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Editor: **Bruce Freeman**

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COURT OF APPEALS

CIVIL PROCEDURE, ADMINISTRATIVE LAW, EDUCATION-SCHOOL LAW.

STATE'S RULING SCHOOL DISTRICT VIOLATED INDIVIDUALS WITH DISABILITIES ACT NOT FINAL, ARTICLE 78 PROCEEDING CHALLENGING RULING PROPERLY DISMISSED.

The Court of Appeals determined the petitioner school district could not bring an Article 78 proceeding to challenge the state's finding that the district's dispute resolution practices for placing students with disabilities violated federal (Individuals with Disabilities Education Act [IDEA]) and state law because the state's decision was not final: "In 2012, the State found that the District's dispute resolution practices violated federal and state law and directed the District to take corrective action. Although the State informed the District that failure to comply could result in further enforcement actions, including withholding federal funds, the State did not make a final decision to withhold funds. A proceeding under CPLR article 78 'shall not be used to challenge a determination which is not final or can be adequately reviewed by appeal to a court or to some other body or officer' ... . Likewise, this Court has recognized that '[t]o challenge an administrative determination, the agency action must be final and binding upon the petitioner' ... . In addition, in the absence of injury, there is no standing to bring an article 78 proceeding ... Assuming, without deciding, that a school district may bring an article 78 proceeding to challenge a final determination by the State under the IDEA, here, the State has not made a final determination, the District has not shown that it has exhausted its administrative remedies, and the District is unable to articulate any actual, concrete injury that it has suffered at this juncture. Accordingly, the District's petition was properly dismissed." ***Matter of East Ramapo Cent. Sch. Dist. v. King*, 2017 N.Y. Slip Op. 02360, CtApp 3-28-17**

CRIMINAL LAW, EVIDENCE.

POSSESSION OF COCAINE CAN BE PROVEN WITHOUT SUBMITTING THE COCAINE ITSELF AS EVIDENCE.

The Court of Appeals, in a short memorandum decision, noted that possession of cocaine can be proven without submitting the cocaine itself as evidence: "Although the People did not recover or introduce any of the cocaine that defendant was charged with possessing, 'direct evidence in the form of contraband or other physical evidence is not the only adequate proof' (*People v. Samuels*, 99 NY2d 20, 24 [2002]). The People presented sufficient evidence in the form of, among other things, defendant's intercepted phone calls replete with drug-related conversations, visual surveillance, and the testimony of cooperating witnesses." ***People v. Whitehead*, 2017 N.Y. Slip Op. 02358, CtApp 3-28-17**

CRIMINAL LAW, EVIDENCE.

EVIDENCE OF AN ALLEGED PRIOR IDENTICAL SEXUAL ASSAULT NOT ADMISSIBLE TO SHOW INTENT, MOTIVE, OR AS BACKGROUND EVIDENCE, CONVICTION REVERSED.

The Court of Appeals, in a full-fledged opinion by Justice Abdus-Salaam, reversing defendant's conviction, determined evidence of an alleged prior sexual assault, identical to the charged offense, should not have been admitted to show intent or motive, or as background evidence: "Here, ... the victim's testimony as to the alleged prior sexual abuse was not necessary to show the nature of the relationship between her and defendant or to 'sort out ambiguous but material facts' ... . The victim testified as to her relationship with defendant, stating that they are relatives who lived, at certain times, in the same home and that on the night of the indicted sexual assault, she and her boyfriend went to defendant's home to spend time together and drink alcohol. The introduction of the prior alleged assault was not necessary to clarify their relationship or to establish a narrative of the relevant events. Further, the evidence of the uncharged crime was not admissible to show intent. The intent here — sexual gratification — can be inferred from the act. * * * To the extent the evidence was admissible to show defendant's motive in getting the victim drunk, the evidence was highly prejudicial, as it showed that defendant had allegedly engaged in the exact same behavior on a prior occasion with the same victim — classic propensity evidence. The prejudicial nature of the Molineux evidence far outweighed any probative value that may be attributed to it." ***People v. Leonard*, 2017 N.Y. Slip Op. 02359, CtApp 3-28-17**

CRIMINAL LAW, EVIDENCE.

DEFENDANT'S HAND UNDER HIS HOODIE WAS SUFFICIENT TO SUPPORT THE ELEMENT OF ROBBERY FIRST WHICH REQUIRES THE DISPLAY OF WHAT APPEARS TO BE A FIREARM.

The Court of Appeals, in a full-fledged opinion by Judge Fahey, over a full-fledged dissenting opinion, determined the evidence was sufficient to support the element of robbery first degree which requires the display of what appears to be a firearm. The defendant threatened to shoot the teller and, at some point in time, one of his hands was under his hoodie. The defendant was quickly apprehended and no firearm was found: "We reject defendant's assumption that the timing of the moment at which the defendant places a hand under his clothing is dispositive of the legal sufficiency analysis. A victim may reasonably believe that a gun is being used, on the basis of conduct that makes it appear that the defendant is holding a gun, regardless of whether the defendant makes a movement while addressing the victim or keeps his hand concealed throughout the encounter in a manner and location suggesting the presence of a gun. Whether a defendant displays what appears to be a firearm does not depend on when precisely the defendant begins the display, provided it occurs 'in the course of the commission of the crime or of immediate flight therefrom' (Penal Law § 160.15 [4])." ***People v. Smith*, 2017 N.Y. Slip Op. 02362, CtApp 3-28-17**

CRIMINAL LAW, EVIDENCE.

ALTHOUGH THE MURDER WAS A NECESSARY ELEMENT OF THE BURGLARY CHARGE, THE PEOPLE JUSTIFIED CONSECUTIVE SENTENCES BY PRESENTING PROOF THE TWO CRIMES ENCOMPASSED DISTINCT ACTS.

The Court of Appeals, in a full-fledged opinion by Judge Klein, determined there was sufficient evidence the burglary and murder were separate acts to justify consecutive sentences. The defendant was charged with breaking and entering his girlfriend's home, dragging her downstairs and then murdering her: " 'By definition, the act of causing death is subsumed within the element causing . . . physical injury' ... and, thus, the act constituting murder here was a material element of that burglary count. The People therefore concede that, with respect to the latter burglary charge, they were required to identify facts establishing that defendant committed this offense and murder through separate and distinct acts. Because 'the People offer[ed] evidence of the existence of . . . separate and distinct act[s]' with respect to that count of burglary in the first degree — indeed, with respect to both counts — 'the trial court ha[d] discretion to order consecutive sentences' ...". ***People v. Brahney*, 2017 N.Y. Slip Op. 02465, CtApp 3-30-17**

CRIMINAL LAW, EVIDENCE.

TRIAL COURT CORRECTLY REFUSED TO CHARGE THE JURY ON THE JUSTIFICATION DEFENSE IN THIS ASSAULT CASE.

The Court of Appeals determined the trial court properly refused to charge the jury with the justification defense in this assault case: "Contrary to defendant's contention, the trial court properly refused to instruct the jury on the defense of justification. Viewing the record in the light most favorable to defendant, as we must ... , we conclude there is no reasonable view of the evidence that would have permitted the factfinder to conclude that defendant's conduct was justified ... . That is, we agree with the People that there is no evidence that objectively supports a belief that defendant was in danger of being physically harmed by the victim at the time defendant used force against him ... . Here, after 'knocking [the victim] out,' defendant was able to freely and safely walk away from the bodega. Moreover, there simply is no evidence that, once he returned to the bodega, defendant needed to leave that store to strike the victim to defend himself. Even if defendant's trial testimony establishes that he actually believed that the victim was lying in wait for him with a weapon ... , there is no reasonable view of the evidence that 'a reasonable person in . . . defendant's circumstances would have believed' the victim to have threatened him with the imminent use of unlawful physical force ... . Put simply, the surveillance footage reflects that defendant's ambush of the victim with the milk crate cannot be considered self defense." ***People v. Sparks*, 2017 N.Y. Slip Op. 02469, CtApp 3-30-17**

CRIMINAL LAW, EVIDENCE.

TRIAL COURT PROPERLY CHARGED THE JURY WITH THE INITIAL AGGRESSOR EXCEPTION TO THE JUSTIFICATION DEFENSE, APPELLATE DIVISION REVERSED.

The Court of Appeals, in a full-fledged opinion by Judge Abdus-Salaam, over a three-judge dissenting opinion, reversing the Appellate Division, determined the trial court properly charged the initial aggressor exception to the justification defense in this homicide case. The evidence was not clear about the timing, but the victim (McWillis) pursued the defendant with a plastic mop handle and swung at the defendant close in time to the shooting: "Here, as the Appellate Division dissent noted, '[n]o matter what the court charged in relation to the initial aggressor issue, [the jury could have reasonably concluded] there was simply no evidentiary support for a finding that defendant was justified in using deadly physical force against McWillis when faced with McWillis's either threatened or actual use of a mop handle' ... . Our law has 'never required that an actor's belief as to the intention of another person to inflict serious injury be correct in order for the use of deadly force to be justified, but [it has] uniformly required that the belief comport with an objective notion of reasonable-

ness' ... . Thus, the jury could have concluded that defendant's choice to respond to a swinging plastic mop handle with a loaded and operable gun was not reasonable, especially in light of his prior comments to police about taking the law into his own hands ...". ***People v. Valentin*, 2017 N.Y. Slip Op. 02470, CtApp 3-30-17**

CRIMINAL LAW, EVIDENCE, APPEALS.

ALTHOUGH DEFENDANT OBJECTED TO THE SANDOVAL RULING AT TRIAL, THE OBJECTION WAS NOT ON THE PRECISE GROUND RAISED ON APPEAL, THE ISSUE WAS THEREFORE NOT PRESERVED.

The Court of Appeals, in a full-fledged opinion by Judge Rivera, over a two-judge concurring opinion, determined defendant's objection to a Sandoval ruling about the admissibility of evidence of a juvenile delinquency adjudication did not preserve the precise issue which was the subject of the appeal. The concurring opinion argued the error had been preserved, but was harmless. The People sought to introduce evidence of the facts underlying the juvenile delinquency adjudication, but not the adjudication itself. The defendant objected arguing that the defendant should not be judged by actions taken when his mind and values were undeveloped. The court ruled the People could elicit the fact that defendant was adjudicated a juvenile delinquent, but could not elicit the facts. On appeal defendant argued it was a legal error to admit evidence of the juvenile delinquency adjudication: "Under the unique factual circumstances of this case and based on the trial court's colloquy with counsel, we conclude that defendant's challenge to the Sandoval ruling is unpreserved. Defendant did not make the argument he now asserts at the time of the alleged erroneous ruling, or at any time at all. Instead, he argued, against the People's initial proffer, that the court should deny the request because defendant's actions should not be judged based on a young offender's undeveloped mind and sense of values. Defendant failed to argue that it would be legal error to permit the People to elicit that defendant was adjudicated a juvenile delinquent ... . Defendant did not make that argument before or after the compromise ruling, or at any point during the proceedings 'when the court had the 'opportunity of effectively chang[ing]' its ruling' ... and avoiding the error of which defendant now complains." ***People v. Jackson*, 2017 N.Y. Slip Op. 02361, CtApp 3-28-17**

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA).

WHERE THE RELEVANT OFFENSES WERE COMMITTED IN TWO COUNTIES, NO NEED FOR TWO SORA RISK ASSESSMENT PROCEEDINGS.

The Court of Appeals, in a full-fledged opinion by Judge Garcia, determined only one SORA risk assessment proceeding should have been held. Defendant had simultaneously pled guilty to crimes committed in two counties. All of the crimes were taken into consideration in the first SORA assessment proceeding: "Where, as here, a single RAI [risk assessment instrument] addressing all relevant conduct is prepared, the goal of assessing the risk posed by the offender is fulfilled by a single SORA adjudication. To hold otherwise — that is, to permit multiple risk level determinations based on conduct included in a single RAI — would result in redundant proceedings and constitute a waste of judicial resources. Here, for instance, once the Division of Criminal Justice Services was notified of the Richmond County SORA court's determination, 'it had the information it needed to serve SORA's goal of 'protect[ing] the public from' this particular sex offender' ... . Any further proceedings then became duplicative." ***People v. Cook*, 2017 N.Y. Slip Op. 02467, CtApp 3-30-17**

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA).

DEFENDANT SHOULD NOT HAVE BEEN ASSESSED POINTS UNDER RISK FACTOR 7, DEFENDANT HAD LONG-TERM NON-SEXUAL RELATIONSHIPS WITH THE VICTIMS BEFORE THE ABUSE STARTED, DEFENDANT DID NOT ESTABLISH THE RELATIONSHIPS FOR THE PRIMARY PURPOSE OF VICTIMIZATION.

The Court of Appeals, in a full-fledged opinion by Judge Stein, over a two-judge dissenting opinion, determined defendant should not have been assessed points under risk factor 7. Risk factor 7 applies when a defendant establishes a relationship with a victim for the primary purpose of victimization. Here the victims were the children of defendant's long-time friends. Defendant had long-term non-sexual relationships with the children before the abuse began: "The People bore the burden of establishing by clear and convincing evidence that defendant promoted his relationship with one or more of the victims for the primary purpose of sexually abusing them (see Correction Law § 168-n [3]...). That burden was not met here. The record reflects that he had long-term, pre-existing relationships with the children, continued those relationships in the role of a close family friend who regularly spent substantial amounts of time with the children and their families, and did not begin to offend against them until the eldest child was approximately 11 years old ... . Therefore, the evidence in this record does not support Supreme Court's determination that defendant 'promoted' his relationships with these children for purposes of victimization ... , as opposed to redirecting his longstanding close and involved relationships with them in such a way as to allow for sexual abuse." ***People v. Cook*, 2017 N.Y. Slip Op. 02468, CtApp 3-30-17**

LABOR LAW-CONSTRUCTION LAW.

QUESTION OF FACT, CREATED BY CONFLICTING EXPERTS, WHETHER OUTSIDE STEEL STAIRCASE WAS SAFE FOR USE IN WET WEATHER, PLAINTIFF SHOULD NOT HAVE BEEN GRANTED SUMMARY JUDGMENT ON HIS LABOR LAW § 240(1) CAUSE OF ACTION.

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, over a three-judge dissenting opinion, determined plaintiff's summary judgment motion on his Labor Law § 240(1) cause of action should not have been granted. Plaintiff fell down a temporary steel staircase which was wet from rain. There were conflicting expert affidavits about the safety of the stairs: "To the extent the Appellate Division opinion below can be read to say that a statutory violation occurred merely because plaintiff fell down the stairs, it does not provide an accurate statement of the law. As we have made clear, the fact that a worker falls at a construction site, in itself, does not establish a violation of Labor Law § 240 (1) ... . Moreover, the present case is distinguishable from 'cases involving ladders or scaffolds that collapse or malfunction for no apparent reason' where we have applied 'a presumption that the ladder or scaffolding device was not good enough to afford proper protection' ... . Here, by contrast, there are questions of fact as to whether the staircase provided adequate protection. As noted above, defendants' expert opined that the staircase was designed to allow for outdoor use and to provide necessary traction in inclement weather. Moreover, defendants' expert opined that additional anti-slip measures were not warranted. In addition, he disputed the assertions by plaintiff's expert that the staircase was worn down or that it was unusually narrow or steep. In light of the above, plaintiff was not entitled to summary judgment on the issue of liability." ***O'Brien v. Port Auth. of N.Y. & N.J.*, 2017 N.Y. Slip Op. 02466, CtApp 3-30-17**

FIRST DEPARTMENT

CIVIL PROCEDURE.

DEFENDANTS' DEMAND FOR A CHANGE OF VENUE WAS PROPERLY DISMISSED AS UNTIMELY UNDER THE ELECTRONIC FILING RULES (TO WHICH DEFENDANTS HAD CONSENTED).

The First Department determined defendants demand for a change of venue was untimely under the electronic filing rules, to which defendants had consented: "Supreme Court properly concluded that defendants' motion was untimely. Having consented to electronic filing, defendants were required to serve their papers electronically (Uniform Rules for Trial Cts [22 NYCRR] § 202.5-b[d][1]), and indeed served their demand for change of venue, together with their answer, by e-filing the documents on July 14, 2015 ... . Having served their demand, defendants were required to bring their motion to change venue within 15 days, or by July 29, 2015 (CPLR 511). However, defendants did not bring their motion until July 31, 2015, rendering it untimely. That defendants also elected to serve their demand via United States mail did not extend the deadline for their motion under CPLR 2103(b)(2). Because they consented to participate in Supreme Court's e-filing system, defendants were bound by the applicable rules governing service." ***Woodward v. Millbrook Ventures LLC*, 2017 N.Y. Slip Op. 02522, 1st Dept 3-30-17**

FREEDOM OF INFORMATION LAW (FOIL).

RECORDS OF PROCEEDINGS BEFORE THE CIVILIAN COMPLAINT REVIEW BOARD ARE POLICE OFFICER PERSONNEL RECORDS WHICH ARE EXEMPT FROM A FREEDOM OF INFORMATION LAW REQUEST.

The First Department, in a full-fledged opinion by Justice Sweeney, reversing Supreme Court, determined Civilian Complaint Review Board (CCRB) records are police officer "personnel records" and are therefore exempt from disclosure under the Public Officers Law and Civil Rights Law. Petitioner sought a summary of any CCRB proceedings involving Officer Pantaleo, who was videotaped applying a choke hold to Eric Garner. Eric Garner died while being restrained by police officers: "We are called upon to determine whether the documents sought herein are the type of documents that fall within the parameters of 'personnel records' and are thus protected from disclosure. Civil Rights Law § 50-a does not define 'personnel records,' leaving it to the courts to determine the kind of documents qualify for this exemption. * * * ... [T]here is no question that the summary sought involves one officer and are part and parcel of his personnel file. There is also no question that the records sought are 'used to evaluate performance toward continued employment or promotion,' as required by the statute. ... CCRB findings and recommendations are clearly of significance to superiors in evaluating police officers' performance. As noted, all complaints filed with the CCRB, regardless of the outcome, are filed with and remain in an officer's CCRB history, which is part of his or her personnel record maintained by the NYPD. We therefore hold that the CCRB met its burden of demonstrating that those documents constitute 'personnel records' for purposes of Civil Rights Law § 50-a, and that they fall squarely within a statutory exemption of the statute ...". ***Matter of Luongo v. Records Access Officer, Civilian Complaint Review Bd.*, 2017 N.Y. Slip Op. 02523, 1st Dept 3-30-17**

FREEDOM OF INFORMATION LAW (FOIL).

RESULTS OF NYPD DISCIPLINARY TRIALS ARE PERSONNEL RECORDS EXEMPT FROM A FREEDOM OF INFORMATION LAW REQUEST.

The First Department, reversing Supreme Court, determined that the results of NYPD police officer disciplinary trials were personnel records which are exempt from a Freedom of Information Law request: "Public Officers Law § 87(2)(a) provides that an agency 'may deny access to records' that 'are specifically exempted from disclosure by state . . . statute.' The NYPD disciplinary decisions sought here fall within Civil Rights Law § 50-a, which makes confidential police 'personnel records used to evaluate performance toward continued employment or promotion' ... . The fact that NYPD disciplinary trials are open to the public (38 RCNY 15-04[g]) does not remove the resulting decisions from the protective cloak of Civil Rights Law § 50-a ... . Whether the trials are public and whether the written disciplinary decisions arising therefrom are confidential are distinct questions governed by distinct statutes and regulations ... . Further, the disciplinary decisions include the disposition of the charges against the officer as well as the punishment imposed, neither of which is disclosed at the public trial." ***Matter of New York Civ. Liberties Union v. New York City Police Dept.*, 2017 N.Y. Slip Op. 02506. 1st Dept 3-30-17**

LANDLORD-TENANT (NYC).

DEFENDANT LANDLORD DEMONSTRATED RENOVATIONS TO THE APARTMENT, WHICH WAS ONCE RENT-CONTROLLED, WERE SUFFICIENT TO WARRANT CHARGING MARKET RENT (FIRST RENT), COMPLAINT DISMISSED BASED ON LANDLORD'S DOCUMENTARY EVIDENCE.

The First Department, over an extensive dissent, determined plaintiff landlord was entitled to dismissal of tenant's complaint (based on documentary evidence). The complaint alleged the landlord was not entitled to charge market rent ("first rent") but rather the apartment was subject to rent control. The landlord demonstrated that renovations, including the addition of a second floor, substantially altered the apartment such that first rent could be charged: "The documentary evidence submitted by landlord was designed to refute plaintiff's claim that the conversion of the apartment into a duplex did not meet the criteria for first rent or high rent vacancy deregulation. A landlord may charge first rent, pursuant to the Rent Stabilization Code, where the landlord 'substantially alters the outer dimensions of a vacant housing accommodation, which qualifies for a first rent equal to or exceeding the applicable amount qualifying for deregulation' (9 NYCRR 2520.11[r][12]) which in this case, was $2,000 or more per month' (9 NYCRR 2520.11[r][4]). Stated somewhat differently, first rent is permitted 'when the perimeter walls of the apartment have been substantially moved and changed and where the previous apartment, essentially, ceases to exist, thereby rendering its rental history meaningless' ... . This Court has described the test for whether alterations qualify for first rent as 'reconfiguration plus obliteration of the prior apartment's particular identity' ... . * * * Landlord satisfied its burden of demonstrating that it made the necessary improvements to qualify for first rent, since it established that it substantially altered the character of the apartment by connecting it to the new penthouse. * * * We similarly find that the documents submitted by landlord established that it properly claimed a rent increase based on the costs of its project to substantially increase the space in the apartment." ***Dixon v. 105 W. 75th St. LLC*, 2017 N.Y. Slip Op. 02504, 1st Dept 3-30-17**

MUNICIPAL LAW, CIVIL RIGHTS LAW (42 USC 1983), CIVIL PROCEDURE.

THREE YEAR STATUTE OF LIMITATIONS FOR A FALSE ARREST CAUSE OF ACTION UNDER 42 U.S.C. 1983 BEGAN TO RUN UPON ARRAIGNMENT.

The First Department noted that the three year statute of limitations for a false arrest cause of action under 42 U.S.C. 1983 began to run upon arraignment: "The three-year limitations period on a section 1983 claim based on false arrest begins to run 'when the alleged false imprisonment ends' — that is, when the arrestee becomes subject to the legal process such as being 'bound over by a magistrate or arraigned on charges' ... . Here, because plaintiff was arraigned on July 16, 2011, the limitations period on his section 1983 claim based on false arrest ended on July 16, 2014, approximately three months before plaintiff filed this action. Accordingly, the claim is time-barred." ***Cruz v. City of New York*, 2017 N.Y. Slip Op. 02386, 1st Dept 3-28-17**

TORTIOUS INTERFERENCE WITH BUSINESS RELATIONS, APPEALS.

TORTIOUS INTERFERENCE WITH BUSINESS RELATIONS CAUSE OF ACTION PROPERLY SURVIVED A MOTION TO DISMISS, LAW OF THE CASE DOCTRINE APPLIES ONLY TO COURTS OF COORDINATE JURISDICTION.

The First Department determined plaintiff had stated a cause of action for tortious interference with business relations. Plaintiff, a Broadway musical producer, alleged defendant made false statements implicating plaintiff in investor fraud (committed by a nonparty). The court noted that the law of the case doctrine applies only to courts of coordinate jurisdiction, not to the appellate courts: "The tortious interference claim was properly sustained insofar as it was premised on emails sent by defendant to a key investor, but not insofar as it was premised on comments made by defendant's attorney that were quoted in various news articles. As to the emails, plaintiff adequately pled that defendant's conduct was unlawful

or for the sole purpose of inflicting intentional harm on plaintiff ... - as we observed in a related action premised on these same emails (see *Rebecca Broadway L.P. v. Hotton*, 143 AD3d 71, 77 [1st Dept 2016]). Specifically, plaintiff alleged that, in sending the emails, defendant misappropriated confidential information he was privy to as a result of his position as the musical's press agent and committed the independent tort of defamation ...". ***Sprecher v. Thibodeau*, 2017 N.Y. Slip Op. 02519, 1st Dept 3-30-17**

TRUSTS AND ESTATES.

DEFENDANT FOUND NOT GUILTY BY REASON OF INSANITY CAN BE SUED FOR WRONGFUL DEATH UNDER THE EPTL, BOTH FOR THE STABBING DEATH OF HIS MOTHER AND THE RELATED SUICIDE OF HIS BROTHER.

The First Department, reversing Supreme Court, determined the fact that defendant was found not guilty by reason of insanity in connection with the stabbing of his mother did not preclude wrongful death claims against him pursuant to EPTL 5-4.1, both for the death of his mother and the related suicide of his brother: "Although defendant was found not guilty by reason of mental disease or defect in connection with the stabbing death of his mother, the complaint stated a viable wrongful death claim against him pursuant to EPTL 5-4.1, since an insane person may be liable in tort for his actions ... . A wrongful death claim was also stated on behalf of defendant's brother, who committed suicide after his mother's murder." ***Rosen v. Schwartz*, 2017 N.Y. Slip Op. 02517, 1st Dept 3-30-17**

SECOND DEPARTMENT

ADMINISTRATIVE LAW.

DEPARTMENT OF CONSUMER AFFAIR'S DETERMINATION WAS AFFECTED BY AN ERROR OF LAW WHICH RESULTED IN A MISINTERPRETATION OF THE ADMINISTRATIVE CODE, DETERMINATION SHOULD HAVE BEEN ANNULLED.

The Second Department determined that the imposition of a fine by the NYC Department of Consumer Affairs (DCA) was improper because the fine was based upon a misinterpretation of a provision of the NYC Administrative Code. The Article 78 petition seeking annulment of the DCA's determination should have been granted: "Here, the DCA's determination was affected by an error of law, since its interpretation of the Administrative Code provision which the petitioner was charged with violating was unreasonable ... . The Administrative Code provision at issue provides, in relevant part: 'Any person requesting application information from a prospective tenant or tenants shall post a sign . . . in any location at which the principal purpose is conducting business transactions pertaining to the rental of residential real estate properties' (Administrative Code § 20-809[a]). It was undisputed by the respondents that the petitioner's business concerned sales of real estate properties, although the petitioner admitted to handling one or two residential rentals per year. Under these circumstances, the petitioner correctly argued that the Administrative Code provision was inapplicable to it because it did not have a 'location at which the principal purpose is conducting business transactions pertaining to the rental of residential real estate properties"'(id.)." ***Matter of Arash Real Estate & Mgt. Co. v. New York City Dept. of Consumer Affairs*, 2017 N.Y. Slip Op. 02416, 2nd Dept 3-29-17**

ARBITRATION, EMPLOYMENT LAW, EDUCATION-SCHOOL LAW.

TERMINATION OF OUT OF WORK SCHOOL DISTRICT EMPLOYEE PURSUANT TO THE CIVIL SERVICE LAW IS NOT ARBITRABLE, PETITION TO STAY ARBITRATION SHOULD HAVE BEEN GRANTED.

The Second Department determined the school district's petition to stay arbitration should have been granted. A school district employee, Turco, was injured on the job and was out of work on Workers' Compensation leave for more than a year. The district terminated his employment pursuant to Civil Service Law 71. Turco filed a grievance with his union alleging the termination violated the collective bargaining agreement. The Second Department held that the matter was not arbitrable because of the conflict between the agreement and the statute: "Despite the general policy favoring the resolution of disputes by arbitration, some matters, because of competing considerations of public policy, cannot be heard by an arbitrator. 'If there is some statute, decisional law or public policy that prohibits arbitration of the subject matter of dispute, . . . the claim is not arbitrable' ... . Indeed, the public policy exception can be invoked as a threshold issue to preclude arbitration pursuant to CPLR 7503 ... . 'Preemptive judicial intervention in the arbitration process is warranted where the arbitrator [cannot] grant any relief without violating public policy' ... . * * * Here, the district terminated Turco's employment pursuant to Civil Service Law § 71. Section 71 provides that a public employer may terminate an employee who is absent due to an occupational disability for a cumulative period of one year if the employee remains physically or mentally unable to return to work ...". ***Matter of Enlarged City Sch. Dist. of Middletown N.Y. v. Civil Serv. Empls. Assn., Inc.*, 2017 N.Y. Slip Op. 02421, 2nd Dept 3-29-17**

CIVIL PROCEDURE, BANKRUPTCY, ATTORNEYS.

PLAINTIFFS HAD STANDING TO SUE FOR LEGAL MALPRACTICE STEMMING FROM A TRIAL BROUGHT IN THE NAME OF PLAINTIFFS' CHAPTER 13 BANKRUPTCY TRUSTEE.

The Second Department, reversing Supreme Court, over a dissent, determined the plaintiffs, who were discharged in Chapter 13 bankruptcy proceedings, could sue for legal malpractice stemming from a personal injury trial brought in the name of the bankruptcy trustee. The plaintiffs alleged the recovery in the personal injury trial was diminished because the jury became aware an injury report had been altered by the defendant lawyers and a doctor: "... [W]e find that the plaintiffs, as Chapter 13 debtors, had standing to maintain this action. We note that standing, of course, concerns the absence or presence of a sufficiently cognizable stake in the outcome of the litigation ... . In contrast to Chapter 7 proceedings, the object of a Chapter 13 proceeding is the rehabilitation of the debtor under a plan that adjusts debts owed to creditors by the debtor's regular periodic payments derived principally from income. Thus, in a Chapter 13 proceeding, a debtor generally retains his property, if he so proposes, and seeks court confirmation of a plan to repay his debts over a three- to five-year period ... . Payments under a Chapter 13 plan are usually made from a debtor's 'future earnings or other future income' ... . 'Accordingly, the Chapter 13 estate from which creditors may be paid includes both the debtor's property at the time of his bankruptcy petition, and any wages and property acquired after filing' ... . Assets acquired after a Chapter 13 plan is confirmed by the court are not included as property of the estate, unless they are necessary to maintain the plan ... , or the trustee seeks a modification of the plan to remedy a substantial change in the debtor's income or expenses that was not anticipated at the time of the confirmation hearing ... . Unlike Chapter 7 proceedings, there is no separation of the estate property from the debtor under a Chapter 13 proceeding, except to the extent that the plan, as confirmed by order of the court, places control over an asset in the hands of the trustee ... . This is the basis for the conclusion that, while Chapters 7 and 11 debtors lose capacity to maintain civil suits, Chapter 13 debtors do not ..." . ***Nicke v. Schwartzapfel Partners, P.C.*, 2017 N.Y. Slip Op. 02437. 2nd Dept 3-29-17**

CRIMINAL LAW, EVIDENCE.

INSUFFICIENT EVIDENCE TO SUPPORT PHYSICAL INJURY ELEMENT OF ASSAULT THIRD, INSUFFICIENT EVIDENCE TO WARRANT SENTENCING AS A PERSISTENT FELONY OFFENDER.

The Second Department determined the evidence of physical injury was not sufficient to support the assault third conviction. The court further determined the totality of the circumstances did not support sentencing defendant as a persistent felony offender: "The record, which contains photographs that were shown to the jury depicting the complainant's injury, demonstrated that the complainant sustained a one-half inch laceration on one of her toes, which stopped bleeding before an emergency medical technician arrived at the scene. No evidence was introduced that the injury sustained by the complainant caused her more than trivial pain. The complainant's vague testimony that she was unable to wear shoes for an unspecified period of time failed to sufficiently demonstrate that the use of her foot was impaired by her injury. Accordingly, there was insufficient evidence that the complainant suffered a 'physical injury' within the meaning of Penal Law § 10.00(9) ... . [T]he totality of the evidence adduced at the persistent felony offender hearing, although warranting the defendant's adjudication as a second felony offender, did not warrant his adjudication as a persistent felony offender ... . In addition, in reaching its determination, the Supreme Court improperly considered a crime of which the defendant was acquitted as a basis for sentencing ...". ***People v. Fews*, 2017 N.Y. Slip Op. 02443, 2nd Dept 3-29-17**

FAMILY LAW, IMMIGRATION LAW.

FAMILY COURT SHOULD HAVE MADE FINDINGS ALLOWING JUVENILE TO PETITION FOR SPECIAL IMMIGRANT JUVENILE STATUS, PARENTAL NEGLECT PRECLUDED REUNIFICATION.

The Second Department, reversing Family Court, determined Family Court should have made findings which would allow the juvenile to petition for special immigrant juvenile status (SIJS). Reunification with a parent was precluded by parental neglect, including excessive corporal punishment, and forcing the juvenile to work rather than attend school: "Pursuant to 8 USC § 1101(a)(27)(J) ... and 8 CFR 204.11, a 'special immigrant' is a resident alien who, inter alia, is under 21 years of age, is unmarried, and has been legally committed to, or placed under the custody of, an individual appointed by a state or juvenile court. Additionally, for a juvenile to qualify for special immigrant juvenile status, a court must find that reunification of the juvenile with one or both of the juvenile's parents is not viable due to parental abuse, neglect, abandonment, or a similar basis found under state law ... , and that it would not be in the juvenile's best interests to be returned to his or her native country or country of last habitual residence ... . Based upon our independent factual review, we conclude that the record supports a finding that reunification of the child with one or both of his parents is not a viable option based upon parental neglect, which includes the infliction of excessive corporal punishment and requiring the child to begin working at the age of 12 instead of attending school on a regular basis ... . The record further supports a finding that it would not be in the best interests of the child to return to India ...". ***Matter of Palwinder K. v. Kuldeep K.*, 2017 N.Y. Slip Op. 02423. 2nd Dept 3-29-17**

MUNICIPAL LAW.

SECOND DEPARTMENT JOINS THE THIRD AND FOURTH DEPARTMENTS IN HOLDING INDIVIDUAL MUNICIPAL EMPLOYEES NEED NOT BE NAMED AS DEFENDANTS IN A NOTICE OF CLAIM.

The Second Department decided to follow the Third and Fourth Departments and did not require the naming of individual municipal employees as defendants in a notice of claim. The decision in this false arrest, malicious prosecution and civil rights violation case is substantive and deals with several issues not summarized here, including the District Attorney's immunity from suit. With respect to the notice of claim, the court wrote: "The Appellate Division, First Department, has held that 'General Municipal Law § 50-e makes unauthorized an action against individuals who have not been named in a notice of claim' ... . * * * The plurality opinion in that case stated that the names of individual employees, if unknown, should still be named as John or Jane Does to enable the municipality to properly investigate the claims and to put individual defendants on notice that they will be sued. ... In contrast, the Appellate Division, Fourth Department, has held that naming individual municipal employees in a notice of claim is not a condition precedent to joining those individuals as defendants in the action ... . In Goodwin, the Fourth Department noted that General Municipal Law § 50-e(2), which sets forth the requirements for a notice of claim, does not include a requirement that specific individual employees be named, and concluded that "[t]he underlying purpose of the statute may be served without requiring a plaintiff to name the individual agents, officers or employees in the notice of claim" (id. at 216). In *Pierce v. Hickey* (129 AD3d 1287, 1289), the Appellate Division, Third Department, followed Goodwin, stating that there was no requirement that 'an individual municipal employee be named in the notice of claim.' We agree with the Third and Fourth Departments. * * * Listing the names of the individuals who allegedly committed the wrongdoing is not required ...". ***Blake v. City of New York*, 2017 N.Y. Slip Op. 02399, 2nd Dept 3-29-17**

MUNICIPAL LAW, PERSONAL INJURY.

19 YEAR OLD NOTICE OF CLAIM WAS NOT SUFFICIENT WRITTEN NOTICE OF SIDEWALK DEFECT.

The Second Department determined a 19-year-old notice of claim did not meet the written notice requirement for a sidewalk defect in this slip and fall case: " 'Administrative Code of the City of New York § 7-201(c) limits the City's duty of care over municipal streets and sidewalks by imposing liability only for those defects or hazardous conditions which its officials have been actually notified exist at a specified location' ... . Accordingly, 'prior written notice of a defect is a condition precedent which plaintiff is required to plead and prove to maintain an action against the City' ... . Here, the City established its prima facie entitlement to judgment as a matter of law by submitting proof that a search of its records revealed that it had not received any prior written notice of the allegedly defective condition ... . In opposition, the plaintiffs failed to raise a triable issue of fact. 'To satisfy a prior written notice statute, the notice relied upon by a plaintiff must not be too remote in time' ... . Here, the plaintiffs' submission of a notice of claim, filed almost 19 years prior to the accident complained of, was insufficient to raise a triable issue of fact since it was too remote in time to constitute prior written notice within the meaning of Administrative Code of the City of New York § 7-201(c) ...". ***Gellman v. Cooke*, 2017 N.Y. Slip Op. 02404, 2nd Dept 3-29-17**

PERSONAL INJURY.

ALTHOUGH THERE WAS A STORM IN PROGRESS, DEFENDANT'S SNOW REMOVAL MAY HAVE EXACERBATED THE SLIPPERY CONDITION, DEFENDANT'S SUMMARY JUDGMENT MOTION SHOULD HAVE BEEN DENIED.

The Second Department, reversing Supreme Court, determined plaintiff had raised a question of fact in this slip and fall case. Although there was a storm in progress, defendant's snow removal efforts may have exacerbated the ice condition (facts not described in decision): "Here, in support of its motion, the defendant established its prima facie entitlement to judgment as a matter of law by submitting evidence, which included the affidavit of its meteorologist, as well as certified climatological data, which demonstrated that the subject accident occurred while a storm was in progress ... . In opposition, the evidence relied upon by the plaintiff, which included her affidavit and the affidavit of her meteorologist, raised a triable issue of fact as to whether any snow removal efforts the defendant undertook prior to the accident in relation to the storm either created or exacerbated the ice condition which allegedly caused the plaintiff to fall ...". ***Dylan v. CEJ Props., LLC*, 2017 N.Y. Slip Op. 02403, 2nd Dept 3-29-17**

PERSONAL INJURY.

FOOT OF A DECORATIVE FENCE OVER WHICH PLAINTIFF TRIPPED WAS OPEN AND OBVIOUS AS A MATTER OF LAW.

The Second Department determined the foot of a decorative fence over which plaintiff tripped was open and obvious and not actionable: "While a landowner has a duty to maintain its premises in a reasonably safe condition ... , 'there is no duty to protect or warn against an open and obvious condition which, as a matter of law, is not inherently dangerous' ... . 'While the issue of whether a hazard is . . . open and obvious is generally fact-specific and thus usually a jury question, a court may determine that a risk was open and obvious as a matter of law when the established facts compel that conclusion, and may do so on the basis of clear and undisputed evidence' ... . Here, the defendants established, prima facie, that the fence, including the 'leg' or foot of the fence, was open and obvious, as it was readily observable by those employing the reasonable use of their senses and, as a matter of law, was not inherently dangerous ... . In opposition, the plaintiff failed to raise

a triable issue of fact. Contrary to her contention, she did not raise a triable issue of fact as to whether the foot of the fence constituted a "trap for the unwary" because it was somehow obscured ...". ***Gerner v. Shop-Rite of Uniondale, Inc.*, 2017 N.Y. Slip Op. 02407, 2nd Dept 3-29-17**

PERSONAL INJURY, COURT OF CLAIMS.

CLAIMANT STRUCK A DOWNED LIGHT POLE WHICH HAD ROTTED BELOW GROUND, STATE DID NOT HAVE ACTUAL OR CONSTRUCTIVE NOTICE OF THE CONDITION.

The Second Department determined the state did not have actual or constructive notice that a light pole was rotten. Claimant was injured when his vehicle struck a downed pole. The rot was not visible above ground. Evidence that rot was visible on other poles did not provide adequate notice: "Here, the Court of Claims correctly concluded that the claimant failed to establish that the State had either actual or constructive notice of any dangerous condition of the subject light pole. Rather, the evidence established that the rot on the pole was at the bottom of the pole, which was buried between six and seven feet below ground. Thus, a reasonable inspection would not have revealed the dangerous condition. The claimant's evidence that a witness noticed rot on some of the wooden poles along Ocean Parkway during the prior 15 years is insufficient to provide notice regarding the specific pole involved in the accident. 'A general awareness of a recurring problem in insufficient, without more, to establish constructive notice of the particular condition that caused the accident' ...". ***Jeffries v. State of New York*, 2017 N.Y. Slip Op. 02409, 2nd Dept 3-29-17**

PERSONAL INJURY, EVIDENCE.

FAILURE TO PRESERVE SURVEILLANCE VIDEO WHICH ALLEGEDLY SHOWED HOW PLAINTIFF WAS INJURED WARRANTED A SANCTION, EVEN THOUGH PLAINTIFF DID NOT DEMAND THE TAPE OR ASK THAT IT BE PRESERVED.

The Second Department determined defendants should have been sanctioned for not preserving a videotape which allegedly showed plaintiff deliberately allowing a car to run over her toes. Plaintiff had not asked that the videotape be preserved. The Second Department determined the appropriate sanction is to prohibit the defendants from introducing any evidence of the contents of the tape. The Second Department further held that plaintiff was not entitled to summary judgment because her conclusory affidavit was not sufficient to demonstrate the absence of comparative fault: "Here, the Supreme Court improvidently exercised its discretion in failing to impose any sanction. The plaintiff sustained her burden of establishing that spoliation occurred, given that the defendants failed to preserve the surveillance video despite their knowledge of a reasonable likelihood of litigation regarding the incident, and the highly relevant nature of the video evidence to that litigation ... . However, since the destruction of the evidence did not deprive the plaintiff of her ability to prove her claim so as to warrant the drastic sanction of striking the defendants' answer, the appropriate sanction for the spoliation herein is to preclude the defendants from offering any evidence in this action regarding the alleged contents of the erased surveillance video ...". ***Rokach v. Taback*, 2017 N.Y. Slip Op. 02456, 2nd Dept 3-29-17**

PERSONAL INJURY, INTENTIONAL TORTS, CIVIL PROCEDURE.

DISMISSAL OF INTENTIONAL TORT CAUSES OF ACTION PRECLUDED SUBSEQUENT ACTION SOUNDING IN NEGLIGENCE, NO NEGLIGENT ASSAULT IN NEW YORK.

The Second Department noted that New York does not recognize an action for negligent assault. Plaintiff's intentional tort causes stemming from an arrest by a security guard were dismissed as time-barred. Plaintiff then brought suit under a negligence theory: " '[U]nder New York's transactional analysis approach to res judicata, once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy' ... . Here, the purported negligence cause of action asserted in the plaintiff's second action arose from the same operative facts as the dismissed intentional tort claims, and could have been raised in the first action. Accordingly, in view of the previous litigation between the parties, the Supreme Court properly directed the dismissal of that cause of action on the ground that it was barred by the doctrine of res judicata ... . Furthermore, the Supreme Court properly dismissed the negligence cause of action on the additional ground that the allegations in support of it failed to state a cause of action. The allegations that Doe physically injured the plaintiff while restraining and arresting him did not transform the plaintiff's time-barred cause of action alleging assault into a timely cause of action alleging negligence, as New York does not recognize a cause of action to recover for negligent assault ... '." ***Johnson v. City of New York*, 2017 N.Y. Slip Op. 02410, 2nd Dept 3-29-17**

THIRD DEPARTMENT

UNEMPLOYMENT INSURANCE LAW.

BUILDING AND HOME INSPECTORS WERE EMPLOYEES OF ENGINEERING FIRM.

The Third Department determined architects and engineers hired by Tauscher to conduct building and home inspections were employees entitled to unemployment insurance benefits: "Here, although the inspectors signed a standard agreement identifying them as independent contractors, the agreement contained a noncompete clause prohibiting the inspectors from working directly or indirectly with competing engineering firms within Tauscher's geographic region, including 100 miles from the Empire State Building in New York City. The agreement further provided that the inspectors perform their inspections in accordance with industry and professional standards and that their post-inspection reports be drafted on forms provided by Tauscher and submitted to Tauscher within a limited time frame. The inspectors were also required to participate in Tauscher's self-insurance fund, as well as pay for professional liability insurance obtained by Tauscher, and to share in the costs of any litigation arising out of the inspections. Tauscher scheduled the time of the inspections, which were not subject to modification by the inspectors, and would seek a replacement inspector if the original inspector was unavailable. Tauscher also provided the inspectors with business cards bearing Tauscher's name to provide to its clients. With regard to compensation, Tauscher established the fees that clients were required to pay for the inspections and also unilaterally set the percentage of the fees that constituted payment for the inspectors. In order for the inspectors to receive payment, they were required to submit invoices to Tauscher, which in turn would pay the inspectors directly. In addition, Tauscher managed the billing of, and collection from, clients. Notwithstanding the proof in the record that could support a contrary result, the foregoing evidence demonstrates that Tauscher retained overall control over important aspects of the services performed by the inspectors, and we therefore find that substantial evidence supports the determination of the Board assessing Tauscher additional unemployment insurance contributions for remuneration paid to the inspectors ...". ***Matter of Tauscher Cronacher PE PC (Commissioner of Labor)*, 2017 N.Y. Slip Op. 02488. 3rd Dept 3-30-17**

WORKERS' COMPENSATION LAW.

EXERTIONAL ABILITY OF LESS THAN SEDENTARY WORK DOES NOT EQUATE TO A FINDING OF PERMANENT TOTAL DISABILITY, PERMANENT PARTIAL DISABILITY FINDING AFFIRMED.

The Third Department, over a two-justice dissent, determined the evidence supported the Workers' Compensation Board's permanent partial disability finding. Claimant argued she was totally disabled and contended the Board's finding she has an exertional ability of "less than sedentary work" equated to a finding of permanent total disability. On that issue, the Third Department wrote: "Under the Board guidelines, physicians are required to perform an evaluation of a claimant's functional capabilities, including his or her exertional abilities (see New York State Guidelines for Determining Permanent Impairment and Loss of Wage Earning Capacity at 44-46 [2012]). The finding of a claimant's exertional ability is a factor to be considered by the Board in determining the claimant's loss of wage-earning capacity ... . The loss of wage-earning capacity is used to establish the duration of benefits for claimants that have sustained a permanent partial disability ... . 'In contrast, a permanent total disability is established where the medical proof shows a claimant is totally disabled and unable to engage in any gainful employment. The duration of benefits is not an issue in the permanent total disability context for the simple reason that there is no expectation that a claimant found to have such a disability will rejoin the work force' ... . Accordingly, a finding that a claimant has an exertional ability of performing less than sedentary work, while a factor to consider in setting the duration of a permanently partially disabled claimant's benefits, is not dispositive in the context of establishing the claimant's overall disability. Rather, the exertional ability to work is applicable only to those claimants already found to have sustained a permanent partial disability and, therefore, are expected to rejoin the work force." ***Matter of Burgos v. Citywide Cent. Ins. Program*, 2017 N.Y. Slip Op. 02489, 3rd Dept 3-30-17**

FOURTH DEPARTMENT

CIVIL PROCEDURE.

RECORDS OF PLAINTIFF'S STAY AT A SHELTER FOR VICTIMS OF DOMESTIC VIOLENCE ARE DISCOVERABLE IN THIS MEDICAL MALPRACTICE ACTION AS DEEMED APPROPRIATE BY THE TRIAL COURT UPON REVIEW, DEFENDANTS ENTITLED TO PRIVILEGE LOG.

The Fourth Department determined the records of plaintiff's stay at a shelter for domestic violence victims were not protected by privilege. The defendants in this medical malpractice action sought the records and the plaintiff's privilege log. The medical malpractice action stemmed from treatment of injuries from an assault. The Fourth Department held that the defendants were entitled to the privilege log, which plaintiff the trial court had ordered submitted only to the court. After the defendants review the log the trial court should hear argument from the defendants concerning the discoverability of any identified documents: "... [T]he shelter records are not protected by any privilege, and they are thus subject to disclosure

to the extent that they are material and necessary to the defense of the action ... . Even assuming, arguendo, that the records were prepared by licensed social workers, which is not evident from the records themselves, we conclude that plaintiff waived any privilege afforded by CPLR 4508 by affirmatively placing her medical and psychological condition in controversy through the broad allegations of injury in her bills of particulars ... . Inasmuch as defendants are not seeking disclosure of the street address of the shelter, we reject plaintiff's contention that Social Services Law § 459-h precludes disclosure of the records. Furthermore, 18 NYCRR 452.10 (a), which renders confidential certain information "relating to the operation of residential programs for victims of domestic violence and to the residents of such programs,' does not preclude disclosure of the records because that regulation allows for access to such information "as permitted by an order of a court of competent jurisdiction' ... . That regulation does not preclude a court from ordering disclosure of shelter records that are material and necessary to the defense of an action ... . [W]e conclude that defendants are not entitled to ' unfettered disclosure' of plaintiff's potentially sensitive shelter records ... . Indeed, we note that a court is 'entitled to consider . . . the personal nature of the information sought' in making a disclosure order ... . We agree with defendants, however, that the court should have directed plaintiff to provide a copy of her privilege log to them rather than directing her to provide it only to the court as an aid for its in camera review of the records." ***Abraha v. Adams*, 2017 N.Y. Slip Op. 02526, 4th Dept 3-31-17**

CRIMINAL LAW, APPEALS.

TRIAL JUDGE'S GRANT OF A TRIAL ORDER OF DISMISSAL IN THIS MURDER CASE WAS ERROR, HOWEVER THERE IS NO STATUTORY AUTHORITY FOR THE PEOPLE'S APPEAL.

The Fourth Department determined the People did not have statutory authority to appeal the grant of a trial order of dismissal after a mistrial had been declared because the jury could not reach a verdict. The Fourth Department explicitly stated that it had reviewed the evidence and found it legally sufficient to support the charge (murder). The trial order of dismissal, then, should not have been granted. But there was no mechanism for the People to appeal the error: " 'It is fundamental that in the absence of a statute expressly authorizing a criminal appeal, there is no right to appeal' ... . CPL 450.20, the 'exclusive route for a People's appeal' ... , does not authorize this appeal. Contrary to the People's contention, CPL 450.20 (2) does not provide the statutory basis for this appeal, inasmuch as the order they seek to appeal did not set aside a guilty verdict and dismiss the indictment pursuant to CPL 290.10 (1) (b). Rather, there was no guilty verdict to set aside, and the order was issued pursuant to CPL 290.10 (1) (a). Thus, the order is not appealable ... . We may not 'create a right to appeal out of thin air' in order to address the merits 'without trespassing on the Legislature's domain and undermining the structure of article 450 of the CPL—the definite and particular enumeration of all appealable orders' ... . Were we able to review the merits, however, we would agree with the People that the court erred in dismissing the indictment. A 'review [of] the legal sufficiency of the evidence as defined by CPL 70.10 (1), [while] accepting the competent evidence as true, in the light most favorable to the People,' compels the conclusion that the evidence was legally sufficient to support the charge ...". ***People v. Tan*, 2017 N.Y. Slip Op. 02541, 4th Dept 3-31-17**

CRIMINAL LAW, EVIDENCE, ATTORNEYS.

DEFENSE COUNSEL NOT INEFFECTIVE FOR FAILING TO INTRODUCE TAPED THIRD-PARTY CONFESSION, THE RELIABILITY PRONG OF THE STATEMENT AGAINST PENAL INTEREST CRITERIA WAS VERY WEAK.

The Fourth Department determined the defendant's motion to vacate the judgment of conviction on ineffective assistance grounds was properly denied. The basis of the ineffective assistance claim was his attorney's failure to put in evidence a third party's taped confession to the crime (to which defendant had pled guilty). The Fourth Department explained the tape recording did not meet the criteria for a statement against penal interest: " 'The declaration against penal interest exception to the hearsay rule recognizes the general reliability of such statements . . . because normally people do not make statements damaging to themselves unless they are true' ... . 'The exception has four components: (1) the declarant must be unavailable to testify by reason of death, absence from the jurisdiction or refusal to testify on constitutional grounds; (2) the declarant must be aware at the time the statement is made that it is contrary to penal interest; (3) the declarant must have competent knowledge of the underlying facts; and (4) there must be sufficient proof independent of the utterance to assure its reliability' ... . 'The fourth factor is the most important aspect of the exception' ... , and '[t]he crucial inquiry focuses on the intrinsic trustworthiness of the statement as confirmed by competent evidence independent of the declaration itself' ... . Where, as here, the declaration exculpates the defendant, '[s]upportive evidence is sufficient if it establishes a reasonable possibility that the [declaration] might be true' ... . In support of her conclusion that the confession was inadmissible, trial counsel testified that all she had was a voice on a tape recording and, based on her discussions with the prior attorney, 'there was some question as to whether [the third party] was even voluntarily in [the prior attorney's] office' when he made the confession. Defendant testified that the third party was a friend of one of his sisters, and that the third party and defendant's sister smoked crack cocaine together. ... [T]he prior attorney made arrangements for the third party to be appointed counsel, but the third party disappeared shortly thereafter and, despite diligent efforts, including maintaining the investigator's search, trial counsel was unable to locate him even up through defendant's trial." ***People v. Conway*, 2017 N.Y. Slip Op. 02530, 4th Dept 3-31-17**

PERSONAL INJURY.

NO SHOWING RUG OVER WHICH PLAINTIFF TRIPPED WAS NOT FLUSH TO THE FLOOR, HEIGHT DIFFERENTIAL WAS TRIVIAL, DEFENDANT'S SUMMARY JUDGMENT MOTION SHOULD HAVE BEEN GRANTED.

The Fourth Department, over a dissent, reversing Supreme Court, determined plaintiff's slip and fall complaint should have been dismissed. Plaintiff alleged he tripped on the corner of a rug. The Fourth Department found, as a matter of law, the rug was in place and plaintiff's foot went under it. The height of the rug was a trivial, nonactionable defect: "... [W]e conclude that defendant established as a matter of law that the alleged defect created by the placement of a rug in the vestibule and any apparent height differential between the rug and the floor 'is too trivial to be actionable' ... . '[T]he test established by the case law in New York is not whether a defect is capable of catching a pedestrian's shoe. Instead, the relevant questions are whether the defect was difficult for a pedestrian to see or to identify as a hazard or difficult to pass over safely on foot in light of the surrounding circumstances' ... . Defendant's submissions established that the accident occurred between approximately 10:00 and 10:30 a.m., when it was 'bright enough to see.' Plaintiff was entering defendant's restaurant behind his son, and there were no other customers in the vicinity. The photograph submitted by defendant depicting the rug does not reveal any defect or irregularity with the rug, and the videotape of the incident shows that the area where plaintiff fell was unobstructed, no other patrons had an issue traversing through the doors and over the rug, and there was no appreciable ripple or other height differential present in the rug to cause a tripping hazard. Thus, after examining the photograph and the video depicting the placement of the rug in the vestibule, and 'in view of the time, place, and circumstances of plaintiff's injury,' we conclude that defendant established as a matter of law that any defect in the rug was too trivial to be actionable ...". ***Langgood v. Carrols*, LLC, 2017 N.Y. Slip Op. 02528, 4th Dept 3-31-17**

PERSONAL INJURY, CIVIL PROCEDURE, GENERAL OBLIGATIONS LAW.

RACE TRACK WAIVER OF LIABILITY INVALID, PRIMARY ASSUMPTION OF RISK NOT APPLICABLE, IMPLIED ASSUMPTION OF RISK APPLICABLE, LAW OF THE CASE DID NOT PRECLUDE DIRECTED VERDICT AFTER DENIAL OF SUMMARY JUDGMENT ON THE SAME ISSUES.

The Fourth Department, in a substantive decision dealing with several liability and damages issues not summarized here, determined the trial court properly granted plaintiff's motion for a directed verdict finding the liability waiver invalid and the doctrine of primary assumption of risk inapplicable. The Fourth Department concluded the doctrine of implied assumption of risk was applicable, however. The Fourth Department further held that the law of the case doctrine did not preclude the court from directing a verdict in plaintiff's favor after denying plaintiff's motion for summary judgment on the same issues. Plaintiff's son was in an auto race at defendant race track. Plaintiff was in the pit area when defendant driver (Holland) backed his car into plaintiff: "Contrary to defendants' contention, the court properly granted plaintiff's motion for a directed verdict establishing that the liability waiver was invalid and that the action was not barred by the doctrine of primary assumption of the risk, inasmuch as there was 'no rational process' by which the jury could have found in favor of defendants on those issues ... . With respect to the waiver, General Obligations Law § 5-326 voids any such agreement entered into in connection with, as relevant here, the payment of a fee by a 'user' to enter a place of recreation. Plaintiff testified at trial that he was a mere spectator on the night of the accident, thereby establishing that he was a user entitled to the benefit of section 5-326 ... , and there was no evidence from which the jury could have rationally found that plaintiff was a participant in the event whose attendance was 'meant to further the speedway venture' ... . With respect to the doctrine of primary assumption of the risk, we conclude that the risk that a pedestrian will be struck by a driver backing up in the pit area, well before the driver is participating in a race, is not inherent in the activity of automobile racing ... , and thus that the doctrine is inapplicable to this case ... . … We further agree with defendants that a charge on implied assumption of the risk should have been given because there was evidence that plaintiff 'disregard[ed] a known risk by voluntarily being in a dangerous area' ... . Inasmuch as the jury was properly instructed on comparative negligence and apportioned 20% of the liability for the accident to plaintiff, however, we conclude that this error did not prejudice a substantial right of defendants and thus does not warrant reversal ...". ***Knight v. Holland*, 2017 N.Y. Slip Op. 02525, 4th Dept 3-31-17**

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