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FIRST DEPARTMENT

CRIMINAL LAW, EVIDENCE.

HANDGUN FOUND IN A COAT IN A CLOSET BY A PAROLE OFFICER WITH A PAROLE ABSCONDER WARRANT SHOULD NOT HAVE BEEN SUPPRESSED.

The First Department, reversing the suppression court in an appeal by the People, determined the handgun found during a search of defendant's bedroom pursuant to a parole warrant should not have been suppressed. The parole officer testified she was searching a closet to see if defendant was hiding there when she felt a handgun in the pocket of a jacket she had seen defendant wearing: "In Huntley, the Court of Appeals 'relied on the dual nature of a parole officer's duties and a parolee's reduced expectation of privacy to hold that a parolee's constitutional right to be secure against unreasonable searches and seizures is not violated when a parole officer conducts a warrantless search that is rationally and reasonably related to the performance of the parole officer's duties' (... see Huntley, 43 NY2d at 179, 181 ...). 'It would not be enough necessarily that there was some rational connection; the particular conduct must also have been substantially related to the performance of duty in the particular circumstances' ... . Applying this standard, we find that Parole Officer Williams, whose testimony the hearing court credited, acted lawfully in retrieving the firearm from defendant's jacket pocket. While executing a valid parole warrant, and in the course of searching for defendant pursuant to that warrant, Williams inadvertently felt an object, that both she and her supervisor believed to be a gun, in the jacket pocket. Because parolees are not permitted to possess firearms, Williams's discovery meant that defendant was in further violation of the conditions of his supervised release. Thus, the minimally invasive step of retrieving the gun from the pocket was 'rationally and reasonably related to the performance of [her] duty as [defendant's] parole officer' ...". ***People v. Jennings*, 2019 N.Y. Slip Op. 05838, First Dept 7-30-19**

EMPLOYMENT LAW, LABOR LAW, CIVIL PROCEDURE.

COMMISSIONER OF LABOR AND INDUSTRIAL BOARD OF APPEALS COULD NOT PURSUE STATE WAGE CLAIMS ON BEHALF OF CLAIMANTS WHO ARE SUBJECT TO A CLASS ACTION SETTLEMENT IN FEDERAL DISTRICT COURT IN WHICH THE STATE WAGE CLAIMS WERE RELEASED.

The First Department, in a full-fledged opinion by Justice Oing, determined that the Commissioner of Labor and the Industrial Board of Appeals (IBA) were bound by the federal district court's release in a class action alleging failure to pay minimum wages, failure to pay overtime wages and unlawful deductions. The IBA had awarded two members of the class state wage claims together with interest and penalties: "Procedurally, IBA erred in entertaining this issue. In the final approval order, the District Court clearly and unmistakably retained exclusive and continuing subject matter jurisdiction of the Stewart class action 'for the purposes of supervising the implementation, effectuation, enforcement, construction, administration and interpretation of the Settlement Agreement and this Judgment.' Undoubtedly, the District Court 'has the power to enforce an ongoing order against relitigation so as to protect the integrity of a complex class settlement over which it retained jurisdiction' ... . * * * Because we have determined that claimants have released their dual wage claims, the focus now necessarily concerns the concept of privity, and whether it exists between claimants and respondents [Commissioner of Labor, et al]. We find that the holding in Applied Card Sys., Inc. (11 NY3d at 124) is dispositive of this issue. The Applied Card Court addressed whether the state Attorney General was precluded under the doctrine of res judicata from pursuing on the class members' behalf their restitution claims released in an underlying class action settlement. The Court held that because the Attorney General was pursuing claims identical to the ones that had been released that fact alone established privity ... . The facts herein are virtually indistinguishable from Applied Card. Here, respondents, on behalf of claimants, seek to pursue their released dual wage claims. As such, privity has been established between claimants and respondents." ***Matter of Silvar v. Commissioner of Labor of the State of N.Y.*, 2019 N.Y. Slip Op. 05841, First Dept 7-30-19**

SECOND DEPARTMENT

BANKRUPTCY, CIVIL PROCEDURE, PERSONAL INJURY.

FAILURE TO DISCLOSE THE SLIP AND FALL ACTION AS AN ASSET IN A BANKRUPTCY PROCEEDING DEPRIVED PLAINTIFF OF THE LEGAL CAPACITY TO SUE.

The Second Department determined plaintiff did not have the legal capacity to sue in this slip and fall case because the action was not listed as an asset in a prior bankruptcy proceeding: " 'The failure of a party to disclose a cause of action as an asset in a prior bankruptcy proceeding, which the party knew or should have known existed at the time of that proceeding, deprives him or her of the legal capacity to sue subsequently on that cause of action' ... . Here, it is undisputed that the plaintiff did not disclose, in the bankruptcy petition that she filed in October 2015, the existence of the cause of action to recover damages for personal injuries that she had previously asserted against the defendant. The defendant established, prima facie, that when the petition was filed, the plaintiff knew or should have known of the existence of her cause of action, and the plaintiff failed to raise a triable issue of fact in opposition to that prima facie showing ...". ***Jean-Paul v. 67-30 Dartmouth St. Owners Corp.*, 2019 N.Y. Slip Op. 05965, Second Dept 7-31-19**

CRIMINAL LAW.

SUPREME COURT SHOULD NOT HAVE GRANTED DEFENDANT'S MOTION TO DISMISS THE INDICTMENT IN THE FURTHERANCE OF JUSTICE WITHOUT HOLDING A HEARING BECAUSE ESSENTIAL FACTS WERE IN DISPUTE.

The Second Department, reversing Supreme Court, in an appeal by the People, determined defendant's motion to dismiss an indictment in the furtherance of justice should not have been granted without a hearing because the facts were in dispute. The Second Department also noted that the defendant had demonstrated good cause for bringing the motion after the 45-day deadline: "... [T]he Supreme Court should not have decided the motion without conducting a hearing. CPL 210.40 authorizes the court to dismiss an indictment or any count thereof in furtherance of justice, as a matter of judicial discretion, when, after considering certain enumerated factors, the court finds 'the existence of some compelling factor, consideration or circumstance clearly demonstrating that conviction or prosecution of the defendant upon such indictment or count would constitute or result in injustice'... . In deciding such a motion, 'a court must strike a sensitive balance between the individual and the State' interests to determine whether the ends of justice are served by dismissal of the indictment' ... . 'Such a value judgment hinge[s] on the production of facts in the possession of the prosecution and the defendant'... . CPL 210.45 requires a hearing when the facts essential to the determination of a motion made pursuant to CPL 210.40 are in dispute ... . Here, since the essential facts were in dispute, the court should have conducted a hearing before making its findings of fact ...". ***People v. Burke*, 2019 N.Y. Slip Op. 05991, Second Dept 7-31-19**

CRIMINAL LAW.

ALTHOUGH THE JURY WAS PROPERLY INSTRUCTED TO ACQUIT ON ALL COUNTS IF THE JUSTIFICATION DEFENSE APPLIED, THE VERDICT SHEET DID NOT MENTION THE JUSTIFICATION DEFENSE WHICH MAY HAVE GIVEN THE JURY THE IMPRESSION THE JUSTIFICATION DEFENSE SHOULD BE CONSIDERED SEPARATELY FOR EACH COUNT, CONVICTION REVERSED.

The Second Department, reversing defendant's conviction, determined that the failure to include the justification defense on the verdict sheet may have led the jurors to believe they had to reconsider the justification defense for each count. The judge had correctly instructed the jurors to acquit on all counts if the justification defense applied, but the omission from the verdict sheet was enough to call the verdict into question: "Supreme Court properly instructed the jurors to consider justification as an element of each count submitted for their consideration. The court also properly instructed the jurors that they must find the defendant not guilty of all counts if they found that the People failed to disprove the defendant's justification defense. However, the verdict sheet did not mention justification, and instructed the jurors to 'continue to' the following count if they found the defendant not guilty of count one, two, three, or four. Therefore, the Supreme Court's instructions, taken together as a whole, may have led the jurors to conclude that deliberation on each crime required reconsideration of the justification defense, even if they had already acquitted the defendant of the previous count based on justification ... . There is now no way of knowing whether the jurors acquitted the defendant of the greater counts on the ground of justification so as to mandate acquittal on the lesser counts ...". ***People v. Smith*, 2019 N.Y. Slip Op. 06004, Second Dept 7-31-19**

CRIMINAL LAW, EVIDENCE.

POLICE OFFICERS' TESTIMONY BASED UPON DEBRIEFING GANG MEMBERS WAS INADMISSIBLE TESTIMONIAL HEARSAY AND THE POLICE OFFICERS, WHO WERE QUALIFIED AS GANG EXPERTS, ACTED AS IMPERMISSIBLE SUMMATION WITNESSES, NEW TRIAL ORDERED.

The Second Department, reversing defendant's conviction, determined that the testimony of two police officers (qualified by the court as gang experts) about information gleaned from interviewing gang members was testimonial hearsay, in violation of Crawford, and the police experts acted as summation witnesses, in violation of Iona: "During the trial, the Su-

preme Court declared Detective Adam Georg an expert 'in the hierarchy, practices, [and] languages of the S.N.O.W. Gang and other gangs.' Similarly, the court declared Lieutenant Robert Bracero an expert 'in the history, hierarchy, practices and language of the S.N.O.W. Gang and rival gangs.' Georg testified that his knowledge of the S.N.O.W. Gang was derived from, among other things, approximately 70 to 80 debriefings of S.N.O.W. Gang members, many of whom had been arrested and were in custody at the police station or in jail. Similarly, Bracero testified that he debriefed approximately 50 S.N.O.W. Gang members after their arrests. * * * ... [T]he defendant contends that Georg's and Bracero's testimony violated Crawford v. Washington (541 US 36) by permitting the introduction into evidence of out-of-court testimonial statements made by absent witnesses who were never subjected to cross examination ... , and that Georg's testimony also ran afoul of the proscription against police experts acting as summation witnesses, in violation of People v. Inoa (25 NY3d 466, 474-475) ... . [F]or the reasons set forth in our decision and order on appeal by one of the codefendants (People v. Jones, 166 AD3d 803), the testimony of Georg and Bracero violated Crawford and Inoa. Since the evidence of the defendant's guilt, without reference to the errors, was far from overwhelming, these errors were not harmless ...". ***People v. Campbell*, 2019 N.Y. Slip Op. 05992, Second Dept 7-31-19**

CRIMINAL LAW, EVIDENCE, APPEALS.

THE PEOPLE DID NOT PROVE DEFENDANT POSSESSED A RAZOR BLADE PARTIALLY WRAPPED IN TAPE WITH THE INTENT TO USE IT UNLAWFULLY AGAINST ANOTHER, THE CONVICTION WAS AGAINST THE WEIGHT OF THE EVIDENCE.

The Second Department, reversing defendant's conviction as against the weight of the evidence, determined the People did not prove that defendant possessed a razor blade partially wrapped in tape with the intent to use it unlawfully against another: "Penal Law § 265.15(4) provides, in relevant part, that '[t]he possession by any person of any . . . weapon, instrument, appliance or substance designed, made or adapted for use primarily as a weapon, is presumptive evidence of intent to use the same unlawfully against another.' 'The presumption of unlawful intent under Penal Law § 265.15(4), like all statutory presumptions in New York, is a permissive presumption, meaning that [it] allows, but does not require, the trier of fact to accept the presumed fact, and does not shift to the defendant the burden of proof' ... . 'Before the presumption may apply, the People must establish beyond a reasonable doubt the predicate fact or facts the statute requires be proved' ... . 'If the People succeed in this endeavor, they are entitled to rely on the presumption, which form[s] part of the support for [their] prima facie case' against the defendant' ... . 'The presumption may be rebutted by any evidence in the case; that is, evidence presented by the defendant or the People' ... 'Evidence rebutting the presumption will not negate the existence of a prima facie case; rather it presents an alternate set of facts, or inferences from facts, to the jury. The jury then has the right to choose between the two versions' ... . [T]he People failed to establish beyond a reasonable doubt that the razor blade recovered from the defendant was 'designed, made or adapted for use primarily as a weapon' ... . There was no testimony by the detectives indicating that they knew based on their experience that the primary use of this type of instrument, by virtue of being wrapped in black tape, was as a weapon, or that they attempted to ascertain from the defendant the manner in which he utilized the blade ... . Furthermore, there was no evidence from which it could be inferred that the defendant considered the instrument to be a weapon ...". ***People v. Rodgers*, 2019 N.Y. Slip Op. 06002, Second Dept 7-31-19**

EDUCATION-SCHOOL LAW, PERSONAL INJURY.

DAY CARE CENTER'S MOTION FOR SUMMARY JUDGMENT IN THIS NEGLIGENT SUPERVISION CASE PROPERLY DENIED.

The Second Department determined defendant day care center's motion for summary judgment in this negligent supervision case was properly denied. The infant plaintiff allegedly was injured while in the care of the day care center. The facts were not described: "The defendant, as a provider of day care services, was under a duty to adequately supervise the children in its charge and may be held liable for foreseeable injuries proximately related to the absence of adequate supervision ... . 'A plaintiff is not required to exclude every other possible cause, but need only offer evidence from which proximate cause may be reasonably inferred. [The p]laintiff's burden of proof on this issue is satisfied if the possibility of another explanation for the event is sufficiently remote or technical to enable the jury to reach its verdict based not upon speculation, but upon the logical inferences to be drawn from the evidence; ... . Here, the defendant failed to establish, prima facie, that the infant plaintiff's injuries were not proximately caused by its negligence. The defendant's submissions failed to negate a reasonable inference that the injury occurred at the defendant's day care center and that the defendant failed to provide adequate supervision ...". ***A.D.G. v. Children's Ark Daycare Ctr., Inc.*, 2019 N.Y. Slip Op. 05959, Second Dept 7-31-19**

FAMILY LAW, INDIAN LAW.

MOTHER DID NOT HAVE STANDING TO BRING AN ACTION TO VACATE THE ADOPTION OF HER CHILD BY HER FORMER HUSBAND PURSUANT TO THE INDIAN CHILD WELFARE ACT (ICWA) BECAUSE THE ACT ONLY APPLIES TO CHILDREN REMOVED FROM A PARENT'S CUSTODY.

The Second Department determined mother did not have standing to bring an action pursuant to the Indian Child Welfare Act (ICWA) to vacate an order of adoption in favor of her former husband. Mother alleged the adoption was not accom-

plished in compliance with the ICWA. The ICWA only applies to a parent from whose custody the child was removed and the child had not been removed from mother's custody: "... [A]lthough the adoption proceeding involved the voluntary termination of the birth father's parental rights to the subject child, the plain language of both 25 USC § 1914 and 25 CFR 23.137(a) is clear that only the child, the parent or Indian custodian from whose custody the child has been removed, and the Indian child's tribe have standing to allege a violation of sections 1911, 1912, or 1913 of the ICWA . Since the mother does not fall in... to any of those categories, she lacked standing to allege a violation of sections 1911, 1912, or 1913 of the ICWA ... . '[T]he language of [section] 1914 ... limits standing to challenge state-law terminations of parental right to parents from whose custody such child was removed' ...". ***Matter of Connor (Mariann D.--Jacob D.)*, 2019 N.Y. Slip Op. 05979, Second Dept 7-31-19**

FORECLOSURE, CIVIL PROCEDURE.

FORECLOSURE ACTION ABANDONED, BANK FAILED TO INITIATE DEFAULT JUDGMENT PROCEEDINGS WITHIN ONE YEAR.

The Second Department, reversing Supreme Court, determined that plaintiff bank had abandoned the foreclosure action by failure to move for a default judgment within one year. The bank's participation in mandatory settlement conferences did not constitute the initiation of an action for a default judgment: "CPLR 3215(c) provides, in part, that if the plaintiff fails to take proceedings for the entry of judgment within one year after the defendant's default, 'the court shall not enter judgment but shall dismiss the complaint as abandoned, without costs, upon its own initiative or on motion' ... . 'The language of CPLR 3215(c) is not, in the first instance, discretionary, but mandatory, inasmuch as courts shall' dismiss claims ... for which default judgments are not sought within the requisite one-year period, as those claims are then deemed abandoned' ... . However, the failure to timely seek a default judgment may be excused if 'sufficient cause is shown why the complaint should not be dismissed' ... . To establish sufficient cause as required by CPLR 3215(c), a plaintiff must proffer a reasonable excuse for the delay in timely moving for a default judgment and demonstrate that it has a potentially meritorious cause of action ... . [A]fter this action was released from the mandatory foreclosure settlement conference part in July 2016, the plaintiff was authorized to proceed with the prosecution of this action. However, despite the fact that the appellants failed to answer or otherwise appear in the action after being served with process, the plaintiff took no steps to initiate proceedings for the entry of a default judgment against the appellants. The plaintiff's participation in the mandatory foreclosure settlement part conferences did not constitute the initiation of proceedings for the entry of a default judgment. Moreover, more than one year passed from the time that the plaintiff was authorized to resume prosecution of this action prior to the appellants moving in October 2017 to dismiss the complaint as abandoned .... In light of the plaintiff's failure to meet its burden to show sufficient cause why the complaint should not be dismissed as abandoned, it is not necessary to address the issue of whether the plaintiff demonstrated that it had a potentially meritorious cause of action ...". ***HSBC Bank USA, N.A. v. Slone*, 2019 N.Y. Slip Op. 05963, Second Dept 7-31-19**

FORECLOSURE, CIVIL PROCEDURE.

THE BANK'S MOTION TO VACATE A DEFAULT JUDGMENT IN THIS FORECLOSURE ACTION SHOULD NOT HAVE BEEN GRANTED BECAUSE OF THE BANK'S UNEXCUSED FAILURE TO APPEAR AT A SCHEDULED CONFERENCE IN VIOLATION OF 22 N.Y.C.R.R. § 202.27(c).

The Second Department, reversing Supreme Court, determined plaintiff bank's unexcused failure to appear at a scheduled conference required denial of the bank's motion to vacate a default judgment: "Although CPLR 3215(c) was not an appropriate ground upon which to dismiss the complaint because the plaintiff initiated proceedings for the entry of a judgment by moving for an order of reference within one year of the defendant's default ..., dismissal of the complaint was appropriate pursuant to 22 NYCRR 202.27(c) since the plaintiff failed to appear for the scheduled October 2012 conference. A plaintiff seeking to vacate a default in appearing at a conference is required to demonstrate both a reasonable excuse for its default and a potentially meritorious cause of action (see CPLR 5015[a][1] ...). Although '[t]he determination of whether an excuse is reasonable is committed to the sound discretion of the motion court' ... , the defaulting party must submit evidence in admissible form establishing both a reasonable excuse and a potentially meritorious cause of action or defense ... . Here, the plaintiff alleged only that the failure of its two prior attorneys to timely file the attorney affirmation in accordance with the January 2011 order caused the delay in prosecuting this action, and failed to proffer any evidentiary support therefor or any excuse for its failure to appear at the October 2012 conference. Moreover, the record reflects that the plaintiff did not take any action for almost four years to cure its default after the action was marked off the calendar. Since the plaintiff failed to demonstrate a reasonable excuse for its default ... , we need not reach the issue of whether it had asserted a potentially meritorious cause of action ...". ***Wells Fargo Bank, N.A. v. McClintock*, 2019 N.Y. Slip Op. 06015, Second Dept 7-31-19**

FORECLOSURE, CIVIL PROCEDURE, EVIDENCE, MUNICIPAL LAW, REAL PROPERTY LAW.

PLAINTIFF BANK WAS ENTITLED TO AN ORDER REQUIRING THE COUNTY COURT TO RECORD A MORTGAGE, THE ORIGINAL OF WHICH HAD ALLEGEDLY BEEN LOST; AN ATTORNEY AFFIDAVIT IS AN APPROPRIATE VEHICLE FOR THE SUBMISSION OF DOCUMENTS IN ADMISSIBLE FORM.

The Second Department, reversing Supreme Court, determined plaintiff bank was entitled to an order requiring the county clerk to accept a copy of a mortgage for recording (the original allegedly had been lost and was never recorded). The Second Department further determined that an attorney affidavit was an appropriate vehicle for the submission of the documents to be recorded, which were in admissible form: "The plaintiff established its prima facie entitlement to judgment as a matter of law on the first cause of action, which sought an order directing the Suffolk County Clerk to accept a copy of the mortgage for recording. The County Clerk has a statutory duty that is ministerial in nature to record a written conveyance if it is duly acknowledged and accompanied by the proper fee (see Real Property Law §§ 290[3]; 291; County Law § 525[1]). 'Accordingly, the Clerk does not have the authority to refuse to record a conveyance which satisfies the narrowly-drawn prerequisites set forth in the recording statute' ... . Here, the copy of the mortgage submitted on the motion, which is notarized, was subject to recording ... . Contrary to the Supreme Court's determination, the complaint adequately stated a cause of action for this relief ... , and the plaintiff's failure to submit an affidavit of someone with personal knowledge of the facts was not fatal to the motion. The affidavit or affirmation of an attorney, even if he or she has no personal knowledge of the facts, may serve as the vehicle for the submission of acceptable attachments which provide evidentiary proof in admissible form, e.g., documents and transcripts ... ". ***JPMorgan Chase Bank, N.A. v. Wright*, 2019 N.Y. Slip Op. 05966, Second Dept 7-31-19**

FORECLOSURE, EVIDENCE, CIVIL PROCEDURE.

PLAINTIFF DID NOT DEMONSTRATE COMPLIANCE WITH THE NOTICE/MAILING REQUIREMENTS IN THIS FORECLOSURE ACTION AND THEREFORE DID NOT DEMONSTRATE PERSONAL JURISDICTION OVER DEFENDANTS, THE REFEREE'S REPORT SHOULD NOT HAVE BEEN CONFIRMED.

The Second Department, reversing Supreme Court, determined the referee's report in this foreclosure action should not have been confirmed because plaintiff did not demonstrate compliance with the notice requirements: "... [T]he Supreme Court should not have confirmed the Referee's report. The plaintiff failed to submit any evidence at the hearing of compliance with the mailing requirement of CPLR 308(2) and, thus, failed to demonstrate that personal jurisdiction had been obtained over the defendants ...". ***Federal Natl. Mtge. Assn. v. Puretz*, 2019 N.Y. Slip Op. 05958, Second Dept 7-31-19**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

CONFLICTING EVIDENCE WHETHER THE PLYWOOD WHICH FLEXED CAUSING PLAINTIFF TO FALL WAS OVER A THREE-FOOT DEEP HOLE OR TRENCH; LABOR LAW §§ 240(1) AND 241(6) CAUSES OF ACTION SHOULD NOT HAVE BEEN DISMISSED.

The Second Department, reversing (modifying) Supreme Court determined the Labor Law §§ 240(1) and 241(6) causes of action should not have been dismissed. There was conflicting evidence whether the plywood which flexed causing plaintiff to fall was over a three-foot deep hole or trench: "... [T]here was conflicting deposition testimony regarding whether the plywood was, under the circumstances, the functional equivalent of a scaffold meant to prevent the plaintiff from falling into a three-foot-deep hole or trench ... . [T]he regulation which plaintiff alleges was violated concerns structural runways, ramps, and platforms (see 12 NYCRR 23-1.22[b]), which is a regulation that sets forth specific standards of conduct sufficient to support a Labor Law § 241(6) cause of action ... . Similar to the plaintiff's Labor Law § 240(1) cause of action, the conflicting deposition testimony ... raised a triable issue of fact as to whether there was insufficient bracing under the plywood ...". ***Davies v. Simon Prop. Group, Inc.*, 2019 N.Y. Slip Op. 05955, Fourth Dept 7-31-19**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

CONFLICTING TESTIMONY ABOUT WHETHER A CO-WORKER WAS HOLDING THE LADDER PLAINTIFF WAS USING PRECLUDED SUMMARY JUDGMENT IN THIS LABOR LAW § 240(1) ACTION.

The Second Department determined conflicting testimony concerning whether the ladder plaintiff was using was being held by a co-worker raised a question of fact in this Labor Law § 240(1) action: "... [T]he plaintiff submitted, among other things, a transcript of his deposition testimony and a transcript of a workers' compensation board hearing, which included the testimony of the plaintiff and his coworker. The plaintiff testified at his deposition and at the hearing that the ladder shifted, causing him to lose his footing, and that nobody was holding the ladder at the time of the accident. His coworker gave a different account. The coworker testified that he was standing at the bottom of the ladder, holding it, when he felt the ladder jolt. Whether the ladder was being stabilized at the time of the accident presents a triable issue of fact ... . Accordingly, 'the plaintiff's own submissions demonstrated that there are triable issues of fact as to how this accident occurred and it cannot be concluded, as a matter of law, that the alleged failure to provide the plaintiff with proper protection proximately caused his injuries' ...". ***Lozada v. St. Patrick's R C Church*, 2019 N.Y. Slip Op. 05971, Second Dept 7-31-19**

RELIGION, CIVIL PROCEDURE, CONSTITUTIONAL LAW.

PLAINTIFF CHURCH'S OBJECTION TO THE SYNOD'S TAKING CONTROL OF A SCHOOL OPERATED BY PLAINTIFF CHURCH IS A RELIGIOUS CONTROVERSY WHICH IS NOT JUSTICIABLE IN STATE COURTS.

The Second Department determined three causes of action in a lawsuit brought by a church (Eltingville) against the Synod and its Bishop (stemming from the Synod's decision to place a school owned and operated by Eltingville under its control) were not justiciable in state courts because of the constitutional separation of church and state: "... [T]he complaint challenged the Synod's determination to impose synodical administration upon Eltingville. Such a determination could only be made upon finding that 'the membership of a congregation has become so scattered or so diminished in numbers as to make it impractical for such a congregation to fulfill the purposes for which it was organized or that it is necessary for this synod to protect the congregation's property from waste and deterioration' (Synod's Constitution § 13.24; see Religious Corporations Law § 17-c[2][a][iii]). A Synod's determination to impose synodical administration on a local church is a nonjusticiable religious determination ... ". ***Eltingville Lutheran Church v. Rimbo*, 2019 N.Y. Slip Op. 05957, Second Dept 7-31-19**

TRUSTS AND ESTATES, CONTRACT LAW.

THE REMAINDER BENEFICIARIES' ACTION ALLEGING THE EXECUTOR'S VIOLATION OF A STANDSTILL AGREEMENT WHICH REQUIRED THE EXECUTOR TO KEEP THE FUNDS FROM THE SALE OF THE DECEASED'S BUSINESS IN A SEGREGATED ACCOUNT UNTIL THE DAUGHTERS' REMAINDER INTERESTS WERE DETERMINED, DID NOT VIOLATE THE IN TERROREM CLAUSE OF THE WILL WHICH PROHIBITED THE DAUGHTERS FROM CONTESTING THE WILL, SURROGATE'S COURT REVERSED.

The Second Department, reversing Surrogate's Court, determined the daughters of the deceased, remainder beneficiaries, did not violate the in terrorem clause of the will by bringing an action against the executor alleging the executor's violation of a standstill agreement. In the standstill agreement with the executor (Anna Marie, the deceased's wife), Anna Marie agreed to hold the proceeds from the sale of the deceased's interest in a business in a segregated bank account while Anna Marie and the daughters determined the daughters' interests in the liquidated assets as remainder beneficiaries of Anna Marie's life estate: "The will included an in terrorem clause which provided for the revocation of the interest of any beneficiary who 'institute[s] . . . any proceedings to set aside, interfere with, or make null any provision of this Will, . . . or shall in any manner, directly or indirectly, contest the probate thereof.' The will left the 'rest, residue, and remainder" of the decedent's estate to Anna Marie, absolutely,' to the exclusion of any children of mine." * * * ... [T]the daughters alleged in the Supreme Court action that Anna Marie breached her fiduciary duty as executor and holder of the life estate in the decedent's interest in Brady Avenue by taking possession of the entire proceeds of the sale to the exclusion and detriment of the daughters as remainder beneficiaries. The daughters have not lodged any contest to the validity of the will, or otherwise interfered with its provisions granting Anna Marie discretion to dispose of estate assets in her capacity as executor. Moreover, the claim that Anna Marie violated the standstill agreement did not implicate any challenge to the will. Thus, we disagree with the determination of the Surrogate's Court that the daughters violated the in terrorem clause of the will and forfeited their legacies under the will ...". ***Matter of Sochurek*, 2019 N.Y. Slip Op. 05987, Second Dept 7-31-19**

THIRD DEPARTMENT

FAMILY LAW.

FAMILY COURT SHOULD NOT HAVE CREDITED TO FATHER CHILD SUPPORT PAYMENTS HE MADE WHEN MOTHER WAS INTERFERING WITH HIS VISITATION.

The Third Department noted that Family Court should not have credited back to father child support payments he made during the period when mother was interfering his visitation. Such a suspension of child support can only be made prospectively: "... Family Court erred in suspending the father's child support obligation from June 21, 2017 to February 8, 2018 and ordering the money collected during that period to be credited back to the father. Although a court may suspend child support payments for a period where 'the custodial parent has 'wrongfully interfered with or withheld visitation' ... , absent special circumstances, not present here, the suspension must be prospective .... We further find that even where, as here, child support payments are suspended due to a parent's interference, the 'strong public policy against restitution or recoupment of support payments' is applicable ... . Family Court therefore had no authority to 'credit[] back' to the father the payments he made during the period of suspension against his current support obligation or the arrears ...". ***Matter of Kanya J. v. Christopher K.*, 2019 N.Y. Slip Op. 06030, Third Dept 8-1-19**

FOURTH DEPARTMENT

ANIMAL LAW, EVIDENCE.

DEFENDANT DOG OWNER'S ACKNOWLEDGMENT SHE HAD HEARD THAT ONE OF HER DOGS NIPPED A BOY IN A PRIOR INCIDENT WAS NOT ADMISSIBLE EVIDENCE OF THE FACTS OF THE INCIDENT; THEREFORE PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT IN THIS DOG BITE CASE SHOULD NOT HAVE BEEN GRANTED.

The Fourth Department, reversing Supreme Court, determined plaintiffs' motion for summary judgment in this dog bite case should not have been granted. The plaintiffs relied on deposition testimony in which defendant acknowledged she had heard about a prior incident in which a boy was nipped by one of her dogs. Defendant's statement was inadmissible hearsay: "Plaintiffs failed, however, to submit evidence in admissible form regarding the purported prior incident allegedly establishing the existence of the dogs' vicious propensities. Instead, plaintiffs relied on defendant's inadmissible hearsay testimony during her deposition about what she had heard from others regarding the purported prior incident, for which she was not present and about which she had no firsthand knowledge ... . Such evidence is insufficient to meet plaintiffs' burden on their motion for summary judgment ... . It is true that, '[i]f a party makes an admission, it is receivable even though knowledge of the fact was derived wholly from hearsay' ... . If, however, the party merely admits that he or she heard that an event occurred in the manner stated, the party's statement is 'inadmissible as then it would only . . . amount[ ] to an admission that he [or she] had heard the statement which he [or she] repeated and not to an admission of the facts included in it'... . Here, defendant merely admitted that she had heard that the purported prior incident occurred in the manner stated by others, which is 'in no sense an admission of any fact pertinent to the issue, but a mere admission of what [she] had heard without adoption or indorsement. Such evidence is clearly inadmissible' ...". ***Christopher P. v. Kathleen M.B.*, 2019 N.Y. Slip Op. 05894, Fourth Dept 7-31-19**

ANIMAL LAW, EVIDENCE.

PLAINTIFFS DID NOT DEMONSTRATE DEFENDANT HAD ACTUAL OR CONSTRUCTIVE KNOWLEDGE OF THE DOG'S VICIOUS PROPENSITIES IN THIS DOG BITE CASE, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED.

The Fourth Department determined defendant's motion for summary judgment in this dog bit case should have been granted. The evidence that the dog had barked at a neighbor did not demonstrate defendant was made aware of the incident and did not demonstrate when the incident occurred: "Even assuming, arguendo, that the dog possessed the requisite vicious propensities, we conclude that defendant met her initial burden on the motion by submitting deposition testimony from herself, her son, and her then boyfriend, which established that defendant lacked actual or constructive knowledge that the dog had any vicious propensities, and plaintiffs failed to raise an issue of fact ... . In opposition to the motion, plaintiffs submitted the affidavit of one of defendant's neighbors, who averred that, on at least two prior occasions, she had seen the dog roaming the neighborhood, and that the dog entered into her backyard and started to bark at her in an aggressive and angry way, thereby putting her in fear that she would be bitten by the dog. The neighbor does not aver that she informed defendant of the two incidents, and thus the affidavit does not raise an issue of fact whether defendant had actual knowledge of the dog's vicious propensities. Furthermore, the neighbor's affidavit does not detail when the two prior incidents occurred, and thus the affidavit does not raise an issue of fact whether defendant had constructive knowledge of the dog's vicious propensities, i.e., that the vicious propensities had 'existed for a sufficient period of time for a reasonable person to discover them' ...". ***Jennifer M.C.-Y. v. Boring*, 2019 N.Y. Slip Op. 05901, Fourth Dept 7-31-19**

CIVIL PROCEDURE, FORECLOSURE, REAL ESTATE.

PLAINTIFF LOAN SERVICING COMPANY WAIVED THE TIME OF THE ESSENCE PROVISION BY ITS RELENTLESS EFFORTS TO PREVENT THE FORECLOSURE SALE TO THE HIGHEST BIDDER (TO EXACT A HIGHER PRICE); THE SANCTIONS IMPOSED ON PLAINTIFF WERE NOT SUPPORTED BY A WRITTEN DECISION AS REQUIRED BY THE CONTROLLING REGULATION; SANCTIONS ASPECT REMITTED.

The Fourth Department determined plaintiff loan company waived the time of the essence provision in this foreclosure sale to the highest bidder, Fox, by its relentless attempts to prevent the sale from going forward (to exact a higher purchase price). The Fourth Department noted that the sanctions imposed upon plaintiff were not supported by a written decision as required by 22 N.Y.C.R.R. § 130-1.1 and remanded for compliance with the regulation: "We reject plaintiff's contention that the court erred in determining that Fox did not breach the time is of the essence clause. It is well settled that '[a] party may waive timely performance even where the parties have agreed that time is of the essence' ... , and that such a waiver may be accomplished by the conduct of a party ... . Here, we agree with the court that plaintiff's relentless attempts to prevent the sale from going forward constituted a waiver of the time is of the essence clause. We also reject plaintiff's further contention that the court erred in determining that plaintiff engaged in frivolous conduct and in imposing sanctions for such conduct. We conclude that plaintiff's conduct was 'completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law[, and was] undertaken primarily to delay or prolong the

resolution of the litigation' (22 NYCRR 130-1.1 [c] [1], [2] ...) . Nevertheless, we conclude that the court erred in failing to comply with 22 NYCRR 130-1.2 because 'it failed to set forth in a written decision the conduct on which . . . the imposition [of sanctions] is based, the reasons why the court found the conduct to be frivolous, and the reasons why the court found the amount . . . imposed to be appropriate' ... . We therefore modify the order by vacating the fourth ordering paragraph and we remit the matter to Supreme Court for compliance with 22 NYCRR 130-1.2 ...". ***Bayview Loan Servicing, LLC v. Strauss*, 2019 N.Y. Slip Op. 05866, Fourth Dept 7-31-19**

CIVIL PROCEDURE, INSURANCE LAW.

NONPARTY SUBPOENA SHOULD NOT HAVE BEEN QUASHED IN THIS OUT-OF-STATE ASBESTOS-RELATED INSURANCE ACTION, THE NONPARTY HAD BEEN EMPLOYED BY THE INSURER AND MAY POSSESS RELEVANT KNOWLEDGE ABOUT HOW THE INSURANCE POLICIES WERE INTERPRETED AND ENFORCED.

The Fourth Department, reversing Supreme Court, determined the petition to quash a nonparty subpoena in this out-of-state asbestos-related insurance action should not have been granted: " 'CPLR 3101 (a) (4) allows a party to obtain discovery from a nonparty, and provides that [t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof' ' ... . The phrase 'material and necessary' in CPLR 3101 'must be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity' ... 'An application to quash a subpoena should be granted [o]nly where the futility of the process to uncover anything legitimate is inevitable or obvious . . . or where the information sought is utterly irrelevant to any proper inquiry' ... , and the burden is on the party seeking to quash a subpoena to make such a showing ... . '[A] witness's sworn denial of any relevant knowledge ...' ... is insufficient, standing alone, to establish that the discovery sought is utterly irrelevant to the action or that the subpoena, if honored, will obviously and inevitably fail to turn up relevant evidence ... . [The nonparty's] deposition testimony is ... potentially relevant because she has personal knowledge of how [the insurer] interpreted and enforced similar 'consent' provisions of other excess policies while she was employed by [the insurer]." ***Matter of Barber v. Borgwarner, Inc.*, 2019 N.Y. Slip Op. 05850, Fourth Dept 7-31-19**

CONTRACT LAW, EVIDENCE.

DEFENDANT RAISED A QUESTION OF FACT WHETHER THE TERMS OF THE NOTE REFLECTED THE ACTUAL AGREEMENT BETWEEN THE PARTIES (MUTUAL MISTAKE).

The Fourth Department, reversing Supreme Court, over a dissent, determined defendant had raised a question of fact whether the note set forth the actual agreement between the parties: " 'Because the thrust of a reformation claim is that a writing does not set forth the actual agreement of the parties, generally . . . the parol evidence rule . . . [does not] appl[y] to bar proof, in the form of parol or extrinsic evidence, of the claimed agreement' ... . Nevertheless, 'there is a heavy presumption that a deliberately prepared and executed written instrument manifest[s] the true intention of the parties' . . . and a correspondingly high order of evidence is required to overcome that presumption' ... . 'The proponent of reformation must show in no uncertain terms, not only that mistake . . . exists, but exactly what was really agreed upon between the parties' ... . [D]efendant here set forth, in detail, the basis for his contention that both parties reached an agreement different from that set forth in the note. The affidavits of the CIO [plaintiff's chief investment officer] and defendant contain the identical assertion that both parties—plaintiff via the CIO and defendant—agreed that plaintiff's right to secure repayment of the loan would be limited to defendant's stock interest ... . The affidavits of the CIO and defendant are based upon personal knowledge and state in detail their understanding of the negotiations and the resulting agreement. Moreover, the CIO averred that he negotiated the loan on behalf of plaintiff at the time he was its chief investment officer, and he concluded that the terms of the note did not reflect what the parties had intended. Thus, in opposition to plaintiff's motion, we conclude that defendant submitted the requisite 'high level' of proof required to raise a triable issue of fact regarding mutual mistake." ***Stache Invs. Corp. v. Ciolek*, 2019 N.Y. Slip Op. 05856, Fourth Dept 7-31-19**

COURT OF CLAIMS, CIVIL PROCEDURE.

THE CLAIM WAS NOT JURISDICTIONALLY DEFECTIVE FOR FAILURE TO SPECIFICALLY ALLEGE LOST WAGES AS PART OF THE DAMAGES IN THIS PERSONAL INJURY ACTION, THE DISSENT DISAGREED AND WOULD HAVE VACATED THE AWARD FOR LOST WAGES.

The Fourth Department affirmed the award of money damages to claimant for personal injury. The claim did not specifically request lost wages as damages. The majority held the claim was not jurisdictionally deficient and the specific items of damage need not have been spelled out. The dissenter disagreed and argued the award for lost wages should be vacated: "Contrary to defendant's contention, the court did not lack subject matter jurisdiction with respect to damages for past and future lost wages inasmuch as the facts alleged by claimant 'were sufficient to apprise [defendant] of the general nature of the claim and to enable it to investigate the matter' ... . The plain language of the statute requires a claimant to specify 'the items of damage or injuries claimed to have been sustained' and, 'except in[, inter alia,] action[s] to recover damages for personal injury . . . , the total sum claimed' (Court of Claims Act § 11 [b]). Contrary to the view of our dissenting colleague, a

natural reading of the statute requires a claimant to specify the items of damage to property or injuries to a person for which the claimant seeks compensation. Here, claimant sufficiently specified the nature of the claim, the time when and the place where the claim arose, and the injuries claimed to have been sustained, i.e., 'injuries to his shoulder, bicep, and elbow' ... . Inasmuch as this is an action for damages for personal injury, claimant was not required to specify, in total or itemized by category, his claimed items of damage ... . Damages sought by claimant for medical expenses or lost wages are matters for the bill of particulars." ***Donahue v. State of New York*, 2019 N.Y. Slip Op. 05948, Fourth Dept 7-31-19**

CRIMINAL LAW.

87 DAY DELAY ATTRIBUTABLE TO THE PEOPLE DESPITE THE 'READY FOR TRIAL' ANNOUNCEMENT AND THE ABSENCE OF A SPECIFIC REQUEST FOR AN ADJOURNMENT, INDICTMENT DISMISSED ON SPEEDY TRIAL GROUNDS.

The Fourth Department, reversing Supreme Court and dismissing the indictment on speedy trial grounds, determined the 87 day delay during which the People sought a superseding indictment was attributable to the People despite their "ready for trial" announcement and despite the absence of a specific request for an adjournment: "... [The] period of delay was 'attributable to [the People's] inaction and directly implicate[d] their ability to proceed to trial' on a charge of CPCS in the fifth degree, i.e., the crime that the People sought to add by way of a superseding indictment and the sole crime for which defendant was ultimately convicted ... . Contrary to the court's determination, the 87-day period was not attributable to the court given that it was 'the People's inaction [in securing a superseding indictment that] resulted in a delay in the court's [trial of the action]' ... . Contrary to the People's contention, it is well established that postreadiness delay may be assessed 'notwithstanding that the People have answered ready for trial within the statutory time limit' ... and notwithstanding the absence of an explicit prosecutorial request for an adjournment ... . Although certain periods of time may be excluded from assessment as postreadiness delay where the People successfully invoke one of the exceptions enumerated in CPL 30.30 (4) ... , the People have identified no exception that might excuse the 87-day delay at issue here ...". ***People v. Johnson*, 2019 N.Y. Slip Op. 05920, Fourth Dept 7-31-19**

CRIMINAL LAW.

DEFENDANT'S PROBATION SHOULD NOT HAVE BEEN REVOKED ABSENT A HEARING OR AN ADMISSION.

The Fourth Department, reversing County Court, determined defendant's probation should not have been revoked absent a hearing or an admission: " A court may not revoke a sentence of probation without finding that the defendant has violated a condition [there]of . . . and affording [him or her] an opportunity to be heard (see CPL 410.70 [1]). The statutory requirements may be satisfied either by conducting a revocation hearing pursuant to CPL 410.70 (3) . . . , or through an admission by the defendant of the violation, coupled with a proper waiver of [his or her] right to a hearing' ... . Here, as the People correctly concede, defendant never admitted to violating his probation and the court never conducted a revocation hearing." ***People v. Ayotunji A.*, 2019 N.Y. Slip Op. 05916, Fourth Dept 7-31-19**

CRIMINAL LAW.

DEFENDANT'S SENTENCE REDUCED FROM 12 TO FIVE YEARS BASED UPON THE PLEA OFFERS, THE LACK OF PRIOR FELONY CONVICTIONS, DEFENDANT'S MENTAL HEALTH ISSUES, AND THE VICTIMS' OPPOSITION TO INCARCERATION.

The Fourth Department reduced defendant's sentence from 12 to five years, taking into account the plea offers of probation only and five years, the lack of any prior felony convictions, her mental health problems, and the victims' opposition to incarceration: "... [T]he 12-year term of incarceration imposed on the count of burglary in the first degree is unduly harsh and severe. Before indictment, defendant was offered the opportunity to plead to a charge for which probation was a sentencing option. After indictment, she was offered the opportunity to plead guilty to the charges with a sentence promise of five years. At the time of the latter offer, all of the relevant facts were known to the court, including those related to defendant's history of mental illness. The victims of the offenses were defendant's parents, and they opposed a lengthy prison sentence, contending that she needed treatment not incarceration. Indeed, defendant's mother stated at sentencing that her daughter needed mental health treatment and that 'jail [was] not the answer.' Moreover, all of defendant's prior convictions, none of which were felonies, were committed within three years of these offenses and only after defendant began to suffer from significant mental health issues. Under the circumstances of this case, where no new facts were set forth during the nonjury trial and the victims were opposed to incarceration, we conclude that the sentence on the burglary count should be reduced to a determinate term of incarceration of five years ...". ***People v. Mccoy*, 2019 N.Y. Slip Op. 05851, Fourth Dept 7-31-19**

CRIMINAL LAW, APPEALS.

THE VICTIM IN THIS KIDNAPPING CASE ASKED THE DEFENDANT IF SHE COULD GO WITH HIM TO FLORIDA; THE JURY SHOULD HAVE BEEN INSTRUCTED THAT THE INTENT TO VIOLATE OR ABUSE THE VICTIM MUST HAVE EXISTED FOR MORE THAN 12 HOURS, A NEW TRIAL WAS ORDERED ON THAT GROUND; BOTH THE CONCURRENCE AND THE DISSENT ARGUED THERE HAD BEEN NO RESTRAINT WITHIN THE MEANING OF THE KIDNAPPING STATUTE.

The Fourth Department, over a concurrence and a dissent, determined the jury instruction on the intent element of kidnapping was wrong requiring reversal. Defendant, who was over 21, drove to Florida with the victim, who was 14, and had sex with her during the trip. The victim asked defendant if she could come with him and snuck out of the house without her mother's knowledge. The concurrence argued the restraint element of kidnapping was not proven, but agreed with the majority because that element had been conceded by the defense. The dissent would have reversed and dismissed the indictment, finding the conviction was against the weight of the evidence: "... [T]he weight of the evidence supports a determination that defendant did not innocently acquiesce to the mere request of a 14-year-old acquaintance to drive her to Florida, but rather took advantage of a 14-year-old child's age and inexperience, by driving the victim across multiple state lines, away from her family, in order to engage in an unlawful sexual relationship with a child. * * * We interpret the statute to mean that kidnapping in the first degree requires that a defendant both restrain a victim for more than 12 hours and possess, for more than 12 hours during the period of restraint, the intent to violate or abuse the victim sexually. Here, however, the court instructed the jury that 'intent does not require advanced planning, nor is it necessary that the intent be in the person's mind for any particular period of time.' ... [W]e conclude that the instruction was erroneous inasmuch as it permitted the jury to find that the element of intent pursuant to section 135.25 (2) (a) had been established even if the jury did not find that the intent existed for more than 12 hours during a period of over 12 hours of restraint. * * * **FROM THE DISSENT:** Under these circumstances, it cannot be said that defendant either 'secreted' or 'held' the victim in his car, or that he intended to prevent her 'liberation.' She was there voluntarily and of her own accord, which is the very antithesis of being 'secreted' or 'held' somewhere." ***People v. Vail*, 2019 N.Y. Slip Op. 05848, Fourth Dept 7-31-19**

CRIMINAL LAW, APPEALS, ATTORNEYS.

THE TRIAL JUDGE'S FAILURE TO PUT ON THE RECORD THE REASONS FOR REQUIRING DEFENDANT TO WEAR A STUN BELT WAS NOT A MODE OF PROCEEDINGS ERROR AND COUNSEL'S FAILURE TO OBJECT WAS NOT INEFFECTIVE ASSISTANCE, THE RELEVANT PROCEDURAL REQUIREMENTS WERE NOT ANNOUNCED BY THE COURT OF APPEALS UNTIL EIGHT YEARS AFTER THE TRIAL; THE LOSS OF TRIAL EXHIBITS DEMONSTRATING WHETHER THE PEREMPTORY JUROR CHALLENGES WERE EXHAUSTED IS HELD AGAINST THE DEFENDANT BECAUSE OF HIS FAILURE TO SEEK A TIMELY RECONSTRUCTION HEARING.

The Fourth Department affirmed defendant's murder conviction and the denial of his motion to vacate the judgment of conviction in a decision addressing several substantive issues not summarized here. The trial court's failure to put on the record the reasons for requiring defendant to wear a stun belt during trial was not a mode of proceedings error and the failure to object was not ineffective assistance because the relevant procedural requirements were not announced by the Court of Appeals until eight years after defendant's trial. The apparent loss of exhibits which would demonstrate whether defendant exhausted the peremptory juror challenges was held against the defendant because of the passage of time and the failure to seek a timely reconstruction hearing: "Assuming, arguendo, that defendant was forced to wear a stun belt, we need not reverse the court's order denying defendant's CPL 440.10 motion because defendant failed to object to the use of a stun belt, and the improper use of a stun belt is not a mode of proceedings error ... . Thus, the failure to object to the stun belt's use means that "reversal would not have been required" on a direct appeal ... . As a result, even on the merits, there is no basis upon which to vacate the judgment of conviction ... . Defendant further contends that trial counsel was ineffective in failing to object to the use of a stun belt. We disagree. The seminal case requiring that a court place findings of fact on the record before requiring a defendant to wear a stun belt is ... , which was decided eight years after the judgment in this case. Although the Court's decision in Buchanan 'did not announce 'new' rules of law' ... , we nevertheless conclude that trial counsel was not ineffective in failing to anticipate the procedural requirements established by the Court's decision in Buchanan ... . * * * ... [D]efendant has provided no explanation for the 14-year delay between the judgment and direct appeal, and 'there was nothing to prevent [defendant] from pursuing his appeal' ... . Moreover, defendant 'has not shown that, if he had acted diligently, an adequate reconstruction of those proceedings could not have been achieved' ... . Had defendant, through his former, privately retained appellate counsel, perfected his appeal in a timely manner, it is possible that the slips of paper might still have been with the file, and it is highly probable that the relevant parties would have been able to recall whether defendant exhausted his peremptory challenges. Where, as here, the lengthy delay is attributable to a defendant's action or inaction, the weight of appellate authority holds that the absence of the relevant transcripts or exhibits should be held against the defendant and the judgment affirmed ...". ***People v. Osman*, 2019 N.Y. Slip Op. 05903, Fourth Dept 7-31-19**

CRIMINAL LAW, CONSTITUTIONAL LAW, EVIDENCE.

EVIDENCE WAS SEIZED DURING A WARRANTLESS PAROLE SEARCH AT A TIME WHEN DEFENDANT'S POST RELEASE SUPERVISION (PRS) HAD BEEN IMPOSED ADMINISTRATIVELY, WHICH HAS SINCE BEEN FOUND UNCONSTITUTIONAL; BECAUSE THE LAW CONCERNING THE REQUIREMENT OF JUDICIAL IMPOSITION OF PRS IS NOW CLEAR, SUPPRESSING THE EVIDENCE WOULD HAVE NO DETERRENT EFFECT AND IS NOT THEREFORE NECESSARY.

The Fourth Department determined the ammunition seized during a warrantless parole search of defendant's residence, and which was connected to a shooting, was not subject to suppression. At the time of the search, defendant's post release supervision (PRS) had been imposed administratively and not by a judge--a procedure which has since been rendered invalid by statute. The Fourth Department held that, under these facts, the exclusionary rule, which usually requires suppression of the fruits of a warrantless search, would have no deterrent effect and need not be applied: "... [T]he improper conduct sought to be deterred by application of the exclusionary rule in this case is the unauthorized administrative imposition of PRS by a state entity rather than a sentencing judge. In that regard, defendant contends that the state criminal justice system disregarded the Second Circuit's decision in Earley v. Murray (451 F3d 71 [2d Cir 2006]), which held that the administrative imposition of PRS is unconstitutional ... , and he contends that application of the exclusionary rule here is necessary to deter similar 'misconduct' in the future. We reject that contention. First, when the parole search took place, in 2007, the issue whether it is proper for the state to administratively impose PRS had not yet been settled ... . Second, and more importantly, it is now settled as a matter of state statutory law that only a court may lawfully pronounce a term of PRS as a component of a sentence ... and, consequently, all the relevant government actors are now well aware of the law. Under the circumstances, the deterrent effect of applying the exclusionary rule is marginal or nonexistent ...". ***People v. Lloyd*, 2019 N.Y. Slip Op. 05855, Fourth Dept 7-31-19**

CRIMINAL LAW, EVIDENCE.

THE PURSUIT OF DEFENDANT WAS NOT JUSTIFIED AND DEFENDANT'S DISCARDING THE HANDGUN WAS IN RESPONSE TO POLICE ILLEGALITY, THE HANDGUN WAS NOT ABANDONED AND SHOULD HAVE BEEN SUPPRESSED.

The Fourth Department, vacating the guilty plea and dismissing the indictment, determined the handgun discarded by the defendant during a police chase should have been suppressed. The police were responding to information that a black male had discharged a weapon. There were several black males in the area and nothing indicated defendant was involved in criminal activity. The defendant did not abandon the weapon because it was discarded in response to police illegality: "... [T]he officer's action of pursuing defendant in response to his flight was not justified at its inception inasmuch as there were no specific circumstances indicating that defendant may have been engaged in criminal activity so as to give rise to reasonable suspicion ... . Although the officer observed defendant walking in the general vicinity of the reported gun shots, that observation does not provide the 'requisite reasonable suspicion, in the absence of other objective indicia of criminality' that would justify pursuit, and no such evidence was presented at the suppression hearing ... . In the absence of other identifying information, the fact that defendant may have matched the vague, generic description of the suspect as a black male, which could have applied to any number of individuals in the area of the large apartment complex with hundreds of residents, did not sufficiently indicate that defendant may have been engaged in criminal activity ... . Thus, the pursuit of defendant was unlawful. * * * ... [D]defendant's act of discarding the handgun was 'spontaneous and precipitated by the unlawful pursuit by the police' and, therefore, the handgun should have been suppressed ...". ***People v. Jones*, 2019 N.Y. Slip Op. 05940, Fourth Dept 7-31-19**

CRIMINAL LAW, EVIDENCE.

DEFENDANT'S MOTION TO SET ASIDE THE VERDICT, BASED UPON A JUROR'S KNOWLEDGE AND CONDUCT, SHOULD NOT HAVE BEEN DENIED WITHOUT A HEARING.

The Fourth Department determined defendant's motion to set aside the verdict, based upon a connection between a juror and defendant's mother, should not have been denied without a hearing: "... [T]he court erred in summarily denying his motion to set aside the verdict pursuant to CPL 330.30 (2). The sworn allegations in support of defendant's motion, including those in the affidavit of his mother, indicated that a juror may have had an undisclosed, potentially strained relationship with the mother resulting from attending high school and working together, possibly knew about defendant's criminal history, and purportedly attempted to speak with the mother's husband during a lunch break at trial, and that the alleged misconduct was 'not known to the defendant prior to rendition of the verdict' ... . We conclude that the allegations 'required a hearing on the issue whether the juror's alleged misconduct prejudiced a substantial right of defendant' ... . We therefore hold the case, reserve decision and remit the matter to County Court to conduct a hearing on defendant's CPL 330.30 motion." ***People v. Blunt*, 2019 N.Y. Slip Op. 05917, Fourth Dept 7-31-19**

CRIMINAL LAW, EVIDENCE, APPEALS.

DEFENDANT'S MANSLAUGHTER CONVICTION REVERSED AS AGAINST THE WEIGHT OF THE EVIDENCE, TWO-JUSTICE DISSENT.

The Fourth Department, over a two-justice dissent, reversed defendant's manslaughter conviction as against the weight of the evidence. The defendant had been alone with the victim, his girlfriend's 13-month-old son, for a short time on the day the baby vomited and was gasping for breath (May 2). The baby died hours later at the hospital. Blunt force head trauma was deemed the cause of death. The defendant was not arrested until four years later after mother had unsuccessfully attempted to have the defendant admit to harming the child in recorded phone conversations. The medical examiner testified on direct that the baby was injured on May 2. But on cross the medical examiner acknowledged the baby could have been injured on May 1, when defendant had no contact with the baby. Other people had access to the baby on May 1, but they were not interviewed because the medical examiner had told the investigators the injuries occurred on May 2: "The only evidence adduced at trial that was not within the knowledge of the police in 2010, when they decided not to arrest defendant, was the testimony of a woman who dated him from 2008 to 2013, with a one-year break in 2010 when he dated [the baby's mother]. The witness testified that, in the years following the victim's death, defendant would sometimes talk about the victim and become emotional but would say that he was not guilty and 'didn't do it.' When questioned by the prosecutor about a written statement she had given to the police, the witness testified that defendant 'admitted to doing something to the baby but he never said what or why.' On cross-examination, the witness testified that defendant, whom she had not dated for years, never admitted that he harmed the victim. All in all, the witness' testimony was of only marginal probative value. Given the equivocal medical evidence with respect to the time frame within which the fatal injuries could have been inflicted, the weakness of the circumstantial evidence, and the lack of direct evidence that defendant caused the victim's injuries, we conclude that the People failed to prove defendant's guilt beyond a reasonable doubt ...". ***People v. Gonzalez*, 2019 N.Y. Slip Op. 05947, Fourth Dept 7-31-19**

CRIMINAL LAW, EVIDENCE, ATTORNEYS.

FOR CAUSE CHALLENGE TO A JUROR WHO FELT POLICE OFFICERS WOULD NOT LIE SHOULD HAVE BEEN GRANTED; STATEMENTS MADE UNDER CUSTODIAL INTERROGATION IN DEFENDANT'S HOME SHOULD HAVE BEEN SUPPRESSED; STATEMENTS MADE AFTER DEFENDANT INVOKED HIS RIGHT TO COUNSEL SHOULD HAVE BEEN SUPPRESSED.

The Fourth Department, reversing defendant's conviction and granting a new trial, determined that a defense for-cause challenge to a juror should have been granted, unwarned statements made by the defendant in his home were in response to custodial interrogation, and the statements made at the police station were made after defendant had invoked his right to counsel: "... [B]y repeatedly insisting that police officers were unlikely to lie under oath because doing so would endanger their pensions, the prospective juror 'cast serious doubt on [her] ability to render a fair verdict under the proper legal standards' and to follow the court's instructions concerning, at a minimum, issues of witness credibility ... . The court was therefore 'required to elicit some unequivocal assurance from the . . . prospective juror[] that [she was] able to reach a verdict based entirely upon the court's instructions on the law' ... . No such assurances were obtained from the prospective juror, ... [I]t is undisputed that defendant was ordered out of his bedroom by police officers in the middle of the night, directed to remain in a vestibule outside his apartment, and thereafter subjected to pointed, accusatory questions for about an hour. Under those circumstances, we agree with defendant that a reasonable person, innocent of any crime, would not have felt free to leave, and that he was thus in custody during the questioning ... . [D]efendant unequivocally invoked his right to counsel by stating 'I think I will take the lawyer' or 'I think I need a lawyer' ... . Thus, we agree with defendant that his statements following his unequivocal invocation of his right to counsel at the police station should have been suppressed as well ...". ***People v. Hernandez*, 2019 N.Y. Slip Op. 05844, Fourth Dept 7-31-19**

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

DEFENDANT WHO KIDNAPPED HER BIOLOGICAL CHILD WAS NOT EXEMPT FROM SORA REGISTRATION.

The Fourth Department determined defendant's waiver of appeal was invalid but rejected her argument that she was exempt for SORA registration because she is the parent of the kidnapping victim, who had been adopted by a family: "The victim of the kidnapping was defendant's biological child, who had been removed from defendant's care more than eight years earlier following allegations of abuse concerning the victim's sibling. Defendant surrendered her parental rights to both the victim and the victim's sibling, and the children were adopted by a family. 'SORA defines sex offender' to include any person who is convicted of' any of a number of crimes listed in the statute . . . SORA requires all people included in this definition to register as sex offenders' ... . The list of offenses provided in the statute includes 'section 135.05, 135.10, 135.20 or 135.25 of [the Penal Law] relating to kidnapping offenses, provided the victim of such kidnapping . . . is less than seventeen years old and the offender is not the parent of the victim' ... . Although we have not yet had the occasion to address

whether a biological parent who has surrendered his or her parental rights and whose child has been adopted is entitled to the benefit of the parent exemption set forth in the SORA statute, in People v. Brown (264 AD2d 12 [4th Dept 2000]), this Court determined that, in a prosecution for kidnapping, such a person could not assert as an affirmative defense that he or she was a relative of the victim ... inasmuch as a biological parent's status as a 'parent' with respect to an adopted child was terminated " in all respects' " by an order of adoption ... . Applying that same reasoning here, we conclude that defendant, the biological mother of an adopted child who she kidnapped, is not a parent of the victim for the purposes of SORA, and thus defendant is not exempt from SORA registration." ***People v. Weir*, 2019 N.Y. Slip Op. 05896, Fourth Dept 7-31-19**

EDUCATION-SCHOOL LAW, EMPLOYMENT LAW, CIVIL PROCEDURE, ADMINISTRATIVE LAW.

ALTHOUGH THE ARTICLE 78 PETITION WAS VERIFIED BY AN ATTORNEY, THE VERIFICATION WAS VALID BECAUSE THE ATTORNEY HAD FIRST-HAND KNOWLEDGE OF THE FACTS; IN ADDITION, ANY DEFECTS IN THE VERIFICATION WERE WAIVED BY RESPONDENTS; PRIOR ARBITRATION PURSUANT TO THE COLLECTIVE BARGAINING AGREEMENT WAS NOT AN OBSTACLE TO THE PETITION ALLEGING A VIOLATION OF THE EDUCATION LAW CONCERNING THE SUSPENSION OF A SCHOOL PRINCIPAL.

The Fourth Department, reversing Supreme Court, determined the verification of an Article 78 petition by petitioner's attorney was valid because the attorney had firsthand knowledge of the contents and, even if the verification was invalid, the respondent had waived any objection to it. The matter concerns the suspension of a school principal which had been the subject of arbitration pursuant to the collective bargaining agreement. The arbitration was not an obstacle to these proceedings brought pursuant to the Education Law because the issues are not the same. The issue involved in the Article 78 petition, an interpretation of Education Law 2566 (6), was not the kind of issue which must first be brought before the Commissioner of Education: "Although the verification requirement of CPLR 7804 (d) must ordinarily be completed by a party, a verification 'may be made by [a party's] attorney [where, as here,] all the material allegations of the pleading are within the personal knowledge of . . . [that] attorney' ... Moreover, a party challenging the sufficiency of a verification is required 'to give notice with due diligence to the attorney of the adverse party that he [or she] elect[ed]' to treat the petition as a nullity' ... . Thus, even assuming, arguendo, that the verification by petitioner's attorney was insufficient, we conclude that respondents waived any challenge to the petition on that ground by failing to make the requisite diligent efforts and instead waiting a month before seeking dismissal of the petition on that basis ... .[A]lthough Education Law § 310 provides ... that any party aggrieved by an official act or decision of school authorities 'may appeal by petition to the [C]ommissioner of [E]ducation,' the Commissioner exercises primary jurisdiction only where the matter involves an issue requiring his or her specialized knowledge and expertise ... . Petitioner's contention regarding section 2566, however, requires no more than the interpretation and application of the plain language of that statute for which no deference to the Department of Education is required ..". ***Matter of Buffalo Council of Supervisors & Adm'rs, Local #10 v. Cash*, 2019 N.Y. Slip Op. 05895, Fourth Dept 7-31-19**

EMPLOYMENT LAW, CONTRACT LAW, CIVIL PROCEDURE.

A COURT MAY CONVERT A MOTION TO DISMISS TO A MOTION FOR SUMMARY JUDGMENT WITHOUT NOTICE WHERE A PURE QUESTION OF LAW IS INVOLVED; THE STRICTER STANDARDS FOR NON-COMPETITION AGREEMENTS IN THE EMPLOYMENT CONTEXT DO NOT APPLY IN THE CONTEXT OF THE SALE OF A BUSINESS.

The Fourth Department, reversing (modifying) Supreme Court, noted that Supreme Court properly dispensed with notice when it converted a motion to dismiss to a motion for summary judgment on a contractual-interpretation issue, and further noted the difference between non-competition agreements in the employment context and in the sale-of-a-business context. Here defendant sold his business, including goodwill, to plaintiff and then was employed by plaintiff: "... [A]lthough the court is normally required to give notice to the parties before converting a motion to dismiss to one for summary judgment ... , the court properly dispensed with the statutory notice here inasmuch as the issue presented 'rested entirely upon the construction and interpretation of an unambiguous contractual provision . . . [that] exclusively involve[d] issues of law which were fully appreciated and argued by the parties' ... . Because plaintiff sold his business to defendant, including the goodwill of that business, the enforceability of the restrictive covenants must be evaluated pursuant to the standard applicable to the sale of a business rather than the 'stricter standard of reasonableness' applicable to employment contracts ... . It is well settled that a covenant restricting the right of a seller of a business to compete with the buyer is enforceable if its duration and scope are 'reasonably necessary to protect the buyer's legitimate interest in the purchased asset' ...". ***Frank v. Metalico Rochester, Inc.*, 2019 N.Y. Slip Op. 05863, Fourth Dept 7-31-19**

LABOR LAW-CONSTRUCTION LAW, LANDLORD-TENANT, APPEALS.

DEFENDANT, AN OUT OF POSSESSION LESSEE, WAS NOT AN 'OWNER' WITHIN THE MEANING OF LABOR LAW §§ 240(1) OR 241(6) AND WAS THEREFORE ENTITLED TO SUMMARY JUDGMENT.

The Fourth Department, reversing (modifying) Supreme Court, determined defendant M & M was not a property owner in the context of Labor Law §§ 240(1) or 241(6) and therefore was entitled to summary judgment. The Fourth Department noted that an issue on which Supreme Court reserved decision is not appealable: "For purposes of Labor Law §§ 240 (1) and 241 (6) liability, 'the term owner' is not limited to the titleholder of the property where the accident occurred and encompasses a [party] who has an interest in the property and who fulfilled the role of owner by contracting to have work performed for [its] benefit' ... . ' [The owner] is the party who, as a practical matter, has the right to hire or fire subcontractors and to insist that proper safety practices are followed' ... . 'The key factor in determining whether a non-titleholder is an owner' is the right to insist that proper safety practices were followed and it is the right to control the work that is significant, not the actual exercise or nonexercise of control' ... . Here, M and M met its initial burden of establishing that it was not an owner for purposes of Labor Law §§ 240 (1) and 241 (6) because its submissions established that 'it was an out-of-possession lessee of the property [that] neither contracted for nor supervised the work that brought about the injury, and had no authority to exercise any control over the specific work area that gave rise to plaintiff's injuries' ...". ***Thompson v. M & M Forwarding of Buffalo, N.Y., Inc.*, 2019 N.Y. Slip Op. 05875, Fourth Dept 7-31-19**

LEGAL MALPRACTICE, CIVIL PROCEDURE, ATTORNEYS, APPEALS.

QUESTION OF FACT WHETHER THE CONTINUOUS REPRESENTATION DOCTRINE TOLLED THE STATUTE OF LIMITATIONS IN THIS LEGAL MALPRACTICE ACTION; THE ATTORNEY HAD ATTEMPTED TO REMEDY THE FAILURE TO FILE OBJECTIONS IN AN ESTATE MATTER AFTER THE STATUTE HAD RUN; ABSENCE OF AN EXPERT'S REPORT FROM THE RECORD ON APPEAL PRECLUDED A RULING ON THE RELATED ISSUE.

The Fourth Department, reversing (modifying) Supreme Court, determined plaintiff had raised a question of fact whether the continuous representation doctrine tolled the statute of limitations in this legal malpractice action. The attorney had attempted to remedy the failure to file objections in an estate matter after the statute had run. The Fourth Department noted that plaintiff's expert's report was missing from the record on appeal and therefore plaintiff was unable to argue on appeal that he had raised a related question of fact (concerning damages) before Supreme Court. Defendant had argued the damages were speculative (requiring dismissal) and Supreme Court did not rule on the issue (because the case was dismissed as untimely). The matter was remitted for a ruling on the damages issue: "We are unable to review plaintiff's contention that he raised a triable issue of fact with respect to ... damages by submitting an expert report inasmuch as plaintiff failed to include that document in the record on appeal. Thus plaintiff, as the party raising this issue on his appeal, 'submitted this appeal on an incomplete record and must suffer the consequences' ... . Defendant met his burden ... by establishing that the statute of limitations for legal malpractice is three years (see CPLR 214 [6]), that the estate cause of action accrued on November 1, 2010, the last date on which to file objections to the accounting ..., and that the estate cause of action was therefore untimely when this malpractice action was commenced on November 15, 2013. 'The burden then shifted to plaintiff[] to raise a triable issue of fact whether the statute of limitations was tolled by the continuous representation doctrine' ... . We agree with plaintiff that the court erred in determining that plaintiff failed to do so. It is well settled that, in order for the continuous representation doctrine to apply, 'there must be clear indicia of an ongoing, continuous, developing, and dependent relationship between the client and the attorney which often includes an attempt by the attorney to rectify an alleged act of malpractice' ... . Here, plaintiff submitted evidence that defendant made several unsuccessful attempts to file the objections within the weeks after the deadline and that he made preparations to appear at a scheduled conference on the objections on November 23, 2010. Those efforts could be viewed as 'attempt[s] by the attorney to rectify an alleged act of malpractice' ... , and thus plaintiff raised a triable issue of fact whether the statute of limitations was tolled by the continuous representation doctrine." ***Leeder v. Antonucci*, 2019 N.Y. Slip Op. 05898, Fourth Dept 7-31-19**

MUNICIPAL LAW, EMPLOYMENT LAW, IMMUNITY, PERSONAL INJURY.

NEGLIGENCE, BREACH OF CONTRACT AND DISCRIMINATION CLAIMS BROUGHT BY A DISABLED FORMER POLICE OFFICER CONCERNING GENERAL MUNICIPAL LAW 207-c BENEFITS PROPERLY DISMISSED.

The Fourth Department affirmed the grant of summary judgment to all defendants in this action by a disabled former police officer concerning claims for General Municipal Law § 207-c benefits: "With respect to the City defendants, ... we conclude that the court properly dismissed the negligence and gross negligence causes of action against them inasmuch as they were entitled to governmental function immunity based on the discretion they are afforded in administering payments of General Municipal Law § 207-c benefits ... . Although plaintiff's negligence and gross negligence causes of action involved the health care services that he was receiving, the City defendants were engaged in a governmental function because they were merely administering the payment of General Municipal Law § 207-c benefits, i.e., they did not actually provide plaintiff

with health care services ;;; . Moreover, the City defendants were entitled to immunity inasmuch as the administration of section 207-c benefits involved the exercise of their discretion and the record establishes that the City defendants denied payment of the disputed claims for benefits after actually exercising this discretion ... . Plaintiff was not a party to the contracts between [the remaining] defendants and City defendants, and therefore liability may be established where, inter alia, 'the contracting party, in failing to exercise reasonable care in the performance of [its] duties, launches a force or instrument of harm' (Espinal v. Melville Snow Contrs., 98 NY2d 136, 140 [2002]). Here, the undisputed evidence established that the [defendants] did not have authority to deny payment of plaintiff's claims for General Municipal Law § 207-c benefits. That authority rested, at all relevant times, with the City defendants. Thus, it cannot be said that these defendants launched any 'instrument of harm' because they never made the decision to deny any of plaintiff's claims for payment of medical care and treatment. ... ... [W]e note that plaintiff, as a public employee, may not sue his employer under Title II of the ADA and the Rehabilitation Act, as plaintiff has done here ... . Where, as here, plaintiff's causes of action are 'related to the terms, conditions and privileges of his employment[, i.e., his entitlement to benefits under General Municipal Law § 207-c, they] are covered by Title I' and not Title II of the ADA or the Rehabilitation Act ...". ***Vassenelli v. City of Syracuse*, 2019 N.Y. Slip Op. 05878, Fourth Dept 7-31-19**

PERSONAL INJURY, EVIDENCE, CIVIL PROCEDURE.

EYEWITNESS TESTIMONY THAT DEFENDANT IN THIS TRAFFIC ACCIDENT CASE APPEARED TO BE INTOXICATED SHOULD NOT HAVE BEEN EXCLUDED, THE EVIDENCE WAS RELEVANT TO DEFENDANT'S RELIABILITY AS A WITNESS AND COULD PROPERLY HAVE BEEN PRESENTED IN REBUTTAL TO DEFENDANT'S TESTIMONY, PLAINTIFFS' MOTION TO SET ASIDE THE DEFENSE VERDICT SHOULD HAVE BEEN GRANTED.

The Fourth Department, reversing Supreme Court, determined plaintiffs' motion to set aside the defense verdict in this traffic accident case should have been granted. There was sharply conflicting testimony about how the accident happened and whether defendant fled the scene. A witness, Stephen, who allegedly chased defendant down after the accident was not allowed to testify that defendant appeared to be intoxicated: "We agree with plaintiffs that the court erred in excluding Stephen's testimony that defendant exhibited indicia of intoxication during their interaction immediately after the accident and that, in his opinion, she was intoxicated. Although defendant's failure to remain at the scene meant that Stephen was the only witness who had an opportunity to observe defendant and interact with her after the accident, the court prohibited Stephen from testifying about his observations of defendant on the ground that he was not an "expert" in signs of intoxication. Contrary to the court's ruling, it is well settled that a lay witness may testify regarding his or her observation that another individual exhibited signs of intoxication ... , and also regarding his or her opinion that another individual was intoxicated ... . [P]laintiffs should have been permitted to present Stephen's testimony with respect to whether defendant appeared to be intoxicated, which would allow the jury to consider whether and to what degree alcohol impaired defendant's senses and her ability to accurately perceive and recall the events about which she testified at trial. ... Stephen's proposed testimony regarding his observations of defendant, i.e., that she fumbled with her license, slurred her speech, and smelled of alcohol, was not cumulative of other evidence already before the jury ... . Defendant testified that she did not fumble with her license, her speech was not slurred, she did not recall her eyes being 'glassy,' and there was no alcohol on her breath. Thus, the excluded testimony from Stephen would have provided ' evidence in denial of some affirmative fact which [defendant] has endeavored to prove' ... and therefore fell within the scope of permissible rebuttal evidence." ***Brooks v. Blanchard*, 2019 N.Y. Slip Op. 05847, Fourth Dept 7-31-19**

PRODUCTS LIABILITY, NEGLIGENCE, EVIDENCE.

PLAINTIFF BUS DRIVER WAS SPRAYED WITH DIESEL FUEL AS SHE ATTEMPTED TO FILL THE TANK OF THE BUS SHE WAS DRIVING; THE MANUFACTURER OF THE GAS PUMP NOZZLE AND THE GAS STATION DEMONSTRATED THE NOZZLE AND THE GAS PUMP WERE WORKING PROPERLY; THERE WAS EVIDENCE OF A RELEVANT DESIGN FLAW IN THE FUEL SYSTEM OF THE BUS; THE NOZZLE MANUFACTURER'S AND THE GAS STATION'S MOTIONS FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED.

The Fourth Department, reversing Supreme Court, over a dissent, determined that the products liability cause of action against the manufacturer of a gas pump fuel nozzle (Husky), and the premises liability cause of action against the gas station (Kwik Fill) should have been dismissed. The plaintiff was sprayed with diesel fuel as she attempted to fill the tank in the bus (manufactured by Coach) she was driving. There was evidence that the design of the fuel system of the bus may have been the cause: "In opposition to Husky's motion, the Coach defendants submitted the affidavit of an expert and the deposition testimony of the vice president of engineering of defendant Motor Coach Industries, Ltd. The expert opined that the accident was caused by a nozzle malfunction. He did not, however, identify any particular defect in the nozzle, which he did not inspect. We thus conclude that the expert's opinion is based on mere speculation and is insufficient to raise an issue of fact ... . It is undisputed that the Kwik Fill defendants hired an outside vendor that regularly inspected and serviced

their fuel pumps, and, in support of their motion, the Kwik Fill defendants submitted evidence establishing that the vendor determined that the fuel pumps were working properly before and after the accident, thus establishing that the Kwik Fill defendants maintained their property in a reasonably safe condition ...". ***Menear v. Kwik Fill*, 2019 N.Y. Slip Op. 05845, Fourth Dept 7-31-19**

REAL PROPERTY LAW.

SUPREME COURT PROPERLY DISMISSED THE CLAIM THAT DEFENDANT VIOLATED THE RESTRICTIVE COVENANT CONCERNING THE HEIGHT OF HOUSES BECAUSE THE TERM 'ONE AND A HALF STORIES' WAS AMBIGUOUS AS TO HEIGHT; HOWEVER THE CLAIMS ALLEGING VIOLATION OF SETBACK RESTRICTIONS SHOULD NOT HAVE BEEN DISMISSED.

The Fourth Department, reversing (modifying) Supreme Court and ordering a new trial, determined defendant's motion for a directed verdict dismissing claims that defendant had violated certain restrictive covenants when defendant's house was constructed should not have been granted. The court noted that plaintiff did not prove defendant violated the covenant restricting the height of a house to one and a half stories. The use of the term "stories" was deemed ambiguous as a measure of height. However the proof demonstrated violations of the required setbacks and Supreme Court should not have dismissed those claims because other properties in the subdivision were in violation or because the house was already built: "... '[T]he words not more than one and one-half stories in height' are ambiguous in scope,' and because the defendants, who were seeking to enforce the covenant, 'failed to present . . . clear and convincing proof with respect to what number of feet constitutes a story in height,' the scope of the covenant is uncertain, doubtful, or debatable,' thus rendering it unenforceable as applied to plaintiff's residence' ... . Although the court determined that there was a violation of at least one of the covenants and restrictions here, it granted the motion on the ground that plaintiff could not seek equitable relief because she did not seek such relief against other property owners within the subdivision regarding their alleged violations of the same covenants and restrictions. That was error. Plaintiff is 'entitled to ignore inoffensive violations of the restriction[s] without forfeiting [her] right to restrain others which [she] find[s] offensive' ... . Moreover, the court's reluctance to grant equitable relief where, as here, the house has already been built was not a valid basis for granting defendant's motion. Defendant 'proceeded with construction of the [house] with knowledge of the restrictive covenants and of plaintiff['s] intention to enforce them' ...". ***Kleist v. Stern*, 2019 N.Y. Slip Op. 05888, Fourth Dept 7-31-19**

REAL PROPERTY LAW.

ADVERSE POSSESSION AFFIRMATIVE DEFENSE SHOULD HAVE BEEN DISMISSED IN THIS LAKE FRONT PROPERTY DISPUTE, THE USE OF THE LAND WAS PERMISSIVE, NOT HOSTILE.

The Fourth Department, reversing Supreme Court, determined plaintiff's motion to dismiss defendants' adverse possession affirmative defense should have been granted. The disputed land is a so-called stub trail which allows access to a lake and which is owned by a third-party (Hillcrest). Defendants' use and maintenance of the property was deemed permissive (i.e., not hostile) as the stub trails were to be used by all the property owners in the subdivision for lake access: "We agree with plaintiff that it met its initial burden on the cross motion of establishing as a matter of law that defendants' use of the disputed property was not hostile and instead was permissive ... , and defendants failed to raise a triable issue of fact in opposition ... . The hostility element 'is satisfied where an individual asserts a right to the property that is adverse to the title owner and also in opposition to the rights of the true owner' ... . 'Possession is hostile when it constitutes an actual invasion of or infringement upon the owner's rights' ... . However, '[w]hen the entry upon land has been by permission or under some right or authority derived from the owner, adverse possession does not commence until such permission or authority has been repudiated and renounced and the possessor thereafter has assumed the attitude of hostility to any right in the real owner' ... . 'The purpose of the hostility requirement is to provide the title owner notice of the adverse claim through the unequivocal acts of the usurper' ... . The ... deed demonstrated that defendants' use of the disputed property was permissive pursuant to the terms of that deed, which allowed property owners around Rushford Lake to use the stub trail at issue that was owned by Hillcrest. The acts of defendants in mowing the lawn, removing weeds, adding fill to the area, and planting trees were fully consistent with the intent of the ... deed, which was to allow property owners to use the trails and stub trails and improve them when needed. The acts of defendants did not give Hillcrest a cause of action in ejectment inasmuch as Hillcrest was required under the terms of the deed to allow property owners such as defendants to use and maintain the trail ...". ***Parklands E., LLC v. Spangenberg*, 2019 N.Y. Slip Op. 05849, Fourth Dept 7-31-19**

REAL PROPERTY TAX LAW (RPTL), UTILITIES, MUNICIPAL LAW, EDUCATION-SCHOOL LAW.

FIBER OPTIC CABLES AND ENCLOSURES ARE TAXABLE UNDER REAL PROPERTY TAX LAW (RPTL).

The Fourth Department, reversing (modifying) Supreme Court, determined that the fiber optic cables and equipment at issue constitute taxable property under RPTL 102, in that the statutory exception for radio and television signals was not

demonstrated to be applicable: "... '[T]ax exclusions are never presumed or preferred and before [a] petitioner may have the benefit of them, the burden rests on it to establish that the item comes within the language of the exclusion.' Moreover, a statute authorizing a tax exemption will be construed against the taxpayer unless the taxpayer identifies a provision of law plainly creating the exemption . . . Thus, the taxpayer's interpretation of the statute must not simply be plausible, it must be the only reasonable construction' ... . [P]etitioners contend that their fiber optic installations are not taxable property pursuant to RPTL 102 (12) (i) (D) because, inter alia, petitioners use those properties to some unspecified extent to transmit 'news or entertainment radio, television or cable television signals for immediate, delayed or ultimate exhibition to the public' ... . We reject that contention. In light of petitioners' failure to establish the percentage of their fiber optic installations that are used for those purposes, we may accept their contention only if we conclude that any such usage of fiber optic installations, no matter how slight, is sufficient to exclude the properties from the tax. That is not ' the only reasonable construction' of the statute ... , indeed, it is 'simply [not plausible' ... . If we accept that interpretation, based on the proliferation of uses of cell phones to stream video, television, and other programming, all fiber optic cables will be excluded from taxation. That, however, conflicts with the Court of Appeals' determination in T-Mobile Northeast, LLC that such property is taxable (32 NY3d at 608). Moreover, RPTL 102 (12) (i) provides that taxable property includes all 'wires, poles, supports and inclosures for electrical conductors upon, above and underground used in connection with the transmission or switching of electromagnetic voice, video and data signals between different entities.'" ***Matter of Level 3 Communications, LLC v. Erie County*, 2019 N.Y. Slip Op. 05913, Fourth Dept 7-31-19**

UNFAIR COMPETITION.

DEFENDANTS' USE OF DOMAIN NAMES VERY SIMILAR TO PLAINTIFF'S STATED CAUSES OF ACTION FOR UNFAIR COMPETITION AND CYBERSQUATTING.

The Fourth Department determined plaintiff had stated causes of action for unfair competition and cybersquatting by using domain names similar to plaintiff's: "... [D[efendants ... operate a website accessed at idealyou.com. In 2016, ... plaintiff ..., established a competing business that operates a website accessed at idealbuff.com. ... [O]n the day plaintiff opened her business, defendants purchased two domain names, idealbuf.com and idealbuffalo.com, and redirected all web traffic from those addresses to idealyou.com. ... As relevant to the cause of action for unfair competition, the statute prohibits using 'any word, term, name, symbol, or device . . . or any false designation of origin . . . which . . . is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association . . . as to the origin, sponsorship, or approval of . . . goods, services, or commercial activities by another person' ... . We agree with plaintiff that, accepting the allegations in the third-party complaint as true ... defendants' use of the idealbuf.com and idealbuffalo.com domain names could be misleading and thus constitute unfair competition under the statute ... . 'To successfully assert a claim [for cybersquatting], a plaintiff must demonstrate that[:] (1) its marks were distinctive at the time the domain name was registered; (2) the infringing domain names complained of are identical to or confusingly similar to the plaintiff's mark; and (3) that the defendant has a bad faith intent to profit from that mark' ...". ***The Ideal You Weight Loss Ctr., LLC v. Zillioux*, 2019 N.Y. Slip Op. 05900, Fourth Dept 7-31-19**

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