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FIRST DEPARTMENT

FAMILY LAW, SOCIAL SERVICES LAW, APPEALS, ADMINISTRATIVE LAW.

THE INTERSTATE COMPACT FOR THE PLACEMENT OF CHILDREN (ICPC) APPLIES ONLY TO OUT-OF-STATE ADOPTION OR FOSTER CARE, NOT TO THE PLACEMENT OF A CHILD WITH AN OUT-OF-STATE PARENT; QUESTION CONSIDERED ON APPEAL AS AN EXCEPTION TO THE MOOTNESS DOCTRINE; REGULATION RELIED ON TO APPLY THE ICPC CONFLICTS WITH THE CONTROLLING STATUTE.

The First Department, reversing Family Court, in a full-fledged opinion by Justice Webber, in a matter of first impression, and refusing to follow the Second Department, determined that the Interstate Compact for the Placement of Children (ICPC) applies only to children to be adopted or placed in foster care in another state, not, as here, to the placement of a child with the father in another state. The issue was considered on appeal as an exception to the mootness doctrine because it is likely to reoccur. The First Department held that the controlling statute, Social Services Law § 374-a, clearly states that the ICPC applies only to out of state foster care or adoption, and the regulation which states otherwise (Association of Administrators of the Interstate Compact on the Placement of Children. AAICPC, Regulation 3) improperly expands the statutory language: "There is no dispute that the ICPC was intended to provide children in need of foster and adoptive families with more possible placements across state lines. The purpose of the statute was twofold: to assure the placement would be in a child's best interests, and to preclude the 'sending State from exporting its foster care responsibilities to a receiving State' ... . Thus the ICPC was enacted to provide children in need of foster and adoptive families with more options, while still paying heed to concerns about the children's welfare. There is also nothing in the language of the statute or the legislative history to indicate that the ICPC was ever intended to address any individual other than an out-of-state foster or adoptive parent. The language explicitly limits its applicability to out-of-state placements in foster care or as a preliminary to a possible adoption ... . The limitation reflects the ICPC's purpose which was to provide 'a uniform legislative framework for the placement of children across state lines in foster and/or adoptive homes' ...". ***Matter of Emmanuel B. (Lynette J.)*, 2019 N.Y. Slip Op. 05640, First Dept 7-18-19**

PERSONAL INJURY, EVIDENCE, CIVIL PROCEDURE, VEHICLE AND TRAFFIC LAW.

PLAINTIFF'S TESTIMONY ABOUT HOW THE TRAFFIC ACCIDENT HAPPENED FOUND INCREDIBLE AS A MATTER OF LAW AT THE SUMMARY JUDGMENT STAGE, DISSENT ARGUED THE TESTIMONY RAISED CLASSIC QUESTIONS OF FACT FOR THE JURY TO DETERMINE.

The First Department, over an extensive dissent, determined the defendants' motion for summary judgment in this traffic accident case was properly granted. The majority argued plaintiff's testimony was incredible and therefore was properly disregarded. The dissent argued plaintiff's testimony raised classic questions of fact about how the accident happened. The collision occurred when plaintiff was attempting to change lanes. The majority interpreted plaintiff's testimony to mean that she was straddling two lanes and was not moving when the truck struck her SUV, which, based on photographic evidence, the majority found incredible as a matter of law: "The photographic evidence shows that plaintiff's SUV struck the rear of defendants' tractor-trailer as plaintiff was attempting to merge into defendants' truck's lane of traffic. Thus, plaintiff violated her 'duty not to enter a lane of moving traffic until it was safe to do so' (… *see* Vehicle and Traffic Law § 1128[a]…) 'and [her] failure to heed this duty constitutes negligence per se'. * * * … [I]n summary judgment analysis, we must discount the plaintiff's testimony where the plaintiff has 'relied solely on [her] own testimony, uncorroborated by any other witnesses or evidence,' and her testimony belied 'common sense' ... . As these circumstances are presented in this case, plaintiff's testimony was properly 'disregarded as being without evidentiary value' ... . Thus, plaintiff's testimony raised no triable issues of fact." ***Castro v. Hatim*, 2019 N.Y. Slip Op. 05639, First Dept 7-16-19**

SECOND DEPARTMENT

ARBITRATION, CONTRACT LAW.

SUPREME COURT SHOULD HAVE DETERMINED WHETHER THE MATTER WAS ARBITRABLE INSTEAD OF SENDING IT TO AN ARBITRATION PANEL, THE APPELLANTS ARGUED THEY WERE NOT PARTIES TO THE AGREEMENT WITH THE ARBITRATION CLAUSE.

The Second Department, reversing Supreme Court, noted that it is the court's role, in the first instance, to decide whether a matter is arbitrable. Here the appellants argued they were not parties to the agreement with the arbitration clause. Supreme Court erroneously referred that issue to an arbitration panel. The Second Department remitted the matter to Supreme Court to resolve the arbitrability question: "It is a 'well-settled proposition that the question of arbitrability is an issue generally for judicial determination in the first instance' ... . 'If the court determines that the parties had not made an agreement to arbitrate, that concludes the matter and a stay of arbitration will be granted or the application to compel arbitration will be denied' ... . This threshold determination must be made by the court unless the parties have 'evinced a clear and unmistakable agreement to arbitrate arbitrability' ... . Since the determination of whether the appellants were bound by the arbitration provision in the payment agreement was a threshold question for the courts, and not the arbitrator, to decide, we disagree with the Supreme Court's determination to refer that issue to an arbitration panel ...". ***Matter of Kent Waterfront Assoc., LLC v. National Union Fire Ins. Co. of Pittsburgh*, 2019 N.Y. Slip Op. 05664, Second Dept 7-17-19**

CIVIL PROCEDURE, ADMINISTRATIVE LAW, EMPLOYMENT LAW, MUNICIPAL LAW.

IN THIS EMPLOYEE-EMPLOYER DISPUTE ABOUT A HEALTH INSURANCE PREMIUM CONTRIBUTION, THE CONTINUING WRONG DOCTRINE DID NOT APPLY TO TOLL THE STATUTE OF LIMITATIONS, EACH PAYCHECK WITH THE PREMIUM DEDUCTION WAS NOT AN INDEPENDENT WRONG.

The Second Department determined the continuing wrong doctrine did not toll the statute of limitations in this employee-employer dispute about a health insurance premium contribution. The petitioner unsuccessfully argued each paycheck with the premium deduction was an independent wrong which tolled the statute of limitations: "A challenge to an administrative determination must be commenced within four months of the time the determination is 'final and binding upon the petitioner' (CPLR 217[1]). 'A challenged determination is final and binding when it has its impact' upon the petitioner who is thereby aggrieved' ... . An administrative determination regarding payment of salary or pay adjustments is final and binding, and a challenge thereto accrues, when the petitioner receives a check or salary payment reflecting the administrative determination ... . Contrary to the petitioner's contention, the continuing wrong doctrine does not apply here to toll the statute of limitations ... . The doctrine 'may only be predicated on continuing unlawful acts and not on the continuing effects of earlier unlawful conduct' ... . 'The distinction is between a single wrong that has continuing effects and a series of independent, distinct wrongs' ... . Here, the Town made the determination to classify the petitioner as an employee hired after December 31, 2014, subject to a 15% health insurance premium contribution requirement, as reflected in her first paycheck issued in April 2015, more than two years prior to the commencement of this proceeding. Each subsequent paycheck deduction 'represent[ed] the consequences of [that allegedly] wrongful act[ ] in the form of continuing damages,' and was not an independent wrong in itself ...". ***Matter of Salomon v. Town of Wallkill*, 2019 N.Y. Slip Op. 05671, Second Dept 7-17-19**

CIVIL PROCEDURE, ATTORNEYS, PRIVILEGE.

EMAILS INADVERTENTLY PROVIDED TO PLAINTIFF WERE NOT PROTECTED BY ATTORNEY-CLIENT PRIVILEGE, SUPREME COURT SHOULD NOT HAVE ISSUED A PROTECTIVE ORDER.

The Second Department, reversing Supreme Court, determined that emails which had inadvertently been provided to the plaintiff were not protected by attorney-client privilege. Therefore Supreme Court should not have granted a protective order pursuant to CPLR 3101(b): "... [T]he defendants failed to meet their burden of establishing a right to protection of the subject emails ... . The communications relate to the business of the defendants, rather than legal issues ... , and nothing stated by in-house counsel in the emails sets him apart as a legal advisor in the discussion. The affidavits of the defendants' CEO and in-house counsel, submitted in support of the cross motion, merely state in a conclusory manner that the communications were confidential and privileged. The defendants point to no particular communication in which in-house counsel gave legal advice, or in which the defendants' other employees sought legal advice from in-house counsel." ***Saran v. Chelsea GCA Realty Partnership, L.P.*, 2019 N.Y. Slip Op. 05710, Second Dept 7-17-19**

CIVIL PROCEDURE, EVIDENCE, FORECLOSURE.

LAW OFFICE FAILURE DEEMED AN ADEQUATE EXCUSE, MOTION TO VACATE THE DEFAULT JUDGMENT SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined that law office failure was an adequate excuse and appellants' motion to vacate a default judgment should have been granted: " 'A motion to vacate a default is addressed to the sound discretion of the motion court' ... . 'In making that discretionary determination, the court should consider relevant

factors, such as the extent of the delay, prejudice or lack of prejudice to the opposing party, whether there has been willfulness, and the strong public policy in favor of resolving cases on the merits' ... . Under the circumstances presented here, the appellants set forth a reasonable excuse for their failure to appear at the centralized motion part of the Supreme Court on the return date of the plaintiff's motion based on evidence of law office failure. In an affirmation, the appellants' attorney explained that upon receiving the plaintiff's motion, he directed his office's legal assistant to note the return date of the motion on the office calendar, but that the return date had not been noted on the calendar. In addition, the appellants demonstrated a potentially meritorious defense based upon the statute of limitations." ***Bank of N.Y. Mellon v. Faragalla*, 2019 N.Y. Slip Op. 05641, Second Dept 7-17-19**

CIVIL PROCEDURE, FORECLOSURE.

MOTION TO VACATE A DEFAULT JUDGMENT SHOULD NOT HAVE BEEN GRANTED, NO EXCUSE OFFERED.

The Second Department determined plaintiff's motion to vacate a default judgment in this foreclosure action should not have been granted: "With regard to default judgments, CPLR 3215(c) provides, in pertinent part, that '[i]f the plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court shall not enter judgment but shall dismiss the complaint as abandoned, without costs, upon its own initiative or on motion.' The 'one exception to the otherwise mandatory language of CPLR 3215(c) is that the failure to timely seek a default on an unanswered complaint . . . may be excused if sufficient cause is shown why the complaint should not be dismissed' ... . 'This Court has interpreted this language as requiring both a reasonable excuse for the delay in timely moving for a default judgment, plus a demonstration that the cause of action is potentially meritorious' ... . Here, the plaintiff did not offer any excuse for its failure to take proceedings for the entry of a default judgment ... for more than one year after the action was released from the foreclosure settlement conference part ... . 'Where, as here, a party moving for a default judgment beyond one year from the date of default fails to address any reasonable excuse for its untimeliness, courts may not excuse the lateness and shall' dismiss the claim pursuant to CPLR 3215(c)' ...". ***HSBC Bank USA, N.A. v. Uddin*, 2019 N.Y. Slip Op. 05649, Second Dept 7-17-19**

CRIMINAL LAW, IMMIGRATION LAW, APPEALS.

WAIVER OF APPEAL INVALID; ALREADY COMPLETED SENTENCE REDUCED BECAUSE OF THE IMMIGRATION CONSEQUENCES OF THE ORIGINAL SENTENCE; MATTER CONSIDERED ON APPEAL IN THE INTEREST OF JUSTICE.

The Second Department, reducing the defendant's already completed sentence in the interest of justice, determined the waiver of appeal was invalid and the immigration consequences of defendant's sentence warranted a reduction to 364 days: "Given the defendant's age of 20 years, that he had dropped out of high school in the 11th grade, that he had documented mental health issues, and his limited experience in the criminal justice system, the Supreme Court's terse colloquy regarding the appeal waiver was insufficient ... . A written appeal waiver, such as the one signed by the defendant, is 'not a complete substitute for an on-the-record explanation of the nature of the right to appeal' ... . It is not 'sufficient for the trial court to defer to the defendant's off-the-record conversations with defense counsel by merely confirming with defense counsel that he or she has discussed the waiver of the right to appeal with the defendant' ... . Thus, the appeal waiver does not preclude review of the defendant's excessive sentence claim. Although the defendant has served his respective sentences, the question of whether the sentences imposed should be reduced is not academic, because those sentences may have potential immigration consequences ... . Considering all of the relevant circumstances of this case, including the potential immigration consequences to the defendant, his sentences should be reduced to concurrent definite terms of imprisonment of 364 days ...". ***People v. Bakayoko*, 2019 N.Y. Slip Op. 05677, Second Dept 7-17-19**

FRAUD, CONTRACT LAW, CIVIL PROCEDURE.

FRAUD IN THE INDUCEMENT CAUSE OF ACTION WAS NOT DUPLICATIVE OF THE BREACH OF CONTRACT CAUSE OF ACTION; MOTION TO DISMISS SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined defendants' motion to dismiss the fraud cause of action should not have been granted. Supreme Court held the fraud action was duplicative of the breach of contract action: " 'The essential elements of a cause of action for fraud are representation of a material existing fact, falsity, scienter, deception and injury' ... . 'Mere unfulfilled promissory statements as to what will be done in the future are not actionable as fraud and the injured party's remedy is to sue for breach of contract' ... . Where, however, it is alleged that the defendant made misrepresentations of present facts that were collateral to the contract and served as an inducement to enter into the contract, a cause of action alleging fraudulent inducement is not duplicative of a breach of contract cause of action ... . [T]he cause of action alleging fraudulent inducement was not duplicative of the breach of contract cause of action. The first cause of action alleges that the defendants knowingly made false representations in ... financial statements, which were collateral to the APA [asset purchase agreement], that these false statements were made in order to induce the plaintiff to enter into the APA, that the plaintiff would not have entered into the APA but for these false statements, and that the plaintiff was injured by this fraudulent conduct .... As the first cause of action alleges misrepresentations of present fact that were collateral to the APA and further alleges that these misrepresentations induced the plaintiff to enter into the APA, the court should have denied

that branch of the defendants' motion which was to dismiss the first cause of action." ***Did-it.com, LLC v. Halo Group, Inc.*, 2019 N.Y. Slip Op. 05644, Second Dept 7-17-19**

INSURANCE LAW, ARBITRATION.

UNINSURED MOTORIST CARRIER (GEICO) WAS ENTITLED TO A FRAMED ISSUE HEARING TO RESOLVE CONFLICTING EVIDENCE WHETHER THE VEHICLE INVOLVED IN THE HIT AND RUN WAS INSURED.

The Second Department determined there was conflicting evidence whether a particular vehicle (owned by McRae) was involved in a hit and run accident involving a parked car in which Williams and Shields were sitting. The alleged registration number matched that of the McRae vehicle which was insured by Liberty Mutual. However, there was evidence the McRae vehicle was being repaired on the day of the accident. A framed issue hearing was therefore required: "GEICO commenced this proceeding pursuant to CPLR article 75 to permanently stay arbitration of the claim for uninsured motorist benefits or, in the alternative, to temporarily stay arbitration pending a framed-issued hearing ... . GEICO, as the party seeking a stay of arbitration, met its burden of showing the existence of sufficient evidentiary facts to establish a preliminary issue which would justify the stay ... . GEICO met this burden by submitting evidence that on the date of the accident, the McRae vehicle was insured by Liberty Mutual. The burden then shifted to Williams and Shields, as the parties opposing the stay, to rebut that prima facie showing ... . Williams and Shields submitted evidence that the McRae vehicle was being repaired at the time of the accident, raising an issue of fact as to whether the McRae vehicle could have been involved in the accident. Since an issue of fact was raised, arbitration should be temporarily stayed, the putative hit-and-run parties joined as respondents, and a framed-issue hearing conducted, before a determination is made on that branch of the petition which was to permanently stay arbitration ...". ***Matter of Government Empls. Ins. Co. v. Williams*, 2019 N.Y. Slip Op. 05660, Second Dept 7-17-19**

INSURANCE LAW, CONTRACT LAW, PERSONAL INJURY.

THE PURPORTED REFORMATION OF THE INSURANCE CONTRACT TO REDUCE COVERAGE AFTER THE TRAFFIC ACCIDENT OCCURRED IS UNENFORCEABLE, THE INSURER IS LIABLE FOR THE ORIGINAL COVERAGE AMOUNT.

The Second Department, reversing Supreme Court, determined that the reformation of the insurance contract to reduce the bodily injury coverage limits from $250,000 to $80,000 was unenforceable because the change was made after the traffic accident occurred: "In December 2011, the plaintiff allegedly was injured when a vehicle in which he was a passenger was involved in a collision. At the time of the collision, the vehicle was driven by nonparty Douglas Giambrone and owned by nonparty Carol Giambrone (hereinafter together the Giambrones), and was insured by the defendant under a liability policy providing for bodily injury coverage up to $250,000 per person/$500,000 per occurrence. In May 2012, the plaintiff commenced an action against the Giambrones to recover damages for personal injuries he sustained in the accident. In August 2012, the defendant entered into an agreement with the Giambrones to reform the policy to reduce the bodily injury coverage to a single $80,000 limit. Thereafter, the Giambrones notified the plaintiff that the coverage limit applicable to the accident was $80,000. The plaintiff subsequently obtained a judgment against the Giambrones in the amount of $300,000 in the underlying personal injury action. ... An insurer may not retroactively reform a policy to reduce the stated bodily injury coverage limits after a loss caused by its insured occurs, even if the reduced limits still meet or exceed the statutory minimum (see Olivio v. Government Empls. Ins. Co. of Washington, D.C., 46 AD2d 437, 443-445; Reliance Ins. Cos. v. Daly, 38 AD2d 715, 716). ... The plaintiff ... demonstrated his prima facie entitlement to judgment as a matter of law declaring that the defendant is obligated to satisfy the first $250,000 of the judgment he obtained against the Giambrones." ***McGuckin v. Privilege Underwriters Reciprocal Exch.*, 2019 N.Y. Slip Op. 05654, Second Dept 7-17-19**

MEDICAL MALPRACTICE, NEGLIGENCE, EVIDENCE, CIVIL PROCEDURE.

THE SURGICAL PROCEDURE FOR WHICH THERE ALLEGEDLY WAS NO CONSENT WAS NOT DEMONSTRATED TO BE THE PROXIMATE CAUSE OF THE CLAIMED INJURIES, THEREFORE THE LACK OF INFORMED CONSENT CAUSE OF ACTION SHOULD HAVE BEEN DISMISSED PURSUANT TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT.

The Second Department, reversing Supreme Court, determined the defendants' motion for summary judgment in this medical malpractice action should have been granted. Plaintiff's expert's affirmation concerning the alleged malpractice was deemed conclusory and therefore did not raise a question of fact. The informed consent cause of action was dismissed because the medical procedure was not the proximate cause of the claimed injuries: "To establish a cause of action to recover damages based on lack of informed consent, a plaintiff 'must prove (1) that the person providing the professional treatment failed to disclose alternatives thereto and failed to inform the patient of reasonably foreseeable risks associated with the treatment, and the alternatives, that a reasonable medical practitioner would have disclosed in the same circumstances, (2) that a reasonably prudent patient in the same position would not have undergone the treatment if he or she had been fully informed, and (3) that the lack of informed consent is a proximate cause of the injury' ... . ' The third element is construed to mean that the actual procedure performed for which there was no informed consent must have been a proximate cause of

the injury' ... . Here, the defendants established through their expert affirmation that the surgery performed ... did not proximately cause the injured plaintiff's claimed injuries ...". ***Gilmore v. Mihail*, 2019 N.Y. Slip Op. 05647, Second Dept 7-17-19**

MUNICIPAL LAW, CIVIL PROCEDURE, PERSONAL INJURY, LABOR LAW-CONSTRUCTION LAW.

THE NOTICES OF CLAIM NOTIFIED THE MUNICIPAL DEFENDANTS ONLY OF THE DAMAGES RELATING TO PLAINTIFF'S DECEDENT, PLAINTIFF'S MOTHER'S MOTION TO AMEND THE COMPLAINT TO ADD HER DERIVATIVE CAUSES OF ACTION SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined that the complaint against the municipal defendants could not be amended to assert a derivative cause of action by plaintiff's decedent's mother: "In September 2015, the decedent commenced this action against the City, the Port Authority, and another defendant, alleging common-law negligence and violations of the Labor Law. The decedent died on August 7, 2016. Subsequently, the decedent's mother, Marilyn Conn (hereinafter Marilyn), as administrator of the decedent's estate and individually, moved for leave to substitute herself as the plaintiff in place of the decedent. She also moved for leave to amend the complaint to add a cause of action to recover damages for wrongful death on behalf of the decedent's estate and, in effect, a derivative cause of action to recover damages for loss of services on her own behalf, in her individual capacity. ... [T]he notices of claim filed against the City and the Port Authority were limited to allegations that, as a result of the accident, the decedent was caused to sustain damages related to his 'personal injuries, loss of earnings, pain and suffering and medical expenses.' Marilyn was not identified as a claimant in the caption of the notices of claim, she was not mentioned in the text of the notices of claim, and there were no allegations that she, individually, sustained any damages for which compensation was sought from the City or the Port Authority ... . Accordingly, the Supreme Court should have denied that branch of Marilyn's motion which was, in effect, for leave to amend the complaint to assert a derivative cause of action to recover damages for loss of services on her own behalf, in her individual capacity, against the City and the Port Authority. Since the City and the Port Authority were not given timely notice of Marilyn's derivative claim, the court should not have allowed it to be asserted against them." ***Conn v. Tutor Perini Corp.*, 2019 N.Y. Slip Op. 05643, Second Dept 7-17-19**

PERSONAL INJURY, EVIDENCE.

ONE INCH DEEP DEPRESSION IN THE ROADWAY WHICH WAS SURROUNDED BY ORANGE MARKINGS WAS NOT DEMONSTRATED TO BE TRIVIAL OR BOTH 'OPEN AND OBVIOUS' AND 'NOT INHERENTLY DANGEROUS' AS A MATTER OF LAW, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined defendants' motion for summary judgment in this slip and fall case should not have been granted. Plaintiff was jogging when she tripped over a raised edge of a depression in the roadway. The defect was surrounded by orange markings: "The evidence demonstrated that [defendant] was in the process of restoring the excavated area in the location of the plaintiff's accident and that the alleged defective condition measured approximately four-feet wide, eight-feet long, and at least one-inch deep. ... … A 'condition that is ordinarily apparent to a person making reasonable use of his or her senses may be rendered a trap for the unwary where the condition is obscured or the plaintiff is distracted' ... . Furthermore, 'proof that a dangerous condition is open and obvious does not preclude a finding of liability . . . but is relevant to the issue of the plaintiff's comparative negligence' ... . 'Thus, to obtain summary judgment, a defendant must establish that a condition was both open and obvious and, as a matter of law, was not inherently dangerous' ... . Here, the defendants failed to establish, prima facie, that the alleged defect was open and obvious and not inherently dangerous given the surrounding circumstances at the time of the accident ... . Finally ... , the doctrine of primary assumption of risk is inapplicable to this action ...". ***Karpel v. National Grid Generation, LLC*, 2019 N.Y. Slip Op. 05651, Second Dept 7-17-19**

THIRD DEPARTMENT

CIVIL PROCEDURE, ADMINISTRATIVE LAW.

THE APPELLATE DIVISION DID NOT HAVE SUBJECT MATTER JURISDICTION BECAUSE PETITIONER'S REQUEST FOR AN ADMINISTRATIVE HEARING HAD BEEN DENIED, THE ARTICLE 78 PETITION, SEEKING REVIEW OF THE DISQUALIFICATION OF A BID ON A CONSTRUCTION PROJECT, WAS THEREFORE DISMISSED.

The Third Department determined it did not have subject matter jurisdiction and therefore the Article 78 petition seeking review of the disqualification of a bid on a construction project must be denied. The appellate division, by statute, has jurisdiction only after an administrative hearing. Here petitioner's request for a hearing was denied: "To commence this proceeding here, petitioner relied on Executive Law § 313 (5) (c), which states that, '[w]ithout limiting other grounds for the disqualification of bids . . . on the basis of non-responsibility, a contracting agency may disqualify the bid . . . as being non-responsible for failure to remedy notified deficiencies contained in the contractor's utilization plan within a period of time specified in

regulations promulgated by the director after receiving notification of such deficiencies from the contracting agency.' The statute further provides that '[w]here the contracting agency states that a failure to remedy any notified deficiency in the utilization plan is a ground for disqualification[,] the contractor shall be entitled to an administrative hearing, on a record[.] . . . A final administrative determination made following such hearing shall be reviewable in a proceeding commenced under [CPLR] article [78] . . . [and] shall be commenced in [this Court]' (Executive Law § 313 [5] [c]). The last quoted portion of the statute grants this Court original jurisdiction in a proceeding to challenge a final administrative determination that was made following a specified type of hearing, which is otherwise provided for in that paragraph. Respondent's determination at issue here was not made following a hearing; indeed, the determination dismissed petitioner's request for a hearing and petitioner is now seeking, as relief in this proceeding, a court order compelling respondent to conduct such a hearing. As no statute grants this Court original jurisdiction to review the determination that petitioner is challenging, we must dismiss the petition for lack of subject matter jurisdiction ...". ***Matter of Accadia Site Contr., Inc. v. Erie County Med. Ctr. Corp.*, 2019 N.Y. Slip Op. 05730, Third Dept 7-18-19**

COURT OF CLAIMS, CIVIL PROCEDURE, NEGLIGENCE, EVIDENCE.

THE CLAIM DID NOT ADEQUATELY DESCRIBE THE LOCATION OF CLAIMANT'S SLIP AND FALL AND EVIDENCE SUBMITTED BY THE CLAIMANT IN RESPONSE TO THE MOTION TO DISMISS NEED NOT BE CONSIDERED, CLAIM PROPERLY DISMISSED.

The Third Department determined claimant in this slip and fall case did not meet the pleading requirements of Court of Claims Act 11 and her claim was therefore properly dismissed. Although claimant submitted an aerial map in opposition to the motion to dismiss, only the information in the claim need be considered: "Court of Claims Act § 11 (b) provides that '[t]he claim shall state the . . . place where such claim arose.' Although 'absolute exactness' is not required, 'a claimant must provide a sufficiently detailed description of the particulars of the claim to enable defendant to investigate and promptly ascertain the existence and extent of its liability' ... . '[D]efendant is not required to ferret out or assemble information that [Court of Claims Act §] 11 (b) obligates the claimant to allege,' and '[f]ailure to abide by [the statute's] pleading requirements constitutes a jurisdictional defect mandating dismissal of the claim, even though this may be a harsh result' ... . Claimant alleged that she fell 'on the exterior stairs/landing located proximate to Moffit Hall and Clinton Dining Hall.' The record establishes, however, that there are three staircases proximate to Moffit Hall and Clinton Dining Hall. Claimant's contention that the location stated in her claim necessarily referred to the sole staircase/landing between the two buildings is without merit because the claim did not allege that the situs of the accident occurred between the two buildings ... . In opposition to the motion to dismiss, claimant submitted an aerial map of where she allegedly fell. However, the aerial map does not cure the pleading defect in her claim because the aerial map was not included in her claim, and defendant is not required to go beyond the claim to ascertain the situs of the injury ...". ***Katan v. State of New York*, 2019 N.Y. Slip Op. 05746, Third Dept 7-18-19**

CRIMINAL LAW.

ADJUDICATING DEFENDANT A YOUTHFUL OFFENDER FOR ONE CHARGE DID NOT REQUIRE A YOUTHFUL OFFENDER ADJUDICATION FOR AN UNRELATED CHARGE, EVEN THOUGH BOTH CHARGES WERE PART OF A JOINT PLEA AGREEMENT.

The Third Department determined that the youthful offender adjudication for one charge did not require the court to adjudicate defendant a youthful offender for an unrelated charge, even though both charges were subject to a joint plea agreement: "Defendant's primary contention is that County Court, having adjudicated him as a youthful offender on the unrelated charge, was also required to adjudicate him a youthful offender on the burglary charge. This is incorrect. Defendant relies upon CPL 720.20 (2), which provides, as relevant here, that, '[w]here an eligible youth is convicted of two or more crimes . . . set forth in two or more accusatory instruments consolidated for trial purposes, the court must not find [the youth] a youthful offender with respect to any such conviction . . . unless it finds him a youthful offender with respect to all such convictions' … . Contrary to defendant's erroneous supposition, the accusatory instruments to which he pleaded guilty, i.e., the superior court informations charging him with burglary and the unrelated crime, were never 'consolidated for trial purposes' so as to require a youthful offender adjudication on both or neither of the convictions (CPL 720.20 [2] ...). Although both accusatory instruments were ultimately resolved under a joint agreement, defendant pleaded guilty to two separate superior court informations, and the record does not reflect that either party moved to consolidate them, that they were ordered joined for trial or, indeed, that they could have been properly joined (see CPL 200.20 [2], [4]; see also CPL 200.15). Consequently, 'the sentencing court was authorized in its discretion to determine that the defendant was a youthful offender with respect to either or both convictions'... , and was not compelled to confer youthful offender status at sentencing on the burglary conviction." ***People v. Turner*, 2019 N.Y. Slip Op. 05718, Third Dept 7-18-19**

CRIMINAL LAW, ANIMAL LAW, ATTORNEYS.

DEFENDANT'S AGGRAVATED CRUELTY TO ANIMALS CONVICTION AFFIRMED; JUSTIFICATION DEFENSE APPLIES ONLY TO PERSONS, NOT ANIMALS; THE PRESENTENCE INTERVIEW AT THE PROBATION DEPARTMENT IS NOT A CRITICAL STAGE OF THE PROCEEDING REQUIRING THE PRESENCE OF DEFENDANT'S ATTORNEY.

The Third Department affirmed defendant's conviction of aggravated cruelty to animals (Agriculture and Markets Law § 353-a) noting that the justification defense (on which the jury was instructed) applies only to persons, not animals. The defendant unsuccessfully argued the presentence report should have been ignored because his attorney was not present during the interview with the Probation Department: "Defendant contends that the court should have disregarded the report in its entirety and ordered a new one because the Probation Department did not abide by counsel's request to be present for the presentence interview. 'New York's right to counsel applies to every critical stage of the criminal proceeding' ... . However, in light of the nonadversarial nature of a routine presentence interview by a probation officer, courts have held that such an interview does not constitute a critical stage of the proceedings ... . Therefore, defendant did not have a right to have counsel present during that interview. In any event, County Court granted defendant's request to strike the portion of the report containing defendant's statement related to this crime." ***People v. Brinkley*, 2019 N.Y. Slip Op. 05728, Third Dept 7-18-19**

CRIMINAL LAW, APPEALS.

DEFENDANT'S WAIVER OF AN APPEAL FROM A JURY VERDICT (AS OPPOSED TO A GUILTY PLEA) WAS VALID.

The Third Department, affirming defendant's conviction, determined a defendant may validly waive an appeal from a jury verdict: "... '[A] defendant may waive his or her right to appeal from a jury verdict' ... . The People set forth the terms of the postverdict agreement on the record, including that defendant would waive his right to appeal for a sentencing commitment of time served. County Court then engaged in a thorough colloquy with defendant, during which defendant acknowledged that he had discussed the agreement with counsel to his satisfaction and understood it. County Court explained the right to appeal from the conviction and eventual sentence, distinguished it from the trial rights that defendant had exercised and made clear that defendant was being asked to give it up as part of the agreement. Defendant confirmed that he understood all of this and orally waived his right to appeal. He further executed a written waiver that was handed up prior to sentencing, a document that included assurances that it had been signed by defendant in open court after consulting with defense counsel. We are satisfied from the foregoing that, notwithstanding isolated uses of language more appropriate for a waiver executed as part of a plea agreement, defendant knowingly, voluntarily and intelligently waived his right to appeal ...". ***People v. Shanks*, 2019 N.Y. Slip Op. 05724, Third Dept 7-18-19**

CRIMINAL LAW, EVIDENCE.

GRAND JURY EVIDENCE SUPPORTED THE MANSLAUGHTER CHARGE BASED UPON THE SALE OF HEROIN WHICH ALLEGEDLY CAUSED THE VICTIM'S DEATH; COUNTY COURT SHOULD NOT HAVE DISMISSED THE MANSLAUGHTER COUNT.

The Third Department, reversing County Court, over a dissent, determined the evidence of manslaughter presented to the grand jury was legally sufficient. Defendant allegedly provided very strong heroin to the victim, causing victim's death: " 'In the context of grand jury proceedings, legal sufficiency means prima facie proof of the crimes charged, not proof beyond a reasonable doubt' ... . Thus, 'if the [People have] established a prima facie case, the evidence is legally sufficient even though its quality or weight may be so dubious as to preclude indictment or conviction pursuant to other requirements' ... . [I]n order to find a defendant guilty of manslaughter in the second degree, the People are required to show that he or she 'recklessly cause[d] the death of another person' (Penal Law § 125.15 [1]). 'A person acts recklessly with respect to a result or to a circumstance . . . when he [or she] is aware of and consciously disregards a substantial and unjustifiable risk that such result will occur or that such circumstance exists' ... . Given defendant's knowledge of the potency of the drugs that he was distributing and their potential lethality, it is evident that the nature of the risk involved was of such degree 'that defendant's failure to perceive it constituted a gross deviation from the standard of care that a reasonable person would observe in the situation' and that his actions were a sufficiently direct cause of the victim's death for him to face the judgment of a jury ...". ***People v. Gaworecki*, 2019 N.Y. Slip Op. 05725, Third Dept 7-18-19**

DEFAMATION, IMMUNITY, MUNICIPAL LAW, ELECTION LAW, APPEALS, CIVIL PROCEDURE.

STATEMENTS POSTED ON AN ELECTION-RELATED FACEBOOK PAGE ABOUT THE OPPOSING CANDIDATE ARE NOT SHIELDED BY IMMUNITY AND ARE ACTIONABLE IN THIS DEFAMATION CASE; TO APPEAL THE DENIAL OF A MOTION TO STRIKE PORTIONS OF A COMPLAINT A MOTION FOR LEAVE TO APPEAL MUST BE MADE.

The Third Department determined statements posted on an election-related Facebook page by defendant, a Sheriff running for County Executive, concerning plaintiff, a Deputy County Executive also running for County Executive, were actionable in this defamation case. The court noted that the defendant's appeal of the denial of his motion to strike certain paragraphs of the complaint (CPLR 3024) was not before the court because a motion for leave to appeal had not been made (CPLR 5701

[b] [3]): "... [W]e reject defendant's contention that he is shielded from liability due to absolute immunity. This immunity protects government officials, such as defendant, 'with respect to statements made during the discharge of those responsibilities about matters which come within the ambit of those duties' ... . As such, plaintiff cannot maintain a defamation claim against defendant based upon statements 'emanating from official reports and communications' ... . Although defendant was commenting about an investigation being conducted by his office, as well as responding to attacks on the credibility of his office, the documentary evidence in the record establishes that the challenged statements were not posted on the official site of the Chemung County Sheriff. Rather, they were posted on defendant's campaign Facebook page and another Internet website. Under these circumstances, defendant cannot rely on absolute immunity ... . The statement that plaintiff was 'pilfering free gas from taxpayers' is 'susceptible to a defamatory meaning, inasmuch as [it] convey[s], at a minimum, serious impropriety and, at worst, criminal behavior' ... . Such statement also 'has a precise meaning that is capable of being proven true or false' ... . The complaint alleged that defendant published the false statements and that they 'were made in bad faith, with reckless disregard for the truth' and 'tend[ed] to subject plaintiff to public contempt, ridicule, aversion, and disgrace.' In view of these allegations, as well as the specific statements at issue, we are satisfied that plaintiff sufficiently pleaded malice ...". ***Krusen v. Moss*, 2019 N.Y. Slip Op. 05733, Third Dept 7-18-19**

FAMILY LAW, CIVIL PROCEDURE.

FAMILY COURT WAS WITHOUT AUTHORITY TO ISSUE A RESETTLED ORDER WHICH SUBSTANTIALLY CHANGED THE ORIGINAL ORDER AND WHICH WAS ISSUED WITHOUT THE BENEFIT OF TESTIMONY CONCERNING MOTHER'S SERIOUS MENTAL HEALTH AND SUBSTANCE ABUSE PROBLEMS.

The Third Department, reversing Family Court, determined the court was without authority to issue a resettled order which substantially changed the original order. The original order, which was issued in the absence of testimony, provided that mother's mental health and substance abuse problems be monitored by the Monroe County Probation Department. The Department declined because it does not handle custody matters. Family Court then issued the resettled order requiring mental health and substance abuse treatment for mother and allowing grandmother access to mother's medical records: " 'Resettlement of an order is a procedure designed solely to correct errors or omissions as to form or for clarification. It may not be used to effect a substantive change in or to amplify the prior decision of the court' (... see CPLR 2221). ... Family Court's resettled order does 'effect a substantive change' and was beyond the court's authority to issue. The underlying petition included serious substance abuse and mental health allegations, but at no point was any actual testimony taken. These concerns were discussed during the stipulation colloquy before Family Court (Ames, J.), but the court ultimately determined to place the mother on probation subject to standard terms and conditions that did not impose independent evaluation requirements. In addition, the court was not authorized to defer to the probation department the decision as to whether the mother should undergo a substance abuse and/or mental health evaluation ... . The plain fact of the matter is that the colloquy resulting in the oral stipulation was not definitive on the evaluation issue. 'To be enforceable, an open court stipulation must contain all of the material terms and evince a clear mutual accord between the parties' ... . Although we are mindful of the court's authority to require a party to undergo an evaluation, the resettled order was issued as a consent order, not as an express directive under Family Ct Act § 251. Given the absence of any record testimony, the resettled order cannot stand." ***Matter of Joan HH. v. Maria II.*, 2019 N.Y. Slip Op. 05737, Third Dept 7-18-19**

FAMILY LAW, JUDGES, EVIDENCE.

THE JUDGE MISCHARACTERIZED THE EVIDENCE AND EXHIBITED BIAS IN FAVOR OF FATHER IN THIS CUSTODY CASE, THE DETERMINATION WAS REVERSED AND THE MATTER SENT BACK FOR ANOTHER HEARING BEFORE A DIFFERENT JUDGE.

The Third Department, reversing the custody determination and remitting the matter for another hearing before a different judge, determined the judge mischaracterized the evidence and exhibited bias in favor of father: "We agree with the mother and the attorney for the child that Family Court's decision and order misstates and mischaracterizes the record evidence and that the determination lacks a sound and substantial basis in the record. For example, the court determined that a 'curious' exchange between the child and a therapist 'tended to suggest that the child was confused about her feelings toward her father,' characterized the testimony by the mother's forensic psychologist who deemed the mother mentally fit as a 'brief interlude of comic relief,' and lauded the father's willingness to undergo penile plethysmograph testing — characterized as 'a colonoscopy of the soul' — as 'speak[ing] volumes to his actual innocence.' The court went so far as to criticize the forensic expert's testimony concerning the September 2016 visitation as an example of blending incidents by commenting, 'The only blending here . . . is that of pseudoscience with the world's oldest profession.' The record does not support any of this unfortunate and bizarre commentary. It is concerning that Family Court wholeheartedly credited the father's testimony, viewed most — if not all — of the evidence in a light least favorable to the mother ... and diminished the evidence of domestic violence perpetrated by the father against the mother in the child's presence." ***Matter of Nicole TT. v. David UU.*, 2019 N.Y. Slip Op. 05729, Third Dept 7-18-19**

WORKERS' COMPENSATION, INSURANCE LAW.

CLAIMANT PROPERLY DENIED WORKERS' COMPENSATION BENEFITS BECAUSE CLAIMANT DID NOT OBTAIN THE WORKERS' COMPENSATION CARRIER'S CONSENT BEFORE SETTLING WITH A THIRD-PARTY.

The Third Department determined the denial of Workers' Compensation benefits was proper because claimant did not obtain the Workers' Compensation carriers consent before settling a third-party action arising from the traffic accident: " 'Workers' Compensation Law § 29 (5) requires either the carrier's consent or a compromise order from the court in which a third-party action is pending for a claimant to settle a third-party action and continue receiving compensation benefits' ... . The burden is on the claimant to establish that proper consent was obtained ... . 'The question of whether a settlement was procured with the proper consent of the carrier is a factual issue for the Board to determine' ... . It is 'well settled[] that neither [this Court] nor the Court of Appeals has power to upset the determination of an administrative tribunal on a question of fact . . . beyond seeing to it that there is substantial evidence' ... . In support of claimant's contention that consent for the settlement was properly obtained, he relies on the final sentence in two correspondences sent by the carrier to his third-party counsel stating that the carrier 'has no objection to a $50,000 policy limit settlement of the claimant's bodily injury claim.' Both correspondences, however, also specifically advised that the carrier's 'consent is required prior to settlement or discontinuance of any third-party action' and to 'please communicate with [the carrier]' before settlement to arrange for consent and satisfaction of the lien. A review of the entire correspondences and the plain language therein reflects that the carrier anticipated further communication with the third-party counsel prior to consenting to any settlement." ***Matter of Hisert v. Ron Allen Trucking Inc.*, 2019 N.Y. Slip Op. 05735, Third Dept 7-18-19**

ZONING, LAND USE.

PLANNING BOARD HAD THE AUTHORITY TO RECONSIDER A SUBDIVISION AND SITE PLAN APPROVAL BASED UPON NEW INFORMATION, DESPITE THE FACT THE APPROVAL HAD BEEN RESCINDED.

The Third Department determined that the village planning board had the authority to reaffirm a subdivision and site plan approval based upon new evidence, despite the fact the plan had previously been rescinded: "Petitioners argue that the Village Planning Board lacked the authority to reaffirm the 2010 subdivision and site plan approval. We disagree. 'Despite the lack of statutory authority, a planning board may reconsider a determination if there has been a material change of circumstances since its initial approval of the plat or new evidence is presented' (Matter of 1066 Land Corp. v. Planning Bd. of Town of Austerlitz, 218 AD2d 887, 887 [1995] [citations omitted]). Given that the record discloses that the Village Planning Board was presented with new information in the amended subdivision and site plan, we find that it was authorized to reaffirm the approval notwithstanding the fact that it had been previously rescinded." ***Matter of Town of Mamakating v. Village of Bloomingburg*, 2019 N.Y. Slip Op. 05732, Third Dept 7-18-19**

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