December 6, 2019

CasePrepPlus

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Editor: **Bruce Freeman**

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COURT OF APPEALS

CIVIL PROCEDURE, BANKRUPTCY, FORECLOSURE, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL).

FEDERAL BANKRUPTCY STAY TOLLED THE STATUTE OF LIMITATIONS IN A FORECLOSURE ACTION COMMENCED BEFORE THE STAY WENT INTO EFFECT.

The Court of Appeals, in a full-fledged opinion by Judge Garcia, over a three-judge dissent, determined an automatic bankruptcy stay tolls the statute of limitations where a party has a pending action at the time the stay was imposed: "New York law tolls the statute of limitations where 'the commencement of an action has been stayed by a court or by statutory prohibition' (CPLR 204 [a]). Federal bankruptcy law automatically stays the commencement or continuation of any judicial proceedings against a debtor upon the filing of a bankruptcy petition (see 11 USC § 362 [a]). We must determine whether the bankruptcy stay qualifies as a 'statutory prohibition' under CPLR 204 (a), and, if so, whether a party may later avail itself of the toll where, at the time the stay was imposed, that party had a pending action asserting the same claim. ... [W]e answer yes to both questions ... . * * * CPLR 204 (a) provides, '[w]here the commencement of an action has been stayed by a court or by statutory prohibition, the duration of the stay is not a part of the time within which the action must be commenced.' The result here depends on our reading of the term 'commencement.' Plaintiff argues that it is impossible for defendant to have been prohibited from 'commencing' an action because a foreclosure action had been commenced prior to plaintiff's bankruptcy filing. Application of plaintiff's rule would be as follows: Because defendant filed the first foreclosure claim and defendant responded by filing a bankruptcy petition, invoking the automatic stay, commencement of that first action was not 'stayed' under the statute and the toll is inapplicable. And when defendant filed a second foreclosure action, and plaintiff again responded by again filing a bankruptcy petition that invoked the automatic stay, 'commencement' of that second action was not stayed, once again making the toll inapplicable ... . * * * Neither this Court nor the Legislature has restricted the term 'commencement' to the first time a party files a complaint asserting a cause of action; instead the term may also include the commencement of subsequent actions asserting the same claim ...". ***Lubonty v. U.S. Bank Natl. Assn.*, 2019 N.Y. Slip Op. 08520, CtApp 11-25-19**

CIVIL PROCEDURE, CONTRACT LAW.

PLAINTIFF TRUSTEE'S RESIDENCE IS CALIFORNIA AND THE CAUSES OF ACTION IN THIS RESIDENTIAL-MORTGAGE-BACKED-SECURITIES BREACH OF CONTRACT ACTION THEREFORE ACCRUED IN CALIFORNIA; UNDER NEW YORK'S BORROWING STATUTE, CPLR 202, THE ACTIONS MUST BE DISMISSED BECAUSE THEY ARE UNTIMELY UNDER CALIFORNIA LAW.

The Court of Appeals, in a full-fledged opinion by Judge Fahey, over a two-judge dissent, determined that California, the residence of the plaintiff, here a residential-mortgage-backed-securities trustee, was where the breach of contract action accrued, not New York. Therefore, pursuant to CPLR 202, New York's borrowing statute, the action must be timely under both California and New York law. The action was not timely under California law which has a four-year statute for breach of contract: "Defendants argued that as a resident of California, plaintiff suffered economic injury in California, and therefore plaintiff's causes of action accrued in California for the purposes of CPLR 202. Plaintiff conceded that it was a resident of California. It argued, however, that instead of applying the general rule that an economic injury is suffered where the plaintiff resides to determine where the cause of action accrued, the court should apply a multi-factor analysis. Plaintiff asserted that because it was suing in a representative capacity on behalf of the trusts, it did not suffer real economic loss, and its residence was irrelevant, or at least not the primary consideration, for determining the place of accrual. * * * We reaffirm that 'a cause of action accrues at the time and in the place of the injury' ... . Although courts may, in appropriate cases, conclude that an economic loss was sustained in a place other than where the plaintiff resides, we decline to apply the multi-factor analysis that plaintiff proposes. * * * ... [W]e conclude that plaintiff's residence applies to determine the place of injury in this case. As trustee, plaintiff is authorized to enforce, on behalf of the certificateholders, the representations and warranties in the relevant agreements. Accordingly, it is appropriate for us to look to plaintiff's residence as the place where the economic injury was sustained and, consequently, where plaintiff's causes of action accrued for purposes of CPLR 202." ***Deutsche Bank Natl. Trust Co. v. Barclays Bank PLC*, 2019 N.Y. Slip Op. 08519, Ct App 11-25-19**

CRIMINAL LAW, APPEALS.

IN AN IMPORTANT CLARIFICATION OF THE LAW, THE WAIVERS OF APPEAL IN TWO OF THE THREE APPEALS BEFORE THE COURT WERE DECLARED INVALID BECAUSE THE DEFENDANT WAS GIVEN THE ERRONEOUS IMPRESSION THAT ALL AVENUES OF APPEAL AND COLLATERAL RELIEF ARE CUT OFF BY THE WAIVER.

The Court of Appeals, in a comprehensive opinion by Judge DiFiore, over several concurring and two dissenting opinions, determined that the waivers of appeal in two of the three appeals before the court were invalid. The opinion is an important clarification of the law and is too detailed to fairly summarize here. In a nutshell, a court should not give the defendant the impression that all appellate avenues, including the filing of a Notice of Appeal, collateral relief, and the availability of counsel, are cut off by the waiver of appeal. The court approved the Unified Court System's Model Colloquy: "... [T]he Model Colloquy for the waiver of right to appeal drafted by the Unified Court System's Criminal Jury Instructions and Model Colloquy Committee neatly synthesizes our precedent and the governing principles and provides a solid reference for a better practice. The Model Colloquy provides a concise statement conveying the distinction missing in most shorthand colloquies — that: '[b]y waiving your right to appeal, you do not give up your right to take an appeal by filing a notice of appeal . . . within 30 days of the sentence. But, if you take an appeal, you are by this waiver giving up the right to have the appellate court consider most claims of error,[] and whether the sentence I impose, whatever it may be, is excessive and should be modified. As a result, the conviction by this plea and sentence will normally be final' (NY Model Colloquies, Waiver of Right to Appeal [emphasis added]). There is no mention made of an absolute bar to the taking of an appeal or any purported waiver of collateral or federal relief in the Model Colloquy or to the complete loss of the right to counsel to prosecute the direct appeal ...". ***People v. Thomas*, 2019 N.Y. Slip Op. 08545, Ct App 11-26-19**

CRIMINAL LAW, EVIDENCE.

DEFENSE COUNSEL SHOULD HAVE BEEN ALLOWED TO CROSS-EXAMINE THE TWO POLICE OFFICERS WHO IDENTIFIED THE DEFENDANT AS THE SHOOTER ABOUT ALLEGATIONS OF THE OFFICERS' DISHONESTY ARISING FROM OTHER COURT PROCEEDINGS.

The Court of Appeals, in a full-fledged opinion by Judge Fahey, reversing defendant's conviction, determined the trial court abused its discretion when it denied defense counsel's requests to cross-examine the two police witnesses about prior acts of dishonesty. The two officers presented the only evidence which identified the defendant as the shooter in this attempted murder prosecution: "At the suppression hearing held before trial, that officer's testimony supported defendant's contention that, in preparing to testify in an unrelated federal criminal proceeding, he had misled the prosecutor in that case with respect to his involvement in a ticket-fixing scheme. ... Defense counsel ... was not permitted to explore what defense counsel characterized as that officer's lies to the federal prosecutor regarding those activities. ... [T]he court limited exploration of that officer's prior bad acts to his participation in the ticket-fixing scheme, and did not permit inquiry with respect to that officer's deceit of the federal prosecutor. That ruling was an abuse of discretion as a matter of law. * * * We also conclude that the trial court abused its discretion as a matter of law in precluding cross-examination of both officers with respect to prior judicial determinations that addressed the credibility of their prior testimony in judicial proceedings." ***People v. Rouse*, 2019 N.Y. Slip Op. 08522, Ct App 11-25-19**

CRIMINAL LAW, EVIDENCE.

DEFENDANT, A PAIN MANAGEMENT PHYSICIAN WHO OPERATED A "PILL MILL," WAS PROPERLY CONVICTED OF RECKLESS MANSLAUGHTER IN THE DEATHS OF TWO PATIENTS WHO DIED OF OPIOID OVERDOSE.

The Court of Appeals, in a full-fledged opinion by Judge Fahey, over a dissenting opinion, determined that defendant, a pain-management doctor, was properly convicted of manslaughter, recklessly causing the death of two persons [Haeg and Pappoid] to whom defendant prescribed opioids as part of a "pill mill" operation: "... [W]e conclude that the evidence was sufficient to support the jury's finding that defendant acted recklessly. A rational juror could have concluded, based on a valid line of reasoning and permissible inferences, that defendant was aware of and consciously disregarded a substantial and unjustifiable risk that Haeg and Rappold would take more drugs than prescribed and would die by overdose, and, given defendant's position as their medical doctor, that defendant's conduct constituted a 'gross deviation from the standard of conduct that a reasonable person would observe in the situation' (Penal Law § 15.05 [3]). * * * The fact that Haeg and Rappold took the substances defendant prescribed for them in a greater dosage than prescribed is neither an intervening, independent agency nor unforeseeable. It is a direct and foreseeable result of defendant's reckless conduct. As explained, viewing the evidence in the light most favorable to the People, a rational juror could conclude that defendant was aware of and consciously disregarded a substantial and unjustifiable risk that Haeg and Rappold would take the medications he prescribed at a higher dose than prescribed in order to attain a narcotic high rather than for legitimate pain management, and that they would die as a result." ***People v. Stan XuHui Li*, 2019 N.Y. Slip Op. 08544, Ct App 11-26-19**

EMPLOYMENT LAW, BATTERY, COURT OF CLAIMS.

BRUTAL, UNPROVOKED ATTACK ON CLAIMANT, AN INMATE, BY CORRECTION OFFICERS WAS DEEMED TO HAVE NO RELATION TO THE DUTIES OF A CORRECTION OFFICER; THEREFORE THE ATTACK WAS NOT WITHIN THE SCOPE OF THE OFFICERS' EMPLOYMENT AND THE STATE, AS A MATTER OF LAW, IS NOT LIABLE UNDER A RESPONDEAT SUPERIOR THEORY.

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, over a three-judge dissent, determined that the state's motion for summary judgment in this assault and battery action by an inmate was properly granted. Claimant was brutally beaten, without cause, by three correction officers and sued the state under a respondeat superior, vicarious liability theory. The Court of Appeals held the state had demonstrated the officers were not acting within the scope of their employment when they assaulted the claimant: "Correction officers are authorized to use physical force against inmates in limited circumstances not present here, such as in self-defense or to suppress a revolt (see Correction Law § 137 [5]; 7 NYCRR 251-1.2 [a], [b]). DOCCS regulations require correction officers to exercise '[t]he greatest caution and conservative judgment' in determining whether physical force against an inmate is necessary (7 NYCRR 251-1.2 [a]). To be sure, correction officers at times use excessive force. Such conduct will not fall outside the scope of employment merely because it violates department rules or policies or crosses the line of sanctioned conduct. Under our multi-factored common-law test for determining respondeat superior liability, an employee's deviation from directions or governing standards is only one consideration in the analysis. Here, the gratuitous and utterly unauthorized use of force was so egregious as to constitute a significant departure from the normal methods of performance of the duties of a correction officer as a matter of law. This was a malicious attack completely divorced from the employer's interests. Further, there is no evidence in the record that DOCCS should — or could — have reasonably anticipated such a flagrant and unjustified use of force, in which, assisted by other officers who immobilized and handcuffed claimant, Wehby [the primary assailant] repeatedly punched and kicked him during a prolonged assault, removing claimant's protective helmet in order to facilitate more direct blows to his head. As such, based on the uncontested facts, it is evident that claimant's injuries were not caused by actions taken within the scope of employment and thus, there were no triable issues of fact as to the State's vicarious liability for assault and battery." ***Rivera v. State of New York*, 2019 N.Y. Slip Op. 08521, Ct App 11-25-19**

EMPLOYMENT LAW, MUNICIPAL LAW, ADMINISTRATIVE LAW.

CITY'S DETERMINATION IT WOULD NOT DEFEND A POLICE OFFICER IN A SUIT ALLEGING THE OFFICER'S USE OF EXCESSIVE FORCE WAS NOT ARBITRARY AND CAPRICIOUS; HIS CONDUCT CONSTITUTED "INTENTIONAL WRONGDOING" WHICH WAS NOT WITHIN THE SCOPE OF HIS EMPLOYMENT.

The Court of Appeals, in a brief memorandum decision, over a two-judge dissenting opinion, determined the City of Buffalo's ruling that petitioner police officer was not entitled to defense and indemnification by the City in an action against the officer alleging use of excessive force. The facts were described in the dissent as follows: "Numerous Buffalo police officers, including Officer Corey Krug, were deployed to keep order at Chippewa Street, a popular location for late-night drunken revelry. In the course of doing his job, a 30-second excerpt of a video filmed by a local TV station crew shows Officer Krug performing his duties with what appears to be excessive force: asking an unarmed young man, Devin Ford, why he returned to the area, throwing him onto the hood of a car, striking him in the leg several times with a baton and stopping only when another officer saw the incident and told him to stop. Criminal charges were filed against Officer Krug for the use of excessive force, and Mr. Ford filed a civil suit against him." The Court of Appeals upheld the determination that Officer Krug was not acting within the scope of his employment when he dealt with Mr. Ford: "Given the narrow question before us and under the circumstances presented here, we cannot say that the City's determination was 'irrational or arbitrary and capricious'... . Insofar as the record supports the City's conclusion that petitioner was not 'acting within the scope of his public employment' under Buffalo City Code § 35-28 because his conduct constituted 'intentional wrongdoing' and violated the City's rules regarding the use of force, the City's determination was not 'taken without regard to the facts' ...". ***Matter of Krug v. City of Buffalo*, 2019 N.Y. Slip Op. 08546, CtApp 11-26-19**

RETIREMENT AND SOCIAL SECURITY LAW.

PETITIONER, A COUNTY CORRECTION OFFICER, WAS ENTITLED TO DISABILITY RETIREMENT BENEFITS; AN INMATE, WHO WAS UNSTEADY ON HER FEET AND MAY HAVE BEEN UNDER THE INFLUENCE OF DRUGS, FELL HEAD FIRST FROM A TRANSPORT VAN ONTO PETITIONER.

The Court of Appeals, in a full-fledged opinion by Judge Feinman, over a concurring opinion and a three-judge dissenting opinion, reversing the Appellate Division, determined that petitioner, a Nassau County correction officer, was entitled to performance-of-duty disability retirement benefits. An inmate, apparently under the influence of drugs, was unsteady on her feet and had to be helped from the transport van to the court, and then back to the van. Upon arrival at the jail, when the transport doors were opened, the inmate fell head first out of the van on top of petitioner, who suffered rotator cuff and cervical spine injuries. The applicable statute refers to injury caused by "any act of any inmate." The majority concluded the act need not be intentional: "Our task ... is to give effect to the text [of the statute, Retirement and Social Security Law § 607-c (a)].

... [E]ven if we were to consider the legislative history, it is inconclusive. While we agree with the dissent insofar as there seemed to have been a desire to provide protections to correction officers because they 'come into daily contact with certain persons who are dangerous, profoundly anti-social and who pose a serious threat to their health and safety' (Governor's Approval Mem, Bill Jacket, L 1996, ch 722 at 9), inmates may be 'dangerous' and pose a 'serious threat' as much through their involuntary acts as by their voluntary acts. Here, the inmate took one to two steps, lost her balance, and landed on petitioner, injuring her. Petitioner's injuries were thus sustained by 'any act of any inmate,' i.e., the inmate's fall on petitioner." ***Matter of Walsh v. New York State Comptroller*, 2019 N.Y. Slip Op. 08518, CtApp 11-25-19**

FIRST DEPARTMENT

CRIMINAL LAW.

THE STREET ADDRESS OF THE PRIVATE RESIDENCE TO BE SEARCHED SUFFICIENTLY IDENTIFIED THE PROPERTY NOTWITHSTANDING THAT PUBLIC RECORDS INDICATED THREE RESIDENTIAL UNITS AT THAT ADDRESS; THE SEARCH WARRANT WAS VALID.

The First Department, in a full-fledged opinion by Justice Tom, over a two-justice dissent. determined that the description in the search warrant of the property to be searched was sufficient, notwithstanding that public records showed three residential units at that street address: "The dissent relies on allegations in defense counsel's affirmation to argue for a more differentiated internal living structure. However, since an attorney's affirmation is not evidence, the endeavor is unavailing. The dissent also relies on the affidavit submitted by defendant's mother to counter the position of the People that the house was a private family residence. In view of the obvious likelihood of a compelling personal interest motivating the mother, we also decline to accept this as reliable evidence in the effort to controvert the warrant and the additional material in the record. The only indication that the house legally could have been occupied as separate units was in the extrinsic materials supplied by defendant in moving to controvert the warrant, consisting of public records showing that the house contained three units. However, the fact that city records reflected that the house could be occupied as three units for tax or zoning purposes does not require a conclusion that it was. There likely are numerous legal two- or three-family residential houses that remain occupied by single families. The classifications of these houses relate to tax or land use matters that have no necessary bearing on the facial validity of a warrant." ***People v. Duval*, 2019 N.Y. Slip Op. 08542, First Dept 11-26-19**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

NO NEED TO SHOW LADDER WAS DEFECTIVE; ENOUGH TO SHOW PLAINTIFF WAS NOT PROVIDED WITH ANY EQUIPMENT TO ENSURE THE LADDER REMAINED UPRIGHT.

The First Department determined plaintiff's motion for summary judgment in this Labor Law § 240(1) ladder-fall case was properly granted. The court noted there was no need to show the ladder was defective, only that nothing was provided to keep the ladder upright while plaintiff was using it: "Whether plaintiff slipped from the rung of the ladder or the ladder tipped over as he sought to steady himself while descending it, plaintiff's testimony established prima facie that defendant failed to provide a safety device to insure that the ladder would remain upright while plaintiff used it to perform his statutorily covered work; plaintiff was not required to show that the ladder was defective (Labor Law § 240[1] ...). In opposition, defendant failed to raise an issue of fact as to whether plaintiff's placement of the ladder where he could fall or step onto a stack of sheetrock was the sole proximate cause of his accident, since it presented no evidence that the appropriate equipment was available to plaintiff ... . Moreover, because plaintiff established that defendant failed to provide an adequate safety device to protect him from elevation-related risks and that that failure was a proximate cause of his injuries, any negligence on plaintiff's part in placing the ladder near the sheetrock is of no consequence ...". ***Pierrakeas v. 137 E. 38th St. LLC*, 2019 N.Y. Slip Op. 08539, First Dept 11-26-19**

MEDICAL MALPRACTICE, PERSONAL INJURY, CIVIL PROCEDURE, EVIDENCE.

COURT SHOULD NOT HAVE CONSIDERED A NEW THEORY OF MEDICAL MALPRACTICE RAISED FOR THE FIRST TIME IN RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT.

The First Department, reversing Supreme Court, determined the court should not have considered a new theory of medical malpractice raised for the first time in response to defendant's motion for summary judgment: "... [T]he complaint and bill of particulars were only sufficient to put defendant on notice of an allegation that, in January 2013, he failed to properly compare the 2013 EC [echocardiagram] with the 2011 EC contained in decedent's medical record, and determine that a dilation in decedent's aorta had increased. Plaintiffs' papers were insufficient to put defendant on notice of plaintiffs' new theory of liability - raised for the first time in her expert's opinion - that he deviated from the standard of care in August 2011, when interpreting the 2011 EC ... . Here, where negligence is specifically alleged to have occurred only between December 2012 and January 2013, we conclude that the vague, ambiguous, nonspecific and open-ended assertion 'prior or subsequent

thereto' contained in plaintiffs' bill of particulars failed to put defendant on notice of a claim that he acted negligently in August 2011." ***Carroll v. New York City Health & Hosps. Corp.*, 2019 N.Y. Slip Op. 08524, First Dept 11-26-19**

SECOND DEPARTMENT

ATTORNEYS, APPEALS.

LAW FIRM SANCTIONED FOR FAILURE TO APPEAR AT A MANDATORY MEDIATION SESSION TO ATTEMPT TO RESOLVE THE MATTER ON APPEAL.

The Second Department sanctioned a law firm $750 for failure to appear at a mandatory mediation session to resolve an appeal: "Pursuant to a Notice of Reference of the Mandatory Civil Appeals Mediation Program, the petitioner-appellant's counsel, the petitioner-appellant, counsel for the respondent-respondent Charles Schwartz, and the respondent-respondent Charles Schwartz were directed to appear for a mandatory mediation session. The petitioner-appellant's counsel, Law Offices of Seidner & Associates, P.C., failed to insure that the petitioner-appellant appear for the regularly scheduled mandatory mediation session, without good cause, and there is no indication that the attorney who appeared for the petitioner-appellant possessed the authority to settle the matter. In this regard, we consider that the lead counsel for the petitioner-appellant sought, and was granted, an adjournment of the mediation session so that he could personally attend and yet inexplicably sent a different attorney in his stead on the adjourned date. Although parties are not compelled to resolve their appeals by settlement, parties and their counsel are required to attend mediation sessions and may not arrogate unto themselves the authority to dispense with a mediation session or to render such sessions nugatory by refusing to appear and participate in them." ***Matter of Schwartz (Schwartz)*, 2019 N.Y. Slip Op. 08565, Second Dept 11-27-19**

CIVIL PROCEDURE, CORPORATION LAW, REPLEVIN, ATTORNEYS, PRIVILEGE.

THE ATTORNEY-CLIENT PRIVILEGE DID NOT PASS TO THE FOREIGN (DELAWARE) CORPORATION AFTER A MERGER AND ACQUISITION OF NEW YORK BUSINESS ENTITIES; THEREFORE THE NEW YORK PARTIES, IN THEIR CLAIMS AGAINST THE ATTORNEYS WHO REPRESENTED THEM IN THE TRANSACTION, CAN SEEK ACCESS TO THE ATTORNEYS' PRIVILEGED COMMUNICATIONS CONCERNING THE TRANSACTION.

The Second Department, in a full-fledged opinion by Justice Austin, reversing Supreme Court, determined that New York law applied to a party's assertion of the attorney-client privilege for documents associated with a corporate acquisition and merger involving New York and Delaware business entities. The opinion is fact-based and far too complex and comprehensive to summarize here. The Second Department, disagreeing with Supreme Court, held that the choice of law was governed by public policy, and the proper theory for access to the privileged documents is New York's law of replevin. In a nutshell, the Second Department held that the attorney-client privilege did not pass to the foreign corporation after the merger and acquisition, but rather remained with the the New York parties (Sina and Askari) and allowed the New York parties to pursue claims against the attorneys (McDermott) who represented them in the transaction: "In a situation where documents are sought, New York will apply the law of the forum where the evidence will be introduced at trial or the location of the proceeding seeking discovery of those documents ... . Here, the privileged communications being sought by the plaintiffs in this New York replevin action were made in New York between New York-based attorneys at McDermott and Sina, a New York corporation, involving its then-majority shareholder and president, Askari, a New York resident. The sole nexus that Delaware has to this action is that Specialty is a limited liability company formed under the laws of that state. Consequently, New York law applies in this action sounding in replevin seeking the disclosure of McDermott's files ... . It would indeed be incongruous to enforce a law which effectively forecloses New York corporations merging with foreign corporations from having the ability to pursue their claims against their counsel or the newly formed, post-merger entities based on the post-merger entities' control of the documents needed by the former entities to prosecute potential claims. Here, Delaware law gives the new corporation, a putative defendant, sole access to and control of the merger-related documents by the exercise of the attorney-client privilege. This is contrary to New York public policy ... . * * * Here, Business Corporation Law § 1006 specifically provides that a dissolved corporation, like Sina, may commence an action in any court under its corporate name. Sina's dissolution does not affect Sina's right or capacity to maintain this replevin action since the claim arose from McDermott's representation of Sina which began before Sina's dissolution. ... Thus, the plaintiffs demonstrated their prima facie entitlement to judgment as a matter of law in this action for replevin since the plaintiffs submitted evidence, through Askari's affidavit, that McDermott represented Sina and Askari during the 'transactions.' As a result, the plaintiffs demonstrated, prima facie, their superior possessory right to McDermott's files." ***Askari v. McDermott, Will & Emery, LLP*, 2019 N.Y. Slip Op. 08547, Second Dept 11-27-19**

COURT OF CLAIMS, PERSONAL INJURY, EVIDENCE.

DEFENDANTS' AFFIDAVITS SUBMITTED IN REPLY TO CLAIMANT'S OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT RAISED A QUESTION OF FACT; DEFENDANTS' MOTION TO DISMISS THE CLAIM SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing the Court of Claims, determined that the defendants' motion to dismiss the claim should not have been granted. Claimant alleged she was injured when she collided with a glass exit door at Brooklyn College. The notice of intention to file a claim and the claim indicated photographs of the door were attached. Defendants apparently assumed the door in question was the front door to the building, but discovery indicated it was the back door. Defendants moved for summary judgment arguing that claimant failed to give proper notice of the location of the door as required by Court of Claims Act 11(b). Defendants submitted affidavits stating that the computer files were searched and no photographs of the door were found. The Second Department held there was a question of fact whether the photographs of the door were attached to the notice of intention and the claim: "Pursuant to Court of Claims Act § 11(b), a notice of intention to file a claim and a claim must set forth, inter alia, the 'place where such claim arose'... . 'On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party' ... . Summary judgment is to be granted only where the moving party has 'tender[ed] sufficient evidence to demonstrate the absence of any material issues of fact' ... . '[O]n such a motion, the court's role is limited to issue finding, not issue resolution' ... . Here, the affidavits submitted by the defendants in reply created a triable issue of fact as to whether the claimant had included, with the notice of intention, photographs, which would have directed the defendants to the precise set of doors at issue. Accordingly, the Court of Claims should have denied the defendants' motion." ***Shabat v. State of New York*, 2019 N.Y. Slip Op. 08589, Second Dept 11-27-19**

CRIMINAL LAW.

CONVICTIONS OF INCLUSORY CONCURRENT COUNTS VACATED.

The Second Department determined inclusory concurrent counts must be dismissed and the related convictions and sentences vacated: "... [A]s charged, the counts alleging driving while ability impaired by alcohol in violation of Vehicle and Traffic Law § 1192(1) and aggravated unlicensed operation of a motor vehicle in the second degree were inclusory concurrent counts of the count alleging aggravated unlicensed operation of a motor vehicle in the first degree (see CPL 300.30[4]; 300.40[3][b]; Vehicle and Traffic Law §§ 511[2][a][ii]; [3][a][i]; 1192). Accordingly, the defendant's convictions of driving while ability impaired by alcohol in violation of Vehicle and Traffic Law § 1192(1) and aggravated unlicensed operation of a motor vehicle in the second degree and the sentences imposed thereon must be vacated, and those counts of the indictment dismissed. Under the circumstances of this case, the defendant's contention that the mandatory surcharge and crime victim assistance fee must be reduced is more appropriately raised before the Supreme Court and, accordingly, we remit the matter to the Supreme Court ... to consider this issue ...". ***People v. Delcid*, 2019 N.Y. Slip Op. 08575, Second Dept 11-27-19**

CRIMINAL LAW, IMMIGRATION.

BECAUSE THE B MISDEMEANOR CARRIES DEPORTATION AS A POTENTIAL PENALTY, DEFENDANT IS ENTITLED TO A JURY TRIAL.

The Second Department reversed defendant's conviction based upon a recent Court of Appeals case which held a defendant charged with a misdemeanor which carries deportation as a potential penalty is entitled to a jury trial: "... [T]he defendant, a noncitizen, is entitled to a jury trial under the Sixth Amendment of the United States Constitution because the charged crime of attempted assault in the third degree, a class B misdemeanor, carries a potential penalty of deportation (see People v. Suazo, 32 NY3d 491). We note that because People v. Suazo was decided after this matter was argued but before it was decided, the change of the law set forth therein therefore applies to the defendant ... . Accordingly, we reverse the judgment of conviction and grant a new trial." ***People v. Ahsan*, 2019 N.Y. Slip Op. 08571, Second Dept 11-27-19**

EDUCATION-SCHOOL LAW, NEGLIGENCE.

14-YEAR-OLD PLAYING CATCH ON A SCHOOL ATHLETIC FIELD ASSUMED THE RISK OF INJURY FROM A TWO TO FIVE INCH DEPRESSION IN THE FIELD.

The Second Department, over an extensive dissent, determined that the primary assumption of risk doctrine applied to a 14-year-old experienced football player who was injured by stepping into a 2 to 5 inch depression in a school athletic field. The majority distinguished the condition here, part of the natural features of a grass field, and a condition resulting from disrepair: "The plaintiffs described the grass field on which the accident occurred as 'choppy,' 'wavy,' and 'bumpy,' with several depressions. In other words, the topography of the grass field on which the infant plaintiff was playing was irregular. The risks posed by playing on that irregular surface were inherent in the activity of playing football on a grass field ... . Moreover, the infant plaintiff's testimony demonstrated that he was aware of and appreciated the inherent risks, and that the irregular condition of the field was not concealed ... . Like our dissenting colleague, we acknowledge the Court of Appeals' admonition that the doctrine of primary assumption of risk 'does not exculpate a landowner from liability for ordinary negligence in maintaining a premises' ... . Thus, the doctrine does not necessarily absolve landowners of liability

where they have allowed certain defects, such as a hole in a net in an indoor tennis court, to persist ... . In this case, we do not determine the doctrine's applicability to similar to that of a hole in an indoor tennis net, as there is a distinction between accidents resulting from premises having fallen into disrepair and those resulting from natural features of a grass field ...". ***Ninivaggi v. County of Nassau*, 2019 N.Y. Slip Op. 08568, Second Dept 11-27-19**

EDUCATION-SCHOOL LAW, NEGLIGENCE, APPEALS.

PLAINTIFF COULD NOT PROCEED ON A THEORY NOT RAISED IN THE NOTICE OF CLAIM; ALTHOUGH THE ISSUE WAS RAISED FOR THE FIRST TIME ON APPEAL, IT COULD BE CONSIDERED.

The Second Department, reversing Supreme Court, held that plaintiff-student could not proceed based upon a theory not included in the notice of claim. Plaintiff, who alleged she was sexually assaulted at a BOCES facility, did not allege in her notice of claim that the school district (North Shore), which did not have custody of her when she was assaulted, was also liable because it had formulated an Individualized Education Program for her. The court noted that the issue, although raised for the first time on appeal, could be considered because it was a question of law that could not have been avoided by the lower court: " 'A plaintiff seeking to recover in tort against a municipality must serve a notice of claim to enable authorities to investigate, collect evidence and evaluate the merits of the claim' ... . 'A notice of claim must set forth, inter alia, the nature of the claim, and the time, place, and manner in which the claim arose' ... . '[A] mistake, omission, irregularity or defect made in good faith in the notice of claim required to be served by [General Municipal Law § 50-e], not pertaining to the manner or time of service thereof, may be corrected, supplied or disregarded, as the case may be, in the discretion of the court, provided it shall appear that the other party was not prejudiced thereby' (General Municipal Law § 50-e[6]). Under General Municipal Law § 50-e(6), '[a] notice of claim may be amended only to correct good faith and nonprejudicial technical mistakes, omissions, or defects, not to substantively change the nature of the claim or the theory of liability' ... . We agree with North Shore that the plaintiff may not proceed under the theory that North Shore negligently failed to formulate an appropriate IEP for her, as the plaintiff did not include this theory in her notice of claim. Although North Shore did not raise this argument before the Supreme Court, we may consider it because 'it presents an issue of law that appears on the face of the record, and could not have been avoided had it been raised at the proper juncture' ... . In her notice of claim, the only theory of liability that the plaintiff asserted was negligent supervision. In opposition to North Shore's motion for summary judgment, the plaintiff contended for the first time that North Shore had negligently failed to formulate an appropriate IEP for her. This was not a technical change, but was an impermissible substantive change to the theory of liability ...". ***I. T. K. v. Nassau Boces Educ. Found., Inc.*, 2019 N.Y. Slip Op. 08557, Second Dept 11-27-19**

ENVIRONMENTAL LAW, MUNICIPAL LAW.

PETITIONERS SHOULD HAVE BEEN ALLOWED TO FILE LATE NOTICES OF CLAIM AGAINST THE COUNTY IN THIS GROUNDWATER CONTAMINATION CASE; THE COUNTY HAD TIMELY KNOWLEDGE OF THE ESSENTIAL FACTS AND THE COUNTY DID NOT DEMONSTRATE ANY PREJUDICE RESULTING FROM THE THREE-MONTH DELAY.

The Second Department, reversing Supreme Court, determined the petition seeking leave to file late notices of claim should have been granted. The claims arise from groundwater contamination linked to chemicals (PFOS and PFOA) used at a county airport. The Second Department noted that the county had timely notice of the essential facts of the claims, the petition was brought three months after the notices of claim were due, and the county did not demonstrate and prejudice resulting from the delay: "... [T]he County's alleged negligent ownership and operation of the Gabreski Airport site, resulting in contamination of the petitioners' water supply with toxic chemicals, constitute the essential facts of the claims, which are common to all the petitioners and were made known to the County by the prior notices of claim ... . Inasmuch as the County acquired timely, actual knowledge of the essential facts of the petitioners' claims, the petitioners made an initial showing that the County was not prejudiced by their delay in serving the notices of claim ... . Moreover, the petitioners sought leave to serve late notices of claim only a little more than three months after the statutory period had expired ... . In opposition, the County failed to rebut the petitioners' showing that the County was not prejudiced by their delay with any particularized evidence ... . The County did no more than assert that the petitioners failed to meet their burden to show that the late notice would not substantially prejudice the County ... . 'A petitioner's lack of a reasonable excuse for the delay in serving a timely notice of claim is not necessarily fatal when weighed against other relevant factors' ... . While the petitioners' assertions that they were not aware of the County's involvement in the cause of the incident does not constitute a reasonable excuse for their failure to file a timely notice of claim, the absence of a reasonable excuse 'is not in and of itself fatal to the petition where, as here, there was actual notice and the absence of prejudice' ...". ***Matter of Brooks v. County of Suffolk*, 2019 N.Y. Slip Op. 08561, Second Dept 11-27-19**

FAMILY LAW, ATTORNEYS, APPEALS.

ATTORNEY FOR THE CHILD PROPERLY AWARDED ATTORNEY'S FEES OF OVER $34,000 IN CONNECTION WITH THE APPEALS IN THIS DIVORCE CASE; HOWEVER A HEARING IS NECESSARY TO APPORTION THE FEES BETWEEN THE PARENTS.

The Second Department determined the attorney for the child in this divorce proceeding properly made a motion seeking attorney's fees for the appeal of the matter to the Second Department and the Court of Appeals and was properly awarded attorney's fees of over $34,000. However, the Second Department held that a hearing was necessary to determine how the fee should be apportioned between the parents: "In this action for a divorce and ancillary relief, the Supreme Court awarded sole legal and physical custody of the parties' minor children to the defendant, without a hearing, under the adequate relevant information standard. This Court affirmed the order ... , and the plaintiff appealed to the Court of Appeals. The attorney for the children (hereinafter the AFC) opposed the plaintiff's appeal, but proposed a new standard for the need for evidentiary hearings in custody cases. The Court of Appeals reversed this Court's order, rejecting the adequate relevant information standard, and determined that an evidentiary hearing was required in this particular case ... . Contrary to the plaintiff's contention, the difference in opinion between this Court (see Matter of Plovnick v. Klinger, 10 AD3d 84) and the Appellate Division, Third Judicial Department (see Redder v. Redder, 17 AD3d 10), as to whether attorneys for children may be compensated directly by the children's parents, rather than by the State, does not give rise to a constitutional claim under the equal protection clauses of the state and federal constitutions. ... [T]he plaintiff's motion to modify the parties' apportionment of responsibility for the AFC's fees should not have been decided without an evidentiary hearing. We take no position on whether the equal split between the parties was appropriate, but because the affidavits submitted by the parties provided sharply conflicting reports on the parties' finances ... and there was 'no evidence in the record that the financial circumstances of the parties [had] ever been considered' ...". ***Lee v. Rogers*, 2019 N.Y. Slip Op. 08559, Second Dept 11-27-19**

FAMILY LAW, EVIDENCE.

COPY OF POSTNUPTIAL AGREEMENT SHOULD NOT HAVE BEEN ADMITTED UNDER THE BEST EVIDENCE RULE; JUDGMENT OF DIVORCE REVERSED.

The Second Department, reversing Supreme Court in this divorce action, determined a copy of the postnuptial agreement should not have been admitted pursuant to the best evidence rule: "The best evidence rule requires the production of an original writing where its contents are in dispute and sought to be proven ... . The rule serves mainly to protect against fraud, perjury, and inaccuracies derived from faulty memory ... . '[S]econdary evidence of the contents of an unproduced original may be admitted upon threshold factual findings by the trial court that the proponent of the substitute has sufficiently explained the unavailability of the primary evidence and has not procured its loss or destruction in bad faith' ... . 'Loss may be established upon a showing of a diligent search in the location where the document was last known to have been kept, and through the testimony of the person who last had custody of the original' ... . The more important the document is to the resolution of the ultimate issue in the case, the stricter the requirement of establishing its loss ... . Here, at trial, the plaintiff merely testified that she did not possess the original postnuptial agreement and that she believed it was either lost or stolen. Given the significance of the postnuptial agreement to the issue of equitable distribution, the defendant's allegations that his purported signature on the document was forged, and the plaintiff's failure to adequately explain the unavailability of the original document, we disagree with the Supreme Court's determination to admit a copy of the document into evidence ... , and to incorporate the purported agreement into the judgment of divorce." ***Mutlu v. Mutlu*, 2019 N.Y. Slip Op. 08567, Second Dept 11-27-19**

FORECLOSURE, EVIDENCE.

PLAINTIFF BANK DID NOT SUBMIT SUFFICIENT PROOF OF ITS STANDING TO BRING THE FORECLOSURE ACTION.

The Second Department, reversing Supreme Court, determined plaintiff bank did not submit sufficient proof of standing to bring the foreclosure action: "... [W]hile the plaintiff alleged that the note had been endorsed to it, the plaintiff failed to submit sufficient evidence to demonstrate that a copy of the note with the endorsement was attached to the complaint. The only copy of the complaint that appears in the record before us was submitted as an exhibit in support of Williams's [defendant's] motion, and the version of the note accompanying that copy of the complaint did not include the endorsement. The plaintiff's attempt to establish standing through the submission of the affidavit of Morgan Battle Ames, a contract management coordinator for the plaintiff's loan servicer, was also insufficient. Ames stated that she had 'personal knowledge of the stated facts and circumstances and books and records maintained by [the loan servicer],' and that the 'information in this affidavit is taken from [the loan servicer's] business records,' which were 'recorded by persons with personal knowledge of the information in the business record.' Since Ames failed to attest that she was personally familiar with the record-keeping practices and procedures of the entity that generated the subject business records, she failed to demonstrate ...". ***HSBC Bank USA, N.A. v. Williams*, 2019 N.Y. Slip Op. 08554, Second Dept 11-27-19**

FORECLOSURE, EVIDENCE, CIVIL PROCEDURE.

DEFICIENCIES IN THE BANK'S PROOF OF DEFAULT, STANDING AND THE AMOUNT OWED COULD NOT BE CURED BY SUBMITTING ADDITIONAL PROOF IN THE REPLY PAPERS IN THIS FORECLOSURE ACTION.

The Second Department, reversing Supreme Court, determined plaintiff bank did not submit sufficient proof of defendants' default, standing or the amount owed, and the deficiencies could not be cured by a second affidavit submitted in reply: "... [T]he plaintiff submitted the affidavit of its assistant vice president, Keith Weinkauf. As to the defendants' alleged default, Weinkauf stated that the defendants 'fail[ed] to make the full payment due on the [m]aturity [d]ate' of the note. On the issue of standing, Weinkauf averred that '[e]ffective March 31, 2016, Montauk Credit Union merged into Bethpage Federal Credit Union.' Further, with respect to the amount owed by the defendants, Weinkauf stated that the current unpaid principal balance due on the note was $58,165.61, plus interest, late charges, and fees. However, apart from producing a copy of the note itself, Weinkauf submitted no evidence in admissible form with his affidavit to establish the existence of a default, the plaintiff's standing, or the calculation of the unpaid amount owed by the defendants ... . Although the plaintiff later submitted, with its reply papers, a second affidavit from Weinkauf, along with supporting documentary evidence, to establish its standing, the plaintiff could not, under the circumstances presented, rely on the second affidavit to correct deficiencies inherent in the original one ...". ***Bethpage Fed. Credit Union v. Luzzi*, 2019 N.Y. Slip Op. 08550, Second Dept, 11-27-19**

FORECLOSURE, EVIDENCE, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL).

PLAINTIFF BANK DID NOT DEMONSTRATE COMPLIANCE WITH THE NOTICE PROVISIONS OF REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL) 1304.

The Second Department, reversing Supreme Court, determined plaintiff bank did not demonstrate compliance with the notice provisions of Real Property Actions and Proceedings Law (RPAPL) 1304: "... [T]he plaintiff failed to establish, prima facie, that it complied with RPAPL 1304 ... . Although Menyweather [an assistant secretary employed by Nationstar Mortgage LLC, the plaintiff's loan servicer] stated in his affidavit that the RPAPL 1304 notices were mailed by regular and certified mail, and attached copies of the notices, the plaintiff failed to attach, as exhibits to the motion, any documents establishing that the notices were actually mailed ... . The plaintiff failed to submit a copy of any United States Post Office document indicating that the notice was sent by registered or certified mail as required by the statute ... . Further, although Menyweather attested that he had personal knowledge of the loan servicer's records, and that those records included the records of the prior servicer, Bank of America, Menyweather did not attest to knowledge of the mailing practices of Bank of America, the entity that allegedly sent the 90-day notices to the defendant ... . Since the plaintiff failed to provide evidence of the actual mailing, or evidence of a standard office mailing procedure designed to ensure that the items were properly addressed and mailed, sworn to by someone with personal knowledge of the procedure, the plaintiff failed to establish its strict compliance with RPAPL 1304 ...". ***HSBC Bank USA, N.A. v. Sawh*, 2019 N.Y. Slip Op. 08556, Second Dept 11-27-19**

PERSONAL INJURY.

PLAINTIFFS, PASSENGERS IN A CAR WITH THE RIGHT OF WAY, WERE ENTITLED TO SUMMARY JUDGMENT IN THIS INTERSECTION TRAFFIC ACCIDENT CASE; COMPARATIVE NEGLIGENCE CAN BE CONSIDERED WHERE, AS HERE, PLAINTIFFS MOVED TO DISMISS DEFENDANT'S COMPARATIVE-NEGLIGENCE AFFIRMATIVE DEFENSE.

The Second Department, reversing Supreme Court, determined plaintiffs were entitled to summary judgment in this intersection traffic accident case. Plaintiffs were passengers in a car which had the right of way. Defendant may or may not have stopped at a stop before proceeding into the intersection. The Second Department noted that whether the defendant stopped or not was irrelevant. Although comparative negligence is generally not an issue at the summary judgment stage, it can be considered where, as here, the plaintiffs moved to dismiss defendant's comparative-negligence affirmative defense. The defense obviously does not apply to innocent passengers: " 'To be entitled to partial summary judgment a plaintiff does not bear the . . . burden of establishing . . . the absence of his or her own comparative fault' ... . Even though a plaintiff is no longer required to establish his or her freedom from comparative negligence, the issue of a plaintiff's comparative negligence may be decided in the context of a summary judgment motion where, as here, the plaintiff moved for summary judgment dismissing a defendant's affirmative defense of comparative negligence ... . Here, in support of their motion, the plaintiffs submitted evidence sufficient to establish, prima facie, that the defendant driver was negligent in failing to see what was there to be seen and in entering the intersection without yielding the right-of-way, even if he did initially stop at the stop sign (see Vehicle and Traffic Law §§ 1142[a]; 1172[a] ...). With respect to the issue of comparative negligence, the plaintiffs demonstrated, prima facie, that they were innocent passengers who did not contribute to the happening of the accident. The right of the plaintiffs, as innocent passengers, to summary judgment is not 'restricted by potential issues of comparative negligence' which may exist as between the defendant driver and the driver of the host vehicle ...". ***Balladares v. City of New York*, 2019 N.Y. Slip Op. 08549, Second Dept 11-27-19**

PERSONAL INJURY, APPEALS.

PLAINTIFF WAS KNOCKED TO THE FLOOR BY A SHOPPING CART PUSHED BY ANOTHER STORE CUSTOMER; THE DEFENDANT STORE DID NOT HAVE A DUTY TO MONITOR CUSTOMERS' USE OF SHOPPING CARTS; ISSUE COULD BE CONSIDERED FOR THE FIRST TIME ON APPEAL.

The Second Department, reversing Supreme Court, determined defendant's motion for summary judgment in this slip and fall case should have been granted. Plaintiff was knocked to the floor by a shopping cart pushed by another customer in the defendant's store. Apparently the customer had piled items high in the cart and couldn't see ahead of it. The court noted that, although defendant raised the "no duty to monitor customers" issue for the first time on appeal, it could be considered because it raises an issue of law than could not have been avoided by the court below: "The defendant contends that it was entitled to summary judgment dismissing the complaint insofar as asserted against it because it did not have a duty to control the conduct of the customer who struck Novak with the shopping cart. Although the defendant has raised this contention for the first time on appeal, 'we may consider it . . . because the existence of a duty presents a question of law which could not have been avoided if brought to the Supreme Court's attention at the proper juncture'... . 'Store owners are charged with the duty of keeping their premises in a reasonably safe condition for the benefit of their customers' ... . '[T]his duty may extend to controlling the conduct of third persons who frequent or use the property, at least under some circumstances' ... . 'This duty is, however, not limitless' ... . '[A]n owner's duty to control the conduct of persons on its premises arises only when it has the opportunity to control such persons and is reasonably aware of the need for such control' ... . Here, the plaintiff contends that the defendant was negligent in failing to monitor its customers' use of the U-boat shopping carts and, more specifically, in failing to require customers to refrain from loading the carts over a certain height. However, the defendant did not owe the plaintiff a duty to protect her from the other customer's negligent use of the U-boat shopping cart because it did not have control over that customer's actions ...". ***Aupperlee v. Restaurant Depot, LLC*, 2019 N.Y. Slip Op. 08548, Second Dept 11-27-19**

THIRD DEPARTMENT

CRIMINAL LAW, ATTORNEYS, JUDGES, APPEALS.

PARKER WARNINGS WERE INADEQUATE BUT THE ERROR WAS NOT PRESERVED FOR APPEAL; HOWEVER DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE ENHANCED SENTENCE; SENTENCE VACATED AND MATTER REMITTED.

The Third Department, vacating defendant's sentence, determined the *Parker* warnings were inadequate. Although the error was not preserved for appeal, defense counsel was deemed ineffective for failing to challenge the enhanced sentence: "Defendant contends that Supreme Court erroneously imposed the enhanced sentence given that it did not specifically inform him as part of the Parker admonishment that a consequence of failing to appear for sentencing was the imposition of a greater sentence. ... This claim is unpreserved inasmuch as the record does not reveal that defendant objected to the enhanced sentence or moved to withdraw his guilty plea ... . The lack of preservation, however, is attributable to the deficiencies of defendant's trial counsel, who represented him both during the plea proceedings and at sentencing. Counsel was ineffective in failing to challenge the enhanced sentence as there was no strategic reason for failing to do so, particularly in light of the clear omissions that were made by Supreme Court in administering the Parker admonishment ... . In view of this, we excuse the lack of preservation and address the merits ... . The record reveals that Supreme Court did not provide defendant with a sufficient Parker admonishment that included the sentencing consequences and that it imposed the enhanced sentence without affording him an opportunity to withdraw his plea. Accordingly, we vacate the sentence and remit the matter to Supreme Court to either impose the agreed-upon sentence or provide defendant with an opportunity to withdraw his guilty plea ...". ***People v. Barnes*, 2019 N.Y. Slip Op. 53934, Third Dept 11-27-19**

CRIMINAL LAW, EVIDENCE.

JURY SHOULD HAVE BEEN INSTRUCTED ON THE "INNOCENT POSSESSION OF A WEAPON" DEFENSE, CONVICTIONS REVERSED.

The Third Department, reversing defendant's possession of a weapon convictions, determined the jury should have been instructed on the "innocent possession of a weapon" defense. Defendant testified the person who had just robbed him dropped the sweatshirt, which had a handgun in the pocket. According to the defendant's testimony, just as defendant picked up the sweatshirt the police pulled up: "The Criminal Jury Instructions provide, in relevant part, that '[a] person has innocent possession of a weapon when he or she comes into possession of the weapon in an excusable manner and maintains possession, or intends to maintain possession, of the weapon only long enough to dispose of it safely. There is no single factor that by itself determines whether there was innocent possession. In making that determination, [the jury] may consider any evidence which establishes that the defendant had knowing possession of a weapon, the manner in which the weapon came into the defendant's possession, the length of time the weapon remained in his/her possession, whether

the defendant had an intent to use the weapon unlawfully or to safely dispose of it, the defendant's opportunity, if any, to turn the weapon over to the police or other appropriate authority, and whether and how the defendant disposed of the weapon' (CJI2d[NY] Temporary and Lawful Possession). Here, defendant's testimony, if credited, provides sufficient facts from which the jury could find a lawful basis for defendant having temporarily and innocently possessed the subject pistol without having had any intent to use it in a dangerous manner or an opportunity to subsequently turn it over to police ...". ***People v. Mack*, 2019 N.Y. Slip Op. 53930, Third Dept 11-27-19**

CRIMINAL LAW, EVIDENCE.

CONSPIRACY COUNTS FATALLY FLAWED, NO OVERT ACT WAS ALLEGED, CONVICTIONS REVERSED, COUNTS DISMISSED.

The Third Department, reversing defendant's conspiracy convictions, determined the conspiracy counts were fatally flawed because no overt act was alleged: " 'A person shall not be convicted of conspiracy unless an overt act is alleged and proved to have been committed by one of the conspirators in furtherance of the conspiracy' (Penal Law § 105.20 [emphasis added] ...). Here, the two conspiracy counts neither allege that an overt act was committed nor include factual allegations describing such an act. There is no assertion that defendant took any action beyond agreeing 'to engage in or cause the performance of a class B felony.' Accordingly, defendant's convictions of conspiracy in the fourth degree under count 3 ... and count 2 ... must be reversed and the sentences imposed thereon vacated. Given that these two conspiracy counts were jurisdictionally defective and not subject to amendment (see CPL 200.50 [7] [a]; 200.70 [2] [a], [b] ...), said counts are dismissed ...". ***People v. Mackie*, 2019 N.Y. Slip Op. 53940, Third Dept 11-27-19**

CRIMINAL LAW, EVIDENCE, ATTORNEYS.

AFTER AN INITIAL WAIVER OF HIS RIGHT TO REMAIN SILENT, DEFENDANT BECAME INCREASINGLY UNWILLING TO ANSWER QUESTIONS AND FINALLY SAID "MAYBE" HE SHOULD GET A LAWYER BECAUSE HE DIDN'T WANT TO INCRIMINATE HIMSELF, FROM THAT POINT ON THE INTERROGATION VIDEO SHOULD HAVE BEEN SUPPRESSED.

The Third Department, reversing defendant's conviction, determined defendant's motion to suppress statements made after the assertion of his right to counsel should have been suppressed: "... [T]he People admitted into evidence a DVD video recording of the first 50 minutes and 55 seconds of defendant's custodial interrogation. ... A review of that video recording shows that defendant was advised of and acknowledged his Miranda rights in writing roughly 16 minutes into the custodial interrogation, after having made small talk with the detective questioning him. For the next 24 minutes, defendant openly and respectfully answered questions regarding the events that transpired earlier that morning, including whether he entered the apartment building, which he maintained that he did not. However, 40 minutes into the interview, defendant became increasingly quiet and less eager to engage in conversation. Indeed, the detective spoke for roughly 3½ minutes, with little to no contribution from defendant, and attempted to appeal to defendant 'as a father.' Defendant asked if he would be at the police station all weekend, to which the detective said, 'no.' The detective then asked defendant to tell him what had happened, but he was met with silence, prompting him to ask again. In response, defendant stated, 'maybe I should get a lawyer. I completely understand what you're saying and I agree with you, but I don't want to f**k myself.' In our view, defendant's marked change in expression and demeanor at this stage of the interrogation, together with his reference to an attorney and his clear statement that he did not want to incriminate himself, constituted an unequivocal request for counsel and an exercise of his right to remain silent ... . Thus, the video recording of the interrogation should have been stopped at 48 minutes and 48 seconds, just before defendant unequivocally invoked his right to counsel. Accordingly, County Court should have granted defendant's motion to suppress all statements made thereafter." ***People v. Harris*, 2019 N.Y. Slip Op. 53943, Third Dept 11-27-19**

FAMILY LAW, ATTORNEYS.

ATTORNEY FOR THE CHILD (AFC) SHOULD HAVE BEEN APPOINTED IN THIS CUSTODY MODIFICATION PROCEEDING, MATTER REMITTED.

The Third Department, reversing (modifying) Family Court, determined that an attorney for the child (AFC) should have been appointed in this custody modification proceeding and remitted the matter: "... [W]e reverse and remit for further proceedings conducted with the involvement of an AFC. This Court has previously noted that the 'appointment of an [AFC] in a contested custody matter remains the strongly preferred practice,' while acknowledging that 'such appointment is discretionary, not mandatory' (... see Family Ct Act § 249 [a]). We have also 'emphasize[d] the contributions competent [AFCs] routinely make in contested matters; they not only protect the interests of the children they represent, they can be valuable resources to the trial court' ... . While advocating for the child, an AFC may provide a different perspective than the parents' attorneys, including through the presentation of evidence on the child's behalf, and may 'recommend alternatives for the court's consideration' ... . Even absent a request, a court may appoint an AFC on its own motion (see Family Ct Act § 249 [a]). Family Court had appointed an AFC for this child in connection with a previous proceeding that resulted in the September 2017 stipulated order. Yet, when — less than two months after entry of that order — the parties' relationship deteriorated

significantly, Family Court inexplicably did not appoint the same or another AFC to protect the child's interests. The lack of an AFC prejudiced the child's interests." ***Matter of Marina C. v. Dario D.*, 2019 N.Y. Slip Op. 53953, Third Dept 11-27-19**

FAMILY LAW, EVIDENCE.

THE STAY-AWAY ORDER OF PROTECTION SHOULD NOT HAVE BEEN VACATED BASED SOLELY ON A PSYCHOLOGIST'S REPORTS IN THE ABSENCE OF ANY TESTIMONY.

The Third Department, reversing Family Court, determined that the stay-away order of protection should not have been vacated without further fact-finding. Apparently the order was vacated based upon a psychologist's reports without any testimony: "On ... the first day of a combined fact-finding hearing on both petitions, both of the psychologist's reports were received into evidence on consent. Without any testimony being taken, respondent, joined by the attorney for the child, then moved to vacate the stay-away order of protection. Both petitioner and the mother objected, and, after taking a brief recess, Family Court issued a ruling from the bench vacating the stay-away order of protection, without explanation. ... The record shows that the stay-away order of protection was based on allegations of sexual abuse first reported by the child's therapist and subsequently pursued by petitioner after its caseworkers interviewed the child. The petition speaks to specific acts of sexual abuse, as well as the emotional stress on the child resulting from respondent's threatening behavior towards the mother. The decision to vacate the stay-away order of protection was made on the first day of trial and, although the psychologist's reports were admitted into evidence, petitioner was not precluded from subpoenaing the psychologist for purposes of cross-examination. Moreover, petitioner represented that it intended to call the child's therapist as a witness. Although we are mindful that the psychologist spoke to the therapist as a collateral source and was highly critical of the interview methods utilized by petitioner's caseworkers, this record should have been further developed before a determination was made as to whether it was in the child's best interests to allow respondent unsupervised, overnight parenting time. This is particularly so given respondent's ongoing, threatening behavior towards the mother and others via text message and on social media." ***Matter of Andreija N. (Michael N.)*, 2019 N.Y. Slip Op. 53957, Third Dept 11-27-19**

WORKERS' COMPENSATION.

DISMISSAL OF A CLAIM BASED UPON THE PRECLUSION OF AN INDEPENDENT MEDICAL EXAMINATION (IME) REPORT DID NOT CONSTITUTE LITIGATION OF THE CLAIM; CLAIMANT WAS ENTITLED TO CONSIDERATION OF THE CLAIM BASED UPON A NEW IME REPORT.

The Third Department, reversing the Workers' Compensation Board, determined that the dismissal of the claim based upon the preclusion of the 2015 Independent Medical Examination (IME) report was not a litigation on the merits and claimant was not precluded from further consideration of the claim based upon a new 2017 IME report: "Claimant contends that the Board erred in denying his request for further action without considering ... 2017 IME report on the ground that the claim had already been litigated and disallowed. We agree. By disallowing the claim in its prior decision based upon the record as it existed after the preclusion of ... 2015 IME report, and declaring that no further direction was planned at the time, the Board did not deny the claim outright ... . As such, the Board's prior decision did not preclude claimant from submitting further medical evidence of causally-related consequential injuries (see Workers' Compensation Law § 123 ...). Accordingly, the Board's decision that the claim for causally-related consequential injuries was already litigated and that claimant could not submit further medical evidence in support thereof was in error, as was its decision denying reconsideration, and they must be reversed." ***Matter of Galatro v. Slomins, Inc.*, 2019 N.Y. Slip Op. 53955, Third Dept 11-27-19**

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