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Editor: **Bruce Freeman**

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COURT OF APPEALS

CRIMINAL LAW, EVIDENCE.

NO REASONABLE VIEW OF THE EVIDENCE SUPPORTED ANYTHING LESS THAN SERIOUS PHYSICAL INJURY, REQUEST FOR A JURY CHARGE ON ASSAULT THIRD WAS PROPERLY DENIED.

The Court of Appeals, affirming the assault second conviction, determined defendant's request for a jury charge on assault third as a lesser-included offense was properly denied because of the severity of the victim's injuries: "Both live and photographic evidence at trial, ten months after the attack, demonstrated that the victim's face was disfigured with scars above one eyebrow, under the other eye, on her lip and across her neck, and that apart from the scars, her facial structure and appearance had changed significantly. Testimony from her treating physician established that she suffered at least five displaced fractures around her eye sockets and nose, which were left to heal as displaced. Viewed in a light most favorable to defendant ... , we agree that no reasonable view of the evidence could support a finding that the victim sustained anything less than a serious physical injury ...". ***People v. Sipp*, 2019 N.Y. Slip Op. 06432, CtApp 8-29-19**

FIRST DEPARTMENT

CIVIL PROCEDURE, TRUSTS AND ESTATES, APPEALS.

LETTERS OF ADMINISTRATION WERE ISSUED ON THE LAST DAY OF THE SIX MONTHS ALLOWED BY CPLR 205(a) TO REFILE A DISMISSED ACTION, THE MOTION TO DISMISS SHOULD NOT HAVE BEEN GRANTED; ARGUMENT THAT SUPREME COURT USED THE WRONG DATE TO CALCULATE THE SIX-MONTH PERIOD PROPERLY RAISED AND CONSIDERED FOR THE FIRST TIME ON APPEAL.

The First Department, reversing Supreme Court, determined the medical malpractice/wrongful death action should not have been dismissed because the letters of administration were issued within six months of the prior dismissal. The argument that Supreme Court used the wrong date to calculate the six-month period for re-filing a lawsuit pursuant to CPLR 205(a) could be raised for the first time on appeal: "On appeal, plaintiff argues for the first time that the prior action was finally terminated when the October 2016 order granting the hospital's motion was issued, so that the court used the wrong date to calculate when the six-month savings period under CPLR 205(a) began to run. We will consider this argument, since it raises a legal question appearing on the face of the record which could not have been avoided ... . While plaintiff, as voluntary administrator, lacked the legal capacity to enforce decedent's personal injury and wrongful death claims on behalf of the estate in this second action (Surrogate's Court Procedure Act § 1306[3] ...), he could remedy this defect by obtaining letters of administration within the six-month savings period provided under CPLR 205(a) ... . In applying CPLR 205(a), we bear in mind that it is designed to ameliorate the potentially 'harsh consequence of applying a limitations period where the defending party has had timely notice of the action' ... . Because the first action was finally terminated on October 18, 2016, and the letters of administration were issued on April 18, 2017, on the last day of the six-month savings period (CPLR 205[a]), plaintiff timely obtained legal capacity to pursue the claims in this action …". ***Rodriguez v. River Val. Care Ctr., Inc.*, 2019 N.Y. Slip Op. 06370, First Dept 8-27-19**

CRIMINAL LAW, CIVIL PROCEDURE, JUDGES.

A JUDGE HAS THE DISCRETION TO EXPUNGE A YOUTHFUL OFFENDER'S DNA RECORDS, SUPREME COURT REVERSED.

The First Department, in a full-fledged opinion by Justice Gische, reversing Supreme Court determined: (1) the Executive Law pertains to the local DNA databank maintained by the Office of the Chief Medical Examiner (OCME); (2) an Article 78 mandamus action seeking the expungement of the petitioner-youthful-offender's (YO's) DNA records from the databank was properly brought; and (3) a judge has the discretion to expunge a YO's DNA records. The petitioner voluntarily provided a DNA sample before he was adjudicated a youthful offender. Supreme Court had held it did not have the discretion to expunge the records: "... [W]e hold that the same discretion afforded to a court under the Executive Law to expunge DNA profiles and related records when a conviction is vacated may also be exercised where, as here, a YO disposition replaces a criminal conviction. The motion court, in finding that, as a matter of law, it had no discretion, failed to fulfill its statutory

mandate to consider whether in the exercise of discretion, expungement of petitioner's DNA records was warranted in this case. * * * A YO disposition by its very nature is a judgment of conviction that is vacated and then replaced by a YO determination. This conclusion is supported by the mechanics of the YO statute, its salutary goals, and legislative intent. * * * Petitioner did not, either expressly or by implication, waive the privilege of nondisclosure and confidentiality by providing his DNA before the court made its determination that he was eligible for YO status. Clearly the Executive Law permits an adult who has voluntarily given his or her DNA in connection with a criminal investigation the right to seek discretionary expungement where a conviction had been reversed or vacated. A youthful offender does not have and should not be afforded fewer pre-YO adjudication protections than an adult in the equivalent circumstances." ***Matter of Samy F. v. Fabrizio*, 2019 N.Y. Slip Op. 06374, First Dept 8-27-19**

SECOND DEPARTMENT

CIVIL PROCEDURE, MEDICAL MALPRACTICE, PERSONAL INJURY.

MEDICAL MALPRACTICE ACTION SHOULD NOT HAVE BEEN DISMISSED ON THE GROUND THAT PLAINTIFF HAD NOT YET MOVED TO BE APPOINTED GUARDIAN AD LITEM FOR HER COMATOSE HUSBAND.

The Second Department, reversing Supreme Court, determined that the motion to dismiss the medical malpractice action should not have been granted on the ground plaintiff had not moved pursuant to CPLR 1202 to be appointed guardian ad litem for her comatose husband (Zheng) prior to commencing the action: "... [T]he mere fact that this action was commenced before the plaintiff moved pursuant to CPLR 1202 to be appointed guardian ad litem of her husband does not provide grounds for dismissal of the complaint pursuant to CPLR 3211(a)(3). An incapacitated individual who has not been judicially declared incompetent may sue or be sued in the same manner as any other person ... , and CPLR 1202(a) expressly contemplates that a motion for the appointment of a guardian ad litem may be made 'at any stage in the action.' Thus, there is no strict legal requirement that the plaintiff should have been appointed guardian before the commencement of this action. While it would have been better for the action to have been commenced in Zheng's name, rather than by the plaintiff 'as Proposed Guardian Ad Litem of [Zheng],' the defect is not fatal, particularly given the relatively short delay between the commencement of the action and the filing of the plaintiff's guardianship motion (see CPLR 2001)." ***Linghua Li v. Xiao*, 2019 N.Y. Slip Op. 06388, Second Dept 8-28-19**

CIVIL PROCEDURE, MEDICAL MALPRACTICE, PERSONAL INJURY.

COURT DID NOT HAVE AUTHORITY TO DISMISS THE ACTION PURSUANT TO CPLR 3216 BECAUSE NO 90-DAY NOTICE HAD BEEN SERVED; DISMISSAL FOR FAILURE TO COMPLY WITH DISCOVERY DEMANDS WAS NOT WARRANTED, BUT PRECLUSION OF FURTHER DISCOVERY WAS APPROPRIATE.

The Second Department, reversing Supreme Court, determined that the court did not have authority to dismiss the medical malpractice action pursuant to CPLR 3216 for failure to prosecute in the absence of a 90-notice. The court further noted that, although dismissal for failure to comply with discovery demands was not warranted, the preclusion of further discovery was appropriate: "With regard to CPLR 3216, 'the courts have no authority to dismiss an action for failure to prosecute, whether on the ground of general delay, or for failure to serve and file a note of issue, unless there has first been served a [90 day notice]' ... . Here, it is undisputed that neither the Supreme Court nor the defendant served the requisite 90-day notice upon the plaintiff. ... . [D]ismissal of the complaint pursuant to CPLR 3126(3) was unwarranted as a sanction for the plaintiff's failure to limit his disclosure demands. The remedy of dismissal is 'only warranted where there has been a clear showing that the failure to comply with discovery demands was willful and contumacious' ... . The sanction of dismissal is available for the willful and contumacious failure to disclose ... , which did not occur here. The plaintiff submitted to a deposition by the defendants. However, the lengthy pendency of this action, the dispute over the plaintiff's overbroad demands for disclosure, and his refusal to tailor those demands in accordance with prior orders of the court, compels the conclusion that further disclosure has been forfeited." ***Rezk v. New York Presbyt. Hospital/N.Y. Weill Cornell Ctr.*, 2019 N.Y. Slip Op. 06426, Second Dept 8-28-19**

CRIMINAL LAW, APPEALS, ATTORNEYS.

APPELLATE COUNSEL'S BRIEF IN SUPPORT OF LEAVE TO WITHDRAW WAS DEFICIENT, NEW APPELLATE COUNSEL ASSIGNED.

The Second Department determined appellate counsel's brief in support of a motion to withdraw was deficient: "An appellate court's role in reviewing an attorney's motion to be relieved pursuant to Anders v. California (386 US 738) consists of two separate and distinct steps ... . Step one requires the appellate court to perform '[an] evaluation of assigned counsel's brief, which must, to be adequate, discuss relevant evidence, with specific references to the record; identify and assess the efficacy of any significant objections, applications, or motions; and identify possible issues for appeal, with reference to the facts of the case and relevant legal authority' ... . Step two requires the appellate court to perform 'an independent review of the record' to determine whether counsel's assessment that there are no nonfrivolous issues for appeal is correct' ... . Here,

the brief submitted by the defendant's counsel pursuant to Anders v. California (386 US 738) was deficient because it failed to adequately analyze potential appellate issues, including, but not necessarily limited to, whether the defendant's plea of guilty was entered knowingly, intelligently, and voluntarily ... . Moreover, upon this Court's independent review of the record, we conclude that nonfrivolous issues exist, including, but not necessarily limited to, whether the defendant's plea of guilty was knowing, intelligent, and voluntary ... . Accordingly, under the circumstances, we must assign new counsel to represent the defendant." ***People v. Robinson*, 2019 N.Y. Slip Op. 06417, Second Dept 8-28-19**

CRIMINAL LAW, CONSTITUTIONAL LAW, APPEALS, JUDGES, ATTORNEYS.

ALLOWING AN UNSWORN WITNESS TO TESTIFY WAS ERROR; ALLOWING QUESTIONING ABOUT A WITNESS'S ASSERTION OF THE FIFTH AMENDMENT PRIVILEGE DEPRIVED DEFENDANT OF A FAIR TRIAL; FIFTH AMENDMENT ISSUES CONSIDERED ON APPEAL IN THE INTEREST OF JUSTICE; CPL § 710.30 NOTICE NOT REQUIRED FOR A STATEMENT NOT SUBJECT TO SUPPRESSION; NEW TRIAL ORDERED BEFORE A DIFFERENT JUDGE.

The Second Department, over a concurrence and a dissent, determined the questioning of an unsworn witness (Mitchell) who refused to answer questions pursuant to the Fifth Amendment privilege deprived defendant of a fair trial. The issues pertaining to the witness's refusal to take the oath and testify were nor preserved, but were considered in the interest of justice. The court noted Criminal Procedure Law § 710.30 does not apply to statements made voluntarily in a noncoercive, noncustodial setting. Therefore the failure to timely notify the defense of the defendant's admission to the murder made to a confidential informant was not an error. Based upon the trial judge's characterization of the defendant at sentencing, the new trial will be before a different judge: "Since Mitchell refused to take the oath, and was not deemed to be ineligible to take the oath by reason of, inter alia, infancy, mental disease, or defect pursuant to CPL 60.20(2), the Supreme Court erred in allowing Mitchell to testify or be questioned by counsel. The court further erred in giving the jury a charge regarding the corroboration of an unsworn witness ..., which permits a jury, under certain conditions, to convict a defendant upon unsworn testimony of a person deemed ineligible to take an oath. .. .[T]he prejudice to the defendant arose from (1) the prosecutor's posing of leading questions which informed the jury that Mitchell, a person familiar with both the defendant and the victim, had previously identified the defendant as the shooter, (2) the inferences that the prosecutor sought to draw from Mitchell's refusal to testify, and (3) the court's jury instructions that the jury may draw an inference of the defendant's guilt from Mitchell's refusal to testify. ... 'Where, as here, a witness asserts [her] Fifth Amendment privilege in the presence of the jury, the effect of the powerful but improper inference of what the witness might have said absent the claim of privilege can neither be quantified nor tested by cross-examination, imperiling the defendant's right to a fair trial' ... . '[A] witness's invocation of the Fifth Amendment privilege may amount to reversible error in two instances: one, when the prosecution attempts to build its case on inferences drawn from the witness's assertion of the privilege, and two, when the inferences unfairly prejudice defendant by adding critical weight' to the prosecution's case in a form not subject to cross-examination' ...". ***People v. Ward*, 2019 N.Y. Slip Op. 06419, Second Dept 8-28-19**

CRIMINAL LAW, EVIDENCE.

UNDER THE CIRCUMSTANCES OF THIS CASE, PRE-MIRANDA QUESTIONING OF THE DEFENDANT ABOUT HIS EMPLOYMENT CONSTITUTED CUSTODIAL INTERROGATION; ALL OF DEFENDANT'S STATEMENTS, PRE- AND POST-MIRANDA, MUST BE SUPPRESSED; JURY SHOULD HAVE BEEN TOLD OUT-OF-COURT STATEMENTS ADMITTED FOR A NONHEARSAY PURPOSE SHOULD NOT BE CONSIDERED FOR THEIR TRUTH.

The Second Department, reversing defendant's conviction, suppressing defendant's statements and ordering a new trial, determined the initial questioning of the defendant, which was not preceded by the Miranda warnings, constituted interrogation. Therefore, those statements and the entire post-Miranda videotaped interrogation, should have been suppressed. The court further noted that statements made by an accomplice in a controlled phone call were admitted for a nonhearsay purpose. Therefore the jury should have been instructed not to rely on those statements for their truth: "... [T]he pre-Miranda questioning was not mere 'small talk,' but, rather, interrogation ... . In particular, the detective was aware, when he questioned the defendant about his employment, that Espinal [an accomplice] claimed to know the defendant from previously working with him at a bar. Indeed, when the questioning resumed after administration of Miranda warnings, it concerned the defendant's work history at bars at or around the time of the incident. Notably, the People assert that they are not claiming that the pedigree exception to the Miranda rule is applicable, and, in any event, the detective admitted at the suppression hearing that, at the time of the interview, he had already recorded the defendant's pedigree information and that such information does not include an individual's employment ... . Under these circumstances, the defendant was improperly subjected to custodial interrogation without being advised of his Miranda rights, requiring suppression of those statements ...". ***People v. Dorvil*, 2019 N.Y. Slip Op. 06409, Second Dept 8-28-19**

CRIMINAL LAW, EVIDENCE.

WARRANTLESS SEARCH OF DEFENDANT'S BACKPACK WAS NOT A VALID SEARCH INCIDENT TO ARREST, SEIZED WEAPON SHOULD HAVE BEEN SUPPRESSED.

The Second Department, reversing defendant criminal possession of a weapon conviction and dismissing that count, determined the arresting officers should have conducted the warrantless search of a backpack in which the seized weapon was found. The criteria for a search incident to arrest were not met: "On April 30, 2015, at approximately 2:30 p.m., police officers went to the defendant's home in response, in part, to information they had received from an informant that the defendant was selling drugs out of his home and kept a firearm concealed inside of a distinctive backpack. When the officers arrived, they observed the defendant smoking a marijuana cigarette on the porch of the home. Upon approaching the defendant and identifying themselves, the officers observed the defendant grab a distinctive backpack matching the description given by the informant, curse out loud, and run inside of the house. The officers pursued the defendant, who dropped the backpack inside the front doorway and proceeded up the stairs toward the second floor of the house. The defendant was apprehended and handcuffed on the stairs. After the defendant was secured, one of the officers at the scene opened the defendant's backpack, inside of which he found a firearm and a quantity of marijuana. ... "The protections embodied in article I, § 12 of the New York State Constitution serve to shield citizens from warrantless intrusions on their privacy interests, including their personal effects' ... . '[E]ven a bag within the immediate control or grabbable area' of a suspect at the time of his [or her] arrest may not be subjected to a warrantless search incident to the arrest, unless the circumstances leading to the arrest support a reasonable belief that the suspect may gain possession of a weapon or be able to destroy evidence located in the bag' ... . The proof adduced at the suppression hearing failed to establish the presence of such circumstances ...". ***People v. Grimes*, 2019 N.Y. Slip Op. 06411, Second Dept 8-28-19**

CRIMINAL LAW, EVIDENCE, ATTORNEYS.

DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO MOVE TO SUPPRESS TANGIBLE EVIDENCE SEIZED PURSUANT TO A SEARCH WARRANT WHICH WAS ISSUED BASED UPON UNWARNED STATEMENTS MADE BY DEFENDANT, STATEMENTS WHICH HAD BEEN SUPPRESSED BY THE TRIAL COURT.

The Second Department, reversing defendant's conviction and ordering new suppression motions and a new trial, determined defense counsel was ineffective for failing to move to suppress tangible evidence seized pursuant to a search warrant which was issued based upon unwarned statements made by the defendant, statements which had been suppressed by the trial court: "Here, defense counsel's assertion of an inappropriate argument in support of the belated suppression motion, and counsel's complete failure to challenge the admissibility of physical evidence seized from the defendant's home based on the Miranda violation ... , prejudiced the defendant and rendered counsel's representation ineffective ...". ***People v. Corchado*, 2019 N.Y. Slip Op. 06408, Second Dept 8-28-19**

CRIMINAL LAW, EVIDENCE, ATTORNEYS.

DEFENSE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO RAISE THE INTOXICATION DEFENSE IN THIS MURDER CASE; THE MANSLAUGHTER CHARGE MUST BE DISMISSED AS AN INCLUSORY CONCURRENT COUNT OF MURDER.

The Second Department determined defendant received effective assistance of counsel but the manslaughter first charge, as a lesser inclusory concurrent count of murder second, must be dismissed. Defendant argued defense counsel was ineffective for failing to raise the intoxication defense in this stabbing case: "Assuming, without deciding, that the evidence at trial was sufficient to warrant an intoxication charge ... , defense counsel was not ineffective for failing to request that charge in this case. Defense counsel prudently pursued arguments which sought to present this incident as a perfect storm of unnecessary escalation by the victim, followed by actions taken by the defendant to protect himself and his friends, all resulting in the wholly accidental death of the victim. Defense counsel could have strategically determined that requesting an intoxication charge would have undermined, or distracted from, the narrative the defense had pursued that the defendant was forced to make a decision when faced with the angry victim to protect himself and his friends. Accordingly, the defendant has not demonstrated the absence of strategic or other legitimate explanations for defense counsel's failure to request the intoxication charge ...". ***People v. Moreira*, 2019 N.Y. Slip Op. 06414, Second Dept 8-28-19**

FAMILY LAW.

APPELLANT, A COUSIN, WAS NOT THE FUNCTIONAL EQUIVALENT OF A PARENT AND WAS NOT, THEREFORE, A PROPER RESPONDENT IN THIS SEXUAL ABUSE/NEGLECT ARTICLE 10 PROCEEDING.

The Second Department, reversing Family Court, determined appellant was not the functional equivalent of a parent and therefore was not a proper respondent in this Family Court Act Article 10 sexual abuse/neglect proceeding: "We disagree with the Family Court's determination that the appellant was a person legally responsible for Sabrina and Zulena within the meaning of the Family Court Act. The appellant was a cousin of the subject children who resided with them for a period

of time in their grandmother's apartment along with the children's mother and father. The record demonstrates that numerous other adults and children resided in the apartment during the relevant time period, including the children's aunt, uncle, and grandmother. Although Sabrina, who was about 13 to 15 years old during the relevant time period, testified generally that there were times when the appellant would supervise her, the testimony of other witnesses, including that of her mother, contradicted this aspect of her account. In this regard, Sabrina's mother testified that she never made the appellant responsible for the children, and that she did not leave them alone with him, as there were always other caretakers present. Sabrina's mother testified that Sabrina's older sister was responsible for the children's care on the occasions when she was at work or otherwise away from the home. In addition, the evidence at the hearing demonstrated that the children's grandmother and other adults were present in the apartment during the time when Sabrina's mother was at work. Although there was evidence that the appellant sometimes contributed money to the grandmother's household, and that he had, on occasion, performed general household chores for the benefit of the entire family, these circumstances were outweighed by evidence that the appellant did not exercise control over the children's environment in a manner commensurate with that of a parent ...". ***Matter of Zulena G. (Regilio K.),* 2019 N.Y. Slip Op. 06392, Second Dept 8-28-19**

FAMILY LAW, EVIDENCE, JUDGES.

FAMILY COURT SHOULD NOT HAVE DELEGATED ITS AUTHORITY TO DETERMINE PARENTAL ACCESS TO THE PARTIES AND SHOULD NOT HAVE MADE FINDINGS IN THE ABSENCE OF A HEARING.

The Second Department, reversing and remitting the matter to Family Court, determined the court should not have delegated its authority to determine parental access to the parties and should not have made findings without a hearing: "A court may not delegate its authority to determine parental access to either a parent or a child ... . While a child's views are to be considered in determining custody or parental access, they are not determinative ... . An access provision which is conditioned on the desires of the children tends to defeat the right of parental access ... . Here, the Family Court determined that it would not compel either child to visit with the mother. Because the order appealed from effectively conditions the mother's parental access on the children's wishes and leaves the determination as to whether there should be access at all to the children, it must be set aside ... . The Family Court made its determination based only upon its review of the papers, the in camera interviews, and the colloquy with the unrepresented parties, which occurred in the absence of the attorney for the children. The court did not conduct a hearing, did not direct a forensic examination, and did not seek information from the clinicians involved in the lapsed therapeutic visits. Although there are indications in the record that the mother's parenting skills may be less than ideal, and she may bear at least some responsibility for her estrangement from the children, the record before us is inadequate to support the Family Court's refusal to order, at the least, the resumption of therapeutic visits. Furthermore, the court's finding that the father had done all that he could to encourage the children to visit with the mother was based solely upon the in camera interviews and was not based on any sworn testimony, and the mother was not afforded the opportunity to challenge, either by her own evidence or through cross-examination, the father's assertions." ***Matter of Mondschein v. Mondschein,* 2019 N.Y. Slip Op. 06395, Second Dept 8-28-19**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

INJURY FROM A CHAIN-LINK FENCE AT A CONSTRUCTION SITE WHICH BLEW OVER ONTO PLAINTIFFS NOT COVERED BY LABOR LAW §§ 240(1) OR 241(6); QUESTIONS OF FACT RE: LABOR LAW 200 AND COMMON LAW NEGLIGENCE.

The Second Department, reversing Supreme Court, determined defendants were entitled to summary judgment dismissing the Labor Law §§ 240(1) and 241(6) causes of action. Plaintiffs were injured when a chain link fence blew over on them, an incident not covered by Labor Law §§ 240(1) or 241(6). However, there were questions of fact re: the Labor Law 200 and common law negligence causes of action: "... [D]efendants ... made a prima facie showing of their entitlement to judgment as a matter of law ... by demonstrating that the chain-link fence was not an object being hoisted or an object that required securing for the purposes of the undertaking, and that the fence did not fall because of the absence or inadequacy of an enumerated safety device ... ." ***Gurewitz v. City of New York,* 2019 N.Y. Slip Op. 06384, Second Dept 8-28-19**

PERSONAL INJURY, CONTRACT LAW.

TWO YOUNG MEN DID NOT REALIZE THE CONCRETE THEY WERE MOVING WAS A CESSPOOL COVER; ONE FELL IN AND THE OTHER JUMPED IN TO RESCUE HIM; BOTH DIED FROM CHEMICAL ASPHYXIATION; QUESTIONS OF FACT WHETHER THE COVER WAS A DANGEROUS CONDITION, WHETHER THE CESSPOOL CONTRACTOR LAUNCHED AN INSTRUMENT OF HARM AND WHETHER THE RESCUE ATTEMPT WAS FORESEEABLE.

The Second Department, reversing Supreme Court, determined there were questions of fact whether the property owner (Cruzate) was negligent and whether the cesspool contractor (Port Jefferson) launched an instrument of harm. Two young men were planning to build a campfire in the backyard of a rental property owned by Cruzate. The men did not realize the pieces of concrete they decided to move were cesspool covers. One of the men (Fuentes) fell in, the other (Castro) jumped in

to rescue him. Both were asphyxiated by chemicals that had been added when the cesspool was serviced: "... [T]he plaintiff raised a triable issue of fact as to whether the cesspool cover was in a defective condition because Port Jefferson Cesspool had improperly replaced it after servicing the cesspool, enabling Suarez to get his fingers underneath the cover and lift it ... . The plaintiff submitted the affidavit of his expert, who opined that, on the date of the accident, the cover was not secure to the ground. According to the expert, there was soil between the cover and the cesspool, so that the cover did not rest firmly on the cesspool, which was a substantial factor in the deaths of Castro and Fuentes. Moreover, Cruzate testified that he hired Port Jefferson Cesspool to service the cesspool, supervised the work, observed Port Jefferson Cesspool lift the cesspool cover, and was present when the work was completed. Therefore, there are triable issues of fact as to whether Cruzate had actual or constructive notice of the allegedly defective condition of the cesspool cover ... . [T]he plaintiff raised a triable issue of fact as to whether Port Jefferson Cesspool launched a force of harm and created a dangerous condition by improperly replacing the cement cover after servicing the cesspool (see generally Espinal v. Melville Snow Contrs., 98 NY2d 136). The plaintiff's expert opined, as discussed above, that there was soil between the cover and the cesspool, so that the cover did not rest firmly on the cesspool, and that this was a substantial factor in the deaths of Castro and Fuentes. ... [T]he fact that Castro decided to jump into the cesspool in an attempt to save his friend does not necessarily act as a bar to recovery. In 1921, the Court of Appeals, in an opinion by Judge Benjamin Cardozo, established that, with regard to the principle of foreseeability, '[d]anger invites rescue. . . . The wrong that imperils life is a wrong to the imperiled victim; it is also a wrong to his rescuer' (Wagner v. International Ry. Co., 232 NY at 180 ...) this principle applies where 'the actions of the injured person were reasonable in view of the emergency situation,' that is, where the rescuer 'acted as a reasonably prudent person would act in the same situation, even if it later appears that the rescuer did not make the safest choice or exercise the best judgment' ...". ***Calderon v. Cruzate*, 2019 N.Y. Slip Op. 06377, Second Detp 8-28-19**

VEHICLE AND TRAFFIC LAW, EVIDENCE, ADMINISTRATIVE LAW.

NO EVIDENCE THE FATAL ACCIDENT WAS CAUSED BY DRIVING TOO FAST FOR THE CONDITIONS; PETITIONER WAS TRAVELLING BELOW THE SPEED LIMIT WHEN HIS CAR STRUCK A POTHOLE, CAUSING A MECHANICAL FAILURE.

The Second Department, reversing the NYS Department of Motor Vehicles Administrative Appeals Board, annulled the finding that petitioner was speeding and the suspension of his driver's license. Petitioner was traveling below the speed limit when his car struck a pothole causing a mechanical failure which resulted in a fatal accident. The Administrative Law Judge had determined petition was driving too fast for the conditions, meaning too fast for a road with potholes: " 'To annul an administrative determination made after a hearing directed by law at which evidence is taken, a court must conclude that the record lacks substantial evidence to support the determination' ... . Here, the determination that the petitioner violated Vehicle and Traffic Law § 1180(a) is not supported by substantial evidence. There is no evidence to support the determination that the petitioner operated his vehicle at a speed greater than reasonable and prudent under the circumstances. There was no evidence to show that the petitioner's speed contributed to the accident or that the vehicle would not have been damaged by the pothole had the petitioner been traveling at a lesser rate of speed ...". ***Matter of Pepe v. New York State Dept. of Motor Vehicles*, 2019 N.Y. Slip Op. 06397, Second Dept 8-28-19**

THIRD DEPARTMENT

ELECTION LAW, MUNICIPAL LAW.

TOWN LAW DID NOT PROHIBIT PETITIONER FROM RUNNING FOR TOWN JUSTICE IN TWO DIFFERENT TOWNS SIMULTANEOUSLY.

The Third Department determined the Town Law did not prohibit simultaneously running for Town Justice in two different towns: "At issue is the portion of Town Law § 20 (4) providing that '[n]o person shall be eligible to hold more than one elective town office.' Petitioner interprets this to mean that no person may hold more than one elective office, even if those offices are in separate towns. Bacon [respondent] asserts that this language prohibits a person from holding more than one elective office only within the same town. Because the quoted language is ambiguous and both proffered interpretations are reasonable, we must view the language in the context of the whole statute ... . Viewing the prohibition in context, Town Law § 20 makes provision for town offices for each town, by class, and contains no other language suggesting that one person cannot fulfill elective town offices in more than one town. Moreover, the prohibition is contained in the same sentence as a provision allowing a town board to consolidate its own town offices and positions, strongly suggesting that the entire subdivision (4) of Town Law § 20 refers to what is permitted in an individual town. ... We further agree with Supreme Court that the offices of town justice in separate towns are not incompatible offices. ...Serving as town justice in two separate towns involves jurisdiction over separate, defined geographic town boundaries and each town court thereof (see Town Law § 2). Moreover, the Legislature has expressly recognized that one person may, under certain circumstances, serve as town justice in more than one town (see UJCA 106 [2]; 106-a, 106-b). Although those circumstances are not present here,

these statutes indicate the Legislature's view that no conflict exists to prevent a person from serving as town justice in two towns simultaneously." ***Matter of Nichols v. Bacon*, 2019 N.Y. Slip Op. 06434, Third Dept 8-29-19**

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