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FIRST DEPARTMENT

ATTORNEYS, CIVIL PROCEDURE.

USING A NEW YORK VIRTUAL LAW OFFICE PROGRAM (VLOP) ONLY AS A MAILING ADDRESS AND AS AN AGENT TO ACCEPT SERVICE DOES NOT SATISFY THE REQUIREMENT THAT AN ATTORNEY PRACTICING IN NEW YORK HAVE A PHYSICAL OFFICE IN NEW YORK, HOWEVER THE ACTION BROUGHT BY THE VLOP ATTORNEY IS NOT A NULLITY AND SHOULD NOT HAVE BEEN DISMISSED.

The First Department, reversing Supreme Court, determined using a Virtual Law Office Program (VLOP) only as a mailing address and as an agent to accept service in New York is not enough to satisfy the Judiciary Law requiring an attorney practicing in New York to have a physical office in New York. However the action started by the attorney with the virtual law office is not, as Supreme Court held, a nullity: "To the extent that counsel uses the VLOP only as a mailing address and an agent authorized to accept service of process, it is insufficient to meet the physical presence requirement of Schoenefeld. While the additional services VLOP provides may well satisfy physical presence, an attorney needs to actually take advantage of those services to meet the requirements of Judiciary Law § 470. At bar, counsel does not claim that he actually uses the VLOP for anything but the delivery of mail and packages and for service of process. Although office space and conference rooms may be available to him, there is no claim that he actually uses those services. ... Counsel's correspondence and the papers served on his adversary and/or filed in court contradicted any physical presence in New York. ... Notwithstanding that we find that counsel is not authorized to maintain this action in New York State, we do not believe that it should have been dismissed. The Court of Appeals recently held that a nonresident attorney's failure to comply with the requirement of Judiciary Law § 470 of maintaining a physical office in New York State at the time a complaint is filed does not render the filing a nullity and therefore that dismissal of the action is not required ... . The party may cure the statutory violation with the appearance of compliant counsel or an application for admission pro hac vice by appropriate counsel ... . Accordingly, we vacate the order and remand the matter to afford plaintiff an opportunity to cure the violation." ***Marina Dist. Dev. Co., LLC v. Toledano*, 2019 N.Y. Slip Op. 05480, First Dept 7-9-19**

ATTORNEYS, CIVIL PROCEDURE, LEGAL MALPRACTICE, NEGLIGENCE.

CONTINUOUS REPRESENTATION DOCTRINE DID NOT APPLY TO TWO DISTINCT AND SEPARATE ACTIONS, LEGAL MALPRACTICE ACTION TIME-BARRED.

The First Department determined the continuous representation doctrine did not apply and the legal malpractice action was time-barred. Plaintiff was represented by defendant law firm in a 2005 divorce. Plaintiff's ex-wife then sued plaintiff alleging he fraudulently concealed an asset in the divorce proceedings. Defendant law firm successfully defended the fraud action. 12 years after the divorce action ended, plaintiff sued the law firm for malpractice, asking to be relieved of the obligation to pay the law firm's legal fees in the fraud action: "The motion court correctly found that this action, which was commenced 12 years after the divorce action ended, is barred by the applicable three-year statute of limitations ... . Contrary to plaintiff's contentions, the continuous representation doctrine is inapplicable, because defendants were retained under two separately executed retainer agreements in the divorce action and the fraud action ... . The first retainer agreement expressly stated that it did not cover any services following the entry of a final judgment of divorce. Thus, there was no mutual understanding that further representation was necessary on the specific subject matter of the malpractice claim ... . Moreover, the divorce action and the fraud action, although related, were two distinct and separate actions ...". ***Etzion v. Blank Rome, LLP*, 2019 N.Y. Slip Op. 05468, First Dept 7-9-19**

CIVIL PROCEDURE, CONSTITUTIONAL LAW, CORPORATION LAW, CONTRACT LAW, EMPLOYMENT LAW.

DEFENDANT'S MOTION TO DISMISS THE COMPLAINT FOR LACK OF PERSONAL JURISDICTION SHOULD HAVE BEEN GRANTED, DEFENDANT'S ONLY CONNECTION TO THE CORPORATION WHICH HAD CONTACTS WITH NEW YORK WAS HIS SALARY; THEREFORE THE CORPORATION'S NEW YORK CONTACTS COULD NOT BE IMPUTED TO DEFENDANT.

The First Department, reversing Supreme Court, determined defendant's (Sprinkle's) motion to dismiss the complaint for lack of personal jurisdiction should have been granted, noting that Sprinkle's only connection with the corporation alleged to have breached the contract was his salary. The corporation's contacts with New York could not, therefore, be imputed to Sprinkle: "The complaint fails to state a cause of action as against Sprinkle for tortious interference with contract, because there is no allegation that Sprinkle personally benefitted from the corporations' alleged breach of contract; the only benefit he is alleged to have received is his salary from the corporations ... . Plaintiff failed to make a sufficient start on a showing of jurisdiction over Sprinkle to entitle it to jurisdictional discovery ... . Because the conduct complained of involved the diversion of funds from outside New York to recipients outside New York, the 'critical events,' and thus the situs of injury, were not in New York ... . Moreover, plaintiff does not allege that Sprinkle received substantial revenue from interstate or international commerce (see CPLR 302[a][3][ii]). Because Sprinkle did not personally benefit from the breach of contract, the corporations' contacts with New York cannot be imputed to him ... . Nor can Sprinkle be said to have "reasonably expected" his actions to have consequences in New York ... as he neither did anything to avail himself of New York nor took any steps to project himself into New York. Given that Sprinkle had no contact with New York and did not purposefully avail himself of New York, the constitutional guarantee of due process bars New York courts from exercising personal jurisdiction over him." ***Greenbacker Residential Solar LLC v. OneRoof Energy, Inc.*, 2019 N.Y. Slip Op. 05487, First Dept 7-9-19**

CIVIL PROCEDURE, CONTRACT LAW, DEBTOR-CREDITOR, FRAUD.

FRAUD CAUSE OF ACTION, AS ALLEGED, IS NOT DUPLICATIVE OF THE ACTION FOR BREACH OF A LOAN GUARANTEE AND SHOULD NOT HAVE BEEN DISMISSED ON THAT GROUND.

The First Department, reversing Supreme Court, determined plaintiff's fraud cause of action was not duplicative on the action for breach of a loan guarantee and should not have been dismissed: "Plaintiff alleges that, as CEO of nonparty Karmaloop, Inc., defendant Gregory Selkoe solicited from plaintiff a bridge loan in the amount of $2,040,000. Plaintiff agreed, on condition that Selkoe personally guarantee the loan. Selkoe provided the personal guarantee, and also represented to plaintiff that he had previously given only one other personal guarantee, and that Karmaloop had never defaulted on any loan payment. Both of these representations were false, in that, unbeknownst to plaintiff, Selkoe had previously guaranteed a loan issued to another Karmaloop executive, and Karmaloop had defaulted on that loan. The foregoing states a claim for fraudulent inducement, which is not duplicative of plaintiff's claim for breach of the guarantee. Plaintiff does not allege that Selkoe misrepresented the intent to perform on the guarantee and underlying promissory note, which would render the fraud claim duplicative, but rather alleges that Selkoe misrepresented his and Karmaloop's ability to perform ... . At this early juncture, we find that plaintiff should be 'permitted to plead in the alternative (see CPLR 3014),' and its claim 'for fraud, should not be dismissed as duplicative of the breach-of-contract cause of action' ...". ***Man Advisors, Inc. v. Selkoe*, 2019 N.Y. Slip Op. 05483, First Dept 7-9-19**

CONTRACT LAW.

PASSING REFERENCE IN A CONTRACT TO A 'TERMS AND CONDITIONS' PAGE THAT WAS NOT PART OF THE CONTRACT REVIEWED BY PLAINTIFF DID NOT SERVE TO INCORPORATE THE PAGE INTO THE AGREEMENT.

The First Department determined that a passing reference to a "Terms and Conditions" page which purported to require all contract disputes to be litigated in North Carolina did not incorporate that page into the document: "... [T]he Terms and Conditions section never appeared in the proposed agreement that plaintiff ultimately reviewed and signed, and it is undisputed that plaintiff never saw the Terms and Conditions page. Indeed, the final 29-page agreement, which did not include the 'Terms and Conditions,' was paginated consecutively and signed on each page by both parties. Therefore, contrary to defendants' suggestions, plaintiff had no reason to ask for any other documents. Although documents may be incorporated by reference as part of an executed agreement ... , the doctrine of incorporation by reference 'is grounded on the premise that the material to be incorporated is so well known to the contracting parties that a mere reference to it is sufficient' ... . The referenced material must be described in the contract such that it is identifiable beyond all reasonable doubt ... . Here the agreement's oblique reference to an otherwise unidentified Terms and Conditions page, which was never provided to plaintiff, is insufficient to meet this exacting standard ...". ***Eshaghpour v. Zepsa Indus., Inc.*, 2019 N.Y. Slip Op. 05490, First Dept 7-9-19**

CONVERSION, REPLEVIN.

HEIRS OF A JEWISH VIENNESE ART COLLECTOR, FRITZ GRUNBAUM, KILLED BY THE NAZIS IN 1941, DEMONSTRATED THEY WERE ENTITLED TO POSSESSION OF CERTAIN ARTWORKS IN THE GRUNBAUM COLLECTION WHICH WERE ALLEGEDLY LOOTED BY THE NAZIS.

The First Department, in a comprehensive opinion by Justice Singh, determined that plaintiffs, heirs of Jewish Viennese art collector, Fritz Grunbaum, who was murdered by the Nazis in 1941, demonstrated they were entitled to certain artworks collected by Grunbaum and alleged to have been looted by the Nazis. The complex history leading to this lawsuit cannot be fairly summarized here:" 'A conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession' ... . 'Two key elements of conversion are (1) plaintiff's possessory right or interest in the property; and (2) defendant's dominion over the property or interference with it, in derogation of plaintiff's rights' ... . Where a party's interests in property have been sold, there can be no interference with their property rights and a conversion claim may not be maintained ... . To state a cause of action for replevin, a plaintiff must establish a superior possessory right to property in a defendant's possession ... . Here, we find that plaintiffs have made a prima facie showing of superior title to the Artworks based on evidence that establishes the following: (1) Grunbaum owned the Artworks prior to World War II; and (2) Grunbaum never voluntarily relinquished the Artworks." ***Reif v. Nagy*, 2019 N.Y. Slip Op. 05504, First Dept 7-9-19**

FAMILY LAW, EVIDENCE, CRIMINAL LAW.

IN THIS NEGLECT PROCEEDING STEMMING FROM THE PARENTS' REFUSAL TO ALLOW THEIR TEENAGE CHILD TO RETURN HOME, THE PARENTS SHOULD HAVE BEEN ALLOWED TO PRESENT EVIDENCE OF THEIR TEENAGE CHILD'S BEHAVIOR WHICH RESULTED IN CRIMINAL PROCEEDINGS AND AN ORDER OF PROTECTION IN FAVOR OF FATHER, AS WELL AS EVIDENCE OF THEIR ATTEMPTS TO MEET WITH THE AGENCY AND WORK OUT A PLAN.

The First Department, reversing Family Court, determined that respondent-parents should have been allowed to present evidence of their teenage child's behavior in this neglect proceeding. The parents refused to allow the child to return home after a physical fight between the child and father which resulted in criminal proceedings against the child and an order of protection in favor of the father: "Parents are obligated to support a child under the age of 21 (Family Court Act § 413[1][a]) and to exercise a 'minimum degree of care' in supplying the child with adequate food, clothing, shelter, and education ... . In determining whether a parent has neglected a child by failing to meet that standard, the court 'must evaluate parental behavior objectively,' by asking whether 'a reasonable and prudent parent [would] have so acted, or failed to act, under the circumstances then and there existing' ... . This Court has concluded in many circumstances that a child's history of disciplinary issues did not justify a parent in excluding the child from the home while failing to cooperate with the agency's efforts to address the child's problems and to return the child to the home ... . However, none of those cases involved pending criminal proceedings and an order of protection against the child and in favor of one parent. Respondents were entitled to a full and fair opportunity to present evidence ... showing that they acted reasonably as prudent parents under all the circumstances ... , and that, based on a founded fear it would be unsafe for the child to return home, they were unable to continue to care for him ... . Instead, the court limited evidence to the time period alleged in the petition, precluding respondents from presenting other evidence concerning the child's behavior. Respondents also were precluded from presenting evidence of their attorney's communications with the agency, which was offered to show their willingness to meet and plan with the agency provided that the child was not present and their attorney could be present." ***Matter of Elijah M. (Robin M.)*, 2019 N.Y. Slip Op. 05471, First Dept 7-9-19**

FORECLOSURE, REAL PROPERTY LAW, CIVIL PROCEDURE, EVIDENCE.

DEED MADE UNDER FALSE PRETENSES IS VOID AB INITIO RENDERING THE RELATED MORTGAGE INVALID; THE LAW OF THE CASE DOCTRINE DOES NOT PRECLUDE RECONSIDERING A MATTER WHERE THERE IS NEW EVIDENCE.

The First Department, reversing Supreme Court, in this foreclosure action, determined a deed made under false pretenses was void ab initio and therefore the related mortgage was invalid. The court noted that the law of the case doctrine does not prohibit it from reconsidering a matter where there is subsequent evidence affecting the prior determination: "It is undisputed that nonparty Rapsil Corporation conveyed the same property to two different recipients, first, defendant Rafael Pantoja (who obtained a mortgage from CitiMortgage), and, second, a bona fide entity that transferred it to the Salazar defendants. Although the deed that conveyed the property from Rapsil to Pantoja was unacknowledged, which ordinarily would render it only voidable, because Pantoja controlled Rapsil, the deed was made under false pretenses and was therefore void ab initio ... . Accordingly, the CitiMortgage mortgage was invalid as well (Weiss v. Phillips, 157 AD3d 1, 10 [1st Dept 2017]). This determination is not inconsistent with our prior related decisions ... . In any event, the law of the case doctrine does not limit our power to reconsider issues 'where there are extraordinary circumstances, such as subsequent evidence affecting the prior determination' ...". ***CitiMortgage, Inc. v. Pantoja*, 2019 N.Y. Slip Op. 05481, First Dept 7-9-19**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

FALL FROM A SCAFFOLD WHICH DID NOT HAVE GUARD RAILS ENTITLED PLAINTIFF TO SUMMARY JUDGMENT ON HIS LABOR LAW § 240(1) CAUSE OF ACTION.

The First Department determined a fall from a scaffold which did not have guard rails entitled plaintiff to summary judgment on his Labor Law § 240(1) cause of action, noting that comparative negligence is not a defense: "Plaintiff was injured in a fall from a scaffold. It is undisputed that the scaffold he was supplied with and directed to use lacked guard rails and that he fell off when the scaffold tipped. Plaintiff was not provided with any other safety devices. This evidence establishes prima facie a violation of Labor Law § 240(1) ... . In opposition, defendants failed to raise an issue of fact. Contrary to defendants' claim, the alleged failure to unlock the wheels does not raise an issue of fact ... . Plaintiff's fall from the scaffold, without guard rails or other protective devices, was a proximate cause of the accident ...". ***Camacho v. Ironclad Artists Inc.*, 2019 N.Y. Slip Op. 05475, First Dept 7-9-19**

PERSONAL INJURY.

DEFENDANT GYM DID NOT DEMONSTRATE AN ACCUMULATION OF DUST ON THE BASKETBALL COURT FLOOR WAS INHERENT IN THE SPORT OR OPEN AND OBVIOUS, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT BASED ON THE ASSUMPTION OF THE RISK DOCTRINE SHOULD NOT HAVE BEEN GRANTED.

The First Department, reversing Supreme Court, determined that the assumption of the risk doctrine did not entitle defendant gym to summary judgment. Plaintiff was playing basketball when he allegedly slipped and fell on an accumulation of dust on the indoor court: "An owner may not be held liable if the injury results from certain conditions inherent in a participant's outdoor game of basketball ... . The same is true if a condition on an indoor basketball court is otherwise open and obvious ... . Here, defendant failed to establish that accumulated dust on an indoor basketball court is inherent in the sport of basketball. Nor did defendant establish that the alleged condition was an open and obvious one ...". ***Samuels v. Town Sports Intl., LLC*, 2019 N.Y. Slip Op. 05477, First Dept 7-9-19**

PERSONAL INJURY.

PLAINTIFF ALLEGED SHE FELL OVER A WORKER WHEN SHE ATTEMPTED TO STEP OFF AN ELLIPTICAL MACHINE, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The First Department, reversing Supreme Court, determined defendant's motion for summary judgment should not have been granted. Plaintiff was on an elliptical machine and allegedly fell over a worker who was working near the machine: "Summary judgment was not warranted in this action, because plaintiff's deposition testimony that she felt 'stuck; as she attempted to step off the elliptical machine, coupled with defendant's maintenance worker's testimony that his right leg was stretched out next to the elliptical machine on which plaintiff was exercising, cleaning the outlets in the area, and that plaintiff's foot hit his foot, causing her to lose balance and fall, were together sufficient to raise a triable issue as to whether plaintiff's injuries were caused by defendant's negligence ... . An incident report prepared by the manager consistently recounts that plaintiff fell over a worker." ***Ausch-Alteras v. Equinox - 85th St., Inc.*, 2019 N.Y. Slip Op. 05478, First Dept 7-9-19**

SECOND DEPARTMENT

CRIMINAL LAW, EVIDENCE, ATTORNEYS, APPEALS.

WITNESS DID NOT IDENTIFY THE DEFENDANT AT A LINEUP, SAYING ONLY SHE WAS 'LEANING TOWARD' CHOOSING THE DEFENDANT, THAT TESTIMONY WAS INADMISSIBLE UNDER CPL § 60.25; PROSECUTOR'S REMARKS IN SUMMATION HARSHLY CRITICIZED.

The Second Department, reversing defendant's conviction in the interest of justice, determined a witness's testimony about a lineup identification procedure in which the witness indicated only she was "leaning toward" choosing the defendant was inadmissible. The Second Department further criticized the prosecutor's summation: "... [T]he foundational requirements of CPL 60.25 were not met .... CPL 60.25 is principally concerned with cases where a witness who has validly identified a defendant on a prior occasion is, nevertheless, unable to make a trial identification due to a lapse of memory ... permits a witness to testify in a criminal proceeding about his or her own prior identification where the witness is 'unable at the proceeding to state, on the basis of present recollection, whether or not the defendant is the person in question' ... . The second witness never identified the defendant at the lineup and, thus, there was no prior identification for her to testify about under CPL 60.25 ... . Notably, the impact of the second witness's testimony was highly prejudicial to the defendant. Identification was a crucial and contested issue in this case. Without the second witness's testimony regarding whom she would 'lean toward,' the evidence of identity consisted primarily of the testimony of the first witness, whose veracity and credibility were questioned because he had lied to detectives and an assistant district attorney, absconded from a police station, and received an extremely favorable cooperation agreement in exchange for his testimony at the defendant's trial. ... [T]he prosecutor improperly argued to the jury that there were 'no coincidences,' that the defendant was not the 'unluckiest guy' in Brooklyn,

that 'the evidence fits together . . . all the pieces connect,' that 'all the evidence points directly at [the defendant] . . . because he's guilty. Because he did these crimes,' … and that the jury would have to do 'a lot of mental gymnastics to believe the defendant did not commit this crime.' She vouched for the credibility of the first witness, arguing that if he had been lying, he would have testified that the defendant 'stab[bed] two people.' The prosecutor also referred to the defendant as engaging in 'machismo' at the time of the events in question." ***People v. Robles*, 2019 N.Y. Slip Op. 05572, Second Dept 7-10-19**

CRIMINAL LAW, JUDGES, APPEALS.

EXCESSIVE INTERFERENCE BY THE TRIAL JUDGE DEPRIVED DEFENDANT OF A FAIR TRIAL; ISSUE CONSIDERED ON APPEAL IN THE INTEREST OF JUSTICE.

The Second Department, reversing defendant's conviction, determined the judge's intervention usurped the roles of the attorneys and deprived defendant of a fair trial. Defense counsel did not object but the issue was considered on appeal in the interest of justice: " '[W]hile a trial judge may intervene in a trial to clarify confusing testimony and facilitate the orderly and expeditious progress of the trial, the court may not take on the function or appearance of an advocate' ... . 'The principle restraining the court's discretion is that a trial judge's function is to protect the record, not to make it'... . Hence, 'when the trial judge interjects often and indulges in an extended questioning of witnesses, even where those questions would be proper if they came from trial counsel, the trial judge's participation presents significant risks of prejudicial unfairness' ... . In this case, the Supreme Court engaged in extensive questioning of witnesses, usurped the roles of the attorneys, elicited and assisted in developing facts damaging to the defense on direct examination of the People's witnesses, bolstered the witnesses' credibility, interrupted cross-examination, and generally created the impression that it was an advocate on behalf of the People." ***People v. Ramsey*, 2019 N.Y. Slip Op. 05571, Second Dept 7-10-19**

EDUCATION-SCHOOL LAW, PERSONAL INJURY.

NEGLIGENT SUPERVISION WAS NOT THE PROXIMATE CAUSE OF PLAINTIFF'S INJURIES IN THIS STUDENT-PUSHES-STUDENT CASE.

The Second Department, reversing Supreme Court, determined the school district's motion for summary judgment in this negligent supervision, student-pushed-by-student, case should have been granted. Negligent supervision was not the proximate cause of the injury: "... [T]he infant plaintiff, a kindergarten student at a school in the defendant ... School District ... , allegedly was injured when she was pushed into a wall by a fellow kindergarten student while they were lining up outside their classroom before the afternoon session. ... 'Schools are under a duty to adequately supervise the students in their charge and they will be held liable for foreseeable injuries proximately related to the absence of adequate supervision' ... . However, where an accident occurs in so short a span of time that even the most intense supervision could not have prevented it, lack of supervision is not the proximate cause of the injury and summary judgment in favor of a defendant charged with the duty of reasonable supervision is warranted ... . Here, the School District established, prima facie, that the incident occurred in so short a period of time that any negligent supervision on its part was not a proximate cause of the infant plaintiff's alleged injuries ...". ***M.P. v. Central Islip Union Free Sch. Dist.*, 2019 N.Y. Slip Op. 05553, Second Dept 7-10-19**

MENTAL HYGIENE LAW, CRIMINAL LAW, EVIDENCE.

STATE DID NOT DEMONSTRATE APPELLANT SEX OFFENDER WAS UNABLE TO CONTROL HIS BEHAVIOR, AS OPPOSED TO HAVING DIFFICULTY CONTROLLING HIS BEHAVIOR; THEREFORE RELEASE WITH STRICT SUPERVISION, AS OPPOSED TO CIVIL COMMITMENT, WAS ORDERED.

The Second Department, reversing Supreme Court, determined the expert testimony offered by the State did not demonstrate the appellant sex offender was unable to control his behavior, requiring civil commitment, as opposed to having difficulty controlling his behavior, requiring strict supervision. Therefore appellant should be released under a regimen of strict and intensive supervision and treatment: "... [T]he State failed to present clear and convincing evidence that the appellant has an 'inability to control sexual misconduct' ... . In this regard, the State relied on, inter alia, the testimony of Dr. Stuart Kirschner, a psychologist, at the mental abnormality trial; a 'dispositional addendum' report that Kirschner submitted; and a report from a psychologist for the New York State Office of Mental Health, Dr. Trevor Floyd. While Kirschner testified that the appellant had difficulty controlling his actions due to certain impulse control problems, Kirschner also testified that it was 'very difficult' to ascertain whether an individual committed a crime because he or she was unable to control his or her conduct or because he or she chose not to control it, and that the distinction between the two was largely 'irrelevant.' This testimony, considered in conjunction with the other evidence presented by the State, was not sufficient to support a finding, by clear and convincing evidence, that the appellant had an 'inabilityto control sexual misconduct' … . Furthermore, Floyd's report, which was based on his own interview with and psychological testing of the appellant, opined that there was insufficient evidence to conclude that the appellant had an inability to control his behavior such that he was a danger to others. The appellant's expert reached a similar conclusion, opining that the appellant was a 'good candidate for release

under conditions of strict and intensive supervision and treatment.' " ***Matter of State of New York v. Ted B.*, 2019 N.Y. Slip Op. 05550, Second Dept 7-10-19**

THIRD DEPARTMENT

CIVIL PROCEDURE, APPEALS, EVIDENCE, MEDICAL MALPRACTICE, NEGLIGENCE.

THE DENIAL OF DEFENDANT'S MOTION TO LIMIT THE EXPERT TESTIMONY PLAINTIFF COULD OFFER AT TRIAL DID NOT LIMIT THE ISSUES TO BE TRIED; THEREFORE ANY APPEAL MUST AWAIT THE CONCLUSION OF THE TRIAL; APPEAL DISMISSED.

The Third Department determined defendant doctor could not appeal the denial of defendant's motion to limit the expert testimony which plaintiff could offer at trial in this medical malpractice action. The motion court's ruling did not limit the issues to be tried. Therefore an appeal must be brought after trial: "It is well settled that 'an order which merely determines the admissibility of evidence, even when made in advance of trial on motion papers, constitutes, at best, an advisory opinion which is neither appealable as of right nor by permission' ... . Here, Supreme Court's decision merely permits the infant to offer various testimony of his expert witnesses and does not limit the scope of issues to be tried ... . Therefore, appellate review of the court's ruling 'must await the conclusion of a trial so that the relevance of the proffered evidence, and the effect of [the court's] ruling with respect thereto, can be assessed in the context of the record as a whole' ... . Accordingly, this appeal must be dismissed ...". ***C.H. v. Dolkart*, 2019 N.Y. Slip Op. 05614, Third Dept 7-11-19**

CIVIL PROCEDURE, ATTORNEYS, JUDGES, CRIMINAL LAW, PRIVILEGE, EVIDENCE, APPEALS.

ARTICLE 78 ACTION SEEKING TO PROHIBIT THE TRIAL JUDGE IN A CRIMINAL CASE FROM EXCLUDING TESTIMONY AS PROTECTED BY THE ATTORNEY-CLIENT PRIVILEGE DISMISSED AS INAPPROPRIATE; MATTER CONSIDERED AS AN EXCEPTION TO THE MOOTNESS DOCTRINE.

The Third Department determined the Article 78 proceeding brought by the district attorney against the trial judge in a criminal case seeking prohibition should have been dismissed. The trial judge had ruled that the conversations between an attorney and the defendant at the scene of the crime were protected by attorney-client privilege. The Article 78 action sought to prohibit the trial judge from adhering to that ruling. At the time of this Article 78 proceeding the criminal trial was over and defendant had been convicted. The matter was considered as an exception to the mootness doctrine: "Prohibition is an extraordinary remedy and, in cases involving the exercise of judicial authority, 'is available only where there is a clear legal right, and then only when a court . . . acts or threatens to act either without jurisdiction or in excess of its authorized powers' ... . Respondent had jurisdiction over the criminal action against Mercer ... and was empowered to preclude Doyle from testifying about matters protected by the attorney-client privilege ... . Petitioner's core complaint is that respondent erred in determining the scope of that privilege, and she may be correct ... . Nevertheless, 'prohibition will not lie as a means of seeking collateral review of mere trial errors of substantive law or procedure, however egregious the error may be, and however cleverly the error may be characterized by counsel as an excess of jurisdiction or power' ... . To allow review of such matters would have an array of negative impacts, encouraging gamesmanship, 'erect[ing] an additional avenue of judicial scrutiny in a collateral proceeding and . . . frustrat[ing] the statutory or even constitutional limits on review' ... . Thus, inasmuch as petitioner does not point to 'an unlawful use or abuse of the entire action or proceeding,' but rather 'an unlawful procedure or error in the action or proceeding itself related to the proper purpose of the action or proceeding,' prohibition will not lie ...". ***Matter of Heggen v. Sise*, 2019 N.Y. Slip Op. 05620, Third Dept 7-11-19**

COURT OF CLAIMS, IMMUNITY, NEGLIGENCE.

EVEN IF THE THRUWAY DISPATCHERS WERE NEGLIGENT IN FAILING TO NOTIFY THE STATE POLICE OF A PIECE OF FURNITURE ON THE HIGHWAY, THE DISPATCHERS WERE PERFORMING A GOVERNMENTAL FUNCTION AND THE STATE IS THEREFORE IMMUNE FROM SUIT; PLAINTIFF WAS INJURED WHEN HIS TRUCK STRUCK THE FURNITURE.

The Third Department determined the New York State Thruway Authority (NYSTA) was engaged in a governmental function when it dispatched a maintenance crew to remove a couch from the highway. Before the maintenance crew arrived plaintiff was injured when his truck struck the couch and rolled on its side. Claimants argued the dispatcher was negligent for failing to dispatch the state police to the scene. The Third Department held the state was immune from suit in this traffic accident case: "Although defendants' radio dispatchers perform varied functions that may appropriately be characterized as interspersing both proprietary and governmental functions, ... the primary capacity in which they were engaged ... involved the assignment of resources to deal with a reported foreign object on the Thruway that posed an immediate risk to the health and safety of the public. It is irrelevant, therefore, whether the State Police ever actually engaged in traffic control on the afternoon in question, as the conduct of dispatching — or failing to dispatch — the State Police is an inseparable component of providing the very police resources that claimants' assert should have been dispatched in the first instance ... . Accordingly, under the circumstances, we find that the provision of dispatching services by NYSTA radio dispatchers

constituted a quintessential governmental function that entitles defendants to immunity from liability for any negligence that may have resulted from the dispatchers' actions and/or failure to act ...". ***Scozzafava v. State of New York*, 2019 N.Y. Slip Op. 05618, Third Dept 7-11-19**

CRIMINAL LAW, APPEALS.

GUILTY PLEA VACATED IN THE INTEREST OF JUSTICE, COLLOQUY DID NOT INFORM DEFENDANT OF ALL THE RIGHTS SHE WAS GIVING UP.

The Third Department, reversing County Court and vacating defendant's guilty plea, over a two-justice concurrence and a dissent, exercised its interest of justice appellate jurisdiction because defendant was not fully informed of the rights she was giving up by entering a guilty plea. The concurrence argued that the potential consequences of the relief granted by an appellate court should not be part of the equation in exercising the interest of justice jurisdiction. The majority noted that defendant had already served her sentence and will now face the original charges. The dissent argued this was not an appropriate case for invoking the interest of justice appellate jurisdiction: "In a notably brief plea colloquy, County Court advised defendant that, by pleading guilty, she would forever relinquish 'the right to go to trial, the right to testify, to call witnesses, [and to] cross-examine the People's witness[es].' There was no discussion of the privilege against self-incrimination or the right to be tried by a jury, nor was there any inquiry into whether defendant had conferred with counsel and understood the constitutional rights that she was automatically waiving by pleading guilty ... . 'While there is no mandatory catechism required of a pleading defendant, there must be an affirmative showing on the record that the defendant waived his or her constitutional rights' ... . As this record contains no such showing, the guilty plea is invalid ...". ***People v. Glover*, 2019 N.Y. Slip Op. 05587, Third Dept 7-11-19**

CRIMINAL LAW, ATTORNEYS, CONSTITUTIONAL LAW.

SPECIAL PROSECUTOR DID NOT HAVE THE AUTHORITY TO PROSECUTE A CRIMINAL OFFENSE ON BEHALF OF THE JUSTICE CENTER FOR PROTECTION OF PEOPLE WITH SPECIAL NEEDS; THE DISTRICT ATTORNEY DID NOT KNOWINGLY CONSENT AND DID NOT MAINTAIN CONTROL OVER THE PROSECUTION; INDICTMENT DISMISSED.

The Third Department, in a full-fledged opinion by Justice Rumsey, determined that the special prosecutor did not have the authority to prosecute a substance abuse counselor who allegedly sexually abused a 16-year-old patient. The special prosecutor was from the Justice Center for Protection of People with Special Needs. Because the special prosecutor did not have have the knowing and express consent to the prosecution by the district attorney, the indictment was dismissed: "In 2012, the Legislature enacted the Protection of People with Special Needs Act (Executive Law § 550 et seq.) to protect individuals 'who are vulnerable because of their reliance on professional caregivers to help them overcome physical, cognitive and other challenges' ... by creating a new state agency, the Justice Center, and mandating, among other things, that it employ a special prosecutor appointed by the Governor (hereinafter the Special Prosecutor) to investigate and prosecute criminal offenses involving abuse and neglect of vulnerable persons by employees of specified types of facilities and service agencies ... . Although the Act specifically authorizes the Special Prosecutor to 'exercise all the powers and perform all the duties in respect of such actions or proceedings which the district attorney would otherwise be authorized or required to exercise or perform'... , it also prohibits the Special Prosecutor from 'interfer[ing] with the ability of district attorneys at any time to receive complaints, investigate and prosecute any suspected abuse or neglect' ... . [T]here is no constitutional support for the Legislature's attempt to provide for 'the gubernatorial appointment of a non-elected special prosecutor, independent of the [d]istrict [a]ttorneys and with unfettered prosecutorial power' ... . We turn ... to consideration of whether the Albany County District Attorney validly consented to prosecution of defendant by the Special Prosecutor. ... [T]he District Attorney did not exercise his essential prosecutorial power to determine whether defendant should be prosecuted but, rather, merely acquiesced in the prosecution by the Special Prosecutor, whom he mistakenly believed already possessed the independent power to prosecute defendant. Second, the District Attorney failed to expressly retain ultimate responsibility for defendant's prosecution ... " ***People v. Hodgdon*, 2019 N.Y. Slip Op. 05596, Third Dept 7-11-19**

CRIMINAL LAW, EVIDENCE.

THE PEOPLE DID NOT DEMONSTRATE THE SEARCH OF DEFENDANT'S VEHICLE WAS A VALID INVENTORY SEARCH; THE RECORD SUPPORTED COUNTY COURT'S CONCLUSION THE INVENTORY SEARCH WAS A 'PRETEXT' FOR A SEARCH FOR INCRIMINATING EVIDENCE.

The Third Department, in this appeal by the People, determined that the search of defendant's vehicle was not a valid inventory search and the related suppression motion was properly granted: "Although not fatal to the establishment of a valid inventory search ... , the People did not admit the relevant tow and impound policy into evidence. The People also failed to ask any substantive questions of the deputy sheriff to establish that the policy was sufficiently standardized, that it was reasonable and that the deputy sheriff followed it in this case. The deputy sheriff only vaguely stated that he conducted the inventory search, radioed for a tow truck and completed the vehicle impound inventory report in accordance with the policy. Further, although the deputy sheriff filled out the impound inventory report, which indicates that the inventory

search began at 9:55 a.m., he testified that the search began prior to that time and did not provide any explanation for the discrepancy. Moreover, there was contradictory testimony as to where the deputy sheriff found defendant's wallet — inside the vehicle or on defendant's person. Significantly, if defendant's wallet was inside the vehicle, as the deputy sheriff testified that it was, then the deputy sheriff allegedly took the wallet out of the vehicle but did not include it in the vehicle impound inventory report. In short, the People did not establish the circumstances under which searching the wallet and the closed trunk was justified under the policy ... . [T]he record supports County Court's conclusion that the alleged inventory search was a 'pretext' to locate incriminating evidence." ***People v. Espinoza*, 2019 N.Y. Slip Op. 05592, Third Dept 7-11-19**

CRIMINAL LAW, EVIDENCE, ATTORNEYS, PRIVILEGE.

EVIDENCE PROPERLY ADMITTED AT TRIAL PURSUANT TO THE CRIME-FRAUD EXCEPTION TO THE ATTORNEY-CLIENT PRIVILEGE, THE SEARCH WARRANT WAS EXECUTED AT AND THE EVIDENCE WAS SEIZED FROM THE SARATOGA COUNTY PUBLIC DEFENDER'S OFFICE.

The Third Department, in affirming defendant's predatory sexual assault against a child and child pornography convictions, noted that evidence was seized from the Saratoga County Public Defender's Office and the evidence was admissible at trial pursuant to the crime-fraud exception to the attorney-client privilege. The facts are not described in any detail: "Defendant ... contends that County Court improperly denied his motion to suppress items seized from the Saratoga County Public Defender's office * * *. ... [U]pon review of the search warrant application and accompanying sworn statements, we conclude that County Court properly determined that there was probable cause to issue the warrant ... . With respect to defendant's claim of attorney-client privilege, we find that the crime-fraud exception applied because there was reasonable cause to believe that the items seized pursuant to the search warrant constituted physical evidence of a crime and that their delivery to counsel was for the purpose of concealing evidence, not for seeking legal advice ...". ***People v. Gannon*, 2019 N.Y. Slip Op. 05591, Third Dept 7-11-19**

PERSONAL INJURY.

PLAINTIFF'S ACTION AGAINST DEFENDANT FOR LETTING PLAINTIFF USE A SCISSORS LIFT SURVIVED SUMMARY JUDGMENT; PLAINTIFF ALLEGED DEFENDANT NEGLIGENTLY ENTRUSTED THE LIFT TO HIM, KNOWING HE DID NOT KNOW HOW TO OPERATE IT; PLAINTIFF WAS INJURED WHEN THE LIFT TIPPED OVER AND PLAINTIFF FELL 25 FEET.

The Third Department determined there was a question of fact whether defendant building contractor negligently entrusted a scissors lift to plaintiff, who was injured when the lift tipped over: "Given the testimony regarding plaintiff's alleged lack of experience operating the subject scissor lift, the alleged observations by defendant's employees of plaintiff's operation thereof, Reagles' [defendant's project superintendent's] assumption as to plaintiff's level of training and his subsequent knowledge that an employee of defendant was allegedly made aware, prior to the accident, that plaintiff was not familiar with and/or trained in the use and operation of the scissor lift, we find that defendant failed to meet its prima facie burden of establishing the absence of a triable issue of fact, specifically as to whether defendant knew or should have known that plaintiff lacked the requisite training and experience necessary to safely operate the subject scissor lift at the time it was entrusted to him, rendering his subsequent use thereof unreasonably dangerous ... . Moreover, the issue of proximate cause is generally more appropriately resolved by the trier of fact ... . Further, although it is undisputed that plaintiff was the sole operator of the scissor lift, we find a question of fact also exists as to whether plaintiff's injuries were a foreseeable result of defendant's negligent entrustment of the lift to plaintiff ...". ***Hull v. The Pike Co.*, 2019 N.Y. Slip Op. 05611, Third Dept 7-11-19**

REAL PROPERTY LAW, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW.

PURCHASER OF A MARINA DEMONSTRATED THE PRIOR OWNER OBTAINED TITLE TO THE DISPUTED LAKE BOTTOM RIGHTS BY ADVERSE POSSESSION.

The Third Department, reversing Supreme Court, determined plaintiff, the purchaser of a marina, had demonstrated the prior owner of the marina had obtained ownership of the disputed lake bottom rights by adverse possession: "... [P]laintiff submitted, among other things, the affidavit of Donald Duso Jr., the grandson of [the prior owner] and a current mechanic for plaintiff, the affidavit of Michael Damp, a member of plaintiff, and an aerial map depicting, among other things, the location of the moorings and floating dock within the claimed area. According to Donald Duso, he personally assisted with the installation of approximately 20 moorings and anchors in the claimed area between the early 1970s and 2005 ... . From 1970 to 1975, six moorings were initially installed in the claimed area, which were specifically placed to create the 'outer bounds or perimeter of the mooring field.'... As the marina's business grew, additional moorings were installed such that, by 2005, there were approximately 20 active moorings available for rent, with all but three or four of the moorings located within the claimed area. Each year, the marina seasonally rented the moorings to boat owners between April and October (hereinafter the boating season) and only those who paid the requisite rental fee were permitted to access or use the moorings. Since the early 1980s, the 14 to 20 active moorings in the claimed area were regularly maintained during the boating season, mooring anchors, ropes and balls were repaired as necessary, and the mooring field was kept clear of debris. Although the nature of

this lake bottom property makes it inherently impractical to erect an enclosure (see RPAPL former 522), the perimeter of the mooring field and, in turn, the location of the claimed area were easily discernible based upon the visibility of the mooring balls attached to each mooring anchor, and became even more apparent when boats were actively moored thereto." ***LS Mar., LLC v. Acme of Saranac, LLC*, 2019 N.Y. Slip Op. 05617, Third Dept 7-11-19**

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