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Editor: **Bruce Freeman**

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FIRST DEPARTMENT

FORECLOSURE, CIVIL PROCEDURE.

DEFENDANT'S PARTICIPATION IN A SETTLEMENT CONFERENCE DID NOT WAIVE HIS RIGHT TO SEEK DISMISSAL OF THE FORECLOSURE ACTION AS ABANDONED.

The First Department, reversing Supreme Court, determined the defendant in this foreclosure action did not waive his right to seek dismissal of the complaint by participating in a settlement conference. The plaintiff bank had abandoned the action: "CPLR 3215(c) states that 'if [a] plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court shall not enter judgment but shall dismiss the complaint as abandoned...upon its own initiative or on motion.' The language of CPLR 3215(c) is not discretionary, and a claim for which a default judgment is not sought within the requisite one-year period will be deemed abandoned ... . Notwithstanding, a claim will not be deemed abandoned if the party seeking a default judgment provides sufficient cause as to why the complaint should not be dismissed (CPLR 3215[c]). Here, plaintiff waited almost three years to seek a default judgment, and it failed to provide sufficient cause as to why the complaint should not be dismissed. As such, plaintiff's complaint is dismissed as abandoned. Plaintiff's argument that defendant waived his right to seek dismissal pursuant to 3215(c) because he participated in the settlement conferences is equally unavailing. Although a party may waive it rights under CPLR 3215(c) 'by serving an answer or taking any other steps which may be viewed as a formal or informal appearance'..., defendant's participation in settlement conferences did not constitute either a formal or an informal appearance 'since [he] did not actively litigate the action before the Supreme Court or participate in the action on the merits' ...". ***Wells Fargo Bank, N.A. v. Martinez*, 2020 N.Y. Slip Op. 01693, First Dept 3-12-20**

PERSONAL INJURY.

WATER CAP IN A SIDEWALK WAS A TRIVIAL DEFECT, SLIP AND FALL ACTION PROPERLY DISMISSED.

The First Department determined that a quarter to half inch depression where a water cap was located in a sidewalk was a trivial defect and therefore could not be the basis of a slip and fall action: "... [T]he alleged defect on which plaintiff tripped was trivial and nonactionable as a matter of law based on the characteristics and surrounding circumstances ... . The water cap was a quarter to half of an inch below the surface of the sidewalk and the photographic evidence shows no defects in the water cap and surrounding sidewalk. Furthermore, plaintiff never attributed the cause of the accident to any broken or cracked cement or inadequate lighting ...". ***Rivera v. City of New York*, 2020 N.Y. Slip Op. 01698, First Dept 3-12-20**

SECOND DEPARTMENT

CIVIL PROCEDURE.

VACATING THE NOTE OF ISSUE RETURNS THE CASE TO THE PRE-NOTE OF ISSUE DISCOVERY STAGE, NO NEED TO MAKE A MOTION TO RESTORE THE ACTION TO THE TRIAL CALENDAR; THE MOTION TO EXTEND THE TIME TO FILE A NOTICE OF ISSUE, CITING LAW OFFICE FAILURE, SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, noted that vacating the note of issue automatically removes the case from the trial calendar and restores the action to the pre-note of issue discovery stage. The Second Department also determined the motion to extend the time to file a note of issue, citing law office failure, should have been granted: "The Supreme Court should have denied, as unnecessary, that branch of the plaintiff's motion which was to restore the action to the active calendar ... . Since the note of issue ... was vacated, thereafter, the action was restored to the pre-note of issue discovery stage ... . Because no note of issue had been filed, the action was not on the trial calendar. Therefore, the court's action of marking the action 'disposed' ... , after the plaintiff failed to file and serve a note of issue by the court-ordered deadline, did not dismiss the action ... . For the same reason, contrary to the defendant's contention, CPLR 3404 was inapplicable ... . As 'this action was never properly dismissed, there was no need for a motion to restore' ... . The Supreme Court improvidently exercised its discretion in denying that branch of the plaintiff's motion which was to extend his time to file a note of issue. CPLR 2004 allows a court to 'extend the time fixed by any statute, rule or order for doing any act, upon such terms as may be just and upon good cause shown.' Here, the plaintiff established good cause for his delay in completing discovery and

filing a note of issue based on law office failure, among other things ...". ***Ryskin v. Corniel*, 2020 N.Y. Slip Op. 01658, Second Dept 3-11-20**

CIVIL PROCEDURE.

INSTEAD OF DISMISSING THE COMPLAINT FOR FAILURE TO NAME A NECESSARY PARTY SUPREME COURT SHOULD HAVE ORDERED THE PARTY SUMMONED.

The Second Department, reversing (modifying) Supreme Court, determined that the motion to dismiss for failure to name a necessary party should not have been granted. Rather the court should have ordered the party summoned: "... [T]he Supreme Court should have denied that branch of [defendant's] motion which was pursuant to CPLR 3211(a)(10) to dismiss the complaint insofar as asserted against her for failure to join the estate ... as a defendant. 'When a [necesssary party] has not been made a party and is subject to the jurisdiction of the court, the court shall order him summoned' (CPLR 1001[b]). Accordingly, we remit the matter ... for the joinder of the administrator of the estate ... and for further proceedings consistent herewith ...". ***U.S. Bank Trust, N.A. v. Gedeon*, 2020 N.Y. Slip Op. 01660, Second Dept 3-11-20**

CONTRACT LAW, LANDLORD-TENANT.

LETTER AGREEMENT REGARDING A LEASE WAS NOT AN ENFORCEABLE CONTRACT; RATHER IT WAS AN AGREEMENT TO AGREE.

The Second Department determined a letter agreement regarding a lease was not an enforceable contract but rather was an agreement to agree: "In a document dated June 27, 2012 (hereinafter the 2012 letter agreement), the parties 'consolidate[d] all existing letter agreements to the same expiration date' of February 28, 2015. The 2012 letter agreement also stated that the terms of the lease were 'extended to now terminate on Feb. 28, 2030,' with 'terms to be determined at the expiration of this initial lease consolidation period.' The 2012 letter agreement further stated that any annual percentage increase in rent will not be less than five percent and will not exceed eight percent. ... A 'mere agreement to agree, in which a material term is left for future negotiations, is unenforceable' ... . 'This is especially true of the amount to be paid for the sale or lease of real property' ... . An agreement is not enforceable as a lease unless all of the essential terms are agreed upon, and if 'any of these essential terms are missing and are not otherwise discernible by objective means, a lease has not been created' ... . Here, the defendants established their prima facie entitlement to judgment as a matter of law by submitting, inter alia, a copy of the 2012 letter agreement, which demonstrated that the renewal provision was an unenforceable agreement to agree ...". ***Reis v. J.B. Kaufman Realty Co., LLC*, 2020 N.Y. Slip Op. 01657, Second Dept 3-11-20**

CRIMINAL LAW.

THE JURY WAS NOT PROPERLY INSTRUCTED ON THE JUSTIFICATION DEFENSE, INDICTMENT COUNT DISMISSED.

The Second Department determined the jury was not properly instructed on the justification defense: "... [T]he Supreme Court instructed the jurors to consider justification as an element of each count submitted for their consideration. The court also 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 the court did not instruct the jurors that if they were to find the defendant not guilty of the greater counts of assault in the second degree on the basis of justification, they were not to consider the lesser count of obstructing governmental administration in the second degree. We cannot say with any certainty, and there is 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 count ... . The evidence at trial of lack of justification was not overwhelming ... . Although, ordinarily, a new trial would be ordered, since the defendant was acquitted of the assault in the second degree counts and the only remaining count of the indictment concerns the offense for which the defendant has already completed his sentence, dismissal of the count of the indictment charging obstructing governmental administration in the second degree, rather than a new trial on that count, is appropriate ...". ***People v. Gunther*, 2020 N.Y. Slip Op. 01638, Second Dept 3-11-20**

CRIMINAL LAW.

DEFENDANT DEMONSTRATED THE NEED TO TESTIFY ABOUT ONE OF THE ROBBERIES AND THE NEED TO REFRAIN FROM TESTIFYING ABOUT THE OTHER ROBBERY; THE MOTION FOR SEVERANCE SHOULD HAVE BEEN GRANTED.

The Second Department, reversing the conviction and ordering a new trial, determined defendant's motion the sever the trials of two distinct robberies should have been granted. Defendant demonstrated the need to testify about his defense of duress re: one of the robberies, and his need to refrain from testifying re: the other robbery due to the *Sandoval* ruling: "The affirmative defense of duress requires the defendant to establish coercion by the use or threatened imminent use of unlawful physical force (Penal Law § 40.00[1]). Since the defendant's written statement did not explain why the defendant did not abandon the Lopez robbery once he was given a gun, the written statement was insufficient to establish that there was a threat of imminent use of physical force ... . Indeed, the People argued to the jury that the defendant's duress defense should

be rejected since, once the defendant was given the gun, he could have left the scene without committing the robbery. Thus, the record convincingly established that the defendant had important testimony to give about his duress defense in order to, inter alia, rebut the People's argument that the defendant was not under duress ... . [T]he defendant convincingly showed that he had a genuine need to refrain from testifying in regards to the Pratt robbery. In the event that the defendant testified, the Supreme Court's Sandoval ruling permitted the People to introduce evidence of the underlying facts of two prior youthful offender adjudications involving robberies that were similar to the Pratt robbery ... . Thus, if the defendant elected to testify, he would expose himself to the 'risk of serious impeachment' with the underlying facts of two robberies bearing similarities to the Pratt robbery … . However, if he refrained from testifying, he was prejudiced in his ability to present his duress defense to the Lopez robbery counts." ***People v. Moore*, 2020 N.Y. Slip Op. 01645, Second Dept 3-11-20**

CRIMINAL LAW, ATTORNEYS.

DEFENDANT DID NOT RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL AT SENTENCING; DEFENSE COUNSEL WAS NOT FAMILIAR WITH THE CASE OR THE DEFENDANT'S BACKGROUND.

The Second Department, reversing the conviction, determined defendant did not receive effective assistance of counsel at sentencing. Counsel was not familiar with the case of the defendant's background: "... [T]he defendant was deprived of the effective assistance of counsel at sentencing. A defendant is 'entitled to an opportunity to be represented by counsel sufficiently familiar with the case and the defendant's background to make an effective presentation on the question of sentence' ... . Here, the defendant's counsel at sentencing made no substantive arguments on the defendant's behalf, and the record demonstrates that counsel had no meaningful knowledge of the case or of the defendant's background." ***People v. Jones*, 2020 N.Y. Slip Op. 01640, Second Dept 3-11-20**

CRIMINAL LAW, EVIDENCE.

PROTECTIVE ORDER PRECLUDING DISCLOSURE OF EVIDENCE TO THE DEFENSE REVERSED.

The Second Department, in a decision by Justice Scheinkman, reversing Supreme Court, vacated a protective order concerning the disclosure of certain evidence to the defense: "I agree with the defendant that the People should have been required to disclose to defense counsel the general nature of the information that the People sought to be protected (see CPL 245.10[1][a] ['Portions of materials claimed to be non-discoverable may be withheld pending a determination and ruling of the court under 245.70 of this article; but the defendant shall be notified in writing that information has not been disclosed under a particular subdivision of (CPL 245.20)']). The defendant and his counsel were not informed as to whether what was sought to be protected were only witness names and personal information as opposed to witness statements, police reports, grand jury testimony, video or audio recordings, or other evidence. I also agree with the defendant that, under the circumstances of this case, the People should have been required to disclose information about the reasons for the application that would not reveal the existence of the information sought to be protected. As I stated in People v. Bonifacio (179 AD3d 977, 979), 'proceedings on applications for a protective order should be entirely ex parte only where the applicant has demonstrated the clear necessity for the entirety of the application, and the submissions in support of it, to be shielded from the opposing party' and that it may be that 'even where some aspects of the application should be considered by the court ex parte, other portions of the application may be appropriately disclosable.' Here, much of the written application could have been disclosed to defense counsel in redacted form without any danger of revealing the information sought to be protected ...". ***People v. Belfon*, 2020 N.Y. Slip Op. 01630, Second Dept 3-11-20**

CRIMINAL LAW, EVIDENCE.

SECOND DEGREE MURDER COUNTS DISMISSED AS INCLUSORY CONCURRENT COUNTS RE FIRST DEGREE MURDER; CROSS EXAMINATION OF A POLICE OFFICER RE EXCESSIVE FORCE PROPERLY PRECLUDED BECAUSE THE ALLEGATIONS WERE NOT RELEVANT TO CREDIBILITY.

The Second Department determined the second degree murder counts must be dismissed as inclusory concurrent counts of the convictions of first degree murder. The court noted that the trial court properly precluded cross examination of a police officer about allegations of the officer's use of excessive force because the allegations were not relevant to credibility: "While specific and relevant allegations of misconduct in a civil action filed against a law enforcement officer may be used for the limited purpose of impeaching that law enforcement witness at trial ... , such impeachment is subject to the court's broad discretion in controlling the permissible scope of cross-examination ... . Here, the defendant failed to demonstrate that specific allegations of excessive force in a federal action pending against the detective and a finding in 2010 by the Civilian Complaint Review Board that the detective used excessive force were relevant to the detective's credibility ...". ***People v. Brown*, 2020 N.Y. Slip Op. 01632, Second Dept 3-11-20**

FORECLOSURE, EVIDENCE.

THE REFEREE'S FINDINGS WERE BASED UPON INADMISSIBLE HEARSAY, JUDGMENT OF FORECLOSURE REVERSED.

The Second Department, reversing Supreme Court, determined the referee's findings in this foreclosure action were based upon inadmissible hearsay: " 'The report of a referee should be confirmed whenever the findings are substantially supported by the record, and the referee has clearly defined the issues and resolved matters of credibility' ... . Here, contrary to the plaintiff's contention, the affidavit of its document execution specialist, submitted for the purpose of establishing the amount due and owing under the subject mortgage loan, constituted inadmissible hearsay and lacked probative value because the affiant did not produce any of the business records he purportedly relied upon in making his calculations ... . Under the circumstances, the referee's findings with respect to the total amount due upon the mortgage were not substantially supported by the record ...". ***Nationstar Mtge., LLC v. Cavallaro*, 2020 N.Y. Slip Op. 01624, Second Dept 3-11-20**

PERSONAL INJURY, MUNICIPAL LAW.

ABUTTING PROPERTY OWNER IS NOT RESPONSIBLE FOR TREE WELLS IN CITY SIDEWALKS; DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined defendant was not liable for plaintiff's slip and fall because abutting property owners are not responsible for the condition of tree wells in a sidewalk: "Administrative Code of the City of New York § 7-210 places the duty to maintain a sidewalk in a reasonably safe condition on the owner of the property abutting the sidewalk, and provides for civil liability for injuries proximately caused by the failure to so maintain the sidewalk. However, the statute does not extend that duty of maintenance to City-owned tree wells or provide for civil liability for injuries occurring in City-owned tree wells ... . Thus, liability may be imposed on the abutting landowner for injuries caused by a dangerous condition in a tree well only where the landowner has 'affirmatively created the dangerous condition, negligently made repairs to the area, [or] caused the dangerous condition to occur through a special use of that area' ... . Here, [defendant] established its prima facie entitlement to judgment as a matter of law by demonstrating that it had no duty to maintain the City-owned tree well, did not create the allegedly dangerous condition, did not negligently repair the sidewalk abutting the tree well, and did not cause the condition to occur through any special use of the tree well." ***Powroznik v. City of New York*, 2020 N.Y. Slip Op. 01655, Second Dept 3-11-20**

PERSONAL INJURY, VEHICLE AND TRAFFIC LAW.

THE BUS DRIVER VIOLATED THE VEHICLE AND TRAFFIC LAW AND WAS NEGLIGENT AS A MATTER OF LAW; DEFENSE VERDICT SET ASIDE.

The Second Department, setting aside the defense verdict in this traffic accident case, determined the bus driver was negligent as a matter of law. To avoid a stopped vehicle the driver (Barreto) crossed a double yellow line and lost control of the bus which crashed into a store. The plaintiffs were bus passengers: "This Court has held that 'a driver who crosses over a double yellow line into opposing traffic, unless justified by an emergency not of the driver's own making, violated the Vehicle and Traffic Law and is guilty of negligence as a matter of law' (... see Vehicle and Traffic Law § 1126[a] ...). Here, although the evidence demonstrated that there was snow or slush on the surface of the subject road, the adverse weather conditions, as well as the fact that the road sloped downhill, were foreseeable and known to Barreto and did not provide a nonnegligent explanation for Barreto's violation of the Vehicle and Traffic Law ... . Although the evidence demonstrated that there was a vehicle stopped in the bus's lane of travel, thereby obstructing its path, the evidence also demonstrated that the stopped vehicle was observable from a far distance, that the bus did not slow down after the stopped vehicle came into Barreto's view, and that Barreto crossed over the double-yellow line without slowing down. Under the circumstances, Barreto's loss of control over the bus was the result of his own negligent driving in adverse weather conditions, rather than the result of an emergency not of his own making. The absence of an emergency was recognized by the Supreme Court in its refusal to grant the defendant's request that the jury be given an instruction on the emergency doctrine. Barreto's operation of the bus under the circumstances here violated Vehicle and Traffic Law § 1120(a). Such violation constitutes negligence as a matter of law and could not properly be disregarded by the jury ...". ***Hodnett v. Westchester County Dept. of Pub. Works & Transp.*, 2020 N.Y. Slip Op. 01603, Second Dept 3-11-20**

THIRD DEPARTMENT

CRIMINAL LAW.

FAILURE TO INCLUDE THE APPROXIMATE TIME OF THE COMMISSION OF THE OFFENSE IN THE SUPERIOR COURT INFORMATION (SCI) IS NOT A JURISDICTIONAL DEFECT.

The Third Department determined that the Superior Court Information (SCI) was not jurisdictionally defective and therefore any attack on the validity of the SCI was precluded by the waiver of appeal: "Pursuant to our recent decisions in People

v. Elric YY. (179 AD3d 1304 [2020]) and People v. Shindler (179 AD3d 1306 [2020]), defendant's further contention that her 2015 waiver of indictment was jurisdictionally defective because the SCI did not set forth the approximate time of the commission of the charged crimes as required by CPL 195.20 is also without merit ... . The omission of the approximate time of the charged crimes in the SCI, to which defendant did not object, is a nonjurisdictional defect to which any objection was forfeited by her guilty plea. Notably, no claim has been made that defendant lacked notice of the specific crimes for which she agreed to waive prosecution by indictment." ***People v. Edwards*, 2020 N.Y. Slip Op. 01671, Third Dept 3-12-20**

CRIMINAL LAW.

REVERSAL IS NOT REQUIRED WHEN A JURY NOTE WHICH WAS NOT ADDRESSED BY THE COURT HAD NO DIRECT RELEVANCE TO THE CHARGED OFFENSE.

The Third Department, in a full-fledged opinion by Justice Garry, determined, after a reconstruction hearing, the trial judge was not made aware of a jury note which requested a trial exhibit and a chronology of events relating to the defendant's dating the victim's relative. The judge's clerk provided the trial exhibit to the jury. No such chronology existed and the judge was not informed of the request for it. Because the chronology did not have anything to do with the charged offense, the failure to address that aspect of the jury note was not a mode of proceedings error: "... [T]he chronology requested by the jury involved background factual information regarding a former relationship between defendant and a relative of the victim that had no relevance to any of the elements of the charged crime or to the jury's process of reaching a verdict ... . [I]n Silva, the Court of Appeals found that a trial court's O'Rama [78 NY2d 270] error did not require reversal of the defendant's drug-related convictions because the jury inquiry did not pertain to those convictions, but only to a conviction for weapon possession (People v. Silva, 24 NY3d at 301 n 2). Likewise, in People v. Walston (23 NY3d 986, 990 [2014]), the defendant's manslaughter conviction was reversed because of a trial court's mode of proceedings error, but the Court of Appeals held that reversal of a separate conviction on another charge was not required because the note did not address that offense. Thus, reversal of a conviction is not required when a trial court fails to address a jury inquiry that has no direct relevance to that conviction ...". ***People v. Johnson*, 2020 N.Y. Slip Op. 01668, Third Dept 3-12-20**

CRIMINAL LAW, EVIDENCE.

DEFENDANT WAS ALONE IN HIS CAR ARGUING WITH SOMEONE ON HIS PHONE WHEN THE POLICE APPROACHED; THE POLICE DID NOT HAVE AN OBJECTIVE, CREDIBLE REASON FOR THE APPROACH; THE HANDGUN FOUND IN AN INVENTORY SEARCH SHOULD HAVE BEEN SUPPRESSED.

The Third Department, reversing County Court and dismissing the indictment, determined the police officers did not have an objective credible reason for approaching defendant, who was in his car outside a nightclub just after the club closed. The defendant was arrested after a check on his license revealed it had been suspended. The handgun found in an inventory search of the car should have been suppressed: "... [D]efendant's engagement in an argument on his cell phone while alone in his private vehicle — did not provide any apparent nexus to the drug and weapons crimes that police said were typically committed in the area, or give rise to any other objective reason to question his presence. Nothing about a driver's conduct in arguing on a cell phone, without more, suggests criminal activity related to weapons or drugs ... . A sole occupant of a private vehicle arguing with someone who is not present gives rise to no apparent reason for police to intervene, such as potential safety concerns ... . Thus, we find that police did not have the requisite objective, credible reason for approaching defendant's vehicle in the first instance. The encounter was further invalid because police had no objective, credible reason to extend the initial conversation by running defendant's driver's license after he responded to their initial inquiry and provided the information they requested ... . The officer gave no explanation for his decision to intrude further at that point, nor does the record reveal such an explanation. Nothing about the exchange with defendant gave rise to any reason to suspect that he was not telling the truth ... . Defendant's driver's license did not appear to belong to someone else ... or reveal anything unusual on its face ... . Lacking an objective, credible reason that justified police in approaching defendant's vehicle and making inquiries, the encounter was invalid at its inception ...". ***People v. Stover*, 020 N.Y. Slip Op. 01676, Third Dept 3-12-20**

FOURTH DEPARTMENT

BATTERY, CIVIL PROCEDURE.

TEACHER'S LAWSUIT AGAINST STUDENTS ALLEGED INTENTIONAL, NOT NEGLIGENT, CONDUCT AND WAS THEREFORE TIME-BARRED.

The Fourth Department, reversing Supreme Court, determined plaintiff-teacher's suit against two students alleged intentional conduct (battery), not negligent conduct, and was therefore time-barred. Plaintiff was pushed into a locker by the students who were fighting each other. Although the students did not intend to touch the teacher, the doctrine of transferred intent applied: "Defendant met her initial burden by establishing that plaintiff was injured as a result of intentional con-

duct that constituted a battery and not negligent conduct ... . 'A valid claim for battery exists where a person intentionally touches another without that person's consent' ... . ' The intent required for battery is intent to cause a bodily contact that a reasonable person would find offensive'; there is no requirement that the contact be intended to cause harm' ... . The deposition testimony of plaintiff and defendants submitted in support of the motion established that defendants intentionally caused offensive bodily contact with each other by engaging in a physical fight ... . Although defendants did not intend to make physical contact with or to injure plaintiff, the contact that resulted in plaintiff's injuries was nevertheless intentional under the doctrine of 'transferred intent' ... . Defendant thus established that this action is barred by the one-year statute of limitations applicable to intentional torts ...". ***Kessel v. Adams*, 2020 N.Y. Slip Op. 01758, Fourth Dept 3-13-20**

CONTRACT LAW, ADMINISTRATIVE LAW, MUNICIPAL LAW, CIVIL PROCEDURE, ZONING, LAND USE.

CORRESPONDENCE BETWEEN THE TOWN AND THE PROPERTY OWNER AMOUNTED TO AN AGREEMENT TO AGREE, NOT AN ENFORCEABLE SETTLEMENT AGREEMENT ALLOWING CONSTRUCTION; SUPREME COURT'S DIRECTIVES TO THE TOWN ENCROACHED UPON THE TOWN'S ADMINISTRATIVE AUTHORITY.

The Fourth Department, reversing Supreme Court, determined: (1) the correspondence between the property owner (PCP) and the town concerning proposed construction created an agreement to agree, not an enforceable settlement agreement allowing construction; and (2), Supreme Court's directing what the town could and could not consider with respect to the construction project encroached upon the town's administrative authority: "... [T]he letters that the court found to have memorialized the settlement agreement did not contain all the material terms of the settlement and constituted no more than an agreement to agree ... . [The town] stated therein only that it was 'now in a position to agree to a settlement of the mass and scale issues,' but that first it would 'need to receive, review and approve all of the items that it normally reviews in connection with any application it receives.' Any agreement was further conditioned on [the town's] receipt of additional documentation from PCP, including 'an accurate, to-scale site plan' and further roof specifications ... . We further conclude that, in the absence of an enforceable settlement agreement, the court's hearing on the issues of mass and scale, subsequent decision rendering findings of fact related to PCP's new application for a certificate of approval, and remittal to [the town] for consideration of that application with specific directives regarding what [the town] could and could not consider were impermissible intrusions into respondents' administrative domain ...". ***Matter of Pittsford Canalside Props., LLC v. Village of Pittsford Zoning Bd. of Appeals*, 2020 N.Y. Slip Op. 01812, Fourth Dept 3-13-20**

CRIMINAL LAW.

PENNSYLVANIA CRIME IS NOT THE EQUIVALENT OF A NEW YORK FELONY; DEFENDANT SHOULD NOT HAVE BEEN SENTENCED AS A SECOND FELONY OFFENDER.

The Fourth Department, vacating the sentence, determined the Pennsylvania crime of receiving stolen property (a firearm) was not the equivalent of a New York felony. Therefore defendant should not have been sentenced as a second felony offender: "We agree with defendant and the People correctly concede that defendant was improperly sentenced as a second felony offender inasmuch as the predicate conviction, i.e., the Pennsylvania crime of receiving stolen property (a firearm) (18 Pa Cons Stat §§ 3903 [a] [3]; 3925) is not the equivalent of the New York felony of criminal possession of stolen property in the fourth degree ... . Upon our review of Pennsylvania statutory and case law, the operability of a firearm is not an element of the Pennsylvania offense, whereas it is a required element of the New York offense ...". **People v. Huntress, 2020 N.Y. Slip Op. 01778, Fourth Dept 3-13-20**

CRIMINAL LAW, APPEALS.

ALTHOUGH COUNTY COURT DID NOT ABUSE ITS DISCRETION, THE APPELLATE COURT EXERCISED ITS INTEREST OF JUSTICE JURISDICTION TO ADJUDICATE DEFENDANT A YOUTHFUL OFFENDER.

The Fourth Department, exercising its own interest of justice authority, determined defendant should be adjudicated a youthful offender, noting that County Court did not abuse its discretion: "... [D]efendant was 17 years old at the time of the crimes and had no prior criminal record, history of violence, or history of sex offending. Moreover, defendant has substantial cognitive limitations, learning disabilities, and other mental health issues, and he has accepted responsibility for his actions and expressed genuine remorse. Both the Probation Department and the reviewing psychologist recommended youthful offender treatment, and the record suggests that defendant might have the capacity for a productive and law-abiding future. The only factor weighing against affording defendant youthful offender treatment is the seriousness of the crimes. On balance, although County Court did not abuse its discretion in denying defendant youthful offender status, we will exercise our discretion in the interest of justice to reverse the judgment, vacate the conviction, and adjudicate defendant a youthful offender ...". ***People v. Nicholas G.*, 2020 N.Y. Slip Op. 01828, Fourth Dept 3-13-20**

CRIMINAL LAW, ATTORNEYS, EVIDENCE.

DEFENDANT'S RIGHT TO COUNSEL ATTACHED AT THE PENNSYLVANIA ARRAIGNMENT; SUBSEQUENT QUESTIONING BY PENNSYLVANIA POLICE IN THE ABSENCE OF COUNSEL VIOLATED DEFENDANT'S RIGHT TO COUNSEL; NEW YORK POLICE DID NOT MAKE A REASONABLE INQUIRY INTO DEFENDANT'S REPRESENTATIONAL STATUS.

The Fourth Department, affirming the suppression of statements made by defendant, determined defendant had requested counsel at his arraignment in Pennsylvania and therefore subsequent questioning by Pennsylvania police about New York (Jamestown) offenses in the absence of counsel violated his right to counsel: "On March 28, 2017, defendant participated in a preliminary arraignment in Pennsylvania ... , and the record supports the finding of County Court that defendant requested counsel during that proceeding. On April 4, 2017, members of the Jamestown Police Department traveled to Pennsylvania to interview defendant about the Jamestown arsons. Although the Jamestown police officers ultimately did not interview defendant themselves, they observed while Pennsylvania State Troopers interrogated defendant, in the absence of defense counsel, about the offenses allegedly committed in Pennsylvania. During that interrogation, the Pennsylvania State Troopers also questioned defendant about the New York offenses, and defendant made inculpatory statements about the Jamestown fires. * * * ...[E]even though the interview was carried out by Pennsylvania State Troopers, their interrogation is nevertheless subject to this state's right to counsel jurisprudence inasmuch as they were agents of the Jamestown police officers ... . The Court of Appeals has held that 'an officer who wishes to question a person in police custody about an unrelated matter must make a reasonable inquiry concerning the defendant's representational status when the circumstances indicate that there is a probable likelihood that an attorney has entered the custodial matter, and the accused is actually represented on the custodial charge' ... . Here, although the [Jamestown] captain asked whether defendant was represented by counsel, based on this record, we conclude that the captain's inquiry was not reasonable inasmuch as he failed to ask whether defendant had requested counsel." ***People v. Young*, 2020 N.Y. Slip Op. 01825, Fourth Dept 3-13-20**

CRIMINAL LAW, ATTORNEYS, EVIDENCE.

DEFENDANT'S MOTION TO VACATE HIS CONVICTION ON INEFFECTIVE ASSISTANCE GROUNDS SHOULD NOT HAVE BEEN DENIED WITHOUT A HEARING.

The Fourth Department, reversing Supreme Court, over a dissent, determined defendant's motion to vacate his conviction on ineffective assistance grounds should not have been denied without a hearing. The defendant submitted an affidavit from an alibi witness claiming that defendant was out-of-state at the time of the offense and further stating that she had so informed defense counsel. In denying the motion to vacate, Supreme Court noted that defendant did not submit an affidavit from defense counsel. The Fourth Department recognized that obtaining such an affidavit is problematic where ineffective assistance is alleged: " 'It is well established that the failure to investigate or call exculpatory witnesses may amount to ineffective assistance of counsel' ... . Contrary to the court's determination, a 'defendant's failure to submit an affidavit from trial counsel is not fatal to [a CPL 440.10] motion' ... . Where, as here, the defendant's ' application is adverse and hostile to his [or her] trial attorney,' it is wasteful and unnecessary' to require the defendant to secure an affidavit from counsel, or to explain his [or her] failure to do so' ... . Moreover, to be entitled to a hearing, a defendant is not required to submit with his or her motion evidence corroborating the alibi witness's affidavit ... . Although the lack of corroboration is a factor the court may consider at a hearing, it is not a basis for denying the motion summarily." ***People v. Scott*, 2020 N.Y. Slip Op. 01807, Fourth Dept 3-13-20**

CRIMINAL LAW, ATTORNEYS, EVIDENCE.

DEFENDANT'S MOTION TO VACATE HIS CONVICTION ON INEFFECTIVE ASSISTANCE GROUNDS SHOULD NOT HAVE BEEN DENIED WITHOUT A HEARING.

The Fourth Department, reversing Supreme Court, over a two-justice dissent, determined defendant's motion to vacate his conviction on ineffective assistance ground should not have been denied without a hearing: "... [D]efendant's CPL 440.10 motion was supported by a notarized but unsworn statement of a witness, dated prior to defendant's trial, who asserted that defendant had borrowed the witness's jacket minutes before defendant's arrest, that the controlled substances in the pockets of that jacket belonged to the witness, and that defendant had no prior knowledge of the controlled substances ... . Defendant himself averred in an affidavit submitted in support of his motion that he informed trial counsel prior to trial of the witness's willingness to testify. Defendant's motion therefore set forth sufficient facts tending to substantiate his claim that he was denied effective assistance of counsel, and we therefore agree with defendant that Supreme Court erred in denying that claim without a hearing ... . We further agree with defendant that the court erred in rejecting his contention that trial counsel was ineffective for failing to either secure police surveillance of the traffic stop that led to defendant's arrest or seek sanctions for the prosecution's alleged failure to preserve the same." ***People v. Fox*, 2020 N.Y. Slip Op. 01809, Fourth Dept 3-13-20**

CRIMINAL LAW, CONTRACT LAW.

DEFENDANT WAS ENTITLED TO SPECIFIC PERFORMANCE OF THE PLEA AGREEMENT; COUNTY COURT SHOULD NOT HAVE ORDERED RESTITUTION WHICH WAS NOT ADDRESSED IN THE AGREEMENT.

The Fourth Department, amending defendant's sentence, determined restitution should not have been ordered because it was not addressed in the plea agreement: "Restitution was not part of the plea bargain, and thus the amended sentence exceeded the sentence promised in the plea bargain ... . Defendant objected to County Court imposing restitution ... , but the court rejected defendant's request for specific performance of the plea agreement and instead offered defendant the opportunity to withdraw his plea, which defendant declined. As defendant contends and the People correctly concede, defendant was entitled to specific performance of the plea agreement because he 'placed himself in a no-return' position by carrying out his obligations under' the agreement here, and there was 'no significant additional information bearing upon the appropriateness of the plea bargain' ...". ***People v. Rosa*, 2020 N.Y. Slip Op. 01793, Fourth Dept 3-13-20**

CRIMINAL LAW, EVIDENCE.

THE POLICE OFFICER DID NOT HAVE A FOUNDED SUSPICION OF CRIMINAL ACTIVITY WHEN HE ASKED THE DEFENDANT POINTED QUESTIONS IN THIS STREET STOP SCENARIO; THE SEIZED EVIDENCE SHOULD HAVE BEEN SUPPRESSED.

The Fourth Department, reversing County Court, determined the police officer did not have a founded suspicion of criminal activity at the time defendant was asked about the contents of a bag he was carrying. The defendant answered "weed," was frisked, and a firearm was seized. The evidence should have been suppressed: "The evidence at the suppression hearing establishes that the arresting officer was on routine patrol in what he described as a high-crime area known to be an 'open air drug market,' where there had also been numerous burglaries and robberies. That officer had been a member of the police force for only a few months, and he was under the supervision of a training officer. The arresting officer testified that he observed defendant walking on a sidewalk shortly after midnight on a chilly night, with temperatures near 40 degrees, and that defendant was wearing a mask that covered the lower part of his face. The officer had not received any reports of recent crimes in the area, was not responding to any call, and did not observe defendant engage in any illegal activity. The officer pulled his patrol vehicle in front of defendant's path of travel, exited the patrol vehicle along with the training officer, approached defendant, and asked defendant why he was wearing a mask. Defendant replied that he was walking his dog, and the unchallenged evidence at the hearing establishes that he was indeed walking a dog. * * * Based on the evidence at the suppression hearing, the People failed to meet their burden of establishing that the training officer had the requisite founded suspicion ... . Thus, we conclude that the training officer's inquiry and the subsequent frisk of defendant by the arresting officer was not a proper escalation of the level one encounter. ... We further conclude that the frisk of defendant and seizure of the gun was not justified 'as having been in the interests of the officer['s] safety, since there was no testimony that the [arresting] officer[ ] believed defendant to be carrying a weapon . . . , and the People presented no other evidence establishing that the [arresting] officer had reason to fear for his safety' ...". ***People v. Wallace*, 2020 N.Y. Slip Op. 01796, Fourth Dept 3-13-20**

CRIMINAL LAW, EVIDENCE.

IT WAS (HARMLESS) ERROR TO ALLOW A POLICE OFFICER TO IDENTIFY DEFENDANT IN SECURITY CAMERA FOOTAGE.

The Fourth Department determined it was (harmless) error to allow a police officer to identify defendant in security camera footage: "Defendant ... contends that the court erred in permitting a police detective to give testimony identifying defendant as the shooter in the security camera footage and drawing certain inferences from that footage ... . To the extent that defendant's contention is preserved for our review (see CPL 470.05 [2]), we conclude that any error in the admission of that testimony is harmless ... . We note that the court sustained at least one objection from defense counsel after a nonresponsive answer from the police detective and issued a curative instruction with respect to that answer, which the jury is presumed to have followed ... . We also note that the court's final instructions to the jury alleviated much of the prejudice of the police detective's testimony of which defendant now complains. The court instructed the jury that they were the sole and exclusive judges of the facts, that the testimony of police officers should not automatically be accepted, and that defendant's identity was a disputed issue in the case. The court also instructed the jury how it should evaluate the accuracy of identification testimony. Again, the jury is presumed to have followed those instructions ...". ***People v. Jordan*, 2020 N.Y. Slip Op. 01817, Fourth Dept 3-13-20**

CRIMINAL LAW, EVIDENCE, APPEALS.

ALTHOUGH THE ASSAULT JURY INSTRUCTION DID NOT TRACK THE INDICTMENT, THE PEOPLE DID NOT OBJECT TO IT AND THE APPELLATE COURT MUST ASSESS THE SUFFICIENCY OF THE EVIDENCE ACCORDING TO THE INSTRUCTION; ASSESSED IN THE LIGHT OF THE JURY INSTRUCTION, THE ASSAULT COUNTS WERE NOT SUPPORTED BY LEGALLY SUFFICIENT EVIDENCE; THE CRIMINAL USE OF A FIREARM JURY INSTRUCTION DID NOT TRACK THE INDICTMENT, VIOLATING DEFENDANT'S RIGHT TO BE TRIED ONLY ON THE CRIMES CHARGED.

The Fourth Department, over a dissent, reversed the assault convictions, while affirming the murder conviction. The codefendant, intending to kill the decedent, also shot the two assault victims. Defendant was charged with murder and assault as an accomplice. Although the indictment charged assault under a transferred intent theory, the jury was instructed to find the defendant guilty of assault only if he intended injure the assault victims. Because, on appeal, the sufficiency of the evidence must be measured by the what the jury was instructed to consider, and because there was no evidence the defendant intended to injure the assault victims (as opposed to the decedent), the assault convictions were not supported by legally sufficient evidence. Although the defendant did not preserve the error by objecting to another inaccurate jury instruction which did not track the indictment, the criminal use of a firearm count was also dismissed because defendant's right to the tried only on the crimes charged was violated: " 'The doctrine of transferred intent' serves to ensure that a person will be prosecuted for the crime he or she intended to commit even when, because of bad aim or some other lucky mistake,' the intended target was not the actual victim' ... . Although that theory may be applied to assault charges ... , County Court's jury instruction in this case mandated that the jury could convict defendant of the counts of assault in the first degree only if they found that he acted 'with the intent to cause serious physical injury to' each assault victim, rather than instructing the jury that they could convict defendant of those crimes if they concluded that he intended to cause such injury to the deceased victim but the codefendant actually caused injury to the assault victims. The prosecution did not object to that charge, and it is well settled that, when reviewing a 'jury's guilty verdict, our review is limited to whether there was legally sufficient evidence . . . based on the court's charge as given without exception' ... . Inasmuch as there is insufficient evidence that defendant knew that either of the assault victims was present or that he intended any harm to either of them ... , we conclude that the evidence is not legally sufficient with respect to the assault counts as charged to the jury. * * * Although the court's jury instructions did not specify assault in the first degree as the underlying crime for the criminal use of a firearm in the first degree count, and defendant did not object to the court's instructions and thus did not preserve this issue for our review, we conclude that 'preservation is not required' ... , inasmuch as 'defendant has a fundamental and nonwaivable right to be tried only on the crimes charged' in the indictment ... . Therefore, based on the indictment, defendant could only be convicted of that charge if he committed assault in the first degree ... . Thus, we conclude that, because 'the conviction[s] of assault in the first degree cannot stand, the conviction of criminal use of a firearm in the first degree, which requires commission of [the] class B violent felony offense[of assault in the first degree] while possessing a deadly weapon, also cannot stand' ...". ***People v. Spencer*, 2020 N.Y. Slip Op. 01823, Fourth Dept 3-13-20**

CRIMINAL LAW, EVIDENCE, APPEALS.

RECKLESS ENDANGERMENT CONVICTION NOT SUPPORTED BY THE WEIGHT OF THE EVIDENCE; BECAUSE THE LEGAL SUFFICIENCY OF THE CONVICTION WAS NOT CHALLENGED IT MUST BE REVERSED NOT REDUCED BY THE APPELLATE COURT; GRAND LARCENY AND POSSESSION OF STOLEN PROPERTY CONVICTIONS NOT SUPPORTED BY THE WEIGHT OF THE EVIDENCE; INADEQUATE PROOF OF VALUE.

The Fourth Department reversed the reckless endangerment, grand larceny, possession of stolen property, and arson third degree convictions, and affirmed the murder, assault and arson second degree convictions. With respect to reckless endangerment first degree, the conviction was against the weight of the evidence and the appellate court could not reduce the conviction to a lesser included because defendant did not argue the evidence was legally insufficient. So the reckless endangerment conviction was reversed. The grand larceny/possession of stolen property convictions were not supported by adequate proof that the value of the stolen vehicle was more than $100. Arson third degree was dismissed as an inclusory concurrent count of arson in the second degree: "We agree with defendant ... that the verdict finding him guilty of reckless endangerment in the first degree is against the weight of the evidence. 'A person is guilty of reckless endangerment in the first degree when, under circumstances evincing a depraved indifference to human life, he [or she] recklessly engages in conduct which creates a grave risk of death to another person' ... . Count five of the indictment alleged that defendant recklessly engaged in conduct creating a grave risk of death to emergency responders when he intentionally started the fire. We agree with defendant that the verdict on that count is against the weight of the evidence because the People did not prove beyond a reasonable doubt that defendant acted with depraved indifference to human life when he set the fire ... . Inasmuch as defendant is challenging only the weight of the evidence with respect to that count and does not challenge the legal sufficiency of the evidence with respect to that count, we cannot reduce the conviction to the lesser included offense of reckless endangerment in the second degree ... . * * * We further agree with defendant that the verdict finding him guilty of grand larceny in the fourth degree and criminal possession of stolen property in the fourth degree is against the weight of the evidence. With respect to each of those counts, the People were required to establish that the value of the stolen motor

vehicle exceeded $100 ... . It is well settled that a witness 'must provide a basis of knowledge for his [or her] statement of value before it can be accepted as legally sufficient evidence of such value' ... . 'Conclusory statements and rough estimates of value are not sufficient' ... . Although the monetary element of each crime is quite low, the People did not attempt to meet that threshold through the testimony of any witness. The testimony of a detective that the vehicle was '[d]efinitely worth over probably 10,000' did not satisfy the monetary element of either crime inasmuch as he provided no basis of knowledge for his statement of value. We therefore further modify the judgment by reversing those parts convicting defendant of grand larceny in the fourth degree and criminal possession of stolen property in the fourth degree and dismissing counts eight and nine of the indictment." ***People v. Box*, 2020 N.Y. Slip Op. 01813, Fourth Dept 3-13-20**

CRIMINAL LAW, JUDGES.

DEFENDANT WAS THREATENED WITH A HARSHER SENTENCE SHOULD SHE DECIDE TO GO TO TRIAL; PLEA VACATED.

The Fourth Department, reversing defendant's conviction by guilty plea, determined defendant was improperly threatened with a heavier sentence should she decide to go to trial: "At an appearance prior to the plea proceeding, the court stated that, if defendant decided to reject the plea offer and was convicted after trial, it intended to impose the maximum sentence on the top count and consecutive time on an unnamed additional count. At that same appearance, the court said that defendant and her codefendants, who were her sister and brother-in-law, would also be federally prosecuted and that 'the evidence is overwhelming here.' It is well settled that '[a] defendant may not be induced to plead guilty by the threat of a heavier sentence if he [or she] decides to proceed to trial' ... . Here, we agree with defendant that 'the court's statements do not amount to a description of the range of the potential sentences but, rather, they constitute impermissible coercion, rendering the plea involuntary and requiring its vacatur' ...". ***People v. Shields*, 2020 N.Y. Slip Op. 01767, Fourth Dept 3-13-20**

CRIMINAL LAW, JUDGES, ATTORNEYS.

JUDGE WHO WAS THE DISTRICT ATTORNEY WHEN DEFENDANT WAS INDICTED WAS DISQUALIFIED FROM HEARING DEFENDANT'S MOTION TO VACATE HIS CONVICTION.

The Fourth Department, reversing County Court's summary denial of defendant's motion to vacate his conviction, determined the judge, who was the District Attorney when defendant was indicted, was disqualified from handling the motion: "The Judge who denied defendant's motion had been the Niagara County District Attorney when defendant was indicted in 2007 on the charges that resulted in the judgment now sought to be vacated and, in fact, had signed the indictment. Thus, we conclude that the Judge was disqualified from entertaining the motion pursuant to Judiciary Law § 14, which provides in relevant part that '[a] judge shall not sit as such in, or take any part in the decision of, an action, claim, matter, motion or proceeding to which he [or she] is a party, or in which he [or she] has been attorney or counsel' … . Inasmuch as 'this statutory disqualification deprived the court of jurisdiction,' the order on appeal is void ... . We therefore reverse the order and remit the matter to County Court for further proceedings on the motion before a different judge ...". ***People v. Simcoe*, 2020 N.Y. Slip Op. 01729, Fourth Dept 3-13-20**

EMPLOYMENT LAW, LABOR LAW, CIVIL PROCEDURE.

LABOR LAW § 198-b, WHICH PROHIBITS AN EMPLOYER'S COLLECTING KICKBACKS FROM AN EMPLOYEE, DOES NOT CREATE A PRIVATE RIGHT OF ACTION AGAINST THE EMPLOYER.

The Fourth Department, reversing Supreme Court, determined Labor Law § 198-b, which essentially prohibits an employer from collecting kickbacks from and employee, did not create a private right of action: "Plaintiff, a former teacher at defendant Utica Academy of Science Charter School (UASCS), commenced this action seeking to recover damages based upon allegations that there in which plaintiff was required to provide donations to [defendant] High Way in the form of illegal kickbacks of his salary under threat of demotion or termination. In his third cause of action, plaintiff alleged that defendants' conduct violated Labor Law § 198-b, and plaintiff sought damages arising from that violation pursuant to Labor Law § 198. ... Although we offer no opinion with respect to whether other provisions within article 6 of the Labor Law afford private rights of action, we agree with High Way that the legislature did not intend to create a private right of action for violations of Labor Law § 198-b ... , inasmuch as '[t]he [l]egislature specifically considered and expressly provided for enforcement mechanisms' in the statute itself' ... . Indeed, by its express terms, a violation of section 198-b constitutes a misdemeanor offense ...". ***Konkur v. Utica Academy of Science Charter Sch.*, 2020 N.Y. Slip Op. 01827, Fourth Dept 3-13-20**

FAMILY LAW, CIVIL PROCEDURE.

WHERE THERE IS A DISCREPANCY THE ORDER MUST BE CONFORMED WITH THE DECISION.

The Fourth Department noted a discrepancy between the decision and the order. Therefore the order was conformed to the decision: "... [W]e note that, in its bench decision, Family Court determined that the child … was derivatively neglected. Inasmuch as there is a conflict between the decision and the order in appeal No. 1, that order must be conformed to the decision (... see generally CPLR 5019 [a]). We therefore modify the order ... by vacating that part of the order determining

that the child was derivatively abused and substituting therefor a determination that the child was derivatively neglected." ***Matter of Aaren F. (Amber S.)*, 2020 N.Y. Slip Op. 01739, Fourth Dept 3-13-20**

FAMILY LAW, JUDGES, APPEALS.

FAMILY COURT DID NOT MAKE THE REQUISITE FINDINGS IN THIS CUSTODY MATTER WHERE A GRANDPARENT WAS SEEKING CUSTODY, MATTER REMITTED; ASSUMING FAMILY COURT'S ORDER WAS NOT FINAL, THE NOTICE OF APPEAL WAS DEEMED AN APPLICATION FOR LEAVE TO APPEAL; THE DISSENT ARGUED THE ORDER IS NOT APPEALABLE.

The Fourth Department, remitting the matter, over a dissent, determined Family Court should not have the requisite findings in this custody matter where a grandparent was seeking custody. Family Court had ordered the parties to stipulate to the custody arrangement noting that , if the parties do not agree, a hearing would be held. The dissent argued the order was not final and therefore was not appealable. The majority, assuming the order was not final, deemed the notice of appeal to be an application for leave to appeal: "With respect to the merits of the mother's contentions regarding the court's award of joint custody to the father and the maternal grandmother, we conclude that the court failed to set forth 'those facts upon which the rights and liabilities of the parties depend' ... , specifically its analysis of whether extraordinary circumstances existed to warrant an inquiry into whether an award of joint custody to the maternal grandmother was in the best interests of the child. 'It is well established that, as between a parent and a nonparent, the parent has a superior right to custody that cannot be denied unless the nonparent establishes that the parent has relinquished that right because of surrender, abandonment, persisting neglect, unfitness or other like extraordinary circumstances . . . The nonparent has the burden of proving that extraordinary circumstances exist, and until such circumstances are shown, the court does not reach the issue of the best interests of the child' ... . Thus, we agree with the mother that the court erred in not determining whether extraordinary circumstances existed before awarding joint custody to the maternal grandmother. The maternal grandmother here had the burden of establishing extraordinary circumstances, which remains the case 'whether the nonparent is seeking sole custody or joint custody with one of the parents' ... . We conclude that ' [t]he absence of the required findings precludes proper appellate review' ...". ***Matter of Steeno v. Szydlowski*, 2020 N.Y. Slip Op. 01808, Fourth Dept 3-13-20**

JUDGES, CIVIL PROCEDURE.

THE JUDGE SHOULD NOT HAVE DISMISSED CAUSES OF ACTION ON A GROUND (STANDING) NOT RAISED BY A PARTY.

The Fourth Department, reversing Supreme Court, determined the judge should not have, sua sponte, dismissed causes of action for lack of standing when that issue was not raised by the parties: "We thus conclude that the court erred in sua sponte reaching the issue of standing with respect to the second and third causes of action ... . Standing 'is an aspect of justiciability which, when challenged, must be considered at the outset of any litigation' ... . Inasmuch as the ... respondents' cross motion with respect to the second and third causes of action was not based on petitioners' alleged lack of standing, there was no basis for the court to reach that issue." ***Matter of Barbeau v. Village of LeRoy*, 2020 N.Y. Slip Op. 01732, Fourth Dept 3-13-20**

REAL ESTATE, CONTRACT LAW.

CONTRARY TO SUPREME COURT'S RULING, THE PURCHASE CONTRACT DID NOT INCLUDE A CLAUSE LIMITING PLAINTIFF'S REMEDY FOR A BREACH TO RETAINING THE DEPOSIT.

The Fourth Department, reversing Supreme Court, determined the purchase contract did not have a limitation of remedies clause restricting plaintiff's damages for a breach to retaining the deposit: "A limitation of remedies 'will not be implied and to be enforceable must be clearly, explicitly and unambiguously expressed in a contract'... . Indeed, '[s]uch clauses are . . . strictly construed against the party seeking to avoid liability' … , and ' a provision must be included in the agreement limiting a party's remedies to those specified in the contract in order for courts to find that th[o]se remedies are exclusive' ... . Here, nothing in the contract stated that plaintiff's contractual right to retain the deposit upon defendant's breach was plaintiff's sole and exclusive remedy for such a breach. The court thus erred in granting the cross motion on that ground ...". ***Lundy Dev. & Prop. Mgt., LLC v. Cor Real Prop. Co., LLC*, 2020 N.Y. Slip Op. 01751, Fourth Dept 3-13-20**

TOXIC TORTS, PERSONAL INJURY.

DEFENDANT, WHO CO-OWNED THE PROPERTY FOR A TWO-YEAR PERIOD, DEMONSTRATED HE DID NOT HAVE ACTUAL OR CONSTRUCTIVE NOTICE OF THE HAZARDOUS LEAD PAINT CONDITION.

The Fourth Department, reversing Supreme Court, determined defendant's motion for summary judgment in this lead-paint exposure case should have been granted. Defendant is a co-owner of the subject property but he was able to demonstrate his connection to the property was such that he did not have actual or constructive notice of the hazardous lead paint condition: "... [D]efendant owned the subject property, as a tenant in common, with his father during the period of plaintiffs' tenancy from 1992 to 1994. In support of his motions, defendant submitted his affidavit, wherein he averred, among other things, that he was a co-owner of the property 'on paper only,' that his father handled all day-to-day maintenance

of the property, and that defendant never entered plaintiffs' apartments or hired anyone to make repairs thereto during plaintiffs' tenancy. Defendant further averred that he did not have a key to the apartments and that he never spoke to or received complaints from plaintiffs or plaintiffs' mother. Defendant's submissions also established that he had no knowledge of inspections for or the existence of lead paint at the property during plaintiffs' tenancy and that he was unaware that the property was constructed at a time before lead paint was banned, that paint was peeling at the property, that lead paint posed a danger to young children, and that young children lived on the property. Regardless of whether defendant's father had actual or constructive notice through his own involvement with the property, that notice cannot be imputed to defendant absent evidence of defendant's own actual or constructive notice ...". ***McDowell v. Maldovan*, 2020 N.Y. Slip Op. 01748, Fourth Dept 3-13-20**

VEHICLE AND TRAFFIC LAW.

TRAFFIC STOP WAS NOT SUPPORTED BY PROBABLE CAUSE TO BELIEVE DEFENDANT HAD COMMITTED A TRAFFIC VIOLATION.

The Fourth Department, reversing the Administrative Law Judge, determined defendant's driver's license should not have been revoked. The record lacked substantial evidence that the police officer had probable cause to believe defendant had committed a traffic violation when he made the traffic stop which resulted in defendant's refusing to submit to a chemical test: "A police officer initially stopped petitioner on a suspected violation of Vehicle and Traffic Law § 600 (1) (a), i.e., leaving the scene of an accident that caused property damage without reporting it. The officer observed petitioner approximately one mile from the accident site driving a white pickup truck, which matched the description of the vehicle involved in the accident. The officer effected a stop of the truck by activating the patrol vehicle's lights and ultimately took petitioner into custody after petitioner exhibited signs and made statements that indicated he was intoxicated. Petitioner refused to submit to a chemical test, and thus his driver's license was temporarily suspended. A refusal revocation hearing was thereafter held pursuant to Vehicle and Traffic Law § 1194 (2) (c). The Administrative Law Judge revoked petitioner's license after concluding, inter alia, that the traffic stop was legal. In affirming that determination on petitioner's administrative appeal, respondent concluded that the stop was lawful because the officer 'had a reasonable basis for stopping' petitioner. We agree with petitioner that respondent reviewed the determination under an incorrect legal standard inasmuch as 'the Court of Appeals has made it abundantly clear' . . . that police stops of automobiles in this State are legal only pursuant to routine, nonpretextual traffic checks to enforce traffic regulations or when there exists at least a reasonable suspicion that the driver or occupants of the vehicle have committed, are committing, or are about to commit a crime' . . . [,] or where the police have probable cause to believe that the driver . . . has committed a traffic violation' ... . We further agree with petitioner that the record lacks substantial evidence to support the determination that the officer had the requisite probable cause at the time of the stop ...". ***Matter of Deraway v. New York State Dept. of Motor Vehs. Appeals Bd.*, 2020 N.Y. Slip Op. 01727, Fourth Dept 3-13-20**

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