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COURT OF APPEALS

CIVIL PROCEDURE, PRIVILEGE, ATTORNEYS.

APPELLATE DIVISION WRONGLY EXTENDED COMMON INTEREST ATTORNEY-CLIENT PRIVILEGE TO MERGER NEGOTIATIONS WHEN THERE WAS NO PENDING LITIGATION.

The Court of Appeals, in a full-fledged opinion by Judge Pigott, over an extensive two-judge dissenting opinion, reversing the Appellate Division, determined the common interest attorney-client privilege should only apply when there is litigation or pending litigation involving the parties with a common interest. The First Department had extended the privilege to merger negotiations between Countrywide and Bank of America at a time when the failure of mortgage-backed securities was in the air but there was no litigation or pending litigation: "Disclosure is privileged between codefendants, coplaintiffs or persons who reasonably anticipate that they will become colitigants, because such disclosures are deemed necessary to mount a common claim or defense, at a time when parties are most likely to expect discovery requests and their legal interests are sufficiently aligned that 'the counsel of each [i]s in effect the counsel of all' ... . When two or more parties are engaged in or reasonably anticipate litigation in which they share a common legal interest, the threat of mandatory disclosure may chill the parties' exchange of privileged information and therefore thwart any desire to coordinate legal strategy. In that situation, the common interest doctrine promotes candor that may otherwise have been inhibited. The same cannot be said of clients who share a common legal interest in a commercial transaction or other common problem but do not reasonably anticipate litigation." ***Ambac Assur. Corp. v. Countrywide Home Loans, Inc.*, 2016 N.Y. Slip Op. 04439, CtApp 6-9-16**

CRIMINAL LAW, APPEALS.

FAILURE TO RESPOND TO JURY NOTES AFTER COUNSEL HAD BEEN MADE AWARE OF THE CONTENTS OF THE NOTES AND THE JUDGE'S PROPOSED RESPONSES WAS NOT A MODE OF PROCEEDINGS ERROR; PRESERVATION REQUIRED.

The Court of Appeals, reversing the Appellate Division, in a full-fledged opinion by Judge Fahey, over a dissenting opinion, determined the trial judge's acceptance of the verdict without answering three jury notes was not a mode of proceedings error. Because there was no objection to the failure to answer the jury notes, the error was not preserved. The notes had been marked as court exhibits, had been read verbatim to counsel and counsel were aware of the court's proposed responses. The note indicating a verdict had been reached was sent out before the court was able to answer: "Criminal Procedure Law § 310.30 imposes two responsibilities on trial courts upon receipt of a substantive note from a deliberating jury: the court must provide counsel with meaningful notice of the content of the note, and the court must provide a meaningful response to the jury ... . A trial court's failure to fulfill its first responsibility — meaningful notice to counsel — falls within the narrow class of mode of proceedings errors for which preservation is not required ... . On this appeal, we consider whether the preservation rule applies when counsel unquestionably had meaningful notice of the jury's substantive inquiries, but the trial court did not respond to those inquiries before accepting the verdict. We hold that where counsel has meaningful notice of the content of a jury note and of the trial court's response, or lack thereof, to that note, the court's alleged violation of the meaningful response requirement does not constitute a mode of proceedings error, and counsel is required to preserve any claim of error for appellate review." ***People v. Mack*, 2016 N.Y. Slip Op. 04321, CtApp 6-7-16**

CRIMINAL LAW, APPEALS.

PRE-SENTENCE INCARCERATION, AS PART OF A PLEA AGREEMENT, DID NOT RENDER THE SUBSEQUENT SENTENCE ILLEGAL, THEREFORE OBJECTION TO SENTENCE WAS SUBJECT TO THE PRESERVATION REQUIREMENT; CRITERIA FOR *OUTLEY* HEARING EXPLAINED.

The Court of Appeals, over an extensive dissenting opinion, determined defendant failed to preserve an objection to his sentence because he did not move to withdraw his plea or otherwise object prior to the imposition of sentence. As part of a plea deal, defendant was required to complete six months in jail, followed by a period of time during which he was not arrested. Defendant completed the jail time but was subsequently arrested. Because of the arrest, the plea deal was not available and defendant was sentenced accordingly. The Court of Appeals held that the narrow exception to the preservation requirement for an illegal sentence did not apply to these facts. The jail-time was deemed to be a "pre-sentence" condition and could

not, therefore, be deemed an illegal sentence. The court further explained the criteria for an *Outley* hearing to determine the validity of an arrest which violates a condition for a plea deal: "Here, defendant's sentence was premised on a violation of an admittedly lawful presentence condition — he could not be arrested — and the issue of the propriety of the plea could certainly have been raised prior to sentencing. Thus, defendant's challenge to the presentencing incarceration, which was not part of the sentence, is subject to the preservation rule ... . * * * [At the *Outley* hearing] the judge heard testimony from the complainant and the arresting officer. Defendant also testified that the complainant had been the aggressor and had attacked him. The judge found that there was a legitimate basis for defendant's arrest, implicitly rejecting defendant's version of events, and that finding was adopted by the sentencing court. Thus, because defendant was given an opportunity to testify to his exculpatory explanation, and his testimony was evidently discredited by the court, the nature of the inquiry was sufficient under our *Outley* standard." ***People v. Reynolds*, 2016 N.Y. Slip Op. 04323, CtApp 6-7-16**

CRIMINAL LAW, APPEALS.

COURT'S FAILURE TO ORDER READBACK OF CROSS-EXAMINATION IN ADDITION TO DIRECT WAS NOT A MODE OF PROCEEDINGS ERROR; PRESERVATION REQUIRED.

The Court of Appeals, reversing the Appellate Division, determined (1) the trial court properly notified all parties of the contents of a jury note, and (2), the response to the jury note, in which only the direct testimony of a witness was read back, was not a mode of proceedings error. Therefore, the failure to read the cross-examination was an error which must be preserved for appellate review (no preservation here): "Counsel had meaningful notice of the precise content of the jury's note and was in the courtroom as the readback was conducted. Counsel was therefore aware that the court had failed to read the witness's cross-examination testimony. Counsel's knowledge of the precise content of the note and of the court's actual response, or lack thereof, removes the claimed error from the very narrow class of mode of proceedings errors for which preservation is not required ... . '[C]ounsel's silence at a time when any error by the court could have been obviated by timely objection renders the claim unpreserved and unreviewable here' ...". ***People v. Morris*, 2016 N.Y. Slip Op. 04327, CtApp 6-7-16**

CRIMINAL LAW, ATTORNEYS.

FAILURE TO MOVE TO SUPPRESS EVIDENCE AND FAILURE TO CHALLENGE A FRISK DID NOT CONSTITUTE INEFFECTIVE ASSISTANCE OF COUNSEL.

The Court of Appeals, in a full-fledged opinion by Judge Garcia, determined defense counsel's failure to make a motion to suppress, failure to contest a frisk of defendant's person, and brief statement at sentencing did not constitute ineffective assistance of counsel. The suppression motion would have had little chance of success, the failure to object to the frisk may have been part of a defense strategy and the non-frisk-related evidence was substantial, and the sentencing court was aware of the defendant's position through the pre-sentence report and defendant's statement at sentencing. With respect to the "defense strategy" and "no challenge to the frisk" issues, the court wrote: "Assuming a colorable challenge to the legality of the frisk incident to defendant's detention could be grounded in this record, as the Appellate Division noted, counsel may have made a legitimate strategic decision not to move to suppress ... . On this record alone, we have no reason to discount the possible strategic explanations for counsel's decision. Because defendant 'made no showing that counsel's failure to seek a suppression hearing was not premised on strategy,' his claim must be rejected ... . In addition, because the remaining evidence demonstrated that defendant was in a vehicle containing a number of recently-stolen items, a challenge to the frisk would have had little to no effect on the outcome." ***People v. Carver*, 2016 N.Y. Slip Op. 04322, CtApp 6-7-16**

CRIMINAL LAW, ATTORNEYS, EVIDENCE.

MOTION TO VACATE CONVICTION PROPERLY DENIED WITHOUT A HEARING; DEFENDANT DID NOT PRESENT SUFFICIENT EVIDENCE OF ACTUAL OR POTENTIAL CONFLICT OF INTEREST ON THE PART OF DEFENSE COUNSEL.

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, determined defendant's motion to set aside his conviction was properly denied without a hearing. Defendant's allegations of defense counsel's conflict of interest were deemed insufficient. Defendant alleged his lawyer represented both him and the District Attorney simultaneously: "Here, defendant's actual conflict claim consists of unsubstantiated and conclusory allegations of simultaneous representation. * * *. . . [T]he statute is plain that the initial failure by a defendant to carry his or her burden of coming forward with sworn allegations substantiating the essential facts in the 440 motion does not shift the burden to the People in their responsive pleadings. * * * To the extent defendant's allegations are sufficient to establish a potential conflict — based on the successive representation — his papers do not attempt to demonstrate that such a conflict operated on the defense." ***People v. Wright*, 2016 N.Y. Slip Op. 04440, CtApp 6-9-16**

CRIMINAL LAW, EVIDENCE.

EVIDENCE OF A SIMILAR UNCHARGED CRIME AGAINST THE SAME VICTIM PROPERLY ADMITTED.

The Court of Appeals determined the admission of evidence of an assault on the same victim (A.H.) a week before the charged assault was not error. The defendant acknowledged the evidence was relevant but argued the evidence should have been summarized because it was unduly prejudicial to allow the jury to hear the details: "We cannot say that both defects necessary for reversible error are present in defendant's case, namely, that the trial court abused its discretion by failing to limit A.H.'s testimony and that such error substantially prejudiced the defendant so as to foreclose a determination of harmlessness. ... A.H.'s testimony concerned the same parties, and served the nonpropensity purpose of directly explaining her relationship with the defendant and his motive. This is far from a case where 'the jury did not require a recital of such a prologue to understand fully what had taken place in the defendant's encounters with [the victim]' ... . In the same vein, testimony that the defendant previously attacked A.H. would not have led the jury to marginalize, relegate to the background, or ignore the grievous nature of the New York City assault, which was characterized by physical violence and several failed attempts at immolation. Under these circumstances, we perceive no error that requires a reversal of defendant's conviction." ***People v. Frankline*, 2016 N.Y. Slip Op. 04441, CtApp 6-9-16**

CRIMINAL LAW, EXECUTIVE LAW.

SPECIAL PROSECUTOR HAS AUTHORITY TO BRING CRIMINAL ACTIONS IN LOCAL COURTS PURSUANT TO THE PROTECTION OF PEOPLE WITH SPECIAL NEEDS ACT.

The Court of Appeals, over an extensive two-judge dissent, determined, under the Executive Law, a special prosecutor has the authority to bring a criminal case in local court concerning the abuse of vulnerable persons pursuant to the Protection of People with Special Needs Act. Defendant unsuccessfully argued the Executive Law limited the power of the special prosecutor to criminal prosecutions in County and Supreme Court: "There is no indication from the statute that the special prosecutor's powers are limited by section 552 (2) (c). That section merely sets forth the requirement that the special prosecutor consult with the district attorney of the pertinent county should the special prosecutor wish to appear in County Court or Supreme Court, or before the grand jury, for the purposes of managing or conducting before such court or grand jury a criminal action or proceeding involving the abuse or neglect of a vulnerable person. There is no indication that the statute governs proceedings in local courts at all." ***People v. Davidson*, 2016 N.Y. Slip Op. 04326, CtApp 6-7-16**

FAMILY LAW.

FAMILY COURT PROPERLY IMPOSED THREE CONSECUTIVE SIX-MONTH JAIL TERMS UPON FATHER WHO WILFULLY FAILED TO PAY CHILD SUPPORT.

The Court of Appeals, in a full-fledged opinion by Judge Garcia, determined Family Court had the power to order father to serve three consecutive six-month jail terms for willful failure to pay child support. Father never claimed an inability to pay: "The father in this case demonstrated the willful flaunting of support orders the Legislature sought to address in passing the Support Enforcement Act. Without making any attempt at an excuse for inability to pay, the father repeatedly failed to meet his court-ordered support obligations. His conduct resulted in a substantial amount owed in arrears and two suspended orders of commitment, one each in 2010 and 2012, for willfully violating Family Court support orders. Both suspended commitments were conditioned upon the father making timely child support payments. In 2013, Family Court found yet a third willful violation of a prior order, revoked the two suspended orders for the past violations, sentenced the father to a new six-month sentence, resulting in three consecutive six-month sentences. Once again, the father made no attempt to plead an inability to pay or seek modification of the support orders. In ordering the term of incarceration, Family Court determined that the father willfully failed to comply with his child support obligations on three separate violation petitions and found good cause existed to revoke the father's two suspended commitments." ***Matter of Columbia County Support Collection Unit v. Risley*, 2016 N.Y. Slip Op. 04325, CtApp 6-7-16**

MUNICIPAL LAW, MEDICAL MALPRACTICE.

MEDICAL RECORDS DOCUMENTING THE MEDICAL CARE DID NOT DEMONSTRATE THE HOSPITAL HAD TIMELY NOTICE OF THE NATURE OF THE MEDICAL MALPRACTICE CLAIM; MOTION FOR LEAVE TO FILE A LATE NOTICE OF CLAIM PROPERLY DENIED.

The Court of Appeals, in a full-fledged opinion by Judge Pigott, over a three-judge dissenting opinion, determined plaintiff's motion for leave to serve a late notice of claim was properly denied. Plaintiff alleged medical malpractice on the part of defendant New York City Health and Hospitals Corporation (HHC). The majority concluded that the mere existence of medical records documenting the hospital care did not demonstrate timely knowledge of the nature of the claim: "[T]he medical records must do more than 'suggest' that an injury occurred as a result of malpractice. [The plaintiff's] argument implies that so long as medical experts reasonably disagree as to whether, based on their respective interpretations of the medical records, the medical staff deviated from the standard of care, a factual question is present and an application for service of late notice must be granted as a matter of law. ... [T]he medical records must 'evince that the medical staff, by its

acts or omissions, inflicted an[] injury on plaintiff . . .' in order for the medical provider to have actual knowledge of the essential facts ...". ***Wally G. v. New York City Health & Hosps. Corp. (Metropolitan Hosp.)*, 2016 N.Y. Slip Op. 04443, CtApp 6-9-16**

REAL PROPERTY TAX LAW, EDUCATION-SCHOOL LAW, CIVIL PROCEDURE.

TAX CERTIORARI PROCEEDING DISMISSED FOR FAILURE TO TIMELY NOTIFY THE SCHOOL DISTRICT CANNOT BE RECOMMENCED PURSUANT TO CPLR 205(a).

The Court of Appeals, in a full-fledged opinion by Judge Fahey, determined that a Real Property Tax Law (RPTL) proceeding (challenging a tax assessment) which is dismissed for failure to provide timely notice to the school district cannot be restarted pursuant to CPLR 205(a). Standard statutory-construction analysis led to the result: "By amending RPTL 708 (3), the legislature allowed school districts to reserve funds to satisfy judgments in tax certiorari proceedings. That right of reservation, however, extended only to the extent funds reserved 'might reasonably be deemed necessary to [pay] anticipated judgments and claims' (Education Law § 3651 [1-a]). A school district of necessity must know of a proceeding in order to be able to estimate the amount it is permitted to set aside. The notice requirements the legislature included in RPTL 708 (3) act to balance the strictures of the Education Law. A petitioner who ignores the mailing requirements of RPTL 708 (3) and simultaneously denies a school district the opportunity to economically address a tax certiorari proceeding is not permitted to recommence a proceeding dismissed based upon such noncompliance. To do so would be to undermine the aims of fairness and efficiency that prompted the amendments to RPTL 708 (3) ...". ***Matter of Westchester Joint Water Works v. Assessor of City of Rye*, 2016 N.Y. Slip Op. 04438, CtApp 6-9-16**

FIRST DEPARTMENT

CRIMINAL LAW, EVIDENCE.

ADMISSION OF THE RESULTS OF A MACHINE GENERATED BLOOD TEST WITHOUT THE TESTIMONY OF THE OPERATOR OF THE MACHINE DID NOT VIOLATE THE CONFRONTATION CLAUSE.

The First Department determined the admission of a machine generated blood test for sexually transmitted disease, without the testimony of the technician who operated the machine, did not violate the confrontation clause. The court distinguished a recent Court of Appeals case, *People v. John*, 2016 N.Y. Slip Op. 03208, which held an analyst who draws conclusions from raw data must testify before the relevant test results can be admitted: "The lab report at issue here was of the purely 'machine generated' category, and the witness whose testimony defendant claims was required was, at best, a technician who tested the accuracy of the machine before placing the sample in it for testing. Under *People v John* and the U.S. Supreme Court cases on which it relies, the report generated by the machine should not be treated as testimonial, and the absence of testimony by the technician who calibrated the machine did not violate defendant's Sixth Amendment right of confrontation. '[T]he testing and procedures employed . . . were neither discretionary nor based on opinion; nor did they concern the exercise of fallible human judgment over questions of cause and effect' ... . In addition, contrary to defendant's argument, the report did not directly link him to the crimes, since the 'test results, standing alone, shed no light on the guilt of the accused' . . . , notwithstanding that they provided circumstantial evidence of guilt in light of other evidence." ***People v. Alcivar*, 2016 N.Y. Slip Op. 04329, 1st Dept 6-7-16**

CRIMINAL LAW, EVIDENCE, ATTORNEYS.

IMPROPER TESTIMONY BY AN ADA ABOUT GRAND JURY PROCEDURE AND THE JUSTIFICATION DEFENSE, COUPLED WITH IMPROPER REFERENCES TO FACTS NOT IN EVIDENCE DURING THE PROSECUTOR'S SUMMATION, REQUIRED REVERSAL.

The First Department reversed defendant's conviction because the prosecutor improperly elicited testimony about the grand proceedings and the justification defense from an assistant district attorney (ADA) called as a prosecution witness. In addition, the prosecutor improperly referred to "facts" not in evidence during summation. The defendant was alleged to have fired at police officers who were pursuing him. The testimony of the ADA was elicited in anticipation of a defense the officers testified falsely in the grand jury to protect themselves from indictment for shooting the defendant. However, the defendant never raised that defense. The ADA was improperly allowed to explain the justification defense (apparently to show the shooting by the officers was justified) and the grand jury procedure (apparently to demonstrate the grand jury found the officers credible): "Comments regarding grand jury composition and proceedings have repeatedly been held to be improper when made by a court, and the same rationale applies when made by a prosecutor ... . * * * By permitting the witness to instruct the jury on the law of justification during the People's case, and apply the law to the facts of this case, 'the court improperly surrendered its nondelegable judicial responsibility' ... . 'The court's delegation of this critical judicial function to the [prosecutor-witness] significantly impaired the integrity of the proceedings and deprived the defendant of a fair trial' ... . * * * The prosecutor must 'stay within the four corners of the evidence,' may not refer to matters not in evidence,

'should not call upon the jury to draw conclusions which are not fairly inferrable from the evidence,' or make arguments that 'have no bearing on any legitimate issue in the case' ... . Here, on two separate occasions during his summation, the prosecutor did exactly that." ***People v. Melendez*, 2016 N.Y. Slip Op. 04328, 1st Dept 6-7-16**

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA).

FEDERAL CONVICTION FOR FAILING TO REGISTER AS A SEX OFFENDER WAS NOT A QUALIFYING OFFENSE FOR A SORA RISK ANALYSIS; THEREFORE, DEFENDANT WAS NOT ENTITLED TO A 15-POINT REDUCTION BECAUSE HE WAS SUBJECT TO POST-RELEASE SUPERVISION FOR THE FEDERAL OFFENSE.

The First Department, in a full-fledged opinion by Justice Gische, determined a federal conviction for failure to register as a sex offender was not a qualifying offense under the Sex Offender Registration Act (SORA). Defendant had been convicted in Michigan of a qualifying offense, but was not subject to post-release supervision upon release. Where there is no post-release supervision, a defendant is assessed 15 points under the SORA risk analysis. Defendant argued that, because he was subject to federal post-release supervision for failure to register, the 15 points should not be assessed. The First Department held the only relevant offense was the Michigan offense, requiring the 15-point assessment. ***People v. Reid*, 2016 N.Y. Slip Op. 04366, 1st Dept 6-7-16**

INSURANCE LAW.

AN EXAMINATION UNDER OATH (EUO) CAN BE REQUESTED BY THE NO-FAULT INSURER BEFORE THE INSURER RECEIVES A CLAIM FORM FROM THE MEDICAL PROVIDER.

The First Department, over a dissent, in a no-fault insurance case, determined plaintiff insurer's motion for summary judgment (dismissing the provider's claim for first-party no-fault benefits) based upon plaintiff's insured's (Manoo's) failure to appear for three scheduled examinations under oath (EUOs) should have been granted. The court held that a EUO can be requested at any time, and the fact that the first EUO was requested before the insurer received a claim form from the provider was of no consequence: "The record establishes that plaintiff requested Manoo's initial EUO by letter dated February 3, 2012. Although [the provider's] NF-3 form is dated February 7, 2012, plaintiff was entitled to request the EUO prior to its receipt thereof ... . The notification requirements for verification requests under 11 NYCRR 65-3.5 and 65-3.6 do not apply to EUOs that are scheduled prior to the insurance company's receipt of a claim form ... ." ***Mapfre Ins. Co. of N.Y. v Manoo*, 2016 N.Y. Slip Op. 04446, 1st Dept 6-9-16**

PERSONAL INJURY, LABOR LAW-CONSTRUCTION LAW.

BUILDING OWNER LIABLE UNDER LABOR LAW § 240(1) FOR INJURY CAUSED BY FALLING ELEVATOR.

The First Department determined plaintiff was entitled to summary judgment on his Labor Law § 240(1) cause of action. The plaintiff, McCrea, was repairing an elevator when it fell on him. The court explained the relevant law, including the criteria for demonstrating an injured worker's actions were the sole proximate cause of the injury: "The evidence here establishes that at the time of the accident, McCrea was engaged in 'repair' work because the elevator's safety shoes were not operating properly, and the condition was an isolated event, unrelated to normal wear and tear ... . In addition, the elevator was a 'falling object' within the meaning of the Labor Law, even though it was not actually being hoisted or secured at the time of the accident, because it required securing for the purpose of McCrea's repair work ... . As plaintiff was engaged in activity protected by Labor Law § 240(1) at the time of the incident, Arnlie, as owner of the building, is subject to absolute liability for injuries which resulted from its failure to provide plaintiff with proper safety devices . . . , without regard to the comparative fault of plaintiff ... . Where the worker is the sole proximate cause of the injury, however, the premises owner will not be liable ... . '[T]o raise a triable issue of fact as to whether a plaintiff was the sole proximate cause of an accident, the defendant must produce evidence that adequate safety devices were available, that the plaintiff knew that they were available and was expected to use them, and that the plaintiff unreasonably chose not to do so, causing the injury sustained' ... . Here, there is no indication that plaintiff refused or misused available safety equipment." ***McCrea v. Arnlie Realty Co. LLC*, 2016 N.Y. Slip Op. 04330, 1st Dept 6-7-16**

SOCIAL SERVICES LAW, APPEALS.

EXCEPTION TO THE MOOTNESS DOCTRINE APPLIED; NOTICES OF MANDATORY MEETINGS REGARDING WORK REQUIREMENTS UNDER THE FAMILY ASSISTANCE PROGRAM DID NOT VIOLATE THE SOCIAL SERVICES LAW.

The First Department, in a full-fledged opinion by Justice Acosta, over a two-justice dissenting opinion, reversing Supreme Court, determined: (1) although the finding that petitioner had violated work-related requirements under the family assistance program was reversed and the reduction in petitioner's benefits had been restored, the appeal was not moot; (2) the wording of the notices of required meetings for work-assessment under the family assistance program did not violate the Social Services Law; and (3) the propriety of the "autopost" system by which petitioner's failure to attend a scheduled meeting resulted in an automatically posted infraction must be determined in the context of a summary judgment or a trial

(not this declaratory judgment action). The dissenters argued the appeal was moot and should not have been heard. ***Matter of Puerto v. Doar*, 2016 N.Y. Slip Op. 04463, 1st Dept 6-9-16**

SECOND DEPARTMENT

CIVIL PROCEDURE, EVIDENCE.

MOTION TO RENEW IN WHICH DOCUMENT PREVIOUSLY REJECTED WAS RESUBMITTED IN ADMISSIBLE FORM SHOULD HAVE BEEN GRANTED.

The Second Department determined Supreme Court should have entertained a motion to renew in which a document previously rejected because it was not in admissible form was resubmitted in admissible form: "The Supreme Court improvidently exercised its discretion in denying the plaintiff's motion for leave to renew. 'CPLR 2221 (e) has not been construed so narrowly as to disqualify, as new facts not offered on the prior motion, facts contained in a document originally rejected for consideration because the document was not in admissible form' ... . Here, the inadvertent mistake of the plaintiff's attorney in including the unnotarized statement of the chiropractor with the plaintiff's opposition papers, rather than the notarized affidavit, was tantamount to law office failure and constituted a reasonable justification for the plaintiff's failure to provide the affidavit to the court in opposing the original motion ...". ***Defina v. Daniel*, 2016 N.Y. Slip Op. 04381, 2nd Dept 6-8-16**

CRIMINAL LAW, EVIDENCE.

DETECTIVE ENTERED FENCED BACKYARD WITHOUT A WARRANT, SUPPRESSION SHOULD HAVE BEEN GRANTED.

The Second Department determined defendant's suppression motion should have been granted. The detective investigating a burglary entered the curtilage of the defendant's home without a warrant in the absence of exigent circumstances: "Here, in entering the defendant's fenced-in rear yard by opening the gate and going through it, the detective entered the curtilage of the defendant's home ... . The People have failed to articulate any exigent circumstances justifying this intrusion and the ensuing warrantless arrest and search ...". ***People v. Avinger*, 2016 N.Y. Slip Op. 04426, 2nd Dept 6-8-16**

FAMILY LAW.

FAMILY COURT SHOULD NOT HAVE DENIED FATHER VISITATION BASED UPON FATHER'S BEHAVIOR WHEN MOTHER TESTIFIED; FUTURE VISITATION SHOULD NOT HAVE BEEN CONDITIONED UPON DRUG SCREENINGS AND A MENTAL HEALTH EVALUATION.

The Second Department determined father's in-court actions during mother's testimony did not provide a sufficient basis for the denial of visitation to father. In addition, the Second Department found that Family Court improperly conditioned future visitation by father upon the results of drug screenings and mental health evaluation: "Here, the Family Court improperly based its determination to deny the father parental access upon the father's in-court demeanor . . . , including his inability 'to control his temper in open Court' and an instance in which he called the mother 'a liar' as she testified. However, no correlation was made between the father's in-court demeanor and any detrimental effect on the children ... . * * * The Family Court also erred in directing the father to submit to random drug and alcohol screens, test negative, and undergo a comprehensive mental health evaluation as conditions of future visitation. 'A court hearing a pending proceeding or action involving issues of custody or visitation may properly order a mental health evaluation of a parent, if warranted, prior to making a custody or visitation determination' ... . A court may also 'direct a party to submit to counseling or treatment as a component of a visitation or custody order' ... . A court may not, however, 'order that a parent undergo counseling or treatment as a condition of future visitation or reapplication for visitation rights' ...". ***Matter of Gonzalez v. Ross*, 2016 N.Y. Slip Op. 04413, 2nd Dept 6-8-16**

FAMILY LAW.

JUDGE WAS BIASED AGAINST MOTHER WHO SOUGHT TO PREVENT THE IMMUNIZATION OF HER CHILDREN FOR RELIGIOUS REASONS.

The Second Department determined the Family Court judge was biased against a mother who sought to prevent her children from being immunized for religious reasons: "Public Health Law § 2164, which requires that an adequate dose or doses of an immunizing agent against certain diseases be administered to children at various intervals, does not apply to children whose parent or parents hold genuine and sincere religious beliefs which are contrary to the practices required therein (*see* Public Health Law § 2164[9]). When a parent seeks to assert a religious objection to immunization under Public Health Law § 2164(9), he or she must prove, by a preponderance of the evidence, that his or her opposition to immunization 'stems from genuinely-held religious beliefs' ... . * * * Here, the record demonstrates that the Family Court had a predetermined outcome of the case in mind during the hearing. In addition to certain comments made by the court regarding the sincerity of the mother's religious beliefs, the court took an adversarial stance, aggressively cross-examined the mother, continually interrupted her testimony, mocked her beliefs, and generally demonstrated bias. The Family Court's bias unjustly affected

the result of the hearing to the detriment of the mother." ***Matter of Baby Girl Z. (Yaroslava Z.)*, 2016 N.Y. Slip Op. 04425, 2nd Dept 6-8-16**

INSURANCE LAW.

DUPLICATE COVERAGE PROHIBITION IN SUPPLEMENTAL UNINSURED UNDERINSURED MOTORIST (SUM) ENDORSEMENT NOT VIOLATED WHERE OVERALL DAMAGES EXCEED AMOUNT WHICH CAN BE RECOVERED FROM SEVERAL TORTFEASORS.

The Second Department determined the "duplicate coverage" prohibition in the supplemental uninsured/underinsured motorist (SUM) endorsement of the GEICO policy did not prevent plaintiff's widow, Maria Sherlock, from proceeding to arbitration seeking coverage under the endorsement. The driver, Maldonado, who struck and killed plaintiff's decedent, had a policy with $50,000 coverage. Maldonado's insurer settled for its $50,000 limit. Because the accident occurred during a police chase and the municipality was sued, the municipality's insurer settled for $425,000. GEICO argued any recovery under the SUM endorsement would constitute prohibited duplicate coverage. Maria Sherlock argued the overall damages were in the millions and recovery of the difference between the $250,000 SUM limit and the $50,000 paid out under defendant's policy would therefore not be duplicative, even taking into account the $425,000 recovery from the municipality: "The key to a proper understanding of [the duplicate coverage prohibition] is the recognition that 'shall not duplicate' is not aimed at preventing an insured from seeking full compensation by combining partial recoveries from several tortfeasors, but at preventing double recoveries for their bodily injuries." ***Matter of Government Empls. Ins. Co. v. Sherlock*, 2016 N.Y. Slip Op. 04414, 2nd Dept 6-8-16**

PERSONAL INJURY, MUNICIPAL LAW.

TOWN DID NOT ADDRESS ALL THEORIES OF LIABILITY RAISED BY THE PLEADINGS IN THIS SLIP AND FALL CASE, MOTION FOR SUMMARY JUDGMENT PROPERLY DENIED ON THAT GROUND.

The Second Department determined the town did not make the requisite showing for summary judgment in this slip and fall case. The town's motion did not address all of the theories of liability raised in the pleadings: "Here, the plaintiff, in her pleadings, alleged that the Town created the hole in the parking lot that caused her to fall, and that the Town made a special use of the parking lot. Thus, in support of its motion for summary judgment, the Town was required to demonstrate, prima facie, that it did not have prior written notice of the allegedly defective condition, that it did not create the condition, and that it did not make a special use of the parking lot ... . Since the Town failed to make this showing, the burden never shifted to the plaintiff to submit evidence sufficient to raise a triable issue of fact." ***Breest v. Long Is. R.R.*, 2016 N.Y. Slip Op. 04376, 2nd Dept 6-8-16**

REAL PROPERTY.

QUESTION OF FACT WHETHER WATER RUNOFF CONSTITUTED TRESPASS AND NUISANCE.

The Second Department, reversing Supreme Court, determined summary judgment should not have been granted to defendants in this action alleging trespass and nuisance caused by water runoff: "A landowner will not be liable for damages to abutting property caused by the flow of surface water due to improvements to his or her land, provided that the improvements were made in good faith to make the property fit for some rational use, and that the water was not drained onto the other property by artificial means, such as pipes and ditches ... . [P]laintiffs raised triable issues of fact . . . by adducing evidence, inter alia, that a gutter downspout located on the defendants' property and a drainage pipe installed under the low point in the defendants' new driveway diverted rainwater runoff onto the plaintiffs' properties ...". ***Biaglow v. Elite Prop. Holdings, LLC*, 2016 N.Y. Slip Op. 04373, 2nd Dept 6-8-16**

TRUSTS AND ESTATES, TAX LAW.

LIFE ESTATES IN A CONDOMINIUM AND COOPERATIVE APARTMENT DID NOT DIMINISH VALUE OF THE PROPERTIES FOR ESTATE TAX PURPOSES.

The Second Department determined the value of properties transferred upon decedent's death was the fair market value at the time of death. The fact that decedent willed life estates in the properties did not diminish the value of the properties for estate tax purposes: " 'Because the estate tax is a tax on the privilege of transferring property upon one's death, the property to be valued for estate tax purposes is that which the decedent actually transfers at his death rather than the interest held by the decedent before death or that held by the legatee after death' ... . An estate tax taxes 'not the interest to which the legatees and devisees succeeded on death, but the interest which ceased by reason of the death' ... . 'The value of every item of property includible in a decedent's gross estate . . . is its fair market value at the time of the decedent's death' ... . An estate tax is a tax on the privilege of passing on property, not a tax on the privilege of receiving property; '[t]he tax is on the act of the testator not on the receipt of the property by the legatees' ...'. Therefore, contrary to the petitioner's contention, the life estates in the condominium and cooperative apartment granted by the decedent to his longtime companion upon the decedent's death did not diminish the value of those properties for estate tax purposes and should not have been taken into account on the estate tax return." ***Matter of Cleary*, 2016 N.Y. Slip Op. 04410, 2nd Dept 6-8-16**

THIRD DEPARTMENT

CIVIL PROCEDURE, EXECUTIVE LAW.

POLICY MEMORANDUM FROM NEW YORK STATE HEALTH INSURANCE PROGRAM AMOUNTED TO A RULE OR REGULATION WHICH MUST BE FILED WITH THE DEPARTMENT OF STATE; BECAUSE IT WAS NEVER FILED THE FOUR-MONTH STATUTE OF LIMITATIONS TO CONTEST THE POLICY NEVER STARTED TO RUN.

The Third Department determined the four-month statute of limitations for challenging a policy announced by the New York State Health Insurance Plan (NYSHIP) never started to run because the policy memorandum amounted to a rule or regulation which was never filed with the Department of State: "Here, the policy memorandum broadly and invariably affects 'that segment of the "general public" over which' the State respondents have authority, inasmuch as it applies to all individuals eligible for NYSHIP coverage who seek to participate in the health insurance buyout program ... . Furthermore, the pronouncement that all those who decline their own NYSHIP coverage are now ineligible for the buyout program if their alternative coverage — e.g., through a spouse — is also a NYSHIP plan, clearly reflects 'a firm, rigid, unqualified standard or policy' that effectively 'carves out a course of conduct for the future' ... . Consequently, we find that the policy memorandum constitutes a 'rule or regulation' within the meaning of NY Constitution, article IV, § 8 and Executive Law § 102 (1) (a). As such, it is invalid and without effect until it is filed with the Department of State ...". ***Matter of Plainview-Old Bethpage Congress of Teachers v. New York State Health Ins. Plan*, 2016 N.Y. Slip Op. 04473, 3rd Dept 6-9-16**

CRIMINAL LAW.

FOR CAUSE CHALLENGE TO JUROR SHOULD HAVE BEEN GRANTED.

The Third Department determined the failure to grant defendant's for cause challenge to a juror required reversal: "During the course of jury selection, prospective juror No. 15 expressed concern regarding a potential witness's prior criminal 'track record.' After initially indicating that he might be influenced 'greatly' by a witness's criminal record, County Court explained to prospective juror No. 15 — and the rest of the panel — that the jury could take into consideration a witness's prior criminal conviction in assessing whether the jury believed the testimony offered by that witness. When asked by County Court whether he could follow the court's instruction on that point, prospective juror No. 15 replied, 'Oh, yes, yes.' Upon further inquiry by defense counsel, however, prospective juror No. 15 explained that if he were to learn that defendant previously had engaged in the same or similar offenses as those charged in the indictment, he 'might be swayed' by what he would view 'as a continuous track record.' When asked how such knowledge would affect his thinking, prospective juror No. 15 replied, 'Negatively.' Defense counsel then inquired, 'Negatively towards?,' in response to which prospective juror No. 15 stated, 'Guilty.' When defense counsel asked, 'Just by virtue of a [prior] record?,' the prospective juror replied, 'Yes, of a continuous criminal record, yes.' Other than County Court's general inquiry as to the panel's ability to follow the law as charged by the court, no further questioning of this juror occurred and no unequivocal assurances of impartiality were elicited." ***People v. Cuevas*, 2016 N.Y. Slip Op. 04468, 3rd Dept 6-9-16**

CRIMINAL LAW, ATTORNEYS.

MOTION TO VACATE CONVICTION ON INEFFECTIVE ASSISTANCE GROUNDS SHOULD NOT HAVE BEEN DENIED WITHOUT A HEARING.

The Third Department determined defendant's motion to vacate his conviction on ineffective assistance grounds should not have been denied without a hearing: "To establish entitlement to a hearing, a defendant must demonstrate that 'non-record facts set forth in [a] CPL article 440 motion . . . are material and [that], if established, they would entitle him [or her] to relief' ... . Defendant's most significant sworn allegation is that counsel failed to watch the entire recording of his interview with law enforcement — or to read the entire transcript of that interview — prior to waiving any challenge to its admissibility and making assurances to the jury during opening remarks as to the contents of that recording. Notably, defendant's father also submitted a sworn statement suggesting that counsel may not have been familiar with the contents of the recorded police interview. * * * Taken as a whole, we find that defendant provided sufficient sworn, material statements in support of his motion that, if credited, would establish that he received less than meaningful representation ...". ***People v. Sposito*, 2016 N.Y. Slip Op. 04467, 3rd Dept 6-9-16**

CRIMINAL LAW, ATTORNEYS, EVIDENCE.

PRECLUSION OF DEFENDANT'S MEDICAL RECORDS AND IMPROPER CROSS-EXAMINATION AND SUMMATION REQUIRED REVERSAL.

The Third Department, reversing the conviction, determined preclusion of defendant's medical evidence in this driving while intoxicated case was an abuse of discretion and the prosecutor's summation and cross-examination of the defendant were improper: " 'Preclusion of evidence is a severe sanction, not to be employed unless any potential prejudice arising from the failure to disclose cannot be cured by a lesser sanction' ... . Here, County Court's own inquiry readily identified measures to alleviate any prejudice to the People ... . Since a less drastic remedy was readily available, we conclude that the

outright preclusion of this evidence was an abuse of discretion. ... . During cross-examination, the prosecutor utilized documentation provided by the defense to question defendant as to his winning an Iron Man . . . and his being recommended for enrollment in the US Army Ranger School ... . Certainly this questioning was an accurate portrayal of defendant's physical fitness prior to being injured during his military service and fair game to a point as to whether defendant was capable of performing the field sobriety tests. The portrayal, however, disregards defendant's actual medical condition as shown in the precluded medical records. This discrepancy came to a head during summation, where the prosecutor stated, 'I just didn't really know what to make' of defendant's claimed impairments. She continued, 'I'm surprised' given defendant's Iron Man award, and concluded, 'I don't understand what happened . . . when he couldn't perform a standardized field sobriety test. It just doesn't make any sense to me.' A prosecutor may not, even during summation, express his or her personal opinion challenging the veracity of the evidence ... . To express personal surprise as to defendant's claim of incapacity, while in possession of defendant's medical records, was disingenuous and improper." ***People v. O'Brien*, 2016 N.Y. Slip Op. 04471. 3rd Dept 6-9-16**

FAMILY LAW.

UNCLE SHOULD HAVE BEEN ALLOWED TO INTERVENE IN NEGLECT PROCEEDINGS.

The Third Department, reversing Family Court, determined uncle should have been allowed to intervene in neglect proceedings to seek custody of the children who had been removed from the home: "There is no question that the uncle is authorized to seek intervention under the statute; he is one of the enumerated relatives permitted to pursue such relief, and both respondent and the child's father (among others) consented to his appearance in the proceeding. Nor does Family Ct Act § 1035 (f) limit the right of intervention to only the fact-finding and dispositional hearings held on a pending Family Ct Act article 10 neglect petition. Quite the contrary, it broadly permits a qualified relative seeking temporary or permanent custody of the child to participate 'in all phases of dispositional proceedings' (Family Ct Act § 1035 [f] [emphasis added]). Furthermore, a permanency hearing is plainly dispositional in nature. A dispositional hearing is defined as 'a hearing to determine what order of disposition should be made' (Family Ct Act § 1045), and Family Ct Act § 1089 (d) provides that, '[a]t the conclusion of each permanency hearing, the court shall . . . determine and issue its findings, and enter an order of disposition in writing.' Family Court seemed to acknowledge all of this, but reasoned that intervention was not permitted because the dispositional phase of the proceeding terminated upon completion of the dispositional hearing concerning the article 10 petition and the issuance of an order pursuant to Family Ct Act § 1052 (a). This was error." ***Matter of Demetria FF. (Tracy GG.)*, 2016 N.Y. Slip Op. 04499, 3rd Dept 6-9-16**

EMPLOYMENT LAW, LABOR LAW.

COMMISSIONER OF LABOR PROPERLY ISSUED A WAGE ORDER INCREASING THE MINIMUM WAGE FOR CERTAIN FAST FOOD WORKERS TO $15 AN HOUR.

The Third Department, in a full-fledged opinion by Justice Devine, determined the Commissioner of Labor had the authority to mandate a minimum wage ($15 an hour) for certain fast food workers in New York: "The Commissioner is authorized to make the assessment as to whether the minimum wage should be increased for employees in specific occupations, does so with help from an agency having special competence in the area and a wage board tasked with investigating the relevant questions as set forth by the Legislature, and thereafter issues a wage order setting a minimum wage in a specific occupation if such would further the policy objectives delineated by statute. The Commissioner complied with that procedure, and the fact that the Legislature failed to agree on an increase in the statutory minimum wage in the leadup to the issuance of the wage order in no way reflects dispute or confusion as to the longstanding authority of the Commissioner to set a minimum wage for employees in a given occupation ...". ***Matter of National Rest. Assn. v. Commissioner of Labor*, 2016 N.Y. Slip Op. 04498, 3rd Dept 6-9-16**

FOURTH DEPARTMENT

CRIMINAL LAW.

PEOPLE'S FAILURE TO OBTAIN AN ACCUSATORY INSTRUMENT AFTER THE COURT REDUCED THE FELONY TO A MISDEMEANOR REQUIRED VACATION OF THE PLEA AND DISMISSAL OF THE INDICTMENT.

The Fourth Department vacated defendant's plea to a misdemeanor (as a reduced charge) and dismissed the indictment because the People did not take any of the steps required by Criminal Procedure Law § 210.20(6): "County Court granted defendant's motion to review the grand jury minutes and, upon that review, concluded that the evidence before the grand jury was not legally sufficient to support [promoting prison contraband first degree] but was sufficient to support the lesser included offense of promoting prison contraband in the second degree. Defendant then pleaded guilty to the lesser included offense. 'CPL 210.20 (6) provides that when a court decides to reduce a count contained in an indictment [to a misdemeanor] on the ground that it is not supported by legally sufficient evidence, the People do one of the following: (1) accept the court's order and file a prosecutor's information containing the reduced charge; (2) re-present the [higher count]

to a grand jury; or (3) appeal the court's order' ... . Here, however, the People did not take any of those three actions, and defendant pleaded guilty to the reduced charge. Inasmuch as '[a] valid and sufficient accusatory instrument is a nonwaivable jurisdictional prerequisite to a criminal prosecution'. . . , the plea must be vacated and the indictment dismissed ...". ***People v. Haigler*, 2016 N.Y. Slip Op. 04584, 4th Dept 6-10-16**

CRIMINAL LAW, APPEALS.

PROSECUTOR'S INCORRECT STATEMENT ABOUT THE LENGTH OF POST-RELEASE SUPERVISION WAS NOT PRESERVED FOR APPEAL BY OBJECTION.

The Fourth Department determined the prosecutor's misstatement concerning the length of post-release supervision did not require reversal because defendant had ample opportunity to raise an objection to preserve the error but did not do so: "Although the prosecutor initially misstated the period of postrelease supervision prior to the plea allocution and the court failed to mention postrelease supervision during the allocution, defendant was aware that the sentence included a postrelease supervision component at the time of the allocution, the court immediately thereafter confirmed the correct agreed-upon sentence, and neither defendant nor defense counsel objected to the period of postrelease supervision or otherwise indicated that there was any misunderstanding with regard to its length." ***People v. Chant*, 2016 N.Y. Slip Op. 04544, 4th Dept 6-10-16**

CRIMINAL LAW, EVIDENCE.

DEFENDANT ENTITLED TO A *WADE* HEARING TO DETERMINE THE RELIABILITY, AS OPPOSED TO SUGGESTIVENESS, OF AN IDENTIFICATION.

The Fourth Department, reversing the conviction, over a concurrence, determined defendant was entitled to a *Wade* hearing to determine the reliability, as opposed to the suggestiveness, of an identification: "Here, following the drug transaction, the undercover officer did not observe defendant again until the trial, which was approximately a year and a half after the transaction. That lapse of time is in stark contrast to the typical situation where an undercover officer identifies the arrestee at the police station contemporaneously with the drug transaction ... . While we recognize that a '*Wade* hearing' is often linked, nearly exclusively, with the concept of 'suggestiveness,' we conclude that a defendant is entitled to CPL 710.30 (1) (b) notice and the opportunity to move to suppress identification testimony pursuant to CPL 710.60 in order to test the reliability of such testimony ... . While 'suggestiveness' may play an important role in the reliability analysis, it is not the exclusive criterion. The list of criteria involved in making a reliability determination may include, but is not limited to: the lapse of time between the criminal transaction and the arrest, the opportunity to observe the suspect during the transaction, the duration of the interaction, and the facts and circumstances of the interaction with the suspect. It is well settled that 'the mere labelling of an identification as confirmatory' will not obviate the need for *Wade* hearings. Case-by-case analyses of the facts and circumstances in each case remains necessary' ... . 'Comprehensive analysis, not superficial categorization, ultimately governs' ...". ***People v. Reeves*, 2016 N.Y. Slip Op. 04502, 4th Dept 6-10-16**

CRIMINAL LAW, EVIDENCE.

ALTHOUGH EVIDENCE OF PRIOR THREATS AGAINST THE VICTIM MAY BE ADMISSIBLE UNDER MOLINEUX, SUCH EVIDENCE MUST BE IN ADMISSIBLE FORM, HERE THE HEARSAY EVIDENCE OF PRIOR THREATS SHOULD NOT HAVE BEEN ADMITTED FOR THE TRUTH OF THE MATTERS ASSERTED.

The Fourth Department, reversing defendant's conviction in this 30-year-old domestic murder case, determined hearsay evidence of threats allegedly made by the defendant against the victim were improperly admitted for the truth of the matters asserted. While evidence of threats made to the victim may be admissible under Molineux, such evidence must be in admissible form: "Citing Molineux and other like cases, including *People v Alvino* (71 NY2d 233), the People argue that evidence of defendant's prior threats and physical abuse of the victim were highly relevant for various nonhearsay purposes, such as establishing background information, revealing the state of mind of the victim and defendant, and demonstrating his motive and intent to kill the victim. As defendant correctly points out, however, there is no Molineux exception to the rule against hearsay. It may be true that evidence that defendant beat and threatened to kill the victim is admissible under a Molineux theory, but such evidence must still be in admissible form. For instance, a witness could testify that he or she witnessed defendant assault the victim, or heard defendant threaten the victim. That is not hearsay. It is hearsay, however, for a witness to testify that someone else told him or her that defendant beat or threatened the victim." ***People v. Meadow*, 2016 N.Y. Slip Op. 04505, 4th Dept 6-10-16**

CRIMINAL LAW, EVIDENCE.

RODRIGUEZ HEARING NECESSARY TO DETERMINE WHETHER SINGLE PHOTO IDENTIFICATION WAS CONFIRMATORY.

The Fourth Department, remitting the case, determined a *Rodriguez* hearing was necessary to determine whether a witness's single photo identification of the defendant was confirmatory: "We agree with defendant that, during the suppression hear-

ing, the court erred in precluding defendant from cross-examining the police investigator on the issue whether 'Witness #1' was sufficiently familiar with defendant in order to render the single photo identification of defendant by that witness 'merely confirmatory' ... . Although the court conducted a *Wade* hearing, which ordinarily eliminates the need for a *Rodriguez* hearing . . . , we conclude that the court's error during the suppression hearing renders a *Rodriguez* hearing necessary in this case ... . We therefore hold the case, reserve decision, and remit the matter to Supreme Court for a hearing to determine whether the identification by the subject witness was truly confirmatory in nature ... and, if the court determines that the identification was not confirmatory, it must further determine whether the single photo identification procedure employed with the subject witness was unduly suggestive ...". ***People v. Hoffman*, 2016 N.Y. Slip Op. 04508, 4th Dept 6-10-16**

CRIMINAL LAW, EVIDENCE.

FAILURE TO PRESERVE SURVEILLANCE VIDEOS TRIGGERED NEED FOR ADVERSE INFERENCE JURY INSTRUCTION.

The Fourth Department, reversing the conviction, over a concurrence, determined defendant was entitled to an adverse inference jury instruction based upon the failure to preserve surveillance videos: "We agree with defendant that the court erred in refusing to give an adverse inference charge based on the People's failure to preserve surveillance tapes ... . Defendant used reasonable diligence in requesting those tapes, which captured 'evidence that [was] reasonably likely to be of material importance' . . . , i.e., a video in the area where the crime occurred, from cameras operated by the City of Rochester Police Department. We respectfully disagree with our concurring colleague that the State's duty to preserve surveillance videos is not triggered until a request has been made by the defendant." ***People v. Butler*, 2016 N.Y. Slip Op. 04512, 4th Dept 6-10-16**

PERSONAL INJURY, LABOR LAW-CONSTRUCTION LAW.

INVESTIGATING A MALFUNCTION CONSTITUTES COVERED REPAIR UNDER LABOR LAW § 240(1).

The Fourth Department, over a two-justice dissent, determined the plaintiff was covered by Labor Law § 240(1) when he was diagnosing a problem on a cell tower, which constituted "repair" under the statute. The Fourth Department further concluded the defendants raised a question of fact about whether plaintiff had been provided with sufficient safety equipment (the dissent argued defendants had not raised a question of fact on that issue): "Here, plaintiff testified that he never performed preventive maintenance on the towers, and that he and his coworkers were dispatched to a tower only when something was in need of repair ... . Indeed, plaintiff's submissions establish that an item on the tower was malfunctioning prior to commencement of the work, and that plaintiff was injured after climbing approximately 180 feet to conduct an investigation into the cause of the alarm and to remedy the malfunction ... . Where, as here, 'a person is investigating a malfunction, . . . efforts in furtherance of that investigation are protected activities under Labor Law § 240 (1)' ...". ***Cullen v. AT&T, Inc.*, 2016 N.Y. Slip Op. 04503, 4th Dept 6-10-16**

TAX LAW, INDIAN LAW.

TAX ON CIGARETTE SALES TO NON-INDIANS UPHELD.

The Fourth Department upheld the state's ability to impose a tax on the sale of cigarettes to non-Indians and non-members of the Seneca Nation: "It is well established that 'the States have a valid interest in ensuring compliance with lawful taxes that might easily be evaded through purchases of tax-exempt cigarettes on reservations . . . States may impose on reservation retailers minimal burdens reasonably tailored to the collection of valid taxes from non-Indians' ... . Although plaintiffs are obligated to pay the amount due as tax from non-Indians who have the tax liability, and from whom the amount is collected at the time of the sale, 'this burden is not, strictly speaking, a tax at all' ...". ***White v. Schneiderman*, 2016 N.Y. Slip Op. 04533, 4th Dept 6-18-16**

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