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FIRST DEPARTMENT

CIVIL PROCEDURE.

SUBPOENA ISSUED BY THE ATTORNEY GENERAL OF THE US VIRGIN ISLANDS SHOULD HAVE BEEN QUASHED BECAUSE IT WAS ISSUED WITHOUT ANY INVOLVEMENT BY A STATE COURT.

The First Department, reversing Supreme Court, determined a subpoena issued by the Attorney General of the United State Virgin Islands (USVI) should have been quashed for failure to comply with CPLR 3119: "The subpoena ... failed to meet the procedural requirements for out-of-state subpoenas because it was not issued 'under authority of a court of record' (see generally CPLR 3119[a][1], [4] ...). Although the subpoena need not have been issued in connection with a pending litigation, there must have been some court involvement, such as the issuance of a commission by a state court clerk or signature of the subpoena by a state court judge ... . We reject respondents' argument that administrative subpoenas are outside the scope of CPLR 3119 and not subject to any restrictions on issuance." ***Matter of American Express Co. v. United States Virgin Is. Dept. of Justice*, 2019 N.Y. Slip Op. 08618, First Dept 12-3-19**

CONTRACT LAW, EMPLOYMENT LAW.

ALTHOUGH THE CONTRACT WAS NEVER SIGNED, IT IS CLEAR THE PARTIES INTENDED TO BE BOUND BY IT.

The First Department noted that a contract need not be signed to be valid. Here the contract was a "termination agreement" which addressed a real estate broker's entitlement to commissions for sales pending upon termination: "It is true that neither party signed the Termination Agreement. However, where the evidence supports a finding of intent to be bound, a contract will be unenforceable for lack of signature only if the parties 'positive[ly] agree[d] that it should not be binding until so reduced to writing and formally executed' ... . While the Termination Agreement contained a counterparts clause and signature lines indicating that it could be accepted by signature and countersignature, it did not positively state that the parties could assent only by signing. By contrast, the Engagement Agreement, also drafted by defendants, expressly provided that 'in unsigned form [it] does not become an offer of any kind and does not become capable of acceptance.' Thus, defendants knew how to draft an agreement that could be accepted only by signature, but they did not so draft the Termination Agreement. The evidence, i.e., the parties' months-long email exchanges, during which plaintiff submitted his list of pending transactions, defendants drafted the Termination Agreement and forwarded it to plaintiff, and the parties disagreed about the extent to which transactions listed by plaintiff were covered, supports a finding that the parties intended to be bound by the Termination Agreement, despite their failure to sign it ...". ***Lerner v. Newmark & Co. Real Estate, Inc.*, 2019 N.Y. Slip Op. 08611, First Dept 12-3-19**

CRIMINAL LAW.

COURTROOM SHOULD NOT HAVE BEEN CLOSED TO FAMILY MEMBERS DURING THE UNDERCOVER OFFICER'S TESTIMONY, NEW TRIAL ORDERED.

The First Department, ordering an new trial, determined the defendant's family members should not have been excluded from the courtroom during the undercover officer's testimony: "The People concede that the trial court erred in excluding defendant's family members from some parts of the trial ... . Here, the People failed to show specifically that defendant's family posed a threat to the undercover officer's safety. The court's error requires reversal of the conviction ... . The People acknowledge that a harmless error/lack of prejudice analysis does not apply to courtroom closure errors. Nevertheless, relying on nonbinding Second Circuit case law, they argue that reversal is not warranted because the exclusion of defendant's family was so trivial as not to implicate defendant's right to a public trial (see e.g. Smith v. Hollins, 448 F3d 533 [2d Cir 2006]). We need not decide whether a triviality exception exists under State law, because even applying that standard, the closure here cannot be characterized as trivial. Defendant's family was kept out of the courtroom during the entirety of the direct examination, and part of the cross-examination, of an undercover officer who was one of the People's key witnesses. That undercover was one of the officers involved in the narcotics operation that formed the basis of the charge against defendant. He set up the meeting to purchase the drugs, gave the buy money to defendant's accomplice, and received crack cocaine in return. Thus, the exclusion of defendant's family members 'from the crux of the [People's] case' was not trivial ...". ***People v. Ruffin*, 2019 N.Y. Slip Op. 08771, First Dept 12-5-19**

CRIMINAL LAW, EVIDENCE.

WITHOUT PROOF DEFENDANT USED, ATTEMPTED TO USE, OR THREATENED TO USE THE BOX CUTTER FOUND IN HIS POCKET, THERE WAS NO PROOF THE BOX CUTTER MET THE DEFINITION OF A DANGEROUS INSTRUMENT.

The First Department, reversing defendant's criminal possession of a weapon conviction, determined the proof that defendant simply possessed a box cutter was not enough: "While feeling around defendant's waist, the officer felt a metal object in defendant's shorts. Upon further search, the officer saw the butt end of a box cutter sticking out of the fly of defendant's underwear. The razor of the box cutter was in its sheath and not exposed. He later tested the box cutter to see if it was sharp, and he was able to cut paper with it. Officer McKeever never saw defendant holding the box cutter and did not see him argue with or threaten anyone. * * * As the jury was charged, a 'dangerous instrument' is 'any instrument, article or substance, . . . which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or other serious physical injury' ... . An object 'becomes a dangerous instrument when it is used in a manner which renders it readily capable of causing serious physical injury' ... . Here, there was no proof that defendant used the box cutter, attempted to use it, or threatened to use it as required under the plain terms of the statute in order for it to be a dangerous instrument ...". ***People v. Knowles*, 2019 N.Y. Slip Op. 08770, First Dept 12-5-19**

CRIMINAL LAW, EVIDENCE.

SEARCH WARRANT FOR DEFENDANT'S CELL PHONE WAS OVERLY BROAD; GUILTY PLEA VACATED.

The First Department, vacating defendant's guilty plea, determined that the search warrant issued for defendant's cell phone was overly broad in that it authorized a search going back eight months before the conduct alleged in the warrant: "The search warrant for defendant's phones was overbroad. The application alleged that, on September 1, 2016, defendant sent texts to a 13 year old making indecent proposals, and called her on the same day. The warrant authorized examination of defendant's internet usage from January 1 to September 13, 2016, and also authorized, without a time limitation, examination of essentially all the other data on defendant's phones. This failed to satisfy the particularity requirement of both the Fourth Amendment and Article 1, § 12 of New York's Constitution ... . The pivotal question here is whether there was probable cause that evidence of the crimes specified in the warrant would be found in the broad areas specified. Notably, the warrant application alleged two discrete crimes and specified conduct that 'began' on September 1, 2016, and, as far as the available information indicated, occurred entirely on that date. While it was of course possible that defendant's phone contained evidence of the specified offenses that predated September 1, there were no specific allegations to that effect. ... The information available to the warrant-issuing court did not support a reasonable belief that evidence of the crimes specified in the warrant would be found in all of the 'locations' within defendant's cell phone to which the warrant authorized access — for example, in defendant's browsing history six or seven months before September 1, 2016, or in his emails, the examination of which was authorized without any time restriction ...". ***People v. Thompson*, 2019 N.Y. Slip Op. 08772, First Dept 12-5-19**

INSURANCE LAW, AGENCY.

QUESTION OF FACT WHETHER THERE EXISTED A SPECIAL RELATIONSHIP BETWEEN PLAINTIFFS AND DEFENDANT INSURANCE BROKER SUCH THAT THE BROKER COULD BE LIABLE FOR THE FAILURE TO PROCURE ADEQUATE COVERAGE FOR A DEMOLITION PROJECT.

The First Department, reversing Supreme Court, determined there is a question of fact whether a special relationship existed between plaintiffs and defendant insurance broker, thereby making the broker liable for the failure to procure adequate coverage for a demolition contract: "Issues of fact exist as to whether a special relationship arose between plaintiff STB Investments Corporation and its managing agent plaintiff 303 West 42nd Street Realty Co. (plaintiffs), on the one hand, and defendant insurance broker, on the other, that imposed on defendant a duty to advise plaintiffs as to insurance coverage that would have included the loss arising from plaintiffs' demolition project ... . Plaintiffs contend that the special relationship arose from an interaction with defendant in which they relied on defendant's expertise as to coverage. There is evidence that plaintiffs' property manager, who allegedly had never before purchased insurance for a demolition project, requested that defendant obtain adequate coverage for that particular risk, and that defendant agreed to do so, reviewed the demolition contract as part of its efforts, and discussed with plaintiffs the demolition contractor's coverage in the larger context of determining the appropriate level of coverage to obtain for plaintiffs ...". ***STB Invs. Corp. v. Sterling & Sterling, Inc.*, 2019 N.Y. Slip Op. 08606, First Dept 12-3-19**

MEDICAL MALPRACTICE, NEGLIGENCE.

DEFENDANT, A PODIATRIST, USING ALTERNATIVE MEDICINE (OZONE THERAPY), TREATED PLAINTIFF FOR LYME DISEASE; DEFENDANT DID NOT SUBMIT PROOF OF THE APPLICABLE STANDARD OF CARE; DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IN THIS MEDICAL MALPRACTICE ACTION SHOULD NOT HAVE BEEN GRANTED.

The First Department, reversing Supreme Court, determined defendant's motion for summary judgment in this medical malpractice action should not have been granted because defendant did not submit proof of the appropriate standard of care. The defendant, a podiatrist, treated plaintiff for Lyme disease with "ozone therapy:" "In this medical malpractice action, plaintiff testified that after he saw an advertisement by defendant in a magazine about alternative medicine he sought treatment from defendant for Lyme disease. Defendant is a licensed podiatrist who the record shows told plaintiff that he could treat a host of incurable non-podiatric conditions. * * * Defendant has a history of being accused of using his putative study of ozone therapy's ostensible benefits in treating podiatric conditions as a cover for his treatment of non-podiatric conditions ... . In the present case, the record reflects that the putative treatment was not for a podiatric condition, and thus that defendant was practicing medicine outside of the medical confines of podiatry ... , which raises an issue of professional misconduct ... . Defendant failed to make the necessary prima facie showing of entitlement to judgment as a matter of law, requiring reversal and denial of his motion for summary judgment regardless of the sufficiency of the opposing papers ... . Defendant failed to establish the standard of care with which he should have complied for the treatment of Lyme disease, as to which he submitted no expert evidence ... . Thus, on this record, it cannot be determined whether defendant deviated from accepted standards of practice. A trial is required on the issue whether defendant's treatment proximately caused the physical and neurological manifestations of injury alleged by plaintiff." ***Georgievski v. Robins*, 2019 N.Y. Slip Op. 08619, First Dept 12-3-19**

SECOND DEPARTMENT

CIVIL PROCEDURE, CONSTITUTIONAL LAW, EVIDENCE, DEBTOR-CREDITOR.

THE CALIFORNIA JUDGMENT SHOULD HAVE BEEN GIVEN FULL FAITH AND CREDIT; THE COURT SHOULD NOT HAVE CONSIDERED THE UNDERLYING MERITS.

The Second Department, reversing Supreme Court, determined that a California judgment should have been given full faith and credit and the underlying merits should not have been considered: "The plaintiff established its prima facie entitlement to judgment as a matter of law by submitting the judgment and the order, which obligated the defendants to pay the plaintiff certain amounts, and evidence that the defendants had not paid the amounts awarded therein (see CPLR 3213 ...). In opposition, the defendants failed to raise a triable issue of fact as to a bona fide defense. The full faith and credit clause of the United States Constitution (US Const, art IV, § 1) requires that the public acts, records, and judicial proceedings of each state be given full faith and credit in every other state. The purpose of the clause is to avoid conflicts between states in adjudicating the same matters ... . 'The doctrine establishes a rule of evidence . . . which requires recognition of the foreign judgment as proof of the prior-out-of-State litigation and gives it res judicata effect, thus avoiding relitigation of issues in one State which have already been decided in another' ... . 'Absent a challenge to the jurisdiction of the issuing court, New York is required to give the same preclusive effect to a judgment from another state as it would have in the issuing state' ... , and it is precluded from inquiring into the merits of the judgment ... . Here, the defendants did not challenge the jurisdiction of the California court, but instead, sought to relitigate the merits underlying that court's determination. The Supreme Court should not have considered the defendants' attack on the merits of the California determination." ***Balboa Capital Corp. v. Plaza Auto Care, Inc.*, 2019 N.Y. Slip Op. 08645, Second Dept 12-4-19**

CIVIL PROCEDURE, DEBTOR-CREDITOR, CONTRACT LAW.

DEFENDANT ASKED PLAINTIFF TO WIRE THE LOAN PROCEEDS TO A BANK IN NEW YORK; NEW YORK THEREFORE HAD JURISDICTION, PURSUANT TO CPLR 302, OVER THIS BREACH OF CONTRACT ACTION STEMMING FROM DEFENDANT'S ALLEGED FAILURE TO REPAY THE LOAN.

The Second Department, reversing Supreme Court, determined that defendant's motion to dismiss for lack of personal jurisdiction should not have been granted. Plaintiff demonstrated defendant had a bank account in a New York bank to which the funds defendant borrowed from plaintiff were wired. Plaintiff alleged defendant breached a contract requiring the repayment of the loan: "CPLR 302(a)(1) provides that 'a court may exercise personal jurisdiction over any non-domiciliary . . . who in person or through an agent . . . transacts any business within the state.' 'The CPLR 302(a)(1) jurisdictional inquiry is twofold: under the first prong the defendant must have conducted sufficient activities to have transacted business in the state, and under the second prong, the claims must arise from the transactions' ... . The sufficient activities requirement is satisfied 'so long as the defendant's activities here were purposeful' ... . 'Purposeful activities are those with which a defendant, through volitional acts, avails [himself or herself] of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws' ... . 'To satisfy the second prong of CPLR 302(a)(1) that the cause of action

arise from the contacts with New York, there must be an articulable nexus . . . or substantial relationship . . . between the business transaction and the claim asserted' ... . 'This inquiry is relatively permissive, and does not require causation, but merely a relatedness between the transaction and the legal claim such that the latter is not completely unmoored from the former, regardless of the ultimate merits of the claim' ... . 'CPLR 302(a)(1) is a single act statute and proof of one transaction in New York is sufficient to invoke jurisdiction, even though the defendant never enters New York, so long as the defendant's activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted' ...". ***Skutnik v. Messina*, 2019 N.Y. Slip Op. 08725, Second Dept 12-4-19**

CIVIL PROCEDURE, MUNICIPAL LAW, ATTORNEYS.

ARTICLE 78 PETITION WAS NOT SERVED UPON A PERSON AUTHORIZED TO RECEIVE SERVICE ON BEHALF OF THE NYC DEPARTMENT OF ENVIRONMENTAL PROTECTION (DEP); ALTHOUGH THE PROCESS SERVER ALLEGED THE PETITION WAS DELIVERED TO AN ATTORNEY AT THE DEP WHO SAID SHE WAS AUTHORIZED TO RECEIVE SERVICE, THE DOCTRINE OF EQUITABLE ESTOPPEL DID NOT APPLY.

The Second Department, reversing Supreme Court, determined that the NYC Department of Environmental Protection (DEP) was not properly served with an Article 78 petition and therefore the court did not have jurisdiction over this Freedom of Information Law (FOIL) action. The process server alleged the petition was delivered to an attorney at the DEP who said she was authorized to receive service. The Second Department found that the doctrine of equitable estoppel, based upon the DEP attorney's assertion she was authorized to receive service, did not apply: "It is undisputed that the petitioner's process server did not deliver the notice of petition and petition to the Corporation Counsel, or any other 'person designated to receive process in a writing filed in the office of the clerk of New York county' (CPLR 311[a][2]). Because the petitioner did not effectuate service in strict compliance with CPLR 311(a)(2), it is irrelevant that the petitioner's process server allegedly relied upon the representations of an attorney employed by the DEP ... . Contrary to the petitioner's contention, the DEP should not be equitably estopped from asserting the petitioner's failure to properly serve the DEP with the notice of petition. The doctrine of equitable estoppel should be invoked against governmental entities sparingly and only under exceptional circumstances ... . Estoppel against a governmental entity will lie when the governmental entity acts or comports itself wrongfully or negligently, inducing reliance by a party who is entitled to rely and who changes its position to its detriment or prejudice ... . The fact that the DEP's attorney may have identified herself as an agent who was 'authorized by appointment to receive service at that address' is far removed from any clear expression of her status as a person designated to receive process on behalf of the City in a writing filed in the New York County Clerk's office ... . There is no evidence in the record demonstrating that the petitioner justifiably relied on any misleading conduct by the DEP which would support a finding of equitable estoppel ...". ***Matter of Exxon Mobil Corp. v. New York City Dept. of Envtl. Protection*, 2019 N.Y. Slip Op. 08670, Second Dept 12-4-19**

CRIMINAL LAW, ATTORNEYS.

PROSECUTORIAL MISCONDUCT DEPRIVED DEFENDANT OF A FAIR TRIAL.

The Second Department, ordering a new trial, determined prosecutorial misconduct deprived defendant of a fair trial: "... [D]uring summation, the prosecutor repeatedly engaged in improper conduct. For instance, the prosecutor denigrated the defense and disparaged the defendant, referring to his self-defense claim as 'ridiculous,' 'insulting,' and 'ludicrous,' and informing the jury that the defendant would 'tell you anything' in an effort to "sell you" a story. The prosecutor described the defendant as a "hothead" and a "punk" who could not 'take [a] beating like a man' ... . Moreover, the prosecutor impinged on the defendant's right to remain silent before arrest by arguing that he could not have acted in self-defense during the altercation because he did not call the 911 emergency number ... . Further, the prosecutor improperly invoked the jury's sympathy for the complainant ... , vouched for the complainant's credibility ... , and interjected her own sense of moral retribution with respect to the complainant's entitlement to use physical force against the defendant, while misleading the jury as to the law on justification ...". ***People v. Dawson*, 2019 N.Y. Slip Op. 08689, Second Dept 12-4-19**

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA).

DEFENDANT DEMONSTRATED HE WAS UNLIKELY TO REOFFEND; THEREFORE, DESPITE THE SERIOUSNESS OF HIS SEX OFFENSES, HE WAS ENTITLED TO A REDUCTION OF HIS RISK LEVEL FROM THREE TO ONE.

The Second Department, modifying the SORA court, in a comprehensive, full-fledged opinion by Justice Austin, determined defendant sex offender was entitled to a downward modification of his risk assessment from level three to level one: "The defendant's submissions demonstrated that, through his long-term sobriety, strong family support, faith-based and law abiding lifestyle, continuous employment despite his numerous physical disabilities and age, his risk of reoffending is so diminished that a further reduction from his current risk level two to risk level one is appropriate ... . * * * ... [I]f a defendant served his or her sentence, rehabilitated himself or herself, and demonstrated no actual likelihood of reoffending, a reduction to a risk level one classification from a level three classification should be a possibility. ... In modifying the Supreme Court's order which reduced the defendant's sex offender risk level classification from three to two, and thereby

granting the petition to further reduce the defendant's sex offender risk level designation to a level one, we are not signaling a departure from our strict interpretation of the Guidelines and the legislative history of SORA. Rather, we are following the law, and the policy underlying it, as it applies to this defendant. That is, it is not out of sympathy for his physical condition nor with a blind eye to the defendant's significant criminal past that we render our determination. Rather, we consider these as well as all of the factors—positive and negative—presented at the hearing on his petition for a downward modification in deciding the singular question presented: Did the defendant establish, by clear and convincing evidence, that the risk he poses to the community as a convicted sex offender warrants a downward modification to level one? We answer that question in the affirmative. To hold otherwise ignores the sincere, positive strides the defendant has made to be a productive, positive member of society. By using the disturbing nature of one's crime as the tipping point in the analysis of a petition such as the one before this Court comes dangerously close to saying, if not holding, that once one has committed a sex crime and has been designated a sex offender level, there is no way he or she can ever be rehabilitated to a legally sufficient extent to warrant a downward modification to the lowest level of supervision. If that were so, then the cited portions of the Guidelines and Correction Law § 168-o(2), which allow annual reevaluation of a defendant's risk level after it is initially established, would be rendered without meaning and illusory." ***People v. Davis*, 2019 N.Y. Slip Op. 08720, Second Dept 12-4-19**

FORECLOSURE, EVIDENCE.

THE REFEREE'S REPORT, WHICH IS MERELY ADVISORY AND IS NOT BINDING ON THE COURT, SHOULD NOT HAVE BEEN ACCEPTED BY THE COURT BECAUSE IT WAS BASED UPON BUSINESS RECORDS THAT WERE NOT PROVIDED TO THE REFEREE.

The Second Department, reversing Supreme Court, determined the referee's report should not have been accepted because it was based upon business records which were not in evidence: "... Supreme Court should have granted that branch of the defendant's cross motion which was to reject the referee's report. 'The report of a referee should be confirmed whenever the findings are substantially supported by the record, and the referee has clearly defined the issues and resolved matters of credibility' ... . 'The referee's findings and recommendations are advisory only and have no binding effect on the court, which remains the ultimate arbiter of the dispute' ... . Here, in addition to the outstanding principal amount of the loan, along with accrued interest and charges, the referee included $507,095.35 in 'Tax Disbursements' and $27,705.00 in 'Hazard Insurance Disbursements' as part of the total amount due to the plaintiff. The defendant correctly objected to the inclusion of these disbursements on the ground that they were calculated based on business records that were never produced by the plaintiff or submitted to the referee (see CPLR 4518[a] ...)." ***HSBC Bank USA, N.A. v. Cherestal*, 2019 N.Y. Slip Op. 08660, Second Dept 12-4-19**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

PLAINTIFF, WHO WAS USING HIS OWN LADDER WHEN IT SLID CAUSING HIM TO FALL, WAS ENTITLED TO SUMMARY JUDGMENT ON HIS LABOR LAW § 240(1) CAUSE OF ACTION.

The Second Department determined plaintiff's motion for summary judgment on his Labor Law § 240 (1) cause of action in this ladder-fall case was properly granted. The rolling stairway provided to plaintiff was not high enough to reach the control box for a door which was stuck open. So plaintiff used his own ladder which slid to the side causing him to fall 10 or 12 feet: "Labor Law § 240(1) provides that building owners and contractors shall furnish, or cause to be furnished, safety devices which are 'so constructed, placed and operated as to give proper protection [to workers]' ... . 'To establish liability pursuant to Labor Law § 240(1), a plaintiff must demonstrate a violation of the statute and that such violation was a proximate cause of his or her injuries' ... . A building owner may be held liable for a violation of Labor Law § 240(1) even if it did not exercise supervision or control over the work ... . Here, the plaintiff established his prima facie entitlement to judgment as a matter of law on the issue of liability on the Labor Law § 240(1) cause of action ... by demonstrating that he was injured when he fell while using an unsecured ladder, which unexpectedly collapsed and caused his injuries, without the benefit of any safety devices to prevent such a fall ...". ***Jara v. Costco Wholesale Corp.*, 2019 N.Y. Slip Op. 08664, Second Dept 12-4-19**

MEDICAL MALPRACTICE, PERSONAL INJURY, CIVIL PROCEDURE.

ALTHOUGH DEFENDANT PSYCHIATRIST ALLEGED HE CALLED PLAINTIFF'S DECEDENT TO TELL HER SHE SHOULD SEE ANOTHER PSYCHIATRIST, THE NEXT SCHEDULED APPOINTMENT WITH DEFENDANT WAS NOT CANCELLED; THERE IS A QUESTION OF FACT WHETHER THE CONTINUOUS TREATMENT DOCTRINE APPLIED AND RENDERED THE ACTION TIMELY; DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, over a dissent, determined that the medical malpractice causes of action should not have been dismissed as time-barred. Plaintiff's decedent had seen the defendant psychiatrist for the first time on November 20, 2014 and the next appointment was set up for December 11, 2014. Defendant alleged he called decedent on November 21, 2014 to tell her she should be treated by someone else, but the December 11, 2014 appointment was not cancelled. Decedent committed suicide on November 24, 2014. The action was commenced on May 24, 2017: "Under the con-

tinuous treatment doctrine, the period of limitations does not begin to run until the end of the course of treatment if three conditions are met: (1) the patient 'continued to seek, and in fact obtained, an actual course of treatment from the defendant physician during the relevant period'; (2) the course of treatment was 'for the same conditions or complaints underlying the plaintiff's medical malpractice claim'; and (3) the treatment is 'continuous' ... . To satisfy the requirement that treatment is continuous, further treatment must be explicitly anticipated by both the physician and the patient, as demonstrated by a regularly scheduled appointment for the near future ... . * * * The question here is whether the statute of limitations began to run on November 20, 2014, when the decedent met with the defendant for a medical appointment, or November 24, 2014, when she died. The Supreme Court concluded that the limited interactions between the defendant and the decedent failed to give rise to a continuing trust and confidence between them upon which the court could conclude that the decedent anticipated further treatment. However, since a further appointment was scheduled and was not cancelled—further treatment of some sort was anticipated, or there is at least a triable issue of fact on that issue ...". ***Hillary v. Gerstein*, 2019 N.Y. Slip Op. 08658, Second Dept 12-4-19**

MEDICAL MALPRACTICE, PERSONAL INJURY, CIVIL PROCEDURE.

THE ALLEGED NEGLIGENCE IN THE PROCEDURE USED WHEN PLAINTIFF DONATED BLOOD SOUNDED IN MEDICAL MALPRACTICE, DESPITE THE FACT THAT NO DOCTOR WAS INVOLVED IN THE PROCEDURE; PLAINTIFF'S FAILURE TO PROVIDE A CERTIFICATE OF MERIT AS REQUIRED BY CPLR 3012-a WAS DUE TO THE GOOD FAITH BELIEF THE ACTION SOUNDED IN COMMON LAW NEGLIGENCE; THE ACTION SHOULD NOT HAVE BEEN DISMISSED WITHOUT AFFORDING PLAINTIFF THE OPPORTUNITY TO PROVIDE A CERTIFICATE OF MERIT.

The Second Department, in a full-fledged opinion by Justice Dillon, reversing Supreme Court, determined: (1) the action stemming from alleged negligence in drawing blood donated by plaintiff sounded in medical malpractice, not common law negligence; (2) therefore a certificate of merit was required (CPLR 3012-a); and (3) the failure to provide a certificate of merit does not warrant dismissal of the action, rather the plaintiff should be allowed 60 days to provide the certificate: "... [M]any of the plaintiff's allegations bear a substantial relationship to the rendition of medical treatment to a particular patient .... The complaint alleges, inter alia, that the defendant failed to properly screen the plaintiff for health problems, obtain her medical history, monitor her physical condition, measure her hemoglobin levels, and keep her at the donation site for a specific period of time to observe any signs of an adverse reaction. The issues of whether the plaintiff needed additional screening, monitoring, or supervision, and whether she was at risk of falling due to a medical condition, involve the exercise of medical judgments beyond the common knowledge of ordinary persons. Only a medical professional would know what factors make a person ineligible to donate blood, how much blood should be drawn, what constitutes the signs and symptoms of an adverse reaction, and how to immediately treat an adverse reaction. Thus, the interaction between the plaintiff and the defendant implicates issues of medical judgment that sound in medical malpractice. * * * ... [A]lthough the complaint was not accompanied by a certificate of merit as required by CPLR 3012-a, dismissal of the complaint is not warranted as the plaintiff's attorney should be provided with an opportunity to comply with the statute now that it is determined that the statute applies to this particular action ... . There is no reason to believe from this record that the plaintiff's attorney's failure to file a certificate of merit was motivated by anything other than a good faith assessment that CPLR 3012-a did not apply to the action. The proper remedy at this stage, since the defendant had also sought in its underlying motion 'such other and further relief as this court may deem just, proper and reasonable' ... , is for this Court to extend the plaintiff's time to serve a certificate of merit upon the defendant until 60 days after service of this opinion and order. Only if the plaintiff is recalcitrant in complying with both the statute and this Court's order may the Supreme Court, in its discretion, then dismiss the complaint ...". ***Rabinovich v. Maimonides Med. Ctr.*, 2019 N.Y. Slip Op. 08724, Second Dept 12-4-19**

PERSONAL INJURY.

DEFENDANT DRIVER WAVED TO PLAINTIFF'S DECEDENT, A PEDESTRIAN, INDICATING SHE WAS ALLOWING PLAINTIFF'S DECEDENT TO CROSS THE STREET; ONE SECOND LATER PLAINTIFF'S DECEDENT WAS STRUCK BY ANOTHER CAR; THE ACCIDENT WAS THE RESULT OF A SUPERSEDING, INTERVENING ACT AND DEFENDANT WAS NOT LIABLE AS A MATTER OF LAW.

The Second Department determined defendant driver, Biesty, was entitled to summary judgment in this pedestrian accident case because the act of another driver was the supervening cause of the accident. Biesty had stopped at a stop sign and waved to plaintiff-pedestrian (Nanfro) indicating Biesty would allow Nanfro to cross the street. One second later Nanfro was struck by a car driven by Agostinelli: "A driver of a motor vehicle may, under certain circumstances, be liable to a pedestrian where the driver "undertakes to direct a pedestrian safely across the road in front of his [or her] vehicle, and negligently carries out that duty" ... . 'However, even if a pedestrian is injured because he or she relied on a driver's gesture directing him or her to cross a roadway, the acts of another driver may constitute a superseding, intervening act that breaks the causal nexus' ... . 'Whether an intervening act is a superseding cause is generally a question of fact, but there are circumstances where it may be determined as a matter of law' ... . Here, assuming without deciding that Biesty negligently motioned Nanfro to continue walking across the street and that Nanfro relied upon the gesture, Agostinelli's unforeseeable failure to see what was there to be seen and failure to yield the right-of-way to Nanfro, who was crossing the street within

an unmarked crosswalk, constituted an intervening and superseding cause that established Biesty's prima facie entitlement to judgment as a matter of law ...". ***Levi v. Nardone*, 2019 N.Y. Slip Op. 08665, Second Dept 12-4-19**

PERSONAL INJURY, EVIDENCE.

DEFENDANT DID NOT DEMONSTRATE IT DID NOT HAVE CONSTRUCTIVE NOTICE OF THE LIQUID ON THE FLOOR WHICH ALLEGEDLY CAUSED PLAINTIFF TO SLIP AND FALL; DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined defendant's motion for summary judgment in this slip and fall case should not have been granted. Defendant did not demonstrate a lack of constructive notice of the liquid on the floor: "... [T]he evidence submitted by the defendant in support of its motion failed to demonstrate, prima facie, that it lacked constructive notice of the alleged dangerous condition that caused the plaintiff to fall. The deposition testimony of the assistant manager of the supermarket, who did not recall if he was working on the date of the accident, and the affidavit of the defendant's vice president of loss prevention, merely referred to the defendant's general cleaning and inspection practices. The defendant did not proffer any evidence demonstrating when the specific area where the plaintiff fell was last cleaned or inspected before the accident ... . Furthermore, the defendant failed to demonstrate, prima facie, that the condition on which the plaintiff fell was not visible and apparent, and would not have been discoverable upon a reasonable inspection of the area where the plaintiff was injured ...". ***Fortune v. Western Beef, Inc.*, 2019 N.Y. Slip Op. 08656, Second Dept 12-4-19**

THIRD DEPARTMENT

CRIMINAL LAW.

THE INCLUSION OF EXTRANEOUS INFORMATION ON THE VERDICT SHEET WHICH DID NOT PROVIDE ANY SUBSTANTIVE INFORMATION ABOUT THE CASE WAS HARMLESS ERROR.

The Third Department determined, although it was error to include extraneous information on the verdict sheet, i.e., that the defendant had authorized the verdict sheet, the error was harmless: "The Court of Appeals has 'held that it is reversible error, not subject to harmless error analysis, to provide a jury in a criminal case with a verdict sheet that contains annotations not authorized by CPL 310.20 (2)' ... . Moreover, '[t]he basic principle is that nothing of substance can be included that the statute does not authorize' ... . * * * The extraneous statement was not part of the questions posed to the jury; rather, it was at the end of the verdict sheet. It did not change any of the questions to the jury. ... [W]e find that the submission to the jury of the verdict sheet with the statement asserting that defendant authorized it, without his signature, was not reversible error, because the extraneous statement gave no substantive information to the jury about the case and merely indicated that defendant saw the verdict sheet, was aware of his charges and was represented by an attorney ...". ***People v. Stover*, 2019 N.Y. Slip Op. 08734, Third Dept 12-5-19**

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA).

PROOF OF OCCASIONAL DRUG USE IN THE REMOTE PAST AND REFERRALS FOR ALLEGED DRUG USE IN PRISON SEVERAL YEARS AGO WAS INSUFFICIENT TO WARRANT THE ASSESSMENT OF 15 POINTS FOR A HISTORY OF DRUG AND ALCOHOL ABUSE.

The Third Department, reversing Supreme Court, determined defendant should not have been assessed 15 points for his history of drug and alcohol abuse. The evidence of drug use was remote in time and drug use was not an aspect of the offense: "Defendant reported that, prior to moving to this area in 1987, he had used cocaine once during his incarceration in Alabama and speed while working in the south, but denied any recent drug use. The information regarding defendant's use of drugs is in the distant past and excessively remote ... and, in any event, does not establish a pattern of drug abuse as contemplated by the Sex Offender Registration Act risk assessment guidelines ... . In addition, the case summary reflects that, upon being screened by the Department of Corrections and Community Supervision, drug use was not an issue of concern with regard to defendant and he was not, at that time, referred to any alcohol or drug treatment program. The remaining evidence with regard to defendant's history of drug or alcohol abuse is the general reference to defendant twice being referred to alcohol and drug abuse treatment programs during his 26 years of incarceration for the instant offense 'presumptively' due to defendant receiving five tier III disciplinary sanctions for drug use. The most recent referral was several years ago, in 2012. We find that this is insufficient, by itself, to establish a pattern of drug or alcohol abuse by defendant ...". ***People v. Brown*, 2019 N.Y. Slip Op. 08746, Third Dept 12-5-19**

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA), APPEALS.

ALTHOUGH COUNTY COURT ISSUED, ENTERED AND FILED A DECISION ADJUDICATING DEFENDANT A LEVEL THREE SEX OFFENDER, THERE WAS NO LANGUAGE INDICATING THE DECISION WAS A JUDGMENT OR AN ORDER; IN ADDITION, THE RISK ASSESSMENT INSTRUMENT DID NOT INCLUDE "SO ORDERED" LANGUAGE; THEREFORE THERE WAS NO APPEALABLE ORDER BEFORE THE COURT AND THE APPEAL WAS DISMISSED.

The Third Department dismissed the appeal of County Court's SORA risk assessment because County Court did not issue an appealable order: "Following a hearing, County Court rejected defendant's challenge to certain assessed points, adjudicated him as a risk level three sex offender and designated him as a sexually violent offender. Defendant appeals. An appealable order must be in writing (see CPLR 2219 [a] ...), and must contain language that identifies the document as 'either a judgment or order of the court'... . Consistent with these mandates, the Sex Offender Registration Act ... requires that County Court must 'render an order setting forth its determinations and the findings of fact and conclusions of law on which the determinations are based'... . That written order must then be 'entered and filed in the office of the clerk of the court where the action is triable' (CPLR 2220 [a] ...). Here, County Court issued a written decision which was subsequently entered and filed. However, the decision contains no language indicating that it is an order or judgment, and it does not appear that a written order was entered and filed ... . Moreover, the risk assessment instrument does not contain 'so ordered' language so that it may constitute an appealable order ... . Accordingly, this appeal is not properly before this Court and must be dismissed ...". ***People v. Porter*, 2019 N.Y. Slip Op. 08743, Third Dept 12-5-19**

DISCIPLINARY HEARINGS (INMATES).

PETITIONER-INMATE WAS DEPRIVED OF HIS FUNDAMENTAL RIGHT TO BE PRESENT DURING HIS DISCIPLINARY HEARING; ALTHOUGH PETITIONER WAS ARGUMENTATIVE, REMOVAL FROM THE HEARING WAS NOT WARRANTED; DETERMINATION ANNULLED.

The Third Department, annulling the disciplinary determination, held that petitioner-inmate was deprived of his right to be present during the hearing. Respondent removed petitioner from the hearing when petitioner became argumentative and asked that respondent recuse himself because of bias against the petitioner: " 'An inmate has a fundamental right to be present at a Superintendent's hearing 'unless he or she refuses to attend, or is excluded for reasons of institutional safety or correctional goals' ... . The record reflects that, early in the hearing, petitioner asked respondent to recuse himself because petitioner had previously filed a complaint against him and perceived him to be biased. Respondent denied petitioner's recusal request, stating that the complaint would not prevent him from providing petitioner with a fair hearing. Petitioner objected and, thereafter, twice interrupted respondent and complained that respondent had become 'hostile' toward him. Respondent directed petitioner to stop interrupting him, warned him that continued interruptions would result in his removal from the hearing and sought petitioner's acknowledgement that he understood that warning. Petitioner refused to acknowledge the warning, stating that it lacked any basis and that he was 'only trying to participate in th[e] hearing.' Respondent then abruptly removed petitioner from the hearing, seemingly because petitioner refused to acknowledge the warning. Although several adjournments were taken that day to secure witnesses, petitioner was never brought back into the hearing. Our review of the record does not demonstrate that petitioner's briefly argumentative behavior rose to the level of justifying his removal for the entire hearing or that his conduct jeopardized institutional safety and correctional goals ...". ***Matter of Clark v. Jordan*, 2019 N.Y. Slip Op. 08757, Third Dept 12-5-19**

WORKERS' COMPENSATION.

ABSENT A FINDING OF PERMANENT PARTIAL DISABILITY, CLAIMANT NEED NOT SHOW ATTACHMENT TO THE LABOR MARKET AND IS ENTITLED TO RELY ON HER CHIROPRACTOR'S OPINION SHE IS TEMPORARILY TOTALLY DISABLED.

The Third Department, reversing the Workers' Compensation Board, determined claimant was not required to show attachment to the labor market because there had not been a finding of permanent partial disability: "Claimant sought review by the Workers' Compensation Board, contending that she was not required to demonstrate attachment to the labor market because, absent a finding that she had sustained a permanent partial disability, she was entitled to rely upon her chiropractor's opinion that she was temporarily totally disabled. ... Claimant's obligation to demonstrate attachment to the labor market is predicated — in the first instance — upon a finding of a permanent partial disability ...". ***Matter of Bowers v. New York City Tr. Auth.*, 2019 N.Y. Slip Op. 08748, Second Dept 12-5-19**

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