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COURT OF APPEALS

CRIMINAL LAW.

ANY ERROR IN FAILING TO INSTRUCT THE JURY ON LESSER INCLUDED OFFENSES WAS HARMLESS BECAUSE DEFENDANT WAS CONVICTED OF THE TOP COUNT AND THE HIGHEST LESSER INCLUDED OFFENSE WAS AVAILABLE TO THE JURY.

The Court of Appeals determined denying a request for the jury to be instructed on lesser included offenses in this murder case was harmless error: "Even assuming the court erred in denying defendant's request to submit the crimes of manslaughter in the second degree and criminally negligent homicide to the jury as lesser included offenses of the charged crimes of murder in the second degree and manslaughter in the first degree, the error was harmless ... . The Appellate Division properly concluded that defendant's conviction of the lesser inclusory count of first-degree manslaughter, which it dismissed as required by CPL 300.40 (3) (b), did not change the harmless error analysis. Under the circumstances presented here, the jury's guilty verdict on the indictment's highest count despite the availability of the next lesser included offense for their consideration, 'forecloses [defendant's] challenge to the court's refusal to charge the remote lesser included offenses' ... , because it dispels any speculation as to whether the jury might have reached a guilty verdict on 'still lower degree[s] of homicide' ...". ***People v. McIntosh*, 2019 N.Y. Slip Op. 05186, CtApp 6-27-19**

CRIMINAL LAW, APPEALS, EVIDENCE.

CONVICTION AFFIRMED, THREE-JUDGE DISSENT ARGUED THE APPELLATE DIVISION EXCEEDED ITS AUTHORITY BY AFFIRMING ON A SEARCH-RELATED GROUND THAT WAS NOT RULED ON BY SUPREME COURT.

The Court of Appeals, over a three-judge dissent, affirmed the suppression determination, without explaining the facts. The dissent mentions the facts briefly but argues that the Appellate Division exceeded its jurisdiction by affirming the conviction on a search-related ground that was not ruled on by Supreme Court: "The present case clearly falls into the category where the trial court's decision has discrete sections enabling an appellate court to discern which issues it has considered and decided, and yet the Appellate Division reviewed an issue that the trial court had not decided adversely to defendant, offering 'an entirely distinct alternative ground for affirmance' ... . If a suppression court writes a 'fully articulated' decision adverse to a defendant ... , but omits discussion of a particular issue raised by the defendant, our law mandates that an appellate court cannot resolve the issue and must remit. Whether our interpretation of CPL 470.15 (1), in LaFontaine [92 NY2d at 474] and its progeny, is 'undesirable from a policy point of view' ... is a question for another day. LaFontaine is the law and, until such time as that precedent is overruled, 'we are constrained by that decision, and . . . cannot be arbitrary in applying it' ...". ***People v. Hill*, 2019 N.Y. Slip Op. 05187, CtApp 6-27-19**

CRIMINAL LAW, CORRECTION LAW.

A FACEBOOK ACCOUNT IS NOT AN 'INTERNET IDENTIFIER' WITHIN THE MEANING OF THE CORRECTION LAW, THEREFORE DEFENDANT SEX OFFENDER'S FAILURE TO DISCLOSE IT TO THE DIVISION OF CRIMINAL JUSTICE SERVICES IS NOT A CRIME.

The Court of Appeals, in a full-fledged opinion by Judge Fahey, affirming the Appellate Division, determined defendant, a sex offender, did not violate the Correction Law by failing to disclose his Facebook account. The Facebook account was not an "internet identifier" which must be disclosed under the Correction Law: "... [T]he Appellate Division correctly concluded that Facebook is not an 'internet identifier,' and that the existence of a Facebook account—as opposed to the internet identifiers a sex offender may use to access Facebook or interact with other users on Facebook—need not be disclosed to DCJS [Division of Criminal Justice Services] pursuant to Correction Law § 168-f (4). As the People concede, this was the legal theory upon which the indictment was based. The indictment therefore accuses defendant of performing acts that 'simply do not constitute a crime' and is jurisdictionally defective ...". ***People v. Ellis*, 2019 N.Y. Slip Op. 05183, CtApp 6-27-19**

CRIMINAL LAW, EVIDENCE.

THE FACTS SUPPORTED CONSECUTIVE SENTENCES FOR CRIMINAL POSSESSION OF A WEAPON AND MURDER, DEFENDANT WAS SEEN IN POSSESSION OF THE WEAPON SEVERAL MINUTES BEFORE THE DEFENDANT APPROACHED THE VICTIM.

The Court of Appeals, affirming defendant's conviction, noted that the consecutive sentences for possession of a weapon and murder were supported by the facts: " 'So long as a defendant knowingly unlawfully possesses a loaded firearm before forming the intent to cause a crime with that weapon, the possessory crime has already been completed, and consecutive sentencing is permissible'... . Here, the record supports Supreme Court's imposition of consecutive sentences. Video surveillance evidence showed defendant in possession of the gun several minutes before approaching the victim, supporting the conclusion that defendant possessed the weapon for a sufficient period of time before forming the specific intent to kill. Thus, consecutive sentencing was permissible." ***People v. Malloy*, 2019 N.Y. Slip Op. 05061, CtApp 6-25-19**

CRIMINAL LAW, EVIDENCE.

DENIAL OF THE REQUEST TO INSTRUCT THE JURY ON ASSAULT THIRD AS A LESSER INCLUDED OFFENSE AND THE ADMISSION OF THE 911 CALL AS AN EXCITED UTTERANCE WERE NOT REVERSIBLE ERRORS.

The Court of Appeals, over an extensive dissenting opinion, as well as another brief dissenting opinion, determined the denial of defendant's request for a jury instruction on the lesser included offense of assault third degree, and the admission of the 911 call as an excited utterance was harmless error. The facts are explained only in the dissent and are not summarized here: "Defendant failed to 'show that there [was] a reasonable view of the evidence in the particular case that would support a finding that he committed the lesser included offense but not the greater' ... . Although '[i]n determining whether such a reasonable view exists, the evidence must be viewed in the light most favorable to [the] defendant' ... , charging the lesser included offense here 'would [have] force[d] the jury to resort to sheer speculation' ... . Nor does Supreme Court's admission of the call between the victim and the 911 operator require reversal. 'A spontaneous declaration or excited utterance—made contemporaneously or immediately after a startling event—which asserts the circumstances of that occasion as observed by the declarant' is an exception to the prohibition on hearsay' ... . 'The test is whether the utterance was made before there has been time to contrive and misrepresent, i.e., while the nervous excitement may be supposed still to dominate and the reflective power to be yet in abeyance' ... . Assuming, without deciding, that it was error to admit the 911 call, any such error would have been harmless ...". ***People v. Almonte*, 2019 N.Y. Slip Op. 05185, CtApp 6-27-19**

CRIMINAL LAW, EVIDENCE, ATTORNEYS.

SURVEILLANCE VIDEO CONSTITUTED *BRADY* MATERIAL WHICH COULD HAVE AFFECTED THE OUTCOME OF THE TRIAL, THE PROSECUTOR HAD SEEN THE VIDEO BUT TOLD THE JURY NO VIDEO EXISTED, CONVICTION REVERSED.

The Court of Appeals, in a full-fledged opinion by Judge Garcia, reversing the Appellate Division, determined the People's failure to turn over to the defense a surveillance video which captured people (not the defendant) present at the time the victim was shot, as well as the victim falling, required a new trial. The prosecutor had seen the video and considered it irrelevant. In her summation, the prosecutor said there was no video of the incident: "In New York, where the defense 'did not specifically request the information, the test of materiality is whether there is a reasonable probability that had it been disclosed to the defense, the result would have been different' ... . Defendant concedes that the 'reasonable probability' standard applies here. In determining materiality, the 'question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence' ... . The 'defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict' ... . Defendant need only show that 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict' ... . * * * It requires no frame-by-frame review to grasp that the video would have become the focal point of defendant's trial. It would have set the scene of the murder, identified other potential witnesses, served to impeach eyewitness testimony, and provided a basis for an argument that other suspects might have been involved in the shooting. Instead of playing that role at trial, the video was withheld from the defense and the jury was told it did not exist. The aggregate effect of the suppression of this evidence undermines confidence in the verdict and therefore defendant is entitled to a new trial." ***People v. Ulett*, 2019 N.Y. Slip Op. 05060, CtApp 6-26-19**

DEBTOR-CREDITOR, CIVIL PROCEDURE, FAMILY LAW.

THE DIVISION OF MARITAL PROPERTY PURSUANT TO A DIVORCE DOES NOT RENDER ONE FORMER SPOUSE THE JUDGMENT DEBTOR OF THE OTHER, THEREFORE A JUDGMENT DEBTOR WHO DOCKETS A JUDGMENT DOES NOT HAVE PRIORITY PURSUANT TO CPLR 5203 OVER A JUDGMENT OF DIVORCE WHICH HAS NOT BEEN DOCKETED.

The Court of Appeals, in a full-fledged opinion by Judge Wilson, determined the 2015 judgment of divorce which awarded the wife, Andrea, a percentage of marital property, a home worth $5 million, did not make Andrea a judgment creditor such that the failure to docket the judgment of divorce gave priority to a judgment debtor, Pangea, who had docketed a 2016 judgment: "The United States Court of Appeals for the Second Circuit has certified the following question to us: 'If an entered divorce judgment grants a spouse an interest in real property pursuant to Domestic Relations Law § 236, and the spouse does not docket the divorce judgment in the county where the property is located, is the spouse's interest subject to attachment by a subsequent judgment creditor that has docketed its judgment and seeks to execute against the property?' We answer that question in the negative. * * * Pangea's conception of Andrea as judgment creditor is utterly incompatible with our legislature's dramatic revision of the Domestic Relations Law in 1980. By incorporating the concept of 'marital property' into Domestic Relations Law § 236, 'the New York Legislature deliberately went beyond traditional property concepts when it formulated the Equitable Distribution Law' ... . Marital assets are not owned by one spouse or another, and the dissolution of a marriage involving the division of marital assets does not render one ex-spouse the creditor of another. Courts are empowered 'not only to make an equitable disposition of marital property between [the spouses], but also to make a distributive award in lieu of or to supplement, facilitate or effectuate the division or distribution of property where authorized in a matrimonial action, and payable in a lump sum or over a period of time' ... . Andrea therefore cannot properly be considered a judgment creditor of John [her ex-husband]. Thus, CPLR 5203 (a), by its plain terms, has no application here, and Pangea can claim no priority." ***Pangea Capital Mgt., LLC v. Lakian*, 2019 N.Y. Slip Op. 05059, CtApp 6-25-19**

LANDLORD-TENANT, REAL PROPERTY TAX LAW (RPTL), MUNICIPAL LAW.

BUILDINGS RECEIVING REAL PROPERTY TAX LAW 421-g BENEFITS ARE NOT SUBJECT TO THE LUXURY DEREGULATION PROVISIONS OF THE RENT STABILIZATION LAW.

The Court of Appeals, in a full-fledged opinion by Judge Stein, over an extensive dissent, reversing the Appellate Division, determined that "plaintiffs' apartments, which are located in buildings receiving tax benefits pursuant to Real Property Tax Law (RPTL) § 421-g, are [not] subject to the luxury deregulation provisions of the Rent Stabilization Law (RSL ... .": "The legislature's intention, as reflected in the language of the statute at issue here, is clear and inescapable. During 'the entire period for which the eligible multiple dwelling is receiving' RPTL 421-g benefits, it 'shall be fully subject to control' under the RSL, 'notwithstanding the provisions of' that regime or any other 'local law' that would remove those dwelling units from such control, 'unless exempt under such local law from control by reason of the cooperative or condominium status of the dwelling unit' (RPTL 421-g [6] ...) ... . The statute does not say that eligible units shall be fully subject to 'the provisions of' any local law for the stabilization of rents. Put differently, the notwithstanding clause of the statute evinces the legislature's intent that any 'local law for the stabilization of rents' that would exempt the unit from 'control under such local law' does not apply to buildings receiving RPTL 421-g benefits, with the sole exception being for cooperatives and condominiums ...". ***Kuzmich v. 50 Murray St. Acquisition LLC*, 2019 N.Y. Slip Op. 05057, CtApp 6-25-19**

TAX LAW, ADMINISTRATIVE LAW.

INFORMATION PROVIDED TO A SUPERMARKET CHAIN ABOUT COMPETITORS' PRICES IS NOT "PERSONAL AND INDIVIDUAL" WITHIN THE MEANING OF TAX LAW 1105, THEREFORE THE REPORTS OF THAT INFORMATION ARE SUBJECT TO SALES TAX.

The Court of Appeals, in a full-fledged opinion by Judge Feinman, over a concurrence and two dissenting opinions, reversing the Appellate Division, determined that a supermarket chain, Wegmans, which pays an outfit, RetailData, for information about competitors' prices, must pay sales tax for that information. Wegmans argued the information was "personal and individual" and therefore not taxable under Tax Law 1105: "Tax Law § 1105 (c) (1) imposes a sales tax on certain information services, 'but exclud[es] the furnishing of information which is personal or individual in nature and which is not or may not be substantially incorporated in reports furnished to other persons.' * * * The information that RetailData compiled and the reports it furnished to Wegmans derived from a non-confidential and widely-accessible source, the supermarket shelves of Wegmans's competitors. There is nothing about the information itself that is personal or individual in nature. RetailData simply collected the prices of products at grocery stores and compiled that information into reports which it furnished to Wegmans. The Tribunal rationally concluded that the information RetailData furnished to Wegmans was not personal or individual in nature because it was collected from prices on supermarket shelves, which are publicly available, widely-accessible, and not confidential. Moreover, in these circumstances, it was rational for the Tribunal to determine that

RetailData's customization of the publicly-available information it collected from supermarket shelves into a report format did not render the furnished information personal or individual in nature ...". ***Matter of Wegmans Food Mkts., Inc. v. Tax Appeals Trib. of the State of N.Y.*, 2019 N.Y. Slip Op. 05184, CtApp 6-27-19**

FIRST DEPARTMENT

CRIMINAL LAW, EVIDENCE.

SEARCH OF A SUITCASE WAS A VALID SEARCH INCIDENT TO ARREST JUSTIFIED BY EXIGENT CIRCUMSTANCES, DESPITE THE FACT THAT DEFENDANT HAD BEEN HANDCUFFED AND WAS IN THE PRESENCE OF AS MANY AS EIGHT POLICE OFFICERS.

The First Department, in a full-fledged opinion by Justice Webber, over an extensive, two-justice dissenting opinion, determined that the search of a suitcase was a valid search incident to arrest, even though defendant, who had let go of the suitcase, had been handcuffed. Defendant had been observed by the arresting officer (Ayala) coming out of several stores and placing apparently stolen items into the suitcase. At the time the suitcase was searched, defendant was handcuffed and had been approached on the street by approximately eight police officers: "Officer Ayala's testimony that a knife was recovered from both defendant and Chauncey also established that there were exigent circumstances justifying the search of the suitcase ... . [A]n officer need not affirmatively testify to the exigency ... . Rather, the exigent circumstances need only be inferred from the circumstances of the arrest ... . Ayala's search of the suitcase was also justified to prevent the loss or destruction of evidence, as Ayala believed defendant and codefendant Chauncey had stolen clothing from approximately three stores and placed the clothing in the suitcase ... . The dissent continues to ignore the facts that the suitcase was large enough to conceal a weapon and that the officer had just seen defendant stealing merchandise and placing it in the suitcase. Officer Ayala did not know whether there were weapons contained in the bag. ... The testimony of Officer Ayala established that the suitcase was not in the exclusive control of the police at the time of the search. It remained at defendant's feet where he dropped it. Additionally, it has been consistently held that '[w]hether in fact defendant could have had access to the briefcase at the moment it was being searched is irrelevant' ... . That defendant was handcuffed in no way negates a finding of exigent circumstances justifying a warrantless search ... . Although defendant was handcuffed during the search of the suitcase, there was a 'realistic possibility' that he could have used means other than his hands 'such as kicking or shoving the arresting officer - to disrupt the arrest process in order to gain a weapon or destroy evidence' ...". ***People v. Harris*, 2019 N.Y. Slip Op. 05099, First Dept 6-25-19**

CRIMINAL LAW, EVIDENCE.

DEFENDANT SHOULD HAVE BEEN ALLOWED TO PRESENT HEARSAY EVIDENCE DEMONSTRATING ONE OF THE ROBBERY VICTIMS, WHO DID NOT TESTIFY, FAILED TO IDENTIFY THE DEFENDANT IN A LINEUP, CONVICTION REVERSED.

The First Department, reversing defendant's conviction, determined the defendant should have been allowed to present evidence that one of the robbery victims, who did not testify, failed to identify the defendant at a lineup, even though there was evidence the victim falsely claimed he/she could not identify anyone: "The court erred in denying defendant's application, expressly made under Chambers v. Mississippi (410 US 284 [1973]), to receive testimony that one of the robbery victims, who was unavailable to testify at trial, failed to identify defendant at a lineup. Of the requirements for admission of exculpatory hearsay evidence, the only one in dispute is the reliability of the nonidentification. Although there were reasons to suspect that this victim may have falsely claimed to be unable to identify anyone in the lineup, the nonidentification plainly bore sufficient 'indicia of reliability' under the applicable standard, which 'hinges upon reliability rather than credibility'... . Where the proponent of the statement 'is able to establish this possibility of trustworthiness, it is the function of the jury alone to determine whether the declaration is sufficient to create reasonable doubt of guilt' ...". ***People v. Cook*, 2019 N.Y. Slip Op. 05210, First Dept 6-27-19**

EMPLOYMENT LAW, CONTRACT LAW, LABOR LAW.

PLAINTIFF'S BREACH-OF-AN-EMPLOYMENT-CONTRACT ACTION SHOULD NOT HAVE BEEN DISMISSED, DESPITE THE FACT THAT DEFENDANT NEVER SIGNED IT.

The First Department, reversing Supreme Court, determined plaintiff's breach-of-an-employment-contract action should not have been dismissed. The defendant never signed the contract. However, plaintiff performed and was paid according to the contract. When plaintiff was terminated, defendant refused to pay the six month's severance which was provided for in the contract: "The fact that defendant never signed the agreement is not, at this pleading stage, an impediment to a finding that the parties intended to be bound ... . There is nothing in the agreement stating that it will not be binding until executed by both sides ... . The counterparts clause provides that each party may indicate its assent by signing a separate counterpart; it does not state that the parties can assent only by signing. The merger and written amendments clauses provide only that

the agreement, and any subsequent amendments, must be in writing; they do not state that the parties may convey their assent only by affixing signatures. The complaint also sufficiently alleges causes of action for promissory estoppel ... and recovery of severance as unpaid wages under Labor Law article 6 ... . However, plaintiff fails to sufficiently allege a claim for unjust enrichment as he does not allege he was not paid for the work he actually performed ...". ***Lord v. Marilyn Model Mgt., Inc.*, 2019 N.Y. Slip Op. 05093, First Dept 6-25-19**

FAMILY LAW, CRIMINAL LAW.

FAMILY OFFENSE OF HARASSMENT UPHELD, SEXUAL MISCONDUCT, ASSAULT SECOND AND CRIMINAL OBSTRUCTION OF BREATHING NOT SUPPORTED BY THE EVIDENCE.

The First Department, in this Family Law family offense proceeding, determined the evidence supported harassment second, but did not support one count of sexual misconduct, assault in the second degree, or criminal obstruction of breathing or blood circulation. Petitioner admitted that she expected payment for sex and did not demonstrate a lack of consent with respect to one of the sexual misconduct counts. Biting petitioner's ear during sex did not constitute assault second (teeth being the dangerous instrument). And restricting petitioner's breathing during sex was not a crime because respondent stopped immediately when petitioner expressed discomfort. With respect to harassment, the court wrote: "The record shows, inter alia, that respondent threatened petitioner that he would take the steps necessary to cause her to lose her immigration status and rights to the child if she stopped prostituting herself to him, thereby evincing respondent's intent to harass and alarm petitioner (Penal Law § 240.26[3]) and his inducing petitioner to engage in a sexual relationship with him by instilling fear in her ... " ***Matter of Irena K. v. Francesco S.*, 2019 N.Y. Slip Op. 05066, First Dept 6-25-19**

PERSONAL INJURY, EVIDENCE.

ALTHOUGH PLAINTIFF FELL DURING A STORM, THERE WAS EVIDENCE THE AREA WAS ICY BEFORE THE STORM, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT PROPERLY DENIED.

The First Department determined defendants' motion for summary judgment in this slip and fall case was properly denied. Although a storm was in progress when plaintiff fell, there was evidence there was ice in that area before the storm: "Although the meteorological records and the expert meteorological affidavits demonstrate that there was a storm in progress when the accident happened, a warehouse associate employed by [defendant] testified at his deposition that he saw ice on the ground the loading dock about a week before plaintiff's fall and defendants submitted no evidence as to when the area was last inspected or cleaned before the accident. In these circumstances, there are triable issues of fact as to whether plaintiff's fall was caused by pre-existing ice on the ground or the storm in progress and whether [defendants] had a reasonable time to remedy any alleged icy condition before the date of plaintiff's fall ...". ***Perez v. Raymours Furniture Co., Inc.*, 2019 N.Y. Slip Op. 05083, First Dept 6-25-19**

PERSONAL INJURY, MUNICIPAL LAW, CONTRACT LAW, EMPLOYMENT LAW.

ABUTTING PROPERTY OWNER HAS A NON-DELEGABLE DUTY TO MAINTAIN THE SIDEWALK WHICH IS NOT DIMINISHED BY HIRING AN INDEPENDENT CONTRACTOR TO WORK ON THE SIDEWALK, PROPERTY OWNER'S MOTION FOR SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE PROPERLY DENIED.

The First Department determined defendant abutting property owner's (Hillman's) motion for summary judgment in this sidewalk slip and fall case was properly denied. Hillman had hired an independent contractor to do concrete work on the sidewalk, but that did not relieve Hillman of his nondelegable duty to keep the sidewalk in good repair (NYC Administrative Code): "Although the 'general rule is that a party who retains an independent contractor . . . is not liable for the independent contractor's negligent acts,' an exception arises when the hiring party 'is under a specific nondelegable duty' ... . Here, Hillman, as the property owner, had a nondelegable duty to maintain the sidewalk, including the sidewalk around the subject sign post stump ... . Contrary to Hillman's contention, the motion court did not conclude that Hillman is, in fact, liable for any alleged wrongs committed by the independent contractor in performing cement sidewalk resurfacing work. Rather, the motion court correctly found that under these circumstances the record raises issues of fact as to whether the cement work ordered by this defendant, the property owner, caused or exacerbated a hazardous tripping condition, and whether Hillman had actual or constructive knowledge of the metal protrusion on the sidewalk outside its building. Factual issues are also presented as to whether the condition was open and obvious, or, alternatively the defect trivial ...". ***Vullo v. Hillman Hous. Corp.*, 2019 N.Y. Slip Op. 05087, First Dept 6-25-19**

SECOND DEPARTMENT

CIVIL PROCEDURE, CONTRACT LAW, INSURANCE LAW.

DOCUMENTARY EVIDENCE SUBMITTED IN SUPPORT OF THE MOTION TO DISMISS DID NOT MEET THE CRITERIA REQUIRED BY CPLR 3211(a)(1).

The Second Department, reversing Supreme Court, determined defendant insurer's (Reliastar's) motion to dismiss based on documentary evidence should not have been granted. Plaintiffs sued for breach of contract when Reliastar canceled the life insurance policy: " 'To succeed on a motion to dismiss based upon documentary evidence pursuant to CPLR 3211(a)(1), the documentary evidence must utterly refute the plaintiff's factual allegations, conclusively establishing a defense as a matter of law'... . 'In order for evidence to qualify as documentary,' it must be unambiguous, authentic, and undeniable' ... . '[J]udicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are essentially undeniable, would qualify as documentary evidence in the proper case' ... . 'Conversely, letters, emails, and affidavits fail to meet the requirements for documentary evidence' ... . Here, in support of that branch of its motion which was pursuant to CPLR 3211(a)(1), Reliastar submitted the policy and certain policy notices, which, according to Reliastar, refuted the plaintiffs' contention that the policy cancellation was the result of Reliastar's breach of its obligations under the policy. The policy notices, however, were, in effect, letters, which fail to meet the requirements for documentary evidence within the meaning of CPLR 3211(a)(1) ...". ***Magee-Boyle v. Reliastar Life Ins. Co. of N.Y.*, 2019 N.Y. Slip Op. 05118, Second Dept 6-26-19**

CIVIL PROCEDURE, FORECLOSURE.

SUPREME COURT SHOULD HAVE SUMMONED A NECESSARY PARTY WHICH WAS SUBJECT TO THE JURISDICTION OF THE COURT PURSUANT TO CPLR 1001; SUPREME COURT SHOULD HAVE GRANTED PLAINTIFF'S SECOND MOTION FOR AN EXTENSION OF TIME TO SERVE A DEFENDANT IN THE INTEREST OF JUSTICE, DESPITE THE EXPIRATION OF THE STATUTE OF LIMITATIONS AND LAW-OFFICE-FAILURE EXCUSE.

The Second Department, reversing Supreme Court, determined plaintiff bank's second motion to extend the time to serve defendant (Bandolos). after the statute of limitations had run, should have been granted. The court further held that Supreme Court should have summoned a necessary party (Mother of Pearl, the record owner) because the party was subject to the court's jurisdiction: "The Supreme Court should have granted that branch of the plaintiff's motion which was, in effect, for leave to join Mother of Pearl as a party to the action ... . 'A party may move for judgment dismissing one or more causes of action asserted against him [or her] on the ground that . . . the court should not proceed in the absence of a person who should be a party' (CPLR 3211[a][10]). However, CPLR 1001(b) provides that where the party 'is subject to the jurisdiction of the court, the court shall order him [or her] summoned.' Mother of Pearl, as the record owner of the property, is a necessary party to this action (see CPLR 1001[a]; RPAPL 1311[1]) subject to the jurisdiction of the court. Consequently, the court should have ordered Mother of Pearl summoned, rather than granting that branch of the mortgagors' cross motion which was pursuant to CPLR 3211(a)(10) to dismiss the complaint insofar as asserted against them ... . Further, under the circumstances of this case, the Supreme Court should have granted that branch of the plaintiff's motion which was pursuant to CPLR 306-b for leave to extend the time to serve the summons and complaint upon Kelly Bandalos by publication in the interest of justice ... . While the action was timely commenced, the statute of limitations has since expired. Although the plaintiff's only excuse for not serving Kelly Bandalos by publication is law office failure, it did make diligent efforts to serve her prior to the first extension of time to serve and the issuance of the order of publication. Further, Kelly Bandalos had actual notice of the action within 120 days of its commencement, she served and filed an answer, and there is no identifiable prejudice to her attributable to the delay in service ...". ***Deutsche Bank Natl. Trust Co. v. Bandalos*, 2019 N.Y. Slip Op. 05106, Second Dept 6-26-19**

CIVIL PROCEDURE, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL), NUISANCE, TRESPASS.

SUPREME COURT SHOULD HAVE GRANTED PLAINTIFF'S MOTION TO AMEND THE COMPLAINT, DESPITE THE PASSAGE OF SIX YEARS SINCE THE ACTION WAS COMMENCED, THE COURT DOES NOT EXAMINE THE MERITS OF THE PLEADING UNLESS THE LACK OF MERIT IS CLEAR AND FREE FROM DOUBT.

The Second Department, reversing Supreme Court, determined plaintiff's motion to amend its complaint, which originally stemmed from the alleged encroachment of defendant's pipes (since removed), should have been granted, despite the passage of six years (during which a default judgment was vacated): "The Supreme Court should have granted that branch of the plaintiff's cross motion which was for leave to amend the complaint. Permission to amend a pleading should be 'freely given' (CPLR 3025[b] ...), where the proposed amendment is neither palpably insufficient nor patently devoid of merit, and there is no evidence that the amendment would prejudice or surprise the opposing party ... . Mere lateness is not a basis for denying an amendment; ' [i]t must be lateness coupled with significant prejudice to the other side, the very elements of the laches doctrine' ... . The burden of establishing prejudice is on the party opposing the amendment ... . Here, notwithstanding

the lengthy gap in time between the commencement of the action and the plaintiff's cross motion for leave to amend the complaint, the defendant has made no showing that it was surprised by the new allegations or would be significantly prejudiced ... . Moreover, some portion of that delay is attributable to the defendant's effort to vacate its default and the parties' subsequent motion practice and negotiations, and there is no contention that discovery has been concluded ... . Contrary to the defendant's contentions, the proposed amendment is not palpably insufficient or patently devoid of merit. 'No evidentiary showing of merit is required under CPLR 3025(b)' ... , and 'a court shall not examine the legal sufficiency or merits of a pleading unless [the] insufficiency or lack of merit is clear and free from doubt' ... . The allegations of the proposed amendment and the submissions in support of it adequately set forth the requisite elements for causes of action alleging private nuisance and trespass ...". ***Krakovski v. Stavros Assoc., LLC*, 2019 N.Y. Slip Op. 05112, Second Dept 6-26-19**

CONTRACT LAW.

PLAINTIFF HOMEOWNER WAS NOT ENTITLED TO PAYMENTS MADE TO AN UNLICENSED HOME IMPROVEMENT CONTRACTOR FOR WORK PERFORMED SOLELY ON THE GROUND THAT THE CONTRACTOR WAS UNLICENSED.

The Second Department, reversing Supreme Court, determined plaintiff was not entitled to the return of payments made to defendant unlicensed contractor for work performed. Plaintiff's motion for summary judgment on that cause of action should not have been granted: "Although an unlicensed contractor may not enforce a home improvement contract against a homeowner or seek recovery in quantum meruit for work performed ... , here, the defendant is not seeking to enforce the parties' contract or to recover in quantum meruit. Rather, the plaintiff homeowner is seeking to recover money already paid to the defendant pursuant to the contract. Where a homeowner receives the benefit of the services of an unlicensed contractor, he or she is not entitled to recoup payments made for such services solely on the basis that the defendant was unlicensed ... . 'The parties, in these circumstances, should be left as they are' ...". ***Rusin v. Design-Apart USA, Ltd.*, 2019 N.Y. Slip Op. 05172, Second Dept 6-26-19**

CRIMINAL LAW, EVIDENCE, ATTORNEYS.

DEFENDANT'S STATEMENT TO HIS MOTHER, ON THE PHONE, ABOUT NEEDING THE ASSISTANCE OF AN ATTORNEY SHOULD NOT HAVE BEEN ADMITTED IN EVIDENCE, ERROR WAS HARMLESS HOWEVER.

The Second Department determined a statement defendant made to his mother about needing the assistance of an attorney should not have been admitted. The error was deemed harmless however: "We agree with the defendant that the Supreme Court should not have admitted into evidence a statement the defendant made to his mother, during a recorded telephone call, that involved him invoking his right to counsel. During the telephone call, the defendant stated that, with the assistance of an attorney, he could "get around" the fact that he had touched the gun earlier in the day. The court initially ruled that this statement was inadmissible. However, during a pretrial proceeding, the People argued that this statement should be admitted, as it demonstrated the defendant's consciousness of guilt. Over the defendant's objection that this statement was inadmissible since it revealed his decision to engage legal representation, the court permitted its introduction into evidence. 'It has long been the rule in this State that, once a criminal proceeding has formally commenced, the accused has an absolute constitutional and statutory right to the assistance of counsel at every stage of the proceeding' ... . Accordingly, evidence which has the jury infer guilt from the fact that a criminal defendant exercised his or her right to counsel should not be admitted ... . Here, the admission of this statement was an improper infringement on the defendant's exercise of his right to counsel ...". ***People v. James*, 2019 N.Y. Slip Op. 05150, Second Dept 6-26-19**

CRIMINAL LAW, EVIDENCE, JUDGES.

COUNTY COURT ABUSED ITS DISCRETION BY REFUSING TO ALLOW DEFENDANT TO SUBMIT A LATE NOTICE OF HIS INTENT TO PRESENT PSYCHIATRIC EVIDENCE, CONVICTION REVERSED.

The Second Department, reversing defendant's conviction, determined County Court abused its discretion by not allowing defendant to serve a late notice of his intent to offer psychiatric evidence: " 'Psychiatric evidence is not admissible upon a trial unless the defendant serves upon the people and files with the court a written notice of his intention to present psychiatric evidence. Such notice must be served and filed before trial and not more than thirty days after entry of the plea of not guilty to the indictment. In the interest of justice and for good cause shown, however, the court may permit such service and filing to be made at any later time prior to the close of the evidence' (CPL 250.10[2]). Contrary to the defendant's contention, the evidence he proffered, in opposition to the People's motion, for the purpose of negating intent, constituted 'psychiatric evidence' under the statute (CPL 250.10[1] ...). The defendant failed to provide the People with timely notice of his intent to offer this evidence. However, the determination as to whether late notice should be permitted is a discretionary one, which requires the court to weigh the defendant's constitutional right to present witnesses in his own defense against the prejudice to the People arising from late notice ... . Here, the record indicates that the trial court failed to exercise any discretion over whether to permit the defendant to serve late notice of his intent to offer psychiatric evidence ... . Exercising our own discretion, we conclude that, under the particular circumstances of this case, the defendant should have been granted permission to serve late notice, and the People's preclusion motion therefore should have been denied. The evidence that the defendant

previously had suffered auditory hallucinations had high probative value to corroborate the defendant's testimony that he entered the home with the intent to aid a woman who was yelling, rather than to damage the house ... . Further, the preclusion of testimony regarding those portions of the defendant's conversation with the responding officer which involved his past auditory hallucinations, and his resultant hospitalization, deprived the jury of the full context of the interaction. Any prejudice to the People was substantially outweighed by the defendant's extremely strong interest in presenting the evidence ...". ***People v. Morris*, 2019 N.Y. Slip Op. 05160, Second Dept 6-26-19**

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA).

DEFENDANT'S APPLICATION FOR A DOWNWARD DEPARTURE SHOULD HAVE BEEN CONSIDERED, INSTEAD THE APPLICATION WAS DISMISSED AS 'PREMATURE,' MATTER REMITTED.

The Second Department Supreme Court should have considered defendant's application for a downward departure and remitted the matter: "The Supreme Court is required to make a determination with respect to a defendant's risk level 30 calendar days prior to discharge, parole, or release (see Correction Law § 168-n). As part of its determination with respect to a defendant's risk level, the court may depart downwardly from the presumptive risk level. A defendant seeking a downward departure from the presumptive risk level has the initial burden of '(1) identifying, as a matter of law, an appropriate mitigating factor, namely, a factor which tends to establish a lower likelihood of reoffense or danger to the community and is of a kind, or to a degree, that is otherwise not adequately taken into account by the [SORA] Guidelines; and (2) establishing the facts in support of its existence by a preponderance of the evidence' ... . If the defendant makes that twofold showing, the court must exercise its discretion by weighing the mitigating factor to determine whether the totality of the circumstances warrants a departure to avoid an overassessment of the defendant's dangerousness and risk of sexual recidivism ... . As the People correctly concede, the Supreme Court should not have denied the defendant's application for a downward departure as premature, but instead, should have addressed the merits of the application ...". ***People v. Powell*, 2019 N.Y. Slip Op. 05170, Second Dept 6-26-19**

ENVIRONMENTAL LAW, ZONING, LAND USE, CIVIL PROCEDURE, JUDGES.

HARDSHIP WAIVER TO ALLOW CONSTRUCTION OF A SINGLE FAMILY HOME IN THE CORE PRESERVATION AREA OF THE LONG ISLAND CENTRAL PINES BARRENS PROPERLY DENIED, ACCOMPANYING ACTION FOR DECLARATORY JUDGMENT SHOULD NOT HAVE BEEN SUMMARILY DENIED, SUA SPONTE, BY THE JUDGE BECAUSE THERE WAS NO REQUEST FOR THAT RELIEF.

The Second Department, modifying Supreme Court, determined that the Article 78 petition for a hardship waiver to allow petitioner to build a single family residence on property within the core preservation area of the Long Island Central Pines Barrens was properly denied. However, the accompanying declaratory judgment action (alleging the denial of the waiver was an unconstitutional taking) should not have been summarily dismissed by the judge absent a motion for that relief: "… [C]ontrary to the petitioner's contention, the Commission's determination to deny its application for an extraordinary hardship waiver had a rational basis and was not arbitrary and capricious. In particular, the Commission rationally found, inter alia, that the alleged hardship was not the result of any unique circumstances peculiar to the subject property (see ECL 57-0121[10][a][i] ...) and, in any event, that the alleged hardship was self-created (see ECL 57-0121[10][a][ii], [iii] ...). The Commission also rationally found that the application did not satisfy the requirements of ECL 57-0121(10)(c) and reasonably distinguished the application from prior applications for which it granted an extraordinary hardship waiver ... . 'In a hybrid proceeding and action, separate rules apply to those causes of action which are asserted pursuant to CPLR article 78, on the one hand, and those to recover damages and for declaratory relief, on the other hand' ... . 'The Supreme Court may not employ the summary procedure applicable to a CPLR article 78 cause of action to dispose of causes of action to recover damages or seeking a declaratory judgment'... . 'Thus, where no party makes a request for a summary determination of the causes of action which seek to recover damages or declaratory relief, it is error for the Supreme Court to summarily dispose of those causes of action' ...". ***Matter of Armand Gustave, LLC v. Pavacic*, 2019 N.Y. Slip Op. 05125, Second Dept 6-26-19**

FAMILY LAW, CONTRACT LAW.

CHILD CONCEIVED WITH AN EGG FROM AN ANONYMOUS DONOR AND CARRIED BY A GESTATIONAL SURROGATE PURSUANT TO AN UNPAID SURROGACY CONTRACT MAY BE ADOPTED BY THE BIOLOGICAL FATHER.

The Second Department, reversing Family Court, determined the biological father of child conceived with an egg from an anonymous donor and carried by a gestational surrogate can adopt the child. Family Court had held that the unpaid surrogacy contract was against public policy and should not be legitimized by adoption. Family Court also held that a biological father cannot adopt his own child. The Second Department rejected both arguments in an extensive opinion which cannot fairly be summarized here: "While commercial surrogacy contracts subject participants, and those who assist in the formation of such contracts, to civil penalties or felony conviction (see Domestic Relations Law § 123; Social Services Law §§ 374[6]; 389), the only sanction against unpaid surrogacy contracts is to treat them as void and unenforceable (see Domestic Relations Law § 122 ...). ... [T]he fact that a child was born as the result of an unenforceable surrogacy agreement does not

foreclose an adoption of the resulting child, upon the surrogate's consent ... . There is nothing in the text of the Domestic Relations Law which precludes a parent from adopting his or her own biological child. While adoption, as we recognized above, is a statutory creation, the adoption sought here is authorized by the governing statute and there is nothing in the statute which precludes it. Further, to the extent that the Legislature has contemplated this subject, it has permitted adoptions notwithstanding an existing biological connection. Domestic Relations Law § 110 expressly provides that '[a]n adult or minor married couple together may adopt a child of either of them born in or out of wedlock.' " ***Matter of John (Joseph G.)*, 2019 N.Y. Slip Op. 05132, Second Dept 6-26-17**

FORECLOSURE, UNIFORM COMMERCIAL CODE (UCC), CIVIL PROCEDURE.

DESPITE LOSS OF THE NOTE, THE BANK CAN DEMONSTRATE STANDING WITH A LOST NOTE AFFIDAVIT WHICH MEETS THE REQUIREMENTS OF UCC 3-803.

The Second Department determined plaintiff bank properly established standing in this foreclosure proceeding, despite the note having been lost, with a lost note affidavit which met the requirements of UCC 3-803: "... '[P]ursuant to UCC 3-804, the owner of a lost note may maintain an action upon due proof of [1] his [or her] ownership, [2] the facts which prevent his [or her] production of the instrument and [3] its terms' ... . Accordingly, we agree with the referee that, as long as the affidavit of lost note meets the requirements of UCC 3-804, a mortgagee may establish standing based on its possession of the note, even where the original note has been lost. Here, the parties stipulated that 'the factual criteria for the application of § 3-804 ha[ve] been satisfied.' Moreover, while ownership of the note may be easier to establish where there is a valid assignment of the note and mortgage ... , due proof of the plaintiff's ownership may also be provided by an affidavit of lost note setting forth details such as who acquired possession of the note and 'when the search for the note occurred, who conducted the search, the steps taken in the search for the note, or when or how the note was lost' ... " ***Bank of N.Y. Mellon v. Hardt*, 2019 N.Y. Slip Op. 05100, Second Dept 6-27-29**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

REMOVING PORTABLE LIGHTING EQUIPMENT IS NOT 'ALTERING' A STRUCTURE WITHIN THE MEANING OF LABOR LAW 240(1), DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined that plaintiff (McCarthy) was not engaged in activity covered by Labor Law 240 (1) when he fell from the roof of a broadcast booth when removing portable lighting: "... [T]he defendants established their prima facie entitlement to judgment as a matter of law dismissing the cause of action alleging a violation of Labor Law § 240(1), through the submission of, inter alia, a transcript of McCarthy's deposition testimony, which demonstrated that the work McCarthy was performing did not constitute 'altering' within the meaning of the statute. McCarthy testified that his work consisted of, inter alia, bringing in and removing portable lighting equipment. McCarthy testified that one of his coworkers had attached the scrim, which is a 'double-weave fabric' that is used to equalize lighting levels during filming, to the exterior of the domestic broadcast booth using C-clamps, which are screw-based clamps, and rope. McCarthy testified that on the day of the accident, he walked along the ledge outside of the broadcast booth, cut the rope holding the scrim, removed the scrim, and placed those items in the hallway. He testified that he went back out on the ledge to retrieve three C-clamps, which were screwed into the roof, and fell backwards onto the stadium below. McCarthy's work of bringing in and removing portable lighting equipment did not constitute altering of any building or structure ... . Further, under these circumstances, the placement of a lighting scrim, secured to the exterior of the broadcast booth with screw-based C-clamps, involved no significant physical change to a structure ...'." ***McCarthy v. City of New York*, 2019 N.Y. Slip Op. 05121, Second Dept 6-26-19**

PERSONAL INJURY, MUNICIPAL LAW, IMMUNITY.

THE CITY'S STUDIES OF THE INTERSECTION WHERE INFANT PLAINTIFF WAS STRUCK BY A CAR WERE DONE IN THE SUMMER WHEN NO SCHOOL CHILDREN USED THE INTERSECTION, THEREFORE THE CITY WAS NOT ENTITLED TO SUMMARY JUDGMENT BASED ON THE DOCTRINE OF QUALIFIED IMMUNITY, THE STUDIES HAD CONCLUDED NO TRAFFIC CONTROL DEVICE WAS NECESSARY, SUPREME COURT REVERSED.

The Second Department, reversing (modifying) Supreme Court, determined the city's motion for summary judgment in this intersection pedestrian traffic accident case should not have been granted. Infant plaintiff, the eight years old, attempted to cross the street, Avenue J, to get on his school bus when he was struck by a vehicle. The city submitted evidence that studies of the intersection had been done which found that no traffic control device was required. Therefore, the city argued, and Supreme Court agreed, it was entitled to qualified immunity precluding suit: " '… [I]n the field of traffic design engineering, the [governmental body] is accorded a qualified immunity from liability arising out of a highway planning decision' ... . Under the doctrine of qualified immunity, a governmental body may not be held liable for a highway safety planning decision unless its study of the traffic condition is plainly inadequate or there is no reasonable basis for its traffic plan. Immunity will apply only 'where a duly authorized public planning body has entertained and passed on the very same question of risk as would ordinarily go to the jury' ... . Here, the City failed to sustain its prima facie burden on the issue of qualified immunity. The City established that, in response to citizen complaints, it had conducted studies of the subject intersection in 2005 and

2007 and concluded that no traffic control device on Avenue J was warranted. However, the City did not establish that those studies, which took place in the summertime, were conducted at times when the subject schools were in session. The City also failed to establish that the studies addressed the specific concern of schoolchildren crossing Avenue J to reach awaiting buses and, thus, did not establish that it had entertained and passed on the very same question of risk that is at issue in this case ...". ***Tyberg v. City of New York*, 2019 N.Y. Slip Op. 05177, Second Dept 6-26-19**

THIRD DEPARTMENT

CRIMINAL LAW.

PAROLE BOARD MAY CONSIDER SUCH FACTORS AS REMORSE AND INSIGHT INTO THE OFFENSE, EVEN THOUGH THOSE FACTORS ARE NOT LISTED IN THE CONTROLLING STATUTE.

The Third Department, affirming the denial of release on parole, noted that the parole board may properly consider remorse and insight into the offense, even though those factors are not listed in the statute: "Petitioner argues that the Board improperly questioned him regarding both what caused him to commit the crimes and why he initially failed to accept responsibility, resulting in the two young victims having to testify in court against him. '[W]hile the Board may not consider factors outside the scope of the applicable statute . . ., it can consider factors — such as remorse and insight into the offense — that are not enumerated in the statute but nonetheless relevant to an assessment of whether an inmate presents a danger to the community' ... . As the Board's questions challenged by petitioner were aimed at petitioner's remorse, his acceptance of responsibility and insight into the crimes, they were not improper ... and did not deprive petitioner of a fair hearing." ***Matter of Payne v. Stanford*, 2019 N.Y. Slip Op. 05242, Third Dept 6-27-19**

CRIMINAL LAW, APPEALS.

SUPERIOR COURT INFORMATION IS JURISDICTIONALLY DEFECTIVE FOR FAILURE TO INCLUDE THE TIME OF THE OFFENSE, ISSUE NEED NOT BE PRESERVED.

The Third Department, reversing defendant's conviction, determined the superior court information (SCI) to which defendant pled guilty was jurisdictionally defective because it did not include the time of the offense. The error survives the guilty plea and waiver of appeal and is not subject to the preservation requirement: "... [T]he People concede and we agree that the waiver of indictment is invalid and the SCI is jurisdictionally defective for failure to set forth the approximate time of the offense in accordance with CPL 195.20 ...". ***People v. Jones*, 2019 N.Y. Slip Op. 05236, Third Dept 6-27-19**

CRIMINAL LAW, APPEALS.

DEFENDANT'S STATEMENTS AT SENTENCING RAISED THE INTOXICATION DEFENSE REQUIRING FURTHER INQUIRY BY THE COURT, ISSUE CONSIDERED AS AN EXCEPTION TO THE PRESERVATION REQUIREMENT, CONVICTION BY GUILTY PLEA REVERSED.

The Third Department, reversing defendant's conviction by guilty plea, determined defendant's statements at sentencing, indicating that he was intoxicated at the time he committed the crimes (assault), required further inquiry by the court. The Third Department noted that the issue constitutes an exception to the preservation requirement: "The statements made by defendant at sentencing, which raised the possibility of an intoxication defense and called into question the intent element of assault in the first degree (see Penal Law § 120.10 [1]), were sufficient to trigger the narrow exception to the preservation requirement, thereby imposing a duty of further inquiry upon County Court 'to ensure that defendant's guilty plea was knowing and voluntary' ... . [D]efendant did not say anything during the course of the plea colloquy that suggested a possible intoxication defense ... , and defendant's statements at sentencing contradicted his sworn admissions during the plea colloquy ... . However, 'statements made by a defendant that negate an element of the crime to which a plea has been entered, raise the possibility of a [particular] defense or otherwise suggest an involuntary plea require[] the trial court to then conduct a further inquiry or give the defendant an opportunity to withdraw the plea' ... . County Court did not pursue either of those avenues here." ***People v. Skyers*, 2019 N.Y. Slip Op. 05233, Third Dept 6-27-19**

CRIMINAL LAW, ATTORNEYS, APPEALS.

PUBLIC DEFENDER'S OFFICE REPRESENTED DEFENDANT AND THE CONFIDENTIAL INFORMANT, CONVICTION REVERSED (THIRD DEPT).

The Third Department, reversing defendant's conviction, determined that the public defender's office represented both the defendant and the confidential informant (CI) creating a conflict of interest. Although the issue was apparently not preserved, the appellate court considered the issue in the interest of justice: " 'A defendant is denied the right to effective assistance of counsel guaranteed by the Sixth Amendment when, absent inquiry by the court and the informed consent of [the] defendant, defense counsel represents interests which are actually in conflict with those of [the] defendant' ... . 'Discussions of the effect of a lawyer's conflict of interest on a defendant's right to the effective assistance of counsel distinguish

between a potential conflict and an actual conflict' ... . 'An actual conflict exists if an attorney simultaneously represents clients whose interests are opposed and, in such situations, reversal is required if the defendant does not waive the actual conflict. In contrast, a potential conflict that is not waived by the accused requires reversal only if it operates on or affects the defense' ... . Here, the People concede that the Public Defender's office was simultaneously representing both defendant and the CI during the pendency of this criminal action, and defendant and the CI had opposing interests. Inasmuch as defendant never waived the conflict, reversal of the judgment is warranted ...". ***People v. Palmer*, 2019 N.Y. Slip Op. 05228, Third Dept 6-27-19**

WORKERS' COMPENSATION.

CLAIMANT HAD THE RIGHT TO CROSS-EXAMINE THE CARRIER'S CONSULTANT, WHO DETERMINED CLAIMANT SUFFERED A 40% SCHEDULE LOSS OF USE, DESPITE THE FACT CLAIMANT NEVER FILED A COMPETING MEDICAL OPINION.

The Third Department determined claimant's counsel's request to cross-examine the carrier's consultant, who concluded claimant suffered a 40% schedule loss of use, should not have been denied on the ground claimant had not filed a competing medical opinion (C-4.3 form): "12 NYCRR 300.10 (c) provides, in relevant part, that '[w]hen the employer or its carrier or special fund desires to produce for cross-examination an attending physician whose report is on file, the referee shall grant an adjournment for such purpose.' As the Board correctly noted, although a claimant's right to cross-examine a carrier's consulting physician is not expressly referenced in the cited regulation, it 'is permitted under tenets of due process' ... . In this regard, a 'claimant's request for cross-examination is not invalidated by the failure to produce a C-4.3 [form]' ... , but this right may be waived if not asserted in a timely manner ... . Notably, '[t]he only requirement is that the request for such cross-examination must be timely made at a hearing, prior to the WCLJ's ruling on the merits' ...". ***Matter of Ferguson v. Eallonardo Constr., Inc.*, 2019 N.Y. Slip Op. 05255, Third Dept 6-27-19**

FOURTH DEPARTMENT

COURT OF CLAIMS, CIVIL PROCEDURE, ENVIRONMENTAL LAW, NEGLIGENCE, TOXIC TORTS.

CLAIMANTS DID NOT ALLEGE WHEN THE ALLEGED INJURIES RELATED TO TOXIC CONTAMINATION WERE INCURRED, CLAIMS PROPERLY DISMISSED AS JURISDICTIONALLY DEFECTIVE.

The Fourth Department determined the action alleging negligence and inverse condemnation stemming from toxic contamination of the vicinity of a defunct factory was properly dismissed because the allegations did not specify when the alleged injuries occurred: "The State of New York is sovereign and has consented to be sued only in strict accordance with the requirements of the Court of Claims Act (see Court of Claims Act § 8 ...). Among those requirements is the claimant's duty to allege 'the time when [the] claim arose' ... . The requirements of section 11 (b) are jurisdictional in nature ... , and the failure to satisfy them mandates dismissal of the claim without regard to whether the State was prejudiced ... or had access to the requisite information from its own records ... . As the Court of Appeals has explained, the State is not required 'to ferret out or assemble information that section 11 (b) obligates the claimant to allege' ... . Here, although claimants adequately specified when defendant's negligent acts allegedly occurred, they failed to supply any dates or ranges of dates regarding their alleged injuries, such as when they were exposed to toxins, when they developed symptoms, when they sought treatment, or when they were diagnosed with an illness. Instead, claimants alleged only the dates of their residence in Geneva and the dates when news of the contamination became public. Claimants' allegations are insufficient to enable defendant to adequately investigate the claims in order to ascertain its liability, if any. Given claimants' failure to provide any dates regarding their alleged injuries, defendant could not realistically differentiate between those injuries attributable to toxic exposure and those injuries attributable to other causes. We therefore conclude that claimants failed to adequately plead when the claims arose for purposes of Court of Claims Act § 11 (b). Consequently, the court properly dismissed the claims as jurisdictionally defective ... ". ***Matter of Geneva Foundry Litig.*, 2019 N.Y. Slip Op. 05271, Fourth Dept 6-28-19**

CRIMINAL LAW, ATTORNEYS.

DEFENDANT WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL, DEFENSE COUNSEL RELIED ON A CONSTITUTIONAL SPEEDY TRIAL ARGUMENT WHEN DEFENDANT WAS ENTITLED TO DISMISSAL OF THE INDICTMENT PURSUANT TO THE SPEEDY TRIAL STATUTE.

The Fourth Department, vacating defendant's guilty plea, determined defense counsel was ineffective because defendant was entitled to dismissal of the indictment pursuant to the speedy trial statute. Defense counsel was aware of the correct dates, but only argued defendant was deprived of his constitutional right to a speedy trial and did not correct County Court's erroneous time calculation: "Although defense counsel set forth the pertinent dates of the commencement of the action and defendant's arraignment, at which time the People announced their readiness for trial (see CPL 30.30 [1] [a]), he failed to argue that the relevant period exceeded six months and was a clear violation of defendant's statutory speedy trial rights. Instead, defense counsel focused on the constitutional speedy trial claim. At oral argument of the motion, the court

addressed the statutory speedy trial claim, set forth the pertinent dates, and then stated that, according to its calculation, 'without specifically crunching the numbers, but by estimates, that is a period of five months and seven days.' After addressing the circumstances of the superceding indictment and the constitutional speedy trial claim, the court asked defense counsel if there were 'any fact[s] that would be pertinent that [it] did not recite in discussing the matter.' Instead of pointing out the court's erroneous calculation of the statutory speedy trial period, defense counsel stated, 'I think my motion was essentially based on the 30.20 Constitutional speedy trial . . .' ... . Here, although, as noted, defense counsel made a speedy trial claim, we conclude that there was no strategic or legitimate explanation for defense counsel's failure to alert the court that it had inaccurately calculated that only five months and seven days had passed between the commencement of the action and the People's statement of readiness and that, instead, more than six months had elapsed ...". ***People v. Bloodworth*, 2019 N.Y. Slip Op. 05284, Fourth Dept 6-28-19**

CRIMINAL LAW, ATTORNEYS, APPEALS, CONTRACT LAW.

RESTITUTION SHOULD NOT HAVE BEEN ORDERED BECAUSE IT WAS NOT PART OF THE PLEA AGREEMENT, THE ARGUMENT SURVIVES THE GUILTY PLEA AND THE WAIVER OF APPEAL; DEFENDANT'S CONTENTION HE WAS DEPRIVED OF HIS RIGHT TO COUNSEL DID NOT SURVIVE THE WAIVER OF APPEAL BECAUSE DEFENDANT DID NOT ASSERT THE DEPRIVATION INFECTED THE PLEA AGREEMENT OR THE VOLUNTARINESS OF THE PLEA.

The Fourth Department determined restitution should not have been ordered because it was not part of the plea agreement. The court noted that defendant's argument he was deprived of his right to counsel with respect to his decision to testify before the grand jury was not forfeited by his guilty plea, but was encompassed by his waiver of appeal. The Fourth Department declined to follow a Third Department decision which held a deprivation-of-counsel argument survives a waiver of appeal irrespective of whether the deprivation infected the guilty plea. Here defendant did not assert that the alleged deprivation of his right to counsel infected the plea bargaining process or tainted the voluntariness of the plea: "Defendant's further contention that County Court erred in ordering him to pay restitution because restitution was not part of the plea agreement survives both his guilty plea and his unchallenged waiver of the right to appeal ... . Moreover, contrary to the People's contention, defendant preserved his contention for appellate review by objecting to the imposition of restitution on the same ground he now advances ... . On the merits, it is undisputed that the plea bargain did not include restitution, and the court therefore erred in awarding restitution without affording defendant the opportunity to withdraw his plea ...". ***People v. Richardson*, 2019 N.Y. Slip Op. 05310, Second Dept 6-28-19**

CRIMINAL LAW, EVIDENCE.

STATEMENTS MADE BY DEFENDANT DURING A CONTROLLED PHONE CONVERSATION WITH THE MOTHER OF THE ALLEGED CHILD VICTIM SHOULD NOT HAVE BEEN SUPPRESSED; STATEMENTS MADE BY DEFENDANT IN A CLOSED ROOM AT THE SHERIFF'S OFFICE, WHERE DEFENDANT WAS INTERROGATED AND CONFRONTED WITH HIS INCULPATORY STATEMENTS, SHOULD NOT HAVE BEEN SUPPRESSED; ALTHOUGH DEFENDANT WAS INTERROGATED, HE WAS NOT IN CUSTODY.

The Fourth Department, on an appeal by the People in this child sexual contact case, determined defendant's statement, made during a controlled phone conversation with the mother of the child, should not have been suppressed. The Fourth Department further found that statements made by the defendant during interrogation at the sheriff's office should not have been suppressed because the defendant was not in custody at the time of the interrogation: "... [W]e conclude that the mother 'did not make a threat [or a promise] that would create a substantial risk that defendant might falsely incriminate himself'... . We further conclude that the controlled call did not constitute an unconstitutionally coercive police tactic; nor were the tactics employed by the mother during the call unconstitutionally coercive (see generally CPL 60.45 [2] [b] [ii] ...), and '[d]eceptive police stratagems in securing a statement need not result in involuntariness without some showing that the deception was so fundamentally unfair as to deny due process or that a promise or threat was made that could induce a false confession' ... . [A]lthough defendant's interview occurred at the Sheriff's Office, that fact 'does not necessarily mean that he is to be considered in custody' ... . Defendant voluntarily agreed to meet the investigators at the Sheriff's Office and arranged for his own transportation to and from the interview ... . When defendant arrived, the investigators informed him that he was free to leave ... . In fact, defendant left the Sheriff's Office at the conclusion of the interview despite making inculpatory statements. Further, defendant was not restrained during the interview, and the door to the interview room was unlocked ... . Although the investigators confronted defendant with the statements that he made during the controlled call, the fact that the questioning may have turned accusatory in nature did not render the interview custodial given the other circumstances present in this case ...". ***People v. Morris*, 2019 N.Y. Slip Op. 05264, Fourth Dept 6-28-19**

CRIMINAL LAW, EVIDENCE.

IN THIS CONSTRUCTIVE POSSESSION CASE, THE INVESTIGATOR'S ASKING DEFENDANT WHERE HE RESIDED WAS DESIGNED TO ELICIT AN INCRIMINATING RESPONSE, THEREFORE DEFENDANT'S RESPONSE WAS NOT PEDIGREE INFORMATION AND A CPL 710.30 NOTICE WAS REQUIRED, ADMISSION OF THE STATEMENT WAS HARMLESS ERROR HOWEVER.

The Fourth Department determined the defendant's answer to the investigator's asking where defendant resided, for which no CPL § 710.30 notice was provided, was not pedigree information and should not have been admitted in evidence. The drug-possession charge was founded on constructive possession. Therefore asking defendant where he resided was designed to elicit an incriminating response. The error was deemed harmless however: "Defendant also contends that the court erred in admitting in evidence an oral statement of defendant regarding his address for which no CPL 710.30 notice had been given. The statement at issue was defendant's response to a question about where he resided, and it was made to one of the principal investigators, who had executed a search warrant at the home of defendant's parents. As the People correctly concede, defendant's statement regarding his address was not pedigree information for which no CPL 710.30 notice was required ... because, under the circumstances of this case, the investigator's question was likely to elicit an incriminating admission and had a 'necessary connection to an essential element of [the possessory] crime[] charged' ... . The court thus erred in admitting the statement in evidence in the absence of a CPL 710.30 notice ...". ***People v. Tucker*, 2019 N.Y. Slip Op. 05274, Fourth Dept 6-28-19**

ENVIRONMENTAL LAW, MUNICIPAL LAW, REAL PROPERTY LAW.

QUESTION OF FACT WHETHER TOWN EASEMENTS ARE SUBJECT TO THE PUBLIC TRUST DOCTRINE SUCH THAT THE LAND CANNOT BE CONVEYED TO A DEVELOPER WITHOUT LEGISLATIVE APPROVAL; OPEN MEETINGS LAW WAS NOT VIOLATED BY POSTING RELEVANT DOCUMENTS ONLY SEVEN HOURS BEFORE THE TOWN MEETING.

The Fourth Department, reversing Supreme Court, determined there was a question of fact whether the public trust doctrine applied to town easements such that the easements could not be conveyed to a developer without legislative approval. The court further held that the Open Meetings Law was not violated by posting relevant documents only seven hours before the town meeting: "... '[A] parcel of property may become a park by express provisions in a deed . . . or by implied acts, such as continued use [by the municipality] [*2]of the parcel as a park' ... . 'A party seeking to establish . . . an implied dedication and thereby successfully challenge the alienation of the land must show that (1) [t]he acts and declarations of the land owner indicating the intent to dedicate his [or her] land to the public use [are] unmistakable in their purpose and decisive in their character to have the effect of a dedication and (2) that the public has accepted the land as dedicated to a public use' ... . [P]etitioner alleged in its petition-complaint that the Town Easements were part of the 'Auburn Trail linear park' and that they were parkland for purposes of the public trust doctrine. In support of that part of each motion seeking to dismiss the second cause of action under CPLR 3211 (a) (1), respondents submitted the conveyances that created the Town Easements. Inasmuch as those instruments provided that the Town Easements were to be used as a 'pedestrian pathway' for 'public use' and required the Town to restore the easement property to "a park like condition" after construction of the pedestrian pathway, respondents' own documentary evidence creates issues of fact whether there was an express or implied dedication of the Town Easements subject to the public trust doctrine. Thus, respondents failed to meet their burden of submitting documentary evidence that conclusively refuted petitioner's allegations ... . In addition, deeming the material allegations of the petition-complaint to be true, we conclude that 'the allegations in the second cause of action presented a justiciable controversy sufficient to invoke the court's power to render a declaratory judgment,' and thus respondents were not entitled to dismissal of that cause of action pursuant to CPLR 3211 (a) (7) ...". ***Matter of Clover/Allen's Cr. Neighborhood Assn. LLC v. M&F, LLC*, 2019 N.Y. Slip Op. 05280, Fourth Dept 6-28-19**

FAMILY LAW, JUDGES.

DENIAL OF MOTHER'S REQUEST FOR AN ADJOURNMENT WAS AN ABUSE OF DISCRETION.

The Fourth Department, reversing Family Court, determined the court abused its discretion when it failed to grant mother's request for an adjournment: "The record demonstrates that the mother presented a valid and specific reason for her inability to attend the hearing well before the hearing date and supported her request for an adjournment, which was her first, with a letter from her inpatient provider. Further, although the mother's counsel appeared on her behalf at the hearing, the record supports the mother's contention that she was prejudiced by her inability to provide testimony at the hearing. The court denied the adjournment based on its general desire to effect a quick and efficient resolution of this matter. There was, however, no evidence that the child would have been harmed by an adjournment." ***Matter of Sullivan v. Sullivan*, 2019 N.Y. Slip Op. 05289, Fourth Dept 6-28-19**

PERSONAL INJURY, EMPLOYMENT LAW, PRIMA FACIE TORT, INSURANCE LAW.

NEGLIGENT HIRING AND SUPERVISION AND PRIMA FACIE TORT CAUSES OF ACTION SHOULD HAVE BEEN DISMISSED, NO ALLEGATION EMPLOYEES WERE ACTING OUTSIDE THE SCOPE OF EMPLOYMENT, NO ALLEGATION MALICE WAS DEFENDANT'S SOLE MOTIVATION.

The Fourth Department determined plaintiff's negligent hiring and supervision and prima facie tort causes of action should have been dismissed. The lawsuit alleged defendant insurer failed to pay claims for medical care submitted by plaintiff: " 'An employer may be liable for a claim of negligent hiring or supervision if an employee commits an independent act of negligence outside the scope of employment and the employer was aware of, or reasonably should have foreseen, the employee's propensity to commit such an act' ... . Here, plaintiff's cause of action for negligent hiring, supervision or retention is based on the factual allegations that defendant's employees denied or delayed the payment of claims to plaintiff and sent repetitive verification demands, and that defendant was aware of what its employees were doing and continued to employ them. Plaintiff, however, failed to allege that those acts were committed outside the scope of the employees' employment. Plaintiff also failed to allege how the employees' alleged acts of denying claims and sending verification demands constituted acts of negligence. ... 'There can be no recovery [for prima facie tort] unless a disinterested malevolence' to injure [the] plaintiff constitutes the sole motivation for defendant['s] otherwise lawful act' ... . Here, plaintiff alleged that defendant acted in 'bad faith' and intended harm by repeatedly sending plaintiff duplicitous requests for verification forms to be completed. Those conclusory statements in the amended complaint, however, fail to allege 'a malicious [act] unmixed with any other and exclusively directed to [the] injury and damage of another' ... . Furthermore, it is '[a] critical element of the cause of action . . . that plaintiff suffered specific and measurable loss' ... , which 'must be alleged with sufficient particularity to identify actual losses and be related causally to the alleged tortious acts' ... , but the injuries alleged by plaintiff are 'couched in broad and conclusory terms' ... , and do not constitute 'specific and measurable loss' stated with particularity ...". ***Walden Bailey Chiropractic, P.C. v. Geico Cas. Co.*, 2019 N.Y. Slip Op. 05267, Fourth Dept 6-28-19**

PERSONAL INJURY, MUNICIPAL LAW, EMPLOYMENT LAW.

THE COUNTY IS DISTINCT FROM THE SHERIFF, AND THE SHERIFF IS DISTINCT FROM THE SHERIFF'S DEPARTMENT, ONLY THE SHERIFF IS RESPONSIBLE FOR THE HIRING AND TRAINING OF SHERIFF'S DEPUTIES, THEREFORE THE INJURED INMATE'S ACTION AGAINST THE COUNTY FOR NEGLIGENT HIRING, TRAINING, SUPERVISION AND RETENTION OF SHERIFF'S DEPUTIES WAS PROPERLY DISMISSED.

The Fourth Department determined the action against the county stemming from the injuries and death suffered by plaintiff's decedent in the Erie County Holding Center was properly dismissed. The court held that the county is separate from the sheriff's department, which in turn is separate from the sheriff. The county is not responsible for the hiring and training of sheriff's deputies, which is only the sheriff's responsibility. Therefore the negligent hiring, training, supervision and retention cause of action against the county was not viable: "The duty to supervise and train Sheriff's deputies rests with the Sheriff (... County Law § 652). ... [T]he County has no similar duty ... . Defendants in this case therefore met their initial burden on the motion by establishing that the County was not liable under the theory stated in plaintiff's fourth cause of action. ... We reject plaintiff's ... contention that the County's representation that the Erie County Sheriff's Department lacked a separate legal identity from the County estops the County from contending that it is not the employer of the Sheriff's deputies. The County correctly stated that 'the Sheriff's Department does not have a legal identity separate from the County . . . and thus an action against the Sheriff's Department is, in effect, an action against the County itself'... . The Sheriff, however, is distinct from both the County and the Sheriff's Department ... and thus the County's representation has no bearing on whether the Sheriff, as opposed to the County, bears the responsibility of hiring, training, and supervising the Sheriff's deputies." ***Metcalf v. County of Erie*, 2019 N.Y. Slip Op. 05265, Fourth Dept 6-28-19**

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