANGING FROM REAR-VIEW MIRROR PROVIDED PROBABLE CAUSE JUSTIFYING VEHICLE STOP.

The Fourth Department, in the context of upholding the revocation of petitioner's license for refusing to submit to a chemical blood alcohol test, determined the arresting officer had probable cause to believe petitioner had committed a traffic offense, and therefore the vehicle-stop was valid. The basis of the stop was the officer's observation of air fresheners hanging three or four inches below the rear-view mirror: " '[P]olice stops of automobiles in this State are legal only pursuant to routine, nonpretextual traffic checks to enforce traffic regulations or when there exists at least a reasonable suspicion that the driver or occupants of the vehicle have committed, are committing, or are about to commit a crime' . . . [,] or where the police have probable cause to believe that the driver . . . has committed a traffic violation' ... . '...[P]robable cause . . . does not require proof sufficient to warrant a conviction beyond a reasonable doubt but merely information sufficient to support a reasonable belief that an offense has been or is being committed' ... . Here, the record establishes that the officer had probable cause to believe that petitioner was violating Vehicle and Traffic Law § 375(30) inasmuch as the officer testified that

he observed objects measuring approximately four inches wide—later identified as air fresheners — hanging three or four inches below the rearview mirror, and that those objects may have obstructed petitioner's view through the windshield ...". **Matter of Deveines v New York State Dept. of Motor Vehs. Appeals Bd., 2016 NY Slip Op 01074, 4th Dept 2-11-16**

DEFAMATION, PUBLIC HEALTH LAW, MUNICIPAL LAW.

DEPARTMENT OF HEALTH ENTITLED TO QUALIFIED PRIVILEGE FOR PRESS RELEASE ABOUT TATTOO-RELATED INFECTIONS, PLAINTIFF UNABLE TO DEMONSTRATE MALICE.

The Fourth Department determined the defendant county Department of Health was entitled to summary judgment on plaintiff's defamation cause of action. The Department of Health had linked eight cases of infection to a particular tattoo artist. The tattoo artist told the Department he worked for plaintiff Tattoos by Design, Inc., doing business as Hardcore Tattoo. The Department issued a press release warning of the infections and noted that the tattoo artist in question reported to them he had worked for Hardcore. The Fourth Department held the Department of Health had a qualified privilege to issue the health warning and plaintiff was unable to demonstrate the press release was motivated solely by malice: "Once defendants established that the statements in the press release were protected by a qualified privilege, the burden shifted to plaintiffs to raise a triable issue of fact 'whether the statements were motivated solely by malice' ... , meaning 'spite or a knowing or reckless disregard of a statement's falsity ...". **Tattoos By Design, Inc. v Kowalski, 2016 NY Slip Op 01091, 4th Dept 2-11-16**

EMPLOYMENT LAW, HUMAN RIGHTS LAW, CIVIL PROCEDURE, MUNICIPAL LAW.

POLICE OFFICER'S CAUSES OF ACTION FOR DISABILITY DISCRIMINATION SHOULD HAVE SURVIVED THE MOTION TO DISMISS.

The Fourth Department determined plaintiff police officer had stated causes of action for unlawful discrimination based upon a disability under the Human Rights Law and the federal Rehabilitation Act. Plaintiff was arrested for DWI and entered a rehabilitation program where he was diagnosed as suffering from post-traumatic stress disorder stemming from his work in New York City after the 9-11 attack. Plaintiff was terminated upon completion of the rehabilitation program. The city argued his termination was based on the DWI, but plaintiff alleged other officers, who were not disabled, were not terminated after committing a criminal offense. The Fourth Department noted that when the plaintiff's and defendant's arguments are equally supported, plaintiff must prevail in a motion to dismiss. **Regan v City of Geneva, 2016 NY Slip Op 01101, 4th Dept 2-11-16**

FAMILY LAW.

MOTHER DEMONSTRATED CHANGE IN CIRCUMSTANCES RELATED TO EXCESSIVE PUNISHMENT BY HUSBAND; FAMILY COURT REVERSED, CUSTODY AWARDED TO MOTHER.

The Fourth Department reversed Family Court finding changes in circumstances sufficient to modify the custody arrangement and award sole physical custody to mother. The evidence demonstrated father imposed excessive corporal punishment. The Fourth Department noted the Family Court judge placed too much emphasis on mother's sexual conduct: "Although the father testified that each of [the] types of physical discipline was a one-time occurrence, the records of the daughter's medical examination documenting that the daughter had 'multiple bruises all over her body in different stages of healing,' as well as the son's statements with respect to the frequency of the father's physical discipline, support the finding that the father repeatedly inflicted excessive corporal punishment on the daughter. We thus conclude that there was a sufficient change in circumstances to warrant an inquiry into the best interests of the children ... . Furthermore, even crediting the father's assertion that the daughter's injuries resulted from tantrums, we conclude that there was a sufficient change in circumstances inasmuch as the father was admittedly unable to handle the daughter's behavioral issues, resorted to inappropriate physical discipline to punish the daughter for her alleged misbehavior, and requested that the mother remove the daughter from his care ... . We further agree with the mother and the AFC that the court's custody determination lacks a sound and substantial basis in the record ... . Upon our review of the relevant factors . . . , 'including an evaluation of the character and relative parental fitness of the parties' . . . , we conclude that it is in the best interests of the children to award the mother sole legal and primary physical custody." **Matter of DeJesus v Gonzalez, 2016 NY Slip Op 01059, 4th Dept 2-11-16**

FAMILY LAW, FIREARMS PERMIT.

FAMILY COURT DID NOT HAVE AUTHORITY TO REVOKE FIREARMS PERMIT AS PART OF AN ORDER OF PROTECTION.

The Fourth Department determined Family Court did not have the authority to revoke respondent's firearm permit as part of an order of protection: "Under Family Court Act § 846-a, the court may revoke a license to carry and possess a firearm '[i]f the court determines that the willful failure to obey [a protective] order involves violent behavior constituting the crimes

of menacing, reckless endangerment, assault or attempted assault.' Where, as here, no such determination is made, the court is not authorized to revoke a respondent's firearms permit ... . Moreover, restriction of respondent's right to use or possess firearms was not warranted under Family Court Act § 842-a, inasmuch as the court did not find, and could not find based on the evidence at the hearing, 'that the conduct which resulted in the issuance of the order of protection involved (i) the infliction of physical injury . . . , (ii) the use or threatened use of a deadly weapon or dangerous instrument . . . , or (iii) behavior constituting any violent felony offense' (§ 842-a [2] [a]), or that there is a 'substantial risk that the respondent may use or threaten to use a firearm unlawfully against the person or persons for whose protection the order of protection is issued' (§ 842-a [2] [b]). We thus modify the order by vacating the provision directing that respondent is not to use or possess firearms nor hold or apply for a pistol permit during the pendency of the order." **Matter of Schoenl v Schoenl, 2016 NY Slip Op 01060, 4th Dept 2-11-16**

MEDICAID, TRUSTS AND ESTATES.

TRUST WHICH ALLOWED PETITIONER'S CHILDREN TO DISTRIBUTE PRINCIPAL TO PETITIONER RENDERED PETITIONER INELIGIBLE FOR MEDICAID, DESPITE CHILDREN'S REFUSAL TO MAKE A DISTRIBUTION.

The Fourth Department confirmed the Department of Health's finding that a trust which allowed petitioner's children to distribute the principal to her rendered petitioner ineligible for Medicaid benefits, despite the children's refusal to make a distribution: "[W]e conclude that the agency's determination, which is based on its conclusion that the principal of a trust of which petitioner is a beneficiary is an 'available resource,' is supported by substantial evidence and is not affected by an error of law. The trust at issue grants petitioner's children, as cotrustees, 'the authority to distribute so much of the principal to [petitioner that they,] in their sole discretion, deem advisable to provide for [petitioner's] health, maintenance and welfare.' Because the principal of the trust may, in the discretion of petitioner's children, be paid for petitioner's benefit, the agency did not err in concluding that the principal of the trust is an available resource for purposes of petitioner's Medicaid eligibility determination (*see* 18 NYCRR 360-4.5 [b] [1] [ii] . . .), despite the fact that her children refuse to exercise their discretion to make such payments of principal." **Matter of Flannery v Zucker, 2016 NY Slip Op 01075, 4th Dept 2-11-16**

PERSONAL INJURY, ASSUMPTION OF THE RISK.

QUESTION OF FACT WHETHER SKIER ASSUMED THE RISK OF STRIKING A SNOWMAKING MACHINE.

The Fourth Department determined plaintiff had raised a question of fact whether he assumed the risk of a skiing injury. Plaintiff fell and slid headfirst into an unpadded portion of a pole on a snowmaking machine. The court rejected defendant's argument that the General Obligations Law, not the common law, controlled: "It is well settled under the common law that '[v]oluntary participants in the sport of downhill skiing assume the inherent risks of personal injury caused by, among other things, terrain, weather conditions, ice, trees and man-made objects that are incidental to the provision or maintenance of a ski facility' ... . Here, although defendant met its initial burden by establishing that the accident was caused by the inherent risks in the sport of downhill skiing, plaintiff raised a triable issue of fact by submitting the affidavit of his expert ... . Plaintiff's expert asserted therein that the snowmaking machine was on the ski trail and was insufficiently padded, thus raising an issue of fact whether defendant 'failed to maintain its property in a reasonably safe condition' ...". **Dailey v Labrador Dev. Corp., 2016 NY Slip Op 01072, 4th Dept 2-11-16**

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