CasePrepPlus

May 3, 2019

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

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FIRST DEPARTMENT

CIVIL PROCEDURE, CONTRACT LAW, SECURITIES.

MOTION TO AMEND THE COMPLAINTS IN THESE RESIDENTIAL MORTGAGE BACKED SECURITIES ACTIONS SHOULD HAVE BEEN GRANTED, COMPETING INTERPRETATIONS OF A CONTRACT SHOULD NOT BE DETERMINED AT THE MOTION-TO-DISMISS STAGE.

The First Department, in a full-fledged opinion by Justice Richter, over a partial dissent, determined plaintiff's (the Trustee's) motion to amend its complaints in these residential mortgage backed securities actions should have been granted. The amendment sought to allege defendant breached the underlying contract by failing to notify the trustee of loan breaches. The majority found that the contract provision requiring notice was ambiguous. The dissent argued the contract was not ambiguous and did not require notification: "It is well settled that '[a] request for leave to amend a complaint should be freely given, and denied only if there is prejudice or surprise resulting directly from the delay, or if the proposed amendment is palpably improper or insufficient as a matter of law' ... . 'A party opposing leave to amend must overcome a heavy presumption of validity in favor of [permitting amendment]' ... . Judged by these standards, the motion court should have granted the Trustee's motions for leave to file the amended complaints with respect to the express breach of contract claims based on DBSP's (defendant's) failure to notify the Trustee of the loan breaches ... . It cannot be said, at this early stage of the proceedings, that these claims are 'palpably improper or insufficient as a matter of law' ... . Nor has DBSP asserted, let alone shown, that it would suffer any prejudice or surprise directly resulting from the delay. * * * ... [B]ecause the disputed provision is reasonably susceptible to more than one interpretation, 'it cannot be construed as a matter of law, and dismissal . . . is not appropriate ...". ***LDIR, LLC v. DB Structured Prods., Inc.*, 2019 N.Y. Slip Op. 03154, First Dept 4-25-19**

CRIMINAL LAW.

FAILURE TO TELL THE JURY TO STOP DELIBERATING IF THEY FIND THE JUSTIFICATION DEFENSE APPLIES REQUIRED REVERSAL, EVEN THOUGH THE JUDGE TOLD THE JURY TO ACQUIT ON ALL COUNTS IF THE JUSTIFICATION DEFENSE APPLIES.

The First Department, reversing defendant's conviction, over a dissent, determined the judge's jury instruction did not make it clear that finding the defendant not guilty of assault first based upon the justification defense required that the jury stop deliberating. The judge had told the jury they must find the defendant not guilty "on all counts" if the justification defense applies: "[R]eversal is warranted despite the lack of preservation, because, contrary to our dissenting colleague's contention, the court's charge, as a whole, failed to properly instruct the jury that if it found defendant not guilty of first-degree assault based on a finding of justification, the jury must not consider the lesser second-degree assault counts arising from defendant's use of force. The dissent posits that the instruction here is meaningfully different from Velez [People v. Velez (131 AD3d 129)] in that the court 'made it clear that a finding of not guilty on the basis of justification of the greater charge of assault in the first degree necessitated an acquittal on all counts.' However, we have already considered and rejected the specific argument that it is proper or meaningfully different from Velez where a court employs the same language that the jury 'must find the defendant not guilty on all counts' if it finds justification on the greater charge … . This language is not sufficient to convey to the jury the 'stop deliberations' principle ...". ***People v. Wah*, 2019 N.Y. Slip Op. 02973, First Dept 4-23-19**

CRIMINAL LAW, ATTORNEYS.

DEFENSE COUNSEL WAS INEFFECTIVE BECAUSE HE MISCALCULATED AND FILED A SPEEDY TRIAL MOTION TEN DAYS BEFORE THE SPEEDY TRIAL CLOCK RAN OUT, DEFENDANT'S MOTION TO VACATE THE CONVICTION WAS PROPERLY GRANTED AND THE INDICTMENT DISMISSED.

The First Department determined defense counsel was ineffective when he filed a speedy trial motion 10 days before the speedy trial clock would have run out. The indictment was dismissed in this CPL § 440.10 proceeding: "Counsel filed a speedy trial motion, alleging well over the required threshold of 183 days of chargeable time. However, because of counsel's miscalculations, these allegations included substantial periods that were not in fact chargeable. As a result, the court deciding the speedy trial motion found that only 174 days were chargeable. However, if counsel had waited only 10 more

days to file the motion, the circumstances of the case establish that this additional period would unquestionably have been charged to the People, as counsel was aware. Thus, the threshold would have been exceeded, and the court would have been required to grant the speedy trial motion. Instead, the filing of the premature motion stopped the clock and rendered the People's additional unreadiness excludable. The CPL 440.10 hearing record establishes that counsel had no strategic reason for filing the speedy trial motion in the form and at the time he did, and that his handling of the motion was objectively unreasonable. Furthermore, the prejudice prong of a single-error ineffectiveness claim was satisfied, because '[i]t is well settled that a failure of counsel to assert a meritorious speedy trial claim is, by itself, a sufficiently egregious error to render a defendant's representation ineffective' ...". ***People v. Stewart*, 2019 N.Y. Slip Op. 03142, First Dept 4-25-19**

CRIMINAL LAW, EVIDENCE, ATTORNEYS.

DEFENDANT AND DEFENSE COUNSEL ENTITLED TO NOTICE AND AN OPPORTUNITY TO BE HEARD IN OPPOSITION TO A WARRANT APPLICATION FOR THE COLLECTION OF DNA EVIDENCE, YOUTUBE VIDEO NOT PROPERLY AUTHENTICATED.

The First Department, reversing defendant's conviction, determined that defendant was entitled to notice and an opportunity to be heard in opposition to a warrant application for the collection of DNA evidence. Defendant was incarcerated and represented on another matter at the time of the warrant application. The First Department also noted that a Youtube video admitted into evidence was not properly authenticated: "In general, search warrant applications are made ex parte ... . However, as explained in Matter of Abe A. (56 NY2d 288 [1982]), special rules apply to evidence to be taken from a suspect's body, such as blood or DNA samples. The hearing court excluded defense counsel based on its understanding that the discussion of notice in Abe A. applied only to the first 'discrete level' of Fourth Amendment analysis identified in that case, involving 'the seizure of the person necessary to bring him into contact with government agents,' and not the second level, involving 'the subsequent search and seizure for the evidence' (id. at 295 [internal quotation marks omitted]). ... Nothing in the Court's opinion suggests a basis for applying the 'elementary tenet of due process' described by the [Abe A.] Court only to the first part of an application for an order to physically detain a person and then make a corporeal search. ... Accordingly, defendant is entitled to suppression of the DNA evidence obtained as a result of the warrant issued by the hearing court, and a new trial ... . [A]t trial the People failed to adequately authenticate an incriminating YouTube video under the standards set forth in People v. Price (29 NY3d 472 [2017]), which was decided after defendant's trial. The authentication testimony was essentially limited to testimony that the video shown in court was the same as the one posted on YouTube and another website, and that defendant appears in the video. Accordingly, there was no authentication under any of the methods discussed in Price." ***People v. Goldman*, 2019 N.Y. Slip Op. 02976, First Dept 4-23-19**

FRAUD, DEBTOR-CREDITOR, CIVIL PROCEDURE, LIMITED LIABILITY COMPANY LAW.

COMPLAINT STATED A CAUSE OF ACTION FOR CONSTRUCTIVE FRAUD BUT THE HEIGHTENED PLEADING REQUIREMENTS FOR ACTUAL FRAUD WERE NOT MET.

The First Department, in an action alleging members of defendant liability company transferred fraudulently transferred funds from the LLC to the defendant members to render the LLC insolvent. The First Department determined the constructive fraud cause of action was sufficiently pled but the allegations did not support an actual fraud cause of action: "[T]he complaint implicitly alleges that a necessary element of fair consideration, i.e., good faith, was lacking when the transfers were made. ... However, the complaint fails to state a cause of action for actual fraud under Debtor and Creditor Law §§ 276 and 276-a. ... [U]nlike the allegations supporting the constructive fraud claim, the allegations supporting the actual fraud claim are subject to the heightened pleading standard of CPLR 3016(b), and the allegations about fair consideration do not meet that standard, because they were made upon information and belief, and the source of the information was not disclosed ... . Nor does the complaint allege any other badges of fraud." ***Brennan v. 3250 Rawlins Ave. Partners, LLC*, 2019 N.Y. Slip Op. 03002, First Dept 4-23-19**

PERSONAL INJURY, EVIDENCE.

NON-MANDATORY STANDARDS WHICH ARE GENERALLY ACCEPTED CONSTITUTE SOME EVIDENCE OF NEGLIGENCE, EVIDENCE OF SIMILAR ACCIDENTS AT OTHER SUBWAY STATIONS PROPERLY ADMITTED IN THIS SUBWAY-PLATFORM GAP SLIP AND FALL CASE.

The First Department affirmed the plaintiff's verdict in this subway "gap" slip and fall accident case. Plaintiff's leg slipped through the gap between the subway car and the platform. The fact that the defendant New York City Transit Authority (NYCTA) was in compliance with its own six-inch-gap rule was not conclusive on liability. Plaintiff's expert's testimony that non-mandatory gap standards promulgated by the American Public Transit Association and the Public Transportation Safety Board were generally accepted was admissible. Evidence of similar gap accidents at other stations was also admissible: "[P]laintiff's expert's testimony regarding gap standards promulgated by the American Public Transit Association (APTA) and the Public Transportation Safety Board (PTSB) did not misleadingly establish industry standards that were non-mandatory guidelines. While mere non-mandatory guidelines and recommendations are insufficient to establish a standard of care, an expert's testimony regarding 'generally accepted' standards, which are promulgated by an associa-

tion such as APTA and the PTSB, and generally accepted in the relevant community at the relevant time, constitutes some evidence of negligence and may establish a standard of care ... . Moreover, the expert noted in his testimony that the standards were voluntary and did not suit all transit systems. His testimony merely served to help the jury determine whether NYCTA's own policy of a six-inch gap was reasonable, in light of the evidence ... . The trial court did not err in admitting evidence of gap accidents at other stations or precluding NYCTA's witnesses from testifying. Plaintiff demonstrated that the relevant conditions of the subject accident and the previous ones were substantially the same, though they occurred at other stations ... , and the probative value of the gap accident statistics outweighed any prejudice to NYCTA ...". ***Daniels v. New York City Tr. Auth.*, 2019 N.Y. Slip Op. 03000, First Dept 4-23-19**

SECOND DEPARTMENT

CIVIL PROCEDURE, EVIDENCE, CRIMINAL LAW, PRIVILEGE, PERSONAL INJURY.

A PERSON ADJUDICATED A YOUTHFUL OFFENDER CAN REFUSE TO ANSWER QUESTIONS ABOUT THE CHARGES, THE POLICE INVESTIGATION, THE PLEA AND THE ADJUDICATION, BUT CANNOT REFUSE TO ANSWER QUESTIONS ABOUT THE UNDERLYING FACTS.

The Second Department determined defendant's youthful offender adjudication allows defendant to refuse to answer questions about the charges, the police investigation, whether she pled guilty and whether a youthful offender adjudication was made, but defendant cannot refuse to answer questions about the facts underlying the adjudication. Here plaintiff sued defendant for personal injuries stemming from a fight with defendant, which was the basis for the youthful offender adjudication: " '[A] person adjudicated a youthful offender may refuse to answer questions regarding the charges and police investigation, whether he or she pleaded guilty, and whether a youthful offender adjudication was made' ... . However, 'not all of the information contained within the protected records is necessarily privileged' ... . The statutory grant of confidentiality afforded to official records and the information contained therein does not extend to the facts underlying the incident which gave rise to the youthful offender adjudication (see CPL 720.35[2]). Thus, an eligible youth may not refuse, on grounds of confidentiality, to answer questions about the facts underlying the subject incident, even though those facts also form the basis of his or her youthful offender adjudication ...". ***Arma v. East Islip Union Free Sch. Dist.*, 2019 N.Y. Slip Op. 03019, Second Dept 4-24-19**

CRIMINAL LAW, EVIDENCE.

WHERE THE INDICTMENT ALLEGES MORE THAN ONE WAY TO COMMIT THE CHARGED OFFENSE, THE PEOPLE NEED ONLY PROVE ONE.

The Second Department noted that the People are not required to prove all of the ways the indictment alleged the crime was committed. The People need only prove one: " 'Where an offense may be committed by doing any one of several things, the indictment may, in a single count, group them together and charge the defendant with having committed them all, and a conviction may be had on proof of the commission of any one of the things, without proof of the commission of the others'... . Therefore, where ' the indictment charge[s] more than the People [are] required to prove under the statute,' they are not required to prove that the defendant committed each of the charged acts ... . Accordingly, the fact that the indictment charged the defendant with committing burglary in the third degree by both unlawfully entering and remaining in the subject premises did not require the People to prove both sets of facts and, since they proceeded only on the theory of unlawful entry, the Supreme Court properly instructed the jury on that theory only." ***People v. Bynum*. 2019 N.Y. Slip Op. 03067, Second Dept 4-24-19**

FAMILY LAW, CONTRACT LAW, EVIDENCE.

FINANCIAL DISCLOSURE AND A HEARING WERE NECESSARY TO DETERMINE WHETHER THE SEPARATION AGREEMENT WAS INVALID, SUPPORT AND MAINTENANCE AGREED TO BY PLAINTIFF WIFE WAS LESS THAN PLAINTIFF'S APARTMENT RENTAL.

The Second Department, reversing Supreme Court, determined a hearing was necessary to determine whether a separation agreement was invalid (unconscionable). The plaintiff wife did not have an attorney when the agreement was negotiated, but she consulted an attorney who advised her the support and maintenance were not sufficient to meet her needs. The amount of support and maintenance agreed to was less than the monthly rental for plaintiff's apartment: "Given that the agreement's support provisions were insufficient to cover the rent for the marital residence and other basic needs of the plaintiff and the children, as well as the lack of financial disclosure regarding the value of the defendant's business, condominium, and actual income, questions of fact existed as to whether the separation agreement was invalid, sufficient to warrant a hearing ... . Given the lack of any financial disclosure, the Supreme Court should have exercised its equitable powers and directed disclosure regarding the parties' finances at the time the agreement was executed, to be followed by a hearing to test the validity of the separation agreement ...". ***Mizrahi v. Mizrahi*, 2019 N.Y. Slip Op. 03040, Second Dept 4-24-19**

FAMILY LAW, EDUCATION-SCHOOL LAW.

MOTHER'S REFUSING TO CONSENT TO AN INDIVIDUALIZED EDUCATION PROGRAM AND HER DELAY IN SCHEDULING AN INDEPENDENT NEUROPSYCHOLOGICAL EVALUATION OF THE CHILD DID NOT CONSTITUTE EDUCATIONAL OR MEDICAL NEGLECT, FAMILY COURT REVERSED.

The Second Department, reversing Family Court, determined the evidence did not support educational neglect or medical neglect on the part of mother. The mother had refused to consent to the Individualized Education Program (IEP) and had delayed in scheduling an independent neuropsychological evaluation, neither amounted to neglect: "Family Court Act § 1012(f) governs parental neglect as related to furnishing a child with an adequate education. Here, the petitioner failed to prove, by a preponderance of the evidence, that the mother had not furnished the child with an adequate education under the statute. Neither the mother's refusal to consent to the IEP for the 2016-2017 school year nor her failure to follow up with independent neuropsychological testing of the child constituted educational neglect under the circumstances presented. Moreover, the petitioner failed to meet its burden of establishing medical neglect by a preponderance of the evidence (see Family Ct Act §§ 1012[f][i][A]; 1046[b]). While the evidence adduced at the fact-finding hearing demonstrated that the mother delayed in scheduling an independent neuropsychological evaluation of the child, and that the child missed some doses of Adderall while he was staying at his father's home, the evidence did not rise to the level of establishing a failure to supply the child with adequate medical care or demonstrate a resulting impairment or imminent danger of impairment of the child's physical, mental, or emotional condition ...". ***Matter of Jahzir Barbee M. (Racine B.)*, 2019 N.Y. Slip Op. 03050, Second Dept 4-24-19**

FREEDOM OF INFORMATION LAW (FOIL), CIVIL RIGHTS LAW, CRIMINAL LAW.

MEDICAL RECORDS OF THE VICTIM OF SEXUAL ASSAULT SHOULD NOT HAVE BEEN MADE AVAILABLE TO THE PETITIONER, WHO WAS CONVICTED OF THE SEXUAL ASSAULT, PURSUANT TO PETITIONER'S FREEDOM OF INFORMATION LAW (FOIL) REQUEST, THE RECORDS ARE PROTECTED FROM DISCLOSURE BY THE PUBLIC HEALTH LAW, THE CIVIL RIGHTS LAW AND THE PUBLIC OFFICERS LAW.

The Second Department, reversing Supreme Court, determined the medical records of the victim of sexual assault could not be disclosed to the petitioner, who was convicted of the sexual assault, pursuant to a Freedom of Information Law (FOIL) request. The medical records were protected from disclosure by the Public Health Law, the Civil Rights Law and the Public Officers Law: " 'All government records are presumptively open for public inspection unless specifically exempt from disclosure' ... . Public Officers Law § 87(2)(a) provides that an agency may deny access to records that are specifically exempted from disclosure by state or federal statute ... . Here, the medical records of the victim sought by the petitioner are exempted from disclosure by Public Health Law §§ 2803-c(3)(f) and 2805-g(3) ... . Also, the medical records are exempt from disclosure pursuant to Civil Rights Law § 50-b, which, with exceptions not relevant here, prevents any public officer from disclosing documents that would identify the victim of a sex offense ... . Further, the records are exempt from disclosure pursuant to Public Officers Law § 87(2)(e)(i) ...". ***Matter of Crowe v. Guccione*, 2019 N.Y. Slip Op. 03044, Second Dept 4-24-19**

INSURANCE LAW, ARBITRATION.

FAILURE TO INFORM INSURER OF A SETTLEMENT WITH THE INSURED PARTY IN THIS TRAFFIC ACCIDENT CASE JUSTIFIED GRANTING THE INSURER'S PETITION TO PERMANENTLY STAY ARBITRATION ON AN UNINSURED MOTORIST BENEFITS CLAIM.

The Second Department, reversing Supreme Court, determined the insurer's (State Farm's) petition to permanent stay arbitration of an uninsured motorist benefits claim should have been granted. The insureds (McLaurin and Corbin) were involved in an accident with two other cars, one of which was uninsured. The insureds settled with the other insured party (Martinez) without informing State Farm: " 'Where an automobile insurance policy expressly requires the insurer's prior consent to any settlement by the insured with a tortfeasor, failure of the insured to obtain such prior consent from the insurer constitutes a breach of a condition of the insurance contract and disqualifies the insured from availing himself [or herself] of the pertinent benefits of the policy' ... . It is undisputed that McLaurin and Corbin entered into the settlement of the Martinez action without State Farm's consent. 'Once the existence of a release in settlement of the relevant tort claim is established, the burden is on the insured to establish, by virtue of an express limitation in the release, or of a necessary implication arising from the circumstances of its execution, that the release did not operate to prejudice the subrogation rights of the insurer' ... . Here, McLaurin and Corbin failed to establish that the release issued in the Martinez action did not operate to prejudice the subrogation rights of State Farm ...". ***Matter of State Farm Fire & Cas. Co. v. McLaurin*, 2019 N.Y. Slip Op. 03057, Second Dept 4-24-19**

LABOR LAW-CONSTRUCTION LAW, COURT OF CLAIMS, PERSONAL INJURY.

ALTHOUGH CLAIMANT WAS INJURED WHEN METAL POLES BEING HOISTED BY A CRANE SLIPPED OUT OF A CHOKER AND STRUCK HIM, CLAIMANT DID NOT SUBMIT EXPERT OPINION EVIDENCE RE: THE CAUSE AND DID NOT ELIMINATE QUESTIONS OF FACT RE: WHETHER HIS CONDUCT IN SECURING THE POLLS WAS THE SOLE PROXIMATE CAUSE, CLAIMANT'S MOTION FOR SUMMARY JUDGMENT IN THIS LABOR LAW § 240(1) ACTION PROPERLY DENIED.

The Second Department determined claimant was not entitled to summary judgment on his Labor Law § 240(1) cause of action. Claimant had secured metal posts with a choker. When the posts were lifted by a crane, they slipped out of the choker and struck claimant, cause traumatic brain injury. Claimant did not submit any expert opinion evidence. Defendant alleged claimant's conduct was the sole proximate cause of the accident: "To prevail on a motion for summary judgment in a Labor Law § 240(1) 'falling object' case, the claimant must demonstrate that, at the time the object fell, it either was being hoisted or secured, or required securing for the purposes of the undertaking .... Labor Law § 240(1) 'does not automatically apply simply because an object fell and injured a worker; [a] plaintiff must show that the object fell . . . because of the absence or inadequacy of a safety device of the kind enumerated in the statute' ... . Here, the claimants failed to establish their prima facie entitlement to judgment as a matter of law. The evidence submitted by the claimants was insufficient to establish that the posts fell due to the absence or inadequacy of an enumerated safety device, and the claimants further failed to eliminate all triable issues of fact as to whether the claimant's conduct was the sole proximate cause of the accident ...". ***Houston v. State of New York*, 2019 N.Y. Slip Op. 03032, Second Dept 4-24-19**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

PLAINTIFF WAS ENGAGED IN ROUTINE MAINTENANCE, NOT REPAIR, WHEN HE FELL FROM AN ELEVATED FORKLIFT, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IN THIS LABOR LAW § 240(1) ACTION SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined that plaintiff injured engaging in routine maintenance of an HVAC unit, not repair. Therefore defendant's motion for summary judgment in this Labor Law § 240(1) action should have been granted. Plaintiff fell from a forklift which was used to lift him up to HVAC unit in the ceiling: " 'In determining whether a particular activity constitutes repairing,' courts are careful to distinguish between repairs and routine maintenance, the latter falling outside the scope of section 240(1)' ... . 'Generally, courts have held that work constitutes routine maintenance where the work involves replacing components that require replacement in the course of normal wear and tear' ... . At his deposition, the plaintiff testified that before the accident occurred, he determined that a belt was missing from the heating unit. Then, according to the plaintiff, while he was in the process of lowering a panel to see whether the pilot light to the heating unit was on or off, he slipped and fell. The plaintiff testified that, based on his experience, there was nothing extraordinary or unusual about a belt needing to be replaced or a pilot light going out on a heating unit. ... [The] evidence showed that the plaintiff's work 'involved replacing components that require replacement in the course of normal wear and tear' and did not constitute 'repairing' or any other enumerated activity ...". ***Dahlia v. S&K Distrib., LLC*, 2019 N.Y. Slip Op. 03023, Second Dept 4-24-19**

LIMITED LIABILITY COMPANY LAW, CORPORATION LAW, LABOR LAW-CONSTRUCTION LAW.

PLAINTIFF DID NOT SUBMIT EVIDENCE SUFFICIENT TO PIERCE THE CORPORATE VEIL AND HOLD A MEMBER OF DEFENDANT LLC PERSONALLY LIABLE, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AGAINST THE LLC MEMBER PERSONALLY SHOULD HAVE BEEN DENIED.

The Second Department, reversing Supreme Court, determined that the motion for summary judgment in this construction accident case against a member of defendant LLC should not have been granted. The motion papers did not support piercing the corporate veil to reach the LLC member (Albaliya) personally: "As a limited liability company, Nadlan is a separate legal entity from its members (see Limited Liability Company Law § 609). 'A member of a limited liability company cannot be held liable for the company's obligations by virtue of his [or her] status as a member thereof' ... . 'However, a party may seek to hold a member of an LLC individually liable despite this statutory proscription by application of the doctrine of piercing the corporate veil' ... . 'Generally, . . . piercing the corporate veil requires a showing that: (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury' ...". ***Singh v. Nadlan, LLC*, 2019 N.Y. Slip Op. 03100, Second Dept 4-24-19**

MEDICAL MALPRACTICE, PERSONAL INJURY, EVIDENCE.

WHERE THERE IS CONFLICTING EXPERT OPINION EVIDENCE IN A MEDICAL MALPRACTICE ACTION, SUMMARY JUDGMENT IS NOT APPROPRIATE, DEFENDANT'S SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined that the defendant hospital's motion for summary judgment in this medical malpractice action should not have been granted. Although the hospital made out a prima facie case with expert evidence, the plaintiff produced conflicting expert evidence: "On a motion for summary judgment dismissing a cause of action alleging medical malpractice, the defendant bears the initial burden of establishing that there was no departure from good and accepted medical practice or that any alleged departure did not proximately cause the plaintiff's injuries ... . In order to sustain this prima facie burden, the defendant must address and rebut any specific allegations of malpractice set forth in the plaintiff's complaint and bill of particulars ... . If the defendant makes such a showing, the burden then shifts to the plaintiff to raise a triable issue of fact, but only as to those elements on which the defendant met its prima facie burden of proof ... . Here, [defendant] Brookhaven met its initial burden of demonstrating its entitlement to judgment as a matter of law dismissing the first cause of action by submitting an expert's affirmation establishing that the diagnostic testing and consultations performed by its personnel were, within a reasonable medical certainty, appropriate and within prevailing standards of practice. In opposition, however, the plaintiff's expert opined that the delay in performing and reviewing the second CT scan ..., constituted a departure from prevailing standards of care. Where, as here, the parties submit conflicting medical expert opinions, summary judgment is not appropriate ...". ***Sheppard v. Brookhaven Mem. Hosp. Med. Ctr.*, 2019 N.Y. Slip Op. 03097, Second Dept 4-24-18**

MENTAL HYGIENE LAW, EVIDENCE.

INSUFFICIENT EVIDENCE TO SUPPORT THE ADMINISTRATION OF TWO DRUGS TO SAMUEL D, A MENTALLY ILL PERSON, OVER SAMUEL D'S OBJECTION.

The Second Department determined that the state had demonstrated the administration of two drugs to Samuel D, a mentally ill person, over Samuel D's objection was proper. But the state's evidence concerning two other drugs was insufficient: "The State may administer a course of medical treatment against a patient's will if it establishes, by clear and convincing evidence, that the patient lacks the capacity to make a reasoned decision with respect to proposed treatment ... , and that 'the proposed treatment is narrowly tailored to give substantive effect to the patient's liberty interest, taking into consideration all relevant circumstances, including the patient's best interests, the benefits to be gained from the treatment, the adverse side effects associated with the treatment and any less intrusive alternative treatments' ... . [T]he petitioner failed to offer sufficient evidence at the hearing to establish by clear and convincing evidence its entitlement to medicate Samuel D. with Valproic Acid and Benztropine over his objection ... . The minimal evidence presented at the hearing regarding these medications was insufficient for the petitioner to establish by clear and convincing evidence that the proposed course of treatment with respect to these medications was narrowly tailored to give substantive effect to Samuel D.'s liberty interest." ***Matter of Samuel D. (Mid-Hudson Forensic Psychiatric Ctr.)*, 2019 N.Y. Slip Op. 03045, Second Dept 4-24-19**

MUNICIPAL LAW, PERSONAL INJURY.

COUNTY NOT LIABLE IN THIS INMATE-ON-INMATE THIRD PARTY ASSAULT CASE.

The Second Department determined the county's motion for summary judgment in this inmate-on-inmate third party assault case was properly granted. Plaintiff, an inmate in county jail, was assaulted with a pool cue by another inmate (named Batts). The complaint against the county alleged negligent supervision: "[T]he County defendants demonstrated that prior to the incident, the plaintiff and Batts had a friendly relationship and joked around with each other. They had no prior physical altercations with one another, and Batts had not been involved in any prior violent incidents with other inmates. The County defendants also demonstrated that prior to August 11, 2013, there had been no incident at the facility where an inmate had used a pool cue as a weapon to attack another inmate. The County defendants established their prima facie entitlement to judgment as a matter of law dismissing the cause of action sounding in negligent supervision by demonstrating that the assault by Batts upon the plaintiff was not reasonably foreseeable ... . As for the cause of action sounding in negligent entrustment, the County defendants established, prima facie, that they did not possess special knowledge concerning a characteristic or condition peculiar to Batts that rendered his access to the pool cue unreasonably dangerous ...". ***Dickson v. Putnam*, 2019 N.Y. Slip Op. 03025, Second Dept 4-24-19**

PERSONAL INJURY.

INSPECTION WOULD NOT HAVE DISCOVERED THE LATENT DEFECT, A SNOW COVERED HOLE IN AN AREA NOT USED AS A WALKWAY, THE LANDOWNER WAS ENTITLED TO SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE.

The Second Department determined the defendant landowner, JWB, did not have constructive notice of a snow covered hole in a grassy area which was not intended to be a public walkway. Because the area was not a public walkway, the land-

owner did not have a duty to keep the area clear of snow. Plaintiff, in this slip and fall case, was injured when he stepped into the hole: "[A] defendant has constructive notice of a defect when it is visible and apparent, and has existed for a sufficient length of time before the accident that it could have been discovered and corrected' ... . When a defect is latent and would not be discoverable upon a reasonable inspection, constructive notice may not be imputed ... . To meet its initial burden on the issue of lack of constructive notice, a defendant is required to offer some evidence as to when th'e accident site was last cleaned or inspected prior to the plaintiff's accident ... . However, 'it is well established that the failure to make a diligent inspection constitutes negligence only if such inspection would have disclosed the defect' ... . JWB showed that it lacked constructive notice of the snow-covered hole in the ground. Even though no evidence of prior inspections of the subject area was offered, JWB demonstrated that the snow-covered hole was a latent defect that could not have been discovered upon a diligent inspection. The plaintiff's own deposition testimony indicated that he first noticed the hole after the accident, and that he had traversed the subject area prior to the accident on a number of occasions during the course of his work and did not see a hole in the grassy median ... . JWB further demonstrated, prima facie, that as a matter of law it owed no duty of care to keep the grassy median clear of snow, as the unpaved median was not intended to be a public walkway ...". ***Reed v. 64 JWB, LLC*, 2019 N.Y. Slip Op. 03094, Second Dept 4-24-19**

PERSONAL INJURY, PRODUCTS LIABILITY, LANDLORD-TENANT.

OUT-OF-POSSESSION LANDLORDS FAILED TO DEMONSTRATE THAT THE SLANTED FLOOR OF THE IN-GROUND POOL WAS NOT A DANGEROUS CONDITION AND THAT THEY DID NOT HAVE CONSTRUCTIVE NOTICE OF THE WAY THE POOL WAS BUILT, THE LANDLORDS' MOTION FOR SUMMARY JUDGMENT IN THIS DIVING ACCIDENT CASE SHOULD NOT HAVE BEEN GRANTED.

The Second Department determined the products liability cause of action against the builder of an in-ground swimming pool (Swim Tech) properly survived summary judgment and further determined the out-of-possession landlords' motion for summary judgment should not have been granted. Plaintiff dove into the pool and struck his head on a slant portion of the pool wall/floor. With respect to the property owners' liability, the court wrote: "An out-of-possession landowner who has assumed the obligation to make repairs to its property can be held liable for injuries caused by a dangerous condition if it is established that the landowner created or had actual or constructive notice of the condition ... . Whether a dangerous condition exists on property so as to create liability on the part of a landowner depends on the particular circumstances of each case and is generally a question of fact for the jury ... . ' [T]he owner of a private residential swimming pool has a duty to maintain the pool in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury and the burden of avoiding the risk' ... . A landowner also has the duty to warn of potentially dangerous conditions that are not readily observable ... . 'To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit [the defendants] to discover and remedy it' ... . Here, the owners failed to establish, prima facie, that the slanted wall in the deep end of their pool was not dangerous or that they lacked constructive notice of the condition ...". ***McDermott v. Santos*, 2019 N.Y. Slip Op. 03039, Second Dept 4-24-19**

THIRD DEPARTMENT

CRIMINAL LAW.

SUPERIOR COURT INFORMATION DID NOT INCLUDE THE APPROXIMATE TIME OF THE OFFENSE, GUILTY PLEA VACATED.

The Third Department, reversing County Court, determined the superior court information (SCI) to which defendant pled guilty was invalid because it did not include the approximate time of the offense. The guilty plea was vacated: "Defendant contends that the waiver of indictment was deficient, requiring that the guilty plea be vacated, because there was not strict compliance with the statutory mandates of CPL 195.20. Specifically, defendant asserts that the superior court information (hereinafter SCI) does not set forth the 'approximate time' of the offense nor does the record establish that the waiver of indictment was signed by defendant in open court ... . With regard to the approximate time of the offense, such information, which is required by the plain language of the statute, was omitted from the SCI . Furthermore, this is not 'a situation where the time of the offense is unknown or, perhaps, unknowable' so as to excuse the absence... of such information ... . As we have previously noted, '[a]ny other interpretation would render the statute's language requiring the 'approximate time' superfluous or redundant' ... . Inasmuch as defendant's waiver of indictment was not procured in strict compliance with the statutory provisions, it is invalid, thereby requiring vacatur of his guilty plea and dismissal of the SCI ...". ***People v. Edwards*, 2019 N.Y. Slip Op. 03108, Third Dept 4-25-19**

UNEMPLOYMENT INSURANCE.

NEWSPAPER ASSEMBLY AND DELIVERY PERSON WAS AN EMPLOYEE ENTITLED TO UNEMPLOYMENT INSURANCE BENEFITS.

The Third Department determined claimant, who assembled and delivered newspapers for Herald Publishing Company, was an employee entitled to unemployment insurance benefits: "[T]he record reflects that claimant was assigned specific routes within defined delivery areas ..., assembled and bagged her papers at the leased premises utilizing plastic bags and rubber bands purchased from Herald Publishing ... and was required to provide Herald Publishing with proof of a driver's license and automobile liability insurance ... . The record further reveals that claimant elected to purchase accident liability insurance from a carrier referenced in the distribution agreements entered into between claimant and Herald Publishing and that the corresponding premiums for such coverage were deducted from the invoices generated in connection with her delivery services ... . Finally, consistent with the terms of the distributor agreements signed by claimant, she was required to 'pick up all newspapers at the agreed pick-up point,' i.e., the leased premises, deliver the newspapers to subscribers 'at or before the target delivery time[s]' — for which she would be paid on a weekly basis at a specified per-paper rate ... — and was precluded from placing any inserts or additional materials in the newspapers that she was delivering ...". ***Matter of Fecca (Herald Publ. Co.--Commissioner of Labor)*, 2019 N.Y. Slip Op. 03120, Third Dept 4-25-19**

UNEMPLOYMENT INSURANCE.

CLAIMANT'S BEHAVIOR, ALLEGED TO HAVE CONSTITUTED HARASSMENT AND INSUBORDINATION, DID NOT RISE TO THE LEVEL OF DISQUALIFYING MISCONDUCT, CLAIMANT WAS ENTITLED TO UNEMPLOYMENT INSURANCE BENEFITS.

The Third Department determined claimant's behavior did not rise to the level of misconduct which would disqualify him from receiving unemployment insurance benefits. Claimant had objected to the way he was treated by his supervisor after claimant had been accused by a coworker of sending a harassing text message: "During the course of his employment as a design assistant for a clothing manufacturer, claimant sent a text message to a coworker. The coworker forwarded this message to the attention of claimant's supervisor, complaining that it was harassment. On the following business day, the supervisor verbally reprimanded claimant for sending the message. Claimant disagreed with the discipline and was advised that he could come back to discuss the matter further if he wished. Later that day, claimant approached the supervisor and demanded to see the text message. Using a tone that the supervisor described as 'angry,' 'hostile' and 'aggressive,' claimant disputed the supervisor's position that the message was work-related and told her how he believed she should have handled the matter. Another employee overheard the discussion and described claimant's voice as 'disrespectful' and 'increasing [in] volume.' The employer's co-owner subsequently terminated claimant's employment, concluding that he had violated the employer's anti-harassment policy by sending the message and had been insubordinate to the supervisor. ... Although the employer's witnesses testified that claimant sent a harassing message and spoke loudly and rudely to the supervisor, they also testified that he had not previously engaged in insubordinate behavior and had not received prior warnings ... . The Board further noted that claimant did not make abusive statements, refuse to follow the supervisor's directions or take other actions that had previously been held to constitute disqualifying misconduct ...". ***Matter of Salcedo (E.H. Mfg. Inc.--Commissioner of Labor)*, 2019 N.Y. Slip Op. 03125, Third Dept 4-25-19**

WORKERS'S COMPENSATION.

COUNTY JAIL CORRECTIONS OFFICER ENTITLED TO WORKERS' COMPENSATION BENEFITS FOR PTSD AND DEPRESSION RESULTING FROM AN INMATE'S SPITTING ON HIM AND THREATENING TO KILL HIS FAMILY.

The Third Department determined claimant's appeal was rendered moot because the Workers' Compensation Board rescinded its prior rulings and found claimant, a county jail corrections officer, could recover for PTSD and depression resulting from an inmate's spitting on him (saliva exposure) and threatening to kill claimant's family: "[T]he Board panel ...found ... that claimant did not sustain a physical injury within the meaning of Workers' Compensation Law § 2 (7) and, further, that the recent amendment to Workers' Compensation Law § 10 (3) (b) did not apply to claimant; hence, claimant was 'required to demonstrate that the stress encountered was greater than that which occurred in the normal work environment of a correction[] officer' ... . On that latter point, the Board panel credited claimant's testimony that the inmate in question 'was more dangerous than the average inmate' and that 'exposure to bodily fluids . . . was not a regular occurrence for [claimant] at work' ... . Accordingly, the Board panel found that claimant experienced stress greater than similarly situated correction officers, that 'establishment of the claim for . . . psychological conditions [was] supported by the credible evidence in the record' and that 'the claim [was] properly amended to include PTSD, major depressive disorder[] and panic disorder' ...". ***Matter of Carey v. Westchester County Dept. of Corr.*, 2019 N.Y. Slip Op. 03116, Third Dept 4-25-19**

WORKERS' COMPENSATION LAW.

CLAIMANT, A SUBWAY CLEANER, WAS ASSAULTED AFTER GETTING OFF THE SUBWAY ON HIS WAY HOME, CLAIMANT'S INJURIES WERE NOT COMPENSABLE.

The Third Department determined that a third-party assault on claimant, a subway cleaner, after claimant had clocked out of work and traveled some distance on the subway to get home, was not compensable: "According to claimant, he finished his shift at 7:50 a.m., 10 minutes early, and clocked out, as he was permitted to do to compensate for coming in early. He left his assigned work train station and traveled on a train six stops on his way home, and was assaulted as he exited the train at approximately 7:55 a.m. Accordingly, at the time of the assault, claimant was not at his assigned train station, having clocked out of work, he was not on duty or performing any of the duties of his employment, and he was not on an errand for the employer ... . Rather, claimant was commuting home, 'using the subways like the general public' ... . There is no evidence that claimant was required to use the trains to commute to work or that the employer benefited from the route that he used to travel home. ... Although injuries resulting from work-related assaults are compensable under certain circumstances, given that the incident occurred six train stops away from claimant's assigned station, after he had completed his shift, and that he was not performing any services for the employer on his commute home, the record supports the Board's determination that there was no nexus between the motivation for the assault and claimant's employment ...". ***Matter of Warner v. New York City Tr. Auth.*, 2019 N.Y. Slip Op. 03122, Third Dept 4-25-19**

FOURTH DEPARTMENT

CRIMINAL LAW.

COUNTY COURT COULD NOT LEGALLY FULFILL THE SENTENCING PROMISE THAT INDUCED DEFENDANT'S GUILTY PLEA, PLEA VACATED AN THE MATTER REMITTED FOR THE IMPOSITION OF A SENTENCE WHICH COMPORTS WITH DEFENDANT'S EXPECTATIONS.

The Fourth Department determined defendant's guilty plea was induced by a sentencing promise County Court could not fulfill. The plea was vacated and the matter was remitted for imposition of a sentence that comports with defendant's expectations: "Penal Law § 70.30 (3) provides that 'the maximum term of an indeterminate sentence imposed on a person shall be credited with and diminished by the amount of time the person spent in custody prior to the commencement of such sentence as a result of the charge that culminated in the sentence.' Penal Law § 70.30 (3) further provides that '[i]n the case of an indeterminate sentence, if the minimum period of imprisonment has been fixed by the court . . . , the credit shall also be applied against the minimum period.' That credit, however, 'shall not include any time that is credited against the term . . . of any previously imposed sentence . . . to which the person is subject' ... . Thus, 'a person is prohibited from receiving jail time credit against a subsequent sentence when such credit has already been applied to time served on a previous sentence' ... . Inasmuch as defendant was serving a sentence on a prior conviction throughout the instant proceedings, the court could not legally fulfill its promise to credit defendant's jail time against his sentence in this matter. It is well established that '[a] guilty plea induced by an unfulfilled promise either must be vacated or the promise honored' ... . 'Where, as here, the originally promised sentence cannot be imposed in strict compliance with the plea agreement, the sentencing court may impose another lawful sentence that comports with the defendant's legitimate expectations' ...". ***People v. Mccullen*, 2019 N.Y. Slip Op. 03180, Fourth Dept 4-26-19**

CRIMINAL LAW.

THE ATTORNEY GENERAL DID NOT HAVE THE AUTHORITY TO PROSECUTE DEFENDANT IN THIS CRIMINAL CASE BECAUSE NO REQUEST WAS MADE BY THE SUPERINTENDENT OF THE STATE POLICE.

The Fourth Department reversed defendant's weapons possession and sale convictions because the state Attorney General did not have the authority to prosecute the case. The Attorney General authority to prosecute a criminal case is triggered when a request is made by the head of an appropriate agency, here the Superintendent of the State Police. No such request was in the stipulated record on appeal: "It is well settled that the Attorney General lacks general prosecutorial authority and has the power to prosecute only where specifically permitted by statute ... . As relevant here, Executive Law § 63 (3) grants the Attorney General prosecutorial authority '[u]pon request of . . . the head of any . . . department, authority, division, or agency of the state' … . Although the People assert that the Attorney General had authority to prosecute this matter under section 63 (3) based on a request made by the State Police, such a request would confer that authority only if made by the head of the division, i.e., the Superintendent of State Police ... . Moreover, 'the State bears the burden of showing that the [division or] agency head has asked for the prosecutorial participation of the Attorney General's office' ...". ***People v. Wassell*, 2019 N.Y. Slip Op. 03187, Fourth Dept 4-26-19**

CRIMINAL LAW.

UNAUTHORIZED USE OF A VEHICLE WAS A LESSER INCLUSORY CONCURRENT COUNT OF THE GRAND LARCENY COUNT, CONVICTION ON THE GRAND LARCENY COUNT REQUIRED DISMISSAL OF THE LESSER COUNT.

The Fourth Department dismissed the unauthorized use of a vehicle charge as a lesser inclusory concurrent count of the grand larceny charge, which was based upon car theft: "'[B]ecause it is impossible to commit the crime of grand larceny in the fourth degree under Penal Law § 155.30 (8) without concomitantly committing the crime of unauthorized use of a vehicle in the third degree under section 165.05 (1)' ... , we agree with defendant and the People that count three of the indictment, charging the latter crime, must be dismissed because it is a lesser inclusory concurrent count of count two, charging the former crime ...". ***People v. Hickey*, 2019 N.Y. Slip Op. 03165, Fourth Dept 4-26-19**

CRIMINAL LAW.

POSTREADINESS DELAY BECAUSE A PROSECUTION WITNESS WAS ON VACATION WAS CHARGEABLE TO THE PEOPLE, DEFENDANT'S MOTION TO DISMISS ON SPEEDY TRIAL GROUNDS SHOULD HAVE BEEN GRANTED.

The Fourth Department, reversing County Court, determined a period of postreadiness delay because a prosecution witness was on vacation was chargeable to the People and the defendant's speedy trial motion should have been granted: "It is well established that '[t]he unavailability of a prosecution witness may be a sufficient justification for delay . .. , provided that the People attempted with due diligence to make the witness available' ... . Additionally, the reason for the witness's unavailability is relevant to determining whether a delay is justified. Where a witness is unavailable because of medical reasons or military deployment, courts generally have held that the delay is not chargeable to the People ... . Where the witness is unavailable because he or she has taken a vacation, however, many courts have charged the time to the People ... . That is because 'the mere fact that a necessary witness plans to go on a vacation does not relieve [the People] of their speedy trial obligation' ... . Here, the People did not establish that they exercised due diligence to secure the witness's presence on the scheduled trial date, and we conclude that the delay arising from the witness's unavailability during his vacation is chargeable to the People." ***People v. Harrison*, 2019 N.Y. Slip Op. 03173, Fourth Dept 4-26-19**

CRIMINAL LAW, EVIDENCE.

STATEMENT MADE BY THE ASSAULT VICTIM 12 TO 15 MINUTES AFTER THE ASSAULT WAS PROPERLY ADMITTED AS AN EXCITED UTTERANCE.

The Fourth Department determined a statement made by the victim of an assault 12 to 15 minutes after the assault was admissible under the excited utterance exception to the hearsay rule: "Defendant contends ... that County Court erred in permitting a prosecution witness to testify that the victim told him that 'the man he was fighting with was the one that cut him' because that statement did not fall under the excited utterance exception to the rule against hearsay. We reject that contention. The victim made the statement approximately 12 to 15 minutes after the assault and while he was being treated in the prison's infirmary. Testimony at trial established that, at the time of the statement, the victim appeared to be 'emotional,' 'mad,' 'angry,' and 'very agitated.' The statement qualified as an excited utterance inasmuch as that statement was 'made shortly after the [assault and] . . . while [the victim] was under the extraordinary stress of [his] injuries' ...". ***People v. Farrington*, 2019 N.Y. Slip Op. 03237, Fourth Dept 4-26-19**

CRIMINAL LAW, EVIDENCE.

ALTHOUGH THE PRIVATE CITIZEN WAS ACTING AS AN AGENT FOR THE POLICE WHEN SHE RECORDED DEFENDANT'S ADMISSION TO MURDER, DEFENDANT WAS NOT ENTITLED TO A 710.30 NOTICE BECAUSE THE STATEMENT WAS VOLUNTARILY MADE AND NOT SUBJECT TO SUPPRESSION, TWO -JUSTICE DISSENT.

The Fourth Department, over a two-justice dissent, determined that the failure to provide a CPL 710.30 notice of a statement made by defendant to a private citizen was a mere irregularity, not reversible error, because the statement was not involuntarily made, and therefore was not subject to suppression. The two dissenters argued that it was possible the defendant was induced to make the statement by the promise of sexual relations with the private citizen. Because there was a colorable basis for suppression, the dissenters argued, the defendant was entitled to notice and a hearing. In the recorded statement the defendant admitted to committing murder and explained the details: "[W]e agree with our dissenting colleagues that the citizen in this case was acting as a police agent at the time she recorded the statements inasmuch as she was acting 'at the instigation of the police . . . to further a police objective' ... . We respectfully disagree with our dissenting colleagues, however, on the issue whether the failure to provide the CPL 710.30 notice warrants preclusion of those statements. We conclude that it does not. Where, as here, there is 'no colorable basis for suppression of the statement, the failure to give notice [constitutes] a mere irregularity not warranting preclusion' ... . In our view, there is no colorable basis for suppression of defendant's statements to the private citizen. There is no dispute that defendant voluntarily went to the citizen's home and that he was interested in pursuing a romantic relationship with her. During the entire conversation, wherein defendant ad-

mitted committing the homicide, the private citizen made no explicit or implicit promises that she would engage in sexual relations with defendant. Rather, it was defendant who offered to tell her anything she wanted to know after she expressed that she was afraid of him, and then provided her with all of the details concerning the homicide. We thus conclude that the private citizen did not make any statement or engage in any conduct that 'create[d] a substantial risk that . . . defendant might falsely incriminate himself'...". ***People v. Albert*, 2019 N.Y. Slip Op. 03227, Fourth Dept 4-26-19**

CRIMINAL LAW, EVIDENCE.

POLICE EFFECTIVELY SEIZED DEFENDANT BY BLOCKING DEFENDANT'S VEHICLE WITH TWO POLICE CARS, BECAUSE THE SEIZURE TOOK PLACE IN THE ABSENCE OF REASONABLE SUSPICION A PARTICULAR PERSON WAS INVOLVED IN A CRIME THE TANGIBLE EVIDENCE SHOULD HAVE BEEN SUPPRESSED.

The Fourth Department, reversing defendant's conviction and suppressing the tangible evidence, determined the police effectively seized defendant by blocking in defendant's vehicle with two police cars without sufficient cause: "The conviction arises from a police encounter during which an officer approached the parked vehicle in which defendant was a passenger and observed that defendant was in possession of a handgun. We agree with defendant that the police lacked reasonable suspicion to justify the initial seizure of the vehicle, and thus Supreme Court erred in refusing to suppress both the tangible property seized, i.e., the weapon, and statements defendant made to the police at the time of his arrest. Here, police officers effectively seized the vehicle in which defendant was riding when their two patrol cars entered the parking lot in such a manner as to prevent the vehicle from being driven away ... . The police had, at most, a 'founded suspicion that criminal activity [was] afoot,' which permitted them to approach the vehicle and make a common-law inquiry of its occupants. They did not, however, have 'reasonable suspicion that [a] particular individual was involved in a felony or misdemeanor' to justify the seizure that occurred here ..., and thus the weapon and defendant's statements should have been suppressed." ***People v. Suttles*, 2019 N.Y. Slip Op. 03158, Fourth Dept 4-26-19**

CRIMINAL LAW, EVIDENCE.

STATEMENTS MADE AFTER DEFENDANT REQUESTED AN ATTORNEY SHOULD HAVE BEEN SUPPRESSED, ERROR WAS NOT HARMLESS.

The Fourth Department, reversing County Court, determined that defendant's statements, made after he had asked for an attorney, should have been suppressed. The court further disagreed with the People's argument that the error was harmless: "We agree with defendant, however, that County Court ... erred in denying that part of his omnibus motion seeking to suppress the statements that he made while at the police station after he unequivocally asserted his right to counsel by asking, 'May I have an attorney please, a lawyer?' Specifically, we conclude that the court erred in refusing to suppress the statements that defendant made to investigators during his videotaped interrogation ... after requesting an attorney and the statements that defendant made on the videotape after the investigators left the interview room ... . We further conclude that, contrary to the People's assertion, the court's error is not harmless inasmuch as there is a 'reasonable possibility that the error might have contributed to defendant's conviction' ... . The defense theory at trial was that defendant had consensual sexual contact with the victim. During the videotaped interrogation viewed by the jury, however, defendant repeatedly denied having had any sexual contact with the victim. He then admitted that he had lied, but nevertheless continued to deny that sexual contact had occurred. In addition, the prosecutor, on redirect examination of one of the investigators, elicited testimony establishing that, after the investigators left the room, defendant was recorded making an additional comment that contradicted his earlier statements." ***People v. Jackson*, 2019 N.Y. Slip Op. 03162, Fourth Dept 4-26-19**

CRIMINAL LAW, EVIDENCE, APPEALS.

DEFENDANT'S CONVICTIONS FOR PREDATORY SEXUAL ASSAULT AGAINST A CHILD AND RAPE AFFIRMED UNDER A WEIGHT OF THE EVIDENCE ANALYSIS, THE DISSENT, APPLYING A WEIGHT OF THE EVIDENCE ANALYSIS, ARGUED THE EVIDENCE DID NOT RISE TO THE LEVEL OF BEYOND A REASONABLE DOUBT.

The Fourth Department, in an extensive, fact-specific decision, over a dissent, affirmed defendant's predatory sexual assault against a child and rape first degree convictions. The child was four when the alleged incident occurred and 11 at the time of the third trial. There was a hung jury in the first trial and the conviction after the second trial was reversed based upon the judge's handling of a jury note. The principal physical evidence was sperm found on the child's underwear. No semen was found on the underwear or on the child. There was no injury to the child's genitals. The defense theory was that the sperm was transferred to the child's underwear during a wash. The People's expert testified such a transfer was possible. The appeal came down to a weight of the evidence analysis. The dissent argued the proof did not rise to the level of beyond a reasonable doubt, noting the absence of semen, the lack of injury, the victim's poor memory and implausible description of the rape, the victim's affirmative response to the prosecutor's mistaken question about a second rape (the prosecutor mistakenly thought the two counts of rape in the indictment alleged two separate incidents), and the fact that defendant had no criminal record and no other allegation of inappropriate sexual conduct had ever been made against him. ***People v. Garrow*, 2019 N.Y. Slip Op. 03238, Fourth Dept 4-26-19**

CRIMINAL LAW, EVIDENCE, APPEALS.

FOR CAUSE JUROR CHALLENGES SHOULD HAVE BEEN GRANTED, JURORS COULD NOT UNEQUIVOCALLY STATE THEY COULD PUT ASIDE THEIR RESERVATIONS AND BE FAIR AND IMPARTIAL, BECAUSE THERE WILL BE A NEW TRIAL AND BECAUSE AN APPELLATE COURT CANNOT CONSIDER ISSUES NOT RULED UPON BY THE TRIAL COURT, THE TRIAL COURT WAS DIRECTED TO CONSIDER TWO EVIDENTIARY ISSUES, ONE RAISED BY THE PEOPLE, AND ONE RAISED BY THE DEFENSE.

The Fourth Department reversed defendant's conviction because for cause challenges to two jurors were denied. Neither juror gave unequivocal assurances that she could be fair and impartial, in fact one juror expressly said she would continue to think defendant was involved based solely on his presence in the courtroom. In the interest of judicial economy, because there will be a new trial, the Fourth Department indicated the court erred in finding defendant's cell phone was lawfully seized from defendant's vehicle incident to arrest to protect evidence in defendant's grabbable area from destruction or concealment. The Fourth Department noted it could not consider the People's argument the cell phone was lawfully seized pursuant to the automobile exception to the warrant requirement because Supreme Court didn't rule on that issue. The Fourth Department directed Supreme Court to make a ruling. The Fourth Department further directed Supreme Court to rule on whether an unavailable witness's hearsay statement should be admitted pursuant to defendant's rights to put on a defense and due process. Defendant had raised that issue but Supreme Court did not rule on it. With respect to the for cause juror challenges, the court wrote: " 'It is well settled that a prospective juror whose statements raise a serious doubt regarding the ability to be impartial must be excused unless the [prospective] juror states unequivocally on the record that he or she can be fair and impartial' '... . Although CPL 270.20 (1) (b) 'does not require any particular expurgatory oath or talismanic' words . . . , [a prospective] juror[] must clearly express that any prior experiences or opinions that reveal the potential for bias will not prevent [him or her] from reaching an impartial verdict' ...". ***People v. Clark*, 2019 N.Y. Slip Op. 03231, Fourth Dept 4-26-19**

FAMILY LAW, CIVIL PROCEDURE.

NEW YORK DID NOT HAVE SUBJECT MATTER JURISDICTION OVER A CUSTODY MATTER BECAUSE THE CHILD HAD NOT LIVED IN NEW YORK FOR SIX MONTHS AT THE TIME THE PROCEEDINGS WERE COMMENCED, NEW JERSEY STILL HAD JURISDICTION AT THAT TIME BECAUSE THE CHILD HAD BEEN REMOVED FROM NEW JERSEY LESS THAN SIX MONTHS BEFORE THE NEW YORK PROCEEDINGS WERE COMMENCED.

The Fourth Department, in a full-fledged opinion by Justice NeMoyer, reversing Family Court, determined that New York did not have subject matter jurisdiction over a child custody proceeding. At the time the proceeding was brought the child had not lived in New York for six months and New Jersey still had jurisdiction. The Fourth Department went through the history of jurisdictional issues in custody matters and through each of the grounds for jurisdiction codified in the Domestic Relations Law: "Instead of claiming home state jurisdiction under Domestic Relations Law § 76 (1) (a), the mother essentially argues that the court had subject matter jurisdiction over this proceeding under the safety net provision of section 76 (1) (d), which confers jurisdiction to make custody determinations when, insofar as relevant here, 'no court of any other state would have jurisdiction under the criteria specified in [section 76 (1)] (a).' ... We reject the mother's reliance on section 76 (1) (d). Under the special UCCJEA [Uniform Child Custody Jurisdiction and Enforcement Act] definition of 'home state' applicable to infants under six months old (Domestic Relations Law § 75-a [7]; NJ Stat Ann § 2A:34-54), New Jersey was the child's 'home state' between the date of his birth (February 18, 2015) and the alleged date of his move to New York (July 15, 2015) ... . Because the UCCJEA confers continuing jurisdiction on the state that 'was the home state of the child within six months before the commencement of the proceeding' if a parent lives in that state without the child (Domestic Relations Law § 76 [1] [a]; NJ Stat Ann § 2A:34-65 [a] [1]), it follows that New Jersey retained continuing jurisdiction of this matter until January 15, 2016, i.e., six months after the child's alleged move to New York on July 15, 2015 and one week after the instant proceeding was commenced on January 8, 2016 ... . Thus, New York lacked jurisdiction under section 76 (1) (d) because New Jersey could have exercised jurisdiction under the criteria of section 76 (1) (a) on the date of this proceeding's commencement ...". ***Matter of Nemes v. Tutino*, 2019 N.Y. Slip Op. 03236, Fourth Dept 4-26-19**

FAMILY LAW, CIVIL PROCEDURE, CONTRACT LAW.

DESPITE THE PROVISION IN THE SEPARATION AGREEMENT REQUIRING THAT ANY MODIFICATION OF SUPPORT APPLY NEW JERSEY LAW, BECAUSE ALL PARTIES RESIDED IN NEW YORK WHEN THE MODIFICATION APPLICATION WAS MADE, NEW YORK LAW CONTROLS.

The Fourth Department, reversing (modifying) Family Court, determined that. despite the choice of law provision in the separation agreement, New York law applied to any modification of child support. The family lived in New Jersey when the separation agreement, providing that New Jersey law would control support modification, was executed. But all parties were living in New York when the application for modification was made: "[W]e conclude that the court had jurisdiction

pursuant to the Uniform Interstate Family Support Act ([UIFSA] Family Ct Act art 5-B) to resolve the issues raised in the mother's petition and objections ... . The UIFSA unequivocally provides that where, as here, the parents reside in this state 'and the child does not reside in the issuing state, a tribunal of this state has jurisdiction to enforce and to modify the issuing state's child support order in a proceeding to register that order' ... . Furthermore, we agree with the mother that New York law must be applied to determine the father's child support obligation here inasmuch as the statute further provides that '[a] tribunal of this state exercising jurisdiction under this section shall apply . . . the procedural and substantive law of this state to the proceeding for enforcement or modification' (Family Ct Act § 580-613 [b]). ... Although courts will generally enforce a choice of law clause ' so long as the chosen law bears a reasonable relationship to the parties or the transaction' ... , courts will not enforce such clauses where the chosen law violates ' some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal' ...". ***Matter of Brooks v. Brooks*, 2019 N.Y. Slip Op. 03164, Fourth Dept 4-26-19**

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