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COURT OF APPEALS

CIVIL PROCEDURE.

NO SPECIAL RULES APPLY TO DISCOVERY OF FACEBOOK POSTS IN A PERSONAL INJURY ACTION, THE SCOPE OF DISCOVERY SHOULD BE BASED UPON RELEVANCE TO THE ACTION BALANCED AGAINST PRIVACY CONCERNS.
The Court of Appeals, in a full-fledged opinion by Judge DiFiore, reversing the appellate division, clarified the standards to be applied to a defendant's discovery request for Facebook posts in a personal injury case. Plaintiff was injured falling from defendant's horse and alleged her cognitive and physical abilities were diminished significantly by her injuries. Plaintiff had posted pictures reflecting her lifestyle on her Facebook page, which was deactivated six months after the accident. Defendant sought plaintiff's entire "private" Facebook account, arguing that photographs and written postings (showing her cognitive abilities) were material and necessary to the defense (CPLR 3101(a)). "Supreme Court granted the motion to compel to the limited extent of directing plaintiff to produce all photographs of herself privately posted on Facebook prior to the accident that she intends to introduce at trial, all photographs of herself privately posted on Facebook after the accident that do not depict nudity or romantic encounters, and an authorization for Facebook records showing each time plaintiff posted a private message after the accident and the number of characters or words in the messages. ... [The appellate division] modified by limiting disclosure to photographs posted on Facebook that plaintiff intended to introduce at trial (whether pre- or post-accident) and eliminating the authorization permitting defendant to obtain data relating to post-accident messages ...". In reinstating Supreme Court's order, the Court of Appeals held that no special rules apply to Facebook accounts and courts should allow discovery based upon relevance, balanced against privacy concerns. ***Forman v. Henkin*, 2018 N.Y. Slip Op. 01015, CtApp 2-13-18**

CONTRACT LAW, ARCHITECTURAL MALPRACTICE.

CITY WAS NOT A THIRD PARTY BENEFICIARY OF A CONSTRUCTION CONTRACT BETWEEN THE DORMITORY AUTHORITY OF NYS AND DEFENDANT ARCHITECTS, MALPRACTICE ACTION AGAINST THE ARCHITECTS WAS DUPLICATIVE OF THE BREACH OF CONTRACT ACTION.
The Court of Appeals, in a full-fledged opinion by Judge DiFiore, over two partial dissenting opinions, determined the city was not a third-party beneficiary of a contract between the Dormitory Authority of the State of New York (DASNY) and defendant architects (Perkins) and the negligence cause of action (professional malpractice) by DASNY against Perkins was duplicative of the the breach of contract cause of action. Perkins had contracted with DASNY to construct a building. During excavation a neighboring building, sidewalks, sewers, etc. settled. The building gradually settled about eight inches. The majority explained when a tort action, in addition to a breach of contract action, is viable in the context of architectural malpractice: "With respect to construction contracts, we have generally required express contractual language stating that the contracting parties intended to benefit a third party by permitting that third party 'to enforce [a promisee's] contract with another' ... . In the absence of express language, '[s]uch third parties are generally considered mere incidental beneficiaries' ... . This rule reflects the particular nature of construction contracts and the fact that — as is the case here — there are often several contracts between various entities, with performance ultimately benefitting all of the entities involved. * * * ... [T]here are circumstances where a professional architect may be subject to a tort claim for failure to exercise due care in the performance of contractual obligations. In seeking to 'disentangl[e] tort and contract claims,' we focused in Sommer both on potential catastrophic consequences of a failure to exercise due care and on the nature of the injury, the manner in which it occurred, and the resulting harm (79 NY2d at 552). We distinguished between the situation where the harm was an 'abrupt, cataclysmic occurrence' not contemplated by the contracting parties and one where the plaintiff was essentially seeking enforcement of contract rights (79 NY2d at 552). Here, the ... building settled during the course of several months, damaging adjacent structures. However, even if any 'abrupt' or 'catastrophic' consequences either could have or did result from Perkins' alleged negligence, the fact remains that the only damages alleged appear to have been within the contemplation of the parties under the contract — and ... are identical for both claims. Put another way, there was no injury alleged here that a separate negligence claim would include that is not already encompassed in DASNY's contract claim." ***Dormitory Auth. of the State of N.Y. v. Samson Constr. Co.*, 2018 N.Y. Slip Op. 01115, CtApp 2-15-18**

CRIMINAL LAW.

MISDEMEANOR COMPLAINTS ADEQUATELY CHARGED POSSESSION OF A DANGEROUS KNIFE.

The Court of Appeals, over a concurrence and a concurrence/dissent, in a memorandum addressing two cases (McCain and Edward), determined the misdemeanor complaints were sufficient to support the charge of possessing a "dangerous knife:" "The factual allegations of a misdemeanor complaint must establish 'reasonable cause' to believe that a defendant committed the charged offense ... . Reasonable cause 'exists when evidence or information which appears reliable discloses facts or circumstances which are collectively of such weight and persuasiveness as to convince a person of ordinary intelligence, judgment and experience that it is reasonably likely that such offense was committed and that such person committed it' ... . Here, the factual allegations of each misdemeanor complaint establish reasonable cause to believe that each defendant possessed a 'dangerous knife' ... , triggering the statutory presumption of unlawful intent arising from such possession ... . **From the concurrence/dissent:** I concur in the result in People v. McCain because the officer's sworn statement attached to the complaint specifies that the 'knife was activated by deponent to an open and locked position through the force of gravity,' which meets the statutory definition of 'gravity knife' in Penal Law § 265.00 (5), and therefore a fortiori is a 'dangerous knife' under Penal Law § 265.01, when subsections (1) and (2) thereof are read together. I dissent from the result in People v. Edward for the reasons set out in Judge Simons' dissent in Matter of Jamie D. (59 NY2d 589 [1983])." ***People v. McCain*, 2018 N.Y. Slip Op. 01018, CtApp 2-13-18**

CRIMINAL LAW, APPEALS.

DEFENDANT WAS ENTITLED TO DISMISSAL OF THE MURDER INDICTMENT ON CONSTITUTIONAL SPEEDY TRIAL GROUNDS, SIX-YEARS BETWEEN ARREST AND GUILTY PLEA, SPEEDY TRIAL IS NOT A MIXED QUESTION OF LAW AND FACT.

The Court of Appeals, in a full-fledged opinion by Judge Fahey, over a three-judge dissent, reversing the appellate division, determined that defendant was entitled to dismissal of the second degree murder indictment (to which he pled guilty) on constitutional speedy trial grounds. The opinion is fact-based, covers several significant legal issues (i.e. CPL 30.30 is not applicable, speedy trial is not a mixed question of law and fact, pre versus post-indictment delay, inter alia), and cannot be fairly summarized here. " ... [T]he People pursued a cooperation agreement with [codefendant] Armstead for approximately 2½ years. After that effort proved unsuccessful, they spent the next three years attempting to convict Armstead, trying him separately from defendant. After three mistrials, Armstead had been convicted of only criminal possession of a weapon in the second degree, he had been acquitted on the top count of second-degree murder, and the People were no closer to securing his testimony against defendant. The time between defendant's arrest on May 28, 2008 and defendant's plea on September 23, 2014 spanned six years, three months, and 25 days, from when defendant was 16 years old until he was 22. Defendant spent the entirety of that period incarcerated." The opinion goes through each of the *Taranovich* factors: "We analyze constitutional speedy trial claims using the five factors set forth in People v. Taranovich (37 NY2d 442 [1975]): '(1) the extent of the delay; (2) the reason for the delay; (3) the nature of the underlying charge; (4) whether or not there has been an extended period of pretrial incarceration; and (5) whether or not there is any indication that the defense has been impaired by reason of the delay' … . These factors are similar, but not identical, to the factors used in evaluating speedy trial claims under the federal constitution, which include the '[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant' ... . '[N]o one factor or combination of the factors . . . is necessarily decisive or determinative of the speedy trial claim, but rather the particular case must be considered in light of all the factors as they apply to it' ...". ***People v. Wiggins*, 2018 N.Y. Slip Op. 01111, CtApp 2-15-18**

CRIMINAL LAW, EVIDENCE.

EVIDENCE OF CONSPIRACY NOT SUFFICIENT TO SUPPORT CONVICTION, PRESENCE WHEN CONSPIRACY DISCUSSED BY OTHER GANG MEMBERS NOT ENOUGH.

The Court of Appeals, over a two-judge dissent, affirming the appellate division, determined the evidence was insufficient to support the conviction of conspiracy in the second degree. The defendant's mere presence when the conspiracy was discussed by other gang members was not enough: "... [A]t the core of the People's case is evidence of defendant's presence at various gang meetings at which the crime intended was discussed by gang members other than defendant. Under the circumstances of this case, to conclude that defendant's presence at such gatherings alone was sufficient to establish agreement to join a plot would be to equate his passive act of 'being present' with the affirmative act of 'agreeing' to engage in a criminal conspiracy discussed at those assemblies. The law does not contain a presumption of agreement based on sheer presence at a meeting at which a conspiracy is discussed ... , and we share the view of the federal courts that mere '[k]nowledge of the existence and goals of a conspiracy does not itself make one a coconspirator' ...". ***People v. Reyes*, 2018 N.Y. Slip Op. 01113, CtApp 2-15-18**

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA).

YOUTHFUL OFFENDER ADJUDICATION PROPERLY CONSIDERED IN ASSESSING RISK LEVEL UNDER THE SEX OFFENDER REGISTRATION ACT (SORA).

The Court of Appeals, in a full-fledged opinion by Judge Rivera, determined that a youthful offender (YO) adjudication can be considered in assessing the risk level of a sex offender under the Sex Offender Registration Act (SORA). Defendant contested the level three sex offender designation. The Court of Appeals held that consideration of the YO adjudication in this context did not violate the Criminal Procedure Law (CPL): "CPL 720.35 (2) provides the Board with access to YO-related documents. Defendant's argument that access alone does not authorize use ignores that the CPL does not permit access for its own sake, but in furtherance of a statutory purpose. Here, that purpose is found in SORA, which requires the Board establish guidelines and make risk level determinations based, in part, on an offender's past actions (Correction Law § 168-l [5]). * * * Certainly, the youthful offender statute reflects the Legislature's recognition of the difference between a youth and an adult, and the Legislature clearly made a policy choice to give a class of young people a distinct benefit. Nevertheless, in concluding that an earlier YO adjudication may be used in assessing points against defendant, the Board has not acted in violation of the CPL ...". ***People v. Francis*, 2018 N.Y. Slip Op. 01017, CtApp 2-13-18**

LANDLORD-TENANT, MUNICIPAL LAW.

NYC HOUSING AUTHORITY'S RULES DO NOT ALLOW A SINGLE ADULT AND ADULT CHILD TO RESIDE PERMANENTLY IN A ONE BEDROOM APARTMENT, ADULT CHILD ALLOWED TEMPORARY RESIDENCY TO CARE FOR HIS MOTHER WAS NOT ENTITLED TO REMAINING FAMILY MEMBER STATUS UPON THE DEATH OF HIS MOTHER.

The Court of Appeals, in a full-fledged opinion by Judge Wilson, over a concurring opinion, reversing the appellate division, determined the petitioner's application for remaining family member (RFM) status allowing him to reside in his late mother's one bedroom apartment was properly denied. The New York City Housing Authority's (NYCHA's) rules do not allow a single adult and and adult child to live together in a one bedroom apartment. Although petitioner could reside in the apartment temporarily to care for his mother, he was not entitled to permanent permission to live in the apartment and therefore he was not entitled to RFM status: "... NYCHA's rules contemplate that a tenant may require a live-in home-care attendant, either for the duration of a transient illness or the last stages of life, and its rules expressly allow for a live-in home-care attendant as a temporary resident, even if the grant of permission would result in 'overcrowding,' without regard to whether the home-care attendant is related to the tenant. Mr. Aponte was, in effect, afforded temporary residency status. Essentially, Mr. Aponte is arguing that NYCHA's policy is arbitrary and capricious because it does not allow him to bypass the 250,000-household waiting line as a reward for enduring an 'overcrowded' living situation while caring for his mother. NYCHA could adopt the policy Mr. Aponte advocates, to encourage people to care for elderly relatives by giving them a succession priority over others, but we cannot say on the record before us that its adoption of a different policy, prioritizing children in need and persons facing homelessness when allocating its insufficient stock of public housing, is arbitrary or capricious." ***Matter of Aponte v. Olatoye*, 2018 N.Y. Slip Op. 01112, CtApp 2-15-18**

MEDICAL MALPRACTICE, CIVIL PROCEDURE, PERSONAL INJURY.

PLAINTIFF RAISED A QUESTION OF FACT ABOUT THE APPLICABILITY OF THE CONTINUOUS TREATMENT DOCTRINE IN THIS MEDICAL MALPRACTICE CASE, DESPITE A 30-MONTH PERIOD BETWEEN VISITS.

The Court of Appeals, in a full-fledged opinion by Judge Garcia, over a three-judge dissent, determined that plaintiff had raised a question of fact about whether the continuous treatment doctrine tolled the statute of limitations in this medical malpractice action, despite a 30-month period between visits. Decision holding that a gap in treatment longer than the statute of limitations precludes the application of the continuous treatment doctrine should not be followed: "Plaintiff saw defendant over the course of four years, underwent two surgeries at his hand, and saw no other doctor for her shoulder during this time. She returned to him after the thirty-month gap, discussed yet a third surgery with him, and accepted his referral to his partner only because defendant was no longer performing such surgeries. Plaintiff's testimony regarding feeling discouraged with defendant's treatment does not demonstrate as a matter of law that she never intended to return to his care; in fact, her testimony reveals that she considered defendant her only doctor during this time. Nor does the fact that defendant repeatedly told plaintiff she should return 'as needed' foreclose a finding that the parties anticipated further treatment. Notably, Plaintiff's injury was a chronic, long-term condition which both plaintiff and defendant understood to require continued care. Each of plaintiff's visits to defendant over the course of seven years were 'for the same or related illnesses or injuries, continuing after the alleged acts of malpractice' ... . As to the 30-month period between visits, we have previously held that a gap in treatment longer than the statute of limitations 'is not per se dispositive of defendant's claim that the statute has run' ... . To the extent that lower courts have held to the contrary ... , those cases should not be followed." ***Lohnas v. Luzi*, 2018 N.Y. Slip Op. 01114, CtApp 2-15-18**

RETIREMENT AND SOCIAL SECURITY LAW.

POLICEMAN AND FIREFIGHTER WERE INJURED BY RISKS INHERENT IN THEIR JOBS AND THEREFORE WERE NOT ENTITLED TO ACCIDENTAL DISABILITY RETIREMENT BENEFITS.

The Court of Appeals, in a full-fledged opinion by Judge Stein, over a two-judge concurrence/dissent, determined that the injuries suffered by a policemen (Kelly) , who was injured preventing a rafter from falling on another officer attempting to rescue residents of a house crushed by a tree during Hurricane Sandy, and a firefighter (Sica), who was injured by odorless toxic gases while performing cardiopulmonary resuscitation on two unconscious persons, did not suffer accidental injury within the meaning of the Retirement and Social Security Law. Therefore, neither petitioner was entitled to accidental disability retirement benefits: "... [T]here is substantial evidence in the record to support the determination that Kelly's actions in assisting the injured residents of the house during life-threatening conditions fell within his job duties, and that his injuries did not result from a sudden, unexpected event that was not a risk inherent in his duties as a police officer ... . [E]xposure to toxic chemicals was a risk for which Sica had been trained, that he had responded to a gas leak in the past, and that his job duties specifically required 'working with exposure to . . . fumes, explosives, toxic materials, chemicals and corrosives,' the particular risk that caused Sica's injury. Inasmuch as it is not unexpected that a firefighter whose job duties required him to respond to emergency medical calls would be exposed to toxic fumes in responding to a call for difficulty breathing, ... Sica's injuries were the result of a risk inherent in his ordinary duties as a firefighter ...". ***Matter of Kelly v. DiNapoli*, 2018 N.Y. Slip Op. 01016, CtApp 2-13-18**

FIRST DEPARTMENT

CRIMINAL LAW, EVIDENCE.

EVIDENCE OF SERIOUS PHYSICAL INJURY INSUFFICIENT IN THIS GANG ASSAULT CASE.

The First Department determined the proof of serious physical injury in this gang assault case was insufficient: "The evidence was legally insufficient to establish that the injuries sustained by the victim constituted serious physical injury (see Penal Law § 10.00[10]), an element of gang assault in the first degree ... . Although there was testimony that the victim still had some physical effects of the assault at the time of trial, the evidence on this was limited and, in any event, the record before the jury did not show that the injury was such that a reasonable observer would find the victim's appearance distressing or objectionable ... . It is also undisputed that the victim's injuries did not impair his general health ...". ***People v. Garay*, 2018 N.Y. Slip Op. 01117, First Dept 2-15-18**

INSURANCE LAW.

ALL RISK ARTWORK INSURANCE DID NOT COVER DEFECTIVE TITLE, ALLEGATIONS DID NOT DEMONSTRATE A FIDUCIARY RELATIONSHIP BETWEEN INSURED AND BROKERS.

The First Department determined an all-risk artwork insurance policy did not cover contractual liability to purchasers of stolen art which was returned to the owner. In addition, the court determined the allegations in the complaint against the insurance brokers were insufficient to allege a fiduciary relationship: " '[D]efective title is clearly not a physical loss or damage . . . from any external cause' ... . Despite the fact that the phrase 'loss or damage' in the policy was not qualified by terms such as 'direct' or 'physical,' '[w]e may not, under the guise of strict construction, rewrite a policy to bind the insurer to a risk that it did not contemplate and for which it has not been paid' ... . 'Title insurance has been regarded as a separate type of contract not falling within any of the three basic classes of insurance. . . . It is not reasonable to interpret a policy so broadly that it becomes another type of policy altogether' ... . The ... causes of action, against the insurance broker defendants, were properly dismissed, with leave to replead ... for a 'special relationship' with the broker defendants ... . 'Although the parties' relationship lasted a considerable period of time and defendant [broker] assured plaintiff that his insurance needs were being met, these circumstances are not so exceptional as to support imposition of a fiduciary duty upon defendant'... . A longstanding relationship alone is insufficient to establish a special relationship between plaintiff and the broker defendants." ***Dae Assoc., LLC v. AXA Art Ins. Corp.*, 2018 N.Y. Slip Op. 01026, First Dept 2-13-18**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

PLAINTIFF'S DECEDENT WAS PROVIDED WITH A SAFETY LINE AND A HARNESS WHICH HE WAS NOT USING WHEN HE FELL THROUGH A SKYLIGHT, FAILURE TO USE THE SAFETY LINE WAS THE SOLE PROXIMATE CAUSE OF THE FALL, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON THE LABOR LAW § 240(1) CAUSE OF ACTION SHOULD HAVE BEEN GRANTED.

The First Department, reversing Supreme Court, determined that defendants' motion for summary judgment on the Labor Law § 240(1) cause of action should have been granted. Plaintiff's decedent was provided with a harness and told to remain tied off at all times. Plaintiff fell through an opening in the roof when he was not tied off: "Contrary to plaintiff's argument, a fall through an unguarded opening in the floor of a construction site constitutes a violation of Labor Law § 240(1) only

where a safety device adequate to prevent such a fall was not provided ... .. A safety line and harness may be an adequate safety device for a person working over an open area or near an elevated edge ... . Defendants established prima facie that plaintiff's decedent was the sole proximate cause of his accident with evidence that a harness and safety rope system was in place on the roof, that the decedent had been instructed to remain tied off at all times while on the roof, and that he could not have reached the skylight through which he fell if he had remained tied off." ***Guaman v. City of New York*, 2018 N.Y. Slip Op. 01025, First Dept 2-13-15**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

EVIDENCE OF DEBRIS ON FLOOR WAS SUFFICIENT TO RAISE A QUESTION OF FACT WHETHER DEFENDANTS WERE LIABLE UNDER LABOR LAW §§ 241(6) AND 200, PLAINTIFF STEPPED INTO A HOLE BUT DID NOT KNOW WHETHER THE HOLE WAS OBSCURED BY THE DEBRIS.

The First Department, reversing (modifying) Supreme Court, determined defendants were not entitled to summary judgment on the Labor Law 241(6) and Labor Law 200 causes of action. Plaintiff testified he stepped into a hole. He testified the floor was strewn with debris but he did not know if the hole was covered by debris. The court noted that a defendant need not supervise or control plaintiff's work to be liable under Labor Law § 200: "In support of his Labor Law § 241(6) claim against the owner defendants, plaintiff relies 12 NYCRR 23-1.7(e)(2), which states: 'Working Areas. The parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed.' ... Although plaintiff could not state with certainty whether or not the garbage and debris actually covered the hole, when his extensive deposition testimony is viewed in its entirety, an inference may be drawn that strewn garbage and debris obscured his view of the floor and hid the hole from him, even if it did not actually cover it, thereby creating a hazardous condition. ... 'Where an existing defect or dangerous condition caused the injury, liability [under Labor Law § 200] attaches if the owner or general contractor created the condition or had actual or constructive notice of it' ... . Proof of the defendants' supervision and control over a plaintiff's work is not required ...". ***Licata v. AB Green Gansevoort, LLC*, 2018 N.Y. Slip Op. 01023, First Dept 2-13-18**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

8 TO 12 INCH HEIGHT DIFFERENTIAL NOT ACTIONABLE, LABOR LAW § 240(1) CAUSE OF ACTION SHOULD HAVE BEEN DISMISSED.

The First Department, reversing Supreme Court, determined plaintiff's Labor Law § 240(1) cause of action should have been dismissed. Plaintiff was injured when a cart he was moving slipped off a makeshift ramp. The height differential was 8 to 12 inches, which did not present an actionable elevation-related risk: "Plaintiff was allegedly injured in the course of rolling a four-wheeled cart filled with about 100 to 200 pounds of materials over an unsecured, makeshift plywood ramp which bridged an approximately five- or six-inch gap between a truck bed to a loading dock, when the ramp slipped out of place and landed on the truck bed, and the cart descended, pulling on plaintiff's arms and causing injuries. Plaintiff admitted that the vertical distance from the surface of the truck bed to the surface of the dock was about 8 to 12 inches, which under the circumstances, does not constitute a physically significant elevation differential covered by Labor Law § 240(1) ... . Plaintiff's injury was not proximately caused by a failure to protect him from any elevation-related risks posed by the distance of almost four feet from the floor to the surface of the dock, since plaintiff remained on the dock while the cart became wedged in the gap between the truck bed and the dock, and there is no evidence that the gap was large enough to pose a significant risk of any hazardous descent to the floor." ***Sawczyszyn v. New York Univ.*, 2018 N.Y. Slip Op. 01120, First Dept 2-15-18**

MEDICAL MALPRACTICE, PERSONAL INJURY.

QUESTION OF FACT WHETHER RESIDENT EXERCISED INDEPENDENT JUDGMENT IN THIS MEDICAL MALPRACTICE CASE, MAKING THE RESIDENT AND HOSPITAL POTENTIALLY LIABLE.

The First Department determined there was a question of fact whether a resident exercised independent judgment in this medical malpractice case, making the resident and his employer (the hospital) potentially liable. Plaintiff's decedent was intoxicated when given Valium: "Plaintiff's decedent was brought into St. Barnabas Hospital by the police in an intoxicated and agitated condition. He was then chemically sedated with Valium. Two and one-half hours later, he 'flatlined,' and, while resuscitative efforts were made, he did not awaken and was declared 'brain dead' four days later. Appellants contend that Dr. McGrath cannot be held liable for medical malpractice because, as a resident, he did not exercise independent medical judgment when he chose the type and dosage of sedative to use on decedent. However, the deposition testimony of the attending physician, defendant Dr. Rao, raised an issue of fact as to whether Dr. McGrath was permitted to, and in fact did, exercise independent medical judgment in deciding on the amount and type of sedation to administer, so that he may be held liable, and St. Barnabas Hospital may be held vicariously liable ...". ***Burnett-Joseph v. McGrath*, 2018 N.Y. Slip Op. 01137, First Dept 2-15-18**

PERSONAL INJURY, LANDLORD-TENANT.

ELEVATOR MALFUNCTION WAS NOT THE PROXIMATE CAUSE OF PLAINTIFF'S DECEDENT'S DEATH, PLAINTIFF'S DECEDENT HAD SUFFERED CARDIAC ARREST BEFORE SHE WAS TRANSFERRED TO THE ELEVATOR, HOUSING AUTHORITY'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED.

The First Department determined the New York City Housing Authority's (NYCHA's) motion for summary judgment in this negligent elevator-maintenance case should have been granted. Plaintiff's decedent had an asthma attack and suffered cardiac arrest in her apartment. When moving plaintiff's decedent to an ambulance, the building elevator malfunctioned and stopped for at least several minutes. The NYCHA did not demonstrate that the elevator was in good working order or that the NYCHA had no notice the elevator malfunctioned. However, the NYCHA was able to demonstrate the elevator malfunction was not the proximate cause of plaintiff's decedent's death. The evidence supported the conclusion death occurred in the apartment: "... NYCHA presented unrefuted evidence demonstrating that the decedent's cardiac rhythm was asystole, a dire form of cardiac arrest in which the heart stops beating and there is no electrical activity in the heart, and that she showed no signs of life in the hour between the arrival of emergency personnel and her transfer into the elevator, despite the emergency responders' continuous resuscitative efforts. Furthermore, NYCHA's medical expert stated that '[t]he prolonged and unsuccessful resuscitative course in an asystolic patient is associated with an extremely poor outcome' and that 'the decedent's obesity made resuscitative efforts more difficult and further reduced [her] likelihood of survival.' Thus, he opined, 'within a reasonable degree of medical certainty[,]. .. the outcome for the decedent would [not] have changed had the transport time within the elevator been shorter.' By these facts and its expert's opinion, NYCHA demonstrated its prima facie entitlement to judgment as a matter of law by showing that the stoppage of its elevator, and resulting delay of the decedent's arrival at the hospital, were not a proximate cause of the decedent's death." ***Lebron v. New York City Hous. Auth.*, 2018 N.Y. Slip Op. 01116, First Dept 2-15-18**

SECOND DEPARTMENT

CIVIL PROCEDURE.

MOTION TO COMPEL ACCEPTANCE OF A LATE ANSWER SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined defendant's motion to compel plaintiff to accept an answer which was two days late should have been granted pursuant to CPLR 2004: "CPLR 2004 provides that, '[e]xcept where otherwise expressly prescribed by law, the court may extend the time fixed by any statute, rule or order for doing any act, upon such terms as may be just and upon good cause shown, whether the application for extension is made before or after the expiration of the time fixed.' Given the strong public policy favoring the resolution of cases on the merits, 'the Supreme Court may compel a plaintiff to accept an untimely answer (see CPLR 2004, 3012[d]) where the record demonstrates that there was only a short delay in appearing or answering the complaint, that there was no willfulness on the part of the defendant, that there would be no prejudice to the plaintiff, and that a potentially meritorious defense exists'... . Here, in light of the defendant's brief and unintentional delay in serving its answer, the lack of prejudice to the plaintiff, and the existence of a potentially meritorious defense, the Supreme Court improvidently exercised its discretion in denying the defendant's motion pursuant to CPLR 2004 to compel the plaintiff to accept its late answer ...". ***Baldwin Rte. 6, LLC v. Bernad Creations, Ltd.*, 2018 N.Y. Slip Op. 01039, Second Dept 2-14-19**

CIVIL PROCEDURE.

MATTER ERRONEOUSLY TRANSFERRED TO A COURT WITHOUT SUBJECT MATTER JURISDICTION (CIVIL COURT) CAN BE RETRANSFERRED TO THE CORRECT COURT (SUPREME COURT) AFTER JUDGMENT, THE CIVIL COURT JUDGMENT IS VOID AND CANNOT BE ADOPTED BY THE SUPREME COURT.

The Second Department, reversing Supreme Court, in a full-fledged opinion by Justice Dillon, addressing two issues of first impression, determined: (1) a matter erroneously transferred to a court which did not have subject matter jurisdiction (Civil Court) can be retransferred to the correct court (Supreme Court); and (2) after the matter is retransferred the error cannot be remedied in Supreme Court by adopting the disposition of the Civil Court, which is void. The fact that the Civil Court judge was an Acting Supreme Court Justice did not afford subject matter jurisdiction to the Civil Court: "While Judge Marrazzo, by virtue of his designation as an Acting Justice of the Supreme Court, would have been authorized to preside over the trial of this matter had it been pending in the Supreme Court, the same cannot be said for the trial in the Civil Court where the Administrative Order had no administrative or substantive relevance. Where subject matter jurisdiction is concerned, courts, including our own, may not cut corners. As a matter of both constitutional adherence and public policy, the Appellate Division must guard against courts acting outside of their subject matter jurisdiction, even if they do so unwittingly, in good faith, or in furtherance of judicial economy. Accordingly, we hold that the duties of an Acting Justice of the Supreme Court directed to matters pending in the Supreme Court operate only as to actions and proceedings pending in that particular court, and not for cases litigated elsewhere. ... ... [S]ince the Civil Court was without jurisdiction to try the instant matter, rendering the trial and judgment void, its findings of fact and conclusions of law cannot as a matter of

comity, res judicata, law of the case, or otherwise, be recognized by the Supreme Court upon its CPLR 325(b) removal of the action, and cannot provide a basis for the Supreme Court judgment presently on appeal." ***Caffrey v. North Arrow Abstract & Settlement Servs., Inc.*, 2018 N.Y. Slip Op. 01043, Second Dept 2-14-18**

CIVIL PROCEDURE, REAL PROPERTY TAX LAW.

MOTION TO DISCONTINUE THIS REAL PROPERTY TAX ASSESSMENT CHALLENGE PROPERLY DENIED, CRITERIA EXPLAINED; SUA SPONTE MERGER OF PARCELS, RELIEF NOT REQUESTED BY THE PARTIES, WAS AN ABUSE OF DISCRETION.

The Second Department determined Supreme Court properly denied petitioner's motion to discontinue the action which challenged the tax assessments of several lots. Supreme Court abused its discretion, however, when it, sua sponte, directed merger of several parcels into a single tax lot: "A motion for leave to discontinue an action is addressed to the sound discretion of the court ... , and generally should be granted unless the discontinuance would prejudice a substantial right of another party, circumvent an order of the court, avoid the consequences of a potentially adverse determination, or produce other improper results ... . In this case, the Supreme Court providently exercised its discretion in denying the petitioner's motion, since the record supports the conclusion that the requested discontinuance would prejudice the respondents' ability to defend against the proceeding ... , and was improperly sought to avoid the consequences of a potentially adverse determination and to obtain an improper result. However, the Supreme Court improvidently exercised its discretion by, sua sponte, directing that the six parcels be merged into a single tax lot. 'Generally, a court may, in its discretion, grant relief that is warranted by the facts plainly appearing on the papers on both sides, if the relief granted is not too dramatically unlike the relief sought, the proof offered supports it, and there is no prejudice to any party' .. . Here, the court failed to abide by this principle. None of the parties sought merger of the parcels or similar relief, merger of all the parcels at issue into one tax lot is not supported by the record, and merger of all the parcels could be potentially prejudicial to the petitioner." ***Matter of Blauvelt Mini-Mall, Inc. v. Town of Orangetown*, 2018 N.Y. Slip Op. 01051, Second Dept 2-14-18**

CRIMINAL LAW.

JURY SHOULD HAVE BEEN INSTRUCTED IT COULD CONSIDER THE ACTIONS OF COMPLAINANT'S HUSBAND IN DETERMINING WHETHER THE JUSTIFICATION DEFENSE APPLIED IN THIS ASSAULT CASE.

The Second Department, reversing defendant's conviction, determined the jury should have been instructed that it could consider the actions of the complainant's husband in this assault case. The defendant raised the justification defense. The altercation leading to the assault charge involved both the complainant and her husband: "... [A] new trial is required because the trial court erroneously declined the defendant's request that the jury be instructed that it could consider the actions of the complainant's husband in determining whether the defendant's use of force was justified ... . Contrary to the People's contention, the error cannot be deemed harmless, as the evidence to establish that the defendant was not justified was not overwhelming, and the jury may have reached a different conclusion had a proper and complete justification instruction been given ... . Significantly, the defendant's case rested on finding that he was justified in responding to the actions of the complainant's husband ...". ***People v. Lijo*, 2018 N.Y. Slip Op. 01081, Second Dept 2-14-18**

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA).

DEFENDANT DID NOT WAIVE HIS RIGHT TO BE PRESENT AT THE SORA HEARING, NEW HEARING ORDERED.

The Second Department, reversing County Court, noted that a defendant has the right to be present at a SORA hearing, and here the defendant did not waive that right: " 'A sex offender facing risk level classification under [SORA] has a due process right to be present at the SORA hearing' ... . While a defendant may waive the right to be present at the hearing, in order to establish a valid waiver it must be shown, inter alia, that 'the defendant was advised of the hearing date, of his right to be present, and that the hearing would be conducted in his absence'... . Here, there is no evidence that the defendant was notified of the adjourned hearing date. Therefore, as the People correctly concede, the record fails to establish that the defendant voluntarily waived his right to be present at the hearing ...". ***People v. Hunt*, 2018 N.Y. Slip Op. 01087, Second Dept 2-14-18**

FAMILY LAW.

NEGLECT STEMMING FROM MOTHER'S MENTAL ILLNESS NOT PROVEN, FAMILY COURT REVERSED.

The Second Department, reversing Supreme Court, determined that neglect based upon mother's mental illness had not been demonstrated: "... [T]he petitioner failed to establish that the mother received inadequate psychiatric treatment for her mental illness, or that her alleged untreated mental illness placed the child at imminent risk of harm. The evidence demonstrated that the mother, who was homeless at the time that she became pregnant and had relapsed into using heroin just a few months earlier, managed to obtain housing at a shelter for high-risk pregnant women, sought out appropriate prenatal care which included visits with a social worker, maintained compliance with a methadone treatment program which included weekly counseling sessions, and regularly took the psychotropic medications that were being prescribed to her by a licensed psychiatrist. The evidence also indicated that the mother interacted appropriately with the child in the hospital following the child's birth ... . The petitioner failed to present competent medical evidence that the treatment the mother

was receiving failed to address her mental health needs or was otherwise improper in light of her mental health history ...". ***Matter of Bella S. (Sarah S.)*, 2018 N.Y. Slip Op. 01069, Second Dept 2-14-18**

FAMILY LAW.

AMBIGUITY IN THE STIPULATION OF SETTLEMENT WAS RESOLVED BY LANGUAGE IN THE QUALIFIED DOMESTIC RELATIONS ORDER (QDRO), THE LANGUAGE IN THE QDRO SHOULD HAVE CONTROLLED THE INTERPRETATION OF THE STIPULATION.

The Second Department, reversing (modifying) Supreme Court, determined that an ambiguity in the stipulation of settlement involving the supplemental employee retirement plan (SERP) should have been resolved by the language of the qualified domestic relations order (QDRO): "Courts must interpret matrimonial stipulations of settlement using the standards of contract interpretation ... . A QDRO can only convey rights agreed upon by the parties in their underlying stipulation of settlement... . Courts 'cannot reform an agreement to conform to what it thinks is proper, if the parties have not assented to such a reformation' ... . Here, however, the parties assented to a reformation of their stipulation of settlement in a manner that resolves the ambiguity of its SERP [supplemental employee retirement plan] language by mutually consenting to the language of the QDRO that was entered by the Supreme Court ... . The QDRO states that the parties 'consent[ed] to the submission of th[e] order,' and it was signed by the attorneys representing both parties. The QDRO directed the use of a standard Majauskas formula for dividing, inter alia, the SERP. While the terms of a QDRO must ordinarily yield to the terms of an underlying matrimonial stipulation of settlement or judgment ... , here, the circumstances warrant otherwise as the QDRO resolved an ambiguity in the language of the underlying stipulation, and further, was submitted for entry upon the consent of both parties. * * * Accordingly, the Supreme Court should have interpreted the stipulation of settlement in light of the 2002 QDRO, which granted to the plaintiff a one-half share, as per the formula set forth therein, in the subject 401(k) account and SERP as of the date of the retirement of the defendant ...". ***Palaia v. Palaia*, 2018 N.Y. Slip Op. 01076, Second Dept 2-14-18**

FAMILY LAW, CIVIL PROCEDURE.

SUPREME COURT, SUA SPONTE, SET ASIDE AN IN-COURT STIPULATION OF SETTLEMENT IN A DIVORCE ACTION, NEITHER PARTY REQUESTED THAT RELIEF, STIPULATION REINSTATED.

The Second Department, reversing Supreme Court, determined the in-court stipulation of settlement in a divorce action should not have been set aside. Neither party requested that the stipulation be set aside: "The defendant contends that the Supreme Court erred in, sua sponte, setting aside the stipulation. We agree. Neither the decedent nor the defendant requested that the court set aside the stipulation ... . Moreover, stipulations of settlement are favored by the courts and not lightly cast aside. 'Only where there is cause sufficient to invalidate a contract, such as fraud, collusion, mistake or accident, will a party be relieved from the consequences of a stipulation made during litigation' ... . Here, the court did not conclude that any of these grounds were present." ***Estate of Michael Reid v. Reid*, 2018 N.Y. Slip Op. 01044, Second Dept 2-14-18**

FAMILY LAW, IMMIGRATION LAW.

FAMILY COURT SHOULD HAVE MADE FINDINGS TO ALLOW THE CHILD TO PETITION FOR SPECIAL IMMIGRANT JUVENILE STATUS.

The Second Department, reversing Family Court, determined Family Court should have made the findings to enable the child to petition for special immigrant juvenile state (SIJS): "... [W]here, as here, the Family Court's credibility determination is not supported by the record, this Court is free to make its own credibility assessments and overturn the determination of the hearing court ... . Based upon our independent factual review, we conclude that the record supports a finding that reunification of the child with his mother is not a viable option based upon parental neglect. The record reflects that the mother failed to meet the educational needs of the child ... . The child testified that, although he was prevented from attending school by gang members who beat him while walking to school, the mother did not arrange for transportation, which was within her financial means, but instead, told him to stay home. Additionally, the child was expelled from one school due to excessive tardiness, and he failed the seventh grade ... . Further, the mother did not provide adequate supervision, often leaving the then eight-year-old child home alone at night in the neighborhood where he had encountered the gang violence ...". ***Matter of Dennis X. G. D. V.*, 2018 N.Y. Slip Op. 01073, Second Dept 2-14-18**

FAMILY LAW, RELIGION.

INABILITY TO AGREE ON CHILD'S RELIGIOUS TRAINING CONSTITUTED A CHANGE IN CIRCUMSTANCES WARRANTING THE AWARD OF SOLE CUSTODY TO MOTHER.

The Second Department determined the parents' inability to agree on the child's religious training, together with the father's threat to take to child to Morocco if she were not raised as a "true Muslim," warranted awarding sole custody to mother: " 'In order to modify an existing custody arrangement, there must be a showing of a subsequent change of circumstances so that modification is required to protect the best interests of the child'... . Here, the parties' inability to agree on the child's religious training, which was an issue that had not been addressed in the parties' July 2009 stipulation of settle-

ment, constituted a change in circumstances. The change in the child's relationship with the father based on the child's fear of his displeasure if she were not a 'true Muslim,' and her belief that he threatened to abscond with her to Morocco, also contributed to the change in circumstances warranting modification ... . The evidence established that the only issue on which the parents disagreed was the religion in which the child should be raised and to what degree she should be expected to observe the tenets of each parent's religion. The award to the mother of sole decision-making authority with respect to religion is in the child's best interests, and the award of parenting time to each parent on his or her respective religious holidays will continue to allow the child to be exposed to both parents' religions ...". ***Matter of Baalla v. Baalla*, 2018 N.Y. Slip Op. 01050, Second Dept 2-14-18**

MENTAL HYGIENE LAW.

A DIAGNOSIS OF UNSPECIFIED PARAPHILIC DISORDER IS NOT ACCEPTED IN THE PSYCHIATRIC OR PSYCHOLOGICAL COMMUNITIES, EXPERT EVIDENCE ABOUT THE DISORDER SHOULD NOT HAVE BEEN ADMITTED IN THIS SEX OFFENDER CIVIL COMMITMENT TRIAL.

The Second Department, reversing Supreme Court, determined that the *Frye* hearing did not demonstrate that diagnosis of unspecified paraphilic disorder has achieved general acceptance in the psychiatric and psychological communities. Therefore the expert evidence on the disorder should not have been admitted at the trial to determine whether appellant sex offender should be subject to civil commitment: "At the Frye hearing, Dr. David Thornton and Dr. Kostas Katsavdakis, who testified for the State, and Dr. Joe Scroppo, who testified on behalf of the appellant, agreed that the forensic use of the diagnosis of unspecified paraphilic disorder, which was added to the latest edition of the Diagnostic and Statistical Manual of Mental Disorders (hereinafter DSM-5) in 2013, was problematic and controversial, since there was no clear definition or criteria for the proposed disorder. Moreover, all of the experts testified that there was no research demonstrating the reliability of the unspecified paraphilic disorder diagnosis after its introduction in the DSM-5 in 2013. Notably, the experts were not aware of any published research, clinical trials, or field studies regarding unspecified paraphilic disorder. Accordingly, we conclude that the State failed to establish that the diagnosis of unspecified paraphilic disorder has achieved general acceptance in the psychiatric and psychological communities so as to make expert testimony on that diagnosis admissible, and as such, that diagnosis should not have been admitted at the appellant's trial. Since the admission of this testimony was not harmless, we remit the matter to the Supreme Court, Nassau County, for a new trial on the issue of mental abnormality, excluding evidence of the unspecified paraphilic disorder diagnosis, and, if necessary, a new dispositional hearing." ***Matter of State of New York v. Hilton C.*, 2018 N.Y. Slip Op. 01071, Second Dept 2-14-18**

MENTAL HYGIENE LAW.

A DIAGNOSIS OF PARAPHILIA NOS (NONCONSENT) IS NOT ACCEPTED IN THE PSYCHIATRIC OR PSYCHOLOGICAL COMMUNITIES, EXPERT EVIDENCE ABOUT THE DISORDER SHOULD NOT HAVE BEEN ADMITTED IN THIS SEX OFFENDER CIVIL COMMITMENT TRIAL.

The Second Department determined that Supreme Court properly found, after a *Frye* hearing ordered by the Second Department and held after the trial, the diagnosis of paraphilia NOS (nonconsent) is not generally accepted in the psychiatric and psychological communities. The evidence should not have been admitted at the sex offender's civil commitment trial: "The evidence at the Frye hearing showed that there was no clear definition or criteria for the diagnosis, the diagnosis could not be reliably distinguished from other motivations for rape, the articles offered in support of the diagnosis did not reflect a wide, significant, or well-rounded body of research supporting the validity of the diagnosis, and the diagnosis was repeatedly rejected for inclusion in the Diagnostic and Statistical Manual of Mental Disorders (hereinafter DSM) or in the DSM appendix ... . Thus, evidence of the paraphilia NOS (nonconsent) diagnosis should not have been admitted at trial. Since the error was not harmless, the matter must be remitted to the Supreme Court, Queens County, for a new trial on the issue of mental abnormality, excluding evidence of the paraphilia NOS (nonconsent) diagnosis, and, if necessary, a new dispositional hearing." ***Matter of State of New York v. Richard S.*, 2018 N.Y. Slip Op. 01072, Second Dept 2-14-18**

PERSONAL INJURY.

PLAINTIFF WALKED INTO THE REAR OF A TRACTOR TRAILER WHICH WAS MAKING A RIGHT TURN, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined defendants' (truck owner's and driver's) motion for summary judgment in this pedestrian traffic accident case should have been granted. Plaintiff was injured by the rear portion of a tractor trailer which had completed 85% of a right turn: "... [T]he plaintiff allegedly was walking on a sidewalk ... . After she stepped off the sidewalk onto the street, her right foot came into contact with the rear of a tractor-trailer that was making a right turn. ... The plaintiff allegedly did not see the tractor-trailer prior to the impact. ... ... [T]he plaintiff was the sole proximate cause of the accident ... . The evidence ... established that the plaintiff failed to see what was there to be seen and walked into the path of the rear of the tractor-trailer." ***Faulknor v. Gina's Trucking, Inc.*, 2018 N.Y. Slip Op. 01045, Second Dept 2-14-18**

PERSONAL INJURY.

TENANT ABUTTING SIDEWALK DID NOT DEMONSTRATE THAT IT DID NOT CLEAR ICE AND SNOW FROM THE SIDEWALK AND THAT IT DID NOT EXACERBATE THE DANGEROUS CONDITION, MOTION FOR SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE PROPERLY DENIED.

The Second Department determined the defendant's (CVS's) motion for summary judgment in this sidewalk slip and fall case was properly denied. CVS did not demonstrate that it made no efforts to clear the sidewalk and that it did not exacerbate the dangerous condition: "CVS failed to demonstrate its prima facie entitlement to judgment as a matter of law dismissing the second third-party complaint and all cross claims asserted against it. CVS failed to make a prima facie showing that it made no efforts to clear snow and ice from the sidewalk on which the plaintiff fell prior to the accident. Further, CVS failed to make a prima facie showing that any snow and ice removal efforts undertaken by it or by persons on its behalf did not exacerbate the hazardous condition which allegedly contributed to the plaintiff's accident ...". ***Hurk-McLeod v. Slope Park Assoc., LLC*, 2018 N.Y. Slip Op. 01047, Second Dept 2-14-18**

PERSONAL INJURY, CIVIL PROCEDURE, EVIDENCE.

STORM IN PROGRESS EVIDENCE IN THIS SIDEWALK SLIP AND FALL CASE INSUFFICIENT; EVIDENCE SUBMITTED IN REPLY PAPERS SHOULD NOT HAVE BEEN CONSIDERED; DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined defendants' motion for summary judgment in this sidewalk slip and fall case should have been denied. The evidence of a storm in progress was insufficient. The climatological analysis report submitted in the reply papers should not have been considered. There was no evidence when the sidewalk was last inspected prior to the fall: "... [T]he defendants submitted a copy of the transcript of the plaintiff's deposition, at which she testified that light rain began to fall about 15 minutes prior to her accident, and that no precipitation fell the day before the accident. The defendants also submitted a copy of the transcript of the deposition of the office manager [the occupant of the abutting property], who testified that she had no recollection of the weather conditions on the day of the accident. The office manager also did not know when the sidewalk was last inspected or what it looked like within a reasonable time prior to the accident. The defendants also submitted video footage and screen shots from a security camera, but this evidence was not probative because it did not clearly depict the surface where the plaintiff slipped. Finally, the defendants submitted a climatological analysis report which was not signed and notarized, and therefore not admissible ... . The defendants submitted a signed and notarized climatological analysis report with their reply papers. However, the Supreme Court should not have considered that report, as it was improperly submitted for the first time with the reply papers ...". ***Brandimarte v. Liat Holding Corp.*, 2018 N.Y. Slip Op. 01042, Second Dept 2-14-18**

WORKERS' COMPENSATION LAW, EDUCATION-SCHOOL LAW. EMPLOYMENT LAW.

EXCLUSIVITY OF A WORKERS' COMPENSATION REMEDY PRECLUDED SUIT AGAINST AN EMPLOYEE OF A PERSON EMPLOYED BY PLAINTIFF'S EMPLOYER, THE NYC DEPARTMENT OF EDUCATION, IN THIS SLIP AND FALL CASE.

The Second Department determined the exclusivity of a Workers' Compensation remedy precluded plaintiff's suit against an employee who worked for someone employed by plaintiff's employer (NYC Department of Education, DOE). Plaintiff slipped and fell on a wet floor in a school cafeteria: "Here, the New York City Department of Education (hereinafter DOE) employed Pedersen as a custodian engineer. As part of an 'indirect system' of employment adopted by the DOE, Pedersen then employed Galant as a custodial assistant. Because the plaintiff was a DOE employee and Galant was employed by Pedersen, who also was a DOE employee, the plaintiff and Galant were 'in the same employ' within the meaning of the Workers' Compensation Law (Workers' Compensation Law § 29[6] ...). Therefore, Workers' Compensation benefits were the plaintiff's exclusive remedy with respect to Galant ...". ***Lupton v. Pedersen*, 2018 N.Y. Slip Op. 01048, Second Dept 2-14-18**

THIRD DEPARTMENT

CRIMINAL LAW.

NO NEED TO SPECIFY CRIME TO BE COMMITTED DURING A CHARGED BURGLARY IN THE SUPERIOR COURT INFORMATION; RESTITUTION FOR AN UNCHARGED BURGLARY IMPROPERLY ORDERED.

The Third Department determined the superior court information (SCI) charging burglary did not need to specify the crime to be committed during the robbery. The court further found that it was error to impose restitution for a burglary which was not charged in SCI: "Defendant further asserts that the SCI is jurisdictionally defective because it did not identify the underlying crime that he intended to commit during the burglary. We are not persuaded. 'A charging instrument that incorporates by reference the statutory provisions applicable to the crime charged has been held to allege the material elements of the crime sufficiently to survive a jurisdictional challenge'... . Here, the SCI specifically referenced Penal Law § 140.20,

which defines burglary in the third degree. Significantly, the statute does not specify that the underlying crime must be identified (see Penal Law § 140.20), nor has this been held to be a requirement... . Consequently, we find that the SCI validly charged defendant with two counts of burglary in the third degree, to which he pleaded guilty. ... As for the restitution award, the People concede that County Court erroneously included the amount of $31,000 as compensation to the owner of the Halfmoon restaurant when there was no accusatory instrument filed charging defendant with any crimes related thereto. We must agree. 'Penal Law § 60.27 permits a trial court to require restitution arising from 'the offense for which a defendant was convicted, as well as any other offense that is part of the same criminal transaction or that is contained in any other accusatory instrument disposed of by any plea of guilty by the defendant to an offense' ...". ***People v. Suits*, 2018 N.Y. Slip Op. 01098, Third Dept 2-15-18**

WORKERS' COMPENSATION LAW.

ALTHOUGH DECEDENT, A NEW YORK RESIDENT, WORKED FOR A PENNSYLVANIA COMPANY, NEW YORK HAD JURISDICTION OVER AN INJURY THAT OCCURRED OUTSIDE NEW YORK.

The Third Department determined New York could exercise jurisdiction over an injury that occurred outside New York. Decedent was a New York resident working for a Pennsylvania company: "The Board has jurisdiction over a claim for an injury occurring outside of New York where there are 'sufficient significant contacts' between the employment and New York ... . A variety of factors must be taken into account in the fact-finding required to assess jurisdiction, 'including where the employee resides, where the employee was hired, the location of the employee's employment and the employer's offices, whether the employee was expected to return to New York after completing out-of-state work for the employer and the extent to which the employer conducted business in New York' ... . The Board's determination as to the existence of jurisdiction will not be disturbed if it is supported by substantial evidence ... . At the hearing, decedent testified that, while he was living in New York, he was hired by the employer during a phone call and that he thereafter went to Pennsylvania for a four-day orientation before he began driving for the employer. He further explained that he continued to live in New York and that, during the two-year period prior to his accident, he had made 17 deliveries to locations in New York, which was significantly more deliveries than he had made to Pennsylvania. Decedent also described his "home base" as being in New York and testified that the employer would contact him at his home in New York about jobs. After decedent was injured, the employer assisted in securing medical care for him in New York and selecting a doctor for him there. Decedent acknowledged that the dispatcher from whom he received calls was located in Pennsylvania. Decedent further explained that, after he was injured, the employer helped secure him light-duty work in New York for which the employer paid him, and the record contains a letter to decedent explaining that the employer had sought assistance in securing him such a position and that it was "an extension of [his] employment" with the employer." ***Matter of Galster v. Keen Transp., Inc.*, 2018 N.Y. Slip Op. 01105, Second Dept 2-14-18**

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