CasePrepPlus

April 13, 2016

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

Editor: **Bruce Freeman**

NEW YORK STATE BAR ASSOCIATION
Serving the legal profession and the community since 1876

COURT OF APPEALS

CRIMINAL LAW, APPEALS.

THE DEFENSE HAD SEVERAL OPPORTUNITIES TO DISCOVER THE JUDGE'S SENTENCE-PROMISE MISTAKE, THEREFORE THE PRESERVATION REQUIREMENT APPLIED TO DEFENDANT'S CHALLENGE TO THE VALIDITY OF HIS GUILTY PLEA.

The Court of Appeals, in a full-fledged opinion by Judge Abdus-Salaam, over a two-judge dissenting opinion, reversing the Appellate Division, determined defendant's failure to preserve his challenge to the validity of his guilty plea precluded review in the Court of Appeals. The matter was remitted to the Appellate Division which could entertain the appeal under its interest of justice jurisdiction. The opinion attempts to clarify when a defendant "lacks a reasonable opportunity to object to a fundamental defect in the plea" such that the preservation requirement does not apply. Here, the sentencing court made an initial mistake indicating defendant's sentence would be three years, where the minimum sentence was six years. Defendant argued his guilty plea was induced by the judge's mistake. The Court of Appeals found there were many subsequent opportunities to discover the mistake and preserve the error. The defendant violated the terms of his release pending sentencing, an *Outley* hearing was held, and a six-year sentence, described as an "enhanced sentence," was ultimately imposed.
***People v. Williams*, 2016 N.Y. Slip Op. 02551, CtApp 4-5-16**

CRIMINAL LAW, APPEALS.

THE TRIAL JUDGE'S FAILURE TO ACT ON DEFENSE COUNSEL'S OBJECTION TO T-SHIRTS REMEMBERING THE MURDER VICTIM WAS ERROR; UNDER THE FACTS, THE ERROR WAS HARMLESS.

The Court of Appeals, in a full-fledged opinion by Judge Fahey, with a three-judge concurring opinion, determined defendant was not deprived of a fair trial by the trial judge's failure to take any action when defense counsel informed him family members were wearing T-shirts remembering the murder victim. The Court of Appeals found the trial judge's failure to act was error. But, under the facts, the error did not deprive defendant of a fair trial. The fact that the trial judge noticed family members had worn the T-shirts before the day when defense counsel objected did not bring up those prior occurrences on appeal. Defense counsel did not elicit a ruling from the trial judge (by moving for a mistrial) based on the prior occurrences, therefore only the wearing of the T-shirts on the day counsel objected was before the court: "We conclude . . . that although spectator displays depicting a deceased victim should be prohibited in the courtroom during trial, and although the trial court here erred in refusing to intervene upon defense counsel's request, the error is subject to harmless error analysis."
***People v. Nelson*, 2016 N.Y. Slip Op. 02554, CtApp 4-5-16**

CRIMINAL LAW, EVIDENCE.

DEFENDANT'S CHALLENGES TO THE HARVESTING FOR USE AT TRIAL OF RECORDINGS OF PHONE CALLS MADE BY INMATES DURING PRE-TRIAL INCARCERATION REJECTED; THE PRACTICE, HOWEVER, WAS NOT CONDONED AND THE PREJUDICE TO DEFENDANTS WHO CANNOT MAKE BAIL WAS EXPRESSLY NOTED.

The Court of Appeals, in a full-fledged opinion by Judge Rivera, with a concurring opinion by Judge Pigott, rejected defendant's challenge to the use at trial of recordings of his phone calls made from Rikers Island during pre-trial incarceration. Prosecutors routinely request recordings of nonprivileged inmate phone calls and pour through them for use at trial. The Court of Appeals did not condone the practice, and the concurring opinion laid out how access to the phone calls prejudices defendants who cannot make bail: "In order to properly address and frame defendant's legal claims, we first clarify what defendant does not allege on this appeal. He does not allege that any conversations with his defense counsel were recorded and admitted at trial, or that the Department permits such monitoring. To the contrary, defendant recognizes that the Operations Order expressly prohibits the recording and monitoring of conversations with an inmate's attorney. Nor does defendant assert that the intention of the City's regulation or the Department's Operations Order is to create and collect information strictly for use by the prosecution against a detainee at trial. Defendant candidly admits that the Department has a legitimate interest in recording and monitoring detainee telephone communications. Defendant instead challenges what he describes as the Department's practice of "automatic, unmonitored harvesting of intimate conversations of pre-trial inmates," and the subsequent dissemination of the Department's recordings to District Attorneys' offices for use in criminal

prosecutions. Defendant claims the practice violated his right to counsel, exceeds the scope of the Department's regulatory authority, and was conducted without defendant's consent. The claims are either without merit or unpreserved and therefore do not warrant reversal and a new trial." ***People v. Johnson*, 2016 N.Y. Slip Op. 02552, CtApp 4-5-16**

CRIMINAL LAW, EVIDENCE.

COURT PROPERLY EXCLUDED SPECULATIVE EVIDENCE OF THIRD-PARTY CULPABILITY; THERE IS NO HEIGHTENED STANDARD FOR ADMISSIBILITY OF THIRD-PARTY CULPABILITY EVIDENCE; RATHER THE USUAL PROBATIVE VS PREJUDICIAL BALANCING TEST APPLIES.

The Court of Appeals, in a full-fledged opinion by Judge Garcia, determined, under an abuse of discretion standard, evidence of third-party culpability was properly excluded as speculative. Defendant was not, therefore, deprived of his constitutional right to present a complete defense when the trial court precluded evidence the defendant's brother, Warren, was the beneficiary of a $500,000 life insurance policy taken out by the murder victim. Here, defense counsel made no specific attempt to demonstrate Warren killed the victim. Defense counsel made only vague assertions "others" could have committed the crime. The Court of Appeals made it clear there is no heightened standard for the admissibility of evidence of third-party culpability. Rather, courts should apply the usual balancing test and exclude such evidence where it has slight probative value and a strong potential for undue prejudice, delay and confusion or where the evidence is so remote it does not connect the third party to the crime: "[A]dmission of third-party culpability evidence does not necessarily require a specific accusation that an identified individual committed the crime. For example, a proffer of an unknown DNA profile may be sufficient. And we reject the trial court's assertion that such a specific accusation 'is an essential element of third-party culpability.' Such a requirement would conflict with the balancing analysis that we . . . reaffirm today. Nevertheless, defense counsel's argument must be assessed based on the proffer as articulated ... . The trial court was within its discretion in finding that proffer speculative and in determining the evidence to support it would have caused undue delay, prejudice, and confusion." ***People v. Powell*, 2016 N.Y. Slip Op. 02555, CtApp 4-5-16**

CRIMINAL LAW, EVIDENCE.

FATHER DEEMED TO HAVE CONSENTED ON BEHALF OF HIS INFANT SON TO THE RECORDING OF THREATS MADE AGAINST HIS SON BY DEFENDANT; ABSENT THE VICARIOUS CONSENT, THE RECORDING WOULD HAVE CONSTITUTED ILLEGAL EAVESDROPPING AND WOULD NOT HAVE BEEN ADMISSIBLE IN COURT.

The Court of Appeals, in a full-fledged opinion by Judge Fahey, over a three-judge dissent, determined father's recording of threats made to his infant son by mother's boyfriend was not eavesdropping, which is prohibited by statute. Rather, father was deemed to have consented to the recording on his son's behalf. Father had attempted to call the child's mother. For some reason, the cell phone call went through but was not picked up by anyone. Father could hear the boyfriend threaten to beat his son. Using a cell phone function, the boyfriend's words were recorded. The boyfriend was subsequently arrested for assault against the child and endangering the welfare of a child. The recording was played at trial. Recording conversations is prohibited in New York as illegal eavesdropping, unless one of the parties to the conversation consents. Here, the Court of Appeals determined the eavesdropping prohibition did not apply because the child was deemed to have consented to the recording. In addition, the Court of Appeals found the trial judge's erroneous jury instruction, which allowed the jury to consider an accomplice theory not charged in the indictment, constituted harmless error. The court concluded, based upon the trial evidence, the jury could not have convicted the defendant of any offense other than what was charged. With respect to the recorded conversation, the court wrote: "There is no basis in legislative history or precedent for concluding that the New York Legislature intended to subject a parent or guardian to criminal penalties for the act of recording his or her minor child's conversation out of a genuine concern for the child's best interests. By contrast, the vicarious consent doctrine recognizes the long-established principle that the law protects the right of a parent or guardian to take actions he or she considers to be in his or her child's best interests. Yet it also recognizes important constraints on that right, by requiring that the parent or guardian believe in good faith that it is necessary for the best interests of the child to make the recording, and that this belief be objectively reasonable." ***People v. Badalamenti*, 2016 N.Y. Slip Op. 02556, CtApp 2016**

EDUCATION-SCHOOL LAW.

TEACHER WITH TENURE WHO RESIGNED AND WAS THEN REHIRED WAS NOT REHIRED WITH TENURE; THE TEACHER FAILED TO COMPLY WITH THE REGULATION REQUIRING A WRITTEN WITHDRAWAL OF THE RESIGNATION SUBJECT TO THE APPROVAL OF THE CHANCELLOR.

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, determined the petitioner, a teacher with tenure who resigned and was then rehired, was not rehired with tenure. The NYC Board of Education Chancellor's Regulations required, in order to be rehired with tenure, the teacher must submit a written request to withdraw the resignation which is subject to a medical examination and the approval of the Chancellor. Because the petitioner did not submit a written request to withdraw his resignation his rehiring was without tenure. ***Matter of Springer v. Board of Educ. of the City Sch. Dist. of the City of N.Y.*, 2016 N.Y. Slip Op. 02553, CtApp 4-5-16**

PERSONAL INJURY, MUNICIPAL LAW, LANDLORD-TENANT.

LANDLORD OWED NO STATUTORY DUTY TO ABATE LEAD IN AN APARTMENT WHERE THE CHILD SPENT 50 HOURS PER WEEK IN THE CARE OF HER GRANDMOTHER, LAW REQUIRING LEAD PAINT ABATEMENT APPLIES ONLY TO APARTMENTS WHERE A CHILD RESIDES.

The Court of Appeals, in a full-fledged opinion by Judge Pigott, over a dissenting opinion by Judge Fahey, determined a New York City Local Law, which imposed a duty on the landlord to abate lead paint in an apartment where a child under the age of six "resides," did not apply to an apartment where a child was cared for 50 hours per week. Plaintiff's child was cared for during the day by grandmother in grandmother's apartment. The child developed an elevated lead level. In order to sue the landlord, the landlord must have owed a statutory duty to the child to abate the lead in grandmother's apartment. The majority held that the term "reside" in the Local Law did not encompass the child's presence in the apartment 50 hours a week. Therefore, the landlord owed no duty to the child: "Dictionaries from the relevant time period define 'reside' as 'to dwell permanently or continuously: occupy a place as one's legal domicile' (Merriam Webster's New Collegiate Dictionary 1003 [9th ed 1986]) and 'to have a settled abode for a time; have one's residence or domicile' (Webster's Third New International Dictionary 1931 [1981]). According to Webster's Third, 'reside' is the 'preferred term for expressing the idea that a person keeps or returns to a particular dwelling place as his fixed, settled, or legal abode' ... . Black's Law Dictionary notes that "residence" "is made up of fact and intention, the fact of abode and the intention of remaining, and is a combination of acts and intention. Residence implies something more than mere physical presence and something less than domicile (Black's Law Dictionary 1176 [5th ed 1979])." ***Yaniveth R. v. LTD Realty Co.*, 2016 N.Y. Slip Op. 02550, CtApp 4-5-16**

FIRST DEPARTMENT

CRIMINAL LAW.

JUDICIAL DIVERSION PROGRAM AVAILABLE TO DEFENDANTS CHARGED WITH BOTH QUALIFYING OFFENSES AND OFFENSES WHICH ARE NEITHER QUALIFYING NOR DISQUALIFYING.

The First Department, in a full-fledged opinion by Justice Sweeny, determined the defendant was eligible for judicial diversion where defendant was charged with both statutorily qualifying offenses and other offenses which were nowhere defined as qualifying or disqualifying offenses: "The Legislature amended the DLRA [Drug Law Reform Act] in 2009, enacting CPL 216.00 and 216.05 to create a mechanism for judicial diversion. Under this program, eligible felony offenders whose drug or alcohol abuse contributed to their criminal conduct, may, at the discretion of the court, be afforded the opportunity to avoid a felony conviction and a prison sentence by successfully participating in a judicially supervised substance abuse program. Unlike prior drug offense programs, judicial diversion does not require the prosecutor's consent ... . * * * . . . [The statute] sets forth a list of disqualifying offenses/conditions that prevent a defendant from qualifying for judicial diversion, although as noted, even some of those offenses may not prevent disqualification with the People's consent. In applying the principle 'espressio unius est exclusio alterius,' 'an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded' ... . The inescapable conclusion is that the Legislature's decision not to list certain offenses as disqualifying means their mere inclusion in an indictment will not prevent an otherwise eligible defendant from making an application for judicial diversion." ***People v. Smith*, 2016 N.Y. Slip Op. 02596, 1st Dept 4-5-16**

CRIMINAL LAW, APPEALS.

CHALLENGE TO THE JURY INSTRUCTION ON CAUSATION OF DEATH IS SUBJECT TO THE PRESERVATION REQUIREMENT; DEFENDANT'S FAILURE TO OBJECT PRECLUDES REVIEW; STRONG DISSENT ARGUED THE JURY INSTRUCTION IS REVIEWABLE BECAUSE IT RELIEVED THE PEOPLE OF THEIR BURDEN OF PROOF.

The First Department, over an extensive dissent, determined defendant's appellate challenge to the jury instruction on causation of death was subject to the preservation requirement. The victim was assaulted by the defendant and died later at the hospital. The defense presented an expert who testified the victim was improving until he fell in the hospital. The cause of death, according to the defense expert, was the hospital's negligence in treating the victim after the fall. The defendant did not object to the causation jury instruction. The dissent would have reversed, either finding the preservation requirement did not apply because the jury instruction relieved the People of their burden of proof, or in the interest of justice: "Defendant failed to raise any challenge to the court's charge regarding causation of death at a time when the court could have easily rephrased the instruction. The issue is therefore unpreserved for appellate review (*see* CPL 470.05[2]). The claimed error does not fall within the 'very narrow exception' discussed in *People v Thomas* (50 NY2d 467, 471 [1980]), as the dissent suggests. That narrow exception is only applicable 'when the procedure followed at trial was at basic variance with the mandate of law prescribed by Constitution or statute' (*id*.). Here, as was the case in *Thomas*, preservation was necessary because defendant essentially claims that 'a portion of the charge could, in the particular case, be interpreted as having a contrary effect' to the burden of proof charge that was correctly stated by the court (*id*. at 472). Nor is the exercise of interest of justice jurisdiction warranted; defendant was not deprived of a fair trial (*see* CPL 470.15[6] [a]). As an alternative holding,

we consider the charge, viewed as a whole, to have properly conveyed the law regarding whether the assault was a sufficiently direct cause of the victim's death ...". ***People v. Castillo*, 2016 N.Y. Slip Op. 02709, 1st Dept 4-7-16**

LANDLORD-TENANT, MUNICIPAL LAW.

NEW YORK CITY HOUSING AUTHORITY ACTED ARBITRARILY AND CAPRICIOUSLY WHEN IT DENIED PETITIONER SUCCESSION RIGHTS TO HIS MOTHER'S APARTMENT.

The First Department, over a two-justice dissent, determined the New York City Housing Authority (NYCHA) acted arbitrarily and capriciously when it denied petitioner succession rights to his mother's apartment. Petitioner had moved in with his mother to care for her when she became unable to care for herself. The NYCHA knew petitioner had moved in to care for his mother but repeatedly denied petitioner's applications to become an occupant of his mother's apartment on "overcrowding" grounds: "Respondent's determination denying petitioner succession rights to his mother's apartment was arbitrary and capricious. Petitioner's mother submitted multiple applications to add petitioner to the lease as required by 24 CFR 966.4(a)(1)(v). The first application was denied on the ground that adding petitioner to the household 'will create overcrowding'; the second, not on that basis but allegedly because petitioner signed the application on his disabled mother's behalf. NYCHA never considered evidence of petitioner's mother's disability in denying the applications. The ground proffered for the denial, i.e., that adding petitioner to the household would result in overcrowding, creates an unacceptable Catch-22 — a request to add an additional family member will almost always result in overcrowding unless NYCHA fails simultaneously to consider transferring the applicant to a larger apartment. NYCHA guidelines provide that an 'overcrowded' apartment should not result in a summary denial of the RFM's (remaining family member's) claims; rather, the housing manager should inform the new tenant that he may submit a request to transfer to a new apartment." ***Matter of Aponte v. Olatoye*, 2016 N.Y. Slip Op. 02708, 1st Dept 4-7-16**

PERSONAL INJURY.

QUESTION OF FACT WHETHER EMERGENCY DEFENSE APPLIED TO A REAR-END COLLISION.

The First Department, in a full-fledged opinion by Justice Renwick, over a two-justice dissenting opinion, determined defendant had raised a question of fact whether the emergency defense applied in a rear-end collision. The defendant, in an affidavit in opposition to plaintiff's motion for summary judgment, alleged an unidentified car suddenly turned into his path causing him to swerve and ultimately strike the back of plaintiff's car. The dissent argued the accident could only have occurred because of defendant's negligence: "We find that plaintiffs have met their burden of establishing a prima facie showing of their entitlement to partial summary judgment on liability. A rear-end collision with a stopped vehicle creates a prima facie showing of negligence on the part of the rear driver ... . Similarly, a violation of Vehicle and Traffic Law § 1129(a), which obligates drivers to maintain safe distances between their cars and cars in front of them, and be aware of traffic conditions, including vehicle stoppages, is prima facie evidence of negligence ... . Defendants opposed, arguing that summary judgment was not warranted, because they had a valid emergency doctrine defense, which would preclude a summary finding of liability against them. The emergency doctrine recognizes that 'when an actor is faced with a sudden and unexpected circumstance which leaves little or no time for thought, deliberation or consideration, or causes the actor to be reasonably so disturbed that the actor must make a speedy decision without weighing alternative courses of conduct, the actor may not be negligent if the actions taken are reasonable and prudent in the emergency context,' provided the actor had not created the emergency ...". ***Maisonet v. Roman*, 2016 N.Y. Slip Op. 02725, 1st Dept 4-7-16**

SECOND DEPARTMENT

ATTORNEYS.

DEFENDANTS WAIVED ANY OBJECTION TO PLAINTIFF'S ATTORNEY BY PARTICIPATING IN THE LITIGATION FOR MORE THAN TWO YEARS AND EIGHT MONTHS WITH KNOWLEDGE OF THE ALLEGED CONFLICT OF INTEREST.

The Second Department determined the Brach defendants' motion to disqualify counsel for the plaintiff limited liability company (Goldberg) was properly denied. Plaintiff sued defendant Brach, a member of the company, alleging Brach violated his duties to the company. After more than two years and eight months of litigation, the Brach defendants moved to disqualify Goldberg, alleging a conflict of interest. The Brach defendants were aware of the alleged conflict from the beginning. Therefore the Brach defendants had waived any objection to Goldberg's representation. The Second Department explained the relevant law: " 'Where a party seeks to disqualify counsel of an adversary in the context of ongoing litigation, courts consider when the challenged interests became materially adverse to determine if the party could have moved at an earlier time' ... . If the party moving for disqualification knew or should have known of the facts underlying the alleged conflict of interest for a prolonged period before bringing the motion, that party may be found to have waived any objection to the other party's representation ... . Further, where a motion to disqualify is brought in the middle of litigation where the

moving party was aware of the alleged conflict of interest well before bringing the motion, it can be inferred that the motion was made to secure a tactical advantage ...". ***Ike & Sam's Group, LLC v. Brach*, 2016 N.Y. Slip Op. 02620, 2nd Dept 4-6-16**

CIVIL PROCEDURE, CONTRACT LAW, LIEN LAW.

UNLICENSED CONTRACTOR CAN NOT RECOVER UNDER HOME IMPROVEMENT CONTRACT OR IN QUANTUM MERUIT.

The Second Department affirmed the dismissal of plaintiff contractor's complaint seeking quantum meruit and recovery under the lien law because the contractor did not allege it was duly licensed in Nassau County when the home improvement services were rendered: " 'An unlicensed contractor may neither enforce a home improvement contract against an owner nor seek recovery in quantum meruit' ... . 'Pursuant to CPLR 3015(e), a complaint that seeks to recover damages for breach of a home improvement contract or to recover in quantum meruit for home improvement services is subject to dismissal under CPLR 3211(a)(7) if it does not allege compliance with the licensing requirement' ... . Here, the complaint did not allege that the plaintiff was duly licensed in Nassau County at the time of the services rendered (*see* Nassau County Administrative Code § 21-11.2). Moreover . . . the plaintiff conceded that it did not possess the necessary license. Therefore, the plaintiff was not entitled to enforce its contract against the defendant or to recover in quantum meruit ...". ***Holistic Homes, LLC v. Greenfield*, 2016 N.Y. Slip Op. 02619, 2nd Dept 4-6-16**

CONTRACT LAW, CIVIL PROCEDURE, LIEN LAW, EVIDENCE.

PLAINTIFF-CONTRACTOR'S FAILURE TO PROVE THE VALUE OF THE WORK PRECLUDED RECOVERY UNDER THE LIEN LAW AND UNDER A QUANTUM MERUIT THEORY; CRITERIA FOR AMENDMENT OF A COMPLAINT TO CONFORM TO TRIAL PROOF DESCRIBED.

In an action to foreclose a mechanic's lien, the Second Department determined Supreme Court properly allowed amendment of the pleadings to conform with the proof, which was consistent with an action for quantum meruit. Plaintiff contractor was unable to show the value of the work performed, so plaintiff's Lien Law and quantum meruit actions failed. Similarly, the defendants failed to prove they ended up paying more than the original agreed price for the work. So defendants' counterclaims for breach of contract and damages failed. With respect to the flaws in plaintiff's proof, the court wrote: "[P]laintiff failed to offer bills, invoices, receipts, time sheets, checks, or any other evidence which would establish the cost of materials, work done by subcontractors, or the number of hours he worked on the job and proffered no explanation for his failure to present this evidence. He likewise failed to provide any detailed description of the work performed, the cost of any portion of the work, or the hourly rate at which he valued his labor. Indeed, at trial, the plaintiff admitted that the sum asserted in his lien was only an estimate. ... . * * * Here, although the plaintiff presented evidence satisfying . . . three elements [of quantum meruit], this cause of action must fail for the same reason that the cause of action to foreclose his mechanic's lien must fail; namely, his failure to present any evidence of the value of the materials supplied or services rendered." ***DiSario v. Rynston*, 2016 N.Y. Slip Op. 02611, 2nd Dept 4-6-16**

CORPORATION LAW, CIVIL PROCEDURE, DEBTOR-CREDITOR.

CORPORATE VEIL PIERCED TO ENFORCE JUDGMENTS.

The Second Department determined petitioners were properly granted summary judgment piercing the corporate (Diontech) veil to enforce judgments: "Equity will intervene to pierce the corporate veil and permit the imposition of individual liability on owners for the obligations of their corporations in order to avoid fraud or injustice ... . A party seeking to pierce the corporate veil must establish that (1) the owners exercised complete domination of the corporation with respect to the transaction at issue, and (2) such domination was used to commit a fraud or wrong against the party seeking to pierce the corporate veil which resulted in the injury to that party ... . The decision whether to pierce the corporate veil in a given instance will depend on the circumstances of the case ... . Here, the petitioners demonstrated their prima facie entitlement to judgment as a matter of law on so much of the petition as sought to pierce Diontech's corporate veil by submitting evidence showing, inter alia, that the appellants dominated Diontech, that Diontech did not adhere to any corporate formalities such as holding regular meetings and maintaining corporate records and minutes, that the appellants used corporate funds for personal purposes, and that the appellants stripped Diontech of assets as they wound down the business, leaving it without sufficient funds to pay its creditors, including the petitioners...". ***Matter of Agai v. Diontech Consulting, Inc.*, 2016 N.Y. Slip Op. 02646, 2nd Dept 4-6-16**

CRIMINAL LAW, EVIDENCE.

DETECTIVE SHOULD NOT HAVE BEEN ALLOWED TO TESTIFY AS AN EXPERT ABOUT THE ROLES PLAYED BY THE PEOPLE OVERHEARD IN RECORDED PHONE CALLS IN THIS DRUG CONSPIRACY CASE; ERROR DEEMED HARMLESS, HOWEVER.

Although deemed harmless error in this drug conspiracy prosecution, the Second Department determined a detective should not have been allowed to testify (as an expert) about the alleged roles played by people overheard in recorded phone

calls: "It was proper to permit the detective to describe certain practices and define certain terms that have a 'fixed meaning . . . within the narcotics world' ... . However, it was error to permit the prosecutor to elicit testimony as to the roles played by the individuals overheard in the phone calls, and the relationships among them, for example, that several were 'runners or workers' for the defendant or codefendant, and the meanings of certain 'case-specific' terms that he had discovered in the course of the investigation. As the Court of Appeals cautioned in *People v Inoa*, where, as here, 'the trial court qualifie[s] a government agent, intimately involved in the investigation of the case and development of the prosecution, to testify as an expert,' there is a danger that the agent will end up 'testifying beyond any cognizable field of expertise as an apparently omniscient expositor of the facts of the case' (*id*. at 473), thereby usurping the role of the jury. Also improper was the testimony, elicited by the prosecutor from members of the surveillance teams who observed the defendant and his associates at the locations described in the phone calls, that what they witnessed was consistent with a drug transaction ... . Nevertheless, we find that the improperly admitted testimony was harmless, as the proof of the defendant's commission of the charged crimes was overwhelming, and there is 'no significant probability that, but for the error, the verdict . . . would have been less adverse' ...". ***People v. Melendez*, 2016 N.Y. Slip Op. 02667, 2nd Dept 4-6-16**

DEBTOR-CREDITOR, BANKRUPTCY, CIVIL PROCEDURE.

ACKNOWLEDGING DEBT IN BANKRUPTCY PLAN RENEWED THE STATUTE OF LIMITATIONS WHICH STARTED TO RUN UPON GRANT OF DISCHARGE IN BANKRUPTCY.

The Second Department determined the statute of limitations re: a default on a note secured by a mortgage was renewed when defendant (Raudkivi) acknowledged the debt in his bankruptcy plan. The statute therefore began to run when defendant was granted a discharge in bankruptcy, which occurred less than six years before suit was brought: "Raudkivi's Chapter 13 bankruptcy plan, in which he acknowledged the mortgage debt and promised to repay it, renewed the limitations period (*see* General Obligations Law § 17-105[1]...). The automatic bankruptcy stay, which was in effect when Raudkivi executed his Chapter 13 bankruptcy plan, tolled the renewed limitations period (*see* CPLR 204[a]...), so the renewed limitations period did not begin to run until Raudkivi was granted his discharge in bankruptcy in October of 2006 (*see* 11 USC § 362[c][2][C]). Since this action was commenced less than six years later, in July of 2012, this action is not time-barred." ***PSP-NC, LLC v. Raudkivi*, 2016 N.Y. Slip Op. 02632, 2nd Dept 4-6-16**

DEFAMATION.

EMAILS CONSTITUTED NONACTIONABLE OPINION AND POSTED FLYERS PROTECTED BY COMMON INTEREST PRIVILEGE.

The Second Department, reversing Supreme Court, determined the defendant residential cooperative members and board were entitled to summary judgment in this defamation action. Emails concerning plaintiff's behavior and performance on the board were nonactionable expressions of opinion. A flyer indicating which shareholders were alleged to be in arrears was protected by the "common interest" qualified privilege: " 'Expressions of an opinion, false or not, libelous or not, are constitutionally protected and may not be the subject of private damage actions' ... . 'The issue of distinguishing between actionable fact and non-actionable opinion is a question of law for the court' ... . Here, the statements contained in the two emails alleged to be defamatory amounted to subjective characterizations of the plaintiff's behavior and an evaluation of her performance as a member of the Board, and thus constituted non-actionable expressions of opinion ... . Accordingly, the email statements cannot serve as a basis for the imposition of liability. The defendants further demonstrated that the challenged statements set forth in the 'Shareholders In Arrears' flyers posted in the building lobby, which listed the apartment numbers of shareholders who allegedly owed arrears and the amount of those arrears, were protected by the qualified common-interest privilege ... . Although a qualified privilege may be lost by proof that the defendant acted out of malice . . . , in opposition to the defendants' motion, the plaintiff failed to raise a triable issue of fact as to whether the challenged statements in the flyers were motivated solely by malice ...". ***Galanova v. Safir*, 2016 N.Y. Slip Op. 02617, 2nd Dept 4-6-16**

FAMILY LAW.

SAME-SEX SPOUSE OF BIOLOGICAL MOTHER HAD STANDING TO SEEK VISITATION WITH CHILDREN CONCEIVED BY ARTIFICIAL INSEMINATION; CALIFORNIA MARRIAGE RECOGNIZED UNDER PRINCIPLES OF COMITY.

The Second Department, in a full-fledged opinion by Justice Roman, affirming Family Court, determined one of the parties to a California same-sex marriage, Kelly S., had standing to seek visitation with the couple's children, now in New York with the birth mother, Farah M., notwithstanding the parties' failure to comply with California's artificial insemination law. The two children named in the visitation proceedings were conceived by artificial insemination performed in the home by the mother, Farah M. All three of the couple's children were fathered by the same sperm donor, a friend who maintained a relationship with the children. The Second Department held that Kelly S., who moved to Arizona after the couple separated, under principles of comity, had standing to bring an action for visitation in New York: "Here, the parties first entered into a registered domestic partnership in California in 2004, prior to the birth of Z.S., and thus, Kelly S. was the presumed parent of Z.S. by virtue of the parties' status as registered domestic partners (*see* Cal Fam Code §§ 297.5[d]; 7611[a]). More-

over, Kelly S. gave her consent to be named as a parent on the birth certificate of Z.S., and the parties were later married in California in August 2008, making Kelly S. the presumed parent of Z.S. pursuant to California Family Code § 7611(c)(1). After the parties' marriage, the child E.S. was born. Thus, Kelly S. is presumed to be the natural parent of E.S. by virtue of the parties' marriage pursuant to California Family Code § 7611(a). Furthermore, the Family Court, as a matter of comity, properly recognized Kelly S. as the parent of the subject children under New York law ...". ***Matter of S. v. Farah M.*, 2016 N.Y. Slip Op. 02676, 2nd Dept 4-6-16**

FORECLOSURE, EVIDENCE, CIVIL PROCEDURE.

THE FLAWS IN PLAINTIFF'S PROOF OF STANDING TO BRING THE FORECLOSURE ACTION DID NOT ENTITLE DEFENDANT TO SUMMARY JUDGMENT ON THE CROSS MOTION; SUMMARY JUDGMENT CANNOT BE GRANTED TO A MOVING PARTY BASED UPON FLAWS IN THE OPPOSING PAPERS.

The Second Department, modifying Supreme Court's order, determined defendant was not entitled to summary judgment in a foreclosure proceeding. Defendant alleged plaintiff, Aurora Loan Services, did not have standing to bring the action (i.e., did not have possession of the note at the time the action was commenced). Aurora Loan Services was unable to demonstrate standing because the evidence submitted did not meet the requirements of the business records exception to the hearsay rule. Aurora's summary judgment motion was therefore properly denied. However, the flaws in Aurora's proof of standing did not entitle defendant to summary judgment on defendant's cross motion. In the summary judgment context, the court first looks only at the moving party's papers to determine whether the moving party has made a prima facie showing justifying summary judgment. Here the defendant's papers did not demonstrate Aurora lacked standing. Therefore the cross motion should have been denied, notwithstanding the flaws in the plaintiff's opposing papers. "Supreme Court erred in granting the defendant's cross motion for summary judgment dismissing the complaint insofar as asserted against him for lack of standing and to cancel the notice of pendency filed against the subject property. '[T]he burden is on the moving defendant to establish, prima facie, the plaintiff's lack of standing, rather than on the plaintiff to affirmatively establish its standing in order for the motion to be denied. To defeat a defendant's motion, the plaintiff has no burden of establishing its standing as a matter of law' ... . Here, the defendant, as the moving party, failed to make a prima facie showing that the plaintiff lacked standing ...". ***Aurora Loan Servs., LLC v. Mercius*, 2016 N.Y. Slip Op. 02599, 2nd Dept 4-6-16**

INSURANCE LAW.

FAILURE TO DISCLAIM BASED UPON AN EXCLUSION DOES NOT GIVE RISE TO COVERAGE WHICH DOES NOT EXIST.

The Second Department noted that the loss at issue, the collapse of a retaining wall caused by run-off water, was the subject of a policy exclusion, an issue about which there was no dispute. Plaintiff argued the insurer's disclaimer letter was ineffective because it did not identify the precise ground upon which the disclaimer was ultimately based. The Second Department, applying common-law waiver and estoppel principles, rejected the argument because the failure to disclaim based upon an exclusion will not give rise to coverage which does not exist: "[T]he defendants' failure to specifically identify the flood and surface water exclusions in its disclaimer letter must be considered under common-law waiver and/or estoppel principles ... . Waiver, which is a voluntary and intentional relinquishment of a known right, does not apply here because 'the failure to disclaim based on an exclusion will not give rise to coverage that does not exist' ... . Under the principles of estoppel, an insurer, though in fact not obligated to provide coverage, may be precluded from denying coverage upon proof that the insurer 'by its conduct, otherwise lulled [the insured] into sleeping on its rights under the insurance contract' ... . Estoppel requires proof that the insured has suffered prejudice by virtue of the insurer's conduct ... . Because the plaintiff failed to make the requisite showing of prejudice, there was no basis to estop the defendants from relying on policy exclusions not detailed in their letter disclaiming coverage." ***Provencal, LLC v. Tower Ins. Co. of N.Y.*, 2016 N.Y. Slip Op. 02644, 2nd Dept 4-6-16**

PERSONAL INJURY, MUNICIPAL LAW.

BECAUSE THE MUNICIPALITY, PROPERTY OWNER, LISTING BROKER, LISTING AGENT AND SNOW REMOVAL CONTRACTOR HAD NOT TAKEN ANY ACTION TO REMOVE SNOW FROM THE SIDEWALK AT THE TIME PLAINTIFF FELL, NO ONE OWED A DUTY TO THE PLAINTIFF.

The Second Department, reversing Supreme Court, determined the city, the property owner, the listing broker, the listing agent and the snow removal contractor owed no duty of care to plaintiff who slipped and fell on a sidewalk the day after snowfall and before anyone shoveled or treated the sidewalk. The city was not notified of the condition and did not create the condition. The property owner was not under a statutory duty to remove the snow. The listing broker, the listing agent and the snow removal contractor did not create the dangerous condition: "The City established its prima facie entitlement to judgment as a matter of law by demonstrating that it did not receive prior written notice of the snow and ice condition which caused the plaintiff's accident, as required by section 24-11 of the Charter of the City of Yonkers ... . * * * … [A]lthough section 103-8 of the City Charter places the duty to keep sidewalks clear from snow and ice on the abutting landowner, the Charter does not expressly make the landowner liable for failure to perform that duty ... . * * * Any duty [the listing broker,

agent and snow removal contractor] had with respect to the plaintiff arose exclusively out of the contracts each of them had with [the property owner] ... . [The property owner] owed no statutory or common-law duty to the plaintiff because there was no statute which imposed liability upon it for the negligent failure to remove snow and ice from a public sidewalk, and neither [the property owner], nor anyone else on its behalf, undertook any snow removal efforts that made the conditions on the public sidewalk more hazardous." ***Rodriguez v. County of Westchester*, 2016 N.Y. Slip Op. 02635, 2nd Dept 4-6-16**

PISTOL PERMITS, MENTAL HYGIENE LAW.

DETERIORATING MENTAL CONDITION AND DEPLORABLE LIVING CONDITIONS JUSTIFIED REVOCATION OF PISTOL PERMIT.

The Second Department determined County Court properly revoked petitioner's pistol permit based upon evidence of deplorable living conditions, deteriorating mental health, and petitioner's inability to care for himself: " 'The State has a substantial and legitimate interest and indeed, a grave responsibility, in insuring the safety of the general public from individuals who, by their conduct, have shown themselves to be lacking the essential temperament or character which should be present in one entrusted with a dangerous instrument' ... . Penal Law § 400.00(1), which sets forth the eligibility requirements for obtaining a pistol license, requires, inter alia, that the applicant be of good moral character with no prior convictions of a felony or serious offense, and a person 'concerning whom no good cause exists for the denial of the license' (Penal Law § 400.00[1][n]...). 'Where a licensee challenges a determination, made after a hearing, to revoke his or her pistol license,' or to deny reinstatement of a permit previously revoked, we review only whether a rational basis exists for the licensing authority's determination, or whether the determination is arbitrary or capricious' ... . Here, at the hearing, testimony was elicited regarding the petitioner's deplorable living conditions, the deteriorating state of his mental health, and his inability to properly care for himself, his environment, or his possessions. Contrary to the petitioner's contention, this evidence, which was credited by the respondent, was sufficient to provide a rational basis for the determination revoking his pistol license." ***Matter of Warmouth v. Zuckerman*, 2016 N.Y. Slip Op. 02659, 2nd Dept 4-6-16**

REAL PROPERTY, MUNICIPAL LAW, HIGHWAY LAW.

HIGHWAY LAW ALLOWING AN UNUSED PUBLIC EASEMENT TO BE DECLARED ABANDONED DOES NOT APPLY WHERE THE MUNICIPALITY OWNS A FEE INTEREST IN THE ROADBED.

The Second Department determined plaintiff's action to have property used by plaintiff as a parking lot declared an abandoned highway was properly dismissed for failure to state a cause of action. The roadbed had been paved and used as a parking lot by plaintiff. Plaintiff alleged the roadway had not been used for at least 15 years. However, Highway Law § 205(1), which allows a public easement to be declared abandoned, does not apply where the municipality owns a fee interest in the road, which was the case here: "In 1942, 'all right, title and interest' in Bishop Road was dedicated to the Town 'for highway purposes.' ... The plaintiff alleged that when it acquired the property abutting Bishop Road in 1998, Bishop Road was 'an unpaved dirt pathway' that led to 'nowhere,' and that it paved the length of Bishop Road, painted stripes for parking stalls to provide spaces for its customers, and erected a six-foot fence, enclosing the full width of the roadbed. The plaintiff asserted that, with the exception of vehicles that cross over a small portion of Bishop Road to enter a separate lot, there had been no regular vehicular or pedestrian traffic along Bishop Road for at least 15 years. * * * . . . Highway Law § 205(1) 'sets forth a six-year limitation on the life of an unused public easement' ... . It does not apply where a town has acquired a fee to the land in question ... . Here, the plaintiff does not dispute that the Town owns a fee interest in Bishop Road. Accordingly, Bishop Road cannot be deemed abandoned under Highway Law § 205, even if it has not 'been traveled or used as a highway for six years' (Highway Law § 205[1]...)." ***No-Dent Props., Inc. v. Commissioner of Town of Hempstead Dept. of Hwys.*, 2016 N.Y. Slip Op. 02625, 2nd Dept 4-6-16**

THIRD DEPARTMENT

ATTORNEYS.

DISQUALIFICATION OF ATTORNEY APPROPRIATE TO AVOID THE APPEARANCE OF IMPROPRIETY.

In a dispute about easements used by property owners to gain access to their properties, the Third Department determined disqualification of an attorney based upon avoiding the appearance of impropriety was appropriate, even though the mandatory conflict-of-interest disqualification criteria may not have been met: "[E]ven in instances where . . . disqualification is not mandatory, disqualification nonetheless may be warranted depending upon the particular facts and circumstances of a given case ... . In this regard, '[i]t is well settled that an attorney must avoid not only the fact, but even the appearance, of representing conflicting interests' ... . To that end, '[a]n attorney may not place himself [or herself] in a position where a conflicting interest may, even inadvertently, affect, or give the appearance of affecting, the obligations of the professional relationship' ... . 'The disqualification of an attorney is a matter that rests within the sound discretion of the court' . . . , and the case law makes clear that '[a]ny doubts as to the existence of a conflict of interest must be resolved in favor of disqualification so as to avoid even the appearance of impropriety'...". ***McCutchen v. 3 Princesses & AP Trust Dated Feb. 3, 2004*, 2016 N.Y. Slip Op. 02703, 3rd Dept 4-7-16**

CRIMINAL LAW, STATUTES.

EXCLUSIONARY LANGUAGE IN HARASSMENT STATUTE NEED NOT BE PLED AND NEGATED IN THE CHARGING DOCUMENT; THE EXCLUSIONS ARE PROVISOS WHICH CAN BE RAISED AS DEFENSES.

The Third Department, in the context of a family offense, determined the portions of the second-degree harassment statute which state the subdivision does not apply "to activities regulated by the national labor relations act, as amended, the railway labor act, as amended, or the federal employment labor management act, as amended" (Penal Law § 240.26 . . .)" were "provisos." The respondent argued that the labor and railroad provisions in the statute were "exceptions" which must be affirmatively pled and negated in the charging document. The Third Department found the provisions were "provisos" which can be asserted as defenses, but which do not have to be pled: " 'The general rule regarding statutory crimes is that 'exceptions must be negatived by the prosecution and provisos utilized as a matter of defense' ... . In attempting to distinguish between exceptions and provisos, courts will look to whether the defining statute 'contains as part of its enacting clause an exception to the effect that under certain circumstances the offense is not to be considered as having been committed' . . . , in which case a true exception generally will be found, or whether the exception arises either by way of a statutory amendment or reference to a statute outside of the Penal Law, in which case the exception generally will be regarded as a proviso ... . As originally enacted, Penal Law § 240.26 did not contain the exclusionary language at issue; such language was added when the statute was amended in 1994 (*see* L 1994, ch 109, § 1) to 'clarif[y] that activities protected by certain federal labor statutes are not included within the definition of harassment' (Governor's Approval Mem, Bill Jacket, L 1994, ch 109, at 7). Further, as a review of the statute itself makes clear, application of the exclusionary language requires reference to numerous federal statutes outside of the Penal Law. Under these circumstances, the language excluding certain labor activities or disputes from the definition of harassment in the second degree 'is more accurately construed as a proviso, which may be raised as a defense [by the charged party], rather than an exception, which must be [affirmatively] pleaded' and negated by the charging party ...". ***Matter of Rogers v. Phillips*, 2016 N.Y. Slip Op. 02687, 3rd Dept 4-7-16**

MEDICAID, TRUSTS AND ESTATES, DEBTOR-CREDITOR.

MORTGAGE HAD PRIORITY OVER COUNTY'S CLAIM FOR REIMBURSEMENT OF MEDICAID BENEFITS.

The Third Department determined a mortgage held by Wells Fargo had priority to a claim by the county seeking reimbursement of Medicaid benefits received by the decedent: "Petitioner [Saratoga County Department of Social Services] asserts priority pursuant to Social Services Law § 104 (1), which provides, in relevant part, that '[i]n all claims of the public welfare official made under [such] section[,] the public welfare official shall be deemed a *preferred* creditor' (emphasis added). 'Preferred creditor' has been construed to give a social services department priority over a 'general creditor, that is, a creditor that, upon giving credit, takes no rights against specific property of a debtor' ... . Here, Wells Fargo holds a mortgage lien against the Rotterdam property that was recorded prior to the May 2014 decree of Surrogate's Court validating petitioner's claim. Although Medicaid assistance was provided to decedent before the mortgage was given, petitioner did not have a prior lien against the property (*see* Social Services Law § 369 [2] [a]). As such, we conclude that Wells Fargo's prior specific lien gives it priority over petitioner's claim with respect to the . . . property ...". ***Matter of Shambo*, 2016 N.Y. Slip Op. 02699, 3rd Dept 4-7-16**

To view archived issues of CasePrepPlus,
visit www.nysba.org/caseprepplus.