CasePrepPlus

June 21, 2019

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

Editor: **Bruce Freeman**

NEW YORK STATE BAR ASSOCIATION
Serving the legal profession and the community since 1876

COURT OF APPEALS

CRIMINAL LAW, ATTORNEYS.

IN THE FACE OF OVERWHELMING EVIDENCE, DEFENSE COUNSEL EFFECTIVELY CONCEDED GUILT AND URGED JURY NULLIFICATION ON THE BURGLARY CHARGE BECAUSE THERE WAS NO BREAK-IN AND THE STOLEN ITEMS WERE NOT WORTH MUCH, THE COURT OF APPEALS HELD THAT DEFENDANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL.

The Court of Appeals determined defendant was not deprived of effective assistance of counsel because counsel effectively conceded defendant stole items from the lobby of an apartment building. Defense counsel argued defendant was over-charged (burglary) because, although defendant had no right to be in the lobby, there was no break-in and the stolen items were of minimal value. The Court of Appeals noted that it has held that a defendant cannot argue jury nullification to the jury: "... [I]n People v. Weinberg, we concluded that defendant's argument that 'he should have been permitted by the trial court to present the concept of jury nullification during summation is foreclosed by our holding in People v. Goetz' (83 NY2d 262, 268 [1994]). Relying on Goetz, we explained that '[p]ermitting defense counsel instead [to en]courage the jury to abdicate its primary function would directly contravene the trial court's authority, recognized [in] Goetz, to instruct the jury that they must follow and properly apply the law' (id.). We cannot say that, on this record when viewed in totality, defendant was provided with less than meaningful representation. Here, defense counsel was eminently familiar with the facts of the case and the evidence elicited, including the details of the surveillance video and the photographic exhibits. Given the truly overwhelming evidence against his client on all the charges, and constrained by the limited legitimate defense strategies available, counsel raised what he reasonably perceived could be factual issues in the case, such as the method of defendant's entry into the building. Counsel's performance included cogent opening and closing arguments, a motion to dismiss after the People's case-in-chief, and thorough cross-examinations of the People's witnesses. Moreover, the trial court did not curb counsel's jury nullification summation arguments. As a result, the whole record of counsel's performance demonstrates that defendant has failed to sustain his burden that he was deprived of meaningful representation ...". ***People v. Mendoza*, 2019 N.Y. Slip Op. 04758. CtApp 6-13-19**

CRIMINAL LAW, ATTORNEYS, EVIDENCE.

THE RECORD WAS INSUFFICIENT TO ALLOW THE CONCLUSION THAT DEFENDANT DID NOT RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL, A POST-TRIAL EVIDENTIARY PROCEEDING MIGHT ANSWER THE QUESTIONS LEFT OPEN BY THE TRIAL RECORD; ANY ERROR IN ADMITTING DNA EVIDENCE WHERE CONSENT, NOT IDENTITY, IS THE ISSUE IS HARMLESS.

The Court of Appeals, in a full-fledged opinion by Judge Wilson, over a dissent, determined (1) the record was insufficient to demonstrate defendant did not receive effective assistance of counsel and (2) because the DNA evidence was not offered to identify the defendant any error in introducing it was harmless. The defendant argued that defense counsel did not review the surveillance video the People provided and pursued a theory at trial that was at odds with the video evidence. In addition, defense counsel told the jury in his opening statement that defendant would testify (he did not testify), the defendant, who worked at a hotel, unlocked a hotel-room door for a couple who were drunk. At some point defendant had sexual contact with the woman while the man slept. Defendant said the sexual contact was consensual. The video evidence contradicted the time-line the defendant had described. The majority concluded the record evidence was not sufficient to conclude that defense counsel did not review or did not understand the significance of the video evidence, and the failure to call the defendant as a witness did not prove ineffective assistance as a matter of law. To make a sufficient record, a 440 motion would be necessary: "Mr. Lopez-Mendoza argues that his attorney's opening statement undermined his case by promising the defendant would take the stand and making arguments contradicted by video evidence, then failing to call defendant to the stand and closing with a new version of events. The ineffective assistance, he argues, was caused by either his attorney's failure to review the video evidence or his failure to understand its importance. Either way, Mr. Lopez-Mendoza contends, that failure proved disastrous. The defendant 'bears the ultimate burden of showing . . . the absence of strategic or other legitimate explanations for counsel's challenged actions' ... . The record here is insufficient to make that showing. Although '[i]t simply cannot be said that a total failure to investigate the facts of a case, or review pertinent records, constitutes a trial strategy resulting in meaningful representation'... , the limited record in this case does not conclusively establish that coun-

sel was ineffective. On its own, the decision not to call a witness after promising to do so does not establish ineffective assistance of counsel as a matter of law ... . * * * '[T]he lack of an adequate record bars review on direct appeal . . . wherever the record falls short of establishing conclusively the merit of the defendant's claim' ... . Here, it is 'essential[] that an appellate attack on the effectiveness of counsel be bottomed on an evidentiary exploration by collateral or post-conviction proceeding brought under CPL 440.10' ... . Such a proceeding could answer the questions left open on this record, including whether counsel reviewed the video evidence at all, or whether he may have misunderstood that the evidence was flatly inconsistent with his opening argument." ***People v. Lopez-Mendoza*, 2019 N.Y. Slip Op. 04759, CtApp 6-13-19**

CRIMINAL LAW, EVIDENCE.

ANY *BRADY* VIOLATIONS WERE NOT "MATERIAL" IN THAT THERE WAS NO REASONABLE POSSIBILITY THE EVIDENCE WOULD HAVE CHANGED THE JURY'S VERDICT, DEFENDANT'S MOTION TO VACATE HIS CONVICTION SHOULD NOT HAVE BEEN GRANTED.

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, over a dissent, reversing the Appellate Division, determined defendant's motion to vacate his conviction based upon the People's failure to turn over *Brady* material relevant to the impeachment of a key prosecution witness (JA), and the prosecutor's failure to correct that witness's testimony, should not have been granted. The opinion includes a detailed recitation of the evidence which can not be fairly summarized here. In a nutshell, the Court of Appeals held that any *Brady* violation that might have occurred, in light of the extensive impeachment evidence forcefully used by defense counsel, the violation was not "material" in that it could not have affected the verdict: "... [D]efendant brought [a] CPL 440.10 motion to vacate his conviction ... . [D]efendant asserted that the People had violated their Brady obligation by failing to turn over evidence that there was an agreement to confer a benefit on JA in exchange for his testimony at defendant's murder trial. In addition, defendant asserted that the trial prosecutor personally intervened in JA's burglary case by procuring his release without bail during the June 13th drug court appearance, failed to correct JA's trial testimony to specify that she was the 'DA' who participated on June 13th, and failed to correct his characterization of his performance as 'good' in the drug treatment program ... . * * * 'To make out a successful Brady claim, a defendant must show that (1) the evidence is favorable to the defendant because it is either exculpatory or impeaching in nature; (2) the evidence was suppressed by the prosecution; and (3) prejudice arose because the suppressed evidence was material' ... . In New York, where a defendant made a specific discovery request for a document, and the information was not disclosed, we measure the third prong of the materiality of the suppressed Brady material by considering whether there is a reasonable possibility that disclosure of the evidence would have changed the result of the proceedings ... . In the absence of a specific request by defendant, materiality is established if there is a 'reasonable probability' that the result would have been different if the evidence had been disclosed — meaning 'a probability sufficient to undermine the court's confidence in the outcome of the trial' ... . * * * In determining that a Brady violation occurred, the Appellate Division failed to do the required materiality analysis as to the suppressed information. * * * ... [T]o say that there was ample impeachment evidence at trial against the witness on multiple levels is an understatement. ... [T]here is no reasonable possibility that the knowledge that the trial prosecutor was the specific ADA who stood up for the People at the June 13th appearance and that JA was still in a drug program despite additional program violations — leaving treatment and bringing cigarettes into a facility — would have changed the jury's verdict." ***People v. Giuca*, 2019 N.Y. Slip Op. 04642, CtApp 6-11-19**

EMPLOYMENT LAW, MUNICIPAL LAW.

'LABOR CLASS' EMPLOYEES ARE NOT ENTITLED TO REINSTATEMENT AFTER A YEAR'S ABSENCE DUE TO ON THE JOB INJURY, CIVIL SERVICE LAW § 71 DOES NOT APPLY TO 'LABOR CLASS' EMPLOYEES.

The Court of Appeals, reversing the Appellate Division, determined section 71 of the Civil Service Law, which provides for the reinstatement of an employee after a one-year absence from work due to an injury, did not apply to petitioner (Jordan), a so-called "labor class" employee of the New York City Housing Authority (NYCHA): "Petitioners argue, as they did below, that 'employee' is unqualified in the statute and so we should apply that term broadly, consistent with its plain meaning. NYCHA counters that, although 'employee' is undefined in the Civil Service Law, section 71 uses terms of art normally not associated with the labor class, including 'preferred eligible list' and 'grade.' Both are fair points, and therefore to resolve any ambiguity, we turn to the history and the purpose of the statute in resolving this issue. Our task here is made easier by the fact that we have already articulated section 71's purpose. Twenty-five years ago, in Allen v. Howe, we said that section 71 'w[as] adopted to address the difficult situation created by the prolonged absence of a civil service employee' due to injury (84 NY2d 665, 671 [1994]). Under Civil Service Law § 75, delineated groups of employees 'shall not be removed . . . except for incompetency or misconduct after a hearing.' This section left a governmental employer unable to fill a vacancy created by an extended absence due to injury without a 'resignation' or the 'institut[ion] of disciplinary hearings' (id.). Section 71 was designed to remove the procedural hurdle imposed by section 75 by allowing a 'State governmental employer' to terminate an employee without 'resort to a disciplinary proceeding' and providing the injured employee a mechanism for later reinstatement (id.). Including Jordan within the coverage of section 71 would not serve that legislative purpose. As a labor class employee, Jordan was not entitled to a disciplinary hearing before she was terminated and NYCHA did not face the dilemma that led to passage of section 71. Moreover, even if NYCHA was forced to rehire Jordan, she could have

been lawfully terminated the next day—'an absurd result that would frustrate the statutory purpose' ... . Therefore, we hold that NYCHA did not violate Section 71 when it refused to reinstate Jordan." ***Matter of Jordan v. New York City Hous. Auth.*, 2019 N.Y. Slip Op. 04756, CtApp 5-13-19**

ELECTION LAW, FREEDOM OF INFORMATION LAW (FOIL).

ELECTION LAW 3-222 WHICH PROHIBITS DISCLOSURE OF VOTED BALLOTS FOR TWO YEARS AFTER AN ELECTION APPLIES BOTH TO PAPER BALLOTS AND ELECTRONIC BALLOTS.

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, over two dissenting opinions (three dissenting judges), reversing the Appellate Division, determined that Election Law 3-222 (2), which prohibits, for two years, the disclosure of "voted ballots" absent a court order of legislative committee direction, prohibits the disclosure of the electronic form of the ballots: "Public Officers Law § 87(2)(a), the FOIL exemption at issue, provides that an agency may deny access to records that are 'specifically exempted from disclosure by state or federal statute.' While an applicable 'state or federal statute' need not 'expressly state it is intended to establish a FOIL exemption, we have required a showing of clear legislative intent to establish and preserve that confidentiality which one resisting a FOIL disclosure claims as protection' ... . Respondents assert that Election Law § 3-222 creates such an exemption. To determine whether Election Law § 3-222 reflects the requisite legislative interest in confidentiality, we must interpret the statute. * * * .. . [T]he rule in Election Law § 3-222(2) that 'voted ballots' are protected from examination during the first two years after an election absent court order or direction from a relevant legislative committee extends to electronic copies of those ballots. The same is true of absentee and military ballots, which are 'voted ballots' under subsection (2) and, along with their envelopes, are also specifically protected in subsection (3)." ***Matter of Kosmider v. Whitney*, 2019 N.Y. Slip Op. 04757, CtApp 6-13-19**

INSURANCE LAW.

THE STATUTORY TIMELY-DISCLAIMER REQUIREMENT OF INSURANCE LAW § 3420(d)(2) DOES NOT APPLY TO OUT-OF-STATE RISK RETENTION GROUPS (RRG'S), DEFENDANT RRG, WHICH DID NOT ISSUE A TIMELY DISCLAIMER OF COVERAGE IN THE UNDERLYING PERSONAL INJURY ACTION, IS NOT BARRED FROM PRESENTING DEFENSES TO COVERAGE.

The Court of Appeals, in a full-fledged opinion by Judge Rivera, over an extensive dissenting opinion by Judge Wilson, determined that the statutory timely disclaimer requirement of Insurance Law § 3420(d)(2) does not apply to defendant PCIC, an out-of-state risk retention group (RRG). Therefore PCIC's failure to make a timely disclaimer of coverage in the underlying personal injury action did not bar PCIC's coverage defenses. The central issue was one of statutory interpretation. The Court of Appeals rejected the argument that Insurance Law § 2601(a)(6), which applies to RRG's and requires prompt "disclosure" of coverage, also requires timely "disclaimer" of coverage: "Whether PCIC's disclaimer is regulated by the Insurance Law turns on whether the reference to an insurer's failure 'to promptly disclose coverage' in section 2601 (a) (6) includes the timely disclaimer requirement of section 3420 (d) (2). Nadkos [plaintiff] argues that section 2601 (a) (6) cites to section 3420 (d) without limitation, and thus encompasses both paragraphs (d) (1) and (d) (2). According to Nadkos, if the Legislature intended to limit section 2601 (a) (6) to a specific subparagraph of section 3420 (d), it knew how to do so ... . We reject the interpretation advocated by Nadkos, and adopted by the dissent, because the prohibition on an unfair claim settlement practice based on a failure to promptly disclose coverage encompasses the mandates of section 3420 (d) (1), not (d) (2)." ***Nadkos, Inc. v. Preferred Contrs. Ins. Co. Risk Retention Group LLC*, 2019 N.Y. Slip Op. 04641, CtApp 6-11-18**

INSURANCE LAW, CORPORATION LAW, CONSTITUTIONAL LAW, EVIDENCE.

INSURERS MAY PROPERLY REFUSE NO-FAULT INSURANCE PAYMENTS TO A PROFESSIONAL MEDICAL SERVICE CORPORATION WHICH IS EFFECTIVELY OWNED AND CONTROLLED BY NONPHYSICIANS, THERE IS NO NEED TO DEMONSTRATE FRAUDULENT INTENT OR CONDUCT TANTAMOUNT TO FRAUD ON THE PART OF THE PROFESSIONAL CORPORATION; ANY ERROR IN ALLOWING THE JURY TO HEAR NONPARTY DEPOSITION TESTIMONY IN WHICH THE NONPARTIES REPEATEDLY ASSERTED THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION WAS HARMLESS.

The Court of Appeals, in a full-fledged opinion by Judge Fahey, determined that the defendant insurers properly refused to make no-fault insurance payments to plaintiff professional corporation because the corporation was owned and controlled by nonphysicians. The court specifically held that fraudulent intent or conduct "tantamount to fraud" need not be demonstrated. The court noted that allowing in evidence the deposition testimony of two nonparties (nonphysicians who allegedly controlled the professional corporation), in which the Fifth Amendment privilege against self-incrimination was repeatedly asserted, if it was error (not determined), was harmless: "... [A]n insurance carrier, seeking to demonstrate that a professional service corporation engaged in corporate practices that violate Business Corporation Law § 1507, Business Corporation Law § 1508, or Education Law § 6507 (4) (c), [need not] show that the professional service corporation or its managers engaged in common-law fraud. ... A corporate practice that shows 'willful and material failure to abide by' licensing and incorporation statutes ... may support a finding that the provider is not an eligible recipient of reimbursement under 11 NYCRR 65-3.16 (a) (12) without meeting the traditional elements of common-law fraud. * * * While the Fifth Amendment

accords an individual the privilege not to answer questions in a civil proceeding if the answers might incriminate the person in future criminal proceedings ... , a witness who asserts this Fifth Amendment privilege in a civil trial is not necessarily protected from consequences in the same manner as in a criminal trial. This Court has held that, in a civil case, failure to answer questions by a witness who is a party 'may be considered by a jury in assessing the strength of evidence offered by the opposite party on the issue which the witness was in a position to controvert' ... . In a civil trial, 'an unfavorable inference may be drawn against a party from the exercise of the privilege against self-incrimination' ... . We have not previously decided whether a nonparty's invocation of the Fifth Amendment may trigger an adverse inference instruction against a party in a civil case, and we have no occasion to do so here because any error by the trial court was harmless ... . ***Andrew Carothers, M.D., P.C. v. Progressive Ins. Co.*, 2019 N.Y. Slip Op. 04643, CtApp 6-11-19**

PRODUCTS LIABILITY, NEGLIGENCE.

DEFENDANT DID NOT DEMONSTRATE AS A MATTER OF LAW THAT COKE OVENS USED IN THE MANUFACTURE OF STEEL WERE NOT PRODUCTS TRIGGERING THE DUTY TO WARN OF THE HAZARDS OF BREATHING EMISSIONS FROM THE OVENS, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Court of Appeals, in a full-fledged opinion by Judge Stein, over a two-judge dissent, reversing the Appellate Division, determined the defendant (Wilputte), which sold coke ovens for steel production, did not demonstrate, as a matter of law, the ovens were not "products" triggering the duty to warn. Therefore defendant's motion for summary judgment should not have been granted (by the Appellate Division). Plaintiff's decedent worked on top of the coke ovens and alleged breathing the toxic substances caused lung cancer. Plaintiffs alleged defendant had a duty to warn plaintiff's decedent to use a respirator when working on the ovens. The Appellate Division had determined the coke ovens, housed in so-called "batteries," were akin to buildings and construction of the buildings was a service, not a product: "... [D]efendant has not met its burden in showing that the coke ovens at issue are not products as a matter of law. Regardless of the alterations Bethlehem [the steel manufacturer] may have made to the scale and specifications of the battery at large, the ovens themselves served one function: the production of coke. This process was standard across all variations of coke ovens that Wilputte sold, ultimately placing the hazardous thing at issue squarely within the category of products to which liability has attached in the failure-to-warn context. ... Wilputte was responsible for placing the ovens into the stream of commerce and that it derived financial benefit from its role in the production process. Indeed, by the time decedent began working for Bethlehem, Wilputte had sold hundreds of coke ovens to plants ... . Wilputte also marketed its ovens with informational brochures showing the completed ovens and their functionality, indicating that Wilputte, not Bethlehem, was the commercial source of the product. ... Although the ovens were largely assembled and completed on-site, that merely speaks to the logistical realties of the market of which Wilputte had a considerable share. ... [T]he record supports Supreme Court's conclusion that Wilputte was in the best position to assess the safety of the coke ovens because of its superior knowledge regarding the ovens' intended functionality ... . 'A major determinant of the existence of a duty to warn' is an assessment of 'whether the manufacturer is in a superior position to know of and warn against those hazards' inherent to its product ...". ***Matter of Eighth Jud. Dist. Asbestos Litig.*, 2019 N.Y. Slip Op. 04640, CtApp 6-11-19**

FIRST DEPARTMENT

ANIMAL LAW, LANDLORD-TENANT, MUNICIPAL LAW, FAIR HOUSING AMENDMENTS ACT.

THE FEDERAL FAIR HOUSING AMENDMENTS ACT AND THE NEW YORK CITY HOUSING AUTHORITY'S RULES REQUIRED THAT THE HEARING OFFICER CONSIDER PETITIONER-TENANT'S ACCOMMODATION REQUEST TO KEEP AN EMOTIONAL SUPPORT DOG IN HIS APARTMENT, THE HEARING OFFICER HAD RULED THE DOG WAS VICIOUS AND MUST BE REMOVED WITHOUT CONSIDERING THE ACCOMMODATION REQUEST, THE MATTER WAS SENT BACK.

The First Department sent the matter back for a determination by the New York City Housing Authority (NYCHA) of petitioner's accommodation request to keep an emotional support dog in his apartment. The dog had apparently bitten a NYCHA employee and the NYCHA alleged the presence of "vicious" dog violated the lease. Before the hearing, petitioner, who suffers from schizophrenia, requested that he be permitted to register the dog, Onyx, as an emotional support dog. The Hearing Officer ruled that petitioner could not keep the dog, but did not reach the accommodation request: "Under the Fair Housing Amendments Act (FHAA), it is unlawful discrimination for a housing provider to 'refus[e] to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling' (42 USC § 3604[f][3][B]). Federal regulations exempt 'animals that assist, support, or provide service to persons with disabilities' from public housing authority pet rules (24 CFR § 960.705[a]). Accordingly, respondent is obligated by both federal law and its own rules to accommodate petitioner's request to maintain his emotional support animal, Onyx, so long as petitioner meets his burden of showing that his dog assists him with aspects of his disability. ... Federal regulations provide that a housing provider can only invoke the direct threat exception after con-

ducting an individualized and objective assessment of the relevant factors, including (1) the nature, duration, and severity of the risk; (2) the probability that the potential [*3]injury will actually occur; and (3) whether any reasonable accommodations will mitigate the risk (24 CFR § 9.131[c]). The 'direct threat' analysis has been applied to cases in which a person with a disability is seeking to maintain an emotional support pet as a reasonable accommodation ...". ***Matter of Washington v. Olatoye*, 2019 N.Y. Slip Op. 04644, First Dept 6-11-19**

ATTORNEYS.

MOTION TO DISQUALIFY COUNSEL SHOULD HAVE BEEN GRANTED BECAUSE OF THE APPEARANCE OF A CONFLICT OF INTEREST.

The First Department, reversing Supreme Court, determined defendant's motion to disqualify plaintiff's attorney should have been granted: "Plaintiff's counsel represented defendant at the time that he commenced this action against defendant on plaintiff's behalf. Thus, the conflict of interest arose at that time and must be assessed as of that time (see Rules of Professional Conduct [22 NYCRR 1200.0] rule 1.7[a][1] ...). Although the matter in which plaintiff's counsel represented defendant is unrelated to the instant matter, we find that counsel should be disqualified because 'an attorney must avoid not only the fact, but even the appearance, of representing conflicting interests' ...". ***City & County Paving Corp. v. Titan Concrete, Inc.*, 2019 N.Y. Slip Op. 04776, First Dept 6-13-19**

CIVIL PROCEDURE.

DEFENDANT DID NOT DENY ALLEGATIONS IN THE COMPLAINT WHICH ALLEGED GENERAL JURISDICTION OVER THE DEFENDANT, THEREFORE JURISDICTION WAS CONFERRED ON THE COURT, THE MECHANICS OF SUCCESSFULLY DENYING JURISDICTION EXPLAINED.

The First Department determined defendant's motion to dismiss the complaint based upon a lack of personal jurisdiction was properly denied because the defense was waived when defendant did not specifically deny an allegation of general jurisdiction made in the complaint. The court explained the mechanics of denying jurisdiction: "... [T]he defendant argues that it asserted a defense of lack of personal jurisdiction in its answer, and thus preserved the issue for adjudication in its present motion. Personal jurisdiction is not an element of a claim, and matters that are not elements need not be pleaded in the complaint ... . Where the plaintiff has not alleged facts specifically addressing the issue of personal jurisdiction in its complaint, the defendant must assert lack of personal jurisdiction as an affirmative defense in order to give plaintiff notice that it is contesting it (see CPLR 3018). Where the plaintiff elects to allege facts specifically addressing the issue of personal jurisdiction in its complaint, the defendant's denial of those allegations may be sufficient to preserve defendant's jurisdictional defense ... . The specific allegations of plaintiff's complaint ... track, almost verbatim, the language of personal jurisdiction in CPLR 302, which provides the bases for specific jurisdiction. Defendant's denial of these allegations is sufficient to provide notice to plaintiff that it is contesting specific jurisdiction. The allegations of plaintiff's complaint paragraphs 83 and 84 purport to establish a basis for general jurisdiction. They were not denied by defendant, rather defendant admitted them to the extent that it 'is a duly organized foreign corporation doing business in New York . . .' This answer, interposed in 2004, before the Supreme Court's ruling in Daimler AG v. Bauman, 571 US 117 (2014), would have provided a basis for general jurisdiction. It, therefore, does not qualify as a specific denial that would have put plaintiff on notice that the defendant is contesting general jurisdiction. Defendant's failure to clearly provide an objection to general jurisdiction in its answer waived the defense and conferred jurisdiction upon the court ...". ***Matter of New York City Asbestos Litig.*, 2019 N.Y. Slip Op. 04777, First Dept 6-13-19**

CRIMINAL LAW, EVIDENCE.

IN AN EXHAUSTIVE DECISION WHICH DISCUSSED ONLY THE CONVOLUTED FACTS OF THIS MURDER CASE, THE MAJORITY AFFIRMED THE CONVICTION, OVER A DISSENT WHICH CALLED INTO QUESTION THE IDENTIFICATION OF THE DEFENDANT AS THE SHOOTER.

The First Department, in an extensive, detailed, exhaustive rendition of the convoluted facts in this murder case, over a dissent, affirmed defendant's conviction, finding the evidence legally sufficient. The victim was a two-year-old child in a van who was struck by a stray bullet. Major issues were whether the accomplice testimony was sufficiently corroborated and whether the jury was made aware that one of the eyewitnesses had identified a person other than the defendant, Morris, as the shooter. Morris was initially charged with the murder and went to trial which ended in a mistrial. He then pled guilty, against his attorney's advice, to an apparently unrelated possession of a weapon charge. The shooting took place in 2006. Defendant was arrested and indicted in 2013 and went to trial in 2015. The majority appeared to rely heavily on evidence of consciousness of guilt (the defendant gave up a business in New York and fled to North Carolina). ***People v. Hemphill*, 2019 N.Y. Slip Op. 04646, First Dept 6-11-19**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

PLAINTIFF WAS INJURED USING A GRINDER WHICH DID NOT HAVE A SAFETY GUARD, THE LABOR LAW § 241(6) CAUSE OF ACTION SHOULD NOT HAVE BEEN DISMISSED.

The First Department, reversing Supreme Court, determined plaintiff's Labor Law 241 (6) cause of action should not have been dismissed. Plaintiff was injured using a grinder that did not have a safety guard: "Industrial Code (12 NYCRR) § 23-1.5(c)(3), which provides that '[a]ll safety devices, safeguards and equipment in use shall be kept sound and operable, and shall be immediately repaired or restored or immediately removed from the job site if damaged,' applies to the instant action and is sufficiently specific to support a section 241(6) claim ... . Here, plaintiff testified that he was given a hand-held grinder from which the safety guard had been removed by his employer to install an over-sized disc blade. Plaintiff was then instructed to use this grinder to cut concrete, over his objections, and was injured when the grinder got stuck, kicked back, knocked him to the ground, and cut into his foot. This testimony raises a triable issue of fact as to whether defendant breached its nondelegable duty "to provide reasonable and adequate protection and safety" to plaintiff ...". ***Contreras v. 3335 Decatur Ave. Corp.*, 2019 N.Y. Slip Op. 04663, First Dept 6-11-13**

LANDLORD-TENANT.

BUILDING OWNERS EXPENDED SUFFICIENT FUNDS FOR THE IMPROVEMENT OF AN APARTMENT TO JUSTIFY AN EXEMPTION FROM RENT STABILIZATION.

The First Department, in a full-fledged opinion by Justice Kahn, over a two-justice dissenting opinion, determined that the building owners demonstrated the expenditure of sufficient funds for improvements to an apartment to justify an exemption from rent stabilization. The opinions are too extensive to fairly summarize here. What follows is the majority's summary of the holding: "On this appeal, we are asked to determine whether the record sufficiently demonstrates that defendants Windemere Chateau, Inc. (Chateau), the original owner of a residential building located at 666 West End Avenue in Manhattan, and Windermere Owners, LLC (Owners), the successor owner of the building, expended an amount in qualified individual apartment improvements (IAIs) to apartment 4K in that building sufficient to render that apartment exempt from rent stabilization. Should we answer that question in the negative and conclude that defendants imposed a rent overcharge on the apartment's tenant, plaintiff Laura DiLorenzo, we are then asked to determine whether there was evidence supporting a finding of willfulness on defendants' part in doing so, warranting an award of treble damages to plaintiff. Upon our de novo review of the record, we conclude that defendants have substantiated their claims that they have made sufficient expenditures for IAIs performed in the apartment to warrant an exemption from rent stabilization and did not impose a rent overcharge. Thus, we do not reach the issue of whether defendants willfully imposed a rent overcharge." ***DiLorenzo v. Windermere Owners LLC*, 2019 N.Y. Slip Op. 04779, First Dept 6-13-19**

MEDICAL MALPRACTICE, NEGLIGENCE.

PAIN MANAGEMENT DOCTOR'S MOTION FOR SUMMARY JUDGMENT IN THIS MEDICAL MALPRACTICE/WRONGFUL DEATH CASE PROPERLY DENIED, THE DOCTOR PRESCRIBED OPIOIDS FOR PLAINTIFF'S DECEDENT, A DRUG ADDICT.

The First Department determined defendant pain-management doctor's (Kiri's) motion for summary judgment in this medical malpractice case was properly denied. Kiri allegedly continued to prescribe high-dosage opioids to plaintiff's decedent knowing that she was an addict. Plaintiff's decedent died of a drug overdose. Although plaintiff's decedent used illicit drugs as well, there was a question of fact about the proximate cause of death and whether the death was a foreseeable consequence of prescribing opioids: "Plaintiff's theory of liability is that Dr. Kiri's prescription of high-dose opioid pain killers for more than a year, despite the fact that her medical records showed drug use and drug seeking behavior, escalated, enhanced, or encouraged that behavior. An accidental overdose is not an unforeseeable result of prescribing, or over-prescribing, opioid painkillers to a patient who displays signs of addiction ... . More specifically, here, decedent's procurement and use of illicit drugs were not unforeseeable in light of the indicia of addiction or misuse noted in her medical records. Because decedent's use of illicit drugs was not unforeseeable, her drug use was not an intervening cause and did not amount to a separate act of negligence that independently caused her death." ***Halloran v. Kiri*, 2019 N.Y. Slip Op. 04769, First Dept 6-13-19**

SECOND DEPARTMENT

CIVIL PROCEDURE, PERSONAL INJURY.

THE NEW JERSEY TRAFFIC ACCIDENT INVOLVED NEW YORK RESIDENTS (PLAINTIFFS), A TRUCK LEASED BY DEFENDANT NEW JERSEY CORPORATION AND THE DEFENDANT TRUCK DRIVER FROM PENNSYLVANIA; NO GENERAL PERSONAL JURISDICTION OVER THE CORPORATION OR THE DRIVER; POSSIBLE LONG-ARM JURISDICTION OVER THE CORPORATION, BUT NOT THE DRIVER, BASED UPON BUSINESS CONDUCTED IN NEW YORK.

The Second Department determined Supreme Court properly denied all but one of the defendants' motions to dismiss premised on lack of personal jurisdiction, pending further discovery. The traffic accident happened in New Jersey. The plaintiffs' van was struck from behind by a freight truck leased by Finkle (a New Jersey corporation) from Ryder Truck Rental and driven by defendant Larios, a resident of Pennsylvania. All the plaintiffs were residents of New York. The Second Department found that there was no general jurisdiction under CPLR 301, and no long-arm jurisdiction under CPLR 302(a)(3) (tortious act outside the state causing injury within the state). However there may jurisdiction against Finkle pursuant to CPLR 302(a)(1) (conducting business within the state): "... [Plaintiffs] have not alleged facts in opposition which would support the exercise of personal jurisdiction under New York's general jurisdiction statute, CPLR 301, over Larios, who was not domiciled in New York, or over Finkle, which was not incorporated in New York and did not have its principal place of business in New York ... . Under CPLR 302(a)(3), '[t]he situs of the injury is the location of the original event which caused the injury, not the location where the resultant damages are subsequently felt by the plaintiff' ... . Here, since the accident which caused the injuries occurred in New Jersey, CPLR 302(a)(3) does not provide a basis for personal jurisdiction over these defendants in New York ... . .. .Finkle asserted that it is a New Jersey corporation with its business address in New Jersey, and Larios stated that, at the time of the accident, he was transporting a load for the United States Postal Service within the State of New Jersey. However, Finkle admitted that it had terminals at four New York locations at which it parked its vehicles. Based upon these facts, and given Finkle's failure to submit trip logs, manifests, or other documentary evidence to support its assertion that the load Larios was transporting was being shipped within the State of New Jersey and had no relationship to Finkle's New York business, we agree with the Supreme Court's determination to deny as premature that branch of the appellants' motion which was pursuant to CPLR 3211(a)(8) to dismiss the complaint insofar as asserted against Finkle, with leave to renew upon completion of discovery." ***Qudsi v. Larios*, 2019 N.Y. Slip Op. 04742, Second Dept 6-12-19**

CONTRACT LAW, INSURANCE LAW, EMPLOYMENT LAW, EDUCATIONS-SCHOOL LAW, PERSONAL INJURY.

DEFENDANT SCHOOL DISTRICT WAS NOT A PARTY TO THE LONG-TERM DISABILITY INSURANCE CONTRACT WHICH COVERED PLAINTIFF, A SCHOOL DISTRICT EMPLOYEE WHO WAS INJURED ON THE JOB; THEREFORE THE SCHOOL DISTRICT COULD NOT BE SUED BY THE EMPLOYEE AFTER THE INSURER CUT OFF BENEFITS.

The Second Department determined that plaintiff, a security guard for the School District who was injured on the job, did not have a cause of action against District based upon the long-term disability insurer's (Sun Life's) decision to terminate her disability benefits. The District was not a party to the contract between Sun Life and the policyholder. Although the Summary Plan Description issued by Sun Life's predecessor mentioned the insured rights under the Employee Retirement Income Security Act (ERISA), the District was not obligated by the Summary-Plan language: "... [T]he plaintiff contends that, based on the language of portions of the Summary Plan Description, the District subjected itself to ERISA's statutory scheme governing appeals from denials of claims. ... An insurance policy is a contract to which standard provisions of contract interpretation apply ... . 'Liability for breach of contract does not lie absent proof of a contractual relationship or privity between the parties'... . 'One cannot be held liable under a contract to which he or she is not a party' ... . Here, the District was not a party to the long-term disability policy issued by Sun Life to a different named policyholder. Even assuming the authenticity of the Summary Plan Description excerpts relied upon by the plaintiff, nothing in the record reflects that the District authored, published, or agreed to be bound by the Summary Plan Description, which, by its terms, did not form part of the insurance policy. Nor do the terms of the insurance policy incorporate the provisions of ERISA ...". ***Arroyo v. Central Islip UFSD*, 2019 N.Y. Slip Op. 04669, Second Dept 6-12-19**

COURT OF CLAIMS, CIVIL PROCEDURE.

THE FACT THAT THE NOTICE OF CLAIM WAS NOT VERIFIED PROPERLY OVERLOOKED.

The Second Department determined the fact that the notice of claim was not verified was properly overlooked: "By notice of motion dated January 6, 2016, the claimants sought leave to amend their notice of intention to file a claim, nunc pro tunc, or, alternatively, for leave to file a late notice of claim. A proposed amended notice of intention to file a claim was included with the motion, and it included the verification which was missing from the original. In the order appealed from, the Court of Claims granted the claimants' motion for leave to amend their notice of intention to file a claim, nunc pro tunc. Pursuant

to Court of Claims Act § 11(b), a 'notice of intention to file a claim shall be verified in the same manner as a complaint in an action in the supreme court.' The Court of Appeals has held that 'there is no basis for treating an unverified or defectively verified claim or notice of intention any differently than an unverified or defectively verified complaint is treated under the CPLR in Supreme Court' ... . Here, as the Court of Claims found, the defendant was not prejudiced by the omission of a verification. Moreover, the court noted that CPLR 2001 permits an omission or defect to be corrected, upon such terms as may be just ...". ***Ordentlich v. State of New York*, 2019 N.Y. Slip Op. 04710, Second Dept 6-12-19**

CRIMINAL LAW, APPEALS.

COURT MUST CONSIDER WHETHER DEFENDANT SHOULD BE AFFORDED YOUTHFUL OFFENDER STATUS, A VALID WAIVER OF APPEAL DOES NOT BAR RAISING THE ISSUE.

The Second Department, vacating the sentence and sending the matter back because the court did not consider whether defendant should be afforded youthful offender status, noted that a valid waiver of appeal would not bar raising this issue on appeal (the waiver here was deemed invalid): "CPL 720.20(1) requires that the sentencing court 'must' determine whether an eligible defendant is to be treated as a youthful offender, even where the defendant fails to request such treatment, or agrees to forgo it as part of a plea agreement . Contrary to the People's contention, the ... defendant's waiver of his right to appeal was invalid because the Supreme Court failed to confirm that the defendant understood the nature of the right to appeal and the consequences of waiving it ... . In any event, a valid waiver would not bar the defendant's contention that the court failed to consider youthful offender treatment ...". ***People v. Ramirez*, 2019 N.Y. Slip Op. 04727, Second Dept 6-12-19**

CRIMINAL LAW, ATTORNEYS, EVIDENCE.

DEFENSE COUNSEL SUCCESSFULLY PURSUED A MISIDENTIFICATION DEFENSE THROUGHOUT THE TRIAL BUT CONCEDED THE ISSUE IN SUMMATION, DEFENDANT DID NOT RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL; A WITNESS MAY IDENTIFY THE DEFENDANT AT TRIAL DESPITE A PROCEDURALLY-DEFECTIVE PRE-TRIAL IDENTIFICATION.

The Second Department, reversing defendant's conviction, determined defendant did not receive effective assistance of counsel. During the trial the victim of the robbery twice misidentified the defendant before identifying the defendant, first indicating he did not see the defendant in the courtroom and then indicating a spectator was the assailant. Defense counsel pursued the misidentification defense throughout the trial, successfully challenging the admission of a surveillance video. But in summation defense counsel essentially conceded that defendant was one of the assailants. The Second Department noted that a witness who participated in a procedurally-defective pretrial identification procedure may still identify the defendant at trial if the People demonstrate the in-court identification is based upon the witness's independent observation of the defendant, here the observations made during the robbery itself: " 'A witness may identify the perpetrator of a crime as part of his or her in-court testimony, notwithstanding the existence of a procedurally-defective pretrial identification procedure, provided that the People establish by clear and convincing evidence that the in-court identification is based upon the witness's independent observation of the defendant' ... . Here, contrary to the defendant's contention, at an independent source hearing, the prosecution proved by clear and convincing evidence that the complainant's in-court identification of the defendant would be based on his independent observations during the robbery ... . * * * ... [D]efense counsel's confused and contradictory actions, effectively conceding the dispositive issue, deprived the defendant of his right to the effective assistance of counsel ... . Given defense counsel's opening statement and his conduct throughout the course of the trial in advancing his misidentification defense, his decision to abandon his chosen defense midstream in favor of a nebulous and contradictory argument that no forcible taking of property had occurred, 'was so unreasonable, inconsistent, and devoid of any possibility of success that it does not even rise to the level of trial strategy' ... . Under the circumstances, the defendant was deprived of the effective assistance of counsel and is entitled to a new trial." ***People v. Goondall*, 2019 N.Y. Slip Op. 04721, Second Dept 6-12-19**

CRIMINAL LAW, EVIDENCE.

THE NEGATIVE CHARACTER TESTIMONY WAS PROPERLY STRUCK, NOT BECAUSE SUCH EVIDENCE IS GENERALLY INADMISSIBLE, BUT BECAUSE THE WITNESS WAS ONLY FAMILIAR WITH THE DEFENDANT'S CHARACTER IN THE WORKPLACE, WHICH WAS NOT RELEVANT TO THE ALLEGED SEXUAL MISCONDUCT WITH A CHILD.

The Second Department determined the negative character evidence was properly stricken. Negative character evidence (i.e., that the witness never heard that defendant acted in a sexually inappropriate or sexually abusive manner in the workplace) is admissible if it relates to the appropriate community. Here the community the witness testified about was the workplace, which was not the relevant community because the alleged sexual misconduct with a child occurred in secret and outside the workplace: "Contrary to the conclusion of the Supreme Court, negative evidence of reputation—i.e., that the witness never heard anyone say anything negative about the defendant—can constitute relevant character evidence ... . However, relevant character evidence must be of reputation generally in the community where the crime occurred ... . Although that community is more broadly defined in modern times ... , the defendant's reputation in the workplace for lack

of sexual impropriety was in no way relevant to whether he sexually abused a child in secret and outside of the workplace. Accordingly, the character evidence was properly stricken, since that evidence was irrelevant." ***People v. Durrant*, 2019 N.Y. Slip Op. 04716, Second Dept 6-12-19**

CRIMINAL LAW, JUDGES.

THE JUDGE PROPERLY HANDLED A JUROR'S HESITATION WHEN THE JURY WAS POLLED, THE JUROR WAS QUESTIONED BY THE JUDGE OUTSIDE THE PRESENCE OF THE JURY, THE JUDGE DETERMINED THE JUROR WAS NOT UNDER IMPROPER PRESSURE AND SENT THE JURY BACK FOR FURTHER DELIBERATIONS.

The Second Department determined the trial judge properly handled a juror's (juror number two's) hesitation when the jury was polled. Outside the presence of the jury, the judge asked the juror about his reasons for hesitation, determined it was not caused by improper pressure, and sent the jury back for more deliberations: "... [T]he Supreme Court providently exercised its discretion in denying his motion for a mistrial based upon juror number two's hesitation in affirming the verdict. '[T]he jury must, if either party makes such an application, be polled and each juror separately asked whether the verdict announced by the foreman is in all respects his verdict. If . . . any juror answers in the negative, the court must refuse to accept the verdict and must direct the jury to resume its deliberation' (CPL 310.80). Here, the court appropriately conducted an inquiry, outside the other jurors' presence, into why juror number two hesitated in affirming the verdict, and further obtained clarification as to the reasons he gave ... . Juror number two's responses clarified that the pressure he perceived did not '[arise] out of matters extraneous to the jury's deliberations or not properly within their scope' … . Further, his responses established that the 'verdict [was] not the product of actual or threatened physical harm' ... . Accordingly, we agree with the court's determination to instruct the jury to continue deliberating ...". ***People v. Folkes*, 2019 N.Y. Slip Op. 04719, Second Dept 6-12-19**

EMPLOYMENT LAW, CONTRACT LAW, ADMINISTRATIVE LAW, PERSONAL INJURY, EDUCATION-SCHOOL LAW, CIVIL PROCEDURE.

SCHOOL EMPLOYEE'S NEGLIGENCE ACTION AGAINST THE DEPARTMENT OF EDUCATION IS NOT GOVERNED BY THE COLLECTIVE BARGAINING AGREEMENT (CBA), NO NEED TO EXHAUST ADMINISTRATIVE REMEDIES; DENIAL OF MEDICAL LEAVE DID NOT HAVE RES JUDICATA OR COLLATERAL ESTOPPEL EFFECT.

The Second Department, reversing Supreme Court, determined an employee's personal injury complaint against the NYC Department of Education (DOE), stemming from an elevator accident, should not have been dismissed. The plaintiff-employee first applied to the DOE for line of duty injury paid medical leave pursuant to the collective bargaining agreement (CBA) and was denied. Plaintiff then commenced the personal injury action. The DOE argued that plaintiff had failed to exhaust the administrative remedies required by the CBA and, in the alternative, the denial of the line of duty pay should be given res judicata or collateral estoppel effect. Supreme Court decided plaintiff had failed to exhaust the administrative remedies. The Second Department held that her injury and the resulting negligence action were not covered by the CBA: "An employee covered by a collective bargaining agreement which provides for a grievance procedure must exhaust administrative remedies prior to seeking judicial remedies ... or face dismissal of the action .... Here, however, the plaintiff seeks to recover damages against the defendants for pain and suffering based upon a negligence theory of liability which is outside the scope of, and is not governed by, the CBA's 'line of duty injury' paid leave grievance provisions... . There is no need to exhaust administrative remedies when the cause of action by the plaintiff is not governed by the CBA ... . The defendants' contention that dismissal is also warranted on the basis of collateral estoppel and res judicata is without merit ... . Collateral estoppel is inapplicable, as the defendants failed to demonstrate that the issue that the plaintiff seeks to pursue here was necessarily decided by the DOE when it denied the plaintiff's "line of duty injury" paid leave application ... . Likewise, the doctrine of res judicata, or claim preclusion, also is inapplicable to the plaintiff's complaint because the relief she seeks could not have been awarded within the context of the prior administrative proceeding ...". ***Shortt v. City of New York*, 2019 N.Y. Slip Op. 04745, Second Dept 6-12-19**

FAMILY LAW, CONTRACT LAW,

UNLESS THE PARTIES OPT OUT BY STIPULATION, A CHILD SUPPORT ORDER MAY BE MODIFIED WITHOUT A DEMONSTRATION OF A SUBSTANTIAL CHANGE IN CIRCUMSTANCES IF A PARTY'S INCOME INCREASES BY 15 % OR MORE AND THREE YEARS HAVE PASSED SINCE THE LAST ORDER.

The Second Department noted that a court can modify child support without a substantial change of circumstances where a party's income has increased by 15% or more and three years have passed since the last support order: "Section 451 of the Family Court Act allows a court to modify an order of child support, without requiring a party to allege or demonstrate a substantial change in circumstances, where (1) either party's gross income has changed by 15% or more since the order was entered or modified, or (2) three years or more have passed since the order was entered, last modified, or adjusted (see Family Ct Act § 451[3][b][i]; Domestic Relations Law § 236[B][9][b][2][ii] ...). The statutory grounds are not available in the event that the parties specifically opt out of that statutory provision in a validly executed stipulation (see Family Ct Act § 451[3][b]). In this case, the parties, in their stipulation, did not opt out of that statutory provision. Thus, the increase in the father's

gross income of more than 15% was sufficient, by itself, to permit the Family Court to modify his child support obligation ...". ***Matter of Regan v. Regan*, 2019 N.Y. Slip Op. 04702, Second Dept 6-12-19**

FORECLOSURE, CIVIL PROCEDURE.

A PRIOR FORECLOSURE ACTION DISMISSED FOR LACK OF STANDING DID NOT ACCELERATE THE MORTGAGE DEBT, THE STATUTE OF LIMITATIONS, THEREFORE, DID NOT START TO RUN.

The Second Department noted that the prior foreclosure action, which was dismissed on the ground the plaintiff lacked standing, did not accelerate the mortgage debt. Therefore the statute of limitations was not triggered by the dismissed action: "[E]ven if a mortgage is payable in installments, once a mortgage debt is accelerated, the entire amount is due, and the Statute of Limitations begins to run on the entire debt" ... . Acceleration occurs, inter alia, 'when a creditor commences an action to foreclose upon a note and mortgage and seeks, in the complaint, payment of the full balance due' ... . '[A]n acceleration of a mortgaged debt, by either written notice or the commencement of an action, is only valid if the party making the acceleration had standing at that time to do so' ... . Auguste contends that the commencement of the prior action in 2007 accelerated the debt, and that the commencement of the instant action, seven years later, was beyond the statute of limitations. Where, as here, the prior action is dismissed on the ground that the plaintiff lacked standing, the purported acceleration is a nullity, and the statute of limitations does not begin to run at the time of the purported acceleration ... ". ***U.S. Bank N.A. v. Auguste*, 2019 N.Y. Slip Op. 04747, Second Dept 6-12-19**

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

BANK'S PROOF OF DEFAULT DID NOT MEET THE REQUIREMENTS OF THE BUSINESS RECORDS EXCEPTION TO THE HEARSAY RULE AND THE PROOF OF MAILING OF THE REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL) 1304 NOTICE WAS DEFICIENT, BANK'S SUMMARY JUDGMENT MOTION IN THIS FORECLOSURE ACTION SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined plaintiff bank's motion for summary judgment in this foreclosure action should not have been granted. The proof of default did not meet the requirements of the business records exception to the hearsay rule. And the proof mailing in accordance with Real Property Actions and Proceedings Law (RPAPL) 1304 was deficient: "… [T]he plaintiff's submissions, including the affidavit of Daphne Proctor, a 'Document Execution Specialist' employed by the loan servicer, failed to lay a proper foundation for the admission of the business records relied on by the plaintiff to establish the defendant's default in repayment of the subject loan ... . Notably, to the extent that Proctor's 'purported knowledge of [the defendant's] default was based upon her review of unidentified business records created and maintained by [the loan servicer], her affidavit constituted inadmissible hearsay and lacked probative value' ... . Moreover, the plaintiff failed to establish, prima facie, its strict compliance with RPAPL 1304. The record contains a single 90-day notice with no clear indication as to whether the mailing was made by registered or certified mail, or by first-class mail ... . Furthermore, Proctor, who asserted that the notices required under RPAPL 1304 were mailed, did not aver in her affidavit that she was familiar with the loan servicer's mailing practices and procedures, and therefore did not establish proof of a standard office practice and procedure designed to ensure that items are properly addressed and mailed ... , nor did she aver that she had mailed the notices herself." ***Wells Fargo Bank, N.A. v. Kohli*, 2019 N.Y. Slip Op. 04751, Second Dept 6-12-19**

LABOR LAW-CONSTRUCTION LAW, AGENCY, EMPLOYMENT LAW, PERSONAL INJURY.

PLAINTIFF FELL THROUGH AN INADEQUATELY PROTECTED HOLE IN DEFENDANT'S BUILDING WHEN HE (APPARENTLY) WAS DOING WORK ON BEHALF OF HIS EMPLOYER, APPARENTLY A TENANT IN THE BUILDING; PLAINTIFF SHOULD HAVE BEEN AWARDED SUMMARY JUDGMENT ON HIS LABOR LAW § 240(1) CAUSE OF ACTION AGAINST THE BUILDING OWNER; BUT PLAINTIFF PRESENTED NO PROOF HIS EMPLOYER HAD ASSUMED THE DUTIES OF AN AGENT OF THE OWNER FOR SUPERVISION OF HIS WORK, THEREFORE SUMMARY JUDGMENT ON THE LABOR LAW § 240(1) ACTION AGAINST THE EMPLOYER WAS PROPERLY DENIED.

The Second Department, reversing (modifying) Supreme Court, determined that plaintiff's Labor Law § 240(1) cause of action against the building owner should have been granted, but his Labor Law § 240(1) cause of action against his employer, Bright Way, was properly denied because plaintiff presented no proof Bight Way acted as the owner's agent. Apparently Bright Way occupies the owner's building. Plaintiff is a salesman for Bright Way. Plaintiff was instructed to run a thermostat wire on the second floor of the building when he fell 15 feet through an inadequately protected hole: "Labor Law § 240(1) 'imposes liability only on contractors, owners or their agents' (...see Labor Law § 240[1]). 'An agency relationship for purposes of section 240(1) arises only when work is delegated to a third party who obtains the authority to supervise and control the job'... . 'Where the owner or general contractor delegates to a third party the duty to conform to the requirements of the Labor Law, that third party becomes the statutory agent of the owner or general contractor' ... . 'The key question is whether the defendant had the right to insist that proper safety practices were followed' ... . '[U]nless a defendant has supervisory control and authority over the work being done when the plaintiff is injured, there is no statutory agency con-

ferring liability under the Labor Law' ... . Here, the plaintiff's evidence failed to establish, prima facie, that Bright Way was an agent of the property owner or one of its contractors at the site. The evidence proffered by the plaintiff in support of his motion did not establish that Bright Way had been delegated the 'duty to conform to the requirements of the Labor Law'... , that Bright Way 'had the right to insist that proper safety practices were followed' at the construction site ... , that Bright Way had 'broad responsibility' to coordinate and supervise "all the work being performed on the job site" ... , or that Bright Way had requested or been granted authority by the owner or contractor to supervise and control the work in the area where the accident occurred ...". ***Yiming Zhou v. 828 Hamilton, Inc.*, 2019 N.Y. Slip Op. 04752, Second Dept 6-12-19**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

NEITHER PLAINTIFF NOR DEFENDANTS WERE ENTITLED TO SUMMARY JUDGMENT IN THIS "FALL FROM AN A-FRAME LADDER" CASE.

The Second Department determined both plaintiff's and defendants' motions for summary judgment were properly denied. The plaintiff was cutting brackets which held up an air duct with an electric saw when the duct came down and plaintiff fell off an A-frame ladder. The fact that plaintiff fell from a ladder did not, standing alone, warrant summary judgment on plaintiff's Labor Law § 240(1) cause of action. The defendants did not demonstrate that the ladder provided proper protection or that plaintiff's conduct was the sole proximate cause of the accident: "... [T]he plaintiff failed to demonstrate, prima facie, that the subject ladder was an inadequate safety device for the work in which he was engaged at the time of his alleged accident ... . The mere fact that the plaintiff fell from a ladder does not, in and of itself, establish that proper protection was not provided ... . The opinion of the plaintiff's expert failed to establish that the ladder that was provided was an inadequate safety device ... . [D]efendants failed to establish their prima facie entitlement to judgment as a matter of law on that branch of their cross motion which was for summary judgment dismissing the Labor Law § 240(1) cause of action. The defendants' expert's affidavit, in which the expert opined that the subject ladder 'was so constructed, placed and operated as to give proper protection,' is conclusory and unsupported by evidence in the record. The defendants also failed to demonstrate, prima facie, that the plaintiff's conduct was the sole proximate cause of his fall because he allegedly failed to use scaffolding that was readily available at the job site ... . In addition, the defendants failed to establish, prima facie, that the plaintiff's conduct was the sole proximate cause of his fall because he allegedly improperly positioned the ladder ... , did not ask his coworker to cut the bracket for him ... , and did not demand that his foreman provide scaffolding ...". ***Orellana v. 7 W. 34th St., LLC*, 2019 N.Y. Slip Op. 04711, Second Dept 6-12-19**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

REPAIRING A LIGHT FIXTURE IS COVERED UNDER BOTH LABOR LAW §§ 240(1) AND 241(6), DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing (modifying Supreme Court) determined defendants' motion for summary judgment on plaintiff's Labor Law 240 (1), 241 (6) and 200 causes of action should not have been granted. Plaintiff fell from an A-frame ladder when he was repairing a light fixture at the Nassau Coliseum. Repairing the light fixture is an activity covered by both Labor Law §§ 240(1) and 241(6): "Here, the County defendants' own submissions highlighted rather than eliminated triable issues of fact as to whether the plaintiff was engaged in repairs or routine maintenance at the time of his accident. Among other things, the County defendants submitted the plaintiff's deposition testimony in support of summary judgment. Although the plaintiff's testimony demonstrated that some of the lighting poles on which he worked may have only required the tightening or replacement of a lightbulb, he testified that more labor intensive work was performed on other lighting poles in order to make them function, which fell within the scope of 'repairing' a light fixture and, concomitantly, within the scope of Labor Law § 240(1) ... . 'Labor Law § 241(6) imposes a nondelegable duty of reasonable care upon owners and contractors to provide reasonable and adequate protection and safety to persons employed in . . . construction, excavation or demolition work'... . '[T]he courts have generally held that the scope of Labor Law § 241(6) is governed by 12 NYCRR 23-1.4(b)(13), which defines construction work expansively. Under that regulation, construction work consists of [a]ll work of the types performed in the construction, erection, alteration, repair, maintenance, painting or moving of buildings or other structures' .... Since the plaintiff was arguably engaged in the repair of the subject lighting fixtures, the County defendants failed to establish, prima facie, that Labor Law § 241(6) was inapplicable to the plaintiff's activities." ***Wass v. County of Nassau*, 2019 N.Y. Slip Op. 04748, Second Dept 6-12-19**

MUNICIPAL LAW, PERSONAL INJURY.

THE PLAINTIFF WAS PROPERLY ALLOWED TO FILE A LATE NOTICE OF CLAIM ASSERTING A NEW CAUSE OF ACTION, ALTHOUGH THE ORIGINAL NOTICE OF CLAIM DID NOT MENTION AN ALLEGEDLY MISSING STOP SIGN AS A BASIS FOR LIABILITY, THE MISSING STOP SIGN WAS MENTIONED IN THE POLICE REPORT WHICH WAS ATTACHED TO THE ORIGINAL NOTICE OF CLAIM.

The Second Department determined plaintiff student was properly allowed file a late notice of claim, which added a cause of action. The infant plaintiff was injured when his school bus was involved in a traffic accident. The initial notice of claim alleged negligence on the of the city and the Department of Education (DOE) in connection with the ownership of the school

bus. The late notice of claim alleged a cause of action against the city and the NYC Department of Transportation based upon an alleged missing stop sign. A police report was attached to the original notice of claim and the missing stop sign was mentioned in the report: "... [T]he Supreme Court providently exercised its discretion in granting that branch of the plaintiff's motion which was for leave to serve a late notice of claim (see General Municipal Law § 50-e[5]). Although the plaintiff failed to demonstrate a reasonable excuse for the failure to serve a timely notice of claim containing the allegation regarding the missing stop sign, the absence of a reasonable excuse is not determinative, as the City defendants acquired actual knowledge of the essential facts constituting the claim within 90 days after the claim arose and were not substantially prejudiced by the late notice ...". ***M.L. v. City of New York*, 2019 N.Y. Slip Op. 04686, Second Dept 6-12-19**

PERSONAL INJURY, CIVIL PROCEDURE, EVIDENCE, REAL PROPERTY LAW.

PLAINTIFF'S DISCOVERY REQUEST FOR INSPECTION AND EXPERT EXAMINATION OF DEFENDANTS' PROPERTY IN THIS SLIP AND FALL CASE SHOULD HAVE BEEN GRANTED, PLAINTIFF ALLEGED DEFENDANTS DIVERTED WATER ONTO A PUBLIC ROAD WHICH FORMED A PATCH OF BLACK ICE.

The Second Department, reversing Supreme Court, determined that plaintiff's request to enter the Rizzetta defendants' property to allow inspection and expert examination of the alleged diversion of water from the property onto a public road should have been granted. Plaintiff was injured riding his bicycle when he hit a patch of black ice, slipped and fell: "CPLR 3120(1)(ii) provides that a party may serve another party with notice 'to permit entry upon designated land or other property in the possession, custody or control of the party served for the purpose of inspecting, measuring, surveying, sampling, testing, photographing or recording by motion pictures or otherwise the property or any specifically designated object or operation thereon.' Motions seeking such discovery 'are routinely granted when a central issue in the case is the condition of the real property under inspection' ... . Here, the Supreme Court improvidently exercised its discretion in denying the plaintiff's motion. A central issue in this litigation is the source of the water which allegedly caused the injury-producing ice condition. An owner of private land abutting a public roadway may be liable for injuries sustained from a fall on ice on the public roadway, if the 'ice condition was caused and created by the artificial diversion of naturally flowing water from the private landowner's property onto the public roadway' ... . The plaintiff's theory of the Rizzetta defendants' liability is premised upon the Rizzetta defendants' alleged diversion of water from their property onto the public roadway. Although the probative value of the inspection may be weakened by the passage of time since the accident occurred, such delay is not a basis for denying the plaintiff's discovery request where, as here, the inspection may still aid the parties in preparation for trial ...". ***Zupnick v. City of New Rochelle*, 2019 N.Y. Slip Op. 04754, Second Dept 6-12-19**

PERSONAL INJURY, MUNICIPAL LAW.

QUESTIONS OF FACT ABOUT WHETHER THE MOVEMENT OF THE BUS WAS VIOLENT AND UNUSUAL, DEFENDANT COMMON CARRIER'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined there were questions of fact whether the movement of the bus was unusual and violent: "To establish a prima facie case of negligence against a common carrier for injuries sustained by a passenger when the vehicle comes to a stop, the plaintiff must establish that the stop was unusual and violent ... . In moving for summary judgment dismissing the complaint, common carriers have the burden of establishing, prima facie, that the stop was not unusual and violent ... . Here, the Supreme Court should have denied the defendants' motion for summary judgment dismissing the complaint. The evidence that the defendants submitted in support of their motion, which included transcripts of deposition testimony and surveillance video footage of the incident, failed to eliminate all triable issues of fact as to whether the stop of the bus was unusual and violent ...". ***San Andres v. County of Westchester*, 2019 N.Y. Slip Op. 04743, Second Dept 6-12-19**

THIRD DEPARTMENT

CRIMINAL LAW.

ATV'S ARE NOT MOTOR VEHICLES WITHIN THE MEANING OF PENAL LAW § 125.13(1) (FIRST DEGREE VEHICULAR MANSLAUGHTER); CONCURRENT INCLUSORY COUNTS OF PENAL LAW § 125.13(3) DISMISSED.

The Third Department dismissed certain counts of the indictment which stemmed from an accident involving an ATV (all-terrain vehicle). A passenger in the ATV, driven by defendant, was thrown from the ATV and killed. Defendant was alleged to have been driving while intoxicated and was convicted of vehicular manslaughter in the first degree, vehicular manslaughter in the second degree, aggravated driving while intoxicated and driving while intoxicated. The Third Department determined that one of the first degree vehicular manslaughter counts must be dismissed because ATV's are not motor vehicles within the meaning of that statute (Penal Law § 125.13 (1)). The court also found that three concurrent inclusory counts must be dismissed: "ATVs are specifically excluded by the plain language of the relevant definition of

motor vehicle. As relevant herein, the Penal Law defines 'vehicle' to include a "motor vehicle," which is further defined in the Vehicle and Traffic Law as '[e]very vehicle operated or driven upon a public highway which is propelled by any power other than muscular power, except. . . [ATVs] as defined in [Vehicle and Traffic Law] article [48-B]' (Vehicle and Traffic Law § 125 ...; see Penal Law § 10.00 [14]). This specific exclusion of ATVs from the definition of motor vehicle is further evident from two statutes that contain provisions that would be unnecessary if ATVs were included in the definition of motor vehicle. First, the crime of vehicular manslaughter in the second degree contains separate provisions for incidents that arise from the operation of motor vehicles (see Penal Law § 125.12 [1]) and ATVs (see Penal Law § 125.12 [3]) and, second, the Vehicle and Traffic Law contains a provision specifically providing that ATVs are motor vehicles for the purpose of Vehicle and Traffic Law article 31, which prohibits the intoxicated operation of a motor vehicle (see Vehicle and Traffic Law § 2404 [5]). Thus, we are constrained to conclude that ATVs are not motor vehicles for purposes of the Penal Law. Accordingly, the weight of the evidence does not support defendant's conviction for vehicular manslaughter in the first degree under Penal Law § 125.13 (1) (count 1). * * * Defendant contends that his convictions under counts 3, 4, 5, 6 and 7 must be dismissed as inclusory concurrent counts of the conviction of vehicular manslaughter in the first degree under count 2 (see CPL 300.40 [3] [b]). 'Concurrent counts are 'inclusory' when the offense charged in one is greater than any of those charged in the others and when the latter are all lesser offenses included within the greater' (CPL 300.30 [4]). The People concede that defendant's conviction of vehicular manslaughter in the first degree under count 2 requires that counts 3, 4, 6 and 7 be dismissed as inclusory concurrent counts. However, they accurately note that count 5 — charging aggravated driving while intoxicated — is not an inclusory concurrent count of vehicular manslaughter in the first degree as charged pursuant to Penal Law § 125.13 (3) in count 2 because it is possible to commit the latter without also committing the former ...". ***People v. Wager*, 2019 N.Y. Slip Op. 04786, Third Dept 6-13-19**

CRIMINAL LAW, CIVIL PROCEDURE, JUDGES, APPEALS.

COUNTY COURT DENIED PETITIONER'S MOTION TO DISMISS AN INDICTMENT ON THE GROUND THE PEOPLE HAD LEGALLY SUFFICIENT EVIDENCE TO SUPPORT THE INDICTMENT AT THE TIME HE PLED GUILTY TO A PRIOR INDICTMENT (CPL § 40.40); PETITIONER'S REMEDY IS DIRECT APPEAL, NOT THE INSTANT ARTICLE 78 PETITION SEEKING PROHIBITION OR MANDAMUS.

The Third Department determined petitioner must seek review of the denial of a motion to dismiss an indictment pursuant to CPL § 40.40 by direct appeal, not by the instant Article 78 action for prohibition or mandamus re: the district attorney and the judge. Petitioner moved to dismiss the indictment on the ground that the People had legally sufficient evidence to support the indictment at the time he pled guilty to a prior indictment. County Court denied that motion without a hearing, even though County Court noted it could not determine whether the People had legally sufficient evidence at the time petitioner pled guilty: "The District Attorney contends that petitioner may not obtain collateral review of County Court's denial of his motion through a CPLR article 78 proceeding. We agree. 'Neither [of the extraordinary remedies of] prohibition nor mandamus lies as a means to obtain collateral review of an alleged error of law particularly where, as here, there is an adequate remedy at law by way of a direct appeal' ... . Any error in County Court's decision denying petitioner's motion to dismiss indictment No. 3 without a hearing is, at most, a mere error of law that does not justify the invocation of the extraordinary remedies sought ...". ***Matter of Davis v. Nichols*, 2019 N.Y. Slip Op. 04794, Third Dept 6-13-19**

CRIMINAL LAW, EVIDENCE.

LEGALLY INSUFFICIENT EVIDENCE THAT THE SUBSTANCE REFERENCED IN THE GRAND JURY TESTIMONY WAS COCAINE, INDICTMENT PROPERLY DISMISSED.

The Third Department, in an appeal by the People, affirmed County Court's dismissal of the indictment because there was legally insufficient evidence that the substance involved was cocaine: " 'Legally sufficient evidence' means competent evidence which, if accepted as true, would establish every element of an offense charged and the defendant's commission thereof' (CPL 70.10 [1] ...). 'The reviewing court must consider whether the evidence, viewed most favorably to the People, if unexplained and uncontradicted — and deferring all questions as to the weight or quality of the evidence — would warrant conviction' ... . '[I]n a drug-related prosecution [, as we have here,] the People's case is legally sufficient if the evidence provides a 'reliable basis' for inferring the presence of a controlled substance' ... . 'More than conclusory assertions that the defendant possessed a drug are required at the [g]rand [j]ury stage' ... . The evidence presented to the grand jury consisted of sparse testimony from the CI and an investigator involved in the controlled transactions, with most of the substance of that testimony having been supplied through leading questions. As to the first transaction, the CI testified, in a conclusory manner, that he believed the substance to be crack cocaine, without providing any description of the substance or explanation for his belief ... , and, with respect to the second transaction, the CI did not express any belief as to the nature of the substance he received from defendant ... . Additionally, although the investigator testified that he received white chunky substances from the CI, his testimony surrounding the testing of those substances was sorely lacking. He did not provide

any detail as to his training and experience in field testing, explain how field testing occurs or specifically identify what he did in this case to determine that both substances were cocaine." ***People v. Carlin*, 2019 N.Y. Slip Op. 04788, Third Dept 6-13-19**

ENVIRONMENTAL LAW, NAVIGATION LAW, INSURANCE LAW.

THREE PRIOR INSURERS OF THE PROPERTY CONTAMINATED BY AN OIL SPILL, SUED BY THE CURRENT INSURER FOR INDEMNIFICATION, PROPERLY GRANTED SUMMARY JUDGMENT DISMISSING THE THIRD-PARTY COMPLAINT, ONE INSURER HAD SPECIFICALLY EXCLUDED COVERAGE FOR THE CONTAMINANT, THE OTHER TWO WERE NOT PROMPTLY NOTIFIED OF THE CLAIM AS REQUIRED BY THEIR POLICIES.

The Third Department determined the summary judgment motions brought by three prior insurers of the property contaminated by oil were properly granted. The three insurers, Arch, AAIC and NSC, were third-party defendants in an action for indemnification brought by the current insurer of the property, Utica Mutual. The Arch policy had a specific exclusion of coverage for the contaminant. Arch's failure to comply with the filing requirement of Insurance Law 2307 did not void the exclusion because there was no evidence Arch violated any regulations or statutes. The actions against AAIC and NSC were properly dismissed because notification of the potential contamination claim by Utica was not made for three years after Utica was aware of the contamination: "... [The] evidence established that the petroleum cleanup and removal costs sought to be recovered by plaintiff arose out of, or were the result of, MTBE contamination at both the spill site and the Honeoye Municipal District Well and, thus, satisfied Arch's prima facie burden of demonstrating that the allegations of the complaint fell completely within the MTBE exclusion ... . Insurance Law § 2307 ... states that 'no policy form shall be delivered or issued for delivery unless it has been filed with the superintendent [of financial services] and either he [or she] has approved it, or [30] days have elapsed and he [or she] has not disapproved it as misleading or violative of public policy' ... . However, as Supreme Court correctly noted, the failure to file under Insurance Law § 2307 'does not, by itself, void the policy clause . . .[; rather,] such clause is void only if the substantive provisions of the clause are inconsistent with other statutes or regulations' ... . Utica Mutual failed to tender sufficient proof to raise a question of fact as to whether it was justifiably ignorant of AAIC's and NSC's prior insurance coverage. Indeed, despite having access to Kirkwood and Kirkwood's records immediately after learning of the contamination and its purported cause, Utica Mutual produced no evidence to show that it made any effort to discover AAIC's and NSC's existence before July 2010, when Utica Mutual's counsel sent a letter to Kirkwood's former insurance broker seeking information regarding Kirkwood's prior insurers. Utica Mutual provided no explanation as to why it waited until July 2010 to inquire about prior insurers." ***State of New York v. Flora*, 2019 N.Y. Slip Op. 04801, Third Dept 6-13-19**

FAMILY LAW.

PETITIONER HAD AN EXTRAMARITAL AFFAIR WITH MOTHER WHO REMAINS MARRIED, PETITION FOR GENETIC TESTING PROPERLY DENIED BASED UPON THE PRESUMPTION OF LEGITIMACY AND THE BEST INTERESTS OF THE CHILD.

The Third Department determined Family Court properly denied the petitioner's request for genetic testing, citing the presumption of legitimacy and the best interests of the child. Petitioner had an extramarital affair with mother, who remains married: "The testimony at the hearing established that respondents were married at all relevant times, including when the child was conceived and when the child was born. The husband was present at the child's birth and was named on the child's birth certificate as the father. Since the birth of the child, who was three years old at the time of the hearing, it is undisputed that the husband has taken an active role as a parent and has developed a strong and loving bond with the child ... . The mother testified that she believes the husband to be the child's biological father and, to date, the husband is the only father that the child has known. Although petitioner's expert and the school social worker who testified on respondents' behalf disagreed on the ultimate question of whether genetic testing should be performed, petitioner's expert specifically qualified his recommendation, stating that, although he believed genetic testing should be performed, he 'would not want that to suddenly mean that the child has to find [the results] out" and opined that, to do so at such a young age, would be "ill-advised' and that any such revelation should occur sometime 'within [10] years' and 'before puberty,' with the aid of 'counseling or consultation.' Meanwhile, the social worker opined that, given the child's young age, it would be confusing, traumatic and potentially disruptive to his development and ability to form proper attachments throughout the rest of his life should such information be revealed at the present time. Family Court also appropriately considered the hostility that petitioner harbors toward respondents in determining that granting petitioner's application would only serve to create uncertainty and unnecessarily disrupt the child's otherwise stable, loving and established family dynamic ...". ***Matter of Mario WW. v. Kristin XX.*, 2019 N.Y. Slip Op. 04798, Third Dept 6-13-19**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

PLAINTIFF, WHO IS FIVE FOOT SEVEN, WAS INJURED WHEN A SIX FOOT HIGH STACK OF SCAFFOLDS PARTIALLY FELL ON HIM, THE HEIGHT DIFFERENTIAL WAS DEEMED DE MINIMUS, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IN THIS LABOR LAW § 240(1) ACTION WAS PROPERLY GRANTED.

The Third Department determined defendant's motion for summary judgment in this Labor Law § 240(1) action was properly granted. Plaintiff, who is five feet seven inches tall, was injured when a six-foot high stack of scaffold partially fell over. The difference between the plaintiff's height and the height of the stacked scaffolds was deemed de minimus: "In a previous appeal from an order deciding the parties' motions for summary judgment, we determined that the scaffolding frames, estimated to be about six feet tall, established an elevation differential, but that questions of fact remained as to plaintiff's actual height, 'the number of scaffolds stacked in the pile that collapsed, the weight of each scaffold and the manner in which the scaffold(s) struck plaintiff' ... . These details are significant because '[i]n determining whether an elevation differential is physically significant or de minimus, we must consider not only the height differential itself, but also 'the weight of the [falling] object and the amount of force it was capable of generating, even over the course of a relatively short descent' ... . To support their motion, defendants submitted the affidavit of Ernest Gailor, an engineer. Gailor opined that 'the [five]-inch differential between the top of . . . plaintiff's head and the maximum height of [the] frames . . . did not significantly contribute to the 'total' force at impact of the offending frame as it struck plaintiff.' * * * In our view, defendants' submissions established a prima facie basis to conclude that the elevation differential here was de minimus and that plaintiff's claim falls outside the scope of Labor Law § 240 (1)." ***Wright v. Ellsworth Partners, LLC*, 2019 N.Y. Slip Op. 04803, Third Dept 6-13-19**

FOURTH DEPARTMENT

CRIMINAL LAW.

THE STATUTE WHICH CRIMINALIZES AN ASSAULT ON A PERSON 65 OR OLDER BY A PERSON MORE THAN TEN YEARS YOUNGER DOES NOT REQUIRE PROOF THE ASSAILANT KNEW THE AGE OF THE VICTIM.

The Fourth Department determined that the statute which criminalizes a younger person's causing injury to a person 65 or older does not require proof that attacker know the victim is 65 or older: "Defendant appeals from a judgment convicting him upon a jury verdict of assault in the second degree (Penal Law § 120.05 [12]). The conviction arises out of a physical altercation that occurred when defendant and his friend encountered the victim in the parking lot of a tavern shortly after the victim interacted with the friend's girlfriend at the bar. At the time of the altercation, defendant was 31 years old and the victim was 69 years old. Defendant contends that County Court erred in determining that Penal Law § 120.05 (12) did not require the People to prove that he knew that the victim was 65 years of age or older. We reject that contention. * * * Contrary to defendant's contention, however, nothing in the statutory text requires that the actor know the age of the injured person; rather, by providing that the defendant must act '[w]ith intent to cause physical injury to a person who is [65] years of age or older' and must cause 'such injury to such person,' the statute simply requires that the person whom the actor intentionally injures be, as a matter of fact, 65 years of age or older (§ 120.05 [12] [emphasis added]). That reading is consistent with the pattern Criminal Jury Instructions, which provide that the People must prove beyond a reasonable doubt that, with respect to the age element, the injured person was 65 years of age or older at the time of the crime (see CJI2d[NY] Penal Law § 120.05 [12])." ***People v. Burman*, 2019 N.Y. Slip Op. 04820, Fourth Dept 6-14-19**

CRIMINAL LAW.

THE FACT THAT THE BENCH WARRANT WAS BASED UPON A CHARGE FOR WHICH THE STATUTORY SPEEDY TRIAL PERIOD HAD EXPIRED DID NOT INVALIDATE THE EXECUTION OF THE WARRANT AND THE RESULTING ARREST FOR RESISTING ARREST.

The Fourth Department noted that the fact that the statutory speedy trial period had expired at the time the bench warrant was executed did not invalidate the arrest for resisting arrest: "[I]t is undisputed that the warrant was facially valid, and it necessarily follows that the officer was authorized to arrest defendant for purposes of the resisting arrest statute ... . [T]he fact that the statutory speedy trial period had expired on the charge underlying the bench warrant did not vitiate the warrant's facial validity and thereby negate the officer's authority to execute it for purposes of the resisting arrest statute ... . Indeed, it is well established that an officer's authority to arrest does not hinge on the ultimate success of the underlying prosecution, if any ...". ***People v. Lowman*, 2019 N.Y. Slip Op. 04823, Fourth Dept 6-14-19**

CRIMINAL LAW.

RE: A JUVENILE OFFENDER, THE SURCHARGE AND CRIME VICTIM ASSISTANCE FEE SHOULD NOT HAVE BEEN ASSESSED, AND THE CONSECUTIVE 2 TO 6 SENTENCES ARE ILLEGAL.

The Fourth Department determined, because defendant is a juvenile offender, the surcharge and crime victim assistance fee must be vacated and the two consecutive 2 to 6 year sentences were illegal: "The People correctly concede in each appeal that the surcharge and crime victim assistance fee must be vacated because defendant is a juvenile offender (... Penal Law §§ 60.00 [2]; 60.10 ...). We therefore modify the adjudication in each appeal accordingly. The People further correctly concede in each appeal that the aggregate duration of the two consecutive sentences, i.e., 2 to 6 years, is illegal (see Penal Law §§ 60.02 [2]; 70.00 [2] [e]; [3] [b] ...), and that defendant's challenge to the illegal sentence in each appeal survives his waiver of his right to appeal and does not require preservation ...". ***People v. Antonio J.*, 2019 N.Y. Slip Op. 04826, Fourth Dept 6-14-19**

CRIMINAL LAW, ANIMAL LAW, JUDGES.

DEFENDANT DID NOT WAIVE HIS RIGHT TO BE PRESENT AT A SIDEBAR DISCUSSION WITH A PROSPECTIVE JUROR; UPON RETRIAL AN ADULT WITNESS SHOULD NOT TESTIFY WHILE ACCOMPANIED BY A THERAPY DOG.

The Fourth Department, reversing defendant's conviction, determined defendant did not waive his right to be present when a prospective juror told the judge and attorneys that she was not sure she had completely answered a voir dire question. Defendant was not in the courtroom when the judge asked defense counsel if he wanted his client present and defense counsel said he was "okay with it." The juror then said that her son was a convicted felon. The Fourth Department also held that upon retrial an adult witness should not be allowed to testify accompanied by a therapy dog: "Initially, we conclude that the situation at issue here constituted a material stage of trial inasmuch as the prospective juror volunteered information about her son's status as a convicted felon. This information was relevant to a question asked earlier during voir dire: 'Have any of you or anyone close to you been a victim of a crime, a witness to a crime, been accused of a crime, or participated in any way in a criminal proceeding?' That question was intended to be relevant to, inter alia, potential bias ... . We further conclude that, under the circumstances of this case, defendant did not waive his right to be present. It is well established that a defendant has the right to be present at every material stage of a trial, including matters such as questioning prospective jurors regarding bias ... . 'It is equally clear, however, that such right may be voluntarily waived by a defendant or the defendant's attorney' and that 'a defendant's waiver in this regard may be either express or implied'' ... . Here, without defendant being physically present in the courtroom, and with counsel simply stating to the court, 'I'm okay with [his absence],' we perceive no basis to conclude that there was either an implicit or explicit waiver. Defendant's absence from the courtroom when the prospective juror raised the issue of potential bias made it impossible for him to knowingly and voluntarily waive his right to be present ...". ***People v. Geddis*, 2019 N.Y. Slip Op. 04819, Fourth Dept 6-14-19**

CRIMINAL LAW, APPEALS.

2003 DEPRAVED INDIFFERENCE MURDER CONVICTION REVERSED, THE CASE WAS ON APPEAL WHEN THE COURT OF APPEALS DETERMINED AN INTENTIONAL MURDER OF A SINGLE VICTIM WITH A WEAPON DOES NOT MEET THE CRITERIA FOR DEPRAVED INDIFFERENCE MURDER.

The Fourth Department determined a 2003 murder depraved indifference murder conviction must be reversed because the case was on appeal when the law of depraved indifference murder was clarified to exclude the intentional murder of a single victim with a weapon: "... [W]e conclude that the evidence establishes that defendant accosted decedent, who was leaving a grocery store. Defendant, who told police investigators he had been informed that decedent had been sent by another man to injure defendant, confronted decedent, grabbed him by either his clothing or by a gold necklace that he was wearing, and dragged him across the street. A friend of decedent's attempted to intervene at some point, at which time defendant displayed a weapon and attempted to shoot the friend, but the gun did not fire. Defendant struck decedent in the face with the handgun, and decedent's friend ran to his car and drove it toward the location where defendant was with decedent. Defendant then fired the weapon approximately eight times. At least six of those shots hit decedent, including two shots that entered his back, and two shots hit the car that decedent's friend was driving. ... In his motion for a trial order of dismissal with respect to the count of depraved indifference murder, defense counsel argued that defendant's 'conduct was intentional or it was nothing at all. If this isn't intentional I don't know what is.' Thus, the issue raised on this de novo appeal was presented to Supreme Court and is therefore preserved for our review. Next, although defendant was convicted before the Court of Appeals decided People v. Feingold (7 NY3d 288, 296 [2006]), which definitively stated for the first time that the depraved indifference element of depraved indifference murder is a culpable mental state rather than the circumstances under which the killing is committed, the People correctly concede that the Feingold standard applies to this appeal inasmuch as defendant's direct appeal was pending when Feingold was decided ...". ***People v. Parris*, 2019 N.Y. Slip Op. 04828, Fourth Dept 6-14-19**

CRIMINAL LAW, APPEALS.

SENTENCING COURT MUST DIRECT THE MANNER IN WHICH RESTITUTION IS TO BE PAID, MATTER REMITTED, ISSUE SURVIVES A WAIVER OF APPEAL AND THE FAILURE TO PRESERVE THE ERROR.

The Fourth Department determined the sentencing court's failure to direct how the restitution is to be paid required remittal. This illegal sentence issue is not foreclosed by a waiver of appeal or the failure to preserve the issue: "... [T]here is merit to defendant's contention that the restitution component of his sentence must be vacated because the court failed to direct the manner of payment, in violation of CPL 420.10 (1). Defendant's contention is a challenge to the legality of the sentence and thus survives his waiver of the right to appeal ... and, based upon 'the essential nature of the right to be sentenced as provided by law,' we review that contention notwithstanding defendant's failure to raise it at sentencing ... . Although we affirm the amount of restitution ordered by the court, we modify the judgment by vacating that part of the sentence ordering restitution ... , and we remit the matter to County Court to fix the manner in which the restitution is to be paid." ***People v. Lamagna*, 2019 N.Y. Slip Op. 04849, Fourth Dept 6-14-19**

CRIMINAL LAW, APPEALS.

ARGUMENT THAT PROBATION CONDITIONS ARE ILLEGAL SURVIVES A WAIVER OF APPEAL AND THE FAILURE TO PRESERVE THE ERROR.

The Fourth Department noted that defendant's argument that the conditions of his probation were illegal survived a waiver of appeal and the failure to preserve the error: "Defendant further contends ... that the court imposed several unlawful conditions of probation. Initially, we note that defendant's contentions are not encompassed by the valid waiver of the right to appeal because they are based on challenges to the legality of the sentence ... . Additionally, although defendant failed to preserve those contentions for our review, there is a 'narrow exception to [the] preservation rule permitting appellate review when a sentence's illegality is readily discernible from the trial record' ... , and that exception encompasses a contention that a 'probation condition is unlawful because it is not reasonably related to rehabilitation or is outside the authority of the court to impose' ... . We conclude that, inasmuch as defendant's challenges to the conditions of probation here 'implicate the legality of defendant's sentence and any illegality is evident on the face of the record, those claims are not barred by . . . defendant's failure to preserve them' ... . With respect to the merits, the People correctly concede that the court erred in barring defendant from all use of the internet. The statute provides that a sentencing 'court may require that the defendant comply with a reasonable limitation on his or her use of the internet . . . provided that the court shall not prohibit such sentenced offender from using the internet in connection with education, lawful employment or search for lawful employment' ...". ***People v. Castaneda*, 2019 N.Y. Slip Op. 04860, Fourth Dept 6-14-19**

CRIMINAL LAW, EVIDENCE.

REQUEST TO SUBMIT CPCS SEVENTH DEGREE TO THE JURY AS A LESSER INCLUDED OFFENSE OF CPCS FIFTH DEGREE SHOULD HAVE BEEN GRANTED, NEW TRIAL ORDERED ON THAT COUNT.

The Fourth Department determined the request to submit Criminal Possession of a Controlled Substance (CPCS) seventh degree to the jury as a lesser included offense of COCS fifth degree should have been granted: "We agree with defendant, however, that the court erred in refusing to submit CPCS in the seventh degree (Penal Law § 220.03) to the jury as a lesser included offense of CPCS in the fifth degree. A party who seeks to have a lesser included offense submitted to the jury must satisfy a two-pronged test: 'First, the crime must be a lesser included offense within the meaning of Criminal Procedure Law § 1.20 (37) . . . Second, the party making the request for a charge-down must then show that there is a reasonable view of the evidence in the particular case that would support a finding that [the defendant] committed the lesser included offense but not the greater' ... . Both prongs are satisfied here. CPCS in the seventh degree is a lesser included offense of CPCS in the fifth degree under Penal Law § 220.06 (5) ... . Furthermore, there is a reasonable view of the evidence that defendant committed the lesser offense but not the greater ... . A person is guilty of CPCS in the fifth degree when he or she knowingly and unlawfully possesses cocaine weighing 500 milligrams or more (see § 220.06 [5]), whereas a person is guilty of CPCS in the seventh degree when he or she knowingly and unlawfully possesses a controlled substance (see § 220.03). In his trial testimony, defendant denied possessing the crack rock, but admitted to possessing the dime bags. A forensic chemist testified that the weight of the crack rock was greater than the aggregate weight of the pure cocaine in the rock and the dime bags combined. If the jury credited defendant's testimony with respect to the rock, it reasonably could have found that defendant possessed some amount of cocaine, but that the People failed to establish that he possessed cocaine weighing 500 milligrams or more. We therefore modify the judgment by reversing that part convicting defendant of CPCS in the fifth degree, and we grant defendant a new trial on that count." ***People v. Patterson*, 2019 N.Y. Slip Op. 04825, Fourth Dept 6-14-19**

CRIMINAL LAW, EVIDENCE.

PEOPLE FAILED TO PROVE THE VICTIM-AGE AND TIME-PERIOD ELEMENTS OF PREDATORY SEXUAL ASSAULT AGAINST A CHILD, CONVICTION REVERSED.

The Fourth Department, reversing defendant's conviction for predatory sexual assault against a child. Essentially the People did not present evidence to support the assaults occurred before the victim turned 13 or during a period of less than three months (statutory criteria): "Without narrowing the time frame, it is entirely possible that the testified-to instances of anal sexual conduct that allegedly occurred at that residence happened before the statute's effective date or after the victim turned 13 years old. The People also failed to establish that the criminal conduct occurred over a period of time not less than three months in duration (see Penal Law §§ 130.96, 130.75 [1]). In short, there were no 'markers' in the evidence at trial about when the conduct occurred that would allow the jury to conclude that defendant committed predatory sexual assault against a child at the relevant time ...". ***People v. Partridge*, 2019 N.Y. Slip Op. 04848, Fourth Dept 6-14-19**

CRIMINAL LAW, FAMILY LAW.

THE FAMILY OFFENSE PETITION DID NOT ALLEGE ALL THE ELEMENTS OF HARASSMENT SECOND DEGREE AND WAS PROPERLY DISMISSED.

The Fourth Department determined the portion of the family-offense petition which charged harassment in the second degree was properly dismissed because it did not allege all the elements of the offense: "A person commits harassment in the second degree under Penal Law § 240.26 (3) when he or she, 'with intent to harass, annoy or alarm another person[,] engages in a course of conduct or repeatedly commits acts which alarm or seriously annoy such other person and which serve no legitimate purpose' ... . Thus, '[t]o be viable under the circumstances here, the [petition was] required to allege that respondent[, inter alia,] engaged in a course of conduct that did alarm or seriously annoy petitioner and the conduct served no legitimate purpose' ... . Although the petition before us accuses respondent of engaging in a course of conduct that annoyed and alarmed petitioner, nowhere does it allege that respondent's alleged course of conduct 'serve[d] no legitimate purpose' (§ 240.26 [3]). Thus, the petition does not adequately plead an allegation that respondent committed harassment in the second degree under section 240.26 (3), and the court therefore properly dismissed the petition to that extent ...". ***Matter of Rohrback v. Monaco*, 2019 N.Y. Slip Op. 04851, Fourth Dept 6-14-19**

EDUCATION-SCHOOL LAW, ADMINISTRATIVE LAW.

PRIVATE COLLEGE DID NOT ADHERE TO ITS PUBLISHED RULES AND GUIDELINES AND FAILED TO INFORM PETITIONER-STUDENT OF HIS RIGHT TO SUBMIT QUESTIONS TO HIS ACCUSER, DETERMINATION THAT PETITIONER VIOLATED THE COLLEGE SEXUAL MISCONDUCT POLICY ANNULLED.

The Fourth Department, reversing the Supreme Court, determined petitioner-student was not afforded his due process rights in proceedings brought by a private college (Hamilton) stemming from allegations petitioner had violated the college's sexual misconduct policy (Policy). Petitioner was not informed of his right to submit questions to his accuser: "Here, the parties agree that respondents did not have to afford petitioner a hearing under either Education Law § 6444 (5) (b) (ii) or the due process clauses of the State and Federal Constitutions. The parties further agree that petitioner did not have a right to confront or cross-examine witnesses against him ... . Nevertheless, the College was required to ensure that its published rules were 'substantially observed'... . This the College did not do. At oral argument on the petition in Supreme Court and in their brief on appeal, respondents asserted that the Policy permits accused students to ask questions of accusers or witnesses in writing. ... Inasmuch as the United States Supreme Court has recognized that the right to ask questions of an accuser or witness is a significant and critical right (see generally Chambers v. Mississippi, 410 US 284, 295 [1973]), we conclude that respondents' failure to inform petitioner that he had such a right establishes that they did not substantially adhere to the College's own published rules and guidelines requiring them to inform petitioner, i.e., the 'individual whose conduct is alleged to have violated th[e] Policy,' of all of the campus judicial rules and procedures. We therefore reverse the judgment, reinstate the petition, grant the petition, annul the determinations that petitioner violated the College's Policy and direct respondents to adhere to the College's published rules and guidelines in any future proceeding against petitioner related to the incident reports." ***Matter of A.E. v. Hamilton Coll.*, 2019 N.Y. Slip Op. 04833, Fourth Dept 6-14-19**

FAMILY LAW, EVIDENCE, CONSTITUTIONAL LAW.

A FAMILY COURT PROCEEDING IS CIVIL IN NATURE AND THE CONFRONTATION CLAUSE APPLIES ONLY IN CRIMINAL MATTERS, THEREFORE DOCUMENTS WRITTEN BY A PSYCHIATRIST WHO DID NOT TESTIFY WERE ADMISSIBLE.

The Fourth Department determined father's right to confront witnesses in this termination-of-parental-rights proceeding was not violated by the admission in evidence of two documents written by a psychiatrist who did not testify. A Family Court proceeding is civil in nature and the Confrontation Clause applies only in criminal matters: "Although the father's

contention is framed in terms of a violation of his right to confront the witnesses against him, 'Family Court matters are civil in nature and the Confrontation Clause applies only to criminal matters' ... . In addition, while every litigant has a right, guaranteed by the Due Process Clauses of both the Federal and State Constitutions, to confront the witnesses against them ... , 'this right is not absolute' in civil actions ... . The Family Court Act permits the admission of hearsay at dispositional hearings if such evidence is 'material and relevant' ... . Here, because the father did not object to either the relevancy or materiality of the challenged exhibits, we conclude that the exhibits were properly admitted in evidence ...". ***Matter of Ramon F. (Wilson F.)*, 2019 N.Y. Slip Op. 04852, Fourth Dept 6-14-19**

MEDICAL MALPRACTICE, PERSONAL INJURY, EVIDENCE, CIVIL PROCEDURE, JUDGES.

PLAINTIFF'S MOTION TO SET ASIDE THE DEFENSE VERDICT IN THIS MEDICAL MALPRACTICE CASE SHOULD HAVE BEEN GRANTED, THE VERDICT WAS AGAINST THE WEIGHT OF THE EVIDENCE; THE VERDICT SHEET DID NOT REFLECT THE TRIAL EVIDENCE ON THE APPLICABLE STANDARD OF CARE.

The Fourth Department, reversing Supreme Court, over a two-justice dissent, determined plaintiff's motion to set aside the defense verdict in this medical malpractice case should have been granted. Plaintiff alleged her bowel was perforated during surgery. The defense expert testified the bowel must be fully inspected as it is replaced, section by section. However, defendant surgeon testified he did not fully inspect the bowel. In addition the jury was asked to determine whether the bowel was subjected to a "focused inspection." However there was no trial evidence equating a "focused inspection" with the standard of care. A new trial was necessary: "The weight of the evidence greatly preponderates in favor of plaintiff due, in no small part, to defendant's testimony that he not only failed to perform a 'focused inspection' of the bowel, but that '[he could not] not observe it' as he returned it into plaintiff's abdomen. In not 'observing' the bowel, defendant plainly could not have conducted a careful visualization of the body part as it was returned to plaintiff's body; therefore he was plainly not performing a 'focused inspection.' Defendant also admitted that '[he] didn't specifically look for [bruising]' of the bowel, which his own expert testified is required when inspecting the bowel during an aortobifemoral bypass surgery. Defendant also testified that he only looked at the bowel's top side. Although his expert did not testify that defendant was personally required to view the other side, she did explain that the other surgeon in the operating room must view that side so that both surgeons, collectively, can view the entire bowel. Defendant did not testify that he ensured that the assisting surgeon carefully viewed the back side of the bowel, segment by segment. Moreover, the assisting surgeon did not testify that defendant instructed her to do so. Inasmuch as defendant's conduct does not meet the standard articulated by the expert witnesses, we conclude that the evidence so preponderates in plaintiff's favor that the court erred in denying her motion to set aside the verdict ...". ***Monzon v. Porter*, 2019 N.Y. Slip Op. 04855, Fourth Dept 6-14-19**

PERSONAL INJURY, APPEALS, EVIDENCE.

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE SHOULD NOT HAVE BEEN GRANTED, ISSUE THAT WAS ADDRESSED BY THE DEFENDANT IN ITS REPLY PAPERS AND THE JUDGE IS PRESERVED FOR APPEAL, COMPLIANCE WITH REGULATIONS IS NOT DISPOSITIVE ON THE ISSUE OF NEGLIGENCE.

The Fourth Department, reversing Supreme Court, determined defendant's motion for summary judgment in this slip and fall case should not have been granted. Plaintiff tripped over a wheelchair scale in a hallway of defendant's nursing home. The Fourth Department noted that the issue was preserved for appeal despite the absence from the record of the memorandum which raised the issue. The issue was addressed in defendant's reply papers and noted in the court's written decision. The Fourth Department held that the scale was not an open and obvious hazard as a matter of law and the fact that the scale was alleged to have been in compliance with the National Fire Prevention Associations's Life Safety Code would not be dispositive on the issue of negligence: "... [P]laintiff's contention that defendant failed to meet its initial burden on its motion for summary judgment is properly before us inasmuch as it involves a 'question of law appearing on the face of the record . . . [that] could not have been avoided by the opposing party if brought to that party's attention in a timely manner' ... . [T]he facts here simply do not warrant concluding as a matter of law that the [wheelchair scale] was so obvious that it would necessarily be noticed by any careful observer, so as to make any warning superfluous' and to support a conclusion that it was not a hazard as a matter of law ... . Defendant also did not meet its initial burden on the motion by submitting the deposition testimony of one of its employees, who opined that the wheelchair scale was in compliance with the National Fire Prevention Association's Life Safety Code, 2000 Edition (Code). Even assuming, arguendo, that defendant's employee was qualified to render an opinion concerning defendant's compliance with the Code ... , we conclude that defendant is not entitled to summary judgment because it is well settled that 'compliance with regulations or a building code is not dispositive on the issue of negligence' ...". ***Rivera v. Rochester Gen. Health Sys.*, 2019 N.Y. Slip Op. 04835, Fourth Dept 6-14-19**

PERSONAL INJURY, EVIDENCE.

GAP IN BATHROOM STALL DOOR AT MCDONALD'S RESTAURANT, IN WHICH INFANT PLAINTIFF'S FINGER WAS PINCHED AND PARTIALLY SEVERED WHEN THE DOOR SLAMMED SHUT, WAS NOT UNREASONABLY DANGEROUS AND WAS OPEN AND OBVIOUS, TWO-JUSTICE DISSENT.

The Fourth Department, over a two-justice dissent, determined that the gap in a bathroom stall door at a McDonald's restaurant, in which infant plaintiff's finger was pinched and partially severed when her brother slammed the door, was not an unreasonably dangerous condition. In addition, the court found the condition was open and obvious and there was no duty to warn. The dissent noted the testimony that McDonald's now installs finger guards which raised questions of fact whether defendants were on notice the door presented an unreasonably dangerous condition: "Defendants met their initial burden by establishing that the stall door did not constitute an unreasonably dangerous condition ... , and plaintiffs failed to raise a triable issue of fact in response ... . The affidavit of plaintiffs' expert was ' speculative and not sufficiently probative to defeat defendant[s'] motion for summary judgment' ... . Contrary to plaintiffs' further contention, we conclude that the alleged hazard posed by the bathroom stall door was also open and obvious, and therefore defendants had no duty to warn that the door presented a finger-pinching hazard ...". ***Christopher J.G. v. Derico of E. Amherst Corp.*, 2019 N.Y. Slip Op. 04857, Fourth Dept 6-14-19**

PERSONAL INJURY, EVIDENCE, CIVIL PROCEDURE.

DEFENDANT IN THIS TRAFFIC ACCIDENT CASE SHOULD NOT HAVE BEEN ALLOWED TO TESTIFY SHE WAS NOT TICKETED; DAMAGES FOR PAIN AND SUFFERING SHOULD NOT HAVE BEEN INCREASED UNCONDITIONALLY BY THE TRIAL JUDGE, THE PROPER PROCEDURE IS TO ORDER A NEW TRIAL UNLESS DEFENDANT STIPULATES TO THE INCREASED DAMAGES.

The Fourth Department noted that defendant, in this traffic accident case, should not have been allowed to testify that she did not receive a traffic ticket. The court also noted that the trial judge properly determined the damages for past pain and suffering should be increased, but that the proper procedure is to order a new trial unless the defendant stipulates to the increased amount. The trial judge had unconditionally increased the damages amount: "It is well established that '[e]vidence of nonprosecution is inadmissible in a civil action' ... . In our view, however, that was the only error during trial ... . We conclude that, 'standing alone' ... , the error was harmless, and therefore the court properly denied the motion insofar as it sought to set aside the jury verdict and a new trial on all issues (see CPLR 2002). Plaintiff further contends that the jury's damages award for pain and suffering materially deviated from what would be reasonable compensation for plaintiff's injuries and that the deviation was not cured by the court's increase of the award for past pain and suffering. We reject that contention. We conclude that the court properly determined that the jury's verdict for past pain and suffering should be increased to $125,000 and that the award for future pain and suffering did not materially deviate from what would be reasonable compensation for plaintiff's injuries (see CPLR 5501 [c]). The court, however, erred in unconditionally increasing the past pain and suffering award. ' [T]he proper procedure when a damages award is inadequate is to order a new trial on damages unless [a] defendant stipulates to the increased amount' ...". ***Queen v. Kogut*, 2019 N.Y. Slip Op. 04863, Fourth Dept 6-14-19**

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

PETITIONER IS NOT ENTITLED TO SURPLUS PROCEEDS AFTER A TAX FORECLOSURE SALE.

The Fourth Department determined petitioner was not entitled to the surplus proceeds after a tax foreclosure sale: "We reject petitioners' contention that they have a right to the surplus proceeds of the foreclosure sale. As respondent correctly contends, petitioners' application for surplus proceeds was improperly predicated upon provisions of RPAPL article 13 that apply to surplus monies arising from the sale of property in mortgage foreclosure proceedings (see e.g.RPAPL 1361 [1]). RPAPL article 13, entitled 'Action to Foreclose a Mortgage,' does not apply to properties acquired by a tax district pursuant to an in rem foreclosure proceeding under RPTL article 11. Thus, petitioners' reliance on RPAPL article 13 and cases involving mortgage foreclosures is misplaced ... . Moreover, petitioners are not entitled to surplus proceeds under RPTL article 11. Contrary to petitioners' assertion that RPTL article 11 is 'silent' regarding any remaining interest that former property owners may have, such as entitlement to surplus proceeds upon the sale of the property following a default judgment of foreclosure, the statute provides that, when property owners neither redeem the property nor interpose an answer, the tax district is entitled to a deed conveying an estate in fee simple absolute and the property owners are 'barred and forever foreclosed of all . . . right, title, interest, claim, lien or equity of redemption' that they may have had in the property (RPTL 1136 [3] ...). Where the tax district obtains a valid default judgment of foreclosure, which is presumed here given that the default judgment is not subject to challenge on this appeal, the formr property owners are not 'entitled to any compensation upon

the resale of the property' ... , and the tax district may 'retain . . . the entire proceeds from [the re]sale' ...". ***Matter of Hoge v. Chautauqua County*, 2019 N.Y. Slip Op. 04821, Fourth Dept 6-14-19**

To view archived issues of CasePrepPlus,
visit www.nysba.org/caseprepplus.