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FIRST DEPARTMENT

HUMAN RIGHTS LAW, MUNICIPAL LAW, EMPLOYMENT LAW.

PETITIONERS' EMPLOYMENT DISCRIMINATION AND RETALIATION CLAIMS UNDER THE STATE AND CITY HUMAN RIGHTS LAW AGAINST THE NYC DEPARTMENT OF TRANSPORTATION SHOULD NOT HAVE BEEN DISMISSED.

The First Department, reversing (modifying) Supreme Court, in a full-fledged opinion by Justice Renwick, determined petitioners' retaliation and discrimination claims against the NYC Department of Transportation (DOT) should not have been dismissed. The facts of the case are too complex to fairly summarize here: "It is undisputed that petitioners sufficiently stated the first two elements of an employment discrimination claim on behalf of Bharat and Kubair under both the State and City HRLs[Human Rights Law's] — namely, that they are both members of a protected class and were well qualified for their respective positions .... Petitioners also sufficiently stated the third element — that they were adversely (State HRL) or differently treated (City HRL) .... In particular, petitioners allege that DOT's failure to upgrade Bharat to SMME II status (a position with greater salary and pension benefits) was discriminatory conduct as a less qualified white employee received the upgrade. * * * Bharat's allegations are sufficient, at the pleading stage, to permit the inference that the reason he was not awarded an upgrade and the determination was issued against him was because of his involvement in the prior federal action against the DOT, which resulted in the issuance of a consent decree that subjected the DOT to significant damages ... . The petition provides additional support for an inference of retaliation in the fact that an employee with less experience was upgraded over Bharat shortly after the consent decree was issued." ***Matter of Local 621 v. New York City Dept. of Transp.*, 2019 N.Y. Slip Op. 08014, First Dept 11-7-19**

HUMAN RIGHTS LAW, EDUCATION-SCHOOL LAW, EMPLOYMENT LAW.

PLAINTIFF'S EMPLOYMENT DISCRIMINATION ACTION AGAINST THE NYC DEPARTMENT OF EDUCATION SHOULD NOT HAVE BEEN DISMISSED.

The First Department, reversing Supreme Court, determined plaintiff's employment discrimination action could go forward: "Plaintiff, Stevenson Petit, commenced this employment discrimination action on or about July 1, 2016, against his former employer, the Department of Education (DOE). Plaintiff was hired by the DOE in 1994 as a paraprofessional. In 2010, he became a guidance counselor at the Tilden Educational Campus and received tenure. Plaintiff, a 55-year-old black male from Haiti, who alleges that he studied voodoo, but does not practice it, asserts that he was discriminated against by the principal of the school, Marina Vinitskaya (a Caucasian woman), due to his Haitian origin and her belief that he is a voodoo priest. Since his hiring in 2010, plaintiff had no performance issues until Vinitskaya became the school's principal in the 2008-2009 school year. He asserts that Principal Vinitskaya then began creating a hostile work environment, by targeting him due to his Haitian origin. Plaintiff asserts that Principal Vinitskaya falsely accused him of misconduct, subjecting him to an Office of Special Investigations investigation, during which Vinitskaya falsely accused plaintiff of being a voodoo priest. Plaintiff also asserts that Principal Vinitskaya assigned him to an unsanitary basement office upon his return to Tilden Educational Campus from a temporary administrative office assignment. Plaintiff asserts that Principal Vinitskaya did this maliciously in disregard of his seniority even though there were other available offices. Reportedly, both plaintiff and his union submitted administrative complaints to no avail. Ultimately, Principal Vinitskaya demoted plaintiff to the position of temporary substitute, assigned on a weekly basis to different schools. Crediting plaintiff's allegations for the purpose of this pre-answer, pre-discovery motion to dismiss the complaint ..., we find that the complaint states a causes of action for discrimination, retaliation and hostile work environment in violation of the New York State and New York City Human Rights laws. These allegations are sufficient to give defendant DOE 'fair notice' of the nature of plaintiff's claims and their grounds .." . ***Petit v. Department of Educ. of the City of N.Y.*, 2019 N.Y. Slip Op. 07990, First Dept 11-7-19**

SECOND DEPARTMENT

CIVIL PROCEDURE.

THE BUILDER OF THE HOUSE WAS NOT A NECESSARY PARTY IN THIS ACTION AGAINST THE SELLER BY THE PURCHASER; EVEN IF THE BUILDER WERE A NECESSARY PARTY, THE COURT SHOULD HAVE SUMMONED THE BUILDER ITSELF PURSUANT TO CPLR 1001(b) RATHER THAN DISMISSING THE COMPLAINT.

The Second Department, reversing Supreme Court, determined that the complaint should not have been dismissed for failure to join a necessary party because (1) defendant (Accent) was not a necessary party and (2) even if Accent were a necessary party, the court should have summoned Accent itself pursuant to CPLR 1001(b). The action concerned alleged defects in a house plaintiffs had purchased from defendants and claimed fraud, negligence, deceptive practices, breach of implied warranty, and breach of contract . Accent had constructed the house: "CPLR 1001 'limit[s] the scope of indispensable parties to those cases and only those cases where the determination of the court will adversely affect the rights of nonparties' ... . Here, the defendants failed to demonstrate that Accent ought to be a party if complete relief is to be accorded between the plaintiffs and the defendants (see CPLR 1001[a]), and also failed to demonstrate that Accent will be inequitably affected by a judgment in this action absent its joinder ... . Accent has no connection to the plaintiffs' cause of action for breach of contract, which alleges only that the defendants breached their contract with the plaintiffs. As for the balance of the plaintiffs' claims, Accent is, at best, a joint tortfeasor, with the plaintiffs having the option to proceed against any or all joint tortfeasors ... . Accordingly, we reverse the order insofar as appealed from and remit the matter to the Supreme Court, Nassau County, for a determination on the merits of the remaining branches of the defendants' motion, and for further proceedings, if necessary, thereafter. We note that, even if Accent was a necessary party, it appears to be subject to the jurisdiction of the court, and therefore, the Supreme Court should have 'order[ed] [it] summoned,' rather than granting that branch of the defendants' motion which was to dismiss the complaint for failure to join a necessary party (CPLR 1001[b] ...)." ***Blatt v. Johar*, 2019 N.Y. Slip Op. 07901, Second Dept 11-6-19**

CIVIL PROCEDURE, APPEALS, PERSONAL INJURY, EVIDENCE, MUNICIPAL LAW.

A PARTY NEED NOT MAKE A MOTION TO SET ASIDE THE VERDICT TO BE ENTITLED TO A WEIGHT OF THE EVIDENCE REVIEW BY AN APPELLATE COURT; THE VERDICT FINDING DEFENDANT BUS DRIVER NEGLIGENT, BUT FINDING THE NEGLIGENCE WAS NOT THE PROXIMATE CAUSE OF PLAINTIFF'S SLIP AND FALL, WAS AGAINST THE WEIGHT OF THE EVIDENCE.

The Second Department, in a full-fledged opinion by Justice Connolly, overruling precedent and disagreeing with the Third and Fourth Departments, determined (1) a party need not make a motion to set aside the verdict to be entitled to an "against the weight of the evidence" review by the appellate court, and (2) the verdict finding defendant bus driver negligent but also finding the negligence was not the proximate cause of plaintiff's slip and fall was against the weight of the evidence. Plaintiff stepped into a pothole when getting off the bus which had stopped to let her off after she had missed her stop: "A ... source of this Court's authority to review the weight of the evidence absent a motion to set aside the verdict comes from CPLR 4404(a), the provision authorizing postverdict motions for a new trial. CPLR 4404(a) provides, in pertinent part: 'After a trial of a cause of action or issue triable of right by a jury, upon the motion of any party or on its own initiative, the court may . . . order a new trial of a cause of action or separable issue where the verdict is contrary to the weight of the evidence' ... . Insofar as the trial court is permitted to order a new trial 'on its own initiative' (CPLR 4404[a]), and 'the power of the Appellate Division . . . is as broad as that of the trial court' ... , this Court also possesses the power to order a new trial where the appellant made no motion for that relief in the trial court. ... [I]t was logically impossible for the jury to conclude that [the bus driver] was negligent in failing to provide the plaintiff with a safe location to alight from the bus but that such negligence was not a proximate cause of the accident. It was uncontradicted that the plaintiff stepped directly from the bus into the pothole, and immediately fell to the ground. The unbroken chain of events was witnessed by ... a neutral witness with no relationship or prior affiliation with the parties, and corroborated by photographs of the scene taken immediately after the accident occurred. Assuming, as the jury found, that [the driver] was negligent, it is logically impossible under the circumstances to find that such negligence was not a substantial factor in causing the accident. Under these circumstances, the issues of reasonable care and proximate cause were so inextricably interwoven that the jury's verdict could not have been reached upon any fair interpretation of the evidence ...". ***Evans v. New York City Tr. Auth.*, 2019 N.Y. Slip Op. 07872, Second Dept 11-6-19**

CIVIL PROCEDURE, FORECLOSURE.

A FORECLOSURE ACTION DISMISSED FOR LACK OF STANDING DOES NOT ACCELERATE THE MORTGAGE DEBT AND DOES NOT TRIGGER THE SIX-YEAR STATUTE OF LIMITATIONS.

The Second Department determined the prior foreclosure action which was dismissed on the ground the bank did not demonstrate standing did not serve to accelerate the mortgage debt. Therefore the statute of limitations did not start running and the current foreclosure action is timely: "... [T]he Supreme Court in the 2009 action determined that the defendant

was entitled to dismissal of the complaint insofar as asserted against him for lack of standing. 'Where, as here, the prior action is dismissed on the ground that the plaintiff lacked standing, the purported acceleration is a nullity, and the statute of limitations does not begin to run at the time of the purported acceleration' ... . Further, the record contains no evidence of either a written assignment or physical delivery of the underlying note to the plaintiff prior to April 2, 2009, so as to establish the plaintiff's standing to commence the 2009 action ... . Thus, contrary to the defendant's contentions, the commencement of the 2009 action did not accelerate the mortgage debt, and the statute of limitations did not begin to run when the 2009 action was commenced ...". ***HSBC Bank USA v. Rinaldi*, 2019 N.Y. Slip Op. 07878, Second Dept 11-6-19**

CIVIL PROCEDURE, FORECLOSURE, EVIDENCE.

DEFENDANT IN THIS FORECLOSURE ACTION PRESENTED SUFFICIENT EVIDENCE REBUTTING THE PROCESS SERVER'S AFFIDAVIT TO WARRANT A HEARING ON WHETHER SHE WAS PROPERLY SERVED WITH THE SUMMONS AND COMPLAINT.

The Second Department, reversing Supreme Court, over an extensive concurring memorandum, determined that defendant made a sufficient showing to warrant a hearing on whether she was served with the summons and complaint in this foreclosure action: "Although the defendant did not deny having actual notice of the action, '[w]hen the requirements for service of process have not been met, it is irrelevant that defendant may have actually received the documents' ... . 'Service is only effective . . . when it is made pursuant to the appropriate method authorized by the CPLR. Actual notice alone will not sustain the service or subject a person to the court's jurisdiction [when there has not been compliance with] prescribed conditions of service' ... . * * * The defendant rebutted the process server's affidavit of service through her specific and detailed affidavit, in which she averred that '[t]he [a]ffidavit of service falsely states that a copy of the Summons and Complaint was affixed to my door.' The defendant's affidavit set out in great detail that the defendant was at home each time that the process server purportedly attempted service, as she was recuperating from a kidney transplant. The defendant averred that April 3, 2009, which happened to be her birthday, was a Friday, and that as an observant Jew she did not leave her home. The defendant submitted a Sabbath calendar printout showing that the sun did not set until 8:04 p.m. on April 4, 2009, approximately one hour after the process server purportedly affixed the summons and complaint to her door. The defendant averred that she never heard anyone knock at her door or ring her doorbell and that, despite various medical problems, she has no issues with her hearing. The defendant averred that her daughter came to pick her up for dinner at 8:30 p.m. on April 4, 2009, and that upon leaving her home, she did not see any documents affixed to her door. The foregoing detailed averments were sufficient to rebut the process server's affidavit and to warrant a hearing on the issue of whether service was properly made ...". ***HSBC Bank USA, N.A. v. Assouline*, 2019 N.Y. Slip Op. 07891, Second Dept 11-6-19**

CRIMINAL LAW, EVIDENCE, ATTORNEYS, JUDGES.

EVIDENCE DEFENDANT HAD BEEN ACCUSED OF FRAUDULENTLY PRACTICING DENTISTRY IN THE PAST WAS NOT RELEVANT TO THE INSTANT PROCEEDING ALLEGING THE UNLICENSED PRACTICE OF DENTISTRY; THE PREJUDICIAL EFFECT WAS EXACERBATED BY REFERENCES TO THE ALLEGED FRAUD BY THE PROSECUTOR IN SUMMATION AND BY THE JUDGE IN THE INSTRUCTIONS TO THE JURY; DEFENDANT'S CONVICTION REVERSED.

The Second Department, reversing defendant's conviction, determined that the probative value of evidence submitted to the jury was outweighed by its prejudicial effect. Defendant was charged under the Education Law with practicing dentistry without a license. Defendant alleged he was legally acting as a clinical director in a dental office. The jury was presented with evidence indicating defendant had been previously accused of practicing dentistry fraudulently: "Evidence that the defendant voluntarily surrendered his license to practice dentistry in 2000 was properly admitted to show that the defendant was unlicensed and was aware that he was unlicensed. However, the evidence submitted to the jury, which consisted of the defendant's 'application to surrender license,' stated not only that he was voluntarily surrendering his license, but also that he was doing so because he was 'under investigation for allegations that [he] practiced the profession of dentistry fraudulently, within the purview and meaning of New York Education Law section 6509(2), and committed unprofessional conduct by engaging in conduct in the practice of the profession of dentistry evidencing moral unfitness to practice.' During summation, the prosecutor argued that the defendant had surrendered his license because he 'had practiced the profession of dentistry fraudulently.' Thereafter, during the Supreme Court's instructions to the jury, the court instructed the jurors that 'there was evidence in the case that on another occasion, the defendant engaged in criminal conduct and was convicted of a crime,' which was 'offered as evidence for [the jurors'] consideration on the questions of whether those facts are inextricably interwoven with the crimes charged, if [they] find the evidence believable, [they] may consider it for that limited purpose and for none other.' The references to fraud and moral turpitude were not relevant to the issue of whether the defendant was unlicensed and was aware that he was unlicensed. Under the circumstances, any probative value of the evidence of the prior fraud was outweighed by its prejudicial effect ...". ***People v. Hollander*, 2019 N.Y. Slip Op. 07950, Second Dept 11-6-19**

CRIMINAL LAW, JUDGES, CONSTITUTION LAW, EVIDENCE.

TRIAL JUDGE SHOULD NOT HAVE LIMITED DEFENSE CROSS-EXAMINATION OF A WITNESS TESTIFYING ABOUT DNA TRANSFER, AND SHOULD NOT HAVE INSTRUCTED THE JURY TO ACCEPT A POLICE OFFICER'S EXPLANATION, NEW TRIAL ORDERED.

The Second Department, reversing defendant's conviction, determined the trial judge should not have limited cross-examination of the prosecution's witness about DNA transfer, and should not have instructed the jury, during defense counsel's summation, to accept the testimony of a prosecution witness: "... [T]he defendant's contention that his right to confrontation was violated when the Supreme Court limited cross-examination of a prosecution witness on the issue of DNA transfer is preserved for appellate review ... . Furthermore, the court's limitation of defense counsel's cross-examination with regard to DNA transfer was an improvident exercise of discretion, since the testimony defense counsel sought to elicit would have been relevant and would not have confused or misled the jury ... . Moreover, under the circumstances presented, the error was not harmless, as there is a reasonable possibility that the error contributed to the defendant's convictions ... . We also agree with the defendant's contention that his right to a fair trial was violated when, during summation, defense counsel attacked the credibility of the testimony of certain police officers regarding wanted posters, and the Supreme Court instructed the jury, 'there was testimony on that. The jurors will be bound by its recollection of the testimony and the explanation.' Since a 'jury is presumed to follow the court's instructions' ... , the court's instruction, which bound the jury to accept the officer's explanation, rather than to rely on its recollection of the testimony and the evidence, was erroneous." ***People v. Kennedy*, 2019 N.Y. Slip Op. 07899, Second Dept 11-6-1**

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA).

DEFENDANT WAS ENTITLED TO A DOWNWARD DEPARTURE IN THIS STATUTORY RAPE CASE.

The Second Department, reducing defendant's risk assessment from level 2 to level 1, determined a downward department was appropriate because the statutory rape conviction involved consensual sex and defendant had no other sexual offenses in his history: "In cases of statutory rape, the Board has long recognized that strict application of the Guidelines may in some instances result in overassessment of the offender's risk to public safety. The Guidelines provide that '[t]he Board or a court may choose to depart downward in an appropriate case and in those instances where (i) the victim's lack of consent is due only to inability to consent by virtue of age and (ii) scoring 25 points in this category results in an over-assessment of the offender's risk to public safety' ... . Considering all of the circumstances present here, including that this offense is the only sex-related crime in the defendant's history, as well as the fact that the defendant's overall score of 80 points, as reduced by the Supreme Court, was near the low end of the range applicable to a presumptive level two designation (75 to 105 points), the assessment of 25 points under risk factor 2 results in an overassessment of the defendant's risk to public safety ... . Accordingly, a downward departure was appropriate, and the defendant should have been designated a level one sex offender." ***People v. Fisher*, 2019 N.Y. Slip Op. 07893, Second Dept 11-6-19**

PERSONAL INJURY, EVIDENCE.

PASSENGER'S MOTION FOR SUMMARY JUDGMENT IN THIS TRAFFIC-ACCIDENT, REAR-END COLLISION CASE SHOULD HAVE BEEN GRANTED DESPITE QUESTIONS OF FACT ABOUT THE TWO DRIVERS' NEGLIGENCE.

The Second Department, reversing Supreme Court, determined plaintiff-passenger's motion for summary judgment in this rear-end collision case should have been granted, despite questions of fact about whether either driver was negligent: "The right of an innocent passenger to summary judgment on the issue of whether he or she was at fault in the happening of an accident is not restricted by potential issues of comparative negligence as between two defendant drivers (see CPLR 3212[g] ...). Here, the plaintiffs made a prima facie showing of entitlement to summary judgment on their motion, and in opposition, the defendants failed to raise a triable issue of fact ... . It is uncontested that the injured plaintiff was a passenger seated in the rear passenger seat of the Freed vehicle. While both drivers involved in the accident submitted affidavits in which each maintained that they were free from fault, neither driver suggested that the injured plaintiff bore any fault in the happening of the accident ...". ***Romain v. City of New York*, 2019 N.Y. Slip Op. 07885, Second Dept 11-6-19**

PERSONAL INJURY, EVIDENCE.

THE ONE-HALF INCH DEFECT IN A STEP WAS NOT TRIVIAL AS A MATTER OF LAW AND DEFENDANT DID NOT DEMONSTRATE A LACK OF NOTICE OF THE DEFECT; DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court in this slip and fall case, determined that the 1/2 inch defect in a step was not trivial as a matter of law and the defendant did not demonstrate a lack of notice: " 'A defendant seeking dismissal of a complaint on the basis that the alleged defect is trivial must make a prima facie showing that the defect is, under the circumstances, physically insignificant and that the characteristics of the defect or the surrounding circumstances do not increase the risks it poses. Only then does the burden shift to the plaintiff to establish an issue of fact'… . Here, the evidence

attached to the defendants' moving papers indicated that there was a defect on the nosing of the step that was created by wear to the step and was approximately ½-inch long and extended down ½-inch on the riser. This alleged defective condition was located on a portion of the step where the plaintiff had to stand while twisting her body to close an exterior door. ... [T]he defendants' moving papers failed to eliminate triable issue of facts as to whether the condition had existed for a sufficient period of time for it to have been discovered and remedied by the defendants in the exercise of reasonable care ...". ***Coker v. McMillan*, 2019 N.Y. Slip Op. 07948, Second Dept 11-6-19**

PERSONAL INJURY, MUNICIPAL LAW.

THE CITY HAD CLEARED A PATH FREE OF ICE AND SNOW ON THE SIDEWALK; PLAINTIFF SLIPPED AND FELL WHEN SHE STEPPED BACKWARDS INTO AN AREA OF THE SIDEWALK WHICH HAD NOT BEEN CLEARED TO AVOID AN UNLEASHED DOG; THE CITY'S MOTION FOR SUMMARY JUDGMENT WAS PROPERLY GRANTED.

The Second Department determined the city's motion for summary judgment in this sidewalk slip and fall case was properly granted. There was a clear path on the sidewalk. Plaintiff slipped and fell when she stepped backward into an area of the sidewalk which had not been cleared to avoid an unleashed dog: " ' To render a municipality liable for an injury caused by the presence of snow and ice on the streets,' it must be established that ' the condition constitutes an unusual or dangerous obstruction to travel and that either the municipality caused the condition or a sufficient time had elapsed to afford a presumption of the existence of the condition and an opportunity to effect its removal' ... . This rule applies to sidewalks ... . 'Generally, whether a municipality was negligent in permitting extraordinary accumulations of snow to exist for an unreasonable period of time or whether it had a reasonable opportunity to remedy the condition are questions for the jury' ... . Here, in opposition to the City's prima facie showing of entitlement to judgment as a matter of law, the plaintiff failed to raise a triable issue of fact as to whether the City had constructive notice of the ice condition that allegedly caused the plaintiff to fall and whether the ice condition was unusual or dangerous. The evidence indicated that a clear path had been shoveled on the sidewalk, but that, due to repeated snow storms, snow and ice remained in the area of the sidewalk close to the street. When the plaintiff stepped backward to avoid the unleashed dog, she stepped in the area of the sidewalk closer to the street, upon which there was a two-inch thick patch of ice of unspecified size. There is no evidence that the patch of ice was unusual or dangerous." ***Cespedes v. City of New York*, 2019 N.Y. Slip Op. 07943, Second Dept 11-6-19**

THIRD DEPARTMENT

UNEMPLOYMENT INSURANCE.

CLAIMANT WAS AN EMPLOYEE OF A RESIDENTIAL NEWSPAPER DELIVERY SERVICE AND WAS ENTITLED TO UNEMPLOYMENT INSURANCE BENEFITS.

The Third Department determined claimant was an employee of a residential newspaper delivery service (Gannett) and was therefore entitled to unemployment insurance benefits: "... [W]e find that the indicators of control retained and exercised by Gannett in its contract and dealings with claimant are not materially distinguishable from those previously found to have established an employer-employee relationship between newspaper publishers and delivery workers ... . Although Gannett 'points out numerous factors that would support a finding that claimant was an independent contractor, we find, consistent with our holdings in similar appeals, that the record contains substantial evidence to support the Board's finding of an employment relationship, precluding further judicial review' ...". ***Matter of DiFalco (Gannett Satellite Info. Network, Inc.–Commissioner of Labor)*, 2019 N.Y. Slip Op. 07965, Third Dept 11-6-19**

FOURTH DEPARTMENT

ATTORNEYS, CIVIL PROCEDURE, FAMILY LAW.

SUPPORT MAGISTRATE SHOULD NOT HAVE ALLOWED FATHER'S ATTORNEY TO WITHDRAW WITHOUT NOTICE TO FATHER AND SHOULD NOT HAVE PROCEEDED IN FATHER'S ABSENCE.

The Fourth Department, reversing Family Court, determined the Support Magistrate's findings should not have been confirmed because the Support Magistrate allowed father's attorney to withdraw without notice to father and proceeded in father's absence: "... [T]he Support Magistrate erred in allowing the father's attorney to withdraw as counsel and in proceeding with the hearing in the father's absence. 'An attorney may withdraw as counsel of record only upon a showing of good and sufficient cause and upon reasonable notice to the client . . . [, and a] purported withdrawal without proof that reasonable notice was given is ineffective' ... . Here, the father's attorney did not make a written motion to withdraw; rather, counsel merely agreed when the Support Magistrate, after noting the father's failure to appear for the hearing, offered to relieve her of the assignment. The absence of evidence that the father was provided notice of his counsel's decision to withdraw in accordance with CPLR 321 (b) (2) renders the Support Magistrate's finding of default improper ...". ***Matter of Gonzalez v. Bebee*, 2019 N.Y. Slip Op. 08027, Fourth Dept 11-8-19**

COURT OF CLAIMS, MEDICAL MALPRACTICE, NEGLIGENCE.

NOTICE OF INTENT WAS TIMELY AND THE CLAIM WAS NOT JURISDICTIONALLY DEFECTIVE, INMATE'S MEDICAL MALPRACTICE ACTION AGAINST THE STATE REINSTATED.

The Fourth Department, reversing the Court of Claims, determined that the notice of intent was timely and the notice of intent and the claim are not jurisdictionally defective in this medical malpractice action against the state. The claimant was an inmate when he underwent hip replacement surgery. The claim alleged inadequate treatment led to infection, requiring further surgeries. The date of the accrual of the action was tolled by continuous treatment, and some mistakes concerning the nature of the injuries (i.e., left hip versus right hip) did not prejudice the defendant: "Generally, a medical malpractice claim accrues on the date of the alleged malpractice, but the statute of limitations is tolled 'until the end of the course of continuous treatment' ... . That toll likewise applies to the time periods contained in Court of Claims Act § 10 (3) ... . Here, the record establishes that claimant was receiving ongoing treatment for his left hip replacement during postoperative follow-up visits through June 12, 2014, when he was transported to a hospital for treatment of the infection that developed at the incision site, which had not been diagnosed during those follow-up visits. We thus conclude that the notice of intent, filed and served on August 22, 2012, was timely inasmuch as it was filed and served within ninety days of the accrual of the claim. The fact that the claim listed a different date of the alleged injury than the notice of intent is a matter related to the contents of the documents, not their timeliness. We recognize that, generally, the failure to treat a condition is not considered continuous treatment so as to toll the statute of limitations ... . In such cases, however, there is a lack of awareness of a need for further treatment and thus no concern relating to the interruption of corrective medical treatment ... . Here, claimant was already being treated for the surgical incision that eventually became infected and, therefore, 'further treatment [was] explicitly anticipated by both [defendant's medical staff] and [claimant,] as manifested in form of . . . regularly scheduled appointment[s]' to monitor the incision and remove staples ... . Moreover, this is not truly a failure-to-treat case inasmuch as defendant's employees did, in fact, attempt to treat the incision area by applying ointment and dressing the area." ***Gang v. State of New York*, 2019 N.Y. Slip Op. 08041, Fourth Dept 11-8-19**

CRIMINAL LAW.

DEFENDANT ENTITLED TO A HEARING ON WHAT SHOULD BE REDACTED FROM THE PRESENTENCE REPORT BUT IS NOT ENTITLED TO RESENTENCING.

The Fourth Department determined defendant in this manslaughter case was entitled to a hearing to determine what information should be redacted from the presentence report. However she was not entitled to resentencing: "Defendant ... contends that this matter should be remitted for a conference or summary hearing to determine what information should be redacted from the presentence report. We agree, and we note that the People do not oppose remittal for that purpose. The record establishes that defendant sent a letter to County Court objecting to certain portions of the report, including references to her failure to cooperate with law enforcement and to her invocation of her right to counsel. At sentencing, the court acknowledged the objections and indicated that it agreed with some, but not all, of them. The court, however, failed to articulate which portions should be redacted. Accordingly, because 'defendant was not properly afforded an opportunity to challenge the contents of the presentence report' ... , we hold the case and remit the matter to County Court for further proceedings in accordance with our decision. To the extent that defendant contends that she is entitled to be resentenced based on the alleged errors in the presentence report, we reject that contention inasmuch as there is no indication that the court relied on the alleged improper information contained in the report in sentencing her ...". ***People v. Ferguson*, 2019 N.Y. Slip Op. 08016, Fourth Dept 11-8-19**

CRIMINAL LAW.

THE WAIVER OF INDICTMENT IS JURISDICTIONALLY DEFECTIVE FOR FAILURE TO INCLUDE THE APPROXIMATE TIME OF EACH OFFENSE.

The Fourth Department, reversing defendant's conviction by guilty plea, determined the waiver of indictment was jurisdictionally defective for failure state the approximate time of each offense: "A jurisdictionally valid waiver of indictment must contain, inter alia, the 'approximate time' of each offense charged in the superior court information (SCI) ... . That requirement is strictly enforced ... . '[S]ubstantial compliance will not be tolerated' ... . Here, the waiver of indictment does not contain the approximate time of the offense ... . Inasmuch as the SCI also does not contain that information, we need not consider whether to adopt the so-called 'single document' rule ... . We therefore reverse the judgment, vacate the plea and waiver of indictment, and dismiss the SCI ...". ***People v. Denis*, 2019 N.Y. Slip Op. 08047, Fourth Dept 11-8-19**

CRIMINAL LAW, EVIDENCE.

SEIZURE OF DEFENDANT WAS BASED UPON AN ANONYMOUS TIP, SEIZED EVIDENCE SHOULD HAVE BEEN SUPPRESSED.

The Fourth Department, reversing the relevant convictions, determined the police officer effectively seized defendant by blocking defendant's car based upon an anonymous tip. The evidence seized from the car should have been suppressed:

"The conviction of criminal possession of a weapon in the second degree arises from a police encounter during which an officer received information from an anonymous 911 call that drugs were being sold out of a vehicle. The officer arrived on the scene and observed a legally parked vehicle matching the description given by the anonymous caller and further observed defendant in a fully reclined position in the driver's seat. The officer parked his patrol car alongside defendant's vehicle in such a manner as to prevent defendant from driving away and, as the People stipulated in their post-hearing memorandum, the officer thereby effectively seized the vehicle. We agree with defendant that the police lacked reasonable suspicion to justify the initial seizure, and thus County Court erred in refusing to suppress both the tangible property seized, i.e., the weapon and marihuana found in the vehicle, and the statements defendant made to the police at the time of his arrest ... . Based on the anonymous tip and defendant's otherwise innocuous behavior ... , the officer had, at most, a 'founded suspicion that criminal activity [was] afoot, which permitted him to approach the vehicle and make a common-law inquiry of its occupants …'. The officer did not make any 'confirmatory observations' of the criminal behavior reported by the 911 caller ... and therefore did not have 'a reasonable suspicion that [defendant] was involved in a felony or misdemeanor' to justify the seizure ...". ***People v. Williams*, 2019 N.Y. Slip Op. 08048, Fourth Dept 11-8-19**

CRIMINAL LAW, EVIDENCE, ATTORNEYS.

ALLOWING LOSS PREVENTION OFFICERS TO IDENTIFY DEFENDANT IN A SURVEILLANCE VIDEO MAY HAVE BEEN ERROR BUT WAS NOT DEMONSTRATED TO CONSTITUTE INEFFECTIVE ASSISTANCE OF COUNSEL.

The Fourth Department determined defense counsel's failure to object to testimony of loss prevention officers identifying defendant in a surveillance video was not demonstrated to amount to ineffective assistance: "Although we agree with defendant that there is no basis in the record to conclude that the loss prevention officers who gave testimony identifying defendant as an individual depicted in the surveillance video were more likely to correctly identify defendant from the video than the jury ... , we further conclude that defendant failed to 'demonstrate the absence of strategic or other legitimate explanations for counsel's alleged shortcoming[]' in failing to object to the admission of that testimony ...". ***People v. Hines*, 2019 N.Y. Slip Op. 08032, Fourth Dept 11-8-19**

FAMILY LAW.

MOTHER ENTITLED TO A HEARING ON WHETHER A CHANGE IN HER CIRCUMSTANCES WARRANTED A RETURN OF HER CHILDREN; CUSTODY OF THE CHILDREN HAD PREVIOUSLY BEEN AWARDED TO RESPONDENT (GREAT AUNT).

The Fourth Department, reversing Family Court, determined mother was entitled to a hearing on whether there had been a change of circumstances warranting the return of the custody of the children to her. Custody had previously been awarded to respondent (great aunt): "Inasmuch as there has been a prior judicial determination of extraordinary circumstances supporting the award of custody to respondent, 'the appropriate standard in addressing the possible modification of the prior order is whether there has been a change of circumstances' warranting an inquiry whether modification of custody or visitation is in the best interests of the children ... . We agree with the mother that Family Court erred in granting respondent's motion to dismiss the petitions at the close of the mother's case on the ground that the mother failed to establish a sufficient change in circumstances since entry of the stipulated order ... . At the time the prior order of custody and visitation was entered, the mother did not have a vehicle or employment, and she lived with a man who was prohibited by court order from having any contact with the subject children. The mother established that, at the time of the hearing, she owned a car, worked full-time, and no longer lived with or had a relationship with the aforementioned man. Indeed, in its oral decision dismissing the petitions, the court noted that the mother had 'improved' herself and that it was 'impressed' with her progress." ***Matter of Heinsler v. Sero*, 2019 N.Y. Slip Op. 08052, Fourth Dept 11-8-19**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

PLAINTIFF FELL WHEN HE ATTEMPTED TO LEAVE A TRAILER THROUGH THE EXIT WHICH DID NOT HAVE A STAIRWAY ATTACHED, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON THE LABOR LAW §§ 240(1) AND 200 CAUSES OF ACTION SHOULD NOT HAVE BEEN GRANTED.

The Fourth Department, reversing Supreme Court, determined that defendant's motion for summary judgment on the Labor Law §§ 240(1) and 200 causes of action should not have been granted on the ground plaintiff's action was the sole proximate cause of his injury. There were two exits to the trailer plaintiff was in, one had a stairway attached and one did not. Plaintiff fell to the ground when he attempted to use the exit with no stairway: "Defendants failed to establish as a matter of law that plaintiff's actions were the sole proximate cause of the accident, i.e., that there was a staircase by which plaintiff could have exited the trailer, that he knew that a staircase was available and that he was expected to use it, that he chose for 'no good reason' not to use it and that, if he had not made that choice, he would not have been injured ... . For the same reason, we conclude that the court erred in granting defendants' motion and cross motion with respect to the claims under Labor Law § 200 and common-law negligence ...". ***Dziadaszek v. Legacy Stratford, LLC*, 2019 N.Y. Slip Op. 08029, Fourth Department 11-8-19**

PERSONAL INJURY.

QUESTION OF FACT WHETHER THE "DANGER INVITES RESCUE" DOCTRINE APPLIED; PLAINTIFF ALLEGEDLY HURT HER BACK TRYING TO PREVENT A PATIENT FROM FALLING WHEN DEFENDANT'S EMPLOYEE IMPROPERLY USED A HOYER LIFT TO TRANSFER THE PATIENT FROM A WHEEL CHAIR TO A BED.

The Fourth Department, reversing (modifying) Supreme Court, determined there was a question of fact whether the "danger invites rescue" doctrine applied. One of defendant's employees tried to use a Hoyer lift to transfer the patient plaintiff was accompanying from a wheel chair to a bed. The lift began to tip over and plaintiff allegedly hurt her back trying to prevent the patient from falling: "... [T]he court erred in granting the motion with respect to the claim for negligence based on the 'danger invites rescue' doctrine (rescue doctrine) ... , and we therefore modify the order accordingly. That 'doctrine imposes liability upon a party who, by his [or her] culpable act has placed another person in a position of imminent peril which invites a third person, the rescuing plaintiff, to come to his [or her] aid' ... , on the ground that '[t]he wrong that imperils life is a wrong to the imperilled victim . . . [and] also to his [or her] rescuer' ... . For the rescue doctrine to apply, 'it is sufficient that [the] plaintiff held a reasonable belief of imminent peril of serious injury to another, and it matters not that the peril feared did not materialize' ... . Here, in support of its motion, defendant submitted, inter alia, plaintiff's deposition testimony wherein she testified that she informed defendant's employee that two people were needed to move the patient onto the bed using the Hoyer lift, but the employee insisted on using the lift alone and did so in a manner that caused the lift to tilt which, in turn, caused the patient to begin to fall off of it. We conclude that the evidence submitted by defendant in support of its motion failed to establish that 'plaintiff's rescue efforts were unreasonable as a matter of law or that plaintiff's actions were so rash under the circumstances as to constitute an intervening and superseding cause' of [her] alleged injuries' ...". ***Payne v. Rome Mem. Hosp.*, 2019 N.Y. Slip Op. 08024, Fourth Dept 11-8-19**

PERSONAL INJURY, EVIDENCE.

DEFENDANT DRIVER STRUCK A DISABLED CAR WHICH WAS SIDEWAYS IN THE LEFT LANE OF A HIGHWAY; THE CAR WAS BLACK AND THE ACCIDENT HAPPENED AT NIGHT IN A STEADY RAIN; DEFENDANT DRIVER CLAIMED TO BE GOING THE SPEED LIMIT, 65 MPH; DEFENDANTS' MOTION FOR SUMMARY JUDGMENT BASED UPON THE EMERGENCY DOCTRINE WAS PROPERLY DENIED.

The Fourth Department determined defendants' (Grice defendants') motion for summary judgment in this traffic accident case was properly denied. Defendant driver, who allegedly was travelling at the speed limit, 65 mph, struck a disabled car which was sideways in the left lane of a highway. The car was black and the accident happened at night when it was raining. Defendants argued the emergency doctrine applied: "Contrary to the Grice defendants' contention, their submissions failed to establish as a matter of law that defendant was confronted with a sudden and unexpected emergency situation to which he did not contribute. Although the accident occurred at night and the disabled vehicle was black and did not have its headlights on, the subject area of the highway was not curved and instead was straight and level with no permanent view obstructions or roadway defects to prevent defendant from perceiving the disabled vehicle. In addition, defendant testified at his deposition that he could see the 'standard distance' with his headlights illuminating the roadway, yet he was unable to provide a reason why he did not observe the disabled vehicle prior to impact ... . The fact that the disabled vehicle was positioned directly ahead of defendant on such an area of the highway with the headlights of defendant's vehicle illuminating the roadway, 'considered in light of [defendant's] conceded failure to see anything prior to the impact, and his failure to take any steps to avoid the collision . . . , calls into question [his] testimony concerning the speed of his vehicle and his attentiveness as he drove' ... . Moreover, inasmuch as the Grice defendants' submissions established that the subject area of the highway was not well lit, that it was raining steadily rather than merely precipitating lightly, and that the highway was wet, we conclude that there is an issue of fact whether defendant, who testified that he was driving at the posted speed limit of 65 miles per hour, was nonetheless operating the vehicle at a speed greater than was reasonable and prudent under the conditions ... . 'If [a trier of fact] determines that [defendant's] speed was unreasonable under the existing weather and road conditions, [the trier of fact] could also conclude that [defendant's] own unreasonable speed was what deprived him of sufficient time to avoid the collision, thereby preventing him from escaping liability under the emergency doctrine' ...". ***White v. Connors*, 2019 N.Y. Slip Op. 08017, Fourth Dept 11-8-19**

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