CasePrepPlus

October 25, 2019

An advance sheet service summarizing recent and significant New York appellate cases

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COURT OF APPEALS

CRIMINAL LAW, EVIDENCE.

BRADY MATERIAL WHICH CONTRADICTED THE PEOPLE'S THEORY OF THE CASE SHOULD HAVE BEEN PROVIDED TO THE DEFENSE, CONVICTION REVERSED.

The Court of Appeals, reversing defendant's conviction, determined that defendant should have been provided with exculpatory (Brady) evidence. Eyewitnesses to the assault made statements that there were two perpetrators, which directly contradicted the People's theory that defendant was the sole perpetrator: "The first two prongs of Brady being satisfied, our inquiry thus turns to whether the suppressed information was material. 'In New York, the test of materiality where . . . the defendant has made a specific request for the evidence in question is whether there is a reasonable possibility' that the verdict would have been different if the evidence had been disclosed' ... . [B]oth witnesses' statements, if true, would have directly contradicted the People's theory of the case that defendant was the sole perpetrator. Although the People presented other evidence of defendant's guilt, the only witness who identified defendant at trial initially told the police that he did not see the perpetrator's face. Considering that the nightclub owner provided the police with the name of another possible assailant, and based on the other evidence presented at trial, it is clear that access at least to him could have allowed defendant to develop additional facts, which in turn could have aided him in establishing additional or alternative theories to support his defense. Given the substance of the nightclub owner's statements and the nature of the People's case, we cannot say—under our less demanding standard—that there was no 'reasonable possibility' that the defense's investigation of the witnesses would not have affected the outcome of defendant's trial ...". ***People v. Rong He*, 2019 N.Y. Slip Op. 07477, CtApp 10-17-19**

MUNICIPAL LAW, PROPERTY DAMAGE.

CITY OF NEW YORK CAN SUE IN NEGLIGENCE FOR DAMAGE TO CITY SIDEWALKS.

The Court of Appeals, reversing Supreme Court, determined that the city has the capacity to sue for the negligent destruction of city property. The city sought money damages for injury to trees caused by the sidewalk repairs performed by defendants for the adjacent property owner: "The City has the general capacity to sue for the negligent destruction of its property (see General City Law § 20 [1]; New York City Charter § 394 [c]). Moreover, the provisions upon which defendants rely do not abrogate the City's claim for damage to its property (*see generally Assured Guar. [UK] Ltd. v. J.P. Morgan Inv. Mgt. Inc.*, 18 NY3d 341, 351 [2011]). Defendants have not established that the City lacks a cognizable common law claim." ***City of New York v. Tri-Rail Constr., Inc.*, 2019 N.Y. Slip Op. 07478, CtApp 10-17-19**

FIRST DEPARTMENT

CRIMINAL LAW.

POSSESSION OF A GRAVITY KNIFE CHARGE DISMISSED EVEN THOUGH THE STATUTE DECRIMINALIZING SUCH POSSESSION IS NOT TO BE APPLIED RETROACTIVELY.

The First Department determined the indictment charging possession of a gravity knife based upon the statute decriminalizing such possession, even though the statute is not to be applied retroactively: "With respect to the weapon conviction, involving a gravity knife, the People, in the exercise of their broad prosecutorial discretion, have agreed that the indictment should be dismissed under the particular circumstances of the case and in light of recent legislation amending Penal Law § 265.01 to effectively decriminalize the simple possession of gravity knives, notwithstanding that this law does not apply retroactively. We agree ...". ***People v. Caviness*, 2019 N.Y. Slip Op. 07494, First Dept 10-17-19**

CRIMINAL LAW, CONSTITUTIONAL LAW.

CONDITION OF PAROLE THAT PETITIONER NEVER ENTER QUEENS COUNTY WITH NO PROVISION FOR OBTAINING PERMISSION TO TRAVEL THERE VIOLATED PETITIONER'S RIGHT TO TRAVEL AND RIGHT TO ASSOCIATE.

The First Department, reversing Supreme Court, determined the condition of petitioner's post release supervision prohibiting him from entering Queens County (where the assault victim resides), without any option to travel there with permission, violated petitioner's right to travel and right to associate and was arbitrary and capricious: "Release conditions that implicate certain fundamental rights, such as the right to travel and the right to associate, have been held permissible as long as 'reasonably related' to a petitioner's criminal history and future chances of recidivism ... . The special condition, as noted, provides, 'I will not leave New York City . . . [including Queens] without written permission from my parole officer (including work purposes). I understand that I am not to travel under any circumstances to the borough of Queens.' Barring petitioner from the entire county of Queens under all circumstances, without any clear right to seek, or ability to obtain, a waiver from respondents, is a categorical ban impinging upon his rights to travel and association, and, for this reason alone, the travel restriction must be vacated as arbitrary and capricious, as it is not 'reasonably related' to petitioner's criminal history and future chances of recidivism ... . Accordingly, we remand this matter for respondents to issue a new travel restriction. The restriction must be clear and 'reasonably related' to petitioner's criminal history and future chance of recidivism ... . Unlike the vacated restriction, the new restriction should specify that any travel restrictions are subject to case-by-case exceptions for legitimate reasons, which petitioner may request from his parole officer." ***Matter of Cobb v. New York State Dept. of Corr. & Community Supervision*, 2019 N.Y. Slip Op. 07480, First Dept 10-17-19**

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

DEFENDANT'S CONNECTICUT CONVICTION WAS NOT EQUIVALENT TO A NEW YORK REGISTRABLE OFFENSE; THE CIVIL APPEALS STANDARDS APPLY; ALTHOUGH NOT PRESERVED, THE ISSUE PRESENTS A PURE QUESTION OF LAW, COULD NOT HAVE BEEN AVOIDED IF RAISED BELOW AND THE RECORD WAS SUFFICIENT FOR REVIEW.

The First Department, reversing Supreme Court, determined defendant need not register as a sex offender in New York based upon a Connecticut misdemeanor conviction which was not equivalent to New York's first-degree sexual abuse statute. The court noted that the civil appeals standards apply and preservation of the error was not required because the appeal presents a pure question of law, the issue could not have been avoided if raised below, and the record is sufficient for review: "In 2003, defendant was convicted in Connecticut of two counts of fourth-degree sexual assault. To the extent relevant here, a person is guilty of that misdemeanor when he 'subjects another person to sexual contact who is . . . physically helpless, or . . . subjects another person to sexual contact without such other person's consent' (Conn Gen Stat § 53a-73a[a][1][D],[2]). The physical helplessness element would make the crime the equivalent of first-degree sexual abuse (Penal Law § 130.65[2]), a registrable offense in New York. In the absence of that element, the crime is the equivalent of third-degree sexual abuse (Penal Law § 130.55), which is not registrable. Equivalency, based on a comparison of essential elements (see Corr Law § 168-a[1],[2][d]), may be established when 'the conduct underlying the foreign conviction . . . is, in fact, within the scope of the New York offense' ... . Here, the hearing court relied on undisputed documentary evidence that each victim 'felt paralyzed' while being sexually abused by defendant; one victim 'just froze' and the other 'was afraid to confront' him. There is no indication, however, that either victim was physiologically incapable of speech, drugged into a stupor, or otherwise unable to communicate her unwillingness to submit to the sexual contact ... . The issue is properly reviewable on this appeal, notwithstanding defendant's failure to raise it before the hearing court. While we agree with the People that preservation considerations applicable to civil appeals apply here, those considerations do not bar review. This appeal presents a pure question of law. This issue could not have been avoided if raised before the hearing court, and it is reviewable on the existing record ... . Moreover, the hearing court expressly ruled on the issue in its detailed decision." ***People v. Burden*, 2019 N.Y. Slip Op. 07497, First Dept 10-17-19**

SECOND DEPARTMENT

CIVIL PROCEDURE, CONSTITUTIONAL LAW, INSURANCE LAW, MEDICAL MALPRACTICE.

STAY IMPOSED BY A SOUTH CAROLINA COURT AS PART OF THE LIQUIDATION OF A SOUTH CAROLINA MEDICAL MALPRACTICE INSURANCE CARRIER WAS NOT ENTITLED TO FULL FAITH AND CREDIT IN A NEW YORK ACTION AGAINST DEFENDANTS INSURED BY THE INSOLVENT CARRIER.

The Second Department, in a full-fledged opinion by Justice Duffy, determined that the stay imposed by a South Carolina court after the medical malpractice carrier, Oceanus, was declared insolvent and dissolved was not entitled to full faith and credit in the New York actions against parties insured by Oceanus. Oceanus was not a party to the New York actions, and due process trumped the Uniform Insurers Liquidation Act (UILA). The opinion is comprehensive and the reasoning cannot be fairly summarized here: "Notwithstanding the goals of the UILA, for the reasons set forth herein, the principles of due process and the right of the plaintiffs to seek redress in the courts in New York for wrongs they allege occurred in New

York mandate that the South Carolina order is not entitled to full faith and credit or comity by the courts in New York in this and the related actions." ***Hala v. Orange Regional Med. Ctr.*, 2019 N.Y. Slip Op. 07387, Second Dept 10-16-19**

CIVIL PROCEDURE, FORECLOSURE, JUDGES.

JUDGE WAS WITHOUT AUTHORITY TO DISMISS THE FORECLOSURE COMPLAINT; ISSUE HAD NOT BEEN JOINED AND THERE WAS NO EVIDENCE PLAINTIFF FAILED TO APPEAR AT A SCHEDULED CONFERENCE.

The Second Department, reversing Supreme Court, determined Supreme Court was without authority to dismiss (sua sponte) the complaint in this foreclosure action because (1) issue had not been joined, and (2) there was no evidence plaintiff failed to appear at a conference: "CPLR 3216(b)(1) states that no dismissal should be made under this statute unless issue has been joined. 'A court may not dismiss an action based on neglect to prosecute unless the CPLR 3216 statutory preconditions to dismissal are met' ... . Here, none of the defendants submitted an answer to the complaint and, thus, issue was never joined (see CPLR 3216[b][1] ...). 'Since at least one precondition set forth in CPLR 3216 was not met here, the Supreme Court was without power to dismiss the action pursuant to that statute' ... . Contrary to the defendant's contention, where, as here, a party 'appeared as scheduled, [22 NYCRR 202.27] provides no basis for the court to summarily dismiss the action' for failure to prosecute ... . In general, '[t]he procedural device of dismissing a complaint for undue delay is a legislative creation, and courts do not possess the inherent power to dismiss an action for general delay where the plaintiff has not been served with a 90-day demand to serve and file a note of issue pursuant to CPLR 3216(b) ...'." ***Bank of N.Y. v. Harper*, 2019 N.Y. Slip Op. 07378, Second Dept 10-16-19**

CIVIL PROCEDURE, FORECLOSURE, JUDGES.

JUDGE SHOULD NOT HAVE, SUA SPONTE, GRANTED DEFENDANTS AN EXTENSION OF TIME TO ANSWER IN THIS FORECLOSURE ACTION, RELIEF WHICH WAS NOT REQUESTED BY DEFENDANTS,

The Second Department, reversing Supreme Court, determined the judge should not have, sua sponte, granted relief in this foreclosure action which was not requested by the defendant: " 'The court may grant relief that is warranted pursuant to a general prayer for relief contained in a notice of motion if the relief granted is not too dramatically unlike the relief sought, the proof offered supports it, and there is no prejudice to any party' ... . Here, the defendants did not request an extension of time to answer, and the Supreme Court's determination to, sua sponte, grant that relief was an improvident exercise of discretion. Indeed, to extend the time to answer the complaint, a defendant must generally provide a reasonable excuse for the delay and demonstrate a potentially meritorious defense to the action ... . Here, the only excuse offered by the defendants for their default was the plaintiff's alleged failure to properly serve them, which excuse was rejected by the Supreme Court. Further, the defendants did not proffer any potentially meritorious defense to the action. We note also that the court's sua sponte determination to extend the time within which the defendants had to answer the complaint is fundamentally inconsistent with its determination to deny that branch of the defendants' motion which was to vacate the judgment of foreclosure and sale. Since the judgment determined the action and the rights of the parties, allowing the defendants to interpose an answer was without practical import." ***U.S. Bank N.A. v. Halevy*, 2019 N.Y. Slip Op. 07438, Second Dept 10-16-19**

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

A LETTER INDICATING THE DEBT WOULD BE ACCELERATED IF THE ARREARS WERE NOT PAID DID NOT SERVE TO ACCELERATE THE DEBT IN THIS FORECLOSURE ACTION; DEFENDANT DID NOT DEMONSTRATE THE BANK FAILED TO COMPLY WITH THE NOTICE REQUIREMENTS OF RPAPL 1304.

The Second Department, reversing Supreme Court, determined defendant's motion for summary judgment contending the bank's action was time barred and the bank failed to comply with RPAPL 1304 should have been denied. The 2010 letter from the bank which mentioned that the loan would be accelerated if the arrears were not paid did not serve to accelerate the debt. And defendant (Grella) did not demonstrate the bank failed to comply with the notice requirements of RPAPL 1304: "On or about December 12, 2010, the loan servicer sent Grella a notice of default which demanded payment of the arrears, and stated, in relevant part, that '[u]nless the payments on your loan can be brought current by January 11, 2011, it will become necessary to require immediate payment in full (also called acceleration) of your Mortgage Note. . . . If funds are not received by the above referenced date, we will proceed with acceleration.' Thereafter, the note and the mortgage were assigned to the plaintiff. ... Contrary to Grella's contention, the language in the 2010 notice of default did not serve to accelerate the loan, as it 'was nothing more than a letter discussing acceleration as a possible future event, which does not constitute an exercise of the mortgage's optional acceleration clause' ... . Here, as the moving party, Grella was required to affirmatively demonstrate that the plaintiff failed to strictly comply with the notice requirements of RPAPL 1304 ... . Grella failed to make such a showing." ***HSBC Bank USA, N.A. v. Grella*, 2019 N.Y. Slip Op. 07388, Second Dept 10-16-19**

CIVIL PROCEDURE, PRODUCTS LIABILITY.

FRENCH COMPANY WHICH MANUFACTURED ELEVATOR BRAKES FOR SALE TO OTHER MANUFACTURERS DID NOT HAVE SUFFICIENT CONTACTS WITH NEW YORK TO CONFER JURISDICTION IN THIS ELEVATOR MALFUNCTION CASE.

The Second Department, reversing Supreme Court, determined New York did not have jurisdiction over a French company (Warner Europe) which manufactured elevator brakes in this elevator-malfunction case. The French company sold the brakes to other companies which incorporated the brakes into their elevator A.C. drives: "Warner Europe established that it does not sell the elevator brakes it manufactures in France to any customers in New York or contract with any other company to distribute its elevator brakes to customers in New York. Instead, it sells its elevator brakes as component parts to other manufacturers which incorporate them into A.C. drives, which are then sold to other manufacturers that incorporate the A.C. drives containing the elevator brakes into elevator systems. Warner Europe also established that it has no knowledge of the end users of the elevator brakes, and that it does not sell replacement elevator brakes or component parts to the end-user customers who purchased the elevators into which they were incorporated. Warner Europe also established that its products were neither sold nor advertised online. Finally, Warner Europe showed that it has no real or personal property in New York, no registered agent or telephone number in New York, and no bank or investment account in New York, and that it does not advertise in New York. Thus, the record does not support a finding that Warner Europe knew or reasonably should have known that its manufacture and sale of elevator brakes would have a direct consequence in New York ... such that long-arm jurisdiction could be exercised. Moreover, the plaintiffs and the defendants that opposed Warner Europe's motion to dismiss did not make a showing of a 'sufficient start' to warrant the denial of the motion ... . There is no basis to allow discovery to be conducted on the issue of personal jurisdiction since the opposing parties did not allege any facts which, if proven, would establish that Warner Europe may be subject to personal jurisdiction in New York ...". ***Grandelli v. Hope St. Holdings, LLC*, 2019 N.Y. Slip Op. 07386, Second Dept 10-16-19**

CRIMINAL LAW, APPEALS.

DEFENDANT'S WAIVER OF APPEAL DID NOT REMAIN VALID AFTER DEFENDANT PLED GUILTY TO A DIFFERENT CRIME WHEN THE INITIAL SENTENCE PROMISE COULD NOT BE FULFILLED.

The Second Department determined defendant's waiver of appeal was invalid because his consent to the waiver was not renewed after he pled to a different crime after the initial sentence promise could not met: "... [T]he Supreme Court was unable to fulfill its sentencing commitment because the sentence it had promised was illegal ... . Although the defendant ultimately agreed to plead guilty to a different crime in return for a different sentence, the modification of the material terms of the original plea agreement 'vitiated defendant's knowing and intelligent entry of the waiver of appeal'... . Under such circumstances, 'it was incumbent on the court to elicit defendant's continuing consent to waive his right to appeal' … . Since the court did not obtain the defendant's continuing consent to waive his right to appeal after the material terms of the original plea agreement were changed, the defendant is not precluded from arguing that the sentence imposed was excessive ...". ***People v. Ellison*, 2019 N.Y. Slip Op. 07413, Second Dept 10-16-19**

CRIMINAL LAW, EVIDENCE.

DNA EVIDENCE TO DEMONSTRATE THE COMPLAINANT'S SEXUAL HISTORY PROPERLY EXCLUDED AS A VIOLATION OF THE RAPE SHIELD LAW.

The Second Department determined Supreme Court correctly refused to allow defendant to present DNA evidence to demonstrate the complainant's sexual history in this sexual offense case: "We agree with the Supreme Court's determination to preclude the introduction of certain DNA evidence at trial. Introducing evidence of additional DNA donors not linked to the defendant for the purpose of demonstrating the complainant's sexual history with persons other than the defendant falls 'squarely within the ambit of the Rape Shield Law, which generally prohibits [e]vidence of a victim's sexual conduct' in a prosecution for a sex offense under Penal Law article 130 (CPL 60.42) because such evidence . . . serves only to harass the alleged victim and confuse the jurors' ... . Moreover, the evidence sought to be admitted was not relevant to any defense ... . Contrary to the defendant's contention, introducing the evidence through a witness other than the complainant does not render the Rape Shield Law inapplicable ...". ***People v. Hubsher*, 2019 N.Y. Slip Op. 07416, Second Dept 10-16-19**

CRIMINAL LAW, EVIDENCE.

COURT HAD JURISDICTION TO ISSUE EAVESDROPPING WARRANTS TO INTERCEPT CELL PHONE CALLS AND TEXT MESSAGES SENT AND RECEIVED OUTSIDE NEW YORK STATE.

The Second Department determined Supreme Court had jurisdiction to issue eavesdropping warrants to intercept cell phone calls and text messages made and received outside New York State: " '[A]ny justice of the supreme court of the judicial district in which the eavesdropping warrant is to be executed' (CPL 700.05[4]) 'may issue an eavesdropping warrant . . . upon ex parte application of an applicant who is authorized by law to investigate, prosecute or participate in the prosecution of the particular designated offense which is the subject of the application' (CPL 700.10[1]). Although the word 'execute'

is not defined in CPL article 700, the plain meaning of the word 'execute' and the use of that word in relevant sections of the Criminal Procedure Law reveal that an eavesdropping warrant is 'executed' when a communication is intercepted by law enforcement officers, that is, when the communication is 'intentionally overheard or recorded' by law enforcement officers (CPL 700.05[3][a]; see CPL 700.35[1]). Here, the eavesdropping warrants were executed in Kings County, New York, where the communications were intercepted by the New York City Police Department ... . Therefore, under the applicable provisions of the Criminal Procedure Law, a Justice of the Supreme Court, Kings County, had jurisdiction to issue the eavesdropping warrants. Moreover, we reject the defendant's argument that the eavesdropping warrants, which were authorized for the purpose of investigating crimes that were occurring in New York, constituted an unconstitutional extraterritorial application of New York State law ...". ***People v. Schneider*, 2019 N.Y. Slip Op. 07424, Second Dept 10-16-19**

CRIMINAL LAW, EVIDENCE, JUDGES.

DEFENSE COUNSEL'S QUESTIONS WHETHER COMPLAINANTS HAD HIRED LAWYERS AND HAD SUED DEFENDANT-TEACHER AND THE SCHOOL DISTRICT IN THIS CHILD SEX ABUSE CASE DID NOT OPEN THE DOOR TO ALL EVIDENCE OF DEFENDANT'S ALLEGED PRIOR SEXUAL ABUSE OF CHILDREN, CONVICTION REVERSED BECAUSE DEFENDANT WAS DEPRIVED OF A FAIR TRIAL; JUDGE SHOULD NOT HAVE PARTICIPATED IN A READBACK OF TESTIMONY.

The Second Department, reversing defendant's conviction in this child sex abuse prosecution, determined that the trial court should not have allowed the prosecution to present all evidence of defendant's alleged prior sexual abuse of children after defense counsel asked complainants whether they had hired a lawyer and were suing the defendant-teacher and the school district based upon defendant's alleged sexual abuse of children. Re-direct should have been limited to only the evidence necessary to clarify and explain the reasons for the witness's hiring a lawyer and bringing a lawsuit. The Second Department also noted that the trial judge should have participated in the readback of testimony and the harmless error analysis is not applicable: "... [D]efense counsel asked questions regarding the civil actions in an attempt to impeach credibility and establish that a motivation for some of the complainants' testimony against the defendant was monetary gain or a pecuniary interest. This line of inquiry did not open an unfettered passageway for the People to elicit extensive and prejudicial evidence regarding alleged uncharged complaints. The extraneous testimony of alleged uncharged complaints did not serve to explain or clarify whether the civil actions provided certain complainants with a financial incentive to testify. Moreover, the admission of evidence of alleged uncharged complaints violated the basic principle underlying Molineux and its progeny that 'a criminal case should be tried on the facts and not on the basis of a defendant's propensity to commit the crime charged ...'. ... The Court of Appeals has explained that 'if in any instance, an appellate court concludes that there has been such error of a trial court, such misconduct of a prosecutor, such inadequacy of defense counsel, or such other wrong as to have operated to deny any individual defendant his fundamental right to a fair trial, the reviewing court must reverse the conviction and grant a new trial, quite without regard to any evaluation as to whether the errors contributed to the defendant's conviction' ...". ***People v. Watts*, 2019 N.Y. Slip Op. 07426, Second Dept 10-16-19**

FORECLOSURE, EVIDENCE, CONTRACT LAW.

PLAINTIFF BANK SUBMITTED EVIDENCE IN INADMISSIBLE FORM AND DID NOT DEMONSTRATE COMPLIANCE WITH THE NOTICE CONDITIONS IN THE MORTGAGE; DEFENDANT'S SUMMARY JUDGMENT MOTION IN THIS FORECLOSURE ACTION SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined that the evidence submitted by defendant in this foreclosure action was either not in admissible form or did not comply with the requirements of the mortgage: "In support of those branches of its motion which were for summary judgment on the complaint insofar as asserted against the defendant and to appoint a referee, the plaintiff submitted an affidavit of an employee of its loan servicer, Ocwen Loan Servicing, LLC (hereinafter Ocwen). The employee attested that she was familiar with business records of Ocwen but failed to lay a proper foundation for the admission of records concerning the defendant's payment history and default. Accordingly, the plaintiff failed to demonstrate that the records relied upon in the affidavit were admissible under the business records exception to the hearsay rule ... . [T]he defendant ... failed to establish that the required notice of default was mailed by first class mail or actually delivered to the notice address if sent by other means, as required by paragraphs 15 and 22 of the mortgage." ***U.S. Bank N.A. v. Kochhar*, 2019 N.Y. Slip Op. 07439, Second Dept 10-16-19**

FORECLOSURE, EVIDENCE, UNIFORM COMMERCIAL CODE (UCC).

PLAINTIFF BANK DID NOT PRESENT SUFFICIENT EVIDENCE OF THE LOSS OF THE NOTE IN THIS FORECLOSURE ACTION; THE MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined plaintiff bank did not present sufficient evidence concerning the allegedly lost note. The bank's motion for summary judgment in this foreclosure action should not have been granted: "Among the evidence offered by the plaintiff was a lost note affidavit, signed by a representative of Beneficial Homeowner Service Corporation (hereinafter Beneficial), the purported predecessor-in-interest to the plaintiff, stating that the note was

deemed lost as of November 14, 2013, and that Beneficial was 'in possession of the original Note prior to its whereabouts becoming undeterminable.' The evidence does not establish that the plaintiff was ever in physical possession of the subject note … . The plaintiff also failed to demonstrate its ownership of the subject note by written assignment. The plaintiff submitted a document dated June 12, 2015, purporting to be a written assignment of the appellants' mortgage and underlying note to the plaintiff by Beneficial, signed by Caliber Home Loans, Inc. (hereinafter Caliber), as Beneficial's 'attorney in fact.' However, the plaintiff failed to demonstrate as a matter of law the validity of the written assignment, because the plaintiff did not produce sufficient evidence of Caliber's authority to execute the assignment as Beneficial's attorney-in-fact ... . Moreover, the plaintiff failed to demonstrate, prima facie, the facts that prevented production of the lost note ... . The affidavit submitted by the plaintiff failed to identify who conducted the search for the lost note ... , and failed to explain 'when or how the note was lost' ... , but instead described only approximately when the search for the note was conducted and when the loss was discovered, which was "on or about' the date the affidavit was executed. In light of the plaintiff's failure to satisfy the requirements of UCC 3-804, we need not reach the parties' further contentions regarding the plaintiff's standing to commence this action ...". ***U.S. Bank Trust, N.A. v. Rose*, 2019 N.Y. Slip Op. 07440, Second Dept 10-16-19**

HUMAN RIGHTS LAW, COOPERATIVES, ANIMAL LAW.

CO-OP DISCRIMINATED AGAINST THE DISABLED COMPLAINANT BY REFUSING TO ALLOW HER TO KEEP A DOG IN HER APARTMENT.

The Second Department determined the Commissioner of the NYS Division of Human Rights had properly found the co-op discriminated against complainant (Hough) by refusing to allow her to keep a dog in her apartment: "To establish that a violation of the Human Rights Law occurred and that a reasonable accommodation should have been made, Hough was required to demonstrate that she is disabled, that she is otherwise qualified for the tenancy, that because of her disability it is necessary for her to keep a dog in order for her to use and enjoy the apartment, and that reasonable accommodations could be made to allow her to keep a dog ... . The term disability, as defined by Executive Law § 292(21), means '(a) a physical, mental or medical impairment resulting from anatomical, physiological, genetic or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques or (b) a record of such an impairment or (c) a condition regarded by others as such an impairment.' Here, there was substantial evidence in the record to conclude that Hough suffered from generalized anxiety disorder, an impairment demonstrable by medically accepted clinical or laboratory diagnostic techniques, and that she required the use of a companion dog to use and enjoy her apartment. There is sufficient evidence that having a dog would affirmatively enhance Hough's quality of life by ameliorating the effects of her disability, thus demonstrating necessity within the meaning of the Human Rights Law ...". ***Matter of 1 Toms Point Lane Corp. v. New York State Div. of Human Rights*, 2019 N.Y. Slip Op. 07392, Second Dept 10-16-19**

MEDICAL MALPRACTICE, PERSONAL INJURY, EVIDENCE.

SURGEON, WHO HAD NO MEMORY OF PLAINTIFF'S PROCEDURE, SHOULD NOT HAVE BEEN ALLOWED TO TESTIFY ABOUT HIS USUAL CUSTOM AND PRACTICE IN PERFORMING A HERNIA REPAIR, DEFENSE JUDGMENT REVERSED IN THIS MEDICAL MALPRACTICE ACTION.

The Second Department, reversing the defense verdict in a medical malpractice case, determined the trial court should not have allowed the defendant doctor, who had no independent memory of the hernia surgery he performed on plaintiff, to testify about his usual custom and practice, or habit. The surgery involved placement of a mesh patch on the abdominal wall. In this case a portion of the patch had come off the wall and adhered to internal organs: " 'Custom and practice evidence draws its probative value from the repetition and unvarying uniformity of the procedure involved as it depends on the inference that a person who regularly follows a strict routine in relation to a particular repetitive practice is likely to have followed that same strict routine at a specific date or time relevant to the litigation' ... . To justify the introduction of habit evidence, 'a party must be able to show on voir dire, to the satisfaction of the court, that the party expects to prove a sufficient number of instances of the conduct in question' ... . Although habit evidence may be admissible in a medical malpractice action where the defendant physician makes the requisite showing, here, the evidence did not demonstrate that the defendant's suturing of the Kugel Composix mesh patch represented a deliberate and repetitive practice by a person in complete control of the circumstances ... . Although the defendant testified that he had performed hundreds of hernia repairs using mesh patches, he could not remember how many times he had used the Kugel Composix mesh patch before he performed the injured plaintiff's surgery. He testified at his deposition that he had used the Kugel Composix mesh patch at least 'a couple times' before he performed the injured plaintiff's procedure. Although the defendant contends that the procedure for suturing the Kugel Composix mesh patch was the same as for other mesh patches, the Kugel Composix mesh patch had features that were different from other mesh patches, including a 'pocket' intended to protect the intestines." ***Martin v. Timmins*, 2019 N.Y. Slip Op. 07391. Second Dept 10-16-19**

MUNICIPAL LAW, PERSONAL INJURY.

POST-VERDICT INTEREST IN THIS ACTION AGAINST THE NEW YORK CITY TRANSIT AUTHORITY SHOULD HAVE BEEN CALCULATED AT THREE PERCENT PURSUANT TO THE PUBLIC AUTHORITIES LAW.

The Second Department noted that the Public Authorities Law allows only three percent interest from the date of the verdict in this action against the New York City Transit Authority. Plaintiff was injured while driving when a piece of metal fell from elevated tracks through the windshield. The nearly two-million dollar verdict was affirmed: "After a trial on the issue of damages, the jury returned a verdict in favor of the plaintiff and against the defendants in the principal sums of $800,000 for past pain and suffering and $1,000,000 for future pain and suffering over a 15-year period. The defendants appeal from a judgment in favor of the plaintiff and against them in the total sum of $1,967,633.08, including interest in the sum of $64,249.90. * * * ... [T]he judgment incorrectly applied an interest rate in excess of the maximum legal rate of three percent per annum to the plaintiff's award against the defendants (see Public Authorities Law § 1212[6] ...). We therefore remit the matter ... for recalculation of interest at the rate of three percent per annum from the date of the verdict ... . ***Rojas v. New York City Tr. Auth.*, 2019 N.Y. Slip Op. 07430, Second Dept 10-16-19**

PERSONAL INJURY.

VEHICLE WHICH STOPPED BEHIND A DISABLED VEHICLE FURNISHED THE CONDITION FOR THE SUBSEQUENT REAR-END COLLISION BUT WAS NOT THE PROXIMATE CAUSE OF THE COLLISION.

The Second Department, reversing Supreme Court, determined the Perez defendants' motion for summary judgment in this rear-end collision case should have been granted. Perez stopped his vehicle in the left lane behind a disabled vehicle when the driver of the disabled vehicle flagged him down. Plaintiff came to a stop behind the Perez vehicle and was attempting to go around the Perez vehicle when plaintiff's vehicle was struck from behind by the Chen vehicle. The Second Department held that the Perez vehicle furnished the condition for the traffic accident but did not cause the accident. The accident was caused by Chen's failure to maintain a safe distance: "This evidence demonstrated that Perez's conduct of stopping his vehicle in the left lane of travel with its hazard lights engaged was not a proximate cause of the collision between Chen's SUV and the plaintiff's vehicle, but rather merely furnished the condition or occasion for it ... . Since the plaintiff was able to safely bring his vehicle to a complete stop behind Perez's vehicle, where it remained stopped for approximately two minutes prior to the accident, any purported negligence on Perez's part was not a proximate cause of the collision between Chen's SUV and the plaintiff's vehicle or of the plaintiff's injuries ... . The sole proximate cause of the accident was Chen's failure to maintain a safe driving speed and distance behind the plaintiff's vehicle ...". ***Kante v. Tong Fei Chen*, 2019 N.Y. Slip Op. 07390, Second Dept 10-16-19**

PERSONAL INJURY.

PLAINTIFF SLIPPED AND FELL ON PAINTED AREAS OF A CROSS-WALK IN DEFENDANT'S PARKING LOT; QUESTION OF FACT WHETHER THE PAINTED AREAS WERE SLIPPERY WHEN WET BECAUSE SAND HAD NOT BEEN ADDED TO THE PAINT.

The Second Department, reversing Supreme Court, determined plaintiff had raised a question of fact whether the painted areas of a cross-walk in a parking lot constituted a dangerous condition in this slip and fall case. Plaintiff's expert presented evidence the painted areas were very slippery when wet and sand should have been added to the paint: "... [T]he plaintiff raised a triable issue of fact as to whether the painted lines constituted a dangerous or defective condition ... . The plaintiff submitted the affidavit of his expert, who opined that the painted surface was 'non-slip' when dry, but became very slippery when wet. The plaintiff's expert further opined that when coatings are applied in an area where people are expected to walk, particularly areas exposed to wet conditions, either sand is added to provide traction or a coating that is slip resistant under wet conditions is used. He also noted that in other areas of the parking lot where the accident occurred, a different coating was used, and that coating was slip resistant under wet conditions." ***Rojecki v. Genting N.Y., LLC*, 2019 N.Y. Slip Op. 07431, Second Dept 10-1619**

REAL ESTATE, CONTRACT LAW.

PURCHASE AGREEMENT DID NOT ALLOW BUYERS TO TERMINATE THE CONTRACT DURING THE CONTINGENCY PERIOD, BUYERS' ACTION TO RECOVER THE DOWN PAYMENT PROPERLY DISMISSED.

The Second Department determined the seller's motion for summary judgment in this action by the buyers for return of the deposit was properly granted. The buyers purported to cancel the real estate purchase contract when the bank denied the mortgage application. But the purchase agreement did not allow the buyers to terminate the contract at that point: "Section 5.8 of the rider clearly and unambiguously provided that if the buyers were unable to obtain a mortgage commitment within 45 days of executing the contract, the seller had the unilateral right to either cancel the contract or extend the mortgage contingency period for an additional 30 days. The buyers were only entitled to cancel the contract upon the expiration of that 30-day period. Neither the rider nor the contract contained any provision permitting the buyers to cancel the contract during the mortgage contingency period upon receiving notice that their application had been denied ... . In opposition,

the buyers failed to raise a triable issue of fact. The record does not support the buyers' contention that their mortgage application was denied on the ground that the subject property constituted 'unacceptable collateral,' and that, therefore, their performance under the contract was rendered impossible. Under these circumstances, the buyers willfully defaulted and anticipatorily breached the contract by purporting to cancel the contract during the mortgage contingency period." ***Federico v. Dolitsky*, 2019 N.Y. Slip Op. 07383, Second Dept 10-16-19**

TOXIC TORTS, ENVIRONMENTAL LAW, NUISANCE, REAL PROPERTY, CIVIL PROCEDURE.

ACTION AGAINST GAS COMPANY FOR CONTAMINATION OF REAL PROPERTY ACCRUED WHEN INJURY SHOULD HAVE BEEN DISCOVERED AND WAS TIME BARRED; ACTION FOR NUISANCE RELATING TO REMEDIATION EFFORTS, HOWEVER, IS SUBJECT TO A DIFFERENT STATUTE OF LIMITATIONS PROVISION AND WAS NOT TIME-BARRED.

The Second Department determined the causes of action against a gas company to recover damages for contamination of real property were time-barred, but the nuisance actions stemming from remediation efforts were not time-barred: " 'Generally, an action to recover damages for personal injury or injury to property must be commenced within three years of the injury' ... . '[T]he three year period within which an action to recover damages for personal injury or injury to property caused by the latent effects of exposure to any substance or combination of substances,' however, 'shall be computed from the date of discovery of the injury by the plaintiff or from the date when through the exercise of reasonable diligence such injury should have been discovered by the plaintiff, whichever is earlier' (CPLR 214-c[2] ...). 'For purposes of CPLR 214-c, discovery occurs when, based upon an objective level of awareness of the dangers and consequences of the particular substance, the injured party discovers the primary condition on which the claim is based' ... . [T]he defendants here demonstrated that they undertook extensive efforts beginning in 1999 to inform and engage with property owners potentially affected by the contamination and remediation by conducting, among other things, door-to-door canvassing, direct mailings of newsletters and fact sheets, numerous public meetings, and highly visible and disruptive remediation work. The defendants also inspected the subject property twice in 2005 to determine whether certain remediation work between those inspections caused any damage, and mailed the results of their inspections to the plaintiff in 2006. ... The defendants ... established, prima facie, that the plaintiff should have discovered, through the exercise of reasonable diligence, the primary condition upon which its exposure-related claims were based prior to January 22, 2007 ... . We disagree, however, with the Supreme Court's determination that the causes of action to recover damages for public and private nuisance allegedly arising from the defendants' remediation work were time-barred ... . These causes of action are subject to the limitations period in CPLR 214(4) rather than CPLR 214-c(2) because they do not seek 'to recover damages for personal injury or injury to property caused by the latent effects of exposure' ... . Here, the papers submitted in support of the defendants' motion demonstrated that there was no dispute that the defendants conducted remediation work in close proximity to the subject property shortly after new tenants signed a lease to occupy the space in 2008 ...". ***Onder Realty, Inc. v. Keyspan Corp.*, 2019 N.Y. Slip Op. 07406, Second Dept 10-16-19**

THIRD DEPARTMENT

CONTRACT LAW, NEGLIGENCE.

A CAUSE OF ACTION FOR SUB-PAR PERFORMANCE OF A CONTRACT SOUNDS IN CONTRACT LAW, NOT NEGLIGENCE; NEGLIGENCE CAUSE OF ACTION SHOULD HAVE BEEN DISMISSED.

The Third Department, reversing (modifying) Supreme Court, determined that the negligence cause of action was really a breach of contract action and therefore the negligence cause of action should have been dismissed. The underlying contract was for demolition and construction work and the complaint alleged damage by the diversion of water: "... [W]e agree with J. Luke [defendant demolition-construction contractor] that [the negligence cause of action] should have been dismissed. Town Homes [defendant property owner] denominated that claim as one for negligence, alleging that J. Luke deviated from accepted standards of care by failing to perform contracted-for demolition and construction work 'in a good workmanlike manner.' Supreme Court correctly categorized those assertions as a claim for negligent performance of contract; the problem is 'that a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated' ... . A failure to plead a cognizable claim would not warrant summary judgment if Town Homes subsequently made out a viable cause of action ... . Town Homes never suggested that J. Luke owed it a duty of care independent from the contract, however, and confirmed in its opposition to J. Luke's motion that the issue was whether J. Luke rendered subpar performance under the contract. Accordingly, in the absence of any indication that J. Luke owed an independent duty to Town Homes arising 'from circumstances extraneous to, and not constituting elements of, the contract' ...". ***517 Union St. Assoc. LLC v. Town Homes of Union Sq. LLC*, 2019 N.Y. Slip Op. 07461, Third Dept 10-17-19**

CRIMINAL LAW.

FOR CAUSE CHALLENGES TO TWO JURORS SHOULD HAVE BEEN GRANTED, CONVICTION REVERSED.

The Third Department, reversing defendant's conviction, determined the defense for cause challenges to two jurors should have been granted in this rape prosecution: "During voir dire, when counsel asked prospective juror No. 2 if she thought that this was the right case for her to sit on, she responded, 'I'm not sure. I teach youth. I have five children. That's where my sympathy would lie. . . . [T]he victim was probably about 20 years old. I would have a tendency to be biased in that direction.' Counsel then asked if those thoughts might make it difficult for prospective juror No. 2 to weigh the evidence. She responded, 'I don't think so. I think I could be biased. I'm sorry, unbiased. I do lean toward sympathy with the youth. That's where my life is.' She then mentioned that she was very involved in church youth organizations and teaches ninth and tenth grade girls. Prospective juror No. 3 acknowledged that he was having a hard time listening to the subject matter of the case during voir dire because he has four younger sisters and a daughter. When asked if he could 'get beyond the allegations and really weigh the evidence' or whether that might be a problem, he responded, 'I'd like to say I could be impartial, but until everything comes out it's difficult to say.' No further questions were asked of these potential jurors by counsel or Supreme Court. Supreme Court denied defendant's challenges to these prospective jurors for cause, asserting that each had said he or she could be fair and impartial. Although prospective juror No. 2 did say she could be unbiased, she again stated immediately thereafter that she leaned toward sympathy with youth and worked with young girls, indicating an inclination toward the young female victim. Prospective juror No. 3 made an equivocal statement regarding his partiality. As neither prospective juror unequivocally stated that he or she could be impartial, the court should have posed questions to rehabilitate them by obtaining such assurances or, if rehabilitation was not possible, excused the prospective jurors ...". ***People v. Jackson*, 2019 N.Y. Slip Op. 07442, Third Dept 10-17-19**

CRIMINAL LAW, CONSTITUTIONAL LAW, APPEALS.

A SUPERIOR COURT INFORMATION CANNOT INCLUDE A JOINABLE OFFENSE WHICH IS GREATER IN DEGREE THAN THE OFFENSE FOR WHICH THE DEFENDANT WAS HELD FOR THE ACTION OF THE GRAND JURY.

The Third Department, resolving a question of first impression, determined that a Superior Court Information (SCI) is jurisdictionally defective if it charges a joinable offense which is greater in degree than the offense for which the defendant was held for the action of the grand jury. The jurisdictional question survives the guilty plea, the failure to preserve and the waiver of appeal: " '... [T]he constitutional waiver provision makes no reference to joinable offenses, providing only that prosecution by an SCI is limited to an offense or offenses for which a person is 'held for the action of a grand jury upon a charge for such an offense' (NY Const, art I, § 6 …). A literal interpretation of the phrase 'any offense or offenses properly joinable therewith' in CPL 195.20 would permit the circumvention of this constitutional imperative by the simple expedient of permitting the inclusion of joinable offenses in a higher degree or grade that were never charged in a felony complaint. Such a statutory interpretation is inconsistent with and undermines the protections provided in NY Constitution, article I, § 6. It is well settled 'that the Legislature in performing its law-making function may not enlarge upon or abridge the Constitution' ... , and that 'courts must avoid, if possible, interpreting a presumptively valid statute in a way that will needlessly render it unconstitutional' ... . Applying these principles, we conclude that a joinable offense may not be included in a waiver of indictment and SCI unless that offense, or a lesser included offense, was charged in a felony complaint and the defendant was therefore held for the action of a grand jury upon that charge ...". ***People v. Coss*, 2019 N.Y. Slip Op. 07445, Third Dept 10-17-19**

CRIMINAL LAW, EVIDENCE.

THE POLICE DID NOT HAVE A REASONABLE SUSPICION DEFENDANT WAS CONCEALING DRUGS ON HIS PERSON WHEN THEY CONDUCTED A STRIP SEARCH, DRUGS SEIZED DURING THE STRIP SEARCH SHOULD HAVE BEEN SUPPRESSED.

The Third Department, reversing defendant's drug-possession conviction, in a full-fledged opinion by Justice Mulvey, determined that the police did not have a reasonable suspicion defendant was concealing drugs on his person at the time of the strip search. The drugs found in the search should have been suppressed: "Strip searches 'cannot be routinely undertaken as incident to all drug arrests,' but must be based on 'specific and articulable facts which, along with any logical deductions, reasonably prompted the intrusion' ... . Courts consider several factors when determining whether, under the totality of the circumstances, the police had reasonable suspicion to conduct 'a strip search, including the defendant's excessive nervousness, unusual conduct, information showing pertinent criminal propensities, informant's tips, loose-fitting or bulky clothing, an itinerary suggestive of wrongdoing, incriminating matter discovered during a less intrusive search, lack of employment, indications of drug addiction, information derived from others arrested or searched contemporaneously, and evasive or contradictory answers to questions' ... . * * * Based on the information that Tibbs planned to purchase cocaine from Pinkney, made the round trip to New York City and routinely went to defendant's apartment after such purchases to cook the powder cocaine into crack cocaine, along with other evidence of the conspiracy that had been ongoing for months, the officers had probable cause to believe that defendant had committed a conspiracy offense. The evidence at the hearing did not, however, support a strip search. The officers knew that Tibbs had purchased a large quantity of cocaine and that

drug traffickers frequently secrete narcotics on their person. Yet they could not identify the other people who were in the vehicle when it returned from New York City, leaving no proof that defendant had accompanied Tibbs to purchase the drugs." ***People v. Turner*, 2019 N.Y. Slip Op. 07443, Third Dept 10-17-19**

CRIMINAL LAW, JUDGES.

DEFENDANT'S PLEA TO A PROBATION VIOLATION WAS NOT VOLUNTARY AND MUST BE VACATED.

The Third Department, reversing County Court, determined defendant's plea to a probation violation was involuntary and must be vacated: "The record reflects that the People's final plea offer came with a prison sentence of 1½ years followed by six years of PRS. When defendant indicated that he wanted to admit to the probation violation and argue for a more lenient sentence, County Court stated that it could not 'override' the recommended sentence unless defendant declined the offer and proceeded to a hearing. The court further told defendant that, if he took the offer, it was 'up to the People' as to whether a lesser sentence could be considered. The People then turned down defendant's proposal to cap his sentencing exposure at 1½ years in prison and stated that they would recommend a higher sentence if defendant rejected the offer and were found guilty following a hearing. Defendant thereafter accepted the offer. The foregoing reflects, and the People concede, that County Court abdicated its responsibility to carefully consider all facts available at the time of sentencing and fashion an appropriate sentence .... Inasmuch as the proceedings were also marred by the People's admittedly inappropriate threat to seek a harsher sentence if defendant rejected the offer and was found guilty after a hearing, however, the plea itself was involuntary. Thus, defendant is entitled to vacatur of his plea ...". ***People v. Roberts*, 2019 N.Y. Slip Op. 07448, Third Dept 10-17-19**

EDUCATION-SCHOOL LAW, ADMINISTRATIVE LAW, CIVIL PROCEDURE.

THE STATE UNIVERSITY OF NY BOARD OF TRUSTEES' CHARTER SCHOOL COMMITTEE DID NOT HAVE THE AUTHORITY TO CHANGE THE TEACHER CERTIFICATION REQUIREMENTS FOR TEACHERS IN CHARTER SCHOOLS.

The Third Department, after finding the petitioners in one of the two actions had the capacity to sue and standing, determined the State University of New York Board of Trustees' Charter School Committee (the Committee) did not have the authority to promulgate regulations changing the teacher certification requirements for teachers in certain charter schools: "... [I]t is a basic principle of administrative law that an agency has only 'those powers expressly conferred by its authorizing statute, as well as those required by necessary implication' ... . Education Law § 355 (2-a) authorizes the Committee, '[n]otwithstanding any other provision of law, rule, or regulation to the contrary, . . . to promulgate regulations with respect to governance, structure and operations of [SUNY-authorized] charter schools.' Respondents assert that the regulations fall within this statutory authorization because teacher licensure pertains to the 'operation' of SUNY-authorized charter schools. In analyzing this claim, we need not defer to the Committee's interpretation of the Education Law, as 'the question is one of pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent' ... . * * * We ... conclude that the inclusion of the word "operation" in Education Law § 355 (2-a) does not authorize the Committee to promulgate regulations pertaining to teacher licensure and certification. We further find that the regulations conflict with provisions of the Education Law that authorize the Commissioner to prescribe regulations governing the certification of teachers and that require most teachers in charter schools and pre-kindergartens to be certified in the same manner as other public school teachers ... . The Committee therefore exceeded its authority in promulgating the regulations ...". ***Matter of New York State Bd. of Regents v. State Univ. of N.Y.*, 2019 N.Y. Slip Op. 07458, Third Dept 10-17-19**

FAMILY LAW.

FIRING A SHOTGUN THROUGH A SCREEN DOOR INTO THE DRIVEWAY WHEN THE CHILD WAS NOT HOME DOES NOT CONSTITUTE NEGLECT.

The Third Department, reversing Family Court, determined the neglect finding against father was not supported by the evidence. Father fired a shotgun through the front door into the driveway when the child was not home. The fact that the child could have returned home and could have been in the driveway was not sufficient: "Although a finding of imminent danger can be established through a single incident or circumstance, the danger 'must be near or impending, not merely possible' ... . As such, it has been held that a finding of imminent danger is contingent on the child being present ... . Here, it is undisputed that the child was not present during the shooting. Despite this, petitioner and the attorney for the child argue that the child and the mother could have returned to the home at any time and traveled through the likely path of the shotgun pellets. However, this did not occur, nor can such danger be said to have been imminent as it was only hypothetical, rather than 'near or impending' ... . Put another way, the issue is not that there was no imminent risk because, fortuitously, nothing happened to the child, but rather that nothing could have happened under the particular scenario because the child was not home ... . 'While respondent's conduct was far from ideal and it is possible to speculate about ways that events could have turned out differently for the child[], nonetheless, the record fails to establish that the child[] [was] in imminent danger' ...". ***Matter of Jordyn WW. (Tyrell WW.)*, 2019 N.Y. Slip Op. 07460, Third Dept 10-17-19**

FAMILY LAW.

EXTRAORDINARY CIRCUMSTANCES WARRANTED AWARDING CUSTODY TO STEPMOTHER WITH VISITATION BY BOTH PARENTS.

The Third Department determined that extraordinary circumstances warranted awarding custody of the child to the stepmother with visitation from both parents. The child had been living with father and stepmother for years when father moved out: "... [T]he child was residing with the other parent — the father — pursuant to a court order. The mother did not originally expressly relinquish the child to the stepmother. Rather, the stepmother assumed parental responsibilities due to her relationship with the father and based on his custodial authority. Nevertheless, in considering the cumulative effect of all the issues, we note that the mother had very little contact with the child for five years, including not seeing him at all for three continuous years, while the child was at a formative age and being raised by the father and the stepmother. Starting in 2012, the mother began consistently exercising her visitation and has continued to do so. However, the mother remained uninvolved in the child's medical and educational life and was only minimally involved in his extracurricular activities. * * * Moving to the best interests of the child, he has lived with the stepmother since he was a toddler, has a close bond with her and was described as inseparable from his half brother, who also lives with them. The child has always attended schools in the same district, has an educational plan to address his difficulties, participates in sports in that district and all of his friends are there. The mother lives in a different school district. The stepmother has been managing the child's medical conditions for a decade, whereas the mother did not even know the names of his doctors. The stepmother has been communicating with the mother regarding visits and providing the majority of the transportation; the mother has no vehicle and her driver's license is suspended, although she drove to drop the child off on at least some occasions." ***Matter of Shanna O. v. James P.*, 2019 N.Y. Slip Op. 07455, Third Dept 10-17-19**

FAMILY LAW, CIVIL PROCEDURE.

FAMILY COURT SHOULD NOT HAVE RELINQUISHED JURISDICTION WITHOUT CONSIDERING THE INCONVENIENT FORUM FACTORS MANDATED BY THE DOMESTIC RELATIONS LAW; MOTHER HAD RELOCATED TO FLORIDA WITH THE CHILDREN AND FATHER WAS SEEKING TELEPHONE AND ELECTRONIC CONTACT WITH THE CHILDREN.

The Third Department, reversing Family Court, determined Family Court should not have relinquished jurisdiction without considering the factors required by statute before finding New York to be an inconvenient forum. Mother had relocated to Florida with the children and father brought a petition and an order to show cause alleging mother refused to allow telephone and electronic contact with the children: "... [M]other's counsel made a request for dismissal of the petition on jurisdictional grounds pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act (see Domestic Relations Law art 5-A [hereinafter UCCJEA]). The father opposed this request, advising that he had not received the notice of limited appearance and did not know that jurisdiction would be contested at the initial appearance. Following a brief discussion with counsel, Family Court granted the mother's request, dismissed the petition, denied the relief sought in the order to show cause and directed all further proceedings to take place in Florida. The father appeals. Family Court erred in summarily relinquishing jurisdiction. As the court acknowledged, it had exclusive continuing jurisdiction over the matter pursuant to the UCCJEA ... . Although a court may decline to exercise such jurisdiction upon finding that New York is an inconvenient forum and another state is a more appropriate forum ... , such a determination must be made in accord with the statutory directives established within Domestic Relations Law § 76-f. The statutory requirements were not met here." ***Matter of Cody RR. v. Alana SS.*, 2019 N.Y. Slip Op. 07471, Third Dept 10-17-19**

FAMILY LAW, CRIMINAL LAW.

FATHER'S PETITION FOR CUSTODY OR PARENTING TIME SHOULD NOT HAVE DISMISSED BASED UPON AN ORDER OF PROTECTION ISSUED IN A CRIMINAL MATTER BEFORE THE CHILD WAS BORN.

The Third Department, reversing Family Court, determined an order of protective issue in a criminal proceeding before the child was born did not prohibit contact between the child and father. Father's petition seeking custody and/or parenting time should not have been dismissed on that ground: "At the initial appearance on the petition, Family Court stated that the order of protection had been issued in a criminal matter and that it barred the putative father from having any direct or indirect contact with the mother. The mother then moved to dismiss the petition, arguing that the order of protection rendered the petition moot. Family Court agreed and granted the motion. The putative father appeals. The order of protection at issue — a copy of which is not in the record but the terms of which we take judicial notice — was issued prior to the child's birth and does not bar the putative father from having contact with the child. It is not, as a result, fatal to the putative father's petition ... . Remittal is therefore required for Family Court to consider whether an order of filiation should be issued (see Family Ct Act § 564) and, if so, whether contact with the putative father would be in the best interests of the child and could be accomplished without contravening the terms of the order of protection ...". ***Matter of Justin M. v. Valencia N.*, 2019 N.Y. Slip Op. 07453, Third Dept 10-17-19**

FAMILY LAW, CRIMINAL LAW, APPEALS.

RESPONDENT, WHO HAD BEEN ADJUDICATED A JUVENILE DELINQUENT, WAS NOT GIVEN SUFFICIENT INFORMATION BEFORE ADMITTING TO A PROBATION VIOLATION, THE PETITION WAS DISMISSED; THE ERROR DID NOT REQUIRE PRESERVATION AND THE APPEAL WAS NOT MOOT BECAUSE OF THE COLLATERAL CONSEQUENCES OF A JUVENILE DELINQUENCY ADJUDICATION.

The Third Department, dismissing the petition, determined that respondent, who had been adjudicated a juvenile delinquent, was not provided sufficient information before admitting to a probation violation. Because of the collateral consequences of a "juvenile delinquent" adjudication, the appeal is not moot, even though the period of respondent's custody and care under the Office of Children and Family Services had expired. In addition, the error did not required preservation: "Initially, we note that preservation of this claim was not required ... . Family Ct Act § 321.3 (1) requires a court to advise a respondent of his or her right to a fact-finding hearing and to question both the respondent and his or her parent, if present, as to whether the respondent committed the act contained in the admission, whether the respondent is voluntarily waiving his or her right to a fact-finding hearing, and whether the respondent is aware of the possible specific dispositional orders ... . The May 2018 allocution did not meet these statutory requirements. Although Family Court did advise respondent, to some extent, regarding his rights, the failure to meet the statutory mandates rendered the allocution inadequate. Critically, although respondent's mother was present, the court failed to question her regarding respondent's waiver of the fact-finding hearing ... or about his failure to attend counseling. Instead, respondent was merely asked whether he had sufficient time to speak to his parents about the allocution ... . Moreover, the court did not determine whether respondent and his mother understood the possible specific dispositional orders that might result from his allocution ... . Although it was stated that placement outside the home was an available option, the court did not 'ascertain whether [respondent] and his parent[] were aware of the full extent of such a disposition' ...". ***Matter of Elijah X.*, 2019 N.Y. Slip Op. 07464, Third Dept 10-17-19**

FORECLOSURE, CIVIL PROCEDURE, REAL PROPERTY LAW, TRUSTS AND ESTATES, APPEALS.

THE DEATH OF A PARTY TO THIS FORECLOSURE ACTION AFFECTED THE MERITS OF THE CASE; SUPREME COURT DID NOT HAVE JURISDICTION TO DETERMINE DEFENDANT'S MOTION AND THE RELATED ORDER IS A NULLITY; THE APPEAL THEREFORE MUST BE DISMISSED.

The Third Department determined the death of a party to this foreclosure proceeding deprived the court of jurisdiction. Therefore the court should not have considered defendant's motion and the related order was a nullity: "In 2003, defendant Sharon A. Harris (hereinafter defendant) and defendant Marion D. Schubnel executed a note in favor of plaintiff that was secured by a mortgage on real property located in Albany County. Defendant and Schubnel owned the subject property as joint tenants with rights of survivorship. ... [P]laintiff commenced this mortgage foreclosure action against defendant and Schubnel, among others. Defendant served an answer but Schubnel failed to do so. In November 2016, Schubnel died. In July 2017, defendant moved for leave to serve an amended answer and, as relevant here, sought to add a statute of limitations affirmative defense. In an amended order entered November 2017, Supreme Court granted the motion and sua sponte dismissed the complaint as time-barred. ... The death of a party generally stays an action until a personal representative is substituted for the deceased party ... . Strict adherence to this rule, however, is unnecessary where a party's demise does not affect the merits of the case ... . It is true that defendant, as the surviving joint tenant, obtained Schubnel's interest in the subject property upon Schubnel's death. Notwithstanding this transfer of interest, Schubnel's estate can still be held liable for any deficiency in the event that a sale of the subject property fails to satisfy the debt. Indeed, the complaint specifically requests that such relief be granted should it be necessary ... . In the absence of a substitution of Schubnel, a discontinuance of the action insofar as asserted against Schubnel or a representation by plaintiff that it would be waiving its right to seek a deficiency judgment against Schubnel, the death of Schubnel affects the merits of the case ... . Because an automatic stay was in effect upon Schubnel's death, Supreme Court was without jurisdiction to consider defendant's motion and, therefore, the November 2017 amended order is a nullity ...". ***Wells Fargo Bank, N.A. v. Schubnel*, 2019 N.Y. Slip Op. 07462, Third Dept 10-17-19**

MEDICAL MALPRACTICE, PERSONAL INJURY, EVIDENCE.

PLAINTIFF'S EXPERT'S AFFIDAVIT, ALTHOUGH POORLY DRAFTED, RAISED A QUESTION OF FACT WHETHER DEFENDANTS DEPARTED FROM THE STANDARD OF CARE FOR A SPINAL FUSION PROCEDURE, SUPREME COURT REVERSED.

The Third Department, reversing Supreme Court, determined the expert affidavit submitted in opposition to defendants' motion for summary judgment, although not well-drafted, raised a question of fact whether defendants' departed from the standard of care for the placement of hardware in a spinal fusion procedure: "... [P]laintiff submitted the expert affidavit of a board-certified orthopedic surgeon, who opined, based upon his review of the relevant medical records and radiological images, including a CT scan taken shortly after the surgery, that Pedersen had improperly positioned the L4 pedicle screws

into the L3-L4 facet joint and that such improper placement constituted a deviation from the standard of care that ultimately caused Yerich to develop spinal and foraminal stenosis at L3-L4. Plaintiffs' expert asserted that placing pedicle screws through the facet joints causes 'damage[to] the joint, reduces movement, [and] makes the spine unstable[,] which results in . . . spinal stenosis and foraminal stenosis requiring fusion,' as happened here. Although plaintiffs' expert affidavit is not a model of precise drafting, when viewed in the light most favorable to plaintiffs ..., we find that plaintiffs' expert affidavit raises a question of fact as to whether Pedersen improperly positioned the L4 pedicle screws through the facet joint, thereby causing injury." ***Yerich v. Bassett Healthcare Network*, 2019 N.Y. Slip Op. 07466, Third Dept 10-17-19**

TRUSTS AND ESTATES.

THE VALIDITY OF THE WILL SHOULD NOT HAVE BEEN DETERMINED AT THE STAGE WHEN THE PETITION FOR PROBATE WAS PRESENTED FOR FILING.

The Third Department, reversing Surrogate's Court, determined that the validity of the will should not have been determined at the stage when the petition to probate the will was presented for filing: "The question presented to Surrogate's Court was not whether the purported will should be admitted to probate, but only whether the petition seeking probate of the subject will should have been accepted for filing. It appears that, in presenting their respective positions regarding the motion, the parties addressed, in detail, the validity of the will and whether it was properly executed and, in turn, Surrogate's Court's well-intentioned decision addressed those arguments and denied probate. That decision was premature (see SCPA 304, 1402 [1], [2]; 22 NYCRR 207.16 ...). There is a difference between accepting a probate petition for filing and admitting a will to probate. The former merely commences the legal proceeding to determine the validity of a purported will; the latter is but one possible outcome of that process. Here, Surrogate's Court should have granted petitioner's motion, directed the Surrogate's Court Clerk to accept the petition and accompanying papers for filing, issued the appropriate citations and proceeded according to the procedures set forth in SCPA article 14." ***Matter of Noichl*, 2019 N.Y. Slip Op. 07468, Third Dept 10-17-19**

WORKERS' COMPENSATION.

MEDICAL PROVIDER'S REQUEST FOR A VARIANCE ALLOWING PAYMENT FOR CLAIMANT'S TREATMENT WITH MEDICAL MARIJUANA SHOULD HAVE BEEN CONSIDERED FOR PROSPECTIVE TREATMENT OF CHRONIC PAIN.

The Third Department determined the treating medical provider's request that the cost of claimant's treatment with medical marijuana (called a "variance") be covered by workers' compensation was properly denied for past treatment but should have been considered for future treatment: "Attached to the August 2017 variance request from claimant's treating medical provider was a July 2017 medical report in which the provider summarized claimant's pain management regimen and reviewed the various 'beneficial effects of the medical mari[h]uana' that claimant had received. The provider reported, among other things, that claimant's sleep has improved and pain was reduced 'since using medical marihuana,' that medical marihuana 'allowed him to participate more with his wife and children' and that he '[e]motionally feels much improved' as a result of using medical marihuana. The treating medical provider also noted that claimant was experiencing a '[f]inancial burden with continuing an optimal dose of the medical THC.' In our view, the Board properly denied the variance request for medical care but only to the extent such care had already been provided (see 12 NYCRR 324.3 [a] [1]). In an instance such as here, however, where the claimant has a chronic pain condition necessitating ongoing treatment, the Board should have addressed the merits of claimant's variance request for prospective medical marihuana treatment." ***Matter of Kluge v. Town of Tonawanda*, 2019 N.Y. Slip Op. 07470, Third Dept 10-17-19**

WORKERS' COMPENSATION.

METHODS FOR DETERMINING WEEKLY WORKERS' COMPENSATION BENEFITS FOR SHORT-TERM EMPLOYMENT EXPLAINED, MATTER REMITTED FOR THE GATHERING OF EVIDENCE AND RE-CALCULATION.

The Third Department, reversing the Workers' Compensation Board, determined the benefits to be provided to the injured worker, based upon only 78 days of employment may have been wrongly calculated and remitted the matter: "Following a hearing, a Workers' Compensation Law Judge (hereinafter WCLJ) established claimant's average weekly wage as $933.14, which was arrived at by dividing his total earnings ($12,130.76) by the number of weeks worked (13). The employer and its workers' compensation carrier (hereinafter collectively referred to as the carrier) sought administrative review. Upon that review, the Workers' Compensation Board determined that claimant's average weekly wage should have been calculated pursuant to Workers' Compensation Law § 14 (3), using a 200 multiplier, and that, so calculated, claimant's average weekly wage was $598.15. * * * Under Workers' Compensation Law § 14 (2), the average annual earnings of a six-day worker is 300 'times the average daily wage or salary . . . which an employee of the same class working substantially the whole of such immediately preceding year in the same or in a similar employment in the same or a neighboring place shall have earned in such employment during the days when so employed.' The carrier did not submit payroll records for similar employees or

otherwise assert that such records were unavailable ... . In the absence of such information, we cannot determine whether the Board properly rejected the method set forth in Workers' Compensation Law § 14 (2) before resorting to Workers' Compensation Law § 14 (3) to calculate claimant's average weekly wage." ***Matter of Molina v. Icon Parking LLC*, 2019 N.Y. Slip Op. 07467, Third Dept 10-17-19**

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