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CasePrepPlus

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COURT OF APPEALS

CRIMINAL LAW.

THE TOP COUNT OF A MISDEMEANOR COMPLAINT WAS NOT SUPPORTED BY SWORN ALLEGATIONS OF FACT, BUT THE LESSER COUNTS WERE SUPPORTED; A GUILTY PLEA TO THE JURISDICTIONALLY DEFECTIVE TOP COUNT DID NOT WAIVE THE DEFECT AND DEFENDANT'S CONVICTION WAS PROPERLY REVERSED.

The Court of Appeals, in a two sentence memorandum decision, followed by two lengthy concurring opinions, and a lengthy three-judge dissenting opinion, determined the Appellate Term properly reversed defendant's guilty plea to a jurisdictionally defective count of a misdemeanor complaint. The top count of the misdemeanor complaint (oxycodone possession) was not sufficiently supported by the factual deposition, but the lesser counts of the complaint (marijuana possession) were supported. Defendant pled guilty to the top count. Defendant's guilty plea did not waive the jurisdictional defect: "Even if the accusatory instrument properly sets out a lower-grade offense, a defendant's challenge to a conviction based on the jurisdictional deficiency of a higher-grade crime of a multi-count complaint is not waived by the defendant's guilty plea. The Appellate Term properly reversed the judgment of conviction and sentence on the ground 'that it was jurisdictionally defective as to the crime of which defendant was actually convicted' (*People v. Hightower*, 18 NY3d 249, 254 [2011])." ***People v. Thiam*, 2019 N.Y. Slip Op. 07712, CtApp 1-29-19**

FALSE ARREST, MALICIOUS PROSECUTION.

DEFENDANT WAS ACQUITTED OF MURDER AFTER IMPRISONMENT FOR TWO AND A HALF YEARS; HIS FALSE ARREST AND MALICIOUS PROSECUTION ACTION WAS PROPERLY DISMISSED AT THE SUMMARY JUDGMENT STAGE; TWO-JUDGE DISSENT ARGUED CONTESTED FACTS REQUIRED A TRIAL.

The Court of Appeals, in a one-sentence memorandum decision, over a two-judge dissenting opinion, determined that the defendants' motion for summary judgment in this false arrest/malicious prosecution case was properly granted. The dissenters argued contested facts required a trial: "The order of the Appellate Division should be affirmed, with costs. Plaintiff failed to raise any material, triable issue of fact with respect to whether probable cause for his arrest and prosecution was lacking, or as to whether the police acted with actual malice (see generally *De Lourdes Torres v. Jones*, 26 NY3d 742 [2016]). **From the dissent:** A jury acquitted plaintiff Wayne Roberts of murder in the second degree and related charges. He then sued the City of New York, the City Police Department and various police officers for, amongst other claims, false arrest and malicious prosecution. In his complaint, plaintiff asserted that he was wrongfully accused and imprisoned for two and half years, and maliciously prosecuted despite the lack of probable cause to arrest and legal justification to pursue his criminal prosecution. He claimed defendants acted with malice and in bad faith, in deliberate indifference to his rights. * * * Where, as here, conflicting evidence creates one or more material issues of fact, those issues 'must be resolved by the jury rather than by the court as a matter of law' (De Lourdes Torres, 26 NY3d at 771). The decision in this Court and the majority decision below both defy this basic principle." ***Roberts v. City of New York*, 2019 N.Y. Slip Op. 07713, CtApp 10-29-19**

INDIAN LAW.

DISPUTE BETWEEN RIVAL FACTIONS OF THE CAYUGA NATION INVOLVES TRIBAL LAW AND IS NOT THEREFORE WITHIN THE JURISDICTION OF NEW YORK COURTS.

The Court of Appeals, in a lengthy, comprehensive opinion by Judge Feinman, over two dissenting opinions, determined the dispute between two factions of the Cayuga Nation involved tribal law and therefore was not within the jurisdiction of New York courts. The opinion is too detailed to fairly summarize here: "Members of the Cayuga Nation, a federally-recognized Indian tribe, have been embroiled in a leadership dispute for more than a decade. One faction commenced this action, purportedly on behalf of the Nation, against individuals comprising the rival faction, asserting tort claims that are premised solely on defendants' alleged lack of authority to act on behalf of the Nation. To resolve these claims, New York courts would have to decide whether defendants were, at various times, or remain legitimate leaders of the tribe, a question that turns on disputed issues of tribal law that are not cognizable in the courts of this state given the Nation's exclusive authority over its internal affairs. Contrary to plaintiff's contentions, we cannot avoid this fundamental jurisdictional problem by decontextualizing a limited recognition determination issued by the Federal Bureau of Indian Affairs (BIA) that

recognized the plaintiff faction as the tribal government for the purpose of distributing federal funds. We therefore hold that New York courts lack subject matter jurisdiction to consider this dispute." ***Cayuga Nation v. Campbell*, 2019 N.Y. Slip Op. 07711, CtApp 10-29-19**

FIRST DEPARTMENT

CIVIL PROCEDURE, CIVIL RIGHTS LAW, BATTERY, EVIDENCE.

THE TRIAL COURT PROPERLY PRECLUDED DEFENDANTS FROM CALLING PLAINTIFF'S TREATING PHYSICIANS AS WITNESSES IN THIS POLICE EXCESSIVE FORCE CASE BECAUSE OF INADEQUATE NOTICE AND THE TRIAL COURT PROPERLY ACCEPTED PLAINTIFF'S REDACTIONS OF THE MEDICAL RECORDS BECAUSE DEFENDANTS FAILED TO SUGGEST THEIR OWN REDACTIONS.

The First Department determined the trial court properly precluded the defendants to call plaintiff's (Walid's) treating physicians as witnesses and properly redacted plaintiff's medical records. Plaintiff, a teenager with autism, brought this action against police officers for assault, battery and use of excessive force. Defendants did not give timely notice of their wish to call the treating doctors and did not supply their own suggested redactions: "We find that, under the circumstances, the trial court did not improvidently exercise its discretion in precluding defendants from introducing testimony from Walid's treating doctors at Ferncliff Manor. Defendants failed to disclose any of these witnesses until four days before trial, after having previously affirmatively represented to the court that they did not intend to call any witnesses. The court and plaintiffs relied on this representation in estimating the length of trial and selecting a jury. In view of the trial court's broad authority to control its courtroom, it was not unreasonable for the court to decline to add these witnesses and prolong the trial when a jury had already been chosen (twice) based on certain representations about its length ... . The trial court also did not improvidently exercise its discretion in allowing only a limited subset of Walid's records from Ferncliff Manor to be admitted into evidence. It is clear that these records required at least some redaction, including to eliminate double hearsay ... and propensity evidence ... . Because defendants refused to propose any redactions, after having been given ample opportunities to do so, the trial court was justified in adopting plaintiffs' proposed redactions instead. Even if defendants are correct that the complete records contain additional relevant evidence that should not have been excluded, having failed to propose any redactions of their own, defendants cannot now complain that the records should have been redacted less heavily." ***Walid M. v. City of New York*, 2019 N.Y. Slip Op. 07739, First Dept 10-29-19**

CRIMINAL LAW.

COURT SHOULD HAVE INQUIRED OF JURORS WHETHER THEIR CONCERNS ABOUT NOT BEING PAID BY THEIR EMPLOYERS DURING JURY DUTY WOULD AFFECT THEIR ABILITY TO RENDER AN IMPARTIAL VERDICT, NEW TRIAL ORDERED,

The First Department, reversing Supreme Court, determined the trial judge should have conducted further inquiry when three jurors stated that they could not continue deliberating because they were not being paid by their employers for the days they were on jury duty: "The court should have granted the defense request for inquiries into whether the financial pressure the jurors were experiencing had any bearing on their ability to deliberate fairly. In *People v. Hines* (191 AD2d 274 [1st Dept 1993], lv denied 81 NY2d 1074 [1993]), this Court held that although 'financial hardship is generally not a sufficient reason to warrant discharge when the trial is near completion,' the trial court 'should have ascertained whether the juror's financial difficulties would have affected his ability to deliberate impartially' (id. at 276). Similarly, in *People v. Cook* (52 AD3d 255, 256 [1st Dept 2008], lv denied 11 NY3d 735 [2008]), we observed that 'a juror's personal or financial inconvenience alone would be insufficient to establish the requisite manifest necessity' for a mistrial, but we went on to state that the fact that 'the juror was unable to declare her continued ability to deliberate fairly' weighed in favor of a mistrial. Here, the jury's note raised the possibility that one or more of the jurors referred to was unqualified, and the fact that they did not specifically volunteer, in their colloquies with the court, that financial pressures might compromise their impartiality did not obviate the necessity of an inquiry." ***People v. Alexander*, 2019 N.Y. Slip Op. 07715, First Dept 10-29-19**

CRIMINAL LAW.

JURY INSTRUCTIONS ON THE JUSTIFICATION DEFENSE WERE ADEQUATE, ARGUMENTS TO THE CONTRARY WERE NOT PRESERVED.

The First Department determined the jury was properly instructed on the justification defense and any argument that the court's instructions and the jury sheet did not comply with *Velez* (requiring the instruction that acquittal on the top count based upon the justification defense requires that deliberations on the lesser counts stop) was not preserved: "Defendant also asked the court, pursuant to *People v. Velez* (131 AD3d 129 [1st Dept 2015]) and its progeny, to charge that, if the jury acquitted him of the higher count of attempted first degree assault based on justification, then it should not continue with deliberations on the lower count of second-degree assault. The court charged the jury on the defense of justification to prevent a burglary, but declined to give a justification charge based on defense of a person. The court also told the jury that

if they find defendant not guilty of either count in the indictment by reason of justification, they must also find defendant not guilty of the other count as well 'because justification is a complete defense to both counts of the indictment.' Finally, the court instructed the jury on the elements of each crime, with the third element of both being 'that the defendant was not justified.' During deliberations, the jury asked the court for reinstruction on the elements of the charged crimes. In a supplemental charge, the trial court reread the elements of each offense, with both including the element 'that the defendant was not justified.' The jury returned a verdict finding defendant not guilty of attempted assault in the first degree, but guilty of assault in the second degree. On appeal, defendant contends that the court's initial and supplemental charges did not comply with Velez, and that the verdict sheet erroneously omitted the issue of justification. These claims are unpreserved. During a colloquy on the Velez issue, the court showed defense counsel a copy of its proposed charge, and defense counsel expressly agreed that it 'satisfies Velez.' Further, defense counsel made no objection to the charge as given. As to the supplemental charge, defense counsel never asked the court to repeat its Velez instruction, and did not object to its absence after the charge was given. Likewise, defendant made no objections to the verdict sheet. Under the circumstances, we decline to exercise our interest of justice jurisdiction to review these unpreserved claims." ***People v. Davis*, 2019 N.Y. Slip Op. 07754, First Dept 10-29-19**

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

SPECIAL NEEDS STUDENT'S STATUTORY ACTIONS AGAINST THE NYC DEPARTMENT OF EDUCATION'S OFFICE OF PUPIL TRANSPORTATION SHOULD NOT HAVE BEEN DISMISSED; THE AUTISTIC SIX-YEAR-OLD STUDENT WAS TRANSPORTED TO SCHOOL ON A FULL-SIZED BUS, GENERATING NINE INCIDENT REPORTS IN A SIX-WEEK PERIOD, INSTEAD OF THE MINI-BUS REQUIRED BY THE INDIVIDUALIZED EDUCATION PROGRAM.

The First Department, reversing Supreme Court, in a full-fledged opinion by Justice Moulton, over and extensive dissenting opinion, determined that a special needs student's statutory actions against NYC's Office of Pupil Transportation should not have been dismissed. The opinions are too detailed and comprehensive to fairly summarize: "[Plaintiff student, I.M., who was six at the time, is] a nonverbal diapered child with autism spectrum disorder, moderate to severe intellectual disability, and attention deficit disorder. His 2005-06 Individualized Educational Program (IEP) stated, in bold faced type, that he required a "mini-bus" to transport him to and from school ... . However, due to a computer coding error he was placed on a full-sized school bus operated by defendant the Pioneer Transportation Corporation (Pioneer) from September 8, 2005 through October 19, 2005. During this period, Pioneer filed nine incident reports with I.M.'s school in connection with these trips. I.M.'s family also repeatedly complained to I.M.'s school and to the New York City Department of Education's Office of Pupil Transportation (OPT). The problem was not rectified until October 20, 2005, when I.M. was placed on a minibus in accordance with his IEP. Plaintiff ... appeals from Supreme Court's dismissal of his claims under section 504(a) of the Rehabilitation Act of 1973 ... (the RA), Title II of the Americans with Disabilities Act of 1990 (the ADA), section 296(2)(a) of the New York State Executive Law, and section 8-107 of the Administrative Code of the City of New York (the State and City HRLs). Supreme Court dismissed these statutory claims on the basis that '[t]here is no evidence that the infant was purposefully discriminated against as a result of his disability when he was placed on the full-sized bus.' ... It let stand plaintiff's common-law negligence and gross negligence claims. The only issue on appeal is whether Supreme Court properly dismissed plaintiff's statutory discrimination claims. We ... reverse ... and reinstate these statutory discrimination claims against the Board of Education of the City of New York, its employees Lorraine Sesti and Joanne Richburg, and OPT (collectively DOE) ... . We affirm Supreme Court's dismissal of the statutory claims against Pioneer but on different grounds. Viewing the evidence, much of which is uncontested, ... issues of fact exist as to whether DOE violated the discrimination statutes by acting with bad faith, gross misjudgment, or deliberate indifference to [plaintiff's] rights to be transported by minibus, thereby depriving him of a FAPE [free appropriate public education]. A reasonable jury could conclude that a simple bureaucratic mistake was compounded by inaction into a violation of the RA, the ADA and the State and City HRLs." ***I.M. v. City of New York*, 2019 N.Y. Slip Op. 07756, First Dept 10-29-19**

INSURANCE LAW, CIVIL PROCEDURE, PRIVILEGE.

INSURER'S ACCIDENT INVESTIGATION REPORT IS PRIVILEGED AND NOT DISCOVERABLE.

The First Department, reversing Supreme Court, determined that an insurer's accident investigation report is privileged and not discoverable: "Documents in an insurer's claim file, including an accident investigation report, that were prepared for litigation against its insured are immune from disclosure (see CPLR 3101[d][2] ...). Although documents in a first-party insurance action prepared in an insurer's ordinary course of business in investigating whether to accept or reject coverage are discoverable (see CPLR 3101[g] ...), there is no indication that such documents are being protected here. In the absence of any demonstration of hardship by plaintiff, the insurer's accident investigation report remains privileged ...". ***Dabo v. One Hudson Yards Owner, LLC*, 2019 N.Y. Slip Op. 07751, First Dept 10-29-19**

LABOR LAW-CONSTRUCTION LAW, EVIDENCE.

SCAFFOLD TIPPED PINNING PLAINTIFF'S HAND AGAINST A WALL; SPECULATIVE EVIDENCE DID NOT RAISE A QUESTION OF FACT ABOUT PLAINTIFF'S ACTIONS BEING THE SOLE PROXIMATE CAUSE; PLAINTIFF WAS ENTITLED TO SUMMARY JUDGMENT ON HIS LABOR LAW § 240(1) CAUSE OF ACTION.

The First Department, reversing (modifying) Supreme Court, determined plaintiff was entitled to summary judgment on his Labor Law § 240(1) cause of action. A scaffold tipped and pinned his hand against a wall, and plaintiff's actions did not constitute the sole proximate cause of the injuries: "Plaintiff is entitled to partial summary judgment on his Labor Law § 240(1) claim. Regardless of whether plaintiff's hand was struck by the beam of the scaffold or the counterweights placed on the scaffold, this matter falls within the purview of Labor Law § 240(1). Plaintiff's injuries were the direct result of the application of the force of gravity to the scaffold and the counterweights, and, although the scaffold and counterweights fell a short distance after the scaffold tipped, the elevation differential was not de minimis, as their combined weight of over 2,400 pounds was capable of generating a great amount of force during the short descent ... .The scaffold was a load that required securing for the purpose of plaintiff's undertaking ... . Contrary to defendants' contention, the counterweights were not a safety device provided to secure the equipment being tied to the bracket, but were to balance a scaffold that would later be suspended from it. Furthermore, the record establishes, as a matter of law, that plaintiff was not the sole proximate cause of his injuries. Plaintiff and his coworker both testified that there was slack in the tieback at the time of the accident. Their foreman's testimony that the scaffold tipped over due to overtightening of the tieback by plaintiff is speculative, as he did not witness the accident. The reports and expert affidavit submitted by defendants concluding that the accident was caused by overtightening are also speculative. In any event, even accepting the defense's proof, it is still insufficient to raise an issue of fact as to sole proximate causation, since the record established that the scaffold tipped over in part due to being inadequately secured, raising only comparative negligence by plaintiff ...". ***Ortega v. Trinity Hudson Holding LLC*, 2019 N.Y. Slip Op. 07743, First Dept 10-29-19**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

ALTHOUGH THE FREE-STANDING BRACE FRAME WAS AT THE SAME LEVEL AS PLAINTIFF AT THE TIME IT FELL OVER, PLAINTIFF WAS ENTITLED TO SUMMARY JUDGMENT ON HIS LABOR LAW § 240(1) CAUSE OF ACTION.

The First Department determined that, although the brace frame and plaintiff were at the same level, the injury caused by the free-standing brace frame tipping over was covered by Labor Law § 240(1): "The brace frames ... , which stood at least 12 feet tall and weighed approximately 1,500 pounds, were not connected to the excavator bucket or any other device either to hold them upright once the connector pins were removed or to lower them slowly to the ground. When plaintiff removed the last connector pin, the brace frame fell and struck him. Contrary to defendants' contention, this evidence establishes prima facie that the activity in which plaintiff was engaged is covered under Labor Law § 240(1). Although plaintiff and the brace frame were at the same level at the time of the accident, the work plaintiff was doing posed a substantial gravity-related risk, because the falling of the brace frame away from the formwork panel would have generated a significant amount of force ... . An engineer employed by defendant Peri Formwork Systems, Inc., the manufacturer of the formwork structure, testified that if a formwork structure was disassembled on the ground, then the brace frames had to be secured by a crane before removing them, and if the formwork structure was standing upright, then each individual component had to be secured by a crane. He said that an unsecured brace frame freestanding in the air would pose a hazard to any worker standing nearby." ***Encarnacion v. 3361 Third Ave. Hous. Dev. Fund Corp.*, 2019 N.Y. Slip Op. 07746, First Dept 10-29-19**

LABOR LAW-CONSTRUCTION LAW, LANDLORD-TENANT, PERSONAL INJURY.

THERE IS A QUESTION OF FACT WHETHER PLAINTIFF'S WORK CONSTITUTED 'ALTERING' WITHIN THE MEANING OF LABOR LAW § 241(6); ACTION AGAINST OUT-OF-POSSESSION LANDLORD PROPERLY DISMISSED, NO SUPERVISORY CONTROL OF THE WORK.

The First Department, reversing Supreme Court, determined the defendant's motion for summary judgment should not have been granted in this Labor Law § 241(6) action. But action against the out-of-possession landlord was properly dismissed because the landlord did not exercise and supervisory control over the work: "Plaintiff alleges that he was injured while installing a refrigeration condenser unit at premises owned by Boss and leased by Antillana. We find that the motion court improperly granted Antillana's motion for summary judgment dismissing the Labor Law § 241(6) claim. Plaintiff was engaged in an activity within the purview of Labor Law § 241(6). Plaintiff worked at the subject premises during the build-out installing three refrigeration system condensers, which weighed about 3000 pounds and had to be moved with a forklift. Three weeks after the store was opened, plaintiff was asked to install an additional condenser which weighed about 200 pounds. The president of Antillana acknowledged that there had been a renovation project underway at the premises before plaintiff's accident. We find that there is an issue of fact whether the subsequent installation of the condenser constituted an 'alteration' of the premises, which falls within the ambit of 'construction' work under Labor Law § 241(6) ... . We also find triable issues of material fact as to whether Antillana violated 12 NYCRR 23-1.25(d), (e)(1), (e)(3), and (f), relied upon by

plaintiff to support his Labor Law § 241(6) claim." ***Rodriguez v. Antillana & Metro Supermarket Corp.*, 2019 N.Y. Slip Op. 07714, First Dept 10-29-19**

PERSONAL INJURY.

RES IPSA LOQUITUR DOCTRINE MAY APPLY IN THIS ELEVATOR MALFUNCTION CASE.

The First Department determined the res ipsa loquitur doctrine may apply to this elevator malfunction case and defendant's motion for summary judgment was properly denied: "Summary judgment was properly denied in this action where plaintiff was injured when the elevator door in defendant's building closed unexpectedly on her hand as she attempted to exit. Defendant has failed to establish, as a matter of law, that res ipsa loquitur is inapplicable to this case ... . In order for the doctrine to apply, three elements must be established: 1) the event must be of a kind which ordinarily does not occur in the absence of someone's negligence; 2) it must be cause by an agency or instrumentality within the exclusive control of defendant; and 3) it must not have been due to any voluntary action or contribution on the part of the plaintiff ... . The rule has the effect of creating a prima facie case of negligence sufficient for submission to the jury, and the jury may -— but is not required to -— draw the permissible inference ... . Here, plaintiff claims that she was injured while attempting to exit an elevator in defendant's building, and that the elevator which malfunctioned was within the exclusive control of defendant. Elevator malfunctions are circumstances giving rise to the possible application of res ipsa loquitur to prove negligence ...". ***Carter v. New York City Hous. Auth.*, 2019 N.Y. Slip Op. 07722, First Dept 10-29-19**

PERSONAL INJURY, MUNICIPAL LAW.

ALTHOUGH THE EXCUSE WAS INADEQUATE, THE CITY HAD ACTUAL NOTICE OF THE HOLE PETITIONER STEPPED IN AND DELAY IN FILING THE NOTICE OF CLAIM DID NOT PREJUDICE THE CITY, PETITIONER'S MOTION FOR LEAVE TO FILE A LATE NOTICE OF CLAIM SHOULD HAVE BEEN GRANTED.

The First Department, reversing Supreme Court, determined petitioner's motion for leave to file a late notice of claim in this slip and fall case should have been granted. Although the excuse was inadequate, the city had actual notice and was not prejudiced by the delay: "Petitioner's assertion that he was unaware of the requirement that he file a notice of claim within 90 days of his accident is not a reasonable excuse for failing to file a timely notice ... . His contention that his injuries prevented him from timely filing a notice of claim is not an acceptable excuse, because he failed to provide any medical documentation to support his claimed incapacity ... . Notwithstanding, his failure to establish a reasonable excuse for not timely filing a notice of claim is not fatal ... . The City obtained actual notice of the accident within a reasonable time after the 90-day period expired ... . It does not contest petitioner's assertion that the condition of the hole remained unchanged at the time he sought leave ... . Although petitioner does not address whether anyone saw the accident, the bare claim that the delay would make it difficult for the City to locate witnesses is insufficient to establish prejudice ...". ***Matter of Montero v. City of New York*, 2019 N.Y. Slip Op. 07732, First Dept 10-29-19**

SECOND DEPARTMENT

ARBITRATION, EMPLOYMENT LAW, MUNICIPAL LAW. CONTRACT LAW.

THERE IS A REASONABLE RELATIONSHIP BETWEEN THE GRIEVANCE AND THE COLLECTIVE BARGAINING AGREEMENT (CBA); THE CITY'S PETITION TO PERMANENTLY STAY ARBITRATION SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined that the city-employer's motion to permanently stay arbitration should not have been granted: "In determining whether a grievance is arbitrable, a court must 'first ask whether there is any statutory, constitutional or public policy prohibition against arbitration of the grievance,' and if there is no prohibition against arbitration, the court must 'then examine the CBA [collective bargaining agreement] to determine if the parties have agreed to arbitrate the dispute at issue' ... . Where, as here, the relevant arbitration provision of the CBA is broad, providing for arbitration of any grievance 'involving the interpretation or application of any provision of this Agreement,' a court 'should merely determine whether there is a reasonable relationship between the subject matter of the dispute and the general subject matter of the CBA' ... . 'If there is none, the issue, as a matter of law, is not arbitrable. If there is, the court should rule the matter arbitrable, and the arbitrator will then make a more exacting interpretation of the precise scope of the substantive provisions of the CBA, and whether the subject matter of the dispute fits within them' ... . According to Local 628, the City, by offering a paramedic training course to its firefighters, violated article 33 of the CBA, which contains various provisions concerning the EMS Program, including a provision stating that the 'EMS Program shall mean the level of services provided as of the date of this Agreement.' Contrary to the City's contention, a reasonable relationship exists between Local 628's grievance and the general subject matter of the CBA ... . '[T]he question of the scope of the substantive provisions of the CBA is a matter of contract interpretation and application reserved for the arbitrator' ...". ***Matter of City of Yonkers v. Yonkers Fire Fighters, Local 628, IAFF, AFL-CIO*, 2019 N.Y. Slip Op. 07776, Second Dept 10-30-19**

CIVIL PROCEDURE, FORECLOSURE.

DEFENDANTS' COUNSEL WAIVED ANY LACK OF PERSONAL JURISDICTION BY FILING A NOTICE OF APPEARANCE, NOTWITHSTANDING THE STATEMENT IN THE NOTICE THAT JURISDICTIONAL DEFENSES WERE NOT WAIVED.

The Second Department determined defendants' counsel had waived any lack of personal jurisdiction in this foreclosure action by filing a notice of appearance, notwithstanding the statement in the notice that jurisdictional defenses were not waived: " 'The filing of a notice of appearance in an action by a party's counsel serves as a waiver of any objection to personal jurisdiction in the absence of either the service of an answer which raises a jurisdictional objection, or a motion to dismiss pursuant to CPLR 3211(a)(8) for lack of personal jurisdiction' ... . Here, the defendants' counsel filed a notice of appearance dated February 25, 2015, and the defendants did not move to dismiss the complaint insofar as asserted against them on the ground of lack of personal jurisdiction at that time, or assert lack of personal jurisdiction in a responsive pleading ... . It is immaterial that the notice of appearance, in addition to requesting that all papers in the action be served on the defendants' counsel, stated that '[t]he Defendants do not waive any jurisdictional defenses by reason of the within appearance.' This language is not a talisman to protect the defendants from their failure to take timely and appropriate action to preserve their defense of lack of personal jurisdiction. The defendants did not move to dismiss the complaint insofar as asserted against them on the ground of lack of personal jurisdiction until January 2016, more than 10 months after filing the notice of appearance. Under these circumstances, the defendants waived any claim that the Supreme Court lacked personal jurisdiction over them in this action." ***JP Morgan Chase Bank, N.A. v. Jacobowitz*, 2019 N.Y. Slip Op. 07773, Second Dept 10-30-19**

CRIMINAL LAW.

DEFENSE PEREMPTORY CHALLENGES TO WHITE JURORS NOT SUPPORTED BY RACE-NEUTRAL REASONS; THE ALLEGED ERROR IN INSTRUCTING THE JURY ON THE JUSTIFICATION DEFENSE WAS NOT PRESERVED.

The Second Department determined defense peremptory challenges to prospective white jurors were not justified on race-neutral grounds and the alleged error in instructing the jury on the justification defense was not preserved: "The defendant contends that the Supreme Court erred in disallowing his peremptory challenges to two prospective white jurors because he provided sufficient race-neutral explanations for challenging them ... . However, defense counsel's proffered explanations for challenging the two jurors 'amounted, essentially, to no reason at all' ... . Thus, we agree with the court's determination that the proffered explanations were pretextual and with the court's disallowal of the defendant's peremptory challenges. Moreover, the court did not act improperly by, sua sponte, directing the defendant's counsel to provide race-neutral explanations for the peremptory challenges ... . The defendant contends that the Supreme Court's instruction to the jury regarding the defense of justification was erroneous because the court included an instruction regarding the use of physical force to resist arrest. This contention is without merit. The justification charge, taken as a whole, correctly instructed the jury as to the defense of justification, and was a correct statement of the applicable law (see CPL 300.10[2] ...). The defendant also contends that the justification instruction was erroneous because the court did not instruct the jurors that, if they found the defendant not guilty of charges of attempted murder in the first degree based on the defense of justification, they were not to consider the lesser counts of aggravated assault upon a police officer and attempted aggravated assault upon a police officer. The defendant failed to preserve this contention for appellate review, and we decline to review this issue in the exercise of our interest of justice jurisdiction ...". ***People v. Foxworth*, 2019 N.Y. Slip Op. 07790, Second Dept 10-30-19**

CRIMINAL LAW, ATTORNEYS, EVIDENCE.

THE MOTION TO SUPPRESS SHOULD NOT HAVE BEEN DENIED WITHOUT A HEARING BECAUSE DEFENSE COUNSEL HAD NOT BEEN PROVIDED WITH A COPY OF THE SEARCH WARRANT AT THE TIME THE MOTION WAS MADE.

The Second Department, reversing County Court, determined the motion to suppress should not have been granted without a hearing because defense counsel had not been provided with a copy of the search warrant at the time the motion was made: "In evaluating whether a defendant's factual allegations in a suppression motion are sufficient to warrant a hearing, the court must assess '(1) the face of the pleadings, (2) assessed in conjunction with the context of the motion, and (3) defendant's access to information' ... . We disagree with the County Court's decision to deny that branch of the defendant's omnibus motion which sought to controvert the search warrant without holding a hearing, as defense counsel did not have access to even a redacted copy of the search warrant applications at the time the motion was made ... . Although in moving to controvert the search warrant, defense counsel did not make precise factual averments, he was not required to do so as he did not have access to the search warrant applications at issue ...". ***People v. Lambey*, 2019 N.Y. Slip Op. 07793, Second Dept 10-30-19**

FAMILY LAW, CRIMINAL LAW, CIVIL PROCEDURE.

HEARING NECESSARY TO DETERMINE WHETHER FAMILY COURT HAS SUBJECT MATTER JURISDICTION IN THIS FAMILY OFFENSE PROCEEDING; JURISDICTION DEPENDS ON THE NATURE OF THE RELATIONSHIP BETWEEN THE PARTIES.

The Second Department, reversing Family Court, determined a hearing was necessary on whether the court had subject matter jurisdiction for the petition seeking an order of protection: " … [T]he petitioner commenced this proceeding pursuant to Family Court Act article 8 seeking an order of protection against Cynthia J. Brock. The petitioner alleged, inter alia, that she and Brock were in an intimate relationship in that the petitioner was the paternal great grandmother of Brock's child, and that she and Brock had 'lived together in the past.' The petitioner further alleged that although her grandson and the child had moved out of her home a month earlier, Brock continued to routinely drop off the child at the petitioner's home after Brock's parental access time with the child, and used these opportunities to threaten, abuse, and annoy the petitioner. The petitioner also alleged that Brock telephoned the child on a daily basis, and verbally harassed the petitioner on the phone. Subsequently, Brock made an application to dismiss the petition for lack of subject matter jurisdiction on the ground that the relationship between her and the petitioner did not qualify as an 'intimate relationship' within the meaning of Family Court Act § 812(1)(e). The Family Court granted the application and dismissed the petition. The Family Court is a court of limited subject matter jurisdiction, and "cannot exercise powers beyond those granted to it by statute"... . Pursuant to Family Court Act § 812(1), the Family Court's jurisdiction in family offense proceedings is limited to certain proscribed criminal acts that occur 'between spouses or former spouses, or between parent and child or between members of the same family or household' ... . For purposes of Family Court Act article 8, 'members of the same family or household' include, inter alia, 'persons who are not related by consanguinity or affinity and who are or have been in an intimate relationship regardless of whether such persons have lived together at any time' ... . Expressly excluded from the ambit of 'intimate relationship' are 'casual acquaintance[s]' and 'ordinary fraternization between two individuals in business or social contexts' ... . Beyond those delineated exclusions, what qualifies as an intimate relationship within the meaning of Family Court Act § 812(1)(e) is determined on a case-by-case basis ... . Relevant factors include 'the nature or type of relationship, regardless of whether the relationship is sexual in nature; the frequency of interaction between the persons; and the duration of the relationship ...' ." ***Matter of Hamrahi v. Brock*, 2019 N.Y. Slip Op. 07781, Second Dept 10-30-19**

FORECLOSURE, CIVIL PROCEDURE.

SUPREME COURT WAS WITHOUT POWER TO DIRECT DISMISSAL OF THE FORECLOSURE ACTION FOR FAILURE TO PROSECUTE BECAUSE A 90-DAY NOTICE HAD NOT BEEN SERVED.

The Second Department, reversing Supreme Court, determined the foreclosure action should not have been dismissed for failure to prosecute because a 90-day notice had not been served: "In April 2009, the plaintiff commenced this action against the defendant Melchior Sansone (hereinafter the defendant), among others, to foreclose a mortgage secured by certain real property located in Suffolk County. In January 2011, following settlement conferences, the action was released from the foreclosure settlement conference part without any resolution. On July 20, 2012, the parties appeared at a compliance conference, at which time the Supreme Court directed the plaintiff to resume the prosecution of this action. By order dated November 21, 2012 (hereinafter the dismissal order), the court directed dismissal of the action upon the plaintiff's failure to resume prosecution of the action. The plaintiff subsequently moved to vacate the dismissal order, and, in effect, to restore the action to the active calendar. By order dated July 30, 2018, the court denied the plaintiff's motion, and the plaintiff appeals. 'A court may not dismiss an action based on neglect to prosecute unless the statutory preconditions to dismissal, as articulated in CPLR 3216, are met' ... . These conditions include, among others, service of a written demand 'requiring the party against whom such relief is sought to resume prosecution of the action and to serve and file a note of issue within ninety days after receipt of such demand' (CPLR 3216[b][3] ...). Here, the Supreme Court was without power to direct dismissal of the action on the ground of failure to prosecute because the plaintiff was not served with a written demand to serve and file a note of issue within 90 days ...". ***U.S. Bank N.A. v. Sansone*, 2019 N.Y. Slip Op. 07807, Second Dept 10-30-19**

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

PLAINTIFF DID NOT SUBMIT SUFFICIENT PROOF OF COMPLIANCE WITH RPAPL 1304 AND DID NOT SUBMIT SUFFICIENT PROOF OF STANDING; PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IN THIS FORECLOSURE ACTION SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined the plaintiff did not demonstrate compliance with the RPAPL 1304 notice requirements and did not demonstrate standing: "... [T]he plaintiff failed to establish, prima facie, that it complied with RPAPL 1304. In support of its motion, the plaintiff submitted the affidavit of a representative of its loan servicer. The affidavit was insufficient to establish that the notice was sent to the defendant in the manner required by RPAPL 1304, as the representative did not attest to knowledge of the mailing practices of the entity which sent the notice, and provided no independent proof of the actual mailing ... . Since the plaintiff failed to provide proof of the actual mailing, or proof of a standard office mailing procedure designed to ensure that items are properly addressed and mailed, sworn to by

someone with personal knowledge of the procedure, the plaintiff failed to establish its strict compliance with RPAPL 1304 ... . [T]he plaintiff appended a copy of the note to the complaint, but the plaintiff is not the original lender, and the note was not endorsed. In support of its motion for summary judgment, the plaintiff submitted an allonge bearing an undated endorsement in blank, as well as the affidavit of a representative of the loan servicer, dated March 31, 2016, who stated that the plaintiff was in possession of the note, but who did not attest that the plaintiff possessed the note prior to the commencement of the action, or that she had personal knowledge of such possession. The plaintiff's submissions therefore failed to establish, prima facie, that the plaintiff was the holder of the note at the time of commencement of this action in March 2015 ...". ***Bank of N.Y. Mellon v. Ettinger*, 2019 N.Y. Slip Op. 07759, Second Dept 10-30-19**

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

PLAINTIFF SUBMITTED INSUFFICIENT PROOF THAT THE NOTICE REQUIRED BY RPAPL 1304 AND THE MORTGAGE WAS PROVIDED TO DEFENDANTS; PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IN THIS FORECLOSURE ACTION SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined plaintiff did not present sufficient evidence to demonstrate compliance with Real Property Actions and Proceedings Law (RPAPL) 1304 or with the notice provisions of the mortgage: "... [T]he plaintiff failed to attach, as exhibits to the motion, any documents to prove that the mailing actually happened ... . Nor did [plaintiff's employee] attest that she had personal knowledge of the mailing practices of her employer at the time the RPAPL 1304 notices allegedly were sent. Accordingly, '[s]ince the plaintiff failed to provide proof of the actual mailing, or proof of a standard office mailing procedure designed to ensure that items are properly addressed and mailed, sworn to by someone with personal knowledge of the procedure, the plaintiff failed to establish its strict compliance with RPAPL 1304' ... . The plaintiff also failed to establish, prima facie, that a notice of default in accordance with section 22 of the mortgage was properly transmitted to the defendants prior to the commencement of this action. [Plaintiff's employee's] unsubstantiated and conclusory statements that a representative ... mailed such notice '[i]n accordance with the provisions of the Mortgage' to the defendants at their last known address at least 30 days prior to commencement of the action, even combined with copies of the notices of default and envelopes, with no evidence as to the date the envelopes were sent, 'failed to establish that the required notice was mailed to the defendant[s] by first-class mail or actually delivered to [their] notice address' if sent by other means, as required by the mortgage agreement' ...". ***U.S. Bank N.A. v. Defendants.*, 2019 N.Y. Slip Op. 07806, Second Dept 10-30-19**

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

THE ESTATE OF A JOINT TENANT WAS NOT A NECESSARY PARTY IN THE FORECLOSURE ACTION BECAUSE THE INTEREST IN THE PROPERTY PASSED UPON DEATH, THE ESTATE'S MOTION TO INTERVENE PROPERLY DENIED.

The Second Department determined the estate's motion to intervene in a foreclosure proceeding was properly denied. When Sydney Burt, a joint tenant with right of survivorship, died, his interest in the property subject to the foreclosure action passed to the joint tenant, Karyn Berkley, and not to Sydney's estate. Therefore the estate did not have the right to intervene in the foreclosure: "... [T]he issue of whether the proposed intervenor was a necessary party in the action was determined on the merits by the Supreme Court in its order ... , wherein it denied the defendant's motion, inter alia, to dismiss the complaint for failure to join the proposed intervenor. Thus, the parties had a full and fair opportunity to litigate the issue of whether the proposed intervenor was a necessary party. ... [W]e agree with the Supreme Court's determination to deny intervention. New York defines a joint tenancy as 'an estate held by two or more persons jointly, with equal rights to share in its enjoyment during their lives, and creating in each joint tenant a right of survivorship' ... . 'The right of survivorship has been defined as a right of automatic inheritance' where, upon the death of one joint tenant, the property does not pass through the rules of intestate succession, but is automatically inherited by the remaining tenant' ... . Therefore, when one joint tenant dies, the other joint tenants automatically inherit the property. This is in marked contrast to tenancies in common which allow a decedent's share of property to pass under the rules of inheritance ... . Thus, here, upon the Sydney Burt's death, his interest in the property did not pass to his estate, the proposed intervenor; rather, it automatically passed to the remaining joint tenants, the defendant and Berkley. Therefore, the proposed intervenor was not a necessary party and did not have the right to intervene in the foreclosure action." ***PHH Mtge. Corp. v. Burt*, 2019 N.Y. Slip Op. 07802, Second Dept 10-30-19**

MUNICIPAL LAW, CIVIL RIGHTS LAW, MALICIOUS PROSECUTION, CIVIL PROCEDURE.

42 U.S.C. § 1983 IS NOT SUBJECT TO THE MUNICIPAL-LAW NOTICE OF CLAIM REQUIREMENT; THE NOTICE OF THE MALICIOUS PROSECUTION ACTION WAS TIMELY; THE PETITION TO FILE LATE NOTICES OF CLAIM FOR THE REMAINING STATE LAW CLAIMS SHOULD NOT HAVE BEEN GRANTED; THE EXCUSES WERE NOT VALID AND THE VILLAGE DID NOT HAVE TIMELY NOTICE OF THE CLAIMS SIMPLY BY VIRTUE OF THE POLICE REPORT AND THE INVOLVEMENT OF A POLICE OFFICER.

The Second Department, reversing (modifying) Supreme Court, over a partial dissent, determined: (1) the 42 U.S.C. § 1983 action was not subject to the notice of claim requirement of the General Municipal Law; the notice of claim for the malicious prosecution cause of action was timely because the limitations period began when the underlying charges were dismissed; and (3) the petition for leave to file late notices of claim for the state law discrimination, false arrest, abuse of process, excessive force, failure to intervene, denial of access to the courts, intimidation and intentional infliction of emotional distress actions should not have been granted: "The petitioner's explanation that the counsel who represented him during the criminal proceeding did not advise him of the notice of claim requirement and that he did not learn of the requirement until ... he retained his current attorney to represent him in a potential civil action did not constitute a reasonable excuse for his failure to timely serve the Village with a notice of claim for the remaining state law claims ... . The petitioner's ignorance of the law does not constitute a reasonable excuse ... . Moreover, the petitioner's assertion that he knowingly delayed commencing any action against the Village while the criminal charges were pending due to unsubstantiated claims of fear and intimidation does not constitute a reasonable excuse ... . The petitioner did not establish that the Village acquired actual knowledge of the essential facts constituting the remaining state law claims within 90 days after they arose or a reasonable time thereafter. 'Generally, knowledge of a police officer or of a police department cannot be considered actual knowledge of the public corporation itself regarding the essential facts of a claim' ... . '[F]or a report to provide actual knowledge of the essential facts, one must be able to readily infer from that report that a potentially actionable wrong had been committed by the public corporation' ... . Here, the involvement of a Village police officer in arresting the petitioner did not, without more, establish that the Village acquired actual knowledge of the essential facts constituting the petitioner's remaining state law claims within 90 days following their accrual or a reasonable time thereafter ...". ***Matter of Nunez v. Village of Rockville Ctr.*, 2019 N.Y. Slip Op. 07783, Second Dept 10-30-19**

THIRD DEPARTMENT

CRIMINAL LAW.

PETITIONER WAS INITIALLY APPROVED FOR PAROLE, BUT AFTER THE VICTIM IMPACT HEARING A RESCISSION HEARING WAS HELD AND PAROLE WAS RESCINDED; THE RESCISSION WAS PROPERLY BASED UPON VICTIM IMPACT STATEMENTS SUPPLYING INFORMATION WHICH WAS NOT "NEW" BUT WHICH WAS NOT PREVIOUSLY KNOWN TO THE PAROLE BOARD.

The Third Department, over a two-justice dissent, determined petitioner's parole was properly rescinded after a rescission hearing was triggered by a victim impact hearing: "In August 2016, letters were sent from the Department of Corrections and Community Supervision to the Albany County District Attorney's office and the judge who imposed the sentence informing them that petitioner was scheduled to appear before respondent. Petitioner appeared before respondent in December 2017, after which he was granted parole with an open release date in February 2018. Thereafter, in January 2018, a victim impact hearing was held at which the victim's mother and two brothers gave victim impact statements. After this hearing, petitioner was served with a notice of rescission hearing, which was subsequently held in February 2018. Following the rescission hearing, petitioner's open release date was rescinded and a hold period of nine months was imposed. This determination was upheld on administrative appeal. Petitioner thereafter commenced this CPLR article 78 proceeding. Petitioner argues that the victim impact statements and letters from the District Attorney's office and sentencing judge disclosed no new facts about petitioner's crime. ... . Although we agree that the letters should not have been considered as they did not reveal any information not previously known by respondent, this argument must fail with respect to the victim impact statements because neither the relevant regulation, nor the existing case law, requires that 'new' information must be disclosed for parole to be rescinded (see 9 NYCRR 8002.5) ... Simply stated, although the regulation provides that such information must be 'significant' and 'not known' by respondent at the time of the original hearing, the origin of this information need not be 'new' ... . Here, respondent was presented with previously unknown information from the mother, including that she was so traumatized by her son's death that she did everything she could to avoid thinking about it, including never visiting his grave. The mother explained that, in the 25 years since the victim's death, she has not celebrated Christmas, Thanksgiving or her other sons' birthdays. She described how she thought that, once petitioner went to prison, it was done, and that she was safe, but she no longer felt safe." ***Matter of Benson v. New York State Bd. of Parole*, 2019 N.Y. Slip Op. 07829, Third Dept 10-31-19**

CRIMINAL LAW, EVIDENCE.

POLICE OFFICER'S WARRANTLESS ENTRY INTO A METH LAB WAS JUSTIFIED BY WHAT WAS IN PLAIN VIEW THROUGH A PARTIALLY OPEN DOOR AND THE OFFICER'S CONCERN FOR THE SAFETY OF PEOPLE INSIDE A NEARBY TRAILER.

The Third Department determined a warrantless search and seizure of a meth lab was valid and defendant's motion to suppress was properly denied. Four police officers went to defendant's property based upon a tip defendant was operating a meth lab there. Before going to the property, the police learned defendant and his girlfriend had purchased Sudafed, which is used to make methanphetamine, and that their subsequent attempts to buy Sudafed were denied. Once on the property officer DeMuth was able to see into the lab through a partially open door. He entered the lab, allegedly because he feared for the safety of persons in a nearby trailer: "All of the attendant circumstances, including DeMuth's knowledge of the tip and defendant's conduct in running out the back door, justified DeMuth's actions in conducting a limited protective sweep, which consisted of walking to the base of the trailer's back steps, where the unknown item had been dropped, and peering inside the shed . The record establishes that, once DeMuth was lawfully in position, he was able to observe the incriminating evidence in plain view inside the shed ... . DeMuth testified that his observations, together with his knowledge of the tip and the information obtained from the national precursor log, led him to believe that there was an active methamphetamine lab inside the shed. He stated that, based upon his training and experience regarding the dangers of methamphetamine production, particularly the risk of explosion, he immediately became concerned for the safety of the inhabitants of the trailer (which included several children), himself and his fellow officers and that he fully opened the door to the shed to provide ventilation. DeMuth's testimony demonstrated that he had objectively reasonable grounds for believing that the contents of the shed posed an immediate danger to everyone present on the scene and, thus, that his actions in opening the door to the shed were justified ... . The record establishes that the methamphetamine lab was subsequently seized by the New York State Police Contaminated Crime Scene Emergency Response Team. In view of all of the foregoing, we find that the warrantless search and seizure of the methamphetamine lab was justified by exceptions to the warrant requirement." ***People v. Richards*, 2019 N.Y. Slip Op. 07810, Third Dept 10-31-19**

DISCIPLINARY HEARINGS (INMATES).

THE RELIABILITY OF THE CONFIDENTIAL INFORMANT WAS NOT ADEQUATELY CONSIDERED BY THE HEARING OFFICER, DETERMINATION ANNULLED AND EXPUNGED.

The Third Department, annulling the determination and expunging the record, found that the hearing officer had not adequately considered the reliability of the confidential informant: "... [W]e find that the Hearing Officer's inquiry was not thorough and specific enough to afford him an adequate opportunity to assess the confidential informant's knowledge and reliability. After briefly reviewing the investigating officer's professional experience, the Hearing Officer, in a cursory fashion, confirmed that the investigating officer had obtained confidential information and then asked whether that information was received under any kind of duress or the product of coercion, whether he thought the information was reliable and credible and whether there was any promise of secondary gain. Nothing further was solicited from the investigating officer, who provided only two or three-word responses to each question and failed to offer any description of the confidential source's statements or further testimony to assist the Hearing Officer's inquiry into the reliability of the confidential information ... . In addition, the investigating officer failed to explain why he found the confidential informant reliable ... . Indeed, '[t]he Hearing Officer may not base his or her conclusion solely upon the correction officer's assessment of the confidential informant's truthfulness' ... . The record also does not reflect that the Hearing Officer attempted to personally interview the confidential informant in order to cure these deficiencies ...". ***Matter of Barber v. Annucci*, 2019 N.Y. Slip Op. 07831, Third Dept 10-31-19**

FAMILY LAW.

FAMILY COURT SHOULD NOT HAVE DELEGATED AUTHORITY TO FATHER CONCERNING VISITATION AND SHOULD NOT HAVE INVOLVED MOTHER'S BOYFRIEND IN KEEPING FATHER INFORMED ABOUT MOTHER'S HEALTH.

The Third Department, modifying Family Court, determined Family Court should not have delegated authority to father to control some aspects of visitation, and should not have involved mother's boyfriend, a non-party, in keeping father informed about mother's medical or mental issues: "The court's authority to set visitation cannot be delegated to a party ... . We agree that the father can choose to temporarily suspend visitation while the mother is hospitalized for a mental health condition. However, Family Court went too far in giving the father — who is not a doctor or otherwise trained in recognizing and treating mental health conditions — that same authority in the vague situations where the mother is 'decompensating or otherwise having an issue with her bipolar condition,' or permitting him to require supervision of visitation in the aftermath of those situations without further court intervention. We have no doubt that if the father believes or is informed that the mother is unstable, he will seek court permission to withhold or limit visits to protect the child ... . The court also

erred in directing the mother's boyfriend — a nonparty, over whom the court had not obtained jurisdiction — to advise the father of any medical or mental issues that the mother may experience 'as they are occurring or as soon as practicable thereafter' ...". ***Matter of Aree RR. v. John SS.*, 2019 N.Y. Slip Op. 07818, Third Dept 10-31-19**

NEGLIGENCE, PERSONAL INJURY.

THE TRACKED IN WATER WAS NOT ACTIONABLE; DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE WAS PROPERLY GRANTED.

The Second Department determined defendant's motion for summary judgment in this slip and fall case was properly granted. Plaintiff was unable to demonstrate that the source of the water on which she slipped and fell was not simply tracked in rain, which was not actionable. The floor in question was temporary flooring used in a tent set up for a graduation ceremony: "We reject plaintiff's contention that defendant failed to properly inspect the premises, or that its use of rubber mats on some portions of the flooring demonstrates that it failed to maintain its premises in a reasonably safe condition. Although defendant placed rubber mats on the flooring near the stage toward the front of the tent, the security director explained that those mats were intended to assist the graduates in approaching, crossing and leaving the stage, which was elevated and located on an incline. Plaintiff further notes that defendant chose to use two tent walls and to leave the other sides open, but she did not demonstrate that any water allegedly present on the walkway originated from those open sides, rather than having been tracked in. Nor did plaintiff establish that the subsequent placement by defendant's staff of a mat in the area of her fall constituted notice of a dangerous condition. Property owners are not "'required to cover all of [their] floors with mats, nor to continuously mop up all moisture resulting from tracked-in rain' ... . Further, even assuming that water was present on the temporary flooring at issue, 'the mere fact that a floor or walkway becomes slippery when wet does not establish a dangerous condition' ...". ***Van Duser v. Mount St. Mary Coll.*, 2019 N.Y. Slip Op. 07824, Third Dept 10-31-19**

RETIREMENT AND SOCIAL SECURITY LAW, PERSONAL INJURY.

POLICE OFFICER ENTITLED TO ACCIDENTAL DISABILITY RETIREMENT BENEFITS FOR INJURIES CAUSED BY STEPPING IN A SNOW-COVERED POTHOLE AS HE RESPONDED TO A SERIES OF VEHICLE ACCIDENTS DURING A SNOWSTORM.

The Third Department. over a dissent, determined petitioner police officer was entitled to accidental disability retirement benefits for injuries caused by stepping in a snow-covered pothole while he responded to a series of vehicle accidents during a snowstorm: "As this Court has stated, '[t]o be deemed accidental, an injury must not have been the result of activities undertaken in the ordinary course of one's job duties but, rather, must be due to a precipitating accidental event which is not a risk of the work performed' ... . There can be no dispute that, at the time of the incident, petitioner was performing his ordinary job duties of responding to a series of traffic accidents that had occurred during his shift and that falling on a slippery snow- and ice-covered road may be a risk of petitioner's ordinary job duties. However, we find that falling due to a pothole concealed under the snow and ice is not such a risk ... . Accordingly, given these circumstances, petitioner's fall was a sudden and unexpected event that constitutes an accident as matter of law ...". Matter of Lewis v. New York State Comptroller, 2019 N.Y. Slip Op. 07828, Third Dept 10-31-19

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