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COURT OF APPEALS

CRIMINAL LAW.

PETITIONER WAS INITIALLY APPROVED FOR PAROLE, BUT AFTER THE VICTIM IMPACT HEARING A RESCISSION HEARING WAS HELD AND PAROLE WAS RESCINDED; THE RESCISSION WAS PROPERLY BASED UPON VICTIM IMPACT STATEMENTS SUPPLYING INFORMATION WHICH WAS NOT "NEW" BUT WHICH WAS NOT PREVIOUSLY KNOWN TO THE PAROLE BOARD.

The Court of appeals affirmed the Third Department's decision upholding the rescission of petitioner's parole: "Judicial intervention in Parole Board determinations is warranted 'only when there is a showing of irrationality bordering on impropriety' ... . Petitioner failed to make such a showing here with regard to the Parole Board's determination to rescind his parole release." ***Matter of Benson v. New York State Bd. of Parole*, 2020 N.Y. Slip Op. 03207, CtApp 6-9-20**

SUMMARY OF THE OCTOBER 31, 2019, DECISION AFFIRMED BY THE COURT OF APPEALS ON JUNE 9, 2020

The Third Department, over a two-justice dissent, determined petitioner's parole was properly rescinded after a rescission hearing was triggered by a victim impact hearing: "In August 2016, letters were sent from the Department of Corrections and Community Supervision to the Albany County District Attorney's office and the judge who imposed the sentence informing them that petitioner was scheduled to appear before respondent.Petitioner appeared before respondent in December 2017, after which he was granted parole with an open release date in February 2018. Thereafter, in January 2018, a victim impact hearing was held at which the victim's mother and two brothers gave victim impact statements. After this hearing, petitioner was served with a notice of rescission hearing, which was subsequently held in February 2018. Following the rescission hearing, petitioner's open release date was rescinded and a hold period of nine months was imposed. This determination was upheld on administrative appeal. Petitioner thereafter commenced this CPLR article 78 proceeding. Petitioner argues that the victim impact statements and letters from the District Attorney's office and sentencing judge disclosed no new facts about petitioner's crime. … . … Although we agree that the letters should not have been considered as they did not reveal any information not previously known by respondent, this argument must fail with respect to the victim impact statements because neither the relevant regulation, nor the existing case law, requires that 'new' information must be disclosed for parole to be rescinded (see 9 NYCRR 8002.5) … Simply stated, although the regulation provides that such information must be 'significant' and 'not known' by respondent at the time of the original hearing, the origin of this information need not be 'new' … . Here, respondent was presented with previously unknown information from the mother, including that she was so traumatized by her son's death that she did everything she could to avoid thinking about it, including never visiting his grave. The mother explained that, in the 25 years since the victim's death, she has not celebrated Christmas, Thanksgiving or her other sons' birthdays. She described how she thought that, once petitioner went to prison, it was done, and that she was safe, but she no longer felt safe." ***Matter of Benson v. New York State Bd. of Parole*, 2019 N.Y. Slip Op. 07829, Third Dept 10-31-19**

CRIMINAL LAW.

FAILURE TO INSTRUCT THE GRAND JURY ON THE DEFENSE-OF-PROPERTY JUSTIFICATION DEFENSE REQUIRED DISMISSAL OF THE MURDER/MANSLAUGHTER INDICTMENT.

The Court of Appeals affirmed for the reasons stated in the Fourth Department's memorandum. ***People v. Ball*, 2020 N.Y. Slip Op. 03209, CtApp 6-9-20**

SUMMARY OF THE AUGUST 22, 2019, MEMORANDUM AFFIRMED BY THE COURT OF APPEALS ON JUNE 9, 2020

The Fourth Department, over a two-justice dissent, determined County Court properly dismissed the murder/manslaughter indictment because the grand jury was not charged with the defense of property justification defense. After decedent had twice attacked defendant inside the home, the decedent reentered the home from the front yard and was shot by the defendant: "During a recess in the grand jury proceeding, defendant asked the People to deliver to the grand jury foreperson a letter requesting, among other things, that the grand jurors be charged with respect to the justifiable use of physical force in defense of a person pursuant to Penal Law § 35.15 and the justifiable use of physical force in defense of premises

and in defense of a person in the course of a burglary pursuant to § 35.20 (3). The People did not deliver the letter to the foreperson. The People instructed the grand jury on the law with respect to murder in the second degree (Penal Law § 125.25 [1]), manslaughter in the first degree (§ 125.20 [1]), and the justification defense pursuant to Penal Law § 35.15; however, the People did not instruct the grand jury with respect to the justification defense pursuant to § 35.20 (3). ... [W]e conclude that the court properly dismissed the indictment based on the People's failure to instruct the grand jury on the justification defense pursuant to Penal Law § 35.20 (3) ... . A court may dismiss an indictment on the ground that a grand jury proceeding is defective where, inter alia, the proceeding is so irregular 'that the integrity thereof is impaired and prejudice to the defendant may result' (CPL 210.35 [5]; see CPL 210.20 [1] [c]). With respect to grand jury instructions, CPL 190.25 (6) provides, as relevant here, that, '[w]here necessary or appropriate, the court or the district attorney, or both, must instruct the grand jury concerning the law with respect to its duties or any matter before it.' 'If the prosecutor fails to instruct the grand jury on a defense that would eliminate a needless or unfounded prosecution, the proceeding is defective, mandating dismissal of the indictment' ... . Under the circumstances of this case, we conclude that an instruction regarding the justification defense pursuant to Penal Law § 35.20 (3) was warranted, and the prosecutor's failure to provide that instruction impaired the integrity of the grand jury proceeding (see CPL 210.35 [5]). Furthermore, we conclude that the error was not cured by the instruction regarding the justification defense under Penal Law § 35.15 ...". ***People v. Ball*, 2019 N.Y. Slip Op. 06295, Fourth Dept 8-22-19**

CRIMINAL LAW, APPEALS.

THE APPELLATE DIVISION COULD NOT DECIDE THE APPEAL OF THE DENIAL OF A SUPPRESSION MOTION ON A GROUND NOT RELIED UPON BY THE SUPPRESSION COURT.

The Court of Appeals, reversing the Appellate Division, determined the Appellate Division could not decide the appeal of the denial of a suppression motion on a ground (exigent circumstances) that was not relied on by the suppression court: "... [D]efendant moved to suppress physical evidence found inside a suitcase that he was carrying at the time of his arrest, relying on People v. Gokey (60 NY2d 309 [1983]), and arguing that exigent circumstances were needed to justify a warrantless search of the closed suitcase. Supreme Court determined that Gokey did not apply and, therefore, made no findings regarding the existence of exigent circumstances. The Appellate Division affirmed on a different ground, determining, as both defendant and the People argued, that Gokey did apply and accepting the People's argument that exigent circumstances—namely, the protection of evidence or the safety of the police or the public—justified the search ... . 'Upon an appeal to an intermediate appellate court from a judgment, sentence or order of a criminal court, such intermediate appellate court may consider and determine any question of law or issue of fact involving error or defect in the criminal court proceedings which may have adversely affected the appellant' (CPL 470.15 [1]). 'This provision is a legislative restriction on the Appellate Division's power to review issues either decided in an appellant's favor, or not ruled upon, by the trial court' ... . The statute 'bars the Appellate Division from affirming a judgment, sentence or order on a ground not decided adversely to the appellant by the trial court' ... . This 'restriction applies in equal force to this Court which itself has no broader review powers' ... . Here, the Appellate Division did not err in determining that Gokey was applicable, the only reviewable issue before it. However, '[b]ecause the suppression court did not deny the motion on the ground that there were exigent circumstances, that issue was not decided adversely to defendant and it could not be invoked by the Appellate Division' ... . Accordingly, the Appellate Division erred in deciding that issue." ***People v. Harris*, 2020 N.Y. Slip Op. 03208, CtApp 6-9-20**

CRIMINAL LAW, EVIDENCE.

FEDERAL CUSTOMS AND BORDER PATROL MARINE INTERDICTION AGENT IS NOT A PEACE OFFICER UNDER NEW YORK LAW; THEREFORE THE AGENT MADE A VALID CITIZEN'S ARREST OF AN ERRATIC DRIVER HE OBSERVED WHILE ON THE HIGHWAY; MOTION TO SUPPRESS THE WEAPON FOUND IN DEFENDANT'S CAR SHOULD NOT HAVE BEEN GRANTED.

The Court of Appeals, in a full-fledged opinion by Judge Feinman, reversing the Appellate Division, over a dissent, determined the federal marine interdiction agent with US Customs and Border Protection (CBP) was not a peace officer under New York law and, therefore, could effect a citizen's arrest. The federal agent observed defendant driving erratically and putting other drivers in danger so he activated his emergency lights and pulled the driver over. The agent stayed in his vehicle and called the Buffalo police. After the Buffalo police arrived, the agent left. The police found a weapon in defendant's car and he was charged with criminal possession of a weapon. Supreme Court granted defendant's motion to suppress and the Fourth Department affirmed. Both courts relied on People v. Williams (4 NY3d 535 [2005]) which held that peace officers could not make a citizen's arrest. The Court of Appeals reasoned that *Williams* did not control because the federal agent in this case was not a peace officer under the relevant New York statutory definitions and therefore could make a citizen's arrest: "Because the agent who stopped defendant in this case is not considered a federal law enforcement officer with peace officer powers pursuant to CPL 2.10 and 2.15, he could not have improperly circumvented the jurisdictional limitations on the powers reserved for those members of law enforcement under CPL 140.25, as the peace officers in Williams did. In other words, the agent's conduct here did not violate the Legislature's prescribed limits on a peace officer's arrest powers because he is not, in fact, a peace officer. ... [A]side from the clear limits as to the justifiable use of physical force that may be applied

during an arrest by a private citizen (CPL 35.30 [4]; CPL 140.35 [3]), as well as the requirement that '[s]uch person must inform the person whom he [or she] is arresting of the reason for such arrest unless he [or she] encounters physical resistance, flight or other factors rendering such procedure impractical' (CPL 140.35 [2]), nothing in the citizen's arrest statutes themselves set forth the methods that must be employed when, as here, a crime is committed in the responding citizen's presence (see CPL 140.30, 140.40 ...). We reiterate that whether this stop comported with constitutional principles or the express terms of the arrest statutes is simply not before us, as defendant failed to raise any such arguments before the suppression court." ***People v. Page*, 2020 N.Y. Slip Op. 03265, CtApp 6-11-20**

FIRST DEPARTMENT

ARBITRATION, CONTRACT LAW.

ALTHOUGH REFORMATION OF THE CONTRACT MAY HAVE CONSTITUTED REVERSIBLE ERROR HAD A COURT DONE IT, THE REFORMATION WAS APPROPRIATE IN THE CONTEXT OF AN ARBITRATION OF THIS COMPLEX COMMERCIAL DISPUTE; THE ARBITRATION AWARD WAS PROPERLY CONFIRMED.

The First Department, in a full-fledged opinion by Justice Oing, determined that, under the highly deferential standard of court-review of arbitration awards, the award here was properly confirmed, despite an error which might have required reversal if committed by a court. The underlying facts (the provisions of the contract) are too complex to fairly summarize here: "The arbitrator's reason for inserting a $10 million deduction * * * [was] not in reliance on any of the provisions set forth in the [contract]. Among other arguments made to the arbitrator, petitioner requested that the relevant portion of the ... agreement be reformed ... . Although the arbitrator did not expressly so characterize his determination, reformation was, in substance, the permissible relief he granted (see Matter of SCM Corp. [Fisher Park Lane Co.], 40 NY2d 788, 792-793 [1976] [arbitrators have the power to fashion remedies, such as reformation, appropriate to the resolution of the dispute]). While a court's grant of reformation based on this record might constitute reversible error, the arbitrator's determination here passes muster, given the extremely limited scope of our review of an arbitration award (see American Intl Specialty Lines Ins. Co. v. Allied Capital Corp., __ NY3d [*4]__, 2020 N.Y. Slip Op. 02529 [2020] [arbitrators routinely use their expertise to orchestrate expeditious resolutions to complex commercial legal disputes and courts are discouraged from becoming unnecessarily entangled in arbitrations]). ... The result the arbitrator reached ... is supportable as a reformation of the parties' agreement, given the highly deferential standard of review accorded arbitration awards under CPLR article 75 ...". ***Matter of Rose Castle Redevelopment II, LLC v. Franklin Realty Corp.*, 2020 N.Y. Slip Op. 03293, First Dept 6-11-20**

CIVIL PROCEDURE.

VENUE WAS IMPROPER; DEFENDANTS FOLLOWED THE STATUTORY PROCEDURE AND MOVED FOR A CHANGE OF VENUE; NO OTHER PARTY MOVED FOR A CHANGE OF VENUE; THE MOTION SHOULD HAVE BEEN GRANTED.

The First Department, reversing Supreme Court, determined the defendants' (Transit Authorities') motion to change venue should have been granted. Venue was improper, the Transit Authorities followed the correct procedure, and no other party made a motion to change venue: "After plaintiffs commenced this action in Bronx County, the Transit Authorities timely served a demand for a change of venue as of right to New York County, where one of them has its principal office (see CPLR 505[a]; 511). Plaintiffs did not respond to the demand, and the Transit Authorities timely moved to change venue (see CPLR 510[1]; 511[b]). In opposition to the motion, plaintiffs did not dispute that their choice of venue was improper, but requested that venue be placed in Kings County, where the accident occurred. No other defendant timely appeared in opposition to the motion, although the City defendants submitted a belated affirmation asserting that venue should be placed in Kings County under CPLR 504(3). By failing to respond to the Transit Authorities' demand to change venue to a proper forum, plaintiffs forfeited their right to select venue ... . Further, no party moved to transfer venue to an alternate county ... . Thus, once the Transit Authorities had followed the procedure set forth in CPLR 511 and established that the county chosen by plaintiffs was improper, their motion to change venue to New York County as of right should have been granted ...". ***Richardson v. City of New York*, 2020 N.Y. Slip Op. 03281, First Dept 6-11-20**

CIVIL PROCEDURE, EVIDENCE.

MOTION FOR CLASS CERTIFICATION BASED UPON ALLEGEDLY ADULTERATED FUEL OIL SHOULD NOT HAVE BEEN GRANTED BECAUSE THE NUMEROSITY REQUIREMENT WAS NOT SUPPORTED BY ADMISSIBLE EVIDENCE; DISMISSAL WAS WITHOUT PREJUDICE AND LEAVE TO RENEW WAS GRANTED.

The First Department, reversing Supreme Court, determined the motion for class certification should have been denied because the proof of the numerosity prerequisite was not in admissible form. The dismissal was without prejudice because it appeared the evidence could be properly presented: "The gravamen of plaintiffs' claim, and that for which they seek class certification, is that defendant provided them and others similarly situated 'with inferior, adulterated heating oil, i.e. that the fuel oil that was delivered to them contained oils of lesser value mixed into the ordered grade of fuel oil, so that the

delivered product did not meet the standards of the parties' contracts' ... . Contrary to defendant's contention, this is the predominant question of law and fact in this case, and it is common among the class. In any event, 'the fact that questions peculiar to each individual may remain after resolution of the common questions is not fatal to the class action' ... . Moreover, 'CPLR article 9 affords the trial court considerable flexibility in overseeing a class action,' and the court could even 'decertify the class at any time before a decision on the merits if it becomes apparent that class treatment is inappropriate' ... . Supreme Court is more than able to recognize if its class certification becomes unduly cumbersome, and, if so, how best to fashion a remedy. Nevertheless, '[t]he proponent of class certification bears the burden of establishing the criteria promulgated by CPLR 901(a) and must do so by tender of evidence in admissible form' ... . Here, plaintiffs failed to submit admissible evidence demonstrating that the numerosity prerequisite to class certification was satisfied. However, the record suggests that such evidence is in plaintiffs' possession but simply was not submitted in connection with their motion. Accordingly, plaintiffs are given leave to renew their motion for class certification, upon admissible evidence providing a sufficient basis for determining the size of the potential class." ***Mid Is. LP v. Hess Corp.*, 2020 N.Y. Slip Op. 03270, First Dept 6-11-20**

CIVIL PROCEDURE, FRAUD.

CAYMAN ISLANDS LAW APPLIES IN THIS FRAUDULENT CONVEYANCE ACTION, CRITERIA EXPLAINED.

The First Department, reversing Supreme Court, determined the motion to dismiss this fraudulent conveyance action should have been granted because Cayman Islands law applied and the cause of action was not adequately pled: " 'In the context of tort law, New York utilizes interest analysis to determine which of two competing jurisdictions has the greater interest in having its law applied in the litigation' .. . 'Given that fraudulent conveyance laws are conduct regulating,' the law of the jurisdiction where the tort occurred will generally apply because that jurisdiction has the greatest interest in regulating behavior within its borders' ... . ' [T]he locus jurisdiction's interests in protecting the reasonable expectations of the parties who relied on it to govern their primary conduct[,] and in the admonitory effect that applying its law will have on similar conduct in the future[,] assume critical importance . . . .' ... . Further, as 'the purpose of fraudulent conveyance laws is to aid creditors who have been defrauded by the transfer of property,' consideration of the residency of the parties, particularly the creditors, is also required to determine their reasonable expectations ... . Applying these principles, the law of the Cayman Islands applies to petitioner's fraudulent conveyance claim. Petitioner, who is the creditor allegedly injured by the fraudulent transfer of the funds at issue, is a Cayman Islands domiciliary. Moreover, petitioner is seeking the return of funds which were allegedly fraudulently transferred to Weston, also a Cayman Islands domiciliary. Additionally, the Cayman Islands has the greatest interest in protecting the reasonable expectations of its residents, both petitioner and respondent Weston, who relied on Cayman Islands law to govern their conduct. Although SIP, the transferor of the funds, is domiciled in Texas, and the bank account into which the funds were transferred is located in New York, it is the Cayman Islands that has the most significant contacts with the matter in dispute. Thus, Cayman Islands law should apply." ***Matter of Wimbledon Fund, SPC (Class TT) v. Weston Capital Partners Master Fund II, Ltd.*, 2020 N.Y. Slip Op. 03279, First Dept 6-11-20**

CORPORATION LAW, APPEALS, CIVIL PROCEDURE, JUDGES.

ACCOUNTING CAUSE OF ACTION IN THIS SHAREHOLDERS' DERIVATIVE SUIT SHOULD NOT HAVE BEEN DISMISSED; ALTHOUGH SUA SPONTE ORDERS ARE NOT APPEALABLE, THE APPEAL WAS HEARD IN THE INTEREST OF JUSTICE; PROPER WAY TO HANDLE A SUA SPONTE ORDER IS TO MOVE TO VACATE AND THEN APPEAL.

The First Department, reversing Supreme Court in this shareholders' derivative action against a low-income Housing Development Fund Corporation (HDFC), determined: (1) although a sua sponte order is not appealable, the appeal of the dismissal of the cause of action for an accounting is heard in the interest of justice; (2) the proper way to handle a sua sponte order is to move to vacate it and then appeal; (3) there was no need to amend the complaint because the accounting cause of action included the right to damages for wrongdoing (here the alleged failure to account for the sale of an apartment for $90,000): "An order issued sua sponte is not appealable as of right (see CPLR 5701[a][2] ...). Plaintiffs' remedy is to move to vacate the court's order, and, if the motion is denied, appeal from that order (CPLR 5701[a][3] ...). ... [W]e find that Supreme Court erred in dismissing the complaint because the cause of action for an equitable accounting was not moot. Supreme Court conflated the first cause of action for the inspection of the HDFC's books and records with the second cause of action for an equitable accounting ... . Defendants failed to demonstrate what happened to the $90,000 from the sale of Apartment 6A, and the funds do not appear in the HDFC's financials. Defendants' affidavits did not address this glaring deficiency. ... An equitable accounting involves a remedy "designed to require a person in possession of financial records to produce them, demonstrate how money was expended and return pilfered funds in his or her possession" ... . Available relief includes a personal judgment against the wrongdoer ...". ***Hall v. Louis*, 2020 N.Y. Slip Op. 03268, First Dept 6-11-20**

CRIMINAL LAW, APPEALS, EVIDENCE.

EVEN THOUGH THE US SUPREME COURT CASE REQUIRING WARRANTS FOR CELL SITE LOCATION DATA WAS NOT DECIDED AT THE TIME OF TRIAL, PRESERVATION OF THAT ISSUE FOR APPEAL IS STILL NECESSARY; A DEFENDANT MAY BE INDICTED FOR BOTH DEPRAVED INDIFFERENCE AND INTENTIONAL MURDER; CONSECUTIVE SENTENCES FOR THE SHOOTINGS AND POSSESSION OF A WEAPON WERE APPROPRIATE.

The First Department, affirming defendant's murder, assault and weapon-possession convictions, and affirming the denial of defendant's motion to vacate the convictions, determined: (1) the issue re: the warrantless procurement of cell site location data was not preserved, and preservation was necessary despite the fact that the US Supreme Court case requiring warrants was not decided at the time of trial; (2) the defendant was properly indicted, by different grand juries, for both depraved indifference and intentional murder; and (3) consecutive sentences for possession of a weapon and the shootings were appropriate: "At trial, defendant did not preserve any claim relating to cell site location information obtained without a warrant, and the motion court providently exercised its discretion under CPL 440.10(2)(b) when it rejected defendant's attempt to raise this issue by way of a postconviction motion. Defendant asserts that it would have been futile for trial counsel to raise the issue because the Supreme Court of the United States had not yet decided Carpenter v. United States (585 US __, 138 S Ct 2206 [2018]), a case that we assume, without deciding, applies here because defendant's direct appeal was pending at the time that case was decided. We conclude that defendant should not be permitted to avoid the consequences of the lack of preservation. Although Carpenter had not yet been decided, and trial counsel may have reasonably declined to challenge the cell site information, defendant had the same opportunity to advocate for a change in the law as did the litigant who ultimately succeeded in doing so ... . In the closely related context of preservation, the Court of Appeals has expressly rejected the argument that an 'appellant should not be penalized for his failure to anticipate the shape of things to come' ... . * * * A grand jury's indictment of defendant for depraved indifference murder, after a prior grand jury had indicted him for intentional murder, did not violate CPL 170.95(3). The second presentation did not require permission from the court, because the first indictment cannot be deemed a dismissal of the depraved indifference count in the absence of any indication that the first grand jury was aware of or considered that charge ... . The rule that a person may not be convicted of both intentional and depraved indifference murder ... applies to verdicts after trial, not indictments. These charges may be presented to a trial jury in the alternative (as occurred in this case, where defendant was acquitted of depraved murder but nevertheless claims a spillover effect). Furthermore, the People were not required to present both charges to the same grand jury ...". ***People v. Crum*, 2020 N.Y. Slip Op. 03282, First Dept 6-11-20**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

PLAINTIFF SHOULD HAVE BEEN AWARDED SUMMARY JUDGMENT ON LABOR LAW §§ 240(1), 200 AND COMMON LAW NEGLIGENCE CAUSES OF ACTION IN THIS FALLING OBJECT CASE, EVEN IF PLAINTIFF SHOULD NOT HAVE BEEN WHERE HE WAS AT THE TIME OF THE ACCIDENT.

The First Department, reversing (modifying) Supreme Court, determined plaintiff was entitled to summary judgment against the general contractor (Sweeney) on his Labor Law § 240(1) cause of action in this falling object case, even if plaintiff was not supposed to be in the area when he was struck (comparative negligence is inapplicable). Plaintiff was also entitled to summary judgment on his Labor Law § 200 and common-law negligence claims against the subcontractor (Structure Tech) whose employee caused the object to fall. There was a question of fact whether the Structure Tech employee was instructed by Sweeney to cut the object which fell, which would make Sweeney liable for the Labor Law § 200 and negligence causes of action as well: "Plaintiff should have been awarded summary judgment on the issue of liability on his Labor Law § 240(1) claim as against Sweeney because there was no overhead protection provided to plaintiff ... . Thus even if, as Structure Tech's superintendent testified, plaintiff was in an area of the worksite where he was not supposed to be at the time of his accident, this would at most constitute comparative negligence which is not a defense to a Labor Law § 240(1) claim ... . Plaintiff also should have been awarded summary judgment on his Labor Law § 200 and common-law negligence claims as against Structure Tech. As a subcontractor and, therefore, the statutory agent of the general contractor, Structure Tech may be held liable pursuant to Labor Law § 200 and under common-law negligence for injuries caused by a dangerous condition that it caused or created or of which it had actual or constructive notice ... . Since no party disputes that a Structure Tech employee was responsible for dislodging the baluster and allowing it to fall and strike plaintiff, Structure Tech is liable to plaintiff under Labor Law § 200 and common-law negligence. However, an issue of fact exists as to Sweeney's liability to plaintiff under these claims based on the testimony of Structure Tech's superintendent that it was, in fact, Sweeney's superintendent who instructed Structure Tech to cut the baluster that ultimately struck plaintiff. If credited, this testimony could support a finding that Sweeney actually exercised supervisory control over the worksite so as to trigger liability under these claims ...". ***Hewitt v. NY 70th St. LLC*, 2020 N.Y. Slip Op. 03280, First Dept 6-11-20**

PRODUCTS LIABILITY, TOXIC TORTS, NEGLIGENCE, CIVIL PROCEDURE, EVIDENCE.

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IN THIS ASBESTOS-INJURY CASE SHOULD NOT HAVE BEEN GRANTED.

The First Department, reversing Supreme Court, determined the defendant's motion for summary judgment in this asbestos -injury case should not have been granted and, alternatively, even if the motion were properly granted, leave to renew should have been granted based on additional evidence: "In connection with a motion for summary judgment in an action based on exposure to asbestos, defendant has the initial burden of showing 'unequivocally' that its product could not have contributed to the causation of decedent's asbestos-related injury ... . Defendant Burnham failed to sustain its initial burden of demonstrating that its products could not have contributed to decedent's mesothelioma. Decedent's testimony identified defendant as the manufacturer of greenhouses in which he worked and cited three possible sources of asbestos: transite benches in the greenhouses, window glazing and the greenhouse boiler. Burnham provided no evidence demonstrating that its products could not have been the source of the asbestos that caused decedent's illness. It only pointed to gaps in plaintiffs' proof, which was insufficient to meet its burden ... . Even if the burden had shifted, plaintiffs' evidence in opposition raised an issue of fact as to whether Burnham had sold, distributed, and recommended asbestos-containing products such as those used in plaintiffs' family's gardening business. While hearsay, that evidence could be considered by the court since it was not the sole basis of the opposition ... Alternatively, even if the summary judgment motion had been properly granted, the court should have granted leave to renew in the interests of fairness and justice since plaintiffs presented an affidavit of decedent's estranged brother, which supplied crucial evidence linking decedent's illness to Burnham's products."

***Fischer v. American Biltrite, Inc.*, 2020 N.Y. Slip Op. 03277, First Dept 6-11-20**

SECOND DEPARTMENT

CONTRACT LAW, REAL ESTATE, FRAUD, TRUSTS AND ESTATES.

ALTHOUGH THE REAL ESTATE PURCHASE AGREEMENT ALLOWED THE SELLER TO CANCEL THE CONTRACT IF SELLER COULD NOT CONVEY TITLE, THAT PROVISION REQUIRES THE SELLER TO ACT IN GOOD FAITH; THE COMPLAINT ALLEGED THE SELLER FALSELY CLAIMED TO BE THE SOLE OWNER OF THE PROPERTY WHEN IN FACT SHE OWNED 50%; THE SELLER'S MOTION TO DISMISS THE COMPLAINT SEEKING SPECIFIC PERFORMANCE SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Surrogate's Court, determined the motion to dismiss the complaint seeking specific performance of a real estate purchase agreement should not have been granted. Although the contract allowed the seller to refund the down payment and cancel the contract if the seller is unable to convey title, the seller must do so only in good faith and only if the buyers rejected the defective title. Here the complaint alleged the seller fraudulently claimed she was the sole owner of the property, when in fact she owned only 50%: " 'Where, as here, a contract for the sale of real property provides that in the event the seller is unable to convey title in accordance with the terms of the contract, the seller may refund the buyer's down payment and cancel the contract without incurring further liability, that limitation contemplates the existence of a situation beyond the parties' control and implicitly requires the seller to act in good faith' ... . Contrary to the Surrogate's Court's determination, the ... complaint set forth cognizable causes of action sounding in breach of contract, fraud, and unjust enrichment, among other things, upon allegations that the seller wilfully failed to supply good and marketable title and rescinded the contract of sale even though the buyer and the appellants did not reject the defective title ...".

***Matter of Valderrama*, 2020 N.Y. Slip Op. 03236, Second Dept 6-10-20**

CRIMINAL LAW.

COURT'S ERRORS IN DEALING WITH NOTES FROM THE JURY, INCLUDING SUBSTITUTING THE WORD 'INITIALLY' FOR 'INTENTIONALLY,' REQUIRED REVERSAL.

The Second Department, reversing defendant's conviction, determined the court's handling of jury notes constituted reversible error: "... [I]n a note marked as court exhibit 8, the jury posited a question about the elements of resisting arrest. When reading that note into the record, the Supreme Court substituted the word 'initially' in place of the word 'intentionally,' forming a substantively different question than that posed by the jury. The court again substituted the word 'initially' in place of the word 'intentionally' when it read the note aloud later in the proceedings. Since there is no indication in the record that court exhibit 8 was shown to the parties, the court's erroneous use of a substantively different word than that used by the jury when it read the note into the record, and its repetition of that same error later in the proceedings, constituted mode of proceedings errors. In addition, although the jury submitted to the court a note marked as court exhibit 10 to clarify which portions of the testimony of certain witnesses the jury wished to have read back, the court did not read court exhibit 10 into the record at any point, and the record does not show that the court ever informed the parties that this note had been received. As a result of the errors regarding these jury notes, we must reverse the defendant's conviction of resisting arrest ...". ***People v. Petrizzo*, 2020 N.Y. Slip Op. 03251, Second Dept 6-10-20**

CRIMINAL LAW.

DEFENDANT'S MOTION TO DISMISS IN THE INTEREST OF JUSTICE SHOULD NOT HAVE BEEN GRANTED; THE MOTION, BROUGHT AFTER CONVICTION BY A JURY, WAS UNTIMELY AND NOT WARRANTED ON THE MERITS.
The Second Department, in an appeal by the People, determined defendant's motion to dismiss the criminal mischief count in the interest of justice, after conviction by a jury, should not have been granted. The motion was untimely and not warranted on the merits: "The People argue on appeal, as they did in opposition to the defendant's motion, that the motion was untimely and therefore should have been denied on that basis. We agree. Under the circumstances, the Supreme Court should have denied the branch of the defendant's motion which was pursuant to CPL 210.40(1), as he failed to show good cause for seeking that relief more than 45 days after his arraignment ... . In any event, we are not persuaded that the interest of justice was served by the dismissal of the criminal mischief in the third degree count of the indictment in this case. 'The power to dismiss an indictment in furtherance of justice is to be exercised sparingly, in those cases where there is some compelling factor, consideration or circumstance clearly demonstrating that conviction or prosecution of the defendant upon such indictment . . . would constitute or result in injustice' ... . In this case, the Supreme Court improvidently exercised its discretion in substituting its own judgment concerning the credibility of the trial witnesses and the culpability of the defendant for that of the jury ... . Additionally, '[t]here is nothing in the record before us that marks the prosecution of this defendant as extraordinary or one which cries out for justice beyond the confines of conventional considerations' ... . Accordingly, we reinstate the count of criminal mischief in the third degree, and remit the matter for sentencing." ***People v. Pfail*, 2020 N.Y. Slip Op. 03252, Second Dept 6-10-20**

CRIMINAL LAW, APPEALS.

SUPREME COURT MISCHARACTERIZED THE SCOPE OF THE WAIVER OF APPEAL BY NOT CLARIFYING THAT CERTAIN FUNDAMENTAL ISSUES REMAIN APPEALABLE DESPITE THE WAIVER; THE WAIVER WAS INVALID.
The Second Department determined Supreme Court mischaracterized the scope of the waiver of appeal rendering the waiver invalid: "... [T]he court mischaracterized the effect of the waiver on the defendant's right to appeal. In this regard, the court, after describing the function of an appellate court, concluded its explanation of the waiver by stating: 'What all this means, though, is that this plea and the sentence I am going to impose are final and that higher court will not have a chance to review it.' 'The improper description of the scope of the appellate rights relinquished by the waiver is refuted by . . . precedent, whereby a defendant retains the right to appellate review of very selective fundamental issues, including the voluntariness of the plea and appeal waiver, legality of the sentence and the jurisdiction of the court' ... . Accordingly, it was incorrect for the Supreme Court to convey to the defendant that an appellate court would have no authority to review the plea or the sentence under any circumstances. Furthermore, the record in this case does not include any 'clarifying language' indicating that 'appellate review remained available for certain issues' or that 'the right to take an appeal was retained' ... . Although the People cite to a written waiver that was apparently signed by the defendant, the Supreme Court 'failed to confirm that [the defendant] understood the contents of the written waiver[ ]' ... . In any event, the written waiver does not indicate that appellate review remained for certain limited issues, but rather, merely stated that '[the] sentence and conviction will be final' ...". ***People v. Christopher B.*, 2020 N.Y. Slip Op. 03242, Second Dept 6-10-20**

CRIMINAL LAW, EVIDENCE.

FRYE HEARING SHOULD HAVE BEEN HELD TO DETERMINE THE ADMISSIBILITY OF DNA EVIDENCE DERIVED USING THE FORENSIC STATISTICAL TOOL (FST); NEW TRIAL ORDERED.
The Second Department, reversing defendant's conviction and ordering a new trial, determined either the DNA evidence should have been precluded, or a *Frye* hearing should have been held for DNA evidence derived using the Forensic Statistical Tool (FST): "Prior to trial, the defendant moved to preclude evidence sought to be introduced by the People regarding DNA testing derived from the use of the Forensic Statistical Tool (hereinafter FST), or alternatively, to conduct a hearing pursuant to Frye v. United States (293 F 1013 [DC Cir]) to determine the admissibility of such evidence. The Supreme Court denied the defendant's motion, finding that FST was generally accepted in the scientific community. Based upon the recent determinations by the Court of Appeals in People v. Foster-Bey (_____ NY3d _____, 2020 N.Y. Slip Op. 02124) and People v. Williams (_____ NY3d _____, 2020 N.Y. Slip Op. 02123), we find that it was an abuse of discretion as a matter of law for the Supreme Court to admit the FST evidence without first holding a Frye hearing 'given [the] defendant's showing that there was uncertainty regarding whether such proof was generally accepted in the relevant scientific community at the time of [the defendant's] motion' ... . Additionally, we find that the error was not harmless ... . Without this forensic evidence, proof of the defendant's guilt was not overwhelming as the only additional evidence linking the defendant to the weapon was the testimony of a lay witness which was circumstantial in nature." ***People v. Pelt*, 2020 N.Y. Slip Op. 03250, Second Dept 6-10-20**

CRIMINAL LAW, EVIDENCE, APPEALS.

FLAWED LINEUP IDENTIFICATION WAS NOT CORROBORATED BY OTHER EVIDENCE; CONVICTION REVERSED AS AGAINST THE WEIGHT OF THE EVIDENCE.

The Second Department, reversing defendant's conviction, determined the lineup identification by the victim was flawed. The conviction was deemed against the weight of the evidence because the flawed identification was not corroborated by other evidence: "The evidence presented at trial established that the complainant described the perpetrator to the police as balding with no facial hair. The participants in the lineup five days later wore hats to conceal their hairlines. However, the defendant's significant facial hair was visible. Further, the defendant was the only participant in the lineup who was wearing a yellow shirt. Although the shirts of the participants in the lineup were covered with a cloth, the defendant's shoulders remained visible. The perpetrator had also worn a yellow shirt. After viewing the lineup, the complainant told the investigating officer that she recognized the defendant's yellow shirt as the shirt worn by the perpetrator, indicating that the most significant similarity between the perpetrator and the defendant visible to her was his yellow shirt. Since the complainant's identification of the defendant as the perpetrator was not corroborated by any other evidence, we conclude, based upon our review of the facts, that there is a reasonable doubt as to whether the defendant committed this crime." ***People v. Mann*, 2020 N.Y. Slip Op. 03249, Second Dept 6-10-20**

CRIMINAL LAW, EVIDENCE, APPEALS.

THE DEPRAVED-INDIFFERENCE ELEMENT OF THE CHARGED OFFENSES WAS NOT SUPPORTED BY THE WEIGHT OF THE EVIDENCE; ALTHOUGH DEFENDANT'S ATTEMPTS TO CARE FOR BURNS ON THE CHILD'S LEGS WERE GROSSLY INADEQUATE, THOSE MEASURES DID NOT SUPPORT A FINDING DEFENDANT DID NOT CARE AT ALL ABOUT THE CONDITION OF THE CHILD.

The Second Department, reducing defendant's assault and reckless endangerment convictions, over a dissent, determined the depraved-indifference element of the charges was not supported by the weight of the evidence. The defendant's 20-month-old foster child had second and third degree burns on his legs. Mother consistently explained she heard screaming coming from the bathroom where she saw the child trying to get out of the tub and the child's three-year-old sister standing outside the tub as the tub was filling up with hot water. The People tried to prove, through an expert (Yurt), that the child had been held in hot water. But there were inconsistencies in the expert's testimony. Defendant explained that she was afraid to take the child to the hospital and instead tried to treat the burns after talking to a pharmacist and going on line: "The inconsistencies in Yurt's [the People's expert's] testimony undermined the People's already tenuous theory that the defendant affirmatively caused the burns. ... Accordingly, to establish the 'depraved indifference' element of the subject offenses, we are left with the defendant's failure to obtain proper medical care for the child. This case is thus squarely controlled by Lewie and Matos. As in those cases, while the evidence in this case shows that the defendant 'cared much too little about [the] child's safety, it cannot support a finding that she did not care at all' (People v. Lewie, 17 NY3d at 359; see People v. Matos, 19 NY3d at 476). Like the defendant in Matos, the defendant in the present case took measures, 'albeit woefully inadequate' ones, to care for the child, by inquiring about proper burn care at a pharmacy, purchasing ointments and bandages, and keeping the burns covered. Those measures are commensurate with the measures taken by the defendant in Matos who reacted to a beating that caused her child severe internal bleeding and multiple broken bones by making a homemade splint for her son's leg and giving him ibuprofen (see id. at 476)." ***People v. Verneus*, 2020 N.Y. Slip Op. 03256, Second Dept 6-10-20**

CRIMINAL LAW, EVIDENCE, APPEALS.

WARRANTLESS SEARCH OF DEFENDANT'S BACKPACK AFTER HE WAS HANDCUFFED NOT JUSTIFIED; CONVICTION REVERSED.

The Second Department, reversing defendant's conviction, determined the warrantless search of defendant's backpack was not justified. The appeal was heard because the waiver of appeal was deemed invalid: "Officer Musa approached the defendant, who, in response to Officer Musa's inquiry, provided his name. The defendant was carrying a backpack, and Officer Musa observed what appeared to be credit cards or identification cards in an outside mesh pocket. Officer Musa arrested the defendant for criminal trespass, handcuffed him, and removed the backpack from the defendant. Officer Musa then searched the backpack at the scene of the arrest ... . * * * ' All warrantless searches presumptively are unreasonable per se,' and, thus, [w]here a warrant has not been obtained, it is the People who have the burden of overcoming' this presumption of unreasonableness' .... '[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' ...". ***People v. Chy*, 2020 N.Y. Slip Op. 03244, Second Dept 6-10-20**

CRIMINAL LAW, EVIDENCE, CONSTITUTIONAL LAW.

HEARSAY STATEMENTS BY THE ONLY WITNESS TO IDENTIFY DEFENDANT AS A PERPETRATOR INDICATED THE WITNESS WAS NOT IN FACT ABLE TO IDENTIFY ANY OF THE PERPETRATORS; THE INCONSISTENT STATEMENTS SHOULD HAVE BEEN ADMITTED BECAUSE THEY WENT TO A CORE ISSUE IN THE CASE IMPLICATING THE RIGHT TO PUT ON A DEFENSE; CONVICTION REVERSED.

The Second Department, reversing defendant's conviction, determined that a hearsay statement allegedly made by the only witness (Lindsay) to identify the defendant as one of the masked intruders in this home-invasion murder-assault-burglary case should have been allowed in evidence. Lindsay, who was shot by one of the intruders, initially claimed he could not identify anyone because they were wearing face-coverings. He later identified the defendant and the others, claiming that he initially did not identify them because he was afraid. The witness who was not allowed to testify, Boyd, is Lindsay's brother. Boyd would have testified that Lindsay repeatedly told him he could not identify any of the intruders. Boyd had contacted defense counsel only after Lindsay testified so no foundation for Boyd's testimony had been laid. The prosecutor was willing to allow Lindsay to be recalled for that purpose: " 'Once a proper foundation is laid, a party may show that an adversary's witness has, on another occasion, made oral or written statements which are inconsistent with some material part of the trial testimony, for the purpose of impeaching the credibility and thereby discrediting the testimony of the witness' ... . 'Since evidence of inconsistent statements is often collateral to the ultimate issue before the [trier of fact] and bears only upon the credibility of the witness, its admissibility is entrusted to the sound discretion of the Trial Judge' ... . Indeed, '[i]t is well established that the trial courts have broad discretion to keep the proceedings within manageable limits and to curtail exploration of collateral matters' ... . However, 'the trial court's discretion in this area is circumscribed by the defendant's constitutional rights to present a defense and confront his accusers' ... . 'Thus, while a trial court may preclude impeachment evidence that is speculative, remote, or collateral, [that] rule . . . has no application where the issue to which the evidence relates is material in the sense that it is relevant to the very issues that the [trier of fact] must decide' ... . 'Where the truth of the matter asserted in the proffered inconsistent statement is relevant to a core factual issue of a case, its relevancy is not restricted to the issue of credibility and its probative value is not dependent on the inconsistent statement' ... . Under such circumstances, the right to present a defense may 'encompass[ ] the right to place before the [trier of fact] secondary forms of evidence, such as hearsay' ... . 'Indeed where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice' ...". ***People v. Butts*, 2020 N.Y. Slip Op. 03243, Second Dept 6-10-20**

FAMILY LAW, EVIDENCE.

THE EVIDENCE DID NOT SUPPORT THE EXISTENCE OF A FATHER-CHILD RELATIONSHIP WITH MOTHER'S HUSBAND OR PETITIONER'S ACQUIESCENCE IN THE DEVELOPMENT OF SUCH A RELATIONSHIP; THE BIOLOGICAL FATHER'S PETITION FOR A DECLARATION OF PATERNITY SHOULD NOT HAVE BEEN DISMISSED PURSUANT TO THE DOCTRINE OF EQUITABLE ESTOPPEL.

The Second Department, reversing Family Court, determined the doctrine of equitable estoppel should not have been invoked to dismiss the petition for a declaration petitioner is the father of a child born in 2016. Mother did not deny petitioner was the father but claimed the child had developed a father-child relationship with her husband, Joseph T. The Second Department held that the evidence did not demonstrate a father-child relationship with Joseph T and did not demonstrate petitioner acquiesced in the creation of a father-child relationship with Joseph T: "The doctrine of equitable estoppel may 'preclude a man who claims to be a child's biological father from asserting his paternity when he acquiesced in the establishment of a strong parent-child bond between the child and another man' ... . ' The doctrine in this way protects the status interests of a child in an already recognized and operative parent-child relationship' ... , and has been applied '[i]n situations where an individual has assumed the role of a father and where the petitioner putative father has neglected to assume such a role' ... . We agree with the petitioner that the respondents failed to demonstrate the existence of an operative parent-child relationship between the child and Joseph T. The only evidence of such a relationship came from the child's foster mother, with whom he has lived since he was one year old. The foster mother testified that the child called Joseph T. 'daddy' during weekly supervised visits, and that they were affectionate with each other at the visits ... . … Joseph T. never appeared in court on the petition and did not testify at the hearing. Further, we disagree with the Family Court that the petitioner acquiesced in the establishment of a relationship between the child and Joseph T. The petitioner testified at the hearing that, until the child was removed from the mother's care, he did not know she married to Joseph T." ***Matter of Luis V. v. Laisha P. T.*, 2020 N.Y. Slip Op. 03235, Second Dept 6-10-20**

FORECLOSURE, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL).

BANK DID NOT PROVE COMPLIANCE WITH RPAPL 1303; BANK'S MOTION FOR SUMMARY JUDGMENT IN THIS FORECLOSURE ACTION SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined the bank's motion for summary judgment in this foreclosure action should not have been granted because the bank did not prove compliance with the notice provisions of Real Property Actions and Proceedings Law (RPAPL) 1303: " 'Proper service of the notice required by RPAPL 1303 notice is a con-

dition precedent to the commencement of a foreclosure action, and it is the plaintiff's burden to show compliance with that statute' ... . Here, in support of its motion, the plaintiff submitted the process server's affidavit indicating that a notice was served with the summons and complaint. However, the plaintiff did not submit a copy of the RPAPL 1303 notice allegedly served, and the process server made no averments that the notice served complied with the requirements of RPAPL 1303 concerning content and form. The plaintiff, therefore, failed to demonstrate, prima facie, that it complied with RPAPL 1303 ...". ***Flagstar Bank, FSB v. Hart*, 2020 N.Y. Slip Op. 03217, Second Dept 6-10-20**

FREEDOM OF INFORMATION LAW (FOIL).

WHETHER THE REQUESTED DOCUMENTS HAVE BEEN REASONABLY DESCRIBED IS DISTINCT FROM WHETHER A SEARCH FOR THE DOCUMENTS WOULD BE UNDULY BURDENSOME; THE DOCUMENTS WERE SUFFICIENTLY DESCRIBED AND THE PETITION SHOULD NOT HAVE BEEN DENIED ON THAT GROUND; MATTER REMITTED FOR A DETERMINATION WHETHER A SEARCH WOULD BE UNDULY BURDENSOME.

The Second Department, reversing Supreme Court, determined the FOIL request for NYC Department of Education (DOC) forms used by employees to request absences for religious observances should not have been denied on the ground the documents were not reasonably described. The DOC conceded that it can locate the records, which are kept at the 1700 individual schools. The matter was remitted to address whether it would be unduly burdensome to search for the documents, a distinct ground Supreme Court did not address: "We disagree with the Supreme Court's determination that it was proper for the respondent to deny the petitioner's request on the ground that the requested records were not reasonably described. The requirement that a FOIL request reasonably describe the records sought is to enable the agency to locate the records in question ... . In order for an agency to deny a FOIL request for overbreadth, the agency must demonstrate that the description is 'insufficient for the purposes of locating and identifying the documents sought' ... . Where the request is sufficiently detailed to enable the agency to locate the records in question, the agency cannot complain about the nomenclature of the request as described ... . The respondent has conflated the requirement of reasonable description with the related, but separate, consideration as to whether it would be unduly burdensome for the respondent to comply with the petitioner's request. While the respondent's submissions demonstrate that it knows where the requested records are located, the respondent also maintains that it would be burdensome for it to conduct a search of the personnel files at each of its 1,700 schools to produce the requested records. However ... Public Officers Law § 89(3)(a) provides that the "agency shall not deny a request on the basis that the request is voluminous or that locating or reviewing the requested records or providing the requested copies is burdensome because the agency lacks sufficient staffing or on any other basis if the agency may engage an outside professional service to provide copying, programming or other services required to provide the copy, the costs of which the agency may recover pursuant to paragraph (c) of subdivision one of section eighty-seven of this article." The issue of burden and/or whether the respondent is able to engage an outside professional service to cull the records sought was not addressed by the Supreme Court and we cannot resolve it on this record. ***Matter of Jewish Press, Inc. v. New York City Dept. of Educ.*, 2020 N.Y. Slip Op. 02785, Second Dept 5-13-20**

PERSONAL INJURY, EVIDENCE.

SUMMARY JUDGMENT PURSUANT TO THE DOCTRINE OF RES IPSA LOQUITUR WAS NOT WARRANTED BECAUSE EXCLUSIVE CONTROL WAS NOT DEMONSTRATED; SANCTIONS FOR THE LOSS OF THE LIGHT FIXTURE WHICH FELL ON PLAINTIFF WERE NOT WARRANTED BECAUSE THE BENT PIPE TO WHICH THE FIXTURE WAS ATTACHED WAS PRESERVED.

The Second Department, reversing Supreme Court, determined summary judgment should not have been granted pursuant to the doctrine of res ipsa loquitur. Plaintiff was injured when a light fixture fell on him. The pipe to which the fixture was attached was bent and was preserved by the defendant. The light fixture, which was same as several others at the site, was not preserved. Because contractors were working at the site, and the pipe securing the light fixture was bent. it could not be said defendant exercised exclusive control over the fixture. The Second Department went on to find that sanctions for the loss of the light fixture were not warranted because the bent pipe was saved and the light fixture itself was not crucial evidence: "Res ipsa loquitur is a doctrine which is submitted to the finder of fact when the accident arises out of an event which ordinarily does not occur in the absence of negligence, the accident was caused by an agency or instrumentality within the exclusive control of the defendant, and it was not due to a voluntary action or contribution on the part of the plaintiff ... . The Court of Appeals has held that 'only in the rarest of res ipsa loquitur cases may a plaintiff win summary judgment or a directed verdict. That would happen only when the plaintiff's circumstantial proof is so convincing and the defendant's response so weak that the inference of defendant's negligence is inescapable' ...". ***Cantey v. City of New York*, 2020 N.Y. Slip Op. 03213, Second Dept 6-10-20**

PERSONAL INJURY, LANDLORD-TENANT.

DEFENDANT OUT-OF-POSSESSION LANDLORD'S MOTION FOR SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE SHOULD HAVE BEEN GRANTED; THE LEASE DID NOT OBLIGATE THE LANDLORD TO MAINTAIN THE AREA AND NO STATUTORY VIOLATION WAS ALLEGED.

The Second Department, reversing Supreme Court, determined defendant out-of-possession landlord's motion for summary judgment in this slip and fall case should have been granted. Plaintiff allegedly slipped on ice which formed from a leak in a pipe in a walk-in freezer. The lease did not require the landlord to maintain the freezer. No statutory violation was alleged: " 'An out-of-possession landlord is not liable for injuries that occur on its premises unless the landlord has retained control over the premises and has a duty imposed by statute or assumed by contract or a course of conduct' ... . Here, where the complaint sounds in common-law negligence and the plaintiff does not allege the violation of a statute, the defendants demonstrated their prima facie entitlement to judgment as a matter of law by establishing that they were an out-of-possession landlord that was not bound by contract or course of conduct to repair the allegedly dangerous condition ... . The lease in this case specified that the 'Landlord's Obligations do not include the performance nor the payment of the costs for . . . the maintenance, repair and/or replacement of Freezer System or the replacement of the Refrigeration System at any time.' " ***Mallet v. City of New York*, 2020 N.Y. Slip Op. 03220, Second Dept 6-10-20**

REAL PROPERTY LAW, REAL ESTATE, DEBTOR-CREDITOR, FORECLOSURE.

THE HOLDER OF A DEED INTENDED AS SECURITY IN THE NATURE OF A MORTGAGE MUST PROCEED BY FORECLOSURE TO EXTINGUISH THE MORTGAGOR'S INTEREST; HERE THE SUBSEQUENT GOOD FAITH PURCHASERS OF THE PROPERTY WERE ENTITLED TO SUMMARY JUDGMENT DISMISSING THE MORTGAGEE'S CAUSES OF ACTION SEEKING RESCISSION OF THEIR DEED AND A DECLARATION THEIR DEED WAS NULL AND VOID.

The Second Department determined a deed which facially appears to evidence an absolute conveyance was actually intended as security in the nature of a mortgage. The holder of such a deed (here American Lending) must proceed by foreclosure to extinguish the mortgagor's interest. The subsequent purchasers of the property (the Romond defendants) were good faith purchasers. Therefore the Romond defendants were entitled to dismissal of American Lending's complaint seeking rescission of the Romond deed and a declaration the deed was null and void: "In 2009, the defendant Dana Grigg sought to purchase certain property ... . When financing for the transaction fell through, Grigg entered into an ... agreement with the plaintiff, American Lending Corp. ... to borrow ... $385,000. The terms of the loan, which were memorialized in a note, included a provision that after 90 days, if the loan had not been repaid in full, American Lending would be authorized to file a joint deed in the property records and to "seek a Summary Judgment instead of following a regular foreclosure proceedings [sic]." In June 2009, Grigg purchased the subject property and executed ... a deed from himself to himself and American Lending (... the joint deed). Grigg subsequently defaulted under the terms of the loan. * * * Real Property Law § 320 provides, in pertinent part, that a 'deed conveying real property, which, by any other written instrument, appears to be intended only as a security in the nature of a mortgage, although an absolute conveyance in terms, must be considered a mortgage' ... . 'The holder of a deed given as security must proceed in the same manner as any other mortgagee—by foreclosure and sale—to extinguish the mortgagor's interest' ... . [T]he Romond defendants established ... that the joint deed was given as security for the loan from American Lending to Grigg. Therefore, pursuant to Real Property Law § 320, the joint deed must be considered a mortgage, and American Lending's sole remedy for Grigg's breach of its terms was to commence an action sounding in foreclosure. Moreover, under the circumstances at bar, the Romond defendants established that they were good faith purchasers of the subject property (see Real Property Law § 290 ...)." ***American Lending Corp. v. Grigg*, 2020 N.Y. Slip Op. 03211, Second Dept 6-10-20**

FOURTH DEPARTMENT

APPEALS, CIVIL PROCEDURE.

ALTHOUGH THE ORDER ADDRESSING A MOTION TO SET ASIDE THE VERDICT WAS ISSUED AFTER JUDGMENT AND THEREFORE CANNOT BE SUBSUMED IN THE JUDGMENT, THE ORDER IS APPEALABLE; PRECEDENT TO THE CONTRARY OVERRULED.

The Fourth Department, in a full-fledged opinion by Justice Troutman, overruling precedent, determined that an order issued after judgment, here an order on a motion to set aside the verdict, can be appealed: "... [W]e must consider whether a party may appeal directly from an order denying a CPLR 4404 motion when that order was entered after entry of a final judgment. In some of our previous cases, we have concluded that such an order is 'subsumed in the judgment and the right to appeal directly therefrom terminated' (Paul Revere Life Ins. Co. v. Campagna, 233 AD2d 954, 955 [4th Dept 1996] ...). We now conclude that the rule set forth in Paul Revere Life Ins. Co. is inconsistent with the statutory framework and with Court of Appeals precedent, and should no longer be followed. Accordingly, we hold that an order otherwise appealable as of right (see CPLR 5701 [a]) entered after the entry of a final judgment is not subsumed in the judgment, but is independently

appealable. An appeal may be taken as of right from an order that, inter alia, 'involves some part of the merits,' 'affects a substantial right,' or 'refuses a new trial' (CPLR 5701 [a] [2] [iii]-[v]). If, however, a court enters an 'intermediate order' and subsequently enters a final judgment, the Court of Appeals has held that the entry of the judgment terminates the right to appeal from the order ... . Although the right of appeal terminates, the order is not beyond review. There is a statutory remedy. An appeal from the final judgment 'brings up for review,' inter alia, 'any non-final judgment or order which necessarily affects the final judgment' or 'any order denying a new trial' (CPLR 5501 [a] [1], [2]). Thus, CPLR 5501 (a) salvages the ability of aggrieved parties to seek review of the intermediate order on appeal. On the other hand, orders entered after the entry of a final judgment cannot conceptually merge into the judgment. The rule in Aho [39 NY2d 241] applies only to an "intermediate order" ... , which the Court of Appeals has defined as an order "made after the commencement of the action and before the entry of judgment" ... . Consequently, inasmuch as the right of appeal from a post-judgment order remains in effect, we conclude that the appeal from the order here is properly before us." ***Knapp v. Finger Lakes NY, Inc.*, 2020 N.Y. Slip Op. 03353, Fourth Dept 6-12-20**

CIVIL PROCEDURE, EVIDENCE.

DISMISSAL OF COMPLAINT TOO SEVERE A SANCTION FOR FAILING TO COMPLY WITH DISCOVERY SCHEDULING ORDER.

The Fourth Department, reversing Supreme Court, determined the dismissal of the complaint was too severe a sanction for plaintiff's failure to comply with the court's scheduling order: "Defendants merely alleged that plaintiff's failure to comply with the discovery deadlines set forth in the scheduling order was due to the representations of plaintiff's attorney that he was engaged in settlement negotiations with a claims adjuster. Plaintiff's attorney apparently believed that settlement of the case was imminent and, thus, that depositions would not be necessary. There is also nothing in the record to indicate that plaintiff ignored any warnings from the court that continued noncompliance with discovery orders could lead to the court striking the complaint ... , or that defendants were prejudiced by the delay in conducting discovery ... . Although plaintiff's dilatory conduct may have reasonably prompted defendants to seek the court's guidance, the drastic sanction of dismissing the complaint with prejudice provided more relief than was necessary to protect defendants' interests ... . In short, plaintiff's conduct was not the type of "deliberately evasive, misleading and uncooperative course of conduct or a determined strategy of delay" that would justify the penalty of dismissal of the complaint ...". ***Windnagle v. Tarnacki*, 2020 N.Y. Slip Op. 03355, Fourth Dept 6-12-20**

CIVIL PROCEDURE, REAL PROPERTY LAW, INSURANCE LAW.

THE TITLE INSURANCE POLICY GAVE THE INSURER THE RIGHT TO PROSECUTE A TITLE CLAIM BUT NOT THE OBLIGATION TO PROSECUTE A TITLE CLAIM; THEREFORE PLAINTIFF'S COMPLAINT ALLEGING DEFENDANT BREACHED THE POLICY BY NOT PROSECUTING THE CLAIM SHOULD HAVE BEEN DISMISSED.

The Fourth Department, reversing Supreme Court, determined plaintiff's action against a title insurance company should have been dismissed based upon the language of the policy. Plaintiff had requested that defendant take action against a party plaintiff believed was using plaintiff's land. Defendant refused. The title insurance policy gave defendant the right but not the obligation to bring such an action: "A dismissal of a complaint pursuant to CPLR 3211 (a) (1) is warranted if 'the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law' ... . Plaintiffs alleged that defendant breached section 5 (b) of the policy, which provides, in relevant part, that defendant 'shall have the right . . . to institute and prosecute any action or proceeding or to do any other act that in its opinion may be necessary or desirable to establish the Title, as insured, or to prevent or reduce loss or damage to the Insured.' Defendant's 'right' to prosecute an action is not equivalent to an 'obligation' ... . Inasmuch as the policy submitted by defendant on the motion did not require defendant to prosecute the action against the property owner, defendant is entitled to dismissal of the complaint insofar as it sought attorneys' fees and costs that plaintiffs had already incurred for the prosecution of that action ... . We further conclude that defendant is entitled to a declaration that it is not obligated to pay for the attorneys' fees and costs necessary to prosecute that action in the future ..". ***Irma Straus Realty Corp. v. Old Republic Natl. Tit. Ins. Co.*, 2020 N.Y. Slip Op. 03307, Fourth Dept 6-12-20**

CORPORATION LAW, LIMITED LIABILITY COMPANY LAW, CONTRACT LAW. FIDUCIARY DUTY, APPEALS, ATTORNEYS.

NO APPEAL LIES FROM A NONFINAL ORDER, HERE ORDERS WHICH DID NOT RESOLVE THE AWARD OF ATTORNEY'S FEES; IN A SUCCESSFUL SHAREHOLDERS' DERIVATIVE ACTION ATTORNEY'S FEES ARE PAID BY THE CORPORATION.

The Fourth Department determined no appeal lies from a nonfinal order and, in a successful shareholders' derivative action, the corporation is liable for attorney's fees. The facts of the case are too complex to fairly summarize here. Defendant

limited liability company was formed to develop a residential subdivision. The action alleged breach of contract and breach of fiduciary duty and sought dissolution of the LLC: "... '[A]lthough all of the substantive issues between the parties were resolved, the order was facially nonfinal, since it left pending the assessment of attorneys' fees—a matter that plainly required further judicial action of a nonministerial nature' ... . Further, plaintiffs' 'request for attorneys' fees was an integral part of each of the asserted causes of action rather than a separate cause of action of its own,' and therefore that issue cannot be implicitly severed from the other issues ... . Thus, the order ... does not constitute a 'final order' within the meaning of CPLR 5501 (a) (1) and does not bring up for our review any prior non-final order ... . * * * ... [W]e agree with defendant that the court erred in determining that plaintiff is entitled to attorneys' fees and disbursements in his status as a derivative plaintiff acting on the LLC's behalf and in awarding such fees and disbursements ... . 'The basis for an award of attorneys' fees in a shareholders' derivative suit is to reimburse the plaintiff for expenses incurred on the corporation's behalf . . . . Those costs should be paid by the corporation, which has benefited from the plaintiff's efforts and which would have borne the costs had it sued in its own right' ... . Thus, plaintiff's success as a derivative plaintiff is not an acceptable basis for an award of attorneys' fees and disbursements against defendant individually." ***Howard v. Pooler*, 2020 N.Y. Slip Op. 03347, Fourth Dept 6-12-20**

CRIMINAL LAW.

ALTHOUGH THE PERSISTENT FELONY OFFENDER STATUS WAS AUTHORIZED AND LEGAL, THE APPELLATE DIVISION EXERCISED ITS DISCRETION TO FIND DEFENDANT SHOULD NOT HAVE BEEN SENTENCED AS A PERSISTENT FELONY OFFENDER AND REDUCED HIS SENTENCE.

The Fourth Department, exercising its discretion, determined, although authorized and legal, defendant should not have sentenced as a persistent felony offender. The Fourth Department reduced his sentence. The court noted that defendant had been offered a much shorter sentence as part of a plea bargain: "Even where the sentencing court does not err as a matter of law in adjudicating a defendant to be a persistent felony offender, '[t]he Appellate Division, in its own discretion, may conclude that a persistent felony offender sentence is too harsh or otherwise improvident' ... . 'A determination by the Appellate Division to vacate a harsh or severe persistent felony offender finding is authorized by CPL 470.20 (6), which grants the Appellate Division discretion to modify sentences in the interest of justice without deference to the sentencing court' ... . Despite defendant's frequent involvement with law enforcement, he has only two prior felony convictions: one in 1981 for burglary in the second degree and one in 2002 for driving while intoxicated. Moreover, a sentence of 20 years to life is a particularly harsh penalty in light of the People's final pretrial plea offer of 6 to 9 years' incarceration. Thus, as a matter of discretion in the interest of justice, we modify the judgment by vacating the finding that defendant is a persistent felony offender and we hereby modify the sentences imposed and sentence defendant as a second felony offender by reducing the sentence imposed for arson in the third degree under count one of the indictment to an indeterminate term of incarceration of 3 to 6 years and reducing the sentences imposed for menacing a police officer or peace officer under counts two, four, five, and seven of the indictment to determinate terms of incarceration of 7 years followed by 5 years of postrelease supervision." ***People v. Garno*, 2020 N.Y. Slip Op. 03311, Fourth Dept 6-12-20**

CRIMINAL LAW.

STEP ONE OF DEFENDANT'S *BATSON* CHALLENGE PROPERLY REJECTED AS VAGUE AND CONCLUSORY; THERE WAS NO *CONCEPCION* BARRIER TO AFFIRMING THE TRIAL COURT'S STEP-ONE RULING; THE REQUEST FOR THE CROSS-RACIAL IDENTIFICATION JURY INSTRUCTION SHOULD HAVE BEEN GRANTED.

The Fourth Department, over a dissent, determined defendant's step one *Batson* challenge was properly rejected as a vague and conclusory assertion that did not create a so-called *Concepcion* problem. The dissent argued the scenario presented a classic *Concepcion* problem. The court noted that the cross-racial identification jury instruction should have been given but found the error harmless: "... [D]efense counsel stated that the prospective juror in question was the 'only black juror' who had not already been dismissed for cause and there was 'no indication' that the juror would be 'anything other than fair and impartial to both sides.' After considering defendant's argument at step one, the court observed that defendant had failed to demonstrate a discriminatory pattern of strikes and denied his application without prompting the prosecutor to provide a race-neutral reason at step two ... . Insofar as the court based its reasoning on the erroneous notion that a discriminatory pattern of strikes must be shown, that reasoning was flawed ... . Nevertheless, because defendant failed to establish a prima facie case at step one, the court properly denied his application without further inquiry ... . Our dissenting colleague concludes that we have a Concepcion problem (see generally People v. Concepcion, 17 NY3d 192, 197-198 [2011]), but we respectfully disagree. Whether a defendant has demonstrated a discriminatory pattern of peremptory strikes goes to the issue of whether that defendant has established a prima facie case at step one of the Batson inquiry (see generally Bolling, 79 NY2d at 324). Because the court relied on that ground in denying the application, Concepcion does not preclude us from affirming the judgment on the same ground, i.e., that defendant failed to establish a prima facie case at step one ... . Where,

as here, 'a witness's identification of the defendant is at issue, and the identifying witness and defendant appear to be of different races, a trial court is required to give, upon request, during final instructions, a jury charge on the cross-race effect' ...". ***People v. Boyd*, 2020 N.Y. Slip Op. 03342, Fourth Dept 6-12-20**

CRIMINAL LAW, APPEALS.

CONSECUTIVE PERIODS OF POSTRELEASE SUPERVISION VIOLATED THE PENAL LAW; ERROR DID NOT NEED TO BE PRESERVED,

The Fourth Department noted that consecutive periods of postrelease supervision violated the Penal Law and the issue did not need to be preserved: "County Court erred in imposing consecutive periods of postrelease supervision in violation of Penal Law § 70.45 (5) (c) ... . Although defendant failed to preserve that contention for our review, the lack of preservation 'is of no moment, inasmuch as we cannot allow an illegal sentence to stand' ... . We therefore modify the judgment by directing that the periods of postrelease supervision imposed shall run concurrently." ***People v. Hyde*, 2020 N.Y. Slip Op. 03319, Fourth Dept 6-12-20**

CRIMINAL LAW, ATTORNEYS.

DEFENDANT SHOULD HAVE BEEN ALLOWED TO EXPLAIN WHY HE WANTED TO WITHDRAW HIS GUILTY PLEA; MATTER REMITTED.

The Fourth Department, over a two-justice dissent, remitting the matter to Supreme Court to allow defendant to explain his desire to withdraw his plea, determined the sentencing court should not have prevented defendant from giving his reasons: "The court convened for sentencing, at which time defense counsel stated that defendant wanted to withdraw the plea, explaining that defendant had done his own legal research and determined that the appeal waiver encompassed issues that he wanted to raise on appeal. Defense counsel asked to be relieved due to an unspecified conflict of interest. Defense counsel, speaking in hypothetical terms, argued that withdrawal of the plea may be justified if defendant did not receive meaningful representation. The court questioned defendant directly. Defendant confirmed that he wanted to withdraw his plea. The prosecutor then asked the court to inquire into defendant's grounds for the motion. Defense counsel objected, and the court ruled in defense counsel's favor, apparently on the ground that such questioning might impermissibly intrude on privileged conversations. '[T]hat's something you'd have to talk to a lawyer about,' the court explained, '[b]ut I'm going to deny that request.' The court added that defendant had executed a written appeal waiver. Defendant began to explain why he had executed the waiver, but the court stopped him from doing so, stating, 'It's not your turn to talk right now.' ... Although we agree with our dissenting colleagues that defense counsel did not take a position adverse to defendant, under the circumstances of this case, we conclude that the court erroneously deprived defendant of a reasonable opportunity to present his contentions in support of his motion to withdraw the plea ...". ***People v. Ramos*, 2020 N.Y. Slip Op. 03364, Fourth Dept 6-12-20**

CRIMINAL LAW, ATTORNEYS, ANIMAL LAW.

IT MAY HAVE BEEN ERROR TO ALLOW THE VICTIM TO TESTIFY ACCOMPANIED BY A DOG, BUT THE ISSUE WAS NOT PRESERVED; ALTHOUGH THE PROSECUTOR MADE AN IMPROPER COMMENT IT DID NOT REQUIRE REVERSAL; PROSECUTORS ADMONISHED THAT THEIR ROLE IS TO ENSURE JUSTICE IS DONE, NOT SIMPLY SEEK CONVICTIONS.

The Fourth Department, affirming defendant's conviction, noted that allowing the adult victim to testify accompanied by a dog may have been an error but was unpreserved. The court also found that a remark made by the prosecutor was improper (but not reversible error) and took the opportunity to address prosecutorial misconduct generally: "We conclude that defendant's contention that the court abused its discretion when it permitted the adult victim to testify while accompanied by a dog is unpreserved because defendant did not object to that arrangement ... . Even assuming, arguendo, that defense counsel erred in not objecting to the court's decision to let the victim testify while accompanied by a dog ... , we conclude that the failure to object did not amount to ineffective assistance ... . [I]t was improper for the prosecutor on summation to characterize defense counsel's summation as evincing 'a Brock Turner mentality'—inflaming the passions of the jury by specifically referring to a recent sexual assault case of nationwide notoriety that involved allegations similar to those made against defendant ... . [W]e ... take this opportunity to remind the People that " [i]t is not enough for [a prosecutor] to be intent on the prosecution of [the] case. Granted that [the prosecutor's] paramount obligation is to the public, [he or she] must never lose sight of the fact that a defendant, as an integral member of the body politic, is entitled to a full measure of fairness. Put another way, [the prosecutor's] mission is not so much to convict as it is to achieve a just result' " ... . To that end, we emphasize that '[p]rosecutors play a distinctive role in the search for truth in criminal cases. As public officers they are charged not simply with seeking convictions but also with ensuring that justice is done. This role gives rise to special

responsibilities—constitutional, statutory, ethical, personal—to safeguard the integrity of criminal proceedings and fairness in the criminal process' ...". ***People v. Carlson*, 2020 N.Y. Slip Op. 03336, Fourth Dept 6-12-20**

CRIMINAL LAW, ATTORNEYS, EVIDENCE.

DEFENDANT'S MOTION TO VACATE HIS CONVICTION SHOULD HAVE BEEN GRANTED; DEFENSE COUNSEL DID NOT ATTEMPT TO SECURE THE TESTIMONY OF A WITNESS WHO WOULD TESTIFY THAT HER BOYFRIEND, WHO USED TO BE THE BOYFRIEND OF THE MURDER VICTIM, CONFESSED TO KILLING THE VICTIM.

The Fourth Department, reversing County Court, over a two-justice dissent, determined defendant's motion to vacate his murder conviction on ineffective assistance grounds should have been granted. Defendant demonstrated that a witness was willing to testify that her boyfriend had confessed to the murder. When the witness did not show up to testify, defense counsel did not attempt to secure her attendance: "... [A]t the time of the trial, defense counsel explicitly informed the court, on the record, that his strategy was to call the witness and present her exculpatory testimony. In this regard, defense counsel stated, '[t]here's one other issue that may or may not come up . . . [that has] to do with [the witness]. [The witness] had a conversation with her then-boyfriend . . . who had been the boyfriend of [the victim] where [the boyfriend] made a tape recording of his voice, identifying his name, his date of birth and his social security number, and indicated there that he killed [the victim]. His words were I killed the bitch. I killed the bitch. I killed the bitch.' And that is the substance of a police report that I received from [the prosecutor].' When the court asked how defense counsel intended to introduce this testimony, he responded, '[w]ell, I intend to call [the witness], should she appear in court. She was subpoenaed. She appeared on Thursday pursuant to the subpoena as well and told me this information for the first time. I don't know whether she's going to be here when we need to call her, which is why I thought maybe we'd wait and see if she showed up and not take the Court's time to do extra research on this issue. But since you've asked me to bring up any possible issues, I would put her on the witness stand and make an offer of proof to the Court and attempt to prove her reliability of the information that she's giving under the Settles case relating to a statement against [the boyfriend's] penal interest.' When the court then asked whether '[the witness's] testimony would relate to this particular homicide,' defense counsel responded, 'Oh yes. Yes.' Nevertheless, and consistent with defense counsel's representation that he would pursue the testimony only if the witness appeared as directed, defense counsel took no further action to secure the witness's presence when she did not appear ... . We agree with defendant that the failure to secure the witness's attendance was deficient conduct and that the record discloses no tactical reason for defense counsel's actions ...". ***People v. Borcyk*, 2020 N.Y. Slip Op. 03359, Fourth Dept 6-12-20**

CRIMINAL LAW, ATTORNEYS, EVIDENCE, VEHICLE AND TRAFFIC LAW.

THE SECTION OF THE VEHICLE AND TRAFFIC LAW RELIED ON BY THE POLICE FOR THE VEHICLE STOP MAY NOT HAVE BEEN APPLICABLE AND THE STOP THEREFORE MAY HAVE BEEN ILLEGAL; DEFENSE COUNSEL'S FAILURE TO MAKE A MOTION TO SUPPRESS ON THAT GROUND CONSTITUTED INEFFECTIVE ASSISTANCE; PLEA VACATED AND MATTER REMITTED.

The Fourth Department, vacating defendant's guilty plea, determined the initial stop of the vehicle in which defendant attempted to flee from a public housing complex parking lot may not have been justified and the defense attorney was ineffective for failure to move to suppress on that ground. The vehicle stop was based on the alleged violation of Vehicle and Traffic Law 1211 (unsafe backing). But the statute does not apply to parking lots. The Fourth Department held the application of the law to a parking lot would not constitute an objectively reasonable mistake of law which could justify the stop. On the record before it, however, the Fourth Department could not determine whether the area in question met the statutory definition of a parking lot: "... [D]efendant had a valid argument that the initial vehicle stop was unlawful because the parking area in which the police purportedly observed unsafe backing was not a 'parking lot' within the meaning of Vehicle and Traffic Law § 129-b ... . Defendant also had a valid argument that the initial vehicle stop could not be justified due to the police officers' objectively reasonable, yet mistaken, belief that the parking area was a 'parking lot' as defined by Vehicle and Traffic Law § 129-b ... . Although contentions that defense counsel was ineffective survive only to the extent that 'the plea bargaining process was infected by [the] allegedly ineffective assistance or that . . . defendant entered the plea because of [defense counsel's] allegedly poor performance' ... , the court's consideration of the aforementioned arguments here would likely have resulted in suppression of the handgun and, concomitantly, dismissal of some or all of the indictment ... . We therefore conclude that defendant demonstrated that 'there is a reasonable probability that, but for counsel's error[], [defendant] would not have pleaded guilty' ...". ***People v. Allen*, 2020 N.Y. Slip Op. 03295, Fourth Dept 6-12-20**

CRIMINAL LAW, EVIDENCE.

COCAINE IS NOT DANGEROUS CONTRABAND WITHIN THE MEANING OF PROMOTING PRISON CONTRABAND IN THE FIRST DEGREE; CONVICTION REDUCED TO PROMOTING PRISON CONTRABAND IN THE SECOND DEGREE (PROHIBITING 'CONTRABAND,' AS OPPOSED TO 'DANGEROUS CONTRABAND').

The Fourth Department, reversing (modifying) County Court, in a full-fledged opinion by Justice Troutman, over a two-justice concurrence and a dissent, determined cocaine does not meet the statutory definition of dangerous contraband within the meaning of the offense of promoting prison contraband in the first degree. The defendant's conviction, based upon the possession of three baggies of cocaine, was reduced to promoting prison contraband in the second degree: " 'A person is guilty of promoting prison contraband in the first degree when . . . [that person] knowingly and unlawfully introduces any dangerous contraband into a detention facility' (Penal Law § 205.25 [1]). 'Dangerous contraband' is defined as any contraband that is 'capable of such use as may endanger the safety or security of a detention facility or any person therein' (§ 205.00 [4]). '[T]he test for determining whether an item is dangerous contraband is whether its particular characteristics are such that there is a substantial probability that the item will be used in a manner that is likely to cause death or other serious injury, to facilitate an escape, or to bring about other major threats to a detention facility's institutional safety or security' ... . ' [W]eapons, tools, explosives and similar articles likely to facilitate escape or cause disorder, damage or physical injury are examples of dangerous contraband,' 'whereas an ' alcoholic beverage is an example of [ordinary] contraband' ... . Drugs, unlike weapons, are not inherently dangerous, and thus general penological concerns about the drug possessed that 'are not addressed to the specific use and effects of the particular drug are insufficient to meet the definition of dangerous contraband' ... . * * * Central to our dissenting colleague's analysis is a distinction between narcotic and non-narcotic controlled substances. The unstated premise is that cocaine is classified as a narcotic because it is inherently dangerous. We respectfully disagree with that premise. Cocaine may be unhealthy, but it is not a narcotic, at least not from a scientific, medical, or pharmacological viewpoint ...". ***People v. Simmons*, 2020 N.Y. Slip Op. 03350, Fourth Dept 6-12-20**

CRIMINAL LAW, EVIDENCE, APPEALS.

RECKLESS ENDANGERMENT AND MENACING A POLICE OFFICER CONVICTIONS WERE AGAINST THE WEIGHT OF THE EVIDENCE.

The Fourth Department reversed two of defendant's convictions as against the weight of the evidence. Defendant was charged with reckless endangerment first degree and menacing a police officer. It was alleged defendant fired a weapon during a foot chase. The two officers heard a gunshot but no bullet or casing was found: "... [T]he jury would have had to resort to sheer speculation to find that defendant displayed or fired a weapon, much less that he fired a weapon intentionally. The officers' testimony that they 'heard' a gunshot from some distance away does not prove beyond a reasonable doubt, for purposes of the menacing charge, that defendant visually displayed the weapon that discharged the shot. Nor does such testimony prove beyond a reasonable doubt, for purposes of the reckless endangerment charge, that the shot was fired toward the officers and thereby created a grave risk of death to them. Indeed, the second officer's testimony that he 'believed' that defendant had shot at the officers is speculative and is contradicted by his contemporaneous statement that the gun might have discharged accidentally." ***People v. Thomas*, 2020 N.Y. Slip Op. 03318, Fourth Dept 6-12-20**

CRIMINAL LAW, EVIDENCE, APPEALS.

AFTER REVERSAL BY THE COURT OF APPEALS, DEFENDANT'S SUPPRESSION MOTION WAS GRANTED AND HIS GUILTY PLEA WAS VACATED; EVEN THOUGH DEFENDANT'S SUPPRESSION MOTION DID NOT RELATE TO THE OFFENSE TO WHICH DEFENDANT PLED GUILTY, THE APPELLATE DIVISION SHOULD HAVE REACHED THE MERITS OF THE MOTION BECAUSE OF ITS POTENTIAL EFFECT ON THE DECISION TO PLEAD GUILTY TO ANOTHER OFFENSE IN FULL SATISFACTION OF ALL THE CHARGES.

The Fourth Department, after a reversal by the Court of Appeals, determined defendant's motion to suppress evidence seized after a street stop should have been granted and vacated defendant's guilty plea. Defendant was charged with two burglaries on different days. Defendant pled guilty to one of the burglaries in satisfaction of both. Defendant appealed the denial of the suppression motion related to the street stop. The Fourth Department did not reach the merits of the appeal because the suppression motion did not involve the offense to which defendant pled guilty. The Court of Appeals reversed, finding that the denial of the suppression motion was appealable because of its potential effect on the decision to plead guilty in satisfaction of both charges: "A majority of this Court concluded that 'the judgment of conviction on appeal here did not ensue from the denial of the motion to suppress [relating solely to count two] and the latter [wa]s, therefore, not reviewable' pursuant to CPL 710.70 (2)' ... . The Court of Appeals reversed, stating that 'the Appellate Division may review an order denying a motion to suppress evidence where, as here, the contested evidence pertained to a count—contained in the same accusatory instrument as the count defendant pleaded guilty to—that was satisfied by the plea' ... . The Court of Appeals remitted the matter to this Court to rule on defendant's suppression contention. Upon remittitur, we now agree

with defendant that Supreme Court erred in refusing to suppress physical evidence seized as a result of his unlawful detention on October 3, 2014 ... . We further agree with defendant that such error was not harmless under the circumstances … . We therefore reverse the judgment, vacate the plea, grant that part of the omnibus motion seeking to suppress the physical evidence seized from defendant on October 3, 2014, and remit the matter to Supreme Court, Monroe County, for further proceedings on the indictment." ***People v. Holz*, 2020 N.Y. Slip Op. 03345, Fourth Dept 6-12-20**

FAMILY LAW, CIVIL PROCEDURE.

NEW YORK DETERMINED TO BE AN INCONVENIENT FORUM IN THIS CUSTODY MATTER.

The Fourth Department noted the record was sufficient to allow the appellate court to determine whether New York was an inconvenient forum in this custody matter. Mother had moved to California with the child after father abused mother in New York. Father filed the custody petitions in New York. After considering the statutory factors the Fourth Department found New York to be an inconvenient forum. With respect to one of the factors--the location of the relevant evidence--the court wrote: "The location of relevant evidence and, to some extent, the ability of the court in each state to decide matters expeditiously also favor California as the appropriate forum. The majority of the evidence pertaining to the best interests analysis in this custody matter is located in California. Although evidence relating to certain domestic violence incidents is, as noted above, more readily available in New York, most other relevant information regarding the child's best interests, such as her school performance, response to therapy, the indigenous tribe she belongs to, and her relationship with her extended family, is in California ... . It does not appear that the child has any connection with New York other than the father and a paternal grandmother. Further, the Attorney for the Child in New York was having trouble providing effective representation to the child inasmuch as it was difficult to communicate with the child by telephone ...". ***Matter of Coia v. Saavedra*, 2020 N.Y. Slip Op. 03325, Fourth Dept 6-12-20**

FAMILY LAW, EVIDENCE.

FINDING THAT MOTHER DID NOT MEDICALLY NEGLECT HER CHILDREN LACKED A SOUND AND SUBSTANTIAL BASIS.

The Fourth Department, reversing Family Court, determined the finding that mother did not medically neglect her children lacked a sound and substantial basis: "A neglected child is defined, in relevant part, as a child less than 18 years of age 'whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his [or her] parent . . . to exercise a minimum degree of care . . . in supplying the child with adequate . . . medical . . . care, though financially able to do so' ... . 'The statute thus imposes two requirements for a finding of neglect, which must be established by a preponderance of the evidence . . . First, there must be proof of actual (or imminent danger of) physical, emotional or mental impairment to the child . . . Second, any impairment, actual or imminent, must be a consequence of the parent's failure to exercise a minimum degree of parental care . . . This is an objective test that asks whether a reasonable and prudent parent [would] have so acted, or failed to act, under the circumstances' ... . 'A parent's failure to provide medical care as required by [Family Court Act § 1012 (f) (i) (A)] may be interpreted to include psychiatric medical care where it is necessary to prevent the impairment of the child's emotional condition' ... . Here, upon our review of the record, we conclude that DSS established a prima facie case of medical neglect by presenting evidence that the mother failed to follow mental health treatment recommendations upon the daughter's discharges from psychiatric hospitalizations for suicidal and homicidal ideation and that the mother failed to rebut DSS's prima facie case ... . We further agree with the AFC that the evidence of neglect with respect to the daughter 'demonstrates such an impaired level of . . . judgment as to create a substantial risk of harm for any child in [the mother's] care,' thus warranting a finding of derivative neglect with respect to the younger children ...". ***Matter of Olivia W. (Courtney W.)*, 2020 N.Y. Slip Op. 03296, Fourth Dept 6-12-20**

FAMILY LAW, JUDGES, CONTEMPT, EVIDENCE.

SUPREME COURT SHOULD NOT HAVE GRANTED SOLE CUSTODY TO FATHER, SHOULD NOT HAVE ORDERED RELIEF NOT REQUESTED, AND SHOULD NOT HAVE SANCTIONED MOTHER FOR PERJURY ALLEGEDLY COMMITTED IN A DIFFERENT COURT PROCEEDING.

The Fourth Department, reversing Supreme Court, determined: (1) father should not have been awarded sole custody of the children for 60 days because no change of circumstances was alleged or demonstrated; (2) the court should not have, sua sponte, directed a child be deprived cell phone and other electronic devices and be barred from outside-the-home activities; (3) the court should not have directed mother to pay a fine to father for perjury; (4) the court did not have the authority to sanction mother for frivolous conduct (perjury); (5) the court should not have awarded attorney's fees to father: "... [T]he court summarily punished the mother by sanctioning her after it determined that she committed perjury during her testimony before a Judicial Hearing Officer in Family Court with respect to the temporary order of protection and during her testimony at the hearing on the petition before Supreme Court. Assuming, arguendo, that perjury would support a finding

of contempt, we conclude that the court could not properly find the mother in criminal contempt based on her testimony in Family Court, nor could the court summarily punish the mother for civil or criminal contempt based on that testimony, inasmuch as it occurred out of the court's 'immediate view and presence' ... . Insofar as the order may be deemed to sanction the mother for civil or criminal contempt that occurred in the presence of Supreme Court, we conclude that, because 'due process requires that . . . the contemnor be afforded an opportunity to be heard at a meaningful time and in a meaningful manner' ... , and the court failed to provide notice that it was considering finding the mother in contempt or an opportunity to be heard thereon, the court erred in imposing such sanction ... . Assuming, arguendo, that sanctions for frivolous conduct may be based on a party's perjury, we conclude that the regulation permitting the imposition of such sanctions specifically provides that it 'shall not apply to . . . proceedings in the Family Court commenced under article . . . 8 of the Family Court Act' ... . In awarding attorney's fees to the father, the court did not state, and we cannot determine on this record, whether it did so based upon the custodial stipulation between the parties or pursuant to statute. Consequently, we are unable 'to determine whether the award was within the proper exercise of the court's discretion' ...". ***Ritchie v. Ritchie*, 2020 N.Y. Slip Op. 03316, Fourth Dept 6-12-20**

FORECLOSURE, CIVIL PROCEDURE, TRUSTS AND ESTATES.

UNDER THE TERMS OF THE MORTGAGE, THE DEATH OF THE BORROWER DID NOT ACCELERATE THE DEBT; BECAUSE THE DEBT WAS NOT ACCELERATED THE INSTALLMENT PAYMENTS FOR THE SIX YEARS PRIOR TO THE COMMENCEMENT OF THE FORECLOSURE ACTION WERE STILL OWING AND THE ACTION WAS NOT BARRED BY THE STATUTE OF LIMITATIONS.

The Fourth Department, reversing Supreme Court, determined the foreclosure action should not have been dismissed as time-barred, noting that the death of the borrower did not accelerate the debt. Therefore the installment payments due during the six year prior to commencing the action were still owing: "An action to foreclose a mortgage is subject to a six-year statute of limitations (see CPLR 213 [4]). Here, the note provided that decedent agreed to repay the loan in monthly installments from September 2007 to August 2032. '[W]ith respect to a mortgage payable in installments, there are separate causes of action for each installment accrued, and the [s]tatute of [l]imitations [begins] to run, on the date each installment [becomes] due' ... . Plaintiff commenced this foreclosure action on September 15, 2017. Therefore, recovery for the installments due within the six years prior to that date, i.e., September 15, 2011, is not barred by the statute of limitations. To the extent that plaintiff seeks recovery for installments due before that date, recovery is barred by the statute of limitations ... . * * * We reject defendants' contention that the debt accelerated automatically upon decedent's death. The mortgage provides that there is a default upon decedent's death, but it does not provide that the death of decedent would automatically accelerate the debt. Rather, the mortgage provides that the lender may accelerate the debt upon a default and, here, defendants did not establish that plaintiff chose to accelerate the debt at any time before the complaint was filed ...". ***Wilmington Sav. Fund Socy. FSB v. Deliberto*, 2020 N.Y. Slip Op. 03297, Fourth Dept 6-12-20**

HUMAN RIGHTS LAW, EMPLOYMENT LAW, EDUCATION-SCHOOL LAW.

QUESTIONS OF FACT PRECLUDED SUMMARY JUDGMENT IN THIS SEX AND DISABILITY DISCRIMINATION ACTION BY A TENURED ASSOCIATE PROFESSOR ON THE EQUAL PAY ACT CAUSE OF ACTION AND CERTAIN NYS HUMAN RIGHTS LAW CAUSES OF ACTION.

The Fourth Department, reversing (modifying) Supreme Court, determined the Equal Pay Act (EPA) cause of action and certain NYS Human Rights Law (NYSHRL) causes of action should not have been dismissed in this sex and disability discrimination action brought by a tenured associate professor: "With respect to the cause of action alleging violations of the EPA, defendant failed to establish as a matter of law that the difference in pay between plaintiff and a less senior male colleague who performed similar work under similar conditions 'is due to a factor other than sex' ... . * * * With respect to the causes of action for sexual discrimination under Title VII and the NYSHRL, we conclude that issues of fact exist whether defendant's challenged actions were 'based upon nondiscriminatory reasons,' and thus summary judgment is precluded on those causes of action ... . Indeed, defendant offered inconsistent and shifting justifications for the pay disparity ... . * * * ... [T]he court erred in granting the motion with respect to the sixth cause of action, alleging violations of the NYSHRL based on unlawful retaliation ... . To establish a claim for unlawful retaliation under the NYSHRL, a plaintiff must show that '(1) she has engaged in protected activity, (2) her employer was aware that she participated in such activity, (3) she suffered an adverse employment action based upon her activity, and (4) there is a causal connection between the protected activity and the adverse action' ... . [I]ssues of fact exist whether defendant unlawfully retaliated against plaintiff after she complained of gender discrimination when it required her to retain her position as the undergraduate coordinator while at the same time maintaining her regular course load ...". ***Nordenstam v. State Univ. of N.Y. Coll. of Envtl. Science & Forestry*, 2020 N.Y. Slip Op. 03346, Fourth Dept 6-12-20**

MEDICAL MALPRACTICE, NEGLIGENCE, MUNICIPAL LAW, CIVIL PROCEDURE.

THE MEDICAL RECORDS SUBMITTED FOR THE FIRST TIME IN REPLY CAN BE CONSIDERED BECAUSE RESPONDENTS ADDRESSED THE RELEVANT ISSUES AT ORAL ARGUMENT; THE MEDICAL RECORDS DEMONSTRATED RESPONDENTS HAD TIMELY NOTICE OF THE NATURE OF THE CLAIM; ALTHOUGH THE EXCUSE FOR DELAY WAS NOT ADEQUATE, THE DEFECT DID NOT REQUIRE DENIAL OF THE APPLICATION FOR LEAVE TO FILE A LATE NOTICE OF CLAIM; THE APPLICATION SHOULD NOT HAVE BEEN DENIED.

The Fourth Department, reversing Supreme Court, over a two-justice dissent, determined claimant's application for leave to file a late notice of claim in this medical malpractice action should have been granted. The court noted that the medical records submitted for the first time in a reply were properly considered because the respondents addressed the relevant issues at oral argument. Both the majority and the dissent noted that the excuse for failure to timely file the notice of claim was inadequate but that defect did not require denial of the application. The majority found claimant demonstrated respondents were not prejudiced by the delay. The dissent disagreed with the majority's finding that the medical records demonstrated respondents had timely notice of the nature of the claim: "... [W]e reject the contention of respondents and the dissent that it is inappropriate under the circumstances of this case to consider the medical records submitted by claimant for the first time in his reply papers. In general, ' [t]he function of reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds [or evidence] for the motion [or application]' ... . 'This rule, however, is not inflexible, and a court, in the exercise of its discretion, may consider a claim or evidence offered for the first time in reply where the offering party's adversaries responded to the newly presented claim or evidence' ... . '[T]he medical records . . . evince that [respondents'] medical staff, by its acts or omissions, inflicted an[ ] injury on [claimant]' ... . The medical records indicate that, following the surgical skin graft procedure, claimant developed swelling beneath the dressings that became constrictive of blood flow to the leg and ultimately caused necrosis, and that respondents' medical staff, for various reasons, had failed to recognize the ischemic nature of the leg and claimant's development of compartment syndrome, thereby eventually necessitating partial amputation of the leg ... . We thus conclude that respondents timely acquired actual knowledge of the essential facts constituting the claim ...". ***Matter of Dusch v. Erie County Med. Ctr.*, 2020 N.Y. Slip Op. 03351, Fourth Dept 7-12-20**

NUISANCE, PUBLIC NUISANCE, CIVIL PROCEDURE, CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA)

COMPLAINT AGAINST THE DIOCESE OF BUFFALO ALLEGING SEXUAL ABUSE BY A PRIEST DID NOT STATE A CAUSE OF ACTION FOR PUBLIC NUISANCE.

The Fourth Department determined the complaint seeking damages and injunctive relief against the Diocese of Buffalo, N.Y. stemming from alleged sexual abuse by a priest did not state a cause of action for public nuisance based on common law and Penal Law § 240.45 (criminal nuisance). The court noted that a nuisance suit in this context would conflict or compete with the classification system under the Sex Offender Registration Act and, to the extent plaintiff seeks damages, a suit pursuant to the Child Victims Act is available: " 'Conduct does not become a public nuisance merely because it interferes with . . . a large number of persons. There must be some interference with a public right. A public right is one common to all members of the general public. It is collective in nature and not like the individual right that everyone has not to be assaulted or defamed or defrauded or negligently injured' ... . Here, the complaint alleges the infringement of, at most, a common right of a particular subset of the community, i.e., a group of Roman Catholic parishioners in the area of the Diocese who attended or were active in the priest's parishes. The complaint does not allege that the general public was exposed to the priest's conduct, nor does it otherwise allege interference with a collective right belonging to all members of the public ... . Penal Law § 240.45 does not imply a private right of action under the circumstances presented here. 'Where a penal statute does not expressly confer a private right of action on individuals pursuing civil relief, recovery under such a statute may be had only if a private right of action may fairly be implied' ... . Three essential factors are considered in determining whether a private right of action may fairly be implied: '(1) whether the plaintiff is one of the class for whose particular benefit the statute was enacted; (2) whether recognition of a private right of action would promote the legislative purpose; and (3) whether creation of such a right would be consistent with the legislative scheme' ...". ***Golden v. The Diocese of Buffalo, NY*, 2020 N.Y. Slip Op. 03354, Fourth Dept 6-12-20**

SEPULCHER, RIGHT OF, MUNICIPAL LAW, IMMUNITY, TRUSTS AND ESTATES.

QUESTION OF FACT RAISED ABOUT WHETHER THE HOSPITAL DEFENDANTS MADE A REASONABLE AND SUFFICIENT EFFORT TO LOCATE THE NEXT OF KIN OF THE DECEDENT IN THIS RIGHT-OF-SEPULCHER CASE; THE PUBLIC ADMINISTRATOR, HOWEVER, ENJOYED GOVERNMENTAL FUNCTION IMMUNITY AND NO SPECIAL DUTY WAS OWED PLAINTIFFS.

The Fourth Department determined plaintiffs had raised a question of fact whether the hospital defendants made reasonable and sufficient efforts to locate the decedent's next of kin in this right-of-sepulcher case alleging defendants interfered with plaintiffs' right to immediate possession of decedent's body. After the hospital defendants failed to locate the next of kin, the investigation was turned over to the County Public Administrator (PA). After the PA failed to locate the next of kin the decedent was buried. After plaintiffs learned of decedent's death, the body was exhumed and a memorial service was held at the PA's expense. The suit against the County PA was properly dismissed because the PA enjoyed governmental function immunity and no special duty was owed plaintiffs: "The common-law right of sepulcher 'affords the decedent's next of kin an absolute right to immediate possession of a decedent's body for preservation and burial . . . , and damages may be awarded against any person who unlawfully interferes with that right or improperly deals with the decedent's body' ... . 'To establish a cause of action for interference with the right of sepulcher, [a] plaintiff must establish that: (1) plaintiff is the decedent's next of kin; (2) plaintiff had a right to possession of the remains; (3) defendant interfered with plaintiff's right to immediate possession of the decedent's body; (4) the interference was unauthorized; (5) plaintiff was aware of the interference; and (6) the interference caused plaintiff mental anguish' ... . * * * ... [P]laintiffs identified certain records of the hospital defendants, which indicated that decedent had resided, on some occasions, at a local homeless shelter. Those documents were available to the hospital defendants at the time they conducted their search for decedent's next of kin, and there is no dispute that the hospital defendants did not attempt to contact that homeless shelter during their search. Plaintiffs also submitted deposition testimony from a person employed by the homeless shelter, who testified that decedent was a frequent resident there and that she knew members of decedent's family and could have contacted them if she had been notified of decedent's death." ***Green v. Iacovangelo*, 2020 N.Y. Slip Op. 03363, Fourth Dept 6-12-20**

ZONING, MUNICIPAL LAW, CONSTITUTIONAL LAW, EMINENT DOMAIN.

LOCAL LAW PROHIBITING SHORT-TERM RENTAL OF PROPERTIES WHERE THE OWNER DOES NOT RESIDE IS NOT UNCONSTITUTIONAL AS A REGULATORY TAKING.

The Fourth Department determined plaintiff's constitutional attack on a Local Law which prohibited short-term rental of properties where the owner did not reside did not constitute a regulatory taking of the property: "In 2012, petitioner-plaintiff (plaintiff) purchased a single-family residence (subject premises) located in respondent-defendant Town of Grand Island (Town) for the purpose of renting it out on a short-term basis, i.e., for periods of less than 30 days. Plaintiff never resided at the subject premises. In 2015, the Town enacted Local Law 9 of 2015 (Local Law 9), which amended the Town Zoning Code to prohibit short-term rentals in certain zoning districts, except where the owner also resided on the premises. The Town enacted the law in response to significant adverse impacts to the community that it found were caused by permitting short-term rental of residential properties to occur. Local Law 9 contained a one-year amortization period—which could be extended up to three times upon application—during which preexisting short-term rental properties could cease operation. * * * ... [P]laintiff did not submit evidence establishing that, due to the prohibition under Local Law 9 on short-term rentals, the subject premises was not capable of producing a reasonable return on his investment or that it was not adaptable to other suitable private use. Instead, plaintiff's submissions showed a 'mere diminution in the value of the property, . . . [which] is insufficient to demonstrate a [regulatory] taking' ...". ***Matter of Wallace v. Town of Grand Is.*, 2020 N.Y. Slip Op. 03301, Fourth Dept 6-12-20**

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