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FIRST DEPARTMENT

CIVIL PROCEDURE, JUDGES.

JUDGE WHO DID NOT HEAR THE ORAL ARGUMENT COULD DECIDE THE SUMMARY JUDGMENT MOTION ON A PURELY LEGAL QUESTION.

The First Department determined it was appropriate for a judge to decide a summary judgment motion, despite the fact that another judge heard the oral argument: "The fact that oral argument was held before a different Justice than the Justice who ultimately decided the motion for summary judgment is not a proper basis for vacating the order granting summary judgment. Although Judiciary Law § 21 provides that a Supreme Court Justice 'shall not decide or take part in the decision of a question, which was argued orally in the court, when he was not present and sitting therein as a judge,' reversal is not warranted on this ground, because the Justice who granted the motion decided a purely legal question ...". ***Marti v. Rana*, 2019 N.Y. Slip Op. 05011, First Dept 6-20-19**

CRIMINAL LAW, ATTORNEYS, APPEALS, IMMIGRATION.

DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO INFORM DEFENDANT THE AGGRAVATED FELONY TO WHICH DEFENDANT PLED GUILTY SUBJECTED HIM TO MANDATORY DEPORTATION, APPEAL HELD IN ABEYANCE TO ALLOW DEFENDANT TO MOVE TO VACATE HIS PLEA.

The First Department determined defendant received ineffective of assistance of counsel. Counsel did not inform defendant he would be subject to mandatory deportation based upon his plea to an aggravated felony: "Defendant should be afforded the opportunity to move to vacate his plea upon a showing that there is a reasonable probability that he would not have pleaded guilty had he been made aware of the deportation consequences of his plea ... and we hold the appeal in abeyance for that purpose. While defendant requests that his conviction be replaced by a conviction under a different subdivision of Penal Law § 220.16 that may entail less onerous immigration consequences, we find that to be an inappropriate remedy, and we instead order a hearing." ***People v. Disla*, 2019 N.Y. Slip Op. 04995, First Dept 6-20-19**

CRIMINAL LAW, EVIDENCE.

DEFENDANT CONSTRUCTIVELY POSSESSED STOLEN PROPERTY FOUND IN THE BOILER ROOM OF A GARAGE WHERE DEFENDANT AND TWO OTHERS WERE HIDING FROM THE POLICE AFTER A MUGGING; VICTIM WAS PROPERLY ALLOWED TO IDENTIFY THE DEFENDANT IN COURT, DESPITE THE SUPPRESSION OF THE SHOWUP IDENTIFICATION.

The First Department, in a full-fledged opinion by Justice Tom, determined defendant was properly convicted of constructive possession of property taken during a mugging, even though defendant, although present, did not participate in the mugging and was acquitted of robbery. The First Department further held that the victim was properly allowed to identify the defendant at trial, despite the suppression of the showup identification. The defendant was convicted on the theory that he constructively possessed the stolen property which (apparently) was found in the locked boiler room of a garage where he and the other two men involved were found hiding by the police: "... [T]he People established, by clear and convincing evidence, that the victim had a basis for her in-court identification of defendant independent of a previously suppressed showup procedure. A number of factors support the independent source finding ,,, , even when viewed in the light of modern scientific knowledge regarding identifications. The victim had an unobstructed view of defendant and the other two perpetrators, under good lighting, at close range, and had sufficient time to observe them while she was being attacked. ... Defendant's presence, his hiding in an oily sump pit inside with the two robbers, and his attempt to physically resist detention compel the conclusion that defendant manifested a consciousness of guilt. Police testimony thus clearly established that defendant had been a participant in the criminal venture and that he exercised dominion and control over the room where the perpetrators were essentially trapped in close proximity to the stolen property, and thereby exercised dominion and control over, and thus joint constructive possession of, the property itself." ***People v. Santiago*, 2019 N.Y. Slip Op. 04897, First Dept 6-18-19**

EMPLOYMENT LAW, FEDERAL EMPLOYERS' LIABILITY ACT, PERSONAL INJURY, EVIDENCE.

DEFENDANT RAILROAD'S MOTION FOR SUMMARY JUDGMENT IN THIS FEDERAL EMPLOYERS' LIABILITY ACT (FELA) ACTION BY A RAILROAD EMPLOYEE WHO WAS ASSAULTED BY A PASSENGER PROPERLY DENIED.

The First Department determined the defendant railroad's motion for summary judgment in this Federal Employers' Liability Act (FELA) by a railroad employee assaulted by a passenger was properly denied. The court explained the evidentiary criteria under the FELA: "The Federal Employers' Liability Act (FELA) (45 USC § 51 et seq.) provides that operators of interstate railroads shall be liable to their employees for on-the-job injuries resulting from the railroad's negligence. In an action under FELA, 'the plaintiff must prove the traditional common-law elements of negligence: duty, breach, damages, causation and foreseeability' ... . However, these elements are 'substantially relaxed' and 'negligence is liberally construed to effectuate the statute's broadly remedial intended function' ... . A claim under FELA 'must be determined by the jury if there is any question as to whether employer negligence played a part, however small, in producing plaintiff's injury' ... . 'A case is deemed unworthy of submission to a jury only if evidence of negligence is so thin that on a judicial appraisal, the only conclusion that could be drawn is that negligence by the employer could have played no part in an employee's injury' ... . To establish the element of foreseeability, a plaintiff must show that the defendant had either actual or constructive notice of the defective condition (id.). However, notice generally presents an issue of fact for the jury ... . 'As with all issues under FELA, the right of the jury to pass on this issue must be liberally construed, with the jury's power to draw inferences greater than in a common-law action' ... . Under the foregoing relaxed standard, there is sufficient evidence to raise an issue of fact concerning defendant's actual or constructive notice of a risk of assault to conductors on the New Haven Line. Plaintiff testified that she was previously assaulted by a passenger, and that there was an ongoing problem of physical intimidation by large groups of adolescents refusing to pay their fares, which caused her to fear for her safety. Plaintiff also testified that she has called the MTA's rail traffic controllers for police assistance at least 250 times to deal with abusive passengers; another conductor was punched in the face and knocked out on the New Haven Line; a passenger attempted to stab and rob another conductor on the Harlem Line." ***Stephney v. MTA Metro-N. R.R.*, 2019 N.Y. Slip Op. 05004, First Dept 6-20-19**

FAMILY LAW, CRIMINAL LAW.

13-YEAR-OLD WHO, AS A FIRST OFFENSE, PARTICIPATED IN AN ASSAULT (USING A MINI OR SOUVENIR BASEBALL BAT) OF A COUPLE BY HER FATHER AND HER FATHER'S GIRLFRIEND PROPERLY ADJUDICATED A JUVENILE DELINQUENT AND SENTENCED TO A 12-MONTH PERIOD OF PROBATION WITH MENTAL HEALTH SERVICES AND SCHOOL MONITORING, STRONG TWO-JUSTICE DISSENT.

The First Department, over an extensive two-justice dissent, determined the juvenile delinquent adjudication, the 12-month probation period, mental health services and school monitoring were appropriate. The dissenters argued an adjournment in contemplation of dismissal (ACD) was the appropriate disposition for this first offense. Appellant was 13 when her father, her father's girlfriend and an unidentified man assaulted a couple. The father was panhandling in the subway and the couple had allegedly refuse to give the father money. Appellant apparently participated in the assault by striking the woman with a mini or souvenir baseball bat: "Although this was appellant's first arrest, she was a participant in an unprovoked violent attack on two strangers. There is no dispute that appellant's father instigated the attack. In the ensuing melee, appellant repeatedly struck the female complainant with a mini or souvenir baseball bat, while the father's girlfriend continuously punched the complainant. Appellant continued the attack by joining her father and his girlfriend in chasing the two complainants, who were able to seek refuge in a restaurant where they called 911. After the police arrived, the complainants were transported by ambulance to the hospital to be treated for their injuries. The female complainant suffered from anxiety after the attack and continuing to the time of trial, and intended to relocate to another borough as a result of the attack. The dissent parses the incident focusing on the injuries inflicted by appellant, but as part of a group assault she is responsible for the consequences of the attack. In addition to the seriousness of the offense, the available information supported the conclusions that appellant would benefit from engagement in mental health services and monitoring with regard to her school attendance and her academic performance and that she was in need of a longer period of supervision than the six-month period that an adjournment in contemplation of dismissal would have provided ... . We find no abuse of discretion in the decision of the court, which heard the evidence and observed appellant throughout the proceedings. We note that appellant may seek relief from the juvenile delinquent adjudication when she reaches the age of 17 ...". ***Matter of A.V.*, 2019 N.Y. Slip Op. 04996, First Dept 6-20-19**

FORECLOSURE, CIVIL PROCEDURE.

QUESTION OF FACT WHETHER THE DISCONTINUANCE OF A PRIOR FORECLOSURE ACTION DE-ACCELERATED THE MORTGAGE RENDERING THE INSTANT ACTION TIMELY.

The First Department determined there was a question of fact whether the discontinuance of a prior foreclosure action de-accelerated the mortgage. If the mortgage was not de-accelerated the instant action would be time-barred: "Acceleration only takes place when the holder of the note and mortgage takes 'affirmative action . . . evidencing the holder's election' to do so ... . This may be accomplished in the form of a notice to the borrower ... . Affirmative action can also occur when

the first foreclosure action is commenced ... . The prior foreclosure action sought the accelerated mortgage amount. There is an issue of fact in this particular case regarding whether plaintiff's discontinuance of the prior foreclosure action de-accelerated the mortgage ... . We note that neither the motion seeking discontinuance or the order entered granting that relief provided that the mortgage was de-accelerated or that plaintiff would now be accepting installment payments from the defendant ...". ***U.S. Bank N.A. v. Charles*, 2019 N.Y. Slip Op. 04997, First Dept 6-20-10**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

QUESTION OF FACT WHETHER THE LESSEE OF THE PROPERTY WAS AN OWNER OR AGENT OF THE OWNER FOR LABOR LAW PURPOSES, PROPERTY MANAGER WAS NOT LIABLE IN THIS LABOR LAW §§ 240(1), 241(6) AND 200 ACTION STEMMING FROM PLAINTIFF'S FALL FROM A ROOF.

The First Department, reversing (modifying) Supreme Court, determined plaintiff's motion for summary judgment on his Labor Law § 240 (1) cause of action, stemming from falling from a roof he was working on, should have been granted with respect to the property owner (Bruckner) and the general contractor (Metro). There was a question of fact whether Western, which leased the property, was an "owner" or "agent" of the owner for Labor Law purposes. However, the property manager, Ashkenazy, had no authority to supervise or control plaintiff's work and was not liable under Labor Law §§ 240(1), 241(6) or 200: "An issue of fact exists as to whether Western, the lessee, was an 'owner' or 'agent' of the owner, for Labor Law purposes. Record evidence showing that Western was responsible for renovating the premises, including the roof, and had retained Metro as the general contractor for the renovation work, raises an issue of fact as to whether Western had the authority to supervise and control the work site ... . The testimony of Western's director of merchandising that he was not involved with the construction work is insufficient to excuse Western from liability, where he had no knowledge of, and could not testify to, the lease arrangements between Western and Bruckner, as well as the arrangement between Western and Metro ... . Ashkenazy had no involvement with the construction work, and was onsite only to check on its progress, and to ensure it did not interfere with the other tenants. The belief of its 'Director of Property Management' that he may have been able to stop work at the job site '[w]ith proper notice I guess as per the lease' is too equivocal to raise an issue of fact. Because there was no evidence that Ashkenazy had authority to supervise or control the work site, the Labor Law § 240(1) claim should be dismissed against it ... . Ashkenazy is also entitled to dismissal of the Labor Law § 241(6) claim because, for the same reasons, it is not an 'owner' or 'agent' under that statute ... . Without authority to supervise or control plaintiff's work, Ashkenazy also may not be held liable under Labor Law § 200 and common law negligence principles in this case involving the means and method of plaintiff's work ...". ***Reyes v. Bruckner Plaza Shopping Ctr. LLC*, 2019 N.Y. Slip Op. 05003, First Dept 6-20-19**

SECOND DEPARTMENT

ATTORNEYS, LEGAL MALPRACTICE, FIDUCIARY DUTY.

THE COMPLAINT STATED A CAUSE OF ACTION TO DISGORGE LEGAL FEES PAID TO LAW FIRM WHICH IS ALLEGED TO HAVE REPRESENTED ADVERSE PARTIES IN THE SAME MATTER; THE ACTION TO DISGORGE FEES IS INDEPENDENT FROM ANY ACTION ALLEGING LEGAL MALPRACTICE OR BREACH OF A FIDUCIARY DUTY.

The Second Department, reversing Supreme Court, determined the complaint stated a cause of action for forfeiture of legal fees on conflict of interest grounds: "The complaint alleged that the plaintiff's decedent retained the defendant in 2005 to, among other things, analyze her ownership interest in Wilson [Corporation], including her right to certain retained earnings in the sum of $20 million. The complaint further alleged that, in January 2007, the defendant began acting as Wilson's corporate counsel, and, beginning in 2008, performed legal services for Wilson regarding the decedent's right to those retained earnings. * * * 'An attorney who violates a disciplinary rule may be discharged for cause and is not entitled to fees for any services rendered' ... . A cause of action for forfeiture of legal fees based on an attorney's discharge for cause due to ethical violations may be maintained independent of a cause of action alleging legal malpractice or breach of fiduciary duty, and does not require proof or allegations of damages ... . [T]he complaint seeks forfeiture of legal fees paid to the defendant between January 2007 and August 2009 in connection with the plaintiff's decedent's claim against Wilson for retained earnings. The complaint alleges that the decedent retained the defendant in January 2007 to recoup the retained earnings from Wilson, that the defendant also represented and performed legal work for Wilson on that issue between 2008 and 2009, that the interests of the decedent and Wilson on that issue were adverse, and that the dual representation violated rule 1.7 of the Rules of Professional Conduct (22 NYCRR 1200.0). The complaint further alleged that, as a result of its previous dual representation, the defendant was disqualified from representing the decedent's estate in a 2009 turnover proceeding against Wilson to collect the retained earnings. Contrary to the determination of the Supreme Court, these allegations are sufficient to state a viable cause of action to disgorge legal fees ... ". ***Baugher v. Cullen & Dykman, LLP*, 2019 N.Y. Slip Op. 04904, Second Dept 6-19-19**

CIVIL PROCEDURE, EVIDENCE.

PROCESS SERVER'S AFFIDAVIT OF SERVICE WAS REBUTTED BY SUFFICIENT EVIDENCE TO WARRANT A HEARING ON WHETHER DEFENDANT WAS SERVED WITH THE SUMMONS AND COMPLAINT IN THIS FORECLOSURE PROCEEDING.

The Second Department, reversing Supreme Court, determined that the process server's affidavit was rebutted by sufficient proof to warrant a hearing on whether defendant, David, was served with the summons and complaint in this foreclosure action: " 'A process server's affidavit of service gives rise to a presumption of proper service' ... . 'Bare and unsubstantiated denials are insufficient to rebut the presumption of service' ... . However, '[w]here a defendant submits a sworn denial of receipt of process containing specific facts to rebut the statements in the process server's affidavit, the presumption of proper service is rebutted and an evidentiary hearing is required' ... . Here, an affidavit of service, in which the process server attested to having served David with copies of the summons and complaint by personal delivery to him at his residence at the subject property in Williston Park on April 16, 2014, at 8:08 p.m., constituted prima facie evidence of proper service on David ... . However, in support of the motion, David submitted an affidavit of Patricia, who attested that David suffered a brain aneurysm in April 2008 and had resided in a nursing home in Glen Cove since July 2008 and, thus, could not have been personally served at the residence on April 16, 2014. These facts were supported by documents submitted with the affidavit, including minutes of a guardianship proceeding dated June 8, 2012, wherein the court noted that David resided in a nursing home in Glen Cove." ***Caliber Home Loans, Inc. v. Silber*, 2019 N.Y. Slip Op. 04907, Second Dept 6-19-19**

CIVIL RIGHTS LAW, CIVIL PROCEDURE, APPEALS.

PETITIONER'S APPLICATION TO CHANGE THE DESIGNATION OF HIS RACE/NATIONALITY PROPERLY DENIED; EX PARTE ORDERS ARE NOT APPEALABLE, NOTICES OF APPEAL TREATED AS APPLICATIONS FOR REVIEW PURSUANT TO CPLR 5704 (a).

The Second Department determined petitioner's application to change his race/nationality from "black/African American" to "Moor/Americas Aboriginal" was properly denied. The court noted that an ex parte order is not appealable but deemed the notices of appeal applications pursuant to CPLR 5704 (a): "An ex parte order is not appealable … . However, under the circumstances of this case, we deem it appropriate to treat the instant notices of appeal as applications for review pursuant to CPLR 5704(a) ... . We agree with the Supreme Court's denial of that branch of the petition which was to change the petitioner's race/nationality, as the petitioner presented no authority for the court to grant him such relief. Article 6 of the Civil Rights Law, which governs petitions for leave to assume another name, does not provide such authority. Further, a person's race is a matter of self-identification. As to nationality, the sole means by which the petitioner may renounce his nationality as a United States citizen is to satisfy one of the conditions set forth in 8 USC § 1481(a) ... . The petitioner made no showing that he met any of these conditions." ***Matter of Keis*, 2019 N.Y. Slip Op. 04944, Second Dept 6-19-19**

CIVIL PROCEDURE, EVIDENCE, PERSONAL INJURY.

DEFENDANTS DID NOT SHOW THERE WAS A COMPELLING NEED FOR DISCOVERY OF 'ALCOHOL/DRUG TREATMENT/MENTAL HEALTH INFORMATION/HIV-RELATED INFORMATION' IN THIS SLIP AND FALL CASE, DISCOVERY REQUEST SHOULD HAVE BEEN DENIED.

The Second Department, reversing (modifying) Supreme Court, determined that the defendants request for discovery of "Alcohol/Drug Treatment/Mental Health Information/HIV-Related Information" in this slip and fall case was not supported by evidence of a compelling need: " '[A] party must provide duly executed and acknowledged written authorizations for the release of pertinent medical records under the liberal discovery provisions of the CPLR when that party has waived the physician-patient privilege by affirmatively putting his or her physical or mental condition in issue' ... However, Public Health Law § 2785(1) provides that, '[n]otwithstanding any other provision of law, no court shall issue an order for the disclosure of confidential HIV related information,' and the only exception to that prohibition that is pertinent in this case requires an application showing 'a compelling need for disclosure of the information for the adjudication of a criminal or civil proceeding' (Public Health Law § 2785[2][a]). Here, the defendants failed to proffer any showing of a compelling need for disclosure related to 'HIV-Related Information.' Further, the defendants failed to submit an expert affidavit or any other evidence that would establish a connection between 'Alcohol/Drug Treatment/Mental Health Information/HIV-Related Information,' and the cause of the accident, and failed to make any effort to link any such information to the plaintiff's ability to recover from his injuries or his prognosis for future enjoyment of life ...". ***Nesbitt v. Advanced Serv. Solutions*, 2019 N.Y. Slip Op. 04961, Second Dept 6-19-19**

CONTRACT LAW, FIDUCIARY DUTY, TORTIOUS INTERFERENCE WITH CONTRACT.

HANDWRITTEN PROVISION OF A LETTER OF INTENT CONTROLS, THE LETTER OF INTENT IS NOT A BINDING CONTRACT, BREACH OF A FIDUCIARY DUTY AND TORTIOUS INTERFERENCE WITH CONTRACT CAUSES OF ACTION PROPERLY DISMISSED IN THE ABSENCE OF A BINDING CONTRACT, UNJUST ENRICHMENT CAUSE OF ACTION PROPERLY DISMISSED BECAUSE THE BENEFIT TO THE DEFENDANTS WAS UNIDENTIFIED.

The Second Department determined that a letter of intent concerning the development of defendant-church's property was not a binding contract because of a handwritten provision. Because there was no binding contract, the fiduciary duty, joint venture, covenant of good faith, and tortious interference with contract causes of action were properly dismissed. The unjust enrichment cause of action was properly dismissed because the benefit allegedly received by defendants was not identified: " 'It is a fundamental principle of contract interpretation that when a handwritten or typewritten provision conflicts with the language of a preprinted form document, the former will control, as it is presumed to express the latest intention of the parties' ... . Here, there are inconsistent provisions in the letter of intent regarding whether the parties intended it to be a binding agreement. However, the parties modified the letter of intent, with a handwritten provision, to state that it is 'not intended to constitute a binding contract.' Accordingly, this handwritten provision controls over the conflicting printed provisions stating that the letter of intent will become binding after a period of five days ... . 'To prevail on a claim of unjust enrichment, a party must show that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered' ... . A bare legal conclusion that it is against equity and good conscience to retain an unidentified benefit is insufficient to adequately allege that an asserted enrichment was unjust ... . Here, the complaint does not identify the benefit the defendants allegedly obtained or explain why it is against equity and good conscience to allow the defendants to retain such benefit." ***FoxStone Group, LLC v. Calvary Pentecostal Church, Inc.*, 2019 N.Y. Slip Op. 04916, Second Dept 6-19-19**

CRIMINAL LAW, EVIDENCE.

THE ROBBERY VICTIM'S IDENTIFICATION OF DEFENDANT IN A PHOTO ARRAY AFTER THE POLICE HAD SHOWN THE ROBBERY VICTIM A CELL PHONE PHOTO DEPICTING THE DEFENDANT USING A TASER ON SOMEONE SHOULD HAVE BEEN SUPPRESSED, THE ROBBER HAD THREATENED THE VICTIM WITH A TASER.

The Second Department, reversing defendant's conviction for one of two robberies charged in the indictment, determined the pretrial identification of the defendant by the robbery victim, Fisher, should have been suppressed. The police were given a cell phone found at the robbery scene. The robber had used a Taser in the Fisher robbery. In the cell phone was a photo of a man using a Taser on a person. Fisher told the police the man in the photo using a Taser was the man who robbed him. Fisher subsequently identified the defendant in a photo array. Even though Fisher's in-court identification of defendant was deemed admissible, the suppression error was not harmless: "... [T]he procedure employed by the detective in showing Fisher the cell phone videos was a police-arranged identification procedure, even though the police did not arrange the content of the videos on the phone. The procedure by which Fisher viewed the videos occurred at the 'deliberate direction of the State,' and not as a result of mere happenstance ... . The People failed to meet their initial burden of establishing the reasonableness of the police conduct and the lack of any undue suggestiveness created by the video identification procedure. By showing Fisher the cell phone and telling him that the phone was recovered from the scene of the robbery, the detective suggested that the phone may belong to one of the perpetrators of the robbery. One of the videos portrayed an individual using a taser on someone else, which was similar to Fisher's description of the circumstances of the robbery. Fisher identified the defendant's photograph in a photo array only after he was shown the video. Further, contrary to the People's contention, it cannot be said that the video did not single out or portray the individual with the taser in a negative light. The video portrayed the individual committing a violent criminal act against another person ... . Accordingly, the court should have suppressed the video identification on the ground that the identification procedure was unduly suggestive." ***People v. Jones*, 2019 N.Y. Slip Op. 04966, Second Dept 6-19-19**

CRIMINAL LAW, EVIDENCE. ADMINISTRATIVE LAW.

PETITIONER WAS 14 IN 1990 WHEN HE MURDERED A CLASSMATE AND THE CHILD SHE WAS BABYSITTING, THE PAROLE BOARD PROPERLY DENIED PAROLE FOR THE FIFTH TIME, THE RECORD DEMONSTRATES THE BOARD CONSIDERED ALL THE RELEVANT FACTORS AND DID NOT BASE THEIR DECISION SOLELY ON THE SERIOUSNESS OF THE OFFENSE.

The Second Department determined the denial of parole to petitioner, who, in 1990, had killed a 15-year-old classmate, and the 17-month-old child she was babysitting, was not irrational. Although petitioner had made strong rehabilitative and educational efforts, the parole board properly considered all the relevant factors and did not make their decision on the basis of the seriousness of the offense alone: "We note that the literature in the record indicates that the effects of encephalitis could include '[a] lack of awareness and insensitivity' and a 'lack of warmth and empathy.' We further note that the Parole Board found that the petitioner appeared to have a 'disconnect' and that his remorse was 'shallow' Nevertheless, the inter-

view record and the text of the subject determination establish that the requisite statutory factors were properly considered, and the record does not support the conclusion that the Parole Board's determination evinces irrationality bordering on impropriety. Contrary to the petitioner's contention, the Parole Board considered the petitioner's 'youth and its attendant characteristics in relationship to the commission of the crime[s] at issue' ... , and did not base its determination solely upon the seriousness of the offenses ... . In addition, the interview transcript indicates that the Parole Board took into account a number of other factors that reflected well on the petitioner, but determined that these factors did not outweigh the factors that militated against granting parole. The Parole Board was not required to give each factor equal weight and was entitled to place greater emphasis on the severity of the petitioner's crimes ...". ***Matter of Campbell v. Stanford*, 2019 N.Y. Slip Op. 04936, Second Dept 6-19-19**

CRIMINAL LAW, EVIDENCE, APPEALS.

THE PEOPLE DID NOT PROVE THE POLICE OFFICER DEFENDANT PUNCHED WAS ENGAGED IN A LAWFUL DUTY AT THE TIME OF THE ASSAULT, THE PEOPLE ARE HELD TO THE 'HEAVIER BURDEN' IN THE DEFINITION OF 'LAWFUL DUTY' PROVIDED TO THE JURY WITHOUT OBJECTION, DEFENDANT'S ASSAULT CONVICTION WAS AGAINST THE WEIGHT OF THE EVIDENCE.

The Second Department reversed defendant's assault conviction. Defendant and his brother were sitting on an elevated subway grate when they were approached by two police officers. Defendant's brother became angry, telling one of the officers to leave him alone and yelling. Defendant restrained his brother, telling him to calm down. At some point defendant suddenly punched one of the police officers. The jury was instructed that, to find the defendant guilty of a violation of Penal Law § 120.05(3), the injured police officer must have been engaged in a lawful duty at the time of the assault. The definition of "lawful duty" provided to the jury included a "heavier burden" of proof, to which the People must be held because there was no objection to the instruction. Pursuant to the law as provided to the jury, defendant's assault conviction was against the weight of the evidence: "Since the People failed to register any objection to the Supreme Court's supplemental charge, they were bound to satisfy the heavier burden of proof contained therein ... , and we must weigh the evidence in light of the elements of the crimes as charged to the jury without objection ... . The consistent testimony of the two police officers shows that they were not in the process of arresting the defendant when the assault occurred. Moreover, while the trial evidence establishes that the defendant's brother was yelling profanities at the female officer and displaying irate behavior, neither of the officers testified that they intended at any time to arrest the defendant's brother for any offense, or were attempting to do so at the time of the assault. Under these circumstances, and particularly in light of the highly specific supplemental charge given by the trial court on the meaning of 'lawful duty,' the evidence was factually insufficient to prove that the female officer was engaged in a lawful duty, as that term was defined to the jury by the Supreme Court, at the time of the assault by the defendant ...". ***People v. Truluck*, 2019 N.Y. Slip Op. 04969, Second Dept 6-19-19**

FAMILY LAW, CONSTITUTIONAL LAW, APPEALS.

FATHER SHOULD HAVE BEEN GIVEN THE OPPORTUNITY TO BE HEARD BEFORE THE SUSPENSION OF HIS COMMITMENT TO JAIL FOR NONPAYMENT OF CHILD SUPPORT WAS REVOKED; THE ISSUE IS APPEALABLE EVEN THOUGH FATHER HAS SERVED HIS TERM OF INCARCERATION.

The Second Department, reversing Family Court, determined father should have been given the opportunity to be heard and present witnesses on the issue of whether good cause existed for the revocation of the suspension of his commitment to jail for nonpayment of child support. The court noted that the matter was not academic, even though father has already served his term of incarceration: "... '[D]ue to the enduring consequences which may potentially flow from the revocation of the order suspending the father's commitment' ... , these appeals are not academic, even if the father has served his term of incarceration before the appeals are determined. Turning to the merits, '[t]he court may suspend an order of commitment upon reasonable conditions and is also authorized to revoke such suspension at any time for good cause shown' (... see Family Ct Act § 455[1]). However, given the liberty interest at stake, the Family Court, before revoking a suspension, must provide to a respondent an opportunity to be heard and to present witnesses on the issue of whether good cause exists to revoke the suspension ... . Here, because the father was deprived of this opportunity, we must reverse the orders appealed from and remit the matter to the Family Court, Kings County, for a hearing and a determination thereafter of whether good cause exists to revoke the suspension." ***Matter of Zhuo Hong Zheng v. Hsin Cheng*, 2019 N.Y. Slip Op. 04958, Second Dept 6-19-19**

FAMILY LAW, EVIDENCE.

MOTHER ATTACKED HER SISTER WITH A KNIFE WHEN MOTHER'S CHILDREN WERE IN THE HOME, FAMILY COURT SHOULD NOT HAVE REVERSED THE NEGLECT FINDING BY THE ADMINISTRATION FOR CHILDREN'S SERVICES, THERE WAS NO NEED TO DEMONSTRATE THE CHILDREN WITNESSED OR WERE AWARE OF THE ATTACK.

The Second Department, reversing Family Court, determined the evidence that mother attacked her sister with a knife while mother's children were in the home supported the finding of neglect. There was no need to demonstrate the children

witnessed the attack: " 'To establish neglect pursuant to Family Court Act § 1012(f)(i)(B), a petitioner must demonstrate, by a preponderance of the evidence, (1) that the child's physical, mental, or emotional condition has been impaired or is in imminent danger of becoming impaired, and (2) that the actual or threatened harm to the child is due to the failure of the parent or caretaker to exercise a minimum degree of care in providing the child with proper supervision or guardianship' ... . Contrary to the Family Court's determination, an imminent danger of impairment to the physical, mental, or emotional condition of the subject children should be inferred from the mother's egregious conduct of attacking the children's pregnant aunt with a knife while the children were in the home ... . Furthermore, impairment or imminent danger of physical impairment should also be inferred from the subject children's proximity to violence directed against a family member, 'even absent evidence that they were aware of or emotionally impacted by the violence' ...". ***Matter of Najaie C. (Niger C.),* 2019 N.Y. Slip Op. 04935, Second Dept 6-19-19**

FAMILY LAW, EVIDENCE.

MOTHER'S MOTION TO VACATE A FACT-FINDING OF NEGLECT WITHOUT ADMISSION SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Family Court, determined mother's motion to vacate a neglect fact-finding without admission: "... [T]he mother moved pursuant to Family Court Act § 1061 to vacate so much of the order of fact-finding and disposition as, upon her consent to the entry of an order of fact-finding without admission pursuant to Family Court Act § 1051(a), found that she neglected the children and imposed certain conditions upon her custody of them. The Family Court denied the mother's motion, and the mother appeals. Pursuant to Family Court Act § 1061, the Family Court may, for good cause shown, set aside, modify, or vacate any order in the course of a proceeding under article 10 of the Family Court Act ... . ' As with an initial order, the modified order must reflect a resolution consistent with the best interests of the children after consideration of all relevant circumstances, and must be supported by a sound and substantial basis in the record' ... . Here, the mother demonstrated good cause to vacate so much of the order of fact-finding and disposition as, upon her consent to the entry of an order of fact-finding without admission pursuant to Family Court Act § 1051(a), found that she neglected the children and imposed certain conditions upon her custody of them. The mother demonstrated that she had successfully completed the court-ordered programs, that she had fully complied with the conditions of the order of disposition, and that the requested modification of the order of fact-finding and disposition was in the best interests of the children ...". ***Matter of Emma R. (Evelyn R.),* 2019 N.Y. Slip Op. 04948, Second Dept 6-19-19**

FAMILY LAW, EVIDENCE, CIVIL PROCEDURE.

MOTION FOR SUMMARY JUDGMENT ON THE ISSUE OF MOTHER'S NEGLECT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Family Court, determined petitioner's motion for summary judgment against mother on the issue of neglect should have been denied: " '[I]n an appropriate case, the Family Court may enter a finding of neglect on a summary judgment motion in lieu of holding a fact-finding hearing upon the petitioner's prima facie showing of neglect as a matter of law and the respondent's failure to raise a triable issue of fact in opposition to the motion' ... . 'Summary judgment, of course, may only be granted in any proceeding when it has been clearly ascertained that there is no triable issue of fact outstanding; issue finding, rather than issue determination, is its function' ... . Here, in support of that branch of its motion which was for summary judgment against the mother on the issue of neglect of the subject child, the petitioner included the evidence submitted at a hearing held pursuant to Family Court Act § 1028. At that hearing, the mother, who is deaf and communicated through a sign language interpreter, gave various explanations for the scratches and other marks on the child's skin. The mother testified that she had difficulty controlling the child, who has been diagnosed with attention deficit hyperactivity disorder and oppositional defiant disorder, and that she accidentally scratched the child while trying to restrain him. Under these circumstances, the evidence at the hearing revealed triable issues of fact as to whether the mother neglected the child." ***Matter of Joseph Z. (Yola Z.),* 2019 N.Y. Slip Op. 04957, Second Dept 6-19-19**

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

PROOF OF REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL) 1304 NOTICE TO THE DEFENDANT WAS INSUFFICIENT, THE BANK'S MOTION FOR SUMMARY JUDGMENT IN THIS FORECLOSURE ACTION SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined the proof compliance with the Real Property Actions and Proceedings Law (RPAPL) 1304 notice requirements was insufficient: " '[P]roper service of RPAPL 1304 notice on the borrower or borrowers is a condition precedent to the commencement of a foreclosure action, and the plaintiff has the burden of establishing satisfaction of this condition' ... .The statute requires that such notice must be sent by registered or certified mail, and also by first-class mail, to the last known address of the borrower (see RPAPL 1304[2]). By imposing these specific mailing requirements, ' the Legislature implicitly provided the means for the plaintiff to demonstrate its compliance with the statute, i.e., by proof of the requisite mailing,' which can be established with proof of the actual mailings, such as affidavits of mailing or domestic return receipts with attendant signatures, or proof of a standard office mailing procedure de-

signed to ensure that items are properly addressed and mailed, sworn to by someone with personal knowledge of the procedure' ... . Here, although Swayze [plaintiff's vice president] stated in her affidavit that the RPAPL 1304 notice was mailed to Saab [defendant] on May 8, 2013, this assertion falls short of constituting admissible evidence sufficient to demonstrate prima facie that the notice was actually mailed in the manner required by the statute. Swayze did not claim that she personally mailed the notice to Saab. Further, she did not aver that she was familiar with the plaintiff's mailing practices and procedures, and, therefore, did not establish the existence of a standard office practice and procedure designed to ensure that items are properly addressed and mailed ...". ***Central Mtge. Co. v. Canas*, 2019 N.Y. Slip Op. 04909, Second Dept 6-19-19**

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

FAILURE TO COMPLY WITH RPAPL 1304 NOTICE REQUIREMENTS IN A FORECLOSURE ACTION IS NOT A JURISDICTIONAL DEFECT; BECAUSE THE ISSUE WAS NOT RAISED BY DEFENDANT, PLAINTIFF BANK NEED NOT DEMONSTRATE COMPLIANCE TO BE ENTITLED TO A DEFAULT JUDGMENT.

The Second Department, reversing Supreme Court, noted that the failure to comply with Real Property Actions and Proceedings Law (RPAPL) 1304 is not a jurisdictional defect. Therefore, because that issue was not raised by the defendant, the bank need not prove compliance in a motion for a default judgment: "... [T]he plaintiff's unopposed renewed motion for a default judgment was facially adequate pursuant to CPLR 3215(f), and therefore, should have been granted ... . Contrary to the Supreme Court's determination, the plaintiff was not required to demonstrate its compliance with RPAPL 1304, since the failure to comply with RPAPL 1304 is not a jurisdictional defect, and that defense was never raised by the borrowers, who failed to appear or answer the complaint ... . Moreover, the plaintiff established its entitlement to an order of reference (see RPAPL 1321 ...)." ***U.S. Bank Trust, N.A. v. Green*, 2019 N.Y. Slip Op. 04988, Second Dept 6-19-19**

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

PLAINTIFF BANK NOT ENTITLED TO SUMMARY JUDGMENT BECAUSE IT FAILED TO DEMONSTRATE COMPLIANCE WITH RPAPL 1304, A CONDITION PRECEDENT; DEFENDANT NOT ENTITLED TO SUMMARY JUDGMENT BECAUSE HE DID NOT DEMONSTRATE THE BANK FAILED TO COMPLY WITH RPAPL 1304.

The Second Department, reversing (modifying) Supreme Court, determined plaintiff bank should not have been awarded summary judgment because it did not demonstrate compliance with RPAPL 1304, but defendant was not entitled to summary judgment on that ground because defendant did not demonstrate RPAPL 1304 was not complied with: "... [T]he evidence submitted in support of the motion failed to establish, prima facie, that the plaintiff strictly complied with RPAPL 1304 ... . Compliance with RPAPL 1304 and 1306 is a condition precedent to the commencement of a foreclosure action ... . However, contrary to Nathan's contention, he was not entitled to summary judgment dismissing the complaint insofar as asserted against him on the ground that the plaintiff failed to comply with the notice requirements of RPAPL 1304, since he failed to present sufficient evidence to demonstrate, prima facie, that the condition precedent was not fulfilled ... . Nathan's affidavit, in which he made a bare denial of receipt of the RPAPL 1304 notice, was improperly submitted for the first time in reply ... . Nathan also failed to establish his prima facie entitlement to summary judgment dismissing the complaint insofar as asserted against him on the ground that the plaintiff failed to comply with RPAPL 1306." ***U.S. Bank, N.A. v. Nathan*, 2019 N.Y. Slip Op. 04989, Second Dept 6-19-19**

MUNICIPAL LAW, VEHICLE AND TRAFFIC LAW, PERSONAL INJURY.

NO SHOWING THAT THE AMBULANCE SIREN OR EMERGENCY LIGHTS WERE IN USE WHEN THE INTERSECTION COLLISION OCCURRED, THEREFORE THERE WAS NO SHOWING THE RECKLESS DISREGARD STANDARD FOR EMERGENCY VEHICLES APPLIED, THE MUNICIPAL DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined the municipal defendants' motion for summary judgment in this ambulance traffic accident case should have been denied. The municipal defendants did not demonstrate that the reckless disregard standard for emergency vehicles applied because they did not present evidence the ambulance siren or emergency lights were in use: "... [W]hile the reckless disregard standard of care in Vehicle and Traffic Law § 1104(e) applies to a driver of an authorized emergency vehicle involved in an emergency operation, who engages in specific conduct exempted from the rules of the road by Vehicle and Traffic Law § 1104(b), the exemptions apply only when the authorized emergency vehicle sounded audible signals such as a siren and displayed at least one red light (see Vehicle and Traffic Law § 1104[c]). Here, the municipal defendants failed to establish, prima facie, their entitlement to judgment as a matter of law under the reckless disregard standard of care, as they did not demonstrate that the siren and lights on the ambulance were activated as required for the exemptions set forth in Vehicle and Traffic Law § 1104(b) to apply ...". ***Wynter v. City of New York*, 2019 N.Y. Slip Op. 04993, Second Dept 6-19-19**

PERSONAL INJURY.

PLAINTIFF ASSUMED THE RISK OF PARTICIPATING IN AN OBSTACLE COURSE RACE; PLAINTIFF FELL ATTEMPTING A 'MONSTER CLIMB' WHICH HAD BEEN ERECTED ON A ROADWAY WITH NO MATS BENEATH.

The Second Department determined plaintiff assumed the risk of injury by participating in a "Monster Climb" knowing she could fall and knowing there were no protective mats. The event was an obstacle course race sponsored by defendants and held at a public park: "... [T]he plaintiffs argued that the assumption of risk doctrine cannot apply unless the sport or recreational activity takes place at a permanent, designated facility. They also argued that there were triable issues of fact as to whether the defendants unreasonably increased the risk of the Monster Climb obstacle by erecting it on a roadway without protective mats underneath it, by allowing an unlimited number of participants on the obstacle's cargo nets at the same time, and by having staffers shout at the injured plaintiff to turn her body and hurry up. ... The 'assumption of risk doctrine applies where a consenting participant in sporting and amusement activities is aware of the risks; has an appreciation of the nature of the risks; and voluntarily assumes the risks'... . 'If the risks of the activity are fully comprehended or perfectly obvious, plaintiff has consented to them and defendant has performed its duty' ... . Risks which are 'commonly encountered' or 'inherent' in a sport, as well as risks 'involving less than optimal conditions,' are risks which participants have accepted and are encompassed by the assumption of risk doctrine ... 'It is not necessary . . . that the injured plaintiff have foreseen the exact manner in which his or her injury occurred, so long as he or she is aware of the potential for injury of the mechanism from which the injury results' ... . A participant's awareness of risk is 'to be assessed against the background of the skill and experience of the particular plaintiff' ...". ***Ramos v. Michael Epstein Sports Prods., Inc.*, 2019 N.Y. Slip Op. 04973, Second Dept 6-19-19**

PERSONAL INJURY, EVIDENCE.

VIOLATIONS OF ORDINANCES, ADMINISTRATIVE RULES OR REGULATIONS DO NOT CONSTITUTE NEGLIGENCE PER SE, ONLY VIOLATIONS OF STATUTES CONSTITUTE NEGLIGENCE PER SE.

The Second Department, reversing (modifying) Supreme Court, determined that defendant Delco's motion for summary judgment dismissing the negligence per se cause of action should have been granted. Negligence per se is shown by the violation of a statute, not, as here, by the violation of local ordinances, administrative rules or regulations. Plaintiffs alleged Delco, a painting contractor, caused a fire at plaintiffs' residence. The Second Department held there was sufficient circumstantial evidence to support the causation element of the negligence cause of action: "Delco failed to eliminate triable issues of fact as to whether it performed electrical work in the area in which the fire started. Although representatives of Delco and Chestnut asserted in their deposition testimony that Delco was not hired to, and did not, perform any electrical work on the subject premises, those averments were contradicted by the deposition testimony of some of the tenant plaintiffs, who asserted that they had observed Delco performing electrical work in the apartment where the fire occurred, and that Delco was the only entity that performed repairs and other work at the premises generally, including electrical work. The foregoing circumstantial evidence set forth sufficient facts upon which Delco's liability could be reasonably and logically inferred ... . However, that branch of Delco's motion which was for summary judgment dismissing the negligence per se causes of action asserted against it by the tenant plaintiffs should have been granted. '[V]iolation of a State statute that imposes a specific duty constitutes negligence per se, or may even create absolute liability'... . In contrast, violation of local ordinances or administrative rules and regulations constitutes only evidence of negligence ... . Here, the tenant plaintiffs did not allege that Delco violated any particular State statute. Rather, they only alleged violations of local laws ...". ***Rivera v. 203 Chestnut Realty Corp.*, 2019 N.Y. Slip Op. 04976, Second Dept 6-19-19**

THIRD DEPARTMENT

CIVIL PROCEDURE, NEGLIGENCE, INSURANCE LAW.

PLAINTIFF SUED YANKEE TRAILS FIVE DAYS BEFORE THE STATUTE OF LIMITATIONS RAN IN THIS BUS TRAFFIC ACCIDENT CASE; THE OWNER OF THE BUS WAS ACTUALLY YANKEE TRAILS WORLD TOURS, A COMPANY WITH A DIFFERENT ADDRESS AND CEO; PLAINTIFF'S MOTIONS TO EXTEND THE TIME TO SERVE THE SUMMONS AND COMPLAINT AND TO AMEND THE COMPLAINT TO SUBSTITUTE THE CORRECT DEFENDANT, MADE AFTER THE STATUTE HAD RUN, SHOULD NOT HAVE BEEN GRANTED.

The Third Department, reversing Supreme Court, over a dissent, determined plaintiff should not have been allowed to have more time to serve defendant and amend the complaint to substitute the correct defendant. The action stemmed from a traffic accident involving a bus owned by Yankee Trails. Five days before the statute of limitations ran, plaintiff commenced an action against Yankee Trails World Tours, a different corporation with different addresses and different chief executive officers: "... [W]hether relief pursuant to CPLR 306-b and 305 (c) is available is not merely a matter of discretion. Significantly, 'CPLR 306-b cannot be used to extend the time for service against a defendant as to which the action was never validly commenced' ... . Similarly, although a court may allow amendment of a summons to correct the name of a defendant pursuant to CPLR 305 (c), such remedy is not available where a plaintiff seeks to substitute a defendant who has

not been properly served ... . The fact that defendant and Yankee Trails use the same insurance carrier is of no significance in the circumstances presented; notably, the record reflects that the insurance carrier did not contact Yankee Trails until after the statute of limitations had expired. Nor may we consider plaintiff's error a mere misnomer that would allow relief to be granted pursuant to CPLR 305 (c) and CPLR 306-b ... . Upon this record, plaintiff's attempt to 'proceed against [Yankee Trails as] an unserved and entirely new defendant' after the statute of limitations had run should have been denied, as he failed to obtain jurisdiction over Yankee Trails for relief pursuant CPLR 306-b and, thus, to later amend the complaint pursuant to CPLR 305 ...". ***Fadlalla v. Yankee Trails World Tours, Inc.*, 2019 N.Y. Slip Op. 05044, Third Dept 6-20-19**

CRIMINAL LAW.

ADMINISTRATIVE APPEAL OF THE DENIAL OF DEFENDANT'S APPLICATION FOR PAROLE WAS TAINTED BY INACCURATE INFORMATION ABOUT THE OFFENSES COMMITTED BY DEFENDANT.

The Third Department, reversing Supreme Court, determined that the administrative appeal of the denial of parole was tainted by inaccurate information about the offenses committed by defendant: "... [T]he claim asserted by petitioner is preserved as it could not have been raised upon administrative appeal. Specifically, petitioner challenges the fact that the administrative appeals unit relied upon inaccurate information regarding his criminal history in affirming the Board's denial of parole. A review of the statement by the appeals unit inaccurately reported that petitioner murdered six, as opposed to four, people. 'Because of the likelihood that such error may have affected' the decision to affirm the Board's denial of petitioner's request for parole release, proper administrative review is required ...". ***Matter of Torres v. Stanford*, 2019 N.Y. Slip Op. 05043, Third Dept 6-20-19**

CRIMINAL LAW, EVIDENCE.

DEFENDANT WAS NOT PROPERLY NOTIFIED OF THE ALLEGED VIOLATIONS OF PROBATION AND THE FINDING THAT DEFENDANT VIOLATED A CONDITION WAS NOT SUPPORTED BY A PREPONDERANCE OF THE EVIDENCE.

The Third Department, reversing County Court, determined defendant was not properly notified of alleged violations of probation and the proof did not support a finding that defendant violated a condition of probation: "Where a violation of probation is alleged to have occurred, a written statement must be filed with the court and provided to defendant 'setting forth the condition or conditions of the sentence violated and a reasonable description of the time, place and manner in which the violation occurred' (CPL 410.70 [2] ...). Here, the details of the alleged violations in the uniform court report only included the that defendant violated condition 2, which required her to obey all state and federal laws, by engaging in conduct that led to her September 2015 and March 2016 arrests. Although a different section of the uniform court report summarizing defendant's probation supervision referenced other incidents that County Court made findings with respect thereto, the uniform court report only alleged that defendant violated condition 2 of the terms of her probation (see CPL 410.70 [2]). Moreover, defendant's probation officer acknowledged in her testimony that defendant was not charged in the uniform court report with violating conditions 8, 12 and 16. Notwithstanding the testimony that was allowed at the hearing with regard to conditions 8, 12 and 16, defendant was not provided with a written statement informing her that she was also being charged with violating these conditions of her probation. Accordingly, County Court's finding that defendant violated these terms of her probation was improper (see CPL 410.70 [2]...). ... Condition 2 of the terms of defendant's probation required her to obey all federal, state and local laws and notify her probation officer immediately if questioned or arrested by a law enforcement agency or if convicted of a new offense. In support of its allegation that defendant violated this condition, the People adduced the testimony of defendant's probation officer who testified, in relevant part, that defendant notified her of both the September 2015 and March 2016 arrests and charges. Beyond the probation officer's testimony that defendant had been arrested on two occasions, no additional evidence or proof was offered as to the underlying acts. Accordingly, County Court's finding that defendant violated condition 2 of her probation was not supported by a preponderance of the evidence ...". ***People v. Johnson*, 2019 N.Y. Slip Op. 05018, Third Dept 6-20-19**

CRIMINAL LAW, JUDGES, ATTORNEYS, PRIVILEGE.

NO RECORD OF JUDGE'S DISCUSSION OF A JURY NOTE WITH COUNSEL, MURDER CONVICTION REVERSED; DEFENDANT AUTHORIZED HIS AGENT TO SHOW HIS LETTER TO HIS ATTORNEY TO A THIRD PARTY, NO ATTORNEY-CLIENT PRIVILEGE; SENTENCES CANNOT BE CONSECUTIVE FOR CRIMES WITH THE SAME ACTUS REUS.

The Third Department determined (1) because there was no record of the judge's discussion of a jury note with counsel, the murder conviction (the only count to which the jury note was relevant) must be reversed. (2) although defendant's girlfriend was defendant's agent for the purpose of delivering defendant's letter, which was mailed to her, to his attorney, there was evidence defendant authorized his girlfriend's mother to read the letter, therefore the attorney-client privilege was lost, (3) the unauthorized use of a vehicle charge has the same actus reus as the robbery and grand larceny charges, therefore the sentence for unauthorized use of a vehicle cannot run consecutively with the sentences for robbery and grand larceny, but it can run consecutively to the sentences for the burglary and criminal possession of stolen property charges: "A divided

Court of Appeals has held that meaningful notice is not provided where there is no record indicating that counsel was informed of the 'precise contents' of the note before the response is given to the jury, or where the trial court paraphrases or summarizes a jury note .... Given the court's statement to the jury that it had an off-the-record conversation with counsel regarding the note, it would not be unreasonable to believe that County Court had informed counsel of the note's precise contents. However, the record contains no specific indication that the court provided counsel with the precise content of the note before it delivered its response to the jury, nor was the note read verbatim on the record before the response was given. Thus, the record fails to establish that counsel had the opportunity to participate in the formation of the court's response to the jury's substantive inquiry. * * * In these circumstances, we conclude that [defendant's girlfriend] was acting as defendant's agent. Thus, whether the letter was protected by the attorney-client privilege turns on whether defendant had a reasonable expectation of confidentiality when he sent it to [her]. In that regard, there was contradictory evidence regarding whether defendant authorized [her] to share a copy of the letter with her mother, which County Court resolved by determining that defendant had authorized disclosure to [her] mother ... . The determination that defendant specifically authorized disclosure of the letter to a third party, i.e., [his girlfriend's] mother, established that defendant had no reasonable expectation of confidentiality and, therefore, defeated the attorney-client privilege. Thus, County Court did not err in admitting the letter." ***People v. Henry*, 2019 N.Y. Slip Op. 05024, Third Dept 6-20-19**

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