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Editor: **Bruce Freeman**

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FIRST DEPARTMENT

ARBITRATION, CONTRACT LAW, ATTORNEYS, APPEALS.

ARBITRATOR'S AWARD OF ATTORNEY'S FEES TO PLAINTIFF IN THIS BREACH OF CONTRACT DISPUTE REINSTATED; MONEY JUDGMENT SHOULD NOT HAVE BEEN GRANTED TO A PARTY WHICH HAD CONTRACTED WITH PLAINTIFF, BUT WITH WHICH DEFENDANT DID NOT HAVE AN AGREEMENT TO ARBITRATE; COURT-REVIEW OF ARBITRATION AWARDS DISCUSSED IN DETAIL.

The First Department, in a full-fledged opinion by Justice Renwick, reversing Supreme Court, determined the arbitrator's award of attorney's fees to the plaintiff should not have been vacated, but the arbitrator's award of a money judgment to OHM, which had contracted with plaintiff but was not a party to any agreement to arbitrate with the defendant, should be vacated. The opinion includes a clear explanation of a court's limited powers of review of an arbitration award and is too comprehensive to fairly summarize here. The court noted, with regard to the American rule generally prohibiting the award of attorney's fees, New York law is preempted by the Federal Arbitration Act (FAA): "... [T]he parties agree that manifest disregard of the law is the only appropriate ground to vacate the arbitrator's award of attorneys' fees ... . For an award to be set aside for manifest disregard, the arbitrator must understand and correctly state the law, but proceed to disregard the same ... * * * Under established law, '[t]he question whether the parties have submitted a particular dispute to arbitration, i.e., the question of arbitrability, is an issue for judicial determination [u]nless the parties clearly and unmistakably provide otherwise' ... . * * * Arbitration is a matter of contract, and a party cannot be forced to arbitrate a dispute that it did not expressly agree to submit to arbitration ... . 'Courts should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so . . . . In this manner the law treats silence or ambiguity about the question who (primarily) should decide arbitrability' differently from the way it treats silence or ambiguity about the question whether a particular merits-related dispute is arbitrable because it is within the scope of a valid arbitration agreement' for in respect to this latter question the law reverses the presumption' ... . An arbitrator's decision to assert jurisdiction, over objection, is subject to a much broader and more rigorous judicial review than an arbitral decision on the merits, and because it is 'a question for the court to decide,' it is subject to de novo judicial review ...". ***Matter of Steyn v. CRTV, LLC*, 2019 N.Y. Slip Op. 05341, First Dept 7-2-19**

CRIMINAL LAW.

THE EVIDENCE DEFENDANT USED A PEN TO PUNCTURE THE CHEEK OF THE VICTIM CONSTITUTED EVIDENCE THE DEFENDANT USED A DANGEROUS INSTRUMENT IN THIS ASSAULT SECOND CASE, THE DEFENDANT WAS NOT ENTITLED TO A JURY INSTRUCTION ON THE ORDINARY-NONDEADLY-FORCE JUSTIFICATION DEFENSE.

The First Department determined defendant's request for a jury instruction on the ordinary-nondeadly-force justification defense in this Assault Second prosecution was properly denied. The defendant did not request a jury instruction on the deadly-force-justification defense. Defendant's use of a pen to puncture the victim's cheek constituted use of a dangerous instrument: "The video surveillance captures the defendant reaching into his bag or pocket with his right hand and then immediately striking the complainant with that same hand. Photographs of the complainant's cheek reflect what appears to be a puncture of the cheek. The photograph of the outside of the complainant's cheek shows that there was a thin, horizontal cut adjacent to the round through-and-through puncture on the complainant's cheek, consistent with a sharp object, such as the point of a pen, scratching the complainant's cheek before the object plunged into it. The record further reveals that police officers who arrived at the scene observed the complainant bleeding from a puncture wound on the side of his face. At the time of defendant's arrest, the police recovered a pen that defendant was holding in his right hand. ... Under the facts presented, the only possible justification charge that would have been available to defendant would have been a charge of justifiable use of deadly, not ordinary, physical force (see Penal Law § 35.15[2]; People v. Mickens, 219 AD2d 543, 544 [1st Dept 1995])…". ***People v. Marishaw*, 2019 N.Y. Slip Op. 05320, First Dept 7-2-19**

PERSONAL INJURY, MUNICIPAL LAW.

PLAINTIFF FELL IN A POTHOLE IN THE PATH FROM THE BUS TO THE CURB, TRANSIT AUTHORITY'S MOTION FOR SUMMARY JUDGMENT PROPERLY DENIED.

The First Department determined the defendant New York City Transit Authority's (NYCTA's) motion for summary judgment in this slip and fall case was properly denied. Plaintiff was let off at a bus stop about seven or eight feet from the curb and stepped into a pothole: "NYCTA's motion was properly denied since the record presents triable issues of fact as to whether NYCTA breached its duty as a common carrier to provide plaintiff with a safe place to board the bus ... . The record shows that the bus stopped seven or eight feet from the curb adjacent to the bus stop, with a pothole, into which plaintiff fell, in the path that passengers would take walking from the sidewalk to board the bus. The fact that approximately 10 other passengers safely boarded the bus at the same time that plaintiff fell in the hole while attempting to board does not entitle NYCTA to summary judgment ...". ***Defay v. City of New York*, 2019 N.Y. Slip Op. 05325, First Dept 7-2-19**

SECOND DEPARTMENT

ATTORNEYS, TRUSTS AND ESTATES, MEDICAL MALPRACTICE, NEGLIGENCE.

ALTHOUGH THE ATTORNEY REPRESENTING HIS MOTHER'S ESTATE IN A MEDICAL MALPRACTICE/ WRONGFUL DEATH ACTION MAY BE A WITNESS, UNDER THE PARTICULAR FACTS OF THE CASE, DISQUALIFICATION PURSUANT TO THE ADVOCATE-WITNESS RULE WAS NOT REQUIRED.

The Second Department, reversing Supreme Court, determined that, although the attorney representing his mother's estate in the medical malpractice/wrongful death action may be a witness, the advocate-witness rule, under the particular facts of this case, did not require disqualification: "... [T]he advocate-witness rules contained in the Rules of Professional Conduct (22 NYCRR 1200.0) provide guidance, but are not binding authority, for the courts in determining whether a party's attorney should be disqualified during litigation ... . Rule 3.7(a) of the Rules of Professional Conduct ... provides that, in general, '[a] lawyer shall not act as advocate before a tribunal in a matter in which the lawyer is likely to be a witness on a significant issue of fact.' There is an exception to this rule when 'disqualification of the lawyer would work substantial hardship on the client'... . Further, the advocate-witness rule generally does not control where the attorney is also a litigant ... . However, estate representatives represent the interests of the estate's beneficiaries, rather than their own. Therefore, generally, the advocate-witness rule will prevail over a fiduciary-attorney's right to self-representation ... . Here, the other distributee affirmed that his interests in the lawsuit are identical to those of the plaintiff, whom he wished would remain as attorney for the estate. Accordingly, while the plaintiff is not a party in his individual capacity, his personal property interests as one of two distributees of the estate are at stake (see EPTL 5-4.4[a] ...), and his interests appear to be identical to those of the estate ... . Furthermore, the plaintiff affirmed that his attempt to retain different counsel for the estate was unsuccessful, such that his disqualification as counsel would essentially foreclose the claim, working substantial hardship on the estate and its distributees ...". ***Greenberg v. Grace Plaza Nursing & Rehabilitation Ctr.*, 2019 N.Y. Slip Op. 05390, Second Dept 7-3-19**

CRIMINAL LAW, CONTRACT LAW, EVIDENCE.

DEFENDANT WAS ENTITLED TO FURTHER INQUIRY TO DETERMINE WHETHER SHE VIOLATED THE PLEA AGREEMENT, COUNTY COURT DID NOT SENTENCE HER IN ACCORDANCE WITH THE PLEA AGREEMENT BASED SOLELY ON THE PROSECUTOR'S ASSERTION SHE DID NOT COMPLETE A MENTAL HEALTH COURT PROGRAM.

The Second Department determined defendant was entitled to further inquiry into whether she violated the terms of her plea agreement. Defendant was not sentenced in accordance with the agreement based solely on the prosecutor's assertion she had not successfully completed a Mental Health Court program:

"The County Court failed to conduct an inquiry sufficient to assure that the defendant had, in fact, violated the terms of the plea agreement and that the information upon which it based the sentence was reliable and accurate ... . Thus, we remit the matter ... for a sufficient inquiry and a new determination as to whether the defendant violated the terms of the plea agreement, and for resentencing thereafter. Moreover, as acknowledged by the People, the County Court should not have pronounced sentence without first receiving a presentence investigation report ...". ***People v. Dimon*, 2019 N.Y. Slip Op. 05417, Second Dept 7-3-19**

CRIMINAL LAW, CORRECTION LAW, SEX OFFENDER REGISTRATION ACT (SORA).

VIRGINIA MURDER CONVICTION WHICH REQUIRED DEFENDANT TO REGISTER AS A SEX OFFENDER IN VIRGINIA DID NOT QUALIFY DEFENDANT AS A SEX OFFENDER IN NEW YORK.

The Second Department, reversing Supreme Court, determined defendant should not have been adjudicated a sex offender in New York based upon a murder conviction in Virginia, where he was required to register as a sex offender under Virginia law. The defendant was convicted of murdering a three year old child who had suffered trauma to his genitalia: "The defendant subsequently relocated to New York in November 2017. Following a hearing pursuant to Correction Law article 6-C, the Supreme Court adjudicated the defendant a level three sex offender. Insofar as relevant to this appeal, the court

determined that the defendant's mandatory registration under Virginia law made him a 'sex offender' under Correction Law § 168-a(2)(d)(ii). The defendant appeals. The victim's extensive injuries in this case included 'significant traumatic injuries to [his] scrotum and penis,' which were described at trial by the prosecution's expert medical witness as having been inflicted 'within hours to one day from the time of [the infant's] death' and were 'caused by blunt force trauma, probably squeezing' … . Nevertheless, as the People correctly concede, the order appealed from must be reversed in light of the Court of Appeals' recent opinion in People v. Diaz (32 NY3d 538), which held that mandatory registration as a murderer under Virginia Code § 9.1-902(D) does not qualify the defendant as a 'sex offender' within the meaning of Correction Law § 168-a(2)(d)(ii)." ***People v. Covington*, 2019 N.Y. Slip Op. 05429, Second Dept 7-3-19**

CRIMINAL LAW, CORRECTION LAW, APPEALS.

PLEA ALLOCUTION NEGATED AN ESSENTIAL ELEMENT OF THE CHARGED VIOLATION OF THE CORRECTION LAW, THE ISSUE SURVIVES THE FAILURE TO MOVE TO WITHDRAW THE PLEA AND THE WAIVER OF APPEAL.

The Second Department, reversing defendant's conviction for a violation of the Correction Law, determined that the plea allocution negated an essential element of the offense. Because the voluntariness of the plea was called into question the issue survived the failure to move to withdraw the plea and the waiver of appeal: "A sex offender is required to register with the Division 'no later than ten calendar days after any change of address' and to pay a fee of ten dollars 'each time such offender registers any change of address' (Correction Law § 168-f[4]). A sex offender who fails to so register within the required time period is guilty of a felony (see Correction Law § 168-t). As the defendant contends, his factual allocution during the plea proceeding negated an essential element of the offense charged, thereby casting significant doubt upon his guilt. Specifically, the defendant indicated that he provided the Division with the address of a homeless shelter that he was using, although he acknowledged that there were some nights when he could not stay in the shelter. He explained 'sometimes if you don't get there in time all the beds are taken, so sometimes you get turned away.' On those days, the defendant asserted, he stayed at a friend's house instead. These statements tended to demonstrate that the defendant did not, in fact, change his address and thus, was not required to notify the Division ...". ***People v. Wright*, 2019 N.Y. Slip Op. 05428, Second Dept 7-3-19**

FORECLOSURE, CIVIL PROCEDURE, JUDGES.

DEFENDANT IN THIS FORECLOSURE ACTION DID NOT ASSERT THE BANK LACKED STANDING IN HIS ANSWER AND DID NOT OPPOSE THE BANK'S MOTION FOR SUMMARY JUDGMENT, THE JUDGE SHOULD NOT HAVE, SUA SPONTE, RAISED THE STANDING ISSUE AND DENIED PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON THAT GROUND.

The Second Department, reversing Supreme Court, determined that the judge should not have, sua sponte, denied plaintiff bank's motion for summary judgment in this foreclosure action on the ground the bank did not establish standing. The bank need not affirmatively demonstrate standing absent the defendant's assertion that the bank lacked standing. Here the defendant did not address the bank's standing in his answer and did not oppose the motion for summary judgment: "... '[A]s a general matter, a plaintiff need not establish its standing (i.e., that it held and/or owned the note at the time the action was commenced) as an essential element of the cause of action. Rather, it is only where the plaintiff's standing is placed in issue by the defendant that the plaintiff must shoulder the additional burden of establishing its standing to commence the action, a burden satisfied by evidence that it was the holder or assignee of the underlying note at the time the action was commenced' ... . In the present case, the defendant did not raise the issue of standing by asserting lack of standing as an affirmative defense in his answer or moving to dismiss the complaint on that ground in a pre-answer motion to dismiss ... . Inasmuch as the defendant 'failed to . . . raise the issue, it was inappropriate for the Supreme Court to, sua sponte, do so on the defendant['s] behalf' ... . The issue of standing was not properly before the Supreme Court ...". ***Deutsche Bank Natl. Trust Co. v. Matzen*, 2019 N.Y. Slip Op. 05386, Second Dept 7-3-19**

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

PLAINTIFF BANK DID NOT DEMONSTRATE COMPLIANCE WITH THE NOTICE PROVISIONS OF RPAPL 1304 AND DID NOT SUBMIT ADMISSIBLE PROOF OF STANDING PURSUANT TO A MERGER, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined that plaintiff bank in this foreclosure action did not demonstrate compliance with the notice requirements of Real Property Actions and Proceedings Law (RPAPL) 1304 and did not demonstrate it had standing, based upon a merger, to foreclose: "... [T]he plaintiff failed to demonstrate, prima facie, its strict compliance with RPAPL 1304 ... . The plaintiff did not submit an affidavit of service or proof of mailing by the United States Postal Service evidencing that the plaintiff properly served the defendants pursuant to RPAPL 1304. Instead, the plaintiff relied upon the affidavit of its employee Lesa Duddey, a vice president of document control. In her affidavit, Duddey averred that her 'review of records' maintained by the plaintiff 'reveal[ed]' that the plaintiff sent 90-day notices by registered or certified mail and first class mail to each of the defendants, and she described a correspondence log that purportedly evidenced such mailings. 'While mailing may be proved by documents meeting the requirements of the business

records exception to the rule against hearsay''... , here, the plaintiff failed to submit a copy of the correspondence log in support of its motion. Consequently, the statements in Duddey's affidavit regarding the correspondence log are inadmissible hearsay and lack probative value ... . The plaintiff did not establish proof of a standard office practice and procedure designed to ensure that items are properly addressed and mailed ... . The presence of 20-digit numbers on the copies of the 90-day notices submitted by the plaintiff, standing alone, did not suffice to establish, prima facie, proper mailing under RPAPL 1304 ... . [W]e note that the plaintiff also failed to submit sufficient evidence in admissible form of ABN's merger with the plaintiff to establish, prima facie, that the plaintiff was the holder of the note at the time of the commencement of the action ...". ***CitiMortgage, Inc. v. Osorio*, 2019 N.Y. Slip Op. 05383, Second Dept 7-3-19**

PERSONAL INJURY.

HOTEL WAS NEGLIGENT AS A MATTER OF LAW IN THIS THIRD-PARTY ASSAULT CASE, PLAINTIFF'S DECEDENT WAS STABBED TO DEATH AT A PARTY AT THE HOTEL, THERE WAS AN EXTENSIVE HISTORY OF CRIMINAL ACTIVITY AT THE HOTEL AND THERE WAS NO SECURITY ON THE NIGHT OF THE STABBING.

The Second Department determined that the facts of this case supported a finding that the hotel (Howard Johnson) where plaintiff's decedent was stabbed to death was negligent as a matter of law. There was an extensive history of criminal acts, including assaults, at the hotel and there was no security on the night of the stabbing: "... [I]n certain 'rare' cases ,,, , a plaintiff may be awarded summary judgment on the issue of a defendant's negligence where 'there is no conflict at all in the evidence' and 'the defendant's conduct fell far below any permissible standard of due care' ... . The case at bar presents such an instance where there is no triable issue of fact as to the defendant's negligence, entitling the plaintiff to summary judgment on the issue of liability on the first and third causes of action insofar as asserted against Howard Johnson. 'A possessor of real property is under a duty to maintain reasonable security measures to protect those lawfully on the premises from reasonably foreseeable criminal acts of third parties' ... . This includes the common-law duty to take 'minimal precautions' to protect tenants and visitors from foreseeable harm, including foreseeable criminal conduct by a third person ... . 'To establish foreseeability, there is no requirement that the past experience of criminal activity be of the same type as that to which the plaintiff was subjected, but the criminal conduct at issue must be shown to be reasonably predictable based on prior occurrences of the same or similar criminal activity at a location sufficiently proximate to the subject location' ... . '[T]he duty to employ protective measures arises when it is shown that the possessor of the property either 'knows or has reason to know from past experience that there is a likelihood of conduct on the part of third persons . . . which is likely to endanger the safety of the visitor' ...". ***Davis v. Commack Hotel, LLC*, 2019 N.Y. Slip Op. 05385, Second Dept 7-3-19**

PERSONAL INJURY, MUNICIPAL LAW.

MOTION TO AMEND THE NOTICE OF CLAIM IN THIS SLIP AND FALL CASE SHOULD NOT HAVE BEEN GRANTED, THE NOTICE ADDED A NEW THEORY OF CAUSATION.

The Second Department, reversing Supreme Court, determined plaintiff's motion to amend her notice of claim in this slip and fall case should not have been granted. The motion was made two years after the complaint was filed and included a new theory of causation: "A timely served notice of claim dated June 1, 2015, alleged, in relevant part, that the steps and/or stairs were 'defective,' 'uneven, misleveled, smooth' with a 'slick surface,' and that the New York City Transit Authority and the Metropolitan Transportation Authority (hereinafter together the defendants), were negligent 'in the ownership, operation, control, and maintenance' of the stairs. The plaintiff subsequently filed a complaint dated April 12, 2016, alleging, in relevant part, that her injuries were caused by the defendants' negligence in the ownership, operation, management, maintenance, care, custody, and control of the premises. More than two years later, in April 2018, the plaintiff moved pursuant to General Municipal Law § 50-e(6) for leave to amend her notice of claim to remove any mention of the stairs being 'uneven, misleveled, smooth' with a 'slick surface,' and to add new allegations that the stairs were 'defectively installed . . . and/or designed . . . with a hole/gap upon which [the plaintiff's] foot was caused to trip and fall.' ... 'A notice of claim may be amended only to correct good faith and nonprejudicial technical mistakes, omissions, or defects, not to substantively change the nature of the claim or the theory of liability' ... . Amendments of a substantive nature are not within the purview of General Municipal Law § 50-e(6) ... . Here, the plaintiff's notice of claim made no allegations of any 'hole/gap' in which the plaintiff's foot got caught, or that the stairs were defectively installed or designed ... . Therefore, the proposed amendments were not technical in nature; rather, they were of a substantive nature beyond the purview of General Municipal Law § 50-e(6) ...". ***Ryabchenko v. New York City Tr. Auth.*, 2019 N.Y. Slip Op. 05430, Second Dept 7-3-19**

REAL ESTATE, CONTRACT LAW.

DOCUMENT PURPORTING TO CONSTITUTE A CONTRACT FOR THE SALE OF TWO PROPERTIES DID NOT SATISFY THE STATUTE OF FRAUDS, PLAINTIFF'S ACTION FOR SPECIFIC PERFORMANCE PROPERLY DISMISSED.

The Second Department determined the one page document purporting to be a contract to sell two properties to defendant did not satisfy the statute of frauds. Therefore plaintiff's action for specific performance was properly dismissed: "In a real estate transaction, the essential terms of a contract typically include the purchase price, the time and terms of payment, the

required financing, the closing date, the quality of title to be conveyed, the risk of loss during the sale period, and adjustments for taxes and utilities ... . '[W]here a contract's material terms are not reasonably definite, the contract is unenforceable' ... . Here, the defendant demonstrated her prima facie entitlement to judgment as a matter of law dismissing the complaint on the basis that the agreement did not satisfy the statute of frauds. The agreement did not state all of the essential terms, including allocation of the price between the two properties, whether one property could be sold without the other, the terms of payment, and the risk of loss during the sale period, and did not mention the adjustments for taxes and utilities which would customarily be included in a transaction of this nature ... . In addition, the agreement did not include the necessary parties because not all of the owners of the properties executed the agreement ...". ***443 Jefferson Holdings, LLC v. Sosa*, 2019 N.Y. Slip Op. 05376, Second Dept 7-3-19**

THIRD DEPARTMENT

CIVIL PROCEDURE, ATTORNEYS.

PLAINTIFF'S NEW COUNSEL FILED A SECOND COMPLAINT ARISING OUT OF THE SAME FACTS AS THE FIRST COMPLAINT TO ALLEGE CERTAIN INTENTIONAL TORTS BEFORE THE STATUTE OF LIMITATIONS RAN OUT, DISMISSAL OF THE SECOND COMPLAINT WAS NOT REQUIRED, CONSOLIDATION OF THE TWO COMPLAINTS WAS ORDERED.

The Third Department, reversing Supreme Court, determined that dismissal of a second complaint arising out of the same facts as the first complaint, filed two months earlier, was not required. Plaintiff had hired new counsel 13 days before the statute of limitations ran out. The first complaint mentioned both intentional and negligent conduct. The second complaint fleshed out specific intentional torts: "CPLR 3211 (a) (4) does not require a trial court to dismiss an action upon the ground that another similar action is pending, instead allowing it to 'make such order as justice requires' ... . '[t]he purpose of the defense of the pendency of another action between the same parties for the same cause is to prevent a party from being harassed or burdened by having to defend a multiplicity of suits' . In our view, the reasons stated by plaintiff for commencing this action rather than moving for leave to amend the first complaint are not... so clearly inadequate that dismissal was required to serve that purpose ... . We note that Supreme Court agreed with plaintiff that there was insufficient time to pursue a motion for leave to amend pursuant to CPLR 2214 (b). As the court observed, it was possible that plaintiff could have obtained timely relief by bringing a request for leave to amend the first complaint via an order to show cause ... . Nevertheless, even if counsel erred in failing to pursue that course, dismissal of this action is too harsh a consequence. Where, as here, relief is required under CPLR 3211 (a) (4) to correct similar pending actions, 'consolidation or joint trial is permissible and in many instances preferable to dismissal'... . In his opposition to defendant's motion to dismiss, plaintiff requested such relief as an alternative remedy. Thus, the requirement for notice to defendant before consolidation is ordered has been satisfied (see CPLR 602 [a] ...). Accordingly, we direct Supreme Court to consolidate this action with the first action, and remit for that purpose." ***LaBuda v. LaBuda*, 2019 N.Y. Slip Op. 05366, Third Dept 7-3-19**

[Note that it may have been possible for the plaintiff to file a copy of the proposed supplemental summons with a motion to amend the complaint which would have tolled the statute of limitations. (see Karagiannis v. North Shore Long Is. Jewish Health Sys., Inc., 80 AD3d 569, 569 [2d Dept 2011])]

CIVIL PROCEDURE, EVIDENCE, NEGLIGENCE, BATTERY.

RECORD WAS INSUFFICIENT TO DETERMINE THE LEVEL OF PREJUDICE CAUSED BY PLAINTIFF'S FAILURE TO PRESERVE THE PHONE WHICH ALLEGEDLY CAPTURED IMAGES OF THE INCIDENT AT THE HEART OF THE LAWSUIT, DISMISSAL OF THE COMPLAINT REVERSED AND MATTER REMITTED FOR FURTHER DISCOVERY.

The Third Department, in a full-fledged opinion by Justice Garry, determined that the record was not sufficient to conclude whether dismissal of the complaint was a proper sanction for spoliation of evidence. Plaintiff alleged defendant negligently or intentionally struck defendant with an all-terrain vehicle (ATV). Defendant asked plaintiff to preserve a phone which allegedly contained images of the incident. Plaintiff did not preserve the phone but provided one image and one video which were alleged to have been on the phone. Supreme Court dismissed the complaint as a sanction for spoliation. The Third Department noted there was evidence that all the metadata on the phone had been preserved and remitted the matter for discovery and, if necessary, an appropriate sanction: "... [T]he factors to be considered in determining the appropriate sanctions for such failures are 'the extent that the spoliation of evidence may prejudice a party and whether a dismissal will be necessary as a matter of elementary fairness' ... . [W]e remit to Supreme Court with direction for plaintiff to promptly obtain and provide to defendant all photos, videos and metadata pertinent to the incident that have been preserved in any source, or to provide defendant with full access to any such stored photos, videos and metadata. The retrieval and examination of this information — or the continued failure to do so — will permit Supreme Court to reexamine, upon a full record, whether pertinent electronic information has been lost as a result of plaintiff's failure to preserve the phone, to what extent

defendant has been prejudiced by that loss and, thus, whether dismissal, an adverse inference charge or some other sanction may be appropriate ...". ***LaBuda v. LaBuda*, 2019 N.Y. Slip Op. 05372, Third Dept 7-3-19**

CRIMINAL LAW, APPEALS.

FAILURE TO INSTRUCT THE JURY THAT ACQUITTAL ON THE TOP COUNT BASED UPON THE JUSTIFICATION DEFENSE REQUIRED ACQUITTAL ON ALL THE RELATED LESSER COUNTS REQUIRED REVERSAL.

The Third Department, reversing Supreme Court, determined the jury was not properly instructed on the justification defense. The defendant was acquitted of the top count, attempted murder, and was convicted attempted assault first, a lesser included offense. The jury was not told that an acquittal on the top count based upon the justification defense required an acquittal on all the counts to which the justification defense applied. The issue was not preserved but was considered in the interest of justice: " '[I]n a case involving a claim of self-defense, it is error for the trial court not to instruct the [jury] that, if [it finds] the defendant not guilty of a greater charge on the basis of justification, [it is] not to consider any lesser counts' ... . Such failure constitutes reversible error ... . [T]he court's instructions, together with the verdict sheet, failed to adequately convey to the jury that, if it found defendant not guilty of attempted murder in the second degree based on justification, it was not to consider the lesser counts to which the justification defense applied ...". ***People v. Daniels*, 2019 N.Y. Slip Op. 05343, Third Dept 7-3-19**

CRIMINAL LAW, APPEALS.

MATTER REMITTED FOR A HEARING ON WHETHER THE TRIAL COURT WAS, OR SHOULD HAVE BEEN, AWARE OF A NOTE FROM THE JURY SUCH THAT THE RESPONSIBILITY TO NOTIFY COUNSEL WAS TRIGGERED.

The Third Department, in a full-fledged opinion by Justice Garry, holding the appeal in abeyance, determined a hearing was required to determine whether the trial court was aware, or should have been aware, of the existence of a note from the jury such that the court's responsibility to alert counsel was triggered: "We find this case similar to People v. Meyers (___ NY3d ___, 2019 N.Y. Slip Op. 03658 [2019]), in which the Court of Appeals addressed the circumstance where a purported jury note that had been marked as a court exhibit was discovered in the court file after the trial, presenting circumstances suggesting that it may have been a draft that the jury discarded or chose not to submit to the trial court. * * * Here, as in Meyers, we are presented with a scanty and ambiguous record, precluding this Court from determining whether County Court's core responsibilities were triggered by its knowledge of the note or by circumstances that should have alerted the court to its presence. Accordingly, we remit the matter for a hearing to assess the circumstances pertaining to the events at trial during the jury's deliberations and the acceptance of its verdict, including the transmission, receipt, marking and communication to the court of all three notes, and for a report to this Court setting out the court's findings." ***People v. Johnson*, 2019 N.Y. Slip Op. 05344, Third Dept 7-3-19**

CRIMINAL LAW, CONSTITUTIONAL LAW, SEX OFFENDER REGISTRATION ACT (SORA).

THE LAW REQUIRING THAT SEX OFFENDERS CANNOT RESIDE WITHIN 1000 FEET OF SCHOOL GROUNDS IS NOT UNCONSTITUTIONAL, EVEN AS APPLIED TO AN OFFENDER WHOSE SEX OFFENSES INVOLVED ADULTS.

The Third Department, over a two-justice concurrence, determined defendant sex offender, in this habeas corpus proceeding, was not entitled to release on parole on the ground that the law prohibiting him from residing within 1000 feet of school grounds was unconstitutional. The concurrence called into question the effects of the law. Petitioner's sex offenses involved adults, not children: "... [A]lthough the open parole release date granted to petitioner cannot be revoked absent procedural due process, we are unpersuaded that he has a further 'liberty interest [or] fundamental right . . . to be free from special conditions of parole' regarding his residence under either the Federal or the State Constitution ... . [P]etitioner has not satisfied his 'heavy burden of showing that [Executive Law § 259-c (14)] is 'so unrelated to the achievement of any combination of legitimate purposes' as to be irrational' ... . Petitioner may or may not be correct when he says that the mandatory condition does not achieve its legitimate goals, but the argument that there are 'better or wiser ways to achieve the law's stated objectives' must be addressed to the Legislature ... . Thus, the mandatory condition comports with substantive due process, and petitioner is not entitled to immediate release." ***People ex rel. Johnson v. Superintendent, Adirondack Corr. Facility*, 2019 N.Y. Slip Op. 05359, Third Dept 7-3-19**

CRIMINAL LAW, EVIDENCE.

EVIDENCE OF PRIOR UNCHARGED SEXUAL OFFENSES WAS NOT ADMISSIBLE UNDER *MOLINEUX,* HEARSAY EVIDENCE OF VICTIM'S DISCLOSURE TWO AND A HALF YEARS AFTER THE ALLEGED INCIDENT WAS NOT ADMISSIBLE AS A PROMPT OUTCRY, CONVICTION REVERSED.

The Third Department, reversing County Court, determined detailed evidence of prior uncharged sexual offenses was not admissible under *Molineux.* The defendant was charged with criminal sexual act alleging defendant asked a six or seven year old boy to perform oral sex on him. The People presented in their direct case the testimony of two female relatives of the defendant alleging sexual offenses occurring more than seven years before the victim's disclosure in the instant case. County Court also erroneously allowed hearsay about the victim's disclosure, two and a half years after the alleged incident,

under the prompt outcry exception to the hearsay rule: “The female relatives specifically testified to repeated instances of oral sex, vaginal sex and digital penetration by defendant, and one of the female relatives stated that defendant forced her and the other female relative to perform sexual acts upon each other as he watched. Contrary to County Court's conclusion, such detailed testimony was not necessary to complete the narrative as to how and why the victim's disclosure occurred ... . Additionally, the prior uncharged acts did not bear a sufficient similarity to the incident underlying the charged crimes so as to constitute, as the People argued, a common scheme or plan or demonstrate defendant's intent or motive ... . Accordingly, as the People failed to establish that the proffered evidence was probative of a material issue other than defendant's criminal propensity, County Court erred in permitting such evidence ... . Moreover, even if the proffered evidence were relevant to some nonpropensity purpose, County Court erroneously determined that the probative value of the evidence outweighed its prejudicial effect ...”. ***People v. Saxe*, 2019 N.Y. Slip Op. 05345, Third Dept 7-3-19**

EMPLOYMENT LAW, ARBITRATION, CIVIL PROCEDURE, SOCIAL SERVICES LAW.

THE DOCTRINES OF COLLATERAL ESTOPPEL AND RES JUDICATA APPLY TO THE ARBITRATOR'S DETERMINATION THAT PETITIONER DID NOT ABUSE A MENTAL HEALTH SERVICES RECIPIENT, THE CONTRARY SUBSEQUENT DETERMINATION BY AN ADMINISTRATIVE LAW JUDGE ANNULLED.

The Third Department, reversing the administrative law judge (ALJ), determined that the doctrines of collateral estoppel and res judicata applied to the original arbitrator's finding that petitioner, a security assistant employed by the Office of Mental Health (OMH), did not abuse a mental health service recipient. The arbitrator found that the service recipient was the aggressor. The proceedings before the ALJ, which found that petitioner had abused the service recipient, were annulled: “The fundamental point here is that the arbitrator reviewed the underlying event and determined that the service recipient fell to the floor and was the sole aggressor. As such, we conclude that respondent was precluded under principles of res judicata and collateral estoppel from relitigating the question of whether petitioner physically abused the service recipient by pushing her to the floor. It follows that his petition to annul respondent's determination should be granted and the determination annulled. The matter must be remitted to respondent for amendment of the findings to state that the report is unsubstantiated and for compliance with the requirements of Social Services Law § 494.” ***Matter of Anonymous v. New York State Justice Ctr. for the Protection of People With Special Needs*, 2019 N.Y. Slip Op. 05364, Third Dept 7-3-19**

EMPLOYMENT LAW, ARBITRATION, MUNICIPAL LAW, CONTRACT LAW.

THE CLAUSE OF THE COLLECTIVE BARGAINING AGREEMENT WHICH STATED THE AGREED FIREFIGHTER STAFFING LEVEL WAS 36 DID NOT BARGAIN AWAY THE MUNICIPALITY'S RIGHT TO ELIMINATE POSITIONS, THEREFORE THE MUNICIPALITY'S REFUSAL TO FILL A FIREFIGHTER VACANCY WAS NOT ARBITRABLE.

The Third Department, reversing Supreme Court, over a two-justice concurrence which argued an additional ground for reversal, determined that the municipality had not bargained away (in the collective bargaining agreement [CBA]) its right to eliminate positions or lay off workers for economic reasons. Therefore the municipality's refusal to fill a vacant firefighter position was not arbitrable (against public policy): “The clause [in the CBA] at issue requires petitioner to fill vacancies as soon as possible to maintain ‘agreed upon’ staffing levels, which, at the effective date of the contract, was 36 firefighters. However, the operative clause does not contain the explicit term precluding downward readjustment of that agreed-upon minimum level that was present in Matter of Burke v. Bowen [40 NY2d 264]. Rather, the clause at issue authorizes petitioner to unilaterally eliminate equipment or close a station on 30 days' notice and requires that the parties bargain the impact of any such change. We conclude that this clause, considered in its entirety, does not meet the ‘stringent test’ necessary to establish that petitioner ‘bargain[ed] away its right to eliminate positions or terminate or lay off workers for budgetary, economic or other reasons’ ... . Accordingly, the dispute is not arbitrable for reasons of public policy.” ***Matter of City of Plattsburgh (Plattsburgh Permanent Firemen's Assn.)*, 2019 N.Y. Slip Op. 05367, Third Dept 7-3-19**

ENVIRONMENTAL LAW, CONSTITUTIONAL LAW.

THE CONSTRUCTION OF 27 MILES OF SNOWMOBILE TRAILS IN THE ADIRONDACK PARK WOULD VIOLATE THE NEW YORK CONSTITUTION'S PROHIBITION OF THE DESTRUCTION OF TIMBER.

The Third Department, reversing Supreme Court, in a full-fledged opinion by Justice Mulvey, over a dissent, determined that the proposed construction of 27 miles of snowmobile trails in the Adirondack Park required the removal of timber and therefore would violate the New York State Constitution: “NY Constitution, article XIV, § 1 states, in relevant part, that ‘[t]he lands of the state, now owned or hereafter acquired, constituting the [F]orest [P]reserve as now fixed by law, shall be forever kept as wild forest lands. They shall not be leased, sold or exchanged, or be taken by any corporation, public or private, nor shall the timber thereon be sold, removed or destroyed.’ * * * Although this project did not involve clear-cutting or the removal of a large swath of trees ... , but instead necessitated destruction of narrow corridors of trees for many miles, we need to consider the entire project when determining its effects. The destruction of a substantial number of trees can be problematic whether those trees were together or spread out along one or more portions of the Forest Preserve. For example, the construction of these trails required the destruction, on average per mile, of over 200 trees at least three inches DBH and approximately 925 trees of all sizes. It would be anomalous to conclude that destroying 925 trees per mile of trails, or

approximately 25,000 trees in total, does not constitute the destruction of timber 'to a substantial extent' or 'to any material degree' ... . Thus, the construction of the Class II trails resulted in, or would result in, an unconstitutional destruction of timber in the Forest Preserve." ***Protect the Adirondacks! Inc. v. New York State Dept. of Envtl. Conservation*, 2019 N.Y. Slip Op. 05363, Third Dept 7-3-19**

FAMILY LAW, APPEALS.

THE ORDER OF PROTECTION WAS NOT SUFFICIENTLY TIED TO THE BEST INTERESTS OF THE CHILD IN THIS NEGLECT PROCEEDING AND SHOULD HAVE BEEN VACATED, ISSUE CONSIDERED ON APPEAL AS AN EXCEPTION TO THE MOOTNESS DOCTRINE.

The Third Department, reversing Family Court in this neglect proceeding, determined that the order of protection requiring respondent putative father to undergo random urine, breath and blood tests was not sufficiently linked to the best interests of the child. Although the issue was moot in respondent's case, the Third Department considered the issue, which is likely to recur, as an exception to the mootness doctrine: "... [U]nder the circumstances of this case, the record does not support Family Court's conclusion that the conditions imposed upon respondent were necessary to further the purposes of protecting the child. At the time that the neglect proceeding was commenced against him and when Family Court entered the temporary order, respondent did not have legal or physical custody of the child; he only had limited parenting time with the child. Yet, the conditions imposed in the temporary order bore no connection to respondent's parenting time with the child (see Family Ct Act §§ 1029 [a]; 1056 [1] [i]...). For example, the temporary order generally required respondent to submit to random urine, breath or other tests upon petitioner's request, rather than requiring that such test occur prior to respondent's parenting time. The conditions were broad and designed to compel respondent to address his alleged alcohol and substance abuse issues. Family Court adopted petitioner's proposed conditions without an adequate connection to or explanation as to how each of the conditions related to the protection of the child. Accordingly, we agree with respondent that the temporary order was improper and that Family Court should have granted respondent's motion to vacate." ***Matter of Carmine GG. (Christopher HH.)*, 2019 N.Y. Slip Op. 05360, Third Dept 7-3-19**

FAMILY LAW, CIVIL PROCEDURE, CRIMINAL LAW.

SUMMARY JUDGMENT, BASED IN PART ON THE COLLATERAL ESTOPPEL EFFECT OF RESPONDENT'S CONVICTION FOR ENDANGERING THE WELFARE OF A CHILD, PROPERLY GRANTED.

The Third Department determined petitioner's motion for summary judgment in this neglect proceeding was properly granted. The motion was based in party on respondent's endangering-the-welfare-of-a-child conviction: "... '[A] criminal conviction may be given collateral estoppel effect in a Family Court proceeding where (1) the identical issue has been resolved, and (2) the defendant in the criminal action had a full and fair opportunity to litigate the issue of his or her criminal conduct' ... . Defendant does not dispute that he had a full and fair opportunity to litigate his criminal conduct before the trial court ... . In order to find a defendant guilty of endangering the welfare of a child, it must be proven that '[h]e or she knowingly act[ed] in a manner likely to be injurious to the physical, mental or moral welfare of a child less than [17] years old' (Penal Law § 260.10 [1]). In turn, '[t]o establish neglect, [a] petitioner must prove by a preponderance of the evidence that a child's physical, mental or emotional condition was harmed or is in imminent danger of harm as a result of a failure on the part of the parent to exercise a minimum degree of care' ... . .. [T]the factual allegations underlying respondent's conviction were adequate to support the finding of neglect." ***Matter of Lilliana K. (Ronald K.)*, 2019 N.Y. Slip Op. 05358, Third Dept 7-3-19**

FAMILY LAW, CONSTITUTIONAL LAW, APPEALS.

FATHER, WHO DID NOT SUBMIT A PETITION FOR CUSTODY, WAS PRECLUDED FROM PRESENTING EVIDENCE OF HIS FITNESS AS A PARENT IN THIS CUSTODY PROCEEDING BROUGHT BY MOTHER; FATHER WAS DEPRIVED OF HIS RIGHT TO DUE PROCESS; ALTHOUGH FATHER DID NOT OBJECT, THE APPELLATE COURT HAS INHERENT AUTHORITY TO CORRECT FUNDAMENTAL ERRORS.

The Third Department, reversing Family Court, determined father was deprived of due process of law because he was not allowed to put in evidence of his fitness as a parent in this custody proceeding brought by mother. Father did not file a custody petition. For that reason Family Court refused to allow father to put in evidence. The Third Department noted father did not object at trial but exercised its inherent authority to correct fundamental errors: "An initial custody determination must be based upon the best interests of the child, taking into account all relevant factors, including 'the parents' past performance and relative fitness, their willingness to foster a positive relationship between the child and the other parent, as well as their ability to maintain a stable home environment and provide for the child's overall well-being' ... . By this standard, the court must assess the qualifications of both parents in determining what custody determination best serves the interests of the child. In its decision, Family Court expressly held that because the father did not also file a custody petition, it could 'only take into consideration the testimony brought by the mother.' There were several instances during the trial where the court precluded testimony from the father and his witness because he did not file a petition. As a result, the father was prevented from addressing all of the relevant factors, including who should be the primary custodian and what

he did to foster a relationship between the child and the mother. The father's stepfather was precluded from testifying as to his observations of the father as a parent. The father was allowed to briefly testify as to his average day with the child at the conclusion of testimony ... . We are mindful that the father did not raise any objections at trial to Family Court's evidentiary limitations. We are also mindful that the father was able to briefly testify as to his interactions with the child. That said, this court has inherent authority to exercise its discretion and correct fundamental errors ... . In our view, the court's failure to allow the father a full and fair opportunity to present evidence, coupled with the court's own limitations on its decision, constitutes a fundamental due process error requiring reversal of Family Court's order ...". ***Matter of Liska J. v. Benjamin K.*, 2019 N.Y. Slip Op. 05347, Third Dept 7-3-19**

REAL PROPERTY TAX LAW, ASSOCIATIONS.

SUPREME COURT SHOULD NOT HAVE GRANTED SUMMARY JUDGMENT FINDING THAT THE VALUE OF COMMON AREAS OF A DEVELOPMENT OWNED AND MAINTAINED BY PETITIONER HOMEOWNERS' ASSOCIATION WAS ZERO FOR PROPERTY TAX PURPOSES BECAUSE OF ENCUMBRANCES AND RESTRICTIONS, QUESTIONS OF FACT ABOUT THE VALUE OF THE COMMON AREAS HAD BEEN RAISED.

The Third Department, reversing Supreme Court, determined questions of fact precluded summary judgment finding that the value of the common areas of a development owned and maintained by petitioner homeowners' association was zero because of encumbrances and restrictions on the property. Petitioner sought a reduction of the tax assessments pursuant to Real Property Tax Law (RPTL) article 7. The town and the village had assessed the value of the common areas in the millions of dollars: "... [T]he declaration of protective covenants purports to impose a servitude upon the common area parcels in the nature of an easement or covenant that runs with the land; however, petitioner's bylaws specifically state that individual lot owners 'shall have a license to use the [c]ommon [a]reas.' To the extent that the corresponding deeds to the individual lot owners recite that each conveyance was made subject to both the declaration of protective covenants and petitioner's bylaws, we now reiterate that '[s]uch a conflict in terminology does not lend itself to summary relief'... . ... [P]etitioner failed to demonstrate, as a matter of law, that the assessed property values of the individual lot owners within the development already include an enhanced value or premium sufficient to cover or offset the value of petitioner's common area parcels. ... Nor did petitioner sufficiently establish that the subject common area parcels have zero or only nominal value. Indeed, '[i]t is possible that a parcel is so interwoven with a dominant estate that it has no extrinsic value that is available for tax purposes. If, however, it is shown that a servient parcel[, i.e., the common area parcels,] has substantial value, the land can be taxed despite its relationship to a dominant estate owned by a member of a community development' ... ". ***Matter of The Assn. of Prop. Owners of Sleepy Hollow Lake, Inc. v. McBride*, 2019 N.Y. Slip Op. 05371, Third Dept 7-3-19**

WORKERS' COMPENSATION LAW.

SPECIAL FUND IS LIABLE FOR DEATH BENEFITS WHERE THE CLAIM WAS TRANSFERED TO THE SPECIAL FUND BEFORE THE FUND WAS CLOSED IN 2014 AND THE CLAIMANT DIED AFTER THE FUND WAS CLOSED.

The Third Department, reversing the Workers' Compensation Board, determined that the Special Fund remained liable for death benefits if the matter had been transferred to the Special Fund before the 2014 closure of the fund. Here the asbestosis case was transferred to the Special Fund in 2011 and the claimant died in 2017: "... [T]he imposition of liability on the Special Fund in this case is not precluded by the statutory amendment [closing the Special Fund], given that liability was transferred to the Special Fund in December 2011, well before the January 1, 2014 closure date. The record does not indicate any violation of the plain language of the statutory sentence at issue. Indeed, the record does not contain a copy of any application by the employer for transfer of liability of a claim to the Special Fund, nor any indication that such an application was filed after January 1, 2014. Thus, the record does not support a finding of a violation of the statute prohibiting the Board from accepting, after the cut-off date, any application by an employer or carrier for transfer of liability of a claim to the Special Fund (see Workers' Compensation Law § 25-a [1-a]). This conclusion is supported by our decision in Matter of Misquitta v. Getty Petroleum (150 AD3d 1363[2017]), which involved a factual situation similar to that presented here. In Misquitta, the decedent had an established workers' compensation claim that had been transferred to the Special Fund prior to his death and, after his death, his widow filed a claim for workers' compensation death benefits. While acknowledging that the consequential death claim was separate and distinct from the decedent's original claim, this Court ruled that 'where . . . liability for a claim has already been transferred from the carrier to the Special Fund and the employee thereafter dies for reasons causally related to the original claim, the Special Fund remains liable for the claim for death benefits' ...". ***Matter of Verneau v. Consolidated Edison Co. of N.Y., Inc.*, 2019 N.Y. Slip Op. 05369, Third Dept 7-3-19**

FOURTH DEPARTMENT

CIVIL PROCEDURE, MEDICAL MALPRACTICE, PERSONAL INJURY.

ALTHOUGH THE TWO THYROID SURGERIES WERE PERFORMED BY THE SAME DOCTOR, THE 2005 SURGERY AND THE 2010 SURGERY WERE DISCRETE EVENTS; THE STATUTE OF LIMITATIONS WAS NOT TOLLED BY THE CONTINUOUS TREATMENT DOCTRINE.

The Fourth Department, reversing (modifying) Supreme Court, determined the medical malpractice action based upon a 2005 thyroid surgery by the same doctor who performed the 2010 thyroid surgery was time-barred. The two surgeries were discreet events and the statute of limitations was not tolled by the continuous treatment doctrine: "Defendants established that [the 2005] claims are time-barred inasmuch as more than 2½ years elapsed between the date of the alleged conduct and the commencement of the action ... , and plaintiff failed to raise an issue of fact in opposition. Contrary to plaintiff's contention, the continuous treatment doctrine does not apply. It is undisputed that plaintiff did not treat with Dr. Chahfe in relation to the 2005 surgery after her final follow-up appointment in 2005, and that she did not return to Dr. Chahfe until 2010. The surgical procedures in 2005 and 2010 were 'discrete and complete' events that cannot be linked by way of the continuous treatment doctrine' ... , and there was no evidence of anticipated further treatment related to the 2005 procedure at the time plaintiff left Dr. Chahfe's care in 2005 ...". ***Angelhow v. Chahfe*, 2019 N.Y. Slip Op. 05437, Fourth Dept 7-5-19**

CIVIL PROCEDURE, PRIVILEGE, MEDICAL MALPRACTICE, NEGLIGENCE.

STATEMENTS MADE IN CONNECTION WITH A HOSPITAL'S QUALITY ASSURANCE INVESTIGATION ARE PRIVILEGED PURSUANT TO THE EDUCATION LAW AND PUBLIC HEALTH LAW; THE STATEMENTS ARE NOT DISCOVERABLE IN THE MEDICAL MALPRACTICE ACTION.

The Fourth Department, reversing Supreme Court, over a concurrence, and refusing to follow the Second Department, determined certain statements made in connection with a hospital's (SUNY Upstate's) quality assurance investigation were privileged pursuant to the Education Law and Public Health Law and therefore were not subject to discovery in this medical malpractice action: " 'The New York State Education Law shields from disclosure the proceedings [and] the records relating to performance of a medical or a quality assurance review function or participation in a medical and dental malpractice prevention program' (... see Public Health Law § 2805-m [2]). Although there is an exception to that privilege, 'the exception is narrow' ... and is limited to 'statements made by any person in attendance at such a [quality assurance] meeting who is a party to an action or proceeding the subject matter of which was reviewed at such meeting' (Education Law § 6527 [3]; see Public Health Law § 2805-m [2] ...). Here, the 'statements' at issue were provided shortly after the incident and were obtained as part of SUNY Upstate's quality assurance investigation. The statements, however, were not made at a quality assurance committee meeting; nor were they made in response to any inquiries initiated by the committee ... . None of the defendants appeared at any committee meeting. Thus, we agree with SUNY Upstate and defendants that plaintiff's proposed construction of the statutory exception would not give any practical effect to the phrase 'in attendance,' but rather would render that phrase meaningless ... . Further, the Court of Appeals specifically instructed that the exception is 'narrow and limited to statements given at an otherwise privileged peer review meeting' ... . Following plaintiff's proposed construction 'would extend the [statutory] exception to a point where it would swallow the general rule that materials used by a hospital in quality review and malpractice prevention programs are strictly confidential' ...". ***Nowelle B. v. Hamilton Med., Inc.*, 2019 N.Y. Slip Op. 05464, Fourth Dept 7-5-19**

CRIMINAL LAW.

ALTHOUGH DEFENDANT MET THE CRITERIA FOR A PERSISTENT FELONY OFFENDER THE RESULTING SENTENCE WAS TOO HARSH; SENTENCE REDUCED BY THE APPELLATE DIVISION.

The Fourth Department determined that, although defendant met the criteria for a persistent felony offender, he should not have been sentenced as a persistent felony offense due to the nature of his prior offenses. His sentence was reduced from 15 to life to 9 to 18 years. Defendant had been offered 2 !/2 to 5 prior to trial: "... [T]he imposition of persistent felony offender status is unduly harsh and severe. The sentencing court's determination to sentence a defendant as a persistent felony offender 'cannot be held erroneous as a matter of law, unless [that] court acts arbitrarily or irrationally' ... . Even where the sentencing court does not err as a matter of law in adjudicating a defendant to be a persistent felony offender, '[t]he Appellate Division, in its own discretion, may conclude that a persistent felony offender sentence is too harsh or otherwise improvident' ... . 'In this way, the Appellate Division can and should mitigate inappropriately severe applications of the statute' ... . 'A determination by the Appellate Division to vacate a harsh or severe persistent felony offender finding is authorized by CPL 470.20 (6), which grants the Appellate Division discretion to modify sentences in the interest of justice without deference to the sentencing court' ...". ***People v. Brown*, 2019 N.Y. Slip Op. 05454, Fourth Dept 7-5-19**

CRIMINAL LAW, APPEALS.

RECORD IS NOT SUFFICIENT TO DETERMINE HOW THE TRIAL COURT HANDLED NOTES FROM THE JURY, NEW TRIAL ORDERED; CHALLENGE TO THE PROPRIETY OF HOLDING A RECONSTRUCTION HEARING IS MOOT AND WILL NOT BE CONSIDERED AS AN EXCEPTION TO THE MOOTNESS DOCTRINE.

The Fourth Department, reversing the conviction, determined the record was not sufficient to determine how the trial court handled notes from the jury and reversal was therefore required: "... [R]eversal is required as a result of ' the absence of record proof that the trial court complied with its [meaningful notice obligation] under CPL 310.30' 'in response to two substantive jury notes ... . Here, the stenographer was unable to transcribe the final day of the trial that included County Court's handling of the jury notes due to an error that rendered the subject electronic stenographic notes unrecoverable, and a reconstruction hearing failed to establish the court's on-the-record handling of those notes. We 'cannot assume that the proper procedure was utilized when the record is devoid of information as to how jury notes were handled' ... . We therefore reverse the judgment and grant a new trial. In light of our determination, defendant's challenge to the propriety of holding a reconstruction hearing under these circumstances is moot, and we reject defendant's contention that his challenge falls within the exception to the mootness doctrine ...". ***People v. Grimes*, 2019 N.Y. Slip Op. 05461, Fourth Dept 7-5-19**

CRIMINAL LAW, EVIDENCE, ATTORNEYS.

TRIAL COURT DID NOT, AS PROMISED, INSTRUCT THE JURY ON THE PURPOSES OF INTRODUCING HEARSAY EVIDENCE OF THE CHILD-VICTIM'S DISCLOSURES OF SEXUAL ASSAULT AND DEFENSE COUNSEL DID NOT OBJECT; THE MAJORITY CONCLUDED THE ISSUE WAS NOT PRESERVED FOR APPEAL; TWO DISSENTERS ARGUED THE ERROR WAS REVERSIBLE AND DEFENSE COUNSEL WAS INEFFECTIVE FOR NOT OBJECTING.

The Fourth Department, over a two-justice dissent, determined that any error in the trial court's failure to instruct the jury on the purposes for the introductions of evidence of the child-victim's disclosure of sexual assault in 2009 and in 2014, evidence which would otherwise be inadmissible bolstering, was not preserved. The dissenters argued that the error was reversible and defense counsel's failure to object constituted ineffective assistance. **From the dissent:** "Prior to trial, the People moved in limine for permission to introduce evidence that the victim reported an incident of sexual contact with defendant to her aunt in 2009, and that she again disclosed the incident in 2014. The court concluded that the People could introduce evidence that the victim made a prompt complaint in 2009 if they laid a proper foundation establishing that the complaint was made at the first suitable opportunity, and that they could introduce evidence that the victim reported the contact in 2014 for the sole purpose of establishing how the investigative process began at that time. The court indicated that it would provide an appropriate limiting instruction if the evidence was introduced. At trial, the People introduced evidence that the victim reported the sexual contact to her aunt in 2009 and to several other people at various times in 2014 and 2015. Nevertheless, the court did not give a limiting instruction either when the testimony was given or at the end of the case. Although we agree with the majority that defendant failed to preserve for our review his contention that the court erred in failing to give the promised charge, we conclude that defendant was deprived of a fair trial by that error, and we would exercise our power to review that contention as a matter of discretion in the interest of justice. * * * ... [Defendant] was deprived of effective assistance by his attorney's failure to object the court's failure to give the promised limiting instruction. The majority concludes that defense counsel's failure to preserve that issue does not rise to the level of ineffective assistance, citing People v. Gross(26 NY3d 689, 696 [2016]). We respectfully disagree. In Gross, the majority of the Court of Appeals concluded that defense counsel may not have objected to the prosecutor's comments on the evidence for tactical reasons. Here, there was no possible tactical basis for 'defense counsel's inexplicable failure to object' when the court failed to give the promised limiting instruction ... " ***People v. Hymes*, 2019 N.Y. Slip Op. 05441, Fourth Dept 7-5-19**

EMPLOYMENT LAW, EDUCATION-SCHOOL LAW, ADMINISTRATIVE LAW.

ALTHOUGH SUBSTANTIAL EVIDENCE SUPPORTED DISCIPLINARY FINDINGS AGAINST PETITIONER, A SCHOOL BUS DRIVER WHO SLAPPED AN UNRULY STUDENT, TERMINATION WAS TOO SEVERE A PENALTY, TWO-JUSTICE DISSENT.

The Fourth Department determined substantial evidence supported the guilty findings on three disciplinary charges against petitioner, a driver of a school bus for special needs children. Petitioner had slapped a nine-year-old student who had become unruly. However, the majority determined the termination of the petitioner, a long-time employee with an unblemished record, was too severe a penalty. The two dissenters argued termination was appropriate: "... [I]n light of petitioner's otherwise unblemished disciplinary record during her 20 years as a school bus driver, including five years driving special needs students, we conclude that termination, absent any other previous progressive disciplinary steps, is so disproportionate to the offense committed as to shock one's sense of fairness ... . Although we are mindful of our limited role in evaluating the discipline imposed here ... , we nevertheless conclude that the circumstances of this unfortunate occurrence, viewed in the specific context of petitioner's background, establish that the harsh penalty of termination was disproportionate and shocking to our sense of fairness. Petitioner was confronted by a student who, due to his special needs, lost control of his behavior and was significantly disrupting the other students on the bus, some of whom were also struggling to behave. Petitioner's was not premeditated and, under these circumstances, appears to be the result of a momentary lapse of judgment.

There is nothing in petitioner's employment history to suggest that she will ever engage in similar conduct again. Although termination in these circumstances shocks our sense of fairness, we do not condone petitioner's behavior, and only conclude that some form of discipline short of termination would be appropriate. We therefore modify the determination by granting the petition in part and vacating the penalty imposed, and we remit the matter to respondent for the imposition of an appropriate penalty less severe than termination ...". ***Matter of Ansley v. Jamesville-DeWitt Cent. Sch. Dist.*, 2019 N.Y. Slip Op. 05439, Fourth Dept 7-5-19**

FAMILY LAW.

SUPPORT MAGISTRATE SHOULD NOT HAVE AWARDED CHILD SUPPORT TO FATHER; MOTHER WAS ENTITLED TO ARREARS UNDER THE CIRCUMSTANCES OF THIS CASE.

The Fourth Department concluded the support magistrate should not have awarded father child support because mother and father shared custody equally and father had the greater income and assets. The Fourth Department determined, in this circumstance, mother should be awarded arrears based upon the child support she should not have been ordered to pay: "... [M]other that she is entitled to a credit against any arrears from the order for the amount of child support erroneously awarded to the father from April 2, 2015 until January 1, 2016, and we therefore remit the matter to Family Court to determine the amount of arrears and the credit to be applied thereto. Although there is a strong public policy against recoupment of child support overpayments ... , we conclude that the requested credit is appropriate under the limited circumstances of this case. Here, the record establishes that the mother had significantly less income and received certain public benefits, while the father received substantial disability and pension benefits and had significant assets ... . Moreover, granting the mother's request 'will not detract from [the father] fulfilling the needs of the child[ ] while [he is] in [the father's] care' and, indeed, will relieve the mother of an erroneously-imposed financial obligation, thereby allowing her to use her funds to maintain a stable household for the child and meet his reasonable needs during visitation ...". ***Matter of Rapp v. Horbett*, 2019 N.Y. Slip Op. 05447, Fourth Dept 7-5-19**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

QUESTION OF FACT WHETHER OWNER/GENERAL CONTRACTOR FAILED IN THEIR NONDELEGABLE DUTY TO SHUT OFF THE ELECTRICITY IN A BUILDING UNDERGOING DEMOLITION; PLAINTIFF RECEIVED AN ELECTRIC SHOCK WHEN HE STRIPPED INSULATION FROM AN ELECTRIC CABLE; PLAINTIFF'S LABOR LAW § 241(6) CAUSE OF ACTION SHOULD NOT HAVE BEEN DISMISSED.

The Fourth Department determined the property owner/general contractor's motion for summary judgment on the Labor Law § 241(6) cause of action should not have been granted. Plaintiff received an electric shock when cutting away the insulation of an electric cable as part of a demolition project. Plaintiff was to make the wiring in the office safe and was going to test the voltage of the wires lying on the floor when he received the shock: "... [T]he court erroneously granted defendants' motion with respect to the Labor Law § 241 (6) claim against them insofar as that claim is predicated upon alleged violations of 12 NYCRR 23-1.13 (b) (4) and 23-3.2 (a) (2) and (3), and we therefore modify the order accordingly. The first of those provisions of the Industrial Code states that '[n]o employer shall suffer or permit an employee to work in such proximity to any part of an electric power circuit that he may contact such circuit in the course of his work unless the employee is protected against electric shock by de-energizing the circuit and grounding it or by guarding such circuit by effective insulation or other means' (12 NYCRR 23-1.13 [b] [4] ...). The latter provisions state, inter alia, that electric lines must be 'shut off and capped or otherwise sealed' before any demolition project begins (12 NYCRR 23-3.2 [a] [2] ...) and, if it is necessary to maintain an electric line during demolition, 'such lines shall be so protected with substantial coverings or shall be so relocated as to protect them from damage and to afford protection to any person' (12 NYCRR 23-3.2 [a] [3]). Defendants failed to meet their initial burden of establishing that they 'did not violate the regulations, that the regulations are not applicable to the facts of this case, or that such violation was not a proximate cause of the accident' ... . We conclude that there are issues of fact whether, inter alia, defendants' failure in their nondelegable duty to shut off the electricity was a proximate cause of the accident ...". ***Winters v. Uniland Dev. Corp.*, 2019 N.Y. Slip Op. 05440, Fourth Dept 7-5-19**

PERSONAL INJURY.

QUESTION OF FACT WHETHER THE EMERGENCY DOCTRINE APPLIED IN THIS TRAFFIC ACCIDENT CASE; DEFENDANT SAW THE VEHICLE WHICH SUBSEQUENTLY RAN THE STOP SIGN AND THOUGHT IT WAS GOING TO FAST TO STOP; QUESTION OF FACT WHETHER DEFENDANT SHOULD HAVE TAKEN EVASIVE ACTION.

The Fourth Department determined defendant did not eliminate questions of fact in this traffic accident case about whether the emergency doctrine applied. Defendant was behind plaintiffs' motorcycle when a vehicle (operated by Buck) ran a stop sign, broadsided a truck (operated by Matthew) which then collided with the motorcycle. There was evidence defendant's vehicle then struck the motorcycle. Defendant testified she saw the Buck vehicle approaching the stop sign and thought it

was going to fast to stop, The Fourth Department determined there was a question of fact whether defendant should have slowed down at that point: "In determining whether the actions of a driver are reasonable in light of an emergency situation, both the driver's awareness of the situation and his or her actions prior to the occurrence of the emergency must be considered ... . Here, defendant's deposition testimony established that she saw Buck's car on the access road approaching the stop sign 'very, very fast,' 'like he was still on the Thruway,' and that she also observed Matthew's pick-up truck approaching the intersection. Defendant was 'very conscious . . . because [she knew] there [were] a lot of accidents that happen on this road because people do not pay attention to the stop sign at that [a]ccess [r]oad,' and she 'start[ed] to get nervous' that Buck's vehicle was moving too fast to stop for the stop sign. Despite defendant's awareness that the intersection presented a particular danger and her observations of Buck's vehicle, however, defendant did not slow down, move over, or apply her brakes until after she saw Buck's vehicle 'smash into the truck.' At that point, defendant did not know where the motorcycle was in relation to her minivan. We thus conclude that issues of fact exist whether defendant, in taking no evasive action and in making no effort to slow down, or move over, or otherwise attempt to avert the impending collision, responded reasonably under the circumstances ...". ***Gilkerson v. Buck*, 2019 N.Y. Slip Op. 05435, Fourth Dept 7-5-19**

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